FEDERAL INTERLOCUTORY APPEALS AND MANDAMUS

by

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TABLE OF CONTENTS

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By Dana Livingston

I. OVERVIEW OF IMPORTANT CHANGES

A. The Fifth Circuit's 2011 decision in *In re Crystal Power* on mandamus is an important companion piece to its October 2008 en banc decision in *In re Volkswagen*.

In October 2008, the Fifth Circuit addressed review by mandamus in a deeply fractured en banc opinion. *In re Volkswagen of Am., Inc.*, 545 F.3d 304 (5th Cir. 2008) (en banc), *cert. denied*, *Singleton v. Volkswagen of Am., Inc.*, 129 S. Ct. 1336 (2009). There, the en banc court held that mandamus was an appropriate vehicle to review a district court's order denying a section 1404 motion to transfer venue. The *Volkswagen* ten-judge majority opinion and its seven-judge dissenting opinion are mandatory reading for anyone seeking or resisting issuance of mandamus relief from the Fifth Circuit.

In May 2011, the Fifth Circuit issued a mandamus opinion that, although it is a panel decision (not an en banc decision), is now also to be considered required reading on the availability of mandamus review in the Fifth Circuit. *In re Crystal Power*, 641 F.3d 82, 85 & n.7 (5th Cir. 2011) (opinion on rehearing). That opinion appears to call into question the correctness of a number of prior Fifth Circuit mandamus decisions, including the en banc court's decision in *Volkswagen* itself, making the opinion an important companion piece to *Volkswagen*. *See infra* subsection IX(A). Thus far, the questions expressly left open by the rehearing opinion in *Crystal Power* remain open questions in this circuit.

B. The U.S. Supreme Court's December 2009 decision in *Mohawk* impacting the collateral-order doctrine and its relationship with discretionary-review mechanisms

In *Mohawk Industries, Inc. v. Carpenter*, issued in December of last year, the Supreme Court held that the collateral order doctrine did not apply to disclosure orders adverse to the attorney-client privilege. 558 U.S. 100, 106 (2009). The holding was based on the Court's conclusion that such orders do not meet the third requirement of the collateral order doctrine—that the order be "effectively unreviewable" on appeal from a final judgment. The opinion is interesting, not only as the Court's latest writing on the collateral-order doctrine, but also for the Court's discussion of the relationship between the doctrine and discretionary-review mechanisms—§ 1292(b) certification and mandamus. *See infra* subsection IV(A)(2)(b).

C. Fifth Circuit Local Rule on Emergency Motions

Effective April 2008, the Fifth Circuit drastically amended its local rule governing the filing of emergency motions in non-capital cases. That rule defines an "emergency" motion as any motion seeking relief before the expiration of 14 days after filing. The rule also contains extensive requirements, some of which may overlap with the requirements of other rules, but many of which are unique to "emergency" motions. *See infra* subsection IV(D)(1).

D. Mandatory e-filing does not apply to initial filings in original proceedings, like mandamus and petitions for permission to appeal.

Effective March 15, 2010, the Fifth Circuit implemented mandatory e-filing for all "Filing Users." By local rule,

> Counsel must register as Filing Users under Rule 25.2.3 and comply with the court's electronic filing standards, posted separately on the court's website, www.ca5.uscourts.gov, unless excused for good cause. Non-incarcerated pro se litigants may request the clerk's permission to register as a Filing User, in civil cases only, under such conditions as the clerk may authorize.

5TH CIR. R. 25.2.1. Counsel who have not yet registered to e-file with the Fifth Circuit should leave at least 3 days before needing to file a document to complete the registration process. Counsel who are not yet admitted to the Fifth Circuit need to allow for additional lead time to be admitted and register. Also, counsel should be aware that they will need to file an appearance of counsel form for each case with which they are associated and in which they intend to e-file documents. Sometimes it takes the clerk's office a full day to process the appearance form.

Counsel should be aware that mandatory e-filing does not apply to every document. The Fifth Circuit local rules specify that "Filing Users may be required to file case-initiating documents in original proceedings, e.g., mandamus, petitions for second and successive habeas corpus relief, petitions for review, etc., in paper format. Subsequent documents may be filed electronically." 5TH CIR. R. 25.2.2.

E. Interplay between December 1, 2009 time-computation rule and deadline changes and the deadlines for petitions for permission to appeal under Rule 23(f) and 28 U.S.C. § 1292(b).

In a memorandum from Judge Lee H. Rosenthal, Chair of the Committee on Rules of Practice and Procedure, to the Chief Judges of the U.S. Courts, Judge Rosenthal describes the December 1, 2009 changes to the Federal Rules of Civil Procedure and Federal Rules of Appellate Procedure with respect to computation of time and deadlines. As that memorandum explains,

> On March 26, 2009, the Supreme Court approved amendments to Appellate Rule 26, Bankruptcy Rule 9006, Civil Rule 6, and

> Criminal Rule 45. The changes are the result of a major project to make all the federal rules on calculating time periods simpler, clearer, and consistent. . . . The current rules exclude intermediate weekends and holidays for some short time periods, resulting in inconsistency and unnecessary complication. The amended rules are consistent and simple: count intermediate weekends and holidays for all time periods. All the deadlines in the Federal Appellate, Bankruptcy, Civil, and Criminal Rules were reviewed and most short periods extended to offset the shift in the time-computation rules and to ensure that each period is reasonable. The amended rules will affect some local rules and standing orders, especially those that set short deadlines. To maintain consistency with the national rules and to avoid confusion, we ask courts to review their local rules and standing orders and make necessary adjustments. It is important that the adjustments take effect on December 1, the same date as the national rule changes. . . .
>
> The simple "days are days" approach to computing deadlines has the effect of shortening current periods less than 11 days in appellate, civil, and criminal proceedings and 8 days in bankruptcy proceedings. Virtually all short periods in the federal rules were lengthened to offset the change in the computation method—5-day periods became 7-day periods and 10-day periods became 14-day periods—in effect maintaining the status quo. Periods shorter than 30 days were revised to be multiples of 7 days, to reduce the likelihood of ending on weekends. . . .
>
> Additionally, time periods in a few rules were extended because they were too short and impractical. In total, 91 rules were changed. Congress passed legislation on April 27 adjusting time periods in 28 statutes that are similarly affected by the federal rules time-computation amendments (H.R. 1626). . . . Both the federal rules amendments and the legislation will take effect on December 1, 2009. Amendments to local rules and standing orders are necessary because the federal rules for calculating time periods also apply to them.

These amendments took effect on December 1, 2009. Most of the changes to the deadlines scattered throughout the federal rules of civil and appellate procedure were adjusted in an attempt to keep the time period basically the same as they were before.[1] Among the exceptions to that general approach are several of the deadlines for filing a motion of the type listed in FED. R. APP. P. 4(a)(4) that tolls the time to perfect an appeal as of right—a final judgment appeal under 28 U.S.C. § 1291, a collateral-order appeal, a Rule 54(b) appeal, and a section 1292(a)(1) appeal. Rather than merely adjust the deadline for most of the motions listed in that rule from a business-day count of 10 days to a calendar-day count of 14 days to offset the time-computation rule change, the amendments that took effect doubled that time period to 28 calendar days. FED. R. CIV. P. 50(b), 59(b), (e). Note that the deadline for filing a motion for attorneys' fees was not expanded to 28 days, but instead is 14 calendar days. FED. R. CIV. P. 54(d)(2)(B).

Similarly, the deadline for filing a petition for permission to appeal under Rule 23(f) from the grant or denial of class certification changed from a business-day count of 10 days to a days-are-days count of 14 days. FED. R. CIV. P. 23(f); FED. R. APP. P. 26(a). That change in the time period usually works out to offset the effect of the amendments to the time-computation rules. *But see supra* note 1.

The 10-day period for filing a section 1292(b) petition for permission to appeal, however, is fixed, not by rule, but by statute. Anyone thinking about utilizing section 1292(b) should note that section 1292(b) was not among the statutes in Title 28 that were amended at the same time in H.R. 1626. The effect, as I explain below, is that section 1292(b)'s 10-day time period effectively changed from a 10 business-day count to a straight 10 calendar-day count, effectively shortening an already short period.

Former Federal Rule of Appellate Procedure 26(a) provided that it applied to "computing any period of time specified in these rules or in any local rule, court order, *or applicable statute*." FED. R. APP. P. 26(a) (emphasis added). The Fifth Circuit routinely accepted as timely 1292(b) petitions that were timely by a 10 business-day count, but would have been untimely under a 10-calendar day count.

Congress did not adjust section 1292(b)'s 10-day period to a 14-day period to offset the amendment to the computation-of-time rules. The plain language of the amended version of Rule 26(a) that went into effect December 1, 2009 makes the days-are-days method of computing time applicable to section 1292(b)'s 10-day time period:

> Computing Time. The following rules apply in computing any time period specified in these rules or in any local rule, court order, or in any

[1] There will be instances in which the change in the computation of time rules, even for a time period that was adjusted to keep the deadline essentially the same, will nevertheless make a material difference in whether a filing is timely or untimely. Shortly after the 2009 time-computation rules went into effect, the Fifth Circuit addressed that situation. In *Harper v. American Airlines*, the court dismissed a Rule 23(f) petition for permission to appeal filed on December 31, 2009 that would have been timely filed under the pre-December 1, 2009 10-day deadline and computation-of-time rules, but was untimely under the post-December 1, 2009 14-day deadline and amended computation-of-time rules. *Harper v. Am. Airlines, Inc.*, 371 F. App'x 511, 512 (5th Cir. 2010).

> *statute that does not specify a method* of computing time.

FED. R. APP. P. 26(a) (emphasis added). Since 28 U.S.C. § 1292(b) states the deadline, but does not specify a *method* of computing time, a section 1292(b) petition for permission to appeal is squarely within the ambit of Rule 26(a). Because the 10-day deadline for a section 1292(b) petition for permission is now a 10 calendar-day count, the net effect of the computation-of-time amendments now cuts short what had previously been (effectively) a 2-week time period for filing a section 1292(b) petition for permission.

II. INTRODUCTION

In federal court, there are many possible avenues for seeking review of an order before entry of a final judgment. To be appealable, an order must be final within the meaning of 28 U.S.C. § 1291, it must fall within the specific class of interlocutory orders made appealable by statute or rule, or it must fall within some jurisprudential exception to, or pragmatic construction of, finality:

> We have jurisdiction over appeals from (1) final orders pursuant to 28 U.S.C. § 1291; (2) orders that are deemed final due to a jurisprudential exception, such as the collateral order doctrine; (3) interlocutory orders specified in 28 U.S.C. § 1292(a); and (4) interlocutory orders that are properly certified for appeal by the district court pursuant to Federal Rule of Civil Procedure 54(b) or § 1292(b).

Acosta v. Pople, 407 F. App'x 838, 839 (5th Cir. 2011) (unpublished); *see Briargrove Shopping Ctr. Joint Venture v. Pilgrim Enters., Inc.*, 170 F.3d 536, 538-41 (5th Cir. 1999); *Kmart Corp. v. Aronds*, 123 F.3d 297, 299 (5th Cir. 1997). *See generally* 15A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE §§ 3911–3913. This paper discusses the most popular[2] avenues for seeking an appeal in *civil* cases before a traditional final judgment has been entered, describing when and how to take advantage of them. A discussion of review from final judgments precedes the discussion of the various ways to obtain review in federal court before final judgment.

Appended to this paper is a one-page, "at a glance" reference tool that lists all the vehicles discussed in the paper, along with a shorthand version of the standards and procedures for each. The second appendix is a table containing examples of cases in which appellate jurisdiction over a controlling question of law was accepted under 28 U.S.C. § 1292(b) or cases in which the court noted that review might be available under section 1292(b), focusing on the Fifth Circuit and cases that were ultimately reviewed by the United States Supreme Court.

III. SECTION 1291 FINALITY

A. Text of Section 1291

Section 1291 provides:

> **§ 1291. Final decisions of district courts**
> The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States, . . . except where a direct review may be had in the Supreme Court.

28 U.S.C. § 1291.

B. History and Purpose of Section 1291's Finality Requirement

The Supreme Court has described the history of the finality requirement:

> Section 1291 of the Judicial Code generally vests courts of appeals with jurisdiction over appeals from "final decisions" of the district courts. It descends from the Judiciary Act of 1789 where "the First Congress established the principle that only 'final judgments and decrees' of the federal district courts may be reviewed on appeal." In accord with this historical understanding, we have repeatedly interpreted § 1291 to mean that an appeal ordinarily will not lie until after final judgment has been entered in a case. . . . Consistent with these purposes, we have held that a decision is not final, ordinarily, unless it "*ends the litigation on the merits and leaves nothing for the court to do but execute the judgment*."'"

Cunningham v. Hamilton County, 527 U.S. 198, 203-04 (1999) (emphasis added) (citations omitted) (quoting *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 798 (1989), and *Van Cauwenberghe v. Biard*, 486 U.S. 517, 521 (1988)). "A 'final decisio[n]" is typically one "by which a district court disassociates itself from a case." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009) (quoting *Swint v. Chambers County Comm'n*, 514 U.S. 35, 42 (1995)).

[2]This paper will not address other avenues for obtaining interlocutory review: (1) appeals in receiverships and admiralty cases, 28 U.S.C. § 1292(a)(2)–(3); (2) interlocutory appeals to the Federal Circuit and the Court of International Trade, 28 U.S.C. §§ 1292(c)–(d), 1295–1296; (3) bankruptcy appeals, 28 U.S.C. § 158; (4) appeals from three-judge district courts, 28 U.S.C. § 1253; (5) appeals from administrative actions by federal agencies, 28 U.S.C. § 2342; (6) appeals under the "final decision" rules in 9 U.S.C. § 16(a) of the Federal Arbitration Act; and (7) appeals in criminal cases, such as appeals under 18 U.S.C. § 3731 (which permits the United States to appeal orders suppressing or excluding evidence in criminal cases so long as the relevant United States Attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is substantial proof of a fact material in the proceeding.).

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