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Summer 2008

The newsletter of the DRI Appellate Advocacy Committee

DRI The Voice of the Defense Bar

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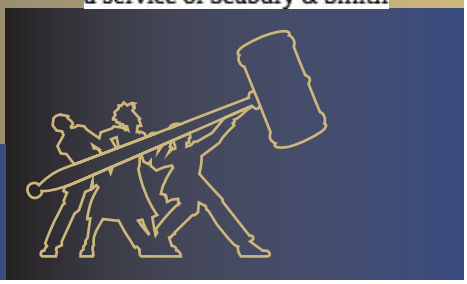

In This Issue…

To Object or Not to Object?: An Exception to the Contemporaneous-Objection Rule

Robert L. Wise
David Gluckman

Picture this: you are starting trial in a decent jurisdiction. While the case could go either way, you are cautiously optimistic about your chances. You have some good in limine rulings in your pocket and, assuming the evidence goes in the way it should, you like your chances.

However, as opening statements unfurl, your opposing counsel makes some inflammatory comments in violation of the court's in limine rulings. You object and the court sustains some of the objections and overrules others. But as the trial progresses and through closing arguments, the improper conduct and inflammatory comments from opposing counsel continue.

Mindful of the contemporaneous objection rule and the possible implications of waiver, you try to object as diligently as possible to preserve the error. At the same time, however, you realize that your objections are starting to add up. You begin to notice the judge and the jury losing patience with you each time you rise to object, and you fear that one more objection may lose both of them forever.

Rob Wise is a partner in the Richmond, Virginia office of Bowman and Brooke LLP, where he is a founding member of the firm's Appellate and Trial Support Practice and also practices commercial litigation, patent litigation, and products liability defense. He is a member of DRI and its Appellate Advocacy Committee, for which he chairs the Web-conference Subcommittee and the Diversity Subcommittee. He is also an active member, speaker and author for the Virginia Association of Defense Attorneys. David Gluckman is a 2008 graduate of the University of Richmond School of Law, was a summer associate with Bowman and Brooke LLP in 2007, and will be joining the firm full-time as a first-year associate in August 2008. *Rob and David would also like to thank 2008 Bowman and Brooke LLP summer associate Jonathan Moore for his help in finalizing this article.*

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FROM THE CHAIR

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Continuing To Move Forward

The Appellate Advocacy Committee continues to grow more appealing. Those of you at our February seminar saw this for yourselves. Our consummate seminar moderator, Diane Bratvold, put on quite a show. Among other things, we learned about the Roberts Court from two esteemed Court watchers; we saw one of the best judicial panels ever to grace a DRI stage; we heard an inhouse counsel panel that topped our last excellent panel of inhouse lawyers (moderated by another consummate performer, Scott Smith); and we heard a hilarious presentation by lawyer-turned-journalist Dahlia Lithwick.

The rest of this year will bring three significant events in the growth of our committee. First, look for our Committee Perspectives section in the November issue of *For the Defense*. Ralph Johnson has been hard at work assembling what promises to be an outstanding set of articles.

Second, our committee hosted its first webconference program in August. It was entitled "Sometimes the Best Offense Is A Good Defense -- The Use of *Bell Atlantic, Inc. v. Twombly*." Rob Wise and Ed Haden organized the program. Appellate lawyers serve as a resource for our trial-lawyer colleagues, so we hope to offer webconference programs that are a resource for both appellate lawyers and trial lawyers with DRI.

Third, it is not too soon to make your plans to attend the DRI Annual Meeting in New Orleans in October. Our committee is sponsoring a writing program on the main stage, featuring legal-writing professor Timothy Terrell. And for our committee meeting, LeAnn Nealey and David Furlow have landed Fifth Circuit Judge Edith Clement Brown as a speaker. Please don't miss these events.

As a closing note, let me encourage you to recruit new members for our committee. Start with the low-hanging fruit — appellate colleagues in your firm. And then approach your appellate colleagues at other firms in your locale. Let's continue to grow this committee together!

FROM THE EDITOR

A Very Positive Status Report

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I am pleased to provide the Committee with a very positive status report. As you will recall, the Winter issue of *Certworthy* contained three articles: Roger Townsend's article on appellate research, David Tennant's article regarding the volume of asylum appeals pending in the federal courts of appeals and Ray Ward's article on using different type faces to improve the appearance and quality of briefs and other written work. All three articles were well received.

In this issue, in addition to the Circuit reports and several subcommittee reports, we have three articles and a book review.

First, an article by Robert Wise and David Gluckman exploring an exception to the contemporaneous objection rule and how appellate courts address the exception.

Second, an article by LeAnn Nealey examining how to preserve a favorable summary judgment ruling where expert testimony has been excluded.

Third, we have an article by Katherine Eubank, which examines appeals in cases where Rule 56(f) motions have been denied.

Finally, we have a book review of Justice Scalia's and Bryan Garner's recent book "Making Your Case: The Art of Persuading Judges," by J.H. Huebert.

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

In addition to *Certworthy*, the Publications Subcommittee has been involved with other projects. In particular, we have been organizing the November 2008 issue of *For The Defense*, which will focus on appellate advocacy and feature seven or eight articles by members of our Committee.

KUDOS

LaDawn Conway and **Charles Frazier**, long time members of the Committee, have joined Alexander Dubose Jones & Townsend LLP, Texas's largest appellate boutique, as partners. They opened the firm's Dallas office on May 1. The firm also has offices in Austin and Houston. Both Conway and Frazier are certified in civil appellate law by the Texas Board of Legal Specialization, and have been practicing 17 and 22 years, respectively, in Dallas/Fort Worth. Conway previously headed the appellate section at Munsch Hardt Kopf & Harr, after practicing with Haynes and Boone for 11 years. Frazier practiced at Cowles & Thompson for the past 22 years, chairing the firm's appellate practice group since 1993. Frazier, who has argued before the U.S. Supreme Court, has been an active member of the Appellate Advocacy Committee since its inception, speaking at the Committee's 2004 seminar, writing a chapter in *A Defense Lawyer's Guide to Appellate Practice* (DRI 2004), and routinely contributing to *Certworthy* and *For the Defense*. Conway serves on the Pattern Jury Charge Committee of the State Bar of Texas (business volume), and has co-authored the *SMU Law Review*'s annual survey on appellate practice and procedure for over ten years.

Eric Magnuson, a former member of the Committee, was appointed the Chief Justice of the Minnesota Supreme Court in March. At the time of his appointment, Magnuson was a shareholder in Briggs and Morgan in Minneapolis, Minnesota.

Ralph W. Johnson III, of Halloran & Sage LLP in Hartford, Connecticut, was named to the Nominating Committee for the American Bar Association's Council of Appellate Lawyers (CAL). The Nominating Committee recommends individuals to serve as the Council's new officers and executive board members for the upcoming year. Earlier in the year, Johnson was named Co-Chair of his firm's Appellate Law & Advocacy Practice Group.

Picking what you think may be the lesser of two evils, you decide to stop objecting, even to the most abusive comments and argument, hoping that you can instead maintain a good rapport with the jury. Have you just waived your right to challenge opposing counsel's improper conduct post-trial or on appeal? Maybe not.

Attorney Misconduct:An Exception to the Contemporaneous-Objection Rule

As every attorney knows from law school, the contemporaneous-objection rule requires counsel to object at the time the improper evidence or argument is presented or as soon as its impropriety becomes clear. *See, e.g., Bitar v. Rahman*, 630 S.E.2d 319, 324-25 (Va. 2006) (requiring objection when the evidence is offered or when its inadmissibility first becomes clear); *Sutton v. State*, 495 N.E.2d 253, 259 (Ind. Ct. App. 1986) (requiring contemporaneous objection); *see also Fed. R. Evid.* 103(a)(1) (requiring "timely" objection); *Fed. R. Civ. P.* 46.

The rule exists to afford the trial court an opportunity to prevent or cure any error in a timely fashion. *See Estelle v. Williams,* 425 U.S. 501, 508 n.3 (1976); *Olden v. Commonwealth*, 203 S.W.3d 672, 675 (Ky. 2006). Failure to follow this rule almost always results in the issue or objection being deemed forever waived.

Nevertheless, when opposing counsel continually engages in misconduct, repeated objections to that misconduct can and do alienate the jury, resulting in what many courts have acknowledged to be a potential "rock-and-hard-place" situation. *See, e.g., Anheuser-Busch, Inc. v. Natural Beverage Distribs.*, 69 F.3d 337, 346 (9th Cir. 1995) ("[C]onstant objections are certainly not required, as they could antagonize the jury . . . ." (quoting *Kehr v. Smith Barney, Harris Upham & Co., Inc.*, 736 F.2d 1283, 1286 (9th Cir. 1984))).

In addition to the possibility of jury alienation, objections and even curative instructions can often do more harm than good, as they can have the effect of emphasizing the improper evidence or inflammatory and prejudicial argument. *See, e.g., Leathers v. Gen. Motors Corp.*, 546 F.2d 1083, 1086 (4th Cir. 1976) ("Counsel for defendant was placed in an unnecessarily difficult and embarrassing position. To interrupt argument by plaintiffs' counsel might antagonize the jury, and would certainly emphasize the point. Both defendant's counsel and the court felt that a curative instruction would point up the argument and would 'make more of it than has already been made.'").

Appreciating this untenable position, many courts have recognized an exception to the contemporaneous-objection rule to allow a court to review attorney misconduct even in the absence of a contemporaneous objection. The recent case of *Moody v. Ford Motor Company*, 506 F. Supp. 2d 823 (N.D. Okla. 2007), is a prime example of just such a situation, as well as of a practical and common-sense approach to the serious problem of how to deal with pervasive and abusive attorney misconduct at trial.

In *Moody*, an automotive, products-liability case, the plaintiffs' counsel rampantly and flagrantly violated evidentiary rulings, made repeated inflammatory statements about Ford Motor Company's counsel and its expert witnesses, and engaged in other egregious misconduct. *Id.* at 831-48. For example, one of the plaintiffs' counsel's more incendiary statements compared the number of deaths in rollover crashes to the death toll in the war in Iraq. *Id.* at 849. The court agreed with Ford that this comment was a "veritable supernova of prejudice." *Id.* at 850. Defense counsel timely objected to some—but not all—of this improper conduct. *Id.* at 831.

Ultimately, the Oklahoma jury returned a $15-million verdict for non-economic damages, which was three times larger than the largest previous non-economic damages award in a wrongful death case reviewed by the Oklahoma Supreme Court. *Id.* at 847 (citing *Johnson v. Ford Motor Co.*, 45 P.3d 86 (Okla. 2002)).

Ford moved for a new trial, pointing to the plaintiffs' counsel's misconduct. The plaintiffs countered that the trial court was precluded from reviewing any alleged misconduct to which Ford did not contemporaneously object at trial. *Id.* at 831. The trial court rejected the plaintiffs' arguments and ordered a new trial. *Id.* at 848.

In doing so, the *Moody* court relied on an exception to the contemporaneous-objection rule that allows a trial or appellate court to "review allegations of misconduct without a timely objection when the 'interests of judicial fairness' so require." *Id.* at 827 (quoting *Ryder v. City of Topeka*, 814 F.2d 1412, 1424 n.25 (10th Cir. 1987)). The court held that the plaintiffs' counsel's misconduct was just such an instance, and that the improper conduct had so tainted the entire trial that the interests of justice

required not only review, but also a new trial, even in the absence of specific, contemporaneous objections. *Id.; see also id.* at 848.

The good news for attorneys who may face the same sort of misconduct is that *Moody* is not alone. Many other courts have recognized the attorney-misconduct exception to the contemporaneous-objection rule.

For instance, the Supreme Court of South Carolina stated that "even in the absence of a contemporaneous objection, a new trial motion should be granted in flagrant cases where a vicious, inflammatory argument results in clear prejudice." *Toyota of Florence, Inc. v. Lunch*, 442 S.E.2d 611, 615 (S.C. 1994).

Similarly, other courts have allowed review without objection in circumstances where to do otherwise would create a "substantial risk of a miscarriage of justice." S*ee, e.g., Commonwealth v. Loguidice*, 650 N.E.2d 1254, 1256 (Mass. 1995). Several federal courts have also recognized a similar exception under Rule 103 of the Federal Rules of Evidence. *See, e.g., Stringel v. Methodist Hosp. of Ind., Inc.*, 89 F.3d 415, 421-22 (7th Cir. 1996); *Wilson v. Attaway*, 757 F.2d 1227, 1242 (11th Cir. 1985).

Moreover, courts have reviewed unobjected-to error or misconduct where it was necessary to avoid grave injustice or denial of essential rights. *See, e.g.*, *Cooper v. Commonwealth*, 140 S.E.2d 688, 693 (Va. 1965); *see also Fed. R. Evid.* 103(d) ("Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.").

In Michigan, courts can review misconduct without objection if there is no cure for the prejudicial effects. *See Saginaw Township v. Stanulis*, 242 N.W.2d 769, 770-71 (Mich. Ct. App. 1976).

In Ohio and North Carolina, courts are instructed to intervene sua sponte to correct egregious misconduct that deprives a party of a fair trial, even in the absence of any objection. *See Pesek v. Univ. Neurologists Ass'n*, 721 N.E.2d 1011, 1016 (Ohio 2000) ("Appellant contends that these comments and others were 'so prejudicial as to influence the jury beyond the bounds of normal argument.' Appellant, however, did not object at trial to most of the above and other complained-of comments made by appellee's counsel. Nevertheless, appellant contends that the trial court should have intervened sua sponte to admonish counsel and correct the prejudicial effect of the misconduct. We agree."); *id.* (noting the trial judge's duty to intervene in cases of misconduct,"[t]he judge who presides over a cause is not a mere umpire; he may not sit by and allow the grossest injustice to be perpetrated without interference.") (quoting *Jones v. Macedonia-Northfield Banking Co.*, 7 N.E.2d 544, 549 (Ohio 1937)); *State v. Zuniga*, 357 S.E.2d 898, 911-12 (N.C. 1987) ("Only where the prosecutor's argument affects the right of the defendant to a fair trial will the trial judge be required to intervene where no objection has been made.").

In addition, most courts will consider the fundamental issue of fairness, under the reasoning that the contemporaneous-objection rule should not protect the unscrupulous party. In *Ryder v. City of Topeka*, 814 F.2d 1412 (10th Cir. 1987), on which *Moody* relied, the Tenth Circuit found this consideration particularly persuasive.

Specifically, the *Ryder* court permitted review of misconduct allegations without a timely objection because the "underlying fairness of the entire trial was placed in issue" by the very party then attempting to invoke the contemporaneous-objection rule as a shield. 814 F.2d at 1424 n.25. The *Ryder* court wrote:

> [Plaintiff] failed to make a contemporaneous objection. . . . However, in the present case, the underlying fairness of the entire trial was placed in issue by defendants' counsel when he failed to timely produce Detective Meyer's statement. Under the circumstances, we cannot overlook an issue of such importance, especially as it arises from the potential misconduct of the party invoking the timely objection rule. Accordingly, we will entertain the question of defendants' counsel's misconduct. *Id.*

Practical Considerations

While many jurisdictions have recognized avenues of reviewing attorney misconduct without a contemporaneous objection, any attorney who sits on an objection does so at his or her client's peril (as well as at his or her own peril). Indeed, before deciding not to object, counsel must consider whether his or her particular trial judge or reviewing court would be likely to agree that opposing counsel's conduct was so egregious as to present a "substantial risk of a miscarriage of justice," or that it was so "vicious" and "inflammatory" that it was clearly prejudicial.

Fortunately, some courts have relaxed the contemporaneous-objection requirement in certain situations. This approach recognizes the practical effects that constant objections may have on the jury.

For instance, although the Ninth Circuit does require at least an initial objection, it often does not require constant objections to preserve post-trial

and appellate review of certain issues like attorney misconduct, as repeated objections "could antagonize the jury." *Anheuser-Busch*, 69 F.3d at 346 (quoting *Kehr*, 736 F.2d at 1286)).

Other courts hold that a single objection following either opening statements or closing arguments is sufficient to preserve the issue for appeal, as long as counsel lodges the objection before the jury returns the verdict. S*ee, e.g., Fonten Corp. v. Ocean Spray Cranberries, Inc.*, 469 F.3d 18, 21-22 (1st Cir. 2006) (noting that an objection made after opposing counsel's entire closing argument was sufficient to preserve the issue for appeal); *Wilson v. Town of Menden*, 294 F.3d 1, 16 n.30 (1st Cir. 2002) ("We are loath to impose a rule that would require counsel to abandon professionalism and decorum by routinely interrupting the other side's closing argument to avoid the risk of waiving an objection entirely."); *DeAngelis v. Harrison*, 628 A.2d 77, 80 (Del. 1993).

However, not all jurisdictions follow this approach, or at least not all jurisdictions apply the attorney-misconduct exception in the same way. Indeed, some courts appear to hold fast to the contemporaneous-objection rule. *See, e.g., Sutton v. State*, 495 N.E.2d 253, 259 (Ind. Ct. App. 1986) (holding that a contemporaneous objection to counsel misconduct is required, and that a single objection following opening statement was insufficient); *People v. Martin*, 197 Cal. Rptr. 655, 666 (Cal. Dist. Ct. App. 1983) (same). Thus, before going to trial, counsel should determine what approach their particular jurisdiction takes on the contemporaneous-objection rule as well as on any exceptions to that rule.

Another option to balance the competing concerns of preserving error while at the same time not alienating the jury is to request the court to recognize a continuing or standing objection. The continuing objection is a "well-established practice" in many jurisdictions, and it affords trial counsel the ability to preserve an objection to specific evidence or even related lines of questioning and evidence without being compelled to make "repetitious" objections that could antagonize the jury. *See, e.g., Rodriguez v. Commonwealth*, 443 S.E.2d 419, 425 (Va. Ct. App. 1994) ("We do not disapprove of the well-established practice of allowing counsel to make a continuing objection to a related series of questions in order to avoid the necessity of repetitious objection.").

Although the continuing objection has its advantages, it is not without its own perils, especially if it is not used properly. For example, in *Boeken v. Philip Morris Inc*, 26 Cal. Rptr. 3d 638, 665-66 (Cal. Dist. Ct. App. 2005), counsel for Philip Morris learned the hard way that continuing objections must be specific and must be precisely defined, or else they may be worthless.

In *Boeken*, Philip Morris's attorneys challenged the admissibility of an expert witness's testimony on a variety of grounds, but the Court of Appeal found that counsel's "standing objection" was too vague and failed to apprise the trial court of the intended scope of the objected-to evidence. *Id.* Thus, the appellate court ruled that Philip Morris's attempted continuing objection lacked specificity and was insufficient to preserve the issue for appeal. *Id.* at 666; *see also Butler & Sidbury, Inc. v. Green St. Baptist Church*, 367 S.E.2d 380, 383-84 (N.C. Ct. App. 1988) (stating that unless the objectionable line of questioning is apparent to the court and the parties, it must be specifically defined).

As *Boeken* teaches, when the evidence departs from the scope of a continuing objection, the onus remains on counsel to object contemporaneously to each specific question. *See, e.g., Rodriguez*, 443 S.E.2d at 425 ("For us to rule that the objection was sufficient to address the evidence that departed from that avowed and upon which the court ruled would impose upon the trial judge the untenable responsibility of continually monitoring a witness's testimony throughout the course of trial."); *Beghtol v. Michael*, 564 A.2d 82, 84-85 (Md. Ct. Spec. App. 1989) ("For purposes of review by the trial court or on appeal, the continuing objection is effective only as to questions clearly within its scope."). Nonetheless, even with its limitations, the continuing objection, when used properly, can be a valuable arrow in the trial attorney's quiver when it comes to dealing with an opposing counsel prone to misconduct.

Conclusion

In general, the contemporaneous objection requirement is here to stay, and attorneys should continue to object timely to inadmissible evidence, improper argument and other attorney misconduct in whatever form and whenever it raises its ugly head. *See, e.g., Moody*, 506 F. Supp. 2d at 831-48 (discussing under the heading of attorney misconduct not only inflammatory and improper attorney argument, but also repeated violations of in limine rulings, violations of the Golden Rule, and personal attacks on Ford's expert witnesses and its counsel).

However, in those jurisdictions that recognize an exception to the contemporaneous-objection rule for attorney misconduct, there may be some relief from the burden of continuous and re-

peated objections. Thus, before going to trial, if there is any suspicion or fear that the other side may stray into improper waters once the jury is seated, as the plaintiffs' counsel did in *Moody*, prudence dictates that trial counsel should research (or better yet, consult with an appellate specialist) to determine that jurisdiction's position on the contemporaneous-objection rule and any possible exceptions or alternatives to repeated and potentially antagonizing objections.

Even if the jurisdiction will review issues of attorney misconduct without a contemporaneous objection, the safer, "belt-and-suspenders" approach is to object as much as reasonably possible and to look for opportunities to lodge specific and well-articulated continuing objections. And if contemporaneous objections are not practicable, and continuing objections are not an option, then the only thing left to do is to dust off a copy of this article, pull together the cases cited, and prepare to argue the attorney-misconduct exception to the contemporaneous-objection rule.

Preserving Summary Judgment Based on the Exclusion of Expert Testimony

LeAnn W. Nealey

Quite frequently, *Daubert* admissibility standards overlap with summary judgment practice: Summary judgment is awarded based on a plaintiff's inability to prove an essential element of his claim because he lacks supporting expert testimony admissible under *Daubert* and Fed. R. Evid. 702. This article addresses how to preserve a favorable summary judgment on this basis by ensuring, to the extent possible, that the record established below shows that the trial court properly exercised its "gatekeeping" responsibilities under *Daubert*.

An Overview of Rule 702 and *Daubert* Standards

To briefly review, under the familiar standard set forth in Rule 702, "[i]f scientific, technical or other specialized knowledge will assist the trier of fact" in understanding the evidence or determining facts in issue, then a witness "qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise…." The trial court's gatekeeping role in applying this rule was firmly established under *Daubert v. Merrell Dow Pharmaceuticals., Inc.,* 509 U.S. 579 (1993).

In *Daubert*, the Supreme Court formulated guidelines for assessing expert testimony admissibility-defining the trial court's role as that of a gatekeeper tasked with determining whether the expert testimony "both rests on a reliable foundation and is relevant to the task at hand." 509 U.S. at 597 (addressing guidelines for assessing scientific evidence); *see Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999) (extending *Daubert* to apply to technical and other specialized knowledge). The Supreme Court explained that "[f]aced with a proffer of expert scientific testimony, . . . the trial judge must determine at the outset, pursuant to [Fed. R. Evid.] 104(a) [footnote omitted], whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." *Daubert*, 509 U.S. at 592. In particular, "[t]his entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Id.* at 592-93. Expressing its confidence "that federal judges possess the capacity to undertake this review," the Supreme Court observed that, "[m]any factors will bear on the inquiry, and we do not presume to set out a definitive checklist or test." *Id.* at 593.

On appeal, the trial court's admissibility determination is reviewed for abuse of discretion, even when that decision results in the entry of summary judgment. *Gen. Elec. Co. v. Joiner,* 522 U.S. 136, 142–43 (1997); *Kumho Tire*, 526 U.S. at 152.

What Is Required to Preserve on Appeal a Favorable Summary Judgment Decision Based on the Exclusion of Expert Testimony?

The *Smith v. Clement* Decision

Though this article focuses on the federal gatekeeping standards under Fed. R. Evid. 702 and *Daubert* as they relate to summary judgment practice, the Mississippi Supreme Court's rulings in *Smith v. Clement*, No. 2006–CA–00018 (Miss. Oct. 4, 2007), *withdrawn and replaced by* ___ So. 2d ___, 2008 WL 880163 (Miss. Apr. 2, 2008) was its impetus. This is so because in October 2007, the Mississippi Supreme Court (in a five to four *en banc* decision) reversed a trial court's summary judgment ruling in defendant's favor based on the trial court's finding that the affidavit of Dr. Forbes, plaintiff's sole causation expert, failed to establish this essential element of plaintiff's claim. *Clement*, Case No. 2006-CA-00018.

In particular, plaintiff supplied Dr. Forbes' affidavit in response to defendant's motion for summary judgment

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but never responded to defendant's motion to strike that affidavit; never offered a supplemental affidavit; and never sought a specific *Daubert* hearing with respect to defendant's motion to strike Dr. Forbes' testimony. Nevertheless, plaintiff argued at the summary judgment hearing that "'Dr. Forbes has not been given an opportunity to further expound' upon his scientific theory as to causation." *Id.* at 3 (quoting from hearing transcript). The Mississippi Supreme Court agreed, holding that plaintiff "was not allowed an opportunity to be heard as contemplated by [Rule 702] and *Daubert*;" thus the trial court improperly struck Dr. Forbes' affidavit, and "the order granting summary judgment [on causation] was also in error." *Id.* at 6.

The Mississippi Supreme Court has now withdrawn its October 2007 opinion on rehearing. In another five to four *en banc* opinion, the Court affirmed the trial court; holding that *Daubert* only requires that "the party sponsoring the expert's challenged opinion be given a fair opportunity to respond to the challenge." *Clement*, 2008 WL 880163 at *4. In this case, the Court observed, the plaintiff failed to exercise this right and the trial court's decision to strike Dr. Forbes' affidavit was not an abuse of discretion. *Id.*

These closely-decided opinions raised my curiosity: What does it take to uphold a favorable summary judgment decision based on the exclusion of expert testimony? Detailed below are issues that should be addressed in order to ensure, to the extent possible, that such a decision is upheld.

The Appeals Court Will Not Hear *Daubert* Challenges for the First Time on Appeal

As an initial matter, in order to ultimately move for summary judgment, you must first specifically ask the trial court to exclude the expert evidence upon which the plaintiff relies to support one or more elements of his claims. Though this seems to be an elementary step, at least one appeals court has vacated summary judgment in defendant's favor where the defendant never gave the trial court the opportunity to address the Rule 702/*Daubert* deficiencies in plaintiff's experts' opinions.

In *Cortes-Irizarry*, defendant failed to first request the trial court to undertake the requisite *Daubert* analysis prior to moving for summary judgment based on the purported inadequacy of the opinions advanced by plaintiff's experts to support the causation element of her medical malpractice claim. *Cortes-Irizarry v. Corporacion Insular De Seguros,* 111 F.3d 184, 189 (1st Cir. 1997). Though defendant raised his *Daubert* arguments on appeal, the First Circuit refused to entertain them: Notwithstanding the arguments defendant "spouts on appeal, [he] never asked in the district court to strike or otherwise [exclude] the statements of Drs. Nathanson and/or Hausknecht. . . . [W]e decline the defendant's odd invitation that we start from scratch and undertake a *Daubert* analysis in the context of this appeal." *Id.*

In short, though a separate *Daubert* challenge need not be made prior to moving for summary judgment; it is important to carefully articulate, with supporting exhibits, the specific grounds under Rule 702 and *Daubert* for excluding proposed expert testimony supporting an essential element of plaintiff's claim. If plaintiff offers expert testimony for the first time in response to a motion for summary judgment (as in *Smith v. Clement*), then you must move to strike such testimony and at that time articulate the grounds under the requisite *Daubert* analysis.

In Presenting the Daubert Challenge, Be Mindful of the Courts' Hesitancy in Making Such Determinations in the Summary Judgment Context

A number of courts have cautioned against using *Daubert* in connection with summary judgment motions where no opportunity is provided to adequately develop the record. As the *Cortes-Irizarry* court explained: "[A]t the junction where *Daubert* intersects with summary judgment practice, *Daubert* is accessible, but courts must be cautious-except when defects are obvious on the face of a proffer-not to exclude debatable scientific evidence without affording the proponent of the evidence adequate opportunity to defend its admissibility." 111 F.3d at 188 ("Given the complex factual inquiry required by *Daubert,* courts will be hard-pressed in all but the most clearcut cases to gauge the reliability of expert proof on a truncated record. . . . [T]he *Daubert* regime should be employed only with great care and circumspection at the summary judgment stage."); *see Padillas v. Stork-Gamco, Inc.,* 186 F.3d 412, 417–18 (3d Cir. 1999) (reversing summary judgment based on district court's exclusion of expert report under *Daubert* standard; holding that "when the ruling on admissibility turns on factual issues, as it does here, at least in the summary judgment context, failure to hold [a *Daubert*] . . . hearing may be an abuse of discretion. We hold that in this case, it was."); *see also In re Paoli R.R. Yard PCB Litig.,* 916 F.2d 829, 854 (3d Cir. 1990) (reversing summary judgment for defendants where record failed to show plaintiffs had sufficient opportunity to defend their expert submissions).

Thus, as detailed below, the most prudent approach in this context is to move for summary judgment only after expert reports have been exchanged and depositions taken, so that this information may be used to support the preliminary *Daubert* challenge to the adequacy and reliability of plaintiff's expert proof

on an essential element of his claim.

It Is Within the Trial Court's Discretion to Determine How It Will Conduct Its *Daubert* Analysis

Though the trial court has no discretion in *whether* to perform its gatekeeping function with respect to the admissibility of expert testimony (*see Daubert*, 509 U.S. at 589); the Supreme Court has also made clear that the trial court is afforded discretion in choosing the *manner* in which it conducts this analysis. *Kumho Tire,* 526 U.S. at 158-59 (Scalia, J., concurring) ("I join the opinion of the Court, which makes clear that the discretion it endorses-trial court discretion in choosing the manner of testing expert reliability-is not discretion to abandon the gatekeeping function."). Thus, the trial court may decide, in its discretion, "whether or when special briefing or other proceedings are needed to investigate reliability," *Kumho Tire*, 526 U.S. at 152; and is not required to follow any special procedure. *See* Fed. R. Evid. 702 advisory committee's note to 2000 amend. (noting that the Rule "makes no attempt to set forth procedural requirements for exercising the trial court's gatekeeping function over expert testimony").

The Trial Court's *Daubert* Analysis Must be Based on a Well-Developed Evidentiary Record

Though the manner in which the trial court conducts its *Daubert* analysis is discretionary, the trial court must ensure that its ruling is based on a well-developed evidentiary record and that "the parties have an opportunity to be heard before the [trial] court makes its decisions." *Miller v. Baker Implement Co.*, 439 F.3d 407, 412 (8th Cir. 2006) (citing *Group Health Plan, Inc. v. Philip Morris USA, Inc.,* 344 F.3d 753, 761 n.3 (8th Cir. 2003)) (internal citations omitted); *see In re TMI Litig.*, 199 F.3d 158, 159 (3d Cir. 2000) (noting plaintiff "need[s] an opportunity to be heard" on the critical issues of scientific reliability and validity." (quoting *Padillas,* 186 F.3d at 418)); *Knight v. Kirby Inland Marine Inc.,* 482 F.3d 347, 355 (5th Cir. 2007) ("District courts must carefully analyze the studies on which experts rely for their opinions before admitting their testimony."); *U.S. v. Call,* 129 F.3d 1402, 1405 (10th Cir. 1997) ("[A]n appellate court must have before it a sufficiently developed record in order to . . . [determine whether] the district court properly applied the relevant law."); *United States v. Lee,* 25 F.3d 997, 999 (11th Cir. 1994) (encouraging district courts "to make specific fact findings concerning their application of Rule 702 and *Daubert*").

A number of courts recognize that a *Daubert* hearing may be the most common or efficient way to accomplish this goal-indeed, a hearing will allow the parties to present testimony, cross examine the witnesses, and allow the court, if it desires, to question the witnesses and thoroughly scrutinize the proposed testimony and the expert's credentials. *See, e.g., United States v. Downing*, 753 F.2d 1224, 1241 (3rd Cir. 1985) (pre-*Daubert*, but suggesting that "the most efficient procedure that the district court can use in making the [expert] reliability determination is an *in limine* hearing."); *Group Health Plan, Inc.,* 344 F.3d at 761 (recognizing "*in limine* hearings are generally recommended prior to *Daubert* determinations"); *Goebel v. Denver & Rio Grande Western R.R. Co.,* 215 F.3d 1083, 1087 (10th Cir. 2000) (noting the "most common method for fulfilling [the trial court's gatekeeping] function is a *Daubert* hearing"); *cf. Borawick v. Shay,* 68 F.3d 597, 608 (2d Cir. 1995) (though generally recognizing that Rule 104(a) pretrial evidentiary hearings are "highly desirable" because they allow parties to present expert evidence and conduct cross-examination of the proposed expert; the court nevertheless affirmed exclusion of expert testimony despite district court's failure to hold pretrial hearing).

All courts agree, however, following *Kumho Tire*, that a *Daubert* hearing is not mandatory. As one court explained, given the Supreme Court's emphasis on the trial courts' broad discretion "in assessing the relevance and reliability of expert testimony, and in the absence of any authority mandating such a hearing, we conclude that trial courts are not compelled to conduct pretrial hearings in order to discharge the gatekeeping function." *United States v. Alatorre*, 222 F.3d 1098, 1100 (9th Cir. 2000).

Thus, the appeals courts have found no abuse of discretion in failing to hold a *Daubert* hearing where the filings, briefs and reports before the trial court were sufficient for the requisite *Daubert* analysis. *See Oddi v. Ford Motor Co.,* 234 F.3d 136, 154–55 (3d Cir. 2000) (evidentiary record sufficient which contained expert's preliminary report, an amended report (prepared *after* review of the deposition testimony of a defense expert), an affidavit specifically prepared to meet the defendants' *Daubert* challenges, and the expert's two depositions); *Shelter Ins. Companies v. Ford Motor Co.,* Case No. 06–60295, 2006 WL 3780474 at *3 (5th Cir., Dec. 18, 2006) (*Daubert* issues were thoroughly briefed by both parties); *Nelson*

v. Tenn. Gas Pipeline Co., 243 F.3d 244, 248–49 (6th Cir. 2001) ("The parties fully briefed *Daubert* issues and it is clear from the extensive record and the magistrate judge's opinion that there was an adequate basis from which to determine the reliability and validity of the experts' opinions."); *Kirstein v. Parks Corp.,* 159 F.3d 1065, 1067 (7th Cir. 1998) (affirming summary judgment and finding no abuse of discretion in district court's exclusion of plaintiff's sole expert without a hearing where trial court acknowledged expert's credentials were "impressive," but record showed expert's opinions were never tested nor did expert submit studies which employed any relevant testing); *Miller,* 439 F.3d at 412 (record sufficient where plaintiff filed a response to the defense motions to exclude; submitted his experts' rebuttal affidavits and a detailed explanation of their expected testimony; and all parties fully briefed the relevant *Daubert* issues); *Group Health Plan, Inc.,* 344 F.3d at 761 n.3 (extensive briefing allowed on defendants' motion for summary judgment based on exclusion of plaintiffs' experts; and plaintiffs presented "written submissions by Dr. Harris and other experts in support of their argument."); *Cook ex rel. Estate of Tessier v. Sheriff of Monroe County, Fla*., 402 F.3d 1092, 1113–14 (11th Cir. 2005) (district court acted within its discretion in excluding proffered expert testimony without *in limine* hearing where expert report, on its face, concerned matters within understanding of lay person and other opinions had no factual basis); *see also In re TMI Litig.*, 199 F.3d at 159 (recognizing that trial court need not "provide a plaintiff with an open-ended and never-ending opportunity to meet a *Daubert* challenge until plaintiff 'gets it right' and [plaintiff] . . . certainly [need not] . . . be given the opportunity to meet a *Daubert* challenge with an expert's submission that is based on a new methodology completely different from the one the expert originally engaged in." (internal citations omitted)).

In contrast to these cases, however, the failure to hold a *Daubert* hearing may be an abuse of discretion when the admissibility ruling is tantamount to a ruling on summary judgment on a scant record, particularly when there are substantial disputed issues of fact that are pertinent to the reliability inquiry. In *Padillas*, for example, the Third Circuit reversed summary judgment based on exclusion of the plaintiff's expert report, finding the district court abused its discretion in failing to hold a *Daubert* hearing. 186 F.3d at 417-18. The court explained that the district court's *Daubert* analysis did not establish that plaintiff's expert (Lambert) lacked "good grounds" for his opinions, "but rather, that they are insufficiently explained and the reasons and foundations for them inadequately and perhaps confusingly explicated." *Id.* at 417. Continuing, the court stated: If the district court "was concerned with the factual dimensions of [Lambert's] evidence . . . it should have had an *in limine* hearing to assess the admissibility of the report giving the plaintiff an opportunity to respond to the court's concerns." *Id.* (citation and internal quotations omitted); *see also In re Paoli R.R. Yard PCB Litig.,* 916 F.2d at 854 (reversing summary judgment for defendants where district court, in excluding expert evidence under Rule 703, failed to provide plaintiffs with "sufficient process for defending their evidentiary submissions;" namely, refusing to allow an *in limine* hearing on the evidentiary issues or oral argument on the summary judgment motion).

Similarly, in *In re Hanford Nuclear Reservation Litigation,* 292 F.3d 1124 (9th Cir. 2002), though remanding on other grounds, the Ninth Circuit also "encourage[d] the [district] court to hold a hearing on remand to provide plaintiffs with an opportunity to respond to the defendants' [*Daubert*] challenges." *Id*. at 1138–39. Likewise, in *United States v. Call,* 129 F.3d 1402 (10th Cir. 1997), though not reversing the district court on this basis, the Tenth Circuit expressed concern over the "limited" material before the court that likely would have made it insufficient to permit a meaningful review under Rule 702 and *Daubert*: "The analysis outlined in *Daubert* is extensive, requiring the district court to 'carefully and meticulously' review the proffered scientific evidence." *Id*. at 1405 (citation omitted). Here, the court noted, "Defendant outlined the areas about which his expert would testify . . . but provided the district court with minimal substantive information. In addition, the district court made no specific factual findings regarding its application of Rule 702 and *Daubert*." *Id*. "However," the court explained, "we need not reach the question of whether this record is insufficient to permit meaningful review, because we hold that the district court properly excluded the evidence under Rule 403." *Id*.; s*ee Goebel,* 215 F.3d at 1087 (reversing jury verdict for plaintiff and remanding for new trial where there was "not a single explicit statement on the record to indicate that the district court ever conducted any form of *Daubert* analysis whatsoever," though requested by defendant through a motion *in limine*; objection at trial; and in defendant's post-trial motions).

An important part of an appellate lawyer's role is to ensure the record is

sufficient to sustain favorable rulings obtained in the court below. In this article we have looked at the necessary issues to address in preserving a summary judgment awarded based on a plaintiff's inability to prove an essential element of his claim because he lacks supporting expert testimony admissible under *Daubert* and Fed. R. Evid. 702. To recap, you must first specifically request that the trial court undertake the requisite *Daubert* analysis prior to moving for summary judgment based on the purported inadequacy of the opinions advanced by plaintiff's experts to support an element or elements of his claim. In doing so, your primary concern should be to provide the trial court with as much information as possible so that it can thoroughly undertake its gatekeeping function with respect to the admissibility of expert testimony-this is particularly important in the summary judgment context, given that courts have demonstrated some reluctance to use *Daubert* in connection with summary judgment motions.

Requesting a specific *Daubert* hearing is most prudent; such a hearing will allow the court to scrutinize the relevance and reliability of the proposed testimony and the expert's credentials. A *Daubert* hearing is discretionary, however, so you must also be sure that the written record contains the legal analysis and all possible evidentiary support for your *Daubert* claims, including: (i) thorough briefing on the *Daubert* issues; (ii) the expert report(s) containing all requisite information under Fed. R. Civ. P. 26(a)(2)(B); (iii) specific deposition testimony; and (iv) any other relevant exhibits. In this way you will ensure, to the extent possible, that the trial court has before it sufficient information to allow it to conduct a meaningful *Daubert* review and analysis.

Re-opening the Escape Hatch: Appealing Denials of Rule 56(f) Relief to Reverse Premature Adjudications

Katherine Taylor Eubank

Call it a plaintiff's nightmare or a defendant's dream, but a true story nonetheless: Plaintiffs file a civil rights action in federal district court and promptly begin discovery, only to have their claims dismissed in three short months when the court grants summary judgment for defendants over plaintiffs' objection that discovery is ongoing. Now let us assume that plaintiffs appeal the summary judgment, as in fact they did. In addition to any substantive legal issues, do plaintiffs have a viable argument that the district court improperly rushed to judgment without giving plaintiffs sufficient time to garner relevant facts? What points might defendants make to the appellate court to counter that argument? What is the standard of review and proper scope of relief in the appellate court, if error is found?

The key to answering these questions is Rule 56(f), sometimes referred to as a procedural "escape hatch" or "safety valve" for avoiding premature adjudication by summary judgment. Rule 56(f) states:

> If a party opposing the [summary judgment] motion shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:
>
> (1) deny the motion;
>
> (2) order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken; or
>
> (3) issue any other just order.

Fed. R. Civ. P. 56(f).

The Supreme Court has opined in *dicta* that Rule 56(f) provides sufficient protection against premature motions for summary judgment "if the nonmoving party has not had an opportunity to make full discovery." *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986). Rule 56(e)'s requirement of setting forth specific facts to show a genuine issue for trial "is qualified by Rule 56(f)'s provision that summary judgment be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5 (1986). As opinions from various circuit courts demonstrate, the use and application of Rule 56(f) are not as straightforward as this language would indicate--challenging issues often arise on appeal when trial courts grant summary judgment before opposing parties have completed discovery.

Discovery Versus Summary Judgment: What Are the Competing Policy Considerations?

The Federal Rules of Civil Procedure have the explicit goal of securing "the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1. This goal is easily stated, but not always easily achieved. "When a motion for summary judgment presents complex legal issues with far-reaching implications, a judge must balance two competing goals. Confronted with the prospect of lengthy pre-trial proceedings that postpone the day of judgment, the district court must conserve judicial resources by promptly resolving those matters in which 'no genuine issue as to any material fact' is presented. Fed. R. Civ. P. 56(c). At the same time, justice requires careful consideration of the entire posture of the case so the 'drastic device' of summary judgment … is not precipitously imposed. … Justice must be both rapid and fair." *Schering Corp. v. Home Ins. Co.*, 712 F.2d 4, 6 (2d Cir. 1983).

Did the Trial Court Abuse Its Discretion?

The standard for reviewing a denial of relief under Rule 56(f) is "abuse of discretion." However, a trial court's discretion is circumscribed: "Unless dilatory or lacking in merit, the [Rule 56(f)] motion should be liberally treated."

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James W. Moore & Jeremy C. Wicker, *Moore's Federal Practice* ¶ 56.24 (1988 ed.). Therefore, "where the movant satisfies the requirements of Rule 56(f), 'a strong presumption arises in favor of relief.'" *Reid v. State of New Hampshire*, 56 F.3d 332, 341 (1st Cir. 1995). Unless the trial court identifies a valid reason for denying relief, an abuse of discretion is likely to be found. In addition, the failure to exercise discretion is itself an abuse of discretion. Error may be found if a trial court grants summary judgment without ruling on pending discovery issues. *E.g., Snook v. Trust Co. of Ga. Bank of Savannah, N.A.*, 859 F.2d 865, 870-71 (11th Cir. 1988).

Is An Affidavit Required?

The rule explicitly contemplates a showing of need by affidavit. Fed. R. Civ. P. 56(f). Some courts strictly construe this language, holding that even though trial courts have inherent discretion to disregard this requirement in the interests of justice, no abuse of discretion will be found if relief is denied due to the lack of an affidavit. *E.g., Murphy v. Timberlane Reg. School Dist.*, 22 F.3d 1186, 1197 (1st Cir. 1994).

Other courts apply a concept of "substantial compliance," recognizing that Rule 56(f) issues may also be raised by way of motions to compel discovery, motions to strike summary judgment motions, and briefs in opposition to summary judgment motions. *E.g., Enplanar, Inc. v. Marsh*, 11 F.3d 1284, 1292 (5th Cir. 1994). These courts refuse to exalt form over substance, focusing instead on whether the trial courts received timely notice that discovery issues remained pending. *E.g., Littlejohn v. Shell Oil Co.*, 483 F.2d 1140, 1146 (5th Cir. 1973).

What Prima Facie Showing is Required for Rule 56(f) Relief?

General allegations regarding the need for discovery are insufficient. *See* Fed. R. Civ. P. 56(f) (relief may be granted if requesting party provides "specific reasons" why that party "cannot present facts essential" to oppose motion for summary judgment). Whatever form the request for Rule 56(f) relief takes, reviewing courts want to know if the following information was provided to the trial court:

(1) Identity of Specific Discoverable Facts and Plan for Discovery

Courts will not construe Rule 56(f) to prolong litigation for speculative "fishing expeditions." *E.g., Garrett v. City and County of San Francisco*, 818 F.2d 1515, 1518 (9th Cir. 1987). Parties seeking relief must identify the facts or information to be gleaned from discovery with reasonable specificity in order to show that such information is "essential" to opposing the motion for summary judgment.

(2) Diligence of Party Seeking Discovery

The request for Rule 56(f) relief must be filed before the trial court rules on the summary judgment motion. In addition, the party seeking relief should describe its efforts to conduct discovery and explain why the information being sought has not yet been obtained. *E.g., Snook*, 859 F.2d at 871. Timely requests for relevant discovery should be considered and liberally granted before trial courts consider entering summary judgment. *E.g., Reid*, 56 F.3d at 341-42.

Trial courts have discretion to deny requests for Rule 56(f) relief where the party opposing summary judgment has not been diligent in pursuing discovery. *E.g., Abiodun v. Martin Oil Serv.*, 475 F.2d 142, 144 (7th Cir. 1973). The failure to diligently pursue discovery cannot be construed "as evidence of genuine issues of material fact requiring resolution at trial." *Aviation Specialties, Inc. v. United Technologies Corp.*, 568 F.2d 1186, 1193 (5th Cir. 1978).

(3) Materiality of Discoverable Facts

The party seeking relief must also demonstrate why the desired information is material to its opposition of the summary judgment motions. "The mere fleeting mention of a matter, without a description of its likely relevance, will not suffice to alert the district court to the potential importance of that undiscovered item." *Enplanar*, 11 F.3d at 1292.

If the materiality of the requested information is readily apparent or sufficiently explained by the party seeking Rule 56(f) relief, the failure to grant relief will be reversible error. *See, e.g., Reid*, 56 F.3d at 341-42. If, on the other hand, the requested discovery will not produce facts material to the summary judgment issues, then denial of the Rule 56(f) request is appropriate even if discovery requests are pending at the time summary judgment is entered. *See, e.g., Universal Money Centers, Inc. v. Am. Telephone & Telegraph Co.*, 22 F.3d 1527, 1536 (10th Cir. 1994).

What If Relevant Materials Are In the Control of the Party Moving for Summary Judgment?

If the discoverable information at issue is in the possession of the party moving for summary judgment, this factor "weighs heavily in favor of relief under Rule 56(f)." *Reid*, 56 F.3d at 342. This circumstance often arises when plaintiffs assert claims against defendants that require proof of the defendants' knowledge, intent,

or motive. *See, e.g., Id.* at 341-42 (false arrest, malicious prosecution, section 1983 claims). However, this fact is not sufficient by itself, as the requesting party must still make a prima facie showing for relief. *See, e.g., Jensen v. Redevelopment Agency*, 998 F.2d 1550, 1554 (10th Cir. 1993).

Does the Appellate Record Include Later Discovered Evidence?

In some cases, evidence that was sought in the Rule 56(f) request may be obtained after the opposing party responded to the motion for summary judgment. Such evidence is directly relevant to the materiality of the Rule 56(f) request and the merits of entering summary judgment despite the Rule 56(f) request. Can later-acquired evidence be included in the record on appeal?

(1) Supplements Before Entry of Summary Judgment

"The court may permit an affidavit to be supplemented or opposed by depositions, answers to interrogatories, or additional affidavits." Fed. R. Civ. P. 56(e)(1). Thus, if the trial court denies the request for Rule 56(f) relief but then delays ruling on the motion for summary judgment for other reasons, the party seeking relief may have an opportunity to present the new information with a motion to supplement the summary judgment filings. Regardless of whether the trial court grants or denies the motion to supplement, the materials will be part of the trial court record and appropriate for consideration on appeal.

(2) Supplements Via Post-Trial Motions

Similarly, new information obtained after the entry of summary judgment may be presented to the trial court by way of a post-trial motion for new trial or amendment of judgment. *See generally* Fed. R. Civ. P. 59 and 60. Such information would then be part of the trial court record and appropriate material for review on appeal.

(3) Supplements on Appeal

Appellate courts generally decline to consider new information that was not presented to the trial court, but they have inherent equitable power to supplement the record on appeal in the interests of justice. *E.g., CSX Transportation, Inc. v. City of Garden City*, 235 F.3d 1325, 1330-31 (11th Cir. 2000). Parties seeking to supplement the record must first request leave of the appellate court. *E.g., Ross v. Kemp*, 785 F.2d 1467, 1474-75 (11th Cir. 1986).

Decisions to exercise this inherent power are made on a case-by-case basis. *CSX*, 235 F.3d at 1330. One key factor to consider before supplementing the record is whether acceptance of the new materials will establish beyond a doubt the proper resolution of the pending issues. *E.g., CSX*, 235 F.3d at 1330. This factor supports supplementation of the record on appeal: if the new information is material to the issues raised in the summary judgment motion, then the party opposing the summary judgment motion should have been granted relief under Rule 56(f); alternatively, if the new information is not material to the summary judgment issues, then the trial court did not commit reversible error by denying the request for Rule 56(f) relief. Either way, the new materials will establish beyond a doubt the proper resolution of the Rule 56(f) issue.

A second factor to consider, closely related to the first, is whether remanding the case to the trial court for consideration of the new materials would be contrary to the interests of justice and judicial efficiency. *E.g., Ross*, 785 F.2d at 1475. This factor also supports the supplementation of records on appeal of Rule 56(f) issues. Because the new information has already been obtained, there is no point in remanding to the trial court for further discovery. In addition, because the standard of review for the summary judgment ruling is *de novo*, there is no point in remanding to the trial court to consider the new evidence. Therefore, reviewing courts should permit supplementation of the record to include after-acquired evidence that was originally requested under Rule 56(f).

What is the Proper Relief if the Appellate Court Finds Error?

(1) Reversal and Remand for Trial Court's Further Consideration

Where the trial court erred by failing to address pending discovery motions or requests for Rule 56(f) relief at all, the appellate court may reverse summary judgment and remand to the trial court for consideration of the pending discovery issues before re-consideration of the motion for summary judgment. *E.g., Snook*, 859 F.2d at 871.

(2) Reversal and Remand for Additional Discovery

If the trial court abused its discretion in denying a valid request for Rule 56(f) relief, then the appropriate result on appeal is reversal of the summary judgment and remand with instructions to the trial court to allow the requested discovery. *E.g., Reid*, 56 F.3d at 342-43.

(3) Reversal and Remand for Trial Proceedings or Affirmation of the Summary Judgment, Whichever Applies

If the party seeking Rule 56(f) relief has already discovered the relevant information and supplemented the record accordingly, then the appellate court can determine both the outcome of the Rule 56(f) issue and the outcome of the summary judgment issues. The resulting *de novo* review of the summary judgment motion may lead to reversal for trial or affirmation, depending upon the existence of genuine issues of material fact.

"Just" Desserts

So what happened in the "true story" referenced in the opening of this article? Taking the substantial compliance view, the Third Circuit first held that plaintiffs had sufficiently alerted the trial court to the pending discovery in their response opposing the motion for summary judgment. *See Sames v. Gable*, 732 F.2d 49, 52 (3d Cir. 1984). It then held that the trial court erred by granting the motion for summary judgment without a hearing and while relevant discovery requests were outstanding. *Id.* at 51-52.

The Third Circuit also had strong words for plaintiffs, noting that they "themselves are largely responsible for the district court's premature grant of summary judgment." *Id.* at 52 n.3. Plaintiffs failed to specifically request a continuance of the motion for summary judgment and failed to identify which specific discovery requests were vital to their claims. *Id.* However, the Third Circuit held that these failings were not "sufficiently egregious to warrant a non-merits resolution of [plaintiffs'] claims." *Id.* Therefore, the case was remanded to allow plaintiffs to conclude discovery before the trial court reconsidered the motion for summary judgment. *Id.* As a lesson to plaintiffs, however, the Third Circuit in *Sames* required plaintiffs to pay their own costs on appeal. *Id.*

Making Your Case: The Art of Persuading Judges, by Antonin Scalia and Bryan Garner

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Let's put the bottom line first: is the new book by Justice Scalia and Bryan Garner worth reading and owning? Yes.

One might expect this book to contain the same ideas Bryan Garner has offered in his other ample materials on legal writing, repackaged with a celebrity co-author's name on the cover. That thought is understandable, but wrong. Instead, Scalia and Garner have created a unique work that is essential reading for any appellate advocate. Lawyers in the early stages of their careers may gain the most from it, but it may also prompt experienced attorneys to reconsider some of their practices.

In about 200 pages, *Making Your Case* offers guidance on virtually all facets of written and oral advocacy. The first portion of the book covers "general principles of argumentation." Which arguments to put first, last, and in the middle? How much to concede? Should you call your opponent "the Plaintiff" to depersonalize him? How best to conclude? The authors address all of this and much more, drawing on their own ideas and experience as well as ancient and modern experts on rhetoric.

The next section discusses legal reasoning – how to think syllogistically, and how to establish your premises so judges will reach your desired conclusion.

The section on briefing offers extensive advice on "architecture and strategy." A sample: the authors suggest that you always put a statement of the questions presented at the very beginning of any brief unless the rules forbid it. You should also always include a summary of argument if the rules allow. And, of course, the authors have much to say on writing style.

The book covers all facets of oral argument: preparation, substance, the manner of argument, how to handle questions, and what to do afterward. The authors address questions any advocate is likely to have, and some questions one might not otherwise think of. What to take with you to the lectern? (An empty manila folder, nothing more.) How to handle a difficult judge? (Politely.) What to wear? (Not a sport jacket.) Their most important piece of advice may be that your "argument" should really be a conversation with the judges, much like the conversation you would have if you were a junior partner in a law firm explaining the case to an intelligent senior partner.

The book stands out not only for its comprehensive advice on all of the above, but also for its own style. The book is not only useful as a reference work; it is also a pleasure to read straight through. The authors demonstrate a love for writing and for words, which they encourage the reader to cultivate as well. Their bibliography suggests additional sources for improving one's writing, speaking, and thinking.

Another great advantage of this book over other works on legal writing and appellate advocacy lies in its subtitle: it's focused on what actually will *persuade judges*.

Too many books and articles on legal writing are written from an academic's perspective, basing their recommendations on research regarding which fonts, font sizes, font combinations, and line spacings will allow a reader to get through a brief the fastest. Such guides overlook the fact that judges do not want you to reinvent the wheel – and few things are as likely to slow a judge down as a brief that looks different from every other brief he has ever seen.

The difference between the academic and practical perspective on legal writing is evident at several points in the book where Scalia and Garner write separately because they disagree.

One of their disputes concerns the placement of citations: Garner holds the unconventional view that citations should be placed in footnotes, but Scalia wants citations where they've always been, in the body of the text.

Garner may be correct about the theoretical advantages of footnoted citations (I am skeptical), but Scalia wins the argument by pointing out that "the conclusive reason not to accept Garner's novel suggestion is that it is novel." Scalia reminds us that our focus must be on serving the client. As he puts it, "You should no more try to convert the court to citation-free text at your client's expense than you should try to convert it to colorful ties or casual-Friday attire at oral argument."

The authors' dispute over the use of contractions in legal writing is similar: Garner favors it because it makes for easier reading and a more natural style. Scalia opposes contractions because you have nothing to gain, and much to lose, from using them. No judge will see a

lack of contractions as too formal, but some judges may view the use of contractions as too informal.

Scalia comes out on the wrong side of one of these disputes, though, by his own criteria. Scalia recommends using "he" as the "traditional, generic, unisex reference to a human being," while Garner insists upon "gender neutral" language. I strongly agree with Scalia – but I put my personal preference aside when writing a brief, because one never knows whether a judge will take offense at the use of "he" alone. A lawyer's duty to his client obligates the use of the language that's less likely to cause offense – even if the offense is not intended or, in the lawyer's view, not warranted.

All of this may seem trivial because judges, after all, are supposed to decide questions based on substance, not style. From my own experience as an appellate law clerk, and as an attorney who has briefed and orally argued issues successfully before the U. S. Court of Appeals, I know that judges and their clerks ultimately look for the right answer – they don't decide cases by keeping score on stylistic points.

But style still matters, just as neatness counts – and, all other things being equal, sometimes such little things could make the difference, especially where a court is in a position to exercise discretion. We must remove every possible barrier to a judge deciding a matter in our favor, and do everything we can to make the judge *want* to decide in our favor. We owe our clients nothing less.

Yes, some of what's in this book has been covered elsewhere by Bryan Garner and others. But I have never seen the topic of how to persuade judges addressed so concisely and thoroughly in one place by figures of such great authority. I expect to return to it often before preparing briefs and giving arguments, and I suspect you will, too.

Circuit Reports

First Circuit

Motion for New Trial Not Reviewable Where District Court Had No Opportunity to Rule on Motion

U.S. v. Pomales-Lebrón, **513 F.3d 262, 269-70 (1st Cir. 2008)**

Edgar Pomales-Lebrón and five co-defendants were convicted of drug trafficking offenses. On appeal, Pomales-Lebrón argued, among other things, that he was entitled to a new trial. The record revealed, however that no new trial motion had ever been made in the district court. The First Circuit ruled that it lacked jurisdiction to review the failure of the court to grant a new trial. The First Circuit stated:

> Counsel for both sides bear responsibility for this egregious error. Accordingly, we feel compelled to comment at some length. Defense counsel failed to properly file a Rule 33 motion on behalf of his client, but nonetheless sought appeal on that ground. This – at best – amounted to gross ineptitude; at worst, it constituted an intentional effort to mislead this Court. We do not, however, pretend to know which is correct. Defendants' responded to the Order to Show Cause, rather than explaining how this error occurred, simply states the painfully obvious: that the motion was "incorrectly filed" . . . Despite defendant's concession that Rule 33 motion was filed in the district court, remarkably, defendant argues – without citation to his single legal authority – that "justice demands" that we address his Rule 33 arguments. . . .
>
> The government compounded the problem by obviously failing to review the record. The government's briefing, as well as its oral argument, responded to defendant's Rule 33 appeal on the merits. The government's response to the Order to Show Cause sheds little light on its actions. Therein, the government attempted to explain its conduct by noting: (1) "the defense never alleged on appeal that it had *actually* filed a Rule 33 motion in the district court'" and (2) defendant "simply argued on appeal that the [he] was entitled to a new trial as an alternative argument" … Quite plainly, this reasoning is ludicrous (emphasis by the Court).

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Second Circuit

Interim Local Rule 25 – Filing and Serving Promulgated on May 9, 2008

Interim Local Rule 25 directs that to facilitate the Clerk's Office's ability to scan in briefs and accompanying documents, any paper filing must include one unbound set (paper not stapled together or otherwise attached). This rule will not apply where a paper brief is submitted with a PDF brief submitted pursuant to Local Rule 32(a)(1)(A). The use of paper clips and rubber bands is permitted. Where the original is the only copy submitted, it must be unbound.

Here is a link to a FAQ regarding the rule: http://www.ca2.uscourts.gov/Docs/News/ELECTRONIC%20MAILBOXES%20-%20FAQs.pdf

Timing to File a Certiorari Petition

Pena v. United States, **529 F.3d 129 (2d Cir. 2008)**

Manuel Pena appealed from a judgment of the district court, denying his motion pursuant to 28 U.S.C. § 2255 to recall the mandate to permit him to file for certiorari. He alleged that his appellate counsel was constitutionally ineffective for failing to inform him of his right to do so. The Second Circuit granted Pena's certificate of appealability limited to that issue, disagreed with his assertion, and affirmed the judgment. The Court observed that Pena sought to expand the certificate to permit a remand for reconsideration of his sentence pursuant to *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005) on the ground that he timely raised a claim pursuant to *Apprendi v. New Jersey*, 530 U.S. 466 (2000) in the district court.

The Court noted that Pena's conviction became final on November 11, 2003 (his deadline for filing a certiorari petition), which fell well before the Supreme Court's decision in *United States v. Booker*, 543 U.S. 2220, 244 (2005). It held that because *Booker* does not apply retroactively to collateral challenges to judgments that were final on the day that case was decided, the Court declined to accept Pena's request to expand the certificate. The Court also held that its rules implementing the Criminal Justice Act, 18 U.S.C. § 3600A, require appointed counsel to assist criminal defendants with the filing of appropriate certiorari petitions, deciding the issue in a tandem opinion – *Nnebe v. United States*, No. 05 Civ. 5713-pr (2d Cir. 2008).

Magistrate Judge Remanding Case to State Court was Dispositive and Subject to De Novo Review by District Court

Williams v. Beemiller, Inc., **527 F.3d 259 (2d Cir. 2008)**

The matter stemmed from a drive-by shooting. While the plaintiff was playing basketball in his neighborhood, the defendant shot and injured the plaintiff. The police soon apprehended the defendant, who eventually pleaded guilty to attempted assault in the first degree. The plaintiff and his father commenced this action in New York State Supreme Court for the County of Erie, alleging that Beemiller, MKS, and Gun-A-Rama had negligently sold or distributed the firearm used by the defendant to shoot the plaintiff and, thus, contributed to his injuries.

Claiming diversity jurisdiction and relying upon 28 U.S.C. § 1441(a)-(b), Beemiller and Brown removed the case to federal court. Shortly thereafter, written consents to removal were filed on behalf of MKS and Gun-A-Rama. Written consents were never filed on behalf of the remaining defendants. Citing the defendants' failure to obtain the requisite consent to removal from all defendants, the plaintiffs moved for remand of the action to state court and for the award of costs and expenses, pursuant to 28 U.S.C. § 1447(c).

The district court referred all non-dispositive pretrial matters to the Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(A). The Magistrate Judge entered a decision and order granting the plaintiffs' motion for remand and determining that the plaintiffs were entitled to an award of costs. In doing so, the Magistrate Judge concluded that "a motion for remand [is] not dispositive as it resolves only the question of whether there is a proper basis for federal jurisdiction to support removal and does not reach a determination of either the merits of a plaintiff's claims or defendant's defenses or counterclaims." However, the Magistrate Judge also acknowledged contrary authority on the issue and invited the district court to treat the decision and order as a report and recommendation, if the district court deemed it appropriate.

The defendants timely submitted objections to the Magistrate Judge's order, arguing that the district court should review the order *de novo* as a report and recommendation on a dispositive motion. The district court entered an order denying the defendants' objections. Upon finding that a motion for remand is considered non-dispositive, the district court reviewed the decision and order of the Magistrate Judge and concluded that it was neither "clearly erroneous [nor] contrary to law" under Fed. R. Civ. P. 72(a).

The defendants timely filed a notice of appeal with the Second Circuit. The plaintiffs moved to dismiss the appeal pursuant to 28 U.S.C. § 1447(d), which prohibits appellate review of an order remanding a case to state court. A Second Circuit panel denied the plaintiffs' motion and directed the parties to further brief the following issues: "1) whether, under 28 U.S.C. § 636(b)(1)(A) and Fed. R. Civ. P. 72, a motion to remand a case to state court is a dispositive matter upon which a magistrate judge is unauthorized to rule without *de novo* review by the district court; 2) whether 28 U.S.C. § 1447(d) bars an appeal of a district court's order reviewing a magistrate judge's remand order under a clear-error-and-contrary-to-law standard of review; and 3) whether resolution of either of these two questions is dependent on resolution of the other."

The Court first determined whether it had jurisdiction to hear the matter. It analyzed 28 U.S.C. 1447(c) and (d) to determine the Court's jurisdiction. The Court determined that if a remand order is based on non- § 1447(c) grounds, § 1447(d) poses no bar to the Court's review. The Court noted that it had not previously decided whether a magistrate judge's order remanding a case to state court for lack of subject matter jurisdiction should be deemed a remand order properly grounded in § 1447(c). Analyzing the holdings of its sister circuits, the Court held that it did have jurisdiction to address the matter. It observed that the appeal did not challenge the merits of the remand order itself but, instead, the defendants merely argued that the district court failed to apply the correct standard of review when considering their objections to the Magistrate Judge's order remanding the case to state court. The Court determined that the appeal required it only to determine the scope of authority of a magistrate judge in this context.

In recognizing that the substantive issue was one of first impression for the Second Circuit, the Court stated:

> Where, as here, a party argues that a district court erroneously treated a matter referred to a magistrate judge as "not dispositive" and thus failed to review *de novo* the decision by a magistrate judge in that matter, our sister circuits have analyzed the practical effect of the challenged action on the instant litigation. . . . In reaching these conclusions, these courts considered the dispositive orders listed explicitly in [28 § 636(b)(1)(A)] to be non-exhaustive.

The Second Circuit agreed that the list is non-exhaustive. The further stated:

> The question of whether a magistrate judge may order a case remanded to state court under § 1447(c) is one of first impression in this Circuit. All three of our sister circuits that have considered the matter have concluded that such orders are dispositive because they are "functionally equivalent" to an order of dismissal for the purposes of § 636(b)(1)(A) and Rule 72(a).

The Court observed that a § 1447(c) remand order is indistinguishable from a motion to dismiss the action from federal court based on a lack of subject matter jurisdiction for the purpose of § 636(b)(1)(A). It held: "A motion to remand is not a "pretrial matter" under § 636(b)(1)(a), and a magistrate judge presented with such a motion should provide a report and recommendation to the district court that is subject to *de novo* review under Rule 72.

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Third Circuit

Timeliness Of Petition For Permission To Appeal Pursuant To Rule 23(f)

Gutierrez v. Johnson & Johnson, **No. 07-8025, 2008 U.S. App. LEXIS 8667 (3d Cir. Apr. 22, 2008)**

The plaintiffs brought a putative class action for employment discrimination. After the district court denied the motion for class certification, the plaintiffs filed a letter with the district court explaining that the parties reached an agreement for an extension of time to file a motion for reconsideration. This was the only submission filed within ten days of the denial of class certification. The district court granted the extension and the plaintiffs subsequently filed their motion for reconsideration, which the district court denied. Within ten days of the denial of the motion for reconsideration, the plaintiffs filed a petition with the Third Circuit, seeking permission to file an interlocutory appeal of the denial of class certification pursuant to Federal Rule of Civil Procedure 23(f).

In determining whether the petition was timely, the Third Circuit joined the other circuits in holding that the ten-day period within which to file a Rule 23(f) petition is tolled by the filing of a timely and proper motion to reconsider the grant or denial of class certification. The court stressed that the ten-day time limit is strict and mandatory, and regardless of any conflicting local rules, a motion to reconsider a class certification decision that is filed more than ten days after the order granting or denying class certification is "untimely" within and will not toll the period for filing a Rule 23(f) petition. The Third Circuit further found that, while a district court is free to extend the time to file a motion or to promulgate a local rule that grants more than ten days to file a motion to reconsider, a district court may not enlarge the time to file a Rule 23(f) petition. Finally, the court determined that neither the Supreme Court's decision in *Bowles v. Russell*, 127 S. Ct. 2360 (2007), nor the doctrine of "unique circumstances" tolled the time for the plaintiffs to file their Rule 23(f) petition. Because the plaintiffs did not file either a Rule 23(f) petition or a motion to reconsider within ten days of the order denying certification, the court found the plaintiffs' petition to be untimely.

No Subject Matter Jurisdiction Over Appeal From State Court Based On Rooker-Feldman Doctrine

Gary v. The Braddock Cemetery, **517 F.3d 195 (3d Cir. 2008)**

In 1991 after mining operations occurred, the plaintiffs filed a state court action against the defendants challenging the Cemetery's right to execute a lease or subsidence agreement with the coal company, and alleging state law violations on the part of all defendants. All liability issues were resolved in favor of the plaintiffs on summary judgment motions. A trial limited to the issue of damages resulted in the jury assessing damages against the defendants. On appeal, the Pennsylvania Superior Court found that the damage award was based on the incorrect measure of damages and that summary judgment had erroneously been granted on a number of claims, and remanded the matter for a new trial encompassing liability as well as damages. The retrial resulted in a finding in favor of the defendants. The trial court rejected the plaintiffs' post-trial argument that allowing the verdict to stand would result in an uncompensated taking of their property. The Superior Court also rejected the plaintiffs' argument and the Pennsylvania Supreme Court refused allocatur.

Plaintiffs did not request a writ of certiorari from the United States Supreme Court, but instead filed suit under 42 U.S.C. § 1983 in the federal district court claiming that the defendants' actions resulted in an unconstitutional taking of their support estates in violation of the United States and Pennsylvania Constitutions. The plaintiffs justified their attempt to relitigate their state court arguments by contending that when the Supreme Court of Pennsylvania denied their petition for

reconsideration, it "clothed the defendants under color of state law with the authority to take private property without just compensation." The defendants subsequently filed a motion to dismiss citing the *Rooker-Feldman* doctrine. The district court granted the motion, dismissing the complaint, and the plaintiffs appealed to the Third Circuit.

The Third Circuit held that the action fell squarely within the class of actions prohibited by the *Rooker-Feldman* doctrine, even as limited by the Supreme Court's opinion in *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280, 125 S. Ct. 1517, 161 L. Ed. 2d 454 (2005). Specifically, the court found that in order for it to find for the plaintiffs, it would be required to re-examine and reject the state courts' decision that the plaintiffs were not deprived of any property interest in the Braddock Cemetery plots. Consequently, pursuant to the *Rooker-Feldman* doctrine, the court lacked subject matter jurisdiction to undertake such a re-examination.

Attorney's Fees Not Recoverable Under The IDEA For The Attorney-Parent's Representation Of His Child In Federal Court Proceedings

Pardini v. Allegheny Intermediate Unit, **No. 07-143, 2008 U.S. App. LEXIS 10196 (3d Cir. May 12, 2008)**

The plaintiffs sought attorney's fees for David Pardini, an attorney who represented his family in its dispute with the defendants pursuant to the Individuals with Disabilities in Education Act ("IDEA"). Mr. Pardini represented the family in both administrative and federal court proceedings. The district court denied the plaintiffs' motion for attorney's fees.

On appeal, the plaintiffs argued the decision in *Woodside v. School District of Philadelphia Board of Education*, 248 F.3d 129 (3d Cir. 2001), concluding that an attorney-parent cannot receive attorney's fees for work representing his minor child in proceedings under the IDEA, was distinguishable because the attorney-parent in *Woodside* sought attorney's fees only for work performed during administrative proceedings. The Third Circuit rejected this argument. The court explained that it based its decision in *Woodside* on its observation that "attorney-parents are generally incapable of exercising sufficient independent judgment on behalf of their children" and granting attorney's fees to them would frustrate the fee-shifting provision's purpose of "encourage[ing] the effective prosecution of meritorious claims." Because the Pardinis failed to offer any explanation for why such concerns do not apply if there is litigation beyond administrative proceedings, the Third Circuit held that attorney's fees may not be recovered for an attorney-parent's representation of his child in either administrative or federal court proceedings.

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Fifth Circuit

Preemption/Removal—Electronic Fund Transfer Act

Bernhard v. Whitney Nat'l Bank, **523 F.3d 546 (5th Cir. 2008)**

The plaintiffs commenced a state-court action against their bank when a contractor with whom they had done business made unauthorized electronic transfers from their checking account. The bank removed to federal court, alleging that the claims fell under the Electronic Fund Transfer Act ("EFTA"), particularly since the plaintiffs sought attorneys' fees. The attorneys' fees were available only under the EFTA and not under state law. The district court denied the plaintiffs' motion to remand, finding that the court had jurisdiction because of the attorney-fee claim and that the EFTA preempted the state-law claims. Although the district court determined that it had supplemental jurisdiction over all claims, it declined to exercise supplemental jurisdiction and remanded the remaining state-law negligence claims.

On appeal, the Fifth Circuit first confirmed that it had jurisdiction to review a remand order that is based on the district court's exercise of its discretion not to exercise supplemental jurisdiction over state-law claims. The Court cited 28 U.S.C. § 1367 for this conclusion. The court then determined whether the district court had federal-question jurisdiction over the plaintiffs' claims. The court held that the request for attorneys' fees, even when allowed under federal law but not state law, does not by itself present federal-question jurisdiction. Because the plaintiffs' claim for attorneys' fees was a boiler-plate request that did not reference any federal law, it did not raise federal-question jurisdiction. Secondly, the court determined that the EFTA does not completely preempt the plaintiffs' state-law claims. The EFTA expressly provides that it "does not annul, alter, or affect the laws of any State relating to electronic fund transfers except to the extent that those laws are inconsistent with the provisions of [the EFTA], and then only to the extent of the consistency." The Fifth Circuit held that this language showed Congress' clear intent that the EFTA did

not provide the exclusive cause of action for claims relating to unauthorized electronic fund transfers. The Court accordingly vacated the district court's judgment and remanded.

Removal/Sovereign Immunity

In re Katrina Canal Litigation Breaches, **524 F.3d 700 (5th Cir. 2008)**

At issue in this case was whether the constitutional principle of sovereign immunity precluded the removal to federal court of a state-filed class action suit that the State of Louisiana commenced. The Attorney General of Louisiana filed a class action in state court naming the State and numerous Louisiana citizens as plaintiffs concerning the failure of several insurance companies to pay covered claims after Hurricanes Katrina and Rita. The insurers removed the suit to federal district court under the Class Action Fairness Act ("CAFA"), and the court denied the Attorney General's motion to remand, which was premised on the contention that Louisiana enjoyed sovereign immunity from voluntary removal to federal court.

The Fifth Circuit first addressed whether removal was proper under CAFA, which provides for removal of class actions involving parties with "minimal diversity" and defines a class action subject to removal as a suit filed under any statute or rule "authorizing an action to be brought by one or more representative persons as a class action." The Court rejected the State's argument that the suit did not fall within CAFA because it is not a "person." CAFA does not require a person to commence an action, but only that it is commenced under a statute or rule that authorizes an action to be brought by a representative person.

The Court then addressed the State's argument that removal was prohibited under the principle of sovereign immunity. Sovereign immunity under Article III, Section 2 in the Fourteenth Amendment of the Constitution ordinarily protects the state from suits filed against the state. The Fifth Circuit recognized that the question remains unanswered as to whether sovereign immunity also protects a state from removal of a suit it files in its own state court seeking enforcement of its state laws against businesses that are subject to the state's regulations. The Court reached only the narrow holding that Louisiana had waived its immunity from removal to federal court by adding private citizens as the plaintiffs to its suit. The Court concluded that "the State cannot pull these citizens under its claimed umbrella of protection in frustration of a congressional decision to give access to federal district courts to defendants exposed to these private claims. . . ." The Court left for another day the penultimate question: is a state immune from removal to federal court of a case it alone files to enforce its own laws based on actions within the state?

NOTE: *En Banc* Rehearing Granted in *In re Volkswagen of Am., Inc.* *See* Certworthy, Winter 2008, at 20. The Fifth Circuit granted *en banc* rehearing, vacated its decision issued on October 24, 2007, and heard oral argument *en banc* on May 22, 2008. At issue in this high-profile mandamus proceeding is (1) what standard should a district court apply in ruling on a § 1404(a) motion to transfer venue, and (2) whether, and to what extent, the court of appeals should weigh in on the district court's decision.

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Eighth Circuit

Conceding A Point In The District Court Waives The Argument For Appeal

Blume v. Marian Health Ctr., **516 F.3d 705 (8th Cir. 2008)**

Dr. Horst Blume sued a hospital after it permanently revoked his staff privileges without providing a hearing as required by hospital bylaws. *Blume*, 516 F.3d at 706. The district court held that as a matter of law the hospital breached the contract and, after a trial on damages, a jury returned a verdict in Blume's favor. *Id.*

There were two issues on appeal. First, the hospital argued that the bylaws did not constitute a contract. *Id.* The Eighth Circuit determined that both parties agreed in the trial court that the bylaws created a contract between them. *Id.* As a result, the hospital conceded the point below and waived the right to raise the issue on appeal. *Id.* The appellate court went on to assume the point was not waived but "merely acquiesced in or forfeited in the trial court," and conducted review for plain error. Nonetheless, the Eighth Circuit noted "[w]e do not give relief based on forfeited claims of error unless the error is obvious and resulted in manifest injustice." *Id.* The court then rejected the issue because treating the bylaws as a contract "was neither an obvious error nor manifestly unjust." *Id.*

Second, the hospital argued it was entitled to immunity because of specific provisions in the bylaws. Before resolving the merits of the second issue, the Eighth Circuit considered another waiver argument. While the hospital had raised the immunity issue at summary judgment, it did not raise it post-

trial in a motion for JMOL. Because the immunity defense rested on the bylaws and interpretation of a contract is a question of law, the court of appeals found no waiver. "A party has no obligation to raise a legal issue post-trial in order to preserve it for appeal." *Id*. at 707 (citing *White Consol. Indus., Inc. v. McGill Mfg. Co*., 165 F.3d 1185, 1190 (8th Cir. 1999)). The court of appeals agreed with the hospital that, under Iowa law, the hospital's bylaws entitled the hospital to immunity from suit. *Id*. at 709. The court emphasized that Dr. Blume sought "only contractual" rights, not statutory or common-law due process rights. The Eighth Circuit vacated the judgment and remanded for entry of judgment for the hospital.

Time to File Tolling Motion Cannot Be Extended By District Court; Objections to "Claims-Processing" Rules Must Be Timely

Dill v. Gen. Am. Life Ins. Co., -- **F.3d --, 07-1358, 2008 U.S. App. LEXIS 9515 (8th Cir. May 2, 2008)**

David Dill sued the insurance company General American Life Ins. Co. for negligent and fraudulent misrepresentation. *Dill*, 2008 U.S. App. LEXIS 9515, at *2. Following a seven-day trial, the jury awarded Dill damages. *Id*. The district court entered judgment on November 17, 2006. *Id*. Before the 10-day period for filing a Rule 50(b) motion had expired, the insurance company filed a motion for an extension of time to file a Rule 50(b) post-judgment motion for judgment as a matter of law. *Id*. Dill did not oppose the motion for an extension, and the district court granted the motion, extending the time to December 8, 2006. *Id*. at *3.

The insurance company filed its Rule 50(b) motion on December 8, 2006. *Id*. Dill filed his response in opposition on January 19, 2007, and, for the first time, argued that the district court lacked jurisdiction over the Rule 50(b) motion. *Id*. Dill argued that under Rule 6(b)(2), which states "[a] court must not extend the time to act under Rules 50(b)…except as those rules allow," the district court had no authority to extend the 10-day time period for filing the Rule 50(b) motion. *Id*. at *3-4. The district court agreed and concluded that it lacked jurisdiction to consider the insurance company's Rule 50(b) motion. *Id*. at *4-5. Alternatively, the district court denied the motion on the merits. *Id*. at *5. The insurance company filed its notice of appeal four days after the district court entered judgment on the post-trial motions. *Id*.

The Eighth Circuit noted that the insurance company's appeal with regard to the jury verdict is untimely, unless the 30-day period for filing the notice of appeal was tolled by the Rule 50(b) motion. *Id*. at *5-6. The court noted that the insurance company did not file its Rule 50(b) motion within the 10-day period, but instead filed within the district court's purported extended time frame, which, the Eighth Circuit determined, the district court lacked authority to do. *Id*. at *6-7.

The insurance company contended that Dill forfeited the right to raise the timeliness of the motion when he did not object to the motion for extension of time. *Id*. at *7. The insurance company contended that the time limitations in Rule 50(b) and 6(b)(2) are not jurisdictional rules, such as subject matter or personal jurisdiction, which cannot be waived or forfeited. Instead, these timing rules are "claim-processing" rules, which can be waived or forfeited if the party asserting the rule waits too long to raise the point. *Id*.

The Eighth Circuit concluded that Rule 50(b) and 6(b)(2) are nonjurisdictional, claim-processing rules. *Id*. at *13. As a result, the timeliness requirements may be forfeited if they are not timely raised. *Id*. at *14. The Eighth Circuit noted that Dill raised the issue before the district court reached the merits of the Rule 50(b) motion, but too late for the insurance company to take corrective action. *Id*. at *17. Nonetheless, the court concluded that Dill "properly and timely raised the untimeliness defense and that the district court properly dismissed [the insurance company's] Rule 50(b) motion for lack of jurisdiction." *Id*.

As a result, the Eighth Circuit dismissed the appeal because it lacked jurisdiction over the appeal of the underlying case that was filed more than 30 days after the district court's entry of judgment. *Id*. at *17-18. The Eighth Circuit noted, "[a]lthough this is a harsh and unfortunate result for [the insurance company], as it relied on the extension granted by the district court, [the company] is not without fault—a simple scan of Rule 6(b)(2) would have provided [the insurance company] notice that the district court lacked authority to grant an extension of time to file the Rule 50(b) motion." *Id*. at *20. The Eighth Circuit also declined to invoke jurisdiction under the "unique circumstances" doctrine. *Id*. at *21-22.

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Ninth Circuit

Heightened Scrutiny, Not Rational Basis, Appropriate Standard of Review for Challenge to Military's "Don't Ask, Don't Tell" Policy

Witt. v. Department of Air Force, **__ F.3d __, 2008 WL 2120501 (9th Cir. May 21, 2008)**

In *Witt v. Department of Air Force*, the Ninth Circuit re-examined prior precedents upholding the military's "Don't Ask, Don't Tell" policy [10 U.S.C. § 654] in light of the Supreme Court's *Lawrence v. Texas*, 539 U.S. 558 (2003), decision striking down a Texas statute that banned homosexual sodomy.

The Ninth Circuit concluded that *Lawrence* had altered the standard, meaning an Air Force nurse's substantive due process claim merited heightened scrutiny and required further proceedings on remand. Whether the nurse had Article III standing to pursue a procedural due process claim depended on her discharge classification, however, and the Ninth Circuit remanded that claim for further factual development. Finally, the court affirmed dismissal of an Equal Protection claim, as *Lawrence* had not reached the Equal Protection issue and, thus, prior Ninth Circuit precedent applied.

Using the Anti-Injunction Act to Manage Mass Tort Litigation

Negrete v. Allianz Life Ins. Co., **523 F.3d 1091 (9th Cir. April 29, 2008)**

The Central District certified a nationwide class action against Allianz Life in the Central District of California over fixed deferred annuities (the "Negrete class"). Similar lawsuits against Allianz Life were pending in other federal and state courts as well. Among these were nationwide class actions certified by both the District of Minnesota and a Minnesota state court under Minnesota's consumer fraud statute.

After discussions began in the Minnesota state court class action regarding a global resolution of the federal and state Minnesota actions, the Negrete Class sought an order prohibiting Allianz Life from settling any claims that might affect the rights of the Negrete class without approval of Negrete Class counsel and the Central District's approval.

Although the Central District nominally denied the request as exceeding its power under the All Writs Act, 28 U.S.C. § 1651(a), at the same time it ordered that Allianz Life and its counsel refrain from engaging in any settlement discussions that did not involve counsel for the Negrete class or require the Central District's approval. Later, the Central District indicated that it would not enforce this order as to other federal district courts, although it neither modified nor vacated the order.

Allianz Life appealed the order, and the Ninth Circuit concluded that it had jurisdiction because the district court's order was an injunction, even if not denominated as such. Likewise, the Ninth Circuit concluded the injunction targeted other courts, even though it specified only Allianz Life and its attorneys, because it had the effect of staying proceedings in other courts.

The Ninth Circuit held that the district court abused its discretion under the All Writs Act. Although the All Writs Act authorizes federal courts to issue "all writs necessary or appropriate" in aid of jurisdiction, the injunction was improper because it was not necessary to protect the Central District action, and because there was no evidence settlement negotiations were proceeding in other courts for any improper purpose. The Ninth Circuit also noted that injunctions between federal district courts are "rarae aves."

The Ninth Circuit also found that the Central District had exacerbated its error by reaching state court proceedings with its injunction. The Anti-Injunction Act is rooted in federalism and restricts a federal court's All Writs Act power against state courts, unless expressly authorized by Congress or "where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283. Although "the existence of advanced federal in personam litigation may, in some instances, permit an injunction in aid of jurisdiction," those circumstances were not present in the Negrete class in the Central District as there was no Multi—District Litigation, discovery was incomplete, and no serious settlement progress had been made.

Settlement While Summary Judgment Motion Pending

In re Syncor ERISA Litig., **516 F.3d 1095 (9th Cir. Feb. 19, 2008)**

Following a drop in stock price after revelation of Foreign Corrupt Practices Act allegations, participants in an ERISA plan that held the defendant's stock filed a class action. The defendants filed a motion for summary judgment, and while the motion was under submission, reached a class settlement. On the very day that the parties informed the court (by voice message to the clerk and in writing) that a settlement had been reached and was being formalized, the district court signed an order granting summary judgment. The next day, even though the parties filed their signed settlement stipulation and a proposed order regarding a stay of the summary

judgment motion and approval of the class settlement, the district court entered its order granting summary judgment -- and then entered final judgment the day after that. The district court also denied the class its motion for relief from judgment.

On appeal, the Ninth Circuit reviewed the denial of the motion for relief from judgment for abuse of discretion, and the grant of summary judgment de novo. Since the parties agreed the settlement was enforceable and had given appropriate notice to the district court, the Ninth Circuit held that it was an abuse of discretion for the district court to enter summary judgment and then deny the motion for relief. Instead, it should have held its summary judgment order and entertained the motion to approve the class settlement. Bolstering its conclusion, the Ninth Circuit found summary judgment for defendants unwarranted and reversed that part of the order as well.

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Tenth Circuit

Appellate Jurisdiction

Medical Supply Chain, Inc. v. Neoforma, Inc., **508 F.3d 572 (10th Cir. 2007)**

The Tenth Circuit dismissed the appeal as untimely, holding that the notice of appeal was not filed within 30 days of the "entry" of judgment. In reaching this holding, the Court reviewed the applicable rules of procedure, particularly with regard to whether a separate document is required for entry of judgment and when judgment is deemed "entered" when no separate document is required.

First, Fed. R. Civ. P. 4(a)(1)(A) states the general rule that a notice of appeal must be filed within 30 days after entry of the judgment or order appealed from (unless the United States is a party). Second, Rule 58(a)(1) generally requires that a judgment be set forth in a separate document. When a separate document is required, the judgment is "entered" when it is both entered in the civil docket under Rule 79(a) and the earliest of the following has occurred: (A) it is set forth on a separate document; or (B) when 150 days have run from entry of the order in the civil docket under Rule 79(a). Fed. R. Civ. P. 58(b)(2). In other words, the failure of the trial court to enter a separate document will not prevent judgment from being "entered" for purposes of Rule 4: in such cases, judgment is deemed "entered" when 150 days have passed from entry of the order even though no separate judgment document has been entered on the docket.

To complicate matters further, the separate document rule does not apply to all orders: separate documents are not required for orders disposing of motions under Rules 50(b), 52(b), 54, 59 and 60. Fed. R. Civ. P. 58(a)(1)(A)-(E). Judgment based on these orders is deemed "entered" immediately upon entry of the order in the civil docket under Rule 79(a). Fed. R. Civ. P. 58(b)(1).

In the case before the Court, the trial court had dismissed the case in an order entered March 7, 2006, resolving all issues between the parties. The trial court failed to enter judgment via a separate document. Therefore, the order was immediately final and appealable, but judgment did not "enter" on the order until 150 days had passed from entry of the order, or August 4, 2006.

After March 7, 2006, a principal of the plaintiff corporation filed several separate motions: seeking reconsideration, informing the trial court that the plaintiff had fired its counsel and would proceed *pro se*, seeking leave to amend the plaintiff's complaint, moving to strike a number of filings by the defendants, and seeking to transfer venue to a different district court. On August 7, 2006, the trial court issued an order striking all of these motions and denying the motion of the plaintiff's counsel to withdraw.

On September 8, 2006, the plaintiff's counsel filed a notice of appeal with regard to the trial court's rejection of the plaintiff's motion to reconsider. The motion to reconsider was a motion under either Rule 59 or Rule 60, or both. Therefore, the order denying the motion to reconsider did not require entry of a separate document, and the judgment "entered" on August 7, 2006, when the trial court entered the order. The notice of appeal was filed 32 days later on September 8, 2006, and therefore was untimely under the 30-day rule contained in Fed. Civ. P. 4. In so ruling, the Court noted that the underlying judgment had been deemed "entered" on August 4, 2006; therefore, there was no question that the trial court's order dismissing the case was "ripe" for purposes of the appeal.

Expert Witnesses

Pace v. Swerdlow, **519 F.3d 1067 (10th Cir. 2008).**

The Tenth Circuit reversed the dismissal of the plaintiffs' claims against their former expert witness. In the underlying state court medical malpractice case, the parents of the deceased sued the medical center and doctors who treated their daughter and allegedly released her from care prematurely. The plaintiffs' retained expert became the defendant in this

subsequent litigation after his change of position was noted by the state court in the order granting summary judgment to the medical malpractice defendants. In the subsequent action, the federal district court granted the expert's motion to dismiss based on lack of proximate cause. On appeal, the Tenth Circuit panel split, with two judges holding that the district court erred in its analysis of proximate cause, reversing the entry of summary judgment, and noting that the district court would be free on remand to address the defendant's alternative bases for dismissal, including expert witness immunity. The third judge concurred regarding the proximate cause analysis, but dissented on the basis that the district court's decision should be affirmed on other grounds, particularly the standard for actionable allegations set by *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955 (2007), and implications for truth-finding function of the legal system if such suits against expert witnesses are permitted.

Standard of Review

In re. Antrobus, **No. 08-4002, 2008 U.S. App. LEXIS 7634 (10th Cir. March 14, 2008)**

The Tenth Circuit split from other circuits regarding the appellate standard of review under the Crime Victims' Rights Act ("CVRA"). Parents of a shooting victim sought review of a district court ruling denying CVRA crime victim status to their daughter. The Tenth Circuit had previously denied the parents' petition for mandamus review, and in this opinion, the Court reaffirmed its application of the traditional standards applicable to writs of mandamus rather than normal appellate standards of review. The Tenth Circuit explained that its ruling was mandated by the plain language of the CVRA, disagreeing with decisions to the contrary by the Second, Ninth, and Third Circuits.

Equitable Vacatur

McMurtry v. Aetna Life Ins. Co., **Nos. 06-6358, 06-6370, 2008 U.S. App. LEXIS 7807 (10th Cir. April 11, 2008)**

The intervenor's appeal was rendered moot by the plaintiff's settlement, triggering a remedy of equitable vacatur because the intervenor was not a party to the settlement. The Tenth Circuit explained that the equitable remedy of vacatur may be available when an appeal is rendered moot through no fault of the party seeking the remedy.

Bankruptcy

In re. Taumoepeau, **No. 064233, 2008 U.S. App. LEXIS 8716 (10th Cir. April 22, 2008)**

The separate document rule was applied to extend the time to appeal an order of Bankruptcy Appellate Panel. In determining whether the notice of appeal was timely for purposes of creating appellate jurisdiction, the Tenth Circuit discussed the interplay of the Federal Rules of Civil Procedure, the Federal Rules of Appellate Procedure, and the Federal Rules of Bankruptcy Procedure. The Court concluded that the notice of appeal was timely because appellants had 180 days to file their appeal after the Bankruptcy Appellate Panel issued a combined "Order and Judgment" rather than a separate judgment document in compliance with Fed. R. Civ. P. 58.

Stay of Judgment

UFCW Local 880-Retail Food Employers Joint Pension Fund v. Newmont Mining Corp., **No. 07-1429, 2008 U.S. App. LEXIS 8953 (10th Cir. April 25, 2008)**

The denial of a stay pending appeal is not an appealable order. The Tenth Circuit followed rulings from other circuits in holding that a district court's denial of a stay pending appeal is not an appealable order, being neither a final decision under 28 U.S.C. § 1291 nor an injunction under 28 U.S.C. § 1292(a)(1). The proper remedy for seeking a stay in the Court of Appeals after denial by the district court is set forth in Fed. R. App. P. 8(a).

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D.C. Circuit

Appellate Jurisdiction

Barksdale v. Wash. Metro. Area Transit Auth., **512 F.3d 712 (D.C. Cir. 2008)**

The D.C. Circuit held that it had appellate jurisdiction over a district court order remanding a case to the Superior Court of the District of Columbia where the remand order was entered for the convenience of plaintiff's counsel and reversed the order of remand.

The plaintiff filed a negligence action against the Washington Metropolitan Area Transit Authority ("WMATA") in the Superior Court of the District of Columbia. WMATA removed the case to federal district court under a statute that creates concurrent federal jurisdiction for actions by or against WMATA and authorizes removal in the manner provided by 28 U.S.C. § 1446. The plaintiff's counsel requested the district court to remand the case, representing that he was not admitted to the bar of the district court and lacked the technology needed to comply with the district court's mandatory electronic case

filing procedures. The district court obliged, and WMATA appealed the remand order.

The D.C. Circuit first concluded that the remand order was a final order for purposes of 28 U.S.C. § 1291 under the "collateral order" doctrine of *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546-47 (1949). The D.C. Circuit explained that the remand order would put the WMATA out of federal court, conclusively determined a forum issue separate from the merits, addressed an important question of the WMATA's right to litigate in federal court, and would not be subsumed in any other appealable order entered by the district court. 512 F.3d at 715 (applying *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 714 (1996)).

The D.C. Circuit next concluded that 28 U.S.C. § 1447(d) did not bar review. Section 1447(d) bars review "'only [of] remand orders issued under § 1447(c) and invoking the [mandatory] grounds specified therein.'" 512 F.3d at 715 (quoting *Osborn v. Haley*, 127 S. Ct. 881, 893 (2007)). That is, Section 1447(d) bars review only of remand orders based on "'a defect in removal procedure or lack of subject matter jurisdiction.'" Id. (quoting *Kircher v. Putnam Funds Trust*, 547 U.S. 633 (2006)). The D.C. Circuit stated that a remand for the convenience of counsel is not based on either of these grounds. The court analogized the remand order to *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976) in which the Supreme Court held that Section 1447(d) did not bar review of an order of remand based on "the District Court's heavy docket." 512 F.3d at 715 (citing 423 U.S. at 344-46, 352).

Finally, the D.C. Circuit reversed because "the district court lack[ed] the power to remand a case for the convenience of counsel," again analogizing the case to *Thermtron*. *Id.* at 716 (citing 423 U.S. at 344). The court stated that in addition to remands based on a defect in removal procedure or lack of subject matter jurisdiction, the Supreme Court of the United States has held that remand is an appropriate alternative to dismissal "'when a [district] court has discretionary jurisdiction over a removed [pendant] state-law claim and the court chooses not to exercise its jurisdiction,'" Id. (quoting *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 354-55 (1988)), and "'a district court may remand a case if it might instead dismiss it based upon 'abstention principles,'" Id. (citing *Quackenbush*, 517 U.S. at 730-31).

Issue Preservation

Brown v. District of Columbia, **514 F.3d 1279 (D.C. Cir. 2008)**

The D.C. Circuit held that a defendant who was properly served in the district court, but failed to answer the complaint, and against whom no default judgment had been taken, could raise the defense of res judicata for the first time on appeal. A prisoner filed a lawsuit against Corrections Corporation of America ("CCA") and other defendants, alleging their failure to provide adequate medical care violated the Eighth Amendment to the Constitution of the United States. CCA did not appear before the district court even though it was properly served with the complaint. The district court, nevertheless, dismissed the complaint against CCA for failure to state a claim.

The D.C. Circuit affirmed as to CCA on the alternative ground of res judicata. Deciding CCA could raise the defense for the first time on appeal, the court reasoned that "because res judicata protects not only the interests of a particular party but the interests of the court, we may consider it for the first time on appeal where the defendant has not forfeited the defense, the relevant facts are uncontroverted, and a failure to consider it would only cause delay." 514 F.3d at 1285-86. The court concluded that each of these "factors" was present. Id. at 1286. First, although CCA risked entry of a default judgment by failing to answer the complaint, "it did not thereby forfeit the right to answer [the prisoner's] complaint and raise the defense if the district court's dismissal in its favor was later reversed." Id. Second, the relevant facts were uncontroverted—there were no factual disputes about the earlier lawsuit on which CCA based its res judicata defense. Third, the D.C. Circuit reasoned that failing to address the defense would have only caused delay because CCA would have been free to raise the defense on remand.

Standard of Review

Se. Fed. Power Customers, Inc. v. Geren, **514 F.3d 1316 (D.C. Cir. 2008)**

The D.C. Circuit held that the standard of review of a settlement agreement for compliance with statutory requirements is de novo:

> The court reviews the fairness of a settlement agreement for abuse of discretion. *Moore v. Nat'l Ass'n of Sec. Dealers, Inc.*, 762 F.2d 1093, 1106 (D.C. Cir. 1985). Although there are few precedents on review of a settlement agreement for compliance with statutory requirements, the district court could hardly approve a settlement agreement that violates a statute, *see, e.g.*, *Sierra Club, Inc. v. Elec. Controls Design, Inc.*, 909 F.2d 1350, 1355 (9th Cir. 1990), and this court owes the district court no deference

in its legal interpretations. Our statutory review then is *de novo*, although this is largely a matter of semantics: "A district court by definition abuses its discretion when it makes an error of law," *Koon v. United States*, 518 U.S. 81, 100 (1996); *see also Donovan v. Robbins*, 752 F.2d 1170, 1178 (7th Cir. 1984).

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Federal Circuit

Mandate Rule

***Amado v. Microsoft Corp.*, 517 F.3d 1353 (Fed. Cir. 2008)**

The Federal Circuit, in an appeal following remand, concluded that the mandate rule barred the district court from reconsideration of its initial issuance of a permanent injunction where the defendant had a reasonable opportunity prior to the Federal Circuit's mandate to present a decision of the Supreme Court of the United States decided during the first appeal. The Federal Circuit held, however, that the mandate rule did not bar the district court from exercising its equitable power to prospectively modify or dissolve the permanent injunction in light of the test for granting an injunction set forth in the Supreme Court's decision.

Following a jury verdict finding Microsoft infringed the plaintiff's patent, the district court issued a permanent injunction, enjoining Microsoft from further infringement. The district court stayed the permanent injunction until seven days after resolution of any appeal from the final judgment. The Federal Circuit affirmed. On remand, Microsoft argued that a decision of the Supreme Court of the United States issued during the appeal—after briefing, but prior to oral argument—made the injunction inappropriate and supported its dissolution. The plaintiff argued that dissolution based on the Supreme Court's decision was barred by the mandate rule.

Microsoft responded that the propriety of the permanent injunction was not at issue in the first appeal, and thus was outside the scope of the mandate. Alternatively, Microsoft argued that the Supreme Court's decision was an intervening decision and is thus an exception to the mandate rule. The district court dissolved the permanent injunction, concluding that it was inappropriate under the legal test for granting an injunction set forth in the Supreme Court's decision.

In the second appeal, the Federal Circuit held that the Supreme Court's decision was not an intervening decision because Microsoft had "a reasonable opportunity to raise [the] issue...prior to issuance of the appellate mandate." 517 F.3d at 1359-60. The Federal Circuit next held that although "[n]either party raised the propriety of the permanent injunction" in the first appeal, the mandate rule barred "reconsideration of the initial issuance of the injunction." *Id.* at 1360 ("[T]he mandate rule precludes reconsideration of any issue within the scope of the judgment appealed from—not merely those issues actually raised—the proper inquiry is whether the district court's grant of the permanent injunction was within the scope of the judgment appealed...."). Continuing, the Federal Circuit stated that "[t]here is a fundamental difference... between the granting of retrospective relief and the granting of prospective relief." *Id.* The mandate rule did not "preclude the district court from modifying, or dissolving, the injunction if it determine[d] that it [was] no longer equitable." *Id.* (Rule 60(b) provides, inter alia, "[o]n motion and just terms, the court may relieve a party...from a final judgment, order, or proceeding...[if] applying it prospectively is no longer equitable...."); *Id.* at 1359 ("'An appellate mandate does not turn a district judge into a robot, mechanically carrying out orders that become inappropriate in light of subsequent factual discoveries or changes in the law.'") (quoting *Barrow v. Falck*, 11 F.3d 729, 731 (7th Cir. 1993)). Accordingly, the Federal Circuit "conclude[d] that the district court was well within its discretion in this case to reconsider the prospective application of the permanent injunction on remand in light of the Supreme Court's decision." *Id.* at 1361.

Time for Filing Notice of Appeal

***Marandola v. United States*, 518 F.3d 913 (Fed. Cir. 2008)**

The Federal Circuit held that trial court's amendment of opinion following entry of judgment to correct typographical error as to the date of the opinion did not constitute an amended judgment when calculating the time to file the notice of appeal. The Federal Circuit further concluded that per local rules of the trial court, the notice of appeal had to be received by that court's clerk within the appeal period and could not be electronically filed.

The Court of Federal Claims issued an Opinion and Order on April 4, 2007 and entered judgment on April 6, 2007. The Opinion and Order bore the incorrect date of April 4, 2006. On April 9, 2007, the Court of Federal Claims issued an Order of Correction, correcting the date of the Opinion and Order from

April 4, 2006 to April 4, 2007. Because the United States was a party, there was a sixty-day appeal period. See Fed. R. App. P. 4(a)(1)(B). The plaintiffs mailed a notice of appeal to the Court of Federal Claims on June 8, 2007, as postmarked, which was received by the clerk's office on June 12, 2007. The Federal Circuit dismissed the appeal as untimely filed.

The Federal Circuit rejected plaintiffs' argument that the Order of Correction constituted an amended judgment and, therefore, the procedures for entering judgment as prescribed by Federal Rule of Civil Procedure 58 did not apply. Rather, the appeal period ran from April 6, 2007. The Federal Circuit also rejected the plaintiffs' argument that a problem with the Electronic Case Filing ("ECF") system precluded timely filing of the notice of appeal because a local rule of the Court of Federal Claims precluded ECF filing of the notice of appeal. See R. Fed. Cl. 5(e) & App. E, 25. The Federal Circuit further concluded that per the local rules of the Court of Federal Claims, "[a] notice of appeal must be received by the deadline, for the Rules require filing with the clerk of court by the due date." 518 F.3d at 915 (citing R. Fed. Cl. 5(e)).

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Since its inception three years ago, the Appellate Advocacy Amicus Subcommittee continues to grow. As a result of the Appellate Advocacy Committee's excellent seminar in February, the subcommittee now has more than 40 members with a vast array of appellate experience. Our members' court admissions cover most state courts, the District of Columbia, the United States Supreme Court and all Circuit Courts of Appeal. Our subcommittee members remain willing to work with DRI's Amicus Committee to identify important cases and select authors ready to assist in preparing amicus briefs so that DRI's voice is heard in important appeals throughout the country.

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The annual meeting subcommittee is pleased to announce that the Honorable Edith Brown Clement, U.S. Court of Appeals for the Fifth Circuit, has agreed to participate in the CLE program that will be presented during the Appellate Advocacy Subcommittee meeting at the DRI 2008 Annual Meeting. As noted in our last report, the 2008 Annual Meeting will take place this year in New Orleans on Wednesday, October 22, 2008 - Sunday, October 26, 2008. The Appellate Advocacy Committee meeting and CLE program is scheduled for Friday, October 24 from 3:30 - 6:00 pm.

The one-hour CLE portion of the Appellate Advocacy Committee's program is entitled: What Appellate Lawyers Need to Do to Better Serve the Court and Their Clients. Judge Clement will answer our questions and informally discuss topics such as persuasive briefing and oral argument, with David A. Furlow (senior partner and appellate attorney at Thompson & Knight) serving as mediator. Additionally, Vik Chandhok, an appellate conference attorney with the Fifth Circuit, will give a presentation on the factors to consider in determining whether to mediate appellate cases; an overview of the process; and the success the Fifth Circuit has had with this program. Erin Gleason-Alvarez, with AIG's Office of Dispute Resolution, will also participate in this presentation, offering the client's perspective on general issues of responsiveness, as well as the need to consider post-trial mediation. We look forward to seeing you there.

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The Webconference Subcommittee is proud to announce that it hosted the Appellate Advocacy Committee's first webconference on August 26, 2008. Entitled "Sometimes the Best Defense is a Good Offense – The Use of *Bell Atlantic, Inc. v. Twombly,*" this webconference focused on how to make the most out of the Supreme Court's recent decision in *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955 (2007).

The webconference first outlined the holding in *Twombly*, presented by one of the authors of the Department of Justice's *amicus curiae* brief. Following this were speakers from diverse practice areas including commercial law, insurance law and products liability, who discussed how best to implement the case's holding from the defense perspective.

The Webconference Subcommittee heartily thanks our excellent presenters: Hill Wellford, Tom Leach, Dan Winters, Bob Powell and Lindsay DeMoss. They all put in a lot of work and made the program a success. Ed Haden and I would also like to thank the entire Webconference Subcommittee for their hard work in putting this webconference together. Great work, team!

But alas, not being ones to rest on our laurels, the Webconference Subcommittee is already back hard at work planning the next webconference program. We are kicking around some good ideas right now. However, as Scott Stolley mentioned in his "From the Chair" report, these webconference programs are intended to serve in part as a resource for our trial-lawyer colleagues, so if any of you have ideas for possible topics that would serve this goal, please let us know. We are always open to suggestions. And along those lines, for those of you who attended the *Twombly* webconference, we welcome any comments or suggestions you may have about what we did well and what we can do better next time.

Thanks again for everyone's interest in and assistance with developing our webconference program. Please be on the lookout for the next webconference later this year or early next. In the meantime, have a great fall, and we look forward to seeing many of you in New Orleans!

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Our "Committee Resources" page on the DRI web site now features links to several appellate blogs from across the country. These include the following:

Abstract Appeal (http://abstractappeal.com/), by Matt Conigliaro, covering Florida and the 11th Circuit.

An Appeal to Reason (http://www.donnabader.com/), by California appellate specialist Donna Bader. Donna's goal for this site is to educate lawyers and the general public about appellate matters and the advantages of retaining an appellate lawyer.

Appealing in Nevada (http://www.nevadaappellatelaw.com/), by Tami D. Cowden, covering Nevada and the 9th Circuit.

California Appellate Law Blog (http://www.caappellatelaw.com/), by the law firm Archer Norris, with most posts written by Kimberly Amick. As the title suggests, the emphasis is on California.

California Blog of Appeal (http://www.calblogofappeal.com/), by Greg May. Greg says his blog is "an appellate practitioner's take on practice and legal developments in the California Courts of Appeal, California Supreme Court, and the Ninth Circuit Court of Appeals." Greg focuses on "the intersection of trial and appellate practice," including substantive legal developments, post-trial motion practice, and written- and oral-advocacy skills.

Fifth Circuit Blog (http://circuit5.blogspot.com/), by Brad Bogan, focusing on criminal law and criminal procedure as expounded by the 5th Circuit.

Illinois Appellate Lawyer Blog (http://www.illinoisappellatelawyerblog.com/), by Steven R. Merican, focusing on Illinois and the 7th Circuit.

Appellate Law & Practice (http://appellate.typepad.com/appellate/), where the pseudonymous S. Cotus writes mostly about criminal law and procedure in the 1st Circuit.

New York Civil Law (http://nylaw.typepad.com/new_york_civil_law/), by our own Matthew S. Lerner. Matt's goal is to provide "a forum for New York appellate law, civil procedure, insurance coverage and defense, and other interesting issues."

Opening Brief (http://www.caso-law.com/blog/wordpress/), billed as "a blog devoted to appellate law and issues." The author is anonymous.

SCOTUS Blog (http://www.scotusblog.com/wp/), by several appellate folks at Akin Gump, Tom Goldstein being the chief instigator. This is simply the premier blog covering the U.S. Supreme Court. If it's not already on your must-read list, it should be.

Second Opinions (http://secondopinions.blogspot.com/), Sanford Hausler's blog about the 2nd Circuit and its opinions.

Supreme Court of Texas Blog (http://www.scotxblog.com/), by Don Cruse, who runs an appellate boutique in Austin.

SW Virginia Law Blog (http://swvalaw.blogspot.com/), by DRI Appellate Advocacy Committee member Steve Minor.

Texas Appellate Law Blog (http://www.texasappellatelawblog.com/), by Todd Smith, a solo appellate specialist in Austin.

Do yourself a favor: Check out some of these blogs, especially the ones covering your home state or circuit, and get to know the appellate lawyers who write for them.

And do me a favor: If you know of a good appellate blog that's not listed above, send me an e-mail with the blog title and URL.

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