

OCTOBER 2023

# 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.

### JURY TRIAL

#### Contractual Waiver

##### *In re N.D. Legis. Assembly*

Pizza Hut L.L.C. v. Pandya, 2023 U.S. App. LEXIS 22113 (5th Cir. Aug. 22, 2023)

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The Fifth Circuit holds that a party objecting to the enforcement of a jury waiver in a facially valid contract bears the burden of showing the waiver's unenforceability, and a fraud claim must target the waiver provision specifically, rather than the contract generally, to invalidate the waiver.

### DEFAULT

#### Setting Aside Default

##### *United States v. Starling*

76 F.4th 92, 2023 U.S. App. LEXIS 20155 (2d Cir. Aug. 4, 2023)

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In a case of first impression, the Second Circuit holds that when a claimant in a civil forfeiture action files a dual motion to make an untimely claim against seized assets and to set aside an entry of default before final judgment, the "good cause" standard of Rule 55(c) applies as opposed to the "excusable neglect" standard of Rule 6 that typically governs forfeiture-specific claims under Supplemental Rule G.

### MAGISTRATE JUDGES

#### Consent

##### *Prater v. Dep't of Corr.*

76 F.4th 184, 2023 U.S. App. LEXIS 19893 (3d Cir. Aug. 2, 2023)

[Jump to full summary](#)

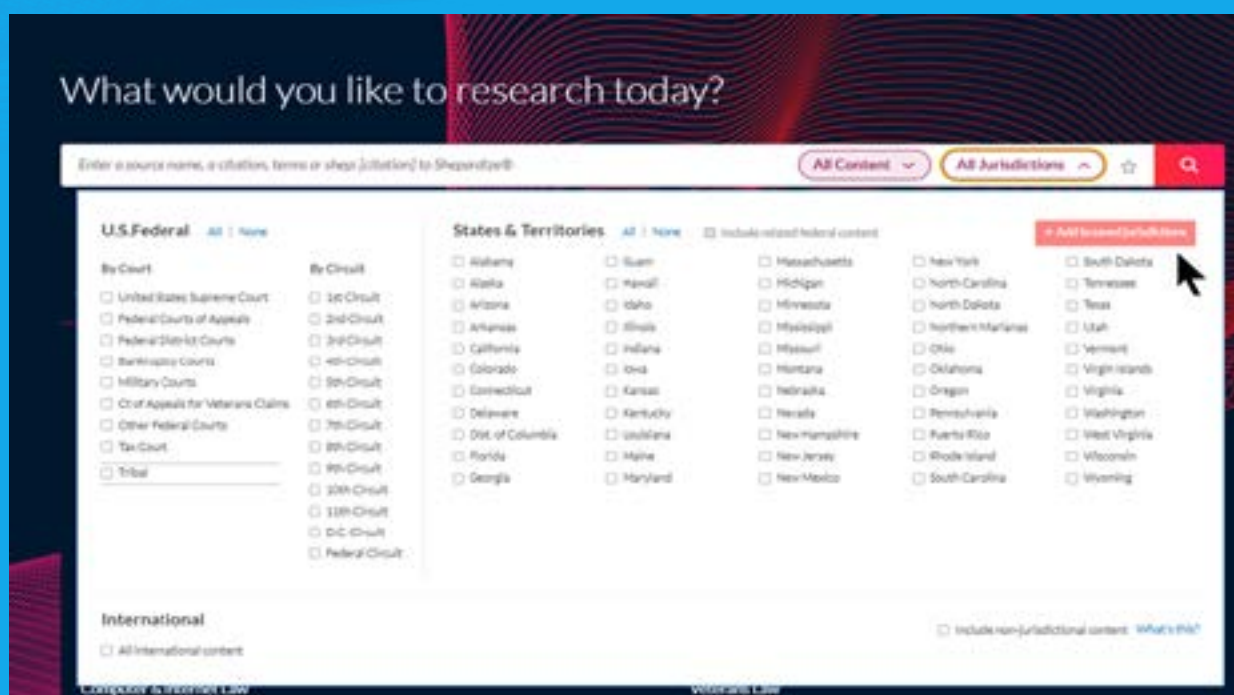
The Third Circuit holds that (1) a motion to proceed in forma pauperis is nondispositive and does not require consent to be heard by a magistrate judge, and (2) consent to have a magistrate judge try a case and enter judgment may be inferred for later-named defendants represented by counsel common to all defendants.

# → Ability to Save Default Jurisdictions Now Available on Lexis+® Homepage

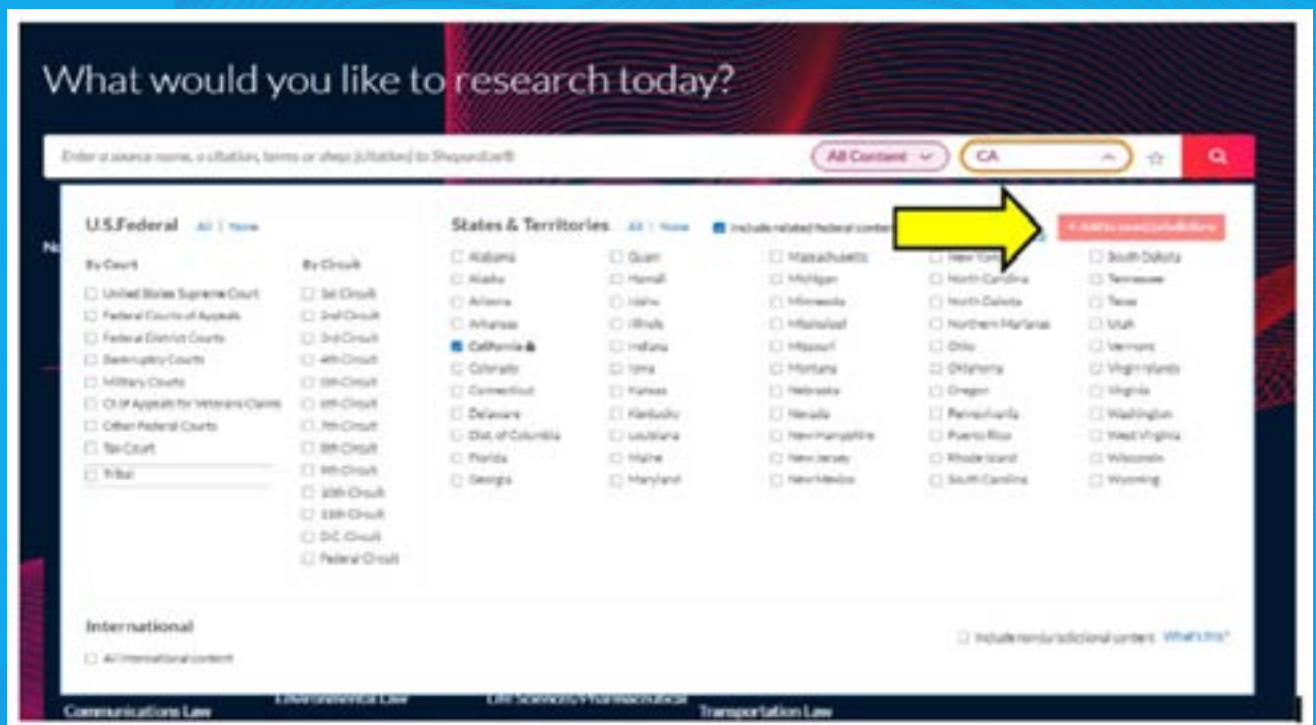
By Meghan Atwood, Esq., LexisNexis Solutions Consultant

LexisNexis continually strives to incorporate feedback from its customers to improve its legal research platform, Lexis+. As a result, a new feature for searching by jurisdiction has recently been added to Lexis+. Users can now easily save the default jurisdiction of their choice from the homepage of Lexis+. Previously, when a user searched a source with a different jurisdiction or used the “Explore Content” area below the main search box, the user would have to re-select the original jurisdiction. But now, no matter what filters are applied during a session, a user’s default jurisdiction will be applied when the user returns to the Lexis+ homepage. In addition, users can choose more than one jurisdiction when choosing default jurisdictions, which will allow them to customize their searches to their exact preferences.

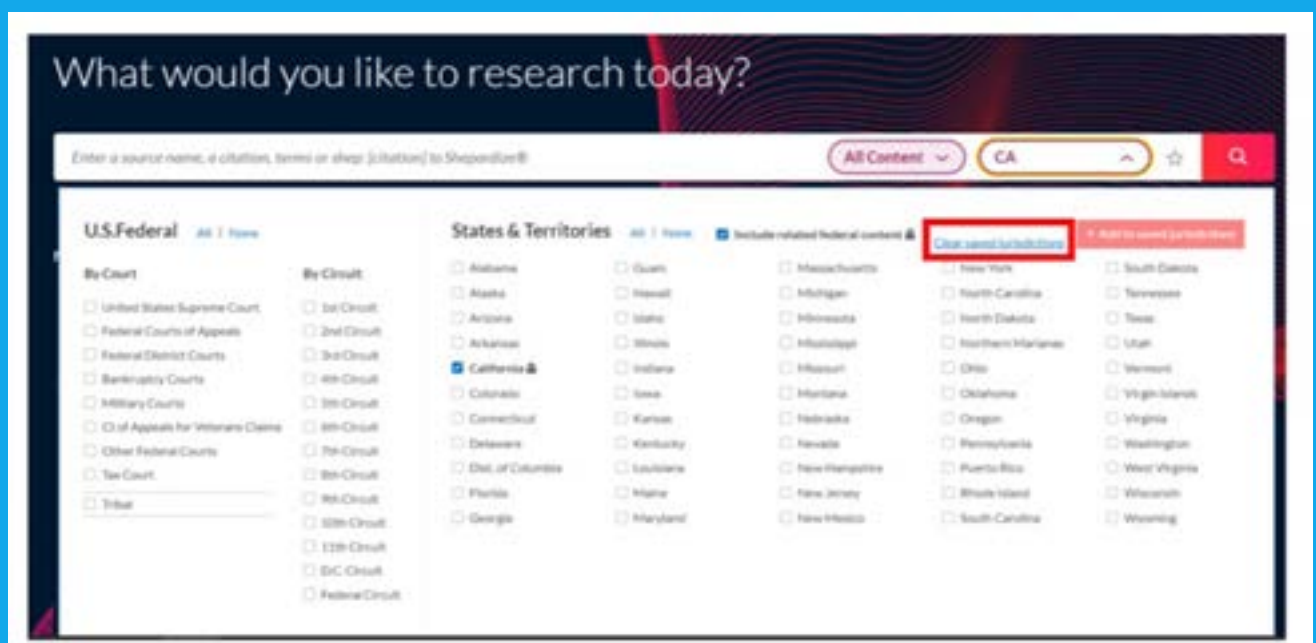
Setting a default jurisdiction is quite simple. When on the homepage of Lexis+, simply click on the “All Jurisdictions” dropdown from the Search Box, which is the second option (see screenshot below).



Then choose your jurisdiction (remember that you can select more than one). Now, click on the red button in the top right corner that reads, “+Add to saved jurisdictions” (see screenshot below). This will make your selection your default jurisdiction.



It is also quite easy to make changes to your default jurisdiction. If you want to clear or change your default jurisdiction(s), just go back to the Jurisdictions dropdown in the Search Box on the homepage and click on the blue button in the top right corner that reads, "Clear saved jurisdictions." This will now reset the filter to All Jurisdictions, which is the standard starting point for Lexis+.



To learn more about setting your default jurisdiction(s) or any other Lexis+ feature or tool, please contact your designated LexisNexis Solutions Consultant.

# → Researching Witnesses and Parties Beyond Public Records

By Adam Dietz

Several years ago, a candidate for public office held a campaign event at a business owned by a convicted cocaine dealer, leading to a burst of negative news coverage. Campaign staff had checked the host's background but not found the conviction which was from a jurisdiction that does not share its criminal records. However, a news search would have found articles revealing the subject's indictment and conviction. Now, imagine if this flawed check had been on a witness in your case. What would be the possible results of missing a criminal record or an inappropriate business relationship, etc., when checking a witness's background? Public Record searches such as Smartlinx and/or Accurint are an essential part of any check, but should be complemented with news, directory and business record searches too. Let's look at some best practices for doing so.

**News searching** – A LexisNexis news search should be a significant part of any background research. News can fill in gaps in the public record. It can also reveal memberships, associations and issues that are not normally the subject of a public records search. The LexisNexis news library contains 40,000+ source of news including many that are subscription-only or paywalled on the open web. This library includes both general interest publications such as newspapers and wire services as well as specialty titles including trade and industry press, journals, etc. Moreover, unlike the open web, LexisNexis offers a deep archive for many of their publications, in some cases dating back to the 1970s. If your subject's "bad acts" occurred thirty years ago, there's a very good chance that a google search won't find that news. A LexisNexis news search might. A few best practices for searching people in the news:

- Use a proximity connector. A search for **John /2 Smith** will find references to John Smith whether the name is inverted (Smith, John) or interrupted (John D. Smith or John David Smith) while still requiring that the two words occur close enough to each other to be likely part of the same name.
- If you want to find articles by a specific person, use a byline connector, thusly: **byline(John /2 Smith)**. This will focus your search on the byline, the part of the article that lists the author, allowing you to find articles for which your subject was the author. This can be especially powerful for expert witnesses who may have written articles on their area of expertise that could be problematic.
- When running search in Lexis+, look for the Negative News filter to the left of your results. This filter will highlight articles with certain negative terms, increasing the likelihood that it addresses a negative issue.
- After looking at the News results, be sure to move to the Legal News area as well, using the content links at the top left of your results. Because Legal News has a particular interest in the courts, these publications are an excellent area to uncover litigation history.

**Directories** – after reviewing your news results, move to the Directories results, again using the content links at the top left. The Directories area is a broad one and can include biographies as well as company and professional directories. These are an excellent way to discover an individual's corporate, board, and other affiliations. The Directories area also includes the World Compliance PEP List, a comprehensive database of "Politically Exposed Persons" (PEPs), their family members and close associates. These listings may include current or former senior officials in the executive, legislative, administrative, military, or judicial branch of a foreign government, foreign political party, or foreign government owned commercial enterprise. Finally, this category also includes the Watchlists and Sanctions source, with hundreds of lists from around the world, including national banks, financial authorities, law enforcement, government regulatory agencies, and multinational agencies. These lists include debarred individuals, terrorist listings, financial and other sanctions, and much more.

**Company and Financial** – finally, consider reviewing the information in the Company and Financial library, which can show you additional information about a person's affiliation to a company, non-profit or other entity. And, as a best practice, you can then search the company to find other people associated to it, as a way of finding ties between individuals. LexisNexis provides over 400 proprietary sources covering over 300 million public and private companies worldwide, as well as the SEC database. Most of these sources come with deep archives, allowing you to see past associations as well.

# → WIN WITH JIM WAGSTAFFE

## Current Awareness Insights!

### **ALERT: On a 12(b)(6) Motion to Dismiss, District Court Properly Considered Police Body-Cam Video under Incorporation by Reference Doctrine**

Under the incorporation by reference doctrine, a court may consider evidence attached to a Rule 12(b)(6) motion to dismiss without converting it into one for summary judgment if: (1) the plaintiff refers to the document in the complaint; (2) the document is “central” to plaintiff’s claim; and (3) the document’s content is undisputed. Traditionally applied to documentary evidence, the issue in this case is whether the doctrine also applies to body camera footage.

Plaintiff alleged he was the victim of excessive police force. Relying on body cam footage, the defendants moved to dismiss. The district court considered the footage and granted the motion to dismiss. The appellate court affirmed the dismissal. The court noted the footage told a completely different story than the one alleged in the complaint, contained both audio and video, was clear, and was easy to follow. It also found all three requirements of the incorporation by reference doctrine easily satisfied.

- First, plaintiff referenced the footage several times in his complaint even alleging on “information and belief ... that the video recording is a display of what happened.”
- Second, the footage depicted the events central to plaintiff’s claim.
- Third, the footage is undisputed because Plaintiff did not challenge its authenticity.

The court acknowledged that at times, a video may not present the entire picture and may contain ambiguities that are subject to interpretation. However, when the “video is clear and obviously contradicts the plaintiff’s alleged facts, we accept the video’s depiction instead of the complaint’s account .... After all, courts are not required to rely on ‘visible fiction.’” *Baker v. City of Madison*, 2023 U.S. App. LEXIS 10852 (U.S. 11th Cir. May 3, 2023).

Fed Civ Proc Before Trial: The Wagstaffe Group [§23-II\[G\]\[4\]\[b\]\[iii\], 23.50—Unattached Documents “Incorporated by Reference”](#).

**JURY TRIAL****Contractual Waiver*****In re N.D. Legis. Assembly***

Pizza Hut L.L.C. v. Pandya, 2023 U.S. App. LEXIS 22113 (5th Cir. Aug. 22, 2023)

**The Fifth Circuit holds that a party objecting to the enforcement of a jury waiver in a facially valid contract bears the burden of showing the waiver's unenforceability, and a fraud claim must target the waiver provision specifically, rather than the contract generally, to invalidate the waiver.**

▼ **Background.** Jignesh Pandya entered into multiple 20-year franchise agreements with Pizza Hut to operate a total of 43 restaurants in Pennsylvania and one in Connecticut. According to Pizza Hut, Pandya failed to pay certain franchise fees and violated brand and operational standards. Pandya's default was grounds for termination under the franchise agreements, and Pizza Hut terminated the agreements.

In an attempt to salvage the restaurants, the parties entered into a "Forbearance Agreement," allowing Pandya to continue operating the franchises while Pandya tried to find a buyer. Pandya's search for a buyer was unsuccessful, and the parties negotiated a second post-termination agreement, the "Transfer Agreement." They discussed the agreement's terms for weeks, ultimately settling on an agreement in which Pandya would continue running certain restaurants in compliance with the franchise agreements. Pandya also agreed to cooperate with Pizza Hut in transferring the restaurants to an approved buyer free and clear and to maintain workers' compensation insurance. In turn, Pizza Hut agreed to use commercially reasonable efforts to identify a purchaser. If Pandya complied with all of the terms and conditions of the Transfer Agreement and a purchaser paid \$2 million or more, then Pandya's capital group, Ronak Capital, L.L.C., would receive the first \$2 million from the sale and Pandya would be released from certain outstanding franchisee fees. If a buyer was not found by the end of the term of the Transfer Agreement, then the remaining stores would be closed and Pandya would still owe his outstanding payments to Pizza Hut.

The Transfer Agreement contained the following provision waiving the right to a jury trial:

The parties to this Agreement explicitly waive their respective rights to a jury trial in any litigation between or among them and hereby stipulate that any such trial shall occur without a jury.

Pandya again defaulted, and Pizza Hut terminated the agreement and filed suit against Pandya and his entities, alleging various contract-breach and intellectual-property claims. Pandya counterclaimed, alleging that Pizza Hut breached the Transfer Agreement. In his third and final amended counterclaims, Pandya alleged new tort counterclaims for (1) fraud/fraudulent inducement, (2) breach of fiduciary duty, (3) tortious interference with prospective business relations, (4) tortious interference with existing contracts and business relations, and (5) business disparagement and defamation. Pandya also demanded a jury trial.

Pizza Hut moved to strike Pandya's jury demand based on the waiver in the Transfer Agreement and to dismiss the Third Amended Counterclaims. In response, Pandya argued that the Transfer Agreement's waiver did not apply to disputes arising under the other agreements, the jury demand was proper under Federal Rules of Civil Procedure 38 and 39, and the jury waiver provision was invalid. In making this last point, Pandya argued that the Transfer Agreement and its provisions had been procured by fraud.

The district court granted the motion to strike the jury demand, holding that the parties explicitly waived their rights to a jury trial under the Transfer Agreement's plain language and that the waiver was knowing and voluntary. In determining knowledge and voluntariness, the court concluded that (1) the parties had relatively equal bargaining power, (2) Pandya was an experienced businessman, (3) Pandya had an opportunity to negotiate the Transfer Agreement's terms, and (4) the jury waiver was conspicuously placed in the short contract. As to the fraud claim, the district court held that fraud allegations against the whole contract and not the waiver provision specifically cannot void the waiver agreement.

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The district court dismissed with prejudice Pandya's breach-of-fiduciary-duty and business-disparity counterclaims and dismissed without prejudice the counterclaim alleging tortious interference with existing business relations. The court allowed the other counterclaims—fraud/fraudulent inducement, tortious interference with prospective business relations, and defamation—to go forward.

The case proceeded to a five-day bench trial. The district court ruled for Pizza Hut and awarded \$6,688,751.14 in damages and interest. Pandya appealed. The only issue on appeal was whether the district court erred in striking Pandya's jury demand.

▼ **Party Objecting to Jury Waiver Has Burden of Proving Unenforceability.** The Fifth Circuit noted that, although waiver of the right to a jury trial is carefully scrutinized, courts have long recognized that parties can waive their jury right. Waiver can be either express or implied, and an express waiver requires only that the party waiving the right do so voluntarily and knowingly.

Courts are split on the issue of which party has the burden to establish that a contractual waiver was knowing and voluntary. The Second and Fourth Circuits have placed the burden on the party seeking to enforce the contractual jury waiver to show that the waiver was knowing and voluntary [see *Leasing Serv. Corp. v. Crane*, 804 F.2d 828, 833 (4th Cir. 1986); *Nat'l Equip. Rental, Ltd. v. Hendrix*, 565 F.2d 255, 258 (2d Cir. 1977)]. By contrast, the Sixth Circuit has placed the burden on the party resisting the waiver [see *K.M.C. Co., Inc. v. Irving Tr., Co.*, 757 F.2d 752, 758 (6th Cir. 1985)]. In this case, the Fifth Circuit sided with the Sixth Circuit's reasoning.

The court explained that facially valid contractual waivers, like other valid contractual provisions, are assumed to be enforceable unless the party seeking to avoid the waiver proves otherwise. This general rule assumes that the party invoking the waiver has shown that a facially valid contract exists between the parties. But once a party establishes that a contractual waiver exists, the burden shifts to the party objecting to enforcement of the waiver to explain why it is invalid.

That a contractual jury waiver involves a constitutional right does not change the analysis. The Seventh Amendment jury right is not compulsory; a party must affirmatively request a jury trial. Without a waiver, a party must demand a jury trial in accordance with the federal rules. If a party fails to do so, even accidentally, the party forfeits the right to have the case heard by a jury. If the opposing party challenges the right's applicability, the party requesting the right bears the burden of showing it is entitled to a jury. Thus, it follows that the party objecting to the enforcement of a waiver in a facially valid contract bears the burden of showing the waiver's unenforceability.

▼ **Fraud Claim Must Specifically Target Waiver Provision** Pandya argued that the waiver was unknowing and involuntary because Pizza Hut allegedly procured the entire Transfer Agreement by fraud. The Fifth Circuit noted that neither it nor the Supreme Court had addressed whether a fraud claim must target the waiver provision specifically to invalidate the waiver. However, the Second and Tenth Circuits have both concluded that a fraud claim must be alleged against the jury waiver specifically [see *Merrill Lynch & Co. Inc. v. Allegheny Energy, Inc.*, 500 F.3d 171, 188 (2d Cir. 2007); *Telum, Inc. v. E.F. Hutton Credit Corp.*, 859 F.2d 835, 837 (10th Cir. 1988)]. These courts analogize to the arbitration context, reasoning that, like stand-alone jury waiver agreements, contractual agreements to arbitrate require parties to bypass their jury rights. In the arbitration context, only fraud in the inducement relating specifically to an arbitration provision invalidates such a provision. Similarly, a district court cannot vitiate a jury waiver provision for general fraud allegations.

Pandya argued that jury waivers are not comparable to arbitration clauses because, unlike arbitration, courts must construe every reasonable presumption against waiver of the right to a jury trial. The court reasoned, however, that if parties can waive their right to a jury—indeed, a whole trial—through an arbitration clause, then a contractual jury waiver, which only waives a specific type of trial, should receive the same treatment.

Applying the arbitration rule, the Fifth Circuit found that Pandya failed to allege that the jury waiver specifically was procured by fraud. Pandya alleged that Pizza Hut fraudulently induced him into signing the Transfer Agreement by representing that it would help him find a buyer although it never intended to do so. Instead, Pizza Hut allegedly made this promise to get Pandya to release any potential claims before it sued. These allegations targeted the agreement as a whole, not just the waiver provision, and thus could not void the waiver provision. Accordingly, the district court correctly held that Pandya's fraud claim did not invalidate the jury waiver.

▼ **Waiver Was Knowing and Voluntary.** The Fifth Circuit then explained that courts generally consider four factors in determining whether a pre-dispute jury waiver is knowing or voluntary: (1) whether both parties had an opportunity to negotiate the terms of the agreement, (2) whether the provision waiving jury trial was conspicuous, (3) the relative bargaining power of the parties, and (4) the business acumen or professional experience of the party opposing the waiver. Some courts also consider whether the party was represented by counsel. The court noted that these factors are "helpful, though not exhaustive," in determining whether, under the totality of the circumstances, a contractual jury waiver is knowing and voluntary. The court found that each factor supported upholding the Transfer Agreement's jury waiver.

First, the record supported the district court's determination that Pandya negotiated the Transfer Agreement's terms. Generally, the fact that a jury waiver is bilateral suggests the parties had a meaningful opportunity to negotiate. Also, Pizza Hut responded to Pandya's requests throughout the negotiation process. Although Pizza Hut inserted the jury waiver at the end, Pandya questioned certain terms in the paragraph containing the waiver on the last turn before signing. His active participation in negotiations over the contract, including over the paragraph containing the waiver, showed that this factor weighed in favor of enforcing the waiver.

Second, the court rejected the argument that the jury waiver was inconspicuously placed because it was not bolded, highlighted, or otherwise set apart. A waiver provision does not have to be set apart to be conspicuous. The Transfer Agreement was short for a legal document (nine pages). The jury waiver was in the final paragraph before the signatures. Pandya circled the paragraph containing the waiver, so he was aware of it. In other words, Pizza Hut did not place the waiver in the middle of a paragraph of inconsequential terms that was easily skippable. The district court thus rightly concluded that Pandya had failed to show that this factor weighed in his favor.

Third, the court rejected the argument that Pizza Hut had more bargaining power. The court found that Pandya, too, had significant bargaining power. Pandya admitted that he was "the largest owner of Pizza Huts in Pennsylvania." Pizza Hut thus had a strong interest in keeping his restaurants open. Pandya also successfully negotiated several favorable terms in the contract. So while there was some inequality of bargaining power, Pandya did not have the kind of extreme bargaining disadvantage or gross disparity in bargaining position that makes a waiver unenforceable.

Fourth, the court disagreed that Pandya did not have sufficient business acumen. Pandya stated in his complaint that he was a "well-known and successful businessman with multiple companies" and "decades of experience in the franchise industry." He even highlighted that he had won an award for his business acumen. His annotations on the version of the draft containing the jury waiver backed up his words. In those annotations, he questioned some provisions, further showing that he was able to comprehend the import of the language contained in the waiver clause. Pandya argued that business acumen cannot overcome fraud. But, as discussed above, he did not claim that the waiver was procured by fraud, which is the proper inquiry in determining whether a waiver is knowing and voluntary.

▼ **Conclusion.** For these reasons, the Fifth Circuit ruled that the district court correctly struck the jury demand because Pandya knowingly and voluntarily waived his right to a jury trial.

**DEFAULT****Setting Aside Default*****United States v. Starling***

76 F.4th 92, 2023 U.S. App. LEXIS 20155 (2d Cir. Aug. 4, 2023)

In a case of first impression, the Second Circuit holds that when a claimant in a civil forfeiture action files a dual motion to make an untimely claim against seized assets and to set aside an entry of default before final judgment, the “good cause” standard of Rule 55(c) applies as opposed to the “excusable neglect” standard of Rule 6 that typically governs forfeiture-specific claims under Supplemental Rule G.

▼ **Background.** In the fall of 2020, as part of a drug-trafficking investigation into Cristal Starling’s then-boyfriend, the police in Rochester, New York, executed a search warrant of Starling’s Rochester apartment. During the search, the police seized \$8040 believed to be drug proceeds. The boyfriend was later arrested and charged with state-law drug violations. Starling was neither arrested nor charged.

The funds were turned over to the U.S. Drug Enforcement Administration, which initiated an administrative forfeiture procedure to claim the funds as proceeds from drug sales. Acting pro se, Starling filed a claim to the proceeds, forcing the government to terminate the administrative procedure and open a judicial forfeiture proceeding in the U.S. District Court for the Western District of New York and file a claim seeking the \$8040. Consistent with the provisions of Supplemental Rule G to the Federal Rules of Civil Procedure, which govern forfeiture proceedings, the government provided the required notice of the forfeiture proceeding on its website and to Starling via Federal Express. The notice required Starling to file a claim to the funds within 32 days after the notice was sent. Starling claimed she was out of town and missed the notice but did not contest that the documents were successfully delivered to her apartment.

After hearing nothing from Starling and receiving no challenge to the forfeiture proceeding, pursuant to Rule 55(c), the government requested that the clerk enter a notice of default, which was done. Ten days later, pursuant to Rule 55(b), the government moved for a final default judgment. About three months later, and before the court ruled on the government’s motion, Starling, still acting pro se, sent the first of four letters to the U.S. Attorney’s office and the district court, stating that the apartment where the funds were seized was hers, and that she was seeking to have the funds returned to her because her boyfriend had been acquitted.

In response, the government offered to split the funds with Starling, 50-50, but she refused and sent a second letter to the government and the court, stating that she wished to continue with the court proceedings to have the funds promptly returned to her. The government moved to strike Starling’s letters as an untimely claim to the funds because she did not respond in the time allotted in the prior notice. Starling objected and argued that her untimely claim should be allowed because she had challenged the previous administrative forfeiture proceeding and she had contacted and followed the advice of the prosecuting attorney presiding over the case that resulted in the funds being confiscated.

The district court interpreted Starling’s first two letters as a claim to the funds in the judicial forfeiture proceedings, and her third and fourth letters as an opposition and surreply to the government’s motion to strike. Noting circuit precedent requiring that a claimant in a government forfeiture proceeding must have statutory and Article III standing, the district court concluded that Starling lacked statutory standing to oppose the forfeiture because she had failed to file a timely claim as required by Supplemental Rule G.

The district court also considered whether Starling should be permitted to file a claim against the funds nunc pro tunc (“now for then,” allowing a court to retroactively correct an earlier ruling). The court answered this question using an “excusable neglect” standard and rejected Starling’s excuses for her untimely claim, which included that she (1) did not receive the FedEx notice, (2) did not understand that she needed to separately challenge the judicial forfeiture proceeding after challenging the administrative forfeiture proceeding, and (3) had been informed by the district attorney that she could not challenge the forfeiture until the completion of the criminal case.

Finding Starling’s claim against the funds untimely, the court entered default judgment for the government. Starling appealed and argued that the district court erred by applying the excusable-neglect standard rather than the more permissive good-cause standard to her letters and claim to the funds.

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- ▼ **Pro Se Litigant's Rights Must Be Protected.** On appeal, the Second Circuit first considered the relief sought in Starling's letters, noting that because Starling was a pro se litigant whose rights must be protected, it could be called upon to reverse the district court's entry of default judgment—even if it found an abuse of discretion that was not glaring. Because Starling's letters communicated a claim to the seized funds and her desire to “move forward with court proceedings to have all of the funds returned,” the Second Circuit concluded that this “is the plea of any tardy litigant trying to lift entry of default,” and the district court was required to heed that message. Even if Starling's desire to press on with the litigation was not clearly communicated, the appellate court said that her letters could not be read as limited to a motion for leave to file an untimely claim, because once the entry of default was on the docket, final default judgment could be rendered no matter what claims she sought to file. Viewing the second letter solely as a motion for late filing of her claim, ignoring its dual status as a motion to lift the default “means reading it as a motion for which no relief could be granted,” which was error.
- ▼ **Question of First Impression for Second Circuit.** Properly viewing Starling's letters as a dual motion to lift the entry of default and to file a claim against the seized funds, and noting that Supplemental Rule G does not specify which rule's standard of review should prevail, the Second Circuit was next faced with a question of first impression: If, after entry of default but before a motion for final default judgment is granted, a claimant in a civil forfeiture proceeding files a dual motion to set aside an entry of default under Rule 55(c) and to make a late claim to seized assets under Supplemental Rule G, does the court apply Rule 55(c)'s more permissive good-cause standard or Supplemental Rule G's more demanding excusable-neglect standard?
- ▼ **Default Is Two-Step Process Under Rule 55.** The road to a default judgment under Rule 55 begins with an entry of default under Rule 55(a), which may be entered by the clerk when a party demonstrates that the non-movant has “failed to plead or otherwise defend.” After an entry of default has been entered, the movant must apply for a default judgment, which is a final adjudication of the claims. Rule 55 sets out alternative standards that a defaulting party must satisfy to resist this process: Under Rule 55(c), the court may set aside an entry of default “for good cause”; but if a default judgment has been entered, then the delinquent party must attack the judgment under the more exacting standards of Rule 60(b) by showing, among other things, excusable neglect.

Because Starling submitted her letters to the court before final judgment (granting the government's motion for a final default judgment), she contended that her challenge should be assessed like any other to any entry of default, under the permissive good-cause standard.

- ▼ **Rule 6's Excusable-Neglect Standard for Excusing Expired Time Requirements.** Under Supplemental Rule G, if a party is given direct notice of a judicial forfeiture complaint, that party must contest the complaint by filing a claim to the assets before the deadline specified in the notice. And under Rule 6's general principle, “[w]hen an act may or must be done within a specified time,” and “the time has expired,” the court may extend the deadline only “if the party failed to act because of excusable neglect” [Fed. R. Civ. P. 6(b)(1)].

The government argued that because Starling failed to file a claim to the seized funds within the time specified in the notice, she was subject to Rule 6's excusable-neglect standard. (Ironically, the court noted the hypocrisy of the government's failure to adhere to Rule G's scrupulous punctuality yet demand it from pro se litigant Starling, given the government's miscalculation of days for fixing the deadline for filing a responsive claim to its Rule G notice.)

- ▼ **Rules 55(c) and Supplemental Rule G Have Materially Different Standards.** Citing and quoting Sixth Circuit cases, the appellate court recognized there are “materially different standards in determining whether to excuse noncompliance or to adhere strictly to the rules.” For example, courts deciding motions to set aside an entry of default under Rule 55(c) are extremely forgiving to the defaulting party and favor the policy of resolving disputes on the merits as opposed to procedural missteps. By contrast, courts deciding motions to strike claims under Supplemental Rule G favor strict adherence to the rules and are unforgiving to even technical noncompliance with the rules.

The Second Circuit rejected as mistaken the government's argument that Rule 6's excusable-neglect standard must apply because it “sets out procedural prerequisites and substantive standards for granting an extension of time.” It opined that to consider untimely claims under the permissive good-cause standard would “attach no consequence to a litigant's failure to request additional time in a timely manner.”

- ▼ **Supplemental Rule G Suggests That Good Cause Is Appropriate Standard.** Rule G sets deadlines for when a claim to assets “must be filed . . . [u]nless the court for good cause sets a different time.” The rule gives no indication that a harsher standard should govern a later motion. Moreover, applying the standard to defaulting claimants would mirror the government’s burden when it seeks an extension of time to convert an administrative forfeiture proceeding into a judicial one.
- ▼ **Interplay of Rules 6 and 55 Does Not Allow for Displacement of Good-Cause Standard of Rule 55 With Excusable-Neglect Standard of Rule 6 When Deadline for Pleading or Defending Has Not Yet Passed.** Default may be entered only when a defendant has “failed to plead or otherwise defend.” And, of course, a party cannot fail to plead or defend if the deadline for pleading or defending has not yet passed. Thus, it cannot be that a single missed deadline is enough to displace Rule 55’s good-cause standard with Rule 6’s excusable-neglect standard; otherwise, a party would never be able to lift the default under the lenient standard, which is contrary to what the rules and cases contemplate.
- ▼ **Timeliness of Claim Cannot Be Sufficient, Standing Alone, to Displace Rule 55.** Federal Rules of Civil Procedure are not supplanted unless they conflict with a provision of the Supplemental Rules. Here, nothing about Supplemental Rule G conflicts with Rule 55’s typical rule that the good-cause standard applies when a party seeks to set aside an entry of default. And there is nothing functionally different about civil forfeiture proceedings that compels different treatment for untimely responses in those cases from all other civil cases.
- ▼ **Civil Forfeiture Magnifies Importance of Deciding Cases on Merits Rather Than by Default.** Civil forfeiture enables the government to seize property without any predeprivation judicial process and to obtain forfeiture of the property—even when the owner is personally innocent. Indeed, the lax notice requirements allow the government to start the default clock with perfunctory measures like ordinary mail and posting on a government forfeiture website that most citizens have no reason to know of. “And because the typical forfeiture case concerns cash and goods with consequence to the deprived party but which rarely justify hiring a lawyer, a huge number of civil forfeiture cases are fought by claimants acting pro se.” As one commentator has noted, “[c]ivil forfeiture laws do not provide a right to counsel for the poor” and “the government’s seizure of modest amounts of cash and vehicles often make it economically infeasible to hire a lawyer” [Louis S. Rulli, *Prosecuting Civil Asset Forfeiture on Contingency Fees: Looking for Profit in All the Wrong Places*, 72 Ala. L. Rev. 531, 535 (2021)]. The court of appeals pointed out that “all of this is driven by incentive: The authorities can pocket what they seize by forfeit.”
- ▼ **Good-Cause Standard Considers Three Factors.** Under the good-cause standard, three factors are relevant: (1) the willfulness of the defaulting party, (2) prejudice to the non-movant, and (3) whether the defaulting party has a meritorious defense. Applying the good-cause standard in this case, the appellate court concluded that the district court should have lifted the entry of default and permitted Starling to file her claim to the funds. The government did not suggest that Starling was acting in bad faith; at worst she was negligent in prosecuting her claim, having relied on advice from a state prosecutor that was correct that under New York law—a claim to the funds could not be made until the criminal defendant was acquitted. The government made no effort to show its interests would be harmed by having to defend a forfeiture suit against a claimant it was aware of from the beginning. And having never been charged with a crime, Starling should have had the opportunity to show that she was an innocent owner whose interest in property “shall not be forfeited under any civil forfeiture statute.” Accordingly, the court concluded that Starling demonstrated the good cause necessary to lift the entry of default and file a belated claim to the seized funds.
- ▼ **Conclusion and Disposition.** Because each factor under the good-cause standard weighed in Starling’s favor, the Second Circuit vacated the grant of the motion to strike and the entry of default judgment and remanded for further proceedings.

## MAGISTRATE JUDGES

### Consent

#### *Prater v. Dep't of Corr.*

76 F.4th 184, 2023 U.S. App. LEXIS 19893 (3d Cir. Aug. 2, 2023)

The Third Circuit holds that (1) a motion to proceed in forma pauperis is nondispositive and does not require consent to be heard by a magistrate judge, and (2) consent to have a magistrate judge try a case and enter judgment may be inferred for later-named defendants represented by counsel common to all defendants.

- ▼ **Background.** This was a consolidation of three appeals by state prisoners challenging orders entered by magistrate judges in their 42 U.S.C. § 1983 cases. They were consolidated because all three appeals argued that the magistrate judges lacked jurisdiction to enter final orders in their respective cases. An amicus curiae was appointed on behalf of the three prisoners for the appeals.
- ▼ **First Case.** The first plaintiff tore his Achilles tendon in an accident and filed a complaint against the state department of corrections (DOC) and 31 prison officials, alleging “deliberate indifference to a serious medical need” and intentional infliction of “unnecessary and wanton pain” by delaying his surgery for months. He sought compensatory and punitive relief.

Along with his complaint, he filed a motion to proceed in forma pauperis (IFP) and a consent to jurisdiction form, choosing to proceed before a magistrate judge under 28 U.S.C. § 636(c)(1) in lieu of proceeding before a district court judge.

The district court assigned the case to a magistrate judge, who denied his IFP motion under the Prison Litigation Reform Act (PLRA), which does not permit an inmate to proceed IFP if he or she has had three or more actions or appeals dismissed as frivolous or malicious, or for failure to state a claim upon which relief may be granted [28 U.S.C. § 1915(g)]. The magistrate judge concluded that the plaintiff could proceed with his claims only after paying the full filing fee.

The plaintiff did not file an amended complaint or pay the full filing fee, and the magistrate judge dismissed his case without prejudice. The plaintiff then appealed to the Third Circuit.

- ▼ **Second Case.** The second plaintiff filed a complaint against the prison, alleging that he had been assaulted on two separate occasions by prison officials. He followed up with an amended complaint, naming 14 prison officials, alleging a violation of his rights when he was beaten, shackled, restrained, drugged, and shocked. He stated that he had properly exhausted administrative remedies because he “talked to everyone he could about the incidents and filed a formal grievance.”

Along with his complaint, he filed an IFP motion and a “consent to jurisdiction” by a magistrate judge in lieu of proceeding before a district court judge under § 636(c)(1). The magistrate judge granted the IFP motion, and throughout the litigation the office of the state’s attorney general appeared on behalf of all defendants. The initial deputy attorney general on the case also filed a form consenting to magistrate judge jurisdiction under § 636(c)(1) on behalf of the institution, the only named defendant at that time.

The plaintiff added 14 officials as defendants, and all defendants moved for summary judgment, arguing that the institution was immune from suit under the Eleventh Amendment, and that the claims against the 14 officials had not been properly exhausted under the PLRA.

The magistrate judge agreed and entered summary judgment in favor of the institution under the Eleventh

Amendment, in favor of the superintendent for lack of personal involvement in the alleged violation, and in favor of all other defendants based on failure to exhaust.

The plaintiff then appealed to the Third Circuit.

- ▼ **Third Case.** The third plaintiff filed a complaint against the prison, over 30 officers, and several groups of John/Jane Doe defendants, alleging excessive force during transport from one housing unit to another. He had filed a formal grievance, and the DOC initiated an investigation and then denied the grievance. He unsuccessfully appealed once but did not seek final administrative review.

His complaint stated that he properly exhausted administrative remedies. Along with his complaint, he filed an IFP motion. After the IFP motion was granted, he filed a “consent to jurisdiction” by a magistrate judge under § 636(c)(1) in lieu of proceeding before a district court judge.

Throughout the litigation, the attorney general’s office appeared on behalf of all defendants. The initial deputy attorney general on the case filed a form consenting to magistrate judge jurisdiction under § 636(c)(1) on behalf of the institution and the only other defendant who had been served at that time.

The plaintiff filed several amended complaints, adding and dropping several claims and defendants.

The defendants deposed the plaintiff and moved for summary judgment. The magistrate judge entered summary judgment for two correctional officer defendants, concluding that the plaintiff failed to exhaust administrative remedies by not taking a final administrative appeal.

The plaintiff then appealed to the Third Circuit.

- ▼ **Scope of Magistrate Judge’s Jurisdiction Depends on Consent of Parties and Nature of Matter.** The Third Circuit observed that the Federal Magistrate Act grew out of Congress’s desire to give district judges additional assistance, as their caseloads were increasing more rapidly than the number of judgeships.

Under the Act, district court judges may delegate certain matters, but because magistrate judges derive their power from Article I of the Constitution (establishing the legislative branch) and not Article III (establishing the judicial branch), the Act limits the circumstances in which a magistrate judge “exercises final adjudicatory authority.”

The Act permits a district court judge to designate a magistrate judge to hear and determine any pretrial matter without the parties’ consent, but it has eight exceptions, which include a motion for summary judgment and involuntary dismissal of an action [28 U.S.C. § 636(b)(1)(A)]. Federal Rule of Civil Procedure 72(a) calls pretrial matters that may be referred to a magistrate judge without the consent of the parties “nondispositive.”

If a party disagrees with the magistrate judge’s decision on a nondispositive matter, the party must timely object, after which the district court “must...modify or set aside any part of the order that is clearly erroneous or is contrary to law.”

If the matter is one in which the magistrate judge does not have the power to determine without the parties’ consent (a “dispositive” matter), a judge may designate a magistrate judge to conduct hearings and to submit proposed findings of fact and recommendations for disposition. The district court “shall” review de novo any timely objections and may “accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge” [28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(3)]. The district court must take some action for a report and recommendations to become a final order, regardless of whether objections are filed.

The Act also provides that, if the parties consent, a magistrate judge may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case [28 U.S.C. § 636(c)(1); Fed. R. Civ. P. 73].

The court summarized:

So absent party consent, a magistrate judge's jurisdiction extends only to nondispositive pretrial matters. Outside these nondispositive pretrial matters, the magistrate judge makes findings of fact and provides the district court with non-final recommendations. But when there is party consent, the magistrate judge's jurisdiction is coextensive with the district court's jurisdiction, extending to any or all proceedings, including entry of final judgment.

▼ **Motions to Proceed in Forma Pauperis Are Nondispositive.** The Third Circuit noted that IFP motions are not in the list of exceptions to a magistrate judge's pretrial jurisdiction listed in § 636(b)(1)(A), but that most courts agree that the list is "illustrative, not exhaustive."

Nevertheless, the court found that "other textual clues suggest IFP motions are nondispositive pretrial matters." First, the Third Circuit observed that Congress clearly prohibited magistrate judges from determining the merits of prisoner petitions challenging conditions of confinement [28 U.S.C. § 636(b)(1)(B)], but did not prevent magistrate judges from ruling on the IFP motions that often accompany such petitions.

Next, the Third Circuit reasoned that IFP motions are "not of the same genre" as the exceptions enumerated in the Act, which are generally outcome-determinative. "Most of the enumerated exceptions—motions for judgment on the pleadings, summary judgment, or dismissal, for example—can formally decide the case." And although motions for injunctive relief are not outcome-determinative of the entire claim, they are dispositive in that they conclusively resolve parties' rights and obligations for the period of the injunction.

The court concluded that the denial of an IFP motion is not outcome-determinative in the same way, even if denial of the motion may "functionally" end a case when a plaintiff lacks the ability to pay. "After a denial of an IFP motion, a plaintiff can proceed with his case, unimpeded as to the merits, after first paying the filing fee."

The Third Circuit rejected several other circuits' contrary conclusions. The Sixth Circuit, followed "without much comment" by the Tenth and Fourth Circuits, primarily reasoned that denial of an IFP motion "is the functional equivalent of an involuntary dismissal." The Third Circuit disagreed, reasoning that a court is "merely determining how a petitioner's case proceeds—with or without prepayment of a filing fee. . . . Just as with other pretrial matters within § 636(b)(1)(A)'s scope, denying an IFP motion simply sets parameters under which a plaintiff may proceed."

The Ninth Circuit held that a magistrate judge's jurisdiction over IFP motions derived only from a referral and parties' consent under § 636(c), but the Third Circuit was not persuaded because the Ninth Circuit "did not substantively discuss § 636(b) or distinguish IFP motions from other matters a magistrate judge has the pretrial authority to decide."

The Third Circuit rejected the concern that its ruling would force an inmate to simultaneously file objections in district court and appeal to the court of appeals. The court reasoned that Congress expressly indicated when certain magistrate decisions are directly appealable to a court of appeals, and § 636(b), related to nondispositive pretrial matters, does not contain language indicating a direct appeal.

Because an IFP motion is a nondispositive pretrial matter, a magistrate judge's denial of an IFP motion does not become final and appealable to the court of appeals until after being objected to by the dissatisfied party and reviewed by the district court. Once the district court rules on the motion, the denial becomes final under 28 U.S.C. § 1291 (final decisions of district courts).

Thus, the Third Circuit ruled that it had no authority to review the magistrate judge's denial of the plaintiff's IFP motion until after the plaintiff sought review in the district court.

- ▼ **Magistrate Judge Did Not Have Jurisdiction to Dismiss First Case, and Court of Appeals Did Not Have Jurisdiction to Review Dismissal.** The Third Circuit reiterated that the magistrate judges' jurisdiction to enter final orders at issue in each of the appeals turned on whether they had the consent of the parties.

In the first case, in which the magistrate judge dismissed the case for "failure to prosecute (failure to pay the filing fee)," the parties agreed that not all named defendants provided express or implied consent. The State conceded that it was not even aware of the suit prior to dismissal. Absent consent, the magistrate judge did not have jurisdiction to decide the matter, and his authority was limited to submitting a recommended disposition of the district court.

The Third Circuit underscored that this kind of recommendation is a nonbinding, nonfinal judgment, and it must either be reviewed by the district court or incorporated into a subsequent final order before the court of appeals has power to act on it in any way.

The court rejected the idea that it nevertheless had appellate jurisdiction to review the dismissal under its supervisory authority. "This process-related oversight power is an insufficient stand-in for statutory appellate jurisdiction." The Third Circuit dismissed the appeal for lack of jurisdiction, which meant that the plaintiff "must seek review of the magistrate judge's non-final, non-binding order in the district court, where his claim will be finally adjudicated by an Article III official."

- ▼ **Consent Was Inferred for Later-Added Defendants in Other Cases, and Court of Appeals Did Have Jurisdiction to Review Summary Judgment Orders.** The parties agreed that the plaintiffs and initially served defendants in each of the other two cases consented to magistrate jurisdiction to conduct any and all proceedings and enter final orders. The plaintiffs disputed, however, whether later-added defendants, who did not file consent forms, consented.

The Third Circuit held that under the Supreme Court's opinion in *Roell v. Withrow*, the later-added defendants' consent could be inferred based on their conduct during the litigation. Citing *Roell*, the court reiterated that "the touchstone of implied consent is not 'adherence to the letter of § 636(b)(2),' but rather the voluntariness of the parties' consent based on their knowledge and conduct during litigation" [*Roell v. Withrow*, 538 U.S. 580, 582, 123 S. Ct. 1696, 155 L. Ed. 2d 775 (2003)].

In both of the other two cases, the later-added defendants were represented by the same counsel that filed consent forms on behalf of the initially named defendants. "When counsel filed consent forms early in each case related to initially named defendants, counsel became aware of the need for consent and the right to refuse it, and still voluntarily continued to appear on behalf of all defendants before the magistrate judges." The court found that there was no indication that defense counsel in either case acted contrary to the wishes of their clients, or that one or all of the defendants involuntarily or unknowingly waived their right to litigate before an Article III judge.

The Third Circuit noted that in these two cases, the plaintiffs added, dropped, re-added, re-dropped, and renamed numerous officials as the cases proceeded through the pleading and discovery phases. The court opined that it would be unworkable to require the defense attorneys to "round up the new, added, renamed, or readded defendants and obtain their consent with each new iteration of the suit."

Because the parties consented to the magistrate judges' entry of final orders in the other two cases, the Third Circuit reviewed the summary judgment orders.

The PLRA set out the default procedure for the inmate grievance process, and the court concluded that both plaintiffs failed to follow the full administrative review process and failed to properly exhaust their claims under PLRA.

Thus, the Third Circuit affirmed the summary judgment orders on the grounds that the plaintiffs failed to exhaust their administrative remedies.

- ▼ **Third Circuit Declined to Require Changes in District Court's Consent Procedures.** The appointed amicus curiae urged the court to review the district court's local rule prescribing the procedures for obtaining consent soon after a pro se prisoner initiates a civil suit [see W.D. Pa. Local Civ. R. 72(C)–(E)]. The Third Circuit found that the local rule provided adequate safeguards, and it was satisfied that the procedures ensured knowing and voluntary consent to magistrate judge jurisdiction.