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FEDERAL PRACTICE AND PROCEDURE

OVERVIEW

The recent decisions of the Tenth Circuit Court of Appeals should promote no major changes in the area of federal practice and procedure. In the past term, the court interpreted several federal rules, made some clarifications in the area of jurisdiction, and demonstrated that it will closely supervise the discretionary actions of the federal district courts. This article presents a survey of the court's most significant decisions in the field.

I. TRIAL COURT SUPERVISION

The most important decisions of the Tenth Circuit in this area pertained to the appellate court's supervision of the activity of the district courts. Specifically, the court addressed the appropriateness of a writ of mandamus as a tool to supervise the district courts' discretion, the proper scope of a pre-trial order, and the abdication of judicial responsibility through verbatim adoption of one party's findings of fact or via an unwarranted reference to a special master.

A. *Review under Rule 21(a) of the Federal Rules of Appellate Procedure*

There are three methods of obtaining appellate review. The most common approach is an appeal under 28 U.S.C. section 1291.[1] This route, however, is restricted to "final orders" of the district court[2] and precludes appeal which is "tentative, informal or incomplete."[3] The purpose of this rule is to avoid piecemeal review.[4]

The second method of review is through an appeal under 28 U.S.C. section 1292(b).[5] This method allows for the appeal of orders, not final for purposes of section 1291, which the district court is willing to certify for appeal.[6]

The third, a seldom used procedure for appellate review, is through a writ of mandamus under the All Writs Act.[7] The Supreme Court has made it clear that mandamus is not a substitute for the appeal procedure under section 1291 or section 1292(b).[8] It is an extraordinary writ and will only be

1. 28 U.S.C. § 1291 (1976).
2. *Id.*
3. Cohen v. Beneficial Ind. Loan Corp., 337 U.S. 541, 546 (1949).
4. *Id.* Lack of jurisdiction is an exception to the "final order" rule. Daiflon, Inc. v. Bohanon, 612 F.2d 1249, 1253 (10th Cir. 1979), *rev'd on other grounds*, 49 U.S.L.W. 3368 (U.S. Nov. 17, 1980) (No. 79-1895).
5. 28 U.S.C. § 1292(b) (1976). *See* FED. R. APP. P. 21(a).
6. The district judge may certify an order for appeal if he is of the opinion that there is substantial ground for difference of opinion and that an immediate appeal may materially advance the ultimate termination of the litigation. 28 U.S.C. § 1292(b) (1976).
7. 28 U.S.C. § 1651(a) (1976). *See* FED. R. APP. P. 21(a).
8. Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26 (1943). *See also* Daiflon, Inc. v. Bohanon, 49 U.S.L.W. 3368 (U.S. Nov. 17, 1980) (No. 79-1895).

granted when the petitioner has established that his right to the writ is "clear and indisputable"[9] and that the district court's action was so extraordinary that it evidenced arbitrariness and clear abuse of discretion.[10]

The Tenth Circuit was petitioned for a writ of mandamus in *State Farm Mutual Auto Insurance Co. v. Scholes*[11] and in *Daiflon, Inc. v. Bohanon*.[12] In the former case, the petition was denied; in the latter case it was granted in part.

In *Scholes*, State Farm Insurance Company appealed from the district court's dismissal of its declaratory judgment action. State Farm was seeking a judicial declaration relieving it of any further obligation to defend Scholes, an insured of State Farm, on the grounds that Scholes had violated various clauses in the insurance contract.[13] The district court ordered the action dismissed without prejudice pending state proceedings which involved the same parties, the same facts and identical issues.[14] For purposes of review, the court of appeals treated the dismissal without prejudice as the equivalent of a stay of proceedings.[15]

As a preliminary matter, the court of appeals stated that an appeal under section 1291 was not the proper procedure for review in this case. While certain appellate courts have held otherwise,[16] the Tenth Circuit stated that the district court's decision to stay the proceedings was not a "final order" for purposes of appellate jurisdiction and that mandamus would be the appropriate remedy.[17] Despite this procedural defect, the circuit court was willing to treat State Farm's "appeal" as an "application for leave to file a petition for writ of mandamus pursuant to the All Writs Act."[18] This act of benevolence proved to be illusory, however, as the court went on to deny State Farm's application, stating that "the district court was clearly justified in staying proceedings before it pending final determination . . . in state court."[19]

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9. Will v. Calvert Fire Ins. Co., 437 U.S. 655, 662 (1978); Bankers Life & Cas. Co. v. Holland, 346 U.S. 379 (1953).

10. Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 383 (1953).

11. 601 F.2d 1151 (10th Cir. 1979).

12. 612 F.2d 1249 (10th Cir. 1979), *rev'd*, 49 U.S.L.W. 3368 (U.S. Nov. 17, 1980) (No. 79-1895).

13. 601 F.2d at 1153.

14. *Id.*

15. The district court stated that "[t]he practical effect of such a stay [of proceedings] would be indistinguishable from a dismissal without prejudice in this case." *Id.* at 1155 (quoting the district court's opinion). The majority did not address this distinction because it was not raised by the parties. *Id.* at 1156 n.3. Judge Logan, in his concurrence, disagreed. A dismissal without prejudice is different from a stay of proceedings; a stay eliminates any statute of limitations problem and "leaves the judge free to reconsider his decision to defer or to take other action." *Id.* at 1156 (Logan, J., concurring).

16. *See* Rancho Palos Verdes Corp. v. City of Laguna Beach, 547 F.2d 1092 (9th Cir. 1976); Drexler v. Southwest Dubois School Corp., 504 F.2d 836 (7th Cir. 1974) (en banc); Druker v. Sullivan, 458 F.2d 1272 (1st Cir. 1972).

17. 601 F.2d at 1154 (citing Pet Milk Co. v. Ritter, 323 F.2d 586, 588 (10th Cir. 1963)). It is questionable whether this classification had any effect on the outcome of the case. Judge Logan believed that an appeal was the proper procedure since he treated the dismissal without prejudice as a "final order", yet he still agreed with the result reached by the majority. *Id.* at 1156 (Logan, J., concurring).

18. 601 F.2d at 1154.

19. *Id.* at 1155.

The circuit court relied on *Will v. Calvert Fire Insurance Co.*,[20] wherein the United States Supreme Court stated that "[i]t is . . . well settled that a district court is 'under no compulsion to exercise [its] jurisdiction' "[21] and that the decision to stay proceedings is "largely committed to the 'carefully considered judgment' . . . of the district court."[22] Based on this authority, Judge Barrett, writing for the circuit court's majority, went on to hold that State Farm's right to have its declaratory judgment action heard was not "clear and indisputable."[23] On the contrary, the district court was clearly justified in its actions because simultaneous prosecution of the case in state and federal court would result in wasteful duplication of counsel, courts, litigants and witnesses.[24]

Daiflon, Inc. v. Bohanon[25] was an antitrust action in the District Court for the Western District of Oklahoma. The jury returned a verdict of $2.5 million in favor of the plaintiff Daiflon. The trial judge denied the defendant's motion for a judgment notwithstanding the verdict. Instead, the judge vacated the jury verdict and granted a new trial on all issues.[26] The trial judge appeared to have based his ruling on the excessive award of damages and on the wrongful admission of unidentified exhibits into evidence.[27] Daiflon petitioned the circuit court to issue a writ of mandamus[28] to prohibit any further proceedings except as necessary to enter judgment on the verdict.[29]

The Tenth Circuit, through Judge Doyle, acknowledged that there are only three circuit court cases in which mandamus has been invoked to review a lower court's order for a new trial.[30] Despite this sparse precedent, Judge Doyle held that mandamus would be proper when

> there is a disregard for proper procedure, or misuse of judicial power in the trial [court constituting] a clear abuse of discretion. If it is found that there was a plain or clear error in the judge's evaluation of the facts and that the granting of the new trial was gross or excessive to the extent that it is extraordinary, it would seem that

20. 437 U.S. 655 (1978).

21. *Id.* at 662 (quoting Brillhart v. Excess Ins. Co., 316 U.S. 491, 494 (1942)).

22. *Id.* at 663 (quoting Colorado River Water Conserv. Dist. v. United States, 424 U.S. 800, 818 (1976)).

23. 601 F.2d at 1155.

24. *Id.* The stay was further justified because the state court obtained jurisdiction long before the federal court did, no issue of federal law was involved, and the state action would resolve all of the issues arising out of the transaction. *Id.*

25. 612 F.2d 1249 (10th Cir. 1979), *rev'd*, 49 U.S.L.W. 3368 (U.S. Nov. 17, 1980) (No. 79-1895).

26. Daiflon, Inc. v. Allied Chem. Corp., No. 72-483-B (W.D. Okla. 1979) (attached as Exhibit A to Daiflon, Inc. v. Bohanon, 612 F.2d at 1261). Although the district court did not formally vacate the judgment, the court of appeals felt that this was a mere "oversight". Daiflon, Inc. v. Bohanon, 612 F.2d at 1252.

27. 612 F.2d at 1252.

28. 28 U.S.C. § 1651(a) (1976); FED. R. APP. P. 21(a).

29. 612 F.2d at 1251. An order granting a new trial is not a "final order" for § 1291 purposes. Kanatser v. Chrysler Corp., 199 F.2d 610, 615 (10th Cir. 1952), *cert. denied*, 344 U.S. 921 (1953).

30. 612 F.2d at 1257. *See* Peterman v. Chicago, Rock Island & Pacific R.R., 493 F.2d 88 (8th Cir.), *cert. denied*, 417 U.S. 947 (1974); Grace Lines, Inc. v. Motley, 439 F.2d 1028 (2d Cir. 1971); Kanatser v. Chrysler Corp., 199 F.2d 610 (10th Cir. 1952), *cert. denied*, 344 U.S. 921 (1953).

vacating the order granting the new trial would be permissible.[31] Using this standard, the circuit court went on to grant supervisory mandamus on the issue of liability but declined to vacate the trial court's order as to damages.[32] The circuit court's reason for granting mandamus on the issue of liability was that the trial judge offered no "rational basis" for vacating the verdict as to liability of respondent.[33] Ordering a new trial on liability invaded the province of the jury and denied the plaintiff's seventh amendment rights.[34]

On the issue of damages, however, the court of appeals was less willing to interfere. Since the trial court heard the evidence in its entirety, it was in a better position to judge this issue. "[S]ubject only to the limitation of the Seventh Amendment the trial court's discretion is most full and complete when the court is considering a factual question such as damages."[35] Thus, even though the court of appeals was not necessarily in agreement with the trial court's determination,[36] the appeals court was unwilling to vacate that section of the trial court's order granting a new trial on the issue of damages.

Daiflon is notable because it is only the fourth case wherein a federal appeals court agreed to issue a writ of mandamus to review a lower court's order granting a new trial. The case is also important for sharpening the distinction between liability and damages with regard to the scope of the trial court's discretion. The court implied that mandamus will seldom, if ever, be issued in the latter case. On the issue of liability, however, the court of appeals will be less inclined to defer to the trial court's discretion. In summary, the Tenth Circuit has indicated that it will supervise the lower courts, by extraordinary writs if necessary, to ensure against any abuse of discretion.

B. *Adherence to Pre-Trial Orders*

In *Trujillo v. Uniroyal Corp.*,[37] the district court rejected tendered evidence and jury instructions on the grounds that they deviated from the pre-trial order.[38] The action was a strict liability claim against Uniroyal for the manufacture and sale of a tire which caused injury to the plaintiff when it exploded during mounting. The defendant claimed that the plaintiff's injury was caused by his own misuse in attempting to mount a 16-inch tire on a 16.5-inch rim.[39] The pre-trial order which set out the plaintiff's claim stated that the tire was defective and that Uniroyal was liable under the rule of strict liability.[40] Shortly before trial the defendant learned that the plain-

31. 612 F.2d at 1255.
32. *Id.* at 1260.
33. *Id.*
34. *Id.*
35. *Id.* at 1259.
36. *Id.* at 1260. The circuit court referred to possible misconceptions by the trial judge of some of the facts related to damages.
37. 608 F.2d 815 (10th Cir. 1979).
38. *Id.* at 816.
39. The plaintiff testified that he thought he was working with a 16-inch rim. *Id.* at 817.
40. New Mexico has adopted the rule of strict liability as set out in Restatement (Second) of Torts § 402A (1965). *See* Fabian v. E.W. Bliss Co., 582 F.2d 1257, 1260-61 (10th Cir. 1978).

tiff planned to base liability on a "failure to warn" theory. The defendant claimed that the plaintiff was trying to change the theory of the case and deviate from the pre-trial order.[41] The trial court agreed and excluded the proffered evidence on that issue. The jury found for the defendant.

The Tenth Circuit, in an opinion by Judge McKay, stated that if parties deviate from a properly drawn pre-trial order, the trial court may exclude the evidence.[42] A proper pre-trial order is one that sharpens and simplifies the issues and represents a complete statement of the parties' claims.[43] If, however, "an adverse party is content with a boilerplate pretrial order, it cannot later demand that the trial court enforce it as though it were a specific and meaningful narrowing of the issues."[44] Since the "rule of strict liability" in New Mexico includes the lack of adequate warning, the court of appeals correctly found that the evidence relating to that issue could not be excluded.[45]

The case is important in two respects. First, the court announced a judicial policy that procedural devices are to be liberally construed in order to avoid dismissing otherwise meritorious lawsuits on technicalities.[46] This rule of construction is to apply to all pretrial procedural tools and not just to the pleadings.[47] Second, the case is yet another example of the Tenth Circuit's willingness and determination to supervise its district courts.

C. *Findings of Fact*

The mechanical adoption of one litigant's proposed findings of fact without adequate evidentiary support is an abdication of the judicial function. This was the holding of the Tenth Circuit in *Ramey Construction Co. v. Apache Tribe*.[48] The trial court in *Ramey* adopted verbatim the defendant's proposed findings of fact and conclusions of law without citation to any legal authority.[49]

Rule 52 of the Federal Rules of Civil Procedure requires the trial judge to make findings of fact and conclusions of law. This rule has two purposes. First, the procedure fosters care on the part of the trial judge "in considering

41. 608 F.2d at 817. Strict liability in New Mexico includes liability for failure to warn. *See* Skyhook Corp. v. Jasper, 90 N.M. 143, 560 P.2d 934 (1977). Therefore, it is unclear why the defendant felt that this was a change of theory unless prior communications between the parties had led defendants to believe that the plaintiffs were limiting their claim to the manufacturing or design aspects of strict liability. The court of appeals opinion sheds no light on this issue.

42. 608 F.2d at 817, *citing* Southern Pac. Transp. Co. v. Nielson, 448 F.2d 121, 125 (10th Cir. 1971).

43. *See* Christenson, *The Pre-Trial Order*, 29 F.R.D. 362 (1960).

44. 608 F.2d at 818. The court easily distinguished two cases cited by the defendant wherein the pre-trial orders were specific and narrowly drawn. *See* Rigby v. Beech Aircraft Co., 548 F.2d 288 (10th Cir. 1977); Rodrigues v. Ripley Indus., Inc., 507 F.2d 782 (1st Cir. 1974).

45. Had the pre-trial order limited the claim to manufacturing or design defects, the district court would have been correct in excluding the evidence related to the failure to warn. Southern Pac. Transp. Co. v. Nielson, 448 F.2d 121 (10th Cir. 1971).

46. 608 F.2d 815, 818 (10th Cir. 1979).

47. *Id.*

48. 616 F.2d 464 (10th Cir. 1980).

49. The only changes by the trial court were in grammar, in the wording (but not substance) of one conclusion of law, and in a citation to the Federal Rules of Civil Procedure. In addition, the last proposed conclusion of law was dropped as unnecessary. *Id.* at 466.

and adjudicating the facts in the dispute."[50] Second, it allows for meaningful review in that the appellate court can determine the trial court's "discerning line for decision."[51]

The court of appeals stated that the trial court may have performed its judicial functions; the court could not tell from the record. The trial court dismissed complex factual allegations and legal theories in a conclusory manner without citation to authority.[52] Certain issues did not receive even summary treatment by the trial court. Without explicit reference in the record, the court of appeals was unable to determine if the trial court had considered the issues.[53]

The most glaring example of the inadequacy of verbatim adoption was evidenced by the trial court's rejection of the plaintiff's theory of damages. The trial court adopted a conclusion of law consisting of five reasons for rejecting the proposed theory; each reason was separated by the phrase "and/or."[54] Presumably, the defense intended the trial court to accept some or all of the suggested reasons and then delete the appropriate conjunction. However, the deletion was not made. "While a court may properly phrase its conclusions in the alternative, this conclusion as adopted [was] merely tentative."[55]

The court of appeals acknowledged that the trial court should have the aid of the parties in its decision-making. Reliance on one party's proposed findings of fact and conclusions of law would have been permissible if the trial court had taken some steps to ensure that it had fulfilled its function. Specifically, the trial court could have 1) had the parties exchange proposals and object to the counterproposals with appropriate fact and law references,[56] 2) annotated the proposals with references to documentary evidence and testimony,[57] or 3) heard oral arguments following submission of the proposals to ensure judicial scrutiny.[58] None of these safeguards were employed.

While the circuit court noted that the trial court did not act in a judicially irresponsible manner,[59] it made clear that the verbatim adoption of

50. *Id.* at 466-67 (quoting Featherstone v. Barash, 345 F.2d 246, 249 (10th Cir. 1965)). This procedure also defines what is being decided for purposes of estoppel and res judicata for future cases. 345 F.2d at 249.

51. *Id.* at 466 (quoting G.M. Leasing Corp. v. United States, 514 F.2d 935, 940 (10th Cir. 1975), *modified on other grounds*, 429 U.S. 338, *cert. denied*, 435 U.S. 923 (1977)).

52. *Id.* at 467.

53. There was no reference in the record to Ramey's claim for interest on money which was admittedly due but improperly retained or to the Tribe's claim of sovereign immunity. *Id.* at 467-68.

54. *Id.* at 467.

55. *Id.*

56. *Id.* at 468 (citing Heterochemical Corp. v. United States Rubber Co., 368 F.2d 169 (7th Cir. 1966)).

57. *Id.* (citing Schnell v. Allbright-Nell Co., 348 F.2d 444 (7th Cir. 1965), *cert. denied*, 383 U.S. 934 (1966)).

58. *Id.* (citing Halliburton Co. v. Dow Chem. Co., 514 F.2d 377 (10th Cir. 1975)).

59. The court of appeals denied plaintiff's request to remand the case to another judge. Comments by the trial court which the plaintiff felt were indicative of inadequacy were merely "self-deprecating modesty and, given the volume of evidence, simple realism." *Id.* at 469, 469 n.7.

the proposed findings of fact and conclusions of law did not fulfill the judicial function. The case was remanded and the trial court was ordered to make new and significantly more detailed findings to give the court of appeals and the parties a fuller explanation of the basis for the decision.[60]

D. *Reference to Special Master*

The Tenth Circuit addressed the propriety of a reference to a Special Master pursuant to rule 53(b)[61] in *Polin v. Dun & Bradstreet, Inc.*[62] The trial court issued two orders of reference which bestowed extraordinary powers on the Special Master. The Special Master was empowered to hear evidence, make findings of fact which would be final, conduct a trial, and recommend judgment which the trial court promised to follow.[63] The result of these orders was "to confer upon the Special Master all of the power that the trial court enjoyed and perhaps more."[64] Following a pre-trial conference, the Special Master granted the defendant's motion for summary judgment. This judgment was confirmed that same day by the trial judge in a one-sentence ruling.[65]

The circuit court, per Judge Doyle, reversed the judgment, stating that this was a complete abdication of the judicial function.[66] Approval of this action would "fly in the face of Rule 53(b)"[67] which states that reference "shall be the exception and not the rule."[68] References to a Special Master will only be approved where exceptional circumstances are shown.[69] The Supreme Court has stated that neither congestion of the docket nor complexity nor length of trial will suffice to warrant a reference.[70] In the instant case, there were no circumstances that would warrant a reference to a Special Master.[71]

In those cases where exceptional circumstances warrant a reference to a Special Master, the Master's report is merely evidence which the jury can disregard.[72] In the instant case, even though a jury trial was contemplated,

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60. *Id.* at 469.

61. Rule 53(b) provides:

> A reference to a master shall be the exception and not the rule. In actions to be tried to a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it.

FED. R. CIV. P. 53(b).

62. No. 78-1648 (10th Cir. Feb. 25, 1980).

63. *Id.*, slip op. at 2-3.

64. *Id.*, slip op. at 3 n.2.

65. *Id.*, slip op. at 1-2.

66. *Id.*, slip op. at 10.

67. *Id.*

68. FED. R. CIV. P. 53(b), *supra* note 61.

69. Bartlett Collins Co. v. Surinam Navig. Co., 381 F.2d 546, 550-51 (10th Cir. 1967).

70. LaBuy v. Howes Leather Co., 352 U.S. 249, 259 (1967). The Court, in *LaBuy*, did concede that a complex accounting was an element that might permissibly be referred to a Special Master. *Id.*

71. The appellate court recognized that Judge Barrow, the trial judge, was in failing health at the time of reference. The proper procedure, however, would have been to transfer the case to another district judge. No. 78-1648, slip op. at 10.

72. Some commentators suggest that a reference to a Special Master would rarely be ap-

the Special Master was empowered to make final findings of fact and to enter a binding judgment. Such an order was not only an abdication of the judicial function but it also invaded the province of the jury and denied to the plaintiff his seventh amendment rights.

Through these decisions, the Tenth Circuit has emphasized that it is going to take the time and effort to supervise the district courts. The court of appeals will not hesitate to intervene to protect the interests of the parties if it finds that the trial court abused its discretion.

II. FEDERAL JURISDICTION

A. *Subject Matter Jurisdiction*

The Tenth Circuit, in *Naisbitt v. United States*,[73] ruled that the federal courts do not have jurisdiction under the Federal Tort Claims Act for claims arising out of intentional torts committed by government employees. The plaintiffs, victims of intentional torts committed by two off-duty airmen, sued the government under the Act and claimed in their suit that the government had been negligent in its supervision of the airmen. The district court granted the government's motion to dismiss based on section 2680(h)[74] of the Act. Under this section, the government retains its immunity when the liability claim arises from intentional torts. Immunity is waived in the Act, however, for negligence claims.

The Tenth Circuit, in an opinion written by Judge Doyle, upheld the district court's dismissal of the claim.[75] The appellate court gave support to the lower court's interpretation of section 2680(h) which allows a negligence claim against the government when an intentional tort has been committed by a non-employee, such as an inmate in a federal prison, whom the government has a duty to supervise. This interpretation bars a negligence claim when the tort has been committed by a government employee. This employee/non-employee distinction, Judge Doyle noted, was first articulated by the Second Circuit in *Panella v. United States*[76] and has been adopted in most subsequent decisions.

> It is believed that [this distinction] stems from the proposition that where the employee has committed a tortious intentional act, even though it is not with the approval of his employer, the government, nevertheless, he is so closely connected with the government that the intentional act is imputed to the government. Since the gov-

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propriate in a non-jury trial as the Special Master and not the court would in fact decide the case. *See, e.g.*, 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2605 (1971).

73. 611 F.2d 1350 (10th Cir.), *cert. denied*, 101 S. Ct. 240 (1980).

74. 28 U.S.C. § 2680(h) (1976) provides that the waiver of immunity shall not apply to "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights . . . ."

75. The trial court reasoned that, although based on negligence, the plaintiffs' claims were, by their character, intentional torts. Where the government is sued for failure to supervise non-employees, the sole basis of the government's liability is negligent supervision. Here, negligence was an alternate theory, not the sole basis of the liability claim.

76. 216 F.2d 622 (2d Cir. 1954).

> ernment has waived liability only in negligence cases in accordance with § 2680(h), an attempt to establish liability on a negligence basis is indeed an effort to circumvent the retention of immunity provided in § 2680(h).[77]

A strong thread running through a number of cases, Judge Doyle summarized, is a recognition of this governmental immunity when the tortfeasor is a government employee. The two airmen were government employees; application of section 2680(h) therefore barred the plaintiff's claims.[78]

The Tenth Circuit found that federal jurisdiction was present in a declaratory judgment action concerning an insurance policy with a $10,000 limit in *Farmers Insurance Co. v. McClain*.[79] The defendants had asserted that, under 28 U.S.C. section 1332, district courts only have jurisdiction when "the matter in controversy *exceeds* the sum or value of $10,000, exclusive of interest or costs."[80] Because the insurance policy was limited to $10,000, Farmers claimed that the plaintiff had not met the statutory requirement for federal court jurisdiction.

Judge McWilliams, writing for the Tenth Circuit, reasoned that the costs and interest excluded from the jurisdictional amount by the statute were only those which might be allowed in connection with the federal action. Farmers' potential liability, however, would include both the costs of defending the claim in the state court proceeding and the costs which might be assessed against the insured. These additional obligations would be considered part of the maximum limit of Farmers' liability and therefore would cause the amount in controversy to exceed $10,000. The opinion cited numerous cases which have held that costs incurred or incurrable in state proceedings could be considered as a part of the amount in controversy for federal jurisdictional limits.[81] Farmers' obligations under the policy might cause the company to incur some expenses in connection with the pending state court proceeding; thus, the jurisdictional limit was met.

The Tenth Circuit made law out of dictum by holding in *Hackney v. Newman Memorial Hospital, Inc.*[82] that the appointment of a fiduciary who has a substantial beneficial interest in existing litigation is immune from a challenge for diversity jurisdiction purposes. The plaintiff, a resident of Colorado, was appointed the successor administratrix of her deceased mother's estate. In this capacity she commenced a wrongful death action in the District Court for the Western District of Oklahoma. Shortly afterwards, the plaintiff moved to Oklahoma. The trial court dismissed the wrongful death action on the grounds that the plaintiff had been appointed administratrix in violation of 28 U.S.C. section 1359. This "anti-collusion" statute denies jurisdiction when a party has been "improperly or collusively made or joined to invoke the jurisdiction of such court."[83] The trial court's holding was

77. 611 F.2d at 1355.
78. *Id.* at 1356.
79. 603 F.2d 821 (10th Cir. 1979).
80. 28 U.S.C. § 1332 (1976) (emphasis added).
81. 603 F.2d at 823.
82. 621 F.2d 1069 (10th Cir.), *cert. denied*, 101 S. Ct. 397 (1980).
83. "A district court shall not have jurisdiction of a civil action in which any party, by

based on a finding that the primary purpose of the plaintiff's appointment was to invoke federal jurisdiction.

In reversing the trial court's dismissal, Judge Logan cited the leading case of *McSparran v. Weist*[84] wherein the Third Circuit had construed the words "improperly or collusively" to prohibit the joinder of "a nominal party designated simply for the purpose of creating diversity of citizenship, who has no real or substantial interest in the dispute or controversy."[85] The courts, following the *McSparran* interpretation of section 1359, have found the appointment of "straw parties" as fiduciaries solely for the purpose of gaining diversity jurisdiction to be collusive but have implied in dictum that collusion would not be present if the appointee had a substantial relationship to the litigation.

Declaring that the "instant case tests the dictum,"[86] Judge Logan, writing for the appellate court, reasoned that the plaintiff, a beneficiary entitled to a portion of the proceeds from the wrongful death action, had a real, substantial stake in the litigation. Thus, she was not a straw party collusively and improperly appointed. The challenge to her appointment failed and the district court was deemed to have jurisdiction to hear the suit that the plaintiff had commenced. Chief Judge Seth, in concurrence, noted that the "primary purpose" test used by the trial court does not apply the "improper and collusive" statutory standard. While motive and intent are elements to be considered in a determination of the collusive and improper standard, "[a] motive or intent to secure federal jurisdiction does not of itself defeat jurisdiction."[87]

B. *Personal Jurisdiction*

The minimum contacts standard of *International Shoe Co. v. Washington*[88] was cited in two Tenth Circuit cases involving personal jurisdiction.

Schreiber v. Allis-Chalmers Corp.[89] involved the transfer of a products liability action from a Mississippi to a Kansas federal district court. The plaintiff, a citizen of Kansas, had been injured in Kansas while working on a rotobaler manufactured by the defendant. Plaintiff brought suit in Mississippi, basing federal jurisdiction on diversity of citizenship. The defendant, a Delaware corporation headquartered in Wisconsin and qualified to do business in Mississippi for many years, sought a change of venue to Kansas. The case was transferred to the Kansas federal district court which was bound, as the transferee court, to apply the state law of the transferor court.[90] The

assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court." 28 U.S.C. § 1359 (1976).

84. 402 F.2d 867 (3d Cir. 1968), *cert. denied*, 395 U.S. 903 (1969).

85. 402 F.2d at 873.

86. 621 F.2d at 1071.

87. *Id.*

88. "It is evident that these operations establish sufficient contacts or ties with the state of the forum to make it reasonable and just, according to our traditional conception of fair play and substantial justice, to permit the state to enforce the obligations which appellant has incurred there." 326 U.S. 310, 320 (1945).

89. 611 F.2d 790 (10th Cir. 1979).

90. Van Dusen v. Barrack, 371 U.S. 612, 639 (1964).

Kansas district court granted summary judgment to the defendant on alternate theories. The trial court first held that the Mississippi court did not have jurisdiction to hear the case because the Mississippi statute violated federal due process. The statute provided that a foreign corporation doing business in Mississippi is subject to suit regardless of where the cause of action accrued.[91] In the alternative, the trial court asserted that if the Mississippi court did have jurisdiction, the action was barred by Kansas' two-year statute of limitations for tort and warranty claims.

On appeal, the Tenth Circuit, per Judge McWilliams, reversed the summary judgment order, finding that the assumption of jurisdiction by the Mississippi court did not offend federal due process. The court of appeals cited a Ninth Circuit decision[92] which had reviewed the authorities on the minimum contacts requirement and had concluded that if a foreign corporation's activities in the forum state are "continuous and systematic," it could be served in causes of action unconnected to forum activities. In answer to the trial court's contention that jurisdiction was prohibited due to the recent Supreme Court ruling in *Shaffer v. Heitner*,[93] the court of appeals distinguished the quasi-in-rem action in that case from the personal jurisdiction question of the instant case, noting that the Court in *Shaffer* had held that jurisdiction could be maintained in a state court proceeding if the minimum contacts standard of *International Shoe* had been met.[94] Allis-Chalmers had been conducting continuous and systematic, although limited, parts of its general business in Mississippi. Therefore, the state statute authorizing jurisdiction over such a foreign corporation when the cause of action had accrued in another state did not violate federal due process standards. Furthermore, the court held that Mississippi's six-year statute of limitations for tort and warranty claims would control because the Kansas federal court was obligated to follow Mississippi law as it presently existed.[95]

Minimum contacts with the forum state sufficient to establish personal jurisdiction were found lacking in *Burke v. Tom McCall & Associates*.[96] The plaintiff, a resident of New Mexico, brought suit in New Mexico federal district court against California and Texas employment agencies, alleging age discrimination under a provision of the Age Discrimination in Employment Act of 1967.[97] The defendants, both of whom had been contacted by the plaintiff by mail, filed motions to dismiss claiming a lack of personal jurisdiction. Neither firm conducted business in New Mexico nor contacted any potential employers in the state on the plaintiff's behalf. The trial court granted the defendants' motion to dismiss.

On appeal, Judge Doyle, writing for the Tenth Circuit, affirmed the

91. MISS. CODE ANN. § 79-1-27 (1972). The trial court felt that Shaffer v. Heitner, 433 U.S. 186 (1977), prohibited a state from opening its courts to a proceeding against a foreign corporation when the cause of action accrued from events arising in another state.

92. Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406 (9th Cir. 1977).

93. 433 U.S. 186 (1977).

94. 611 F.2d at 794.

95. *Id.*

96. No. 79-1145 (10th Cir. Aug. 21, 1979).

97. 29 U.S.C. § 216(b) (1976).

trial court's finding of a lack of personal jurisdiction. Because the cause of action arose under a federal law, the federal standard for jurisdiction set out in *International Shoe Co.* was applicable. "Under *International Shoe Co.* it is necessary for the plaintiff to demonstrate that the defendant had substantial contact with the state."[98] Because there had been no transaction of business by either defendant in New Mexico, neither fairness nor due process would permit personal jurisdiction to attach by the mere receipt of a letter.

C. *Appellate Jurisdiction*

The Tenth Circuit restricted appellate jurisdiction in class action suits in *Bowe v. First of Denver Mortgage Investors*[99] by holding that dismissal of a complaint for failure to prosecute does not permit appellate review of a trial court's order denying certification of the class action. The plaintiff in *Bowe* filed a class action suit alleging violations of the Securities and Exchange Act,[100] the Colorado Securities Act[101] and fraud. The district court denied the motion for certification of the class action and the plaintiff appealed. In dismissing the appeal, the Tenth Circuit determined that the order denying certification did not constitute a final judgment subject to review nor did it satisfy the "death knell"[102] or collateral order[103] exceptions to 28 U.S.C. section 1291,[104] the final judgment rule. On remand, the plaintiff again sought, but failed, to obtain class certification. The trial court dismissed the plaintiff's individual complaint for failure to prosecute. The plaintiff once again appealed to the Tenth Circuit, alleging that the dismissal of her complaint constituted a final judgment, making the lower court's order denying certification reviewable on appeal.[105]

Judge Doyle, writing for the court, agreed that the dismissal for failure to prosecute was a final judgment. However, the matter to be reviewed on appeal was the trial court's dismissal of the complaint and *not* the order denying class certification.[106] Judge Doyle asserted that review of a decertification order, which is interlocutory in nature, would conflict with the *Livesay* doctrine. In *Livesay*,[107] the Supreme Court held that a district court's pre-

98. No. 79-1145, slip op. at 5.

99. 613 F.2d 798 (10th Cir. 1980).

100. Securities Exchange Act of 1934 § 10(b), 15 U.S.C. 78jjj(c) (Supp. III 1979).

101. COLO. REV. STAT. § 11-51-123 (1973).

102. The "death knell" exception to the final judgment rule allowed the appeal of an order denying class certification if such order was likely to sound the "death knell" of the litigation. This would occur when a plaintiff seeking representative status would find it economically difficult, without the incentive of a potential group recovery, to pursue his complaint to final judgment; such a plaintiff could seek appellate review of the denial of class certification. *See* Eisen v. Carlisle & Jacquelin, 370 F.2d 119 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967).

103. In order to qualify for the collateral order exception, enunciated in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), an interlocutory order must determine conclusively the disputed question, it must resolve an issue which is separate from the merits of the claim, and it must be effectively unreviewable on appeal from a final judgment.

104. "The court of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court." 28 U.S.C. § 1291 (1976).

105. 613 F.2d at 799.

106. *Id.*

107. Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978).

judgment order denying certification of a class action was not appealable under the final judgment rule of section 1291. The Supreme Court opinion ended the circuit courts' use of the "death knell" exception, by which parties denied class certification could obtain appellate review if the order was likely to sound the "death knell" for the litigation. The Supreme Court opposed further use of the exception because the "death knell" doctrine authorized indiscriminate interlocutory review of decisions made by the trial judge and "defeat[ed] one vital purpose of the final-judgment rule—'that of maintaining the appropriate relationship between the respective courts.' "[108]

The claim of the class representative in the *Bowe* case, Judge Doyle concluded, was not distinguishable from the claim in *Livesay*. To permit appellate review of the order denying certification merely because the plaintiff's individual complaint had been dismissed for failure to prosecute would circumvent the clear mandate of *Livesay*. Judge Doyle reasoned that any plaintiff desirous of appellate review could simply allow dismissal of his claim for class representation on the grounds of failure to prosecute. If review of the dismissal included review of the order denying certification, an intolerable loophole to *Livesay* would be created.

Judge Doyle noted that the Ninth Circuit had reached a similar conclusion in *Huey v. Teledyne, Inc.*[109] He recognized the hardship which strict application of this rule would place on plaintiffs for whom denial of class action review terminated the litigation. Nonetheless, the *Livesay* doctrine, which represents further difficulties for plaintiffs seeking class action representation,[110] compelled the Tenth Circuit court to conclude that they were without authority to review "the class issue . . . .at this preliminary stage . . . notwithstanding that the individual case of the class representative stands dismissed."[111]

An appeal cannot be taken from a federal magistrate's order for entry of a final judgment, the Tenth Circuit held in the *per curiam* decision of *Harding v. Kurco, Inc.*[112] The district court had ordered consolidated actions brought under the Fair Labor Standards Act and referred them to the United States Magistrate for trial. The parties, pursuant to the district court's local rule 17(a), which required that stipulations for trial to a magistrate include review procedures, stipulated that the magistrate's judgment would be final and directly appealable to the court of appeals. Following the trial, the defendants appealed from the judgment which was entered for the plaintiffs on the magistrate's direction and order.

In dismissing the appeal, the Tenth Circuit court cited the Federal Magistrates Act, which authorizes the assignment to a magistrate of only those additional duties that are not inconsistent with the Constitution and laws of the United States. The district judge retains supervisory power over the magistrate's decisions and is ultimately responsible for that decision.

108. *Id.* at 476.
109. 608 F.2d 1234 (9th Cir. 1979).
110. *See also* Comment, *Federal Jurisdiction—Class Actions—Orders Relating to Class Certification Not Appealable Under 28 U.S.C. § 1291 Prior to Final Judgment*, 49 MISS. L.J. 973 (1978).
111. 613 F.2d at 802.
112. 603 F.2d 813 (10th Cir. 1979).

Thus, the court of appeals concluded that "the discretionary authority to direct entry of a final judgment is a fundamental and exclusive power of an Article III judge."[113] The magistrate's order was vacated and the appeal dismissed without prejudice so that district court review would be facilitated.

An appeal from a district court judgment interpreting oil and gas pricing regulations promulgated by the Federal Energy Administration (FEA) was dismissed by the Tenth Circuit for lack of jurisdiction, in *Oklahoma Association of Energy Consumers & Producers v. FEA*.[114] The plaintiff association asserted that the issue before the trial court was FEA adherence to proper procedures in the promulgation of regulations, thus giving the circuit court jurisdiction over the appeal. The government moved to dismiss the appeal, contending that the Temporary Emergency Court of Appeals (TECA) had exclusive appellate jurisdiction in this matter.

In dismissing the appeal, the Tenth Circuit established that the district court's jurisdiction was based on the provisions of the Economic Stabilization Act. The Supreme Court, in *Bray v. United States*,[115] held that all appeals arising under this Act were within the exclusive jurisdiction of the TECA. The trial court's determination dealt with "exactly the types of regulations on oil and gas pricing . . . that the TECA was established to handle."[116] The court of appeals rejected a Second Circuit opinion[117] allowing a bifurcated appeal to both a circuit court and to the TECA, declaring that "[t]here is little to be gained . . . other than mass confusion, by the promoting of simultaneous circuit-court-TECA appeals."[118]

As the question of ripeness affects subject matter jurisdiction, the court may raise the issue sua sponte at any time, the Tenth Circuit ruled in their denial of jurisdiction in *In re Grand Jury, April, 1979*.[119] A federal grand jury had issued subpoenas duces tecum to the defendant. While motions to quash the subpoenas were being heard, the grand jury indicted the defendant. The government then applied for issuance of pre-trial subpoenas, requesting the same documents sought by the grand jury. The district court had not ruled upon the government's application for pre-trial subpoenas at the time of this government appeal from a lower court ruling which partly sustained and partly overruled the motions to quash the grand jury subpoenas.

The defendant argued, on appeal, that the grand jury's indictment, which came without the grand jury first obtaining the requested documents, mooted the subpoena issue. The government, however, contended that it had applied for issuance of pre-trial subpoenas and believed that the defendants would raise the same defenses to their subpoenas as were raised to the enforcement of the grand jury subpoenas. Thus, the government asserted

113. *Id.* at 814.
114. No. 79-1847 (10th Cir., Oct. 23, 1979).
115. 423 U.S. 73, 74 (1975).
116. No. 79-1847, slip op. at 4.
117. Coastal States Marketing, Inc. v. New England Petroleum Corp., No. 79-7330 (2d Cir., Aug. 1, 1979).
118. No. 79-1847, slip op. at 5.
119. 604 F.2d 69 (10th Cir. 1979).

that the issues presented were "capable of repetition, yet evading review."[120]

Judge Barrett's Tenth Circuit opinion rejected both of these arguments, but he dismissed the appeal for want of ripeness, an issue which the court of appeals may raise voluntarily because it affects the court's subject matter jurisdiction. The court declined to issue an advisory opinion on the propriety of the government's subpoena applications, declaring that "it is preferable to defer decision of the constitutional issues raised until there is an actual, concrete need to decide them."[121] Although the appellate court recognized that the defendants were likely to raise the same defenses to the government's subpoenas when issued, the court decided to delay resolution of the question until a time closer to the disputed event.

D. *Removal Jurisdiction*

Parties who seek removal to federal court are not estopped from challenging that court's jurisdiction on appeal, the Tenth Circuit ruled in *Hudson v. Smith*.[122] The district court, however, had the authority to remand a separate and independent claim while retaining a non-removable cause of action.

In *Hudson*, the plaintiff, assignee of a third party's interest in a corporation, brought suit in Oklahoma state court. The first claim sought damages for breach of contract; the second claim sought dissolution of the corporation formed by the contract under an Oklahoma statute which provided for dissolution when there was a deadlock in corporate ownership. The state court granted the defendant's petition for removal to federal district court; the plaintiff then moved to remand the action to the state court. The federal district court remanded the claim for dissolution to state court but retained the breach of contract claim pursuant to 28 U.S.C. section 1441.[123] This statute gives the district court the discretion either to try or to remand separate and independent causes of action which have been joined with non-removable claims. Trial on the breach of contract claim resulted in a jury verdict for the plaintiffs. Defendants appealed, claiming that the federal district court to which they sought removal now lacked jurisdiction. Defendants charged that both causes of action should have been remanded to the state court.

Judge McWilliams' opinion rejected the argument that a party who petitions for removal to a federal court and then loses his case in that court is estopped from seeking remand to a state court. The decision rested on the authority of *American Fire & Casualty Co. v. Finn*.[124] Instead, the judge looked to the provisions of section 1441(c) to determine if the plaintiff's two causes

120. *Id.* at 72.
121. *Id.*
122. 618 F.2d 642 (10th Cir. 1980).
123. 28 U.S.C. § 1441 states:
> Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

124. 341 U.S. 6 (1951).

of action were separate and independent, thus giving the district court discretionary authority to remand the dissolution claim but retain the breach of contract action. In determining that the two claims were indeed separate and independent, the appellate court reasoned that the outcome of the breach of contract claim would not affect the question of whether the corporation's ownership was deadlocked. Because the dissolution action would be pursued regardless of who prevailed in the contract claim, the trial court properly held that the two claims were separate and independent and properly retained the contract claim.

III. FEDERAL RULES OF CIVIL PROCEDURE

A. *Rule 15(b)—Amendments to Conform to the Evidence*

In *In re Santa Fe Downs, Inc.*,[125] the Tenth Circuit declared that under the minimum procedural requirements of rule 15(b), a plaintiff's suit may be dismissed from court when the pleadings contain an incorrect statutory citation.[126] This is particularly true when the plaintiff's legal theory is reliant upon the statute miscited.[127]

In the original complaint, the trustee of the bankrupt, Santa Fe Downs, claimed that defendants' mortgages were void under a section of the Bankruptcy Act unrelated to consensual liens.[128] Therefore a showing of the lienholders' knowledge of the insolvency was not required. The court, through Judge McKay, declared that defendant mortgagees properly objected when Santa Fe Downs' trustee sought to introduce evidence of the mortgagees' knowledge of insolvency.[129]

The deficiencies in the trustee's complaint were repeatedly noted. Because the trustee failed to amend the pleadings, and because rule 15(b) makes no provision for automatic amendment when proper objections are made to the admission of evidence,[130] the Tenth Circuit determined that the bankruptcy court committed reversible error in refusing the mortgagees' motion for dismissal on the grounds that the plaintiff's presentation of evidence failed to show a right to relief.[131] Underlying the appellate court's determination in the case was its recognition that while the Federal Rules of Civil Procedure may have abolished full fact pleading, the rules must accommo-

125. 611 F.2d 815 (10th Cir. 1980).

126. *Id.* at 816.

127. *Id.*

128. The trustee's complaint stated that the suit was brought to declare liens null and void pursuant to § 67(a)(1) of the Bankruptcy Act, 11 U.S.C. § 107(a)(1) (1976), (current version at 11 U.S.C. §§ 349(b), 457(b), (d), 551 (Supp. III 1979)), which is directed at liens obtained by attachment, judgment, levy, or other equitable process or proceedings. 611 F.2d at 816.

129. 611 F.2d at 816.

130. FED. R. CIV. P. 15(b), in relevant part, reads:

> If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby *and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits.*

(emphasis added).

131. FED. R. CIV. P. 41(b).

date a defendant by requiring that he be given some notice of the case against him.[132] Therefore, plaintiff's error in citation of a statute essential to the claim for relief was more than a mere technical error. Dismissal of the suit during the trial would not have constituted the tyranny of formalism which rule 15(b) seeks to prevent.[133]

B. *Rule 56—Summary Judgment*

St. Louis Baptist Temple, Inc. v. FDIC[134] provided the Tenth Circuit with an opportunity to reiterate that, in considering a motion for summary judgment, a district court may take judicial notice sua sponte of its own records and the records of other courts—if called to the court's attention by the parties—to determine the existence of a genuine issue of material fact.[135] The appeal arose from the Colorado District Court's entry of summary judgment for the defendant FDIC in an action brought by St. Louis Baptist Temple, Inc. (Temple). Temple challenged the validity of a sheriff's sale in satisfaction of a judgment debt. The judgment had been rendered against Soldiers of the Cross, Inc. (Soldiers) and Goff Memorial Library (Goff), which Temple alleged to be its predecessors in title. The suit, originally brought in the district court of Jefferson County, Colorado, was removed to the federal district court by the FDIC. It challenged the validity of the sale for insufficiency of publication and inadequacy of the sale price. Temple, on appeal, contended that the district court erred in granting summary judgment based on judicial notice of records from an earlier litigation and appeal involving the same tract of land.

The Tenth Circuit, through Judge Barrett, reasoned that court records are verifiable with certainty and may be judicially noticed when brought to the attention of the court by the parties.[136] The records of the earlier case and appeal were properly considered by the district court because they were directly relevant to the determination of the existence of a genuine issue of a material fact. The prior litigation and affirmance by the Tenth Circuit established that Soldiers and Goff were estopped collaterally from attacking both the judgment and the sheriff's deed, and the related doctrines of *res judicata* and collateral estoppel applied against the plaintiff, Temple. Since the plaintiff was attempting to litigate the same issues "the second time around,"[137] utilization of judicial notice, whether requested or not,[138] was considered especially appropriate.

132. 611 F.2d at 816.
133. *Id.* at 817.
134. 605 F.2d 1169 (10th Cir. 1980).
135. *See* Ginsberg v. Thomas, 170 F.2d 1 (10th Cir. 1948).
136. 605 F.2d at 1172.
137. In its memorandum opinion in civil action no. C-4227, the district court noted that Soldiers, Goff, and the president of Temple, Reverend Bill Beeny, were closely connected in identity. The court stated that "this is the second time around for defendant's counsel and for Rev. Bill Beeny who quarterbacked the case for defendants." *Id.* at 1174.
138. *Id.* at 1174-77.

C. *Rule 60(a)—Relief from Judgment or Order—Clerical Mistakes*

A district court's inadvertent mistake in ordering a party guilty of civil contempt to pay $1200 compensatory damages, when evidence indicated that the figure should have been $12,000, properly fell under the scope of rule 60(a)'s provision allowing sua sponte correction of errors arising from oversight or omission,[139] so the Tenth Circuit held in *Allied Materials Corp. v. Superior Products Co.*[140] The appellant, Superior Products, was found to have violated a consent decree by making false and misleading representations about joint sealant which Allied had contracted to provide for construction of an addition to Stapleton Airport in Denver. Superior Products contended on appeal that the trial court could not amend its findings on its own motion.[141]

In rejecting Superior Products' contention that the district court's mistake triggered the application of rule 52(b), which rule would have required that the court's amendment be preceded by the parties motion for amendment, the Tenth Circuit court defined the following boundary between the rules under discussion: rule 52(b) will apply if the court *intended* to say, write, or record the words which are the subject of the amendment and later finds them to be wrong; rule 60(a) will apply if the error in speech, writing, or recordation was not what the court intended.[142] The mistake involved in *Allied Materials*, which the court described as an inadvertent removal of one zero in the judgment order, was clearly of the rule 60(a) variety. Therefore, the district court was found to have made no error in correcting the omission on its own initiative.[143] While the appellee, Allied Materials, prevailed on the procedural issues involving the federal rules, the court of appeals accepted Superior Products' contention that the $12,000 compensatory damages award was not supported by the evidence. The court of appeals offered Allied the choice of an award of $7,000, as the amount of damages supported by the evidence, or a retrial of the case on the issue of damages.[144]

D. *Rule 60(b)—Relief from Final Judgment Due to Mistake, Inadvertence, Excusable Neglect, or Newly Discovered Evidence*

In a decision upholding a district court's denial of a rule 60(b) motion[145] for relief from a default judgment, *C.I.T. Corp. v. Allen*,[146] the Tenth

139. FED. R. CIV. P. 60(a) reads, in relevant part:
Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

140. 620 F.2d 224 (10th Cir. 1980).

141. Superior argued on appeal that rule 52(b), not rule 60(a), applied. *Id.* at 225-27. FED. R. CIV. P. 52(b) states: "*Upon motion of a party* made not later than ten days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly." (emphasis added).

142. The court of appeals repeated this distinction as it was set forth in Kelley v. Bank Bldg. & Equip. Corp., 453 F.2d 774, 778 (10th Cir. 1972).

143. 620 F.2d at 226.

144. *Id.* at 226-28.

145. The rule states, in part:
On motion and upon such terms as are just, the court may relieve a party or his legal

Circuit extensively quoted prior decisions to emphasize that the grant of a motion to set aside a judgment is within the sound discretion of the trial court. The trial court's determination will not be disturbed in the absence of a showing of abuse.

Defendant Allen had defaulted on two promissory notes secured by using heavy construction equipment as collateral. Upon Allen's default, the balance had been accelerated, the equipment had been repossessed by C.I.T., and, following public sales of the equipment, C.I.T. obtained, by default, a deficiency judgment against the defendant. Over six weeks after being served, and some twenty days after the district court's entry of the default judgment in favor of C.I.T., Allen filed his original answer. Seven days later, he filed a motion to set aside the default judgment alleging that his failure to respond was the result of excusable neglect. He also stated that he had a meritorious defense because the construction equipment was sold below its fair market value. Subsequently, Allen submitted additional memoranda alleging that C.I.T. had allowed a third party to use the repossessed equipment prior to sale, that the third party had damaged the equipment, and that the equipment was sold in damaged condition. Relying on its 1978 decision in *In re Stone*,[147] the Tenth Circuit stated that for a successful motion to set aside a default judgment under rule 60(b), not only must the movant demonstrate justifiable grounds such as mistake, inadvertence, surprise or excusable neglect, but the movant must also show the existence of a meritorious defense.[148] While Allen may have made out a case for excusable neglect, the Tenth Circuit held that he failed to elaborate the facts as sufficiently as required by *In re Stone*[149] to permit the trial court to judge whether the defense would have been meritorious. The court of appeals noted that Allen's later assertions about third-party damage to the equipment were "predicated on rank hearsay."[150] Furthermore, he never asserted that he was not in default, that C.I.T. repossessed the equipment in an improper manner, or that C.I.T. acted in excess of its rights conferred under the notes and security agreements.[151]

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representative from a final judgment, order or proceeding for the following reasons: 1) mistake, inadvertence, surprise, or excusable neglect; 2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 59(b); 3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; 4) the judgment is void; 5) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or 6) any other reason justifying relief from the operation of the judgment.

FED. R. CIV. P. 60(b). For another case dealing with rule 60(b), see notes 163-79 *infra* and accompanying text.

146. No. 79-1637 (10th Cir., Dec. 10, 1979).

147. 588 F.2d 1316 (10th Cir. 1978). This case details the law controlling the granting of motions for relief from default judgments.

148. No. 79-1637, slip op. at 5.

149. 588 F.2d at 1319.

150. No. 79-1637, slip op. at 6-7.

151. *Id.* at 7.

E. *Rule 60(b)—Modification of Consent Decree*

In *EEOC v. Safeway Stores, Inc.*,[152] seventeen individual union members intervened in an unfair employment practices action to seek modification of the original parties' consent decree. The Tenth Circuit prescribed two channels through which such a consent decree may be modified. First, rule 60(b) may be applied to grant relief when a final judgment is shown to be void, when it is shown that prospective application would no longer be equitable, or when there is any other reason justifying relief. Second, the continuing jurisdiction of equity empowers a court to modify a decree upon a showing of changed circumstances.[153]

The consent decree agreed upon by the EEOC, various labor unions, and Safeway altered the seniority system for all of Safeway's employees. The intervenors argued that the decree did not comport with the purpose of Title VII of the Civil Rights Act of 1964[154] because it discriminated against employees who had transferred positions before the decree became effective.[155] In dismissing these contentions and affirming the district court's denial of intervenors' motion for modification, the Tenth Circuit stated that, absent a showing of abuse of discretion, a trial court's ruling on a rule 60(b) motion will not be disturbed, that a consent decree may vary from the statutory confines of the original action in order to encourage voluntary settlements, and that rule 60(b) is not designed "to allow modification of a consent decree merely because it reaches a result which could not have been forced on the parties through litigation."[156] While the appellate court admitted that a consent decree may be altered upon a showing of changed circumstances which produce hardship so extreme and unexpected as to make the decree oppressive, it found no abuse of discretion in the district court's determination; there was no evidence of substantial change in the facts underlying the decree and the interpretation of the order.

Finally, in response to the intervenors' assertion that modification of the decree was compelled by the Supreme Court case of *International Brotherhood of Teamsters v. United States*,[157] decided after the decree was entered, the Tenth Circuit cited its 1958 decision of *Collins v. City of Wichita*[158] and the Third Circuit's decision of *Mayberry v. Maroney*.[159] In *Collins*, a change in the judicial view of an established rule of law was not deemed to be an extraordinary circumstance justifying relief under rule 60(b).[160] According to the Third Circuit in *Mayberry*, the power to alter decrees may not be based merely on "precedential evolution."[161] Finally, the court in the instant case held that

152. 611 F.2d 795 (10th Cir. 1979).
153. *Id.* at 799. *See* FED. R. CIV. P. 60(b), *supra* note 145.
154. 42 U.S.C. § 2000(e) (1976).
155. In the court's words: "[Intervenors'] seniority status was adversely affected by the enhanced seniority of post-decree transferees, many of whom had no more claim to Title VII protection than intervenors." 611 F.2d at 798.
156. *Id.* at 800.
157. 431 U.S. 324 (1977).
158. 254 F.2d 837 (10th Cir. 1958).
159. 558 F.2d 1159 (3d Cir. 1977).
160. 254 F.2d at 839.
161. 558 F.2d at 1164.

although there may be some situations where a change in the law would warrant modification of an injunctive decree, under no circumstances would modification based on judicial clarification be allowed to undo the effects of past enforcement or to jeopardize the seniority of employees who had transferred positions in reliance on the decree.[162]

IV. FEDERAL-STATE RELATIONS

The Tenth Circuit addressed the unusual situation of a federal court enjoining a state court proceeding in *Brown v. McCormick*.[163] Three years after the plaintiff obtained a default judgment in federal court, the defendants sought to relitigate the issues in state proceedings. The plaintiff unsuccessfully defended on the basis of *res judicata*. He then instituted this action in the federal district court seeking to enjoin the state proceedings under 28 U.S.C. section 2283.[164] The defendants responded with a motion for relief of judgment under rule 60(b) of the Federal Rules of Civil Procedure.[165] The district court denied the rule 60(b) motion and enjoined the defendants from proceeding with their action in the state court.

The Tenth Circuit affirmed. The opinion involved a two-part analysis. The court had to determine if the earlier default judgment could withstand a rule 60(b) attack and, if so, whether an injunction was permissible under 28 U.S.C. section 2283. Rule 60(b) is an extraordinary procedure which permits the court to grant relief from its judgment upon a showing of good cause.[166] The rule is not a substitute for appeal but instead concerns matters which were not raised and considered by the court in reaching its judgment.[167]

As a basis for the rule 60(b) motion, the defendants claimed 1) that the federal court had lacked personal and subject matter jurisdiction; 2) that they were denied due process by virtue of rule 37 sanctions;[168] 3) that the default judgment was obtained by fraud on the court; and 4) that the default judgment was in excess of the pleadings.[169]

The court of appeals agreed with the district court that these contentions were without merit. The claims of lack of personal jurisdiction and fraud on the court were summarily dismissed.[170] The Tenth Circuit found that subject matter and diversity were addressed and resolved by the trial

162. 611 F.2d at 801.

163. 608 F.2d 410 (10th Cir. 1979).

164. 28 U.S.C. § 2283 (1976) states that "a court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

165. FED. R. CIV. P. 60(b)(4) permits a court to relieve a party from a final judgment if the judgment is void.

166. *See* 6A J. MOORE, FEDERAL PRACTICE, ¶ 60.02 (2d ed. 1979); 7 *id.* ¶ 60.19.

167. *See* Daily Mirror, Inc. v. New York News, Inc., 533 F.2d 53 (2d Cir.), *cert. denied*, 429 U.S. 862 (1976).

168. FED. R. CIV. P. 37.

169. 608 F.2d at 413.

170. *Id.* at 413, 414.

court prior to the entry of default judgment[171] and that the rule 37 sanctions were appropriate in light of the defendant's "dilatory tactics."[172] Finally, the default judgment was deemed not to have exceeded the scope of the complaint.[173]

Having found the default judgment to be valid, the appellate court then determined that the injunction against further state proceedings was proper. The anti-injunction statute[174] provides that federal courts cannot normally interfere with state court proceedings. However, an injunction by the federal court to "protect or effectuate its judgment" is an exception to this general rule.[175] The court of appeals, per Chief Judge Seth, found that the exception applied in this case; *res judicata* and collateral estoppel operated to preclude relitigation.[176] The *Younger-Huffman*[177] doctrine of abstention based on the principle of federalism did not apply as "[n]either Supreme Court case involved *res judicata* principles or the situation where a party armed with his valid federal judgment exhausted state appellate review."[178]

The injunction issued by the district court under 28 U.S.C. section 2283 extended to claims not actually litigated in the initial action. Chief Judge Seth, however, held that this was valid. These claims arose from the same underlying transaction and as a compulsory counterclaim, they too were subject to the injunction.[179] Once it was determined that the prior default judgment obtained in federal courts was valid and that the state proceedings sought to relitigate the same issues, the district court was obligated to issue the injunction. The integrity of the federal judiciary would allow no less.

V. STATUTE OF LIMITATIONS

A. *Malpractice Actions: Statute Does Not Run Until Claim Accrues*

In *Zeidler v. United States*,[180] the conservator of the mentally incompetent plaintiff brought a malpractice action in 1976 under the Federal Tort Claims Act.[181] Zeidler's conservator alleged that lobotomy operations per-

171. *Id.* at 413-14. Having been addressed by the district court, these issues were not considered proper grounds for a rule 60(b) motion.

172. *Id.* at 414.

173. This controversy centered on whether certain grazing lands were part of the Z-Bar-T Ranch. The district court found that they were because the evidence showed such was the intent of the parties. *Id.* at 414-15.

174. 28 U.S.C. § 2283 (1976).

175. *Id.*

176. 608 F.2d at 416.

177. *See* Younger v. Harris, 401 U.S. 37 (1971); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975).

178. 608 F.2d at 416. *Younger* concerned a state criminal prosecution. Harris claimed the statute under which California was prosecuting him unconstitutionally abridged his freedom of speech. The Supreme Court declared that the principles of federalism prohibited federal interference in the state proceeding, barring extraordinary circumstances. *Huffman* applied this rationale in a civil case. However, it was a civil obscenity case with criminal ramifications. Additionally, Pursue, Ltd. had not exhausted its state remedies, a necessary component under *Younger*. Neither case dealt with a situation so clearly covered by the statute.

179. *Id.* The "pending action" exception to this rule only applies when the counterclaim was the subject of a pending state action when the federal suit was instigated.

180. 601 F.2d 527 (10th Cir. 1979).

181. 28 U.S.C. § 2401(b) (1976).

formed in 1947 and 1948 by the government to control Zeidler's conduct while he was a Veterans Administration Hospital patient rendered him incompetent and should not have been performed. The district court concluded that insanity was a disability for which the statute of limitations could not be tolled;[182] therefore, from the face of the complaint, any action was barred by the two-year statute of limitations applicable to the section of the Federal Tort Claims Act under which the action had been brought.[183]

The Tenth Circuit Court of Appeals reversed and remanded on the grounds that the trial court, in rendering a final disposition based on the pleadings, made the improper assumption that Zeidler's complaint was based on insanity leading to the automatic running of the statute. Instead, the appellate tribunal contended, the main thrust of the plaintiff's action was malpractice, under which claim the statute could have been tolled.[184] In medical malpractice actions, the claim accrues when the claimant has a reasonable opportunity to discover the essential elements of a possible cause of action.[185] The case was therefore remanded for a determination as to whether Zeidler knew or should have known that he suffered injury.

Judge Logan, in his dissent, criticized the majority's conclusion based on the insanity-malpractice dichotomy as a "distinction without a difference."[186] If Zeidler had been mentally incapacitated *before* the operation then the claim would have been barred by the statute of limitations; if the alleged malpractice had *caused* the incompetency, then the result would have been observable by family and friends following the operation and the statute would have commenced running. As Judge Logan intimated in his dissent, *Zeidler* is a difficult case contested in the realm of limitations of actions. The plaintiff seemed to argue that it was a tort to perform the lobotomies, not that they were negligently done, and that the defendant government should be judged from hindsight after thirty years of advancements in medical science. The currency of the standard of judgment would be a logical foundation supporting the running of the statute of limitations.

B. *Vindicating Public and Private Rights Under Federal Statutes: State Statutes of Limitations Do Not Apply*

The Tenth Circuit Court of Appeals determined in *Marshall v. Intermoun-*

182. *See* Casias v. United States, 532 F.2d 1339, 1342 (10th Cir. 1976).

183. 28 U.S.C. § 2401(b) (1976), which, according to the trial court, contained the applicable statute of limitations reads:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

The administrative claim, required by 28 U.S.C. § 2675(a), was filed and denied. 601 F.2d at 528.

184. The court extensively cited Exnicious v. United States, 563 F.2d 418 (10th Cir. 1977), where plaintiff was able to bring a malpractice action thirteen years after an operation because there was a material factual issue as to when the plaintiff had been able to discover the injury.

185. 601 F.2d at 529 n.1, 530 (citing Ciccarone v. United States, 486 F.2d 253, 256 (3d Cir. 1973)).

186. *Id.* at 533.

tain Electric Co.[187] that when an action is brought by the government to enforce private as well as public rights, state statutes of limitations will not bar the action even though no period of limitations is provided in the operative federal statute. The Secretary of Labor filed the complaint in this case almost twenty-six months after an Intermountain employee, Edward Cavaliere, had been discharged for filing safety-related complaints with Intermountain. The Secretary's suit, in which the government sought an injunction against future violations of section 11(c) of the Occupational Safety and Health Act (the Act)[188] and reinstatement and backpay for Cavaliere, was dismissed by the district court on the ground that the action was barred by Colorado's two-year statute of limitations for federal causes of action.[189]

In reversing the district court's dismissal of the action, the court of appeals noted that a state limitations period will not be applied to an action brought by the federal government to vindicate *public rights* or *public interests* absent a clear showing of contrary congressional intent.[190] Furthermore, the court stated that there is no suggestion of congressional intent to adopt state statutes of limitations in the Act itself;[191] and that section 11(c) of the Act is designed to ensure reporting of violations rather than vindication of private interests.[192] The court relied on the Supreme Court's decision in *Occidental Life Insurance Co. v. EEOC*[193] to find a new rule applicable to cases in which the plaintiff seeks to vindicate a hybrid of private and public interests; in *Intermountain Electric* the original action had been brought to vindicate public rights but the primary immediate effect would be relief for private individuals. Under the new rule, state statutes of limitations are inapplicable even though the federal statute provides no period of limitations. However, in situations where the public and private interests are combined, the doctrine of laches may be applied to protect the defendant against unreasonable delay in the commencement of the action.[194]

The *Intermountain Electric* decision appears to reach a sympathetic conclusion in extending indefinitely the period within which the public interest may be vindicated. However, it does not acknowledge that the equitable and elastic doctrine of laches fails to protect, in as certain a manner as statutory periods of limitations, the ability of defendants to prepare for trial in the

187. 614 F.2d 260 (10th Cir. 1980).

188. 29 U.S.C. § 660(c) (1976). Subsection 1 provides that employees may not be discharged or in any way discriminated against for filing a complaint pursuant to the Act or for in any way exercising rights afforded by the Act. Under subsection 2, provision is made for the filing of complaints with the Secretary of Labor.

189. COLO. REV. STAT. § 13-80-106 (1973) reads:

> Actions under federal statutes. All actions upon a liability created by a federal statute, other than for a forfeiture or penalty for which actions no period of limitations is provided in such statute, shall be commenced within two years or the period specified for comparable actions arising under Colorado law, whichever is longer, after the cause of action accrues.

190. 614 F.2d at 262.

191. *Id.*

192. *Id.*

193. 432 U.S. 355 (1977). The *Occidental* decision is analyzed and applied by the Tenth Circuit Court of Appeals as the principal support for the new rule. 614 F.2d at 262-63.

194. 614 F.2d at 263 n.8.

increasing variety of hybrid situations, such as administrative cases, where public and private interests are combined.

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