

LITIGATION INSIGHTS

MOORE'S FEDERAL PRACTICE—TOP THREE HIGHLIGHTS

The following three summaries are this month's Editor's Top Picks from the dozens of decisions added to Moore's Federal Practice and Procedure.

CLASS ACTIONS

Personal Jurisdiction

Mussat v. IQVIA, Inc.

953 F.3d 441, 2020 U.S. App. LEXIS 7560 (7th Cir. Mar. 11, 2020)

[Jump to full summary](#)

The Seventh Circuit holds that in a class action, the named representatives must be able to demonstrate either general or specific personal jurisdiction, but the unnamed class members are not required to do so.

DETERMINING FOREIGN LAW

Appellate Review of Determinations of Foreign Law

Bugliotti v. Republic of Argentina

952 F.3d 410, 2020 U.S. App. LEXIS 8331 (2d Cir. Mar. 17, 2020)

[Jump to full summary](#)

The Second Circuit holds that, although it has discretion under Federal Rule of Civil Procedure 44.1 to decide a question of foreign law in the first instance, it also has discretion to remand to the district court, which is better situated to implement Rule 44.1's procedures for determining foreign law.

SUBJECT MATTER JURISDICTION

Diversity and Alienage

Boal v. DePuy Orthopaedics, Inc. (In re DePuy Orthopaedics, Inc.

ASR Hip Implant Prods. Liab. Litig.)

953 F.3d 890, 2020 U.S. App. LEXIS 9630 (6th Cir. Mar. 27, 2020)

[Jump to full summary](#)

The Sixth Circuit holds that (1) diversity jurisdiction is lacking when citizens of foreign states are on both sides of an action, but domestic citizens are additional parties on only one side; and (2) an amendment to assert a federal claim could not preserve jurisdiction in such a case because 28 U.S.C. § 1653 permits only the correction of *defective* jurisdictional allegations, not assertion of a new basis for jurisdiction.



























▼ **View Moore's Federal Practice & Procedure in Lexis Advance**

Search Lexis Advance® Your Way With The **Explore Content** Feature

Now you can start your research even faster. Do you know what source or sources you want to search on Lexis Advance®? The **Explore Content** feature on Lexis Advance® shows you available sources so you can quickly choose, search, and view results for just the sources you want.

You'll find **Explore Content** below the Search Box on the Lexis Advance® home page. With Explore Content, you can select a specific source or group of sources by content type, jurisdiction, practice area, and more. The **Explore Content** pod on the Lexis Advance home page opens a realm of source-selection possibilities.

If you don't have a specific source in mind, you can browse or search across sources on the **Content Type**, **Federal**, **State**, **Practice Area or Industry**, or **International** tabs.

Explore Content						
Content Type	Federal	State	Practice Area or Industry	International	Find a Source	Find a Topic
Cases 			Secondary Materials 	News 		Public Records 
Statutes & Legislation 			Treatises & Practice Guides 	Dockets 		Private Databases
Statutory Codes 			Law Reviews & Journals 	Scientific 		Custom Pages 
Archived Codes 			Forms 	Company & Financial 		Practice Centers 
Administrative Codes & Regs 			Jury Instructions 	Directories 		Free Law360 Coronavirus News 
Administrative & Agency Materials 			Jury Verdicts & Settlements 	Intellectual Property 		
Arbitration Materials 			Expert Witness Materials 			
Briefs, Pleadings & Motions 			Legal News 			

Just click the blue hyperlink to choose the individual or group sources you need from the tab.

Advanced Search | Tips

Enter a source name, a citation, terms or shep: [citation] to Shepardize®.

Cases

All Federal | All States | All Trial Court Orders | All Tribal |
 All Reported Federal | All Reported States |

Federal Cases by Court

U.S. Supreme Court Cases, Lawyers' Edition | U.S. Court Military Commission Review |
 United States Courts of Appeals | Judicial Panel on Multidistrict Litigation Cases |
 United States Bankruptcy Courts | American Maritime Cases |
 Federal District Courts | US Court of Federal Claims, Claims Court & Court of Claims Cases |
 US Tax Court Cases | US Court of Appeals for Veterans Claims |
 US Court of International Trade Cases |

Federal Cases by Circuit

First Circuit | Fifth Circuit | Eighth Circuit | Eleventh Circuit |

You can search all sources listed on the tab or pick specific sources to search by checking the boxes to the left of the source name. The sources you select are shown to the left of the search button (🔍) just below the search box.

Enter a source name, a citation, terms or shep: [citation] to Shepardize®.

Narrow by: Massachusetts Federal District Courts x Maine Federal District Courts x

☐ Search all sources on this page ☒ Select sources to search

First Circuit

Appellate

☐ U.S. Supreme Court Cases, Lawyers' Edition | ☐ 1st Circuit - US Court of Appeals

District

☒ Maine Federal District Courts | ☐ Puerto Rico Federal District
☒ Massachusetts Federal District Courts | ☐ Rhode Island Federal District

Click the **Star** at the top of any page, to add that page to your list of favorites. Click the **Star** to the right of your selected source(s) to save as a favorite.

Advanced Search | Tips

Enter a source name, a citation, terms or shep: [citation] to Shepardize®.

1st Cir., U.S. Sup.Ct.; Cases: Maine Federal District Courts; 🔍

Narrow by: Maine Federal District Courts x Massachusetts Federal District Courts x

☐ Search all sources on this page ☒ Select sources to search

Clear ☆

If you select an individual source from **Explore Content**, an Advanced Search Form is provided to make your search experience even easier.

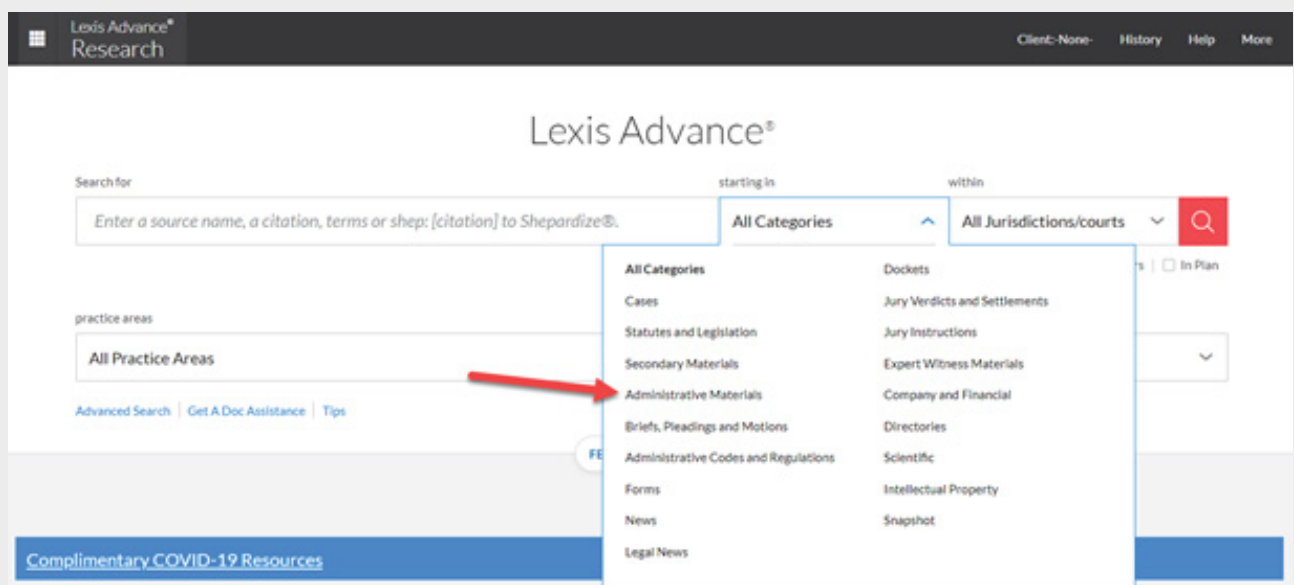
The tab you select persists between sessions. For example, if you use the **Federal** tab to navigate to sources now, the next time you open Lexis Advance the **Federal** tab is displayed.

As this is additional functionality to Lexis Advance, you still have the choice to either find specific sources to add them as filters or search all the **Lexis Advance** content. You can still find sources or build group sources as you have in the past—all browsing and source selection features are still available.

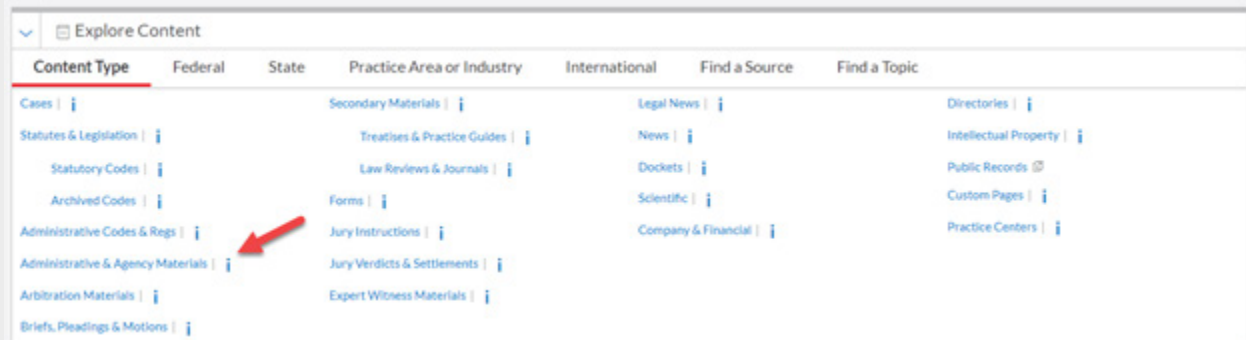
Explore Content gives you another choice for searching. Remember, the search box, with its jurisdiction pre-filters and a host of post-search filter options is still right at the top of Lexis Advance. You choose the way you want to search. It's your research; it's your choice.

Researching Administrative Materials on Lexis Advance

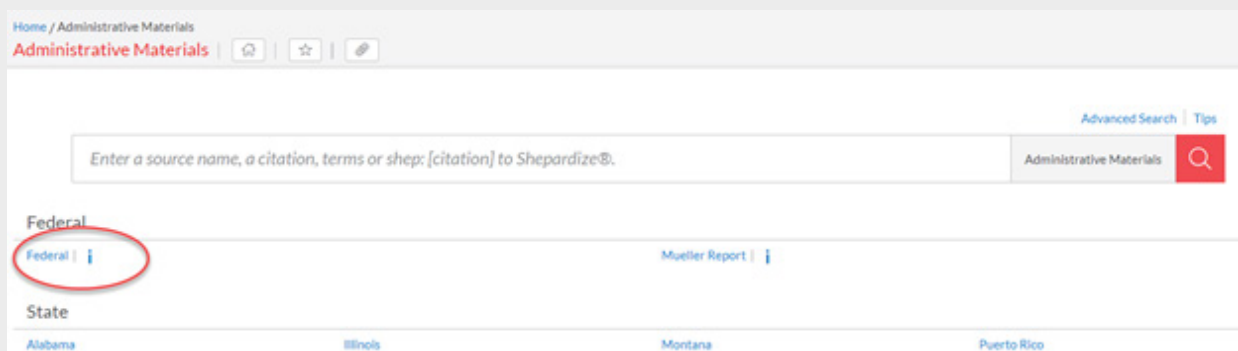
It's easy to search Administrative Materials on Lexis Advance! At the Lexis Advance landing page, you can select Administrative Materials as the primary category to display.



Alternatively, if you scroll down on the main landing page, the Explore Content box has some additional options. For example, if you select Administrative & Agency Materials from the list below:



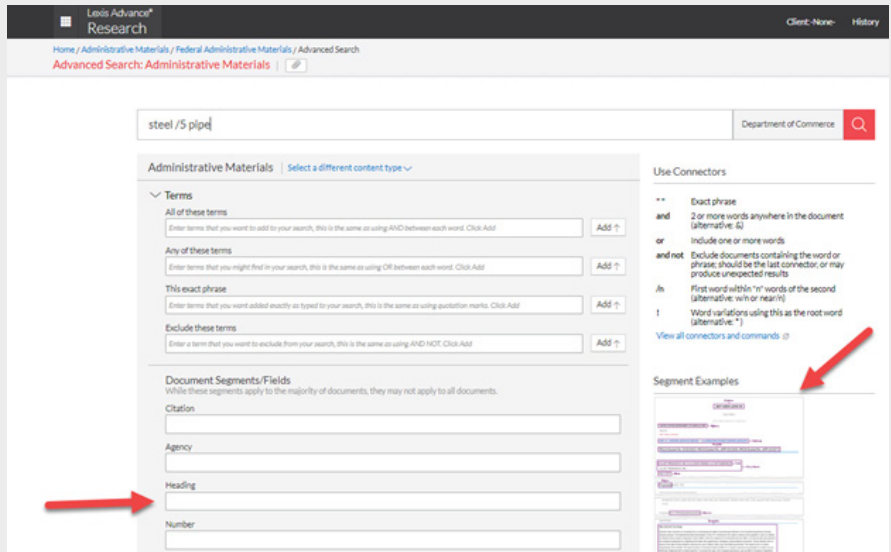
At the next screen, you can search in all Administrative Materials, or select Federal to drill down further:



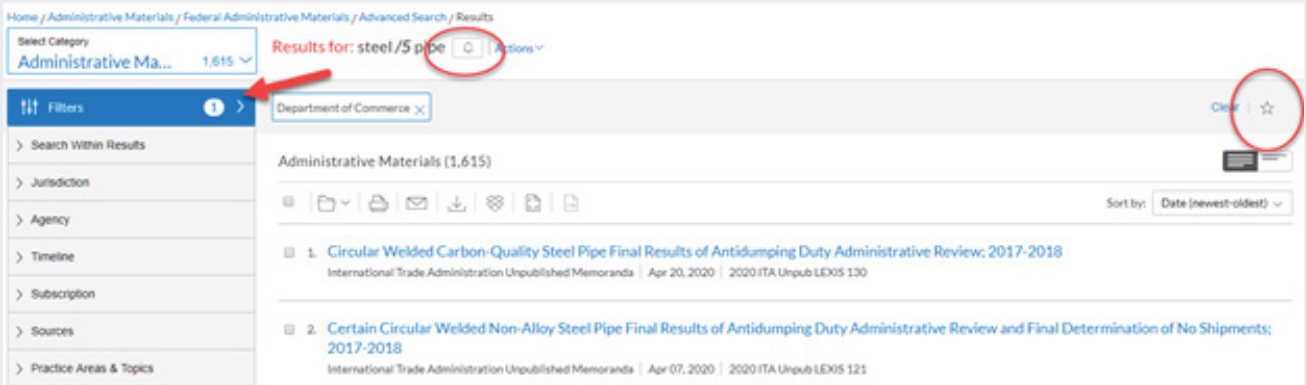
The next screen will list two separate categories: Executive Branch Agencies and Independent Agencies:

Executive Branch Agencies	
Department of Agriculture	Department of the Interior
Department of Commerce	Department of Justice
Department of Defense	Mueller Report
Department of Education	Department of Labor
Department of Energy	Department of Transportation
Department of Health & Human Services	Department of Treasury
Department of Homeland Security	Department of Veterans Affairs
Department of Housing & Urban Development	Executive Office of the President
Independent Agencies	
Administrative Conference of the United States	Federal Reserve Board
Board of Contract Appeals	Federal Trade Commission
Commodity Futures Trading Commission	Government Accountability Office
Congressional Accountability Office of Compliance	International Trade Commission Decisions
Consumer Financial Protection Bureau	Merit Systems Protection Board
Consumer Product Safety Commission	National Credit Union Administration
Environmental Protection Agency	National Labor Relations Board
Equal Employment Opportunity Commission	National Mediation Board
Farm Credit Administration	Nuclear Regulatory Commission
Federal Communications Commission	Occupational Safety & Health Review Commission
Federal Deposit Insurance Corporation	Office of Government Ethics
Federal Election Commission	Office of Personnel Management
Federal Housing Finance Agency	Pension Benefit Guaranty Corporation
Federal Labor Relations Authority	Securities & Exchange Commission
Federal Maritime Commission	Small Business Administration
Federal Mine Safety & Health Review Commission	Social Security Administration

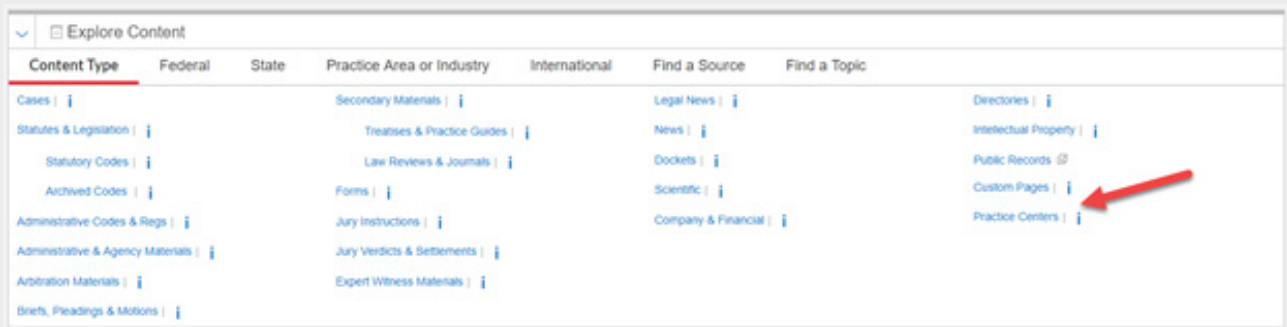
Clicking on an agency's name will take you to the Advanced Search page, where you can enter in your search terms or use the Segment Examples on the right-hand margin to find the appropriate segment/field to use in your search:



Once you are in your search results, other tools that are available include: filters to further narrow your results; the Alert feature to automatically update the search; and clicking on the star to add this source to your favorites:



Finally, another way to access Administrative Materials on Lexis Advance is through the Practice Page, which can be accessed through the Explore Content pod at the bottom of the landing page:



There are over 30 different Practice Areas available, including International Trade & Business:

Practice Area or Industry		
Antitrust / Competition / Trade Regulations	Energy & Utilities	Manufacturing
Banking & Financial Services	Entertainment & Sports	Military Justice
Bankruptcy	Environmental	Native American
Commercial	Family Law	Offices of General Counsel
Communications	Federal Civil Litigation	Patent
Construction	Government Contracts	Product Liability
Copyright	Healthcare	Real Property
Corporate Counsel	Immigration	Securities
Corporate and M&A	Insurance	Trademark
Criminal Law	International Trade & Business	Transportation
Data Privacy & Cyberlaw	Labor & Employment	Veterans Law
Employee Benefits & Executive Compensation	Life Sciences/Pharmaceutical	Workers' Compensation

Once you are in a specific Practice Page, the available Administrative Sources for that page are listed under the Top Sources pod:

Home / Lexis Advance® Practice Centers / International Trade & Business

International Trade & Business

Search for: starting in: within:

Enter a source name, a citation, terms or shep: [citation] to Shepardize®.

All Categories All Jurisdictions/courts

Narrow by:

Remember Filters ☐

Clear ☆

Advanced Search | Tips

FEWER OPTIONS

Top Sources

- Secondary Sources
- Cases, Statutes, Regulations and Treaties
- Administrative Sources
- Department of Commerce Notices
- DOC ITA Unpublished Decisions
- DOC ITA Federal Register Notices
- GATT Panel & WTO Dispute Settlement Reports
- International Trade Commission Decisions
- International Trade Commission Administrative Law Judge Decisions
- U.S. Customs & Border Protection Bulletins & Decisions
- U.S. Customs & Border Protection Rulings - HQ & NY Series
- NAPTA Panel Review Decisions

Law360 News

Law360 International Trade

DOJ Says Pair Tried To Help Iran Military Buy Oil Tanker

Fi, 01 May 2020 17:37:49

An Update On CFR/IS During The Pandemic

Fi, 01 May 2020 17:33:43

Trump Moves To Shield US Power Grid From Foreign Reach

Fi, 01 May 2020 17:27:32

Trade Court Tosses Challenge To Russian Steel Duties

Fi, 01 May 2020 16:09:39

Schein Settles Pair Of Investor Suits Over Price-Fixing Claims

Fi, 01 May 2020 11:36:52

View all International Business Law News


SHEPARD'S CASE CARD

Candace Kelly, Regional Solutions Consultant

Have you ever been perusing through your search results and wondered why a case received that Shepard's symbol? With Shepard's Case Card, you no longer need to wonder because the answer now appears within your search results.

Shepard's Case Card appears in the Graphical View of search results for cases. It is found to the right of the case name and is labeled "Reason for Shepard's Signal." This case card will tell you:

1 The reason for the Shepard's signal, i.e. if it is red, why it is red, in a pop out box on your search screen. This pop out box contains the treatment statement, the case that gave this treatment, the date, the jurisdiction, and a short quote from that treatment.



1. Reason for Shepard's signal

2. Reason for Shepard's Signal™ Number of citing decisions

3. Breakdown of Citing Decisions

4. Most Cited Headnote

5. Link to full Shepard's report

Reason for Shepard's Signal™

Overruled in part by...

2,337 Citing Decisions

Warning - 1
Questioned - 21
Caution - 264
Positive - 366
Neutral - 2,041

Most Cited Headnote:
Adjustments & Enhancements, Armed Career Criminals

Reason for Shepard's Signal™

Overruled in part by...

38 Citing Decisions

Caution - 1
Positive - 7
Neutral - 34

Most Cited Headnote:
Murder, Depraved Heart

Overruled in part by: U.S. | April 17, 2018
Sessions v. Dimaya 138 S. Ct. 1204, 200 L. Ed. 2d 549, 2018 U.S. LEXIS 2497, 86 U.S.L.W. 4189, 27 Fla. L. Weekly Fed. S 161, 2018 WL 1800371

We readily accept a part of that argument. This Court for several years looked to ACCA's listed crimes for help in giving the residual clause meaning. See, e.g., *Begay v. United States*, 553 U.S. 137, 142, 128 S. Ct. 1581, 170 L. Ed. 2d 490 (2008); *James*, 550 U.S. at 203, 127 S. Ct. 1586, 167 L. Ed. 2d 532. But to no avail. As the Government relates (and Johnson explained), the enumerated crimes were themselves too varied to provide such assistance. See Brief for Petitioner 38-40; 576 U.S. at ___, 135 S. Ct. 2551, 192 L. Ed. 2d 569, 582. Trying to reconcile them with each other, and then compare them to whatever unlisted crime was at issue, drove many a judge a little batty. And more to the point, the endeavor failed to bring any certainty to the residual clause's application. See Brief for Petitioner 38-40.

for which the **drunk driver** is convicted (**driving** under the influence) need not be a **drunk driver** may very well **drink** on purpose. But this Court has said that, unlike the ex which the **drunk driver** is convicted (**driving** under the influence) need not be purposeful a, 543 U.S., at 11...

Shepardize®

2. How many citing decisions there are for this case.
3. A breakdown of how many of these citing decisions are warning, questioned, caution, positive, and/or neutral, including a pie chart depiction of these results. Clicking on any of the Shepard's treatments will take you directly to that portion of the Shepard's report.
4. The most cited headnote in the case, if it applies. This pop out includes the headnote number in the case, the topics covered in that headnote, how many total citations there are to that headnote, and a breakdown of the citation numbers that are either warning, questioned, caution, and positive.

tes | Apr 16, 2008 | 553 U.S. 137

U.S.C.S. § 924(e)(2)(B)(ii), defendant's prior DUIs under N.M. Stat. Ann. § 66-8-102, which
 red from a prior record of violent and aggressive intentional crimes such as those listed in
 ying § 924(e)(2)(B)(ii) to defendant's weapons conviction was reversed.


HN2 - Adjustments & Enhancements, Armed Career Criminals 595 Citations Q 2 ▲ 43 ◆ 55

Federal law prohibits a previously convicted felon from possessing a firearm. 18 U.S.C.S. § 922(g)(1). A related provision provides for a prison term of up to 10 years for an ordinary offender. 18 U.S.C.S. § 924(a)(2). The Armed Career Criminal Act imposes a more stringent 15-year mandatory minimum sentence on an offender who has three prior convictions for a violent felony or a serious drug offense. 18 U.S.C.S. § 924(e)(1).

Reason for Shepard's Signal™

■ Overruled in part by...

2,337 Citing Decisions



Warning - 1
 Questioned - 21
 Caution - 264
 Positive - 366
 Neutral - 2,041

Most Cited Headnote:
 Adjustments & Enhancements, Armed Career Criminals

[Shepardize®](#)

5. A Shepardize button that links you to the full Shepard's report you are familiar with. With Shepard's Case Card you will save time while retrieving the best results possible.

CLASS ACTIONS

Personal Jurisdiction

Mussat v. IQVIA, Inc.

953 F.3d 441, 2020 U.S. App. LEXIS 7560 (7th Cir. Mar. 11, 2020)

The Seventh Circuit holds that in a class action, the named representatives must be able to demonstrate either general or specific personal jurisdiction, but the unnamed class members are not required to do so.

▼ **Background.** This was an action under the Telephone Consumer Protection Act (TCPA) [47 U.S.C. § 227]. An Illinois doctor received two unsolicited faxes from the defendant, a Delaware corporation with its headquarters in Pennsylvania. These faxes failed to include the opt-out notice required by the statute. The doctor brought a putative class action in the Northern District of Illinois on behalf of himself and all persons in the country who had received similar junk faxes from the defendant in the four previous years.

The defendant then moved to strike the class definition, arguing that the district court did not have personal jurisdiction over the non-Illinois members of the proposed nationwide class. The district court granted the motion, reasoning that under the Supreme Court's decision in *Bristol-Myers Squibb Co. v. Superior Court*, not just the named plaintiff, but also the unnamed members of the class, had to show minimum contacts between the defendant and the forum state [*Bristol-Myers Squibb Co. v. Superior Court*, 582 U.S. —, 137 S. Ct. 1773, 198 L. Ed. 2d 395 (2017)]. Under this analysis, the district court concluded that it had no jurisdiction over the claims of parties who were harmed outside Illinois.

▼ **Appeal Under Rule 23(f).** The Seventh Circuit had granted the plaintiff's petition for interlocutory appeal under Rule 23(f), which permits an appeal from an order granting or denying class-action certification. The defendant argued that the district court's order striking the class definition under Rule 12 was not an order granting or denying class certification, and therefore the appeal was improper. The Seventh Circuit, however, noted that the Supreme Court has found that an order striking class allegations is functionally equivalent to an order denying class certification and therefore is appealable under Rule 23(f) [*Microsoft Corp. v. Baker*, 581 U.S. —, 137 S. Ct. 1702, 198 L. Ed. 2d 132 (2017)], and the Seventh Circuit had reached a similar result in an earlier case [*In re Bemis Co., Inc.*, 279 F.3d 419, 421 (7th Cir. 2002)].

The Seventh Circuit concluded that Rule 23(f) "grants the courts of appeals jurisdiction to hear interlocutory appeals of orders that expressly or as a functional matter resolve the question of class certification one way or the other." Because the district court's order striking the nationwide class was the functional equivalent of an order denying certification of the proposed class, the Seventh Circuit had jurisdiction over the appeal under Rule 23(f).

▼ **Personal Jurisdiction.** Before the Supreme Court's decision in *Bristol-Myers*, the Seventh Circuit said, there was a general consensus that due process principles did not prohibit a plaintiff from seeking to represent a nationwide class in federal court, even if the federal court did not have general jurisdiction over the defendant. For cases relying on specific jurisdiction over the defendant, minimum contacts, purposeful availment, and relation to the claim were assessed only with respect to the named plaintiffs. Even if the links between the defendant and an out-of-state unnamed class member were confined to that person's home state, that did not destroy personal jurisdiction. Once certified, the class as a whole was the litigating entity, and its affiliation with a forum depended only on the named plaintiffs. The Supreme Court regularly entertained cases involving nationwide classes in which the plaintiff relied on specific, rather than general, personal jurisdiction in the trial court, without any comment about the supposed jurisdictional problem. Accordingly, the defendant's claim that class actions have always required minimum contacts between all class members and the forum was nothing more than "ipse dixit."

The district court had held that under *Bristol-Myers Squibb Co. v. Superior Court*, the unnamed members of the class had to show minimum contacts between the defendant and the forum state. That case did not involve a certified class action. Six hundred plaintiffs, most of whom were not California residents, filed a lawsuit in California state court against Bristol-Myers Squibb, asserting state-law claims based on injuries they suffered from taking Plavix, a blood thinning drug. Bristol-Myers sold Plavix in California, but it had no other contacts with the state. The plaintiffs brought their case as a coordinated mass action, a device authorized under section 404 of the California Civil Procedure Code. Somewhat like the multi-district litigation process in federal court, the California statute permits consolidation of individual cases, brought by individual plaintiffs, when the necessary findings are made. The Supreme Court concluded that the California courts did not have jurisdiction over Bristol-Myers with respect to the claims of the plaintiffs who were not California residents and had not purchased, used, or been injured by Plavix in California [*Bristol-Myers Squibb Co. v. Superior Court*, 582 U.S. —, 137 S. Ct. 1773, 198 L. Ed. 2d 395 (2017)].

Bristol-Myers neither reached nor resolved the question whether, in a Rule 23 class action, each unnamed member of the class must separately establish specific personal jurisdiction over a defendant. The coordinated mass action in that case did not involve any absentee litigants—all the plaintiffs were named parties. In a Rule 23 class action, by contrast, the lead plaintiffs earn the right to represent the interests of absent class members by satisfying all four criteria of Rule 23(a) and one branch of Rule 23(b). The absent class members are not full parties to the case for many purposes. Generally speaking, the label “party” does not indicate an absolute characteristic, but rather a conclusion about the applicability of various procedural rules that may differ based on context. For example, absent class members are not considered parties for assessing whether the requirement of diverse citizenship under 28 U.S.C. § 1332 has been met. The Seventh Circuit concluded that there was “no reason why personal jurisdiction should be treated any differently from subject-matter jurisdiction and venue: the named representatives must be able to demonstrate either general or specific personal jurisdiction, but the unnamed class members are not required to do so.”

The Seventh Circuit noted that Rule 23 supports a focus on the named representative for purposes of personal jurisdiction. Moreover, nothing in the federal rules discourages nationwide class actions, even in a forum in which the defendant is not subject to general jurisdiction. Finally, the Seventh Circuit noted that the Supreme Court in *Bristol-Myers* expressly reserved the question whether its holding extended to the federal courts at all. Considering the personal jurisdiction question in the light of class-action law, the Seventh Circuit concluded that this was an area in which absent class members are more like nonparties, and thus there would be no need to locate each of them and conduct a separate personal-jurisdiction analysis of their claims.

DETERMINING FOREIGN LAW

Appellate Review of Determinations of Foreign Law

Bugliotti v. Republic of Argentina

952 F.3d 410, 2020 U.S. App. LEXIS 8331 (2d Cir. Mar. 17, 2020)

The Second Circuit holds that, although it has discretion under Federal Rule of Civil Procedure 44.1 to decide a question of foreign law in the first instance, it also has discretion to remand to the district court, which is better situated to implement Rule 44.1’s procedures for determining foreign law.

▼ **Background.** Plaintiffs, subscribers to the Republic of Argentina’s 1994 sovereign debt offering, enrolled their bonds in a governmental tax-credit program just prior to Argentina’s 2001 default on the bonds. Pursuant to that program, plaintiffs placed their bonds into trust and received certificates representing principal and interest amounts, respectively. Plaintiffs held approximately \$36 million worth of those bonds bearing maturity dates in 2012 and 2017, but prior to Argentina’s default, plaintiffs entered their bonds into a complex governmental tax-credit program that allowed bondholders to obtain tax credits in place of interest payments on their bonds. In short, the bondholders would place their bonds into trust and would receive two types of certificates: Tax Credit Certificates (or CCFs, as abbreviated in the original Spanish), each corresponding to the bonds’ outstanding interest payments, and Custody Certificates (or CCs), which corresponded to the bonds’ outstanding principal. Once in possession of those certificates, the bondholders could redeem the CCFs as each interest payment came due for a credit against their tax obligations.

Plaintiffs redeemed each of the interest-based certificates for a corresponding tax credit; meanwhile, although the bonds all reached their respective maturity dates, Argentina continued to withhold the principal. After plaintiffs' 2012 bonds reached maturity and Argentina did not repay their full principal amount, one plaintiff, Euclides Bugliotti, brought a so-called amparo proceeding in Argentine court seeking a declaration that Argentina's postponement of its payment obligations was unconstitutional under Argentine law. In that lawsuit, Bugliotti sought an order "suspending the effectiveness" of any regulation that suspends or restricts the right to collect on the CCs. That lawsuit was ongoing.

Plaintiffs' remaining bonds matured in 2017 and Argentina again failed to repay the principal due. Plaintiffs then filed this lawsuit in the U.S. District Court for the Southern District of New York, seeking a money judgment in the amount of unpaid principal and post-maturity interest and an injunction enforcing the bonds' *pari passu* clause. The district court dismissed the complaint on multiple alternative grounds, including foreign sovereign immunity and failure to state a claim. Central to each of those grounds for dismissal was the district court's holding that plaintiffs no longer "owned" the bonds themselves as a matter of Argentine trust law. Plaintiffs appealed.

- ▼ **Issue on Appeal.** The Second Circuit explained that the "decisive question" on appeal was not whether plaintiffs "own" the bonds; instead, it was whether plaintiffs retain the specific right to sue to enforce them. Because answering that question may involve an inquiry into Argentine law that the district court did not conduct, the appellate court remanded so that the district court could do so in the first instance.
- ▼ **Determination of Foreign Law.** The Second Circuit explained that questions of foreign law are decided in the federal courts pursuant to Federal Rule of Civil Procedure 44.1, which provides that in determining foreign law, "the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence." The purpose of Rule 44.1 is to make the process of determining foreign law identical with the method of ascertaining domestic law to the extent that it is possible to do so. Rule 44.1 preserves a district court's freedom to employ fact-like procedures, including by taking written and oral testimony, as sometimes may be required to adjudicate foreign legal questions. Rule 44.1 thus simultaneously requires law-like appellate review of foreign-law determinations, while maintaining a district court's flexibility to tailor fact-like methods of inquiry to the needs of the case.

Pursuant to Rule 44.1, an appellate court has the same discretion to look beyond the record and the parties' submissions as the district courts. Furthermore, an appellate court may even determine foreign law in the first instance in appropriate circumstances. However, because these legal determinations frequently call for fact-like procedures that a district court is better situated to implement, considerations of judicial economy often lead an appellate court to remand rather than review a foreign legal question with which the district court did not, or did not fully, engage. Because that is what happened in this case, the Second Circuit remanded to allow the district court to conduct the necessary inquiry into Argentine law in the first instance. In doing so, the Second Circuit reminded the district court that it would not be limited to the materials submitted by the parties in connection with Argentina's motion to dismiss. Rather, the district court must avoid a determination that rests "simply on the basis of an inadequate submission by one party." The district court's task, in other words, would be to arrive at an independent interpretation of the governing Argentine law, aided by the most persuasive or authoritative materials available to it. The Second Circuit noted, in that regard, that a decision by an Argentine court as to the meaning of the relevant Argentine laws may be preferable to any of the materials proffered thus far in the litigation. In the absence of an authoritative answer to a foreign legal question, however, a district court's obligation to reach an independent determination remains.
- ▼ **Abstention Was Improper.** The district court also concluded, in the alternative, that dismissal was appropriate under the doctrine of "adjudicative" international comity, which permits abstention in deference to parallel foreign proceedings in exceptional circumstances. The task of a district court evaluating a request for dismissal based on a parallel foreign proceeding is to determine whether exceptional circumstances exist that justify the surrender of that jurisdiction. The exceptional circumstances that would support such a surrender must raise considerations that are not generally present as a result of parallel litigation. Thus, even to the extent the Argentine amparo proceeding was parallel to this case, abstention on the grounds of adjudicative international comity would be appropriate only because of circumstances not generally present as a result of parallel litigation. The district court cited "the importance of the Tax Credit Program to the Republic" and Argentina's "greater interest" in the litigation, considerations that would be present in virtually every case implicating an important foreign governmental program.

The Second Circuit has singled out only one type of foreign governmental program—namely, foreign bankruptcy regimes—as categorically sufficient to trigger comity-based abstention. Because the district court did not identify any exceptional circumstances that would support abstention in this case, its decision to abstain was an abuse of discretion.

- ▼ **Conclusion.** Therefore, the Second Circuit ruled that the district court erred in dismissing the action, because the issue was not whether the plaintiffs owned the bonds, but whether they could sue to enforce them, and the district court was better situated to decide the relevant question of Argentine law under Rule 44.1.

SUBJECT MATTER JURISDICTION

Diversity and Alienage

Boal v. DePuy Orthopaedics, Inc. (In re DePuy Orthopaedics, Inc.

ASR Hip Implant Prods. Liab. Litig.)

953 F.3d 890, 2020 U.S. App. LEXIS 9630 (6th Cir. Mar. 27, 2020)

The Sixth Circuit holds that (1) diversity jurisdiction is lacking when citizens of foreign states are on both sides of an action, but domestic citizens are additional parties on only one side; and (2) an amendment to assert a federal claim could not preserve jurisdiction in such a case because 28 U.S.C. § 1653 permits only the correction of *defective* jurisdictional allegations, not assertion of a new basis for jurisdiction.

- ▼ **Facts and Procedural Background.** In 2010, several thousand product liability actions against multiple defendants concerning a medical device used in hip replacement surgeries were consolidated for multidistrict litigation (MDL) treatment [see 28 U.S.C. § 1407] in the Northern District of Ohio. As permitted by a case management order of the MDL court, additional plaintiffs filed “short form” complaints concerning hip surgeries that had occurred in Spain. The complaints did not allege a basis for subject matter jurisdiction, but the accompanying civil cover sheets listed diversity jurisdiction under 28 U.S.C. § 1332. The complaints also stated that the plaintiffs were Spanish residents and either Spanish or British citizens, but did not allege the citizenship of the defendants, one of which was both incorporated and had its principal place of business abroad. No party objected to subject matter jurisdiction; instead, more than eight years after commencement, the defendants sought and obtained a dismissal on the basis of forum non conveniens (FNC) because the district court agreed that Spain provided the better forum. In conjunction, the defendants agreed both to stipulate to the jurisdiction of Spanish courts, and to waive any limitations defense in those courts. When the plaintiffs appealed the FNC dismissal, the Sixth Circuit sua sponte raised the issue of subject matter jurisdiction and ordered additional briefing by the parties.
- ▼ **Lack of Subject Matter Jurisdiction Is Fundamental.** The Sixth Circuit first noted that despite the eight years of litigation, whether the MDL court had subject matter jurisdiction was not a mere “technicality” as the plaintiffs alleged. Instead, it was a fundamental requirement, because the exercise of judicial power without any statutory basis is a violation of the separation of powers. Accordingly, “the first thing—not the last—that any potential federal plaintiff should ask itself is whether a federal court would have jurisdiction over a federal suit.”
- ▼ **Statutory Basis for Diversity and Alienage Jurisdiction.** Although Article III calls for only minimal diversity as a constitutional prerequisite, the statutory requirements for diversity jurisdiction are more onerous. Two provisions of the statute mention cases in which aliens are parties, providing jurisdiction when the amount in controversy requirement is met, and the action is (1) between “citizens of a State and citizens or subjects of a foreign state,” or (2) between “citizens of different States and in which citizens or subjects of a foreign state are additional parties” [28 U.S.C. § 1332(a)(2), (3)].

Under circuit precedent, the first of these provisions requires complete diversity, so that jurisdiction is permitted only when domestic citizens are on one side of the action, and aliens only are on the other [see *U.S. Motors v. Gen. Motors Europe*, 551 F.3d 420, 422–424 (6th Cir. 2008); *Peninsula Asset Mgmt. (Cayman) Ltd. v. Hankook Tire Co. Ltd.*, 509 F.3d 271, 272–273 (6th Cir. 2007)]. The second permits joinder of aliens as additional parties on either or both sides of an action between diverse domestic citizens.

- ▼ **Application of Rules Barred Subject Matter Jurisdiction.** As previously noted, the plaintiffs in this case were all aliens, and one of the defendants was also an alien, because it was both incorporated and had its principal place of business abroad. Aliens were therefore on both sides of the action, but domestic citizens were additional parties on only the defendant's side. The Sixth Circuit concluded:

On these facts, the plaintiffs cannot satisfy § 1332(a)(2) or (a)(3). Section 1332(a)(2) will not work because citizens of foreign states fall on both sides of the dispute and so complete diversity is lacking. . . . And § 1332(a)(3) will not work because citizens of different states do not fall on both sides.

Neither alienage provision of the diversity statute applied, so subject matter jurisdiction was barred and the district court erred in exercising jurisdiction and dismissing the actions on other grounds.

- ▼ **Amended Complaint Not Available.** Although the plaintiffs belatedly conceded that subject matter jurisdiction under the diversity statute was barred, they argued that federal jurisdiction could be preserved by an amended complaint that asserted a warranty claim under the federal Magnuson Moss Warranty Act. The Sixth Circuit rejected that argument, noting that the provision of the Judicial Code permitting jurisdictional amendments on appeal [see 28 U.S.C. § 1653] permits only the correction of defective jurisdictional allegations, not the assertion of a new basis for federal jurisdiction that is not supported by the original allegations of the complaint. Because the proposed amendments were to create jurisdiction, not confirm it, they were not within the coverage of the statute.

Sinochem Rule Inapplicable. Finally, the defendants also objected to a jurisdictional dismissal, apparently to preserve any collateral consequences of the lower court's FNC dismissal as to the adequacy and preferability of the Spanish forum. The defendants therefore noted that *Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.* affirmed an FNC dismissal despite an unresolved issue of subject matter jurisdiction [*Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 127 S. Ct. 1184, 167 L. Ed. 2d 15 (2007)]. As the Sixth Circuit noted, however, *Sinochem* stands for the rule that when subject matter jurisdiction is dubious, but a preliminary nonmerits issue can be easily resolved against the party asserting jurisdiction, the court may rely on the latter to dismiss. In this case, the rule did not apply because the absence of subject matter jurisdiction was apparent from the outset. In addition, *Sinochem* left open the question whether a defendant's concessions in conjunction with an FNC dismissal could be valid when subject matter jurisdiction was never decided. To avoid that inquiry, the Sixth Circuit opted for a jurisdictional dismissal.

- ▼ **Disposition.** The Sixth Circuit vacated the dismissal on FNC grounds and remanded for further proceedings consistent with its opinion. Though the court of appeals did not expressly direct a dismissal for lack of subject matter jurisdiction, it is difficult to see how any other disposition could be consistent with its opinion.