



Litigation Insights

AUGUST 2024

 LexisNexis®

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.

DISCOVERY

Access to Public Documents

United States ex rel. Oberg v. Nelnet, Inc.

105 F.4th 161, 2024 U.S. App. LEXIS 14786 (4th Cir. June 18, 2024)

The Fourth Circuit holds that the public has a presumptive First Amendment right to access documents submitted in connection with a summary-judgment motion whether or not the district court ever resolves the motion.

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FEDERAL QUESTION JURISDICTION

Legal Malpractice Action

Link Motion Inc. v. DLA Piper LLP (US)

103 F.4th 905, 2024 U.S. App. LEXIS 14061 (2d Cir. June 10, 2024)

The Second Circuit held that a federal standing question embedded in a state-court legal malpractice claim did not permit the exercise of federal jurisdiction over a state-law claim.

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PERSONAL JURISDICTION

Purposeful Direction

XMission, L.C. v. PureHealth Rsch.

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The Tenth Circuit has held that a defendant was subject to specific personal jurisdiction in Utah when it knowingly sent marketing emails to the customers of an internet and email provider located in Utah, and those emails allegedly harmed the provider in violation of federal and state law.

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Chevron Reversed: Lexis Tools to Track the Impact of Loper Bright

By Chet Lexvold, LexisNexis Practice Area Expert for the Federal Government

In *Loper Bright Enters. V. Raimondo*, 2024 U.S. Lexis 2882, the Supreme Court overturned four decades of judicial deference to federal agencies' interpretations of the law when statutes were board or ambiguous (what was commonly referred to as "Chevron deference"). In the aftermath of *Loper Bright*, legal professionals will need to stay on top of the impacts of this significant change in administrative law. Thankfully, Lexis has excellent tools for the task.

First, Practical Guidance on Lexis+ has the ["Chevron Reversal Impact Resource Kit,"](#) a collection of articles that discuss the impact of this reversal across a range of practice areas, including Federal Government, Labor & Employment, Energy & Utilities, and more.

Second, Law360 has been providing tremendous coverage of *Loper Bright* and its impact. Searching Law360 (or the Legal News Hub on Lexis+) for "Chevron" and/or "*Loper Bright*" will return several dozen articles analyzing the impact of this decision from a multitude of angles. A couple of personal favorites: (1) [After Chevron Deference: What Lawyers Need to Know](#); and (2) [3 Ways Agencies Will Keep Making Law After Chevron](#).

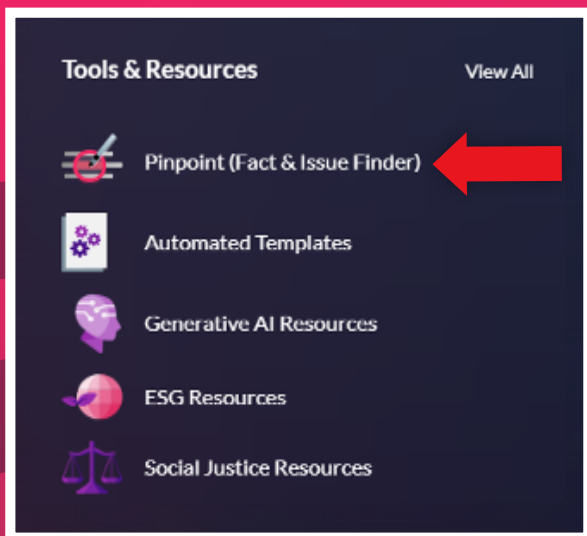
Third, how about a *Shepard's* alert on *Loper Bright* itself? Simply navigate to the [Shepard's page for Loper Bright](#) and click the little alarm bell next to the case name to set up daily, business daily, weekly, or monthly alerts to see how courts are interpreting the impact of *Loper Bright*.

Finally, a search alert in Legal News on Lexis is a great way to track breaking impacts of *Loper Bright*. Searching headline(*chevron* or *loper bright*) within Legal News content, and then clicking the alarm bell, allows you to receive automated alerts from several legal news publishers, including Law360, that will provide substantive analysis of *Loper Bright*.

Pinpoint adds Practice Areas and Customizable Dashboard

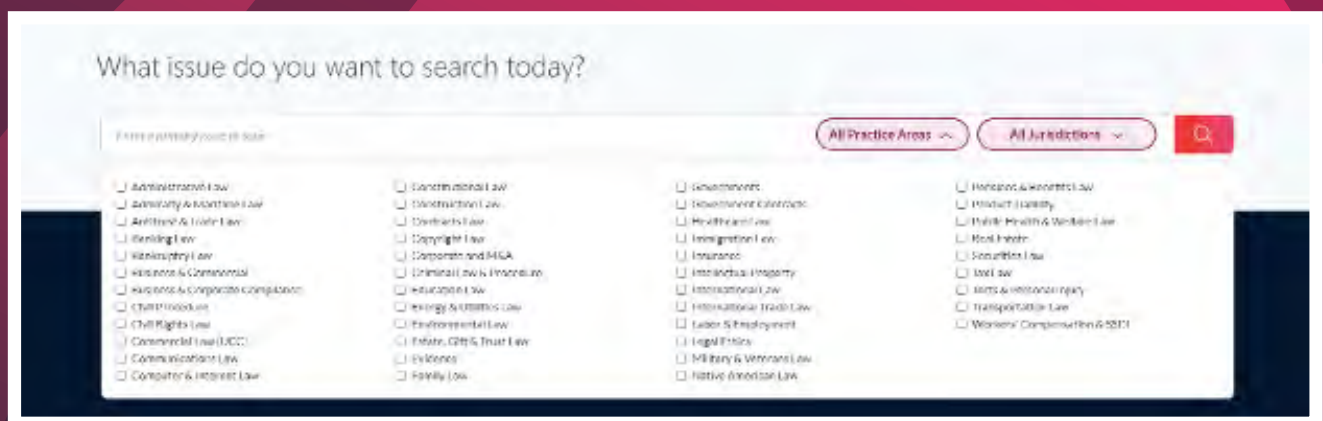
By Mandi Cummings

Lexis+ Pinpoint is a practice area, fact-specific search engine that helps users build a sophisticated litigation strategy by quickly identifying critical resources most similar to their case in fact and issue. It uses advanced search capability, machine-learning, and data visualization to generate the most precise, rapid and complete search results displayed in one easy-to-understand dashboard.



37 New Practice Area Filters

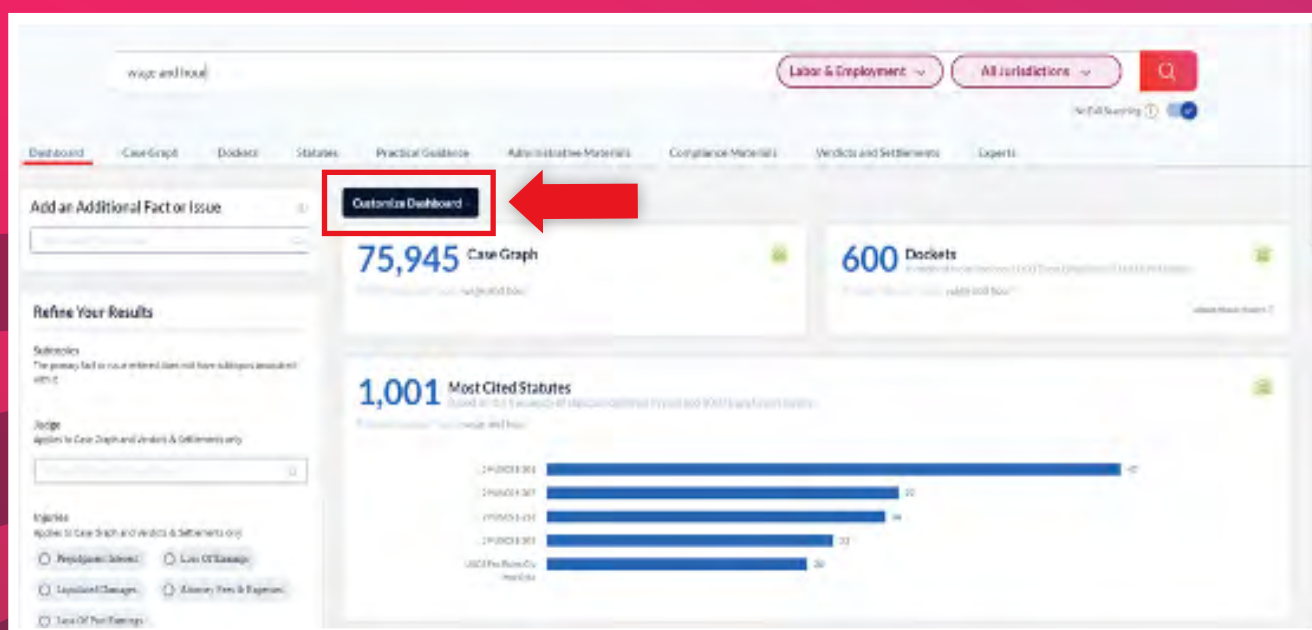
Pinpoint has recently expanded its number of practice areas from 8 to 45, allowing for more customers across various practice areas to be able to utilize its functionality. This enhancement provides a wider range of options for users to choose from. With the new practice areas added, we are now supporting nearly 22,000 topics. Apart from this there are plans to add another 20,000 topics in the near future.



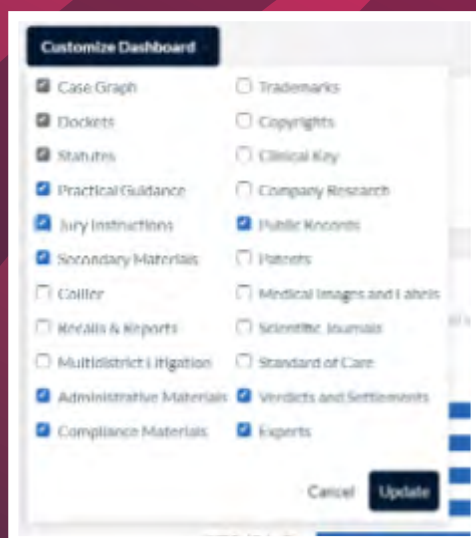
Customizable Dashboard

In addition to the expanded practice areas, Pinpoint now offers a customizable dashboard. Previously, the dashboard was determined by the practice area searched, but now users have the flexibility to choose the content types and information they want to see on their dashboard. This allows for a more personalized and flexible user experience.

1. Click on the **Customize Dashboard** button to choose content types for what would be most pertinent for your research.



2. From here, you can choose whatever information you want to see on your Pinpoint dashboard. Such as Practical Guidance, Secondary Materials, Administrative Materials, or even verdicts and settlements.



These newly added enhancements provide added value to our users and make Pinpoint an even more versatile and useful tool for all practice area categories.

DISCOVERY

Access to Public Documents

United States ex rel. Oberg v. Nelnet, Inc.

105 F.4th 161, 2024 U.S. App. LEXIS 14786 (4th Cir. June 18, 2024)

The Fourth Circuit holds that the public has a presumptive First Amendment right to access documents submitted in connection with a summary-judgment motion whether or not the district court ever resolves the motion.

→ **Background.** In 2007, Jon Oberg filed a lawsuit under the False Claims Act against several student-loan companies (“Nelnet and Brazos,” or “the companies”). Oberg alleged that the companies submitted false claims to the Department of Education to inflate their loan portfolios eligible for interest subsidies. The parties consented to a magistrate judge deciding the case.

After the parties agreed to a protective order for discovery, the companies filed a joint motion for leave to file confidential summary-judgment materials under seal. They explained that “sealing is necessary in order to protect the producing party from the harm that could arise from immediate disclosure” of financial information and nonpublic emails. They also proposed “that the seal would be maintained for 30 days from the date that the reply briefs to the motions for summary judgment are filed.” Oberg did not oppose the motion. The magistrate judge granted the motion but clarified that the seal would be temporary, “to give the producing party the opportunity to defend its professed confidentiality interest and [the judge] would automatically unseal that information after a reasonable period unless the producing party successfully persuades this Court to maintain the confidentiality of the information at issue.” But he warned the parties that any motion to maintain an exhibit under seal had to be filed no later than August 20, 2010, after which time the parties would have to file the formerly sealed exhibits electronically with the court.

The companies later filed five summary-judgment motions and a joint statement of stipulated facts. Oberg responded by moving for partial summary judgment, as well as by filing a consolidated opposition to the companies’ motions. Oberg’s opposition motion, many of his exhibits, and his response to the joint statement of stipulated facts were filed partially or completely under seal. The summary-judgment motions were never decided.

Four days before trial was to commence, the judge issued an order staying “all proceedings in this action relating to pending motions and the trial,” so the parties could engage in settlement negotiations. The order also provided that “[w]hile this matter is stayed no pleadings shall be filed other than those related to the resolution of claims by the parties.” Perhaps because of this order, none of the parties moved to seal summary-judgment materials before the August 20 deadline. Instead, the parties eventually settled, and on October 22, 2010, the magistrate judge dismissed the actions against the companies with prejudice.

On March 31, 2023, Michael Camoin—a documentary filmmaker who covers the student-loan industry—filed a pro se letter in the district court requesting access to the materials that Oberg filed under seal in connection with his opposition to summary judgment. In his letter, Camoin noted that no motion had been filed to maintain the seal on the documents, as required by the district court’s order, and requested that copies be made available. The district court docketed this letter as a motion requesting copies of exhibits formerly under seal and allowed all parties to the original suit until May 5, 2023, to respond to Camoin’s request. Before anyone responded, however, Camoin filed a second letter explaining that he read elsewhere that Oberg had claimed the settlement

agreement would unseal the summary-judgment exhibits unless the companies moved to maintain the seal—which they never did.

Nelnet and Brazos eventually filed a joint brief opposing Camoin's request. In their brief, they contended that Camoin's request did not state a basis for a right to access the documents and that in any event, Camoin had no right to access the documents, because the magistrate judge never ruled on the summary-judgment motions. But because of their view that Camoin offered no basis for his right to access the documents in his letters, they did not offer reasons that justified maintaining the seal. Camoin later filed a supplemental reply alleging that he had a common-law and First Amendment right to access the documents.

The magistrate judge denied Camoin's motion. The judge found that Camoin had no common-law or First Amendment right to access the documents because "a document must play a relevant and useful part in the adjudication process for either the First Amendment or common law rights of public access to attach." He concluded that the documents Camoin requested played no such role in the litigation, because the case settled before any action on the summary-judgment motion. The judge thus held that the documents were not "judicial documents" protected by either the common law or First Amendment and dismissed Camoin's motion. Camoin then filed a timely notice of appeal.

→ **Fourth Circuit Had Appellate Jurisdiction.** Before proceeding to the merits, the Fourth Circuit considered its appellate jurisdiction. Generally, only parties to a lawsuit, or those who properly become parties, such as by intervention, may appeal an adverse order or judgment. The reason is that because a nonparty generally is not bound by a judgment, he or she ordinarily cannot be aggrieved by the judgment to the extent necessary to permit appellate review. Moreover, an appellate tribunal generally is not the proper place for a litigant to commence its participation in a case. Thus, parties and intervenors, but not nonparties, may directly appeal a district court's sealing decision.

Courts have recognized a narrow exception to the rule against nonparty appeals—termed "nonparty appellate standing"—that allows a nonparty to appeal a district court's order or judgment when the nonparty (1) possessed an interest in the cause litigated before the district court, and (2) participated in the proceedings actively enough to make him or her privy to the record. Hence, the court has sometimes relaxed the rule against nonparty appeals for nonparties with sufficient interest and participation in the challenged proceedings.

Appeal, however, is not the sole mechanism for challenging a district court's sealing order. A nonparty asserting the public's right to access proceedings or documents who has not intervened and lacks nonparty appellate standing can still seek mandamus review of the district court's sealing decision. And if the nonparty without nonparty appellate standing has filed a notice of appeal rather than a petition for mandamus, the court may treat the appeal as a petition for mandamus if the nonparty has Article III standing and has substantially complied with Rule 21(a) of the Federal Rules of Appellate Procedure.

Camoin was not a party to the original proceedings between Oberg and the companies. Nor was there any indication that he intervened in the court below. Thus, he could not appeal under the normal procedural rules. The second prong of the nonparty appellate standing test asks whether the nonparty has actively participated in the proceedings below such that he or she is privy to the record. The court acknowledged that it has never applied nonparty appellate standing when the nonparty's only involvement occurred after the original proceedings had terminated. Given that this doctrine is an exception to an otherwise bright-line jurisdictional rule, the court declined to extend it to this context.

Instead, the court chose to treat Camoin's appeal as a petition for mandamus. Camoin satisfied the requirements of Article III standing, as he had suffered a constitutional injury traceable to the sealing decision that would be redressed if the decision were reversed. And he had substantially complied with the requirements of Appellate Rule 21(a). The Fourth Circuit therefore construed his notice of appeal as a petition for mandamus and considered the district court's holding under the standards for granting that form of relief. The party seeking mandamus relief has a heavy burden of showing that no other adequate means to attain the relief desired exists and that the right to such relief is clear and indisputable.

➔ **Camoin Had Presumptive First Amendment Right to Access Summary-Judgment Motion Papers.** The Fourth Circuit explained that the public and press have a qualified right of access to judicial documents and records filed in civil and criminal proceedings. This right derives from two independent sources: the common law and the First Amendment. The right protected by each varies.

The common law presumes a right of the public to inspect and copy all judicial records and documents. Documents filed with the court are "judicial records" if they play a role in the adjudicative process or adjudicate substantive rights, such as when they were filed with the objective of obtaining judicial action or relief. The finding that a document is a judicial record guarantees only a presumption of access, however, and this presumption can be rebutted by a showing that countervailing interests heavily outweigh the public interests in access. In conducting this balancing test, the court considers whether the records are sought for improper purposes, such as promoting public scandals or unfairly gaining a business advantage, whether release would enhance the public's understanding of an important historical event, and whether the public has already had access to the information contained in the records.

Unlike the common-law right, the First Amendment right of access extends only to certain judicial proceedings and records. In particular, the right attaches to any judicial proceeding or record (1) that has historically been open to the press and general public, and (2) when public access plays a significant positive role in the functioning of the particular process in question. It also protects materials submitted in conjunction with judicial proceedings that themselves would trigger the right of access. Whenever a proceeding or document is protected by the First Amendment, access may be restricted only if closure is necessitated by a compelling government interest and the denial of access is narrowly tailored to serve that interest. Thus, while common-law protections are broad but shallow, First Amendment protections are narrower but deeper.

The Fourth Circuit has previously held that the First Amendment protects the right to access summary-judgment motions and documents filed in connection with those motions [*Rushford v. New Yorker Magazine*, 846 F.2d 249, 253 (4th Cir. 1988)]. Although the public generally does not have a right of access to discovery documents, once documents are made part of a dispositive motion, such as a summary-judgment motion, they lose their status of being simply discovery materials. Unlike discovery, summary judgment adjudicates substantive rights and serves as a substitute for a trial. Because the public has a First Amendment right to attend trials, the public has an equivalent right to access documents filed in connection with civil summary-judgment motions. Before a court can limit the public's access to such documents, therefore, it must find that such a limitation is justified under the First Amendment.

The magistrate judge denied Camoin's request to access Oberg's opposition to the summary-judgment motion and the documents attached to that motion. Because the parties settled before any resolution of the summary-judgment motions, the judge concluded that the requested documents played "no adjudicative role" in the case and that Camoin therefore had no right to access them. The Fourth Circuit declined to adopt such a narrow interpretation. Instead, the court found that the First Amendment right of access to summary-judgment

materials does not depend on judicial resolution of the summary-judgment motion or judicial reliance on the documents in resolving the motion. Rather, the First Amendment right attaches once the documents are made part of a summary-judgment motion and no later. That is, once the documents are filed in connection with a summary-judgment motion in a civil case, the First Amendment standard must be satisfied before the public can be denied access. In other words, the right to access protected documents attaches immediately upon their filing.

The public has an interest in ensuring basic fairness and deterring official misconduct not only in the outcome of certain proceedings, but also in the very proceedings themselves. That interest is protected by granting the public access to those proceedings. And a necessary corollary of the right to attend protected proceedings is the ability to access documents submitted in conjunction with those proceedings, for only then can members of the public truly understand what has occurred.

Nelnet and Brazos argued that because the original case settled before a summary-judgment ruling, the documents were of little value in understanding what happened in the litigation. But it was up to the public to decide why the case was brought and fought and what exactly was at stake in it. Nelnet and Brazos asserted that the original parties settled in response to the district court's finding that Oberg failed to preserve certain evidence. Camoin, by contrast, noted that they may have settled because of the arguments and evidence presented in the summary-judgment proceedings. However, without access to the sealed materials, it was impossible for the public to know which view is correct. So irrespective of whether a district court ever resolves a summary-judgment motion, the public has a presumptive First Amendment right to access documents submitted in connection with it.

→ **Conclusion.** Accordingly, the Fourth Circuit held that the district court erred in concluding that Camoin had no First Amendment right to access the summary-judgment motion and the documents attached to it. Therefore the appellate court reversed the magistrate judge's order and remanded for consideration of whether maintaining the seal on the requested documents would be justified under First Amendment scrutiny.

FEDERAL QUESTION JURISDICTION

Legal Malpractice Action

Link Motion Inc. v. DLA Piper LLP (US)

103 F.4th 905, 2024 U.S. App. LEXIS 14061 (2d Cir. June 10, 2024)

The Second Circuit held that a federal standing question embedded in a state-court legal malpractice claim did not permit the exercise of federal jurisdiction over a state-law claim.

→ **Background.** The plaintiff in this case was a Chinese company incorporated in the Cayman Islands. The company sought legal advice from the defendant law firm in connection with a stock offering. Later that year, the company was sued in the U.S. District Court for the Southern District of New York by a shareholder. The complaint was styled as a “Verified Shareholder Derivative Complaint,” and it asserted federal securities claims, as well as common-law claims for breach of fiduciary duty and unjust enrichment.

On December 13, 2018, the shareholder’s counsel notified the law firm of the action and sent it a copy of the complaint, advising that it would move the next day for a temporary restraining order (TRO), preliminary injunction, and appointment of a receiver.

The law firm promptly emailed notice of the action to the company’s in-house counsel and reported that an associate would appear in connection with the TRO application and advise the court that the firm had not yet received instructions from the company on how to proceed.

The next day, the district court entered a TRO enjoining the company from transferring or dissipating any assets for 14 days. At the same time, the court ordered the parties to confer and to submit a joint letter by December 21 indicating whether the company consented to extend the TRO, and proposing a briefing schedule on the preliminary-injunction and receivership motions.

The law firm then repeatedly sought the company’s guidance as to how to proceed in the action but received none. On December 21, the shareholder’s attorney and the law firm submitted a joint letter to the district court consenting to extension of the TRO pending decision on the shareholder’s preliminary-injunction and receivership motions.

Over the next month, the law firm continued to seek the company’s instructions as to how it wished to proceed in the action. On January 14, 2019, the law firm sent an email in both English and Mandarin to all members of the company’s board, stating that the firm had repeatedly asked for instruction on how to proceed in the action but had not received any guidance from the company. Receiving no response to this communication, on January 18, the law firm sent the company another email advising that if no instructions were received within 24 hours the law firm would assume that it had the company’s consent not to oppose the preliminary-injunction and receivership motions.

With no response forthcoming from the company, on January 21, the law firm and the shareholder’s counsel filed a joint stipulation with the district court stating that the company did not oppose entry of a preliminary injunction and that the shareholder agreed to an extension of time for the company to answer the complaint. The district court so-ordered the stipulation, and on February 1, 2019, issued the requested preliminary injunction and appointed a receiver.

On March 1, the law firm sought leave to withdraw from the action, citing the company's failure to cooperate in the firm's representation, to respond to the firm's inquiries, and to pay the firm's overdue legal fees. The district court granted the request the same day.

Several years later, on review of various motions and amended pleadings filed in the shareholder's action, the district court adopted a magistrate judge's detailed report recommending rejection of a challenge to the court's jurisdiction. The district court concluded that the shareholder had standing under federal law to pursue his federal securities claims.

The district court also adopted the magistrate judge's recommendation of a dissolution of the receivership, finding that because the shareholder's second amended complaint stated only direct, not derivative, claims for which he could not show that available legal remedies would be inadequate, continued receivership was unwarranted.

Following the dissolution of the receivership, the company initiated the present legal malpractice claim in New York state court, alleging that the law firm acted without its informed consent in representing to the district court that the company did not oppose entry of the preliminary injunction. The claim also alleged that no preliminary injunction or receivership would have been ordered had the law firm timely advised the company and argued to the district court that the shareholder (1) lacked standing to bring derivative claims on behalf of the company, (2) failed to state the elements of a federal securities claim, and (3) was required by Federal Rule of Civil Procedure 65(c) to post security.

The law firm removed the action to federal court on September 29, 2022, based on federal question jurisdiction under 28 U.S.C. § 1331 and supplemental jurisdiction under 28 U.S.C. § 1367. The law firm argued that the malpractice action required evaluation of the merits of the federal defenses that the company claimed the law firm should have raised, and that the factual nexus between the state malpractice action and the federal shareholder action permitted the court to hear the malpractice action.

The company moved for remand to state court, arguing that federal question jurisdiction did not lie because the law firm could not show that the claim presented substantial federal issues as required by *Gunn v. Minton* [568 U.S. 251, 258, 133 S. Ct. 1059, 185 L. Ed. 2d 72 (2013)], and therefore supplemental jurisdiction under 28 U.S.C. § 1367 would not be permitted, because original jurisdiction was lacking.

The district court denied remand. Although the district court agreed that the company's state malpractice claim did not arise directly under federal law, the court concluded that it nevertheless fell within the narrow category of state-law claims presenting substantial federal issues so as to warrant the exercise of federal jurisdiction. The district court also denied the company's subsequent motion for reconsideration or, in the alternative, certification of the issue for immediate interlocutory appeal.

On May 26, 2023, the district court dismissed the company's complaint with prejudice as time barred. Applying New York law, the district court found that the claim accrued, at the latest, on January 21, 2019, the date on which the law firm joined the shareholder's counsel in filing the joint stipulation stating that the company did not oppose entry of a preliminary injunction. The company's September 12, 2022, filing of the present malpractice action thus fell outside the applicable New York three-year statute of limitations, and no tolling principles supported a contrary conclusion.

Denied reconsideration by the district court, the company filed this appeal, challenging both the district court's judgment of dismissal and its earlier denial of its motion to remand the action to state court.

➔ **Remand Was Required Because Federal Jurisdiction Was Lacking.** The Second Circuit noted that a removed case should be remanded if "at any time before final judgment it appears that the district court lacks subject matter jurisdiction" [28 U.S.C. § 1447(c)]. Here, jurisdiction depended on whether the claim arose under the Constitution, laws, or treaties of the United States, or presented significant disputed issues of federal law.

The court reiterated that in order to determine whether a state claim presents a significant disputed issue of federal law, "the embedded federal issue must be (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress" [see *Gunn v. Minton*, 568 U.S. 251, 257, 133 S. Ct. 1059, 185 L. Ed. 2d 72 (2013)].

The parties agreed that the company's malpractice action implicated the federal question of whether the shareholder had standing to pursue his federal securities claims. Regarding the first *Gunn* factor, the Second Circuit found that the standing issue was necessarily raised, rejecting the company's argument that it related to a defense and was not an element of its malpractice claim. The face of the company's complaint demonstrated that the issue was integral to its malpractice claim because it alleged that the law firm breached the duty of care by failing to advise the company that the shareholder lacked standing. Thus, to prove malpractice, the company had to show that it would have prevailed on a federal standing challenge in the underlying action.

Regarding the second *Gunn* factor, the court found that because the federal standing issue was critical to the causation element of the malpractice claim, it qualified as a "central point of dispute" in the state action, thus satisfying the "actually disputed" factor. The possibility that the district court's ruling that the shareholder had standing as a matter of law might prevent the company from succeeding on this point did not alter the fact that the dispute, grounded in federal law, was central to its malpractice claim.

The Second Circuit noted, however, that the satisfaction of these first two *Gunn* factors was not enough to confer federal question jurisdiction and avoid remand. As to the third factor, the court quoted *Gunn* to emphasize that it is not enough that the federal issue be significant; rather, "the substantiality inquiry looks instead to the importance of the issue to the federal system as a whole." Moreover, the court noted that most federal questions raised in connection with state-law claims will not be deemed substantial.

Here, the court found that the standing issue embedded in the malpractice claim, however important to the law firm, lacked the sort of significance to the federal system as a whole that would warrant the exercise of federal jurisdiction. The Second Circuit found *Gunn* to be instructive, as it involved a state-law malpractice claim in which the underlying action was a patent dispute for which the federal courts had exclusive jurisdiction. The Supreme Court explained that "because of the backward-looking nature of a legal malpractice claim, the federal question is posed in a merely hypothetical sense." The Court in that case held that the legal malpractice claim did not arise under federal law, and that no matter how the state courts resolved the "hypothetical 'case within a case,' it would not change the real-world result of the prior federal patent litigation."

The Second Circuit rejected the law firm's argument that this case was distinguishable from *Gunn* in that the district court's order on the standing issue was not hypothetical, and the malpractice action should have been seen as a "collateral attack" that asked the state court to effectively overrule the district court's decision. The court was not persuaded by the characterization that this threatened to undermine the finality of federal decisions and the development of a uniform body of federal law, finding that any misapplication of federal law

by the state court could be reviewed by the Supreme Court. “While such review is not automatic, its availability mitigates any risk to uniformity of federal law from possible state error.”

Moreover, the court found that substantiality was not shown by the possibility of a state court ruling at odds with federal law. “Such a ruling would not alter the district court’s federal law standing decision. . . . Nor would it control in any future federal securities cases. . . . It also would be unlikely to bear on other state malpractice cases, which, like this case, tend to arise under unique circumstances.” The Second Circuit opined that a ruling favorable to the company would, at most, shift certain costs from client to attorney, which “is the same relief sought in every legal malpractice action, including the one at issue in *Gunn*.”

The Second Circuit underscored that state courts are recognized to be competent to apply relevant federal law to the resolution of state claims. Here, the federal standing issue allegedly neglected by the law firm was eventually raised and decided adversely to the company by the magistrate judge and the district judge in the shareholder suit. Following remand, the state court “will have the benefit of these decisions, and we have no reason to doubt that it will give them careful review and appropriate weight in deciding [the company’s] claim of legal malpractice based on [the law firm’s] alleged failure to raise a federal law standing challenge.”

The court found that the fourth *Gunn* factor required little discussion because, in the absence of a substantial federal issue, exercise of federal jurisdiction over a state-law claim would disrupt the balance of federal and state judicial responsibilities. The Second Circuit emphasized that the balance inquiry required sensitivity in recognizing claims of the sort ordinarily resolved in state courts, and the Supreme Court has repeatedly recognized that legal malpractice actions “plainly present the sort of claims ordinarily resolved in state courts.” Thus, the court found that the fourth *Gunn* factor also weighed against the exercise of federal jurisdiction in this case.

- ➔ **No Supplemental Jurisdiction.** The Second Circuit rejected the argument that the district court had supplemental jurisdiction over the malpractice action due to its factual overlap with the federal shareholder’s suit. The removal statute confers federal jurisdiction only over removed civil actions “of which the district courts of the United States have original jurisdiction” [28 U.S.C. § 1441(a)]. Here, as previously discussed, the district court did not have original federal jurisdiction over the state malpractice action.
- ➔ **Disposition.** The Second Circuit concluded that the district court was without subject matter jurisdiction to consider the removed state legal malpractice claim. The court of appeals therefore vacated the district court’s judgment of dismissal without addressing its finding that the action was untimely filed. The court remanded the case with instructions that the district court return the case to the state court.

PERSONAL JURISDICTION

Purposeful Direction

XMission, L.C. v. PureHealth Rsch.

105 F.4th 1300, 2024 U.S. App. LEXIS 15945 (10th Cir. June 28, 2024)

The Tenth Circuit has held that a defendant was subject to specific personal jurisdiction in Utah when it knowingly sent marketing emails to the customers of an internet and email provider located in Utah, and those emails allegedly harmed the provider in violation of federal and state law.

→ **Background.** The plaintiff, an internet service and email provider based in Utah, brought suit in federal district court in Utah against the defendant, a company that sells nutritional supplements through its website. The defendant was incorporated in Wyoming, with its principal place of business in Virginia.

The plaintiff claimed that its customers in Utah received thousands of unwanted promotional emails from the defendant sent in violation of state and federal law, resulting in increased server maintenance costs and customer complaints. Specifically, the plaintiff alleged that the advertising emails violated the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 [15 U.S.C. §§ 7701–7713]. The advertising emails, according to the complaint, contained materially false or misleading subject headings, which impaired the plaintiff's ability to process the emails on its servers and were designed merely to induce recipients to open the emails under false pretenses. Additionally, the plaintiff alleged that the defendant did not honor customer opt-out requests within 10 business days as required by the Act. Similar claims were also stated under Utah's Consumer Sales Practices Act [Utah Code Ann. § 13-11-1].

The defendant moved to dismiss for lack of specific personal jurisdiction, and the district court granted the motion.

→ **District Court Could Exercise Personal Jurisdiction.** The court of appeals first noted that the jurisdictional question had been properly raised. While personal jurisdiction may be waived or forfeited, here it had been properly asserted at the pleading stage. Further, at the pleading stage, the plaintiff need only make out a prima facie case of jurisdiction.

The court of appeals also observed that, although the case displayed distinctively modern features, it was readily resolved by longstanding jurisdictional principles. The parties agreed that this was a specific jurisdiction case, and that general jurisdiction was not involved. The specific jurisdiction inquiry focuses on the relationship among the defendant, the forum, and the litigation. Specific jurisdiction is proper if (1) the out-of-state defendant "purposefully directed" its activities at residents of the forum state, and (2) the plaintiff's alleged injuries arise out of or relate to those activities.

The purposeful-direction prong of the test requires that a defendant have deliberately engaged in significant activities within the forum state or deliberately directed its activities at the forum state, so that it has manifestly availed itself of the privilege of conducting business there. This requirement ensures that a defendant will not be subject to the laws of a jurisdiction solely as a result of random, fortuitous, or attenuated contacts, the unilateral activity of another party or a third person, or the mere foreseeability that its actions may cause injury in that jurisdiction.

One framework for testing whether a defendant has purposefully directed its activities at the forum state is the harmful-effects test from *Calder v. Jones*. This test has often been applied to suits involving the internet.

Under this test, a plaintiff meets its prima facie burden by showing that an out-of-state defendant's intentional conduct targets and has substantial harmful effects in the forum state. A plaintiff must allege that the defendant committed (1) an intentional action that was (2) expressly aimed at the forum state with (3) knowledge that the brunt of the injury would be felt in the forum state [*Calder v. Jones*, 465 U.S. 783, 788–790, 104 S. Ct. 1482, 79 L. Ed. 2d 804 (1984)].

As to the first element, there was no doubt that the defendant had engaged in an intentional action by sending emails to the plaintiff's customers in Utah.

As to the second element, express aiming, the district court had concluded that this element was unsatisfied because the customers opted into receiving the defendant's newsletter emails. However, the court noted that the district court had mistakenly focused on the customers' conduct rather than on the defendant's conduct of knowingly sending its emails to customers in Utah. Jurisdictional discovery had confirmed that the defendant maintained a database of customer information for recipients of emails, tying each customer's email address to a physical address. Thus, the defendant knew that its emails were going directly to Utah residents. Emailing someone in a particular forum without knowledge of where they live is not purposeful direction, but that was not the case here. The possibility that the customers might, at some time and in some way, have consented to receive emails from the defendant did not disturb this conclusion. The focus of the personal jurisdiction inquiry is on the defendant's relationship to the forum state; jurisdiction must be based on the conduct of the defendant, not on unilateral conduct by another party.

The third element of the harmful-effects test requires that the defendant know that the brunt of the injury would be felt in the forum state. The plaintiff had also made a sufficient prima facie showing of this element. By knowingly sending emails to Utah residents on Utah servers, the defendant knowingly inflicted harm on a Utah business.

The court of appeals concluded that the plaintiff had made out a prima facie showing that the defendant had purposefully directed its conduct at the forum state by knowingly sending emails to customers residing in Utah.

The court also concluded that the claims arose out of or related to the defendant's forum conduct. This component of the specific jurisdiction test requires courts to ensure that there is an adequate link between the forum state and the claims at issue, regardless of the extent of a defendant's other activities connected to the forum. The "arise out of" language requires a causal connection between a defendant's contacts and the action. The court of appeals noted that it has used both but-for and proximate causation tests, and that in the present case as in others either test could be satisfied.

Proximate causation calls for courts to examine whether any of the defendant's contacts with the forum are relevant to the merits of the plaintiff's claim. This test may be somewhat looser than the tort concept of proximate causation. The court must determine whether a nexus exists between a defendant's forum contacts and a plaintiff's cause of action. Here, the defendant's emails sent to Utah constituted conduct in Utah that was linked to the plaintiff's claims. The plaintiff alleged that the emails violated the law by including false and misleading subject lines and that this led to its damages. The emails squarely formed the basis of the plaintiff's claims. Under the but-for causation formulation, any event in the causal chain leading to the plaintiff's injury is sufficiently related to the claim to support the exercise of specific jurisdiction. The emails were at a minimum an event in the causal chain. But for the defendant's act of knowingly sending emails directly to the plaintiff's customers, the plaintiff would not have had a cause of action based on the allegedly false and misleading subject lines in those emails.

The plaintiff had made a prima facie showing that its injuries arose out of or were related to the emails. The complaint detailed how the defendant's emails were sent to the plaintiff's Utah customers, causing those emails to reside on the plaintiff's Utah servers. And the plaintiff alleged it received customer complaints that damaged its goodwill and reputation and forced it to spend money on its servers it otherwise would not have spent. Those allegations were sufficient to establish that the plaintiff's injuries arose out of the defendant's emails.

The court of appeals accordingly reversed the district court's dismissal and remanded for further proceedings.