MESSAGE FROM THE CHAIR

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Our Appellate Advocacy Committee strives to connect appellate practitioners throughout the country and provide a forum for sharing useful practice information.

An important part of that forum is this newsletter. We have long enjoyed valuable contributions from our Circuit editors, and we appreciate their continued dedication to reporting important federal appellate decisions. In addition to the Circuit reports, we have sometimes (but not consistently) printed feature articles about specific practice topics or appellate decisions.

Over the summer, our committee leadership decided to increase the presence of feature articles in the newsletter. I thank our newsletter editors Aaron Chastain and Mary Ann Couch, both of Birmingham, for taking the lead in pursuing that goal.

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This newsletter has two feature articles. Kim Mello and Jonathan Tannen of Greenberg Traurig, LLP have written a great piece analyzing the practice of remittitur and the limits imposed by the Seventh Amendment’s Reexamination Clause. Jesse Mondry of Maslon Edelman Borman & Brand has contributed a very thorough article that reviews issues with recovering costs under Federal Rule of Appellate Procedure 39. We hope you find both works interesting and useful to your practice.

We are looking for more feature articles, and the more submissions that we receive, the more that we will run. We are not expecting articles with the length and detail of law-review articles. (But if you are motivated to write something of the sort, please let me know. I will gladly help you get published in The Tort Trial and Insurance Law Journal.) Quick reads – even a page or less – can be quite valuable.

If you have something interesting to share – useful or fun – please contribute it.

We recognize that there was not much promotional cachet in saying that you wrote an article for the American Bar Association Tort Trial and Insurance Practice Section Appellate Advocacy Committee News. That is a mouthful to say, and I’m not even sure how to punctuate it. With that in mind, we have changed the newsletter’s title.

Welcome to The Appellate Quarterly. We hope that you like the changes.

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“Credibility is like virginity. Once you lose it, you can never get it back.”
- Anonymous

I was chatting with a now-retired judge about his decades of experience, most of it on the appellate bench. This was a unique opportunity to explore his view of what works (and what doesn’t work) for the appellate advocate. We talked about the nuances of briefing and how to handle a hot bench. We discussed precedent and pluralities and persuasion. We debated organizational styles and electronic filings. In the end, though, the best piece of takeaway advice he offered me is to “be true” as a lawyer: Be true to yourself, your client, the cases, and the court.

What does this mean, you ask? It’s simple—be honest, be fair, and be sincere. All the things you learned in kindergarten (and, hopefully, re-learned in law school).

The judge laid it out for me this way: an appellate judge is largely dependent on the appellant to sketch out the initial situational framework of a case. True, the judge might pick up the lower court’s opinion to read first, but—because that decision is being challenged—the initial framing of the issues on appeal is almost entirely done by the appellant. It is up to the appellant to accurately lay out the factual and procedural bases of the case and a summary of the challenged ruling, only afterwards delving into the substance of the legal issues presented.

But the appellant’s take is just one side of the story. In its brief, the appellee often claims that the appellant has misrepresented the record or the law … or both. (I recently saw another judge remark that “rival briefs can read like dueling political parties’ advertisements at election time.” I don’t think he meant it as a compliment.)

This leaves appellate judges with the tricky first step of deciding who is being honest with the court: appellant or appellee? Now, of course, not all cases follow this path; sometimes the appellant and appellee simply challenge the others’ interpretation of precedent or the policy implications of a ruling. That is how the process should work. But, as phrased by the retired judge, many advocates refused to “be true” to the case and the law, instead leaving the court with the task of digging into the case to see which side had correctly presented the issues.

“Being true,” for this judge, meant laying out the facts as found in the trial court (including the ones that hurt), and disclosing all negative cases even if there was a chance your opponent might not find them. A real appellate advocate had to be able to do this, and still find the route to reversal. It was folly to think that the court would not eventually find the flaw(s) counsel thought were so carefully hidden. That is what law clerks live for.

As I listened to the judge, I was wondering how many times appellate judges were coming to oral argument having already formed an initial opinion of not just the case, but the credibility of the attorneys involved. Who among us wants to be thought of as untrustworthy? Not I!

Not all the news was bad, however; the judge assured me that no judge leaped too quickly...
to the conclusion that an advocate was being intentionally deceptive. The problem, the judge thought, was that some attorneys did not properly balance their idea of “zealous advocacy” with the requirement that the facts and issues should be presented in as straightforward a manner as possible.

Second, while the judges might form early opinions about who was not being honest with them, the opposite was also true: Judges also form opinions about who is routinely trustworthy. Especially for those attorneys who appear before the particular court with some frequency, the judge said that it is easy to form an opinion about someone’s veracity when he or she had proven themselves to be a credible source of information in the past.

These people, exclaimed the judge, were “a gift” because it took the guesswork and the initial uncertainty out of the equation. When it is someone you have seen for years, the judge explained, and their work has been reliably consistent all of that time, “you can almost breathe a sigh of relief because you know you can trust what he is telling you.”

“You have to be meticulous when you are an advocate,” the judge continued, “because you cannot risk losing the court’s high opinion of you. If you have failed me by twisting the facts to your advantage, by neglecting to include all of the details of the key cases you are relying on, by stretching precedent beyond the point of feasibility; well, don’t expect that I won’t believe that you will try to trick me in other cases as well. You are going to have a very hard time getting me to trust you again.”

Worthwhile parting advice, indeed.

Linda L. Morkan maintains a litigation practice dedicated to appellate advocacy and is celebrating her 25th anniversary with Robinson & Cole LLP in Hartford, Connecticut. Ms. Morkan has been involved in more than 200 appeals in courts throughout New England and a smattering of federal courts of appeal, including the United States Supreme Court.
Contrary to what one might guess, recovery of the full cost of an appeal requires action by both the circuit court and the district court. That’s because Federal Rule of Appellate Procedure 39 (“Rule 39”) provides that some appellate costs are taxed by the circuit court while others are taxed by the district court. The answer to when you can recover, when you must file, and whether you may postpone recovery, depends upon the outcome on appeal, and the federal rules are silent on some key practical concerns. For example, the federal rules provide no guidance on when a party should file a bill in the district court to recover appellate costs. Practitioners should also be aware that the requirements for recovering appellate costs in the district court depend on the outcome of the appeal. Finally, practitioners should be aware that when a circuit court remands an appeal for further proceedings, the district court may stay the award of appellate costs pending final adjudication.

This article offers a brief primer on recovering appellate costs taxable in the district court, highlights some of the common pitfalls, analyzes the few cases considering motions to stay an award of costs, and concludes with a short list of suggestions for practitioners.

To recover appellate costs taxable in the district court in appeals without a clear winner, a party needs an order from the circuit court.

The case with which a party may recover appellate costs—both from the circuit court and the district court—depends on the disposition of the appeal. In cases where one party obtains a clear victory via affirmance, reversal, or dismissal, the general rule is that the prevailing party is awarded costs unless the court orders otherwise. Thus, when a judgment is affirmed, costs are taxed against the appellant; when a judgment is reversed, costs are taxed against the appellee. Fed. R. App. P. 39(a)(2), (a)(3). And when an appeal is dismissed, costs are taxed against the appellant unless the parties agree otherwise. Id. at 39(a)(1).

There is a presumption against awarding appellate costs in cases without a clear victor. In such situations, appellate costs are governed by Rule 39(a)(4), which provides that “if a judgment is affirmed in part, reversed in part, modified, or vacated, costs are taxed only as the court orders.” Fed. R. App. P. 39(a)(4) (emphasis added). By contrast, costs under Rule 39(a)(1) through (a)(3) are taxed unless the court orders otherwise, and in the case of dismissal, unless the parties agree otherwise.

In appeals without a clear victor, a party’s failure to obtain a circuit court order taxing costs will likely mean a party cannot recover any appellate costs. See, e.g., Golden Door Jewelry Creations v. Lloyds Underwriters Non-Marine Ass’n, 117 F.3d 1328, 1340-41 (11th Cir. 1997) (denying appellate costs taxable in the district court where the circuit court order did not specifically order taxation of those costs); Reeder-Simco GMC, Inc. v. Volvo GM Heavy Truck Corp., 497 F.3d 805, 808-09 (8th Cir. 1997) (holding the district court properly determined it was without authority to award appellate costs where the Eighth Circuit never entered an order regarding the recovery of those costs); McDonald v. McCarthy, 139 F.R.D. 70, 72 (E. D. Pa. 1991) (holding it lacked any authority to award appellate costs where the Third Circuit expressly ordered each party to bear its own costs). Consequently, when the circuit court disposes of an appeal under the situations outlined in Rule 39(a)(4), practitioners seeking to recover appellate costs that are taxable in the district court should specifically request those costs in their bill submitted to the circuit court.

The time periods governing the recovery of appellate costs taxable in the district court depend on the court’s jurisdiction.

No matter the outcome on appeal, a party who wants costs taxed must file a bill of costs with the circuit court clerk, and must do so within 14 days after entry of judgment. Fed. R. App. P. 39(d)(1). The party against whom costs are to be taxed then has 14 days after service of the bill of costs to file objections. Id. at 39(d)(2). The circuit clerk then prepares an itemized statement of costs for insertion in the mandate. Id. at 39(d)(3).
Once the circuit court issues its mandate (and an order in cases of partial affirmance, reversal, and the like as discussed above), a party may seek to recover the following appellate costs in the district court:

- the preparation and transmission of the record;
- the reporter’s transcript, if needed to determine the appeal;
- premiums paid for a supersedeas bond or other bond to preserve rights pending appeal; and
- the fee for filing the notice of appeal.

Fed. R. App. P. 39(e). What the federal appellate rules do not tell practitioners is when to file a bill of costs in the district court.

Courts have agreed that the time limitation (if any) on filing a bill of costs in the district court begins to run from the date on which the appellate court issues its mandate. The rationale for this starting point is that an appeal is not final until the circuit court issues the mandate and district courts lack jurisdiction over the case until such time. Simpson v. Thomas, No. 2:03-cv-00591-MCE-GGH, 2008 U.S. Dist. LEXIS 105633, at *6-*7 (E.D. Cal. Dec. 19, 2008). See also Carlson v. Bukovic, No. 07-C-0006, 2011 U.S. Dist. LEXIS 28161, at *8 (N.D. Ill. Mar. 18, 2011) (Available on Westlaw at 2011 WL 1003068) (“It is the issuance of the court of appeal’s mandate that is critical to starting the clock running, not the final judgment.” (citation omitted)); 20A Moore’s Federal Practice § 341.12[3] (3d ed. 2012) (“Until issuance of the mandate, control over the matter lies with the circuit court. . . . Once the mandate has issued, the matter returns to the district court.”)

Consequently, practitioners should not file a Rule 39(e) bill of costs in the district court until after the court of appeals issues its mandate, which is when any applicable time period for filing begins to run.

Where courts differ is on the length of the period after the circuit court issues its mandate in which a party must seek appeal costs in the district court. For example, in the Eastern District of California the local rules required a party seeking appellate costs in the district court to file within ten days of issuance of the circuit court mandate. Simpson, 2008 U.S. Dist. LEXIS 105633 at *3. But in jurisdictions without a governing local rule, timeliness may depend on considerations of equity and reasonableness. See Choice Hotels Int’l, Inc. v. Kaushik, 203 F. Supp. 2d 1281, 1285 (M.D. Ala. 2002) (holding its local rules did not apply to cost bills under Rule 39(e)). The Kaushik court noted the silence of the federal appellate rules but found “room for a practical and equitable principle to be at play and that a prevailing appellate party must file a Rule 39(e) bill within a reasonable time or, at least, should not wait to a point in time when the opposing party would be unfairly disadvantaged . . . .” Id. at 1285-1286 (finding two months not unreasonable). Accordingly, it is imperative that practitioners examine local rules and precedent for any requirements as to the timing of filing a bill of costs in the district court that seeks recovery of appellate costs.

District courts have discretion to stay an award of the appellate costs taxable in the district court until final adjudication.

The final section of this article considers a cost issue unique to appeals returned for further proceedings; specifically whether and under what circumstances may a district court stay an award of appellate costs recoverable in the district court until final adjudication. The appellate cases on point are clear that district courts have such discretion, see Berthelsen v. Kane, 907 F.2d 617, 623 (6th Cir. 1990) and Emmenegger v. Bull Moose Tube Company, 324 F.3d 616, 626-27 (8th Cir. 2003), but the law is not clear on the circumstances that merit staying an award of appellate costs recoverable in the district court. The few cases on this topic offer no hard and fast rules. The courts appear swayed by considerations of fairness, the potential of prejudice to the merits, the rule that final adjudication is not a prerequisite for obtaining costs, and the likelihood of spawning collateral litigation concerning the cost award. The lack of clear guidance is an upside for practitioners who seek to defer the imposition of appellate costs and, obviously, a downside for practitioners seeking to recover appellate costs as soon as possible.

In one case that shows the breadth of potentially relevant circumstances, the court stayed a bill of costs pending adjudication on the merits because of concerns of collateral litigation and because the costs were disproportionately expensive to the underlying case. Ross-Simmons Hardwood Lumber Co. v. Weyerhaeuser Co., No. 00-CV-1693-PA, 2007 U.S. Dist. LEXIS 54997 (D. Or. July 5, 2007) (Available on Westlaw at 2007 WL 2050869). In Ross-Simmons, the plaintiff prevailed in a two-week jury trial on its antitrust claims against the defendant. Id. at *1-2. The Ninth Circuit affirmed, but the Supreme Court held the jury instructions were flawed and remanded the matter for further proceedings. Id. at *2. The defendant then obtained an order from the Ninth Circuit stating “[a]ppellant is hereby

Continued on page 24
The right to a jury trial in civil cases is “a basic and fundamental feature of our system of federal jurisprudence which is . . . sacred to the citizen” and “should be jealously guarded by the courts.” *Jacob v. New York City*, 315 U.S. 752, 752-53 (1942). The Seventh Amendment not only guarantees the right to a jury trial in civil cases, but also provides that “[n]o fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.” U.S. Const. amend VII. Accordingly, under the Seventh Amendment’s “Reexamination Clause,” *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 433 (1996), “[a] federal court has no general authority to reduce the amount of a jury’s verdict.” *Johansen v. Combustion Eng’g, Inc.*, 170 F.3d 1320, 1328 (11th Cir. 1999); see also *Kennon v. Gilmer*, 131 U.S. 22, 29 (1889) (“[N]o court of law . . . is authorized, according to its own estimate of the amount of damages which the plaintiff ought to have recovered, to enter an absolute judgment for any other sum than that assessed by the jury.”).

Juxtaposed against the “sacred” place of the jury in American jurisprudence, remittitur has long been recognized as a post-trial mechanism to request reduction of an excessive jury verdict. Underlying its acceptance is the well-established principle that the Reexamination Clause does not “inhibit the authority of trial judges to grant new trials” if they determine the verdict goes against the weight of the evidence. *Gasperini*, 518 U.S. at 433. Thus, when a federal court determines that a jury’s verdict is excessive, it may hold that, unless the plaintiff accepts a remittitur of the award to an amount the court determines is supported by the evidence, the court will order a new trial. See *Atlas Food Sys. & Servs., Inc. v. Crane Nat’l Vendors, Inc.*, 99 F.3d 587, 593 (4th Cir. 1996). Federal courts have held that remittitur is the appropriate remedy where “the jury’s damage award exceeds the amount established by the evidence[.]” *Goldstein v. Manhattan Indus., Inc.*, 758 F.2d 1435, 1448 (11th Cir. 1985), or “where the verdict is so grossly excessive as to shock the judicial conscience.” *Bennett v. Riceland Foods, Inc.*, 721 F.3d 546, 553 (8th Cir. 2013).

To avoid violating the Reexamination Clause, however, a post-trial remittitur can only be awarded if the plaintiff consents; otherwise, the court must order a new trial. If a federal district or appellate court “enter[s] judgment for a lesser amount than that determined by the jury without allowing petitioner the option of a new trial,” the court’s decision “cannot be squared with the Seventh Amendment” and must be reversed. *Hetzel v. Prince William Cnty., Va.*, 523 U.S. 208, 211 (1998) (emphasis added); see also *B. Braun Med., Inc. v. Rogers*, 163 F. App’x 500, 506 (9th Cir. 2006) (“A court violates the Seventh Amendment’s guarantee of a jury trial by ordering a remittitur without affording the party the option of a new trial.”); *Bucher v. Krause*, 200 F.2d 576, 588 (7th Cir. 1952) (“For either the trial court or the appellate court arbitrarily to reduce the damages to a lesser amount is well-nigh to deprive plaintiff of a right to a jury trial.”).

There is no question juries can—and in many cases do—wrongly award a plaintiff an amount of damages greater than that which is supported by the evidence or permitted by law. The defendant’s ability to request a remittitur is therefore an important potential weapon in the post-trial arsenal. Indeed, the United States Supreme Court has expressly held that “[i]f the amount of damages awarded is excessive, it is the duty of the trial judge to require a remittitur or a new trial.” *Linn v. United Plant Guard Workers of Am., Local 114*, 383 U.S. 53, 65-66 (1966); see also *Tingley Sys., Inc. v. Norse Sys., Inc.*, 49 F.3d 93, 96 (2d Cir. 1995) (“If a district court finds that a verdict is excessive, it may order a new trial, a new trial limited to damages, or, under the practice of remittitur, may condition a denial of a motion for a new trial on the plaintiff’s accepting damages in a reduced amount.”).

This article discusses several considerations a defendant should take into account when deciding
whether to seek a post-trial remittitur of an excessive jury verdict. First, under what circumstances must a plaintiff be given the option of a new trial? Second, what is the proper procedure for seeking a remittitur? And third, is there any danger that an even higher award would be returned if the plaintiff were to elect a new trial?

**When Does the Reexamination Clause Apply?**

In deciding whether to challenge an excessive jury verdict, the first question a party must consider is whether the jury’s award is excessive as a matter of fact or law. This distinction is important because the Supreme Court has held that the Reexamination Clause is implicated—requiring a federal court to give the plaintiff the option of a new trial—only when a reduction in the verdict is based on an issue of fact. See *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 436 (2001). “Neither common law nor the Seventh Amendment, however, prohibits reexamination of the verdict for legal error.” *Johansen*, 170 F.3d at 1330 (emphasis added). “Therefore, if legal error is detected, the federal courts have the obligation and the power to correct the error by vacating or reversing the jury’s verdict.” *Id.* In addition, “where a portion of a verdict is for an identifiable amount that is not permitted by law, the court may simply modify the jury’s verdict to that extent and enter judgment for the correct amount. . . . The Seventh Amendment is not offended by this reduction because the issue is one of law and not fact.” *Id.* (citations omitted).

Stated differently, the “critical question” in determining whether a district court has authority to order remittitur without affording the plaintiff the option of a new trial is whether, by granting remittitur, the court would “substitute[] its own evaluation of the evidence regarding damages for the jury’s factual findings” or whether the reduction of damages [would be] based on a ‘determination that the law does not permit the award.’” *Cartel Asset Mgmt. v. Ocwen Fin. Corp.*, 249 F. App’x 63, 81 (10th Cir. 2007) (quoting *Corpus v. Bennett*, 430 F.3d 912, 917 (8th Cir. 2005)).

Based on these principles, federal courts have found that certain damage awards are legally erroneous and, therefore, that the plaintiff need not be afforded the option of a new trial. For instance, the Supreme Court has held that the Reexamination Clause is not implicated if an award of punitive damages is constitutionally excessive:

> “Unlike the measure of actual damages suffered, which presents a question of historical or predictive fact, the level of punitive damages is not really a ‘fact’ ‘tried’ by the jury.” Because the jury’s award of punitive damages does not constitute a finding of “fact,” appellate review of the district court’s determination that an award is consistent with due process does not implicate the [Reexamination Clause].

See *Cooper Indus., Inc.*, 532 U.S. at 437 (citations omitted). In other words, a constitutional reduction of an award of punitive damages “is a determination that the law does not permit the award.” *Johansen*, 170 F.3d at 1331.

Courts have also held that a new trial does not need to be offered if the district court is merely reducing a “nominal” damages award to a legally nominal amount where there was a finding by the jury that the plaintiff suffered no direct injury. See *Corpus*, 430 F.3d at 915-17 (reducing the jury’s nominal damages award of $75,000 to one dollar). In such a circumstance, the Seventh Amendment is not implicated because “the district court did not substitute its own evaluation of the evidence regarding damages for the jury’s factual findings. Instead, the district court made ‘a determination that the law does not permit the award,’ and followed its duty to reduce the nominal damages award to conform with the law.” *Id.* at 917 (internal citation omitted) (quoting *Ross v. Kansas City Power & Light Co.*, 293 F.3d 1041, 1049 (8th Cir. 2002)).

Similarly, courts have held that the Reexamination Clause is not implicated where the court reduces a verdict to comply with a statutory damages cap. See, e.g., *Davis v. Omitowoju*, 883 F.2d 1155, 1162 (3d Cir. 1989) (holding that the Reexamination Clause did not apply to the reduction of a jury award to comply with a $250,000 statutory cap on non-economic damages in medical malpractice cases); see also *Gasperini*, 518 U.S. at 429 n.9 (“While we have not specifically addressed the issue, courts of appeals have held that district court application of state statutory caps in diversity cases, postverdict, does not violate the Seventh Amendment.”). The reason is that, in the case of a statutory damages cap, “a court does not ‘reexamine’ a jury’s verdict or impose its own factual determination regarding what a proper award might be. Rather, the court simply implements a legislative
policy decision to reduce the amount recoverable to that which the legislature deems reasonable.” Estate of Sisk v. Manzanares, 270 F. Supp. 2d 1265, 1278 (D. Kan. 2003).

Even where a damages award is reduced due to legal error, however, courts may still elect to offer the plaintiff the option of a new trial. The Second Circuit, for example, has continued to require that the plaintiff be permitted to opt for a new trial when a court reduces the amount of punitive damages. See Thomas v. iStar Fin., Inc., 652 F.3d 141, 146-47 (2d Cir. 2010) (noting that, notwithstanding the Supreme Court’s decision in Cooper, “the law of this Circuit does not appear to distinguish between compensatory and punitive damages . . . even where the punitive damages award has been held unconstitutionally excessive”). Defendants seeking a reduction in a jury’s verdict based on legal error should therefore be aware that, while the Seventh Amendment may not require courts to offer a plaintiff the option of a new trial, certain circuits may nonetheless require that the plaintiff be given the option in particular circumstances. See Johansen, 170 F.3d at 1332 (declining to follow the Second and Tenth Circuits’ apparent practice of affording the plaintiff the option of a new trial in lieu of remittitur of a constitutionally excessive punitive damages award, but commenting that “the Constitution does not prohibit this cautious approach”); but see Jones v. United Parcel Serv., Inc., 674 F.3d 1187, 1208 n.8 (10th Cir. 2012) (holding that no offer of a new trial was required where reduction of a punitive damages award was “required by the constitution”).

Procedure for Seeking Remittitur

Courts are not in agreement as to the proper procedure a defendant should follow in requesting remittitur. While some courts have recognized that a motion for remittitur should be brought under Rule 59(e) as a motion to alter or amend the judgment, others have indicated that it should be brought under Rule 59(a) as a motion for a new trial.

As a general matter, a motion for remittitur seems more appropriately brought in a motion to alter or amend the judgment under Rule 59(e), the purpose of which “is to bring the court’s attention to . . . manifest error[s] of law or fact.” Neal v. Newspaper Holdings, Inc., 349 F.3d 363, 368 (7th Cir. 2003). A jury verdict exceeding the amount supported by the evidence certainly qualifies as an error of “fact” in the judgment. Moreover, in many cases, a defendant may have no interest in a new trial, and would simply prefer the court order the damages award reduced. Indeed, several courts have recognized that motions for remittitur can or should be brought through Rule 59(e). See, e.g., Warren v. Cnty. Comm’n of Lawrence Cnty., Ala., 826 F. Supp. 2d 1299, 1305 n.4 (N.D. Ala. 2011) (stating that the defendant’s post-trial request for remittitur was governed by Rule 59(e)); see also Hite v. Vermeer Mfg. Co., 446 F.3d 858, 869 (8th Cir. 2006) (“Under Rule 59(e), the district court should grant remittitur only when the verdict is so grossly excessive as to shock the court’s conscience.”) (emphasis added and quotation marks omitted); Acevedo-Garcia v. Monroig, 351 F.3d 547, 566 (1st Cir. 2003) (stating that the defendants timely filed a motion seeking reduction or remittitur of the damage award pursuant to Rule 59(e)).

The Fourth Circuit, by contrast, has stated that Rule 59(a) “is the established method by which a trial judge can review a jury award for excessiveness.” Atlas Food, 99 F.3d at 593 (emphasis added); see also G.M. Garrett Realty, Inc. v. Century 21 Real Estate Corp., 17 F. App’x 169, 173 (4th Cir. 2001) (concluding that the defendant’s “characterization of its Motion for Remittitur as a motion to alter or amend the judgment under Rule 59(e) [was] inappropriate”). In courts that follow this view, a motion for remittitur is more appropriately brought under Rule 59(a) as an alternative to a motion for a new trial. See, e.g., Vigilant Ins. v. Sunbeam Corp., 231 F.R.D. 582, 595 (D. Ariz. 2005) (“Under Rule 59(a), this Court may grant a motion for a remittitur if the jury award was against the weight of the evidence.”) (emphasis added); Schramm v. Long Island R.R. Co., 857 F. Supp. 255, 257-58 (E.D.N.Y. 1994) (“[T]he process of remittitur allows the court to grant a Rule 59(a) motion, while presenting the plaintiff with the choice of either submitting to a new trial or agreeing to the reduced damage award which the court considers justified.”).

In short, there is a split of authority among the federal courts as to whether a request for remittitur should be brought under either Rule 59(a) in a motion for new trial or Rule 59(e) in a motion to alter or amend the judgment. If there is no controlling law in the jurisdiction, reliance on either procedural mechanism would appear to be appropriate.

Does the Reexamination Clause Matter?

A final consideration for the defendant, in deciding whether to seek remittitur, is whether there is any “danger” in the plaintiff being given the option of a new trial.

Continued on page 25
JOIN TIPS AT OUR UPCOMING 2014 SECTION MEETINGS!

**TIPS Spring Meeting**  
May 14-18, 2014  
Boca Raton Resort & Club  
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**ABA Midyear Meeting**  
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**ABA Annual Meeting**  
August 7-12, 2014  
Sheraton Hotel  
Boston, MA
JUDICIAL REPORTS

Editor’s Note: Before citing any legal authority that is mentioned or discussed in this Newsletter, you are advised to independently verify its content and current status, including whether it has been overruled, modified, amended, rescinded, or otherwise limited.

FIRST CIRCUIT

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IMPORTANT POST-JUDGMENT ISSUES

The First Circuit decided two cases this quarter involving issues of interest to appellate advocates: post-judgment interest and the “hail mary pass” that is Federal Rule of Civil Procedure 60(b). While not breaking new ground, both of these decisions contains a neat, tight resource if ever you run into one of these issues.

First is the decision in Vazquez-Filippetti v. Cooperativa de Seguros Multiples de Puerto Rico, 723 F.3d 24 (1st Cir. 2013), in which the First Circuit considered the issue of the defendant-insurer’s liability for post-judgment interest on a multi-million dollar plaintiffs’ recovery. The plaintiff was severely injured when struck by a car while using an ATM machine. In a diversity action, she pursued claims against the driver of the automobile and its owner, as well as the bank who owned the ATM. The jury awarded her $6 million dollars, apportioned 75% to the bank and 25% to the driver and owner, although the judgment was later amended to specify that the defendants were jointly and severally liable. Id. at 26. The bank appealed, but about five months after the verdict was rendered, the automobile insurer tendered its full policy limits into court.

When, on appeal, the verdict against the bank was set aside for insufficient evidence, the plaintiff tried a number of avenues to challenge the automobile insurers’ claim that it was not liable for anything further, even if its insureds were on the hook as jointly and severally liable with the bank. Id. at 27. Although they did not succeed on making the insurer liable for a larger chunk of the damage award, the plaintiff’s persuading the Court that the insurer should be made to pay a portion of the post-judgment interest that had accrued after the original judgment entered.

Taking up first the insurer’s claim that the plaintiffs had waited too long (5 years) to raise the issue of its responsibility to pay post-judgment interest, the First Circuit held that post-judgment interest in federal actions is a statutory entitlement (21 U.S.C. § 1961(a)), thus there is no time limit within which one must move for or request its award: it simply starts accruing. Id. at 28. Next, holding that the policy at issue contained a “standard interest clause” which obligated the insurer to pay post-judgment interest, the Court held that the insurer was required to pay interest on the entire amount of the verdict, but only for the period of time between the entry of the judgment and the date the insurer tendered its policy limits.

Next, the First Circuit issued a surprisingly snarky opinion directed at plaintiff’s counsel’s desperate attempts to secure some relief from the entry of summary judgment:

When litigation goes awry, lawyers sometimes scramble to find a scapegoat. So it is here: having conspicuously failed to protect the record, the plaintiff’s lawyers attempt to shift the blame to their opposing counsel. Concluding, as we do, that this diversionary tactic lacks force, we affirm the district court’s denial of the plaintiff’s motion for relief from judgment.

Nansamba v. North Shore Medical Center, Inc., 727 F.3d 33, 35 (1st Cir. 2013).
The plaintiff in Nansamba tried to use that well-recognized last-ditch effort that is a “motion for relief from judgment” pursuant to Federal Rule of Civil Procedure 60(b) after having lost a motion for summary judgment, lost a motion for reconsideration, and let the deadline expire without filing a notice of appeal. \textit{Id. at 36-37}. She appealed the district court’s denial of the Rule 60(b) motion and attempted to use that vehicle as a way to raise the propriety of the district court’s entry of summary judgment against her. The First Circuit recognized the ploy and promptly shut it down. \textit{Id. at 37-38}. The court then considered the grounds relied on solely for the Rule 60(b) motion and found no error in the district court’s ruling. Although the plaintiff could establish that the judgment entered as a result of counsel’s “neglect” (the court held that “[t]his [was] neglect on steroids. . .” Ouch!), she could not establish that the neglect was in any way “excusable,” and thereby fell short of making a case under Rule 60(b). \textit{Id. at 38}. As the court reflected, relief under Rule 60(b) is reserved for those situations where “exceptional circumstances exist, favoring extraordinary relief.” \textit{Id. at 37-38}. It is the rare party indeed, who can satisfy the high standard of Rule 60(b); may we all practice many years without ever having to invoke it. 572

In \textit{Ali v. Federal Insurance Co.}, 719 F.3d 83 (2d Cir. 2013), the Second Circuit held that it had jurisdiction to decide an appeal from a voluntary dismissal of a claim following the denial of a motion for summary judgment. Although the Court generally lacks appellate jurisdiction to review voluntary dismissals of claims or denial of motions for summary judgment, the Court nevertheless concluded that it could review the final judgment under the “unusual circumstances” of the case.

\textit{Ali} was a declaratory judgment action concerning insurance coverage. The former directors and officers of a company that had filed for bankruptcy were protected from potential liability under a series of insurance policies. The primary policy covered the first $10 million in liability, and eight successive excess insurance policies provided additional levels of coverage. Because two of the underlying insurers had ceased operations and liquidated their assets, one of the excess insurers filed a declaratory judgment action seeking a declaration that it was not required to cover liability that otherwise would have been covered by the out-of-business excess insurance companies. In the same action, the directors filed a counterclaim against the excess insurer and also named one of the other excess insurers as a third-party defendant, seeking a declaration that the two excess insurers’ obligations were triggered when the total amount of the obligations exceeded the limits of any underlying policies. The directors then moved for partial summary judgment on this issue.

Concluding that excess coverage is not triggered until the underlying insurance is exhausted solely as a result of payment of the losses, the district court granted the excess insurer’s requested declaratory relief but denied the directors’ motion for partial summary judgment. After this decision, the parties submitted a letter to the court agreeing that all remaining claims and third-party claims should be dismissed with prejudice. The court then dismissed the action pursuant to Federal Rule of Civil Procedure 41(a)(2). The directors appealed the judgment relating to the court’s denial of their motion for partial summary judgment.

Typically, orders granting Rule 41(a)(2) motions for voluntary dismissals are not appealable. However, in limited circumstances, a plaintiff can appeal from a voluntary dismissal when the dismissal is sought only to expedite review of an adverse decision which, in effect, dismissed the plaintiff’s complaint. The adverse decision must have rejected the claim “as a matter of
law.” Accordingly, when a plaintiff loses on a dispositive issue that affects only a portion of the claims, the plaintiff may decide to abandon the unaffected claims that are still pending, invite a final judgment and obtain review of the adverse ruling.

Applying these principles, the Court held that the directors’ appeal was appropriate because the order denying the motion for summary judgment plainly rejected the legal basis for directors’ counterclaim, the district court had disposed of all claims with prejudice and the directors’ consent to final judgment was intended to obtain immediate appeal of the prior adverse ruling without piecemeal appellate review. 572

**THIRD CIRCUIT**

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**APPELLATE REVIEW OF CONFLICTING CITIZENSHIP DECISIONS**

As appellate practitioners, we know that a finding of fact, reviewable only for clear error, will seldom be disturbed on appeal. So what happens when a business entity with locations in multiple states is the subject of conflicting factual findings from different judges of the same district court concerning its citizenship for diversity jurisdiction purposes? Because the standard of review controls the outcome, the answer appears to be driven by which of the conflicting decisions is appealed.

In *Johnson v. Smithkline Beecham Corp.*, 724 F.3d 337 (3d Cir. 2013), the plaintiffs originally sued in state court in Philadelphia. The defendants removed the case to the Eastern District of Pennsylvania on the basis of diversity jurisdiction. The plaintiffs moved to remand, asserting that there was not complete diversity because SmithKline and a related defendant were Pennsylvania citizens.

The district court denied the remand motion, finding that the SmithKline defendants were not citizens of Pennsylvania. The court then certified the issue for interlocutory review. The court noted that six different judges in the Eastern District had made rulings on Smithkline’s citizenship in six different cases, with four judges concluding that SmithKline was a citizen of Pennsylvania, and two (including the *Johnson* court) concluding that it was not. The district court certified the issue because of the disagreement among the judges in the district and the likelihood that it would continue absent appellate review. Accordingly, the district court certified the issue as “a controlling question of law as to which there is substantial ground for difference of opinion.” *Id.* at 344 (emphasis added).

The Third Circuit accepted the case on that basis, but having done so, concluded that the determination of citizenship was based on findings of fact that were not clearly erroneous. Although its standard of review was plenary concerning the district court’s application of the law to its factual findings, the Third Circuit concluded that the district court had applied the law correctly. Ultimately, therefore, the outcome of the appeal revolved around the deference accorded to the district court’s findings of fact concerning the locations and significance of Smithkline’s business activities. That evidence was conflicting; it could – and did – lead to differing opinions from different district court judges.

The deferential standard of review and the differing factual outcomes in the different cases suggest the unsettling inference that had one of the conflicting decisions been certified for review instead of *Johnson*, the Third Circuit would have affirmed that decision and held that SmithKline was a Pennsylvania citizen. For better or worse, the outcome was driven by which case was chosen for certification. In fact, the *Johnson* plaintiffs argued that the standard of review was unfair because of the differing decisions reached by different judges on the citizenship issue. The Third Circuit, however, found itself constrained by its limited review, concluding that “varying outcomes do not change that we are called upon to review only the particular order on appeal, nor do they put us in a better position to make our own factual findings.” *Id.* at 345, 573
FOURTH CIRCUIT
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FOURTH CIRCUIT DEEMS VOLUNTARY DISMISSAL TO BE WITH PREJUDICE TO EXERCISE APPELLATE JURISDICTION

In *Waugh Chapel South, LLC v. United Food and Commercial Workers Union Local 27*, 2013 WL 4505288, ___ F.3d ___ (August 26, 2013), the Fourth Circuit elected to deem a voluntary dismissal to be with prejudice when it was taken to allow appellate review of an otherwise interlocutory order. The plaintiff-appellant had ambiguously dismissed part of its complaint to allow immediate appeal of a dismissal order. Rather than remanding the case to the district court for resolution of the dismissed claim, the Fourth Circuit considered the appeal after deeming the voluntary dismissal to be with prejudice.

In *Waugh Chapel South*, the plaintiffs sued the defendant unions under the Labor Management Relations Act, alleging unfair labor practices by the defendants. The defendants moved to dismiss the complaint in its entirety, and the district court granted partial dismissal. Instead of proceeding with the remaining cause of action, the plaintiffs entered into a consent order dismissing the remaining count “with prejudice, but without prejudice to refilling in any other proceeding.”

The Fourth Circuit observed that such a split judgment “ordinarily would not be considered ‘final’ and therefore appealable under 28 U.S.C. §1291 because it does not wind up the entire litigation in the district court.” Moreover, the plaintiff-appellants admitted that the voluntary dismissal was intended to allow the court to have appellate jurisdiction over the case. The Fourth Circuit noted that such a procedure was improper, as it “would allow an end-run around the final judgment rule.”

The question for the Fourth Circuit was what sanction to apply. The Court observed that sister circuits had generally considered and applied one of two alternative sanctions: reverse the dismissal and remand to the district court for completion while dismissing the appeal, or deem the dismissal as one with prejudice and immediately consider the entire appeal.

Reasoning that deeming the ambiguous dismissal as one with prejudice would be the remedy that best “polices the boundaries of our appellate jurisdiction without punishing the litigants in this appeal,” the Fourth Circuit elected to consider the appeal of the remaining claims. The Court ultimately reversed in part the dismissal of the complaint and remanded for further proceedings concerning the claims that the district court erroneously dismissed.
FIFTH CIRCUIT
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APPEALABILITY
In two recent cases the Fifth Circuit dismissed appeals for lack of appellate jurisdiction. In Quinn v. Miller, No. 12-20726, 2013 WL 3475117 (5th Cir. July 11, 2013), the court dismissed an appeal from a district court order that dismissed one plaintiff from a suit when claims by other plaintiffs remained pending. The court held the order was not immediately appealable because it was only a partial disposition of a multi-party claim and because the order did not indicate an intent to enter a final or immediately appealable judgment.

In another case, Fontenot v. Watson Pharmaceuticals, Inc., 718 F.3d 518 (5th Cir. 2013), the court held it lacked jurisdiction to review an order remanding the case to the state court because of the joinder of non-diverse parties. After removal the district court allowed the joinder of several non-diverse defendants and then remanded the case under 28 U.S.C. § 1447(e). Asserting that the joinder and remand were improper, the defendant appealed. The court noted that, while some remand orders are reviewable on appeal, it is well-established that remand orders based on a lack of subject-matter jurisdiction under 28 U.S.C. § 1447(c) are shielded from appellate review. Noting that every circuit to address the issue has reached the same conclusion, the Fifth Circuit extended the same rule to remand orders under 28 U.S.C. § 1447(e) where the joinder of additional defendants defeats subject matter jurisdiction.

SIXTH CIRCUIT
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AS A MATTER OF FIRST IMPRESSION, COURT ADDRESSES JURISDICTIONAL ISSUES REGARDING CHALLENGES TO PLEADINGS IN MULTIDISTRICT LITIGATION
Recently the Sixth Circuit became the first federal court of appeals to address the issue of whether the dismissal of some, but not all, of the claims in multidistrict litigation is a final, appealable order. In In re Refrigerant Compressors Antitrust Litigation, Nos. 13-1608, 13-1615, 13-1617, 13-1624, 13-1625, 13-1628, 13-1631, 2013 WL 5338010 (6th Cir. Sept. 25, 2013), two groups of plaintiffs (direct and indirect purchasers) alleged that manufacturers of compressors violated antitrust laws by fixing prices and dividing markets. The multidistrict panel centralized proceedings in the Eastern District of Michigan, and the indirect purchasers filed a single “consolidated amended complaint” that combined all of their allegations. The district court dismissed some but not all of the indirect purchasers’ claims, leading to an appeal by the purchasers whose claims were dismissed.

The Sixth Circuit, in determining whether a final appealable order existed, looked to the nature of the pleading at issue: Was the indirect purchasers’ amended complaint intended to be a “master complaint” that included only an administrative summary of the plaintiffs’ claims? If so, the Court reasoned that the individual complaint would retain its separate legal existence and an order dismissing the complaint would be immediately appealable. Or was the amended complaint intended to be a legally operative pleading that combined the allegations of all plaintiffs? If so, the dismissal of some
but not all claims would not be immediately appealable. On the record before it, the Court concluded that the latter was the case. The consolidated amended complaint combined the plaintiffs’ allegations, was served on the defendants, was used to fix deadlines, and was treated as a real complaint when the plaintiffs asked for leave to amend it. Thus, the district court’s order was not final or appealable.

**BANKRUPTCY COURT’S DENIAL OF CONFIRMATION OF CHAPTER 11 PLAN IS NOT FINAL, APPEALABLE ORDER**

The Sixth Circuit recently joined the majority of circuit courts in holding that a bankruptcy court’s decision denying confirmation of a proposed Chapter 11 plan is not a final, appealable order. In *In re Lindsey*, 726 F.3d 857 (6th Cir. 2013), the bankruptcy court refused to confirm the debtor’s plan based on a question of law involving the absolute priority rule’s application to individual Chapter 11 debtors. The district court affirmed this order, and the debtor sought appellate review.

The district court did not enter a final judgment under Rule 54 and no party sought certification under 28 U.S.C. § 1292. The Court concluded that the denial of a Chapter 11 plan was not final and appealable as “[f]or more than a few ministerial tasks remain to be done after such a decision.” In reaching this decision, the Court aligned itself with the Second, Eighth, Ninth, and Tenth Circuits and declined to follow the reasoning of the Third, Fourth, and Fifth Circuits.


**ELECTION CHALLENGE IS CAPABLE OF REPETITION YET EVADING REVIEW**

Although the 2012 Presidential election is over, the litigation regarding the Libertarian Party candidate’s omission from the ballot in Michigan is not. In *Libertarian Party of Michigan v. Johnson*, 714 F.3d 929 (6th Cir. 2013), the Court declined to dismiss the challenger’s appeal as moot even though election day had passed. Gary Johnson initially sought the Republican Party nomination but changed his mind and decided to seek the Libertarian nomination instead. However, he withdrew from the Republican primary too late and his name remained on the ballot. Obviously, he did not win the Republican nomination. He did, though, win the Libertarian nomination, but was denied a spot on the Michigan ballot under its “sore loser law” because his name had appeared on the Republican primary ballot. The district court dismissed the case.

The Court held that Johnson’s appeal was capable of repetition yet evading review because the action was too short in duration to be fully litigation prior to the conclusion of the election cycle and that future candidates may find themselves in similar situations. The Court nevertheless upheld the dismissal of the complaint. 726 F.3d 857 (6th Cir. 2013).
The Seventh Circuit recently issued an opinion describing a trap for unwary insurers of defendants in class actions who may lose out on an opportunity to seek appellate review. In CE Design, Ltd. v. Cy’s Crab House North, Inc., __ F.3d __, 2013 WL 5425342 (7th Cir. Sept. 30, 2013), a defendant to a class action settled with the certified class for policy limits without informing its insurer. Less than 30 days after the district court approved the settlement in a final judgment, the Seventh Circuit issued an opinion casting significant doubt upon the validity of the class certification; the following day, the insurer moved to intervene based on that decision. At that point, the 30-day time limit for filing a notice of appeal had not yet run.

The district court held a hearing on the motion on the 30th day after the judgment had been entered. When the parties questioned whether the insurer’s time to appeal would be exhausted if the court did not rule immediately, the district court indicated that the court would extend the deadline to appeal if it determined that the insurer was entitled to intervene or entitled to an extension. Three days later, the district court denied the insurer’s motion to intervene; the insurer filed a notice of appeal the following day purporting to appeal both the district court’s final judgment and the denial of the motion to intervene.

On appeal, the Seventh Circuit held that the notice of appeal was untimely as to the underlying judgment and moot as to the denial of the motion to intervene. The Court noted that the 30-day time limit for filing a notice of appeal is jurisdictional; although it may be extended by the district court for an additional 30 days, here the district court’s promise to extend the time to appeal was merely conditional. The Court further held that a “timely appeal of [an] order denying the intervention motion thus has no bearing on whether the notice was timely vis-à-vis the judgment.” Id. at *3. Finally, the Court held that because the underlying judgment was final and not subject to review, intervention would be of no use to the appellant.

A company sued several former employees on several contract-based claims, for permanent injunctive relief, and for a declaratory judgment regarding the defendants’ covenants not to compete. During the lawsuit, one defendant filed for Chapter 7 bankruptcy and all proceedings against that defendant were stayed. The lawsuit continued against the remaining defendants, who achieved summary judgment against the company on all counts except the declaratory judgment. The remaining defendants filed a motion for attorneys’ fees, which the district court denied.

The company appealed the summary judgment order but did not first seek certification under Federal Rule of Civil Procedure 54(b). The defendants cross-appealed the denial of their motion for attorneys’ fees after obtaining Rule 54(b) certification.

The Seventh Circuit chastised the company for failing to obtain Rule 54(b) certification or seeking relief from the bankruptcy stay. Because one defendant was in bankruptcy, the case was still “open” in the district court, and there was no final judgment to appeal under 28 U.S.C. § 1291. “The fact that the parties consented in writing to the entry of a final judgment is not enough for jurisdiction under 28 U.S.C. § 1291.” Id. at 1010. However, the company was not without any relief on appeal. The Court held it had jurisdiction under 28 w to review the district court’s refusal to grant permanent injunctive relief and pendent appellate jurisdiction to review the defendants’ cross-appeal regarding attorneys’ fees. 52
EIGHTH CIRCUIT

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EIGHTH CIRCUIT CLARIFIES ‘PREVAILING PARTY’ FOR PURPOSES OF FEE SHIFTING

What happens when a contract provides for fees to a prevailing party, but both sides prevail on a portion of their respective claims? In DocMagic, Inc. v. The Mortgage Partnership of Am., LLC, F.3d , 2013 WL 4733855 (8th Cir. Sept. 4, 2013), the Eighth Circuit affirmed an award of fees and costs to a defendant that prevailed on five claims outright after trial, was found liable for one claim for which the jury assessed zero damages, and awarded $243,000 in damages on a final claim, out of a total of $4 million sought. The defendant also prevailed on its counterclaims for breach of the parties’ agreement and was awarded $52,500 in damages.

The parties’ agreement provided for an award of fees and costs to the prevailing party. Post-trial, both parties claimed to have prevailed. Reviewing the legal question of which litigant prevailed under a de novo standard and reviewing the fee award for abuse of discretion, the Eighth Circuit held that it was appropriate for the district court to apply the “main issue” test and to look at the relative amount of each side’s damage award to determine which party prevailed. The breach of the agreement was the “main issue” in dispute, and the defendant prevailed on that issue. In addition, the defendant recovered 58 percent of its claimed damages, whereas the Plaintiff recovered 7 percent of what it had sought. The award of fees and costs to the defendant as prevailing party was affirmed.

DISTRICT COURT’S SUA SPONTE DISMISSAL OF PLAINTIFF’S CASE FOR SCHEDULING CONFLICT CONSTITUTED ABUSE OF DISCRETION

In DiMercurio v. Malcolm, 716 F.3d 1138 (8th Cir. 2013), the Eighth Circuit applied Federal Rule of Civil Procedure 41(b) to reverse a district court’s dismissal of a case for the plaintiff’s failure to attend trial as a result of an announced and unavoidable conflict. After changing the parties’ trial date sua sponte to a date six weeks after the initial trial setting, the district court denied Plaintiff’s requests for continuance, which were based on the fact that Plaintiff and two key witnesses would be on a non-refundable trip out of the country, which had been booked after receiving the original trial setting. The district court denied reconsideration and denied another request for continuance made on the morning of trial, at which time Plaintiff’s counsel announced that he could not go forward without any witnesses. The district court then dismissed Plaintiff’s case with prejudice under Rule 41(b) and assessed costs against Plaintiff as a sanction.

Citing the lack of any intentional delay or contumacious conduct on the part of the Plaintiff, the Eighth Circuit reversed. Rule 41(b) permits the extreme sanction of dismissal with prejudice if a plaintiff fails to prosecute his case, fails to follow the rules of procedure, or fails to comply with court orders. While the Eighth Circuit was mindful of the district court’s discretion to advance its docket, it found an abuse of discretion in employing such an extreme sanction when the delay of trial was not caused by Plaintiff.

NO COLLATERAL ORDER JURISDICTION OVER SUMMARY JUDGMENT BASED ON QUALIFIED IMMUNITY

In Mitchell v. Shearrer, F.3d , 2013 WL 4793107 (8th Cir. Sept. 10, 2013), the Eighth Circuit dismissed a plaintiff’s cross-appeal of a grant of summary judgment to two defendant police officers based on qualified immunity, although it heard a third officer’s interlocutory appeal of the lower court’s denying qualified immunity in a Section 1983 action. The Court held that the district court had not issued a final judgment in the case and that the collateral order doctrine does not apply when a party complains that the district court should not have granted summary judgment based on qualified immunity.

RETIRED PRO ATHLETES FAIL TO STATE A CLAIM FOR TORTIOUS INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE

In Eller v. National Football League Players Association, F.3d , 2013 WL 5302711 (8th Cir. Sept. 23, 2013), a putative class of retired professional football players sought declaratory relief and damages for alleged breaches of fiduciary duty and interference with prospective economic advantage against the NFL.
players association for not permitting them to separately negotiate a new Collective Bargaining Agreement with management. The district court dismissed the suit for failure to state a claim.

While holding that Minnesota law recognizes the tort of intentional interference with prospective economic advantage and follows the Restatement (Second) of Torts formulation, the Eighth Circuit nonetheless upheld the district court’s dismissal because: (1) the retired players lacked a reasonable expectation that negotiating separately from active players would yield better or additional benefits; and (2) because the players could not show that any alleged “interference” by the players’ union in bargaining for better benefits for active players was somehow improper, especially given the special privilege for competitors with tortious interference claims.

NINTH CIRCUIT

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JURISDICTION: APPELLATE COURT LACKS JURISDICTION TO REVIEW DISTRICT COURT’S ADMINISTRATIVE DECISION DENYING JOURNALISTS’ REQUEST FOR EXEMPTION FROM PACER FEES

The district court denied two journalists’ request for an exemption from standard charges for access to court documents through the Public Access to Court Electronic Records (PACER) system. The Ninth Circuit dismissed the journalists’ appeal for lack of jurisdiction. In Re: Application for Exemption, 728 F.3d 1033 (9th Cir. 2013). The journalists argued the order was a final decision of the district court and therefore appealable under 28 U.S.C. § 1291. The appellate court agreed the order was final, but ruled that it was not a “decision” within the meaning of § 1291. A decision must be one of a judicial character. This order was not of a judicial character; it was an administrative action, wholly unconnected to pending litigation.

MOOTNESS: PLAINTIFF’S ACKNOWLEDGMENT OF SATISFACTION OF JUDGMENT PARTIALLY IN HIS FAVOR MOOTS HIS APPEAL FROM ADVERSE PORTION OF JUDGMENT

In Jones v. McDaniel, 717 F.3d 1062 (9th Cir. 2013), a state prisoner sued his jailors for various civil rights violations. First Amendment claim was dismissed on partial summary judgment, but a jury awarded both nominal and punitive damages on the remaining claims. While post-trial motions were pending, the plaintiff settled for cash, attorney’s fees and expungement of his prison disciplinary record. In return, the plaintiff gave the defendants an accord and satisfaction that acknowledged receipt of payment in full satisfaction of the judgment. Then the plaintiff appealed, seeking review of the dismissal of his First Amendment claim.

The Ninth Circuit dismissed his appeal as moot. The court held that when parties have settled all claims before appeal, there remains no live case or controversy. Here, the parties settled the “judgment” without mentioning the First Amendment claim, and the settlement must have included that claim because the district court’s interlocutory disposition of the claim had merged into the final judgment.
GAMING THE SYSTEM: JUDGES CHASTISE LOSING PARTY FOR BELATED REQUEST FOR CERTIFICATION OF QUESTION TO STATE COURT

In *Hinojos v. Kohl’s Corp.*, 718 F.3d 1098 (9th Cir. 2013), the plaintiffs appealed from dismissal of a putative class action under a state false advertising law. A month after oral argument, which did not go well for the defense, the defendant requested that the question be certified to the state supreme court. The Ninth Circuit denied the request, finding that a recent state supreme court decision provided more than sufficient guidance to resolve the question on appeal, and reversed the judgment.

Two of the three judges criticized the defendant’s timing of its motion to certify the question. The defendant had never suggested that certification was necessary until after oral argument, nor did it explain its delay. Courts disfavor attempts to “manipulate the system” by seeking to avoid a panel viewed as unlikely to rule favorably (that’s why the composition of the panel is not revealed until a week before oral argument), and in particular by seeking a second chance through certification to a state court. The third judge, while suspicious of the defendant’s motives, would have simply denied the request as untimely.

TENTH CIRCUIT

By: Katayoun A. Donnelly, Azizpour Donnelly LLC, 2373 Central Park Blvd., Suite 100, Denver, CO 80238, (720) 675-8584, katy@kdonnellylaw.com

FEDERAL LAW PREEMPTS STATE BREACH-OF-WARRANTY CLAIMS WHERE THE STATE DUTIES DO NOT PARALLEL, BUT ADD TO, FEDERAL REQUIREMENTS.

In *Schrock, et al v. Wyeth Inc., et al*, 727 F.3d 1273 (10th Cir. 2013), the Tenth Circuit affirmed the district court’s dismissal of claims against brand-name and generic manufacturers of the drug metoclopramide. The Court held that the plaintiffs’ breach-of-warranty claims against the generic manufacturers were preempted because they could not follow the state law and at the same time be consistent with federal law. The Court also affirmed dismissal of the claims against the brand-name manufacturers, predicting that Oklahoma state law would not impose a duty on them that flows to consumers of generic drugs.

AN EXCLUSION BASED ON THE COMMON LAW CLAIM OF MALICIOUS PROSECUTION DOES NOT ENCOMPASS ALL CLAIMS OF MALICIOUS ABUSE OF PROCESS.

In *Carolina Casualty Insurance v. Nanodetex Corporation et al*, F.3d , 2013 WL 4405722 (10th Cir. Aug. 19, 2013), the Tenth Circuit held that the term “malicious prosecution” in an insurance policy exclusion does not encompass all claims of malicious abuse of process, but only claims whose elements are essentially those of the common-law cause of action for malicious prosecution.

In the recent years, the New Mexico Supreme Court has recognized a new tort called “malicious abuse of process,” which subsumed causes of action for malicious prosecution and abuse of process. Nanodetex Corporation and two of its principals sought indemnification from Carolina Casualty Insurance Company, which covered them under a management liability policy, after they were successfully sued for malicious abuse of process. Carolina denied the claim and sought a declaratory judgment, arguing that it was not liable for the damages arising from the malicious-abuse-of-process judgment because the policy contained an exclusion for losses arising from claims for “malicious prosecution.” On Carolina’s motion for summary judgment, the district court agreed with Carolina and also rejected the insureds’ counterclaims. The insureds appealed. The Tenth Circuit reversed the district court’s decision, holding that because, in the initial action against the insureds, the judgment was affirmed on appeal on a claim that was not substantially the same as common-law malicious prosecution, the exclusion in the Carolina Policy did not apply.
ELEVENTH CIRCUIT
By: Stephanie A. Fichera, Jorden Burt LLP, 777 Brickell Avenue, Suite 500, Miami FL 33131-2803, (305) 371-2600, saf@jordenusa.com

PARTY MAY APPEAL ADVERSE, NONDISPOSITIVE ISSUE DESPITE DISTRICT COURT DECISION IN ITS FAVOR

In Unique Sports Products, Inc. v. Ferrari Importing Co., 720 F.3d 1307 (11th Cir. 2013), the Eleventh Circuit considered “whether a party may appeal on the merits from a decision in its favor, where a district court found against him as to one issue, nondispositive of the case.” Id. at 1308. The case involved a trademark infringement claim. The district court ruled that the plaintiff’s trademark of its tennis racket grip tape was valid and enforceable, but that the defendant’s use of a similar color on a similar product did not infringe that trademark. See id. at 1309. The defendant appealed. The Eleventh Circuit ruled that, although the defendant could not challenge the decision in its favor on the plaintiff’s infringement claim, it was entitled to have the nondispositive and adverse portion of the district court’s order regarding the validity of the trademark vacated. See id. at 1308, 1310-11.

COURT LACKED JURISDICTION TO HEAR POST-TRIAL MOTIONS NOT DESIGNATED IN NOTICE OF APPEAL

In Weatherly v. Alabama State University, F.S.A., 2013 WL 4712727, at *1, 6 (11th Cir. Sept. 3, 2013), the Eleventh Circuit held that it lacked jurisdiction to hear an appeal by Alabama State University (“ASU”) of the district court’s denial of its post-trial motions pursuant to Federal Rules of Civil Procedure 50(b) and 59(b). ASU had not perfected its appeal because its “notice of appeal did not designate the district court’s denial of its post-trial motions as subject to appeal.” Id. at *6. ASU filed its notice while the post-trial motions were pending before the district court and failed to file a subsequent or amended notice after the motions were denied. See id. While the Court recognized that parties are not required to wait until a ruling from the district court on their Rule 50(b) and Rule 59(b) motions to appeal the final judgment, “the appealing party is required to file a separate notice of appeal or amend its original notice to designate the motion subject to appeal.” Id.
In the recent case of *In re Aiken County*, 725 F.3d 255 (D.C. Cir. Aug. 13, 2013), the D.C. Circuit used mandamus aggressively to police an independent agency’s compliance with a congressional mandate.

*Aiken* dealt with the long-pending federal consideration of Nevada’s Yucca Mountain as a permanent repository for the nation’s nuclear waste. The Nuclear Waste Policy Act of 1983 required the Nuclear Regulatory Commission to consider and issue a final decision on the Department of Energy’s application to store waste at Yucca Mountain within three years. DOE filed its application in 2008, meaning NRC’s decision was due in 2011 and was two years late in 2013.

States and other entities that are temporary sites for waste storage (including South Carolina and Washington) sought a writ of mandamus directing NRC to process DOE’s application. But as Chief Judge Garland pointed out in dissent, even if NRC were violating the law, there were significant equitable reasons not to issue a writ. Congress had ceased appropriating money for NRC’s consideration of the Yucca Mountain application, such that NRC had only $11 million in funds remaining for that task—a sum that was insufficient to complete an application process with 288 claims remaining to be resolved and over 100 expert witnesses to consider. As a result, Judge Garland concluded that “issuing a writ of mandamus amounts to little more than ordering the Commission to spend part of those funds unpacking its boxes, and the remainder packing them up again.”

Judge Kavanaugh, joined by Judge Randolph, nevertheless held that the writ should issue. He noted that independent agencies such as NRC generally must comply with congressional mandates. According to the majority, NRC’s inaction was not excused by Congress’s apparent disinterest in providing funding sufficient to complete the task, for “allowing agencies to ignore statutory mandates and prohibitions based on agency speculation about future congressional action . . . would gravely upset the balance of powers between the Branches and represent a major and unwarranted expansion of the Executive’s power at the expense of Congress.” The majority expressed a hope that Congress would reappropriate the $11 million, if it intends to cease funding the Yucca Mountain project, so that the funds would not be wasted. But this was Congress’s decision to make, not the NRC’s. Until then, the existing mandate controlled.

The case should be read against the backdrop of Judge Kavanaugh’s well-known concerns regarding independent agencies’ lack of political accountability. Indeed, in a previous iteration of *Aiken*, Judge Kavanaugh issued a lengthy concurrence summarizing his views on that issue. He noted the Supreme Court’s recent unwillingness to extend *Humphrey’s Executor* (the 1935 case that upheld the constitutionality of Congress prohibiting removal of independent agency heads except for cause). He also quoted Justice Breyer’s suggestion that independent agencies receive more aggressive judicial review than other agencies.
APPELLATE COSTS…

Continued from page 7

awarded its costs on appeal.” Id. at *3. Shortly afterwards, the defendant filed a bill of costs in the Ninth Circuit seeking reimbursement of $931.80 for photocopying and costs in a companion appeal totaling $615.40. Id. at *4. Next the defendant filed bills in the district court seeking just over $1 million dollars in Rule 39(e) costs. Id. The plaintiff filed objections to both bills of cost and the district court determined that a stay was warranted. Id.

The Ross-Simmons court found several problems with awarding appellate costs prior to final adjudication. According to the district court, nowhere in the record was there any evidence suggesting that the Ninth Circuit was aware, when issuing its cost order, that the defendant was seeking over $1 million dollars. Id. at *6-7. In addition, the district court believed that the amount of defendant’s request “seem[ed] all but certain to spawn collateral litigation” because the losing party would likely seek Ninth Circuit review, “thereby commencing another round of litigation even as the court and parties continue to grapple with the complex procedural and substantive questions posed by the underlying antitrust claims.” Id. at *7-8. Moreover, the court foresaw complications in the litigation if defendant sought to execute the judgment concerning costs while the underlying cases were still being litigated. Id. at *8. The court also expressed concerns that an Oregon statute introduced the prospect that plaintiffs’ counsel, or their law firms, could be held liable for the amount of the cost award that plaintiffs were unable to pay. Id. The court concluded that all of these issues “pose a serious risk of distracting the court and the parties from the principal issues in this litigation” and in the companion cases. Id. at *11. Thus the court exercised its discretion to stay defendant’s cost bills until after the merits of the underlying cases were resolved. Id. at *12.

Other courts considering staying a high-value cost award, however, have declined to defer an award until final adjudication and instead relied on the rule that entitlement to costs does not depend on the outcome on remand. See e.g. Hynix Semiconductor, Inc. v. Rambus Inc., No. 00-CV-20905-RMW, 2012 U.S. Dist. LEXIS 3552, at *15 (N.D. Ill. July 16, 2012) (Also available on Westlaw at 2012 WL 2905614). In that case, the Seventh Circuit reversed a jury verdict in favor of defendants and ordered a new trial due to the undisclosed and prejudicial testimony of a key witness for the defense. Id. at *1. Plaintiffs sought taxable appeal costs from the district court of approximately $3,300 and defendants requested a stay pending final adjudication on grounds of equity. Id. at *2, 5. The court noted its broad discretion to allocate costs and that some courts had chosen to wait until final adjudication before imposing costs. Id. at *6. But the court also noted that “final adjudication is not a prerequisite to a party obtaining taxable costs pursuant to Rule 39” and that Hynix’s entitlement to costs would be extinguished in the event it prevailed on remand. Id. at *15 (quotation omitted). The Northern District of California rejected this argument, explaining that “an order taxing appellate costs is effective immediately, and is not dependent upon the ultimate outcome of the case on remand.” Id. (citations omitted). Although apparently the court in Hynix was not confronted with arguments based on Ross-Simmons, this decision tells practitioners that the monetary value of appellate costs alone may not convince a district court to stay an award until an adjudication on the merits.

In Olympia Express, Inc. v. Linee Aeree Italiane S.P.A., No. 02-CV-2858, 2008 U.S. Dist. LEXIS 21573 (N.D. Ill. Mar. 19, 2008) (Available on Westlaw at 2008 WL 744231), the court considered arguments based on Ross-Simmons, but declined to order a stay where defendants sought to recover $70,000 for a premium paid to post an appeal bond of $7 million. In denying the stay, the court explained that final adjudication is not a prerequisite to an award of appeal costs and rejected plaintiffs’ argument that a stay was warranted because defendant had achieved only a “procedural victory” on appeal. Id. at *15. The district court explained that the Seventh Circuit had made a “significant merits determination” that would “greatly affect plaintiffs’ provable damages at trial.” Id. at *16. Consequently, the court saw no reason to stay an award of costs because even if plaintiffs prevailed on retrial, plaintiffs’ damages could not match those of the first trial. Id. Finally, the court rejected the plaintiffs’ “distraction” argument that was not faced with a million-dollar costs judgment likely to spawn collateral litigation. Id. at *17.

Apart from issues concerning the amount of the appellate cost award, the Northern District of Illinois has also declined to stay an award where the party seeking the stay engaged in misconduct. See Tribble v. Evangelides, No. 08-CV-02533, 2012 U.S. Dist. LEXIS 98569 (N.D. Ill. July 16, 2012) (Available on Westlaw at 2012 WL 2905614). In that case, the Seventh Circuit reversed a jury verdict in favor of defendants and ordered a new trial due to the undisclosed and prejudicial testimony of a key witness for the defense. Id. at *1. Plaintiffs sought taxable appeal costs from the district court of approximately $3,300 and defendants requested a stay pending final adjudication on grounds of equity. Id. at *2, 5. The court noted its broad discretion to allocate costs and that some courts had chosen to wait until final adjudication before imposing costs. Id. at *6. But the court also noted that “final adjudication is not a prerequisite to a party obtaining taxable costs pursuant to Rule 39” and
concluded that “[a]bsent a compelling reason” it was not inclined to stay the award of costs. *Id.* at *6-7* (quotation omitted). Moreover, the court found little reason to stay the award given that defendants were asking the court to potentially shift costs to plaintiff for a retrial that would not have occurred but for the defendants’ undisclosed expert testimony and therefore denied the motion to stay. *Id.* at *7-8*. This decision suggests that courts may be less likely to stay a *Rule 39(e)* award where the appellate costs resulted from the inequitable conduct of a litigant or that a court may require a “compelling” reason (*Tribble* offered no examples of what might constitute such a reason).

This line of cases gives practitioners grist for motions, but little predictability. Staying an award of appellate costs until final adjudication to prevent collateral litigation has practical merit when it is likely that a party will immediately appeal the cost award. Yet several cases establish that a cost award is not dependent on a party prevailing in a final adjudication. What is an effective argument in one court may go nowhere in another. Still, these cases provide practitioners with a variety of arguments that may apply in arguing for or against a stay. But practitioners arguing this issue should recognize that the abuse of discretion standard applicable to a district court’s award of appellate costs means there is little likelihood of overturning a decision on a request to stay.

**Suggestions for Practitioners**


2. On appeal, when the district court judgment is affirmed in part, reversed in part, modified or vacated, make sure the bill of costs you file in the circuit court includes a request for appellate costs taxable in the district court under *Rule 39(e)*.

3. No matter the result on appeal, consult local rules and precedent for any requirements on when you should file a bill of appellate costs in the district court. When in doubt, file shortly after the circuit court issues its mandate.

4. If you are the party against whom appellate costs have been taxed in the district court, consider asking the district court to exercise its discretion to stay the imposition of those costs until final adjudication.

On one hand, it is questionable whether the “offer” of a new trial is even an issue for the defendant. When determining the amount of the remittitur, courts generally follow the “‘maximum recovery rule,’ which directs that the court set an amount based on the ‘highest amount of damages that the jury could properly have awarded based on the relevant evidence.’” *Jabat, Inc. v. Smith*, 201 F.3d 852, 858 (7th Cir. 2000) (quoting *Unisplay v. Am. Elec. Sign Co., Inc.*, 69 F.3d 512, 519 (Fed. Cir. 1995)). This is because “[o]nly a reduction to the maximum amount ‘which the jury could reasonably find’ has any reasonable claim of being consistent with the Seventh Amendment.” *Gumbs v. Pueblo Int’l, Inc.*, 823 F.2d 768, 772 (3d Cir. 1987) (original emphasis) (quoting *Gorsalitz v. Olin Mathieson Chem. Corp.*, 429 F.2d 1046, 1046 (5th Cir. 1970); but see *K-B Trucking Co. v. Riss Int’l Corp.*, 763 F.2d 1148, 1162 n.21, 1163 (10th Cir. 1985) (applying the maximum recovery rule, but discussing alternative approaches for determining the proper amount of a remittitur).

Thus, when a plaintiff is given the option of a new trial or remittitur, the court has already “determine[d] the maximum amount the jury could reasonably have awarded” based on the evidence presented. *Skalka v. Fernald Envtl. Restoration Mgmt. Corp.*, 178 F.3d 414, 427 (6th Cir. 1999). Under such circumstances, electing a new trial will usually be a waste of time and resources. As one commentator reasoned,

> If the jury finds for the plaintiff and awards more damages than the remitted amount, there is every reason for the plaintiff to believe that the judge will reduce the damages again, because she is the same judge who previously determined the remitted amount was the maximum award under the facts.

Suja A. Thomas, *Re-Examining the Constitutionality of Remittitur Under the Seventh Amendment*, 64 Ohio St. L.J. 731, 740 (2003); see also *Donovan v. Penn Shipping Co., Inc.*, 536 F.2d 536, 539 n.4 (2d Cir. 1976) (Feinberg, J., dissenting) (“Logically, if plaintiff secured any verdict higher than that deemed proper by the trial judge in his original order of remittitur, the trial judge would again set it aside, thus putting plaintiff on a treadmill until he obtained a lower verdict, accepted the remittitur or settled the case.”).

Nor will a plaintiff generally be permitted to use the new trial as an opportunity to present new evidence of
damages and obtain a higher verdict, since only where a party demonstrates “manifest injustice” can it present witnesses or proof on retrial that it failed to present at the original trial. See Whitehead ex rel. Whitehead v. K Mart Corp., 173 F. Supp. 2d 553, 565 (S.D. Miss. 2000) (citing Cleveland v. Piper Aircraft Corp., 985 F.2d 1438, 1449 (10th Cir. 1993)). Indeed, in Total Containment, Inc. v. Davco Products, Inc., 177 F. Supp. 2d 332, 338-39 (E.D. Pa. 2001), the court refused to allow the plaintiff to present a new theory of damages at a second trial following the plaintiff’s rejection of a remittitur, stating, “a plaintiff omits evidence necessary to sustain its damage award at its peril.” See also Martin’s Herend Imports, Inc. v. Diamond & Gem Trading U.S. of Am. Co., 195 F.3d 765, 776 (5th Cir. 1999) (affirming trial court’s decision limiting the plaintiff, on retrial, to the same witnesses and evidence offered at the first trial); Oriental Fin. Grp., Inc. v. Fed. Ins. Co., Inc., 483 F. Supp. 2d 161, 167 (D.P.R. 2007) (prohibiting both parties from presenting new evidence or witnesses at a partial retrial).

In the majority of cases, then, the plaintiff will likely have little incentive to seek a new trial and instead will either accept the remittitur or settle the case. See Thomas, 64 Ohio St. L.J. at 744 (finding, based on a study of remittitur cases over a ten-year period, that plaintiffs agreed to the remittitur or settled in 98% of the cases surveyed).

An alternative view, however, is that even if the court has determined the verdict was excessive at the first trial, it may nonetheless refuse to overturn a verdict as excessive more than once. As one leading treatise has argued, “Just as courts are very reluctant to set aside two successive verdicts as against the weight of the evidence . . . it seems that they would be reluctant to pronounce excessive a verdict that two different juries have thought proper from the evidence.” Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, 11 Fed. Prac. & Proc. Civ. § 2815 n.20 (3d ed. 2013). Under this reasoning, a plaintiff could choose to reject the remittitur, calculating that (1) the same issues which led the jury to issue an excessive verdict at the first trial will result in an equally large or even higher verdict at the second trial, and (2) the court will refuse to overturn the second verdict.

That is exactly what occurred in Frank v. Atlantic Greyhound Corp., 177 F. Supp. 922 (D.D.C. 1959), aff’d, 280 F.2d 628 (D.C. Cir. 1960). There, after the first trial resulted in an award of $30,000 to the plaintiff, the trial court reviewed the evidence, determined that $15,000 was the maximum reasonable verdict, and ordered a new trial to be held unless the plaintiff accepted a remittitur. See Frank v. Atl. Greyhound Corp., 172 F. Supp. 190, 193 (D.D.C. 1959). The plaintiff rejected the remittitur and opted for a new trial. Subsequently, the case was retried before the same judge, on substantially the same evidence, but before a new jury. At the end of the trial, the second jury returned an even higher award of $35,000. See Frank, 177 F. Supp. at 923. This time, the court refused to overturn the verdict, stating:

[T]he fact that two juries made substantially the same award on practically the same evidence leads the Court in the exercise of its discretion not to disturb the second verdict. The defendant had an opportunity to present the matter to two juries. Both juries agreed. Substantial justice has been done.

Id. at 924.

Thus, while a motion for remittitur will generally be to the defendant’s advantage in most cases, the motion can carry potential drawbacks. Even if the potential for another excess verdict is small, the plaintiff may still elect to “roll the dice” and use its option of a new trial to attempt to obtain another excessive damages award. If such an election is made, the defendant will be required to try the case for a second time, with no guarantee that the trial or appellate court will require remittitur of a second excessive verdict.

Conclusion

A motion for remittitur is an effective and well-established tool for challenging an excessive jury verdict. However, when deciding whether to seek remittitur, a defendant must be aware of the impact of the Reexamination Clause of the Seventh Amendment. If the award is excessive as a matter of fact, the Reexamination Clause applies and the court cannot reduce the jury’s verdict to conform to the evidence without first giving the plaintiff the option of a new trial.

In the large majority of cases, a plaintiff will likely accept the reduction to the amount the court has determined is the maximum reasonable award, “avoid[ing] the delay and expense of a new trial when [the] jury’s verdict is excessive in relation to the evidence of record.” Unisplay, 69 F.3d at 519. In certain circumstances, however, remittitur simply may not be the best option for the defendant. Whether the possibility of a new trial poses any risk to the defendant is, necessarily, a question that must be evaluated based on the facts and circumstances of the particular case.
# 2014 TIPS CALENDAR

## January 2014

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