



Side BAR

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MESSAGE FROM THE CHAIR



Susan D. Pitchford

Dear Litigators,

The new year is always a great time to set goals and resolutions for the upcoming months. Firstly, I would ask you to consider adding pro bono service to your list of resolutions. As I write, our colleagues in federal government face the financial crunch and anxiety of reduced workforce due to the federal shutdown. Our federal courts face growing caseloads with unrepresented parties with claims sounding in social security / disability, immigration, employment, and civil rights. Please consider volunteering with your local chapters who bring pro bono services to federal litigants, and if your chapter does not have such a pro bono clinic, contact us! The Federal Litigation Section has assisted with start-up costs for pro bono legal advice clinics and appointed representation programs, and for CLE training for volunteer lawyers. We help lawyers gain valuable federal practice and procedure experience while supporting our courts and court staff. If you would like assistance in finding or founding a pro bono

project, let us help you!

Secondly, I would ask you to add self-care to your resolutions. The stress of litigation can wreak havoc on our schedules, our health, and our relationships. This is a put-your-own-mask-on-before-helping-others situation. You do not have to do anything fancy to reduce your stress. Take a walk outside – it’s free! Leave the phone behind and breathe. Consider setting a “walk and talk” meeting with a colleague rather than meeting over drinks. Your blood pressure will thank you, and you will find yourself enjoying improved focus and clarity.

Do well, and be well, litigators. Your section is here to support you! **SB**

About the Chair • Susan Pitchford is a partner at Chernoff Vilhauer LLP, an intellectual property law firm in Portland, Oregon, where she handles patent and trademark disputes and litigates a range of IP-related disputes. Susan served as President of the Oregon Chapter of the FBA 2011-12 and serves on the Board of Directors for Oregon Women Lawyers. Susan can be reached at sdp@chernofflaw.com or at (503) 227-5631.

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Note from the Editor

Jeffrey T. Cox

GOOD NEWS - SHARE IT!

2018 was a productive and engaging year for the Federal Litigation Section as reported in recent editions of this newsletter. Working with FBA committees, sections and chapters around the country, the FLS engaged members, lobbied Congress, sponsored continuing education and networking events, underwrote scholarship opportunities, weighed in on federal rulemaking, supported local, regional and national civics initiatives, and many other efforts to advance our profession and federal practice.

Notwithstanding these ongoing efforts, this active FBA section would benefit further from increased member participation in its many activities. As you set priorities for 2019, I invite you to take advantage of the opportunity to become more engaged with the Federal Litigation Section! One easy and rewarding way to do so is to contribute an article for publication in SideBAR; consider writing on your area of practice, a key decision, an emerging area of law or federal procedure -- the floor is yours. We seek to publish scholarly articles in each of our newsletter editions, and are continually soliciting for outstanding content.

If you are working on an article or blog post, or teaching at a CLE, consider converting your work product into an article submission to SideBAR, and share your work with over 5,000 fellow federal litigators and members of the federal judiciary!

This edition includes a summary and photographs from the November 2018 "Veterans Litigation for General Practitioners" CLE in San Juan, Puerto Rico sponsored by the FBA's Federal Career Service Division and the Puerto Rico Chapter of the FBA. Thanks go out to Adam Hill, Vice Chair for Veterans, Federal Career Service Division, for his summary of this event. The Federal Litigation Section was happy to provide scholarship support for this 2018 event.

Also featured in this newsletter are three excellent articles worth your review. In the first, Beverly Pohl and George Mahfood thoughtfully examine federal question jurisdictional challenges faced by district courts when asked to confirm,

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About the Editor • *Jeff Cox is a business and complex litigation attorney, and Partner at Faruki P.L.L., a business and complex litigation 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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Greetings from the Vice Chair

Nicole Deese Newlon

As a commercial litigator in Tampa, Florida, I have practiced in law firms of various sizes and with a number of experienced, bright, and respected federal court practitioners. I have also had the honor of practicing in a District in which the members of the Bar are professional, collegial, and supportive. The Middle District of Florida stretches 350 miles, from the Georgia border on the northeast to the south of Naples on Florida's southwest coast, and includes 35 of Florida's 67 counties.

I started my involvement with the Federal Bar Association at the local level, serving on the Board of the Tampa Bay Chapter of the FBA and, after holding several different positions, ultimately concluded my service as President of that organization several years ago. After my years of service at the local level, I sought and found opportunities to continue my work with the FBA through the Federal Litigation Section.

I have enjoyed my work with the Section as Secretary/Treasurer, gaining insight and familiarity with the Section, its mission, its past accomplishments, and its future goals. I look forward to serving as the Section Vice Chair for the next two years and actively participating in the Section's continued successes and growth.

The Section is dedicated to improving litigation practices in federal courts and agencies, it has impacted legislation and rule making, it has sponsored and co-sponsored seminars and other continuing legal education events, and it has provided a wealth of support to local FBA and federal court programs. If you share these interests, and

are looking for additional career development opportunities and professional networking, then I would encourage you to reach out to the Section and find your own path.

If I can be of any service to you, or if you have any questions or comments about the Section, please let me know (nnewlon@jclaw.com). I look forward to meeting as many of you as possible at Section and FBA events, as we continue to find ways to serve the interests and needs of the federal litigation practitioner. **SB**

About the Vice Chair • Nicole Newlon is Vice Chair of the Federal Litigation Section of the FBA. She is a partner at Johnson & Cassidy, P.A. in Tampa, Florida, where she practices commercial litigation. Nicole served as President of the Tampa Bay Chapter of the FBA (2014-15) and previously served as Secretary-Treasurer of the Federal Litigation Section; she can be reached at nnewlon@jclaw.com or at (813) 699-4858.

Editor continued from page 2

vacate or modify an arbitration award; the article considers the issues arising from *Vaden v. Discover Bank*, 556 U.S. 49 (2009), and the split of circuit authority left in the wake of that SCOTUS decision.

The second featured article, submitted by Ira Cohen, affords an in-depth and appreciative historical nod to Dr. Henry Campbell Black and his lasting legacy to the legal profession: *Black's Law Dictionary*.

My sincere congratulations and appreciation goes out to each of these fine lawyers.

Finally, I have included a short article I prepared regarding the Supreme Court's current consideration of Rule 23 standards in *cy pres* settlements in *Frank v. Gaos*, and the growing likelihood that the jurisdictional inquiry into constitutional standing may forestall the Court's broader examination of class actions.

I have a slogan written on the chalkboard in my workout room at home that is a simple, to-the-point self-encouragement in the battle against Father Time: "DON'T JUST START --

FINISH." I hope you will accept this encouragement as well. Many FLS members reach out to propose an article; many more contemplate writing, but other commitments interfere. I would love to be overwhelmed with article submissions this year, so please get started, and once you finish, share your article with me for publication consideration!

Happy 2019 to one and all. **SB**

FEDERAL LITIGATION SECTION NEWS

FLS Scholarship Support for Rising Professionals

The Federal Litigation Section kicked off 2019 with a \$2,000 commitment to provide four \$500 scholarships to the 2019 FBA Rising Professionals Symposium, February 1-2, 2019 in Las Vegas, Nevada. The scholarship funding request came from the FBA Young Lawyers Division. The YLD selected scholarship recipients using several criteria, including YLD section membership, lawyers with less than five years of

practice, who are solo, small firm, public sector, unemployed, or otherwise have a financial need. The two-day CLE program was jam-packed with great presentations addressing practice tips and speakers addressing cutting-edge legal developments. The FLS is pleased to support the YLD's Las Vegas program!

Federal Career Service Division and Puerto Rico Chapter Host CLE One Year Post-Hurricane Maria

Adam M. Hill, Vice Chair for Veterans, Federal Career Service Division



The November 2018 gathering included (L to R): 2012-13 FBA National President Robert J. De Sousa; current 2018-19 FBA National President Maria Z. Vathis; and 2013-14 FBA National President Hon. Gustavo A. Gelpi, Chief Judge for the United States District Court for the District of Puerto Rico.

Hurricane Maria struck Puerto Rico on September 20, 2017, just below a category 5 storm. Winds and floods caused widespread devastation on the island. NOAA estimates the damage in Puerto Rico and the U.S. Virgin Islands due to Hurricane Maria is 90 billion dollars. Maria is, by a large degree, the most destructive hurricane to hit Puerto Rico in modern times.

On November 2, 2018, just past one year after Hurricane Maria, the Federal Bar Association's Federal Career Service Division and the Puerto Rico Chapter of the Federal Bar Association presented a very successful CLE in San Juan, Puerto Rico. Titled "An Overview of Veterans Litigation for General Practitioners," the CLE covered a wide range of relevant and current topics including VA appeals, discharge upgrades, military naturalization and derivative citizenship, military justice, and ethical issues in representing veterans.

The nearly 80 participants registered for the event were very pleased to hear from both the Honorable Gustavo Gelpi,



Chief Judge for the U.S. District Court for the District of Puerto Rico, and the Honorable Roberto Feliberti, Associate Justice, Supreme Court of Puerto Rico. Judge Feliberti told in detail about the devastation suffered in Puerto Rico during a luncheon for all attendees. Although the island still has a long way to go on the path to recovery, Judge Feliberti encouraged participants to go home and tell their friends and family to come visit the Island of Enchantment. Ongoing necessary recovery work, including painting and restoration, occurred outside and inside the scenic San Juan Embassy Suites and was visible throughout Puerto Rico during our trip. Many beaches and restaurants are open for business, and the U.S. Territory is ready to welcome many more people back to the Commonwealth.

All of the helpful resources from the CLE, including slides and handouts, are available on the Federal Bar Association's website at: <http://www.fedbar.org/Divisions/Federal%20Career%20Service%20Division/Puerto-Rico-CLE-Nov-2-2018.aspx>. Anyone who wants to learn more about legal issues involving veterans are encouraged and welcome to review the slides.



A Circuit Split on a Question of Federal Jurisdiction: When seeking to confirm or vacate an arbitration award, is federal question jurisdiction to be determined from the face of the petition, or may a district court “look through” the petition and consider the nature of the underlying dispute?

Beverly A. Pohl & George G. Mahfood¹

Introduction

Arbitration is a popular forum for dispute resolution, but enforcement of an arbitration award may require that it be confirmed by a court in the form of a judgment. The Federal Arbitration Act (FAA), provides in 9 U.S.C. § 9, that parties may specify the court in which a petition to confirm shall be filed, or if they do not, “then such application may be made to the United States court in and for the district within which such award was made.”² Sections 10 and 11, governing petitions to vacate or to modify an award, also refer only to “the United States court in and for the district wherein the award was made. . . .” But neither the parties’ agreement nor the FAA statutes can guarantee that a federal district court will have federal question jurisdiction to confirm, vacate, or modify an arbitration award.

Notably, parties to an arbitration are free to agree to seek to confirm or vacate an award in state courts, thus, avoiding issues of federal jurisdiction. However, because the FAA does not itself confer federal jurisdiction, federal district courts have jurisdiction to entertain petitions brought under the Act only if an independent basis for federal jurisdiction exists. In that regard, the FAA has been called “something of an anomaly” in the realm of federal legislation, because it bestows no federal jurisdiction but rather requires for access to a federal forum an independent jurisdictional basis over the parties’ dispute.³ A conflict between the circuits has arisen as to whether federal question jurisdiction should be determined from the face of a petition brought under the FAA—similar to any complaint brought in federal court—or whether, in this context, courts should “look through” the petition to the underlying controversy in arbitration.

The conflict arises from *Vaden v. Discover Bank*, 556 U.S. 49 (2009), which construed § 4 of the FAA, governing petitions to compel arbitration. Based on the unique language of that statute, the majority of a divided Court held that district courts may “look through” a petition to compel arbitration and consider the nature of the underlying dispute when deciding if federal question jurisdiction exists. However, the federal circuit courts of appeals are divided as to whether *Vaden’s* “look through” approach also applies to petitions brought under other sections of the FAA, §§ 9-11 petitions to *confirm*, *vacate*, or *modify* arbitration awards.⁴

The Vaden Decision

Vaden originated with a “garden variety” state-law contract action.⁵ Discover Bank sought to recover past due charges from Betty Vaden, a credit card holder. She counterclaimed, alleging that the bank’s claims violated state law, and invoked an arbitration clause in the credit card agreement. Discover Bank then filed a § 4 petition in the United States District Court for Maryland to compel arbitration of the plaintiff’s counterclaims.⁶ Discover Bank argued that the § 4 petition arose under federal law because Vaden’s state law counterclaims were preempted and governed by § 27(a) of the

Federal Deposit Insurance Act (“FDIA”), 12 U.S.C. § 1831d(a) (2012).⁷ Vaden eventually agreed with that preemption argument. The district court and a divided Fourth Circuit found that federal question jurisdiction existed to compel arbitration. The Fourth Circuit also found that because complete federal preemption existed, it trumped the familiar well-pleaded complaint rule, i.e., the rule that federal question jurisdiction must appear on the face of the complaint, and courts cannot look to a federal defense or a counterclaim when assessing federal jurisdiction.⁸ The Supreme Court granted certiorari to resolve an existing circuit split on how to determine if federal question jurisdiction exists when a case is initiated through a § 4 petition to compel arbitration.⁹

The Supreme Court looked to the pertinent statute for the answer. Title 9 U.S.C. § 4 provides, in pertinent part:

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, *save for such agreement*, would have jurisdiction under title 28, in a civil action or in admiralty of *the subject matter of a suit arising out of the controversy between the parties*, for an order directing that such arbitration proceed in the manner provided for in such agreement. . . . (emphasis supplied).

Focusing on the terms of the statute (“[t]he text of § 4 drives our conclusion. . . .”), the Court held that the district court was required to “look through” the § 4 petition to the parties’ underlying substantive controversy to determine federal question jurisdiction.¹⁰

The phrase “save for [the arbitration] agreement” [in § 4 of the FAA] indicates that the district court should assume the absence of the arbitration agreement and determine whether it “would have jurisdiction under title 28” without it. Jurisdiction over what? The text of § 4 refers us to “the controversy between the parties.” The phrase, the Fourth Circuit said, and we agree, is most straightforwardly read to mean the “substantive conflict between the parties.”¹¹

But that conclusion alone was not enough to affirm the Fourth Circuit. An important part of the *Vaden* analysis was to reaffirm the familiar well-pleaded complaint rule, which requires that federal question jurisdiction must appear on the face of a complaint, *not* in a defense, and *not* in a counterclaim.¹² Because Discover’s complaint was based on state law, and federal law only governed Vaden’s *counterclaim*, the Court found that the well-pleaded complaint rule precluded the exercise of federal jurisdiction: “[u]nder the well-pleaded complaint rule, a completely preempted counterclaim remains a counterclaim and thus does not provide a key capable of opening a federal

court's door."¹³ The Court therefore reversed the Fourth Circuit decision, for lack of federal question jurisdiction.

Thus, *Vaden* only decided how to determine federal jurisdiction in a petition to *compel* arbitration, under the unique text of 9 U.S.C. § 4.¹⁴ It remains an unanswered question, with a developing conflict among the circuits, whether the “look through” approach should also apply to petitions to confirm, vacate, or modify an arbitration award, under §§9–11 of the FAA.

The Circuit Split

The First and Second Circuits, and most recently, the Fourth Circuit, apply *Vaden* to all petitions brought under the FAA, while the Third and Seventh Circuits have limited *Vaden* to its original context, § 4 petitions to compel arbitration.¹⁵

In *Ortiz-Espinosa v. BBVA Securities of Puerto Rico, Inc.*, 852 F.3d 36 (1st Cir. 2017), the First Circuit applied the “look through” approach to cases brought under §§ 9–11 of the FAA.¹⁶ Although those statutes do not contain the “save for such agreement” language found in § 4, the First Circuit found the difference in the statutory text to be irrelevant, finding as a policy matter that the “look through” approach should be applied because it is “the only approach available that provides broad federal court jurisdiction over proceedings to enforce awards.”¹⁷

Similarly, in *Doscher v. Sea Port Group Securities, LLC*, 832 F.3d 372 (2d Cir. 2016), the Second Circuit held that pursuant to the principles established in *Vaden*, district courts may look through petitions brought under § 10 of the FAA to determine federal question jurisdiction.¹⁸ *Doscher* recognized tension between the fact that § 4 appears to speak to federal jurisdiction, by virtue of the “save for” clause, despite the fact that it is well-established that the FAA itself does not provide a basis for federal jurisdiction. The court resolved that tension by concluding that a court must make an “ordinary” jurisdictional inquiry, looking to the underlying substantive dispute with respect to all remedies under the Act, not just § 4.¹⁹ And like the First Circuit, *Doscher* found it intolerable that some, but not all, attempts to confirm or vacate an arbitration award might find a federal forum. That reasoning effectively turns a blind eye to the well-pleaded complaint rule, reaffirmed so forcefully in *Vaden*.

Most recently, in *McCormick v. America Online, Inc.*, 909 F.3d 677 (4th Cir. 2018), the Fourth Circuit aligned itself with the cases discussed above, concluding that “if the underlying claim is one that otherwise could be litigated in federal court, the § 10 or § 11 motion can likewise be resolved in federal court.”²⁰ That court avoided the fact that the language in § 4 that was critical to the *Vaden* decision was absent in § 10 and § 11, by saying that § 4 is a “procedural gate to arbitration,” and that if the federal court has jurisdiction to compel an arbitration, that jurisdiction extends to a later petition to review the award under §§ 10 and 11, even if a no petition to compel arbitration had ever been filed.²¹

Conversely, the Third and Seventh Circuits have refused to extend *Vaden* beyond the § 4 context, and have rejected the notion of a “look through” approach when considering petitions to vacate an arbitration award.²² *Goldman v. Citigroup Global Markets, Inc.*, 834 F.3d 242 (3d Cir. 2016), held that “§ 4 of the FAA should be read differently than § 10 for jurisdictional purposes.”²³ Finding the “save for” language in § 4 to be critical (as did *Vaden* itself), the Third Circuit conducted an extensive analysis and concluded that “Neither the textual nor practical considerations noted by the Court in *Vaden* apply in a case relying on § 10 of the FAA. Section 10 lacks the critical “save

for such agreement” language that was central to the Supreme Court’s *Vaden* opinion.”²⁴

Similarly, *Magruder v. Fidelity Brokerage Services, LLC*, 818 F.3d 285 (7th Cir. 2016), rejected the “look through” approach to determine federal question jurisdiction over petitions to vacate arbitration awards. Noting that federal litigants typically may not return to federal court to enforce a contractual settlement agreement (unless the settlement was entered as a judgment or the federal district court reserved jurisdiction to enforce it),²⁵ *Magruder* reasoned that denying the “look through” approach for petitions to vacate an arbitration award—and relegating those parties to pursue their remedy in state court—would “harmonize the law of arbitration with the law of contracts.”²⁶

Pros and Cons of Extending the Look-Through Approach

Statutory text is always the starting point for statutory interpretation, and certainly the language of § 4, governing motions to compel arbitration, differs from the language of § 9, governing motions to confirm, and § 10, governing motions to vacate.

Nonetheless, supporters of the “look through” approach beyond the § 4 context have argued that “[a]pplying the ‘look through’ approach [to § 9 and § 10 petitions] prevents the absurdity of an interpretation that permits parties to file motions to compel in federal court where the underlying dispute raises a federal question, but precludes them from seeking the same federal court’s aid under the FAA’s other provisions.”²⁷ But perhaps “absurdity,” like beauty, is in the eyes of the beholder.

That approach, inviting all comers in to federal district court, despite the fact that the FAA alone cannot support jurisdiction, and where a federal question is not shown on the fact of the petition, fails to consider the wave of unanswered questions that would then arise. For instance, if district courts should “look through” petitions to confirm or vacate arbitration awards, how far back should they look? The Supreme Court itself was split on the issue of which controversy the district courts should look to under § 4 of the FAA.²⁸ Moreover, what if there are multiple underlying controversies? Is *Vaden* applicable to determine questions of diversity jurisdiction or only federal question jurisdiction? Notably, a party that is foreclosed from bringing a petition to confirm or vacate in federal court has a recourse, in state court. Therefore, in our view, enforcing the well-pleaded complaint rule in this context, and requiring that federal jurisdiction be shown on the face of the petition, might exclude some cases from a federal forum, but would be consistent with other situations where federal courts simply do not have jurisdiction over a particular case.

Conclusion

In our view, *Vaden*’s textual analysis limits its reach to § 4 petitions to compel arbitration, because the statutes and the policy concerns in cases seeking to confirm or vacate an award are significantly different. Indeed, some courts have stated that in enacting the FAA, the “central federal interest” was enforcement of agreements to arbitrate, not the review of arbitration decisions.²⁹ Given the existing circuit split, lawyers involved in arbitrations might reasonably advance either side of this argument in circuits that have not yet weighed in, but eventually the Supreme Court may have to resolve this important question of federal question jurisdiction.



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Endnotes:

¹The authors, partners at Nelson Mullins Broad and Cassel in Fort Lauderdale and Miami, acknowledge the valuable research and drafting assistance of Jennifer Bautista, a 2018 Summer Associate, and a law student at Nova Southeastern University in Fort Lauderdale, FL.

²9 U.S.C. § 9 (2012), provides:

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made.

³*Vaden v. Discover Bank* 556 U.S. 49, 59 (2009) (citations omitted).

⁴*Compare Goldman v. Citigroup Glob. Mkts., Inc.*, 834 F.3d 242, 254 (3d Cir. 2016) (declining to apply *Vaden* to questions of federal question jurisdiction over motion to vacate arbitration award brought under § 10 of the FAA), *and Magruder v. Fidelity Brokerage Servs., LLC*, 818 F.3d 285, 288 (7th Cir. 2016) (holding district courts may not look through actions brought under §9 and § 10 of the FAA), *with McCormick v. America Online, Inc.*, 909 F.3d 677 (4th Cir. 2018) (when determining subject-matter jurisdiction over § 10 and § 11 motions, courts should look to the nature of the underlying claim in dispute, just as is done with respect to § 4 petitions to compel arbitration); *Ortiz-Espinosa v. BBVA Secs. of P.R., Inc.*, 852 F.3d 36 (1st Cir. 2017) (“[T]he look through approach cannot be limited to § 4 petitions to compel”) *and Doscher v. Sea Port Grp. Secs., LLC*, 832 F.3d 372, 388 (2d Cir. 2016) (holding the look through approach may be applied to determine federal question jurisdiction over actions brought under § 10 of the FAA).

⁵*Vaden*, 556 U.S. at 54.

⁶*Id.* at 54-55.

⁷*Id.*

⁸*See Franchise Tax Bd. of State of Cal. v. Constr. Laborers Vacation Tr. for S. Cal.*, 463 U.S. 1, 27-28 (1983).

⁹*Vaden*, 556 U.S. at 57.

¹⁰*Id.* at 53.

¹¹*Id.* at 62–63 (alteration in original); *see also* § 9 U.S.C. § 4.

¹²*See id.* at 60–62.

¹³*Id.* at 66.

¹⁴*Id.* at 62 (emphasis added).

¹⁵*See supra* note 4.

¹⁶*Ortiz-Espinosa*, 852 F.3d at 47; *see also* 9 U.S.C. §§ 9–11 (2012).

¹⁷*Ortiz-Espinosa*, 852 F.3d at 45-46.

¹⁸*Doscher*, 832 F.3d at 388.

¹⁹*Id.* at 384, 388. The Second Circuit later refused to extend *Vaden*'s “look through” approach to cases alleging diversity jurisdiction. *Hermes of Paris, Inc. v. Swain*, 867 F.3d 321 (2d Cir. 2017) (holding *Vaden* inapplicable because it only decided the issue of how to determine if federal question jurisdiction was present).

²⁰*McCormick, supra*, 909 F.3d at 679

²¹*Id.* at 682-83.

²²*See generally Goldman*, 834 F.3d at 242; *Magruder*, 818 F.3d at 285.

²³*Goldman*, 834 F.3d at 254.

²⁴*Id.* at 253.

²⁵*Magruder*, 818 F.3d at 288 (citing *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375 (1994)).

²⁶*Id.*

²⁷*Doscher*, 832 F.3d at 387.

²⁸*Vaden*, 556 U.S. at 67–68. Although the *Vaden* Court unanimously agreed to “look through” the § 4 petition, four dissenting justices argued that the majority should have looked to “the specific controversy the § 4 petitioner [sought] to arbitrate,” rather than the broader controversy the state-court litigation sought to resolve. *Id.*

²⁹*Goldman*, 834 F.3d at 254 (quoting *Minor v. Prudential Sec., Inc.*, 94 F.3d 1103, 1107 (7th Cir. 1996)).

Legal Traditions & Trivia: H.C. Black and the *Lexicon Magnus*

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

"The dictionary now offered ... does not purport to be an epitome or compilation of the body of the law (but) its value is impaired if any single word that may reasonably be sought between its covers is not found there."¹

Thus wrote Dr. Henry Campbell Black in the sweltering summer heat of Washington, D.C., in 1891, as a prefatory note to his novel legal work, a behemoth dictionary bearing his iconic surname.² The nascent Black's Law Dictionary had arrived.³

Dr. Black was quite serious about the comprehensiveness of his work. Long before Amazon® became known for its provision of things "A to Z," Black was on top of his lexographic game.⁴ Witness the opening entry of the Fourth Edition (Revised, 1968): "A. The first letter in the English and most other alphabets derived from the Roman or Latin alphabet, which was one of several ancient Italian alphabets derived from the Greek, which was an adaption of the Phoenician..." (Emphasis in original.)

Those among us who count ourselves as litigators genuflect at the counsel table o'er the bounty of full plates; our courtroom cups, they runneth over. As preoccupied professionals, frenetically facing a host of the trials and tribulations in everyday practice, some of us tend to take for granted certain common trappings of legal practice. For those of you who plead excusable neglect, it is nevertheless time to wake up and smell the courthouse.

Have you, for examples, ever marveled at the architecture of some of our historic courthouses, gazed upon the impressive statuary, admired the fine Brazilian cherry wood, or traversed the polished Italian marble floors that grace their hallowed halls and majestic courtrooms? Have you never pondered what, and who, has walked before you in these palaces of justice?

And what of your written work product? Of what caliber is your legal writing? Do you seek to ever refine and improve upon the *corpus* of your own legal *oeuvre*? Broaden your legal horizons and expand your legal vocabulary with Black's Law Dictionary.

In the short story entitled "A Scandal in Bohemia,"⁵ Sir Arthur Conan Doyle's literary master sleuth, Sherlock Holmes astutely observed, while chatting with his affable and loyal sidekick, Dr. Watson, as follows:

"Quite so," he answered, lighting a cigarette, and throwing himself down into an armchair. **"You see, but you do not observe. The distinction is clear.** For example, you have frequently seen the steps which lead up from the hall to this room."

"Frequently."

"How often?"

"Well, some hundreds of times."

"Then how many are there?"

"How many? I don't know."

"Quite so! You have not observed. And yet you have seen. That is just my point. Now, I

know that there are seventeen steps, because I have both seen and observed." (Emphasis added.)

Parenthetically, I should add that Sir Arthur – before ascending the pedestal of *bona fide* literary giant – was, by previous profession, a British medical doctor. He had studied medicine at the University of Edinburgh from 1876-1881 and practiced ophthalmology (quite apropos of the above-cited "visionary" quote). In 1891, he embarked, in earnest, on his own, now legendary, writing career.

As we lawyers find our way... grind our way... wind our way through the jurisprudential "matrix" – unfeelingly, emotionlessly – regrettable as it may seem, many seemingly garden-variety things concerning the law and legal practice manage to escape our due notice. Moreover, many of us may not have been blessed with any natural curiosity or academic interests outside the parameters of our assigned causes or our clients' legal welfare.

Nevertheless, it is an indisputable fact that our great profession is deeply rooted in history and richly steeped in timeless traditions. Over time, people have a tendency to forget a good many things. Some things, however, ought to be firmly borne in our collective memory bank. Rather than ignore such customs with our benign neglect, or unceremoniously relegate them to the dark and dusty shelves of some law school library's basement stacks, I believe that they fully merit our unabashed admiration, awe, and reverence.

As lawyers, we are creatures, masters, and servants, of both the written and spoken words. We admittedly are, in the main, bookish folk. Some of us write them, but the vast majority of us read and utilize books as working tools, with nary a thought given to simple reading enjoyment and pleasure.

Chief amongst the texts we must often burn our midnight oil over are reference books and kindred informational materials. And, if there was only one book which we were asked to point to stock our own legal practice or home law libraries... would there by any doubt...could there be any doubt... as to our solitary selection?

Stated otherwise, if the Jeopardy® "question" on the board in the column marked "Legal Etymology" is "What is Black's?", the correct "answer" or response, unquestionably would have to be "The preferred, pre-eminent and go-to legal dictionary for American lawyers." In the game of jurisprudence, the voluminous and comprehensive Black's Law Dictionary is an irreplaceable and well-fitting piece of the puzzle of legal nomenclature.

In barest summary, this shining tome of word-smithery, this *Lexicon Magnus*, must be perceived as the original legal dictionary of latter-day American times. To be sure, Black's Law Dictionary sets forth the principal definitions and terms of modern commercial law and treats myriad concepts, subjects, and words pertaining to our jurisprudence. What is more, it incorporates the main terms and maxims of numerous titles from *in iure civili* (the civil law), as well

as from foreign legal systems.⁶ Consequently, this old, yet new, reference tool has been, and remains, invaluable for law students, lawyers, judges, and amateur legal scholars alike.

Black's Law Dictionary (sometimes hereinafter referred to as "Black's") must be conceded to be the most widely read, hard copy, legal dictionary utilized in the U.S. by American lawyers. You may have heard of Bouvier's,⁷ and Ballantine's,⁸ and other pretenders to the dictionary throne. The one and only real royalty in this genre decidedly is Black's.

Notwithstanding the foregoing, few have taken the time or effort to wonder about the storied background, or the pedigree of the creator, of this august juridical work. Have you ever afforded any thought to the origin and evolution of this legal master work? I freely confess that, as an old bookworm, I have; until now, however, I had not had the fascinating opportunity to delve into the story of this *opus magnus*; my discoveries and comments thereupon follow.

On October 17, 1860, a powerful earthquake struck in eastern Canada, and was felt all the way from Hamilton, Ontario (out to the west), to New Brunswick (in the east), and southward as far away as Newark, New Jersey.⁹ On the very same day as that infamous "Charlevoix Earthquake," somewhere in the vastness of the affected zone, Henry Campbell Black was born in Westchester County, in Ossining, New York.¹⁰

He was the son of John Henry Black, the rector of Christ Church of Williamsport, Pennsylvania, and Carolina Campbell Black.¹¹ In 1857, his father, after serving various churches in New Jersey, had accepted a calling to a position in St. Paul's Church in Ossining.¹²

Growing up, young Henry was educated at Trinity College in Hartford, Connecticut. He pursued and earned a bachelor's degree from Trinity in 1880.¹³ Subsequently, he studied at, and was awarded a master's degree, from the same institution of higher learning, in 1887.¹⁴

Later on, Henry re-located to Philadelphia, Pennsylvania, where he studied law at a now defunct law school.¹⁵ He thereafter was admitted to the practice of law in Pennsylvania in 1883.¹⁶

In the late 1880s, having become disenchanted both with Pennsylvania and the rigors and obligations of his law practice, after about five years,¹⁷ Henry moved back home to live with his parents who, at that time, were residing in Washington, D.C.¹⁸

Black, then, neither sought, nor achieved the status of a courtroom celebrity; nor was he a practitioner of any degree of renown. Rather, he made his indelible mark on the legal profession by his studied attempt to catalogue and comment on legal jargon and idioms; he metamorphosed into the quintessential purveyor of parlance and phraseology. To this end, he would devote the lion's share of his life's literary toils.

In many ways, I have noted that there are marked similarities between Henry Campbell Black and Peter Mark Roget (1779-1869), another relatively hermitic compiler, and to us principally known and remembered as the creator of the "Thesaurus." Back in 1840, Dr. Roget, a London-born, and University of Edinburgh-trained, medical doctor (much like Sir Arthur Conan Doyle), chose to retire from his medical practice. In the same type of personal and professional path later followed by both Conan Doyle and Black, Roget decided to eschew his originally chosen profession in order to focus the rest of his

life's work on his writings, in his case, the epic and eponymous project, "Roget's Thesaurus of English Words and Phrases Classified and Arranged so as to Facilitate the Expression of Ideas and Assist in Literary Composition." Albeit, as early as 1805, Roget had compiled, for his own personal use, a small indexed catalogue of words (*i.e.*, a dictionary of synonyms), it was not until 1848 when he started preparing the work for publication in earnest. Roget's Thesaurus was first published in 1852 and has not been out of print since that time.¹⁹

I have not been able to exhume any evidence of Dr. Black having taught law students in the context of a classroom setting. Yet, it may be fairly stated that he certainly managed to school them with his omnipresent legal writings around the turn of the 20th century.

In 1900, the U.S. Census revealed that, as a 39-year-old lawyer, he lived with his then-widowed mother in the family home on 14th Street in the capitol.²⁰ Sequestered in an Ivory Tower of self-making and choice, the perennial homebody, Black, inarguably was a great legal thinker in his own unique manner.

Later, in April of 1910, at age 49, he married 44-year-old Bertha Brown (formerly of N.Y.) (who had boarded in the Black's house for many a year, since 1900).²¹ Henry and Bertha would remain in Washington, D.C. until the end of Henry's life.²²

Black ought to be remembered and celebrated as a consummate legal scholar, who, like myself, seemed to enjoy and revel in arcane subjects. However, he not only wrote about the law, but also composed a number of timely political pieces.²³

Still, Henry, much like a faithful retriever, always returned to his beloved law dictionary. Indeed, a number of revisions were fashioned during his lifetime. In fact, he personally oversaw the addition of thousands of new words and concepts to his living, breathing collection of words, phrases, and concepts.

Overall, during the many decades he spent in Washington, D.C., Black wrote prodigiously. He penned articles, he wrote treatises, and, of course, he regularly updated the law dictionary. One might say that, while learned articles about the law were Black's offspring, his most precious brainchild, by far, was his namesake legal dictionary.

In the beginning, there was, quite aptly, the First Edition of the Black's Law Dictionary; as mentioned above, the inaugural work appeared in 1891. The book was published by the then-fledgling West Publishing Company of St Paul, Minnesota.

"A 2d edition came out in 1910; a 3rd in 1933, 4th in 1955, 5th in 1979, 6th in 1990, 7th in 1999, and since 2004, an 8th edition with a 9th expected in 2009..." Currently, Black's boasts no less than 10 editions, not including revised edition and special edition versions.

It is noteworthy that, in the various dictionary editions, only Black's Master of Arts degree is referenced. Yet, as a matter of objective fact, however, in June of 1916, he had been granted an Honorary Doctor of Laws (LLD) by his alma mater, Trinity College.²⁵

In 1917, Black also edited a well-known and well-received legal magazine called "The Constitutional Review." He remained an author, and the Editor, of that long-running publication until his demise a decade later.

As the various editions of the vaunted dictionary, such as the revised 4th Edition, remind us, Black also was the

author of various and sundry other legal works, such as works on Constitutional Law, Judgments, Interpretation of Laws, Intoxicating Liquors, Rescission and Cancellation of Contracts, and Tax Titles. A chronological list of but some of H.C. Black's many major books and treatises include, but are not limited to, the following:

An essay on the constitutional prohibitions against legislation impairing the obligation of contracts and against retroactive and ex post facto laws. (Boston: Little, Brown, 1887).

A treatise on the law of riparian rights as the same is formulated and applied in the Pacific states: including the doctrine of appropriation. (St. Paul, Minn.: West Pub. Co., 1887).

A treatise on the laws regulating the manufacture and sale of intoxicating liquors. (Saint Paul, Minn.: West Pub. Co., 1892).

A dictionary of law: containing definitions of the terms and phrases of American and English jurisprudence, ancient and modern; including the principal terms of international, constitutional, and commercial law; with a collection of legal maxims and numerous select titles from the civil law and other foreign systems. (St. Paul, Minn.: West Pub. Co., 1891).

Black, Henry Campbell (1891). A Dictionary of Law: Containing Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern: Including the Principal Terms of International, Constitutional, and Commercial Law: with a Collection of Legal Maxims and Numerous Select Titles from the Civil Law and Other Foreign Systems. Reprinted 1991 by the Lawbook Exchange, Ltd. LCCN 91-62383. ISBN 0-9630106-0-3.

1910 edition free e-book Black, Henry Campbell (1910). A Law Dictionary: Containing Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern: and Including the Principal Terms of International, Constitutional, Ecclesiastical and Commercial Law, and Medical Jurisprudence, with a Collection of Legal Maxims, Numerous Select Titles from the Roman, Modern Civil, Scotch, French, Spanish, and Mexican Law, and Other Foreign Systems, and a Table of Abbreviations. West Publishing Company. Retrieved 18 December 2018.

Handbook of American Constitutional Law. (St. Paul, Minn., West Publishing Co., 1895).

A handbook of bankruptcy law; embodying the full text of the act of Congress of 1898 and annotated with references to pertinent decisions under former statutes. (St. Paul, Minn., West Publishing Co., 1898).

A treatise on the law of mortgages and deeds of trust, founded on the laws and judicial decisions of the state of Illinois. (Chicago, Callaghan & Co., 1903).

Handbook on the construction and interpretation of the laws. (St. Paul, Minn., West Pub. Co., 1911).

Handbook on the law of judicial precedents, or, The science of case law. (St. Paul, Minn.: West Pub. Co., 1912).

A treatise on the law and practice of bankruptcy: under the act of Congress of 1898. (Kansas City, Mo.: Vernon Law Book Company, 1914).

Illustrative cases on constitutional law. (St. Paul, Minn.: West Pub. Co. ca. 1914).

A treatise on the law of income taxation under federal and state laws. (Kansas City, Mo., Vernon Law Book Co., 1915).

A treatise on the rescission of contracts and cancellation of written instruments. (Kansas City, Mo., Vernon Law Book Company, 1916).

A treatise on federal taxes, including those imposed by the War tax act of Congress of 1917, the Income tax law as amended, and other United States internal revenue acts now in force, with commentaries and explanations, references to the rulings and regulations of the Treasury department and pertinent decisions of the courts, (Kansas City, Mo., Vernon Law Book Company, 1917).

The Constitutional Review: a quarterly magazine advocating the maintenance of constitutional government and recording its progress at home and abroad. (Washington, D.C., 1917-1927).

The relation of the executive power to legislation. (Princeton, Princeton University Press, 1919).

Socialism in American colleges. (Washington, D.C., 1920).

Handbook of American government. (New York: T.Y. Crowell Co., ca. 1920).

A treatise on the law and practice of bankruptcy, under the act of Congress of 1898, and its amendments, (Kansas City, Mo., Vernon law book company, 1922).

In due course, after a remarkable career, Henry C. Black died, at age 66, on March 19, 1927, in the District of Columbia,²⁶ where he had resided for almost forty years. He was survived by his wife/widow, Bertha.

It would not be crawling out onto a narrow ledge to state that Black's Law Dictionary is the most widely used law dictionary in the United States. To be sure, it is the reference of choice for definitions in legal memoranda, appellate briefs, and court opinions. Who amongst us has not used Black's? It should hardly come as a surprise, then, that Black's has been cited as a secondary legal authority in literally hundreds of U.S. Supreme Court opinions and as part and parcel of thousands upon thousands of lower court opinions in every state and federal jurisdiction.

Inasmuch as many legal terms are derived from Latin root words, Black's Dictionary also provides a pronunciation guide for such terms. In addition, the applicable entries provide pronunciation transcriptions pursuant to those found among North American practitioners of law or medicine.

With good reason, then, Black's has enjoyed, and continues to enjoy, a well-deserved reputation for quality and authority. This venerable work remains a go-to source and reference

work for all manner of legal professionals. The 10th Edition of Black's offers some 50,000 definitions, 4,000 Latin legal maxims, as well as 7,500 new terms and 16,000 new definitions.²⁷

Professor Bryan A. Garner, a world-class legal lexicographer in his own right, and now the Editor-In-Chief of Black's Law Dictionary, well understands the import of Black's, not only as a dictionary par excellence, but also as a historical reference work. During an interview conducted in 2014, Professor Garner was asked: "Do you cut terms if they are no longer current?" The Professor's cogent response was as follows:

"No. Lawyers are historians. Any term that a law student might encounter in an old case – the original meaning of *litigatrix*, say – needs to be in the books. Nobody uses *litigatrix* in the old sense today, but *Black's* has a very important historical purpose."²⁸ (Emphasis in original.)

As a matter of tradition, as well as need, as neophyte students of the law, many of us acquired our first copy of "Black's" just prior to, or during, our time as 1Ls in law school. Indeed, my first copy of Black's was of 4th Edition vintage, a green-toned, faux leather-bound volume, which I purchased in or around August of 1977.

Truth be told, I still have that worn, but welcome, Black's Legal Dictionary in my law office today. There it reposes on my bookshelf, nestled amongst various other, older editions including my personal, *ex libris*, Black's Law Dictionary, Special Deluxe Fifth Edition (1979).

Be advised that the last edition with all of the wonderful old legal terms was the Fourth Edition (1951, 1957, and 1968), each bearing almost 1,900 main pages. Since that time, many archaic legal terms have been retired.

Oh, yes, rest assured that I am fully cognizant that, nowadays, Black's may be accessed and utilized on an internet website. Alas, I am a purist, not to mention the fact that I am an avid antiquarian book collector. On any day of the week, therefore, if I had my druthers, I would be foraging through the forest of hoary volumes in some cobweb-laden old book store rather than clicking my computer mouse on a static web-page. Call me old-fashioned.

Quite candidly, it is totally unimaginable for me to conceive of running a law office, or engaging in the cherished practice of law, whether in 1891, or more than six score years hence, in 2018, without one's trusty Black's lying on a desk nearby. What's in your library?



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Endnotes:

¹Preface to the First Edition of a Dictionary of Law: Containing Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern Including the Principal Terms of International, Constitutional and Commercial Law; With a Collection of Legal Maxims and

Numerous Select Titles From the Civil Law And Other Foreign Systems," by Henry Campbell Black, M.A., dated Washington, D.C., August 1, 1891.

²See, generally, *Who Was Who in America. A component volume of Who's Who in American History*, Volume 1, 1897-1942 (Chicago: A.N. Marquis Co., 1943), page 100.

³Henry Campbell Black, *A Dictionary of Law* (St. Paul, Minn: West Pub. Co., 1891).

⁴I would like to think that the creators of an original character from the Star Trek® episode entitled "All Our Yesterdays", "Mr. Atoz," a omniscient intergalactic librarian of the vast book collection in the atavachron on Planet Sarpeidon, in the year 2269, took his inspiration from Dr. Black.

⁵A. Conan Doyle was a contemporary of Henry Campbell Black. Doyle's first short story, *A Scandal in Bohemia*, was first published on June 25, 1891, in the July issue of the Strand magazine, only a month or so before the first publication of Black's Law Dictionary.

⁶For a thorough discussion of the details surrounding other legal dictionaries (English and American), as well as Black's methodologies of creation, his publishing competitors, and the evolution of his work, see Sarah Yates, *Black's Law Dictionary: The Making of an American Standard*, *Law Library Journal*, Vol. 103:2 [2011-12].

⁷Bouvier's Law Dictionary, a 2 volume work by John Bouvier, was first published in 1839, in Philadelphia.

⁸James A. Ballentine published the first edition of his work, *Ballentine's Law Dictionary*, in 1916.

⁹Smith, W. E. (1962), *Earthquakes of eastern Canada and Adjacent areas 1534–1927*, 26 (5), *Publications of the Dominion Observatory*, pp. 271–301, archived from the original on 2013-01-01. Retrieved 18 December 2018.

¹⁰Roger K. Newman, editor, *The Yale Biographical Dictionary of American Law* (New Haven: Yale University Press, 2009), 49, "Black, Henry Campbell."

¹¹1860 U.S. Census, Westchester County, New York, population schedule, p. 125, dwelling 500, family 708, John Black household; digital image, Ancestry.com (<http://www.ancestry.com>: accessed 18 December 2018).

¹²Edward Henry Eckel, *Chronicles of Christ Church Parish, Williamsport, PA, 1840-1896* (Williamsport, Pa: p.p., 1910), 21; digital images, *Google Books* (<http://books.google.com> : accessed 5 Jan 2012).

¹³Russell, Judy G., *Henry Campbell Black (1860-1927)*, Jan. 6, 2012, <https://www.legalgenealogist.com/2012/01/06/henry-campbell-black-1860-1927>. Retrieved 18 December 2018.

¹⁴*Id.*

¹⁵*Id.* It is not altogether clear, but Black may have attended the College of Philadelphia (later to become or merge into the University of Pennsylvania) legal courses were taught there from 1790 on and a law school was established around 1850.

¹⁶*Id.*

¹⁷Hirby, James, <https://thelawdictionary.org/article/who-was-henry-campbell-black/>, retrieved on 18 December 2018.

¹⁸J.L. Suter, *American Biographical Directories, District of Columbia: Concise Biographies of its Prominent and Representative Contemporary Citizens, and Valuable Statistical Data, 1908-1909* (Washington, D.C.: Potomac Press, 1908, 41; digital images, *Google Books* (<http://books.google.com>;

Cy Pres Settlements Of Class Actions: SCOTUS Entertains A Witch's Cauldron Of Rule 23 Quandaries On Halloween: *Frank v. Gaos*

Jeffrey T. Cox

All Hallow's Eve 2018 proved a fitting date for oral argument in the Supreme Court of the United States in *Frank v. Gaos*, (S. Ct. No. 17-961), a case exploring the often-mysterious component to class action settlements known as "cy pres."¹ The specific question before the Court asked:

"Whether, or in what circumstances, a *cy pres* award of class action proceeds that provide no direct relief to class members supports class certification and comports with the requirement that a settlement binding class members must be 'fair, reasonable, and adequate.'"

While the Court certainly examined this question, it became evident early on that the Justices sought a broader discourse on Rule 23 practice; whether class action settlements were adequately addressing class members' grievances; and whether it was a legislative or judicial responsibility to attempt to clarify the acceptable bounds of class action *cy pres* awards.

The case, on appeal from the 9th Circuit (869 F.3d (2017)), arose from a 2010 class action filed by Paloma Gaos and a few other class representatives against Google, Inc. alleging multiple counts, including fraud and invasion of privacy related to Google's sharing of plaintiffs' search terms with websites that the named plaintiffs had visited. That class action (on behalf of the then-129 million Google search users) was contested by Google as meritless, but in order to resolve the lawsuit, Google agreed to an \$8.5 million settlement. \$5.3 million would be allocated to six *cy pres* recipients, with the remaining \$3.2 million dedicated to plaintiffs' attorneys' fees, class administration costs and incentive payments to the named plaintiffs. Individual class members, meanwhile, would receive no direct payment or benefits.

The six *cy pres* beneficiaries,² it was agreed, would each "receive anywhere from 15 to 21% of the money, provided that they agreed 'to devote the funds to promote public awareness and education, and/or to support research, development, and initiatives, related to protecting privacy on the Internet.'"³ The *cy pres* recipients were chosen after submitting proposals, but as objectors were quick to point out, several of the *cy pres* beneficiaries had ties to class counsel or to the Defendant, Google.

Class Objectors Ted Frank and Melissa Holyoak of the Competitive Enterprise Institute challenged whether the settlement (which besides awarding \$5.3 million to several third-parties, would pay plaintiffs' counsel \$2.125 million, while affording class members no recovery) was consistent with the mandates of Federal Rule of Civil Procedure 23 -- that a class action settlement be "fair, reasonable, and adequate." While in similar circumstances at least three other federal appellate courts previously held otherwise, the 9th Circuit affirmed the trial court's approval of the settlement. The 9th Circuit acknowledged that "*cy pres*-only settlements are considered the exception, not the rule"⁴ but affirmed the district court's ruling that the cost of verifying and 'sending out very small

payments to millions of class members would exceed the total monetary benefit obtained by the class," and also agreed with the lower court that the class action was "the superior means of adjudicating this controversy" contrary to Objectors' argument that the case was inconsistent with Federal Rule of Civil Procedure 23(b)(3).⁵

The 9th Circuit wrote extensively on the adequacy of the *cy pres* recipients and the process of their selection, and affirmed the district court's finding that class counsel sufficiently supported their lodestar rationale for the award of over \$2.125 million in attorneys' fees. The Objectors then sought review from the Supreme Court ("SCOTUS").

The extensive briefing of the parties, not to mention the appearance of over 30 amici curiae proved a harbinger of the interest in SCOTUS' review of the class action issues. The October 31, 2018 argument featured lengthy questioning from every member of the bench besides Justice Thomas. Argument was heard from Petitioner Frank; Respondents Google, Inc., and the class representatives; and from amicus curiae United States. What proved most striking was the scope of the Justices' inquiries ranging from constitutional standing (the jurisdictional inquiry seemed to trouble many of the Justices); to Rule 23 class action practice generally (not just the superiority requirements of Rule 23(b)(3)) such as class notice, administration and claims processing; the nature of *cy pres* settlements, and how that aspect of class settlements varies between cases (a) with payouts to class members with residual to *cy pres* recipients, and (b) settlements resolved exclusively via *cy pres* payments to third-parties but with no direct relief to class members.

The Court also pondered its role in sorting out these various questions, as opposed to leaving the legislating of clarifications to Rule 23 practice to Congress. On this question, interestingly, several Justices openly pondered the Court's role vis-à-vis Congress ranging from Justices Ginsburg and Sotomayor to Justices Gorsuch and Kavanaugh, representing ideological opposites.

The Supreme Court's treatment of *cy pres* class settlement inquiries are of great consequence, with the potential to significantly re-frame class action litigation. Writing in a blog posted on the ABA Journal's website a day prior to the oral argument, constitutional law scholar Erwin Chemerinsky⁶ raised several "what ifs":

"An underlying question is what will be done with the funds if the Supreme Court were to disapprove such settlements? Would they go back to the defendants? That would be a windfall for defendants and undermine the function of class actions in enforcing the law and deterring wrongdoing. Would the money go to the government? But if so, on what basis and for what purposes? Or might the [C]ourt go even further and accept the petitioner's argument that *cy pres*-only class actions cannot be certified at all, providing a great benefit to defendants and making it much harder to enforce the law where the class members will not directly benefit from the settlement."⁷

Class actions have long been an area of contentiousness in legal and corporate circles. An important device for protecting consumer and civil rights or a grossly-abused tool of the plaintiff's bar to line attorneys' pockets resulting in expensive defense costs but little behavioral change by class defendants? As with most things, the answer lies not in the polar extremes, but rather in the confounding middle ground. The Halloween hearing on *Frank v. Gaos* served to highlight and frame many of these difficult issues the nine Justices must consider, but afforded little preview of how the Court may resolve or guide lower courts as to the "fair, reasonable and adequate" means of resolving large multi-party class litigation. Should the Court reach the merits, its opinion will be anxiously awaited by the class action plaintiff and defense bars, as well as the many institutions and not-for-profits which have been beneficiaries of *cy pres* awards.

Chances are good, however, that the question of whether *cy pres* settlements of class actions abide Fed. R. Civ. P. 23's "fair, reasonable and adequate" requirement for class settlements may remain undecided, at least by the Supreme Court. A more expansive examination of Rule 23 practice by the Supreme Court may be left to some future appellate action, due to the Court's concern whether the jurisdictional hurdle of standing can be surmounted.

In early November 2018, the Court requested supplemental briefing from the parties and from the Solicitor General to address whether these plaintiffs have standing such that there is Article III jurisdiction. Supplemental briefing in November and December 2018 was completed by the year-end holidays and the jurisdictional question now sits ripe for the Court's consideration.

For Rule 23 practitioners, the briefing of the parties and the United States addressing the standing requirement and the challenges of that jurisdictional hurdle in a case in which the reach and impact of technology intersects with privacy considerations, makes for compelling reading. While the merits question on appeal, regarding Rule 23's "fair, reasonable, and adequate" requirement vis-à-vis *cy pres* only settlements may not be answered in this case, the Court would appear well-positioned in this case for a 2019 decision that will likely further refine constitutional standing jurisprudence.



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Endnotes:

¹As near (as possible)", [Anglo-French], Merriam-Webster's Dictionary of Law, 1996.

²The six *cy pres* beneficiaries are: AARP, Inc.; The Berkman Center for Internet and Society at Harvard University; Carnegie-Mellon University; the Illinois Institute of Technology Chicago Kent College of Law Center for Information Society and Policy; the Stanford Center for Internet and Society; and the World Privacy Forum.

³*Gaos v. Holyoak (In re Google Referrer Header Privacy Litigation)*, 869 F.3d 737, 740 (9th Cir. 2017).

⁴Id. at 741-42.

⁵Rule 23(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

. . . (3) The court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) The class members' interests in individually controlling the prosecution or defense of separate actions;

(B) The extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) The desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) The likely difficulties in managing a class action."

⁶Erwin Chemerinsky is Dean of the University of California at Berkeley School of Law, where he is also the Jesse H. Choper Distinguished Professor of Law.

⁷<http://www.ABAJournal.com/authors/9822/>.

Trivia continued from page 11

accessed 18 December 2018).

¹⁹See, generally, *Kendall, Joshua (2008). The Man Who Made Lists: love, death, madness, and the creation of "Roget's Thesaurus". New York: G. P. Putnam's Sons. ISBN 978-0-399-15462-1.*

²⁰1910 U.S. census, Washington, D.C., pop. sched., ED 212, p. 203A (stamped), dwell. 126, fam. 251, Caroline C. Black household.

²¹"Licensed to Marry," The Washington Post, 23 April 1910; digital image, "Historical Newspapers, Birth, Marriage, and Death Announcements, 1851-2003" database and images, Ancestry.com (<http://www.ancestry.com>: accessed 18 December 2018).

²²1920 U.S. Census, Washington, D.C., population schedule, enumeration district (ED) 295, p. 80A, dwelling 2, family 34, Henry C. Black household; digital images, Google Books (<http://books.google.com>: accessed 18 December 2018).

²³Black, Henry C., *Socialism in American colleges.*

(Washington, D.C., 1920).

²⁴<http://www.duhaime.org/LawMuseum/LawArticle-893/Henry-Campbell-Black-1860-1927.aspx>.

²⁵"Trinity and Dr. Black," Case and Comment: The Lawyer's Magazine (May 1917) 23: 258; digital images, Google Books (<http://books.goggle.com>: accessed 18 December 2018). <https://digitalrepository.trincoll.edu/cgi/viewcontent.gi?referer=https://www.google.com/&httpsredir=1&article=2977&context=tripod> Retrieved 18 December 2018.

²⁶<https://www.findagrave.com/memorial/116946068/henry-campbell-black>, Hamilton, Jane, Retrieved 18 December 2018.).

²⁷O'Grady, Jean, Black's Law Dictionary 10th Edition: Making Everything Old New Again. Why Legal Dictionaries Still Matter, May 9, 2014, www.deweystrategic.com. Retrieved 20 December 2018.

²⁸<https://abovethelaw.com/2014/07/blacks-law-dictionary-an-interview-with-bryan-a-garner>. Retrieved 18 December 2018.

SideBAR

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