THE MIDDLE GROUND

Federal Bar Association - Middle District of North Carolina Chapter Volume 6, Issue 1 – May 2016

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Chapter Officers:

President's Message

By Brian R. Anderson
Nexsen Pruet, PLLC

Greetings, Middle District of North Carolina Chapter members. When I took over as Chapter president in October, 2015, I knew I had a tough act to follow. Under our former president, Randy Loftis, our Chapter enjoyed an outstanding year. With eight months as Chapter president under my belt, I am proud to say that we are enjoying yet another great year.

We strive to provide programs that not only are of interest to our members, but also allow members of the Chapter and the judiciary to interact in a welcoming setting. Our Fall Banquet and CLE has turned into an annual success, and we are thrilled to have two esteemed members of the judiciary speak at our Spring Luncheon and CLE on June 7, 2016: The Honorable Mark D. Martin, Chief Justice of the Supreme Court of North Carolina and The Honorable Frank D. Whitney, Chief District Judge for the Western District of North Carolina. You will not want to miss out on the opportunity to ask them questions during the Q & A session.

We also take great pride in our Chapter newsletter, *The Middle Ground*. We attempt to provide you with content that not only is relevant to your practice, but also is interesting and informative. Our editor, Cassie Crawford, has done another wonderful job with the latest issue of *The Middle Ground*.

I am honored to have the opportunity to serve the Middle District of North Carolina Chapter. As my term as President nears its end, I would like to thank the other Chapter leaders who make this Chapter a success. John Korzen, Randy Loftis, and The Honorable Joi Peake, have been a tremendous help throughout the year and I know the Chapter is in good hands with John as the incoming President.

Finally, I encourage you to attend each of our programs and to invite your colleague who may be interested in becoming members of the Chapter. I also encourage you to take advantage of the many opportunities made available to you by the Federal Bar Association and to become more involved in the Chapter. We are always looking for motivated folks to serve on our board or write articles for *The Middle Ground*.▪

Call for Articles – Fall Issue of *The Middle Ground*

As previewed in Brian's introduction, the Chapter is seeking articles suitable for publication in the fall edition of this newsletter. Articles can address any topic of interest to federal practitioners. We hope to use the dialogue from the June 7 CLE, regarding the interaction between state and federal courts, as a springboard for further discussion and analysis on this broad topic. As such, we welcome in particular articles exploring this relationship and building upon this theme. Some such articles are featured in this newsletter, covering diversity jurisdiction, the application of the *Rooker-Feldman* doctrine post-*Exxon*, and recent federal Constitutional challenges to North Carolina state laws.

If you are interested in contributing an article for the fall newsletter—whether on the suggested topic or any other area of interest—please email: cassie.crawford@nelsonmullins.com. ▪

Clerk's Corner: An Update from the Clerk of Court for the United States District Court for the Middle District of North Carolina

By John S. Brubaker

Greetings to all. Please find the following suggestions and updates from the Clerk's Office for the Middle District of North Carolina.

Attorney Admission Status Search. A new search feature is available on our website. The Attorney Admission Status Search allows the public to enter a North Carolina State Bar number or attorney name. The search results will indicate an attorney's date of admission to the Middle District of North Carolina and current status.

CM/ECF Training. New attorneys are encouraged to sign-up for CM/ECF training. New paralegals and office staff are welcome to attend training even if their attorney already received training in the past.

CM/ECF Registration. Newly admitted attorneys should complete a CM/ECF Registration form. See Local Rule 5.3(c). Being admitted to the Middle District of North Carolina does not automatically qualify attorneys as CM/ECF filers.

New Training Coordinator. Kenan Sonbay recently joined the Clerk's Office as our new Training Coordinator. He has several years of previous court training experience, and will be the primary contact for CM/ECF training and registration questions. Kenan can be reached at 336-332-6003 or kenan_sonbay@ncmd.uscourts.gov.

Archived Records. The Clerk's Office will be glad to help you locate older case file records. We have efficient and cost effective ways of retrieving documents from the National Archives and Records Administration, such as the new electronic retrieval of records SmartScan program. Call us at 336-332-6000 for more information.

Have Suggestions? We are looking for ways to improve. If you have suggestions to the local rules, please send a message to LocalRuleComments@ncmd.uscourts.gov. If you have ideas on how the Clerk's Office can improve its services, you can use the suggestions@ncmd.uscourts.gov address.▪

The Case for a Unified Approach to Corporate and LLC Citizenship

by Jamie Dean
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Imagine opening your email one morning to find a copy of a complaint and summons just received by your out-of-state corporate client. The caption shows a familiar North Carolina company as the lone plaintiff, and a cursory review of the allegations reveals several indicia of a case that you would prefer to defend in federal court: a demand for substantial damages, a remote venue with limited court calendars, a plaintiff who is a major employer in the forum county, and potentially complicated legal issues that would benefit from full briefing. No problem, you think, because the matter will probably be removable, given the amount at issue and your client's out-of-state incorporation and headquarters. When you scrutinize the caption again and note the three letters "LLC" appended to the plaintiff's name, however, what first seemed clear becomes opaque.

At this juncture, a quick review of the rules applicable to diversity jurisdiction and removal is helpful. The familiar requirements for diversity jurisdiction include (1) an amount in controversy in excess of $75,000 and (2) diversity of citizenship between each plaintiff and each defendant.[1] Additionally, no defendant may remove a matter filed in a state where the defendant is a citizen, and all defendants properly joined and served in a matter must consent to removal.[2] Generally, a defendant must remove within 30 days of service of a pleading or other paper showing the propriety of diversity jurisdiction.[3] During the first year after the action is commenced, if the initial pleading is not removable, a defendant may also remove within 30 days of receiving a paper demonstrating removal is proper.[4]

A corporation is a citizen of (1) the state where it is incorporated and (2) the state where it has its principal place of business.[5] In 2010, the Supreme Court clarified that "the phrase 'principal place of business' refers to the place where the corporation's high level officers direct, control, and coordinate the corporation's activities," often referred to as its "nerve center."[6] An LLC, on the other hand, is a citizen of every state where its members are citizens.[7] Consequently, the state where an LLC is formed and the location of its principal place of business are irrelevant for diversity purposes.[8] Rather, to determine an LLC's citizenship, one must ascertain the citizenship of each member following the guidelines provided in § 1332.[9]

Returning to the hypothetical, assume the complaint alleges that plaintiff is a North Carolina LLC with its principal office in Greensboro, but says nothing about plaintiff's members. The North Carolina Secretary of State's website confirms the domestic formation, but is silent about the current membership. Unless you find another source that identifies plaintiff's members, you are stuck litigating in your non-preferred forum, at least until you can use the discovery process to identify plaintiff's members, a process that could take weeks or months.

As this scenario illustrates, taking differing approaches to LLC and corporate citizenship can give rise to potentially frustrating inefficiencies. Several factors favor abandoning this disparate approach and applying the same citizenship criteria to corporations and LLCs.

Simplicity –

A unified approach simplifies the process of identifying a party's citizenship. In adopting the nerve center test for ascertaining a corporation's principal place of business, the Supreme Court "place[d] primary weight upon the need for judicial administration of a jurisdictional statute to remain as simple as possible."[10] Using a member-based approach for LLCs opposes this objective.

Determining the citizenship of a corporation is generally straight forward. A corporation's state of incorporation is a matter of public record and the location of its key officers, if not public, often is readily ascertainable. Even for private corporations, on whom less public information is available, at least the inquiry halts after key officers have been identified and located.

For LLCs, the analysis can become cumbersome. Even for LLCs with a single layer of ownership, members can be numerous, and each member's citizenship must be analyzed. The situation becomes significantly more complicated when the LLC is nested in a family that includes other LLCs. Consider an LLC with three members, each of whom is also an LLC. Determining the citizenship of the first LLC requires determining the citizenship of the three member LLCs, which requires determining the citizenship of the members of each of those LLCs. As the number of layers of ownership increases, the number of members relevant to the analysis can go up, exponentially. The inquiry only stops when a member is identified who is either an individual or a corporation whose citizenship can be determined under the guidelines of § 1332. While application of the corporate citizenship test would not make it easier to locate information about an LLC's members, it would at least focus the inquiry on those who are key decision-makers.

Fairness –

Congress declared that a corporation is a citizen of its principal place of business to prevent local companies from availing themselves of diversity jurisdiction in their home states, simply because they might be incorporated elsewhere.[11] The nerve center test adopted by the Supreme Court furthers this objective, ensuring that a corporation cannot affect its citizenship by arbitrarily designating a headquarters or principal office in a foreign state.

Under the current framework, however, the forum shopping Congress and the Supreme Court attempted to curtail is still available to an LLC. No matter where an LLC is formed and no matter where its operations and decision-makers are located, its citizenship depends only on the citizenship of its members. Thus, a North Carolina LLC with all operations and offices in North Carolina, but out-of-state members, could remove a suit filed by a North Carolina plaintiff in North Carolina state court. This runs contrary not only to the theory undergirding the nerve center approach to corporate citizenship, but also to the notion that a defendant sued in its own state courts does not need the protections afforded by diversity jurisdiction.[12]

Tying an LLC's citizenship to the citizenship of its members could also unfairly inhibit an LLC's ability to avail itself of federal jurisdiction. The purpose of diversity jurisdiction is to protect a foreign defendant against local bias.[13] The member-centered test increases the likelihood that this protection will not be afforded to an LLC. For example, an LLC formed and operating exclusively in Virginia with a single member in North Carolina could not remove a matter filed by a North Carolina plaintiff in North Carolina state court. If the North Carolina resident is the sole owner of the Virginia LLC defendant, this might not seem unfair. The result seems less reasonable, though, if the North Carolina resident is one of numerous members. If the North Carolina resident is only tangentially related to the Virginia LLC defendant through a structure of nested LLCs, as discussed above, then the result becomes very difficult to square with diversity jurisdiction's goal of giving foreign defendants a fair forum. The nerve center aspect of the corporate citizenship test would mitigate this problem by linking citizenship to the locus of company control rather than the more arbitrary location of its membership.

Theoretical Consistency –

The prevailing analysis equates an LLC to a partnership.[14] This ignores the form and function of modern LLCs, which more closely resemble those of corporations. For example, like corporations, LLCs are creatures of statute, not common law.[15] Like shareholders (and unlike general partners), members in an LLC are not personally liable for the company's obligations.[16] Finally, the LLC is plainly encroaching on territory that was previously the province of corporations, as national and multi-national companies, such as Chrysler, Westinghouse Digital, and Domino's Pizza, choose the LLC form. If the object is for courts to treat comparable entities similarly, it makes sense to subject LLCs to the same citizenship criteria employed for corporations.

Practicality –

Finally, disparate treatment of corporations and LLCs creates practical problems for attorneys on both sides of the courtroom. For a plaintiff who prefers to litigate a particular state court claim in federal court, there is the obvious difficulty of ascertaining an LLC's members, pre-suit, to determine if diversity jurisdiction is proper. If the plaintiff sues in federal court based on available information suggesting that the LLC is diverse, then turns out to be wrong, it faces dismissal. Even worse, because subject matter jurisdiction is not waivable and may be raised at any time,[17] a defendant LLC could adopt a wait and see approach, then use the jurisdictional issue to take a second bite at the apple if the litigation does not go its way in federal court. On the other hand, a plaintiff who sues in state court may not remove its own matter if it learns that the defendant LLC is diverse.[18] The Plaintiff must either proceed in its non-preferred state court forum or take a voluntary dismissal then refile in federal court. Of course, any result that leads to a procedural dismissal and re-litigation in a different forum is likely to create a host of problems, not the least of which is client unhappiness.

Defendants also face potential inefficiencies and pitfalls due to the difficulty of ascertaining an LLC's citizenship. Unless the complaint names a plaintiff LLC's members, a defendant will likely be required to wait until it can obtain discovery on that issue before it can determine if the case is removable. This delay is inefficient and potentially prejudicial. For instance, a defendant could be required to expend resources answering and responding to discovery on claims that, while sufficiently pled under North Carolina's pleading standard, would not survive the more strenuous federal standard. By the time the case is removed, the value of challenging those claims might be diminished by the litigation activities already completed in state court. Worse, if the plaintiff avoids disclosing its members' citizenship for more than a year, the defendant's opportunity to remove is lost, altogether, unless the court determines the plaintiff acted in bad faith.

Even where the LLC at issue is the defendant, the difficulty of ascertaining citizenship could be problematic. Most practitioners have experienced the urgency that accompanies receiving a summons and complaint from a client within days or even hours of the removal deadline. In the case of large or nested LLCs, quickly ascertaining the citizenship of every member may not be possible. Once the removal window closes, it cannot be re-opened based on a party's ignorance of its own citizenship. Consequently, both plaintiffs and defendants would benefit from a more straight-forward approach that simplifies the process of identifying a party's citizenship.

Conclusion –

Employing different analyses to determine the citizenship of LLCs and corporations exposes courts and litigants to a host of inefficiencies, without any obvious advantages. Adopting the corporate approach and treating an LLC as a citizen of the state of its formation and the state where its nerve center is located would eliminate these problems while still protecting against forum shopping and advancing diversity jurisdiction's purpose of protecting foreign litigants. The need for such an approach is only going to grow as LLCs continue to multiply in number and sophistication. ▪

Endnotes

[1] 28 U.S.C. § 1332(a).
[2] *Id. at* §§ 1441(b)(2), 1446(b)(2)(A).
[3] *Id.* at § 1446(b)(1).
[4] *Id.* at §§ 1446(b)(3), 1446(c)(1).
[5] *Id.* at § 1332(c).
[6] *Hertz Corp. v. Friend*, 559 U.S. 77, 80-1 (2010) (internal citations omitted).
[7] *Meyn America, LLC v. Omtron USA LLC*, 856 F. Supp.2d 728, 732 (M.D.N.C. 2012) (internal citation omitted).
[8] *Id.* at 733 (citation omitted).
[9] *See, e.g.*, *id.* (analyzing state of incorporation and principal place of business of corporation that was sole member of defendant LLC to determine LLC's citizenship).
[10] *Hertz*, 559 U.S. at 80.
[11] S. REP. 85-1830, 85TH Cong., 2nd Sess. 1958.
[12] This is reflected in 28 U.S.C. § 1446(b)(2)'s prohibition on a defendant removing an action filed in a state where the defendant is a citizen.
[13] *Long v. Sasser*, 91 F.3d 645, 648 (4th Cir. 1996).
[14] *See Meyn America*, 856 F. Supp.2d at 732.

[15] *LLCs: Is the Future Here?: A History and Prognosis*, GP|SOLO LAW TRENDS & NEWS – BUSINESS LAW, Vol. 1, No. 1, Oct. 2004, available at <http://www.americanbar.org/newsletter/publications/law_trends_news_practice_area_e_newsletter_home/llc.html> (noting that, since 1996, every U.S. jurisdiction has had an LLC statute).

[16] *See, e.g.*, Uniform Limited Liability Company Act § 304 (National Conference of Commissioners on Uniform State Laws 2006) , available at http://www.uniformlaws.org/shared/docs/limited%20liability%20company/ullca_final_06rev.pdf, Pg. 56.

[17] *U.S. v. Wilson*, 699 F.3d 789, 792 (4th Cir. 2012) (internal citation omitted).

[18] *See* 28 U.S.C. § 1441(a) (only authorizing removal by "the defendant or the defendants").

The Evolving Application of the *Rooker-Feldman* Doctrine Within the Fourth Circuit

By Adrianna Sarrimanolis
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Prior to 2005, courts within the Fourth Circuit broadly applied the *Rooker-Feldman* doctrine to determine if district courts had subject-matter jurisdiction to hear a case. Finding many federal circuits were interpreting the *Rooker-Feldman* doctrine more broadly than intended, in *Exxon Mobile Corp. v. Saudi Basic Indus. Corp.* the Supreme Court bound the circuit courts to a narrow interpretation of the doctrine. Post-*Exxon*, the Fourth Circuit has adapted to the narrow approach espoused by the Supreme Court, allowing district courts greater jurisdiction in cases with some relation to prior state court proceedings.

Origins of the Rooker-Feldman Doctrine:

The *Rooker-Feldman* doctrine developed across a span of sixty years between *Rooker v. Fidelity Trust Co.* in 1923, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman* in 1983, 460 U.S. 462 (1983). In *Rooker*, the Supreme Court held a district court lacked subject-matter jurisdiction to hear a plaintiff's claim when it sought to have a district court hold the previously decided state-court judgment was "null and void." *Rooker*, 263 U.S. at 414-15. The Supreme Court held that "under the legislation of Congress, no court of the United States other than this Court could entertain a proceeding to reverse or modify the judgment for errors of that character." *Rooker*, 263 U.S. at 416. The holding reaffirmed § 1257(a) by reserving appellate jurisdiction for the Supreme Court and allowing only original claims to be heard in district courts. *Id.*

Sixty years later in *Feldman,* plaintiffs brought two claims to the District of Columbia Court of Appeals: 1) the District of Columbia state court's denying bar admission to those who had not graduated from law school violated "federal constitutional and statutory law" and 2) denying plaintiff's petitions for waivers of the "bar admission rule" by the state court violated "federal constitutional and statutory law." *Feldman*, 460 U.S. at 486; *see also Davani v. Va. DOT*, 434 F.3d 712, 716 (4th Cir. 2006). The plaintiffs' first claim asked the district court to "assess the validity of a rule promulgated in a nonjudicial proceeding," which did not require a review of the state-court's judgment. *Feldman*, 460 U.S. at 486. Therefore, the district court had jurisdiction to hear the claim. *Id.* Reaffirming *Rooker*, the Court held that the federal courts lacked subject matter jurisdiction to hear the plaintiffs' second claim because it requested appellate review of the state court determination. *Id.* at 482. The Supreme Court added to the *Rooker* decision, holding: "if the constitutional claims presented to a United States district court are inextricably intertwined with the state court's denial in a judicial proceeding . . . the district court is in essence being called upon to review the state-court decision. This the district court may not do." *Id.* at n.16.

The two cases combined worked to deny district courts jurisdiction when asked to review judicial decisions made by state courts or claims "inextricably intertwined" with the state court decisions. This came to be known as the *Rooker-Feldman* doctrine.

The Fourth Circuit's Broad Interpretation of the Doctrine:

The Fourth Circuit initially broadly interpreted the *Rooker-Feldman* doctrine. In *Plyler v. Moore*, 129 F.3d 728 (4th Cir. 1997), the Court established that district courts lacked jurisdiction to hear claims that required direct review of state court decisions or were "inextricably intertwined" with the judgment of the state court. *Plyler*, 129 F.3d at 731. More particularly,

the Court held that "if success on the federal claim depends upon a determination that the state court wrongly decided the issues before it," the claims were inextricably intertwined. *Id*; *Barefoot v. Wilmington*, 306 F.3d 113, 120 (4th Cir. 2002); *Safety-Kleen, Inc. v. Wyche*, 274 F.3d 846, 858 (4th Cir. 2001). This application of "inextricably intertwined" shifted the interpretation of the doctrine away from the holdings of *Rooker* and *Feldman*. *Davani*, 434 F.3d at 717. As long as the issue was already decided by or "could have been raised" in the state court proceedings, the claim was "inextricably intertwined." *See Barefoot,* 306 F.3d at 120-21; *see also Davani*, 434 F.3d at 717. This extended the doctrine beyond denying jurisdiction when a federal claim sought appellate review of state-court decisions to denying jurisdiction when a federal claim sought remedies for injuries caused by defendants if they were deemed "inextricably intertwined" by the *Plyler* definition. *Davani*, 434 F.3d at 717.

The Supreme Court Narrows the Rooker-Feldman Doctrine:

Fourth Circuit courts were not alone in expansively applying the *Rooker-Feldman* doctrine. *See generally Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280 (2005) (narrowing the Third Circuit's interpretation of the *Rooker-Feldman* doctrine). In 2005, the Supreme Court decided *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.* to clarify the "narrow ground occupied by *Rooker-Feldman*." *Exxon*, 544 U.S. at 284. The Court held the doctrine was exclusive to cases brought by parties who had lost in state court and wished to redress injuries caused by state court judgments decided prior to district court actions. *Id.* If plaintiffs assert an independent claim (one not purely seeking redress for an injury caused by a state court judgment) to a federal district court, the district court has jurisdiction to hear the case. *Id.* A district court does not lack jurisdiction to hear the independent claim even if to be successful it requires a judgment contradictory to the previously decided state court judgment. *Id.*

The Fourth Circuit's Post-Exxon Application of the Doctrine:

Following the *Exxon* decision, the 4th Circuit adjusted its expansive interpretation of the doctrine.

In *Washington v. Wilmore*, 401 F.3d 274 (4th Cir. 2005), the 4th Circuit applied the post-*Exxon Rooker-Feldman* doctrine, holding that federal district courts lack jurisdiction only when a plaintiff challenges a state-court decision. *Washington*, 401 F.3d at 280. This effectively changed the Court's previous application of the "inextricably intertwined" standard established in *Plyler*. *Id.* The Court determined that the "inextricably intertwined" standard was not meant to be a "separate legal test" barring jurisdiction of district courts to hear independent federal claims but a conclusion reinforcing district courts' inability to review state court decisions: "if the state-court loser seeks redress in the federal district court for the injury *caused by the state-court decision*, his federal claim is, by definition, "inextricably intertwined" with the state-court decision . . ." *Davani*, 434 F.3d at 719 (emphasis added); *see Washington*, 401 F.3d at 280 (asserting that plaintiffs' claim was not "inextricably intertwined" with the state-court decision; the alleged injury was based "not on the state court judgment itself, but rather on the alleged violation of his constitutional rights by [defendant]").

Davani v. Va. DOT provides the leading illustration of the Fourth Circuit's application of the *Rooker-Feldman* doctrine today. Davani was employed by the Virginia Department of Transportation and was terminated after receiving three "Group Written Notices" contending that he was not completing his job to his supervisor's standards. *Davani*, 434 F.3d at 714. Davani challenged his termination to the Department of Employment Dispute Resolution alleging he was unjustly terminated. *Id.* He alleged that the Group Written Notices and termination were based on his race and national origin and were administered in retaliation for discrimination complaints he had previously brought against the Department of Transportation to the Equal Employment Opportunity Commission. *Id.* A hearing officer determined there was "no credible evidence" the Department disciplined or terminated Davani for any "impermissible reason." *Id.*

Subsequently, Davani filed a civil action suit in federal court, asserting discrimination and termination claims similar to those already brought and denied in the previous proceedings. *Id.* at 715. The defendants argued the *Rooker-Feldman* doctrine barred the district court from hearing the case because the asserted federal claims were "inextricably intertwined" with the state court's judgment. *Id.* Based on a pre-*Exxon* interpretation, the defendants likely would have succeeded on this claim; success of Davani's federal claim required finding the state court's holding was incorrect. *Plyler,* 129 F.3d at 731 (holding a federal

claim is "inextricably intertwined" with the state court judgment "if success on the federal claim depends upon a determination that the state court wrongly decided the issues before it").

Applying the post-*Exxon Rooker-Feldman* doctrine, the Fourth Circuit held that the district court had jurisdiction to hear the case. *Id.* at 719. Davani did not claim the state court decision caused him injury; he alleged that discrimination by the defendants caused him injury in violation of federal and state law. *Id.* Solidifying its narrow application of the *Rooker-Feldman* doctrine, the Court explained that the federal claim was an independent claim not requiring direct review of a state court judgment and "[t]he fact that the state court chose not to remedy the injury does not transform the subsequent federal suit on the same matter into an appeal, forbidden by *Rooker-Feldman*, of the state-court judgment." *Davani*, 434 F.3d at 719 (*quoting Hoblock v. Albany County Bd. of Elections*, 422 F.3d 77 (2d Cir. 2005)). Accordingly, moving forward, practitioners invoking or defending against the doctrine should be wary of pre-*Davani* case law and should consider whether the federal claims truly seek redress for an injury caused by the state court decision itself. ▪

The Middle District of North Carolina as the Forum of Choice for Challenges to Controversial State Laws

By Nate Pencook
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With control of the machinations of state government returned completely to Republicans for the first time in a century, the North Carolina Republican Party quickly went to work in 2012 enacting legislation to advance a conservative agenda. Simultaneously, Democrats those favoring liberal policies began resisting the changes of this new agenda; the weekly "Moral Monday" protests made it clear that any legislation passed by the GOP-led General Assembly would be challenged—through protests, in the media, and perhaps most importantly, in the courts.

Using litigation as a means of achieving political change is nothing new: one need look no further than the successes of the Civil Rights movement for an example of how the federal judiciary in particular can enforce constitutional rights over the protestations of state governments. *See, e.g.*, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). This is often the best strategic choice for those who seek to overturn a law. Courts can be the path of least resistance, especially when political headwinds are not in the challenging party's favor; moreover, allowing courts to enforce a judgment rather than attempting to win challenges through the (sometimes agonizing) processes of electing legislatures may leave those suffering under the law without recourse until such time as a new class of legislators is elected to right any existing wrongs.

A constitutional challenge to a state law can be filed either in state courts or federal courts. With the broad applicability of state laws and the wide availability of plaintiffs with standing to challenge the legislation in numerous jurisdictions across the state, strategic forum selection plays a role at the outset of litigation. Newly-created three-judge panels in Wake County have sole authority at the trial level to hear constitutional and federal law-based challenges to state laws brought in state court in North Carolina. *See generally* Joshua A. Yost, Comment, *"If It Ain't Broke, Don't Fix It": Evaluating North Carolina's Creation of a Three-Judge Court to Hear Constitutional Challenges to State Law*, 93 N.C. L. REV. 1893 (2015) (describing the adoption of three-judge panels and concluding that it will "cause more problems than it solves"). Such challenges can also be filed in a federal district court. When bringing suit in federal court in North Carolina, potential plaintiffs obviously have a choice of district. Notably, plaintiffs challenging the more controversial state laws—i.e., abortion legislation and politically-supercharged legislation like election reform—have in recent years increasingly chosen to bring suit in the Middle District.

A brief disclaimer regarding the scope of this article: I do not make any attempt to determine the reasoning behind this strategy, the effectiveness of this strategy, or the merit of these suits. Nor do I make any judgment on the dispositions of these matters. Instead, this article focuses solely on describing the numerous instances of plaintiffs choosing the Middle District of North Carolina to wage their legal battles against state laws.

Case Study: Challenges to the Voter Identification and Verification Act

A classic example of the Middle District being used as the forum of choice for litigants challenging state laws is the challenge to the election reform bill, the Voter Identification Verification Act ("VIVA"). *See* 2013 N.C. Sess. Law 381. While VIVA was being discussed in the legislature, Moral Monday protests decried the bill as "voter suppression". *See, e.g.*, Ari Berman, *North Carolina Passes the Country's Worst Voter Suppression Law*, THE NATION (July 26, 2013) ("Move aside Florida, North Carolina is now the poster child in the war on voting."). Once passed by the legislature and signed by the governor, the law was challenged in federal court.

The League of Women Voters, Common Cause NC, and a handful of individual women voters brought a suit against the State of North Carolina, members of the Board of Elections, and various political leaders seeking an injunction against VIVA—specifically, elimination of same-day registration, reduction of the number of early-voting days, elimination of high school pre-registration, *inter alia*—pursuant to the Voting Rights Act, § 42 U.S.C. 1973, and the Fourteenth and Fifteenth Amendments to the United States Constitution. *See* Complaint, *League of Women Voters v. North Carolina* (1:13-cv-00660) (M.D.N.C. Aug. 12, 2013). Later, these plaintiffs would be joined by a number of young voters as plaintiff-intervenors, thereby broadening the scope of the challenge to include college students whose ability to vote where they attend school might be affected by the law. *See* Motion to Intervene as Plaintiffs, *id.*

Concurrently, another case was filed against the State—again in the Middle District of North Carolina—by the North Carolina NAACP, also alleging violations the same constitutional provisions and the Voting Rights Act. *See* Complaint, *North Carolina State Conference of NAACP v. McCrory* (1:13-cv-00658) (M.D.N.C. Aug. 12, 2013). Later, the Department of Justice would file a third action in the Middle District of North Carolina alleging solely violations of the Voting Rights Act. *See* Complaint, *United States v. North Carolina* (1:13-cv-00861) (M.D.N.C. Sept. 30, 2013).

After consolidation and extensive pre-trial discovery, Judge Thomas Schroeder declined to issue a preliminary injunction for any of the provisions of VIVA. *See N.C. State Conference of NAACP v. McCrory*, 997 F. Supp. 2d 322, 334 (M.D.N.C. 2014). This was partially reversed on appeal to the Fourth Circuit with regards to the "elimination of same-day registration and prohibition on counting out-of-precinct ballots." *League of Women Voters v. North Carolina*, 769 F.3d 224, 230 (4th Cir. 2014). The ultimate disposition of this case was a complete dismissal, while retaining the injunction pursuant to the Fourth Circuit decision until June 8, 2016. *NAACP v. McCrory*, 2016 WL 1650774 at *171 (M.D.N.C. Apr. 25, 2016). An appeal is currently pending before the Fourth Circuit.

As shown above, three different cases with multiple plaintiffs chose to challenge the same fraught statewide election reform bill in the Middle District—whether due to some perceived advantage or otherwise.

Further Examples: Abortion Regulation, "Ag-Gag," and Second-Parent Adoption

While the voting rights case demonstrates a single instance wherein numerous plaintiffs chose to file a challenge in the Middle District, it does not stand as the only example of such a choice. In cases involving contentious social legislation, plaintiffs have made a conscious decision to file their claims in the Middle District. The following are a handful of examples of recent challenges to state laws filed in the Middle District:

- *Speech-and-Display Requirements*: The General Assembly passed a bill requiring abortion providers to perform an ultrasound on women seeking an abortion at least four hours prior to the abortion and display the ultrasound images and describe them aloud. This provision was challenged by several doctors and abortion providers including Planned Parenthood. The complaint was filed in the Middle District of North Carolina. *See* Complaint, *Stuart v. Huff*, 834 F. Supp. 2d 424 (M.D.N.C. 2011) (1:11-cv-804). Judge Catherine Eagles issued both a favorable preliminary injunction of the speech-and-display practice, and a final ruling in the plaintiffs' favor. *See Stuart v. Huff*, 834 F. Supp. 2d 424 (M.D.N.C. 2011); *Stuart v. Loomis*, 992 F. Supp. 2d 585 (M.D.N.C. 2014).

- *Second Parent Adoption and Marriage Equality*: In 2010, the North Carolina Supreme Court made second parent adoptions—a common practice among both gay and straight relationships—illegal for same-sex couples, claiming they are "against the best interests of the child." *See Boseman v. Jarrell*, 364 N.C. 537, 553, 704 S.E.2d 494, 505 (2010). Six couples of same-sex parents filed a complaint alleging violations of the Equal Protection and Due Process clauses of the Fourteenth Amendment. *See* Complaint at 47–53, *Fisher-Borne v. Smith*, 14 F. Supp. 3d 695 (M.D.N.C. 2014) (1:12-cv-00589). Chief Judge William Osteen ruled in their favor after the suit was expanded to encompass a challenge to the state constitutional amendment only recognizing traditional marriages. *See Fisher-Borne v. Smith*, 14 F. Supp. 3d 695, 698–99 (M.D.N.C. 2014).

- *"Ag-Gag"*: The General Assembly passed another provocative bill that had been passed in many states nationwide, primarily intended to curb whistleblowing in the agriculture industry by allowing those employers to sue whistleblowers for "exceeding the scope of authorized access to property." *See* 2015 N.C. Sess. Law 50; *see also* Editorial, *No More Exposés in North Carolina*, N.Y. Times (Feb. 1, 2016), http://www.nytimes.com/2016/02/01/opinion/no-more-exposes-in-north-carolina.html?_r=0. North Carolina extended that employer-focused protection beyond the agriculture industry to all businesses statewide, cemented by the GOP supermajority's override of Gov. McCrory's veto. *See id.* PETA and other animal welfare organizations filed a suit in the Middle District against N.C. Attorney General Roy Cooper and Chancellor Carol Folt of the University of North Carolina at Chapel-Hill challenging the "ag-gag" bill—which they termed an "Anti-Sunshine Law"—as a violation of the First and Fourteenth Amendments to the U.S. Constitution, as well as various provisions N.C. Constitution. *See* Complaint, *People for the Ethical Treatment of Animals v. Cooper*, 16-cv-00025 (M.D.N.C. Jan. 13, 2016). This case is still pending before Judge Thomas Schroeder.

Continuing Trend? Recent Case Filings Regarding the "Bathroom Bill"

Perhaps the best example of how forum selection is playing out in these controversial state law cases is the recent litigation beginning regarding HB2, the "Bathroom Bill." After weeks of rhetoric, the media battle has turned into a legal battle (as is so often the case). Gov. McCrory filed a suit against the Department of Justice in the Eastern District, while the Department of Justice filed a separate suit in the Middle District. The ultimate resolution of these cases remains to be seen. There are likely a plethora of factors that litigants consider when choosing the Middle District: perhaps the litigants have more faith in the Middle District than other districts to handle a potentially lengthy and contentious trial; perhaps litigants feel that the demographic served by the Middle District will prove friendlier to their positions than other districts; or perhaps litigants perceive the Middle District as simply more receptive to their arguments than the surrounding districts. Whether any of this is true remains unclear, but practitioners in the Middle District can nonetheless enjoy following high profile Constitutional litigation in their local court.

With plenty of fodder for litigation springing forth from this oft-toxic political climate, the choice of forum for litigants will remain an important and interesting facet of litigation strategy in the years to come.▪

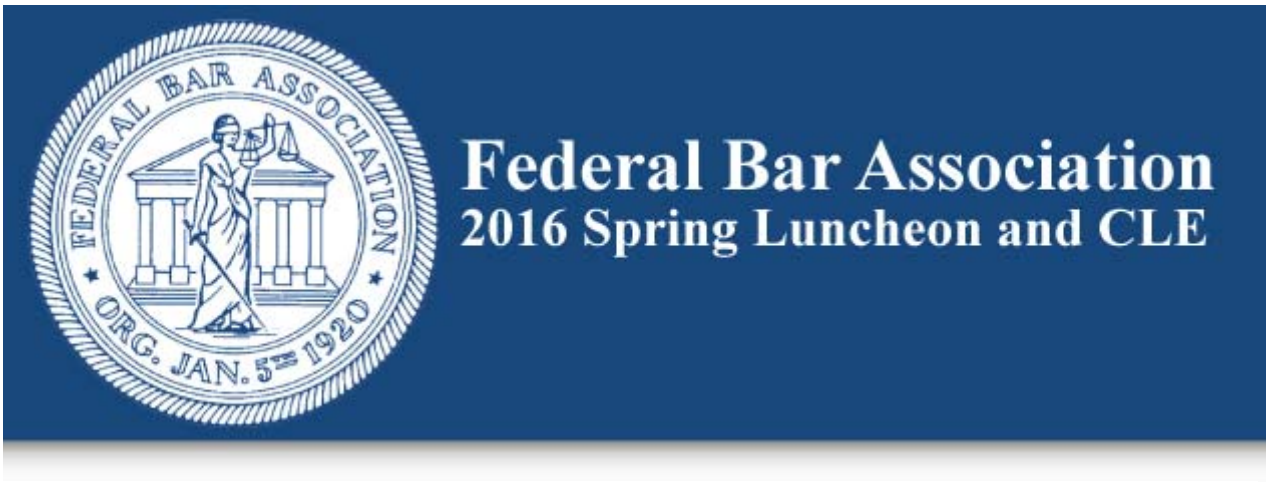
Brief Historical Note

This year marks the 125th anniversary of the Judiciary Act of 1891 (also known as the "Evarts Act"), which established the United States Courts of Appeals. This year is also the 89th anniversary of the creation of the Middle District of North Carolina.

The original Greensboro federal courthouse was built in 1887, and was used by the Western District of North Carolina until the creation of the Middle District (*see photos on next page*). It was demolished in 1938. The Preyer Building (1933) (the current federal courthouse in Greensboro), along with the federal courthouses in Durham (1934) and Winston-Salem (1907), are still in use today. Another courthouse in Rockingham (1935) was used by the Middle District through 1980 and is currently owned by Richmond

County. Photo Credits: National Archives, via http://www.fjc.gov/history/courthouses.nsf; all source material from the Federal Judicial Center's website.▪

Federal Courthouse, Greensboro, NC, 1904



Federal Bar Association Spring Luncheon & CLE

Please join us for lunch and a CLE featuring **The Honorable Mark D. Martin, Chief Justice of the Supreme Court of North Carolina** and **The Honorable Frank D. Whitney, Chief District Judge for the Western District of North Carolina**.

Tuesday, June 7, 2016

11:30 a.m.	Registration
12:00-12:30 p.m.	Luncheon
12:30-2:00 p.m.	CLE

Wake Forest University School of Law (see map)
1834 Wake Forest Road
Winston-Salem, NC 27109

Agenda

- Overview of the State-Federal Judicial Council
- Panel discussion on areas of common interest between state and federal courts
- Q&A session

Please register by June 2nd.
To register, complete registration form on next page and return to Brian Anderson at the address provided on the registration form.

For more information about the FBA, or to join, please visit **www.fedbar.org**

FBA MDNC programs and events are for all lawyers, regardless of FBA membership .

Registration Form

Registration Deadline is June 2, 2016

Federal Bar Association, MDNC Chapter
Attention: Brian R. Anderson

Post Office Box 3463
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(336) 387-5156

Conference Name: 2016 Spring Luncheon and CLE

Conference Date: Tuesday, June 7, 2016

Conference Time:

Registration	11:30 a.m.
Luncheon	12:00-12:30 p.m.
CLE	12:30-2:00 p.m.

Conference Location: Wake Forest University School of Law
1834 Wake Forest Rd
Winston-Salem, NC 27109
Registrants should park in lot W-1 adjacent to the law school.

To register, please remit this form and payment by check, payable to "FBA MDNC Chapter," to Brian Anderson at the address above.

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State Bar Number:	

Registration

Luncheon/CLE Registration Fee

- ☐ Private Lawyer $40
- ☐ FBA MDNC Member $25
- ☐ CJA Panel Member $25
- ☐ Government Lawyer $25
- ☐ Law Students $25
- ☐ Judges $0

TOTAL: ☐