

Certworthy

Winter 2008

The newsletter of the DRI
Appellate Advocacy Committee


The Voice of the Defense Bar



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Carts and Horses, or Circles and Spirals: Ramblings and Ruminations on Legal Research

ROGER D. TOWNSEND

“Terrific,” said Sheila Fischer, inside counsel for Wilmington Slade. John thought, “Great, I sold another one.” Driving back to his downtown office at Crud & Dud, John Steinitz suddenly shouted, to no one in particular, “Burma!” That was what John always said to ward off a panic attack. He had gained the idea from an old British comedy show. Now, he seemed to say it more and more often. The immediate cause of this particular explosion was his having convinced Sheila to hire his firm for the appeal of a \$120 million securities case, even though John knew virtually nothing about securities law. Fortunately for John, the subject of his experience with securities law had not arisen during the interview. Now facing

a deadline for postjudgment motions, he needed to learn a lot of law and to learn it fast. How, and where, to begin?

Across town, Bobby Lasker was equally ecstatic. He had just been interviewed by Leroy Lullybup, the infamously hard-nosed general counsel for TweetyBird Feeders. Bobby had prepared for the worst, but it had gone remarkably smoothly. Now Bobby had two weeks in which to prepare posttrial motions in TweetyBird’s tortious-interference case against Sylvester & Sons. That seemed like a lifetime, since Bobby knew contracts law as a painter knows turpentine. When he returned to the office, Bobby huddled his team and handed out assignments about specific areas to research.

Roger Townsend is a partner in the Houston office of Alexander Dubose Jones & Townsend LLP, a civil appellate law firm. A graduate of the Harvard Law School, Roger is listed in The Best Lawyers in America and is a Fellow and Director of the American Academy of Appellate Lawyers. A past chair of the Appellate Practice Section of the State Bar of Texas, he authored a chapter on brief writing for A Defense Lawyer’s Guide to Appellate Practice (DRI 2004). More recently, Roger served as the National Editor of the treatise on Superseding and Staying Judgments: A National Compendium (ABA TIPS 2007). He also was the executive producer of the Grammy-winning Best Latin Jazz album for 2006, Simpatico, by Brian Lynch and Eddie Palmieri. **continued on page 6**

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As I undertake my term as chair of the DRI Appellate Advocacy Committee, I want to thank my predecessor, Dan Lindahl, for his great leadership. Dan has been a leader in this committee since the beginning, and we owe him a debt of gratitude. I also want to extend special thanks to our newly retired publications chair, Ray Ward. Over his four years as chair, Ray took *Certworthy* to the next level.

Starting On Solid Ground

As you read this issue of *Certworthy*, you will see a new roster of committee leaders. They are already off to a great start. For instance, Diane Bratvold and Mitch Brown (with the usual help from Scott Smith) have assembled a great program for our February 2008 seminar in Orlando. Please join us in Orlando, and let's break our attendance record!

Before even producing his first *Certworthy*, our new publications chair, Ralph Johnson, snagged the opportunity for our committee to publish a series of appellate-focused articles in *For the Defense*. Look for a great *FTD* issue in November 2008.

Other committee leaders are working behind the scenes to move our committee forward. I want to thank them for their unsung efforts. And I want to thank the entire committee membership for making our committee vibrant and relevant.

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I would like to thank Scott Stolley, Scott Smith and Ray Ward for the opportunity to serve as the Chair of the Publications Subcommittee and the Editor of *Certworthy*. I would also like to thank Matthew Lerner for agreeing to serve as Vice Chair. Matthew has already been a great help.

Following Ray Ward as Chair of the Publications Subcommittee and Editor of *Certworthy* is a challenge to say the least. Ray's contributions to this committee are legendary. Beyond producing *Certworthy* for years and leading other publication efforts, Ray has had a great impact behind the scenes. For example,

A Tough Act to Follow

authors who have had a chance to have Ray edit their articles (myself included), uniformly comment on how working with Ray has improved their writing and given them different and broader perspectives on writing.

I hope that I can continue to move forward the good work that Ray has started. This issue gets us off to a good start. In addition to our traditional reports from the subcommittees and our circuit editors, the issue features three exceptional pieces.

First, an article by Roger Townsend on appellate research. In it, Roger, a loyal and active member of this committee, provides a deeper perspective on approaching appellate research.

Next, David Tennant explores in detail the issue of how the overwhelming volume of asylum appeals is having

an impact on the federal courts of appeals and the other cases pending before them.

Finally, Ray Ward provides his insights into using different typefaces to improve the appearance and quality of your brief and other written work.

These authors, the circuit editors and the subcommittee chairs have my thanks for all of their hard work. Hopefully, the articles will inspire the members of the committee and the other readers of *Certworthy* to consider submitting an article, essay on legal writing or book review. If you are interested, please do not hesitate to contact me.

KUDOS

Roger W. Hughes, a long time member of the committee, was recently awarded a Green Bag 2007 Award for Exemplary Legal Writing, for *Legalese in the Age of IM (Instant Messaging)*, 8 Appellate Advocate 14 (Summer 2006). For more details on the award, please visit [\[manac_and_Reader_2008_announcement.pdf\]\(#\).](http://www.greenbag.org/docs/Green_Bag_Al-</p>
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Roger is a partner with Adams & Graham, LLP in Harlingen, Texas.

Roger Townsend, another long time member of the committee, has been admitted into the membership of *Scribes*, the American Society of Legal Writers,

which encourages a "clear, succinct, and forceful style in legal writing."

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Meanwhile, in the suburb of Nimzowitsch, Professor Ruy López, the Alek Alekhine Professor of Advanced Applications of Applied Appliance Law at the Capablanca University School of Law, prepared his lecture for new law students about legal research. Professor López fancied himself a pragmatic professor, rather than a theorist. Unlike most of the faculty, he even had once worked as a lawyer in a law firm, Paul & Morphy. While this caused the faculty to dismiss him as a lightweight, his students usually remembered him with warm affection. From teaching introductory legal research for years, Professor López had learned that the hardest thing to convey to his students was the need to treat each project as unique, rather than to succumb to time and billing pressures by applying cookie-cutter molds to their research projects. Yet he also had discovered certain patterns to the structures of legal research. In his own way, therefore, Ruy López was a closet theorist.

This article addresses the tension between practice and theory. This article addresses the tension between treating each research project on its own terms, yet not running up the bill. This article further addresses the tension between starting with the facts or starting with the law, and between starting with the policies at issue or starting with the authorities. This article also addresses the tension between starting with the big picture or starting with the details. In short, this article . . . Oh, Burma!

To become wise, Grasshopper, you must first comprehend your own ignorance

When retained on a new matter or as-

signed a new project, you need to assess very quickly how much you already know about the subject. The limits of your existing knowledge will tell you what you need to learn. Usually you will not know many of the facts, but you might know a lot of background law. Other times, you won't know much, if anything, about the area of law at issue. These different situations require different approaches. Sometimes, the cart must come before the horse.

With fair knowledge of the background law, you can quickly spot many of the relevant legal issues, narrowing them down as you learn the facts. Your client may have been wise enough to retain you to attend the trial; if so, then you know the facts. Otherwise, you can learn the facts either from debriefing trial counsel, assuming they remain cooperative, or from quickly reviewing the record, assuming it is available. When you already know most of the law and have learned the facts, your initial research can be focused on finding cases with similar facts.

For a traverse through totally new territory, you will want to map the legal boundaries before learning the facts. Otherwise, you will not realize what possible issues are lurking in the case and which facts are relevant to the potential issues. You will probably want to start with general treatises, encyclopedia, articles, or even law-school study guides (yes, practicing lawyers sometimes still use study guides) to educate yourself about that field of the law. Only then will you be able even to spot the issues in the case that will deserve more detailed research. And only then will you be able to debrief trial counsel intelligently, since trial counsel notoriously

wander from the subject in a posttrial debriefing—most likely from an inability to appreciate the largely conclusive effect of the standard of review once the facts have been found.

Determining what you know and do not know may not always be so daunting as it sounds. If you have been retained as appellate counsel after the verdict, usually—though unfortunately not always—the trial counsel will have identified the key issues. You may still need general research to educate yourself and to place those issues in their proper context, but you may not have to spot the issues themselves. Conversely, if you are retained early in the case (as you preferably should be), then you may have to identify the issues from the outset. But in that instance you should have more time to do so than if you are not retained until just before the charge conference—as all too often occurs.

You do not find, Grasshopper, because you do not know what to seek

What you are looking for depends on what is at stake. In broad terms, cases can be classified as those that turn on (1) the application of settled law to their facts, (2) the choice between settled legal principles, or (3) the creation or adoption of new legal principles.

Even if not always easy for an appellate lawyer, the first category is usually simple: Everyone agrees about the law; the parties just disagree about the facts. Trials of these cases typically involve pattern jury charges and rely on the talents of trial counsel to persuade the jury that one side's version of the facts is more credible than the other side's. Successful appeals of these cases usually involve

only evidentiary or other procedural rulings that may have skewed the jury's determination of credibility.

The second and third categories are more complex for an appellate lawyer. They implicate the policy considerations behind the legal rules. Many lawyers, however, approach this research backwards. Too many lawyers look for a case stating the rule that they want. When they find it, they cite the authority to the court, naively expecting the cited authority to carry the day. They then express dismay when the appellate court subsequently distinguishes the case. This not infrequently leads to accusations of judicial unpredictability, incompetence, bias, or worse.

We have all heard the expression “that's a distinction without a difference.” But few of us have asked the question: Why does one distinction make a difference and another does not? The answer is that one distinction affects the policy values implicated by the rule, and the other distinction does not. The former will make a difference; the latter will not.

The determination whether a particular fact affects a policy value in a case is all too often made implicitly rather than explicitly. Nevertheless, it is the heart of the common-law process. The common law evolves as legal rules are modified in the face of new fact patterns. Two principles usually guide that evolution: (1) a desire to do justice between the parties at bar; and (2) a desire to reach a sensible, pragmatic resolution of the dispute that will likely work for future parties in a similar situation. See Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* 238 (1960). Sometimes these two principles are in harmony; sometimes they are in tension. Different judges, moreover, may dem-

onstrate a marked preference for one principle over the other (When they do, they are said to have a “judicial philosophy.”). More commonly, a judge will be influenced more by one principle in one case and the other principle in another case, depending on the judge's “judgment” about the case at bar.

The lesson to take from this discussion is that it may be more important first to identify the policy or value that seems fair between the parties at bar and that will work for similar parties in the future. After you have clearly articulated a workable, fair policy, you will almost always find authority to support it. In blunt terms, if the policy is really that good, the odds are that it has already been enacted by some legislature, adopted by some court, or proposed by some commentator.

Further, even when no authority can be found for that policy, its logic will likely carry the day so long as it is not contravened by binding precedent. When you have the sound and fair policy value in your favor, lesser precedents will be distinguished. And, occasionally, even binding precedents will be overruled in the face of a compelling policy argument to the contrary.

Not to know when enough is enough, Grasshopper, will lead to disaster

In this era of globalized competition, clients are finally realizing that the commodity of legal services is exchanged through a buyer's market. In other words, the potential supply for legal services generally exceeds the demand, which means clients are becoming conscious of costs. Few areas of appellate work can cost more than research. To know when to stop legal research, it is again necessary to know which type of

case you are handling. It also is necessary to keep track of your results.

With regard to the type of case you are handling, if the case will turn on the facts, then a leading case from your jurisdiction's highest court will often be enough. If the case is ancient, which in this age of judicial turnover and rapid acceleration now seems to be defined as more than 15 years old, you may wish also to cite a more recent authority that follows the binding case. A more recent authority from the forum you are in will usually be the best choice—unless it was controversial in that court.

If your case is one of competing policies, then your research will need to be more extensive. While you will wish to cite authorities from your jurisdiction, it can be helpful to show what the majority of jurisdictions are doing with the issue. Legal treatises, annotations, and law reviews that are directly on point can also be helpful.

When your case is one of first impression in your jurisdiction, then your research must be expanded in scope. Almost anything is fair game—especially authorities from other jurisdictions and even, perhaps, from other nations. Treatises, law reviews, and analogies from other areas of the law can be particularly helpful. Social-science materials, historical records, or other matters that would meet the test for judicial notice could be useful.

It also is necessary to keep track of your results, so that (1) you don't have to duplicate your efforts, and (2) you know when your research is becoming redundant. For both, a research log is a good practice.

A research log has no particular format, though a spreadsheet may be most effective. The important thing is to record the relevant information, such as

the style, authoring judge, procedural posture, key issues, material facts, holdings, interesting dicta, and any concurrences and dissents. In the column containing the holdings, I would cite any controlling cases relied upon by the court. A column for your notes about how to use the case or qualifications about it can also be useful. Key language from the cases can be quoted in a separate document or on the spreadsheet itself. With the advent of computerization, however, printouts of copies of cases are neither necessary nor environmentally friendly.

When you keep finding references to the same authorities you have already studied, you can presume that your research is nearing completion. Of course, before the brief is filed or oral argument is presented, you will update your research for any late-breaking developments.

I have not commented on string citations. That is a problem with writing, not with research. Typically your research should have string citations to ensure that your point remains valid with little contradiction. But that does not mean that you should include everything you have found in your written brief. In short, your research should not traverse a circle; it should rise like a spiral.

You will learn, Grasshopper, that people do not always mean what they say

Does precedent really matter? In all courts it does, but the degree to which it matters varies from court to court, judge to judge, and case to case. Certainly in theory and usually in practice, *binding* precedent always matters to lower courts. And binding precedent in its guise of *stare decisis* sometimes matters to the court with the power to overrule it. The importance of persuasive precedents vary. Some lower courts can't wait to latch on to them, while others dismiss persuasive precedents derisively. Usually the reaction depends on a court's sense of the how it believes the present case should be decided and whether the persuasive precedent supports that outcome. The highest court in a jurisdiction usually has little interest in persuasive authorities unless it is facing an issue of first impression. But occasionally an opinion by a legendary judge from another court will be followed.

The importance of dicta is unpredictable. Some courts blindly follow it; some eschew it. Some assert that everything the highest court says is binding, no matter how extraneous to the case at bar. (The author of the opinion that contains the dicta is particularly likely to share this view.) Other courts distinguish between judicial dicta and obiter

dicta. The former has some relationship to the case at bar, but is not part of the discussion essential to the holding. The latter are idle judicial musings on any subject that crossed the opinion writer's mind that day. In some courts, however, perspicacious advocates who try to distinguish between obiter and judicial dicta may soon observe a look of the most profound perplexity on the faces of the judges hearing, or at least pretending to hear, the argument.

Nevertheless, because the quality of the precedent and the type of dicta does matter to some courts, you need to be aware of what type you are finding and using. But in terms of evaluating your case, you will usually be better served by concentrating on an analysis of the policies underlying the authorities and how they will be served or disserved by the case at bar.

Go forth and prosper, Grasshopper, but with humility

The theme to this article has been to think before you research, provided you have enough background knowledge to be able to think intelligently. If not, then you must research to educate yourself to recognize the policy values implicated in your case. When you understand those values, think hard about what is fair for the parties at bar and pragmatic for similarly situated parties in the future. When you grasp that policy fully, go forth and research to your heart's content—or at least to the extent of your client's budget.

The Surge in Asylum Appeals: What does it Mean to Civil Appellate Litigation?

DAVID H. TENNANT

In public comments, members of the U.S. Court of Appeals for the Second Circuit have described a “crisis” in the federal courts relating to the overwhelming number of asylum appeals filed since 2002. Some 14,000 asylum appeals currently are pending in the circuit courts, with the Ninth Circuit and Second Circuit particularly burdened by these appeals. See Administrative Office of the United States Courts (“AO”), *Annual Report of the Director*, FY 2006, at Table B-6. The dockets in those two circuits account for 80 percent of the pending asylum cases (over 11,000). *Id.* Two staff members of the Second Circuit (and a law professor) undertook a detailed study of the so-called “immigration surge” noting it “has placed a great strain on judicial resources.” J.R.B. Palmer, S.W. Yale-Loehr & E. Cronin, *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 *Geo. Immigr. L.J.* 1, 3 (2005) (hereafter “*Study*”)

The federal appellate courts already were overburdened, as many commentators have pointed out, with a prior *Certworthy* article suggesting the longstanding right of appeal may need to give way to discretionary review. See Ralph W. Johnson III, *The Right to Ap-*

peal: Are Its Days Numbered?” *Certworthy* (Defense Research Institute Winter 2006). The circuit courts have limited resources with which to respond to the influx of these thousands of additional appeals. Litigants in other cases – civil and criminal – naturally wonder if the pressing caseload of agency appeals reduces the time and attention paid to other parts of the federal appellate docket.

This article seeks to illuminate the problems presented by the “surge” in asylum cases and its impact on the civil appeals docket. First, the article examines the numbers, including reviewing the historical data regarding agency appeals in general, and immigration appeals in particular, to understand the baseline against which the current “surge” is measured. The article then examines the data regarding the “surge,” including the reasons for the large number of asylum appeals, how quickly the courts are deciding them (i.e., what is happening to the backlog), and what appeal filing rates suggest about docket management in the future. Beyond this strictly quantitative analysis, the article identifies the steps taken by the most affected courts to manage their respective immigration caseload, and what politicians have done to address the problem. Finally, this article comments on how the influx of asylum cases may be affecting the administration of justice in

our courts, particularly with respect to the civil appeals DRI members typically handle.

Agency Appeals as Part of Federal Docket

Appeals from administrative agency decisions are a steady part of the federal appellate docket. Between 1998 and 2001, appeals from rulings by administrative agencies (including appeals from final orders issued by the Immigration and Naturalization Service (INS)) routinely constituted approximately 6 percent of annual filings in the twelve regional circuit courts. AO, *Annual Report of the Director*, FY 2002 and FY 2006, at Table B-3. Of those administrative appeals, petitions for review of INS rulings played a substantial part, ranging from about one-third to one-half of all administrative agency appeals (or about 3 percent of all appeals). *Id.* Circuit court statistics did not separately identify and report asylum rulings, which are issued by the Board of Immigration Appeals (BIA), until FY 2005. Because of that reporting limitation, this article treats the INS appeal statistics before 2005 as a close equivalent to BIA asylum statistics. This relationship is memorialized in Table 1, below, which reports asylum appeal statistics under the joint heading “BIA/INS.”

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Board of Immigration Appeals (BIA)

The BIA is part of the Executive Office of Immigration Review (EOIR) within the Department of Justice. The BIA is the highest administrative body for interpreting and applying immigration laws and has nationwide jurisdiction. EOIR *FY 2006 Statistical Year Book*, “Glossary” at 4. The BIA jurisdiction

includes providing appellate review of rulings issued by the nation’s 52 immigration courts. In March 2002, to combat a growing backlog of 56,000 cases, the BIA truncated its review procedures by expanding the use of summary disposition (including affirmance in one-line decisions without any explanatory opinion) and by relying on review by a single Board Member rather than by a three-

member panel. *Study* at 3-4, 22-29.

The number of appeals from BIA rulings -- almost all asylum cases -- rose 365 percent between 1998 and 2007 as set out below in Table 1. The dramatic rise in BIA appeals, starting in 2002, coincides with the truncated review by the BIA.

Table 1
U.S. Courts of Appeals Annual Filings

Year	Total Appeals	All Agency Appeals (BIA/INS Appeals)	BIA/INS Appeals as % All Appeals
1998	53,805	3,793 (1,936)	3.6
1999	54,693	3,280 (1,731)	3.2
2000	54,697	3,237 (1,723)	3.2
2001	57,464	3,300 (1,760)	3.1
2002	57,555	5,789 (4,449)	7.7
2003	60,847	9,988 (8,833)	14.5
2004	62,762	12,255 (10,812)	17.2
2005	68,473	13,713 (12,349)	18.0
2006	66,618	13,102 (11,911)	17.9
2007	60,668	11,186 (10,042)	16.4

Source: Administrative Office of the U.S. Courts, *Annual Reports of the Director*, Table B-3, for 1998 to 2006 (Fiscal Year ending September 30); *Federal Judicial Caseload Statistics – March 31, 2007* (Offices of Judges Program, Statistics Division) (year ending March 31, 2007).

In each year, the burden falls disproportionately on the Ninth Circuit and Second Circuit. This is illustrated in the statistics for FY 06 which show the Ninth Circuit received 49 percent of all new BIA appeals while the Second Circuit received 22 percent of the new BIA appeals. AO, *Annual Report of the Director* FY 2006, Table B-3. Asylum cases represented approximately 48 percent of the docket of the Ninth Circuit, and 39 percent of the docket of the Second Circuit, at the end of fiscal year 2006. *Id.*, Table B-6. The disproportionate impact on the Ninth and Second Circuits is largely explained by the location of the immigration courts and where applicants for asylum choose to file their

applications. EOIR, *FY 2006 Statistical Year Book* at 12-13 and Table 6. The immigration courts in California and New York City attract the majority of asylum applications. *Id.*

Critics have stated that the BIA, in adopting summary procedures to resolve its backlog of cases, simply “displaced them to the federal courts.” *Immigration Backlog Forces Justice to Shift Staffing*, *Washington Post* (Dec. 19, 2004). The backlog in the federal courts will eventually be resolved. But it remains to be seen how quickly the circuit courts will review asylum cases, a process that depends on what resources the courts devote to these cases.

The latest statistics include an en-

couraging piece of information: Appeals from BIA rulings dropped 23 percent from March 2006 to March 2007. AO, *Federal Judicial Caseload Statistics – March 31, 2007* (Offices of Judges Program, Statistics Division) at 8. Even so, the number of such appeals (10,042) still represents more than 16 percent of all appeals filed during that period. The downturn in appeals from BIA rulings is consistent with a decrease in overall activity before the BIA between 2005 and 2006, including a 6 percent decrease in new filings and a nearly 16 percent reduction in pending cases. EOIR, *FY 2006 Statistical Year Book* at S1, U1 and Table 1. Federal court statistics through March 31, 2007 also show a decrease in

the number of pending appeals relating to BIA decisions, although the decline in pending cases is not as sharp as the decline in new federal court filings. AO, *Federal Judicial Caseload Statistics – March 31, 2007* at 7. With somewhat fewer cases in the BIA pipeline, it appears that BIA appeals will continue to decline as a percentage of the overall circuit court docket. This means the federal appellate courts should be past the worst of the immigration crisis, although the large number of pending cases remains a challenge to process, and there is no assurance that the filing rate for new BIA appeals will drop as dramatically as it rose. Indeed, as long as the appeal rate remains high (i.e., the rate at which applicants seek judicial review of orders denying asylum) the federal courts – and particularly the Ninth and Second Circuits -- will continue to bear a heavy burden. For example, even if BIA output dropped dramatically from 36,000 completions in 2006 to 21,000 completions as previously experienced by the BIA six years earlier (EOIR, *FY 2002 Statistical Year Book* at Table 17 showing 21,378 completions in 2000) – which represents a 40 percent decline in BIA output -- the burden on the federal appellate courts would remain great provided the appeal rate remains constant. The appeal rate for BIA rulings is estimated to be 26 percent. *Study* at 52. Even with the 40 percent reduction in BIA output, that rate translates into 5,460 appeals from BIA rulings per year, approaching 10 percent of all appeals filed in the twelve regional circuit courts. Thus, it appears that the Ninth and Second Circuits will continue to be severely burdened by BIA appeals for years to come.

Reasons for Surge in Asylum Appeals

Three factors combined with the BIA's reduced administrative review to produce a sharp upturn in appeals to the federal circuit courts. First, the BIA's summary procedures produced a larger proportion of final orders of expulsion. Such final orders were all appealable in federal court. *Study* at 6-7, 93. Second, the increase in final expulsion orders has been felt disproportionately by aliens who are not in detention and have better access to counsel. *Id.* at 7, 93. Third, the behavior of asylum applicants and their lawyers have changed with the private immigration bar finding it economical to appeal a large number of rulings by efficiently recycling work product. *Id.*

Judicial Responses to Influx

The strain of the massive immigration appeal docket has forced courts to hire additional staff, recruit visiting judges, and schedule extra sessions for hearing cases. *Study* at 3.

Second Circuit

The Second Circuit in May 2003 convened a meeting at the courthouse attended by Second Circuit staff attorneys, the U.S Attorney's Office for the Southern District of New York (which handles asylum appeals) and members of the private immigration law bar, to openly discuss how the flood of new cases could be efficiently and fairly handled. See, *The Surge of Immigration Appeals and its Impact on the Second Circuit Court of Appeals*" (Association of the Bar of the City of New York, Aug. 31, 2004) at 9-12. As a result of that early meeting and the follow-up commit-

ment by the stakeholders in the BIA appeals, innovative and positive steps were implemented:

- The U.S. Attorney's office agreed to devote substantial additional resources to briefing asylum cases. *Id.* at 11.
- The Second Circuit implemented a mediation program where staff attorneys conference cases without need for briefing or argument. This has resulted in the efficient disposition of about 60 percent of BIA appeals without consuming judicial resources. *Id.* at 12.
- The Second Circuit adopted new procedures to expedite review in asylum cases, including implementing in 2005 a non-argument calendar for all BIA appeals, and establishing an aggressive calendar that involves assigning 48 appeals of asylum cases each week to four panels of three judges – in addition to its regular court calendar. Through these efforts, the court expects to eliminate the BIA backlog in three years.

See Statement of Jon O. Newman, United States Circuit Judge, Second Circuit Court of Appeals, before the Senate Committee on the Judiciary, Apr. 3, 2006, at 3.

In an apparent concession to its swelling caseload, the Second Circuit adopted a new interim rule concerning oral argument in all cases. Interim Rule 34, adopted August 27, 2007, requires litigants in all cases to confer about the need for oral argument and to request argument if they want to be heard, but making clear the court can dispense with oral argument. In altering the long-standing presumption in the Second Circuit that litigants would be allowed oral argument, Interim Rule 34 is viewed as a sign of the times, and in particular, the court's BIA-swollen docket.

Ninth Circuit

The Ninth Circuit does not appear to have implemented any special procedures to address the surge in BIA appeals. At least one court commentator has identified the swelling immigration caseload as one of the major challenges facing the new Chief Judge, Alex Kozinski, who was appointed on November 30, 2007. C. Tobias, *The Challenges Alex Kozinski Faces as the New Chief Judge of the U.S. Court of Appeals for the Ninth Circuit* (FindLaw.Com Dec. 31, 2007) (available at http://writ.news.findlaw.com/commentary/20071231_tobias.html).

Congressional Response to Influx

Congress in 2006 considered removing asylum cases from the regional circuit courts and concentrating them in the Federal Circuit, and further making such centralized appellate review conditioned on the issuance of a certificate of reviewability by a single judge. See *Immigration Litigation Reform*, CRS Report for Congress (Congressional Research Service, May 8, 2006) at 4-5. A broad coalition led by the federal judiciary opposed these major jurisdictional changes. One of the federal judges who spoke in opposition to the Congressional initiative was Second Circuit Judge Jon O. Newman. He appeared before the Senate Judiciary Committee on April 3, 2006 and spoke forcefully against removing appellate jurisdiction from the twelve regional circuit courts:

gressive management of asylum cases appears to have reversed the trend:

We surely are overburdened, especially in the Second and Ninth Circuits, which have experienced the major share of the increase in filings. I have little doubt that many judges of the regional courts of appeal would tell you that they would be delighted to be rid of these cases. But the personal preference of judges is not a legitimate basis for formulating public policy concerning the structure of appellate jurisdiction. We serve to adjudicate cases that are appropriately placed within our jurisdiction, not just cases we would prefer to hear.

I implore you not to remove these cases from the regional courts of appeals, an unprecedented move that would be antithetical to our Nation's traditional insistence on full judicial consideration of claims involving denial of liberty in appellate courts of general jurisdiction.

As a result of the opposition from circuit court judges and others, the Chairman of the Senate Judiciary Committee deleted the bill's provisions concerning the re-assignment of BIA appeals to the Federal Circuit. *Immigration Litigation Reform*, *supra*, at 5. In its place, the Senate bill called for the General Accounting Office to undertake a study as to possible solutions in handling the surge in BIA appeals, with the Senate specifying three potential changes: (1) consolidating all appeals into an existing circuit court such

as the U.S. Court of Appeals for the Federal Circuit; (2) consolidating all appeals in a centralized appellate court consisting of active judges temporarily assigned from the various circuits; and (3) implementing a mechanism by which a panel of active circuit judges could reassign appeals from circuits with relatively high caseloads to circuits with relatively low caseloads. *Id.*; Comprehensive Immigration Reform Act of 2006, S.2612 (Sec. 707 "GAO Study on the Appellate Process for Immigration Appeals").

Congress was unable to agree to comprehensive reform on immigration matters and the 2006 bill (after many changes) was defeated. The proposed GAO study has not been undertaken.

A Tale of Two Circuits: Ninth Circuit and Second Circuit Compared

The federal judicial caseload statistics for 2000-2007 show the flood of BIA asylum appeals has impacted the operation of the two most affected courts – the Ninth and Second Circuits. But while the existence of significant impacts on these two circuits is not surprising, as the two most heavily burdens courts, what may be surprising are the differences between the Ninth Circuit and Second Circuit.

As shown in Table 2(a), the number of pending cases has risen dramatically in both circuits, although the Second Circuit's ag-

Table 2(a)

	Ninth Circuit	% Change	Second Circuit	% Change
2005 / 2006	16,087 / 17,299	+7.5	9,614 / 7,674	-20
2004 / 2005	13,436 / 16,087	+19.7	9,431 / 9,614	+1.9
2003 / 2004	11,294 / 13,436	+19	6,843 / 9,431	+37.8
2002 / 2003	9,625 / 11,294	+17.3	4,670 / 6,843	+46.5
2001 / 2002	8,847 / 9,625	+8.8	3,955 / 4,670	+18
2000 / 2001	9,190 / 8,847	-3.7	3,597 / 3,955	+10

Pending Cases – Year to Year Comparison

Source: Administrative Office of the U.S. Courts, *Annual Report of the Director*, Table B (using the "revised" numbers of pend-

ing cases reported in the following year).

Surprisingly, the median time between filing the notice of appeal to final disposition does not appear to have been extended appreciably in the Ninth Circuit, while the Second Circuit has experienced substantial delays in processing appeals – although the Second Circuit’s time to decision remains substantially shorter than the Ninth Circuit’s:

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Table 2(b)

	Ninth Circuit	Second Circuit
2006	15.7	11.2
2005	16.1	13
2004	14	11
2003	14	11.2
2002	15.1	10.9
2001	15.8	9.1

Time between Notice of Appeal and Disposition (in months)

Source: Administrative Office of the U.S. Courts, *Annual Report of the Director*, Table B-4.

Other effects appear to include an increasing number of cases that remain under submission for more than three months (*Annual Report of the Director* in FY 2003 thru 2006, Table S-5, showing a 100 percent increase in such cases in the Second Circuit between 2003 and 2006); a declining number of cases decided with the benefit of oral argument (*Annual Report of the Director* in FY 2001 thru 2006, Table S-1, documenting a drop in the Second Circuit in the percentage of cases decided with oral argument, from 52.8 percent in 2001 to 32.2 percent in 2006); and a drop in the Second Circuit’s use of written, signed opinions, from 21.7 percent in 2005 to 12.7 percent in 2006. *Annual Report of the Director* in FY 2005 and 2006, Table S-3).

Impact on Civil Docket

The foregoing statistics do not shed a great deal of light on the specific question of whether (and to what extent) non-BIA cases are being delayed, or subject to less review, because of the

flood of asylum appeals. The “negative” statistics noted above may include non-BIA cases, with civil appeals taking longer to be decided and with perhaps less rigorous review and write-up. Indeed, it is difficult to imagine civil cases not getting backed up in the Ninth and Second Circuits as the result of those courts being swamped with asylum cases, which fall on top of an ever-burgeoning criminal docket.

The subject of collateral impact on civil cases was addressed on *Lou Dobbs Tonight* (CNN, April 19, 2005) following brief interviews with the Chief Judges of the Ninth Circuit (Mary M. Schroeder) and Second Circuit (John Walker):

TUCKER: Immigration cases now make up so much of the court calendar that they are affecting other cases. In the 9th Circuit Court of Appeals, for example, the time taken to complete a typical case has risen from one year, Lou, to a year-and-a-half.

DOBBS: A year-and-a-half?

TUCKER: Yes.

DOBBS: Five hundred percent increase over the past four years?

TUCKER: Right.

DOBBS: How in the world can the sys-

tem sustain with that kind of crushing burden?

TUCKER: Well, as these two chief judges are saying, they need the resources. They obviously want to deal with it. But they are short on the resources, current funding doesn’t allow for adequate staffing to deal with what they see coming from the immigration courts.

DOBBS: And this, of course, (sic) having a detrimental effect on every other part of the appellate process for others.

TUCKER: If you have a civil case in an appeals court, you are delayed. Your criminal case takes priority, but the civil cases all back up.

DOBBS: Incredible. You wonder what it’s going to take. Bill Tucker, thank you.

Transcript at 4-5. (Transcript available at <http://transcripts.cnn.com/TRANSCRIPTS/0504/19/ldt.01.html> (last visited January 9, 2008)).

On the other hand, the Herculean efforts in the Second Circuit to address asylum cases through additional panels may not have detracted materially from the attention paid to the civil docket. Without being in chambers and seeing how both time and talent are allocated to the asylum cases, one can only look

at the court statistics and speculate that the large influx of asylum appeals has led to a reduction in resources available to civil cases. But such a negative effect is almost unavoidable in light of the heavy workloads that circuit court judges have publicly described. For example, one circuit court judge reported at a DRI Appellate Advocacy program that any given appeal receives only about one hour of dedicated, focused time from each judge. With such precious little

time to connect with the decision-makers, there is no way to reallocate time away from the civil docket to address asylum cases without impairing the appellate review provided to civil cases.

Conclusion

Further study is warranted concerning the impact of BIA appeals on the civil appellate docket. Lawyers and clients involved in civil appeals need to know

if their cases are being delayed or otherwise negatively impacted by the crush of asylum appeals. If such effects are documented, the information would assist the courts in their long-standing efforts to increase the number of judges and staff to meet the growing caseload. In the unlikely event that such further review shows the courts are managing the surge in asylum cases without missing a beat on civil appeals, we can all applaud the courts for doing what appears to be the impossible.

The Right Tool for the Job

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Your computer is probably loaded with hundreds of typefaces — on mine, I counted 530. The vast majority of these are of no use to legal writers; you would never, for example, write a brief in a comic-book typeface or a letter to a client in Old English. A good writer steers clear of anything, including fancy typefaces, that calls attention to itself.

But if you limit yourself to the default Times New Roman for everything, you're doing your readers and yourself a disservice. Typefaces, like tools, are each designed for a particular purpose. Using just one typeface for everything is like using a flathead screwdriver on a Phillips screw: it may work, but it's not the right tool for the job.

For text, use serif type.

A serif is a little stroke at the end of a main stroke composing a letter or number. In the example below, the letter on the left has five serifs, while the one on the right has none:

E E

Studies show that long passages of serif type are generally easier to read than long passage of sans-serif type (type without serifs). Ruth Anne Robbins, *Painting With Print*, 2 J. ALWD 108, 120 (2004). More importantly, many courts require text in briefs to be in serif typeface. See, e.g., Fed. R. App. P. 32(a)(5)(A).

Times New Roman is a serviceable serif typeface, but it's not the best choice

for briefs. It was designed for newspapers, which means it was designed for skimming. For briefs, you want a typeface designed for thoughtful reading: one designed for books. The U.S. Seventh Circuit recommends Baskerville, New Baskerville, Bembo, Book Antiqua, Bookman Old Style, Calisto, Century, Century Schoolbook, Caslon, Deepdene, Galliard, Jenson, Minion, Palatino, Pontifex, Stone Serif, Trump Mediäval, and Utopia. *Requirements and Suggestions for Typography in Briefs and Other Papers* 5, <http://www.ca7.uscourts.gov/Rules/type.pdf>. Try one of these on your next brief.

For headings, use bold sans-serif type.

If you're still using the same typeface for both headings and text, try this experiment. Take a page of anything you've written lately that includes one or more headings. Put the entire page in a serif typeface with the headings in bold, and print it out. Now make one change to the page: convert just the headings into a sans-serif typeface (e.g. Arial), again in bold. Print out this page, lay it next to the one you printed out earlier. The contrast between the serif and sans-serif typefaces should make the latter jump off the page.

Use the same technique for anything that you want to stand out. When I compose the cover of a brief, I put everything in plain serif type except for two items: the docket number and the title (e.g. "Brief of Appellant") — these two items I put in slightly larger bold sans-serif type. Try that on the cover of your next brief.

For writing intended for on-screen reading, use Georgia or Verdana.

Georgia is a serif typeface designed to remain legible at low resolutions on a computer screen. This makes Georgia the best choice among serif typefaces for on-screen reading. The same goes for Verdana, a sans-serif typeface also designed for on-screen reading. See Daniel Will-Harris, *Georgia & Verdana: Typefaces designed for the screen (finally)*, <http://www.will-harris.com/verdana-georgia.htm>.

If you're tech-handy, set your e-mail program to display all plain-text e-mail in Georgia or Verdana — your eyes will thank you. And set it to put all your out-going e-mail in Georgia or Verdana — your readers' eyes will thank you.

For drafts, try Courier.

Courier is much maligned. Judge Mark Painter calls it "the most unreadable font." *The Legal Writer* 45 (3d ed. 2005). And Virginia appellate lawyer Steve Minor describes it as "just another random relic of history that's long since lost its purpose." Steven R. Minor, SW Virginia Law Blog, *Reason No. 1001 why all orders and opinions should be published, on the Web, and in the public eye*, <http://swvalaw.blogspot.com/> (Nov. 19, 2007).

I agree that nothing intended for someone else's eyes should be submitted in Courier when so many more attractive and more legible alternatives are available. But every tool, no matter how ugly, has its uses. Courier, in all its monospaced ugliness, may be ideal for preliminary drafts.

According to a *Slate* article, many professional authors compose in Courier. *My Favorite Font*, <http://www.slate.com/id/2166947/> (May 25, 2007). The main reason they do so is to facilitate ruthlessness in editing. Luc Sante puts it this way: “I like Courier because it seems provisional—I can still change my mind—whereas Times New Roman and its analogues look like book faces, meaning that they feel nailed down and immovable.” Jonathan Lethem expresses the same thought more succinctly: “I dislike the temptation of making a raw draft look like it’s already typeset.”

Sir Arthur Quiller-Couch advised would-be writers to edit themselves ruthlessly. “Murder your darlings,” he said. *On the Art of Writing* 203 (Dover 2006). If your darlings are in ugly Courier, you may feel less compunction about murdering them.

Before the final edit, convert to a different typeface.

Another advantage of using Courier for your first draft is that it forces you at some point to convert the typeface. If you switch typefaces between writing

and editing, you may find yourself a more effective self-editor.

This idea comes from Susan Bell’s book, *The Artful Edit*. Apparently it works, according to lawyer and author Gretchen Rubin. After reading Bell’s book, she tried drafting something in Times New Roman, then printing it out in Georgia. She found that “the changed look of the page made it easier to spot awkward spots.” Gretchen Rubin, *The Happiness Project, The happiness of finding a new technique to improve my writing*, <http://www.happiness-project.com/> (July 12, 2007). I tried it myself while writing this article, and instantly spotted two structural glitches that I missed before converting typefaces.

This technique may help you out of the mental rut you create when you edit yourself. In his book *Expectations*, George Gopen describes the problem: When you revisit a sentence you have written in order to judge whether it needs revision, you *think* the following is happening:

You see these words.

You know the meaning of each of these words.

When you put these words with those

meanings into this syntactical structure, the meaning of the whole is *X*.

Since *X* is what you intended to convey, you judge the sentence to be fine.

You move on.

What *actually* is happening is the following:

You see these words.

You *remember* those words.

Those are the words you summoned when you were trying to articulate *X*.

Mere association. Since those were the words you chose when you were trying to convey *X*, naturally they will remind you of *X* when you reencounter them.

George D. Gopen, *Expectations* 15–16 (2004). By changing typeface between drafting and editing, you may break the association between what you see when editing and what you saw when writing.

Conclusion

If you strive to blend in with the herd, then do as they do: use Times New Roman for everything. But if you strive for excellence, then select for each writing project the best typeface — the one most suitable for that project. Be like the master craftsman, who always selects the right tool for the job.

First Circuit

No Abuse of Discretion in Sanctioning Counsel for Refusing to Stipulate

Reinhardt v. Gulf Ins. Co., 489 F.3d 405 (1st Cir. 2007)

The district court judge in *Reinhardt v. Gulf Ins. Co.*, 489 F.3d 405, 410 (1st Cir. 2007) dismissed without prejudice a claim by EIU Group, Inc. (EIUG) for attorneys' fees pursuant to M.G.L. c. 93A for breach of fiduciary duty and, in a separate memorandum dismissed a claim by Gulf Insurance Company for unjust enrichment. Joseph Reinhardt, counsel for EIUG, "refused to enter into good faith negotiations over a stipulation for what a docket entry should read forcing" opposing counsel "to file a motion and incur significant litigation costs." *Id.* at 411. Even though the district court ultimately accepted Reinhardt's language on the docket entry, the First Circuit upheld an award of Rule 11 sanctions against him for failing to enter into good-faith negotiations concerning the proposed stipulation. The court also stated, "it is important to bear in mind that the sanction imposed was an obligation to perform ten hours of pro bono service. This sanction is not out of proportion to the violation." *Id.* at 417.

Court of Appeals Will Not Address an Issue Raised by an Amicus that was not Seasonably Raised by a Party

Dalomba Fontes v. Gonzales, 498 F. 3d 1 (1st Cir. 2007)

Antonio Dalombo Fontes, an alien and citizen of Cape Verde, petitioned for review of a decision of the Board of Immigration Appeals that ordered his deportation and denied his motion to reopen based on the alleged eligibility for waiver of deportability. The First Circuit denied the petition. *See Dalomba Fontes v. Gonzales*, 483 F. 3d 115 (1st Cir. 2006). Fontes petitioned for a rehearing and the ACLU moved for leave to file an amicus brief addressing an issue that Fontes raised for the first time on the rehearing. The issue stated: "[U]nder the Real ID Act, [the First Circuit] lacks jurisdiction to review the BIA's rejection of his *res judicata* argument." *Dalomba Fontes v. Gonzales*, 498 F. 3d 1, 2 (1st Cir. 2007). The First Circuit refused to address the issue, providing that it "will not address an issue raised by an amicus that was not seasonably raised by a party to the case." *Id.* The court went out of its way in denying rehearing to the state, stating:

Still, we acknowledge that the Suspension Clause issue is not only of constitutional dimension but also is colorable. Consequently, we wish to make clear that our holding on the jurisdictional issue should not be read, under principles of *stare decisis* as barring a future panel of this court, in a case in which the Suspension Clause issued is timely raised, directly presented, and fully briefed, from considering the import (if any) of the Suspension Clause with respect to the jurisdictional question. The panel intimates no view to the outcome of such an inquiry.*Id.*

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Second Circuit

Time File Notice of Appeal Runs from Entry of Original Judgment, Not Corrected Judgment When Corrected Judgment Does Not Change Matter of Substance

In re American Safety Indem. Co., 502 F.3d 70 (2d Cir. 2007) (per curiam)

The appellee, the Official Committee of Unsecured Creditors of Vanderveer Estates Holdings LLC (the "Committee"), removed this personal injury action from state court to the federal bankruptcy court. In a decision dated July 20, 2005, the bankruptcy court granted summary judgment dismissing the appellant, American Safety Indemnity Company's claims. The clerk of the bankruptcy court docketed an order and judgment on August 31, 2005 and American appealed that judgment to the district court. On October 3, 2006, the district judge affirmed the bankruptcy judgment in an opinion and order. On October 12, 2006, the district court entered a judgment that stated that the "July 20, 2005 order and judgment of the Bankruptcy Court [is] affirmed in all respects" (the "Original Judgment"). Subsequently, the district court amended the Original Judgment on October 26, 2006 by changing its reference to the date of the bankruptcy order from July 20, 2005 to August 31, 2005 (the "Corrected Judgment"). Apart from correcting the date, the original and corrected judgments were identical in all material respects.

After receiving the Corrected Judgment, American's counsel telephoned the district judge's chambers to inquire whether the time to appeal ran from the Original Judgment or the Corrected Judgment. American maintained that

the judge's law clerk advised its counsel that the time for an appeal would run from the Corrected Judgment and that it filed its notice of appeal on November 27, 2006 in reliance on the law clerk's representation.

The Committee moved to dismiss American's appeal for lack of appellate jurisdiction arguing that the notice of appeal was untimely filed. In response, American argued that the time to appeal ran from the Corrected Judgment because it constituted the "first proper judgment." The Second Circuit rejected this argument. It noted that it is well-established that where a judgment is reentered, and the subsequent judgment does not alter the substantive rights affected by the first judgment, the time to appeal runs from the first judgment. It is only when the lower court changes matters of substance or resolves a genuine ambiguity in a judgment previously rendered that the period within which an appeal must be taken begins to run anew.

In the alternative, American argued that the exceptional facts of this case compelled the application of the "unique circumstances" doctrine, which relaxes the strict enforcement of the time limits under Federal Rules of Appellate Procedure. The Second Circuit rejected this argument noting that *Bowles v. Russell*, 127 S. Ct. 2360, 2366 (2007) had expressly abrogated that doctrine. Moreover, the Second Circuit believed that the "wisdom of *Bowles*" was confirmed in this case because of the "mischief that would be spawned by excusing untimeliness on the basis of law clerk statements." Consequently, the Second Circuit granted the Committee's motion to dismiss the appeal.

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Third Circuit

Applicable Statute of Limitations When Change of Venue Occurs

Lafferty v. St. Riel, 495 F.3d 72 (3d Cir. 2007)

A federal district court in New Jersey with diversity jurisdiction transferred a personal-injury claim filed within the limitations statutes of both New Jersey and Pennsylvania to a federal district court in Pennsylvania because the New Jersey district was an improper venue. The federal district court in Pennsylvania granted the defendants' motion for judgment on the pleadings, finding that recovery was barred because the transfer occurred after the running of Pennsylvania's statute of limitations.

Distinguishing between transfers and dismissals under 28 U.S.C. § 1406(a) (relating to improper venue), the Third Circuit reversed and held that when cases timely filed in an improper forum within the limitations period of the transferor and the transferee forums are transferred rather than dismissed pursuant to § 1406(a), the date of filing is the initial filing date in the transferor forum, even if the case is not docketed in the new forum until after the limitations period there has run. The court explained that this result was required by the Supreme Court's decision in *Goldlawr, Inc. v. Heiman*, 369 U.S. 463 (1962), and its own interpretations in analogous situations. The Third Circuit expressly declined to decide whether a § 1406(a) transfer is timely when the limitations periods of the forums are different.

Federal Jurisdiction in a Removal of a Class Action Case

Frederico v. Home Depot, 507 F.3d 188 (3d Cir. 2007)

The plaintiff brought a putative class ac-

tion against Home Depot in a New Jersey state court, alleging fraud and breach of contract with respect to its vehicle rental return procedures. The defendant removed the case to federal court, and the district court decided that jurisdiction was proper pursuant to the Class Action Fairness Act of 2005 ("CAFA"). The court subsequently granted the defendant's motion to dismiss and entered judgment "without prejudice."

The first question, raised by the Third Circuit, sua sponte, considered whether it had jurisdiction over the district court's judgment entered "without prejudice." The court concluded that the dismissal of the complaint was final and appealable because the plaintiff clearly indicated an intent to stand on the original complaint.

The second issue the Third Circuit considered was whether the class action, removed as a diversity matter, properly met the requisite amount in controversy set by CAFA. Upon review of recent precedent in the circuit, the court found that where a complaint specifically avers that the amount sought is less than the jurisdictional minimum, a defendant seeking removal must prove to a legal certainty that plaintiff can recover the jurisdictional amount. By contrast, when a plaintiff has not specifically averred in the complaint that the amount in controversy is less than the jurisdictional minimum, the case must be remanded if it appears to a legal certainty that the plaintiff cannot recover the jurisdictional amount.

Tolling of New Jersey Statute of Limitations During Pendency of Action Brought in Court Which Lacked Personal Jurisdiction

Jaworowski v. Ciasulli, 490 F.3d 331 (3d Cir. 2007)

The plaintiff filed suit against the defendant in New York state court within the applicable statute of limitations. After the statute had run, the plaintiff filed a virtually identical complaint in a federal district court in New York, and the complaint was later transferred to a federal district court in New Jersey. After the state court action was discontinued, the district court dismissed the action believing itself bound by the Third Circuit's decision in *Young v. Clantech, Inc.*, 863 F.2d 300 (3d Cir. 1988).

Relying on recent changes in the legal landscape, the Third Circuit reexamined its prior ruling in *Young*, in which it had concluded that it was unwilling to predict that the Supreme Court of New Jersey would toll the statute of limitations for personal injury actions during the pendency of a suit brought in a court that did not have personal jurisdiction over the defendant. Upon review of various decisions of the Superior Court of New Jersey, including *Mitzner v. West Ridgelawn Cemetery, Inc.*, 709 A.2d 825 (N.J. Super. Ct. App. Div. 1998), the Third Circuit predicted that the Supreme Court of New Jersey would find that the personal injury statute of limitations could be equitably tolled during the pendency of an action brought in a court that lacked personal jurisdiction over the defendant in those situations in which the goals of the statute would not be offended.

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Fifth Circuit

Venue/Mandamus - Defendant's Burden Under a § 1404(a) Motion to Transfer Venue

In re Volkswagen of Am., Inc., No. 07-40058, 2007 U.S. App. Lexis 24931 (5th Cir. Oct. 24, 2007)

The plaintiffs were injured in an automobile accident while driving their Volkswagen (VW) in Dallas. They sued VW in Marshall, Texas (155 miles east of Dallas), claiming their injuries resulted from a design defect in the car. They asserted venue was proper because VWs are available in Marshall. VW moved to transfer venue to Dallas under § 1404(a) because none of the parties or witnesses lived in Marshall, all non-party witnesses were beyond the subpoena range of the court, all documents and physical evidence were located in the Dallas Division, the VW was purchased in Dallas, and the accident occurred in Dallas. The district court evaluated the § 1404(a) factors and determined that VW failed to show that the balance of convenience and justice *substantially* weighed in favor of transfer. VW sought mandamus relief in the Fifth Circuit, challenging the district court's use of the "substantial" standard to weigh a § 1404(a) motion to transfer.

The court reviewed the proper weight to be given a plaintiff's choice of venue under § 1404(a), a standard the court acknowledged had been unclear under its prior decisions. After reviewing prior precedent and the Supreme Court's directive in *Norwood v. Kirkpatrick*, 349 U.S. 29 (1955), that § 1404(a) was "intended to permit courts to grant transfers upon a lesser showing of inconvenience" than that required in the forum-non-conveniens context, the

court concluded that § 1404(a) did *not* require VW to show that the balance of convenience and justice substantially weighed in favor of transfer, a standard applied under forum-non-conveniens. Instead, the court held that a defendant must show "good cause" for a venue transfer, a standard more in line with § 1404(a)'s purpose of allowing transfer "for the convenience of parties and witnesses, in the interest of justice."

The court determined that the lower standard of "good cause" requires the moving party to show only that the transfer is more convenient for the parties and witnesses. Accordingly, if the transferee forum is no more convenient than the chosen forum, the plaintiff's choice prevails. If the defendant shows the transferee forum is "clearly more convenient," however, the court should order the transfer. After examining the private and public factors in determining convenience, the court held that the Dallas Division was more convenient and ordered the case transferred.

Procedure – Waiver of Challenge to Deficient JMOL Motion

Decorte v. Jordan, 497 F.3d 433 (5th Cir. 2007)

In this Title VII case, the defendant moved for judgment as a matter of law (JMOL) under Rule 50(a) after plaintiffs rested and at the close of evidence. In each motion, the defendant claimed insufficiency of the evidence, but failed to specify the law and facts that entitled him to judgment, as required by Rule 50(a)(2). The plaintiffs, however, did not challenge the motions for lack of specificity.

After the jury found for the plaintiffs, the defendant submitted a renewed motion for JMOL under Rule 50(b), which fully articulated the law and facts sup-

porting his insufficiency-of-the-evidence argument. The plaintiffs also failed to inform the district court that the defendant's arguments in the renewed motion for JMOL were not asserted in the prior motions, but were made for the first time in the renewed motion.

On appeal to the Fifth Circuit, the plaintiffs claimed the defendant forfeited his insufficiency-of-the-evidence argument for failing to properly assert it in his two pre-verdict motions. The court concluded that because the plaintiffs did not raise their forfeiture argument in opposition to the renewed motion for JMOL, they waived the right to raise it on appeal. In any event, the court held that the plaintiffs presented sufficient evidence to support their race-discrimination claims under Title VII, and affirmed.

Insurance – Duty of Reimbursement Between Primary Insurers

Liberty Mut. Ins. Co. v. Mid-Continent Ins. Co., No. 03-10705, 2007 WL 3375636 (5th Cir. Nov. 14, 2007)

Liberty sued Mid-Continent for reimbursement of Mid-Continent's proportionate share of a \$1.5 million settlement Liberty paid on behalf of the insured, Kinsel Industries. Both Liberty and Mid-Continent: (1) were primary insurers of Kinsel; (2) had maximum policy limits of \$1 million with Kinsel; (3) cooperatively assumed Kinsel's defense; and (4) admitted coverage. After Liberty paid the plaintiff \$1.5 million, it sought reimbursement from Mid-Continent for its proportionate share of the settlement. Mid-Continent, however, refused to contribute more than \$150,000 because it contended it would only have settled the case for \$300,000. The Fifth Circuit acknowledged that \$1.5 million was a reasonable settlement

offer, while \$300,000 was unrealistic. Unsure if Mid-Continent owed Liberty an actionable duty to reimburse its share of the settlement, the court certified the question to the Supreme Court of Texas.

In *Mid-Continent Ins. Co. v. Liberty Mut. Ins. Co.*, 236 S.W.3d 765 (Tex. 2007), the supreme court held that Mid-Continent did not owe Liberty a duty of reimbursement—either directly or by subrogation of the insured's rights. The court first held that Liberty could not bring a contribution claim against Mid-Continent because no contractual right of contribution existed between them, and the pro-rata clause in their CGL policies precluded a claim for equitable contribution. The court further held that Liberty had no subrogation claim against Mid-Continent after fully indemnifying the insured because “a fully indemnified insured has no right to recover an additional pro rata portion of settlement from an insurer regardless of that insurer's contribution to the settlement.” *Id.* at 775-76. Accordingly, the Fifth Circuit remanded the case to the district court and ordered that court to enter judgment in favor of Mid-Continent consistent with the Texas Supreme Court's opinion.

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Eighth Circuit

Supreme Court Remand Order Applies Only To Pro Se Party Who Sought Certiorari and Not to Other Appellant

Abdul-Muhammad v. Kempker, 486 F.3d 444 (8th Cir. 2007)

The Eighth Circuit reviewed a remand order issued by the United States Su-

preme Court that was favorable to a pro se complainant, but refused to apply the order to the co-complainant because he did not join in the petition for writ of certiorari.

In previous proceedings, the court of appeals had affirmed the dismissal of a prison-condition complaint filed by order issued by the United States Supreme Court that was favorable to a pro se complainant, but refused to apply the order to the co-complainant because he did not join in the petition for writ of certiorari.

In previous proceedings, the court of appeals had affirmed the dismissal of a prison-condition complaint filed by Missouri inmates Malik Abdul-Muhammad and Rashid Ash-Sheikh Junaid for failure to exhaust all available administrative remedies. *See Abdul-Muhammad v. Kempker*, 450 F.3d 350 (8th Cir. 2006). The court based its decision on the principle that under the Prison Litigation Reform Act of 1995 (PLRA), 42 U.S.C. § 1997e(a), an inmate must first properly exhaust each claim against each defendant through the prison grievance process or the complaint must be dismissed in its entirety.

After the appellate court's decision, Ash-Sheikh Junaid, proceeding pro se, filed a petition for a writ of certiorari with the Supreme Court. Abdul-Muhammad did not file a petition, nor did he file any document with the Supreme Court indicating he intended to join in Ash-Sheikh Junaid's petition. The Supreme Court granted Ash-Sheikh Junaid's petition, vacated the court of appeals' judgment, and remanded the case for further consideration in light of Supreme Court decision *Jones v. Bock*, -- U.S. ---, 127 S.Ct. 910 (2007), where the Supreme Court had concluded that the PLRA requires only that the unex-

hausted claims be dismissed and does not require that the complaint be dismissed in its entirety.

On remand, the court of appeals accordingly reversed the district court's dismissal of Ash-Sheikh Junaid's claims and remanded the case for further consideration. *Abdul-Muhammad*, 450 F.3d at 446. However, the appellate court did not extend the Supreme Court's remand order to Abdul-Muhammad. Because only Ash-Sheikh Junaid filed a petition and the petitioner was pro se, the Eighth Circuit held that "Ash-Sheikh Junaid is the only party to benefit from the Supreme Court's order . . ." *Id.* at 445 (citing Sup. Ct. R. 12.6.). The court again affirmed the district court's dismissal of Abdul-Muhammad's claims for failure to exhaust all available remedies.

Notice Of Appeal Held Ineffective To Reach Pre-Judgment Order; Separate Document Rule Also Applied

Chambers v. City of Fordyce, -- F.3d --, 2007 WL 4192198 (8th Cir. Nov. 29, 2007)

The Eighth Circuit dismissed an appeal from an order denying a plaintiffs' motion for relief from judgment and held the notice of appeal did not trigger the court's jurisdiction to review an order granting partial summary judgment. The plaintiffs sued the City of Fordyce and individual police officers under §42 U.S.C. 1983, claiming that excessive force was used in the shooting death of their son.

In March 2002 the district court granted summary judgment to all but two individual defendants. After the parties settled the remaining claims, the district court entered an order granting a joint motion to dismiss with prejudice

on July 2, 2004. The plaintiffs filed a "Motion to Reopen Case and/or Relief for Judgment," but the district court denied the motion on September 23, 2004. The plaintiffs filed a notice of appeal on October 25, 2004.

The defendants filed a motion to dismiss the appeal, arguing that the notice of appeal was untimely. The Eighth Circuit held that the July order was a final appealable order. The district court, however, had not entered judgment dismissing the case on a separate document as required by Fed. R. Civ. P. 58(a)(1). Under Rule 4(a)(7)(A)(ii), the appeal clock did not begin to run until November 29, 2004, 150 days after the July order was entered. The court concluded that "[t]he net effect of these rules is that the Notice of Appeal filed on October 25, 2004, was actually premature, but is still timely in relation to the July 2, 2004 final order." *Id.* at 881.

The notice of appeal did not, however, reach the March 2002 partial summary judgment order. Under Rule 3(c)(1)(B), the appellant must "designate the judgment, order or part thereof being appealed" in the notice of appeal, which is a jurisdictional requirement. Here, the notice of appeal did not identify the March 2002 Order. Additionally, an appeal from a motion for relief from judgment does not raise the underlying judgment for purposes of appellate review. The Eighth Circuit, therefore, dismissed the appeal for lack of jurisdiction over the 2002 summary judgment order, which was the only error briefed on appeal.

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Tenth Circuit Court Procedures General Order No. 95-01, In Re: Electronic Submission Of Documents And Conversion To An Electronic Case Management System (Aug. 10, 2007).

The Tenth Circuit implemented its new case management system on September 4, 2007, as part of its transition to an electronic system. All attorneys, and all pro-se litigants who are able, are required to e-submit copies of pleadings in Native PDF on or before the due date for the filing, as well as still being required to submit hard copies to the clerk's office. In addition, service from the court is being made via e-mail for counsel and all parties who have provided a valid e-mail address to the court. Complete details regarding requirements for filing and service of particular documents can be found in General Order No. 95-01 and a related Notice to Counsel and Litigants, both of which can be printed from the court's website at www.ca10.uscourts.gov. The Notice also invites counsel and parties to call the clerk's office at 303-844-3157 with specific questions.

Interlocutory Review of Qualified Immunity under 28 U.S.C. §1291

Weise v. Casper, No. 06-1504 and 06-1516, 2007 U.S. App. LEXIS 26865 (10th Cir. Nov. 20, 2007)

In this *Bivens* action, the majority opinion dismissed an appeal from an interlocutory order denying the defendants' motion to dismiss under Rule 12(b)(6) based on qualified immunity. The court noted that denials of dispositive motions based on qualified immunity are

appealable only to the extent they turn on issues of law and not issues of fact. While Rule 12(b)(6) motions normally presume well-pled factual allegations to be true and, therefore, usually turn on issues of law, the trial court in this instance correctly noted that there was a factual issue regarding the defendants' standing to raise the qualified immunity defense and ordered limited discovery on this issue. Because the trial court's order only noted the existence of a foundational issue of fact and did not contain any legal decision, it was not appealable under the collateral doctrine of 28 U.S.C. § 1291. A lengthy dissent argued that the order was appealable because it turned on "a pure issue of law" concerning the standing of private citizens to invoke qualified immunity in a *Bivens* case "in the absence of proof that they were closely supervised by federal officials."

Waiver Versus Forfeiture in Determining Right to Appellate Relief

U.S. v. Carrasco-Salazar, 494 F.3d 1270 (10th Cir. July 30, 2007)

The Tenth Circuit held that the criminal defendant-appellant had waived previously-made objections by confirming that the issues had "been resolved" in response to the trial court's questions at the sentencing hearing. The court emphasized the distinction between waiver ("the intentional relinquishment or abandonment of a known right") and forfeiture ("the [neglectful] failure to make the timely assertion of a right"). *Id.* at 1272 (*cites omitted*). This distinction is important on appeal because a party who has inadvertently forfeited a right by failing to make a proper objection may obtain relief for plain error, but a party who has waived a right cannot get appellate relief. *Id.* Thus, for

example, an invited error constitutes a waiver precluding appellate relief. In the case before the court, the defendant had not actually invited the alleged error, but appeared to have abandoned his prior objections. Reviewing similar cases from other circuits, the Tenth Circuit concluded that an abandoned objection is waived, rather than forfeited. In this case, the dialogue at the sentencing hearing demonstrated that the objections had been waived and that the waiver was knowing and voluntary. Therefore, the court would not consider the merits of the waived arguments, and appellant's criminal sentence was affirmed.

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Eleventh Circuit

Appellate Jurisdiction: Stay Orders

King v. Cessna Aircraft Co., 505 F.3d 1160 (11th Cir. 2007)

In this mass tort case arising from the largest airplane disaster in Italian history, the Eleventh Circuit held that a stay order entered by the district court staying certain portions of a federal lawsuit in favor of foreign proceedings in Italian court was appealable. The Court based its holding on the exception to the final judgment rule for stay orders that put a litigant "effectively out of court." *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 9–10 (1983). Because the stay order at issue had "the legal effect of preventing [the plaintiff] from proceeding with his claims in federal court for an indefinite period of time, potentially for years," the court concluded it had appellate jurisdiction to review the order that put him out of court. 505 F.3d at 1169.

Appellate Jurisdiction: Arbitration Orders

Conart, Inc. v. Hellmuth, Obata + Kassabaum, Inc., 504 F.3d 1208 (11th Cir. 2007)

The Eleventh Circuit in this case refused to exercise appellate jurisdiction over the district court's refusal to enjoin arbitration of claims arising from a construction dispute. Appellate jurisdiction over such a decision is barred by the plain language of 9 U.S.C. § 16(b)(4), the court held. The court refused to find jurisdiction under the statute generally giving appellate jurisdiction over orders "refusing . . . injunctions." *See id.* at 1210. "[T]he plain terms of § 16(b) fit this situation snugly; there is no wiggle room," the court stated. *See id.* To hold otherwise "would write out FAA §16(b)(4)'s clear command, because all orders 'refusing to enjoin an arbitration' are orders 'refusing . . . injunctions.'" *Id.*

Appellate Jurisdiction: Military Immunity

McMahon v. Presidential Airways, Inc., 502 F.3d 1331 (11th Cir. 2007)

In this wrongful death action arising from an airplane crash in Afghanistan that killed three servicemen, the Eleventh Circuit held that a governmental contractor claiming derivative immunity under the *Feres* doctrine can immediately appeal the district court's denial of a motion to dismiss. The Court held such an order is an appealable collateral order. *See Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949).

Appellate Jurisdiction: Class Certification Orders

Jenkins v. BellSouth Corp., 491 F.3d 1288 (11th Cir. 2007)

This class action appeal raised an interesting question: If the parties miss the

10-day deadline under Rule 23(f) for petitioning the circuit court for permission to appeal a class certification order, can the district court reenter the order and restart the clock? The Eleventh Circuit's answer: No. Unlike 28 U.S.C. § 1292(b), which involves the discretion of *both* the district court *and* the court of appeals, Rule 23(f) involves the discretion of *only* the court of appeals. Thus, "the district court was without the authority to circumvent the ten-day deadline for obtaining interlocutory review of its order denying class certification by vacating and reentering that order after the original deadline for seeking interlocutory relief under Rule 23(f) had passed." *Id.* at 1292.

Precedent: Prior Panel Rule

Atlantic Sounding Co. v. Townsend, 496 F.3d 1282 (11th Cir. 2007)

The question presented in this interlocutory appeal was whether a prior Eleventh Circuit decision allowing an injured sailor to claim punitive damages for his employer's refusal to pay for his maintenance and cure, *Hines v. J.A. LaPorte, Inc.*, 820 F.2d 1187 (11th Cir. 1987), was inconsistent with a more recent Supreme Court decision, *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), which barred non-pecuniary damages in a sailor's wrongful death action. The court held that the prior panel rule required it to follow the holding in *Hines* notwithstanding the contrary reasoning of *Miles*. As Judge Carnes explained in his concurrence, where an argument "does not pit holding against holding, but reasoning against holding," the prior circuit holding wins out over Supreme Court reasoning. This is the essence of the prior panel rule. "It promotes predictability of decision and stability of the law, it helps keep the

precedential peace among the judges of this court, and it allows us to move on once an issue has been decided." *Hines*, 820 F.2d at 1286. Without the rule, "every sitting of this court would be a series of do-overs, the judicial equivalent of the movie 'Groundhog Day.'" *Id.* "While endlessly recurring fresh starts is an entertaining premise for a romantic comedy, it would not be a good way to run a multi-member court that sits in panels," Judge Carnes observed. *Id.*

Post-Trial Motions: Renewed Motion for Judgment as a Matter of Law

Chaney v. City of Orlando, 483 F.3d 1221 (11th Cir. 2007)

The Eleventh Circuit in this case held that the district court erred in relying on the jury's findings in a special verdict form in deciding a Rule 50(b) motion. As the court reminded readers, "Regardless of timing, . . . in deciding a Rule 50 motion[,] a district court's proper analysis is squarely and narrowly focused on the sufficiency of the evidence." *Id.* at 1227. In granting the defendant's Rule 50(b) motion notwithstanding the jury's adverse verdict, the district court erred by relying on the jury's specific findings on the verdict form. That was reversible error. "The fact that Rule 50(b) uses the word 'renew[ed]' makes clear that a Rule 50(b) motion should be decided in the same way it would have been decided prior to the jury's verdict." *Id.* at 1228. Thus, the court held "the jury's particular findings [were] not germane to the legal analysis." *Id.*

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Time for Filing Notice of Appeal

Cambridge Holdings Grp., Inc. v. Fed. Ins. Co., 489 F.3d 1356 (D.C. Cir. 2007)

The D.C. Circuit dismissed an appeal as untimely because the plaintiff did not file a notice of appeal within thirty days after the district court entered judgment. The court held that a district court order disposing of all claims against all properly served defendants was a final judgment even though the order did not resolve claims against an unserved defendant.

The district court entered a July 12, 2004 order dismissing four counts of a complaint alleged against two properly served defendants for failure to state claims upon which relief can be granted. The order said nothing about a fifth count alleged against only an unserved defendant. No docket activity followed until April 28, 2005 when the district court *sua sponte* scheduled a status conference, which led to a dispute about whether the July 12, 2004 order was final and appealable. On June 20, 2005, the court entered an order dismissing the fifth count for failure to prosecute and dismissing the case in its entirety. The court contemporaneously entered a separate document entitled "Final Judgment." The plaintiff filed a notice of appeal on July 19, 2005 and appealed only the dismissal of a claim within the first four counts.

The D.C. Circuit dismissed the appeal because the plaintiff did not file a notice of appeal "within 30 days after the judgment or order appealed from [was] entered." Fed. R. App. P. 4(a)(1)(A). The plaintiff contended that the July 12, 2004 order was not a final

decision appealable under 28 U.S.C. § 1291 based on Federal Rule of Civil Procedure 54(b), which specifies that a district court “may direct the entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay.” The district court indisputably had not made this express determination.

Reviewing the other circuits’ treatment of this issue, the D.C. Circuit held that “defendants that have not been subject to effective service are not ‘parties’ within the meaning of Rule 54(b),” and “a district court order disposing of all claims against all properly served defendants satisfies the requirements of Rule 54(b) even if claims against those not properly served remain unresolved.” 489 F.3d at 1360-61. Therefore, the July 12, 2004 order was a final judgment despite the unresolved fifth count. The limitations period for filing a notice of appeal commenced 150 days after entry of that order on the civil docket, December 9, 2004. See Fed. R. App. P. 4(a)(7) (“A judgment or order is entered for purposes of this Rule 4(a) . . . when the judgment or order is entered in the civil docket...and when the earlier of these events occurs: the judgment or order is set forth on a separate document, or 150 days have run from entry of the judgment or order in the civil docket”); cf. Fed. R. Civ. P. 58(a) (“Every judgment and amended judgment must be set out in a separate document.”). The plaintiff’s time to file a notice of appeal expired thirty days later in January 2005.

The D.C. Circuit noted that it had no reason to resolve certain related issues. Eight circuits “treat an improperly served defendant as never [having been] before the district court” for purposes

of Rule 54(b). 489 F.3d at 1360. The D.C. Circuit concluded that qualifications to this rule applied by the Seventh Circuit and Ninth Circuit would not affect its decision. The Seventh Circuit requires that “an attempt by the plaintiff to serve the complaint on the unserved defendant would be untimely under Fed. R. Civ. P. 4(m),” and “any new complaint against the unserved defendant would be barred by the statute of limitations.” See *id.*; see also *Manley v. City of Chicago*, 236 F.3d 392, 395 (7th Cir. 2001). The Ninth Circuit has qualified the other circuits’ approach by holding that an order disposing only of all claims against the served parties is not final if “it is clear from the course of proceedings that further adjudication is contemplated” by the district court. *Disabled Rights Action Comm. v. Las Vegas Events, Inc.*, 375 F.3d 861, 871-72 (9th Cir. 2004). The D.C. Circuit also expressly left open whether a judgment that does not resolve claims against an allegedly unserved defendant is appealable where factual uncertainty exists as to whether the party was properly served.

Standard of Review

Galvin v. Eli Lilly & Co., 488 F.3d 1026 (D.C. Cir. 2007)

Writing for the court, Chief Judge Ginsburg flagged a standard of review issue: “Although we have not formally addressed the standard applicable to review of a district court decision to treat an affidavit as a sham, *Pyramid* suggests the determination is part of our overall review of summary judgment and accordingly subject to *de novo* review.” 488 F.3d at 1030 n.* (citing *Pyramid Secs. Ltd. v. IB Resolution, Inc.*, 924 F.2d 1114, 1123-24 (D.C. Cir. 1991)). He also commented that the Second Circuit

has implied this determination is a matter of law, while the First, Sixth, Tenth, and Eleventh Circuits have treated this as an evidentiary issue subject to review for abuse of discretion. Compare *Langman Fabrics v. Graff Californiawear, Inc.*, 160 F.3d 106, 112 (2d Cir. 1998), with *Torres v. E.I. Dupont De Nemours & Co.*, 219 F.3d 13, 21 (1st Cir. 2000); *Briggs v. Potter*, 463 F.3d 507, 512-13 (6th Cir. 2006); *Kalis v. Colgate-Palmolive Co.*, 231 F.3d 1049, 1055-56 (7th Cir. 2000); *Lantec, Inc. v. Novell, Inc.*, 306 F.3d 1003, 1016 (10th Cir. 2002); *Telfair v. First Union Mortgage Corp.*, 216 F.3d 1333, 1342-43 (11th Cir. 2000). The D.C. Circuit did not resolve the issue in this case because there was no genuine dispute over a material fact even if the disputed supplemental affidavits were admitted.

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Federal Circuit

Transfer of Jurisdiction to Appellate Court

Gilda Indus., Inc. v. United States, -- F.3d --, No. 2007-1172, 2008 WL 53271 (Fed. Cir. Jan. 4, 2008)

The Federal Circuit held that jurisdiction remained in the trial court where a party had filed a defective notice of appeal and that the docketing of the appeal in the circuit court had no jurisdictional significance.

As a result of unsuccessful electronic filing, the plaintiff’s counsel filed a notice of appeal one day late. A week later, the Federal Circuit docketed the appeal on the same date that the plaintiff filed

a motion in the trial court to extend the deadline for filing a notice of appeal by one day. The trial court concluded that it lacked jurisdiction and denied the motion based on the plaintiff having filed a notice of appeal. The Federal Circuit dismissed that appeal as untimely. The plaintiff then appealed the trial court's order denying the motion to extend the filing deadline.

The Federal Circuit stated that *Bowles v. Russell*, 127 S. Ct. 2360, 2366 (2007) “ma[de] clear that the timely filing of a notice of appeal in a civil case is a jurisdictional requirement.” Accordingly, neither the filing of the defective notice of appeal nor docketing of that appeal in the Federal Circuit divested the district court of jurisdiction. This conclusion followed also from the rationale of *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) that “a federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously.” The Federal Circuit remanded so the trial court could determine whether the untimely notice of appeal resulted from “excusable neglect or good cause under Fed. R. App. P. 4(a)(5).” 2008 WL 53271, at *4.

Appeal of Remand of Supplemental State Law Claims

HIF BIO, Inc. v. Yung Shin Pharms. Indus. Co., 508 F.3d 659 (Fed. Cir. 2007)

Departing from the majority view in the circuit courts of appeal, the Federal Circuit held that the bar in 28 U.S.C. § 1447(d) on appellate review of orders remanding actions to state court extends to orders declining to exercise supplemental jurisdiction over pendent state law claims.

In a removed action, the plaintiffs filed a complaint that included a federal RICO claim, causes of action seeking a declaratory judgment

for ownership and inventorship, and nine indisputably state law causes of action. The district court granted a motion by the defendants to dismiss the RICO claim, declined supplemental jurisdiction over the remaining claims, and remanded the case to state court. A defendant appealed contending that the district court remanded before disposing of all federal claims (i.e., that the ownership and inventorship claims arose under federal law). The Federal Circuit did not resolve this issue, however, holding instead that 28 U.S.C. § 1447(d) barred appellate review of the remand order.

Section 1447(d) provides that “[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise.” 28 U.S.C. § 1447(d) (2008). Read *in pari materia* with Section 1447(c), the bar on appellate review is limited to remand orders based either on a lack of subject matter jurisdiction or defects in removal procedure. See *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996).

The Federal Circuit concluded that it had to decide whether a remand based on declining jurisdiction under 28 U.S.C. § 1367(c) falls within Section 1447(c) and is, therefore, barred from appellate review by Section 1447(d). The court recognized that the Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits have all held that review is not barred. However, the court said the other circuits rely on a footnote in *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 355 n.11 (1988) — “[Section] 1447(c)...do[es] not apply to cases over which a federal court has pendent jurisdiction.” — which in the panel's view has not been properly limited to its historical context.

In a concurring opinion in *Things Remembered, Inc. v. Petrucca*, 516 U.S. 124, 130 (1995), Justice Kennedy stated that although *Cohill* held that “a district court may remand to state court a case in which . . . only pendent state-law claims remained,” the court “did not find it necessary to decide whether [§ 1447](d) would bar review of a remand on these

grounds.” In *Powerex Corp. v. Reliant Energy Services, Inc.*, 127 S. Ct. 2411, 2418-19 & n.4 (2007), the Court stated that “[i]t is far from clear . . . that when discretionary supplemental jurisdiction is declined the remand is not based on lack of subject-matter jurisdiction for purposes of § 1447(c) and § 1447(d)” and “[w]e have never passed on whether *Cohill* remands are subject-matter jurisdictional for purposes of post-1988 versions of § 1447(c) and § 1447(d).”

As part of “this new perspective on the jurisdictional bar of § 1447(d),” the Federal Circuit stated that *Powerex* sweeps under Section 1447(d) any remand order that can be “colorably characterized as a remand based on lack of subject matter jurisdiction.” 508 F.3d at 665. The Federal Circuit concluded that although the Court held in *Quackenbush* that Section 1447(d) does not bar review of abstention-based remand orders, remands under Section 1367(c) are jurisdictionally distinct. A court “abstains” from hearing claims over which it has an independent basis of subject matter jurisdiction, whether it be federal question jurisdiction or diversity jurisdiction. The Federal Circuit reasoned, by contrast, that “because every § 1367(c) remand necessarily involves a predicate finding that the claims at issue lack an independent basis of subject matter jurisdiction, a remand based on declining supplemental jurisdiction can be colorably characterized as a remand based on lack of subject matter jurisdiction.” *Id.* at 666. The court, therefore, held that a remand based on declining supplemental jurisdiction falls within Section 1447(c) and is barred from appellate review by Section 1447(d).

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Since its inception three years ago, the Appellate Advocacy Amicus Subcommittee continues to grow and now has more than 40 members with a vast array of appellate experience. Our members' court admissions cover most state courts, the District of Columbia, the United States Supreme Court and all Circuit Courts of Appeal. In the

past year, DRI's Amicus Committee authorized several amicus briefs, including two in the United States Supreme Court, for which DRI selected authors from our highly qualified subcommittee members to prepare the briefs. Our subcommittee members remain willing to work with DRI's Amicus Committee to identify important cases and select au-

thors ready to assist in preparing amicus briefs so that DRI's voice is heard in important appeals throughout the country.

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ANNUAL MEETING SUBCOMMITTEE REPORT

The Annual Meeting subcommittee is currently considering several suggestions we have received for a speaker at the Appellate Advocacy committee meeting at the DRI Annual Meeting. The 2008 Annual Meeting will take place this year

in New Orleans, LA on Wednesday, October 22, 2008 - Sunday, October 26, 2008. We welcome any additional speaker or topic suggestions from our members. Please contact me or vice-chair David Furlow with your ideas.

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The Membership Committee is actively recruiting new members and brainstorming ways to grow our membership rolls for 2008. From the end of 2002 through October 2007, the Appellate Advocacy Committee grew from 340 to 430 members. While this growth is impressive, there is further opportunity for recruiting new members within DRI, as DRI membership as a whole climbed from 21,065 members at the end of 2002 to 25,466 today.

The focus for membership in 2008, therefore, will primarily be on recruit-

ing members from other DRI groups. We will further be focusing on getting members in “big firms” to encourage multiple memberships instead of having one representative member and on making sure our current members are happy with their involvement in this Committee. To that end we’ll be working with DRI on “cross-marketing”, asking those of you in larger firms to pitch in on recruiting and encouraging you to let us know how the Committee can serve you better. We’ll also be looking forward to seeing everyone at the February 2008

Appellate Advocacy Seminar. Please send on any ideas or leads you may have for increasing our membership to Todd or me at the email addresses below. We look forward to hearing from you.

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You should have already received our program report by direct mail. Our latest and best news is that our seminar is coming up and you should make your reservations now for Orlando, Florida on February 28-29, 2008. Our accommodations are superb. We will be at the JW Marriott Orlando in Grande Lakes. This resort features a nearby golf course, spa, a lazy-river outdoor heated pool, and, of course, it is near to all the wonderful distractions offered in the Orlando area.

The tremendous program is the direct result of hard work of our committee members and lots of good fortune. Our programming committee first brainstormed and then extended invitations to speakers through the truly impressive network of contacts we collectively possess.

Thursday's session will include a distinguished panel of federal and state appellate judges – Judge Diane Sykes of the Seventh Circuit, Chief Justice Jean Hoefer Toal of the South Carolina Supreme Court, and Judge Theodore McKee of the Third Circuit. In addition, we will hear an assessment of the Roberts Court by renowned legal experts, Patricia Ann Millett of Akin, Gump, Strauss, Hauer, & Feld, who has argued more cases than any other woman lawyer alive today, and Professor David Stras, who has frequently contributes to SCOTUSblog and is often sought-after for media interviews about the Supreme Court. Also on Thursday, Director of the Administrative Office of the United States Courts, James Duff, will articulate his observations on recent trends in federal appellate courts.

Appellate lawyers are always seeking an edge in brief writing and our seminar

will provide useful insights in this quest. Professor Ruth Anne Robbins of Rutgers School of Law will provide crucial suggestions for how to persuasively present your written argument and include tips on formatting and typography. Her ideas are so highly regarded that the Seventh Circuit has posted one of her papers on its website. Professor Emily Sherwin of Cornell University Law School will delve into what makes legal analysis effective, sharing her research on what guides judges as they create and apply common law. Interestingly, Professor Sherwin argues that many judges do not rely on formalized legal reasoning.

Despite our devotion to rules and case law, we all suspect that there is more than this at stake in successful appellate advocacy. During Friday's session, Luther Munford, former President of the American Academy of Appellate Lawyers, will discuss the unwritten rules of appellate advocacy. And Dahlia Lithwick, a professional journalist for *Slate*, will disclose how she breathes life into document materials when she writes.

Finally, on both days of our seminar, we will hear from lawyers who practice inside the corporation. On Thursday, a panel of three general counsel will discuss why and how they want appellate lawyers involved at the trial stage. On Friday, we will hear from a senior vice president of an insurance and risk management corporation who regularly consults with large law firms on professional responsibility and liability issues.

We are hoping for record-breaking attendance and thank all of our members who have already registered. A number of you are spreading the word about our seminar by recommending it to your

colleagues. These efforts will result in a lively social hour on both Wednesday and Thursday evenings. We hope to see you there.

If you have comments or questions about the upcoming seminar, please contact either Diane Bratvold or Mitch Brown.

Link to DRI website for registration information and brochure:

<http://dri.org/DRI/open/CLE.aspx?sem=20080010>

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The Teleconference Subcommittee plans to hold two teleconferences in 2008 on topics of broad-based interest to trial and appellate counsel. These teleconferences will address not only recent appellate decisions and developments, but also practical applications of major rulings to trial counsel.

As one example, we are considering a program on what Justice Breyer has called “the case of the century,” *Hall Street Associates L.L.C. v. Mattel, Inc.* This case should decide a question that has divided the circuits—whether the “Federal Arbitration Act (‘FAA’) precludes a federal court from enforcing the parties’ clearly expressed agreement providing for more expansive judicial review of an arbitration award than the narrow standard of review otherwise provided for in the FAA.” Some circuits have held that an arbitration clause may provide for judicial review of an arbitrator’s erroneous findings of fact and conclusions of law, similar to an appellate court’s review of a trial court decision. Other circuits have held that judicial review is limited to whether the arbitrator had authority to act, maintained fair

procedures, and made a decision that was at least plausible. A teleconference on this topic would include experts discussing the Supreme Court’s decision and its impact on practitioners who draft and litigate arbitration issues in commercial, insurance, employment and other areas.

Another possible topic is the Supreme Court’s recent decision in *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955 (2007), in which the Court, according to many commentators, redefined the standard for pleading under Federal Rule of Civil Procedure 8(a)(2). Although *Twombly* was an antitrust case, the Court’s statements could have much more broad-based application to defense practitioners. The Court’s basic holding was that factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the complaint’s allegations are true. Thus, a plaintiff’s obligation to provide the “grounds” of his “entitle[ment] to relief” requires more than labels and conclusions, and a formulaic recitation of a cause of action’s elements simply will not do. These holdings could be used to

challenge complaints in products liability, commercial and many other types of cases. A teleconference on this topic would feature a discussion of *Twombly* and its holdings followed by speakers from various practice areas discussing how those holdings could be applied to sample complaints and allegations in those areas.

These topics are not in stone. If any members have suggestions for other topics or formats for teleconferences, we are open to your suggestions. Be on the lookout for announcements on upcoming teleconferences. We look forward to your attendance.

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The DRI web site has not always been attractive, or accessible, or useful. But that has changed. The current version of the web site is everything that prior versions were not: it's simple to navigate, and it's full of resources that make logging in worthwhile.

A true story: A few months ago, a lawyer at my firm asked for some general information about staying a federal-court judgment by posting a supersedeas bond. I remembered that at least one of our past appellate seminars included a presentation on just that topic. I was about to start shuffling through my CDs of seminar materials when it occurred to me that all this stuff might be online at www.dri.org. So I went to the web site, logged in, went to "DRI Online" (one of the headings under "Quick Links" on the left side of the screen), and ran a search for "supersedeas." The web site instantly returned the following materials, all in PDF format:

- *Supersedeas Bonds: Back Door to Coverage*, an article by Edwin L. Scherlis from the August 1995 issue of *For the Defense*.
- *Staying the Judgment on Appeal: Supersedeas Bonds, Their Alternatives, and (Some of) the Issues Pertaining Thereto*, materials for a seminar presentation by John M. Bredehoft, Michael B. King, and others.
- *Stays, Supersedeas Bonds and Injunction Bonds*, materials for a seminar presentation by Darlene A. Bornt.
- *Handling Appeal of the Excess Judgment*, materials for a seminar presentation by Roger W. Hughes.
- *Appeal and Supersedeas Bonds: Understanding Jurisdictional Variations*, an article by Denise C. Puente from the September 2004 issue of *For the Defense*.

I downloaded the PDF files, bundled them up in an e-mail, and sent them to the inquiring lawyer. Total research and e-mail time: 12 minutes.

My first goal as web-page chair is to educate committee members about the wealth of resources available on the web site. Did you know that it includes every article in *For the Defense* going back to 1991? Or all materials from all our appellate seminars? Or that, if you're so inclined, you can search for and download every *Writer's Corner* ever published in *For the Defense*? Or that, if you're updating your résumé, you can search for your own name and get a handy list of your own *Certworthy* and *For the Defense* publications? Indeed, the DRI web site has become two things we never imagined it would become: (1) a valuable research tool; and (2) a temptation to waste time.

My second goal is to make the resources already on the web site more accessible. I envision a menu on our committee web page providing one-click access to every appellate issue of *For the Defense* and materials from each of our appellate seminars. Those materials are on the web site now; the goal is to provide easy access to them from our committee web page.

My third goal is to increase the resources available on our web page. Among other things, I'd like to create an appellate blog roll with links to blogs and other web sites of interest to appellate lawyers.

You can help yourself and other committee members get more out of the DRI web site. Here's how: E-mail me any ideas, questions, aggravations, or other thoughts you have about the web site and our committee web page. I can-

not promise to implement every idea, or answer every question, or solve every problem. But I can promise to try. And I can also promise that every question or idea you send in will have the potential to benefit the whole committee.

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