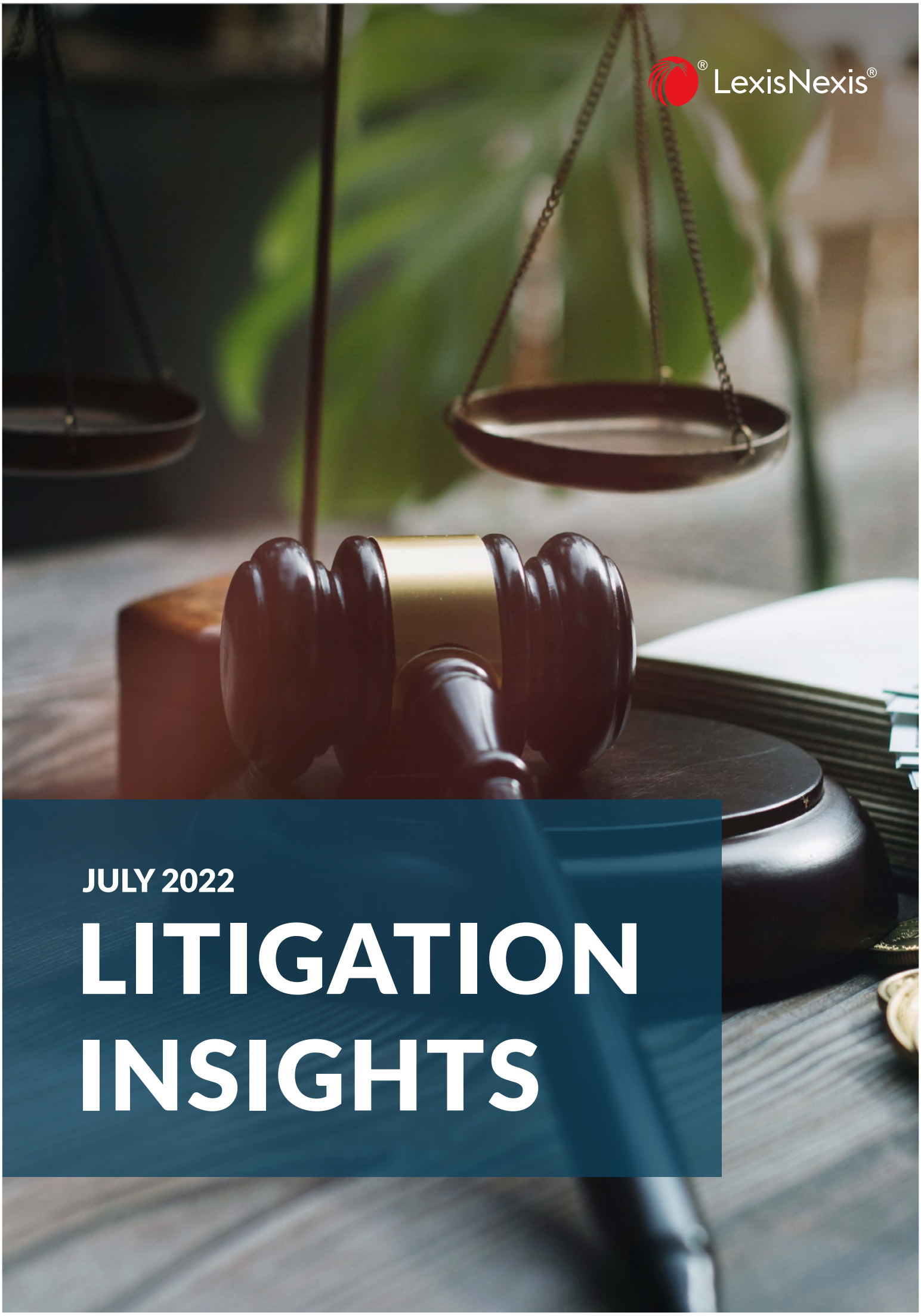
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LITIGATION INSIGHTS

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

Federal Arbitration Act

Dalla-Longa v. Magnetar Cap. LLC

33 F.4th 693, 2022 U.S. App. LEXIS 12818 (2d Cir. May 12, 2022)

Jump to full summary

The Second Circuit holds that a motion commencing court proceedings to vacate an arbitration award under the Federal Arbitration Act cannot be served on counsel for the arbitration winner by e-mail unless the attorney has previously consented in writing to that form of service within the litigation itself, despite consent in the underlying arbitration.

DISCOVERY

Depositions of Corporate Representatives

Fuentes v. Classica Cruise Operator Ltd.

32 F.4th 1311, 2022 U.S. App. LEXIS 11960 (11th Cir. May 3, 2022)

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The Eleventh Circuit has ruled that the fact that a Rule 30(b)(6) witness designated by a corporation could not answer every question on a certain topic did not necessarily mean that the corporation failed to comply with its obligation to prepare its designee to testify as to matters known to the corporation.

SUBJECT MATTER JURISDICTION

Climate-Change Litigation

Rhode Island v. Shell Oil Prods. Co., L.L.C.

35 F.4th 44, 2022 U.S. App. LEXIS 13838 (1st Cir. May 23, 2022)

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On remand from the Supreme Court, the First Circuit has held that there was no federal question jurisdiction over Rhode Island's climate-change suit against energy companies.

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U.S. Treaties on LEXIS® – This source contains the full text of every treaty and international agreement ever signed by the United States from 1776 onward, whether ratified or not. The collection includes treaties that are "in-force", as well as older terminated, superseded, or abolished treaties for historical research. *Tip: use the Parties segment to find treaties with a specific country*, e.g. parties(Ireland). *This can be combined with other keywords*, e.g., parties (Ireland) and extradition.

USCS - International Conventions – A specialized subset of US Treaties, this source contains the full text of forty international conventions, including those relevant to intellectual property, human rights, or civil litigation procedural matters. The United States is a signatory to all of these conventions. Examples include the *International Covenant on Civil and Political Rights, the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters*, and the *Patent Cooperation Treaty*.

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IMPLEMENTATION OF TREATIES:

Each of the above sources contain the full text or status of the treaty. If you would like see information about how United States implementation of the treaty, check our normal statutory sources, *Public Laws* (from 1988), *Statutes at Large* (from 1776) and the *United States Code Service*. These will provide the text of laws, as passed and as codified, for any implementation acts. Examples include the *North American Free Trade Agreement Implementation Act or the Patent Law Treaties Implementation Act of 2012.*

IMPLEMENTATION OF TREATIES:

Many law reviews and treatises discuss treaties, as appropriate. Amongst those with significant analysis or coverage are the following publications.

- *Benedict on Admiralty*
- *International Copyright Law and Practice*
- *International Exporting Agreements*
- *Restatement Fourth, Foreign Relations Law of the U.S. Treaties*
- *Rhoades & Langer U.S. International Taxation & Tax Treaties*
- *U.S. Naval War College International Law Studies Series*

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Navigating Documents by Important Search Terms on Lexis+®

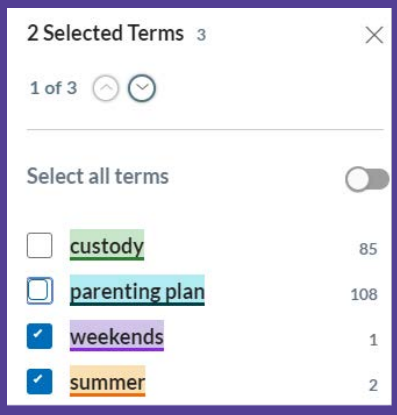
By Chet Lexvold, LexisNexis, SolutionsConsultant for the Federal Government

Have you ever run a search with multiple search terms, opened a case (or statute or secondary source, etc.), and then wanted to focus on the instances in the document where only one or two of your search terms are mentioned? You can do that on Lexis+®!

In this search example, I have run the following search within Wisconsin courts: "custody and parenting plan and weekends and summer," and opened the top case, *Guelig v. Guelig*. When I open the case, the heat map of my search terms on the left-hand side of the case is full of my terms, but the overwhelming majority of highlighted terms are "custody" and "parenting plan." What if I wanted to just focus on the areas where my search terms "weekends" and "summer" are mentioned by the court?

In the top left-hand corner of my case, I can click on the icon labeled "Search Terms" with a drop-down arrow next to it:

Then I will be shown all my search terms and the number of times they appear in the document, and I can de-select the terms I don't want highlighted, leaving the other terms more visible within the document:



That allows me to quickly and easily navigate to the three instances in the document where either "weekends" or "summer" are mentioned by either using the arrows to the right of the "Search Terms" navigation, or by simply clicking on the relevant highlighted lines in the heat map on the left.

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ARBITRATION

Federal Arbitration Act

Dalla-Longa v. Magnetar Cap. LLC

33 F.4th 693, 2022 U.S. App. LEXIS 12818 (2d Cir. May 12, 2022)

The Second Circuit holds that a motion commencing court proceedings to vacate an arbitration award under the Federal Arbitration Act cannot be served on counsel for the arbitration winner by e-mail unless the attorney has previously consented in writing to that form of service within the litigation itself, despite consent in the underlying arbitration.

- **Facts and Procedural Background.** As required by his employment contract, an investment manager commenced an arbitration proceeding against his former employer, alleging discrimination in his termination. For purposes of the arbitration, the parties agreed to exchange any required notices through e-mail under the rules of the American Arbitration Association [see AAA Employment Arbitration Rules and Mediation Procedures 38]. On September 9, 2019, after a six-day hearing, the arbitration panel issued a final award denying all claims with prejudice. Under the Federal Arbitration Act (FAA), notice of a motion to vacate an award must be served on the adverse party or attorney "within three months after the award is filed or delivered" [9 U.S.C. § 12]. Accordingly, on December 9, 2019, the plaintiff filed a petition to vacate the arbitration award in district court, and simultaneously e-mailed a copy of the petition to the firm that represented the employer in the arbitration. On August 4, 2020, the district court both granted the defendant's motion to dismiss for improper service, and refused to excuse untimely service on equitable grounds. The plaintiff appealed on both grounds.

- **Expedited Proceedings Under FAA.** The rule in the vast majority of federal litigation is that a civil action is commenced by filing a complaint with the court [see Fed. R. Civ. P. 3]. After arbitration, however, the FAA provides for an expedited proceeding that involves a different method of commencement. Any action to confirm or challenge an arbitration award is brought under the motions practice of the federal court, not by the filing of a complaint [9 U.S.C. § 12 ("service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court")]. The question presented in this case was therefore whether service by e-mail on counsel for the employer was sufficient under that motions practice.

- **Filing and Service Under Civil Rule 5.** How to file and serve papers other than a complaint in federal court is governed by the Federal Rules of Civil Procedure. In particular, electronic service methods are provided in Federal Rule of Civil Procedure 5(b)(2)(E). Under that provision, filing through the court's e-filing system is effective immediately as service on all registered users of the system. But any other form of electronic service requires the written consent of the party or attorney to be served.

- **Arbitration Consent Does Not Carry Over to FAA Proceeding.** The Second Circuit began its analysis by noting that two issues were presented for review: (1) whether the plaintiff properly served notice of the petition to vacate the arbitration award; and, (2) if not, whether improper service can be excused on equitable grounds. It was undisputed that the defendant and counsel had not consented to service by e-mail within the litigation itself, so the propriety of service by that method essentially turned on whether the arbitration consent carried over to the subsequent judicial proceeding. Unfortunately for the plaintiff, the only AAA Rule as to e-mail was unambiguous that it was confined to notices required by the rules, i.e., those within that discrete proceeding, not any FAA notices [AAA Employment Arbitration Rules and Mediation Procedures 38(b) ("The AAA, the arbitrator, and the parties may also use overnight delivery or electronic facsimile transmission (fax), to give the notices required by these rules. Where all parties and the arbitrator agree, notices may be transmitted by electronic mail (e-mail), or other methods of communication.")]. Although another rule applied to related court proceedings, it was limited by its own terms to service by "mail," i.e., regular mail, not e-mail [AAA Employment Arbitration Rules and Mediation Procedures 38(a) ("Any papers, notices, or process necessary or proper for the initiation or continuation of an arbitration under these rules, for any court action in connection therewith, . . . may be served on a party by mail

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addressed to the party, or its representative at the last known address . . . .")]. The Second Circuit therefore held that the district court correctly dismissed, because there was no consent to service by e-mail within the FAA litigation itself. The court noted that this result was in accord with both a prior unpublished opinion of the Second Circuit [Martin v. Deutsche Bank Secs. Inc., 676 Fed. Appx. 27, 29 (2d Cir. 2017) (unpublished)], and the only apparent published circuit authority on the issue [see O'Neal Constructors, LLC v. DRT Am., LLC, 991 F.3d 1376, 1380–1381 (11th Cir. 2021)].

- **No Equitable Grounds to Excuse Failure to Make Timely Service.** Finally, the Second Circuit rejected an argument that the district court should have excused the plaintiff's failure to serve the petition within the statutory three-month period of the FAA, noting simply that the plaintiff did not offer any equitable grounds to excuse compliance. Instead, the plaintiff simply misunderstood (or ignored) the governing rules, which was not a reason for equitable relief. The court of appeals noted, however, that it was not foreclosing the possibility of equitable relief from the time period if appropriate circumstances were shown.

- **Disposition.** The Second Circuit affirmed the district court's judgment dismissing the challenge to the arbitration award.

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DISCOVERY

Depositions of Corporate Representatives

Fuentes v. Classica Cruise Operator Ltd.

32 F.4th 1311, 2022 U.S. App. LEXIS 11960 (11th Cir. May 3, 2022)

The Eleventh Circuit has ruled that the fact that a Rule 30(b)(6) witness designated by a corporation could not answer every question on a certain topic did not necessarily mean that the corporation failed to comply with its obligation to prepare its designee to testify as to matters known to the corporation.

Background. Mr. Fuentes and his wife were passengers on a two-night cruise aboard the *Grand Classica*, a ship operated by Classica. On the evening of May 12, 2018, they were playing foosball on the ship when they were interrupted by Clynt Hadley, another passenger. According to Mr. Fuentes, Mr. Hadley intentionally bumped into the foosball table and made a comment directed at his wife. Mr. Fuentes did not respond to Mr. Hadley's comment and did not report the encounter to any of Classica's employees.

The next morning, after the *Grand Classica* docked, while in the immigration line waiting to disembark, Mr. Fuentes noticed Mr. Hadley attempting to cut in front of them. He told Mr. Hadley that he should go to the back of the line. A verbal altercation between Mr. Fuentes and Mr. Hadley then ensued. Sayyed Azzad Alam, a *Grand Classica* security officer, was standing nearby when the verbal exchange began and radioed the chief of security for help. Mr. Azzad Alam then approached Mr. Fuentes and Mr. Hadley, stepped between them, and asked that they "calm down." Mr. Azzad Alam then turned to speak to Mr. Fuentes. At that point, Mr. Hadley "blindsided" Mr. Fuentes by punching him in the face. Mr. Fuentes tried to grab Mr. Hadley in a headlock, but Mr. Hadley and one of his friends knocked Mr. Fuentes to the ground, injuring his right elbow in the process. The takedown, according to Mr. Fuentes, was a "spur of the moment type of thing."

Mr. Fuentes filed suit, alleging that Classica was negligent, and responsible for his injuries, because it failed to (1) reasonably and properly train security personnel; (2) have adequate security measures, including adequate security presence and surveillance cameras; (3) warn him of the danger of being physically assaulted while onboard the vessel; (4) promulgate and enforce policies and procedures designed to prevent passengers from physically assaulting other passengers; and (5) exercise reasonable care under the circumstances. The district court granted summary judgment in favor of Classica, ruling that there was no evidence suggesting that Classica had actual or constructive notice of the risk of harm to someone like Mr. Fuentes.

In addition to appealing the summary judgment, Mr. Fuentes asserted that Grant Plummer, Classica's corporate representative, was not adequately prepared for his Rule 30(b)(6) deposition on two topics—prior incidents of "aggressive behavior" on ships in Classica's fleet over the previous three years, and how many security officers were present on the deck when the assault occurred. He argued that the magistrate judge and the district court erred in denying his motion for sanctions, which requested attorney's fees and sought to bind Classica to the answers given by Mr. Plummer during his deposition. He added that, to make matters worse, after the Rule 30(b)(6) deposition Classica provided a security log indicating that multiple security officers were present, and Mr. Plummer submitted a declaration addressing whether there had been any incidents of passenger-on-passenger violence on Classica's ships. The district court, he said, considered these submissions in its summary judgment order.

District Court Did Not Abuse Its Discretion in Declining to Impose Sanctions. The Eleventh Circuit also observed that a district court has broad discretion in deciding whether to impose sanctions for a failure to satisfy Rule 30(b)(6) obligations, and a district court's order denying a motion for sanctions is reviewed for abuse of discretion. This standard gives the district court a range of choice as long as that choice does not constitute a clear error of judgment.

As to Mr. Plummer's testimony about how many security officers were on the deck when Mr. Fuentes was assaulted, the district court, by affirming the magistrate judge's order denying sanctions, essentially concluded that Mr. Plummer's testimony, though imprecise, was not so inconsistent with the incident log discovered and produced after his deposition that it rose to the level of sanctionable failure to prepare under Rule 30(b)(6). In answer to the question whether employees were present in the area where the assault took place, Mr. Plummer

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answered that "security got involved," "multiple employees [were] in the area," and crew members reported that the disembarking process was being followed. The court found that these statements, "however sparse," did not differ substantively from the account that appears in the incident report produced by Classica after the Rule 30(b)(6) deposition. Thus, at the very least, there was no abuse of discretion in ruling that Mr. Plummer's testimony on this point was not a sanctionable failure under Rule 30(b)(6).

Regarding Mr. Plummer's testimony about eight prior incidents of "aggressive behavior" on Classica's ships, Mr. Plummer said that he had no knowledge as to seven of those incidents involving passengers on other Classica ships. Mr. Fuentes focused on his lack of information about an incident on May 11, 2018. This incident, according to Mr. Plummer's subsequent declaration, involved a domestic dispute between a husband and wife in their stateroom that turned into a physical altercation. The district court concluded that Mr. Plummer's testimony, when viewed in the context of the extensive deposition as a whole, was a lapse of preparation that did not rise to the level of sanctionable conduct. Again, the Eleventh Circuit found no abuse of discretion.

The magistrate judge explained that Mr. Plummer's inability to answer questions regarding an exhibit listing prior incidents of "aggressive behavior" on Classica ships was not sanctionable because Mr. Fuentes only listed "prior physical assaults" as an area of inquiry on the notice of deposition. The incidents listed on the exhibit, except the domestic dispute, involved conflicts that did not rise to the level of physical assaults. With respect to the domestic dispute between a husband and wife in their stateroom, Mr. Plummer did not know the details during his deposition and only provided specifics in his subsequent declaration. The district court could have sanctioned Classica for that failure, but under the abuse-of-discretion standard, the refusal to do so did not constitute reversible error. The appellate court noted that the occasional "I don't know" in the context of a broad deposition does not itself reveal a Rule 30(b)(6) violation, if the witness otherwise took reasonable steps to prepare.

- **Conclusion.** For these reasons, the Eleventh Circuit affirmed the denial of sanctions for failure to properly prepare the Rule 30(b)(6) designee.

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SUBJECT MATTER JURISDICTION

Climate-Change Litigation

Rhode Island v. Shell Oil Prods. Co., L.L.C.

35 F.4th 44, 2022 U.S. App. LEXIS 13838 (1st Cir. May 23, 2022)

On remand from the Supreme Court, the First Circuit has held that there was no federal question jurisdiction over Rhode Island's climate-change suit against energy companies.

Background. This was the First Circuit's second pass at a climate-change case that, in the court's words, "requires us to explore the mind-numbing complexities of federal removal jurisdiction." Rhode Island, like other state and local governments across the country, sued several oil and gas companies in state court, seeking relief for the catastrophic harm the defendants allegedly have done and will do to its non-federal property and natural resources. The State alleged several state-law causes of action, including public nuisance, strict liability design defect, negligent design defect, negligent failure to warn, impairment of public trust resources, and violations of the state's Environmental Rights Act.

The defendants removed the matter to federal court under the federal-officer removal statute [see 28 U.S.C. § 1442(a)(1)], the federal question doctrine, the Outer Continental Shelf Lands Act (OCSLA), the admiralty-jurisdiction statute, and the bankruptcy-removal statute. The district court rejected these grounds for jurisdiction and remanded to state court.

In the first appeal, the First Circuit affirmed, concluding first that it could only review the federal-officer removal ground, and then that the defendants had not satisfied the requirements of the officer-removal statute [see Rhode Island v. Shell Oil Prods. Co., 979 F.3d 50, 58–60 (1st Cir. 2020)].

On the defendants' petition for certiorari, the Supreme Court granted certiorari, vacated, and remanded, and (without reversing the prior decision on the merits) instructed the First Circuit to give further consideration in light of *BP P.L.C. v. Mayor of Balt*. In *BP P.L.C.*, the Court held that a court of appeals must review the entire remand order and consider all of the defendant's removal grounds, not just the part of the order resolving the federal-officer removal ground [BP P.L.C. v. Mayor of Balt., 593 U.S. —, 141 S. Ct. 1532, 209 L. Ed. 2d 631, 641–642 (2021)].

"Pleased to oblige," the First Circuit requested and received supplemental briefs from counsel and reviewed using a de novo standard.

No Removal Jurisdiction Based on Federal Common Law. The First Circuit reiterated that under the general removal statute, a defendant can remove a state-filed case to federal court only if the plaintiff could have brought the case there originally [see 28 U.S.C. § 1441(a)]. Federal courts have original jurisdiction over cases that arise under the Constitution, laws, or treaties of the United States [see 28 U.S.C. § 1331], as well as claims founded on federal common law.

The First Circuit rejected the defendants' assertion that, even though Rhode Island's complaint said nothing about federal law, the claims alleged were "inherently federal" and arose under federal law because they were based on interstate and international emissions, that is, uniquely federal interests that must be governed by federal common law.

The court indicated that while there are pockets of federal judge-made law that bind the states, the circumstances in which such laws displace state law are few, and restricted to "extraordinary cases" involving "uniquely federal interests" and significant conflict between a federal policy or interest and the use of state law. Here, the First Circuit pointed to the federal interests cited by the energy companies (controlling interstate pollution, promoting energy independence, and negotiating multilateral treaties addressing global warming), and found that the defendants never adequately described how any significant conflict existed between these interests and the state-law claims, which is a precondition for recognition of a federal rule of decision.

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The First Circuit addressed older cases cited by the defendants that possibly recognized federal common law in the context of interstate pollution and greenhouse-gas emissions. The court indicated that those cases did not address the type of acts Rhode Island sought judicial redress for, but even if they did, the subsequent enactment of the Clean Water Act and the Clean Air Act (neither of which was invoked by Rhode Island) has statutorily displaced any federal common law that previously existed.

- **No Federal Jurisdiction Based on *Grable* Factors.** Under *Grable & Sons Metal Prods. v. Darue Eng'g & Mfg.*, in very rare cases removal may still be proper in a case in which a claim (1) necessarily raises a federal issue that is (2) truly disputed and (3) substantial and that (4) a federal court can decide without upsetting the balance between state and federal judiciaries [Grable & Sons Metal Prods. v. Darue Eng'g & Mfg., 545 U.S. 308, 313–316, 125 S. Ct. 2363, 162 L. Ed. 2d 257 (2005)].

  The First Circuit, "just like other circuits in comparable cases," found that the *Grable* factors were not supported in this case. The court reasoned that although federal interests such as energy policy, economic policy, environmental regulation, national security, and foreign affairs were implicated here, the defendants "pinpoint no specific federal issues that must necessarily be decided for Rhode Island to win its case; and their speaking about federal law or federal concerns in the most generalized way is not enough for *Grable* purposes."

- **Clean Air Act Does Not Completely Preempt Rhode Island's Claims.** The First Circuit rejected an argument that the Clean Air Act completely preempts Rhode Island's claims and authorizes removal, indicating that no circuit to consider this kind of argument has accepted it, and "we will not be the first." The court reasoned that complete preemption requires the defendants to show that Congress clearly intended to supersede state authority. The claim of such an intention is undermined by the Act's language, which says that "pollution prevention. . . . and air pollution control at its source is the primary responsibility of *States and local governments*." Moreover, the Act has two savings clauses that expressly preserve non-Clean Air Act claims. Not providing an exclusive federal cause of action for suits against private polluters "makes complete preemption a nonstarter too."

- **Rhode Island's Complaint Did Not Seek Relief for Damage to Federal Enclaves.** Federal courts have subject matter jurisdiction over tort claims arising on federal enclaves, but no relief was sought here based on damage to federal lands. The First Circuit rejected the defendants' argument that the federal courts have jurisdiction because "a big chunk" of the energy companies' operative activities occurred on federal land. The court opined that the problem is that the "doctrine of federal enclave jurisdiction generally requires that *all* pertinent events take place on a federal enclave." Here, some of the pertinent events occurred outside federal lands, such as the defendants' deceptive marketing and Rhode Island's injuries.

- **OCSLA Did Not Provide Federal Jurisdiction.** The Outer Continental Shelf Lands Act (OCSLA) extends federal jurisdiction to cases "arising out of, or in connection with . . . any operation conducted on the outer continental shelf [OCS] which involves exploration, development, or production of . . . minerals" [43 U.S.C. § 1349(b)(1)]. The defendants argued that jurisdiction existed under OCSLA here because of their "substantial" activities on the OCS.

  The First Circuit asserted that the phrase "in connection with" bore directly on this case, but that it has not yet addressed that phrase's meaning. Looking to other circuits' precedents, the court found that the phrase might impose a but-for relationship between a party's case and operations on the OCS, but reasoned that it was not necessary to "wrestle the but-for-causation issue to the ground today." This was because the sister circuits' application of § 1349(b) would lead to a materially similar result. Cases finding OCSLA jurisdiction involve either "a direct physical connection to an OCS operation (collision, death, personal injury, loss of wildlife, toxic exposure) or a contract or property dispute directly related to [that] operation."

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The court held that the defendants had not shown that Rhode Island's tort claims arose out of or were in connection with their operations on the OCS for purposes of OCSLA jurisdiction. The court recapped that here, the core of the suit concerned how the defendants "knew what fossil fuels were doing to the environment and continued to sell them anyway, all while misleading consumers about the true impact of the products." And the court found that although the energy companies talked up how extensive their OCS operations were, Rhode Island's claims concerned their "overall conduct, not whatever unknown fraction of their fossil fuels was produced on the OCS." The court opined that if extensive OCS operations were enough to satisfy the in-connection benchmark, "then any suit against fossil-fuel companies regarding any adverse impact linked to their products would trigger OCSLA federal jurisdiction because (to quote Rhode Island's latest brief) 'a significant portion' of the oil and gas we use comes from the OCS—a consequence too absurd to be attributed to Congress."

The First Circuit also rejected the defendants' argument that OCSLA jurisdiction was proper because a large monetary judgment against them would deter OCS operations and therefore jeopardize the federal OCS leasing program as a whole. The court found that the lawsuit did not directly attack OCS exploration, resource development, or leases, and the defendants' theory was contingent and speculative. "And 'contingent and speculative' do not suffice for OCSLA jurisdiction purposes."

- **No Admiralty Jurisdiction.** The First Circuit rejected the defendants' assertion that fossil-fuel extraction that occurs on vessels engaged in maritime commerce gave them admiralty jurisdiction in federal court. The court found that when the injury suffered is on land, the jurisdiction-invoking party must show that a vessel on navigable water caused the tort, and Rhode Island did not allege that any vessel caused the land-based injuries.

- **Removal Was Not Supported by Possible Connection to Texaco's Confirmed Bankruptcy Plan.** A party in a civil suit may remove claims "related to" bankruptcy cases under 28 U.S.C. §§ 1452(a) and 1334(b). The defendants argued that Rhode Island's complaint was related to bankruptcy cases because it "seeks to hold [them] liable for the pre-bankruptcy operations of Texaco Inc." Texaco's confirmed bankruptcy plan, they argued, barred various claims arising against it before March 15, 1988, and Rhode Island's claims allegations against Texaco included conduct before that date.

  The First Circuit held that not only was there no indication that the bankruptcy plan involved climate change, but also that the defendants "offer no convincing explanation for 'how a judgment more than thirty years later could impact Texaco's estate.'" The court found that the defendants' argument was waived because it was too skeletal and confusingly constructed.