

APRIL 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.

DISMISSAL

Involuntary Dismissal for Failure to Obey Court Orders *Vivaldi Servicios de Seguridad, Inc. v. Maiso Grp., Corp.*

93 F.4th 27, 2024 U.S. App. LEXIS 3461 (1st Cir. Feb. 14, 2024)

[Jump to full summary](#)

The First Circuit ruled that a district court ordinarily may not dismiss a case for counsel's unexcused failure to appear at the final pretrial conference if that was the first and only instance of noncompliance and the district court did not consider a lesser sanction.

FOREIGN SOVEREIGN IMMUNITIES ACT

COVID Litigation

Missouri ex rel. Bailey v. People's Republic of China

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The Eighth Circuit held that the Foreign Sovereign Immunities Act protects the People's Republic of China against claims of negligence in connection with the spread of COVID-19, but that immunity does not extend to claims that China manipulated the market for personal protective equipment during the pandemic.

PRIVILEGES

Legislative Privilege

La Union del Pueblo Entero v. Abbott

93 F.4th 310, 2024 U.S. App. LEXIS 3789 (5th Cir. Feb. 16, 2024)

[Jump to full summary](#)

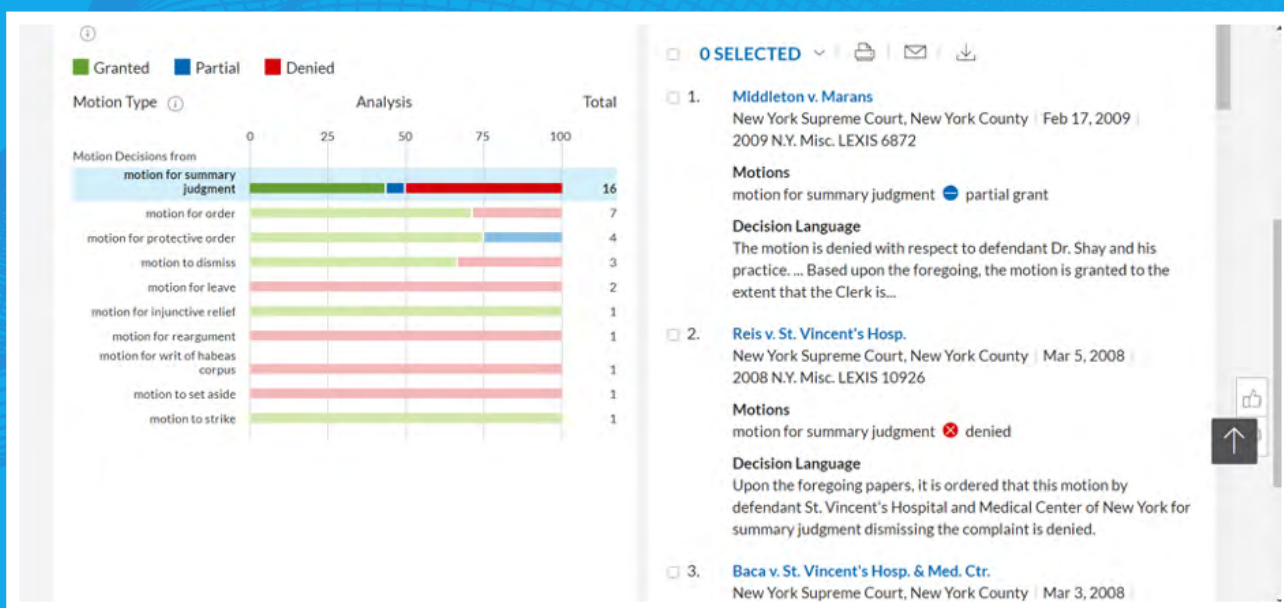
The Fifth Circuit held that when a legislator brings third parties into the legislative process, those third parties may invoke the legislative privilege on that legislator's behalf for acts done for or at the direction of the legislator.

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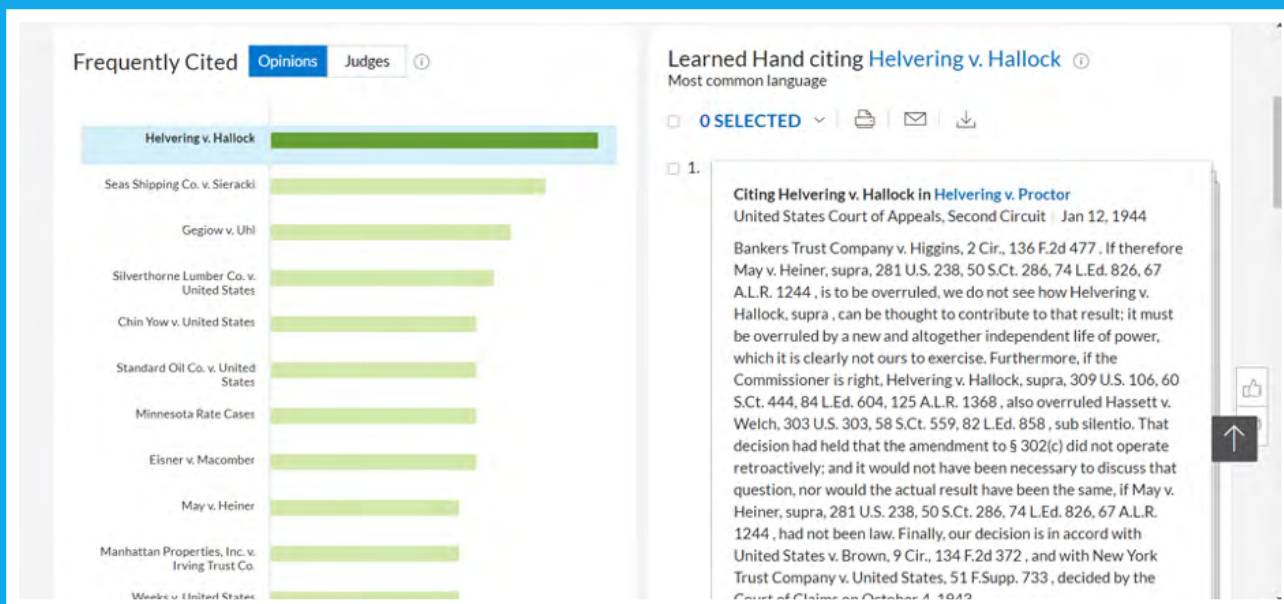
LexisNexis Context

Context is LexisNexis’ language-based legal analytics solution, providing deep insight into trends and tendencies for judges, courts, attorneys and expert witnesses. This article will provide a brief look at each of these options.

Context for Judges provides an Overview, Analytics, and relevant Documents. The first category provides a brief curriculum vitae for the judge – education, judicial and legal experience, case load and areas of law for that case load. Documents provides an easy way to find cases involving the judge, including both opinions and dockets as well as expert witness rulings. It also offers quick access to legal news and secondary sources discussing the judge. Analytics offers two categories. The first, Motion Language, provides an analysis of the judge’s rulings in various motion types, with links to the actual ruling language.

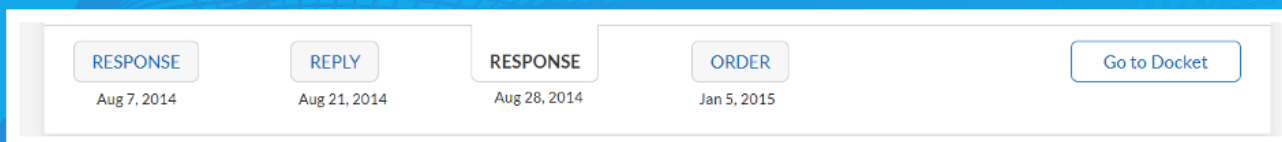


The second option shows which court cases and other judges your subject most often cites, with linked case excerpts. Here is an example for Learned Hand.



Context for Courts provides much of the same with regards to Analytics and Documents. The Overview page will provide essential court facts, including active judges, jurisdiction and location in addition to case load and area of law statistics.

Context for Attorneys offers a similar Overview, with information about education, experience, and litigation by areas of law. It adds in statistics of litigation by court, bar information and quick links to specific document types involving the attorney. There is also a Documents tab that provides more in-depth access to cases, dockets, briefs, pleadings and motions involving the attorney, as well directories, legal news and secondary sources that mention them or that they wrote. This page has robust filters, allowing you to quickly find, for instance, briefs they wrote on a specific subject, for a specific court or judge, etc. The Arguments tab is unique to attorneys. It provides a list of their briefs, pleadings and motions, complete with LexisNexis headnotes to allow you to branch out to other similar documents. It also provides links to other documents in a motion trail. For instance, it will link to prior motions, replies, orders, etc. as well as to the docket itself.



Context for Expert Witnesses starts with an in-depth overview. This will include the expected – education, certifications, professional experience. It will also provide links to their own curriculum vitae, as well as case load by year, area of law and court. Additionally, it leads off with analytics of their typical hiring parties – how often are they hired by the plaintiff, defendant, or someone else? And in what subject areas? Next, there is a Challenges tab with details for any challenge to their expert status. This tab shows how often they were challenged, on what basis, with the specific result per challenge. There is also a display of relevant language from the court’s decision on the challenge, with a link to the full ruling.

Overall Challenges Outcome Analysis (14)

■ Positive ■ Negative ■ Unknown

29%
 29%
 42%

Context detects a **positive** court analysis of an expert when the language of the court admits an expert's testimony, or weights it heavily. It detects a **negative** court analysis of expert when the language of the court excludes or discounts the expert's testimony.

- 2. **United States v. Maxwell**
 United States District Court, New York Southern | Nov 21, 2021
Summary
 Motion to exclude granted in part denied in part.
Court Language
 'With this law in mind, the Defense explains that Dr. Dietz 's credibility testimony is relevant primarily to argue that Dr. Rocchio improperly believed her clients' claims of sexual abuse. ... Third, Dr. Dietz 's opinion on false memories rests on the research of Dr. Loftus . Because the Court will admit Dr. Loftus 's testimony on false memories, the Court will preclude Dr. Dietz 's testimony on the same issue as needlessly cumulative and causing undue delay.'
- 3. **United States v. Wells**
 United States District Court, Alaska | Jul 17, 2019
Summary
 Motion to exclude denied with limitations.
Court Language
 'The government asserts that because it will not be using the term "workplace violence" at trial and will not be calling its workplace violence profiler (Dr. Meloy) from the first trial, Dr. Dietz 's testimony about workplace violence is not relevant. ... • The motion regarding Dr. Dietz at Docket 975 is DENIED with the following limitations: Dr. Dietz may testify about workplace violence and his critiques of Mr.

Trial Level Challenges ⓘ

Cases	Methodology	Qualification	Relevance	Procedural	Analysis
United States v. Maxwell	●		●		✖
United States v. Wells	●	●	●		✖
O'Rourke v. Lizzaraga	●				✔

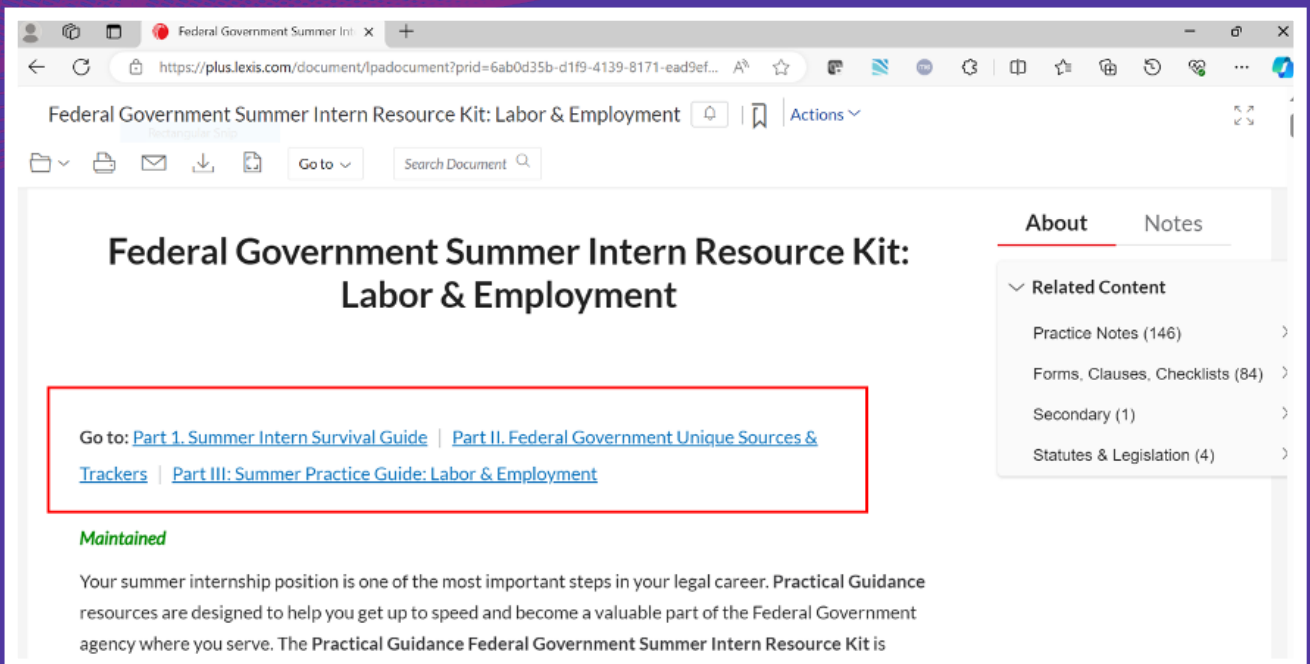
There is an Experience tab, allowing you to drill down to documents based on document type and specific subject areas, e.g., opinions in cases involving the expert and the subject of forensic psychiatry. And finally, a Document tab which provides access to every document on LexisNexis – cases, news, briefs, directories, etc. – by or about your expert.

→ Federal Government Summer Intern Resource Kits on Practical Guidance

By Marisa Beirne

Federal Government summer intern positions are one of the most important steps in your legal career. This year, **Practical Guidance** has carefully curated Resource Kits that are designed to assist Federal Government summer interns in accomplishing their work tasks. In general, **Practical Guidance** resources are designed to help you get up to speed and become a valuable part of the Federal Government agency where you serve. The **Practical Guidance Federal Government Summer Intern Resource Kits** are customized to provide extensive coverage of what you need to know to excel in a Federal Government agency and complete daily tasks efficiently and successfully.

This resource kit consists of three sections: **Summer Intern Survival Guide**, **Federal Government Unique Sources & Trackers**, and **Summer Practice Guides**.



Federal Government Summer Intern Resource Kit: Labor & Employment

Go to Search Document

Federal Government Summer Intern Resource Kit: Labor & Employment

Go to: [Part 1. Summer Intern Survival Guide](#) | [Part II. Federal Government Unique Sources & Trackers](#) | [Part III: Summer Practice Guide: Labor & Employment](#)

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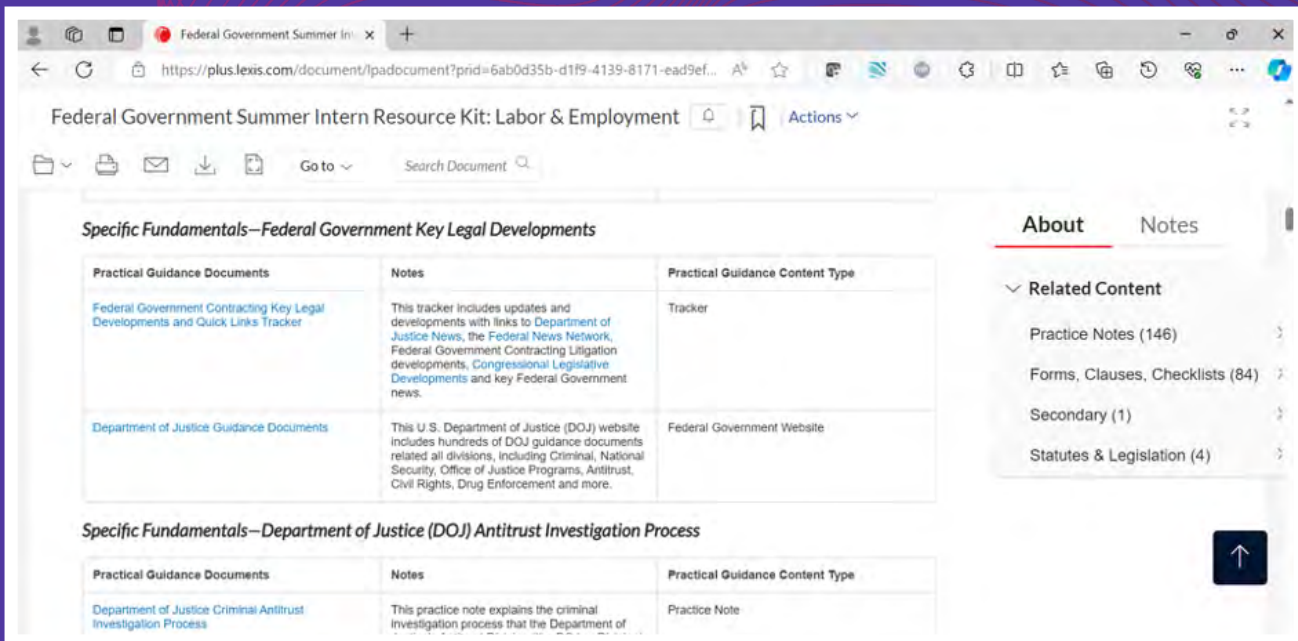
Your summer internship position is one of the most important steps in your legal career. **Practical Guidance** resources are designed to help you get up to speed and become a valuable part of the Federal Government agency where you serve. The **Practical Guidance Federal Government Summer Intern Resource Kit** is

About **Notes**

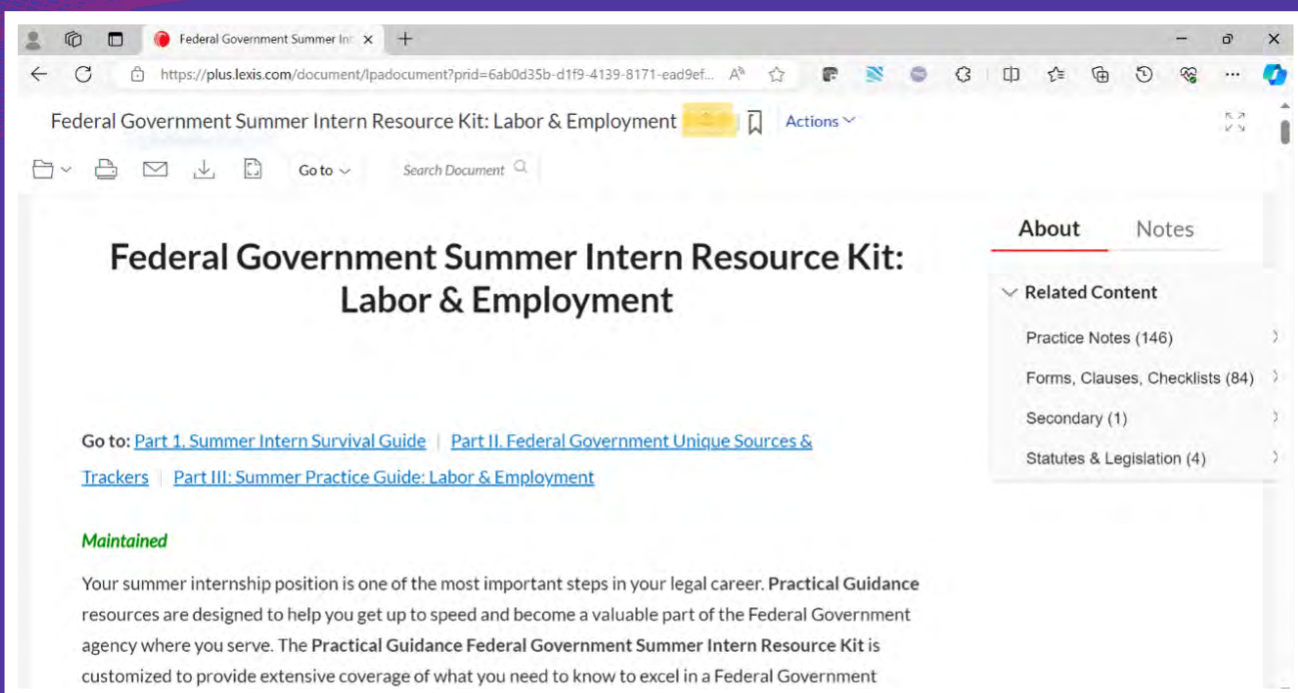
Related Content

- Practice Notes (146) >
- Forms, Clauses, Checklists (84) >
- Secondary (1) >
- Statutes & Legislation (4) >

The first section, **Summer Intern Survival Guide**, provides professional development and career support with practical tips prepared by **Practical Guidance** experts. The second section, **Federal Government Unique Sources & Trackers**, is a compilation of unique fundamental **Practical Guidance** materials that are specifically related to certain Federal Government agencies. This section offers guidance, sources, and trackers designed to familiarize interns with specific agencies. The third section, **Summer Practice Guide**, provides summer interns with a list of key Resources, Practice Notes, Articles, Checklists and specific guidance in their area of interest. See the screenshot below for a sneak preview of what is contained in each resource kit.



Don't forget, on Practical Guidance researchers are able to set Alerts on each Resource Kit so that they are continuously updated on new information, practice notes, and trackers that are added to the kit. Check out the screenshot below for the highlighted bell which interns can utilize to set up Alerts.



There are currently ten live Federal Government Summer Intern Resource Kits which include: Tax, Real Estate, Life Sciences, Labor and Employment, Intellectual Property & Technology, Healthcare, Financial Services Regulations, Energy and Utilities, Data Security and Privacy, and Construction with more Resource Kits being added!

Through each of the Summer Intern Resource Kits, Federal Government interns have access to content and materials designed to help them to achieve success at their agency! Check them out today and makes sure to spread the word with your Federal Government Summer Interns.

WIN WITH JIM WAGSTAFFE

Current Awareness Insights!

Alert: District Courts Have Authority Under 28 U.S.C. §1915(a)(1) to Set a Partial Filing Fee

Ordinarily, the fee for filing this civil action is \$ 402: a \$350 filing fee and a \$52 administrative fee. However, 28 U.S.C. § 1915(a)(1).grants district courts the authority to allow the filing of a civil case “without prepayment of fees...by a person who submits an affidavit that the person is unable to pay such fees. Here, in response to his application under Section 1915(a)(1), the plaintiff, a non-prisoner, was ordered to pay a \$100 filing fee.

On appeal, plaintiff argued that district courts may either make a plaintiff pay the full fee or waive the fee entirely but may not impose a partial fee. The Ninth Circuit disagreed finding district courts have the discretion to set a partial fee. Here, based on the facts set forth in the application concerning Plaintiff’s assets the district court’s determination that a \$100 filing fee was fair and appropriate was “not implausible, illogical, or unsupported by the record” and as such was not an abuse of discretion. *Hymas v. U.S. Dep’t of the Interior*, 73 F.4th 763 (9th Cir. 2023).

Fed Civ Proc Before Trial: The Wagstaffe Group [§ 17-XVIII\[B\]\[3\], 17.566](#)—Parties Appearing in Forma Pauperis.

DISMISSAL**Involuntary Dismissal for Failure to Obey Court Orders*****Vivaldi Servicios de Seguridad, Inc. v. Maiso Grp., Corp.***

93 F.4th 27, 2024 U.S. App. LEXIS 3461 (1st Cir. Feb. 14, 2024)

The First Circuit ruled that a district court ordinarily may not dismiss a case for counsel's unexcused failure to appear at the final pretrial conference if that was the first and only instance of noncompliance and the district court did not consider a lesser sanction.

- ▼ **Background.** The plaintiff filed a complaint alleging RICO violations, pursuant to 18 U.S.C. §§ 1962 and 1964, and related state-law claims on February 6, 2018. The defendants moved to dismiss shortly after, and the district court agreed; however, it granted the motion without prejudice, permitting the plaintiff to file an amended complaint. After the plaintiff did so, the case proceeded to discovery, and the district court resolved the few discovery issues that arose before it.

Up until the final pretrial conference, the district court did not note a single noncompliant act by any of the parties. At the conference, held by video teleconferencing on February 23, 2023, the plaintiff's counsel inexcusably failed to appear. In a succinct minute entry, the district court noted, "Case Called. Defense counsel present. The plaintiff's counsel does not appear. Case is non-suited[] for proceedings held before Judge William G. Young."

The plaintiff's counsel filed a motion to clarify the district court's decision, asking if, in fact, the district court dismissed the case outright. In this motion, the plaintiff's counsel informed the district court that he was unable to connect for reasons beyond his control. On March 27, 2023, the district court denied the motion via minute entry:

Motion denied. There is nothing to clarify. This case was dismissed due to the failure of plaintiff's counsel to appear at a duly scheduled final pretrial conference notwithstanding repeated attempts to contact him. If this motion was intended to be treated as a motion for reconsideration, it is denied as wholly unsupported.

The district court then entered judgment against the plaintiff, and the plaintiff appealed.

- ▼ **Dismissal for First Failure to Appear Was Improper.** The First Circuit noted that a district court, as part of its inherent power to manage its own docket, may dismiss a case sua sponte for any of the reasons prescribed in Rule 41(b). However, dismissal under Rule 41(b) is warranted only if a plaintiff's misconduct has been extreme or contumacious.

The court explained that dismissal should not be viewed either as a sanction of first resort or as an automatic penalty for every failure to abide by a court order. The First Circuit has repeatedly made clear that dismissal with prejudice for want of prosecution is an extreme sanction and should not be imposed easily. Although the choice of an appropriate sanction must be handled on a case-by-case basis, within the court's discretion, the district court's authority to manage its docket must be balanced against the larger concerns of justice, including the strong presumption in favor of deciding cases on the merits. Thus, a district court should consider several factors before entertaining dismissal, including but not limited to the severity of the violation, the deliberateness of the misconduct, mitigating excuses, prejudice to the other side and to the operations of the court, and the adequacy of lesser sanctions. With the presumption in favor of resolving cases on their merits in mind, dismissal should be employed only after the district court has determined that none of the lesser sanctions available to it would truly be appropriate.

Further, the First Circuit and others have looked unfavorably on district courts dismissing cases sua sponte without showing a pattern of contumacious conduct, contemplating or giving a lesser sanction, warning the disruptive party that it may be sanctioned, or, at the very least, developing a record showing that they weighed

the relevant factors seriously. For example, in *Crossman v. Raytheon Long Term Disability Plan*, the court reversed the district court's dismissal of the case based on an attorney's single failure to appear at a hearing, because the record showed no pattern of the plaintiff's recalcitrance or prejudice to the district court or the defendant, and the district court did not consider lesser sanctions [*Crossman v. Raytheon Long Term Disability Plan*, 316 F.3d 36, 39–40 (1st Cir. 2002)]. The court gave examples from other circuits as well. In *Tolbert v. Leighton*, the Ninth Circuit reversed a district court's sua sponte dismissal of a plaintiff's case when (1) the only evidence of dilatoriness was the attorney's failure to attend a pretrial conference, (2) the court had not warned that failure to attend would create a risk of dismissal, and (3) the case had not been pending long [*Tolbert v. Leighton*, 623 F.2d 585, 587 (9th Cir. 1980)].

In this case, counsel's nonappearance at the final pretrial conference was the first and only instance of noncompliance by the plaintiff or its counsel of record. The district court gave no notice that failure to appear would result in dismissal, the record contained no evidence that the defendants were prejudiced by the delay, and the district court did not try less dire alternatives before resorting to dismissal. The district court thus erred in dismissing the case under those circumstances.

Although the district court mentioned that it made "repeated attempts to contact" the plaintiff's counsel, those appear to have been made contemporaneously with the final pretrial conference. Hence, absent any other indication in the record, the appellate court refused to conclude that these were separate and repeated violations that amounted to contumacious conduct worthy of dismissal. Further, while the district court discredited the plaintiff's counsel's justification for failing to appear (that he could not connect to the video conference), this amounted to a sole violation of a court order, which should not lead to an "automatic" dismissal.

The court emphasized that counsel and parties are not entitled to one "get-out-of-jail-free pass" to violate court orders. To the contrary, the district court had a number of alternative lesser sanctions it could employ. It could have, for example, fined counsel, awarded attorney's fees to the opposing party, or rescheduled the conference with a warning that any future dilatory behavior would result in more severe consequences. What it may not do is immediately dismiss a case upon a single, inadvertent violation of a court order and without even considering lesser sanctions. The appellate court again emphasized the strong presumption in favor of deciding cases on the merits.

Conclusion. Therefore, the First Circuit vacated the district court's dismissal order and remanded for further proceedings.

FOREIGN SOVEREIGN IMMUNITIES ACT

COVID Litigation

Missouri ex rel. Bailey v. People's Republic of China

90 F.4th 930, 2024 U.S. App. LEXIS 636 (8th Cir. Jan. 10, 2024)

The Eighth Circuit held that the Foreign Sovereign Immunities Act protects the People's Republic of China against claims of negligence in connection with the spread of COVID-19, but that immunity does not extend to claims that China manipulated the market for personal protective equipment during the pandemic.

- ▼ **Background.** The COVID-19 pandemic led to a tragic loss of life and had financial effects worldwide. The State of Missouri alleged that China's negligence led to the virus's escape from the laboratories at the Wuhan Institute of Virology and therefore it was to blame for COVID-19.

Missouri's complaint alleged that China allowed the virus to spread all over the world and engaged in a campaign to keep other countries from learning about it. In the meantime, the Chinese government allegedly bought up masks and other types of personal-protective equipment (PPE), and such hoarding of the PPE allowed China to sell lower-quality masks as the outbreak spread.

Missouri sued various Chinese entities in the U.S. District Court for the Eastern District of Missouri, seeking damages for the thousands of lives Missouri lost during the pandemic, and the tens of billions of dollars in economic damage that the state suffered.

None of the defendants appeared in court, not even through counsel. Their absence led the clerk of court to enter a default.

The default never became a judgment, however, because the district court questioned its own subject-matter jurisdiction under the Foreign Sovereign Immunities Act (FSIA) [28 U.S.C. § 1330]. It concluded that each of the defendants had immunity, which both deprived it of subject-matter jurisdiction and required dismissal of every claim in Missouri's complaint. Missouri appealed.

- ▼ **All Defendants Qualified as Foreign States for Purposes of FSIA.** The Eighth Circuit began by noting that the FSIA sets the ground rules for when American courts may exercise jurisdiction over a foreign state.

It then went through all of the defendants and determined that each defendant qualified as a foreign state for purposes of the Act because each was either a part of China's official government, a political subdivision, or a governmental agency or instrumentality.

The People's Republic of China was the "easiest call," being the country's officially recognized government, the "body politic that governs the territory." The National Health Commission, the Ministry of Emergency Management, and the Ministry of Civil Affairs were parts of the government and therefore also qualified.

Although the court acknowledged that the Chinese Communist Party "may look like a nongovernmental body at first glance," it found that it exercised direction and control over the actions of all other defendants, including China's official government. It thus was in substance the same "body politic that governs China," and the Eighth Circuit held it to be a foreign state.

The Eighth Circuit then noted that the definition of "foreign state" in the Act covers other entities, including a "political subdivision of a foreign state" [see 28 U.S.C. § 1603(a)]. This would include ministries, and also provincial and township level bodies like the People's Government of the Hubei Province and the People's Government of Wuhan City.

Finally, other entities included in the Act's definition of "foreign state" would be "agencies and instrumentalities" [28 U.S.C. § 1603(a)], which, unlike political subdivisions, are separate legal persons from the government itself. The court found that the final two defendants, the Wuhan Institute of Virology and the Chinese Academy of Sciences, were legally separate from the government, but still closely enough connected to qualify as "organs" of the government [see 28 U.S.C. § 1603(b)(1), (2)]. The complaint "[drove] this point home by alleging that they are under the 'control' of the Communist Party and act as 'agents' of the Chinese government."

- ▼ **Noncommercial-Tort Exception Did Not Apply.** The Eighth Circuit indicated that because each defendant was found to be a foreign state for purposes of the FSIA, it would lack both personal and subject-matter jurisdiction over the defendants unless an exception to the FSIA applied.

The court first examined the noncommercial-tort exception, which denies immunity "for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of any foreign state" [28 U.S.C. § 1605(a)(5)]. Missouri argued that the defendants breached their duty of care by allowing COVID-19 to spread, blocking the dissemination of information about the virus, and cornering the market on personal-protective equipment.

The Eighth Circuit found that the exception within the exception for torts arising out of discretionary functions applied here. The idea behind it is to prevent judicial second-guessing of decisions grounded in social economic and political policy, and decisions "susceptible to policy analysis" are outside the purview of American courts [28 U.S.C. § 1605(a)(5)(A); see *United States v. Gaubert*, 499 U.S. 315, 323, 111 S. Ct. 1267, 113 L. Ed. 2d 335 (1991)].

The Eighth Circuit concluded:

Whatever the wisdom of China's policy decisions, they were discretionary. Every single act or omission identified in Missouri's complaint falls into this category, from continuing to allow large gatherings in Wuhan to taking legal action against doctors who tried to share information about the virus. None of these actions, as far as we can tell from the complaint, were mandatory or forbidden in China, meaning they were the subject of a "judgment or choice" by policymakers.

- ▼ **Commercial-Activity Exception Did Not Apply to Most of Complaint.** Under the commercial-activity exception to the FSIA, immunity is abrogated for claims based on (1) a commercial activity carried on in the United States by the foreign state, (2) an act performed in the United States in connection with a commercial activity of the foreign state elsewhere, or (3) an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere that caused a direct effect in the United States [28 U.S.C. § 1605(a)(2)].

The Eighth Circuit noted that none of the conduct identified in the complaint occurred within the United States, so it proceeded to examine whether the third clause applied here, and concluded that there was no direct causal chain in this case.

The court stated that three of Missouri's claims targeted the "malfeasance and deception" behind the spread of COVID-19, alleging that the harm the state suffered was attributed to the research undertaken by the defendants, the management of China's healthcare system, and the "operation of traditional and social-media platforms for commercial gain." The harm included a loss of jobs, income, and business opportunities, as well as millions of dollars in state expenditures, widespread school closures, and visitation restrictions in hospitals and nursing homes.

The Eighth Circuit ruled that even if the activities were commercial, "their effects were remote and attenuated, not direct. . . . To be direct, an effect must follow as an immediate consequence of the defendant's activity" [see *Republic of Arg. v. Weltover, Inc.*, 504 U.S. 607, 618, 112 S. Ct. 2160, 119 L. Ed. 2d 394 (1992)]. Here, the spread of the virus required at least one infected individual (and probably more) to travel to other parts of the world,

eventually reaching the United States and Missouri. And it took several more steps for Missouri's economy to suffer, as infections had to reach a high enough level in the United States and Missouri for stay-at-home orders to be issued, schools and businesses to close, state expenditures to grind to a halt, and medical facilities to close their doors to visitors.

The court concluded that "it is impossible to directly trace the economic and other harms identified in Missouri's complaint to the virus research in Wuhan, operation of the Chinese healthcare system, and social-media censorship."

- ▼ **Commercial-Activity Exception Did Apply to PPE Hoarding Claim.** However, the Eighth Circuit concluded that the hoarding claim was different. One allegation was that the defendants hoarded PPE and then sold lower-quality equipment in the United States, and the other was that China took over factories that made masks, which essentially halted the export of high-quality masks to the United States. "Together, they identify classic anticompetitive behavior, except on a country-wide scale."

The Eighth Circuit found these actions to be commercial in nature. Taking over factories and buying up a substantial portion of the world's supply of PPE "are the actions of a 'private player' in the market. The same goes for the act of selling those items for a profit" (citation omitted). The court noted that the courts distinguish between things like regulations that limit foreign currency exchange on the one hand and contracts to buy army boots or bullets on the other. "Buying and selling personal-protective equipment is much more like the latter, a 'commercial activity,' than the former, a 'sovereign' one."

The court found the "closest call" to be whether the behavior had a direct effect in the United States, but found that it did. The complaint alleged that China bought up much of the world's supply of masks, which led to an immediate shortage in Missouri and allowed the defendants to enter the market to sell lower-quality masks. Missouri healthcare providers thus either paid higher prices for the masks they could find, or had more difficulty safely and effectively treating patients with the virus because of lower-quality masks.

The Eighth Circuit emphasized that China's "market power and superior knowledge about the virus meant that no one else other than the defendants had to act to create those effects. . . . The most basic supply-and-demand principles tell us that these market effects depend little, if at all, on variables independent of the defendants' conduct given the information asymmetry and tight timeframe that existed at that time."

The court rejected the dissent's suggestion that courts should measure the scope of the effect by reference to what Congress would have wanted it to do, noting that the FSIA lacked a substantiality or foreseeability requirement. "Given this guidance, what we can say at this point is that Missouri has plausibly alleged that the defendants' anticompetitive behavior had 'a direct effect in the United States.'"

Finally, the Eighth Circuit ruled that the commercial activity had a connection with the conduct that constituted the gravamen of the suit. Missouri's overarching theory, which it still had to prove, was that China manipulated the worldwide PPE market, and "it has alleged enough to allow the claim to proceed beyond a jurisdictional dismissal on the pleadings."

- ▼ **Holding.** The Eighth Circuit affirmed the district court's dismissal of most of the claims under the FSIA, but reversed the judgment on the hoarding claim.
- ▼ **Dissent.** Chief Judge Smith concurred with the majority opinion as to the dismissal of most of Missouri's claims, but dissented as to the hoarding claim. Chief Judge Smith would have held that China's behavior lacked a direct effect in the United States, as the effect of hoarding occurred at the end of a long chain of causation.

PRIVILEGES

Legislative Privilege

La Union del Pueblo Entero v. Abbott

93 F.4th 310, 2024 U.S. App. LEXIS 3789 (5th Cir. Feb. 16, 2024)

The Fifth Circuit held that when a legislator brings third parties into the legislative process, those third parties may invoke the legislative privilege on that legislator's behalf for acts done for or at the direction of the legislator.

- ▼ **Background.** In 2021, the Texas Legislature enacted Texas Senate Bill 1 (SB1), relating to voter registration, voting by mail, poll watchers, and other aspects of election integrity and security. La Union del Pueblo Entero (LUPE) sued, alleging that (1) SB1's amendments chilled voter registration, and (2) SB1 was enacted with an intent to discriminate against racial minorities. Initially, the only named defendants were the state defendants. The Harris County Republican Party (HCRP) was added as a defendant-intervenor after the district court granted its renewed motion to intervene [see *La Union del Pueblo Entero v. Abbott*, 29 F.4th 299, 305–309 (5th Cir. 2022)]. LUPE sought documents and communications that HCRP had sent to or exchanged with the Texas Legislature and various members of the Texas executive branch regarding SB1.

LUPE moved to compel HCRP to produce those materials. Following a hearing, the district court ordered HCRP to “produce documents responsive to Plaintiffs’ requests for production, subject to the objections sustained at the hearing” and the HCRP’s “assertions of privilege.” In response to LUPE’s deposition requests, HCRP designated Alan Vera, the chair of the HCRP Ballot Security Committee, as its document custodian. At Vera’s deposition, he testified that he had communicated extensively on behalf of HCRP with legislators and legislative staff regarding SB1. But Vera declined to testify when the scope of the question appeared potentially to encompass Vera’s communications with the legislators or legislative staff in response to a legislative inquiry.

Vera’s deposition was the first time the parties became aware that Vera held potentially privileged documents on his personal email and personal computer. LUPE filed a motion to compel HCRP to conduct a search for and produce all relevant documents in response to the plaintiffs’ requests for production, including documents in Mr. Vera’s personal email address and personal computer, and to provide deposition testimony in response to the plaintiffs’ questions regarding HCRP’s communications with legislators and legislative staff.

Following a hearing on the motion, the district court rejected the assertions of legislative privilege and ordered Vera to submit to another deposition and Vera and HCRP to produce documents responsive to the requests for production. The legislators appealed.

- ▼ **Appellate Jurisdiction Under Collateral Order Doctrine.** The Fifth Circuit first addressed several jurisdictional issues, including whether the legislators, as nonparties, had standing to appeal, and whether the collateral order doctrine permitted appellate jurisdiction.

LUPE contended the legislators lacked standing to appeal because they were not parties to the case. The legislators agreed that nonparties generally cannot appeal an order or judgment, but relied on the exception that a nonparty may appeal if the decree affects his or her interests. The appellate court considers three factors in determining whether the exception applies: (1) whether the nonparties actually participated in the proceedings below, (2) whether the equities weigh in favor of hearing the appeal, and (3) whether the nonparties have a personal stake in the outcome.

The Fifth Circuit found that the legislators had participated adequately in the district court proceedings. The legislators had previously been served with third-party subpoenas seeking the same documents and communications at issue in this appeal. In responding to those subpoenas, the legislators invoked legislative privilege. The legislators also filed briefing and attended hearings where they argued that legislative privilege

applied and had not been waived. Thus, the first factor was satisfied because the legislators participated adequately in the proceedings in the district court.

As to the second factor, the court found that the equities favored the appeal because the legislators had no other mechanism to vindicate their potentially meritorious claims of legislative privilege. The district court, denying the legislators' privilege claims, had ordered the production of potentially privileged documents. Once such production has occurred, the privilege would be irretrievably breached and beyond the protection of an appellate court. In addition, denials of legislative privilege affect interests far beyond those held by the legislators and the plaintiffs in this case. The privilege is necessary to enable and encourage a representative of the public to discharge public trust. Erroneous denials of legislative privilege threaten both the public's substantial interest in ensuring that elective office remains an invitation to draft legislation and the legislators' interest in freedom from constant distraction.

The Fifth Circuit found that the third factor—whether the party seeking appellate review has a personal stake in the outcome—was also met. LUPE sought to discover documents and communications HCRP sent to or exchanged with the Texas Legislature and various members of the state executive branch regarding SB1. The legislators could potentially assert legislative privilege over those documents because they might have been created, reviewed, or produced within the sphere of legitimate legislative activity or within the regular course of the legislative process.

In response, LUPE asserted the legislators surrendered whatever interest they might have had in the confidentiality of these documents when they shared them with private parties who were not members or employees of the Legislature. The Fifth Circuit disagreed. Legislative privilege covers material provided by or to third parties involved in the legislative process, because these actions occur within the regular course of the legislative process. The legislators' communications do not lose their protected character merely because they are stored with a third party. Consequently, the legislators had a personal interest in the privileged documents stored on Vera's personal computer and personal email. In sum, the Fifth Circuit held that the legislators had standing to bring this appeal.

The court acknowledged that appellate jurisdiction generally extends only to final decisions of the district courts. However, a collateral order is immediately appealable if it meets the following three conditions: (1) it conclusively determines the disputed question, (2) it resolves an important issue completely separate from the merits of the action, and (3) it is effectively unreviewable on appeal. Ultimately, the decisive consideration is whether delaying review until the entry of final judgment would imperil a substantial public interest or some particular value of a high order.

The first collateral-order factor was met because HCRP could be sanctioned for failing to comply with the district court's order compelling production of Vera's documents. Likewise, the order met the second factor, since the issue of privilege did not decide the legality of various provisions of SB1. And the issue was important because denials of legislative privilege—especially if unreviewable—would deter lawmakers from the uninhibited discharge of their legislative duty and diminish the public good. Third, the denial of legislative privilege would be effectively unreviewable on appeal. Once HCRP had produced the potentially privileged documents, there would be no further point to the claim of privilege because it would be irretrievably breached and beyond the protection of an appellate court.

- ▼ **Invoking Legislative Privilege.** After establishing jurisdiction, the Fifth Circuit acknowledged that the legislative privilege is personal to the legislator. However, the legislative privilege “covers all aspects of the legislative process.” The complexity of the modern legislative process makes it impossible for legislators to perform their legislative tasks without the help of aides and assistants, which is why legislators' aides and assistants can invoke legislative privilege. Yet aides and assistants cannot independently claim the legislative privilege. Their ability to invoke the privilege comes not from their positions as “aides” or “assistants,” but instead depends on whether the act for which they invoke privilege was done at the direction of, instruction of, or for a legislator. Aides and

assistants can invoke privilege only over acts for which the legislator would be immune if performed by the legislator.

The court concluded there is no reason to draw the line at aides and assistants. Rather, communications outside the Legislature such as private communications with advocacy groups are part of the modern legislative procedure through which legislators receive information possibly bearing on the legislation they are to consider. Those acts—even if performed by third parties brought into the legislative process—occur within the sphere of legitimate legislative activity. Consequently, when a legislator brings third parties into the legislative process, those third parties may invoke the privilege on that legislator’s behalf for acts done at the direction of, instruction of, or for the legislator.

The court found that Vera was a third party brought into the legislative process itself. The legislators sought his comments on draft language for bills that eventually became SB1. Vera also provided feedback on proposed provisions on bills that eventually became SB1. He also emailed senators with suggested language to include in SB1. Much like the services of a legislative aide or assistant conducting legislative acts at the behest of a legislator, Vera’s acts occurred within the sphere of legitimate legislative activity. Vera could therefore invoke the legislative privilege for those acts since they were undertaken at the direction of, instruction of, or for a legislator.

- ▼ **Scope of Legislative Privilege.** The scope of the legislative privilege extends beyond voting for or against a particular piece of legislation. It covers all aspects of the legislative process, including material prepared for a legislator’s understanding of legislation and materials the legislator possesses related to potential legislation. The privilege extends to material provided by or to third parties involved in the legislative process, because all of those actions occur within the regular course of the legislative process. Thus, the legislative privilege applied to documents shared, and communications made, between the legislators and Vera. That included Vera’s emails, which contained the legislators’ communications with a third party who was brought into the legislative process. Because they were created, transmitted, and considered within the legislative process itself, they were protected by legislative privilege.

The court acknowledged that the legislative privilege “must yield” in “extraordinary instances.” That includes cases in which important federal interests are at stake, such as the enforcement of federal criminal statutes and extraordinary civil cases. Nevertheless, the mere fact that constitutional rights are at stake or that there is a claim of unworthy purpose does not destroy the privilege. Even for allegations involving racial animus, the legislative privilege stands fast.

A civil case is extraordinary so that the legislative privilege must yield if it satisfies three elements: (1) the civil case must implicate important federal interests beyond a mere constitutional or statutory claim; (2) the civil case must be more akin to a federal criminal prosecution than to a case in which a private plaintiff seeks to vindicate personal rights; and (3) the civil case cannot be brought so frequently that it would, in effect, destroy the legislative privilege.

The Fifth Circuit found that none of the three elements are satisfied in this case. The first element is not satisfied because LUPE merely alleges that “the Texas Legislature enacted S.B. 1 with an intent to discriminate against racial minorities.” LUPE’s case thus failed to implicate any important federal interest beyond constitutional or statutory claims of racial animus.

As to the second element, there are two characteristics common in federal criminal prosecutions but rare in civil suits. The first characteristic concerns who is entitled to bring suit. Only the United States, acting as a sovereign, is entitled to bring federal criminal prosecutions. Similarly circumscribed should be the cause of action for an extraordinary civil case. The second characteristic concerns the relief that may be sought. A successful federal criminal prosecution provides for unique relief that could not be sought by private litigants. Likewise, a civil case is more likely extraordinary if the cause of action provides additional and unique relief—above and beyond what may be sought by typical private plaintiffs. LUPE’s case shared neither of the characteristics common to federal

criminal prosecutions. For example, LUPE's racial-animus claim under the Voting Rights Act could be brought by any number of private plaintiffs and the United States, in stark contrast to federal criminal prosecutions. Moreover, neither LUPE nor the United States is entitled to any relief beyond what is available in other private plaintiffs' Voting Rights Act suits. Even such actions brought by the United States in its sovereign capacity are not extraordinary civil cases in which the privilege must yield. In sum, this was not one of those "extraordinary instances" in which the legislative privilege must yield.

- ▼ **Conclusion.** For these reasons, the Fifth Circuit ruled that the legislators had standing to bring this appeal, and the appellate court had jurisdiction under the collateral order doctrine. Further, the legislative privilege was properly invoked, protected documents shared and communications made between the legislators and Vera, and did not yield in these circumstances. Thus, the order denying legislative privilege was reversed.