Litigation Insights

MARCH 2025

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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.

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Appellate Jurisdiction

Ashley v. Clay County

125 F.4th 654, 2025 U.S. App. LEXIS 538 (5th Cir. Jan. 10, 2025)

The Fifth Circuit holds that although an order compelling arbitration ordinarily is not appealable, the district court's failure to resolve a challenge to its jurisdiction before ordering arbitration is appealable.

JUMP TO SUMMARY

DEFAULT JUDGMENTS

Vacatur

Choice Hospice, Inc. v. Axxess Tech. Sols., Inc.

125 F.4th 1000, 2025 U.S. App. LEXIS 349 (10th Cir. Jan. 7, 2025)

The Tenth Circuit holds that lack of notice of default judgment proceedings under Rule 55(b)(2) is generally not a basis for finding the judgment void under Rule 60(b)(4) if the defendant delayed in raising the issue.

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JURY RIGHT

Distinction Between Legal and Equitable Relief

Consumer Fin. Prot. Bureau v. CashCall, Inc.

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The Ninth Circuit holds that a defendant waived its constitutional jury right by agreeing to and participating in a bench trial without objection.

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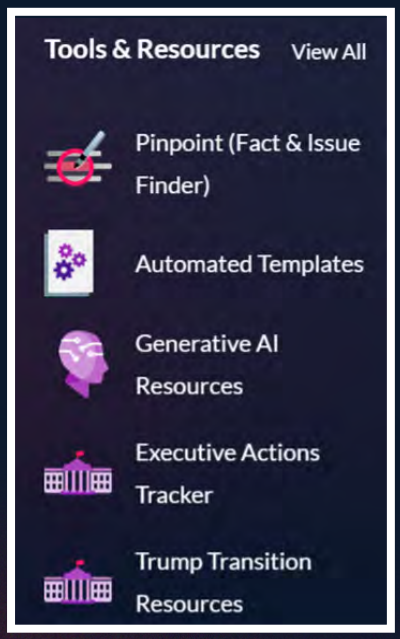
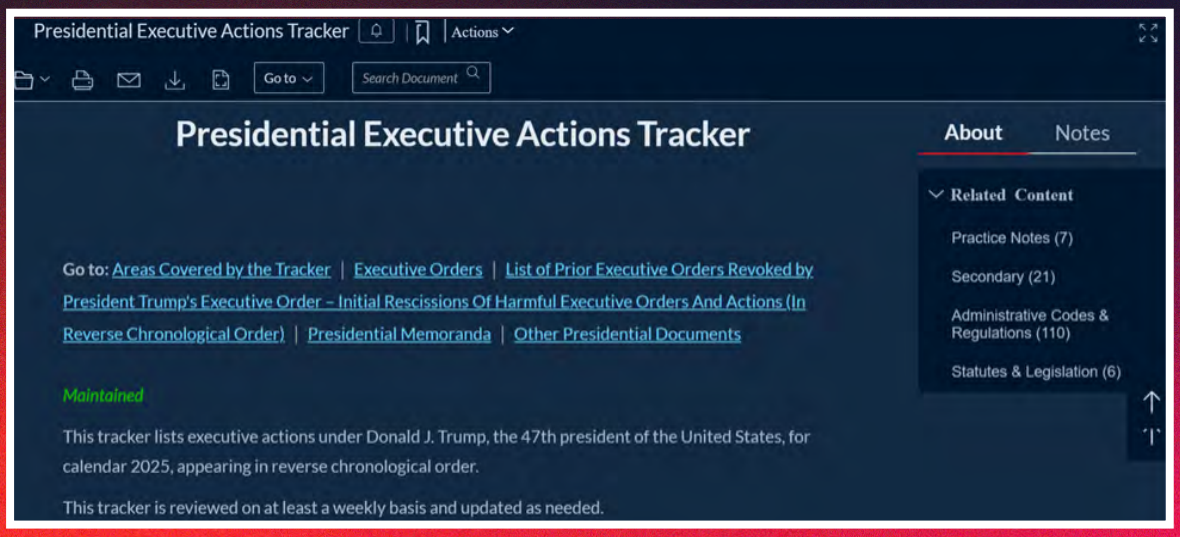
Presidential Executive Actions Tracker Joins the Lexis+® Homepage

By: Noah Kanary, LexisNexis Solutions Consultant, Federal Government

As warmer weather starts to return, I am excited to share an update to the Lexis+ homepage. Located within the Tools and Resources section on the right-hand side of the Lexis+ homepage, you can now find the Executive Actions Tracker, which is accompanied by a White House icon.





The Executive Actions Tracker is going to be your one stop shop for keeping track of the executive actions taken by President Donald Trump and his new Administration. This tracker will contain not only the full text of each executive action, but also summaries of each executive action, and identification of the relevant area of law.

With President Donald Trump having commenced his second term, significant changes are occurring across the domestic and global spectrum. President Trump has issued a quick and comprehensive series of executive actions starting on his Inauguration Day.

To assist subscribers in navigating these changes, we have developed this executive actions tracker. The tracker includes:

- Name and link to the full text of each executive action
- Summaries of each executive action
- Identification of the area of law
- Links to related content

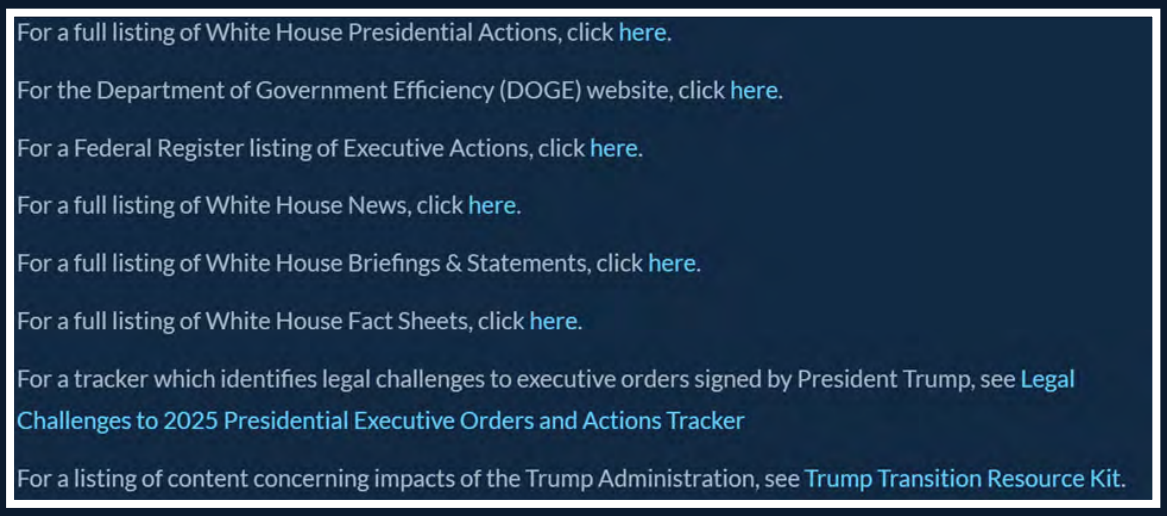
Areas Covered by the Tracker

Our comprehensive tracker spans multiple areas of law, primarily:

Border/Immigration	Federal Contracting	National Security
Economy/Domestic Policy	Federal Employees	Politics
Environment/Energy	Foreign Affairs	Technology
DEI/Social Issues	Government	Trade/Tax
Education	Health and Safety	Other
Emergency Relief	Justice	

Executive Order Title	Date	Summary	Area of Law	Related Content
Further Amendment to Duties Addressing the Synthetic Opioid Supply Chain in the People's Republic of China	3/3/25	The President has issued an order under various U.S. laws, including the International Emergency Economic Powers Act, to address the synthetic opioid crisis linked to the People's Republic of China (PRC). The order follows Executive Order 14195, which imposed tariffs on Chinese products due to the PRC's inadequate action against the flow of synthetic opioids like fentanyl to the U.S. The PRC's lack of cooperation in mitigating the drug crisis has led to an amendment increasing the tariffs from 10% to 20%. 90 Fed. Reg. ___.	Trade/Tax Health and Safety	
Amendment to Duties to Address the Situation at our Southern Border	3/2/25	The President has amended Executive Order 14194, which addresses the situation at the southern border, by modifying the duty-free de minimis treatment for certain articles. This treatment will end once the Secretary of Commerce confirms that systems are in place to efficiently process and collect applicable tariffs. The order maintains existing legal authorities and does not create enforceable rights. 90 Fed. Reg.	Trade/Tax Health and Safety	

Links to related content will also be provided to related relevant resources, such as the Department of Government Efficiency (DOGE) website, practice notes, and administrative codes and regulations.



As changes in government occur at a rapid pace, the tracker will be updated as changes are made, with a minimum of weekly updates. The Executive Actions Tracker can become an indispensable resource for you regardless of role or agency as it will allow you to stay up to date on the most important actions you care about.

Lexis+® Practical Guidance Module for the Federal Government Practice Area

Did you know that Practical Guidance on Lexis+® includes a **comprehensive Federal Government module** which provides guidance on all the most critical tasks that Federal Government attorneys undertake? The module offers you award-winning **practice notes, checklists, templates and tools** covering topics such as **contracting, agency law, administrative law, information law, and labor and employment law**. The module provides practitioners with guidance on how to complete common tasks, such as enforcing compliance regulations, implementing fair processes for soliciting bids for contracts, and enforcing applicable statutes. By consolidating all relevant information into one place, Practical Guidance makes cumbersome tasks quicker and easier to complete. It helps **boost productivity and free up time** for high-value work. By using the resources found in the Federal Government module, practitioners can feel confident that they have the resources necessary to ensure their work is carried out appropriately.

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If you would like to learn more about the Federal Government module in Lexis+ Practical Guidance, please contact your Solutions Consultant.

Win with Jim Wagstaffe Current Awareness Insights!

Alert: Complaint Must Allege Some Injury (For Standing) but Need Not Narrate the Quantum of Injury

In a Title VII action, the district court dismissed the complaint in part because it failed to allege the plaintiff's resulting damages were sufficiently serious to be cognizable under Title VII. The Seventh Circuit reversed. First, the Court noted that a recent Supreme Court ruling in Muldrow v. St. Louis, 601 U.S. 346, 35 (2024) that while a Title VII plaintiff must show "some harm" resulting from a term of condition of employment they need not show that the harm incurred was significant or serious.

Second, the Court held that demanding details about loss in the complaint—as opposed to the summary judgment stage—is a problem because complaints "need not plead damages. Special damages, yes, see Fed. R. Civ. P. 9(g), but ordinary injuries no." The Court noted that under Rule 54(c), "[p]revailing parties receive the relief to which they are entitled no matter what was in (or missing from) the complaint."
The Court acknowledged that a compliant must "allege some injury (otherwise the plaintiff lacks standing), but they need not narrate the quantum of injury. That's for a later stage." Thomas v. JBS Green Bay, Inc., 120 F.4th 1335, 1337 (7th Cir. 2024).

Fed Civ Proc Before Trial: The Wagstaffe Group § 17-XII[A], 17. 450—Complaint Must Contain Demand for Relief Sought (Rule 8(a)(3))

APPEALS

Appellate Jurisdiction

Ashley v. Clay County

125 F.4th 654, 2025 U.S. App. LEXIS 538 (5th Cir. Jan. 10, 2025)

The Fifth Circuit holds that although an order compelling arbitration ordinarily is not appealable, the district court's failure to resolve a challenge to its jurisdiction before ordering arbitration is appealable.

Background. The plaintiff in this case sued her former employer, a county-owned hospital, as well as the county itself, asserting claims under federal and state law. The county moved to dismiss on the basis of state-law governmental immunity from suit, and the hospital moved to compel arbitration under an arbitration agreement in the plaintiff's employment contract. The district court declined to address the county's arguments regarding governmental immunity and issued an order sending all parties to arbitration (including the county, which contended it was not a signatory to the arbitration agreement). The district court thereafter dismissed the county's motion to dismiss as moot. The county filed a timely appeal.

Appellate Jurisdiction. As a threshold matter, the Fifth Circuit panel had to determine whether it had jurisdiction over this appeal. Both parties contended that the court had appellate jurisdiction under the collateral order doctrine, so the court began its jurisdictional analysis with that doctrine.

Collateral Order Doctrine. Under 28 U.S.C. § 1291, federal appellate courts generally have jurisdiction only over final decisions of the district courts [see Mitchell v. Forsyth, 472 U.S. 511, 524, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985)]. The collateral order doctrine, however, represents a "practical construction" of the final-judgment requirement of § 1291. This narrow doctrine allows federal appellate jurisdiction over an order that, while not ending the litigation, effectively functions as a final decision [see Swint v. Chambers Cnty. Comm'n, 514 U.S. 35, 41–42, 115 S. Ct. 1203, 131 L. Ed. 2d 60 (1995)]. To fall within this doctrine, a district-court order must (1) conclusively determine a disputed question, (2) resolve an issue that is completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from a final judgment [see Troice v. Proskauer Rose, L.L.P., 816 F.3d 341, 345 (5th Cir. 2016)]. Orders denying governmental immunity typically satisfy these criteria [see, e.g., Morgan v. Plano Indep. Sch. Dist., 724 F.3d 579, 582 (5th Cir. 2013)].

General Prohibition of Interlocutory Review of Orders Favoring Arbitration. In cases not involving claims of governmental immunity, the Fifth Circuit has held that the collateral order doctrine does not confer appellate jurisdiction over interlocutory orders granting motions to compel arbitration [see Doe v. Tonti Mgmt. Co., 24 F.4th 1005, 1009–1010 (5th Cir. 2022); Al Rushaid v. Nat'l Oilwell Varco, Inc., 814 F.3d 300, 304 (5th Cir. 2016)]. In that context, the court has declined to apply the collateral order doctrine to override the specific framework provided by the Federal Arbitration Act (FAA) for determining whether and when an order concerning arbitration is appealable. For example, the FAA provides that except as otherwise provided in 28 U.S.C. § 1292(b) (which authorizes discretionary appeals), an appeal may not be taken from an interlocutory order directing arbitration to proceed [9 U.S.C. § 16(b)(2)].

Tension Between FAA and Immunity Principles. The appellate panel in this case noted that while the FAA's prohibition of interlocutory appeals from orders compelling arbitration reflects Congress's strong preference for arbitration, it stands in tension with the general principles of immunity. The Supreme Court has held that immunity from suit is a threshold question to be resolved as early in the proceedings as

possible [see Siegert v. Gilley, 500 U.S. 226, 231–233, 111 S. Ct. 1789, 114 L. Ed. 2d 277 (1991); see also Tex. All. for Retired Ams. v. Scott, 28 F.4th 669, 672 & n.4 (5th Cir. 2022) (pretermitting issues such as standing and preclusion once court determined immunity applied); Backe v. LeBlanc, 691 F.3d 645, 648–649 (5th Cir. 2012) (district court erred in withholding its ruling on qualified immunity defense pending general discovery); Mangieri v. Clifton, 29 F.3d 1012, 1015 (5th Cir. 1994) ("The question of qualified immunity must be addressed as a threshold issue because this issue determines a defendant's immunity from suit.")]. And this jurisdictional tension arises when the district court grants a motion to compel arbitration without first addressing the issue of immunity, as happened in this case.

Failure to Address Immunity Made District Court's Order Final and Appealable. The court of appeals found that its precedent in *Helton* v. Clements provided a framework for resolving this jurisdictional impasse. In Helton, the Fifth Circuit held that a district-court order that declines to rule on a motion to dismiss on the basis of a claim of immunity constitutes a final decision under 28 U.S.C. § 1291 [*Helton* v. Clements, 787 F.2d 1016, 1017 (5th Cir. 1986)]. Applying *Helton*, the appellate panel in this case focused not on the merits of the arbitration order itself but on whether the district court properly addressed its own jurisdiction to compel arbitration. The question therefore, was whether the district court had arrived at its decision in accordance with established principles of jurisdictional authority.

The court of appeals found it significant that the district court had bypassed its obligation to decide the threshold immunity question. It refused to adjudicate the county's motion to dismiss, denied that motion as moot, deferred the issue to arbitration, and stayed the proceedings. Under *Helton*, this refusal to engage with the immunity question—leaving it unanswered—constituted a final decision under 28 U.S.C. § 1291. For this reason, the court concluded that the district court's order denying the county's motion to dismiss as moot was appealable. The court of appeals did not, however, reach the question whether the county was entitled to the immunity it claimed; that was a matter for the district court to decide in the first instance.

Decisional Sequencing in District Court. Having confirmed its appellate jurisdiction, the Fifth Circuit addressed the proceedings below, in particular whether the district court was obligated to address the immunity issue before ruling on the motion to compel arbitration. The appellate panel emphasized that governmental immunity from suit is no ordinary defense; it operates as a jurisdictional bar, depriving a trial court of authority to proceed.

The court of appeals noted that a federal court generally may not rule on the merits of a case without first determining that it has subject-matter jurisdiction of the claims asserted and personal jurisdiction over the parties [see Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp., 549 U.S. 422, 430–431, 127 S. Ct. 1184, 167 L. Ed. 2d 15 (2007)]. And motions to compel arbitration are not one of the limited instances in which district courts have leeway to pretermit the resolution of jurisdictional challenges [Hines v. Stamos, 111 F.4th 551, 566 (5th Cir. 2023)].

Under state law applicable in this case, the county's claimed governmental immunity would bar both liability and suit unless expressly waived by statute. Thus, the immunity defense would, if successful, strip the district court of subject-matter jurisdiction. The district court nonetheless compelled arbitration without first addressing the immunity defense. In bypassing this threshold jurisdictional issue, the district court's arbitration order failed to adhere to Fifth Circuit precedent [see Hines v. Stamos, 111 F.4th 551, 566 (5th Cir. 2023)]. Accordingly, the court of appeals concluded that the district court erred by not resolving challenges to its jurisdiction before deciding arbitrability.

Conclusion and Disposition. Because the district court did not address its own jurisdiction before entering an order compelling arbitration, the Fifth Circuit reversed the order. The case was remanded with instructions that the district court resolve the question of governmental immunity and the motion to dismiss before ruling on the motion to compel arbitration.

DEFAULT JUDGMENTS

Vacatur

Choice Hospice, Inc. v. Axxess Tech. Sols., Inc.
125 F.4th 1000, 2025 U.S. App. LEXIS 349 (10th Cir. Jan. 7, 2025)

The Tenth Circuit holds that lack of notice of default judgment proceedings under Rule 55(b)(2) is generally not a basis for finding the judgment void under Rule 60(b)(4) if the defendant delayed in raising the issue.

Background. Choice Hospice, Inc., the plaintiff, provided hospice services in Oklahoma. Choice Hospice contracted with Axxess Technology Solutions, Inc., a Texas corporation, for Axxess to process and bill hospice claims on Choice Hospice's behalf.

On October 26, 2022, Choice Hospice filed a breach-of-contract suit against Axxess. Choice Hospice alleged that it was not receiving payments for its services because Axxess failed to properly process claims. Axxess was properly served with the complaint and summons on November 3, 2022, and again on November 7, 2022. On November 17, 2022, Choice Hospice filed a mediation request and forwarded it and a copy of the complaint to Axxess. An Axxess employee responsible for receiving and processing lawsuits incorrectly informed Axxess's counsel that Axxess had not been served in the pending lawsuit. As a result, Axxess did not file an answer or otherwise timely respond to the complaint.

On December 2, 2022, Choice Hospice moved for an entry of default by the clerk of court. On December 5, 2022, the clerk entered Axxess's default, and Choice Hospice applied to the district court for a default judgment. On January 4, 2023, the district court entered a default judgment against Axxess and awarded Choice Hospice almost $1 million in damages.

On January 6, 2023, Axxess attended a pre-mediation conference with Choice Hospice's counsel, who reported that a default judgment had been entered. Axxess claimed this was the first time it learned of the default judgment. Thereafter, counsel for Axxess investigated and learned that the employee responsible for receiving and processing lawsuits never saw the summons and complaint in the electronic folder, because she had been working outside of the country and was distracted after the deaths of her brother and father, requiring her to take two bereavement leaves.

On March 3, 2023, Axxess filed its first motion to vacate the default judgment. In a footnote in this motion, Axxess stated that it was making the motion under Rule 55(c) but contended that the judgment should be vacated as void under Rule 60(b)(4) because the parties had a valid and enforceable mediation clause. Choice countered that there was no applicable mediation clause, and even if there was, Axxess waived that defense by failing to timely respond to the complaint. Choice Hospice also argued that Axxess's motion could not properly be brought under Rule 55(c) because the court may set aside a default judgment only under Rule 60(b) and Axxess's motion failed to allege any grounds to support vacatur under Rule 60(b).

In reply, without addressing the procedural propriety to do so, Axxess maintained that its motion was pursuant to Rule 55(c) and reasserted its lack-of-jurisdiction defense alleging the default judgment was void because of the binding mediation clause. It also raised Rule 60(b)(1)'s excusable-neglect factors, explaining that "[i]t was not until after entry of default judgment that Axxess became aware of the need to defend this lawsuit."

On April 19, 2023, the district court denied Axxess's motion to vacate the default judgment. The court construed the motion as one made under Rule 60(b)(4) and concluded that even if there was a binding mediation clause, Axxess waived its right to force mediation. The district court then rejected Axxess's Rule 60(b) excusable-neglect argument, finding that Axxess waived that argument by not raising it until the reply and that Axxess failed to offer any reasonable explanation for not responding to the complaint or for waiting 56 days after learning of the default judgment to seek relief.

Axxess did not appeal that order. Instead, on November 11, 2023, Axxess filed its second motion to vacate and exclusively relied on Rule 60(b). Citing Rule 60(b)(1), Axxess argued that there had been excusable neglect. For the first time, Axxess asserted that its failure to respond to the complaint was due to employee error, though it did not identify when it learned of this error, stating only that before it filed its first motion to vacate, the employee had not informed legal counsel why the process for logging and responding to lawsuits broke down.

Citing Rule 60(b)(4), Axxess again argued that the default judgment should be vacated as void. Axxess argued that under Rule 55, Choice Hospice was required to provide notice of the default judgment proceedings, and its failure to do so rendered the default judgment void. And citing Rule 60(b)(6), which permits relief for "any other reason that justifies relief," Axxess argued that Choice Hospice's failure to give Axxess notice of the default proceedings and its "manner of obtaining default judgment" entitled Axxess to relief.

The district court denied Axxess's second motion to vacate on claim-preclusion grounds. Without addressing the 60(b)(4) and (b)(6) grounds, the district court concluded that claim preclusion applied because Axxess's excusable-neglect argument based on employee error could and should have been raised in its first motion to vacate. Axxess appealed.

- **Claim Preclusion Requires Previous Action.** The Tenth Circuit affirmed the district court's denial of Axxess's second motion to vacate but not on claim-preclusion grounds. The appellate court found that the affirmative defense of claim preclusion was inapplicable because one of its essential elements—an earlier action—was lacking. "Although there was a final judgment, there was only one action and thus no 'earlier action.'" In addition, the Tenth Circuit found that the district court should have exercised its discretionary authority to deny successive Rule 60(b) motions instead of invoking claim preclusion.

- **Rule 60(b) Is Extraordinary Remedial Procedure.** A court may relieve a party from a final order or judgment under Rule 60(b). Denial of a Rule 60(b) motion is reviewed for an abuse of discretion—unless a party moves for relief under Rule 60(b)(4) on grounds that the judgment is void, in which case de novo review is appropriate. A district court abuses its discretion if its decision is "arbitrary, capricious, whimsical, or manifestly unreasonable." Successive Rule 60(b) motions are not appropriate to advance new arguments or to support facts that were available but not raised at the time of the original motion.

- **Excusable Neglect.** The Tenth Circuit rejected Axxess's excusable-neglect argument, noting that because the events supporting that argument all occurred before Axxess filed its first motion to vacate, this argument should have been raised in that motion. Absent extraordinary circumstances, the grounds for a successive Rule 60(b) motion must not have been available at the time the first motion was filed. Therefore, Axxess's second motion was not an appropriate vehicle to advance arguments or support facts that were available but not raised at the time of the original argument, and the district court did not abuse its discretion by rejecting this argument.

In so holding, the Tenth Circuit also rejected Axxess's argument that its second motion to vacate was not a successive Rule 60(b) motion because its first motion was brought under Rule 55(c). Rule 55(c) allows a court to set aside an entry of default for good cause, but it may set aside a final default judgment only under Rule 60(b). By the time Axxess filed its first motion to vacate, the district court had entered a final default judgment; therefore, a Rule 60(b) motion was required. Consequently, Axxess's second motion to vacate was a successive Rule 60(b) motion.

Void Judgment. Rule 55(b)(2) requires notice of default proceedings if "the party against whom a default judgment is sought has appeared personally or by a representative." A motion under Rule 60(b)(4) must be made within a reasonable time [Fed. R. Civ. P. 60(c)(1)]. Axxess conceded that its lack-of-notice argument could have been raised in its first motion to vacate but argued that delay was not fatal. Circuit precedent in support of that proposition holds that "if a judgment is void, it is a nullity from the outset and any 60(b)(4) motion for relief is therefore filed within a reasonable time" [VTA, Inc. v. Airco, Inc., 597 F.2d 220, 224 n.9 (10th Cir. 1979)].

Citing the interest of finality, the Tenth Circuit noted that Rule 60(b)(4) is narrow and "applies only in the rare instance where a judgment is premised on a certain type of jurisdictional error or on a violation of due process that deprives a party of notice or the opportunity to be heard" [United Student Aid Funds, Inc. v. Espinosa, 559 U.S. 260, 271, 130 S. Ct. 1367, 176 L. Ed. 2d 158 (2010)]. The court rejected its application in cases involving deficient Rule 55(b)(2) notice when the movant delays raising the argument, equating that to a harmless procedural defect. Axxess was in this "'inextricable situation' because it did not appeal the default judgment or raise the Rule 55(b)(2) notice argument" in its first motion to vacate: "Rule 60(b)(4) does not provide a license for litigants to sleep on their rights" [United Student Aid Funds, Inc. v. Espinosa, 559 U.S. 260, 275, 130 S. Ct. 1367, 176 L. Ed. 2d 158 (2010)].

Other Bases for Relief. The Tenth Circuit rejected Axxess's argument that it was entitled to relief under Rule 60(b)(6) because Choice Hvospice acted in bad faith seeking mediation after filing the lawsuit. Because Axxess was aware that Choice Hospice had pursued mediation after filing the lawsuit, Axxess's argument about bad faith could have been raised in its first motion to vacate. Thus, the district court properly exercised its discretion to deny relief.

The court also rejected Axxess's repackaged voidness argument under Rule 60(b)(6). Rule 60(b)(6) may not be used as a vehicle to re-allege 60(b)(4) allegations, and parties moving for relief under Rule 60(b) cannot simply "throw in subsection (6) without any new arguments" and expect to obtain relief.

Holding. Accordingly, the Tenth Circuit affirmed the district court's denial of Axxess's second motion to vacate the default judgment.

JURY RIGHT

Distinction Between Legal and Equitable Relief

Consumer Fin. Prot. Bureau v. CashCall, Inc.
124 F.4th 1209, 2025 U.S. App. LEXIS 99 (9th Cir. Jan. 3, 2025)

The Ninth Circuit holds that a defendant waived its constitutional jury right by agreeing to and participating in a bench trial without objection.

Introduction. In 2015 the Consumer Financial Protection Bureau (CFPB) brought what it referred to as an equitable claim against CashCall, Inc., a California Subchapter S-corporation under the Consumer Financial Protection Act (CFPA). The claim alleged unfairness, deception, and abusiveness, but the remedy it sought was the full amount lost by consumers. CashCall waived its Seventh Amendment right to a jury by failing to timely demand one and later expressly agreeing to and participating in a bench trial in the Central District of California. The district court, in 2017 after a bench trial, found CashCall liable for violation of the Consumer Financial Protection Act but denied restitution; that order was reversed on appeal [see Consumer Fin. Prot. Bureau v. CashCall, Inc., 35 F.4th 734 (9th Cir. 2022)]. On remand the district court awarded $33 million for reckless violation of the CFPA and legal restitution of $134 million for the total amount consumers paid above the loan amounts received, minus refunds. CashCall appealed, arguing that the CFPB had asserted that it was seeking equitable restitution and that the remedy should have been limited to its net profits, so the district court's order of legal restitution made the Seventh Amendment right to a jury trial applicable.

Seventh Amendment. The Seventh Amendment guarantees a right to a jury trial in suits at common law, including legal but not equitable actions. The Supreme Court has held that restitution is a legal remedy when ordered in a case at law and an equitable remedy when ordered in an equity case, and whether it is legal or equitable depends on the basis for the plaintiff's claim and the nature of the underlying remedies sought [see Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 213, 122 S. Ct. 708, 151 L. Ed. 2d 635 (2002)]. The Court has also held that an equitable disgorgement award not exceeding a defendant's net profits is permissible [see Liu v. SEC, 591 U.S. 71, 140 S. Ct. 1936, 207 L. Ed. 2d 401 (2020)]. In 2024 the Court held that common-law cases to which a right to jury trial exists include all lawsuits that are not of equity or admiralty jurisdiction, considering the cause of action and the remedy it provides, with emphasis on the remedy. The Court distinguished common-law and equity cases, noting that a court of equity can order a defendant to return unjustly obtained funds, but only courts of law issue monetary penalties as punishment [see SEC v. Jarkesy, 603 U.S. 109, 144 S. Ct. 2117, 219 L. Ed. 2d 650 (2024)].

Factual Background. CashCall, Inc., makes unsecured high-interest consumer loans. After some run-ins with government regulators, it adopted a strategy of having another entity, Western Sky Financial, LLC, a South Dakota limited liability company with its offivces located on the Cheyenne River Sioux Reservation, make the loans. Western Sky lent money from a subsidiary of CashCall, WS Funding, LLC, and then CashCall purchased the loans from Western Sky a few days later. The contracts with the consumers had a choice-of-law provision making tribal law applicable.

Trial was held in 2017; the trial court held that because CashCall had relied on advice of counsel, it should only be subject to a statutory penalty of $10 million. The court denied the CFPB's request for restitution because the Bureau "did not show that Defendants intended to defraud consumers or that consumers did not receive the benefit of their bargain from the Western Sky Loan Program" [Consumer Fin. Prot. Bureau v. CashCall, Inc.,

2018 U.S. Dist. LEXIS 9057, at *37 (C.D. Cal. Jan. 19, 2018)]. In the first appeal, the Ninth Circuit held that the trial court erred in denying restitution and remanded for the district court to reconsider whether restitution was appropriate, noting that whether consumers received the benefit of their bargain was irrelevant [Consumer Fin. Prot. Bureau v. CashCall, Inc., 35 F.4th 734, 751 (9th Cir. 2022)].

The district court on remand awarded $33 million for CashCall's reckless violation of the CFPA and legal restitution of $134 million, reflecting the total amount consumers paid above the loan amounts received, minus refunds. CashCall appealed, arguing that the CFPB had asserted that it was seeking equitable restitution. The government in response argued that despite having put the wrong label on the relief sought, it had specifically sought the return of consumer losses measured by the interest and fees that CashCall had illegally collected. The Ninth Circuit held that the district court had not erred; the test for legal rather than equitable remedies depends on the substance of what was sought, not on the label applied.

CashCall also argued that the district court's order of legal restitution made the Seventh Amendment right to a jury trial applicable. But CashCall had made an express, knowing, and voluntary waiver of its jury trial right by agreeing to a bench trial and participating without objection. The Ninth Circuit stated that "[w]e have never held that a party's legal error can vitiate its waiver of a jury-trial right, or that a party must demonstrate a correct understanding of the law for its waiver to be effective."