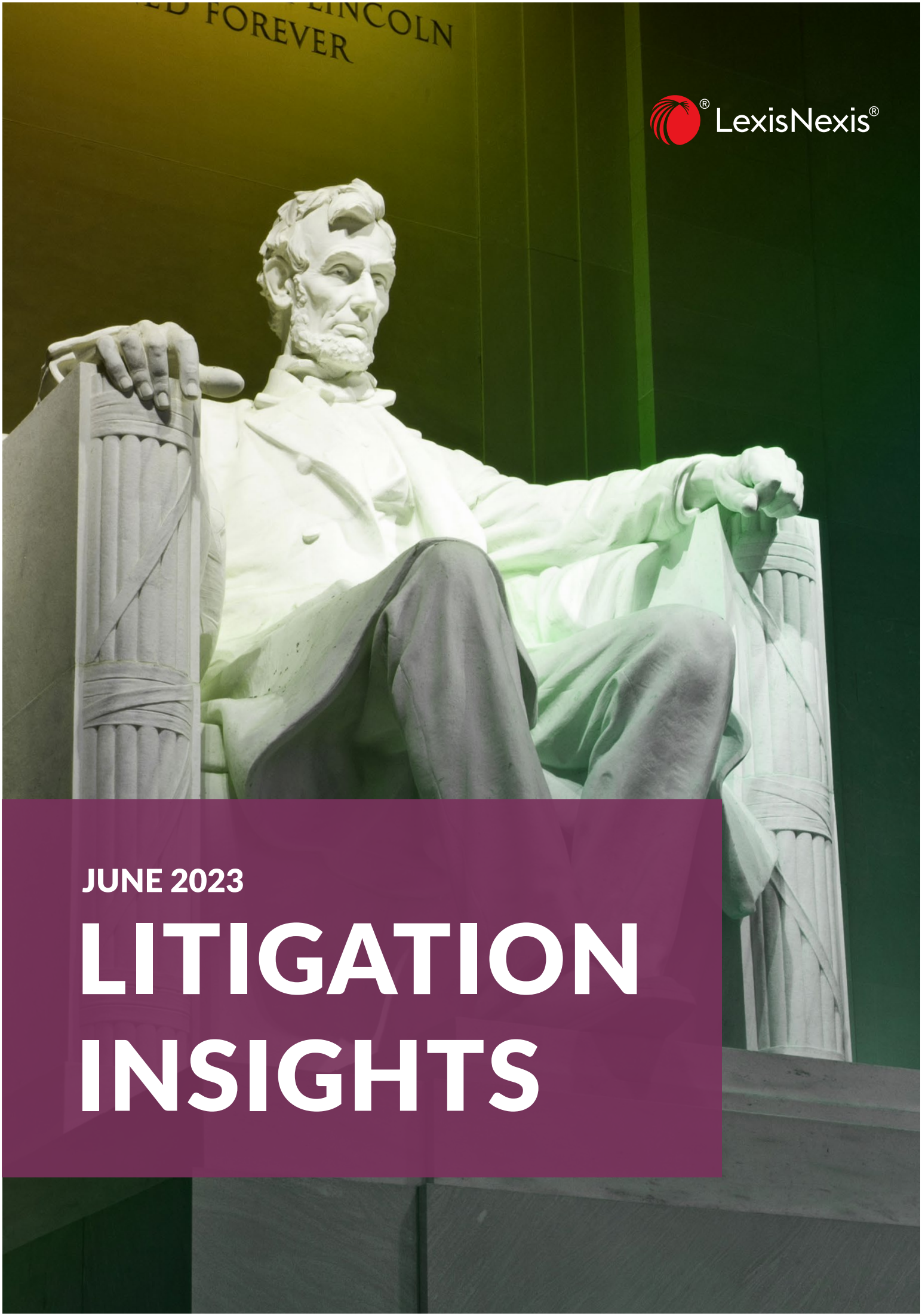

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LITIGATION INSIGHTS

MOORE'S FEDERAL PRACTICE—TOP THREE HIGHLIGHTS

The following three summaries are this month's Editor's Top Picks from the dozens of decisions added to Moore's Federal Practice and Procedure.

APPEALS

Collateral Order Doctrine

Collins ex rel. J.Y.C.C. v. Doe Run Res. Corp

65 F.4th 370, 2023 U.S. App. LEXIS 8706 (8th Cir. Apr. 12, 2023)

Jump to full summary

The Eighth Circuit holds that an order prohibiting ex parte communication with represented parties is not reviewable under the collateral order doctrine or under 28 U.S.C. § 1292(a)(1), which permits appeals for interlocutory injunctive orders.

JURY TRIAL

Right to Poll Jurors

SEC v. Sargent

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In a case of first impression, the First Circuit holds that a district court's denial of the right to poll each juror individually under Federal Rule of Civil Procedure 48(c)—even after the jury has been collectively polled—is per se reversible error.

VENUE

Forum Non Conveniens

DIRTT Env't Sols., Inc. v. Falkbuilt Ltd.

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The Tenth Circuit holds that a district court clearly abuses its discretion when it elects to dismiss an action as to several defendants under a theory of forum non conveniens while simultaneously allowing the same action to proceed against other defendants.

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Getting to Know the NEW Practical Guidance Federal Government Content

By Heather Robinson
LexisNexis Solutions Consultant on Federal Government Team

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- **INFORMATION LAW AND PRIVACY** – Find resources explaining the complexities of the Freedom of Information Act (FOIA) to assist government counsel in understanding and processing FOIA requests.
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- **CHECKLISTS** – Find a growing collection of checklists that provide guidance on core Federal Government practice topics.

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Parallel Citation Lookup now available on Lexis+®

By Mandi Cummings
LexisNexis Solutions Consultant on Federal Government Team

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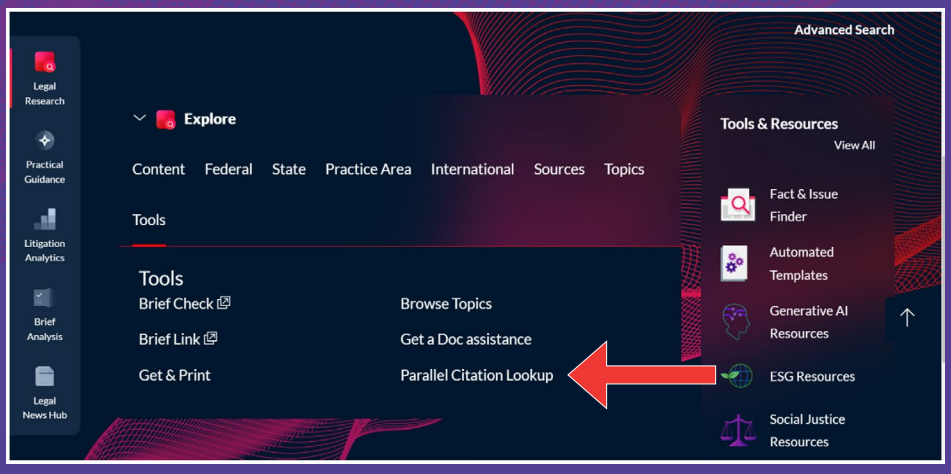

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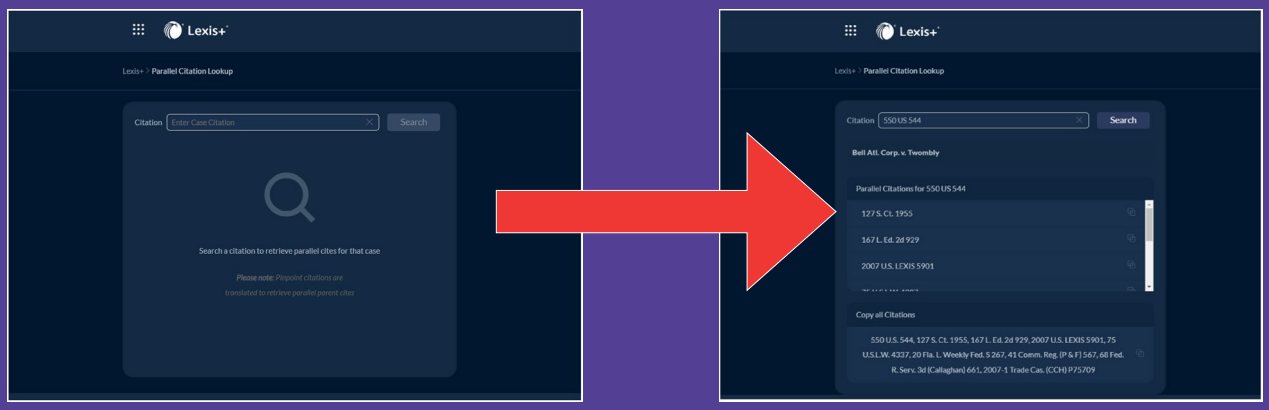

After searching for their citation, users can then one-click copy one of the citations or all of the parallel citations that were retrieved for a case from the search.

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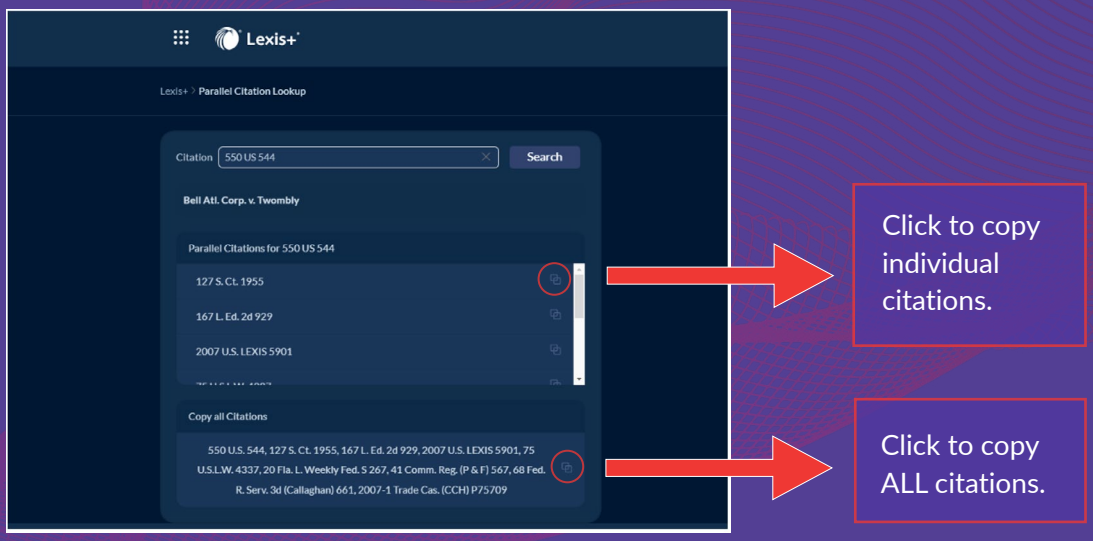
Users can then one-click copy any of the individual citations or all of the parallel citations retrieved for a case.



One thing to note is for pinpoint citations, the tool will only retrieve parent parallel cites.

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APPEALS

Collateral Order Doctrine

Collins ex rel. J.Y.C.C. v. Doe Run Res. Corp

65 F.4th 370, 2023 U.S. App. LEXIS 8706 (8th Cir. Apr. 12, 2023)

The Eighth Circuit holds that an order prohibiting ex parte communication with represented parties is not reviewable under the collateral order doctrine or under 28 U.S.C. § 1292(a)(1), which permits appeals for interlocutory injunctive orders.

Background. The plaintiffs, thousands of Peruvian citizens, alleged injury from Doe Run's lead-mining and smelting complex in La Oroya, Peru. Doe Run, based in St. Louis, Missouri, operated the complex since 1997. The plaintiffs alleged that more than 99 percent of children born in La Oroya since 2005 had lead poisoning.

The plaintiffs sued in Missouri state court, and the defendants removed the case to the U.S. District Court for the Eastern District of Missouri. The parties identified a small sample of plaintiffs whose cases would be tried first (the "trial-pool plaintiffs").

In October 2021, the defendants submitted a report to the district court about allegedly fraudulent conduct by two former "plaintiff recruiters" in Peru. The report noted that the defendants had hired Peruvian counsel to report the fraud to Peruvian law enforcement. Consequently, Peruvian authorities opened an investigation. Under Peruvian law, because the defendants reported the crime, they could suggest witnesses for Peruvian prosecutors to interview and they could attend the interviews.

To support their fraud allegations, the defendants sought certain discovery in this case. They proposed a verification procedure for all plaintiffs, requested the appointment of a special master to investigate fraud, and sought discovery from a non-trial-pool plaintiff about his relationship with plaintiffs' counsel. The plaintiffs opposed these efforts; they proposed a more targeted means to test the impact of the alleged fraud and filed for a protective order to bar the defendants from obtaining discovery from the non-trial-pool plaintiff. The plaintiffs also filed an emergency motion for a protective order to prohibit the defendants' Peruvian counsel from participating in witness interviews in the Peruvian criminal investigation, claiming that it would be impermissible ex parte communication. The district court denied the defendants' requests and granted the plaintiffs' requested protective orders. The defendants appealed the grant of the plaintiffs' emergency motion for a protective order, and moved to stay the protective order pending appeal. The district court denied the motion because it did not want the defendants to talk directly with plaintiffs through the Peruvian criminal witness interviews about a subject related to the litigation—fraud. It explained that the "criminal investigation is directed at issues that are inextricably intertwined with the discovery issues before this Court in this matter" and "[t]he information Defendants' Peruvian counsel gains from their participation in interviewing plaintiffs in this investigation . . . could not be obtained by Defendants' counsel in this case."

Meanwhile, the defendants filed actions in other courts related to their fraud allegations. In the Southern District of Florida, the defendants filed a 28 U.S.C. § 1782 application to take discovery, seeking materials to aid the ongoing fraud investigation in Peru. In Florida state court, the defendants brought malicious-prosecution and negligent-supervision claims against two former plaintiff recruiters, alleging that they fabricated evidence supporting some of the claims in the Missouri cases.

On appeal, the Eighth Circuit first considered whether it had jurisdiction.

No Jurisdiction Under Collateral Order Doctrine. Generally, appellate courts have jurisdiction "of appeals from all final decisions of the district courts of the United States" [28 U.S.C. § 1291]. Under the collateral order doctrine, "final decisions" includes a small class of rulings, not concluding the litigation, but conclusively resolving claims of right separable from, and collateral to, rights asserted in the action. The Eighth Circuit explained that it

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has jurisdiction to review a collateral order if it (1) conclusively determines a disputed question, (2) resolves an important issue completely separate from the merits of the action, and (3) is effectively unreviewable on appeal from a final injunction. The court emphasized that collateral order review is a narrow exception. That a ruling may burden litigants in ways that are only imperfectly reparable by appellate reversal of a final district court judgment does not suffice. Instead, the decisive consideration is whether delaying review until the entry of final judgment would imperil a substantial public interest or some particular value of a high order.

The jurisdictional inquiry under the collateral order doctrine looks beyond the particular order being appealed and focuses instead on the class of claims that the challenged order resolves. As long as the class of claims, taken as a whole, can be adequately vindicated by other means, the chance that the litigation at hand might be speeded, or a particular injustice averted, does not provide a basis for jurisdiction under the collateral order doctrine. Thus, the collateral order doctrine does not extend to categories of orders affecting rights that can be adequately protected without an immediate appeal. Pretrial discovery orders, for example, are generally not immediately appealable because in the rare case when appeal after final judgment will not cure an erroneous discovery order, a party may defy the order, permit a contempt citation to be entered against him or her, and challenge the order on direct appeal of the contempt ruling. Even an order denying attorney-client privilege is not immediately appealable, because a litigant can petition for a writ of mandamus or ask the district court to certify, and the appellate court to accept, an interlocutory appeal under 28 U.S.C. § 1292(b).

The appellate court classified the district court's order as an order prohibiting ex parte communication. The plaintiffs' emergency motion requested a "Protective Order to Prevent Ex Parte Communication with Plaintiffs," and the district court's legal basis for granting the motion was Missouri Rule of Professional Conduct 4-4.2. The court rejected the defendants' assertion that the order should be classified as prohibiting participation in a foreign law-enforcement investigation. Although the order prohibited the defendants' Peruvian counsel from attending witness interviews in a foreign law-enforcement investigation, it did not prohibit the defendants from participating in the investigation. Peruvian counsel could still present evidence to, suggest questions for, and communicate with the prosecutor. Instead, the district court explained that it did not want defendants' Peruvian counsel talking with current plaintiffs or using a criminal investigation to have their lawyers communicate with current plaintiffs about the subject of this lawsuit. Thus, the challenged order was properly classified as an order prohibiting ex parte communication with represented parties.

The court found that such orders are not effectively unreviewable on appeal from a final judgment, so the collateral order doctrine did not apply. That Peruvian law may allow this communication and the right may be important does not mean that all orders prohibiting ex parte communication are immediately appealable. As with most pretrial discovery orders, a litigant ordered to refrain from ex parte communication can seek other remedies that will sufficiently protect its rights. When prohibited from engaging in an ex parte communication, a litigant can appeal the order after final judgment, request certification of an interlocutory appeal under 28 U.S.C. § 1292(b), petition the appellate court for a writ of mandamus, or defy the order and incur sanctions, which may be immediately appealable if a criminal-contempt order is issued. The court emphasized that even in situations in which a party will be irreparably damaged if forced to wait until final resolution of the underlying litigation before securing review of a specific order, it is not necessary, in order to resolve those situations, to create a general rule permitting the appeal of all such orders.

In sum, the court found that orders prohibiting ex parte communication are not effectively unreviewable on appeal from final judgment. Thus, the defendants could not appeal the challenged order under the collateral order doctrine.

- **Order Was Not Appealable as Injunction**. The Eighth Circuit also ruled that the order was not appealable under § 1292(a)(1), which permits appeals for interlocutory orders "granting, continuing, modifying, refusing or dissolving injunctions." The statute provides appellate jurisdiction over orders that grant or deny injunctions and orders that have the practical effect of granting or denying injunctions and have serious, perhaps irreparable, consequences.

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Generally, discovery orders, though in the form of an injunction because they require parties to do or not do something, are deemed not to be injunctions within the meaning of § 1292(a)(1).

In determining whether the district court acted specifically to grant injunctive relief, the appellate court examines the language of the order, the grounds on which it rests, and the circumstances in which it was entered. The Eighth Circuit in this case explained, "An order has the practical effect of an injunction for purposes of appeal if it is directed to one or more of the parties, is coercive and equitable in nature, is enforceable by contempt, and grants at least some of the relief that is sought in the litigation" (quoting 19 Moore's Federal Practice (3d ed.) § 203.10[2][a]). The defendants argued that the challenged order had the effect of an anti-suit injunction and thus was appealable because it enjoined the defendants' Peruvian counsel from attending Peruvian law-enforcement interviews of current plaintiffs. However, the court found no support for the argument that an order that merely affects foreign proceedings—but does not enjoin a party from participating in them—is immediately appealable under § 1292(a)(1).

Though an order is not appealable merely by virtue of its effect on a foreign criminal investigation, it may nevertheless be appealable if it has the practical effect of an injunction and has serious, irreparable consequences. The Eighth Circuit concluded that the order in this case did not have that effect. For one, it did not grant at least some of the relief that is sought in the litigation, because the plaintiffs alleged personal injury from lead poisoning. Moreover, the defendants had not demonstrated that it had serious, irreparable consequences. Indeed, in their response to the motion to dismiss, the defendants did not explain how they were irreparably harmed by their Peruvian counsel's inability to attend the witness interviews. Even though the defendants' Peruvian counsel could not attend witness interviews, the defendants continued to pursue their fraud theory in Missouri federal court and in the Florida actions. Therefore the challenged order was not appealable under § 1292(a)(1).

For these reasons, the Eighth Circuit dismissed the appeal for lack of jurisdiction.

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JURY TRIAL

Right to Poll Jurors

SEC v. Sargent

66 F.4th 11, 2023 U.S. App. LEXIS 9229 (1st Cir. Apr. 18, 2023)

In a case of first impression, the First Circuit holds that a district court's denial of the right to poll each juror individually under Federal Rule of Civil Procedure 48(c)—even after the jury has been collectively polled—is per se reversible error.

Background. The Securities and Exchange Commission (SEC) filed a civil enforcement action against Henry B. Sargent and others in June 2019. The SEC alleged that the defendants had engaged in a fraudulent and deceptive scheme to disguise public stock sales by corporate affiliates that should have been registered with the SEC.

After a ten-day trial in front of Judge William G. Young, the jury returned a unanimous verdict against Sargent, which the clerk recorded by reading aloud each of the questions on the verdict form along with the jury's corresponding responses. The clerk next confirmed the verdict by polling the jury collectively.

Judge Young then thanked the jurors for their service and instructed them to return to their deliberation room. But before the jurors left the courtroom, Sargent's attorney asked: "Can we poll the jury?" And Judge Young responded: "Denied. They may be excused." Judge Young remained on the bench for a time discussing several matters with the parties before he joined the jurors in their deliberation room.

The next day, after Sargent told the SEC that he believed that Judge Young committed reversible error by denying his request to poll the jurors individually, the SEC immediately filed an emergency motion to recall the jurors so they could be polled individually. Sargent moved for a new trial the next day.

During the hearing on the motion, Judge Young acknowledged that he violated Rule 48(c) when he denied Sargent's request to poll the jurors. Judge Young explained that he "simply did not know the rule," and that since its adoption in 2009, no party in any civil case had requested that he poll each of the jurors individually. He then partially recused himself for the question whether his error was reversible and automatically entitled Sargent to a new trial or whether his error should first be assessed for harmlessness under Rule 61.

The matter was randomly assigned to Judge Richard G. Stearns, who ruled that a violation of the right to poll each of the jurors individually under Rule 48(c) is per se reversible, which therefore entitled Sargent to a new trial. Judge Stearns was persuaded by dictum from the First Circuit suggesting that the criminal and civil rules on jury polling should be interpreted in pari passu (on equal footing) because they were now "virtually identical," and statements from the Seventh Circuit finding no reason to distinguish between the two polling rules when a district court refuses a request to poll the jurors [see Ira Green, Inc. v. Mil. Sales & Serv. Co., 775 F.3d 12, 25 (1st Cir. 1958); Verser v. Barfield, 741 F.3d 734, 738 (7th Cir. 2013)].

Judge Stearns did, however, note that the First Circuit had called the issue "open to legitimate question" and that more than one state court, when interpreting similar jury-polling rules, concluded that automatic reversal is required in criminal but not civil cases when the right to a jury poll is violated [see Ira Green, Inc. v. Mil. Sales & Serv. Co., 775 F.3d 12, 24–25 (1st Cir. 1958)].

Judge Stearns sua sponte certified the question for immediate interlocutory appeal, which was granted, and the SEC then filed its appeal.

Individual Polling in Criminal Case Is Intended to Ascertain That Unanimous Verdict Has Been Reached Without Juror Coercion or Inducement. Noting that the right to have a criminal jury polled "is of ancient origin and of basic importance," the First Circuit explained that Criminal Rule 31(d) recognizes and establishes this right [see Miranda v. United States, 255 F.2d 9, 18 (1st Cir. 1958)].

Right to Have Jurors Polled Individually in Criminal Case Is Not Met by Collective Polling. Citing circuit precedent, the court explained that a criminal defendant's right to poll the jurors individually includes "the right to require each

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juror individually to state publicly [the juror's] assent to or dissent from the returned verdict," and this is not met when the jurors are collectively polled, and this conclusion was affirmed when Criminal Rule 31(d) was amended in 1998 [see Miranda v. United States, 255 F.2d 9, 17 (1st Cir. 1958); Fed. R. Crim. P. 31(d) advisory committee notes to 1998 amendments].

- **Denial of Individual Polling in Criminal Case Requires New Trial Regardless of Whether Error Might Have Been Harmless.** Reiterating that "a failure to poll the jury after a timely request constitutes per se reversible error," the First Circuit recognized this as the prevailing rule among the courts of appeals and rejected the contention that Supreme Court precedent had since contradicted that rule.

  Notwithstanding its concession that this is the circuit rule in criminal cases, the SEC contended that a district court's denial of a party's civil right to poll each juror individually under Rule 48(c) required initial analysis for harmless error under Rule 61. To support that argument, the SEC argued that because the Supreme Court has never found a trial error in a civil case involving a non-constitutional right to be per se reversible and because Rule 48(c) errors result in the denial of only non-constitutional rights, a denial of a party's Rule 48(c) right to poll the jurors individually cannot be per se reversible. In addition, the SEC argued that the inherent differences between criminal and civil cases—including the higher stakes and higher burden of proof in the former, noting that in a civil case, the party claiming error has the burden to show that it was not harmless, while in a criminal case, the burden is on the government to show the error was harmless—provide further justification for not giving the same treatment to jury-polling errors occurring in the two contexts.

  The First Circuit began its analysis by noting the "virtually identical" text of the jury-polling rules in Criminal Rule 31(d) and Civil Rule 48(c) and the similar categorical mandates of the harmless-error rules in Criminal Rule 52(a) and Civil Rule 61. Criminal Rule 31(d) provided the model upon which Civil Rule 48(c) was written, with only minor revisions to reflect Civil Rules style and the parties' opportunity to stipulate to a nonunanimous verdict. Criminal Rule 52(a) provides that "[a]ny error that does not affect substantial rights must be disregarded," and Civil Rule 61 provides that "the court must disregard all errors and defects that do not affect any party's substantial rights." Finding a lack of material differences between the criminal and civil rules and noting only stylistic differences, the court rejected the SEC's textual argument. Because Civil Rule 61 does not provide an exception for Civil Rule 48(c) errors, such errors may be treated as per se reversible because the SEC failed to identify how the use of "any error" versus "all errors" or any other differences between the two rules supported its argument.

- **Some Civil-Trial Errors May Be Per Se Reversible.** As for the SEC's argument that no civil trial errors are per se reversible, the First Circuit pointed to its 1992 decision in Cabral v. Sullivan, in which it treated the non-constitutional error of a civil trial court permitting alternate jurors to participate in jury deliberations as reversible error and thereby gave identical interpretation to Civil Rule 47(b) and its criminal analogue, Criminal Rule 24(c). In so doing, the court in Cabral explained that because the two rules "literally read the same," the court did not believe that the drafters intended them to be interpreted differently [see Cabral v. Sullivan, 961 F.2d 998, 1001 n.3, 1003 (1st Cir. 1992)].

- **Analogous Criminal and Civil Rules Should Be Interpreted in Pari Passu.** The First Circuit also cited Cabral to support its dicta in previous precedent upon which Judge Stearns also relied to conclude that common sense suggests that analogous civil and criminal rules should be interpreted in pari passu with regard to whether violations of those rules should be assessed for harmlessness [see Ira Green, Inc. v. Mil. Sales & Serv. Co., 775 F.3d 12, 25 (1st Cir. 1958)].

- **Other State-Court Decisions Are Not Basis to Depart From Circuit Precedent.** The First Circuit acknowledged that jury-polling errors are treated as per se reversible in criminal cases but not in civil cases in several state courts. However, the court was not persuaded that those decisions provided a basis for it to stray from its precedent and distinguish between juror-polling errors in criminal and civil cases.

  Finally, the court of appeals found that the SEC waived any argument that because courts review for harmlessness any denial of the Seventh Amendment right to a jury trial, the court must also review for harmlessness any jury-related errors occurring in a jury trial, including jury-polling errors.

  On these grounds, the First Circuit affirmed the district court's interlocutory order.

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VENUE

Forum Non Conveniens

DIRTT Env't Sols., Inc. v. Falkbuilt Ltd.

65 F.4th 547, 2023 U.S. App. LEXIS 8535 (10th Cir. Apr. 11, 2023)

The Tenth Circuit holds that a district court clearly abuses its discretion when it elects to dismiss an action as to several defendants under a theory of forum non conveniens while simultaneously allowing the same action to proceed against other defendants.

Background. The appellants in this case were a Colorado corporation and its Canadian parent, which operated a business designing prefabricated interior spaces using proprietary software. The former CEO of this business established his own business of the same type. The original company claimed that the new company recruited its employees and affiliates in order to acquire the original company's proprietary information.

The original company began litigation by filing suit for breach of contract in Canadian court, and later brought the present suit in U.S. district court against the new company, former employees, and other defendants, alleging various theft-of-trade-secret claims under both federal and state law, as well as a breach-of-contract claim against one of the individual defendants. The new company filed a counterclaim, which the original plaintiff moved to dismiss on forum non conveniens grounds. The parties engaged in discovery. The original plaintiff amended its complaint and added various additional parties and also changed its citizenship from Canada to the United States and refined its allegations to be more focused on harm suffered in the United States. Some of the defendants moved to dismiss this amended complaint in favor of a Canadian forum under forum non conveniens. Other defendants refused to join this motion or consent to Canadian jurisdiction.

The district court eventually dismissed the counterclaim for forum non conveniens and later dismissed the amended complaint as to some of the defendants for the same reasons, while leaving the case pending against other defendants.

No Partial Forum Non Conveniens Dismissal. The court of appeals noted that whether a district court can appropriately dismiss part of an action pursuant to the forum non conveniens doctrine, while allowing the other part to proceed, was a question of first impression in the Tenth Circuit. The court concluded that the forum non conveniens doctrine is fundamentally concerned with the convenience of the venue, and relatedly the efficient administration of justice, and that therefore partial dismissal is inappropriate.

Forum non conveniens is a discretionary common-law doctrine under which a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute. The forum non conveniens inquiry asks two threshold questions: (1) whether the other forum is an adequate alternative forum in which the defendants are amenable to process, and (2) whether the foreign law applies. If the answers to both questions are yes, the court must examine and balance various private- and public-interest factors.

The parties raised many issues, but the court of appeals focused on the first threshold question. The foreign forum must be both available, in the sense that the defendants are subject to process there, and adequate. Three of the six defendants in the suit were not subject to Canadian jurisdiction and had not consented to jurisdiction there. The other three had agreed to be subject to Canadian jurisdiction. They argued that the original defendant had splintered the litigation when it filed one case in Canada and then filed a second, overlapping action seven months later in the United States.

The court of appeals, however, was presented with no authority allowing forum non conveniens to be used to split cases. Rather, a foreign forum is said to be available only when "the entire case and all parties can come with the jurisdiction" of the foreign forum [Baumgart v. Fairchild Aircraft Corp., 981 F.2d 824, 835 (5th

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Cir. 1993)]. The idea that all parties, and by extension the entire case, must be subject to the jurisdiction of an alternative forum in order for it to be considered available under forum non conveniens makes good sense, the court of appeals said. Forum non conveniens is a doctrine that is fundamentally concerned with convenience, and convenience is a multidimensional concept that is not primarily focused on any one party's interests. Instead, a court should consider convenience as it applies to the entire case when it analyzes the appropriateness of dismissal for forum non conveniens. Here, all the defendants were subject to jurisdiction in the U.S. court. Some were not subject to jurisdiction in Canada, and therefore Canada was not an available alternative forum. Splitting the case as the district court had done would fundamentally contradict the central purpose of forum non conveniens, because it would only increase the possibility of overlapping, piecemeal litigation.

The Tenth Circuit expressly held that forum non conveniens was not available as a tool to split or bifurcate cases. The district court had abused its discretion by granting the motion to dismiss. The Tenth Circuit reversed the judgment and remanded with instructions to exercise jurisdiction over the entire action.