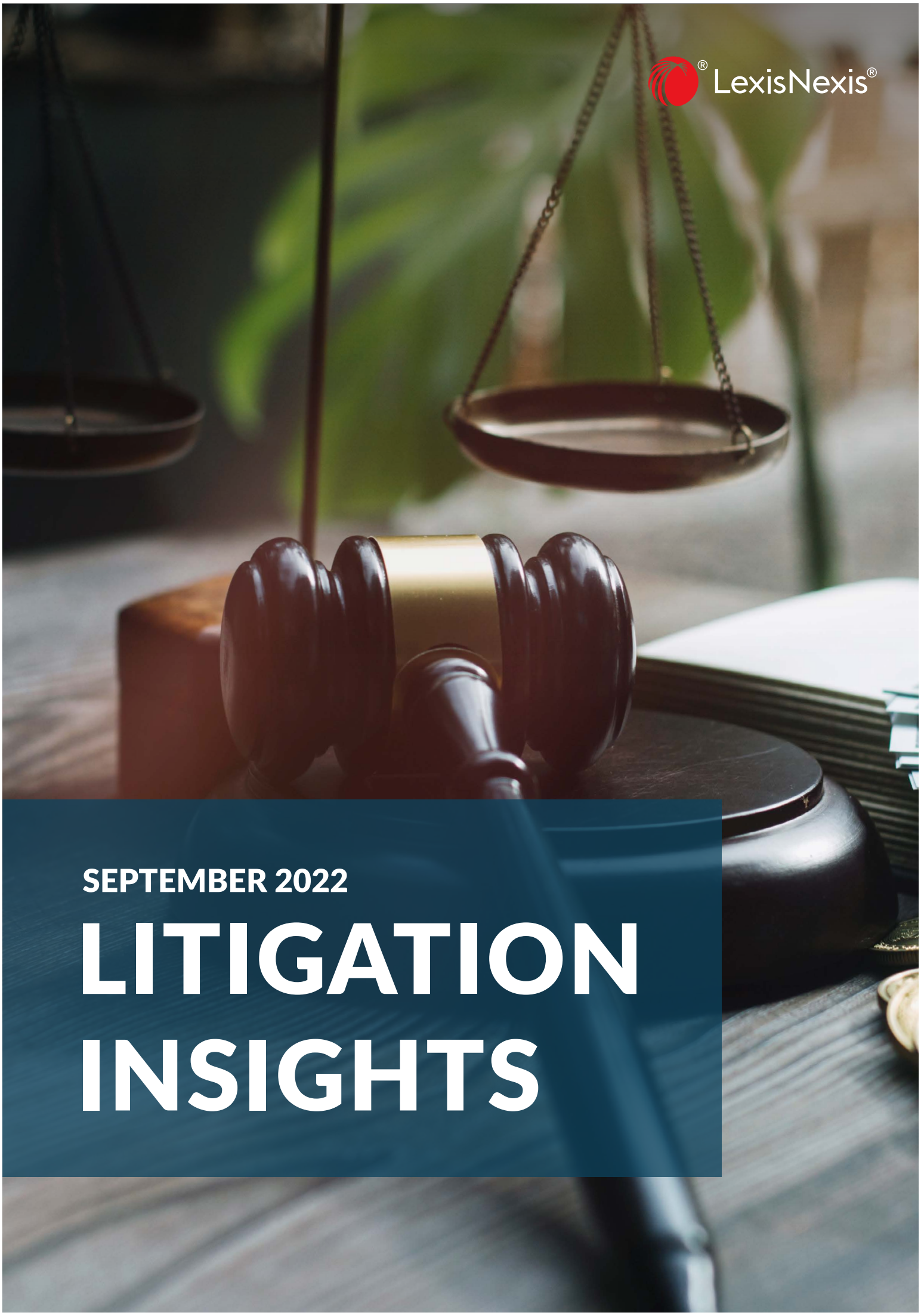

LexisNexis®
SEPTEMBER 2022
LITIGATION INSIGHTS

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

Jump to full summary

Notice of Appeal

Gonpo v. Sonam's Stonewalls & Art, LLC

41 F.4th 1, 2022 U.S. App. LEXIS 19595 (1st Cir. July 15, 2022)

The First Circuit, applying Appellate Rule 3 as amended in 2021, has held that a notice of appeal designating both the district court's final judgment and some of its interlocutory orders did not prevent the appellant from challenging other interlocutory orders not specified in the notice of appeal.

ATTORNEY'S FEES

Jump to full summary

Prevailing Party Status

Royal Palm Props., LLC v. Pink Palm Props., LLC

38 F.4th 1372, 2022 U.S. App. LEXIS 18682 (11th Cir. July 7, 2022)

The Eleventh Circuit has held that when adverse parties each asserted affirmative claims for relief against each other, but all claims failed and no relief was awarded, the district court did not abuse its discretion in determining that there was no "prevailing party," so neither party was eligible for an award of costs or attorney's fees under Rule 54(d).

JURY TRIAL

Jump to full summary

Withdrawal of Demand for Jury Trial

Ross Dress for Less, Inc. v. Makarios-Oregon, LLC

39 F.4th 1113, 2022 U.S. App. LEXIS 18834 (9th Cir. July 8, 2022)

The Ninth Circuit holds that Federal Rules of Civil Procedure 38 and 39, which generally allow a party to rely on another party's jury demand and require that parties consent to withdrawal of a jury demand before the court may conduct a bench trial, do not apply when the parties have no right to a jury trial by virtue of a contractual waiver.

Continue on next page

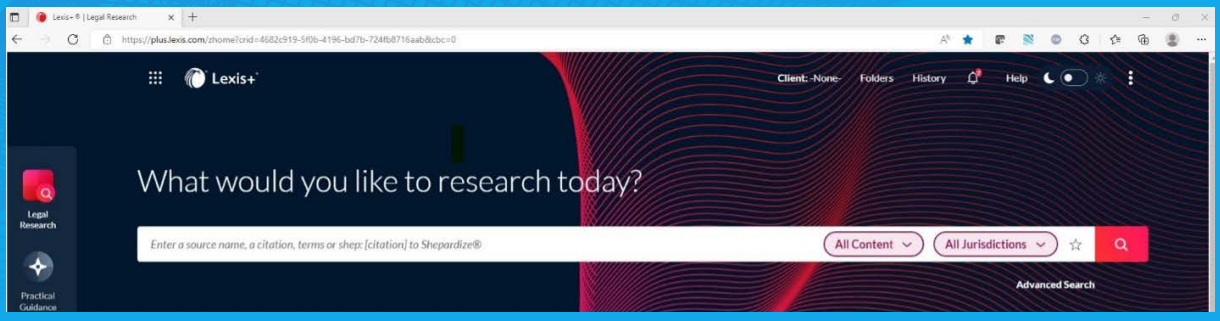
LEXIS+® 2022 UPDATES

Stay up to date on all of the Updates on Lexis+

By Marisa Beirne
Federal Government Solutions Consultant, LexisNexis®

Throughout 2022 Lexis+® has released many new enhancements and features that were created to enhance your overall efficiency throughout your workflow. Please see a highlight of the enhancements and examples below to make sure that you are up to date on all the new LexisNexis® technology as well as making the most of the products.

ALERTS: The Alerts icon has moved to an easy to identify location. All Lexis+ users will now see the Alerts icon on the top navigation bar. Additionally, the icon with now show a number indicating the number of new Alerts attached to your username. Alerts within Lexis® can still be found under the "more" menu as well.



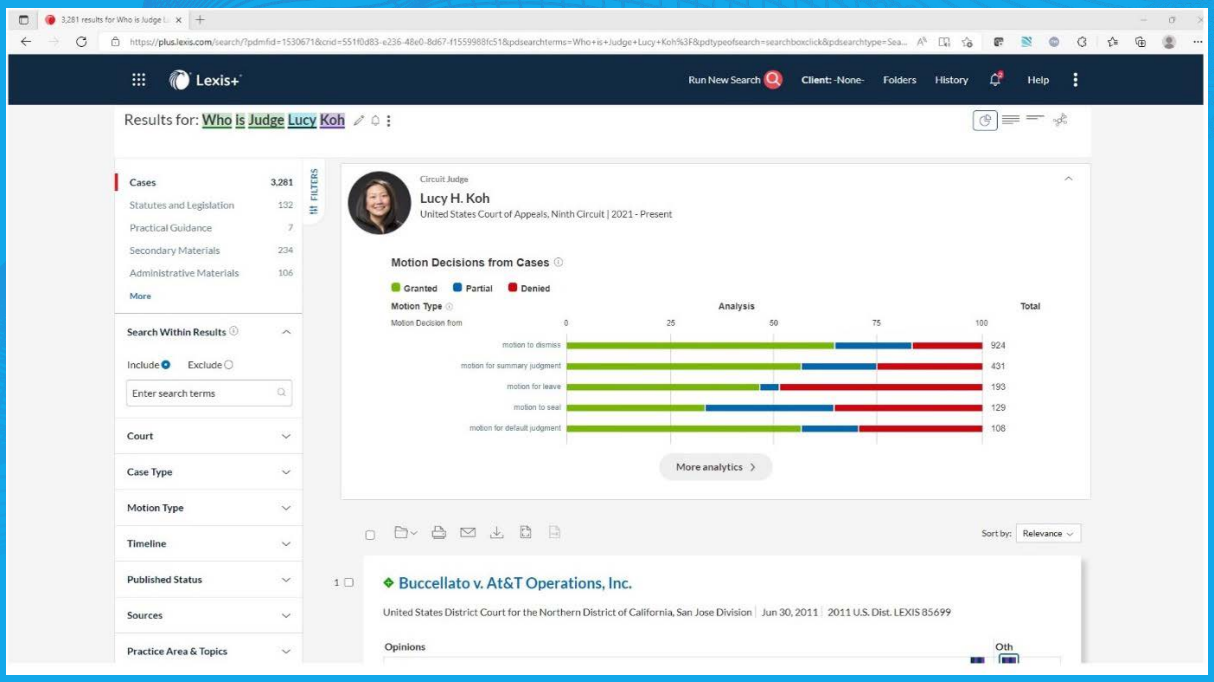
FASTER ACCESS TO KEY CONTENT:

1. Archived Code Re-Ranking: Lexis+ Users who access archived codes from a current code section will now see them ranked in order with the most current archive on top.
2. International Explore Content Enhancements: Lexis+ Users can now explore the comprehensive international content collection by content type via the International Tab located in the Explore Content area on the Lexis+ landing page.
3. Civil Litigation Video Content: The Federal Civil Litigation Practice Center now contains a dedicated "Videos Section" under Secondary Materials. Users can locate the Video Section by navigating to Lexis Practice Centers from the Lexis+ landing page, then entering the "Federal Civil Ligation" practicing center and finally navigating to "videos." Please see the list of videos located in the Practice Center below.

Continue on next page

LEGAL NEWS HUB: Lexis+ Legal News Hub has now completely integrated MLEX's global regulatory risk content; Lexis+ Legal News Hub also houses a brand-new universal instant trial experience.

LEXIS+ JUDGE ANSWER CARD ENHANCEMENT: Context analytics is now incorporated into your judge searches performed on Lexis+. This enhancement will provide users with better insight on the judge being searched. Simply type "Who is Judge_____?" into the search box on the Lexis+ landing page and an analytics box will appear at the top of your result list, as pictured below.

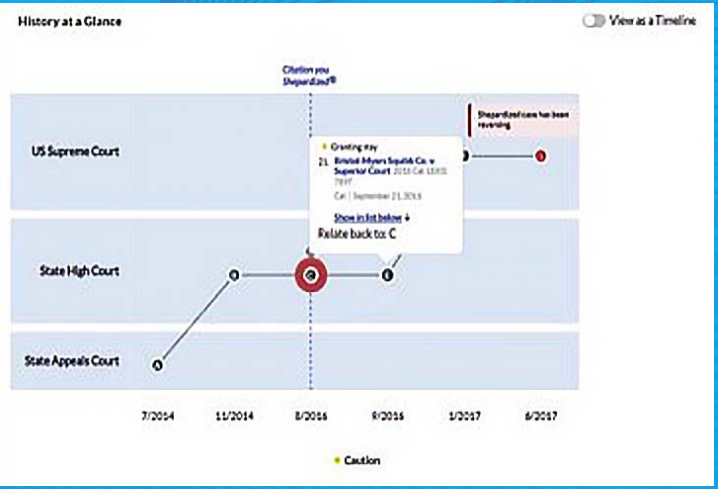


SEARCH ENHANCEMENTS:

1. Wildcards Within Quotations Will Now Be Recognized: Now a wildcard operator (i.e.-?, *,!) that is contained within quotations marks will be recognized, delivering better search results. Please note, this enhancement is not available on Newsdesk or Nexis Diligence™.
2. Re-Classification of Some Terms and Connectors (Boolean) Searches to Natural Language: Specifically in US cases on Lexis+, some searches that include 'and' (and not any other indicators that would make it an obvious terms and connectors search) could not be run as a natural language search. This enhancement will better align with the user's intent and deliver better results faster.
3. Lexis+ Search Tree Enhancements: Search Tree is now capable with Natural Language searching, allowing the user to better understand why he or she did not receive the most on point results to his or her search. The product team has continued to make visual enhancements so that the natural language search tree and Boolean search trees looks more similar.

Continue on next page

SHEPARD'S®: *Shepard's* now has a history at a glance timeline available. This new graphical view on Lexis+ makes it much easier for a user to see the most important cases in the history chain and display relationships between the cases. See the picture below for a visual understanding of this new *Shepard's* enhancement. You can find a complete discussion of *Shepard's* History at a glance in the August 2022 Department of Justice Newsletter.



FOR MORE INFORMATION ON ANY OF THE NEW LEXIS+ ENHANCEMENTS PLEASE CONTACT YOUR LEXISNEXIS SOLUTIONS CONSULTANT!

Continue on next page

APPEALS

Notice of Appeal

Gonpo v. Sonam's Stonewalls & Art, LLC

41 F.4th 1, 2022 U.S. App. LEXIS 19595 (1st Cir. July 15, 2022)

The First Circuit, applying Appellate Rule 3 as amended in 2021, has held that a notice of appeal designating both the district court's final judgment and some of its interlocutory orders did not prevent the appellant from challenging other interlocutory orders not specified in the notice of appeal.

- **Threshold Issue on Appeal.** Before considering the merits of this appeal, the First Circuit panel had to decide whether it had appellate jurisdiction to review some interlocutory orders of the district court, even though those orders had not been included in a list of orders designated in the notice of appeal.

- **Appellate Rule 3.** Federal Rule of Appellate Procedure 3, as amended effective December 1, 2021, requires that a notice of appeal "designate the judgment—or the appealable order—from which the appeal is taken" [Fed. R. App. P. 3(c)(1)(B)]. There is no need to designate specific interlocutory rulings for appellate review; a court of appeals will have jurisdiction to review any interlocutory order that merged into the designated judgment or order [Fed. R. App. P. 3(c)(4)].

  The notice of appeal in this case was filed before December 1, 2021. The version of Appellate Rule 3 in effect at that time provided that an appellant had to "designate the judgment, order, or part thereof being appealed" [see former Fed. R. App. P. 3(c)(1)]. The First Circuit panel in this case explained that under that version of the rule, there were two ways a notice of appeal could designate the appellate issues. The first way was to identify just the final judgment; such a notice was deemed to encompass not only that judgment, but also all earlier interlocutory orders, since those earlier orders merged into the judgment [see United States ex rel. Booker v. Pfizer, Inc., 847 F.3d 52, 55 (1st Cir. 2017)]. The second option was to itemize the specific rulings appealed from. But using the second option limited the scope of appellate review; the court of appeals had no jurisdiction to review unspecified rulings [see Denault v. Ahern, 857 F.3d 76, 81 (1st Cir. 2017)].

- **Notice of Appeal in This Case.** The notice of appeal in this case listed some of the district court's interlocutory rulings, but that list omitted two rulings that the appellant challenged in his opening brief. However, the notice also said that the appellant was appealing from the final judgment (into which those unlisted rulings had merged).

  The First Circuit acknowledged that before Appellate Rule 3 was amended in December 2021, it had been inconsistent in its treatment of the scenario in which a notice of appeal designated the final judgment as well as specific interlocutory rulings [compare Denault v. Ahern, 857 F.3d 76, 81 (1st Cir. 2017) (finding no jurisdiction because order challenged in briefing was not among interlocutory orders itemized in notice of appeal, even though notice also identified "Amended Judgment"), with United States ex rel. Booker v. Pfizer, Inc., 847 F.3d 52, 55 (1st Cir. 2017) (finding jurisdiction over interlocutory order not specified in notice of appeal, even though notice specified certain other orders, because it also specified district court's final judgment)].

- **Purpose and Effect of 2021 Amendment of Appellate Rule 3.** AAs noted above, Appellate Rule 3 was amended in 2021. As explained by the Advisory Committee, a "notice of appeal is supposed to be a simple document that provides notice that a party is appealing and invokes the jurisdiction of the court of appeals. . . . It is the role of the briefs, not the notice of appeal, to focus the issues on appeal" [Fed. R. App. P. 3, Advisory Committee Note of 2021].

  Significantly for the present case, the amended rule also now provides that "[a]n appellant may designate only part of a judgment or appealable order by expressly stating that the notice of appeal is so limited." But "[w]ithout such an express statement, specific designations do not limit the scope of the notice of appeal" [Fed. R. App. P. 3(c)(6)]. The Advisory Committee explained that this provision was designed to remove a "trap for the unwary," in

Continue on next page

which a court might treat the designation of some interlocutory orders as limiting the scope of appeal even if the final judgment is also designated [see Fed. R. App. P. 3, Advisory Committee Note of 2021; see, e.g., Denault v. Ahern, 857 F.3d 76, 81 (1st Cir. 2017) (finding no jurisdiction because order challenged in briefing was not among interlocutory orders itemized in notice of appeal, even though notice also identified "Amended Judgment")].

- **Application of Amended Rule in This Case.** As noted above, the notice of appeal in this case was filed well before the amendments to Appellate Rule 3 went into effect on December 1, 2021. But the Supreme Court's order adopting the 2021 amendments to the Rules of Appellate Procedure provides that the amendments operate not only in cases newly filed after their effective date; they also "shall govern . . . , insofar as just and practicable, [in] all proceedings then pending" [see Order Adopting Amendments to the Federal Rules of Appellate Procedure at 3 (2021), https://www.supremecourt.gov/orders/courtorders/frap21_9p6b.pdf].

  The First Circuit found nothing unjust about applying amended Appellate Rule 3 in this case. For one thing, the court saw no prejudice to the appellee from having to defend the undesignated issues on the merits. The appellee claimed that since the notice of appeal delineated certain orders, he focused on the issues specifically identified in preparing to defend the appeal. But the court reasoned that had the notice of appeal identified only the final judgment, the appellee would have learned exactly which orders the appellant wished to challenge no sooner than he actually did.

  The court of appeals also acknowledged that refusing to apply the amended rule retroactively in this case would prove especially unjust, considering the court's "inharmonious caselaw on this particular genre of notice of appeal under the old version" of the rule.

- **Conclusion.** Applying the amended rule, the appellate panel concluded that the notice of appeal—specifying both the final judgment and some interlocutory orders—did not prohibit the appellant from challenging other interlocutory orders not specifically designated in the notice of appeal. Nothing in the notice of appeal reflected an "express statement" limiting the appeal to the designated orders, particularly in light of the notice's separate designation of the final judgment, into which the undesignated rulings merged. The court therefore had jurisdiction to review the undesignated rulings.

Continue on next page

ATTORNEY'S FEES

Prevailing Party Status

Royal Palm Props., LLC v. Pink Palm Props., LLC

38 F.4th 1372, 2022 U.S. App. LEXIS 18682 (11th Cir. July 7, 2022)

The Eleventh Circuit has held that when adverse parties each asserted affirmative claims for relief against each other, but all claims failed and no relief was awarded, the district court did not abuse its discretion in determining that there was no "prevailing party," so neither party was eligible for an award of costs or attorney's fees under Rule 54(d).

Background—Initial Proceedings. Royal Palm Properties, a real-estate broker, sued its competitor Pink Palm Properties, asserting a claim under the Lanham Act for infringement of its registered trademark on the phrase "Royal Palm Properties." The defendant counterclaimed under the same Act for a declaratory judgment that the mark was invalid. A jury verdict rejected all claims, but the district court granted judgment as a matter of law (JMOL) on the counterclaim and declared the trademark invalid. Because the defendant had prevailed on all claims, the district court awarded costs under Federal Rule of Civil Procedure 54(d).

Background—Appeal and Proceedings on Remand. On appeal by the plaintiff, the Eleventh Circuit reversed the JMOL and ordered a remand to reinstate the jury verdict that the trademark was not invalid [Royal Palm Props., LLC v. Pink Palm Props., LLC, 950 F.3d 776, 780 (11th Cir. 2020)]. Despite this result, when the case was remanded, the defendant moved not only for an additional award of costs, but also for an award of attorney's fees. The defendant argued that because it defeated the plaintiff's trademark-infringement claims, it was the "prevailing party" under the Lanham Act on those claims under Supreme Court precedent [see CRST Van Expedited, Inc. v. EEOC, 578 U.S. 419, 431, 136 S. Ct. 1642, 194 L. Ed. 2d 707 (2016) (defendant is prevailing party "whenever the plaintiff's challenge is rebuffed, irrespective of the precise reason for the court's decision")], so that the result of its counterclaim was inconsequential to the analysis. The district court disagreed and refused to award costs or attorney's fees to either side, because all trademark claims had failed, so there was no "prevailing party" eligible for any award of costs or fees. The defendant appealed the denial of costs and attorney's fees.

Prevailing-Party Requirement Applied Uniformly. The Eleventh Circuit began its analysis by noting that "prevailing party" is a legal term of art that applies to awards of both costs and attorney's fees, and it is applied uniformly, regardless of the source of law for the award [e.g., CRST Van Expedited, Inc. v. EEOC, 578 U.S. 419, 422, 136 S. Ct. 1642, 194 L. Ed. 2d 707 (2016) ("Congress has included the term 'prevailing party' in various fee-shifting statutes, and it has been the Court's approach to interpret the term in a consistent manner")].

Accordingly, the fact that this appeal concerned the requirement in the context of a routine award of costs instead of the more-common context of an award of attorney's fees did not affect the analysis. Other courts of appeals have agreed with this approach [e.g., B.E. Tech., L.L.C. v. Facebook, Inc., 940 F.3d 675, 677 (Fed. Cir. 2019) ("We interpret the term ['prevailing party'] consistently between different fee-shifting statutes and between Rule 54(d) and 35 U.S.C. § 285." (citations omitted))].

Must There Be A Prevailing Party in Every Case? The Eleventh Circuit then noted that this case turned on an issue of first impression: Is there a prevailing party in every case? There are three possible answers: (1) there can be more than one prevailing party, (2) there has to be a single prevailing party, or (3) there can be no prevailing party. The court categorically rejected the first answer for linguistic reasons. Rule 54(d) refers to "the prevailing party," so by using the definite article and the singular, the rule precludes any court from finding that there are two (or more) prevailing parties. Though there is little authority on the issue, other courts have agreed with this approach [Shum v. Intel Corp., 629 F.3d 1360, 1367 (Fed. Cir. 2010) ("In our view, the plain language of Rule 54 unambiguously limits the number of prevailing parties in a given case to one because the operative term, 'prevailing party,' is singular. . . . Our conclusion that there can only be one prevailing party in a given case is reinforced by the use of the definite article 'the' before 'prevailing party.'")].

As to the other two possible answers, the Eleventh Circuit concluded that there need not be a prevailing party in every case, so a district court may find that no party meets the requirements for that status. The court first rejected the analysis and holding of the Federal Circuit that there must be a prevailing party in every action that

Continue on next page

goes to final judgment [see Shum v. Intel Corp., 629 F.3d 1360, 1367 (Fed. Cir. 2010) ("For the purposes of costs and fees, there can be only one winner. A court must choose one, and only one, 'prevailing party' to receive any costs award.")]. The Eleventh Circuit noted that there are two requirements for prevailing-party status: (1) the party must receive some relief on the merits, and (2) that relief must materially alter the legal relationship between the parties. The court rejected the Federal Circuit's approach because it was based on an implicit, erroneous presumption that every case results in a material alteration in the legal relationship between the parties. The court relied on a remarkably similar Eighth Circuit case in which the parties brought rival Lanham Act claims against each other, but all claims were rejected, so neither party was the prevailing party. In that case, the court described the rejection of all claims as restoring the "status quo ante," so the parties achieved a "dead heat" and neither prevailed because their legal relationship remained unchanged [East Iowa Plastics, Inc. v. PI, Inc., 832 F.3d 899, 906–907 (8th Cir. 2016)]. The Eleventh Circuit expressly agreed with this reasoning, holding that this "case is precisely the kind of legal 'tie' where it would make no sense to force the district court to declare a prevailing party."

- **Disposition.** The Eleventh Circuit affirmed the district court's judgment denying any recovery of costs or attorney's fees.

Continue on next page

JURY TRIAL

Withdrawal of Demand for Jury Trial

Ross Dress for Less, Inc. v. Makarios-Oregon, LLC

39 F.4th 1113, 2022 U.S. App. LEXIS 18834 (9th Cir. July 8, 2022)

The Ninth Circuit holds that Federal Rules of Civil Procedure 38 and 39, which generally allow a party to rely on another party's jury demand and require that parties consent to withdrawal of a jury demand before the court may conduct a bench trial, do not apply when the parties have no right to a jury trial by virtue of a contractual waiver.

Background. This litigation arose from Ross's lease of the Richmond Building, a five-story property located at 600 SW Fifth Avenue in Portland, Oregon. Section 13.04 of the lease provided that "[t]he Tenant waives all right to trial by jury in any summary or other judicial proceedings hereafter instituted by the Landlord against the Tenant in respect to the demised premises." When the lease term expired, a dispute arose as to Ross's end-of-lease obligations: Section 16.01 required Ross to surrender the property "in good order, condition, and repair, except for reasonable wear and tear," and Section 16.02 required Ross to "make such alterations to the building then erected on the demised premises as . . . necessary to constitute such building an entirely independent and self-sufficient structure."

Ross sued its landlord, Makarios, and the owner of a connected building, in district court, seeking declaratory relief regarding its end-of-lease obligations concerning both buildings. Both defendants filed counterclaims against Ross, alleging breach of contract and requesting a declaratory judgment regarding Ross's end-of-lease obligations. Makarios demanded a jury trial on its counterclaims. Makarios later moved to withdraw its jury demand. In its opposition, Ross argued it was entitled to rely on Makarios's request for a jury and that pursuant to Federal Rules of Civil Procedure 38 and 39, Makarios could not withdraw its demand unless Ross consented. According to Makarios, because Ross waived its right to a jury trial when it entered into the lease, Ross had no ability to object to Makarios's withdrawal of its jury demand or to take advantage of the general rule that parties must consent to a bench trial after a proper jury demand is made.

The district court granted Makarios's motion to withdraw its jury demand, finding that Section 13.04 of the lease included "an unequivocal and voluntary and knowing waiver . . . by the tenant and its successors, including Ross, to a jury trial." The court acknowledged that Rules 38 and 39 generally allow a party to rely on another party's jury demand, but explained that because the lease included a waiver of the tenant's right to a jury trial, Ross could not invoke the protections of the Rules to oppose Makarios's withdrawal of its demand. After a bench trial and entry of judgment in favor of Makarios for $2,931,829, Ross timely appealed, and Makarios cross-appealed. The bulk of the issues on appeal were resolved in a concurrently filed memorandum disposition. In this opinion, the Ninth Circuit addressed the district court's order granting Makarios's motion to withdraw its jury trial demand.

Ross Was Not Entitled to Jury Trial. Applying Oregon law, the Ninth Circuit first found that, under the clear terms of Section 13.04 of the lease, Ross waived its right to a jury trial on counterclaims filed by Makarios. Nevertheless, Ross argued that even if it contractually waived its jury trial right, it was still entitled to rely on Makarios's jury demand under Federal Rules of Civil Procedure 38(d) and 39(a). Rule 38(d) provides that a proper jury trial demand "may be withdrawn only if the parties consent." Rule 39(a) requires trial by jury "on all issues so demanded" unless the parties stipulate or "the court, on motion or on its own, finds that on some or all of those issues there is no federal right to a jury trial." The district court concluded Rules 38 and 39 did not apply because Ross had no right to a jury trial by virtue of its waiver in Section 13.04 of the lease. The Ninth Circuit noted that the precise function of Rules 38 and 39 in the scenario presented appeared to be an issue of first impression in the circuit.

The Ninth Circuit acknowledged that a party is generally entitled to rely on another party's original jury demand and need not file its own. Typically, the combination of Rules 38(d) and 39(a) prevents a party from unilaterally

Continue on next page

withdrawing its jury demand, even when no other party has requested a jury trial. However, the right to rely on another party's jury demand is not unlimited. For example, the right extends only to issues that the original demand actually covered. The Ninth Circuit has recognized at least two other exceptions to these general rules. First, a party may consent to the unilateral withdrawal of a jury demand through its conduct, thereby waiving its right to rely on the protections of Rules 38(d) and 39(a). For example, the courts have declined to enforce Rules 38 and 39 "when the party claiming the jury trial right is attempting to act strategically—participating in the bench trial in the hopes of achieving a favorable outcome, then asserting lack of consent to the bench trial when the result turns out to be unfavorable" [see, e.g., Solis v. County of Los Angeles, 514 F.3d 946, 955 (9th Cir. 2008)]. By contrast, one's reluctant participation in a bench trial does not amount to waiver of the right to a jury trial.

On the other hand, the circumstances under which Rule 39(a) allows a jury demand to be withdrawn are not unlimited. Rule 39(a) applies only if there is a federal right to a jury trial in the first place. The plain language of Rule 39 requires this exception because it provides that a court may order a bench trial if it finds that "on some or all . . . issues there is no federal right to a jury trial" [Fed. R. Civ. P. 39(a)(2)].

The court found two cases involving jury demands "particularly instructive." First, in Craig v. Atlantic Richfield Co., the Ninth Circuit affirmed a district court's ruling rejecting a Jones Act plaintiff's attempt to rely on the defendant's jury trial demand. The court reasoned that the federal court's sole basis for jurisdiction was the Jones Act claim and the defendant did not have the right to demand a jury trial for the Jones Act claim [Craig v. Atlantic Richfield Co., 19 F.3d 472, 476–477 (9th Cir. 1994)].

In Rachal v. Ingram Corp., the Fifth Circuit affirmed a district court's decision to allow the plaintiff to unilaterally strike its jury demand, over the defendant's objection, after the plaintiff amended his complaint to remove the only basis for a jury trial. The court explained that Rule 39(a)'s consent requirement generally serves to protect the rights of a party who did not make the initial jury demand, but Rule 39 does not grant that party "any new or independent right to a jury trial; it simply protects rights to a jury trial that the [non-requesting party] may have been granted elsewhere" [Rachal v. Ingram Corp., 795 F.2d 1210, 1215–1216 (5th Cir. 1986)].

- **Conclusion.** Therefore, the Ninth Circuit affirmed the district court's interpretation of Rules 38 and 39 and its ruling that the application of Rules 38 and 39 did not entitle Ross to a jury trial after Makarios withdrew its demand, because the parties' lease included a waiver of the tenant's right to a jury trial.