SideBAR

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Message from the Chair

John G. McCarthy

During the late spring and summer, the Federal Litigation Section has been a co-sponsor of several great events. During May, I traveled to Minneapolis to address that Chapter's 44th Practice Seminar. FLS was a co-sponsor for this event, which the Chapter was seeking to reinvigorate. Thanks to the wonderful efforts of the Chapter leadership and some funds from our Section, the event was a huge success. The Chapter closed registration when it had 228 people pre-register. The day was full of interesting CLEs and topics. One unique aspect of the day was the Chapter's decision to have "pop-up talks." Each of these 15-minute talks involved non-legal topics of interest to federal practitioners presented by lawyers and non-lawyers. They were quite informative as to cryptocurrency, smartphone forensics and e-mail tracking. Congratulations to the Minnesota Chapter, its president, Judge Susan Richard Nelson, and Seminar co-Chairs, Judge Kate Menendez and Joel Schroeder, on a great event.

Another terrific chapter program that the Section has assisted through sponsorship is the weeklong "summer camp" program ran by the EDNY Chapter. Officially called the Annual EDNY Justice Institute, the camp takes place at the US Courthouse in Central Islip, New York and neighboring Tuoro Law Center. Approximately 100 students from local high schools attended and were mentored by law students from Touro and other law schools. The student heard from several participants in the criminal justice system and prepared for a mock trial competition held on Friday. I attended while two seasoned trial attorneys – an AUSA and a local criminal defense attorney – addressed the campers and demonstrated how to make a closing argument. Judge Joseph Bianco and Dina Miller did a great job on this program and are willing to share their knowledge and playbook with other FBA chapters.

I am excited that our Section is once again offering scholarships for Section members to travel to San Juan, P.R. for an FBA event there. We are supporting the Veterans Law Conference that will take place on November 2. The all-day continuing legal education event promises to be a can't miss event for those interested in veterans law issues.

Finally, it has been my privilege to serve as one of the officers of our Section since 2013. Back then, the end of my years on

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About the Chair • *John McCarthy is a trial attorney and partner in the New York City office of Smith, Gambrell & Russell, LLP, where he leads the litigation practice and is a member of the firm's Intellectual Property Law Group and its Commercial and Bankruptcy Law Practice. John is a former FBA Circuit Vice President and past Chapter President of the S.D.N.Y. Chapter; John most recently served as Vice Chair of the FBA Federal Litigation Section. He can be reached at jmccarthy@sgrlaw.com or (212) 907-9703.*

Inside this Issue

Note from the Editor

Jeffrey T. Cox

The first hints of autumn greeted me when I let the dogs out at daybreak this morning – a heavy dew; a slight dip in humidity, and a gentle cool breeze, all soon to surrender to a still, mid-day late afternoon heat. For most litigators, the approach of fall also means an acceleration of case activities, as the summer vacation season comes to a close and calendar conflicts dissipate.

Fall 2018 also brings with it heightened national consciousness to the importance of an independent federal judiciary and the primacy of the Rule of Law in our American democratic society.

Indeed, by the time this newsletter publishes, the Senate Judiciary Committee, may have concluded hearings on President Trump's second Supreme Court nominee, DC Circuit Judge Brett Kavanaugh, who hopes to make the short trip up Constitution Avenue to join his eight new colleagues at One First Street, NE. Events may well continue to transpire that will delay a final confirmation vote. Should the nomination of Judge Kavanaugh move forward, that confirmation process, regardless of outcome, has again shone a bright light on many of the most polarizing issues that roil our national psyche, including but not limited to the Separation of Powers and the bounds of the First, Second, and Fourteenth Amendments. As I write this Note, the disposition of the Kavanaugh nomination, as well as the coming November 2018 midterm elections play out amidst the Special Counsel investigation into the scope and breadth of Russian interference in the 2016 elections and any involvement of prominent US citizens in such activity. These are extraordinary times in the life of our nation.

Against this backdrop, the need for citizens to have trust and confidence in the dedication and reliability of our court system deepens, and the critical role of the federal bench and bar grows ever more apparent. I have had the good fortune to litigate in federal courts across the country for nearly three decades. The caliber of judicial officers and staff, and my interactions with fellow members of the federal bar over that time has assured the practice to be intellectually challenging,

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About the Editor • *Jeff Cox is a business and complex litigation attorney, and Partner at Faruki Ireland Cox Rhinehart & Dusing P.L.L., a business and complex litigation and white collar criminal defense practice with offices in Dayton and Cincinnati, Ohio. Jeff's practice includes intellectual property and technology disputes, competition-based litigation and professional malpractice and data security matters. A past president of the FBA's Dayton Chapter, Jeff serves on the Federal Litigation Section Board of Directors, as well as the FBA's Government Relations Committee. Jeff can be reached at jcox@ficlaw.com or (937) 227-3704.*

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Comments from the Incoming Chair

Susan Pitchford

As fall envelops us, pumpkin spice lattes return, the kids go back to school, and election season approaches. The best part of fall surely is the FBA's Annual Meeting, this year in New York City. I hope to meet many of you at the Litigation Section's social, at our fantastic CLE, and at the many other scheduled events across the conference.

I encourage your feedback on the programs sponsored and organized by the Litigation Section. I want to hear from you about the best programs and speakers you have seen. I want to know how the Litigation Section can support your litigation practice, through training, or networking opportunities, or developing new programing. I may do a little arm twisting to see if you would be a fantastic addition to one of our committees. The Litigation Section exists to support you, so let us know who we can better do our job.

If you will not be at the Annual Meeting, please feel free to reach out to me (sdp@chernofflaw.com). I look forward to talking with you. **SB**

Best, Susan

Federal Litigation Section News

The Federal Litigation Section has continued over the course of the past year to offer support to FBA chapter activities from coast-to-coast (and off-shore, too)! In recent months this support has ranged from the Minnesota Chapter's annual conference to the Eastern District of New York's Justice Institute to the FBA Young Lawyers Division Summer Law Clerk Program in Arlington, Virginia and Washington, D.C. The Section also provided financial support for the Tenth Circuit Bench Bar Conference; start-up funding for the Oregon District Court Pro Se Law Clinic; the Oregon Chapter's "How to Win a Case, a Judge's Perspective" program with Jim Wagstaffe (September 2018); and scholarship support for attendees at the Veterans and Military Law conference in late 2018 in San Juan, Puerto Rico.

Indeed, these above-referenced events are only a handful of the FBA and federal court programs benefitting from FLS support in 2018. FLS Chair John McCarthy made time in his busy practice schedule to personally attend many FLS-sponsored programs around the country and to share with attendees the benefits of FBA membership and participation in the Federal Litigation Section activities (Great Work, John!).

Of course, many, many FLS members are actively involved in FBA and chapter activities, working alongside members of the federal judiciary and judicial staff to provide education, service and professional networking and development opportunities, and to meet the shifting expectations of our federal court system.

As Susan Pitchford assumes the Chair of the Section, feel free to reach out to Susan and other FLS board members if you would like to become involved in Section activities and leadership, or if your chapter has some innovative, upcoming litigation-related programming ideas that might merit financial support of the Section. **SB**

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the leadership ladder seemed so far in the future. The time has really flown past and now I am just weeks away from the end. I am pleased at everything that we have done during those years. I am grateful for the opportunity to represent this Section and to have met so many of you, my fellow Fed Lit members. Thank you to the entire board for all of their support and efforts these past two years, especially Susan Pitchford and Nicole Newlon. Our Section is in good hands with them and Andrea Marconi at the helm. Finally, I want to thank Jeff Cox, the best editor any Section could have, for all of his work on SideBar and for the Section. **SB**

SideBAR Recognized for Second Year in a Row with FBA's Outstanding Newsletter Award

Thanks to all who contributed to the 2017-2018 FLS newsletters.
Keep those article submissions coming!

Oustanding Newsletter Award Winner 2016-2017; 2017-2018.

Statement of the Federal Bar Association on Executive Order 13843 Regarding the Hiring of Federal Administrative Law Judges (adopted August 10, 2018).

An independent, effective administrative judiciary is essential to the proper adjudication of federal administrative law disputes. Administrative law judges (ALJs) are a vital element of that process. Selected on the basis of professional merit and insulated from political pressures, ALJs are called upon to preside over full and fair hearings and render decisions based solely upon the applicable law and evidence.

On July 10, 2018, President Trump issued Executive Order 13843, 83 Fed. Reg. 32755, requiring federal agencies to more flexibly appoint ALJs as part of the "excepted" civil service, rather than through the "competitive service" procedures used for decades by the Office of Personnel Management (OPM). The executive order replaces OPM's extensive hiring and selection procedures with a minimal standard that permits agencies to appoint anyone as an ALJ so long as they are permitted to practice law. The executive order authorizes, but does not require, agencies to supplement that minimal requirement with additional standards that assess qualities in ALJ candidates that meet particular agency needs. Though the efficacy of OPM's ALJ examination and certification procedures has long been a matter of debate, the executive order goes further by citing a recent Supreme Court decision (*Lucia v. SEC,* 138 S. Ct. 2044 (2018)) as grounds for questioning the compatibility of the OPM procedures with the discretion an agency head should possess in making ALJ appointments based on Lucia's interpretation of the Appointments Clause (art. II, § 2, cl. 2) of the United States Constitution.

Critics of the executive order have questioned whether the change to excepted service appointments of ALJs may lead to a politicized appointment process and an administrative judiciary lacking the necessary experience, judgment and skills to adjudicate a wide range of administrative disputes. Indeed, the lone requirement that an ALJ need only be authorized to practice law raises legitimate concerns over the prospect of abuse in the exercise of agency hiring authority.

Despite this potential relaxation of standards, there are still opportunities to retain selection criteria that would assure excellence in our ALJs. First, the executive order contemplates OPM rulemaking to update government-wide regulations in implementation of the new ALJ hiring and appointment framework. Second, agencies will have latitude under the order to assure that ALJ appointments are compatible with *Lucia* and the shift to the excepted service, and thus could still impose appropriate qualifications for their ALJs. The Federal Bar Association encourages national leaders and Members of Congress to take prompt and responsible action to assure that our federal administrative judiciary remain fully qualified, independent and effective in resolving the administrative disputes brought before them. **SB**

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rewarding and affirming. That experience reinforces my respect for the wisdom of the Founders' commitment to a tripartite system of government and the critical importance of an independent federal judiciary. As officers of the court, it is our solemn responsibility to assure that the Rule of Law is alive and thriving in America; active participation in the FBA and in our Federal Litigation Section is a great way to share that responsibility with colleagues across the country.

One of the privileges of editing this newsletter is the opportunity to interact with FLS members who contribute to the profession through their scholarship and preparation of articles for SideBAR. This edition of the newsletter features several excellent articles from FLS members; I hope you will take a few minutes to read these articles and consider submitting an article of your own.

To this edition's article writers: thank you! Thanks to Nathaniel Garrett for his article addressing the conflict between Fed. R. Civ. P. 45's subpoena reach limitations and the witness accessibility provided for under various federal statutes, including the Federal False Claims Act. Thanks to Ira Cohen for his article providing cautions and practice tips when considering voluntary dismissals under Fed. R. Civ. P. 41(a)(1). Thanks to Christian Waugh for his examination of federal district court "local rules" and the potential cost-shifting effect of those rules. Thanks, too, to Michael Mayer for his analysis of recent Sixth Circuit jurisprudence addressing evidentiary requirements for dismissal on forum non conveniens grounds.

Finally, a special thank you to U.S. District Judge Timothy Black, who graciously agreed to be interviewed by my colleague, Augustus Flottman, about Judge Black's handling of the Obergefell same-sex marriage case, that eventually wound its way to the U.S. Supreme Court -- and thanks to the Cincinnati and Northern Kentucky Chapter for allowing SideBAR to re-publish the interview, which first ran in the chapter's Summer 2018 newsletter.

I hope you enjoy this Fall 2018 edition of SideBAR. **SB**

Obergefell v. Hodges: An Interview with U.S. District Judge Timothy S. Black (S.D. Ohio)

Judge Timothy S. Black & Augustus B. Flottman

Reprinted with permission of Judge Black and Dan Donnellon, President, John W. Peck Cincinnati and Northern Kentucky Chapter. This interview, conducted and recorded by FBA member Augustus B. Flottman, originally appeared in the Summer 2018 extended edition of the Cincinnati and Northern Kentucky Chapter's newsletter "For the Record".

Justice is bigger than any one individual, and for us attorneys our sense of professional responsibility is rooted in our inclusion in a system that is larger than the self. Throughout the country, individual courtroom battles between litigants play out as part of a system of justice in which advocating for a single individual's interest may very well result in a decision that ultimately affects the interests of all Americans. Our judges, the true engine in this system, are uniquely positioned to appreciate how the downstream effect of a single decision can lead to meaningful change to our society and its institutions.

Here in the Southern District of Ohio, the Honorable Timothy S. Black presided over one of those few generational cases that so fundamentally altered our society that it stands as a historic manifestation of the nobility of our system of justice. *Obergefell v. Hodges* asked Judge Black, at a high level, for a determination of the rights of same-sex couples and the extent to which those rights can be abridged by the states. The difficult legal questions and nuanced considerations presented by the *Obergefell* case were paralleled by a contentious national discourse on the social, moral, and religious issues implicated by the question of what rights and protections same-sex couples deserve. It was against this backdrop that Judge Black crafted an opinion underscored by a thoughtful appeal to human dignity, which evinced the court's recognition that the *Obergefell* case presented not just questions of law, but fundamental questions on the integrity of our national consciousness.

The Sixth Circuit, addressing like cases consolidated from Michigan, Kentucky, and Tennessee, reversed Judge Black's decision by finding the issue of same-sex marriage is most appropriately decided through the democratic process – not by the judiciary. However, as most of us know, the Supreme Court reversed the Sixth Circuit in its historic decision that, like Judge Black, cited to the centrality of marriage to the human condition. The Cincinnati Chapter of the Federal Bar Association sat down with Judge Black for a Q&A to discuss the *Obergefell* case in order to learn and appreciate the perspective of one of the few judges who presided over a case that changed the lives of tens of millions and instantly became a part of our legal history.

1. The beginning of your opinion in *Obergefell* references Justice Scalia's prediction that, following *Windsor*, the question would be presented to courts throughout the country whether, unlike the federal government, states can discriminate against same-sex couples. Did it occur to you at the time that your decision might find its way to the Supreme Court?

> No. I suspected the ultimate issue would eventually reach the Supreme Court. But in terms of my own cases, both *Obergefel*l and *Henry*, I was simply focused on what was before me. I knew my rulings would be appealed to the Sixth Circuit. But I never considered that *Obergefell* would become the named Supreme Court case.

2. The *Henry* case was a somewhat less discussed case than *Obergefell*, which involved death certificates. Some of our readers may not know that Henry actually presented identical legal questions as *Obergefell*. However, *Henry* involved the right of both individuals in a same-sex couple to be listed on the birth certificate of a child that the couple was adopting or conceiving through a donor – a right which Ohio's marriage recognition ban denied same-sex couples. In your opinion in *Henry* you included a footnote with a poem about adoption, can you tell us a little about that poem?

> Those are actually the lyrics to a John McCutcheon song titled "Happy Adoption Day." The song celebrates the beauty of adoption. In my family, we sing that song every year on my daughter's adoption day. It just happened that the day we issued the *Henry* decision, April 14, is actually my daughter's adoption day.

3. How challenging was it to reach the conclusion that Ohio encroached on a fundamental right of the plaintiffs in light of the fact that the majority of federal courts had found the right to same-sex marriage was not implicated in the fundamental right to marry?

> To some degree, *Obergefell* presented a different set of circumstances from the other cases. First, it presented a marriage recognition issue. It was also post-*Windsor*.
>
> But the very first sentence of the first Order I issued in *Obergefell* started off: "This is not a complicated case." I didn't struggle with the decision, because the constitutional rights at issue were clear. And I do not say that because of my own personal beliefs or politics. The decision was not difficult because it was what was required under the law.

4. Your opinion talks about the Bill of Rights withdrawing certain subjects from political controversy, but at the time same-sex marriage was a topic of contentious national debate, and an Ohio state representative actually sought to begin impeachment proceedings against you. How difficult was it to put into practice this principle that certain subjects are not up for political debate when at that very time, the question before you was being hotly debated?

> It was not difficult. That principle was recognized by the Supreme Court 70 years before *Obergefell*, in the case *W. Virginia State Bd. of Educ. v. Barnette*, which I cited to in my final order. In fact, I included the following

quote from *Barnette*:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

Barnette, 319 U.S. 624, 638 (1943).

Politics, public controversy, and personal beliefs do not dictate judicial rulings. Judges have an ethical obligation to not allow family, social, political, financial, or any other relationships to influence their judicial conduct or judgment. Everyone has personal opinions and beliefs, including judges. But those personal opinions and beliefs should never affect the outcome of cases, nor should they determine the validity of another person's fundamental rights.

5. Similarly, a consistent theme in all the decisions and briefs associated with this case is this underlying question of whether a judicial decision on the definition of marriage and the legality of same-sex marriage is usurping the democratic process. As a judge, how difficult of a line is it to walk between an individual's need to access the courts to defend their rights and allowing the democratic process to legislate on such a right and to what extent was this a consideration for you?

There are certain rights that are so fundamental to life, to liberty, to dignity, that enforcing those rights cannot be conditioned upon the approval of others. Certain rights are so fundamental that it does not matter if the majority of voters do not approve. It is simply not for them to decide.

And when the electoral process, or any process, violates those fundamental rights, it is a judge's duty, when called upon, to address the issue. The notion that judges are 'usurping the democratic process' by striking down *unconstitutional* laws fails to recognize that, in the first instance, the fundamental rights afforded to every human being in this country "depend on the outcome of no election." **SB**

Judge Timothy S. Black was sworn in as United States District Judge for the Southern District of Ohio on June 21, 2010. He previously served as a United States Magistrate Judge and prior to that as a Hamilton County, Ohio Municipal Court Judge. Before taking the bench, Judge Black was a partner with a large Cincinnati law firm.

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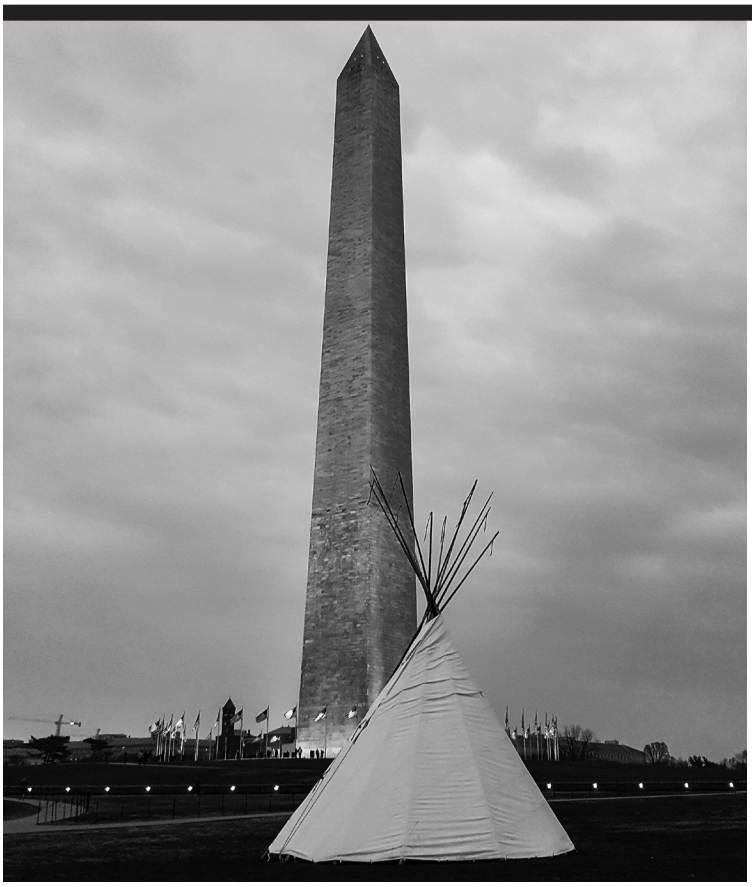

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The False Claims Act's (and Other Statutes') Nationwide Subpoena Authority Remains Unaffected by the 2013 Amendments to Fed. R. Civ. P. 45

Nathaniel Garrett

The ability to subpoena witnesses to testify is an essential aspect of trial practice. In-person testimony aids the fact-finder in making credibility determinations, and a witness' testimony can often make or break your case. Undoubtedly, the absence of a witness will affect your trial strategy.

Given the importance of subpoenas, federal practitioners will appreciate that the 2013 Amendments to Federal Rule of Civil Procedure 45 were intended to simplify subpoena practice. Unfortunately, those same Amendments prompted questions regarding the continued viability of statutes that permit nationwide subpoenas because Rule 45 lost language that permitted such exceptions to its otherwise applicable geographic limitations. But, did changes designed to simplify subpoena practice also eliminate the nationwide subpoena authority found in multiple statutes including the False Claims Act (31 U.S.C. § 3731(a)), the Racketeer Influenced and Corrupt Organizations Act (18 U.S.C. § 1965(c)), Antitrust claims (15 U.S.C. § 23), and Multiparty, Multiforum claims (28 U.S.C. § 1785)?

No, of course it did not. Nothing suggests that the Rules Committee intended to fundamentally alter federal practice in such a manner. Still, that has not dissuaded unwilling subpoena recipients from arguing that the amended rules abrogated statutes to the extent the statutes require compliance outside of Rule 45's geographic limits.

This article focuses on two cases that considered the effect of Rule 45's 2013 Amendments on the Federal False Claims Act's nationwide subpoena power. The cases—*United States ex rel. Kieff v. Wyeth*[1] and *United States ex rel. Lutz v. Berkeley Heartlab, Inc.*[2] —both concluded sensibly that the Act's nationwide subpoena authority was unaffected by the Rule 45 Amendments, but they reached this conclusion in a different manner.

The Federal False Claims Act

The False Claims Act is the government's primary tool for fighting false and fraudulent conduct committed against it. The statute was originally signed into law by President Abraham Lincoln in 1863 and has been used to deter and punish those that defraud the government in areas involving health care spending, defense contracting, or other government programs. The statute is unique in that it enlists private individuals, known as Relators, to bring suits on behalf of the government and themselves for treble damages and civil penalties. To date, False Claims Act cases have recovered in excess of $56 billion.[3] At the time of this writing, there are more than 11,000 False Claims Act cases filed, many progressing to their scheduled trial date.[4]

As is often the case in this area of law, the cases are complex. They can take years to progress from investigation to trial. There is likely to be numerous witnesses involved and the allegations could span many years. Practitioners will eventually face the issue of how to ensure their necessary witnesses will be available when the case finally has its day in court. Fortunately, in recognition of the realities of the False Claims Act practice, the statute allows for witnesses to be commanded to attend trial regardless of their location in the United States.

The False Claims Act's Subpoena Provision

Section 3731(a) of the False Claims Act states: "A subpena [sic] requiring the attendance of a witness at a trial or hearing conducted under section 3730 of this title may be served at any place in the United States."[5] While no appellate court has yet to interpret Section 3731(a), the great weight of the authority supports that the False Claims Act authorizes both the service and enforcement of subpoenas nationwide.[6] *Wyeth* and *Lutz* are part of a growing list of District Courts that have reached this conclusion.

There is an outlier, but it does not warrant much discussion. The District Court of the Virgin Islands opined that because Section 3731(a) referred only to "service" of a subpoena, that did not also permit enforcement.[7] In that Court's opinion, the geographic limits of Rule 45 would still control. But, as *Wyeth* recognized, such a conclusion is "unsympathetic to the plain intent of § 3731(a) and oblivious to the familiar language used to embody that intent."[8]

When Congress wants to permit a statute to have nationwide subpoena authority, it uses the term "service" or "issuing" of the subpoena—the same language used in the False Claims Act.[9] Indeed, Federal Rule of Criminal Procedure 17(e)—the rule that Congress modeled Section 3731(a) after—speaks only of a subpoena being "served." It is well-settled that Fed. R. Crim. P. 17 permits compelling trial attendance nationwide.[10]

The Supposed "Conflict" Between the Federal Rules and Section 3731(a)

Section 3731(a) is an exception to the subpoena authority that generally applies in federal practice. Rule 45 provides in most cases that witnesses can only be compelled to attend trial if they reside, are employed, or regularly transact business in person within 100 miles of the District Court where the trial is being held (or within that State, if the witness will not incur substantial expense).[11] Prior to the 2013 Amendments, Rule 45 provided an exception to that general rule. Rule 45(b)(2)(D) used to state, "a subpoena may be served at any place . . . that the court authorizes on motion and for good cause, if a federal statute so provides." The 2013 Amendments removed that language.

At first glance, removal of that language suggests a significant change. The Court in *Wyeth* found that the new Rule 45 was "superficially in conflict" with Section 3731(a) because the Rule no longer permitted statutory exceptions.[12] If this were true, then the Rules Enabling Act (28 U.S.C. § 2072(b)) says that federal rules supersede previously existing statutes with which they conflict.[13] In other words, all statutory exceptions to Rule 45 in existence prior to 2013 would be abrogated.

The problem with that reading of Rule 45 is that nothing is stated in the minutes or reports of the Rules Committee suggesting a result of that magnitude. The minutes and reports are silent on the deletion, and the Court in *Wyeth* was not about to opine that subpoena practice under the False Claims Act (and as a logical extension, all statutes authorizing nationwide

subpoena service) had ended based on mere silence.[15] Thus, the Court concluded that the removal of 45(b)(2)(D)'s language was an "oversight of the revisers" of the 2013 Amendments.[16] The Court then read the deleted language back into Rule 45.[17]

While the *Wyeth* opinion provides thoughtful analysis, the problem is that it failed to identify textual support for its conclusion. The opinion was also provisional, and it was made without the benefit of the adversarial process because there was no actual subpoena challenge before the Court at the time of the opinion.[18] In any event, the *Wyeth* Court reached a sensible, albeit unsupportable conclusion. Fortunately, it did not take long before the Court in *Lutz* identified the textual support that the *Wyeth* opinion lacked.

Easily Reconciling the Federal Rules and Section 3731(a)

Like the Court in *Wyeth*, the Court in *Lutz* was addressing whether the False Claims Act's nationwide subpoena authority remained viable after the 2013 Amendments to Rule 45. But, the *Lutz* Court actually had motions to quash before it, in which numerous non-parties were arguing that they could not be compelled to attend trial outside of the geographic limits of Rule 45[19].

The *Lutz* opinion relied on portions of *Wyeth,* but disagreed with *Wyeth*'s conclusion that the removal of Rule 45(b)(2)(D)'s language was an "oversight" by the drafters.[20] Instead, *Lutz* found that Rule 45(d)(2)(D) was duplicative of Federal Rule of Civil Procedure 81(a)(5), and so the removal of that language from Rule 45 fulfilled the Rules Committee's goal of simplifying the subpoena process.[21]

Rule 81 deals with the application of the Federal Rules generally and provides numerous exceptions. Rule 81(a)(5) states, "These rules apply to proceedings to compel testimony or the production of documents through a subpoena issued by a United States officer or agency under a federal statute, except as otherwise provided by statute, by local rule, or by court order in the proceedings." Rule 81 was never discussed by the Court in *Wyeth*, but it provides the textual support that the Court's opinion lacked.

Finding that Rule 81(a)(5) explicitly permits Section 3731(a) to be excepted from Rule 45's application, the Court went on to conclude that it had the authority to compel attendance at trial from witnesses located anywhere in the United States.[22] Both *Lutz* and *Wyeth* reached the correct conclusion, but the opinion in Lutz is more textually sound.

What is Missing from *Lutz* and *Wyeth*?

There is another aspect that practitioners should be aware of when addressing subpoena challenges in the context of the False Claims Act. Fraud against the government—what the False Claims Act punishes—has long been a driving force behind nationwide subpoenas. History is on the side of interpreting the False Claims Act's subpoena power to the maximum extent possible.

At the end of World War I, Congress pushed the Department of Justice ("DOJ") to prosecute war material contractors that were defrauding the United States. But, the DOJ protested because they were unable to assure the appearance and testimony of necessary witnesses.[23] As a result, Congress amended the general subpoena statute of the time (this was before the Federal Rules) to allow for nationwide subpoenas. This authority was granted for a period of three years, but Congress extended it for another three years.[24]

In 1978, the DOJ was again faced with the problem of prosecuting fraud cases. Again, the DOJ asked Congress to permit it to have the authority for nationwide subpoenas. When making this request, the DOJ asked that the False Claims Act's subpoena provision be modeled after the nationwide subpoena authority found in Fed. R. Crim. P. 17.[25]

Viewed in context, this is a remarkable request. The DOJ asked Congress to allow a civil statute to have nationwide subpoena authority identical to the authority found in criminal cases where a defendant's life and liberty are at stake. The takeaway is that the DOJ felt that the prosecution of fraud is so important that the interest in securing the attendance of witnesses for trial in those cases is akin to a criminal defendant's right to due process. This could help explain why the False Claims Act's subpoena authority has no textual restrictions and does not have any requirement for "good cause" to be shown prior to the subpoena being served, like other statutes require. Perhaps good cause for a witness' attendance may be implied in any case where a defendant seeks to cheat the government.

Conclusion

The False Claims Act's nationwide subpoena authority not only remains viable following the 2013 Amendments to Rule 45, but the opinions in *Wyeth* and *Lutz* continue the trend of interpreting the statute's subpoena power broadly. Courts should have no qualms about ordering witnesses to be produced in False Claims Act trials, regardless of their location in the United States. Indeed, that has been the intent of Section 3731(a) all along. **SB**

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Endnotes:

[1]Nos. 03-12366-DPW, 06-11724-DPW, 2015 WL 8024407 (D. Mass. Dec. 4, 2015). This opinion was written under the caption of two cases, both against Wyeth.

[2]No. 9:14-230-RMG, 2017 WL 5624254 (D.S.C. Nov. 21, 2017).

[3] CIVIL DIV., U.S. DEP'T OF JUSTICE, FRAUD STATISTICS—OVERVIEW OCTOBER 1, 1986–SEPTEMBER 30, 2017, https://www.justice.gov/opa/press-release/file/1020126/download.

[4] For more information on the False Claims Act, *see* James B. Helmer, Jr., *False Claims Act: Whistleblower Litigation* (BNA Bloomberg 7th Ed. 2017).

[5]31 U.S.C. § 3731(a).

[6]*Wyeth,* 2015 WL 8024407, at *1.

[7]*Id.* at *2.

[8]*Id.*

[9]*Id.* at *2–*3.

[10]*Id.*

[11]*See* FED. R. CIV. P. 45(c)(1).

False Claims footnotes continued on page 16

"It Ain't Over Till It's Over!"[1]; Rule 41(a)(1) Voluntary Dismissals: Pitfalls, Traps, & Practice Tips

Ira Cohen, Esq., B.A., J.D., LL.M.

Of late, the woody walls, and hallowed halls, of the U.S. District Courts look more like marble mausoleums. In this new age of jurisprudence by electronic correspondence, many, indeed most, cases are laid to their final resting places long before they ever reach trial.

Cases have always been disposed of ("terminated," in the parlance of court administrators) before trial in the federal system. Were they not, doubtless, the system would become hopelessly mired in the muck of litigation, and the wheels of justice would slip and slosh as they slowed down to a muddied halt.

The courts and public policy favor ending cases by settlements, whether out-of-court, informal, or by virtue of mediation. Still others are destined to die on the chopping block of pretrial procedural motions to dismiss, motions for judgment on the pleadings, motions for summary judgment, etc.

Despite this impressive array of cutting implements found in the case-terminating toolbox, it would appear that the one way that civil cases are NOT frequently disposed of is by trial. In a persistent, and disturbing, trend, a very low number of federal civil cases are terminated at or by trial. Actually, the cold, hard statistics are downright alarming.

To illustrate, with the most up-to-date information available, for the 12 month period ending March 11, 2018, the district courts terminated a total of 286,585 civil cases. No court action was taken on 51,930 cases; in total, court action was taken on 234,655 cases. Of those cases, 202,397 were terminated before trial; another 29,745 were terminated during or after pretrial. Most notably, only 2,513 cases went to trial, with 1,706 jury trials and 807 bench trials. In the final analysis, the total percentage of civil cases that did reach trial was less than 1 percent (i.e., 0.9%).[2]

During the course of federal litigation, it sometimes comes to pass that, through necessity or expedience, plaintiff is determined to voluntarily dismiss an action. A settlement may have been reached by the parties. Alternatively, the plaintiff may have other, valid reasons for pulling the plug on the lawsuit or -- less admirably-- may be engaging in that frowned upon lawyerly past-time known as forum-shopping.

The pertinent procedural rule involved is Rule 41(a), Fed. R. Civ. P., which provides, in haec verba, as follows:

Rule 41. Dismissal of Actions

(a) Voluntary Dismissal

(1) *By the Plaintiff.*

(A) *Without a Court Order*. Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute, the plaintiff may dismiss an action without a court order by filing:

(i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or

(ii) a stipulation of dismissal signed by all parties who have appeared.

(B) *Effect*. Unless the notice or stipulation states otherwise, the dismissal is without prejudice. But if the plaintiff previously dismissed any federal- or state-court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits.

(2) *By Court Order; Effect.* Except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper. If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the action may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication. Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.

Thus, a plaintiff may dismiss an action voluntarily without a court order in two circumstances, *to wit:* by filing a notice of dismissal before the opposing party serves an answer or motion for summary judgment, Fed. R. Civ. P. 41(a)(1)(A)(i); or at any time during the litigation by filing a stipulation of dismissal signed by all parties who have appeared, Fed. R. Civ. P. 41(a)(1)(A)(ii).[3]

The distinctions Rule 41(a)(1) draws between notices and stipulations essentially are based on the stage of litigation during which they may be filed. Notably, the Rule make no distinction regarding their effect on the litigation. See Fed. R. Civ. P. 41(a)(1)(B) (discussing the effect of a "notice or stipulation").

Whatever the animus, the plaintiff can, pursuant to Rule 41(a), Fed. R. Civ. P., play the dismissal card so long as its filing is properly timed by counsel. The question next arises as to whether the mere filing of the Notice of Dismissal, without more, effectively, and definitively, ends the game of litigation? To put it more bluntly, when is the case really over?

In that vein, both scholars and courts alike trumpet the general proposition that Rule 41(a) is self-executing and automatic. The court, in theory, loses jurisdiction over the case upon the event of filing. Yet, as we all know, many courts continue to issue Orders of one stripe or another in the wake of the Rule 41 Dismissal Notice filing. Are such post-Rule 41 Notice Orders by the Courts valid? Are they necessary? Can one reanimate a corpse case?

Upon review of a Rule 41(a) Notice of Dismissal, many courts routinely issue one or two more orders. Some courts issue an Order of Dismissal which, in turn, is based on the Rule 41 Notice. Most courts will issue an Order denying all pending motions as moot, and closing the case. No doubt, there are behind-the-scenes bureaucratic forces and statistical requirements from the Administrative Office in Washington, D.C. at work there. Moreover, a court certainly has the inherent power to control its own docket. Whether it needs to issue any such post-Rule 41 Notice-Orders, vel non, is a horse of a different color.

In the author's view, in practice, for most times and purposes, the answer is that it matters not. While these queries may pose interesting legal fodder for the Ivory Tower academics and their student charges to ponder, for the seasoned litigator, there should be no real concern unless, of course, a court has issued an order which changes the status of the case, purports to dismiss the case with prejudice (contrary to plaintiff's wishes), grants attorneys' fees or some form of relief to a party, or has

attempted to retain jurisdiction impermissibly.

On initial inspection, the Rule 41(a) landscape may seem simple and tranquil. In reality, it is fraught with stumbling stones, water hazards, pitfalls, and sand-traps. In order to render the legal terrain more navigable, I offer the following Baker's Dozen of Rule 41(a) practice tips.

The Rule 41(a) Notice of Dismissal must dismiss the entire action.

Rule 41(a) was designed, and operates, to dismiss cases in their entirety. It is graven in stone that this procedural tool is not intended to be employed to dismiss discreet claims or counts in a civil action.[4] The rule's own text strongly suggests that this is an "all or nothing" proposition. As for the courts' viewpoint, for example, the Eleventh Circuit Court of Appeals, in *Perry v. Schumacher Group of Louisiana,* 891 F.3d 954, 958 (11th Cir. June 4, 2018), makes it crystal clear that Rule 41(a) is not to be utilized for disposing of anything but the entire action.

The Rule 41(a) Notice of Dismissal is "without prejudice" unless it expressly states otherwise.

As the Rule unmistakably states: "Unless the notice or stipulation states otherwise, the dismissal is without prejudice." Fed. R. Civ. P. 41(a)(1)(B). That basic fact and principle may not be changed or modified by either the opponent or the court.

The Rule 41(a) Notice of Dismissal may not be conditional.

In order for a Rule 41 Notice to enjoy vitality and efficacy, it must be unconditional.[5] Few, if any, exceptions or flexibility in this principle have been observed in practice.

To illustrate, where the Notice requires more than the Clerks' ministerial act of closing the file, the notice is deemed to be conditional.[6] To provide another concrete example, in situations wherein a notice states that there is a right for the plaintiff to reinstate the claims within 45 days, that Notice is viewed as conditional. In some instances, a court will cut some slack for a litigant which has filed a conditional Rule 41 Notice, construing same as a motion to dismiss under Rule 41(a)(2), and provide notice to the filer of such contemplated treatment, barring the filing of an unconditional Rule 41(a) Notice within a prescribed period of time.[7]

The Rule 41(a) Notice of Dismissal is automatic.

Rule 41(a) allows the Plaintiff to set in gear the legal machinery by which the case is simply and cleanly disposed of. Indeed, it obviates the need for any judicial intercession at all. "Rule 41(a)(1)(i) ... provides a simple, self-executing mechanism whereby a case may be dismissed in certain circumstances without motion, argument, or judicial order.... [T]he dismissal takes effect automatically: the trial judge has no role to play at all."[8] In that manner, the case dies a relatively quiet death, on a markedly anti-climactic note.

Some courts, in discussing the automatic nature of the Rule 41(a)(1)(A) dismissal's automatic feature, have contrasted the procedure under Rule 41(a)(1)(A)(ii) relating to voluntary dismissal by means of a stipulation. For example, the former Fifth Circuit Court of Appeals indirectly indicated that a Rule 41(a)(1)(A)(ii) stipulation may dismiss the case automatically.[9] Inasmuch as the parties are at liberty to stipulate to end the lawsuit at any time by way of stipulation (e.g., in the case of a settlement), the better approach is to treat Rule 41(a)(1)(A)(ii) as likewise dismissing a case automatically. In short, the answer is that the dismissal by stipulation also runs on automatic pilot.

The Rule 41(a) Notice of Dismissal is self-executing.

The Rule 41 dismissal Notice is considered by the courts to be self-executing. In other words, it takes effect the moment it is filed with the Clerk of Court and no judicial imprimatur is needed.[10] It is not climbing out on a ledge to suggest that the unadorned language of Rule 41(a)(1)(A)(ii) requires that a stipulation filed pursuant to that subsection is self-executing and dismisses the case upon its becoming effective. Consequently, the vast majority of the courts have ruled, in the context of both published and unpublished opinions, that a Stipulation filed under Rule 41(a)(1)(A)(ii) is self-executing and dismisses the case upon filing.[11] "[A] voluntary stipulation of dismissal under Rule 41(a)(1)(A)(ii) is effective immediately, [so] any action by the district court after the filing of such a stipulation can have no force or effect because the matter has already been dismissed . . . ."[12]

The Rule 41(a) Notice of Dismissal is effective immediately and closes the case.

As one may correctly surmise, pursuant to Rule 41(a)(1)(i), a plaintiff has an absolute right to dismiss without prejudice and no action is required on the part of the court. Ordinarily, the filing of a Rule 41(a)(1)(A)(i) Notice closes the case.[13] As to the timing of the Notice's effectiveness, the triggering event is the filing.[14]

> As sagely observed by the Tenth Circuit Court of Appeals, in *Janssen v. Harris*:
>
> "The [filing of a Rule 41(a)(1)(i) notice] itself closes the file. There is nothing the defendant can do to fan the ashes of that action into life and the court has no role to play. This is a matter of right running to the plaintiff and may not be extinguished or circumscribed by adversary or court. There is not even a perfunctory order of court closing the file. Its alpha and omega was the doing of the plaintiff alone. The effect of the filing of a notice of dismissal pursuant to Rule 41(a)(1)(i) is to leave the parties as though no action had been brought. Once the notice of dismissal has been filed, the district court loses jurisdiction over the dismissed claims and may not address the merits of such claims or issue further orders pertaining to them."[15]

The Rule 41(a) Notice of Dismissal does not require judicial approval or any order of the court.

It is well-settled that the filing of a notice of dismissal pursuant to Rule 41(a)(1)(i) does not require an order of the court.[16] *Matthews v. Gaither,* 902 F.2d 877, 880 (11th Cir.1990). The court has no discretion to deny it and "[t]he dismissal is effective immediately upon the filing of a written notice of dismissal, and no subsequent court order is required."[17] Consequently, court orders are quite unnecessary for any dismissals under Rule 41 (a)(1)(A)(i). "Other than to determine... whether an answer or a motion for summary judgment has in fact been filed prior to the filing of a notice of dismissal, a court has no function under Rule 41(a)(1)(i)." See also 8 Moore's Federal Practice ¶ 41.33[6] [e], at 41-84 (3d ed. 1999) ("Once a notice of dismissal without prejudice is filed, the court loses jurisdiction over the case, and may not address the merits of [the] action or issue further

orders.").[18]

The same principle applies to voluntary dismissal by stipulation; that is to say, the dismissal is automatic and there is no requirement of judicial approval.[19] Indeed, the district court has "nothing further to do when a stipulation of dismissal without prejudice is filed."[20] In fact, one lower court was called on the carpet when it "Ordered" a stipulated dismissal. The Eighth Circuit noted that Rule 41(a)(1) "contains no exceptions that call for the exercise of judicial discretion by any court" and invalidated the court's entry of a "So Ordered" notation on the parties' Rule 41(a)(1)(ii) stipulated dismissal.[21]

The Rule 41(a) Notice of Dismissal effectively divests the court of jurisdiction.

The court's task, upon then filing of a notice of dismissal, is severely limited. "Other than to determine... whether an answer or a motion for summary judgment has in fact been filed prior to the filing of a notice of dismissal, a court has no function under Rule 41(a)(1)(i)."[22]

A Rule 41(a)(1)(i) dismissal "strips a court of jurisdiction" in the sense that it "terminates the case all by itself. There is nothing left to adjudicate."[23] Once the plaintiff has dismissed the action under the rule, the court loses all jurisdiction over the action. As to cases involving stipulations, once again, the same principle is applied. As the Second Circuit Court of Appeals noted: "Generally . . . a plaintiff's filing in the district court of a stipulation of dismissal signed by all parties pursuant to Rule 41(a)(1)(ii) divests the court of its jurisdiction over a case, irrespective of whether the district court approves the stipulation."[24]

After the filing of the Rule 41(a) Dismissal Notice, the court may not address the merits of the case.

The voluntary dismissal of a case strips the court of its jurisdiction. Once the Rule 41(a) Notice has been electronically filed with the Clerk's Office, the District Court has lost its legal hold over the matter and, moreover, cannot enter any further orders relating to the claims of the case.[25] As a result, the courts have reasoned that any action by the district court after a voluntary dismissal is "superfluous."[26] Similarly, in those cases involving Rule 41 Stipulations, once a stipulation is filed pursuant to Rule 41(a)(1)(A)(ii), all action on the merits of the case is terminated.[27]

After the filing of the Rule 41(a) Dismissal Notice, the court may not retain jurisdiction by further Order.

Ordinarily, the filing of a Rule 41(a)(1)(A) Notice closes the case.[28] Furthermore, the trial court thereupon loses jurisdiction and cannot enter any further orders relating to the claims of the case.[29] A court cannot alter the Notice. More specifically, it cannot retain jurisdiction over the cause by judicial fiat imposed after the filing of the Rule 41 Notice. Once the case is dismissed and jurisdiction has not been retained, the district court does not have any jurisdiction to rule on the merits of that decision. "Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."[30]

Cave statutum de limitibus; beware the statute of limitations.

There are marked differences between federal and state re-filing deadlines. The attorney must be cognizant of the chronological imperatives of each case.

Under Rule 41 of the Federal Rules of Civil Procedure, a plaintiff may voluntarily dismiss its claim "without prejudice" prior to service by the defendant of an answer or motion for summary judgment, whichever occurs first. This generally means that the plaintiff can dismiss the claim and, yet, retain the ability to refile the same claim within the statute of limitations.

The prudent practitioner, however, must exercise extreme caution when taking a voluntary dismissal. Albeit a plaintiff can refile a claim after voluntarily dismissing it without prejudice, attorneys need to be cognizant that, under the federal rules, the statute of limitations continues to run and could impose a bar on the claim.

One merciless trap for the unwary is that Rule 41 does not allow for the one year grace period to refile outside the statutes of limitation. Under the Federal Rules, if dismissal is taken outside the statutes of limitation, the case is over. Furthermore, under the Federal Rule, even if the statute of limitations has not expired when dismissal is taken, attorneys should keep in mind that any refiling must be accomplished within the limitations period, not within one-year of the dismissal.[31]

Some states have enacted special laws ("savings statutes") which spare plaintiffs' lawyers from the bottomless abyss of malpractice. By way of illustration, at first blush, North Carolina Rule of Civil Procedure 41 appears similar to the federal rule. However, under the North Carolina variant, plaintiff may refile the claim within one year of the voluntary dismissal, even if the second action would otherwise be barred by the statute of limitations; that is to say, the one-year provision extends the period for refiling.

The moral of this part of the story is that one needs a trustworthy calendaring system One can use Outlook® or some other electronic format, but, dinosaur that I am, I tend to I favor being supported by both "belt and suspenders." As I look back across the span of time, my paper desk calendar has not failed me in 35 years.

Attorney's Fees Awards and the "Double Dismissal" Rule.

Rule 41(d) applies where a plaintiff voluntarily dismisses a case against a defendant in one jurisdiction and, subsequently, re-files that case or a similar case in another jurisdiction. In such situations, the rule enables the defendant to recover "the costs" associated with defending the previously dismissed action. To be sure, the rule is designed to discourage forum-shopping and to remunerate defendants for expenses incurred in defending the same case twice.

Rule 41(d), Fed. R. Civ. P., provides as follows:

(d) Costs of a Previously Dismissed Action. If a plaintiff who previously dismissed an action in any court files an action based on or including the same claim against the same defendant, the court:

(1) may order the plaintiff to pay all or part of the costs of that previous action; and

(2) may stay the proceedings until the plaintiff has complied.

The question next arises as to the meaning of the word "costs," i.e., whether the hapless defendant can recover its attorneys' fees as part of its "costs"? Legal research has

disclosed, as is so often the case, that the various circuits have split on that question into at least three separate and distinct camps.

This judicial trifurcation may fairly be summarized as follows. First, there are some appellate courts who have held that such awards are always allowable.[32] Second, espousing the polar alternative - and eschewing any departure from the "American Rule" -- absent express Congressional intent and language -- other circuits have concluded that attorneys' fees under Rule 41(d) should never be awarded.[33] Third, a number of courts have taken the middle ground, a limited rights approach couched on the rationale that such attorneys' fees awards should be allowed when the substantive statute under which the lawsuit was filed defines costs to include lawyers' fees.[34]

The lesson, or take-away, here is quite simple. Where possible and proper, the lawyer for an erstwhile plaintiff contemplating the re-filing of an action in one of the liberal jurisdictions on this issue, ought to afford due consideration to the issue of being stung by the opponent for attorneys' fees for the prior action and changing, if practicable, the re-filing forum. If no change is possible, then, an appropriate costs-benefits analysis ought to be conducted prior to re-filing. Otherwise, rather than the second time being a charm, it may well turn into a curse.

One must also be aware of the so-called "Double Dismissal" Rule. In this game, two (2) strikes and the plaintiff can be called "out"…of court.

"[T]he effect of a Rule 41(a)(1) dismissal is to put the plaintiff in a legal position as if he had never brought the first suit. The plaintiff suffers no impairment beyond his fee for filing."[35] A voluntary dismissal without a court order is presumed to be without prejudice unless the notice of dismissal states otherwise. Rule 41(a)(1)(B), Fed. R. Civ. P.

In the event, however, the "the plaintiff previously dismissed any federal- or state-court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits."[36] Thus, if plaintiff brings a third action, it will be tossed out based upon the second Rule 41(a) dismissal.

This is known as Rule 41's "Double Dismissal Rule" to the effect that a notice of voluntary dismissal operates as an adjudication on the merits when it is filed by a plaintiff who has already dismissed the same claim in another court. It ought to be mentioned that the rule does not apply where stipulations, motions, or orders are involved.[37]

A Rule 41(a) Dismissal Notice may be proper to file even in light of an existing Bankruptcy Stay under Section 362(a)

There are few things in legal practice that give rise to more grey hairs than the thought of running afoul of a federal court order or a Rule, let alone the serious mistake of violating the automatic Section 362(a) Bankruptcy stay. See Title 11, Section 362(a).[38] In most litigators' minds, the latter transgression may fairly be likened to jumping off the stalled litigation train onto the "third rail" of the judicial process.

Notwithstanding our instinctive (and, generally, well-founded) fear of the automatic stay, it would appear that the proper use and application of a Rule 41 voluntary dismissal can switch the tracks and completely derail a pending, but stayed, litigation.

In that regard, it appears that the courts have favorably received Rule 41 dismissal notices, despite the existence of a previously issued auto-stay under 362(a) of the Bankruptcy Reform Act. A reading of the pertinent case law suggests that sound reasoning and strong public policy has trained the courts to approach the problem in a very pragmatic fashion.

In any case, the central question is whether the voluntary dismissal is not inconsistent with the terms of the stay.[39] Nor does the § 362(a) stay "preclude another court from dismissing a case on its docket or ... affect the handling of a case in a manner not inconsistent with the purpose of the automatic stay."[40]

Parenthetically, it should be noted that, in some instances, the courts have treated the Rule 41 dismissal notice as a motion to lift the stay and for the court to issue an Order for a voluntary dismissal.[41] The bottom line seems to be that if the debtor and its financial situation, is not prejudiced by and, indeed, is helped by the dismissal, no problem is presented.

Conclusion

It has been said that Rule 41 was originally derived from an old common law practice known as retraxit. Black's Law Dictionary defines "retraxit" as follows:

"Lat. He has withdrawn. The open, public, and voluntary renunciation by a plaintiff, in open court, of his suit or cause of action…U.S. v. Parker, 7 S. Ct. 454, 120 U.S. 89, 30 L. Ed. 601;…"[42]

In modern practice, plaintiff need not wait for the time and tribulations of trial. In fact, as I have stated, the statistics mentioned hereinabove reflect that the chance of reaching trial are slim to none. In stark contrast, Rule 41 provides a convenient, electronic method, like pushing the buttons on a cleaning machine, by means of which the case is quickly and efficiently washed away and rinsed from the judicial system. One does need to take care, of course, that the right buttons are pushed, at just the right time, and that the door is properly shut and watertight, so as to prevent the client's suit from being ruined.

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Endnotes:

[1]A classic "Yogi-ism," attributed to legendary baseball coach, manager, and N.Y. Yankee catcher, Yogi Berra, during the 1973 National League pennant race.

[2]U.S. Courts Caseload Statistics Data Tables, U.S. District Courts- Civil Cases Terminated by Nature of Suit and Action Taken During the 12-Month Period Ending March 31, 2018, retrieved from www.uscourts.gov/statistics/caseload-statistics-data-tables, on July 30, 2018.

[3]*See, generally*, Bradley Scott Shannon, Dismissing *Federal Rule of Civil Procedure 41*, 52 University of Louisville Law Review 265 *et seq.* (2014).

[4]*See, e.g., Klay v. United Healthgroup, Inc.,* 376 F.3d 1092, 1106 (11th Cir. 2004)(with the court observing that this may be accomplished by amendment under Rule 15, Fed. R. Civ. P.).

[5]*See Hyde Constr Co. v. Koehring Co.*, 388 F.2d 501, 507 (10th Cir. 1968); *See also Amore v. Accor N. Am., Inc.,* 529

Supp. 2d 85, 91 (D.D.C. 2008).

[6]*Blue Cross & Blue Shield of Mo. v. Nooney Krombach Co.,* 170 F.R.D. 467, 471 (E.D. Mo. 1997).

[7]*See, e.g., Anna Males v. Nationwide Recovery Systems, Inc.,* Case No. 10-1071-CM, D.C., D. Kan., May 5, 2010 (per Muguia, D.J.)

[8]*Randall v. Merrill Lynch,* 820 F.2d 1317, 1320 (D.C. Cir. 1987).

[9]*See, e.g., United States v. City of Miami,* 614 F.2d 1322, 1330 (5th Cir. 1980).

[10]*See Marex Titanic, Inc. v. The Wrecked & Abandoned Vessel,* 2 F.3d 544, 546 (4th Cir.1993).

[11]*De Leon v. Marcos,* 659 F.3d 1276, 1284 (10th Cir. 2011) (characterizing a Rule 41(a)(1)(A)(ii) dismissal as self-executing); *see also Marino v. Pioneer Edsel Sales, Inc.*, 349 F.3d 746, 752 n.1 (4th Cir. 2003) (noting that dismissals by stipulation pursuant to Rule 41(a)(1)(ii) are not effectuated by court order).

[12]*See also Small BizPros, Inc.,* 618 F.3d 458, 463 (5th Cir. 2010). *See also Green v. Nevers*, 111 F.3d 1295, 1301 (6th Cir. 1997) (noting that a "properly stipulated dismissal under Rule 41(a)(1)[(A)](ii) is self-executing and does not require judicial approval . . . ."). *Gardiner v. A.H. Robins Co.,* 747 F.2d 1180, 1189 (8th Cir. 1984) (recognizing that the entry of a stipulation under Rule 41(a)(1)(A)(ii) is effective automatically and does not require judicial approval).

[13]T.E. *Janssen v. Harris,* 321 F.3d 998, 1000 (10th Cir. 2003).

[14]*Matthews v. Gaither*, 902 F.2d 877, 880 (11th Cir. 1990) (per curiam); *see also Jenkins v. Village of Maywood,* 506 F.3d 622, 624 (7th Cir. 2007).

[15]*Janssen, supra,* 321 F.3d 998, at 1000.

[16]*See Hyde Constr. Co. v. Koehring Co.,* 388 F.2d 501, 507 (10th Cir. 1968).

[17] *Williams v. Ezell,* 531 F.2d 1261, 1263–64 (5th Cir. 1976).

[18] *D.C. Elecs., Inc. v. Nartron Corp.,* 511 F.2d 294, 298 (6th Cir.1 975).

[19] *Kabbaj v. Am. Sch. of Tangier,* 445 F. App'x 541, 544 (3d Cir. 2011) (*per curiam*)(*citing First Nat'l Bank of Toms River v. Marine City, Inc.,* 411 F.2d 674, 677 (3d Cir. 1969); see also In re Wolf, 842 F.2d 464, 466 (D.C. Cir. 1988) (*per curiam*) ("'[C]aselaw concerning stipulated dismissals under Rule 41(a)(1)[(A)](ii) is clear that the entry of such a stipulation of dismissal is effective automatically and does not require judicial approval.'" (*quoting Gardiner v. A.H. Robins Company, Inc.*, 747 F.2d 1180, 1189 (8th Cir. 1984).

[20]*State Treasurer of Mich. v. Barry*, 168 F.3d 8, 14 (11th Cir. 1999).

[21]*Gardiner v. A.H. Robins Co.*, 747 F.2d 1180, 1190 (8th Cir. 1984).

[22]*D.C. Elecs., Inc. v. Nartron Corp.*, 511 F.2d 294, 298 (6th Cir. 1975). See also 8 Moore's Federal Practice ¶ 41.33[6][e], at 41-84 (3d ed. 1999).

[23]*Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1078 (7th Cir. 1987).

[24]*Gambale v. Deutsche Bank AG,* 377 F.3d 133, 139 (2d Cir. 2004).

[25]*Janssen v. Harris* 321 F.3d 998, 1001 (10th Cir. 2003); see also Netwig v. Ga. Pac. Corp., 375 F.3d 1009, 1011 (10th Cir. 2004).

[26]*SmallBizPros, Inc. v. MacDonald,* 618 F.3d 458, 463 (5th Cir. 2010) (per curiam).

[27]*Smith v. Phillips,* 881 F.2d 902, 904 (10th Cir. 1989).

[28]*Janssen v. Harris,* 321 F.3d 998, 1000 (10th Cir. 2003).

[29]*Id.,* at 1001. *See also Netwig v. Ga. Pac. Corp.,* 375 F.3d 1009, 1011 (10th Cir. 2004).

[30] *Ex Parte McCardle,* 74 U.S. (7 Wall.) 506, 514 (1869).

[31]*See, e.g., Bamberger v. Bernholz*, 96 N.C. App. 555 (1989), *reversed on other grounds*, 326 N.C. 589, 391 S.E. 2d 192 (1990).

[32]*See, e.g., Evans v. Safeway Stores, Inc.,* 623 F.2d 121, 122 (8th Cir. 1980)(*per curiam*).

[33] *See, e.g., Rogers v. Wal-Mart Stores, Inc.,* 230 F.3d 868, 874 (6th Cir. 2000).

[34]*See, e.g., Andrews v. America's Living Ctrs.*, LLC, 827 F. 3d 306, 310 (4th Cir. 2016)(*quoting Esposito v. Piatrowski,* 223 F.3d 497, 501 (7th Cir. 2000).

[35]*Yesh Music v. Lakewood Church,* 727 F.3d 356, 359 (5th Cir. 2013) (*quoting Harvey Specialty & Supply, Inc. v. Anson Flowline Equip. Inc.*, 434 F.3d 320, 324 (5th Cir. 2005).

[36]*Id.*

[37]*American Cyanamid Co. v. McGhee*, 317 F.2d 295, 298 (5th Cir. 1963); *see also, e.g., ASX Investment Corp. v. Newton*, 183 F.3d 1265, 1268 (11th Cir. 1999); Manning v. S.C. Dep't of Highway and Public Transp., 914 F.2d 44, 47 n.3 (4th Cir. 1990) (citing 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 2368, at 188 (1971); *Sutton Place Dev. Co. v. Abacus Mortg. Inv. Co.,* 826 F.2d 637, 640 (7th Cir. 1987).

[38]That Section provides, in pertinent portion:

a)Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of—

(1)

the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;…"

[39]"[C]ourts retain jurisdiction 'to determine the applicability of the stay to litigation pending before them, and to enter orders not inconsistent with the terms of the stay.'" *Robert v. Bell Helicopter Textron, Inc.*, 2002 WL 1268030, 2 (N.D. Tex. May 31, 2002) (*quoting Picco v. Global Marine Drilling Co.*, 900 F.2d 846, 850 (5th Cir. 1990)).

[40]*Dennis v. A.H. Robins Co., Inc.,* 860 F.2d 871, 872 (8th Cir. 1988).

[41]*See, e.g., Hancock Bank v. Richard T. Miles and Vanessa T. Miles,* Case 1:12-cv-00642-KD-C, U.S.D.C., S.D. Ala., S. Div. (per Dubose, J.)

[42]Black's Law Dictionary 1480 (4TH ed. 1968).

Public Cost-Shifting and Effects of Individual District Court Rules

Christian W. Waugh

Introduction

As practitioners in federal courts for civil matters, each of us has likely familiarized ourselves with at least one set of local rules for a district court, such rules supplementing the general Federal Rules of Civil Procedure. Some local rule sets are more onerous to learn and apply than others. But, in fact, the rules we need to know to actually *practice* do not end there. Although we may take them for granted, how many of our federal district court judges, including standard district court judges, magistrates, and bankruptcy judges, maintain their own separate, niche rules for submitting orders, setting hearings, and the other countless technical minutiae necessary to push a case through federal court and obtain results for a client?

The answer is "a lot."

The cost of these cascading sets of rules is unseen, but not unfelt. They may raise the cost of litigation and thus deter access to the courts.

First, since I can already see law clerks angrily marking this article up, I offer a disclaimer: this short article does not address whether these rules and their consequent costs are *good* or *bad.* This article is merely intended to describe the costs and consequences imposed by the rules so that they are seen and understood by the Federal Bar. Whether they are worth the tradeoff is a question for actual scholars. But based on the identifiable costs in this article, the individual rules developed by district court judges create significant costs and, *ceteris paribus*, a kind of viscosity for litigants that reduces their ability to navigate the federal courts.

The Rules

The Federal Rules of Civil Procedure have been around since 1938,[1] with local rules following not long after. Federal practitioners have been known to take special pride in the federal rules, as if they are the gates of Rome and state rules are the spears of barbarians at those gates. In 1958, Professor Charles E. Clark of Yale Law School published a valedictory lament on the success of his work in developing the federal rules: "No more stimulating or rewarding work has ever fallen to my lot. Sometime I hope a history may be written of what was done and how; of the gay Committee meetings and the dull; of the successes, which were many, and the failures, which were few."[2]

My "home" federal district is the United States District Court for the Middle District of Florida, which sports a PDF containing all its *local* rules that spans 136 pages. Here is a sample of local rule spans from other district courts from around the country: E.D. Tenn. – 111 pages, E.D.N.Y. and S.D.N.Y. – 127 pages, and C.D. Cal – 161 pages. These rules supplement the Federal Rules to govern everything from admission of new attorneys to certificates of conference and objections to magistrate rulings.

Lawyers not wanting to earn the ire of district court judges or, perhaps worse, that of their judicial assistants and clerks, will take the time to read all pages, and perhaps even to train others, such as associates or paralegals in them, too. This, alone, is a substantial undertaking in time and money. But you know all this, already.

Beneath the level of local rules, however, things start getting murky. Many individual courts have their own judge-specific requirements, which require close scrutiny. Take the Central District of California for example. C.D. Cal features a weblink for each judge's procedures and schedules: https://www.cacd.uscourts.gov/judges-schedules-procedures. The practices of the judges vary, but taken together, individual courts prescribe: (a) the formatting of draft orders; (b) the manner in which counsel may contact chambers; (c) motion practice on discovery motions; (d) dress codes; (e) continuances; (f) mandatory print copies of certain electronically filed documents; (g) exhibit tags; (h) expected lunch break times; and the list goes on and on and on.

It is not unusual for a court's particular rules to span a dozen pages. These, like the local rules, become an obligation on counsel and staff to follow. The consequences of not doing so are not always clear, and no doubt vary from court to court, but whatever the case, the consequences of violating, if any, are unlikely to lead to swifter resolution of cases or litigants spending less money. Like any other, this type of rules constitutes an expense, which, depending on the income of the litigant, may be great or small.[3]

Rules as Cost-Shifting

It is, of course, highly unlikely that any individual court, or clerk managing a court, promulgates individual court rules with the explicit intention of creating new expenses for lawyers or litigants. But it seems equally obvious that there must be some reason why such idiosyncratic court rules have proliferated through the entire federal system. Since the individual court rules originate with the judges themselves, we need a way to assess why judicial decision-making leads to this result.

In *The Behavior of Federal Judges,* authors Judge Richard Posner, William M. Landes, and Lee Epstein derive a "judicial utility function," which explains judicial behavior as a function of several factors.[4] Specifically, a judge's utility function would be: $U = U(S(t_j), EXT(t_j, t_{nj}), L(t_l), W, Y(t_{nj}), Z)$.[5] Under this function, the authors explain:

> …the judge seeks to maximize his utility subject to a time constraint ($T = t_j + t_{nj} + t_l$) where T is his total available hours (24 hours per day), t_j is the number of hours he devotes to judicial activities, t_{nj} is the number of hours he devotes to nonjudicial work such as writing and lecturing, and t_l is the number of his leisure hours. S denotes the satisfactions of the job and is expected to be a positive function of the hours the judge devotes to his judicial work. S includes the internal satisfaction of feeling that one is doing a good job, the prospect of being promoted, and the social dimensions of judgeship…. EXT are external satisfactions from being a judge, including reputation, prestige, power, influence, and celebrity, which are positively related to the time devoted to both judicial and nonjudicial activities. L is leisure, and is a function of hours of leisure activities (so $t_l = T - t_j - t_{nj}$). W is the judicial salary, while $Y(t_{nj})$ is other earned income and is related to hours spent in nonjudicial work. Z is the

combined effect of all other variables, including the cost of increasing the probability of promotion to a higher level of the judiciary (what we call auditioning).[6]

The exact function of each factor within the utility function is not important, but knowing that they vary in direct relationship to other things, such as different component's of a judge's time, is. For example, *S* and *EXT* are a function, themselves, of t^j, the number of hours a judge devotes to her or his judicial duties. But *S* and *EXT* may vary in different ways, or different proportions, based on this variable.

If we decompose the time spent on judicial work, t^j, into two component types of work: the work that judges derive satisfaction from, t^{j1}, and the ceaseless drudgery of judicial administration from which no one could derive much satisfaction (document formatting, communications that could be avoided had a lawyer read a rule, organization for hearings and trials, etc.), t^{j2}, then we can immediately see why individual court rules have proliferated. Obviously, $t^j = t_{j1} + t_{j2}$.[7]

Given this "decomposition" of t_j, it is necessary to restate the judicial utility function. Neither the internal satisfactions, *S*, nor the external satisfactions, *EXT*, are functions of t_{j2}. But they do vary based on t_{j1}.[8] Leisure remains dependent on the total sum of time spent on judicial work. Thus, our restated judicial utility function would be:

$$U = U(S(t_{j1}), EXT(t_{j1}, t_{nj}), L(t_l), W, Y(t_{nj}), Z)$$

To the extent that individual court rules reduce the amount of time dealing with the routine drudgery of judicial administration, t_{j2}, the individual court rules obviously also reduce total time spent on judicial work, t_j. The interesting result of this restated judicial utility function is that it shows how leisure time, *L*, increases while not depriving judges of any of the internal satisfactions of the job, *S*, nor external satisfactions, *EXT*. As a result, a judge's utility could be substantially increased by implementing individual court rules with virtually no cost to the judge.

No doubt, *someone* must bear the expense for the organization and efficient progression of a case through a legal system. The decrease in total time spent on judicial work doesn't mean the work isn't done or isn't needed. To the contrary, there is a tradeoff: when *judicial* work is decreased, *lawyer* work is increased. An order must still be drafted. A hearing must still be scheduled.[9] The lawyer must spend the time that judges once spent on bringing everything into order, scheduling, formatting, and so on. As a result, we can clearly see individual court rules not just as increasing judicial utility, but also as an exercise in *cost-shifting* from the public to the people who bear the costs of lawyers.[10]

The Judicial Counter-Argument

A counter-argument exists and goes something like this: individual court rules may decrease judicial work and increase *some* types of lawyer work, but they also decrease *other* types of lawyer work, such that the *net effect* of individual court rules is positive because *overall* it reduces work.

For example, consider the amount of time that it takes for all the stakeholders in our judicial system to go from a motion and hearing through to an order. In this example, for the sake of simplicity, let us assume we have a plaintiff, a defendant, a judge, and a judicial assistant, and let us further assume that these are the only parties who spend any time or energy working in a given federal district court.

Now let us assume that a judge's rule regarding formatting and sending in a draft order costs everyone x time such that it is the addition of $\boldsymbol{x_1}$, the time one party's attorney spends drafting the order, $\boldsymbol{x_2}$, the time the other attorney's spends reviewing the order, $\boldsymbol{x_3}$, the time the judicial assistant spends checking the formatting and propriety of the order, and $\boldsymbol{x_4}$, the time the judge spends reviewing and signing the order.[11] By way of section 3 of this article, we would know that *but for the rule*, both $\boldsymbol{x_3}$ and $\boldsymbol{x_4}$ would be larger than they are. Meaning that all things being equal, whatever shape the rule is, the rule acts to shift some of the time from $\boldsymbol{x_3}$ and $\boldsymbol{x_4}$ to $\boldsymbol{x_1}$ and $\boldsymbol{x_2}$, who are charged with drafting and formatting the order properly ahead of time, greasing the skids for the judge and judicial assistant.

But without more information, $\boldsymbol{x}$, that is the sum of time that *all* stakeholders spend on dealing with the order, could be larger or smaller due to the rule. It may be that the rule acts to put all parties on notice as to what the proper formatting is, ameliorating the need for the stakeholders to communicate back and forth until the proper form is found. Thus, while the rule imposes an increase in some drafting work for the lawyers, it may also decrease some of the work, too. It may also be that because each court has its own courtroom rule, and courtrooms adhere strictly to it, that the parties have to spend an inordinate amount of time properly researching the rule and formatting the order accordingly.

Over time, assuming all the stakeholders were the same and they repeated interactions with each other such that the time attorneys need to spend learning or re-learning the rule goes down, we might expect the rule overall to save time. But there is no way without further research to know that. All we can conclude given our modeling is that the effect of a courtroom rule on total judicial costs is ***ambiguous***: it could increase total cost or decrease it.

Conclusion

Economists and lawyers speak different languages,[12] but scholars such as the authors of *The Behavior of Federal Judges* have made notable progress in translating the law, legal process, and the demand that drives them through the lens of the economic science. This lens is important because, as here, we can better explain in shared terms the causes and effects of things such as individual court rules.

Economics modeling clearly establishes that individual court rules impose and shift costs. This article shows that individual court rules, at a minimum, decrease judicial work, while likely increasing the work of lawyers participating in a given court. Based on the modeling contained herein, the total effect on the amount of work that stakeholders in the court system must perform as a result of the rules is ambiguous. The author is skeptical that the total amount of work goes down, however.

There are reasons beyond the scope of this limited article that inveigh against the notion that the cost-shifting is favorable for litigants. The rules impose costs that may act as barriers to entry, resulting in fewer lawyers who can practice in the federal bar, fewer litigants who can get access to the courts, and very likely less competition in the legal market. As bad as the costs may be for represented litigants, consider how terrifying and opaque individual court rules may be for *pro se* litigants.

Given the cost-shifting and potentially increased costs, the

burden should be on those courts to explain why the benefits, whatever they are, exceed the costs as shown here. If it is a close call, then we might hope that individual courts make an attempt to harmonize their rules as much as possible, so that ideally they would in fact be local district rules and not a mish-mash of individual court rules. In that way, we might better fulfill the vision of the original supporters and authors of the Federal Rules of Civil Procedure.

In the bigger picture perspective, it is the author's hope that federal practitioners and rules committee members may see the utility of applying the economics lens to their activities and consider using economics modeling as a technology for assessing the efficacy of rules and other aspects of the federal court system in the future.

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Endnotes:

[1]United States Courts website, http://www.uscourts.gov/rules-policies/current-rules-practice-procedure/federal-rules-civil-procedure [last visited August 26, 2017]

[2]Charles E. Clark, Two Decades of the Federal Civil Rules, 58 Colum. L. Rev. 435 (1958).

[3]The value, or "marginal utility," of $1,000 (or any amount of money) is generally expected to be much greater for someone whose annual income is $30,000 versus someone whose annual income is $200,000, or a corporation with bottomless coffers. As a result, even a small imposition of cost from the individual court rules may lead to a significant hardship to a litigant. For a detailed discussion on marginal utility, see: Michael Parkin, Microeconomics, 179-80, 182 (11th ed. 2014).

[4]Richard Posner et al., The Behavior of Federal Judges loc. 976 (2013).

[5]Id. at loc. 989.

[6]Id. at loc. 989.

[7]Perhaps another thing should be said about tj. In many ways, law clerks, who are hired to assist the judge manage case dockets, write opinions, and the like, as well as deputy clerks, bailiffs, and assistants to the court, are extensions of judges. When a law clerk cannot write an opinion, a judge must write the opinion. When a bailiff does enforce a dress code, the judge may need to do so. When a clerk of the court does not efficiently file something, the duty may fall on the judge's chambers. Thus, tj may encompass the amount of work that agents of a judge perform, and so we would expect judicial utility to increase when the judicial work of those agents is reduced, as well. Put more succinctly: "a happy clerk makes for a happy judge."

[8]Upon closer examination and elaboration, we probably could conceive of both S and EXT decreasing as a function of tj2 once it exceeds a certain amount—such as we would expect from a backward bending supply of labor curve. See: Parkin, Microeconomics, 422 (11th Ed. 2014).

[9]In many districts, mediation is encouraged or suggested, and local rules have been promulgated to that effect. In at least one district of which the author is aware, such mediation is mandatory for most cases. See: L.R. 16.2(b)(1) of the United States District Court for the Southern District of Florida, "In every civil case excepting those listed in Local Rule 16.2(c), the Court shall enter an order of referral similar in form to the proposed order available on the Court's website (www.flsd.uscourts.gov), which shall: (A) Direct mediation be conducted not later than sixty (60) days before the scheduled trial date which shall be established no later than the date of the issuance of the order of referral." This would be an extreme example of potential cost-shifting from the public to private entities, although the net effect is likely ambiguous, as with so many of the local and individual court rules, discussed further, infra.

[10]In a world with no scarcity, either of time or money, such cost-shifting does not matter. But the only place we can conceive without scarcity is reserved for angels—and that disqualifies all courtrooms. The magnitude of the problem is exacerbated given the size of egos in the profession. There is no better jurisdiction to see the problem laid bare than the state where everything is bigger: Texas. In Henry v. Cox, 60 Tex. Sup. Ct. J. 1007 (Tex. 2017), in an opinion by Justice Don Willett of Twitter fame (@JusticeWillett), the Texas Supreme Court resolved a fiery, internecine battle between two judges who fought over the position and salary of a "Director of Judicial Administration," which sounds a lot like a high-ranking clerk of the court. Had either the local commissioners court or judiciary had infinite resources, perhaps this battle could have been avoided.

[11]$x = x1 + x2 + x3 + x4$.

[12]Ana Rosado Curbero, Barriers to Competition: The Evolution of the Debate 1 (2016).

***False Claims* footnotes continued from page 8**

[12]*Wyeth*, 2015 WL 8024407, at *4.

[13]*Id.*

[14]*Id.; see also* Report of the Civil Rules Advisory Committee to the Standing Committee on Rules of Practice and Procedure, May 2, 2011, *available at* http://www.uscourts.gov/sites/default/files/fr_import/CV05-2011.pdf.

[15]*See Wyeth*, 2015 WL 8024407, at *4.

[16]*Id*. at *3.

[17]*See id.* at *3–*5.

[18]*Id*. at *1.

[19]*Lutz*, 2017 WL 5624254, at *1.

[20]*Id*. at *2.

[21]*Id.*

[22]*Id.* at *3.

[23]James B. Sloan, William T. Gotfryd, *Eliminating the 100 Mile Limit for Civil Trial Witnesses: A Proposal to Modernize Civil Trial Practice,* 140 F.R.D. 33, 35 (1992).

[24]*Id.* at 35–36.

[25]*See* H.R. Rep. No. 95-1447, at 7–8 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5566, 5570–72.

How Convenient -- Sixth Circuit Addresses Evidentiary Requirements for Dismissal on Forum Non Conveniens Grounds

Michael S. Mayer, Esq.

A recent opinion from the Sixth Circuit provides guidance for showing that an alternative forum is "available and adequate" when moving to dismiss on the basis of *forum non conveniens*. *Associação Brasileira de Medicina de Grupo v. Stryker Corp.,* 891 F.3d 615 (6th Cir. 2018) ("*Stryker*"). In *Stryker,* the Sixth Circuit rejected the argument that a defendant can establish an alternative forum as available and adequate to hear the case simply by consenting to the alternative forum's jurisdiction. Instead, the Court held that the defendant bears the burden of establishing that the alternative forum can (1) exercise jurisdiction over the parties; (2) exercise jurisdiction over the subject matter; and (3) provide a satisfactory remedy. The Court also explained the types of evidence that are typically necessary to carry that burden.

Stryker and the Forum Non Conveniens Doctrine

In *Stryker,* an association of Brazilian health insurance providers sued a Michigan corporation in the U.S. District Court for the Western District of Michigan. The association alleged that the defendant, from its offices in Michigan, ran a scheme in which it made fraudulent and improper payments to Brazilian doctors, resulting in an increased cost to provide healthcare. The claims included fraud, civil conspiracy, tortious interference with contractual relationships, and unjust enrichment.

The defendant moved to dismiss the case on *forum non conveniens* grounds, with Brazil as the alternative forum. The district court granted the motion. Under the common law doctrine of *forum non conveniens,* a federal trial court can decline to exercise its jurisdiction, even though the court has jurisdiction and is a proper venue, when it appears that the convenience of the parties and the court and the interests of justice indicate that the action should be tried in another forum. However, as *Stryker* reiterated, the doctrine should be rarely invoked by a court, given the persistent obligation of federal courts to exercise their jurisdiction. Indeed, the Sixth Circuit uses a rigorous three-step test to determine whether dismissal on *forum non conveniens* grounds is appropriate: the court determines (1) the degree of deference owed to the plaintiff's forum choice, (2) whether the defendant carried its burden of establishing an adequate alternative forum, and (3) whether the defendant carried its burden of showing that the plaintiff's chosen forum is unnecessarily burdensome based on public and private interests.[1]

Adequate Alternative Forum Requirement

Stryker primarily involved the second step of the three-step test: whether the defendant carried its burden of establishing that the claim can be heard in an available and adequate alternative forum. The Sixth Circuit emphasized that identifying such an alternative forum is a prerequisite for dismissal, not simply a factor to be balanced. Thus, if there is no suitable alternative forum where the case can proceed, then the entire inquiry ends and the motion must be denied.

The defendant in *Stryker* focused its argument on the Supreme Court's statement from *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22, 102 S. Ct. 252, 265 (1981) that an alternative forum is ordinarily considered to be adequate "when the defendant is 'amenable to process' in the [alternative] jurisdiction." The defendant argued that, by simply consenting to Brazilian jurisdiction, it satisfied its burden of establishing an adequate alternative forum. *See, e.g., Watson v. Merrell Dow Pharmaceuticals, Inc.,* 769 F.2d 354, 356 (6th Cir. 1985) ("In the case at bar, defendant…has clearly met its threshold burden for entitlement to a *forum non conveniens* dismissal by consenting to United Kingdom jurisdiction."). It also argued that there was no requirement to submit an expert opinion or a treatise on foreign law to show the existence of an adequate alternative forum. *See, e.g., Wong v. PartyGaming, Ltd.,* 589 F.3d 821, 831 (6th Cir. 2009) ("plaintiffs have not cited to any case law which requires the district court to make specific findings on the issue [of whether the alternative forum is adequate], nor have we found any").

The Sixth Circuit disagreed. It explained that an alternative forum is not actually available -- and a defendant is not meaningfully amenable to process there -- if the foreign court cannot exercise jurisdiction over both parties. Additionally, an alternative forum would not be adequate if the remedy it offered was "so clearly inadequate or unsatisfactory that it is no remedy at all," such as when that forum does not permit litigation of the subject matter of the dispute.[2] The Court held that the defendant bears the burden of establishing that the alternative forum meets those criteria.

Although the Sixth Circuit held that the nature of the showing required to carry that burden depends on the nature of the case at hand (and in particularly clear cases, pleadings and preliminary submissions alone may suffice), it explained that defendants usually will need to submit expert evidence. That expert evidence could include, for example, an affidavit from an expert in the law of the foreign jurisdiction or citations to treatises, cases, or statutes.

The defendant in *Stryker* failed to meet its burden because it was not obvious from the pleadings that a Brazilian court would be able to (1) exercise jurisdiction over the defendant, (2) exercise jurisdiction over the subject matter, and (3) offer a satisfactory remedy. The defendant -- an American, not Brazilian, corporation -- did not provide the court with any evidence on those issues. This includes that it did not provide any guidance from a Brazilian legal expert or citations to Brazilian law or a treatise on the subject. The Court explained that, if the case could be dismissed without such evidence to show that Brazil truly was an available forum, then the plaintiff could be left without any forum in which to present its case. Though perhaps inconvenient, the plaintiff could at least be sure of having jurisdiction over the defendant and its claims in the original jurisdiction, the Western District of Michigan.

Regarding the defendant's argument that its consent to jurisdiction in Brazil was sufficient in and of itself to fulfill its burden, the Sixth Circuit provided an example to show why the argument must fail: a party's consent to a federal court's jurisdiction over her state law claim worth $50,000 would not

be legally meaningful because, under 28 U.S.C. §1332, a federal court would lack subject matter jurisdiction over the claim. In the end, the Sixth Circuit remanded the case to allow the defendant to refile its motion with proper supporting evidence to meet its burden of establishing that Brazil is an adequate alternative forum to hear the case.

Potential Alternatives

The Supreme Court in *Piper Aircraft* advised that the doctrine of *forum non conveniens* "is designed in part to help courts avoid conducting complex exercises in comparative law."[3] A possible alternative to *Stryker's* potentially complex evidentiary hurdles would be (a) a preliminary showing of likely jurisdiction and satisfactory remedy in the alternative forum (without expert testimony), coupled with (b) dismissal without prejudice to refiling in the original forum if the alternative forum becomes unavailable or inadequate. Some courts, including the Sixth Circuit, have used dismissal without prejudice as a type of "safety net" in these situations,[4] while other federal circuits appear to require significantly less evidence to establish an adequate alternative forum than *Stryker*. For example, the Fifth Circuit has said that, although defendants must carry the burden of showing an adequate alternative forum, they may rely on a presumption that the foreign forum is adequate (and a plaintiff could overcome that presumption by making a contrary showing).[5] The Second Circuit has held that, because a defendant agreed to submit to the jurisdiction of a foreign court as a condition of dismissal, and the plaintiff was a resident of that foreign country and had not claimed that the foreign court was otherwise inadequate, the district court had not erred in concluding that the foreign country was an adequate forum.[6]

However, this potential alternative procedure could end up lengthening the litigation and significantly increasing expenses if the court turns out to be wrong in its initial determination to dismiss the case. The procedure also does not correspond with the motion's purpose of completely ending the case in the original forum. As the Seventh Circuit has said, the defendant rightfully bears a "heavy burden" when invoking the *forum non conveniens* doctrine "because if the doctrine is successfully invoked, the result is not a transfer to another court but a dismissal, and the plaintiff will not be able to refile his case in any other court if the statute of limitations has run."[7] *Stryker* follows that logic.

Conclusion

International trade has significantly increased over the past couple of decades,[8] and the world has seemingly gotten smaller with the growth in technology. It is likely that even more foreign plaintiffs will bring lawsuits in the United States instead of their own countries, like the plaintiffs in *Stryker*. In such cases, the safest practice for attorneys representing defendants who want to dismiss the case on *forum non conveniens* grounds is to submit expert evidence to satisfy the adequate alternative forum requirement. That evidence should show that, in the alternative forum, (1) all parties are amenable to process, (2) all parties and claims are subject to the court's jurisdiction, and (3) the remedy provided is not so clearly inadequate or unsatisfactory that it would be no remedy at all.[9] **SB**

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Endnotes

[1]The tests in other circuits are similar, although some have differences that may affect the type of evidence that a defendant would want to present. *E.g., Wilson v. Island Seas Invs., Ltd.,* 590 F.3d 1264, 1269 (11th Cir. 2009) ("A forum non conveniens dismissal is appropriate where (1) the trial court finds that an adequate alternate forum exists which possesses jurisdiction over the whole case, including all of the parties; (2) the trial court finds that all relevant factors of private interest favor the alternate forum, weighing in the balance a strong presumption against disturbing plaintiffs' initial forum choice; (3) if the balance of private interests is at or near equipoise, the court further finds that factors of public interest tip the balance in favor of trial in the alternate forum; and (4) the trial judge ensures that plaintiffs can reinstate their suit in the alternate forum without undue inconvenience or prejudice"); *Kisano Trade & Invest Ltd. v. Lemster*, 737 F.3d 869, 873 (3d Cir. 2013) (factors to guide a district court are "(1) the amount of deference to be afforded to plaintiffs' choice of forum; (2) the availability of an adequate alternative forum where defendants are amenable to process and plaintiffs' claims are cognizable; (3) relevant 'private interest' factors affecting the convenience of the litigants; and (4) relevant 'public interest' factors affecting the convenience of the forum").

[2]*Stryker*, 891 F.3d at 620, citing and quoting Piper Aircraft, 454 U.S. at 254 & n.22.

[3]*Piper Aircraft,* 454 U.S. at 251.

[4]*See, e.g., Gschwind v. Cessna Aircraft Co.,* 161 F.3d 602, 607 (10th Cir. 1998) (affirming dismissal on *forum non conveniens* grounds where the appellate court found a treatise that showed that the foreign jurisdiction recognized the type of claims brought by the plaintiff and the district court had conditioned dismissal on the defendants' consent to have the action reinstated in the original forum if the alternative forum refused jurisdiction); *Rustal Trading US, Inc. v. Makki,* 17 Fed. Appx. 331, 337 (6th Cir. 2001) (explaining the "safety net" created by permitting the plaintiff to re-file its complaint in the original forum in the event that the courts of the alternative forum proved not to constitute an adequate and available alternative forum).

[5]*InduSoft, Inc. v. Taccolini,* 560 Fed. Appx. 245, 248-249 (5th Cir. 2014).

[6]*R. Maganlal & Co. v. M.G. Chem. Co.,* 942 F.2d 164, 167 (2d Cir. 1991).

[7]*Deb v. Sirva, Inc.,* 832 F.3d 800, 806 (7th Cir. 2016).

[8]*See* https://www.wto.org/english/res_e/statis_e/its2015_e/its2015_e.pdf (last visited August 10, 2018) (World Trade Organization publication stating that world exports of commercial services had risen from $1,179 billion in 1995 to $4,872 billion in 2014, and world merchandise exports had risen from $5,168 billion in 1995 to $19,002 billion in 2014).

[9]*See Stryker*, 891 F.3d at 620-621; Piper Aircraft, 454 U.S. at 241, 254 & n.22.

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