Class Action Appellate Digest

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Summary

In August, the federal circuit courts showed little sign of taking a summer break. Courts across the country issued important decisions for the plaintiffs' bar, including laws interpreting Title VII, the TCPA, and 42 U.S.C. § 1988(b)'s provision for attorneys' fees in civil rights actions. The Third Circuit issued crucial guidance on interpretation of the False Claims Act's materiality element. The Second Circuit clarified what qualifies as damages under RICO and what facts may entitle a plaintiff to equitable tolling of statutes of limitation. And the circuits issued notable class action rulings, resolving questions as to if and when the clock to file a Rule 23(f) petition begins to run, the timing of rulings on contractual class waivers, the standard for assessing class settlements, and the propriety of incentive awards.

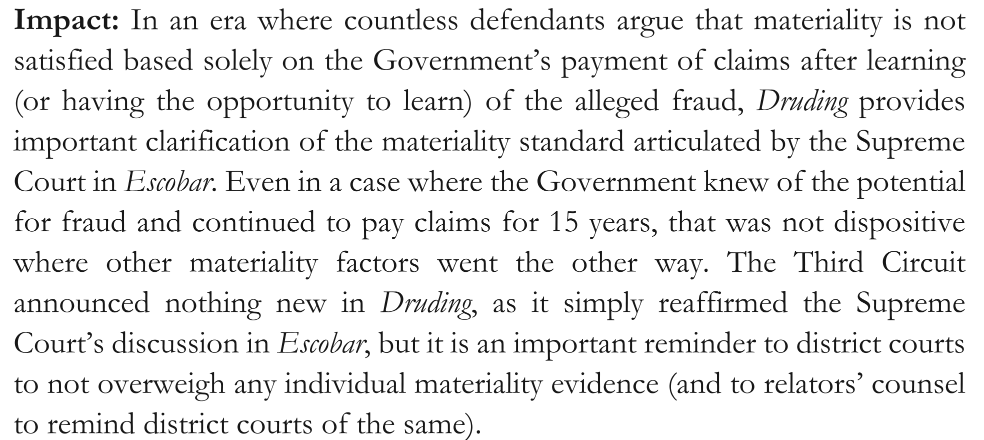
Federal Opinions

United States ex rel Druding v. Care Alternatives, -- F.4th --, No. 22-1035, 2023 WL 5494333 (3d Cir. Aug. 25, 2023)

Background: A group of relators sued their former employer, a hospice care company, under the False Claims Act, alleging that the defendant (among other things) fraudulently certified patients for hospice care by failing to provide the documentation needed to establish their eligibility for hospice, and then sought reimbursement from Medicare. The district court granted summary judgment in favor of the defendant because it found that the relator failed to prove that the alleged fraud was material to the Government's payment decision. The district court rested its decision primarily on the fact that the Government could see that the defendant submitted inadequate documentation to prove that the patients qualified for hospice care at the time it submitted its requests for reimbursement, yet for 15 years the Government never refused any claims or raised the issue of inadequate documentation.

The district court relied primarily on the Supreme Court's discussion in *Universal Health Servs., Inc. v. United States ex rel. Escobar*, which explained that a finding that the Government made continued payments despite actual knowledge of the defendant's violation may counsel against a finding of materiality, 579 U.S. 176, 194 (2016).

Holding: The Third Circuit reversed, holding that a genuine dispute of fact existed as to the FCA's materiality element. The appeals court reiterated that materiality is a holistic, totality-of-the-circumstances inquiry in which no single factor is dispositive. Thus, the district court's almost total reliance on the Government's continued payment of the defendant's claims was erroneous. While that fact was evidence against a finding of materiality, other evidence pointed in the opposite direction. Specifically, (1) federal regulations make the documentation requirement an express condition of payment, (2) the documentation requirement "addresses a foundational part of the Government's Medicare hospice program," and (3) the defendant's violations were pervasive and knowing, and thus were not "minor or insubstantial." The Third Circuit also pointed out that, when construing the evidence in the light most favorable to the relators, it showed that the Government had knowledge of *allegations* of wrongdoing, not *actual* knowledge of wrongdoing—and even if it had actual knowledge and continued to pay claims, that was "very strong" evidence against materiality but still not dispositive. Thus, a reasonable jury could find either way on materiality.



Impact: In an era where countless defendants argue that materiality is not satisfied based solely on the Government's payment of claims after learning (or having the opportunity to learn) of the alleged fraud, *Druding* provides important clarification of the materiality standard articulated by the Supreme Court in *Escobar*. Even in a case where the Government knew of the potential for fraud and continued to pay claims for 15 years, that was not dispositive where other materiality factors went the other way. The Third Circuit announced nothing new in *Druding*, as it simply reaffirmed the Supreme Court's discussion in *Escobar*, but it is an important reminder to district courts to not overweigh any individual materiality evidence (and to relators' counsel to remind district courts of the same).

Horn v. Medical Marijuana, Inc., -- F.4th ---, No. 22-349-CV, 2023 WL 5418081 (2d Cir. Aug. 22, 2023)

Background: The plaintiff was fired from his truck driving job after testing positive for THC. He alleged that he unknowingly ingested THC from a cannabis-derived product sold to him by the defendant, even though it was marketed as THC-free. He brought suit under RICO. The district court ruled in favor of the defendant, finding the plaintiff lacked standing to bring a RICO cause of action because his loss of earnings were derivative of an antecedent personal injury, applying the judge-made "antecedent-personal-injury bar" to defeat the claim.

Holding: The Second Circuit reversed and held that RICO authorizes a plaintiff to sue for loss of earnings that are proximately caused by a violation of a substantive RICO provision. It rejected the core district court holding, concluding instead that RICO's language permitting suit for "any person injured in his business or property" allows claims for lost wages even if they flow from antecedent personal injuries. In so doing, the Second Circuit explicitly rejected the idea that RICO contains an antecedent-personal-injury bar.

Impact: Whether RICO bars claims that flow from antecedent personal injuries is the subject of a deepening circuit split, and the Second Circuit's decision in *Horn* takes the side of plaintiffs. The Ninth Circuit is in accord, while the Sixth Circuit has instead held *en banc* that antecedent personal injuries cannot form the basis of a RICO claim.

Horn is a forceful rejoinder to the Sixth Circuit and other courts that have suggested RICO claims are limited in this context. The *Horn* Court explained that RICO's explicit permission for claims based on injuries to "business or property" is not an implicit bar to claims based on personal injuries. It described instead the limitation on RICO actually imposed by Congress, proximate cause, as one that includes foreseeable consequences of RICO predicate acts, even if they are unintended.

Plaintiffs in the Second Circuit will now enjoy greater access to justice when bringing claims under the civil RICO statute. Practitioners should consider whether a plaintiffs' injuries may fit within RICO's predicate acts and form the basis of a RICO claim, even if those injuries flow from personal injuries. And advocates in other circuits should be aware of the burgeoning split in the courts' interpretation of RICO when deciding where to bring suit.

Hamilton v. Dallas County, --F.4th--, No. 21-10133, 2023 WL 5316716 (5th Cir. Aug. 18, 2023)

Background: Female detention service officers sued a municipality, alleging that the sheriff's department had a policy prohibiting female officers from taking a full weekend off but not prohibiting male officers from doing the same. They asserted this was disparate treatment that violated Title VII. The district court dismissed the complaint under Fifth Circuit precedent, which held only "ultimate employment decisions" such as "hiring, granting leave, discharging, promoting, and compensating" are actionable "adverse employment actions" for the purposes of Title VII. A Fifth Circuit panel affirmed, and the full court granted rehearing *en banc* to reexamine this construction of Title VII.

Holding: The full Fifth Circuit reversed, overruling its prior precedent and holding that employment actions that are not "ultimate employment decisions" may be "adverse employment actions" for Title VII disparate treatment cases. The Court found that the requirement for "ultimate employment decisions" had no basis in the statutory text; in fact, it was based on a misinterpretation of a Fourth Circuit decision describing trends in Title VII cases. The court determined that its precedent was also contrary to Supreme Court rulings, which held that an adverse employment action "need only be a term, condition, or privilege of employment." *Hishon v. King & Spalding*, 467 U.S. 69, 77 (1984). Applying the new standard, the court held that the policy restricting only female officers' ability to take full weekends off was a "term, condition, or privilege of employment" because the days and hours that an individual works is a foundational aspect of their employment.

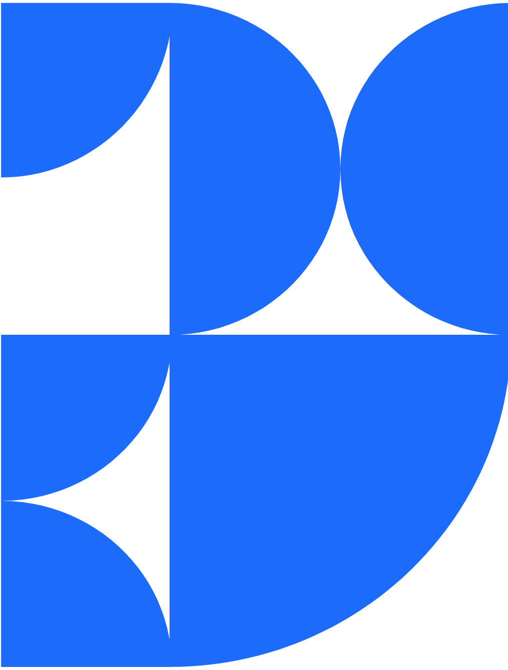
Impact: This landmark holding opens the door for plaintiffs in the Fifth Circuit to seek redress for discriminatory policies that are not just "hiring, granting leave, discharging, promoting, and compensating." The ruling extends Title VII's protections to discrimination ingrained in policies governing day-to-day work activities and brings the Fifth Circuit's interpretation in line with Title VII's text.

In re Marriott International, Inc., 78 F.4th 677 (4th Cir. August 18, 2023)

Background: In separate actions, plaintiffs from across the country sued Marriott and its IT contractor after hackers broke into one of its guest reservation databases and gained data from millions of reservations. After the cases were consolidated into an MDL, the district court certified several classes, including classes for monetary damages and "issue" classes for the purpose of addressing certain elements of plaintiffs' claims for negligence. At class certification, Marriott argued that the court should refuse to certify the damages classes because all class members were bound by a class-action waiver in the terms and conditions governing the relationship between Marriott and its customers, and that an issue class may be certified to address only full causes of action, not certain elements of a cause of action. The plaintiffs argued that waiver was a common question of contract interpretation, and it thus was a merits issue that was inappropriate for resolution at the class certification stage, and that district courts have broad discretion to certify issue classes addressing numerous questions, not just full causes of action. The district court agreed with the plaintiffs.

Holding: The Fourth Circuit allowed an interlocutory appeal of the class certification ruling and reversed and remanded. As to the monetary damages classes, the court held that the time to address a contractual class waiver is before, not after, a class is certified.

As to the issue classes, the court declined to decide whether a court may certify an issue class to address some but not all elements of a cause of action. The panel observed that federal courts may be "coalescing" around a broad view of Rule 23(c)(4) that allows for certification of classes to address discrete issues as long as common questions predominate over individualized ones as to that issue (not as to the whole litigation), but it opined that the question is "not entirely free from doubt." However, it stated that in such cases, Rule 23(b)(3)'s superiority requirement "takes on special importance." And in that regard, the panel instructed the district court to perform a new superiority assessment with respect to the issue classes in light of its vacatur of the damages classes.



Impact: *Marriott* touches on a subject of disagreement among the federal courts regarding the timing of assessing a contractual class waiver, and it appears to be the first circuit to weigh in on the issue. At least one federal district court ruled that when interpretation of a class waiver is common to the whole class, it is a merits issue to be resolved in a single stroke. *See Earl v. Boeing Co.*, 339 F.R.D. 391, 421 n.16 (E.D. Tex. 2021). At least one other district court ruled that in such circumstances, the applicability of a class waiver to the named plaintiffs goes to Rule 23(a)(3)'s adequacy requirement because a representative plaintiff bound by a class waiver is inadequate to represent the class. *See Bombin v. Southwest Airlines Co.*, No. 5:20-CV-01883-JMG, 2023 WL 5832166 (E.D. Pa. Sept. 7, 2023). *Marriott* takes a third approach, holding that the applicability of a class waiver must be decide at the certification stage because it is not a "merits" question in the traditional sense and addressing it at that stage is "the only approach consistent with the nature of class actions and the logic of class waivers." Still further, the Fourth Circuit held that even if the issue is a merits question, it should *still* be addressed at class certification because it's acceptable for district courts to consider "aspects of the merits" at that stage.

The Fourth Circuit's analysis is paradoxical in some respects. If the same class waiver arguably applies to all members of a proposed class, it would, on balance, be beneficial for all parties to have the issue resolved consistently as to all class members in a single stroke. Moreover, such proceedings would not necessarily undermine the interests behind contractual class waivers. Courts could still use their discretion to resolve the issue in early summary judgment proceedings or in a special proceeding before a trial on the merits, thus preserving the defendant's contractual right to not be forced to defend a class action at trial. On the other side of the ledger, requiring the court to resolve such an issue—particularly if there is a genuine *factual* dispute bearing on the waiver's interpretation or enforceability, it may be premature to make a binding determination at class certification when the parties are still in the middle of discovery. It will be curious to see how this new rule plays out in the Fourth Circuit, and there is little doubt that another circuit court or courts will be faced with the same issue in the near future.

In the meantime, class action practitioners should take precautionary steps in cases involving a contractual class waiver. Specifically, if factual issues will bear on applicability, interpretation, or enforcement of a class waiver, make sure to push for case sequencing and scheduling that will allow for complete factual discovery on those issues before the deadline to seek class certification. Otherwise, the court may decide the issue without a complete record.

Moses v. New York Times Co., 79 F.4th 235 (2d Cir. Aug. 17, 2023)

Background: Plaintiffs sued the New York Times for violating California's Automatic Renewal Law applicable to NYT subscriptions. The parties settled their dispute and agreed for NYT to provide one-month NYT access codes (as the default) or *pro rata* cash refunds (if affirmatively chosen by a class member) to 876,000 subscribers. The settlement agreement, approved by the district court over objection, also awarded $1.25 million in fees to plaintiffs' counsel—76% of the settlement cash fund—and a $5,000 incentive award to the named plaintiff. The objector appealed the settlement approval.

Holding: The Second Circuit reversed. It first held that a district court may no longer apply a "presumption of fairness, adequacy, and reasonableness" to a settlement agreement negotiated at arms' length. Instead, courts must analyze the Rule 23(e)(2) factors, which include arms-length negotiation but do not apply any presumption to the agreement as a whole if that factor is satisfied.

It also held that the attorneys' fees were substantively unfair, because the district court misapplied the Rule 23 standard and because of the inverse relationship between the amount of fees and the cash available for *pro rata* distribution. Because class counsel received more fees when class members stuck with the Access Code default option rather than affirmatively chose a cash refund, the district court erred when it did not consider the intertwined nature of the fees and classwide relief.

The *Moses* Court also interpreted the Class Action Fairness Act ("CAFA")'s language regarding coupon settlements. Under CAFA, courts must calculate attorneys' fees based on their redemption value, not their face value. The Court concluded that the Access Codes were coupons within the meaning of CAFA, and that the district court erred by not analyzing them as such when evaluating the attorney fee award.

Finally, the Court held that incentive awards are proper and are not foreclosed by 19th-century Supreme Court precedent.

Impact: *Moses* is an important reminder to class action lawyers to carefully negotiate, develop, and present settlement agreements in a manner consistent with the latest developments in the law. The Second Circuit recognized that the "presumption" applied by the district court was in use as recently as 2018, but Rule 23(e)(2)'s amendment supplanted that presumption and thus courts are now barred from used it. Practitioners should explain these developments in their briefing for settlement approval.

Class counsel must also take care when negotiating attorney fee provisions or when relief in a settlement could be considered a "coupon" under CAFA. Here, the *Moses* Court found the attorney fee provision incentivized class counsel to push the class toward Access Codes and away from the *pro rata* cash refund option. Plaintiffs' counsel should be extremely careful when negotiating fees that could rise based on class members' subsequent decisions.

And the Court held that the Access Codes were "coupon" relief partly because they could not be used to extend existing subscriptions but only to initiate new ones. It also analyzed existing law describing that coupon-default and cash-optional settlements, like this one, should be analyzed under CAFA's coupon standards. *Moses* should remind class counsel that non-cash settlements should be carefully negotiated with CAFA's coupon provision in mind.

The *Moses* Court also offered some good news to plaintiffs' class action attorneys in rejecting an invitation to bar incentive awards. So far, only the Eleventh Circuit has done so, but objectors will continue to make the argument so long as the Eleventh Circuit's outlier rule remains in place. For now, named plaintiffs in all other circuits may still receive incentive awards for their roles in class actions.

Smith v. First Hospital Laboratories, Inc., 77 F.4th 603 (7th Cir. August 9, 2023)

Background: The defendant sent several faxes to a physician offering to pay him for joining its network of preferred medical providers (and thereby earn new clients and administer additional medical services). The physician, who did not consent to such faxes, sued the defendant under the TCPA's provision prohibiting unsolicited advertisements by fax. The district court dismissed the case because it ruled that the faxes were not "unsolicited advertisements" since they merely asked the physician to join the defendant's network and did not invite him to buy anything.

Holding: The Seventh Circuit reversed. While it agreed that a fax must directly or indirectly encourage recipients to buy goods, services, or property to qualify as an unsolicited advertisement, the court held that, as alleged, the faxes qualified because they promoted the defendant's network, which would bring the physician new business in exchange for giving the defendant a portion of the client fees the physician would earn from providing the advertised services. That ultimate goal of advertising the defendant's service in exchange for compensation was enough to qualify it as an advertisement.

The court further noted that even if a fax states it is not an advertisement or other solicitation, that is not enough, standing alone, to remove it from the TCPA's reach. The panel observed that the most effective advertisements sometimes fall short of an express solicitation, and what ultimately matters for purposes of the TCPA is whether the sender declared the availability of its services in a "promotional" way.

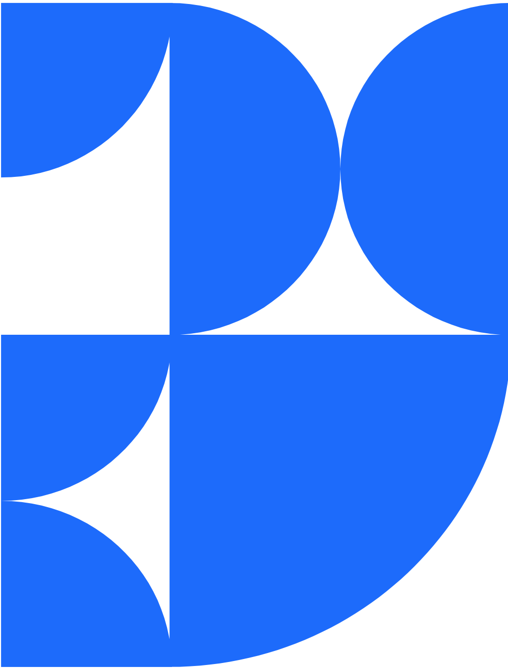
Impact: In terms of directly controlling precedent, *Smith* is unlikely to have widespread impact. After all, how many people use fax machines these days? But *Smith*'s rationale potentially has broader application. Numerous provisions of the TCPA govern "telemarketing" calls or telephone "solicitations." The Seventh Circuit's rationale applies with equal force to such terms. Thus, *Smith* is an important reminder that just because a defendant characterizes a call as "informational" or otherwise, the TCPA cares about function over form.

Wolff v. Aetna Life Insurance Co., 77 F.4th 164 (3d Cir. Aug. 9, 2023)

Background: To seek an interlocutory appeal of a district court's class certification order under Federal Rule of Civil Procedure 23(f), a party must file a petition for review within 14 days of such an order. In *Wolff*, the district court certified a class, and the defendant did not seek review within the prescribed time. Months later, the district court revised its class certification order by rewording the class definition. The defendant then filed a Rule 23(f) petition. The issue presented was whether and when modifications to a prior class certification order entitle litigants to a new 14-day period to file such a petition.

Holding: The Third Circuit denied the defendant's petition as untimely. The court adopted a new standard to answer the question, stating that a modified class certification order triggers a new Rule 23(f) petition period only when the modified order materially alters the original order on class certification. Applying that standard to the case before it, the panel held that the changes the district court made to its prior order were "more akin to minor clarifications," not "material alterations." In response to a motion for reconsideration, the district court amended the class definition to address potential fail-safe issues by (1) expressly including the length of the class period, (2) cleaning up language in the class definition to clarify who was in the class, and (3) modifying certain language to clarify the theory of why certain class members had been harmed. The Third Circuit viewed the practical impacts on the size of the class as minimal, and thus held that they did not constitute a material change to the class definition.

Impact: *Wolff* affirms that the clock for filing a Rule 23(f) petition does not restart every time a district court amends a class certification order. In practice, this rule will only come into play when a class is certified, because it is difficult to conceive how a district court could materially modify an order *denying* class certification.



Wolff also establishes that even modifications to a class definition which expand or narrow classes are not necessarily "material" enough to trigger a new Rule 23(f) window. The district court's amendment to the class definition in the case did narrow the class, but only marginally (the appeals court did not specify how many class members might be affected, but it is clear that number was small), and the Third Circuit contrasted this with a prior case in which an amended definition excluded 3,000-3,500 class members (more than half the class). Thus, whether some class members will be left out or swept in under an amended definition may not be dispositive if the number of affected persons is small.

Trim v. Reward Zone USA LLC, 76 F.4th 1157 (9th Cir. Aug. 8, 2023)

Background: The plaintiff sued under the TCPA's prerecorded-voice provision, 47 U.S.C. § 227, alleging that the defendant sent unwanted mass-marketing texts to her phone without her consent. Based on legislative history and dictionary definitions that define "voice" broadly as a medium of expression, the plaintiff argued the texts contained "prerecorded voice[s]." The defendant moved to dismiss, and the district granted the motion, ruling that a text message that does not have an audible component cannot constitute a "voice" for purposes of the TCPA.

Holding: The Ninth Circuit affirmed the dismissal, holding that the text messages did not use prerecorded voices because they did not include audible components. The panel based its decision on the statutory text, context, and legislative history.

Impact: *Trim* appears to be the first circuit court decision holding that the TCPA's prerecorded-voice provisions (47 U.S.C. § 227) cannot be read to apply to text. In practice, this means that TCPA claims will almost always be limited to phone calls or voicemails involving prerecorded messages. Nevertheless, the provision might still apply to text messages having an audible component of some sort (such as a voice note or similar audio recording).

Stinnie v. Holcomb, 77 F.4th 200 (4th Cir. Aug. 7, 2023)

Background: The plaintiffs brought a challenge under the Fourteenth Amendment to a Virginia law requiring automatic suspension of drivers' licenses after failure to pay certain court fines and fees. They sought preliminary and permanent injunctions to prevent the enforcement of the law and reinstate the suspended licenses. The district court granted the preliminary injunction, but before trial, the Virginia General Assembly repealed the law, mooting the case. Plaintiffs then petitioned for attorneys' fees under 42 U.S.C. § 1988(b). The district court found that under Fourth

Circuit precedent, it could not award fees because winning a preliminary injunction does not qualify a litigant as a "prevailing party." For the purpose of Section 1988(b). A Fourth Circuit panel affirmed, but the court granted rehearing *en banc* to reconsider its prior precedent on the issue.

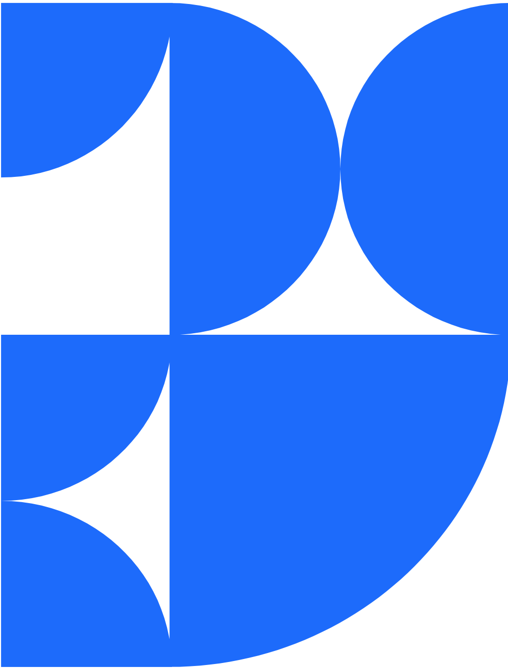
Holding: The full Fourth Circuit overruled its prior precedent and held that a plaintiff whose case is rendered moot after she wins a preliminary injunction may qualify as a prevailing party in appropriate circumstances. The Court articulated a new test: "[w]hen a preliminary injunction provides the plaintiff concrete, irreversible relief on the merits of her claim and becomes moot before final judgment because no further court-ordered assistance proves necessary, the subsequent mootness of the case does not preclude an award of attorney's fees." Here, the preliminary injunction granted "actual relief" to the plaintiffs because it ordered precisely what they sought: reinstatement of the plaintiffs' suspended licenses. Further, the injunction provided enduring relief because the case was mooted before final judgment, precluding any further judgment that would supersede the preliminary ruling.

Impact: *Stinnie* brings the Fourth Circuit in line with every circuit that has reached the issue in permitting fees when a preliminary injunction awards all the relief sought and when the passage of time or legislative developments moots the case. This decision, which focuses on the practical effect of a suit, reduces financial risk when representing civil rights plaintiffs for time-sensitive matters that would be resolved through the grant of a preliminary injunction, such as cases regarding protests for a specific event or the receipt of medical care. It also could increase the pressure on defendants to resolve the issue or end an unlawful practice before the preliminary injunction stage.

Doe v. United States, 76 F.4th 64 (2d Cir. Aug. 4, 2023)

Background: The plaintiff, a native of Honduras, alleged that for seven years (during which time she lived in the United States), an ICE officer violently raped her, engaged in physical abuse that left visible scars on her body, and psychologically abused her, demanding that she become an ICE informant—all under threat of arranging her deportation if she refused to comply with his demands. Four years after the alleged abuse ended, she sued the agent, the United States, the Department of Homeland Security, and two senior DHS officials, asserting various federal and state claims. The applicable limitations periods were either two or three years. The defendants moved for summary judgment on the claims, asserting they were time-barred. The district court granted the motions for summary judgment based on the applicable statutes of limitations and denied the plaintiff's request for equitable tolling.

Holding: The Second Circuit vacated and remanded the decision, holding that a reasonable factfinder could find that years of sexual abuse and threats to the plaintiff's life constituted extraordinary circumstances preventing her



from filing her suit sooner, and that she acted with reasonable diligence. Thus, she created a material dispute of fact concerning application of equitable tolling, and finding as a matter of law that equitable tolling did not apply was therefore erroneous. The district court instead should have acted as a factfinder to determine whether equitable tolling applied, rather than apply the summary judgment standard.

The appeals court held that, when acting as a factfinder (as the district court was required to do for the purpose of equitable tolling), the district court could reasonably conclude that an extraordinary circumstance stood in the plaintiff's way of filing her lawsuit sooner. Importantly, the Second Circuit noted that several courts recognize that the psychological trauma of long-term or extreme sexual abuse can constitute an extraordinary circumstance that prevents a victim from coming forward even for some time after the abuse has ended. Additionally, the appeals court held that a reasonable factfinder could conclude that the plaintiff exercised reasonable diligence in bringing her claim. The court noted that the district court could reasonably find that the fear and psychological impact caused by the alleged assaults and threats prevented the plaintiff from filing her claim earlier.

Impact: In *Doe*, the Second Circuit expressly recognized that the psychological impact of sexual abuse can constitute an extraordinary circumstance that prevents a victim from coming forward sooner, and thus may be a basis for equitable tolling. *Doe* is not the first court to do so, but it recognizes this important reality in a published opinion serving as precedent in one of the country's largest circuits by population. Expect *Doe* to be cited a lot on this point in cases across the country, as courts have opportunity to consider claims involving sexual assault that would otherwise be time-barred. This is a victory for sexual abuse victims courageously seeking justice for their traumas under the public eye.

Another interesting point is that the Second Circuit adopted the two-step test for equitable tolling (extraordinary circumstances preventing a plaintiff from filing sooner, coupled with a showing that the plaintiff acted with reasonable diligence once they were able to file) in an ordinary civil case. The Supreme Court adopted this test in *habeas corpus* cases, *see Holland v. Florida*, 560 U.S. 631, 649 (2010), and it has openly mused over whether the test applies in other civil contexts, *see Menominee Indian Tribe of Wisconsin v. United States*, 577 U.S. 250, 257 n.2 (2016). *Doe*'s application of this test to equitable tolling claims involving a reasonable fear of retaliation may reduce the burden that plaintiffs in such circumstances must meet to invoke equitable tolling, and it provides persuasive authority for applying the standard to other civil contexts as well.