“Additional views” of Federal Judges
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Only Federal Circuit judges seem to file opinions labeled other than as dubitante, concurrence or dissent

On the Patent Laws, 3 Wheat. App. 13, 24 (1818), summarizes English and U.S. law of the time, but it is neither signed nor part of an opinion. It appears in the same volume as *Evans v. Eaton (I),* 16 U.S. (3 Wheat) 454 (1918), and seems to signal the outcome of *Evans v. Eaton (II),* 20 U.S. (7 Wheat.) 356 (1922). *Brenner v. Manson* 383 U.S. 519, 532-33 n. 20 (1966), credits Justice Story for that summary, but it was not cited in his *Eaton II* majority opinion.

The potential impact of appended remarks seems most pointedly raised by *In re Wella A.G.,* 858 F.2d 725 (1988) (*Wella II*). There, at 728, Judge Friedman, for reasons not apparent, seems to bristle at the TTAB's use of a suggestion drawn from Judge Nies' "additional views" in *In re Wella A.G.,* 787 F.2d 1549, 1554 (1986) (*Wella I*). Judge Archer, however, finds no fault, saying, "it is the merits of the new ground for rejection that are important, not its source." *Wella II,* 858 F.2d at 730 (concurring).

Consider also, *Xechem Intern., Inc. v. University of Tex. M.D. Anderson Cancer Center,* 382 F.3d 1324 (2004). There, Judge Newman, whose panel opinion denies a federal claim against a state university, also filed "additional views." *Id.* at 1332. Perhaps to soften the blow, she notes that the plaintiff's due process concerns had not yet been fully explored. She also seems to suggest, although Xechem did not attempt it, that relief might be available under *Ex parte Young,* 209 U.S. 123 (1908). *Id.*

Most recently, Judge Plager, writing for the panel in *Myspace, Inc. v. Graphon Corp.,* 2012 WL 716435 at *5 n.9 (Fed. Cir. 2012), cites with approval Judge Rader's "additional views" in *Classen Immunotherapies, Inc. v. Biogen IDEC,* 659 F.3d 1057, 1073. (2011). In one of the few instances where another joins an opinion so labeled, Judge Newman joins in Judge Rader's observations. Thus, at least three judges seem eager to exit the subject matter morass that engulfs the system. *Mayo Collaborative Services v. Prometheus Laboratories, Inc.,* 2012 WL 912952, however, makes that less apt to happen.

Curious about the frequency and function of such complements to concurring and dissenting opinions, I ran the query, <"additional views">, in Westlaw's JLR database. Finding nothing, I decided to investigate further, zeroing in on federal appellate reports.

The query, <"opinion with additional views"> <"judge, additional views">, in Westlaw's CTA database yielded twenty-seven relevant cases, including *EZ Dock v. Schafer Systems, Inc.,* 276 F.3d 1347 (Fed. Cir. 2002). There, Judge Linn filed a concurring opinion that begins, "While I concur…, I write to express my *additional views* on the experimental use doctrine…" *Id.* at 1354 (emphasis added).

The broader query <"judge/10 "additional views"> in the CTA database yielded twenty-eight additional citations. All but five were labeled as concurrences or dissents but contained language similar to Judge Linn's in *EZ Dock.* Twelve such opinions were scattered through cases from other circuits, and eleven were from the Federal Circuit.

Of thirty-two opinions bearing only the label, "additional views," all came from the Federal Circuit. Judge Nies, in *SSIH Equipment S.A. v. ITC,* 718 F.2d 365, 379 (Fed. Cir. 1983) was apparently the first to offer views other than in a concurrence or dissent. Because they were unlabeled, they were found only through citations in later opinions. *See, e.g., Akzo N.V. v. ITC,* 808 F.2d 1471, 1479 (Fed. Cir. 1986).

In all, Judge Nies penned such views eight times. Judge Newman has done so seven times (also joining three other such opinions); Judges Bissel, Gajarsa and Rader, four times each; and Judges Markey and Plager (also joining one), twice. Judges Mayer, Michel and Nichols did so once. Judge Smith joined Judge Bissel once but never filed "additional views" separately.

Plowing through thirty-two cases would serve little purpose, but several seem noteworthy. *See, e.g., Matsushita Elec. Indus. Co., Ltd. v. U.S.*, 750 F.2d 927, 936 n. 14 (Fed. Cir. 1984), "The additional views of Judge Nichols have not been incorporated into the majority opinion only because they read so well as separately stated." *Dawn Equip. Co. v. Kentucky Farms Inc.*, 140 F.3d 1009 (Fed. Cir. 1998), is also notable for generating three sets of "additional views" — Judge Plager's, at 1018, Judge Newman's, at 1022, and Judge Michel's, at 1023. Also, Judge Bissell's "additional views" in *Coplin v. U.S.*, 761 F.2d 688, 692 (Fed. Cir. 1985), are notable for revealing a fact urged to be relevant in *Harris v. U.S.*, 768 F.2d 1240 (11th Cir. 1985). The Eleventh Circuit ruled otherwise, however. *Id.* at 1243 (refusing, in the circumstances of that case, to accept "matters that were not presented to the lower court").

Although it contains no such opinion, *Toews v. U.S.*, 376 F.3d 1371 (Fed. Cir. 2004), is of particular interest. *Toews* rejects a suggestion that concurrences by two members of an en banc majority weakened the precedential value of an earlier case. *Id.* at 1380 n. 6 ("Even a cursory reading of the concurrence shows that there was no disagreement on any of the issues, as well as on the result."). Considerably diluting the significance of labels, *Toews* goes on to say, "Whether denominated as a 'concurrence' or as 'additional views,' an appellation used in other cases under similar circumstances, the holding of the case reflects the considered view of a substantial majority of the court." *Id.*

No overarching pattern was found. Yet it seems notable that twelve "additional views" were penned by judges who wrote majority opinions in the same cases. That might suggest reluctance to "concur" with one's own opinion. Still, Judge Lumbard in *Dawn Donut Co., Inc. v. Harts Food Stores, Inc.*, 267 F.2d 358, 367 (2d Cir. 1958), took care to *dissent within* his own opinion.

Airing "additional views" in especially relevant contexts, nevertheless seems useful. Why judges in other circuits eschew this option is unclear, but Judge Nies' innovation (perhaps inspired by Justice Story) merits consideration.

Note: Dubitante opinions are ignored here. *See, e.g., U.S. v. Root*, 585 F.3d 145, 160 n.9 (3d Cir. 2009) ("The term 'dubitante' 'is [used] to signify that [a judge] doubted the decision rendered.'") (quotation marks in original). Such opinions are not further discussed here because they are rarely used by Federal Circuit judges.