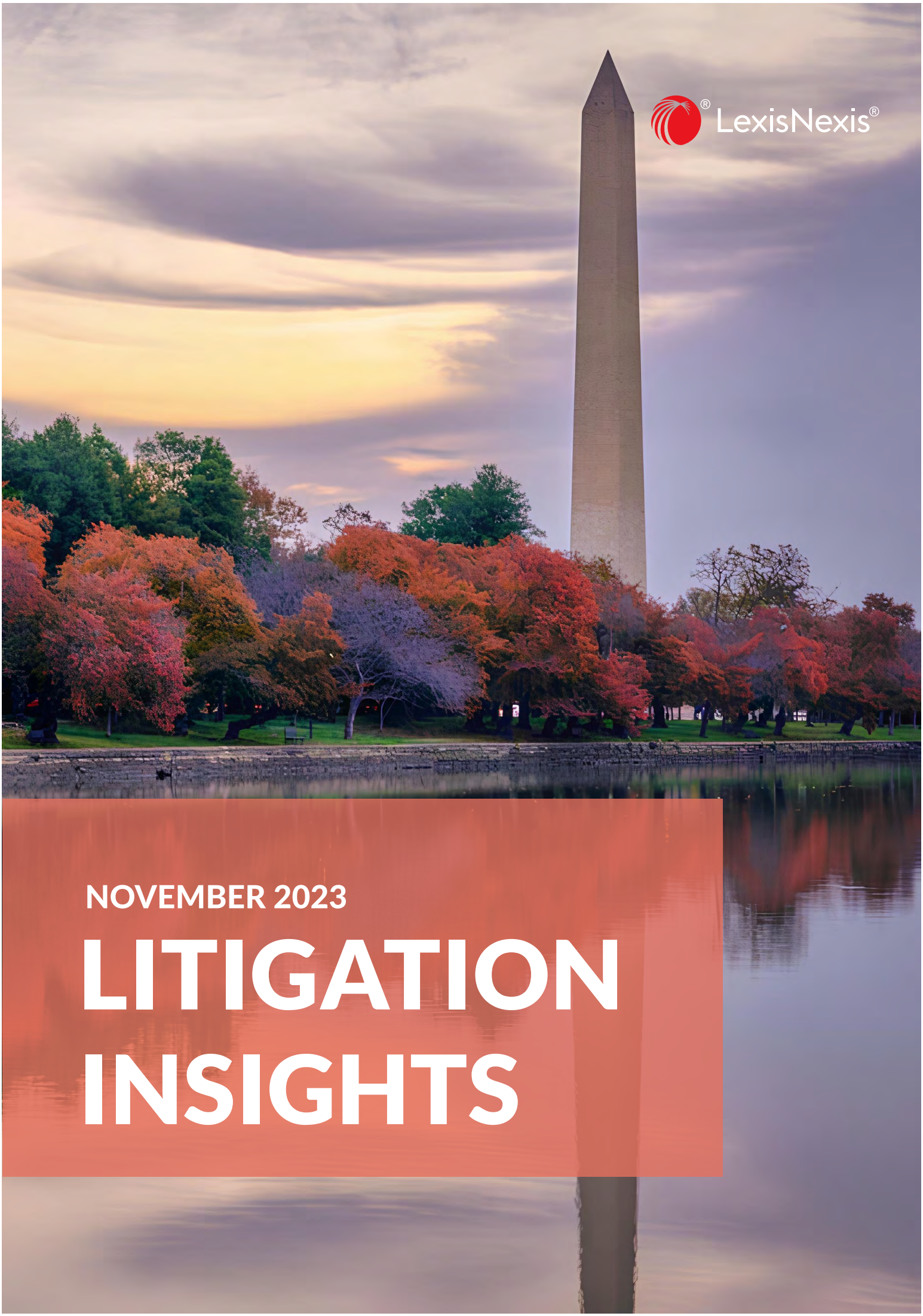

NOVEMBER 2023

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.

CLASS ACTIONS

Coupon Settlements

Moses v. N.Y. Times Co.

79 F.4th 235, 2023 U.S. App. LEXIS 21530 (2d Cir. Aug. 17, 2023)

Jump to full summary

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DISMISSAL

By Stipulation of Parties

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REMOVAL

Exceptions to Well-Pleaded Complaint Rule

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In an action involving state-law wrongful-death claims, the Eighth Circuit held that (1) snap removal did not cure the lack of diversity jurisdiction, (2) the Public Readiness and Emergency Preparedness Act did not completely preempt state-law claims for COVID-19-related death, (3) no federal issue was a necessary element of the state-law claims, and (4) a nursing home's designation as "critical infrastructure" did not authorize federal-officer removal.

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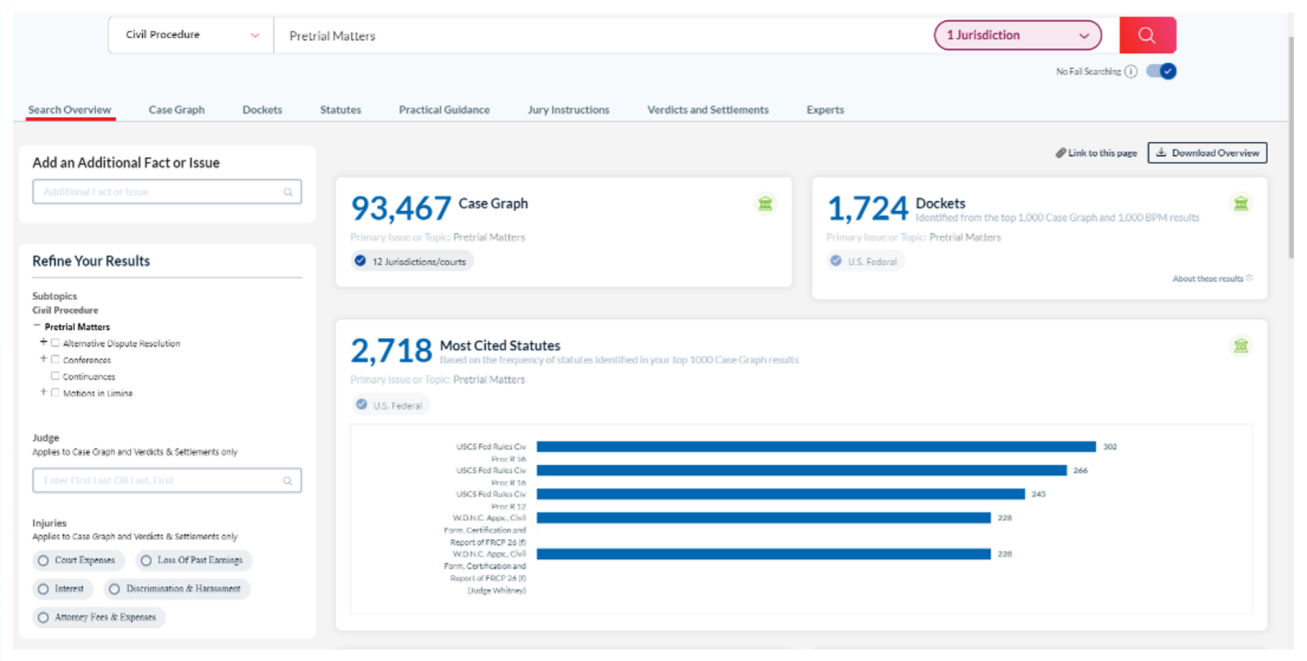
Most Cited Statutes now available through Pinpoint

By Mandi Cummings



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A majority of customers consider statutes to be essential to their research. However, statutes can be difficult to locate because of the limited keywords in statute documents. By adding the Most Cited Statutes tile to the dashboard, it eliminates the need to go anywhere else, saving precious time and eliminates the fear of missing out on relevant statutes.

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How does it function?

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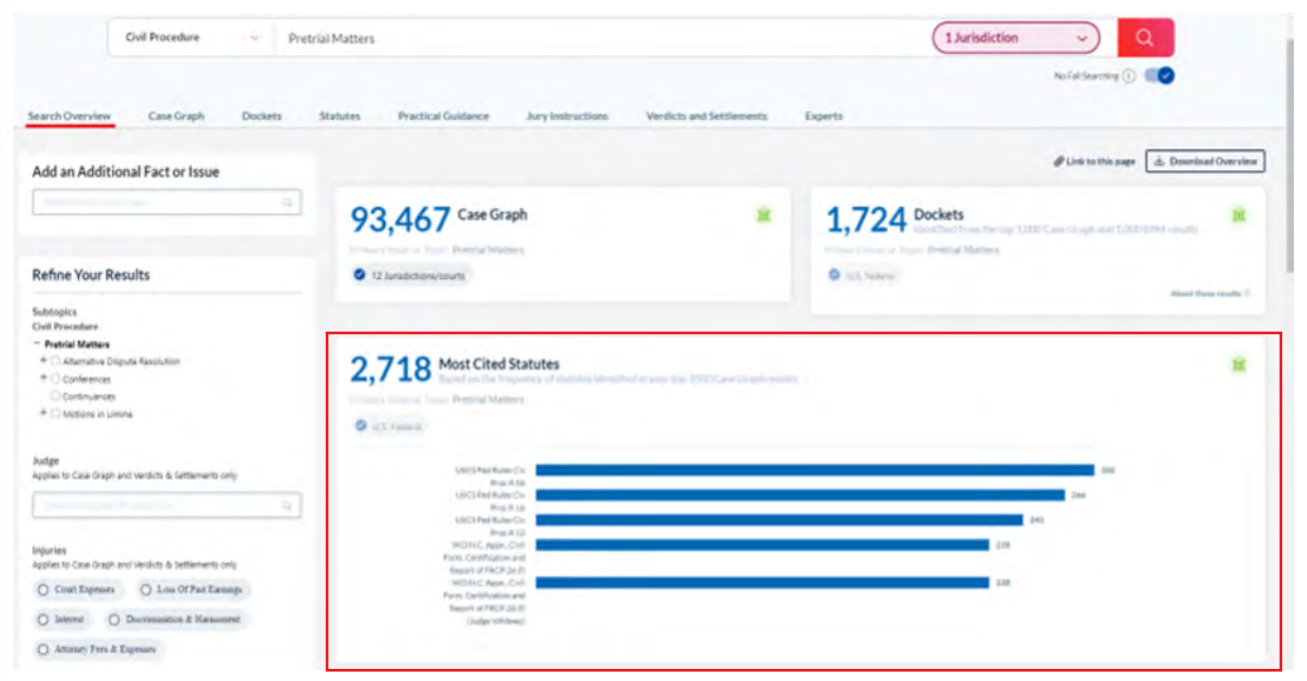
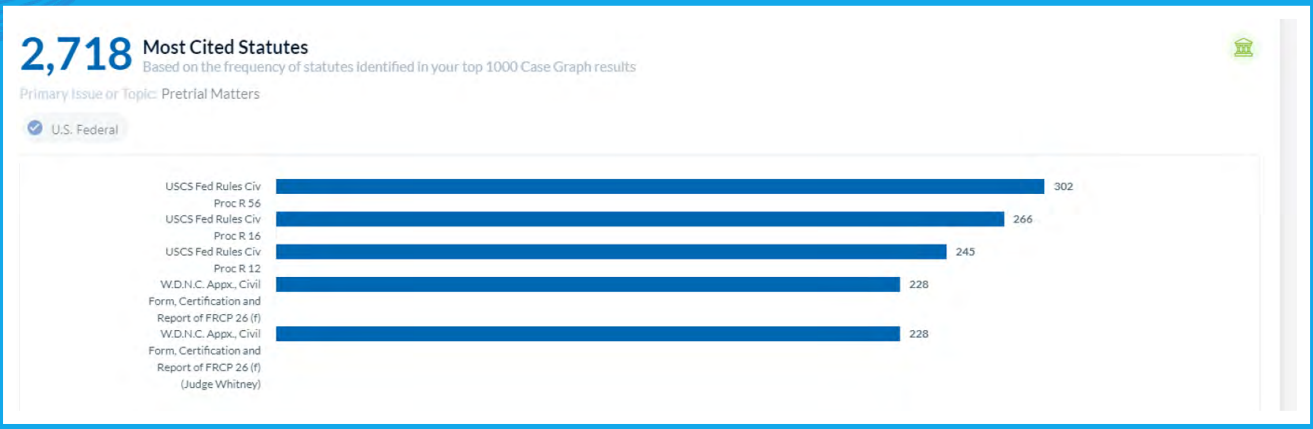
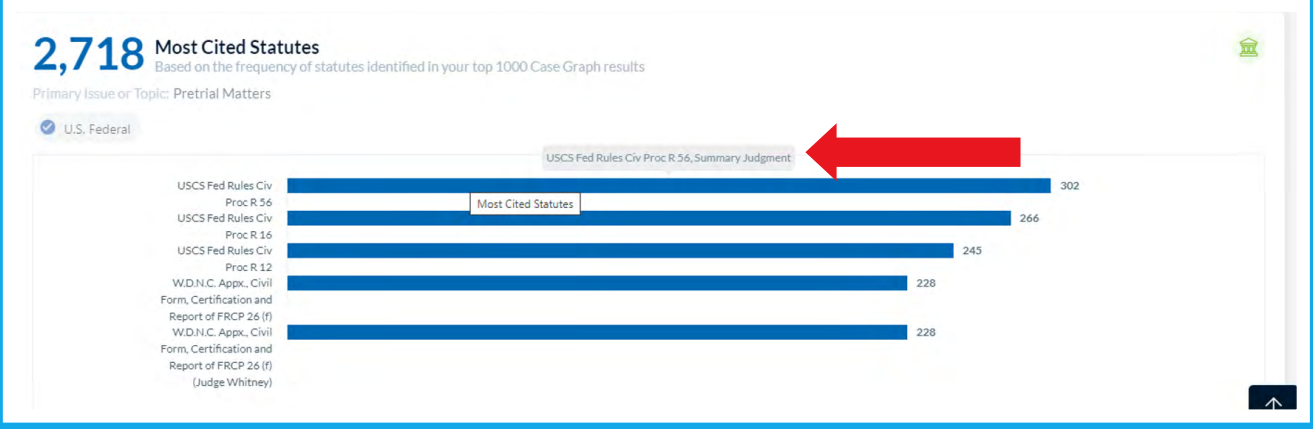


The numbers on the right side of the graph indicates how many times the statute or code was cited (i.e USCS Fed Rules Civil Procedure Rule 56 was cited 302 times within the top 1000 Case results).



Hovering over the graph will provide you more information about that statute.



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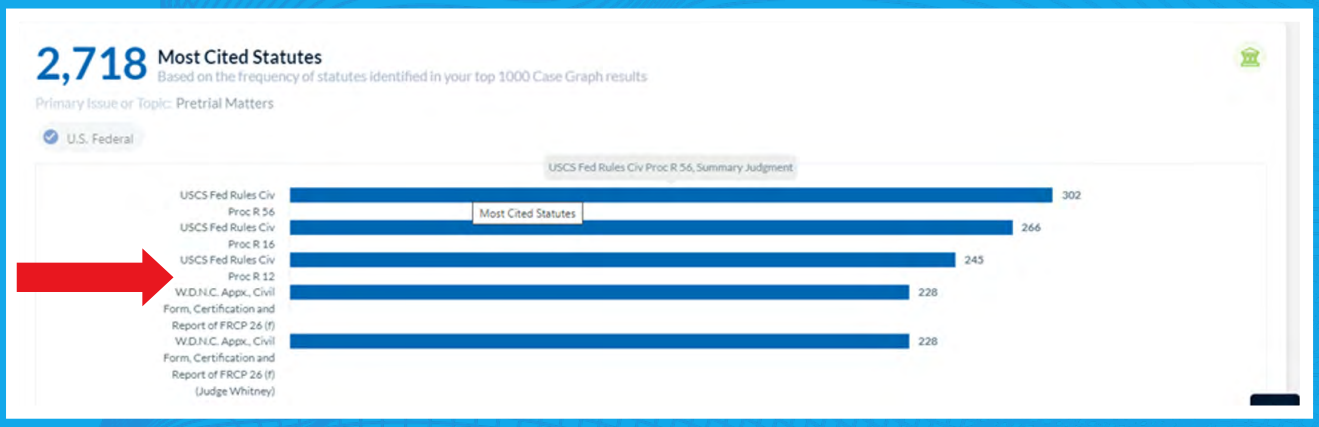
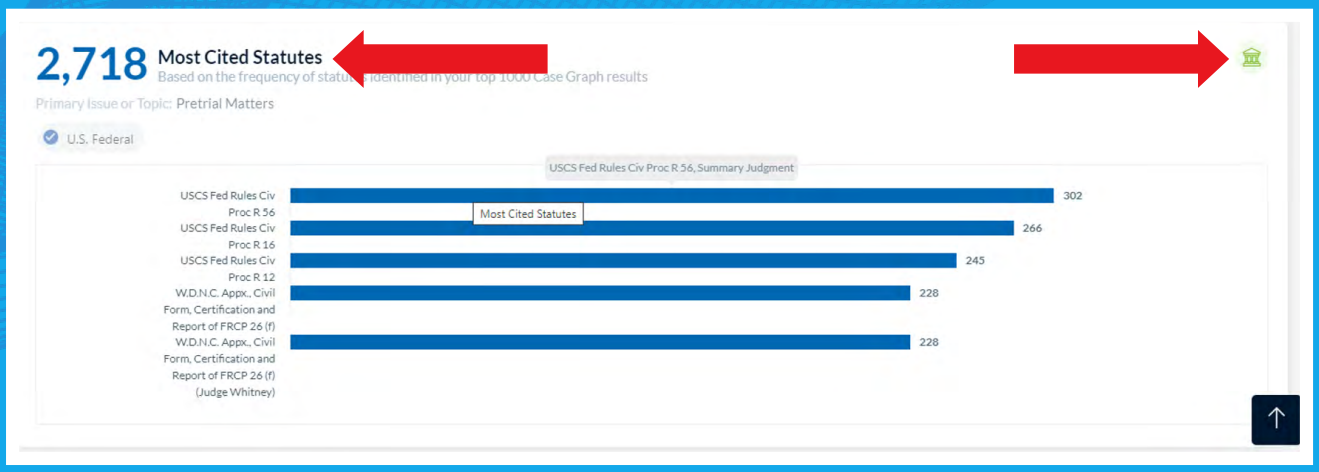
Clicking on the name of the statute will open the full document in a separate tab which will keep you from losing your place on the dashboard.



To see the entire list of statutes, just click on Most Cited Statutes heading or the green icon to the right. This will lead you to the statutes result page.



From the results page that is arranged by most cited to least cited, you will be able to do the following:

- **Click into each statute to see the full text document.**
- **View the Table of Contents.**
- **See how many archive versions and compare the versions.**
- **View all the cases that cite the statute.**

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Lexis+ AI Has Arrived!

By Heather Robinson

On October 25, Lexis released our revolutionary generative AI solution designed to transform legal work, Lexis+ AI™. Lexis+ AI features conversational search, intelligent legal drafting, insightful summarization, and document upload capabilities, all supported by state-of-the-art encryption and privacy technology to keep sensitive data secure:

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Alert: Absence of Complete Diversity Mandates Dismissal Even When Raised for First Time on Appeal

A commercial real estate broker sued for wrongful termination of a contractual relationship with an international brokerage firm that was a multi-layered limited liability company (LLC). The action was filed in federal court under diversity jurisdiction, and was later consolidated with a parallel lawsuit that involved one claim arising under federal law. Although no party raised an absence of subject matter jurisdiction, on appeal the court concluded that the action must be dismissed after it traced the defendant company's citizenship through layered entities and found that complete diversity did not exist between at the time of filing. The defendant was an LLC, wholly owned by another LLC, wholly owned by a limited partnership, a partner of which was another limited partnership that ultimately did not have diversity of citizenship.

For defendants that are non-corporate entities, the Court must examine (and count) the citizenship of all members (including members and partners of sub-entities that are themselves members of the entity--so-called "great-grandparent entities"). The court rejected the notion that jurisdiction may later have been proper post-consolidation as jurisdiction must exist in the first instance—otherwise there was no power to consolidate the cases at all.

Moreover, while unfortunate, the court cannot "forgive" the absence of jurisdiction in the interests of finality or economy. The Court emphasized: "Whether mutual contentment with the federal forum or genuine obliviousness brought the parties to this unfortunate juncture, this Court will not condone the exercise of jurisdiction where it did not truly exist." Capps v. Newmark S. Region, LLC, 53 F.4th 299 (4th Cir. 2022).

Fed Civ Proc Before Trial: The Wagstaffe Group *§7-III[D]—Unincorporated Entities (e.g., Partnerships, Limited Liability Companies, Associations) Have Citizenship of Each Member*.

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CLASS ACTIONS

Coupon Settlements

Moses v. N.Y. Times Co.

79 F.4th 235, 2023 U.S. App. LEXIS 21530 (2d Cir. Aug. 17, 2023)

The Second Circuit reversed a class action settlement, including attorney's fees, after the district court failed to apply the coupon settlement procedures of the Class Action Fairness Act.

Background. This was an action by a class of California plaintiffs against the New York Times, claiming that the Times automatically renewed subscriptions without providing the disclosures and authorizations required by California's Automatic Renewal Law [see Cal. Bus. & Prof. Code § 17600]. The parties negotiated a settlement whereby the class members dropped their claims in exchange for the defendant's reformation of its business practices and either access codes for one-month subscriptions to Times products or pro rata cash payments. Access codes could not be redeemed to pay for or extend existing subscriptions. The settlement agreement also provided for the payment of attorney's fees and an incentive award to the class representative.

A class member objected to the proposed settlement, primarily arguing that the settlement was unfair, the attorney's fees calculation improperly exceeded limits set by the coupon-settlement provisions of the Class Action Fairness Act (CAFA) [see 28 U.S.C. § 1712], and the incentive award was not authorized by law. The district court disagreed, and after a fairness hearing certified a class for settlement purposes and approved the settlement, $1.25 million attorney's fees, and a $5,000 incentive award. The attorney's fees amounted to about 76% of the $1.65 million cash settlement fund, and 22.5% of the total value of the settlement if calculated by including the face value of the access codes.

Settlement Standards. A district court may approve a settlement proposal that binds class members only after a hearing and on finding that it is fair, reasonable, and adequate [Fed. R. Civ. P. 23(e)(2)]. Civil Rule 23(e)(2) includes a list of four primary procedural considerations to evaluate the fairness, reasonableness, and adequacy of a class settlement, including whether (1) the class representatives and class counsel have adequately represented the class; (2) the proposal was negotiated at arm's length; (3) the relief provided for the class is adequate, taking into account the costs, risks, and delay of trial and appeal, the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims, the terms of any proposed award of attorney's fees, including timing of payment, and any agreement required to be identified under Rule 23(e)(3); and (4) the proposal treats class members equitably relative to each other.

The factors, the court of appeals said, prohibit courts from applying a presumption of fairness to proposed settlements arising from an arms-length agreement. Courts evaluating the fairness, reasonableness, and adequacy of a proposed settlement must consider the four factors holistically, taking into account, along with the considerations stated in the rule, the proposed attorney's fees and incentive awards. The court of appeals noted that the four factors do not displace other factors traditionally considered, which remain a useful framework for considering substantive fairness [see City of Detroit v. Grinnell Corp., 495 F.2d 448, 462–463 (2d Cir. 1974)]. But the rule now mandates courts to evaluate factors that may not have been highlighted in prior case law, and its terms prevail over any prior inconsistent analysis.

The district court had imposed a presumption of fairness, adequacy, and reasonableness to the proposed class settlement on the ground that it was negotiated at arm's length. Formerly, the court of appeals said, such a presumption was appropriate, but not so after the addition of the four factors in Rule 23(e)(2). The district court erred by applying such a presumption.

The court of appeals also found that the district court had erred by failing to evaluate the settlement's fairness, reasonableness, and adequacy in light of the attorney's fee award and incentive award. A district court is

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required to review both the terms of the settlement and any fee award or incentive award encompassed in a settlement agreement. The existence and extent of incentive payments is relevant to whether class members are treated equitably relative to each other. The court must reject incentive awards that are excessive compared to the service provided by the class representative or that are unfair to the absent class members. In the present case, the district court had erred by reviewing the appropriateness of the attorney's fee and incentive awards separately from its consideration of the fairness, reasonableness, and adequacy of the settlement.

In short, the district court had abused its discretion when it evaluated and approved the settlement based on the wrong legal standards. This kind of error does not automatically require reversal of approval, but here the error was not harmless.

- **Coupon Settlement.** The court of appeals also concluded the district court erred in failing to apply CAFA's coupon-settlement provisions when calculating the attorney's fee award. CAFA requires courts to calculate attorney's fee awards in coupon settlements based on the redemption value of the coupons, rather than their face value [see 28 U.S.C. § 1712(a)]. Here, the district court had failed to do this because it had determined that the access codes were not coupons.

  A coupon is generally defined as an item that entitles its user to free or discounted products or services. The access codes provided in the settlement here were coupons under the plain meaning of the word. They were, in substance, digital vouchers that could be surrendered to obtain a one-month subscription to a New York Times product. The court of appeals noted that the access codes required recipients to continue doing business with the defendant in order to benefit from the codes. They were also limited in that they were valid for only select products or services and could be described as more of a promotional opportunity than a penalty. The access codes could benefit the defendant more than the class members. In fact, the access codes could be of little use to class members, who were challenging the defendant's use of improper business practices to retain customers. Finally, the access codes were inflexible and could not be used in the way most people would like, to extend existing subscriptions.

  These considerations all led to the conclusion that the access codes were coupons for purposes of the statute. Accordingly, the district court had erred by not subjecting its attorney's fee calculation to CAFA's coupon-settlement provisions.

- **Incentive Award.** The incentive award here created no problem under Rule 23. A court can approve a settlement only if it treats class members equitably with one another [Fed. R. Civ. P. 23(e)(2)(D)]. District courts can approve incentive awards that are harmonious with this directive. Incentive awards encourage class representatives to participate in class actions. Incentive awards often level the playing field and treat differently situated class representatives equitably relative to the class members who simply sit back until they are alerted to a settlement. Most courts have concluded that district courts are permitted to grant incentive awards. Only the Eleventh Circuit takes the view that incentive awards are forbidden [see Johnson v. NPAS Sols., LLC, 975 F.3d 1244 (11th Cir. 2020)].

- **Conclusion.** The district court had neither evaluated the settlement in light of the fee awards nor complied with CAFA's coupon-settlement requirements when it awarded attorney's fees based on the face value of the access codes. On remand, the district court was instructed to consider these matters in determining the appropriate attorney's fee award. The error in not applying the coupon provisions was not only fatal to the approval of the fee award, but extended to the court's determination of whether the settlement terms were fair, reasonable, and adequate.

  Accordingly, the court of appeals vacated and remanded the district court's order approving the settlement and the attorney's fees. The court of appeals did not opine on the fairness of the settlement or suggest that the district court was required to overturn the settlement. The district court was simply directed to recalculate the attorney's fees pursuant to the coupon restrictions in CAFA [see 28 U.S.C. § 1712] and to evaluate the settlement in light of Rule 23's appropriate legal standard.

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DISMISSAL

By Stipulation of Parties

City of Jacksonville v. Jacksonville Hosp. Holdings, L.P.

82 F.4th 1031, 2023 U.S. App. LEXIS 24318 (11th Cir. Sept. 13, 2023)

The Eleventh Circuit holds that Rule 41(a)(1)(A)(ii), which permits a plaintiff to dismiss an action without a court order by filing "a stipulation of dismissal signed by all parties who have appeared," requires the signature of all parties who have appeared in the lawsuit, and not just all defendants who are being dismissed.

Background. In 2015, the City of Jacksonville ("the City") filed a complaint to recover costs and damages related to the contamination of soil and groundwater near a gas plant located within its borders. In its complaint, the City alleged that three parties were liable to it under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 [42 U.S.C. §§ 9607(a), 9613(g)(2)], and Florida law. The three named defendants were Jacksonville Hospitality Holdings L.P. (JHH); Shoppes of Lakeside, Inc.; and Continental Holdings, Inc. ("Continental"). In April 2015, Continental filed an amended third-party complaint against six third-party defendants, including, among others, Houston Pipe Line Company, L.P. ("Houston"). Continental alleged that these third-party defendants were liable for the release of pollutants at the gas plant. Houston lodged counterclaims in return. Then, in May 2015, Continental filed an amended, four-count counterclaim against the City, contending that the City was also liable for the pollution.

Bit by bit, whether through amended complaints, summary judgments, or voluntary dismissals, the claims dropped off. Numerous claims were "dismissed" using stipulations of voluntary dismissal under Civil Rule 41(a)(1)(A)(ii). For each of these, fewer than all parties involved in the litigation signed the stipulation.

After all the claims were seemingly resolved and stipulated dismissals filed, Continental filed its notice of appeal, challenging an earlier district-court order that denied its motion to voluntarily dismiss Houston pursuant to Rule 41(a)(2). Continental contested this order because, well over a year after the motion to dismiss Houston was denied, the district court granted a motion by Houston to impose sanctions on Continental for what the district court determined was frivolous and bad-faith litigation. The district court ordered Continental to pay Houston nearly $1.5 million in attorney's fees and costs. From Continental's perspective, these monetary sanctions would not have been unduly multiplied if the district court did not abuse its discretion in denying (at Houston's request) its Rule 41(a)(2) motion to dismiss Houston from the case.

Before receiving the parties' briefs on the merits, the Eleventh Circuit issued a jurisdictional question. The question was "whether all the voluntarily dismissed claims have been properly resolved [under Rule 41(a)(1)(A)(ii)] for purposes of this Court's appellate jurisdiction."

Stipulated Dismissal Under Rule 41(a)(1)(A)(ii) Requires Signature of All Parties That Have Appeared. Federal Rule of Civil Procedure 41(a)(1)(A)(ii) states that, subject to certain rules and statutes (none of which are relevant in this case), a "plaintiff may dismiss an action without a court order by filing . . . a stipulation of dismissal signed by all parties who have appeared" (emphases added).

In In re Esteva, the Eleventh Circuit found that a "plain reading" of Rule 41(a)(1)(A) "reveals that the Rule does not authorize the voluntary dismissal of individual claims" [In re Esteva, 60 F.4th 664, 675 (11th Cir. 2023)]. Instead, the word "action" refers to an entire lawsuit and not just particular claims within it. In another recent case, the court held that the reasoning of In re Esteva extends to Rule 41(a)(2), which authorizes dismissal by the court at the plaintiff's request. Thus, "a Rule 41(a)(2) dismissal can only be for an entire action, and not an individual claim" [see Rosell v. VMSB, LLC, 67 F.4th 1141, 1144 (11th Cir. 2023)]. Both cases recognized an important, longstanding exception to this rule. "That is, Rule 41(a) allows a district court to dismiss all claims against a particular defendant."

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The court acknowledged that few cases have interpreted the meaning of the phrase "all parties who have appeared." Relying on a footnote in a Fifth Circuit case, Continental argued that only the signature of the defendant to be dismissed is required [see Nat'l City Golf Fin. v. Scott, 899 F.3d 412, 415 n.3 (5th Cir. 2018) ("In a multi-defendant suit, the plaintiff may single out a party for dismissal; in those cases only the dismissed defendant need sign the stipulation.")]. Continental reasoned that because Rule 41(a)(1)(A) concerns itself with the dismissal of "an action," it is sensible to append the word "action" to the end of subsection 41(a)(1)(A)(ii), such that it effectively reads that parties may file "a stipulation of dismissal signed by all parties who have appeared in the action." And, because there is precedent that permits individual defendants to be dismissed using Rule 41(a)(1)(A), it follows that when this happens, only the plaintiffs and individual defendants involved in the dismissal of the action against those defendants should have to sign the stipulation.

In addition, Continental argued that it makes little sense to burden counsel with the inconvenience of tracking down every party that has appeared in a case just to dismiss a single defendant. This very dispute highlighted the point: ten parties had been involved, with claims being resolved at different points over the course of eight years. As Continental saw it, requiring parties to gather ten signatures each time a defendant was voluntarily dismissed would have added an unnecessary inefficiency to the adjudication process.

On the other side of the debate, Houston pointed to two unpublished decisions (including one from the Eighth Circuit) holding that Rule 41(a)(1)(A)(ii) requires the signatures of all parties in a lawsuit [see Hardnett v. Equifax Info. Servs., 2023 U.S. App. LEXIS 3819 (11th Cir. Feb. 17, 2023) (unpublished) (per curiam); Anderson-Tully Co. v. Fed. Ins. Co., 347 Fed. Appx. 171, 176 (6th Cir. 2009) (unpublished)]. Both of those cases relied primarily on the plain text of the Rule.

Mindful of the obligation to give the Federal Rules of Civil Procedure their plain meaning, the Eleventh Circuit agreed with Houston. Looking to the text of Rule 41(a)(1)(A)(ii), the court found no language that qualifies the clause "all parties who appeared." The lack of any words restricting the subsection's scope suggests that a broad reading—one covering all parties in a lawsuit—is warranted. This interpretation is supported by the fact that the drafters qualify the term "party" or "parties" elsewhere in the Federal Rules [see, e.g., Fed. R. Civ. P. 19(a)(1)(A) ("existing parties"); Fed. R. Civ. P. 24(a)(2) ("existing parties"); Fed. R. Civ. P. 24(b)(3) ("original parties"); Fed. R. Civ. P. 25(a)(2) ("remaining parties"); Fed. R. Civ. P. 26(c)(1) ("affected parties")]. In fact, even in Rule 41(a)(1)(A)(i), the drafters permit a plaintiff to "dismiss an action without a court order by filing . . . a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment." (emphasis added). In Rule 41(a)(1)(A)(ii), the drafters swap the words "opposing party" for "all parties," expanding its scope.

In fact, the court found that a Rule 41(a)(1)(A)(ii) stipulation also requires the signature of a party that appeared but has already been removed from an action.

The court recognized the inconveniences this result may cause parties in large, multi-defendant lawsuits. However, requiring each and every party that has appeared in a lawsuit to sign a stipulation of dismissal ensures that other parties are not somehow prejudiced by the sudden dismissal of a defendant. This case, for example, involved the allocation of liability for pollutants discharged by a long-defunct gas company. Continental, via its third-party complaint, pointed the blame at a handful of other parties as the true successors-in-interest of the company, and thus of the liabilities. While not implying that this occurred here, the court observed that in a similar suit one could easily imagine two parties striking a collusive agreement to dismiss all claims, whether in order to strategically increase the exposure for another party or to throw roadblocks in front of the City's efforts to obtain the orderly and efficient adjudication of its claims. Requiring signatures from all parties would help to thwart these possibilities. Further, it is not always true that a removed party has no more interest in the course of a suit; the final judgment in the district court often triggers the beginning of appellate proceedings.

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The court also noted that if counsel are unable to acquire signatures from all parties who have appeared in the litigation, the Rules do not leave them without recourse. Rule 41(a)(2) still provides parties with an avenue for securing dismissals through court order [see Fed. R. Civ. P. 41(a)(2)]. Other alternatives are available as well. Litigants who wish to dismiss, settle, or otherwise resolve less than an entire action can ensure that they receive a final judgment on the remainder of their claims by seeking partial final judgment under Rule 54(b) from the district court, or by amending their complaints under Rule 15.

- **Conclusion.** The Eleventh Circuit concluded that the plain text of Rule 41(a)(1)(A)(ii) requires the signature of all parties to the action. Because multiple stipulations made under the Rule were not signed by all parties who appeared in the lawsuit, they were ineffective, and the claims they purported to dismiss remained pending before the district court. Consequently, there had not been a final judgment below, and the appellate court lacked jurisdiction to consider the merits of the appeal.

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REMOVAL

Exceptions to Well-Pleaded Complaint Rule

Cagle v. NHC Healthcare-Maryland Heights, LLC

78 F.4th 1061, 2023 U.S. App. LEXIS 22575 (8th Cir. Aug. 28, 2023)

In an action involving state-law wrongful-death claims, the Eighth Circuit held that (1) snap removal did not cure the lack of diversity jurisdiction, (2) the Public Readiness and Emergency Preparedness Act did not completely preempt state-law claims for COVID-19-related death, (3) no federal issue was a necessary element of the state-law claims, and (4) a nursing home's designation as "critical infrastructure" did not authorize federal-officer removal.

Background. Beginning in May 2020, numerous residents of the defendant nursing home contracted COVID-19 and died from the disease. The nursing home allegedly failed to follow proper infection-control procedures to prevent and control the outbreak, by (1) allowing staff with COVID-19 symptoms to work with the residents, (2) failing to quarantine contagious residents from the rest of the nursing home's population, (3) not training staff on how to use personal protective equipment, and (4) not requiring staff to adhere to social-distancing guidelines.

The plaintiff's father, a resident of the nursing home, was diagnosed with COVID-19 on May 20, 2020. Following his diagnosis, the nursing home allegedly failed to adequately monitor and respond to his deteriorating condition. He died from the disease on June 12, 2020.

The plaintiff, a Missouri citizen, sued the nursing home, three corporate entities, and twelve staff members of the nursing home in Missouri state court. He asserted Missouri causes of action for wrongful death, negligence per se, and lost chance of survival.

The corporate entities, none of them a Missouri citizen, were served on November 23, 2021. Most of the individual staff-member defendants were Missouri citizens, but they were not served immediately. On December 7, 2021, the corporate entities removed the case to federal district court before any of the individual staff-member defendants had been served.

The removing defendants asserted three independent grounds for federal jurisdiction. First, they argued that diversity jurisdiction existed because none of the "properly joined and served" defendants were Missouri citizens. Second, they argued that the state-law claims were completely preempted by the Public Readiness and Emergency Preparedness Act (PREP Act) [42 U.S.C. §§ 247d-6d, 247d-6e], and that the claims necessarily raised a substantial, disputed federal question. Third, they contended that due to the extensive federal regulation of nursing homes during the COVID-19 pandemic, the nursing home "acted under" a federal officer and therefore federal-officer removal jurisdiction applied [28 U.S.C. § 1442(a)(1)].

The district court disagreed on all fronts and remanded the case to state court. The nursing home and corporate entities appealed, and the Eighth Circuit reviewed the decision de novo.

Diversity Jurisdiction Was Lacking. The Eighth Circuit reiterated that complete diversity was determined by the citizenship of all of the defendants named in the complaint, and whether all of the named parties had been served was irrelevant when evaluating diversity of citizenship.

The Eighth Circuit rejected the defendants' argument that under "snap removal" (removal before forum-defendants are served), complete diversity was required among only the properly joined and served defendants. Snap removal is a strategic device used to get around the "forum-defendant rule." Under the forum-defendant rule, a civil action "otherwise removable" on the basis of diversity jurisdiction may not be removed if any of the "parties in interest properly joined and served as defendants" are citizens of the forum state [28 U.S.C. § 1441(b)(2)].

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The court found that it was undisputed that the plaintiff shared Missouri citizenship with some of the named individual defendants, and the action was therefore not "otherwise removable" for purposes of § 1441(b)(2). Removing before forum defendants have been served would only have been effective had diversity jurisdiction been lacking, which it was not. Thus, the Eighth Circuit held that snap removal did not cure this lack of complete diversity.

PREP Act Did Not Completely Preempt COVID-Related State-Law Claims. The Eighth Circuit underscored the "well-pleaded complaint rule" and its exceptions. Federal-question jurisdiction is generally found only when the face of the plaintiff's properly pleaded complaint presents a federal question. The potential availability of a federal defense is not enough.

However, there are two exceptions: Removal can be allowed when the state-law claims (1) are completely preempted by federal law, or (2) necessarily raise a substantial, disputed federal question.

The defendants argued that both exceptions applied in this case. As to the first exception, they argued that the PREP Act, which was used to declare a public emergency in response to the COVID-19 pandemic, completely preempted the state-law claims.

The PREP Act authorizes the Secretary of the Department of Health and Human Services to declare that a disease is a public emergency, and to define appropriate "covered countermeasures" to the disease, including drugs, biological products, or devices that mitigate the disease's harm [42 U.S.C. § 247d-6d(b)(1), (i)(1)].

The Act immunizes covered individuals from suit for injuries "caused by, arising out of, relating to, or resulting from the administration to or the use by an individual of a covered countermeasure." If an injured person's claim falls within this immunity, recourse must be sought under an administrative compensation scheme established by the Act.

The Act does not provide immunity when a covered person's "willful misconduct" is the proximate cause of a person's injuries. The PREP Act creates an exclusive federal cause of action for claims based on willful misconduct [42 U.S.C. §§ 247d-6d(a)(1), (d)(1), 247d-6e].

The Eighth Circuit reiterated that the complete-preemption rule applies when a federal statute "wholly displaces the state-law cause of action," such that a claim that comes within the scope of that cause of action, "even if pleaded in terms of state law, is in reality based on federal law." However, ordinary preemption (where a federal law has superseded a state-law claim), does not provide a basis for removal. The court emphasized that to establish complete preemption, "Congress must have intended the federal statute to provide 'the exclusive cause of action for the claim asserted and also set forth procedures and remedies governing that cause of action.'"

The court found that the PREP Act's immunity from suit "does not create a cause of action against a covered person, let alone an exclusive one. The statute affords a federal defense to liability under state law—a rule of ordinary preemption."

The court further found that the only exclusive federal cause of action against covered persons in the Act is the cause of action for injuries proximately caused by covered persons' "willful misconduct."

Here, the plaintiff's complaint asserted negligence, but it did not allege willful misconduct by the defendants. Thus the Eighth Circuit held that the state-law claims were not completely preempted by the Act.

The court rejected the defendants' reliance on an advisory opinion of the General Counsel at the Department of Health and Human Services, which declared that the immunity provision of the Act was a complete-preemption statute. "Like every circuit to consider this question, . . . we conclude that the legal conclusion of the general counsel is not entitled to controlling deference. Ordinary principles of interpretation establish unambiguously

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that the PREP Act does not completely preempt state causes of action for negligence" [see Solomon v. St. Joseph Hosp., 62 F.4th 54, 62 (2d Cir. 2023); Martin v. Petersen Health Operations, LLC, 37 F.4th 1210, 1214 (7th Cir. 2022); Mitchell v. Advanced HCS, L.L.C., 28 F.4th 580, 585 n.3 (5th Cir. 2022); Saldana v. Glenhaven Healthcare LLC, 27 F.4th 679, 687 (9th Cir. 2022); Maglioli v. Alliance HC Holdings LLC, 16 F.4th 393, 403–404 (3d Cir. 2021)].

- **State-Law Claims Did Not Raise Substantial, Disputed Federal Question.** The Eighth Circuit reiterated the second exception to the well-pleaded complaint rule: In a "special and small category of cases," federal jurisdiction over a state-law claim exists when "a federal issue is (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in a federal court without disrupting the federal-state balance approved by Congress." The question of federal law must be a "necessary element of one of the well-pleaded state claims."

  The court found that the defendants failed to identify a federal issue that was a necessary element of the plaintiff's state-law claims. The claims turned on issues such as whether the nursing home enforced social distancing policies, quarantined residents infected with the virus away from other residents, allowed its staff to work while exhibiting COVID-19 symptoms, or promptly responded to the plaintiff's father's symptoms. The defendants' intention to assert PREP Act immunity as a defense to these claims was not enough to create federal jurisdiction.

- **Nursing Homes' "Critical Infrastructure" Status Did Not Authorize Federal-Officer Removal.** Under 28 U.S.C. § 1442, removal is authorized when a civil action is brought against an "officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office."

  The Eighth Circuit ruled that the defendants did not establish what was required in order for them to remove under § 1442: that (1) the nursing home acted under the direction of a federal officer, (2) there was a causal connection between the nursing home's actions and the official authority, (3) the nursing home had a colorable federal defense to the plaintiff's claims, and (4) the nursing home was a "person" within the meaning of the statute. "To 'act under' a federal officer, a private entity's actions 'must involve an effort to assist, or to help carry out, the duties or tasks of the federal superior. That relationship typically involves subjection, guidance, or control'" (citation omitted).

  The court rejected the defendants' argument that the government's designation of the nursing home as "critical infrastructure" during the pandemic, subjecting it to extensive regulation, meant that it was acting under the direction of a federal officer. The Eighth Circuit reiterated that "compliance with even pervasive federal regulation is not sufficient to show that a private entity acted under the direction of a federal officer."

  The Eighth Circuit underscored that designating an industry as important, or even critical, is not in and of itself "sufficient to federalize an entity's operations and confer federal jurisdiction." For example, even though the food and agriculture sector had been designated as critical infrastructure during the pandemic, a food processing company was held not to act under a federal officer [see Buljic v. Tyson Foods, Inc. 22 F.4th 730, 740–741 (8th Cir. 2021)].

- **Disposition.** The Eighth Circuit affirmed the district court's remand of the case to state court.