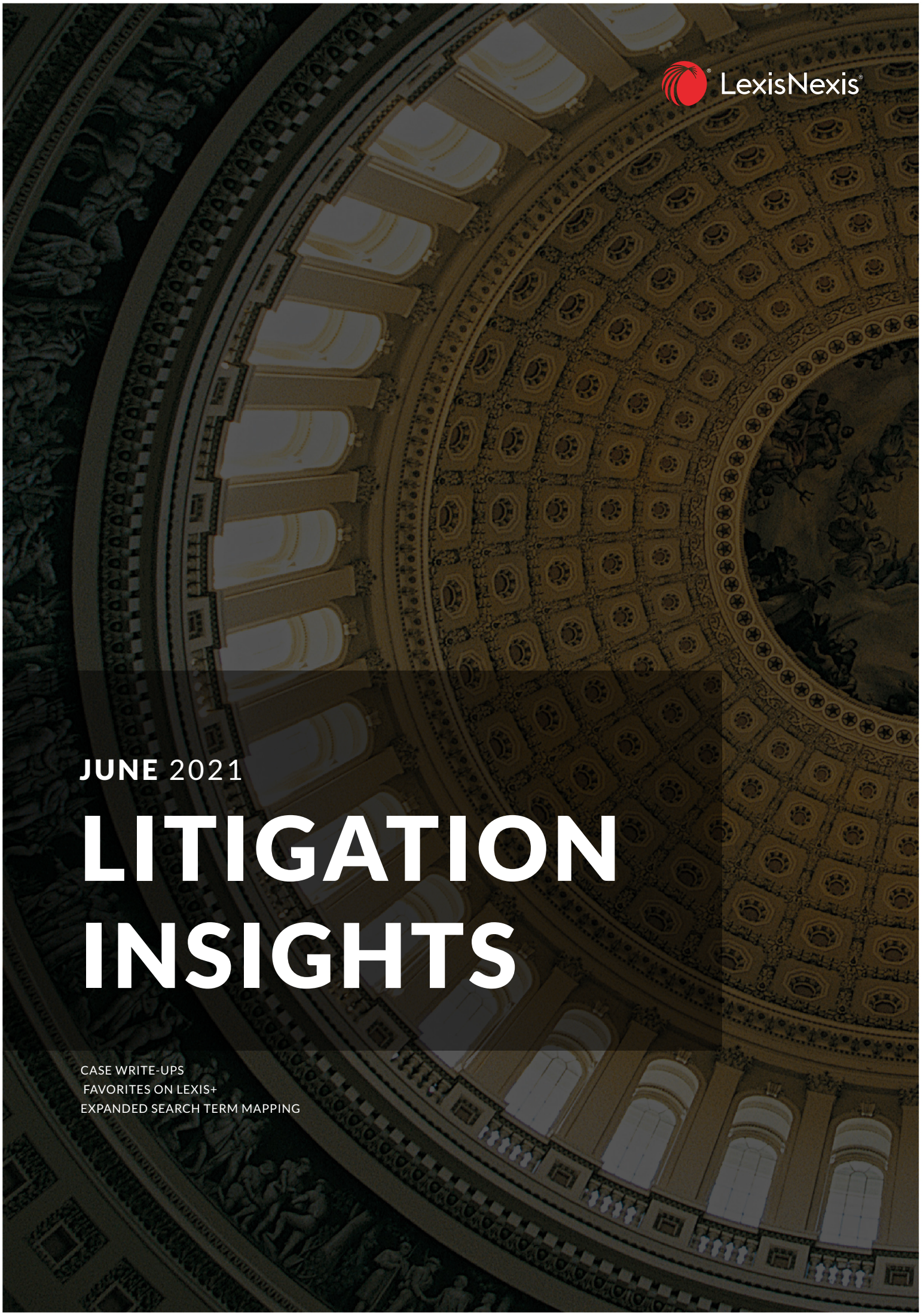

JUNE 2021

LITIGATION INSIGHTS

CASE WRITE-UPS
FAVORITES ON LEXIS+
EXPANDED SEARCH TERM MAPPING

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.

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ERISA

Peer v. Liberty Life Assurance Co.

992 F.3d 1258, 2021 U.S. App. LEXIS 9843 (11th Cir. Apr. 6, 2021)

The Eleventh Circuit, as a matter of first impression, rules that ERISA's fee-shifting provision cannot support a fee award against counsel.

DETERMINING FOREIGN LAW

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Timing of Notice

Azarax, Inc. v. Syverson

990 F.3d 648, 2021 U.S. App. LEXIS 6583 (8th Cir. Mar. 8, 2021)

Although Rule 44.1 does not set a definite limit on a party's time for giving notice of the potential application of foreign law, the Eighth Circuit holds that a party should provide notice "as early as is practicable," and concluded that the three-year delay in this case was unreasonable.

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Federal Officer Removal

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The Fifth Circuit has affirmed the denial of a motion to remand, because subject matter jurisdiction based on the federal-contractor defense existed when the petition for removal was filed.

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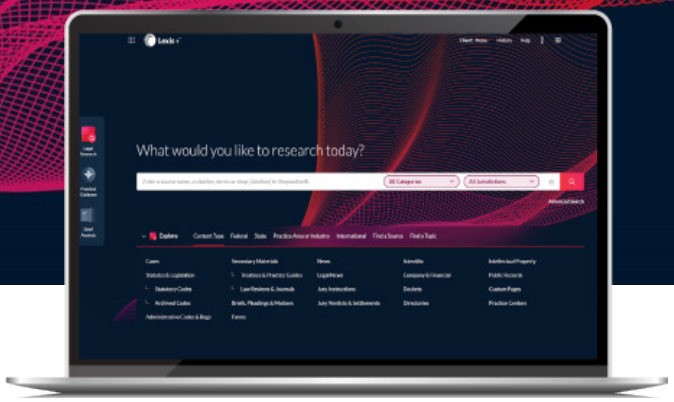
Favorites on Lexis+



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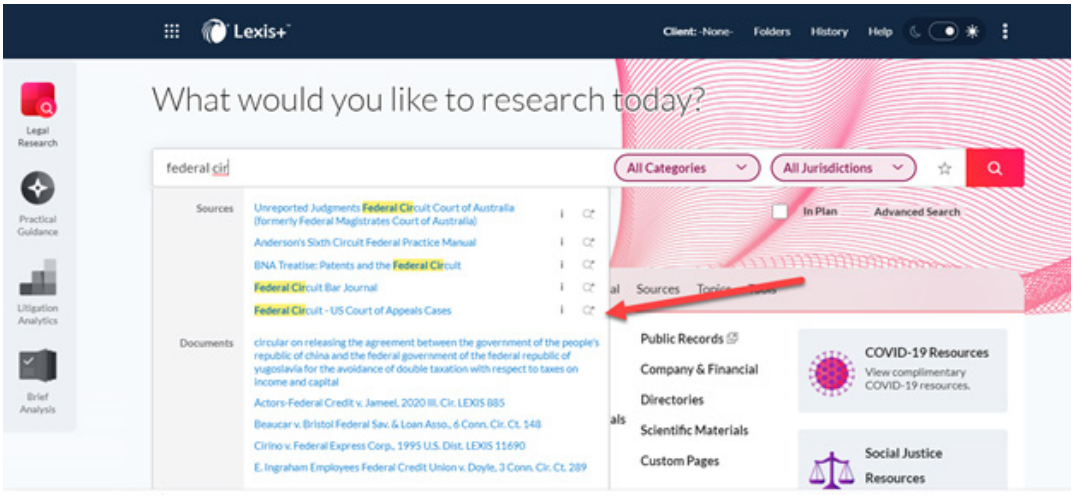
- Opinions by a specific judge;
- Notices in the Federal Register from a specific agency; or
- A specific section of a newspaper

Here are some quick steps to favorite a filter:

1. Type the source into the main search box to locate and click on name of source to add as a search filter.



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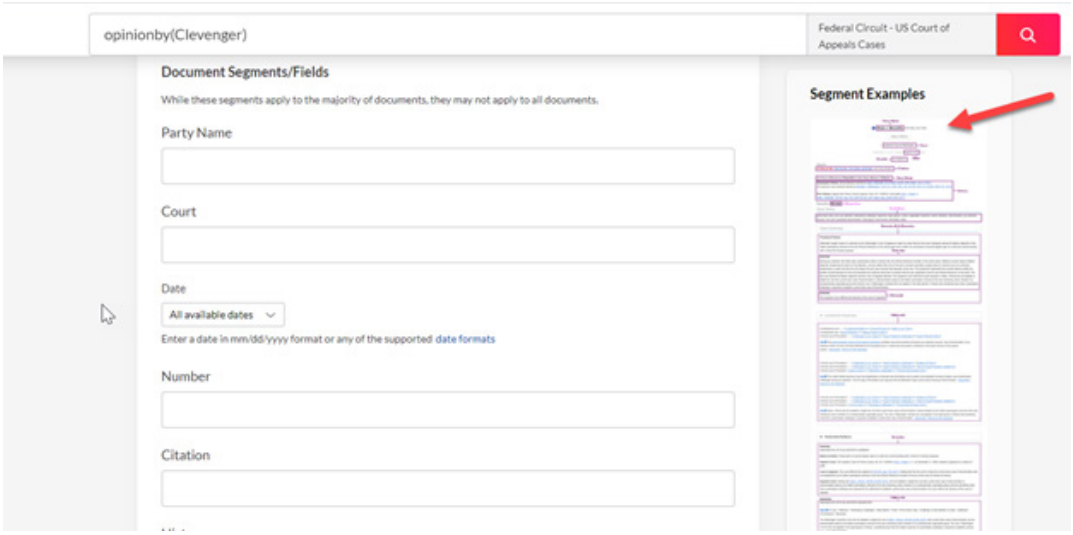
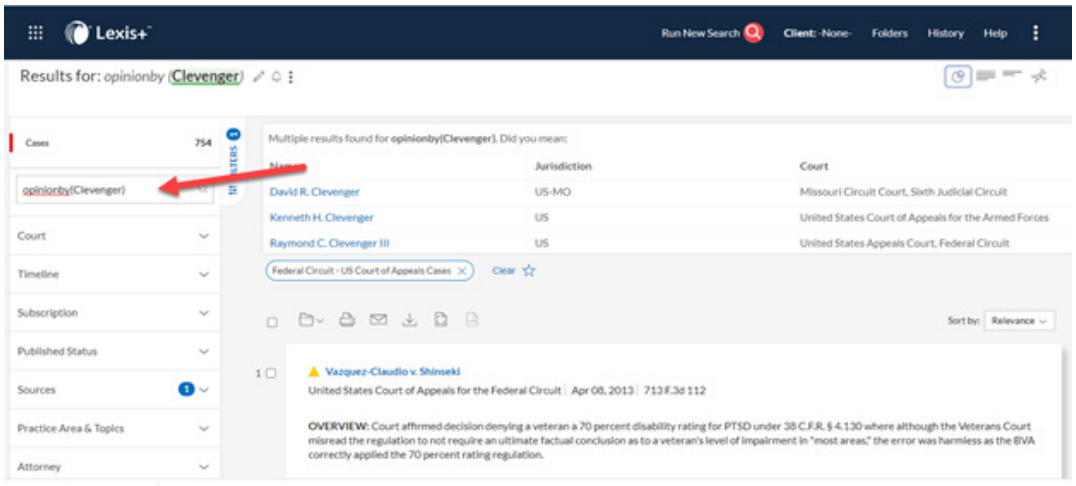
2. On the Advanced Search page, find the appropriate segment to search (using the segment examples on the righthand margin). In this example, we are using the segment "opinionby" to search for opinions authored by a specific judge:



3. Results that are displayed will only show opinions by Judge Clevenger. To favorite this filter, copy the segment search into the "Search Within Results" on the left:



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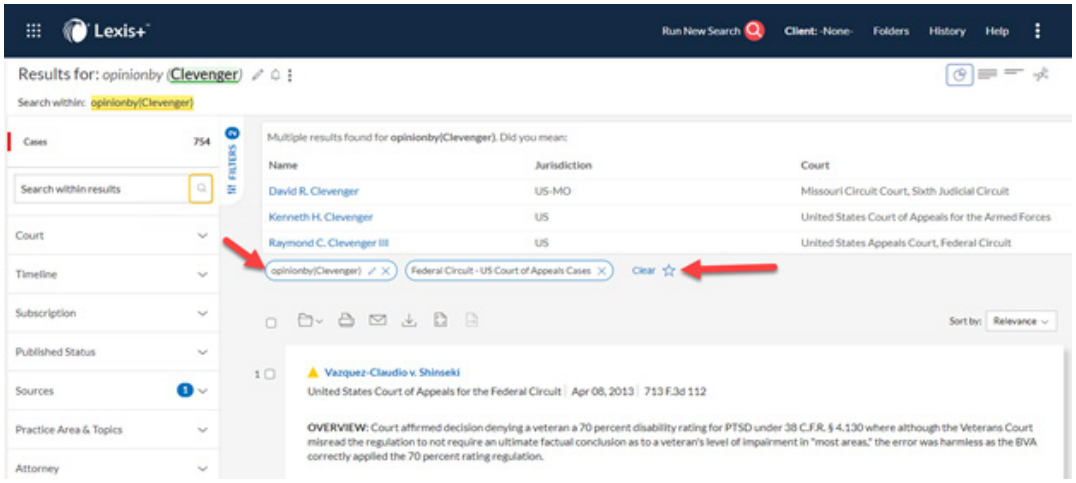
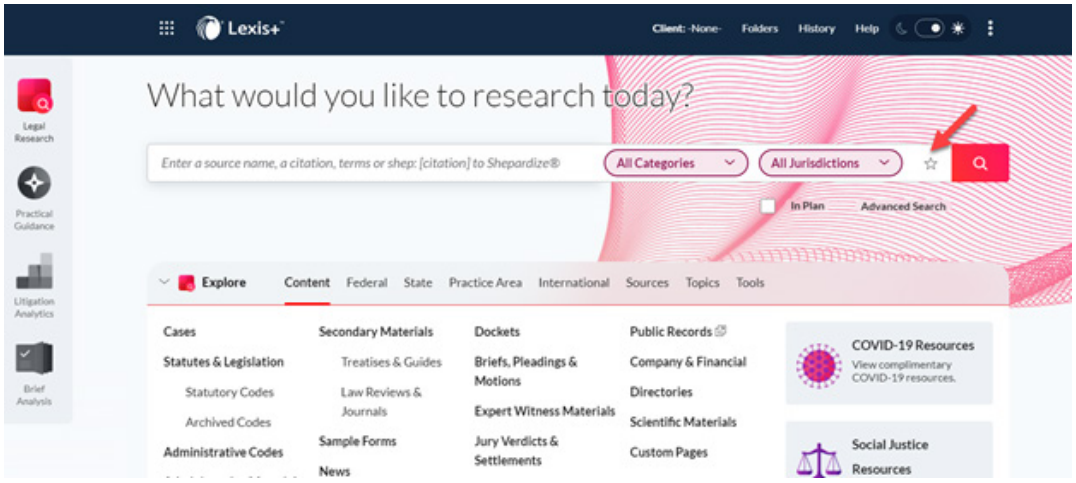
4. When the filter appears on the search line, click on the star on the right to favorite.



5. Favorites are listed on the main landing page under the star icon:



Lexis+ provides a flexible way of searching, including the ability to search within a very specific portion of a document. Being able to favorite that specific filter will save you time and ensure that your search results are on-point.

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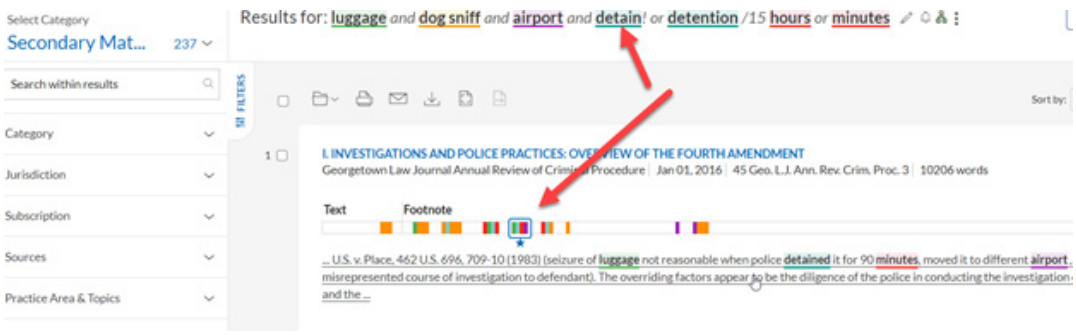
Now Available to You on Lexis+: Expanded Search Term Mapping!

By Chet Lexvold, LexisNexis Solutions Consultant for the Federal Government

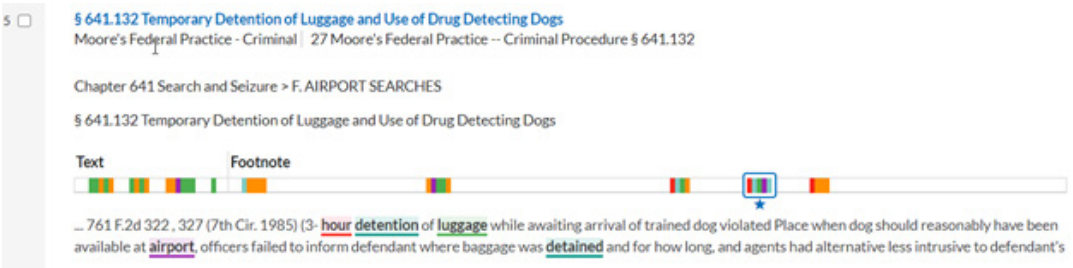
Use **Expanded Search Term Mapping** on the Lexis+™ service to quickly identify the most relevant agency decisions, secondary sources, or news articles (and more!) to your search query. According to the University of Minnesota's Management Information Systems Research Center (MISRC), the human brain processes images 60,000 times faster than text. This processing is the impetus behind Search Term Mapping, which visualizes search terms in search results through color-coding.

LexisNexis rolled out search term mapping for case law on Lexis Advance years ago, and Lexis+ takes search term mapping to the next level by expanding it to other content areas, including Administrative, Secondary, and News.

Simply run a keyword search and view results in the desired type of content. For example, if you wanted a secondary source that can give you a review of cases on the issue of how long law enforcement can detain someone's luggage at the airport if a drug sniffing dog alerts on that person's luggage, run the search and look at Secondary Materials. Search Term Mapping allows you to simply scan a horizontal bar above the text of a result and look for the "most colors" that match your search terms to identify a paragraph that is on-point. Each color snippet can be clicked on to view the terms in context of the search result.



Search Term Mapping allows researchers to visually scan dozens of search results for certain colors, greatly increasing the identification of relevant results across many different content types on Lexis+.



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ATTORNEY'S FEES

ERISA

Peer v. Liberty Life Assurance Co.
992 F.3d 1258, 2021 U.S. App. LEXIS 9843 (11th Cir. Apr. 6, 2021)

The Eleventh Circuit, as a matter of first impression, rules that ERISA's fee-shifting provision cannot support a fee award against counsel.

Background. Plaintiff was issued an ERISA-governed insurance policy, which provided that a policyholder who became totally disabled was entitled to a waiver of policy premiums for the duration of the disability. Defendant insurer denied plaintiff this benefit after determining that she was not disabled from "any occupation."

Plaintiff hired her attorney to appeal that adverse benefits determination, but the decision was upheld on administrative appeal. She then filed a lawsuit against defendant, seeking a waiver of premium, clarification of her right to future benefits, and a reasonable claims procedure going forward.

Five months after plaintiff filed her lawsuit, defendant gave up and reinstated her coverage, and the waiver of premium benefit was retroactive to the original termination date. At that point, defendant advised the court that it had mooted the only issue in plaintiff's pending motion for summary judgment.

The district court denied the motion for summary judgment as moot and also dismissed as moot the claim for waiver of premium. The court then directed plaintiff to identify any remaining issues, and subsequently held that each issue was either rendered moot or was "confusingly intertwined" with the mooted issues. The court closed the case but granted plaintiff leave to amend her complaint.

Plaintiff filed an amended complaint that incorporated by reference every paragraph in her original complaint, and that added a second count that recited the procedural history of the case and rephrased the claims for relief that had previously been declared moot, requesting an "adjudication as to whether and how [defendant] will handle her waiver of premium requests in the future." The court struck the amended complaint for failing to comply with local rules prohibiting the incorporation of previous pleadings without restating the averments. Plaintiff then filed a second amended complaint that block-quoted the original complaint for Count I and repeated Count II verbatim.

The district court remained confused as to why plaintiff was attempting to maintain the mooted action, and the court "utilized an unusual case management procedure and issued interrogatories directly to" plaintiff's attorney. The court asked her attorney whether the case presented questions of law capable of resolution by summary judgment, or whether only factual issues remained. Her attorney responded that legal issues remained for the court to address, so the court set a "status conference" for the attorney to explain, in person, what relief needed adjudication.

After the conference, the court dismissed the claims in Count I as moot, and granted judgment on the pleadings as to Count II on ripeness grounds. It viewed Count II as unripe because plaintiff was seeking an advisory opinion about her rights if defendant were to render an adverse benefits determination in the future.

The Eleventh Circuit affirmed, holding that plaintiff already received the relief she sought and that the district court could award her no further relief. The court of appeals agreed that any claim for the adjudication of the right to future benefits was unripe.

On remand, defendant and plaintiff both moved for attorney's fees under ERISA's fee-shifting provision, 29 U.S.C. § 1132(g)(1). The district court granted both motions in part, awarding plaintiff attorney's fees for work performed until her policy was reinstated, and awarding defendant attorney's fees incurred for any work performed after reinstatement of the policy, including fees for litigating the appeal. The court directed defendant to pay plaintiff's fees, but it directed plaintiff's attorney, not plaintiff, to pay defendant's fees.

The district court entered the defendant's award against plaintiff's attorney for two reasons: (1) if the attorney had brought his client's claims "with cogent clarity, this case would have ended soon after" the policy was reinstated, and (2) plaintiff's attorney had 30 years of ERISA experience and "should have known that [his client's] case was moot and that there was no further justiciable controversy between the parties."

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The plaintiff filed a motion to alter judgment, which the court denied within the hour and without a response from the defendant. Plaintiff's attorney timely appealed. Defendant cross-appealed the fee order, arguing that the court erred in assessing attorney's fees solely against the plaintiff's attorney and not the plaintiff.

District Court Abused Its Discretion by Entering Fee Award Against Plaintiff's Attorney. The question for the Eleventh Circuit on this appeal was whether a court has discretion under ERISA's fee-shifting provision to require an attorney to pay another party's fees. The court of appeals held that it does not, for several reasons.

First, the court reiterated the "bedrock principle" of the American rule, which presumes that each party will pay its own attorney's fees. The judiciary does not have "roving authority" to allow fees whenever the courts might deem them warranted. Congress may override this common-law rule, but it must do so explicitly, and the courts must read fee-shifting statutes strictly, with a presumption favoring the American rule.

The court cited a case where it had held that the fee-shifting provision in Title VII of the Civil Rights Act did not support an attorney's fee award against counsel [see Durrett v. Jenkins Brickyard, Inc., 678 F.2d 911, 914 (11th Cir. 1982)]. Title VII, like ERISA's provision at issue here, provides for an award of fees without specifying who is supposed to pay [see 42 U.S.C. § 1988(b)]. The court held in that case that because the statute makes no mention of attorney liability for costs and fees, the statute "authorizes attorney's fees only against litigants, not against counsel."

The Eleventh Circuit indicated that fee awards against attorneys have been disallowed in a "wide array of contexts," including under the Securities Act, the False Claims Act, the Copyright Act, and the Federal Rules of Civil Procedure.

Here, the Eleventh Circuit held that "[b]ecause ERISA is silent about who must pay a fee award, the statute does not allow a court to award fees against a party's lawyers." The court reasoned that there is no question that ERISA authorizes an award of fees "to either party" but, like Title VII, does not identify who must pay the award. It cited authority indicating that "the proper presumption is that when a fee-shifting statute does not explicitly permit a fee award against counsel, it prohibits it." By way of contrast, the court quoted from 28 U.S.C. § 1927, which does explicitly permit an award against counsel: "Any attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."

The court rejected defendant's argument that the authority is distinguishable and wrongheaded because ERISA does not impose a presumption in favor of awarding fees to a prevailing party. It opined that this is "a distinction without a difference" and does not indicate an intent to allow an award against counsel.

Second, the court pointed out that its holding is consistent with the Eleventh Circuit's view of ERISA generally. When it is silent on an issue, the court evaluates proposed additions to ERISA's common law by asking whether the rule would further ERISA's scheme and goals, namely "(1) protection of the interests of employees and their beneficiaries in employee benefit plans; and (2) uniformity in the administration of employee benefit plans." The court opined that ERISA, therefore, is not primarily about punishing misconduct, and "we see no benefit to employees or uniformity in creating a special sanctions regime for ERISA lawyers. If anything, such a standard would undermine ERISA by making it harder for beneficiaries and insurance plans to hire qualified counsel."

The court rejected defendant's argument that awards against counsel can be justified under ERISA caselaw. It stated that it has instructed district courts to weigh five factors in determining whether to award fees under ERISA, and the factors focus on the parties, not their counsel. "Nothing in this five-factor test suggests that the statute is best read to make an attorney liable for paying a party's fees."

Third, the court reasoned that its holding would minimize disruption to the lawyer-client relationship. Fee litigation can cause friction and put an attorney in "an ethical quagmire." As an example, the court cited this case, in which the relationship between plaintiff and her attorney disintegrated after the attorney was made liable for defendant's fees. Plaintiff had no counsel to argue against defendant's cross-appeal seeking to expand the fee award to include her.

Continue on next page

Fourth, the court found that its reading of the statute comports with "the longstanding rule that clients are responsible for the actions of their lawyers, not the other way around."

Fifth, the court opined that reading ERISA's fee-shifting provision to allow an award of fees against a lawyer would circumvent procedures to sanction attorney misconduct and would deprive the attorney of due process. "When attorney sanctions are appropriate, as they may be in this case, it is important that a district court apply the right test and follow the proper procedures. The law imposes a relatively high bar to sanction an attorney for his or her litigation choices, recognizing that attorneys should not generally 'be required to risk personal liability merely for acting in a representational capacity or for seeking to place a client in a more favorable litigation posture.'"

Holding. The court held that ERISA's fee-shifting statute does not allow a court to impose a fee award against a party's lawyer, and the court reversed and vacated the fee award against plaintiff's attorney. "Our precedent, common sense, and principles of statutory interpretation establish that the statute allows a fee award against parties, not their counsel."

The court remanded the case for the district court to address whether the court should sanction plaintiff's attorney under 28 U.S.C. § 1927 or Fed. R. Civ. P. 11(c), and whether fees should be awarded against plaintiff herself.

DETERMINING FOREIGN LAW

Timing of Notice

Azarax, Inc. v. Syverson
990 F.3d 648, 2021 U.S. App. LEXIS 6583 (8th Cir. Mar. 8, 2021)

Although Rule 44.1 does not set a definite limit on a party's time for giving notice of the potential application of foreign law, the Eighth Circuit holds that a party should provide notice "as early as is practicable," and concluded that the three-year delay in this case was unreasonable.

Background. Azarax, Inc., brought an action against attorney William Syverson and his law firm, alleging legal malpractice and breach of fiduciary duty. Plaintiff alleged that defendants were negligent in their representation of an entity known as Convey Mexico, a Mexican telecommunications company. Plaintiff claimed that it was a successor by merger to Convey Mexico. Azarax purported to have acquired the interests of Convey Mexico through a succession of mergers: first, a merger between Convey Mexico and Azarax Holding, and then the merger of Azarax Holding into Azarax.

Azarax alleged that defendants represented Convey Mexico and committed malpractice by stealing a business opportunity—namely, a contract to provide telecommunication services between the United States and Mexico. The claim was premised entirely on injuries to Convey Mexico before the alleged mergers. Azarax did not assert that it maintained an attorney-client relationship with defendants or that they did anything that directly injured Azarax.

Convey Mexico initially was operated by two shareholders, Nicolas Barrera and Arturo Barbosa Nataren. In September 2011, another entity, Wireless Communications Ventures, LLC, agreed to invest one million dollars in Convey Mexico in exchange for a twenty-percent shareholder stake. In connection with that transaction, an entity called MexAm Connect, LLC, received a 4.5% shareholder stake in Convey Mexico.

Syverson prepared a draft shareholder agreement for the restructured entity, with signature blocks for the four shareholders. In June 2012, Barrera sent Syverson signed copies of the shareholder agreement, dated December 13, 2011, with a cover email that said, "Attached are the two SHA's signed by Arturo." The agreement was also signed by Barrera and representatives of Wireless Communications and MexAm Connect.

Article V of the shareholder agreement provided that Convey Mexico could not "approve or enter into any merger, liquidation, or dissolution of the Corporation" without "prior unanimous written consent of all the Shareholders." In August 2014, Barbosa and Barrera, as shareholders and officers of Convey Mexico, signed an agreement purporting to merge Convey Mexico with Azarax Holding.

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On a motion for summary judgment, the district court ruled that Azarax was not a valid successor in interest to Convey Mexico and therefore lacked standing to sue defendants. Plaintiff appealed, advancing two arguments against the district court's conclusion. First, Azarax contended that the Convey Mexico shareholder agreement was invalid because majority shareholder Barbosa did not sign the agreement. Azarax maintained that without a valid shareholder agreement requiring all shareholders to give written consent for a merger, the merger between Convey Mexico and Azarax Holding took effect without the consent of shareholders Wireless Communications and MexAm Connect.

Second, Azarax argued that Mexican law prohibited shareholder agreements that required unanimous consent of the shareholders, so the unanimity provision in the Convey Mexico shareholder agreement was void. Azarax contended that it could have established the invalidity of the unanimity requirement, but the district court improperly excluded evidence of Mexican law governing corporations.

Plaintiff Lacked Standing to Assert Rights of Convey Mexico. The district court concluded that Azarax lacked standing to assert the interests of Convey Mexico because the purported merger between Convey Mexico and Azarax Holding was not valid. The Convey Mexico shareholder agreement required "unanimous written consent" of all shareholders for a merger, but shareholders Wireless Communications and MexAm Connect did not give written consent. Citing lack of consent by Wireless Communications, the district court concluded that the merger was invalid, and that Azarax was not a valid successor in interest to Convey Mexico.

The Eighth Circuit agreed with the district court, finding no genuine dispute of material fact as to the validity of the Convey Mexico shareholder agreement. Long before the commencement of this litigation, Convey Mexico—through an email from corporate officer Barrera—affirmatively represented to Syverson and Wireless Communications that Barbosa signed the shareholder agreement. Barrera sent an email stating he had attached shareholder agreements "signed by Arturo." Arturo Barbosa Nataren admitted in this litigation that no other person named "Arturo" worked with Barrera on Convey Mexico. One signature on the agreement—above a line bearing the typewritten name of Arturo Nataren—read "A Barbosa." Barrera's statement about the signed shareholder agreement was an authorized statement of Convey Mexico sent in furtherance of the company's objective to secure business with Wireless Communications. It was therefore properly imputed to the corporation as an evidentiary admission. Barrera made the statement on behalf of Convey Mexico; Azarax claimed to be Convey Mexico's successor, so it necessarily adopted Barrera's admission.

Azarax maintained that Barbosa's testimony in this litigation created a genuine dispute of material fact about whether he signed the shareholder agreement. In a deposition, Barbosa denied that he signed the agreement and said that the signature on the document was not his. Under the unusual circumstances of this case, however, the appellate court concluded that Barbosa's testimony was insufficient to undermine Barrera's admission and create a genuine dispute of material fact.

The court acknowledged that a party may "explain away" an evidentiary admission like Barrera's, but it is not enough simply to assert that a previous admission was incorrect. The party must provide an explanation for the retraction or revision that is sufficient to satisfy a rational trier of fact. Azarax did not offer a plausible justification in this case. Barrera was the witness who could have addressed his admission that "Arturo" signed the shareholder agreement. But Barrera failed to answer interrogatories and declined to appear at three depositions. As a result, the district court imposed sanctions and barred Barrera from giving testimony in the case. Azarax had to bear the consequences of that sanction. Azarax could not create a genuine dispute of material fact about Barrera's admission by presenting testimony of a different corporate officer (Barbosa) while failing to produce the first corporate officer (Barrera) to address his own prior statement. On this record, Azarax offered no plausible explanation why Barrera would send an email representing that Barbosa signed the shareholder agreement if he had not done so. Given its failure to produce Barrera for examination, Azarax was "stuck with" Barrera's admission that the shareholder agreement was properly executed.

Notice of Application of Foreign Law Was Untimely. The Eighth Circuit then rejected the argument that the district court abused its discretion by excluding proffered evidence of Mexican law as untimely. Federal Rule of Civil Procedure 44.1 provides that "[a] party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing." The rule is designed to avoid unfair surprise and is based on the discretionary powers of the district court to supervise litigation.

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A court evaluating the reasonableness of notice under this rule may consider the stage the case has reached at the time of the notice, the reason proffered by the party for failure to give earlier notice, and the importance to the case as a whole of the issue of foreign law sought to be raised. The rule does not set a definite limit on a party's time for giving notice. The court noted that in some cases, the issue may not become apparent until the trial. However, once a party becomes aware of the potential application of foreign law, notice should be given as early as is practicable and, in any event, at a time that is reasonable in light of the interests of all parties and the court.

In excluding Azarax's evidence of Mexican law, the district court explained that the litigation had been pending for over three years when Azarax raised foreign law for the first time in response to the defendants' motion for summary judgment. The court found that Azarax provided no reason for the late notice, and that the delay was not reasonable.

Azarax contended that delayed notice was justified because it did not learn that the validity of the shareholder agreement was at issue until defendants moved for summary judgment in December 2018. The court found, however, that there was ample basis for the district court's conclusion that Azarax should have given earlier notice. In January 2017, defendants answered the complaint by asserting that Azarax lacked standing, that the interests of Convey Mexico were not validly assigned to Azarax, and that Azarax was not the real party in interest. At that point, Azarax should have known that the analytical steps required to show that Azarax validly succeeded Convey Mexico would require it to establish a valid merger between Convey Mexico and Azarax Holding.

The issue was raised again in a deposition taken on February 20, 2018. Defense counsel questioned the president of Azarax about whether there was a unanimous vote in favor of the merger, and whether due diligence had been performed to ensure that the merger of Convey Mexico and Azarax Holding was valid. Then on May 21, 2018, defendants moved for sanctions based on Barrera's failure to appear. Defendants recited that the Convey Mexico shareholder agreement required that any merger be approved by a unanimous vote of all shareholders, and sought a judicial admission that Convey Mexico did not hold a shareholder vote to approve the merger with Azarax Holding.

Taken all together, these references to the need for unanimity of the shareholders and the validity of the merger, along with defendants' answer to the complaint, should have alerted Azarax that the shareholder agreement was central to the defense. Yet rather than give timely notice of an intent to raise an issue about Mexican law, Azarax waited until discovery closed and defendants moved for summary judgment in December 2018. The district court properly determined that Azarax failed to provide an adequate justification for its delayed notice.

The district court also reasoned that timely notice "would have aided the district court's planning for trial and its decision on applicability and substance of foreign law." Azarax eventually proffered an affidavit from a law professor opining on the significance of Mexican law for the validity of the merger. At that point, defendants were left to address the new issue of foreign law in a reply brief with no opportunity for discovery of Azarax's expert and minimal time to gather information about foreign law or to identify an expert of their own. The court would have been required either to decide an issue of foreign law without the benefit of thorough briefing or to extend litigation that was already three years old to permit additional briefing and discovery.

Conclusion. The Eighth Circuit concluded that a district court is entitled to considerable deference in managing litigation, and the court did not abuse its discretion in excluding the evidence of Mexican law under the circumstances.

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REMOVAL

Federal Officer Removal

Williams v. Lockheed Martin Corp.
990 F.3d 852, 2021 U.S. App. LEXIS 6847 (5th Cir. Mar. 9, 2021)

The Fifth Circuit has affirmed the denial of a motion to remand, because subject matter jurisdiction based on the federal-contractor defense existed when the petition for removal was filed.

Background. The plaintiff worked for the defendant at its NASA-owned facility from 1974 to 1993. After being diagnosed with malignant mesothelioma, he sued defendant Lockheed Martin Corp. (and several other defendants not at issue in this appeal) in state court, alleging that the cancer resulted from exposure to asbestos while he was employed by the defendant. He asserted multiple theories of liability, including strict liability, negligence, and intentional tort. In a deposition, he alleged that he worked on NASA rockets while employed by the defendant and he believed that they contained asbestos. The defendant claimed that the only NASA products it manufactured during the plaintiff's employment were External Fuel Tanks (EFTs) of the Space Shuttle program, and removed the action to federal court on the ground of federal officer removal jurisdiction under 28 U.S.C. § 1442(a)(1). Subsequently, the Judicial Panel on Multidistrict Litigation transferred the action to the In re: Asbestos Products Liability Litigation, MDL No. 875, pending in the Eastern District of Pennsylvania.

The plaintiff died while the matter was pending in the MDL court and his children were substituted as plaintiffs. They amended the complaint to include survival and wrongful-death claims. The plaintiffs then filed a motion to remand based on the untimeliness of removal and lack of subject matter jurisdiction; the motion was denied. They later renewed their motion to remand, disclaiming the EFTs as a potential source of asbestos and instead focusing on asbestos allegedly present in the buildings at the NASA-owned facility. That motion to remand was also denied.

The MDL court granted summary judgment in favor of the defendant, determining that there was no evidence that the deceased plaintiff was exposed to asbestos prior to September 1, 1975, the date that the Louisiana Worker's Compensation Act (LWCA) became the only avenue for the deceased plaintiff's claims. The court also imposed $10,000 in sanctions against the plaintiffs' attorney for an ex parte conversation he initiated with a current employee of the defendant.

The case was transferred back to the district court for resolution as to the remaining active defendants, and the district court entered judgment in defendant Lockheed Martin's favor. The plaintiffs then filed a third motion to remand, which the court denied.

After the district court entered final judgment as to each defendant, the plaintiffs filed this appeal, challenging the district court's subject matter jurisdiction, the summary judgment, various discovery orders, and the imposition of sanctions. The panel dismissed the appeal for lack of appellate jurisdiction, and the plaintiffs filed for en banc rehearing. The Fifth Circuit granted en banc rehearing and determined that it had jurisdiction to hear the appeals.

Removal Was Proper Because Subject Matter Jurisdiction Based On Federal Contractor Defense Existed At Time Petition For Removal Was Filed. The Fifth Circuit reiterated that questions of federal law in MDL-transferred cases are governed by the law of the transferee circuit, and the court therefore applied Third Circuit precedent.

The Fifth Circuit rejected the plaintiffs' first challenge to removal, which was based on the assertion that the district court was not permitted to look beyond the allegations in the complaint at the time of removal. The defendant moved for removal after the plaintiff's deposition revealed possible asbestos exposure from his work on the EFTs, basing its motion on federal officer removal jurisdiction. The plaintiffs, however, did not allege in their complaint that the EFTs were in any way involved in the asbestos exposure while working for the defendant, and they disclaimed any previous assertion that the EFTs were involved, asserting that the deposition testimony was mistaken.

The Fifth Circuit acknowledged that there is some debate as to whether a district court is (1) limited to the allegations in the complaint, (2) limited to the complaint and the notice of removal, or (3) can look at the full state-court record at the time of removal. The court of appeals agreed with what it characterized to be the majority view and held that the district court properly considered the full state-court record as it existed at the time of removal.

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The court noted that the Third Circuit has not explicitly held which of the differing views would apply, but pointed to a Third Circuit decision in which it "implicitly affirmed the district court's reliance on information outside of the complaint." In that case, in order to determine when the 30-day timeline for removal began, the Third Circuit looked not only to the complaint but also to the facts alleged in the notice of removal, which included deposition testimony [Papp v. Fore-Kast Sales Co., 842 F.3d 805, 811 (3d Cir. 2016)].

Next, the court looked to the four requirements for proper removal under the federal officer removal statute: (1) the defendant is a "person" within the meaning of the statute; (2) the plaintiff's claims are based on the defendant's conduct "acting under" the United States, its agencies, or its officers; (3) the plaintiff's claims against the defendant are "for, or relating to" an act under color of federal office; and (4) the defendant raises a colorable defense to the plaintiff's claims [28 U.S.C. § 1442(a)].

The Fifth Circuit found that the defendant "easily" met the first two requirements. A corporation is legally a person within the meaning of the statute, and the court viewed this is an "archetypal case" of a defendant acting under the United States: the allegations were directed at actions the defendant took while working under a federal contract to produce EFTs, which the government would otherwise have been forced to produce on its own.

The court found that the third requirement was also met, as the defendant alleged that NASA issued detailed material, design, and performance specifications and exercised direct control over all aspects of the EFT design, development, and production. It also controlled written materials accompanying the fuel tanks, including warnings and safeguards.

The fourth requirement was the closest call and required the court to examine the three elements of the federal-government-contractor defense as defined by Boyle v. United Techs. Corp.: The defense applies "when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States" [Boyle v. United Techs. Corp., 487 U.S. 500, 512, 108 S. Ct 2510, 101 L. Ed. 2d 442 (1988)].

The Fifth Circuit rejected the plaintiffs' argument that the Boyle elements were not satisfied because the defendant did not prove that NASA required it to use asbestos in the construction of the EFT, that asbestos was used, and that the defendant warned NASA that using asbestos was dangerous. The court reasoned that the plaintiffs' reading would have required the defendant to concede that the EFTs contained asbestos, and a federal contractor does not need to admit that it committed the charged offenses in order to secure removal. As to warning about the dangers about asbestos, the court said that the purpose of this element is to discourage a contractor from "cutting off information highly relevant to the discretionary decision." This is only an issue if asbestos was actually used in constructing the EFTs, and even if it was, the requirement to inform NASA of the dangers of using asbestos exists only to the extent that those dangers were known to the defendant and not to NASA. The plaintiffs did not account for the possibility that NASA would know of the dangers.

The court opined that the defendant did not need to win its case in order to have it removed, and that it only needed to show that the Boyle defense could "reasonably be asserted, given the facts presented and the current law." It ruled that the defendant stated sufficient facts to make out a colorable Boyle defense: (1) it alleged that NASA issued "detailed material, design, and performance specifications," for the EFTs, and "exercised direct control over all aspects of [EFT] design, development, and production"; (2) it alleged that it needed specific authorization and approval from NASA to deviate from its specifications, and that NASA maintained inspectors at the facility to ensure compliance; and (3) without admitting that the EFTs contained asbestos, it claimed that NASA had superior knowledge of the dangers of asbestos.

The court distinguished two unpublished decisions relied on by the plaintiffs, the first involving a defendant that contracted with the defendant in this case and not with the government, and the second involving a defendant to which NASA gave "vast and broad responsibilities with only very general specifications."

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The Fifth Circuit rejected the plaintiffs' argument that the defendant had a "continuous jurisdictional burden" that it had not met because they no longer asserted that the asbestos exposure had anything to do with the EFTs. The plaintiffs did not disclaim the allegations related to the EFTs until after their first motion to remand, and the court reiterated the rule that the district court does not lose jurisdiction once the plaintiffs cease to assert a claim that was subject to the federal-contractor defense, or once the facts later indicate that the defense fails.

The court held that subject matter jurisdiction based on the federal-contractor defense existed at the time the petition for removal was filed and the exercise of supplemental jurisdiction over the remaining state-law claims was also proper.

Other Matters. With minimal discussion, the court found that the district court did not abuse its discretion with respect to any of the challenged discovery orders.

The court next held that the district court correctly granted summary judgment as to the wrongful-death claim because it was barred by the LWCA. The plaintiff died in 2009, and at that time the LWCA provided the exclusive remedy for actions involving a death resulting from mesothelioma. The court also held that the district court appropriately granted summary judgment on the plaintiffs' survival claims because the plaintiffs failed to show that the cause of action accrued prior to 1975, when the LWCA became the exclusive remedy.

Finally, the court found that the district court did not abuse its discretion in awarding $10,000 in attorney's fees as a sanction for the plaintiffs' attorney's ex parte communication with one of the defendant's employees. The court found that the district court's findings about the attorney's behavior were tantamount to findings of bad faith, required for a sanction-based award of attorney's fees.