Cramming Cases
into Existing Tests

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I once had the privilege of representing a woman who was vying for the heart of a prince—Prince Charming, to be precise. My client was quite the prize by every standard: bright, chaste, well educated, well mannered, fashionable, a great conversationalist, vivacious, and gorgeous. Prince Charming, however, made it known that to win his hand, his mate had to fit into a very particular glass slipper. This presented quite a dilemma for my client and me. Despite all the qualities that would make her a great wife, princess, mother, and queen, her feet were a bit on the large side. So, we asked ourselves, should we argue against the prince's test and attempt to convince him that he shouldn't be focusing on my client's feet, or should we attempt to convince the good prince that the shoe did indeed fit (despite the folds of skin spilling over the shoe)? We knew that the prince took his test very seriously, and, as far as he was concerned, that was the only pathway to his heart. So, of course, we went in for the fitting and tried to persuade the prince that the glass slipper must have been a perfect fit the night of the ball (without admitting or denying that my client did or did not in fact dance with the prince that night), but with the weather having cooled and contracted the glass a bit since then, the shoe was naturally a bit tighter now. She later married a blacksmith and invited me to the wedding.

More recently, I took on the unusual case of a woman who spun her wool a bit too fine and soon found herself accused of practicing witchcraft. Well, I wasn't about to take the chance on what would happen if we submitted her to the prescribed trial by ordeal in which her innocence would be revealed once she drowned. So, I gathered the greatest legal minds of the day, and we crafted a powerful argument against subjecting our client to the dunk tank. We submitted to the tribunal that, under some yet to be accepted standards, there was insufficient basis to pursue this witch trial as we championed all of the non-witch-like qualities of our client. Predictably, we were met with the retort "If she isn't a witch, what are you so afraid of?" And with that, our client was left to her fate.

Clearly, there is a risk when you take on a well-entrenched test, but our client (subsequently declared innocent, by the way)

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had much to lose. Still, there is yet another risk for my client's fate and my integrity when I am faced with a test that forces me to argue the importance of facts remotely relevant to the issue but required under the established test.

This same dynamic is happening every day in our courtrooms. Our courts have established tests for how to measure a particular argument. These tests are ingrained in the system after being handed down from our highest courts and persisting through the years. Yet, as times change and the facts of a particular case may vary from what inspired the test, the test may not be entirely applicable to the matter at hand. The litigator is thus presented with the dilemma of the glass slipper: whether to strain and stretch his or her client's facts in a vain attempt to satisfy the established test or to make an end run, to try to convince the court that the requested relief should be granted in spite of the admitted inability to squeeze the client's facts into the prevailing test. At what point does the former option cross the line and become a prohibited misrepresentation? At what point does the latter option become a failure to provide zealous advocacy to the client? Of course, many of the tests we use to evaluate certain arguments have changed and evolved over time, but the client who chooses to challenge the test would have to be counseled to expect at least one level, if not several levels, of appeals to make a change in the law.

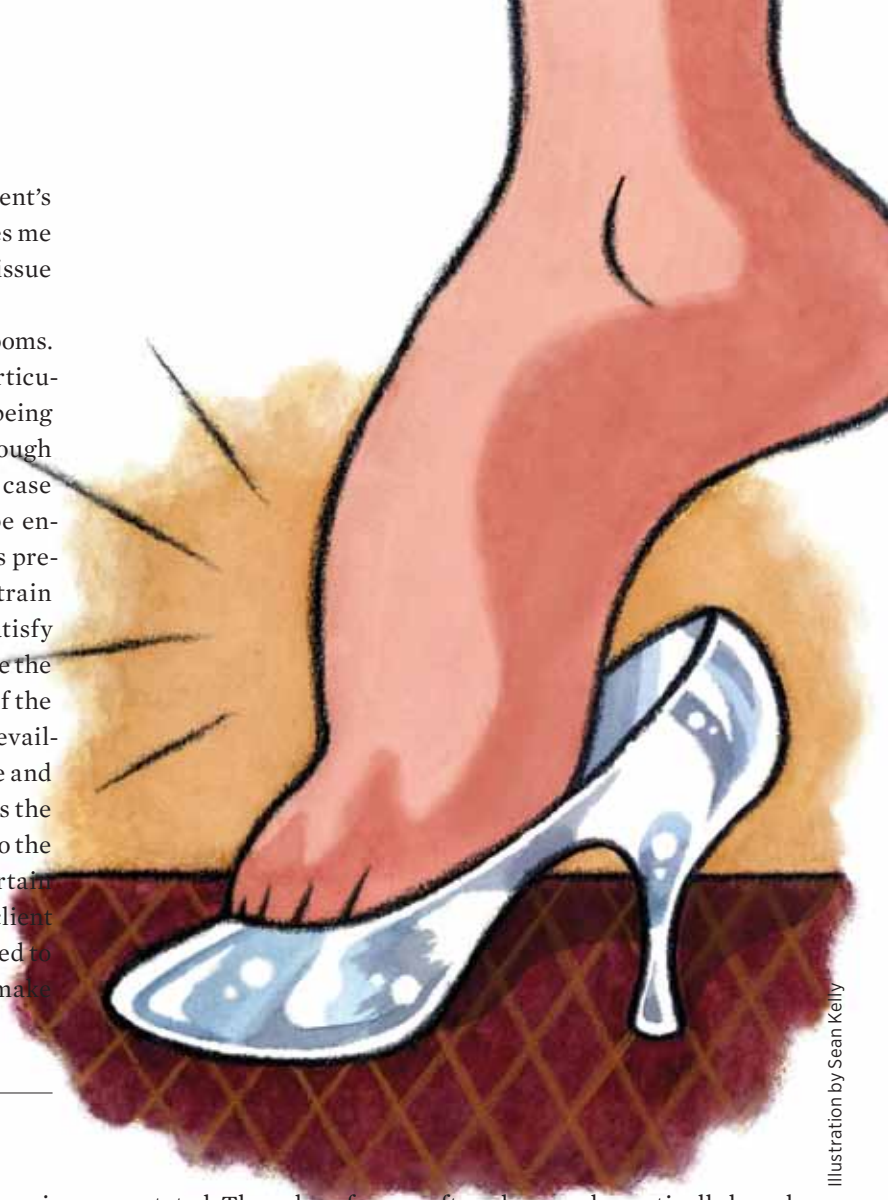

Illustration by Sean Kelly

Forum Shopping

Consider what takes place when we argue a forum non conveniens motion, or FNC. Undoubtedly, there are times when a case belongs in the United States, and there are times when a case belongs somewhere else. There is no need to hide from the true motivations of this dispute. The next of kin to a foreign passenger who boarded a third-world airline operating under questionable safety standards likely has no expectation of a jury award of American proportions, regardless of whether there may have been an errant U.S.-manufactured part in the aircraft. Similarly, the American mother who loses her husband when his domestic aircraft, operated by a domestic airline, happens to crash on foreign soil should not be deprived of her rights to compensation under the judicial standards of this country. When a foreign plaintiff's attorney files a claim in the United States, he or she may have only done so because our laws are more advantageous to plaintiffs than laws in the other countries, including the availability of strict liability, a jury trial, and shockingly huge verdicts, particularly in the venues where FNC motions are most frequently litigated. (*See* Am. Tort Reform Found., *Judicial Hellholes 2010/2011*, (2010), *available at* www.judicialhellholes.org.)

The importance of the rulings on FNC motions cannot be overstated. The value of a case often changes dramatically based on the FNC decision. Once the potential stakes are set, the motivations for settlement and the benefits to be gained from any further litigation become much clearer. It is not uncommon for cases to settle soon after the court issues an FNC ruling.

American courts focus on the "convenience" of maintaining litigation in the United States in determining whether an adequate alternative forum would be better suited for the case. Thus, victims of forum shopping end up arguing about the location of witnesses and documents, the ability to compel certain witnesses to testify, the level of local interest in the lawsuit, the court's familiarity with governing law, the burden on local courts and juries, congestion in the court, and the costs of resolving a dispute unrelated to this forum. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981).

Putting aside the rationality of having the propriety of a given forum hang on the "convenience" of competing forums, the factors hardly measure real-world modern-day realities. We place great value on the location of documents, without regard for the ease of scanning, emailing, or shipping documents around the world. Similarly, the location of lay witnesses is highlighted without much appreciation for how much of the

case will depend on expert witnesses, the ability to capture testimony in a recording or use of videoconference, or the ease of travel in our modern world. Indeed, most, if not all, of the factors that are weighed in the FNC motion are subjective and subject to gross exaggeration, and they provide the courts with tremendous latitude to emphasize or de-emphasize any given factor to support their decisions.

Though we are so often challenged by our dual obligation to our clients and the courts, the concept that litigators are not helpless subjects in these circumstances should not come as a shock. We may feel that when we are faced with an entrenched but ill-fitting legal framework, we have to choose between death and drowning or, in more realistic terms, between stretching and straining to characterize our facts to fit the existing standards and engaging in pointless arguments likely to backfire against client and lawyer alike. The truth is that the law can indeed evolve to better address facts in our changing world, and occasionally, the courts acknowledge the need to revise correspondingly the tools they use to measure our arguments. The burden falls on the bar to resist the easy road and recognize when an opportunity for change is ripe and fruitful for the client.

Twombly and *Iqbal*

The defendants in the now famous cases of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), must have considered simply arguing that the complaints at issue failed to meet the existing federal pleading standards. No doubt they recognized that such arguments would have no better chance of success than my efforts to cram my client's size 12 foot into that size 4 glass slipper. So even though the applicable complaints met the existing federal pleading standards, they argued that dismissal was nonetheless appropriate, and a new pleading standard was born.

Recognizing an opportunity created by dissention in the lower courts, defense counsel in *Twombly* addressed the merits of a heightened pleading standard in civil actions. The court accepted the argument and responded with recognition of the need for change. With the successful challenge in the Supreme Court, it is easy to applaud the *Twombly* success as if the strategy is an easily adapted approach for all litigators currently struggling to find a way out from between their rock and hard place.

Still, the evolution seen in our pleading standards certainly does not stand in isolation. Consider a less publicized but equally valid example from the Arizona Supreme Court. In the case of *Planning Group of Scottsdale v. Lake Matthews Mineral Properties*, 246 P.3d 343 (Ariz. 2011) (en banc), the court appeared to take a step away from the facts and standards at issue to fashion a new approach consistent with the underlying goals of long-arm jurisdiction. The court was dealing with an interstate sales transaction, and the plaintiff sought to affirm jurisdiction over the out-of-state defendants in Arizona. Yet because jurisdiction hinged on a contractual relationship, traditional analysis would demand a determination of whether or not the defendants purposefully sought to avail themselves of the privileges and benefits of conducting business in Arizona. *Id.* at 347–48. As the mining investment was to be conducted solely out of state, this test would fail. Traditionally, the purposeful direction test, which would analyze whether or not the allegedly fraudulent statements at issue had been "purposefully directed" into Arizona, was reserved for tort actions of the personal injury and product liability variety. *Id.* Still, the court recognized that the fundamental goal of these tests was to determine whether the aggregate of the defendants' conduct would make it fair and reasonable to hale them into court. *Id.* at 349. Accordingly, the court adopted a new standard that looks to the totality of the defendants' contacts with the state, without regard for the cause of action on which a plaintiff seeks liability. *Id.*

On the horizon, we may see a change in the standards used to qualify for class certification. Just this past term, the U.S. Supreme Court considered the appropriateness of class certification in a case potentially involving more than one and a half million plaintiffs. *See Wal-Mart Stores, Inc. v. Betty Dukes et al.*, 131 S. Ct. 2541 (2011). Counsel argued and the Court decided the case, which featured the greatest number of plaintiffs by far, under the established framework used in all other discrimination class actions. By arguing the standard prongs required under the Rule 23 certification analysis, counsel was forced to diminish the novelty of such a large class suit against a national mega-conglomerate employer in an effort to please the Court. In other words, counsel was forced to lie.

In *Wal-Mart*, both sides probably made sacrifices in litigation strategy in order to abide by the prevailing test. Defense counsel sacrificed any probing exploration (though, as it turned out, without consequence in this case) of a perhaps more appropriate argument that certification in a disparate impact discrimination claim brought by a class of this magnitude would unfairly prejudice the defendant's ability to present a nuanced defense. The defense primarily argued within the current framework of commonality and typicality, instead of arguing that in light of the modern expansion of large corporations, operating primarily under regional and localized management, any cross-department, cross-store, and cross-regional classes should be subject to a more specific commonality and typicality requirement under Rule 23. Similarly, plaintiff's counsel did not pursue the relevant argument that, in light of the size and geographic reach of the employer, the commonality analysis should be adjusted to focus on the commonality of the policy that gave

rise to the discrimination claims, as opposed to the sameness of the injury. On both sides, as in many FNC motion arguments, counsel chose to focus their energies on the slipper instead of the attributes that would supposedly be revealed by the slipper test. Both the defendant and the plaintiffs failed to address the need for a revised standard fair to both sides in class actions of

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this magnitude. Yet the case further highlights the need for change.

The stories of my colleagues' courage to resist the temptation to simply try the shoe on for size and the courts that have been receptive to a new approach give me hope that I will someday have the opportunity once again to save a client from drowning rather than succumb to the standards of the day. Perhaps these opportunities are not common, but we must recognize them when they present themselves. We are not compelled to accept the wisdom of a slipper test. ■