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Lit Alerts

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In This Issue:

Important Fifth Circuit Rule Changes

The U.S. Fifth Circuit Court of Appeals has adopted new briefing rules, effective December 1, 2013, that standardize citations to the record such that judges and their staff can instantly access electronic versions of the underlying documents. According to the Fifth Circuit's clerk of court, the record citation change is designed to accommodate a court-developed software program that scans parties' briefs and inserts a hyperlink to electronic versions of underlying documents. The Fifth Circuit is the first circuit to use the software, but has made it available to the other federal appellate and district courts.

The Fifth Circuit also has formally adopted a federal appellate rule change that does away with the requirement for a separate "statement of the case," and instead combines procedural history with the relevant facts and issues. The rule describes the new consolidated section as "a concise statement of the case setting out the facts relevant to the issues submitted for review, describing the relevant procedural history, and identifying the rulings presented for review, with appropriate references to the record."

Class Actions: Deepening Circuit Split Emerges On Litigation Tactic Used To Avoid Federal CAFA Jurisdiction

The Class Action Fairness Act (CAFA) allows defendants to remove to federal court civil actions for money damages in which "claims of 100 or more persons are proposed to be tried jointly." 28 U.S.C. § 1332(d)(11)(B)(i). In order to enjoy the cost-saving benefits of class action litigation—without the potential downside of removal to federal court—plaintiffs' attorneys have taken to breaking classes into groups of 99 or fewer plaintiffs for purposes of trial, but seeking consolidation of the cases for pretrial purposes.

In *Atwell v. Boston Scientific Corp.*, No. 13-8031 (8th Cir. Nov. 18, 2013), the Eighth Circuit held that such tactics make the joint resolution of common issues inevitable, and therefore evince the intent to have the claims tried jointly. Accordingly, the Eighth Circuit held that the individual cases were properly removed to federal court despite the number of plaintiffs in each case being less than 100. In so holding, the Eighth Circuit joined the Seventh Circuit and rejected a recent holding from the Ninth Circuit (covered in the October 2013 - Issue 2 of Lit Alerts) finding such a tactic does not constitute a proposal that the claims "be tried jointly."

The Short Shelf Life of Internet Citations: Best Practices for Combating "Link Rot"

According to this recent article in the *ABA Journal*, a recent study found that nearly one-third of the websites cited by the U.S. Supreme Court were nonfunctioning, and another study reported that 70 percent of the web links in the *Harvard Law Review* from 1999 to 2012 do not work. Though internet links account for a small amount of judicial citations overall, their use is increasing, making the problems with nonworking links more recurrent.

Suggestions for dealing with “link rot” include saving copies of the cited webpages and attaching an appendix with the version of the website to which the author refers. While this approach may work well for webpages that contain only text and still images, movies and MP3 files are more difficult to capture in hard copy form. Researchers are experimenting with preserving Web links through a database, called Perma.cc, which will store permanent caches of links on a public platform.

Recent Changes To Fed. R. Civ. P. 45

Substantial changes to Rule 45 of the Federal Rules of Civil Procedure took effect December 1 of this year. First, Rule 45(c)(1) has been revised to clarify that a party officer, like other witnesses, cannot be compelled by subpoena to travel more than 100 miles to testify at trial. Second, subpoenas to non-parties located outside the jurisdiction in which an action is pending “must be issued from the court where the action is pending,” rather than the jurisdiction in which compliance is to take place. Fed. R. Civ. P. 45(a)(2). Third, motions concerning subpoena-related disputes must be initially brought in the district court in the compliance location if compliance is not required in the district of the issuing court, Fed. R. Civ. P. 45(d), but the motion may be transferred to the issuing court "if the person subject to the subpoena consents or if the court finds exceptional circumstances." Fed. R. Civ. P. 45(f).

For more information on these revisions and to review additional changes to Rules 45 and 37, the text of the rules and committee notes are available here.

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