Litigation Insights

OCTOBER 2024

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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.

DEFAULT JUDGMENT

Inconsistent Judgments

Henry v. Oluwole

108 F.4th 45, 2024 U.S. App. LEXIS 17218 (2d Cir. July 15, 2024)

A divided Second Circuit panel has held that an action decided in favor of an answering defendant should likewise have been dismissed against a defaulting defendant, so as to avoid inconsistent judgments.

JUMP TO SUMMARY

FEDERAL QUESTION JURISDICTION

Application to Vacate Arbitration Award

Friedler v. Stifel

108 F.4th 241, 2024 U.S. App. LEXIS 17677 (4th Cir. July 18, 2024)

The Fourth Circuit finds no jurisdiction to vacate an arbitration award based on a claim that the arbitrators disregarded federal law.

JUMP TO SUMMARY

JURY SELECTION

***Batson* Challenges**

Carter v. City of Wauwatosa

2024 U.S. App. LEXIS 20513 (7th Cir. Aug. 14, 2024)

The Seventh Circuit holds that the three steps of the Batson analysis for discriminatory peremptory challenges are analytically distinct, and a district court must follow the three steps in sequence and develop a comprehensive record as to each step.

JUMP TO SUMMARY

What's New in Practical Guidance

By Mandi Cummings

Practical guidance allows you to accomplish tasks efficiently and effectively with exclusive practice resources and tools. Practical guidance allows you to develop critical legal know how to complete the most complex tasks, including outside your area of expertise, with access to tried-and-true materials from leaders with deep expertise in your issue.

Did you know the Practical Guidance team is constantly adding new content to ensure that our users are as up to date as possible. Below are a few pieces that have recently been added:

****Each header is a hyperlink that will take you directly to the Practical Guidance resource.*

Chevron Reversal Impact Resource Kit

This new resource addresses the Supreme Court's recent decision to overturn Chevron deference. This consolidated coverage resource includes guidance across 12 practice areas and is being updated regularly as new content is added in Practical Guidance. This resoucr kit provides an overview of practical guidance related to the Supreme Court's recent decision overturning the Chevron Doctrine, a 1984 decision that resulted in four decades of judicial deference to federal agencies' interpretations of the law when statues were broad or ambiguous. In what may be one of the most consequential decisions in administrative law, the U.S. Supreme Court decided two cases that determine the constitutionality of what had been a long-standing interpretation of federal agencies' ability to interpret law and issue regulatory guidance.

Loper Bright Upends Judicial Deference: Implications for the IRS, Treasury, and Taxpayers

On June 28, 2024, the U.S. Supreme Court decided Loper Bright Enterprises v. Raimondo and Relentless, Inc. v. Department of Commerce, which ended the era of judicial deference to agencies' interpretations of federal law, as expressed in formal rules and regulations. The decision will have far-reaching impacts on all federal agencies, including the US Department of the Treasury and Internal Revenue Service, as well as for taxpayers.

In Loper Bright and Relentless, [1] the Court expressly overruled Chevron U.S.A. v. National Resources Defense Council, Inc., [2] which had required federal courts to defer to reasonable regulatory interpretations of ambiguous statutory provisions. Going forward, courts addressing challenges to agency interpretations ''must exercise their independent judgment in deciding whether an agency has acted within its statutory authority'' and ''may not defer'' to the agency's interpretation, regardless of any ambiguities or gaps in the statutory provision being interpreted. [3]

This Practical Guidance piece covers the following topics to help taxpayers evaluate how Loper Bright will affect them and what steps they can take to protect potential claims and positively influence the development of future rules:

- Prior standards for judicial review of tax regulations
- The impact of Loper Bright on the review of tax regulations
- Opportunities and next steps for taxpayers
- How to stay informed

Go Fish! U.S. Supreme Court Overturns 'Chevron Deference' to Federal Agencies: What It Means for Employers

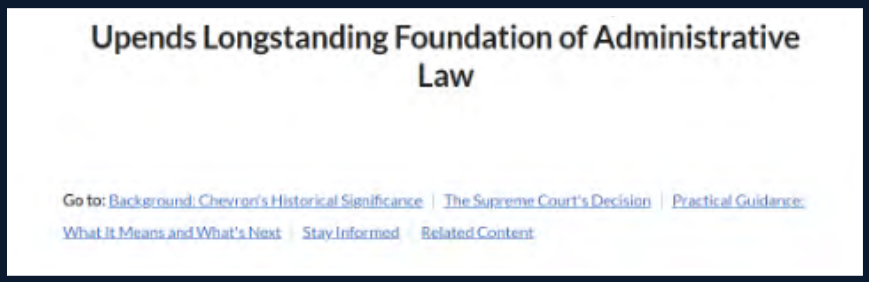

Go Fish! U.S. Supreme Court Overturns 'Chevron Deference' to Federal Agencies: What It Means for Employers

Go to: Chevron Doctrine | Chevron's Impact on Workplace Law | The Court's Decision | What Does This Mean for Employers? | Jackson Lewis Guidance | Related Content

The U.S. Supreme Court has overturned the decades-old Chevron doctrine of judicial deference to a federal agency's interpretation of an ambiguous statute. Loper Bright Enters. v. Raimondo, No. 22-451, and Relentless, Inc. v. Department of Commerce, No. 22-1219 (June 28, 2024). The Court's decision came in response to a pair of cases brought by two fishing vessel operators challenging federal regulations on fishery management in federal waters.

Although the underlying cases were not workplace-related, the decision may significantly affect employers because of the many regulations issued by federal agencies such as the Equal Employment Opportunity Commission (EEOC), Department of Labor (DOL), Occupational Safety and Health Administration (OSHA), and National Labor Relations Board (NLRB) that affect the workplace every day.

Chevron Doctrine Overruled: U.S. Supreme Court Upends Longstanding Foundation of Administrative Law



The U.S. Supreme Court on June 28 decided Loper Bright Enterprises v. Raimondo and Relentless v. Department of Commerce, overruling the Chevron doctrine that for four decades has required federal courts to defer to administrative agencies' interpretations of ambiguous or broad statutes. The doctrine was a foundation of administrative law and afforded successive US presidential administrations flexibility to interpret statutes via agency adjudications and rulemaking. The Court's decision will have substantial impact on both regulated industries and agencies.

With the Loper Bright and Relentess decision, courts must now interpret federal statutes without deference to agency interpretations and instead based on standard statutory interpretation tools, including plain language and congressional intent, as they do in all other cases involving federal statutes.

Shepard's® Embedded Signals Now in Cases & Statutes

By Marisa Beirne

Lexis+ now provides a toggle that streamlines legal research by displaying the *Shepard's* signal for cited cases directly within your document. Previously, this feature has been available when *Shepardizing* statutes so that end users can drill down to the treatment of the specific subsection he/she is citing. Now, the toggle has been added to caselaw and allows users to quickly assess the subsequent treatment and validity of cases they are interested in, without having to navigate away from the document. This enhancement seamlessly integrates into your workflow and allows you to quickly Shepardize the exact portion of the case you are citing. This new feature is titled "Signals on Case Features" and can be found on the right-hand side of the case under the blue "Shepardize document" button.

When activated, the *Shepard's* signal for each cited case will be prominently displayed in the text of the full document and will stay persistent for the session for both cases and statutes. End users can turn on the *Shepard's* Enhancement by moving the toggle to the right, so that you will see the *Shepard's* signal in the document. If the end user clicks on one of the embedded signals it will open the full *Shepard's* report for you in another tab for that case or statute.

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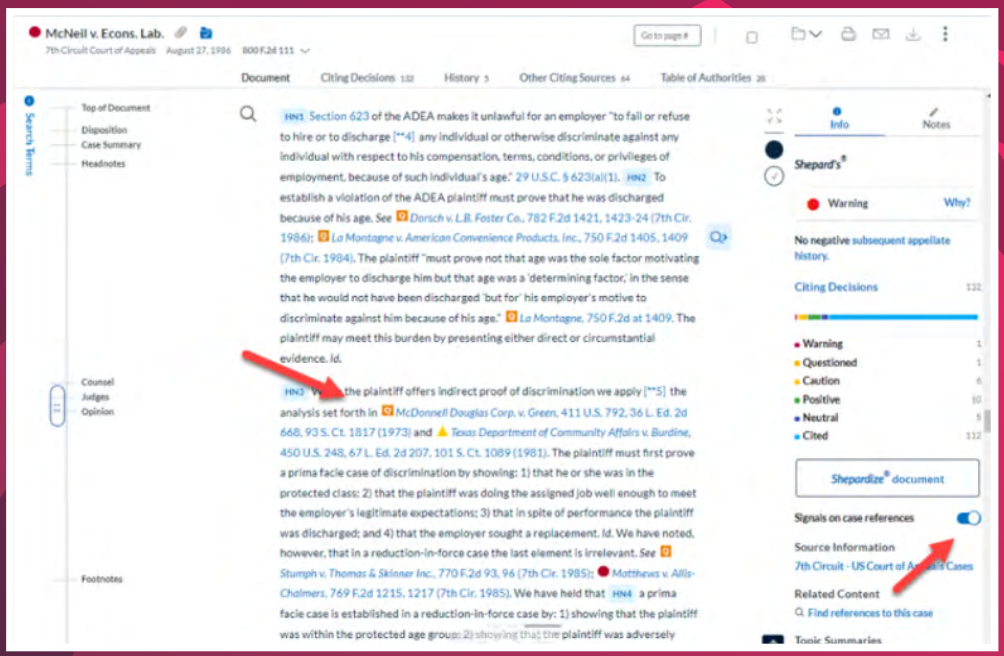

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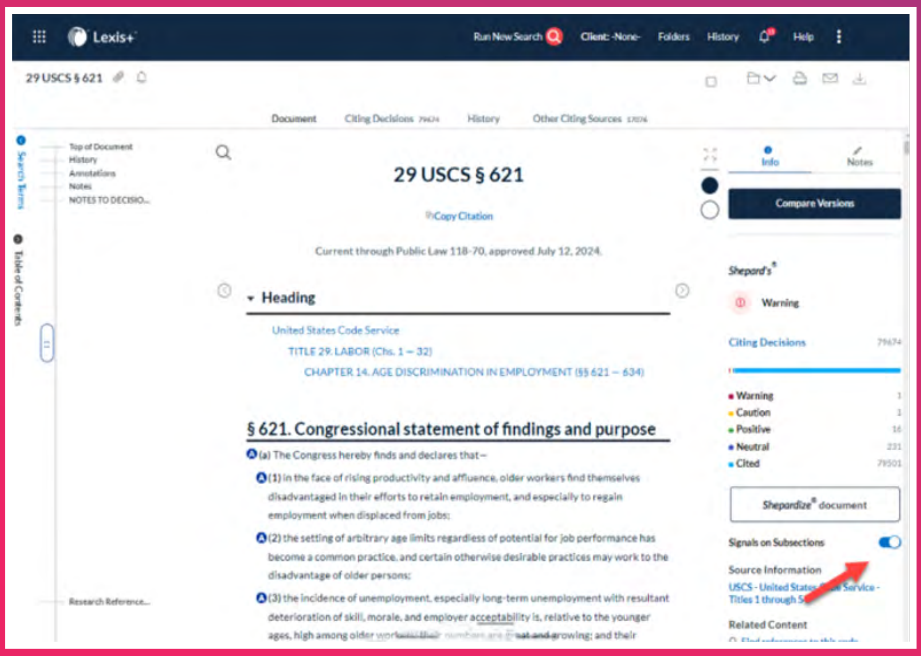

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Alert: Appellate Court Rejects Argument That Seven Month Delay in Seeking Injunction Undercut Claim of Irreparable Injury

Several courts have held that an unreasonable delay in seeking a preliminary injunction may undercut the movant's required showing of irreparable injury. In a patent infringement case, however, the Federal Circuit Court rejected the argument that a seven month delay in asserting a claim of patent infringement was grounds to deny a preliminary injunction.

Seven months after it was granted a patent related to products used for early detection of cancer research, Plaintiff brought this suit against its competitor. The Defendant argued that the claim of infringement arose, if at all, once the patent was granted and the seven month delay in filing suit suggested the Plaintiff was not likely to suffer irreparable injury absent an injunction.

The District Court rejected this argument, giving credence to the Plaintiffs' explanation for the delay, namely that it was litigating over related patents during the seven month period and timely brought suit here just four days after Defendant received Medicare approval of its competing product and within four months of the competing product becoming commercially available. The appellate court agreed. Natera, Inc. v. NeoGenomics Lab'ys, Inc., 106 F.4th 1369. (Fed. Cir. 2024).

Fed Civ Proc Before Trial: The Wagstaffe Group § 31-XIII[A][4][e]—31-180—Compare—Delay in Asserting Irreparable Harm

DEFAULT JUDGMENT

Inconsistent Judgments

Henry v. Oluwole

108 F.4th 45, 2024 U.S. App. LEXIS 17218 (2d Cir. July 15, 2024)

A divided Second Circuit panel has held that an action decided in favor of an answering defendant should likewise have been dismissed against a defaulting defendant, so as to avoid inconsistent judgments.

Background. In 2011, both Laura Henry and Dr. Olakunle Oluwole were employees of Bristol Hospital in Connecticut. On June 11, 2011, Henry and Oluwole had sexual relations in Oluwole's office at the hospital. Henry claimed that the encounter was not consensual; two years later, in 2013, Henry filed an action in federal court against Oluwole and the hospital. Henry's complaint asserted 11 claims against Oluwole and the hospital: six claims of battery and one claim each of assault, false imprisonment, intentional infliction of emotional distress, negligent infliction of emotional distress, and negligence.

Oluwole failed to appear in the action, and Henry moved for an entry of default, which the clerk of court entered on February 12, 2015. In March, Henry moved for a default judgment, which the district court entered—except as to damages— on September 22, 2015. The order was not considered a final entry of judgment because the court postponed the damages inquest pending the resolution of Henry's claims against the hospital. Meanwhile, the parties continued to litigate Henry's claims against the hospital.

In 2018, five years into the case, four years after being served, and three years after entry of the default judgment against him, Oluwole's counsel entered a notice of appearance and moved to set aside the default judgment. The motion, which was not supported by an affidavit or other solemn declaration, cited a 2013 motorcycle accident that allegedly occurred shortly after Henry filed her suit. The motion alleged that the accident caused Oluwole to suffer traumatic brain injury and prevented him from receiving timely notice of the action. But the motion was denied—despite a finding that Oluwole was likely to mount a meritorious defense based on his assertion that the sexual encounter with Henry was consensual—because the court found that Oluwole's default was willful. The court based its finding on Henry's production of evidence showing that Oluwole had been aware of her lawsuit since at least November 2015, when Oluwole sent Henry a Facebook message about the accident and his inability to face her in court.

Henry's case against the hospital proceeded to trial, commencing on October 21, 2019, and lasting for five days. During the trial, the jury heard from Henry and Oluwole, who testified that he and Henry had consensual sex on the date in question. The jury returned a verdict absolving the hospital of any liability after it found that Henry had not proven by a preponderance of the evidence that Dr. Oluwole engaged in tortious conduct toward her by sexually assaulting her or by assaulting or battering her.

The district court denied Oluwole's second motion to set aside the default judgment. It cited the principle underpinning the Supreme Court's 1872 decision in *Frow v. De La Vega*, which found default judgments that create "incongruity" with judgments on the merits "unseemly and absurd, as well as unauthorized by law" [Frow v. De La Vega, 82 U.S. 552, 554, 15 Wall. 552, 21 L. Ed. 60 (1872)]. The court then proceeded to conduct a damages hearing against Oluwole and partly reversed itself on the *Frow* question, explaining that if the hospital was not liable to Henry because the jury found there was no sexual assault, assault, or battery, then Oluwole also could not be liable to Henry for assault and battery, which were premised on the occurrence of a sexual assault [see Frow v. De La Vega, 82 U.S. 552, 554, 15 Wall. 552, 21 L. Ed. 60 (1872)].

Specifically, the district court found that if it allowed the assault and battery claims to stand against Oluwole, this would result in the entry of "logically inconsistent judgments" in contravention of *Frow*. However, the court let stand the default judgment against Oluwole on the false imprisonment, intentional and negligent infliction of emotional distress, and negligence claims, because the court did not find those counts inconsistent with the jury's verdict. The court explained that although the intentional and negligent infliction of emotional distress claims "rest in part upon the allegations of sexual assault," they also relied upon allegations of false imprisonment.

After another hearing on damages, the district court ordered Oluwole to pay Henry $100,000 in damages and entered final judgment. Oluwole appealed, arguing that the district court erred both times it denied his motions to set aside the default judgment. The Second Circuit agreed.

Like the district court, the Second Circuit evaluated Oluwole's motion under the standard to set aside a default, as opposed to a final default judgment, because the original order of default postponed entry of final judgment pending the damages inquest. Thus, the appellate court noted a "circumscribed" deferential standard of review, citing a "smaller 'range of permissible decisions' available to the district court when a final judgment has not yet been entered."

Relevant Factors. In deciding whether to relieve a party from a default or default judgment, the district court must consider three factors: (1) whether the default was willful, (2) whether setting aside the default would prejudice the adversary, and (3) whether a meritorious defense is presented [see Enron Oil Corp. v. Diakuhara, 10 F.3d 90, 96 (2d Cir. 1993)]. The Second Circuit concluded that the district court erred in failing to set aside the default judgment because the second and third factors—prejudice and a meritorious defense—"strongly favored lifting the default judgment even if the first factor—willfulness—weighed in the other direction."

Delay Alone Is Not Sufficient to Establish Prejudice. The Second Circuit was unpersuaded that setting aside the default judgment would prejudice Henry, and it rejected the district court's conclusion that after six years, Henry had litigated long enough and setting aside the judgment would delay the proceedings even further. Rather, the Second Circuit found that "it must be shown that delay will result in the loss of evidence, create increased difficulties of discovery, or provide greater opportunity for fraud and collusion," none of which the district court found or could be suggested in the record.

The Second Circuit also found that the district court correctly found that Oluwole asserted a potentially meritorious defense with his contention that the sexual encounter with Henry was consensual. Thus, finding that two of the three factors weighed strongly in Oluwole's favor and that any doubt whether the default should have been granted or vacated should be resolved in the defaulting party's favor, the appellate court concluded the district court erred in not granting Oluwole's first motion to set aside the default judgment.

The Second Circuit next addressed Oluwole's second motion to set aside the default judgment, which he made after the jury verdict and which the district court denied with respect to Henry's claims for false imprisonment, intentional and negligent infliction of emotional distress, and negligence claims. Citing *Frow*, the Second Circuit found that vacatur of the entire default judgment was required because all of Henry's claims against Oluwole were inconsistent with the jury's verdict in favor of the hospital.

Default Judgment May Be Judgment on Merits. The Second Circuit reviewed the Supreme Court's longstanding *Frow* principle prohibiting inconsistent judgments and noted numerous recent sister-circuit precedents

reaffirming and applying that principle. In *Frow*, the Supreme Court held that "if the suit should be decided against the complainant on the merits, the bill will be dismissed as to all the defendants alike—the defaulter as well as the others" [v v. De La Vega, 82 U.S. 552, 554, 15 Wall. 552, 21 L. Ed. 60 (1872)]. Recent circuit decisions have explained that Frow controls in situations where the liability of one defendant necessarily depends on the liability of others, and that if an action against the answering defendants is decided in their favor, then the action should be dismissed against both answering and defaulting defendants [see Escalante v. Lidge, 34 F.4th 486, 495 (5th Cir. 2022); Arwa Chiropractic, P.C. v. Med-Care Diabetic & Med. Supplies, Inc., 961 F.3d 942, 950–951 (7th Cir. 2020); Nielson v. Chang (In re First T.D. & Inv., Inc.), 253 F.3d 520, 532 (9th Cir. 2001)].

No Default Judgment Unless Complaint States Facially Valid Claim. The court also recognized "the ancient common law axiom that a default is an admission of all well-pleaded allegations against the defaulting party" (except those relating to the amount of damages), which in turn also means that a defaulting party does not admit conclusions of law. Consequently, the standard for granting a default judgment is like that applicable to a motion to dismiss. And when deciding whether to grant a default judgment, a district court must determine whether—after taking all well-pleaded allegations as true and making reasonable inferences in the plaintiff's favor—the plaintiff's allegations establish liability as a matter of law.

Thus, the court found that the appeal implicated two basic questions: (1) whether the complaint justified entry of default, and (2) whether compliance with Frow required the court to disregard the allegations in the complaint that conflicted with the jury verdict. To that end, the court concluded that because the jury determined that Henry had not proved that Oluwole committed sexual assault, an assault, or a battery, it would not credit Henry's allegations that Oluwole did, leaving the question whether the remaining well-pleaded allegations—taken as true, with reasonable inferences in Henry's favor—sufficed to establish liability as a matter of law.

The Second Circuit found that the district court correctly applied this analytical framework when it vacated the default judgment with respect to the six battery claims and one assault claim, but not with respect to the four remaining claims of false imprisonment, intentional and negligent infliction of emotional distress, and negligence. However, the operative complaint also based those four remaining claims on allegations of a sexual assault; disregarding the allegations in Henry's complaint of a sexual assault, an assault, or a battery, the complaint therefore failed to state a claim as to any of the remaining claims as well.

After disregarding the allegations in the complaint that were inconsistent with the jury's verdict, the court reviewed the remaining factual allegations vis-à-vis the claims for false imprisonment, intentional and negligent infliction of emotional distress, and negligence and concluded as a matter of law that they were insufficient to state these claims because for each, one or more essential elements were unmet. As a result, the court concluded that the default judgment against Oluwole on these claims had to be set aside.

Holding. The district court erred twice in denying Oluwole's motions to set aside the default judgment on Henry's claims. The district court's judgment was reversed, and the matter was remanded with instructions to enter judgment in favor of Oluwole.

Dissent. Citing **Moore's**, the dissent disagreed with the majority's "disregard for the record as to the willfulness of Oluwole's default" and failure to find that "Henry had been prejudiced by Oluwole's delays" and its ruling that Henry's complaint failed to state a cause of action for false imprisonment and intentional infliction of emotional distress. The dissent, while noting that assessing the complaint's sufficiency after a jury verdict required a

modification of the usual requirement to take all of its well-pleaded nonconclusory allegations of fact as true, did not specifically disagree in theory with the majority's reliance on the Frow principle, but rather with the way it was applied. The dissent criticized the majority for failing to consider all of Henry's well-pleaded allegations that did not conflict with the jury's verdict, contending that the jury's finding Henry did not prove that Oluwole more likely than not subjected Henry to assault or battery did not require the court "simply to ignore every sentence in the complaint that mentions a physical or threatening touch." The dissent opined that the majority incorrectly concluded that the district abused its discretion when it declined to vacate Oluwole's default with respect to the torts of false imprisonment and intentional infliction of emotional distress.

FEDERAL QUESTION JURISDICTION

Application to Vacate Arbitration Award

Friedler v. Stifel

108 F.4th 241, 2024 U.S. App. LEXIS 17677 (4th Cir. July 18, 2024)

The Fourth Circuit finds no jurisdiction to vacate an arbitration award based on a claim that the arbitrators disregarded federal law.

Summary. The Fourth Circuit concluded that an application to vacate an arbitration award that was allegedly rendered in manifest disregard of federal law does not present a federal question [see Friedler v. Stifel, 108 F.4th 241, 2024 U.S. App. LEXIS 17677 (4th Cir. July 18, 2024)].

Background. The petitioners opened brokerage accounts with the defendant brokerage firm in 2010. They were ultimately unhappy with the account manager's performance and filed a claim against the manager and the firm for arbitration with the Financial Industry Regulatory Authority (FINRA). The petitioners sought damages for the alleged mismanagement of their accounts, claiming negligence, breach of contract, breach of fiduciary duty, negligent supervision, and violations of state and federal securities laws.

At more than twenty hearing sessions, the arbitration panel heard evidence and arguments from the parties, and issued a two-sentence award for the defendants at the end of the proceedings. The panel did not provide a detailed written explanation for the award, as the parties did not jointly request an explained decision despite FINRA rules allowing for one.

The petitioners then moved to vacate the arbitration award in federal court on the ground that the panel manifestly disregarded the law, including federal securities law. The petition asserted that the district court had federal question jurisdiction under 28 U.S.C. § 1331 based on the Federal Arbitration Act (FAA) and the Securities Exchange Act (SEC Act), and supplemental jurisdiction over the state-law claims.

At the time the petition was filed, Fourth Circuit precedent held that federal courts had jurisdiction to review motions to vacate arbitration awards if they would have had jurisdiction over the underlying disputes (commonly known as the "look-through" approach). However, three days after the petitioners moved to vacate the award, the Supreme Court issued its decision in Badgerow v. Walters. In that case, the Court held that the "look-through" approach applied only to petitions to compel arbitration under section 4 of the FAA [9 U.S.C. § 4], but not to motions to confirm or vacate arbitration awards under sections 9 and 10 [9 U.S.C. §§ 9, 10]. Therefore, a petition to vacate an arbitration award in federal court must identify a grant of federal jurisdiction apart from section 10 itself [see Badgerow v. Walters, 596 U.S. 1, 5, 11, 142 S. Ct. 1310, 212 L. Ed. 2d 355 (2022)].

Without addressing jurisdiction, the district court denied the petitioners' motion to vacate the award. It held that the petitioners "did not come close" to establishing that the panel manifestly disregarded the law. It noted that nothing in the panel's "cursory decision" suggested any intentional disregard of applicable legal standards, and explained that the petition itself "illustrated the myriad factual and legal disputes, including the standards for determining suitability of an investment, the nature of the fiduciary duties owed, and the proper method of calculating damages."

The petitioners appealed the order denying the motion to vacate, and the Fourth Circuit ordered supplemental briefing in light of Badgerow. The petitioners and the defendants both insisted that the Fourth Circuit had

jurisdiction to consider the petition on the ground that the petition asserted that the panel manifestly disregarded federal securities law.

Contention That Award Was Rendered in Manifest Disregard of Federal Law Did Not Present Federal Question. The Fourth Circuit began (and ultimately ended) with the question whether subject-matter jurisdiction existed.

The court first noted that enforcement of the FAA is left in large part to the state courts, because the FAA does not create any independent federal question jurisdiction, even though it creates a body of federal substantive law (an "anomaly in the field of federal-court jurisdiction"). As noted in Badgerow, petitions to compel arbitration under Section 4 of the FAA allow a federal court to look through the petition to see whether it would have jurisdiction over the underlying dispute [citing Vaden v. Discover Bank, 556 U.S. 49, 62, 129 S. Ct. 1262, 173 L. Ed. 2d 207 (2009)]. But petitions to vacate arbitration awards require a federal court to look to the "face of the application" for an independent jurisdictional basis beyond the FAA itself.

The Fourth Circuit rejected the parties' assertion that the face of the petition, which claimed that the arbitration panel manifestly disregarded federal securities laws, gave the district court federal question jurisdiction over the dispute. The court emphasized that "[a] petition to vacate an arbitration award doesn't raise the merits of the underlying claim, but rather the enforceability of an arbitral award, which is no more than a contractual resolution of the parties' dispute" (internal quotation marks omitted).

The Fourth Circuit noted that judicial review of arbitration awards is "among the narrowest known at law," and that giving full scrutiny of arbitration awards would go against the purpose of having arbitration at all, which is designed to permit expedited resolution of disputes in order to avoid the expense of litigation.

The court emphasized that parties who agree to arbitrate "assume the risk that the arbitrator may interpret the law in a way with which they disagree." A court deciding whether to vacate an arbitration award based on manifest disregard of the law should focus only on "whether the arbitrator did his job—not whether he did it well, correctly, or reasonably, but simply whether he did it" (internal quotation marks omitted).

The Fourth Circuit concluded that its duty here required analyzing the law "in only the most cursory sense. We simply ask whether there is binding precedent requiring a contrary result, that the arbitrator was aware of, understood correctly, found applicable to the case, and yet chose to ignore."

The court noted that the Second Circuit came to a contrary conclusion, that a petition complaining in good faith that a panel's award was rendered in manifest disregard of federal law immerses the federal court in questions of federal law and therefore gives the district court federal question jurisdiction [see Doscher v. Sea Port Grp. Sec., LLC, 832 F.3d 372, 375 (2d Cir. 2016)]. But the Fourth Circuit found that that case relied on analysis that predated Badgerow [see Greenberg v. Bear, Sterns & Co., 220 F.3d 22, 27 (2d Cir. 2000)]. Moreover, the analysis predated Supreme Court precedent that addressed when a complaint that does not arise under federal law nevertheless raises a "substantial federal question" [see Gunn v. Minton, 568 U.S. 251, 133 S. Ct. 1059, 185 L. Ed. 2d 72 (2013); Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 125 S. Ct. 2363, 162 L. Ed. 2d 257 (2005)].

The Fourth Circuit reiterated that under Grable and Gunn, whether a federal issue is substantial depends on the importance of the issue to the federal system as a whole, which is a high bar that generally involves a "pure issue

of law, rather than being fact-bound and situation-specific." This applies "even where, as here, the federal issue would otherwise be within the exclusive jurisdiction of federal courts."

The court reasoned that given the fact-intensive nature of the dispute, involving over 20 hearings, and the "superficial review of federal law" involved in the manifest-disregard analysis, it was confident that any federal issue posed by the petition would not be found to be substantial.

The Fourth Circuit noted, however, that there may be federal statutes beyond the FAA itself that would support federal jurisdiction and entitle an applicant petitioning to vacate an arbitration award to relief. For example, the Sixth Circuit has held that the Labor Management Relations Act (LMRA) is such a statute [see Greenhouse Holdings, LLC v. Int'l Union of Painters and Allied Trades Dist. Council 91, 43 F.4th 628, 631 (6th Cir. 2022) (LMRA confers jurisdiction over suits for violation of contracts between employer and labor organization)].

But the Fourth Circuit did not find any such grant of jurisdiction in the SEC Act. Although the Act grants federal courts exclusive jurisdiction over violations of the Act and all suits brought to enforce any liability or duty created by the Act, "it doesn't authorize vacatur of an award that the parties agreed to have settled by an arbitrator." Thus, the court found that even if the petition alleged that the defendants violated the Act, the Act itself would not entitle the petitioners to vacatur of the arbitration award.

The Fourth Circuit also rejected an argument that the manifest-disregard claim was a creature of federal common law that itself gave rise to federal question jurisdiction. Although earlier cases had described, in dicta, manifest disregard to be a common-law ground for vacatur separate and distinct from the FAA's statutory grounds, the court emphasized that the Supreme Court, in Hall Street Assocs., LLC v. Mattel, Inc., cast doubt on that view by holding that grounds for vacatur in the FAA are exclusive and cannot be expanded by contract [see Hall Street Assocs., LLC v. Mattel, Inc., 552 U.S. 576, 584, 128 S. Ct. 1396, 170 L. Ed. 2d 254 (2008)]. In Hall Street, the Supreme Court observed that "maybe the term 'manifest disregard' was meant to name a new ground for review, but maybe it merely referred to the FAA grounds collectively, rather than adding to them," or it may have been "shorthand" for the FAA grounds authorizing vacatur when the arbitrators were guilty of misconduct or exceeded their powers.

The Fourth Circuit noted, however, that the Supreme Court later declined to decide whether claims of manifest disregard survived Hall Street as an independent ground for review, or whether such claims were merely a judicial gloss on the enumerated grounds set out in the FAA [see Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp., 559 U.S. 662, 672 n.3, 130 S. Ct. 1758, 176 L. Ed. 2d 605 (2010)]. The court noted that courts of appeals have subsequently been split on the continuing validity of claims of manifest disregard as a basis for vacatur.

The Fourth Circuit had not previously weighed in, and in this case it concluded that "manifest disregard is best understood as a 'judicial gloss' on the FAA's statutory grounds for vacatur," which is supported by most circuits that continue to recognize such claims. The court stressed that "no circuit since Hall Street has held that manifest disregard claims are independent of the FAA."

The court opined that Badgerow bolsters its view that manifest disregard is not a jurisdictional gateway for vacatur. If parties on the losing end of an arbitration award could "merely claim that the panel manifestly disregarded the law as their ticket into federal court, federal jurisdiction over petitions to vacate would be even broader than under the 'look-through' approach that Badgerow rejected."

- **Disposition.** The Fourth Circuit vacated the district court's judgment and remanded to the district court with instructions to dismiss the petition for lack of jurisdiction.

- **Concurring Opinion.** Circuit Judge Wilkinson concurred, agreeing with the majority that manifest disregard of federal law is a "flawed yardstick" for determining federal jurisdiction in the wake of Badgerow. But he stressed that the lack of guidance as to what qualifies as an "independent jurisdictional basis" under § 1331 engenders a great concern "that the litigious nature of the legal profession will come incrementally to shrink the difference between arbitration and full-blown litigation."

JURY SELECTION

Batson Challenges

Carter v. City of Wauwatosa

2024 U.S. App. LEXIS 20513 (7th Cir. Aug. 14, 2024)

The Seventh Circuit holds that the three steps of the Batson analysis for discriminatory peremptory challenges are analytically distinct, and a district court must follow the three steps in sequence and develop a comprehensive record as to each step.

City of Wauwatosa police officer Patrick Kaine was patrolling when a citizen flagged him down with a tip about a robbery in progress. The citizen told Officer Kaine that he had witnessed a Black man robbing two white women inside a blue Lexus. In response, Officer Kaine located a Lexus, followed it, and eventually initiated a vehicle stop pursuant to *Terry v. Ohio* [392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)]. He called for backup because he believed the robber might have a firearm. Paulette Barr and Sandra Adams, both white women, were in the front seats, and Akil Carter, a Black man, was in the back seat, which was consistent with the tipster's description. Officer Kaine ordered Carter to exit the car. Carter exited the Lexus and complied with all of Officer Kaine's commands. Officer Kaine, with help from another officer, handcuffed Carter and placed him in the back seat of a squad car with the door open.

Officer Kaine quickly learned that the tip he received was entirely inaccurate. Barr and Adams told Officer Kaine there was no robbery in progress. Instead, Barr explained that Carter was her grandson, and that the three were on their way to get ice cream. Officer Kaine apologized for the inconvenience, uncuffed Carter, and told them that they were free to go. Carter had been handcuffed for five minutes. The stop lasted roughly eleven minutes in total.

Following the stop, Carter, Barr, and Adams filed suit in state court against Officer Kaine, the City of Wauwatosa, and the other officers who provided backup that day. Their complaint asserted claims under 42 U.S.C. § 1983, violations of their Fourth Amendment rights, municipal liability, state-law negligence, negligent and intentional infliction of emotional distress, negligent hiring, false imprisonment, and violations of the Wisconsin Constitution. The defendants removed to the Eastern District of Wisconsin.

At the pretrial conference, the district judge determined that the trial would proceed only as to Officer Kaine, and the jury would be asked a single question: whether Officer Kaine possessed reasonable suspicion sufficient to support the *Terry* stop.

The trial proceeded, beginning with jury selection. At the close of voir dire, the district judge instructed the parties to exercise their peremptory strikes. The plaintiffs' counsel informed the court that the plaintiffs had an objection to one of the defense's strikes. The court went off the record to address the plaintiffs' objections, which were heard in full and decided at an untranscribed sidebar. The contemporaneous record does not indicate what type of objection the plaintiffs made, but the trial record later indicated that the plaintiffs had raised a *Batson* challenge [see Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986)].

Two days later, after the jury had been charged and sent to deliberate, the district judge noted that the parties wanted to make a record of what occurred at the untranscribed sidebar following voir dire. The plaintiffs' counsel stated for the record that she had raised a challenge under *Batson* to the defense's strike of Juror 10. Juror 10 was a Black woman with a master's degree who was employed by Milwaukee County. When Juror 10 was struck by the defense, she was the only remaining Black individual on the venire following the for-cause excusal of Juror

14, who was also a Black woman. The judge allowed the parties to make a post-hoc record of the objection, and the following exchange occurred:

> [DEFENSE COUNSEL:] Plaintiffs are both Caucasians and persons of color . . . . The peremptory strike was based on both her master's degree and her employment as a Milwaukee County Social Service Social Worker . . . . Our concern in this case [is] . . . professional testimony regarding a claim of emotional injuries. That would be an individual who would be sympathetic.
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> [THE COURT:] All right. And given that one of the plaintiffs' witnesses was a counselor, I think also is a contributing factor for both sides whether you want the individual or don't, and so I find for the reasons that the court stated off the record yesterday, that the defense has provided a race-neutral reason for having exercised their peremptory strike. And I also noted for the record that this is not a case in which there is a single plaintiff who happens to be a minority whether Hispanic, Asian, or African American. There are two plaintiffs who are Caucasian, so that effectively neutralizes the entirety of the applicability of the Supreme Court's ruling in *Batson* beyond the matter of a race-neutral reason for the defense having exercised one of their peremptory strikes as to Juror Number 10.

The plaintiffs' counsel also indicated that the district judge had stated off the record that *Batson* does not apply in civil cases because he had only ever seen it in criminal cases. Counsel cited *Edmonson v. Leesville Concrete Co.* [500 U.S. 614, 111 S. Ct. 2077, 114 L. Ed. 2d 660 (1991)] in support of her position that *Batson* applies equally to civil cases. The district judge denied the *Batson* challenge without further comment.

After a two-day jury trial, the jury returned a verdict in favor of Officer Kaine, finding that he possessed reasonable suspicion to stop the Lexus. The plaintiffs appealed on several grounds, including that the district judge erred in denying their *Batson* challenge.

***Batson* Prohibition Against Discriminatory Use of Peremptory Challenges.** The Seventh Circuit observed that excluding even a single prospective juror on account of race, ethnicity, or gender violates the Equal Protection clause. Under the three-step *Batson* process, the challenger first must make out "a prima facie case of purposeful discrimination" [*see* Batson v. Kentucky, 476 U.S. 79, 93–94, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986)]. The burden at the prima facie stage is low, requiring only circumstances raising a suspicion that discrimination occurred.

If the challenger makes out a prima facie case, the burden shifts to the striking party to provide a race-neutral explanation for the strike [*see* Batson v. Kentucky, 476 U.S. 79, 97, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986)]. At this second step, the proffered reasons must be "clear and reasonably specific" and "related to the particular case." If such a reason is provided, the district judge must assess whether the race-neutral reasons provided by the striking party are pretext for racial discrimination. Step three, at which the trial court weighs the evidence and determines whether the strike's opponent has proved purposeful discrimination, is crucial. The district court must make credibility determinations at this stage.

The three steps of *Batson* are analytically distinct, and the Seventh Circuit encourages district courts to follow the three steps in sequence and to develop a comprehensive record as to each step. A district judge must proceed to and through the third step after reaching the first two. *Batson's* third step requires that the district judge make factual findings on the record regarding whether the striking party's proffered reason for the strike is pretextual. This is a credibility determination. Failure to make the step-three credibility determination is a legal error. Further, the appellate court cannot substitute its judgment for that of the district court. In completing the

step-three inquiry, the judge must do more than summarily deny the challenge or merely categorize the striking party's reason as race-neutral. When the district judge fails to appropriately proceed to or conduct Batson's third step, the Seventh Circuit will remand for additional findings by the district judge.

In this case, the plaintiffs disputed the credibility of the defendants' proffered reason for striking Juror 10, so the Seventh Circuit focused solely on Batson's third step. Based on the record, the Seventh Circuit found it difficult to discern whether the district judge properly completed Batson's third step. Ultimately, the appellate court concluded that the district judge halted his Batson analysis too early, completing the required step two finding but failing to continue forward to step three.

After the jury was discharged, the plaintiffs' counsel stated for the record that she believed Juror 10—a social worker—had been struck because she was the final Black member of the venire panel. Defense counsel had lodged a preemptory strike based upon Juror 10's employment as a counselor who worked for Milwaukee County, indicating that the defendants believed Juror 10 would be unusually sympathetic to one of the plaintiffs' expert witnesses, a counselor, who testified to the emotional damage that Carter suffered because of the stop. To complete the Batson inquiry, the judge needed to decide whether the defense's proffered reason for the strike was pretextual. But he did not do so. Instead, he said:

> And given that one of the plaintiffs' witnesses was a counselor, I think also is a contributing factor for both sides whether you want the individual or don't, and so I find for the reasons that the court stated off the record yesterday, that the defense has provided a race-neutral reason for having exercised their peremptory strike.

The Seventh Circuit explained that simply classifying the striking party's justification as "race-neutral" is not enough to constitute a step-three Batson finding. Batson's third step requires the court to weigh the evidence and determine whether the striking party's nondiscriminatory reason for the strike is credible. Batson cannot operate properly if the second and third steps are conflated. This is why a district court must take Batson's steps in order such that the appellate court can easily discern a step-two finding from a step-three one.

The district judge signaled to the parties that he was providing reasons to support the finding of a race-neutral reason and then stopped short. And the most natural reading of the second half of the district judge's comment classifying the defense's reason as "race-neutral" suggests that the judge was not making any credibility determinations. He did not indicate whether he believed the defense, whether he found them credible, or whether, in his discretion, he thought the counselor could be unusually sympathetic to one of the plaintiffs' witnesses. Instead, he parroted defense counsel's proffered reason and correctly found it to be race-neutral. But determining whether the defense provided a race-neutral reason is the point of step two, not step three, of the Batson analysis.

The court observed that the issue was made more difficult because the judge heard the initial objection at an untranscribed sidebar, which is inconsistent with the requirement that district judges develop "a crystal-clear record" for the benefit of all, and to facilitate appellate review. After the sidebar, the district judge allowed the parties to make a post-hoc record of the objection. Despite the parties' request that the district judge make a record of the Batson challenge, only the brief colloquy above existed. Either there was more to the district judge's analysis that he decided not to put on the record, or the step-three analysis was never completed. Either way, the record before the appellate court did not enable it to affirm the judge's denial of the Batson challenge.

In closing, the Seventh Circuit noted that Batson applies in civil cases. Furthermore, a party of any race may make a Batson challenge, including when the party challenging the strike and the stricken juror are of different races. So the fact that two of the three plaintiffs in this case were white women did not change the applicability of Batson, contrary to the district judge's statements on the record.

Conclusion. Accordingly, the Seventh Circuit remanded the case for the district judge to properly complete the three-step process under Batson. The court expressed no opinion as to the outcome of the credibility issues or factual findings, which were matters for the district court to consider in the first instance. Depending on the outcome of a properly conducted Batson process, placed on the record to allow for appellate review, the judge may order a new trial, reopen the period for dispositive motions, or manage the case as he otherwise sees appropriate.