



Litigation Insights

APRIL 2025

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—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.

CLASS ACTIONS

Attorney's Fees

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Data Breach Litig.*

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[JUMP TO SUMMARY](#)

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Foreign States

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SUMMARY JUDGMENT

Anti-Ferret Rule

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San Juan, Inc.*

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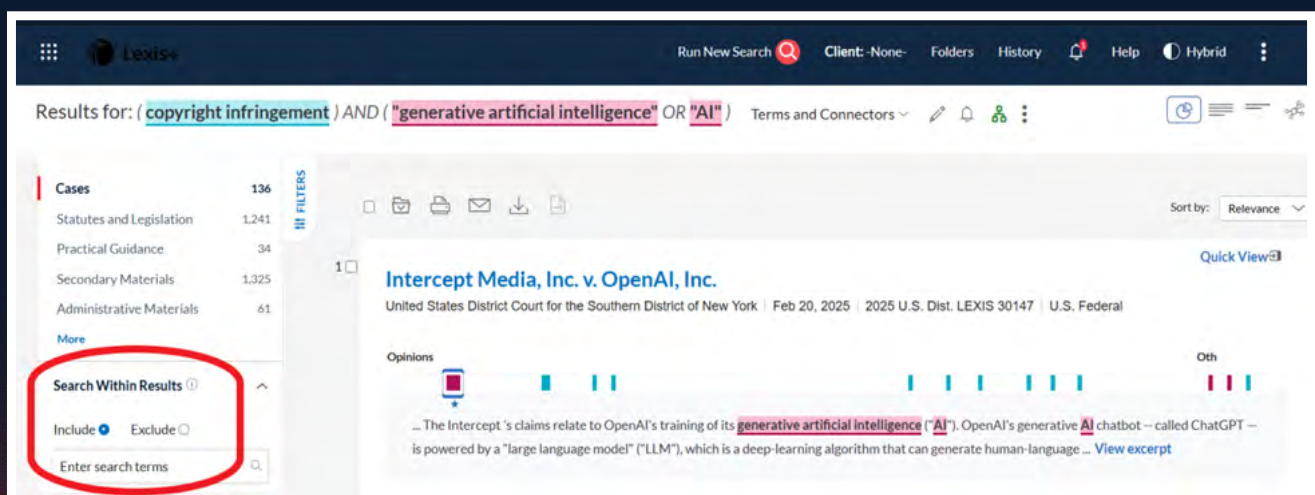


Strengthen Your Search Results Using “Search within Results” Post Search Filter

By: Marisa Beirne

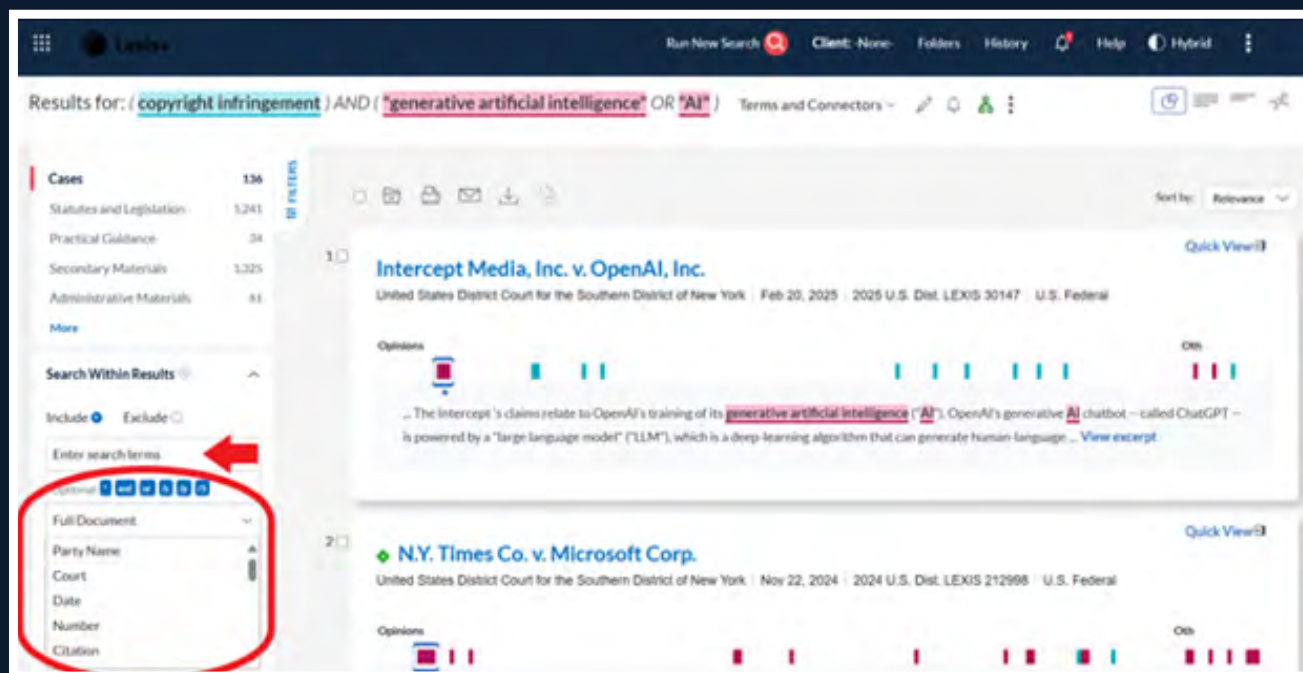
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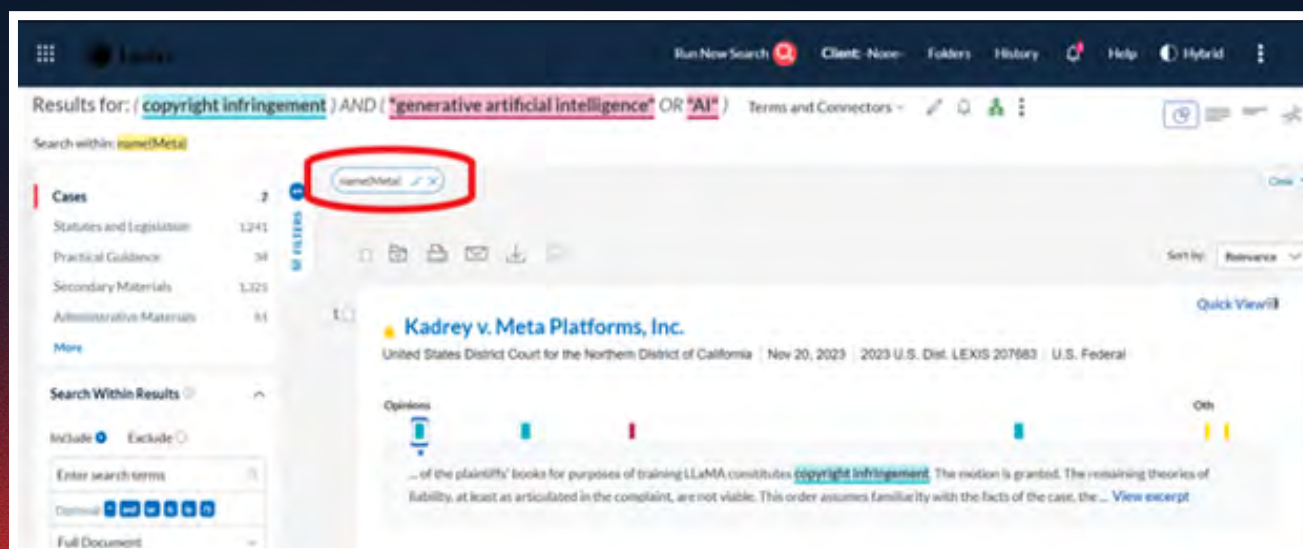


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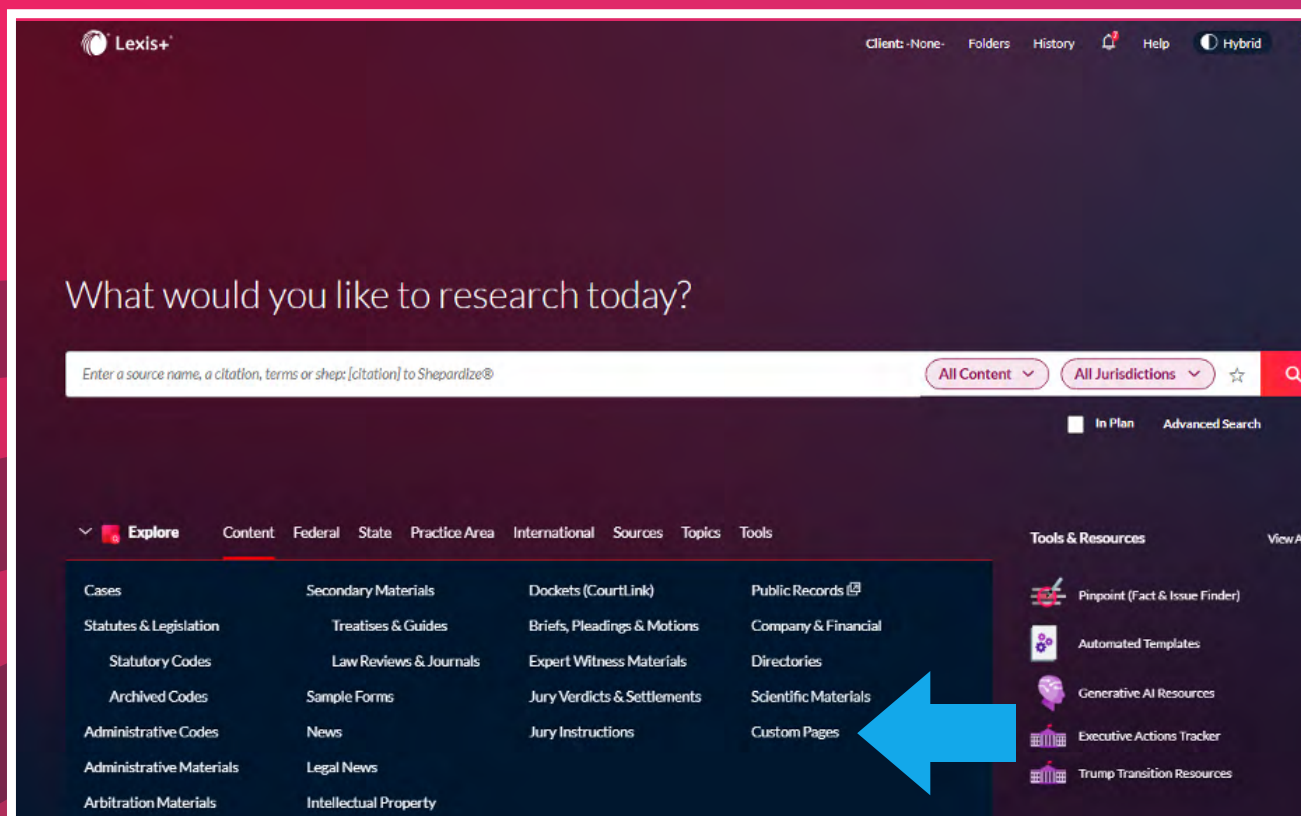
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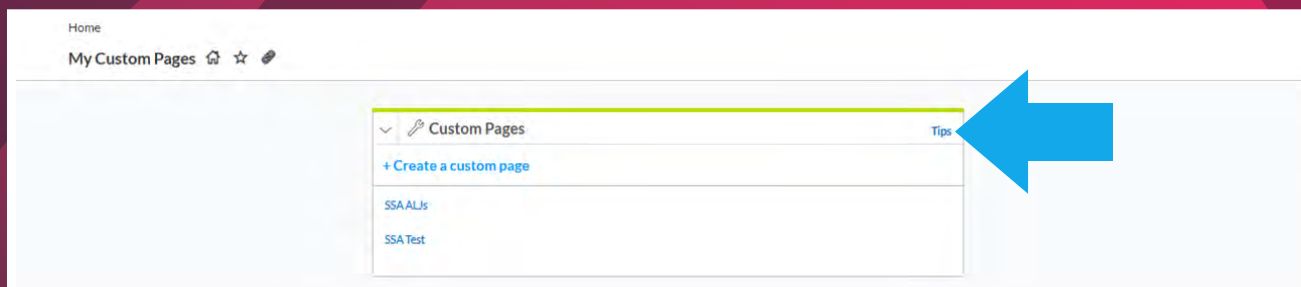
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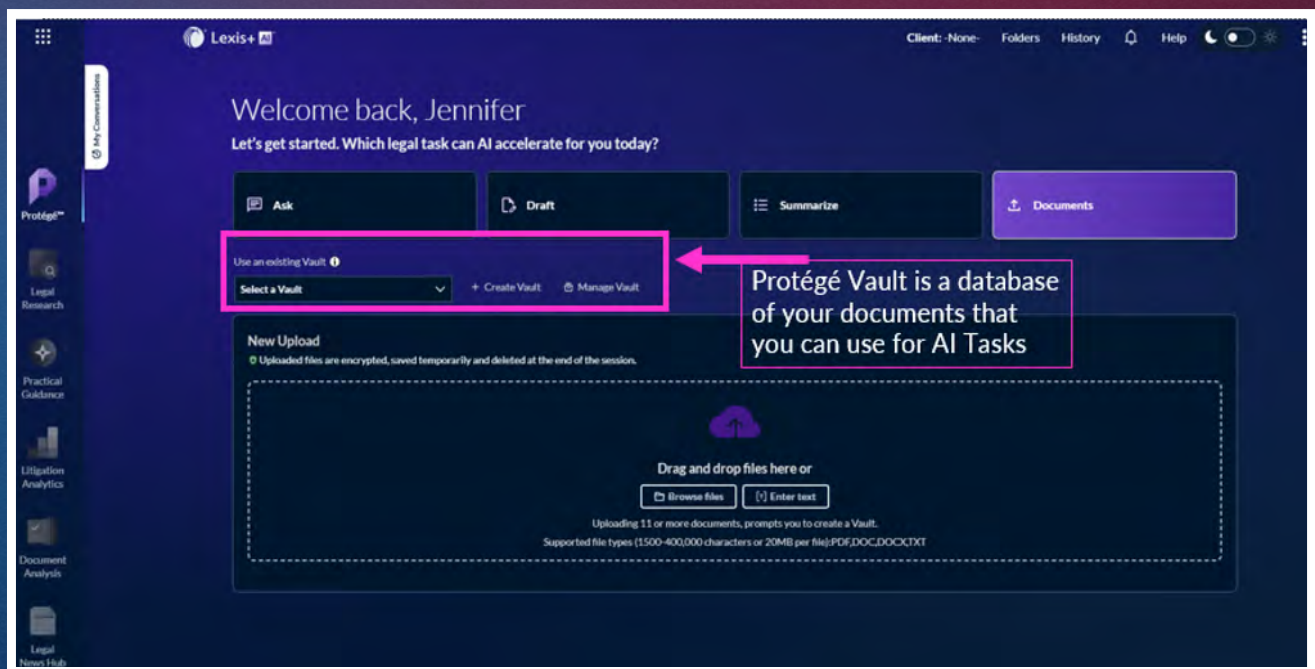
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April AI Spotlight

By: Marisa Beirne

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CLASS ACTIONS

Attorney's Fees

In re Cal. Pizza Kitchen Data Breach Litig.

129 F.4th 667, 2025 U.S. App. LEXIS 4168 (9th Cir. Feb. 24, 2025)

The Ninth Circuit has affirmed the approval of a settlement as fair, reasonable, and adequate, but reversed the accompanying fee award because the district court had not assessed the actual value of the settlement and compared that value to the fees requested.

→ **Background.** After the defendant, a restaurant chain, suffered a cyberattack that compromised the personal information of over 100,000 former and current employees, a number of attorneys filed competing class actions. These actions alleged that the defendant had failed to safeguard its employees' personally identifiable information, and asserted claims for negligence, breach of implied contract, and violations of business and privacy statutes.

One group of plaintiffs' lawyers quickly reached a settlement with the defendant. The settlement offered class members cash payments of up to \$1,000 in reimbursement for ordinary expenses and lost time incurred because of the data breach, cash payments of up to \$5,000 for monetary loss from actual identity theft, and 24 months of credit monitoring services. The defendant would be required to provide these benefits only to class members who timely submitted valid claims with supporting documentation. The defendant also agreed to very limited injunctive relief ordering it to maintain for three years certain business practices it had already implemented as a response to the security breach.

The plaintiffs estimated that this settlement had a conservative value of over \$3.7 million, but this would depend on the number of claims actually submitted. The settlement agreement also permitted class counsel to request up to \$800,000 in attorney's fees and costs, to be paid separately from any money disbursed to class members.

The district court held a hearing, extensively analyzed the proposed settlement, and approved it as adequate, fair, and reasonable. The court postponed the award of attorney's fees until the number of submitted claims was known. Once the claims deadline had passed, however, the plaintiffs reported monetary claims totaling around \$950,000 at most, far less than had been projected. The district court expressed concern over the deflated value of the settlement from the earlier estimate, but it issued final approval of the settlement and awarded the full \$800,000 in attorney's fees and costs. The court noted that attorney's fees would constitute 36.3% of the total class benefit of \$2,133,719, but the written order did not explain the court's rationale for approving the settlement and fees.

→ **District Court Did Not Abuse Its Discretion in Approving Class Settlement.** Federal Rule of Civil Procedure 23(e) requires judicial approval of any class action settlement and tasks the district court with ensuring that the settlement is "fair, reasonable, and adequate." Under this standard, the district court can neither rubberstamp the settlement nor unduly meddle in the parties' affairs. An underlying concern in the analysis is the possibility of collusion: counsel may tacitly reduce the overall settlement in return for a higher attorney's fee. In *In re Bluetooth Headset Prods. Liab. Litig.*, the Ninth Circuit identified "subtle signs" of collusion that a district court should note when reviewing a settlement: (1) when counsel receives a disproportionate distribution of the settlement; (2) when the parties negotiate a "clear sailing" arrangement, under which the defendant agrees not to challenge a request for an agreed-upon attorney's fee; and (3) when the agreement contains a "kicker" or "reverter" clause that returns unawarded fees to the defendant, rather than the class [*In re Bluetooth Headset Prods. Liab. Litig.*,

654 F.3d 935, 946 (9th Cir. 2011)]. If these indicia of implicit collusion are present, then a proposed settlement must withstand an even higher level of scrutiny for evidence of collusion or other conflicts of interest than is ordinarily required.

The court of appeals also noted that the district court's approval order here was sparse and did not set out the district court's rationale for approving the settlement. Usually, the Ninth Circuit said, when it cannot determine the district court's reasoning, it remands the case for the court to explain its rationale. Here, however, remand was not necessary because the district court's rationale could reasonably be inferred from the record, which was unusually extensive, with multiple hearings and supplemental briefs. The Ninth Circuit ruled that it could reasonably deduce the factors the district court had considered when approving the settlement.

The district court had appropriately considered the *Bluetooth* procedural safeguards. The settlement raised all three flags of potential collusion identified in *Bluetooth*: there was a disproportionately large fee award compared to what the class received, the parties had agreed to a clear sailing provision under which the defendant had agreed that it would not challenge the award of attorney's fees, and the settlement had a reverter or kicker provision, because any fees not paid to class counsel would revert to the defendant and not be paid to the class. The Ninth Circuit noted that the fear of collusion applies in claims-made settlements as well as common-fund ones.

The Ninth Circuit concluded that the district court had fulfilled its obligation to ferret out any evidence of collusion or other conflicts of interest. The presence of all three *Bluetooth* factors does not necessarily make a settlement per se collusive. The district court had examined the settlement provisions and made an explicit finding that the settlement was "non-collusive." The district court had not ignored the *Bluetooth* factors or abused its discretion in determining that collusion was not present.

Further, the district court had not abused its discretion in finding that the settlement overall was fair, reasonable, and adequate and had properly evaluated the appropriate factors under Rule 23 and case law. The record showed that the district court had considered a host of concerns. It had identified the key harm to the class (the disclosure of sensitive personal information) and ensured that class members were compensated for it. The monetary payments and credit monitoring services offered real benefit to class members. The district court also appropriately weighed the significant risks, expense, and uncertainty the class would face in litigation. The Ninth Circuit also noted that district courts do not have a duty to maximize settlement value for class members. Rather, the court's duty is to ensure that the settlement is fair, reasonable, and adequate. Perhaps other counsel could have obtained a better deal through further litigation, but reasonable disagreements on case strategy are not evidence of an unfair deal or collusion. Moreover, an early settlement may often be beneficial for the class, as it reduces attorney's fees, preserves value for the class, and offers immediate compensation for injured class members.

The Ninth Circuit noted that the most problematic part of the class settlement was its claims-made nature. As evidenced by the 1.8% claims rate here, redemption rates are typically very low because most class members do not bother jumping through the hoops necessary to submit a claim. Nevertheless, claims-made settlements are not per se unfair, and the settlement here offered real benefits to the class.

➔ **Approval of Excessive Attorney's Fees Was Reversed.** Courts may award only "reasonable" attorney's fees [Fed. R. Civ. P. 23(h)]. The touchstone for reasonableness is the benefit to the class. Two methods are used for determining reasonableness of fees: the lodestar method and the percentage-of-recovery method. Under the lodestar method, the court multiplies the number of hours reasonably spent on the case by a reasonable hourly

rate. Under the percentage-of-recovery method, the court simply awards counsel a percentage of the recovery claimed by the class—the typical benchmark is 25%. Under either method, certain factors, such as the quality of representation, the benefit obtained for the class, the complexity and novelty of the issues presented, and the risk of nonpayment, may favor upward or downward adjustment.

The Ninth Circuit noted that while the district court's rationale for its settlement approval could be inferred from the record, this was not true of the rationale for the fee award. The district court had raised concerns about the reasonableness of the \$800,000 fee request as to both the lodestar and percentage methods. Although it seemed disinclined to award fees above a benchmark of 25%, its final award constituted around 45% of the settlement value to the class. The district court failed to provide an adequate explanation for the fees, so reversal was necessary.

Moreover, apart from the failure to provide an explanation, the district court had erred by approving fees that appeared excessive of settlement value. To assess the reasonableness of fees, the district court must first independently calculate the class action settlement's benefit to the class members. In a claims-made settlement, that obligation requires the district court to wait until at least after the claims deadline to award attorney's fees. Here, the greatest the monetary value of the class claims could be was about \$950,000, and this amount might be much less after the submitted claims were validated. A fee award of \$800,000 would constitute at best around 45% of settlement value, a significant departure from the Ninth Circuit's 25% benchmark.

On remand, the Ninth Circuit said, the district court should scrutinize the reasonableness of the plaintiffs' lodestar amount. It should then calculate the actual value of the settlement to the class and perform a crosscheck of the lodestar against the 25% percentage-of-recovery benchmark to ensure that fees are reasonable. This method would likely favor downward adjustment.

➔ **Concurrence and Dissent.** One member of the panel concurred in the majority's reversal of the approval of the fee award, but dissented from the decision to affirm the approval of the underlying settlement. Under Rule 23(e), the dissent said, a court must closely scrutinize the substantive fairness of a class action settlement proposal and may approve a settlement only on finding that it is fair, reasonable, and adequate. Moreover, to survive appellate review, the district court must show it has explored comprehensively all factors and must give a reasoned response to all non-frivolous objections. The dissent also noted the importance of the *Bluetooth* factors cited by the majority. Although the presence of these factors is not a death knell for a settlement, when they exist, they require the district court to examine them and develop the record to support its final approval decision.

The district court, in approving the final settlement proposal, had failed to follow these procedural requirements, the dissent said. It provided little explanation as to why it approved the settlement, even though the settlement triggered all the *Bluetooth* factors, and the fee award amounted to nearly 46 percent of the entire settlement. The dissent concluded that the district court's failure to adequately examine any of these issues compelled reversal and remand.

REQUIRED JOINDER OF PARTIES

Foreign States

Hussein v. Maait

129 F.4th 99, 2025 U.S. App. LEXIS 3804 (2d Cir. Feb. 19, 2025)

The Second Circuit holds that a lawsuit against a foreign official in his or her official capacity cannot proceed without joinder of the foreign state, which is a required party.

- **Background.** The Egyptian government in 1999 effectively expropriated stock shares equivalent to what was then approximately \$15.7 million belonging to the plaintiff in SIMO Middle East Paper Company, a manufacturer and seller of paper products. The plaintiff brought suit and was awarded damages by the court in Egypt but was unable to recover when the government refused to honor the award. He later secured, and in the present case sought to enforce, a judgment issued by an Egyptian administrative court and a decree by the then-Prime Minister of Egypt that the judgment should be executed. Neither has ever been paid.
- **Trial Court Litigation.** Dr. Ahmed Diao Eldin Ali Hussein brought suit in New York state court, against the minister of finance of Egypt, Dr. Maait, in his official capacity. Maait was served with the complaint in Egypt and subsequently removed the case from state court to the Southern District of New York, which allowed late removal. The finance minister then moved to dismiss the case. The trial court held that the underlying basis of the lawsuit occurred in Egypt and dismissed the case, finding that the nation of Egypt was the real party in interest, that the Foreign Sovereign Immunities Act (FSIA) [28 U.S.C. §§ 1332, 1391, 1441, 1601–1611] applied, and that Egypt was immune. The taking did not relate to commercial activities in the United States relevant to Hussein's stock and there was no direct effect in the United States under the FSIA's commercial activity exception at 28 U.S.C. § 1605(a)(2).
- **District Court Did Not Abuse Its Discretion in Allowing Late Removal.** Though Dr. Maait did not timely file the removal notice, the district court did not abuse its discretion in allowing the late filing for cause. Dr. Maait demonstrated that he had moved "expeditiously and in good faith" to secure counsel in America after being served in Egypt and that the underlying basis of the lawsuit did not implicate his personal conduct.
- **Egypt Was Real Party in Interest.** The FSIA does not extend immunity to individual officials of foreign nations, because immunity is confined to suits involving public rather than commercial acts. The Supreme Court, in *Samantar v. Yousuf*, held that an individual sued for conduct undertaken in his official capacity is not a foreign state or agency under the FSIA [*Samantar v. Yousuf*, 560 U.S. 305, 313, 130 S. Ct. 2278, 176 L. Ed. 2d 1047 (2010)]. In *Samantar* the claim was against the foreign official in his personal capacity for authorizing torture and extrajudicial killings of the plaintiffs or members of their families, leaving the claims subject to the common law of immunity rather than the FSIA. The FSIA did not extinguish common-law protections [*Samantar v. Yousuf*, 560 U.S. 305, 324, 130 S. Ct. 2278, 176 L. Ed. 2d 1047 (2010)].

Here, Hussein sued Maait in his official capacity, seeking damages from Egypt. Civil Rule 19(a)(1)(B) requires joinder when the state is the real party in interest. When damages are sought against government officials in their official capacity, it is generally held that the real party in interest is the government [see *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690, n.55, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978)].

The Second Circuit articulated three relevant factors in determining whether the real party in interest is the person or the state. The first factor is the process by which the plaintiff sued the defendant; here, Hussein sued

Maa'it in his official capacity. The second factor is the substance of the claim, in this case personal liability for personal acts or official capacity when the state is the real actor. And the third factor is the nature of the relief sought, in this case payment by the Egyptian government. Because Egypt was the real party in interest, Maa'it was entitled to invoke its sovereign immunity and other procedural protections under the FSIA. The court of appeals thus concluded that the trial court had correctly determined that it lacked jurisdiction.

SUMMARY JUDGMENT

Anti-Ferret Rule

Rodríguez v. Encompass Health Rehab. Hosp. of San Juan, Inc.
126 F.4th 773, 2025 U.S. App. LEXIS 1475 (1st Cir. Jan. 23, 2025)

The First Circuit holds that the anti-ferret rule is not violated when a party provides general citation to a lengthy document and relevant information appears prominently on a vast majority of its pages or when an entire document is proffered to cite to an absence of evidence.

→ **Introduction.** Norene and Iris Aida Rodríguez brought a medical malpractice action against Dr. Jose Baez Cordova (Dr. Baez) and Encompass Health Rehabilitation Hospital of San Juan, Inc. They alleged that the Dr. Baez and the hospital failed to provide adequate medical care to their mother, Gloria Rodríguez Gonzalez, who, while in the defendants' care and recovering from a severe bout of the COVID-19 virus, developed acute respiratory failure, was transferred to another hospital, and died of ventilator-acquired pneumonia.

Dr. Baez was an Assistant Professor at the University of Puerto Rico's School of Medicine (UPR), and not an employee of Encompass, but he did oversee medical residents who participated in an affiliation agreement between Encompass and UPR. The doctor and hospital denied liability and asserted an immunity defense under Puerto Rican law.

After the close of discovery, the doctor and hospital each moved for summary judgment based on their asserted immunity to medical malpractice actions. The plaintiffs opposed both motions. The district court granted summary judgment in favor of both defendants after finding that Dr. Baez was immune from suit under Puerto Rican law and because of that immunity, Encompass could not be held vicariously liable. The plaintiffs appealed and among other things, challenged the district court's disregard of certain facts proposed by the plaintiffs in opposing the summary judgment motions.

The plaintiffs first took issue with the district court's refusal to acknowledge that Dr. Baez was their mother's attending physician, which they had supported with only a general citation to their mother's 589-page medical record. The district court found that this general citation to the entire medical record violated the anti-ferret rule.

The plaintiffs next alleged that the district court improperly used the anti-ferret rule to disregard two additional proffered facts derived from absences in the medical record: that the record did not identify any doctor besides Dr. Baez as their mother's attending physician, and that the medical record did not mention the UPR. The plaintiffs also supported the proffer of these two facts with general citations to the entire 589-page medical record.

→ **Anti-Ferret Rule.** The anti-ferret rule of the District Court of the District of Puerto Rico requires that facts proffered by the parties at summary judgment be "anchored in specific citations to record evidence." District Rule 56(e) provides that: "An assertion of fact . . . shall be followed by a citation to the specific page or paragraph of identified record material supporting the assertion." This type of rule is designed to allow a district court to adjudicate a summary judgment motion "without endless rummaging through a plethoric record." And the district court may "disregard any statement of fact not supported by a specific citation to record material."

→ **Exception to Anti-Ferret Rule.** "Providing a general citation to a lengthy document does not violate the anti-ferret rule when the relevant information appears prominently on the vast majority of its pages." In such a case,

the purpose of the rule is not frustrated because the court does not have to search through the record to pinpoint the asserted facts.

The First Circuit found that the exception applied to the plaintiffs' alleged errors. First, regarding the factual contention that Dr. Baez was the plaintiffs' mother's attending physician, which was supported by a general citation to the entire medical record, the appellate court found that because a banner at the top of virtually every page of the record proclaimed that Dr. Baez was the attending physician, it was reasonable for the plaintiffs to have cited the entire record to support this claim. Thus, unlike the district court, the appellate court, for purpose of its review, considered that Dr. Baez was the plaintiffs' mother's attending physician.

The appellate court also found that the district court improperly relied on the anti-ferret rule to disregard the plaintiffs' contentions that the record did not identify any doctor besides Dr. Baez as their mother's attending physician and that the medical record did not mention the UPR, which were also supported by general citations to the entire medical record. The court explained that "[a]lthough the anti-ferret rule typically requires that facts be supported with precise citations, there is no more precise way to cite to the absence of information in a given source: the only way to show that information does not appear anywhere in the medical record is to look at the entire medical record." However, the court also found that the district court could have alternatively disregarded these two facts as immaterial.

→ **Conclusion.** Because none of the disregarded facts advanced the plaintiffs' cause, and the plaintiffs could not advance any other successful challenges, the court of appeals affirmed the district court's decision granting summary judgment to both defendants.