



Litigation Insights

OCTOBER 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.

ARBITRATION

Loss of Right to Arbitrate Through Litigation Conduct

*Kloosterman
v. Metro. Hosp.*

2025 U.S. App. LEXIS 22072 (6th Cir. Aug. 27, 2025)

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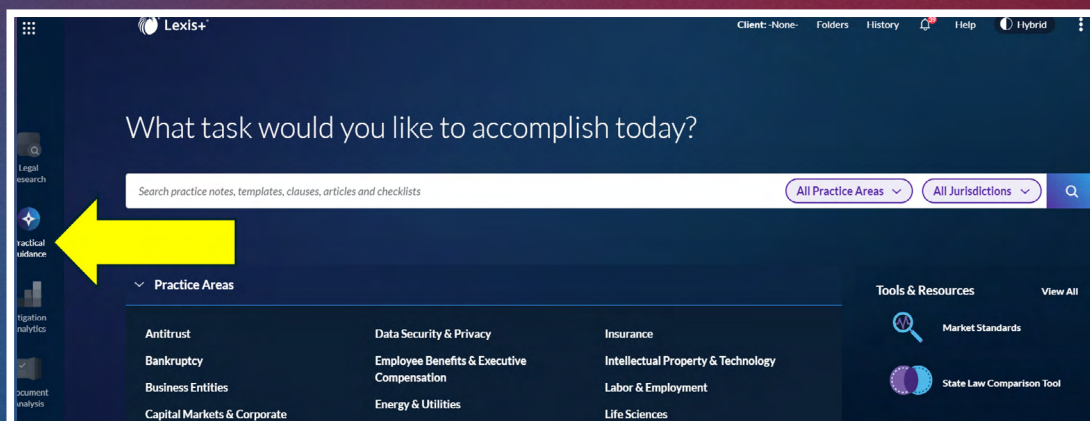
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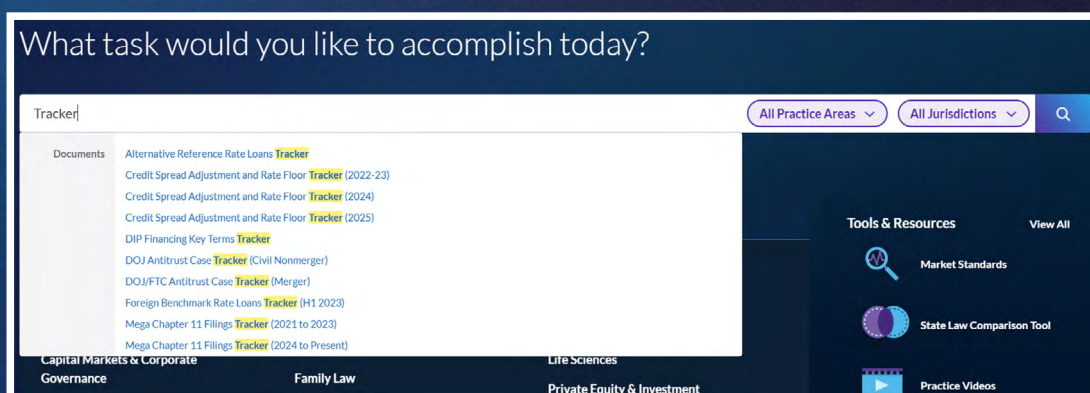
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By Christine King, Esq.

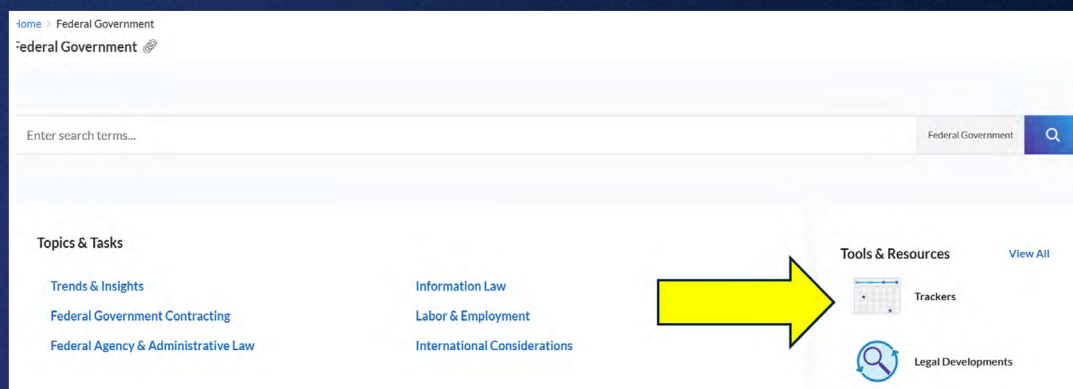
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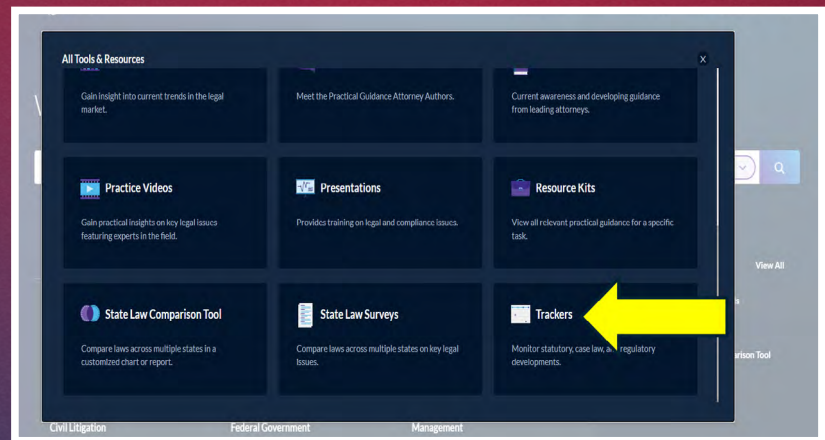
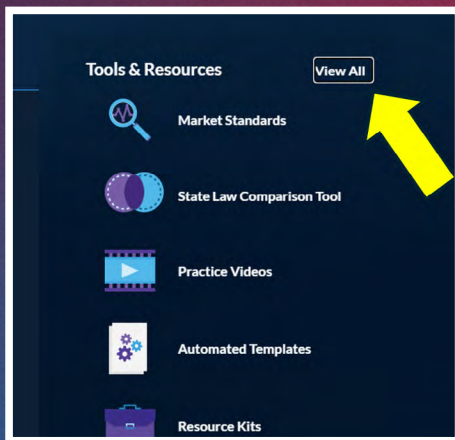
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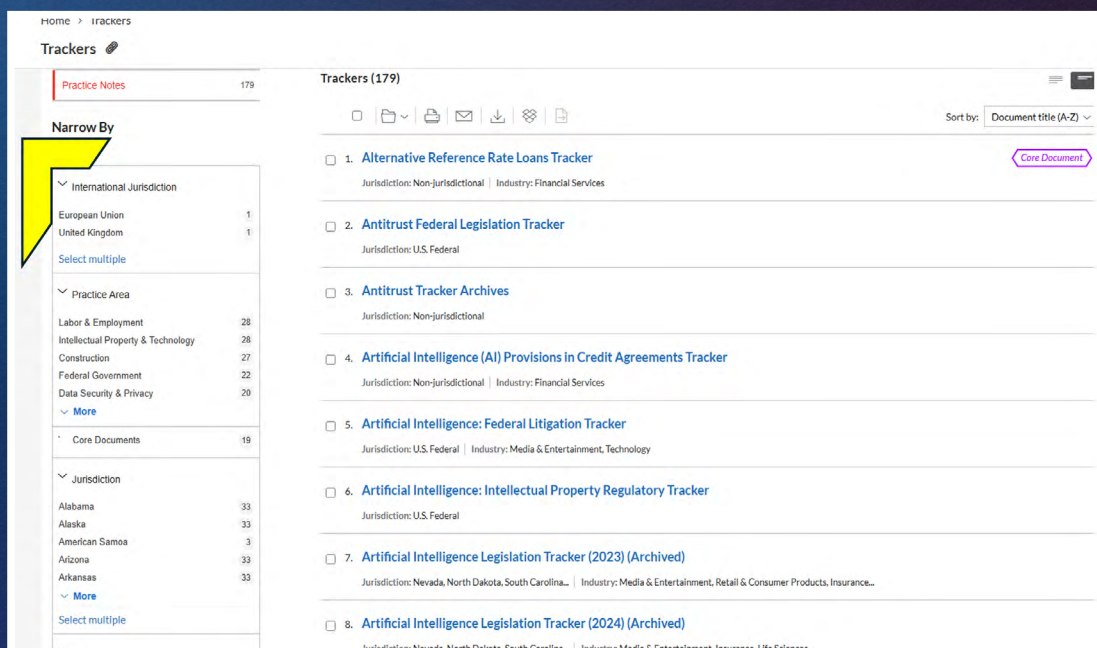
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Executive Order Title	Date	Summary	Area of Law	Related Content
[NEW] EO, Unlocking Cures for Pediatric Cancer with Artificial Intelligence	9/30/25	This order directs a coordinated effort by the MAHA Commission and key agencies to harness AI in advancing pediatric cancer research and care. It focuses on leveraging the Childhood Cancer Data Initiative to improve diagnostics, treatments, and clinical trial design, while enhancing data sharing and infrastructure. The initiative aims to drive investment, integrate AI into healthcare systems, and empower patients and researchers in the quest to reduce childhood cancer mortality and improve overall outcomes. Fact Sheet . 90 Fed. Reg. ____.	Health and Safety	
[NEW] EO 14354, Continuance of Certain Federal Advisory Committees	9/29/25	This order extends the continuation of various presidential advisory committees until September 30, 2027, including committees on security, environment, education, and others, as specified by their respective executive orders or proclamations. It directs that the designated department heads perform applicable Federal Advisory Committee Act functions and supersedes parts of a previous executive order. The order becomes effective on September 30, 2025 and is subject to applicable law and funding availability. 90 Fed. Reg. 48145 (Sept. 6, 2025).	Government/Regulatory	
[NEW] EO 14353, Assuring the Security of the State of Qatar	9/29/25	This executive order reiterates the strong alliance between the U.S. and the State of Qatar and outlines U.S. commitment to ensuring Qatar's security and territorial integrity. It begins by emphasizing the long-standing cooperation between both nations—highlighting Qatar's role in hosting U.S. forces, supporting critical security operations, and serving as a	Foreign Affairs	

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Generative Artificial Intelligence (AI) Federal and State Court Rules Tracker

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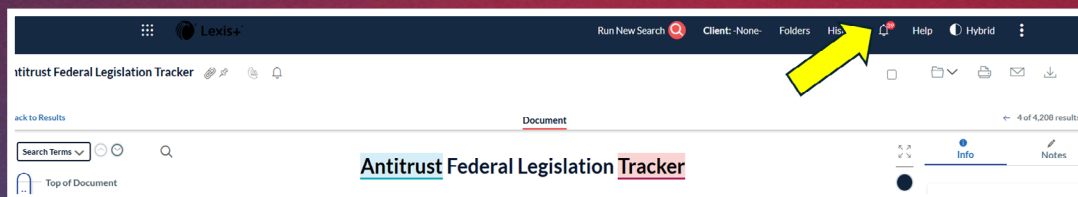
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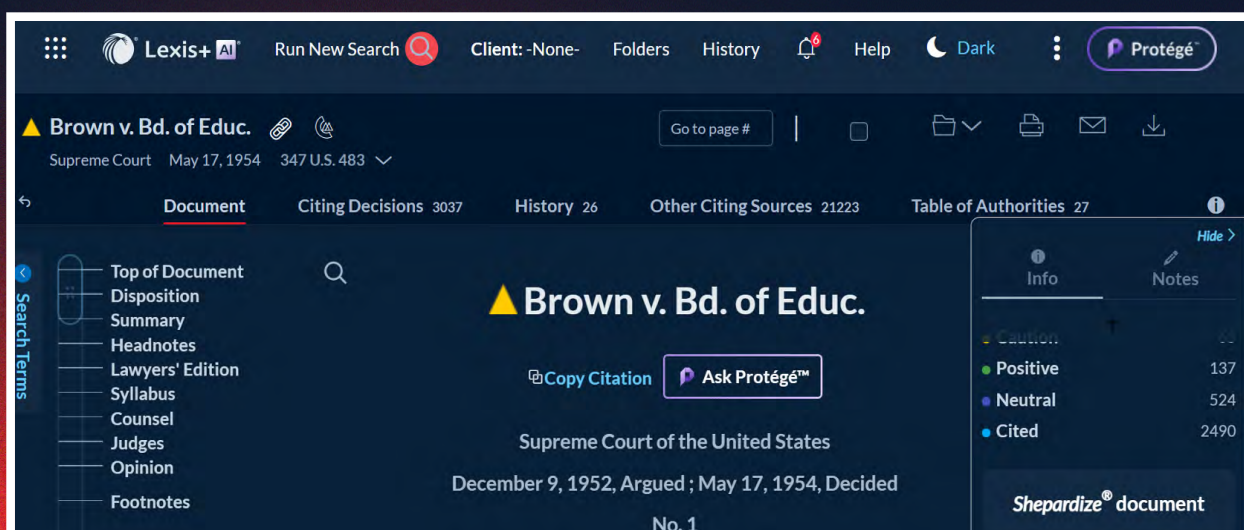
Filter by Agency Decisions Within the *Shepard's*® Citation Service

By Noah Canary, Esq.

As we near the end of the year, and the colder weather that comes with it, there's no better time to warm up with some exciting updates from LexisNexis®. One such update comes in the form of the Agency Decisions Filter that is now embedded within the flagship *Shepard's*® Citation Service on Lexis+.

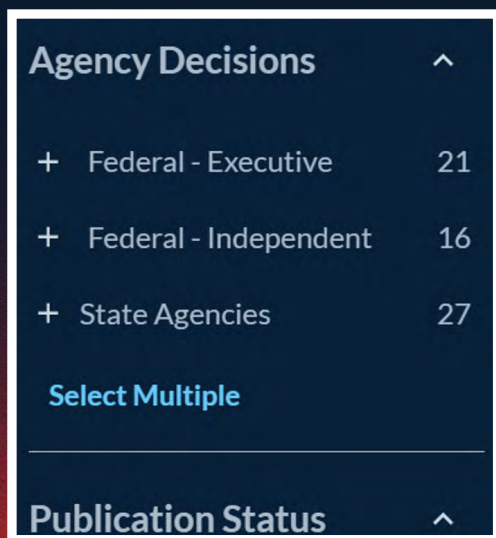
Just as a little bit of background, the *Shepard's* Citation Service has been online since the 1980s, providing even easier access to attorneys. In 1998, Lexis purchased *Shepard's* Citator and the functionality we see today was added just a year later. Today, Lexis is the exclusive provider of *Shepard's* Citation Services. While other legal research providers have created alternative citation services, only *Shepard's* Citator is grounded in over a century of expertise, which gives you the confidence and tools you need to ensure that what you are working with is still "good law".

The *Shepard's* Citation Service then continues to advance with the timely updates that you need. One of the most recent updates comes in the form of a new filter within the full *Shepard's* reports. After you open up a *Shepard's* report, you will see all of the available citation references for the material that you are viewing.





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ARBITRATION

Loss of Right to Arbitrate Through Litigation Conduct

Kloosterman v. Metro. Hosp.

2025 U.S. App. LEXIS 22072 (6th Cir. Aug. 27, 2025)

The Sixth Circuit holds that if a defendant seeks total victory in court by moving for dismissal on the merits, and seeks to compel arbitration only after the court denies the dismissal motion, the defendant is in “default” of the parties’ arbitration agreement and has lost the right to arbitrate.

→ **Background.** The plaintiff in this case sued her former employer, a state-affiliated hospital and several hospital administrators, alleging constitutional claims under 42 U.S.C. § 1983, federal statutory claims under Title VII, and state-law claims. The defendants moved to dismiss all claims on the merits; the district court granted the motion in part, dismissing some claims but allowing others to proceed. The parties then conferred to plan for discovery in the case [see Fed. R. Civ. P. 26(f)], and the district court scheduled a discovery conference.

Around that time—more than a year after commencement of the lawsuit—the defendants for the first time asserted that the dispute was subject to arbitration, based on an arbitration clause in the plaintiff’s employment agreement. The district court granted the defendants’ motion to compel arbitration. The plaintiff appealed, contending that the defendants had lost their right to arbitrate by litigating the dispute in court for a year before invoking the arbitration right.

→ **Federal Arbitration Act.** The Sixth Circuit panel’s analysis began with two provisions of the Federal Arbitration Act (FAA) that govern how a party may raise an arbitration agreement in federal court. The first provision, 9 U.S.C. § 3, applies to a case already pending in federal court; it gives a defendant the right to seek a stay of the federal case in favor of arbitration. The second section, 9 U.S.C. § 4, gives a party to an arbitration agreement the right to “petition” a federal court for an order compelling the other side to arbitrate a dispute. Although § 4 on its face applies when no federal suit has been commenced, courts have long allowed defendants in a pending federal case not just to stay the case under § 3, but also to move to compel arbitration under § 4 [see *Boykin v. Fam. Dollar Stores of Mich., LLC*, 3 F.4th 832, 836–837 (6th Cir. 2021)].

Section 3 suggests that a party cannot stay a case if the party is in “default” of seeking arbitration. Specifically, it provides that a court “shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration” [9 U.S.C. § 3]. The Sixth Circuit panel emphasized that the statutory word “default” has a clear legal meaning. A party is in “default” of a duty or promise if the party omits or fails to fulfill the duty or promise through neglect or otherwise [see **BLACK’S LAW DICTIONARY 342 (2d ed. 1910); WEBSTER’S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 686 (2d ed. 1934)**]. And the court found that that meaning fits the context in which § 3 applies. If a defendant litigates in court for a long enough time before seeking arbitration, the defendant has not lived up to the promise to arbitrate. Such a defendant has thus committed a “default in proceeding with such arbitration” under that phrase’s normal meaning [see 9 U.S.C. § 3]. The court pointed out that in an early case it concluded that the defendants were in default of their arbitration agreement, thus losing their right to arbitrate, because they had litigated the case for seven years before seeking a stay under § 3 [see *Am. Locomotive Co. v. Chemical Research Corp.*, 171 F.2d 115, 121 (6th Cir. 1948)].

→ **Determining Whether Right to Arbitrate Has Been Lost Through Litigation Conduct—*Morgan v. Sundance*.** For many years, the Sixth Circuit applied a two-part test to show that a defendant’s choice to litigate in court

barred the defendant from seeking to arbitrate. First, the defendant's litigation conduct had to be "completely inconsistent with any reliance on an arbitration agreement." Second, the defendant's conduct had to have caused actual prejudice to the plaintiff [*Solo v. UPS*, 947 F.3d 968, 975 (6th Cir. 2020)].

The Sixth Circuit panel in this case noted that the Supreme Court's recent decision in *Morgan v. Sundance, Inc.*, called the circuit's two-part test into doubt. In *Morgan*, the plaintiff argued that the defendant waived an arbitration agreement by litigating in court for eight months before seeking to arbitrate, but the Eighth Circuit rejected the waiver claim because the defendant's delay had not prejudiced the plaintiff. The Supreme Court assumed that the courts of appeals had been correctly relying on federal law and using the terminology of waiver to resolve this timeliness question in the arbitration context. Under those assumptions, the Court held that because in other contexts the federal law of waiver does not require a showing of prejudice, the FAA does not allow federal courts to create an arbitration-specific waiver test [*Morgan v. Sundance, Inc.*, 596 U.S. 411, 416–419, 142 S. Ct. 1708, 212 L. Ed. 2d 753 (2022)].

In a subsequent case, the Sixth Circuit recognized that *Morgan* had invalidated the "prejudice" element of the circuit's two-part test [*Schwebke v. United Wholesale Mortg. LLC*, 96 F.4th 971, 974 (6th Cir. 2024)]. In that case, the court of appeals assumed that *Morgan* left intact the first element—that a defendant took actions "completely inconsistent" with an intent to arbitrate—because the parties did not dispute that question.

→ **Defendants' Litigation Conduct Put Them in "Default" of Arbitration Agreement.** The Sixth Circuit concluded that the defendants' litigation conduct in this case had resulted in the loss of their right to arbitrate. The court noted that 9 U.S.C. § 3, the FAA provision authorizing a stay pending arbitration, suggests that a court should deny a stay if the moving party is in "default," and § 4 contains no similar language for a request to compel arbitration. But the court reasoned that it would render § 3's default limitation meaningless if a party in default could avoid that limit by moving to compel arbitration rather than to stay the case.

The appellate panel therefore proceeded to the primary question in this appeal, concluding that the defendants' decision to litigate the case in court before seeking to resolve it in arbitration had put them in "default" of the arbitration agreement.

The panel explained that Sixth Circuit precedents treat a defendant's actions as "entirely inconsistent" with arbitration if the defendant first seeks "an immediate and total victory" in court through a motion to dismiss for failure to state a claim [see Fed. R. Civ. P. 12(b)(6)] and then moves to arbitrate only after the court rejects this initial attempt to end the dispute [see *Solo v. United Parcel Serv. Co.*, 947 F.3d 968, 975 (6th Cir. 2020)]. A party that seeks this type of judicial win on the merits is in "default" of an arbitration agreement because the party has failed to observe its contractual promise to arbitrate the merits. "After all, if the defendant wins this motion, it will forgo arbitration altogether. And defendants may not 'play heads I win, tails you lose' by keeping arbitration in reserve just in case a court does not reject the entire case at the start."

The Sixth Circuit panel found "overwhelming circuit precedent" supporting this view [see, e.g., *White v. Samsung Elecs. Am., Inc.*, 61 F.4th 334, 340 (3d Cir. 2023) (defendant lost right to arbitrate when it sought to enforce that right only after judicial decisions on its motions to dismiss made clear that further litigation would be required and that it could not win on pleadings); *Smith v. GC Servs. Ltd. P'ship*, 907 F.3d 495, 501 (7th Cir. 2018) (defendants lost right to arbitrate because they sought arbitration only after losing motion to dismiss); *Parker v. Kearney Sch. Dist.*, 130 F.4th 649, 654–655 (8th Cir. 2025) (defendants lost right to arbitrate by filing unsuccessful motions to dismiss and for summary judgment before attempting to enforce arbitration right)].

The Sixth Circuit panel acknowledged that whether a party has acted inconsistently with the right to arbitrate turns on the totality of the circumstances in a given case. But the court explained that its precedents have made that point to clarify that a defendant can relinquish the right to arbitrate even if (unlike in the present case) it never files a dispositive motion that affirmatively seeks a decision on the merits from the court [see *Schwebke v. United Wholesale Mortg. LLC*, 96 F.4th 971, 976 (6th Cir. 2024)]. “Our case-by-case reasoning thus has recognized the importance of that affirmative request to the question whether the defendant lost the right to arbitrate.” Moreover, in this case the defendants pointed to no other case-specific conduct that would suggest they had preserved the right to arbitrate.

→ **Disposition.** Because the defendants lost the right to arbitrate by seeking dismissal of all of the plaintiff’s claims on the merits, the Sixth Circuit reversed the district court’s order compelling arbitration and remanded the case.

JUDICIAL ESTOPPEL

State-Law Claims

Retro Metro, LLC v. City of Jackson

147 F.4th 551, 2025 U.S. App. LEXIS 19982 (5th Cir. Aug. 7, 2025)

The Fifth Circuit holds that although judicial estoppel is generally considered a matter of federal procedural law, state judicial estoppel principles apply when nonfederal issues are at stake.

→ **Background.** In 2011, the defendant in this case, the City of Jackson, Mississippi, leased a commercial property from the plaintiff, a limited liability company. The lease has been the subject of several lawsuits over the years. In a 2016 breach-of-contract lawsuit in state court, the City's answer to the complaint admitted that it entered into the lease in 2011. That litigation ultimately settled.

In 2023, the plaintiff again sued the City in state court, seeking specific performance of the lease. The City again admitted in its answer that it had entered the lease, and it asserted a counterclaim for breach of the lease.

Later in 2023, the City Council authorized the mayor to terminate the lease. This prompted the plaintiff to file the present action in federal district court against the City and local officials, alleging constitutional violations, breach of contract, and racial discrimination in violation of Title VII of the Civil Rights Act of 1964. The district court granted the City's motion for summary judgment and dismissed all claims against the individual defendants. In arriving at its decision, the district court concluded, among other things, that the lease was not a valid contract. Specifically, the court found that the lease did not satisfy Mississippi's "minutes rule," which provides that public boards speak only through their meeting minutes, so that the lease was not valid because it was not recorded in the City Council's meeting minutes.

The plaintiff appealed, challenging only the summary-judgment ruling on the breach-of-contract claim against the City. The Fifth Circuit panel concluded that the district court was correct in determining that the minutes rule was not satisfied in this case. That is, the City Council's minutes were insufficient to establish that the lease was a valid contract.

→ **Judicial Estoppel—Choice of Law.** Another argument presented by the plaintiff on appeal was that even if the minutes rule was not satisfied, the doctrine of judicial estoppel barred the City from contending that the lease was invalid, because that contention was inconsistent with the City's position in previous lawsuits. Because contract validity was a matter of state law, and because both Mississippi and federal law recognize judicial estoppel, the Fifth Circuit panel had to determine which law applied.

The court of appeals noted that in adjudicating a state-law claim, it applies state substantive law and federal procedural law, but the line between procedural and substantive law can be "hazy" [see *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 92, 58 S. Ct. 817, 82 L. Ed. 1188 (1938)]. In determining which side of the line a particular issue falls on, the court keeps in mind the goals of discouraging forum shopping and avoiding the inequitable administration of laws [see *Hall v. GE Plastic Pac. PTE, Ltd.*, 327 F.3d 391, 395 (5th Cir. 2003)]. Specifically regarding judicial estoppel, the court observed that many courts have applied either federal or state law without analysis. But most courts have concluded that federal law should apply, because a federal court should have the ability to protect itself from manipulation as a matter of federal procedure. And the Fifth Circuit generally considers judicial estoppel a matter of federal procedure [see *Hall v. GE Plastic Pac. PTE, Ltd.*, 327 F.3d 391, 395 (5th Cir. 2003)].

However, the Fifth Circuit will apply state judicial estoppel when nonfederal issues are at stake [see *Cont'l Cas. Co. v. McAllen Indep. Sch. Dist.*, 850 F.2d 1044, 1046 n.2 (5th Cir. 1988)]. Nonfederal issues are not at stake, for example, if (1) the application of federal judicial estoppel is not outcome-determinative, and therefore does not encourage forum shopping, and (2) all relevant lawsuits were in federal court, such that it is the federal court that is subject to manipulation and in need of protection [see *Hall v. GE Plastic Pac. PTE, Ltd.*, 327 F.3d 391, 395–396 (5th Cir. 2003)].

In the present case, the Fifth Circuit found that distinctly nonfederal issues were at stake, for three reasons. First, the City argued that substantive Mississippi law did not permit judicial estoppel to override the minutes rule. Applying judicial estoppel as a matter of federal procedure could therefore enable the enforcement of a contract in federal court that could never be enforced in state court. Second, the other lawsuits between the parties occurred entirely in state court. And third, this was a dispute between two Mississippi parties regarding a state-law claim; it was subject to federal jurisdiction only because the plaintiff initially also pursued related federal claims. Under these circumstances, the risks of inequitably administering justice and encouraging forum shopping were much greater than the risk that the federal court would be manipulated. The court of appeals therefore applied Mississippi judicial estoppel.

→ **Conclusion and Disposition.** Applying Mississippi's judicial estoppel doctrine, the court of appeals concluded that the doctrine did not apply in this case. The elements of Mississippi judicial estoppel are (1) an asserted legal position inconsistent with one previously taken during litigation, (2) a court's acceptance of the previous position, and (3) no inadvertence in taking the inconsistent position. However, after examining Mississippi Supreme Court precedent, the court of appeals concluded that the state's highest court would most likely hold that judicial estoppel cannot cure a failure to comply with the minutes rule. Accordingly, because the plaintiff could not establish the validity of the lease, the Fifth Circuit affirmed the district court's summary judgment in favor of the City.

WESTFALL ACT

No Post-Trial Substitution

Carroll v. Trump

148 F.4th 110, 2025 U.S. App. LEXIS 20084 (2d Cir. Aug. 8, 2025)

The Second Circuit holds that a post-trial motion to substitute the United States as a party pursuant to the Westfall Act is untimely; the Attorney General's certification that the defendant was acting within the scope of federal employment must be filed before trial.

→ **Background.** On November 4, 2019, the plaintiff filed this action in New York state court, asserting a single count of defamation per se against Donald Trump in his individual capacity, based on statements he made in June 2019 during his first term as President of the United States. In September 2020, then-Attorney General Barr certified that Trump had been acting within the scope of his employment when he made the statements, removed the case to the U.S. District Court, and filed a motion pursuant to the Westfall Act seeking to substitute the United States as the defendant [see 28 U.S.C. § 2679(d)(2)].

Under the Act, certification is conclusive for purposes of removal to federal court, but the question of substitution is subject to judicial review. After its review, the district court denied the motion to substitute [see *Carroll v. Trump*, 498 F. Supp. 3d 422, 430 (S.D.N.Y. 2020)].

Defendant Trump filed an interlocutory appeal from that ruling, and on September 27, 2022, a divided panel of the Second Circuit (1) reversed the district court's finding that Trump was not an employee of the government under the Westfall Act, (2) vacated the district court's determination that Trump was not acting within the scope of his employment when he made the statements at issue, and (3) certified the scope-of-employment question to the D.C. Court of Appeals [see *Carroll v. Trump*, 49 F.4th 759, 761, 770, 781 (2d Cir. 2022)].

On April 13, 2023, the D.C. Court of Appeals clarified the scope of the doctrine of respondeat superior under District of Columbia law, but declined to resolve the ultimate question of whether Trump was acting within the scope of his employment when he made the statements that formed the basis of the plaintiff's defamation claim. The Second Circuit remanded the matter to the district court with instructions for it to apply the clarified District of Columbia law to the facts of this case [see *Carroll v. Trump*, 66 F.4th 91, 94 (2d Cir. 2023) (per curiam)].

On remand, the government filed a letter contending that the prior certification and motion to substitute were overtaken by events, and that the Attorney General should be given the opportunity to decide anew whether to certify that Trump was acting within the scope of his office when he made the statements at issue in the case. The district court granted this request, ruling that any further submission by the United States or the defendant regarding substituting the United States for the defendant must be served and filed no later than July 13, 2023.

On July 11, 2023, the government notified the district court that in light of the D.C. Court of Appeals' clarification of the standard for respondeat superior liability, as well as new factual developments, it declined to certify under the Westfall Act that Trump was acting within the scope of his office and employment when he made the statements that formed the basis of the defamation claims.

No further action was taken by Trump or the government regarding Westfall Act substitution before the case proceeded to trial, and in January 2024 the jury rendered a verdict of \$83.3 million in the plaintiff's favor. Trump appealed.

On January 20, 2025, Trump was sworn into office for his second term as President. On April 11, 2025, when Trump had been President for nearly three months and the appeal had been fully briefed, he and the government jointly moved in the Second Circuit to substitute the United States as a party under the Westfall Act.

On June 18, 2025, in advance of oral argument, the Second Circuit issued an order denying the motion, and indicated that it would subsequently issue an opinion detailing its reasoning.

This opinion was issued to explain the basis for that decision. In a footnote, the Second Circuit noted that it is common practice for it to resolve a pending motion and later issue an opinion expounding on its reasoning [see *Hassoun v. Searls*, 976 F.3d 121, 129 & n.4 (2d Cir. 2020) (collecting cases)].

→ **Westfall Act Does Not Allow Certification After Trial.** The Second Circuit examined the text and purpose of the Westfall Act and concluded that the Act does not permit certification on appeal after trial.

The court noted that, in certain circumstances, the Act permits the United States to be substituted as a party in a lawsuit against a federal employee alleging that the employee committed tortious conduct in the course of his or her employment. Substituting the United States for the defendant makes the action against the United States under the Federal Tort Claims Act (FTCA) the exclusive means of recovery for the injured individual in tort. For actions initiated in state court, the Act provides for removal of the action to federal court [see 28 U.S.C. § 2679(d)].

The Westfall Act provides for certification by the Attorney General that the defendant employee was acting within the scope of his or her office at the time of the incident out of which the claim arose [see 28 U.S.C. § 2679(d)(1), (2)]. Certification by the Attorney General does not establish that the substitution of the United States was correct, however, and it remains for the court to determine whether the scope-of-employment certification was correct.

In the event that the Attorney General refuses to certify scope of office or employment, the Act allows the employee to petition the court to find and certify that the employee was acting within the scope of his office or employment [see 28 U.S.C. § 2679(d)(3)].

The Second Circuit emphasized that the relevant provision of the Westfall Act, 28 U.S.C. § 2679(d)(2), which applies to actions commenced in state court and certified by the Attorney General, contains a timing restriction, providing for removal “at any time before trial by the Attorney General.”

The court found that the plain language of the statute, specifically the “before trial” language in § 2679(d)(2), places a timing restriction on both the certification by the Attorney General and the removal of the suit from state court to federal court. The court reasoned that “it is the certification itself that prompts the removal in the first instance. Without certification, there is no removal. . . . It is undisputed and indisputable that removal must be accomplished before trial; as such, the certification must be made before trial, too.”

Moreover, the Second Circuit concluded that even if the Attorney General’s 2023 rescission of certification meant that § 2679(d)(2) did not apply, it would be untimely under § 2679(d)(3) for Trump to petition the court of appeals to find and certify that he was acting within the scope of office. Section 2679(d)(3) allows a petition for certification at any time before trial and does not distinguish between suits filed originally in state court or in federal court. “Thus, regardless of whether an employee is sued in federal or state court and petitions for substitution pursuant to § 2679(d)(3), he must do so before trial.”

The Second Circuit opined that the role and purpose of the Westfall Act also “compellingly support” its conclusion that substitution motions must be made before trial. FTCA cases are subject to bench trials, and therefore invocation of the Westfall Act supplants the jury. “Supplanting the jury as factfinder has little utility in a case, like this one, that has already been tried to a jury.” Moreover, the purpose of the Act is in the nature of an immunity from suit, as it relieves covered employees from the cost and effort of defending the lawsuit. The Supreme Court has instructed that immunity-related issues should be decided at the earliest opportunity [see *Osborn v. Haley*, 549 U.S. 225, 253, 127 S. Ct. 881, 166 L. Ed. 2d 819 (2007)].

The court looked to its prior precedent involving 42 U.S.C. § 233(c), a related statutory provision with substantially similar language. Section 233(c) applies to federally funded public health centers, and the Second Circuit had held that the plain text of the statute required that the Attorney General’s certification that the defendant was acting in the scope of his or her employment must occur before trial [see *Celestine v. Mount Vernon Neighborhood Health Ctr.*, 403 F.3d 76, 80–82 (2d Cir. 2005)].

The Second Circuit also observed that decisions from other circuits required certification before trial.

The court concluded that “a motion for substitution pursuant to § 2679(d)(2) or (d)(3) must be made before trial. The motion to substitute here, filed after entry of a verdict at trial and during the pendency of the appeal, is therefore statutorily barred.”

→ **Movants Waived Their Rights to Move for Substitution.** The Second Circuit found that in 2023, when the government declined to certify under the Westfall Act, Trump’s failure to timely petition the district court to certify pursuant to subsection (d)(3) waived his rights to move for substitution.

The court noted that waiver occurs when a litigant intentionally relinquishes a known right, and the district court expressly provided both Trump and the government with an opportunity to make further submissions on the issue of Westfall Act substitution by July 13, 2023. The Attorney General declined to certify on July 11, 2023, and Trump could have moved for court certification under § 2679(d)(3) but he declined to do so. “Indeed, at no time after the remand did Trump file anything regarding substitution in the district court. By declining to seek such relief, Trump waived his right to now bring this motion.”

The Second Circuit added that the government waived its right to bring this motion “and its belated recertification.” When certification arose again in 2023 because of clarification of the respondeat superior standard by the D.C. Court of Appeals, the government determined that certification was not appropriate. “[O]ur law of waiver does not permit a party to withdraw an objection in the district court and then attempt to reassert that objection on appeal, with the benefit of hindsight.”

In a footnote, the court opined that “permitting the extremely belated motion to substitute would result in manifest injustice to Carroll, while finding it waived wreaks no such injustice to Trump. Trump has vigorously litigated this action without substitution through able counsel of his choosing. Requiring him to remain in the case at this late stage does no injustice.”

→ **Denial of Motion as Untimely Was Matter of Fairness.** The court concluded by emphasizing that the case had been extensively litigated for more than five years through multiple courts. Liability was determined at the summary judgment stage, the matter then proceeded to a jury trial on the issue of damages, and the jury returned a verdict of \$83.3 million in favor of the plaintiff. “The practical impact of permitting the Movants’ untimely

motion to substitute would be to unwind those five years of litigation and a duly-rendered jury verdict, and, potentially, to deprive [the plaintiff] of any opportunity to pursue her claims.”

The Second Circuit reiterated that substituting the United States in place of Trump would mean the failure of the plaintiff’s defamation lawsuit. This is because a successful motion to substitute would result in the matter being governed by the FTCA, and the FTCA expressly does not waive sovereign immunity for the tort of defamation [see 28 U.S.C. § 2680(h)].