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MAY 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.

AMENDED PLEADINGS

Relation Back

Moore v. Walton

96 F.4th 616, 2024 U.S. App. LEXIS 6713 (3d Cir. Mar. 21, 2024)

Jump to full summary

The Third Circuit holds that, for purposes of relation back as to a new or substituted defendant under Civil Rule 15(c)(1)(C), (1) the defendant's notice of the action need only be within the period for service under Rule 4(m), not before the statute of limitations has expired; and (2) the period for service includes not only the original 90 days provided by Rule 4(m), but also any court-ordered extension of the period for good cause.

APPEAL

Final Judgment

Amerisure Ins. Co. v. Auchter Co.

94 F.4th 1307, 2024 U.S. App. LEXIS 5564 (11th Cir. Mar. 7, 2024)

Jump to full summary

The Eleventh Circuit has ruled that it lacked jurisdiction to review a purported "final" judgment that left at least one claim in the case unresolved.

DISCOVERY

For Use in Foreign Proceedings

Frasers Grp. PLC v. Morgan Stanley

95 F.4th 54, 2024 U.S. App. LEXIS 5192 (2d Cir. Mar. 4, 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.

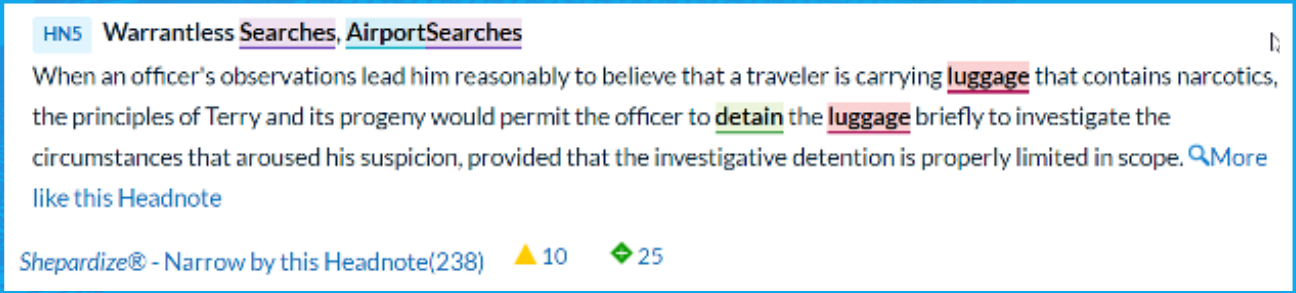
Continue on next page

Use Headnotes on Lexis to their Full Capability

By Chet Lexvold,
LexisNexis Solutions Consultant for the Federal Government

LexisNexis Headnotes identify the key points of a case by closely mirroring the court's language. This is important because while legal researchers should not cite headnotes, Lexis Headnotes so closely reflect the court's language that when the user uses the link to jump down to the actual court language within the court opinion mirrored by the Lexis Headnote, they can be confident they will find substantially the same language they saw in the headnote. Then, they can use Lexis's "Copy" feature to cite the court's language with the correct pinpoint page citation where that language appears in the court's opinion. Compare the below screenshots.

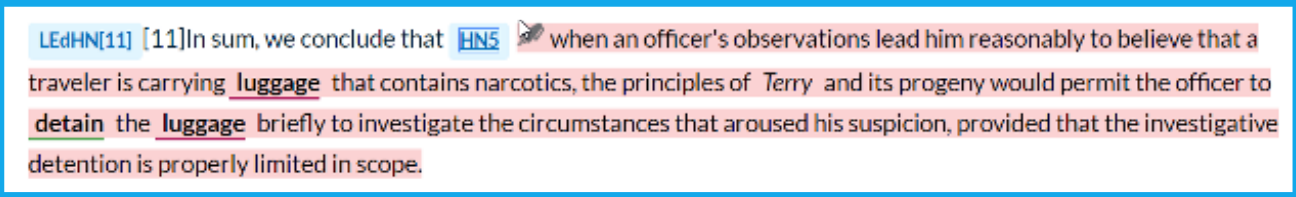
Headnote 5 from United States v. Place, 462 U.S. 696 (1983)


HN5 **Warrantless Searches, AirportSearches**

When an officer's observations lead him reasonably to believe that a traveler is carrying **luggage** that contains narcotics, the principles of Terry and its progeny would permit the officer to **detain** the **luggage** briefly to investigate the circumstances that aroused his suspicion, provided that the investigative detention is properly limited in scope. More like this Headnote

Shepardize® - Narrow by this Headnote(238) 10 25

Court's language from United States v. Place, 462 U.S. 696, 706 (1983)


LEdHN[11] [11]In sum, we conclude that HN5 when an officer's observations lead him reasonably to believe that a traveler is carrying **luggage** that contains narcotics, the principles of *Terry* and its progeny would permit the officer to **detain** the **luggage** briefly to investigate the circumstances that aroused his suspicion, provided that the investigative detention is properly limited in scope.

Furthermore, by leveraging Lexis Headnotes, the researcher can then track how other court opinions have cited to that precise language from the original opinion. When looking at the first screenshot, above, you can see the *Shepardize* – Narrow by this Headnote(238) link appearing below HN5, allowing the user to see all 238 decisions that cite that specific holding from Place. Additionally, noteworthy Shepard's signals, such as the negative, cautionary, or positive treatment (the first screenshot reflects a yellow triangle for cautionary, and green diamond for positive) is further broken out beneath the headnote, allowing the user to easily link to more relevant caselaw that provides substantive analysis of the legal holding from this opinion.

In sum, LexisNexis Headnotes allow users to quickly find relevant holdings from court opinions because the LexisNexis Headnotes closely mirror the court opinion's language, and then to track how that language has been treated by other courts by utilizing the *Shepardize* – Narrow by this Headnote feature.

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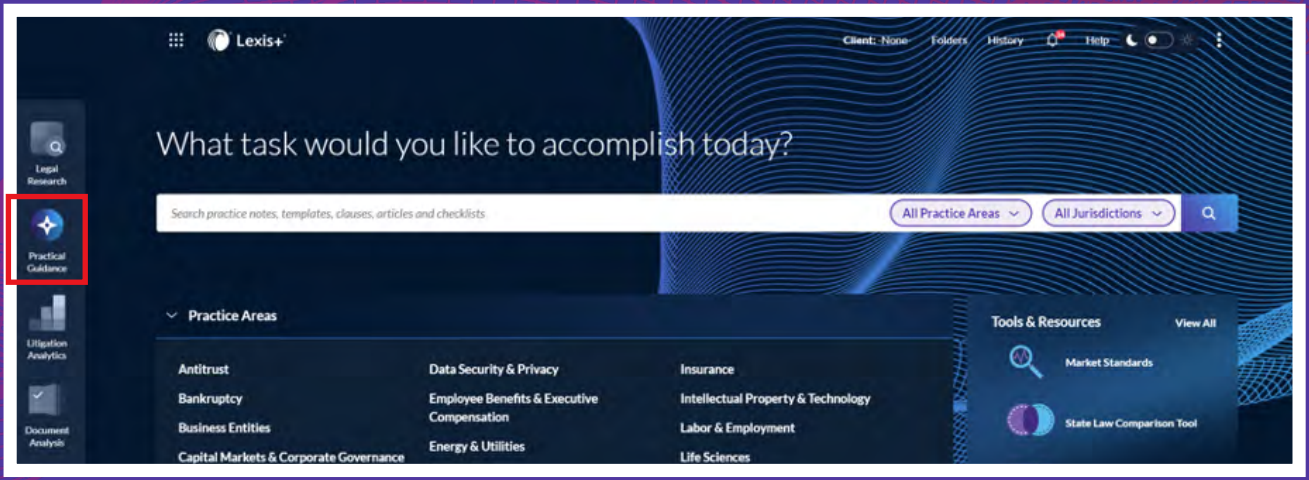
Four Things you Didn't know about Practical Guidance

By Mandi Cummings

Practical Guidance allows for users to accomplish legal tasks more efficiently and confidently than ever before. Practical Guidance allows users to develop critical legal know-how to complete the most complex tasks, including those outside your primary are of expertise, with access to tried-and-true materials from leaders with deep expertise in your issue.



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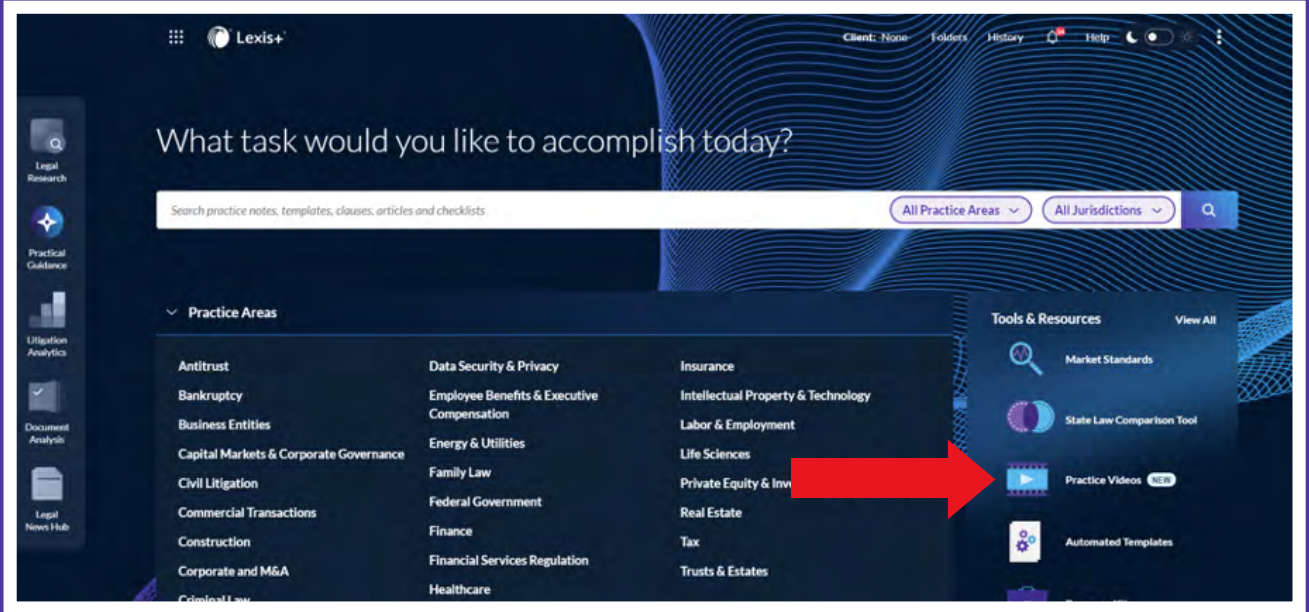
Many users have told us they rarely have time to watch videos, but would consider watching 30-90 second videos that provide a nice nugget of practical legal advice in a short amount of time. Browse Practice Videos on Practical Guidance to gain practical insights on key legal issues that feature experts in the field. Use Practice Videos to learn more about practice areas and topics quickly.



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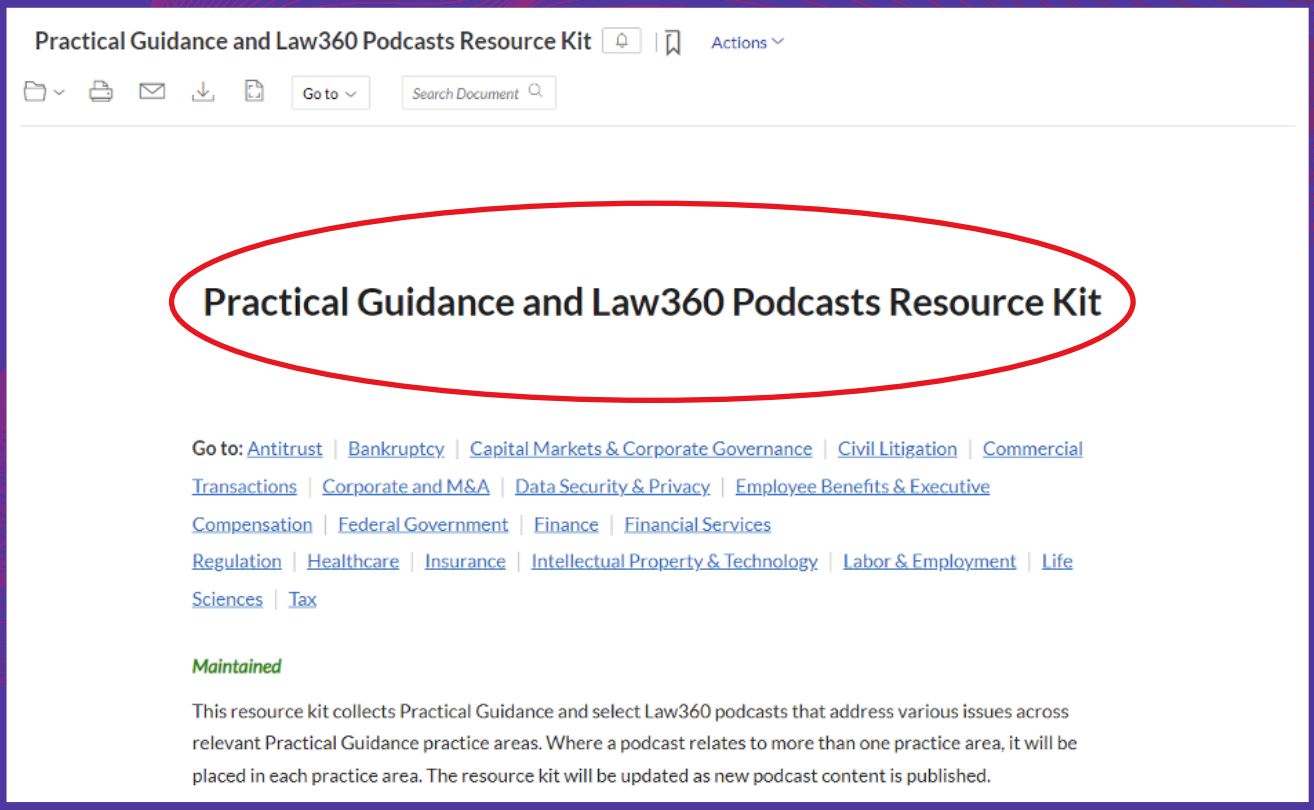
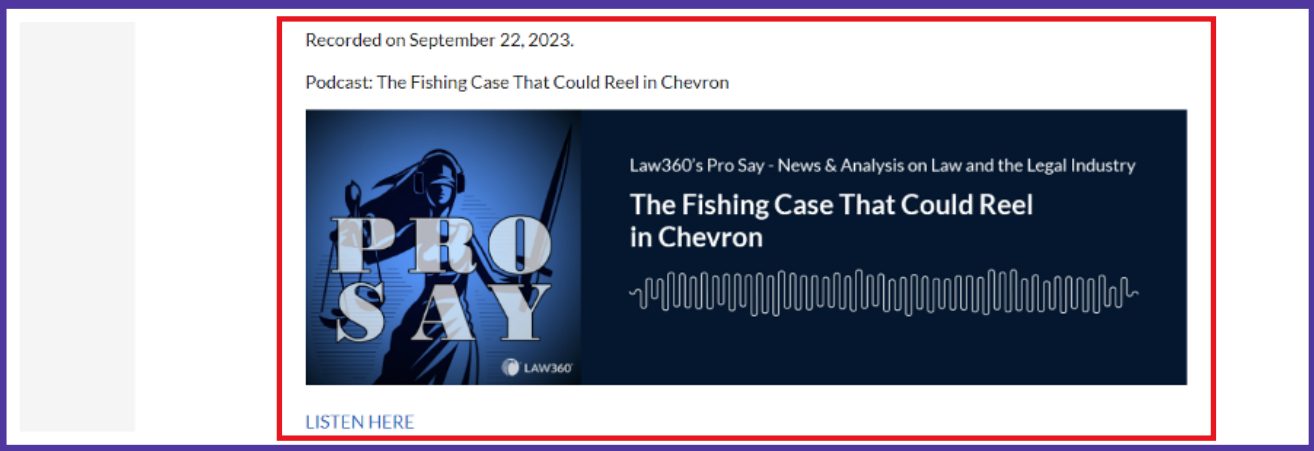
The Practical Guidance and Law360 Podcast Resource Kit houses select Law360 podcasts that address various issues across relevant Practical Guidance practice areas. If a podcast relates to more than one practice area, it will be placed in each practice area. The resource kit is updated as new podcast content is published.



Easily listen to the podcast listed within the resource kit while you work.



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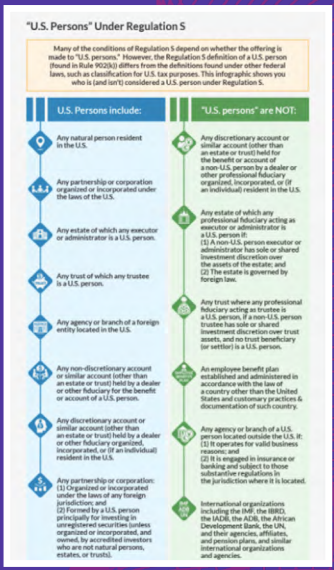

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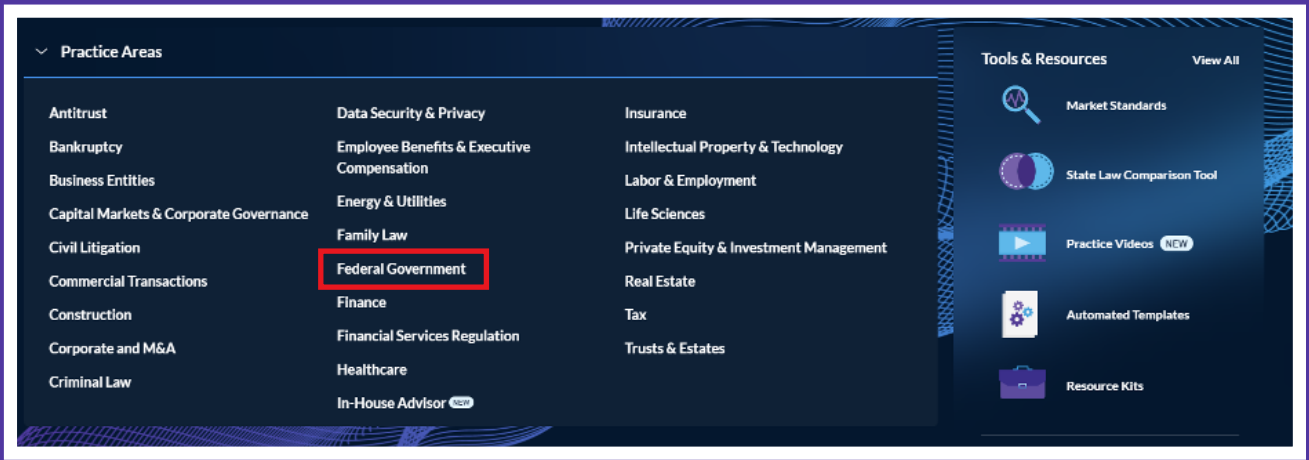
Practical Guidance has infographics located within resource kits throughout multiple practice areas. The infographics provide a visual overview of the topics within the various resource kits. ¬These infographics vary from helpful checklist, deadlines, and flowcharts.

Federal Government Practice Area Page

The Practical Guidance Federal Government practice area page provides guidance on all the most critical tasks that Federal Government attorneys undertake, including contracting, agency law, administrative law, information law, and labor and employment law.

The Federal Government practice area page includes authoritative practice notes, annotated forms, clauses, and checklists, authored by practicing attorneys with real world expertise, guide you through key issues related to Federal Government practice and tasks with ease.



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WIN WITH JIM WAGSTAFFE
Current Awareness Insights!

Alert: Removal to Federal Court Not Allowed in Climate Change Lawsuits Despite National Effect

Two Maryland local governments filed nearly identical suits against BP P.L.C. and more than 20 other energy companies in Maryland state court. The complaints sought damages and equitable relief under Maryland's Consumer Protection Act and various state tort law causes of action based on the companies' use and promotion of fossil fuel products while "knowing," "conceal[ing]," and "obscur[ing]" the connection between those products and climate change.

The Fourth Circuit (following the lead of every other circuit to address the subject and as previously reported in The Wagstaffe Group Current Awareness) rejected the companies' arguments that the district court had federal question jurisdiction because the local governments' claims necessarily and exclusively arose under federal law, or arose out of, or in connection with the A operations on the Outer Continental Shelf.

The Court concluded there was no federal question jurisdiction allowing removal simply because the lawsuit impacted "national" issues or involved important questions of widespread interest. Rather, the lawsuit involved state law claims that did not raise a "substantial federal question" for removal purposes. See Anne Arundel Cty. v. B.P., P.L.C., 94 F.4th 343 (4th Cir. 2024); see also Minnesota v. API, 63 F.4th 703 (8th Cir. 2023) (same); City & Cnty. of Honolulu v. Sunoco LP, 39 F.4th 1101 (9th Cir. 2022) (same).

Fed Civ Proc Before Trial: The Wagstaffe Group § 8-V[B][2]— Mere Reference to Federal Law Insufficient; Fed Civ Proc Before Trial: The Wagstaffe Group § 8-V[B][5][b]—Test for Substantial Federal Question Jurisdiction.

Continue on next page

AMENDED PLEADINGS

Relation Back

Moore v. Walton

96 F.4th 616, 2024 U.S. App. LEXIS 6713 (3d Cir. Mar. 21, 2024)

The Third Circuit holds that, for purposes of relation back as to a new or substituted defendant under Civil Rule 15(c)(1)(C), (1) the defendant's notice of the action need only be within the period for service under Rule 4(m), not before the statute of limitations has expired; and (2) the period for service includes not only the original 90 days provided by Rule 4(m), but also any court-ordered extension of the period for good cause.

Facts and Procedural Background. On the night of Sept. 16, 2013, Troy Moore Sr. was sitting in his cell in the Philadelphia Industrial Correctional Center (PICC) when the cell's toilet suddenly exploded and covered both him and the walls of the cell in raw sewage. Though a correctional officer named Saajida Walton quickly responded and looked through the cell window, she inexplicably offered no aid, so Moore was not let out of his cell and cleaned up until a shift change occurred some eight hours later. A grievance was filed with PICC the next day, but it referred to Walton only as "the c/o" because Moore did not know her name. PICC eventually orally provided only the last name, but Moore misheard it and believed it was spelled "Walden." The grievance did not resolve the dispute.

Initial Complaint. On June 23, 2014, Moore filed an initial complaint naming "Walden, Correctional Officer" as one of the defendants. A few days later, Moore's application to proceed in forma pauperis was granted, and service by the marshals was ordered. The summons issued to "Walden" was returned unexecuted in October. At a status conference on December 14, 2014, an attorney for the City of Philadelphia appeared and stated the inability to identify anyone named "Walden" who worked at PICC. In April 2015, the court ordered production of various records and reports concerning the incident. One of those records was a log of the events on the night of the incident with numerous entries made by "WALTON_S." But Moore apparently did not immediately notice this, and he made no effort to correct the misspelling. Accordingly, on December 17, 2015, the claim against "Walden" was dismissed without prejudice for failure to serve process.

Amended Complaint. After discovering the spelling error, Moore filed an amended complaint on December 31, 2015 that contained identical allegations but now named "Corrections Officer S. Walton" as a defendant. Nevertheless, two different summonses directed to the newly named defendant failed, because the city asserted that it needed more information in order to accept service on Walton's behalf. The court later informed Moore that an individual named Saajida Walton was employed as a correctional officer at PICC from July 7, 2008, to April 5, 2014. Moore quickly responded on November 15, 2016, that "Saajida Walton" was indeed the person he intended to serve. The court extended the deadline to make service, and Walton was finally served on May 2, 2017.

Walton moved to dismiss for defective service of process because she was served well outside the 120 days then allowed (now 90 days) for service under Fed. R. Civ. P. 4(m), as measured from either complaint. The district court denied the motion, concluding that its extension order permitted belated service. Walton then moved for summary judgment based on the affirmative defense that she was served well after the two-year statute of limitations had expired. The district court determined that she was entitled to notice through service or some other method before the limitations period expired, and it therefore granted the motion. The court also refused to consider whether the amended complaint related back to the original, concluding that, even if it did, it would not cure the absence of notice within the limitations period.

Relation Back Under Rule 15(c)(1)(C). The Third Circuit began its analysis by noting that the whole point of the relation-back provisions is to avoid the expiration of a limitations period that would otherwise bar a particular claim. The district court therefore erred in refusing to consider whether the amended complaint related back. The court of appeals then noted that Rule 15(c)(1)(C) permits relation back when an amendment to a pleading

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changes the defendant and three conditions are satisfied: (1) the claim against the new defendant arises out of the same conduct, transaction, or occurrence set out in the original complaint; (2) the new defendant received such notice of the action that it will not be prejudiced; and (3) the new defendant knew or should have known that but for the plaintiff's mistake concerning identity, the action would have been brought against it. In this case, it was undisputed that the first and third conditions were met, so the Third Circuit turned to the notice-and-prejudice condition.

- **Notice Under Rule 15(c)(1)(C) Must Be Within Service Period, Not Limitations Period.** The Third Circuit then noted that the terms of the rule are unambiguously clear that the new defendant only needs to receive notice within the service period [Fed. R. Civ. P. 15(c)(1)(C) (defendant must receive notice "within the period provided by Rule 4(m) for serving the summons and complaint")], not before the statute of limitations expires. The district court therefore clearly erred in applying the contrary rule.

- **Service Period Includes Court-Ordered Extension for Good Cause.** The Third Circuit then noted that Fed. R. Civ. P. 4(m) sets the default service period as 90 days from the filing of the complaint [Fed. R. Civ. P. 4(m) ("If a defendant is not served within 90 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time")]. But, if the plaintiff shows good cause for the failure to comply, the service period will be enlarged, because the district court must extend the time for service for an appropriate period. The court also may extend the service period even if good cause is not shown. The court concluded that, by referencing only "the period provided by Rule 4(m)," and not "the initial" or "default period provided by Rule 4(m)," the plain text of Rule 15(c)(1)(C) means to include the entire service period, which includes any mandatory extensions granted for good cause. In the instant case, the district court expressly found good cause to extend the service period due to the justifiable confusion over the name of the defendant. Because it was undisputed that the service on Walton on May 2, 2017, was within the extension period, the district court clearly erred in refusing to consider whether relation back was available to avoid the limitations bar.

- **Disposition.** The Third Circuit vacated the summary judgment and remanded to the district court to determine (1) whether Walton had the requisite notice on December 17, 2015, the date of the dismissal of the original complaint and (2) whether Walton was prejudiced by belated service.

Continue on next page

APPEAL

Final Judgment

Amerisure Ins. Co. v. Auchter Co.

94 F.4th 1307, 2024 U.S. App. LEXIS 5564 (11th Cir. Mar. 7, 2024)

The Eleventh Circuit has ruled that it lacked jurisdiction to review a purported "final" judgment that left at least one claim in the case unresolved.

Background. This case arose from a contract to construct an office building. After the project suffered delays and water intrusion, the property owner sued the builder and its surety in state court, seeking a declaratory judgment and damages. The defendant surety filed a counterclaim, seeking payment of the balance of the construction contract and related damages. The defendants also filed a third-party complaint against some subcontractors, asserting indemnity and breach-of-contract claims.

After a trial, the state court entered judgment (1) in favor of the property owner against the builder and its surety, (2) in favor of the surety against one of the subcontractors, and (3) in favor of the builder and its surety against another subcontractor.

After entry of the state court's judgment, the builder's primary insurance providers (collectively, "Amerisure") —which had defended the state-court action under a reservation of rights—filed the present lawsuit in federal court against the builder and its surety, the property owner, the subcontractors that lost in state court, and the insurer for one of the subcontractors. In the state-court action, the subcontractor's insurer ("Landmark") had acknowledged the builder as an additional insured under the policy covering the subcontractor but had refused to provide the builder with a defense. Amerisure sought a declaration that it owed no duty to indemnify the builder and its surety, plus reimbursement of the cost of defending the state-court action. The parties filed multiple crossclaims and counterclaims.

Years later, after numerous summary-judgment motions and orders, and a partial settlement, the district court granted Amerisure's motion for a final judgment against Landmark, finding that Amerisure was entitled to attorney's fees and costs. The district court entered what it called a "final" judgment against Landmark (and only Landmark). Landmark appealed.

Appellate Jurisdiction Was Lacking. The Eleventh Circuit panel began and ended its analysis with a threshold issue: whether it had jurisdiction to hear this appeal. The court noted that it has an independent obligation to determine whether appellate jurisdiction exists in every case, regardless of whether the parties have raised the issue [see Reaves v. Sec'y, Fal. Dep't of Corr., 717 F.3d 886, 905 (11th Cir. 2013)].

In general, federal appellate courts have jurisdiction over final decisions of the district courts. Under 28 U.S.C. § 1291, "[t]he courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court." A "final" decision for this purpose generally is one that ends the litigation on the merits and leaves nothing for the district court to do but execute the judgment [see Catlin v. United States, 324 U.S. 229, 233, 65 S. Ct. 631, 89 L. Ed. 911 (1945)]. An order or decision, however designated, that adjudicates fewer than all the claims in a suit is not a final judgment from which an appeal may be taken, unless the district court properly certifies as final, under Civil Rule 54(b), a judgment as to fewer than all claims or parties [see Fed. R. Civ. P. 54(b) ("[T]he court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay."); see also Supreme Fuels Trading FZE v. Sargeant, 689 F.3d 1244, 1246 (11th Cir. 2012)].

The Eleventh Circuit panel pointed out that the purported final judgment in this case did not dispose of all claims against all parties, so it was not final. The court explained that it has consistently held that the entry of judgment is not enough to supply appellate jurisdiction—even if it is labeled a "final" judgment—if the district court failed

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to dispose of all claims [see Gov't Emps. Ins. Co. v. Glassco, Inc., 58 F.4th 1338, 1345 (11th Cir. 2023)]. For example, Landmark asserted, in its crossclaim against the subcontractor that was Landmark's insured, that it had no duty to defend or indemnify the subcontractor in the underlying action. The various summary-judgment orders entered by the district court did not dispose of that claim, and the purported final judgment contained no disposition of that claim. Moreover, despite the presence of that unresolved claim, there was no Rule 54(b) certification of finality for the claim that was disposed of in the district court's purported "final" judgment.

The court of appeals rejected an argument that the judgment was final and appealable because the district court's decisions in the case had fully answered any questions relating to Landmark's obligations to its insured. The appellate court explained that even if Landmark's duty to indemnify other parties effectively answered the question of its duty to indemnify its own insured, answering an abstract issue is not the same as resolving a tangible claim. Thus, whatever questions were answered by the district court, Landmark's claim against its insured remained pending.

The court of appeals also rejected a contention that any deficiency in finality had been cured at oral argument on appeal, when Landmark represented that it would abandon its crossclaim against its insured [cf. Tiernan v. Devoe, 923 F.2d 1024, 1031 (3d Cir. 1991) (court had jurisdiction following plaintiffs' statement renouncing any further action against defendants that had been dismissed without prejudice, even though "at the time [the] appeal was filed, jurisdiction under 28 U.S.C. § 1291 was lacking")]. The appellate panel pointed out that the Eleventh Circuit had never held that a promise at oral argument to abandon a claim can finalize an order that was not final when the appeal was taken. But even if it had the power to accept Landmark's representation at oral argument that it would abandon its crossclaim, it would have chosen not to do so. The court remarked that it is well settled in the Eleventh Circuit that parties to a suit cannot agree to grant the court appellate jurisdiction [see State Treasurer of Mich. v. Barry, 168 F.3d 8, 13 (11th Cir. 1999)].

Moreover, the court of appeals explained, to the extent that Landmark might have abandoned its crossclaim against its insured in the district court, "abandonment" is not the way to dismiss a party from an action. Federal Rule of Civil Procedure 41(a) is the proper vehicle to dismiss all of a party's claims against another party [see Klay v. United Healthgroup, Inc., 376 F.3d 1092, 1106 (11th Cir. 2004)]. In the district court, a claimant can abandon or dismiss its claims against another party in one of three ways: (1) by filing a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment, (2) by filing a stipulation of dismissal signed by all parties who have appeared, or (3) by obtaining a court order [see Fed. R. Civ. P. 41(a)]. Landmark did not do any of those things in this case.

Conclusion and Disposition. Because the district court's "final" judgment in this case had left at least one claim unresolved, and the district court had not made a Rule 54(b) certification, the court of appeals lacked jurisdiction to review the judgment. Accordingly, the appellate panel dismissed the appeal.

The court of appeals noted that although the pendency of Landmark's claim against its insured sufficed to establish a lack of appellate jurisdiction, there was also no disposition on the record as to the builder and the other subcontractor (the one not insured by Landmark). The district clerk had entered a default against the builder, but not the contractor, and had not entered a default judgment against either [see Arango v. Guzman Travel Advisors, 761 F.2d 1527, 1530–1531 (11th Cir. 1985) (entry of default is not final judgment and is not same as entry of default judgment)]. Rather than address the parties' suggestion that the subcontractor was merely a nominal party, and that there were no substantive claims pending against the builder, the court of appeals left those arguments for the district court to consider on remand.

Continue on next page

DISCOVERY

For Use in Foreign Proceedings

Frasers Grp. PLC v. Morgan Stanley

95 F.4th 54, 2024 U.S. App. LEXIS 5192 (2d Cir. Mar. 4, 2024)

The Second Circuit has held that a district court did not abuse its discretion in denying discovery for use in a foreign proceeding under 28 U.S.C. § 1782, because the documents sought were obtainable through discovery from a party in the foreign proceedings.

Background. Frasers Group PLC ("Frasers"), a British retailer group, entered into various options transactions with Saxo Bank A/S ("Saxo Bank") related to shares of the fashion company Hugo Boss. From mid-April 2021 to May 2021, Frasers sold an increasing number of Boss call options. Concurrently, Saxo Bank entered into trades with Morgan Stanley & Co. International PLC (MSIP), an English company and a subsidiary of Morgan Stanley, in relation to the Boss call options. On May 25, 2021, MSIP issued a margin call to Saxo Bank (the "Margin Call"). The net amount of the Margin Call was $915 million. Saxo Bank paid $400 million in part satisfaction of the Margin Call and then issued its own, cash-only margin call to Frasers in respect to the Boss call options with an obligation to pay "immediately" (the "Passed-On Margin Call"). Frasers objected to the Passed-On Margin Call and filed a lawsuit in the United Kingdom in the High Court of Justice in the Business and Property Courts of England and Wales (the "English Proceedings") for damages against Saxo Bank and MSIP.

Frasers later submitted an application for judicial assistance under 28 U.S.C. § 1782 in the United States, seeking to obtain documentary and testimonial evidence from James Gorman, the Executive Chair of Morgan Stanley (and its former Chief Executive Officer), for use in the English Proceedings. Specifically, Frasers sought to depose Gorman and to subpoena certain documents related to the Margin Call.

Frasers argued before the district court that the application supported its allegations in the English Proceedings, and the documents and testimony it sought would help reveal the extent, if any, of Gorman's knowledge of the Margin Call; his involvement, if any, in the decisions to impose and maintain the Margin Call; and whether the decision to impose and maintain the Margin Call was guided by unwritten policies put in place by Morgan Stanley's leadership. The district court denied the application, and Frasers timely appealed.

Obtaining Discovery for Use in Foreign Proceedings. 28 U.S.C. § 1782(a) provides that the district court in which a person resides or is found may order that person to give testimony or produce documents for use in a proceeding in a foreign or international tribunal. Discovery may be ordered if (1) the person from whom discovery is sought resides or is found in the district of the district court to which the application is made, (2) the discovery is for use in a proceeding before a foreign tribunal, and (3) the application is made by a foreign or international tribunal or any interested person. When these statutory requirements are met, the district court has discretion to grant or deny the application.

In Intel Corp. v. Advanced Micro Devices, Inc., the Supreme Court established four discretionary factors district courts should consider when determining whether to grant domestic discovery for use in foreign proceedings under § 1782. Those four factors are: (1) whether the person from whom discovery is sought is a participant in the foreign proceeding; (2) the nature of the foreign tribunal, the character of the proceedings abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance; (3) whether the request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States; and (4) whether the discovery request is unduly intrusive or burdensome [Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 264–265, 124 S. Ct. 2466, 159 L. Ed. 2d 355 (2004)].

In denying Frasers's application, the district court found that the second and third Intel factors "moderately" favored granting the application, but that the first and fourth Intel factors weighed heavily against relief. On appeal, Frasers challenged the district court's findings as to the first and fourth Intel factors and contended that

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the district court arrived at this conclusion by improperly reading an exhaustion requirement into both factors. The Second Circuit disagreed.

The Second Circuit found that the district court did not err in finding that the first Intel factor weighed against relief as to the production of documents, because the documents sought were obtainable through discovery from MSIP in the English Proceedings. Contrary to Frasers's assertions, the district court did not impose an exhaustion requirement on Frasers. Although the district court considered the availability of the documents in the English Proceedings, it did not treat Frasers's failure to first pursue discovery of these documents in the English Proceedings as a categorical bar.

The court explained that when the person from whom discovery is sought is a participant in the foreign proceeding, the need for § 1782 aid generally is not as readily apparent as when evidence is sought from a nonparticipant in the matter arising abroad. A foreign tribunal has jurisdiction over those appearing before it and can itself order them to produce evidence. By contrast, nonparticipants in the foreign proceeding may be outside the foreign tribunal's jurisdictional reach; thus, their evidence, available in the United States, may be unobtainable absent § 1782 aid. In fact, courts have found that the first Intel factor weighs against relief, even if the discovery target is not a party to the foreign proceeding, when the applicant is "for all intents and purposes" seeking discovery from its opponent in the foreign litigation. In this case, Frasers "for all intents and purposes" sought discovery from MSIP, its opponent in the English Proceedings. And because MSIP was a participant in the English Proceedings and subject to the foreign court's jurisdiction, Frasers's need for § 1782 help was not as critical as when evidence is sought from a nonparticipant in the matter abroad. Although Gorman was not a party to the English Proceedings, MSIP made two concessions: first, that MSIP would treat all documents sought in the English Proceedings that Gorman may hold on his personal devices or in his homes as within MSIP's custody; and second, that MSIP would not object in the English Proceedings to the disclosure of Morgan Stanley documents on the grounds that they were located in the United States. These concessions indicated that Frasers could obtain these documents in the English Proceedings.

Accordingly, there was no abuse of discretion in finding that the first Intel factor weighed against granting the application.

As to the fourth Intel factor, the court found that the discovery request was "unduly intrusive or burdensome." Burdensomeness is assessed by applying Rule 26 standards. Rule 26 provides, in relevant part, that a "court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that . . . the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive" [Fed. R. Civ. P. 26(b)(2)(C)(i) (emphasis added)]. When it is clear that discovery is equally available in both foreign and domestic jurisdictions, a district court might rely on this circumstance to conclude that the § 1782 application is duplicative or was brought vexatiously.

As with the first Intel factor, the Second Circuit found that the district court did not improperly read an exhaustion or "quasi-exhaustion" requirement into its analysis of the fourth Intel factor. The court acknowledged that an applicant is not required to first seek the requested discovery from the foreign court. However, the district court did not impose such a condition in this case; rather, it considered the possibility that the applicant could obtain the discovery in the foreign proceedings along with other factors, including that pursuing discovery in the foreign court would have been more convenient, an approach consistent with Rule 26(b)(2). In addition, with respect to Frasers's request for Gorman's testimony, the district court not only weighed the time commitment required against his competing obligations as the Chief Executive Officer of Morgan Stanley, but also found that Gorman's testimony bore little relevance to Frasers's claims. Thus, the district court also did not abuse its discretion in finding that the fourth Intel factor weighed against granting the application.

- **Conclusion.** For these reasons, the Second Circuit affirmed the order denying the application for discovery for use in foreign proceedings.