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Committee Leadership

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Leadership Note

From the Chair

By Rob Wise

Who doesn't love Chicago in the summer? No one. Which is why we expect to see each of you there on July 18 and 19 when our Appellate Advocacy Committee again joins with the National Foundation for Judicial Excellence for our next seminar. Program Chairs Sarah Spencer and Adam Hofmann, along with the NFJE's planning committee, have organized an excellent seminar, which they outline more in the pages to follow. I won't steal their thunder. So please read on, check out the program for the agenda, make your plans to attend and register, and help us get the word out about this excellent seminar.

In addition, this edition includes numerous valuable contributions and feature articles. First, our Rules Subcommittee Chair Charlie Frazier provides his summary and comments on the 2019 Amendments to the Rules of the Supreme Court of the United States. This is a must-read for anyone who practices or may practice before the Supreme Court.

Next, our first featured article—"When Does the Law Become 'Clearly Established'"—comes from Mark Standridge, who explores this issue in the context of qualified immunity in civil rights litigation. Sarah Spencer authored our second article, titled "The Final Judgment Rule and the Procedural Trap of 'Manufactured Finality'," which takes a look at this critical issue of appealability and jurisdiction. Finally, Jill M. Steinberg and Kristine E. Nelson give us their take on federalism and the interplay between federal and state courts in their article, "A Growing Call for Federal Court of Appeals Certification of Unsettled State Law Issues to State Supreme Courts."

DRI's Amicus Committee, staffed by numerous Appellate Advocacy Committee members and chaired by our own Matt Nelson (who succeeded our Publications Chair Larry Ebner), also continues to be very active, submitting amicus briefs on behalf of numerous DRI members. For more information on the Amicus Committee's efforts and to learn how DRI is using its voice for the benefit of the defense bar and our clients, please read Matt's report in the pages that follow.

This edition also features our Circuit Reports, compiled by Erik Goergen and his network of reporters. We thank them, as always, for drafting and compiling this valuable resource and keeping us abreast of developments across the country. If you have any ideas for reporting in your circuit, please reach out to Erik (or Larry).

On behalf of the entire Appellate Advocacy Committee, I thank all our authors for their excellent contributions. And as always, I thank our tireless Publications Chair, Larry Ebner, for the amazing job he does edition after edition, year after year, in pulling together our publications. If you are interested in drafting something for *Certworthy*, or for our other publication opportunities, including dedicated Appellate editions of *For The Defense* (*FTD*), *FTD*'s *Writers' Corner* feature in almost all its issues, or for *In-House Defense Quarterly*, please reach out to Larry.

I know you will enjoy this issue of *Certworthy*. And I look forward to seeing you all in Chicago in July. If you have not yet registered for that seminar, please do.

Robert L. Wise with Bowman and Brooke LLP is the Chair of the DRI Appellate Advocacy Committee. Mr. Wise focuses his practice on class and mass actions, appeals and advanced motions, product liability defense, and complex commercial litigation. As a founding member of the firm's Appellate and Advanced Motions Practice, Rob is integrally involved in several high-profile putative class and mass actions, including ongoing alleged football-concussion-injury litigation, as well as several putative nationwide putative class actions in the automotive, consumer product, and medical device industries. Mr. Wise has also handled appeals before all levels of appellate courts in Virginia in both civil and administrative proceedings and has been involved in appeals throughout the country as lead appellate counsel, on-brief author, and off-brief legal-strategy consultant. Mr. Wise is active in several legal and professional organizations, including DRI and its Class Actions and Appellate Advocacy Committees (of which he is the committee Chair), as well as the Virginia Association of Defense Attorneys (for which he served on the board for several years).

Summary of and Comments on the 2019 Amendments to the Rules of the Supreme Court of the United States

By Charlie Frazier

On April 18, 2019, nearly five months after they were proposed for comment, the Supreme Court of the United States adopted amendments to several of its Rules of Court. These amendments will be effective on—and will "govern all proceedings after"—July 1, 2019, except that the amendments to Rule 25.3 (time to file reply briefs) and Rule 33.1(g) (word limits) "will apply only to cases in which certiorari was granted, or a direct appeal or original action was set for argument, after [July 1, 2019]." Sup. Ct. R. 48.

The following is my own summary and brief comment on each of these amendments.

Identifying Any Proceedings "Directly Related" to the Case at Issue

Rule 14. Content of a Petition for a Writ of Certiorari

Summary. Rule 14.1 lists the contents of a petition for writ of certiorari, which are to be presented "in the order indicated." Rule 14.1(g)(i) and (ii) require a "list of all parties to the proceeding in the court whose judgment is sought to be reviewed" and a corporate disclosure, respectively. The amendment adds paragraph (iii), which requires the petitioner to list all proceedings in any state or federal court "directly related to the case in this Court." For each proceeding, the list must provide:

- the court in question;
- docket number;
- case caption; and
- date of entry of judgment.

The amendment provides that, for purposes of the rule, a proceeding is "directly related" if it

> arises from the same trial court case as the case in this Court (including the proceedings directly on review in this case), or if it challenges the same criminal conviction or sentence as is challenged in this Court, whether on direct appeal or through state or federal collateral proceedings.

Sup. Ct. R. 14.1(g)(iii).

Comment. The amendment's requirement that a petition list all directly related cases will assist each Justice in evaluating whether his or her involvement in a case before joining the Court may require recusal.

Rule 15. Briefs in Opposition; Reply Briefs; Supplemental Briefs

Summary. The amendment to Rule 15.2 adds that a brief in opposition must now "identify any directly related cases that were not identified in the petition under Rule 14.1(b)(iii), including for each such case the information called for by Rule 14.1(b)(iii)."

Comment. This amendment serves the same purpose as the amendment to Rule14.1(b)(iii), permitting the respondent to address any omissions and errors to the list of directly related cases listed in the petition for writ of certiorari.

II. Moving Up the Latest Date for Filing a Reply Brief

Rule 25. Briefs on the Merits: Number of Copies and Time to File

Summary. Rule 25.3 is amended to provide that "any reply brief must actually be received by the Clerk not later than 2 p.m. *10 days* before the date of oral argument," instead of one week under the current rule.

Comment. The purpose of this amendment is to give the Justices and their law clerks a little more time to review and analyze reply briefs in preparing for oral argument.

III. Reminder: All Filings Are Still in *Paper* Form!

Rule 29. Filing and Service of Documents; Special Notifications; Corporate Listing

Summary. Rules 29.1 and 29.2 both add the phrase "in paper form" when referring to any document filed with the Court. Rule 29.1: "Any document required or permitted to be presented to the Court or to a Justice shall be filed with the Clerk *in paper form*." Rule 29.2: "A document is timely filed if it is received by the Clerk *in paper form* within the time specified for filing . . . ."

Comment. Ensuring that attorneys and parties understand that the advent of electronic filing in federal district and circuit courts has *not* arrived in the Supreme Court, these amendments make it crystal clear that all filings must be in paper form, as always, and that the timeliness of any filing is based on when the paper form of the document was submitted to the Clerk's Office.

IV. New (Reduced) Word Limits for Merits Briefs and Certain Other Filings

Rule 33. Document Preparation: Booklet Format; 8½-by-11-Inch Paper Format

Summary. Following the reduced word limits to briefs and other filings introduced by the 2016 amendments to the Federal Rules of Appellate Procedure, the Supreme Court has reduced the word limits for briefs on the merits, amicus briefs at the merits-briefing stage, and a few other filings. The chart below provides the document, the current word limit, and the new word limit provided in the amendments to Supreme Court Rule 33.1(g):

Documents	Current word limits	New word limits
Brief on the Merits for Petitioner or Appellant [Rule 24] Exceptions by Plaintiff to Report of Special Master [Rule 17]	15,000	13,000
Brief on the Merits for Respondent or Appellee [Rule 24.2] Brief on the Merits for Respondent or Appellee Supporting Petitioner or Appellant [Rule 12.6] Exceptions by Party Other Than Plaintiff to Report of Special Master [Rule 17]	15,000	13,000
Reply Brief on the Merits [Rule 24.4]	6,000	4,500
Reply to Plaintiff's Exceptions to Report of Special Master [Rule 17] Reply to Exceptions by Party Other Than Plaintiff to Report of Special Master [Rule 17]	15,000	13,000
Brief for an *Amicus Curiae* in Support of the Plaintiff, Petitioner, or Appellant, or in Support of Neither Party, on the Merits or in an Original Action at the Exceptions Stage [Rule 37.3] Brief for an Amicus Curiae in Support of the Defendant, Respondent, or Appellee, on the Merits or in an Original Action at the Exceptions Stage [Rule 37.3]	9,000	8,000

Comment. The comment from the Supreme Court Clerk that accompanied these word-limit changes when they were proposed in November 2018 stated:

> Experience has shown that litigants in this Court are able to present their arguments effectively, and without undue repetition, with word limits slightly reduced from those under the current rule. Reductions similarly designed were implemented for briefs in the federal courts of appeals in 2016.

The Comment's mention of the "[r]eductions to briefs in the federal courts of appeals in 2016" refers to the December 1, 2016, amendments to the Federal Rules of Appellate Procedure reducing the word limits for principal briefs by 1,000 words and reply briefs by 500 words. Perhaps the 2016 word-limit reductions have generally resulted in more efficient and effective briefs, or at least nominal requests for extensions in word limits. But the stated reason for the 2016 amendments was not the observation of the circuit courts that attorneys could effectively present arguments in fewer words than the then-14,000-word limit. Rather, the Advisory Committee on Appellate Rules proposed the word-limit reductions based on a 1993 study of briefs that revealed that one page was equivalent to 250 words. When Rules 27 and 32 were amended in 1998 to provide word limits for computer-generated briefs, the word limits were derived using the assumption that one page was equivalent to 280 words. Time will tell whether the 2,000-word reduction in Supreme Court merits briefs will prove the Comment correct.

Feature Articles

When Does the Law Become "Clearly Established"?

By Mark D. Standridge

For defense practitioners handling federal civil rights litigation, qualified immunity is "the most important doctrine in the law of constitutional torts" because it shields a government official from a civil suit for monetary damages unless said official violates "clearly established" constitutional rights. John C. Jeffries, Jr., *What's Wrong with Qualified Immunity?*, 62 Fla. L. Rev. 851, 852 (2010); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). "Part of the power of the qualified immunity doctrine arises from the fact that it must simply be raised as a defense by a defendant, and the plaintiffs have the burden of establishing the proof and arguments necessary to overcome it." *Strickland v. City of Crenshaw*, 114 F.Supp.3d 400, 412 (N.D. Miss. 2015) (citing *Pierce v. Smith*, 117 F.3d 866, 871–72 (5th Cir.1997) ((noting that the plaintiff bears the burden of demonstrating that an individual defendant is *not* entitled to qualified immunity)).

The threshold inquiry in any 42 U.S.C. §1983 suit requires that the Court "identify the specific constitutional right" at issue. *Manuel v. City of Joliet*, 137 S.Ct. 911, 920 (2017) (quoting *Albright v. Oliver*, 510 U.S. 266, 271 (1994)); *see also Echols v. Lawton*, 913 F.3d 1313, 1326 (11th Cir. 2019) ("[w]hen a plaintiff complains that a public official has violated the Constitution, qualified immunity shields the official from individual liability unless he had fair notice that his alleged conduct would violate 'the supreme Law of the Land'") (quoting U.S. Const. art. VI). After pinpointing that right, the Court still must determine the elements of, and rules associated with, an action seeking damages for its violation. *Manuel*, 137 S.Ct. at 920 (citing *Carey v. Piphus*, 435 U.S. 247, 257–58 (1978)); *see also Albright*, 510 U.S. at 270 n.4 (there must be some "constitutional peg on which to hang" a claim); *Lewis v. City of Chicago*, 914 F.3d 472, 475 (7th Cir. 2019). Where, for example, the plaintiff's Section 1983 claim arises out of a police officer's use of force, the Court's first task is to "identify[] the specific constitutional right allegedly infringed by the challenged application of force." *See Graham v. Connor*, 490 U.S. 386, 394 (1989). Then, the question becomes whether "clearly established law" would put the officer on notice that his or her conduct violated that specific constitutional right. *See, e.g.*, *City and Cnty. of S.F. v. Sheehan*, 135 S.Ct. 1765, 1777 (2015); *Echols*, 913 F.3d at 1326.

"Clearly Established" Law: A Short Primer

Two years ago, in *White v. Pauly*, 137 S.Ct. 548 (2017) (per curiam), the Supreme Court reiterated its long-standing rule that, for purposes of qualified immunity, the relevant "clearly established law" must be "particularized" to the facts of the case. *White*, 137 S.Ct. at 552 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). The Supreme Court has repeatedly reaffirmed this "particularity" or "speci-

ficity" requirement over the past two years. *See Ziglar v. Abbasi*, 137 S.Ct. 1843, 186–67 (2017); *D.C. v. Wesby*, 138 S.Ct. 577, 590 (2018) ("[t]he clearly established standard… requires a high degree of specificity") (quotations omitted)); *Kisela v. Hughes*, 138 S.Ct. 1148, 1153 (2018) (per curiam) ("police officers are entitled to qualified immunity unless existing precedent 'squarely governs' the specific facts at issue" (quoting *Mullenix v. Luna*, 136 S.Ct. 305, 309 (2015) (per curiam)). To satisfy the "clearly established law" prong, the plaintiff must identify a controlling case or robust consensus of cases finding a constitutional violation "under similar circumstances" as those presented in the case at hand. *Wesby*, 138 S.Ct. at 591 (citing *White*, 137 S.Ct. at 552); *see also Anderson*, 483 U.S. at 640 ("our cases establish that the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense"). The burden is on the plaintiff to identify a case where government officials acting under similar circumstances were held to have violated the Constitution. *See White*, 137 S.Ct. at 552.

"To be clearly established, a legal principle must have a sufficiently clear foundation in *then-existing precedent*" such that it is "settled law." (emphasis supplied). *D.C. v. Wesby*, 138 S.Ct. at 589. The Supreme Court has "not yet decided what precedents—other than [its] own—qualify as controlling authority for purposes of qualified immunity." *Wesby*, 138 S.Ct. at 591 n.8. *See also Sheehan*, *supra*, 135 S.Ct. at 1776 (assuming without deciding that "a controlling circuit precedent could constitute clearly established federal law"); *Carroll v. Carman*, 135 S.Ct. 348, 350 (2014); *Reichle v. Howards*, 132 S. Ct. 2088 (2012); *City of Escondido v. Emmons*, 139 S.Ct. 500, 503 (2019). However, assuming that a federal circuit court can "clearly establish" the law for purposes of qualified immunity, exactly *when* does a circuit court's opinion become rooted as "clearly established" law?

At What Point Does the Law Become "Clearly Established"?

To understand what *is* timely, clearly established law, it is useful to first examine was is *not* timely clearly established law. A plaintiff in a Section 1983 case cannot rely on cases decided after the incident at issue to prove the existence of clearly established law, even where Defendants can do so to show the *absence* of such law. *See Knopf v. Williams*, 884 F.3d 939, 947 (10th Cir. 2018) (plaintiff's four cited cases—particularly one that was decided more than a year after the relevant events—did not suffice to show "clearly established law"); *Jones v. Muniz*, 349 F.Supp.3d 377, 386–87 (S.D.N.Y. 2018) ("[c]ases that were decided after the plaintiff's arrest could not have provided Lt. Treubig with fair warning that his use of the taser…was clearly in violation of the plaintiff's constitutional rights"). While later-decided cases may demonstrate the absence of clearly established law (as was the case in *Mullenix v. Luna*, *supra*), they cannot provide clear notice that particular conduct is unlawful. *See*, *e.g.*, *Plumhoff v. Rickard*, 134 S.Ct. 2012, 2023 (2014) (citing *Brosseau v. Haugen*, *supra*, 543 U.S. at 200 n.4, to demonstrate the absence of clearly established law in 1999, but noting "[w]e did not consider later decided cases because they 'could not have given fair notice to [the officer]'"); *cf. Medeiros v. O'Connell*, 955 F.Supp. 21, 22 (D. Conn. 1997) (in 1995, "the Second Circuit held that a due process right to be free from excessive force was not clearly established in January 1991. No subsequent developments in the law served to clarify the existence of that right before January 1993, when the events at issue in this case occurred").

By contrast, the question of when a circuit opinion becomes "clearly established" law for purposes of qualified immunity is somewhat murkier. In *Bryan v. United States*, 913 F.3d 356 (3d Cir. 2019), the Third Circuit provided some guidance on this issue. In that case, U.S. Customs and Border Protection (CBP) officers searched plaintiffs' cruise ship cabins on suspicion of drug-smuggling activity; those searches yielded no contraband and prompted the plaintiffs to assert claims against the officers for allegedly violating their Fourth Amendment rights. *Bryan*, 913 F.3d at 358. The plaintiffs relied on a published Third Circuit case, *United States v. Whitted*, 541 F.3d 480 (3d Cir. 2008), a (then) first-of-its-kind ruling in any federal circuit involving nearly identical facts (including the exact same cruise ship) as the plaintiffs' case. *See Bryan*, 913 F.3d at 362–63. *Whitted* held that searches of cruise-ship cabins docked in the Virgin Islands after a trip to foreign ports requires reasonable suspicion under the Fourth Amendment. *Whitted*, 541 F.3d at 489–90; *Bryan*, 913 F.3d at 362. However, *Whitted* was issued on September 4, 2008, while the searches in *Bryan* occurred only days later, on September 5 and 6, 2008. *Bryan*, 913 F.3d at 363.

In *Bryan*, the Third Circuit ruled that the *Whitted* decision was not yet clearly established and that therefore the officers were entitled to qualified immunity, finding that "it is beyond belief that within two days the government could determine what was 'reasonable suspicion' and what new policy was required to conform to the ruling, much less communicate that new policy to the CBP officers." *Bryan*, 913 F.3d at 363. The Court ruled that "the *Whitted*

standard was not clearly established…on September 5 or 6," and that the CBP officers could not "reasonably be expected to have learned of this development in…Fourth Amendment jurisprudence" within one or two days. *Id.* "For purposes of qualified immunity, a legal principle does not become 'clearly established' the day [a Court] announce[s] a decision, or even one or two days later." *Id.*

Conclusion

Obviously, there is a question that remains wide open after *Bryan*: exactly how many days (or weeks, or even months) does it take for a legal principle to become "clearly established"? The Third Circuit's opinion in *Bryan* was "informed by the overarching aim of the qualified immunity doctrine to insulate from civil liability 'all but the plainly incompetent or those who knowingly violate the law,' and the need to ensure that the relevant legal principle is framed with particularity and settled 'beyond debate.'" *Bryan*, 913 F.3d at 363 (citations omitted). Of course, the Third Circuit only decided the case actually before it, and "decline[d] to draw a bright line demarcating when a legal principle becomes 'clearly established,'" leaving "that exercise for another day." *Id.* That said, reasonable government employees are not expected to conduct "an exhaustive study of case law" in connection with their day-to-day operations. *See Meehan v. Thompson*, 763 F.3d 936, 946 (8th Cir. 2014). Nor are reasonable government officials "expected to recognize the significance of a few scattered cases from disparate areas of the law." *Swanson v. Powers*, 937 F.2d 965, 968 (4th Cir. 1991) (internal citations omitted) (quoting *Lum v. Jensen*, 876 F.2d 1385, 1389 (9th Cir. 1989); *Lojuk v. Johnson*, 770 F.2d 619, 628 (7th Cir. 1985)). It is thus likely that the federal courts would (and should) allow a reasonable amount of time for an appellate decision or new legal principle to become rooted and disseminated to government employees and officials.

Mark Standridge is a private practitioner focusing on personal injury and civil rights defense and appellate work. Mark is the Chair of the New Mexico State Bar's Appellate Practice Section and is a member of the New Mexico Supreme Court's Appellate Rules Committee. Mark is also a member of DRI, and serves as Amicus Chair for the New Mexico Defense Lawyers Association. Mark was counsel of record in White v. Pauly.

The Final Judgment Rule and the Procedural Trap of "Manufactured Finality"

By Sarah Elizabeth Spencer

The final judgment rule is a well-accepted tenant of appellate procedural law. Federal courts of appeal have appellate jurisdiction over only "final decisions of the district courts." 28 U.S.C. §1291. "A 'final decision' is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233, (1945) (*citing St. Louis, I.M. & S. Ry. Co. v. S. Express Co.*, 108 U.S. 24, 28, (1883)).

In multi-party cases involving numerous causes of action and complicated pleadings (including counterclaims, crossclaims and third-party claims), it is not uncommon for orders on dispositive motions to adjudicate fewer than all pending causes of action. Such orders can tempt litigants and attorneys into the procedural trap of "manufactured finality": the decision to dismiss by voluntary stipulation outstanding claims as a way to make an "end-run" around the final judgment rule.

The problem arises where parties attempt to have their appeal heard while simultaneously saving for another day, post-appeal, the adjudication of other issues and claims in the case. Engaging in this "procedural sleight-of-hand" (*Camesi v. University of Pittsburgh Med. Center*, 729 F.3d 239, 245–46 (3d Cir. 2013)) can create a dangerous situation where a litigant ultimately loses both the right to appeal and the right to pursue further proceedings in the district court, thereby being deprived of any remedy at all.

Federal courts of appeal have repeatedly held that a dismissal without prejudice does not give rise to a final, appealable judgment. "[A] party cannot obtain appellate jurisdiction where the district court has dismissed at least one claim without prejudice because the case has not

been fully disposed of in the lower court." *Jackson v. Volvo Trucks N. Am., Inc.*, 462 F.3d 1234, 1238 (10th Cir. 2006); *see also e.g. Marshall v. Kansas City S. Ry. Co.*, 378 F.3d 495, 500 (5th Cir. 2004) (per curiam) (citations omitted) ("[A] party cannot use voluntary dismissal without prejudice as an end-run around the final judgment rule to convert an otherwise non-final—and thus non-appealable—ruling into a final decision appealable under §1291"; the law "eschews this practice of manufacturing §1291 appellate jurisdiction and disallows the manipulative plaintiff from having his cake (the ability to refile the claims voluntarily dismissed) and eating it too (getting an early appellate bite at reversing the claims dismissed involuntarily).").

In *Heimann v. Snead*, 133 F.3d 767, 769 (10th Cir. 1998), for example, the Tenth Circuit Court of Appeals concluded that it lacked appellate jurisdiction over the appeal of a non-final judgment, where the parties voluntarily dismissed certain claims to permit a sooner appeal. In *Heimann*, the plaintiffs alleged a seven count complaint and the defendants counterclaimed. *Id.* at 768. The district court granted the defendants' motion to dismiss in part, and after discovery, further pared down the claims via a summary judgment order. Three claims remained for trial: one of the plaintiff's claims and the defendants' two counterclaims.

"Because Plaintiffs wished to appeal the district court's dismissal and summary judgment orders, the parties submitted a stipulation to the district court in which Plaintiffs agreed to dismiss the only remaining count of their complaint, i.e., Count VII, with prejudice and Defendants agreed to dismiss their counterclaims without prejudice." *Id.* at 768.

The plaintiff subsequently filed a notice of appeal. The Tenth Circuit dismissed the appeal for lack of appellate jurisdiction. "Parties may not confer appellate jurisdiction upon us by obtaining a voluntary dismissal without prejudice of some claims so that others may be appealed." *Id.* at 769. "The district court did not adjudicate Defendants' counterclaims but rather dismissed them without prejudice. Thus, all claims of all parties were not decided on the merits." *Id.* The *Heimann* court advised the plaintiffs-appellants that the proper process would have been for the plaintiff-appellant to first obtain certification of the non-final order pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. *Id.* at 769.

This procedural trap arises not only in cases of voluntary dismissals without prejudice of outstanding claims, but also in cases were parties seek to dismiss un-adjudicated claims *with* prejudice but separately or privately agree that the claimant reserves his right to "revive" the dismissed claims following the appeal. In *Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 582 U.S., 198 L. Ed. 2d 132 (2017), the plaintiffs were denied class certification. They desired to resolve the class certification issue before engaging in further litigation. "Instead of pursuing their individual claims to final judgment on the merits," the plaintiffs "stipulated to a voluntary dismissal of their claims 'with prejudice'; but reserved the right to revive their claims should the Court of Appeals reverse the District Court's certification denial." *Id.* at 1707.

The United States Supreme Court reversed the Ninth Circuit Court of Appeals' determination that it had appellate jurisdiction under Section 1291 over a case of manufactured finality. "Repeatedly we have resisted efforts to stretch §1291 to permit appeals of right that would erode the finality principle and disserve its objectives." *Id.* at 1712. As such, "§1291's firm final-judgment rule is not satisfied whenever a litigant persuades a district court to issue an order purporting to end the litigation." *Id.* at 1715. The Court held that due to non-finality of the judgment, which arose from the agreement that the plaintiffs could revive their claims, the Ninth Circuit did not have appellate jurisdiction to consider the class certification ruling. *Id.*

Due to the limited avenues for parties to appeal non-final interlocutory orders, the procedural trap created by manufactured finality can, on occasion, "permanently strip[] some good-faith litigants of their right to appeal." *State Treasurer of the State of Michigan v. Barry*, 168 F. 3d 8, 11th Circuit 1999) (Cox, J., concurring). "For the crime of what we presume to be crafting premature appellate jurisdiction, the litigant is forever denied the appeal by right that §1291 bestows. Once the district court has relinquished jurisdiction, the litigant has no sure way of obtaining finality that would permit review of the district court's order in this action." *Id.*

In a recent Sixth Circuit case, *West v. Louisville Gas & Elec. Co.*, No. 18-1906, 2019 U.S. App. LEXIS 9950, at *18 (7th Cir. Apr. 4, 2019) the Sixth Circuit concluded that it lacked appellate jurisdiction where the parties attempted to "fabricate" a final judgment. In *West*, the parties voluntarily dismissed claims remaining against a single defendant after a series of rulings on dispositive motions by the trial court. To effectuate their plan to create a final judgment, the parties "filed a joint stipulation asking the court to dismiss the claims against [defendant] LG&E and close the case, but the district court denied that request." *Id.* at 6 (record citations omitted). The district court refused to accept the stipulation, instead "indicat[ing] that the parties had three options open to them: (1) continue litigating the merits of [plaintiff] West's claims against LG&E

to a final judgment; (2) stipulate to the dismissal of these claims with prejudice; or (3) seek a certification of a final judgment as to fewer than all parties pursuant to Federal Rule of Civil Procedure 54(b)." *Id.*

"Rather than pursuing any of these options, West and LG&E pursued a fourth option in the hope of creating a final judgment that would open the door to this appeal." *Id.* at 7. "The two parties entered into a tolling and standstill agreement which provided for the voluntary dismissal of West's claims against LG& E for the duration of, and conditioned upon the outcome of, his appeal of the dismissal of the claims against the Charter defendants." *Id.*

In squarely rejecting this approach, the *West* Court noted that "[t]he requirement of a final judgment is more than a mere formality." *Id.* at 9. "West and LG&E engineered a provisional dismissal of the claims against LG&E so as to bring the proceedings in the district court to a close, but without the binding effects of a truly final judgment." *Id.* at 10–11. "This conditional dismissal of the claims against LG&E represents the very sort of attempt to manufacture appellate jurisdiction of which our precedents have consistently disapproved." *Id.* at 12. "We have thus repeatedly cited the absence of a final judgment when, after a dispositive ruling as to some but not all claims or parties, the parties have entered to a conditional dismissal of the remaining claims on terms that permit those claims to be revived at a later date." *Id.* at 12.

The *West* court observed that the trial court had warned the parties of the issue and informed the parties of the solution that would have addressed the finality concern, but that he parties failed to heed the trial court's advice, "instead opt[ing] to pursue the same type of effort to fabricate a final judgment that we have rejected as a transparent effort to circumvent section 1291." *Id.* at 16. The Court also noted that it had given appellant's counsel one more opportunity to correct the jurisdictional problem by asking counsel to concede at oral argument that appellant would not pursue the dismissed claims. Instead of accepting this suggestion, counsel instead "reiterated in rebuttal that the dismissal of LG&E was conditional, as the terms of the tolling agreement make clear it is." That decision was fatal to appellate jurisdiction. *Id.* at 17–18 (citing and distinguishing cases in which jurisdiction was conferred where appellant at oral argument agreed to permanently abandon claims voluntarily dismissed without prejudice).

With appellant's counsel's refusal to concede that his client would not pursue relief on the claims dismissed without prejudice, the *West* court found that it lacked appellate jurisdiction. "There is, consequently, no final judgment as required by section 1291." *Id.* at 19. "The parties did not litigate West's claims against LG&E to a final judgment, and their agreed-upon dismissal of those claims allows West to reinstate them in the district court depending upon the outcome of this appeal (were it permitted to proceed)." *Id.* "Our precedents foreclose this attempt to manufacture appellate jurisdiction by producing a judgment which has the appearance but not the binding quality of finality." *Id.*

Scholars have challenged the wisdom behind the final judgment rule, urging that relaxing the rule makes more sense in the modern era where the vast majority of cases are resolved by settlement. *See* Shah, Ankur, "Increase Access to the Appellate Courts: A Critical Look at Modernizing the Final Judgment Rule," 42 Seton Hall Circuit Review Vol. 11:40 2014, 47-8 (arguing that "relaxation of the final judgment rule" will "prevent hasty and unwise decisions about settlement," "help control dockets," "avoid the unnecessary expenditure of judicial resources," "lead to clearer rulings on complex issues due to added appellate court guidance," "lead to higher quality, much needed, and greater numbers of higher court legal precedent, critical to the proper development of emerging areas of the law," and "remove doctrinal inconsistency, and lead to better and fairer settlements").

Despite the validity of some of these arguments for liberalizing the rule, courts have been reluctant to abandon the longstanding rule of finality. Appellate and trial practitioners must therefore beware of any situation in which a party is seeking to appeal a partial ruling on a dispositive motion that does not dispose of all pending causes of action alleged in the case with prejudice (and without any agreement to later revive the claims). Instead of voluntarily dismissing a cause of action, counsel should consider moving for certification under Rule 54(b) of the Federal Rules of Civil Procedure or seeking a statutory interlocutory appeal under 28 U.S.C. §1292(b).

Rule 54(b) of the Federal Rules of Civil Procedure provides in pertinent part:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

Certification under Rule 54(b) motion is appropriate "when a district court adheres strictly to the rule's requirement that a court make two express determinations."

Oklahoma Turnpike Auth. v. Bruner, 259 F.3d 1236, 1242 (10th Cir. 2001) (internal citations omitted). "First the district court must determine that the order it is certifying is a final order." *Oklahoma Turnpike,* 259 F.3d at 1242. "To be final for purposes of Rule 54(b), an order must be 'final' in the sense that it is 'an ultimate disposition of an individual claim entered in the course of a multiple claims action.'" *Jordan v. Pugh*, 425 F.3d 820, 826 (10th Cir. 2005). "Second, the district court must determine that there is no just reason to delay review of the final order until it has conclusively ruled on all other claims presented by the parties to the case." *Oklahoma Turnpike,* 259 F.3d at 1242.

Finally, the adjudicated claims sought to be appealed must be "distinct and separable from the claims left unresolved." *Oklahoma Turnpike*, 259 F.3d at 1243. Certification under Rule 54(b) is only available for claims that are *not* "inherently inseparable" from or "inextricably interrelated" with claims still pending and which will not be included in the appeal. *See, e.g., Hudson River Sloop Clearwater, Inc. v. Dept. of Navy*, 891 F2d 414, 418 (2d Cir. 1989).

The district court has discretion in deciding whether to grant 54(b) certification. *Ginett v. Computer Task Group Inc.*, 962 F2d 1085, 1092 (2nd Cir. 1992). The decision "must be considered in light of the goal of judicial economy as served by the 'historic federal policy against piecemeal appeals.'" *O'Bert ex rel. Estate of O'Bert v. Vargo*, 331 F3d 29, 41 (2nd Cir. 2003) (quoting Curtiss-Wright Corp. v. Gen. Elec. Co., 446 US 1, 8 (1980)).

A separate basis for appellate review of an interlocutory order may be available under 28 U.S.C. §1292(b). Section 1292(b) allows the district court to certify that an interlocutory order in a civil case "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." The court of appeals "may thereupon, it its discretion, permit an appeal to be taken from such order." *Id.*

In light of the foregoing cases, appellate and trial practitioners are well served to avoid circumstances that might give rise to manufactured finality and instead pursue other accepted and proper methods of seeking review of interlocutory orders.

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A Growing Call for Federal Court of Appeals Certification of Unsettled State Law Issues to State Supreme Courts

By Jill M. Steinberg and Kristine E. Nelson


Sixth Circuit Judges Divided on the Availability of Bad Faith and

Punitive Damages and the Constitutionality of Tennessee's Punitive Damages Cap

In December 2018, a divided panel of the U.S. Court of Appeals for the Sixth Circuit held that Tennessee's statutory cap on punitive damages violates the right to trial by jury under the Tennessee Constitution. The case in question involved the alleged bad faith delay of an insurance company in paying the proceeds of a life insurance policy to the proper beneficiary.

The decision is particularly relevant to insurance companies because it also involved unsettled issues of whether and how such companies may be subjected to both statutory "bad faith" penalties *and* punitive damages. Anyone who may find themselves named as defendants in Tennessee, including corporate entities and individuals doing business in the state, should take note of the decision.

The decision may also lend insight into whether, and how, the federal appellate courts are being impacted by the large number of federal Circuit Court of Appeals judges appointed since 2017. The parties in the case sought *en banc* review in light of the divided panel decision. In March 2019, a majority of the Sixth Circuit's active judges voted to deny *en banc* review. A group of four judges—all recent

appointees—nevertheless concurred in a "Statement" asserting that the Sixth Circuit should have certified the important state-law questions to the Tennessee Supreme Court. These judges expressed particular concern for the kind of "friction-generating errors" that may arise when federal courts invalidate state statutes.

The Lindenberg Case

In *Lindenberg v. Jackson National Life Ins. Co.*, 919 F.3d 992 (6th Cir. 2018), a deceased man's former wife sought to compel the payment of proceeds from her ex-husband's life insurance policy, which named her as the primary beneficiary.

The policyholder died in January 2013. In February 2013, his ex-wife, who had been paying premiums on the policy since the couple divorced pursuant to a Marital Dissolution Agreement, filed a claim for the $350,000 in life insurance proceeds. In March 2013, the insurance company, expressing concern over the issue of whether at least some of the decedent's children may have a claim to the policy proceeds, raised a series of questions to the ex-wife, including a demand that she obtain "waivers to be signed by the other potential parties" and "court-appointed Guardians" for the minor children. The company suggested that another option would be for the claimant to waive her rights under the policy so that the proceeds could be disbursed to the minor children, and also raised the prospect of having to interplead the proceeds from the policy into court so that it could obtain a judicial declaration of the appropriate beneficiary or beneficiaries.

The deceased policyholder's ex-wife filed suit in federal court for the company's breach of contract and "bad faith" in processing the claim. Like most states, Tennessee has a law allowing plaintiffs seeking payment of insurance claims to recover damages beyond the policy amounts due if the company is found to have acted in bad faith. The claimant in *Lindberg* requested a bad faith finding under this statute and also asserted a common law claim under Tennessee law for punitive damages – an award designed not to compensate the plaintiff, but instead to punish fraudulent or otherwise reprehensible action by a defendant.

The federal district judge ultimately allowed the bad faith and punitive damages claims to proceed to a jury trial. Following a week-long trial, the jury returned a verdict finding that (1) the defendant breached its contract with its policyholder by not paying policy proceeds to the plaintiff, resulting in actual damages of $350,000; (2) the defendant refused to process the claim in a timely manner, which constituted bad faith, resulting in additional statutory damages of $87,500[1]; and (3) the defendant's refusal to pay was intentional, reckless, malicious, or fraudulent, thus justifying punitive damages. The jury then returned a special verdict awarding punitive damages of $3 million, almost nine times the amount of compensatory damages. The defendant insurer appealed.

A Panel Majority Allowed Recovery of Both Bad Faith and Punitive Damages and Invalidated Tennessee's Statutory Cap on Punitive Damages

The appeal was assigned to a panel of three judges with stellar academic and judicial backgrounds: Circuit Judges Eric L. Clay, Jane B. Stranch, and a 2017 appointee to the federal circuit court, former Michigan Supreme Court Justice Joan L. Larsen. In a key threshold decision, resulting in a 2–1 vote, the panel (Clay and Stranch in the majority) declined to accept what Judge Larsen called an "invitation" by the Tennessee Supreme Court to resolve through a certification process to the Tennessee Supreme Court the state law issues of whether a punitive damage award could stand at all if a bad faith finding had already been made and whether the legislative cap on punitive damages was constitutional.

Instead, in an opinion authored by Judge Clay and joined by Judge Stranch, the majority resolved those issues, finding that a previously decided Sixth Circuit case addressing the issue of whether punitive damages could be awarded in addition to a bad faith penalty misread Tennessee law on the subject. The correct answer to that question, in the view of the majority, was that the Tennessee Supreme Court would find that both forms of damages were allowable. The majority therefore held that, under Tennessee law, a plaintiff could freely pursue a statutory remedy for insurer bad faith along with any available common law claims including a claim for punitive damages.

The majority then addressed the constitutional viability of the punitive damage cap—once again putting itself in the position of opining on what the Tennessee Supreme Court would likely do if deciding the issue. Tennessee's cap on punitive damages, Tennessee Code Annotated Section 29-39-104, was part of a tort reform bill passed by the Tennessee General Assembly in 2011. In its current form, with certain exceptions not relevant here, the statute caps punitive damages at two times the amount of compensatory damages awarded or $500,000, whichever is greater.

[1] Tennessee's bad faith statute allows an insured to recover up to 25% of the loss. The $87,500 portion of the judgment therefore constituted the maximum bad faith recovery allowable under Tennessee law.

The majority concluded that the cap on punitive damages promulgated by the Tennessee legislature violated the right to jury trial guaranteed by the Tennessee Constitution. The Declaration of Rights in the Tennessee Constitution provides that "the right of trial by jury shall remain inviolate." The majority noted that this broad language does not guarantee the right to a jury trial in every case. Rather, it guarantees the right to trial by jury as it existed at common law under the laws and constitution of North Carolina at the time of the adoption of the Tennessee Constitution of 1796. (As the majority noted, North Carolina has special relevance because the land that became Tennessee was originally part of North Carolina, and Tennessee's Constitution draws heavily from North Carolina's).

Judge Clay's majority opinion reviewed historical records and cases from Tennessee and North Carolina indicating, in the opinion of Judges Clay and Stranch, that punitive damages awards were part of the right to trial by jury at the time the Tennessee Constitution was adopted. Based on this review—including a line of cases addressing the measure of punitive damages as a "finding of fact" within the exclusive province of the jury—the majority concluded that the caps provision set forth in Tennessee Code Annotated Section 29-39-104 violates the Tennessee Constitution's right to trial by jury.

Judge Larsen's Dissent and a Growing Call for Certification to the Highest State Court

But the majority opinion in *Lindenberg* is not likely to be the last word. The law was unsettled before *Lindenberg* was decided, and it remains unsettled now.

Judge Larsen, the third panel member in the *Lindenberg* case, is a recent appointee to the Sixth Circuit. A former Michigan Supreme Court Justice, her name appeared on a "short list" of potential U.S. Supreme Court nominees released by the Trump campaign during the 2016 general election. Judge Larsen was appointed to the Sixth Circuit in November 2017.

In a 21-page dissenting opinion, Judge Larsen argued that the majority's holdings were "unnecessary" because *Lindenberg* presented "uncertain and important" state law questions that were best left for the Tennessee Supreme Court to decide. Judge Larsen observed that the Tennessee Supreme Court could potentially decide the state law questions through the process of certification. (Indeed, as Judge Larsen noted, the Tennessee Supreme Court had arguably "signaled its willingness" to take up the state law issues through certification during the procedural history of the case). Judge Larsen argued that the Sixth Circuit should have taken advantage of the certification process to ascertain how the Tennessee Supreme Court would decide the issues relating to bad faith and punitive damages. According to Judge Larsen, any federal court decision striking down a state statute on novel state-constitutional grounds merely risked "friction-generating error" and infringed on principles of "comity and our cooperative federalism."

Judge Larsen further observed that—absent certification—she was compelled to review the *Lindenberg* issues on the merits. Judge Larsen dissented from the majority's holding allowing a claimant to pursue both bad faith and punitive damages claims under Tennessee law. Judge Larsen also dissented from the majority's finding that the Tennessee statutory cap on punitive damages violates the Tennessee Constitution. Judge Larsen reasoned, in part, that Tennessee statutes receive a "strong presumption" of constitutionality when facing state constitutional challenges. Judge Larsen argued that the majority had failed to overcome the burden necessary to take a step as significant as declaring Tennessee's statutory cap on punitive damages unconstitutional.

The parties sought *en banc* review in light of Judge Larsen's dissent. A majority of the 16 active judges in the Sixth Circuit voted to deny *en banc* review. But four judges joined a "Statement" regarding the denial of rehearing *en banc*. All four judges were recent appointments to the Sixth Circuit: John Nalbandian (confirmed 2018); Amul Thapar (confirmed 2017); John Bush (confirmed 2017); and Judge Larsen (confirmed 2017). Judge Nalbandian authored the Statement.

Judge Nalbandian remarked that the denial of *en banc* review "marks a missed opportunity for our court to more firmly establish its commitment to a 'cooperative judicial federalism.'" According to Judge Nalbandian, he would have granted rehearing *en banc* to certify the state-law questions to the Tennessee Supreme Court, rather than risk the kind of "friction-generating error" that arises when federal courts invalidate state statutes.

Judge Nalbandian also appeared to encourage future courts to seek certification of the *Lindenberg* issues to the Tennessee Supreme Court. Judge Nalbandian remarked that nothing prevents future courts—whether another panel of the Sixth Circuit or a district court in the Sixth Circuit—from certifying the same questions to the Tennessee Supreme Court should they arise again. Judge Nalbandian observed that "until the state judiciary speaks on an unsettled issue of state law, no amount of decisions

from this court prevents the *next* court from certifying the question."

Conclusion

For the time being, practitioners are left with the 2–1 majority opinion in *Lindenberg* governing the issues relating to Tennessee bad faith and punitive damages in the Sixth Circuit. Tennessee state courts are free to follow *Lindenberg* as persuasive authority or not, as those courts see fit. It will be important, of course, for counsel to preserve these issues in the trial court, state or federal. Counsel with cases pending in federal district court should also consider moving for certification just as Judge Nalbandian suggests.

This uncertainty will affect pleadings, discovery, settlement discussions, jury trials, and post-verdict motion practice in all Tennessee courts. In cases that may be removed from state to federal court, the decision is a factor weighing in favor of a defendant remaining in state court, but this should be part of a careful analysis of other factors, including the profiles of the state court judge and jury pool in comparison to the federal venue. Counsel should also be mindful that the Tennessee Supreme Court may well have settled the law on this issue by the time a removed case goes to trial in federal court.

Defense counsel should also oppose any plaintiff's attempt to apply *Lindenberg* in other contexts either in Tennessee or in other jurisdictions. In Tennessee, for instance, defendants enjoy the benefits of legislation enacted in 2011 that limits any noneconomic damages in personal injury suits to $750,000, or $1 million if the injury is catastrophic. *Lindenberg* should not affect this statutory cap. Even the majority holding in *Lindenberg* was based on the rationale that "punitive damages awards were part of the right to trial by jury at the time the Tennessee Constitution was adopted" in 1796. It is unclear whether a plaintiff challenging the statutory cap on noneconomic damages will be able to successfully make the same argument that the statutory cap violates the Tennessee Constitution.

At the same time, however, *Lindenberg*'s result may encourage plaintiffs nationwide to continue to challenge the constitutionality of statutory caps. Plaintiffs have made some gains in various jurisdictions challenging the constitutionality of statutory limits on available damages. *See, e.g.*, *North Broward Hosp. Dist. v. Kalitan*, 219 So.3d 49 (Fla. 2017) (holding that the statutory cap on personal injury noneconomic damages violates the Equal Protection Clause of the Florida Constitution); *Lebron v. Gottlieb Memorial Hosp.*, 930 N.E.2d 895 (Ill. 2010) (finding statutory caps on noneconomic damages in medical malpractice actions are unconstitutional for violating the separation of powers doctrine required by the Illinois Constitution); *Rains v. Stayton Builders Mart, Inc.*, 410 P.3d 336 (Or. 2018) (holding that application of $500,000 statutory cap on noneconomic damages on a workers personal injury claim against a manufacturer violated the remedy clause in state constitution).

Lindenberg's majority holding adds to this list of successful plaintiffs' challenges against statutory caps on damages—or at least until the Tennessee Supreme Court has the last word on the still unsettled questions of state law.

Lindenberg also appears to reflect a growing call in the Sixth Circuit for certification of all unsettled state law questions to the state's highest court. Judge Nalbandian's Statement, joined by three other recent Sixth Circuit appointees, encourages federal courts to defer to the state's highest court wherever possible to answer unsettled questions of state law. Whether this call for certification *actually* results in the increased use of the process is still unknown. We will continue to monitor these developments closely to determine what effect, if any, *Lindenberg* might have on litigation practice and strategy.

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The authors acknowledge the significant contributions of their colleagues: Buckner Wellford, Buck T. Lewis and Matthew S. Mulqueen.

Education

Appellate Advocacy Seminar Preview

By Sarah Elizabeth Spencer and Adam Hofmann, Program Co-Chairs


The annual Appellate Advocacy Seminar will be held July 19, 2019, at the Loew's Chicago Hotel. Appellate attorneys, at all levels of experience, will have the opportunity to come together, connect with colleagues throughout the country, and study their craft in a full day of focused programming, along with two evenings of networking.

For attendees who are able to arrive early, we'll begin with a networking reception on the evening of July 18. The reception will be followed by "dine-arounds," at a choice of pre-selected restaurants in Chicago.

Programming starts in earnest on the morning of July 19, with Larry Ebner moderating a panel entitled "You Too Can Be a Supreme Court Practitioner." The panel will illuminate the *real* Supreme Court Bar, that is, the hundreds of appellate specialists around the United States who are well qualified to handle the vast bulk of Supreme Court work—which is in the form of written/printed petitions and briefs. The panel will discuss how to develop, promote, and conduct a Supreme Court practice. Larry will be joined by Matthew Nelson of Warner, Norcross & Judd, in Grand Rapids, who is developing his own brand as a Supreme Court advocate. Karen Pierangeli, President of Supreme Court printing firm Byron S. Adams, and Kim Proxmire, Legal Marketing & Brand Strategy consultant from Indigo Marketing Group, will round out the discussion with their thoughts on the logistics of Supreme Court practice and personal brand development.

Next, Adam Hofmann will sit down with legal-writing scholars to discuss the often emphasized, but rarely taught art of editing legal writing, especially appellate briefs. Most lawyers know that good editing is at least as important as—if not more important than—good writing. Beyond creating good, persuasive work product, however, good editing practices also facilitate the effective delegation of work, while providing some of the most important training opportunities for young attorneys. But what is good editing, and how is it accomplished? Megan Boyd of Georgia State University's College of Law and Mark Cooney of Western Michigan University's Cooley School of Law will explore best practices and concrete tips to help attorneys edit their own appellate work and the work of others more effectively and efficiently.

Mary Massaron will then be joined by the Honorable Elizabeth T. Clement of the Michigan Supreme Court and the Honorable Harris L. Hartz of the U.S. Court of Appeals for the Tenth Circuit to discuss the role of facts and evidentiary records on appeal. They will discuss resolution of factual questions on appeal. Topics will include the development of a good, complete, and helpful record and how (and when) to handle extra-record evidence. In addition, Mary and the panel will consider the potential relevance of post-judgment facts and when to seek remand for more complete development of the factual record.

After lunch, Jim Martin will moderate a panel discussion of appeals from injunctive orders. Orders granting and denying temporary restraining orders and preliminary injunctions are generally immediately appealable in both federal court and the courts of most states, but these appeals can present a range of challenges. Along with Jim, the experienced panel will include Gregory Castanias from Jones Day's D.C. office, Marcy Hogan Greer from Alexander, Dubose, Jefferson & Tonsend in Austin, and Fred Rowley from the Los Angeles office of Munger, Tolles & Olson. They will discuss the development of an appropriate record in the trial court, when and how to stay further trial proceedings, required security, and procedures for expediting review.

Then, Jason Anderson will discuss judicial ethics and recusal with the Honorable Beth Andrus of the Washington Court of Appeals, the Honorable Eliot Prescott of the Connecticut Court of Appeals, and James Alfini of South Texas College of Law. Jason and the distinguished panelists will address the applicable rules of ethics and procedure and consider real and hypothetical scenarios to help practitioners better understand judicial disqualification and recusal on appeal, as well as the always difficult question of when to request a recusal.

Finally, as a special bonus, this year's seminar will pair with the National Foundation for Judicial Excellence's Annual Judicial Symposium, which begins the next day in the same location, giving our members an opportunity to mingle with judges and benefit from their perspective. At the end of the Appellate Advocacy Seminar, our committee

will team up with NFJE for a joint, key-note presentation by Jeffrey Rachlinski of Cornell School of Law. Dr. Rachlinski will discuss the ways that modern social and economic sciences combine to change our understanding of human decision making, including judicial decisions. Dr. Rachlinski's presentation will be followed by a networking reception with NFJE judges and another dine-around at pre-selected, local restaurants.

We look forward to seeing you there!

Sarah Elizabeth Spencer is a shareholder at Christensen & Jensen in Salt Lake City, Utah. She is an experienced appellate advocate who has handled a variety of appeals in state and federal court. Ms. Spencer also defends high-stakes lawsuits involving commercial disputes, business torts, and product liability claims. She has been active in DRI since 2008. Ms. Spencer currently serves as the Program Chair for the 2019 Appellate Advocacy Seminar and previously served on the DRI Young Lawyers Committee's steering committee.

Adam W. Hofmann is a partner with Hanson Bridgett LLP and is the assistant leader of the firm's appellate practice. Adam has argued cases in the U.S. Court of Appeals for the Ninth Circuit and in every Court of Appeal in California. He has also filed merits briefs on behalf of amici curiae in the U.S. and California Supreme Courts, and he received the International Municipal Lawyers' Association's Amicus Advocacy Award for 2018. Outside of work, Adam teaches courses in land-use and local-government law at the University of San Francisco School of Law and coaches moot-court teams at the U.C. Davis School of Law. Adam is the Program Vice Chair of the 2019 Appellate Advocacy Seminar.

Center for Law and Public Policy

DRI Amicus Committee Report

By Matt Nelson

This year has started strong for DRI's amicus curiae program. DRI has submitted or is in the process of submitting amicus briefs to the United States Supreme Court in five cases:

- *AVCO Corp. v. Sikkelee*: DRI's brief supported granting certiorari to address whether the Federal Aviation Act preempts state-law design-defect claims. The petition is pending. Rob Wise co-authored the brief with Adele Karoum and Matthew Berard.
- *Arizona v. California*: DRI's brief supported the State of Arizona's motion for leave to file a bill of complaint attacking California's expansive "doing business" tax on limited liability companies as an extraterritorial seizure of funds. The motion for leave is pending. The National Federation of Independent Business Small Business Legal Center joined DRI's brief. Mary Massaron co-authored the brief with Josephine DeLorenzo.
- *Cochise Consultancy, Inc. v. U.S. ex rel. Hunt*: DRI's brief argued that the Supreme Court should hold that the statute of limitations for *qui tam* relators is not based on whether the government has knowledge of the violation of the False Claims Act. The Court rejected that argument. Zach Chaffee-McClure co-authored the brief with Ruth Anne French-Hodson.
- *McKesson Technologies, Inc. v. True Health Chiropractic, Inc.*: DRI's brief supported granting certiorari to overturn a Ninth Circuit decision imposing a presumption of predominance in a damages class action. The petition is still pending. Scott Burnett Smith co-authored the brief with Sarah Osborne and Michael Pennington.
- *Winston & Strawn v. Ramos*: DRI will be filing a brief supporting a petition for a writ of certiorari addressing whether California's arbitration-specific unconscionability rules are preempted by the Federal Arbitration Act.

We are also pleased to report that the Supreme Court's decision in *Lamps Plus v. Varela* aligns with the arguments presented by DRI's amicus brief in that case. In *Lamps Plus*, the Supreme Court held that an ambiguous arbitration agreement cannot provide the necessary contractual basis for class arbitration. DRI's amicus brief was co-authored by Mary Massaron and Hilary Ballentine.

Matthew T. Nelson chairs Warner Norcross & Judd's Appellate Practice Group. Mr. Nelson has successfully argued

before the United States Supreme Court, and has represented businesses, governments, and individuals in appeals throughout the country. During the 2016 Term of the U.S. Supreme Court, Mr. Nelson represented clients in two cases on the merits addressing such diverse topics as copyrighting the design of cheerleading uniforms and constitutionally deficient immigration advice. Mr. Nelson serves as chair of DRI's Amicus Committee and membership co-chair of the DRI Appellate Advocacy Committee. Among other honors, Mr. Nelson has received three distinguished brief awards for briefs he has submitted to the Michigan Supreme Court.

Legal News

Circuit Reports

Compiled by Erik Goergen

First Circuit

Appellate Jurisdiction: Review of Final Orders and Judgments

Sexual Minorities Uganda v. Lively, **899 F.3d 24 (1st Cir. 2018)**

In *Sexual Minorities Uganda v. Lively*, the First Circuit clearly outlined the limits of its jurisdiction to address statements unfavorable to an appellant in an order granting judgment in favor of the appellant. The First Circuit reaffirmed that its jurisdiction is limited to reviewing findings necessary to sustain the final judgment.

The case involved a claim against defendant Scott Lively under the Alien Tort Claim statute, as well as common-law claims for negligence and civil conspiracy. The district court granted Lively's motion for summary judgment, concluding that it lacked subject matter jurisdiction over the federal claim and declining to exercise supplemental jurisdiction over the pendent state law claims. Even though Lively prevailed, he nonetheless appealed. On appeal, Lively asked the First Circuit to "purge certain unflattering statements from the district court's dispositive opinion." These statements constituted dicta because they were not necessary to the district court's analysis and did not affect the outcome of the opinion.

The First Circuit's conclusion was straightforward: because the statements at issue were not "in any sense necessary to the district court's judgment," the court "lack[ed] jurisdiction to entertain Lively's request." The court noted that, in 28 U.S.C. §1291, Congress authorized courts of appeals to review final orders and judgments. As a necessary corollary to this authorization, appellate courts review "judgments, not statements in opinions." Accordingly, as a general matter, only a party aggrieved by a final order may appeal under Section 1291. An appellate court therefore typically only reviews an appeal by losing parties, and limits its inquiry to findings "necessary to sustain the final judgment."

The court held that, because Lively obtained a favorable final judgment, he may not "seek review of uncongenial findings not essential to the judgment and not binding upon him in future litigation." That is, he could not appeal the judgment "merely because there [were] passages in the court's opinion that displease[d] him." The court observed that this outcome is not only necessarily implicit in the language of Section 1291, but is also justified by "prudential considerations": the court of appeal's time and resources should not be spent in reviewing every word used by a district court in rendering a final judgment.

The First Circuit did acknowledge that, at times, a party who prevailed below may nevertheless appeal because (1) the final judgment rendered that party some injury, and (2) important policies would justify entertaining the appeal. For instance, when a judgment contains a legal finding that is unfavorable to the prevailing party, a court might hear an appeal to "direct the reformation of the decree." In *Lively*, however, there was no finding adverse to the appellant on the face of the judgment – the offending language appeared only in the opinion.

The court also disposed of Lively's other attempts to save his appeal. Though Lively asserted that the statements he wished to challenge damaged his reputation, the court noted that "critical comments made in" an opinion does not provide any "independent basis for appeal." That is, "unflattering comments, without more, cannot suffice to manufacture appellate jurisdiction." Lively also contended that 28 U.S.C. §2106, which empowers courts of appeals to affirm, reverse, remand, or otherwise dispose of an order,

provided an independent basis for appellate jurisdiction. The court made short shrift of this argument, noting that the statute merely "enumerates the extensive remedial authority available" to it, and is not a font of jurisdiction.

The First Circuit therefore dismissed the portion of Lively's appeal seeking to purge unfavorable comments from the district court's opinion.

Subject-Matter Jurisdiction: Federal Question Jurisdiction

Lawless v. Steward Health Care Sys., **LLC 894 F.3d 9 (1st Cir. 2018)**

In *Lawless v. Steward Health Care Systems*, the First Circuit demonstrated its commitment to determining the existence of federal subject matter jurisdiction even absent any disagreement by the parties as to the existence of such jurisdiction.

In *Lawless*, the plaintiff had brought suit in state court, asserting that the defendant failed to pay her amounts due for paid time off and extended sick leave. She alleged that the payment shortfalls breached her employment contract and violated Massachusetts' Wage Act. The plaintiff was the member of a union that had a collective bargaining agreement ("CBA") with the defendant. After the plaintiff filed suit in state court, the defendant removed to federal court.

The parties agreed that the court had subject matter jurisdiction. The First Circuit, however, noted the well-known axiom that, because the existence of subject matter jurisdiction implicates the court's power to hear a case, it must address the issue before proceeding any further. As the court wrote, "[a] court without jurisdiction is like a king without a kingdom: both are powerless to act." Determining the existence of jurisdiction is, in the court's words, an "unflagging obligation"; jurisdiction can neither be presumed nor conferred by acquiescence.

The First Circuit ultimately held that subject matter jurisdiction did exist, but only after extensive analysis. The court noted that the case was removable only if jurisdiction existed at the time of removal. The potential jurisdictional issue arose because the complaint only referenced state law. Because the complaint potentially implicated the Labor Management Relations Act ("LMRA"), however, the doctrine of complete preemption applied. The LMRA completely displaces state causes of action for violating a contract between an employer and labor organization, and therefore the plaintiff's claim could potentially be considered a claim arising under federal law rather than state law—but only if it might require interpretation of the relevant CBA. Because the court concluded that there was at the time of removal a colorable argument that adjudication of the plaintiff's claim would require construction of the CBA, the court held that subject matter jurisdiction existed.

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Second Circuit

Appellate Jurisdiction: Jurisdiction Over Order Denying Motion To Compel Arbitration

Milligan v. CCC Info. Servs., **2019 U.S. App. LEXIS 9766 (2d Cir. Apr. 3, 2019)**

An automobile insurance policyholder commenced this class action against her insurance carrier, GEICO, alleging various contract, negligence, and state law insurance violations relating to an insurance claim. GEICO moved to compel the plaintiff to comply with a policy provision requiring the submission of disputes over the amount of loss to a panel of appraisers. The plaintiff opposed the motions, arguing that GEICO had not timely sought appraisal and that appraisal was inappropriate because her claims concerned a legal dispute over the amount of coverage under the policy. The district court agreed with the plaintiff and denied the motions.

In affirming the district court, the Second Circuit first addressed whether it had jurisdiction over this interlocutory appeal. According to GEICO, the Court had appellate jurisdiction pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. §16(a)(1)(B), which permits an interlocutory appeal from a district court's denial of a motion to compel arbitration. GEICO argued that the appraisal process set forth in the policy constituted "arbitration" within the meaning of the FAA and therefore denial of the motion to compel appraisal vested the Second Circuit with appellate jurisdiction.

While the FAA does not define the term "arbitration," the Second Circuit looked to federal common law to determine its meaning including a prior decision that explained that "an enforceable arbitration clause in a contract is one that clearly manifests an intention by the parties to submit certain disputes to a specified third party for binding resolution." 2019 U.S. App. LEXIS 9766, at 10. In that case, the Court held that "the parties' contractual agreement to submit disputes about the value of share prices to

an independent tax counsel constituted an arbitration agreement within the meaning of the FAA, even though the contract language did not employ the word 'arbitration.'" *Id.* at 10–11. The Court explained that "what is important is that the parties clearly intended to submit some disputes to their chosen instrument for the definitive settlement of certain grievances under the Agreement." *Id.* at 11. Accordingly, the Second Circuit reasoned that "the term 'arbitrate' need not appear in the contract to invoke the benefits of the FAA." *Id.* at 11–12. Similarly, it was not "dispositive that an agreement fails to label the independent third party's conclusions 'final' or 'binding,' so long as the parties' intent in that regard is clear from the language of their contract." *Id.* at 12.

Applying these principles here, the Second Circuit held that the GEICO "appraisal process constitutes arbitration for purposes of the FAA." *Id.* The Court explained that the "appraisal provision identifies a category of disputes (disagreements between the parties over 'the amount of loss'), provides for submission of those disputes to specified third parties (namely, two appraisers and the jointly-selected umpire), and makes the resolution by those third parties of the dispute binding." *Id.* As such, the Court held that it had jurisdiction over this appeal because it had appellate jurisdiction over orders denying motions to compel arbitration and the appraisal process here fell within the meaning of arbitration under the FAA. Ultimately, after concluding that appellate jurisdiction existed, the Second Circuit held that GEICO's motion to compel appraisal was properly denied because appraisal was inappropriate given that the insured's claims concerned a legal dispute over the amount of coverage under the policy. *See id.* at 13–17.

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Third Circuit

Falco v. Zimmer, **2019 U.S. App. LEXIS 10744 (3d Cir. April 11, 2019)**

Appellate Procedure. Record on Appeal. Motion to Supplement Record. Waiver – Undeveloped Argument.

This case arose out of disagreements between Appellant, Anthony Falco ("Falco"), the former Chief of Police of the Hoboken Police Department ("HPD"), and Dawn Zimmer ("Zimmer"), the former Mayor of Hoboken. Falco generally alleged that the Appellees, Zimmer; Jon Tooke ("Tooke"), the former Director of Public Safety ("DPS") of Hoboken; and the City of Hoboken ("Hoboken"), interfered with his operation of the HPD and withheld his benefits because he often criticized Zimmer and supported her political opponents. Falco brought a lawsuit against Appellees, asserting claims for First Amendment retaliation and procedural due process violations. After the District Court dismissed his case for a third time at the pleading stage, Falco appealed to the U.S. Court of Appeals for the Third Circuit. The court determined that the District Court erred in articulating and applying the relevant legal standard to Falco's First Amendment retaliation claims, but did not err in assessing Falco's procedural due process claims—reversing in part and affirming in part, and remanding for further proceedings.

In his opening brief, Falco attempted to rely upon several pieces of evidence that were not a part of the record before the District Court. The evidence included: (1) Falco's testimony in a deposition in a related action before the Superior Court of New Jersey, Law Division (Hudson County) that he was discouraged from exercising his First Amendment rights as a result of Appellees' punishment; (2) testimony from Vincent Lombardi, the former President of the Hoboken Policemen's Benevolent Association, that Zimmer had "probably" engaged in "retaliation against the [C]hief for cooperating with the union" against Zimmer's budget reduction plan that called for HPD layoffs; (3) Falco's forensic accountant's report that estimated that Falco's damages resulting from Appellees' retaliation amounted to approximately $1,000,000, excluding attorneys' fees and costs; (4) testimony from Angel Alicea, a former DPS of Hoboken, that he targeted Falco for harassment to please Zimmer; (5) evidence that Falco had been prescribed medication to treat the anxiety he developed in the workplace; (6) Superior Court deposition testimony from Arch Liston, the former Business Administrator of Hoboken, that Falco should have received the same uniform allowance and attendance incentive as Police Superior Officers Association ("PSOA") members; and (7) evidence that Falco continued to have police union dues deducted from his paycheck like other PSOA members, even after Appellees began withholding certain elements of his compensation.

Falco admitted that the evidence, adduced while discovery was proceeding in the District Court action or in the related Superior Court action, was not part of the record before the District Court. Yet, Falco argued that the Third Circuit should consider it "in the interests of justice and fairness" because said evidence would demonstrate the prematurity of the District Court's dismissal and that the

District Court incorrectly made factual inferences adverse to Falco. Appellees argued that the evidence should be disregarded by the Third Circuit because Falco never filed a motion to supplement the record on appeal. Falco countered that an appellate court may expand the record by taking judicial notice of new developments not considered by the lower court, since procedural rules are designed to promote justice.

The Third Circuit refused to consider the evidence that was outside the District Court record. Citing *In re Capital Cities/ABC, Inc.'s Application for Access to Sealed Transcripts*, 913 F.2d 89, 96 (3d Cir. 1990), the court noted that, as a general matter, it could not consider material on appeal that is outside a district court record. But, looking to *United States v. Lowell*, 649 F.2d 950, 966 n.26 (3d Cir. 1981)(quoting *Landy v. Fed. Deposit Ins. Corp.*, 486 F.2d 139, 151 (3d Cir. 1973), the court acknowledged that the rule "is subject to the right of an appellate court in a proper case to take judicial notice of new developments not considered by the lower court."

The court instructed that, as per *Biliski v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 574 F.3d 214, 224 n. 10 (3d Cir. 2009), the proper process for expanding the record—beyond merely correcting errors or omissions – is through a motion for leave to supplement the record on appeal. Referring to the test set forth in *Acumed LLC v. Advanced Surgical Servs., Inc.*, 561 F.3d 199, 226 (3d Cir. 2009) (quoting *Capital Cities*, 913 F.2d at 97), the court wrote that exceptional circumstances must exist for such a motion to be granted, and that the court should consider: (1) whether the proffered addition would establish beyond any doubt the proper resolution of the pending issue; (2) whether remanding the case to the district court for consideration of the additional material would be contrary to the interests of justice and the efficient use of judicial resources; and (3) whether the appeal arose in the context of a *habeas corpus* action. Again citing *Capital Cities*, 913 F.2d at 97, in which the Third Circuit had previously declined to expand the appellate record beyond what the lower court had considered because the appellant in that case had not filed a motion for leave to supplement the record on appeal, the court reiterated that it need not exercise any inherent equitable power to expand the record if a party has not sought leave to supplement the record.

In the case before it, Falco had not filed a motion for leave to supplement the record on appeal. Therefore, the court declined to expand the record by considering evidence that was not before the District Court. The court concluded that "Falco's invocation of the principles of justice and fairness are to no avail where he has not followed the proper process."

Later in its opinion, the court also addressed another failure on the part of Falco to follow procedure. It determined that Falco had failed to preserve his argument on appeal that a claim for conspiracy to violate civil rights under 42 U.S.C. §1985 had been improperly dismissed. The court held that Falco's briefing before it failed to address any conspiracy or discriminatory animus by Appellees, which was a required element of a §1985(3) claim. The court found waiver, citing *N.J. Media Grp., Inc. v. United States*, 836 F.3d 421, 426 n.20 (3d Cir. 2016), which had deemed an argument waived on appeal due to its "utterly undeveloped character."

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Fourth Circuit

Appellate Jurisdiction—Finality

AirFacts, Inc. v. de Amezaga, **909 F.3d 84 (4th Cir. Nov. 20, 2018)**

Diego de Amezaga was employed in a senior-level position with AirFacts, which makes accounting software primarily used in the airline industry. AirFacts' primary product, TicketGuard, analyzes ticket fares for airlines and travel agencies to ensure tickets are sold for the appropriate price. de Amezaga worked under an employment agreement with AirFacts. Paragraph 4.2 of the employment agreement provided that upon leaving AirFacts' employ, de Amezaga would return all equipment, software, manuals, notes, reports, and any confidential information to AirFacts.

de Amezaga resigned from AirFacts in February 2015. Before his last day, he emailed a database and a spreadsheet related to an upcoming, not-yet-released software product to his personal email address. About a month after his employment ended, de Amezaga used his old AirFacts credentials to log into an online document-sharing platform, from which he downloaded two flowcharts showing airfare pricing rules.

Paragraph 8.1 of the employment agreement provided for a one-year noncompete period, during which de Amezaga was prohibited from working for any AirFacts customer unless the services performed were not competitive with AirFacts. Three months after leaving AirFacts, de Amezaga went to work for American Airlines, in their

refunds department. American assured AirFacts that de Amezaga's work would not violate ¶ 8.1.

AirFacts sued de Amezaga, alleging he violated ¶¶ 4.2 and 8.1 of his employment agreement by helping American clear a backlog of ticket refund requests and by developing software that performed the same function as the software AirFacts had been developing when de Amezaga left the company. In addition to the breach of contract claim, AirFacts also alleged a claim under the Maryland Uniform Trade Secrets Act and a claim for conversion. The district court conducted a five-day bench trial, during which AirFacts abandoned its conversion claim. In its memorandum opinion ruling in de Amezaga's favor, the district court concluded that AirFacts had also abandoned its breach of contract claim as to ¶ 4.2. Analyzing breach of contract only as to ¶ 8.1, the district court found that de Amezaga's work for American was neither similar to, nor in competition with, his work for AirFacts. The court also rejected the trade secrets claim.

On appeal, AirFacts asserted that it never abandoned its breach of contract claim as to ¶ 4.2, and therefore the district court had erred in failing to rule on it. The Fourth Circuit held AirFacts' position (that it had not abandoned its claim under ¶ 4.2) might indicate the Court did not have appellate jurisdiction, because an order that does not resolve all pending claims would not be final under 28 U.S.C. §1291. After receiving supplemental briefs from the parties, the Court held that the district court's order was final and that appellate jurisdiction was proper. The Court reasoned that the district court had "addressed AirFacts' Paragraph 4.2 claim, albeit summarily, in deeming it abandoned. Furthermore, the district court's order lacks any indication that the court intended it to be anything but final." Accordingly, the Court had jurisdiction to consider AirFacts' appeal.

Appellate Jurisdiction: Pendant Appellate Jurisdiction

Cannon v. Village of Bald Head Island, NC, **891 F.3d 489 (4th Cir. May 30, 2018)**

Plaintiffs-Appellees, employees of the Public Safety Department of the Village of Bald Head Island, were fired based on comments they made in a group text chain. They sued the Village and the individuals responsible for their terminations (the town manager and the director of public safety), alleging that their terminations violated their First Amendment rights. They also asserted that public disclosures regarding the reasons for their terminations constituted defamation and violated their due process rights. Following discovery, the individual defendants moved for summary judgment. The defendants argued they were entitled to summary judgment as to the constitutional claims on the basis of qualified immunity claims, and that they were entitled to summary judgment as to the defamation claim because the evidence was insufficient to create a jury question on the element of actual malice. The district court denied summary judgment.

The defendants appealed both rulings to the Fourth Circuit. Since a denial of qualified immunity is immediately appealable, there was no question of the Fourth Circuit's jurisdiction over that portion of the appeal. However, the Court rejected the defendants' assertion that the Court could exercise pendent appellate jurisdiction over the denial of summary judgment on the defamation claim.

The Court began its analysis by recognizing that pendent appellate jurisdiction is authorized "(1) when an issue is inextricably intertwined with a question that is the proper subject of an immediate appeal; or (2) when review of a jurisdictionally insufficient issue is necessary to ensure meaningful review of an immediately appealable issue." The defendants contended that jurisdiction was proper because the issues were intertwined. The Fourth Circuit disagreed, noting that two rulings are inextricably intertwined only if "the same specific question" underlies both the appealable and the non-appealable ruling, "such that resolution of the question will necessarily resolve the appeals from both orders at once."

Applying this standard, the Court found that the question of whether the defendants had acted with actual malice in disclosing information regarding the plaintiffs' terminations was not inextricably intertwined with the qualified immunity issue. The question for qualified immunity was whether the disclosures violated the plaintiffs' clearly established rights. Resolving this question did not require a determination of whether the defendants had acted with actual malice. Therefore, the issues were not intertwined and the Court could not exercise pendent appellate jurisdiction.

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Fifth Circuit

Appellate Procedure and Jurisdiction—rule prohibiting "manufactured" appellate jurisdiction not applicable to voluntarily dismissed third-party claim

84 Lumber Co. v. Continental Casualty Co., **914 F.3d 329 (5th Cir. 2019)**

In this school construction dispute, appellant 84 Lumber—a sub-subcontractor—sued general contractor Paschen for failure to pay and sought recovery on release bonds. Paschen, in turn, brought a third-party action against the intermediate subcontractor, J &A Construction. The district court granted partial summary judgment and a Rule 12(c) judgment on the pleadings, both in favor of Paschen. Paschen then dismissed without prejudice its third-party action against J & A. 84 Lumber appealed. The first impression jurisdictional question raised was whether Paschen's third-party dismissal of J & A made the case unappealable under *Ryan v. Occidental Petroleum*, 577 F.2d 298 (5th Cir. 1978). Under the *Ryan* rule, a voluntary dismissal without prejudice is not a final appealable decision. The court summarized the basis for the rule: to prevent the appealing party from "manufacturing" jurisdiction by using an "end-run around the final judgment rule to convert an otherwise non-final—and thus nonappealable—ruling into a final decision appealable under §1291."

Typically, the court noted, the *Ryan* rule operates when a plaintiff has filed multiple claims against a single party, or against multiple parties, and the district court has dismissed some but not all of the claims. Then, in an effort to preserve his remaining claims while simultaneously appealing the adverse dismissal, the plaintiff asks the district court to dismiss his remaining claims without prejudice and enter a final judgment. *Ryan*, the court explained, "eschews this practice of manufacturing §1291 appellate jurisdiction and disallows the manipulative plaintiff from having his cake (the ability to refile the claims voluntarily dismissed) and eating it too (getting an early appellate bite at reversing the claims dismissed involuntarily)." Following the Eleventh Circuit's analysis, the court concluded that the *Ryan* rule does not apply to voluntarily dismissed third-party claims because the plaintiff (in this case, 84 Lumber), did not participate in defendant's dismissal of its remaining third-party claim, so it did not "manufacture appellate jurisdiction."

Appellate Procedure—untimely appeal of Rule 54(b) partial judgment

Johnson v. Ocwen Loan Servicing LLC, **916 F.3d 505 (5th Cir. 2019)**

After receiving a notice of default, Appellant Teresa Johnson sued Ocwen, the servicer of her home equity loan, asserting three state and two federal claims. The district court granted summary judgment for Ocwen on both federal claims and two of the state claims, referring the remaining state claim to the magistrate for further scrutiny. On January 4, 2018, the district court entered a partial final judgment on the four dismissed claims pursuant to Federal. Rule of Civil Procedure 54(b). After further review of Johnson's remaining state claim, the district court granted summary judgment on that claim and entered final judgment resolving the rest of the case on January 31, 2018. Johnson appealed on March 1, within 30 days of the January 31st final judgment but more than 30 days after entry of the Rule 54(b) judgment.

The Fifth Circuit held that Johnson's notice of appeal was timely as to the second judgment, but not as to the first because the partial final judgment started its own appellate clock. The court rejected Johnson's argument that the Rule 54(b) judgment was unauthorized because the rule applies to cases with multiple claims, but she—by her characterization—brought only one and that the district court failed to explain why it found no just reason for delay. Expressing doubt that an appeal of the final judgment allows a collateral attack on the propriety of a Rule 54(b) judgment from which an appeal was not taken, the court recognized that two other circuits have allowed such challenges to the validity of a partial judgment when the appellant waits to appeal until after the final judgment.

The court concluded that it need not resolve the question of whether a Rule 54(b) partial judgment not separately appealed may later be challenged as procedurally defective because, under any standard, Johnson's lawsuit alleged multiple claims. And, although an explanation of why the district court found no just reason for delay existed might be helpful on review, it is not required. The court recognized that, in hindsight, waiting to enter judgment on all claims would *not* have resulted in meaningful delay because the district court resolved the final claim only 27 days after issuing the Rule 54(b) judgment, but that this ultimately speedy resolution was not known to the district court at the time it entered the partial judgment.

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Sixth Circuit

Appellate Jurisdiction—jurisdiction of district court and state probate court over provision of veterans' benefits, and state probate court's loss of jurisdiction upon removal

Estate of West v. United States Dep't of Veterans Affairs, **895 F.3d 432 (6th Cir. 2018)**

In this case, the Sixth Circuit determines that neither a federal district court nor a state probate court has jurisdiction over veterans' benefits forming the res of a deceased veteran's estate. A Vietnam veteran died days after the Department of Veterans Affairs approved his disability claim. The award of backpay was received by his estate and deposited within the estate's bank account, where it sat for several months until the VA realized the veteran had died and ordered the bank to wire the benefits back to the U.S. Treasury. The estate moved in the state probate court for an order requiring the government to return the funds, which was granted. The government then removed the matter to district court under 28 U.S.C. §1442(a). However, the district court granted the estate's motion for remand under the so-called "probate exception" to federal court jurisdiction, which seeks to avoid "dueling jurisdiction" of a federal court over an asset that is also subject to the jurisdiction of a state probate court.

The Sixth Circuit made two pertinent jurisdictional rulings. First, the Court ruled that the district court should have dismissed the case on jurisdictional grounds because neither the district court nor the state probate court had jurisdiction over a dispute regarding the provision of veterans' benefits. Jurisdiction instead belonged to the Board of Veterans' Appeals, and if necessary, the Court of Appeals for Veterans Claims and the Federal Circuit. See 38 U.S.C. §511(a). Second, the Court ruled that remand under the "probate exception" to federal court jurisdiction was inappropriate, not only because of the BVA's exclusive review process for veterans' benefits determinations, but also because the state probate court lost jurisdiction over the benefits upon removal—thus, there was no "dueling jurisdiction" to prevent.

Appellate Jurisdiction—jurisdiction over appeal filed from stipulated judgment awarding nominal damages to appellant

Innovation Ventures, LLC v Custom Nutrition Laboratories, **LLC, 912 F.3d 316 (6th Cir. 2018)**

In this case, the Sixth Circuit applies the *Raceway* rule governing appeals from stipulated judgments awarding nominal damages, where claims have been dismissed by stipulation to achieve finality. The district court determined that the plaintiff manufacturer's proposed methodologies for showing damages were impermissible, such that the plaintiff was entitled only to nominal damages for breach of a noncompete agreement. The district court suggested other methodologies could be used by the plaintiff at trial to prove damages. Desiring to appeal this ruling but lacking a final order, the plaintiff entered into a stipulated judgment dismissing the one remaining claim and awarding nominal damages. The stipulations were entered into for the purpose of expediting appellate review of the district court order excluding evidence of damages, pursuant to *Raceway Props., Inc. v. Emprise Corp.*, 613 F.2d 656, 657 (6th Cir. 1980) and 28 U.S.C. §1291. The Sixth Circuit ruled that the plaintiff had properly entered into a stipulated judgment which did not divest the Court of jurisdiction over the appeal, because the claim which the plaintiff agreed to dismiss to achieve finality was dismissed with prejudice and without reservation of the right to revive that claim. Moreover, the stipulated award of nominal damages mandated by the district court's existing rulings did not bar the plaintiff from appealing. Nor did the district court's suggestion that the plaintiff prove damages by alternative proofs require the plaintiff to do so before proceeding with its appeal regarding its preferred theory of proofs. The Court found the plaintiff had clearly indicated its intent to enter into the stipulations for the purpose of expediting appeal of previous orders, and therefore jurisdiction was proper under *Raceway* and §1291.

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Seventh Circuit

Appellate Jurisdiction – Patent Law – Appeal Not Subject to Federal Circuit's Exclusive Jurisdiction

ABS Global, Inc. v. Inguran, LLC, **914 F.3d 1054 (7th Cir. 2019)**

The Court of Appeals for the Federal Circuit has exclusive appellate jurisdiction over actions that include claims or compulsory counterclaims that arise under the Patent Act. The Seventh Circuit recently considered the scope of this exclusive jurisdiction in *ABS Global, Inc. v. Inguran, LLC*.

ABS sued Inguran under the antitrust laws, alleging that it held an unlawful monopoly on the market for sexed bull semen. Inguran asserted patent infringement and other counterclaims against ABS. A jury found that Inguran had violated the Sherman Act, but also found that ABS infringed two of Inguran's patents and breached the parties' confidentiality agreement.

On appeal, ABS argued that one of Inguran's patents was invalid and that the jury's verdict as to the specific claims in the patent was internally inconsistent. It also challenged the jury's finding that it breached the confidentiality agreement.

Before turning to the merits, the Seventh Circuit first considered whether it had jurisdiction over ABS's appeal. To answer this question, the panel analyzed whether Inguran's claims arose under the Patent Act or required resolution of a question of patent law. Because Inguran's complaint only raised claims under the Sherman Act and state law, and did not raise any issues under the patent laws, it did not trigger the Federal Circuit's exclusive jurisdiction.

The panel then analyzed a second possibility - that Inguran's counterclaim for infringement could trigger exclusive jurisdiction if Inguran was compelled to raise it in the lawsuit. Here, the panel focused on whether Inguran's counterclaims arose out of the same transaction or occurrence as ABS's claims; if they did, they would be compulsory under the Federal Rules of Civil Procedure and exclusive jurisdiction would lie with the Federal Circuit.

The panel concluded that ABS's claims and Inguran's counterclaims were "quite different" because the facts out of which they arose did not overlap. ABS's antitrust claim concerned Inguran's "competitive practices" in respect to contract terms and other "coercive applications of market power," which the panel deemed to be separate and distinct from claims about the validity of its patent. Though ABS had identified Inguran's "pooling" of its patents as an anticompetitive practice, the panel determined that this was "distinct from questions of infringement and validity." Because the counterclaims were merely permissive, the Seventh Circuit held that it had jurisdiction over ABS's appeal.

Appellate Jurisdiction – Collateral Order Doctrine – Order Denying Qualified Immunity Directly Appealable

Dockery v. Blackburn, **911 F.3d 458 (7th Cir. 2018)**

Appellate jurisdiction exists over certain non-final orders, including some orders that deny summary judgment on the defense of qualified immunity. In *Dockery v. Blackburn,* the Seventh Circuit examined the circumstances in which denial of qualified immunity will support appellate jurisdiction.

The case arose out of a police sergeant's use of a Taser on the plaintiff while he was being booked at a police station. The plaintiff, Dockery, became uncooperative during the booking process and began struggling with police officers, one of whom used a Taser to subdue him. The incident, which lasted less than one minute, was recorded by a security camera in the booking room. Dockery sued the officers alleging that they had violated his rights under the Fourth Amendment by using excessive force. The officers filed a motion for summary judgment on qualified immunity which the district court denied.

Though orders denying summary judgment are ordinarily not immediately appealable, the Supreme Court has recognized an exception for orders denying qualified immunity. As the Seventh Circuit explained, that exception is limited to denials that turn on "pure questions of law;" an order that denies qualified immunity because of a genuine issue of material fact is not immediately reviewable. The question for the panel in *Dockery* was whether the district court's order turned on a legal question or a disputed factual issue.

To answer this question, the panel reviewed two Supreme Court decisions applying qualified immunity to claims arising out of interactions with law enforcement that were visually recorded. The first, *Scott v. Harris*, 550 U.S. 372 (2007), held that an officer's entitlement to qualified immunity could be determined as a matter of law based on the video recording of the high-speed chase that had resulted in injury to the plaintiff. The video evidence allowed the Supreme Court to determine that the officer's decision to ram the plaintiff's car during the chase was objectively reasonable.

Seven years after *Scott*, the Court held in *Plumhoff v. Rickard*, 572 U.S. 765 (2014) that appellate jurisdiction existed over an order denying qualified immunity because the Fourth Amendment's objective reasonableness standard could be applied to the officers' conduct, which had been video recorded.

Applying the holdings of *Scott* and *Plumhoff*, the panel in *Dockery* concluded that it had jurisdiction over the officers' appeal. Resolution of the qualified immunity issue turned, in part, on whether the officers' actions were objectively reasonable. The security camera footage of the incident between Dockery and the officers provided the panel with enough information to answer that question. Because the officers' immunity claim did not require the resolution of any disputes of fact, but instead turned on a pure question of law, appellate jurisdiction was secure.

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Tenth Circuit

Appellate Jurisdiction: Tenth Circuit holds it did not forfeit de novo merits review by remanding an earlier appeal on jurisdictional grounds

Siloam Springs Hotel, L.L.C. v. Century Surety Co., **906 F. 3d 926 (10th Cir. 2018)**

This case involves complicated procedural history, resulting in a question as to whether the Tenth Circuit had jurisdiction to decide whether the district court's grant of summary judgment to the defendant-insurer was proper. In reversing summary judgment for the defendant, the Tenth Circuit determined it did in fact have jurisdiction to decide the plaintiff-insured's appeal.

The plaintiff-insured initially filed suit in state court in Oklahoma, and the defendant-insurer removed the case to federal court where the district court judge granted summary judgment in favor of the defendant, finding the insurance policy at issue excluded the requested coverage. The plaintiff then filed an appeal to the Tenth Circuit on this grant of summary judgment. On appeal, in an earlier decision, the Tenth Circuit found that the insurer's removal notice was defective and did not show that complete diversity of citizenship existed. The Court remanded the case to the district court for further proceedings, and suggested that, if the court found it did have jurisdiction, it might consider certifying the coverage question to the Oklahoma Supreme Court.

On remand, the district court received evidence on the jurisdiction question and found that complete diversity did in fact exist and that jurisdiction was proper. It then certified a question regarding coverage to the Oklahoma Supreme Court. The Oklahoma Supreme Court declined to resolve the parties' dispute about interpretation of the insurance policy exclusion. The plaintiff then asked the district court to reopen the case to either reconsider its previous summary judgment order or to enter a final, appealable judgment against it. The district court held that the case had already been administratively closed and that it had no need to reopen the case because neither its findings on diversity nor the Oklahoma Supreme Court's decision affected its previous summary judgment ruling for the defendant. The plaintiff immediately filed another appeal with the Tenth Circuit.

On appeal, the defendant argued that the Tenth Circuit forfeited de novo review of the grant of summary judgment by not retaining jurisdiction over the merits of the first appeal while remanding for the district court judge to determine diversity jurisdiction. Thus, argued the defendant, the Tenth Circuit, in this second appeal could decide only whether the district court abused its discretion in refusing to reopen the case. The Tenth Circuit rejected the defendant's argument.

The Tenth Circuit held that although the previous summary judgment ruling was a final, appealable order at the time it was issued (2014), it lost its finality when the Tenth Circuit remanded the case from the first appeal. At that time, held the Tenth Circuit, the "summary judgment order became, in essence, an interlocutory order, which merged with the district court's final order once the district court resolved the issues it was directed to resolve on remand from this court and held that it would not further reconsider its previous decision in this case." The Tenth Circuit continued:

> The insurer cites no authority to support its proposition that an appellant is forever foreclosed from appealing the merits of a case if the appellee failed to make an adequate showing of federal jurisdiction before the district court, thus requiring remand to resolve the jurisdictional issue before the appellate court may properly address the merits of the case. We will not be the first to adopt such an unjust rule.

The Tenth Circuit further went on to reject another argument raised by the defendant: that the notice of appeal was untimely because the clock should start running from

the decision of the Oklahoma Supreme Court on the certified question. The Tenth Circuit, describing this argument by the defendant as "convoluted" and "without citation to any persuasive authority or reasoning," held that it did not see any merit to the argument and proceeded to decide the merits of the summary judgment ruling below.

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Eleventh Circuit

Subject-Matter Jurisdiction: Where plaintiff fails to plead facts sufficient to establish its standing, the court will not "speculate concerning the existence of standing," nor will it "piece together an injury sufficient to give plaintiff standing"

Aaron Private Clinic Mgmt. LLC v. Berry, **912 F.3d 1330 (11th Cir. 2019)**

The Eleventh Circuit held that the Court does "not speculate concerning the existence of standing, nor should [it] imagine or piece together an injury sufficient to give plaintiff standing when it has demonstrated none'."

Aaron Private Clinic Management is a for-profit company that made preliminary plans to operate a methadone clinic in Georgia for the purpose of treating opioid addiction. In 2016, after Aaron made those plans, Georgia passed a statute that enacted "[a] temporary moratorium on the acceptance of new applications for licensure of narcotic treatment programs." The statutorily enacted moratorium prohibited new applications from being accepted between June 1, 2016, and June 30, 2017. Georgia enacted a second statute in 2017, which superseded the previous statutory moratorium and which provided that Georgia's Department of Community Health must establish minimum standards of quality for narcotic-treatment programs and provided for annual or biannual open-enrollment periods for program applications. The second statute also extended the moratorium on new applications through December 1, 2017.

In May 2017, Aaron filed a complaint on its own behalf and "on behalf of its prospective patients who are opiate-addicted, who are qualified disabled under the [Americans with Disabilities Act], and who are prospective patients of [Aaron],"alleging that the two Georgia statutes violate the Rehabilitation Act and the Americans with Disabilities Act. Georgia moved to dismiss Aaron's complaint for lack of standing. The district court granted Georgia's motion, finding that Aaron's complaint failed to establish that Aaron directly suffered an injury in fact that is "actual or imminent, not 'conjectural' or 'hypothetical.'" The district court explained that the complaint alleges at most that Aaron was in the early stages of the planning process, not that it would have been prepared to offer treatment to its prospective clients but for the challenged statutes. The district court also held that Aaron did not establish that it had third-party standing to assert the claims of its would-be patients because Aaron had not established that it had suffered an injury in fact, that it had a close relationship to a third party that was being discriminated against, and that there was some hindrance to the third party's ability to protect his or her own interests.

Aaron appealed and the Eleventh Circuit affirmed. The Court first held that Aaron lacked direct standing because it failed to plead facts establishing that it had directly suffered an actual or imminent injury in fact. According to the Court, "[t]o adequately allege injury in fact, it is not enough that a complaint "'sets forth facts from which [the Court] could imagine an injury sufficient to satisfy Article III's standing requirements.'" Rather, "[t]o satisfy its burden at the pleading stage, a plaintiff must 'clearly allege facts demonstrating'" a concrete injury that is traceable to the conduct of the defendant and that will be redressed by a favorable decision. As the Eleventh Circuit pointed out, the Court does "not speculate concerning the existence of standing, nor should [it] imagine or piece together an injury sufficient to give plaintiff standing when it has demonstrated none.'"

The Court held that Aaron's allegations of a bare intention to someday found a clinic were insufficient to confer direct standing. Likewise, its threadbare allegations of increased costs and expenses as a result of the statutes were so vague that they failed to establish any of the required elements of standing. Finally, the Court held that Aaron had failed to plausibly plead a stigmatic injury because it had not personally suffered any discriminatory treatment. The Court also agreed with the district court's determination that Aaron had failed to plead fact sufficient to establish third-party standing.

Appellate Procedure: Party is estopped from appealing jury verdict based on an erroneous jury charge where party's attorney expressly agreed that jury charge should be given to the jury

B & D Nutritional Ingredients, Inc. v. Unique Bio Ingredients, LLC, **No. 17-15793, 2018 WL 6719403 (11th Cir. Dec. 19, 2018)**

The Eleventh Circuit held that a party cannot complain on appeal when a jury follows an instruction to which it agreed.

Unique India is an Indian company that manufactures probiotics. B & D Nutritional Ingredients, Inc. contracted with Pharmacenter Corp., then the exclusive importer of Unique India probiotics in the United States, obtaining the near-exclusive right to distribute the probiotics in the United States. The distribution agreement contained a carve-out solely for Florida, where Pharmacenter retained distribution rights. B & D and Pharmacenter also entered into a secrecy agreement to protect any confidential information exchanged between them. At the time of these agreements, Luis Echeverria and Jairo Escobar were Pharmacenter's Business Development Manager and President, respectively.

During their business relationship, B & D shared with Pharmacenter various confidential lists of its customer information. At the same time, Echeverria and Escobar began making plans to open a probiotics business to compete with B & D. Echeverria and Escobar ultimately left Pharmacenter and formed Unique USA. Unique USA then entered into a non-exclusive importation and distribution agreement with Unique India. According to B & D, Echeverria and Escobar absconded to Unique USA with B & D's confidential customer lists and used the information contained in those lists to solicit B & D's customers.

B & D sued Unique India, Unique USA, Echeverria, and Escobar in federal court, alleging claims for tortious interference and violations of the Florida Deceptive and Unfair Trade Practices Act, among other claims. Echeverria answered the complaint and counterclaimed against for defamation. After discovery, the defendants moved for summary judgment on all of B & D's claims, and B & D moved for summary judgment on the counterclaim. The district court granted the defendants' motion with regard to the FDUTPA and tortious-interference claims and denied B & D's motion, ultimately allowing Echeverria's defamation claim to go to the jury.

After the close of evidence, the parties agreed to jury instructions, including an instruction on damages. The instructions stated that Echeverria could recover both general damages—"an amount of money that will fairly and adequately compensate him for such injury as a preponderance of the evidence shows was caused by the defamatory statement in question—and nominal damages—"damages of an inconsequential amount which are awarded to vindicate a right where a wrong is established but no damage is proved." Ultimately, the jury returned a verdict in favor of Echeverria in the amount of $5,000. B & D appealed the grant of summary judgment on its FDUTPA and tortious-interference claims and the award of damages on Echeverria's counterclaim.

With regard to Echeverria's counterclaim, B & D argued that the district court erred by instructing the jury that it could award more than nominal damages on Echeverria's counterclaim. However, the Eleventh Circuit rejected B & D's argument, holding that B & D had invited the error when it expressly consented to the giving of the jury charge. According to the Court, "a party cannot complain on appeal when a jury follows an instruction to which it agreed." Here, B & D's counsel expressly agreed to the damages instruction given by the district court. Accordingly, the Eleventh Circuit affirmed with regard to Echeverria's counterclaim.

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D.C. Circuit

Forfeiture of an Appellate Issue

Al-Tamimi v. Adelson, **916 F.3d 1 (D.C. Cir. 2019)**

The D.C. Circuit held that while a party ordinarily forfeits the appellate issue by purporting to incorporate prior briefing by reference in an opening brief, this is a discretionary rule, and the circumstances of the case warranted a finding of no forfeiture.

Plaintiffs, eighteen Palestinians and a Palestinian village council, alleged that defendants, all American citizens or entities, engaged in a conspiracy to expel all non-Jews from the West Bank (including East Jerusalem, and the Gaza Strip), referred to by the D.C. Circuit as the "disputed territory." *Id.* at 4. The complaint included four claims: (1) defendants engaged in civil conspiracy to rid the disputed territory of all Palestinians, (2) defendants committed or sponsored genocide and other war crimes, (3) defendants aided and abetted the commission of genocide and other

war crimes, and (4) defendants trespassed on plaintiff Palestinians' property. *Id.* at 4–5. The district court granted the defendants' motion to dismiss for lack of subject matter jurisdiction, concluding, under the factors set forth in *Baker v. Carr*, 369 U.S. 186 (1962), that the complaint raised at least five nonjusticiable political questions. Plaintiffs appealed.

On appeal, defendants argued that plaintiffs forfeited their challenge to the district court's political question holding by improperly incorporating by reference into their opening brief an argument made previously in plaintiffs' memorandum in support of a summary reversal motion they filed before the opening brief was due. *Id.* at 6. The D.C. Circuit first acknowledged that, ordinarily, a party forfeits an argument not raised in its opening brief. *Id.* Incorporation by reference to an argument made at an earlier stage of litigation is normally rejected by the D.C. Circuit for two reasons: (1) incorporation by reference can be used to evade word limits, and (2) rejecting incorporation by reference prevents "sandbagging" opponents by depriving them of a fair chance to respond. *Id.*

In this case, however, the D.C. Circuit found these policy rationales inapplicable and deemed plaintiffs' incorporation by reference "unobjectionable." *Id.* at 7. First, before merits briefing was due, the D.C. Circuit warned the parties that it would look with "extreme disfavor" on repetitious submissions. *Id.* Although the order was "aimed at defendants," who had more briefing opportunities, the D.C. Circuit found it was "reasonable" for plaintiffs to heed this admonition. *Id.* Second, the plaintiffs' opening brief was so concise, the D.C. Circuit recognized plaintiffs "were not seeking to, and did not, evade the word limit." *Id.* (noting plaintiffs could have inserted the entire summary reversal motion without exceeding the word limit). Finally, the D.C. Circuit highlighted that the defendants' responding merits brief defended the district court's political question holding—this meant that defendants had the required fair chance to respond to the plaintiffs' opposing political question arguments. *Id.* In light of these considerations, the D.C. Circuit bent its usual rule in favor of allowing an argument on appeal, despite plaintiffs' incorporating by reference an argument made at a preliminary stage of their appeal. *Id.*

Final Judgment Rule

Katopothis v. Windsor-Mount Joy Mut. Ins. Co., **905 F.3d 661 (D.C. Cir. 2018)**

The D.C. Circuit held that it had jurisdiction under the final judgment rule, 28 U.S.C. §1291, to review an order dismissing only one of two defendants, even in the absence of the required Rule 54(b) determination that there is "no just reason for delay," where the claims against the remaining defendant were transferred to another forum. *Id.* at 666–67.

A burst pipe in plaintiffs' beach home flooded the building, which caused mold to spread throughout the house and resulted in an alleged $800,000 worth of damages. *Id.* at 664. After the flooding, plaintiffs brought action against their insurance company, Windsor-Mount, for breach of contract when it failed to cover costs of repair. *Id.* Windsor-Mount impleaded plaintiffs' cleaning-and-restoration company, Gale Force, as a third-party defendant on the theory that if Windsor-Mount was liable to plaintiffs, the extent of liability turned on Gale Force's conduct. *Id.* Plaintiffs amended their complaint to add claims against Gale Force. *Id.*

Plaintiffs and Windsor-Mount filed cross-motions for summary judgment, and Gale Force, a Delaware corporation, moved to be dismissed for lack of personal jurisdiction. *Id.* The district court granted summary judgment to Windsor-Mount based on the "clear terms" of their insurance policy. *Id.* The district court then transferred the remaining claim to the District Court of Delaware, finding plaintiffs did not allege that Gale Force had sufficient contacts with the District of Columbia to establish personal jurisdiction. *Id.* at 665.

On appeal, the D.C. Circuit first explained that it only had jurisdiction over "final decisions" of the district court and that "any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties is not final unless the [district] court certifies, pursuant to Federal Rule of Civil procedure 54(b), that 'there is no just reason for delay.'" *Id.* at 666. Here, the district court granted summary judgment to Windsor-Mount but did not render a final decision against Gale Force; nor did the court make the required Rule 54(b) certification that there was "no reason for just delay."

The D.C. Circuit next asserted that, in the absence of a Rule 54(b) certification, where a court dismisses one claim and transfers the remaining claims to another forum, the non-transferred claims ordinarily "tag along" to preserve judicial economy. *Id.* However, the D.C. Circuit explained that the rule only applies to transfer cases involving dismissal of a *claim*, and not to dismissal of a *party*. *Id.* Party dismissals do not "tag along" with transferred claims. Thus, by dismissing all claims against one defendant, and transferring the remaining claims against other defendants to another forum, the court "disassociates itself from the case in all respects." *Id.* The summary judgment decision in

favor of Windsor-Mount was "final," even though the D.C. Circuit lacked jurisdiction to review the transfer order, and notwithstanding the absence of a Rule 54(b) certification. *Id.* at 665–66.

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Federal Circuit

Final Judgment Rule

Princeton Digital Image Corp. v. Office Depot, Inc., **913 F.3d 1342 (Fed. Cir. 2019)**

The Federal Circuit held that a district court may not circumvent the final judgment rule by entry of judgment to facilitate an appeal where the district court's summary judgment order limited but did not foreclose the party's claims.

Princeton Digital Image Corporation ("PDIC") licensed its patent to Adobe, Inc. ("Adobe"), and simultaneously agreed not to sue Adobe or Adobe's customers for claims arising from an Adobe Licensed Product. *Id.* at 1344. Despite this agreement, PDIC sued Adobe customers for patent infringement, and Adobe intervened to defend. *Id.* In a related suit, Adobe complained that, by suing Adobe customers, PDIC breached its licensing contract with Adobe. *Id.*

A few months after Adobe's intervention, PDIC had dismissed each of the infringement actions, but litigation continued on Adobe's breach of contract claim. *Id.* at 1345. The district court eventually granted in part and denied in part PDIC's motion for summary judgment: it denied summary judgment on liability, finding a reasonable juror could find a violation of the license agreement's covenant not to sue; and it granted summary judgment in part on damages, finding Adobe's damages were to be limited to "defense" fees incurred defending Adobe customers from PDIC's suits. *Id.*

Adobe filed a supplemental report and a letter disclosing its defense fees, but the district court struck both because Adobe failed to parse defense fees from fees incurred in its breach of contract claim. *Id.* at 1345. To secure an appealable decision, Adobe requested the district court enter judgment in favor of PDIC, arguing the court's rulings meant Adobe "doesn't have damages to present," which was "an element of what is to be tried." *Id.* The district court stated "there are purely defensive damages that can be proved on this record," but granted Adobe's request and entered judgment in favor of PDIC. *Id.*

The Federal Circuit decided whether this judgment entered by the district court constituted a final appealable decision. *Id.* The Federal Circuit first stated "a final decision is a decision by the district court that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Id.* at 1346. The Federal Circuit then looked to *Microsoft Corp. v. Baker*, 137 S.Ct. 1702 (2017), in which, following the denial of class certification, plaintiffs dismissed with prejudice their individual claims while reserving the right to revive their claims if the certification decision were reversed. *Id.* The *Microsoft* court held this voluntary-dismissal tactic subverts the final-judgment rule, and does not give rise to a final decision, but relied in part on the conflict between allowing the appeal and the limited appeal right in the class action context. *Id.*

Based on the facts of this case, the Federal Circuit extended *Microsoft*'s ruling, finding "a voluntary dismissal does not constitute a final judgment where the district court's ruling has not foreclosed the plaintiff's ability to prove the required elements of the cause of action." *Id.* at 1348. The Federal Circuit held the district court's rulings did not foreclose Adobe's ability to satisfy the damages element of its breach claim, but merely limited Adobe's potential damages. *Id.* at 1349. Accordingly, Adobe could have tried its breach claim, and was required to do so to obtain a final, appealable decision on the merits. *Id.* The district court's entry of judgment had no effect. *Id.* at 1350.

Appellate Review of Alleged Application of Wrong Legal Standard

James v. Wilkie, **917 F.3d 1368 (Fed. Cir. March 7, 2019)**

The Federal Circuit held that, when examining whether a lower court selected the appropriate standard, it must determine what standard the lower court *applied*, and not which standard it recited.

Plaintiff served on active duty during the Vietnam War, and sought service-connected disability compensation. *Id.* at 1370. On January 28, 2016, plaintiff's claims were denied. *Id.* On May 27, 2016, at the tail end of the 120-day window dictated by 38 U.S.C. §7266 (2012), plaintiff placed his notice of appeal in the mailbox at his residence and put the flag up for collection. *Id.* After a long weekend away, plaintiff realized the flag on his mailbox had fallen down, and his mail had consequently never been picked up or delivered. After a hearing in which plaintiff was asked to "show cause why his appeal should not be dismissed for

untimely filing," the Veterans Court dismissed his appeal, determining "a fallen mailbox flag was not an extraordinary circumstances beyond [plaintiff's] control…but rather an ordinary hazard of last minute mailing that could have been avoided." *Id.* at 1371.

The Federal Circuit found the Veterans Court applied an improper legal standard when considering the extraordinary circumstances requirement. *Id.* at 1373. Although the Veteran's Court stated its conclusion was based on a case-by-case analysis, the Federal Circuit noted it actually "made a categorical determination that a fallen mailbox flag is not entitled to equitable tolling." *Id.* (analyzing the Veterans Court's general statement that "a fallen mailbox flag is not an extraordinary circumstance beyond [plaintiff's] control that warrants equitable tolling"). The Federal Circuit was able to look past the Veterans Court's syntactic framing because, "when determining whether a court committed legal error in selecting the appropriate standard, [the appellate court] determine[s] which legal standard the tribunal *applied*, not which standard it recited." *Id.* at 1374.

Here, although the lower court stated a case-by-case standard, it *applied* a categorical ban foreclosing the possibility that a fallen mailbox flag may ever constitute an extraordinary circumstance. *Id.* Accordingly, the Federal Circuit vacated and remanded the decision for the Veterans Court to decide whether equitable tolling was appropriate by applying the correct legal standard. *Id.*

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