

JANUARY 2023

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.

ATTORNEY'S FEES

Social Security Litigation

Pais v. Kijakazi

52 F.4th 486, 2022 U.S. App. LEXIS 30280 (1st Cir. Nov. 1, 2022)

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The First Circuit, relying on Rule 60(b)(6) instead of the requirements of Rule 54(d)(2), holds that a motion for an award of attorney's fees under §406(b) of the Social Security Act should be filed within a reasonable time of the decision awarding benefits.

MOOTNESS

"Picking-Off" Exception

Duncan v. Governor of the Virgin Islands

48 F.4th 195, 2022 U.S. App. LEXIS 24540 (3d Cir. Aug. 31, 2022)

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The Third Circuit holds that the "picking-off" exception to mootness permits a plaintiff to continue to represent a class, notwithstanding otherwise mooted claims, if (1) the individual plaintiff's claim is acutely susceptible to mootness, and (2) the individual plaintiff has expressed a clear intent to represent a class.

REMOVAL

Forum-Defendant Rule

In re Levy

52 F.4th 244, 2022 U.S. App. LEXIS 29845 (5th Cir. Oct. 26, 2022) (per curiam)

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The Fifth Circuit holds that snap removal is not authorized when complete diversity is lacking.

→ New and Noteworthy in LexisNexis®'s Practical Guidance Experience

By Marisa Beirne, LexisNexis
Solutions Consultant for the Federal Government

Throughout 2022 there have been many additions and expansions to Practical Guidance's practice areas. As 2023 begins, Practical Guidance remains your "how to manual" for accomplishing tasks throughout your daily workflow. You are able to manage matters quickly and efficiently with easy access to new practical guidance, checklists, model documents, and supporting legal analysis and primary content. Moreover, Practical Guidance allows attorneys and support staff to produce more in less time with comprehensive guidance and model documents produced by subject matter experts.

Practical Guidance currently contains 23 practice area pages that include market standards, state law comparison tools, practice videos, and resources kits! Even with the vast amount of information and resources on Practical Guidance, the experience is constantly updating and expanding. The list below provides updates to specific practice areas that matter the most to the Department of Justice ("DOJ"). Please note, the new and updated content below has been hyperlinked directly to the content for your convenience.

Antitrust:

Coming in Quarter 1 of 2023, Practical Guidance will release new trackers. These trackers include an Antitrust Litigation Tracker which will track federal legislation introduced in the past two years and a DOJ Antitrust Tracker which will track non-case related updates, including personnel changes and updated guidance from the federal antitrust agencies. These new tracker releases will supplement Practical Guidance's existing trackers such as the DOJ Antitrust Case Tracker (Civil Nonmerger).

Bankruptcy:

The Bankruptcy practice page has three new and updated practice notes and trackers. These include Complaint Objecting to Chapter 7 Discharge, Mega Chapter 11 Filings Tracker (updated with new Crypto bankruptcy filings), and Assignment for the Benefit of Creditors (FL). Additionally, be on the lookout for a Government Attorneys Bankruptcy Resource Kit, coming early 2023. This Government Bankruptcy Resource kit will provide beneficial information and was specifically created with government work and attorneys in mind.

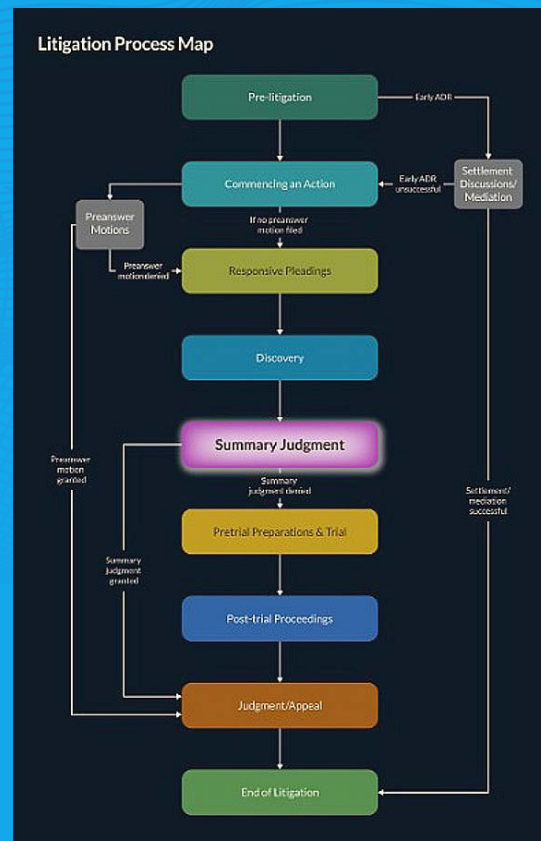
Capital Markets:

Brand new and available on Lexis and Lexis+ is the Lexis Federal Securities Index. Through this index users can navigate federal securities laws and related content all in one easily accessible place. The index includes but is not limited to statutes, rules and regulations, SEC Releases and No Action Letters.

Civil Litigation:

New State Court Local Rules Guides have recently been released which allow users to quickly pinpoint and link relevant local rules in key state courts including but not limited to California, Florida, Georgia, New Jersey, New York, Pennsylvania, and Texas. Currently there are two specific topics discussed: Injunctive Relief Local Rules Guide and Motion Practice Local Rules Guide. Practical Guidance will continue to expand in 2023 with release of additional states/topics to round out its collection.

Additionally, new Civil Litigation Process Maps have been released for state courts in Maryland and North Carolina. Process maps educate and connect users to relevant guidance for key phrases of a state court litigation all in one place. Moreover, Process Maps help attorneys and support staff plan for their workflow needs further along in the litigation lifecycle. Please see an example North Carolina Process Map below.



Data Security and Privacy:

The Data Security and Privacy Practice Area on Practical Guidance has released new explanatory videos created by data security and privacy subject matter experts! See the links below to access the new video content.

[Modern Approaches to Cybersecurity: Incident Response Video](#)

[Modern Approaches to Cybersecurity: How Attackers Gain Access Video](#)

[Modern Approaches to Cybersecurity: NIST Cybersecurity Framework Video](#)

[Modern Approaches to Cybersecurity: Endpoint Detection and Response Video](#)

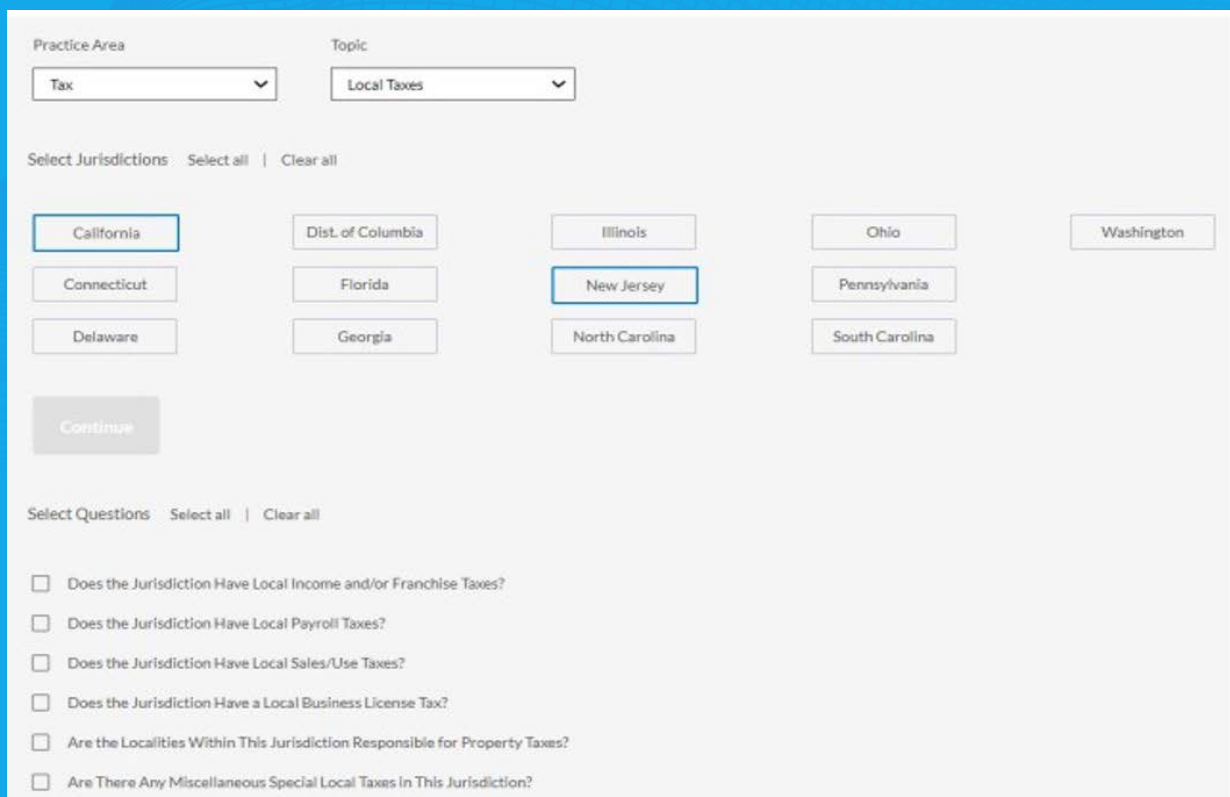
Additionally, the Data Security and Privacy practice area page has added new questions and answers covering Data Security Requirements for 27 states. Look out for the Tips for Protecting Attorneys Against Cyber Attacks video coming in 2023.

Labor and Employment:

Practical Guidance has recently added new employment law treatises! Practical Guidance added state specific treaties including *Alabama Employment Law*, *Indiana Employment Law*, and *Virginia Labor & Employment Law*. Look out in early 2023 for an Oklahoma Employment Law State Law Treatise.

Tax:

A very exciting update for the Tax law practice area page is the new State Law Comparison Tool for Tax. Tax has added a Local Taxes topic to its existing topics. Local taxes currently cover 13 states with seven more states coming in 2023. Current questions assist in answering questions on local business license, income/franchise, property, payroll, sales and use, and miscellaneous local taxes. Please see the 13 current states below.



The screenshot displays the 'State Law Comparison Tool for Tax' interface, specifically for the 'Local Taxes' topic. At the top, there are two dropdown menus: 'Practice Area' set to 'Tax' and 'Topic' set to 'Local Taxes'. Below these, there are links for 'Select Jurisdictions', 'Select all', and 'Clear all'. A grid of 13 state buttons is shown, with 'California' and 'New Jersey' highlighted with blue borders. The states included are California, Dist. of Columbia, Illinois, Ohio, Washington, Connecticut, Florida, New Jersey, Pennsylvania, Delaware, Georgia, North Carolina, and South Carolina. A 'Continue' button is located below the grid. At the bottom, there are links for 'Select Questions', 'Select all', and 'Clear all', followed by a list of six questions with checkboxes, all of which are currently unchecked.

Practice Area: Tax | Topic: Local Taxes

Select Jurisdictions: Select all | Clear all

California | Dist. of Columbia | Illinois | Ohio | Washington
Connecticut | Florida | New Jersey | Pennsylvania
Delaware | Georgia | North Carolina | South Carolina

Continue

Select Questions: Select all | Clear all

- ☐ Does the Jurisdiction Have Local Income and/or Franchise Taxes?
- ☐ Does the Jurisdiction Have Local Payroll Taxes?
- ☐ Does the Jurisdiction Have Local Sales/Use Taxes?
- ☐ Does the Jurisdiction Have a Local Business License Tax?
- ☐ Are the Localities Within This Jurisdiction Responsible for Property Taxes?
- ☐ Are There Any Miscellaneous Special Local Taxes in This Jurisdiction?

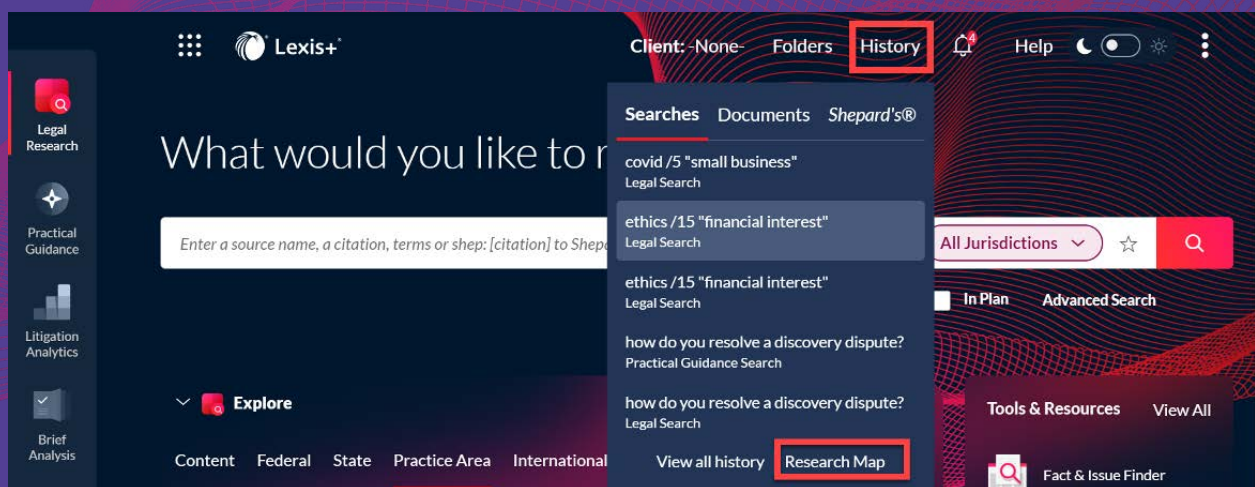
As mentioned earlier, Practical Guidance is continuously updating and expanded! Please reach out to your LexisNexis Solutions Consultant to find out new updates or schedule a Practical Guidance training session to really dive into all the helpful content!



Using the Research Map from History on Lexis+®

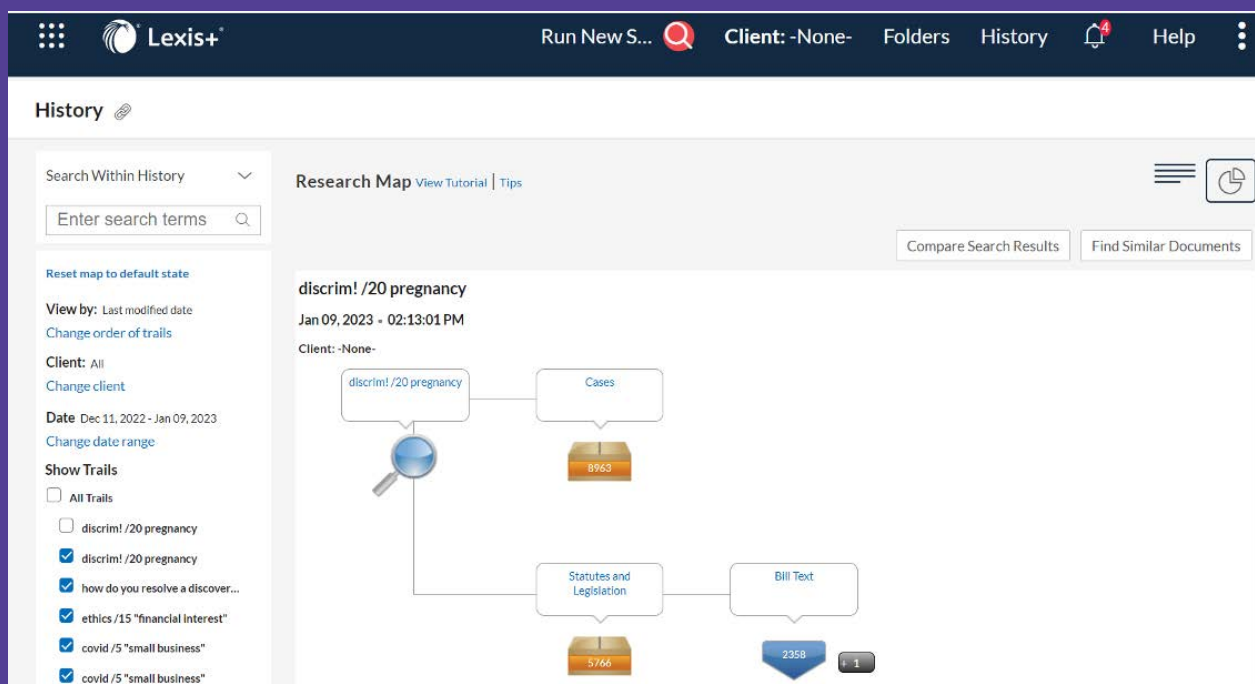
You can retrieve your previous searches or documents from **History on Lexis+**. **History** includes searches, document views, and delivery requests.

The **History** drop-down menu from the global navigation bar include **Searches**, **Documents**, and **Shepard's®**. The **Searches**, **Documents**, and **Shepard's®** tabs have the 5 most recently viewed searches, non-public records documents, or Shepard's Citation service reports.



Click **View all history** to open your full History in list format to see all searches, document views, and deliveries.

You might have noticed the Click **Research Map** to access your History in a graphic view on the **History** drop-down menu too.



The **Research Map** research trail displays a series of events linked together for one search session. Each action displays a corresponding **Event** icon, such as a magnifying glass to signify a **Search**, with a message bubble providing additional details about that event.

The **Research Map** gives you a bird's-eye view of your search. Not only does it let you see your search step-by-step, it allows you to resume your search anywhere along the search trail.

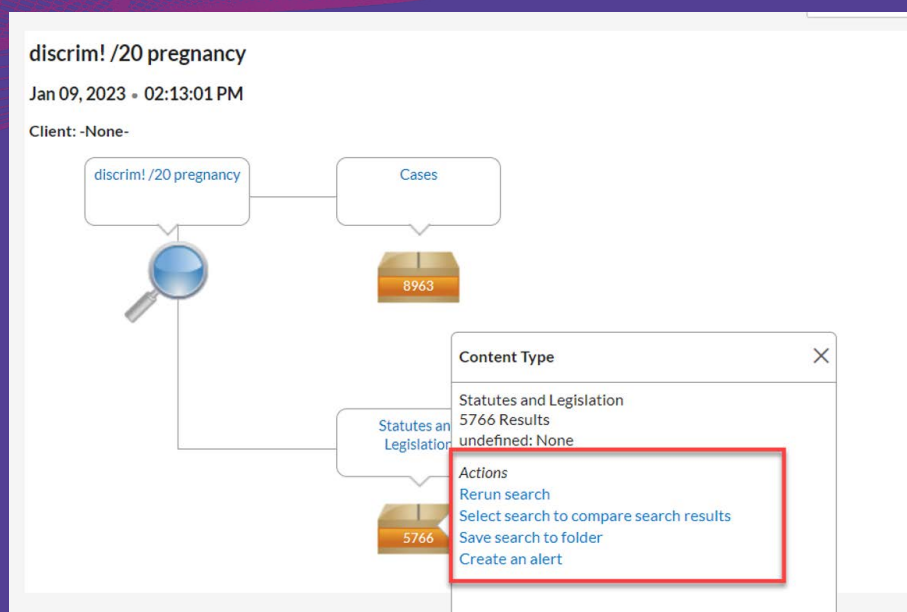
The **Research Map** will be a go-to view of your research history if you:

- like a visual approach to reviewing your searches
- want to step back and start your search from a prior point in your research process with a click
- need to review your research path after an interruption or share your research with a colleague
- wish to quickly identify and open a document you opened during your search

You can access the **Research Map** using any of the following methods:

- On any page, click **History** and select **Research Map**
- While viewing your **History**, click **Research Map**

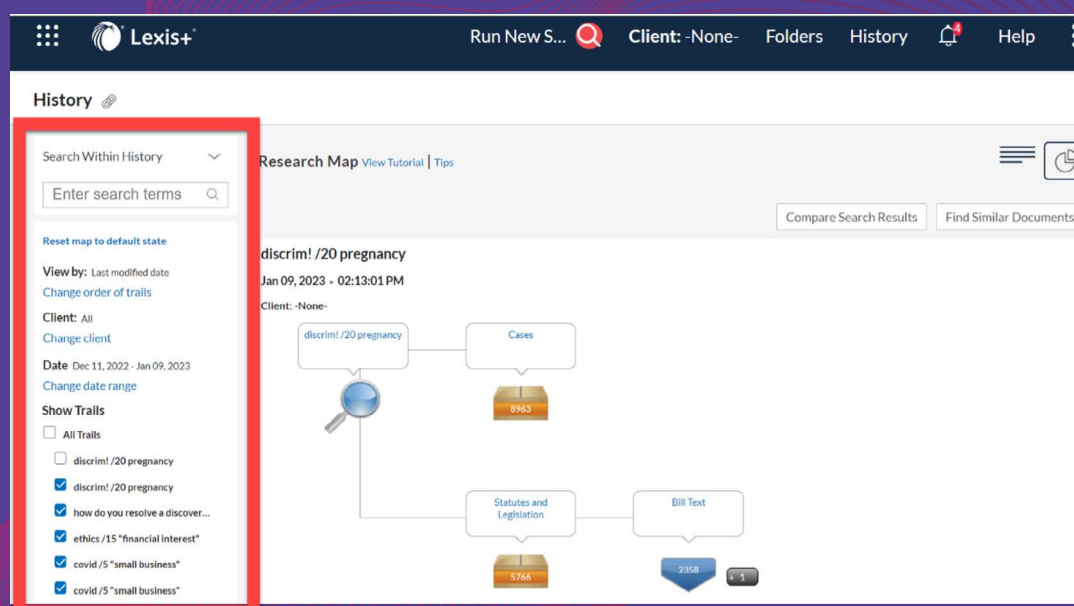
Message Bubble



When you click any **Event** icon, the service displays a message bubble with the information about the **Event** including the following as applicable to the **Event**:

- The search criteria
- The name of the results tab, such as **Cases** or **News**
- The filters you applied
- Any cases that you *Shepardize*® using the *Shepard's*® Citation Service
- Any additional actions for the search, such as the following:
 - **Rerun search**
 - **Rerun as natural language** (or terms & connectors, depending on the original search)
 - **Save search to folder**
 - **Create an alert**
 - **Select search to compare search results**
 - **Select this document to find similar**

Using Filters in Research Map



You can change the settings to restrict what you view in the Research Map. Under the **Narrow By** pane, you can do any of the following:

- **Search Within History** to search for specific searches in your research trails with terms you enter
- **Change order of trails** to view the list by **Last modified date** or **Original activity date**
- **Change date range** to see only the research trails you did for a specific timeframe
- Select or remove research trails from the Research Map view under **Show Trails**

You can return to the default view of the Research Map after using any of the above filters by clicking **Reset map to default state**.

ATTORNEY'S FEES

Social Security Litigation

Pais v. Kijakazi

52 F.4th 486, 2022 U.S. App. LEXIS 30280 (1st Cir. Nov. 1, 2022)

The First Circuit, relying on Rule 60(b)(6) instead of the requirements of Rule 54(d)(2), holds that a motion for an award of attorney's fees under § 406(b) of the Social Security Act should be filed within a reasonable time of the decision awarding benefits.

- ▼ **Background—Social Security Benefit Claims.** In addition to benefits for the elderly and retired, the Social Security Act provides for: (1) survivor benefits for the families of those who die before reaching retirement age, and (2) disability benefits for those who are incapable of working. These benefits are sought by an application to the Social Security Administration, with judicial review available if the application is denied or the beneficiary is dissatisfied with the amount awarded. It is not unusual for there to be multiple administrative and judicial proceedings necessary to resolve a claim for such benefits.

One component of a benefit award is a lump-sum, retroactive amount to account for delay in receipt, which is referred to as “past-due benefits.” If a beneficiary was represented by counsel, the agency withholds a portion of the past-due benefits to pay attorney's fees for the agency proceedings or any related federal action. To protect the beneficiary, these fee awards are generally capped at a maximum of 25 percent of the past-due benefits.

- ▼ **Timing of Motion for Fees in Judicial Proceedings.** Because the amount of an award of attorney's fees for litigation depends in large part on the award of past-due benefits, an attorney seeking a fee award under 42 U.S.C. § 406(b) may face a conundrum as to when to file, if the case is remanded to the agency for a subsequent award. Civil Rule 54(d)(2)(B) generally requires a motion within 14 days of the judgment. The “judgment” that begins the running of the period must be the remand; however, at that time, the proceedings on remand will not have occurred, so that there will be no award of benefits and no basis for computing the statutory maximum fee.

- ▼ **Four-Way Circuit Split.** The issue of the timing of a fee motion in this context has generated a four-way circuit split. The Fifth and Eleventh Circuits have applied Rule 54(d)(2)(B) and required a fee motion within 14 days of the remand order (or any extension of that period granted by the district court) [*Bergen v. Comm'r of Soc. Sec.*, 454 F.3d 1273, 1278 n.2 (11th Cir. 2006); *Pierce v. Barnhart*, 440 F.3d 657, 663–665 (5th Cir. 2006)].

The Second and Third Circuits have also applied Rule 54(d)(2)(B), but they have held that the 14-day period is automatically tolled by the remand order itself until a decision on benefits is reached [*Sinkler v. Berryhill*, 932 F.3d 83, 86 (2d Cir. 2019); *Walker v. Astrue*, 593 F.3d 274, 277–280 (3d Cir. 2010)].

The Tenth Circuit has declined to apply Rule 54(d)(2)(B) at all, instead holding that the issue can be raised by a postjudgment motion seeking relief from the remand judgment under Rule 60(b)(6) [*McGraw v. Barnhart*, 450 F.3d 493, 505 (10th Cir. 2006)].

Finally, the Sixth Circuit has held that a remand order is simply not a final judgment because it does not award any relief, so Rule 54(d)(2)(B) applies only after the benefits are subsequently quantified [*Hayes v. Comm'r of Soc. Sec.*, 895 F.3d 449, 452–453 (6th Cir. 2018)].

- ▼ **Facts and Procedural Background of Present Case.** In 2014, Jose Pais unsuccessfully applied for disability benefits. On judicial review with representation by counsel, the claim was remanded to the agency in 2018, which ultimately determined that he was disabled and entitled to benefits. On June 16, 2019, the agency provided notice of the past-due benefits and that 25 percent (\$29,159.13) had been withheld for attorney's fee awards. Counsel quickly sought an award for the administrative work and on November 19, 2019, the agency approved an award of \$7,091.03. On two separate occasions in both 2020 and 2021, the agency sent counsel letters advising that

the remaining funds were available to compensate for the litigation work and stating that they would be disbursed to Pais if no fee claim was made within 20 days. Apparently spurred by the fourth of these letters sent on August 11, 2021, counsel finally filed a fee motion in the district court two days later. The agency opposed the motion as untimely, and the district court agreed, holding that a fee motion must be filed within a reasonable time of the decision awarding benefits, and that the delay of more than two years was not reasonable.

- ▼ **First Circuit Adopts Tenth Circuit's Approach.** The First Circuit panel began its analysis by noting that this case presented an issue of first impression in the circuit. After surveying the split of authority described above, the First Circuit joined the Tenth in holding that the issue is properly raised by a postjudgment motion seeking relief from the remand judgment under Rule 60(b)(6). The court rejected the application of the 14-day period of Rule 54(d)(2)(B), because that rule implicitly presumes that the fee award is separate and apart from the underlying judgment on the merits and therefore primarily applies to awards made under fee-shifting statutes, contracts, or other authority. By contrast, a fee award for litigation over benefits is taken from those benefits, so the First Circuit concluded that it is essentially a conditional component of the remand order itself. In short, if the agency awards benefits after a remand judgment, the condition is met and a fee award for securing the remand seeks an alteration of that judgment. The mere fact that the award cannot be calculated at the time of the remand because any award of past-due benefits will occur later does not affect the analysis. But once the agency determines the amount of past-due benefits, counsel must file a fee motion within a reasonable time.
- ▼ **Delay Was Not Reasonable.** After deciding on the appropriate timing rules, the First Circuit then agreed with the district court that the delay of more than two years in filing the fee motion after the benefits award was not reasonable, so it declined to address what amount of delay might be permissible.
- ▼ **Disposition.** The First Circuit affirmed the district court's denial of the motion for attorney's fees under § 406(b) of the Social Security Act.

MOOTNESS

“Picking-Off” Exception

Duncan v. Governor of the Virgin Islands

48 F.4th 195, 2022 U.S. App. LEXIS 24540 (3d Cir. Aug. 31, 2022)

The Third Circuit holds that the “picking-off” exception to mootness permits a plaintiff to continue to represent a class, notwithstanding otherwise mooted claims, if (1) the individual plaintiff’s claim is acutely susceptible to mootness, and (2) the individual plaintiff has expressed a clear intent to represent a class.

- ▼ **Facts and Procedural Background.** The plaintiff, Jennifer Duncan, a taxpayer, filed a putative class-action lawsuit against the United States Virgin Islands and certain government officials to end the Territory’s alleged practice of delaying the tax refund checks for most taxpayers but expediting the tax refund checks for favored taxpayers and government employees. Duncan alleged that the practice violated the law of the Virgin Islands and the Fourteenth Amendment and sought refunds, a writ of mandamus, and declaratory and injunctive relief.

The district court denied Duncan’s motion for class certification. It concluded that Duncan’s mid-litigation receipt of an “Arithmetic Correction” notice for her tax return for the year she claimed the unpaid refund and a refund check from the Territory denied Duncan of standing and rendered all her claims atypical, making the case ineligible for class certification under Federal Rule of Civil Procedure 23(a)’s typicality prerequisite.

On appeal, the Third Circuit first noted that the district court not only conflated the concepts of class-action certification and standing, but also conflated the justiciability doctrines of standing and mootness.

- ▼ **Rule 23(a)’s Typicality Requirement and Article III Case or Controversy Standing Are Independent Requirements That Require Separate Analysis.** The concepts of standing and Rule 23(a) appear related: both aim to measure whether the proper party is before the court. But they are independent criteria that differ not only in the sources of law from which they derive—Article III’s “case or controversy” requirement for standing [U.S. Const., art. III § 2, cl. 1], and Federal Rule of Civil Procedure 23(a)(3)’s requirement that the class representative’s claims be “typical of the claims . . . of the class” for typicality—but they have practical differences, too. When standing is lacking, a claim must be dismissed, whether it is brought in a class action or some other type of action. When a class representative’s claim is not typical of the claims of the class, class-action certification is simply denied. Thus, the Third Circuit concluded that if the district court thought that Duncan lacked standing to assert her claims, then the proper remedy would have been to dismiss those claims, not deny class certification.
- ▼ **Standing and Mootness Are Distinct Justiciability Doctrines.** The Third Circuit found that the district court also erred when it determined that Duncan’s mid-litigation receipt of her refund check called into question her standing. The court noted that “[s]tanding looks to whether a live controversy exists ‘[a]t the start of litigation,’ while mootness examines whether ‘some development’ occurred during the litigation such ‘that there is no longer a live controversy.’” And because the parties agreed that any justiciability issues were tied to the effect of Duncan’s receipt of the refund check almost a year after she filed the lawsuit, suggesting that she had standing at the start of the case, the relevant justiciability doctrine was mootness.

This is an important distinction because, according to the court, “Article III mootness is more “flexible” than other justiciability requirements, especially in the context of class action litigation,” in which context, special mootness rules, like the “picking off” exception, apply. The picking-off exception to mootness refers to a specific application of the relation-back principle that “permits courts to relate a would-be class representative’s (now moot) claim for relief back in time to a point at which that plaintiff had a personal stake in the outcome of the litigation.”

To that end, the Third Circuit explained that under the picking-off exception, a plaintiff may continue to represent a class, notwithstanding otherwise mooted claims, if (1) the individual plaintiff’s claim is acutely susceptible to mootness, and (2) the individual plaintiff has expressed a clear intent to represent a class [see *Richardson v. Dir. Fed. Bureau of Prisons*, 829 F.3d 273, 286 (3d Cir. 2016)]. Thus, if a plaintiff files a motion to certify a class when his or her individual claim still is live, the mootness of that claim while the motion is pending does not prevent the court from deciding the certification motion [see *LaSpina v. SEIU Pa. State Council*, 985 F.3d 278, 290 (3d Cir. 2021)].

The Third Circuit noted that the Territory had the heavy burden to show that Duncan's claims were moot and that resorting to the picking-off exception was unnecessary. Notwithstanding Duncan's receipt of a refund check, Duncan contended that the refund check, which she did not cash, was for only \$2,738.30—and that she was entitled to a refund of \$7,104, and she did not agree with the Territory's new calculations. Duncan argued that her refusal to cash the refund check was the equivalent of rejecting a settlement offer or an offer of judgment, which, when rejected, cannot moot a case. And, as the court noted, the availability of a partial remedy is sufficient to prevent a case from being moot; thus, when there is money at stake, the case is not moot.

Nevertheless, the court concluded that even if Duncan's claims were mooted by the issuance of the refund check, the picking-off exception applied. For the first requirement, Duncan's claims were acutely susceptible to mootness, because "[s]mall claims for cash can always be mooted swiftly with payment of the amount claimed." The Territory's arguments that there were more than 19,000 pending viable class plaintiffs and that it did not intend to pick off Duncan's claims were irrelevant to how susceptible the claims were to mootness and lacked any precedential support.

As to the second requirement—that the individual plaintiff must have expressed a clear intent to represent a class—the court noted that Duncan's original complaint was labeled a "Class Action Complaint" and that she moved for class certification within weeks of filing her original complaint.

- ▼ **Disposition.** Because Duncan met the two requirements for the picking-off exception to mootness, the court ruled that it would relate her claim back to the date she filed her lawsuit, "when she had not received a refund check and thus had live claims based on the Territory's failure to pay." At that point, the court further concluded, "the case had no justiciability problems—either standing or mootness." The Third Circuit vacated the district court's order denying class certification and remanded the case to the district court to reconsider the issues of typicality and adequacy of representation under the correct legal standards.

REMOVAL**Forum-Defendant Rule*****In re Levy***

52 F.4th 244, 2022 U.S. App. LEXIS 29845 (5th Cir. Oct. 26, 2022) (per curiam)

The Fifth Circuit holds that snap removal is not authorized when complete diversity is lacking.

- ▼ **Background.** The plaintiff, a citizen of Louisiana, was in a traffic collision with another citizen of Louisiana. He sued the driver of the other vehicle, as well as two other defendants, in Louisiana state court.

Zurich American Insurance Company (“Zurich”), a diverse defendant and the only defendant that had received service of process, promptly removed to federal court, asserting that removal was proper despite the “forum-defendant rule.” The forum-defendant rule provides that an action otherwise removable solely on the basis of diversity jurisdiction “may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought” [28 U.S.C. § 1441(b)(2)]. According to Zurich, it could remove to federal court because the driver of the other vehicle, although a citizen of the forum state, had not yet been served.

The plaintiff moved to remand the case to state court for lack of diversity under 28 U.S.C. § 1332, arguing that at the time of removal there was at least one named defendant that was also a citizen of Louisiana.

The district court denied the motion to remand, and the plaintiff petitioned the Fifth Circuit for a writ of mandamus directing the district court to remand for want of federal-court jurisdiction.

- ▼ **Forum-Defendant Rule Barred Removal.** The Fifth Circuit rejected Zurich’s asserted grounds for removal. The court found the grounds problematic, because in general, removal based on diversity jurisdiction is permissible under 28 U.S.C. § 1441(b)(2) only if complete diversity exists among all named parties, both at the time of filing in state court and at the time of removal to federal court. Here, the named plaintiff and at least one named defendant were citizens of Louisiana, which destroyed complete diversity.

The Fifth Circuit reiterated its precedent that, whenever removal jurisdiction depends on complete diversity, the “existence of diversity is determined from the fact of citizenship of the parties named and not from the fact of service.” The court explained that in *N.Y. Life Ins. Co. v. Deshotel*, it had held that a nonresident defendant cannot remove an action “if the citizenship of any co-defendant, joined by the plaintiff in good faith, destroys complete diversity, regardless of service or nonservice upon the co-defendant” [*N.Y. Life Ins. Co. v. Deshotel*, 142 F.3d 873, 883 (5th Cir. 1998)].

Citing *Moore’s*, the Fifth Circuit underscored that although § 1441(b)(2) does not specify whether unserved defendants are to be considered in determining the existence of diversity for removal purposes, the law seems to be settled that whether defendants have been served is irrelevant and that diversity for purposes of removal is based on the citizenship of all parties named in the complaint.

The court opined that the defendants “unnecessarily complicated” what should have been simple analysis by citing authority regarding “snap removals.” A snap removal is a term of art used to describe removal timed to prevent application of the forum-defendant rule, that is, when a defendant rushes to remove an action before a named co-defendant, who is a citizen of the forum, has been served. The Fifth Circuit pointed out that *Texas Brine Co., LLC v. Am. Arb. Ass’n, Inc.*, which authorized the use of snap removals in the circuit, involved completely diverse parties [see *Texas Brine Co., LLC v. Am. Arb. Ass’n, Inc.*, 955 F.3d 482, 485 (5th Cir. 2020)]. Moreover, the cases relied on in the *Texas Brine* decision confirmed that their parties were completely diverse as well.

The Fifth Circuit further found that whether Texas Brine or Deshotel informed jurisdiction in this case was not at issue, since there was no conflict between the two cases. “The key is that where—as here—there is no other basis for subject matter jurisdiction, no case can be successfully removed unless diversity is complete. That follows from the fact that a case is not removable if the plaintiff could not have brought it in federal court in the first instance.” A named defendant’s “non-diverse citizenship cannot be ignored simply because he was an unserved defendant.”

The Fifth Circuit observed that the district court never mentioned Deshotel despite the fact that the plaintiff relied heavily on it in his motion to remand. Moreover, the court further observed that the defendants omitted any reference to Deshotel in their opposition to the mandamus petition.

Because complete diversity was lacking and the plaintiff could not have originally filed his case in federal court, the Fifth Circuit held that the district court had to dismiss for want of jurisdiction. However, the court denied the petition for writ of mandamus without prejudice because it was confident that the district court “will carry out this directive.”