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The Challenge to Change: Learning the Hot New Litigation Developments

It's been said that change is the only constant. And in words that should resonate for practicing lawyers — young and old — General Eric Shinseki put it even more bluntly: "If you don't like change, you're going to like irrelevance even less."

So meeting the challenge to change means stay relevant by knowing the hot new rule and case law developments in litigation practice. And certainly, this includes the significant amendments to the Federal Rules of Civil Procedure effective December 1, 2018.

To stay abreast of the most recent changes in litigation case law, you should have at your fingertips my LexisNexis Current Awareness feature which is an online companion to The Wagstaffe Group Practical Guide: Fed. Civ. Proc. Before Trial (Lexis Nexis 2018). There, you'll find weekly reports on the hottest new cases on litigation procedure.

So, if it's true, as they say, that when you're through changing, you're through, then read below some highlights from recent months to keep us all relevant and adaptive to new rules and developments.

The New Federal Rule Amendments

If change brings opportunity, they abound with the new federal rules of civil procedure effective December 1, 2018. Here's a quick summary:

- Giving notice of certified/settled class actions now hits the 21st Century with amended Rule 23(c)(2) as it acknowledges "contemporary communication realities" and allows the "best practicable notice" to include notice by electronic means, including email or even texts that could be combined with mail notice.
- The new Rule 23(e)(1) also now allows courts to order notice of a proposed settlement class if there is a sufficient likelihood of certification and approval. And we now must make sure that such notice details the settlement benefits, likely range of outcomes, other litigation, and the fees.
- Want your settlement class approved? New Rule 23(e)(1) says tell the court about discovery in your case (and how it showed strengths and weaknesses) and the outcome of any similar or parallel cases.
- Under new Rule 23(e)(5), any payment agreement with objectors has to be approved by the district court, and be sure you specifically state in your fairness analysis whether any objectors' objections apply to the entire class, a subset of the entire class or only to the objectors.
- On another front, the newly amended Rule 5 affects electronic service and eliminates paper certificates of service.
- And in our final new rule alert, Rule 62's automatic stay of judgment enforcement is now a presumptive 30 (not 14) days, and the court may earlier dissolve that 30 day automatic stay of enforcement.

New Cases on Jurisdiction and Removal

A notice of removal does not need to include evidence supporting jurisdiction, so long as it includes a short and plain statement of the grounds for removal. *Betzner v. Boeing Co.*, 2018 U.S. App. LEXIS 35172 at *6 (7th Cir. December 12, 2018)[1] (federal officer removal based on simple allegation of federal contractor defense sufficient without any other evidentiary facts).

Speaking of fun removal issues, if a local defendant removes before service, some courts hold that the statutory bar on

removal does not apply. *Encompass Ins. Co. v. Stone Mansion Rest. Inc.*, 902 F.3d 147 (3d Cir. 2018)[2].

A federal court will have no ancillary jurisdiction over a fee dispute between lawyers even if the fees were being sought for work in a federal court action. The dispute between the lawyers is a simple breach of contract suit to be decided in state court. In re *Comty. Bank N. Va. Mortg. Lending Practices Litig.*, 2018 U.S. App. LEXIS 35841 at *10 (3d Cir. December 20, 2018).

In diversity cases, distinguish between business trusts (e.g. REITs) and traditional fiduciary trusts—only the former takes on the citizenship of all trust members (as opposed to the trustee alone). *Doermer v. Oxford Fin. Grp., Ltd.*, 884 F.3d 643 (7th Cir. 2018)[3].

Court shouldn't dismiss supplemental claims without notice and opportunity to be heard—especially right before trial. *Catzin v. Thank You & Good Luck Corp.*, 899 F.3d 77 (2d Cir. 2018)[4].

If insurance case involves validity of an insurance policy, the policy's full amount is the amount in controversy for diversity purposes. *Elhouty v. Lincoln Ben. Life Co.*, 886 F.3d 752 (9th Cir. 2018)[5].

Speaking of the amount in controversy, you can include (if awardable by statute or contract) past and future attorney's fees. *Fritsch v. Swift Transp. Co.*, 899 F.3d 785 (9th Cir. 2018)[6].

There is no personal jurisdiction over even a large, national defendant just because the plaintiff lives in the forum state—especially if the injury is suffered elsewhere. *Waite v. All Acquisition Corp.*, 901 F.3d 1307 (11th Cir. 2018)[7].

New Cases on Twombly/Iqbal

If you allege mere puffery and possibly higher than advertised prepackaged food prices you don't satisfy Twombly/Iqbal plausibility or pleading securities fraud. *Employees' Ret. Sys. v. Whole Foods Mkt., Inc.*, 905 F.3d 892 (5th Cir. 2018)[8]; see also *Wysong v. APN*, 889 F.3d 267 (6th Cir. 2018)[9] (Lanham Act case based on competitor's dog food label showing premium meat cuts doesn't pass Twombly/Iqbal test since consumers not really misled).

If the allegations even of state of mind elements (e.g. actual malice in public figure defamation case) aren't plausible or detailed, a Twombly/Iqbal dismissal is in order. *Lemelson v. Bloomberg, L.P.*, 903 F.3d 19 (1st Cir. 2018)[10]; see also *Nwanguma v. Trump*, 903 F.3d 604 (6th Cir. 2018)[11]

(complaint against Trump campaign for injuries suffered at rally failed to allege plausible incitement to riot claim since candidate did say "don't hurt them).

The Twombly/Iqbal plausibility standards have been held to apply even to pleading subject matter jurisdiction and standing. *BNSF v. Seats*, Inc., 900 F.3d 545 (8th Cir. 2018)[12].

Some circuits deplore what they call "shotgun complaints" that over-incorporate generalized allegations without specificity. *Jackson v. Bank of America*, N.A. 898 F.3d 1348 (11th Cir. 2018)[13].

Don't count on conclusory "aiding and abetting" allegations to survive a Twombly/Iqbal motion to dismiss. *Vexol, S.A. v. Berry Plastics Corp.*, 882 F.3d 633 (7th Cir. 2018)[14].

New Cases on Summary Judgment

If evidence on summary judgment is conclusory, it will be insufficient to survive summary judgment. *Mancini v. City of Providence*, 909 F.3d 32 (1st Cir. 2018)[15].

Oppose summary judgment with Rule 56(d) declaration for more discovery? Don't count on it. Mere speculation for fishing expedition might be "mere hope of revealing smoking gun." *Helping Hand Caregivers v. Darden*, 2018 U.S. App. LEXIS 22490 (7th Cir. 2018)[16].

New Cases on Arbitration

The Supreme Court has just held that a court cannot decline to delegate to an arbitrator the arbitrability question simply because it determines that the question is wholly groundless. Arbitration is a matter of contract and courts must enforce the contract according to its terms—which may include delegating to the arbitrator "gateway" questions of arbitrability. *Henry Schein, Inc. v. Archer*, ___ U.S. ___ (January 8, 2019).

Think you can never get an arbitration decision reversed. Generally, you're right as reversal only happens when the showing of unfairness is compelling. *Republic of Argentina v. AWG*, 894 F.3d 327 (D.C. Cir. 2018)[17].

Federal question jurisdiction over every challenge to FINRA arbitration? No federal jurisdiction just because FINRA arbitrator allegedly breached duties. *Webb v. FINRA*, 889 F.3d 853 (7th Cir. 2018)[18]; but see *Turbeville v. FINRA*, 874 F.3d 1268 (11th Cir. 2017)[19].

New Cases on Discovery

In the name of proportionality, the court can phase discovery (e.g. causation) and apply its common sense in limiting search terms for producing ESI. *Vallejo v. Amgen*, 903 F.3d 733 (8th Cir. 2018)[20].

Also in the name of proportionality, the court can order production of archived backup tapes by emphasizing the large amount in controversy and the producing party's sole access to the information. *Physicians All. Corp. v. WellCare Health Ins. of Ariz., Inc.*, 2018 U.S. Dist. LEXIS 31001 (M.D. La. 2018)[21].

New Cases on Exclusion of Undisclosed Witnesses

If you don't disclose, for example, the treating physician as an expert witness during discovery, don't count on calling them to testify at trial. *Vanderberg v. Petco Animal Supplies Stores, Inc.*, 906 F.3d 698 (8th Cir. 2018)[22].

By the way, if you don't disclose a party witness as a damages expert, they'll be excluded at the summary judgment stage as well. *Karum Holdings LLC v. Lowe's Cos.*, 895 F.3d 944 (7th Cir. 2018)[23].

New Cases on Erie Doctrine

The Erie debate as to whether state anti-SLAPP statutes apply in federal court lives on. Some courts say no since the federal rules cover the situation. *Los Lobos Renewable Power, LLC v. AmeriCulture, Inc.*, 885 F.3d 659 (10th Cir. 2018)[24].

New Cases on Sanctions

Don't even think about threatening potential witnesses with a Facebook post. It can lead to monetary sanctions even if you (or your client) threaten only "liars". See *Emerson v. Dart*, 900 F.3d 469 (7th Cir. 2018)[25].

Facing a motion to dismiss, the plaintiff submits materially altered email. The court properly dismisses the action per Rule 11, because submitting falsified evidence interferes with the integrity of the judicial process. Dismissal is an "essential tool" in the sanctions toolbox. *King v. Fleming*, 2018 U.S. App. LEXIS 22611 (10th Cir. 2018)[26]; see also *Fuery v. City of Chicago*, 900 F.3d 450 (7th Cir. 2018)[27].

What's in the Pipeline?

Preparing for success in litigation often is to know and understand important cases in the U.S. Supreme Court of the United States (SCOTUS) pipeline (i.e. cert. granted but awaiting decision). These include:

- Is an exemption under the FAA an arbitrability issue to be resolved by the arbitrator? See *New Prime v. Oliveira* – SCOTUS argued 10/3/18.
- Does the FAA foreclose a state-law interpretation of general language in an arbitration agreement to allow for class arbitration? See *Lamps Plus Inc. v. Varela* – SCOTUS argued 10/29/18.
- The scope of cy pres awards in class actions will be addressed in *Frank v. Gaos* – SCOTUS argued 10/31/18.
- Whether claims process appeal deadline of Fed. R. Civ. P. 23(f) is jurisdictional is before SCOTUS in *Nutraceutical Corp. v. Lambert*, argued 11/27/18.
- Can a cross-defendant (not the original defendant) remove the case under CAFA? See *Home Depot v. Jackson* – SCOTUS argued 1/15/19.
- Is Williamson exhaustion rule (ripening of taking claims in fed. court) still valid (or should it be abandoned)? See SCOTUS in *Knick v. Township of Scott* – argued 1/16/19.
- How about APA discovery outside administrative record aimed at evidence from decision maker? See SCOTUS In re Dept. of Commerce – argument 2/19/19.
- What is a state actor and does it include private entities that operate public access television stations? See SCOTUS – *Manhattan Community Access Corp. v. Halleck* – SCOTUS – argument 2/25/19.

No one less than Stephen Hawking said that, "Intelligence is the ability to adapt to change." So it might be a step down but equally compelling to end with a refrain from Dr. Seuss: "You'll be on your way up! You'll be seeing great sights! You'll join the high fliers who soar to high heights."

Authority you can trust, James M. Wagstaffe

Renowned author James M. Wagstaffe is a preeminent litigator, law professor and expert on pretrial federal civil procedure. He has authored and co-authored a number of publications, including *The Wagstaffe Group Practice Guide: Federal Civil Procedure Before Trial*, which includes embedded videos directly within the content on Lexis Advance. As one of the nation's top authorities on federal civil procedure, Jim has been responsible for the development and delivery of federal law, and regularly educates federal judges and their respective clerk staffs. Jim also currently serves as the Chair of the Federal Judicial Center Foundation Board—a position appointed by the Chief Justice of the United States Supreme Court.

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[1] *Betzner v. Boeing Co.*, 2018 U.S. App. LEXIS 35172 at *6 (7th Cir. December 12, 2018)
[2] *Encompass Ins. Co. v. Stone Mansion Rest. Inc.*, 902 F.3d 147 (3d Cir. 2018)
[3] *Doermer v. Oxford Fin. Grp.*, Ltd., 884 F.3d 643 (7th Cir. 2018)
[4] *Catzin v. Thank You & Good Luck Corp.*, 899 F.3d 77 (2d Cir. 2018)
[5] *Elhouty v. Lincoln Ben. Life Co.*, 886 F.3d 752 (9th Cir. 2018)
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[7] *Waite v. All Acquisition Corp.*, 901 F.3d 1307 (11th Cir. 2018)
[8] *Employees' Ret. Sys. v. Whole Foods Mkt., Inc.*, 905 F.3d 892 (5th Cir. 2018)
[9] *Wysong v. APN*, 889 F.3d 267 (6th Cir. 2018)
[10] *Lemelson v. Bloomberg, L.P.*, 903 F.3d 19 (1st Cir. 2018)
[11] *Nwanguma v. Trump*, 903 F.3d 604 (6th Cir. 2018)
[12] *BNSF v. Seats*, Inc., 900 F.3d 545 (8th Cir. 2018)
[13] *Jackson v. Bank of America*, N.A. 898 F.3d 1348 (11th Cir. 2018)
[14] *Vexol, S.A. v. Berry Plastics Corp.*, 882 F.3d 633 (7th Cir. 2018)
[15] *Mancini v. City of Providence*, 909 F.3d 32 (1st Cir. 2018)
[16] *Helping Hand Caregivers v. Darden*, 2018 U.S. App. LEXIS 22490 (7th Cir. 2018)
[17] *Republic of Argentina v. AWG*, 894 F.3d 327 (D.C. Cir. 2018)
[18] *Webb v. FINRA*, 889 F.3d 853 (7th Cir. 2018)
[19] *Turbeville v. FINRA*, 874 F.3d 1268 (11th Cir. 2017)
[20] *Vallejo v. Amgen*, 903 F.3d 733 (8th Cir. 2018)
[21] *Physicians All. Corp. v. WellCare Health Ins. of Ariz., Inc.*, 2018 U.S. Dist. LEXIS 31001 (M.D. La. 2018)
[22] *Vanderberg v. Petco Animal Supplies Stores, Inc.*, 906 F.3d 698 (8th Cir. 2018)
[23] *Karum Holdings LLC v. Lowe's Cos.*, 895 F.3d 944 (7th Cir. 2018)
[24] *Los Lobos Renewable Power, LLC v. AmeriCulture, Inc.*, 885 F.3d 659 (10th Cir. 2018)
[25] *Emerson v. Dart*, 900 F.3d 469 (7th Cir. 2018)
[26] *King v. Fleming*, 2018 U.S. App. LEXIS 22611 (10th Cir. 2018)
[27] *Fuery v. City of Chicago*, 900 F.3d 450 (7th Cir. 2018)

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