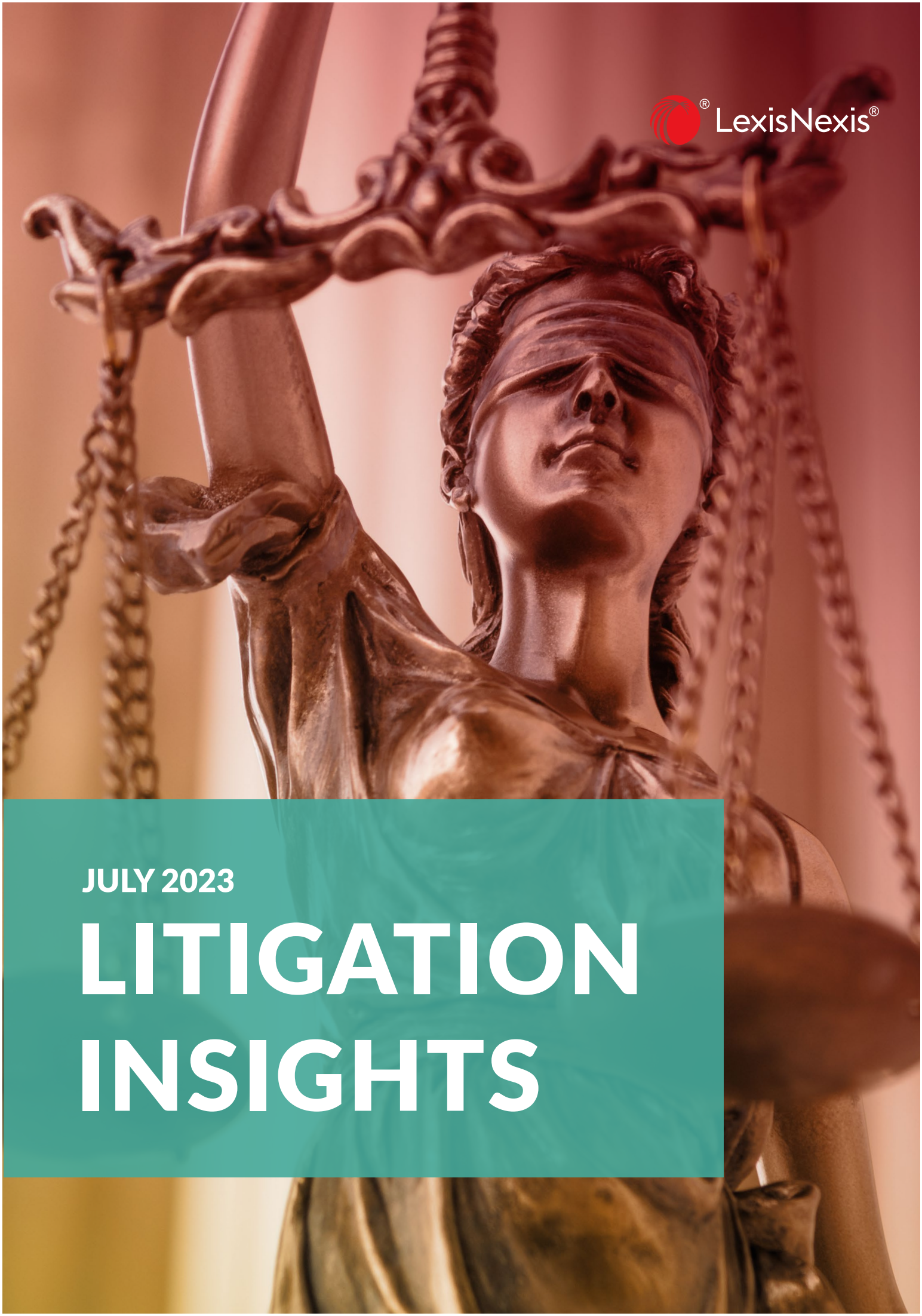

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LITIGATION INSIGHTS

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.

CLASS ACTIONS

Class Notice

Bakov v. Consol. World Travel, Inc.

68 F.4th 1053, 2023 U.S. App. LEXIS 12373 (7th Cir. May 19, 2023)

Jump to full summary

The Seventh Circuit has held that the district court did not abuse its discretion in allocating the costs of class notice to the defendant when the defendant's liability had already been determined.

DISMISSAL

Voluntary Dismissal

Rosell v. VMSB, LLC

67 F.4th 1141, 2023 U.S. App. LEXIS 11696 (11th Cir. May 12, 2023)

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The Eleventh Circuit has held that, because Federal Rule of Civil Procedure 41(a) provides only for the dismissal of an entire action, the voluntary dismissal of a single claim was invalid and did not create a final, appealable judgment.

PRIVILEGES

Legislative Privileges

Jackson Mun. Airport Auth. v. Harkins

67 F.4th 678, 2023 U.S. App. LEXIS 11503 (5th Cir. May 10, 2023)

Jump to full summary

The Fifth Circuit holds that legislators do not waive their legislative privilege for documents or information shared with third parties if the communications are made within the sphere of "legitimate legislative activity."

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To find any case on which Judge Terwilliger sat, whether alone or as part of a panel, use the **Judge** segment, e.g., ***judge(Terwilliger)***. This does not address whether she wrote the opinion, just that she was part of the panel for that case.

To find cases in which your judge wrote the opinion, concurrence or dissent, use the **Writtenby** segment e.g., ***writtenby(Terwilliger)***. There are three more precise versions as well, opinionby (to find where your judge wrote the majority opinion), concurby (wrote the concurrence), and dissentby (wrote the dissent. You can use these to find a judge's history on a specific issue, or to compile a collection of their opinions overall.

Best practice: be sure to identify how the court lists the judge before using these segments. Many courts use only the judge's last name if there is no other judge in that court with the same last name. If there is another judge with the same name, they may be identified by a first name or initial. For instance, when both were on the DC Court of Appeals, Judge Douglas Ginsburg was listed as D.H. Ginsburg while Judge Ruth Ginsburg was Ruth B. Ginsburg.

Best practice: you may combine segments with regular searches. For instance, a search for ***opinionby(Smith) and free speech or first amendment*** will find cases where Judge Smith wrote the opinion in a free speech case.

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NEWS AND LEGAL WRITING:

To find News or Legal News articles by a specific author, use the **Byline** Segment, e.g., ***byline(Lincoln)***. This search will focus on articles where a specific person is listed in the byline as the author of the article. So, a search for byline(Springsteen) will find articles by the performer rather than those about him.

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WIN WITH JIM WAGSTAFFE Current Awareness Insights!

CALIFORNIA'S STATUTORY BAR ON ARBITRATION OF EMPLOYMENT DISCRIMINATION CLAIMS PREEMPTED BY FEDERAL ARBITRATION ACT

California enacted a law (Labor Code § 432.6, AB 51) which made it a criminal offense for an employer to require an existing employee or an applicant for employment to consent to arbitrate state employment discrimination claims as a condition of employment or continued employment. In a prior 2-1 decision, the Ninth Circuit had upheld this law reasoning that the strong state public policy underlying the statute meant it was not preempted by the Federal Arbitration Act (FAA). However, the panel has recently reversed itself, now ruling that the statute is preempted by the FAA. The new decision reasons that all provisions of AB 51 work together to burden the formation of arbitration agreements and, therefore, the FAA preempts it as applied to arbitration agreements. Specifically, the panel decision held, AB 51's deterrence of an employer's willingness to enter into an arbitration agreement is antithetical to the FAA's liberal federal policy favoring arbitration agreements. ***Chamber of Com. Of United States v. Bonta***, 62 F.4th 473 (9th Cir. 2023).

See Fed Civ Proc Before Trial: The Wagstaffe Group *§13-IV[C]*, 13.31—FAA Preempts Conflicting State Laws; *2023-2 The Wagstaffe Group Current Awareness 03 (2023)*.

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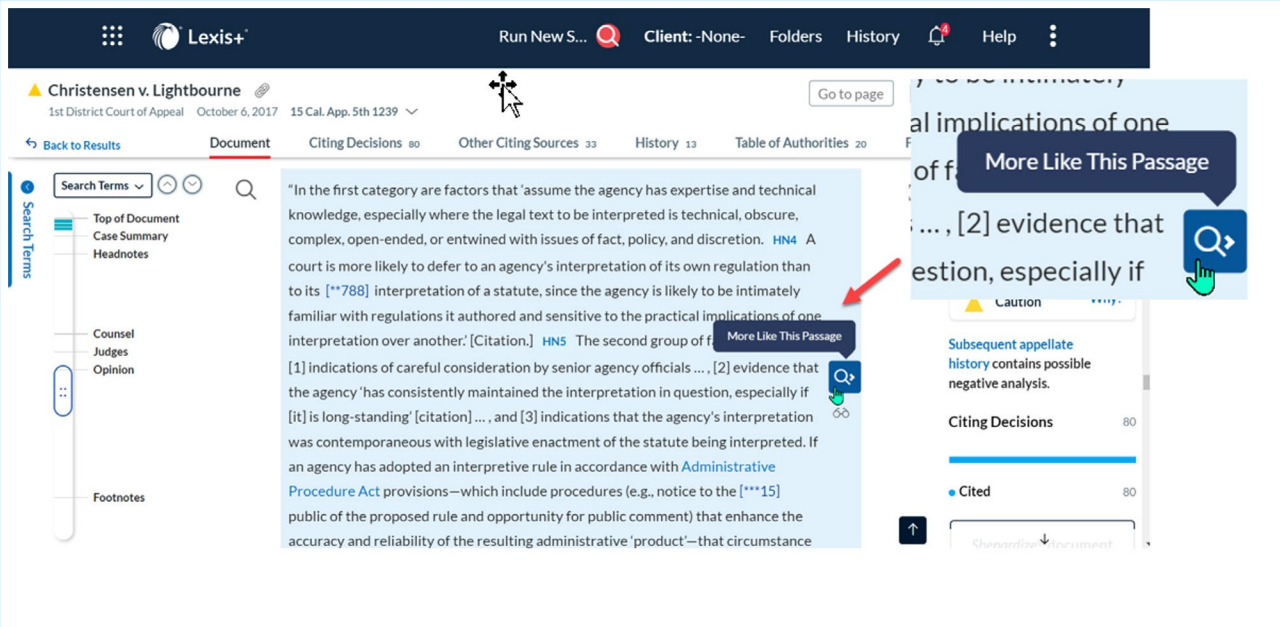
Once you identify a relevant passage in a case law opinion, you can click on the ***More Like This Passage*** icon.



More Like This Passage leverages advanced natural language processing and machine learning to surface relevant cases that a keyword search might miss taking precision searching to a new level.

Unlike ***More Like This Headnote***, which runs a new search and displays the associated headnotes/cases in a new results screen, ***More Like This Passage*** will display similar passages

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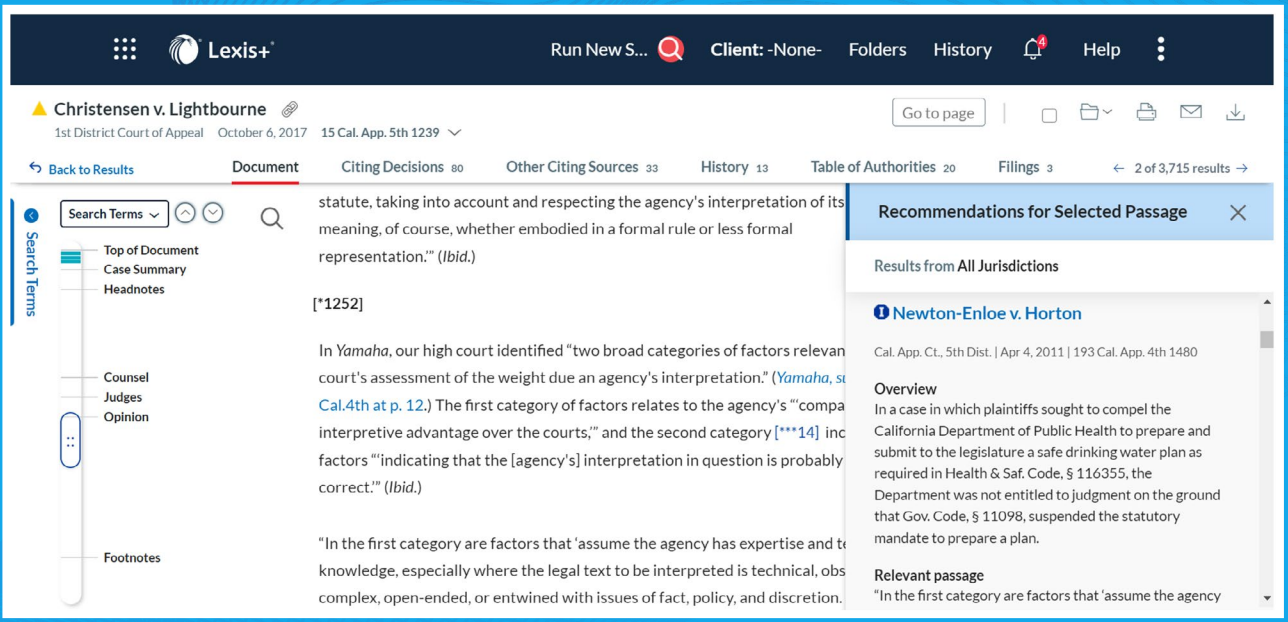
in a right-side panel (similar to how ***Recommended Secondary sources*** works). From there, click a case to open it in a new tab.



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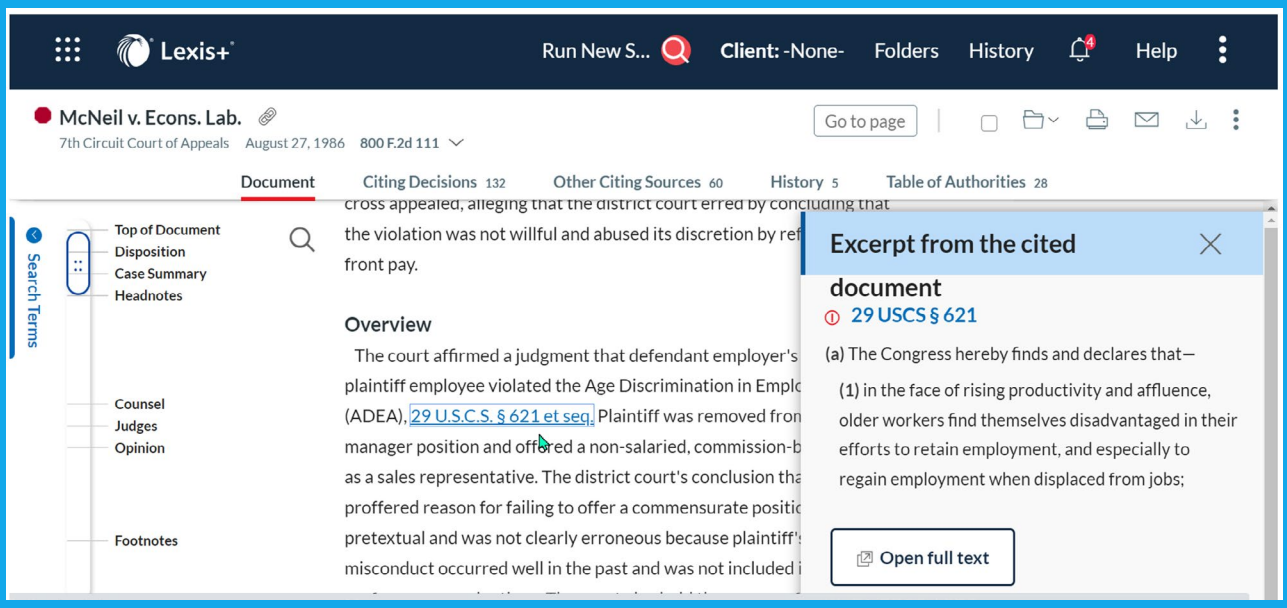

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CLASS ACTIONS

Class Notice

Bakov v. Consol. World Travel, Inc.

68 F.4th 1053, 2023 U.S. App. LEXIS 12373 (7th Cir. May 19, 2023)

The Seventh Circuit has held that the district court did not abuse its discretion in allocating the costs of class notice to the defendant when the defendant's liability had already been determined.

Background. The plaintiffs alleged that the defendant violated the Telephone Consumer Protection Act by calling class members using prerecorded voice messages, a practice the Act expressly prohibits [47 U.S.C. § 227(b)(1)(B)]. The plaintiffs initially sought to certify a nationwide class, but the district court agreed to certify a class of Illinois residents. The parties then submitted cross-motions for summary judgment, and the district court granted summary judgment on the plaintiffs' claim. Later, because of intervening Seventh Circuit precedent, the district court reconsidered its decision to limit the class to Illinois. It ultimately revised its class-certification order to certify a nationwide class and entered summary judgment in favor of the nationwide class.

After certifying the expanded class, the district court determined that the new class members were entitled to notice and an opportunity to opt out [Fed. R. Civ. P. 23(c)(3)(B)]. The district court determined that the defendant would be responsible for the costs of notice, estimated to be $602,838, and explained that this was appropriate since the defendant's liability had already been established through summary judgment. The defendant appealed this order as an immediately appealable collateral order.

Costs Properly Allocated to Defendant. The Seventh Circuit noted that the case presented a "narrow but important" question about the administration of class actions: What authority do district courts have to impose the cost of class notice on a defendant that already has been found liable to the class? For any class certified under Rule 23(b)(3), the court "must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort" [Fed. R. Civ. P. 23(c)(2)(B)].

The usual rule is that the plaintiff must initially bear the cost of notice to the class, although the costs may later be shifted. In *Oppenheimer Fund v. Sanders*, the Supreme Court explained that a district court has discretion to order a defendant to perform a necessary task related to notice if the defendant may be able to perform the task with less difficulty or expense than the plaintiffs. Even when the defendant is ordered to perform certain tasks, the costs should be borne by the plaintiffs when the expense is substantial. If the task is one that the defendant must perform in any event in the ordinary course of its business, then it may be appropriate to leave the costs with the defendant. It is inappropriate for a court to place notice costs on a defendant just because the defendant prevailed on an argument that made notice necessary [Oppenheimer Fund v. Sanders, 437 U.S. 340, 356, 98 S. Ct. 2380, 57 L. Ed. 2d 253 (1978)].

The *Oppenheimer* opinion, the Seventh Circuit said, left room for district courts to tailor the allocation of costs to the specifics of a case. The general rule outlined by *Oppenheimer* is most likely to apply when liability has yet to be determined. Normally, the class-certification decision and the notice to the class come before any decision on the defendant's liability. At that point, a class action consists mainly of allegations, and so notice costs appropriately should fall on the representative plaintiff who seeks to maintain the suit as a class action. A defendant should be responsible for the cost of a necessary task at that stage only if the cost is insubstantial or if the defendant will perform the task anyway.

The situation in the present case differed from the norm because the liability determination had come before the class notice was ordered. This order of events is unusual because certification must be made at an early practicable time [Fed. R. Civ. P. 23(c)(1)(A)] and because plaintiffs are typically prohibited from obtaining a favorable judgment and then seeking to certify a class. In some cases, however, the "quirks of litigation" result in situations in which

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class-certification decisions are justifiably postponed or revisited after liability has been determined. In these situations, courts have relied on a finding of liability to shift notice costs to a defendant [*see* Hunt v. Imperial Merchant Servs., Inc., 560 F.3d 1137 (9th Cir. 2009)]. This was the situation here: the district court had not abused its discretion in shifting costs to the defendant under the procedural posture presented.

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DISMISSAL

Voluntary Dismissal

Rosell v. VMSB, LLC

67 F.4th 1141, 2023 U.S. App. LEXIS 11696 (11th Cir. May 12, 2023)

The Eleventh Circuit has held that, because Federal Rule of Civil Procedure 41(a) provides only for the dismissal of an entire action, the voluntary dismissal of a single claim was invalid and did not create a final, appealable judgment.

Background. The plaintiffs were employees of VMSB's restaurant. They alleged that VMSB failed to meet its minimum-wage and overtime-pay obligations under the Fair Labor Standards Act and comparable Florida laws. Specifically, they asserted that a "service charge" collected from customers and divided among staff was in fact a tip that should not have counted as part of their regular rate of pay.

The complaint alleged three counts, and both sides filed cross-motions for summary judgment. A magistrate judge recommended granting partial summary judgment for VMSB on Counts I and II (the federal and state minimum-wage claims) and denying summary judgment to both sides on Count III (the federal overtime claim). While the district court was considering the magistrate judge's report and recommendation, the parties settled Count III. Without opposition, the plaintiffs moved the district court to approve the settlement and to "direct the clerk to dismiss Count III" with prejudice.

The district court ultimately adopted the magistrate judge's report and recommendation and entered judgment for VMSB on Counts I and II. The court also approved the settlement of Count III and closed the case—but it also directed the parties to "file a joint stipulation of dismissal of Count 3 with prejudice" within 30 days and added that the "stipulation shall be self-executing upon its filing." The plaintiffs then filed a notice of appeal regarding Counts I and II.

Appellate Court Lacked Jurisdiction. The Eleventh Circuit first considered whether it had subject matter jurisdiction over the appeal. The court noted that Rule 41 governs the "Dismissal of Actions" in general, and Rule 41(a) outlines the procedure for voluntary dismissals at the parties' request. Rule 41(a)(1) provides that a plaintiff may dismiss an "action" without a court order, and Rule 41(a)(2) specifies when an "action" can be dismissed at the plaintiff's request by court order. In this case, neither the court nor any party explained which subsection of Rule 41(a) authorized the dismissal, but classification was irrelevant because the dismissal was procedurally improper either way.

The Eleventh Circuit has previously held that Rule 41(a)(1) cannot be used to create appellate jurisdiction over a partial grant of summary judgment. As the Rule's plain text says, a joint stipulation of voluntary dismissal may be used to dismiss only an "action" in its entirety [*see* Perry v. Schumacher Grp. of La., 891 F.3d 954, 958 (11th Cir. 2018)]. In a recent case, the court reemphasized the *Perry* holding, noting that "Rule 41(a) does not permit plaintiffs to pick and choose, dismissing only particular claims within an action" [Esteva v. UBS Fin. Servs. Inc. (In re Esteva), 60 F.4th 664, 677 (11th Cir. 2023) (internal quotation marks omitted)]. The court found that these same conclusions apply to Rule 41(a)(2).

Esteva discussed Rule 41(a) in general, not just Rule 41(a)(1). Further, the word "action" is used identically in both subdivision (a)(1) and subdivision (a)(2). The court stated, "[W]e now make explicit what *Esteva* at a minimum implied—a Rule 41(a)(2) dismissal can only be for an entire action, and not an individual claim." Because the parties attempted to dismiss one count rather than the entire action, no part of Rule 41(a) authorized the dismissal. And because the dismissal was ineffective, Count III remained pending before the district court. That meant there was no "final decision" to review. A voluntary dismissal purporting to dismiss a single claim is invalid, even if all other claims in the action have already been resolved. The lower court still had to address or otherwise dispose of the claim in some manner.

The court acknowledged that this rule seems to create procedural oddities. However, parties can plan around it. Litigants who wish to dismiss, settle, or otherwise resolve less than an entire action can ensure that they receive a final, appealable judgment on the remainder of their claims by seeking partial final judgment under Rule 54(b) from the district court, or by amending the complaint under Rule 15.

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In summary, the court stated:

> Today we make explicit what our precedent has implied for almost two decades: Federal Rule of Civil Procedure 41(a)(2) provides only for the dismissal of an entire action. Any attempt to use this rule to dismiss a single claim, or anything less than the entire action, will be invalid—just like it would be under Rule 41(a)(1).

- **Conclusion.** For these reasons, the Eleventh Circuit found that a final judgment had never been rendered, and it therefore lacked jurisdiction to hear the appeal.

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PRIVILEGES

Legislative Privileges

Jackson Mun. Airport Auth. v. Harkins

67 F.4th 678, 2023 U.S. App. LEXIS 11503 (5th Cir. May 10, 2023)

The Fifth Circuit holds that legislators do not waive their legislative privilege for documents or information shared with third parties if the communications are made within the sphere of "legitimate legislative activity."

Background. Since 1960, the Jackson-Medgar Wiley Evers International Airport, located in Jackson, Mississippi, had been operated by the Jackson Municipal Airport Authority, whose five commissioners are selected by the city government. In 2016, the Mississippi legislature passed SB 2162, which abolished the Jackson Municipal Airport Authority and replaced it with a regional authority composed of nine commissioners, only two of whom are selected by Jackson city government.

Shortly before the Governor signed SB 2162 into law, a Jackson citizen filed a suit seeking to enjoin the law. The mayor, the city council, the Jackson Municipal Airport Authority, its board of commissioners, and the commissioners in their individual capacities intervened in that lawsuit. The intervenors contended that SB 2162 violated the Equal Protection rights of the citizens of Jackson by eliminating the locally controlled Jackson Municipal Airport Authority for racially discriminatory reasons.

During discovery, the intervenors served subpoenas on eight nonparties, state legislators who had participated in SB 2162's drafting and passage. The legislators refused to comply with a subpoena request seeking documents and communications related to SB 2162, asserting that any responsive discovery would be either irrelevant or protected by legislative privilege. The magistrate judge, and later the district court, rejected this position. The court's order noted that because legislative privilege is qualified, the legislators had to produce a privilege log before any assertions could be assessed. It also held that the "privilege has been waived for documents that have been shared with third parties," and that "the Legislators must produce the nonprivileged documents responsive to Request #3." The legislators appealed, but the Fifth Circuit vacated the district court's order without reaching the merits, holding that the commissioners lacked standing.

On remand, the district court allowed the plaintiffs to amend their complaint to cure the standing defect and add two newly appointed commissioners as plaintiffs. The commissioners again served subpoenas on the legislators, seeking the exact same information as the prior subpoenas. The legislators again objected on the basis of legislative privilege, the district court again ordered the legislators to comply with the subpoena, and the legislators again declined and appealed.

The Fifth Circuit recognized four issues in the second appeal: (1) whether it had appellate jurisdiction; (2) whether the commissioners had standing; (3) whether legislative privilege relieved the legislators from having to submit a privilege log; and (4) whether the district court erred in holding that legislative privilege was waived for any documents that had been shared with third parties.

Court Had Appellate Jurisdiction. Generally, appellate jurisdiction is statutorily confined to review of "final decisions" [see 28 U.S.C. § 1291]. Final decisions include not only decisions that terminate an action, but also "a small class of collateral rulings that, although they do not end the litigation, are appropriately deemed final" [Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 106, 130 S. Ct. 599, 175 L. Ed. 2d 458 (2009)]. Under Fifth Circuit precedent, the legislators had the right to immediately appeal the district court's order. The Fifth Circuit explained that one who unsuccessfully asserts a governmental privilege may immediately appeal a discovery order if he or she is not a party to the lawsuit. Thus, the court held that appellate jurisdiction existed in this case.

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Commissioners Had Standing. The Fifth Circuit next found that the commissioners had standing. To have standing, a plaintiff must have suffered an invasion of a legally protected interest that is (1) concrete, particularized, and actual or imminent; (2) fairly traceable to the challenged action; and (3) redressable by a favorable ruling. The commissioners fulfilled these conditions.

The alleged injury was concrete because the commissioners would be deprived of their benefits if they lost their positions. As commissioners, they were entitled to receive a per diem for their service and a travel reimbursement that allowed them to obtain specialized training in airport administration. In addition to these tangible benefits, their positions also conferred substantial status and authority because as commissioners, they exercised considerable power over the airport by overseeing finances and operations and defining the airport's strategic goals. The court held that the potential loss of benefits that came with the commissioners' position was sufficiently concrete to support the commissioners' standing.

The court also found that the alleged injury was sufficiently particularized because the commissioners would suffer a personal injury from losing their positions as commissioners and the benefits that came with the position if SB 2162 were allowed to become effective. The court rejected the legislators' argument that because SB 2162 abolished the entirety of Jackson Municipal Airport Authority (not just the commissioners' seats), the harm was not particularized to the commissioners. On the contrary, the commissioners alleged deprivation of something to which they were personally entitled: their seats as commissioners and the benefits that came with the position. Accordingly, the court held that the alleged injury was sufficiently particularized to support the commissioners' standing.

The court found that the alleged injury was imminent because SB 2162 abolished the Jackson Municipal Airport Authority and thus the commissioners' positions. On this issue, the legislators argued that the injury was not imminent because SB 2162 would not immediately abolish the Jackson Municipal Airport Authority; the Authority would continue to exist until the Federal Aviation Administration's approval of the new Jackson Metropolitan Area Airport Authority. However, the only reason the FAA had not considered the transfer yet was that the FAA declines to do so while there is active litigation concerning a contested transfer of airport control. The legislators never denied that assertion. Rather, they merely asserted that even if the dismissal of the complaint would ultimately lead to approval by the FAA of the new Authority, "the process may take a very long time." But the fact that the approval process might take a very long time was insufficient to defeat the commissioners' standing, because the alleged injury was still likely to occur and was certainly impending.

Finally, the court addressed traceability and redressability. The alleged injury was traceable to SB 2162 because the law, by its very own terms, eliminated the commissioners' positions. As to redressability, the commissioners were seeking an injunction against SB 2162 and a declaration that SB 2162 was unconstitutional. The legislators argued this would not redress any harm because the commissioners could lose their positions for some other reason. However, the redressability prong does not require a remedy that covers every conceivable injury, just one that redresses the harm caused by SB 2162. Enjoining the enforcement of SB 2162 would prevent the law from abolishing the Jackson Municipal Airport Authority, and thus the commissioners' positions. Consequently, the alleged injury was redressable by the relief sought.

Accordingly, the court concluded that the commissioners had standing in this case.

Privilege Log Was Necessary. The legislators contended that no privilege log should be required because all the requested communications would be either privileged or irrelevant. The appellate court found, however, that a privilege log would not be useless, because evidence of legislative motive is not necessarily privileged. As the legislators themselves recognized, legislative privilege can be waived when certain conditions apply. For example, legislative privilege as to certain documents is waived when a legislator publicly reveals those documents. Likewise, statements that have no connection whatsoever with "legitimate legislative activity" are not protected by legislative privilege. Accordingly, the district court properly ruled that a privilege log was

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necessary to determine which of the requested documents and communications were protected by legislative privilege.

- **Disclosure to Third Parties Does Not Always Waive Privilege.** Although the district court did not abuse its discretion in ordering the legislators to produce a privilege log, the Fifth Circuit found that the district court's determination that legislative privilege had been waived for any documents or information shared with third parties was overbroad. Legislative privilege applies to communications when the legislator or agent acts within "the sphere of legislative activity." The privilege is not limited to the casting of a vote on a resolution or bill; it covers all aspects of the legislative process.

  Communications with third parties outside the legislature might still be within the sphere of "legitimate legislative activity" if the communications bear on potential legislation. Consequently, some communications with third parties, such as private communications with advocacy groups, are protected by legislative privilege when they are part of the modern legislative procedures through which legislators receive information possibly bearing on the legislation they are to consider. Thus, the appellate court disagreed with the district court's broad pronouncement that the legislators waived their legislative privilege for any documents or information that had been shared with third parties.

- **Conclusion.** Therefore, the Fifth Circuit affirmed in part, reversed in part, and remanded for further proceedings.