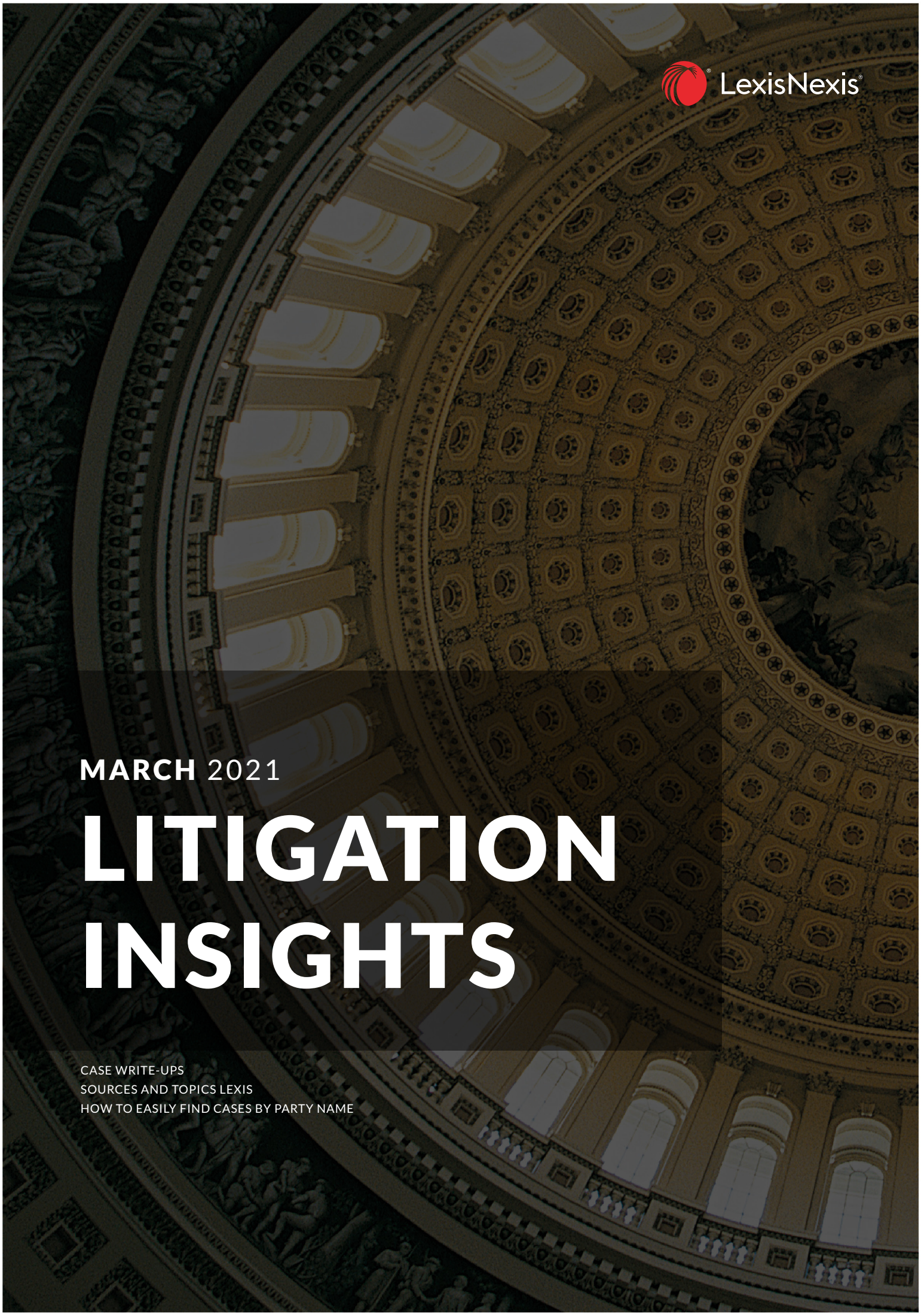

MARCH 2021

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MOORE'S FEDERAL PRACTICE—TOP THREE HIGHLIGHTS

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Sources and Topics

Candace Kelly, Regional Solutions Consultant

What happens when research needs to be done in a practice area that you know nothing about? The research task can seem like finding a needle in a haystack! Lexis has a simple solution that can help with this issue: "Sources" and "Topics." Both features can be found within the "Explore Content" box on the Lexis home page. Let's dive a bit deeper in to how each can help with your research!

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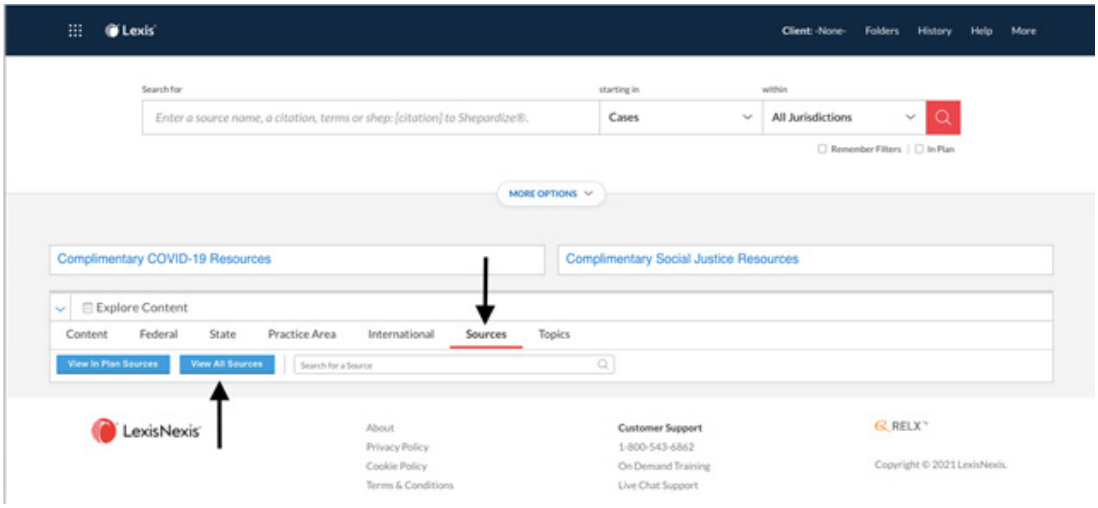

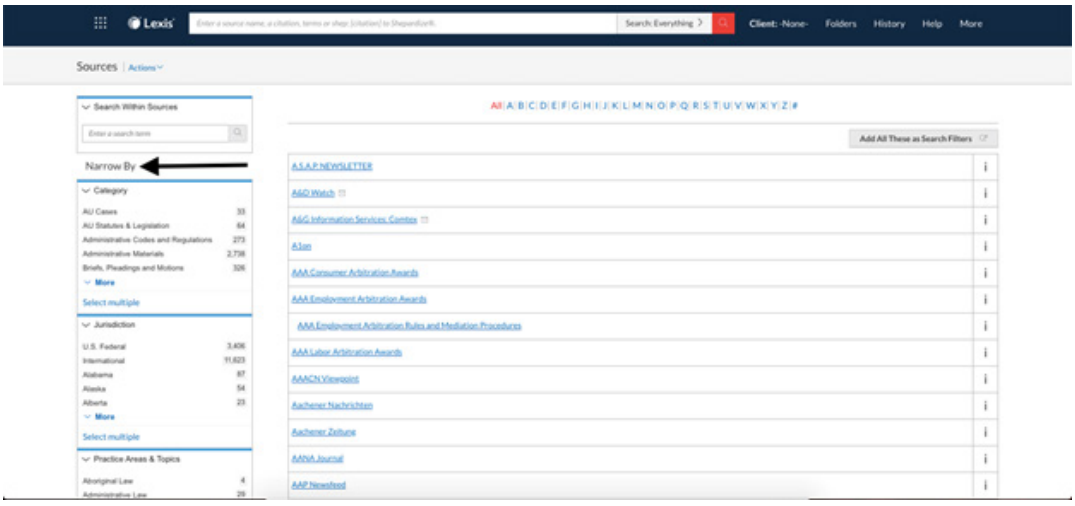

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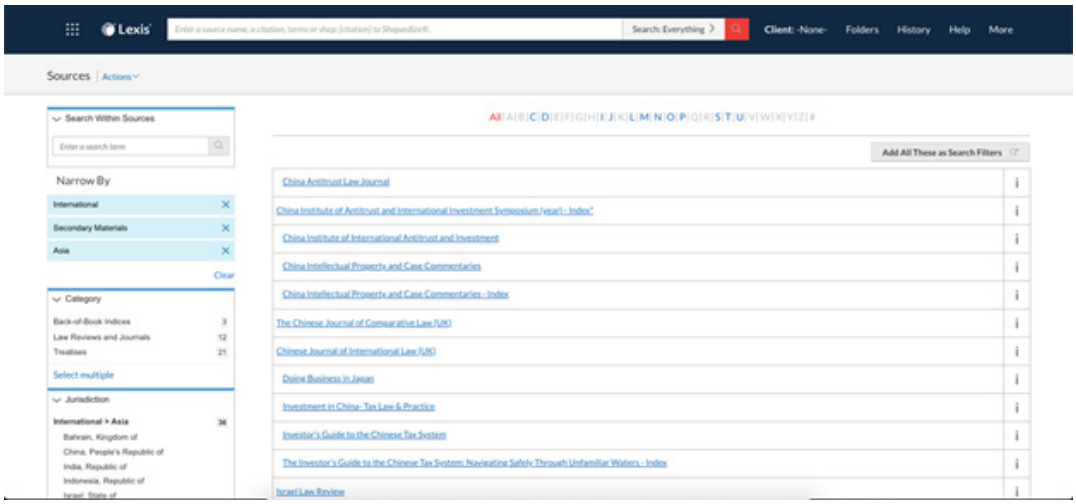

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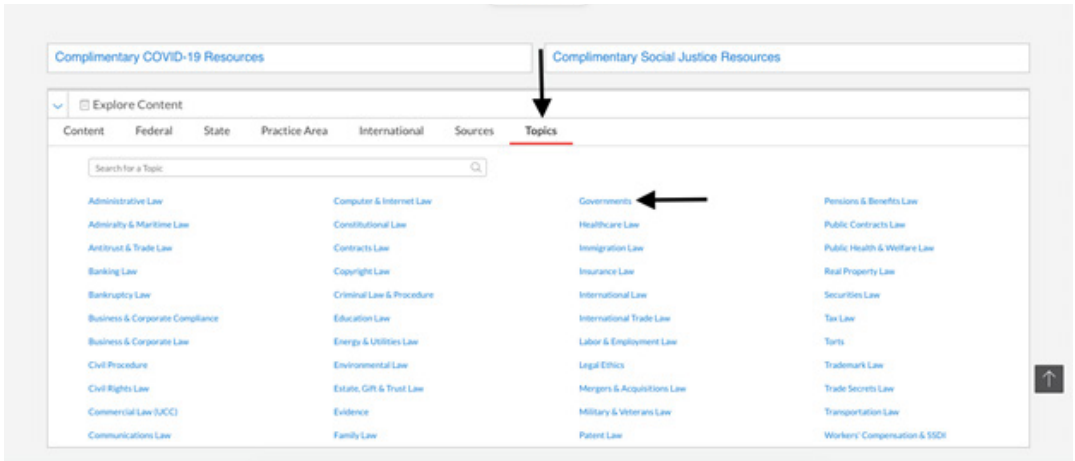

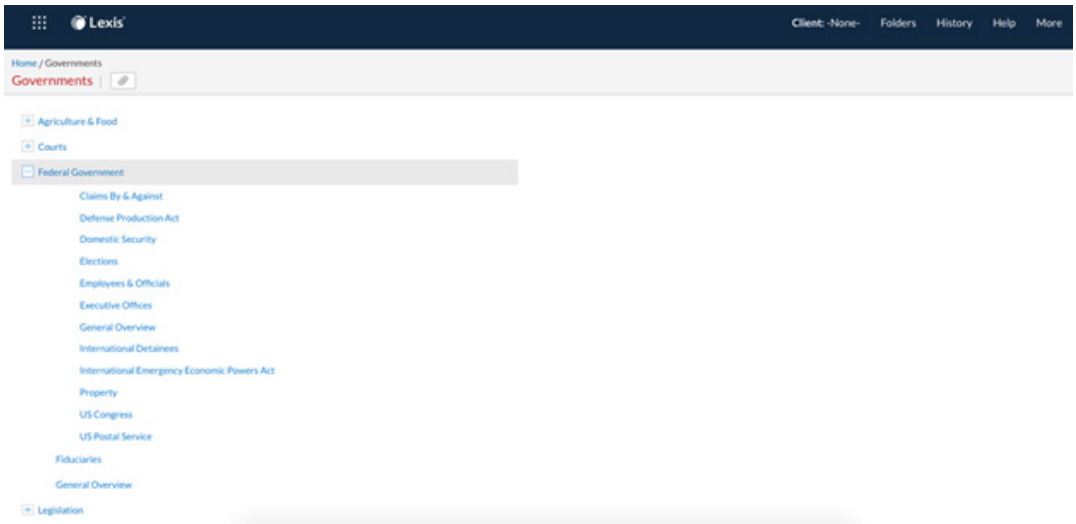

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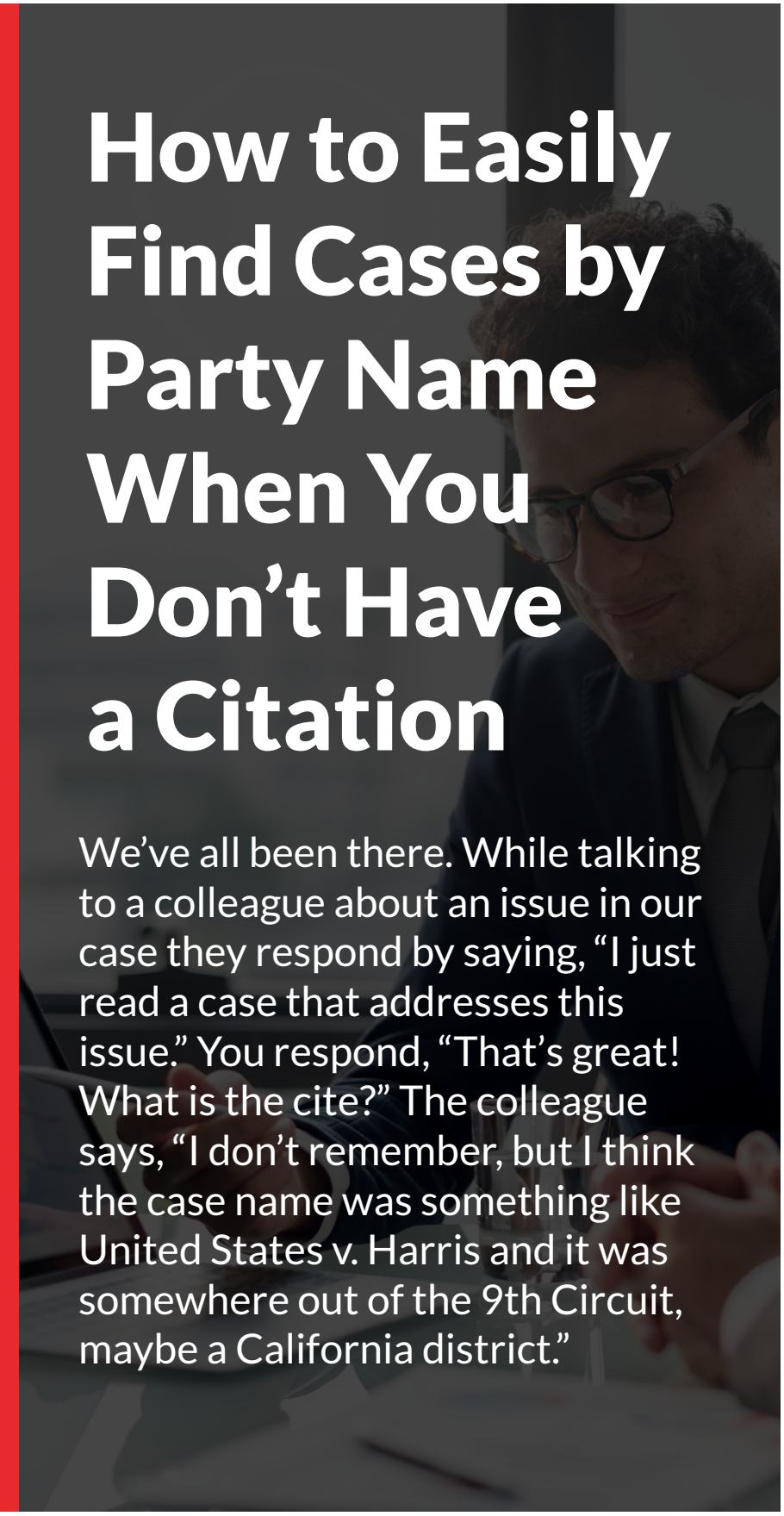

How to Easily Find Cases by Party Name When You Don't Have a Citation

We've all been there. While talking to a colleague about an issue in our case they respond by saying, "I just read a case that addresses this issue." You respond, "That's great! What is the cite?" The colleague says, "I don't remember, but I think the case name was something like United States v. Harris and it was somewhere out of the 9th Circuit, maybe a California district."

With that information, you log into Lexis and go to the main search bar to enter "United States and Harris" as your search terms, then set 9th Circuit as a pre-search filter. When you land on a results page your eyes nearly jump out of your head because it returned thousands of results. You wonder how you will find the suggested case amid all these results and think to yourself, "There has to be a better way!"

There is! Here are 2 methods for locating a case by party name that will help take those large result sets down to a much more manageable number.

The first option is the Get a Doc assistance tool which allows you to search for cases specifically within the party names section of the document. You can find this tool on Lexis+ under the Tools tab of the Explore box. The original search in the general search bar returned a large number of results because it was very broad. When searching for the case in the "name 1 and name 2" format, the search bar understands that as a connector search where both terms must appear, but they could be in any section and in any proximity to one another within the entire document. The Get a Doc tool narrows your search significantly to only the party name section so that your results are more focused. It allows you to add a date range to your search as well so that you can further focus your search if needed.

The second search method uses the general search bar, but tailors the search so that it only looks within the party name section of the document. By typing your search in the following format, you instruct the search box to limit the search to only the name segment so that it isn't as broad as the original search example. The format to use is: name(United States and Harris). Note that there is no space between the last letter of the word "name" and the open parenthesis. You can use the pre-search filters to narrow your court selection. With either method, you can use the post-search filters to further narrow your results.

Using either of these methods will save time and energy by returning a more focused set of results when you search by party names. Please feel free to reach out to your Solutions Consultant for additional search tips or to schedule training. Enjoy your research!

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APPEALS

Interlocutory Appeals

DiTucci v. Bowser

985 F.3d 804, 2021 U.S. App. LEXIS 1624 (10th Cir. Jan. 21, 2021)

The Tenth Circuit has held that a purported writ of attachment prohibiting a defendant from transferring or encumbering residential property and ordering the deposit of certain funds with the court was not an appealable interlocutory order.

General Principles Governing Appealability. The Tenth Circuit began its analysis with a review of the basic principles governing appellate jurisdiction. Under the final-judgment rule of 28 U.S.C. § 1291, courts of appeals have appellate jurisdiction over "final decisions" of the district courts. The Tenth Circuit has defined a "final decision" as one that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment [SEC v. Merrill Scott & Assocs., Ltd., 600 F.3d 1262, 1270 (10th Cir. 2010)].

Apart from the final-judgment rule, Congress has provided for appellate review of certain interlocutory decisions [see 28 U.S.C. § 1292]. As relevant to the present case, 28 U.S.C. § 1292(a)(1) permits interlocutory appeal of orders "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions."

If the district court denotes its interlocutory order as the grant or denial of an injunction, the Tenth Circuit will treat it as coming within § 1292(a)(1) [see MAI Basic Four, Inc. v. Basis, Inc., 962 F.2d 978, 980–982 (10th Cir. 1992)]. But even if the order is not denoted as such, it may still come under § 1292(a)(1); the court of appeals may look beyond the label assigned by the district court and consider the substance rather than the form of the motion and order. The Tenth Circuit has defined an injunction broadly as an equitable decree compelling obedience under the threat of contempt [see New Mexico v. Trujillo, 813 F.3d 1308, 1318–1319 (10th Cir. 2016)]. Citing **Moore's**, the court of appeals noted that additional factors such as the following can support classification as an injunction: whether the order is directed to one or more of the parties, whether it is coercive and equitable in nature, whether it is enforceable by contempt, and whether it grants at least some of the relief that is sought in the litigation [*see also* Bogosian v. Woloohojian Realty Corp., 923 F.2d 898, 900–901 (1st Cir. 1991)].

The court of appeals further explained that some orders that may appear to satisfy the foregoing test are nevertheless not appealable under § 1292(a)(1). As relevant to this case, a writ of attachment (or the denial of a request for the writ) is not appealable as an injunction. Although the Tenth Circuit had not yet had occasion to address the issue, other circuits hold that true writs of attachment do not fall under § 1292(a)(1). The underlying reasoning is that court-ordered attachments, even if coercive and designed to protect ultimate relief, are typically considered to be legal, not equitable, in nature and therefore are not injunctions for § 1292(a)(1) purposes [*see* Bogosian v. Woloohojian Realty Corp., 923 F.2d 898, 901 (1st Cir. 1991); see also Fin. Servs., Inc. v. Ferrandina, 474 F.2d 743, 745–746 (2d Cir. 1973); Am. Mortg. Corp. v. First Nat'l Mortg. Co., 345 F.2d 527, 528 (7th Cir. 1965)].

The Tenth Circuit also noted that the Supreme Court has recognized that § 1292(a)(1) was intended to carve out only a limited exception to the final-judgment rule. The Court has therefore construed the statute narrowly to ensure that appeal as of right under § 1292(a)(1) will be available only when an appeal will further the statutory purpose of permitting litigants to effectually challenge interlocutory orders of "serious, perhaps irreparable, consequence" [Carson v. Am. Brands, Inc., 450 U.S. 79, 84, 101 S. Ct. 993, 67 L. Ed. 2d 59 (1981)]. Thus, to appeal under § 1292(a)(1) an interlocutory order that is not expressly denominated as an injunction, a party must show that the order (1) threatens a serious, perhaps irreparable, consequence, and (2) can be effectually challenged only by immediate appeal [see Forest Guardians v. Babbitt, 174 F.3d 1178, 1185 (10th Cir. 1999)].

Application of Principles in This Case. In the present case, a defendant sought to appeal an interlocutory order that prohibited him from transferring or encumbering a residence he was arranging to purchase and ordered him to deposit with the district court any proceeds from the sale of his prior home not used to pay off liens or purchase the new residence. (The district court had issued the order on motion of the plaintiffs, who feared that the sale of the defendant's prior home would deprive them of an effective remedy even if they obtained a favorable judgment.)

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To determine whether the district court's order was appealable, the Tenth Circuit first considered whether it was a writ of attachment. The district court issued an "Order and Memorandum Decision Granting Prejudgment Writ of Attachment." The district court relied on Federal Rule of Civil Procedure 64, which makes available to the federal district court "every remedy . . . that, under the law of the state where the court is located, provides for seizing . . . property to secure satisfaction of the potential judgment" [Fed. R. Civ. P. 64(a)]. These remedies include "attachment" and "other corresponding or equivalent remedies"—"however designated" [Fed. R. Civ. P. 64(b)]. An applicable federal statute could override state law [see Fed. R. Civ. P. 64(a)], but no such federal statute was applicable in this case.

After reviewing the relevant law of the forum state, the Tenth Circuit found it unclear whether the district court's order constituted a writ of attachment under state law for purposes of Rule 64. The court of appeals reasoned that it was unnecessary to resolve that question, however. The court explained that even if the order was not a writ of attachment, it was nevertheless unappealable, because it could not be classified as an injunction.

Because the district court's order was not labeled as an injunction, deciding whether it qualified as an injunction required the court of appeals to determine whether the order threatened a serious, perhaps irreparable, consequence, and could be effectually challenged only by immediate appeal [see Carson v. Am. Brands, Inc., 450 U.S. 79, 84, 101 S. Ct. 993, 67 L. Ed. 2d 59 (1981)].

The Tenth Circuit panel held that the district court's order did not threaten serious or irreparable consequences for the defendant. The court opined that the defendant's inability to use the affected funds or to raise money from his property might have some financial consequences, but he had not shown that those consequences were irreparable—that is, that he could not be adequately compensated if he ultimately prevailed in the case.

The court of appeals explained that as a general rule, a temporary restraint on the use of passive assets does not threaten irreparable injury. It is settled that simple economic loss usually does not, in and of itself, constitute irreparable harm, because such a loss is compensable by monetary damages [see In re Deepwater Horizon, 793 F.3d 479, 492 (5th Cir. 2015); First Eagle SoGen Funds, Inc. v. Bank for Int'l Settlements, 252 F.3d 604, 607 (2d Cir. 2001); Middleby Corp. v. Hussman Corp., 962 F.2d 614, 616 (7th Cir. 1992); Abish v. Nw. Nat'l Ins. Co., 924 F.2d 448, 453–454 (2d Cir. 1991)]. The court rejected a contention that the unique nature of real property required a finding that the order's restrictions constituted irreparable injury. The court emphasized that the defendant retained the right to live in and enjoy his new residence and was merely prohibited from transferring it or any interest in it. Those restrictions on the transfer of a home did not constitute the kind of irreparable injury that might be inflicted by similar restrictions on income-producing property.

The court of appeals conceded that the restriction on encumbering the residence might inflict a serious irreparable injury if it precluded the defendant from obtaining legal representation in this case. But that issue was not properly before the appellate court, because it had not been raised in the district court. (After the present appellate proceedings were initiated, bankruptcy proceedings involving a corporate defendant in this case were converted from Chapter 11 to Chapter 7, cutting off the defendant's source of income.)

Conclusion and Disposition. On the record before it, the Tenth Circuit concluded that even if the district court's interlocutory order was not a writ of attachment, it could not be appealed as an injunction. Accordingly, the court dismissed the appeal for lack of jurisdiction.

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CLASS ACTIONS

Certification Decision

Prantil v. Arkema Inc.

986 F.3d 570, 2021 U.S. App. LEXIS 1876 (5th Cir. Jan. 22, 2021)

The Fifth Circuit holds that scientific evidence must meet the Daubert standard for reliability in order to be considered on class certification issues.

Background. The defendant, Arkema, produced a volatile chemical compound that decomposes and combusts unless refrigerated. An incident at its plant in Crosby, Texas, brought about as a result of Hurricane Harvey, resulted in combustion and the release of toxic ash and smoke into the surrounding communities and necessitated the evacuation of nearby residents. A group of local property owners brought a putative class action seeking redress for the effects of this incident. They claimed to have suffered adverse health effects, property damage, or both.

After extended argument on the plaintiffs' motion for class certification, the district court granted the defendant's motion to exclude the plaintiffs' damages expert. It credited three other experts and granted the motion for class certification. It certified both a damages class under Rule 23(b)(3) and an injunctive class under Rule 23(b)(2).

***Daubert* Analysis Is Required at Class Certification Stage.** Although a district court has broad discretion to certify a class, it must rigorously analyze Rule 23's prerequisites before doing so. This analysis requires the district court to go beyond the pleadings to determine whether the requirements of Rule 23 have been met. A court must understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues.

When Rule 23 issues turn on scientific evidence, the court must apply the same metric of admissibility for certification as for trial. That is, the evidence must meet the Daubert standard [see *Daubert* v. Merrell Dow Pharms., Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)]. The Fifth Circuit noted that it joined three other circuits in adopting this position [In re Blood Reagents Antitrust Litig., 783 F.3d 183, 187 (3d Cir. 2015); Sher v. Raytheon Co., 419 Fed. Appx. 887, 890–891 (11th Cir. 2011); Am. Honda Motor Co. v. Allen, 600 F.3d 813, 816 (7th Cir. 2010)]. Application of *Daubert* conforms with the requirement that a court conduct a rigorous analysis of the Rule 23 requirements. Expert testimony that is insufficiently reliable to satisfy the *Daubert* standard cannot prove that the Rule 23 requirements have been met. In short, the certification decision must be based on adequate admissible evidence to justify class certification.

Here, the district court had excluded one expert witness whose methodology was insufficiently reliable, but its analysis of the reports of other experts reflected hesitation to apply *Daubert's* reliability standard with full force. In its certification order, the district court was not as searching in its assessment of the expert reports' reliability as it would have been outside the certification setting. However, an assessment of the reliability of any scientific evidence for certification cannot be deferred.

Inquiry as to Predominance Was Insufficient. A class may be certified under Rule 23(b)(3) only if common questions predominate over individual ones. This requirement tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation. In the present case, the plaintiffs had proposed to calculate classwide damages through mass property appraisals, but the district court rejected the report of the plaintiffs' damages expert because he failed to offer a reliable means of making these calculations. Neither the court nor the plaintiffs had identified another means by which the plaintiffs could calculate damages on a classwide basis. Nonetheless, the district court had found predominance because non-damages issues were common and plaintiffs proposed to bifurcate the proceedings so that damages could be addressed separately.

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However, the court of appeals concluded that the class certification order was wanting as to the predominance question; it did not discuss the considerations affecting the administration of trial, and it concluded that common questions would predominate without adequately addressing arguments that causation, injury, and damages would be highly individualized. The district court did not discuss the manner in which it would conduct the liability phase or how it would implement the proposed "bellwether trials" at the damages phase. Although the district court was correct that individualized damages do not make a case per se unsuitable for class treatment, it was not appropriate for the district court to adopt a "figure-it-out-as-we-go-along" approach.

Absent appropriate analysis of predominance issues in the certification order, a court of appeals is unable to review the district court's decision. Further certification proceedings, the court of appeals said, would benefit from detailing the evidence the parties may use to prove or defend against liability and its commonality to all class members.

Cohesiveness of Injunctive Class. The district court had also certified an injunctive class. The plaintiffs sought two separate forms of injunctive relief: medical monitoring and property remediation. The certification order in an injunctive class action must be sufficiently specific to give content to the injunctive relief sought so that final injunctive relief may be crafted. Here, the district court had discussed the requested injunctions, but in broad strokes that did not satisfy the specificity requirement. Rule 23(b)(2) does not require that every detail of the injunctive relief be spelled out at the class certification stage, but some reasonable detail as to the acts required is necessary.

The court of appeals concluded that the district court's order certifying the proposed class would have to be vacated and the case remanded for further proceedings, including reconsideration of certification in light of the appellate court's discussion. The court of appeals made clear that it did not limit the tools necessary to the district court's management of complex litigation, such as the bifurcation of liability and damages. The reality of Rule 23, the court said, is that it depends on the management skills of the able district courts.

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SUMMARY JUDGMENT

Verified Pleading as Affidavit

Goodman v. Diggs

986 F.3d 493, 2021 U.S. App. LEXIS 2449 (4th Cir. Jan. 28, 2021)

The Fourth Circuit holds that although an amended complaint supersedes any prior complaint, any verification of a superseded complaint survives the amendment, so the verified allegations are competent summary-judgment evidence that cannot be disregarded by the district court.

David Graham Goodman was a disabled inmate in a Virginia prison. He was taken to a different institution for a hearing on a probation violation. Before he could be returned to the original prison, he was allegedly abused by guards at the institution where the hearing was held. He sued the guards, asserting an excessive-force claim. He filed both an original and amended complaint that were verified and sworn under penalty of perjury. Later, however, he filed a second amended complaint that was not verified. Goodman sought discovery of any video recordings of the alleged abuse, but the defendant replied by affidavit that the recordings were reviewed and deleted under established policy. Discovery requests for pictures, documents, and medical records of the incident and its aftermath were also either denied or ignored by the district court. The defendants moved for summary judgment, which the district court granted because Goodman did not file any evidentiary materials to oppose the defendants' motion.

Goodman appealed to the Fourth Circuit, contending that his two verified complaints were affidavits for summary-judgment purposes and created genuine disputes of material fact as to his excessive-force claim. He also argued that summary judgment was premature in light of his pending discovery requests. The Fourth Circuit agreed with both contentions.

Verification of Pleadings. In general, pleadings in federal court need not be verified unless a federal statute or rule provides otherwise [Fed. R. Civ. P. 11(a)], Even if not required, however, voluntary verification has one significant effect: it makes the pleading equivalent to an affidavit, so the allegations of the complaint constitute evidence, not mere assertions of fact.

Verified Complaints Were Affidavits for Purposes of Summary Judgment. The Fourth Circuit explained that, as a general rule, when one party files a motion for summary judgment, the nonmovant cannot merely rely on matters pleaded in the complaint, but must, by factual affidavit or the like, respond to the motion. However, it is well established that a *verified* complaint is the equivalent of an opposing affidavit for summary judgment purposes, when the allegations contained therein are based on personal knowledge. In this case, Goodman's first two complaints met the requirement: they were verified, and they contained detailed accounts of the incident based on his personal knowledge. The district court therefore erred in not considering the verified complaints.

The court acknowledged that, ordinarily, an amended complaint supersedes those that came before it. Goodman's second amended complaint, which superseded the original and first amended complaints, was *not* verified. That raised the question whether a verified complaint can be considered an affidavit for summary-judgment purposes when, as in this case, that complaint has been superseded by a later, amended complaint.

The court noted that it had not directly addressed this question in the past and adopted the reasoning of the Seventh Circuit's decision in *Beal v. Beller* [847 F.3d 897, 901–902 (7th Cir. 2017)]. In that case, the court considered the *evidentiary* value of a verified complaint that had been superseded for *pleading* purposes by an amended verified complaint. The plaintiff in *Beal* alleged that police officers subjected him to an unjustified stop-and-frisk in violation of the Fourth Amendment. The district court granted summary judgment to the officers after finding that the tip they acted on was not anonymous. Stop-and-frisks that result from anonymous tips are harder to justify than those that result from a tip from a known informant, so whether the informant was known was key to the analysis.

Importantly, while Beal's original verified complaint alleged that the officers told him their tip was anonymous, his amended verified complaint did not. The Seventh Circuit held it was appropriate to consider Beal's original, verified complaint as evidence, including the key allegation, even though it had been superseded as a pleading, because a verified complaint contains "factual allegations that if included in an affidavit or deposition would be

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considered evidence, and not merely assertion." In other words, while the mere assertions of an unverified pleading fall "out of the picture" when replaced by those of another complaint, a superseded *verified* complaint still puts forward live factual allegations with evidentiary value. Thus, the Seventh Circuit concluded, a "verified complaint does not lose its character as the equivalent of an affidavit just because a later, amended complaint, is filed." The Eighth and Ninth Circuits have reached the same conclusion [see Barnes v. Sea Haw. Rafting, LLC, 889 F.3d 517, 532 (9th Cir. 2018) (agreeing that an original complaint does not lose its character as the equivalent of an affidavit just because a later, amended complaint, is filed); Hartsfield v. Colburn, 371 F.3d 454, 455 (8th Cir. 2004) (Eighth Circuit has long treated verified complaints as affidavits at summary-judgment stage, even when they are followed by amended complaints)].

Based on these authorities, the Fourth Circuit held that an amended complaint does not divest an earlier verified complaint of its evidentiary value as an affidavit at the summary-judgment stage. Thus, the district court erred in disregarding the evidentiary value of Goodman's original and first amended complaints, which were verified and based on his personal knowledge and were therefore the equivalent of opposing affidavits.

District Court Should Have Resolved Discovery Disputes Before Granting Summary Judgment. In his written opposition to defendants' summary judgment motion, Goodman asked the district court to delay ruling on their motion until he could review evidence including digital photographs of his injuries, his medical records, and notes taken regarding the incident. He also requested that the district court issue a subpoena to the relevant correctional facilities for his medical records. In its summary-judgment decision, the district court denied Goodman's motion for subpoenas as moot but did not otherwise address his outstanding discovery requests. The Fourth Circuit found that the district court abused its discretion by granting summary judgment to the officers before Goodman had the opportunity to conduct sufficient discovery.

The court explained that summary judgment should be granted only after adequate time for discovery, and should be denied when outstanding discovery requests on material issues exist. Summary judgment before discovery leaves the nonmoving party unprepared to defend against the motion. Accordingly, the court has, on numerous occasions, vacated a grant of summary judgment issued before adequate discovery has occurred. In this case, summary judgment was premature because outstanding discovery requests existed on material issues. For example, the undisclosed photographs, records, reports, and eyewitness testimony could have shown that Goodman sustained multiple serious injuries. Such evidence was material to his claim because evidence that he had suffered substantial injury could suggest that the officers applied serious and unnecessary force, key components of an Eighth Amendment excessive-force inquiry.

The Fourth Circuit rejected defendants' counterargument that Goodman failed to properly alert the district court—either through a formal Rule 56(d) affidavit or the equivalent thereof—that further discovery was needed before a decision on summary judgment was made. An affidavit in technical accordance with Rule 56(d) is not necessarily required if the nonmoving party has adequately informed the district court that the motion is premature and that more discovery is necessary. This is especially true when the nonmoving party is proceeding *pro se*. Goodman, who proceeded *pro se* before the district court, adequately informed the district court that the officers' motion for summary judgment was premature. The district court was put on notice by Goodman's repeated filings seeking discovery and, in particular, by his opposition to summary judgment, which asked the court to delay ruling until he could conduct discovery.

Conclusion. For these reasons, the Fourth Circuit concluded that the district court erred in granting summary judgment without considering Goodman's verified complaints, and abused its discretion in granting summary judgment before resolving his discovery requests.