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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

Stay of Litigation

Arabian Motors Grp. W.L.L. v. Ford Motor Co.

19 F.4th 938, 2021 U.S. App. LEXIS 35811 (6th Cir. Dec. 3, 2021)

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The Sixth Circuit holds that if the claims remaining in a lawsuit are before an arbitrator who will decide whether the claims are arbitrable, the district court ordinarily must stay the lawsuit rather than dismiss it, even if the court is of the opinion that the claims are indeed arbitrable.

ENTERING JUDGMENT

Separate-Document Requirement

United States v. Hassebrock

21 F.4th 494, 2021 U.S. App. LEXIS 38108 (7th Cir. Dec. 23, 2021) (per curiam)

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INJUNCTIONS

Preliminary Injunctions

MPineda v. Skinner Servs., Inc.

2021 U.S. App. LEXIS 38572 (1st Cir. Dec. 30, 2021)

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The First Circuit holds that, although a district court lacks authority under Rule 65 to grant preliminary relief enjoining a defendant from dissipating its assets, it does have power under Rule 64 to issue such relief if authorized under the law of the forum state.

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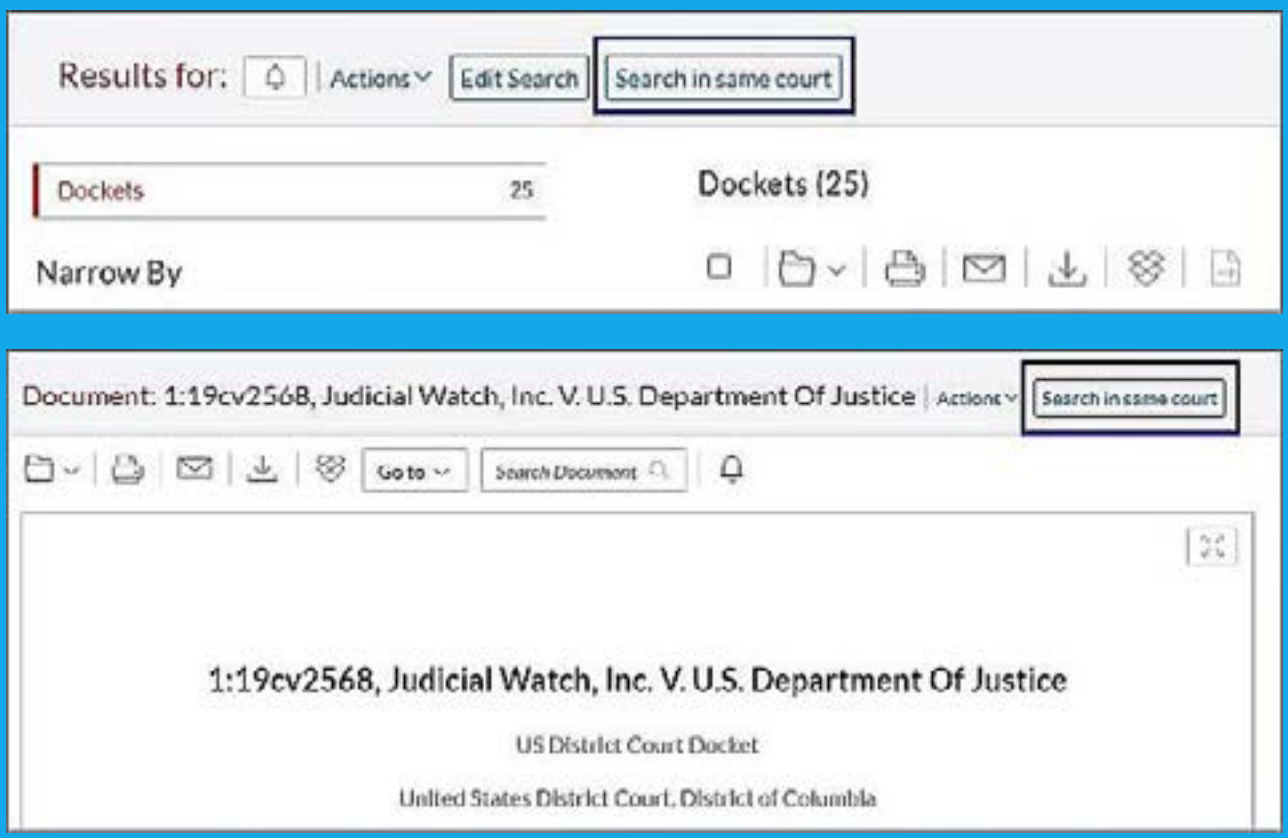

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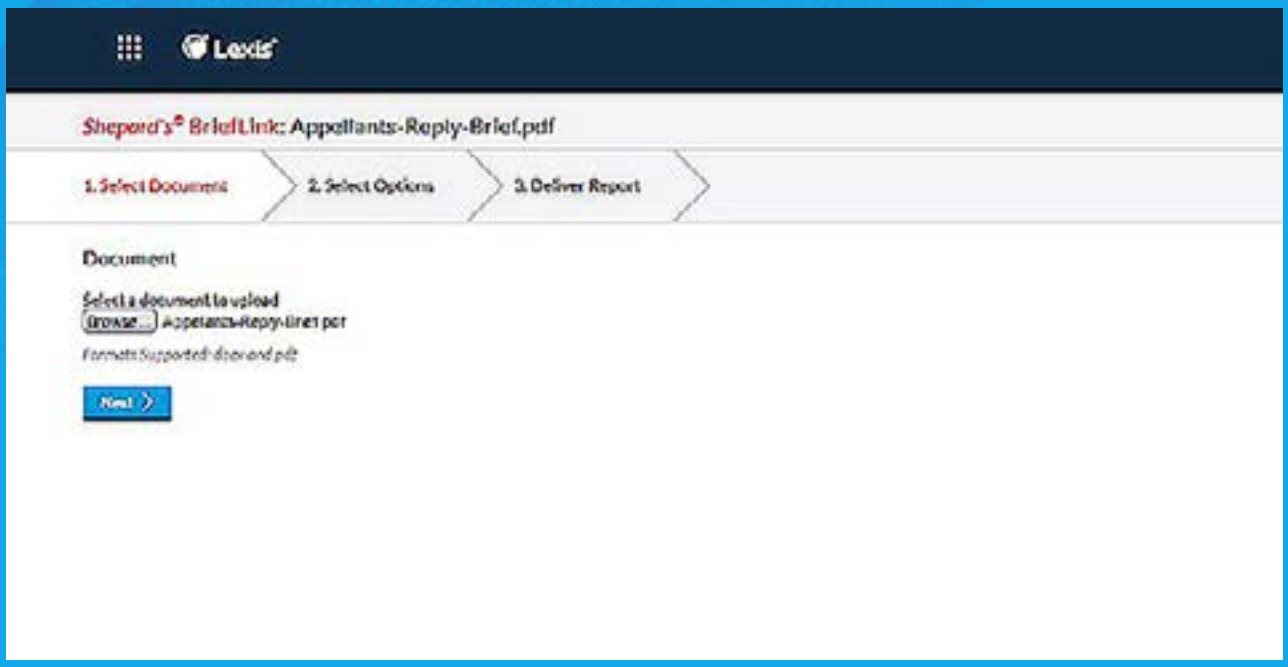

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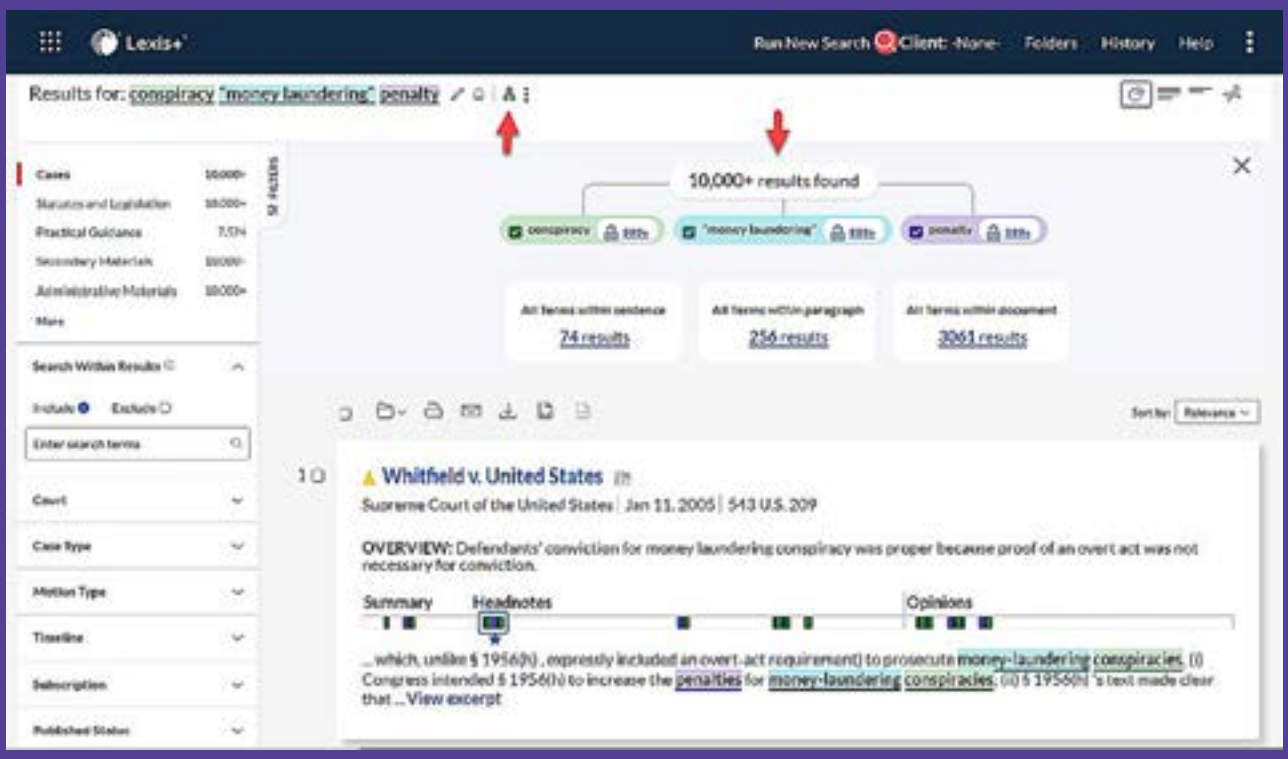

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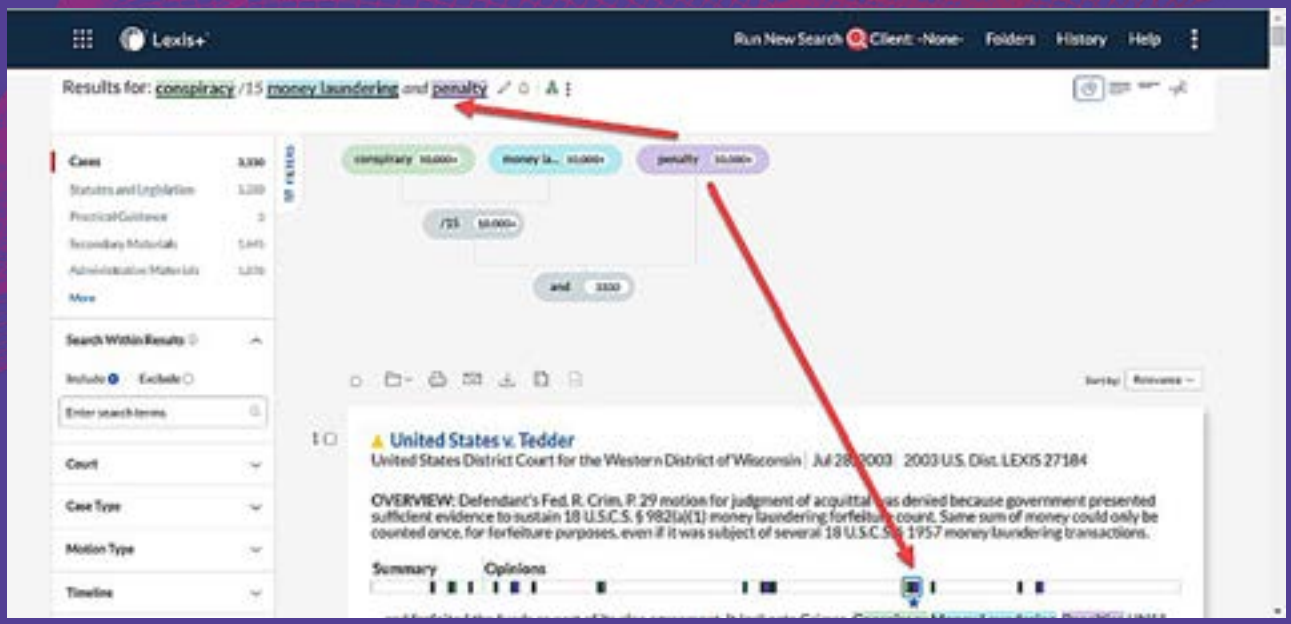

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ARBITRATION

Stay of Litigation

Arabian Motors Grp. W.L.L. v. Ford Motor Co.

19 F.4th 938, 2021 U.S. App. LEXIS 35811 (6th Cir. Dec. 3, 2021)

The Sixth Circuit holds that if the claims remaining in a lawsuit are before an arbitrator who will decide whether the claims are arbitrable, the district court ordinarily must stay the lawsuit rather than dismiss it, even if the court is of the opinion that the claims are indeed arbitrable.

Background. The plaintiff and defendant had a business relationship under an agreement that provided for binding arbitration of any "dispute, claim, or controversy" about the contract. When the relationship went sour, the defendant terminated the agreement and initiated arbitration proceedings, seeking a declaration that it had permissibly ended the agreement and did not owe the plaintiff anything under the agreement. The plaintiff then sued in federal district court, seeking an injunction and declaration prohibiting the defendant from proceeding with arbitration; the plaintiff also asserted common-law claims for breach of contract and fraud.

After the district court denied the plaintiff's request for a preliminary injunction to halt the arbitration, the arbitration panel decided that the defendant had permissibly terminated the parties' agreement. The panel issued an award taxing the defendant's legal fees and the cost of the arbitral proceedings against the plaintiff. In the arbitration proceedings, the plaintiff initially asserted counterclaims for common-law breach of contract and fraud, but it withdrew those counterclaims before the arbitration panel issued its award. In allowing the withdrawal of the counterclaims, the arbitral panel noted that it was making no determination of the effect of the withdrawal on an attempt to reassert the counterclaims in a future proceeding.

The parties then returned to the district court, which confirmed the award (a decision that was upheld by the Sixth Circuit). The defendant then moved to stay the federal action to allow the arbitration panel to resolve the plaintiff's common-law breach-of-contract and fraud claims. Although one issue for the arbitral panel was to be whether the reasserted common-law claims could be arbitrated, the district court determined on its own that the common-law claims were subject to arbitration. The district court then decided to dismiss the action without prejudice, rather than staying it.

The Sixth Circuit reversed, concluding that the district court should have stayed the action rather than dismissing it.

Case Was Not Moot. As a threshold matter, the Sixth Circuit panel considered whether the case was moot. The question of mootness arose from the fact that the court of appeals had already affirmed the district court's confirmation of the arbitration award, which had resolved all of the questions that were before the arbitral panel (the common-law claims having been withdrawn). The court of appeals concluded that, because the arbitration panel could interpret its rules as allowing the reassertion of the previously withdrawn common-law claims, "this leaves us with a dispute that may be on life support but one that is not moot."

District Court Should Have Stayed Action. Section 3 of the Federal Arbitration Act (FAA) provides that when a court is satisfied that a claim before it is arbitrable, it "shall on application of one of the

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parties stay the trial" and order the parties to proceed to arbitration [9 U.S.C. § 3]. The Sixth Circuit reasoned that this provision's use of the word "shall" coveys that a stay is mandatory [see Anderson v. Yungkau, 329 U.S. 482, 485, 67 S. Ct. 428, 91 L. Ed. 436 (1947) ("The word 'shall' is ordinarily the language of command." (some internal quotation marks omitted))].

The court of appeals noted that other provisions of the FAA reinforce the interpretation that section 3 imposes an obligation to stay court proceedings. Several provisions of the FAA enable a district court to facilitate an arbitration [*see*, e.g., 9 U.S.C. §§ 5 (parties may apply to court for appointment of arbitrator), 7 (parties may ask court to summon witnesses to arbitration), 9–11 (court may confirm, vacate, or modify arbitration award)]. When a district court stays a case and retains jurisdiction over it, that permits the parties to use these mechanisms promptly and efficiently. By contrast, a dismissal would require the parties to file a new action, possibly in front of a different judge.

The court of appeals further explained that because a dismissal, unlike a stay, permits an objecting party to file an immediate appeal, a dismissal order would undercut the pro-arbitration appellate-review provisions of the FAA. Section 16 of the FAA allows immediate appeals of court orders that deny arbitration (such as the refusal of a stay under section 3) but defers appellate review of decisions in favor of arbitration (such as the grant of a stay or a refusal to enjoin arbitration) [9 U.S.C. § 16]. If a district court could freely dismiss cases in this setting, it would upend this pro-arbitration approach. That is, a party normally required to bring an appeal at the end of the action could sidestep the clear policy preference of the Act and continue to litigate the issues in federal court and thus disrupt the arbitration.

The Sixth Circuit noted that the Fifth Circuit has said that if all issues raised in an action are arbitrable and must be submitted to arbitration, retaining jurisdiction and staying the action will serve no purpose [Alford v. Dean Witter Reynolds, Inc., 975 F.2d 1161, 1164 (5th Cir. 1992)]. The Sixth Circuit declined to adopt this rationale and pointed out that the FAA is not a docket-management statute. "It is a statute that lays out a textual preference for arbitration, not cleaning out district court dockets."

The Sixth Circuit acknowledged that there might be situations in which a dismissal is permissible, such as when the dispute is moot or suffers from some other pleading or procedural defect, or when both parties request a dismissal or neither party asks for a stay. But this case was a straightforward situation in which a stay was mandatory. The court of appeals therefore left open the question whether dismissal might be appropriate in other scenarios and declined to join those circuits that flatly hold that district courts never have discretion to dismiss when a party requests a stay pending arbitration [*see* Lloyd v. Hovensa, LLC, 369 F.3d 263, 270 (3d Cir. 2004); Katz v. Cellco P'ship, 794 F.3d 341, 345 (2d Cir. 2015)].

The Sixth Circuit concluded by pointing out that its holding is not undermined by the possibility of a permissible interlocutory appeal under 28 U.S.C. § 1292(b), a possibility that is recognized by the FAA [see 9 U.S.C. § 16(b)]. Such an appeal is available only for a pressing, non-arbitrable, and efficiency-enhancing issue, and only if both the district court and the court of appeals exercise their discretion to permit the appeal [*see* 28 U.S.C. § 1292(b)]. Thus, in most instances a stay of proceedings under FAA section 3 will further the underlying pro-arbitration policy by protecting the party seeking arbitration from having to go through an immediate appeal before the completion of arbitration proceedings.

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ENTERING JUDGMENT

Separate-Document Requirement

United States v. Hassebrock

21 F.4th 494, 2021 U.S. App. LEXIS 38108 (7th Cir. Dec. 23, 2021) (per curiam)

The Seventh Circuit holds that Rule 58's requirement that a judgment be set out in a separate-document applies to a district court's determination of a petition for a writ of coram nobis.

Background. The petitioner in this case had been convicted of tax evasion. While in custody, he unsuccessfully challenged his sentence under 28 U.S.C. § 2255.

After completing his prison sentence and supervised release, he petitioned for a writ of coram nobis. That writ provides, for defendants who are no longer in custody, relief similar to that available under § 2255. The district court construed the petition as a § 2255 motion and dismissed it as an unauthorized successive habeas corpus petition.

Four months later, the petitioner moved to set aside the judgment of dismissal under Federal Rule of Civil Procedure 60(b), arguing that, because he no longer was in custody at the time he filed his petition, it did not fall within the scope of § 2255. The district court denied the Rule 60(b) motion, and the petitioner appealed, seeking review of the judgment of dismissal.

Timeliness of Appeal. As a threshold matter, the government contended that the petitioner's failure to appeal the denial of his coram nobis petition within 60 days rendered this appeal timely only as to the denial of the Rule 60(b) motion [*see* Fed. R. App. P. 4(a)(1)(B)(i), (C)]. An appeal from the denial of a Rule 60(b) motion does not allow the appellate court to review the underlying decision [*see* Bell v. McAdory, 820 F.3d 880, 883 (7th Cir. 2016)].

The Seventh Circuit panel rejected the government's contention. Although the notice of appeal was filed well over 60 days after the district court's dismissal of the petition for coram nobis, the time for appeal is measured from the *entry* of the judgment of dismissal [*see* Fed. R. App. P. 4(a)(1)(B)(i), (C)]. The appellate panel in this case pointed out that the district court had not filed a separate judgment under Federal Rule of Civil Procedure 58. If a court neglects to enter a separate document that is required by Rule 58, then the judgment is deemed entered—and the time to appeal begins to run—150 days after the dispositive order was entered on the civil docket [*see* Fed. R. App. P. 4(a)(7)(A)(ii); Fed. R. Civ. P. 58(c)(2)(B)]. Thus, if Rule 58 applies to the disposition of a writ of coram nobis, then the petitioner's notice of appeal, which was filed within 60 days of the 150-day window, would have been timely as to the underlying denial.

Separate-Document Requirement Applies to Coram Nobis. The Seventh Circuit panel concluded, as a matter of first impression within the circuit, that Rule 58 does apply to a determination on coram nobis. The court explained that the text of Rule 58 states that "[e]very judgment . . . must be set out in a separate document," with five specified exceptions, none of which concerns coram nobis petitions [*see* Fed. R. Civ. P. 58(a)]. The purpose of the rule is to clarify when the time for appeal begins to run [*see* Bankers Trust Co. v. Mallis, 435 U.S. 381, 384, 98 S. Ct. 1117, 55 L. Ed. 2d 357 (1978); Brown v. Fifth Third Bank, 730 F.3d 698, 700 (7th Cir. 2013)]. The court remarked that the rule can be particularly helpful to clarify for pro se litigants, like the petitioner in this case, that a decision is final and appealable.

The Seventh Circuit panel noted that, although it had not decided whether Rule 58 applies in the

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analogous context of § 2255 proceedings, it has suggested that it does [*see, e.g.*, Morales v. Bezy, 499 F.3d 668, 671 (7th Cir. 2007)]. And most other circuits have applied Rule 58 to § 2255 motions [*see, e.g.*, Kingsbury v. United States, 900 F.3d 1147, 1151 (9th Cir. 2018); Jeffries v. United States, 721 F.3d 1008, 1012–1013 (8th Cir. 2013); Gillis v. United States, 729 F.3d 641, 643 (6th Cir. 2013); United States v. Fiorelli, 337 F.3d 282, 286 (3d Cir. 2003); United States v. Johnson, 254 F.3d 279, 283, 349 U.S. App. D.C. 202 (D.C. Cir. 2001); Sassoon v. United States, 549 F.2d 983, 984 (5th Cir. 1977); *but see* Williams v. United States, 984 F.2d 28, 30 (2d Cir. 1993) (§ 2255 motion is not subject to Rule 58 because it "is a further step in the movant's criminal case and not a separate civil action")].

The court rejected a government contention that the petitioner had waived the benefit of the 150-day window by including in his jurisdictional memorandum a request that the appellate panel "[p]lease consider Rule 58 waived." Construing this pro se submission generously, the court interpreted it as waiving only the requirement that the district court enter judgment in a separate document, not the 150-day rule that rendered the appeal timely. The court emphasized that the separate-document requirement is not jurisdictional and is not intended to act as a "trap" for inexperienced litigants. [see Bankers Trust Co. v. Mallis, 435 U.S. 381, 384, 386, 98 S. Ct. 1117, 55 L. Ed. 2d 357 (1978)].

Disposition on Merits. Proceeding to the merits of the appeal, the Seventh Circuit concluded that even though the district court erred in treating the petition as a § 2255 motion, the petitioner was not entitled to relief. A writ of coram nobis is available only in an extraordinary case, when (1) there is an error so fundamental as to render the conviction invalid, (2) there are sound reasons for the petitioner's failure to seek relief earlier, and (3) the petitioner continues to suffer from the conviction [*see* United States v. Delhorno, 915 F.3d 449, 452 (7th Cir. 2019)]. The court explained that the second element was not met: the petitioner could have raised all his arguments either on direct appeal or in his previous § 2255 motion, and he offered no reason at all for failing to do so. And the primary argument he raised in his coram nobis petition—ineffective assistance of counsel—was raised and rejected in his § 2255 motion and could not be relitigated in this case [*see* United States v. Keane, 852 F.2d 199, 206 (7th Cir. 1988)]. Accordingly, the Seventh Circuit affirmed the district court's judgment.

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INJUNCTIONS

Preliminary Injunctions

MPineda v. Skinner Servs., Inc.

2021 U.S. App. LEXIS 38572 (1st Cir. Dec. 30, 2021)

The First Circuit holds that, although a district court lacks authority under Rule 65 to grant preliminary relief enjoining a defendant from dissipating its assets, it does have power under Rule 64 to issue such relief if authorized under the law of the forum state.

Background. The plaintiffs in this case were workers who, on behalf of themselves and others similarly situated, sued their employer for unpaid wages. The plaintiffs asserted claims under the Fair Labor Standards Act (FLSA) and Massachusetts law.

After the lawsuit was filed, the defendant employer created four new companies. The plaintiffs alleged that the new entities were created in order to transfer the defendant's corporate assets so as to prevent the plaintiffs from recovering damages should they prevail on their claims. On motion by the plaintiffs, the district court issued a preliminary injunction restricting the defendant from transferring its assets except under specified conditions.

On interlocutory appeal to the First Circuit, the defendant challenged the preliminary injunction.

Supreme Court's *Grupo Mexicano* Decision. The defendant's primary argument was that the preliminary injunction, which was issued under state law, contravened the Supreme Court's holding in *Grupo Mexicano de Desarollo S.A. v. Alliance Bond Fund, Inc.* In that case, the Court held that a federal court lacks authority under Federal Rule of Civil Procedure 65 to issue a preliminary injunction to prevent a defendant from disposing of its assets pending adjudication of the plaintiff's claim for money damages [Grupo Mexicano de Desarollo S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 333, 119 S. Ct. 1961, 144 L. Ed. 2d 319 (1999)]. (Rule 65 generally governs the issuance of injunctive relief by district courts.)

The First Circuit panel noted that the Supreme Court in *Grupo Mexicano* based its analysis on the historical powers of federal courts of equity, which the Court found did not extend to the issuance of preliminary injunctions to preserve defendants' assets [Grupo Mexicano de Desarollo S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 319–322, 119 S. Ct. 1961, 144 L. Ed. 2d 319 (1999)]. But the Court explicitly did not consider the argument that such a preliminary injunction was available under the law of the forum state pursuant to Federal Rule of Civil Procedure 64 [Grupo Mexicano de Desarollo S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 318 n.3, 330–331, 119 S. Ct. 1961, 144 L. Ed. 2d 319 (1999)].

Rule 64 Authorizes Injunctive Relief Under State Law. In the present case, the First Circuit panel held that the district court was indeed authorized by Rule 64 and Massachusetts law to issue the preliminary injunction. Rule 64 provides that in any federal action, "every remedy is available that, under the law of the state where the court is located, provides for seizing a person or property to secure satisfaction of the potential judgment" [Fed. R. Civ. P. 64(a)].

The appellate panel observed that many courts have interpreted Rule 64 as authorizing injunctive relief under state law [*see, e.g.*, United States ex rel. Rahman v. Oncology Assocs., 198 F.3d 489, 501 (4th Cir. 1999) (Rule 64 incorporates state procedures to secure satisfaction of judgment, including

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any state-authorized injunctive relief for freezing assets); Hendricks v. Bank of Am. N.A., 408 F.3d 1127, 1139 (9th Cir. 2005) (applying California standard for preliminary injunction under Rule 64)]. And "[t]his court also has recognized as much in dicta" [*see* Micro Signal Research, Inc. v. Otus, 417 F.3d 28, 33 n.3 (1st Cir. 2005); Charlesbank Equity Fund II v. Blinds to Go, Inc., 370 F.3d 151, 161 (1st Cir. 2004) ("The Court's reasoning [in *Grupo Mexicano*] supports the continued vitality of Rule 64.")].

The court of appeals rejected an argument that the power to enter a preliminary injunction under Rule 64 is limited to cases brought to federal court under diversity jurisdiction. The court pointed out that nothing in Rule 64 indicates that the power to rely on the forum state's law to "secure satisfaction of the potential judgment" turns on the basis for the district court's subject-matter jurisdiction. And the court was not aware of any caselaw limiting the scope of Rule 64 on that basis.

District Court Did Not Abuse Its Discretion in Granting Preliminary Injunctive Relief. The First Circuit panel went on to find that the district court had not abused its discretion in determining that the state-law requirements for a preliminary injunction to prevent dissipation of the defendant's assets had been met in this case.

Under Massachusetts law, a party seeking a preliminary injunction must show (1) that he or she is likely to succeed on the merits, (2) that he or she will likely suffer irreparable harm in the absence of preliminary injunctive relief, and (3) that the risk of irreparable harm outweighs the potential harm to the nonmoving party if the injunction is awarded. The court of appeals found that the record was sufficient to support findings in the plaintiffs' favor on each of these elements. In arriving at that determination, the court of appeals rejected a contention that the district court had not made sufficient written findings under Rule 52(a) [*see* Fed. R. Civ. P. 52(a) (district court "must find the facts specially")]. The appellate court remarked (internal quotation marks and citation omitted):

> We can affirm the result where, as here, the basis for the court's decision is clear and the record gives substantial and unequivocal support for the ultimate conclusion. In a case such as this, where the district court has been handling it for years, has received substantial testimonial and documentary evidence in connection with the preliminary injunction motion and other motions, and has held a hearing on the matter, the court's sparse written factual findings will not be fatal to its entry of a preliminary injunction.

The court of appeals also found no abuse of discretion in the district court's decision not to require the plaintiffs to post a bond before issuance of the preliminary injunction [see Fed. R. Civ. P. 65(c)]. The court of appeals pointed out that "[t]he bond requirement is not jurisdictional," and the defendant had not shown how it had been harmed by the absence of a bond.

Norris-LaGuardia Act Was Not Applicable. The First Circuit panel concluded by dismissing a contention that the anti-injunction provisions of the Norris-LaGuardia Act deprived the district court of jurisdiction to enter the preliminary injunction [*see* 29 U.S.C. §§ 107, 113]. The court of appeals explained that the Act governs injunctions in cases "involving or growing out of . . . labor dispute[s]" [*see* 29 U.S.C. § 107], and not actions for unpaid wages under the FLSA. The Act defines "labor disputes" to include "any controversy concerning terms or conditions of employment, or concerning the association or representation of persons negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment" [29 U.S.C. § 113(c)]. By contrast, the FLSA protects statutory, rather than contractual, rights of individual workers to guaranteed compensation for all work performed [*see* Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S.

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728, 741, 101 S. Ct. 1437, 67 L. Ed. 2d 641 (1981)].

As the first court of appeals to confront the question, the First Circuit held that a claim for unpaid wages under the FLSA does not constitute a "labor dispute" as defined by the Norris-LaGuardia Act. Accordingly, the strictures of the Act did not govern the preliminary injunction issued against the defendant in this action for unpaid wages.