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From the Chair

By Lisa Baird

This latest edition of *Certworthy* is the product of great enthusiasm and hard work by many on the Appellate Advocacy Committee, most notably our tireless publications chair, **Larry Ebner**. It covers a wide range of appellate topics of interest: **Claire Parsons** provides tips on blogging and social media for appellate lawyers; **Marshall Bowen** and **Xan Ingram Flowers** look at how to use dissenting opinions to your client's advantage; **Brandon Maxey** covers ethical issues faced by attorneys representing an amicus curiae; and **Iván Resendiz Gutierrez** serves some food for thought about the timing of settlements of appellate matters. Finally, in addition to an update from **Adam Hofman** about our next Appellate Advocacy Seminar, currently scheduled for February 4–5, 2021, in Nashville, Amicus Committee Chair **Matt Nelson** also provides and update about DRI's recent amicus filings, and **Erik Goergen**'s Circuit Report team will keep you up to date about issues of appellate jurisdiction and practice.

As we all continue to adjust to pandemic-related changes to our traditional ways of practicing law, I hope that you will all stay connected with your fellow DRI members, and all stay well!

Lisa M. Baird, *a partner of Reed Smith LLP in Miami, is chair of the DRI Appellate Advocacy Committee. Ms. Baird has more than twenty years' experience defending corporate clients in appellate and trial courts throughout the country, and is admitted in both Florida and California. Her work has a particular emphasis on issues that regularly recur in medical device and pharmaceutical product liability litigation, including preemption, as well as other types of complex litigation, such as class issues, unfair competition, consumer fraud claims, third party payor claims, and punitive damages.*

Appellate Advocacy Seminar Preview

By Adam Hofmann

We're excited to announce that the 2021 Appellate Advocacy Seminar kicks off on February 4, 2021, at the Renaissance Hotel in Nashville. As ever, the seminar provides an opportunity for appellate attorneys of at all experience levels to gather, connect with colleagues from around the country, and develop their skills in two days of focused programming, along with two evenings of networking, including some joint activities with the Product Liability Conference being held concurrently at the Renaissance.

For attendees who are able to arrive early, we'll begin with a networking reception on the evening of February 3. The reception will be followed by "dine-arounds," at a choice of pre-selected restaurants in Nashville.

Programming starts in earnest on the morning of February 4, with Jeff Sheehan leading a panel on the art of writing for attorneys' target audience: judges. The Hon. Alistair Newbern, U.S. District Court, Middle District of Tennessee, and the Hon. William C. Koch, retired Justice of the Tennessee Supreme Court will discuss how their experience on the bench informs their legal-writing instruction at Vanderbilt University.

Next, Sarah Spencer will sit down with Tillman Breckenridge and Julie Wang to discuss appellate attorneys' role in addressing preservation problems. For the most part, attorneys handling a new matter on appeal have to take the record as they find it. This panel, however, will explore advanced techniques for securing review of issues not preserved during the trial, including post-trial motions, the plain-error doctrine, and rules permitting discretionary review of certain issues for the first time on appeal.

The Appellate Advocacy Seminar and Product Liability Conference will then come together for an ethics presentation by the Hon. W. Neal McBrayer of the Tennessee Court of Appeal and Ed Lanquist. Judge McBrayer and Mr. Lanquist will use scenes from famous movies to explore—in a lighthearted manner—the ethical issues that attorneys face in real-life practice.

After lunch, Jim Martin will moderate a panel discussion of stare decisis and *sua sponte* decision-making. Leading appellate advocates, Sarah Harris, Mark Fleming, and Michael Kimberly will analyze the precedent of precedent, with a focus on the U.S. Supreme Court's recent decision in *Ramos v. Louisiana*, that explored—without reaching consensus—the Justices views of stare decisis. They will also consider *United States v. Sineneng-Smith* and the party-presentation rule, generally limiting judicial review to issues raised by a case's parties.

Adam Hofmann will then moderate a discussion between Sixth Circuit Judge Jane Branstetter Stranch and Edmund Sauer regarding the thorny question of appealable orders and manufactured finality. Interlocutory orders can have a significant impact on a case, and clients often wish to pursue review immediately. But appellate jurisdiction is generally limited. This panel will discuss the delicate process of seeking review of otherwise non-appealable orders.

The Hon. Bernice Donald has had a truly storied career and is recognized as a trailblazer in the legal community. In addition to her work as an attorney in private practice and as a judge in Tennessee State Court, the Western District of Tennessee and, now, on the Sixth Circuit, she has served as faculty for federal judicial programs and international missions to many countries in Africa, Europe, and Asia. Matt Nelson will interview Judge Donald about her life and experiences.

Closing out the first day's programming, Lee Mickus will present on Rule 702 and the judicial role of gatekeeping expert testimony. Mr. Mickus will explore the standards for admitting expert testimony in the context of thinking through how to preserve—or challenge—expert testimony on appeal. He will also discuss the ongoing push for the Federal Rules Committee to adopt changes to the courts' gatekeeping function and the possibility of further guidance from the U.S. Supreme Court.

After networking with the Product Liability group on Thursday night, we'll get the day started on Friday with a discussion of remote oral arguments. The Hon. Danny Boggs of the Sixth Circuit, Sixth Circuit Clerk Deborah Hunt, and Mike King will review recent experiences with appellate arguments presented by telephone or video—a practice that once seemed like a rare and disfavored option, but which the pandemic has made very common. The speakers will discuss recent experiences to identify best practices and mistakes to avoid.

Larry Ebner will be moderating a panel on the strategic use of amicus briefs in appellate advocacy. Panelists will include Steven Lehotsky, Executive Vice President & Chief Litigation Counsel for the U.S. Chamber Litigation Center, and Richik Sarkar. Steve will discuss the Litigation Center's preeminent and influential role as amicus curiae in numerous Supreme Court and federal court of appeals cases. Richik will comment on how public policy arguments can be used to enhance the content of amicus briefs.

Finally, we will close out the seminar with a tour of the Tennessee Supreme Court, led by the Hon. W. Neal McBrayer.

We look forward to seeing you there!

(As DRI continues to monitor the status of the COVID-19 pandemic, the dates of early 2021 seminars may be subject to change. Any new information will be shared with the membership as soon as possible.)

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

DRI Amicus Committee Report

By Matt Nelson

DRI's Amicus Committee has always filed briefs in high-profile cases, mostly in the U.S. Supreme Court, to advance the interests of the defense bar. But as with so much this year, DRI's amicus program has been affected by the global COVID-19 pandemic and been unable to participate in as many cases this year. Despite that difficulty, DRI's Amicus Committee notched a considerable achievement in conjunction with members of the Center for Public Policy's Medicare Secondary Payer (MSP) committee in filing an amicus brief in support of a petition for en banc review in an important MSP case in the Eleventh Circuit.

The Eleventh Circuit has interpreted the MSP Act to allow Medicare Advantage Organizations to sue a tortfeasor's liability insurer—the so-called primary payer—for double damages for unreimbursed medical claims. Then, in *MSP Recovery Claims, Series LLC v. ACE American Insurance*, the Eleventh Circuit expanded this right to pursue double-damages to downstream actors who are not Medicare Advantage Organizations. This not only misinterprets the MSP Act but interferes with the ability of parties to settle because a settling tort defendant cannot know whether a possible downstream actor may come back years later with an MSP suit for double damages.

DRI's MSP committee has been monitoring this situation for years. When the Eleventh Circuit's *MSP Recovery Claims* decision came down, the group immediately sought DRI's amicus support for an en banc petition. The problem is en banc petitions and supporting amicus briefs are due just a few weeks after the decision. This is far less time than the 45 days that DRI needs to prepare an amicus brief. Worse yet, DRI had expended its amicus brief budget for the year—any amicus brief would need to be prepared entirely pro bono.

Fortunately, Amicus Committee member and Appellate Advocacy Committee chair Lisa Baird, and her colleagues David de Jesus, Edward Mullins, and Christina Olivos at Reed Smith. were familiar with the issues and volunteered to handle the brief. MSP committee members M. Re Knack at Ogden Murphy Wallace and Catherine Goldhaber at Hawkins Parnell & Young gathered information and gave input into the drafting process. Within little more than a week, Lisa and her team had pulled together a brief persuasively explaining that the Eleventh Circuit should consider the case en banc because, if left unchanged, the existing decision would make settlement in tort actions far more difficult to achieve and embroil numerous industries in MSP litigation including medical device manufacturers and even grocery stores.

The Eleventh Circuit unfortunately denied the en banc petition, and it remains to be seen whether the Supreme Court review will be sought. But the filing shows that even in difficult times, DRI finds ways to serve its members and their clients' interests even on the shortest timeframes. Special thanks Lisa and her Reed Smith colleagues for their effort and dedication to DRI.

Matthew T. Nelson *chairs Warner Norcross & Judd's Appellate Practice Group. Mr. Nelson has successfully argued before the United States Supreme Court, and has represented businesses, governments, and individuals in appeals throughout the country. During the 2016 Term of the U.S. Supreme Court, Mr. Nelson represented clients in two cases on the merits addressing such diverse topics as copyrighting the design of cheerleading uniforms and constitutionally deficient immigration advice. Mr. Nelson serves as chair of DRI's Amicus Committee. Among other honors, Mr. Nelson has received three distinguished brief awards for briefs he has submitted to the Michigan Supreme Court.*

Feature Articles

How to Write Engaging Blog and Social Media Posts About Appellate Legal Issues

By Claire E. Parsons

Appellate lawyers tend to be great writers, but if they want to showcase their expertise on the internet, they can't create content that reads like an appellate brief. Potential clients, and frankly even other lawyers, don't have the time to sift through 50 pages of text. They may not relish pondering the meaning of a footnote in a Supreme Court decision quite as much as you do. Instead, the audience on the internet is a notoriously fickle bunch with a short attention span, and a variety of content providers are willing to encourage their pursuit of quick fixes.

Does this mean appellate lawyers should eschew the internet? Not at all. Many have built sizable followings on social media and developed business by learning to showcase their expertise in a new way. I love writing blogs and actively post on LinkedIn about a variety of issues relating to law and law practice. In this article, I'll share my top five tips to help you write about appellate legal issues if you want to try blogging or posting on social media to market your practice.

Respect Character (and Attention Span) Limits

If you want to write about appellate issues online, you first must learn to break down issues into discrete, bite-sized pieces. Character limits on platforms like Twitter are notoriously low, but even LinkedIn permits you only a few hundred words. While blog posts give you greater flexibility, most of the best-performing posts range from 500 to 800 words because internet readers look for the gist and move on quickly if they can't find it. As such, the first step to writing good internet content about legal issues is to select topics that you can explain quickly and simply. This doesn't mean that you can't explore tricky issues, but it does mean you must use care and judgment in writing to ensure that your audience can follow you. Ideally, you should break down issues into small, manageable parts and explore each one in turn. This may sound difficult, but when you remember that you can post to blogs or social media multiple times in a week or even daily, this task becomes a lot easier. In other words, writing about legal issues on the internet is less about creating a magnum opus and more about creating a breadcrumb trail of your legal knowledge.

Timely and Cutting-Edge Issues Are Great

Appellate lawyers love it when our positions are supported by a mountain of authority, but blogging or posting on social media gives you a chance to explore issues that aren't yet so settled. These issues may be the best to explore since your audience can likely find answers to well-settled questions on LexisNexis or Westlaw but need Google to help wrestle with issues not yet fully resolved. If you are brave enough to apply your knowledge of the law to offer insights about novel issues, you will likely grab the attention of your reader, and even better, they will look to you as a resource. Thus, don't overthink topic selection for internet content. You don't have to wait for a circuit split. You don't even have to wait for one court to rule. If you have noticed a quirky issue in your practice that hasn't yet been fully answered, it may be a great topic to explore online.

Start a Conversation

The point above may worry you that a past blog or social media post about a cutting-edge issue could come back to haunt you if you ever have to handle that issue on appeal. To address that concern and generally to improve results with your online efforts, I recommend more of a conversational tone for social media or blog posts. In general, the goal of internet content is to create engagement. You want people not just to read (or watch) but also to react, to comment, or even to reach out to you. People engage when they feel comfortable and when they see that the author is human and approachable. Thus, a great way to write your content is not to pretend as if you have all the answers but instead to ask questions and start conversations. This is more likely to bring people in to discuss issues with you, which will help you appear like a thought leader. In addition, you are likely to find that discussing issues with other people online with different perspectives is likely to increase your own knowledge and help you answer some questions more clearly. As a result, for blogging or posting

on social media, bringing people in is a great way to help you stand out.

Add Your Own Personal Value

One of the most common things lawyers overlook when they begin making their own internet content is that personal branding is as much about showing who you are as it is about sharing what you know. As you discuss new and emerging legal issues, you can and should share a bit about yourself. Unlike in an appellate brief, the audience for blog and social media posts tends to care about your war stories, practice experiences, and even your reactions to things. In part, this is because the audience on the internet does not necessarily know you. They need this information to understand your background and perspective so that they can understand your content. While you must be judicious about the type and amount of personality you include in your content, omitting this aspect entirely may prevent others from seeing you as a thought leader because you may not seem relatable or approachable. This may seem strange at first if you are accustomed to the comparatively more stuffy writing we lawyers tend to use in briefs, but once you practice for a while and find your voice, you are likely to find it liberating and even fun.

It's Not Just Your Words

We lawyers love our words. We love how we sound. We love how brilliant we feel when we write something particularly suave. You know what? Most people are not lawyers. They don't care as much about words. Some, perish the thought, are visual learners. This means that they pick up information best from images and charts. Even those people who aren't as visually inclined may need assistance if they are reading content on the internet, since generally they will be reading it on one screen or another. How do you address this? You add images.

Images break up the white space on the screen. They give the eyes a moment to rest. They make long blocks of text less intimidating. They signal to the reader "No it won't take you 3 hours to read this post." And, even more importantly, they call out to the reader and alert them of the subject matter of the content as they scroll or scan through posts and webpages. In other words, imagery may be needed even to get people to expand your post or click on a link to read your article.

Does this mean you have to take a bunch of selfies as you highlight an appellate decision to share with your post? No, although doing this once might get at least a few laughs. You could find simple, free stock images with a Google search, or make your own on websites like Adobe Spark or Canva, or at a minimum throw in a few emojis to add a little color and levity to your posts. In short, as you write, remember that many people read with their eyes first.

I have learned these top five tips from blogging and posting on social media. All of them have been derived from trial and error and suffering through a certain level of frustration. Yet one more tip remains. This, perhaps, is the most important tip I can offer you: remember that writers write. If you want to get started creating internet content about appellate legal issues, just get started. Write a blog post. Put a post on LinkedIn. Observe what happens. Watch other lawyers who create effective content, and then learn and experiment. As an appellate lawyer, you know how to learn, and you know how to explain things well. To begin creating content on the internet to build your reputation or market your practice, you just have to apply those skills in a new way.

Claire E. Parsons *is a member at Adams Stepner Woltermann & Dusing PLLC in Covington, Kentucky, where she practices in the areas of local government, civil litigation, and school law. She is an active member of several DRI committees and writes frequently on law practice, legal issues, and more on LinkedIn. She invites you to connect with or follow her at* https://www.linkedin.com/in/claireeparsons/.

Making Use of Dissenting Opinions

By Marshall A. Bowen and Xan Ingram Flowers


Perhaps every appellate practitioner can relate to the experience of finding a perfect on-point quote while conducting research only to discover the quote is from a dissenting opinion. But don't disregard that quote just yet. As this article will explore, dissenting opinions are a useful tool for appellate lawyers, and mastering the art of incorporating dissenting opinions into your briefs and oral arguments is a worthwhile endeavor. After all, judges put great effort into crafting dissenting opinions, so those opinions should not be disregarded in appellate advocacy.

A dissenting opinion represents what one—or often more than one—judge thinks the law *should* mean, but what is the purpose of a dissent? The late Second Circuit Judge William Hughes Mulligan is said to have remarked that a "primary purpose of a dissent is, of course, to annoy the majority."[1] But within a dissenting opinion's critical language of the majority are helpful insights that can improve your advocacy. Using these insights to your advantage may indeed have a meaningful impact on how the court rules in your case.

While a majority opinion settles disputes as to how the law should be applied to a particular set of facts, dissenting opinions highlight potential flaws in the majority's reasoning and unsettled questions that remain in the wake of the court's decision. As one commentator explains, "[m]ajority opinions are exercises in power; dissents are appeals to our better judgment."[2] Herein lies the advocacy value of a dissenting opinion: the ability to persuade the court that it should move away from—or even abrogate—a prior decision. This article suggests three ways that dissenting opinions can aid your brief-writing and oral argument preparation: (1) dissents can help frame your case; (2) dissents can serve as a gap-filler, coloring in facts and law the majority omitted; and (3) dissents can deepen your understanding of varying views within a court. Finally, there is an important ethical consideration that all lawyers must remember when citing to a dissenting opinion.

Framing Your Case

Framing your case in its proper legal and factual context gives the court a clear understanding of what law should guide the court's decision. Part of framing your case often entails confronting adverse authority, which may lead to an argument that the court should refine an area of law or even reverse binding precedent. By lodging thoughtful critiques of majority opinions, dissents highlight ambiguities in the law and do much of the legwork in moving a court to abrogate a prior decision. Because a fierce dissent may act as a barometer of what is in the offing, a devoted student of dissents will be better equipped to bend the arc of a court's jurisprudence in her client's favor.

Indeed, at critical moments in our nation's history, dissenting opinions have charted the course away from ill-advised decisions. Perhaps the most famous example is Justice John Marshall Harlan's dissent in *Plessy v. Ferguson*,[3] which undoubtably helped lay the groundwork for the Court's eventual reversal of *Plessy* in *Brown v. Board of Education*.[4] Another example is Justice Brandeis's dissent in *Olmstead v. United States*,[5] which paved the way for significant shifts in the Court's jurisprudence in the right-to-privacy context. In his dissent in *Olmstead*, Justice Brandies criticized the Court's decision, explaining that "to declare that the Government may commit crimes in order to secure the conviction of a private criminal… would bring terrible retribution."[6] Nearly forty years later, the Court, with a nod to the disagreement among the justices in *Olmstead*, reversed course in *Katz v. United States*.[7]

Dissents also aid in framing a case by revealing unsettled areas in the law. Specifically, dissents often point out

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1 John D. Feerick, Remarks Delivered on the Occasion of the Presentation of the Fordhamstein Award to the Hon. William Hughes Mulligan, 59 Fordham L. Rev. 479, 483 (1991).

2 David Cole, The Power of a Supreme Court Dissent, Wash. Post (Oct. 29, 2015), https://www.washingtonpost.com/opinions/the-power-of-a-supreme-court-dissent/2015/10/29/fbc80acc-66cb-11e5-8325-a42b5a459b1e_story.html.

3 136 U.S. 537 (1896), rev'd *Brown v. Bd. of Ed. of Topeka, Shawnee Cty., Kan.*, 347 U.S. 483 (1954).

4 347 U.S. at 483.

5 277 U.S. 438 (1928).

6 *Id.* at 469 (Brandeis, J., dissenting).

7 389 U.S. 347, 353 (1967) ("Thus, although a closely divided Court supposed in Olmstead that surveillance without any trespass and without the seizure of any material object fell outside the ambit of the Constitution, we have since departed from the narrow view on which that decision rested.").

inconsistencies in a court's analysis and provide a basis for arguing that an area of the law merits additional attention. As an example, Justice Reed, in *Sacher v. Association of the Bar of City of New York*,[8] explained the reason for his dissent: "The purpose of this dissent is to show that in reversing the disbarment of Mr. Sacher this Court departs from its previous practice of leaving exclusions from their bars to the district courts except when there has been an abuse of discretion."[9] Similarly, in *Bush v. Lone Oak Club*,[10] a recent case from the Texas Supreme Court, Justice Green argued that the majority opinion "charts a new path of Texas jurisprudence that departs from the long-standing distinction in Texas law between submerged land above the line of mean high tide and submerged land below the line of mean high tide."[11]

Drawing the court's attention to the fact that prior judges have wrestled with a similar question and emerged with divergent views gives the majority author in your case a hook on which to hang his hat if he decides to move away from prior decisions. As some commentators have suggested, "[l]ikeminded future litigants can interpret legal rationales in dissenting opinions as information about how they might reconstruct the case facts and legal arguments to be more likely to win on the merits in the future."[12] Using a dissent to invite the court to clear up confusion from prior decisions, or to abandon an ill-advised decision altogether, can reinforce your appellate arguments.

Filling the Gap

A second way to use a dissent in appellate briefs and oral arguments is as a gap-filler. An appellate court's majority opinion generally follows a well-known structure: an introduction, an explanation of the background and facts, the relevant standard of review, the court's application of the law to the facts, and a conclusion. The author of the court's majority opinion decides how to cast the facts and the law guiding the analysis and conclusion. Frequently, dissenting judges expend significant ink to point out facts the majority glossed over, or relevant law the majority omitted from its analysis. A careful reading of a dissent may uncover additional facts or relevant law that will prove useful in ameliorating adverse authority.

A dissenting opinion often contains a detailed account of the law that should have guided the majority's decision, or law that the majority, in the dissent's view, applied incorrectly. One example is Justice Frankfurter's dissent in *United States v. Monia*.[13] The issue in *Monia* was whether a subpoenaed witness who does not claim his Fifth Amendment privilege while testifying before a grand jury retains immunity under the Sherman Act.[14] In a succinct, roughly 1,600-word opinion, the Court concluded that such a witness does retain immunity under the Sherman Act.[15]

In his over 5,000-word dissent, Justice Frankfurter went to great lengths to explain the historical context of the statutory and case law that should have undergirded the majority's decision.[16] In Justice Frankfurter's view, the majority failed to consider the entire legal landscape in deciding the case.[17] While some judges have suggested the limited utility of a dissent,[18] Justice Frankfurter's dissent in *Monia* left an impact. Nearly twenty years after *Monia* was decided, Justice Black, dissenting in *United States v. Welden*,[19] highlighted Justice Frankfurter's comprehensive approach to filling the majority's gaps in *Monia*.[20]

A dissent may also illuminate facts from the record that the majority omitted from its analysis. Such omissions sometimes prompt a dissenting judge to call out the court for ignoring facts that should have weighed on the court's decision. One example is Judge Bataillon's dissent in *Wexler v. Jensen Pharmaceuticals*.[21] The issue in *Wexler* was whether a pharmaceutical company employee was terminated on the basis of his age or because of his performance as an employee.[22] The majority affirmed the trial court's grant of summary judgment in the pharmaceutical

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8 347 U.S. 388 (1954).=

9 *Id.* at 390 (Reed, J., dissenting).

10 601 S.W.3d 639 (Tex. 2020).

11 *Id.* at 658 (Green, J., dissenting).

12 Vanessa Baird & Tonja Jacobi, How the Dissent Becomes the Majority: Using Federalism to Transform Coalitions in the U.S. Supreme Court, 59 Duke L.J. 183, 201 (2009).

13 317 U.S. 424, 431 (1943).

14 *Id.* at 425.

15 *Id.* at 430–31.

16 Id. at 431.

17 *See id.* at 413 (Frankfurter, J., dissenting) ("This question cannot be answered by closing our eyes to everything except the naked words of the Act of June 30, 1906.").

18 Stark v. Holtzclaw, 105 So. 330, 334 (Fla. 1925) (Ellis, J., dissenting) ("I realize that in many cases the serviceability of a dissenting opinion is extremely doubtful, if, indeed, it does not make for harmful results which may be expected to flow from differences of opinion on the part of the members of a court of last resort upon a rule of law by which the responsibilities and liabilities of citizens are to be measured in their relations to one another.").

19 377 U.S. 95 (1964)

20 *Id.* at 108 (Black, J., dissenting).

21 739 F. App'x 911 (9th Cir. 2018).

22 Id. at 912–13.

company's favor.[23] Judge Bataillon argued in his dissent that the majority ignored facts that could have explained the employee's declining sales, other than those cited by the company.[24] Judge Bataillon didn't mince words in his critique of the majority's attention to the facts: "The majority's analysis gives a selective and incomplete picture of the record in this case."[25]

Understanding the Court

Finally, dissenting opinions provide helpful insights into varying views within an appellate court. Many dissents begin as the court's proposed majority opinion. After a case is submitted, a judge on an appellate panel or a high court circulates a draft majority opinion laying out how that judge believes the case should be decided. If that judge fails to garner enough support for her draft majority opinion, what was once a majority opinion becomes a dissent.

In the motions for rehearing context, dissenting opinions are particularly useful in appealing to judges' divergent views. In *United States v. Erwin*,[26] Judge Ryan stated: "the majority opinion fails to identify the correct issue in this case, omits facts essential to a correct resolution of the real issue, and announces a rule of law wholly foreign, until today, to established Fourth Amendment jurisprudence."[27] Indeed, Judge Ryan's view ultimately carried the day when the Sixth Circuit granted rehearing en banc, reversed its prior decision, and issued a new en banc majority opinion authored by Judge Ryan .[28]

Conclusion

Dissenting opinions provide a creative opportunity to strengthen your advocacy, and appellate lawyers should thus devote ample consideration of a dissenting judge's arguments. But all lawyers must be mindful of the duty of candor to the tribunal when citing dissents.[29] Dissents are, of course, not binding authority. Accordingly, when citing dissents in briefs and during oral argument, take care to always include a notation informing the court that the citation arises from a dissenting opinion.[30] Failure to include such a notation could make it appear that you are being less than forthcoming about the cited authority's weight. At best, this greatly undermines your credibility with the court and at worst could result in disciplinary action in many jurisdictions.

Marshall A. Bowen *is an associate at Butler Snow in Austin, Texas. Marshall focuses his practice on appellate advocacy and commercial litigation. Prior to joining Butler Snow, Marshall completed clerkships with judges on Texas's two high courts: the Supreme Court of Texas and the Texas Court of Criminal Appeals. Marshall is a member of DRI and DRI's Appellate Advocacy Committee. Marshall is also a member of the appellate sections of the State Bar of Texas and the Austin Bar Association.*

Xan Ingram Flowers *is an associate at Butler Snow in Birmingham, Alabama. Xan focuses her practice on product liability litigation and appellate advocacy. Xan is a member of DRI and the Marketing Chair of the Young Lawyers Product Liability Committee. Xan is also a member of the Alabama Bar Association, the Birmingham Bar Association, and the Alabama Defense Lawyers Association.*

23 Id. at 914.

24 Id. at 917 (Bataillon, J., dissenting) ("The majority also ignores facts that show the decline in sales could have been due to factors other than Wexler's alleged shortcomings in failing to adapt to the new sales model.").

25 *Id.* at 914 (Bataillon, J., dissenting). Perhaps Judge Bataillon's criticism was amplified because he is a trial judge who sat by designation on the appellate panel in Wexler.

26 71 F.3d 218, 223 (6th Cir. 1995), rev'd 155 F.3d 818 (6th Cir. 1998).

27 *Id.* at 223 (Ryan, J., dissenting).,

28 Erwin, 155 F.3d at 818.

29 Model Rules of Prof'l Conduct r. 3.3 (Am. Bar Ass'n 2018).

30 Westlaw appears to have picked up on this hazard, and its new Westlaw Edge platform highlights dissenting opinions in red.

Ethical Considerations as Counsel for Amici Curiae

By Brandon W. Maxey

Over the past several years, amicus curiae briefs have become a key part of appellate litigation. In the U.S. Supreme Court alone, any case accepted for review is likely to receive a dozen briefs from amici. While much has been written on the increasingly visible role that amicus curiae briefs are playing, ethical considerations involving the drafting and use of these briefs has received little attention. This article seeks to discuss ethical considerations in this context.

The Applicable Rules

Both the Supreme Court Rules and the Federal Rules of Appellate Procedure are directed to the proper use of amicus briefs. Namely, Supreme Court Rule 37.6 provides the following:

> Except for briefs presented on behalf of *amicus curiae* listed in 37.4, a brief filed under this Rule shall indicate whether counsel for a party authored the brief in whole or in part and whether such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief, and shall identify every person other than the *amicus curiae*, its members, or its counsel, who made such a monetary contribution. The disclosure shall be made in the first footnote on the first page of text.

Sup. Ct. R. 37.6

Similarly, Federal Rule Appellate Procedure 29(a)(4)(E) provides that any amicus brief not authored by the United States or a state must include a statement that indicates whether

1. A party's counsel authored the brief in whole or in part,
2. A party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and
3. A person—other than amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person.

Fed. R. App. P. 29(a)(4)(E).

State courts have similar rules. In Texas, for example, any amicus brief submitted must "identify the person or entity on whose behalf the brief is tendered" and "disclose the source of any fee paid or to be paid for preparing the brief." Tex. R. App. P. 11.

Coordination Between Counsel for Parties and Amici

The above-listed rules do not overtly prohibit coordination between a party and amici curiae. In fact, the advisory committee notes for Rule 29 encourage coordination between a party and amicus, "to the extent that it helps to avoid duplicative arguments." *See* Fed. R. App. P. 29, Advisory Committee's Note, 1998 Amendments. The committee notes go on to specifically state that the "mere coordination—in the sense of sharing drafts of briefs—need not be disclosed" under Rule 29. *Id.*

But, when coordination goes beyond the mere sharing of the drafts, where is the line?

For starters, we know that a party to litigation should not "underwrite" or fund the drafting of an amicus brief. In a 2003 case, for example, the 11th Circuit considered whether a prevailing party could recover attorneys' fees related to the submission of amicus briefs. *See Glassroth v. Moore*, 347 F.3d 916, 919 (11th Cir. 2003). In doing so, the Court stated that "we suspect that amicus briefs are often used as a means of evading the page limitations on a party's briefs" and that "[e]ven where such efforts are successful, however, they should not be underwritten by the other party." *Id.* As such, the Court held that the trial court "should not award plaintiffs any attorneys' fees or expenses for work done in connection with supporting amicus briefs." *Id.* The Court further stated that "[t]o pay a party for such work would encourage the practice, which we are loathe to do." *Id.* In short, a party to litigation should not fund the drafting of amicus briefs.

For similar reasons, while general discussions on the themes/arguments advanced by the amicus brief are legitimate and commonplace activities, a party's counsel should avoid writing any portion of a brief—such as redlining a draft. Courts have long held that an amicus curiae's purpose is to provide differing perspectives which will be helpful to the Court, or to direct the Court to non-partisan issues touching on the case. *See e.g.* Michael J. Harris, *Amicus Curiae: Friend or Foe? The Limits of Friendship in American Jurisprudence*, 5 Suffolk J. Trial & App. Adoc. 1, n. 5 (2000). To that end, the purpose behind the disclosure

requirements of Rule 29 and Supreme Court Rule 37.6 is to allow the Court to assess the credibility of the amici curiae. Stephen G. Masciocchi, *What Amici Curiae Can and Cannot Do with Amicus Briefs*, 46 Colorado Lawyer 23 (April 2017) (*citing* Shapiro *et al.*, *Supreme Court Practice* 518, 755 (Bloomberg BNA 10th ed. 2013).

Engaging in drafting activities as counsel for a party would certainly trigger the disclosure requirements of Rule 29 or Supreme Court Rule 37.6. Given the longstanding role played by amici curiae in appellate courts, such conduct would (at the very least) call into question the credibility of the brief.

This is particularly an ethical issue where a party is attempting to side-step the page limitations of a brief, as discussed briefly above by the *Glassroth* opinion. Even in states which do not have similar disclosure requirements as the Federal rules, most states have disciplinary rules that would prohibit such conduct. For example, in Texas, an attorney may not engage in "conduct involving dishonesty, fraud, deceit or misrepresentation." Tex. Disciplinary R. 8.04(a)(3). Thus, attempting to use amicus briefs as an end-around page limitations or other requirements—even in the absence of disclosure requirements—would potentially constitute a violation of ethics rules. *See* Sorenson, *The Ethical Implications of Amicus Briefs: A Proposal for Reforming Rule 11 of the Texas Rules of Appellate Procedure*, 30 St. Mary's L.J. 1219, 1249–51 (1999).[31] This necessarily brings us to our next potential ethical area in the context of an amicus brief.

Submission of Quality Information

Especially where amici curiae seek to educate the Court on public policy matters, these briefs are often most helpful in aiding the Court in considering the impact of its decisions. Namely, amici curiae sometimes submit "Brandeis briefs," which contain "non-legal data to aid the Court in making a legal rule." Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 Va. L. Rev. 1757, 1770 (Dec. 2014) ("Larsen"). In providing research and data outside of the legal records, amici curiae can provide the Court with the real-world effects that its opinions and rules may have on the public at-large.

This also presents several ethical concerns, however, given that these briefs are "filed after the record is closed, and the information they present is not subject to cross-examination below." *Id.* at 1772–73. For this reason, and together with the potentially large impact that such briefs have in some circumstances, counsel should take care to make sure that facts, research, or data presented to the Court are of sound quality.

As mentioned above, state disciplinary rules require that counsel be candid in their representations to a court. Similarly, the American Bar Association's Model Rules of Professional Conduct state that a lawyer "shall not knowingly… make a false statement" or "fail to disclose" opposing, controlling legal authority to any tribunal. *See* Model Rules Rule 3.3. As the comments on Model Rule 3.3 state, a lawyer not only has an "obligation to present the client's case with persuasive force," but the lawyer also has a "a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process…" *See* Model Rules Rule 3.3, cmt. 1–2, 12. Given these rules, it is clear that counsel for an amici must not only present its brief in a manner consistent with zealous advocacy, but must also present the brief "within the ambit of reasonable lawyering." Allison Lucas, *Friends of the Court? The Ethics of Amicus Brief Writing in First Amendment Litigation*, 26 Fordham Urb. L.J. 1605, 1631–32 (May 1999).

In a 2014 law review article, Professor Allison Orr Larsen of William & Mary Law School discussed her findings of "troubling patterns" in such briefs, including: (1) no citations to sources by amici, (2) amici citing to sources "created in anticipation of litigation," and (3) citations by amici to "minority views" in their field. *See* Larsen, *supra* at 1784–99. Professor Larsen's article also discusses potential reforms to address these issues. For our purposes, basic ethical rules should also prevent these types of issues from occurring. It is important that counsel—so that the Court can be supplied with quality information—apply the same standards to amicus briefs that they would other use in any other filing in litigation. This means that counsel should strongly consider the veracity of the information being provided to the Court through an amicus brief, both from factual and legal standpoints.

Conflicts of Interests

On a more specific note, conflicts of interest have become an ethical issue for counsel. And, given the increasing

[31] Though, in her comment, Sorenson argues that commenting or reviewing a draft "could be equated to authoring the brief in part," which would require disclosure under Rule 29. *Id.* Certainly, given the ambiguous nature of what it means to be an "author" Rule 29 or Sup. Ct. Rule 37.6, there is a legitimate concern as to *how much* coordination may occur until the disclosure requirements in the federal appellate courts are triggered.

participation of firms and clinics in the amicus practice, this will likely be of continued concern. The New York State Bar Association ("NYSBA"), in fact, recently issued its *Ethics Opinion 1174* in October 2019 that considered a conflicts-of-interest matter.[32]

In that matter, as part of its *pro bono* program, a law firm's attorney sent around a proposal to other attorneys in the firm to prepare an amicus brief advocating a specific position for submission to the Supreme Court of the United States. In response, some associates in that program favored one side of the issue before the Court, while others wanted to advocate the opposing view. As such, the firm proposed having the two groups draft and submit two opposing briefs. The firm asked the NYSBA for its opinion on whether "attorneys from a single firm [may] submit amicus briefs on opposing sides of the same issue" to the Supreme Court of the United States. In its opinion, NYSBA came to the following conclusion:

> Attorneys at the law firm representing clients may not submit amicus briefs on opposing sides of an issue before the Supreme Court of the United States, but attorneys at the firm may in their individual capacities submit amicus briefs for opposite sides of an issue pro se.

In considering this matter, the NYSBA first assumed that the firm would be representing two retained clients with opposing views. Citing to state ethics rules and past opinions, the NYSBA stated that a law firm may not represent clients on both sides of the same litigation and is a "nonconsentable conflict." Further, the NYSBA stated that this nonconsentable conflict would possibly present itself in this situation, if the law firm had established an attorney-client relationship with its own lawyers for the purposes of the amicus briefs.

However, the NYSBA went on to state that the conflict would not be present if the lawyers were simply representing their own *pro se* interests. Absent any rule in the firm's governing documents, there would be "no ethical reason why attorneys may not appear in their own name (rather than in the name of the firm) as pro se amici on opposing sides of a question before the Court." The Opinion did caution that such an arrangement may trigger the disclosure requirements of the Supreme Court.[33]

In sum, counsel for amici curiae should be aware of ethical issues surrounding conflicts-of-interest. While the above Opinion relates to a specific set of circumstances, it does demonstrate that state bars (and likely the federal bar) would apply the same ethical rules to counsel in the amici context.

Conclusion

In today's appellate practice, amicus briefs will continue to play an important role. There has been little ethical oversight on these briefs, however, and the information contained therein. As appellate counsel continue to advocate for their client's interests through amicus filings, it is important for counsel to apply the same ethical standards that they would otherwise provide as to any other brief.

Both the Supreme Court and Federal Rules of Appellate Procedure, as well as rules in state courts, provide for ethical assurances related to the drafting and funding of amicus briefs. Considering these rules, general coordination on the overall arguments and themes of an amicus brief is likely appropriate. Specific drafting or editing by a party's counsel, however, would trigger the disclosure requirements of the rules—and would likely be inappropriate.

Further, counsel have a general duty of candor in their representations and filings to courts. This doesn't change simply because a brief is on behalf of a third-party. Therefore, when drafting Brandeis-type amicus briefs, counsel should take great care to ensure that the information, facts, and data being provided are of a high-quality nature.

Finally, as demonstrated by the above ethics opinion from New York, standard ethics rules and obligations apply to representation of amici curiae. This includes issues of conflicts-of-interest, among other issues. In short, lawyers have well-established ethical obligations to their clients, the courts, and the public in general, which should be applied to amicus representation.

Brandon W. Maxey *is an associate attorney with Mayer LLP in Dallas, Texas. He focuses his practice on matters involving business disputes and he maintains an appellate practice. He can be reached at* **bmaxey@mayerllp.com**.

[32] The opinion is publicly available at https://nysba.org/ethics-opinion-1174/

[33] This is may be of particular interest to the Court if the law firm is "funding" the briefs by, for example, allowing the hours spent on the briefs count towards "billable hour" requirements within the firm.

Caution—Think Twice Before You Settle Your Appeal!

By Iván Resendiz Gutierrez

Appellate litigators should carefully consider the timing of settlement. Finalizing a settlement agreement at the wrong stage of litigation can cause unintended damage.

Summary of Procedures for Dismissing a Docketed Appeal Based on a Negotiated Settlement

In the U.S. Supreme Court

Settling parties seeking to dismiss a docketed appeal pending before the U.S. Supreme Court should follow Rule 46 of the Court's Rules. Rule 46 provides that "[a]t any stage of the proceedings, whenever all parties file with the Clerk an agreement in writing that a case be dismissed, specifying the terms for payment of costs, and pay to the Clerk any fees then due, the Clerk, without further reference to the Court, will enter an order of dismissal." U.S. Sup. Ct. R. 46(1); *see Utah Pub. Serv. Comm'n v. El Paso Nat. Gas Co.*, 395 U.S. 464, 466 (1969) ("Ordinarily parties may be [sic] consensus agree to dismissal of any appeal pending before this Court.").

In the Federal Courts of Appeal

Federal Rule of Appellate Procedure 42 governs voluntary dismissal in the federal courts of appeal. It allows the appellant to voluntarily dismiss by stipulation or motion. Fed. R. App. P. 42(b); *see Herrnreiter v. Chicago Hous. Auth.*, 281 F.3d 634, 637 (7th Cir. 2002) ("A simple rule is the best rule: An appeal continues until either (a) the litigants sign a mutually satisfactory written agreement that entails the dismissal of the appeal under Rule 42(b), or (b) the appellant actually files a notice of dismissal under Rule 42(b).").

A stipulation or motion is necessary at any time after the federal circuit court dockets the appeal. Fed. R. App. P. 42(b). The stipulation or motion must specify how the parties are allocating costs and fees and pay any fees that are due. *Id.* In addition to following Rule 42(b), parties should also check the local circuit court rules.

The Role Appellate Courts Play in Enforcing the Terms of Settlement Following Voluntary Dismissal

The *district court* typically supervises settlements if needed, even if the case is on appeal at the time of settlement. *See Hendrickson v. United States*, 791 F.3d 354, 358 (2d Cir. 2015). The appellate court may retain jurisdiction to oversee a settlement, but that practice has been criticized because of the appellate courts' lack of factfinding ability. *See* Fed. R. App. P. 33 ("The court may, as a result of the conference, enter an order controlling the course of the proceedings or implementing any settlement agreement."); *Nw. Env't Advocates v. U.S. E.P.A.*, 340 F.3d 853, 854 (9th Cir. 2003), *as amended* (Sept. 15, 2003) (Kleinfeld, J., dissenting) (noting that an appellate court's "lack of factfinding ability" makes it "unsuitable" to enforce settlements and U.S. Supreme Court's "rarely exercised certiorari jurisdiction" over any determination regarding enforcement "is not an adequate substitute for an appeal as of right");[34] *Herrnreiter*, 281 F.3d at 638 (an appellate court's authority to retain jurisdiction over a settlement under Rule 33 is ill-advised because the court "lacks factfinding apparatus").

Appellate-Related Considerations That Should Be Addressed in a Settlement Agreement—Jurisdiction Provisions in Settlement Agreements

To avoid a circumstance in which a federal court refuses to accept jurisdiction of a dispute concerning a settlement agreement, parties should ensure that the federal court's order of dismissal either (1) expressly retains jurisdiction over the settlement agreement or (2) incorporates the terms of the settlement agreement. *See, e.g.*, *K.C. ex rel. Erica C. v. Torlakson*, 762 F.3d 963, 967 (9th Cir. 2014) ("courts have ancillary jurisdiction to enforce a settlement agreement only if the parties' obligation to comply with the terms of the settlement agreement ha[s] been made part of the order of dismissal—either by separate provision (such as a provision retaining jurisdiction over the settlement

[34] *But see Laguna v. Coverall North America, Inc.*, 762 F.3d 902, 902 (9th Cir. 2014) (requesting a copy of settlement agreement (under seal if confidential) to evaluate mootness argument).

agreement) or by incorporating the terms of the settlement agreement in the order") (internal quotation marks and citations omitted); *accord Herrnreiter*, 281 F.3d at 638 ("In principle, a settlement agreement could be enforced in federal court if the court enters it as a judgment or explicitly retains jurisdiction to enforce the agreement.").

Standards for Vacatur of an Opinion or Ruling That Was Appealed

At the district-court level, a party typically moves to vacate an otherwise proper opinion (or ruling) to facilitate settlement under Federal Rule of Civil Procedure 60(b)(6). Under Rule 60(b), "the court may relieve a party… from a final judgment, order, or proceeding" for one of six reasons.

To evaluate the appropriateness of vacatur, courts may consider: (1) "the consequences and attendant hardships of dismissal or refusal to dismiss"; (2) "the competing values of the finality of judgment and right to relitigation of unreviewed disputes"; (3) "the motives of the party whose voluntary action mooted the case"; and (4) the public interest against allowing a losing party to "buy and bury" an unfavorable decision." *American Games, Inc. v. Trade Prods., Inc.*, 142 F.3d 1164, 1168 (9th Cir. 1998) (quoting *Dilley v. Gunn*, 64 F.3d 1365, 1370–71 (9th Cir. 1995)).

A district court's denial of a Rule 60(b) motion is reviewed for abuse of discretion. *See, e.g.*, *Hartford Cas. Ins. Co. v. Crum & Forster Specialty Ins. Co.*, 828 F.3d 1331, 1333 (11th Cir. 2016) (describing abuse of discretion standard); *Hall v. Louisiana*, 884 F.3d 546, 551 (5th Cir. 2018); *American Games*, 142 F.3d 1166.

Useful Guidance from the Federal Courts on Vacatur

The seminal vacatur case is *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994), a bankruptcy case that settled after the United States Supreme Court granted certiorari. According to the Ninth Circuit, "*U.S. Bancorp* makes clear that the touchstone of vacatur is equity." *Dilley* v., 64 F.3d at 1370. Although the Supreme Court had held that "mootness by happenstance" is sufficient reason to vacate, vacatur was not automatic "whenever mootness prevents appellate review of a lower court decision." *Id.* (emphasis in original). At least in the Ninth Circuit, "the primary inquiry is whether the appellant caused the mootness by his own voluntary act." *Id.* at 1370 n.4 (noting that two sisters, the Second and Tenth Circuits, agree).[35] *See Jones v. Temmer*, 57 F.3d 921, 923 (10th Cir. 1995); *Associated Gen. Contractors of Connecticut, Inc. v. New Haven*, 41 F.3d 62, 67 (2d Cir. 1994).

Consistently with the holding in *Dilley*, the Ninth Circuit has held that a district court is "not required to vacate a judgment when the appellant causes the dismissal of its appeal by settling." *Bates v. Union Oil Co. of Cal.*, 944 F.2d 647, 650 (9th Cir. 1991). Without this rule, "any litigant dissatisfied with a trial court's findings would be able to have them wiped from the books." *BrightEdge Techs., Inc. v. Searchmetrics, GmbH.*, No. 14-cv-01009-HSG, 2019 WL 1369915, at *1 (N.D. Cal. Mar. 26, 2019) (internal quotation marks and citations omitted).

A recent patent infringement case illustrates the danger of not considering vacatur before settling a case while the case is up on appeal. In *Protegrity USA, Inc. v. Netskope, Inc.,* No. 15-cv-02515-YGR, 2016 WL 4761093, at *1 (N.D. Cal. Sept. 13, 2016), the plaintiffs claim patent infringement by defendant Netskope. The district court granted Netskope's motion for judgment on the pleadings and entered judgment invalidating the patent. *Id.*

Plaintiffs timely appealed, but the parties settled before the appeal was decided. The settlement that was not contingent on the outcome of the appeal. *Id.* The appellate court remanded the case back to the district court—without instructing the district court to vacate its previous

[35] It is important to note that because the Court decided *Bancorp* in the context of vacatur by federal appellate courts, which is governed by 28 U.S.C. § 2106, *Bancorp*'s holding is not considered binding precedent for district courts. *See, e.g.*, *Valero Terrestrial Corp. v. Paige*, 211 F.3d 112, 117 (4th Cir. 2000) (observing that "the holding of *Bancorp* extends only to appellate court vacatur"); *Dana v. E.S. Originals, Inc.*, 342 F.3d 1320, 1328 (Fed. Cir. 2003) (Dyk, J., concurring) ("[B]y its terms, *Bancorp* does not apply to district courts but rather only to the Supreme Court and to courts of appeals.") (citing *Valero*, 211 F.3d at 117–20)).

But "given that the particular considerations adopted by the Court in *Bancorp* derived exclusively from the extraordinary and equitable nature of the relief of vacatur, rather than… from any power or ability unique to the appellate courts," *Valero*, 211 F.3d at 118–19, at least one circuit court has treated *Bancorp*'s "exceptional circumstances" requirement as being equivalent to Rule 60(b)(6)'s "extraordinary circumstances," 211 F.2d 121. And as noted, that term in Rule 60(b)(6) precludes relief if the movant deliberately chose not to appeal. Not all circuit courts, however, share the Fourth Circuit's view. *See, e.g., Marseilles Hydro Power LLC v. Marseilles Land & Water Co., 481 F.3d 1002, 1003 (7th Cir. 2007).*

decision. On remand, the plaintiffs filed an unopposed motion to vacate the district court's judgment, arguing that "vacatur of the Court's judgment was an important factor in plaintiff's settlement with defenses, and the beneficial effect of such settlement outweighs any public policy concerns." *Id.*

The district court denied the vacatur motion, finding that "the balance of the equities weighs against vacating its judgment invalidating the [patent]." *Id.* at *2. The court explained its reasoning, which provides useful guidance on how district courts may analyze vacatur issues:

> By their own admission, plaintiffs seek vacatur so that they may assert the [patent] again against others, which would result in unnecessary relitigation of issues already determined by this Court.
>
> Judicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by vacatur.... Furthermore, plaintiffs' assertion that the beneficial effect of their settlement outweighs any other factors is belied by their admission that the settlement is not contingent on the Court granting its motion for vacatur.

Id. (internal quotation marks and citations omitted) (citing *Reynolds v. Allstate Ins. Co.*, No. 10-CV-4893, 2012 WL 4753499, at *2 (N.D. Cal. Oct. 4, 2012) (denying vacatur where granting of vacatur was not necessary to consummation of settlement)).

A 2010 insurance case also provides some useful guidance on vacatur. In *Aearo Corp. v. Chartis Specialty Ins. Co.*, No. 1:08-cv-0604-DFH-DML, 2010 WL 2925020, at *1 (S.D. Ind. July 19, 2010), the plaintiff sued its insurer, seeking damages arising out of the insurer's refusal to defend plaintiff against a lawsuit. The parties filed cross-motions for summary judgment, and the court granted the plaintiff's motion and denied the insurer's in an opinion. The parties stipulated the amount of plaintiff's damages, and the court entered a final judgment.

The parties settled while that insurer's appeal was pending. Pursuant to the settlement, the parties moved jointly to vacate the district court's opinion and to dismiss with prejudice.

The court summarily denied the joint motion, noting that the parties did not argue that any of the first five reasons listed in Rule 60(b) applied to the opinion. To vacate its previous opinion, the court has to determine that the last reason applied: "any other reason that justifies relief." *See* Fed. R. Civ.P. 60(b)(6).

The court found that no such reason existed. The court was not persuaded by the parties' urging that a district court "is not cabined by the Supreme Court's admonition to appellate courts that they may vacate district court judgments only in 'exceptional circumstances.'" *Aearo*, 2010 WL 2925929, at *1 (*quoting Marseilles Hydro Power LLC v. Marseilles Land & Water Co.*, 481 F.3d 1002, 1003 (7th Cir. 2007). Instead, the court held that vacatur required "extraordinary circumstances." Id. (noting that the Supreme Court "has separately admonished district courts that they, too, must find extraordinary circumstances before they may vacate their decisions under Rule 60(b)(6)") (internal quotation marks and citation omitted).

The court's respect for the sanctity of precedent, including district-court precedent, ultimately doomed the litigants. *See Aearo*, 2010 WL 2925929, at *1–2 (noting that district-court precedent "can provide helpful guidance to other courts, attorneys, and parties") (internal quotation marks and citation omitted). The court was especially troubled by the litigants' apparent desire to have their cake and eat it too. *See Aearo*, 2010 WL 2925929, at *2 ("In other words, the parties want the opinion to be binding on them but unavailable to the public. Parties who want that sort of private justice should consider private dispute resolution at their own expense.").

Vacatur as a Material Condition of Appellate Settlement

To mitigate the risk of a district court's refusing to vacate an unfavorable order or opinion, the parties condition the settlement on vacatur of the underlying order or opinion. This agreement may encourage an appellate court to remand the decision with an instruction to vacate the order or opinion.

Many authorities—including recent circuit court authority—supporting the position that, when the litigants make vacatur of a previous order an *express* condition to settlement, they may be able to convince a federal court to approve the settlement. By doing this, the litigants may be able to sway a district court to find the "exceptional circumstances" contemplated by *Bancorp*, despite the federal court's respect for the sanctity of precedent.

An appellate litigator should focus a district court on the *equitable* nature of vacatur and that at least one circuit court has held that it is error for a court to read *Bancorp* as creating a bright-line rule prohibiting vacatur in the settlement context. For example, in *Hartford*, the Eleventh Circuit reversed the district court, holding that the court's

adoption of an "erroneous bright-line approach" in addition to being "plainly contrary to the equitable nature of the inquiry called for by *Bancorp*," also failed "to recognize that the public interest is not served only by the preservation of precedent." *Hartford*, 828 F.3d at 1337.

Conclusion

The holdings in *Protegrity* and *Aearo* are cautionary tales that should lead practitioners to weigh the pros and cons of settlement while appealing an unfavorable district court ruling. In some circumstances, the benefits settlement may not be worth the loss of the opportunity to erase unfavorable precedent.

These decisions also show that to obtain vacatur of a previous order, a party may need to address the sanctity of precedent. In the words of Justice Stevens: "Judicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur." *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 40 (1993) (Stevens, J., dissenting); *see also Bancorp*, 513 U.S. at 27 (citing Justice Stevens' dissent approvingly).

For these reasons, practitioners should think twice before settling any appeal.

Iván Resendiz Gutierrez *is a litigation and appellate attorney in the Portland, Oregon, Office of Miller Nash Graham & Dunn LLP. A member of the firm's Appellate, Education, and Labor & Employment Law teams, Iván advises and represents public and private employers, school districts, and higher education institutions on a wide range of employment and commercial matters, including appeals, breaches of contract, employment discrimination, harassment, retaliation, wrongful termination (as well as other tort claims), professional negligence, CERCLA litigation, and ERISA litigation. Before joining the firm, Iván clerked for the Honorable Lynn R. Nakamoto at the Oregon Supreme Court and the Oregon Court of Appeals. Iván is a member of DRI's Appellate Advocacy Committee.*

Circuit Reports

Compiled by Erik Goergen, Nixon Peabody LLP

First Circuit

Appellate Jurisdiction: Finality of Judgments When Fee Requests Are Pending

***In re Empresas Martinez Valentin Corp.*, 948 F.3d 448 (1st Cir. 2020)**

The First Circuit, in *In re Empresas Martinez Valentin Corp.*, held that the time limit within which an appeal need be made "starts running even if the lower court still has before it a request for attorneys' fees or costs incurred in litigating the case."

In *In re EMV*, the bankruptcy court issued a ruling on April 4, 2017, disposing of all claims and issues, save for the prevailing party's request for costs and attorneys' fees incurred during the bankruptcy proceeding. The court then issued an order granting attorneys' fees on November 27. On December 8, the opposing party appealed to the district court as to both the damages award and the award of fees. The district court found the appeal timely and affirmed.

The First Circuit found the appeal untimely. It noted that any appeal to the district court from a bankruptcy court must be filed within 14 days after entry of the judgment being appealed and that, if the appeal to the district court was untimely, then the First Circuit by extension also lacked jurisdiction. The court observed that the April 4 order resolved all the claims in the case, but that the time for appealing begins to run "from when the decision is entered in the docket."

The court then explained the three ways in which a judgment is deemed entered under Fed. R. Civ. P. 58. First, a judgment may be entered by preparing and docketing a separate document setting out the judgment. Second, if the court fails to docket a separate document for more than 150 days after the ruling, then judgment is deemed to have entered when the 150 days runs. Third, certain rulings need not be set out in a separate document to be deemed entered.

The court concluded that the second of these applied, because the bankruptcy court had never entered a separate document setting forth the judgment and the ruling did not fall within the exceptions to the separate document requirement. The court found that the notice of appeal was untimely because it was filed more than 164 days after the April 4 ruling.

The court then concluded that the pendency of a request for attorneys' fees did not change this analysis. A request for attorneys' fees ordinarily does not affect the finality of a judgment. The First Circuit rejected the argument that this rule did not apply in *In re EMV* because the attorneys' fees were arguably compensatory damages recoverable as an element of the underlying claim. According to the court, the rule does not depend on whether the fee claim is characterized as part of the merits of a claim, but rather whether the fees in question had been incurred in litigating the case and thus could not have been determined until after the case was litigated. In *In re EMV*, the attorneys' fees had been incurred as part of the proceeding, and, thus, the request for fees did not affect the finality of the bankruptcy court's order.

The court closed with a warning that the civil rules clearly provide that the pendency of a request for attorneys' fees ordinarily does not stay the time within which an appeal need be filed. The rules also contain a "safe harbor" that avoids any potential dangers: "when in doubt, file your notice of appeal, because a premature notice, unlike a late notice, can still be effective."

Appellate Jurisdiction: Appeals from Orders Remanding for Further Agency Proceedings

***Littlefield v. Mashpee Wampanoag Indian Tribe*, 951 F.3d 30 (1st Cir. 2020)**

One of the questions confronted by the First Circuit in *Littlefield v. Mashpee Wampanoag Indian Tribe* was the propriety of an appeal from an order remanding to an agency for further proceedings. The First Circuit held that such orders may be final, appealable orders.

In *Littlefield*, the Bureau of Indian Affairs determined that it could take certain lands into trust for the Mashpee Wampanoag Indian Tribe. Plaintiffs challenged this decision, and the district court found that the BIA had exceeded its authority. The court remanded the matter to the agency for further proceedings. Both the tribe and the government appealed, but the government voluntarily dismissed its appeal. The appellees argued that the First Circuit lacked appellate jurisdiction because orders remanding an issue to an agency are generally not immediately appealable except by the agency. They contended that the government's decision to dismiss its appeal stripped the court of jurisdiction.

The court noted that, under 28 USC §1291, it has jurisdiction over "final decisions." The final decision rule "precludes piecemeal, prejudgment appeals that would undermine efficient judicial administration and encroach upon the prerogatives of district judges." The final judgment requirement is given "a practical rather than a technical construction" to serve those purposes.

The First Circuit went on to conclude that the government's decision to dismiss its appeal did not defeat the court's jurisdiction under the final judgment rule. The court observed that, in some cases, a remand order might be non-final because the government agency may resolve the underlying issue on remand. The court further observed, however, that this rule is not without exceptions and that appeals have been allowed from orders remanding to an agency for further proceedings, "often based on efficiency concerns."

The court held that that there was "both real and practical finality [to the district court's order], and it would be contrary to judicial efficiency to dismiss this appeal." The court endorsed certain considerations in determining whether a remand order is final: whether the order "conclusively resolves a separable legal issue," whether the remand order "forces the agency to apply a potentially erroneous rule which might result in a wasted proceeding," and whether "review would, as a practical matter, be foreclosed if an immediate appeal were unavailable." The court construed these factors as "considerations," not "strict prerequisites," to determining whether the remand order has the "necessary practical finality to be appealed."

In *Littlefield*, the court found the first consideration most relevant, concluding that the district court had conclusively resolved a separable legal issue and that the remand proceeding dealt with a separate merits issue. Accordingly, the court concluded that the "district court's merits decision has the requisite practical finality to be appealed." As a result, the court stated, "there is no gain, and only potential loss, to judicial efficiency by dismissing this appeal."

Joshua D. Dunlap, Esq.
Pierce Atwood LLP
Portland, ME
jdunlap@pierceatwood.com

Second Circuit

Appellate Jurisdiction: Temporary Restraining Orders/Preliminary Injunctions

***Uniformed Fire Officers Ass'n v. De Blasio*, 973 F.3d 41 (2d Cir. Aug. 27, 2020)**

This litigation arose out of New York State's June 2020 repeal of a law which had shielded from public disclosure personnel records of various uniformed officers including police officers. *Id.* at 45. The Second Circuit was asked to decide a motion to stay a District Court order exempting the New York Civil Liberties Union ("NYCLU") from its earlier-issued order prohibiting various New York City agencies ("the City) from publicly disclosing records of civilian complaints against approximately 81,000 New York City police officers. *Id.* at 44.

The NYCLU obtained access to the records in response to a request it made to New York City's Civilian Complaint Review Board ("CCRB") under New York's Freedom of Information Law ("FOIL"). *Id.* On the same day the CCRB provided the database to the NYCLU, several unions representing police, firefighters, and correctional officers commenced an action in state court seeking an injunction to prohibit the City from publicly disclosing what were described as "Unsubstantiated and Non-Final Allegations." *Id.* at 45. The state court judge issued a TRO prohibiting the City from publicly disclosing the records and the City removed to federal court. *Id.*

After removal, the District Court held a hearing on the Unions' request to extend the state court's TRO, initially finding that the NYCLU was "acting in concert" with the City. *Id.* The NYCLU immediately requested that the District Court modify that order. *Id.* After a hearing, the District Court modified the order, relying on Rule 65, and concluded that "the NYCLU was not acting in concert with the City either when it requested or received the information at issue." *Id.* at 46. The District Court further stayed the ruling for twenty-four hours to permit the Unions to seek a stay from the Second Circuit. *Id.* Thereafter, "an applications judge" at the Second Circuit granted the stay motion pending determination by a three-judge panel, which later issued an order denying the stay motion. *Id.*

The Second Circuit defined the issue as follows: "whether the District Court had authority under Rule 65(d)(2)(C) of the Federal Rules of Civil Procedure to enter the disclosure prohibition against the NYCLU as an entity 'in active concert or participation with' persons bound by a temporary restraining order ('TRO') or a preliminary injunction." *Id.* at 44. The Court held that "the District Court properly excluded the NYCLU from the disclosure prohibition", concluding that "[t]he NYCLU could not be 'in active concert' with such a party because it lawfully gained access to the information at issue before the… disclosure prohibition was issued against it and obviously could not have known of a prohibition that did not then exist." *Id.*

Although none of the parties raised the issue of appellate jurisdiction, the Second Circuit nevertheless addressed it due to the "possible doubt" which arose "because the pending motion seeks to stay, pending appeal, a ruling, as applied to the NYCLU, that appears to be the denial of a TRO, and such a denial is ordinarily not appealable." *Id.* at 46. The Court explained that the appeal was from the later-issued order ending the earlier-issued order applying the disclosure prohibition to the NYCLU. *Id.* at 46.

The Second Circuit posed several questions concerning appellate jurisdiction and "the proper classification of the restraint that was applied to the NYCLU." *Id.* at 46–47. Further, the Court "recognized that the label applied to a restraint is not determinative and that a restraint called a TRO may sometimes be regarded for purposes of appellate jurisdiction as a preliminary injunction." *Id.* at 47. The factors relevant to the proper classification of the restraint include: (1) "the duration of the order, whether it was issued after notice and hearing"; (2) "the type of showing made in obtaining the order"; and (3) "where a grant or denial of a TRO might have a serious, perhaps irreparable, consequence." *Id.*

In this case, the Second Circuit only considered the last circumstance, holding that the exclusion of the NYCLU from the previously-issued "application of the restraint to it enabled the NYCLU to make publicly available disciplinary report information adverse to thousands of police officers." *Id.* at 47–48. Further, the Court concluded, "[i]f made, the disclosure could not be undone, thus rendering the consequences irreparable" and "[w]hether or not those consequences would inflict injury sufficient, when considered with other factors, to warrant a stay pending appeal, the disclosure would be a serious, perhaps irreparable, consequence that suffices to permit" the Court to consider the subsequently-issued District Court order "to be the denial of a preliminary injunction, which is appealable." *Id.* at 48.

Erik A. Goergen
Nixon Peabody LLP
Buffalo, New York
egoergen@nixonpeabody.com

Fourth Circuit

Appellate Jurisdiction: Alternative Request for Stay Pending Arbitration

***Noe v. City National Bank*, ___ F. App'x ___, 2020 WL 5814243 (4th Cir. Sept. 30, 2020)**

Brenda Noe filed a class action lawsuit against City National Bank of West Virginia ("the Bank"), alleging that the Bank's practice of assessing multiple insufficient-funds fees on a single transaction breached contractual promises the Bank made in its 2017 "Terms and Conditions of Your Account" disclosure. The Bank moved to dismiss the appeal for failure to state a claim and, alternatively, requested a stay pending arbitration. The district court denied the Bank's motion in an order that focused primarily on the court's determination that the complaint plausibly stated a claim. The district court also briefly addressed—and denied—the Bank's alternative request for a stay.

Although neither party challenged appellate jurisdiction, the Fourth Circuit considered the issue pursuant to its independent obligation to verify the existence of its jurisdiction. The Court's jurisdictional analysis specifically addressed the alternative character of the Bank's request for a stay pending arbitration, considering whether the denial of a request made in the alternative was immediately appealable. Noting that the district court had explicitly addressed, and rejected, the request even though it had been phrased in the alternative, the Fourth Circuit held that "the Bank's alternative request that the 'matter be stayed pending referral of the matter to arbitration' equated to a motion seeking enforcement of a purported arbitration agreement and, thus, we have jurisdiction over the appeal."

Appellate Jurisdiction: Collateral Order Doctrine

***United States v. Sueiro*, 946 F.3d 637 (4th Cir. Jan. 9, 2020)**

Christopher Sueiro, a criminal defendant facing federal trial on child pornography charges, sought to represent himself at trial pursuant to *Faretta v. California*, 422 U.S. 806 (1975). After the district court denied Sueiro's *Faretta* motion, he filed a notice of appeal, contending that appellate jurisdiction was proper under the collateral order doctrine. The Fourth Circuit concluded that appellate jurisdiction was lacking.

As an initial matter, the Court noted that the final judgment rule, in the context of a criminal prosecution, "means that this Court generally does not have jurisdiction until after the imposition of a sentence." *Sueiro*, 946 F.3d at 639; *see Flanagan v. United States*, 465 U.S. 259, 264–65 (1984) (recognizing that final judgment rule is "at its strongest in the field of criminal law," because of the compelling interest in the speedy resolution of criminal cases). Since Sueiro had not even gone to trial, the final judgment rule obviously did not apply.

Turning to Sueiro's contention that jurisdiction was proper under the collateral order doctrine, the Court first laid out the criteria necessary for establishing that an interlocutory order is collateral and immediately appealable: "a collateral order is immediately appealable if it (1) "conclusively determine[s] the disputed question," (2) "resolve[s] an important issue completely separate from the merits," and (3) is "effectively unreviewable on appeal from a final judgment." *Sueiro*, 946 F.3d at 639. The Court added, "[t]his is not a balancing test; to fall within the collateral order doctrine, a trial court order must satisfy each condition." *Id.* at 640.

The Court then observed that the Supreme Court has only recognized four types of immediately appealable collateral orders in criminal proceedings: (1) an order denying a Double Jeopardy Clause challenge; (2) an order denying a Speech or Debate Clause challenge; (3) an order denying a motion to reduce bail; and (4) an order allowing for forced medication of a criminal defendant. *Sueiro*, 946 F.3d at 640–41.

While the Supreme Court has not decided whether denial of a *Faretta* motion is immediately appealable, it has ruled that a pretrial order disqualifying counsel in a criminal case is not immediately appealable. *See Flanagan*, 465 U.S. at 260. The *Flanagan* Court held that because denial of a defendant's counsel of choice is appealable after conviction, it is not like denial of a reduction of bail, which becomes moot upon conviction and imposition of sentence. *See also Sell v. United States*, 539 U.S. 166, 175–77 (2003) (holding forced medication order immediately appealable because the right to avoid forced medication, once lost, cannot be restored on appeal). The *Flanagan* Court also concluded that erroneous disqualification of counsel is not like a violation of the Double Jeopardy and Speech or Debate Clauses, both of which confer a right *not to be tried*.

Attempting to fit his *Faretta* claim into the mold of rights that cannot be restored on appeal, Sueiro contended that an erroneous denial of his right to self-representation would result in "an ongoing harm to his autonomy that could not be vindicated in a second trial." *Sueiro*, 946 F.3d at 642. In rejecting this argument, the Fourth Circuit pointed to *dicta* in *Flanagan*, in which the Court commented on the interplay between the collateral order

doctrine's requirement of effective unreviewability, noting that an error that is presumptively prejudicial will never be effectively unreviewable on appeal. Applying that rationale to the case before it, the Fourth Circuit held that since an erroneous denial of a *Faretta* motion is presumptively prejudicial, it is necessarily subject to effective vindication on appeal and cannot satisfy the third requirement of the collateral order doctrine. The Fourth Circuit therefore dismissed the appeal.

Kirsten Small, CIPP/US
Nexsen Pruet, LLC
Greenville, South Carolina
Ksmall@nexsenpruet.com

Seventh Circuit

Appellate Jurisdiction: Appeal of Interlocutory Decisions – Deadline to Seek Review Not Subject to Extension

***Groves v. United States*, 941 F.3d 315 (7th Cir. 2019)**

Federal law permits a district judge to certify a non-final order for immediate appeal if it presents a "controlling question of law as to which there is substantial ground for difference of opinion" and resolving the issue "may materially advance the ultimate termination of the litigation." 28 U.S.C. §1292(b). Such an order may be reviewed by the court of appeals if a party applies for review within ten days after the order is entered. *Id.*

Groves sued the United States after the Internal Revenue Service assessed a penalty against him for organizing, selling and promoting abusive tax shelters. Groves argued that the penalties were time-barred; the district court disagreed but certified its orders for immediate appeal under Section 1292(b). Groves' application did not reach the court of appeals within the ten day period, but the district court re-issued its orders to re-start the clock, as the Seventh Circuit had allowed in an earlier decision.

Presented with the opportunity to re-visit its earlier guidance in light of intervening United States Supreme Court decisions, the appellate panel concluded that it lacked jurisdiction over the appeal. The panel first rejected Groves' argument that the statutory ten day period to apply for appellate review is not a jurisdictional prerequisite, but merely a claim-processing rule. The court found this argument unpersuasive in light of *Hamer v. Neighborhood Hous. Serv. of Chicago*, 138 S. Ct. (2017), in which the Supreme Court stated that statutory time periods that apply to transferring "adjudicatory authority from one Article III court to another" are jurisdictional.

The panel then turned to its decision in *Nuclear Engineering Co. v. Scott*, 660 F.2d 241 (7th Cir. (1981), in which it stated that district courts could re-start the ten-day period by reentering or recertifying their orders. The panel found *Nuclear Engineering* to be incompatible with subsequent Supreme Court decisions that reflected a "renewed emphasis on the federal courts' lack of authority to read equitable exceptions into fixed statutory deadlines." In the panel's view, Congress had spoken clearly and unequivocally in Section 1292(b) that disappointed litigants had ten days to apply for review and the federal courts lacked the authority to expand this timeframe. Because *Nuclear Engineering* was fundamentally at odds with the prohibition on judicial expansion of jurisdictional deadlines, the panel overruled it.

Appellate Jurisdiction: Intervenor's Right to Immediate Appeal

***Driftless Area Land Conservancy v. Huebsch*, 969 F.3d 742 (7th Cir. 2020)**

Federal appellate courts ordinarily have jurisdiction to review only the final decisions of district courts. 28 U.S.C. §1291. And in nearly all cases, only a party in the district court may seek appellate review. But not always. Recently, the Seventh Circuit considered an exception to these rules that gives non-parties an opportunity to seek prompt review if a district court denies intervention.

Three private electricity providers moved to intervene in a lawsuit brought by environmental groups against the Wisconsin Public Service Commission over the commission's decision to authorize construction of a power line. The district court denied the intervenors' request to join the suit without prejudice, finding that the commission adequately represented their interests but leaving the door open to a renewed request if the intervenors' interests diverged from the commission's at a later point in the case.

The intervenors appealed the district court's decision, but the environmental groups argued the decision was not final and thus did not fall within the court of appeals' jurisdiction. In examining this issue, the appellate panel began by stating the "well established" rule that an order denying intervention is final from the intervenor's perspective and thus appealable under Section 1291. The environmental groups argued that the district court's order was not final because it had denied intervention without prejudice and

left the door open to allowing the intervenors into the suit later in the case.

The panel did not agree that these aspects of the district court's ruling foreclosed immediate review. The change in circumstances identified by the district court might never come to pass, keeping the intervenors out of the case permanently without any opportunity to obtain meaningful review of the district court's decision. In the panel's view, it was sufficient for the purpose of jurisdiction that the district court had addressed the intervention motion (and denied it) on its merits. The intervenors were entitled to seek immediate appellate review.

Appellate Procedure: Guidelines for Effective Amicus Briefs

***Prairie Rivers Network v. Dynegy Midwest Generations, LLC*, ___ F.3d ___, 2020 WL 5867923 (7th Cir. Oct. 2, 2020) (Scudder, J.) (in chambers)**

Litigators are often asked to file amicus briefs on behalf of nonparties who have interests in the outcome of litigation. Federal Rule of Appellate Procedure 29 permits the filing of amicus briefs but provides little in the way of drafting guidance. The rule requires only that amicus briefs explain why they are "desirable and why the matters asserted are relevant to the disposition of the case." Fed. R. App. P. 29(a)(3)(B). What makes an amicus brief effective and helpful to an appellate court? A Seventh Circuit judge addressed this question recently and provided some useful pointers to amicus brief writers seeking to maximize the impact of their submissions.

The theme of the judge's guidance is to be "additive" – to offer "something different, new and important." Amici often urge the court to adopt one of the parties' positions, but a brief that simply parrots a party's legal arguments adds little to the mix. Instead, amici can live up to their role as "friends of the court" by doing one or more of the following:

- Proposing a different analytical approach to the issues in the case;
- Focusing on "factual, historical or legal nuance" not covered by the parties;
- Discussing the practical implications of a decision in favor of one of the parties;
- Providing relevant empirical data or expertise on "specialized subjects beyond the ken of most generalist federal judges;" and
- Marshalling treatment of the same or similar issues by courts in other jurisdictions.

Daniel J. Kennedy
Gass Weber Mullins LLC
Milwaukee, Wisconsin
kennedy@gwmlaw.com

Eighth Circuit

Appellate Jurisdiction: Qualified Immunity

***Thurmond v. Andrews*, 972 F.3d 1007, 1010 (8th Cir. 2020)**

In *Thurmond v. Andrews*, six former inmates of the Faulkner County Detention Center sued Faulkner County, Arkansas, and two of the jail's employees, under 42 U.S.C. §1983. The inmates alleged that they were confined in unconstitutional living conditions, and specifically claimed that mold was present in and around the jail's showers.

The district court found that the plaintiffs clearly established their right to sanitary prison conditions, and also found that there were genuine issues of material fact as to whether the defendants had violated those rights by acting with deliberate indifference or reckless disregard. Therefore, the district court found qualified immunity was improper and denied the defendants' motion for summary judgment. The jail employees appealed, arguing that they were entitled to qualified immunity because the conduct at issue did not violate a clearly established constitutional right. The county also appealed, arguing that it was entitled to summary judgment because no constitutional violation occurred.

The Eighth Circuit noted that its jurisdiction was limited in the interlocutory review of the order denying qualified immunity. It explained that "[w]e have authority to decide the purely legal issue of whether the facts alleged by the plaintiff are a violation of clearly established law." 972 F.3d at 1011 (quoting *Raines v. Counseling Assocs., Inc.*, 883 F.3d 1071, 1074 (8th Cir. 2018)).

The Eighth Circuit first examined the appeal by the individual defendants, the two jail employees. To determine whether the individual defendants had qualified immunity, the Eighth Circuit determined "(1) whether the facts shown by the plaintiff make out a violation of a constitutional or statutory right, and (2) whether that right was clearly established at the time of the defendants' alleged misconduct." *Id.* at 1012 (quoting *Thurmond v. Andrews*, 972 F.3d 1007, 1011 (8th Cir. 2020)). The Eighth Circuit concluded that although prisoners have an Eighth Amendment right to sanitary prison conditions, that right has not been

clearly defined so as to include non-toxic environmental allergens. Therefore, "a reasonable officer could glean little to no guidance from Eighth Circuit precedent about how to address the presence of a common mold in the jail, especially at the levels alleged." *Id.* at 1013. The Eighth Circuit held that a grant of qualified immunity was proper and reversed the district court's denial of summary judgment as to the individual defendants.

The Eighth Circuit then turned to the county, noting that municipalities do not enjoy qualified immunity. The Eight Circuit noted that although it held the individual defendants were immune because their actions did not violate clearly established law, that conclusion did not mean that the county did not violate the rights of the plaintiffs. The Eighth Circuit concluded that the determination of Faulkner County's liability did not flow from a resolution of the qualified-immunity issue, so it lacked jurisdiction to hear the county's appeal.

***Birkeland as Tr. for Birkeland v. Jorgenson*, 971 F.3d 787, 789 (8th Cir. 2020)**

In 2016, two police officers shot and killed John Birkeland in his home. Birkeland's trustee for the next-of-kin brought a wrongful death action against the two officers who shot Birkeland, another officer who was present, and the City of Roseville, Minnesota. The two police officers testified that when they shot at Birkeland, they feared for their safety and the safety of the other officers who were present. The trustee asserted that the officers' entry into the apartment was unlawful, that deploying a police dog was objectively unreasonable for a welfare check, and that Birkeland had a right to defend himself against the objectively unreasonable force used by the officers.

The district court granted summary judgment in favor of the officers and the city on all claims except for the reasonableness of the use of deadly force and related state-law claims. The officers appealed, arguing (1) they were entitled to qualified immunity on their use of deadly force; (2) that they were entitled to official immunity on several state law claims; and (3) that the City of Roseville was entitled to vicarious official immunity with regard to several state-law claims.. The trustee cross-appealed, seeking review of the grant of qualified immunity, official immunity, and vicarious official immunity as to several other claims.

The Eighth Circuit noted that it had limited jurisdiction to review the denial of summary judgment based on qualified immunity to the extent that it turned on an issue of law. The court also noted that it does not have jurisdiction "when a party complains that the district court should not have granted summary judgment based on qualified immunity." 971 F.3d at 791 (quoting *Mitchell v. Shearrer*, 729 F.3d 1070, 1073 (8th Cir. 2013)). The Eighth Circuit also explained that it may review other claims to the extent those claims are inextricably intertwined with an issue it does have jurisdiction to review—this meant that it did have jurisdiction to review issues of law related to the denial of official immunity, "because official immunity under Minnesota law provides immunity from suit." *Id.* The Eighth Circuit concluded that it had jurisdiction to review issues of law pertaining to the denial of qualified immunity on the deadly force claim and the denial of official immunity on the state-law claims related to the use of deadly force. It did not have jurisdiction to review the district court's grant of qualified immunity or its grant of official immunity.

The Eighth Circuit concluded that the officers' use of deadly force in this situation was not a violation of a clearly established right, and held that the district court erred in denying the officers qualified immunity on the deadly force claim. Similarly, the Eighth Circuit determined that a reasonable fact finder could not conclude that the officers' conduct in this case was willful or malicious, so the officers were entitled to official immunity as a matter of law. Finally, the court concluded that the City of Roseville had no vicarious liability. The court dismissed the cross-appeal by the trustee for lack of jurisdiction.

Judge Kelly concurred in part and dissented in part because she believed questions of fact precluded drawing the conclusion that the officers did not violate Birkeland's clearly established rights.

Colin S. Seaborg
Maria P. Brekke
Bassford Remele, P.A.
Minneapolis, Minnesota
cseaborg@bassford.com
mbrekke@bassford.com

Ninth Circuit

Impact of a Post-Judgment Motion for Attorney's Fees on Deadline to Appeal

***Nutrition Distribution LLC v. IronMag Labs, LLC*, 972 F.3d 1088 (9th Cir. 2020)**

Nutrition Distribution addressed whether a post-judgment motion for attorney's fees automatically extends the deadline to appeal from an underlying judgment. The extent to which a post-judgment fee motion extends the deadline to appeal is addressed by Federal Rule of Appellate Proce-

dure 4(a)(iii), which provides that such a motion extends the deadline when the district court has extended the time to appeal under Federal Rule of Civil Procedure 58. But, in *Nutrition Distribution*, the district court had not extended the deadline to appeal. Instead, the appellant argued that its fees motion was, in effect, a motion to amend the judgment which automatically extended the deadline to appeal under Federal Rule of Appellate Rule 4(a)(iv). The Ninth Circuit, recognizing that such an interpretation would operate as an end run around Rule 4(a)(iii)'s requirement that the district court extend the deadline to appeal, rejected that construction and held that an attorney's fees motion does not automatically extend the deadline to appeal. Rather, an attorney's fees motion only extends the deadline to appeal when the district court has ordered the deadline extended.

Jurisdiction Over California Private Attorney General Act (PAGA) Representative Actions

Canela v. Costco Wholesale Corp., 971 F.3d 845 (9th Cir. 2020)

Canela provided clarity on when federal courts have jurisdiction over representative actions brought under California's Private Attorney General Act (PAGA). PAGA enables aggrieved employees to bring a type of qui tam action to seek civil penalties for violations of California's labor laws. Under PAGA, 75 percent of recovered penalties are distributed to the Labor and Workforce Development Agency, while the remaining 25 percent of penalties are distributed to the aggrieved employees themselves. Prior Ninth Circuit cases had held that because PAGA actions are not class actions, the provisions of the Class Action Fairness Act giving federal courts jurisdiction over class actions are not applicable to PAGA actions but that federal courts may nevertheless still have diversity jurisdiction when the amount in controversy requirement is otherwise satisfied. Given the unique nature of PAGA cases, district courts had disagreed over how to calculate the amount in controversy in such cases. *Canela* clarified the methodology to be used. It held that in calculating the amount in controversy, the total civil penalties and attorney's fees that are recoverable are to be apportioned among all of the aggrieved employees. Thus, in *Calena*, the Ninth Circuit held that even though Costco's removal demonstrated that as much as $5,324,000 in civil penalties and $1,064,800 in attorney's fees were at issue, the $75,000 amount in controversy requirement was not satisfied because there were 968 aggrieved employees at issue, meaning that the plaintiff's pro-rata share of the civil penalties and attorney's fees at issue totaled $6,600.

Preservation of Issues Decided During Summary Judgment in a Subsequent Appeal from a Judgment Following a Trial

***In re Bard IVC Filters Prod. Liab. Litig.*, 969 F.3d 1067 (9th Cir. 2020)**

This case addressed whether a legal defense decided against a defendant at summary judgment is preserved for appeal when the case subsequently goes to trial. The Supreme Court in *Ortiz v. Jordan*, 562 U.S. 180 (2011) had held that an order denying summary judgment is generally not reviewable on appeal after trial. More specifically, *Ortiz* had held that because questions related to the sufficiency of the evidence following a trial can only be raised by a renewed motion for judgment as a matter of law under Federal Rule of Civil Procedure 50, the denial of a motion for summary judgment, in so far as it challenges the sufficiency of the evidence, is not preserved in that procedural context. While recognizing that *Ortiz* forecloses review of summary judgment motions that challenge the adequacy of the evidence, the Ninth Circuit held that a different rule applies to summary judgment rulings that implicate purely legal issues and that such purely legal issues are preserved for appeal.

Kasey Curtis
Reed Smith LLP
Los Angeles, California
kcurtis@reedsmith.com

Eleventh Circuit

Subject-Matter Jurisdiction: Plaintiffs Who Failed to Allege Concrete and Particularized Injury as a Result of the Violation of a Statutory Right Lacked Article III Standing

***Trichell v. Midland Credit Management, Inc.*, 964 F.3d 990 (11th Cir. 2020)**

This case involved two separate lawsuits by two plaintiffs—John Trichell and Keith Cooper—against Midland Funding, LLC and Midland Credit Management, Inc. Midland Funding is a company that buys defaulted consumer debt, and its sister company, Midland Credit Management attempts to collect on those defaulted debts. In 2017, Midland Credit Management sent three collection letters to Trichell, who had defaulted on credit card debt over six years before. The letters indicated that Trichell had been "pre-approved for a discount program designed to save [him] money," offered three options for repayment, and encouraged

Trichell to "[a]ct now to maximize [his] savings and put this debt behind [him]." What the letters did not say, however, is that the applicable statute of limitations had already run on Trichell's debt, meaning that any claim on that debt would be time barred. Nevertheless, the letters did say that "[t]he law limits how long you can be sued on a debt and how long a debt can appear on your credit report. Due to the age of this debt, we will not sue you for it or report payment or non-payment of it to a credit bureau." Trichell sued Midland Funding and Midland Credit under the Fair Debt Collection Practices Act ("FDCPA"), alleging that the collection letters were misleading and unfair in falsely suggesting that he could be sued or that the debt could be reported to credit-rating agencies.

Likewise, in 2017, Cooper received a similar letter laying out seemingly attractive repayment options for a debt that he had defaulted on seven years earlier. Like Trichell's debt, as of the date of the letter, any claims based on Cooper's debt would have been time barred under the applicable statute of limitations. Cooper's letter also included the same disclaimer language that was in Trichell's letter. Like Trichell, Cooper sued Midland Funding and Midland Credit Management, alleging that the letter was misleading because it failed to warn that making partial payment on the debt could constitute a new promise to pay that could restart the statute of limitations.

Neither district court considered the question of Article III standing, but both dismissed the lawsuits for failure to state a claim upon which relief could be granted. Trichell and Cooper appealed and the cases were consolidated on appeal.

On appeal, the Eleventh Circuit held that Trichell and Cooper failed to allege facts that demonstrated that they suffered a concrete and particularized injury in fact. According to the Court, neither complaint alleged any tangible injury. For example, "neither plaintiff allege[d] that he made any payments in response to the defendants' letters—or even that he wasted time or money in determining whether to do so. Instead, when confronted with the standing issue during oral argument, Trichell and Cooper asserted only intangible injuries, in the form of alleged violations of the FDCPA." The Court held that it "must look to both history and the judgment of Congress" in order "[t]o determine whether an intangible injury is sufficiently concrete" to confer Article III standing.

The Court said that for history, it must consider whether the intangible injury bears a "close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." According to the Court, "the common law furnishes no analog to the FDCPA claims" that Trichell and Cooper asserted. The closest analogs were causes of action for negligent and fraudulent misrepresentation. But, as the Court noted, those torts require that the plaintiff show that he or she relied on the allegedly false representation to his or her detriment. But Trichell's and Cooper's claims departed drastically from these requirements, seeking to recover for allegedly misleading statements "without proving even that they relied on the representations."

The Court then considered the judgment of Congress. Although Congress's judgment plays a limited role in the Article III standing analysis, the Court said that it can matter because (1) Congress may "elevat[e] the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law" and (2) Congress is "well positioned" to make decisions about what type of injuries may be sufficiently concrete, particularized, and imminent to constitute injuries in fact. Here, however, the judgment of Congress also disfavored Trichell and Cooper. According to the Court, the FDCPA's statutory findings only state that the statute is aimed at addressing "[a]busive debt collection practices," which "contribute to [a] number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy." "These serious harms," the Court said, "are a far cry from whatever injury one may suffer from receiving in the mail a misleading communication that fails to mislead."

Because Trichell and Cooper failed to allege facts demonstrating that they had suffered an injury in fact as a result of the allegedly misleading statements in the letters the received, the Court vacated the district court's orders and remanded with instructions to dismiss for lack of Article III standing.

Appellate Jurisdiction: Order Granting Plaintiffs' Motion to Voluntarily Dismiss Claims Against Two Remaining Defendants After Out-of-Circuit MDL Court Granted Summary Judgment to Other Defendants Was Final Order from Which Plaintiffs Could Appeal to Seek Review of Interlocutory Order of Out-of-Circuit MDL Court

***Corley v. Long-Lewis, Inc.*, 965 F.3d 1222 (11th Cir. 2020)**

Charles Corley was diagnosed with mesothelioma, a lung cancer caused by exposure to asbestos. Charles and his wife, Martha, sued dozens of asbestos manufacturers in Alabama state court, alleging that defendants' products caused Charles's mesothelioma. The defendants removed the Corley's lawsuit to the United States District Court for

the Northern District of Alabama, after which the Judicial Panel on Multidistrict Litigation transferred the case to the Eastern District of Pennsylvania as part of an ongoing MDL.

The Eastern District of Pennsylvania granted summary judgment in favor of seventeen companied that supplied products that Charles used when he was in the Navy, holding that the statute of limitations had expired on the claims against those companies. The Corleys moved to reconsider, for the first time asking the district court to allow them to elect the application of maritime law, which carried a longer statute of limitations. The court denied the Corley's motion.

Over the next year, the Pennsylvania district court whittled the case down to what it believed were the last two remaining defendants—Honeywell International, Inc. and Ford Motor Company. The Judicial Panel on Multidistrict Litigation then transferred the case back to the Northern District of Alabama, which dismissed the Corleys' claims against Honeywell and Ford with prejudice.

The Corleys appealed to the Eleventh Circuit to challenge the Pennsylvania district court's summary judgment order. However, upon investigation, the Eleventh Circuit determined that the Corleys' claims against two manufacturers were still pending in the Alabama district court, so it dismissed the appeal. On remand, the Corleys moved to voluntarily dismiss their claims against the remaining two manufacturers without prejudice, which the Alabama district court granted. The Corleys then filed another appeal seeking to reverse the Pennsylvania district court's summary judgment order.

On appeal, the Eleventh Circuit held that it had jurisdiction to hear the Corleys' appeal. First, despite divergent circuit precedent, the Court held that the order granting the Corleys' motion to voluntarily dismiss their claims against the remaining defendants without prejudice was a final appealable order. According to the Eleventh Circuit, the conflicting decisions about whether voluntary dismissals without prejudice are final can be traced to two decisions of the former Fifth Circuit. After discussing various Eleventh Circuit opinions applying these cases, the Court held that an irreconcilable conflict existed among its precedents. As a result, the Court held that circuit precedent required it to follow the oldest decision that governed the issue. In doing so, the Eleventh Circuit overruled its holding in *Mesa v. United States*, 61 F.3d 20 (11th Cir. 1995), and held that an order granting a motion to voluntarily dismiss the remainder of a complaint under Rule 41(a)(2) qualifies as a final judgment for purposes of appeal.

The Court next determined that it had territorial jurisdiction to review the summary judgment order entered by the Pennsylvania district court. According to the Eleventh Circuit, a circuit split exists over the application of 28 U.S.C. §1294 to interlocutory orders that precede an inter-circuit transfer. The Eleventh Circuit adopted the majority approach, which holds that a court of appeals has jurisdiction to review an out-of-circuit interlocutory decision so long as the court has jurisdiction over the district court that issued the appealable decision. That is because outside of narrow circumstances, courts of appeals can only review interlocutory orders when they merge into a final judgment of the district court. So, even when the courts of appeals review the merits of interlocutory orders, they only do so by reviewing the final judgment into which the earlier order has merged.

Finally, although none of the parties disputed the issue, the Court *sua sponte* considered whether the Corleys had standing to pursue their appeal. Specifically, the Court considered whether they were adverse to the final judgment in light of their voluntary dismissal of the remaining claims. Ordinarily, a plaintiff is not adverse to a voluntary dismissal that he or she requested because he or she has acquired that which he or she sought. The Court determined that the Corleys had standing, holding that because a party is aggrieved by a decision granting in part and denying in part the remedy requested, they are adverse to the part of the final judgment that granted summary judgment to the manufacturers. So, notwithstanding their voluntary dismissal, the Corleys are adverse to part of the final judgment, which is enough to establish appellate standing.

Adam K. Israel
Balch & Bingham LLP
Birmingham, Alabama 35203
aisrael@balch.com

D.C. Circuit

Deadline to Petition for Interlocutory Appeal

***Strange ex rel. Strange v. Islamic Republic of Iran*, 964 F.3d 1190 (D.C. Cir. 2020)**

The D.C. Circuit held as a matter of first impression in this Circuit that a district court may not recertify an order for interlocutory appeal under 28 U.S.C. §1292(b) after the statutory ten-day deadline to petition for interlocutory appeal has expired.

Section 1292(b) provides that, "[w]hen a district judge, in making in a civil action an order not otherwise appealable

under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order." Section 1292(b) then provides that "[t]he Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after entry of the order...."

The district court certified an order for interlocutory appeal under §1292(b) but no petition was filed by §1292(b)'s ten-day deadline. The district court subsequently granted a motion to recertify its order, and the plaintiffs then filed a petition for permission to appeal and a notice of appeal within ten days of the recertification.

The D.C. Circuit held "that a district court cannot restart the jurisdictional clock in this manner," *id.* at 1193, and therefore dismissed the petition and the related appeal for lack of jurisdiction. The D.C. Circuit observed that, "[o]rdinarily, [f]ailure to file the petition for permission to appeal within the [ten]-day period... deprives [it] of jurisdiction over the appeal," but this case was complicated "by the fact that the district court recertified its order for interlocutory appeal and the [plaintiffs] thereafter filed a petition within ten days." *Id.* at 1196 (internal quotation marks omitted). The plaintiffs argued that the U.S. Supreme Court decision of *Baldwin County Welcome Center v. Brown*, 466 U.S. 147 (1984) (per curiam) should control because there the appeal proceeded after "the district court had recertified its order nine months after section 1292(b)'s filing period had expired." 964 F.3d at 1197. The D.C. Circuit disagreed because the only discussion of this issue in *Baldwin County* was in a dissenting opinion, and "[t]he majority didn't address the question at all." *Id.* Thus, the D.C. Circuit concluded with respect to *Baldwin County* that "[e]ven if the majority approved recertification sub silentio,... its assumption would be a drive-by jurisdictional ruling[] lacking precedential effect." *Id.* (internal quotation marks and citation omitted).

The D.C. Circuit next addressed that the plaintiffs "correctly note that most circuits to consider the issue have held that recertification resets the jurisdictional clock." *Id.* at 1198. The D.C. Circuit in considering other circuits' decisions concluded that most circuits reaching the conclusion that recertification restarts the jurisdictional clock have done so based on equitable balancing of interests. The D.C. Circuit reasoned that these decisions all predate *Bowles v. Russell*, 551 U.S. 205 (2007), "which 'introduced the [Supreme] Court's renewed emphasis on the federal courts' lack of authority to read equitable exceptions into fixed statutory deadlines.'" 964 F.3d at 1198 (citation omitted). The D.C. Circuit observed that only the Seventh Circuit has considered the recertification issue after *Bowles*, which then reversed its prior approach of allowing recertification to restart the clock "as 'inconsistent with the [Supreme] Court's approach to fixed deadlines.'" *Id.* at 1199 (quoting *Groves v. United States*, 941 F.3d, 315, 322 (7th Cir. 2019)). The D.C. Circuit concluded that the Supreme Court's statement in *Bowles* that "federal courts 'ha[ve] no authority to create equitable exceptions to jurisdictional requirements'" applies to this recertification issue. 964 F.3d at 1200 (quoting *Bowles*, 551 U.S. at 214). After rejecting the plaintiffs' remaining arguments, the D.C. Circuit quoted the Supreme Court's statement that, "'[i]f rigorous rules like the one applied today are thought to be inequitable, Congress may authorize courts to promulgate rules that excuse compliance with the statutory time limits.'" *Id.* at 1202 (quoting *Bowles*, 551 U.S. at 214).

Collateral Order Doctrine

***League of Women Voters v. Newby*, 963 F.3d 130 (D.C. Cir. 2020)**

The D.C. Circuit held as a matter of first impression in this Circuit that it has appellate jurisdiction under the collateral order doctrine to hear an appeal of an order denying a motion for permissive intervention for the limited purposes of seeking to unseal judicial records.

A third-party organization moved to intervene under Federal Rule of Civil Procedure 24(b) to seek disclosure of certain documents filed under seal during a privilege dispute in the district court. The district court denied the motion for permissive intervention, and the third-party organization timely filed an appeal.

While the parties did not dispute the D.C. Circuit's appellate jurisdiction to review the order denying permissive intervention, the D.C. Circuit stated its obligation to assure itself of jurisdiction in each case. The D.C. Circuit then observed that it "has never expressly addressed its jurisdiction to review a district court order denying a motion to permissively intervene for the limited purpose of unsealing judicial records." *Id.* at 134. The D.C. Circuit held that the collateral order doctrine extends appellate jurisdiction to this circumstance because the collateral order doctrine allows for review of decisions that do not end the litigation but resolve important questions that are separable from the merits. The D.C. Circuit reasoned that the district court order denying permissive intervention is

"separable from, and collateral to the rights at issue in the underlying case" because "the underlying case does not concern public-access rights, and the party challenging the order was not a party to the underlying… proceeding." *Id.* at 135 (internal quotation marks and citation omitted). In this regard, the D.C. Circuit observed that "the parties continued to litigate during the pendency of the motion to intervene, after the order denying that motion was entered, and during the course of [the] appeal." *Id.* Further, "the district court's order 'finally determine[d]' the issue of whether [the third-party organization] could participate in the case." *Id.* (citation omitted). The D.C. Circuit also considered that this decision is consistent with prior D.C. Circuit decisions allowing interlocutory appeals under the collateral doctrine from orders to unseal court records and orders denying requests to unseal court records.

James M. Sullivan
Hollingsworth LLP
Washington, DC
jsullivan@hollingsworthllp.com

Federal Circuit

Standing to Appeal

***Mayborn Grp., Ltd. v. Int'l Trade Comm'n*, 965 F.3d 1350 (Fed. Cir. 2020)**

The Federal Circuit held that a product importer had Article III standing to appeal a U.S. International Trade Commission (the "Commission") decision denying the importer's petition for rescission of a general exclusion order ("GEO") that prohibited importing products that infringed a particular patent even though the importer continued to import the product and the GEO had not yet been enforced against the importer.

Complainant companies who own a patent involving a self-anchoring beverage container notified a product importer that the importer's products infringed their patent in violation of a GEO that the Commission previously issued in an infringement proceeding in which the importer was not involved. In response, the importer petitioned the Commission to rescind the GEO, arguing that the conditions that led to entry of the GEO ceased to exist. The importer disputed the validity of the patent including based on purported new information that the Commission did not have in the earlier proceeding. The Commission denied the petition, and the importer appealed.

The Commission challenged the importer's Article III standing to appeal, arguing that the importer continued to import the products at issue and thus lacked the requisite injury. Further, although the complaint companies who own the patent threated to enforce the GEO against the importer and its retail partners, the Commission argued that this did not confer Article III standing because those threats had nothing to do with the Commission or the Commission's decision not to rescind the GEO.

The Federal Circuit rejected the Commission's arguments, and agreed with the importer that it had Article III standing. The Federal Circuit stated that "Article III standing to appeal from a decision of an administrative agency" exists when the appellant "(1) suffered a particularized, concrete injury in fact that is (2) fairly traceable to the challenged conduct of the defendant and is (3) likely to be redressed by a favorable judicial decision." *Id.* at 1354 (citing *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016)). The importer suffered an injury in fact because it imports products that potentially infringe the complainant companies' patent and thus violates the GEO. The Federal Circuit concluded that it is unnecessary for the Commission to have already barred importation of the importer's products to have standing to appeal. The Federal Circuit considered in this regard that the Commission or U.S. Customs and Border Patrol ("CBP") may at any time determine that the importer's products violate the GEO and act to enforce the GEO, and the importer already lost sales and incurred costs stemming from the complainant companies' threats to assert the GEO. The Federal Circuit concluded that the injury was traceable to the Commission's conduct (and not limited to the conduct of the complainant companies) because the GEO was issued by the Commission and the Commission retained the authority to enforce, modify, or rescind the GEO. Finally, the Federal Circuit concluded that the injury could be redressed by a favorable judicial decision because the importer's request to invalidate the patent and rescind the GEO would remove the threat of enforcement against the importer by CBP or the Commission.

Collateral Order Doctrine

***Uniloc 2017 LLC v. Apple, Inc.*, 964 F.3d 1351 (Fed. Cir. 2020)**

The Federal Circuit held that it had jurisdiction under the collateral order doctrine to hear an appeal of the district court's denial of motions to seal and a related motion for reconsideration.

Plaintiffs moved to seal briefing and exhibits filed by the parties in connection with the defendant's motion to dismiss the plaintiffs' infringement actions. The

district court denied the motion to seal as lacking the narrow tailoring and support required by local rule. The plaintiffs subsequently filed a motion for leave to seek reconsideration and an accompanying revised motion to seal. Plaintiffs made these filings more narrowly tailored and provided additional evidentiary support for the sealing requests. However, the district court denied the motion for leave to seek reconsideration and the revised motion to seal because, *inter alia*, the plaintiffs did not show a change of law after the order denying the motion to seal or any of the other circumstances under which the court's local rule permitted a motion for reconsideration. Plaintiffs then filed a timely appeal to the Federal Circuit.

Before reaching the merits, and affirming the district court's orders in part, vacating the orders in part, and remanding the case for further consideration, the Federal Circuit considered whether it had jurisdiction to hear the appeal. Although the jurisdiction of federal appellate courts, as a general rule, extends only to "final decisions of the district courts of the United States" pursuant to 28 U.S.C. §1291, the Federal Circuit held that it had jurisdiction pursuant to the collateral order doctrine, which requires that the order being appealed "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." 964 F.3d at 1357 (internal quotation marks and citation omitted). The Federal Circuit concluded that the district court's orders met the first requirement of the collateral order doctrine because they conclusively determined that plaintiffs' filings should be made public. As to the second requirement, the Federal Circuit concluded that the appeal presented an important issue that is separate from the merits of the underlying lawsuit because it addressed the scope of a district court's discretion to deny, in full, a motion to seal based on failure to comply with local procedural rules. The Federal Circuit concluded that the district court's orders met the third requirement of the collateral order doctrine because "the orders are effectively unreviewable on appeal from a final judgement because once the parties' confidential information is made publicly available, it cannot be made secret again." *Id.* at 1358 (citation omitted).

James M. Sullivan
Hollingsworth LLP
Washington, DC
jsullivan@hollingsworthllp.com

Erik Goergen *is an associate in the Buffalo, New York, office of Nixon Peabody. He is a litigator who represents a wide range of local, national and international clients in complex commercial disputes, appeals, government investigations and white collar defense.*