# Litigation Insights

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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.

### ARBITRATION

***Waiver of Right to Arbitrate***

*Berzanskis v. FCA US, LLC (In re Chrysler Pacifica Fire Recall Prods. Liab. Litig.)*

143 F.4th 718, 2025 U.S. App. LEXIS 17048 (6th Cir. July 10, 2025)

The Sixth Circuit has held that a district court violated the principle of party presentation by sua sponte finding that the defendant had waived its right to arbitrate the parties' dispute.

JUMP TO SUMMARY

### CLAIM PRECLUSION

**Scope of Prior Litigation**

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The Tenth Circuit has held that a district court's judgment on a federal claim precludes a separate action on a related state-law claim over which the court could have exercised diversity jurisdiction.

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### PLEADINGS AND MOTIONS

**Service and Filing**

*Giuffre v. Maxwell*

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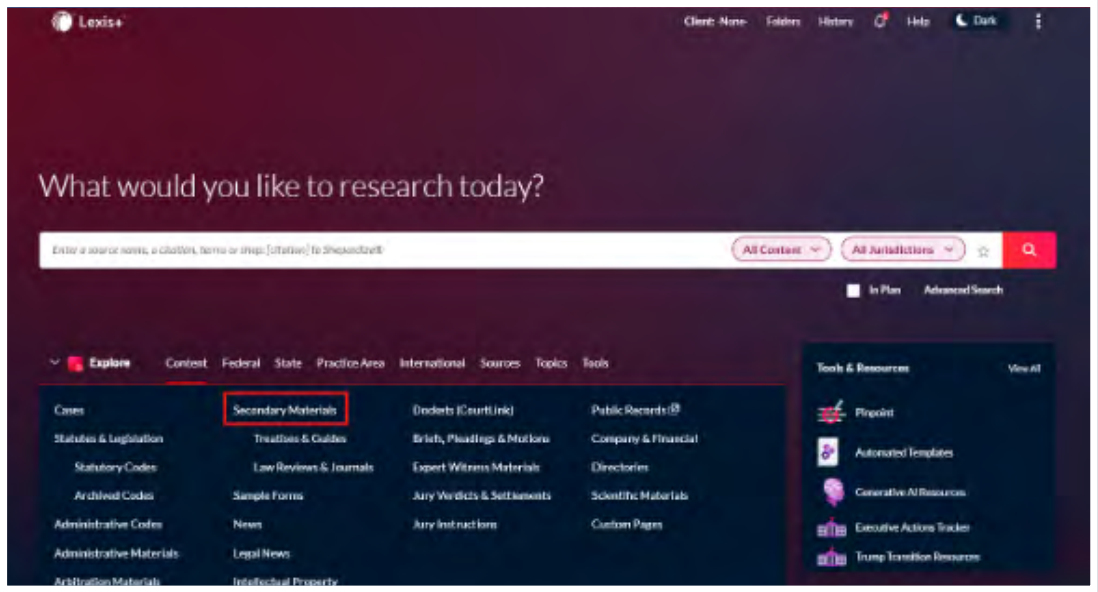
The Second Circuit holds that (1) undecided motions rendered moot by the parties' settlement are nevertheless "judicial documents" subject to the common-law presumption of public access; (2) whether a court relies on a particular judicial document in making a ruling does not, by itself, undermine the presumption of public access attending that document; and (3) filings relevant to a motion to seal or unseal court documents are themselves judicial documents subject to the presumption of public access.

JUMP TO SUMMARY

# Lexis+® Practical Guidance – Pinned Documents Replacing Bookmarks

***By Meghan Atwood, Esq., Federal Government Solutions Consultant***

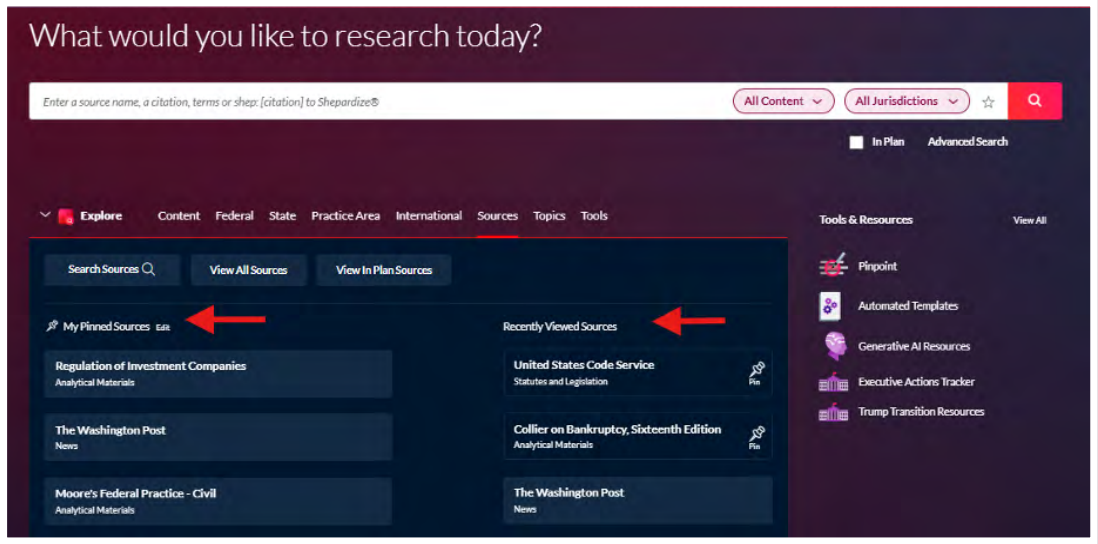
Practical Guidance within Lexis+® now reflects the ability to pin favorite documents and easily return to them right from the Practical Guidance homepage. In addition, users can search the pinned documents, and there is the ability to see recently viewed documents with an opportunity to pin them, if you choose, once you have returned to the homepage (see screenshot below).




It is important to note that "My Pinned Documents" replaces the "Bookmarks" feature that previously existed within Practical Guidance on Lexis+. Additionally, "Recently Viewed Documents" replaces the "Document History" list that previously appeared on the landing page.

To pin a document in Practical Guidance, look at the top of it, and select the button that looks like a push pin. At present, 50 documents can be pinned for easy future access through the landing page of Practical Guidance. You can also pin a document that you recently viewed by pinning it from the "Recently Viewed Documents" list on the Practical Guidance home page.

You may recall that Legal Research has a similar feature titled, "My Pinned Sources," found on the Sources tab on the landing page (see screenshot below). This capability allows users to pin favorite sources so that they can return to them again and again without taking the extra step of locating them with the search box, etc. The process for pinning in Legal Research is quite similar to the process in Practical Guidance as outlined above.




Feel free to take advantage of "My Pinned Documents" in Practical Guidance and "My Pinned Sources" in Lexis+ Legal Research to quickly access your favorite documents and sources and ultimately, streamline your legal research experience.

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# The Serial Set: Congressional Documents 1777-current

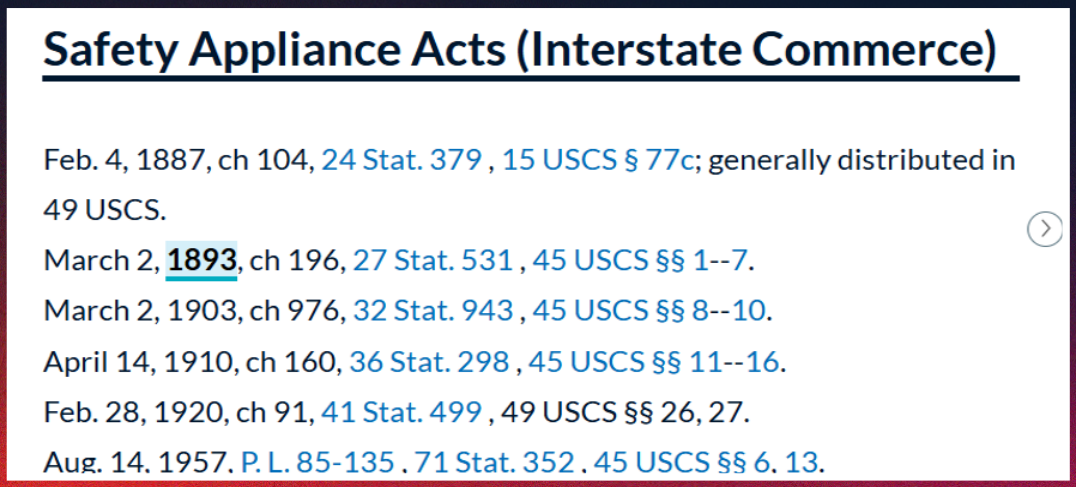
One of the lesser known but often quite important aspects of legal research is legislative history. In those instances where the meaning or intent of a statute is not plain on its face, a researcher often needs to find what Congress intended while passing the law. This can be either at a holistic level ("the purpose of this bill is to…") or a more granular level ("the definition of 'truck' in section 5301 is…). This research can include recent legislation, such as this year's tax bill, or much older material. For instance, the Securities and Exchange Act was enacted in 1934, and the Sherman Antitrust act in 1890, with many of the original provisions still standing. The recent Loper-Bright decision (603 U.S. 369) will only increase the need for courts and attorneys to research legislative intent.

There are several documents that can include legislative intent information, including (but not limited to) the Congressional Record and Congressional Hearings. Both of these are available on LexisNexis, with coverage of the Record and its predecessors back to 1787, and of Hearings back to 1824. One of the most significant sources of Congressional intent is the Committee Report. These reports often contain remarks that explain the purpose behind an entire bill or a specific section. They can be issued by the committee with specific subject matter jurisdiction over an issue, such as the Senate Banking, Housing, and Urban Affairs, or the House Armed Services Committee. They can also be issued by a Conference Committee, a committee appointed on an ad hoc basis to settle differences between the House and Senate versions of a bill. These committee reports, commonly called Conference Reports will detail the compromises or adjustments made, and often the reason why, making them another great source of legislative intent information.

LexisNexis offers a source officially called Congressional Documents 1777-current, but more commonly known as the Serial Set. It is our version of an official Congressional collection, and includes committee reports, presidential communications to Congress, treaty materials, certain executive department publications, and certain non-governmental publications, among other documents. If you look at the name, you'll see it goes back to 1777, covering Congress even before the Constitution. It's an invaluable source of committee reports from the most recent of legislation back to the much older material that you might need.

The first thing to know about the Serial Set is that the content is presented as a PDF. As you can see below, there is a link to the PDF in the LexisNexis document, in the right hand column, labeled Replica of Original Proceedings. Clicking that link will open the PDF, which is then searchable using your normal browser Edit-Find (Ctrl-F) feature. Moreover, despite its PDF format the full text is fully searchable in the normal Lexis+ search box. That is, if you enter search terms you will find all the reports containing that language anywhere within the report.


Another way to search for relevant reports is to search by Public Law number. This particular source does prefer the number to have the Congress number first, then the abbreviation PL, then the law number. For instance, for reports associated to the Securities Act of 1933, enter the search as *73 PL 22*. For acts that predate the early 20th century, you can search by the Statutes at Large number instead, e.g., 26 Stat. 209 for the Antitrust Act. This is necessary because the use of Public Law numbers (unofficially) only began in 1901. Before that, the Stat citation was the only unique designation available. Hint – if you're sure of the Public Law number or Statutes at Large cite, the Popular Names Table source will give that. Simply enter the popular name a search term and it will give you the appropriate citation.



# ARBITRATION

## Waiver of Right to Arbitrate

*Berzanskis v. FCA US, LLC (In re Chrysler Pacifica Fire Recall Prods. Liab. Litig.)*
143 F.4th 718, 2025 U.S. App. LEXIS 17048 (6th Cir. July 10, 2025)

**The Sixth Circuit has held that a district court violated the principle of party presentation by sua sponte finding that the defendant had waived its right to arbitrate the parties' dispute.**

**Procedural Background.** This case was a products-liability suit against an automobile manufacturer. Several months into discovery, the defendant learned that some of the plaintiffs had agreed to arbitration clauses when they purchased the allegedly defective vehicles from third-party dealers. The defendant then moved to compel arbitration of those plaintiffs' claims.

After a hearing, the district court denied the defendant's motion to compel arbitration. The court held that the defendant had waived its right to arbitrate—even though the plaintiffs never asserted waiver—because the defendant's conduct in the litigation was inconsistent with its arbitration rights. At the hearing on the motion, the district court never warned the defendant about a potential waiver problem.

On interlocutory appeal, the Sixth Circuit reversed the district court's denial of the motion to compel arbitration. The court of appeals concluded, among other things, that the district court could not sua sponte raise and find waiver of the right to arbitrate. (The court of appeals noted that although the loss or implicit waiver of an arbitration right through inconsistent litigation conduct is technically a "forfeiture" [see Ohio State Univ. v. Redbubble, Inc., 989 F.3d 435, 443 (6th Cir. 2021)], courts and litigants generally use the term "waiver" of arbitration. In the interest of uniformity, and because the distinction was not material in this case, the Sixth Circuit panel used that term as well.)

**Waiver Was for Court to Decide.** As a threshold matter, the Sixth Circuit panel applied the general presumption that courts, not arbitrators, are to decide whether a party waived its arbitration right. The court acknowledged that parties can overcome the presumption of judicial resolution if they can show that they clearly and unmistakably agreed to arbitrate gateway questions of arbitrability such as waiver of the right to arbitrate [see Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 68–69, 130 S. Ct. 2772, 177 L. Ed. 2d 403 (2010)]. But in this case, the court of appeals found that the arbitration clauses did not cover gateway questions such as waiver through inconsistent litigation conduct. Therefore, the general presumption applied, and the waiver-through-inconsistent-litigation issue was a matter for judicial resolution.

**Waiver Was Not Established in This Case.** Next, the Sixth Circuit panel concluded that the district court erred in finding waiver in this case. The court of appeals explained that in determining whether a party has waived its right to arbitrate, ordinary waiver rules apply. Thus, to establish waiver, there must be an intentional relinquishment or abandonment of a known right [see Morgan v. Sundance, Inc., 596 U.S. 411, 417–418, 142 S. Ct. 1708, 212 L. Ed. 2d 753 (2022)]. And because a party does not often express its intent to waive a right to arbitrate, a court will infer that intent when a party takes actions that are completely inconsistent with any reliance on its arbitration agreement [see Solo v. UPS Co., 947 F.3d 968, 975 (6th Cir. 2020)].

Under ordinary waiver rules, a party usually cannot waive a right without first having knowledge of the right's existence [see Am. Locomotive Co. v. Chem. Rsch. Corp., 171 F.2d 115, 121 (6th Cir. 1948); see also In re Pawn

Am. Consumer Data Breach Litig., 108 F.4th 610, 614 (8th Cir. 2024); Hill v. Xerox Bus. Servs., LLC, 59 F.4th 457, 468 (9th Cir. 2023)]. In the absence of actual knowledge, waiver can be found if the party had all the information that it needed to determine its arbitration rights but negligently failed to do so [see Solo v. UPS Co., 947 F.3d 968, 976 (6th Cir. 2020)].

Applying these principles, the Sixth Circuit concluded that the district court could not properly have found that the defendant waived its arbitration rights. For one thing, the district court believed that whether the defendant had knowledge of the arbitration clauses was irrelevant. But the defendant could not have intentionally relinquished its arbitration rights by taking actions inconsistent with those rights if it never knew that they existed. Moreover, the district court had no evidence that would have allowed it to make a finding that the defendant knew of the arbitration clauses before it learned of them in discovery. The court of appeals pointed out that there was no basis for the district court to assume that arbitration clauses were standard practice in the auto industry; only 18 of the original plaintiffs in this case had signed sales agreements that included such clauses.

**Sua Sponte Finding of Waiver Was Improper.** The Sixth Circuit panel observed that normally, when the district court has not made legitimate factual findings to support its legal conclusion, the case will be remanded for further factfinding [see, e.g., Wallace v. Oakwood Healthcare, Inc., 954 F.3d 879, 898 (6th Cir. 2020)]. But the court of appeals declined to do so in this case, because there was another, more fundamental problem with the district court's decision. The district court—not the plaintiffs—raised waiver as a defense to the defendant's motion to compel arbitration. Accordingly, "because the district court violated the principle of party presentation by raising the waiver issue on its own, we decline to give the district court another opportunity to decide the issue."

The court of appeals explained that federal courts follow the principle of party presentation, under which the parties frame the issues for decision, and courts act as neutral arbiters of matters the parties present [see Greenlaw v. United States, 554 U.S. 237, 243, 128 S. Ct. 2559, 171 L. Ed. 2d 399 (2008)]. A court transcends its limited role as neutral arbiter if it proceeds to act as a self-directed board of legal inquiry and decides issues that the parties never presented [see United States v. Sineneng-Smith, 590 U.S. 371, 375–376, 140 S. Ct. 1575, 206 L. Ed. 2d 866 (2020) (adversarial system is designed around premise that parties know what is best for them and are responsible for advancing facts and arguments entitling them to relief); NASA v. Nelson, 562 U.S. 134, 147 n.10, 131 S. Ct. 746, 178 L. Ed. 2d 667 (2011)].

The appellate panel acknowledged that the principle of party presentation is not ironclad. But that does not mean district courts can disregard the principle whenever it would be convenient to do so [see Wood v. Milyard, 566 U.S. 463, 472, 132 S. Ct. 1826, 182 L. Ed. 2d 733 (2012) ("[A] federal court does not have carte blanche to depart from the principle of party presentation basic to our adversary system.")]. Rather, the principle of party presentation sets a very high bar for addressing an issue that neither party raised, and that bar is cleared only in exceptional cases or when applying the party-presentation principle would produce a plain miscarriage of justice [see Koprowski v. Baker, 822 F.3d 248, 259 (6th Cir. 2016)].

The court of appeals opined that this was not an exceptional case that forced the district court to choose between respecting the core principle of party presentation and preventing some miscarriage of justice. The appellate panel found it significant that the 18 plaintiffs potentially subject to arbitration had every incentive and opportunity to raise waiver as a defense to the motion to compel arbitration but chose not to do so; holding them to that strategic choice would not result in a miscarriage of justice. At worst, those plaintiffs would be required to abide by the terms of their contracts and pursue their claims before an arbitrator. The appellate court concluded

that that "unremarkable" outcome did not clear the high bar required for the district court to disregard the party-presentation principle and sua sponte resurrect an affirmative defense that those plaintiffs chose not to assert.

The court of appeals pointed out that a district court cannot sua sponte raise defenses such as waiver in the arbitration context simply because the delayed assertion of arbitration rights may threaten judicial economy and the orderly administration of justice. Rather, concerns about judicial economy cut the other way, because the goal of the Federal Arbitration Act (FAA) to promote efficient dispute resolution is furthered only when motions to compel arbitration are decided quickly and correctly. And as this case showed, a district court cannot decide a motion to compel arbitration correctly when the parties are not given a chance to present the court with all the relevant evidence. Thus, after a sua sponte finding of waiver, a case like this one would have to be returned to the district court for another try, after which another interlocutory appeal might follow [see 9 U.S.C. § 16(a)(1)(B)]. Because such a piecemeal approach would frustrate the FAA's purpose and threaten judicial economy, the court of appeals concluded that it could not allow district courts to raise affirmative defenses sua sponte when deciding arbitration motions, except when their not doing so would produce a plain miscarriage of justice.

Because the district court's decision not only violated the principle of party presentation, but also contravened the Sixth Circuit's settled waiver rules, the court of appeals reversed the district court's order and remanded for further proceedings, which must not include the issue of waiver of the right to arbitration.

# CLAIM PRECLUSION

## Scope of Prior Litigation

*Markley v. U.S. Bank Nat'l Ass'n*

142 F.4th 732, 2025 U.S. App. LEXIS 15510 (10th Cir. June 24, 2025)

**The Tenth Circuit has held that a district court's judgment on a federal claim precludes a separate action on a related state-law claim over which the court could have exercised diversity jurisdiction.**

**Procedural Background.** In 2019, the plaintiff sued his former employer in federal court, asserting a claim under the Age Discrimination in Employment Act and a state-law claim of wrongful termination in violation of public policy. In the civil cover sheet of his complaint, he asserted federal-question jurisdiction. The civil cover sheet also indicated that diversity jurisdiction existed, noting that the plaintiff was a citizen of the forum state, and the defendant was incorporated and had its principal place of business in another state. Still, the plaintiff did not assert diversity jurisdiction in the body of his complaint. Rather, he asserted federal-question jurisdiction over the age-discrimination claim, and supplemental jurisdiction over the wrongful-termination claim [see 28 U.S.C. § 1367(a) (district court has supplemental jurisdiction "over all other claims that are so related to claims in the action within [the court's] original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution")].

The district court granted summary judgment for the defendant on the federal age-discrimination claim, and it declined to exercise supplemental jurisdiction over the state-law wrongful-termination claim, which it dismissed without prejudice. The district court then entered a final judgment and closed the case.

The plaintiff appealed the summary judgment on the age-discrimination claim to the Tenth Circuit, which affirmed the district court's judgment on that claim [see Markley v. U.S. Bank Nat'l Ass'n, 59 F.4th 1072 (10th Cir. 2023)].

Notably, the plaintiff did not appeal the dismissal of the state-law wrongful-termination claim, even though he could have done so. He also did not ask the district court to reconsider its dismissal of that claim and resolve it under diversity jurisdiction, even though he could have done so. Instead, the plaintiff chose to take his remaining state-law claim and file the present action against the defendant as a new case in state court.

The defendant removed the present action to federal district court, asserting diversity of citizenship as the basis of federal jurisdiction. Once in the district court, the defendant moved to dismiss on several grounds, including claim preclusion. According to the defendant, the plaintiff was precluded from relitigating his wrongful-termination claim since it arose from the same transaction as his federal claim, and the previous final judgment on the federal claim foreclosed his state-law claim from moving forward in the present case.

The district court granted the defendant's motion to dismiss. The court found that claim preclusion barred the plaintiff's wrongful-termination claim, because he could have pursued that claim in the first suit if he had asserted diversity jurisdiction. Because the plaintiff had not pursued that claim in his first action, the district court concluded that he could not have a second chance to litigate that claim in the present case.

On appeal by the plaintiff, a panel of the Tenth Circuit affirmed the district court's judgment of dismissal.

**Claim Preclusion Doctrine.** The Tenth Circuit began its analysis with an overview of the doctrine of claim preclusion (also called res judicata). The doctrine prevents a party from relitigating a legal claim that was or could have been the subject of a previously issued final judgment [see MACTEC, Inc. v. Gorelick, 427 F.3d 821,

831 (10th Cir. 2005)]. The underlying principle is that a party who has had a chance to litigate a claim before an appropriate tribunal usually should not have another chance to do so [see Lenox MacLaren Surgical Corp. v. Medtronic, Inc., 847 F.3d 1221, 1239 (10th Cir. 2017)]. The Tenth Circuit has observed that claim preclusion serves many functions, including ensuring finality, judicial economy, preventing repetitive litigation and forum-shopping, and furthering the interest in bringing litigation to an end [see Plotner v. AT & T Corp., 224 F.3d 1161, 1168 (10th Cir. 2000)].

For claim preclusion to apply, the party invoking the doctrine must show that there was (1) a final judgment on the merits in an earlier action, (2) identity of parties or privies in the two suits, and (3) identity of the cause of action in both suits. The focus is on whether there was a final judgment as to the cause of action, that is, a given set of facts related in time, space, origin, or motivation giving rise to the lawsuit. And the Tenth Circuit has repeatedly held that all claims arising from the same employment relationship constitute the same transaction or cause of action for claim-preclusion purposes [see Wilkes v. Wyo. Dep't of Emp. Div. of Lab. Standards, 314 F.3d 501, 504 (10th Cir. 2002)].

In sum, claim preclusion means that once a court resolves a case on the merits, the plaintiff cannot bring a claim based on the same set of facts (that is, the same cause of action) in a later lawsuit and before the same court, even if that specific claim had never been litigated [see Lenox MacLaren Surgical Corp. v. Medtronic, Inc., 847 F.3d 1221, 1239 (10th Cir. 2017)].

The Tenth Circuit panel in this case noted that in barring some claims that have never been specifically litigated, claim preclusion is broader than issue preclusion (also called collateral estoppel). The latter bars relitigation only of specific issues actually decided in a prior proceeding between the same parties [see Drexler v. Kozloff, 2000 U.S. App. LEXIS 6761, at *7 (10th Cir. Apr. 13, 2000) (unpublished)]. By contrast, claim preclusion bars the litigation of claims that could have been raised in a prior lawsuit but were not [see Lenox MacLaren Surgical Corp. v. Medtronic, Inc., 847 F.3d 1221, 1239 (10th Cir. 2017)].

Whether claim preclusion applies is subject to de novo review by the court of appeals [see MACTEC, Inc. v. Gorelick, 427 F.3d 821, 831 (10th Cir. 2005)].

**Claim Preclusion Barred Plaintiff's Second Suit.** The Tenth Circuit panel quickly disposed of two elements of claim preclusion: there was no dispute that the plaintiff's first federal suit and the present case involved identical parties and arose out of the same cause of action.

The only issue, therefore, was whether the district court in the first action rendered a final judgment on the merits. The plaintiff argued that the judgment in the first case was not a final judgment on the merits, at least regarding his state-law claim, because that claim had been dismissed without prejudice, and a dismissal without prejudice cannot be the basis for claim preclusion.

The Tenth Circuit panel pointed out that neither party disputed that the plaintiff could have pursued his state-law claim in the first suit but failed to do so. The court of appeals found this to be important, because it went to the core principle behind claim preclusion. After the district court resolved the plaintiff's federal claim on summary judgment and dismissed his state-law claim without prejudice, he could have done either of two things to pursue his state-law claim: (1) appeal the dismissal of that claim to the Tenth Circuit, as he did with his federal claim, or (2) notify the district court of diversity jurisdiction on a motion for reconsideration. But he did neither of those things, thus triggering the core principle behind claim preclusion: a party who once had a chance to litigate

a claim before an appropriate tribunal usually should not have another chance to do so [see Lenox MacLaren Surgical Corp. v. Medtronic, Inc., 847 F.3d 1221, 1239 (10th Cir. 2017)].

The Tenth Circuit rejected the plaintiff's contention that the blame for failing to assert diversity jurisdiction lay with the district court in the first action, which (by virtue of the information in the civil cover sheet filed in that action) was on notice that diversity jurisdiction existed but did not sua sponte exercise diversity jurisdiction. The court of appeals stressed that a bedrock rule in litigation is that the burden of establishing subject-matter jurisdiction is on the party asserting jurisdiction [see Port City Props. v. Union Pac. R.R., 518 F.3d 1186, 1189 (10th Cir. 2008); see also Maher v. GSI Lumonics, Inc., 433 F.3d 123, 126 (1st Cir. 2005)]. "Although we sympathize with [the plaintiff's] predicament, our adversarial system puts the burden on litigants—not the court—to assert the grounds for diversity jurisdiction."

The court of appeals was not persuaded by the plaintiff's argument that he was not required to assert diversity jurisdiction to press his state-law claim after it was dismissed without prejudice. The court found this argument to be beside the point. Certainly, no party is required to assert diversity jurisdiction simply because it exists. But the relevant question under claim preclusion is whether the plaintiff could have litigated the contested claim in a prior lawsuit [see Johnson v. Spencer, 950 F.3d 680, 693 (10th Cir. 2020)]. The court concluded that because the plaintiff neglected to invoke diversity jurisdiction in his prior action in order to pursue his state-law claim, barring the present action satisfied both the elements of claim preclusion as well as its underlying policy.

In holding that the failure to assert diversity jurisdiction to pursue a state-law claim in a prior suit arising from the same operative facts precludes a subsequent suit on that claim, the Tenth Circuit joined the First and Seventh Circuits [see Maher v. GSI Lumonics, Inc., 433 F.3d 123, 125–127 (1st Cir. 2005); Shaver v. F.W. Woolworth Co., 840 F.2d 1361, 1368 (7th Cir. 1988)].

**Preclusion Applied Despite Lack of Merits Judgment on Specific Claim.** The Tenth Circuit rejected the plaintiff's argument that he could not be precluded from bringing the present suit because the district court in his first suit never rendered a final judgment on the merits of his state-law claim. This argument relied on the fact that the state-law claim was dismissed without prejudice in the first suit, and a dismissal without prejudice is not a final judgment on the merits.

The court of appeals conceded that a dismissal without prejudice—particularly on jurisdictional grounds—is generally not a final judgment on the merits [see Stewart Sec. Corp. v. Guar. Tr. Co., 597 F.2d 240, 241 (10th Cir. 1979)]. But that point did not control in the circumstances of this case. For claim-preclusion purposes, the question is whether there was a dismissal without prejudice as to the cause of action, rather than the individual claim [see Wilkes v. Wyo. Dep't of Emp. Div. of Lab. Standards, 314 F.3d 501, 504 (10th Cir. 2002)]. Significantly, in the plaintiff's first suit, the district court resolved the plaintiff's federal claim on the merits, and then rendered a final judgment on the cause of action after the plaintiff chose not to litigate (or appeal) his state-law claim. For claim-preclusion purposes, that judgment was final and on the merits, since the court clearly intended to terminate all proceedings, and the judgment rested on the district court's resolution of the federal claim, which arose from the same cause of action as the state-law claim. In other words, the district court's final judgment in the first suit included a judgment on the merits for one of the claims asserted, and because that claim arose from the same operative facts as the state-law claim, the final judgment on the federal claim was enough to trigger claim preclusion.

**Disposition.** Because litigation of the plaintiff's state-law wrongful-termination claim in the present action was barred by claim preclusion, the Tenth Circuit affirmed the district court's judgment of dismissal.

# PLEADINGS AND MOTIONS

## Service and Filing

*Giuffre v. Maxwell*

146 F.4th 165, 2025 U.S. App. LEXIS 18304 (2d Cir. July 23, 2025) (per curiam)

**The Second Circuit holds that (1) undecided motions rendered moot by the parties' settlement are nevertheless "judicial documents" subject to the common-law presumption of public access; (2) whether a court relies on a particular judicial document in making a ruling does not, by itself, undermine the presumption of public access attending that document; and (3) filings relevant to a motion to seal or unseal court documents are themselves judicial documents subject to the presumption of public access.**

**Parties and Factual Background.** IThe original parties to this case were closely associated with the late infamous financier and accused sex trafficker Jeffrey Epstein. The plaintiff, Virginia Giuffre, was perhaps the most prominent alleged victim of Epstein, while the defendant, Ghislaine Maxwell, was his accomplice who was eventually imprisoned for her participation in Epstein's schemes. When Giuffre went public with her accusations, Maxwell responded by stating publicly that the allegations were "obvious lies." Giuffre therefore sued for defamation in the Southern District of New York.

**Initial Decision and Appeal.** After several years of discovery, and while Maxwell's motion for summary judgment was pending, the parties settled and the district court closed the case. Both before and after the closing, several nonparties intervened to seek access to documents filed in the case. In particular, all the documents submitted in conjunction with Maxwell's motion for summary judgment and its opposition were filed under seal, as was a good portion of the discovery materials in the case. The district court denied the motion for unsealing, but the Second Circuit reversed, clarifying the standards for public access to judicial documents, and ordering a document-by-document review under those standards on remand [Brown v. Maxwell, 929 F.3d 41 (2d Cir. 2019)].

**Second Decision of District Court.** On remand, the district judge ordered document-by-document submissions from the parties as required by the appellate mandate. In December of 2019, the district court ordered that only those motions "actually decided" and documents relevant to those decisions were judicial documents subject to the presumption of public access. A clarifying order issued the next month stated that all pending motions on the date of the order closing the case were moot, so neither the motions themselves nor their accompanying papers were judicial documents. As to the discovery documents, however, the district court unsealed many of them, with appropriate redactions, and issued a final unsealing order in December of 2023. In January of 2024, Giuffre and the intervenors filed notices of appeal.

**Second Circuit Had Appellate Jurisdiction.** The Second Circuit first rejected the argument that it lacked appellate jurisdiction, holding that the 2019 order and its subsequent clarification were interlocutory orders not subject to appeal on any basis. Therefore, an appeal from the final unsealing order brought up all the previous orders under the merger doctrine of Federal Rule of Appellate Procedure 3(c), and the court had appellate jurisdiction under 28 U.S.C. § 1291.

**Undecided Motions and Accompanying Documents.** The Second Circuit then held that motions and their accompanying documents were not categorically excluded from being judicial documents subject to the presumption of public access merely because the motions were undecided at the time the action settled and therefore became moot. Instead, the court clarified that "a judicial document determination is properly made by

evaluating the relevant materials at the time of their filing with the court," so subsequent mooting or any other event is simply irrelevant to the issue. The court noted that it had previously held that when a sealed complaint is filed and the action is quickly settled, the complaint is nevertheless a judicial document subject to unsealing even though the court did not address its validity or award any relief [Bernstein v. Bernstein Litowitz Berger & Grossmann LLP, 814 F.3d 132, 140 (2d Cir. 2016)]. The same rule applied to Maxwell's motion for summary judgment.

**Giuffre's Deposition Transcript.** The well-known retired Harvard law professor Alan Dershowitz was named by Giuffre as a client of Epstein. Dershowitz deposed her in a state-court lawsuit and introduced her testimony under seal in support of his motion to intervene in the federal action. The district court refused to lift the seal because the deposition was not relied on in ruling on the intervention motion. The Second Circuit vacated and remanded, holding that whether the court relies on a particular judicial document in making a ruling does not, by itself, undermine the presumption of public access. As the court noted, the absence of reliance may be equally relevant to the public's interest in the court's decisionmaking process. The proper inquiry is whether the documents are relevant to the performance of the judicial function, not whether they were actually relied on.

**Unsealing Motions and Accompanying Documents.** Finally, the Second Circuit rejected the district court's determination that the motions to unseal the previously discussed materials and their related documents were not judicial documents, noting that they were submitted with the intent to affect the district court's decision on whether *the other documents* were subject to unsealing, so they were crucial to the court's adjudicative functions, and the presumption of public access was implicated. The court conceded that the strength of the presumption of public access to such materials depends on the importance of the underlying sealed documents to the adjudicative functions of the court. But in this case, the district court appeared to apply a presumption that motions to unseal are simply excluded from the presumption of public access. Remand was therefore necessary for the district court to apply the correct standard.

**Disposition.** The Second Circuit vacated the orders of the district court maintaining the seals on the described materials and remanded for further proceedings consistent with its opinion.