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FEDERAL PRACTICE AND PROCEDURE

OVERVIEW

I. ATTORNEY-CLIENT RELATIONSHIPS

In *Hayes v. Eagle-Picher Industries, Inc.*,[1] the Tenth Circuit considered whether a settlement agreement was binding on dissenting members of a group of plaintiffs who had earlier "entered into [an] . . . agreement that the majority rule would govern acceptance of a settlement."[2] On the evening prior to the day the trial was set, the attorneys for the plaintiffs entered into a settlement agreement with the defendant. This agreement was accepted by 13 of the 18 plaintiffs and on the next day "an announcement was made in open court that the majority had agreed to settle."[3] When the trial judge asked if there were any objections to the settlement, the dissenting members of the group failed to respond; however, when the court reduced the settlement to a judgment, two of the plaintiffs did object and subsequently brought this appeal.

The Tenth Circuit reversed the trial court's acceptance of the settlement by holding that an attorney cannot settle a case over the "express objection of his clients."[4] The court said that an agreement to be bound by the decision of the majority was invalid because it is

> contrary to the plain duties owed by an attorney to a client. An agreement such as the present one which allows a case to be settled contrary to the wishes of the client and without his approving the terms of the settlement is opposed to the basic fundamentals of the attorney-client relationship.[5]

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[1] 513 F.2d 892 (10th Cir. 1975).

[2] *Id.*

[3] *Id.* at 893. The two plaintiffs claimed that they did not hear the judge's question, and he subsequently entered judgment on the basis that "there was no fraud, misrepresentation or misconduct" in connection with the agreement. *Id.* at 893 n.1. The defendants argued that the failure of the plaintiffs to speak when the court made its inquiry barred them from later attempting to repudiate the agreement. The Tenth Circuit, however, rejected this argument by applying for the first time in the Tenth Circuit the well-established right of "litigants to set aside a compromise to which they do not agree." *Id.* at 894, *citing* Harris v. Diamond Constr. Co., 184 Va. 711, 36 S.E.2d 573 (1946); Annot., 30 A.L.R.2d 957 (1953).

[4] 513 F.2d at 894.

[5] *Id.* While the agreement to be bound by the majority in a settlement was entered into prior to the actual settlement, the court did not see how this would make the agree-

The court questioned the propriety of such an agreement because it placed the attorney in the posture of representing "both the clients who favored the settlement and those who opposed it."[6]

In *Fullmer v. Harper*[7] and *Redd v. Shell Oil Co.*,[8] the court of appeals considered the proper procedure for the disqualification of an attorney. In *Fullmer* the defendants filed a verified motion to disqualify one of the plaintiff's attorneys on the grounds that a conflict of interests existed because of a prior attorney-client relationship between the attorney and the defendant. The motion was dismissed even though the "relationship pertained to the general subject matter out of which the . . . controversy had arisen," and the defendants appealed the dismissal.[9] While the Tenth Circuit was unable to decide whether a conflict of interests existed because of the inadequacy of the record before the court, it did lay down the procedure it thought the trial court should follow when presented with a motion to disqualify:

> In our view the verified motion to disqualify raises ethical questions that are conceivably of a serious nature. In such circumstance a written response should be required. The trial court should then hold a full evidentiary hearing on the issues posed by the motion to disqualify and the response thereto, which hearing should include the taking of testimony. A motion of this type should not be resolved on the basis of mere colloquy between court and counsel. At the conclusion of such hearing the trial court should then make specific findings and conclusions, to the end that this court will then have a

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ment effective because "the plaintiffs would [still] have the right to agree or refuse to agree once the terms of the settlement were made known to them." *Id.*

[6] *Id.* The court felt that this might be a violation of ABA CODE OF PROFESSIONAL RESPONSIBILITY Disciplinary Rule 5-106 (1971), which had been promulgated by the Kansas Supreme Court; however, the Tenth Circuit acknowledged the good faith of the attorneys and noted that its opinion was "not to be understood as criticizing the professional conduct of the trial attorney" for the plaintiffs. 513 F.2d at 895 n.3.

[7] 517 F.2d 20 (10th Cir. 1975) (per curiam). *Fullmer* was an action brought under the Labor-Management Reporting and Disclosure Act of 1959, codified in scattered sections of Titles 28 and 29, for injunctive relief and monetary damages.

[8] 518 F.2d 311 (10th Cir. 1975). *Redd* was an appeal brought from an attorney-disciplinary action that arose in connection with an antitrust suit in the United States District Court for the District of Utah.

[9] 517 F.2d at 21. The court also considered whether an order of a trial court denying a motion to disqualify an attorney is an appealable order within the meaning of 28 U.S.C. § 1291 (1970), which provides that "[t]he courts of appeal shall have jurisdiction of appeals from all *final* decisions of the district courts of the United States . . . ."

record before it which will permit a meaningful review, should review be sought.[10]

Less than 2 months later a similar problem arose in *Redd v. Shell Oil Co.*[11] The trial judge in *Redd* imposed a $5,000 fine on defendant's attorney for filing what the trial court considered "a meritless and untimely motion for disqualification of all of [the plaintiff's] counsel."[12] The basis for the motion was the fact that an attorney who had previously worked for the firm representing the defendant was employed by plaintiff's counsel and was involved in the case at bar. While the defendant apparently knew of this fact for several months prior to the actual filing of the motion, it delayed "the filing of the motion until the Friday before the Monday on which the trial was to commence."[13] Because the attorney who had earlier worked for the defendant had never done any work related to the present litigation and because the motion to disqualify was delayed until the eve of the trial, the district court held the filing of the motion "constituted a sham and justified the imposition of sanctions" in the form of a $5,000 fine.[14]

The court of appeals reversed the imposition of the fine on the basis that it was "wholly unjustified" and because it "was not a correct measure of the action."[15] Instead, "it would have been amply sufficient to strike the motion to disqualify and to have reprimanded counsel for having filed it at the eleventh hour."[16]

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[10] 517 F.2d at 20-21.

[11] 518 F.2d 311 (10th Cir. 1975).

[12] 518 F.2d at 312. A problem similar to that in *Redd* arose in Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 496 F.2d 800 (2d Cir. 1974) (en banc). In that case a law clerk, employed in the litigation department of the attorneys for the defendant and involved in work concerning the defendants, subsequently formed his own firm that then became involved in litigation with the defendant. The trial court, in an opinion reported at 370 F. Supp. 581 (E.D.N.Y. 1973), denied the motion to disqualify, and this decision was affirmed by the Second Circuit in an opinion which primarily recognized the appealability of the denial of such motions. In its opinion the Second Circuit recognized the likelihood that such problems would continue to arise because of changes in the "structures of large metropolitan law firms," and it predicted that "[c]harges of conflict of interest and motions to disqualify will probably increase rather than abate." 496 F.2d at 803. In its opinion the Tenth Circuit noted that similar problems had recently arisen in other cases in Arizona.

[13] 518 F.2d at 314.

[14] *Id.* at 312.

[15] *Id.* at 314.

[16] *Id.*

The court of appeals noted that "lawyer conflict of interest problems ought to be brought up long before the date of trial in an atmosphere which does not cast a shadow over the trial itself,"[17] and it reiterated the procedure it established for such problems in *Fullmer*.

II. JURISDICTION

The Tenth Circuit in *May v. Supreme Court*[19] rejected for lack of jurisdiction[20] a class action challenging the imposition by the Colorado State Supreme Court of an annual $20 fee.[21] The court held that the amount in controversy did not exceed the jurisdictional amount of $10,000 required under section 1331 despite the plaintiffs' contention that "the amount of controversy is not the fee of $20 but the value of their right to practice law," which presumably did exceed $10,000.[22] In rejecting this contention, the court of appeals relied on the 1934 Supreme Court decision of *Healy v. Ratta*[23] in which the Court said that "[t]he

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[17] *Id.* The court pointed out that the only issue it was deciding in *Redd* was whether the disciplinary action against the attorney involved was justified by the facts and circumstances of the case.

[18] The court, at 518 F.2d at 316 n.3, quoted the language from *Fullmer*, appearing at 517 F.2d at 20-21 and quoted *supra* in the text accompanying note 10. This language describes the proper procedure that should be followed when a motion to disqualify an attorney is made.

[19] 508 F.2d 136 (10th Cir. 1974), *cert. denied*, 95 S. Ct. 2631 (1975).

[20] The plaintiffs claimed jurisdiction under 28 U.S.C. § 1331 (1970) [hereinafter cited as section 1331], which gives district courts jurisdiction "of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000," and 28 U.S.C. § 1343(3) (1970) [hereinafter cited as section 1343(3)], which gives district courts jurisdiction to "redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States."

[21] COLO. R. CIV. P. 227 provides, in part, as follows:

> (1) Every attorney admitted to practice in Colorado (including judges, those admitted on a provisional or temporary basis and those admitted as judge advocate) shall pay an annual fee of $20.00 . . . . The fee shall be used only to defray the costs of disciplinary administration and enforcement, the costs incurred with respect to unauthorized practice matters, and the expenses incurred in the administration of this Rule. . . .
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> (2) Any attorney who fails to timely pay the fee required under paragraph (1) above shall be summarily suspended . . . .

[22] 508 F.2d at 138. The basis for the plaintiffs' claim was that the plaintiffs would be suspended under COLO. R. CIV. P. 227(2) if they did not pay the fee.

[23] 292 U.S. 263 (1934). In *Healy* an attack was made on an annual $50 fee for peddlers, with a fine of $200 for failure to comply; the plaintiffs alleged that they met the jurisdictional amount because the value of their business was worth more than that amount. The Supreme Court, however, disagreed and held

disputed tax is the matter in controversy, and its value, not that of the penalty or loss which payment of the tax would avoid, determines the jurisdiction."[24] Because the jurisdictional amount was not met, the Tenth Circuit affirmed the district court's dismissal of the action.

In *Richins v. Industrial Construction, Inc.*[25] the State Road Commission of Utah argued that the eleventh amendment precluded an indemnity action brought against it, and the plaintiff countered this by pointing to the existence of a Utah statute waiving immunity for suits brought in the state court[26] and the State's appearance in court.[27] The Tenth Circuit agreed with the road commission that the facts pointed to by the plaintiff did not constitute an "implied waiver" of immunity and that the action was therefore barred.[28] In so ruling the court of appeals noted that it had a marked "preference for an approach giving full effect to the Eleventh Amendment absent some *extraordinary* waiver" of immunity.[29] By expressing this preference, the Tenth Circuit is consonant both with its own precedent,[30] recent Supreme Court

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> that the total amount of the tax demanded, or which may be demanded . . . is less than the jurisdictional amount . . . . [Therefore, the] decree will be reversed, with instructions to the district court to dismiss the cause for want of jurisdiction.

Id. at 272.

[24] *Id.* at 269. This holding has been consistently followed by later courts considering similar issues. *See, e.g.*, Suther v. Mayfield, 358 F.2d 741 (5th Cir. 1966); Jacobs v. Tawes, 250 F.2d 611 (4th Cir. 1957); Thomas v. General Elec. Co., 207 F. Supp. 792 (W.D. Ky. 1962); Brown v. Graham, 169 F. Supp. 397 (D. Ore. 1959); Southern Fruit Co. v. Porter, 21 F. Supp. 1011 (W.D.S.C. 1937).

[25] 502 F.2d 1051 (10th Cir. 1974).

[26] Utah Governmental Immunity Act, UTAH CODE ANN. §§ 63-30-1 to -34 (1953). Section 63-30-16 provides for the waiver of immunity in *state* district courts and has been previously interpreted by the Tenth Circuit as lacking the "clear intent" necessary to waive immunity in the *federal* district courts. Harris v. Tooele County School Dist., 471 F.2d 218 (10th Cir. 1973).

[27] The Tenth Circuit, however, resolved the question of whether a waiver of the immunity conferred by the eleventh amendment can be effected "by the attorney general of the state entering an appearance and litigating in the case" by saying that "[w]e are of the opinion that it cannot be so waived." 502 F.2d at 1056. *Accord*, Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275, 276-77 (1959); Murray v. Wilson Distilling Co., 213 U.S. 151, 171 (1909).

[28] 502 F.2d at 1056. *But see* Parden v. Terminal Ry., 377 U.S. 184 (1964); Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275 (1959); Ladue Local Lines, Inc. v. Bi-State Dev. Agency, 433 F.2d 131 (8th Cir. 1970).

[29] 502 F.2d at 1056 (emphasis added), *citing* Williams v. Eaton, 443 F.2d 422 (10th Cir. 1971).

[30] Harris v. Tooele County School Dist., 471 F.2d 218 (10th Cir. 1973); Williams v.

opinions,[31] and a growing tendency among the circuits to find against a waiver of immunity by a state.[32]

In *Dry Creek Lodge, Inc. v. United States*[33] the Tenth Circuit reversed the district court's determination that it did not have jurisdiction to decide a controversy under the Indian Civil Rights Act.[34] The plaintiff claimed a right of access to its property, upon which it had built "a stopping off place for persons entering wilderness areas" from the main road.[35] The access was a 3½ mile dirt road which crossed "Indian properties held in trust by the United States for the benefit of individual Indians and the Shoshone and Arapahoe tribes."[36] When the lodge was built the plaintiff was aware that it did not have a right of access and it was advised that it should obtain a formal right-of-way to insure its right of ingress and egress. Apparently the plaintiff viewed the lack of an assured right-of-way as "no problem"; however, on the day the lodge was opened to the public, the individual Indians owning the property as well as "members of the . . . Joint Business Council of the tribes . . . erected a barricade across the road and stopped traffic in both directions."[37]

Eaton, 443 F.2d 422 (10th Cir. 1971); Hamilton Mfg. Co. v. Trustees of State Colleges, 356 F.2d 599 (10th Cir. 1966). *See also* Gallagher v. Continental Ins. Co., 502 F.2d 827 (10th Cir. 1974).

[31] *Compare* Edelman v. Jordan, 415 U.S. 651, 671-74 (1974), *and* Employees of Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare, 411 U.S. 279, 293-99 (1973), *with* Parden v. Terminal Ry., 377 U.S. 184, 195-96 (1964), *and* Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275, 276-77 (1959). *See also* the dissent of Justice Frankfurter in *Petty* which evinces a reluctance to find a waiver of the immunity conferred by the eleventh amendment similar to that shown by the Tenth Circuit in *Richins*.

[32] *See, e.g.*, Dawkins v. Craig, 483 F.2d 1191, 1193-96 (4th Cir. 1973); Daye v. Pennsylvania, 483 F.2d 294, 297-98 (3d Cir. 1973); Employees of the Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare, 452 F.2d 820, 823 (8th Cir. 1971), *aff'd*, 411 U.S. 279 (1973); McDonald v. Board of Regents, 371 F.2d 818, 819-20 (6th Cir. 1967); Scott v. Board of Supervisors, 336 F.2d 557, 558 (5th Cir. 1964). *Cf.* Aerojet-General Corp. v. Askew, 453 F.2d 819, 826-28 (5th Cir. 1971). *Contra*, Pennsylvania Environmental Council, Inc. v. Bartlett, 454 F.2d 613, 625 (3d Cir. 1971) (dicta); Ladue Local Lines, Inc. v. Bi-State Dev. Agency, 433 F.2d 131, 136 (8th Cir. 1970).

[33] 515 F.2d 926 (10th Cir. 1975).

[34] 25 U.S.C. § 1302 (1970) which, in pertinent part, provides as follows:

> No Indian tribe in exercising powers of self-government shall—
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> . . . .
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> (8) deny to *any person* within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law.

(Emphasis added).

[35] 515 F.2d at 929.

[36] *Id.*

[37] *Id.*

The plaintiff filed a complaint in which it named as defendants "the Secretary of the Interior, the area director of the Bureau of Indian Affairs, the superintendent of the Reservation, . . . the Indian tribes together with the Joint Business Council of the tribes and its individual members," and the individual Indians owning the property.[38] The trial court initially issued an order restraining maintenance of the barricade, but then "denied the application for permanent injunction" and then "without further notice . . . proceeded to dismiss the cause of action."[39] On appeal, the plaintiff challenged the propriety of the trial court's issuing "what amounted to a summary judgment without giving the requisite notice" and the correctness of its determination that it lacked jurisdiction.[40]

The court of appeals first considered the trial court's dismissal of the United States and its officers as parties to the action.[41] Because the United States had "neither expressly nor impliedly consented to the suit" it was not a proper party to the action and its dismissal was correct.[42] The appeals court similarly affirmed the district court's ruling that the claims brought against the individual officers could not be sustained under section 1983,[43] because there was no showing that the defendants had acted under color of state law.[44] The Tenth Circuit did, however, reverse the trial court's determination that there was no jurisdiction under section 1985, which prevents a denial of equal protection of the laws and does not require a showing of state action.[45] The basis for the denial of equal protection and due process was

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[38] *Id.* For a discussion of the propriety of the inclusion of the Government officials in the action, see text accompanying notes 41-51 *infra;* for a discussion of the propriety of the inclusion of the Indian tribes, see text accompanying notes 52-61 *infra.*

[39] 515 F.2d at 929.

[40] *Id.*

[41] *Id.* at 930-32.

[42] The court said, "The law is well settled that waiver of sovereign immunity is to be strictly construed, and it is plain that Congress did not give its consent to suits against it by private individuals seeking private roads." *Id.* at 930.

[43] 42 U.S.C. § 1983 (1970).

[44] *See, e.g.*, Native Am. Church v. Navajo Tribal Council, 272 F.2d 131 (10th Cir. 1959); Williams v. Sisseton-Wahpeton Sioux Tribal Council, 387 F. Supp. 1194 (D.S.D. 1975); Loncassion v. Leekity, 334 F. Supp. 370 (D.N.M. 1971); Dodge v. Nakai, 298 F. Supp. 17 (D. Ariz. 1968); Toledo v. Pueblo de Jemez, 119 F. Supp. 429 (D.N.M. 1954).

[45] 42 U.S.C. § 1985 (1970). The court said that in section 1985 actions "the presence or absence of state action is not a factor, for this provision embraces private conspiracies." 515 F.2d at 931, *citing* Griffin v. Breckenridge, 403 U.S. 88 (1971).

the plaintiff's allegation that it was made an "object of discrimination" as a result of the blockade.[46] While "the complaint [did] not detail the factual basis for the claim," there was a sufficient basis in this allegation to have jurisdiction to consider the question.[47] There was, moreover, another basis for the trial court's jurisdiction under *Bivens v. Six Unknown Federal Agents.*[48] *Bivens* established the "constitutional tort" doctrine,[49] and the Tenth Circuit held that both *Bivens* and *Bell v. Hood*[50] "recognize that the federal jurisdiction requirement is satisfied by allegations in the complaint, even though not specific, which describe the violation of constitutional rights."[51] Thus, it was improper for the trial court to dismiss the actions against the officers of the United States because the claims did make sufficient allegations to justify the court's exercise of jurisdiction.

The Tenth Circuit then considered whether the dismissal of the claims against the tribes, the Joint Business Council, and its agents was proper.[52] To resolve this question, the Tenth Circuit had to determine whether the Indian Civil Rights Act provided jurisdiction which would enable the federal district court to consider the instant case. The issue had been before the court earlier, but had not been resolved because the plaintiffs in the other actions had not presented sufficient jurisdictional facts[53] or had failed to exhaust tribal remedies.[54] In *Dry Creek Lodge* the court noted that "a decision on the question [was] unavoidable, because of the case's procedural posture"[55] and held that:

> [W]e are of the opinion that 25 U.S.C. § 1302 [the Indian Civil Rights Act], which recognizes the right to be protected against dep-

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[46] 515 F.2d at 931. For the court's description of the adequacy of the claim presented in this case, see text accompanying note 57 *infra*.

[47] 515 F.2d at 931.

[48] 403 U.S. 388 (1971).

[49] For a discussion of this doctrine, see Horlbeck & Harkness, *Executive Immunity and the Constitutional Tort*, 51 DENVER L.J. 321 (1974).

[50] 327 U.S. 678 (1946).

[51] 515 F.2d at 931; *see id.* at 932 n.4.

[52] *Id.* at 932-36.

[53] Slattery v. Arapahoe Tribal Council, 453 F.2d 278 (10th Cir. 1971); Groundhog v. Keeler, 442 F.2d 674 (10th Cir. 1971).

[54] McCurdy v. Steele, 506 F.2d 653 (10th Cir. 1974).

[55] 515 F.2d at 933 n.7. *See also* Meyers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938); *see* McKart v. United States, 395 U.S. 185 (1969); 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 20.02 (1970).

> rivation of due process and equal protection of the law furnishes a jurisdictional basis which justifies the federal court's entertaining of the case. . . . [I]n view of the legislative history [of the Indian Civil Rights Act], it applies to non-Indians as well as Indians who are under the jurisdiction of the tribe.[56]

Even though the instant case was "not the strongest case imaginable under the Indian Civil Rights Act," the allegations were sufficient to give the district court jurisdiction.[57] The Tenth Circuit's opinion in *Dry Creek Lodge* seems a reasonable interpretation of the Indian Civil Rights Act. The legislative history indicates, as the court pointed out, that the Act "was intended to establish rights for all persons who may be subject to the jurisdiction of tribal governments."[58] This interpretation, moreover, is similar to that given to the Act by the Eighth Circuit[59] and by two district courts[60] which have considered the question.[61]

In *Norvell v. Sangre de Cristo Development Co.*[62] the Tenth Circuit reversed a district court's declaratory judgment on the basis that no jurisdiction existed because no case or controversy was present. The action was initiated by the State of New Mexico and sought "a judgment declaring that the State has certain jurisdiction over the Sangre de Cristo Development Company and its activities under a 99-year lease granted it in 1970 by the Pueblo de Tesuque, an Indian Tribe."[63] The district court granted the judgment despite the contentions of the defendants that "the State of New Mexico is without any jurisdiction whatsoever over the property . . . inasmuch as the lease and/or subleases cover lands owned by the Pueblo de Tesuque."[64] The Tenth Circuit reversed the judgment on the basis that no case or controversy

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[56] 515 F.2d at 933.

[57] *Id.* at 934.

[58] *Id.* at 934 n.8.

[59] Schantz v. White Lightning, 502 F.2d 67 (8th Cir. 1974).

[60] Hickey v. Crow Creek Housing Authority, 379 F. Supp. 1002 (D.S.D. 1974); Dodge v. Nakai, 298 F. Supp. 17 (D. Ariz. 1968).

[61] The defendants also alleged that the Indian tribes and its members were protected by the same governmental immunity which shielded the United States and its officers. The court rejected this argument by holding that section 1302 of the Indian Civil Rights Act is a "waiver by Congress of this immunity." 515 F.2d at 934.

[62] 519 F.2d 370 (10th Cir. 1975).

[63] *Id.* at 371.

[64] *Id.* at 375.

presently existed. In an earlier decision, *Davis v. Morton*,[65] which applied to the same lease, the Tenth Circuit had held that "the subject lease did involve major federal action requiring compliance with the National Environmental Protection Act (NEPA) mandates."[66] The subject lease had at the time of the decision not conformed to the requirements of NEPA, and it was, therefore, "speculative when or conceivably whether it shall meet NEPA requirements."[67] The declaratory action was improper because "ongoing activity [might] radically change the factual situation."[68] The Tenth Circuit reversed the trial court's declaratory judgment and left the question as to the State of New Mexico's jurisdiction over Indian lands within it to be decided at a later time.

III. FEDERAL RULES OF CIVIL PROCEDURE

A. *Rule 23 Class Actions*

1. *Sanderson v. Winner*[69]

Class plaintiffs brought an antitrust action against various Nissan corporations and dealerships. A demand for production of documents filed by defendants requested of the plaintiffs personal financial information reflecting their ability to finance the expenses of a class action. Additionally, the defendants requested plaintiffs' fee arrangements with their attorneys on the grounds that attorneys' fees were requested in the action. The trial court ruled that the documents were relevant to the appropriateness of the class action and whether plaintiffs were worthy representatives of the class. Interlocutory appeal was denied. The Tenth Circuit held that a writ of mandamus was appropriate under the circumstances[70] and that the trial court's decision allowing such

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[65] 469 F.2d 593 (10th Cir. 1972). The court in *Norvell* pointed out that this decision had not been rendered at the time these proceedings were taking place before the district court. 519 F.2d at 372.

[66] 519 F.2d at 372.

[67] *Id.* at 375.

[68] *Id.* at 378.

[69] 507 F.2d 477 (10th Cir. 1974).

[70] The Tenth Circuit noted mandamus was not to be used as a substitute for an appeal, but recognized it might be used in some instances to review an interlocutory order. The court found the writ appropriate here because the case fell within the standards recognized by other cases. *Id.* at 479.

discovery was an unwarranted extension of *Eisen v. Carlisle & Jacquelin.*[71]

The Tenth Circuit acknowledged that a court must be satisfied that plaintiffs could pay the notice costs and that due process required decent notice.[72] However, the Tenth Circuit held that there was nothing in *Eisen* which called for unlimited inquiry into the financial capacity of the plaintiff in regard to the question as to whether a class action was to be allowed.[73] Additionally, defendants did not have the right to inquire whether plaintiffs would be able to pay their lawyers or a judgment for costs.[74] Thus, since the documents sought were irrelevant, the court did not consider the question of privilege.[75]

2. *Albertson's Inc. v. Amalgamated Sugar Co.*[76]

The three plaintiffs were purchasers of beet sugar from defendant-sellers. On appeal, plaintiffs challenged the propriety of the lower court's order that, because of a lack of commonality of interest and a conflict of interest within the class, the claims based on a tying arrangement and price discrimination should not be maintained as a class action.[77] The pricing policy followed

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[71] 417 U.S. 156 (1974). *Eisen*, which was a class action brought on behalf of odd-lot traders against brokerage firms for alleged violations of antitrust and securities laws, held that in a class action individual notice to identifiable class members cannot be waived or reduced in a particular case. The Court further held that the plaintiff bringing the class action must bear the cost of the notice and said as follows: "Where, as here, the relationship between the parties is truly adversarial, the plaintiff must pay for the cost of notice as part of the ordinary burden of financing his own suit." *Id.* at 178-79.

[72] Lower court decisions have considered the plaintiff's ability to pay as relevant. *See* P.D.Q. Inc. v. Nissan Motor Corp., 61 F.R.D. 372 (S.D. Fla. 1973); Ralston v. Volkswagenwerk A.G., 61 F.R.D. 427 (W.D. Mo. 1973). The Tenth Circuit distinguished these cases on the grounds that the plaintiffs in *P.D.Q. Inc.* and *Ralston* sought to represent a class of all new car purchasers in the United States, and size and manageability of the class were not problems in the instant case. 507 F.2d at 480.

[73] 507 F.2d at 479. Additionally the court noted that oppressive discovery should not be used to discourage private litigation which may advance an important interest of the government. *Id.* at 480.

[74] Federal Rule of Civil Procedure 69 [all references to rules in this section are to the Federal Rules of Civil Procedure unless otherwise indicated]. Rule 69 will provide an opportunity for discovery if judgment is obtained. *See* Federal Savings & Loan Ins. Corp. v. Krueger, 55 F.R.D. 512 (N.D. Ill. 1972); Gangemi v. Moor, 268 F. Supp. 19 (D. Del. 1967). These cases suggest that there is no right to discovery of assets until judgment is obtained. 507 F.2d at 480.

[75] The court noted that the attorney-client fee arrangement may not be privileged. The cases split depending on the facts. 507 F.2d at 480.

[76] 503 F.2d 459 (10th Cir. 1974).

[77] Rule 23(a)(3), (b)(3).

by defendant-sellers was to meet the price of *cane sugar* in any locality. The formula used in arriving at the price charged for beet sugar was based on: (1) The price charged by the cane sugar refinery in California, and (2) the cost of shipping the cane sugar from California to particular zones within the complaint area. Plaintiffs argued that the cost of shipping in the beet sugar pricing formula invariably exceeded the actual cost of transportation from the beet sugar refinery to the buyer-plaintiff.[78]

The Tenth Circuit upheld the reasoning of the trial court that, if the plaintiffs were successful on these claims, defendants would be enjoined from using their formula pricing method and would have to give recognition to actual freight costs. The result would be that a plaintiff closer to the beet plant would pay less for beet sugar than a plaintiff further away. Thus, a conflict of price paid would result between plaintiffs, and their competitive positions would be disrupted.[79] The Tenth Circuit stated that "a plaintiff cannot maintain a class action when his interests are antagonistic to, or in conflict with the interests of the persons he would seek to represent."[80] The Tenth Circuit recognized that disparity in benefit will not preclude a class action; but in this case the competitive positions would be changed among the plaintiffs, thus producing the lack of the required commonality of interest among the class members. However, the plaintiffs' claims based on conspiracy and attempt to monopolize could proceed as class actions because any relief would not affect the pricing system of the defendants.[81]

3. *Monarch Asphalt Sales Co. v. Wilshire Oil Co.*[82]

On February 28, 1973 the trial court approved class status for all Oklahoma public bodies and denied class status to the Oklahoma private contractors in an antitrust suit against certain liquid asphalt sellers. Between April 9th and 13th the private contractors sought to intervene as co-plaintiffs, and the trial court held that the intervention was barred by the statute of limitations.

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[78] 503 F.2d at 462.

[79] *Id.* at 463-64.

[80] *Id.* at 463, *citing* Hansberry v. Lee, 311 U.S. 32 (1940); Schy v. Susquehanna Corp., 419 F.2d 1112 (7th Cir. 1970).

[81] 503 F.2d at 464.

[82] 511 F.2d 1073 (10th Cir. 1975).

The first issue facing the Tenth Circuit was the reviewability of an order denying class status. The court noted the general rule that "an order denying class status is interlocutory and not appealable."[83] When the trial court entered a final judgment against the intervenors, the interlocutory order denying class status merged into the final judgment and thus became reviewable.[84] The intervenors further challenged the district court's denial of certification. The appellate court noted that "[c]lass certification is discretionary with the trial judge" and found no abuse of discretion.[85] Because a class may be divided into subclasses,[86] the trial court was justified in its discretionary creation of two subclasses in that the interests of the public and private bodies were divergent.[87]

However, each subclass must meet the requirements of rule 23(a) and (b). The private contractors did not meet either the requirements of numerosity[88] or fair and adequate representation.[89] There were 37 potential Oklahoma private contractors, and joinder was held not to be impracticable.[90] Secondly, the court found that the class representative was not in the road construction business, had not purchased liquid asphalt for 4 years prior to the suit, and, therefore, did not share a common interest with the class members.[91]

Next, the court considered the question of the bar of the statute of limitations on the intervention of the private contractors as coplaintiffs. Private civil antitrust suits must be comm-

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[83] *Id.* at 1076-77.

[84] *Id.* at 1077, *citing* Atchison, T. & S.F. Ry. v. Jackson, 235 F.2d 390, 392 (10th Cir. 1956); Skirvin v. Mesta, 141 F.2d 668, 671-72 (10th Cir. 1944). The court noted that they could find no cases specifically on the question of whether after denial of class status and intervention, the class status denied could be raised as error on appeal from denial of intervention. 511 F.2d at 1077.

[85] The same issue was raised in Redhouse v. Quality Ford Sales, Inc., 523 F.2d 1 (10th Cir. 1975). The court in a rehearing en banc determined that although the trial judge had expressed a conclusion that the case be considered a class action, the findings as to the elements of a class action required by rule 23 were not made. Neither proper procedure nor proper sequence was followed. The case was remanded to the trial court.

[86] Rule 23(c)(4)(B).

[87] 511 F.2d at 1077.

[88] Rule 23(a)(1).

[89] Rule 23(a)(4).

[90] 511 F.2d at 1077.

[91] *Id.*

enced within 4 years after the cause of action has accrued.[92] If an action is brought by the United States, the statute of limitations for private antitrust actions is suspended during the pendency of the federal suit and for 1 year thereafter. However, a private action must be brought within the period of suspension plus 1 year or within 4 years after the cause of action accrued, or it will be barred.[93]

In resolving whether the private contractors could intervene or were barred by the statute of limitations, the court relied upon *American Pipe & Construction Co. v. Utah.*[94] When *American Pipe* was filed, 11 days remained of the suspension period. This period was tolled during the time the court considered the question of maintenance of the class action. Interventions filed 8 days after the denial of class status were upheld in *American Pipe*; however, in *Monarch* the suspension period resulting from the federal action[95] ended on November 6, 1971. The original complaint in this case was filed on October 12, 1971. The suspension period was tolled during consideration of the class status of the parties. When class status was denied the contractors on February 28, 1973, there were 26 days left in the suspension period. The private contractors failed to file their petition to intervene until April 9, 1973, and thus were barred by the statute of limitations.

Other arguments put forth by the private contractors were rejected by the Tenth Circuit. Even though the February 28th order allowed the contractors 45 days in which to intervene, the Tenth Circuit held that it is necessary to adhere strictly to the statute of limitations.[96] The court did not allow motions for a new trial, motions to amend the February 28th order under rule 59(a) and (e), or an oral motion to amend the February 28th order to toll the suspension period.[97] Finally, the court held that interven-

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[92] 15 U.S.C. § 15b (1970).

[93] *Id.* § 16(b).

[94] 414 U.S. 538 (1974).

[95] United States v. Wilshire Oil Co., 427 F.2d 969 (10th Cir.), *cert. denied*, 400 U.S. 829 (1970). Certiorari was denied on October 12, 1970. Under Supreme Court rule 58, the petitioners had 25 days to file a petition for rehearing. Even if none were filed, the case would remain pending in the Supreme Court for those 25 days. 511 F.2d at 1078.

[96] 511 F.2d at 1079, *citing* Kavanagh v. Nobel, 332 U.S. 535, 539 (1947).

[97] The Tenth Circuit noted that rule 59 applied to new trials and amendments of judgments and the February 28th order was interlocutory and not appealable. The court stated: "Although Rule 59 motions may extend the time for appeal from judgments and

tion into a certified class action suit does not automatically relate back to the date on which the original action was filed.[98]

4. *Seiffer v. Topsy's International, Inc.*[99]

Defendants appealed under 28 U.S.C. § 1291 from a judgment certifying a class action in a federal securities fraud suit.[100] The Tenth Circuit held the order was not appealable under section 1291 and the order could only be reviewed upon final judgment on the merits. The Tenth Circuit noted its reluctance to review a denial or grant of class status because the order may be amended as the trial proceeds.[101] The Tenth Circuit indicated its approval of the Second and Third Circuits' post-*Eisen* three-pronged tests for section 1291 appealability.[102] Considerations are to be: (1) Whether the class action determination is fundamental to the further disposition of the case and not merely a provisional disposition of an issue; (2) whether review of the order is separable from the merits; and (3) whether rights would be irreparably lost and irreparable harm, in terms of time and money, would be caused if review were postponed until final disposition of the case.

Applying the above considerations to the instant case, the Tenth Circuit denied review. Whether 4700 potential class members were included or not, the plaintiffs could pursue the suit even if class status were denied. Thus, no irreparable harm was done to the defendants. The determination of the class was not collateral to a final decision on the merits, and proof of due diligence would be an integral part of the suit whether brought individually or as a class.[103]

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appealable orders, see F.R.A.P. Rule 4(a), they do not stay interlocutory orders or toll the running of a limitation period." 511 F.2d at 1079.

[98] The court noted that this had been allowed under the old rule 23 which did not control in this case. 511 F.2d at 1079.

[99] 520 F.2d 795 (10th Cir. 1975).

[100] The appellants argued that a standard of due diligence in discovering the fraud should be required of each class member, thus making the class unmanageable. The trial court held, however, that an objective standard of whether the reasonable investor would have discovered the fraud was the test. Thus, common questions of law and fact predominated, and the class was manageable. *Id.* at 796.

[101] The Tenth Circuit relied upon Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974), which approved a grant of review when the matter concerned final disposition of a claimed right but was not a review on the merits. In the instant case the issue sought to be reviewed went to the merits—that is, whether the class was properly certified. 520 F.2d at 797.

[102] 520 F.2d at 797-98, *citing* Rodgers v. United States Steel Corp., 508 F.2d 152, 159 (3d Cir. 1975); General Motors Corp. v. City of New York, 501 F.2d 639, 644 (2d Cir. 1974).

[103] 520 F.2d at 798.

B. *Appealability*: R.D. Andersen Construction Co. v. Iron Workers Local 101[104]

In this opinion the Tenth Circuit addressed the question of a timely appeal.[105] The appellant argued that his appeal was timely[106] because the trial court granted an extension of time, until 15 days after receipt of the trial transcript, in which to file post-trial motions. However, the Tenth Circuit held that because there must be a definite point at which judgment is final, rule 6[107] allowed no enlargement of time for the exercise of rights under rules 50(b)[108] and 59(b).[109] Appellant also contended that his orally made motion for a directed verdict did not need to be reduced to writing within the 10-day limit of rule 50(b). However, the Tenth Circuit interpreted rule 50(b) as requiring a written motion within 10 days after judgment when the oral motion is not granted.[110]

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[104] No. 75-1298 (10th Cir., July 1, 1975) (Not for Routine Publication).

[105] The Tenth Circuit considered the timeliness of appeal in two other cases: Q-Panel Co. v. Newfield, No. 74-1039 (10th Cir., Jan. 3, 1975) (Not for Routine Publication) and Lovell v. Saxbe, No. 75-1167 (10th Cir., July 23, 1975) (Not for Routine Publication). In *Q-Panel* an appeal from a bill of costs a month after the ruling by the clerk asserted that the ruling dealt with "expenses" as distinguished from the costs portion. The Tenth Circuit held that rule 54(d) requires that this review of the clerk's action must be requested within 5 days and this review was, therefore, not timely. In *Lovell* the Tenth Circuit held that rule 60(b) does not extend the time for taking an appeal and does not affect the finality of a judgment.

[106] If there are no timely post-trial motions filed, appellant has 30 days to file a notice of appeal as required by FED. R. APP. P. 4. Gooch v. Skelly Oil Co., 493 F.2d 366 (10th Cir. 1974), *cert. denied*, 95 S. Ct. 311 (1974). *See Tenth Circuit Survey*, 52 DENVER L.J. 227, 228 n.16 (1975).

[107] Rule 6(b)(2) provides for enlargement "upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time" for rules 50(b) and 59(b).

[108] Rule 50(b) concerns motions for a directed verdict and for judgment notwithstanding the verdict. It provides that "[n]ot later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside . . . ." *See Tenth Circuit Survey*, 52 DENVER L.J. 227, 229-30 (1975).

[109] Rule 59(b) provides: "A motion for a new trial shall be served not later than 10 days after the entry of the judgment . . . ."

[110] In Berry v. Cimmarron Ins. Co., No. 74-1129 (10th Cir., Dec. 20, 1974) (Not for Routine Publication), the Tenth Circuit considered the effect of the failure to move for a directed verdict. The court held that where a defendant fails to move for a directed verdict at the close of all the evidence, he may not thereafter challenge the sufficiency of the evidence on appeal, in a motion for a new trial, or in a motion for judgment notwithstanding the verdict. As support for this, the court cited Continental Baking Co. v. Utah Pie

C. *Rule 13 Compulsory Counterclaims:* Pipeliners Local 798 v. Ellerd[111]

Plaintiffs filed a civil rights action arising out of physical violence at a construction site concerning the hiring of union labor. Defendants answered, stating that plaintiffs violated the Colorado Labor Peace Act, and counterclaimed alleging that plaintiffs' actions had caused damage to the defendants including expenses for the protection of labor and material, the replacement of 12 workers frightened by the union's threats, and the loss of 2 days' production at the site.[112] All parties agreed in open court to a stipulation dismissing the complaint with prejudice and all parties agreed that defendants' counterclaim survived.

Appellants contended that, because the complaint had been dismissed and the counterclaim was permissive, the counterclaim must fail for lack of an independent basis of jurisdiction. The Tenth Circuit noted the standards used to determine the compulsory or permissive nature of a counterclaim:

> 1. Are the issues of fact and law raised by the claim and counterclaim largely the same? 2. Would res judicata bar a subsequent suit on defendants' claim absent the compulsory counterclaims rule? 3. Will substantially the same evidence support or refute plaintiffs'

Co., 349 F.2d 122, 156 (10th Cir. 1965); Brown v. Poland, 325 F.2d 984 (10th Cir. 1963); Southern Ry. v. Miller, 285 F.2d 202 (6th Cir. 1960).

[111] 503 F.2d 1193 (10th Cir. 1974).

[112] Plaintiffs contended the trial court abused its discretion in admitting exhibits relating to expenses incurred by defendants resulting from the encounter on the job site as business records and, thus, an exception to the hearsay rule. The Tenth Circuit held that these were records kept in the ordinary course of business and that they were within the personal knowledge of the witness. Hodgson v. Okada, 472 F.2d 965 (10th Cir. 1973); United States v. Sparrow, 470 F.2d 885 (10th Cir. 1972), *cert. denied,* 411 U.S. 936 (1973). 503 F.2d at 1200-01.

Second, the appellants argued that, since the defendants relied on a violation of the Colorado Labor Peace Act in their counterclaim, they must first exhaust administrative remedies. The Tenth Circuit held that the defendants had a right to an independent remedy, *citing with approval,* Denver Bldg. & Constr. Trades Council v. Shore, 132 Colo. 187, 287 P.2d 267 (1955), which reasoned that the damages as a result of an illegal act are based in tort and, thus, a common law action for damages is valid. 503 F.2d at 1201. *See generally* note 93 *supra.*

Third, plaintiffs objected to damages recovered for "loss of efficiency" on the job because of the lack of substantive evidence on the point. However, the Tenth Circuit found that the "loss of efficiency" was based on expert estimates of the damages in turn based on facts established at trial, and recovery would not be denied because damages could not be specifically measured. The court cited Hodgson v. Okada, 472 F.2d 965 (10th Cir. 1973); A to Z Rental, Inc. v. Wilson, 413 F.2d 899 (10th Cir. 1969). 503 F.2d at 1201-02.

> claim as well as defendants' counterclaim? 4. Is there any logical relation between the claim and the counterclaim?[113]

The court stated that the "logical relation test" was the most important of the standards;[114] that is, the principal claim and the counterclaim logically relate to each other because of their common origin. Rule 13(a) states that a claim is compulsory and must be pleaded if it "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim."[115] The Tenth Circuit noted that "transaction" and "occurrence" should be construed liberally,[116] and held the defendants' counterclaim was compulsory.[117]

Concerning jurisdiction, the court held a permissive counterclaim not arising out of the same transaction or occurrence must have its own base of jurisdiction. However, a compulsory counterclaim derives its jurisdiction from the principal suit;[118] thus, a federal court may assert jurisdiction over the claim even though it might not have jurisdiction if it were an independent proceeding.[119] The Tenth Circuit stated that it was settled law that a court has ancillary jurisdiction even if the plaintiff's claim is dismissed as in the instant case.[120]

D. *Rule 19 Indispensable Parties:* State Farm Mutual Automobile Insurance Co. v. Mid-Continent Casualty Co.[121]

Lance Garton rented a car from Budget-Rent-A-Car and subsequently became involved in a traffic accident injuring a passen-

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[113] 503 F.2d at 1198.

[114] *Id.* at 1199.

[115] *But see* rule 13(b).

[116] 503 F.2d at 1199.

[117] Judge Breitenstein, who wrote a concurring opinion, did not wish the majority's opinion to be viewed as general approval of counterclaims in civil rights actions. Moreover, the "transaction or occurrence" requirement of rule 13(a) should have been determined by the trial court and not de novo by the court of appeals; however, in the instant case plaintiffs failed to object to the counterclaim at the trial court level, and, therefore, Judge Breitenstein concurred with the majority that the counterclaim should stand. *Id.* at 1202.

[118] *Id.* at 1198, *citing* United States v. Acord, 209 F.2d 709 (10th Cir. 1954), *and quoting* Inter-State Nat'l Bank v. Luther, 221 F.2d 382, 390 (10th Cir. 1955), *cert. denied,* 350 U.S. 944 (1956).

[119] Aetna Ins. Co. v. Chicago, R.I. & P.R.R., 229 F.2d 584 (10th Cir. 1956).

[120] Moore v. New York Cotton Exch., 270 U.S. 593 (1926); Kirby v. American Soda Fountain Co., 194 U.S. 141 (1904).

[121] 518 F.2d 292 (10th Cir. 1975).

ger in another car, Carol Ammerman. Ammerman instituted a tort suit, claiming $481,200 in damages. A dispute arose between Budget's insurance carrier, Mid-Continent Casualty, and Garton's carrier, State Farm Mutual Automobile Insurance, as to who was the primary carrier and thus had the responsibility of defending the tort suit. In an action for declaratory judgment[122] the trial court determined that Mid-Continent was the primary carrier.

Mid-Continent appealed,[123] contending that the absence of Garton as a party to the litigation was error[124] because he was an indispensable party.[125] An indispensable litigant must first qualify as a conditionally necessary party under one of the options of 19(a) before his indispensability can be determined under 19(b). Concerning 19(a)(1),[126] complete declaratory relief was accorded the parties and, thus, Garton was not a necessary party. Next, the court concluded that Garton met the threshold requirement of 19(a)(2); that is, he possessed an interest relating to the subject matter of the action. Because of the amount of the tort claim and the existence of two insurance policies, Garton had an interest in securing maximum coverage.[127]

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[122] 28 U.S.C. § 2201(b) (1970).

[123] *Id.* Section 2201 provides as follows: "Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

[124] Rule 12(h)(2). The defense of failure to join an indispensable party may be made at any time.

[125] Rule 19 provides as follows:

> (a) Persons to Be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.
>
> (b) Determination by Court Whenever Joinder Not Feasible. If a person as described in subdivision (a)(1)-(2) hereof cannot be made party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable.

The court noted that it did not concern itself with whether Garton was a proper party who *may* be joined. 518 F.2d at 294. *See also Tenth Circuit Survey*, 52 DENVER L.J. 227 (1974).

[126] *See* note 196 *supra*.

[127] The court did not recognize the interest of the insured in the right to the defense

In addition, however, Garton had to meet the requirements of 19(a)(2)(i) and 19(a)(2)(ii).[128] The declaratory judgment was not res judicata as to Garton, so 19(a)(2)(i) did not make Garton a necessary party as he could relitigate the matter on his own behalf.[129] Because there was no substantial risk of inconsistent obligations arising from possible subsequent litigation, 19(a)(2)(ii) also required classifying Garton as a necessary party.[130] The court reasoned that subsequent litigation could not result in judgments against the insurance carriers beyond their policy limits. Second, litigation on Garton's part after a determination of primary and excess coverage was unlikely. However, if one company was held to provide all the coverage and the tort claim was in excess of that, there was a possibility of litigation by Garton against the other insurer with the possible result of inconsistent obligations. However, the Tenth Circuit noted:

> We, like the trial court, are required to look to "practical possibilities more than theoretical possibilities" in considering possible prejudice to parties.[131]

The Tenth Circuit reasoned that Garton had shown no interest in the litigation, and any tort judgment would likely be within the sole insurer's limits.

Appellant further argued that the trial court should have exercised its discretion and not granted declaratory relief. The Tenth Circuit acknowledged that a declaratory judgment[132] remedy requires an actual controversy, the joinder of all inter-

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he contracted for with his own insurer. This was not a case where the insured was attempting to have its uninsured defended by an unrelated insurance company. In the instant case Garton had contracted with both companies. The court rejected the notion that the insurers might be subjected to unequal duties to defend, reasoning that Garton had not sought defense from either company. 518 F.2d at 296.

[128] *See* note 125 *supra*.

[129] 518 F.2d at 295, *citing* Diamond Shamrock Corp. v. Lumbermen's Mut. Cas. Co., 416 F.2d 707 (7th Cir. 1969). The court distinguished the two Seventh Circuit cases, Traveler's Indem. Co. v. Standard Accident Ins. Co., 329 F.2d 329 (7th Cir. 1964) and *Diamond Shamrock*, which held that without the insured or injured party a declaratory judgment was only an advisory opinion. The Tenth Circuit noted that the above cases did not consider the issue in terms of rule 19. The lack of res judicata is to be considered in a rule 19(a)(2) and 19(b) analysis. 518 F.2d at 295-96.

[130] 518 F.2d at 295.

[131] *Id.* at 295, *citing* 3A J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 19.07-2[1] at 2260 (2d ed. 1974).

[132] 28 U.S.C. § 2201 (1970).

ested parties whenever possible,[133] disposal of a controversy, and must serve a useful purpose.[134] However, the court had determined that all conditionally necessary and indispensable parties were present.[135] Moreover, even though subsequent controversies might arise, the action disposed of the dispute as to which insurer was primary.[136] Thus, the trial court had not abused its discretion.[137]

Charles P. Leder
Mary M. Schwertz

POST-JUDGMENT RELIEF UNDER RULE 60(b)(6)
Pierce v. Cook & Co., 518 F.2d 720 (10th Cir. 1975)

BY ALAN M. LOEB*

In *Pierce v. Cook & Co.*[1] the Tenth Circuit rendered a decision dealing with post-judgment relief under rule 60(b) of the Federal Rules of Civil Procedure[2] which may have far-reaching

[133] Earlier in the opinion the court noted that "there are no special provisions detailing parties needed for a just adjudication in declaratory actions; general principles of joinder control." 518 F.2d at 294, *citing*, 6A J. MOORE, *supra* note 131, ¶ 57.25 at 57-253.

[134] 518 F.2d at 296, *citing* Allstate Ins. Co. v. Thompson, 121 F. Supp. 696 (W.D. Ark. 1954).

[135] *See* text accompanying notes 125-31 *supra*.

[136] Both insurance policies contained escape (*i.e.*, no liability) clauses. 518 F.2d at 297. The court noted that, where escape clauses are mutually repugnant, the loss will be prorated. *Id.*, *citing* 16 H. COUCH, CYCLOPEDIA OF INSURANCE LAW § 62.84 (Supp. 1974). However, after the escape clauses cancelled each other's effectiveness, State Farm's policy provided for excess coverage and Mid-Continent's policy provided for pro rata coverage. The Tenth Circuit held that when one policy provides for pro rata coverage and the other for excess coverage, the policy with the pro rata clause is the primary carrier up to the limits of the policy, and the policy with the excess clause is liable for amounts over the limits of the pro rata policy. 518 F.2d at 297-98, *citing* Thurston Nat'l Ins. Co. v. Zurich Ins. Co., 296 F. Supp. 619 (D. Okla. 1969).

[137] 518 F.2d at 297.

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[1] 518 F.2d 720 (10th Cir. 1975).

[2] FED. R. CIV. P. 60(b) provides:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect;

implications on the finality of all civil diversity judgments well beyond the narrow factual setting of the *Pierce* case itself.

The facts in *Pierce* were as follows: Edwards, the owner and driver of a tractor-trailer, was hauling wheat on an Oklahoma highway for the defendant Cook & Co. (hereinafter Cook) when the rig collided with a car driven by Mr. Pierce.[3] Pierce was killed and two passengers in his car were injured. Pierce's wife brought suit against Cook in an Oklahoma state court as surviving widow of Mr. Pierce and for their minor children. Similar state court actions were also brought against Cook by Ellenwood and Davis, the passengers in the Pierce car. Cook removed all three cases to the federal district court in Oklahoma on grounds of diversity of citizenship.[4] However, the Davis case was dismissed on the voluntary motion of the plaintiff and was later refiled in the Oklahoma state court by coguardians of Davis, who was a minor. This procedural maneuver destroyed diversity of citizenship and thus kept the Davis case in the state court.

Applying Oklahoma law, the United States District Court for the Western District of Oklahoma granted Cook summary judgment against Pierce and Ellenwood on the ground that, under the prior Oklahoma Supreme Court decision in *Marion, Machine Foundry & Supply Co. v. Duncan*,[5] Cook was not liable for the

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(2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C. § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

[3] The accident occurred on January 11, 1968.

[4] 28 U.S.C. § 1332 (1970).

[5] 187 Okla. 160, 101 P.2d 813 (1940).

tort of Edwards, who was an independent contractor. Pierce and Ellenwood appealed, and the Tenth Circuit, concluding that Oklahoma law controlled, affirmed.[6] This decision became final in January 1971.

Similarly, in the Davis case, an Oklahoma state trial court gave summary judgment for Cook on the basis of the *Marion* decision. However, on appeal,[7] the Oklahoma Supreme Court specifically overruled *Marion*, holding that, under some circumstances, a shipper may be held liable for the torts of an independent contractor motor carrier,[8] and remanded the case for a jury trial.[9] This decision became final in May 1974.

Several months after the decision of the Oklahoma Supreme Court became final, Pierce and Ellenwood filed a motion under rule 60(b) directly with the Tenth Circuit seeking relief as a matter of law from the prior judgment entered against them.

Sitting en banc, the Tenth Circuit, in an opinion by Judge Breitenstein,[10] first held that it was appropriate for the court of appeals to hear the motion. The court then held that extraordinary relief under rule 60(b)(6)[11] appeared to be appropriate in this case and, accordingly, vacated its prior judgment and remanded

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[6] Pierce v. Cook & Co., 437 F.2d 1119 (10th Cir. 1970). On appeal, Pierce and Ellenwood conceded the effect of the *Marion* decision, but argued that federal common law controlled as a result of the Motion Carrier Act, 49 U.S.C. §§ 301-27 (1970). The Tenth Circuit rejected this argument.

[7] Hudgens v. Cook Indus., Inc., 521 P.2d 813 (Okla. 1974).

[8] The Oklahoma Supreme Court stated:

> Where there is foreseeable risk of harm to others unless precautions are taken, it is the duty of one who is regularly engaged in a commercial enterprise which involves selection of motor carriers as an integral part of the business, to exercise reasonable care to select a competent carrier. Failure to exercise such care may create liability on the part of the employer for the negligence of the carrier.

Id. at 816.

[9] The Davis case was ultimately settled without a trial.

[10] 518 F.2d 720 (10th Cir. 1975). There were three other opinions in addition to the majority's. Judge Barrett wrote a separate opinion concurring in the result. *Id.* at 724. Chief Judge Lewis (joined by Judge Seth) dissented. *Id.* at 725. And Judge Seth (joined by Chief Judge Lewis) also wrote a dissenting opinion. *Id.*

[11] FED. R. CIV. P. 60(b)(6) provides in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for . . . (6) any other reason justifying relief from the operation of the judgment.

Apparently, neither party briefed or argued the impact of rule 60(b)(6) on the issues before the Tenth Circuit. 518 F.2d at 723.

the case to the trial court for consideration of the plaintiffs' arguments in light of both its opinion and the recent decision of the Oklahoma Supreme Court.[12]

The first interesting question raised by the *Pierce* decision is whether the Tenth Circuit should have even considered the merits of the motion before it. Technically, motions under rule 60(b) should be directed to the trial court, which then exercises its discretion on whether or not to grant the motion on its merits. There is no provision for a rule 60(b) motion to be filed with the appellate court in the first instance.[13] At most, the appellate court has the power to consider a motion for leave to file a rule 60(b) motion in the trial court.[14] The majority opinion recognized that the filing of a motion with the appellate court for leave to file a rule 60(b) motion in the trial court may be unnecessary, and, indeed, conceded that such a procedure had been previously passed on by the Tenth Circuit in *Wilkin v. Sunbeam Corp.*[15]

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[12] 518 F.2d at 721. It is important to note that the Tenth Circuit did not set aside the judgment of the trial court. *Id.* at 724. Rather, it invited the plaintiffs to file a motion in the trial court under rule 60(b)(6), seeking relief from the summary judgment entered against them, and directed the trial court to "consider the motion, and any response thereto, in the light of the Hudgens opinion . . . and of this opinion and . . . make such determination as it deems proper." *Id.* Chief Judge Lewis, dissenting, took the view that the majority opinion "for all practical purposes" aborted the discretion of the trial court through a "predecision . . . on the merits." *Id.* at 725.

[13] An interesting sidelight is that the Colorado Supreme Court, in a case arising under the Colorado Rules of Civil Procedure, specifically held that it could not and would not pass upon the merits of a rule 60(b) motion in the first instance. Olmstead v. District Court, 157 Colo. 326, 403 P.2d 442 (1965). The Colorado Supreme Court stated:

> [E]ven though it might well facilitate matters for this Court to step in and pass on the merits of these two motions, such would short circuit the judicial process to the end that this Court would then be acting as a trial court. This Court does not grant or deny motions filed subsequent to entry of judgment under Rule 59 or Rule 60, R.C.P. Colo. This is a function of the trial court. Once a trial court has acted, however, this Court may in appropriate proceedings be called upon to review the propriety of the action thus taken by it.

Id. at 331, 403 P.2d at 444.

[14] This is the procedure suggested by Judge Seth in his dissenting opinion in *Pierce*. 518 F.2d at 725.

[15] 405 F.2d 165 (10th Cir. 1968), *cert. denied*, 409 U.S. 1126 (1973). The Court stated in *Wilkin*:

> We agree that the trial court is in a better position to pass upon the issues presented in a motion pursuant to Rule 60(b). Accordingly, we hold that there is no necessity that a preliminary petition requesting permission be filed with the appellate court.

405 F.2d at 166.

Nevertheless, the majority chose not to follow *Wilkin* but rather to consider the motion before it in *Pierce.*

The reason espoused by the majority for considering the motion was that, because its judgment was final and mandate had been issued, "the trial court could well believe that it is without power to determine a legal question contrary to the decision of the court of appeals."[16] Yet, it can be questioned whether this reason is sufficient to distinguish the court's previous comments in *Wilkin* and to adopt the procedure utilized in *Pierce.* Indeed, the majority itself recognized that there is no time limitation for filing motions under rule 60(b)(6) with the trial court[17] other than that the motion must be made within a "reasonable time." As such, a trial court could feel free to consider the merits of such a motion and allow the parties to appeal its decision to the court of appeals if there was dissatisfaction with it.

The second and more important aspect of the *Pierce* decision is the majority's ruling and comments on the substantive issue itself—*i.e.,* whether the petitioners presented any "reason justifying relief from the operation of the judgment."[18] Citing *Collins v. City of Wichita,*[19] the majority stated the applicable test to be that "in extraordinary situations, relief from final judgments may be had under Rule 60(b)(6), when such action is appropriate to accomplish justice."[20] The issue, as defined by the majority, was whether the *Pierce* case presented such an "extraordinary situation."[21] The majority held that it did.

In the *Collins* case, the plaintiffs initially attacked the constitutionality of a Kansas condemnation statute and lost.[22] Over a year later, in a case unrelated to *Collins,* the United States Supreme Court held the same Kansas statute unconstitutional.[23] The plaintiffs in *Collins* then sought relief from the trial court by way of a motion under rule 60(b)(6). The motion was overruled

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[16] 518 F.2d at 722.

[17] Motions pursuant to rule 60(b)(1), (2), and (3) must be made not more than 1 year after the judgment, order, or proceeding was entered or taken.

[18] FED. R. CIV. P. 60(b)(6).

[19] 254 F.2d 837 (10th Cir. 1958).

[20] *Id.* at 839.

[21] 518 F.2d at 723.

[22] Collins v. City of Wichita, 225 F.2d 132 (10th Cir.), *cert. denied,* 350 U.S. 886 (1955).

[23] Walker v. City of Hutchinson, 352 U.S. 112 (1956).

and that decision was affirmed by the Tenth Circuit.[24] In *Collins*, the Tenth Circuit used strong language in holding that the change in law involved there did not justify rule 60(b)(6) relief. The court stated:

> Litigation must end some time, and the fact that a court may have made a mistake in the law when entering judgment, or that there may have been a judicial change in the court's view of the law after its entry, does not justify setting it aside.[25]

The majority in *Pierce* distinguished *Collins* by arguing that, there the decisional change in the law came in an unrelated case, whereas in *Pierce* it came in a case "arising out of the same accident as that in which the plaintiffs now before us were injured."[26] It can be questioned whether this is a valid distinction. Although *Collins* involved two unrelated pieces of litigation, the constitutionality of the same Kansas statute was at issue in both. This fact tied the two cases together just as the accident tied the *Pierce* cases together.[27] In the abstract, therefore, it is difficult to accept the majority's distinction of *Collins* and its refusal to follow that decision.

The real basis for the majority's decision in *Pierce* would appear to be its acceptance of the argument that after the plaintiffs were forced into federal court by the removal procedure on the basis of diversity jurisdiction, the federal forum gave them "substantially different treatment than that received in state court by another injured in the same accident."[28] This result, according to the majority, violated the "outcome determination" principle set forth in *Erie Railroad Co. v. Tompkins*.[29] It was this combination of events which led the Tenth Circuit to conclude that *Pierce* presented an "extraordinary situation" justifying relief under rule 60(b)(6).

Judges Lewis and Seth, in dissent, expressed concern that the scope of the majority opinion was so broad that it could be interpreted so as to create uncertainty as to the finality of any

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[24] 254 F.2d 837 (10th Cir. 1958).

[25] *Id.* at 839.

[26] 518 F.2d at 723.

[27] Judge Seth, in his dissent, went so far as to state that the majority opinion effectively overruled *Collins*. *Id.* at 725.

[28] *Id.* at 723.

[29] 304 U.S. 64, 74-75 (1938).

final judgment in any diversity case. Chief Judge Lewis "assumed" that the majority opinion was intended to be limited to cases based on common disasters, but noted that the decision was not precise on this point.[30] Judge Seth opined that the "argument advanced by the majority is equally applicable to any diversity case."[31] In the abstract, the comments of the dissenters are well-taken, for the finality of judgments is important, and consistency in the law, while desirable, may not be required.[32] It remains to be seen, however, whether as a practical matter the Tenth Circuit will utilize the *Pierce* decision continually to uphold post-judgment relief under rule 60(b)(6) in all types of diversity cases.

In the final analysis, the Tenth Circuit's opinion in *Pierce* may be just a further indication of the federal judiciary's growing dissatisfaction with diversity jurisdiction and the problems it is creating for the federal court system.[33] Diversity jurisdiction and the removal procedure for invoking such jurisdiction have been criticized as a significant cause of the increasingly burdensome caseload in the federal courts, and there have been recent expressions that diversity jurisdiction should be abolished altogether.[34] To the extent that the Tenth Circuit's decision in *Pierce* can be read as that court's opinion—however indirect—that substantive state law questions should be decided by the state courts rather than by the federal courts sitting with diversity jurisdiction, it may serve as a warning to lawyers who practice in the Tenth Circuit to analyze in greater detail the initial strategic decision whether to litigate in the state or federal court systems.

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[30] 518 F.2d at 725 (Lewis, C.J., dissenting).

[31] *Id.* at 726 (Seth, J., dissenting).

[32] *Id.* at 725 (Lewis, C.J., dissenting).

[33] In this regard, Judge Barrett's concurring opinion in *Pierce* may be the most enlightening of all four of the written opinions. Concurring in the result, Judge Barrett stated that rule 60(b)(6)

> *should always be applied* in order to relieve a party who did not invoke the jurisdiction of the federal court in a diversity suit from a judgment adverse to that which would otherwise have been favorable in the state court forums. One who invokes the jurisdiction of the federal court when the diversity requirements are present should pay the consequences of that election. A change in state law should not be cause for relief to one who has voluntarily selected that forum. Such a litigant is not entitled to the proverbial "two bites at the apple." Furthermore, such application should do much to promote and strengthen proper Federal-State court relations.

Id. at 724 (emphasis added).

[34] *See, e.g.*, Burger, *Report on the Federal Judicial Branch*, 59 A.B.A.J. 1125, 1126 (1973).