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NOVEMBER 2021
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.

ARBITRATION

Judicial Action on Arbitration Award

McLaurin v. Terminix Int'l Co.

2021 U.S. App. LEXIS 28122 (11th Cir. Sept. 17, 2021)

Jump to full summary

The Eleventh Circuit has recommended the procedure a district court should generally follow when a motion to confirm an arbitration award is filed before expiration of the time to challenge the award.

ATTORNEY'S FEES

Equal Access to Justice Act

Doucette v. Comm'r of Soc. Sec

2021 U.S. App. LEXIS 26527 (6th Cir. Sept. 2, 2021)

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The Sixth Circuit holds that the Equal Access to Justice Act allows a prevailing party to recover attorney's fees for all phases of litigation, including time spent replying to opposition to the award, and it is an abuse of discretion for the district court to disregard evidence of current market rates.

MOOTNESS

Prudential Mootness

In re VeroBlue Farms USA, Inc.

6 F.4th 880, 2021 U.S. App. LEXIS 23164 (8th Cir. Aug. 5, 2021)

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The Eighth Circuit has limited the use of the equitable mootness doctrine.

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Ravel™

By Candace Kelly, Regional Solutions Consultant

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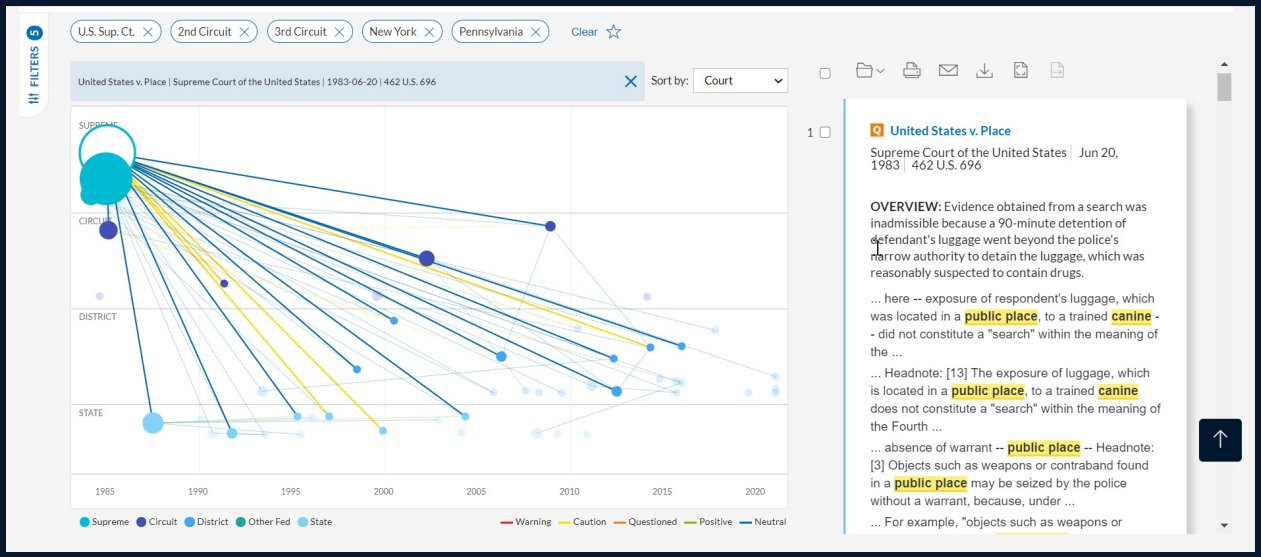

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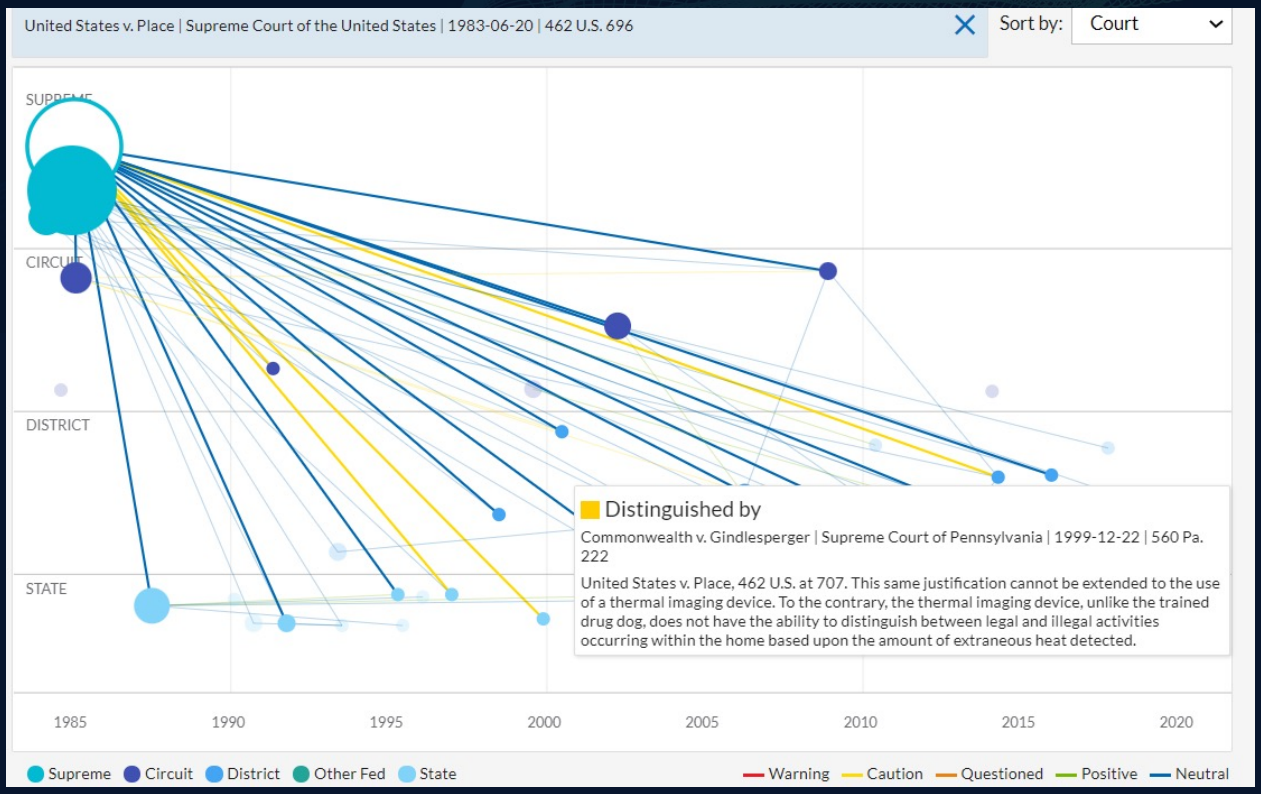

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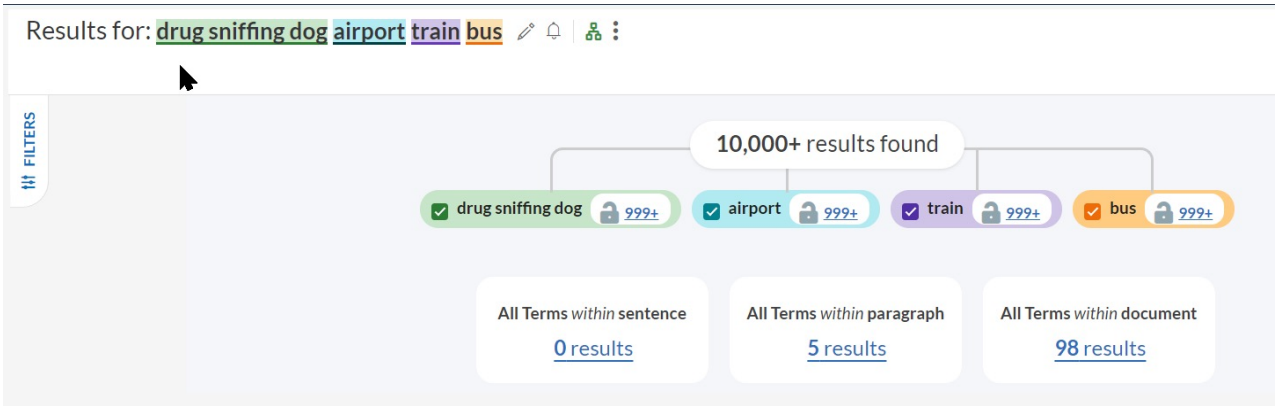

Note: The Search Tree is available for natural language searches run in all content types except News and Legal News.

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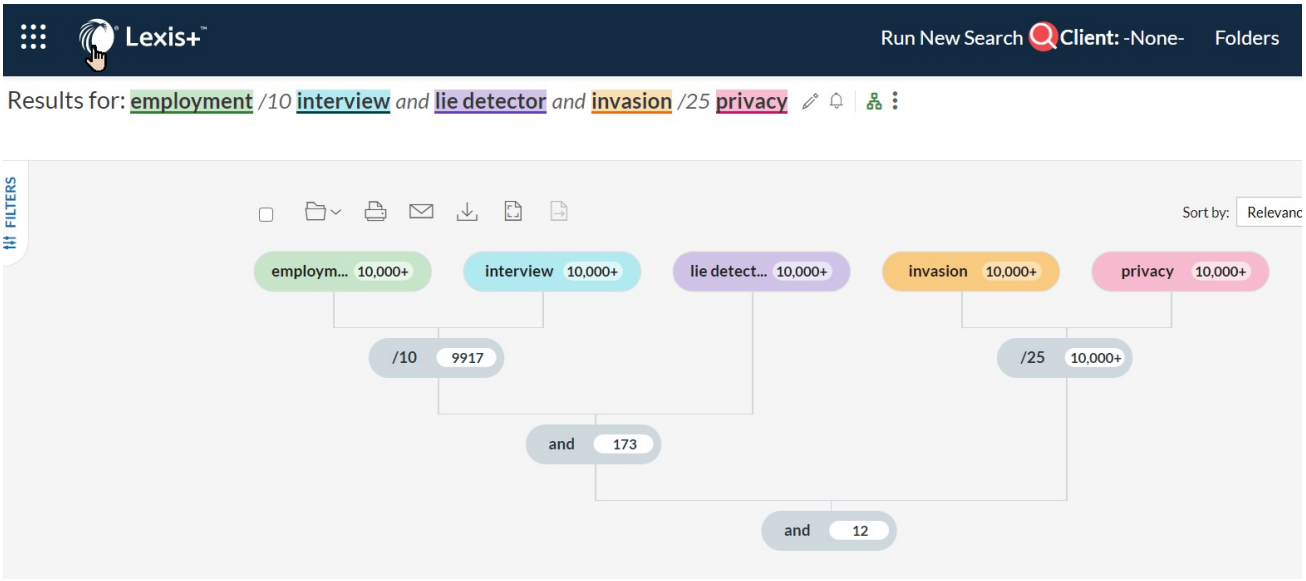
Terms & Connectors (Boolean)

In a terms & connectors search, the search runs and looks for the terms according to the relationships you defined with the connectors in your search. Search Tree provides a graphical representation of the background process to determine the ultimate number of results you get from your search.

Each part of your search is represented in a box that displays how many results would be retrieved if only that part of the search was run. Each level of the interactive tree indicates how each part of the search is run until the last level displays the final result count of the full search.

Hover your cursor over any of the oval boxes to see the search that would be run to retrieve that Doc Count and click to run the search.



Note: The Search Tree is available for terms & connectors (Boolean) searches run in all content types.

With Search Tree, you can easily gain an understanding of how your search is working and if it's processing your search terms the way you intended when you constructed your search by simply clicking the Search Tree icon to the right of your search terms at the top of the results screen.

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ARBITRATION

Judicial Action on Arbitration Award

McLaurin v. Terminix Int'l Co.

2021 U.S. App. LEXIS 28122 (11th Cir. Sept. 17, 2021)

The Eleventh Circuit has recommended the procedure a district court should generally follow when a motion to confirm an arbitration award is filed before expiration of the time to challenge the award.

Motions in District Court After Arbitration Award. <D>The Federal Arbitration Act (FAA) provides for a variety of motions in district court (or other court agreed on by the parties) after the arbitrator has made an award. A motion to confirm the award may be made by the arbitration winner [*see* 9 U.S.C. § 9]; a court order confirming the award makes available a variety of remedies available to enforce the court's judgments. On the other hand, any party (more often the arbitration loser, but sometimes the winner) may file a motion to vacate, modify, or correct the award [*see* 9 U.S.C. §§ 10, 11].

The Eleventh Circuit panel in this case observed that because the FAA reflects a national policy in favor of arbitration agreements, there is a presumption under the FAA that arbitration awards will be confirmed. Thus, the FAA provides only limited grounds for undoing or modifying an arbitration award, such as fraud, corruption, or an evident miscalculation [*see* 9 U.S.C. §§ 10, 11]. But it allows a party to file a motion to confirm an arbitration award for any reason, which "the court must grant . . . unless the award is vacated, modified, or corrected" [9 U.S.C. § 9; *see* Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 587, 128 S. Ct. 1396, 170 L. Ed. 2d 254 (2008) ("There is nothing malleable about 'must grant,' which unequivocally tells courts to grant confirmation in all cases, except when one of the 'prescribed' exceptions applies.")].

Different Timing Requirements for Post-Award Motions. The policy in favor of arbitration is also reflected in the FAA's different timing requirements for post-award motions. The deadline to file a motion to challenge an arbitration award is only three months, but a motion to confirm may be filed up to a year after the award [*compare* 9 U.S.C. § 9 (one year to seek confirmation of award) *with* 9 U.S.C. § 12 (three months to serve notice of motion to vacate, modify, or correct award)]. Therefore, if three months elapse without the losing party having filed a motion to vacate, modify, or correct the award, then the losing party will be unable to defend against a later-filed motion for confirmation on any grounds that would support vacatur, modification, or correction of the award.

Preferred Procedure When Confirmation Is Sought Before Expiration of Time to Vacate, Modify, or Correct Award. Sometimes, as happened in this case, the arbitration winner files a motion to confirm the arbitration award before the losing party's three-month period to seek vacatur, modification, or correction has run. Within that three-month limitations period, the FAA allows the losing party to oppose the motion to confirm based on the moving party's failure to comply with the FAA or for the reasons specified in the FAA for vacating, modifying, or correcting the award [Frazier v. CitiFinancial Corp., LLC, 604 F.3d 1313, 1324 (11th Cir. 2010); *see* 9 U.S.C. §§ 10, 11 (grounds for vacatur, modification, or correction)]. The losing party can also take up to three months from the arbitration award to file a separate motion to vacate, modify, or correct the award. And if the losing party files a timely motion, it may ask the court to stay the proceedings to confirm the award until the court rules on the separate motion to vacate, modify, or correct the award [*see* 9 U.S.C. § 12].

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The Eleventh Circuit panel in this case opined that when a motion to confirm is filed before the three-month period to challenge the arbitration award has lapsed, the best practice is for the district court to issue an order that sets simultaneous deadlines for the losing party to file any opposition to the motion to confirm, and to file any separate motion to vacate, modify, or correct the award. The court of appeals acknowledged that individual circumstances could justify a different approach in certain cases. "But a district court that follows this best practice will be on sound legal footing and ensure that all issues are fully and fairly litigated."

- **Procedure in Present Case.** In the present case, the arbitration winners filed a motion to confirm the award before the loser's three-month limitations period had run. The district court did not set simultaneous deadlines for the arbitration loser to file a brief in opposition to confirmation and a motion to vacate the award. Instead, the district court ordered that "any opposition to the [motion to confirm] shall be filed no later than September 25, 2019"—a date less than three months after filing of the arbitration award—and did not expressly set a separate deadline for a motion to vacate, modify, or correct the award. In response, the arbitration loser filed a four-page brief, arguing only that the motion to confirm was filed too soon. Rather than make substantive objections to the motion to confirm, seek an extension to oppose it, or ask the district court to wait to rule on it, the arbitration loser waited to raise its substantive arguments until it filed a motion to vacate a month and a half after the district court's deadline to oppose confirmation. The district court rejected the arbitration loser's procedural argument, granted the motion to confirm as substantively unopposed, and struck the motion to vacate as untimely.

- **Issues on Appeal.** The arbitration loser appealed, arguing that (1) a court cannot confirm an arbitration award without giving the losing party three months to file its motion to vacate, modify, or correct the award; and (2) even if the district court correctly rejected its procedural argument, the district court should have considered and ruled on the merits of its separate motion to vacate the award.

- **Three-Month Period to Challenge Award Does Not Affect Timing of Motion to Confirm.** <D>The Eleventh Circuit panel rejected the arbitration loser's first argument as incompatible with the plain text of the FAA. The court of appeals emphasized that the FAA explicitly authorizes a party to file a motion to confirm "at any time within one year after the award is made" [*see* 9 U.S.C. § 9]. This timeline does not change based on whether a losing party intends to challenge an award by filing its own motion. Nothing in the FAA prevents a party from moving for confirmation of an award within three months of the award or mandates that a district court wait to rule on such a motion because another party may file (or has stated an intention to file) a motion to vacate. The court also found it significant that a party may raise the grounds for vacatur, modification, or correction of an award as defenses to a motion to confirm an arbitration award so long as those defenses are timely under the FAA and any scheduling order [*see* 9 U.S.C. § 9 (court may confirm unless award is vacated, modified, or corrected as prescribed in 9 U.S.C. §§ 10, 11)].

  In short, nothing in the FAA required the arbitration winners in this case to wait to file their motion to confirm until after the loser filed its motion to vacate, modify, or correct. The Eleventh Circuit concluded that the district court correctly rejected the loser's procedural argument and granted the motion to confirm.

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- **No Abuse of Discretion in Treating Motion to Vacate as Untimely.** Turning to the arbitration loser's second argument, the court of appeals concluded that, after granting the motion to confirm, the district court did not abuse its discretion in declining to rule on the merits of the arbitration loser's later-filed motion to vacate. Specifically, the court of appeals found no abuse of discretion in the district court's interpretation of its order to file "any opposition" to the motion no later than September 25, 2019, to encompass any ground for opposing the award, even a substantive ground that could otherwise be raised in a motion for vacatur.

  That the September 25 deadline specified by the district court was less than three months after the arbitration award did not alter the analysis. The court of appeals pointed out that although the district court could not unilaterally extend the statutory time to move for vacatur, modification, or correction, it did have the power to shorten that time. "The statutory deadline for giving notice of a motion to vacate sets an outer bound; it does not impose a three-month delay for the benefit of an arbitration's loser." Accordingly, the arbitration loser in this case should have identified its substantive grounds for vacatur by the September 25 deadline set by the district court. And in light of the arbitration loser's failure to raise any of its grounds to oppose confirmation of the award, the post-confirmation motion to vacate was moot.

- **Conclusion and Disposition.** The Eleventh Circuit panel closed by encouraging district courts faced with motions to confirm to follow the procedure of setting simultaneous deadlines for the arbitration's losing party to file an opposition to the motion to confirm, if any, and to file a separate motion to vacate, modify, or correct, if any.

  Although that preferred procedure was not followed in this case, the court of appeals remarked that "[n]onetheless, a district court is the master of its own docket, and the parties ignore its orders at their peril." Thus, the district court acted within its discretion in granting the substantively unopposed motion to confirm without addressing the later-filed motion to vacate. Accordingly, the court of appeals affirmed the district court's judgment.

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ATTORNEY'S FEES

Equal Access to Justice Act

Doucette v. Comm'r of Soc. Sec

2021 U.S. App. LEXIS 26527 (6th Cir. Sept. 2, 2021)

The Sixth Circuit holds that the Equal Access to Justice Act allows a prevailing party to recover attorney's fees for all phases of litigation, including time spent replying to opposition to the award, and it is an abuse of discretion for the district court to disregard evidence of current market rates.

Background. An attorney who represented thousands of claimants seeking disability benefits from the Social Security Administration (SSA) turned out to be a fraudster, causing the SSA to pay out millions of dollars in fraudulent benefits and fees. In an earlier case, he was found to have bribed doctors to certify false disability applications, and to have bribed an administrative law judge to approve those applications.

After the attorney's scheme came to light, the SSA identified over 1,700 applications that it believed were tainted by his fraud, and it redetermined these applicants' eligibility for benefits. Many former clients took issue with how the SSA redetermined eligibility, and years of litigation ensued. The SSA was held to have violated due process and the Administrative Procedure Act in one case, *Hicks v. Comm'r of Social Security* [909 F.3d 786 (6th Cir. 2018)].

But before *Hicks* issued, the SSA redetermined the eligibility for benefits and denied applications of the two plaintiffs in this case, and they filed separate civil actions (in the same district court) for judicial review.

The first of the two cases was stayed pending the *Hicks* decision, and the SSA moved to remand to the agency. The district court granted the SSA's motion and sent the case back to the agency via a judgment. The plaintiff then moved for attorney's fees under the Equal Access to Justice Act (EAJA), seeking an hourly rate of $203 for 9.1 hours of work ($1,847.30 total). The SSA agreed that a fee award was appropriate but argued for a lower rate and disqualification of certain hours. The plaintiff filed a reply, addressing the SSA arguments, and requested additional attorney's fees for the four hours required to prepare the reply.

The district court decided that the statutory rate of $125 was appropriate, and also decided that only hours worked before the deadline to appeal were compensable under the EAJA, denying fees for drafting the reply after the time to appeal had expired.

The second of the two cases involved more substantive legal work and the district court initially decided the plaintiff's challenge to the SSA's decision on the merits, granting summary judgment in favor of the Commissioner. The plaintiff appealed and filed an opening brief, but after the Sixth Circuit issued *Hicks*, the SSA agreed to remand to the agency. After that remand, the plaintiff filed a motion for attorney's fees in the district court, requesting an hourly rate of $207.67 for 41.8 hours worked ($8,680.61 total). The SSA agreed to the request in full, but the district court reduced the hourly rate to $150, resulting in a fee award of $6,270.

Each appealed, and the court consolidated their appeals for review.

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- **District Court's Denial of Fees for Work Done on Reply to Fee Award Was Based on Erroneous Interpretation of EAJA.** The Sixth Circuit rejected the district court's reasoning that, because the EAJA allows a prevailing party to recover attorney's fees "incurred by that party in any civil action" [*see* 28 U.S.C. § 2412(d)(1)(A)], that action terminates once the judgment has been entered and the time to appeal has expired. The Sixth Circuit began by opining that this reasoning does not align with that of the Supreme Court, which has "recognized—without qualification—that 'Congress intended the EAJA to cover the cost of *all* phases of successful civil litigation addressed by the statute.'" [*see* Commissioner, INS v. Jean, 496 U.S. 154, 166, 110 S. Ct. 2316, 110 L. Ed. 2d 134 (1990)].

  The court found that the EAJA itself cuts against the district court's deadline for fee eligibility. Section 2412(d)(1)(B) provides the timeframe for seeking a fee award to be "within thirty days of final judgment in the action." Thus, Congress contemplated that fee applicants would be able to begin the fee-seeking process *after* a judgment becomes nonappealable.

  The Sixth Circuit underscored its reasoning with a hypothetical: A plaintiff files a fee application before the time to appeal has expired, which is opposed by the government. The district court schedules oral argument on the application and the hearing occurs after the judgment becomes final. Under the lower court's interpretation of the EAJA, the plaintiff would be able to receive attorney's fees for the time spent drafting the application, but not the time spent arguing in support of that application at the hearing. The court opined that such a result goes against logic and the text of the statute.

- **District Court Abused Its Discretion by Disregarding Plaintiffs' Evidence of Prevailing Market Rate.** The plaintiffs argued that the rates awarded by the district court were unreasonable because they were far below the prevailing market rate. The Sixth Circuit found that the plaintiffs offered evidence sufficient to justify higher fees (between $205 and $500 per hour) than the EAJA's $125 statutory cap, but the district court denied their requested rates and settled on $125 and $150 for two reasons: (1) judges in this district court usually awarded only $125 per hour in social security cases, and (2) the plaintiffs' relatively simple cases did not justify straying too far from this practice.

  The Sixth Circuit found that the district judges' hourly-fee determinations were abuses of discretion. The judges placed "undue weight" on prior fee awards while dismissing, without explanation, the plaintiffs' evidence of current market conditions. Although prior fee awards can provide some inferential evidence of what a market rate is, they "do not set the prevailing market rate—only the market can do that." The Sixth Circuit found that courts should hesitate to give controlling weight to prior awards when presented with other credible evidence of the current market, especially when the other evidence is unrefuted.

  The court cited earlier decisions showing that courts generally default to the $125 rate because the claimant has failed to substantiate a request for a higher rate. Plaintiffs here "more than substantiated" their requested rates, and summarily dismissing this evidence and treating prior default EAJA awards as dispositive "holds other plaintiffs' shortcomings against the applicant."

  In addition, the Sixth Circuit held that the district judges' consideration of the cases' complexity was also an abuse of discretion. There was no evidence that any lawyer in the relevant communities would accept below-market rates "for any kind of service on even the simplest of cases," and the complexity of the action cannot be invoked to justify a rate below the spectrum of the market for legal services.

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MOOTNESS

Prudential Mootness

In re VeroBlue Farms USA, Inc.

6 F.4th 880, 2021 U.S. App. LEXIS 23164 (8th Cir. Aug. 5, 2021)

The Eighth Circuit has limited the use of the equitable mootness doctrine.

- **Background.** This case stemmed from the Chapter 11 filing of appellee VeroBlue Farms USA, Inc.. After the bankruptcy court approved the Chapter 11 plan, a preferred shareholder appealed the order confirming the plan. Other shareholders then moved to dismiss the appeal and sought to keep the plan in place. The district court granted the motion to dismiss the appeal on the ground of equitable mootness. In dismissing the appeal, the district court did not consider the merits of the appeal, but instead declared the appeal "equitably moot." The dismissal was predicated on the need to protect the rights of third parties who would benefit from the approved plan. The preferred shareholder appealed the finding of equitable mootness.

- **Equitable Mootness Doctrine Is Designed to Prevent Significant Harm to Third Parties.** The doctrine commonly referred to as the equitable mootness doctrine is based on a recognition that even when the moving party is not entitled to dismissal on Article III grounds, common sense or equitable considerations may justify a decision not to decide the case on the merits. Typically, the doctrine has been applied when necessary to prevent substantial harm to third parties. In the context of Chapter 11 confirmation appeals, disturbing the approved Chapter 11 plan has the potential to harm numerous parties who stand to benefit from the approved plan, but who are not party to the appeal.

  In this case, the Eighth Circuit took exception to the nomenclature of the doctrine and clarified that a case is actually moot only if "it is impossible for a court to grant any effectual relief whatsoever" [*see* Mission Prod. Holdings v. Tempnology, LLC, 587 U.S. —, 139 S. Ct. 1652, 203 L. Ed. 2d 876, 885 (2019)]. The court approvingly cited a Seventh Circuit opinion that said there is a big difference between *inability* to alter the outcome (real mootness) and *unwillingness* to alter the outcome (what is termed equitable mootness) [In re UNR Indus., 20 F.3d 766, 769 (7th Cir. 1994)]. The Seventh Circuit went on to say, "Using one word for two different concepts breeds confusion. Accordingly, we banish 'equitable mootness' from the (local) lexicon" [In re UNR Indus., 20 F.3d 766, 769 (7th Cir. 1994)]. Although the Eighth Circuit did not expressly banish the term "equitable mootness," it made plain its dislike for the term.

- **Equitable Mootness Should Be Cautiously Applied.** The Eighth Circuit further took issue with the frequency with which the doctrine arises in bankruptcy cases. The court noted that the doctrine should be limited in scope and cautiously applied. However, the court cited a Third Circuit opinion in which that court found that the doctrine of equitable mootness has become a routine part of bankruptcy litigation [One2One Communs., LLC v. Quad/Graphics, Inc., 805 F.3d 428, 432–433 (3d Cir. 2015)].

  In the *One2One* case, the Third Circuit held that the doctrine was intended to promote finality, but "it has proven far more likely to promote uncertainty and delay" [One2One Communs., LLC v. Quad/Graphics, Inc., 805 F.3d 428, 446 (3d Cir. 2015)]. The Third Circuit noted that motions to dismiss appeals on the ground of equitable mootness have become so routine in bankruptcy cases that parties rush to implement plans in order to have an equitable mootness defense.

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The parties then inevitably litigate equitable mootness rather than the merits of an appeal. The Third Circuit went on to say that "even if an appeal is dismissed as equitably moot by a district court, that dismissal is appealed to our Court, often resulting, in turn, in a remand and further proceedings. . . . Without the equitable mootness doctrine, . . . the District Court would have ruled on the merits long ago" [One2One Communs., LLC v. Quad/Graphics, Inc., 805 F.3d 428, 447 (3d Cir. 2015)].

- **Equitable Mootness Should Not Be Invoked Unless Court Has First Considered Merits of Appeal and Availability of Other Equitable Remedies.** The Eighth Circuit noted that the inefficiencies identified in *One2One* were also present in the case at hand. The district court had not considered the merits of the appeal, and the parties were therefore litigating the issue of equitable mootness.

  In order to place limits around the invocation of the equitable mootness doctrine, the Eighth Circuit considered the manner in which courts determine whether a case is equitably moot. The court noted that other circuits, including the Third and Fifth Circuits have adopted multi-factor tests to determine whether a case should be deemed equitably moot.

  The Eighth Circuit panel declined to adopt such a test. The court noted that "[t]he ultimate question to be decided is whether the Court can grant relief without undermining the plan and, thereby, affecting third parties" [*quoting* SRE Restructuring, Inc. v. Wooley (In re SI Restructuring, Inc.), 542 F.3d 131, 136 (5th Cir. 2008)]. The most important factors in that determination are whether the plan has been substantially implemented, and if so, what effects reversal would have on third parties. In addition, whether the appellant sought a stay pending review may be relevant, but it is not determinative.

  The court concluded that a reviewing court must (1) make "at least a preliminary review of the merits" of an appeal to determine the strength of the claims at issue; (2) assess the "amount of time that would likely be required" to resolve the merits of such claims on an expedited basis; and (3) consider the potential equitable remedies that might still be available even after a plan's implementation, should the appeal prove successful, to avoid undermining the plan or harming third parties.

  In closing, the court predicted that the Supreme Court, which has to date refused to grant certiorari on equitable mootness petitions, may weigh in and either severely curtail or outright abolish the use of the doctrine.