Litigation Insights

SEPTEMBER 2024

LexisNexis®

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.

INTERSYSTEM PRECLUSION

Rooker-Feldman Doctrine

Gilbank v. Wood Cnty. Dep't of Hum. Servs.

2024 U.S. App. LEXIS 19244 (7th Cir. Aug. 1, 2024) (en banc)

The Seventh Circuit, sitting en banc, affirmed dismissal of constitutional claims alleging injury caused by a state court's expired child-custody orders. Although a narrow majority of the court of appeals held that the *Rooker-Feldman* doctrine posed no bar to a claim that did not seek to undo expired state-court orders, a different majority affirmed the district court's dismissal, with some judges invoking *Rooker-Feldman*, and one judge relying on *Heck v. Humphrey* [*see* Gilbank v. Wood Cnty. Dep't of Hum. Servs., 2024 U.S. App. LEXIS 19244 (7th Cir. Aug. 1, 2024) (en banc)].

JUMP TO SUMMARY

COSTS

Taxable Items

Knowles v. Temple Univ.

109 F.4th 141, 2024 U.S. App. LEXIS 18476 (3d Cir. July 26, 2024)

The Third Circuit holds that 28 U.S.C. § 1920(1), which authorizes the taxing of costs for "[f]ees of the clerk and marshal," does not permit an award of the expenses of a private process server to the prevailing party under Rule 54(d)(1).

JUMP TO SUMMARY

RECUSAL OF JUDGE

Financial Interest of Spouse

Litovich v. Bank of Am. Corp.

106 F.4th 218, 2024 U.S. App. LEXIS 16128 (2d Cir. July 2, 2024) (per curiam)

The Second Circuit has vacated a judgment entered by a district judge who presided over the case while his spouse owned stock in one of the defendants, even though she had divested herself of the stock before the judge issued his decision to grant the defendants' dismissal motion.

JUMP TO SUMMARY

Hatch Act Resources on Lexis+®

The Hatch Act, a federal law passed in 1939, limits certain political activities of federal employees, as well as some state, D.C., and local government employees who work in connection with federally funded programs. The law's purposes are to ensure that federal programs are administered in a nonpartisan fashion, to protect federal employees from political coercion in the workplace, and to ensure that federal employees are advanced based on merit and not based on political affiliation.

At Lexis we strive to provide our federal government customers with resources that will support their research on issues related to the Hatch Act. You'll find a list below of our content specifically relating to the Hatch Act.

Hatch Act Advisory Opinions from Office of Special Counsel – Our coverage of these opinions dates back to July 6, 1996 and are updated regularly from the agency.

United States Attorney General, Opinions of the Office of Legal Counsel – Our coverage from 1977 is updated within a day of its publication. The Attorney General of the United States has delegated to the Office of Legal Counsel the responsibility for preparing the formal opinions of the Attorney General, providing opinions to federal agencies, and assisting the Attorney General in performing his or her function as legal adviser to the President. In the Opinions, Hatch Act issues may be discussed.

Practical Guidance – Within the practical guidance content on Lexis+ there are a variety of Hatch Act related resources in PG, including articles, practice notes, templates and checklists. Some examples are:

- An article discussing *The Hatch Act And Political Speech By Federal Employees*
- A practice note detailing the *Hatch Act and Prohibitions on Employment Discrimination Based on Political Affiliation*
- A checklist for *Political Activity Limitations on Government Employees and Members of the Armed Forces Checklist*

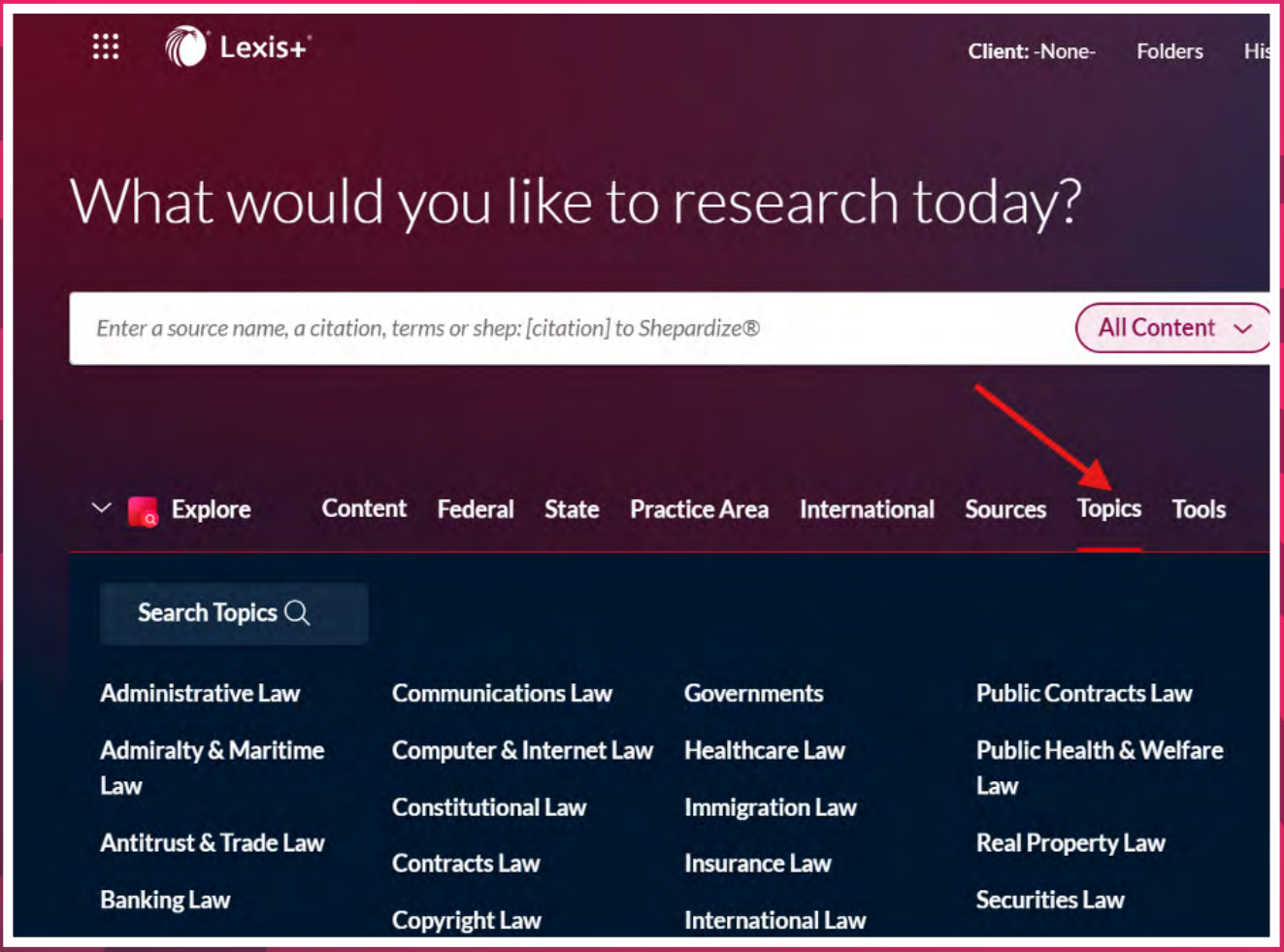
If you would like to schedule Lexis training with a focus on Hatch Act related content, please reach out to your Solutions Consultant.

Find Relevant Authority on an Issue with Lexis+® Topics

By Meghan Atwood, LN Solutions Consultant

If you have felt unsure of the exact terms of art to use in your search or if you are new to an area of law, Lexis+ Topics can be the perfect place for you to start. The Lexis+® Topics feature is designed to point you in the right direction as you begin your legal research journey.

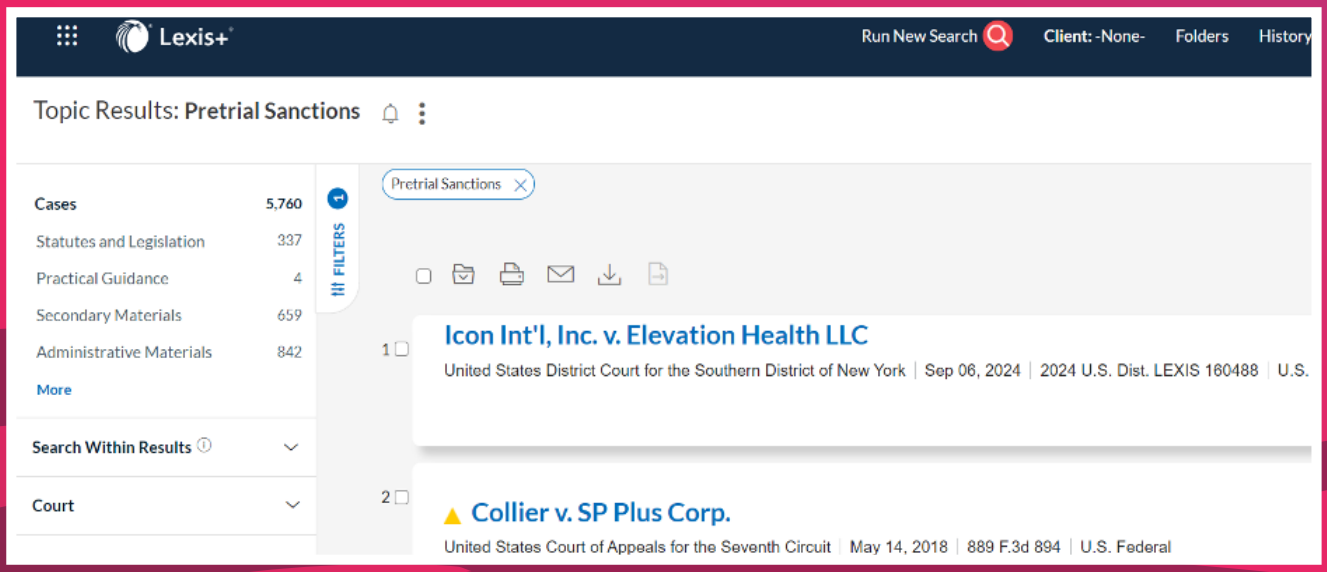
Lexis+ Topics are easy to utilize as well. Starting on the homepage of Lexis+®, select the Topics tab within Explore Content. You can either type in a topic (e.g., "personal jurisdiction" or "summary judgment") in the "Search Topics" box or browse by Area of Law from the list below (see screenshot).



The topical hierarchy will show you which area of law your topic falls under and allow you to select more specific sub-categories when you expand that section. You can even select the "General Overview" sub-category, which then runs a search across all of Lexis+® for relevant documents, including primary and

secondary content. This can be a great way to find seminal cases and treatises that help explain a topic further for you.

For example, you could begin with the topic of "Civil Procedure" and select the sub-topic of "Pretrial Sanctions." From there, you can immediately access a list of cases, statutes, exclusive Practical Guidance pieces, and treatises that are relevant to this topic (see screenshot below).



In addition, you can see the terms of art relevant to a particular topic of interest. For instance, if you are interested in the issue of the grounds for injunctions, you can select the topic of "Civil Procedure" and then the sub-topic of "Injunctions" to learn that terms, such as balance of hardships, irreparable harm, likelihood of success, and public interest, may be key terms to use for crafting an initial Lexis+® search.

As you can see, Lexis+® Topics can give you a great introduction to variety of legal subjects and help you to find the right terms to build your Lexis+ search.

For more information on Lexis+® Topics or any other LexisNexis product or feature, contact your LexisNexis® Consultant.

Win with Jim Wagstaffe Current Awareness Insights!

Alert: Seventh Circuit Emphasizes That Video Evidence Cannot Be Used to Support a Motion to Dismiss Unless the Video "Clearly and Definitively" Discredits the Allegations of the Complaint

Plaintiff sued for malicious prosecution. Plaintiff claims he was arrested for illegally possessing a firearm by police who knew he was not person they actually saw in possession of the gun involved. In response to the allegation in the complaint that the officers' body cam video would incontrovertibly support his claim, the District Court reviewed the video and held the police had probable cause to detain Plaintiff, eliminating the viability of all his claims. The court granted the Defendants' motion to dismiss.

Plaintiff did not attach the video to the complaint but alleged that the police could be heard on the video discussing the fact that he was not the person they saw with the gun. Plaintiff conceded that the Court could consider the video under these circumstances.

The Seventh Circuit affirmed. Relying on Twombly, it held that to survive a motion to dismiss the complaint must state a claim plausible on its face and a "complaint that contradicts uncontroverted video is not plausible." A plaintiff can contest the meaning or significance of the video, but not when the video "utterly discredits" the non-movant's version of the facts such that there is "no reasonable disagreement about what the video depicts."

Here viewed as a whole, the video "undoubtedly" support a finding that the officers had probable cause to believe Plaintiff was the person who possessed the gun. See Esco v. City of Chicago, 107 F.4th 673 (7th Cir. 2024).

Fed Civ Proc Before Trial: The Wagstaffe Group *§ 23-II[G][4][b][iii]*—23.50 Unattached Documents "Incorporated by Reference–Examples"

INTERSYSTEM PRECLUSION

Rooker-Feldman Doctrine

Gilbank v. Wood Cnty. Dep't of Hum. Servs.
2024 U.S. App. LEXIS 19244 (7th Cir. Aug. 1, 2024) (en banc)

The Seventh Circuit, sitting en banc, affirmed dismissal of constitutional claims alleging injury caused by a state court's expired child-custody orders. Although a narrow majority of the court of appeals held that the *Rooker-Feldman* doctrine posed no bar to a claim that did not seek to undo expired state-court orders, a different majority affirmed the district court's dismissal, with some judges invoking *Rooker-Feldman*, and one judge relying on *Heck v. Humphrey* [*see* Gilbank v. Wood Cnty. Dep't of Hum. Servs., 2024 U.S. App. LEXIS 19244 (7th Cir. Aug. 1, 2024) (en banc)].

Factual and Procedural Background. Before filing this federal suit, the plaintiff was involved in state-court child-protective proceedings concerning her daughter. For nearly a year during those proceedings, the child's father had sole custody, pursuant to temporary orders of the state court. At the end of the state-court proceedings, those orders had no further effect, and the plaintiff regained sole custody of her daughter.

The plaintiff then filed the present lawsuit for money damages in federal district court, alleging that officials involved in the state-court proceedings had violated her federal constitutional rights. The district court granted summary judgment for all defendants, finding that some of the plaintiff's claims were barred by the *Rooker-Feldman* doctrine and that all other claims failed on the merits.

The plaintiff appealed, and the Seventh Circuit, sitting en banc, affirmed the district court's judgment of dismissal.

In arriving at its decision, the en banc court addressed the elements and application of the *Rooker-Feldman* doctrine, and differences among the judges generated three opinions. For example, Circuit Judge Hamilton's opinion, which announced the decision of the en banc court, was actually a dissent on one issue, with part of Circuit Judge Kirsch's dissenting opinion serving as the majority view on that issue. And within a part of Judge Hamilton's opinion that was joined by six of the eleven participating judges, one footnote was joined by all eleven.

***Rooker-Feldman* Doctrine.** The *Rooker-Feldman* doctrine embodies the principle that lower federal courts lack jurisdiction over claims seeking review of state-court judgments [see District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 103 S. Ct. 1303, 75 L. Ed. 2d 206 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413, 44 S. Ct. 149, 68 L. Ed. 362 (1923)]. The doctrine rests on inferences from the federal courts' statutory jurisdictional structure. Under 28 U.S.C. § 1257, the Supreme Court is the only federal court with general statutory jurisdiction to review state-court judgments; by contrast, federal district courts' jurisdiction is original, not appellate [see 28 U.S.C. §§ 1331, 1332, 1334].

In *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, the Supreme Court responded to the lower courts' expansion of the doctrine "far beyond the contours of the Rooker and Feldman cases" [Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 283, 125 S. Ct. 1517, 161 L. Ed. 2d 454 (2005)]. The *Exxon Mobil* Court emphasized the narrow scope of the *Rooker-Feldman* doctrine, which applies only to "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments" [Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 284, 125 S. Ct. 1517, 161 L. Ed. 2d 454 (2005)].

Before the Seventh Circuit's en banc decision in the present case, its precedent held that the *Rooker-Feldman* doctrine applied to federal suits that, although not directly challenging state-court judgments, were "inextricably intertwined" with them [see Andrade v. City of Hammond, 9 F.4th 947, 950 (7th Cir. 2021)]. Circuit precedent also held that the doctrine applies only if the federal plaintiff had a reasonable opportunity to raise the federal issue in state-court proceedings [see Jakupovic v. Curran, 850 F.3d 898, 902 (7th Cir. 2017)].

Seventh Circuit Recognizes *Exxon Mobil's* Four-Element Formulation. The en banc court unanimously recognized and adopted *Exxon Mobil's* formulation of the *Rooker-Feldman* doctrine. Part III of Judge Hamilton's opinion, which was joined by five other judges (making a 6-5 majority), described *Rooker-Feldman*'s elements as follows:

> [T]he doctrine blocks federal jurisdiction when four elements are present. First, the federal plaintiff must have been a state-court loser. Second, the state-court judgment must have become final before the federal proceedings began. Third, the state-court judgment must have caused the alleged injury underlying the federal claim. Fourth, the claim must invite the federal district court to review and reject the state-court judgment.

In that same part of his opinion, Judge Hamilton acknowledged that the Seventh Circuit "has added to the four elements in *Exxon Mobil* a fifth that the Supreme Court has not had occasion to address directly. *Rooker-Feldman* does not apply to bar jurisdiction over a plaintiff's federal claim if she did not have a reasonable opportunity to raise her federal issues in the state courts."

Judge Kirsch, in Part I of his opinion, which was joined by a different 6-5 majority, also accepted *Exxon Mobil's* four elements (Circuit Judge Easterbrook joined both Judge Hamilton and Judge Kirsch on this point).

Despite the court's unanimous acceptance of *Exxon Mobil's* four elements, the court was sharply divided on the meaning and application of the fourth element—that the federal claim seeks review and rejection of a state-court judgment.

Fourth Element: Review and Rejection of State-Court Judgment. Part I of Judge Kirsch's opinion, which was joined by five other judges (making it a 6-5 en banc majority view), concluded that the fourth element of the *Rooker-Feldman* doctrine (seeking review and rejection of the state-court judgment) is an independent requirement and is not automatically satisfied when the third element (injury caused by the state-court judgment) is met.

Judge Kirsch noted that under *Exxon Mobil*, the terms review and rejection refer to a request that the federal court "overturn" or "undo" the state-court judgment [see Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 287 n.2, 292–293, 125 S. Ct. 1517, 161 L. Ed. 2d 454 (2005)]. And "[o]nly when every element is met does *Rooker-Feldman* enter the picture." Judge Kirsch rejected the view that any plaintiff complaining of injuries caused by a state-court judgment (the third element) inherently asks the federal court to review and reject that judgment. But the source of a plaintiff's injury is one, and only one, requirement. Courts must give due weight to all four elements of *Rooker-Feldman*. This requires a federal court to consider the relief requested in determining whether the plaintiff has indeed asked it to reject a state-court judgment. When the requested relief would not undo the state-court judgment—such as when the plaintiff seeks damages for injury caused by a state court's custody order, but does not seek to set aside the custody order—the fourth element is not met.

Applying these principles to the present case, Judge Kirsch concluded that the plaintiff was not seeking review and rejection of the state court's custody order. He explained that the return of the plaintiff's child resolved the state-court orders that effectuated her alleged constitutional injuries. Thus, the state court's orders were not subject to review by any court anywhere, and the plaintiff, in requesting damages, was not asking the district judge or the court of appeals to alter or annul any decision by a state judge [cf. Kovacic v. Cuyahoga Cnty. Dep't of Child. & Fam. Servs., 606 F.3d 301, 302–303 (6th Cir. 2010) (*Rooker-Feldman* did not bar damages claims based on conduct of social workers that led to custody judgment that was no longer in effect); Green v. Mattingly, 585 F.3d 97, 102 (2d Cir. 2009) (*Rooker-Feldman* did not bar plaintiff's suit against officials involved with temporarily depriving her of custody of her daughter, because plaintiff's child had been returned to her, so only conceivable judgment against plaintiff—temporary removal of child—had already been undone)].

Judge Hamilton, joined by four other judges, dissented on this point, opining that claims for damages for injuries inflicted by state-court judgments invite "review and rejection" of those judgments, thus satisfying both the third and fourth elements of *Rooker-Feldman*.

Although joined by a majority of the en banc court, Judge Kirsch's understanding of the meaning and application of the fourth *Rooker-Feldman* element might be thought of as dictum, since it was not necessary to the court's ultimate affirmance of the district court's judgment of dismissal. However, Judge Hamilton's opinion announcing the decision of the court characterized Judge Kirsch's opinion on this point as "an en banc majority opinion" that "holds" *Rooker-Feldman* inapplicable to the claims for injuries allegedly inflicted by the state-court orders. And Judge Kirsch's opinion said, "This narrower view of *Rooker-Feldman* is how courts in this circuit will apply the doctrine going forward." Therefore, future appellate panels and district courts within the Seventh Circuit will be bound by Judge Kirsch's understanding of *Rooker-Feldman*'s fourth element.

Judge Easterbrook's Concurrence. Circuit Judge Easterbrook agreed with Judge Kirsch's view that the fourth element of the *Rooker-Feldman* doctrine was not met in this case. But Judge Easterbrook found an alternative basis for affirming the dismissal of the claims that five other judges thought were barred by *Rooker-Feldman*.

Judge Easterbrook observed that all the defendants in this case were state actors, and the plaintiff's claims rested on 42 U.S.C. § 1983. Judge Easterbrook therefore opined that this case was governed by the principle established in *Heck v. Humphrey*. In *Heck*, the Supreme Court held that a federal court must dismiss any suit that seeks damages under § 1983 on a theory that is incompatible with the validity of a state court's judgment, if that judgment has not been set aside on appeal or by some other means [*Heck v. Humphrey*, 512 U.S. 477, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994)]. The Seventh Circuit has treated *Heck* as establishing a strong judicial policy against using § 1983 to create an outcome that is inconsistent with a state court's decision [see Savory v. Cannon, 947 F.3d 409, 414 (7th Cir. 2020) (en banc)].

Judge Easterbrook noted that in litigation under § 1983, *Heck* and the *Rooker-Feldman* doctrine serve much the same purpose, although *Heck* is nominally about ripeness, and *Rooker-Feldman* is nominally about jurisdiction. Concluding that *Heck* blocked an award of damages in the present case because the state court's custody orders had not been set aside, Judge Easterbrook joined the five judges who relied on *Rooker-Feldman* to affirm the judgment of dismissal of the plaintiff's claims that alleged injury caused by the state court's order.

Seventh Circuit Rejects "Inextricably Intertwined" Concept in *Rooker-Feldman* Analysis. The en banc court unanimously rejected any further use of the "inextricably intertwined" concept in *Rooker-Feldman* analysis. This "inextricably intertwined" language was used by the Supreme Court in Feldman, which noted that a federal claim

is inextricably intertwined with a state court's judgment when the federal court "is in essence being called upon to review the state court decision" [District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, at 482 n.16 & 486–487, 103 S. Ct. 1303, 75 L. Ed. 2d 206 (1983)]. The Seventh Circuit's previous use of the concept has been criticized [see, e.g., Andrade v. City of Hammond, 9 F.4th 947, 954 (7th Cir. 2021) (Sykes, C.J., concurring)].

Footnote 5 in Judge Hamilton's opinion pointed out that although the Supreme Court has never explicitly discarded the "inextricably intertwined" phrase, the phrase played no role in the Court's analysis in *Exxon Mobil* and has not otherwise explained it. "All judges agree here that the 'inextricably intertwined' language is not useful in analyzing questions under *Rooker-Feldman*."

Seventh Circuit Rejects Fraud Exception to *Rooker-Feldman*. The en banc court unanimously declined to recognize any exception to *Rooker-Feldman* for claims of injury caused by an opponent's fraudulent litigation conduct.

Judge Hamilton, joined by five other judges (making a 6-5 majority) rejected the plaintiff's argument that *Rooker-Feldman* was inapplicable because some of her injuries inflicted by the state-court orders were the result of defendants lying to and defrauding the state court. The plaintiff thus tried to invoke what has sometimes been called a "fraud exception" to *Rooker-Feldman*'s jurisdictional bar.

The Seventh Circuit recently rejected a "corruption" exception to *Rooker-Feldman*. In Hadzi-Tanovic v. Johnson, the court concluded that *Rooker-Feldman* applies even if the federal plaintiff alleges that the state courts that injured her were corrupt [Hadzi-Tanovic v. Johnson, 62 F.4th 394, 396 (7th Cir. 2023)]. In the present case, Judge Hamilton's majority opinion applied similar reasoning to reject the fraud exception, overruling circuit precedent to the extent that it had held otherwise.

Judge Hamilton pointed out that the Supreme Court has never suggested that *Rooker-Feldman* does not apply to claims that sound in fraud. "If a state-court loser can challenge a state-court judgment in federal court merely by alleging fraud, that exception could too easily swallow the rule." And he emphasized that *Rooker-Feldman* is not concerned with why a state court's judgment might be mistaken. Although fraud is one such reason, there are many others, and the reason a litigant gives for contesting a state court's decision should not be a basis for endowing a federal district court with jurisdiction that it does not otherwise have.

Judge Kirsch, writing for a different 6-5 majority on the issue of how to apply the fourth *Rooker-Feldman* element, opined that circuit precedents "do not stand for a 'fraud exception' to *Rooker-Feldman*, as there has never been such an exception."

Conclusion and Disposition. The en banc court unanimously agreed to affirm the summary judgment dismissing the plaintiff's claims that were not based on allegations of injuries inflicted by the state court's order.

The en banc court was divided on the question whether the *vv* doctrine barred the plaintiff's claims based on alleged injuries caused by the state court's custody orders. A narrow 6-5 majority of the court concluded that *Rooker-Feldman* was not applicable because its fourth element (seeking review and rejection of a state-court judgment) was not met. However, the five judges who believed that all four *Rooker-Feldman* elements had been met, and that dismissal was therefore appropriate, were joined by Judge Easterbrook, who also believed dismissal was appropriate under the alternative ground provided by *Heck*.

Accordingly, the en banc court affirmed the district court's summary judgment in favor of the defendants on all claims.

Call for Clarification by Supreme Court. Primarily because of a serious divergence in the judges' views on the meaning and application of the fourth *Rooker-Feldman* element, Judge Hamilton's opinion announcing the decision of the court included a call for clarification by the Supreme Court:

> [A]ll members of the en banc court agree that our different understandings of the *Rooker-Feldman* doctrine may help show a need for the Supreme Court to clarify application of the doctrine, especially in the types of cases where the lower courts often confront it, including child-custody and mortgage-foreclosure cases.

COSTS

Taxable Items

Knowles v. Temple Univ.

109 F.4th 141, 2024 U.S. App. LEXIS 18476 (3d Cir. July 26, 2024)

The Third Circuit holds that 28 U.S.C. § 1920(1), which authorizes the taxing of costs for "[f]ees of the clerk and marshal," does not permit an award of the expenses of a private process server to the prevailing party under Rule 54(d)(1).

Background. Atina Knowles was enrolled in graduate school at Temple University. After she failed some tests that were essential to obtaining her degree, Temple removed her from the program. Knowles sued in state court, alleging that the termination violated procedural due process. Temple removed the case to federal district court, based on federal-question jurisdiction. The parties consented to trial before a magistrate judge. After discovery was conducted, summary judgment was entered in favor of Temple. The Third Circuit affirmed [Knowles v. Temple Univ., 2022 U.S. App. LEXIS 21255 (3d Cir. Aug. 2, 2022) (per curiam) (unpublished)].

Costs Proceeding. As the prevailing party under Federal Rule of Civil Procedure 54(d)(1), Temple filed a bill of costs, which Knowles moved to strike. Denying that motion, the magistrate judge ultimately awarded Temple $2,578.93 for the discovery proceedings, which included $625 for private process servers, $1,743.55 for transcripts, and $210.38 for copies. Knowles appealed the award.

Taxable Costs Are Limited by Statute. The Third Circuit began its analysis by noting that the term "costs" in Rule 54(d)(1) is a legal term of art that refers solely to those items that may be taxed as costs under 28 U.S.C. § 1920. A federal court has no authority to award expenses not specifically permitted by that statute [Crawford Fitting Co. v. J. T. Gibbons, Inc., 482 U.S. 437, 441–445, 107 S. Ct. 2494, 96 L. Ed. 2d 385 (1987)]. Accordingly, if any portion of the costs awarded to Temple by the magistrate judge was not authorized by any of the six enumerated items of § 1920, that portion of the award would be vacated. In this case, the only disputed items were (1) fees of the clerk and marshal, (2) fees for transcripts necessarily obtained for use in the case, and (4) fees for copies necessarily obtained for use in the case [28 U.S.C. § 1920(1), (2), (4)].

First Item: Fees of Clerk and Marshal. Section 1920(1) authorizes the taxing of costs for "[f]ees of the clerk and marshal." The clerk's fees are set by 28 U.S.C. § 1914, while the marshal's fees are set by 28 U.S.C. § 1921. The latter contains a lengthy list of fees that the marshal may charge that may later be taxed as costs, but most deal with service of process of various kinds, including "a subpoena or summons for a witness" [28 U.S.C. § 1921(a)(1)(B)]. The award to Temple included $625 for service of witness subpoenas, but service was actually made by a private process server, not the marshal. The Third Circuit therefore noted that the question for decision in this case was whether the marshal must serve the subpoena for the fee to be taxed as costs.

Meaning of Marshal. When §§ 1920 and 1921 were adopted, the term "marshal" had the accepted meaning of the public actor employed by the court to perform service of all process in a federal action. As the Third Circuit noted, other textual clues supported this construction. First, § 1920(1) uses the singular article to refer to "the" marshal, which suggests a single actor. Second, fees "of" the marshal means those belonging to, or incurred by, the marshal, not those of other parties. Third, by using the terms "marshal" and "clerk" together, Congress intended them to have the same construction. Because there are no services of the clerk that can be performed by a private actor, the same limitation should apply to services of the marshal. Finally, the court noted that § 1920 was amended in 1978 and 2008, both of which were well after the marshals were largely relieved of their obligation

to serve process by amendments to Civil Rule 4. Because Congress did not act to authorize taxing the costs of private process servers, the Third Circuit declined to adopt that reading of the statute.

Split of Authority. In a footnote, the Third Circuit acknowledged that its decision deepened a split of authority on this issue. The Seventh and Eleventh Circuits have held that service costs may be taxed regardless of who performs it, provided it does not exceed the statutory maximum fee for service by the marshal [EEOC v. W&O, Inc., 213 F.3d 600, 623 (11th Cir. 2000); Collins v. Gorman, 96 F.3d 1057, 1060 (7th Cir. 1996)]. And the Ninth Circuit has essentially held that the cost of service is always recoverable, no matter who performs it or for what cost [Alflex Corp. v. Underwriters Labs., Inc., 914 F.2d 175, 178 (9th Cir. 1990) (per curiam)]. By contrast, the Second Circuit has affirmed the denial of the costs of private process servers [United States ex rel. Evergreen Pipeline Constr. Co. v. Merritt Meridian Constr. Corp., 95 F.3d 153, 172 (2d Cir. 1996)]. For the reasons previously stated, the Third Circuit joined the Second Circuit.

Second and Fourth Items; Transcripts and Copies. Items (2) and (4) of § 1920 authorize the taxing of costs for transcripts and copies of materials "necessarily obtained for use in the case." In this case, Temple was awarded $1,743.55 for transcripts, and $210.38 for copies. In one remarkably brief paragraph, the Third Circuit affirmed this award, noting that the materials would have been used at trial had summary judgment not been granted, so the award was not an abuse of discretion.

Disposition: The Third Circuit reversed as to the costs for private process servers, but otherwise affirmed the balance of the award of costs.

RECUSAL OF JUDGE

Financial Interest of Spouse

Litovich v. Bank of Am. Corp.

106 F.4th 218, 2024 U.S. App. LEXIS 16128 (2d Cir. July 2, 2024) (per curiam)

The Second Circuit has vacated a judgment entered by a district judge who presided over the case while his spouse owned stock in one of the defendants, even though she had divested herself of the stock before the judge issued his decision to grant the defendants' dismissal motion.

Background. The plaintiffs in this case were bond investors who bought and sold certain types of corporate bonds from and to the defendants, who were investment bank dealers of those bonds. After the district court granted the defendants' Rule 12(b)(6) motion to dismiss, the plaintiffs appealed.

Several months after the district court's order, the parties learned that the district judge had presided over part of the case while his wife owned stock in one of the defendants, although she had divested herself of that stock before the judge issued his decision. On appeal, therefore, the plaintiffs contended that the district judge should have disqualified himself in light of his wife's prior financial interest. A panel of the Second Circuit agreed and vacated the district court's judgment.

Statutory Disqualification Requirement. The Second Circuit began with a review of the relevant statutory disqualification provisions. Under 28 U.S.C. § 455(a), a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." A judge need not have actual knowledge of the disqualifying circumstance for § 455(a) to apply. That is because the purpose of § 455(a) is to promote public confidence in the integrity of the judicial process, which does not depend upon whether or not the judge actually knew of facts creating an appearance of impropriety, so long as the public might reasonably believe that he or she knew [see Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 859–860, 108 S. Ct. 2194, 100 L. Ed. 2d 855 (1988)]. Thus, the test for whether an appearance of partiality exists "is an objective one based on what a reasonable person knowing all the facts would conclude" [Chase Manhattan Bank v. Affiliated FM Ins. Co., 343 F.3d 120, 127 (2d Cir. 2003)].

Section 455(b)(4) provides that one of the circumstances requiring disqualification is when a judge "knows that . . . his spouse . . . has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding" [28 U.S.C. § 455(b)(4)]. Section 455(c) imposes the additional duty that a federal judge "should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse" [28 U.S.C. § 455(c)]. As relevant to the present case, § 455(d)(4) defines "financial interest" as an "ownership of a legal or equitable interest, however small" [28 U.S.C. § 455(d)(4)].

The court of appeals acknowledged that unlike § 455(a), which covers even the appearance of partiality, § 455(b)(4)'s requirement of disqualification applies only when the judge actually knows about the disqualifying circumstance [see Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 859, 108 S. Ct. 2194, 100 L. Ed. 2d 855 (1988)]. Even then, however, the existence of a financial interest on the part of a judge's spouse is not always grounds for automatic disqualification, as a judge may avoid disqualification if he or she discloses and divests the financial interest [see Chase Manhattan Bank v. Affiliated FM Ins. Co., 343 F.3d 120, 127 (2d Cir. 2003)]. Specifically, § 455(f) provides, in relevant part, as follows:

> [I]f any . . . judge . . . to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that . . . his or her spouse . . . has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the . . . spouse . . . divests himself or herself of the interest that provides the grounds for the disqualification.

District Judge Should Have Disqualified Himself. The Second Circuit agreed with the plaintiffs that the district judge should have recused himself under § 455(a), because his impartiality could reasonably be questioned in light of his wife's financial interest.

The court focused on § 455(a), rather than § 455(b)(4), because the record was not clear on precisely when the district judge learned of the conflict created by his wife's financial interest in one of the defendants. For purposes of its analysis, the court assumed that the judge had no knowledge of the conflict until it was reported in the press, which was after the judge issued his decision granting the motion to dismiss. In the absence of actual knowledge by the district judge of a conflict-creating spousal financial interest, § 455(b)(4) does not mandate recusal.

But even if the facts do not suffice for recusal under § 455(b), those same facts may be examined as part of an inquiry into whether recusal is mandated under § 455(a) [see In re Certain Underwriter, 294 F.3d 297, 306 (2d Cir. 2002)]. The Second Circuit noted that the record in this case indicated that the judge presided over this matter during the time that his spouse held an ownership interest in a party to the litigation. This conflict-creating ownership and financial interest existed until some time after the briefing on the motion to dismiss was fully submitted. Looking at these facts from the perspective of an objective, disinterested observer, the court of appeals concluded that it is reasonable to question the partiality of a judge presiding over a case in which the judge's spouse holds an ownership interest in a party. The court therefore held that the district judge violated § 455(a).

Vacatur Was Required. The Second Circuit then turned to the appropriate remedy for the district judge's failure to disqualify himself. The court explained that in determining how best to address a violation of § 455(a), it considers three factors: (1) the risk of injustice to the parties in the particular case, (2) the risk that the denial of relief will produce injustice in other cases, and (3) the risk of undermining the public's confidence in the judicial process [see United States v. Amico, 486 F.3d 764, 777 (2d Cir. 2007)]. The court found that this case implicated all of these factors, and it concluded that vacatur of the district court's judgment was warranted.

Regarding the first factor (the risk of injustice to the parties in this case), the court of appeals found a plausible risk of injustice to the plaintiffs, because it was conceivable, albeit highly unlikely, that the district judge's conflict of interest impacted the outcome of the case. The court emphasized that it was not questioning the district judge's reasoned judgment or suggesting that he treated the parties unfairly. But "the focus of § 455(a) is on avoiding the appearance of partiality, even absent an explicit showing of it." Because the district judge's impartiality could reasonably be questioned based on this appearance, the appellate court found that the first factor weighed in favor of vacating the district court's judgment.

Turning to the second factor (the risk that the denial of relief will produce injustice in other cases), the court of appeals found that the type of conflict of interest presented in this case did risk injustice in other cases. That injustice, as highlighted by the press coverage of this and other cases regarding disqualification, would consist of federal judges failing to recuse themselves in future cases, which might increase the likelihood of conflicts

going unnoticed and unremedied. The court of appeals emphasized that judges have an obligation to exercise reasonable effort to avoid cases in which they are disqualified, and they accordingly bear the burden of complying with the strictures of § 455(a) [see Chase Manhattan Bank v. Affiliated FM Ins. Co., 343 F.3d 120, 130 (2d Cir. 2003)].

The court of appeals also found that the third factor (the risk of undermining public confidence in the judicial process) weighed in favor of vacatur. The court noted that there had been media coverage of this § 455 violation, as well as others, and the court pointed out that the risk of losing public trust "is an issue the federal judiciary knows it needs to remedy" [see Hon. John G. Roberts, Jr., 2021 Year-End Report on the Federal Judiciary, at 3 (Dec. 31, 2021), https://www.supremecourt.gov/publicinfo/year-end/2021year-endreport.pdf ("We are duty-bound to strive for 100% compliance [with 28 U.S.C. § 455] because public trust is essential, not incidental, to our function.")]. The court of appeals acknowledged that an appearance of partiality must have an objective basis beyond the fact that claims of partiality have been publicized. However, it agreed that recurrent controversies legitimately risk undermining public confidence in the federal judiciary and its function of fairly adjudicating the law. Because it found that the conflict in the present case presented an appearance of impropriety, the Second Circuit concluded that vacating the judgment would be the best means of dispelling any potential loss of faith in the judiciary.

Divestiture Before Judge's Ruling Did Not Change Result. The Second Circuit went on to find that although the district judge's wife divested herself of the stock approximately two months before oral argument on the motion to dismiss, and three months before the judge granted the motion, vacatur was still warranted. The court explained that although divestiture under § 455(f) can cure a conflict of interest [see Kidder, Peabody & Co. v. Maxus Energy Corp., 925 F.2d 556, 561 (2d Cir. 1991)], that is possible only when the conflicted judge's rulings have been limited to technical matters such as routine scheduling orders. That was not the case here. Although divestiture occurred three months before the district judge's decision, the parties had already filed their motions, and the case was well past the "technical" stage. "Permitting curative § 455(f) divestiture once a litigation has advanced to substantive disputes may implicate the risks to the present parties, other proceedings, and public confidence already discussed, and is a determination that must be analyzed on a case-by-case basis."

The Second Circuit concluded that due to the length of time that the district judge presided over this case with a conflict—albeit almost certainly unknowingly—and the substantive motions that came before him in that period, his wife's divestiture of stock in a defendant corporation was not sufficiently curative.

Disposition. Because recusal under § 455(a) was required, the Second Circuit vacated the district court's judgment of dismissal and remanded the case to the district court for further proceedings under the district judge to whom the case had been reassigned after the conflict was discovered.