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JANUARY 2022
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.

APPEALS

Time for Appeal

Al-Qarqani v. Saudi Arabian Oil Co.

2021 U.S. App. LEXIS 35664 (5th Cir. Dec. 2, 2021)

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The Fifth Circuit holds that the filing of a timely motion for reconsideration of an appealable order delays the start of the time for appeal, even if the district court ultimately strikes the motion for failure to comply with requirements of form imposed by local court rules.

ARBITRATION

Federal Arbitration Act

Cunningham v. Lyft, Inc

17 F.4th 244, 2021 U.S. App. LEXIS 33010 (1st Cir. Nov. 5, 2021)

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The First Circuit holds that Lyft drivers do not qualify as a class of workers engaged in interstate commerce so as to be exempt from the Federal Arbitration Act.

SERVICE OF PROCESS

Extension of Time

Morrissey v. Mayorkas

17 F.4th 1150, 2021 U.S. App. LEXIS 33216 (D.C. Cir. Nov. 9, 2021)

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The D.C. Circuit holds that Civil Rule 4(m) does not mandate an extension of time to serve the United States with process after expiration of the initial 90-day period merely because the limitations period has run and the claim will be barred in subsequent litigation [*see* Morrissey v. Mayorkas, 17 F.4th 1150, 2021 U.S. App. LEXIS 33216 (D.C. Cir. Nov. 9, 2021)].

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Lexis+® Real Time Archives for Statutes on Lexis+ Code Compare

By Marisa Beirne, LexisNexis Solutions Consultant for the Federal Government

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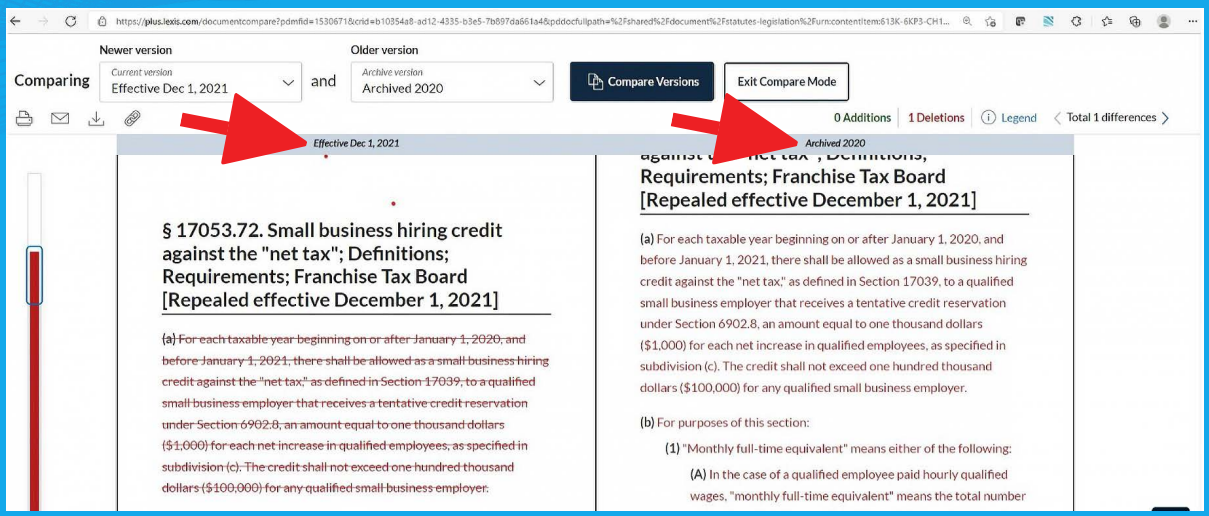

Users will activate Code Compare in the exact same way as before. Once a user hits the blue "Compare Versions" button, this will activate Code Compare and the navigation bar will appear at the top of the screen. At this point, the user is able to pick any of the specific date versions that are available and compare the statutes. By utilizing this new Lexis+ Code Comparison enhancement users can be confident that they are comparing the most up to date versions of any statute.

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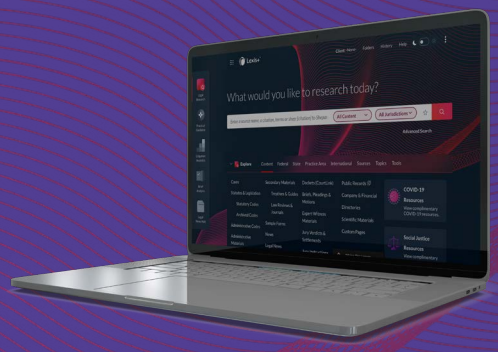
Searching on Lexis+® and New 'Search Within' Enhancements for 2022



By Marisa Beirne, LexisNexis Solutions Consultant for the Federal Government

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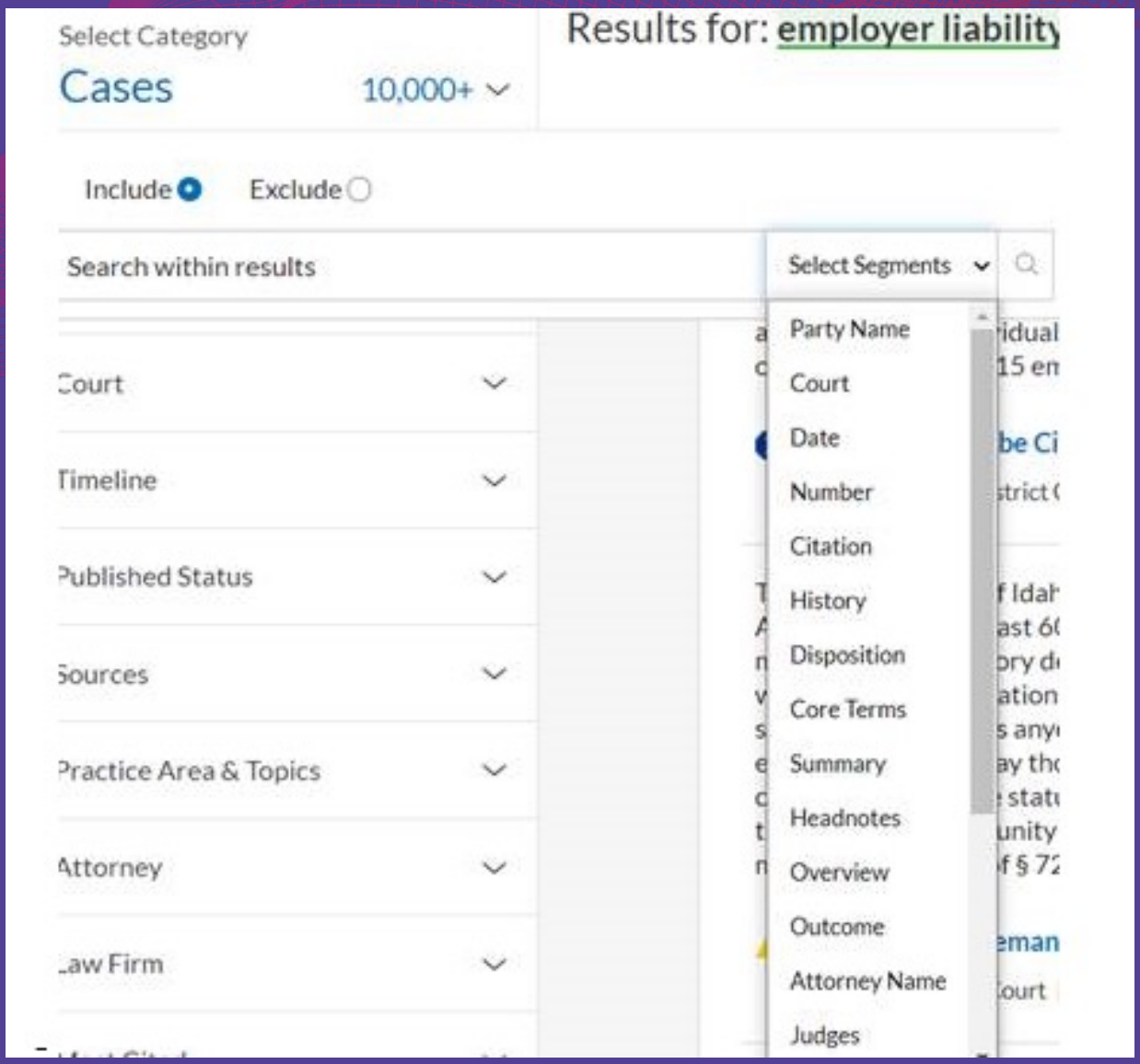
feature to search the "Judges" segment and find opinions that were only written by Justice Scalia (i.e., by selecting "Judges" from the drop-down list and typing in "Scalia" as the search term).

The "Search Within" enhancements are currently rolling out to customers. Please contact your LexisNexis® Solutions Consultant for more information or any help with this new Lexis+ search feature.

See screenshot on next page.



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APPEALS

Time for Appeal

Al-Qarqani v. Saudi Arabian Oil Co.

2021 U.S. App. LEXIS 35664 (5th Cir. Dec. 2, 2021)

The Fifth Circuit holds that the filing of a timely motion for reconsideration of an appealable order delays the start of the time for appeal, even if the district court ultimately strikes the motion for failure to comply with requirements of form imposed by local court rules.

Background. The plaintiffs in this case had petitioned the district court to confirm a foreign arbitration award. Four weeks after the district court denied their petition, the plaintiffs filed a motion for reconsideration. Eight days later, the district court entered an order striking the motion for failure to comply with two of the court's procedural rules. Twenty-nine days later—65 days after entry of the original order denying their petition—the plaintiffs filed a notice of appeal from the original order.

Appellate Jurisdiction—Time for Appeal. As a threshold matter, the Fifth Circuit panel considered whether it had jurisdiction over the appeal, a question that depended on whether the notice of appeal had been timely filed.

Federal Rule of Appellate Procedure 4(a) provides that a private party in a civil case generally has 30 days from the entry of the judgment or order appealed from to file a notice of appeal [Fed. R. App. P. 4(a)(1) (60 days if any party is United States or its agency or certain of its current or former officers or employees)]. The Fifth Circuit noted that on the face of the record in this case, the 30-day time limit was not met. The plaintiffs filed their notice of appeal 65 days after the district court denied their petition. Ordinarily, however, a motion for reconsideration, which was filed in this case, tolls the period for filing a notice of appeal.

Specifically, Appellate Rule 4(a)(4) provides that if any of certain postjudgment motions is timely filed, the time to file an appeal runs for all parties from the entry of the order disposing of the last of such motions [Fed. R. App. P. 4(a)(4)(A)]. Thus, if the plaintiffs' motion for reconsideration qualified under Appellate Rule 4(a)(4), their notice of appeal would have been timely, since it was filed only 29 days after the district court disposed of the motion. The motion for reconsideration (i.e., to alter or amend the district court's judgment under Civil Rule 59(e)) was one of the motions listed in Appellate Rule 4(a)(4), and it was timely [*see* Fed. R. App. P. 4(a)(4)(iv); Fed. R. Civ. P. 59(e) (allowing 28 days to file motion to alter or amend judgment)].

The defendant contended, however, that because the district court struck the motion for reconsideration for failure to comply with local rules, the motion did not serve the tolling function under Appellate Rule 4(a)(4).

Striking of Motion for Violation of Local Rules Did Not Deprive it of Tolling Effect. The defendant's argument that this motion for reconsideration did not toll the filing period rested on cases holding that struck motions for reconsideration did not toll the period for filing a notice of appeal [*see* Bunn v. Perdue, 966 F.3d 1094, 1095–1098 (10th Cir. 2020); Franklin v. Burlington N. & Santa Fe Ry., 522 Fed. Appx. 220 (5th Cir. 2013) (per curiam) (unpublished); Hoffman v. Meckling, 139 F.3d 899 (5th Cir. 1998) (per curiam) (unpublished)]. The Fifth Circuit panel in this case noted that

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those cases traced their reasoning back to the First Circuit's 1994 decision in *Air Line Pilots Ass'n v. Precision Valley Aviation, Inc.* [26 F.3d 220 (1st Cir. 1994)]. None of those cases, however, noted that in 1995, after *Air Line Pilots* was decided, Civil Rule 83(a) was revised to add a second paragraph that currently says, "A local rule imposing a requirement of form must not be enforced in a way that causes a party to lose any right because of a nonwillful failure to comply" [Fed. R. Civ. P. 83(a)(2)].

The Fifth Circuit panel found that the motion for reconsideration in this case was struck because of a failure to comply with a requirement of form as contemplated by Civil Rule 83(a). Specifically, the motion was struck for noncompliance with the district court's local procedural rules requiring (1) that the motion contain a certificate of conference "stating that counsel and pro se parties have conferred regarding the substance of the relief requested, and stating whether the relief is opposed or denied"; and (2) that the motion be accompanied by a proposed order. The court of appeals concluded that these requirements were matters of form, and under Civil Rule 83(a) they could not be enforced in a way that would deprive the plaintiffs of the motion's tolling effect.

Conclusion and Disposition. Because the notice of appeal, which was filed within 30 days after entry of the order striking the motion for reconsideration, was timely, the court of appeals concluded that it had jurisdiction over this appeal.

On the merits, the Fifth Circuit panel held that the district court had lacked jurisdiction over this proceeding to confirm a foreign arbitration award. The defendant qualified as a "foreign state" with immunity from suit in U.S. courts under the Foreign Sovereign Immunities Act, and none of the Act's exceptions to immunity was applicable [*see* 28 U.S.C. §§ 1603–1605]. In particular, the Act's exception for actions brought to confirm arbitration awards was inapplicable because there was in fact no arbitration agreement between the plaintiffs and the defendant [*see* 28 U.S.C. § 1605(a)(6)]. Accordingly, the court of appeals vacated the district court's judgment and remanded with instructions to dismiss the case for lack of jurisdiction.

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ARBITRATION

Federal Arbitration Act

Cunningham v. Lyft, Inc

17 F.4th 244, 2021 U.S. App. LEXIS 33010 (1st Cir. Nov. 5, 2021)

The First Circuit holds that Lyft drivers do not qualify as a class of workers engaged in interstate commerce so as to be exempt from the Federal Arbitration Act.

- **Summary.** The Fourth Circuit holds that a plaintiff's filing of a complaint under a fictitious name without first obtaining leave of court to proceed pseudonymously is not a jurisdictional defect.

- **Background.** The plaintiffs in this case were rideshare drivers who used the Lyft application to find passengers. They sued Lyft, claiming that they had been misclassified as independent contractors rather than employees. After the district court denied Lyft's motion to compel arbitration, Lyft appealed to the First Circuit.

- **Exemption From Federal Arbitration Act.** The central issue on appeal was whether the parties' arbitration agreement was exempt from the Federal Arbitration Act (FAA) [9 U.S.C. § 1 et seq.]. The FAA generally requires courts to place arbitration agreements on an equal footing with other contracts and enforce them according to their terms [*see* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011)]. However, the FAA exempts from its coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" [9 U.S.C. § 1].

  The Supreme Court has rejected the interpretation that the FAA's exemption covers all workers arguably involved in commerce. Instead, the exemption covers only "transportation" workers [Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 119, 121 S. Ct. 1302, 149 L. Ed. 2d 234 (2001); *see also* New Prime Inc. v. Oliveira, 586 U.S. —, 139 S. Ct. 532, 202 L. Ed. 2d 536, 543–549 (2019) (transportation workers covered by FAA exemption include independent contractors as well as employees)].

  In this case, Lyft contended that the plaintiffs were not among a class of transportation workers engaged in "interstate commerce" within the meaning of the FAA exemption. The plaintiffs did not challenge the premise that they had to be among such a class of transportation workers in order to claim the benefit of the exemption. Instead, they contended that members of the class of transportation workers to which they belonged were engaged in interstate commerce for two reasons: (1) because they took passengers to and from the airport for trips to and from other states and countries, and (2) because some Lyft drivers sometimes take fares across state lines. The First Circuit panel rejected both of these arguments.

- **Taking Passengers to and From Airport Is Not Engaging in Interstate Commerce.** The First Circuit found that the plaintiffs' argument based on their transportation of some passengers to and from the local airport "runs headlong into the instruction supplied by *United States v. Yellow Cab Co.*" In that case, the Supreme Court held that for purposes of the Sherman Antitrust Act, taxi companies hired by railroads to transfer interstate passengers between rail stations in Chicago were engaged in interstate commerce, but when local taxicabs conveyed interstate train passengers between their homes and a railroad station, that service was not an integral part of interstate transportation [United States v. Yellow Cab Co., 332 U.S. 218, 229, 233, 67 S. Ct. 1560, 91 L. Ed. 2010 (1947), *overruled on other grounds by* Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 759–760, 777, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)].

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Using the Supreme Court's *Yellow Cab* logic, the First Circuit concluded that Lyft drivers taking passengers to and from the airport do not engage in interstate commerce. As in *Yellow Cab*'s second scenario, the Lyft driver contracts with the passenger as part of the driver's normal local service to take the passenger to the start (or from the finish) of the passenger's interstate journey. And such trips by Lyft drivers did not fit in *Yellow Cab*'s first scenario: the airlines did not agree to provide the relevant ground transit, and neither Lyft nor Lyft drivers contracted with the airlines to help perform such an undertaking.

- **Occasionally Taking Passengers Across State Lines Is Not Engaging in Interstate Commerce.** Turning to the plaintiffs' second argument against application of the FAA exemption, the First Circuit panel acknowledged there is a circuit split on the question whether occasional trips across state lines constitutes engaging in interstate commerce. The Seventh Circuit has held that cement-truck drivers whose local trips took them across state lines on roughly two percent of their delivery trips were within the ambit of the FAA exemption. The Seventh Circuit reasoned that "there is no basis in the text of [9 U.S.C.] § 1 for drawing a line between workers who do a lot of interstate transportation work and those who cross state lines only rarely; both sorts of workers are 'engaged in foreign or interstate commerce'" [see Int'l Brotherhood of Teamsters Local Union No. 50 v. Kienstra Precast, Inc., 702 F.3d 954, 958 (7th Cir. 2012)]. Conversely, the Ninth Circuit has concluded that Uber drivers, as a class of workers, do not fall within the FAA exemption, because their work predominantly entails intrastate trips, even though some Uber drivers cross state lines in the course of their work. The Ninth Circuit reasoned that driving passengers interstate was not a "central part of the job description," and that "someone whose occupation is not defined by its engagement in interstate commerce does not qualify for the exemption just because she occasionally performs that kind of work" [*see* Capriole v. Uber Techs., Inc., 7 F.4th 854, 863, 865 (9th Cir. 2021)].

  In this case, the First Circuit joined the Ninth Circuit, concluding that Lyft drivers do not fit within the FAA exemption. In so holding, the court found it significant that not all Lyft drivers engage in interstate transportation, and that the nature of Lyft's business cannot be characterized as interstate commerce. "Lyft is clearly primarily in the business of facilitating local, intrastate trips."

- **Conclusion and Disposition.** Because the plaintiffs were not part of a "class of workers engaged in foreign or interstate commerce" [*see* 9 U.S.C. § 1], the parties' arbitration agreement was not exempt from the FAA. Accordingly, the First Circuit reversed the district court's decision denying Lyft's motion to compel arbitration.

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SERVICE OF PROCESS

Extension of Time

Morrissey v. Mayorkas

17 F.4th 1150, 2021 U.S. App. LEXIS 33216 (D.C. Cir. Nov. 9, 2021)

The D.C. Circuit holds that Civil Rule 4(m) does not mandate an extension of time to serve the United States with process after expiration of the initial 90-day period merely because the limitations period has run and the claim will be barred in subsequent litigation [see Morrissey v. Mayorkas, 17 F.4th 1150, 2021 U.S. App. LEXIS 33216 (D.C. Cir. Nov. 9, 2021)].

- **Service Requirements; Federal Parties.** To sue a federal agency or other U.S. government entity, a plaintiff must serve both the entity and the United States [Fed. R. Civ. P. 4(i)(2)]. To serve the latter, a plaintiff must serve a summons and the complaint on both the U.S. Attorney for the district where the action is brought, and the U.S. Attorney General [Fed. R. Civ. P. 4(i)(1)]. Only 90 days are provided to complete service, and if the plaintiff fails to do so, the court must either dismiss the action without prejudice, or order that service be made within a specified time. This 90-day period must be extended if good cause is shown, but the court has discretion to grant an extension without such a showing [Fed. R. Civ. P. 4(m)]. However, because of the complex requirements for service on federal parties, the court must allow a party a reasonable time to cure its failure to comply in certain cases of partial compliance [Fed. R. Civ. P. 4(i)(4)].

- **Factual and Procedural Background.** Two former federal employees sued their employing agencies, alleging discrimination during the term of their employment and in how that term ended. Both served the agency but failed to also serve the United States. The first plaintiff received reminders from the court of his service obligations, but he failed to either comply by the 90-day deadline or seek a good-cause extension, so the district court dismissed without prejudice. The second plaintiff was granted an extension sua sponte, but he failed to comply by the extended deadline, so his case was also dismissed without prejudice. Each plaintiff filed a postjudgment motion, arguing that because the statute of limitations had expired, the dismissal was effectively with prejudice, so the district court was either required to or should have permitted more time for service. The motions were denied and the appeals to the D.C. Circuit were consolidated.

- **Standard of Review.** The D.C. Circuit began its analysis by noting that under well-established precedent, a district court's dismissal under Rule 4(m) is reviewed only for an abuse of discretion. Both employees argued for a heightened standard because the dismissals, though nominally without prejudice as required by the terms of Rule 4(m), were in essence *with prejudice* because of the limitations bar. In support, each invoked a Fifth Circuit case taking that approach [*see* Millan v. USAA GIC, 546 F.3d 321, 326 (5th Cir. 2008) ("[W]here the applicable statute of limitations likely bars future litigation, a district court's dismissal of claims under Rule 4(m) should be reviewed under the same heightened standard used to review a dismissal with prejudice.")]. The D.C. Circuit panel rejected that argument, declining to apply a heightened standard or to cabin the district court's broad discretion to manage its docket.

- **First Employee's Appeal: Extension of Time.** As to the first employee's appeal, the court of appeals affirmed the refusal to extend the time for service for two reasons: (1) Rule 4(m) authorized it, and a district court cannot abuse its discretion by doing what a rule expressly allows; and (2) the employee never sought to show good cause to require an extension.

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- **First Employee's Appeal: Postjudgment Motion.** The D.C. Circuit then concluded that the district court did not abuse its discretion in denying the postjudgment motion seeking to set aside the dismissal by reason of the potential limitations bar, because the first employee provided no reason why that factor standing alone required, or weighed in favor of, a discretionary extension. Although Rule 4(i)(4) requires an extension in certain defined circumstances of failed service on federal parties, this employee's case did not fall within the rule, and the D.C. Circuit declined to extend it to a new context beyond its own terms. As to a discretionary extension, the court noted that the only factor favoring it was the potential limitations bar, which was insufficient to overcome the other countervailing considerations of failure to comply or exercise due diligence. As the court summarized, "Rule 4 gives a district court discretion to grant an extension, but it does not mandate an extension where a plaintiff fails to serve the government and the statute of limitations has run."

- **Second Employee's Appeal: Extension of Time.** As to the second employee's appeal, the court of appeals affirmed the refusal to extend the time for service for a second time, because the employee failed to complete service before the initial extended deadline despite a warning that dismissal would be the result of any failure to comply. The district court was therefore not required to afford a "third bite at the apple." The potential limitations bar as grounds for an extension was waived because the second employee never brought that to the district court's attention.

- **Second Employee's Appeal: Postjudgment Motion.** The D.C. Circuit then concluded that the district court did not abuse its discretion in denying the second employee's postjudgment motion, because the standards for relief under Rule 59(e) and Rule 60(b) were not met. First, the mistake, inadvertence, surprise, or excusable neglect standard of Rule 60(b)(1) did not apply, because the plaintiff (or counsel) simply did not know about the service requirements, so compliance was within the reasonable control of the plaintiff. As the court put it, "Rule 60(b) affords the district court wide discretion, and the running of the statute of limitations, standing alone, does not mandate an extension" to serve process. Second, the standards of Rule 59(e) were not met because the plaintiff's arguments for relief from the dismissal judgment were all available before it was entered, so that procedural vehicle was unavailable. Moreover, the potential limitations bar urged by the plaintiff was considered as a factor by the district court, both in granting the initial extension, and in declining to grant another one or award relief from the judgment. Because of this factor, the court of appeals declined to address whether the failure of a district court to consider a potential limitations bar would be a per se abuse of discretion.

- **Disposition.** The D.C. Circuit affirmed the dismissals of the two employees' complaints for the failure to serve process on the United States within the time permitted by Rule 4(m) or any applicable extension of that period.

- **Dissent.** Circuit Judge Millett dissented from the panel's decision, based primarily on the Fifth Circuit case mentioned above [Millan v. USAA GIC, 546 F.3d 321 (5th Cir. 2008)]. The dissent first noted, however, the general rule that federal courts favor disposition on the merits, not for "mere technicalities." This general rule is particularly strong when dismissing claims would have a preclusive effect by effectively ending the litigation. For this reason, the dissent noted that D.C. Circuit precedent requires that any dismissal for failure to prosecute under Rule 41(b) must be without prejudice, unless the district court finds repeated misconduct or dilatoriness that justifies a dismissal with prejudice [see Peterson v. Archstone Cmtys. LLC, 637 F.3d 416, 418 (D.C. Cir. 2011)]. The dissent argued that failure to comply with the 90-day service period of Rule 4(m) is simply a particular example of a failure to prosecute, so it should fall within the circuit precedent and

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require some form of misconduct barring the courthouse doors to the plaintiff due to a limitations bar. Finally, the dissent noted that the Advisory Committee Notes to Rule 4 mention a potential limitations bar as a reason for a discretionary extension [Fed. R. Civ. P. 4, Advisory Committee Note to 1993 amendment], and that the shortening of the period from 120 days to 90 days in 2015 would increase the frequency of such extensions [Fed. R. Civ. P. 4, Advisory Committee Note to 2015 amendment]. Given all these factors, the dissent argued that whether a dismissal is *effectively* prejudicial under Rule 4(m) or is *actually* with prejudice under Rule 41(b) "is a distinction without a difference," so the district court abused its discretion by failing to follow circuit precedent.