

# Judicial Notice: An Underappreciated and Misapplied Tool of Efficiency

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**M**OST people have never heard about the 1858 murder trial of William “Duff” Armstrong. But everyone knows Armstrong’s defense attorney: Abraham Lincoln. Before he was elected the Sixteenth President of the United States, Lincoln had struggled to make a name for himself. As he told the jury, Mrs. Armstrong – the widowed mother of his client – had shown him kindness, providing shelter and

clothes when he had none. Seeking to reciprocate the generosity when her boy found himself in some trouble, Lincoln volunteered for her son’s defense without a fee.

Armstrong was charged with murder in the first degree. Prosecutors alleged that on the night of August 29, 1857, Armstrong beat James Metzger so severely that he died the next day. A fellow by the name of Allen, witness for the prosecution, testified that he

witnessed the blow. How? By the light of the full moon. It was 10 o'clock p.m., he testified, and the moon shined brightly. The court adjourned for the day.

That night, Lincoln went to a corner drug store in Beardstown, Illinois, and purchased an almanac. The next day, he was prepared. The moon on that night, the almanac showed, did not shine until several hours *after* 10 p.m. The court took judicial notice. Shortly thereafter, the jury acquitted Armstrong.

The reason for telling the story of the "Almanac Trial" is two-fold. The first is that judicial notice is valuable. Without it, Lincoln would have had to lay a foundation for introduction of testimonial evidence showing that the moon did not shine at the time Allen said, cross-examine Allen to impeach the witness or in the hopes he recanted, or offer documentary evidence and have it authenticated.

The second reason for the story is that by using judicial notice, Lincoln won the case. Once called the "*deus ex machina* of evidence," judicial notice provides a shortcut that is not only more efficient, but also more commanding than ordinary evidence. The jury was instructed to accept the fact that the moon did not shine until hours after midnight.

Judicial notice is one of the most underappreciated and frequently misunderstood doctrines of evidence, yet it remains a powerful

tool for any trial attorney. Judicial notice can help establish important facts beyond dispute, and more significantly, help establish facts decisively. This article will discuss this important evidentiary doctrine, offer some helpful insights into successful application of judicial notice, and offer tips to avoid its misuse.

## **I. A Brief History**

Judicial notice has long-standing roots. Based on the ancient adage *manifesta non indigent probatione*, or "what is known need not be proved," judicial notice is one of the oldest doctrines in common law history. Originally, judicial notice was a tool of convenience, used by trial judges with broad authority based on their own common knowledge.

Eventually, however, Federal Rule 201 and its state counterparts paved the way for judicial notice to focus less on the common knowledge of judges, and more on the source of the fact. This seemingly slight change has broadened the application of the rule, and, coupled with the technological revolution, opened the door to an infinite amount of noticeable material.

### **A. Early Common Law**

Surprisingly, the earliest use of judicial notice does not come from

the rules of evidence for use at trial. Instead, the first application of judicial notice was at the motion to dismiss stage. Early American courts took judicial notice of obvious facts that were omitted from a pleading to avoid having to dismiss a claim.<sup>1</sup> Although judicial notice would soon become enshrined in the Federal Rules of Evidence and used during trials, it started as a simple means of convenience for the court. While the rule has evolved over the years, the importance of convenience has remained a constant, and judicial notice has developed into a tool to circumvent long and inefficient procedural hurdles in all stages of litigation.

The use of judicial notice at trial developed as a matter of common sense and convenience. The opportunity to save time, work, and money made judicial notice a valuable resource. As John Henry Wigmore explained:

The object of this rule is to *save time, labor, and expense in securing and introducing evidence on matters which are not ordinarily capable of dispute and are actually not*

*bona fide disputed*, and the tenor of which safely be assumed from the tribunal's general knowledge or from slight research on its part. . . It thus becomes a useful expedient for *speeding trials and curing informalities*.<sup>2</sup>

Wigmore identified three general classes of matters that were authorized to be judicially noticed:

A. Matters which are necessary for exercising the judicial functions and are therefore likely to be already known to the judge by virtue of his office;

B. Matters which are actually so notorious in the community that evidence would be unnecessary;

C. Matters which are not either necessary for the judge to know nor actually notorious, but are

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<sup>1</sup> See JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 279-286 (1898) (explaining that judicial notice was used to circumvent rigid pleading rules which required indispensable words be used to maintain a legal action; for example,

*"felonice"* and *"burglariter"* were required when referring to a felony or burglary).

<sup>2</sup> JOHN HENRY WIGMORE, THE POCKET CODE OF THE RULES OF EVIDENCE IN TRIALS AT LAW § 2120 (1910) (emphasis added).

capable of such positive and exact proof, if demanded, that no party would be likely to impose upon the tribunal of a false statement in the presence of an intelligent adversary.<sup>3</sup>

This meant a fact could be judicially noticed where it was: (a) already known; (b) obvious; or (c) so easy to prove that no intelligent person would contradict it.

The United States Supreme Court in *Brown v. Piper*,<sup>4</sup> provides a good example of judicial notice during the early common law period. In that case, Piper filed an action to prevent Brown from infringing on his patent for preserving fish using a freezing mixture. Brown denied that Piper held a patent on the freezing mixture, and further denied the novelty of the invention. The circuit court upheld the validity of Piper's patent.

The Supreme Court reversed. Relying on judicial notice, the Court held that evidence of what is old and in general use at the time of an alleged invention is admissible.<sup>5</sup> In this instance, the Court noted that the freezing mixture was already

well-known and used frequently at the time, for example, in preserving a corpse, or in animals which were found undecomposed in the ice of Siberia and "which must have been embalmed in ice for ages."<sup>6</sup>

The Court added that to require proof of every fact "would be utterly and absolutely absurd," and that "[c]ourts will take notice of whatever is generally known within the limits of their jurisdiction; and, if the judge's memory is at fault, he may refresh it by resorting to any means for that purpose which he may deem safe and proper."<sup>7</sup> This case illustrates a classic example of the benefits of judicial notice, and the obvious results that stem from its application: a freezing mixture used to preserve fish is not novel when anyone can look around to see ice has been used for years to preserve other items.

Other areas in which judicial notice has been used include verifiable documents, historical events, well-settled scientific facts, and most commonly, geographic locations. This is "for the obvious reason that geographic locations are facts which are not generally controversial[.]"<sup>8</sup> Other famous, but less obvious examples of judicial notice at common law include

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<sup>3</sup> *Id.* at § 2130.

<sup>4</sup> 91 U.S. 37 (1875).

<sup>5</sup> *Id.* at 38.

<sup>6</sup> *Id.* at 43 (quoting Tit. "Antiseptic," 1 AMER. ENCYCLO. 570).

<sup>7</sup> *Id.* at 42.

<sup>8</sup> *United States v. Bello*, 194 F.3d 18, 23 (1st Cir. 1999).

*Gilbert v. Flint & P.M. Railway*,<sup>9</sup> *Wolfe v. Missouri Pacific Railway*,<sup>10</sup> and *Jacob & Flint & PMR Co.*<sup>11</sup>

The fact that some of these examples seem *too* obvious to be judicially noticed raises another interesting point. Facts that are commonly known today are not necessarily facts that were commonly known yesterday, or that will be commonly known tomorrow. That a freight car on a highway is not likely to frighten horses of ordinary gentleness was considered common knowledge in 1883. In 2017, not as much. In 1995, it was commonly known that Pluto was the ninth planet in the solar system. In 2017, it is commonly known that Pluto is not actually a planet at all. It could be argued that this apparent weakness is, in fact, one of the greatest strengths of the ancient doctrine: as technology allows for easier access to an increasing number of incontrovertible facts, so does application for the rule.

Application of judicial notice in early common law was both broad and specific: broad due to the absence of guidelines in applying the rule, and specific due to its common application in particular areas, such as geographical, historical, scientific, and locally

known facts. It was in these areas that judicial notice first developed, and it is these areas that judicial notice is still used most frequently today.

Perhaps the best way to view judicial notice during early common law is in comparison to what came after. As Jeffrey Bellin and Andrew Guthrie Ferguson observe in their article “Trial by Google”:

[T]he legitimacy of taking judicial notice came more from the authority of the judge than from the source of the information. If, for example, there was a question about the existence of a river, it could be judicially noticed not because a map showed the fact (the map was unnecessary), but because the judge knew the river existed in that general location. *The judge thereby acted as a proxy for the general knowledge of the community.* Sources could support or confirm the judge’s preexisting general knowledge, but

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<sup>9</sup> 16 N.W. 868, 869 (Mich. 1883) (taking notice that a freight car resting on a highway is not likely to frighten horses of ordinary gentleness).

<sup>10</sup> 11 S.W. 49, 51 (Mo. 1889) (taking notice of the nature, operation, and ordinary uses of the telephone).

<sup>11</sup> 105 Mich. 450, 63 N.W. 502 (Mich. 1895) (taking notice that an ordinarily prudent person would not jump from a moving train).

did not alter the underlying premise that the judge's knowledge controlled.<sup>12</sup>

The strength of judicial notice was based on its liberal applicability in allowing judges and litigants a shortcut to otherwise less efficient evidentiary requirements. For example, using an almanac to show the moon was not shining at a particular hour on a given day. Not surprisingly, the adoption of Federal Rule of Evidence 201 sought to provide guidelines where none existed, while still seeking to preserve its most convenient features.

#### **B. Adoption of Federal Rule of Evidence 201**

In 1975, the Federal Rules of Evidence codified the doctrine of judicial notice with Federal Rule of Evidence 201. For the first time, judicial notice had an established framework. Before then, it was left to the discretion of judges to decide what was or was not considered "common knowledge." Rule 201 embraced the spirit of the rule, while also adding necessary guidelines and new procedural mechanisms.

Rule 201, named "Judicial Notice of Adjudicative Fact" reads as follows:

**(a) Scope.** This rule governs judicial notice of an adjudicative fact only, not a legislative fact.

**(b) Kinds of Facts That May Be Judicially Noticed.** The court may judicially notice a fact that is not subject to reasonable dispute because it:

- (1)** is generally known within the territorial jurisdiction; or
- (2)** can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

**(c) Taking Notice.** The court:

- (1)** may take judicial notice on its own; or
- (2)** must take judicial notice if a party requests it and the court is supplied with the

<sup>12</sup> Jeffrey Bellin and Andrew Guthrie Ferguson, *Trial by Google: Judicial Notice in*

*the Information Age*, 108 NW. U. L. REV. 1137, 1152 (2014) (emphasis added).

necessary information.

**(d) Timing.** The court may take judicial notice at any stage of the proceeding.

**(e) Opportunity to Be Heard.** On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.

**(f) Instructing the Jury.** In a civil case, the court must instruct the jury to accept the noticed fact as conclusive. In a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as conclusive.

Generally, the rule itself remained the same with modifications only to phrasing. For example, Rule 201(b)(1) allows for judicial notice of facts that are “generally known,” mirroring the common-law rule. This means common law cases decided prior to adoption of Federal Rule 201

remain relevant. They offer insight into the kinds of facts that were, and still are, judicially noticeable based on common knowledge. Rule 201(b)(2) allows for judicial notice of facts determined from sources whose “accuracy cannot reasonably be questioned,” which also mirrors the common-law rule. A judge may rely on accurate sources to determine facts they may not personally know.

There is one important difference. At common law, it was clear the judge was the arbiter of “common knowledge.” A fact could only be noticed if the judge knew it to be true or could be assured it were true. The wording of Rule 201(b)(2) shifts the focus away from the judge’s authority, and places more emphasis on the accuracy of the source itself. The motivation behind this subtle shift was likely caused by consideration of a growing collection of sources (for a more modern example, the Internet) that while accurate, were not commonly known. As discussed in more detail below, this section of the rule pushed the number of sources that can be judicially notice to infinity and beyond.

Finally, the addition of Rule 201(e) provides a party formal notice and an opportunity to be heard on the issue of whether a fact can be judicially noticed. This is important for a party to preserve the issue for appeal.

## II. Application of Judicial Notice

Federal Rule of Evidence 201 allows courts to take judicial notice of adjudicative facts that are “not subject to reasonable dispute” because they are “generally known within the trial court’s territorial jurisdiction” or “can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” The “adjudicative fact” requirement refers to facts “that relate to the parties.”<sup>13</sup> These are the “who did what, where, when, how, and with what motive or intent” facts, which typically go to the jury.<sup>14</sup>

Pursuant to Rules 201(c)(1) and (2), a court may take judicial notice on its own, or if a party requests such notice and the court is provided the necessary information and sources. Rule 201(d) allows judicial notice to be used at any stage of the proceeding. This includes motions for summary judgment, trial, and appeal. Finally, based on Rule 201(f), in a civil case, the court must instruct the jury to accept the noticed fact as conclusive. This is an incredibly powerful section that is discussed in more detail later.

The scope of judicial notice is related to the division of function between judge and jury. Accordingly, application of judicial notice varies significantly

depending on whether the parties are pre-trial, perhaps at the summary judgment stage, or in the midst of trial. Both scenarios are examined in more detail below.

### A. Pre-Trial

Prior to trial, a judge may be asked to rule on a motion to dismiss or motion for summary judgment. In ruling on such motions, the judge must determine whether the complaint states a cause of action or whether the issue can be decided without a jury as a matter of law. A judge may notice facts in upholding a complaint or in striking it as insufficient. This could have a profound on the parties’ ability to bring a case to trial, or to bring a case in the first instance. Accordingly, unless a fact is undisputable, judicial notice at the pre-trial stage is used much less frequently than at trial.

Application of judicial notice at the pre-trial phase is simple. For example, in a motion to dismiss, a defendant can state they are the holder of a new drug application filed with the Food and Drug Administration (“FDA”). The defendant may then provide the court with legal precedent that it can and should take judicial notice of such a fact. For example, the defendant could cite legal precedent supporting the proposition that a

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<sup>13</sup> FED. R. EVID. 201(b) Advisory Committee’s Notes.

<sup>14</sup> *Id.*



court may take judicial notice of FDA documents found online because the website is a “source whose accuracy cannot reasonably be questioned.”<sup>15</sup> When done correctly, this could help achieve defendant’s goal of securing an early dismissal.

### **B. Trial**

At trial, application of judicial notice should be straight-forward. Pursuant to Rules 201(c)(1) and (2), the court may take judicial notice on its own or if a party requests it and the court is supplied with the necessary information. The request may proceed as follows:

Plaintiff Attorney: Your Honor, I ask the court take judicial notice of the weather on the day of the accident.

Defense Attorney: Objection.

Judge: Counsel, do you have a weather report that I can review?

Plaintiff Attorney: Yes, Your Honor. Let me show you this weather report certified by a

meteorologist who indicates that on the day of the accident the weather was 16 degrees with 6 inches of snow.

Judge: Overruled. The court will take judicial notice that the weather on the day of the accident was 16 degrees with 6 inches of snow.

Notice in the example above, that even though the weather is easily verifiable, that does not mean the court will simply take your word for it. Rule 201(c)(2) requires the moving party to provide the court with “necessary information.” In the case where counsel asks the court to take judicial notice of the weather on a particular day, counsel should be prepared with a certified statement by a meteorologist or other reliable document.

### **III. What Kinds of Evidence Can Be Judicially Noticed?**

Procedural application of judicial notice is far less controversial than its substantive application. The real issue is what happens when the parties or courts

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<sup>15</sup> See *Funk v. Stryker Corp.*, 631 F.3d 777, 783 (5th Cir. 2011) (holding the district court’s judicial notice of public records indicating that an orthopedic implant received the FDA’s pre-market approval did

not consider extrinsic evidence so as to transform the manufacturer’s motion to dismiss into a motion for summary judgment).

do not agree about whether a fact is noticeable.

### A. General Rules

It is important to distinguish between facts that are almost universally judicially noticeable and those that are not. Sometimes the distinctions are clear. For example, it is generally proper to take notice of an evidentiary fact, but not of an “ultimate fact” – one that is necessary for a party to prove his case.<sup>16</sup> For example, a court may take judicial notice that defendant was driving on icy roads, but will not take judicial notice that defendant was negligent for failing to proceed with caution.

There are other areas where courts tend to agree. For example, there are numerous cases holding that while it is generally acceptable to take judicial notice that a document was part of a court action, it would be improper to take judicial notice of the truth of the contents of

a document filed in a court action. This is because facts found by a judge upon resolution of contested evidence cannot usually be considered beyond “reasonably dispute.”<sup>17</sup>

Sometimes the distinctions are less clear. In *State v. Silva*,<sup>18</sup> the New Jersey Appellate Division created a distinction between taking judicial notice that a judge decided a case in a particular way and taking judicial notice that a party’s testimony in that case must have been truthful.<sup>19</sup> There, the trial court took judicial notice of another judge’s factual finding in a related domestic violence that it was impossible for defendant to have committed the offense because he could not have been at the scene. Reversing the trial court, the Appellate Division held that because the trial judge’s findings were based upon evidence that was vigorously contested and could not be immediately verified by a source whose accuracy cannot be

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<sup>16</sup> Compare *State v. Lawrence*, 120 Utah 323 (Utah 1951) (reversing the trial court taking notice that the value of the car stolen by the defendant was worth more than \$50.00, the amount required for a larceny conviction) with *Datlof v. United States*, 252 F. Supp. 11, 23 (E.D. Pa. 1966) (taking notice that October 5, 1955 was a Wednesday).

<sup>17</sup> See *Liberty Mut. Ins. Co. v. Rotches Pork Packers, Inc.*, 969 F.2d 1384, 1388 (2d Cir. 1992) (reversing trial court taking judicial notice of bankruptcy court’s factual findings); *Morrissey v. Luzerne County Cmty. Coll.*, 117 Fed. Appx. 809, 815 (3d Cir. 2004) (affirming judicial notice could not be taken of ageist remarks made by community college president in an unrelated case); *Gen. Elec. Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1082 (7th Cir. 1997) (reversing trial court taking judicial notice of finding in prior class action).

<sup>18</sup> 394 N.J. Super. 270 (App. Div. 2007).

<sup>19</sup> *Id.* at 278-279.

questioned, the evidence was not judicially noticeable.

Another area where most courts agree is with regard to geographic locations. For example, in *United States v. Kelly*, the court agreed that judicial notice could be used to confirm locations of cities and streets through use of simple internet searches, including Mapquest.<sup>20</sup> Not all websites are fair game, however, as discussed in the next section.

### B. Public Versus Private Websites

One of the major areas of debate in recent years is whether internet sources are judicially noticeable. Some courts have permitted judicial notice of online information, some have permitted it with caution, and others have refused. Here, the distinctions are primarily focused on whether the information comes from an official government-sponsored website or a private website, such as Wikipedia.

*Dingle v. Bioport*<sup>21</sup> shows that not all websites are treated equally. The court observed that “public

records and government documents available from reliable sources on the internet” are “generally considered ‘not to be subject to reasonable dispute.’”<sup>22</sup> In *Dingle*, however, defendants asked the federal district court to take judicial notice of information posted on private websites “dedicated to the anthrax vaccine.” The issue was whether there had been prior public disclosure of the facts alleged by plaintiff concerning alleged violations of the False Claims Act. The court denied defendants’ request to take judicial notice of information on the private websites, finding that the information was “subject to reasonable dispute” because it “could not verify the information found on these websites for accuracy or authenticity.”<sup>23</sup>

Even government websites are not always fair game. In *Polley v. Allen*,<sup>24</sup> the Court of Appeals of Kentucky overturned the trial court’s decision to take judicial notice of information from the United States Department of Labor, Bureau of Labor Statistics because the moving party failed to identify

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<sup>20</sup> 535 F.3d 1229, 1236-1237, n. 3 (10th Cir. 2008) (affirming the trial court taking judicial notice that Weber County is in the District of Utah).

<sup>21</sup> 270 F. Supp.2d 968 (W.D. Mich. 2003).

<sup>22</sup> *Id.* at 972, citing *Grimes v. Navigant Consulting, Inc.*, 185 F. Supp. 2d 906, 913 (N.D. Ill. 2002) (taking judicial notice of stock prices posted on a website); and *Cali v. E. Coast Aviation Sers. Ltd.*, 178 F. Supp. 2d 276, 287 (E.D.N.Y. 2001) (taking judicial notice of documents from the Federal Aviation Administration website).

<sup>23</sup> *Id.* at 973.

<sup>24</sup> 132 S.W.2d 223 (Ky. App. 2004).

the uniform resource locator (URL) of the website on which they were published. The Appellate Panel found the moving party “did not lay a foundation to demonstrate the accuracy and reliability of the statistical information.”<sup>25</sup> Because the source of the information was not specifically identified, the court found it was not “capable of accurate and ready determination by resort to sources whose accuracy cannot be questioned.”<sup>26</sup>

Finally, most courts have agreed that Wikipedia does not fall into the category of a source whose accuracy cannot be questioned. In *Cynergy Economics Inc. v. Ergonomic Partners, Inc.*,<sup>27</sup> plaintiff sold commercial handling products with a printed figure resembling the “Vitruvian Man”. Defendants were in the same business and used the same mark. Plaintiff sued alleging trademark infringement. In their motion to dismiss, defendants asked the court to take judicial notice of Leonardo da Vinci’s “Vitruvian Man”, the Wikipedia entry about “Vitruvian Man”, and a list of other websites using the same iconic figure. While the court said it would take judicial notice of da Vinci’s famed symbol, which is generally known, it would not take notice of the Wikipedia entry about the drawing because it did not come

from a source “whose accuracy cannot reasonably be questioned.” Similarly, in *Capcom Co. v. MKR Grp., Inc.*,<sup>28</sup> a trademark case, the court declined to take judicial notice of Wikipedia articles related to zombie movies and video games based on precedent that “Wikipedia may not be a reliable source of information.”<sup>29</sup>

Counsel would be wise to approach judicial notice of websites with some degree of caution. Government websites can generally be judicially noticed whereas, private websites, especially those premised on ad hoc user-edits, cannot. Even when requesting the court judicially notice a government website, however, remember to provide the court with information sufficient to show the source can be trusted. This may require providing the court with a webpage URL, binding or persuasive precedent demonstrating courts have judicially noticed the same or similar sources, or other evidence supporting that the information comes from a trustworthy source.

### III. Benefits of Judicial Notice

In law school, students devote substantial time to learning exceptions to the hearsay rule. Why? Because there are many and

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<sup>25</sup> *Id.* at 225.

<sup>26</sup> *Id.*

<sup>27</sup> 2008 WL 2064967 (E.D. Mo., May 14, 2008).

<sup>28</sup> 2008 WL 4661479 (N.D. Cal. Oct. 20, 2008).

<sup>29</sup> *Id.* at 4.

they are important. But also because it can be satisfying to respond to a well-timed objection with, “Ahh, but the exception applies here!” At its core, judicial notice is an evidentiary exception. Learning what it is an exception to is the key to unveiling its value.

First, judicial notice can be used as a substitute for the presentation of evidence. Generally, a party asserting a fact bears the burden of proving the fact with evidence. Evidence must be supported by authentication.<sup>30</sup> Judicial notice allows a party to skip this burden in certain instances.<sup>31</sup> If the appropriate opportunity presents itself, instead of spending time authenticating a document or laying foundation for a witness, consider whether judicial notice would apply.

Second, judicial notice is not merely one way to establish a fact. Many have argued it is the *most* efficient and powerful way to establish a fact. As Leonard M. Niehoff suggests in his article “Judicial Notice: The *Deus Ex Machina* of Evidence”:

[J]udicial notice is an aspiring star of unfulfilled potential. Its stage presence is

extremely powerful because a notice fact is a *conclusively established fact*. Successfully invoke judicial notice and *Voila!* The fact in question is not merely supported, it is settled.<sup>32</sup>

A judge and jury have a special relationship. In most courtroom settings, the judge is the first person who greets the jury in the morning, and dismisses them at the end of the day. The judge acts as the gatekeeper for evidence the jury can hear, sets the rules by which the trial is performed, provides instructions to the jury and the law on which to base their decisions, and in most instances, is the only non-biased party in the courtroom at any given time. Any opportunity to have the judge tell the jury they should “accept this fact as conclusively established” is a powerful one that should not be underestimated.

Third, judicial notice can be used as a workaround for the exclusion of evidence. Generally, courts cannot consider evidence outside the four corners of the complaint when deciding a Rule 12(b)(6) motion to

<sup>30</sup> FED. R. EVID. 901.

<sup>31</sup> See *Castillo-Villagra v. INS*, 972 F.2d 1017, 1026 (9th Cir. 1992) (Stating “[n]otice is a way to establish the existence of facts without evidence,” and holding that to deny aliens an opportunity to be heard on facts of which the Board of Immigration Appeals

took notice, that political group Sandinistas were out of power in Nicaragua and that any fear of persecution which aliens might have had could no longer be well-founded, denied aliens due process).

<sup>32</sup> 27 Litigation 31 (Fall 2000).

dismiss.<sup>33</sup> However, facts subject to judicial notice can be considered at this stage.<sup>34</sup> Use judicial notice as an opportunity to promote evidence that would otherwise not be seen or considered at the motion to dismiss stage.

#### IV. Learning from Misuse of Judicial Notice

Recent criticisms regarding misuse of judicial notice provide insights into strategies to employ and avoid. In *HsingChing Hsu v. Puma Biotechnology, Inc.*,<sup>35</sup> plaintiffs sued Puma Biotechnology alleging the company misled investors about a breast cancer medicine. In its motion to dismiss, defendant cited 26 exhibits for the court to consider using judicial notice and incorporation by reference, 14 of which were disputed by plaintiffs. The Central District of California's opinion is informative and offers valuable suggestions relating to proper use of judicial notice and potential pitfalls.

The opinion begins by explaining that while a court can typically only consider what is in the

complaint when deciding a motion to dismiss, there are a few exceptions to that rule. Judicial notice allows a party to skip this production.<sup>36</sup> Unfortunately, many attorneys misunderstand and misuse the doctrine:

Unfortunately, too many attorneys don't understand judicial notice. Some take judicial notice literally, as a command. "Hey! Judge! Look!" They use judicial notice to get a court's attention like a businessman who's running late and trying to whistle down a taxi on a crowded downtown street. But courts aren't cabbies, and judicial notice isn't appropriately used this way. Other attorneys ask courts to judicially notice things that don't need to be judicially noticed, like a controlling piece of law. Or attorneys ask courts to judicially notice things that aren't

<sup>33</sup> See *Hal Roach Studios, Inc. v. Richard Feiner & Co.* 896 F.2d 1542, 1555 n.19 (9th Cir. 1989) (holding judgment should not have been entered against party who was not named in amended complaint).

<sup>34</sup> *Mullis v. U.S. Bankr. Ct.*, 828 F.2d 1385, 1388 (9th Cir. 1987) (holding that bankruptcy judges are entitled to judicial immunity from civil liability for damages

arising from their judicial acts, and taking judicial notice of entries on the docket of underlying bankruptcy case as evidence that party had alternative remedies through appeal or extraordinary writ).

<sup>35</sup> 8:15-cv-00865 (C.D. Cal. Sept. 30, 2016).

<sup>36</sup> See *Castillo-Villagra*, 972 F.2d at 1026 ("Notice is a way to establish the existence of facts without evidence.").

appropriate for judicial notice, like emails between the parties' counsel. All of these misuses misconstrue the narrow doctrine.<sup>37</sup>

The court states that judicial notice and incorporation by reference at the motion to dismiss stage have "led to inappropriate efforts by defendants to expand the two doctrines" to end cases early.<sup>38</sup>

The court analyzed each of defendant's requests to take judicial notice. First, the court denied defendant's request to judicially notice market analyst reports, finding that the cases cited by defendant did not clarify the types of documents they addressed.<sup>39</sup> Second, the court denied defendant's request to judicially notice a printout from a website finding that the webpages defendant provided were captured in November 2015, while the relevant time period for the claims was July 2014 through May 2015.<sup>40</sup> Finally, the court denied defendant's request to judicially notice a printout from the website of Herceptin, in part, on the basis that defendant improperly attempted to

push the burden on a request for judicial notice onto plaintiffs.<sup>41</sup>

The lessons here are: (1) cite relevant authority to guide the court into taking judicial notice of evidence you request be judicially noticed; (2) use webpages captured at the time relevant to the claims, and; (3) recognize that the burden remains on the party requesting judicial notice to show that is trustworthy beyond question. Most noteworthy, though, is the court's emphasis on determining (a) whether judicial notice is appropriate and (b) whether it was necessary.

Judicial notice is a powerful tool, but a court's tolerance for its overuse – and especially its inappropriate use – is limited. This is especially true in a motion to dismiss, where "with too little to lose, too many defense attorneys are tempted by the puncher's chance offered by such a motion."<sup>42</sup> Resist the urge to request judicial notice of facts that cannot be noticed because they are easily disputed, or worse, that do not need to be noticed at all.

## V. Conclusion

Judicial notice remains an underappreciated and often misapplied doctrine of evidence. Litigators would be wise to better

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<sup>37</sup> *Puma Biotechnology*, slip op. at 7.

<sup>38</sup> *Id.* at 9.

<sup>39</sup> *Id.* at 11.

<sup>40</sup> *Id.* at 14.

<sup>41</sup> *Id.* at 13.

<sup>42</sup> *Id.* at 9.

understand the rule, its procedural application, and when to use it to their advantage. At the pre-trial stage, raise judicial notice in a motion to dismiss or motion for summary judgment to establish important facts conclusively. At trial, use judicial notice to make your point more efficiently and with greater emphasis. Understand too that the limits and boundaries of judicial notice are subject to constant reconsideration due to the increasing number of accurate sources. Finally, remember Abraham Lincoln and his almanac. In a world of litigation fraught with complex issues, sometimes the greatest victories are the simplest.