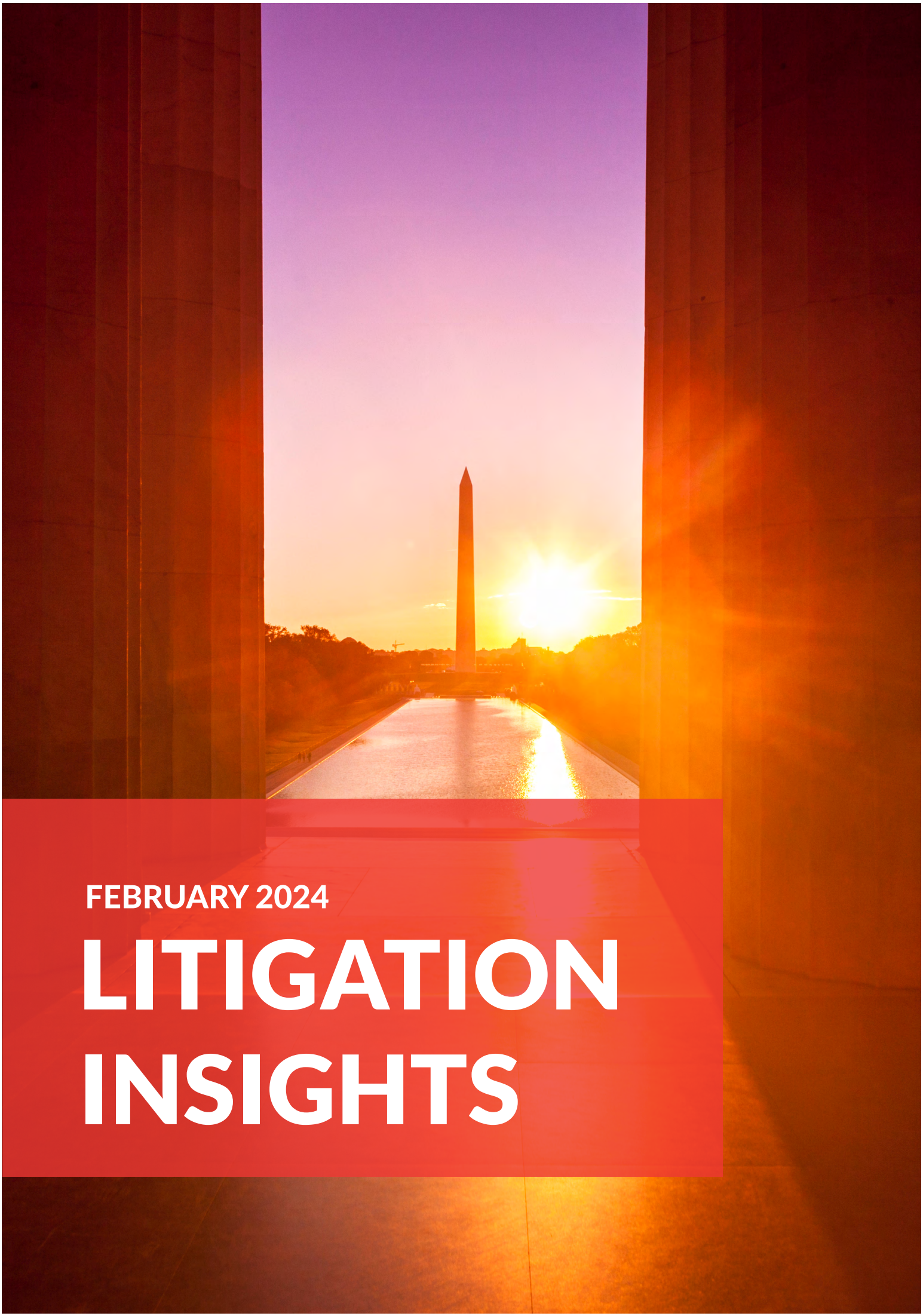

FEBRUARY 2024

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.

APPEALS

Notice of Appeal

Cruzado v. Alves

89 F.4th 64, 2023 U.S. App. LEXIS 34053 (1st Cir. Dec. 22, 2023)

Jump to full summary

The First Circuit holds that a motion to extend the time to file a memorandum of law in support of an application for a certificate of appealability can be the functional equivalent of a notice of appeal if it indicates an intent to appeal and sufficiently identifies the party taking the appeal, the judgment or order appealed from, and the court to which the appeal is taken.

ARBITRATION

Compelling Arbitration

Bedgood v. Wyndham Vacation Resorts, Inc.

88 F.4th 1355, 2023 U.S. App. LEXIS 33600 (11th Cir. Dec. 19, 2023)

Jump to full summary

The Eleventh Circuit has affirmed the denial of a defendant's motion to compel arbitration when the plaintiff's prelitigation attempt to initiate arbitration had been foiled by the defendant's own noncompliance with the parties' agreed arbitration procedure.

DISMISSAL

Stipulated Dismissal

Moses v. City of Perry

90 F.4th 501, 2024 U.S. App. LEXIS 211 (6th Cir. Jan. 4, 2024)

Jump to full summary

The Sixth Circuit holds that a person seeking to intervene is not a party within the meaning of Federal Rule of Civil Procedure 41(a)(1)(A)(ii), which authorizes voluntary dismissal by stipulation if signed by "all parties who have appeared."

Continue on next page

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By Meghan Atwood, Esq., LexisNexis Solutions Consultant on Federal Government Team

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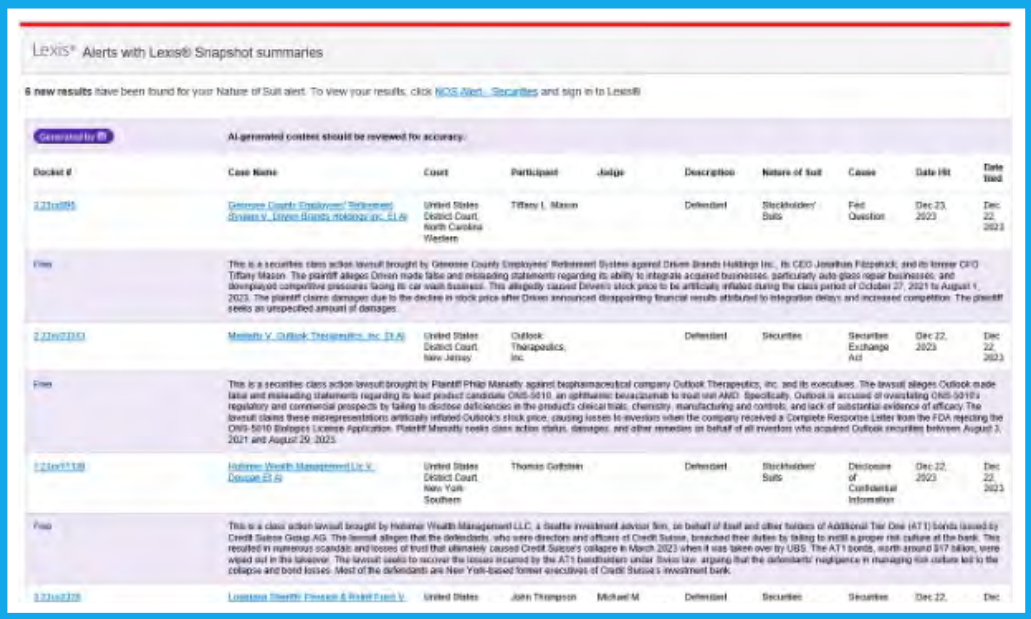

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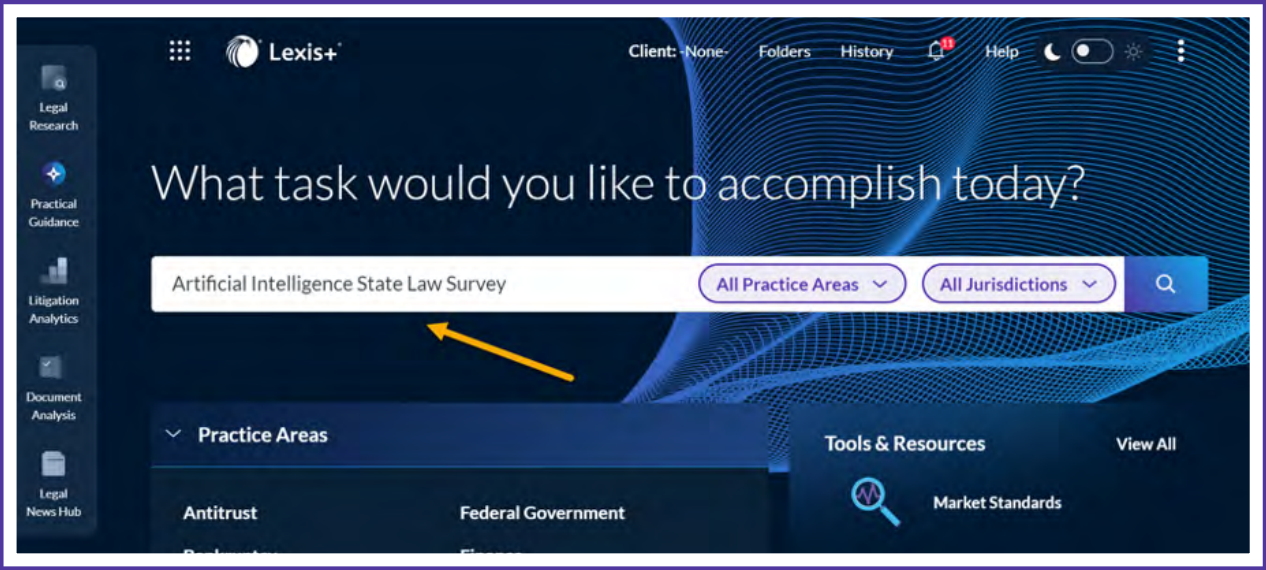
Artificial Intelligence 50 State Survey on Lexis+ Practical Guidance

Artificial Intelligence (AI) has become part of our daily conversation and it's important to be able to keep up with the enacted and notable legislation related to AI. Last month we brought you information about the Generative AI Federal and State Court Rules Tracker on Lexis+. This month we'd like to introduce you to the Artificial Intelligence 50 State Survey available via Lexis+ Practical Guidance.

With the growth of AI state lawmakers have become concerned with the potential threats and advantages related to AI tools. Laws related to AI technology have been enacted across several areas of law, including criminal employment, healthcare, and consumer privacy, just to name a few. As the technology continues to grow and evolve, we can likely expect to see more state-enacted laws. By using the State Law Survey along with the Legislative Tracker, you can stay informed about what already exists and what is to come with regard to AI and state laws.

You can find the survey by using the search box on the Practical Guidance page. Just search for "Artificial Intelligence State Law Survey" and Lexis+ will take you to a results page which includes not only the survey but several other AI-related tools. Alternatively, from the Practical Guidance start page you can select the "View All" link in the Tools & Resources box to the right of the page. A pop up menu will appear and from there just scroll all the way down to the State Law Surveys box on the bottom row. You can scroll or filter until you see the survey. Please see the included screenshots or reach out to your Solutions Consultant for more information about the Artificial Intelligence State Law Survey or any other questions you may have about your Lexis content.



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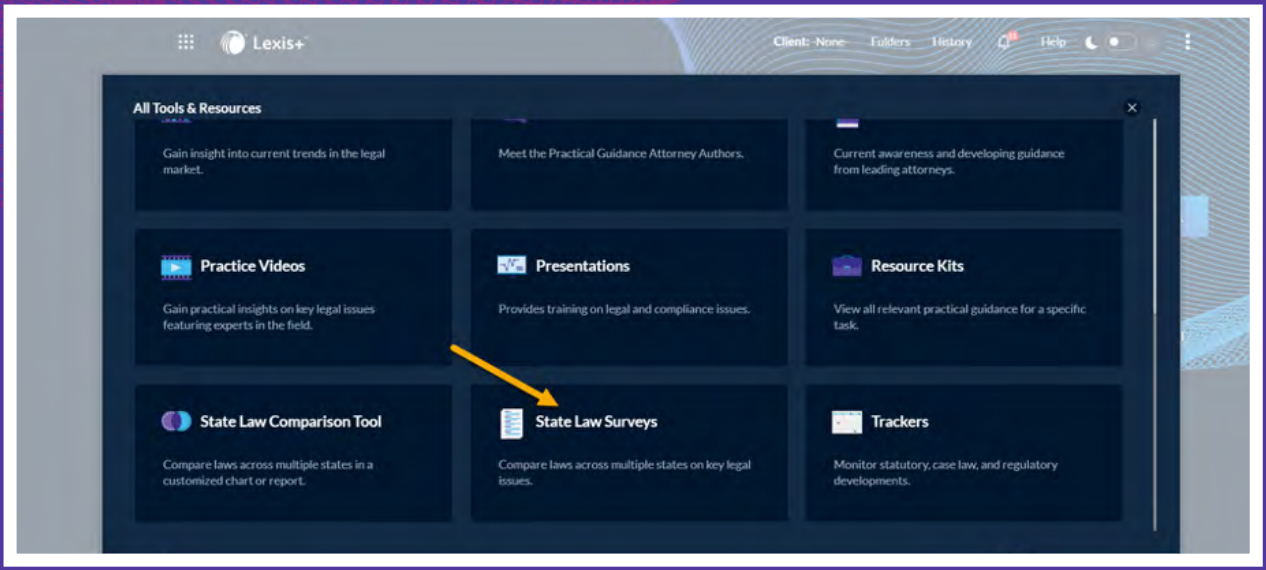

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Current Awareness Insights!

Alert: Eighth Circuit Rejects Attempt to Remove Climate Change Litigation to Federal Court

Minnesota sued a litany of fossil fuel producers in state court for common law fraud and violations of Minnesota's consumer protection statutes. The energy companies then removed the action to federal court arguing that the cases raised "substantial federal questions" as involving "transboundary pollution" claims and also that the case implicated federal officer removal. The trial court remanded the action to state court and the Eighth Circuit affirmed.

Joining multiple circuits that have rejected such efforts to invoke federal removal jurisdiction (see, e.g., Cnty. of San Mateo v. Chevron Corp.32 F.4th 733 (9th Cir. 2022)), the Eighth Circuit again rejected the arguments that federal law somehow preempted the state-law claims, that the claims arose under the federal Outer Continental Shelf Lands Act, that the case triggered federal common law, or that federal officer removal allows this jurisdictional switch. Merely characterizing the case as existing at the intersection of federal energy and environmental regulation does not mean the case, which involves fact-specific and not purely l egal issues, implicates the federal system as a whole. See Minnesota By Ellison v. American Petroleum Inst., 63 F.4th 703 (8th Cir. 2023).

Fed Civ Proc Before Trial: The Wagstaffe Group § 6-VI[D]—State Law Claim Involving Substantial Federal Question.

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APPEALS

Notice of Appeal

Cruzado v. Alves

89 F.4th 64, 2023 U.S. App. LEXIS 34053 (1st Cir. Dec. 22, 2023)

The First Circuit holds that a motion to extend the time to file a memorandum of law in support of an application for a certificate of appealability can be the functional equivalent of a notice of appeal if it indicates an intent to appeal and sufficiently identifies the party taking the appeal, the judgment or order appealed from, and the court to which the appeal is taken.

Background. This was a habeas corpus proceeding brought by a state prisoner. The district court dismissed the petition on November 3, 2021, in a memorandum and order that gave the prisoner until December 3 to file a memorandum addressing whether the court should issue a certificate of appealability (COA) [see 28 U.S.C. § 2253(c)(1)(A); Fed. R. App. P. 22(b) (COA as prerequisite to state prisoner's appeal from denial of habeas corpus)]. On November 30, the prisoner filed a motion for an extension of time until December 10 to file a memorandum in support of the issuance of a COA. The extension was granted, and the prisoner filed the memorandum on December 9. On January 4, 2022, the district court issued a COA, and the prisoner filed a notice of appeal on the same day.

Appellate Jurisdiction. As a threshold matter, the First Circuit had to decide whether the appeal should be dismissed as untimely. Generally, Appellate Rule 4(a)(1)(A) provides that a notice of appeal in a civil case (a category that includes habeas corpus proceedings) must be filed within 30 days after entry of the judgment or order appealed from [see Fed. R. App. P. 4(a)(1)(A)]. Appellate Rule 3 sets forth the necessary elements of a notice of appeal [see Fed. R. App. P. 3(c)].

It was undisputed that on January 4, 2022, the prisoner had filed a document that constituted a notice of appeal under Appellate Rule 3. But that document was not timely under Rule 4(a)(1)(A), because it was not filed within 30 days after the district court denied the prisoner's petition on November 3, 2021. However, the prisoner argued that an earlier filing—his November 30 motion to extend the time to file a memorandum in support of an application for a COA, which was filed within the 30-day period—should have been treated as the functional equivalent of a notice of appeal.

Requirements for Notice of Appeal. Appellate Rule 3(c)(1) requires that a notice of appeal name the parties taking the appeal, the judgment or order from which the appeal is being taken, and the court to which the appeal is being made [Fed. R. App. P. 3(c)(1)]. And Rule 3(c)(7) states that an appeal "must not be dismissed for informality of form or title of the notice of appeal" [Fed. R. App. P. 3(c)(7)].

Supreme Court's *Smith v. Barry* Decision. In *Smith v. Barry*, the Supreme Court held that Appellate Rule 3's requirements must be liberally construed and that even if a filing is "technically at variance with the letter of Rule 3, a court may nonetheless find that the litigant has complied with the rule if the litigant's action is the functional equivalent of what the rule requires... While a notice of appeal must specifically indicate the litigant's intent to seek appellate review," it is "the notice afforded by a document, not the litigant's motivation in filing it," that "determines the document's sufficiency as a notice of appeal" [Smith v. Barry, 502 U.S. 244, 248, 112 S. Ct. 678, 116 L. Ed. 2d 678 (1992) (internal quotation marks and brackets omitted)]. Applying those principles, the Smith Court concluded that an inmate's "informal brief" in response to a briefing order could qualify as the functional equivalent of a notice of appeal [Smith v. Barry, 502 U.S. 244, 250, 112 S. Ct. 678, 116 L. Ed. 2d 678 (1992)].

First Circuit's *Campiti* Decision. Following *Smith*, the First Circuit held, in *Campiti v. Matesanz*, that a motion for appointment of counsel was the functional equivalent of a notice of appeal. The motion in Campiti was not styled as a notice of appeal and merely requested that the district court take a step—the appointment of counsel—that

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could facilitate the later filing of a notice of appeal. But the motion did contain everything that Smith required for a filing to constitute a notice of appeal [see Campiti v. Matesanz, 333 F.3d 317, 319–320 & n.3 (1st Cir. 2003)].

In the present case, the appellate panel said that whether the prisoner's motion to extend the time to file a memorandum in support of an application for a COA constituted the functional equivalent of a notice of appeal depended on whether it was materially indistinguishable from the motion in Campiti. The court therefore compared the Campiti motion to the motion involved in the present case.

In Campiti, the First Circuit reasoned that under Smith, a filing constitutes the functional equivalent of a notice of appeal so long as it gives the pertinent information required by Appellate Rule 3 and evinces an intention to appeal. The Campiti court further explained that whether a particular type of document is the functional equivalent of a notice of appeal may depend on its content and surrounding circumstances rather than on any general rule. Applying these principles, the court concluded that the motion in Campiti both evidenced an intention to appeal and gave the pertinent information [Campiti v. Matesanz, 333 F.3d 317, 320 (1st Cir. 2003)]. The court noted that the motion for appointment of counsel in Campiti included the following language:

> I am the petitioner in the above captioned habeas corpus proceeding. My counsel . . . has been allowed to withdraw by the court. I am indigent and hereby request that the court appoint counsel to represent me for the purposes of filing a notice of appeal and a request for a certificate of appealability. A financial affidavit is attached for the court's consideration.

Based on this statement, the Campiti court concluded that the motion plainly evidenced an intention to appeal, because it asked for counsel to be appointed for the purposes of filing a notice of appeal and requesting a certificate of appealability. Moreover, the caption of the motion identified the parties. And although the motion did not specify the judgment appealed from or the appellate court, the Campiti court concluded that "here, where no doubt exists as to either, Rule 3 buttressed by latitude for a pro se litigant forgives these 'informalit[ies] of form'" [Campiti v. Matesanz, 333 F.3d 317, 320 (1st Cir. 2003) (quoting language now found in Fed. R. App. P. 3(c)(7))].

Application of *Campiti's* Principles to Present Case. Turning to the motion for an extension of time that was the focus in the present case, the First Circuit reiterated that, after Smith, whether a filing is the functional equivalent of a notice to appeal depends on the filing's content and surrounding circumstances rather than on any general rule. And after making that case-specific inquiry, the court concluded that the motion for an extension of time did qualify as the functional equivalent of a notice to appeal.

The court of appeals acknowledged that the motion in this case "would appear to have at most purported to notify the opposing party and the court of an intention to file a notice of appeal after the memorandum of law in support of the motion for the issuance of the COA had been completed." But that was sufficient notice of an intent to appeal: the motion in Campiti also did not purport to give notice that the movant was appealing at the time of the motion itself. Rather, the motion in Campiti expressly sought only to have counsel appointed for the purpose of a notice of appeal thereafter being filed. Thus, what mattered in Campiti for purposes of establishing the movant's intent to appeal was whether the motion at issue evidenced the movant's intent to appeal, even if the filing on its face contemplated that the notice of appeal itself would be filed only later [see Campiti v. Matesanz, 333 F.3d 317, 320 (1st Cir. 2003)].

The court of appeals in the present case concluded that it was evident from the content and surrounding circumstances of the motion for an extension of time that the prisoner intended to appeal, even though the motion made no reference to a notice of appeal as such. The motion stated in relevant part that "counsel for [the prisoner] states that due to a busy trial schedule, she is unable to complete the Memorandum [of Law in Support of Issuance of COA] within the time allotted" and that she sought an extension of time "from December 3, 2021 to December 10, 2021." The court of appeals found it significant that the motion not only plainly sought the extension of time

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to complete a memorandum of law in support of a COA but also sought the extension to a date after the time for filing the notice of appeal otherwise would have run. The court reasoned that if the prisoner did not intend to file the notice of appeal along with the request for the COA, then he would have had no reason to seek to extend the time to complete the work needed to file a COA to a date after the 30-day time limit for filing the notice of appeal would have run. Under the circumstances, then, the motion did provide sufficient notice of an intent to appeal.

The First Circuit panel went on to find that the motion in this case also provided the pertinent information specified in Appellate Rule 3. It explicitly named the party taking the appeal (the prisoner) because it named the prisoner and defendant in its caption [see Fed. R. App. P. 3(c)(1)(A)]. And although the motion did not name the court to which the prisoner intended to take his appeal [see Fed. R. App. P. 3(c)(1)(C)], the appellate court held, consistent with Smith's instruction to liberally construe the requirements of Rule 3, that a failure to meet this requirement is excused when there is only one court to which the appeal can be taken (in this case, the First Circuit) [see United States v. Gooch, 842 F.3d 1274, 1277 (D.C. Cir. 2016)].

The court of appeals also concluded that the motion in this case satisfied Appellate Rule 3's requirement that a notice of appeal designate the judgment or order from which the appeal is taken [see Fed. R. App. P. 3(c)(1)(B)]. The motion did not specifically state that the prisoner intended to challenge the district court's memorandum and order denying his habeas petition. But the motion did include the district court's docket number on its face, and the motion for an extension of time was the next filing on the docket after the only substantive order by the district court in the case—the order denying the habeas petition (with a companion order dismissing the case). Since that was the only order from which an appeal could have been taken, the appellate court concluded that the prisoner's motion sufficiently designated the judgment he intended to appeal.

- **Prisoner's Representation by Counsel Did Not Affect Court's Analysis.** The court of appeals noted that although the appellant in *Campiti* was a pro se litigant, the prisoner in the present case was represented by counsel. The court acknowledged that pro se litigants should be given leniency when construing the requirements of Appellate Rule 3. Nonetheless, the court emphasized that Rule 3(c)(7)'s requirement that a notice of appeal not be rejected "for informality of form or title" applies to all litigants and does not draw distinctions between those represented by counsel and those who are not. The court therefore rejected an argument that the fact that the prisoner in this case was represented by counsel provided a basis for concluding that his motion was not the functional equivalent of a notice of appeal. Still, the court closed with a note of caution for counsel: "We do not condone the failure of [appellant's] attorney to file a formal notice of appeal in timely fashion—and trust there will be no repetition of the oversight by members of the bar of this [C]ourt" (quoting *Bell v. Mizell*, 931 F.2d 444, 445 (7th Cir. 1991)).

- **Conclusion and Disposition.** Because the prisoner's motion to extend time was the functional equivalent of a notice of appeal and had been filed within 30 days of the denial of habeas relief, the First Circuit concluded that the appeal was timely. Thus assured of its own jurisdiction, the appellate court proceeded to the merits of the appeal, ultimately affirming the district court's rejection of the petition for habeas relief.

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ARBITRATION

Compelling Arbitration

Bedgood v. Wyndham Vacation Resorts, Inc.

88 F.4th 1355, 2023 U.S. App. LEXIS 33600 (11th Cir. Dec. 19, 2023)

The Eleventh Circuit has affirmed the denial of a defendant's motion to compel arbitration when the plaintiff's prelitigation attempt to initiate arbitration had been foiled by the defendant's own noncompliance with the parties' agreed arbitration procedure.

Background. The three defendants in this case—Wyndham Vacation Resorts ("Resorts"), Wyndham Resorts Development Corporation ("Development"), and WorldMark, The Club ("WorldMark")—were related corporate entities that sold and operated timeshare ownership interests in vacation properties. Each plaintiff had purchased a timeshare interest with one of the defendants, and all the purchase agreements contained nearly identical arbitration clauses. Each arbitration clause provided that any dispute between the parties would be determined exclusively and finally by individual arbitration under the Federal Arbitration Act (FAA). Each arbitration clause designated the American Arbitration Association (AAA) to administer any arbitration and to appoint an independent arbitrator under the AAA's Consumer Arbitration Rules. Each arbitration clause also included a forum-selection clause specifying Orange County, Florida, as the sole venue for arbitration, and each contract limited the seller's liability to the total amount paid under the contract.

The relevant AAA rules articulated principles and policies governing the filing, conduct, and resolution of covered disputes. Included among these rules were provisions outlining the AAA administrator's process for vetting arbitration clauses, as well as attendant administrative procedures. The rules further provided that all merits-based decisions in a particular arbitration were to be made by the arbitrator, not the administrator.

The plaintiffs who had contracts with Resorts sought to arbitrate breach-of-contract and fraudulent-inducement claims under the arbitration clauses in their contracts. After initial review, but before appointing an arbitrator, the AAA summarily rejected the plaintiffs' arbitration petitions on the ground that Resorts had "failed to comply with the AAA's policies." For example, Resorts had not registered its arbitration clause with the AAA's Consumer Clause Registry, a pre-arbitration vetting mechanism designed to ensure that arbitration clauses met the AAA's minimum due-process requirements. Having declined to administer the requested arbitrations, the AAA informed the plaintiffs that under the Consumer Arbitration Rules, they could seek judicial resolution of their claims.

The plaintiffs who had sought arbitration then filed a putative class-action lawsuit in federal district court. They were joined in that suit by other plaintiffs who had contracts with Resorts, and by plaintiffs who asserted similar claims against Development and WorldMark.

The defendants moved for an order under FAA sections 3 and 4 staying the litigation and directing arbitration before the AAA [see 9 U.S.C. §§ 3, 4]. In the alternative, the defendants asked the district court to appoint a substitute arbitrator (one not affiliated with the AAA) under section 5 of the FAA [see 9 U.S.C. § 5]. The district court denied the motion, holding that all plaintiffs could proceed with the litigation. The defendants took an interlocutory appeal [see 9 U.S.C. § 16(a)(1)(A), (B)].

Issues on Appeal. Before a panel of the Eleventh Circuit, the defendants raised four issues. First, they contended that the district court had erred in concluding that the defendants were "in default" within the meaning of FAA section 3 and thus ineligible for a stay of litigation [see 9 U.S.C. § 3].

Second, the defendants contended that they were "aggrieved" by the plaintiffs' "failure, neglect, or refusal" to arbitrate within the meaning of FAA section 4 and therefore entitled to an order compelling arbitration [see 9 U.S.C. § 4].

The defendants' third contention was that the district court erred in refusing to appoint a substitute, non-AAA-

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affiliated arbitrator under FAA section 5 [see 9 U.S.C. § 5].

The defendants' fourth contention was that the district court should not have determined the arbitrability of the underlying claims but should instead have referred that question to an arbitrator.

The Eleventh Circuit panel first addressed these four contentions with respect to the claims against Resorts.

- **Defendant Was in Default in Proceeding With Arbitration.** The Eleventh Circuit panel agreed with the district court that Resorts was "in default" within the meaning of FAA section 3 and thus ineligible for a stay of litigation. Section 3 entitles a party to stay the litigation of an action that falls within an arbitration agreement's terms unless the party is "in default in proceeding with such arbitration" [9 U.S.C. § 3].

  The appellate panel noted that the AAA declined to administer the requested arbitration because it determined that Resorts had failed to comply with the AAA's policies and rules regarding consumer claims. Relying on the AAA's determination to that effect, the district court had concluded that Resorts was "in default" with its contractually chosen forum and accordingly refused to stay litigation under FAA section 3.

  Before the court of appeals, Resorts argued that the district court erred in relying on the AAA's determination because, according to Resorts, the question whether its arbitration clause complied with AAA policies was reserved to the arbitrator, and the AAA exceeded its authority in making the default determination.

  The Eleventh Circuit panel rejected this argument. The court explained that the contracts at issue were governed by the AAA's Consumer Arbitration Rules, which expressly delegated policy-compliance determinations to the AAA administrator. And the parties' contracts did not reallocate that authority to the arbitrator. The court of appeals acknowledged that each contract with Resorts contained a delegation clause reserving to the arbitrator questions of "enforcement, interpretation, or validity" of the arbitration clause. But the AAA administrator had not opined on the clause's enforcement, interpretation, or validity. Rather, the administrator merely determined that the arbitration clause—irrespective of its enforcement, interpretation, or validity—violated AAA policies and thus declined to open its forum to the parties. The administrator's determination therefore fell outside the scope of the delegation clause.

  The court also observed that the fact that the AAA's determination lacked specificity (it did not identify precisely which policies Resorts had violated) did not undermine its legitimacy. Accordingly, the court of appeals held that the AAA was empowered to conclude that the arbitration clause in the contracts with Resorts violated its policies, and the district court therefore did not err in relying on the AAA's determination to conclude that Resorts was "in default" within the meaning of FAA section 3.

- **Defendant Was Not Aggrieved by Failure to Arbitrate.** The Eleventh Circuit panel next addressed the contention that the district court erred in refusing to direct arbitration in the AAA under section 4 of the FAA. That section provides that "[a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement" [9 U.S.C. § 4]. The court of appeals explained that section 4 prescribes two conditions for relief: (1) the party resisting arbitration must have failed, neglected, or refused to arbitrate; and (2) the party seeking an order directing arbitration must have been aggrieved by that failure, neglect, or refusal [see Cmty. State Bank v. Strong, 651 F.3d 1241, 1256 (11th Cir. 2011)].

  The court of appeals observed that there were two groups of plaintiffs who had contracts with Resorts: those who had petitioned the AAA to arbitrate, and those who had not. The court opined that with respect to the first group, Resorts was not aggrieved by an alleged failure, neglect, or refusal to arbitrate. That is, because each of these plaintiffs had attempted to arbitrate, there was no failure, neglect, or refusal by which Resorts could have been aggrieved for purposes of section 4. Those plaintiffs had sought to arbitrate their claims in accordance with their contracts, and they were thwarted in that pursuit by the conduct of Resorts itself.

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The court applied similar reasoning with respect to the group of plaintiffs who had identical contracts with Resorts but who had not formally sought to arbitrate. Even though these plaintiffs had failed, neglected, or refused to arbitrate—thus meeting the first condition for the application of section 4—Resorts could not meet the second condition, because it was not aggrieved by the failure to arbitrate. The court of appeals explained that to the extent that Resorts was aggrieved, it was aggrieved either by its own failure to bring its arbitration clause into compliance with AAA policies or, at the very least, by the AAA's decision to that effect, not by the conduct of any plaintiff.

- **No Appellate Jurisdiction Over Substitute-Arbitrator Issue.** Resorts separately argued that even if the district court correctly applied FAA sections 3 and 4, it erred in refusing to appoint a substitute, non-AAA-affiliated arbitrator under FAA section 5 [see 9 U.S.C. § 5]. The Eleventh Circuit panel, however, concluded that it lacked jurisdiction to consider that issue in this interlocutory appeal.

  In general, the court of appeals may review only final judgments [see 28 U.S.C. § 1291; Wajnstat v. Oceania Cruises, Inc., 684 F.3d 1153, 1155 (11th Cir. 2012)]. The FAA provides some exceptions to this final-judgment rule. In particular, the FAA provides for immediate appeal of an order "refusing a stay of any action under section 3" or "denying a petition under section 4... to order arbitration to proceed" [9 U.S.C. § 16(a)(1)(A), (B)]. But importantly, the FAA is silent on whether a party may immediately appeal an order refusing to appoint a substitute arbitrator under section 5. Because the FAA specifically authorizes interlocutory appeals of section 3 and section 4 orders, but does not mention section 5 orders, the court of appeals concluded that it lacked jurisdiction over the district court's substitute-arbitrator decision.

  The court of appeals went on to find that it also lacked pendent appellate jurisdiction over the section 5 order, because the nonappealable section 5 ruling was not inextricably intertwined with the appealable section 3 and section 4 rulings, nor was review of the section 5 ruling necessary to ensure meaningful review of the appealable rulings [see Swint v. Chambers Cnty. Comm'n, 514 U.S. 35, 51, 115 S. Ct. 1203, 131 L. Ed. 2d 60 (1995); King v. Cessna Aircraft Co., 562 F.3d 1374, 1379 (11th Cir. 2009)]. "We needn't resolve the Section 5 issue to reject Resorts' contentions with respect to Sections 3 and 4, both of which are resolvable by reference to statutory language and the AAA Consumer Arbitration Rules alone."

- **Appeal Did Not Present Question of Arbitrability.** The Eleventh Circuit panel went on to hold that the arbitrability of the claims against Resorts was not an issue on this appeal. Resorts contended that an arbitrator, rather than the district court, should have decided the arbitrability of the plaintiffs' underlying breach-of-contract and fraudulent-inducement claims. But the appellate court pointed out that the district court did not decide—and had no need to decide—the arbitrability issue. Instead, it decided the case on threshold procedural grounds, in particular finding that the AAA had closed its doors to the plaintiffs because of the refusal by Resorts to comply with AAA policies. The district court thus held on procedural grounds that the defendants could not avail themselves of arbitration through the AAA, and it accordingly directed the parties to litigation.

- **Conclusion and Disposition.** For the foregoing reasons, the Eleventh Circuit panel affirmed the district court's denial of the motion by Resorts to stay the litigation and direct arbitration. The plaintiffs who asserted claims against Resorts could therefore proceed to litigate those claims.

  The appellate panel then turned its attention to the claims against Development and WorldMark. The court of appeals noted that the district court had entered the same orders concerning the claims against Development and WorldMark as it had on the claims against Resorts. However, although the three defendants used similar arbitration clauses, they were not identical, and although the defendants were affiliated with one another, they did maintain separate corporate identities. Thus, the AAA might reject a petition to arbitrate claims against Development or WorldMark just as it rejected the petitions involving Resorts. However, because no plaintiff had actually petitioned to arbitrate claims against Development or WorldMark, the AAA had not actually ruled that either was in violation of relevant AAA rules. On the current record, therefore, the district court lacked a sufficient foundation to deny Development and WorldMark's motions under FAA sections 3 and 4. Accordingly, the court of appeals vacated the district court's orders on those motions and remanded for further proceedings.

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DISMISSAL

Stipulated Dismissal

Moses v. City of Perry

90 F.4th 501, 2024 U.S. App. LEXIS 211 (6th Cir. Jan. 4, 2024)

The Sixth Circuit holds that a person seeking to intervene is not a party within the meaning of Federal Rule of Civil Procedure 41(a)(1)(A)(ii), which authorizes voluntary dismissal by stipulation if signed by "all parties who have appeared."

Background. Plaintiffs Liberty Wellness, LLC, and Jonathan Moses sued the City of Perry, Michigan, because the City refused to implement a voter-approved city-charter amendment allowing for eight marijuana facility licenses and regulating license applications. Liberty Wellness submitted two applications in compliance with the amendment in November 2021 and then resubmitted them in July 2022. In a July letter, the City's attorney told Liberty Wellness that the amendment was "unlawful," and the City would not enact it. On September 1, 2022, the City Council enacted ordinances that provided for a single marijuana facility. The City opened up an application process under the ordinances in the fall of 2022 and awarded a conditional marijuana retailer license to the only applicant, Local Roots. The City refused the earlier applications of Liberty Wellness.

Liberty Wellness and Jonathan Moses sued the City of Perry, seeking a declaration that the charter amendment was "valid" and "binding." Moses argued that the City violated his "right to engage in direct democracy" as a voter. Liberty Wellness wanted to operate marijuana establishments in line with the 2021 amendment.

Local Roots moved to intervene on February 9, 2023. Local Roots claimed it did so mere "days" after learning that the original parties were negotiating a settlement. The district court ordered the original parties to respond to the motion by March 10. Instead, the original parties settled and dismissed the case before that deadline. On March 3, the district court ordered that "[u]pon the immediate formal filing of a Notice of Settlement or submittal of a proposed Stipulated Order of Dismissal, the current Motion to Intervene will be mooted." That same day, the City filed an answer, the original parties filed a stipulation of dismissal with prejudice, and the district court signed an order dismissing the case with prejudice. Neither the stipulation nor the district court's order provided a way to reopen the case or undo the dismissal.

The district court retained jurisdiction to enforce the terms of the settlement agreement for three years, until 2026, at the parties' request. Among other things, the settlement agreement required the City to "enact such ordinances and take such other actions as are necessary to allow an additional conditional marijuana retailer license to be awarded to Liberty." The parties stipulated to bar any lawsuits by the plaintiffs against the City arising from the ordinances or the 2021 amendment but not "an action brought by a party to enforce the terms of this Stipulation and Order, and/or to enforce the terms of the Settlement Agreement." The district court effectively denied the motion to intervene as moot, given the settlement and dismissal. Local Roots appealed "from the orders effectively denying its Motion to Intervene and dismissing the case entered on March 3, 2023."

Stipulation of Dismissal Was Valid Without Prospective Intervenor's Signature. The Sixth Circuit noted that an invalid stipulation of dismissal cannot moot a pending motion to intervene. Local Roots argued the stipulation was invalid because Local Roots did not sign it. Rule 41(a)(1)(A)(ii) provides that a plaintiff may dismiss an action without a court order by filing a stipulation of dismissal signed by "all parties who have appeared." The City consented to the dismissal; Local Roots did not.

The Sixth Circuit explained that a nonparty does not become a "party" under Rule 41 as soon as it moves to intervene. Rather, a nonparty does not become a party until the district court grants the motion to intervene. Rule 24, which addresses intervention, uses "existing parties," "original parties," and "parties" interchangeably, and as a different category from proposed intervenors. For intervention of right, "existing parties" must not adequately represent the proposed intervenor's interest [Fed. R. Civ. P. 24(a)(2)]. For permissive intervention,

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the court must consider prejudice to "the original parties' rights" [Fed. R. Civ. P. 24(b)(3)]. Furthermore, would-be intervenors must serve their motion to intervene on "the parties" [Fed. R. Civ. P. 24(c)]. Rule 24 refers to the proposed intervenor as "the movant" or "anyone."

Federal Rule of Civil Procedure 7.1, concerning disclosure statements, also treats "parties" as separate from those seeking to intervene. Rule 7.1(a)(2) requires "a party or intervenor" in a diversity action to file a specific disclosure statement. Rule 7.1(b) requires a "party, intervenor, or proposed intervenor" to file its disclosure statement at certain times. The court reasoned that the rule's language would be superfluous if "parties" by default included proposed intervenors.

The Sixth Circuit concluded that the stipulation of dismissal was valid. Local Roots was not a party, because the district court had not yet granted its motion to intervene. Local Roots therefore did not have to sign the stipulation for it to be effective.transfer when both districts are equally capable of applying the relevant law. Federal judges routinely apply the law of states other than the one in which they sit, and they hesitate to find that that this factor weighs in favor of transfer unless there are exceptionally arcane features of the other state's law. The district court had held that this factor weighed against transfer because some of the plaintiff's claims were based on Texas law. The court of appeals, however, concluded that the district court committed a clear abuse of discretion by so holding without first making a good-faith attempt to ascertain which jurisdiction's law will apply, even when the outcome of that choice-of-law analysis is not entirely clear. Moreover, even if Texas law unequivocally governed the state-law claims, there was no showing of any "arcane features" of Texas law that would make its application difficult for a California court. Thus, this factor was at most neutral.

Avoidance of unnecessary problems of conflict of laws. No one contested the district court's conclusion that this eighth factor was neutral.

- **Stipulated Dismissal Mooted Motion to Intervene.** The Sixth Circuit acknowledged that a stipulation of dismissal does not strip the district court of all jurisdiction. The district court retains jurisdiction to hear motions under Rule 60(b), or motions regarding collateral issues like costs, attorney's fees, contempt charges, or sanctions. None of these bases for jurisdiction applied to Local Roots. Instead, Local Roots argued the dismissal was not final because it was a conditional dismissal order. A conditional dismissal order lets a party move to reopen within a set time if a condition occurs, and it does not become final until the time to satisfy the condition expires. For example, a conditional dismissal could allow parties to move to reopen if a settlement agreement is not finalized by a certain date. Such an order effectively makes dismissal contingent on a condition subsequent.

  The Sixth Circuit explained that conditional dismissal is different from retaining ancillary jurisdiction to enforce a settlement agreement. Enforcement of a settlement agreement is a different remedy from the mere reopening of the dismissed suit. Furthermore, parties can enforce a settlement by filing a new complaint, without ever reopening the dismissed case.

  The district court did not issue a conditional dismissal order in this case. The stipulation specifically permitted a new lawsuit "brought by a party... to enforce the terms of the Settlement Agreement," and the district court retained jurisdiction to enforce the settlement. However, neither the stipulation nor the court's order identified a condition subsequent that could reopen the whole case and prevent the dismissal from taking effect. The parties dismissed the action with prejudice. And nothing suggested that the dismissal lacked full effect until expiration of the district court's ancillary jurisdiction in 2026.

  In other words, the original parties stipulated to a final dismissal that was effective immediately, not a conditional dismissal that became effective only later. The district court retained jurisdiction only to enforce the settlement agreement. The dismissal therefore mooted Local Roots's motion to intervene.