

Certworthy

Winter 2009

The newsletter of the DRI
Appellate Advocacy Committee


The Voice of the Defense Bar



In This Issue...

Interlocutory Appellate Review of Class-Certification Rulings under Rule 23(f): Do Articulated Standards Matter?	1
Appellate Advocacy Committee Leadership	2
Regional Editor Listing	4
From The Chair:	
Striving for Excellence.....	5
From The Editor:	
A Very Productive Year	6
Kudos.....	7
The State Solicitor General Boom	13
Summary of the Argument-It's Not Just a Summary	16
Circuit Reports.....	20
First Circuit.....	20
Second Circuit.....	21
Third Circuit.....	21
Fourth Circuit.....	22
Fifth Circuit	23
Sixth Circuit.....	24
Seventh Circuit.....	26
Eighth Circuit	27
Ninth Circuit	28
Tenth Circuit.....	29
Eleventh Circuit	31
Federal Circuit	32
D.C. Circuit.....	33
Annual Meeting Subcommittee Report.....	34
Membership Subcommittee Report.....	35
Program Subcommittee Report	36
Webpage Subcommittee Report	37

©2009 DRI. All rights reserved

Interlocutory Appellate Review of Class-Certification Rulings under Rule 23(f): Do Articulated Standards Matter?

Julian W. Poon, Blaine H. Evanson, William K. Pao

Since Rule 23(f) of the Federal Rules of Civil Procedure came into effect approximately ten years ago, most Circuits have attempted to elaborate upon the guidance provided by the Committee Note as to when Courts of Appeals will exercise the “unfettered discretion” Rule 23(f) affords them to decide whether to grant or deny interlocutory appellate review of class-certification rulings. This article examines the differing standards that have been formulated by the various U.S. Courts of Appeals, and takes a first cut at evaluating whether differences in those published standards actually translate into tangible differences in grant rates across the various Circuits.

Prior to December 1, 1998, when

Rule 23 came into effect, only limited avenues existed for immediate appellate review of a district court’s exercise of its discretion under Rule 23 to certify, or deny certification, of a class action: primarily 28 U.S.C. § 1292(b) and mandamus. Recognizing that a district court’s class-certification decision is not a “final decision within the meaning of [28 U.S.C.] § 1291,” *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 477 (1978) (internal quotation marks omitted), the Supreme Court and the Committee, drawing on the added statutory authority conferred by 28 U.S.C. § 1292(e), sought to “[e]xpan[d] ... opportunities to appeal” by promulgating Rule 23(f), directing the various Courts of Appeals to “develop standards for granting review that reflect the changing areas of uncertainty in class litigation.” Fed. R.

Julian W. Poon is a partner, and Blaine H. Evanson and William K. Pao are associates, in the Los Angeles office of Gibson, Dunn & Crutcher LLP. All three of them are members of the firm’s Appellate and Constitutional Law Practice Group.

continued on page 8

Chair

SCOTT P. STOLLEY
Thompson & Knight LLP
One Arts Plaza 1722 Routh
Street, Suite 1500
Dallas, Texas 75201
214.969.1678
214.969.1751
scott.stolley@tklaw.com

Vice Chair

SCOTT BURNETT SMITH
Bradley Arant Boult Cummings, LLP
200 Clinton Avenue West,
Suite 900
Huntsville, Alabama 35801
256.517.5198
256.517.5298
ssmith@babbc.com

Past Chair

R. DANIEL LINDAHL
Lindahl Law Firm, PC
121 S.W. Morrison St. Suite 1100
Portland, Oregon
503.241.4099
503.241.5013
dan.lindahllawfirm.com

Membership Chair

ERIC SCHROEDER
Powell Goldstein LLP
1201 W. Peachtree Street,
Suite 2300
Atlanta, Georgia 30309
404.572.6894
404.572.6999
eschroed@pogolaw.com

Membership Vice Chair

TODD PAGE
Stoll, Keenon & Ogden
300 West Vine Street
Suite 2100
Lexington, Kentucky 40507-
1801
859.231.3000
859.253.1093
Todd.Page@skofirm.com

Marketing Chair

TBA
Amicus Chair
NANCY CIAMPA
Carlton Fields
100 SE 2nd Street, Suite
4000
Miami, Florida 33131
305.539.7280
305.530.0055
nciampa@carltonfields.com

Publications Chair

RALPH W. JOHNSON III
Halloran & Sage LLP
One Goodwin Square
225 Asylum Street
Hartford, Connecticut 06103
860.297.4646
860.548.0006
johnsonr@halloran-sage.com

Publications Vice Chair

MATT LERNER
Goldberg Segalla LLP
8 Southwoods Blvd., Suite
300
Albany, New York 12211-
2364
518.463.5400
518.463.5420
mlerner@goldbersegalla.com

Program Chair

C. MITCHELL BROWN
*Nelson Mullins Riley & Scar-
borough, LLP*
1320 Main Street, 17th Floor
Columbia, South Carolina
29201
803.255.9595
803.255.9025
mitch.brown@nelsonmullins.com

Program Vice Chair

NANCY WINKELMAN
*Schnader Harrison Segal &
Lewis LLP*
1600 Market Street, Ste 3600
Philadelphia, Pennsylvania
215.751.2342
215.751.2205
nwinkelman@schnader.com

Diversity Liaison

ROBERT L. WISE
Bowman and Brooke LLP
1111 East Main Street, Suite
2100
Richmond, Virginia 23219
804.649.8200
804.649.1762
rob.wise@ric.bowmanand-brook.com

DRI Board Liaison

ROBERT B. DELANO, JR.
Sands Anderson Marks
801 E. Main St., Ste 1800
Richmond, VA 23218
804.783.7268
804.783.2926
cdelano@sandsanderson.com

Legislative/Rulemaking Liaison

TBA

Web Page Chair

RAYMOND P. WARD
Adams and Reese LLP
701 Poydras Street, Suite
4500
New Orleans, Louisiana
70139
504.585.0339
504.566.0210
raymond.ward@arlaw.com

Webeconference Chair

ROBERT L. WISE

Webeconference Vice Chair

ED HADEN
Balch & Bingham, LLP
P.O. Box 306
Birmingham, Alabama
35201-0306
205.251.8795
205.488.5648
ehaden@balch.com

Corporate Involvement

DOUGLAS COLLODELL
Sedgwick, Detert, Moran & Arnold LLP
801 S. Figueroa Street, 18th Fl
Los Angeles, California 90017-5556
213.426.6900
213.426.6921
douglas.collodel@sdma.com

ROBERT W. POWELL
Ford Motor Co.
300 Parklane Towers West
Dearborn, MI 48126-2568
313.621-6402
313.248-7727
rpowel12@ford.com

Law Institute Liaison

KERI LYNN BUSH
Lewis Bribois Bisgaard & Smith LLP
650 Town Center Drive, Ste. 1400
Costa Mesa, California 92626-1925
714.668-5558
714.850-1030
bush@lbbslaw.com

Public Relations Contacts East

SCOTT BURNETT SMITH

Central

SCOTT P. STOLLEY

West

R. DANIEL LINDAHL

Young Lawyer Liaisons

ELAINE J. LAFLAMME
Quintairos, Prieto, Wood & Boyer, P.A.
One E. Broward Blvd., Ste 1400
Fort Lauderdale, Florida 33301
954.523.7008
954.523.7009
elaflamme@qpwblaw.com

MICHAEL L. REITZELL
Duane Morris LLP
P.O. Box 7199
Tahoe City, California 96145-7199
530.584.5100
530.581.3215
MLReitzell@duanemorris.com

Steering Committee

DAVID AXELRAD
Horvit & Levy
15760 Ventura Blvd., 18th Fl
Encino, California 91436
818.995.0800
818.788.5922
daxelrad@horvitzlevy.com

Winter 2009

LINDA COBERLY
Winston & Strawn
35 W. Wacker Drive, 40th Fl
Chicago, Illinois 60601
312.558.8768
312.558.5700
lcoberly2@winston.com

CHARLES CRAVEN
Marshall Dennehey Warner
1845 Walnut Street
Philadelphia, Pennsylvania 19103
610.355.7424
610.355.7444
ccraven@mdwgc.com

CHARLES T. FRAZIER, JR.
*Alexander Dubose Jones
& Townsend LLP*
4925 Greenville Avenue,
Suite 717
Dallas, Texas 75206-4087
214.369.2358
214.369.2359
cfrazier@adjtlaw.com

ROGER HUGHES
Adams & Graham
P.O. Drawer 1429
Harlingen, Texas 78551-1429
956.428.7495
956.428.2954
rhughes@adamsgraham.com

MICHAEL KING
Talmadge Law Group
18010 Southcenter Parkway
Tukwila, Washington 98188-4630
206.574.6661
206.575.1397
michael@talmadgelg.com

CARRIE LEGUS
Legus and Bisson
107 State Street
Montpelier, Vermont 05601
802.223.5696
802.223.9922
carrie@legusbisson.com

RICHARD NEUMEIER
Morrison & Mahoney
250 Summer Street, 8th Floor
Boston, Massachusetts
02210-1181
617.439.7569
617.342.4980
rneumeier@morrisonmahoney.com

MARY MASSARON ROSS
Plunkett & Cooney
535 Griswold Street, Suite 2400
Detroit, Michigan 48226-3684
313.983.4801
313.983.4350
mmassaron@plunkettcooney.com

MICHAEL B. WALLACE
Wise Carter Child & Caraway, P.A.
P.O. Box 651
Jackson, Mississippi 39205
601.968.5500
601.968.5519
mbw@wisecarter.com

PATRICK J. SWEENEY
Sweeney & Sheehan
1515 Market Street, 19th Floor
Philadelphia, Pennsylvania 19102
215.563.9811
215.557.0999
patrick.sweeney@sweeneyfirm.com

Newsletter Editor

RALPH W. JOHNSON III

Annual Meeting Chair

LEANN NEALEY
Butler Snow O'Mara Stevens & Canada, PLLC
210 E. Capitol Street, 17th Floor
Jackson, Mississippi 39201
601.985.4581
601.985.4500
leann.nealey@butlersnow.com

Annual Meeting Vice Chair

DAVID FURLOW
Thompson & Knight LLP
333 Clay Street, Suite 3300
Houston, Texas 77002-4499
713.654.8111
713.654.1871
david.furlow@tklaw.com

Expert Witness Chair

TBA

Legislative/Rulemaking Liaison

TBA

State Liaison Chair

TBA

First Circuit

RICHARD L. NEUMEIER
Morrison Mahoney, LLP
250 Summer Street
Boston, Mass. 02210-1181
(617) 439-7569
rneumeier@morrisonmahoney.com

Second Circuit

MATT LERNER

Third Circuit

KIMBERLY BOYER-COHEN
*Marshall, Dennehey, Warner,
Coleman & Goggin*
1845 Walnut St.
Philadelphia, PA 19103-4797
(215) 575-2707
kaboyer@mdwvcg.com

Fourth Circuit

STEVEN R. MINOR
Elliott Lawson & Minor
110-112 Piedmont Ave.
(24201)
P.O. Box 8400
Bristol, VA 24203-8400
(276) 466-8400
Sminor@elliottlawson.com

Fifth Circuit

CHARLES FRAZIER, JR.

Sixth Circuit

SARAH M. RILEY
Warner, Norcross & Judd LLP
900 Fifth Third Center
111 Lyon Street NW
Grand Rapids, MI 49503-
2487
(616) 752-2541
sriley@wnj.com

TIMOTHY FITZGERALD
Gallagher Sharp Fulton & Norman
Seventh Floor, Bulkley Building
1501 Euclid Ave.
Cleveland, OH 44115
(216) 522-1164
TFitzgerald@gallaghersharp.com

Seventh Circuit

Beth Ermatinger Hanan
Gass Weber Mullins LLC
309 N. Water St.
Milwaukee, WI 53202
(414) 224-7781
hanan@gasswebermullins.com

Eighth Circuit

DIANE B. BRATVOLD
Briggs and Morgan, P.A.
2200 IDS Center
80 South 8th Street
Minneapolis, MN 55402
(612) 977-8650
dbratvold@briggsgin.com

Ninth Circuit

LISA M. BAIRD
Reed Smith LLP
355 South Grand Avenue
Los Angeles, CA
(213) 457-8036
lbaird@reedsmith.com

Tenth Circuit

KATHERINE T. EUBANK
*Fowler, Schimberg & Flanagan,
P.C.*
1640 Grant Street, Suite 300
Denver, CO 80203
(303) 298-8603
K_eubank@fsf-law.com

Eleventh Circuit

SCOTT BURNETT SMITH

DC and Federal Circuits

JAMES SULLIVAN
Spriggs Hollingsworth
1350 I St. NW
Washington, DC 20005
(202) 898-5800
jsullivan@spriggs.com

SCOTT P.
STOLLEY

Thompson & Knight LLP
Dallas, Texas
scott.stolley@tklaw.com

One thing I like about our committee is the way our members work hard to provide fresh, insightful articles and CLE presentations about appellate practice. Just when I think we have exhausted all possible ideas for articles, the editors of *Certworthy* discover novel topics like those in this issue. Just when I think that all of the CLE topics have been overdone, our Programs Subcommittee

Striving for Excellence

finds new ones, matched with exciting speakers.

It is so easy to lapse into sameness, both in our personal and professional lives. I see it all the time in appellate practice - for example, articles and books that offer the same stale writing advice and seminar programs that repeat trite presentations by tired speakers. Opportunities for variety are often squandered. Fortunately, our committee members have a passion for variety combined with excellence.

In that regard, I recently encountered a gem of a quote by the ubiquitous commentator "Anonymous":

Excellence can be obtained if you:

- . . . care more than others think is wise;
- . . . risk more than others think is safe;
- . . . dream more than others think is practical;
- . . . expect more than others think is possible.

Our committee cares about excellence, and it shows in our publications and programs. I congratulate you, and urge you to keep up the good work in 2009.

A Very Productive Year

RALPH W. JOHNSON III
Halloran & Sage LLP
Hartford, CT

johnsonr@halloran-sage.com

I am pleased to report that the past year was a very productive one for the Publications Subcommittee. We began the year with the Winter 2008 issue of *Certworthy*. In addition to the circuit reports and the reports from the other subcommittees, that issue included articles by Roger Townsend, David Tennant and Ray Ward.

Next, the Summer 2008 issue of *Certworthy* included articles by Robert Wise, David Gluckman, LeAnn Nealey and Katherine Eubank. It also included a book review by J.H. Huebert.

The final project for the Publications Subcommittee in 2008 was the release of the November issue of *For The Defense*. Our subcommittee was able to provide DRI with eight articles on a variety of appellate focused topics. Those articles were authored by Scott Stolley, Scott Smith, Roger Hughes, Mary Mas-

saron Ross, Ed Haden, Kristen Henson, Ray Ward, Eric Schroeder, Aaron Bayer and Joseph Gillis.

Both of the issues of *Certworthy* and the November issue of *For The Defense* received positive feedback.

We begin 2009 picking up where we left off in 2008. In addition to the circuit reports and several subcommittee reports, this issue of *Certworthy* contains three interesting articles by accomplished practitioners.

First, Julian Poon, Blaine Evanson and William Pao of the Los Angeles office of Gibson, Dunn and Crutcher LLP have prepared an exceptional article analyzing the standards governing the interlocutory review of class-certification rulings under Rule 23(f) of the Federal Rules of Civil Procedure. Among their many accomplishments, Julian is a former law clerk to Justice Antonin Scalia and Blaine is a former law clerk to Judge A. Raymond Randolph of the D.C. Circuit.

Next, Kevin Newsom of the Birming-

ham office of Bradley Arant Boult Cummings LLP examines the expanding roles of State Solicitor General offices and their impact on appellate practice. Kevin's article also reviews his experiences as a former Solicitor General of Alabama. Among his many accomplishments, Kevin is a former law clerk to Justice David Souter.

Finally, Charles Frasier and LaDawn Conway provide us with an extremely helpful article examining the summary of the argument section of an appellate brief. Charles and LaDawn are long time members of the committee. They are with the Dallas office of Alexander Dubose Jones and Townsend LLP.

These authors, the circuit editors and the chairs of the other subcommittees have my thanks for all of their hard work. Hopefully the articles will inspire the members of the committee and 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.

On January 12, 2009, **Gene C. Schaerr**, **Linda T. Coberly**, and **Timothy E. Flannigan** filed an *Amicus Curiae* brief in the United States Supreme Court on behalf of DRI - The Voice of the Defense Bar. The brief supports the petition for a writ of *certiorari* in *DeReyes v. Wilkins*, No. 08-762. Gene and Timothy are with the Washington, D.C. office of Winston & Strawn LLP. Linda is with Winston & Strawn's Chicago office.

The case should be of interest to law enforcement officers and those that defend them. The petitioners are New Mexico police officers who were sued for alleged constitutional violations by two defendants who claimed the police had coerced incriminating statements from their co-conspirators that were used against them at a criminal trial. The case presents the issue of whether criminal defendants can sue police officers under the Fourth Amendment for malicious prosecution. Courts across the country have given conflicting answers to this question.

DRI's amicus brief urged the Supreme Court to take the case on the merits to resolve this inconsistency. If criminal defendants can bring malicious prosecution claims against their arresting officers, the DRI brief argues, it will have a "chilling effect" on "legitimate police work."

On January 16, 2009, DRI-The Voice of the Defense Bar filed an *Amicus Curiae* letter in support of the petition for review filed by Wyeth, Inc. in *Elizabeth Ann Conte v. Wythe, Inc.*, No. S169116, a products liability case pending before the California Supreme Court. **Mary Massaron Ross** authored the letter. Mary is with the Detroit office of Plunkett & Cooney.

In *Conte*, the intermediate appellate court held that "the common law duty to use due care owed by a name-brand prescription drug manufacturer when providing product warnings extends not only to consumers of its own product, but also to those whose doctors foreseeably rely on the name-brand

manufacturer's product information when prescribing a medication, even if the prescription is filled with the generic version of the prescribed drug." DRI's amicus letter argued that this "novel and expansive approach to tort liability [could] not be reconciled with long-standing principles of California tort law, [ran] counter to the basic notion of personal responsibility that provides the foundation of traditional tort law, threaten[ed] to complicate litigation, will drastically increase the expense of litigation by adding additional parties, and will force many brand-name manufacturers to undergo the rigors and expenses of trials in order to prove they are strangers to the plaintiff, and to the product ingested by the plaintiff." DRI's letter urged the California Supreme Court to take the case on the merits and reverse the intermediate appellate court's decision.

Civ. P. 23(f) advisory committee's note (1998 amendments).

Consistent with the drafters' expectations, a majority of the Courts of Appeals have since published opinions articulating the general standards that they will use in deciding whether a class-certification decision warrants interlocutory review or not. And although those standards draw upon the Committee Notes to Rule 23 and overlap with each other, there are also some notable differences in the standards formulated by the various Circuits.

Do the differences in these published standards matter, however, to litigants trying to predict the frequency and type of cases in which a given Court of Appeals will grant a petition brought under Rule 23(f)? In other words, how have the various standards the Courts of Appeals have developed affected the rate at which petitions under Rule 23(f) are granted? Is there a correlation between seemingly permissive standards and the grant rates in Circuits with laxer standards? This article begins by summarizing what those standards are and what the Circuits' respective grant rates are, in order to begin to answer this question. From this, we suggest some additional considerations that may assist appellate practitioners in advising their clients whether to seek interlocutory appellate review of an adverse class-certification ruling.

The Standards for Granting 23(f) Petitions in the U.S. Courts of Appeals

Rule 23(f) was adopted in 1998 to expand the discretion of the Courts of Appeals to grant interlocutory review of

class-certification rulings. The Committee made clear that the scope of Rule 23(f) was to be broader than the scope of Section 1292(b) "in two significant ways": (1) "it does not require that the district court certify the certification ruling for appeal"; and (2) "it does not include the potentially limiting requirements of § 1292(b) that the district court order 'involve[] a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.'" Fed. R. Civ. P. 23(f) advisory committee's note (1998 amendments) (quoting from 28 U.S.C. § 1292(b)). Recognizing that class litigation involves "changing areas of uncertainty," the Committee noted that the task of developing explicit standards lies completely with the Courts of Appeals. *Id.* ("The courts of appeals will develop standards for granting review that reflect the changing areas of uncertainty in class litigation."). Thus, the Courts of Appeals have "unfettered discretion . . . akin to the discretion exercised by the Supreme Court in acting on a petition for certiorari." *Id.*

To illustrate the purpose of the new subsection, the Committee gave several examples of when interlocutory review may be most appropriate. First, Rule 23(f) interlocutory review may be appropriate to address "death-knell"-type situations for either plaintiffs or defendants: (1) when the denial of class certification makes continuing litigation too costly for individual plaintiffs and (2) when the grant of class certification places insurmountable pressure on defendants to settle. *Id.* Second, "[p]ermission [to appeal] is most likely

to be granted when the certification decision turns on a novel or unsettled question of law, or when, as a practical matter, the decision on certification is likely dispositive of the litigation." *Id.*

Relying on the Committee's Notes, most Courts of Appeals (except for the Fifth, Eighth, and Federal Circuits) have published opinions setting forth the standards that they will use in deciding whether to grant interlocutory review under Rule 23(f). And notwithstanding the unfettered discretion of the Courts of Appeals, in formulating these standards, the Courts of Appeals have hewed closely to the factors set forth by the Committee.

The "Core-Committee" Factors

The Seventh Circuit was the first Court of Appeals to construe Rule 23(f) and articulate the standards that it would use in deciding whether to grant Rule 23(f) review. Taking its cue from the Committee's Notes, the Seventh Circuit first held that interlocutory review is appropriate when the denial of class certification sounds the "death knell" for: (1) plaintiffs whose "claim is too small to justify the expense of litigation," or (2) defendants facing claims where "the stakes are large and the risk of a settlement or other disposition that does not reflect the merits of the claim is substantial." *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834-35 (7th Cir. 1999). But even in these "death-knell" scenarios, the "appellant must demonstrate that the district court's ruling on class certification is questionable" because "if the ruling is impervious to revision there's no point to an interlocutory appeal." *Id.* Finally, recognizing that one of the purposes of Rule 23(f) is to further the

development of the law of class actions, the Seventh Circuit held that interlocutory review is proper when an appeal involves a “fundamental issue[]” relating to class actions. *Id.* at 835. In these cases, “it is less important to show that the district court’s decision is shaky” because “[l]aw may develop through affirmances as well as through reversals.” *Id.*

Both the First and the Second Circuits subsequently followed the Seventh Circuit’s example and adopted what this article will refer to as the “Core-Committee-Factors” test. See *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 294 (1st Cir. 2000); *Sumitomo Copper Litig. v. Credit Lyonnais Rouse, Ltd.*, 262 F.3d 134, 139 (2d Cir. 2001). In adopting the Core-Committee-Factors test, the First Circuit, however, made a “small emendation.” *Mowbray*, 208 F.3d at 294. Noting that “a creative lawyer almost always will be able to argue that deciding her case would clarify some ‘fundamental’ issue,” the First Circuit concluded that granting review under Rule 23(f) is appropriate in cases involving a fundamental issue only if it is “important to the particular litigation as well as important in itself and likely to escape effective review if left hanging until the end of the case.” *Id.*

The “Core-Committee-Plus” Factors

The Third, Ninth, Tenth, and D.C. Circuits have all found that the Core-Committee Factors warrant Rule 23(f) review. See *Newton v. Merrill Lynch Pierce, Fenner & Smith*, 259 F.3d 154, 165 (3d Cir. 2001); *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 959 (9th Cir. 2005); *Vallario v. Vandehey*, 2009 WL 251938, at *3-*4 (10th Cir. Feb. 4, 2009); *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 105 (D.C. Cir. 2002). And the Ninth, Tenth, and

D.C. Circuits adopted the First Circuit’s gloss on the fundamental-issues factor. See *Chamberlan*, 402 F.3d at 959 (finding that Rule 23(f) review is proper when “the certification decision presents an unsettled and fundamental issue of law relating to class actions, *important both to the specific litigation and generally*, that is likely to evade end-of-the-case review” (emphasis added)); *Vallario*, 2009 WL 251938, at *4 (same); *In re Lorazepam*, 289 F.3d at 105 (same).

All these courts have also adopted “manifest error” in the class-certification ruling as an independent and adequate ground for interlocutory review thereof. See *Newton*, 402 F.3d at 165; *Chamberlan*, 402 F.3d at 959; *Vallario*, 2009 WL 251938, at *4; *In re Lorazepam*, 289 F.3d at 105. As discussed above, for those Courts of Appeals adhering to the Core-Committee-Factors standard, whether the district court’s decision is “questionable” is relevant only when it tolls the “death knell” for the case. But for the Third, Ninth, Tenth, and D.C. Circuits, whether the district court committed manifest error is independently important, as the D.C. Circuit noted, “if for no other reason than to avoid a lengthy and costly trial that is for naught once the final judgment is appealed.” *In re Lorazepam*, 289 F.3d at 105.

The “Expansive-Core-Committee” Factors

The Fourth, Sixth, and Eleventh Circuits have not only adopted, but expanded upon, the Core-Committee Factors, in formulating the tests that they will use in guiding their decision whether to grant Rule 23(f) review in a particular case or not. See *Prado-Steiman v. Bush*, 221 F.3d 1266, 1274-76 (11th Cir. 2000); *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 144-46 (4th Cir.

2001) (“We thus adopt the Eleventh Circuit’s five-factor *Prado-Steiman* test for judging the appropriateness of granting a petition for review under Rule 23(f)”); *In re Delta Air Lines*, 310 F.3d 953, 960 (6th Cir. 2002).

Like the Third, Ninth, Tenth and D.C. Circuits, the Fourth, Sixth, and Eleventh Circuits also consider whether the district court erred in deciding whether to grant review. See *Lienhart*, 255 F.3d at 145-46; *In re Delta Air Lines*, 310 F.3d at 960; *Prado-Steiman*, 221 F.3d at 1275. For both the Eleventh and Fourth Circuits, this factor operates as a “sliding-scale.” See *Lienhart*, 255 F.3d at 145-46; *Prado-Steiman*, 221 F.3d at 1275 n.10. In other words, “the stronger the showing of an abuse of discretion, the more this factor weighs in favor of interlocutory review.” *Prado-Steiman*, 221 F.3d at 1275 n.10. Thus, when the district court’s decision is “manifestly erroneous,” “review is appropriate without regard to the other factors.” *Lienhart*, 255 F.3d at 146. Review may not be appropriate, however, when it is less clear whether the district court erred.

The Fourth, Sixth, and Eleventh Circuits have all expanded on the Core-Committee-Plus Factors. All three Circuits consider the status of the litigation in the district court, particularly the progress of discovery. *Lienhart*, 255 F.3d at 144-46; *In re Delta Airlines*, 310 F.3d at 960; *Prado-Steiman*, 221 F.3d at 1276. Moreover, the Fourth and Eleventh Circuits consider whether future events could impact the case, such as pending settlement negotiations or potential bankruptcy filings. *Lienhart*, 255 F.3d at 143, 145-46; *Prado-Steiman*, 221 F.3d at 1276.

Rule 23(f) Standards, Grant Rates, and Their Relationship Across Different Circuits

One might assume that those Courts of Appeals with the most generous standards for granting interlocutory review would grant a greater proportion of the petitions submitted to them. In other words, it seems logical to assume that it should be easier for a litigant to obtain review in the Fourth or Eleventh Circuits than, for example, in the First or Seventh Circuits. One might also assume that courts with similar standards

would have similar “grant rates.” However, it turns out that neither assumption is entirely correct.

As an initial matter, the number of petitions *filed* varies dramatically from Circuit to Circuit. The Eleventh Circuit received the most petitions, 104, between December 1, 1998 and October 30, 2006. The Seventh, Ninth, and Fifth Circuits received 83, 80, and 79 petitions, respectively. And, during the same period, litigants petitioned just 13, 7, and 6 times in the D.C., Fourth, and Tenth Circuits. See Barry Sullivan & Amy Kobelski Trueblood, *Rule 23(f): A*

Note on Law and Discretion in the Courts of Appeals, 246 F.R.D. 277, 290 (2008).

As with the number of Rule 23(f) petitions filed, grant rates also vary significantly across different Courts of Appeals. During the 1998-2006 period, the Fourth Circuit granted 100 percent of the petitions it decided. See *id.* The Third Circuit granted 86 percent, and the Fifth Circuit 58 percent. See *id.* On the low end are the Second Circuit at 22 percent, the Eighth Circuit at 16 percent, and the Tenth Circuit at zero percent. See *id.*

Circuit	1	2	3	4	5	6	7	8	9	10	11	DC	Total
Petitions filed	41	56	15	7	79	20	83	54	80	6	104	13	558
Number decided	36	46	14	5	67	19	71	50	65	2	89	12	476
Number granted	10	10	12	5	36	11	22	8	17	0	35	3	169
Plaintiff filed/decided	13	21	6	1	33	4	29	29	25	1	31	5	196
Defendant filed/decided	23	25	8	4	34	15	42	21	40	1	58	7	278
Plaintiff granted	2	4	5	1	10	1	3	1	9	0	4	3	43
Defendant granted	8	6	7	4	26	10	19	6	8	0	31	0	125
% granted	28%	22%	86%	100%	54%	58%	31%	16%	26%	0%	39%	25%	36%
% plaintiff granted	15%	19%	83%	100%	30%	25%	10%	3%	36%	0%	13%	60%	22%
% defendant granted	35%	24%	88%	100%	76%	67%	45%	29%	20%	0%	53%	0%	45%
Number published	4	4	3	1	3	4	13	1	2	0	4	8	47
% published	11%	9%	21%	20%	4%	21%	18%	2%	3%	0%	4%	67%	10%

Figure 1. Data available at Sullivan & Trueblood, *supra*, 246 F.R.D. at 290.

From this data, we can detect a slight correlation between a Circuit's grant rate and its articulated standard for granting Rule 23(f) review. The Fourth Circuit has the highest percentage of Rule 23(f) petitions granted—100 percent—and also applies the most permissive standard that has been adopted: the sliding-scale, five-factor approach. The Sixth Circuit has the third highest percentage of Rule 23(f) petitions granted—58 percent—and applies a broader standard than that used by other Circuits, except for the Fourth and Eleventh. Moreover, those Circuits applying the basic Core-Committee Factors standard have some of the lowest grant rates of all.

But when we compare the grant rates of Circuits purporting to share the same standard, we find that any correlation between a Circuit's grant rate and its articulated standard for granting Rule 23(f) review seems weak, at best. For example, both the Fourth and the Eleventh Circuits claim to apply the same Expansive-Core-Committee Factors, but the Fourth Circuit has granted 100 percent of Rule 23(f) petitions (albeit based on a small sample size) while the Eleventh Circuit has granted only 39 percent of petitions. Similarly, the Third, Ninth, and D.C. Circuits all apply the Core-Committee-Plus Factors standard, but the Third Circuit has granted 86 percent of Rule 23(f) petitions while the Ninth and D.C. Circuits have granted 26 and 25 percent of petitions, respectively. (The Tenth Circuit's standard, handed down only recently, has obviously not yet affected the Tenth Circuit's grant rate.)

In sum, the data from Rule 23(f)'s first eight years of existence suggest that the standards articulated by various Circuits for when they will grant Rule 23(f) review do not adequately capture

and account for the discrepancy in grant rates amongst different Circuits. Therefore, to attain a better understanding of when and how frequently different Courts of Appeals will grant Rule 23(f) petitions submitted to them, one should look beyond the courts' stated reasons for granting review.

What Other Considerations Impact Rule 23(f) Petitions?

Most Circuits often summarily rule on Rule 23(f) petitions, publishing only a small percentage of their decisions. As one judge has noted, commenting on the Seventh Circuit's practice, "[t]he vast majority of our rulings on 23(f) motions are not published. It just happens quietly in the chambers of the judges and we normally don't take them...." Sullivan & Trueblood, *supra*, 246 F.R.D. at 277. Assuming this holds true for most Courts of Appeals, where should appellate practitioners look to obtain further guidance on how to advise their clients on whether to seek interlocutory appellate review of an adverse class-certification ruling?

One avenue that may prove fruitful is to look more closely at the opinions addressing Rule 23(f) and to examine not only the standards that they articulate, but also the language and manner in which those standards are articulated. Doing so may shed more light on different Circuits' differing and not-fully-articulated views of Rule 23(f), and thus on: (1) how strictly they would apply the standards they have articulated; and (2) how likely they would find "special circumstances" that would justify deviating from the standards. For instance, as discussed above, both the Fourth and the Eleventh Circuits have adopted the same Expansive-Core-Committee

Factors, but the Fourth Circuit has a significantly higher grant rate. This disparity, however, makes more sense when we look at the language and tone of the courts' opinions, which suggest that the Fourth and the Eleventh Circuits perceive the role of Rule 23(f) differently. While the Fourth Circuit cautions that "exceptionally stringent standards for review" are inappropriate "[i]n light of Rule 23(f)'s purpose to eliminate the unduly restrictive review practices which obtained when mandamus was the only means to review a class certification," the Eleventh Circuit emphasizes that "interlocutory appeals are inherently disruptive, time-consuming, and expensive" and threatens to "increase[] the workload of the appellate courts, to the detriment of litigants and judges." *Compare Lienhart*, 255 F.3d at 145, with *Prado-Steiman*, 221 F.3d at 1276 (internal quotation marks and citation omitted).

Similarly, the language and tone used by the Third, Ninth, and D.C. Circuits shed light on the divergent grant rates amongst courts applying the Core-Committee-Plus factors. In *Chamberlan*, the Ninth Circuit made clear that it was "of the view that petitions for Rule 23(f) review should be granted sparingly," 402 F.3d at 959, and in *In re Lorazepam*, the D.C. Circuit noted that "[t]he sheer number of class actions, the district court's authority to modify its class certification decision, and the ease with which litigants can characterize legal issues as novel, all militate in favor of narrowing the scope of Rule 23(f) review." 289 F.3d at 105-06. Both Circuits' grant rates are low. On the other hand, the Third Circuit, which has a much higher rate, did not mention that Rule 23(f) review should be rare or sparingly granted but rather emphasized that

“courts of appeals are afforded wide latitude” and repeatedly declared that any persuasive consideration could justify review. *Newton*, 259 F.3d at 164-65.

Another avenue that may deepen appellate practitioners’ understanding of when and how frequently the various Circuits are granting Rule 23(f) petitions is looking at the Circuits’ respective caseloads. As the Eleventh Circuit noted in *Prado-Steiman*, one factor that weighs in favor of the sparing use of Rule 23(f) review is that it may threaten to overburden the courts of appeals. *See Prado-Steiman*, 221 F.3d at 1276. Thus, unsurprisingly, the Ninth and the Second Circuits have two of the lowest grant rates. But a comparison of the caseloads of the various Circuits makes clear that the predictive power of caseloads is limited, at best, given the weak correlation between caseloads and grant rates. For instance, from 1998 to 2006, the Fifth Circuit had a larger caseload (77,703) than the Second Circuit (51,138), yet a dramatically higher grant rate (76 vs. 24 percent). *See* U.S. Court

of Appeals – Judicial Caseload Profile, <http://uscourts.gov/cgi-bin/cmsa2003.pl>; <http://www.uscourts.gov/cgi-bin/cmsa2006.pl>. The Third Circuit’s caseload (34,811) is almost three times as large as the D.C. Circuit’s caseload (12,269). *See id.* The Third Circuit’s grant rate (88 percent), however, is more than three times higher than the D.C. Circuit’s grant rate (25 percent).

These considerations certainly do not resolve the question. Numerous other factors could affect how courts decide whether to grant a Rule 23(f) petition, and discerning the precise weight these factors may have is difficult given the dearth, to date, of readily available data and information pertaining to Rule 23(f). For example, a putative class action’s underlying subject matter may influence the court’s decision whether to grant a Rule 23(f) petition. But because most courts summarily rule on Rule 23(f) petitions, extracting the data to test this hypothesis would require a far more in-depth review than is possible in this article of docket sheets and briefs in

cases in which Rule 23(f) petitions have been filed. *Sullivan & Trueblood, supra*, 246 F.R.D. at 286.

Conclusion

Ten years after its enactment, it remains far from clear when and why the various Courts of Appeals will grant Rule 23(f) interlocutory appellate review of class-certification rulings. And while appellate practitioners should obviously be mindful of the published standards articulated by the Circuit they are petitioning when preparing their Rule 23(f) petitions, they should take those standards with a grain of salt and remember that those standards fall short of telling the whole story, particularly given the Committee’s directive that these factors should evolve to meet the ever-changing needs of courts and litigants in the class-action context.

The State Solicitor General Boom

KEVIN C. NEWSOM

My Story

In October 2003, I was happy as a clam as a mid-level associate in the appellate practice group at Covington & Burling in Washington, D.C., where I'd been since finishing up a clerkship with Justice David Souter at the United States Supreme Court in 2001. Late one evening, I got a call, essentially out of the blue, from Alabama's then-Attorney General, Bill Pryor. General Pryor (now a judge on the Eleventh Circuit) said that his Solicitor General—the first in Alabama's history—was moving on. He wanted to know if I was interested in returning home (I'm an Alabama native) to take the position as the State's chief appellate lawyer. I was.

What I knew about state solicitors general I had learned from watching Jeff Sutton (also, as it turns out, now a judge—on the Sixth Circuit). While serving as Ohio's Solicitor General in the mid- to late-1990s, Sutton had developed an active and sophisticated U.S. Supreme Court practice litigating on behalf of the States. Most famously, he had sought and obtained the Court's permission to present oral argument, as a non-party amicus curiae, in *City of Boerne v. Flores*, 521 U.S. 507 (1997). Sutton contended in that case that by enacting the Religious Freedom Restoration Act, which purported to “enforce” the Fourteenth Amendment by redefining the manner in which the First Amendment's Free Exercise Clause applied to the States, Congress had overstepped its author-

ity and violated cardinal principles of federalism. He won and, in a sense, the modern “SG” movement was born.

As fulfilled as I was at Covington—two partners there, Bob Long and Ed Bruce, are in many respects responsible for molding me into the lawyer I am today—the opportunity to follow in Sutton's footsteps was simply too good to pass up. It turned out to be the move of a lifetime. The reason: experience, experience, experience. One of the things I had appreciated most about my time at Covington was the opportunity the firm had given me to take on low-paying or pro bono cases as a way of getting in-court appellate experience. By the time I left Washington, I had argued four cases in the U.S. Courts of Appeals. Not bad, I thought. But over the course of the next 3-plus years as Alabama's SG, I would argue 18 cases—three of them in the U.S. Supreme Court—covering all sorts of subjects: from voting rights to capital punishment, from free speech to eminent domain, from civil rights to criminal procedure. The point is simply that the on-my-feet experience I was offered as Alabama's SG simply could not have been matched in any private-sector job. That experience, needless to say, has served me very well since returning to private practice, which I did a little more than a year ago when I joined a large regional firm based in my hometown of Birmingham.

The Rise Of The State SG

But this is not an article about me. The point is to use my own story to educate DRI members about the office of state solicitor general. Who are these state

SGs, what do they do, and how are they relevant to the private practicing bar?

At the outset, let's clarify the terminology. As I learned the hard way through many a puzzled look when answering the question, “What do you do for a living?”, the title “solicitor general” is not self-defining. To be clear, when I talk about a State's solicitor general, I mean the State's chief appellate lawyer—the State's very own version of (in the last administration) Ted Olson or Paul Clement. The office of state solicitor general itself is not new. Missouri's long-time SG, Jim Layton, something of an expert on SG-related history, reports that New York established the solicitor general position by statute in 1909 and that its SG began “consistently to appear on behalf of the state in appellate decisions from the 1930s.” James R. Layton, *The Evolving Role of the State Solicitor: Toward the Federal Model?*, J. App. Prac. & Proc. 533, 536 (2001). Several other States—Colorado, Michigan, Oregon, and Tennessee, among them—followed suit in the ensuing decades. But to be clear, the modern state SG boom is largely a “post-Sutton” phenomenon. It is the office's “remarkable growth in the states in the past 10 years” that the *National Law Journal* has called “one of the most significant developments in appellate practices in the [Supreme Court], as well as other federal and state courts.” Marcia Coyle, *Justices Listen to a Key Voice*, *National Law Journal*, p. 1 (Apr. 7, 2008).

Today, nearly 40 States and territories have an SG or its equivalent. (By

Kevin C. Newsom is co-chair of the Appellate Litigation Group at Bradley Arant Boult Cummings LLP. Kevin is the former Solicitor General of Alabama and a former clerk to U.S. Supreme Court Justice David Souter. He has argued 25 cases in the U.S. Supreme Court, the U.S. courts of appeals, and the state appellate courts.

my count, the States that have *not* yet come to the party are Arkansas, Georgia, Idaho, Iowa, Kentucky, Massachusetts, New Hampshire, New Mexico, Rhode Island, South Carolina, South Dakota, West Virginia, Wisconsin, and Wyoming.) The models in the States vary widely. At one end of the spectrum, the SG offices in New York and Illinois employ as many as 40 lawyers who handle essentially every appeal to which the State is a party. Alabama is at the other end. During my tenure, I had only two deputies, and while we made a concerted effort to supervise the State's entire appellate docket, we directly handled only the State's most significant appeals—principally in the U.S. Supreme Court, the U.S. courts of appeals, and the state supreme court. Other States—including, most notably, Texas, Ohio, and Virginia—fall somewhere in between the two extremes.

Whatever the size of the SG operation, its fundamental purpose is the same: “to ensure quality and consistency” in the State's appellate representation, especially in the biggest cases. Layton, *supra*, at 537. Let's talk first about consistency. By locating ultimate responsibility for all of the State's appellate litigation in a solicitor general, a state attorney general can ensure that the State is litigating with purpose—that it is speaking with a unified voice. There is a risk, for instance, that without someone sitting atop the appellate pyramid and coordinating state litigation policy, the right hand may not know what the left hand is doing. It may be that the State's criminal-appeals lawyers and its capital-litigation lawyers are making slightly (or even very) different arguments to the state supreme court about procedural bars. Or perhaps the lawyers in the constitutional-torts divi-

sion litigate qualified immunity issues in the U.S. courts of appeals in a slightly (or again even very) different way than do the lawyers in the general civil-litigation division. And so on and so on. The problems are clear. For one thing, the incoherence of a State's presentations can, over time, dilute the State's litigation “message.” Unlike many private parties, States are not “one off” litigants. They are institutional litigants—repeat players—and they have concrete long-term interests. A State, therefore, needs to litigate its cases purposively, *i.e.*, in a manner that is intentionally calculated to achieve those interests. Just as significantly, if a State does not speak with a unified voice to the courts in which it routinely appears—if it says one thing about statutory construction in one case and something else in the next—those courts will grow frustrated with the State's flip-flopping and count it against the State's credibility. And that, of course, can be a death-blow. All of which is simply to say that one of a state solicitor general's chief tasks is to coordinate and unify the State's litigation program so as to maximize the State's effectiveness as a legal policymaker.

State SGs also aim to improve the quality of States' appellate advocacy—“not just in order to be more persuasive in specific cases, or even in order to improve the quality of appellate advocacy overall, but also in order to have a greater influence on the development of the law.” Layton, *supra*, at 542. Quality of advocacy is enhanced, with any luck, by bringing an enhanced level of expertise to the enterprise. The point here is to concentrate the State's high-stakes appellate litigation in an individual who argues big appeals for a living and, just as importantly, who will become familiar to and—one would hope—trusted

by the courts in which he or she regularly appears. Particularly with an eye toward improving their chances in the most high-profile cases, States are increasingly hiring former U.S. Supreme Court clerks to head their appellate operations. According to National Association of Attorneys General records, nearly 20 high-court clerks have served as state SGs over the course of the last decade or so. (For those keeping score, Justice Thomas has the lead; four of his former clerks have gone on to state SG jobs.) And the trend seems to be picking up speed. During my recent tenure, in addition to myself, the SGs in Colorado, Illinois, New York, and Texas had all clerked at the Supreme Court.

Word has it that the move—not just hiring former Supreme Court clerks specifically, but hiring experienced appellate practitioners more generally—is paying off. Current Chief Justice John Roberts has recalled that a generation ago his predecessor (or grand-predecessor, technically) Warren Burger “made the need for improved advocacy a recurring theme during his speeches” and, in particular, “focus[ed] on the poor quality of advocacy by those representing the states and local governments.” John G. Roberts, Jr., *Oral Advocacy and the Re-emergence of a Supreme Court Bar*, 30 J. Sup. Ct. Hist. 68, 78 (2005). Today, the outlook is far rosier. Here is what Chief Justice Roberts has to say about the state SG movement just a few years ago:

More and more states are copying the federal model and establishing state solicitor general's office. These offices certainly are devoted to and focused on litigation before their state supreme court and their state courts of appeals. But they also appear far more frequently before the Supreme Court of the United States than they

did in 1980. In the 2003 Term, for example, a solicitor general or someone from that office appeared for the states of Alabama, Illinois, Michigan, Ohio, Tennessee, Texas, and Washington. I do not want to put too much weight on the label, but in fact if you do have an office of appellate specialist at the state level, I think it is natural to hope and assume that lawyers from that office will bring more experience and expertise to their cases before the Supreme Court.

Id. at 77.

So ... What's It To Me?

What does the modern state SG movement mean for private-sector lawyers? I think there are three points worth making here.

First, and most obviously, you should be aware that if you find yourself litigating an appeal against a State, you are more likely now than in the past to face an experienced appellate advocate—someone who makes a living handling and arguing big appeals. You should adjust your litigation strategy accordingly.

Second, you should be aware that state SGs are increasingly maintaining active amicus curiae practices—particularly in the U.S. Supreme Court, but in the U.S. courts of appeals and state supreme courts as well. During my tenure as Alabama's SG, for instance, I filed

some 25 amicus briefs in the U.S. Supreme Court alone, and a handful more in the U.S. courts of appeals. Importantly for present purposes, I filed nearly half of those in support of litigants represented by private-sector counsel—never simply as a favor, of course, but rather because in each of those cases the State's institutional interest lined up nicely with one of the parties' positions. I filed briefs, for instance, supporting individual litigants, municipalities, school districts, athletic associations, and private corporations. If you find yourself facing a tough appellate battle, you would do well to consider whether, perhaps, the State may have a real interest in your case. If so, you should reach out to your state SG and gauge his or her interest in filing.

Finally, the private bar needs to recognize that the state SG movement is simply part of a larger development in litigation practice: the increasing frequency with which important appeals are handled by experienced appellate specialists. Washington, D.C., "the traditional heart of the nation's appellate bar," has been clued into this for some time. Peter Page, *State Solicitor General Appointments Open Doors for Appellate Practitioners*, National Law Journal (online version Aug. 18, 2008). D.C. has long been home to dedicated appellate practice groups and boutiques. Think

Sidley. Think Mayer Brown, Covington, Gibson Dunn, and Latham. In the last several years, however, the rest of country has begun, ever so gradually—and in some cases reluctantly—to follow suit. My current firm is a perfect example. Just a decade ago, it would have been unthinkable for even a large firm in Birmingham, Alabama to aspire to establish a dedicated appellate practice group. Today, my firm's appellate group includes more than 15 lawyers in four cities, as many as half of whom—including myself—devote essentially all of their time to appeals. We handle cases in the U.S. Supreme Court and in U.S. courts of appeals and state appellate courts around the country.

This isn't a commercial, of course. But it is the story of my work life—the only work life I truly know. And my very strong sense is that my work life is reflective of an evolution in the way cases get litigated. The days of generalist lawyers taking their cases from cradle to grave are on the wane. Reasonable minds can and will disagree whether this move toward increasing appellate specialization is a good thing. Not surprisingly, I happen to believe that it is a very good thing. Good thing or not, though, specialization is increasingly a fact of life, and the appellate specialist—whether in the private or public sector—is here to stay.

Summary of the Argument-It's Not Just a Summary

CHARLES T. FRAZIER, JR.
LADAWN H. CONWAY

The Purpose of the Summary of the Argument

Your appellate brief must contain a “summary of the argument,” which “must contain a succinct, clear, and accurate statement of the arguments made in the body of the brief,” which “must not merely repeat the argument headings.” FED. R. APP. P. 28(a)(8). So what does that mean? At a minimum, it means your summary of the argument should not be a mere re-work of your table of contents for the argument section of your brief. It means the court wants something *more* than a mere outline of your arguments. What it really means is that you have a singular opportunity for persuasion that you should use to your full advantage.

Use the summary of the argument to crystallize your very best arguments in a short statement about why you should win. “Unless readers know right up front where you’re heading and why, it’s very difficult for them to follow a complicated explanation or argument, much less be convinced by it.” STEVEN D. STARK, WRITING TO WIN 6-7 (1999).

A Two-Pronged Approach

Ideally, a judge should be able to read the summary of the argument and

quickly identify the following information: (1) a roadmap of the argument; and (2) the most persuasive specific arguments for your position. Therefore, the summary should not just be a roadmap of your argument; it should also give the two or three most compelling *specific* reasons why you should win. Additionally, the summary should be very brief—rarely more than one page. One survey of appellate judges showed that one-third responded that a summary of the argument should never be more than one page. Amy A. Hennessee & Daryl L. Moore, *Who’s on First?—Results of the Judicial Survey*, STATE BAR OF TEX., 17TH ANNUAL ADVANCED CIVIL APP. PRACTICE COURSE 2 (Sept. 11-12, 2003). More than two-thirds said a summary should never be more than two pages. *Id.*

For a summary of the argument to be persuasive and convey the heart of the argument, it cannot be merely general. It should identify specific, persuasive reasons for your position, even if the legal and factual support will require substantial development later in the body of the argument. If possible, the summary should include specific examples rather than general concepts. To achieve this, first brainstorm your very best fact and law arguments and then weave them together in a small, coherent package.

Example 1

The following is a sample summary from an appellee’s brief using this formula:

The trial court judgment should be affirmed, and the arguments in plaintiff/AB’s brief rejected, because AB’s arguments fail to follow the correct rule of law and the evidence in this case. First, the rule of law suggested by AB greatly expands the fiduciary duties of a departing employee—far beyond the duties recognized by Texas courts. Previously, Texas law has recognized that a departing employee has the right to make plans to compete with his employer, the right to secretly join other employees in the endeavor, and the right to keep these plans secret from his employer. AB, however, would change Texas law by requiring the departing employee to disclose the plans to compete and by preventing the employee from hiring other employees after the employee has resigned.

Second, AB also ignores the evidence and inferences favoring the jury’s verdict. There is substantial evidence to support the jury’s verdict that defendant did not breach any fiduciary duty when other employees joined his new company after he resigned. There is evidence that defendant did not know other employees would follow him until after

Charles T. Frazier, Jr. and LaDawn H. Conway are partners in the Dallas office of Alexander Dubose Jones & Townsend LLP, an appellate boutique firm. Their practices concentrate on appellate advocacy and trial support. They are both Board Certified in Civil Appellate Law by the Texas Board of Legal Specialization, and are members of the DRI Appellate Advocacy Committee. Charlie and LaDawn specially thank Robert Dubose for his valuable contribution to this article. Robert is a partner in the Houston office of Alexander Dubose Jones & Townsend LLP, and is similarly Board Certified in Civil Appellate Law by the Texas Board of legal Specialization.

he left AB. There also is substantial evidence that other employees left, not because of any inducement by defendant, but because of their deep-seeded resentment of AB's management. The record in this case establishes no more than a former employee's legal competition with his former employer.

This summary provides the two important parts of a summary of the argument. First, it provides a roadmap, which appears in the last part of the first sentence ("the correct rule of law and the evidence in this case") and in the words "first" and "second." Those words constitute a roadmap because the argument that follows has two parts, the first about the correct rule of law and the second about the evidence in the case.

Second, the summary includes specific, persuasive arguments, not just general conclusions. For instance, the first paragraph explains how the rule proposed in the other side's brief would specifically change the legal requirements placed on departing employees. The second paragraph points to specific facts that demonstrate that the appellee did not breach his fiduciary duty.

Example 2

The following is another sample using this basic structure in a negligent entrustment case.

To recover for negligent entrustment, a plaintiff must prove that the vehicle owner entrusted it to a driver who the owner knew, or should have known, was an unlicensed, incompetent, or reckless driver. Proof of recklessness requires evidence that either: (1) the driver did not have a license, (2) the owner had reason to believe that the driver was reckless, or (3) the driver had multiple prior convictions involving some form of reckless driving.

Defendant was a licensed driver. Her only two prior traffic convictions were not for reckless driving, but for driving without liability insurance. There is no evidence that she had been convicted of being at fault in any prior accident. Under well-established law, the evidence is legally insufficient proof that defendant was an incompetent or reckless driver.

Instead of the usual proof of negligent entrustment, plaintiff's case rested on the fact that the new-driver enrollment form signed by defendant required that she had been a licensed driver for the previous three years. Although she was a licensed driver when she signed the independent contractor agreement, defendant's license had been suspended for part of previous three years for failing to carry liability insurance. For the judgment to be affirmed on this basis, this Court would have to do what no Texas court has ever done: expand the duties owed under negligent entrustment so that any business that has internal policies that are stricter than the requirements under Texas law is punished by having its standard of care raised beyond what is required of other companies. This Court should reject this attempt to expand negligent-entrustment liability and hold that the evidence is legally insufficient to support a claim of negligent entrustment.

In this example, the best, specific facts to prove that the driver had no history of recklessness are included up front, followed by specific reasons to support the legal argument that the court should not expand the law of negligent entrustment.

Example 3

Another example applying this basic formula is from an appellant's brief in a

case alleging discrimination under federal and state disability laws:

The district court made two mistakes. First, it found that defendant was bound by a consent decree to which defendant never consented. The second flowed from the first, for the court used the finding that defendant was bound to justify joining defendant as a party to the lawsuit. The controlling precedent from the Supreme Court is clear: "A court may not enter a consent decree that imposes obligations on a party that did not consent to the decree." This is so because "[i]t is a violation of due process for a judgment to be binding on a litigant who was not a party nor a privy and therefore has never had an opportunity to be heard." In this case, defendant did not consent to the decree, and was never given an opportunity to be heard on the merits of the consent decree. To bind it to the decree is a violation of due process.

There is no applicable exception to this rule based on privity. Claims based on discrimination are personal claims, so the transfer of property from co-defendant to defendant did not create a relationship that would make defendant liable for the misconduct of co-defendant. The district court also attempted to justify binding defendant to the consent decree under theories of apparent authority, equitable estoppel, and virtual representation, but there is simply no evidence to support these theories. The evidence provided by defendant, which was never contradicted, demonstrates that defendant never authorized co-defendant to negotiate on its behalf, and that neither the district court nor plaintiffs relied

on the existence of such an authorization. No theory of privity can justify the district court's order. Defendant did not consent to the Consent Decree and was not in privity with co-defendant. Thus, it could neither be joined as a party nor bound to the Consent Decree.

In this example, the summary identifies the two fundamental mistakes made by the district court (findings of consent and privity), lays out the correct rules of law (regarding consent and privity), and then specifically discusses the evidence (as it relates to those two principles).

Example 4

A final example of this basic structure comes from legal writing expert Bryan A. Garner's book "The Winning Brief":

Under established Texas law, an insurer that (1) undertakes the defense of an insured without reserving its rights to contest coverage, and (2) neither initiates settlement talks nor agrees to settle within policy limits, is liable to the full extent of any judgment in excess of policy limits. Here Allied Mutual controlled the defense of the Eloise Bauer estate, never initiated settlement talks even though liability was clear, refused settlement offers within policy limits, and then allowed an excess judgment of \$4.25 million to be taken against the insured. Allied Mutual knew of Eloise Bauer's liability on April 11, 1988, but it continued to control the defense (without contesting coverage) through the July 1988 trial date. The judgment became final in August 1988, and in September Allied Mutual belatedly asserted a coverage defense. The facts here are extremely unusual, but the principle is not: under *Gandy and Kelly*, the amount of the judgment establishes damages as a

matter of law.

BRYANA. GARNER, *THE WINNING BRIEF* 426-27 (1999). In this summary, Mr. Garner sets forth the correct rule of law and then the specific evidence that demonstrates why his client should win under a proper application of that rule.

Adding a Theme to the Summary

Depending on the nature of your case, a different approach to the summary of the argument might be appropriate. For example, in a case where your opponent made procedural mishaps that are central to the appeal, the summary of the argument might lend itself to a "too little too late" theme for the brief, as demonstrated below.

Example 5

This is a case of too little too late. Over a year ago, the trial court entered an order denying a prior request by defendants for arbitration. Instead of appealing that order, defendants engaged in discovery and motion practice for nearly a year. Only after receiving a negative ruling on a portion of the merits did defendants unsuccessfully re-urge their request for arbitration and seek appellate review. Their appeal comes too late. The rules of procedure required defendants to seek appellate review within 20 days of the first denial of arbitration. By failing to seek timely review of that ruling, defendants have waived any right to such review, and this proceeding should be dismissed.

Further, defendants bring this appeal in only their individual capacities, not derivatively on behalf of the corporate defendant. As a result, their appeal seeks too little. Under Texas law, defendants in their

individual capacities are recognized as distinct and separate persons as defendants in their derivative capacity on behalf of the corporate defendant. As minority shareholders, defendants do not have standing in their individual capacities to enforce any provision of the contract between the corporate defendant and plaintiffs, including the arbitration clause. Because the parties who have standing to challenge the arbitration ruling are not before the Court on appeal, the trial court's ruling should be affirmed.

Finally, on appeal, defendants lodge no challenge whatsoever to the trial court's conclusion that the rent provision in the lease is void and unenforceable, which undergirds the court's denial of arbitration. As a consequence, defendants' appeal again seeks too little. To attack an adverse ruling, defendants were required to provide briefing explaining the nature of the alleged error, with citations to authority and the record. By failing to do so, defendants have waived any error in the trial court's construction of the contract supporting the denial of arbitration. Because the basis for the trial court's denial of arbitration is not challenge on appeal, the trial court's ruling should be affirmed.

While this summary comports with the basic formula described above (it provides a roadmap for the opponent's failings, the correct rules of law for each, and a specific description of the relevant evidence), it also develops a theme (waiver) for the brief. A theme that ties the arguments together adds strength to the overall summary.

Conclusion

The summary of the argument is *the* opportunity for providing the court the

fundamental reasons why your client should prevail. Do not miss this opportunity. In fact, you should approach the summary with the care you would give if the judge stopped you on the street and said, “I only have about a half a minute, so who are you, what do you want, and why?” STARK, WRITING TO WIN

5. The two or three sentences that comprise your response reflect your very best arguments and should form the basis for your summary. Take the time and reflection necessary to know what those sentences should be, and your summary will be as powerful and persuasive as the case permits.

First Circuit

Attorney Fee Claim Waived Where Defendant Did Not Request Fees in Opening Brief but Only in Reply Brief

***B. Fernandez v. Kellogg USA, Inc.*, 516 F.3d 18, 26 (1st Cir. 2008)**

The First Circuit affirmed the district court ruling that a non-diverse Puerto Rican Cereal distributor was an indispensable party to a suit alleging that the American manufacturer terminated a prior Puerto Rican distributor without just cause. The court held that a judgment against the manufacturer in the distributor's absence could prejudice the distributor in any future attempt to enforce a defendant's agreement with the plaintiff. The manufacturer cross-appealed from the district court's sua sponte denial of costs and attorneys' fees without explanation (Puerto Rican law would entitle the defendant to fees under the usual circumstances). The court found this claim was waived because the manufacturer defendants did not explain in their opening brief why they should be entitled to fees "but rather make the argument in the reply brief. . . ." 516 F.3d at 60. Therefore, the court held that the argument was waived.

The Court of Appeals May Make Findings in Ruling on Motion to Intervene Where District Court Made No Specific Findings

***Geiger v. Foley Hoag LLP Retirement Plan*, 521 F.3d 60 (1st Cir. 2008)**

David Geiger was married in 1980 and, following a trial, a divorce judgment entered in June 2004. In dividing the marital assets, the judge assigned

the former wife's benefits in three of Geiger's retirement plans. After entry of the divorce judgment, counsel for the former wife and the plan's administrator worked to effectuate the transfer of the retirement plans' benefits by drafting Qualified Domestic Relations Orders (QDRO), a crucial step as benefits provided under an ERISA plan "may not be signed or alienated" by a domestic relations order, unless the order "is determined to be QDRO. 29 U.S.C. §1056(d)(1) and (3)(A)." *Id.* at 62.

In December 2004, the former wife obtained model QDROs and QDRO's procedures from the plan administrators. Numerous rounds of back-and-forth correspondence ensued. Geiger was copied on all the correspondence. Proposed QDROs were presented to the divorce court in January 2005 and, in response to concerns raised by the judge, additional revisions were made. Copies were provided to Geiger approximately two weeks before the next scheduled hearing and he offered no substantive comment about the draft QDROs, but did provide his former wife's counsel with certain information she had requested about the plans.

On the day of the hearing, Geiger filed a motion objecting to the issuance of any orders related to the retirement plans and alleged a host of substantive and procedural infirmities related to the divorce judgment as well. "After making several modifications to the proposed QDROs, the court entered the orders, each of which is entitled 'Qualified Domestic Relations Order and retained jurisdiction to further modify them to establish or maintain its qualification as a [QDRO]." *Id.* at 63. After receiving correspondence from the plan's administrators that they considered the orders to be QDROS, Geiger penned lengthy

letters to the administrators objecting to their conclusions.

In September 2005, the plaintiffs rejected Geiger's objections and issued their final determination that the court's orders were QDROs and set out to effectuate the orders by establishing accounts for the former wife. Days later, Geiger filed suit in federal court against one of the plans, essentially claiming that any transfer of his interests would violate ERISA because the orders were not QDROS.

The district court granted Geiger's request for preliminary injunction premising its decision, at least in part, on Geiger's incorrect assertion that the defendant plans did not object. *Id.* at 63. Instead of adopting Geiger's proposed order, the court ordered Geiger to confer with his former wife's counsel to create an agreed upon order. Two weeks before a scheduled hearing in June, the former wife moved to intervene pursuant to Fed. R. Civ. P. 24(a) and simultaneously moved to dismiss involving the *Rooker-Feldman* doctrine, abstention and claim preclusion.

Over Geiger's objection, the court granted, without writer order, the motion to intervene and subsequently granted the motion to dismiss. The court ruled that its standard of review was for abuse of discretion and "where, as here, the district court made no specific findings, we can do so, relying on the record." *Id.* at 64. The court rejected Geiger's argument that the motion to intervene was untimely, since at the time it was filed, "the only pending item was a scheduled hearing in which the court would condier the two competing injunctions proposals." The court concluded that the former wife "amply . . . satisfied the requirements of Rule 24(a) . . ." *Id.* at 65.

Finally, the court ruled that the motion to dismiss was correctly granted, holding:

In the final analysis, Geiger rejected the opportunity to challenge the QDROs at both the state trial and appellate levels. That he did so on the mistaken belief that the federal courts had exclusive jurisdiction over those challenges does not alter the finality of those judgments, nor their preclusive effect.

RICHARD L. NEUMEIER
Morrison Mahoney LLP
Boston, Massachusetts
rneumeier@morrisonmahoney.com

Second Circuit

Amended Local Rule: Clerk's Fees Local Rule 0.17

On January 9, 2009, the court amended Local Rule 0.17 concerning the clerk's fees. The amendment requires that the payee name for all fees is, "United States Court of Appeals for the Second Circuit." The amendment did not impact any of the fee amounts.

Amended Local Rules Appendix Interim Local Rules 25 and 25.2

On January 9, 2009, the court amended Interim Local Rules 25 and 25.2, which concern filing and service and an appendix. The amendment requires that a party represent by counsel to submit every appendix on a CD-ROM, and serve a CD-ROM version on all opposing counsel, in addition to filing the required number of copies of the appendix. A party may submit a certification of hardship in an attempt to avoid the CD-ROM requirement.

Court Declines to Certify Question to New York Court of Appeals Because Statute Clearly Addressed Issue

Canora Family, Inc. v. Universal Underwriters Ins. Co., 2008 WL 5265861 (2d Cir. 2008)

The insured claimed that the insurer could not rely on its notice of cancellation/notice of renewal to secure summary judgment because that document was an "alternative renewal notice" under New York Insurance Law § 3426(e)(1)(C), which requires a second notice. The court disagreed and refused the insured's request to have the court certify the question to New York's highest court. The Second Circuit concluded that the plain words of the statute provided an answer to the issue raised and, therefore, certification of the issue was unnecessary.

Erie Doctrine Regarding Class Actions and State Procedural Law *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 549 F.3d 137 (2d Cir. 2008)

In this action regarding New York's no-fault law, the medical provider brought a putative class action against an automobile insurer, alleging breach of contract, bad faith breach of contract, and the violation of New York law by failing to pay statutory interest penalties on overdue payments of insurance benefits owed under the no-fault law. The district court granted the automobile insurer's motion to dismiss based on New York procedural rule that prohibits a lawsuit seeking a statutory penalty from being brought as a class action.

The Second Circuit addressed whether New York's procedural rule – N.Y. CPLR 901(b) – may be applied in a federal court sitting in diversity

jurisdiction and adjudicating claims under New York law. The medical provider argued that the rule conflicts with Federal Rule of Civil Procedure 23 and, therefore, the federal rule should apply. The Second Circuit disagreed, observing that Rule 23 does not control the issue of which substantive causes of action may be brought as class actions or which remedies may be sought by class action plaintiffs. The Second Circuit noted that N.Y. CPLR 901(b) was analogous to a statute of limitations, which is treated as substantive law for Erie doctrine analyses.

The court agreed with a majority of jurisdictions that applied N.Y. CPLR 901(b) in a federal forum. It reasoned that doing anything other would contravene the mandates of Erie by allowing plaintiffs to recover on a class-wide basis in federal court where they would be unable to do the same in state court. The court also noted that failing to apply CPLR 901(b) would encourage forum-shopping.

MATTHEW S. LERNER
Goldberg Segalla LLP
Albany, New York
mlerner@goldbergsegalla.com

Third Circuit

Diversity Jurisdiction

Swiger v. Allegheny Energy, Inc., 540 F.3d 179 (3d Cir. 2008)

The plaintiff sued various defendants on several state law claims based upon diversity jurisdiction. The defendant, Morgan, Lewis & Bockius LLP, moved to dismiss the complaint on the ground that complete diversity between the parties was lacking. Morgan Lewis is a partnership that had among its partners a dual United States and United Kingdom citizen domiciled in the United

Kingdom. The district court dismissed the case for lack of jurisdiction, and, on appeal, the Third Circuit addressed the issue of first impression in the Circuit as to whether a federal district court has diversity jurisdiction over a lawsuit involving a partnership that has among its partners an American citizen domiciled in a foreign state.

Relying on the rule set forth by the United States Supreme Court in *Chapman v. Barney*, 129 U.S. 677 (1889), the Third Circuit first indicated that partnerships and other unincorporated associations are not considered “citizens,” but rather the courts are to look to the citizenship of all the partners to determine whether the federal district court has diversity jurisdiction. As a result, for purposes of diversity jurisdiction, a partnership’s citizenship as a party is determined by reference to all partners, and all partners must be diverse from all parties on the opposing side. Next, the court explained that in order to be a citizen of a State, a natural person must be both a citizen of the United States and be domiciled within the State. An American citizen domiciled abroad, while being a citizen of the United States, is not domiciled in a particular State, and is “stateless” for purposes of diversity jurisdiction as he or she is neither a “citizen of a State” nor “citizens or subjects of a foreign state. Because Morgan Lewis has a stateless partner and, thus, all partners of Morgan Lewis are not diverse from all parties on the opposing side, the Third Circuit found that the district court correctly held that it lacked diversity jurisdiction over the action.

The Third Circuit also rejected the plaintiff’s argument that the district court nevertheless had diversity jurisdiction under 28 U.S.C. § 1332(a)(2)

because the partner, as a dual citizen of the United States and United Kingdom, would still be a “citizen or subject of a foreign state.” The court explained that this question was already decided in *Frett-Smith v. Vanterpool*, 511 F.3d 396 (3d Cir. 2008), in which it held “that for purposes of diversity jurisdiction, only the American nationality of a dual national is recognized.” Because the partner at issue is a United States citizen, the Third Circuit found that any reliance on § 1332(a)(2)’s alienage jurisdiction would be in error.

Removal/State Sovereign Immunity

***Lombardo v. Commonwealth of Pennsylvania, Department of Public Welfare*, 540 F.3d 190 (3d Cir. 2008)**

The plaintiff brought an employment discrimination complaint in the Court of Common Pleas of Luzerne County alleging violations of both federal and state antidiscrimination laws. Based on the federal claim, the Commonwealth removed the complaint to the United States District Court for the Middle District of Pennsylvania and sought partial dismissal on sovereign immunity grounds. The District Court denied the motion to dismiss, reasoning that the Commonwealth waived its Eleventh Amendment immunity by removing the case from state to federal court.

On appeal, the Third Circuit held that state sovereign immunity is comprised of two distinct types – i.e., immunity from suit in federal court and immunity from liability. First, states possess immunity from suit in the federal courts, also known as Eleventh Amendment immunity, which may be waived by the State by invoking federal court jurisdiction voluntarily. While the Third Circuit agreed that the

Commonwealth’s voluntary removal unequivocally invoked the jurisdiction of the federal courts and waived the Commonwealth’s Eleventh Amendment immunity from suit in a federal forum, the Third Circuit held that the removing State still retains all defenses it would have enjoyed had the matter been litigated in state court, including immunity from liability. Looking to Pennsylvania law, the court determined that the state assembly had not specifically waived immunity for ADEA violations, nor are such violations included in the statutory exceptions to sovereign immunity. Consequently, the Third Circuit reversed the judgment of the District Court because the Commonwealth had immunity from liability regarding claims under the ADEA and it did not waive such immunity by affirmatively selecting a federal forum for litigating the case.

KIMBERLY BOYER-COHEN

Marshall, Dennehey, Warner, Coleman & Goggin

Philadelphia, Pennsylvania

kaboyer@mdwvcg.com

Fourth Circuit

ERISA Notice Requirements

***Gagliano v. Reliance Standard Life Ins. Co.*, 2008 WL 4916330 (4th Cir.)**

In *Gagliano*, the Court dealt with the remedies for an employee benefit plan’s violation of the procedural requirements of ERISA. The district court concluded that the plan had gone about terminating the claimant’s benefits without complying with ERISA’s notice requirements, and ordered that the plan reinstate the benefits, citing *Wenner v. Sun Life Assur. Co. of Canada* 482 F.3d 878 (6th Cir. 2007). On appeal, the court reversed, expressly rejecting the rationale of the majority in *Wenner*, and

concluded that the appropriate remedy was a remand for a redetermination of the termination issue applying the correct procedures.

Abuse of Discretion Standard Within Context of Immigration Matter

***Zub v. Mukasey*, 2008 WL 4983837 (4th Cir.)**

In *Zub*, the court reversed the conclusion of an immigration judge on an asylum petition. The opinion emphasizes the substance of the standard of review for abuse of discretion. The abuse of discretion standard, the Court explained, does not give the immigration judge “a blank check.” In particular, the court explained that the immigration judge must offer a specific, cogent reason for disbelief of the applicant’s testimony, and noted that the court would not defer to adverse credibility findings by the immigration judge based on speculation, conjecture, or an otherwise unsupported personal opinion.

Evidentiary Issues Concerning Title VII Case

***Ziskie v. Mineta*, 2008 WL 4891202 (4th Cir.)**

In *Ziskie*, a Title VII case, the court reversed the entry of summary judgment for the employer, concluding that the trial court erred in its failure to consider the affidavits of the plaintiff’s co-workers. The court concluded that this ruling was at odds with Fourth Circuit precedent, which has recognized that on the issue of workplace hostility, all the circumstances relating to the nature of the work environment should be considered, including relevant testimony as to events of which the plaintiff has no personal knowledge. The court explained, however, that on remand the plaintiff’s

case faced many obstacles, including the need to prove that the harassment was gender-based, and that the harassment was severe and pervasive.

Employee Polygraph Protection Act

***Worden v. SunTrust Banks, Inc.*, 2008 WL 4966543 (4th Cir.)**

In *Worden*, the court addressed the plaintiff’s claims against his former employer under the Employee Polygraph Protection Act, 29 U.S.C. § 2001, *et seq.* On the plaintiff’s discharge claim, the court reversed summary judgment for the employer, holding that the district court erred in its construction of the statute by requiring the plaintiff to prove that the polygraph results were the “sole factor” that caused his discharge. Instead, the court applied the mixed-motive analysis from the plurality opinion in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and concluded that the employer was entitled to summary judgment. On the plaintiff’s “acceptance” claim, the court agreed with the district court that the employer’s “mere receipt” of polygraph results was insufficient to establish liability under the Act for acceptance of polygraph results.

STEVE MINOR

Elliott, Lawson & Minor

BRISTOL, VIRGINIA

sminor@elliottlawson.com

Fifth Circuit

Mandamus of § 1404(a) Motion to Transfer Venue Order

***In re Volkswagen of America, Inc.*, 545 F.3d 304 (5th Cir. 2008) (en banc)**

[Note: a review of the panel’s opinion of October 24, 2007 appears in the Winter 2008 *Certworthy*] After its motion to transfer venue was denied in this

product-liability and personal-injury case, Volkswagen sought a writ of mandamus in the Fifth Circuit directing the district court to transfer the case from the Marshall Division of the Eastern District of Texas to the Dallas Division of the Northern District of Texas. The automobile accident occurred in Dallas, all documents and physical evidence were located in the Dallas Division, and the car was purchased in Dallas. The Marshall Division had no connection with the parties or facts. In a per curiam opinion, a divided panel denied mandamus relief. Volkswagen filed a petition for rehearing en banc, which the panel interpreted as a petition for panel rehearing. That petition was granted, the original panel withdrew its opinion, and a second panel heard argument. That panel unanimously granted mandamus relief, held that the Dallas Division was more convenient, and ordered the case transferred. The plaintiffs’ petition for rehearing en banc was granted.

In a divided opinion, the Fifth Circuit first addressed whether mandamus is an appropriate procedure for challenging a district court’s ruling on a 28 U.S.C. § 1404(a) motion to transfer venue. The court concluded that it is appropriate where there is a clear abuse of discretion. The court relied on the three requirements for issuance of a writ set out in *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 380-81 (2004), which stated: (1) “the party seeking the issuance of the writ [must] have no other adequate means to attain the relief he desires—a condition designed to ensure that the writ will not be used as a substitute for regular appeals process”; (2) the petitioner must show that “[his] right to issuance of the writ is clear and indisputable”; and (3) “even if the first two prerequisites have been met, the issuing

court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances.”

The court acknowledged the plaintiffs’ privileges as to where to file suit under 28 U.S.C. § 1391, but analyzed how those privileges are weighed against factors of convenience under § 1404(a). In considering Volkswagen’s evidence of inconvenience, the court held that the district court abused its discretion by denying the motion to transfer. The court then held that the district court *clearly* abused its discretion by giving undue weight to the plaintiffs’ choice of venue, ignoring precedents, misapplying the law, and “glossing over the fact that not a single relevant factor favors the [plaintiffs’] chosen venue. . . .” The majority of the Fifth Circuit concluded that Volkswagen met each of the *Cheney* requirements for mandamus relief and therefore ordered the case transferred to the Dallas Division. Seven judges on the court dissented. The dissent disagreed with the majority’s analysis and result, and asserted that the majority ignored long-standing Supreme Court precedent in permitting interlocutory review of a nonappealable order that is within the District Court’s discretion.

Appellate Jurisdiction - Labor ***Bally’s Park Place, Inc. v. N.L.R.B.*,** **546 F.3d 318 (5th Cir. 2008) (per** **curiam)**

Bally’s is a New Jersey casino operator that sought review in the Fifth Circuit of a National Labor Relations Board summary judgment that Bally’s had acted unlawfully in refusing to bargain with the United Automobile Workers. Under 29 U.S.C. § 160(f), an appeal from such an order is to the court of appeals for the federal circuit where the chal-

lenged labor practice occurred or where the aggrieved party resides or transacts business. Conceding that it did not reside in any of the states within the Fifth Circuit and that it did not commit the purported unfair labor act in the Fifth Circuit, Bally’s contended that it “transacts business” within the Fifth Circuit.

The court acknowledged that there is no statutory definition of the phrase, “transacts business,” and little pertinent case law exists. Whatever the definition is, it focuses on contacts of a certain type within a federal circuit. The court first rejected Bally’s contention that it was able to “borrow” the contacts of its parent corporation, Harrah’s Entertainment, Inc., in the Fifth Circuit. The court followed the decisions of other circuits that a distinction between parent corporations and their subsidiaries exists in applying the NLRB judicial-review provision. Accordingly, Bally’s could not utilize Harrah’s contacts. The court next considered Bally’s argument that it transacts business within the Fifth Circuit because (1) it profits financially from patrons who travel from the Fifth Circuit to its New Jersey casinos, (2) it solicits business by mail to residents within the circuit, and (3) circuit residence may make room reservations online via Bally’s website. The court held that more contacts are needed—that “some sort of physical presence” is required. While the court found significant the fact that Bally’s maintained no physical presence in the Fifth Circuit, it did not find this fact dispositive. What was determinative was Bally’s inability to point to nothing more than the above-referenced activity. In granting the NLRB’s motion to dismiss, however, the Fifth Circuit clarified that it was not attempting to identify the precise contacts needed to satisfy the Act’s judicial-re-

view process.

CHARLES T. FRAZIER, JR.

Cowles & Thompson

DALLAS, TX.

cfrazier@cowlesthompson.com

Sixth Circuit

Certification of State Law Question

***Planned Parenthood Cincinnati Region v. Strickland*, 531 F.3d 406 (6th Cir. 2008)**

Following the State of Ohio’s enactment of legislation in 2004 regulating when physicians can prescribe administration of the abortion inducing pill RU-486, the district court permanently enjoined enforcement of the entire statute. The district court found the law unconstitutionally vague. During oral argument in the Sixth Circuit, the appellate panel inquired whether the scope and meaning of the statute should be decided first by the Supreme Court of Ohio before passing on the ultimate issue of its constitutionality. Both Planned Parenthood and the State encouraged the Sixth Circuit to speculate on how the Supreme Court of Ohio would construe the previously uninterpreted state statute, as opposed to seeking an authoritative interpretation from the Ohio high court via certification.

Preferring not to speculate as to how the state supreme court would interpret the abortion legislation and in “the interests of judicial federalism and comity,” the Sixth Circuit sua sponte certified two questions of state law to the Supreme Court of Ohio for resolution pursuant to the Rules of the Supreme Court of Ohio and *Bellotti v. Baird*, 428 U.S. 132 (1976), that encourages federal courts to employ certification or abstention if the “unconstrued state statute is

susceptible of a construction by the state judiciary which might avoid in whole or in part the necessity for federal constitutional adjudication, or at least materially change the nature of the problem.” *Id.* at 146-47.

Capacity of Non-named Class Members to Appeal

***Fidel v. Farley*, 534 F.3d 508 (6th Cir. 2008)**

The appellant, a non-intervening, non-named member of a Rule 23(b)(3) class of shareholders, appealed from the district court’s approval of a settlement in a securities class action. The appellant contended that the district court erred in approving the settlement because certain class members, including the appellant, received notice of the settlement after the deadline for objecting to or opting out of the settlement. The appellees argued that the appeal should not be heard because the appellant was not a “party” for purposes of appealing the settlement. Joining with the Ninth Circuit and relying upon a “broad reading” of *Devlin v. Scardelletti*, 536 U.S. 1 (2002), which recognized that a non-named member of a mandatory Rule 23(b)(1) class who has objected in a timely manner to approval of a settlement at a fairness hearing has the power to bring an appeal without first intervening, the Sixth Circuit held that the appellant could bring this appeal, notwithstanding his status as a non-intervening, non-named Rule 23(b)(3) class member.

Reopening Time To Appeal; Duty to Monitor Electronic Docket

***Kuhn v. Sulzer Orthopedics, Inc.*, 498 F.3d 365 (6th Cir.), cert. denied, 128 S.Ct. 655 (2007)**

The appellants were members of a certified settlement class action against Sul-

zer Orthopedics, Inc. in connection with allegations that Sulzer’s orthopedic hip implants were defective. In addition to monies that the appellants received under the class settlement, the appellants were entitled to receive additional compensation owing to the extraordinary injuries sustained. The appellants’ former counsel, however, failed to timely file the claim under the terms of the settlement’s “Extraordinary Injury Fund.” This failure barred the appellants’ recovery of the additional monetary relief.

During the course of the appellants’ lawsuit in Texas state court against their former attorney for, inter alia, legal malpractice, they sought discovery from Sulzer about the negotiation and implementation of the class-action settlement. Arguing that the Texas lawsuit implicated questions exclusively within the continuing jurisdiction of the district court to oversee the class-action settlement and that the Texas case was a collateral attack on the district court’s judgment, Sulzer obtained an injunction from the district court enjoining the prosecution of some of the appellants’ state-court claims. The appellants’ counsel did not receive notice of entry of the injunction order and thus failed to file a timely appeal. When the injunction order was discovered, a motion to reopen the time to appeal was filed under Fed. R. App. P. 4(a)(6). Finding that the appellants’ counsel had (1) failed to register his e-mail address with the court’s CM/ECF system so that he would obtain e-mail notifications of the court’s orders, and (2) neglected his duty to monitor the on-line docket, the district court denied the motion.

While the Sixth Circuit noted that the record established that the three express conditions of Rule 4(a)(6) had been satisfied and the appellants’ coun-

sel was not required to register with the court’s CM/ECF system, it held that the district court did not abuse its discretion in denying the motion because the appellants’ counsel had failed to regularly monitor the electronic docket. The circuit noted that “[a]n interpretation of Rule 4(a)(6) that allowed parties to ignore entirely the electronic information at their fingertips would severely undermine the benefits for both courts and litigants fostered by the CM/ECF system, including ease and speed of access to all the filings in a case.” *Id.* at 371.

Sanctions for Frivolous Appeal

***B & H Medical, L.L.C. v. ABP Administration, Inc.*, 526 F.3d 257 (6th Cir. 2008)**

After affirming the district court’s summary judgment and award of sanctions made pursuant to Fed. R. Civ. P. 11 against counsel for his failure to voluntarily dismiss this antitrust case after a lengthy discovery process failed to disclose any support for the antitrust claims asserted in the complaint, the Sixth Circuit granted the appellee’s motion for appellate sanctions pursuant to Fed. R. App. P. 38 due to the appellant’s having pursued a frivolous appeal. The appellate sanctions were imposed due to the appellant (1) having devoted much of its appellate briefing to an entirely new argument under a legal theory of antitrust liability that was never advanced in the district court; and (2) having neglected to challenge in the opening brief (and then only cursorily in its reply brief) the district court’s “crucial determination” that the appellant lacked antitrust standing in the absence of any evidence of an injury to competition, which the Circuit noted rendered the other issues raised in the antitrust appeal “essentially meaningless.” The sanction award was

made against both the appellant and its counsel.

TIMOTHY J. FITZGERALD
Gallagher Sharp
Cleveland, OH
tfitzgerald@gallaghersharp.com

Seventh Circuit

Subject Matter Jurisdiction; Rule 60(b) motions

***Craig v. Ontario Corp.*, 543 F.3d 872 (7th Cir. 2008)**

The court of appeals held that a district court retains authority to hear a Rule 60(b)(4) motion while an appeal is pending.

Former employee sued employer to recover on promissory notes related to a stock repurchase. The district court entered judgment for employee and denied employer's motion for relief from judgment. While an appeal of that ruling was pending, the employer discovered additional facts putting diversity in question and lodged a second Rule 60 motion for relief. The district court held it lacked jurisdiction to rule on the motion because of the pending appeal.

Generally, a district court may consider Rule 60(b) motions for relief from judgment while an appeal is pending. If the motion lacks merit, the court should deny it promptly, but if there is some merit, the district court should issue a short memorandum so the appellate court can be informed of its views and take action. Here the district court declined even to conduct a hearing or review new filings.

In reversing, the court of appeals underscored the importance of considering a Rule 60(b) motion when the basis for the challenge is subject matter jurisdiction. Subject matter jurisdiction is so central to the district court's power to

issue any orders whatsoever, that it may be inquired into at any time, with or without a motion, by any party or by the court itself.

Subject matter jurisdiction, *Rooper-Feldman* doctrine

***Kelley v. Med-1*, __ F.3d __ (7th Cir. 2008), available at 2008 WL 4977590**

The court of appeals held that the district court lacked jurisdiction to review a state court judgment. A collection agency sued in its own name in state court to collect hospital expenses owed by former patients, and also collected attorneys' fees. Several debtors then sued the agency and its in-house lawyers for violation of the Fair Debt Collection Practices Act related to the requests for attorneys' fees, but the district court dismissed the action for lack of subject matter jurisdiction. The *Rooper-Feldman* doctrine precludes lower federal court jurisdiction over claims seeking review of state court judgments, no matter how erroneous or unconstitutional the state court judgment may be. The doctrine applies to claims actually raised as well as those inextricably intertwined with state court determinations.

The court of appeals acknowledged a recent limitation on the doctrine, rendered in *Exxon Mobil Corp. v. Saudi Basic Industries*, 544 U.S. 280, 284 (2005). In *Exxon Mobil Corp.*, the Supreme Court explained that the narrow doctrine is confined to cases brought by state court losers complaining of injuries caused by state court judgments rendered before the district court proceedings began, seeking district court rejection of those judgments. Here, even though appellants tried to limit their federal claims to allegedly fraudulent claims for attorneys' fees made before the state court judgments were entered,

the claims were not independent of the state court judgments because such fees can only be awarded by a court. Federal review of the claims necessarily would entail review of the state court judgments.

The court of appeals then considered the "reasonable opportunity" exception to *Rooper-Feldman*. Under that exception, if a plaintiff lacked a reasonable opportunity to litigate its claims in state court, the federal lawsuit can proceed. Here, the plaintiffs argued that the monetary limit in small claims actions precluded their FDCPA claims. The court of appeals rejected that argument, because plaintiffs could have transferred their small claims case to the state plenary docket for a jury trial. The court of appeals endorsed Fourth Circuit jurisprudence that applies the "reasonable opportunity" inquiry to any reasonable opportunity to raise the claims, including transferring or appealing within the state system. Especially in light of the narrowing of *Rooper-Feldman* by the Supreme Court in *Exxon Mobil*, the court of appeals questioned the continued vitality of the "reasonable opportunity" exception.

Post-trial review of summary judgment; final pre-trial orders

***Houskins v. Sheahan*, __ F.3d __ (7th Cir. 2008) available at 2008 WL 4977584**

The court of appeals held that a sheriff's employee did not enjoy First Amendment protection of speech, where the speech was a report of an incident between deputies in the sheriff's department parking lot. Prior to reaching this determination of the merits, the court addressed several scope of review questions.

Appellant sheriff sought post-trial

review of the district court's denial of a motion for summary judgment based on evidentiary insufficiency. The court observed that generally such motions are not reviewable, citing *Chemetall GMBH v. ZR Energy, Inc.*, 320 F.3d 714, 718-19 (7th Cir. 2003) (holding that after trial, merits should be judged in relation to the fully-developed record from trial, and reviewing court will not step back in time to determine whether a different outcome should have been reached on the summary judgment record). To preserve a challenge to sufficiency of the evidence, it must be raised in a Rule 50(a) motion for judgment as a matter of law, before the case is submitted to the jury. In this case, however, the sheriff had sought summary judgment not based on adequacy of the evidence, but on the legal question of whether one of the sheriff's employee's speech was constitutionally protected. Even though the district court did not rule on that basis, the court of appeals concluded that the sheriff had preserved the legal question for review by raising it in the summary judgment motion as well as by subsequent motions and objections throughout trial.

The employee also contended that appellate review was foreclosed because he had failed to include the First Amendment issue in the final pre-trial order. The court rejected that argument by noting the absence of any requirement in the Federal Rules of Civil Procedure to insert in a final pre-trial order a contention that had already been rejected by the trial court.

BETH ERMATINGER HANAN

Gass Weber Mullins LLC

Milwaukee, WI

hanan@gasswebermullins.com

Eighth Circuit

An Appealable Order Must Clearly And Unequivocally Terminate The Case

Waterson v. Hall, 515 F.3d 852 (8th Cir. 2008)

The Eighth Circuit dismissed an appeal from an order granting a permanent stay of district court proceedings. Dr. Jeffrey Hall had performed a colonoscopy on Hellen Nash and found a cancerous mass. *Waterson*, 515 F.3d at 853. Three days later, he performed a surgery to remove the mass, but allegedly failed to remove all of the cancerous tissue. *Id.* Nash sued Hall for medical malpractice; four months later, Hall filed for bankruptcy, but did not list Nash as a creditor and Nash did not receive notice of the bankruptcy action. *Id.* Nash died shortly before the bankruptcy proceedings closed and Hall received a general discharge of all debts. *Id.* Mary Waterson, administrator of Nash's estate, amended the complaint to add a claim for wrongful death. *Id.* Hall filed an answer and a motion to stay, pleading his bankruptcy discharge as a defense, but agreeing Nash could seek recovery from any liability insurance. *Id.* The district court granted the motion to stay. *Id.* at 854.

Ten days later, Waterson filed a motion for clarification of the district court's order, asking whether the stay was temporary or permanent. *Id.* Before the district court ruled on the clarification motion, Waterson filed a notice of appeal of the original order granting the stay. *Id.* The district court subsequently addressed the clarification motion, stating that the stay was permanent, but noted that the court would grant Waterson leave to file an amended

complaint. *Id.* Waterson then appealed the clarification order. *Id.*

On the consolidated appeals, the Eighth Circuit stated that the district court would have lacked jurisdiction to enter the clarification order, unless the initial stay order was not appealable. *Id.* at 855. The Eighth Circuit noted that the initial stay order would be appealable if it "clearly and unequivocally terminate[d]" the case, which the court determined it did not. *Id.* Thus, the initial stay order was not a final, appealable order. *Id.*

The Eighth Circuit also concluded that the clarification order is not a final, appealable order. *Id.* The court cited the rule that an order is not final where the district court clearly manifests an intention to permit the plaintiff's action to continue once new pleadings are filed. *Id.* at 855-56 (citation omitted). The district court here "left open the possibility that [Waterson] could file an amended complaint" and, therefore, the clarification order was not final. *Id.* at 855. Since both orders were not final, the Eighth Circuit dismissed the appeal for lack of jurisdiction. *Id.* at 857.

A District Court Stay Generally Does Not Trigger Appeal As Of Right

Kreditverein der Bank Austria Creditanstalt fur Niederosterreich und Bergenland v. Nejezchleba, 477 F.3d 942 (8th Cir. 2007)

The Eighth Circuit dismissed an appeal, holding that a district court stay of proceedings is not immediately appealable if ordered pursuant to the court's inherent powers (as opposed to under the abstention doctrine). *Kreditverein*, 477 F.3d at 947. *Kreditverein* arose from a legal action in which an Austrian court found a breach of loan agreements en-

titled a bank to damages. *See id.* at 944. While the amount of damages was being litigated in Austria, the bank filed suit in the District of Minnesota on substantially the same grounds as had been successfully litigated in Austria, and sought enforcement of the Austrian judgment. *Id.* The district court stayed proceedings pending the damages determination in Austria, and the debtor appealed. *Id.* at 945.

The bank moved to dismiss the appeal for lack of jurisdiction; the debtor contended that appellate jurisdiction existed. *Id.*

In its decision dismissing the appeal, the Eighth Circuit observed, “[t]he only time that an order granting a stay will be considered a final order is if [the stay] is tantamount to a dismissal and [the stay] effectively ends the litigation.” *Id.* at 946. This stay was deemed pursuant to inherent court powers rather than abstention, and hence, temporary in nature. *See id.* at 947.

The Eighth Circuit also concluded that this was not a case in which “proceedings were stayed to allow pending parallel proceedings” to run their course. *Id.* at 946. The Eighth Circuit reasoned that the stay of proceedings was not awaiting an order that would, in effect, decide *all* issues, but rather would merely decide the amount of *damages*. *Id.* at 946-47. Because future district court proceedings were contemplated, the stay order was not an effective final resolution and the order was not appealable. *Id.* at 947.

Change In Law That Occurred After Opening Brief Was Filed May Be Raised In A Reply Brief

***Newton v. Clinical Reference Lab., Inc.*, 517 F.3d 554 (8th Cir. 2008)**

The Eighth Circuit considered a state

supreme court decision that changed the law, even though the decision was raised in the reply brief, because it involved a pure question of law and occurred after the opening brief was filed. Andrea Newton had sued a clinical laboratory, a medical review officer, and the review officer’s employer, alleging negligent performance of a drug test mandated by Newton’s employer. *Newton*, 517 F.3d at 555. The district court dismissed the case based on Newton’s failure to comply with Arkansas’s statute that an expert affidavit must be filed within thirty days after a complaint is filed in a medical injury case. *Id.* Newton appealed. *Id.*

After Newton filed her opening brief, the Supreme Court of Arkansas held, in separate litigation, that the statute’s thirty-day time limit conflicted with Rule 3 of the Arkansas Rule of Civil Procedure regarding the commencement of litigation. *Id.* at 556. The supreme court ruled that the statutory provision must be stricken from the Code as inconsistent with the rules of civil procedure and the state supreme court’s constitutional authority to prescribe those rules. *Id.*

Newton raised the Arkansas Supreme Court ruling in her reply brief. The appellees contended that the Eighth Circuit should decline to consider the Arkansas decision because Newton did not argue the issue in the district court or in her opening brief. *Id.* The Eighth Circuit held that the court “may address arguments raised for the first time in a reply brief on appeal where the proper resolution is beyond doubt or when the argument involves a purely legal issue in which no additional evidence or argument would affect the outcome of the case.” *Id.* (quoting and citing prior decisions). The Eighth Circuit reversed the district court because the proper resolution of the issue “is now beyond

doubt.” *Id.* at 557.

DIANE B. BRATVOLD

Briggs and Morgan, P.A.

Minneapolis, Minnesota 55402

dbratvold@brigss.com

Ninth Circuit

Standard For Pleading In Securities Litigation

***In re Gilead Sciences Securities Litigation*, 536 F.3d 1049 (9th Cir. 2008)**

In *In re Gilead Sciences Securities Litigation*, the Ninth Circuit reversed a district court’s dismissal of a securities fraud class action for failure to state a claim. On the element of “loss causation,” the plaintiffs had pled that public disclosure of an FDA “warning letter” caused a pharmaceutical company’s stock price to drop – three months later.

Although the Supreme Court endorsed a relatively vigorous standard for motions to dismiss under Federal Rule of Civil Procedure 12(b)(6) in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), the Ninth Circuit stated that *Twombly* only permits the dismissal of claims premised on “facially implausible” allegations. According to the Ninth Circuit, allegations that spark mere “incredulity” can survive a motion to dismiss, and raise questions “best reserved for later stages of the proceedings when the plaintiff’s case can be rejected on evidentiary grounds.” *In re Gilead Sciences Securities Litigation*, 536 F.3d at 1057. The Ninth Circuit nevertheless suggested that on remand, the district court could consider the adequacy of the pleading as to the securities fraud elements of falsity and scienter as those issues were not addressed on appeal.

Review of a District Court's Refusal To Certify A State Law Question to the State Supreme Court

Thompson v. Paul, 547 F.3d 1055 (9th Cir. 2008)

In *Thompson v. Paul*, the Ninth Circuit reviewed a district court's refusal to certify a state law question to the Arizona Supreme Court for abuse of discretion. Because the plaintiffs did not request certification of the state law issue until they asked the district court to reconsider an adverse ruling, the Ninth Circuit concluded the district court did not abuse its discretion in turning down the certification request. The court observed that although certification of an open state law issue to a state supreme court can promote efficiency and comity, "[t]here is a presumption against certifying a question to a state supreme court after the federal district court has issued a decision."

Tribal Sovereign Immunity From Claims In Federal Court

Cook v. AVI Casino Enterprises, Inc., 548 F.3d 718 (9th Cir. 2008)

Reviewing *de novo* the district court's dismissal for lack of subject matter jurisdiction, in *Cook v. AVI Casino Enterprises*, the Ninth Circuit concluded that for diversity jurisdiction purposes, a tribal corporation formed under tribal law is not a citizen of any state, but rather a sovereign separate from the state. That left the tribal corporation's principal place of business as the only consideration relevant for diversity jurisdiction purposes, and since the tribal corporation's principal place of business was Nevada and the plaintiff was a California citizen, the district court erred in dismissing due to a lack of diversity jurisdiction.

The Ninth Circuit affirmed dismissal

of the case nonetheless, due to the tribe's sovereign immunity. Since "a sovereign can assert immunity 'at any time during judicial proceedings,'" *id.* at 724 (citing *In re Jackson*, 184 F.3d 1046, 1048 (9th Cir.1999)), and since the issue can even be raised on appeal *sua sponte*, the Ninth Circuit "treat[ed] the issue as having been fairly raised," even though the corporation initially only objected on diversity jurisdiction grounds.

LISA M. BAIRD, ESQ.

Reed Smith LLP

Los Angeles, California

lbaird@reedsmith.com

Tenth Circuit

Appellate Jurisdiction—Order Granting Remand to State Court

Moody v. Great Western Ry. Co., Nos. 07-1285 & 07-1287, 2008 U.S. App. LEXIS 17132 (10th Cir. Aug. 12, 2008)

The Tenth Circuit held that it lacked jurisdiction to review the district court's order remanding the case to state court because review is barred by 28 U.S.C. § 1447(d). The plaintiffs filed this action in state court seeking to quiet title to property formerly used as a railroad right-of-way. The action was stayed while the abandonment issue was presented to the federal Surface Transportation Board ("STB") under 49 U.S.C. § 10501(b). After the state court stay was lifted, the defendants removed the action to federal court, asserting federal-question jurisdiction over the abandonment issue. Reversing course only days later, the defendants filed a motion to dismiss, asserting that the court lacked subject matter jurisdiction because the STB had exclusive jurisdiction over the abandonment issue. The plaintiffs sought remand rather than dismissal,

arguing that the state court should determine related state claims. The district court held that it lacked jurisdiction to decide the federal question regarding abandonment and remanded for resolution of the state claims.

Review of a decision to remand is barred under 28 U.S.C. § 1447(d) if the remand is based on lack of subject matter jurisdiction or defective removal under 28 U.S.C. § 1447(c). Review is not barred if remand is based on other grounds.

The Tenth Circuit cannot independently review the grounds for remand relied on by the district court: if the district court states that remand is based on a lack of subject matter jurisdiction, the appellate court's inquiry is limited to whether subject matter jurisdiction is a plausible basis for remand. *Powerex Corp. v. Reliant Energy Servs. Inc.*, 127 S.Ct. 2411, 2418 (2007). The district court's decision to remand cannot be reviewed for error, no matter how plain. *Kircher v. Putnam Funds Trust*, 547 U.S. 633, 642 (2006). These recent Supreme Court decisions clarify the narrow scope of review and preclude reliance on earlier circuit opinions that implied a broader scope of review. Additionally, the collateral order doctrine does not provide an independent basis for review when the § 1447(d) bar applies. Therefore, the appeal was dismissed for lack of jurisdiction.

Timeliness of Appeal—Appeal After Denial of Rule 60 Motion

Griffin v. Ortiz, No. 08-1008, 2008 U.S. App. LEXIS 14348 (10th Cir. July 8, 2008)

The Tenth Circuit held, based on the following chronology, that the notice of appeal was untimely to review the trial court's summary judgment, but was

timely to review the trial court's denial of the plaintiff's Rule 60 motion:

- Entry of summary judgment against the plaintiff – July 11, 2007;
- Motion to Set Aside filed – September 5, 2007;
- Motion denied – December 28, 2007;
- Notice of Appeal filed – January 4, 2008.

The 30-day timeframe for filing a notice of appeal can be tolled if a Rule 59 or Rule 60 motion is filed within 10 days after the entry of judgment. Here, the Tenth Circuit held that the plaintiff's post-trial motion, which was filed more than 10 days after entry of the summary judgment, did not toll the time for filing an appeal. Therefore, the notice of appeal was not timely as to the summary judgment.

Because the plaintiff's motion was not timely filed under Rule 59, the court construed it as a motion seeking relief under Rule 60(b). The notice of appeal was timely for review of district court's order denying the plaintiff's motion. However, a Rule 60(b) motion is not a substitute for appeal of the merits; therefore, the Tenth Circuit would not consider any arguments regarding the merits of the summary judgment. Judgment was affirmed because the plaintiff's arguments regarding the trial court procedure were without merit.

Supersedeas Bond---Status on Remand for Retrial Only on Damages

***Morrison Knudsen Corp. v. Ground Improvement Techniques, Inc.*, 532 F.3d 1063 (10th Cir. 2008)**

The Tenth Circuit held that the supersedeas bond, filed in conjunction with a prior appeal, was still in effect and available for the new judgment after a retrial

on damages. In the first trial, Morrison Knudsen ("MK") was found liable for \$5.6 million for wrongful termination of a subcontractor. MK and its surety posted a supersedeas bond for the first appeal. The Tenth Circuit affirmed the liability ruling, but remanded for a new trial only on the issue of damages because the jury had not used a special verdict form. The jury in the second trial awarded damages over \$15 million. The district court held that MK and its surety were jointly and severally liable for the amount of the supersedeas bond.

MK and the surety appealed, arguing that the supersedeas bond had been discharged with the first appeal. The appellant subcontractor cross-appealed, arguing that the surety should be held jointly and severally liable with MK for the entire judgment (well in excess of the supersedeas bond). The bond stated that it would remain in full force and effect unless MK prosecuted the appeal "to effect" and satisfied any resulting judgment in full. Therefore, the Tenth Circuit defined the key issue on appeal as whether MK had prosecuted the first appeal "to effect." Because the bond (a contract) was unambiguous, the appeal presented an issue of law to be determined under a *de novo* standard of review. In this case of first impression, the Tenth Circuit construed the term "to effect" as requiring the appellant to have substantially prevailed on appeal. Here, MK only obtained a new trial to calculate damages, and failed to have its liability reversed. There was no doubt that MK would be liable for some amount of damages, the only issue on retrial was the amount of damages. Under such circumstances, MK did not substantially prevail, and the surety's obligation under the bond was not discharged. Its obligation, however, was capped at the

amount stated in the supersedeas bond.

Mootness of Appeal---Payment of Judgment Without Settlement or Release

***Amicorp Inc. v. General Steel Domestic Sales, LLC*, No. 07-1416, 2008 U.S. App. LEXIS 14139 (10th Cir. July 3, 2008)**

The Tenth Circuit held that payment of the judgment while the appeal was pending did not moot the appeal. The appellant had previously sought a stay and attempted to post a supersedeas bond. The judgment was paid without any settlement, compromise, or agreement not to appeal. In addition, there was no showing that if the judgment were reversed, the appellee could not be ordered to restore the funds to the appellant. Therefore, the appeal was not moot.

Timeliness of Appeal---Separate Judgment Rule

***Harvey-Burgin v. Sprint/United Mgt. Co.*, No. 08-3103, 2008 U.S. App. LEXIS 12207 (10th Cir. June 6, 2008)**

The Tenth Circuit held that a trial court order approving the settlement in a class action did not satisfy Rule 58's requirement of a separate judgment, and no separate judgment was entered. The time to appeal did not begin to run until 150 days after entry of the order approving the settlement. Therefore, the appellant's motion for extension of time to file a notice of appeal was timely.

Interlocutory Jurisdiction – Order Denying Motion to Abstain

***Tarrant Reg. Water Dist. v. Sevenoaks*, 545 F.3d 906 (10th Cir. 2008)**

The Tenth Circuit joined several other circuit courts when it held that the collateral-order doctrine does not provide

jurisdiction for interlocutory review of an order denying abstention under the *Younger* doctrine. The court explained that when abstention is denied, that decision is reviewable upon the entry of final judgment and therefore fails to fall within requirements for interlocutory review. The court confirmed that the opposite would be true for a decision granting abstention under *Younger* because that decision would be rendered unreviewable by the res judicata effect of the state court judgment.

The Tenth Circuit also declined to accept pendant jurisdiction over the abstention denial, noting that the issue was not “inextricably intertwined” with the appealable issue of Eleventh Amendment immunity.

Preservation of Issue for Appeal – Sufficiency of the Evidence

***Kelly v. City of Albuquerque*, 542 F.3d 802 (10th Cir. 2008)**

In this employment discrimination litigation, the Tenth Circuit held that the defendant city failed to properly preserve for appeal the issue of whether the plaintiff had presented sufficient evidence of causation. The city had raised this argument three times: first, by moving for summary judgment before trial; second, in a motion under Rule 50(a) at the close of the plaintiff’s case-in-chief; and third, in a similar Rule 50(a) motion at the close of evidence. The trial court denied each motion on this issue and sent the case to the jury, which found for plaintiff. The city then filed a motion under Rule 50(b) or, in the alternative, under Rule 59, but that motion did not reassert the causation issue.

The Tenth Circuit retroactively applied *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 404 (2006), which holds that the failure to comply

with Rule 50(b) forecloses a party’s argument based on sufficiency of the evidence. The trial court’s denials of pre-trial and mid-trial motions regarding the sufficiency of the evidence were not reviewable because they merely postponed the resolution of the sufficiency issue until after the verdict. The city’s failure to raise the issue in its Rule 50(b) [JNOV] motion prevented the trial court from rendering a final decision regarding sufficiency of the evidence, and therefore constituted a waiver of that issue for appeal.

In explaining its ruling, the Tenth Circuit clarified that it was not deciding the further issue of whether the failure to file a Rule 50(b) motion deprives an appellate court of subject matter jurisdiction to review the sufficiency of the evidence. According to the court, that position was taken in the Sixth Circuit, *Allison v. City of E. Lansing*, 484 F.3d 874, 876 (6th Cir. 2007). The Tenth Circuit stated that it need not decide the jurisdictional issue because the *Unitherm* rationale permitted it to resolve the issue without ruling on the merits.

KATHERINE TAYLOR EUBANK
Fowler, Schimberg & Flanagan P.C.
Denver, Colorado
k_eubank@fsf-law.com

Eleventh Circuit

Post-Trial Motions: Motion to Reopen Time to Appeal

***Big Top Coolers v. Circus-Man Snacks*, 528 F.3d 839 (11th Cir. 2008)**

The Eleventh Circuit in this case held that a motion under Federal Rule of Appellate Procedure 4(a)(6) is the exclusive means to reopen the time for filing a notice of appeal. The appellant there tried to get relief via a Rule 60(b) motion, which the District Court denied.

The Eleventh Circuit affirmed, holding Rule 60(b) was not the appropriate procedural vehicle for the relief sought.

Standard of Review: Tax Appeals ***Ballard v. Comm’r of Internal Revenue*, 522 F.3d 1229 (11th Cir. 2008)**

In this tax appeal, the Eleventh Circuit enforced the standard of review established by Tax Court Rule 183. That rule provides that, after hearing evidence and arguments in a tax trial, the Special Trial Judge should file recommended findings of fact and conclusions of law with the Tax Court. The Tax Court Judge, in turn, must presume the facts found by the Special Trial Judge are correct. Tax Court Rule 183(d). In appellate-speak, this means the Tax Court Judge must review the factual findings for “clear error.” Because the Tax Court Judge in this case did not give appropriate deference to the Special Trial Judge’s findings, the Eleventh Circuit reversed.

Appellate Jurisdiction: Satisfaction of Judgment after Oral Argument

***Perez v. Sanford-Orlando Kennel Club*, 518 F.3d 1302 (11th Cir. 2008)**

The moral of this decision is, “Don’t play games with the appellate court.” The employer in this FLSA case lost a significant jury verdict. On appeal, the employer lost even more because the appellate decision led to double damages and more attorney’s fees. After the panel decision, the defense counsel notified the Eleventh Circuit (in its rehearing petition) that it had paid the trial court judgment and filed a satisfaction of the judgment two weeks after oral argument. The employer claimed this gambit deprived the panel of jurisdiction to issue its ultimate opinion three months later. Not surprisingly, the court expressed its anger with the attempt “to

put this court through a trial run.” The court rejected the employer’s jurisdictional theory and held the employer had an obligation to promptly notify the court of satisfaction of the judgment. Because the employer did not move to dismiss the appeal but continued to litigate the appeal after paying the judgment (via miscellaneous motions, 28(j) letters, etc.), the court held that the appeal was not moot.

Appellate Jurisdiction: Remand Orders

***Alvarez v. Uniroyal Tire Co.*, 508 F.3d 639 (11th Cir. 2007)**

The Eleventh Circuit in this case overruled prior precedent that a remand order based upon a post-removal event was reviewable on appeal. Instead, the court held that a remand based upon lack of subject-matter jurisdiction cannot be reviewed under 28 U.S.C. § 1447(d), even if jurisdiction existed upon removal but was destroyed by post-removal amendment to the complaint. The Court read the Supreme Court’s intervening decision in *Powertex Corp. v. Reliant Energy Servs.*, 127 S. Ct. 2411 (2007), to hold that if at any time before final judgment the district court issues an order remanding a case to state court because it lacks jurisdiction, appellate review of such an order is barred by § 1447(d).

Appellate Relief: New Trial

***Rodriguez v. Farm Stores Grocery*, 518 F.3d 1259 (11th Cir. 2008)**

The Eleventh Circuit in this appeal from a jury verdict addressed a novel issue. Without objection from either party, the district court gave the jury a wrong instruction on how to calculate damages. The jury then made the error worse by awarding more damages than

the erroneous instruction would have allowed. What is the right remedy under the circumstances, remittitur to the maximum amount of damages under the erroneous instruction or a new trial? The Eleventh Circuit held a new trial on damages was the only way to correct the compound error.

SCOTT BURNETT SMITH

Bradley Arant Boalt Cummings LLP

Huntsville, Alabama

ssmith@ba-boult.com

Federal Circuit

Scope of Review

***Mittal Steel Point Lisas Ltd. v. United States*, 542 F.3d 867 (Fed. Cir. 2008)**

Federal Circuit held that its factual assumptions in a prior appeal did not preclude the fact-finder upon remand from making contrary findings of fact.

The International Trade Commission (the “Commission”) found that there were eleven categories of products at issue in an antidumping investigation. Notwithstanding this finding, the Commission concluded that the Federal Circuit’s decision in a prior appeal in the case “foreclosed the Commission from...finding that the products were not fungible.” 542 F.3d at 875. The Federal Circuit disagreed, holding that it had made no findings of fact and to the extent that it had incorrectly assumed undetermined facts based on an incomplete record, “it was the Commission’s prerogative to say so.” *Id.* at 875 (“Appellate courts do not make factual findings; they review them.”).

Power to Order Judge Reassignment upon Remand

***Research Corp. Techs., Inc. v. Microsoft Corp.*, 536 F.3d 1247 (Fed. Cir. 2008)**

Federal Circuit considered its power to remand with instructions to reassign a case to a different judge, stating

“This court evaluates a request to transfer to a different judge under the law of the regional circuit.... This court considers a transfer request with great caution, and, in the absence of personal bias, would grant such a request only in ‘unusual circumstances.’ *Davis & Cox v. Summa Corp.*, 751 F.2d 1507, 1523 (9th Cir. 1985). This court understands that a transfer may require a new judge to learn material and thus may occasion some duplicative judicial effort. At the same time, this court must recognize that a pattern of error based on previously-expressed views or findings may make it difficult for a trial court to approach a remanded case with an open mind. After a thorough review of all the evidence, testimony, and facts of this case, this court concludes the strongly expressed convictions of the trial court in this case may not be easily and objectively reconsidered. Accordingly, this court remands with instructions to reassign this case. *See* 28 U.S.C. § 2106; *Liteky v. U.S.*, 510 U.S. 540, 554, 114 S. Ct. 1147, 127 L.Ed.2d 474 (1994).” 536 F.3d at 1255 (internal citation omitted).

Article III Case or Controversy Requirement

***Janssen Pharmaceutica, N.V. v. Apotex, Inc.*, 540 F.3d 1353 (Fed. Cir. 2008)**

Federal Circuit held that generic pharmaceutical manufacturer’s claim that brand manufacturer’s drug patents were invalid did not present a “case or controversy” under Article III of the United States Constitution where a ruling for the generic manufacturer would not have accelerated or resulted in a right to

market a generic version of the drug.

The pharmaceutical manufacturer obtained a statutory right to 180 days of marketing of its generic version of the appellee's brand drug to the exclusion of other generics by being the first to challenge the validity of the appellee's patents. The appellant, a different generic manufacturer, later sought declaratory judgment of noninfringement of the patents. The brand manufacturer moved to dismiss on the ground that the noninfringement claim did not present a case or controversy under Article III.

Affirming the district court, the Federal Circuit held that under the facts presented, the appellant generic manufacturer's right to market would only arise after the 180-day exclusive marketing period to which the other generic manufacturer was entitled. There was no real and immediate harm to the appellant resulting from the contested patents. The appellant's inability to market its generic drug resulted from the other generic manufacturer's statutory right to an exclusive marketing period. The potential that the other generic manufacturer might delay in marketing its drug (thereby delaying the 180-day exclusivity period), did not create an Article III controversy because it was speculative.

JAMES M. SULLIVAN
Spriggs & Hollingsworth
Washington, D.C.
jsullivan@spriggs.com

D.C. Circuit

Duty to Determine Court's Jurisdiction

Chalabi v. Hashemite Kingdom of Jordan, 543 F.3d 725 (D.C. Cir. 2008)

The D.C. Circuit held that where a court's Article III jurisdiction is not in doubt, the court may address a non-ju-

isdictional ground for resolving the case before addressing a question of statutory jurisdiction.

The plaintiffs' appeal presented two potential grounds for dismissal—statute of limitations, which the D.C. Circuit considered a potential merits issue, and statutory immunity under the Foreign Sovereign Immunities Act (FSIA), a jurisdictional issue. The D.C. Circuit held that, assuming the statute of limitations issue was a merits issue, there was no requirement that it first address the statutory immunity question. The court reasoned that *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94-95 (1998), requires a court to “prioritize the jurisdictional issue only when the existence of *Article III* jurisdiction is in doubt; that decision ‘explicitly recognized the propriety of addressing the merits where doing so made it possible to avoid a doubtful issue of *statutory* jurisdiction.’” *Chalabi*, 543 F.3d at 728 (citations omitted).

Standard of Review

Karsner v. Lothian, 532 F.3d 876 (D.C. Cir. 2008)

D.C. Circuit held, “Although we usually review a district court's ‘denial of intervention for untimeliness under the abuse of discretion standard,’ here we review *de novo* because the district court failed to provide any findings for us to review. See *Cook v. Boorstin*, 763 F.2d 1462, 1468 (D.C. Cir. 1985) (where ‘there are essentially no factual findings to which to defer...we must make our own determination [regarding intervention]’).” 532 F.3d at 886 (internal citation omitted).

Filing Notice of Appeal

Royall v. Nat'l Assoc. of Letter Carriers, AFL-CIO, No. 07-7165, 2008 WL

4951411 (D.C. Cir. Nov. 21, 2008)

D.C. Circuit held that notice of appeal was timely filed within thirty days of entry of the judgment or order being appealed even though the district court clerk's office did not docket the notice of appeal until almost two months after the thirty-day appeal period. *Id.* at *5 (“[P]ursuant to the federal rules, the electronic case filing system's failure to docket Royall's timely submitted notice of appeal cannot be treated as a failure on his part to file timely... Where, as here, a notice of appeal is tendered to the clerk within the filing period, ‘any error regarding the filing of his notice of appeal must be charged to the court, not to him.’”).

Final Judgment Rule

Andrew v. Chevy Chase Buick, No. 08-CV-1087, 2008 WL 4809269 (D.C. Nov. 6, 2008)

The District of Columbia Court of Appeals held that “[a] judgment is final for purposes of appeal notwithstanding the pendency of a post-trial motion for attorney's fees.” *Id.* at *1.

JAMES M. SULLIVAN
Spriggs & Hollingsworth
Washington, D.C.
jsullivan@spriggs.com

ANNUAL MEETING SUBCOMMITTEE REPORT

The annual meeting subcommittee is happy to report that we had an enthusiastic turn-out for our CLE program presented during the Appellate Advocacy Subcommittee meeting at the DRI 2008 Annual Meeting this past October. Vik Chandhok, an appellate conference attorney with the Fifth Circuit, started out the program, giving an overview of factors to consider in determining whether to mediate appellate cases, then answering questions from our attendees. Vik was followed by Erin Gleason-Alvarez,

with AIG's Office of Dispute Resolution, who offered a client's perspective on general issues of responsiveness, as well as the need to consider post-trial mediation. To cap things off, the Honorable Edith Brown Clement, U.S. Court of Appeals for the Fifth Circuit, shared her thoughts with us and answered our questions on a number of topics, ranging from persuasive briefing and oral argument, to her day-to-day life as a Fifth Circuit judge. Thank you to all of you that participated.

LEANN W. NEALEY, CHAIR
Butler, Snow, O'Mara, Stevens & Canada, PLLC

Jackson, Mississippi
leann.nealey@butlersnow.com

DAVID A. FURLOW, VICE-CHAIR
Thompson & Knight LLP

Houston, Texas
David.Furlow@tklaw.com

The Appellate Advocacy Committee continues to grow. At the end of 2007, the Committee had 438 members. As of the end of October, the Committee has grown to 480 members, a gain of roughly 10.8%. The Committee's growth rate is slightly faster than the DRI as a whole, which has grown roughly 9% in the same time period. Further, perhaps in a sign of the increased visibility and "appeal" of being an appellate lawyer, the Appellate Advocacy Committee has grown faster, percentage-wise, than nearly every other committee during the same time period. Yet, there remains further opportunity

for expanding the reach of the Committee, as the Committee is the sixteenth (16th) largest out of the twenty-six (26) DRI Committees, and there is an untapped pool of 26,735 DRI members from which to recruit and expand our network.

Therefore, one area where everyone can make a difference is person-to-person marketing among your colleagues and within your firm, large or small. There are many ways to become actively involved in a subcommittee in our group, and they are always looking for assistance. If you or a colleague wish to become further involved in the Ap-

pellate Advocacy Committee, or have questions about membership, please let us know. Also, please send on any ideas or leads you may have for increasing our membership to Todd or I at the email addresses below. We look forward to hearing from you.

ERIC P. SCHROEDER, CHAIR
Bryan Cave Powell Goldstein LLP
Atlanta, GA

eschroed@pogolaw.com

TODD PAGE, VICE CHAIR
Stoll, Keenon & Ogden
Lexington, KY

Todd.Page@skofirm.com

The latest news is that our next seminar is coming up and you should calendar now for the event set for San Diego, California on November 5-6, 2009. The accommodations and setting are terrific. We will be at the Hilton La Jolla Torrey Pines. This resort is next door to the Torrey Pines golf course, home of the 2008 US Open Championship. The hotel also features an outdoor heated pool, tennis courts, and, of course, it is conveniently located near downtown San Diego.

The tremendous program is the direct result of hard work of our committee members. Our programming committee has spent many hours planning the program and is in the process of extending invitations to speakers through the truly impressive network of contacts we collectively possess. Work is ongoing and a brochure will be finalized in the near future.

Feedback from prior programs has

been in favor of more judges speaking. Therefore, there will be two judges panels at the upcoming seminar. Thursday's and Friday's session will include a distinguished panel of state and federal appellate judges. During Thursday's session with the judges, the panelists will cover a topic important to all of us—how to win more appeals. During Friday's judicial panel, the judges will answer questions submitted by attendees and committee members at the seminar. In prior seminars there has been insufficient time for the judges on the panels to answer all the questions posed, and therefore an entire session will be devoted to them.

Also during this seminar speakers will examine the important decisions handed down by the United States Supreme Court in recent months, issues relating to diversity in appellate practice, and offer advice on how to persuasively present your written and oral arguments

Speakers will also cover the increasing trend of using moot courts in preparing for oral arguments. A segment is also planned to cover the interaction of the appellate courts with the media, and a segment will be devoted to insights on how to build a successful appellate practice, among others.

We are hoping for record-breaking attendance and hope to see you there!

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

C. MITCHELL BROWN, CHAIR
Nelson Mullins Riley & Scarborough, LLP
Columbia, South Carolina
mitch.brown@nelsonmullins.com

NANCY WINKELMAN, VICE CHAIR
Schnader Harrison Segal & Lewis LLP
Philadelphia, Pennsylvania
nwinkelman@schnader.com

I am pleased to report two exciting developments by DRI: the new, improved DRI web site (www.dri.org) and a brand new *For the Defense* web site, forthedefense.org.

www.dri.org

The biggest improvement to www.dri.org is that signing in with user name and password is no longer required to access *Certworthy* and the membership directory. To access the current issue of *Certworthy*, just move your pointer to “Committees” and select “Appellate Advocacy.” That will take you to our committee’s web page. On the right side, just below the smiling faces of Scott Stolley and Scott Smith, you’ll find a link to the current issue of *Certworthy*. (Hint: To download a printable copy, click on “pdf version.”) To access past issues back to 2005, click on “archives.”

Signing in is still necessary to access some other features of www.dri.org. But having experienced some frustration and hearing others’ frustration with

downloading *Certworthy*, I applaud DRI for removing the sign-in barrier. This change not only makes *Certworthy* more accessible to us; it also makes *Certworthy* accessible to the whole world. So now, if you write something for *Certworthy*, your audience will be much larger than it was before—anyone doing a Google search for your topic should be able to find your article.

forthedefense.org

[Forthedefense.org](http://forthedefense.org) is a brand new DRI web site, packed with great content. As the name suggests, it contains articles from past issues of *For the Defense*, from January 2005 through two months ago. It also contains DRI’s amicus briefs—a feature that members of this committee will enjoy— plus DRI’s press releases, position statements, and a blog, allowing DRI members to publish short articles instantly.

The best feature of forthedefense.org is that you don’t have to sign in to access any of its content. This means that

its content is accessible to anyone, anywhere in the world.

But don’t give up your DRI membership! You still need to be a member to read the current issue of *For the Defense*. And you still need your DRI user name and password to access some advanced features of www.dri.org, such as *For the Defense* archives going back to 1991, past DRI seminar materials, and *Certworthy* archives back to 1998. But the features our committee members use most often are now readily accessible without a password.

RAYMOND P. WARD, CHAIR
Adams and Reese LLP
 New Orleans, Louisiana
ray.ward@arlaw.com