MESSAGE FROM THE CHAIR

An important tradition of our committee is our willingness to give new members important roles right away. I hope you’ll consider getting involved.

For example, I’m tremendously thankful to Aaron Chastain and Mary Ann Couch for taking over the reins of our newsletter. They are eager to develop new content, so if you are interested in contributing, let them know.

We also are preparing our CLE for the spring meeting in Washington, on April 25. The panelists—Beth Brinkmann, Paul Clement, Neal Katyal, and Bob Peck—have argued dozens of Supreme Court cases. If you’re interested in helping coordinate this project, please contact Brian Miller or me.

John C. Neiman, Jr.

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Copies may be requested by contacting the ABA at the address and telephone number listed above.
STAYING PUT: HALTING LITIGATION DURING AN APPEAL FROM AN ORDER DENYING ARBITRATION

By: R. Aaron Chastain, Bradley Arant Boult Cummings LLP, 1819 5th Ave N, Birmingham, AL 35203-2120, (205) 521-8771, Fax: (205) 488-6771, achastain@babc.com

Seeking to take advantage of the prevailing wisdom that arbitration “is usually cheaper and faster than litigation,” Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 280 (1995), litigants who believe that they have an enforceable arbitration agreement often move early in the litigation to compel arbitration under section 2 of the Federal Arbitration Act (FAA), 9 U.S.C. § 2. But when a motion to compel arbitration is denied and litigation goes forward in the district court, the cost- and time-saving benefits of arbitration are irrevocably lost and cannot be salvaged by a reversal on appeal after the parties have participated in time-consuming and expensive motion practice, discovery, and trial. Recognizing this issue, Congress amended the FAA in 1988 to allow for interlocutory appellate review of a district court’s order denying a motion to compel arbitration. 9 U.S.C. § 16(a)(1)(c).

But the availability of an interlocutory appeal is not always enough to maintain the potential benefits of arbitration. Although the FAA allows a party to appeal immediately from an order denying a motion to compel arbitration, it does not provide an automatic stay of the litigation pending the outcome of that appeal. Without a stay, district courts can push the litigation forward, requiring the parties to incur costs that are not only burdensome, but may also prove to be unnecessary if the order denying arbitration is ultimately reversed.

This article discusses a way that parties can secure a stay of district court proceedings pending an interlocutory appeal from an order denying a motion to compel arbitration: jurisdictional divestiture. Relying on the principle that “[t]he filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal,” Griggs v. Provident Consumer Disc. Co., 459 U.S. 56, 58–59 (1982), parties can argue that an appeal from a district court’s order denying a motion to compel arbitration divests the district court of jurisdiction and thus effectively stays the underlying case.

The Circuit Split

The majority view—adopted by the Third, Fourth, Seventh, Tenth, and Eleventh Circuits—is that the filing of a notice of an FAA interlocutory appeal is an event of jurisdictional significance that divests the district court of jurisdiction (so long as the appeal is not frivolous). See Levin v. Alms & Assoc., Inc., 634 F.3d 260, 262 (4th Cir. 2011); Ehleiter v. Grapetree Shores, Inc., 482 F.3d 207, 215 n.6 (3d Cir. 2007); McCauley v. Halliburton Energy Servs., Inc., 413 F.3d 1158, 1162–63 (10th Cir. 2005); Blinco v. Green Tree Servicing, LLC, 366 F.3d 1249, 1253 (11th Cir. 2004); Bradford-Scott Data Corp. v. Physician Computer Network, 128 F.3d 504, 507 (7th Cir. 1997); see also Bombadier Corp. v. Nat’l R.R. Passenger Corp., No. 02-7125, 2002 WL 31818924, at *1 (D.C. Cir. Dec. 12, 2002) (unpublished per curiam decision adopting the majority view). The Fourth Circuit’s recent decision is illustrative. In Levin, a group of investors sued their financial services advisor for negligence and negligent misrepresentation. 634 F.3d at 262. After the district court denied the defendant’s motion to dismiss or stay the suit pending arbitration, the defendant filed a notice of appeal and moved the district court to stay all proceedings pending appeal. The district court noted that the appeal was not frivolous, but it nonetheless denied the motion to stay and permitted the plaintiffs to commence discovery. The defendant then moved the Fourth Circuit for a stay of the district court proceedings pursuant to Fed. R. App. P. 8.

The Fourth Circuit granted the stay, holding that the pending appeal of an order denying a motion to compel arbitration divested the district court of jurisdiction over the merits of the underlying dispute, including the power to direct the parties to commence or continue discovery. 634 F.3d at 264. The court reasoned that the appeal necessarily involved the same issues as those pending in the district court because “[t]he core subject of an arbitrability appeal is the challenged continuation of proceedings before the district court on the underlying claims.” Id. The court also noted that “allowing discovery to proceed would cut against the

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JUDICIAL REPORTS

Editor’s Note: Before citing any legal authority that is mentioned or discussed in this Newsletter, you are advised to independently verify its content and current status, including whether it has been overruled, modified, amended, rescinded, or otherwise limited.

FIRST CIRCUIT

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THE TIMELINESS OF A NOTICE OF APPEAL

The First Circuit issued a handful of opinions in 2012 concerning a topic which makes most appellate practitioners blanch: the timeliness of a notice of appeal. For the appellate advocate, understanding how the 30-day deadline for the filing of an appeal is both triggered and tolled is absolutely essential, in that the deadline is considered to be jurisdictional. One day late, and you may find yourself out of court.

Some attorneys find it difficult to calculate the proper appeal deadline when post-judgment motions are involved (such as motions for new trial, reconsideration, and attorneys’ fees). In two key 2012 decisions, the First Circuit held that, while the filing of a motion for statutory attorneys’ fees represents a post-judgment filing, the awarding of attorneys’ fees pursuant to a contract provision is a component of the cause of action itself and represents a pre-judgment filing. Compare Central Pension Fund v. Ray Haluch Gravel Co., 695 F.3d 1, 7 (1st Cir. 2012) with House of Flavors, Inc. v. TFG-Michigan, L.P., 700 F.3d 33, 36 (1st Cir. 2012). The difference in approach is critical for the potential appellant: the filing of a motion for statutory attorneys’ fees following the entry of judgment does not automatically toll the running of the 30-day appeal period. See generally Fed. R. Civ. P. 54; Budinich v. Becton Dickinson & Co., 486 U.S. 196 (1988). The process of awarding contractual attorneys’ fees, however, which is treated as an element of damages, must by definition precede the entry of judgment, so the appellant is not expected to file its notice of appeal until the issue of fees is resolved and a final judgment entered. The Court noted in Central Pension that its treatment of this tricky issue does not necessarily mirror the position taken by other federal circuits.

There is also continuing confusion over: (1) what is the relevant “order” appealed from (i.e., the event that triggered the appeal period); and (2) the proper identification of the order or orders being appealed. In In re Lupron Marketing & Sales Practices Litigation, 677 F.3d 21, 28-29 (1st Cir. 2012), the Court held that it had jurisdiction because the appellant had timely appealed even though the notice had been filed more than thirty days from the entry of the relevant order. Because the district court did not comply with the “separate document” mandate of Federal Rule of Appellate Procedure 3, the appellants had 150 days to file their notice.

The Court’s decisions in McKenna v. Wells Fargo Bank, N.A., 693 F.3d 207 (1st Cir. 2012) and Markel Am. Ins. Co. v. Diaz-Santiago, 674 F.3d 21 (1st Cir. 2012), were also dependent on Rule 3 and the requirement that a “notice of appeal must . . . designate the judgment, order or part thereof being appealed.” Fed. R. App. P. 3. In both cases the appellants had timely filed their notices of appeal, but the notices were arguably deficient in identifying precisely which “orders or parts thereof” in the district court proceedings were being challenged on appeal. The Court, although acknowledging that Rule 3 sets forth a jurisdictional requirement, reiterated that its charge was to apply the rule liberally and in view of the entire context of the proceedings. Markel, 674 F.3d at 26-27. In both instances, the Court forgave the deficiencies and proceeded to a review on the merits; a more careful advocate, however, would be well-warned to specify in the notice of appeal any issue which might possibly be raised.
SECOND CIRCUIT

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SECOND CIRCUIT HOLDS THAT IT LACKS APPELLATE JURISDICTION WHERE NOTICE OF APPEAL FAILED TO SPECIFY WHICH DEFENDANTS WERE APPEALING

In *Gusler v. The City of Long Beach*, 700 F.3d 646 (2d Cir. 2012), the Second Circuit held that it lacked appellate jurisdiction where the notice of appeal failed to comply with Rule 3(c)(1)(A) of the Federal Rules of Appellate Procedure, which requires that the notice “specify the party or parties taking the appeal by naming each one in the caption or body of the notice”.

In that case, the notice of appeal listed all fifteen defendants in the caption, but stated in the body that the defendant Nassau County was appealing. Nassau County, however, was not a defendant. The caption named three defendants who still had claims pending against them, in addition to those defendants against whom all claims had been dismissed. Because the notice of appeal was not “objectively clear” and did not provide fair notice to the court or opposing party of the specific defendants taking the appeal, the Second Circuit dismissed the appeal for lack of jurisdiction. In so holding, the Court noted that naming the appealing party in the caption is sufficient only if it is “manifest” from the notice that the party wishes to appeal. If the body of the notice leaves uncertainty as to which party is appealing, the requirement of Rule 3(c)(1)(A) is not satisfied.

SECOND CIRCUIT HOLDS THAT ARBITRATORS’ NONDISCLOSURE OF OVERLAPPING SERVICE IN TWO REINSURANCE ARBITRATIONS DID NOT CONSTITUTE EVIDENT PARTIALITY.

In *Scandinavian Reinsurance Company Limited v. Saint Paul Fire & Marine Insurance Company*, 668 F.3d 60 (2d Cir. 2012), the Second Circuit held that the failure of two arbitrators to disclose their concurrent service as arbitrators in another proceeding did not constitute “evident partiality” under the Federal Arbitration Act, 9 U.S.C. § 10(a)(2).

Scandinavian Reinsurance and St. Paul entered into a stop-loss retrocessional agreement. After Scandinavian refused to make payments under the agreement, St. Paul commenced arbitration proceedings, and a majority of the arbitration panel ruled in favor of St. Paul.

While the St. Paul arbitration was pending, Platinum Underwriters Bermuda, a re-insurer, commenced a reinsurance arbitration against PMA Capital and several related companies. Two of the arbitrators from the St. Paul arbitration also served on the panel in the Platinum arbitration. Neither arbitrator disclosed their concurrent service. Although St. Paul was not a party to the Platinum arbitration, St. Paul’s business was related in several ways to Platinum’s, and a witness who was a past employee of both Scandinavian and Platinum testified in both arbitration proceedings.

Scandinavian filed a petition to vacate the arbitration award on the grounds of evident partiality, and the district court ruled in favor of Scandinavian. On appeal, the Second Circuit reversed the judgment of the district court, concluding that “evident partiality” may be found only “where a reasonable person, considering all the circumstances, would have to conclude that an arbitrator was partial to one party to the arbitration.” After noting that the undisclosed matter was concurrent service and not a “material relationship with a party,” the Court also rejected the arguments that the similarities between the two arbitration proceedings was evidence of the arbitrator’s partiality and that Scandinavian was “misled” by the two arbitrators’ repeated assurances that were required to make continuing disclosures.
In a pair of decisions issued on February 13, 2012, the Third Circuit attempted to clarify the standards for timeliness of prisoners’ pro se motions for reconsideration and notices of appeal.

In *Long v. Atlantic City Police Dep’t*, 670 F.3d 436 (3d Cir. 2012), the court confirmed that where a motion for reconsideration under Fed. R. Civ. P. 59(e) is untimely because receipt of the decision is delayed by the prison’s mail handling, the motion will be deemed timely and will accordingly toll the time limit for filing an appeal under Fed. R. App. P. 4(a)(4). Moreover, the court held that the prison, as the party with the easier access to relevant information, has the burden of proof concerning the delay issue.

In *Long*, however, the delay allegedly arose partly from the conduct of prison personnel and partly from errors by the district court clerk. Unlike delay caused by prison personnel, a delay arising from court error does not toll the time limit for filing a motion for reconsideration. Thus, where a delay has multiple causes, the district court normally must sort out the amount of delay attributable to each (though in this instance such fact-finding was not necessary because the appellate court based its decision on other grounds).

In *Baker v. United States*, 670 F.3d 448 (3d Cir. 2012), a prisoner filed an untimely motion for reconsideration under Fed. R. Civ. P. 59 and sought to reopen the time for filing an appeal under Fed. R. App. P. 4(a)(6) based on failure to receive notice of a decision. Although a court may reopen the time to file an appeal in certain circumstances, the Third Circuit held that Rule 4(a)(6)(B) imposes an outside time limit of 180 days for filing a motion to reopen. Relying on *Bowles v. Russell*, 551 U.S. 205 (2007), the court also concluded that the time limit of Rule 4(a)(6), which is based on 28 U.S.C. § 2107, isjurisdictional and not subject to exceptions. Because Baker’s motion related to an order entered more than 180 days previously, the court lacked jurisdiction to grant relief.

Regarding Baker’s Rule 59 motion for reconsideration, the record demonstrated that the delay in receipt of the order arose from errors by the court clerk, not prison personnel. Consistent with its conclusion in *Long*, the court found that delay caused by the clerk could not support deemed timeliness of a Rule 59 motion. The court recognized the unfair consequences of its ruling, but noted that litigants are responsible to check on the status of pending decisions.

**STARE DECISIS: EFFECT OF PREVIOUSLY BINDING FEDERAL PRECEDENTS ON THE NEWLY CREATED SUPREME COURT OF THE VIRGIN ISLANDS**

In 1954, Congress authorized the Virgin Islands legislature to create its own court system. The legislature initially created a trial court system with an appellate division, but no supreme court. The United States Court of Appeals for the Third Circuit therefore served as the final interpreter of Virgin Islands law. In 2004, however, the Virgin Islands legislature established the Supreme Court of the Virgin Islands, which began exercising its authority on January 29, 2007. Although the Third Circuit has a temporary Congressional mandate to oversee the developing Supreme Court of the Virgin Islands and has discretionary authority to grant writs of certiorari to evaluate decisions by the Court, it may overturn a decision of the Virgin Islands Supreme Court only if the decision is “manifestly erroneous” or “inescapably wrong.”

In *Defoe v. Phillips*, 702 F.3d 735 (3d Cir. 2012), the plaintiff sued a fellow employee after a work-related accident. Existing Third Circuit precedent held that the Virgin Islands’ workers’ compensation statute precluded tort actions against co-employees. In *Defoe*, however, the Supreme Court of the Virgin Islands disagreed and declared itself not bound by the Third Circuit’s decision. The Third Circuit granted certiorari to consider whether its previously developed body of jurisprudence constraining Virgin Islands law would bind the Supreme Court of the Virgin Islands.

The Third Circuit concluded that the Supreme Court of the Virgin Islands must have the authority to overturn previous Third Circuit decisions on matters of territorial law. Not to recognize such authority, the court reasoned, would undermine Congress’s intent to allow the Virgin Islands Supreme Court to develop its own body of jurisprudence. While noting its disagreement with the Virgin Islands Supreme Court’s interpretation of the statute at issue, the Third Circuit found the court’s analysis was thorough, not obviously flawed, and contained no internal inconsistency. Accordingly, the Third Circuit found that the Supreme Court of the Virgin Islands had acted within its authority in overruling the Third Circuit’s precedent.
FOURTH CIRCUIT

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FOURTH CIRCUIT NEWS

On September 8, 2011, President Barack Obama nominated Stephanie D. Thacker to the seat vacated by Judge M. Blane Michael, who passed away on March 25, 2011, after serving on the court since 1993. Judge Thacker received her commission on April 17, 2012.

DISMISSAL OF INTERLOCUTORY APPEAL TO REVIEW DENIAL OF IMMUNITY

Following the 2003 invasion of Iraq, several Iraqis detained at Abu Ghraib prison near Baghdad filed lawsuits against contractors and employees of a private corporation that had contracted with the United States to provide civilian employees to assist the military in interrogating detainees. The detainees alleged that the contractors and employees were liable for common law torts and under the Alien Tort Statute, 28 U.S.C. § 1350, for torturing and abusing them during incarceration. After the contractors’ motions to dismiss based on the law-of-war defense, Saleh preemption, and Mangold immunity were denied, the contractors filed an interlocutory appeal to the Fourth Circuit, contending that the defenses they raised gave rise to “immunity from suit” and thus merited immediate appellate review. Al Shimari v. CACI International, Inc., 679 F.3d 205 (2012).

On rehearing en banc, the Fourth Circuit held that neither the law-of-war defense nor Saleh preemption provided a basis for an interlocutory appeal because neither defense afforded the contractors immunity from suit and instead could only insulate them from liability. On the other hand, the Court explained that the defense of Mangold immunity is a defense to suit that shields “statements and information, whether truthful or not, given by a government contractor and its employees in response to queries by government investigators engaged in an official investigation.” 679 F.3d at 211 (quoting Mangold v. Analytic Servs., Inc., 77 F.3d 1442, 1449 (4th Cir. 1996)). However, the Court found that there were genuine issues of fact that had yet to be fully ascertained as to whether the contractors were entitled to such immunity. Because the contractors appealed before the district courts could reasonably determine the applicability of Mangold immunity, the Fourth Circuit held that it lacked appellate jurisdiction to consider the defense and dismissed the consolidated appeals.

NO APPELLATE JURISDICTION TO REVIEW REMAND TO AN ERISA CLAIMS ADMINISTRATOR

In Dickens v. Aetna Life Insurance Company, 677 F.3d 228 (4th Cir. 2012), the Fourth Circuit considered, for the first time, whether a district court’s order remanding to an ERISA claims administrator for reconsideration is a final, appealable decision. The Fourth Circuit followed the majority view—along with the First, Sixth, Eighth, Tenth, and Eleventh Circuits—in finding that such an order is not a final decision.

The employee applied for long-term disability benefits under his employer’s group plan and the Social Security Administration awarded him benefits. When the ERISA claims administrator later terminated the employee’s benefits, the employee filed suit seeking to restore his long-term disability benefits and enjoin the claims administrator from terminating such benefits. The parties filed cross-motions for summary judgment, and the employee moved, in the alternative, to have the matter remanded to the claims administrator. The district court denied summary judgment as to both parties, but granted the employee’s motion to remand for reconsideration. The claims administrator appealed to the Fourth Circuit.

Although the district court found the ERISA claims administrator’s decision to terminate the employee’s long-term disability benefits “arbitrary and unreasonable,” the district court expressed no opinion as to whether the employee was in fact disabled under the plan’s definition. Dickens, 677 F.3d at 230. The Fourth Circuit found that this was clearly not a final judgment and that remand “was but a momentary backtrack of the litigation.” Id. at 231. The Court also rejected the claims administrator’s argument that jurisdiction existed pursuant to the collateral order doctrine, 28 U.S.C. § 1291. By interpreting the district court’s remand order as retaining jurisdiction, the Fourth Circuit concluded that either party could later challenge the claim administrator’s eligibility determination before the same court.
FIFTH CIRCUIT
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CHANGES ON THE FIFTH CIRCUIT

In 2012 Judges Emilio Garza and Fortunato “Pete” Benavides took senior status. Because of the change in their status, there are currently two vacant seats on the circuit. No nominations are pending for those seats.

APPELLATE JURISDICTION OVER REMAND ORDERS

The Fifth Circuit addressed the applicability of a narrow exception to the rule against appellate review of district court remand orders. In Bepco, L.P. v. Santa Fe Minerals, Inc., 675 F.3d 466 (5th Cir. 2012), the district court remanded, in part, on a ground that had not been raised in a timely motion to remand. Declining to review the order, the Fifth Circuit refused to accept the proposition, followed by the Ninth Circuit, that a remand order may be reviewed when it is based on a removal defect that was not timely raised. Compare N. Cal. Dist. Council of Laborers v. Pittsburg-Des Moines Steel Co., 69 F.3d 1034 (9th Cir. 1995).

Ordinarily, remand orders are unreviewable so long as they are based on either a lack of subject-matter jurisdiction or a defect in removal procedure. In this case, the district court’s remand was based on two separate grounds. The first ground, contractual waiver, was timely raised in a motion to remand, but is not a basis for remand that the appellate court can review. The second ground, untimeliness of the removal petition, is a basis for remand that the appellate court can review, but it was not raised within the 30-day time limit for a motion to remand. The Fifth Circuit reasoned that the second ground for remand was unreviewable, even though not timely raised, based on its reading of the plain language of the statute regarding the power of federal courts to review remand orders. 28 U.S.C. § 1447(d).

REMOVAL AFTER FINAL JUDGMENT

The Fifth Circuit held that the United States may not remove a case to federal court after a final judgment has been entered and the time to appeal has expired. In Oviedo v. Hallbauer, 655 F.3d 419 (5th Cir. 2011), a patient asserting personal injury claims against two physicians obtained a default judgment in state court. After judgment, the United States appeared on behalf of the physicians and filed a motion for new trial, asserting that the physicians were federal employees under the Federal Tort Claims Act. But the motion was overruled by operation of law, and the United States did not file a notice of appeal. After the time to appeal expired, the United States removed the case to federal district court, which set aside the state-court default judgment and dismissed the case for failure to exhaust administrative remedies.

The Fifth Circuit reversed and dismissed the federal action for lack of jurisdiction. Although the United States asserted that removal and federal jurisdiction were proper under a number of statutes, including the Federal Tort Claims Act, the Fifth Circuit held that removal is not proper under any statute after the state-court judgment is final and no longer subject to appeal. The Court acknowledged that it has allowed the removal of cases in some circumstances where the state-court action is pending on appeal, or even where an appellate-court judgment is final but subject to further appeal. Yet it explained that there is no support in its precedent for the removal of a case after the state court’s jurisdiction has “wholly expired.”

FINALITY: MAGISTRATE’S DISMISSAL ORDER

The Fifth Circuit reaffirmed the rule that a magistrate’s order of dismissal ordinarily is not a final judgment and may not be directly appealed. In Barber v. Shinseki, 660 F.3d 877 (5th Cir. 2011), the district judge referred a motion to a magistrate judge, who entered an electronic order dismissing a pro se plaintiff’s suit for failure to comply with court orders and for failure to prosecute. The plaintiff appealed to the Fifth Circuit.

The Fifth Circuit dismissed the appeal for lack of appellate jurisdiction. The Court reasoned that it is well-established that a magistrate judge’s order is not final and may not be appealed directly to the court of appeals. It acknowledged a limited exception to this rule in cases where a district court, with consent of the parties, has authorized the magistrate judge to conduct proceedings and enter a final judgment. But that exception did not apply here because the plaintiff had not consented to have his case disposed of by a
The Court emphasized that, for an order to be an appealable final judgment, the judgment disposing of the case must be a separate, freestanding document, and not just a docket entry.

Interestingly, the Fifth Circuit’s initial opinion in *Barber* stated that a judgment must be set forth on a separate paper document. In a substituted opinion, the Court recognized that, although Rule 58 requires that every judgment must be set forth on a separate document, that separate document may be electronic.

**FEDERALISM: FEDERAL INJUNCTIONS OF STATE PROCEEDINGS**

The relationship between insurance coverage actions in federal court and underlying tort claims in state court was addressed in *GuideOne Specialty Mutual Insurance Company v. Missionary Church of Disciples of Jesus Christ*, 687 F.3d 676 (5th Cir. 2012). After a plaintiff injured in an auto accident sued a church in state court, the church’s insurer brought a federal action seeking a declaration judgment that it owed no duty to defend or indemnify the church. The insurer also sought to enjoin the underlying plaintiff from prosecuting her state-law claim on the theory that the church owed her no duty. The district court not only held that the insurer owed no duty to defend or indemnify the church, but also enjoined the underlying state-court action.

The Fifth Circuit reversed. Applying Texas law, it held that the insurer did owe a duty to defend, and that the duty to indemnify could not be resolved until the underlying action was resolved.

The Court also addressed whether a federal court in an insurance coverage action has the power to enjoin an underlying state-court liability action from proceeding. The Court explained that insurance coverage disputes are not meant to resolve underlying tort claims. It also cited the federalism values at stake in allowing state-law claims to be resolved in a plaintiff’s chosen forum. It reasoned that the Anti-Injunction Act does not allow federal courts to stay court actions except in a narrow class of cases. 575.
NOT YOUR “EVERYDAY CASE” ON SOVEREIGN IMMUNITY

Our Founding Fathers were certainly unconventional thinkers. Apparently, 236 years later, the United States Government is still thinking outside the box. In United States v. Carroll, 667 F.3d 742 (6th Cir. 2012), the government invoked the jurisdiction of the federal court system in order to contest it. This case arose from the events surrounding the influx of Chapter 13 bankruptcies in 2009. Since one asset of Chapter 13 debtors is their tax refund, the bankruptcy judges of the Eastern District of Michigan began entering orders in Chapter 13 cases requiring the IRS to send individual tax refunds to the Chapter 13 trustees, not the individual debtors as the Internal Revenue Code requires. The IRS did not initially challenge these orders but, as the number of affected returns swelled from 401 in 2008 to 4,966 in 2009, the IRS had a change of heart. At the IRS’s request, the United States sued each of the Chapter 13 bankruptcy trustees of the Eastern District of Michigan in their official capacities, complaining that the refund-redirection orders violated the United States’s sovereign immunity.

The Sixth Circuit decided it did not have jurisdiction because the United States sued the wrong parties. Judge Sutton concluded that the United States only satisfied one of the three elements of standing (injury) and failed to show causality or redressability. Specifically, the Court found that the harm the government suffered (administrative costs associated with processing tax refunds) flows not from the trustees’ actions but from the bankruptcy court’s orders: “When an entity does not like a court order, the answer is not to sue the lawyer or party who recommended the order; it is to appeal the order or, if utterly necessary, to sue the court. Bankruptcy trustees do not control bankruptcy courts.” The proper remedy, the Court suggested, would be for the government to file a direct appeal from the entry of a refund-redirection order in one or more of the cases in which the IRS is a party.

IS A THIRD-PARTY DEFENDANT REALLY A DEFENDANT?

The law is relatively settled that a third-party defendant may not remove an action from state court to federal court pursuant to 28 U.S.C. § 1441 et seq. However, in the context of a class action lawsuit, the Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d) (“CAFA”), allows a court of appeals to accept an appeal on the removal “by any defendant without the consent of all defendants.” 28 U.S.C. § 1453(b). In what started out as a simple foreclosure action in Kentucky, the Sixth Circuit was faced with the issue of whether it had jurisdiction to review a district court’s decision to remand a case after it was removed by a third-party defendant.

In re Mortgage Electronic Registration Systems, Inc., 680 F.3d 849 (6th Cir. 2012), began as a foreclosure case filed by BAC Home Loan Servicing, LP against the Hansons in Kentucky state court. The Hansons filed a counterclaim arguing that BAC did not establish that it validly held the loan or mortgage because the executed documents were not in favor of BAC. The mortgagee was MERS, who later assigned the mortgage to BAC. The Hansons then filed a third-party class action complaint against MERS alleging that MERS was simply a database for assignments of mortgages and failed to follow Kentucky registration laws. MERS timely removed to the U.S. District Court for the Western District of Kentucky. The Hansons moved to remand, arguing that MERS, as a third-party defendant, could not remove the case to federal court. The district court agreed and remanded the case.

On appeal, MERS argued that § 1453(b)’s language entitling “any defendant” to remove the case includes third-party defendants. According to MERS, this language in the CAFA distinguished it from the typical removal language in § 1441(a) and the case law holding that a third-party defendant is not a “defendant” for purposes of removal. The Sixth Circuit disagreed and interpreted the “any defendant” language in § 1453(b) as a modifier of the rule that all defendants must consent to the removal. In reaching this conclusion, the Sixth Circuit joined the Fourth, Seventh, and Ninth Circuits in concluding that CAFA does not change the general rule of removal that counterclaim or third-party defendants do not have a right of removal.
NO JURISDICTION TO REVIEW PRELIMINARY INJUNCTION ORDER EVEN WHEN STYLED AS MOTION TO DISSOLVE

In *Gooch v. Life Investors Insurance Company of America*, 672 F.3d 402 (6th Cir. 2012), the Sixth Circuit addressed its jurisdiction to modify or dissolve a preliminary injunction order, as opposed to a request to reconsider the merits of the preliminary injunction order as issued. The district court issued the injunction in March 2008, but Life Investors did not appeal at that time. Instead, in March 2009, Life Investors moved to dissolve the injunction based on allegedly new evidence it obtained in discovery and depositions. This motion was denied and Life Investors appealed.

The Sixth Circuit distinguished its ability to review orders continuing, modifying, or refusing to dissolve or modify injunctions, from its lack of jurisdiction to review orders denying reconsideration of a previously granted preliminary injunction. See 28 U.S.C. § 1292(a)(1). The Court determined it needed to look beyond the caption of the motion to its substance. Since an injunction could only be modified or dissolved with a showing of significant changes in fact, law, or circumstance, the Court looked to the nature of the allegedly “new” evidence submitted by Life Investors. The Court determined that this evidence was in existence prior to the issuance of the injunction and did not constitute a change in fact, but Life Investors argued that evidence previously in existence was not considered by the district in granting the injunction. The Court concluded that this was simply an attempt to challenge the merits of the original injunction order, not to modify or dissolve an injunction based on changed circumstances. Accordingly, the Court lacked jurisdiction to review the interlocutory order denying Life Investors’ motion.

COURT ALLOWS APPEAL ON MERITS BUT DISMISSES APPEAL ON DISCOVERY SANCTIONS FOR LACK OF JURISDICTION

Our next entry involves a somewhat simple issue but a questionable policy choice that seems to promote the filing of piecemeal appeals. In *Armisted v. State Farm Mutual Automobile Insurance Company*, 675 F.3d 989 (6th Cir. 2012), the district court sanctioned State Farm for discovery violations but reserved ruling on the amount of the monetary sanction until a later time. The plaintiffs appealed the verdict and the decision on post-trial motions, and State Farm cross-appealed on the issue of discovery sanctions.

The Sixth Circuit concluded that it had jurisdiction to entertain the plaintiffs’ appeal on the merits but lacked jurisdiction over State Farm’s cross-appeal because the district court had not yet made a monetary award. The Court’s decision to review the plaintiffs’ appeal on the merits is somewhat perplexing. The Court reasoned that unresolved issues involving awards of attorney fees and discovery sanctions do not prevent a judgment on the merits from being final. However, the only case the Court cited in its favor was a per curiam decision out of the Tenth Circuit from 1990. The Court affirmed the decision in all other respects, but recognized that it may see this case again in the near future once the district court awards discovery sanctions.

This decision appears to promote, rather than prevent, more piecemeal appeals. This is an issue that bears watching not only in this Court but in other circuits as well.
NOTICES OF APPEAL

The Seventh Circuit has issued two decisions recently on notices of appeal, one being too early and one too late.

Premature Notice of Appeal

In *Brown v. Columbia Sussex Corporation*, 664 F.3d 182 (7th Cir. 2011) the Seventh Circuit Court of Appeals considered whether an appellant’s premature notice of appeal from the district court’s non-final decision to dismiss the case ripened into a timely notice upon the district court’s entry of a belated Rule 54(b) judgment. On November 10, 2010, the district court indicated that it would dismiss the case as a discovery sanction, but did not enter final judgment until January 7, 2011. On December 10, 2010, after the district court’s announcement of its decision but before final judgment was entered, plaintiffs filed their notice of appeal from the district court’s decision to dismiss their claims. The plaintiffs did not, however, file a timely notice of appeal from the January 7, 2011 Rule 54(b) judgment.

On appeal, the defendant Columbia Sussex Corporation argued that the court of appeals lacked jurisdiction because the notice of appeal was not filed from a final appealable judgment. The plaintiffs responded by arguing that the district court’s Rule 54(b) judgment made the district court’s dismissal both final and appealable in accordance with 28 U.S.C. § 1291, and that the final judgment revived the premature notice of appeal filed earlier.

Columbia relied on *FirstTier Mortgage Co. v. Investors Mortgage Insurance Co.*, 498 U.S. 269 (1999) wherein the Supreme Court held that under Fed. R. App. P. 4(a)(2), a premature notice of appeal from a clearly interlocutory decision—such as a discovery ruling or sanction order pursuant to Fed. R. Civ. P. Rule 11—did not become a valid notice of appeal after the judgment became final. Columbia argued that the district court’s order dismissing plaintiffs’ claims was clearly interlocutory and thus the premature appeal could not be saved by Rule 4(a)(2). Columbia further argued that since more than 30 days had passed since the district court’s entry of final judgment, any notice of appeal by plaintiffs would now be time-barred. In part to conform with its previous holding in *Garwood Packaging, Inc. v. Allen & Co.*, Inc., 378 F.3d 698 (7th Cir. 2004), the court held that if finality of a district court’s decision is subsequently achieved, as to a particular claim or party, Rule 4(a)(2) can save an otherwise premature appeal.

The Seventh Circuit accepted jurisdiction over the appeal, holding that the plaintiffs’ premature notice of appeal ripened into a valid notice of appeal after the entry of the Rule 54(b) judgment. The court reasoned that Rule 4(a)(2) saves a premature notice of appeal if, regarding the claim being appealed, the entry of judgment is all that is left for the district court to do in finalizing the order.

Belated Notice of Appeal

In *Abuelyaman v. Illinois State University*, 667 F.3d 800 (7th Cir. 2012), the Court discussed the “excusable neglect” standard for an order granting an extension of time to file a notice of appeal. In *Abuelyaman*, a former Illinois State University professor sued the university alleging claims of racial and religious discrimination and retaliation. After dismissing or granting summary judgment on most of the professor’s claims, the jury returned a verdict for the university on the sole remaining retaliation claim. The professor appealed that verdict to the Seventh Circuit Court of Appeals.

On the eve of oral argument, the university filed a supplemental brief in which it argued that the district court had erred in granting the professor’s motion to extend the time to file a notice of appeal. Specifically, the university argued that the professor’s explanation for his late filing did not satisfy Fed. R. App. P. 4(a)(5)(A)’s
“excusable neglect” standard. Fed. R. App. P. 4 permits a party to move for an extension of time to file a notice of appeal if (1) such a motion is made within 30 days after the original deadline has passed, and (2) if the moving party demonstrates “excusable neglect or good cause” for failing to file the notice of appeal on time. Fed. R. App. P. 4(a)(5)(A). The university argued that Fed. R. App. P. 4(a)(5)(A) is not a “toothless” standard and that “excusable neglect” refers to the missing of a deadline due to such things as misrepresentations of judicial officers, lost mail, and plausible misrepresentations of ambiguous rules.

The Seventh Circuit held that it had jurisdiction over the appeal, rejecting the university’s Rule 4 argument. The court stated that the excusable neglect standard is not a merciless one; rather, the test as to what constitutes excusable neglect is an equitable one, taking account of all relevant circumstances surrounding the party’s omission, the most important of which are the degree to which the appellant is prejudiced and the good faith of the appellant. The court of appeals found that the necessity of extension was rooted in good faith efforts to timely file. The professor’s attorney had attempted to electronically file one day before the deadline, but unbeknownst to her until seven days later, had failed to do so. However, the professor’s attorney had properly served notice of the appeal to the university’s counsel and had provided the clerk’s office with a credit card so as to pay the filing fee. Such was evidence of professor’s counsel’s good faith attempt to timely file although failing to do so. Lastly, any claim by the university that it would be prejudiced by a granting of the extension would not be compelling since the motion to extend was filed a mere six days after the date on which notice of appeal was due and since the university made no response whatsoever to the professor’s motion for extension.

NOTICE OF APPEAL WHEN POST-TRIAL MOTIONS ARE AT ISSUE

In Blue v. International Brotherhood of Electrical Workers Local Union 159, 676 F.3d. 579, 582 (7th Cir. 2012), Susan Blue had brought a Title VII discrimination claim against the International Brotherhood of Electrical Workers Local Union 159 (“IBEW”), her former employer. Blue argued that IBEW had retaliated against her for opposing the discrimination of an African-American electrician, Alexander Phillips. The jury found in Blue’s favor and awarded her $202,396.76.

The District Court formally entered judgment against IBEW on August 9, 2010, and set a deadline of August 25, 2010, for all post-trial motions. Later, however, the court purported to extend the deadline for post-trial motions, and on September 10, 2010, IBEW filed two motions seeking either judgment as a matter of law under Federal Rule of Civil Procedure 50(b) or a new trial Under Federal Rule of Civil Procedure 59(a). On February 3, 2011 The District Court denied both motions, and IBEW filed its Notice of Appeal on March 1, 2011.

On appeal, the Seventh Circuit considered whether it had jurisdiction over IBEW’s appeal. The court stated that pursuant to 28 U.S.C § 2107(a) and Fed. R. App. P. 4(a)(1)(A), it generally had jurisdiction to hear case only where a notice of appeal was filed within 30 days of the entry of judgment. The court noted that although a timely post-trial motion tolls the time to appeal under Rule 4(a)(4)(A), the motions filed by IBEW did not have any tolling effect because they were untimely. The court concluded that the fact that the District Court purported to extend the time for filing the post-trial motions was irrelevant to the tolling question because Fed. R. Civ. P. Rule 6(b)(2) prohibits a court from granting such an extension. Thus, the Court concluded that because the post-trial motions were untimely, they did not toll the period for IBEW to file its appeal from the judgment.

The court then considered a second jurisdictional problem: whether the District Court had the authority to rule on IBEW’s post-trial motions, despite their untimeliness. Whether the time limits contained in Rules 50 and 59 was jurisdictional was a matter of first impression for the Seventh Circuit. The court concluded that the “28 day limit on filing motions and rules 50 and 59 are non-jurisdictional procedural rules designed to aid in the orderly transaction of judicial business.” Id. at 584. Thus, although the district court violated Fed. R. Civ. P. 6 by extending IBEW’s time to file its post-trial motions beyond 28 days, the error had no jurisdictional consequences, and the district court was within its discretion to consider the untimely post-trial motions. Id. at 585.

DIVERSITY JURISDICTION—AMOUNT IN CONTROVERSY, AND GUIDANCE ON PROPER DEPOSITION BEHAVIOR

In Hunt v. DaVita, Inc., 680 F.3d 775, 777-78 (7th Cir. 2012), the Seventh Circuit held that a plaintiff’s post-removal disclaimer of damages exceeding $75,000 could not defeat federal jurisdiction after the case was properly removed to federal court based on the
In *Hunt*, an employee sued her employer in state court alleging that she was fired in retaliation for her intention to file a workers’ compensation claim related to her carpal tunnel syndrome. The district court granted summary judgment for the employer.

On appeal the employee argued that the federal court lacked jurisdiction and should have remanded the case to state court for failure to satisfy the amount-in-controversy requirement for federal diversity jurisdiction under 28 U.S.C. § 1332. The employee argued that because she had disavowed and offered to return any damages that might be awarded in excess of $75,000, the amount in controversy requirement necessary for federal diversity jurisdiction was lacking. The Seventh Circuit held that the employee had not shown that it was legally certain that the amount in controversy would not exceed $75,000. The Seventh Circuit reasoned that since *Hunt* sought punitive damages in her complaint, even a modest punitive to compensatory damages ratio of 2:1 or 3:1 could have led to an award in excess of $75,000. In upholding that post-removal disclaimer of damages exceeding $75,000 could not defeat federal diversity jurisdiction, the court relied on prior similar rulings including *St. Paul Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 292 (1938); *Back Doctors Ltd. v. Metropolitan Property and Casualty Ins. Co.*, 637 F.3d 827, 830 (7th Cir. 2011), and *Chase v. Shop 'N Save Warehouse Foods, Inc.*, 110 F.3d 424, 429 (7th Cir. 1997).

Perhaps even more interesting to practitioners, *Hunt* also involved a discussion of the deposition conduct of counsel. The district court had refused to strike the deposition testimony of defendant’s employee responsible for ending Hunt’s employment. Hunt sought to strike deposition testimony because during the deposition defendant’s counsel conferred privately with the witness about exhibits as they were presented, allegedly pointing out policy language that plaintiff’s counsel had asked the witness herself to identify. Defendant’s counsel responded that he was merely assisting the witness and was not suggesting testimony.

The Court of Appeals found counsel’s conduct at the deposition to be “not appropriate or professional.” *Hunt*, at 780. “The fact-finding purpose of a deposition requires testimony from the witness, not from counsel, and without suggestions from counsel. Coaching in private conferences (on issues other than privilege) that would be inappropriate during trial testimony are not excused during a deposition merely because the judge is not in the room.” *Id.* However, the court noted, district courts have broad discretion in supervising discovery, including deciding whether and how to sanction such misconduct. Accordingly, the court held that the magistrate judge had not abused its discretion in determining that the conduct did not actually impede the purpose of the deposition and thus denying the motion to strike the deposition testimony.
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Washington, D.C.

SPEAKERS:
Beth S. Brinkmann
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U.S. Department of Justice—Civil Division
Washington, D.C.

Paul D. Clement
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EIGHTH CIRCUIT

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NEWSPAPER REPORTER’S EXCLUDED TESTIMONY WAS HARMLESS ERROR; COURT REMANDS FOR NEW TRIAL ON PUNITIVE DAMAGES

In Doe v. Young, 664 F.3d 727 (8th Cir. December 28, 2011), a “Jane Doe” plaintiff, whose nude before-and-after plastic surgery pictures were published in a newspaper, appealed a verdict awarding her $100,000 in compensatory damages, arguing that the district court committed error by excluding testimony from the newspaper reporter that would have contradicted the Defendant plastic surgeon’s testimony about the intended use of the photos.

Defendant’s plastic surgery practice was featured in a newspaper article. One of the physicians gave the Plaintiff’s before-and-after photos to the newspaper reporter and allegedly told her not to use the photographs. The reporter’s testimony that she was not so instructed was excluded as a discovery sanction by the district court, which had relied upon the newspaper’s earlier invocation of the reporter’s privilege to prevent discovery about the Defendant plastic surgeon’s testimony about the intended use of the photos.

Finding that “the district court’s discretion to fashion a remedy or sanction for discovery violations under Rule 37 is not absolute,” the Eighth Circuit reversed, holding that the communications were not related to the editorial process, and that there was no discovery abuse or ambush by proffering testimony from a witness who was properly disclosed and had been deposed—although, apparently not about the topic she was prepared to testify about at trial. The Court upheld the verdict on compensatory damages but remanded for a new trial on punitive damages, finding that the excluded evidence was more related to that issue.

STOCKPILING DRIVER INFORMATION FOR RESALE DEEMED NOT A PER SE VIOLATION OF DPPA

In Cook v. ACS State & Local Solutions, Inc., 663 F.3d 989 (8th Cir. 2011), the Eighth Circuit affirmed a district court’s dismissal of a putative class-action lawsuit against various entities that compiled data obtained from the Missouri Department of Revenue for the purpose of later reselling it. Plaintiffs alleged that stockpiling the data and compiling databases to re-sell to other end-users constituted a per se violation of the Driver’s Privacy Protection Act, 18 U.S.C. §§ 2721-2725. The Act provides 14 enumerated exceptions to the prohibition, but Plaintiffs argued that collecting the data in bulk for later use violated the statute, which they contended required the data to be put to an immediate enumerated use. The Court rejected these arguments, finding that legislative history and precedent from other circuits supported dismissal of the action.

AIDING AND ABETTING FRAUD CLAIM DISMISSED FOR LACK OF PARTICULARITY

Relying on the heightened pleading requirement of Federal Rule of Civil Procedure 9(b), in E-Shops Corp. v. U.S. Bank N.A., 678 F.3d 659 (8th Cir. 2012), the Court affirmed dismissal of a putative class action against a bank for aiding and abetting criminals making fraudulent credit card purchases. Plaintiffs alleged and provided two anonymous affidavits from bank employees that the bank’s security systems had been compromised and that the bank was “well aware of the problem.” The Court found that the lack of affiant identification and the failure to state what positions they held in the bank or how they acquired the information was insufficient to meet the heightened pleading standard. Because knowledge of the fraudulent activity is an element of an aiding and abetting claim under Minnesota law, the Court found the complaint and affidavits insufficiently particular to state a claim.
NINTH CIRCUIT
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THREE NEW NINTH CIRCUIT JUDGES CONFIRMED
In mid-2012, the Senate confirmed three of President Barack Obama’s nominees to the Ninth Circuit, the nation’s busiest appellate court. Two new judges are from Los Angeles: Jacqueline Nguyen, a U.S. District Court Judge, and Paul J. Watford, a trial and appellate attorney and former law clerk to Ninth Circuit Chief Judge Alex Kozinski. The third new judge is Andrew Hurwitz of the Arizona Supreme Court. That leaves one vacancy on the 29-judge Court, a position vacant since 2004 and unlikely to be filled soon in light of an on-going political dust-up in the Senate whether the nominee should be from Idaho or California.

APPEALABILITY OF INTERLOCUTORY ORDERS

Anti-SLAPP Order in Diversity Case is Appealable If State Anti-SLAPP Statute Grants Immunity From Suit.

In Metabolic Research, Inc. v. Ferrell, 668 F.3d 1100 (9th Cir. 2012), the Ninth Circuit ruled that a district court order denying a defendant’s motion to dismiss a diversity action under Nevada’s anti-SLAPP statute (which provides for prompt dismissal of meritless lawsuits filed with intent to chill the defendant’s exercise of First Amendment rights) was not immediately appealable as a “collateral order” under the standards of Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546 (1949).

The Court explained that the Ninth Circuit has no blanket rule regarding the appealability of anti-SLAPP rulings in diversity cases. Although all states’ anti-SLAPP statutes reflect important public policy considerations such as protection of free speech, the decisive factor for immediate appeal is whether the particular state statute provides immunity from suit or merely a ground for dismissal of the suit. If it affords immunity from suit, it is effectively unreviewable other than by immediate appeal. The immunity violation is irreparable if the defendant is forced to litigate the action and await the outcome to obtain review of the anti-SLAPP ruling.

According to the court, Nevada law provides for immunity from liability rather than immunity from suit, and therefore offers no right of immediate appeal. Moreover, the defendant was not totally without an immediate appellate remedy. He could have, but did not, ask the district court to certify the issue for interlocutory appeal under 28 U.S.C. § 1292(b), or, if the matter were truly extraordinary, seek a writ of mandamus. Accordingly, the defendant’s appeal from denial of his anti-SLAPP motion under Nevada law was dismissed.

Interlocutory Orders in Bankruptcy Proceedings Are Appealable in Limited Circumstances

In In re SK Foods, L.P., 676 F.3d 798 (9th Cir. 2012), the question presented was whether orders of a district court, undertaking appellate review of bankruptcy court orders that deny a motion to remove a trustee, to disqualify trustee’s counsel, and to take possession of documents in the trustee’s custody, were immediately appealable. The Ninth Circuit explained that under 28 U.S.C. § 158(d)(1), a circuit court has jurisdiction over final orders of a district court reviewing bankruptcy court decisions. The finality of such a district court order depends on the finality of the bankruptcy court order under review. A bankruptcy court order is final if it resolves and seriously affects substantive rights and finally determines the discrete issue presented. An order removing a bankruptcy trustee would be a final order. It alters the status quo because the trustee can no longer act in that capacity. But here, the order denying removal did not change the status quo. The trustee remains in office and his or her actions may be reviewed throughout the bankruptcy proceedings. The same holds true for orders denying disqualification of counsel and retaining possession of documents. The appeals from district court orders affirming the bankruptcy court orders were therefore dismissed.

ARTICLE III STANDING ON APPEAL: INTERVENORS, AS PROONENTS OF STATE PROPOSITION ADOPTED BY VOTERS, CAN APPEAL JUDGMENT OVERTURNING PROPOSITION.

In Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012), the district court ruled California’s Proposition 8–
a voter initiative adding a ban on gay marriage to the State Constitution and effectively overturning an earlier California Supreme Court decision under which thousands of gay couples had married—was unconstitutional under the Equal Protection and Due Process Clauses of the Federal Constitution, and enjoined state officials from enforcing the ban.

State officials declined to defend the ban at trial or to appeal the judgment. Proponents of Proposition 8, whom the district court had permitted to intervene to defend their Proposition at trial, appealed from the judgment.

On appeal, the challengers to Proposition 8 argued that the intervening proponents of Proposition 8 lacked standing to assert the state’s interest in the Proposition’s validity when the State declined to do so. The Ninth Circuit disagreed, holding that the proponents did not have to establish they were personally injured by the district court’s ruling. Because the State would have had Article III standing, and because the proponents had the right to defend the Proposition when the State declined to do so, that was sufficient for Article III standing. After determining that the proponents had standing to appeal, the Ninth Circuit affirmed the injunction against the gay marriage ban on its merits.

In December 2012, the Supreme Court granted the gay marriage ban’s proponents’ petition for certiorari. On its own motion, the Supreme Court directed the parties to brief the question of whether the proponents had standing to do so, that was sufficient for Article III standing.

RAISING NEW ISSUES ON APPEAL: YOU CAN, SOMETIMES

In Ruiz v. Affinity Logistics Corp., 667 F.3d 1318 (9th Cir. 2012), the defendant contended the plaintiffs had waived any objection to the district court’s decision to apply Georgia law because the plaintiffs had failed to raise the issue in district court. The Ninth Circuit rejected that contention. The Court explained that an appellate court may, in its discretion, consider an issue for the first time on appeal whenever (1) an extraordinary case review is necessary to prevent a miscarriage of justice or to preserve the integrity of the judicial process, (2) the law has changed while the appeal is pending, or (3) the issue is purely one of law and either does not depend on the factual record or the pertinent record has been fully developed. Here, the Court found the choice of law issue had been adequately raised below, but even if it had not been raised below, it would exercise its discretion to do so because the issue was one of law and the factual record was fully developed.

SEPARATE NOTICE OF APPEAL FROM FEE AWARD MUST BE TIMELY UNDER RULES OF APPELLATE PROCEDURE 3 AND 4

In Cruz v. International Collection Corp., 673 F.3d 991 (9th Cir. 2012), the district court granted summary judgment to the plaintiff on his claim for violation of the Federal Fair Debt Collection Practices Act. Within 30 days, the defendants filed notice of appeal from the judgment. The court later amended the judgment to award attorney’s fees and costs to the plaintiff. Several months later, the defendants filed an “amended” notice of appeal to include appeals from the post-judgment orders awarding damages and fees and substituting the plaintiff.

The Ninth Circuit affirmed the judgment on the merits and dismissed the defendants’ appeals from the post-judgment orders as untimely: “FRAP 3 and 4 establish a hard rule based on the number of days that pass: a prospective appellant has 30 days to file a notice of appeal.” The defendants’ amended notice of appeal was untimely because it was filed 461 days, 280 days, and 34 days, respectively, after the post-judgment orders from which it purported to appeal. According to the court, “[n]othing in the rule allows one party to file a second notice of appeal late merely because that party had previously filed a first notice of appeal.”

COURT DEEMS NOTICE OF APPEAL FROM NON-FINAL MINUTE ORDER “OF NO OPERATIVE EFFECT”

In Meyer v. Portfolio Recovery Associates, LLC, 696 F.3d 943 (9th Cir. 2012), the district court entered a minute order indicating that the plaintiff’s motions for a preliminary injunction and provisional class certification would be denied and that the court would prepare a written order. Plaintiff appealed from the minute order. The court then flip-flopped and entered a written order granting the injunction and class certification. The defendant appealed the written order.

In the defendant’s appeal, the defendant contended that plaintiff’s earlier appeal from the earlier minute order deprived the court of jurisdiction to issue its subsequent written order. The Ninth Circuit disagreed, holding that the minute order was not a final appealable order because it did not clearly evidence the court’s intention that it would be its final act on the matter, especially since the court stated a written order was to follow. Plaintiff’s notice of appeal was therefore “premature and had no operative effect,” and the district court had jurisdiction to issue its subsequent written order.
TENTH CIRCUIT

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PRESIDENT OBAMA RE-NOMINATES JUDGE BACHARACH FOR 10TH CIRCUIT

In January 2013, President Obama re-nominated Judge Robert Bacharach for the seat on the Court of Appeals for the Tenth Circuit vacated by former Chief Judge Robert Henry. Judge Bacharach, who has served as a Magistrate Judge for the Western District of Oklahoma since 1999, was first nominated for a position on the Court in 2012, but his confirmation was held up in the Senate. On February 25, 2013, the U.S. Senate confirmed Judge Bacharach to the Tenth Circuit.

INTERLOCUTORY REVIEW: TIMELINESS OF PETITION FOR PERMISSION TO APPEAL

In Gelder v. Coxcom Inc., 696 F.3d 966 (10th Cir. 2012), the issue before the Court considered whether Federal Rule of Civil Procedure 23(f) allowed a plaintiff to appeal an order denying the plaintiff’s motion for reconsideration of an order denying class certification even though the plaintiff’s petition for permission to appeal was filed more than fourteen days after the original order. Rule 23(f) permits an appeal from an order denying class action certification if the petition to appeal is filed within fourteen days after the order is entered. Relying upon U.S. v. Ibarra, 502 U.S. 1 (1991), the Court held that the time to file a petition for permission to appeal does not begin to run on the date of the order denying the class certification—rather, it begins on the date of the order denying the motion for reconsideration. Thus, the Court concluded that the petition for permission to appeal was timely as it was filed within fourteen days of the date the district court denied the motion for reconsideration.

The Court also held that granting such a petition is disfavored and is “the exception rather than the rule.” Finding nothing exceptional about the facts of this case, the Court denied the petition for permission to appeal.

Practice Tip: Only in exceptional circumstances is a petition for permission to appeal likely to be granted. Should such exceptional circumstances exist, as noted in Vallario v. Vandehey, 554 F.3d 1259 (10th Cir. 2009), counsel has 14 days from the date of the order denying the motion to reconsider to file a petition for permission to appeal.

APPELLATE JURISDICTION: RIPENESS OF A NOTICE OF APPEAL

In the unpublished opinion, Clemenston v. Countrywide Financial Corp., 464 Fed. App’x 706 (10th Cir. 2012), the issue for the Court was whether the plaintiff’s premature notice of appeal triggered the savings provision of Appellate Rule 4(a)(2), which states: “A notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry.” The Court reasoned that while Rule 4(a)(2) “operates to ripen” a premature notice of appeal, the savings provision is limited to decisions or orders, which prior to the premature notice, provide “some indicia of finality and [are] likely to remain unchanged during subsequent court proceedings.” Thus, the Court held that the magistrate judge’s recommendation to dismiss most of the plaintiff’s claims “had sufficient indicia of finality to trigger the savings provisions of Rule 4(a)(2).” However, the Court also held that it did not have appellate jurisdiction over the plaintiff’s appeal from a subsequent order dismissing the plaintiff’s claim for injunctive relief because there was no indicia as to a dismissal of the claim for injunctive relief on or before the date the notice of appeal was filed.

Practice Tip: While counsel may be well served by filing a notice of appeal sooner rather than later, the savings provision of Appellate Rule 4(a)(2) does “not automatically effectuate the appeal of every judgment or order entered in the entire case.” Thus, the best practice is to file a supplemental notice upon entry of a subsequent final order, particularly if it alters the scope of the initial decision or order.
ELEVENTH CIRCUIT
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COURT NEWS
In February 2012, Judge Adalberto Jordán was confirmed by the Senate to sit on the Eleventh Circuit Court of Appeals. Prior to his confirmation, Judge Jordán had served on the United States District Court for the Southern District of Florida since 1999. On January 3, 2013, President Obama re-nominated Jill A. Pryor, an attorney in private practice in Atlanta, Georgia, to the Eleventh Circuit. Ms. Pryor awaits hearing and confirmation by the Senate.

COURT SUA SPONTE DISMISSES APPEAL REGARDING LONG-TERM DISABILITY BENEFITS FOR WANT OF JURISDICTION
In Young v. Prudential Insurance Company of America, 671 F.3d 1213 (11th Cir. 2012), Prudential served as a third-party administrator for a group long-term disability insurance plan provided by the plaintiff’s employer. Prudential denied the plaintiff’s claim for long-term disability benefits under the plan, and the plaintiff sought review in the district court. The district court entered partial summary judgment in favor of the plaintiff and remanded the case to the plan administrator for a determination of whether the plaintiff was disabled. The district court’s order directed the clerk to enter judgment in favor of the plaintiff and to close the case. The clerk complied and entered what purported to be a final judgment.

Prudential appealed the summary judgment ruling pursuant to 28 U.S.C. § 1291. Prudential proceeded to act on the district court’s remand order and determined that the plaintiff was disabled.

The Eleventh Circuit sua sponte dismissed the appeal for want of jurisdiction. The Court ruled that the district court’s order was not a final appealable order under § 1291 because the order did not end the plaintiff’s case and did not resolve the question of plaintiff’s entitlement to benefits under the plan. The Court also held that the district court’s order was not appealable under the Collateral Order Doctrine because (1) it did not conclusively determine the question in dispute and (2) did not resolve an issue completely separate from the merits of plaintiff’s claim.

APPELLATE JURISDICTION OVER POST-JUDGMENT ORDERS CLARIFIED
In Mayer v. Wall Street Equity Group, Inc., 672 F.3d 1222 (11th Cir. 2012), the Eleventh Circuit ruled that it lacked jurisdiction to consider an appeal of a district court order denying the defendants’ motion for attorneys’ fees.

Mayer arose out of the parties’ settlement of a Fair Labor Standards Act overtime pay case. The plaintiff’s attorney filed the settlement with the district court and moved for attorneys’ fees. After the district court dismissed the case pursuant to the settlement, the defendants filed an opposition to the plaintiff’s motion and a motion for their own attorneys’ fees. The district court denied the defendants’ motion without explanation, but did not rule on the plaintiff’s motion. Although the plaintiff’s motion was still pending, defendants appealed the denial of their motion to the Eleventh Circuit. After the appeal was filed, a magistrate judge recommended that the district court grant the plaintiff’s motion and deny the defendants’ motion.

The Eleventh Circuit held that it lacked jurisdiction to consider the appeal because the dispute was not final in the district court. For a post-judgment order to be final and appealable, the Court explained, the order must be the last order entered in the action and must dispose of all the issues raised in the motion giving rise to post-judgment proceedings. “[T]o hold otherwise,” the court reasoned, “invites litigants to appeal every attorney’s fee order, even if other requests remain outstanding, resulting in a proliferation of piecemeal or repetitious appeals.” 672 F.2d at 1224.

ISSUE OF FIRST IMPRESSION REGARDING INACCESSIBILITY OF CLERK’S OFFICE DECIDED
In Chao Lin v. U.S. Attorney General, 677 F.3d 1043 (11th Cir. 2012), the Eleventh Circuit considered a jurisdictional issue of first impression regarding whether the untimely delivery of a petition by a commercial delivery service due to inclement weather rendered the Clerk’s office “inaccessible” within the meaning of Federal Rule of Appellate Procedure 26(a)(1) so as to extend the deadline for a petition for review of a Board of Immigration Appeals decision.
The petition at issue was filed one day after the deadline. The petitioners argued that the petition was timely because they had paid a commercial delivery service to deliver it to the Clerk’s office within the deadline, but the delivery was delayed by inclement weather. The Court rejected the petitioners’ argument because the Clerk’s office was not physically inaccessible due to inclement weather that day. Rather, it remained open and accessible to the general public, and petitioners offered no evidence or argument that the weather made it impossible for them to access the Clerk’s office or that they lacked internet access to file the petition electronically. The Court held, therefore, lacked jurisdiction to consider the untimely petition.

DIVERSITY JURISDICTION: COURT DECIDES ISSUE OF FIRST IMPRESSION REGARDING DISSOLVED CORPORATION’S PRINCIPAL PLACE OF BUSINESS

Holston Investments, Inc. v. LanLogistics Corp., 677 F.3d 1068, (11th Cir. 2012), addressed an issue of first impression in the Eleventh Circuit. The Court held that a dissolved corporation has no principal place of business for purposes of diversity jurisdiction. The Court aligned itself with the Third Circuit Court of Appeals and explained that “a dissolved or inactive corporation is a citizen only of the state in which it was incorporated.” The Court reasoned that “this bright-line rule may open federal courts to an occasional corporation with a lingering local presence, but undeserved access to a fair forum is a small price to pay for the clarity and predictability that a bright-line rule provides.” 677 F.3d at 1071.

The Court rejected the Second Circuit’s position, which focused on where the dissolved corporation last conducted business to determine principal place of business, because it permitted a dissolved corporation to be considered a citizen of a state of which it was not a citizen prior to its dissolution.

COURT DECIDES ISSUES OF FIRST IMPRESSION RELATING TO STIPULATIONS OF DISMISSAL

Anago Franchising, Inc. v. Shaz, LLC, 677 F.3d 1272 (11th Cir. 2012), decided several issues of first impression in the Eleventh Circuit relating to a district court’s ability to retain jurisdiction when an action is voluntarily dismissed pursuant to Federal Rule of Civil Procedure Rule 41(a)(1)(A)(ii).

In Anago, the parties entered into a confidential settlement agreement while the case was pending before the district court. The district court administratively closed the case and ordered the parties to file a stipulation for final order of dismissal. The parties proceeded to file a signed stipulation that referenced Rules 41(a)(1)(A)(ii) and 41(a)(2), agreed to dismiss the matter with prejudice, and stated that the district court would retain jurisdiction to enforce the settlement. The parties also filed a joint motion for entry of final judgment by consent. The district court never entered an order dismissing the case with prejudice.

Several months later, one party filed a motion in the district court to compel compliance with the settlement agreement. A magistrate judge found that the district court retained jurisdiction to consider the motion and recommended that the court deny it. The district judge adopted the magistrate’s recommendation.

On appeal, the Eleventh Circuit considered whether the case had been dismissed by the district court and whether the district court retained jurisdiction to enforce the settlement after dismissal. The Court determined that the stipulation was entered pursuant to Rule 41(a)(1)(A)(ii), not Rule 41(a)(2), and held that a stipulation filed pursuant to 41(a)(1)(A)(ii) “is self-executing and dismisses the case upon its becoming effective. The stipulation becomes effective upon filing unless it explicitly conditions its effectiveness on a subsequent occurrence. District courts need not and may not take action after the stipulation becomes effective because the stipulation dismisses the case and divests the district court of jurisdiction.” 677 F.3d at 1278.

The Court further held that “a district court cannot retain jurisdiction by issuing a postdismissal order to that effect. A district court loses all power over determinations of the merits of a case when it is voluntarily dismissed.” Id. at 1279. Thus, in order for the district court to power to enter post-stipulation orders, (1) the court must enter an order retaining jurisdiction before a Rule 41(a)(1)(A)(ii) stipulation becomes effective, or (2) the parties must condition the stipulation’s effectiveness on the court’s entry of an order retaining jurisdiction.

Because the Anago case was dismissed and jurisdiction was not retained, the district court did not have jurisdiction to consider the motion to compel, and the Eleventh Circuit lacked jurisdiction to rule on the merits of the district court’s decision on the motion. Accordingly, the Eleventh Circuit vacated the district court’s ruling on the motion and remanded the case with instructions to dismiss for lack of jurisdiction.
INSURER OBLIGATED TO PAY FOR DIMINUTION IN VALUE OF PROPERTY IN ADDITION TO COSTS OF REPAIR

Royal Capital Development, LLC v. Maryland Casualty Co., 688 F.3d 1285 (11th Cir. 2012), involved a dispute over the interpretation under Georgia law of a real property insurance policy that provided coverage for “direct physical loss of or damage to” a building owned by the plaintiff, Royal Capital. The policy gave the insurer, Maryland Casualty, the option of paying either the cost to repair the building or the value of the lost or damaged property.

Royal Capital argued that the policy should have covered “compensation for the building’s diminution in value resulting from stigma due to the building’s physical damage, even after all repairs have been made.” Royal Capital relied on a Georgia Supreme Court case, State Farm Mutual Automobile Insurance Co. v. Mabry, 556 S.E.2d 114 (Ga. 2001), which held – in the context of automobile insurance – that “a provision requiring the insurer to pay for loss to the insured’s car required the insurer to also pay for any diminution in value of the repaired vehicle.” The issue in the case was whether Mabry’s holding applied outside the context of automobile insurance, and the Eleventh Circuit certified that question to the Georgia Supreme Court.

The Georgia Supreme Court answered the question in the affirmative and stated that the Mabry ruling was applicable to the Royal Capital policy at issue, explaining that its “ruling in Mabry is not limited by the type of property insured, but rather speaks generally to the measure of damages an insurer is obligated to pay.” The Georgia Supreme Court further explained that “whether damages for diminution in value are recoverable under Royal Capital’s contract depends on the specific language of the contract itself and can be resolved through application of the general rules of contract construction.” In light of the Georgia Supreme Court’s opinion, the Eleventh Circuit reversed the district court’s grant of summary judgment in favor of Maryland Casualty and remanded the case for further proceedings in accordance with the opinion.

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efficiency and cost-saving purposes of arbitration” and “could alter the nature of the dispute significantly by requiring parties to disclose sensitive information that could have a bearing on the resolution of the matter”—a bell that could not be un-rung by a later ruling that the dispute should have been sent to arbitration. Id. at 265.

The Fourth Circuit also addressed the concern that applying the doctrine of jurisdictional divestiture to interlocutory appeals under the FAA creates an incentive for parties to bring frivolous appeals to stall the litigation. Id. The court noted, however, that if a party files a frivolous appeal, “the district court may frustrate any litigant’s attempt to exploit the categorical divestiture rule by taking the affirmative step, after a hearing, of certifying the § 16(a) appeal as frivolous or forfeited,” which “will prevent the divestiture of district court jurisdiction.” Id. (quoting McCauley v. Halliburton Energy Servs., Inc., 413 F.3d 1158, 1162 (10th Cir. 2005)).

In contrast to Levin, the Fifth Circuit recently joined the Second and Ninth Circuits in adopting the majority view that filing an FAA interlocutory appeal does not prevent a district court from proceeding with the merits of the case pending the outcome of the appeal. See Weingarten Realty Investors v. Miller, 661 F.3d 904, 909 (5th Cir. 2011); Motorola Credit Corp. v. Uzan, 388 F.3d 39, 54 (2d Cir. 2004); Britton v. Co-Op Banking Grp., 916 F.2d 1405, 1411–12 (9th Cir. 1990). In Weingarten, the Fifth Circuit narrowly construed the Supreme Court’s statement in Griggs that the filing of a notice of appeal transfers jurisdiction from the district court to the appellate court concerning “those aspects of the case involved in the appeal,” concluding that “[a]n appeal of a denial of a motion to compel arbitration does not involve the merits of the claims pending in the district court.” 661 F.3d at 909.

Making the Argument

To use jurisdictional divestiture in the First, Sixth, Eighth, Federal, and D.C. Circuits, where there is no circuit-level, published precedent adopting either the majority or minority rule, litigants who have unsuccessfully moved to compel arbitration should move for a stay in the district court under Federal Rule of Civil Procedure 62(c). In addition to asserting the typical grounds for a stay—the likelihood of success on appeal, the probability of irreparable harm by proceeding with litigation, the lack of harm to other parties, and the public interest of avoiding dual tracks of litigation—the appellant should raise jurisdictional divestiture as a separate ground for a stay. See, e.g., Baron v. Best Buy Co., 79 F. Supp. 2d 1350, 1354 (S.D. Fla. 1999) (granting motion for stay).

If the motion for a stay is denied, the appellant, like the appellants in Levin, should move the court of appeals for a stay under Federal Rule of Appellate Procedure 8. In seeking such a stay, appellants should emphasize both the practicality of a jurisdictional divestiture rule and its conformity with congressional intent in amending the FAA to allow interlocutory appeals. Appellants should contend that the underlying merits of the case are “necessarily involved in the appeal” under Griggs because “[w]ether the case should be litigated in the district court . . . is the mirror image of the question presented on appeal.” Levin, 634 F.3d at 263 (quoting Bradford-Scott Data Corp. v. Physician Computer Network, 128 F.3d 504, 506 (7th Cir. 1997)). Furthermore, appellants should argue that allowing the district court to compel discovery destroys much of 9 U.S.C. § 16’s rationale in allowing appeals of orders denying motions to compel arbitration in the first place. Levin, 634 F.3d at 264.

In the Second, Fifth, and Ninth Circuits, which have rejected the jurisdictional divestiture argument, an appellant still should advance the same reasoning underlying the jurisdictional divestiture rule in support a motion for a discretionary stay pending appeal made either in the district court or in the court of appeals. For instance, even if an appeal does not trigger jurisdictional divestiture, the inefficiencies of parallel litigation nonetheless may conflict with the public interest. See, e.g., Sutherland v. Ernst & Young LLP, 856 F. Supp. 2d 638, 644 (S.D.N.Y. 2012) (noting that “considerations of judicial economy counsel, as a general matter, against investment of court resources in proceedings that may prove to have been unnecessary” and partially granting discretionary stay pending appeal of an order denying motion to compel arbitration). Furthermore, courts have recognized that the costs of discovery pose a threat of irreparable harm if an order denying a motion to compel arbitration is reversed on appeal. See, e.g., Rajagopalan v. Noteword, LLC, No. C11-5574, 2012 WL 2115482, at *3 (W.D. Wash. June 11, 2012) (granting a stay pending an appeal of an order denying a motion to compel arbitration due to the possibility of irreparable harm caused by proceeding with the merits of the case, thus “defeat[ing] the important, cost-limiting purpose of arbitration agreements” (internal quotation marks omitted)). Thus, even in circuits that have rejected the jurisdictional divestiture argument, appellants can advance similar arguments in seeking to obtain a stay. ☞
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13-17 TIPS National Trial Academy  Grand Sierra Resort Reno, NV
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15  TIPS Premier Program  ABA Center for CLE
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19  Current Issues in Insurance Regulation  New York City Bar New York, NY
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24-2 TIPS & Judicial Division Joint Spring Meeting  JW Marriott Washington, DC
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24  ADR National CLE Forum  JW Marriott Washington, DC
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May 2013

2-4  Fidelity & Surety Committee Spring Meeting  Walt Disney World Swan Orlando, FL
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16-18 Property Insurance Law Committee Spring CLE Meeting  PGA National Resort & Spa
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