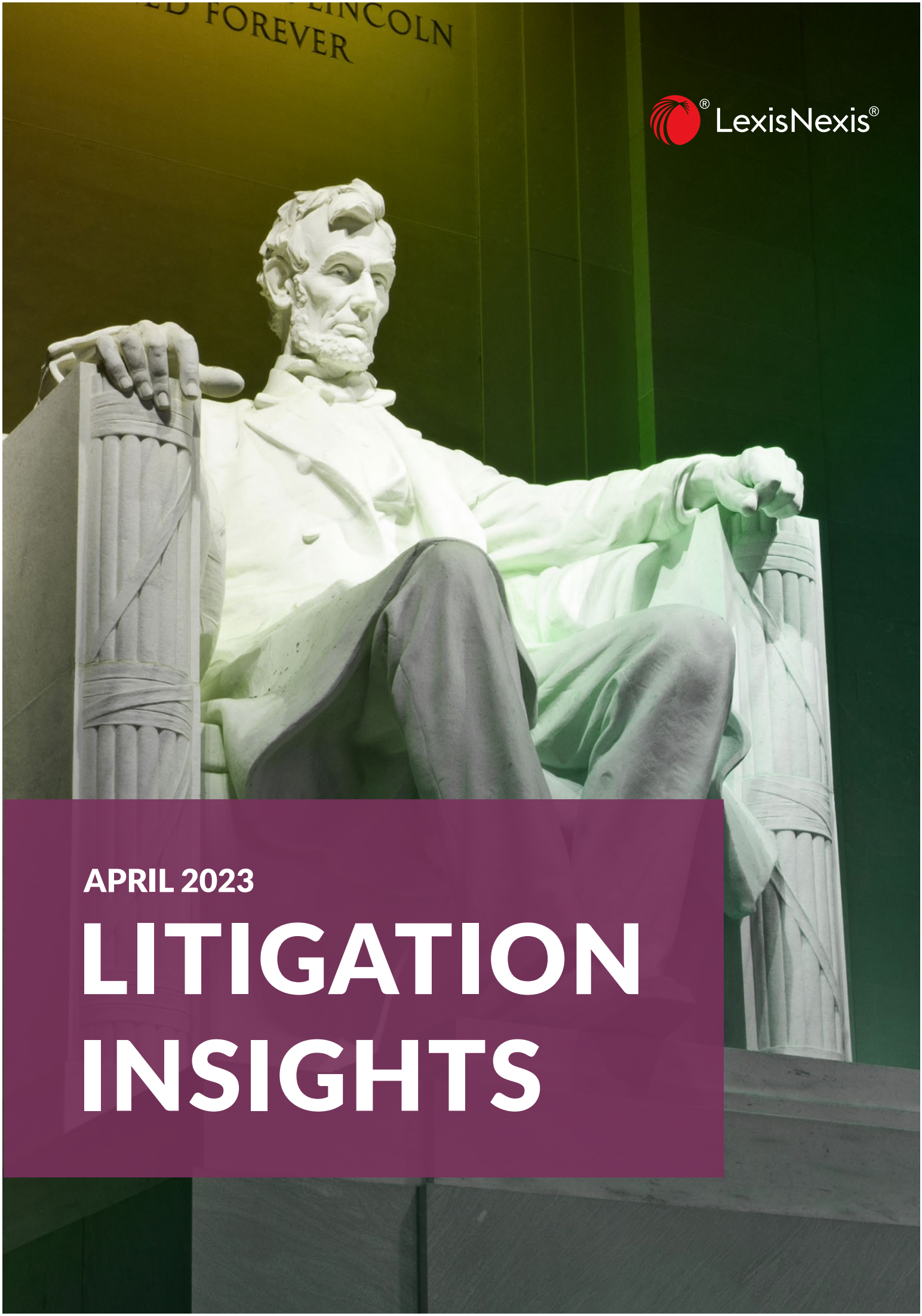


LexisNexis®

APRIL 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.

ABSTENTION

Jump to full summary

Burford Abstention

Elec. Reliability Council of Tex., Inc. v. Just Energy Tex., L.P. (In re Just Energy Grp., Inc.)

57 F.4th 241, 2023 U.S. App. LEXIS 253 (5th Cir. Jan. 5, 2023)

The Fifth Circuit holds that *Burford* abstention applies to cases in bankruptcy court.

JUDGMENT AS MATTER OF LAW

Jump to full summary

Governing Standard

SEC v. Clark

60 F.4th 807, 2023 U.S. App. LEXIS 4334 (4th Cir. Feb. 23, 2023)

The Fourth Circuit holds that, in considering a motion for judgment as a matter of law, a court's only task is to decide whether there is evidence from which a reasonable jury could decide in favor of the nonmoving party.

MULTIDISTRICT LITIGATION

Jump to full summary

Proceedings in Transferee Court

Home Depot USA, Inc. v. Lafarge N. Am., Inc.

59 F.4th 55, 2023 U.S. App. LEXIS 2644 (3d Cir. Feb. 2, 2023)

The Third Circuit concludes that the doctrines of law of the case and issue preclusion apply to each case in a multidistrict litigation but cannot be applied across distinct cases even though the cases are consolidated in the multidistrict litigation.

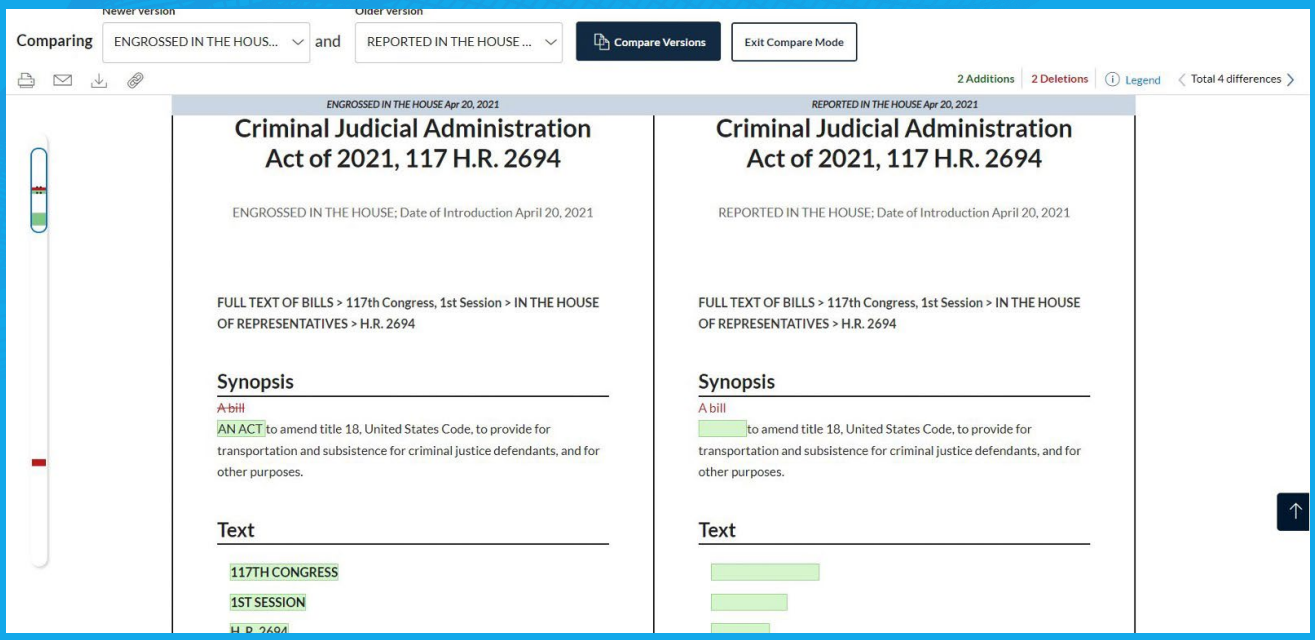
Continue on next page

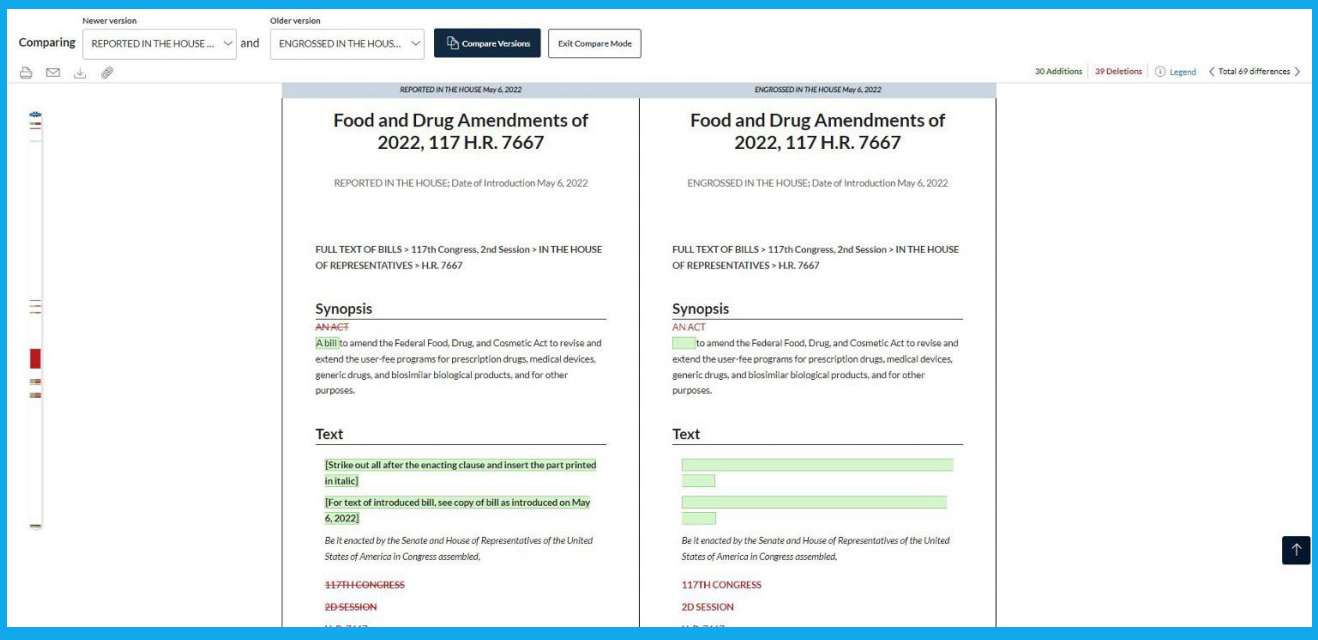
LexisNexis®

Lexis+® Code Compare Functionality Now Available for Legislation

With the latest product enhancements made to the *Code Compare* tool, an exclusive feature only available in Lexis+®, *Code Compare* now offers **Federal and State Legislation Compare functionality**, allowing customers to compare multiple versions of Federal and State legislation in a matter of seconds. Instead of manually comparing two different documents to discover the changes, now Lexis+ customers will be able to compare versions of a bill or code in seconds with a single click of a button and compare the changes **Side-by-Side** or in a **Single Overlay** document.

An illustration of *Code Compare* shown below:





Continue on next page

In terms of the complete coverages of the Code Compare tool with the applicable coverage dates, below is a handy list:

- Federal Statutes: 1991
- State statues: 1991
- CFR: 1981
- State Administrative Codes: 2004
- Federal Court Rules: 1992
- State Court Rules: 2013
- Federal & State Bill Text – 2018

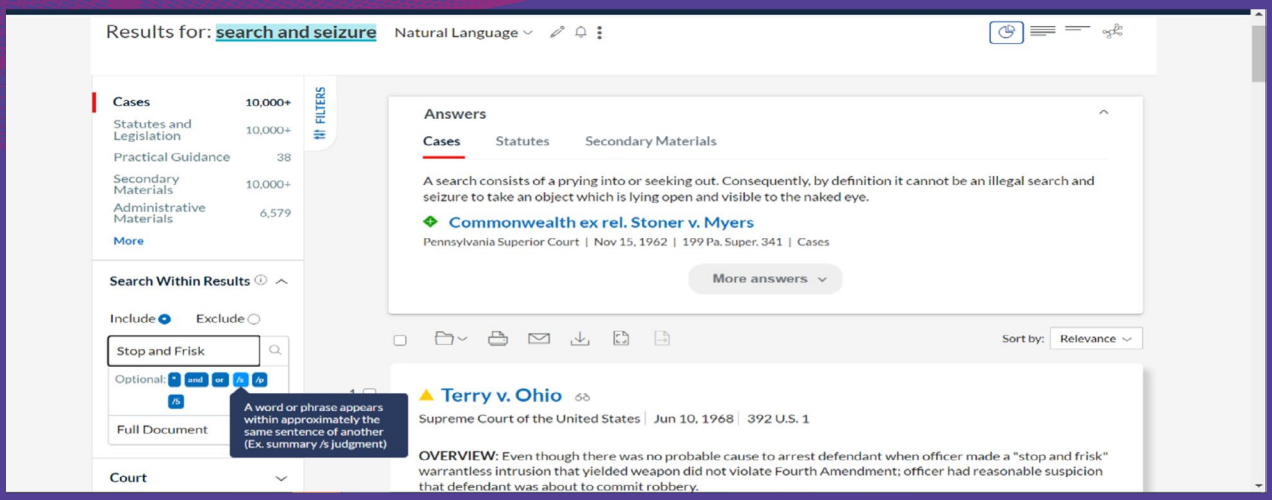
Continue on next page

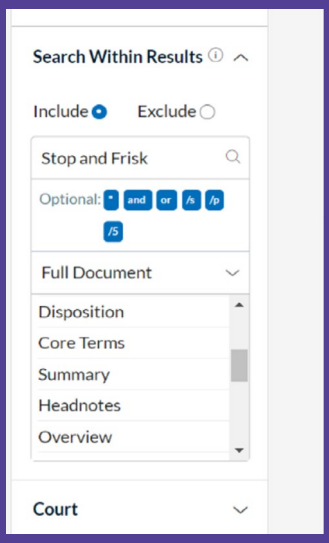
LexisNexis®

Lexis+ Search Within Results Query Builder

Lexis+ makes starting research far easier at every step of the process. ***Search Within***, is a feature that Lexis allows researchers the ability to easily narrow their search results. ***Search Within*** is an efficient way to narrow results, but researchers have expressed uncertainty about how to create effective precision queries. The ***query builder*** is designed to give researchers support to easily create a precision query if so desired.

As soon as a researcher clicks into the "Search Within Results" box, a query builder will display showing the researcher the most commonly used connectors. Click on the query builder chips to quickly create a query or hover over the chip to learn how the search connectors work. The query builder is optional, so users who do not want to create a precision query can ignore the query builder and continue with their research.





Moreover, a user can now utilize segment searching within "Search within Results." Should a user not want to search the full document for additional words (for example, they want to narrow to include words that appear in the summary, or disposition, headnotes, overview, etc.) they can expand the Full Document (all segments) drop down and choose from a list of segments available to search. When the user selects a segment, the words they search will be searched within that segment only. While search within a segment functionality was available previously, the segment dropdown is now in a new location. Utilizing segment searching within "Search within Results" will help a user achieve the answers they need faster as well as hone their research skills. For more information on "Search within Results" or any other Lexis+ features, please contact your dedicated Solutions Consultant.

Continue on next page

ABSTENTION

Burford Abstention

Elec. Reliability Council of Tex., Inc. v. Just Energy Tex., L.P. (In re Just Energy Grp., Inc.)

57 F.4th 241, 2023 U.S. App. LEXIS 253 (5th Cir. Jan. 5, 2023)

The Fifth Circuit holds that Burford abstention applies to cases in bankruptcy court.

Background. Texas's Public Utility Regulatory Act (PURA) established a "comprehensive and adequate regulatory system for electric utilities to assure rates, operations, and services that are just and reasonable to the consumers and to the electric utilities" [Tex. Util. Code § 31.001(a)]. Through PURA, the Texas legislature created a regulatory scheme that was intended to be the exclusive means of regulating electric utilities in Texas.

The Public Utility Commission of Texas (PUCT) is the agency charged with overseeing and implementing PURA. This includes ultimate authority over Texas's intrastate electric grid, which is independent of the two larger national grids.

Pursuant to PURA, the PUCT certified the Electric Reliability Council of Texas, Inc. (ERCOT), an independent organization, to manage the wholesale electricity market and ensure the adequacy and reliability of the electric grid. ERCOT determined market-clearing prices unless otherwise directed by the PUCT, and was the sole buyer to each seller, and the sole seller to each buyer, of all energy in Texas.

During winter storm "Uri," which devastated Texas residents for a week in February 2021, ERCOT and the PUCT allegedly intervened in the market for wholesale electricity by setting prices that were "orders of magnitude higher than what market forces would ordinarily produce." Energy supply plummeted as power plants were forced offline by the storm's impact, and as demand for electricity outpaced supply, ERCOT ordered forced power outages to reduce strain on the power grid. In response, the PUCT issued orders directing ERCOT to ensure that these cuts were accounted for in ERCOT's scarcity pricing signals.

These orders were allegedly invalid because they were not tied to "a fact-based analysis of the current market conditions," and failed to explain the reasoning behind the PUCT's determination that prices should be set at the "high-system-wide offer cap." Further, ERCOT, following the PUCT orders, allegedly "impermissibly" priced energy at the cap, $9,000 per megawatt hour (MWh), for more than 80 consecutive hours. And ERCOT allegedly left this price in place for 33 hours after the PUCT rescinded its orders.

Once ERCOT allowed normal supply-and-demand forces to set the price of power, the trading price plummeted within one hour from $9,000/MWh to $27/MWh, later falling to less than $5/MWh.

Just Energy, a retail energy provider, purported that after the storm, ERCOT "floored" it with invoices totaling approximately $335 million for the operating days of the storm. Lacking sufficient liquidity to satisfy the invoices on its own, Just Energy commenced bankruptcy proceedings in Canada and filed this Chapter 15 case in the U.S. Bankruptcy Court for the Southern District of Texas, Houston Division. Under protest, Just Energy paid ERCOT the monies owed, disputing "no less than $274 million of the invoiced amounts."

Just Energy challenged its invoice obligations, alleging that the PUCT orders regarding the scarcity pricing were unlawful and otherwise inconsistent with the ERCOT Protocols. In the alternative, Just Energy contended that even if the orders were valid, ERCOT had no basis to apply the $9,000/MWh price during the 33 hours after the PUCT rescinded its orders mandating that rate.

ERCOT moved to dismiss the complaint, arguing that each count attempted to obtain judicial repricing of energy charges, and implicated the filed-rate doctrine, the PUCT's rulemaking, ERCOT's sovereign immunity, and *Burford* abstention.

Continue on next page

The court dismissed all counts but four. The first three sought a declaratory judgment that ERCOT's storm-related invoices and transfers paid to satisfy them were void because they were made in favor of ERCOT over Just Energy's other creditors, and the fourth alleged that property transferred to satisfy the invoices was subject to turnover. ERCOT appealed the court's partial dismissal.

The bankruptcy court stated that it would strike various language from the complaint, which it concluded, without explanation, would solve the abstention problem. One example of the struck language was "subject to reduction only after a finding by the Court concerning a legally appropriate energy price per megawatt hour as proven by expert testimony, if appropriate, but in no event greater than the price per megawatt hour in effect after market forces took effect."

- ***Burford* Abstention Applies in Bankruptcy Context.** The Fifth Circuit rejected Just Energy's argument that *Burford* abstention was inapplicable because of language in the bankruptcy abstention statute, 28 U.S.C. § 1334(c), which it claimed subsumed *Burford*. Section 1334(c) provides that "Except with respect to a case under chapter 15 of title 11, nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11."

  The Fifth Circuit recounted that it had already decided that § 1334(c) does not subsume *Burford* abstention. In a Chapter 11 bankruptcy case, the Fifth Circuit acknowledged bankruptcy abstention under § 1334(c), yet applied *Burford* instead [*see* Wilson v. Valley Elec. Membership Corp., 8 F.3d 311, 313–316 (5th Cir. 1993)]. The court concluded that its application of *Burford* demonstrated that "the two types of abstention are distinct and stand alone."

  The court reasoned that because *Burford* and § 1334(c) are independent abstention doctrines, Just Energy's reliance on a Chapter 15 precedent was misplaced, even though the case held that a district court could not abstain from exercising jurisdiction in proceedings related to Chapter 15 cases. The court in that case limited its holding to Chapter 15-related cases that were "remanded based on § 1334(c)(1) permissive abstention" [see Firefighters' Ret. Sys. v. Citco Grp. Ltd., 796 F.3d 520 (5th Cir. 2015)]. The Fifth Circuit opined that that precedent might have applied here had ERCOT argued abstention under § 1334(c), but ERCOT argued abstention exclusively under *Burford*.

  The Fifth Circuit concluded that it was affirming its precedent establishing that: (1) abstention under § 1334(c) is distinct from abstention under *Burford*, and (2) Burford applies in the bankruptcy context.

- **District Court Abused its Discretion in Declining to Abstain.** The Fifth Circuit reiterated that *Burford* abstention allows federal courts, including bankruptcy courts, to avoid entanglement with state efforts to implement important policy programs. Courts have discretion to abstain "from deciding unclear questions of state law arising in complex state administrative schemes when federal court intervention would undermine uniform treatment of local issues."

  The court further expounded that where "timely and adequate" state-court review is available, "a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies" (1) when "there are difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar," or (2) where federal review "would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."

  The Fifth Circuit set out the five factors to be considered when deciding whether to abstain under *Burford*: (1) whether the plaintiff raises state or federal claims, (2) whether the case involves unsettled state law or detailed local facts, (3) the importance of the state's interest in the litigation, (4) the state's need for a coherent policy in the area, and (5) whether there is a special state forum for judicial review.

Continue on next page

Because Just Energy's Chapter 15 claims were pleaded under Canadian and federal law, the Fifth Circuit found that the first factor weighed against abstention, but concluded that this did not settle the issue.

Going on to the second factor, the court stated that abstention does not so much turn on whether the cause of action was alleged under federal or state law as it does on "whether the plaintiff's claim may be in any way entangled in a skein of state law that must be untangled before the federal case can proceed." Moreover, abstention has been held to be proper under this factor when proceeding in the district court "would have risked reaching a different answer than the state institutions with greater interest in and familiarity with such matters."

Here, Just Energy was asking the bankruptcy court to decide that either the PUCT orders were invalid, or ERCOT had misapplied its lawful authority by applying the $9,000/MWh price for the 33 hours after the PUCT rescinded its orders. The Fifth Circuit opined that Just Energy was asking it to second-guess ERCOT's decisionmaking and authority during the unusual, emergency circumstances of winter storm Uri. That risked "reaching a different answer than the state institutions with greater interest in and familiarity with such matters." Because this was the sort of "highly localized, specialized, judgmental, and perhaps partisan analysis" that calls for abstention, the court ruled that the second factor weighed in favor of abstention.

As to the third factor, the Fifth Circuit found that Texas's electricity market was a state administrative scheme that guarded an "'over-all plan of regulation of vital interest to the general public' from federal interference." The court explained that the purpose of PURA was "to establish a comprehensive and adequate regulatory system for electric utilities to assure rates, operations, and services that are just and reasonable to the consumer and to the electric utilities." Further, to develop a competitive wholesale electric market was in the public interest. To protect that public interest, the legislature gave the PUCT "exclusive original jurisdiction over the rates, operations, and services of an electric utility" in certain geographical areas, and exclusive appellate jurisdiction in others.

The Fifth Circuit concluded that the state interest was so strong that the third factor weighed in favor of abstention. The court underscored this finding by stating that "because the electricity grid is entirely intrastate, the management of the market is 'a matter of particular importance to the state.'"

The Fifth Circuit recounted that the fourth factor, the state's need for a coherent policy, was intended to avoid recurring and confusing federal intervention in an ongoing state scheme. The court found that Texas's wholesale electricity market was the type of complex state administrative process that *Burford* abstention aimed to protect from undue federal interference. The legislature's description of PURA as "comprehensive," coupled with the fact that PURA regulated even the particulars of a utility's operations and accounting, demonstrated the statute's pervasiveness, and the court found that Just Energy's desired outcome jeopardized Texas's pervasive administrative electricity scheme.

The court reasoned that should ERCOT repay monies for the energy Just Energy expended, it would have to allocate the debt to other market participants in order to remain revenue neutral. All other market participants would necessarily be affected. "This resulting domino effect is exactly the type of 'worrisome' federal court interference with an interdependent administrative scheme that *Burford* seeks to prevent."

As to the fifth factor, which requires a forum that offers "timely and adequate state-court review," the Fifth Circuit rejected Just Energy's assertion that its bankruptcy claims could not be adjudicated in administrative proceedings before the PUCT or before a Texas state court. The court reasoned that "behind the guise of Just Energy's bankruptcy action is its challenge to ERCOT's pricing decision and invoices." Those types of challenges must be filed with ERCOT, with a right to appeal to the PUCT, and then to the Travis County district court, which was selected to "prevent the confusion of multiple review of the same general issues."

Continue on next page

The court underscored its conclusion by opining that the only way Just Energy could get the $274 million relief it sought would be for the Travis County district court to answer the question, "Did ERCOT charge a lawful filed rate calculated in accordance with market-based protocols?" For the federal court to "inject itself into the matter would be exactly the type of interference *Burford* abstention exists to avoid. Because the answer central to Just Energy's claims can only be found in a specific state forum, this last factor weighs in favor of abstention."

Because four of the five factors were "lopsided in favor of abstention," the Fifth Circuit held that the district court abused its discretion in declining to abstain.

Continue on next page

JUDGMENT AS MATTER OF LAW

Governing Standard

SEC v. Clark

60 F.4th 807, 2023 U.S. App. LEXIS 4334 (4th Cir. Feb. 23, 2023)

The Fourth Circuit holds that, in considering a motion for judgment as a matter of law, a court's only task is to decide whether there is evidence from which a reasonable jury could decide in favor of the nonmoving party.

Background. The Securities and Exchange Commission sued Christopher Clark for trading Corporate Executive Board, Inc. (CEB) stock using inside information. The Commission alleged that Clark aggressively traded CEB stock after he received inside information about a potential merger from William Wright, Clark's brother-in-law and CEB's Corporate Controller. The Commission alleged Clark began trading CEB stock using inside information from Wright on December 9, 2016, the day CEB's board decided to proceed with the merger. Clark liquidated $4,000 from his wife's retirement account to purchase 40 CEB call options. Clark purchased the CEB call options with strike prices of $65 and $70 per share and expiration dates in January, February, and March. He bought more call options on December 12, 13, 14, 15, 20, 22, 27, and 29, and on January 3 and 5. To finance these trades, Clark took out a line of credit at a 9-percent interest rate and borrowed against his car. Clark told his son to make similar purchases during the same period.

On January 4, the merger was approved and then announced the next morning. After this announcement, CEB's stock price increased. During December, CEB shares traded between $57.70 and $60.60. But on January 5, 2017, the price of CEB stock closed at $74.85.

On January 5, Clark and his son began to exercise their call options. Since their strike prices were less than the market price of the CEB stock, they made a lot of money. All told, by spending $33,050, Clark cleared $245,230 in profit. And by spending $5,300, his son profited $53,050.

There was no direct evidence of when Wright learned of the merger, but the Commission presented evidence from which it might be inferred that Wright knew of the merger at least by November of 2016.

At trial, Clark moved for judgment as a matter of law under Federal Rule of Civil Procedure 50(a) at the conclusion of the Commission's case. He argued the Commission failed to present evidence that Wright possessed inside information about the merger at the time Clark began the relevant trading. And if Wright had no such information at that time, Clark contended, Wright could not have passed it on to Clark. The district court agreed and granted judgment for Clark.

The Commission appealed. The critical issue on appeal was whether the Commission presented evidence from which a reasonable jury could conclude that Wright possessed inside information about CEB's merger, which he then could have passed on to Clark, by the December 9 trading date.

Standard for Granting Judgment as Matter of Law. The Fourth Circuit explained that a motion for judgment as a matter of law may be granted when a party has been fully heard and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party [Fed. R. Civ. P. 50(a)(1)]. The appellate court reviews an order granting judgment as a matter of law de novo, viewing the facts and drawing all reasonable inferences from them in favor of the nonmoving party. A court must not weigh evidence, determine witness credibility or substitute its judgment of the facts for that of the jury. Nevertheless, to defeat a motion for judgment as a matter of law, the nonmovant must present more than a scintilla of evidence to support its claim.

Law on Insider Trading. Section 10(b) of the Securities Exchange Act of 1934 and the Securities and Exchange Commission's corresponding Rule 10b-5 prohibit persons under a duty of trust and confidence from secretly using inside corporate information that is not disclosed to the public for personal advantage [15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5]. This duty of trust and confidence, which requires abstention from trading, extends to a tippee who acquires the information from a tipper. To impose liability, the Commission must prove, by a preponderance of the evidence, that the tippee knew the information was disclosed in breach of the tipper's duty, and the tippee traded in disregard of that knowledge. A tippee's liability for trading on inside information hinges on whether the tipper breached a fiduciary duty by disclosing the information. Because a defendant or interested party rarely makes a

Continue on next page

statement or reveals information that amounts to direct evidence of impermissible trading, the Commission may present circumstantial evidence to meet its burden of proof.

Commission Presented Sufficient Circumstantial Evidence From Which Jury Could Infer Insider Knowledge. Applying the legal principles to the evidence presented in the Commission's case-in-chief, the Fourth Circuit found that a reasonable jury could infer that Clark engaged in insider trading based on insider information from Wright.

The district court had reasoned that Anschutz, the person who allegedly informed Wright about the merger, testified that he did not tell Wright until December, and the court was "having trouble coming up with any circumstantial evidence that would justify a finding that Mr. Clark got insider information and took some action on it." The court also noted that Clark had traded CEB options "long before [the Commission] alleged he got some insider information." And it said that Clark, other than lying to the FBI about his son's CEB trades, "seemed perfectly honest . . . about what he had done and what he didn't do." As for Clark's financial situation, the court stated, "[T]his wasn't a man who was desperate for money. At all times during this entire situation and before, his assets far exceeded his liabilities." Thus, the court found nothing suspicious about Clark's CEB stock transactions beginning December 9 and there was "no circumstantial evidence here that gives rise to an inference that he received the insider information, as has been alleged here." Because the Commission's evidence did not give "rise to an inference that he received the insider information," the district court concluded that it had a duty to grant Clark's motion for a judgment as a matter of law.

The Fourth Circuit found that the district court failed to consider the evidence in the light most favorable to the Commission. In emails on November 3, Anschutz and Wright discussed the effect of a transaction like a merger on unvested CEB stock, which they both had. Anschutz and Wright exchanged these emails just one day after CEB's board responded to the initial merger offer. Then, in early December, when the stock price offered in the merger proposal reached a price acceptable to CEB, Wright began emailing employment recruiters. In later emails, he said he had been working on the merger when the recruiters first contacted him, which was before December 9. In another email in January, Wright told recruiters he had been working on the merger for months.

Finally, while there was a dispute about when Anschutz learned about the merger negotiations, Anschutz testified that he at least knew by Thanksgiving—before Clark began the trades. And Anschutz and Wright were close friends who saw each other frequently and communicated by text and phone daily throughout November and December.

The Fourth Circuit concluded that, from this evidence, a jury could have reasonably concluded that Wright had inside information about the merger before Clark began buying call options on December 9, the very day that the Board approved the merger. In fact, Wright corroborated that inference in the January emails with recruiters. True, as Clark insisted, the emails to recruiters may have just been "puffery" designed to make Wright a more attractive candidate. True, the November 3 emails were before CEB accepted the merger offer and before the share price offered reached a level that was acceptable to CEB. And true, there was no direct evidence that Anschutz told Wright about the merger before December 9. However, the court's job in reviewing the order granting judgment as a matter of law was not to decide whether Wright in fact possessed inside information before December 9; it was to decide whether there was evidence from which a reasonable jury could have concluded that he had such information. The appellate court found there was.

The court further observed that there was also evidence from which a reasonable jury could have concluded that Wright passed inside information about the merger to Clark before December 9. First, the trades began on December 9, the very day CEB accepted the merger offer. Second, until those transactions, Clark had only once before traded in CEB call options, nearly a decade earlier. Instead, he had always bought put options, which bet on the company's value to go down. Third, he did not just bet on CEB's share price to go up; Clark went to extraordinary measures to buy the call options. He emptied his wife's retirement account, borrowed money at a 9 percent interest rate, and took out a loan secured by his car to fund the purchases. In total, he bought call options ten times in less than a month. Fourth, he advised his son to make similar purchases and later lied to the FBI about whether he had done so. And fifth, his trades proved remarkably lucrative. The $245,230 he made in profit from purchases of $33,050 represented a return on investment of over 700 percent. A jury considering all of this evidence could reasonably infer that Clark received inside information from Wright and used it to aggressively trade in a way that would be reckless if he did not have inside information.

Continue on next page

In reversing the district court's order, the appellate court did not mean to suggest Clark was liable for insider trading. A jury could reasonably decide that Wright did not have any inside information about the merger by December 9. As the district court noted, Clark had speculated on CEB stock for many years. And he professed to have an investment strategy that explained his December 9 transactions. However, the court again emphasized that, in considering the motion for a judgment as a matter of law, its only task was to decide whether there was evidence from which a reasonable jury could have decided that Clark was liable.

Conclusion. Finding that the evidence presented would permit a reasonable jury to conclude that Wright possessed the inside information and that Clark traded CEB stock after receiving it from Wright, the Fourth Circuit reversed the district court's order granting judgment as a matter of law and remanded for further proceedings.

Continue on next page

MULTIDISTRICT LITIGATION

Proceedings in Transferee Court

Home Depot USA, Inc. v. Lafarge N. Am., Inc.

59 F.4th 55, 2023 U.S. App. LEXIS 2644 (3d Cir. Feb. 2, 2023)

The Third Circuit concludes that the doctrines of law of the case and issue preclusion apply to each case in a multidistrict litigation but cannot be applied across distinct cases even though the cases are consolidated in the multidistrict litigation.

- **Background.** This case involved allegations of a conspiracy to fix prices in the drywall industry. The district court relied on issue preclusion and law of the case to exclude substantial portions of the testimony of plaintiff Home Depot's expert, as part of its case against defendant Lafarge. The expert had opined that the conduct of several firms in the drywall industry, including Lafarge, was consistent with illegal price fixing. This same conduct had been at issue in a class action brought by direct purchasers of drywall as part of a multidistrict litigation before the same court. Home Depot's later-filed case was consolidated with this multidistrict litigation over its objection.

  The district court found that large portions of the expert's testimony were "fundamentally improper" because they were "contrary to fundamental events" that had occurred in the multidistrict litigation before Home Depot filed its case. Specifically, the district court faulted the expert for failing to conform his testimony to three events: (1) the court's prior grant of summary judgment to one of the alleged conspirators, (2) the fact that another supplier had not previously been sued, and (3) the fact that an alleged conspirator settled very early in the class action. The district court said that Home Depot was bound by these events under the doctrines of issue preclusion and law of the case. This interlocutory appeal followed under 28 U.S.C. § 1292(b).

- **Law of Case and Issue Preclusion Doctrines Did Not Apply.** The law of the case doctrine prevents reconsideration of legal issues already decided in earlier stages of a case. It only applies within the same case and affects only issues that were expressly or necessarily resolved by prior decisions in the same case. Accordingly, it cannot be applied across distinct actions in a multidistrict proceeding. Cases centralized in a multidistrict litigation retain their separate identities unless they choose to proceed on a consolidated master complaint. In other words, the law of the case doctrine could not bind Home Depot to decisions in the class action because Home Depot's case and the class action were different cases. All of the binding events in the class action occurred before Home Depot filed its lawsuit.

  Also, the doctrine did not apply because law of the case extends only to issues that were actually decided in prior proceedings. Here, two of the events relied on by the district court (the absence of a summary judgment ruling and lack of a suit against Georgia-Pacific) were not decisions.

  The multidistrict procedure does not create an exception to the usual law of the case rules, nor does it merge the suits into a single cause, or change the rights of the parties.

  Issue preclusion did not apply for similar reasons. Issue preclusion bars a party from relitigating an issue when the identical issue was decided in a prior adjudication, there was a final judgment on the merits, the party against whom the bar is asserted was a party or in privity with a party to the prior adjudication, and the party against whom the bar is asserted had a full and fair opportunity to litigate the issue in question. Each event to which the court purported to bind Home Depot failed these requirements. Home Depot was not a party when these events occurred, and was not in privity with any party. It had not had an opportunity to litigate these issues. Also, two of the events were not decisions, and issue preclusion applies only when an issue is litigated.

- **Case Reversed and Remanded.** On remand, the Third Circuit said, the district court should consider the admissibility of the expert testimony afresh, unencumbered by reliance on the doctrines of law of the case and

Continue on next page

issue preclusion. The decision should instead be shaped by the traditional evidentiary principles governing the admissibility of expert testimony. In considering the parties' pending motions for summary judgment, the district court need not blind itself to its prior decisions, but may only apply its prior reasoning after it has allowed Home Depot to put forth new legal theories and to raise new arguments based on newly developed or preexisting evidence. It should also consider Home Depot's arguments that prior rulings in the multidistrict litigation should not be followed.

The Third Circuit noted that judges in multidistrict litigation face a considerable challenge and have often risen to this challenge by devising efficient, effective, and fair case management techniques. Nothing in its opinion, the court said, should be taken to disparage the creativity and innovation shown by judges presiding over multidistrict litigation. Instead, the Third Circuit endorsed the considerable authority that is vested in transferee courts to efficiently and fairly manage complex cases.

The Third Circuit also recognized the values inherent in the two finality doctrines, including judicial economy and fairness to litigants, and noted that a multidistrict litigation court has a variety of options to avoid the needless duplication of work across the cases that make up the proceeding. A court may rely on its prior decisions as persuasive and demand good reasons to change its mind. A court may formalize this process through case management orders. A court may also make use of consolidated complaints to simplify the litigation. A court may avoid unfairness through the use of appropriate discovery management orders. The court might also deal with monetary aspects of the problem by assessing common benefit fees. No particular approach, the Third Circuit emphasized, will be suitable in every case, and these suggestions were merely examples of alternatives that may be available.