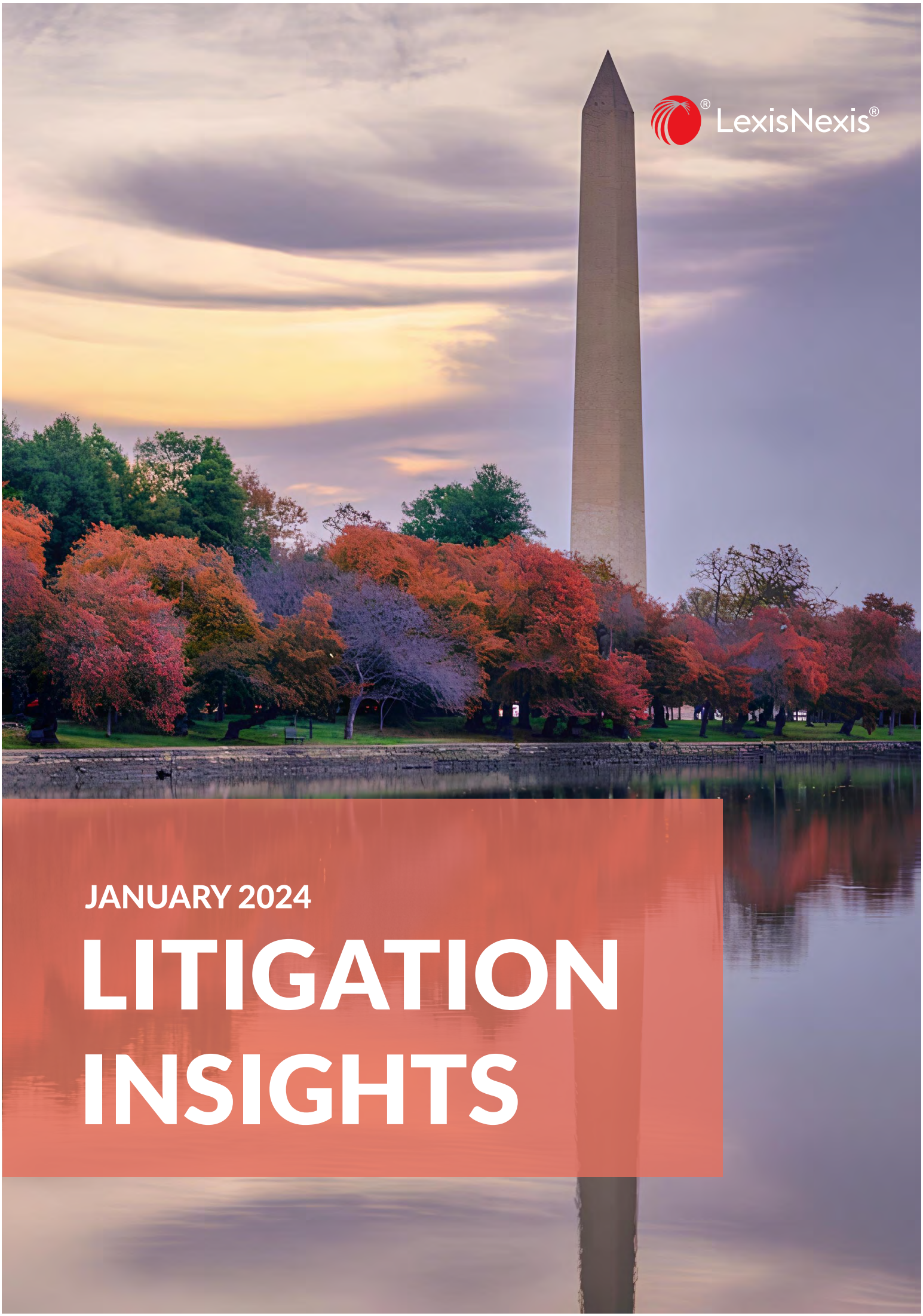

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JANUARY 2024

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.

ANTI-INJUNCTION ACT

Necessary-In-Aid-of-Jurisdiction Exception

Quint v. Vail Resorts, Inc.

84 F.4th 918, 2023 U.S. App. LEXIS 27495 (10th Cir. Oct. 17, 2023)

Jump to full summary

The plaintiffs alleged that the defendant corporation's nationwide employment practices violated the Fair Labor Standards Act and state law. They brought suit in the U.S. District Court for the District of Colorado, seeking recovery of unpaid wages, overtime, and other benefits for themselves and similarly situated parties.

PLEADINGS

Amended and Supplemental Pleadings

Lutter v. JNESO

86 F.4th 111, 2023 U.S. App. LEXIS 29489 (3d Cir. Nov. 6, 2023)

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The Third Circuit holds that a new complaint may be both an amendment under Rule 15(a) as to certain allegations and a supplement under Rule 15(d) as to allegations of events that occurred after the original complaint was filed, and as to the latter, Article III standing is determined as of the supplemental complaint, not the original.

PRIVILEGES

Legislative Privilege

Pernell v. Fla. Bd. of Governors of the State Univ.

84 F.4th 1339, 2023 U.S. App. LEXIS 28770 (11th Cir. Oct. 30, 2023)

Jump to full summary

The Eleventh Circuit holds that the legislative privilege shields purely factual information, and the privilege is unqualified in private civil-rights actions.

Continue on next page

Generative Artificial Intelligence (AI) Federal and State Court Rules Tracker

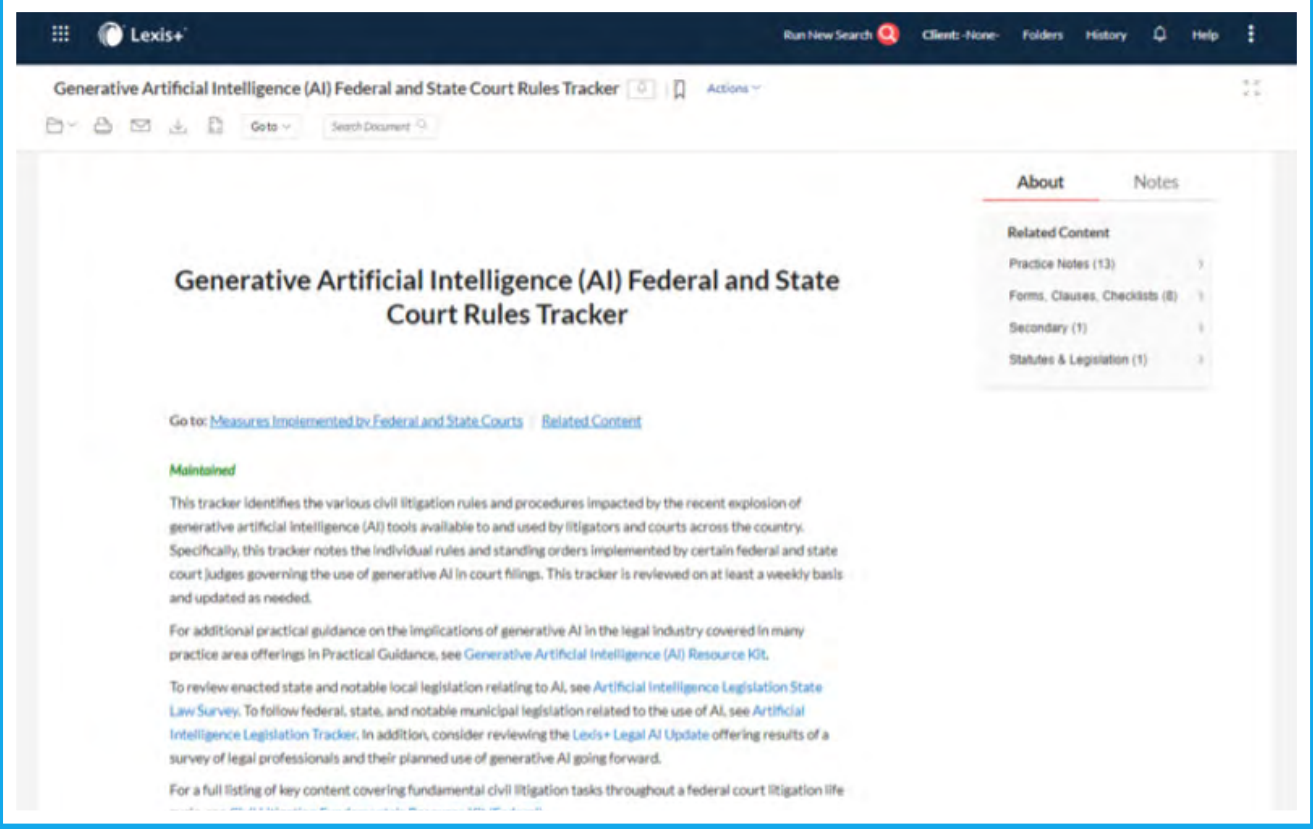
By Marisa L. Beirne, LexisNexis Solutions Consultant for the Federal Government

Happy 2024 everyone! LexisNexis rang in the New Year with a new Federal and State Court Rules Tracker on Generative Artificial Intelligence. In response to customer requests, the Practical Guidance Civil Litigation team released a generative AI Federal and State Court Rules Tracker.

As quick refresher, Generative AI produces new output, commonly text, but it could be in audio or visual formats. And it does this using large language models which enables prediction from lots of examples, it is not just repeating back information that is found.

The Generative Artificial Intelligence Federal and State court rules tracker has two main purposes. First, the tracker identifies and links to various individual rules and standing orders implemented by Federal and State Court judges governing generative AI's use in court filings and it summarizes the requirements impacting litigators practicing in those courts.

Moreover, this tracker identifies the various civil litigation rules and procedures impacted by the recent explosion of generative artificial intelligence (AI) tools available to and used by litigators and courts across the country. Specifically, this tracker notes the individual rules and standing orders implemented by certain federal and state court judges, court administrations, and bar associations governing the use of generative AI in court filings.



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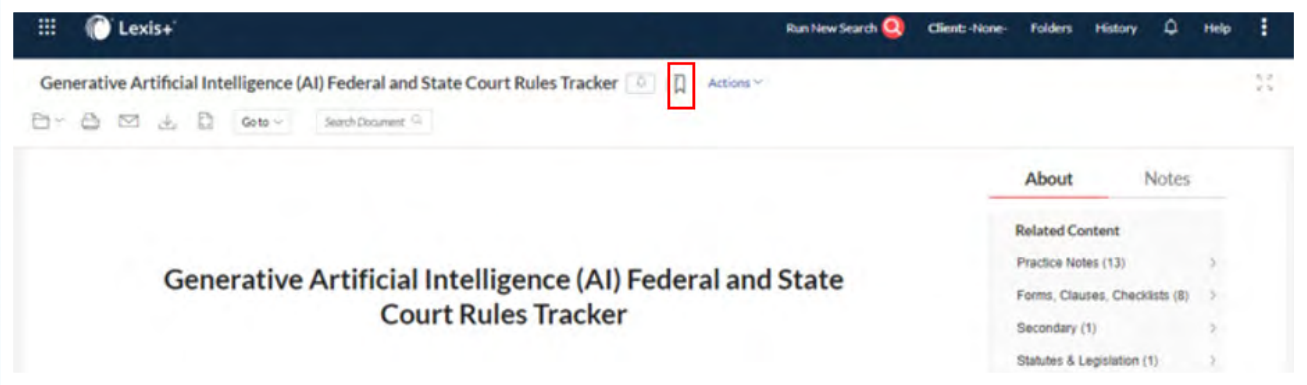
Although this tracker is one of the newest trackers Practical Guidance has produced, there are many other trackers on Practical Guidance. Please use the links below to view those trackers as well as to stay abreast of general Legal AI Updates.

1. To review enacted state and notable local legislation relating to AI, see ***Artificial Intelligence Legislation State Law Survey***.
2. To follow federal, state, and notable municipal legislation related to the use of AI, see ***Artificial Intelligence Legislation Tracker***.
3. In addition, consider reviewing the ***Lexis+ Legal AI Update*** offering results of a survey of legal professionals and their planned use of generative AI going forward.

Don't forget that you can always bookmark any of the above trackers for easy access and review. You can access all your bookmarked content on Practical Guidance right from the landing page of Practical Guidance. See the red box around the bookmark hyperlink below.



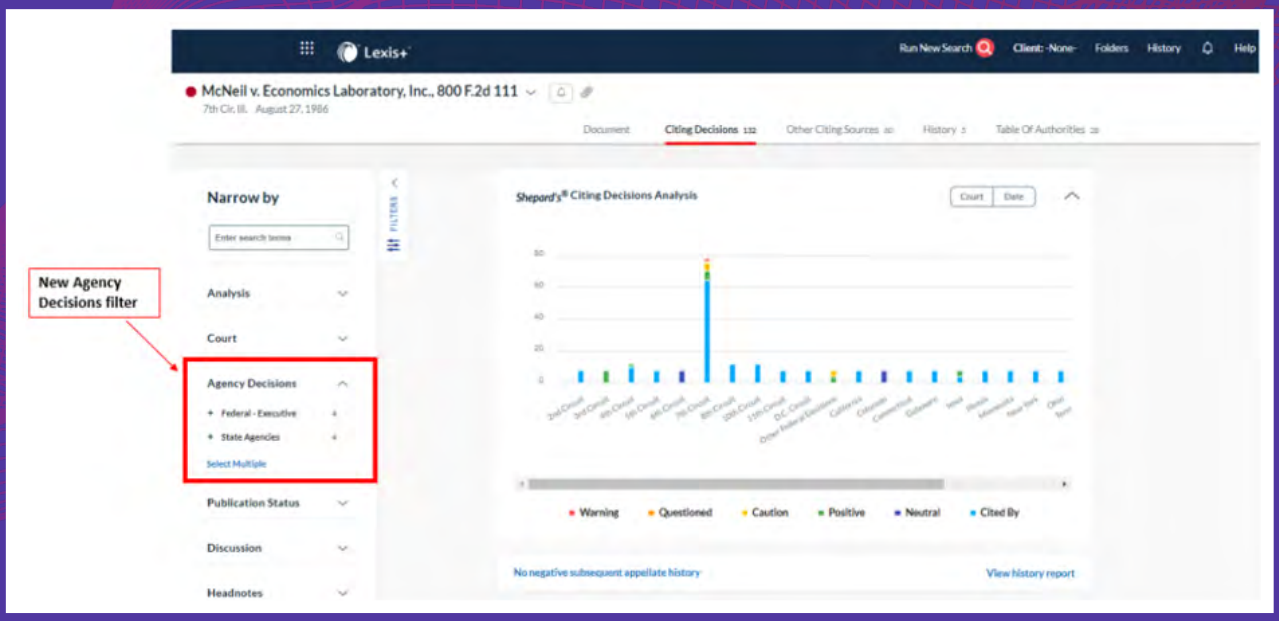
The Practical Guidance team will continue to monitor court activity weekly and will update all trackers accordingly. Feel free to contact your dedicated Lexis Nexis Solutions Consultant to schedule a Practical Guidance class or a demo on our latest product: Lexis+ AI.

Continue on next page

Agency Decisions Filter Now Available in *Shepard's*

By Chet Lexvold, LexisNexis Solutions Consultant for the Federal Government

Shepard's has been enhanced by adding an Agency Decisions filter for easier access to both federal and state agency decisions that cite specific cases, statutes, and regulations.



Previously, Agency Decisions were found under the "Courts" filter. Now, Agency Decisions have their own designated filter. Lexis+ users can filter by Federal, State and Self-Regulatory Organizations.

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WIN WITH JIM WAGSTAFFE
Current Awareness Insights!

Alert: District Court's Lack of Time Limit on Order Granting Plaintiff Right to Amend After 12(B)(6) Dismissal Enabled Amended Complaint Filed 19 Months Later to Relate Back for Statute of Repose Purposes

Here lies a cautionary tale…make sure "dead" cases are truly dead.
On October 16, 2016, Plaintiffs brought a federal securities class action against Defendants. After Plaintiff filed an amended complaint on May 11, 2017, Defendants moved to dismiss under FRCP 12(b)(6). On March 14, 2018, the district court granted the motion to dismiss but did not bar Plaintiff from pursuing his claim and dismissed without prejudice. In response to a timely motion to reconsider the dismissal and included a proposed amended complaint. In response, Defendants stated they did not oppose the request for leave to file a new amended complaint.

The court denied the motion to reconsider but granted the request to amend telling Plaintiffs to "review your proposed amended complaint carefully and resubmit only if it complies." The court did not set a deadline for filing an amended complaint.

The docket was "silent for almost 19 months" when Plaintiffs filed the second amended complaint (SAC) on June 8, 2020. It did not add any new parties or claims but did add factual support to its allegations. On April 16, 2021, the district court granted a motion to dismiss not on failure to state a claim but instead on the basis that any claims based on statements made before June 8, 2015 were now time barred. "The court declined to "excuse [Plaintiff's] nearly two-year delay in refiling this case."…It applied the statute of repose as if the SAC were the initial complaint."

The Tenth Circuit reversed, finding that under FRCP 15 the SAC related back to the filing of the first amended complaint. The problem for defendants was the operative order controlling the case when the SAC was filed was not a final judgment. This was not just because it was without prejudice. Here, further proceedings were contemplated as the operative order explicitly authorized the filing of an amended complaint with no deadline for filing.

The Court noted that defendants may "feel put upon" by the long delay. But they could have requested a deadline for filing or filed a motion under FRCP 41(b) seeking dismissal for failure to prosecute. They took no such action.

Because the district court had not reviewed the SAC for adequacy, the case was remanded to resolve this issue. Hogan v. Pilgrim's Pride Corp., 73 F.4th 1150 (10th Cir. 2023).

Fed Civ Proc Before Trial: The Wagstaffe Group *§ 18-III[C][3]*, 18.114—Second Ground: When Amendment to Add Claim or Defense is Transactionally Related to Original claims.

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ANTI-INJUNCTION ACT

Necessary-In-Aid-of-Jurisdiction Exception

Quint v. Vail Resorts, Inc.

84 F.4th 918, 2023 U.S. App. LEXIS 27495 (10th Cir. Oct. 17, 2023)

In a Fair Labor Standards Act action challenging nationwide employment practices, the Tenth Circuit held the Anti-Injunction Act barred a motion requesting an injunction seeking to prevent state-court approval of a settlement involving different plaintiffs.

Background. The plaintiffs alleged that the defendant corporation's nationwide employment practices violated the Fair Labor Standards Act and state law. They brought suit in the U.S. District Court for the District of Colorado, seeking recovery of unpaid wages, overtime, and other benefits for themselves and similarly situated parties.

Five other actions, asserting similar claims against the defendant corporation's subsidiaries, had been filed by different plaintiffs in California. The defendant notified the Colorado plaintiffs and the district court that it had negotiated a nationwide settlement with the other plaintiffs encompassing all claims for alleged unpaid wages and any other violation of state or federal law involving it and its subsidiaries. It initially indicated that the settlement would be submitted for approval in the district court in the U.S. District Court for the Eastern District of California, but the settling parties later stipulated to stay the California federal-court actions and seek approval of the settlement in a California state-court action.

The Colorado plaintiffs filed an emergency motion seeking an injunction under the All Writs Act [28 U.S.C. § 1651] to enjoin the defendant from "consummating a facially collusive 'reverse auction' settlement in a recently filed placeholder California state court action or any other court."

The magistrate judge issued a report and recommendation (R&R) to deny the injunction motion, concluding that the relief the Colorado plaintiffs sought was barred by the Anti-Injunction Act [28 U.S.C. § 2283].

The district court accepted and adopted the R&R and denied the injunction motion, overruling the Colorado plaintiffs' objections.

The Colorado plaintiffs appealed, arguing that the district court erred by (1) applying the wrong standard in reviewing the R&R, (2) holding the Anti-Injunction Act applied even though the motion sought an injunction against the defendant rather than the state court, (3) declining to consider one exception to the Anti-Injunction Act, (4) holding a second exception to the Anti-Injunction Act did not apply, (5) failing to enforce the first-to-file rule, and (6) abstaining under the Colorado River doctrine.

District Court Erred in Failing to Apply de Novo Review, But Error Was Harmless. The Tenth Circuit reiterated that under 28 U.S.C. § 636(b), magistrate judges may hear and determine any pretrial matters pending before the court, with eight exceptions. Those eight motions are generally referred to as "dispositive" motions, and magistrate judges may hear them but may only propose findings and recommendations. The district court then must make de novo determinations as to those matters if a party objects to the magistrate judge's recommendations [see 28 U.S.C. § 636(b); Fed. R. Civ. P. 72(b)].

Even though a motion for injunctive relief is one of the eight listed dispositive exceptions, the defendant erroneously argued that the injunctive relief sought by the plaintiffs was not dispositive of a claim or defense. Although "motions not designated on their face as one of those excepted in [§ 636(b)(1)](A) are nevertheless to be treated as such a motion when they have an identical effect" [see Ocelot Oil Corp. v. Sparrow Indus., 847 F.2d 1458, 1462–1463 (10th Cir. 1988)], the Tenth Circuit found that there is no authority for the proposition that a motion expressly excepted in § 636(b)(1)(A) may nevertheless be heard and determined by a magistrate judge if it

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can be shown not to be dispositive of a claim or defense. "Such a conclusion would expand the magistrate judge's authority beyond its unambiguous, congressionally defined scope in § 636(b)(1)."

Thus, the Tenth Circuit held that the district court erred by construing the R&R as addressing a nondispositive matter under Rule 72(a) and by applying the clearly-erroneous-or-contrary-to-law review standard.

However, the appellate court held that the district court's error was harmless. The disposition of the appeal turned on issues of law, and the contrary-to-law standard of review was essentially the same as plenary review, which the Tenth Circuit emphasized has been equated with de novo review.

The Anti-Injunction Act Barred the Requested Injunction. The Tenth Circuit reiterated that the Anti-Injunction Act provides that a federal court may not grant an injunction to stay proceedings in a state court except (1) as expressly authorized by an act of Congress, (2) where necessary in aid of its jurisdiction, or (3) to protect or effectuate its judgments [28 U.S.C. § 2283].

The court rejected the plaintiffs' argument that an injunction against settlement does not stay proceedings, emphasizing that the focus of the California state-court action was the submission, approval, and appeal of the settlement.

The Tenth Circuit also rejected the plaintiffs' assertion that the Anti-Injunction Act does not prohibit enjoining a party from proceeding in state court. The plaintiffs did not cite any authority to support this argument, and the Tenth Circuit cited Toole County v. United States, in which it held that the Act precluded the district court from enjoining parties from prosecuting a state-court action [Toole County v. United States, 820 F.3d 1183, 1185 (10th Cir. 2016)]. Moreover, in an analogous decision, the Supreme Court had held that where a state court lacks power to restrain federal-court proceedings, it also may not restrain parties from proceeding in the federal court [see Donovan v. City of Dallas, 377 U.S. 408, 413, 84 S. Ct. 1579, 12 L. Ed. 23 409 (1964)].

The court also found that the plaintiffs' reliance on the All Writs Act as authority for its injunction ignored the Anti-Injunction Act's limitation on the district court's authority under the All Writs Act to enjoin parties from litigating in state court.

As far as the Anti-Injunction Act's three exceptions, the Tenth Circuit analyzed only the second (necessary in aid of jurisdiction) exception. The court noted that the plaintiffs had taken inconsistent positions as to which exceptions they believed were applicable to their injunction motion. Their motion asserted that "at least two exceptions apply," and did not argue the first (authorized by Congress) exception. In their reply, however, they added an argument about the first exception, but the magistrate judge stated in the R&R that this exception would not be addressed because the plaintiffs "do not argue that the first exception applies." In their objections to the R&R, the plaintiffs pointed to their reply, and argued only the first and second exceptions, dropping any reference to the third.

In reviewing the R&R, the district court declined to "indulge Plaintiffs in a review of arguments not properly raised before [the magistrate judge]," and noted the plaintiffs' counsel's "trend" of waiting to raise new arguments in reply briefs. "While I will not speculate as to whether these errors were intentional, I remind counsel that they have ethical obligations of candor to the court and general competency." The district court proceeded to review only the second and third exceptions.

On appeal, the plaintiffs argued that the first and second exceptions applied, but the Tenth Circuit declined to address the first exception after finding that the district court did not abuse its discretion in declining to address the exception, and that it had exercised its independent judgment in considering and rejecting the plaintiffs' objection.

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In reviewing the necessary-in-aid-of-jurisdiction exception, the Tenth Circuit began by restating the R&R's conclusion that the exception applies only when in rem or quasi in rem actions are pending in both state and federal courts. When that is the case, the first court to acquire jurisdiction or assume control over the property is entitled to maintain and exercise its jurisdiction to the exclusion of the other court.

The R&R found that the plaintiffs' case was in personam, rather than in rem or quasi in rem, and recommended rejecting their contention that this exception applied here. The plaintiffs' objection, which asserted that back wages are property and the action was therefore in rem or quasi in rem, did not persuade the district court, which held that the plaintiffs failed to cite, nor could it find, any case holding a claim for back wages to be considered in rem or quasi in rem.

On appeal, the Tenth Circuit found that the plaintiffs waived appellate review of their argument that the necessary-in-aid-of-jurisdiction exception was not limited to in rem or quasi in rem proceedings, because they did not raise it in their objections to the R&R.

The court of appeals found that the district court did not err in holding that back wages are not property for in rem jurisdictional purposes, and that the case was in personam. The Tenth Circuit emphasized that the cases cited by the plaintiffs did not hold that a case for back wages is considered in rem or quasi in rem.

- **First-to-File Rule Was Not Relevant to Relief Sought in Injunction Motion.** The Tenth Circuit rejected the plaintiffs' argument that the district court erred by not enforcing the first-to-file rule. The rule "permits, but does not require, a federal district court to abstain from exercising its jurisdiction in deference to a first-filed case in a different federal district court." The court affirmed the district court's assertion that the first-to-file rule is specific to federal courts. Moreover, the court emphasized that the rule "is a test for determining whether a federal court should abstain from exercising jurisdiction . . . , not a basis for enjoining another court from doing so." Thus, the Tenth Circuit held that the district court did not err in holding that the first-to-file rule was not relevant to the injunction motion.

- **District Court Did Not Abstain Under *Colorado River*.** The Tenth Circuit rejected the plaintiffs' assertion that the district court improperly abstained from exercising jurisdiction in favor of the California state court contrary to the *Colorado River* abstention doctrine. The court found that the district court correctly concluded that the plaintiffs "misunderstood and misinterpreted the R&R," which did not recommend abstention, but instead cited to *Colorado River* as a contradictory proposition to the explanation that the first-to-file rule did not pertain to state-court proceedings. The Tenth Circuit was dismissive of the plaintiffs' contention that the district court still "effectively abstained," concluding that "in denying the Injunction Motion, the district court did not abstain—actually or effectively, properly or improperly—under *Colorado River*."

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PLEADINGS

Amended and Supplemental Pleadings

Lutter v. JNESO

86 F.4th 111, 2023 U.S. App. LEXIS 29489 (3d Cir. Nov. 6, 2023)

The Third Circuit holds that a new complaint may be both an amendment under Rule 15(a) as to certain allegations and a supplement under Rule 15(d) as to allegations of events that occurred after the original complaint was filed, and as to the latter, Article III standing is determined as of the supplemental complaint, not the original.

Legal Background. In its 2018 decision in Janus v. AFSCME, Council 31, the Supreme Court overruled a 40-year-old First Amendment precedent and held that labor unions cannot collect compulsory agency fees from nonmembers [Janus v. AFSCME, Council 31, 585 U.S. —, 138 S. Ct. 2448, 201 L. Ed. 2d 924, 964 (2018)]. Relying on Janus, many union members sued for reimbursement of fees wrongfully withheld from their paychecks. Many courts, including the Third Circuit, have held that a claim for retroactive money damages is barred as a matter of law by good-faith reliance on the Court's prior precedent [Diamond v. Pa. State Educ. Ass'n, 972 F.3d 262, 269 (3d Cir. 2020)].

Facts and Procedural Background. In anticipation of the decision in Janus, the New Jersey legislature enacted a statute providing that a union member could resign or revoke an authorization for payroll deductions only during the ten days following the anniversary of that member's employment start date. The decision in Janus was released on June 27, 2018. The plaintiff Jody Lutter was employed on May 31, so she had to wait for almost a full year to effectively either resign or revoke the authorization filed with her public-sector union and prevent further deductions. On June 6, 2019, within a week of her formal revocation, Lutter sued to challenge this delay under 42 U.S.C. § 1983, seeking damages from the union, declaratory and injunctive relief as to the validity of the state law against other defendants, and attorney's fees.

On February 28, 2020, Lutter filed what was labeled as an "amended" complaint that fleshed out the allegations of the original, but also included additional allegations as to events that had occurred between June 6, 2019, and February 28, 2020. Shortly after the new complaint was filed, the union unilaterally sent a check to Lutter's attorney for what it represented was the full amount of payroll deductions made between the date of the decision in Janus and the date of Lutter's resignation and revocation, plus interest on that amount. The check was not cashed or deposited by Lutter or her counsel. Nevertheless, the district court determined that the check mooted the damages claims against the union. In a later order, the claims for declaratory and injunctive relief were dismissed for lack of standing. Lutter appealed to the Third Circuit.

Requirements for Article III Standing. The Third Circuit began its analysis by noting that a plaintiff must establish standing for each claim she asserts in federal court. To demonstrate Article III standing, a plaintiff must show (1) that she has suffered an injury in fact, (2) that the injury is fairly traceable to the challenged conduct of the defendant, and (3) that the injury would likely be redressed by a favorable judicial decision. As a fundamental tenet of the case-or-controversy requirement of Article III, the failure to establish standing deprives the court of subject-matter jurisdiction, without which a court lacks authority to adjudicate the claim [Spokeo, Inc. v. Robins, 578 U.S. 330, 338–339, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016); Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 180–181, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000)].

Time for Determination of Article III Standing. The Third Circuit then noted that the general rule is that a plaintiff must have Article III standing on the date the lawsuit was commenced. But that rule may be altered by the filing of amended or supplemental complaints under Fed. R. Civ. P. 15(a) and (d). An amendment revises the allegations, claims, and prayers for relief to reflect the state of things as of the date the action was commenced. By contrast, supplementation adds or alters allegations, claims, or prayers for relief based on events that

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occurred after the initiation of the lawsuit. An amended complaint does not restart the date for assessing standing because it simply revises the prior pleading to reflect a more accurate understanding of the state of things when the action was filed. But when a district court permits a supplemental complaint, then for the claims and requested relief that are affected by the alleged post-suit developments, a plaintiff's Article III standing is evaluated as of the date of the supplemental pleading. In this case, the new complaint was a hybrid, because it contained both kinds of allegations. Because amended and supplemental pleadings are not mutually exclusive, the new complaint was both an amendment and a supplement to the original.

- **Plaintiff Lacked Standing to Seek Prospective Relief.** The Third Circuit then concluded that because the supplemental allegations related to Lutter's resignation from the union, the time to determine standing was the filing of the new complaint, not the original. Because she was no longer a member of the union, she lacked Article III standing to seek any form of prospective relief and the district court's dismissal was affirmed as to those claims.

- **Damages Claims Against Union Were Not Moot.** Finally, the Third Circuit rejected the district court's conclusion that the claim for damages was moot due to the tender from the union of a check for the full amount of the challenged deductions plus interest. The court conceded that if the plaintiff had deposited the check, that would have been a complete resolution of the dispute and mooted the claim. But it was undisputed that not only was the check not deposited, but Lutter also explicitly rejected it as inadequate to settle the union's potential liability. As the Third Circuit noted, the Supreme Court has held that an unaccepted settlement offer cannot moot a case, even if it is made as a formal offer of judgment under Fed. R. Civ. P. 68 [Campbell-Ewald Co. v. Gomez, 577 U.S. 153, 160–166, 136 S. Ct. 663, 193 L. Ed. 2d 571 (2016)]. The court therefore concluded that "the post-suit provision of a check for the amount owed for the underlying claims plus interest does not moot" a claim for damages.

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PRIVILEGES

Legislative Privilege

Pernell v. Fla. Bd. of Governors of the State Univ.

84 F.4th 1339, 2023 U.S. App. LEXIS 28770 (11th Cir. Oct. 30, 2023)

The Eleventh Circuit holds that the legislative privilege shields purely factual information, and the privilege is unqualified in private civil-rights actions.

Professors and one student challenged Florida's Individual Freedom Act for having a racially discriminatory purpose in violation of the Equal Protection Clause of the Fourteenth Amendment. Governor DeSantis described the Act as "a stand against the state-sanctioned racism that is critical race theory." It prohibits Florida's public schools from training or instruction that espouses, promotes, advances, inculcates, or compels individuals to believe any of eight concepts descended from critical race theory. For example, the Act stops schools from teaching that "[m]embers of one race, color, national origin, or sex are morally superior to members of another," that "[a] person, by virtue of his or her race, color, national origin, or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously," or that "[a] person, by virtue of his or her race, color, national origin, or sex, should be discriminated against or receive adverse treatment to achieve diversity, equity, or inclusion."

The plaintiffs described the Act as "racially motivated censorship that the Florida legislature enacted, in significant part, to stifle widespread demands to discuss, study, and address systemic inequalities, following the nationwide protests that provoked discussions about race and racism in the aftermath of the murder of George Floyd." They alleged that the Act imposes viewpoint restrictions in violation of the First Amendment, is unconstitutionally vague in violation of the Due Process Clause of the Fourteenth Amendment and was enacted with a racially discriminatory purpose in violation of the Equal Protection Clause. The district court preliminarily enjoined the Act's enforcement in higher education on the viewpoint-discrimination and vagueness grounds.

The plaintiffs served subpoenas on 14 nonparty legislators—13 co-sponsors of the Act and one legislator who supported the bill during a Florida House of Representatives debate. The subpoenas sought an array of documents from "both personal and government devices" from January 2020 onward that bore on 18 separate requests. For example, the subpoenas demanded the production of any and all notes, memoranda, research, written analysis, white papers, studies, reports, or opinions relied on, created by, or reviewed by the legislator or the legislator's employees, staff, or representatives, regarding "creation and drafting," the "enactment," and the "implementation" of the Act. The requested discovery extended beyond documents concerning the bill itself to all documents reflecting communications regarding Racial Justice Protests or Black Lives Matter or Critical Race Theory.

In response, the legislators argued that "the legislative privilege prohibits these sort of fishing expeditions" and moved to quash the subpoenas. The district court partially denied the motion on the grounds that factual documents are outside the scope of the privilege and that important federal interests outweighed the legislative privilege. The district court reasoned that the legislative privilege does not extend to "purely factual documents, including bill drafts, bill analyses, white papers, studies, and news reports." Second, the district court reasoned that, even if the legislative privilege does extend to purely factual documents, it yields to the important federal interests presented in this case. The legislators appealed, and 17 state attorneys general filed a brief as amici curiae supporting the legislators.

Legislative Privilege Shields Purely Factual Information. The Eleventh Circuit explained that the legislative privilege protects state legislators from discovery requests related to their legislative duties. Although the core of the privilege is a state legislator's immunity from civil suit for acts related to legislative proceedings, the privilege extends to discovery requests because complying with such requests detracts from the performance of official duties. So when a discovery request inquires into legislative acts or the motivation for actual performance of legislative acts, state legislators can protect the integrity of the legislative process by invoking the privilege to quash the request. The district court split the documents subject to subpoena into two categories: "purely factual documents" and those documents that set out the legislators' or their staff members' motivations and mental impressions.

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It denied the legislators' motion as to the first category because, it determined, factual documents fall outside the privilege's scope. The Eleventh Circuit found, however, that the categorical distinction drawn by the district court between factual documents and other documents had no basis in precedent.

The Eleventh Circuit considers the purpose of a subpoena, not what the subpoena seeks, to determine if the legislative privilege applies. In Ala. Educ. Ass'n v. Bentley (In re Hubbard), the court explained that any material, documents, or information that goes to legislative motive is covered by the legislative privilege. In that case, the court held that the district court should have quashed subpoenas when their "only purpose was to support the lawsuit's inquiry into the motivation behind [a statute], an inquiry that strikes at the heart of the legislative privilege." The Hubbard court further explained that when a claim is "at its core and in its entirety an inquiry into the subjective motivation" of the legislators, it does not take a "document-by-document" approach. In other words, there is no need for the lawmakers to peruse the subpoenaed documents, to specifically designate and describe which documents are covered by the legislative privilege, or to explain why the privilege applied to those documents. It is enough to point out that the only purpose of the subpoenas is to further the plaintiff's inquiry into the lawmakers' motivations for a statute and that their legislative privileges exempted them from such inquiries [Ala. Educ. Ass'n v. Bentley (In re Hubbard), 803 F.3d 1298, 1310–1311 (11th Cir. 2015)].

Courts need not decide whether a document fits some descriptor, like "purely factual," to determine whether it is protected. If the document is sought for an impermissible purpose, the inquiry is over.

According to the plaintiffs' response to the Florida legislators' motion to quash in this case, the plaintiffs served the subpoenas on the legislators to determine whether there was a discriminatory motive behind the Act. By the plaintiffs' own admission, the subpoenas' purpose was to uncover the legislators' motives in passing the law. The privilege applies with full force against requests for information about the motives for legislative votes and legislative enactments. So, the privilege applied with its usual force against the discovery of even the factual documents in the Florida legislators' possession. The district court abused its discretion when it determined otherwise.

Conclusion. Because factual documents are within the scope of the privilege, which is unqualified in this kind of lawsuit, the Eleventh Circuit reversed and remanded with instructions to quash the subpoenas.