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FEDERAL PRACTICE AND PROCEDURE

Overview

During the past year, the Tenth Circuit Court of Appeals decided numerous federal practice and procedure cases, the majority of which involved common issues in this area of the law. This brief review of selected cases is intended to assist the practicing attorney in ascertaining the present status of certain federal practice and procedure questions and to provide guidance for further research.

The first part of this article will analyze two decisions which considered jurisdiction issues. One decision concerns the final judgment rule and the other decision concerns a unique twist in the diversity requirement for federal jurisdiction. The second part of the article is comprised of a survey of selected Tenth Circuit decisions in the areas of removal jurisdiction, finality of interlocutory orders, and review of a master's recommendations.

I. Preclusion of Appellate Jurisdiction by Option Judgments

By statute, the federal circuit courts are vested with appellate jurisdiction over the final decisions of federal district courts.[1] The statute does not define what is "final" for the purpose of appellate jurisdiction. Consequently, the question of finality is often the threshold issue in a case on appeal. Unless a district court judgment is deemed final, an appeal must be dismissed without considering its merits. The Court of Appeals for the Tenth Circuit, on its own motion, addressed the issue of finality in *McKinney v. Gannett Co.*[2]

A. *The Final Judgment Rule*

Although the wording is original, the final judgment rule in 28 U.S.C. § 1291[3] has existed in the American judicial system since the Judiciary Act of 1789.[4] Today, section 1291 allows appeals only from "final decisions."[5] In 1789, when the final judgment rule was enacted under the Judiciary Act,

1. 28 U.S.C. § 1291 (1982). The statute reads in relevant part: "The courts 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." *Id.*

2. 694 F.2d 1240 (10th Cir. 1982). The issue of appellate jurisdiction may be raised at any time during the proceedings and, if the parties fail to raise the question, the court has a duty to determine the issue sua sponte. United States v. Siviglia, 686 F.2d 832, 834-35 (10th Cir. 1981), *cert. denied*, 103 S.Ct. 1902 (1983) (citing Basso v. Utah Power and Light Co., 495 F.2d 906, 909 (10th Cir. 1974)), *quoted in McKinney*, 694 F.2d at 1245-46. The lack of a final judgment in *McKinney* was not raised by the parties on appeal. *Id.*

3. 28 U.S.C. § 1291 (1982).

4. Judiciary Act of 1789, ch. 20, § 21, 1 Stat. 73, 83-84.

5. *See supra* note 1. When originally enacted, section 1291 allowed appeals only from "final judgments or decrees." Judiciary Act of 1789, ch. 20 § 21, 1 Stat. 73, 83-84. The actual origin of the final judgment rule is hidden in the obscure history of appellate procedure in English common law. Crick, *The Final Judgment as a Basis for Appeal*, 41 YALE L.J. 539, 544 (1932).

its underlying purpose was to avoid piecemeal reviews.[6] This remains the primary purpose behind section 1291, although two other policy concerns now affect the resolution of finality questions. The first, prevention of excessive appeals, evolved after the final judgment rule had been enacted.[7] The second, maintaining the appropriate relationship between the trial and appellate courts,[8] is also of relatively modern origin.

A literal reading of section 1291 suggests strict construction even though Congress did not define the term "final."[9] Because of the strict construction suggested by the language of section 1291 and the problems surrounding a determination of what is "final," the Supreme Court and Congress have created exceptions to the rule. One common exception is the provision for appeals from interlocutory orders, found in 18 U.S.C. § 1292.[10] Another exception is the collateral order doctrine set out in *Cohen v. Beneficial Industrial Loan Corp.*[11] Additionally, to avoid the harshness section 1291 may effect appellate courts will use the extraordinary writs of mandamus, prohibition, certiorari, or habeas corpus.[12] These exceptions reflect the general recognition among circuit courts that flexibility is appropriate under section 1291. *McKinney*, however, creates a limitation upon appellate flexibility by concluding that certain relief awarded by a trial court prevents a judgment from becoming a final decision.

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6. United States v. Nixon, 418 U.S. 683, 690 (1974); Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 511 (1950); Cobbledick v. United States, 309 U.S. 323, 325 (1940). *See also* United States v. Feeney, 641 F.2d 821, 824 (10th Cir. 1981) (quoting *Nixon*, 418 U.S. at 690).

7. *See* Crick, *supra* note 5, at 550-51.

8. Coopers & Lybrand v. Livesay, 437 U.S. 463, 476 (1978) (quoting Parkinson v. April Industries, Inc., 520 F.2d 650, 654 (2d Cir. 1975)). The phrase "appropriate relationship" refers to the judicial process of allowing the trial court to fully hear and consider a case without the appellate court running interference for the litigants by considering every order issued by the trial court. The trial court's actions are entitled to respect; only upon completion of the entire trial should the appellate court consider the wisdom of the trial court's actions. *See generally* Note, *Appealability in the Federal Courts*, 75 HARV. L. REV. 351, 351-52 (1961).

9. A strict construction is suggested because use of the word "final" indicates a congressional intent to maintain an "appropriate relationship" between trial and appellate courts.

10. 28 U.S.C. § 1292 (1982). Section 1292 appeals usually concern trial court injunctions, *id.* § 1292(a)(1), or unsettled questions of law which should be determined to facilitate proper adjudication on the merits. *Id.* § 1292(b).

11. 337 U.S. 541 (1949). *Cohen* held that appellate jurisdiction existed for interlocutory appeals "which finally determine claims of right separable from, and collateral to, rights asserted in the action, [and which are] too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Id.* at 546. For discussion of a recent Tenth Circuit case, Chavez v. Singer, 698 F.2d 420 (10th Cir. 1983), which addressed the collateral order exception, see *infra* notes 227-237 and accompanying text.

12. *See generally* Crick, *supra* note 5, at 553-54 (general discussion of the purpose and application of each extraordinary writ). An example of the harsh effects of the finality rule is a lower court order that a litigant's trade secrets are discoverable. The appellate court may grant a writ of mandamus to consider the propriety of such an order. *See, e.g.*, Hartley Pen Co. v. United States District Court, 287 F.2d 324 (9th Cir. 1961).

The majority in *McKinney* did not address the harsh effect its dismissal would have on the litigants. The dissent, however, did consider the issue. 694 F.2d at 1251-52 (Logan, J., dissenting).

FED. R. CIV. P. 54(b), allowing appeals from orders not dispositive of the entire case, is a variation of the final judgment rule and not an exception. *See infra* notes 234-36 and accompanying text.

B. McKinney v. Gannett Co.

1. The Facts

McKinney v. Gannett Co.[13] arose from a breach of contract action. McKinney and Gannett had entered into an agreement whereby McKinney agreed to sell his two New Mexico newspaper corporations to Gannett in a stock-for-stock exchange.[14] The agreement included a ten-year employment contract with McKinney which required McKinney to contribute his services to one of the newspaper corporations on the proviso McKinney would retain editorial control and that Gannett would compensate McKinney for his services.[15] After three years, the contractual relationship between the parties deteriorated and McKinney instigated suit. The grounds for the action were limited by the district court, through pretrial motions and rulings during trial, to McKinney's claims of breach of contract and fraud, and Gannett's affirmative defenses of waiver and legal excuse for the alleged breach of contract.[16]

The New Mexico district court eventually considered the case in two phases. The first phase concerned liability. The liability issues were heard by a jury which returned special verdicts finding in favor of McKinney on the breach of contract claims and for the defendants on the fraud claim.[17] The second phase concerned an accounting required for effecting an equitable rescission. This accounting was ordered following a post-trial hearing at which McKinney argued that rescission was the only adequate remedy. The district court agreed, stating that any other relief would be "mere patchwork."[18] The court added, however, that to ensure Gannett properly managed the papers during the accounting phase, McKinney did not have to elect rescission until the trial on the accounting was completed.[19]

Upon completion of the accounting phase of the trial, the district court entered judgment providing McKinney sixty days from the expiration of the time to appeal, or sixty days from a Tenth Circuit decision affirming the judgment, in which to exercise an option to rescind the contract.[20] If Mc-

13. 694 F.2d 1240 (10th Cir. 1982).

14. *Id.* at 1241. "Gannett" refers collectively to Gannett Co. and the two newspapers unless otherwise noted.

15. *Id.* at 1241-42.

16. *Id.* at 1242. McKinney originally alleged eleven causes of action and sought rescission, an accounting, and damages. Gannett Co. asserted eight affirmative defenses; in a separate answer the New Mexican newspapers asserted twenty-six affirmative defenses. *Id.*

17. *Id.* at 1243.

18. *Id.*

19. *Id.* Because the New Mexico newspapers were not fully assimilated into Gannett, an accounting was proper and, additionally, was necessary to separate the newspapers' books and profits from Gannett operations.

As noted, the purpose of the option judgment was to ensure that Gannett Co. continued responsible operation of the newspapers. *Id.* at 1244. At this point in the proceedings, the defense attorney questioned whether the option to rescind would be a final judgment from which an appeal could be taken. *Id.* at 1245. The district court believed that an option judgment would be final. *Id.*

20. The option portion of the judgment was worded as follows:

> McKinney may exercise the rescission election only during either of the following periods:
>
> (1) The 60-day period commencing the day following expiration of the time to

Kinney failed to exercise this option, the contract would remain in full force and effect.[21] The parties then appealed to the Tenth Circuit.

2. The Decision

As noted, the Tenth Circuit considered the finality issue on its own motion.[22] The majority held that the district court judgment was not final, and dismissed the appeal for lack of appellate jurisdiction.[23] Judge Logan dissented from this disposition.[24]

McKinney argued that the judgment was final by virtue of the Tenth Circuit's reasoning in *Irwin v. West End Development Co.*[25] In *Irwin*, a constructive trust was imposed over stock to allow the plaintiffs thirty days to exercise their rights, as shareholders, to purchase a pro-rata share of the stock.[26] The defendant agrued that the plaintiffs' purchase rights had expired because they failed to exercise those rights within thirty days after the trial court's entry of judgment.[27] The Tenth Circuit held that the appeal suspended the thirty-day period until the judgment became effective, and that plaintiffs therefore retained their purchase rights.[28] The issue of final judgment was not considered.

McKinney argued that there was no meaningful difference between the stock purchase arrangement in *Irwin* and the rescission option created in his case. Both arrangements merely created the right to elect a fixed remedy following appellate consideration of the trial court's rulings.[29]

The *McKinney* judgment obviously contains an option. The Tenth Circuit, through Judge Barrett, viewed the judgment as terminating only the liability question, leaving the award of damages unresolved.[30] This form of judgment, leaving damages unresolved, is not final under section 1291.[31] To

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> appeal, . . . provided that none of the parties to the action has filed a timely notice of appeal; or
>
> (2) The 60-day period commencing on the date of issuance of a mandate of the United States Court of Appeals for the Tenth Circuit affirming McKinney's right to the rescission election.

Id. at 1245 (quoting district court judgment).

21. *Id.*

22. *See supra* note 2.

23. 694 F.2d at 1249.

24. *Id.* (Logan, J., dissenting).

25. 481 F.2d 34 (10th Cir. 1973), *cert. denied*, 414 U.S. 1158 (1974).

26. 481 F.2d at 37, 40.

27. *Id.* at 39.

28. *Id.* at 40. The Tenth Circuit held that the option fell within the general rule that an appeal suspends the time required for performance of an obligation. *Id.* at 39-40.

29. 694 F.2d at 1247. The *Irwin* judgment provided "[such] tender shall be made within thirty days from the date this judgment becomes final, and, if such tender is not made, the trust hereby impressed shall be released." *Id.* at 1250 (Logan, J., dissenting).

30. 694 F.2d at 1246.

31. *Id.* The Supreme Court has held:

> The order, viewed apart from its discussion of Rule 54(b), constitutes a grant of partial summary judgment limited to the issue of petitioner's liability. Such judgments are by their terms interlocutory, see Fed. Rule Civ. Proc. 56(c), and where assessment of damages or awarding of other relief remains to be resolved have never been considered to be "final" within the meaning of 28 U.S.C. § 1291.

Liberty Mutual Ins. Co. v. Wetzel, 424 U.S. 737, 744 (1976), *quoted in McKinney*, 694 F.2d at 1246.

have the appellate court consider the case before a decision on damages disturbs the appropriate relationship by placing the appellate court in the trial process.

Besides relying on the form of the judgment in reaching its conclusion on lack of finality, the Tenth Circuit also drew upon the final judgment definition articulated in *Catlin v. United States*.[32] In *Catlin*, the Supreme Court held that a final judgment is one that "end[s] the litigation on the merits and leave[s] nothing for the court to do but execute the judgment."[33] The option judgment in *McKinney* required more than the mere execution of judgment, because execution of the district court judgment was dependent on McKinney's decision to rescind. Therefore, under *Catlin*, the trial court's order was not a final decision.[34]

A further factor militating against finding a final decision was the possibility of rendering an advisory opinion. Even though the parties' rights and liabilities had been adjudicated, to have the Tenth Circuit consider the merits would place the court in the position of rendering an advisory opinion.[35] The advisory opinion was possible because the majority interpreted the trial court's judgment as a "*second* . . . option to rescind, *following our opinion* on the merits."[36] Essentially, McKinney's decision would be based on the appellate treatment of alleged errors in the accounting, rather than the trial court's findings in the accounting proceeding.[37]

The majority opinion dismissed McKinney's analogy to *Irwin v. West End Development Co.*[38] by distinguishing *Irwin*. According to the majority, the *Irwin* judgment *required* plaintiffs to tender money for stock.[39] Therefore, it contained no option similar to that present in *McKinney*.[40]

Judge Breitenstein concurred in Judge Barrett's majority opinion, but distinguished *Irwin* on different grounds. *Irwin* involved equitable relief essentially forcing performance of a contractually created stock purchase option.[41] *McKinney* involved a judicially created option which would allow the plaintiff to choose one of two forms of relief after an appellate decision had settled certain issues affecting the relative worth of each option.[42] Essentially, the *McKinney* option allowed the plaintiff to obtain judicial advice on the effect of a particular election, thereby allowing an improper exercise of

32. 324 U.S. 229 (1945).

33. *Id.* at 233, *quoted in McKinney*, 694 F.2d at 1247.

34. 694 F.2d at 1248. *Cf.* Equal Employment Opportunity Comm'n v. Frontier Airlines, Inc., No. 82-1404 (10th Cir., Dec. 8, 1982) (district court approval of settlement agreement not final inasmuch as a defendant could opt out of the agreement).

35. It is axiomatic that federal courts cannot render advisory opinions. *E.g.*, Norvell v. Sangre de Cristo Dev. Co., 519 F.2d 370 (10th Cir. 1975).

36. 694 F.2d at 1249 (emphasis in original).

37. *Id.* The merits of the appeal involved tax questions and challenges to the accuracy of accounting; deciding those issues would have helped McKinney choose the most advantageous option. *Id.*

38. 481 F.2d 34 (10th Cir. 1973), *cert. denied*, 414 U.S. 1158 (1974).

39. *Id.* The majority's characterization of the *Irwin* judgment order appears inaccurate. *See supra* note 29.

40. 694 F.2d at 1247.

41. *Id.* at 1249 (Breitenstein, J., concurring). *See Irwin*, 481 F.2d at 37-41.

42. 694 F.2d at 1249.

judicial power.[43]

3. The Dissent

Pointing first to the equitable motivation for the option,[44] and second to the fact that McKinney had no remedial option—he could either accept rescission or forego all relief whatsoever[45]—the dissent found the relief granted was an appropriate exercise of the trial court's equitable power.[46] The dissent also found support for its position in *Irwin*'s failure to consider the finality of the shareholders' option, which, for Judge Logan, was essentially identical to McKinney's option.[47] This failure indicated the routine nature of judgments granting optional relief.[48]

Judge Logan also rejected the majority's reliance on *Catlin*. The only action required of the trial court was entry of McKinney's election, and modifications in the accounting ordered by the court of appeals. Thus, the judgment was final under *Catlin*.

Next, the dissent pointed to the general rule that a judgment should be given a practical rather than a technical construction when considering finality.[49] The Tenth Circuit could have entertained the appeal to advance final judgment policies: trial proceedings would not be interfered with because the trial was over for all practical purposes; costs and piecemeal appeals would be avoided because remanding would allow interlocutory appeals pursuant to the certification provision in section 1292; and judicial efficiency would be promoted.[50] Also, because the legal issues had been decided by the lower court and the option was designed to encourage responsible action by Gannett, a remand would impose undue and unjustified hardship on the parties.[51] Judge Logan concluded by stating that he could not "accept the view that because litigants may abandon rights reduced to judgment the judgment is advisory"; accordingly, he would have addressed the appeal on the merits.[52]

C. *Judicial Discretion and Final Decisions*

The only Supreme Court construction of the meaning of "final decision" was in *Catlin*, where the Court held that the primary indicium of final-

43. *Id.*
44. *Id.* at 1250 (Logan, J., dissenting).
45. *Id.* *See supra* notes 20-21 and accompanying text.
46. 694 F.2d at 1250 (Logan, J., dissenting).
47. Judge Logan observed that the *Irwin* judgment did not *require* any action by the plaintiffs, notwithstanding the majority's interpretation of the terms of the judgment. *Id.* (quoting *Irwin* judgment).
48. *Id.*
49. *E.g.*, Gillespie v. United States Steel Corp., 379 U.S. 148, 152 (1964); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 545 (1949). The dissent claimed the majority's opinion was merely a technical decision because, practically, the case was ripe for appeal. All the legal issues had been developed and decided. The contingency judgment was merely an equitable device that should not defeat the appeal. 694 F.2d at 1251 (Logan, J., dissenting).
50. 694 F.2d at 1251 (Logan, J., dissenting). *See generally* André, *The Final Judgment Rule and Party Appeals of Civil Contempt Orders: Time for a Change*, 55 N.Y.U. L. REV. 1041, 1061 (1980).
51. 694 F.2d at 1252 (Logan, J., dissenting).
52. *Id.*

ity was termination of a trial court's adjudicative function.[53] The Supreme Court has since acknowledged that this definition has not provided a formula through which a final judgment can be pinpointed.[54] Thus, as predicted in an early critique of the final judgment rule,[55] a large volume of litigation has evolved around the question of what constitutes a final decision.

In light of the inadequate *Catlin* definition, courts often invoke a balancing test. Although the ultimate purpose of the final decision rule is to have one review over all stages of the proceeding,[56] courts must balance avoidance of piecemeal review against delay which will cause a denial of justice.[57] Thus, fairness to litigants is not sacrificed merely because the presence of a final judgment is arguable. This balancing approach, however, still fails to create a clear formula for determining what constitutes a final judgment.

In *Gillespie v. United States Steel Corp.*,[58] Justice Black recognized that a decision on whether a judgment is final can often be supported equally either way.[59] The decision in *McKinney* illustrates Justice Black's assertion, and also demonstrates the significant discretionary power of an appellate court to determine finality.

The majority in *McKinney* strictly followed the *Catlin* definition. The trial court could not simply execute judgment because it was required to wait for McKinney's decision on the option. Because that decision would occur after the appeal, the majority refused to treat the trial court's order as a final decision; to do so would involve the appellate court in the trial process. Further, McKinney would have benefitted from an appellate decision on the merits of the appeal.[60] Thus, on balance, the competing policy factors weighed against assuming jurisdiction.[61] The dissent focused on the negative effects of refusing jurisdiction to a decision which had eliminated all the trial court's adjudicatory functions.[62] By remanding the case, the parties would incur considerable hardship, and interlocutory appeal possibilities would contribute to judicial inefficiency.[63] Therefore, the competing policy concerns weighed in favor of accepting jurisdiction. In essence, the judges,

53. *Catlin*, 324 U.S. at 233 ("A 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.")

54. *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 170 (1974).

55. Crick, *supra* note 5, at 558.

56. *Cohen*, 337 U.S. at 546.

57. *See, e.g.*, Dickinson v. Petroleum Conversion Corp., 338 U.S. 507 (1950). *See generally* André, *supra* note 50, at 1042. Judge Logan considered this balancing approach in *McKinney*. *See* 694 F.2d at 1251 (Logan, J., dissenting).

58. 379 U.S. 148 (1964).

59. Justice Black stated: "[w]hether a ruling is 'final' within the meaning of § 1291 is frequently so close a question that decision of that issue either way can be supported with equally forceful arguments. . . ." *Id.* at 152.

60. 694 F.2d at 1249.

61. Although the majority's analysis does not explicitly weigh competing policy concerns, this conclusion is implicit in its rejection of a decision which was final for all practical purposes. *See supra* notes 44-52 and accompanying text.

62. *See supra* text accompanying notes 50-51.

63. 694 F.2d at 1250 (Logan, J., dissenting).

in keeping with the practice of other circuit courts,[64] were using their discretion in determining whether the trial court's order was a final decision.

Fifty years ago one commentator concluded that without a definite formula for identifying a final judgment, section 1291 was useless.[65] A satisfactory definition must establish a definite point in a trial court proceeding which can be labeled as final; only when that point is reached could an appeal be taken.[66] As the Supreme Court has recognized, the *Catlin* definition is not dispositive. Instead of perfecting the definition, appellate courts continue to emphasize various purposes and policies in determining what is a final judgment.[67] Unfortunately, all the Tenth Circuit determined in *McKinney* was that a certain form of judgment is not a final decision under section 1291. The holding does nothing to clear the fog emanating from the *Catlin* definition.

Section 1291 is important because it avoids disruption and delay of legitimate court functions and minimizes the strain on the parties and the judicial system forseeable in a system sending all trial court orders through the appeal process.[68] As *McKinney* illustrates, however, in many cases courts are using their discretion in determining what constitutes a final decision under section 1291. Although the purposes behind section 1291 are important and must be effected, as it stands section 1291 generates as much labor as it saves.[69] Instead of requiring courts to rationalize their decisions, section 1291 should be repealed.[70] Appellate courts would then be left in their present position of applying discretion based on court-made policies, but would be able to develop a more disciplined set of criteria for determining finality.

The proposed repeal of section 1291 should not be equated with ignoring the judicial policy of avoiding piecemeal reviews, however. That policy, along with the policies of preventing excessive appeals, maintaining an appropriate relationship with the trial court, and avoiding undue hardship, must continue to serve as the guidelines for determining the scope of appellate jurisdiction.

64. *See, e.g.*, *In re* Continental Inv. Corp., 637 F.2d 1 (1st Cir. 1980); *In re* Berkley & Co., 629 F.2d 548 (8th Cir. 1980); Dilly v. S.S. Kresge Co., 606 F.2d 62 (4th Cir. 1979); Ryan v. Occidental Petroleum Corp., 577 F.2d 298 (5th Cir. 1978); David v. Hooker, Ltd., 560 F.2d 412 (9th Cir. 1977); West v. Capitol Fed. Sav. & Loan Ass'n, 558 F.2d 977 (10th Cir. 1977); Kappelmann v. Delta Air Lines, Inc., 539 F.2d 165 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1061 (1977).

65. Crick, *supra* note 5, at 563-65.

66. *See id.* at 558.

67. *Cf.* Mercantile Nat'l Bank v. Langdeau, 371 U.S. 555, 575 (1963) (Harlan, J., dissenting) ("The Court's decision in these appeals throws the law of finality into a state of great uncertainty and will, I am afraid, tend to increase further efforts at piecemeal review.").

68. *See* André, *supra* note 50, at 1061.

69. *See* Crick, *supra* note 5, at 562.

70. *Cf.* Crick, *supra* note 5, at 564-65 (proposing repeal of statutory limits on appellate jurisdiction in favor of appellate discretion in order to effect a more meaningful appellate review).

II. *Harris v. Illinois-California Express, Inc.*: Applying the Requirement of Complete Diversity

A. *Overview of Diversity Jurisdiction*

It is fundamental that federal courts are courts of limited jurisdiction.[71] Federal jurisdiction is limited both by the provisions of article III[72] and by the acts of Congress.[73] One such limitation is the diversity requirement, which permits actions normally within state court jurisdiction to be brought in federal court when the adverse parties are citizens of different states.[74] Supreme Court interpretations of the current diversity jurisdiction statute have held that if any adverse parties are citizens of the same state, diversity jurisdiction does not exist.[75] Historically, an exception to this statutory requirement of complete diversity has been recognized where complete diversity is lost through events taking place after a federal court properly had jurisdiction. In that circumstance, the Court has recognized the continued presence of diversity jurisdiction.[76] *Harris v. Illinois-California Express, Inc.*[77] required the Tenth Circuit to consider whether diversity jurisdiction existed following a series of procedural events, detailed below, which resulted in a loss of complete diversity.

B. Harris v. Illinois-California Express, Inc.

1. The Facts

Harris was a personal injury action arising from an automobile accident which took place in New Mexico. Kimberly Harris, a passenger in the car of Sherry and William Harden, commenced an action against the drivers, owners, and insurers of the other vehicles involved in the accident.[78] The action was filed in the federal district court for New Mexico, with jurisdiction based on complete diversity between Harris and the defendants.[79] The defendants

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71. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). *Accord* Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 372 (1978).

72. U.S. CONST., art. III.

73. Ex Parte McCardle, 74 U.S. (7 Wall.) 506 (1869); Sheldon v. Sill, 49 U.S. (8 How.) 441 (1850).

74. 28 U.S.C. § 1332(a)(1) (1982) provides: "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—(1) citizens of different states." *See also* U.S. CONST., art. III, § 2, cl. 7. The primary purpose of diversity jurisdiction is to protect out-of-state citizens from the prejudice of local courts, or at least to alleviate the fear of such prejudice. *See* Bank of United States v. Deveaux, 9 U.S. (5 Cranch) 61, 87 (1809). Other justifications for diversity range from the supposed procedural advantages existing in federal court to the invigorating effect an available federal forum has on inter-regional capital flows. *See generally* C. WRIGHT, LAW OF FEDERAL COURTS 134-36 (1983).

75. State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 530-31 (1967). *Accord* Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 373 & n.13 (1978); Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806).

76. *See* Wichita R.R. & Light Co. v. Public Util. Comm'n, 260 U.S. 48 (1922); *see generally* D. CURRIE, FEDERAL COURTS 303 (1982).

77. 687 F.2d 1361 (10th Cir. 1982).

78. *Id.* at 1364. Harris sued individually and as a personal representative of her husband's estate. Her husband was a passenger and died in the accident.

79. *Id.*

subsequently filed a third-party complaint against William Harden.[80] Following this complaint, Sherry Harden filed a motion requesting permission to intervene as a co-party plaintiff against the defendants named in Harris' original complaint, which motion was granted.[81] Sherry's intervention did not affect jurisdiction; complete diversity remained between all plaintiffs and defendants in Harris' original suit.[82] Next, however, Harris amended her complaint to include William Harden as a defendant.[83] Sherry Harden did not assert any claims against William.[84] Nonetheless, because both Hardens had identical state citizenship, William's addition as a defendant destroyed complete diversity; citizens of the same state were then on opposite sides of the same action.[85] After trial on the merits the defendants appealed, raising the question of diversity jurisdiction.[86]

2. The Decision

The Tenth Circuit began by observing that complete diversity existed at the time of Harris' original complaint, remained after Sherry Harden intervened as a plaintiff, and was only lost when William Harden was joined as a defendant by Harris' amended complaint.[87] The Tenth Circuit held, however, that Harris's addition of William did not violate the complete diversity rule.[88] This holding stemmed from the court's statement that once diversity jurisdiction has properly attached, jurisdiction is not destroyed by the permissive intervention of a non-indispensable party, especially where that party has independent grounds for jurisdiction.[89] The court rejected defendants' argument that Sherry Harden was an indispensable party. Although the claims of Harris and Sherry Harden had questions of law and fact in common, the actions were independent of each other and could be treated separately.[90] Because Sherry was not an essential party, her intervention could not defeat diversity jurisdiction.[91]

The Tenth Circuit then considered William Harden's position in the

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80. *Id.* William Harden filed cross-claims against the defendants as third-party plaintiffs. *Id.*

81. *Id.* at 1364-65.

82. *Id.* at 1365.

83. *Id.* Harris and William Harden had different state citizenships.

84. *Id.*

85. *Id.* At the district court level the defendants moved to dismiss for lack of diversity jurisdiction, but withdrew the motion. *Id.*

86. *Id.* Plaintiffs prevailed at trial. *Id.* at 1364.

87. *Id.* at 1366.

88. *Id.* at 1369.

89. *Id.* at 1367. This principle is grounded in the doctrine of ancillary jurisdiction, which permits a court to exercise judicial power over a group of related claims once jurisdiction exists over the original claim. *See* D. CURRIE, *supra* note 76, at 303. Limits on ancillary jurisdiction exist, *see* Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365 (1978), although those limits have yet to be defined. *See* D. CURRIE, *supra* note 76, at 304. *See also* infra notes 99-143 and accompanying text.

90. 687 F.2d at 1368. The court also noted that Sherry's intervention did not, in itself, destroy diversity jurisdiction. The Tenth Circuit analogized this situation to a consolidation of actions under FED. R. CIV. P. 42. If the two actions had been commenced independently, they would have been consolidated for judicial economy. Therefore, jurisdiction should be maintained. *See* 687 F.2d at 1368-69.

91. *Id.* (quoting *Wichita R.R. & Light Co. v. Public Util. Comm'n*, 260 U.S. 51, 53-54 (1922)).

action. Although Harris' amended complaint joining William Harden as a defendant destroyed complete diversity, like Sherry, William was not an essential party.[92] Therefore, William's addition, like Sherry's, could not divest the court of jurisdiction.[93]

The conclusion to recognize jurisdiction was buttressed by citation to the Supreme Court's decision in *Owen Equipment & Erection Co. v. Kroger*.[94] *Owen* rejected the argument that diversity jurisdiction remained after all diverse defendants had been dismissed from plaintiff's case, even though diversity jurisdiction had originally been present.[95] Crucial to the decision, however, was the fact that the plaintiff in *Owen* could not have sued the remaining defendant under the diversity provisions.[96] The Supreme Court recognized that the doctrine of ancillary jurisdiction, although flexible, could not be used to create jurisdiction over a suit so obviously in contravention of the statutory diversity requirement.[97] The Tenth Circuit, emphasizing *Owen*'s recognition of the benefits of flexibility in construing a court's ancillary jurisdiction powers,[98] upheld jurisdiction in *Harris* notwithstanding the lack of complete diversity.

C. *The Tenth Circuit Loses Itself in Court-Made Rules*

Diversity jurisdiction is determined at the time an action is commenced and at every stage of the proceeding.[99] This jurisdiction cannot be enlarged or limited by the Federal Rules of Civil Procedure.[100] Pursuant to Rule 14(a),[101] the defendants named in Harris' original complaint impleaded William Harden as a third-party defendant.[102] By so doing, the district court acquired jurisdiction over Mr. Harden. Because impleader is a defensive weapon, which ensures that a defendant's interests are adequately pro-

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92. 687 F.2d at 1368-69.
93. *See id.* at 1368-69.
94. 437 U.S. 365 (1978).
95. *Id.* at 377.
96. *See id.*
97. *Id.*
98. 687 F.2d at 1369.
99. *See, e.g.*, Treines v. Sunshine Mining Co., 308 U.S. 66 (1939). In certain circumstances, once diversity jurisdiction is held to exist subsequent changes in the status of the original parties will not divest a court's jurisdiction. St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283 (1938) (diversity jurisdiction not ousted by plaintiff's subsequent lowering of claimed damages); Koenigsberger v. Richmond Silver Mining Co., 158 U.S. 41 (1895) (subsequent change in a party's citizenship will not destroy diversity jurisdiction). *Cf. also* Hill v. Rolleri, 615 F.2d 886 (9th Cir. 1980) (court maintained jurisdiction over non-diverse third-party claim after dismissal of diverse plaintiff because diversity was present at time action commenced, and subsequent events would not defeat jurisdiction).
100. FED. R. CIV. P. 82 provides in part that "[t]hese rules shall not be construed to extend or limit the jurisdiction of the United States district courts."
101. FED. R. CIV. P. 14(a). This rule provides in part:

> At any time after commencement of the action a defending party as a third-party plaintiff may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him . . . . The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff . . . .

Id.
102. 687 F.2d at 1364.

tected, no independent jurisdictional grounds need to be asserted by the impleading defendant.[103] Jurisdiction over an impleaded defendant exists by virtue of a federal court's power to hear claims ancillary to the primary action.[104]

Rule 14(a) also permits the original plaintiff to assert claims directly against a third-party defendant.[105] Because Rule 14(a) is not jurisdictional,[106] confusion has arisen as to when independent grounds for jurisdiction are necessary for a plaintiff asserting claims directly against a third-party defendant. This section will attempt to sort out some of that confusion.

In 1978, the Supreme Court concluded that independent jurisdictional grounds must be present for a diversity plaintiff to assert a claim directly against a third-party defendant.[107] The Supreme Court's decision, *Owen Equipment & Erection Co. v. Kroger*,[108] involved diversity action in which the plaintiff amended her complaint to assert a claim against a non-diverse third-party defendant.[109] The primary diverse defendant was dismissed from the action,[110] and the Supreme Court held that jurisdiction was lost over the remaining claim in the absence of an independent basis for federal jurisdiction.[111] Although Kroger reemphasizes strict construction of the diversity requirement,[112] its actual holding is limited to the factual situation in which the plaintiff and the third-party defendant are non-diverse.[113]

The lower courts in *Kroger* would have retained the action under the doctrine of ancillary jurisdiction.[114] Discussing the scope of ancillary jurisdiction[115] in light of the federal diversity requirements, the Court observed

103. Northern Contracting Co. v. C.J. Langenfelder & Son, Inc., 439 F. Supp. 621, 624 (E.D. Pa. 1977); *see also* James Talcott, Inc. v. Allahabad Bank Ltd., 444 F.2d 451 (5th Cir. 1971); Dery v. Wyer, 265 F.2d 804 (2d Cir. 1959).

104. Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 375 n.18 (1978).

105. *See supra* note 101.

106. *See supra* note 100.

107. *See* Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365 (1978).

108. 437 U.S. 365 (1978).

109. *See id.* at 368-69.

110. *Id* at 368.

111. *Id.* at 370, 377.

112. *See id.* at 377. The rule of complete diversity reaffirmed in *Kroger* requires every plaintiff in a diversity action to have a state citizenship different from every defendant. *Harris*, 687 F.2d at 1366 (quoting *Kroger*, 437 U.S. at 377). *See also* Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806); Oppenheim v. Sterling, 368 F.2d 516 (10th Cir.), *cert. denied*, 386 U.S. 1011 (1966).

113. *See infra* notes 114-18 and accompanying text. The Fifth Circuit has held that *Kroger* holds that "an independent basis of jurisdiction is necessary for a plaintiff in a diversity action to assert a non-federal claim against a non-diverse third-party defendant." Birmingham Fire Ins. Co. v. Winegardner & Hammons, Inc., 714 F.2d 548, 553-54 (5th Cir. 1983) (quoting Fauvor v. Texaco, Inc., 546 F.2d 636, 643 (5th Cir. 1977)).

114. 437 U.S. at 367. The court of appeals held that the district court had discretion over whether it should adjudicate the non-diverse claim because, under United Mine Workers v. Gibbs, 383 U.S. 715 (1976), the plaintiff's claim against the third-party defendant derived from the same "core of operative facts" as the main action. 437 U.S. at 369.

115. The distinctions in applying pendant and ancillary jurisdictions are fading into one indistinguishable doctrine. *See generally* Comment, *Pendant and Ancillary Jurisdiction: Towards a Synthesis of Two Doctrines*, 22 U.C.L.A. L. REV. 1263, 1273 (1975). In *Kroger*, the Supreme Court, without attempting to distinguish between ancillary and pendant jurisdiction, 437 U.S. at 370

that if the plaintiff was allowed to assert her claim against the non-diverse third party, the diversity requirement would be circumvented.[116] To prevent such an occurrence, the Supreme Court set forth three criteria for ancillary jurisdiction. Besides the requirement of a "common nucleus of operative fact" enunciated in *United Mine Workers v. Gibbs*,[117] the Court added that consideration should be given to the context in which the non-federal claim is propounded, and that consideration should be given to maintaining the integrity of the statute bestowing jurisdiction over the original claim.[118] Noting that ancillary jurisdiction normally is a defensive weapon used by defendants,[119] and applying the three criteria to the facts in *Kroger*, the Supreme Court prohibited the offensive use of ancillary jurisdiction by the plaintiff in a diversity action.

The Tenth Circuit did not discuss the initial propriety of Harris' amended complaint including William Harden as a defendant. Instead, the court was concerned solely with whether Mr. Harden was an indispensable party.[120] Although Judge Barrett failed to discuss Harris's amendment under the three criteria set out in *Kroger*, the complaint satisfies those criteria and, therefore, is not in conflict with *Kroger*'s prohibition against the offensive use of ancillary jurisdiction. First, Harris' direct claim against William Harden as third-party defendant obviously arose from the same core of operative fact,[121] and is a claim which Harris would expect to try with her other claims in one judicial proceeding.[122] Second, the posture in which Harris' amended complaint comes about is important on two points. To begin with, unlike the defendant in *Aldinger v. Howard*[123] Mr. Harden was already a party to the action and within the court's jurisdiction. Harris' amended complaint therefore does not raise the problems associated with a plaintiff's

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n.8, recognized that ancillary jurisdiction is clearly proper with respect to impleader, cross-claims, and counter-claims. *Id.* at 375 & n.18.

116. "[A] plaintiff could defeat the statutory requirement of complete diversity by the simple expedient of suing only those defendants who were of diverse citizenship and waiting for them to implead nondiverse defendants." 437 U.S. at 374.

117. 383 U.S. 715, 725 (1966).

118. *Id.* at 373 (citing Aldinger v. Howard, 427 U.S. 1, 18 (1976)). The three factors articulated in *Kroger* have been applied in subsequent ancillary jurisdiction cases. *E.g.*, Travelers Ins. Co. v. First Nat'l Bank, 675 F.2d 633, 638-40 (5th Cir. 1982) (held no ancillary jurisdiction over cross-claims of non-diverse parties in an interpleader action); Acton Co. v. Bachman Foods, Inc., 668 F.2d 76, 79-80 (1st Cir. 1982) (held no ancillary jurisdiction over joinder of non-diverse plaintiff); Gunnell v. Amoco Oil Co., 490 F. Supp. 67, 69 (W.D. Mich. 1980) (held no ancillary jurisdiction over plaintiff's claim against a non-diverse third-party defendant). *See also* Runyan v. United Bhd. of Carpenters, 566 F. Supp. 600 (D. Colo. 1983) (applied *Kroger's* requirements to prohibit pendant jurisdiction over a state claim).

119. 437 U.S. at 376. Ancillary jurisdiction is "defensive" because it is a way for defendants, brought into court against their will, to protect their interests by asserting claims against the plaintiff or other responsible parties. *Id.*; *see also* Acton Co. v. Bachman Foods, Inc., 668 F.2d 76, 79 (1st Cir. 1982); Comment, *supra* note 115, at 1273. Justice White dissented from *Kroger*'s defensive classification of ancillary jurisdiction. *Kroger*, 437 U.S. at 381 (White, J., dissenting). Justice White would have followed *Gibbs*, and held that a common nucleus of operative fact is sufficient for jurisdiction over all claims arising in a diversity case. *Id.* at 384.

120. 687 F.2d at 1368-69. The Tenth Circuit ultimately held that Mr. Harden was not a necessary party to Kimberly Harris' action.

121. *See id.* at 1364-65.

122. *See Gibbs*, 383 U.S. at 725.

123. 472 U.S. 1 (1976). The Supreme Court in *Aldinger* held that a federal court does not have pendant party jurisdiction over a defendant sued solely on a state claim.

attempt to add a new party to the action.[124] Next, unlike *Kroger*, Harris and William Harden were diverse parties, so that Harris could have maintained an independent action against Mr. Harden in federal court.[125] Finally, the independent jurisdictional basis upon which Harris could amend her complaint to include a claim against William Harden ensures the integrity of the diversity jurisdiction statute. Harris' use of Rule 14(a) did not expand the Tenth Circuit's limited jurisdiction; hence, her action against Harden is permissible under *Kroger*.

Sherry Harden's effect on diversity, as a result of Sherry's intervention, is not necessarily determinative for purposes of diversity jurisdiction. When a party seeks to intervene in a lawsuit, several considerations are implicated. First, it must be determined whether the party seeking intervention is an indispensable party under Rule 19.[126] The Tenth Circuit correctly held that Sherry was not an indispensable party.[127] After determining that an intervenor such as Sherry is not an indispensable party, the propriety of permissive intervention must be considered. Two requirements must be met for permissive intervention under Rule 24(b).[128] First, the intervenor must have a question of law or fact in common with the pending action.[129] Second, the intervening party must have independent grounds for federal jurisdiction.[130] Sherry Harden met both requirements.[131] When a party is not indispensable and meets the criteria for permissive intervention, diversity jurisdiction under 18 U.S.C. § 1332(a)[132] is not destroyed.[133] Therefore, Sherry's presence as a permissive intervenor did not have to be considered when Harris' complaint was amended to include William Harden as a defendant.

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124. *See id.* at 14-15. *Aldinger* distinguished between the situation where a plaintiff seeks to assert a claim against one already present under federal jurisdiction and a plaintiff's attempt to join an entirely new defendant without an independent basis of jurisdiction. In the latter situation, the federal court would lack jurisdiction. *Id. See Kroger*, 437 U.S. at 381-82 (White, J., dissenting) (noting this significant distinction involving context). Moreover, the *Aldinger* holding was limited to the plaintiff's specific claim pursuant to 18 U.S.C. § 1343(3) (1982) and 42 U.S.C. § 1983 (Supp. V 1981). The Court recognized that different party alignments and different jurisdictional statutes could permit a different result. 427 U.S. at 18.

125. *See* 28 U.S.C. § 1332 (1982) (providing a federal jurisdiction for diversity actions). This aspect of the case negates the Supreme Court's fear in *Kroger* that a plaintiff could sue only diverse citizenship defendants and wait for the defendants to implead non-diverse defendants. *See supra* note 116.

126. FED. R. CIV. P. 19. This rule sets out the requirements for classification as an indispensable party.

127. *See* 689 F.2d at 1367.

128. FED. R. CIV. P. 24(b).

129. "[A]nyone may be permitted to intervene in an action . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common." *Id.*

130. 687 F.2d at 1367; Miller & Miller Auctioneers, Inc. v. G.W. Murphy Indus., Inc., 472 F.2d 893, 528, 530 (10th Cir. 1973) (permissive intervention denied because no independent grounds for jurisdiction). When the intervening party does not have independent jurisdictional grounds, the intervenor must meet Rule 24's requirements for intervention by right.

131. Sherry had questions of law and fact in common with Harris, and diversity jurisdiction was present between Sherry and the original defendants. 687 F.2d at 1367.

132. 18 U.S.C. § 1332(a) (1982).

133. Miller v. Miller, 406 F.2d 590, 593 (10th Cir. 1969) ("Executors are not indispensable parties in actions such as this and therefore the intervention of such a party cannot destroy diversity jurisdiction."); Drillers Engine & Supply, Inc. v. Burckhalter, 327 F. Supp. 648, 649-50 (W.D. Okla. 1971) (non-indispensable parties do not defeat the court's diversity jurisdiction over the main action).

The above reasoning appears to have been followed by the Tenth Circuit,[134] but parts of Judge Barrett's analysis fail to articulate the interaction between Rule 19(a), Rule 24(b), and section 1332(a). At the outset, the Tenth Circuit's emphasis on the fact that Sherry intervened prior to Harris' amended complaint[135] is misplaced. Regardless of when permissive intervention is sought, it is within the court's discretion to allow intervention if the party is not indispensable and the criteria behind Rule 24(b) are met.[136] Because diversity jurisdiction over the main action is not affected by such a party, it does not matter when the party seeks to intervene.[137]

Another aspect of *Harris* indicating the court's failure to focus on the relevant rules is its quote from *Wichita Railroad & Light Co. v. Public Utilities Commission*.[138] *Wichita Railroad* involved the permissive intervention of a non-diverse party as a defendant.[139] In that case, the Supreme Court held jurisdiction was not divested.[140] The Tenth Circuit unfortunately did not distinguish *Wichita Railroad*, which did not involve Rule 24(b) and which does not support the Tenth Circuit's statement that Sherry Harden could not have intervened if Harris had amended her complaint first.[141] Finally, the discussion of consolation[142] seems to be a weak effort to bolster the Tenth Circuit's holding, and suggests that the court may have been uneasy with its own reasoning and with reliance on Rule 24(b).

Although the court's conclusion in *Harris* is correct under the criteria set out in *Kroger*, the Tenth Circuit's reasoning relies on undisciplined arguments and fails to note factual distinctions in relevant precedents. *Kroger* did

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134. *See* 687 F.2d at 1367-68.

135. *See id.* at 1368.

136. *See supra* notes 126-33 and accompanying text; *cf.* Drillers Engine & Supply, Inc. v. Burckhalter, 327 F. Supp. 648, 649 (W.D. Okla. 1971) (pointing out that non-diverse parties did not assert claims against each other but were asserting their own claims independently).

137. *See supra* note 132 and accompanying text. The Tenth Circuit implicitly recognized this point when it discussed whether William Harden was an indispensable party. *See* 687 F.2d at 1369.

138. 260 U.S. 48 (1922). *Harris* quoted the following passage from *Wichita Railroad*:

> The intervention of the Kansas Company, a citizen of the same State as the Wichita Company, its opponent, did not take away the ground of diverse citizenship. That ground existed when the suit was begun and the plaintiff set it forth in the bill as a matter entitling it to go into the District Court. Jurisdiction once acquired on that ground is not divested by a subsequent change in the citizenship of the parties . . . . Much less is such jurisdiction defeated by the intervention, by leave of the court, of a party whose presence is not essential to a decision of the controversy between the original parties . . . . The Kansas Company, while it had an interest and was a proper party, was not an indispensable party.

687 F.2d at 1368 (quoting *Witchita Railroad*, 260 U.S. at 53-54).

139. 260 U.S. at 52-53. This case illustrates the defensive use of ancillary jurisdiction, rather than the offensive use prohibited by the Supreme Court in *Kroger*. Such a factual difference surrounding the non-diversity claim is perhaps the material reason why *Kroger* did not overrule *Wichita Railroad*. In *Wichita Railroad* a defendant benefited, whereas in *Kroger* it would have been the plaintiff who benefited.

140. *Id.* at 54.

141. *See* 687 F.2d at 1368. Specificially, there were no independent jurisdictional grounds in *Wichita Railroad*. 260 U.S. at 52. In fact, the *Wichita Railroad* quote supports the conclusion that Sherry Harden could have intervened after William Harden had been joined as a direct defendant by Harris.

142. *See* 687 F.2d at 1368-69 (distinguishing *Kroger* from consolidation actions under FED. R. CIV. P. 42).

not eliminate the possibility of avoiding complete diversity. It is a significant decision in the diversity area and should not be tossed aside unnoticed, as the Tenth Circuit seemed to do in *Harris*. Reaching the proper result through the misapplication of *Kroger* and *Wichita Railroad* leaves *Harris* a bewildering and confusing precedent.[143]

III. REMOVAL JURISDICTION

Removal refers to the right to transfer an action from a state court, where it was originally filed, to a federal court. Removal is permitted when the federal court would have had original jurisidiction over the action.[144] This right has existed as a valid statutory procedure since the Judiciary Act of 1789.[145] The purposes behind the removal statute are to escape local prejudice towards nonresident litigants and to provide an appropriate forum for actions involving federal law which have been brought in state court.[146] The construction and effect of the removal statute was the subject of several Tenth Circuit decisions this past term.

A. *Defect in State Jurisdiction Not Cured by Removal*

Jurisdiction upon removal is derivative, meaning that when a state court has no jurisdiction over a claim, a federal court acquires none on removal and must dismiss the case.[147] This is true even if jurisdiction would have been proper had the suit originally been filed in a federal court.[148] The Tenth Circuit, in *Goodrich v. Burlington Northern Railroad*,[149] reinforced the rule that where a state court does not have jurisdiction over a particular claim, proper removal to a federal court will not cure the defect regardless of considerations of judicial economy.

Goodrich was a negligence action originally brought in a Colorado state court. The defendant, Burlington Northern Railroad (Burlington), impleaded the United States Postal Service (United States), asserting claims for

143. *Harris* is another example of the judicial energy wasted on the diversity requirement, and lends support for abolishing diversity jurisdiction. *See generally* Rowe, *Abolishing Diversity Jurisdiction: Positive Side Effects and Potential for Further Reforms*, 92 HARV. L. REV. 963 (1979).

144. *See* 28 U.S.C. § 1441(a) (1982). This section states:

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

Id.

145. Judiciary Act of 1789, ch. 20, § 12; 1 Stat. 73, 79. For a brief history of the removal statutes, see Note, *Remand Order Review After* Thermtron Products, 1977 U. ILL. L. F. 1086, 1088-91.

146. Myers, *Federal Appellate Review of Remand Orders: Expansion or Eradication?* 48 MISS. L.J. 741, 741 (1977).

147. Arizona v. Manypenny, 451 U.S. 232, 242 & n.17 (1981). The dismissal is based on lack of subject matter jurisdiction. Venner v. Michigan Central R.R., 271 U.S. 127, 131 (1926); *accord* Washington v. American League of Professional Baseball Clubs, 460 F.2d 654 (9th Cir. 1972); Martinez v. Seaton, 285 F.2d 587 (10th Cir.), *cert. denied*, 366 U.S. 946 (1961). *See also* Montgomery v. Utah, No. 82-2194 (10th Cir., Feb. 28, 1983) (removal jurisdiction dependent upon a viable state action).

148. Arizona v. Manypenny, 451 U.S. 232, 242 n.17 (1981).

149. 701 F.2d 129 (10th Cir. 1983).

contribution and indemnity under the Federal Tort Claims Act.[150] The United States successfully removed the case to federal court.[151] Once in federal court, the United States pointed out that exclusive jurisdiction over claims asserted under the Federal Tort Claims Act rests with the federal district courts.[152] The state court therefore had no jurisdiction over the third party claim, with the result that the federal district court had no derivative jurisdiction.[153] The district court agreed, and dismissed the third-party claim for lack of subject matter jurisdiction.[154] The propriety of the dismissal was appealed to the Tenth Circuit.

On appeal, Burlington asserted that the federal district court erred in granting the dismissal because such a ruling, based on the derivative jurisdiction principle, frustrated judicial economy.[155] Judge Seymour, writing for the Tenth Circuit, considered the impleader rule[156] and its purpose of judicial economy, and stated that the derivative jurisdictional principle nonetheless applied to third-party claims.[157] Judge Seymour followed *Kenrose Manufacturing Co. v. Fred Whitaker Co.*,[158] a Fourth Circuit decision which held that mere permission in the federal rules to bring a claim does not confer jurisdiction over a claim.[159]

The application of *Kenrose Manufacturing* in *Goodrich* was entirely appropriate. The state court did not have jurisdiction over the third-party claim, and removal could not create jurisdiction over that claim. The Tenth Circuit properly ruled that a judicial economy argument supporting a third-party claim cannot cure a defect in subject-matter jurisdiction. Thus, the derivative jurisdiction principle applies to third-party claims as well as to main actions.

B. *Limiting the Permissible Grounds for Remand to State Court*

After removal, a district court must remand a case back to state court at any time prior to final judgment if the case appears to have been "removed improvidently and without jurisdiction."[160] Until 1976, the general rule was no appellate review of district court remand orders.[161] The nonreviewability

150. 28 U.S.C. §§ 2671-2680 (1982). *See* 701 F.2d at 130.

151. 701 F.2d at 130.

152. *Id. See* 28 U.S.C. § 1346(b) (1982).

153. 701 F.2d at 130.

154. *Id.* Because the federal district court did not have jurisdiction over the primary claim of negligence, and did not acquire jurisdiction over the federal claim, the question of pendent jurisdiction over the primary claim was not considered.

155. *Id.* Dismissal of the third-party claims means Burlington must now bring its indemnity and contribution claim against the United States as a separate cause of action in federal court. *See* 28 U.S.C. § 1346(b) (1982).

156. FED. R. CIV. P. 14(a). Rule 14(a) allows a defendant to implead a third party who is or may be liable to the defendant for all or part of the original plaintiff's claim. *Id.*

157. 701 F.2d at 130.

158. 512 F.2d 890 (4th Cir. 1972).

159. *Id.* at 893. "Permission" means that although Rule 14(a), for example, does not require third party impleader, a court in its discretion *may* allow the impleader. There is nothing in Rule 14(a) conferring jurisdiction, and therefore it should not be construed as a source of jurisdiction. *See* FED. R. CIV. P. 82.

160. *See* 28 U.S.C. § 1447(c) (1982).

161. *See* Myers, *supra* note 146, at 743. This rule originates from 28 U.S.C. § 1447(d) (1982)

rule was intended to prevent delays and interruptions of the proceedings in a case.[162] Then, in *Thermtron Products, Inc., v. Hermansdorfer*,[163] the Supreme Court relaxed the harshness of this rule by holding that a remand order for a properly removed case may be reviewed when the remand is based on grounds not authorized by statute.[164] The Tenth Circuit applied this rule of law when it granted a writ of mandamus in *Sheet Metal Workers International Association v. Seay*.[165]

Sheet Metal Workers was commenced in Oklahoma state court, and involved an alleged breach of a collective bargaining agreement.[166] The case was properly removed to the United States District Court for the Eastern District of Oklahoma because federal district courts have original jurisdiction over actions involving collective bargaining agreements.[167] The federal district court then granted the employer's motion to remand the case to state court.[168] The case was not remanded upon statutory grounds, however.[169] Applying *Thermtron*, the Tenth Circuit granted the requested writ of mandamus and ordered the district court to vacate the remand order and hear the case.[170]

The Tenth Circuit's decision rejected the three arguments raised by the employer (Acme). First, Acme argued that the mandamus proceeding was barred because of the statutory prohibition against appellate review of remand orders.[171] Citing *Thermtron*, the Tenth Circuit responded that a remand decision is reviewable when it is based on grounds not specified by statute.[172] Because the statute, 28 U.S.C. § 1447(c),[173] permits remand only when removal is "improvident and without jurisdiction," and those were not the grounds proffered by the district court, appellate review was not barred.[174]

Second, Acme attempted to distinguish *Thermtron* by pointing out that the word "improvidently" is not defined. Therefore, respondent Acme con-

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which reads in relevant part: "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." The statute provides an exception for remand orders in civil rights cases. *Id.*

162. Myers, *supra* note 146, at 742 (citing Chandler v. O'Bryan, 445 F.2d 1045, 1057 (10th Cir. 1971), *cert. denied*, 405 U.S. 964 (1972)).

163. 423 U.S. 336 (1976).

164. *Id.* at 351. The statutory basis for remand is set forth in 28 U.S.C. § 1447(c) (1982).

165. 693 F.2d 1000 (10th Cir. 1982), *modified*, 696 F.2d 780 (10th Cir. 1983). The court modified its original decision to allow the district court to determine whether it would entertain pendent state claims. 696 F.2d at 783.

166. 693 F.2d at 1001.

167. *See* Labor-Management Relations (Taft-Hartley) Act § 301(a), 29 U.S.C. § 185(a) (1982). Removal of original jurisdiction actions is authorized by 28 U.S.C. § 1441(a) (1982).

168. 693 F.2d at 1001.

169. Concurrent jurisdiction existed between the state and federal court. The injunctive relief requested by the employer could not be granted by the federal court, *see* Norris-LaGuardia Act, 29 U.S.C. §§ 101-114 (1982), but was a possible remedy in state court. 693 F.2d at 1001. The district court remanded because it felt the state court's power to grant complete relief made that court a better forum. *Id.* at 1002 n.2.

170. 693 F.2d at 1006.

171. *Id.* at 1002. *See* 28 U.S.C. § 1447(d) (1982).

172. 693 F.2d at 1002.

173. 28 U.S.C. § 1447(c) (1982).

174. 693 F.2d at 1001-02.

tended, the definition of "improvidently" removed should include situations in which removal would limit the available remedies.[175] The Tenth Circuit disagreed, stating that the presence of restricted remedies in federal court does not compel a remand. Disparity in remedies is just one of the hardships incurred when federal jurisdiction is properly invoked.[176]

Third, Acme contended that the case had been "improvidently removed." For this argument to stand, however, Acme was required to show a procedural defect.[177] Because the case had been timely removed and contained no other procedural defects, it had not been "improvidently removed" and appellate review was proper.[178] Restricted remedies did not violate a procedural requirement, and consequently could not affect the circuit court's jurisdiction.[179]

After rejecting Acme's arguments the Tenth Circuit concluded that the restricted availability of remedies is not a statutory ground for remand back to a state court.[180] Consequently, the court was required to grant the requested mandamus.[181] The fact that the court felt compelled to grant the mandamus indicates that district courts are no longer free to remand for reasons not specified by statutes.

C. *Limiting "Federal Question" Removal*

Another general rule in removal jurisdiction is that removal statutes are to be strictly construed.[182] The Tenth Circuit applied this rule in *Fajen v. Foundation Reserve Insurance Co.*,[183] where it considered whether the federal district court had jurisdiction pursuant to 28 U.S.C. § 1441(b),[184] which permits removal of cases involving federal questions.[185]

A brief recital of the complex procedural history behind *Fajen* is necessary for an understanding of the court's decision. Five years after the plain-

175. *Id.* at 1003. Acme was seeking injunctive relief which a federal court could not grant but a state court could. *See supra* note 169.

176. *See* 693 F.2d at 1004 (quoting Avco Corp. v. Aero Lodge No. 735, Int'l Assoc. of Machinists, 390 U.S. 557, 561 (1968)). The Tenth Circuit noted that the solution to the problem of restricted remedies lies with Congress. 693 F.2d at 1004.

177. 693 F.2d at 1005. *See generally* Note, *supra* note 145, at 1093 (concludes improvidently means legally defective). *But cf.* Young v. Board of Educ., 416 F. Supp. 1139, 1141 (D. Colo. 1976) (without mentioning section 1447(c), the district court remanded a properly removed case because either state or federal court could hear civil rights actions and the plaintiff's choice of forum should be protected).

178. *See* 693 F.2d at 1005 (failing to find procedural defect).

179. Avco Corp. v. Aero Lodge No. 735, Int'l Assoc. of Machinists, 390 U.S. 557, 561 (1968).

180. 693 F.2d at 1005-06.

181. *Id.* at 1006.

182. *See, e.g.*, Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100 (1941); Chicago, R.I. & P.R. Co. v. Stude, 204 F.2d 116 (8th Cir. 1953), *aff'd*, 346 U.S. 574 (1954).

183. 683 F.2d 331 (10th Cir. 1982).

184. 28 U.S.C. § 1441(b) (1982). This section reads:

> Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the state in which such action is brought.

Id.

185. 683 F.2d at 333.

tiff had obtained a default judgment in a Nevada state court, the plaintiff filed suit in the United States District Court for the District of New Mexico to recover the unsatisfied judgment.[186] The district court refused to enforce the judgment; instead, it granted summary judgment for the defendant because the record in the earlier action indicated that the plaintiff had failed to comply with Nevada's requirements for substituted service of process.[187] Consequently, the Nevada court had not had personal jurisdiction over the defendant in the earlier action, and the default judgment was unenforceable.[188] The plaintiff then returned to Nevada and obtained an amended default judgment nunc pro tunc, which corrected the personal jurisdiction problem.[189] Plaintiff then instituted an action in a New Mexico state court seeking to enforce the amended Nevada judgment.[190] Defendant requested removal to federal district court, which the United States District Court for the District of New Mexico granted to protect its prior summary judgment decision.[191] Instead of treating plaintiff's suit on the nunc pro tunc judgment separately, however, the district court consolidated it with the prior grant of summary judgment for the defendant and characterized the consolidated action as a Rule 60(b)[192] motion to vacate the grant of summary judgment.[193] The hybrid motion was then denied, and the action was dismissed.[194]

On appeal the issue was whether jurisdiction existed to permit removal.[195] The majority held that removal was improper, and ordered the case remanded to state court.[196] The starting point for the majority's analysis was the rule that removal jurisdiction statutes must be strictly construed.[197] In *Fajen*, the majority found that the district court was more concerned with protecting its prior summary judgment than with applying the Tenth Circuit's standard for removal based on a federal question.[198] Two reasons were given for reversing the trial court's assumption of jurisdiction.

First, plaintiff's action on the judgment nunc pro tunc was not a collateral attack on the federal court's grant of summary judgment because the issues involved in the two actions were markedly different.[199] The issue in the summary judgment proceeding was limited to determining whether the

186. *Id.* at 332.
187. *Id.*
188. *See id.* at 333.
189. *Id.*
190. *Id.*
191. *Id.*
192. FED. R. CIV. P. 60(b). Rule 60(b) permits motions to vacate a prior judgment.
193. 683 F.2d at 333.
194. *Id.*
195. *Id.*
196. *Id.* at 334. Chief Judge Seth dissented from this decision. *Id.* (Seth, C.J., dissenting).
197. *Id.* at 333 (citing Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 108-09 (1941)).
198. 683 F.2d at 333. The standard to be met is that "the required federal right or immunity must be an essential element of the plaintiff's cause of action, and . . . that federal controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal." Madsen v. Prudential Fed. Sav. & Loan Ass'n, 635 F.2d 797, 800 (10th Cir. 1980), *cert. denied*, 451 U.S. 1018 (1981), *quoted in Fajen*, 683 F.2d at 333.
199. 683 F.2d at 334.

Nevada state court had jurisdiction to enter the original default judgment.[200] The issue in the disputed proceeding on the judgment nunc pro tunc, however, was whether Nevada could cure the jurisdictional defect after the fact.[201] Consequently, the prior judgment was not at issue in the second suit, and the court had no jurisdiction to grant a removal petition to protect its previous judgment.[202]

Second, to the extent that the federal summary judgment order was implicated in the second proceeding, it was implicated only by way of defense.[203] The majority stated that the basis for federal question removal must appear on the face of a complaint.[204] Where the complaint was predicated on state grounds, the fact that the suit might ultimately involve construction of a prior federal judgment did not convert the suit into an action involving a federal question.[205] Hence, removal under section 1441(b) was improper.[206]

Chief Judge Seth, in dissent, presented the two issues on appeal as first, whether plaintiff's motion to remand the action to state court was properly denied, and second whether the Rule 60(b) motion was properly denied.[207] Chief Judge Seth declared strongly that the action on the nunc pro tunc judgment directly attacked the district court's grant of summary judgment because the nunc pro tunc proceeding was in essence an attempt to obtain relief from a federal judgment.[208] Thus, the remand was properly denied, because protecting a prior decision presented a federal question under the Fifth Circuit's *Villarreal v. Brown Express, Inc.*[209] decision. The plaintiff should not be allowed to circumvent the prior federal court dismissal by correcting the defect supporting the dismissal; rather, the earlier federal judgment was entitled to protection in subsequent actions.[210]

The dissent also abjured the majority's use of a well-pleaded complaint rule. The duty of the court was to go beyond the facts of the complaint and look for a controlling question of federal law.[211] If the majority had done so, they would have found a federal question,[212] and therefore would have sustained jurisdiction upon removal.[213] Given jurisdiction, the dissent would

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id. See supra* note 198.

205. *Id. Cf.* Louisville & Nashville R.R. v. Mottley, 211 U.S. 149 (1908) (no federal question jurisdiction based on a "lurking" federal defense).

206. 683 F.2d at 334.

207. *Id.* at 335 (Seth, C.J., dissenting).

208. *Id.* at 336.

209. 529 F.2d 1219 (5th Cir. 1976). In *Villarreal*, the plaintiff had settled a personal injury claim for $300,000 in federal district court, and the action was dismissed with prejudice. Plaintiff later brought a state court action against the defendant, claiming that the federal award was inadequate because the defendant had converted key evidence. The Fifth Circuit held that federal question removal was proper to protect the existing federal judgment. *Id.* at 1220-21.

210. 683 F.2d at 336 (Seth, C.J., dissenting).

211. *Id.* at 335.

212. *See supra* notes 208-10 and accompanying text.

213. 683 F.2d at 335-36 (Seth, C.J., dissenting).

have affirmed the district court's denial of the Rule 60(b) motion.[214]

Despite the strong dissent, the decision in *Fajen* limits the rule articulated in *Villarreal*. Unless a prior federal judgment is a material part of a subsequent action, protecting that prior judgment is an insufficient basis for federal question removal in the Tenth Circuit.

D. *Retaining Jury Trial Rights After Removal*

The question of when a state right to a jury trial is retained upon removal pursuant to section 1442(a)(1)[215] was addressed in *City of Aurora v. Erwin*.[216] *City of Aurora* involved a petty offense action[217] in which Erwin, a United States postman, argued that he had an absolute right to a jury trial under state law[218] and that this right was retained upon removal.[219] Applying a two-part analysis, a Tenth Circuit panel majority determined that Erwin's right to a jury trial was retained following removal.[220] First, the Tenth Circuit noted that removal cannot supplant substantive state law, but that federal procedural rules preempt conflicting state rules.[221] Next, the court concluded that the Colorado statute providing for a jury trial was nonprocedural in character,[222] and that this right was therefore retained upon removal.

In reaching the court's conclusion, Judge McKay, writing for the majority, considered the limited purpose behind section 1442(a)(1). Citing *Arizona v. Manypenny*,[223] Judge McKay stated that section 1442(a)(1) was intended to permit a federal officer to assert immunity defenses in a forum free from local interests and prejudices.[224] Removal jurisdiction could "neither enlarge nor contract the rights of the parties."[225] Therefore, state law applies unless it is preempted by a federal procedural rule.[226]

Next, Judge McKay considered whether the Colorado statute providing jury trials in criminal petty offense actions was enacted for procedural or nonprocedural reasons. Although this determination was a federal question, the court observed that a state's purpose in granting the jury trial right is a significant factor in arriving at a final conclusion.[227] Probing into the history of the state statutory provision for a jury trial, the court concluded that

214. *Id.* at 336.

215. 28 U.S.C. § 1442(a)(1) (1982). This section permits removal to a federal court when the action is brought against a United States officer, or an agent of such officer, concerning an act within the scope of his or her office. *Id.*

216. 706 F.2d 295 (10th Cir. 1983).

217. The postman was charged with a petty offense after spraying a dog's owner with dog repellant. The offense took place on the "doggiest route in Aurora." *Id.* at 295 n.1.

218. *Id.* at 295. The defendant was entitled to a jury trial under Colorado law. *See* COLO. REV. STAT. § 16-10-109(2) (1978).

219. 706 F.2d at 296.

220. *Id.* at 299.

221. *Id.* at 296-97.

222. *Id.* at 298-99.

223. 451 U.S. 232 (1981).

224. 706 F.2d at 296.

225. Arizona v. Manypenny, 451 U.S. 232, 242 (1981), *quoted in City of Aurora*, 706 F.2d at 296-97.

226. 706 F.2d at 297. *See also* 28 U.S.C. § 2072 (1982).

227. 706 F.2d at 297.

the right was created as a direct response to the Colorado Supreme Court decision in *Austin v. City of Denver*.[228] In *Austin*, the state supreme court ruled that the right to a jury trial did not extend to petty criminal offenses. Shortly thereafter, the legislature enacted a statute granting such jury trial rights.[229] Since its enactment, the Colorado Supreme Court has characterized the statute as creating a substantive right,[230] albeit without articulation of a nonprocedural rationale to support that characterization. Judge McKay concluded that the jury trial right had been enacted, at least in part, for nonprocedural reasons, and therefore the right was retained as state substantive law upon removal to the federal court under section 1442(a)(1).[231]

In the dissenting opinion, Chief Judge Seth criticized the majority's conclusion that Erwin was entitled to a jury trial in federal court. Chief Judge Seth's primary argument was that "state laws cannot alter the essential character or functions of a federal court."[232] He reasoned that because a federal magistrate court does not hold jury trials for petty criminal offenses, the majority's decision alters this fundamental characteristic of the magistrate court.[233] The dissent concluded that, although the policy behind the Colorado law was relevant in assessing the rule's importance, it should not dictate the determination of what constituted a substantive right in a federal court.[234] Because the majority's decision altered the federal distribution of functions between judge and jury in the absence of convincing evidence of the substantive nature of the state jury trial right, Chief Judge Seth dissented.

IV. MULTIPLE CLAIMS AND FINALITY UNDER RULE 54(b)

A basic policy in federal courts is that an appeal will lie only from a final decision.[235] A slight variation of that policy is provided in Rule 54(b).[236] Rule 54(b) allows particular orders which are not dispositive of an entire action to be treated as final and, therefore, reviewable.[237] The usual

228. 170 Colo. 448, 462 P.2d 600, *cert. denied*, 398 U.S. 910 (1970). *See* 706 F.2d at 298.

229. 706 F.2d at 298. *See* COLO. REV. STAT. § 16-10-109(2) (1978).

230. Garcia v. People, 200 Colo. 413, 615 P.2d 698 (1980); Hardamon v. Municipal Court, 178 Colo. 271, 497 P.2d 1000 (1972).

231. 706 F.2d at 299.

232. *Id.* at 300 (Seth, C.J., dissenting). As supporting authority, the chief judge cited two diversity jurisdiction cases, Byrd v Blue Ridge Coop., 356 U.S. 525 (1958) and Herron v. Southern Pac. Co., 283 U.S. 91 (1931). 706 F.2d at 299. The majority distinguished these cases because they were diversity cases, not section 1442(a)(1) actions, and therefore invoked different policy considerations. *Id.* at 299 n.10. In addition, the majority offered three other rebuttal arguments: *Byrd* concerned a seventh amendment, not a sixth amendment, jury right; like *Bryd*, *City of Aurora* furthered the federal policy of promoting jury trials; and, finally, *Byrd* has been subject to controversy. *Id.*

233. 706 F.2d at 300 (Seth, C.J., dissenting).

234. *Id.*.

235. *See supra* notes 1-8 and accompanying text.

236. FED. R. CIV. P. 54(b). Rule 54(b) reads in pertinent part:

> When more than one claim for relief is presented in an action . . . or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

237. *See id.*

problem with Rule 54(b) is determining which trial court decisions are final. In this past term, the Tenth Circuit considered this question in light of the requirements and purposes of Rule 54(b).

A. *Partial Damage Awards Are Not Final Under 54(b)*

In the per curiam decision *Wheeler Machinery Co. v. Mountain States Mineral Enterprises, Inc.*,[238] the Tenth Circuit held that a partial summary judgment, awarding only a portion of the damages claimed, is not a final judgment for purposes of Rule 54(b).[239] The district court in *Wheeler* granted partial summary judgment for the minimum undisputed amount Mountain States owed Wheeler under a contract, and declared that judgment final under Rule 54(b).[240] The Tenth Circuit dismissed Mountain States' appeal, concluding that the partial summary judgment was not final within the meaning of Rule 54(b).[241]

In determining whether the damages judgment was final, the Tenth Circuit relied on the definition of a Rule 54(b) final judgment set forth in the Supreme Court decisions *Sears, Roebuck & Co. v. Mackey*[242] and *Curtiss-Wright Corp. v. General Electric Co.*[243] *Sears* defined final judgment under Rule 54(b) as the ultimate disposition of one claim among several claims.[244] An "ultimate disposition" must meet the finality requirements of section 1291 even though it encompasses fewer than all the claims in an action.[245] The district court cannot, by certifying a decision as final, change the inherent nature of that decision.[246] Once finality is found, a Rule 54(b) appeal is permitted if the district court determines that there is no just reason for delay.[247]

In *Wheeler*, the partial summary judgment for damages left other damage claims arising from the same breach—interest, attorney fees, disputed principal—undetermined. The Tenth Circuit applied the rule, followed by other circuit courts,[248] that where a principal amount is awarded but an interest claim has yet to be determined, the award is not final for purposes of appellate review.[249]

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238. 696 F.2d 787 (10th Cir. 1983) (per curiam).

239. *Id.* at 789.

240. *Id.*

241. *Id.*

242. 351 U.S. 427 (1956). The Supreme Court held that Rule 54(b) is important for permitting timely appeals of adjudicated issues before all the issues in an action are determined. *Id.* at 437.

243. 446 U.S. 1 (1980).

244. 351 U.S. at 436, *quoted in Curtiss-Wright Corp.*, 446 U.S. at 7.

245. 351 U.S. at 438.

246. *Id.* at 437.

247. 446 U.S. at 8. The district court acts as a dispatcher, determining when Rule 54(b) certification is appropriate.

248. *See* Memphis Sheraton Corp. v. Kirkley, 614 F.2d 131, 131-32 (6th Cir. 1980); Acha v. Beame, 570 F.2d 57, 60 (2d Cir. 1978); Cinerama, Inc. v. Sweet Music, S.A., 482 F.2d 66, 69 (2d Cir. 1973).

249. 696 F.2d at 789. The court also noted that a dispute over a portion of the principal precludes finality. *Id.*

B. *Rule 54(b) Finality and Class Action Damage Awards*

In *Strey v. Hunt International Resources Corp.*,[250] the Tenth Circuit also concluded that a damage award was not final and therefore not reviewable under Rule 54(b).[251] *Strey* was a class action in which the district court rendered a damage award without providing a method for dividing the fund among class members, for disposing of unclaimed shares, and for assessing attorney fees against the common fund.[252] The Tenth Circuit cited *Boeing Co. v. Van Gemert*[253] as supporting the rule that the absence of a formula for dividing the damage award created a lack of final judgment, and dismissed the appeal.[254]

C. *Rule 54(b) Certification Merges with Previous Orders to Create Final Judgment*

A notice of appeal must be filed within thirty days of an order or judgment in a civil action.[255] The timely filing of the notice of appeal is a condition precedent to appellate jurisdiction over the appeal.[256] The Tenth Circuit adheres strictly to this rule.[257] A prerequisite to appeal is a final order.[258] If the appeal is under Rule 54(b), the district court must expressly determine that the partial judgment is final, and must direct entry of judgment.[259] Without such certification, even a timely appeal is not reviewable.[260]

In *A.O. Smith Corp. v. Sims Consolidated, Ltd.*,[261] the Tenth Circuit held that a Rule 54(b) certification merges with a prior order disposing of a claim, and constitutes the final judgment for purposes of the thirty-day period for filing a notice of appeal.[262] *Garden City Production Credit Association v. Interna-*

250. 696 F.2d 87 (10th Cir. 1982). In another class action case, the Tenth Circuit held that an order which did not address the merits of the claim was not appealable under Rule 54(b). *See* Baker v. Bray, 701 F.2d 119 (10th Cir. 1983).

251. 696 F.2d at 88.

252. *Id.*

253. 444 U.S. 472 (1980).

254. 696 F.2d at 88. *See* 444 U.S. at 481 n.7.

255. FED. R. APP. P. 4(a)(1). The thirty-day rule is subject to exceptions, such as interlocutory appeals under 28 U.S.C. § 1292(b) (1982) and certain bankruptcy appeals.

256. Gooch v. Skelly Oil Co., 493 F.2d 366, 368 (10th Cir.), *cert. denied*, 419 U.S. 997 (1974) (timeliness is mandatory and jurisdictional).

257. The Tenth Circuit's strict adherence to the filing rule is represented by several opinions, not selected for routine publication, issuing this past term and dismissing cases for untimely appeals. *See, e.g.*, Boyd v. Shawnee Mission Pub. Schools, No. 82-1699 (10th Cir., Mar. 3, 1983); Robinson v. Audi NSU Auto Union, No. 82-1680 (10th Cir., Feb. 28, 1983); Myers v. Utah State Adult Probation & Parole Dept., No. 82-2171 (10th Cir., Dec. 13, 1982); United States v. Daniels, No. 82-2071 (10th Cir., Dec. 8, 1982); St. Louis-San Francisco Ry. v. Scott Fertilizer Co., No. 82-1510, No. 82-1561 (10th Cir., Oct. 27, 1982); United States v. Clayton, No. 82-1482 (10th Cir., Oct. 22, 1982); American Motorists Ins. Co. v. Resource Technology Corp., No. 82-1492 (10th Cir., Aug. 27, 1982); Herron v. Pendleton, Sabian & Craft. No. 82-1200 (10th Cir., Aug. 3, 1982); United States v. Afflerbach, No. 82-1667 (10th Cir., July 29, 1982).

258. 28 U.S.C. § 1291 (1982).

259. FED. R. CIV. P. 54(b). *Accord* Golden Villa Spa, Inc. v. Health Indus., Inc., 549 F.2d 1363, 1364 (10th Cir. 1977). *See also* United States v. Taylor, 632 F.2d 530 (5th Cir. 1980) (if no certificate of finality is issued, then appeal under Rule 54(b) should be dismissed).

260. Golden Villa Spa, Inc. v. Health Indus., Inc., 549 F.2d 1363 (10th Cir. 1977).

261. 647 F.2d 118 (10th Cir. 1981).

262. *Id.* at 121.

tional Cattle Systems[263] allowed the Tenth Circuit to reaffirm its holding in *A.O. Smith*.

The issue in *Garden City* was whether the court had jurisdiction over an appeal and cross-appeal filed prior to a Rule 54(b) certification. The district court had granted a partial summary judgment against only one defendant, International Cattle Systems (ICS), on November 20, 1981.[264] On January 7, 1982, that judgment was adjusted for interest due.[265] On February 24, 1982, the district court denied ICS's motion for reconsideration of the judgment.[266] A notice of appeal was filed by ICS on March 25, 1982, and another defendant cross-appealed on April 7, 1982.[267] Because the summary judgment was only partial, ICS then requested certification of its appeal under Rule 54(b); the district court issued the Rule 54(b) certificate on April 13, 1982.[268]

As the facts illustrate, ICS's notice of appeal was filed more than thirty days after the November 20 order and the January 7 order but prior to the Rule 54(b) certification. In determining its jurisdiction over the appeals, the Tenth Circuit answered two questions. First, the Tenth Circuit held the orders on summary judgment and interest were not final because not all of the parties' rights and liabilities were adjudicated.[269] Thus, jurisdiction over the original appeals was defective. Next, the Tenth Circuit considered whether the Rule 54(b) certification cured the jurisdictional defects in the notices of appeal. Relying on *A.O. Smith*, the court held that the Rule 54(b) certification did not cure the defects; rather, the certification merged with the prior orders to create a final judgment.[270] The notices of appeals pursuant to the original summary judgment orders were ruled premature, and the court would therefore have been required to dismiss the appeals except that a second set of appeal notices had been timely filed following the certification order.[271] *Garden City* reaffirms the holding of *A.O. Smith* and further emphasizes the importance of filing a timely notice of appeal.

IV. Collateral Order Exception to Finality

Collateral orders are orders incidental to the primary action, and are exceptions to the final decision rule for appellate jurisdiction. Regardless of the status of the primary action, such orders are immediately appealable as final decisions provided certain factors are present.[272] The Tenth Circuit

263. No. 82-1387 (10th Cir., July 30, 1982).
264. *Id.* at 2.
265. *Id.*
266. *Id.* at 4.
267. *Id.*
268. *Id.*
269. *Id.*
270. *Id.*
271. *Id.* at 4-5. The court considered this second notice of appeal to be properly filed. *Id.* at 4-5.
272. The collateral order exception concerns orders "which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." Cohen v. Beneficial Loan Corp. 337 U.S. 541, 546 (1949).

considered these factors, and their application in the context of a claim of absolute governmental immunity, in *Chavez v. Singer*.[273]

In *Chavez*, a federal government firefighter brought a tort action in federal district court against his supervisor, claiming that he had been injured as a result of his supervisor's negligent instructions.[274] The district court granted partial summary judgment denying the supervisor's asserted defense of absolute immunity.[275] The supervisor appealed this decision, claiming appellate jurisdiction existed under the collateral order exception.[276]

The four elements to be met before a collateral order exception will lie are: 1) the appeal must be from an order conclusively resolving a disputed question; 2) the question resolved must be collateral to and separate from the merits of the action; 3) the question must be effectively unreviewable on appeal from a final judgment; and 4) the appeal must present a serious and unsettled question.[277] The Tenth Circuit found the collateral order doctrine applicable by analogizing the absolute immunity issue to the double jeopardy issue presented to the Supreme Court in *Abney v. United States*.[278] The Tenth Circuit recognized that, like the double jeopardy issue, the absolute immunity issue should be addressed before trial because it determines whether the supervisor could be "haled into court" and would therefore not be subject to meaningful review.[279] Similarly, the question of immunity was distinct from the merits and was a serious and unsettled question.[280] Finally, the district court's ruling on the issue was conclusive.[281] The court therefore concluded that the immunity question was collateral to the main action; finding the appeal proper under the collateral order exception, the Tenth Circuit discussed the merits and affirmed the district court's ruling.[282]

V. Standard of Review for Special Master's Recommendation

Judges must be alert to the possibility that a jury may have reached a compromise verdict.[283] A judge cannot question a jury's deliberative process, but the judge's suspicion should be aroused when there is a close question on liability and the damage award is extremely inadequate.[284] If it is determined a compromise verdict was reached, then the judge should recom-

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273. 698 F.2d 420 (10th Cir. 1983).

274. *Id.* at 421.

275. *Id.*

276. *Id.*

277. *Id.* The first three elements were set forth by the Supreme Court in Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978). The final element was recognized in Nixon v. Fitzgerald, 457 U.S. 731, 742-43 (1982) (citing Cohen v. Beneficial Loan Corp., 337 U.S. 541, 547 (1949)).

278. 431 U.S. 651 (1977).

279. 698 F.2d at 421. *See also* 431 U.S. at 659.

280. 698 F.2d at 421.

281. *Id.*

282. *Id.* at 421-22.

283. A compromise verdict is reached when some jurors surrender their view on a material issue in return for similar action by other jurors on another issue, resulting in a verdict which is not shared by the jury. A common source for compromise verdicts is a disagreement on liability. Liability will be found, but only a small award of damages is given. *See, e.g.*, Lucas v. American Mfg. Co., 630 F.2d 291, 294 (5th Cir. 1980); Young v. International Paper Co., 322 F.2d 820, 823 (4th Cir. 1963).

284. *See supra* note 283.

mend a new trial. This was the problem presented in *National Railroad Passenger Corp. v. Koch Industries, Inc.*[285]

The jury in *National Railroad* returned a verdict finding the defendant ninety-nine per cent negligent and the plaintiff one per cent negligent, yet awarded damages only equaling what the plaintiff had paid third parties and ignoring the actual losses the plaintiff suffered.[286] Noting that liability was a hotly contested issue and that the defendant did not contest plaintiff's damages, the special master concluded that the jury had reached a compromise verdict and recommended a new trial.[287] Without reviewing the transcript, the district court judge rejected the special master's recommendation and ordered a new trial limited to the issue of damages.[288] The issues presented to the Tenth Circuit were the degree of deference the district court judge should give the special master's recommendation, and the degree of deference the Tenth Circuit should give to the district court judge's decision.

Addressing the first issue, the Tenth Circuit concluded that the abuse-of-discretion test should apply to its review of the district court's decision to reject the master's findings.[289] The Tenth Circuit recognized that if the trial judge alone had determined that a compromise verdict was reached and had ordered a new trial, or if the trial judge alone had ordered a new trial on damages, a circuit court would uphold the decision unless the record indicated an abuse of discretion.[290] The decision to grant a new trial based on the master's findings was entitled to similar deferential review.[291]

The Tenth Circuit then noted that a district court could abuse its discretion by failing to apply the proper standard of review to a master's recommendation.[292] When reviewing a masters's recommendation, a de novo determination was required, which meant that the district court could place whatever reliance it chose to on the special master's recommendations.[293] The district court, however, could not summarily ignore a recommendation based primarily upon credibility; rejecting such a recommendation without reviewing the record was an abuse of discretion.[294] The Tenth Circuit concluded that a finding of a compromise verdict was similar to a finding based on credibility, because the master's subjective impression of the trial was intimately tied to the conclusion that there had been a "hotly contested" issue

285. 701 F.2d 108 (10th Cir. 1983). A magistrate conducted the proceedings in the district court as a special master pursuant to 28 U.S.C. § 636(b)(2) (1982). 701 F.2d at 109. Section 636(b)(2) allows special master proceedings "upon consent of the parties, without regard to the provisions of rule 53(b) of the Federal Rules of Civil Procedure." Therefore, the limitations of Rule 53(b) (requiring the reference to a master to be the exception rather than the rule) need not be considered.

286. 701 F.2d at 110.

287. The special master discovered "no rational connection between the verdict rendered and the facts and evidence presented at the trial." *Id.*

288. *Id.* at 112.

289. *Id.* at 110-11.

290. *Id.*

291. *Id.* at 111.

292. *Id.*

293. *Id.* *See also* United States v. Raddatz, 447 U.S. 667, 674-75 (1980) (holding that congressional intent behind requiring de novo review of magistrate's findings required "sound exercise of judicial discretion," not a new hearing).

294. 701 F.2d at 111.

of liability.[295] The trial court was therefore required to review the transcript before rejecting the master's recommendation.[296] Because the trial court had failed to do so in *National Railroad*, it had abused its discretion; accordingly, the case was remanded for a decision based upon a review of the transcript.

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295. *Id.*
296. *Id.*