

# Certworthy

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The newsletter of the DRI  
Appellate Advocacy Committee



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## CITATION OF UNPUBLISHED DECISIONS

# The Ninth Circuit Offers Conflicting Opinions

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In the last several years, many state and federal courts have considered the propriety of citing unpublished opinions. For a few months last year, the question in the Ninth Circuit seemed settled: The court unequivocally cautioned that counsel should not be “seduced” into citing unpublished opinions. *Hart v. Masanari*, 266 F.3d 1155, 1159 (9th Cir. 2001). In a divided opinion issued in May 2002, however, a different panel of the court indicated that the court could consider unpublished opinions to determine one factor of the qualified immunity test. *Sorrels v. McKee*, 01-35222, 2002 WL 826888 (9th Cir. May 2, 2002). The rule against citation of unpublished decisions is the better-reasoned approach, and counsel in the Ninth Circuit would be wise to avoid citing unpublished authority. However, in light of the opinion in *Sorrels*, attorneys in qualified immunity cases now have a limited duty to cite unpublished opinions that are helpful to their clients.

In *Hart v. Masanari*, 266 F.3d at 1159, Judge Kozinski, writing for a unanimous court, held that the Ninth Circuit’s rule prohibiting citation of unpublished opinions is constitutional and that counsel who violate the rule can be sanctioned. According to the court, the Eighth Circuit’s vacated decision in *Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000), “continues to have persuasive force,” but is wrongly decided and should not “seduce members of our bar into... the mistaken impression that [a rule against citation of unpublished opinions] is unconstitutional.” *Hart*, 266 F.3d at 1159. Judge Kozinski’s conclusion is consistent with the history of opinion writing and with the realities faced by modern courts.

In *Hart*, the Ninth Circuit ordered counsel to show cause why he should not be disciplined for violating Ninth Circuit Rule 36-3, which provides that unpublished decisions have no precedential value and may be cited only for law of the case, *res judicata*, and collateral estoppel purposes. Counsel responded by arguing that Rule 36-3 might be un-

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The Committee is forging ahead with two major projects. First, under the leadership of our Publications Chair, Scott Stolley, ably aided by Raymond

## Major Projects

Ward, the Committee has taken on the challenging task of preparing an appellate practice manual for defense lawyers. The manual will cover the whole of appellate practice, and we anticipate its completion in the Spring of 2003. For details, please contact either Scott ([stolleys@tklaw.com](mailto:stolleys@tklaw.com)) or Ray ([Raymond.Ward@arlaw.com](mailto:Raymond.Ward@arlaw.com)).

The Committee is also organizing its fourth appellate advocacy seminar. To

be held May 1 and 2, 2003 in Chicago, this program will feature another impressive array of topics and speakers, including the usual complement of state and federal appellate court judges. Dan Lindahl is the chair, and has taken on this demanding responsibility with the requisite combination of energy and organizational skill. (For details, see Dan's report set forth elsewhere in this issue.)

Thanks!



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Due to publication difficulties, the last issue of *Certworthy* was extremely late.

## Pardon the Delay

We apologize for the delay, and want you to know that DRI has taken steps to improve on timeliness. We expect that things will be back on course with the next issue. In the meantime, we offer this truncated issue of *Certworthy*.

We expect that the next issue will be a full issue, with our usual complement

of articles and columns. But to do that, we need your help. Specifically, we need authors for our lead articles and columns. If you would like to volunteer, please contact me. The deadline to submit manuscripts is November 1st, which will be here before we know it.

**Seminar**

The Seminar Subcommittee is actively planning for the Appellate Advocacy Committee's next seminar, which is scheduled for May 1 and 2, 2003 in Chicago. Anyone interested in learning more about the seminar should contact either of the program co-chairs, Dan Lindahl ([dan.lindahl@bullivant.com](mailto:dan.lindahl@bullivant.com)) and Mike Wallace ([wallacem@phelps.com](mailto:wallacem@phelps.com)).

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**Publications**

For some time now, we have been threatening to produce an appellate manual for defense counsel. I am happy to report that we are carrying out our threat. Under the direction of four co-editors (me, Ray Ward, Mary Massaron Ross, and Doug Collodel), we have begun work on the manual. We have formulated a list of chapters and confirmed our author se-

lections for most of those chapters.

Those authors are (we hope) diligently drafting their chapters, for completion in a few months. Our goal is to have the manual edited and published before the Committee's seminar next May.

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**WRITERS WANTED**

for

- the January 2003 issue of *Certworthy*
- the monthly Writers' Corner in DRI's magazine, *For The Defense*

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**The Ninth Circuit Offers Conflicting Opinions, from page 1**

constitutional, and relied on *Anastasoff* to support that assertion. In a scholarly opinion citing early United States Supreme Court precedent and the likely intent of the Framers when drafting Article III of the Constitution, the Ninth Circuit held that *Anastasoff* "overstates the case" for requiring published opinions, and that many compelling policy reasons support Rule 36-3. *Hart*, 266 F.3d at 1160, 1180.

Judge Kozinski began with the proposition that "[r]ules that empower courts of appeals to issue nonprecedential decisions do not cut those courts free from all legal rules and precedents." *Id.* at 1160. Instead, "such rules have a much more limited effect" because they "allow panels of the courts of appeals to determine whether future panels, as well as

judges of the inferior courts of the circuit, will be bound by particular rulings" and thereby "deal with precedent in the context of a modern legal system, which has evolved considerably since the early days of common law, and even since the time the Constitution was adopted." *Id.*

This conclusion is the heart of Judge Kozinski's analysis, and is the main point on which the Ninth Circuit disagreed with the three-judge Eight Circuit panel that issued the original *Anastasoff* opinion. According to the Ninth Circuit, the *Anastasoff* court incorrectly expanded the judicial power clause of Article III to find that judges must publish all opinions, when there is no common law or historical support for that notion. *Id.* at 1161. As the Ninth Circuit explained, even if there were some merit in "*Anastasoff*'s

premise that the [Article III] phrase 'judicial Power' contains limitations separate from those contained elsewhere in the Constitution, we should exercise considerable caution in recognizing those limitations." *Id.* at 1162. In the absence of common law support or evidence of Framers' intent on this point, creating a new limitation on judicial power is not warranted. *Id.* at 1163-70.

The Ninth Circuit also relied on sound policy reasons in rejecting the notion that all cases should be published. First, as the court explained, while binding precedent "bring[s] to the law important values such as predictability and consistency, it also (for the very same reason) deprives the law of flexibility and adaptability." *Id.* at 1175 (citing *Planned Parenthood v. Casey*, 505 U.S. 833, 868, 112

S.Ct. 2791 (1992) (“The promise of constancy, once given, binds its maker for as long as the power to stand by the decision survives and the understanding of the issue has not changed so fundamentally as to render the commitment obsolete.”)).

Similarly, a “system of strict binding precedent also suffers from the defect that it gives undue weight to the first case to raise a particular issue.” This is true “whether or not the lawyers have done an adequate job of developing and arguing the issue.” *Id.*

Finally, requiring courts to publish all opinions “would preclude appellate courts from developing a coherent and internally consistent body of caselaw to serve as binding authority for themselves and the courts below them.” *Id.* at 1176. As Judge Kozinski noted, because “[p]recedential opinions are meant to govern not merely the cases for which they are written, but future cases as well,” writing “a precedential opinion, thus, involves much more than deciding who wins and who loses in a particular case [and] is a solemn judicial act” requiring a great deal of time. *Id.* at 1177. Therefore, “few, if any, appellate courts have the resources to write precedential opinions in every case that comes before them.” *Id.* To require publication in every case would necessarily strain the quality of opinions and the cohesiveness of the law.

For all of these reasons, the Ninth Circuit concluded that “an inherent aspect of our function as Article III judges is managing precedent to develop a coherent body of circuit law to govern litigation in our court and the other courts of this circuit.” *Id.* at 1180. To do so, judges must recognize that “certain types of cases do not deserve to be authorities, and that one important aspect of the ju-

dicial function is separating the cases that should be precedent from those that should not.” *Id.* With no clear “constitutional basis for abdicating this important aspect of our judicial responsibility,” the Ninth Circuit refused to follow the Eighth Circuit and wisely held that a court constitutionally may rule that counsel should not cite opinions written by judges who do not intend the opinion to be precedent.

Just a few months later, however, a divided three-judge panel of the Ninth Circuit accepted counsel’s argument that it should consider nonpublished decisions in deciding whether an area of the law was sufficiently established that officials following the law would be entitled to qualified immunity. *Sorrels*, 2002 WL 826888, at \*5. According to the majority, Ninth Circuit authority predating *Hart* indicates that the court is “not categorically forbidden from considering unpublished or non-precedential decisions in inquiring if the law was established” for qualified immunity purposes. *Id.*

The *Sorrels* majority reasoned that it could consider the unpublished opinions as long as it did not cite them as precedent. *Id.* at \*6. On this basis, the court found “the logic behind Ninth Circuit Rule 36-6” did not apply. *Id.* Instead, “[t]he better course is... not to categorically forbid consideration of unpublished decisions in deciding... qualified immunity,” but to allow consideration of the decisions as long as they are not cited as precedent.

District Judge Teilborg, sitting by designation, wrote separately to state that he did not agree with the majority’s conclusion. He explained: “Because unpublished decisions can never be binding precedent,... I do not believe courts should

consider unpublished decisions....” *Id.* at \*8 (Teilborg, J., concurring).

Judge Teilborg’s concurrence points to the major flaw in the *Sorrels* majority’s logic. Because consideration of the opinions by the court would necessarily treat them as precedent, even if the court did not cite them, it would violate the many principles discussed by Judge Kozinski in *Hart* and the language of rule 36-3.

Further, as a practical matter, a rule that the court may consider, but not cite, unpublished opinions means either that the judges and their staffs will find all of those unpublished opinions themselves or that counsel will have to cite them in the briefs. But if the court finds and considers the unpublished material on its own, counsel will not have a chance to comment on that authority, and likely will not ever know the court considered it (since those cases will not be cited in the opinion). And under *Hart* and rule 36-6, counsel is not permitted to cite nonpublished authority.

Faced with this problem, a Ninth Circuit practitioner in a qualified immunity case should comply with the duty to cite all available authority helpful to his or her client. Thus, counsel should cite unpublished opinions bearing on the issue of whether the law is established. To avoid sanctions, however, counsel should be very careful not to cite unpublished cases on any other ground and should explain why the case is being cited. In all other situations, counsel should comply with rule 36-3.

*The best sentence? The shortest.*

— GUSTAVE FLAUBERT

# Dance with the Issues that Brung You

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In *Boudreaux v. State, Department of Transportation & Development*, 2002 WL 264982 (La. Feb. 26, 2002), the Louisiana Supreme Court taught two fundamental lessons for those who successfully convince a state supreme court to exercise its discretionary jurisdiction. In your brief on the merits: (1) you must argue the issues that you raised in your writ application; and (2) you must not argue issues that you did not raise in your writ application. In *Boudreaux*, an applicant's violation of these two basic rules caused the court to dismiss its previously granted writ of certiorari.

The case involved a class action by property owners against the Louisiana Department of Transportation and Development (DOTD). The class representatives alleged that the construction of an interstate highway interfered with the natural flow of drainage, causing their property to be flooded by torrential rain. The trial court certified the class and found DOTD liable. The intermediate appellate court affirmed. *Boudreaux v. State, DOTD*, 780 So. 2d 1163 (La. Ct. App. 1 Cir. 2001). DOTD petitioned the Louisiana Supreme Court for a writ of certiorari or review, raising three issues: (1) prescription or statute of limitations; (2) erroneous evidentiary rulings; and (3) the lower courts' failure to retroactively apply a statute that (according to DOTD) would have changed the out-

come. The Louisiana Supreme Court granted DOTD's writ application, thus agreeing to hear the case on the merits. *Boudreaux v. State, DOTD*, 794 So. 2d 804 (La. 2001).

But just when things were going DOTD's way, DOTD blew it. In its brief on the merits, DOTD argued only one of the three issues raised in its writ application (the retroactivity issue). Instead of briefing the prescription and evidentiary issues, DOTD argued numerous other issues that it had not raised in its writ application.

In response, the Louisiana Supreme Court took the unusual step of dismissing its own writ of certiorari. The court held that by failing to brief the prescription and evidentiary issues, DOTD abandoned them. The court further held that the issues DOTD attempted to raise for the first time in its brief on the merits were not properly before the court, because they were not presented in the writ application.

The court explained that its rules are designed to assist it in the exercise of its discretionary jurisdiction. Among those rules are requirements that an applicant for a writ of certiorari list assignments of error and address with particularity why they call for the court to exercise its discretionary jurisdiction. If the court is to focus on issues most worthy of its consideration, it must not be "blindsided" after granting a writ by issues that did not appear in the writ application. For these reasons, the court found that DOTD had abandoned the issues that it had raised in its writ application but failed

to address in its brief on the merits. And the court found that the additional issues that DOTD raised in its brief but failed to raise in its writ application were not properly before the court.

The *Boudreaux* court based its decision on considerations that apply to all top-tier courts with discretionary jurisdiction. In a three-tiered court system, all appeals from trial courts go to intermediate courts. The supreme court receives few appeals directly from trial courts; its jurisdiction is generally limited to reviewing the intermediate court's decision on a discretionary basis. The theory behind this arrangement is that every litigant is entitled to but one appellate review of a trial court's judgment. Any further review should be provided only in the interest of law and the legal system. *Boudreaux*, at 3 n.5. In a three-tiered system, the supreme court's role is not to correct errors (that is the intermediate court's role), but to develop the law. Thus, when a state supreme court grants a writ of certiorari, the probable reason is that the court wants to address the legal issues raised by the writ application. Small wonder, then, that DOTD's failure to brief those issues, and its attempt to inject other issues into the case, drew the *Boudreaux* court's ire.

The message from *Boudreaux* is clear: When briefing your case on the merits before a state supreme court, dance with the issues that brung you. Brief the issues that you raised in your writ application, and *only* those issues. Failure to follow this simple rule can lead to the embarrassing result that DOTD received in *Boudreaux*.

### Dismissal

#### ***Alternative Energy, Inc. v. St. Paul Fire & Marine Insurance Co.*, 267 F.3d 30 (1st Cir. 2001)**

In *Alternative Energy, Inc. v. St. Paul Fire & Marine Insurance Co.*, 267 F.3d 30 (1st Cir. 2001), the court of appeals held that the trial court could consider a document outside the complaint (a settlement agreement) in ruling on a Rule 12(b)(6) motion to dismiss.

In a prior action, the plaintiff sued some attorneys for legal malpractice. After settling that action, the plaintiff filed a second suit against one attorney's professional liability insurer, under the theory that the second suit was not covered by the settlement. The insurer filed a motion to dismiss and attached three documents to its motion, including the settlement. The district court struck the other two documents but refused to strike the settlement. And based on the settlement, the district court dismissed the suit.

The First Circuit affirmed. The court explained that ordinarily, when deciding a Rule 12(b)(6) motion, a court must not refer to any documents except the complaint itself and any document expressly incorporated into the complaint. But a "narrow exception" exists: (1) for documents whose authenticity is not disputed; (2) for official public records; (3) for documents central to the plaintiff's claim; and (4) for documents sufficiently referred to in the complaint. The First Circuit found that the settlement fit the third, fourth, and first exceptions.

### Notice of Appeal

#### ***Graphic Communications International Union, Local 12-N v. Quebecor Printing Providence, Inc.*, 270 F.3d 1 (1st Cir. 2001)**

In *Graphic Communications International Union, Local 12-N v. Quebecor Printing Providence, Inc.*, 270 F.3d 1 (1st Cir. 2001), the court found that an appellant's filing a notice of appeal one day late, due to counsel's ignorance of FRAP 4, did not result from excusable neglect. Hence, the court affirmed the district court's denial of an extension of time to appeal.

The facts of the case read like a textbook example of Murphy's Law. On July 21, 2000, the district court granted summary judgment in defendant's favor, dismissing the union's suit. The 30th day following July 21 was Sunday, August 20, making the due date for the appeal Monday, August 21. On Thursday, August 17, the union's Washington counsel sent a notice of appeal and check by express mail to Providence counsel and telephoned either that day or the day before to alert him to expect the package. Although guaranteed to arrive the morning of Friday, August 18, the postal service did not attempt delivery until Saturday morning, August 19, when no one was there to sign for it. The package was finally delivered in mid-afternoon on Monday, August 21, the due date for the notice of appeal. But at the time, the attorney to whom the package was addressed was not in the office. So the secretary who received the package put it on her desk, intending to give it to the attorney as soon as he returned. But instead, the package got buried under mounds of paper (because the same secretary was working on an arbitration brief that was due the next day). The secretary lost track of the package until the following day, when

she gave it to the attorney. The date was August 22, the 31st day after summary judgment was rendered.

The union immediately filed the notice of appeal—a day late. The union also filed a motion for extension of time to file the notice of appeal, on grounds of excusable neglect. At the hearing, the union's counsel indicated that he had thought the delay for appealing was 60 days, not 30 days. The district court denied the motion for extension.

The court of appeals affirmed. Both the district court and appellate court noted that *some* factors supported a finding of excusable neglect: the delay was minimal, there was no bad faith, and little danger of prejudice. But despite these factors, both courts found that the untimeliness resulted from something inexcusable: counsel's "ignorance of a simple procedural rule [FRAP 4]" and "inattention to detail." The appellate court reasoned that to find such neglect "excusable" would condone carelessness and inattention to practice before the federal courts, and would nullify the filing deadline in FRAP 4.

### Summary Judgment

#### ***Lohnes v. Level 3 Communications, Inc.*, 272 F.3d 49 (1st Cir. 2001)**

In *Lohnes v. Level 3 Communications, Inc.*, 272 F.3d 49 (1st Cir. 2001), the appellate court affirmed both a summary judgment and the district court's decision to disregard the affidavit of a purported expert whose opinions were not disclosed until long after the discovery deadline.

The underlying action was a securities claim, specifically whether the terms "capital reorganization" or "reclassification of stock" in a stock warrant encompassed a stock split. Level 3 moved for summary judgment, arguing that the

language could not reasonably be construed to include a stock split. In opposition to the motion, Lohnes filed an affidavit from a Boston attorney specializing in securities law and corporate finance, stating that the phrases could cover stock splits. Level 3 moved to strike the affidavit. The district court granted Level 3's summary judgment. Although the district court did not expressly strike the affidavit, the tenor of the summary-judgment decision signaled the court's approval of that motion.

The First Circuit affirmed, approving the district court's apparent decision to disregard the affidavit. The appellate court found that the affidavit violated at least two provisions in FRCP 26 and a local rule that implemented Rule 26 and regulated expert disclosures. To file such an affidavit more than three months after the close of discovery and fewer than three weeks before the final pretrial conference "was nothing short of a sneak attack." The appellate court went on to affirm the summary judgment, finding that "[w]ithout the affidavit, the appellant is plainly fishing in an empty stream."

### Joint-Defense Agreement

#### *In re Grand Jury Subpoena*, 274 F.3d 563 (1st Cir. 2001)

In a recent decision, the First Circuit addressed issues of justiciability, appellate jurisdiction, attorney-client privilege, and enforceability of a joint-defense agreement. *In re Grand Jury Subpoena*, 274 F.3d 563 (1st Cir. 2001).

A federal grand jury served a subpoena duces tecum to a corporation seeking records pertaining to the affairs of a subsidiary. Although the corporation and the subsidiary waived all claims of privilege, the subsidiary's former attorney and two of its former officers intervened and moved to quash. The

intervenor argued that the subsidiary had entered into a longstanding joint-defense agreement with former officers, and that the subpoenaed materials were privileged. The district court denied the motion to quash but stayed production of the documents pending appeal.

On appeal, the First Circuit affirmed. Before addressing the privilege issues, the court addressed two preliminary matters: the intervenors' right to intervene, and the court's own appellate jurisdiction. The First Circuit resolved both preliminary issues in the intervenors' favor. Under FRCP 24(a)(2), intervention is appropriate as of right when the disposition of an action may impair or impede the applicant's cognizable interest. Colorable claims of privilege easily qualify as cognizable interest. And although denial of a motion to quash is ordinarily not appealable, an exception exists when "a substantial privilege claim... cannot effectively be tested by the privilege-holder through a contemptuous refusal" to comply with the district court's order. [Editor's note: Compare *In re: Flat Glass Antitrust Litigation*, 2002 U.S. App. LEXIS 7650 (3rd Cir. Apr. 26, 2002), discussed in the Third Circuit report below, where the court reached the opposite result, requiring *nonparties* to stand in contempt before denial of their privilege claims can be appealed. Here, the intervenors made themselves parties by intervening.]

On the merits, the First Circuit affirmed denial of the motion to quash. The intervenors did not allege that any of the subpoenaed documents were solely privileged to them. Rather, they alleged that the documents were subject to a joint-defense agreement. The First Circuit rejected this argument. The joint-defense agreement could not deprive the subsidiary of the right to waive any

privilege that might exist over its own documents. Moreover, the joint-defense agreement itself was probably null. One requirement for a joint-defense agreement is that there be some particular litigation (actual or potential) that the parties have a joint interest in defending. The agreement that intervenors relied upon, however, was created when no particular litigation or investigation was active or anticipated. According to intervenors, the agreement would "attach... to all matters subsequently arising..." The court commented, "The law will not countenance a 'rolling' joint defense agreement of this limitless breadth." To hold otherwise would be to "create a judicially enforced code of silence, preventing attorneys from disclosing information obtained from other attorneys and other attorneys' clients. Common sense suggests that there can be no joint defense agreement when there is no joint defense to pursue."

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### Third Circuit

### Declaratory-Judgment Actions

#### *Westport Insurance Corp. v. Bayer*, 284 F.3d 489 (3d Cir. 2002)

In *Westport Insurance Corp. v. Bayer*, 284 F.3d 489 (3d Cir. 2002), the appellate court held that the district court had no authority to render declaratory judgment on an issue not raised by the parties' pleadings. Westport had sued for declaratory judgment that its policy did not cover an incident. The district court declared that there was coverage, *and* that the aggregate limit applied rather than the per-claim limit. The Third Circuit affirmed the declaration of coverage, but

reversed the declaration of the applicable policy limit, because the latter issue was not raised in the parties' pleadings.

## Appellate Jurisdiction

***In Re: Flat Glass Antitrust Litigation*, 2002 U.S. App. LEXIS 7650 (3d Cir. 4/26/02)**

*In Re: Flat Glass Antitrust Litigation*, 2002 U.S. App. LEXIS 7650 (3d Cir. 4/26/02), presented an appeal from an order compelling document production from a nonparty witness in a consolidated, multi-district antitrust class action. The issue was whether a discovery order compelling a nonparty to produce documents allegedly protected by the attorney-work-product doctrine may be appealed without a citation for contempt. The Third Circuit answered "no," and dismissed the appeal.

The court noted that the Supreme Court has unswervingly adhered to the principle established in *Alexander v. United States*, 201 U.S. 117 (1906), in which nonparties to a Sherman Act case refused to submit subpoenaed documents, and the Supreme Court held that finality was established only if the nonparties stood in contempt. The Third Circuit rejected the appellants' contention that the rule applied only to grand jury proceedings, citing several prior decisions applying the rule in civil cases.

The Third Circuit also rejected the parties' unanimous contention that the *Cohen* collateral-order doctrine applied. The Court acknowledged that it had asserted jurisdiction under the collateral-order doctrine in cases concerning the attorney-work-product privilege. But those cases did not involve nonparty witnesses, and the Third Circuit had not exercised appellate jurisdiction over similar claims by nonparties. By standing in

contempt, the non-parties would have a right to appeal.

On that ground, too, the Third Circuit refused to treat the nonparties' notice of appeal as a mandamus petition. Noting that the first factor to obtain mandamus required that "the party seeking the writ has no other adequate means to attain the relief he desires," the court held that the nonparties could not satisfy that factor, because they "can 'attain relief' by standing in contempt."

## Scope of Review

***Ziccardi v. City of Philadelphia*, 2002 U.S. App. Lexis 8041 (3d Cir. Apr. 30, 2002)**

In *Ziccardi v. City of Philadelphia*, 2002 U.S. App. Lexis 8041 (3d Cir. Apr. 30, 2002), the Third Circuit drew two fine lines. The first, a jurisdictional boundary, is between a district court's decision that a set of facts establishes a violation of a clearly established constitutional right (reviewable under the *Cohen* collateral-order doctrine) and a district court's decision whether pretrial evidence can establish that set of facts (not reviewable under *Cohen*). The second, concerning a defendant's state of mind necessary for a constitutional tort, is the difference between awareness of a "substantial risk" of harm and a "great risk" of harm.

The suit arose from an accident that rendered James Smith a quadriplegic. Smith sued two Philadelphia Fire Department paramedics, alleging that they moved him without supporting his back and neck. After removing the case to federal court, the defendants moved for summary judgment, alleging qualified immunity. The district court found that the evidence was sufficient to show that the paramedics acted with subjective deliberate indifference to Smith's medical needs and denied the motion.

On appeal, the paramedics argued that the Third Circuit could review the trial court's assessment of inferences that could be drawn from the summary-judgment evidence. The Third Circuit disagreed, finding that the scope of its review under *Cohen* was limited. The court explained that in a constitutional-tort case, when the defendant moves for summary judgment based on qualified immunity and the district court denies the motion, the appellate court has jurisdiction to review whether the facts identified by the district court establish a violation of clearly established constitutional rights. But under *Cohen*, the appellate court does not have jurisdiction to review whether the district court correctly identified the set of facts that the summary-judgment evidence can prove. The Third Circuit further held that this limit on the scope of its review applied not only to factual disputes over conduct, but also to those over intent.

The Third Circuit found that it could review whether the trial court applied the correct legal standard to measure the paramedics' state of mind. And while the Third Circuit affirmed the denial of summary judgment, it remanded with instructions on what the plaintiff would have to prove on the state-of-mind issue. In a case where defendants must make a split-second decision, or need to act in a matter of hours or minutes, the plaintiff must prove that the defendants consciously disregarded, not just a "substantial risk," but a "great risk that serious harm would result" from their actions.

## Sham-Affidavit Doctrine

***Shelcusky v. Garjulio*, 2002 N.J. LEXIS 581 (May 22, 2002)**

In *Shelcusky v. Garjulio*, 2002 N.J. LEXIS 581 (May 22, 2002), the New Jersey Supreme Court had its first opportunity

to consider the sham-affidavit doctrine, which has been adopted in one form or another by a majority of state and federal jurisdictions. The sham-affidavit doctrine permits a trial court to disregard an affidavit in opposition to a summary-judgment motion when the affidavit contradicts the affiant's prior deposition testimony. The New Jersey Supreme Court adopted the doctrine, but restricted it to cases where there is no reasonable explanation for the contradictory testimony. The court identified three circumstances under which the doctrine should not be applied:

- (1) when the apparent contradiction is reasonably explained;
- (2) when the affidavit does not patently and sharply contradict the earlier deposition testimony; or
- (3) where confusion or lack of clarity existed at the time of deposition questioning, and the affidavit reasonably clarifies the affiant's earlier statement.

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## Fifth Circuit

### Removal

#### ***Bosky v. Kroger Texas, LP*, 288 F.3d 208 (5th Cir. 2002)**

When does the 30 days to remove a case from state court to federal court begin to run? In *Bosky v. Kroger Texas, LP*, 288 F.3d 208 (5th Cir. 2002), the court answered this question, distinguishing removal based on the initial pleading from removal based on a later pleading.

Removal based on the initial pleading is governed by the first paragraph of 28 U.S.C. §1446(b). Under this paragraph, the initial pleading must "set forth" a

claim that is removable. The 30 days to remove begins running "from the defendant's receipt of the initial pleading only when that pleading affirmatively reveals on its face that the plaintiff is seeking damages in excess of the minimal jurisdictional amount." 288 F.3d at 210.

Removal based on a later pleading is governed by a different standard, one requiring "a greater level of certainty" that the case is removable. Such removals are governed by the second paragraph of 28 U.S.C. §1446(b), which governs cases that are not removable based on the initial pleading. Under that paragraph, the 30-day removal period starts when the defendant first receives a pleading or other paper "from which it may first be ascertained that the case is... removable." The Fifth Circuit identified "ascertained" as the key word in this provision, holding that the information supporting removal in a later pleading or paper must be "unequivocally clear and certain" to start the 30-day removal period. In so holding, the court followed the Tenth Circuit's lead in *DeBry v. Transamerica Corp.*, 601 F.2d 480 (10th Cir. 1979).

The Fifth Circuit noted that its reading of 28 U.S.C. §1446(b) would ease the burden on federal courts by reducing the number of "protective" removals (removals taken in ambiguous cases to avoid the risk of losing the right to removal by lapse of time).

### Premature Appeal

#### ***Swopes v. Columbian Chemicals Co.*, 281 F.3d 185 (5th Cir. 2002)**

In *Swopes v. Columbian Chemicals Co.*, 281 F.3d 185 (5th Cir. 2002), the court held that it had appellate jurisdiction to review a partial summary judgment, even though the notice of appeal was filed before the district court designated the judgment as final under F.R.C.P. 54(b).

In so holding, the court followed its own precedent in *St. Paul Mercury Insurance Co. v. Fair Grounds Corp.*, 123 F.3d 336 (5th Cir. 1997), holding that "a premature notice of appeal is effective if Rule 54(b) certification is subsequently granted."

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## Seventh Circuit

### Arbitration

#### ***McCaskill v. SCI Management Corporation, Inc.*, 285 F.3d 623 (7th Cir. 2002)**

The Seventh Circuit has recently ruled that a mandatory arbitration clause requiring each party to pay its own attorneys' fees on a Title VII claim is unenforceable.

In *McCaskill v. SCI Management Corporation, Inc.*, 285 F.3d 623 (7th Cir. 2002), plaintiff McCaskill sued her employer, SCI, alleging that she was terminated in violation of Title VII. SCI moved to dismiss her complaint and to compel arbitration. The arbitration agreement required each party to (1) pay its own costs and attorneys' fees regardless of the outcome, and (2) pay one half of the costs of arbitration. McCaskill argued that the agreement was unenforceable, because it prevented the litigant from fully vindicating her Title VII rights, which include attorneys' fees if successful.

The court agreed. Judge Rovner reasoned that claims under federal statutes are appropriate for arbitration only as long as the litigant may effectively vindicate her statutory cause of action in the arbitral forum. Title VII provides that attorneys' fees *may* be awarded to a prevailing plaintiff, and the Seventh Circuit has previously ruled that a prevailing

party *should* recover fees absent special circumstances rendering such an award unjust. The court noted the importance of such a rule in Title VII cases, as a plaintiff in a civil rights suit often acts not only for himself, but also as a “private attorney general,” and attorneys must be compensated in order to encourage representation in such actions. As a result, an arbitration agreement that requires each party to pay its own attorneys’ fees denies a Title VII plaintiff a remedy that is “essential to fulfill the remedial and deterrent functions” of the statute, and is therefore unenforceable. The court did not reach plaintiff’s arguments regarding the second prong of the agreement, requiring parties to split the cost of arbitration.

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## Eighth Circuit

### Remittitur

#### ***Schaefer v. Spider Staging Corp.*, No. 01-1008 (8th Cir. Jan. 7, 2002)**

In *Schaefer v. Spider Staging Corp.*, No. 01-1008 (8th Cir. Jan. 7, 2002), a diversity case, the court held that federal law governs the district court’s decision to grant a remittitur.

Schaefer sued Spider Staging for damages caused by a scaffolding collapse. The jury returned a verdict for \$1,750,000, but the district court ordered remittitur to \$200,000. In so ruling, the district court considered all trial evidence. On appeal, Schaefer argued that the district court should have followed state law in deciding the motion for remittitur, and thus should have reviewed the evidence in a light most favorable to the jury verdict. The Eighth Circuit flatly rejected that argument and affirmed the remittitur. Although state law must be followed

when reviewing jury verdicts in diversity cases, remittitur is a procedural matter governed by federal law.

### Appellate Jurisdiction

#### ***Lukowski v. Immigration & Naturalization Service*, No. 01-1858 (8th Cir. Jan. 18, 2002)**

In *Lukowski v. Immigration & Naturalization Service*, No. 01-1858 (8th Cir. Jan. 18, 2002), the court held that it did not have jurisdiction to review a decision by the Board of Immigration Appeals terminating an alien’s residency status because he had committed a criminal offense.

Wieslaw Lukowski, a permanent resident alien, pled guilty to two felony theft charges. The INS obtained a removal order and terminated his residence status. The Board of Immigration Appeals summarily affirmed, and Lukowski petitioned the Eighth Circuit for review.

The Eighth Circuit denied Lukowski’s request, holding that it had no jurisdiction to review the BIA’s removal order. The court based its ruling on a 1996 amendment to the Immigration and Nationality Act, stating that “no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense.” 8 U.S.C. §1252(a)(2)(C). Other circuits had concluded that, despite the statute’s wording, they have jurisdiction to review a removal order to determine whether the alien has in fact been convicted of the criminal offense or offenses specified in the statute. The Eighth Circuit declined to join those courts. Strictly construing the statute, the Eighth Circuit concluded that its statutory jurisdiction to consider the BIA’s removal order was at an end.

### Notice of Appeal

#### ***Parkhill v. Minnesota Life Ins. Co.*, No. 00-3337 (8th Cir. Apr. 18, 2002)**

Plaintiff brought a class action against an insurance company, asserting various claims. The district court dismissed some claims, denied a motion for class certification, and—a year later—granted summary judgment dismissing all remaining claims. Plaintiff appealed the district court’s summary judgment, but did not mention the denial of class certification or any other prior orders in his notice of appeal. Because of that omission, the Eighth Circuit held that it could not review the district court’s denial of class certification. *Parkhill v. Minnesota Life Ins. Co.*, No. 00-3337 (8th Cir. Apr. 18, 2002).

F.R.A.P. 3(c)(1)(B) provides that a notice of appeal must “designate the judgment, order, or part thereof being appealed.” Plaintiff’s notice of appeal made no mention of the district court’s order, entered a year before the summary-judgment order, denying class certification. Even though notices of appeal are to be liberally construed, the court held that an appeal from one order does not “inherently imply” an intent to appeal other orders entered in the action. The court distinguished this appeal from a case where a notice of appeal specifies the final judgment in a case, which should be understood to bring up for review all previous rulings.

### Mandate

#### ***In re MidAmerican Energy Co.*, No. 01-3886 (8th Cir. Apr. 3, 2002)**

On remand from the court of appeals, a district court may not allow a plaintiff to amend a complaint to allege claims inconsistent with the appellate court’s mandate. *In re MidAmerican Energy Co.*, No. 01-3886 (8th Cir. Apr. 3, 2002).

In this case, Nebraska Public Power District (NPPD) sued MidAmerican Energy Co. (MEC) for declaratory judgment whether MEC was required under a contract to make nonrefundable payments to NPPD. The district court ruled in NPPD's favor, but on appeal the Eighth Circuit reversed, and remanded so that the district court could determine whether MEC could recover payments already made to NPPD. On remand, NPPD sought leave to file a second amended complaint, raising four new causes of action. The district court allowed the amendment.

MEC then petitioned the Eighth Circuit for a writ of mandamus to compel compliance with the original mandate. The Eighth Circuit granted the writ. The court reasoned that the four new causes of action involved exactly the same claim that was before the Eighth Circuit in the first appeal. Under law of the case, those claims had been explicitly and implicitly resolved in MEC's favor. Noting that an appellate mandate encompasses "everything decided, either expressly or by necessary implication," the court ruled that it had clearly determined that MEC had no obligation under the contract or any other separate agreement to make current, nonrefundable payments.

Equally important, the court held that claims not raised in the initial appeal brief were waived. Noting that at no time during the pendency of this litigation in either the district court or in the first appeal did NPPD raise alternative allegations to support its claim for the payments. "As a result, NPPD is now foreclosed from raising in a second amended complaint alternate theories of liability...."

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## Unpublished Opinions

### *Schmier v. Ninth Circuit*, 279 F.3d 817 (9th Cir. 2001)

The continuing debate over unpublished opinions (see *Certworthy*, Winter 2001, p. 24) took a new turn, but came no closer to resolution, in February 2002 when the Ninth Circuit itself became a defendant in a lawsuit. In *Schmier v. Ninth Circuit*, 279 F.3d 817 (9th Cir. 2001), the plaintiff, an employment attorney practicing in the California federal courts, alleged that Circuit Rule 36-3 and other rules barring citation to unpublished opinions violate his constitutional rights, because these rules have "sever[ed] the mechanism by which the public can monitor the application of law."

The Ninth Circuit, represented by the Department of Justice, moved to dismiss, and the district court granted the motion with prejudice. A panel of judges sitting by designation after all Ninth Circuit judges recused themselves agreed that Schmier had failed to allege a cognizable injury, as he admitted that he had never been sanctioned for citing an unpublished opinion. The court concluded that he had not alleged an injury or even an imminent injury to himself or to a client and, thus, had no standing, as "[t]he federal courts do not have the constitutional authority to adjudicate the metaphysical injuries that Schmier has allegedly suffered."

Far from ending this debate, this opinion suggests several options for the next round of argument. The court first noted that, without sanctions or harm from an inability to rely on an unpublished opinion in actual litigation, "Schmier will have to press his concerns about unpublished opinions to either a committee of

the Ninth Circuit or to the Congress," but then concluded that, "Given the wide range of interest shown in the debate about unpublished opinions, and assuming that parties with personal stakes in live controversies will properly raise the issue with the federal courts, we think it is only a matter of time before the theoretical questions raised by Schmier's complaint are all properly presented and resolved."

## Notice of Appeal

### *Nguyen v. Southwest Leasing and Rental, Inc.*, 282 F.3d 1061 (9th Cir. 2002)

That most intimidating of deadlines—the deadline for filing a notice of appeal—came under review in *Nguyen v. Southwest Leasing and Rental, Inc.*, 282 F.3d 1061 (9th Cir. 2002), a case construing the 1991 amendment to Federal Rule of Appellate Procedure 4(a)(6). Under that rule, a district court may reopen the time for filing a notice of appeal if it finds, *inter alia*, that the motion to reopen was filed either within 180 days after entry of judgment or within seven days after the movant receives notice of that entry.

In this personal-injury action, the court entered a default judgment on April 27, 2002, but it was undisputed that plaintiff did not receive a copy. Two and one-half months later, on July 13, plaintiff's counsel was advised by a courtroom clerk that judgment had been entered, but that she could not send him a copy. Although the clerk could access the document electronically, no written copy of the judgment was placed in the court files until late August. Meanwhile, a service employed by plaintiff's counsel faxed him a copy on July 28, and within seven days he moved to reopen the time for filing a notice of appeal. The motion

was granted and plaintiff filed his notice of appeal within statutorily provided time. One of the defendants appealed, arguing that counsel's conversation with the court clerk on July 13 was sufficient "notice," and plaintiff's failure to file the motion within seven days thereafter rendered the motion and the subsequent notice of appeal untimely.

Asked to decide if oral notice of entry of judgment can ever constitute "notice" within the meaning of Rule 4(a)(6), the court readily acknowledged that the majority of circuits require written notice, and for many good reasons. The court then stated that there were also good reasons for *not* limiting the rule to pure written communications, including statutory construction of the rule, which does not require written notice, and instances in which counsel admits actual notice and is apprised of all facts necessary to take action. The court then ruled that it would not confine the concept of notice under Rule 4(a)(6) to written communications and held that it would accept nonwritten notice as sufficient where it rises to the "functional equivalent of written notice," meaning that it "must be specific, reliable, and unequivocal."

However, under the facts before it, the court concluded that the clerk's comment to counsel on July 13, when no written evidence of entry of judgment could be found in the court files, did not meet this standard. The court found that the district court did not abuse its discretion in reopening the time in which a notice of appeal could be filed based upon the July 28 written notice, and found the appeal to be timely.

### Supplemental Briefs

***Warren v. Commissioner of Internal Revenue*, 282 F.3d 1119 (9th Cir. 2002)**

A lively disagreement over a reviewing

court's role when it spots an issue that the parties did not address appears in the opinion and dissent in *Warren v. Commissioner of Internal Revenue*, 282 F.3d 1119 (9th Cir. 2002), in which the court *sua sponte* appointed an *amicus curiae* and requested that he and the parties submit supplemental briefs on the constitutionality of a Revenue Code tax exemption. Neither party had raised the constitutional question, and both had advised the court they did not wish to do so.

The dissent argued that it was not only unnecessary, but "completely... improper" for the court to decide constitutional issues that had never been raised, and cited Justice Felix Frankfurter and other United States Supreme Court precedent for the position that "If there is one doctrine more firmly rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality... unless such adjudication is unavoidable."

The majority, however, insisted that "not even the ghost of Justice Frankfurter" could help their dissenting colleague avoid the fact that the issue was before the court even though the parties had not raised it, for the reason that "if the exemption,... is unconstitutional, the statute on which both parties rely would likely have to be invalidated." And it cited ample authority for its position that "When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law...." Citing United States Supreme Court precedent that a court of appeals does not abuse its discretion either by questioning the validity of a law when the parties have failed to raise the issue or by ap-

pointing *amicus curiae* counsel to argue a position not previously advanced, the majority remarked that "What is unprecedented is that a judge objects so vehemently and wrong-headedly to his colleague's request for supplemental briefing."

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### D.C. Circuit

#### Interlocutory Review

***In re: Lorazepam and Clorazepate Antitrust Litigation*, 289 F.3d 98 (D.C. Cir. 2002)**

Rule 26(f) of the Federal Rules of Civil Procedure allows a court of appeals, in its discretion, to permit an appeal from a district-court order granting or denying class certification. In a recent case, the D.C. Circuit established the criteria for deciding whether to allow a Rule 23(f) appeal in a particular case. *In re: Lorazepam and Clorazepate Antitrust Litigation*, 289 F.3d 98 (D.C. Cir. 2002).

The case arose from antitrust allegations against pharmaceutical manufacturers, including Mylan Laboratories, that they controlled the supply of ingredients for two generic drugs, lorazepam and clorazepate, thus controlling the price of the drugs. Two prior suits making these allegations had been brought by the FTC and several states attorneys general. Those two suits were consolidated and ultimately settled. Meanwhile, two class actions, making the same allegations, were brought against Mylan and another defendant by purchasers of the two generic drugs. The class actions were consolidated, and the plaintiffs moved for class certification. Mylan filed a motion to dismiss under Rule 12(b)(6), arguing that the settlement of the prior suits pre-

cluded the class actions. Mylan also opposed class certification, arguing that the class included indirect purchasers, who had no antitrust standing. The district court certified a class of direct purchasers and denied Mylan's motion to dismiss. Mylan appealed under Rule 23(f).

Mylan's appeal presented for the first time to the D.C. Circuit the question of when interlocutory review of a class-certification decision is appropriate under Rule 23(f). After studying the advisory committee's notes accompanying the rule, and surveying prior decisions by other courts of appeals on this question, the D.C. Circuit stated that review will ordinarily be appropriate in three circumstances:

- (1) when the district court's class-certification decision will likely end the litigation (or be its "death knell") for reasons independent of the merits of the underlying claims, and the decision is "questionable, taking into account the district court's discretion over class certification;"
- (2) when the certification decision presents an unsettled and fundamental issue of law relating to class actions, important both to the specific litigation and generally, that is likely to evade end-of-case review; or
- (3) when the district court's class-certification decision is manifestly erroneous.

The court cautioned that these standards "represent guidance, not a rigid test." The court did not wish to strait-jacket itself from reviewing a later case under special circumstances that the advisory committee and the court could not foresee. Nonetheless, because of the appellate courts' general reluctance to take interlocutory appeals, "Rule 23(f)

review should be granted rarely where the case does not fall within one of these three categories."

Applying these newly adopted standards, the court declined Mylan's interlocutory appeal. Mylan's arguments in support of its Rule 12(b)(6) motion to dismiss (the antitrust-standing issue) were unrelated to class certification. And Mylan's only challenge to class certification fell outside the court's new standards. The court rejected Mylan's attempt to recharacterize its argument for dismissal (the standing argument) as an argument against class certification. While Mylan's position, if accepted, would end the litigation, its dispositive character did not make it reviewable under Rule 23(f).

The court warned against reviewing such issues because the effect would be to "expand Rule 23(f) interlocutory review to include review of any question raised in a motion to dismiss that may potentially dispose of a lawsuit as to the class as a whole. This result would inappropriately mix the issue of class certification with the merits of a case," which are not reviewable under Rule 23(f).

### Remand

#### ***Republic of Venezuela v. Philip Morris, Inc.*, 287 F.3d 192 (D.C. Cir. 2002)**

In *Republic of Venezuela v. Philip Morris, Inc.*, 287 F.3d 192 (D.C. Cir. 2002), the court rebuffed an effort by some tobacco companies to gain appellate review of a district court's order remanding four cases that had been removed from state court to federal court.

The case involved six lawsuits against tobacco companies filed in state court by foreign countries. The tobacco companies removed the cases to federal court. The district court remanded four lawsuits to state court for lack of federal subject matter jurisdiction, and appeared poised

to remand the remaining two cases. The tobacco companies appealed the district court's remand orders to the D.C. Circuit and sought a writ of mandamus to prevent the district court from ordering the remand of the remaining two lawsuits still pending before it.

The D.C. Circuit held that it had no appellate jurisdiction to review the district court's remand orders. Under 28 U.S.C. §1447(d), a district court's remand order "is not reviewable on appeal or otherwise." The tobacco companies argued that an exception to §1447(d) exists when the remand order raises a constitutional question, but the court rejected the argument. As long as the district court orders a case remanded for want of subject matter jurisdiction, Congress has insulated the decision to remand from review "whether or not that order might be deemed erroneous by an appellate court."

For similar reasons, the court denied the tobacco companies' petition for writ of mandamus. The court found that mandamus was not available under the circumstances of the case, because two prerequisites for the writ were lacking: no other adequate means of redress, and necessity of a writ to remedy a clear error or abuse of discretion. The court perceived that the tobacco companies' real complaint was not lack of adequate means to vindicate a legal right, but rather absence of the legal right itself—that is, no right to appellate review of a remand order. The court found that the tobacco companies did not demonstrate that remand constituted a clear error or abuse of discretion by the district court.

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## Notice of Appeal

### *Santoro v. Principi*, 274 F.3d 1366 (Fed. Cir. 2001)

The Federal Circuit reversed the dismissal of a veteran's appeal, finding that an incorrect zip code, which caused misdelivery of the veteran's appeal notice, did not equal failure to properly address the notice as required by statute. *Santoro v. Principi*, 274 F.3d 1366 (Fed. Cir. 2001).

Santoro was a veteran who applied for service-related benefits. The Board of Veteran Appeals denied his claim, and on May 1, 1998, denied his motion for reconsideration. To perfect his appeal of the Board's adverse decision, Santoro was required by statute to postmark his notice of appeal within 120 days from the date of mailing of the Board's decision, *i.e.*, by August 29, 1998. Accordingly, in July 1998, Mr. Santoro sent a notice of appeal to the Court of Appeals for Veterans Claims by certified mail, return-receipt requested. He addressed the notice properly, except that he used the wrong zip code. The Post Office erroneously delivered the notice of appeal to the Office of the General Counsel, Department of Veterans Affairs on July 27, 1998, thirty-three days before the 120-day filing deadline. The VA General Counsel's office signed for and accepted the notice of appeal.

Santoro learned in December 1998 that the Court of Appeals for Veterans Claims had no record of his appeal notice. He immediately resubmitted his notice of appeal, including a cover letter explaining the prior timely mailing of the notice, and a photocopy of the corresponding return-receipt-request card signed as received by the VA General Counsel's office on July 27, 1998. The Court of

Appeals for Veterans Claims dismissed Santoro's appeal for lack of jurisdiction.

The Federal Circuit reversed. The operative statute provides that a notice of appeal filed by mail is deemed to be received on the date of the United States Postal Service postmark stamped on the mailing envelope, if the notice is properly addressed. 38 U.S.C. §7266(a)(B). Was Santoro's notice of appeal "properly addressed" under the statute, even though the zip code was wrong? The Federal Circuit answered "yes." According to the court, "properly addressed" does not mean "without flaw." Though Santoro made a mistake that caused the Post Office to misdeliver the appeal notice, misdelivery alone should not be decisive, because even perfectly addressed mail is sometimes delivered to the wrong address. The court decided that "properly addressed" simply means an address enables delivery to the intended destination. Thus, the incorrect zip code was an inconsequential error that did not prevent Santoro's notice of appeal from being properly addressed—or from being considered timely.

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## U.S. Supreme Court

### Appellate Jurisdiction

*Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*, No. 01-408, 2002 U.S. LEXIS 4022 (June 3, 2002) In *Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*, No. 01-408, 2002 U.S. LEXIS 4022 (June 3, 2002), the Supreme Court considered the scope of general federal question "arising under" jurisdiction, and applied it to the exclusive patent-based jurisdiction of the U.S. Court of Appeals for the Federal Circuit.

The Court held that, just as the federal question must appear in the plaintiff's "well-pleaded Complaint," and not an answer, so also the patent-based nature of an appeal must appear in the complaint, not an answer or counterclaim, for the Federal Circuit to have jurisdiction. The effect of this ruling was to strictly construe and, thus, narrow the Federal Circuit's jurisdiction.

The jurisdiction of the Federal Circuit, set forth in 28 U.S.C. §1295, is limited to matters that have arisen in U.S. District Courts under 28 U.S.C. §1338, which is based on claims "arising under" an Act of Congress relating to patents. In *Holmes*, the complaint, filed in the District of Kansas, did not arise under any patent-related statute, but rather asserted declaratory and injunctive relief based on a trade-dress claim. The defendant's compulsory counterclaim alleged patent infringement. When the District of Kansas ruled in plaintiff's favor, the defendant appealed to the Federal Circuit, rather than the Tenth Circuit, basing its jurisdictional claim on the patent counterclaim. The venue for the appeal was crucial because the Tenth Circuit and the Federal Circuit had opposite precedent on the underlying question.

The Supreme Court vacated the Federal Circuit decision and ordered the case transferred to the Tenth Circuit for further proceedings. Addressing general federal question jurisdiction, Justice Scalia noted that well-settled caselaw required the federal question to be based on the "well-pleaded Complaint," not a defendant's answer. By the same token, federal jurisdiction cannot be based on counterclaims asserted by a defendant, an issue that the Court had not previously decided. The same standard applies in determining the Federal Circuit's jurisdiction, because section 1295 explicitly

incorporates the language of section 1338, granting federal question jurisdiction to matters “arising under” federal patent statutes. Scalia rejected the defendant’s policy argument that the Federal Circuit was intended to foster uniform interpretation of patent questions. The Court’s task, said Scalia, was not to determine what would further Congress’s goal of uniformity, but rather to determine what the statute must be fairly understood to mean. The result may be that appeals of rulings on patent counterclaims are outside the Federal Circuit’s reach, even though the identical issue would be subject to the Federal Circuit’s exclusive jurisdiction if based on plaintiff’s original claim.

### Plain Error

*United States v. Vonn*, 122 S. Ct.

1043 (2002), decided March 4, 2002

Rule 52 of the Federal Rules of Criminal Procedure describes how courts are to treat errors. Courts are to disregard “harmless error,” that is, error that does not affect substantial rights. But courts are to take notice of “plain error,” when the error affects substantial rights. The government has the burden of showing that an error is harmless, while the defendant has the burden of showing that an error is plain. In *United States v. Vonn*, 122 S. Ct. 1043 (2002), decided March 4, 2002, the Court addressed these standards for challenging errors, in the context of sentencing colloquies under Fed. R. Crim. P. 11. Rule 11, which governs the defendant’s pleas, echoes Rule 52 in requiring harmless error to be disregarded, but does not address how to handle plain error in the plea procedure.

The defendant, Vonn, pleaded guilty to several charges and was sentenced without being specifically advised of his right to counsel at trial, but failed to

raise any challenge to the sufficiency of the sentencing colloquy until appeal. The court of appeals vacated the sentencing based on the error, holding that the government failed to meet its burden to show the error was harmless. The Supreme Court reversed, however, holding that where the asserted error is not raised at the sentencing, it is subject to the plain-error standard, for which the defendant bears the burden of proof. Although Rule 11 does not refer to the plain-error standard, it still applies in sentencing hearings. Thus, Vonn, not the government, had the burden of proof on whether the error affected his substantial rights. The Court also held that in reviewing the assertion of error, it was proper to consider the entire record in the case, rather than merely the record for the sentencing hearing. This was important, because Vonn had been advised of his right to counsel at trial several times before the sentencing hearing.

### Disqualification

*Sao Paulo State of the Federative*

*Republic of Brazil v. American*

*Tobacco Co., Inc.*, 122 S. Ct. 1290

(2002), decided April 1, 2002

Consider the potential for judge-shopping that would ensue if a party were able to disqualify a judge merely because, years before being elevated to the bench, the judge had been tangentially involved in briefing an issue now being litigated before him or her. The Supreme Court rejected such an effort in *Sao Paulo State of the Federative Republic of Brazil v. American Tobacco Co., Inc.*, 122 S. Ct. 1290 (2002), decided April 1, 2002. In this *per curiam* opinion, the Court summarily granted certiorari and reversed the Fifth Circuit, holding that the District Judge assigned to this tobacco litigation should not have been disqualified from hearing

the case. The grounds asserted were that nine years before the Sao Paulo case was filed, the future judge had his name attached to an amicus brief filed by the Louisiana Trial Lawyers Association (LTLA) in an individual claim for tobacco-related injuries involving some of the same defendants. His name had mistakenly appeared solely by virtue of his status as Executive Director of the LTLA. He had neither prepared the brief, participated in the amicus assignment, nor even been aware that his name was on the brief. Thus, he had not actually taken a position on the issues briefed.

The standard for disqualifying judges, set forth in 28 U.S.C. §455 and *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988), requires recusal if a reasonable person, knowing all the circumstances, would expect the judge to have actual knowledge of his or her interest or bias. The Court in *Sao Paulo* easily found that the circumstances in this case would not cause a reasonable person to conclude that the judge had actual bias, and reversed the Fifth Circuit. The Court noted the concerns of judge shopping expressed by members of the Fifth Circuit.

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*First, you have to go through hell  
to know exactly what you're  
writing about, inside and out.  
Then, you have to leave most  
of it out....*

—TOM SHRODER