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FEDERAL PRACTICE AND PROCEDURE

OVERVIEW

The term of the Tenth Circuit Court of Appeals covered by this survey has resulted in a number of interesting decisions. This overview will endeavor to emphasize certain of the more significant cases and discuss others only briefly.

I. FEDERAL-STATE RELATIONS

A. *Concurrent Jurisdiction—The* Pullman *Doctrine*

The *Pullman* doctrine,[1] more properly termed the doctrine of abstention, was applied in *Western Food Plan, Inc. v. MacFarlane*[2] to preclude a collateral attack in the federal courts on proceedings then pending in the Colorado courts. The action filed in the federal district court,[3] as described in Western's first amended complaint, was substantially identical to the counterclaim in intervention urged by Western in the state proceeding.[4] Both pleadings alleged, *inter alia*, that rule 102, Colorado Rules of Civil Procedure, was in procedure and substance in conflict with the Colorado Constitution as well as the United States Constitution.

The Tenth Circuit agreed with the decision of the district court that federal abstention, in light of the circumstances, should be practiced. Cited in support of this conclusion was *Railroad Commission v. Pullman Co.*,[5] from which the following quotation was abstracted:

> In this situation a federal court of equity is asked to decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication. [citations omitted] The reign of law is hardly promoted if an unnecessary ruling of a federal court is thus supplanted by a controlling decision of a state court.[6]

Viewing the case at hand, the obvious potential existed that the state proceeding would dispose of the controversy on state constitutional grounds, or otherwise. Under such circumstances, the federal courts should not attempt to "forecast" the outcome of the state litigation, but should abstain until that litigation culminated.[7]

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1. Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941).
2. 588 F.2d 778 (10th Cir. 1978).
3. The action was filed pursuant to 42 U.S.C. § 1983 (1976).
4. In the state proceeding, Western intervened in an action filed by the Attorney General pursuant to COLO. REV. STAT. § 6-1-101 to -114 (1973 and Supp. 1978). Western counterclaimed and alleged, *inter alia*, that a writ of attachment, levied and executed pursuant to Colorado Rule of Civil Procedure 102 upon a corporation controlled by Western, was void.
5. 312 U.S. 496 (1941).
6. *Id.* at 500.
7. 588 F.2d at 780. The principle of abstention should be distinguished from the *Siler* doctrine, Siler v. Louisville & Nashville R.R., 213 U.S. 175 (1909), which calls for a federal court to treat an issue by reference to state law when doing so may avoid the need to decide a federal constitutional question. 1 MOORE'S MANUAL § 207[1], at 2-25 (1978).

However, because the district court had *dismissed* the action after realizing the need for abstention, the Tenth Circuit remanded with directions to reinstate the action and hold it in abeyance pending the completion of state court proceedings.[8]

B. *State Proceeding as an Element of a Federal Crime: The State's Characterization Controls*

One of the more controversial opinions rendered by the Tenth Circuit during this survey period was *United States v. Stober*.[9] The issue in *Stober* was whether the defendant had been previously "convicted" as that term is used in section 922(h) of the statutory codification of the Omnibus Crime Control and Safe Streets Act, under which he was charged.[10]

Prior to his indictment for violation of this federal act, Stober had entered a plea of guilty in a state prosecution in order to avail himself of the benefits of the Oklahoma Deferred Judgment Procedure.[11] The consequences of Stober's participation, and specifically his entry of a guilty plea, in the Deferred Judgment Procedure comprised the issue considered by the Tenth Circuit. The government asserted that under federal law the consequences of Stober's guilty plea fell within the ambit of the term "convicted;" hence the issue more narrowly defined was whether state or federal law should determine whether Stober had been convicted.[12]

On the basis of expert testimony, decisions of the Oklahoma Court of Criminal Appeals,[13] and the statutory language itself, the Tenth Circuit decided that no conviction results under the Deferred Judgment Procedure.[14] In view of this conclusion, the court ruled that the evaluation and characterization by the state of the Deferred Judgment Procedure should be determinative of the consequences of participation in the system for purposes of the federal act.[15] Accordingly, the court found that Stober had not been previously "convicted" within the contemplation of the federal act; never having been convicted by the court which tried him, he could not be "convicted" by

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8. 588 F.2d at 781. *See Pullman*, 312 U.S. 496, 501-02 (1941).

9. No. 77-1854 (10th Cir. Aug. 3, 1979) (Doyle, J., dissenting). This opinion was reissued after a rehearing and affirmed with minor alteration the previous decision issued December 1, 1978. Judge Doyle rewrote his dissenting opinion which, although rendered somewhat more persuasive, advocated essentially the same legal conclusions as his previous dissent. Judge McWilliams concurred in the dissent.

10. 18 U.S.C. § 922(h) (1976). That section provides, in pertinent part: "It shall be unlawful for any person . . . who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."

11. OKLA. STAT. ANN. tit. 22, § 991c (West Supp. 1979).

12. According to § 991c of the Oklahoma statute, *id.*, the accused must enter a guilty plea, but the court does not enter any judgment based thereon unless the mandatory two year probationary period provided in the act is violated. Upon successful completion of the probationary period, the accused is discharged without a court judgment of guilt, and the plea of guilty is expunged from the accused's record.

13. Hefner v. State, 542 P.2d 527 (Okla. Crim. 1975); Belle v. State, 516 P.2d 551 (Okla. Crim. 1975).

14. No. 77-1854 at 3-4.

15. *Id.* at 4.

the federal courts.[16]

Judge Doyle's dissent voiced strong opposition to the majority's reasoning and result. Judge Doyle asserted that *Braswell v. United States*,[17] which was by his reading a case closely on point in principle at least, had reached a contrary conclusion which should have been binding upon the majority under principles of *stare decisis*. In *Braswell*, it was contended that the defendant had been "convicted" of a crime of violence for purposes of the Federal Firearms Act[18] as a result of having taken advantage of the Texas rehabilitation statutes. These statutes allowed the presiding judge to enter an order suspending sentence; however, no final, appealable order resulted from that action.[19] In referring to the Firearms Act, the Court in *Braswell* stated:

> It would indeed be a strange construction of the statute which would impose its sanctions on those under indictment and not yet tried but would not include within its prohibition those convicted of crimes of violence and receiving suspended sentences. There is no contention that appellant was not convicted, and the Texas Statutes relied on constantly refer to the "conviction" of the defendant who is to have the benefits of the Act.[20]

The statutory intendment argument embodied in this passage, and paraphrased in Judge Doyle's dissent, is not without superficial appeal. Perhaps more significant is the reference in the quoted passage to Texas law, and the state characterization of the consequences of accepting the benefits of the rehabilitation statutes. The fact that the state of Texas considered one availing oneself of its rehabilitation program to have been nonetheless "convicted" apparently controlled the application of the federal statute, and is therefore consistent with the reasoning of the majority in *Stober*.

Disagreeing with the majority's conclusion, Judge Doyle adverted to the *Braswell* court's disposal of the defendant's claim that because the state characterized the order entered under the Texas procedure as non-appealable, the previous finding that a conviction resulted under the procedure should be legally unsupportable.[21] To Judge Doyle, the *Braswell* court's refusal to allow this characterization to control application of the federal statute indicated the impropriety of the majority result in *Stober*.

This reasoning does not accord adequate significance to the fact that the *Braswell* court, under the federal statute being applied, was constrained to limit its inquiry into state law to a determination of whether a "conviction" occurred under the Texas procedure. Judge Doyle also chose not to acknowledge that the *Braswell* court dealt with a statutory procedure substantially different from that considered in *Stober*. Under the Texas scheme considered in *Braswell*, the accused's plea was accepted and a judgment entered thereon, merely suspending sentence; whereas the Oklahoma statute

16. *Id.* at 8-9.
17. 224 F.2d 706 (10th Cir. 1955).
18. 15 U.S.C. § 902(e) (1976).
19. 224 F.2d at 709 (citing Fitch v. State, 235 S.W.2d 896 (Tex. Crim. App. 1951)).
20. 224 F.2d at 710.
21. *Id.* at 709.

mandates that no judgment enter on the plea, no sentence result, and that the plea itself be expunged eventually from the accused's record.[22]

Judge Doyle next discussed *United States v. Place*,[23] in which the Tenth Circuit rejected the notion that merely because the State of California indulged in an *ex post facto* classification of a crime according to the length of the imprisonment to which the defendant was eventually sentenced, that classification should control application of a federal act concerned with "a crime punishable by imprisonment for a term exceeding one year . . . ."[24] In *Place*, the Tenth Circuit stated that in construing the above-quoted phrase, "the only purpose in looking to State law . . . is to determine the maximum penalty which *could* have been imposed . . ." (emphasis in original).[25] Again, the Tenth Circuit made a controlling inquiry into state law in order to satisfy the elements of the federal act. Moreover, the court stated in *Place* that "the term 'convicted' must be given a nonrestrictive interpretation. Once guilt has been established by plea or verdict, and naught but sentencing remains, a defendant has been 'convicted' within the meaning of that word in question 8.b."[26] The cases cited by Judge Doyle simply do not provide convincing support for his dissent; the unique attributes of the Oklahoma Deferred Judgment Procedure require the conclusion reached by the majority in *Stober* that no "conviction" had been shown, and therefore a necessary element in the statutory crime was lacking.[27]

C. *Service of Process as Substantive Law:* Ragan v. Merchants Transfer & Warehouse Co. *Revisted*

One of the most significant cases discussed in this survey is *Lindsey v. Dayton-Hudson Corp.*[28] As will be explained, the probability looms that the reasoning and holding of the Tenth Circuit in this case must eventually be tested in the United States Supreme Court.

The issue in *Lindsey* was whether, in a diversity action, a state statute of limitations in which the requirement of service of process is given a substantive role or the Federal Rules of Civil Procedure,[29] in which service of process is purely procedural, shall determine whether an action has been timely filed. The distinction was vital in *Lindsey* since application of the state service of process rule would mandate a dismissal of the action for failure to comply with its requirements within the limitations period;[30] however,

22. *See* note 12 *supra*.

23. 561 F.2d 213 (10th Cir. 1977).

24. 18 U.S.C. § 922(h) (1976).

25. 561 F.2d at 215 (quoting McMullen v. United States, 349 F. Supp. 1348 (C.D. Cal. 1972), *aff'd*, 504 F.2d 1108 (9th Cir. 1974)).

26. 561 F.2d at 215.

27. *See also* Huddleston v. United States, 415 U.S. 814 (1974); United States v. Dotson, 555 F.2d 134 (5th Cir. 1977) (per curiam).

28. 592 F.2d 1118 (10th Cir 1979). *See also* Rose v. K.K. Masutoku Toy Factory Co., 597 F.2d 215 (10th Cir. 1979); Walker v. Armco Steel Corp., 592 F.2d 1133 (10th Cir. 1979).

29. Specifically, FED. R. CIV. P. 3 and 4(d)(1).

30. Lindsey's attorney attempted to file the action under the pseudonym "John Doe" on April 22, 1979, the last day permitted by the Oklahoma one-year statute of limitations applicable to the false imprisonment, assault and battery, and slander allegations in the complaint. However, the "John Doe" filing was ruled unacceptable, so the plaintiff's real name was in-

should the Federal Rules of Civil Procedure apply, the action would be deemed to have commenced within the limitations period.[31]

The district court held that the case was governed by *Ragan v. Merchants Transfer & Warehouse Co.*,[32] in which it was decided that because state law created the cause of action under which the suit was brought, the federal court could not give that cause a longer life than it would have had in state court.[33]

Ragan is, however, inconsistent with a subsequent Supreme Court decision, *Hanna v. Plumer*.[34] In *Hanna*, the Court held that federal law should control; the act of Congress in authorizing the promulgation of the Federal Rules of Civil Procedure evidences Congress' intent that these rules should displace any inconsistent state rules in a diversity action.

> For the constitutional provision for a federal court system (augmented by the necessary and proper clause) carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either.[35]

Unfortunately, the court in *Hanna* did not expressly overrule *Ragan*,[36] which, perhaps not coincidentally, was a decision originating in the Tenth Circuit. That fact eventually persuaded the Tenth Circuit that *Ragan*, bothersome as it might be, was still good law and controlling, at least in this circuit. Therefore, the court reaffirmed in *Lindsey* the *Ragan* result, and held that a federal court applying the forum state's substantive law in a diversity case must apply the forum state's procedural law as well if such application would change the outcome of the case. Since the Oklahoma statute construed in *Lindsey* contained as an integral component a limitations period within which the summons must issue, and Lindsey failed to toll the statute by assuring issuance, the summary judgment granted by the trial court was affirmed.[37]

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serted on the complaint, which was then timely filed. The summons was not filed until April 29, 1976. OKLA. STAT. ANN. tit. 12, § 95 (West Supp. 1978) specified, in pertinent part, that:

> An action is deemed commenced . . . as to each defendant, at the date of the summons which is served on him. . . . An attempt to commence an action shall be deemed equivalent to the commencement thereof . . . when the party faithfully, properly and diligently endeavors to procure a service; but such attempt must be followed by the first . . . service of the summons . . . within 60 days.

31. FED. R. CIV. P. 3 provides that "[a] civil action is commenced by filing a complaint with the court."

32. 337 U.S. 530 (1949).

33. *Id.* at 533-34.

34. 380 U.S. 460 (1965) (Harlan, J., concurring).

35. *Id.* at 472. The Court criticized certain of the tests previously used to delineate the boundary between substantive and merely procedural rules, such as the "outcome determinative" test and the "integral relation" test. *Id.* at 466, 475.

36. *But see* Justice Harlan's concurring opinion in *Hanna*, 380 U.S. at 477.

37. The trial court erroneously applied the *Ragan* rule to a cause of action for malicious prosecution which accrued subsequently to the allegations of slander, false imprisonment, and assault and battery. Nonetheless, the Tenth Circuit affirmed the dismissal of the malicious prosecution cause of action on grounds not considered by the trial court. Because counsel for both litigants thoroughly briefed the issue, and the relevant facts had been clearly established, the Tenth Circuit was able to conclude that malice, an essential element of the action, was not present. 592 F.2d at 1124.

Lindsey may well prove to be the pratfall for many an unsuspecting attorney in the Tenth Circuit. Nonetheless, absent some word from above, *Ragan* will remain alive and well in the Tenth Circuit.

II. FEDERAL RULES OF APPELLATE PROCEDURE

A. *Appeal as of Right by a Non-Party*

The Dietrich Corp. v. King Resources Co.[38] deals with the appeal of Ted Fiflis[39] from certain orders of the trial court by which the court purported to determine the extent of Fiflis' compensation for the services he rendered as a consultant to the two firms serving as lead counsel for plaintiffs in the principal litigation.[40] Fiflis attempted, by way of motions, to intervene in the action, to secure a new trial and amendment of judgment, or to obtain relief from judgment, but received adverse rulings on all motions.[41]

Prior to any consideration of the substantive issues raised by the appeal, the Tenth Circuit had to determine a basis upon which Fiflis, a non-party in the principal litigation, could appeal. That basis lay essentially in the peculiar circumstances confronting Fiflis: he was directly affected by the trial court's limitations upon the fee he might receive from the law firms; and the law firms which had previously represented Fiflis' interests did not appeal from the lower court's rulings. Hence, in the view of the Tenth Circuit, Fiflis could properly be characterized as an aggrieved party whose property interest could be protected only by allowing him to intervene after the judgment and take an appeal.[42]

B. *Rule 4(a)—Premature Notice of Appeal*

Century Laminating, Ltd. v. Montgomery[43] demonstrated the Tenth Circuit's

38. 596 F.2d 422 (10th Cir. 1979). This case is connected with the complex and voluminous litigation generated by the financial collapse of King Resources Company. The lawsuits with which this particular case is concerned were consolidated for pre-trial proceedings in the United States District Court for the District of Colorado. *In re* King Resources Co. Sec. Litigation, 342 F. Supp. 1179 (Jud. Pan. Mult. Lit. 1972).

39. Fiflis, at the time of the underlying litigation, was a professor of law at the University of Colorado, hired in connection with this litigation to act as a consultant in the area of his specialty, legal accounting and the liability of accountants. Retained by the two firms serving as lead counsel for plaintiffs, he was to receive compensation for his service in accordance with a contingent fee agreement. However, while Fiflis is and was a member of the Illinois State Bar, he was not, at the time of entering into the agreement, licensed to practice law in Colorado. Holding that by virtue of this fact Fiflis was a non-lawyer in Colorado, the trial court disallowed any contingent fee arrangement as being in violation of Canon 3 of the Code of Professional Responsibility, as adopted by the Supreme Court of Colorado.

40. Fiflis and the law firms agreed upon a $125.00 per hour compensation rate in lieu of the contingent fee, which the trial court rejected as being in excess of the typical hourly rate of payment for Colorado attorneys.

41. 583 F.2d at 424.

42. *Id. See also* 9 MOORE'S FEDERAL PRACTICE ¶ 203.06 (2d ed. 1975). The appeal proved fruitful in this case. The Tenth Circuit decided that Fiflis was a lawyer in Colorado within the contemplation of the canons, specifically D.R. 3-102 (prohibiting lawyer or law firm from sharing legal fees with a non-lawyer). Significant to the court was that the unlicensed attorney not be held out as an independant source of legal advice, and the interposition of a licensed attorney as the party singularly liable to the clients and subject to the discipline of the courts. 583 F.2d at 426 (citing Spanos v. Skouras Theatres Corp., 364 F.2d 161, 169 (2d Cir. 1966)).

43. 595 F.2d 563 (10th Cir. 1979).

hard-line stance on adherence to technical jurisdictional requirements by the court's refusal to hear a prematurely filed appeal. Specifically, according to the court of appeals, when one of the motions enumerated in rule 4(a) is *timely* filed,[44] any judgment previously entered does not become final until the motion is ruled upon; the filing of a notice of appeal during the time the motion is under consideration is completely ineffective, exposing the defectively filed appeal to dismissal for lack of jurisdiction.

In order to reach this result, the court followed the established rule[45] in the Tenth Circuit which provides that a trial court will not be divested automatically of its jurisdiction where the circumstances reveal an untimely filing of the notice of appeal, or the notice refers to a non-appealable order.[46]

III. FEDERAL RULES OF CIVIL PROCEDURE

A. *Rule 22—Interpleader*

Subsequently to interpleading into the registry of the Federal District Court for the District of Utah the surplus from a forced sale of Major Oil Corporation's Roosevelt, Utah refinery, the Internal Revenue Service (IRS) issued a refund check to Major for the amount claimed in Major's 1975 corporate income tax return.[47] The trial court ruled that this refund should also have been interpleaded by the IRS, and accordingly ordered Major to deposit the refund proceeds, along with interest at the rate of six per cent from the date of refund, into the court registry for distribution to creditors. The Tenth Circuit in *United States v. Major Oil Corp.*,[48] was called upon to determine whether the trial court had properly exercised subject-matter jurisdiction over the refund proceeds, and whether the conclusion that this

44. In the instant case, a FED. R. CIV. P. 50(b) motion for judgment notwithstanding the verdict was filed May 19, 1977, and was still under consideration by the district court on June 10, 1977, when the notice of appeal was filed.

A rule 4(a) motion essentially implores the trial court to review its judgment and, depending upon the disposition of the motion, might well vitiate any need for appeal. According to the express language of rule 4(a), the appellant would have had a full 30 days, measured from the date on which the order denying the motion for judgment n.o.v. was entered, within which to file his notice of appeal.

45. *See, e.g.*, Arthur Andersen & Co. v. Finesilver, 546 F.2d 338, 340-41 (10th Cir. 1976), *cert. denied*, 429 U.S. 1096 (1977).

46. 595 F.2d at 567. *See* 9 MOORE'S FEDERAL PRACTICE ¶ 204.12[1], at 950 (2d ed. 1975). The Tenth Circuit decided one other FED. R. APP. P. 4(a) case, United States v. Van Cott, Bagley, Cornwall, McCarthy, 588 F.2d 1327 (10th Cir. 1978). That case held that where an action is brought under the False Claims Act, 31 U.S.C. § 231 (1976), and the United States declines to participate in the suit as is its option under 31 U.S.C. § 232(c) (1976), the time for appeal under rule 4(a) is only thirty days rather than the sixty days appellant would have had if the United States were a party.

47. Scarcely one year prior to the refinery seizure, Major had been released and discharged from all of its debts except as provided in a "Plan for Arrangement." The sale of the refinery by the IRS for delinquent income, excise, and employment taxes resulted in a surplus of $1,950,359.35. Only ten days prior to this sale, in an unlikely coincidence, Major had applied to the IRS for an extension of time within which to file its corporate income tax return for the fiscal year ending September 15, 1975. A three month extension was granted, however, Major managed to file its return, accompanied by a claim for refund stemming from a 1974 loss carryback, a mere two days following sale of the refinery. The refund of $94,287.39 was issued directly to Major.

48. 583 F.2d 1152 (10th Cir. 1978).

refund should become part of the interpleader res was correct.[49]

The jurisdictional challenge hinged on Major's contention that the trial court could not properly exercise control over monies "not *originally* part and parcel of the funds constituting the subject matter of the interpleader action"[50] at its inception. The trial court had reasoned, by analogy to *Segal v. Rochelle*[51] and *Kokoszka v. Belford*,[52] that the source of the refund proceeds was an off-set against taxes which were owed, but delinquent; that the same delinquency had precipitated the seizure and sale of Major's refinery, and had generated the surplus fund initially comprising the interpleader res; and that these events were so interrelated that the refund could not be considered to have been generated by a transaction separate from the sale of Major's property.[53]

The Tenth Circuit expressed its agreement with the trial court's reasoning and held that the tax refund was property to be included in the interpleader res. The court chose further to rest its decision on the disparate equities inherent in the positions of Major and the other claimants to the interpleaded fund. Major had moved for and was granted an order restraining its creditors from initiating or prosecuting claims in either the courts of the State of Utah or the federal district court for the District of Utah.[54] Given the scope of the restraining order granted Major, the inference that Major was attempting to bar its creditor-claimants from access to the refund proceeds in order to preserve those monies for itself was unavoidable. Hence, Major had violated the equitable doctrine of "clean hands" and could not avail itself of the protections provided by the "equitable remedy" of interpleader.[55]

Further, the Tenth Circuit explained that at the time the IRS filed the interpleader action both the refinery sale surplus and the as yet unclaimed refund monies were in its "custody and possession,"[56] and therefore could correctly be characterized as components of the same interpleaded res. Coupled with rule 22,[57] which does not require that the interpleaded fund be deposited with the registry of the court, the above reasoning enabled the Tenth Circuit to dispose of all of Major's contentions on appeal, and affirm the trial court.

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49. *Id.* at 1155.

50. *Id.* at 1157.

51. 382 U.S. 375 (1966) (income tax refund received subsequently to filing of petition in bankruptcy was property to which trustee entitled).

52. 417 U.S. 642, 645-48 (1974) (income tax refund is property which passes to trustee since it is "sufficiently rooted in the prebankruptcy past," Segal v. Rochelle, 382 U.S. at 380, and is neither conceptually related to, nor the equivalent of, future wages for the purpose of giving the bankrupt a new start).

53. 583 F.2d at 1156-57.

54. *Id.* at 1154.

55. *Id.* at 1158.

56. *See* 28 U.S.C. § 1335(a) (1976).

57. The remedy provided by rule 22 is in addition to the remedy of 28 U.S.C. § 1335 which would have required deposit into the registry of the entire sum in controversy.

B. *Rule 23—Class Actions*

Another progeny of the King Resources Company's financial downfall was *Dietrich Corp. v. King Resources Co.*[58] This class action concerned the attempt of certain members of the class, represented by Chester Baird as trustee of the King Resources Company Employee Profit Sharing Retirement Plan (the Baird class), to secure participation in a settlement plan negotiated for the plaintiff class and concurrently preserve claims in addition to and purportedly distinct from those to which the settlement plan pertained. The complaint on behalf of the entire plaintiff class in *King Resources* broadly alleged fraud and deceit in connection with the sale of stock, in violation of federal and state securities laws.[59] The Baird class asserted that its claims were in common with the claims of the consolidated class only to a limited extent, and on that basis maintained that the Baird class be allowed to execute a conditional release preserving the allegedly distinct claims.[60]

The Tenth Circuit held that the Baird class claims were totally encompassed within the claims asserted for the consolidated class; therefore, allowing the Baird class to realize its proportionate share of the settlement distribution in addition to whatever might be recoverable on its "distinct" state claims would be contrary to the terms of the settlement plan. Accordingly, the trial court's allowance of the conditional release was reversed.[61]

C. *Rule 37—Deposition of a Non-Party*

In *First National Bank v. Western Casualty & Surety Co.*,[62] the Tenth Circuit relieved Earl Davis, a national bank examiner employed by the Comptroller of the Currency and not a party in the underlying litigation, from the unpleasant prospect of spending 30 days in jail and paying a fine of $1,000.00 on a civil contempt citation. Davis, a resident of Denver, Colorado, was served with a deposition subpoena from the United States District Court for the District of Colorado.[63] During the course of the deposition, Davis refused to answer certain questions basing his refusal upon instructions from his employer, the Comptroller. When neither Western Casualty, the deposing party, nor Davis would compromise on the issue, the deposition was adjourned prior to termination.

Upon Western Casualty's motion, an order issued from the Federal District Court for the District of Wyoming directing the Comptroller or his representative to appear and show cause why his office "should not authorize its personnel to appear at depositions to be scheduled . . . and give all relevant

58. 583 F.2d 1143 (10th Cir. 1978).

59. *Id.* at 1144-45. King Resources Company was undergoing financial reorganization pursuant to Chapter X of the Bankruptcy Act, 11 U.S.C. §§ 501-676 (1976).

60. *Id.* at 1145.

61. *Id.* at 1149. The Baird class did not protest the settlement plan and "opt out" of the class; had it done so, the court would have been required to protect its claim in accordance with 11 U.S.C. § 616(7) (1976). *Id.*

62. 598 F.2d 1203 (10th Cir. 1979).

63. The action was brought in the United States District Court for the District of Wyoming. Apparently, counsel for Western Casualty caused the subpoena to issue pursuant to FED. R. CIV. P. 37(a)(1).

testimony . . . ." Davis was also ordered to appear and similarly show cause concerning his refusal to respond to any and all propounded questions.[64] The Comptroller and Davis made a special appearance through counsel in an attempt to contest the court's jurisdiction; however, their objections were overruled. Thereafter, an "Order Compelling Discovery" was directed solely at Davis, who was to appear before the court in Wyoming to conclude his deposition.[65] Davis failed to appear in the court, and was held in contempt.

The Tenth Circuit, in its deliverance of Davis, determined that the Wyoming court did not have jurisdiction over Davis, and reversed the contempt order and commitment. Apparently, the district court had been laboring under the misapprehension that its actions were appropriate according to Federal Rules of Civil Procedure 45(e)(1), which pertains to subpoenas for attendance at hearing or trial.[66] In fact, though, since Western Casualty was endeavoring to compel Davis to continue his deposition, Federal Rules of Civil Procedure 37 applied. According to that rule, applications for orders to and sanctions upon a deponent who is not a party must be made to the court in the district in which the deposition is being taken.[67]

D. *Rule 56—Summary Judgment*

A motion to dismiss pursuant to any of the enumerated grounds in rule 12(b) is a procedure similar in result to the interposition of a motion for summary judgment in accordance with rule 56; if granted, either motion results in an abrupt termination of a plaintiff's action. These motions are different essentially in that the court may not consider matters outside the pleadings in ruling upon a motion to dismiss but may consider evidence obtained through pre-trial proceedings and by way of affidavit in evaluating a motion for summary judgment. If this distinction is not observed and matters beyond the pleadings are considered by the court evaluating a motion to dismiss, rule 12(b) mandates that the motion so made be treated as the motion for summary judgment it has effectively become, and handled in accordance with the procedures specified in rule 56.

Ohio v. Peterson, Lowry, Roll, Barber & Ross[68] involved a motion to dismiss for failure to state a claim upon which relief might be granted,[69] supported by a memorandum brief in which the statute of limitations was asserted in bar of Ohio's action, and to which a complaint filed by the State of Ohio in a previous action concerning the same controversy as in the case at bar, but impleading different defendants, was attached as an exhibit. The trial court had clearly relied upon this exhibit in granting the motion to dismiss, with-

64. 598 F.2d at 1204. At the abortive deposition, Western Casualty had verbally requested that certain documents be produced. The "show cause" order referred to these documents as well.

65. *Id.*

66. *Id.* at 1205.

67. FED. R. CIV. P. 37(a)(1), (b)(1). *See* 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2287 (1969).

68. 585 F.2d 454 (10th Cir. 1978).

69. FED. R. CIV. P. 12(b)(6).

out informing the State of Ohio that the motion was being treated as one for summary judgment in opposition to which Ohio could present any matters pertinent under rule 56 to demonstrate a material issue of fact. The Tenth Circuit reversed the ruling of the trial court, pointing out that the trial court may, in its discretion, deign to consider matters beyond the pleadings presented in connection with a rule 12(b)(6) motion to dismiss.[70] But, according to that rule, consideration of such extraneous material transforms the motion to dismiss into one for summary judgment, and requires compliance with rule 56.[71]

E. *Rule 60(b)—Relief from Judgment or Order*

V.T.A., Inc. v. Airco, Ltd.[72] presented the Tenth Circuit with an opportunity to explain some of the bases upon which a motion for relief under rule 60(b) may be made.[73] Significantly, a motion based upon any of the enumerated grounds, with one exception, must be made within specified time constraints after the judgment, order or proceeding was entered or taken.[74] However, though not obvious from the language of rule 60(b), a motion for relief based upon a contention that the order entered was void is subject to no time limitation at all. A void judgment may be regarded as a nullity; hence, a rule 60(b)(4) motion for relief can be considered to have been made within a reasonable time regardless of when actually made.[75] This observation notwithstanding, the Tenth Circuit affirmed the trial court's denial of appellants' rule 60(b)(1) motion since appellants contended that the trial court's judgment was erroneous, rather than void.[76]

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70. In a case dealing with a related issue, Downes v. Beach, 587 F.2d 469 (10th Cir. 1978), the Tenth Circuit considered whether, upon a motion for summary judgment, the trial court must go beyond the specific demonstration of a material issue relied upon by the party opposing summary judgment, and evaluate other evidence in the record. The Tenth Circuit held that the trial court has discretion to search beyond the evidence proffered in resistence of the motion, but is "not *required* to consider what the parties fail to point out." *Id.* at 472.

71. 585 F.2d at 456 (quoting 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 1336 at 683 (1969).

72. 597 F.2d 220 (10th Cir. 1979).

73. Also decided by the court during this survey period, and illustrative of FED. R. CIV. P. 60(b), was *In re* Stone, 588 F.2d 1316 (10th Cir. 1978) (in order to obtain relief from default judgment under rule 60(b)(1), movant must show justifiable grounds, which the court will evaluate on the merits, *and* must demonstrate existence of a meritorious defense by alleging existence of sufficient facts which, if true, would constitute a defense to the action).

74. FED. R. CIV. P. 60(b) provides six reasons for which the extraordinary relief embodied in that rule may be obtained. The rule specifies that a motion based upon any of reasons (1) through (3) must be made within one year from the date of judgment, order or proceeding was entered or taken, and that motions based upon any of the remaining grounds must be made within a reasonable time. In *V.T.A.*, the Tenth Circuit agreed with the trial court that motions based upon 60(b)(5) and 60(b)(6), filed 16 months after judgment, were untimely. 597 F.2d at 224.

75. 597 F.2d at 224 n.9.

76. 597 F.2d at 226. Voidness may result from a lack of jurisdiction, an obvious usurpation of power by the court or from actions by the court inconsistent with due process of law. *Id.* at 224-25.

F. *Rule 69—State Procedure Applies to United States*

The Tenth Circuit, in *International Paper Co. v. Whitson*,[77] applied rule 69's mandate that state "procedure on execution, in proceedings supplementary to and in aid of a judgment, and in aid of execution" be followed in federal diversity actions.[78] This circuit follows the rule that the foregoing mandate binds even the United States when seeking entry of a deficiency judgment after foreclosure of a mortgage;[79] hence, the trial court's ruling that the Department of Housing and Urban Development was precluded from seeking a deficiency judgment because of its failure to comply with Oklahoma's procedure was affirmed.[80]

G. *Rule 83—Rules Governing Local Practice*

Martinez v. Thrifty Drug & Discount Co.[81] reaffirms the authority of district courts to make and amend rules governing practice before these courts, so long as such rules are consistent with the Federal Rules of Civil Procedure. The District Court for the District of New Mexico had promulgated a rule authorizing the court to impose jury costs against parties and their counsel under circumstances where the court's clerk has not been notified of a settlement or dismissal of an action before twelve noon of the last business day preceding trial; provided with such notification, the clerk could advise jurors that they need not attend court.[82] The parties in *Martinez* stipulated to a dismissal of the action on the morning of the first day scheduled for the trial,[83] and the district court's clerk assessed plaintiff and her counsel jury costs amounting to $1,026.72. The Tenth Circuit concluded that the district court's rule effectively promoted the objective of efficient court administration, and upheld the assessment of jury costs.[84]

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77. 595 F.2d 559 (10th Cir. 1979).

78. FED. R. CIV. P. 69(a).

79. The court recognized that the circuits are not in agreement on this issue, citing, *e.g.*, United States v. Merrick Sponser Corp., 421 F.2d 1976 (2d Cir. 1970).

80. 595 F.2d at 562 (citing United States v. Inciardi, 258 F. Supp. 837 (W.D. Okla. 1966), *aff'd*, No. 9502 (10th Cir. Aug. 3, 1967) (Small Business Administration subject to provisions of Oklahoma statute defining manner of computing amount of deficiency judgment); Reconstruction Fin. Corp. v. Breeding, 211 F.2d 385 (10th Cir. 1954) (Reconstruction Finance Corp. subject to provisions of Oklahoma statute concerning manner of obtaining deficiency judgment)).

81. 593 F.2d 992 (10th Cir. 1979).

82. *Id.* at 993.

83. The stipulation provided that any assessment of costs "shall be borne solely by the Plaintiff and that the Defendant shall not be liable therefor." *Id.* at 993. The Tenth Circuit noted that it could have decided the issue based solely on that stipulation, yet proceeded to dispose of the issue on other grounds. *Id.* at 994.

84. *Id.* at 994 (citing Lance, Inc. v. Dewco Serv., Inc., 422 F.2d 778 (9th Cir. 1970) (courts have broad discretion in applying rules to promote court efficiency); Woods Constr. Co., Inc. v. Atlas Chem. Indus., Inc., 337 F.2d 888 (10th Cir. 1964) (rules promulgated under FED. R. CIV. P. 83 are binding on parties before the court and have same force and effect as law); Brewster v. North Am. Van Lines, Inc., 461 F.2d 649 (7th Cir. 1972) (rulemaking power extends to allocation of costs under FED. R. CIV. P. 83); 6 MOORE'S FEDERAL PRACTICE ¶ 54.77[8] at 1749-50 (2d ed. 1976)).

H. *Res Judicata—Unappealed Determination of Lack of Jurisdiction*

The determination of a jurisdictional issue on its merits which results in a dismissal of the action for lack of jurisdiction and further constitutes a deprivation of jurisdiction to all courts of the State, is res judicata in an action between the same parties and involving the same issue, although initiated in the federal district court by virtue of diversity.[85] This principle was applied in *Eaton v. Weaver Manufacturing Co.*,[86] which examined the effect of an unappealed holding by an Oklahoma court that *in personam* jurisdiction over a particular defendant was lacking.[87] The federal district court had ruled that the state court's ruling on the jurisdictional issue "was not based upon the characterization of Volkswagen South's activities, but the absence of a nexus between any contacts with this state and the claims asserted."[88] Therefore, the Tenth Circuit held that the unappealed state court judgment had determined the issue on the merits, and relitigation of the jurisdictional issue was precluded.[89]

IV. JURISDICTION

A. *Pendent Jurisdiction*

National Insurance Underwriters v. Piper Aircraft Corp.[90] is a well-reasoned case in which the Tenth Circuit determined whether, in a diversity action, a federal court may exercise pendent party jurisdiction over several defendants against which alternative claims below the requisite jurisdictional amount[91] were made, and as to whom there was no independent basis of federal jurisdiction after dismissal of the claim upon which diversity jurisdiction was properly based.

Initially, the Tenth Circuit noted certain familiar decisions in which pendent jurisdiction has been applied and explained.[92] The court then con-

85. *See* Angel v. Bullington, 330 U.S. 183 (1947). Since, for purposes of diversity jurisdiction, a federal court is merely another court of the state, the state court's decision cannot be relitigated. *Id.* at 187. *See also* Woods v. Interstate Realty Co., 337 U.S. 535 (1949). Rather, an appeal should be taken, or absent availability of appeal, a method provided by statute should be followed. *See* Stevens Expert Cleaners & Dyers, Inc. v. Stevens, 267 P.2d 998 (Okla. 1954).

86. 582 F.2d 1250 (10th Cir. 1978).

87. The Oklahoma court did not articulate its reasons for ordering the dismissal, but did, subsequently to entering its judgment, write a letter and execute an affidavit in an attempt to clarify the judgment. After discussing the propriety and efficacy of an order nunc pro tunc, the Tenth Circuit refused to consider the letter and affidavit. These items constituted neither an order nunc pro tunc, nor matters reviewable when construing an unclear order. *Id.* at 1254-55.

88. *Id.* at 1255.

89. *See also* Stewart Sec. Corp. v. Guaranty Trust Co., 597 F.2d 240 (10th Cir. 1979) (holding, on rehearing, that where an action brought in the Federal District Court for the District of Oklahoma had been dismissed for lack of jurisdiction because an Oklahoma state court already had exclusive jurisdiction over the subject matter of the proposed federal proceeding, the unappealed dismissal operated as a bar to relitigation of the same issue on the grounds of res judicata).

90. 595 F.2d 546 (10th Cir. 1979).

91. *See* 28 U.S.C. § 1332(a) (1976).

92. Aldinger v. Howard, 427 U.S. 1 (1975) (concerning constitutional and congressional grants of judicial authority) and United Mine Workers v. Gibbs, 383 U.S. 715 (1966) (setting forth the requisites of pendent jurisdiction).

sidered the more immediately pertinent case of *Owen Equipment & Erection Co. v. Kroger*,[93] in which the Supreme Court stated that the question of federal jurisdiction must be analyzed at two levels:

> [A] finding that federal and nonfederal claims arise from a 'common nucleus of operative fact,' the test of Gibbs, does not end the inquiry into whether a federal court has power to hear the nonfederal claims along with the federal ones. Beyond this constitutional minimum, there must be an examination of the posture in which the nonfederal claim is asserted and of the specific statute that confers jurisdiction over the federal claim, in order to determine whether 'Congress . . . has expressly or by implication negated' the exercise of jurisdiction over the particular nonfederal claim.[94]

Applying this analysis to the situation in *National Insurance*, the Tenth Circuit concluded that because Congress had conditioned the existence of federal diversity jurisdiction upon the presence of both the requisite amount in controversy and diverse citizenship,[95] jurisdiction over the pendent claims was lost upon dismissal of the only claim possessing these attributes. Therefore, the judgment of the trial court in which the defendants had been found liable on the "pendent" claims was reversed.[96]

B. *Removal Jurisdiction*

In *Debry v. Transamerica Corp.*,[97] the Tenth Circuit embraced the "voluntary-involuntary" test[98] to control the availability of removal jurisdiction.[99] The court explained that where the plaintiff in an action in state court changes the circumstances relevant to jurisdiction by voluntary action, such as by dismissing a non-diverse defendant to create a diversity situation, or as in *Debry*, by revealing that the residence[100] of one of the plaintiffs has

93. 437 U.S. 365 (1978).

94. *Id.* at 373.

95. 28 U.S.C. § 1332(a) (1976).

96. 595 F.2d at 548-51. The Tenth Circuit decided two other cases in which the doctrine of pendent jurisdiction was discussed: Mendoza v. K-Mart, Inc., 587 F.2d 1052 (10th Cir. 1978) (federal claim based on 42 U.S.C. §§ 1983, 1985, and 1986 and alleging state action by virtue of New Mexico shoplifting statute, N.M. STAT. ANN. §§ 30-16-19 to -23 (1978), not so insubstantial as to be unable to support pendent state claims where courts disagree on federal issue posed); and McMann v. Northern Pueblos Enterprises, Inc., 594 F.2d 784 (10th Cir. 1979) (since no subject matter jurisdiction under Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2674 (1976), over alleged claims against subcontractors because of protections of Miller Act, 40 U.S.C. § 270a-270d (1976). no pendent jurisdiction over non-government defendants).

97. No. 77-1894 (10th Cir. May 31, 1979). This opinion was withheld from publication pending action by the court on a petition for rehearing. The petition was denied November 28, 1979.

98. *See* 1A MOORE'S FEDERAL PRACTICE ¶ 0.168[3.-5] at 487 (2d ed. 1979).

99. 28 U.S.C. § 1446 (1976).

100. The use of the term "residence", rather than citizenship as specified in 28 U.S.C. § 1332(a) (1976), provoked a strong dissent from Justice McKay. An additional point of disagreement between the majority and Justice McKay concerned the means by which the defendants "ascertain" that the cause has become removable. The plaintiff had stated in deposition that he had returned to Salt Lake City from California. The defendant contended that, notwithstanding the statements in deposition, it had no notice of the change of circumstance whereby diversity occurred until receipt of an amended complaint, some four months after the deposition. The majority agreed with the defendant's contention because submission to discov-

changed, the action may then be removed to federal court within thirty days after receipt by the defendant "of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable."[101]

Christopher Mammel

ery proceedings is not a voluntary act and the plaintiff had been "reluctant and evasive" in his deposition, thereby preventing defendant from ascertaining the existence of diversity. No. 77-1894 at 18.

101. 28 U.S.C. § 1446(b) (1976).