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As a litigator, I find there is nothing better than appearing before an unbiased judge who will listen to both sides of an argument, ask intelligent questions, and then rule in my favor. The flip side, of course, is finding that the judge doesn't like my case, my client, or my arguments, not because of some inherent flaw in the case but because the judge has a blind spot about the issue involved or just doesn't want to have to deal with the legal question.

Sometimes judges who don't want to deal with a case will lean on the parties to settle it. (Our best-known "settling judge" in the federal court in the Eastern District of Pennsylvania once locked me, my adversary, and our clients in a jury room for three hours to soften us up for a settlement of a case he considered unworthy of federal resources.) Other judges come up with rationales that explain why your case or your defense simply shouldn't be in their court. Sometimes the rationales are couched as legal precedents, other times the judges don't bother with such niceties.

When I was a novice lawyer, I tried a case before one of the latter in a local municipal court. I represented the son of an executive at a large corporate client of the firm for which I worked. The son lived in an apartment in a Philadelphia suburb. The landlord, a politically connected entrepreneur who owned many properties in that suburb, had neglected the apartment building so completely that it had leaks in the ceiling and no heat or hot water. The son, at his father's urging, withheld his rent. Emboldened by a recent Pennsylvania Supreme Court decision, *Pugh v. Holmes*, 486 Pa. 272, 405 A. 2d 897 (1979), holding that every renter has an implied warranty of habitability in an abode, I advised my client that his chosen remedy was the very one the supreme court had just approved. On his behalf, I sent a lawyer's letter demanding that the landlord fix the apartment, at which point the rent would be paid. The landlord responded by suing the son for eviction in the local municipal court. We entered a counterclaim under *Pugh v. Holmes* for breach of the warranty of habitability.

A few moments before the hearing, I noticed the judge chatting at the bench with two older men. "That guy on the right's my landlord," my client whispered to me. At that point I didn't have a good feeling about this case. My visceral reaction turned out to be right. I learned, much to my surprise as someone who believes in the rule of law, that even a supreme court decision directly on point won't always protect you from a biased judge.

When the court called my case, I walked to the bench with my adversary. "Your Honor," he said, "my client's tenant has not paid his rent for four months. We seek to evict him today."

"Ms. Kole," said the judge, "is your client prepared to pay his rent tonight?"

"Your Honor," I began, but he cut me off.

"Yes or no, Ms. Kole?"

"Your Honor, under the supreme court's decision in *Pugh v. Holmes*, where an apartment is in disrepair—as this one is—a tenant may withhold rent until the apartment is fixed. We have evidence—"

The judge banged his gavel. "That's enough," he said. "You Philadelphia lawyers are always coming here trying to argue law to me. But this isn't Philadelphia. Your client pays his rent tonight or he's evicted."

Not since that long-ago time in Ardmore, Pennsylvania, has a judge told me that if I want to argue the law I should be in a different court. The rationales judges now use for why a case or argument does not belong in their court have become much more sophisticated. Now the rubric for not having to deal with difficult legal issues or unpleasant fact situations or cases that are just plain boring or time consuming is often "lack of jurisdiction."

Lack of jurisdiction covers a multitude of situations. It can be statutory—for example, there is no private right of action under the statute. There can be a lack of personal jurisdiction if it strikes the judge as unfair to "hale into court" a particular

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defendant. There can be a lack of subject matter jurisdiction if a judge thinks you've been inartful in stating a claim. All of these can act as bars to being heard in a particular court.

It's no secret that after an explosion of litigation in the eighties, both state and federal court judges found themselves with overwhelming dockets and no easy way out of the morass. Although certain administrative measures were put in place to alleviate the backlog of cases—fast-track discovery, separation of motion and discovery practice from trial practice, and emphasis on mediation and arbitration—legislatures and judges also had a try at paring down the number of cases being heard. One of the more harrowing results for practitioners is that jurisdiction, and whether the court has it, have become increasingly important in managing court calendars.

The requirements for passing jurisdictional muster are expanding, particularly in federal courts. Both lawmakers and the courts are placing additional hurdles in the way of the hapless litigant intent on obtaining relief, like pre-suit notice (for example, under the Resource Conservation and Recovery Act) or minimum damages (as in the ever-increasing threshold jurisdictional amount in federal court). And as the number of hurdles expands, there is a corresponding contraction of jurisdiction for otherwise meritorious cases.

Lawyers are aware that the current U.S. Supreme Court is an "activist" court with a leaning to the right; some of us are old enough to remember the Warren court and its liberal bias, which was equally "activist" but in the other direction. An "activist" Supreme Court can really expand or contract jurisdiction as it wishes, either by insisting on a literal interpretation of words, *e.g., Bread Political Action Comm. v. Fed. Election Comm'n*, 455 U.S. 577 (1982), or by carving out exceptions to their meaning. But while a particular Supreme Court may hope to shape society with its rulings, certain lower court judges themselves are "activists," punching out holes in the Court's holdings for litigants to jump into.

For example, under the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901 *et seq.*, no private plaintiff can sue to force a violator of the act to clean up contaminated property unless the plaintiff first provides to the administrator of the Environmental Protection Agency notice of each purported violation, the state in which it occurs, and the violator, and then delays suit for 60 days. 42 U.S.C. § 6972. Until the issue reached the Supreme Court, many lower courts took a "no harm, no foul" approach to the notice requirement, reasoning that by the time the complaint was served, the violator and the governments had sufficient notice either to try to negotiate a cleanup or a settlement or to go ahead and litigate, even in the absence of the formal, statutorily required notice and delay. But the Supreme Court, which has not been a friend to private suits under environmental law, saw it differently. The notice requirement, said the Court, is jurisdictional, and failure to provide notice and the 60-day delay are absolute bars to a RCRA lawsuit in federal court. *Hallstrom v. Tillamook County*, 493 U.S. 20 (1989). The Court skirted actually calling the bar "jurisdictional in the strict sense of the term," denominating the notice requirements and delay "mandatory conditions precedent to commencing suit."

A careful lawyer, once alerted to this "bar," would of course provide pre-suit notice before suing under RCRA. But not everyone is careful. Nevertheless, hope exists for the careless lawyer if the district court judge is supportive of the concept of private suits under environmental law. Although no longer able to simply shrug the judicial shoulder, judges in some post-*Hallstrom* decisions have overlooked failures of notice by carving out exceptions. For example, where only one of several plaintiffs provided statutory notice, the district court held the other filings sufficient for all plaintiffs. *Envtl. Def. Fund v. Tidwell*, 837 F. Supp. 1344, 1352 (E.D.N.C. 1992). Where plaintiff gave notice of a claimed violation of a hazardous waste management provision under a different section of RCRA that requires notice but no delay, but did not wait 60 days to bring its suit, which included claims under § 6972 that did require both notice and delay, the district court refused to dismiss the § 6972 claims, finding substantial compliance with the notice provision. The court of appeals affirmed. *Dague v. City of Burlington*, 935 F.2d 1343 (2d Cir. 1991).

Reasonable minds can differ, but even though some of these jurisdictional requirements make prudential sense and are required by the Constitution, others are pointlessly harsh and seem arbitrarily imposed. Although I say this with the greatest respect, the suspicion does arise that intelligent people such as judges are able to come up with some damn good rationales for kicking cases out of court.

A recent case in the Third Circuit pointed up the misfortunes that a nit-picky judiciary can inflict on litigants who fail to abide by seemingly pedantic and extremely harsh rules made by judges. In *Shaffer v. GTE N., Inc*., D.C. Civil Action No. 99-CV-01768 (Mar. 28, 2002), the Third Circuit Court of Appeals vacated the district court's order granting a party the right to move for enforcement of a settlement agreement after dismissal of the case on the record. The court pointed out, with apparent satisfaction, that the litigant had fallen into "a trap for the unwary" in the frequently encountered situation where, after announcing on the record that a settlement has been reached, the judge dismisses the case. Although neither party raised the argument that the district court had no jurisdiction over enforcement of the settlement, the court raised it *sua sponte*, "as every court is obligated to do when subject matter jurisdiction is in question." *See also Green v. Larrain*, 854 F.2d 916 (7th Cir. 1988) (Posner, J.) (en banc). Of course neither party thought it *was* in question, nor did the district court give it a moment's thought. Only the court of appeals thought jurisdiction was in question. After deciding there was a jurisdictional question, the court then decided there was no jurisdiction to enforce the settlement agreement in the district court, purporting to rely on *Kokkonen v. Guardian Life Insurance Co*., 511 U.S. 375 (1994), which the Third Circuit claimed was dispositive of the issue. *Kokkonen* held that enforcement of a settlement agreement is more than just a continuation or renewal of the dismissed suit and requires its own basis for jurisdiction; in the absence of language in the dismissal order retaining jurisdiction to enforce the settlement, the court has no jurisdiction. Using *Kokkonen* as its shield, the *Shaffer* court claimed to have no discretion in the matter—the parties were out of court.

By contrast, the Seventh Circuit has been somewhat more lenient toward litigants seeking to enforce settlement agreements after dismissal of the case. In *Ford v. Neese*, 119 F.3d 560 (7th Cir. 1997), Judge Posner, speaking for the panel, held that the district court retained jurisdiction to enforce a settlement agreement even though the case was dismissed years before the parties sought to enforce it. Why did the court believe this was appropriate? Because the appellate judges believed that the case was dismissed solely so the district court judge could show one less case on his calendar. The Seventh Circuit disapproved of such shenanigans, even though *Kokkonen* was just as binding on the Seventh Circuit as it was on the Third. What made the difference? The judges' points of view, not the law. It offended the Seventh Circuit that a judge would use a jurisdictional argument to manage the docket.

Though paradoxical, even most judicial prejudice is no more than a judge's idiosyncratic view of what is just.

Lest anyone think that the Third Circuit was attempting to manage crowded dockets by coming to the opposite conclusion, the *Shaffer* court pointedly rejected Judge Posner's view and threw in a small ad hominem attack for good measure. The *Shaffer* court noted that some appellate judges (like Judge Posner) have suggested that "the practice of ordering the current dismissal of cases involving as-yet-incomplete settlements is prompted by the district judges' concern over statistics—over the size of their calendars." The author of the *Shaffer* opinion was *shocked* (actually he said "troubled") that anyone would think such a thing and rejected such speculation as coming from judges without trial experience, implying they were creatures of lesser worth than those *with* trial experience.

What it boils down to, at least in the Third Circuit, is that litigants who want to be certain they will be able to go back to court to enforce a settlement have to ask a judge to incorporate a few "magic words" in the order of dismissal. The *Shaffer* court explained that unless the district judge specifically incorporates the terms of the settlement into the order, or specifically holds onto jurisdiction for the purpose of enforcing the settlement, the district court deprives itself of jurisdiction to hear a motion to enforce the settlement agreement.

Although the Third Circuit was a "strict constructionist" about *Kokkonen*, the Seventh Circuit tempered justice with mercy, reading into the district court's dismissal an *intent* to keep jurisdiction, even in the absence of the magic words. The conclusion we should all draw from this comparison is that the law is not an "absolute," and that even seemingly crystal-clear statutes or precedents, filtered through the lens of a judge's point of view, can become an ink blot test, each judge seeing something different in the precept.

Let me digress for a moment to explain that I am not attempting to criticize judges here. First of all, some of my best friends are judges (including my father). Second, judges are human beings. Apart from the docket management issue, where judges clearly know why they're doing what they're doing, judges' decision-making processes are shaped as much by who they are—their sets of beliefs—as by the letter of the law. In the 1980s the academic discipline of "critical legal studies" was all the rage in law schools; it dared to tell the shocking truth that judges sometimes made up their minds about a case, then searched for the legal rationale to support their decisions. This is not necessarily bad or wrong; it's just human. Every lawyer can point to a case that could have ruled for the defendant or the plaintiff, depending on the line of cases the judge chose to follow or the argument the court found more appealing.

In fact, as paradoxical as it sounds, even most judicial prejudice is no more than a judge's idiosyncratic view of what is just. Sometimes this makes little sense to the outraged litigant, who screams at his bemused lawyer, "It just isn't fair!" But even though fairness and justice are not always congruent concepts, in most courts they run together.

For every judge who does not want to hear a case and uses jurisdiction as a bar, another judge will figure out a way to give the plaintiff a forum. This is most obvious in the constantly emerging law surrounding the question whether each plaintiff in a class action must meet the statutory threshold for the jurisdictional amount of damages for federal diversity jurisdiction. Does each plaintiff in a class action suit have to meet the jurisdictional amount required by 28 U.S.C. § 1332, or can the amount be aggregated among all plaintiffs?

The circuits are split on the issue. Those that are less receptive to class actions hold that individual plaintiffs have to meet the threshold amount (currently these are the Third, Eighth, and Tenth Circuits); those that are willing at least to listen to the claims believe that one plaintiff meeting the threshold is enough (Fourth, Fifth, Seventh, and Ninth Circuits). They cite the supplemental jurisdiction statute, 28 U.S.C. § 1367, which provides that a federal court can take supplemental jurisdiction of claims over which it would not ordinarily have jurisdiction if those claims "are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." Looking at identical language in Title 28, one court can believe that the statute is clear on its face and permits aggregation (the Fourth Circuit, for example, in *Rosmer v. Pfizer, Inc.*, 263 F.3d 110 (4th Cir. 2001)). Yet another court, likewise declaring that the statute is unambiguous and clear, will not permit aggregation. *Leonhardt v. W. Sugar Co.*, 160 F.3d 631 (10th Cir. 1998). A third court believes the language of the statute is ambiguous and does not permit aggregation. *Meritcare Inc. v. St. Paul Mercury Ins. Co.*, 166 F.3d 214, 222 (3d Cir. 1999).

What are we to make of these differences? What lessons can be learned from these examples of widely divergent views among court panels and individual judges? Recognizing that the rule of law is tempered or colored by a judge's personal bias simply means that the wise lawyer should include argu-

ments known to appeal to the particular judge in the calculus of case preparation, so the judge can understand why your case should be decided the same way the court decided the *John Doe* case back in 1985. If the case does not involve a social or political issue, you may simply want to be sure you appeal to the judge's sense of fairness or humanity. Sometimes you will prepare a case with the appellate process firmly in mind because you know you can't win below.

Going from macrocosm to microcosm (as my philosophy professor used to say), the wise lawyer will include jurisdictional analysis in the case preparation. This analysis consists of several steps:

1. What court do I want to be in? Although it is mainly plaintiffs who can make this choice, the removal statute on occasion puts this issue into play for defendants as well. Forum non conveniens arguments also can be made by defendants to give themselves a degree of choice.

Assuming you have a choice between state and federal courts (or even among different states) and lack of venue doesn't prevent you from choosing a hospitable court, forum shop. Find out what court has the best law on your subject matter. If, for example, you are a plaintiffs' class action lawyer, it helps to know that the judges you may draw in a particular circuit generally are conservative, dislike class actions, and hate plaintiffs' lawyers. You would then avoid that venue at all costs.

Sometimes, however, the choice of forum is not yours to make.

2. I have no choice of forum. What is the law on the subject matter of my case in this forum? If the law is good, you are golden. If it is not, search for a new interpretation or an exception to the rule that can change the outcome, or pound the facts that support a different outcome. If nothing works at the trial level, search for an appealable issue as you try your case, with a view to what the appellate court has shown to be its bias.

For example, a few years ago, I represented a film producer who came to me after a $13 million default judgment was entered against him in a federal district court in the Third Circuit. He is a Spanish national, purportedly served with process in Spain pursuant to the Pennsylvania long-arm statute (state long-arm provisions are incorporated into Federal Rule of Civil Procedure 4(e)(1)). The Pennsylvania statute provides (in the subpart relevant to my case) that process may be served "by handing a copy … at any office or usual place of business of the defendant to his agent *or to the person for the time being in charge thereof*." Penn. R. Civ. Pro. 402(a)(2)(iii), emphasis supplied. The Pennsylvania courts have found service of process to be proper on a broad spectrum of agents, including service on a night watchman of a corporate defendant. The plaintiff in my case claimed service was proper on the film producer. Based on the law of the forum, he seemed to have a good argument.

The producer's offices at the time of the purported service were housed in Madrid, in a two-story office building with a receptionist in the lobby. The process server found the door to the producer's office locked and left the complaint and summons (translated into Spanish as required by treaty) with the receptionist. My client's first lawyer advised him to ignore the service, and he did so until he learned of the default judgment, at which point he got nervous and hired me.

The district judge who granted the motion to enter the default judgment was known for two things: intellectual brilliance and never having been reversed. His opinion granting judgment of $13 million against the producer nailed down every possible variation on the issue of service of process, holding that the plaintiff adequately notified the producer of the suit in addition to actually effecting service under the Pennsylvania long-arm statute.

I could not argue with the black-letter law principles enunciated by the judge. I could, however, point out a fact that tested the outer limits of whether service had been properly made: The process server handed the papers to the receptionist of the building during the month of August. In Spain almost all offices close during August for a month's vacation. The receptionist did not work for the producer; she worked for the producer's landlord. She was the only person in the building that day. She was therefore not "for the time being in charge" of the producer's office, only of the building. During August *no one* was in charge!

$13 Million Judgment Thrown Out

The judge rejected this argument as unthinkable to a well-ordered mind, but the Third Circuit reversed. This circuit court is known to be pragmatic in the area of business disputes, often rejecting hypertechnical arguments in favor of fundamental fairness (in contrast to its "strict constructionist" approach to docket management). To hinge a $13-million default judgment on service of process in Spain during August on someone who did not even work for the defendant seemed unfair to the panel. As a result, they held there was no good service on the producer and the federal court had no jurisdiction over him.

Knowing that the Third Circuit judges were pragmatists about business issues and sticklers for the rules (particularly where the rules operate to oust the federal court of jurisdiction) enabled me to craft an argument to get the $13-million judgment thrown out.

3. A judge has been assigned to the case. The law of the forum is pretty good for my client. What more do I need to know? Every lawyer who tries a case must find out everything there is to know about the judge. Search for the judge's written opinions in similar cases. Find out if possible who the judge's friends are. (If I had done that in my landlord/tenant case, I would not have been blindsided by the judge's friendship with the landlord.) What clubs does the judge belong to? What are the judge's hobbies? These pieces of information are particularly valuable and important when you are trying a case in an unfamiliar venue. If your client's CEO is black, for example, and the judge belongs to a country club that excludes African Americans, you want to know that. It may influence your decision about which company representative should sit at the counsel table with you. Because all people are products of their surroundings, check out the judge's community as well to see what biases exist.

Some years back a developer client came to me because his corporation had just purchased a farm to build a residential

development. Unfortunately, after the sale, the company discovered the property was contaminated. The farm was located in Pennsylvania, which has an excellent environmental statute that gives plaintiffs the right to sue for cleanup costs; federal environmental statutes also have private plaintiff provisions. Did I want to be in federal or state court? State court judges are elected, county by county, in Pennsylvania. After I did some checking on local county politics, I discovered that the farmer who sold the property to the developer had been active for years in local county politics. The farmer and his wife were the defendants. Not wishing to have a repeat of the demoralizing experience I had in that long-ago landlord/tenant case, I chose to bring suit in federal court. Even though the developer was local, the farmer's long-standing political ties to successfully elected local judges made the choice of forum obvious.

4. I am stuck in the jurisdiction and have hit the worst possible judge for my case. I will lose. Now what? Sometimes you cannot overcome a judge's biases at the trial level, and you will lose your case. You and your client can try to settle the case before it gets ugly, or you can gird yourself for appeal by making a record throughout the trial of whatever improper behavior you believe is prompted by bias. As painful as an appeal is, in terms of both time and money, it may be your client's only chance for justice, and the only jurisdiction that matters.

The most important thing to remember when a case begins is that the individual judge you draw in your case—not a statute, not a rule, not an opinion—controls your access to the forum. The individual judge determines whether there is jurisdiction. Before you even begin to shape the evidence and prepare you case, you must focus on whether your judge will take and keep jurisdiction over the matter—and, above all, whether you want the judge to do so.