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Iii. Civil Procedure

III. CIVIL PROCEDURE

A. *Postjudgment Intervention in Title VII Class Actions*

Congress enacted Title VII of the Civil Rights Act of 1964[1] (Title VII) to achieve equal employment opportunities by eliminating employment practices that discriminate against individuals on the basis of race, color, religion, gender, or national origin.[2] Congress recognized that the elimination of employment discrimination would be an important step in eradicating the discrimination that permeates all segments of society.[3] To achieve the purpose of Title VII, Congress created the Equal Employment Opportunity Commission (EEOC) to act as the administrative agency for Title VII.[4] To eliminate discriminatory practices, Title VII authorizes victims of employment discrimination to bring suit in conjunction with the EEOC against employers who engage in discriminatory practices.[5] A number of courts have held that the class action is the most efficient method for litigating Title VII grievances.[6] Rule 23 of the Federal Rules

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[1] 42 U.S.C. §§ 2000e-2000e-17 (1976 & Supp. I-IV 1977-80).

[2] *Id.* Title VII provides that an employer may not fire or hire an individual, or discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment on account of the individual's race, color, religion, gender, or national origin. *Id.* at § 2000e-2.

[3] *See* H.R. REP. NO. 914, pt. 2, 88th Cong., 2nd Sess. 28, *reprinted in* 1964 U.S. CODE CONG. & AD. NEWS 2391, 2488 (views of Rep. McCulloch) (Title VII intended to commit nation to elimination of manifestations of racial prejudice and to achieve goals of freedom, equality, justice, and opportunity). *See generally* Berg, *Equal Employment Opportunity Under the Civil Rights Act of 1964*, 31 BROOKLYN L. REV. 62 (1965).

[4] 42 U.S.C. § 2000e-4 (1976 & Supp. IV 1980).

[5] *Id.* at § 2000e-5 (1976 & Supp. III 1979). As a prerequisite to the right to bring a civil action, an aggrieved employee alleging discrimination first must file a complaint with the Equal Employment Opportunity Commission (EEOC). *Id.* The EEOC then serves notice of the complaint on the respondent employer. *Id.* at § 2000e-5(b). If a subsequent investigation by the EEOC reveals that reasonable cause exists to believe that the charges of discrimination are true, the EEOC will attempt to eliminate the alleged unlawful employment practice by conference, conciliation, and persuasion. *Id.* If within 180 days from the filing of the charge, the EEOC has failed to reach a conciliation agreement between the respondent employer and the aggrieved individual and neither the EEOC nor the Attorney General has filed a civil action against the employer, the EEOC or the Attorney General must notify the victim of the alleged discrimination and that the victim now has the right to sue. *Id.* at § 2000e-5(f)(1). The receipt of the notice of a "right to sue" gives the aggrieved party the right to bring a civil action against the respondent named in the notice, provided the plaintiff takes action within ninety days of receipt of the notice. *Id. See generally* Galvin, *Handling Title VII Charges Before the Equal Employment Opportunity Commission*, 16 ARIZ. B.J., August 1980, at 16; Sape & Hart, *Title VII Reconsidered: The Equal Employment Act of 1972*, 40 GEO. WASH. L. REV. 824 (1972); Comment, *Certification of EEOC Class Suits Under Rule 23*, 46 U. CHI. L. REV. 690 (1979).

[6] *See, e.g.*, Stastny v. Southern Bell Tel. & Tel. Co., 628 F.2d 267, 273 (4th Cir. 1980) (class actions are appropriate and useful devices for achieving remedial purposes of Title VII); Hall v. Werthan Bag Corp., 251 F. Supp. 184, 186 (M.D. Tenn. 1966) (race discrimina-

of Civil Procedure establishes the requirements for certification of a class action in federal court.[7] Appellate courts have the power to decertify all or part of a class based on defects in rule 23 certification and to vacate any judgment that the district court awarded in favor of the class.[8] In *Hill v. Western Electric Co.* (*Hill II*),[9] the Fourth Circuit con-

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tion is by definition class discrimination); S. REP. NO. 415, 92d Cong., 1st Sess. 27 (1971), *reprinted in* SENATE COMM. ON LABOR AND PUBLIC WELFARE, 92d CONG. 2d SESS., LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972 at 436 (1972) (Senate Committee on Labor and Public Welfare agreeing with courts that Title VII actions are class complaints, and that any restrictions on class actions would undermine Title VII's effectiveness); Miller, *Class Actions and Employment Discrimination Under Title VII of the Civil Rights Act of 1964*, 43 MISS. L.J. 275, 276 (1972) (class action is most effective device for achieving goal of Title VII); *see also* Blecher, *Is the Class Action Really Doing the Job? (Plaintiff's View Point)* 55 F.R.D. 365, 374 (1973) (class action is only viable procedure to redress series of relatively small injustices, cumulative effect of which is socially destructive discrimination). *But see* Simon, *Class Actions: Useful Tool or Engine of Destruction*, 55 F.R.D. 375, 377 (1973) (class action fosters unnecessary litigation, reduces federal courts to small claims courts, and only benefits unethical lawyers).

[7] FED. R. CIV. P. 23. As a prerequisite to a class action, rule 23(a) requires that the class be so numerous that joinder of all members is impracticable. FED. R. CIV. P. 23(a). Additionally, rule 23(a) provides that questions of law or fact common to the class must exist. FED. R. CIV. P. 23(a)(2). The claims or defenses of the representative parties also must be typical of the claims and defenses of the class. FED. R. CIV. P. 23(a)(3). Finally, rule 23(a) requires that the representative parties must fairly and adequately protect the interests of the class. FED. R. CIV. P. 23(a)(4).

Even if the class meets the prerequisites of rule 23(a), a class is not certifiable unless it falls within one of the categories of rule 23(b). FED. R. CIV. P. 23(b). Rule 23(b) attempts to avoid establishing incompatible standards of conduct for the party opposing the class by stating that a class action is permissible when the prosecution of separate claims by individual members of the class would create the risk of inconsistent adjudications with respect to individual members of the class. *Id.* Rule 23(b)(1) also allows class actions where adjudication with respect to individual members of the class effectively would dispose of the interests of other members not party to the adjudications or would impair substantially the absent class members' ability to protect their interests. FED. R. CIV. P. 23(b)(1). Courts also will allow class actions when final injunctive relief or corresponding declaratory relief with respect to the entire class is appropriate because the action that the class seeks to enjoin affects the entire class. FED. R. CIV. P. 23(b)(2). Finally, a class action is permissible when the court finds that questions of law or fact common to the members of the class predominate over any questions affecting only individual class members. FED. R. CIV. P. 23(b)(3).

The court also must determine that a class action is superior to other methods for the fair and efficient adjudication of the controversy. *Id.* In determining whether questions common to the class predominate and whether a class action is the best method of adjudication, courts consider the interest of the members of the class in individually controlling their own prosecution or defense in separate actions. FED. R. CIV. P. 23(b)(3)(A). The court also should consider the extent and nature of any litigation concerning the controversy that already involves members of the class. FED. R. CIV. P. 23(b)(3)(B). Rule 23 also requires the court to weigh the desirability of concentrating the litigation of the claims in a particular forum. FED. R. CIV. P. 23(b)(3)(C). Finally, the court must consider the difficulties that the court will encounter in the management of a class action. FED. R. CIV. P. 23(b)(3)(D).

[8] *See* Hill v. Western Elec. Co., 596 F.2d 99, 102, 107 (4th Cir.) (*Hill I*) (Fourth Circuit decertified class and vacated judgment), *cert. denied*, 444 U.S. 929 (1979).

[9] 672 F.2d 381 (4th Cir. 1982) (*Hill II*), *cert. denied*, 51 U.S.L.W. 3340 (U.S. Nov. 2, 1982) (No. 82-393).

sidered whether a member of a decertified class could intervene after judgment to cure a defect in certification.[10]

The complex *Hill* litigation began on May 14, 1975, when eight present and former employees at the Western Electric (Western) facility in Arlington, Virginia, brought a class action against Western.[11] The plaintiffs alleged that Western's policies on hiring, job assignments, and promotion to salaried and supervisory positions discriminated against blacks and women in violation of both Title VII and Section 1 of the Civil Rights Act of 1866.[12] On November 21, 1975, the District Court for the Eastern District of Virginia certified a class consisting of applicants denied employment and employees claiming discrimination in promotions.[13] On April 30, 1976, following a bench trial, the district court issued a memorandum opinion upholding the plaintiffs' claims of discrimination in hiring, job placement, and promotional practices.[14] The court also granted extensive relief.[15] Western appealed to the Fourth Circuit.[16]

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[10] *Id.* at 385.

[11] Hill v. Western Elec. Co., 12 Fair Empl. Prac. Cas. (BNA) 1175, 1177 (E.D. Va. 1976).

[12] 12 Fair Empl. Prac. Cas. (BNA) at 1177; *see* 42 U.S.C. § 1981 (1976) (Civil Rights Act of 1866). Section 1 of the Civil Rights Act of 1866 states that every nonwhite person within the jurisdiction of the United States enjoys the same right as white citizens to full and equal benefit of the laws and proceedings for the security of persons and property. *Id.*

[13] Hill v. Western Elec. Co., 672 F.2d 381, 58 app. (4th Cir. 1982) (order certifying class). The district court initially refused to certify the entire class on the grounds that the named plaintiffs, as employees, lacked standing to assert the rights of applicants for employment because none of the named plaintiffs were aggrieved applicants for employment. *Id.* at 53 app. On reconsideration of the ability of the named plaintiffs to represent aggrieved hirees, the district court certified the entire class on the theory that *Barnett v. W. T. Grant Co.* allowed across-the-board certification of a class action. 672 F.2d 381, 38 app. (letter from Judge Bryan explaining inclusion of applicants for employment in the class action); *see* Barnett v. W. T. Grant Co., 518 F.2d 543, 547 (4th Cir. 1975) (across-the-board attack on all discriminatory practices permissible in class action). The district court then certified the class consisting of all black and female individuals that had worked or were working at the Western facility at Arlington, Virginia, since July 2, 1965. 12 Fair Empl. Prac. Cas. (BNA) at 1177. Additionally, the class, as certified, included all blacks and females who had applied for employment at the Arlington facility since July 2, 1965. *Id.*

[14] 12 Fair Empl. Prac. Cas. (BNA) at 1180-83. The *Hill* district court found that no discrimination had occurred in promotions within the hourly positions since the company based promotions solely on seniority. *Id.* at 1182. The district court judge deferred any decision regarding discrimination with respect to maternity benefits. *Id.* at 1183.

[15] *See* 672 F.2d 381, 275 app. (district court decree for relief of aggrieved class). The district court entered a decree appointing a special master pursuant to rule 53 of the Federal Rules of Civil Procedure to handle the claims of identified members of the certified class for back pay and future damages. 672 F.2d 381, 284 app.; *see* FED. R. CIV. P. 53 (district court's appointment of master). The district court also ordered Western to establish priority hiring and promotion of blacks and females to counteract past discriminatory practices and to institute nondiscriminatory job-related employment and promotion guidelines to prevent future discrimination. 672 F.2d 381, 288-93 app.

The district court also sought to prevent Western's noncompliance with the order through corporate reorganization. 672 F.2d at 384. The court therefore noted that for the purposes of the decree, the Arlington facility included any functional successor to that plant. 672 F.2d 381, app. 276. (district court decree for relief of aggrieved class).

[16] 596 F.2d at 99 (*Hill I*).

On appeal in *Hill v. Western Electric Co. (Hill I)*,[17] the Fourth Circuit affirmed the district court's holding that Western had discriminated against blacks and females.[18] The *Hill I* court, however, also considered whether named plaintiffs who suffered discrimination in promotions could represent the unnamed portion of the class alleging hiring discrimination.[19] The Fourth Circuit considered the Supreme Court's decision in *East Texas Motor Freight System, Inc. v. Rodriguez*[20] to be controlling in deciding whether a named plaintiff who has not suffered the exact same injury as other class members is a proper class representative.[21] In *Rodriguez* plaintiff employees claimed that the defendant company's refusal to promote the plaintiffs was racially discriminatory in violation of Title VII.[22] The Supreme Court held that the named plaintiffs were not qualified for the positions that they sought through promotion and therefore were inadequate to serve as representatives of a class comprised of employees denied promotion.[23]

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[17] *Id.*

[18] *Id.* at 107; *see* 12 Fair Empl. Prac. Cas. (BNA) at 1183 (district court finding of discrimination against blacks and females in hiring and promotions).

[19] 596 F.2d at 101-02.

[20] 431 U.S. 375 (1977).

[21] 596 F.2d at 101; *see* East Tex. Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 403 (1977) (plaintiff must suffer same injury as class that plaintiff purports to represent).

[22] 431 U.S. at 398-99.

[23] *Id.* at 403-04. In considering the adequacy of the named representatives, the Supreme Court in *Rodriguez* found that the representatives' failure to move for class certification before trial indicated that the representatives might fail adequately to protect the interests of the class under rule 23(a)(4) of the Federal Rules of Civil Procedure. *Id.* at 405; *see supra* note 7 (rule 23). A large portion of the union that the *Rodriguez* plaintiffs claimed to represent also rejected a plan for the merger of city-driver and line-driver collective bargaining units that the plaintiff sought as a remedy. 431 U.S. at 405. The division in interests between members of the class and the named plaintiffs raised the issue of adequacy of the plaintiffs' representation of the class since the plaintiffs had not suffered the same injury as the class and therefore failed to meet the commonality requirement of rule 23(a). *Id.* at 403; *see supra* note 7 (rule 23 requirements for certification). The Court also found that the defendant corporation had denied two of the applicants jobs as over-the-road drivers because they had been involved in three driving accidents each, injuring five and seven individuals respectively. 431 U.S. at 403 n.9. In addition several customers warned the company that the customers would refuse any freight that the third plaintiff delivered. *Id.* The *Rodriguez* Court held that the plaintiffs had not suffered discrimination and therefore were ineligible to represent the class members who had suffered discriminatory injury. *Id.* at 404.

Because the named plaintiffs in *Rodriguez* were inadequate for many reasons, and because the named plaintiffs suffered no discrimination, one commentator has suggested that *Rodriguez* merely stands for the proposition that named representatives must have suffered some discriminatory injury in common with class members. Comment, *The Proper Scope of Representation in Title VII Class Actions, A Comment on* East Texas Motor Freight Systems, Inc. v. Rodriguez, 13 HARV. C.R.-C.L. L. REV. 175, 199 (1981) [hereinafter cited as *Proper Scope*]; *see Fourth Circuit Review—Class Action Certification in Title VII Litigation*, 39 WASH. & LEE L. REV. 652, 663 (1982) (*Rodriguez* "same injury, same interest" language provides an analytical framework for determination of proper scope of class representation) [hereinafter cited as *Fourth Circuit Review*]. *See generally* Slover, *Appeal of Class Certification Denial, Reconciling* United States Parole Commission v. Geraghty

The *Hill I* court interpreted *Rodriguez* as requiring that class representatives must possess the same interest and suffer the same injury as the class members whom the plaintiffs purport to represent.[24] Since the class in *Hill I* did not contain any named plaintiffs who represented the victims of alleged discrimination in hiring, the Fourth Circuit decertified the portion of the class comprised of frustrated job applicants.[25] The *Hill I* court also vacated all findings of discrimination regarding Western's hiring practices.[26] The *Hill I* court then remanded the case to the district court with directions that the lower court reframe a decree consistent with the Fourth Circuit's holding.[27] The plaintiffs then filed a petition for a writ of certiorari, which the Supreme Court denied on October 29, 1979.[28] Upon the Supreme Court's refusal to hear the appeal, three new plaintiffs representing the victims of Western's hiring discrimination attempted to intervene.[29] Considering the plaintiffs' motion to intervene, the district court reasoned that the Fourth Circuit's remand did not preclude automatically the possibility of intervention.[30] The district court, however, exercised its discretion by denying the motion to intervene.[31] The plaintiffs again appealed to the

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with East Texas Motor Freight Systems, Inc. v. Rodriguez, 1 REV. LITIGATION 231 (1981); Note, *How Far Across the Board: The Permissible Breadth of Title VII Class Actions*, 24 ARIZ. L. REV. 61 (1982); Note, *The Importance of Being Adequate: Due Process Requirements on Class Actions Under Federal Rule 23*, 123 U. PA. L. REV. 1217 (1975).

[24] 596 F.2d at 101.

[25] *Id.* at 102, 107; *see supra* text accompanying note 11 (class representatives in *Hill* were employees rather than applicants for employment positions).

[26] 596 F.2d at 107.

[27] *Id.*

[28] *See* Hill v. Western Elec. Co., 444 U.S. 929 (1979) (Supreme Court denying appeal of *Hill I's* decertification of class).

[29] *See* 672 F.2d 381, 386 app. (motions for intervention or, alternatively, motion for joinder of new plaintiffs). The plaintiffs filed motions to intervene or to amend the complaint to add three new plaintiffs to the action. 672 F.2d at 385. The three plaintiffs who sought intervention were two black females, Darlene Johnson and Betty Bailey, and a black male, Victor L. Furr. *Id.* at 385. Both Johnson and Furr claimed that in the autumn of 1979 Western had rejected on discriminatory grounds their applications for employment as installers. *Id.* Although both intervenors had applied for employment at Western's facility at Landover, Maryland, both contended that the Landover facility was a successor to the Arlington plant. *Id.*; *see supra* note 15 (to avoid Western's noncompliance with order demanding priority hiring and promotional practices, district court determined that for purposes of decree, "Arlington facility" included any functional successor to Arlington plant). Bailey alleged that Western had denied her employment as a result of discriminatory hiring practices. 672 F.2d at 385.

[30] 672 F.2d 381, 421 app. (transcript of *Hill* district court proceedings).

[31] *Id.* (transcript of *Hill* district court proceedings). The district court noted that the original plaintiffs had filed the complaint over four years earlier and expressed a desire to speedily conclude the case; *see* FED. R. CIV. P. 1 (commending just, speedy, and inexpensive determination of every trial). The *Hill* district court also reasoned that allowing intervention would require a hearing on the hiring claims that inevitably would delay relief on the job assignment claims that the Fourth Circuit had affirmed in *Hill I*. 672 F.2d 381, 422 app. The district court concluded that the task of bifurcating the proceedings and conducting the

Fourth Circuit, which in *Hill II* considered the propriety of the district court's refusal to allow the intervention of the three new plaintiffs representing the victims of employment discrimination.[32]

On May 28, 1980, the named plaintiffs and Western reached a settlement covering all claims mentioned in the complaint except the claims that related to hiring discrimination.[33] The agreement resolved all claims relating to job assignments by providing back pay and other relief to class members.[34] On September 19, 1980, after the litigants had submitted the settlement agreement to the district court, the district court entered a final judgment approving the agreement.[35]

The Fourth Circuit in *Hill II* considered the sole issue on appeal to be whether the district court's denial of the plaintiffs motion for permissive intervention under rule 24(b) of the Federal Rules of Civil Procedure constituted an abuse of discretion.[36] In determining whether the district court had abused its discretion, the *Hill II* court weighed various factors regarding the propriety of intervention.[37] The Fourth Circuit held that the plaintiffs' motion to intervene must be timely.[38] In considering timeliness, the *Hill II* court noted that a court must consider not only duration of litigation but also other circumstances as well.[39] The Fourth Circuit determined that one fundamental consideration concerning the timeliness of plaintiffs' proposed intervention was whether the motion to intervene occurred immediately after the proposed intervenors realized that the named class representatives no longer could protect the un-

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action simultaneously between the district court and the master reviewing the job assignment claims was not only impractical but also nearly impossible. *Id.*; *see* FED. R. CIV. P. 23(c)(4) (subclassification in class action).

[32] 672 F.2d 381, 426 app. (notice of appeal). The plaintiffs and proposed intervenors appealed from the district court's order denying the plaintiffs' motion for leave to amend and the intervenors' motion to intervene as named plaintiffs. 672 F.2d 381, 426 app.

[33] *See* Brief for Appellants at 13-14, Hill v. Western Elec. Co., 672 F.2d 381 (4th Cir. 1982).

[34] 672 F.2d at 381. By providing back pay and other relief to class members, the settlement eliminated the need for further proceedings before the special master or the district court. *Id.* The class representative sent notice of the proposed settlement to all class members. *Id.*

[35] *Id.* at 385.

[36] *Id.*; *see* FED. R. CIV. P. 24(b). Rule 24(b) states that upon timely application the district court may allow anyone to intervene provided that the intervenor's claim and the main action involve common questions of law or fact. *Id.* Rule 24(b) also requires the court, in exercising its discretion whether to allow intervention, to consider whether intervention would cause undue delay in the adjudication or would prejudice the rights of the original parties. *Id.*

[37] 672 F.2d at 386-87; *see* Spring Constr. Co. v. Harris, 614 F.2d 374, 377 (4th Cir. 1980) (in determining timeliness of intervention mere passage of time is only one factor that court must consider in light of all circumstances); *infra* note 43 (facts of *Spring*).

[38] 672 F.2d at 386.

[39] *Id.*; *see supra* note 37 (passage of time is only one factor in determining whether motion to intervene is timely).

named class members claiming hiring discrimination.[40] The Fourth Circuit ruled that the named plaintiffs ceased representing the rejected job applicants only when the Supreme Court denied the plaintiffs' motion for certiorari on October 29, 1979.[41] The *Hill II* court held that by filing the motion to intervene on January 17, 1980, the proposed intervenors sought intervention within the ninety-day period that the Title VII statute of limitations establishes.[42]

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[40] 672 F.2d at 386. The *Hill II* court relied on the Supreme Court's decision in *United Airlines, Inc. v. McDonald. Id.*; *see* United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977). In *McDonald* the Court allowed a putative member of a class to intervene after judgment for the purpose of appealing the district court's refusal to certify the class. 432 U.S. at 394, 396. The proposed class consisted of all United Airlines stewardesses discharged under a no marriage rule that allegedly violated Title VII. *Id.* at 387. The Seventh Circuit reversed the district court's holding that the postjudgment motion to intervene was untimely. Romasanta v. United Airlines, Inc., 537 F.2d 915, 917-19 (7th Cir.), *aff'd sub nom.* United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977), *cert. denied sub nom.* 442 U.S. 939 (1979). The Seventh Circuit also reversed the district court's order denying class certification. 537 F.2d at 919-20. The Supreme Court affirmed the Seventh Circuit, holding that the intervenor's motion was timely because the intervenor moved to intervene as soon as the intervenor was aware that named class representatives no longer would protect the interests of the unnamed class members. 432 U.S. at 394. Critical to the Supreme Court's reasoning was the fact that in the Seventh Circuit a denial of class certification is an interlocutory order that an appellate court cannot review as of right until after final judgment. *Id.* at 389 n.4. The Court reasoned that intervention at any point before judgment would have made the intervenor a superfluous spectator because the intervenor could not have appealed denial of certification until after final judgment. *Id.* at 394 n.15.; *see* Note, *Class Actions in the Seventh Circuit: Appealability of an Interlocutory Order Denying Class Status*, 53 CHI.-KENT L. REV. 462, 473 (1976) (interlocutory appeal of denial of class certification preferable to Seventh Circuit procedure which allows appeal of class certification denial only after judgment). *See generally* Note, *Federal Courts—Rules of Civil Procedure Postjudgment Motion to Intervene to Appeal Denial of Class Certification is Timely*, United Airlines, Inc. v. McDonald, 435 U.S. 385 (1977), 1978 B.Y.U. L. REV. 189.

[41] 672 F.2d at 386. In *Hill II*, Western argued that the putative intervenors should have moved for intervention no later than April, 1979, when the court of appeals issued an order decertifying the class on grounds of inadequacy of representation. *Id.* Since the proposed plaintiffs did not file a motion to intervene until months after that date, Western argued that the district court had not abused its discretion in determining that the motion was untimely. *Id.*

[42] *Id.* The *Hill II* court held that the named class representatives actively were pursuing the interests of the decertified portion of the class until the Supreme Court denied the class' motion for certiorari on October 29, 1979. *Id. See* Hill v. Western Elec. Co., 444 U.S. 929 (1979) (Supreme Court denying appeal of *Hill I*'s decertification of class). By the time the Supreme Court denied certiorari, two of the proposed intervenors, Johnson and Furr, already had begun the administrative prerequisite to intervention by filing charges with the EEOC. 672 F.2d at 386. Johnson filed on October 2, 1979, and Furr filed on October 17, 1979. *Id.* at 385; *see supra* note 5 (procedure for bringing suit under Title VII). Bailey filed on November 6, 1979, eight days after the Supreme Court's denial of certiorari. 672 F.2d at 386. The Fourth Circuit reasoned that the proposed intervenors attempted to intervene as soon as the intervenors realized that the class representatives no longer could protect the intervenors' interests. *Id.* The Fourth Circuit concluded that by filing a motion on January 17, 1980, the putative intervenors sought intervention within the 90 day statute of limitations. *Id.*; *see supra* note 5 (procedure for bringing civil action under Title VII).

The Fourth Circuit stated that the district court, in ruling on the proposed intervention, must determine whether the delay in intervention was prejudicial to any of the parties.[43] The *Hill II* court determined that the filing of the initial complaint gave Western notice of the possibility of liability to the entire class and that Western was not prejudiced by the claim itself.[44] The Fourth Circuit therefore refused to dismiss the motion as untimely on the basis of prejudice to Western.[45]

In addition to the court's conclusion that intervention was not prejudicial to Western, the Fourth Circuit concluded that the proposed intervention would not prejudice the portion of the plaintiff class whose claims the *Hill I* court had affirmed on appeal.[46] The *Hill II* court agreed with the district court that allowing intervention would compel the trial court to conduct a hearing concerning the intervening plaintiffs' adequacy to represent the class and that the hearing would involve some relitigation on the merits.[47] The majority disagreed with the district

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[43] 672 F.2d at 386. The *Hill II* court relied on *Spring Constr. Co. v. Harris*, in which the Fourth Circuit held that the most important consideration regarding timeliness of intervention is whether the delay in intervention has prejudiced the other parties. *Id.*; *see* Spring Constr. Co. v. Harris, 614 F.2d 374, 377 (4th Cir. 1980). In *Spring*, the plaintiff construction company won a judgment in the United States District Court for the Eastern District of Virginia against the Department of Housing and Urban Development (HUD) and a housing development corporation (Owners). 614 F.2d at 376. Spring sought equitable relief arising from a breach of contract between Spring as general contractor and the Owners for construction of two federally financed housing projects. *Id.* at 376. On remand the district court allowed an insurance company to intervene in the action. *Id.* The insurance company had issued mortgage title insurance policies on the projects to the construction lender, a mortgage corporation, and had to pay the claims of subcontractors. *Id.* Despite Spring's opposition, the Fourth Circuit allowed the intervention. *Id.* at 377. The Fourth Circuit determined that the passage of time is only one of several factors the court must consider in determining the timeliness of intervention. *Id.* The *Spring* court held that since the insurance company's intervention did not prejudice the other parties to the action, the insurance company's intervention was permissible. *Id.*

[44] 672 F.2d at 386. The Fourth Circuit relied on *United Airlines, Inc. v. McDonald. Id.*; *see* United Airlines, Inc. v. McDonald, 432 U.S. 385, 392-93 (1977). In *McDonald*, the Supreme Court held that the original complaint of the United Airlines stewardesses provided United Airlines with the information necessary to anticipate the size of the litigation. 432 U.S. at 392-93 (citing American Pipe & Constr. Co. v. Utah, 414 U.S. 538, at 555 (1974); *see* Note, *Resurrecting Claims Through Postjudgment Appeal of Class Certification Denial*, 64 IOWA L. REV. 964, 971 (1979) (United Airlines reasonably should have expected postjudgment denial of certification and therefore intervention was not prejudicial); *supra* note 40 (facts of *McDonald*).

[45] 672 F.2d at 386.

[46] *Id.* at 387; *see supra* text accompanying note 18 (*Hill I* finding in favor of Western employees suffering from discrimination in promotions).

[47] 672 F.2d at 387; *see* Simmons v. Brown, 611 F.2d 65, 67 (4th Cir. 1979). In *Brown*, the Fourth Circuit ordered the district court to retain a class action on the docket, although the named plaintiff's inadequate representation precluded certification of the class, to allow an appropriate class representative the opportunity to come forward. 611 F.2d at 67. The Fourth Circuit held that if a suitable plaintiff should appear, the district court must conduct a hearing to determine whether the class action was maintainable and whether the new

court's determination that a hearing and relitigation would delay unnecessarily relief for the portion of the class that prevailed on the merits.[48]

Western argued that, even if the court considered the proposed intervention timely, postjudgment intervention was so unusual that a court should grant intervention only in exceptional circumstances.[49] The Fourth Circuit, however, held that a court could justify a more stringent standard for intervention following judgment only upon a showing of heightened prejudice to the parties and an indication that intervention would interfere substantially with the orderly process of the court.[50] The *Hill II* court held that without some indication that prejudicial effects

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plaintiff was a proper representative of the class. *Id.*; *see* Goodman v. Schlesinger, 584 F.2d 1325, 1332 (4th Cir. 1978) (after Fourth Circuit determined named plaintiff of certified class was inadequate representative, court remanded case to district court with instructions to retain case on docket until appropriate named plaintiff appeared); Cox v. Babcock & Wilcox Co., 471 F.2d 13, 16 (4th Cir. 1972) (same).

[48] 672 F.2d at 387. The Fourth Circuit in *Hill II* noted that the claims of victims of hiring discrimination focused on the issue of liability, while claims of individuals claiming discrimination in job assignments focused only on the issue of damages. *Id.* The *Hill II* majority also noted that the relative simplicity of bifurcating the proceedings and of structuring the plaintiff class into subclasses minimized the risk of prejudice and made intervention permissible. *Id.* The Fourth Circuit concluded that rule 23(c)(4)(B) of the Federal Rules of Civil Procedure allowed for bifurcation of the class with the court differentiating subclasses on the basis of separate claims. *Id.*; *see* FED. R. CIV. P. 23(c)(4). Rule 23(c)(4) states that when appropriate, a court may divide a class into subclasses with each subclass treated as a separate class. FED. R. CIV. P. 23(c)(4); *see* Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 43 F.R.D. 452, 462 (E.D. Pa. 1968) (class action appropriate for each of three subclasses).

[49] 672 F.2d at 387; *see* Alaniz v. Tillie Lewis Foods, 572 F.2d 657, 659 (9th Cir.) (only exceptional cases permit intervention after entry of consent decree), *cert. denied*, Beaver v. Alaniz, 439 U.S. 837 (1978); United States v. Associated Milk Producers, Inc., 534 F.2d 113, 116 (8th Cir.) (courts generally will grant postjudgment intervention only upon strong showing of both necessity and justification for failure to intervene sooner), *cert. denied*, National Farmer's Org. Inc. v. United States, 429 U.S. 940 (1976); Sohappy v. Smith, 529 F.2d 570, 574 (9th Cir. 1976) (district court properly denied postjudgment motion of non-Indian commercial fisherman to intervene in suit of Indian treaty fishermen in absence of showing of any extraordinary or unusual circumstances); United States v. Carroll County Bd. of Educ., 427 F.2d 141, 141 (5th Cir. 1970) (motion to intervene in school desegregation case, filed after district court ordered judicially approved school desegregation plan into effect, was not timely); *see also* 3B J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 24.13 at 24-154 (2d ed. 1982) (intervention after judgment unusual and infrequently granted); 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1916, at 577-80 (1972) (courts are extremely reluctant to allow postjudgment intervention after action has gone to judgment, and courts require strong showing of need for intervention from applicant) [hereinafter cited as WRIGHT & MILLER].

[50] 672 F.2d at 387; *see* 7A WRIGHT & MILLER, *supra* note 49, § 1916 at 582 (mere fact that court has entered judgment is not sufficient reason to deny application for intervention); Jones, *Litigation Without Representation: The Need for Intervention to Affirm Affirmative Action*, 14 HARV. C.R.-C.L. L. REV. 31, 80 (1979) (due to economic necessity, minority groups frequently intervene only after final judgment and must rely on representation of litigants until then) [hereinafter cited as Jones].

would occur, a court should not deny an application for intervention simply because a court already had rendered judgment in the case.[51]

The Fourth Circuit noted that the possibility of the district court's reinstatement of the original findings of discrimination in hiring was an additional factor supporting intervention.[52] The Fourth Circuit reasoned that before permitting intervention, and as a prerequisite to reinstatement of the original findings, the district court first must determine whether the prospective intervenors would be suitable representatives of the victims of hiring discrimination.[53] The Fourth Circuit determined that the district court's reinstatement of the original findings and conclusions would achieve the benefit of conserving judicial resources.[54] The *Hill II* court further stated that reinstatement of the verdict would avoid the danger of inconsistent sequential adjudications of the issues because the intervenors, if unsuccessful, probably would pursue the class claim in a new action.[55]

Western argued that reinstatement following the Fourth Circuit's vacation of judgment was impossible because the Fourth Circuit's action rendered the vacated findings void.[56] The *Hill II* majority rejected Western's argument, concluding that the cases Western cited as authori-

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[51] 672 F.2d at 387. The Fourth Circuit relied on the reasoning of *McDonald v. E. J. Lavino Co. Id.*; *see* McDonald v. E. J. Lavino Co., 430 F.2d 1065 (5th Cir. 1970). *Lavino* involved an injured employee's action against a third-party tort-feasor. 430 F.2d at 1066. The workmen's compensation carrier of the employer attempted to enter the action by filing a motion for intervention. *Id.* The trial court denied the motion because the compensation carrier filed the motion one day after judgment. *Id.* On appeal the Fifth Circuit reversed, holding that intervention after judgment is permissible unless intervention would prejudice the rights of the existing parties to the litigation or substantially interfere with the orderly process of the court. *Id.* at 1072. The *McDonald* court also noted that courts did not intend the timely application requirement of rule 24(b) to punish intervenors for failing to act promptly, reasoning that the requirement was designed to insure that an intervenor's failure to intervene earlier would not prejudice the original parties. *Id.* at 1074; *see* FED. R. CIV. P. 24(a) (necessity of timeliness of intervention); *supra* note 50 (court's entering of judgment is not sufficient reason alone to deny application for intervention).

[52] 672 F.2d at 387.

[53] *Id.*; *see supra* note 7 (rule 23's adequacy requirement).

[54] 672 F.2d at 387.

[55] *Id.* The Fourth Circuit in *Hill II* was concerned that failure to allow intervention would lead to a new action by the rejected intervenors. *Id.*; *see* FED. R. CIV. P. 23(b)(1)(A). Rule 23(b)(1)(A) allows class certification when separate trials by individual members of the class could establish incompatible standards for the party opposing the class. FED. R. CIV. P. 23(b)(1)(A); *see supra* note 7 (rule 23).

[56] 672 F.2d at 387-88; *see, e.g.*, Simpson v. Motorists Mut. Ins. Co., 494 F.2d 850, 854 (7th Cir. 1974) (district court's findings of fact and conclusions of law in declaratory action inadmissible in later case in which appellate court reversed judgment and dismissed case for lack of jurisdiction), *cert. denied*, 419 U.S. 901 (1974); Troy State Univ. v. Dickey, 402 F.2d 515, 516 (5th Cir. 1963) (effect of vacating lower court's judgment is to void precedential effect). *But cf.* Dunlop v. Rhode Island, 398 F. Supp. 1269, 1273 (D.R.I. 1975) (although court may not give collateral estoppel effect in subsequent case to vacated holding of earlier case, court may adopt earlier case's findings of fact if no new evidence emerges).

ty were inappropriate since the cases held only that vacated findings have no power or authority in unrelated litigation.[57] The majority considered the Fifth Circuit's decision in *Finn v. American Fire and Casualty Co.*[58] controlling precedent.[59] In *Finn* the jury returned a verdict in favor of a policy holder against one of two defendant insurance companies.[60] On appeal, the Fifth Circuit vacated and remanded the district court judgment for lack of complete diversity between the parties.[61] Although the plaintiff in *Finn* later cured the jurisdictional defect by dropping the claim against the in-state defendant, on remand the district court nevertheless refused to reinstate the vacated judgment in favor of the policy holder.[62] The *Finn* district court reasoned that the initial judgment was void without proper jurisdiction.[63] On appeal, the Fifth Circuit reversed.[64] Noting that jurisdiction, although defective, initially did exist, the Fifth Circuit held that once the plaintiff had cured the jurisdictional defect, reinstatement of the original judgment was within the district court's discretion.[65] The *Hill II* majority relied on *Finn* to hold that the reinstatement of the holding and supporting conclusions was permissible.[66] The Fourth Circuit, however, cautioned that prior to reinstatement the prevailing party must cure minor jurisdictional defects on remand and that the defects must have had no influence over the merits that the winning party wished to reinstate.[67]

Beyond holding that the proposed intervention was timely and that reinstatement of the judgment was possible, the Fourth Circuit also developed guidelines for the district court to employ in determining the

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[57] 672 F.2d at 387-88; *see supra* note 56 (cases holding effect of vacating lower court's judgment is to void precedential effect).

[58] 207 F.2d 113 (5th Cir. 1953). In *Finn* a plaintiff brought an action in a state court against two foreign insurance companies and one resident insurance agent, alleging that the defendants had failed to pay compensation for property lost in fire. *Id.* at 114.

[59] 672 F.2d at 388.

[60] 207 F.2d at 114.

[61] *Id.* In *Finn*, the resident insurance agent was the source of the defect in diversity jurisdiction. *Id.*; *see* 28 U.S.C. § 1332 (1976) (for section 1332 jurisdiction to exist, case must be between citizens of different states, and no defendant may be from same state as any plaintiff).

[62] 207 F.2d at 115.

[63] *Id.*; *see supra* note 61 (defect in diversity).

[64] 207 F.2d at 116.

[65] *Id.* at 115. The *Finn* court determined from reading the testimony of the district court trial that the presence of the in-state defendant in a federal case under diversity jurisdiction did not prejudice the insurance company that lost on the merits. *Id.* The Fifth Circuit therefore granted a new judgment on the old verdict. *Id.* The Fifth Circuit noted that because the litigation had involved the same issues and the same claim for five years, considerations of judicial economy demanded that the appellate court preserve the holding of the first district court decision since the joinder of the resident defendant did not prejudice the defendant insurance company. *Id.*

[66] 672 F.2d at 388.

[67] *Id.*

propriety of intervention.[68] The Fourth Circuit first recommended reinstatement of the judgment in favor of the applicants if the proposed intervenors desired the district court to reinstate the findings of hiring discrimination.[69] The Fourth Circuit reasoned that an independent choice on the part of the intervenors would indicate that the class felt that the named plaintiffs representation of the class in the prior litigation of the hiring claim had been "fair" and "adequate" under Federal Rule of Civil Procedure 23(a)(4).[70]

In addition, the Fourth Circuit recommended that the district court reconsider the *Hill I* court's original determination that the named plaintiffs inadequately represented the class.[71] The Fourth Circuit noted that the *Hill I* court's determination focused on the formal lack of common interests between the named class representatives and the class of frustrated applicants rather than on the actual effectiveness of representation.[72] The *Hill II* majority concluded that the named plaintiffs' actual representation demonstrated diligence and effectiveness.[73] The *Hill II* court also noted that since the district court determined in a normal adversary context that Western had discriminated against job applicants, later reinstatement of the findings could not prejudice Western.[74] The *Hill II* court remanded the case to the district court for proceedings consistent with the Fourth Circuit's opinion.[75].

In his dissent to *Hill II*, Judge Widener disagreed with the majority's holding that the trial court erred in denying the appellants' motion to intervene.[76] Judge Widener argued that an appellate court should disturb a trial court's rulings only if the trial court abused its discretion.[77] The dissent noted that a trial court's failure to consider

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[68] *Id.*

[69] *Id.* at 391.

[70] *Id.*

[71] *Id.*; *see supra* text accompanying notes 19-28 (*Hill I* held named representatives inadequate because named plaintiffs did not suffer same injury as victims of hiring discrimination).

[72] 672 F.2d at 391; *see supra* text accompanying notes 19-28 (*Hill* district court's rationale for dismissing judgment in favor of aggrieved applicants).

[73] 672 F.2d at 391. The Fourth Circuit noted that the class representatives' early pursuit of certification of the victims of hiring discrimination as members of the class and the plaintiffs' defense of the class on appeal indicated plaintiffs' effectiveness as adequate representatives of the applicants. *Id.* at n.8. The Fourth Circuit further stated that the district court's verdict in favor of the entire class also evidenced the quality of the representation. *Id.* at 391; *see* 12 Fair Empl. Prac. Cas. (BNA) at 1183 (district court judgment on behalf of entire class).

[74] 672 F.2d at 391. The *Hill II* court noted that the Fourth Circuit could review for error any reinstated findings appearing in any appealable order. *Id.* The Fourth Circuit also noted that if Western had relevant evidence of events occurring before the date of the finding, reinstatement would not preclude consideration of that evidence. *Id.* at 391-92.

[75] *Id.* at 392.

[76] *Id.* (Widener, J., dissenting).

[77] *Id.*; *see* NAACP v. New York, 413 U.S. 345, 366 (1973). In *NAACP v. New York*, the NAACP appealed a district court denial of postjudgment intervention in a suit that New

whether intervention would delay or prejudice the rights of the original parties constitutes the principal form of abuse of discretion.[78] Judge Widener argued that the district judge had considered the issue of prejudice to the parties when he denied intervention.[79]

The dissent also disagreed with the majority's conclusion that the filing of the original complaint put Western on notice of the potential for classwide liability and therefore intervention was not prejudicial to Western.[80] Judge Widener suggested that intervention could prejudice Western since the *Hill II* majority opinion provided for the possibility of reinstatement in the district court of adverse findings that the *Hill I* court previously had vacated.[81] The dissent also reasoned that the decertification of the class members who were victims of hiring discrimination and the vacation of the district court's judgment demonstrated that the

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York State, representing three New York counties, brought against the United States seeking exoneration from the Attorney General's finding that the counties had imposed a literacy test on voters in violation of the Voter's Rights Act of 1965. *Id.*; *see* 42 U.S.C. § 1973 (1976) (no political subdivision of state may impose a voting qualification to deny or abridge the rights of individuals on account of race or color). The United States Justice Department already had assented to a declaratory judgment in favor of New York at the time of the NAACP's attempted intervention. 413 U.S. at 360. The *NAACP* Court applied a four part test to determine whether intervention was timely. *Id.* at 364-69. First, the court considered the length of time that the prospective intervenors knew or should have known that suit was pending. *Id.* at 365. The Supreme Court also considered the promptness with which the prospective intervenors acted once they became aware of the suit. *Id.* at 366. The Court then considered whether any unusual circumstances existed warranting intervention. *Id.* at 368. Finally, the *NAACP* Court considered whether any unusual circumstances existed that militates against intervention. *Id.* In affirming the district court's denial of intervention, the *NAACP* Court noted that a district court determines the timeliness of proposed intervention in the exercise of its discretion. *Id.* at 366. The Court also noted that unless the district court abuses its discretion, the appellate court will not review the district court's ruling. *Id.* *But see* Jones, *supra* note 50, at 380-84 (*NAACP* Court should have allowed intervention because intervention is only economical method for minorities to protect their rights).

[78] 672 F.2d at 392 (Widener, J., dissenting); *see* EEOC v. United Airlines, Inc., 515 F.2d 946, 949 (7th Cir. 1975) (appropriateness of court's denial of intervention depends on harm or prejudice, including trial delay, to parties); McDonald v. E. J. Lavino Co., 430 F.2d 1065, 1073 (5th Cir. 1970) (most important consideration in determining timeliness of intervention is whether intervention will harm or prejudice existing parties); Diaz v. Southern Drilling Corp., 427 F.2d 1118, 1126 (5th Cir.) (prejudice to existing parties is main consideration in determining timeliness of intervention), *cert. denied*, 400 U.S. 878 (1970).

[79] 672 F.2d at 392 (Widener, J., dissenting); *see supra* note 31 (district court's reasoning for denial of motion for intervention).

[80] 672 F.2d at 393 (Widener, J., dissenting); *see supra* text accompanying notes 43-45 (majority's analysis that intervention was not prejudicial to Western).

[81] 672 F.2d at 393 (Widener, J., dissenting). The *Hill II* dissent also distinguished *United Airlines, Inc. v. McDonald*, a case upon which the majority relied to demonstrate the nonprejudicial nature of intervention. 672 F.2d at 393; *see* United Airlines, Inc. v. McDonald, 432 U.S. 385, 395-96 (1977) (postjudgment intervention to appeal denial of class certification permissible); *supra* note 40 (majority relied on *McDonald* to permit intervention). The dissent noted that in *McDonald* the intervenors alleged the same type of discriminatory injury as that of the original plaintiffs. 672 F.2d at 393; *see McDonald*, 432 U.S. at 388 (all members of class challenged no-marriage rule). The only difference between the original plaintiffs and the intervenors in *McDonald* was that only the original plaintiffs

Hill I court had determined that the original certification was prejudicial to Western.[82] Because the dissent believed the district court had weighed the possibility of prejudice, Judge Widener concluded that the trial court had not abused its discretion in denying intervention.[83]

The dissent also disagreed with the majority's opinion that intervention could allow the district court to reinstate its prior findings.[84] The dissent reasoned that since the *Hill I* court determined that the certification of a class including victims of alleged hiring discrimination was erroneous, any subsequent intervention also would be in error.[85] The dissent argued that the *Hill II* court should have disposed of the reinstatement issue by holding that vacated judgments are not res judicata and therefore have no precedential value in subsequent litigation.[86]

The *Hill II* court's holding that the district court's denial of the appellant's motion for intervention was an abuse of discretion is inconsistent with the state of the law in circuits that have considered the problem.[87] Although postjudgment intervention is unusual, circuit courts

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had filed letters of protest with the EEOC. 672 F.2d at 393 (Widener, J., dissenting); *see supra* note 5 (requirements for filing suit under Title VII). In contrast to the *McDonald* class in which all plaintiffs suffered the same injury, the *Hill I* court concluded that the *Hill* class was overbroad and that the district court's adjudication of classwide liability was void as without jurisdiction. 672 F.2d at 393 (Widener, J., dissenting); *see supra* text accompanying notes 19-28 (*Hill I* court's explanation for decertifying portion of class).

[82] 672 F.2d at 393 (Widener, J., dissenting).

[83] *Id.*; *see supra* note 31 (district court's rationale for denying intervention).

[84] 672 F.2d at 395 (Widener, J., dissenting); *see supra* text accompanying notes 48-64 (majority's determination of permissibility of reinstatement of judgment).

[85] 672 F.2d at 396 (Widener, J., dissenting). Judge Widener pointed out that under the Supreme Court's decision in *East Tex. Motor Freight Sys., Inc. v. Rodriguez*, courts will not allow improperly certified classes in Title VII actions. 672 F.2d at 396-97; *see* East Tex. Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 405 (1977) (close attention to requirements of rule 23 indispensable in determining Title VII class action); *supra* note 23 (discussion of *Rodriguez*). The dissent conceded that *Rodriguez* might permit the continued vitality of a class after a trial court had certified the class and subsequently discovered that the named plaintiffs were inadequate class representatives. 672 F.2d at 396; *see supra* note 47 (appellate court determined named plaintiff inadequate to represent class but remanded with orders to keep case on docket until proper new plaintiff could intervene). The dissent also noted that *Rodriguez* would allow certification following intervention only if the initial certification were proper. *Id.* (Widener, J., dissenting); *see* 431 U.S. at 406 n.12 (certification proper in situation in which district court certified class and later discovered named plaintiffs were not class members). The *Hill II* dissent concluded that *Rodriguez* precluded recertification and reinstatement in favor of the aggrieved applicants because the district court erroneously certified the portion of the class made up of applicants. 672 F.2d at 395; *see supra* text accompanying notes 19-28 (*Hill I* court's determination to decertify victims of hiring discrimination).

[86] 672 F.2d at 401 (Widener, J., dissenting). Judge Widener contended that *Firestone Tire & Rubber Co. v. Risjord* overruled the *Hill II* majority's holding that reinstatement of the court's findings of facts was permissible. 672 F.2d at 397; *see* Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 379 (1981). In *Firestone* the Supreme Court held that a court has no discretion to consider the merits of a case over which the court lacks jurisdiction. *Id. But see supra* text accompanying notes 53-71 (majority's analysis allowing reinstatement).

[87] *See supra* note 49 (courts hold intervention proper only under unusual circumstances).

have been willing to grant postjudgment intervention in exceptional circumstances.[88] Absent exceptional circumstances, circuit courts have been reluctant to overturn a district court's denial of postjudgment intervention as an abuse of discretion.[89]

Despite the contrary rulings of other circuits Fourth Circuit precedent supports the *Hill II* decision.[90] In *Brink v. DaLesio*,[91] the Fourth Circuit permitted the postjudgment intervention of a putative class representative after the district court had denied the intervention motion.[92] In *DaLesio*, members of a Teamsters Union local brought suit against the local's union officers for violations of the fiduciary duties as trustees of employee benefit funds.[93] The district court held that the defendants had violated fiduciary standards that Congress imposed upon union officers and fiduciaries[94] of union trust funds.[95] The district court,

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[88] *See* Howse v. S/V Canada Goose I, 641 F.2d 317, 320 (5th Cir. 1981) (postjudgment intervention, though approved reluctantly, was not an abuse of district court's discretion); Legal Aid Soc. of Alameda Cty. v. Brennan, 608 F.2d 1319, 1328 (9th Cir. 1979) (postjudgment intervention for purposes of appeal may be appropriate if intervenors act promptly after judgment and meet traditional standing requirements), *cert. denied*, 447 U.S. 921 (1980); *see also* Coopers & Lybrand v. Livesay, 437 U.S. 463, 469 (1978). In *Coopers*, the Supreme Court refused to allow prejudgment appeal of class certification denial since under *McDonald* an order denying class certification is subject to effective review only after final judgment through a motion by the named plaintiff or by intervening class members. *Id.*; *see* United Airlines, Inc. v. McDonald, 432 U.S. 385, 394 (1977) (since plaintiff could appeal denial of class certification only after judgment, postjudgment intervention was permissible); *supra* note 40 (facts of *McDonald*).

[89] *See supra* note 47 (cases holding that district courts did not abuse discretion by denying postjudgment intervention).

[90] *See* Brink v. DaLesio, 667 F.2d 420, 429 (4th Cir. 1981) (Fourth Circuit held that district court's denial of postjudgment intervention was abuse of discretion). The Fourth Circuit only recently recognized the utility of postjudgment intervention. *See* Black v. Central Motor Lines, Inc., 500 F.2d 407, 408 (4th Cir. 1974) (intervention is ancillary and subordinate to main cause and whenever action is terminated, action in which there can be intervention no longer exists) (citing Becton v. Greene County Bd. of Educ., 32 F.R.D. 220 (E.D.N.C. 1963)).

[91] 667 F.2d 420 (4th Cir. 1981).

[92] *Id.* at 429.

[93] Brink v. DaLesio, 496 F. Supp. 1350, 1356 (D. Md. 1980), *aff'd in part and rev'd in part*, 667 F.2d 420 (4th Cir. 1981). In *DaLesio* plaintiff teamsters alleged that DaLesio had received excessive compensation and prerequisites from his position as trustee of the Local 311 Health and Welfare Fund, the Local 311 Pension Fund, the Affiliated Health and Welfare Fund (Affiliated), and the Allied Pension Fund (Allied). *Id.* The plaintiffs also claimed that DaLesio breached his fiduciary duties in negotiating a lease for the local. *Id.* The Teamsters also charged DaLesio with receiving gratuities in the course of transactions with individuals doing business with the Union. *Id.* A third charge involved allegedly unreasonably high commissions to a second defendant, Bell, or to Bell's personally owned company. *Id.*

[94] *See* 29 U.S.C. § 1002(21)(A) (1976). Section 1002 states that a person is a fiduciary to the extent that the person exercises any discretionary authority or control of management of a fund or disposition of its assets. *Id.* Anyone who renders investment advice for a fee or other compensation also qualifies as a fiduciary. *Id. See generally* Little & Thrailkill, *Fiduciaries Under ERISA: A Narrow Path to Tread*, 30 VAND. L. REV. 1 (1977).

[95] 496 F. Supp. at 1368, 1370-71.

however, held that the plaintiff union members lacked standing to remedy fiduciary violations on behalf of the members of the two employee benefit funds because neither was a participant, a beneficiary, or a fiduciary of the funds.[96] The district court refused to award the full monetary relief that the plaintiffs sought.[97] The district court also refused to permit postjudgment intervention by employees representing the benefit funds.[98]

On appeal, the Fourth Circuit in *DaLesio* held that one of the plaintiffs had standing to represent the interests of one of the employee benefit funds becuase the plaintiff had been a participant in the fund at the time of the proposed intervention.[99] The *DaLesio* court also held that the district court erred in refusing to allow representatives of the second fund to intervene.[100] The Fourth Circuit noted that in a class action, class members have a right to rely on the representative members of the class until the court rules otherwise.[101] Since the district court raised and resolved the standing issue against the named plaintiffs only when deciding the case on the merits, the Fourth Circuit held that proper representatives of the funds could not have known of the necessity of intervention until the district court rendered its judgment.[102] Further, the *DaLesio* court held that intervention would not prejudice the defendant and would protect the intervenors from prejudice.[103] The Fourth Circuit therefore concluded that despite the general policy among courts discouraging postjudgment intervention, the district court abused its discretion in denying intervention.[104]

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[96] *Id.* at 1374. The *DaLesio* district court held that under Title IV of the Employee Retirement Income Security Act (ERISA), standing to bring suit for breach of a trustee's duty to a fund is limited to the Secretary of Labor, and the participants, beneficiaries, and fiduciaries of the fund. *Id.* at 1373; *see* 29 U.S.C. § 1132(a) (1976) (ERISA standing requirements).

[97] 496 F. Supp. at 1374.

[98] Brink v. DaLesio, 88 F.R.D. 610 (D. Md. 1980). After the *DaLesio* district court determined that the plaintiffs lacked standing to represent Allied Fund and Affiliated Fund, both Allied Fund and Affiliated Fund as well as Allen R. Holland in his capacity as trustee, beneficiary, and participant in both funds moved to intervene in the *DaLesio* action. *Id.* at 611. In a second judgment the district court denied the trust fund applicants' postjudgment motions as untimely. *Id.* at 612.

[99] 667 F.2d at 423; *see* Brink v. DaLesio, 496 F. Supp. 1350, 1374 (D. Md. 1980) (district court determination that plaintiffs lacked standing to represent Allied and Affiliated Funds).

[100] 667 F.2d at 423.

[101] *Id.* at 428; *see* Brink v. DaLesio, 88 F.R.D. 610, 611 (D. Md. 1980) (district court's denial of trust fund applicants' motions to intervene).

[102] 667 F.2d at 428; *see* Brink v. DaLesio, 496 F. Supp. 1350, 1374 (D. Md. 1980) (district court ruling that plaintiffs had no standing to represent class).

[103] 667 F.2d at 428-29. The Fourth Circuit determined that denial of intervention would prejudice Allied Fund members because denial would force fund members to file a new lawsuit and retry issues already thoroughly litigated. *Id.* at 429. The Fourth Circuit also was concerned that Allied fund members might not be able to defend themselves against pleas of limitation or laches if forced to file a new suit. *Id.*

[104] *Id.* at 429; *see* 88 F.R.D. at 611-12 (district court's denial of trust fund applicant's motion to intervene).

The Seventh Circuit made a similar determination in reversing a district court's denial of postremand intervention.[105] In *F. W. Woolworth Co. v. Miscellaneous Warehouseman's*,[106] the plaintiff company's discharge of three employees became an issue in arbitration between plaintiff and the local of the Miscellaneous Warehouseman's Union, which represented the three employees.[107] The arbitrator ordered the rehiring of the employees, and Woolworth brought an action in federal district court to vacate the arbitrator's decision.[108] The district court granted summary judgment in favor of Woolworth and denied as untimely attempted postjudgment intervention by the three employees.[109] The Seventh Circuit reversed, stating that the district court abused its discretion by holding the proposed intervention untimely.[110] The Seventh Circuit reasoned that the employees had no reason to intervene until summary judgment, when the Union decided not to appeal.[111] The Seventh Circuit reasoned that since the Union was the employees' representative, the employees did not have to intervene until the Union indicated it no longer would pursue the employees' claims.[112]

Although the *Hill II* majority stated that the only issue on appeal was whether the district court abused its discretion in denying postremand intervention, the court nonetheless considered whether a court could reinstate a vacated order.[113] The Fourth Circuit's recommendation that the district court reinstate the judgment is difficult to reconcile with the Supreme Court's holding in *Firestone Tire & Rubber Co. v. Risjord*.[114] The Supreme Court in *Firestone* held that any jurisdictional defect, which would include inadequate representation, renders any judgment of the court lacking jurisdiction a nullity.[115] Postjudgment cures to jurisdictional defects seem insufficient to justify the reinstatement of a judgment on the merits that under the *Firestone* rule was a nullity from the start.[116]

The *Hill II* decision was a departure from the Fourth Circuit's deci-

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[105] *See* F. W. Woolworth Co. v. Miscellaneous Warehouseman's, 629 F.2d 1204, 1214 (7th Cir. 1980) (district court's denial of postjudgment intervention was abuse of discretion), *cert. denied*, 451 U.S. 937 (1981).

[106] *Id.* at 1204.

[107] *Id.* at 1206. Woolworth discharged the employees for excessive absences. *Id.*

[108] *Id.* at 1207.

[109] *Id.* at 1208.

[110] *Id.* at 1213-14.

[111] *Id.* at 1213.

[112] *Id.*; *see* Romasanta v. United Airlines, Inc., 537 F.2d 915, 918 (7th Cir. 1976) (application for intervention is timely if intervenor acts immediately after class representatives indicate they will not appeal order denying class status), *aff'd sub nom.* United Airlines v. McDonald, 432 U.S. 385 (1977); *supra* notes 40 & 44 (facts of *McDonald*).

[113] 672 F.2d at 387; *see supra* text accompanying notes 52-67 (*Hill II* majority's determination that reinstatement of vacated judgment could be permissible).

[114] 449 U.S. 368 (1981).

[115] *Id.* at 379; *see supra* note 86 (*Hill II* dissent's discussion of *Firestone's* overruling of *Finn*).

[116] *See* 449 U.S. at 379.

sion in *Hill I* in which the court relied on the language of *East Texas Motor Freight Systems, Inc. v. Rodriguez*.[117] The Supreme Court recently reaffirmed the reasoning and holding of *Rodriguez* in *General Telephone Co. of the Southwest v. Falcon*.[118] In *Falcon*, General Telephone Company (General) denied a promotion to Falcon, a Mexican-American.[119] Falcon brought a class action against the company in the United States District Court for the Northern District of Texas.[120] Without conducting a hearing, the district court certified a class consisting of all General's Mexican-American employees, as well as all Mexican-Americans who had applied at General or would have applied had General not practiced discrimination in hiring.[121] The district court held that General had discriminated against the named plaintiff in the company's promotion practices but not in the company's hiring practices.[122] Conversely, the district court held that General had discriminated against the class in hiring practices but not in promotion practices.[123] Both parties appealed, and the Fifth Circuit held that the class certification was proper under Fifth Circuit precedent, which permits victims of racial discrimination to maintain "across-the-board" attacks on employers' discriminatory practices.[124]

The Fifth Circuit upheld on the merits the district court's finding of discrimination in General's promotion policies but dismissed the district court's finding of discrimination in General's hiring practices.[125] The

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[117] *See supra* text accompanying notes 19-28 (*Hill I* court's rationale for decertification of frustrated applicant class); *supra* note 23 (discussion of *Rodriguez*).

[118] ___ U.S. ___, 102 S. Ct. 2364 (1982).

[119] ___ U.S. at ___, 102 S. Ct. at 2367.

[120] *Id.*

[121] ___ U.S. at ___, 102 S. Ct. at 2367-68. The *Falcon* Court certified a class comprised of all hourly Mexican-American employees who have worked or may work at the General plant and all Mexican-Americans who had applied or would have applied for employment if General had not practiced racial discrimination. *Id.*

[122] Falcon v. General Tel. Co., 463 F. Supp. 315, 316 (N.D. Tex. 1978), *modified*, 626 F.2d 369 (5th Cir. 1980).

[123] *Id.*

[124] 626 F.2d 369, 376 (5th Cir. 1980), *vacated*, 450 U.S. 1036 (1981). The Fifth Circuit rejected the respondent Mexican-American's contention that the class should have included employees from all of General's operations in Texas, New Mexico, Oklahoma, and Arkansas. *Id.* at 376. The Fifth Circuit held that the district court had not abused its discretion in localizing the class to a specific plant since each of General's divisions conducted its own hiring and since management of the broader class action would be difficult. *Id.* The Fifth Circuit held that the class was not too broad since under a Fifth Circuit policy allowing named plaintiffs to meet liberal standing requirements in Title VII class actions, an employee complaining of one discriminatory employment practice may represent another party allegedly harmed by a different practice providing both have suffered essentially the same injury. *Id.* at 375. The Fifth Circuit held that the *Falcon* class met identity requirements since all claims involved discrimination due to national origin. *Id.*

[125] *Id.* at 380, 383. In affirming the district court's finding of promotional discrimination, the Fifth Circuit in *Falcon* determined that the district court had not been clearly erroneous in finding in favor of the plaintiff. *Id.* at 379. The Fifth Circuit held the district court

Supreme Court granted General's petition for certiorari to decide whether the district court and the Fifth Circuit properly certified a class comprised of both victims of promotional discrimination and victims of hiring discrimination.[126] The *Falcon* Court noted that although Title VII allows the EEOC to sue in its own name for relief of victims of discrimination, the class representative under Title VII must meet the requirements of commonality, typicality, and adequacy of representation that rule 23(a) specifies.[127] The *Falcon* Court noted that the requirements of commonality and typicality tend to operate as guideposts that allow courts to determine whether a class action is economical.[128] The requirements also allow courts to determine whether the plaintiffs' claims and the class' claims are so interrelated that the plaintiffs will adequately protect the interests of the class members.[129] The Court also noted the high potential for conflict between employees and aggrieved applicants, who would compete with employees for fringe benefits or seniority if the Court granted the frustrated applicants relief.[130] The Supreme Court concluded that the district court erred in failing to investigate the named plaintiff's adequacy as a class representative prior to certification.[131] Since the *Falcon* Court found no evidence indicating common questions of law and fact between the plaintiff and the class, the Court decertified the class.[132]

The *Falcon* holding does not represent a complete refutation of across-the-board class actions since the Supreme Court acknowledged

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legitimately had based its holding on an EEOC investigator's testimonial evidence that General had failed to promote Falcon on account of his Mexican-American heritage, as well as on Falcon's testimony. *Id.* Regarding hiring discrimination, the Fifth Circuit held that once a plaintiff offers a prima facie case of discrimination by offering evidence that proves a significant disparity between the composition of the employer's work force and the general community, the employer must introduce evidence to rebut the presumption of discrimination. *Id.* at 380-81. Since the district court based its findings of discrimination on evidence reflecting the relevant work force for only a two year period, the Fifth Circuit remanded the hiring claim to the district court for an analysis based on a broader spectrum of time. *Id.* at 382.

[126] ___ U.S. at ___, 102 S. Ct. at 2366.

[127] *Id.*; *see supra* note 7 (rule 23).

[128] ___ U.S. at ___, 102 S. Ct. at 2371 n.13.

[129] *Id.*

[130] *Id.* The Supreme Court concluded that under rule 23, the same plaintiff could not represent both a class of aggrieved applicants and employees suffering promotional discrimination. *Id.*

[131] ___ U.S. at ___, 102 S. Ct. at 2372. The Supreme Court held that the district court erred in presuming that respondent's claim was typical of other claims against General by Mexican-American employees and applicants. *Id.* at 2371; *see* 463 F. Supp. at 316 (district court's certification of class). The *Falcon* Court noted that if one allegation of specific discriminatory treatment was sufficient to support an across-the-board attack, every Title VII case potentially could result in a Title VII class action, resulting in a massive expansion of class action litigation. 102 S. Ct. at 2371.

[132] ___ U.S. at ___, 102 S. Ct. at 2373.

that a court might allow certification of a class of both applicants and employees upon a showing of significant proof that an employer operated under a general policy of discrimination that was applicable to both applicants and employees.[133] The Supreme Court's vacation of the Fourth Circuit's judgment in *Brown v. Eckerd Drugs*[134] nonetheless reflects the narrowness of the *Falcon* exception allowing a plaintiff suffering one type of discriminatory injury to represent members of a class suffering other types of discriminatory injuries.[135]

In *Eckerd Drugs*, a group of female employees brought an action against Eckerd Drugs, the defendant employer, charging discrimination in hiring, firing, promotion, job assignment, and geographical assignment.[136] The United States District Court for the Western District of North Carolina certified a class consisting of all employees working at the defendant's main office, warehouse, and retail stores and claiming injury from Eckerd's allegedly discriminatory policies toward promotions or transfers into management and supervisory jobs.[137] Although the class initially included rejected applicants for employment, the district court excluded applicants from the class on the basis of the *Hill I* decision.[138] The district court found that the employer had discriminated against two of the named plaintiffs and the class and granted broad relief.[139] The *Eckerd Drugs* court granted back pay to the two successful plaintiffs and enjoined the company from all promotion and practices found to discriminate against minorities.[140] On appeal the Fourth Circuit affirmed the district court's judgment, noting that *Hill I* did not preclude an employee claiming injury from some particular discriminatory practice of the employer from representing other employees with factually different grievances.[141] The Supreme Court granted Eckerd's motion for certiorari, vacated the judgment, and remanded the case to the Fourth Circuit for reevaluation in light of *Falcon*.[142]

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[133] ___ U.S. at ___, 102 S. Ct. at 2371-72 n.15. The Supreme Court in *Falcon* noted that if an employer operated under a general policy of discrimination, such as through an entirely subjective decision making process, a court conceivably could justify a class of both applicants and employees. ___ U.S. at ___, 102 S. Ct. at 2371-72. The *Falcon* Court also noted that Title VII prohibits discriminatory employment practices not an abstract policy of discrimination. ___ U.S. ___, 102 S. Ct. at 2372 n.15; *see supra* note 2 (Title VII).

[134] 663 F.2d 1268 (4th Cir. 1981), *vacated*, ___ U.S. ___, 102 S. Ct. 2952 (1982).

[135] *See infra* text accompanying note 142 (Supreme Court's rationale for vacating *Eckerd Drugs*); ___ U.S. ___, 102 S. Ct. 2952 (1982).

[136] 663 F.2d at 1269.

[137] *Id.* at 1269-70.

[138] *Id.* at 1269; *see supra* text accompanying notes 19-27 (*Hill I* court's reasoning in decertifying applicant portion of class).

[139] 663 F.2d at 1269-70.

[140] *Id.*

[141] *Id.* at 1275. The *Eckerd* court noted that when claims arise out of the same legal or remedial theory, the presence of factual variations normally is not sufficient to preclude class action treatment. *Id.*

[142] ___ U.S. ___, 102 S. Ct. 2952 (1982) (Supreme Court's vacating of *Eckerd* judgment).

Since the Supreme Court's holding in *Rodriguez*, Fourth Circuit employment discrimination cases have reflected a narrowing of the scope of Title VII class actions.[143] In *Stastny v. Southern Bell Telephone & Telegraph Co.*, [144] the Fourth Circuit gave practical effect to the *Rodriguez* "same interest, same injury" language and foreshadowed *Falcon* by emphasizing rule 23(a) prerequisites of commonality of issues and typicality of claims between the named plaintiff and the class that the plaintiff purports to represent.[145] By regarding specific and uniform discriminatory practices and uniformity of occupation as underlying bases for determining whether commonality is present,[146] the *Stastny* court narrowed the scope of employment discrimination class actions from a tool to redress injuries sustained as a result of a generalized policy of discrimination by an employer to a tool to redress injuries sustained due to specific discriminatory practices.[147] The *Stastny* court also provided the Fourth Circuit with a method for determining whether a class meets the rule 23 certification requirements, which the Supreme Court in *Rodriguez* held indispensable in determining the permissibility of class actions.[148]

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[143] *See* Abron v. Black & Decker, Inc., 654 F.2d 951, 954-55 (4th Cir. 1981) (class representative must have suffered same injury and must share same interests as class members); United Black Fire Fighters of Norfolk v. Hirst, 604 F.2d 844, 846 (4th Cir. 1979) (Fourth Circuit refused to certify class of black firefighters because plaintiffs failed to show personal stake in remedying conduct under attack). *See generally Fourth Circuit Review*, *supra* note 23 (discussion of *Abron*).

[144] 628 F.2d 267 (4th Cir. 1980).

[145] *Id.* at 273. The *Stastny* court noted that under *Rodriguez*, the remedial purposes of Title VII and the fitness of class actions in employment discrimination litigation do not supercede the court's obligation under rule 23(a) and (b) to inquire into the specific fitness for certification of each Title VII case in which the plaintiff seeks a class action. *Id.*; *see* East Tex. Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 405 (1977) (careful attention to requirements of rule 23 remains indispensable in Title VII actions); *supra* note 7 (rule 23); *supra* note 23 (discussion of *Rodriguez*).

[146] 628 F.2d at 277. The *Stastny* court noted that a court must consider other factors in determining commonality. *Id.* The court required an inquiry into the degree of centralization of the employer's management organization. *Id.* The court also noted that courts should consider the time span that the allegations cover as the time span relates to the degree of probability that similar conditions prevailed throughout the period. *Id.*

[147] *See id.* (*Stastny* court's restrictive definition of rule 23 commonality requirement). *Compare* General Tel. Co. v. Falcon, ___ U.S. ___, 102 S. Ct. 2364, 2372 n.15 (1982) (Supreme Court noted Title VII prohibits discriminatory practices, not abstract policy of discrimination) *with* Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1124 (5th Cir. 1969) (claim attacking system-wide policy of racial discrimination is permissible) *and* Hall v. Werthan Bag Corp., 251 F. Supp. 184, 186 (M.D. Tenn. 1966) (threat of racially discriminatory policy hangs over racial class and is a question of fact common to all members of class).

[148] *See* East Tex. Motor Freight Sys., Inc. Co. v. Rodriguez, 431 U.S. 395, 405 (1977) (requirements of rule 23 indispensable in determining permissibility of Title VII class action); Stastny v. Southern Bell Tel. & Tel. Co., 628 F.2d at 277 (analysis for finding rule 23 commonality in class actions); *Fourth Circuit Review*, *supra* note 23, at 663 (*Stastny* court established sound analytical framework for determining proper scope of class representation).

Although *Hill II* is consistent with the congressional intent of Title VII litigation, which is to eradicate broad policies of discrimination by an employer,[149] *Hill II* is difficult to reconcile with the Supreme Court's holding in *Falcon* that allows for class certification only if the members have typical and common claims.[150] While the *Hill II* court's conclusion that intervening named plaintiffs representing the victims of hiring discrimination might meet rule 23(a) adequacy of representation considerations, the *Hill II* court disregarded the rule 23(a) prerequisite of commonality which the Fourth Circuit in *Stastny*[151] and the Supreme Court in *Rodriguez*[152] and *Falcon*[153] have held are indispensable in determining the permissible scope of class actions.[154] Moreover, under the *Stastny* court's restricted definition of rule 23(a) commonality, the named plaintiffs in the initial *Hill* litigation did not possess the same interests or suffer the same injury as the class that the plaintiffs sought to represent.[155] Since no common questions of law existed under the restricted definition of commonality between the named plaintiffs who were employees and the victims of hiring discrimination, the original plaintiffs lacked standing to represent the class.[156] The original district court judgment in favor of the aggrieved applicants therefore was a nullity under Article III of the Constitution.[157] Although later intervention by victims of hiring discrimination might cure the adequacy of representation defect by providing appropriate named plaintiffs for that

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[149] *See supra* text accompanying note 3 (congressional intent underlying Title VII).

[150] *See* General Tel. Co. v. Falcon, ___ U.S. ___, 102 S. Ct. 2364, 2370 (1982) (individual litigant seeking to maintain class action under Title VII must meet prerequisites of numerosity, commonality, typicality, and adequacy of representation, which rule 23(a) specifies).

[151] *See* 672 F.2d at 391 (*Hill II* court's determination that *Hill* plaintiffs were only technically inadequate); *supra* note 145 (*Stastny* court holds Title VII class actions must meet rule 23(a) prerequisites).

[152] East Tex. Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 405 (1977); *see supra* note 23 (*Rodriguez* Court holding that observation of rule 23 prerequisites is indispensable in determining permissibility of class action).

[153] *See* General Tel. Co. v. Falcon, ___ U.S. ___, 102 S. Ct. 2364, 2373 (1982) (court can certify class in Title VII class action only if members meet rule 23 prerequisites).

[154] *See supra* notes 151-53 (Supreme Court holdings and Fourth Circuit holdings that emphasize rule 23 commonality requirements); *infra* text accompanying note 161 (*Falcon* holding restricts liberal case authority in which courts allow plaintiffs to represent class on basis of common threat of discrimination).

[155] Hall v. Western Elec. Co., 12 Fair Empl. Prac. Cas. (BNA) at 1177 (district court certifies employee to represent class comprised of both employees and applicants); *see supra* text accompanying notes 144-48 (*Stastny* analysis for determining commonality).

[156] *See* 12 Fair Empl. Pract. Cas. (BNA) at 1177 (*Hill* district court grants employees standing to represent applicant class). *But see* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 216 (1974) (to have standing to sue as class representative, plaintiff must be part of class, possessing same interests and suffering same injury as all other members of class).

[157] *See supra* note 153 (to have standing to sue as member of class, plaintiff must possess same interest and suffer same injury as all other members of class).

portion of the class, the district court still would have difficulty certifying a class on the ground that the class failed to meet restrictive commonality requirements.[158]

In *Rodriguez* and *Falcon* the Supreme Court has severly limited across-the-board Title VII class actions because those actions have resulted in multiplication of claims, endless litigation, and a drain on resources of the judiciary and of the litigants.[159] By stressing the rule 23(a) prerequisites to class actions in employment discrimination cases, the Supreme Court in *Rodriguez* and *Falcon* has attempted to promote judicial economy by allowing only class actions involving common questions of law and fact.[160] The two Supreme Court rulings also effectively restrict a line of liberal case authority in which courts have allowed named plaintiffs to represent entire classes on the basis of a common threat of discrimination.[161] Under the holding of *Falcon*, a class representative's complaint must specifically identify the questions of law and fact common to the claims of the class representatives and the members of the class that the plaintiffs seek to represent.[162] Unless the representative can designate a specific practice of discrimination common to all members of the class, the representative has failed to meet the commonality requirements of rule 23(a), and the class action will fail.[163]

In *Hill II*, the Fourth Circuit reverted to a pre-*Rodriguez* perspective on the permissable scope of class actions by recommending to the district court certification of a class comprised of victims of either hiring

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[158] *See supra* text accompanying notes 144-48 (*Stastny* court restricts scope of class action in Fourth Circuit through narrowly determined commonality requirement).

[159] *See* General Tel. Co. v. Falcon, ___ U.S. ___, 102 S. Ct. 2364, 2374 (1982) (Burger, C.J., concurring in part and dissenting in part) (Title VII cases are typically a drain on judicial resources and only promote endless litigation).

[160] *See id.* at 2373 (purpose of rule 23 is to promote judicial economy); *supra* note 7 (rule 23).

[161] *See, e.g.*, Waters v. Heublein, Inc., 547 F.2d 466, 469 (9th Cir. 1976) (white plaintiff has standing under Title VII to sue employer who discriminates against minorities because white plaintiff has right to work in environment free of racial prejudice), *cert. denied*, 433 U.S. 915 (1977); Gray v. Greyhound Lines, East, 545 F.2d 169, 176 (D.C. Cir. 1976) (black employee may challenge discriminatory hiring policies on grounds that policies violate Title VII right to nondiscriminatory work environment); Rich v. Martin Marietta Corp., 522 F.2d 333, 341 (10th Cir. 1975) (limitation on scope of class would render rule 23 void); Rogers v. EEOC, 454 F.2d 234, 235 (5th Cir. 1971) (Hispanic employee has standing to challenge employer's discriminatory service to Hispanic patients because discriminatory service violates employee's right to discrimination-free work place), *cert. denied*, 406 U.S. 957 (1972); Hackett v. McGuire Bros., 445 F.2d 442, 446-47 (3d Cir. 1971) (courts may not frustrate public policy of Title VII and § 1981 by development of overly technical judicial doctrines of standing); Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1126 (5th Cir. 1969) (overtechnical limitations on representative status will drain life out of Title VII); Hall v. Werthan Bag Corp., 251 F. Supp. 184, 186 (M.D. Tenn. 1966) (whether threat of racially discriminatory policy hangs over racial class is a question of fact common to all class members).

[162] ___ U.S. ___, 102 S. Ct. 2364, 2371 (1982).

[163] ___ U.S. at ___, 102 S. Ct. at 2371.

or promotional discrimination.[164] The Fourth Circuit analysis focused on the inequity of denying relief to a group of frustrated applicants that the court perceived as proven victims of hiring discrimination.[165] The *Falcon* holding and the need for establishing precedent that would allow for long term judicial economy should have compelled the Fourth Cicuit to invalidate the *Hill* district court holding in favor of the victims of hiring discrimination.[166] Although invalidation of the finding in favor of the job applicants would force the applicants to pursue a second suit to gain redress on the discrimination claim, the *Hill II* court would have established precedent that effectively would introduce judicial economy into class actions in the Fourth Circuit by demanding a stricter showing of common questions of law and fact between the named plaintiffs and the class which the plaintiffs seek to represent.[167] The Fourth Circuit's permitting of postjudgment intervention of an adequate named plaintiff fails to address the immediate issue of the proper scope of class actions.[168] In light of the restrictions placed on Title VII class actions, postjudgment intervention of an adequate plaintiff to remedy a defect in representation appears inadequate as a means of achieving certification of a class alleging across-the-board discrimination.[169]

ROBERT S. PARKER

B. *Virginia Nonsuit Venue Restriction*

Nonsuit is a procedural device that terminates a judicial proceeding without adjudicating issues on the merits.[1] In Virginia, the plaintiff may

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[164] *See supra* text accompanying note 24 (*Hill II* interpretation that *Rodriguez* does not abolish across-the-board discrimination class actions but merely requires that at least one named plaintiff adequately represent each portion of the class by suffering same injury as that portion).

[165] *See* Hill v. Western Electric Co. (*Hill II*), 672 F.2d 381, 391 (4th Cir. 1982). The *Hill II* court considered that one reason to allow intervention of adequate representatives of applicants was that the entire class had been successful on merits in the district court. *Id.*

[166] *See supra* text accompanying notes 159-60 (*Rodriguez* and *Falcon* holdings promote judicial economy by allowing only class actions involving common questions of law and fact); *supra* text accompanying notes 56-67 (*Hill II* majority found reinstatement of vacated finding in favor of discriminated applicants permissible).

[167] *See supra* text accompanying notes 159-60 (stricter commonality requirements will solve class action problems of endless litigation and multiplication of claims); *supra* text accompanying note 55 (denied intervenors could pursue class claim in separate class action); 42 U.S.C. § 2000e (initiation of a grievance by a class member suspends statute of limitations under equal opportunity statutes).

[168] *See supra* text accompanying notes 149-52 (*Hill II* court failed to address all rule 23 prerequisites to class action); *supra* note 7 (rule 23).

[169] *See supra* notes 149-52 (*Hill II* court failed to address all rule 23 requirements to class actions).

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[1] McColgan v. Jones, Hubbard, & Donnell, Inc., 11 Cal.2d 243, _____, 78 P.2d 1010, 1011 (1938). The term "nonsuit" applies to a dismissal of an action due to the plaintiff's

take one nonsuit as a matter of right[2] before the fact-finder retires to

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failure to move forward with his case. *See* BURKS, PLEADING & PRACTICE, § 336, at 64 (4th ed. 1952). At common law, the plaintiff could take a nonsuit at any time before the verdict. *See* Barret v. Virginia Ry. Co., 250 U.S. 473, 476 (1919). A plaintiff suffers a nonsuit when he finds himself unprepared to maintain his cause. *See* Mallory v. Taylor, 90 Va. 348, 349, 18 S.E. 438, 439 (1893). This inability to maintain his cause results when court action or witness' testimony surprises the plaintiff. *See* Cahoon v. McCulloch, 92 Va. 177, 180, 23 S.E. 225, 226 (1894).

A nonsuit is either voluntary or involuntary. *See* Washburn v. Allen, 77 Me. 344, 346 (1885). A nonsuit is voluntary when granted upon the plaintiff's own motion. *Id.* A nonsuit is involuntary when demanded by order of the court. *Id.* A nonsuit, voluntary or involuntary, is any judgment of dismissal when the court has left the merits of the case untouched. Anderson v. Asphalt Distrib. Co., 55 S.W.2d 688, 692 (Mo. 1932).

The common-law nonsuit was similar to several other procedural orders by which the plaintiff's action came to an end before judgment. *See generally* Head, *The History and Development of Nonsuit*, 27 W. VA. L.Q. 20 (1920). A *non prosequitur* is a dismissal judgment that a court enters against a plaintiff because of his failure to continue with the suit. *See* Steele v. Beaty, 215 N.C. 680, 683, 2 S.E.2d 854, 856 (1939). A *non prosequitur* is like a nonsuit in its practical effect. *See* Hewitt v. International Shoe Co., 110 Fla. 37, _____, 148 So. 533, 536 (1933). A *nolle prosequi* is an agreement not to proceed further in the action in reference to a person or a cause of action. *See* Steele, 215 N.C. at 682, 2 S.E.2d at 856. The voluntary nonsuit generally has superceded the *nolle prosequi*. *Id.* A *retraxit*, alternatively, is an open and voluntary renunciation of a claim in court. *See* Virginia Concrete Co. v. Board of Supervisors, 197 Va. 821, 826, 91 S.E.2d 415, 419 (1956). A *retraxit* operates as a dismissal of the cause with prejudice. *See* Savery v. Mosely, 182 Okla. 133, _____, 76 P.2d 902, 904 (1938).

State legislators statutorily have recognized the nonsuit or similar dismissal procedures. *See, e.g.*, ILL. ANN. STAT. ch. 110, § 52 (Smith-Hurd 1976); N.Y. CIV. PRAC. R. 3211.1 (McKinney 1970 & Supp. 1982); TEX. CIV. PRO. R. 164 (1981). Although states now have codified common-law nonsuit, the application and effect of the different nonsuit procedures vary. *Compare* CAL. CIV. PROC. CODE § 581 (1976 & Supp. 1981) (plaintiff may not take nonsuit once trail has commenced) *and* OKLA. STAT. ANN. tit. 12, § 683 (West 1978) (plaintiff may not take nonsuit after submission of case to jury) *with* VA. CODE § 8.01-380(A) (1977) (plaintiff may not take nonsuit after court sustains motion to strike or before jury retires to deliberate). *See generally* Sweeney, *Nonsuit in Virginia*, 52 VA. L. REV. 751 (1966); Note, *The Voluntary Nonsuit in Virginia*, 7 WM. & MARY L. REV. 357 (1966) [hereinafter cited as *Voluntary Nonsuit*].

The Federal Rules of Civil Procedure also recognize a variation of the common-law nonsuit privilege. FED. R. CIV. P. 41. The term "dismissal" replaces nonsuit in the federal court system. *Id.* Under rule 41, the plaintiff may move for a voluntary dismissal, which, if granted, is generally without prejudice. FED. R. CIV. P. 41(a)(1). The district judge has the power to order an involuntary dismissal for want of prosecution by the plaintiff, or for the failure of the plaintiff to comply with the rules of the court. FED. R. CIV. P. 41(b). An order of involuntary dismissal normally precludes further adjudication. *Id.* An involuntary dismissal is a drastic sanction that a court should exercise only in extreme situations. *See* Mann v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 488 F.2d 75, 76 (5th Cir. 1973); Syracuse Broadcasting Corp. v. Newhouse, 271 F.2d 910, 914 (2d Cir. 1959). *See generally* 5 J. MOORE, J. LUCAS, & J. WICKER, MOORE'S FEDERAL PRACTICE ¶¶ 41.01-41.17 (2d. 1982) [hereinafter cited as MOORE]; 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 2361-2376 (1971) [hereinafter cited as WRIGHT & MILLER]; Comment, *The Demise (Hopefully) of an Abuse: The Sanction of Dismissal*, 7 CAL. W. L. REV. 438 (1971).

[2] *See* VA. CODE § 8.01-380(B) (1977). Under the Virginia nonsuit statute, the plaintiff's right to nonsuit is absolute. *See* Joseph v. Blair, 488 F.2d 403, 404 (4th Cir. 1976), *cert. denied*, 416 U.S. 955 (1974). Virginia, however, has retained the common-law rule that for-

consider the verdict.[3] A Virginia nonsuit judgment does not preclude a subsequent action for the same cause so long as the applicable statute of limitation has not run.[4] Virginia law recognizes that statutes of limitation are obstacles to the free exercise of the nonsuit privilege.[5] To guarantee the availability of the nonsuit privilege in the face of applicable statutes of limitation, the Virginia legislature has enacted a toll-

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bids a nonsuit if prejudicial to the defendant. Thomas Gemmell, Inc. v. Svea Fire & Life Ins. Co., 166 Va. 95, 98, 184 S.E. 457, 458 (1936); Kemper v. Calhoun, 111 Va. 428, 431, 69 S.E. 358, 359 (1910). Further, a plaintiff cannot suffer a nonsuit after the court has granted a motion to strike the evidence or after the jury retires to consider its verdict. VA. CODE § 8.01-380(A) (1977). Similarly, a plaintiff may not nonsuit an action without the consent of any adverse party who has filed a counterclaim, cross-claim, or third-party claim arising out of the same transaction or occurrence. VA. CODE § 8.01-380(C) (1977).

[3] The Virginia nonsuit statute provides in part:

> A party shall not be allowed to suffer a nonsuit as to any cause of action or claim, or any other party to the proceeding, unless he does so before a motion to strike the evidence has been sustained or before the jury retires from the bar or before the action has been submitted to the court for decision. After a nonsuit, no new proceeding on the same cause of action or against the same party shall be had in any court other than that in which the nonsuit was taken, unless that court is without jurisdiction, or other good cause be shown for proceeding in another.

VA. CODE § 8.01-380(A) (1977). *See generally* Sweeney, *supra* note 1, at 751; *Voluntary Nonsuit*, *supra* note 1, at 357.

The nonsuit privilege lies exclusively in the plaintiff's control and is entirely voluntary. *See* BURKS, *supra* note 1, § 336, at 646. Virginia, therefore, has no compulsory nonsuit for situations in which the plaintiff fails to present a prima facie case. *Id.* The voluntary nature of the Virginia nonsuit procedure evolved from the common-law belief that although a court could encourage a nonsuit, a court could not force a plaintiff to accept a nonsuit. *See* Ross v. Gill, 1 Va. (1 Wash.) 114, 116-17 (1792). *See generally*, Sweeney *supra* note 1, at 755-58.

[4] *See* Alderman v. Chrysler Corp., 480 F. Supp. 600, 603 (E.D. Va. 1979) (effect of nonsuit is to end pending litigation without prejudice to either party). In *Alderman*, the plaintiff brought an action in state court for the wrongful death of her husband resulting from a car accident. *Id.* at 602. During the state trial, the plaintiff took a voluntary nonsuit pursuant to the Virginia nonsuit procedure. *Id.* The plaintiff then brought suit in federal court for the same cause of action. *Id.* at 603. The *Alderman* court concluded that a judgment of nonsuit does not operate as a bar to subsequent action between the same parties on the same cause of action. *Id.* (dicta); *see also* Popp v. Archbell, 203 F.2d 287, 289 (4th Cir. 1953) (later suit in federal diversity action is not precluded by nonsuit judgment in state court); Thomas Gemmell, Inc. v. Svea Fire & Life Ins. Co., 166 Va. 95, 97, 184 S.E. 457, 458 (1936) (later suit in state court is not precluded by earlier nonsuit judgment in state court).

[5] *See* VA. CODE § 8.01-229(E)(3) (1977). In order to defeat the potentially severe effect statutes of limitation could have upon the nonsuit privilege, the Virginia statute tolls the running of the statute of limitation if the plaintiff recommences his action within six months. *See id.*; *see also infra* text accompanying notes 56-58 (effect of unrestrained statute of limitation on Virginia nonsuit procedure). The remedial character of the statute requires a liberal construction to effectuate its purpose. *See* Woodson v. Commonwealth Util., Inc., 209 Va. 72, 74-75, 161 S.E.2d 669, 670 (1968) (tolling provision operates to defeat statute of limitation defense). The tolling provision protects the rights of action for plaintiffs who have been unable to adjudicate on the merits. *See* Atkins v. Schmultz Mfg. Co., 435 F.2d 527, 530 (4th Cir. 1970) (equitable considerations behind tolling provision permit litigation in face of statute of limitation defense), *cert. denied*, 402 U.S. 932 (1971).

ing provision.[6] This statutory provision tolls the running of the statute of limitation if a nonsuited plaintiff recommences his action within six months of the original nonsuit.[7] At the same time, the Virginia nonsuit statute seeks to minimize the risks of abuse that accompany the nonsuit procedure by restricting the venue of subsequent actions on the same cause to the court that granted the nonsuit.[8]

Soon after the Supreme Court's decision in *Erie Railroad Co. v. Tompkins*,[9] federal courts sitting in diversity actions generally applied state substantive law and federal procedural law.[10] Categorization of state limitations statutes as either substantive or procedural, however, has been a difficult task for federal courts.[11] The Supreme Court

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[6] *See* VA. CODE § 8.01-229(E)(3) (1977) (Virginia nonsuit tolling provision).

[7] *See id.*

[8] *See id.* § 8.01-380(A) (1977); *see also supra* note 3 (citing statute). The statutory scheme is consistent with the common-law rule forbidding nonsuits that would be prejudicial to the rights of the defendant. *See supra* note 2 (common-law prohibition against nonsuit orders prejudicial to defendants).

[9] 304 U.S. 64 (1938). In *Erie*, the plaintiff, Tomkins, sustained injuries when struck by an attachment of a train while he was walking alongside railroad tracks. *Id.* at 69. Tompkins brought a negligence action against the railroad, basing jurisdiction upon diversity of citizenship. *Id.* Tompkins prevailed in the district court and upon appeal. *Id.* at 70. The issue before the Supreme Court was whether to apply state or federal law in determining the railroad's liability. *Id.* at 71. State law would absolve the railroad, while federal law would impose liability. *Id.* at 70. The Supreme Court held that state law determined the substantive question of the standard of care owed to Tompkins. *Id.* at 79-80. *See generally* Younger, *Observation: What Happened in* Erie, 56 TEX. L. REV. 1011 (1978).

[10] *See* Mayer v. Puryear, 115 F.2d 675, 678 (4th Cir. 1940) (*Erie* required application of Virginia automobile negligence standard in federal diversity action); Equitable Life Assurance Soc'y v. MacDonald, 96 F.2d 437, 438 (9th Cir. 1938) (federal district court applied Washington substantive law in diversity action). *But see infra* notes 11, 12, 35, 37 & 38 (evolution of *Erie* doctrine away from substantive-procedural distinction); note 76 (application of automatic test does not determine application of state law in diversity cases).

In *Erie*, the Supreme Court concluded that the unwritten common law of a state controlled in diversity cases. *Id.* at 78. Federal district courts have diversity jurisdiction over controversies between citizens of different states and between a state or its citizens and foreign states or their citizens. 28 U.S.C. § 1332 (1976). Prior to *Erie*, federal courts were free to determine state diversity cases by using federal common law. Swift v. Tyson, 41 U.S. (16 Pet.) 166, 170-71 (1842). The *Erie* holding expressly overturned the rule enunciated in *Swift*. 304 U.S. at 79-80. The *Erie* Court determined that the *Swift* Court incorrectly interpreted the Rules of Decision Act by unconstitutionally invading states' rights. *Id.* at 80. The Rules of Decision Act requires federal courts to apply state law except when the Constitution or any act of Congress requires otherwise. 28 U.S.C. § 1652 (1976). *See generally* Clark, *State Law in Federal Courts: The Brooding Omnipresence of* Erie v. Tompkins, 55 YALE L. J. 267 (1946); Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693 (1974); Friendly, *In Praise of* Erie—*And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964).

[11] *See* Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945). In *Guaranty Trust*, the Supreme Court first considered the *Erie* analysis in reference to state statutes of limitation. *See id.* The Court held that federal diversity courts must apply state law if the application of federal law would lead to a substantially different result from the application of state law. *Id.* at 109. This outcome-determinative test required the application of a state statute of

therefore has instructed federal courts sitting in diversity actions to apply state statutes that are integral parts of the policies that state statutes of limitation serve.[12] In *Yarber v. Allstate Insurance Co.*,[13] the Fourth Circuit considered whether the Virginia venue restriction was applicable in a federal diversity action.[14]

In *Yarber*, Regina Yarber brought a state action in a Virginia court against Allstate Insurance Company (Allstate).[15] The action resulted from a physical examination conducted by Robert Miller.[16] Upon discovering that Miller was not a licensed practitioner, the plaintiff brought charges of assault, battery, and gross negligence resulting in personal injury.[17] The Virginia court granted the plaintiff's motion for a nonsuit in the state action.[18] The plaintiff then filed a complaint in the

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limitation in *Guaranty Trust*. *Id.* at 108-09. The Court noted that the characterization of state statutes of limitation as substantive or procedural was immaterial. *Id.* at 109. The proper analysis turned upon the existence or nonexistence of decisional variation between a federal and state approach. *Id. See generally* Note, *Commencement Rules and Tolling Statutes of Limitation in Federal Court*, 66 CORNELL L. REV. 842 (1981) [hereinafter cited as *Commencement Rules and Tolling Statutes*].

Following *Guaranty Trust*, the Supreme Court considered the applicability of tolling provisions to state limitation doctrine in federal diversity cases. *See* Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949). In *Ragan*, the Court considered whether a Kansas commencement provision was applicable in federal diversity action. *Id.* at 531-34. Since the commencement provision would have worked with the statute of limitation to bar an action in state court, the Supreme Court affirmed a circuit court order dismissing the federal action as time-barred. *Id.* at 532-34. The Court concluded that a statute providing that an action is commenced when summons is served on the defendant is an integral part of the Kansas statute of limitation. *Id.*

Mild controversy existed concerning the continued validity of *Ragan* in the face of subsequent Supreme Court decisions. *See* Hanna v. Plumer, 380 U.S. 460, 474-78 (1965) (Harlan, J., concurring) (*Ragan* is no longer good law); *see also* Sylvestri v. Warner & Swasey Co., 398 F.2d 598, 605 (2d Cir. 1968) (status of *Ragan* is far from certain). The Supreme Court, however, recently reaffirmed *Ragan*. Walker v. Armco Steel Corp., 446 U.S. 740, 748-53 (1980). In *Walker*, the Court upheld an Oklahoma statute similar to the Kansas statute in *Ragan*, and concluded that *Walker* and *Ragan* were indistinguishable. Id. at 748, 753.

[12] *See* Walker v. Armco Steel Corp., 446 U.S. 748, 751-52 (Oklahoma commencement statute deemed to be integral part of policies served by state statute of limitations by circuit court and then applied by Supreme Court). Since the federal courts are more familiar with state law than the Supreme Court, the *Walker* Court implied that a federal court's conclusion that a state statute is an integral part of the policies served by the statute of limitation creates a presumption for that statute's application. *See id.* at 748.

[13] 674 F.2d 232 (4th Cir. 1982).

[14] *Id.* at 234-37.

[15] *Id.* at 233. Yarber was among four plaintiffs who sought damages from Allstate in the state action. *Id.*

[16] *Id.* Miller was a named defendant along with Allstate Insurance Company and Physical Measurements, Inc. *Id.* The physical examination was a prerequisite to employment with the firm, and the examination was part of the employment application process. *Id.*

[17] *Id.*

[18] *Id.*

United States District Court for the Eastern District of Virginia.[19]

Allstate moved to dismiss the federal court action on two grounds.[20] First, Allstate contended that the district court lacked subject matter jurisdiction to hear the case.[21] Allstate claimed that the venue restriction operated to deprive the federal courts of jurisdiction of any nonsuited claim.[22] Second, Allstate argued that the applicable statute of limitation on Yarber's claim had run, precluding adjudication in federal court.[23] Yarber responded that the Virginia tolling provision, in conjunction with the six-month grace period provided by Virginia statute, allowed the federal action.[24] The six-month extension operates only if the statute of limitation has run in the interim.[25] According to Yarber, the commencement of the state action tolled the running of the state statute of limitation.[26] Yarber argued that because she filed the action in federal court within six months of the nonsuit, Allstate's statute of limitation argument was invalid.[27] Allstate, however, argued that the operation of the six-month extension was available only in the court in which the state judge granted the nonsuit.[28] Without the benefit of the six-month grace period, the running of the statute of limitation prohibited the federal action.[29] The federal district court rejected Allstate's jurisdictional and statute of limitation defenses.[30] Allstate appealed the interlocutory order denying its motion to dismiss the action to the Fourth Circuit Court of Appeals.[31]

In *Yarber*, the Fourth Circuit discussed several decisions by the

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[19] *Id.* at 233-34. The plaintiff based jurisdiction on diversity of citizenship. *Id.*; *see supra* note 10 (discussion grant of federal jurisdiction based on diversity of citizenship).

[20] 674 F.2d at 234.

[21] *Id.*

[22] *Id.* at 234 n.3.

[23] *Id.* at 234. The Virginia statute of limitation requires the commencement of an action for personal injury within two years after the cause of action accrues. VA. CODE § 8.01-243(A) (1977).

[24] 674 F.2d at 234; *see also supra* notes 5 & 6 (citing and discussing tolling provision and six-month extension).

[25] VA. CODE § 8.01-229(E)(3) (1977); *see also supra* note 6 (citing statute that grants extension).

[26] 674 F.2d at 234.

[27] *Id.*

[28] *Id.*; *see also supra* note 3 (venue restriction).

[29] 674 F.2d at 234.

[30] *Id.* at 234 n.3. The district court rejected the jurisdictional argument because state venue restrictions cannot deprive a federal court of its diversity jurisdiction. *Id.*; *see* Popp v. Archbell, 203 F.2d 287, 288 (4th Cir. 1953) (venue restriction cannot defeat federal jurisdiction). The district court denied the statute of limitation defense, noting that the six-month grace period provided by Virginia statute had not expired when the plaintiff filed the federal action. 674 F.2d at 234. According to the district court, the venue restriction did not operate in the diversity action. *Id.*

[31] 674 F.2d at 234. An interlocutory order determines an immediate issue arising during the course of a pending litigation that does not dispose of the case, but requires further

United States Supreme Court considering the applicability of state statutes in federal diversity actions.[32] Relying on these Supreme Court decisions, the *Yarber* court developed a three-step analysis for determining whether the state nonsuit limitations apply in federal diversity actions.[33] First, the *Yarber* court noted that under the Supreme Court's decision in *Hanna v. Plumer*,[34] state law cannot prevail if the state law conflicts with a federal rule of civil procedure.[35] The *Hanna* displacement

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court action resolving the entire controversy. *See* Witt v. Witt, 204 S.W.2d 612, 614 (Tex. Civ. App. 1947).

The Interlocutory Appeals Act, 28 U.S.C. § 1292 (1976), permitted the defendant's appeal. 674 F.2d at 234. The Interlocutory Appeals Act grants discretion to the courts of appeal to review an interlocutory order if the federal district court notes that the order involves a controlled question of law that presents substantial ground for differing opinions. *See* 28 U.S.C. § 1292(b) (1976). An immediate appeal from the order may promote judicial economy by advancing the termination of the proceeding. *See id.*

[32] 674 F.2d at 234-37; (citing Walker v. Armco Steel Corp., 446 U.S. 740 (1980); Hanna v. Plumer, 380 U.S. 460 (1965); Byrd v. Blue Ridge Rural Elec. Coop., Inc. 356 U.S. 525 (1958); Guaranty Trust Co. v. York, 326 U.S. 99 (1945)). The Fourth Circuit summarily dismissed the defendant's jurisdictional objection. 674 F.2d at 234 n.3. The *Yarber* court decided that the district court correctly rejected the defendant's jurisdictional challenge. *Id.* The court concluded that the Fourth Circuit's decision in Popp v. Archbell, 203 F.2d 287 (4th Cir. 1953), effectively dismissed the defendant's jurisdictional objection. 674 F.2d at 234 n.3; *see* 203 F.2d at 288 (venue restriction could not defeat federal diversity jurisdiction); *see also supra* text accompanying notes 21 & 22 (describing Allstate's contention that venue restriction prevented Fourth Circuit from asserting jurisdiction); *infra* notes 118-23 and accompanying text (extended discussion of *Popp*).

[33] 674 F.2d at 235. The test that the *Yarber* court announced is actually a two-part inquiry. *Id.* Part one presents two questions. *Id.* The first question is whether a federal procedural rule requires pre-emption of the state statute. *Id.* The second question is whether a countervailing federal interest necessitates the displacement of the state statute. *Id.* The second part of the *Yarber* analysis considers the relationship between the state statute and the policies that the state statute of limitation serves. *Id.* The *Yarber* court, however, presented the analysis in three parts. *Id.*

[34] 380 U.S. 460 (1965).

[35] 674 F.2d at 235. In *Hanna v. Plumer*, the plaintiff brought a diversity action for injuries received in an automobile accident. Hanna v. Plumer, 380 U.S. 460, 461 (1965). The plaintiff served process by leaving the complaint and summons with the defendant's spouse at the defendant's home. *Id.* The service was effected pursuant to federal procedure. *See* FED. R. CIV. P. 4(d)(1). The relevant state procedure require in-hand service of process. 380 U.S. at 462. The issue in *Hanna* was the validity of rule 4(d)(1) of the Federal Rules of Civil Procedure. *Id.* at 461; *see* FED. R. CIV. P. 4(d)(1) (service of process permitted by leaving copy of summons and complaint at party's dwelling with person of suitable age and discretion).

The *Hanna* court distinguished between federal judge-made rules and federal statutory rules. *Id.* at 470. In determining the validity of federal judge-made rules, courts should consider *Erie*'s twin aims of avoidance of forum shopping and inequitable administration of the laws in light of *Guaranty Trust*'s outcome-determinative test. *Id.* at 468 (modified outcome-determinative test); *see supra* notes 9-11 (discussing development of *Erie* doctrine including *Guaranty Trust*'s outcome-determinative test). The Supreme Court, however, determined that the Constitution and the Rules Enabling Act controlled the applicability of the Federal Rules of Civil Procedure in federal diversity cases. 380 U.S. at 470-71.

The Rules Enabling Act (the Act) empowers the Supreme Court to prescribe general

principle will operate only when a state statute directly conflicts with a federal rule.[36] Second, state law cannot control if the statute conflicts with a powerful countervailing federal interest.[37] Third, once the nonsuit procedure satisfies the first two conditions, the nonsuit procedure should apply if the statute has an integral relationship to the policies that the Virginia statute of limitation serves.[38]

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rules for the practice and procedure of federal courts in civil actions. 28 U.S.C. § 2072 (1976). The Act authorizes the Rules Advisory Committee to promulgate the Federal Rules of Civil Procedure. *See* Edmunds, *The New Federal Rules of Civil Procedure*, 4 J. MAR. L. Q. 291, 292 (1939). If a rule regulates procedure, then the rule falls within the scope of the Rules Enabling Act. *See* Sibbach v. Wilson & Co., Inc., 312 U.S. 1, 14 (1941) (procedure is judicial process for enforcing rights and duties recognized by substantive law). The *Hanna* Court concluded that rule 4(d)(1) did fall within the scope of the Act. 380 U.S. at 463-64. The Court further determined that the federal rule did not transgress federal constitutional bounds. *Id.* When a valid federal rule of procedure directly conflicts with a state statute, the federal procedural rule therefore will prevail. *Id.* at 460, 474. *See generally* McCoid, Hanna v. Plumer: *The* Erie *Doctrine Changes Shape*, 51 VA. L. REV. 884 (1965); Stason, *Choice of Law Within the Federal System:* Erie v. Hanna, 52 CORNELL L. Q. 377 (1967).

[36] Hanna v. Plumer, 380 U.S. at 470, 474. The displacement principle refers to the preemptory power the Federal Rules of Civil Procedure enjoy when a rule conflicts directly with a state statute. *Id.* at 473-74; *see supra* note 35 (basis for *Hanna* displacement principle).

[37] 674 F.2d at 235. In Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525 (1958), the Supreme Court adopted a balancing test to decide between conflicting state and federal interests in the absence of an applicable procedural rule. *Id.* at 538. In *Byrd*, a South Carolina state rule required that the judge determine a significant factual issue concerning the defendant's negligence in a workmen's compensation action. *Id.* at 534. The Supreme court held that such a determination necessarily fell within the confines of the jury's fact-finding function in federal diversity cases. *Id.* at 538. The Court determined that the state rule could not disrupt "the essential character or function of a federal court of the federal court system." *Id.* at 539. The Court further concluded that strong federal policy considerations argue against allowing state rules to alter the relationship between the judge and jury in the federal courts. *Id.* at 538.

[38] 674 F.2d at 235; *see* Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530, 534 (1949). In *Ragan*, the Court suggested that for the purposes of initiating the running of the statute of limitation, state commencement rules and not rule 3 of the Federal Rules of Civil Procedure, control in federal actions based on diversity of citizenship. *Id.* at 533; *see* FED. R. CIV. P. 3 (manner of commencing and filing federal action). In *Ragan*, the plaintiff brought his action within the Kansas two-year statute of limitation. 337 U.S. at 531. The defendant contended that the statute of limitation precluded the diversity action. *Id.* Under the Kansas statute, an action commenced for the purpose of tolling the statute of limitation when the defendant was served. *Id.* The plaintiff failed to serve the defendant until after the statute of limitation had run. *Id.* Since the statute was an integral part of the policies that the state statute of limitation served, the Court applied the Kansas statute, consequently precluding plaintiff's cause of action. *Id.* at 534.

After *Ragan*, courts followed one of two courses. First, courts uniformly applied state commencement procedure. *See, e.g.*, Murphy v. Citizens Bank, 244 F.2d 511, 512 (10th Cir. 1957) (application of New Mexico statute recognizing need for good faith in filing of action and due diligence in issuance of process in order to toll statute of limitation); Hagy v. Allen, 153 F. Supp. 302, 305 (E.D. Ky. 1957) (application of Kentucky statute recognizing need for good faith in issuance of process). Second, courts distinguished *Ragan* by finding that the procedure was not an integral part of state limitation policy. *See, e.g.*, Wright v.

In applying this three-part test to the facts in *Yarber*, the Fourth Circuit first considered whether the *Hanna* displacement principle applied.[39] The *Yarber* court observed that the Virginia venue restriction and tolling provision do not conflict directly with any federal procedural rule.[40] In a recent decision, *Walker v. Armco Steel Corp.*,[41] the Supreme Court held that commencing a federal action alone does not displace state statutes of limitation or tolling provisions.[42] Relying on *Walker* and the absence of any conflicting rules of procedure, the *Yarber* court held that the *Hanna* displacement principle did not apply to displace the Virginia venue restriction or tolling provision.[43]

Having established that the state law did not conflict with the Federal Rules of Civil Procedure, the *Yarber* court next considered whether a powerful countervailing federal interest existed.[44] The Fourth Circuit noted that a pressing countervailing concern could require the pre-emption of a state statutory provision even though the state law did not conflict directly with a federal procedural rule.[45] These federal concerns evolved in part from *Erie*'s twin aims of avoidance of forum shopping and inequitable administration of the law.[46] After the identification of such a federal interest, federal courts must weigh competing federal

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Lumbermen's Mut. Cas. Co., 242 F.2d 1, 2-3 (5th Cir.) (Louisiana statute declaring suit abandoned if no steps are taken to prosecute within five years is not integral part of policy served by statute of limitation), *cert. denied*, 354 U.S. 939 (1957); Glebus v. Filmore, 104 F. Supp. 902, 903 (D. Conn. 1952) (rule 3 applies for tolling of statute of limitation when no statute specifies point at which action commences); *see Commencement Rules and Tolling Statutes*, *supra* note 11, at 844; *see also* Walker v. Armco Steel Corp., 446 U.S. 740, 748-53 (1980) (reaffirming *Ragan*); Alonzo v. ACF Property Management, Inc., 643 F.2d 578, 581 (9th Cir. 1981) (federal rule 6(a) deemed inapplicable under *Ragan* rule); *supra* note 11 (further discussion of *Ragan*).

[39] 674 F.2d at 235; *see supra* note 36 (defining *Hanna* displacement principle).

[40] 674 F.2d at 235.

[41] 446 U.S. 740 (1980). In *Walker*, the Court addressed the claim that rule 3 is a generally pre-emptive federal tolling statute. *Id.* at 741; *see* FED. R. CIV. P. 3. *See generally* 2 MOORE, *supra* note 1, at ¶¶ 3.01-3.07; 1 WRIGHT & MILLER, *supra* note 1, at §§ 41-50.

[42] 446 U.S. at 750-51. The *Walker* Court conditioned the application of the *Hanna* analysis on a direct collision between the federal rule and state law. *Id.* at 749. In *Hanna*, the collision between rule 4(d)(1) and the state service requirement was unavoidable. Hanna v. Plumer, 380 U.S. at 470; *see supra* notes 35 & 36 (discussing *Hanna*). In *Walker*, however, rule 3 did not collide directly with the Oklahoma commencement statute. 446 U.S. at 752; *see* FED. R. CIV. P. 3. In determining that rule 3 was insufficiently broad to amount to a federal tolling provision, the *Walker* Court also found the *Hanna* displacement principle inapplicable. 446 U.S. at 749-50.

[43] 674 F.2d at 235-36.

[44] *Id.* at 235.

[45] *Id.* at 235-36; *see supra* note 37 (*Byrd* balancing test determines applicability of state statutes when no federal procedural rule directly conflicts).

[46] *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 74-78 (1938). The *Erie* goals of avoidance of forum shopping and inequitable administration of the laws are based on the theory that the application of federal common law would infringe upon state sovereignty, and the application of state procedural law would discourage uniformity in the federal judicial system.

and state policies to determine which will prevail.[47] The Fourth Circuit determined that state forum shopping concerns were not a factor in *Yarber*.[48] The court reasoned that forum shopping based solely upon the Virginia venue restriction was unlikely.[49] The *Yarber* court concluded that no other countervailing federal interest required the pre-emption of the Virginia venue restriction.[50]

After concluding that neither the Federal Rules of Civil Procedure nor pressing federal interests precluded the court from applying the Virginia nonsuit statute, the *Yarber* court examined the policies underlying Virginia's voluntary nonsuit procedure to determine whether the nonsuit provisions are integral parts of the policies that the Virginia statute of limitation serves.[51] The court noted that the Virginia nonsuit procedure protects the interests of the parties in litigation for several reasons.[52] First, the nonsuit procedure protects the plaintiff from many of the mischances of litigation.[53] Second, the nonsuit procedure protects the defendant from any undue prejudice that may result from an unre-

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Id. The Supreme Court has determined that the preservation of the relationship between judge and jury is a significant federal concern that pre-empts state statutes that operate against the federal concern. Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 538 (1958); *see supra* note 37 (discussion of *Byrd*). The Fourth Circuit has noted that the federal courts place great emphasis on the functioning of the federal system as a whole. Atkins v. Schmultz Mfg. Co., 435 F.2d 527, 533 (4th Cir. 1970), *cert. denied*, 402 U.S. 932 (1972). In Szantay v. Beech Aircraft Corp., 349 F.2d 60 (4th Cir. 1965), the Fourth Circuit concluded that countervailing federal considerations are explicit and numerous. *Id.* at 65. Included among these interests is a nonresident's right to adjudicate any cause in a convenient forum, free from any local bias. *Id.*

[47] Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 538 (1958); *see supra* note 46 (court-mandated federal concerns).

[48] 674 F.2d at 236. Forum shopping occurs when a party seeks a forum that is charitable to his cause of action or unfavorable to the adverse party's position. Rayco Mfg. v. Chicopee Mfg., 148 F. Supp. 588, 592 (S.D.N.Y. 1957). The *Yarber* court noted that federal forum shopping concerns militate against the displacement of the Virginia statutes in question. 674 F.2d at 236. The court observed that the failure to apply the venue restriction in the federal courts would make the existence of different rules in the state and federal jurisdictions a forum shopping factor. *Id.* at 236 n.7. This disparity would arise only after the plaintiff had suffered a nonsuit in the original state action. *Id.* The application of the Virginia venue restriction therefore would avoid what the *Yarber* court called secondary forum shopping. *Id.* at 237.

[49] 674 F.2d at 236 n.7. Forum shopping based upon the venue restriction after a nonsuit is unlikely because, before a party suffers a nonsuit, the venue restriction is too tenuous a factor to affect forum choice. *Id.*

[50] *Id.* at 236.

[51] *Id.* at 235-36; *see supra* notes 11 & 38 (significance of *Ragan* and *Walker* when determining applicability of state statutes of limitation).

[52] 674 F.2d at 236; *see supra* note 1 (Virginia nonsuit procedure protects plaintiff from mischances of litigation); note 2 (plaintiff may not take nonsuit if prejudicial to rights of defendant); notes 3 & 6 (statutes outlining Virginia nonsuit procedure).

[53] 674 F.2d at 236; *see supra* note 1 (mischance can occur when plaintiff is surprised by court action or witness' testimony).

stricted nonsuit privilege.[54] Finally, Virginia nonsuit procedure promotes judicial efficiency.[55]

The *Yarber* court noted that an unrestrained statute of limitation would frustrate the free exercise of the nonsuit privilege.[56] Generally, the statute of limitation has run by the time the need for a voluntary nonsuit arises.[57] Without some statutory scheme to offset a situation when statutes of limitation defeat the nonsuit privilege, the nonsuit procedure becomes a practical nullity.[58] The tolling and savings provisions are Virginia's response to the barrier that an unrestrained statute of limitation presents.[59] Speaking specifically to the venue restriction, the *Yarber* court reasoned that the restriction served to minimize the risk of abuse inherent in the tolling and savings provisions.[60] In *Yarber*, the Fourth Circuit concluded that the tolling and savings provisions and the venue restriction are integral parts of the policy that the statute of limitation serves, and therefore are binding on a federal court in a diversity case.[61] A failure to apply the venue restriction would circumvent the aims outlined in *Erie*.[62] The Fourth Circuit, therefore, held that the state statute of limitation applied and that nonsuiting plaintiffs in Virginia could avoid the running of the statute of limitation only by recommencing their actions in the same court and within the six-month grace period.[63] Applying these restrictions to the case before it, the *Yarber* court reversed the district court and remanded the case for dismissal on the grounds that Yarber's claims were time-barred.[64]

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[54] 674 F.2d at 236; *see supra* note 2 (plaintiff's right to nonsuit is absolute as long as nonsuit is not prejudicial to defendant).

[55] 674 F.2d at 236. The Virginia venue restriction limiting subsequent action on a previously nonsuited cause of action avoids secondary forum shopping. *Id.* at 236 n.7; *see supra* notes 48 & 49 (manner in which venue restriction minimizes secondary forum shopping). Since the venue restriction discourages forum shopping, the forum court may adjudicate efficiently a case with which the court is familiar. 674 F.2d at 236 n.7.

[56] 674 F.2d at 236.

[57] *Id.*

[58] *Id.* at 236-37.

[59] *Id.*; *see supra* note 5 (remedial function of nonsuit tolling provision and six-month grace period).

[60] 674 F.2d at 237; *see* VA. CODE § 8.01-380(A) (1977) (nonsuit venue restriction). The *Yarber* court concluded that the venue restriction minimizes the benefits of bringing a second action for the same cause. 674 F.2d at 237. The operation of the restriction prevents undue prejudice to the defendant. *Id.* at 236; *see supra* note 2 (nonsuit is prohibited if prejudicial to the defendant). The operation of the venue restriction prevents secondary forum shopping and consequently promotes judicial efficiency. 674 F.2d at 237.

[61] 674 F.2d at 237.

[62] *Id.* The *Yarber* court determined that the Virginia venue restriction is a statement of substantive law by the Virginia legislature. *Id.* In *Erie*, the Supreme Court required that federal courts apply state substantive law. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78-80 (1938); *see supra* notes 9-11, 38 (application of *Erie* doctrine to state statutes of limitation).

[63] 674 F.2d at 237.

[64] *Id.*

Relying on *Popp v. Archbell*,[65] the dissent claimed that the Virginia venue restriction could not limit federal diversity jurisdiction.[66] In *Popp*, the Fourth Circuit concluded that the intent of the Virginia nonsuit statute was to regulate practice and procedure in the court's of the state.[67] The Virginia legislature, however, did not intend the statute to defeat federal jurisdiction.[68] The *Yarber* dissent found the majority's distinction of *Popp* unpersuasive.[69] The *Yarber* dissent contended that the expeditious labelling of an issue as substantive rather than jurisdictional could not overcome the supremacy of federal legislation over a contrary state enactment.[70] The dissent concluded that the operation of the venue restriction has the practical effect of defeating federal jurisdiction, a result that *Popp* forbids.[71]

In *Yarber*, the Fourth Circuit presented an *Erie* analysis that was consistent with the dictates of *Erie* and other Supreme Court cases.[72] An *Erie* analysis, however, is not appropriate to determine the breadth of

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[65] 203 F.2d 287 (4th Cir. 1953); *see infra* note 118. (background of *Popp*).

[66] 674 F.2d at 238-39 (Murnaghan, J., dissenting). The Virginia nonsuit venue restriction cannot operate to divest a federal court of its jurisdiction. Popp v. Archbell, 203 F.2d at 290; *see* Markham v. City of Newport News, 292 F.2d 711, 716 (4th Cir. 1961) (state law cannot restrict or enlarge federal jurisdiction).

[67] 203 F.2d at 288. In *Popp*, the Fourth Circuit noted that the Virginia nonsuit statute merely limits the venue of any new action brought on any nonsuited cause of action. *Id.* The Fourth Circuit concluded that a venue statute can have no application to the federal courts. *Id.*

[68] *Id.*

[69] 674 F.2d at 234 n.3. The *Yarber* majority distinguished *Popp* in a single footnote. *Id.* After noting that *Popp* disposed of the jurisdictional objection, the *Yarber* court then attempted to distinguish *Popp* on the ground that no statute of limitation defense was at issue in *Popp*. *Id.* The majority contended that *Popp* was persuasive in dismissing the defendant's jurisdictional objection. *Id.* According to *Yarber*, the substantive statute of limitation defense should not fail, however, because the defendant's jurisdictional defense failed. *Id.*

[70] *Id.* at 239-41 (Murnaghan, J., dissenting). The *Yarber* dissent stated that the venue restriction directly conflicts with the grant of federal diversity jurisdiction. *Id.* at 239. A plaintiff can invoke federal diversity as long as the plaintiff meets the federal diversity requirements. *See* 28 U.S.C. § 1332 (1976); *see also supra* note 10. (federal diversity jurisdiction). Since the *Yarber* majority concluded that the venue restriction was applicable in diversity actions, the dissent argued that the majority's treatment of the venue restriction was inconsistent with *Popp*. *Id.* at 239.

[71] 674 F.2d at 239 (Murnaghan, J., dissenting).

[72] *See supra* notes 32-64 and accompanying text (Fourth Circuit's analysis for determining applicability of Virginia nonsuit venue restriction). The Fourth Circuit correctly applied Supreme Court standards by which federal courts must determine the applicability of state statutes in federal diversity actions. *Id.* The Fourth Circuit properly determined that the *Hanna* displacement principle was inapplicable to the facts in *Yarber*. *See supra* notes 34-36, 39-43 and accompanying text (Fourth Circuit's *Hanna* analysis in *Yarber*). In *Yarber*, the court determined that no federal rule was broad enough to pre-empt the Virginia statute. Yarber, 674 F.2d at 235. The *Yarber* court's reliance on Walker v. Armco Steel Corp., 446 U.S. 740 (1980), for the proposition that filing an action in federal court was not sufficiently broad to constitute a pre-emptive tolling provision disposed of the analysis re-

federal jurisdiction.[73] In determining jurisdiction, federal courts must look to the sources of their judicial power, which are contained in article III of the Constitution and congressional grants of jurisdiction.[74] State legislatures clearly have extensive power to create and define substantive rights,[75] and *Erie* generally ensures the application of state substan-

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quired by *Hanna*. *See supra* notes 41-43 and accompanying text (Fourth Circuit's approach consistent with *Walker*).

The Fourth Circuit in *Yarber* is also faithful to the modified outcome-determinative test. *See supra* notes 44-64 (Fourth Circuit's analysis in *Yarber*). The Rules of Decision Act is the basis for the outcome-determinative test. Kanouse v. Westwood Obstetrical & Gynecological Assoc., 505 F. Supp. 129, 130 (D.N.J. 1981); *see* 28 U.S.C. § 1652 (1976) (laws of states shall be regarded as rules of decision in actions in federal courts except when Constitution or acts of Congress provide otherwise). The modified outcome-determinative test enunciated in *Hanna v. Plumer* is the prevailing test that courts utilize today. 505 F. Supp. at 130; *see also supra* note 11 (*Guaranty Trust* outcome-determinative test); note 35 (*Erie* doctrine aims to avoid forum shopping and inequitable administration of laws). In *Yarber*, the Fourth Circuit properly determined that no countervailing federal interest required displacement of the venue restriction and deemed the venue restriction integral to the policies that the state statute of limitation serves. *See supra* notes 44-64 and accompanying text (Fourth Circuit analysis in *Yarber*). *But see infra* text accompanying notes 113-16 (application of venue restriction in *Yarber* is against basic philosophy behind *Erie* that adjudication in federal court should lead to same result as adjudication in state court).

[73] *See* Markham v. City of Newport News, 292 F.2d 711, 718 (4th Cir. 1961) (application of state statutes limiting venue to state courts would operate against basic tenet behind *Erie* that result should be the same whether action was brought in state or federal court); *see also* Grand Bahama Petroleum Co., Ltd. v. Asiatic Petroleum Corp., 550 F.2d 1320, 1325 (2d Cir. 1977) (federal jurisdiction based upon source of judicial power is basic to principle of federalism and not affected by *Erie* doctrine); Poitra v. DeMarrias, 502 F.2d 23, 27 (8th Cir. 1974) (citing *Markham*) (*Markham* language suggests that courts have obligation to exercise jurisdiction when statutory requisites are present), *cert. denied*, 421 U.S. 934 (1975); Stephenson v. Grant Trunk W. R.R. Co., 110 F.2d 401, 405 (7th Cir. 1940) (*Erie* does not govern jurisdictional matters).

In one respect, however, *Erie* does give the states a means of indirectly limiting federal jurisdiction. C. WRIGHT, LAW OF FEDERAL COURTS § 46 (3d ed. 1976) [hereinafter cited as FEDERAL COURTS]. If a state closes its courts to a particular class of claim or litigant, a federal court, in a diversity case, cannot entertain a suit on such a claim or by such a litigant. Meisner v. Reliance Steel & Aluminum Co., 273 F.2d 49, 50 (9th Cir. 1959); *see* Woods v. Interstate Realty Co., 337 U.S. 535, 538 (1949) (federal court in Mississippi has no jurisdiction to hear suit brought by foreign corporation when Mississippi statute bars suit in state court by corporation that has not qualified to do business in Mississippi); Angel v. Bullington, 330 U.S. 183, 191-92 (1947) (federal court sitting in North Carolina could not entertain suit for deficiency judgment arising out of Virginia mortgage when North Carolina statute precluded deficiency judgments). *See generally* Stewart, *The Federal "Door Closing" Doctrine*, 11 WASH. & LEE L. REV. 154 (1954).

[74] *See* Markham v. City of Newport News, 292 F.2d at 713; *see also infra* text accompanying notes 109-15 (discussion of *Markham* decision). Under article III of the Constitution, Congress determines the manner and conditions upon which judicial power shall be exercised. U.S. CONST. art. III, § 2. Congress has granted the courts of the United States original jurisidiction over specific causes of action. *See, e.g.*, 28 U.S.C. § 1331 (1976 & Supp. V 1981) (federal courts have jurisdiction over civil actions arising under Constitution); 28 U.S.C. § 1332 (1976) (federal diversity jurisdiction); 28 U.S.C. § 1446 (1976 & Supp. V 1981) (removal jurisdiction).

[75] *See* U.S. CONST. amend. X. The tenth amendment provides:

tive law in federal diversity actions.[76] State statutes, however, cannot limit or extend federal jurisdiction.[77] Similarly, state courts cannot enjoin a pending or impending federal action if the federal court properly could assert jurisdiction over the cause of action.[78] The Fourth Circuit, therefore, improperly applied the Virginia nonsuit venue restriction because the venue restriction had the practical effect of defeating federal jurisdiction.[79]

The supremacy clause of the Constitution recognizes the supremacy of the Constitution and the laws of the United States over state statutes and state constitutions.[80] The Constitution also grants the federal courts jurisdiction over controversies between citizens of different states while providing Congress with wide power to extend or to limit the scope of federal jurisdiction.[81] In the Judiciary Act of 1789, Congress required that actions brought under diversity of citizenship jurisdiction also satisfy a minimum amount in controversy requirement before federal courts can assume jurisdiction.[82] In *Yarber*, the plaintiff satisfied the

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> The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

Id.

[76] *See supra* notes 9 & 10 (*Erie* instructs that federal courts sitting in diversity are to apply state substantive law and federal procedural law). In *Hanna v. Plumer*, however, the Supreme Court noted that the application of an automatic, "litmus paper criterion" does not determine the applicability of state statutes in federal diversity actions. Hanna v. Plumer, 380 U.S. 460, 467 (1965). The Court concluded that federal courts sitting in diversity must decide between federal and state law by referring to the policies behind the *Erie* doctrine. *Id.*

[77] *See infra* notes 89-129 and accompanying text (Supreme Court and federal court cases that have refused to apply state statutes that limit federal jurisdiction).

[78] *See* Donnovan v. City of Dallas, 377 U.S. 408, 412-13 (1964) (state courts are without power to restrain in personam actions pending in federal court); *see also* General Atomic Co. v. Felter, 434 U.S. 12, 17 (1977) (reaffirming *Donovan*) (in personam actions in federal courts are not subject to abridgement by state court injunction regardless whether federal action is pending or prospective). *See generally* Hornstein & Nagle, *State Court Power to Enjoin Federal Judicial Proceedings*: Donovan v. City of Dallas *Revisited*, 60 WASH. U.L.Q. 1 (1982).

[79] *See supra* notes 72-78 and accompanying text; *infra* notes 80-129 and accompanying text (Constitution and case law indicate that state statutes cannot divest federal courts of their jurisdiction).

[80] U.S. CONST. art. VI. The supremacy clause of the United States Constitution provides:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding.

Id.

[81] *See* U.S. CONST. art. III § 2. Article III enumerates instances in which the district courts of the United States have original jurisdiction over a controversy and provides Congress with the right to determine the extent of judicial power. *See id.*

[82] *See* 28 U.S.C. § 1332 (1976) (district courts have original jurisdiction over civil ac-

statutory requirements the congressional grant of jurisdiction demands.[83] According to *Yarber*, jurisdiction was proper in the federal court, but the state venue restriction required an immediate dismissal.[84] As a practical matter, therefore, the venue restriction operated to defeat federal jurisdiction.[85] The substance of a state statute determines its constitutionality.[86] Since the Judiciary Act is a constitutionally valid extension of congressional power, the supremacy clause of the Constitution requires the pre-emption of the Virginia nonsuit venue restriction.[87] In *Yarber*, therefore, the Fourth Circuit should have asserted effective jurisdiction and then decided the case on its merits.[88]

The Supreme Court long has recognized that state statutes cannot enlarge or contract the limits of federal jurisdiction.[89] In *Railway Co. v. Whitton*,[90] the plaintiff brought a wrongful death action in Wisconsin state court against the defendant railroad company.[91] The plaintiff subsequently sought to remove his action to federal court pursuant to a federal statute and based on diversity of citizenship.[92] The defendant

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tions when amount in controversy exceeds $10,000 and is between citizens of different states).

[83] *See* Yarber, 674 F.2d at 233. Since the district court in *Yarber* assumed subject matter jurisdiction based on diversity of citizenship, the requisites of diversity jurisdiction must have been present. *See id.*

[84] *See id.* at 234 n.3, 237 (jurisdiction was proper but venue restriction operated to require dismissal of plaintiff's cause of action).

[85] 674 F.2d at 239-40 n.5 (Murnaghan, J., dissenting).

[86] *See* Robinson v. American Broadcasting Cos., Inc., 441 F.2d 1396, 1400 (6th Cir. 1971) (substance of statute governs its constitutionality); Scott v. Eastern Air Lines, Inc., 399 F.2d 14, 24 (3d Cir.) (choice of law governed by substance of action, not form of pleading), *cert. denied*, 393 U.S. 979 (1968).

[87] *See supra* note 80 (supremacy clause of Constitution declares the supremacy of Constitution and laws of United States over conflicting state enactments); *supra* notes 74 & 81 (Congress determines extent of judicial power under article III of Constitution); *see also* Gordon v. Longest, 14 U.S. (16 Pet.) 198, 200 (1842) (under Judiciary Act party can remove action to federal court based on diversity jurisdiction if amount in controversy and diversity of citizenship requirements are satisfied); Wood v. Wagnon, 6 U.S. (2 Cranch) 9, 9 (1804) (courts of United States shall not have jurisdiction over actions between different states unless record indicates that parties are of diverse citizenship).

[88] *See supra* notes 81-87 and accompanying text (supremacy clause requires preemption of nonsuit venue restriction since restriction has practical effect of defeating federal diversity jurisdiction).

[89] *See infra* notes 90-107 and accompanying text (analysis of Supreme Court cases that have held ineffective state efforts to limit jurisdiction of federal courts).

[90] 80 U.S. (13 Wall.) 270 (1871).

[91] *Id.* at 272. In *Whitton*, the wrongful death action arose when the defendant's locomotive struck the plaintiff's decedent. *Id.* at 275. The plaintiff alleged that the carelessness and culpable mismanagement of the railroad caused the death of the plaintiff's decedent. *Id.* at 272.

[92] *Id.* at 273. In *Whitton*, while the state action was pending, Congress passed an act allowing the removal of certain causes from state courts to the courts of the United States. *Id.* at 272. The act permitted either party to remove to federal court any state action as long as the requisites for federal diversity jurisdiction were present. *Id.* at 273.

claimed that the federal court did not have jurisdiction to hear this action because the applicable Wisconsin statute recognizing the remedy for the tort action also limited such actions to the state courts of Wisconsin.[93] In upholding federal removal jurisdiction, the *Whitton* Court held that any federal court within the same state having jurisdiction over the parties can enforce general rights recognized by state statutes.[94] The Court concluded that state legislation cannot limit the jurisdiction of the federal courts.[95]

Similarly, the Supreme Court has held ineffective state statutes that require foreign corporations[96] to forfeit their right to diversity jurisdiction as a prerequisite of conducting business in that state.[97] In *Insurance Co. v. Morse*,[98] the defendant insurance company sought to remove a Wisconsin state action to federal court.[99] In order to qualify as a foreign corporation for the purpose of conducting business in Wisconsin, a Wisconsin statute required that foreign corporations waive their right of removal to federal court any state action arising from the corporation's business within the state.[100] The Supreme Court of Wisconsin determined that the state statute precluded the removal of the state action.[101] The United States Supreme Court however reversed that determination.[102] Under article III of the Constitution, the *Morse* Court noted that Congress is largely responsible for regulating the jurisdiction of the federal courts.[103] In the Judiciary Act, Congress provided litigants the right to

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[93] *Id.* at 279-80.

[94] *Id.* at 286.

[95] *Id.*; *see also* Tennessee Coal Co. v. George, 233 U.S. 354, 359-60 (1914) (state statute limiting cause of action to state court may not limit jurisdiction of sister state unless enforcement of cause of action depends on adjudication in specified tribunal); Atchison, Topeka and Santa Fe Ry. Co. v. Sowers, 213 U.S. 55, 67, 70 (1909) (New Mexico statutory provision restricting venue of personal injury actions to its courts was held ineffective since personal injury actions are transitory and maintainable if court can assume jurisdiction over subject matter and persons).

[96] *See In re* Grand Lodge A.O.U.W., 110 Pa. 613, 1 A. 582 (1885). A foreign corporation, when used in a state statute, is a business organization not created by the laws of such state. *Id.* at 616-17, 1 A., at 584-85.

[97] *See infra* notes 99-107 and accompanying text (discussing *Insurance Co. v. Morse*); *see also* Terral v. Burke Construction Co., 257 U.S. 529, 532 (1922) (Supreme Court held ineffective Arkansas statute that provided for revocation of foreign corporation's license to do business in state because corporation resorts to federal courts); Barron v. Burnside, 121 U.S. 186, 200 (1887) (Supreme Court held void Iowa statute that required foreign corporation to stipulate that foreign corporation would not remove actions into federal court as condition of transacting business in state).

[98] 87 U.S. (20 Wall.) 445 (1874).

[99] *Id.* at 446. In *Morse*, the defendant sought to remove the cause of action pursuant to § 12 of the Judiciary Act. *Id.* Under § 12, either party may remove a state action to federal court as long as the requisites of diversity are present. *Id.* at 446-47.

[100] *Id.* at 445-56.

[101] *Id.* at 447.

[102] *Id.* at 458.

[103] *Id.* at 453; *see supra* notes 74, 81 (article III of Constitution).

remove state actions to federal court as long as the requisites of diversity jurisdiction are present.[104] In *Morse*, the defendant insurance company met the requirements necessary to invoke federal jurisdiction.[105] The *Morse* Court concluded that while Wisconsin is free to regulate its own affairs, its statutes are subordinate to the Constitution and laws of the United States.[106] Accordingly, the *Morse* Court concluded that the Wisconsin statute could not extend or limit the jurisdiction of the federal courts.[107]

The *Yarber* decision is inconsistent with Fourth Circuit cases that have considered state venue restrictions in the context of federal diversity jurisdiction.[108] In *Markham v. City of Newport News*,[109] the Fourth

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[104] *Id.* at 454. Today, a defendant can remove a state action to federal court if that federal court has original jurisdiction over the controversy. 28 U.S.C. § 1441(a) (1976). Since the district courts of the United States have jurisdiction over civil actions when the matter in controversy exceeds $10,000 and is between citizens of different states, the removal of state actions to federal courts based on diversity of citizenship is appropriate. *See* 28 U.S.C. §§ 1332(a)(1), 1441(a) (1976).

[105] 87 U.S. (20 Wall.) at 454-55. In *Morse*, the defendant insurance company was a corporation organized under the laws of New York State. *Id.* at 446. The *Morse* Court noted that a corporation is a citizen of the state in which the corporation is incorporated. *Id.* at 453. The defendant insurance company therefore was a citizen of New York State for the purposes of determining diversity jurisdiction. *See id.* at 453-54. Since the plaintiff was a Wisconsin citizen, the diversity requirement was present in *Morse*. *See id.* at 446-47; *see also* U.S. CONST. art. III, § 2 (original jurisdiction of courts of United States includes controversies between citizens of different states). In addition, the cause of action satisfied the minimum amount in controversy requirement of $500. 87 U.S. (20 Wall.) at 454. Under the terms of the Judiciary Act, therefore, the defendant could remove the state action to federal court since the federal diversity requisites were present. *Id.* at 454-55.

[106] *Id.* at 455; *see supra* notes 74 & 80 (supremacy clause).

[107] 87 U.S. (20 Wall.) at 458. Since the Wisconsin statute precluded the removal of the state action to federal court when the requisites of federal diversity were present, the Supreme Court deemed the statute void and unconstitution. *Id.* at 458. The *Morse* Court stated that the Wisconsin statute, in requiring a corporation to waive its right to remove state actions to federal court, is inconsistent with the proposition that a man may not barter away his freedom or any substantial rights. *Id.* at 451 (dictum). The Court explained that advance agreements to oust the courts of the United States of the jurisdiction conferred by law are illegal. *Id.*

The Supreme Court also has refused to apply state statutes that require creditors to bring claims against the estates of insolvents and decedents in the court of the state having jurisdiction over administration of the estate when the requisites of federal diversity are present. *See, e.g.*, Hess v. Reynolds, 113 U.S. 73, 76-79 (1885); Hyde v. Stone, 61 U.S. (20 How.) 170, 175 (1856); Suydam v. Broadnax, 39 U.S. (14 Pet.) 67, 75-76 (1840). Similarly, the Court has held ineffective statutes limiting to state courts jurisdiction over actions for the collection or enforcement of a securities obligation owed by a state subdivision. *See, e.g.*, Chicot County v. Sherwood, 148 U.S. 529, 534 (1893); Lincoln County v. Luning, 133 U.S. 529, 531 (1890); Cowles v. Mercer County, 74 U.S. (7 Wall.) 118, 121-22 (1868).

[108] *See infra* notes 109-25 and accompanying text (analysis of Fourth Circuit decisions considering applicability of venue restrictions in federal diversity actions).

[109] 292 F.2d 711 (4th Cir. 1961). In *Markham*, a California resident sustained injuries when she drove her car into an uncovered manhole in the city of Newport News, Virginia. *Id.* at 712. The plaintiff brought a diversity action in federal district court against the city. *Id.* The district court dismissed the action on the basis of a Virginia statute that limits tort

Circuit addressed the issue of whether a statute restricting the venue of a tort action to a state court was applicable to a federal court sitting in diversity.[110] The Fourth Circuit in *Markham* concluded that state statutes could not enlarge or restrict federal jurisdiction.[111] The *Markham* court, therefore, held that the venue restriction was inapplicable.[112]

The *Markham* court noted that the *Erie* doctrine does not extend to matters of procedure or jurisdiction.[113] According to *Markham*, the basic philosophy behind *Erie* is that a federal court exercising diversity jurisdiction to adjudicate state rights sits as another court of that state.[114] The *Markham* court noted that adjudication in federal court should reach the same result as a state court when adjudicating an identical issue.[115] The application of the venue restriction in *Yarber* ignores the Fourth Circuit's earlier pronouncement on the philosophy behind *Erie*.[116] The Fourth Circuit consequently treated Yarber's federal diversity action as time-barred, while adjudication of the same cause of action was available in Virginia state court.[117]

In *Popp v. Archbell*,[118] the Fourth Circuit determined that the Virginia nonsuit venue restriction could not defeat federal diversity

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actions against a city to the courts of Virginia. *Id.* *See generally* Note, *Federal Courts: Jurisdiction over Municipalities: State Statutes Limiting Tort Actions Against Municipalities to State Courts*: Markham v. City of Newport News, 48 CORNELL L.Q. 192 (1962) (discussion of *Markham*); Note, *Recent Cases*, 75 HARV. L. REV. 1433 (1962) (same).

[110] 292 F.2d at 712.

[111] *Id.* at 713. The *Markham* court noted that Congress fixed the jurisdiction of the district courts of the United States pursuant to article III of the Constitution. *Id.* The Constitution provides that the judicial power of the federal courts extends to controversies between citizens of different states. U.S. CONST. art. III, § 2. Congress authorizes the exercise of that power if the amount in controversy exceeds $10,000. 28 U.S.C. § 1332(a) (1976). States have the right to create substantive rights and the means to enforce those rights. *See* U.S. CONST. amend. X (states' rights amendment). According to *Markham*, however, states may not deny federal courts their judicial power. 292 F.2d at 713. In *Markham*, the Fourth Circuit concluded that federal courts must look to the sources of their power when determining their own jurisdiction. *Id.*

[112] 292 F.2d at 716-18. In *Markham*, the Fourth Circuit reversed the district court's dismissal and remanded the case for adjudication on the merits. *Id.* at 718.

[113] *Id.*; *see supra* note 73 (*Erie* does not extend to jurisdiction).

[114] 292 F.2d at 718; *see supra* notes 9 & 10 (*Erie* holds that federal courts are to apply state substantive law and federal procedural law).

[115] 292 F.2d at 718.

[116] *See infra* note 117 (application of venue restriction is inconsistent with Fourth Circuit's earlier pronouncement on philosophy behind *Erie*).

[117] 674 F.2d at 237. The application of the venue restriction in *Yarber* is not consistent with the proposition that adjudication in federal court will lead to the same result as adjudication in state court. *See supra* text accompanying note 115 (basic philosophy behind *Erie* is that adjudication in federal court should reach identical result as adjudication in state court).

[118] 203 F.2d 287 (4th Cir. 1953). In *Popp*, the plaintiff suffered a voluntary nonsuit pursuant to the Virginia nonsuit statute. *Id.* at 288. The plaintiff then brought a second action for the same cause in federal court based on diversity of citizenship. *Id.* The district court dismissed the federal action as precluded by the nonsuit venue restriction. *Id.*

jurisdiction.[119] The Fourth circuit in *Popp* noted that the nonsuit statute serves to regulate practice and procedure in the Virginia state courts.[120] Explaining that the venue restriction merely limits the venue of any new action brought upon a previously nonsuited cause of action,[121] the Fourth Circuit concluded that a state venue statute has no application to the federal courts.[122] According to *Popp*, state law determines remedies and substantive rights.[123] When a remedy exists for a cause of action in state court, however, federal courts also can assume jurisdiction over the action if the requisites of federal diversity are present.[124] *Yarber* is irreconcileable with *Popp* because the Fourth Circuit in *Yarber* applied the venue restriction and effectively defeated federal jurisdiction over the controversy when a remedy existed in Virginia state court and the requisites of federal diversity jurisdiction were present.[125]

The Fourth Circuit's application of the venue restriction in *Yarber* is inconsistent with other federal courts that have considered state law or state statutes that limit the venue of a specified cause of action to a state court.[126] In *Kanouse v. Westwood Obsterical & Gynecological*

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[119] *Id.* at 290.

[120] *Id.* at 288.

[121] *Id.*

[122] *Id.*; *see also* Steel Motor Serv., Inc. v. Zalke, 212 F.2d 856, 858 (6th Cir. 1954) (dictum) (state law cannot control venue of federal court); Buffington v. Vulcan Furniture Mfg. Co., 94 F. Supp. 13, 15 (W.D. Ark. 1950) (same); *supra* notes 114-16 and accompanying text (application of state statutes limiting venue to state courts operates against basic tenet behind *Erie* that result should be the same regardless of chosen forum).

[123] 203 F.2d at 288.

[124] *Id.* at 289; *see also* U.S. CONST. amend. X (states' rights amendment); 28 U.S.C. § 1332(a)(1) (requisites for diversity jurisdiction are parties of diverse citizenship and minimum amount in controversy).

[125] *See* Yarber, 674 F.2d at 239. In *Yarber*, the Fourth Circuit did not overrule *Popp*. *See id.* at 232-39.

[126] *See* United States v. Estate of Slate, 304 F. Supp. 380 (S.D. Tex.), *aff'd*, 425 F.2d 1208 (5th Cir. 1969). In *Slate*, the United States brought a state probate action against the estate of Slate to recover a judgment for unpaid taxes. *Id.* at 381. Under Texas law, the failure of the administratrix of the estate to act upon the claim constituted a rejection of the Government's claim. *Id.* The Government then filed suit in federal court. *Id.* The defendant argued that the Texas Probate Code required the Government to seek redress in state court after the rejection of the claim in the state probate court. *Id.* at 381-82. The *Slate* court concluded that a provision of the Texas Probate Code could not defeat federal jurisdiction based on a congressional grant of jurisdiction. *Id.* at 382-83; *see* 28 U.S.C. § 1345 (1976) (district courts shall have original jurisdiction of all civil suits brought by United States); *see also* Knighton v. Johnston County, 330 F. Supp. 652, 654 (E.D.N.C. 1971) (state statute limiting malpractice actions against county to courts sitting therein was deemed inoperative to prevent plaintiff's federal diversity action); Prendergast v. Long Island State Park Comm'n, 330 F. Supp. 438, 440 (E.D.N.Y. 1970) (state statute limiting actions against parkway authority to state courts cannot divest federal court of admiralty jurisdiction); Baton Rouge Contracting Co. v. West Hatchie Drainage Dist., 279 F. Supp. 430, 432 (N.D. Miss. 1968) (Mississippi statute limiting jurisdiction of all actions against drainage district to chancery court held ineffective to preclude Louisiana corporation's resort to federal diversity jurisdiction); Schultz v. Greater New Orleans Expressway Comm'n, 250 F. Supp. 89, 93-94 (E.D. La. 1966) (state constitution cannot defeat diversity jurisdiction of federal courts); St.

Associates,[127] the defendant medical group objected to federal jurisdiction over a medical malpractice dispute.[128] The defendant argued that the action was justiciable only in a state malpractice tribunal provided for in the New Jersey Court Rules.[129] Since the requisites of federal diversity jurisdiction were present, the court assumed jurisdiction over the controversy.[130] According to *Kanouse*, state statutes cannot divest federal courts of their recognized jurisdiction.[131]

In *Yarber*, the Fourth Circuit's analysis for determining applicable law in federal diversity cases is consistent with *Erie* and subsequent Supreme Court cases.[132] An *Erie* analysis, however, is not appropriate to determine the scope of federal jurisdiction.[133] Federal courts must look to the sources of their judicial power when determining the extent of federal jurisdiction.[134] In setting the requirements for federal diversity jurisdiction, Congress granted the federal courts jurisdiction over any action whenever the federal diversity requisites are present.[135] The application of the venue restriction in *Yarber* had the practical effect of defeating federal diversity jurisdiction and, consequently, ran afoul of the supremacy clause of the Constitution.[136] The Fourth Circuit's holding in *Yarber* also is inconsistent with Supreme Court and Fourth Circuit cases that have recognized that state statutes cannot divest federal courts of their congressionally mandated jurisdiction.[137] The Fourth Circuit should treat *Yarber* as a judicial anomaly and reaffirm *Popp* at the earliest opportunity.

JAMES FITZSIMMONS POWERS

John v. State Farm Mutual Automobile Ins. Co., 225 F. Supp. 74, 75 (W.D. Mo. 1964) (federal court has jurisdiction to hear diversity action notwithstanding state statute limiting antitrust claims to courts of state); Moss v. Calumet Paving Co., 201 F. Supp. 426, 430 (S.D. Ind. 1962) (Indiana statutory provision requiring plaintiffs to bring actions against highway commission in designated state courts was inapplicable in federal court). *See generally* FEDERAL COURTS, *supra* note 73, § 46 (discussing state attempts to limit federal jurisdiction).

[127] 505 F. Supp. 129 (D.N.J. 1981).

[128] *Id.* at 129.

[129] *Id.*; *see* N.J. CT. R. 4:21-1—4:21-10 (procedure for personal liability claims against members of medical profession).

[130] 505 F. Supp. at 129. Having established that the court had jurisdiction to hear the malpractice action, the *Kanouse* court then determined that *Erie* required the application of the New Jersey malpractice procedures in federal court. *Id.* at 130-32.

[131] *Id.* at 129.

[132] *See supra* notes 32-64, 72 and accompanying text (Fourth Circuit's *Erie* analysis in *Yarber*).

[133] *See supra* notes 73, 113-15 and accompanying text (discussion of cases that have held that *Erie* does not extend to matters of jurisdiction).

[134] *See supra* notes 74, 81, 82 and accompanying text (sources of judicial power are article II of Constitution and congressional grants of jurisdiction).

[135] *See* 28 U.S.C. § 1332(a)(1) (1976) (diversity jurisdiction).

[136] *See supra* notes 80-88 and accompanying text (supremacy clause analysis).

[137] *See supra* notes 89-125 and accompanying text (discussion of Supreme Court and Fourth Circuit cases that have held ineffectual state attempts to limit federal jurisdiction).

C. *Rule 60(b): Fraud on the Court*

Rule 60(b) of the Federal Rules of Civil Procedure[1] sets forth grounds upon which a party may obtain relief from the operation of a judgment. Rule 60(b) attempts to balance the principles of judicial finality[2] and substantial justice in judgments.[3] In order to achieve this goal, rule 60(b)(3) permits a party to file within one year of judgment a motion alleging intrinsic or extrinsic fraud,[4] misrepresentation, or other

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[1] Rule 60(b) of the Federal Rules of Civil Procedure provides in part:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: . . . (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; . . . or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons . . . (3) not more than one year after the judgment, order or proceeding was entered or taken . . . . This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding . . . or to set aside a judgment for fraud upon the court.

FED. R. CIV. P. 60(b).

[2] *See* Southern Pac. R.R. v. United States, 168 U.S. 1, 48-54 (1897). Respect for the finality of judgments is a fundamental principle of judicial systems. *Id.* at 49; *see* Baldwin v. Iowa State Traveling Men's Ass'n., 283 U.S. 522, 525-26 (1931) (public policy dictates an end to litigation); Mitchell v. First Nat'l Bank of Chicago, 180 U.S. 471, 480 & n.1 (1901) (finality of judgments essential to maintenance of societal peace). Through the prevention of repetitive litigation, the principle of finality protects individual litigants from harrassment. RESTATEMENT OF JUDGMENTS § 126, comment c, at 613-14 (1942). Respect for the finality of judgments also lends stability and predictability to judicial activity. Moore & Rogers, *Federal Relief from Civil Judgments*, 55 YALE L.J. 623, 626 (1946). *See generally* Comment, *Rule 60(b): Survey and Proposal for General Reform*, 60 CALIF. L. REV. 513, 533 (1972) [hereinafter cited as *Proposal For General Reform*].

[3] Bankers Mortgage Co. v. United States, 423 F.2d 73, 77 (5th Cir.), *cert. denied*, 399 U.S. 927 (1970). In determining whether to relieve a litigant from a final judgment or order under rule 60(b), courts must balance the sanctity of final judgments with the "incessant command of the court's conscience that justice be done in light of all the facts." *Id.* at 77; *accord* Compton v. Alton S.S. Co., 608 F.2d 96, 102 & n.8 (4th Cir. 1979); *see also* Boughner v. Secretary of HEW, 572 F.2d 976, 977 (3d Cir. 1978) (rule 60(b) strikes balance between judicial finality and substantial justice); New York State Health Facilities Ass'n v. Carey, 76 F.R.D. 128, 132-33 (S.D.N.Y. 1977) (rule 60(b) balances finality of judgments and effectuation of justice). *See generally* J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 60.27[1] (2d ed. 1981) [hereinafter cited as MOORE]; 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE: Civil § 2851 (1973) [hereinafter cited as WRIGHT & MILLER]; Kane, *Relief from Federal Judgments: A Morass Unrelieved by a Rule*, 30 HASTINGS L.J. 41, 68-70 (1978); Note, *History and Interpretation of Federal Rule 60(b) of the Federal Rules of Civil Procedure*, 25 TEMP. L.Q. 77, 78 (1951).

[4] *See* United States v. Throckmorton, 98 U.S. 61, 68 (1878) (difference between intrinsic and extrinsic fraud). Extrinsic fraud is fraud present in the act of obtaining a judgment which denies the opposing party a fair hearing on the merits. Independence Lead Mines v. Kingsbury, 175 F.2d 983, 987-88 (9th Cir. 1949); *see, e.g.*, Aldrich v. Aldrich, 203 Cal. 433, 435, 264 P. 754, 756 (1928) (complaining party's failure to receive proper notice of suit constituted extrinsic fraud); Flood v. Templeton, 152 Cal. 148, 152, 92 P. 78, 81 (1907) (fraudulent promise of compromise, preventing complaining party from asserting defense,

misconduct of an adverse party.[5] Rule 60(b) also preserves a court's inherent power to adjudicate independent actions for relief from fraudulent judgments.[6] Rule 60(b), in addition, permits a party to bring an action to set aside a judgment for fraud upon the court.[7] Neither an independent action nor an action based on fraud upon the court is sub-

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constitutes extrinsic fraud); People v. Perris Irrigation Dist., 142 Cal. 601, 603, 76 P. 381, 382-83 (1904) (attorney involvement in fraud constitutes extrinsic fraud). *See generally* MOORE, *supra* note 3, ¶ 69.37[1], at 613.

Intrinsic fraud, on the other hand, is fraud involving issues already presented and litigated in the judgment assailed. Hilton v. Guyot, 159 U.S. 113, 207 (1895); *see, e.g.*, Aetna Casualty & Sur. Co. v. Abbott, 130 F.2d 40, 43-44 (4th Cir. 1942) (perjury constitutes intrinsic fraud); Lockwood v. Bowles, 46 F.R.D. 625, 630 (D.D.C. 1969) (same); Eaton v. Koontz, 138 Kan. 267, 269, 25 P.2d 351, 353 (1933) (forged instruments constitute intrinsic fraud).

[5] *See* MOORE, *supra* note 3, ¶ 60.25[5]. Any type of fraud, misrepresentation, or other wrongful acts committed by a prevailing party in the attainment of an inequitable judgment constitutes grounds for rule 60(b)(3) relief. *Id.* at 287-88; *see, e.g.*, Conerly v. Flower, 410 F.2d 941, 945 (8th Cir. 1969) (misrepresentation of amount of liability coverage in personal injury suit constitutes rule 60(b)(3) fraud between parties); Peacock Records, Inc. v. Checker Records, Inc., 365 F.2d 145, 147-48 (7th Cir. 1966) (perjured testimony constitutes grounds for 60(b)(3) relief), *cert. denied*, 385 U.S. 1003 (1967). *But cf.* Walker v. Bank of America Nat'l Trust & Sav. Ass'n, 268 F.2d 16, 26 (9th Cir. 1959) (opposing counsel's statement during trial that plaintiff had no cause of action constitutes an opinion of law and not 60(b)(3) fraud).

[6] *See* Throckmorton v. United States, 98 U.S. 61, 65-71 (1878) (independent action to set aside judicial decree confirming a land grant). The independent action doctrine rests upon a court's equitable jurisdiction. *See* Sayers v. Burkhardt, 85 F. 246, 248 (4th Cir. 1898) (independent action to set aside fraudulent judgment which created cloud upon title to land), *cert. denied*, 172 U.S. 649 (1899). *Throckmorton* is the seminal case on independent actions for relief from fraudulent judgments. *See generally* MOORE, *supra* note 3, ¶ 60.37[1]; *Proposal for General Reform*, *supra* note 2, at 531-44; Note, *Attacking Fraudulently Obtained Judgments in the Federal Courts*, 48 IOWA L. REV. 398, 398-02 (1963) [hereinafter cited as *Attacking Fraudulently Obtained Judgments*]. In *Throckmorton*, the United States Supreme Court recognized the right of a litigant to attack a fraudulently obtained judgment in an independent action. 98 U.S. at 61. *Throckmorton* involved an original action brought by the United States to declare null and void a decree rendered by a district court twenty years earlier. *Id.* at 63. The government alleged that the petitioner in the original action procured the judgment by means of a fraudulent instrument and perjured testimony. *Id.* The Court dismissed the case on the merits, holding that perjured testimony and fraudulent instruments were insufficient grounds to support an independent action for relief from a judgment rendered twenty years earlier. *Id.* at 66. The Court classified perjured testimony and fraudulent instruments as intrinsic frauds. *Id.* at 63; *see supra* note 4 (intrinsic fraud is fraud already presented and considered in judgment assailed). The Court concluded that only extrinsic fraud supports equitable relief by independent action. 98 U.S. at 66; *see supra* note 4 (extrinsic fraud is fraud preventing litigant a hearing on merits).

[7] *See* Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944) (scheme to obtain a patent by means of a fraudulent publication constituted fraud on court). *See generally* Note, *Federal Rules 52(a) and 60(b)—A Chinese Puzzle*, 21 S.W.L.J. 339 (1967); *Proposal for General Reform*, *supra* note 2, at 531; Note, *Federal Rule 60(b): Relief From Civil Judgments*, 61 YALE L. J. 76 (1952) [hereinafter cited as *Relief From Civil Judgments*]. For a definition of fraud upon the court, *see* MOORE, *supra* note 3, ¶ 60.22. According to Professor Moore, fraud upon the court consists of fraud which defiles or attempts to defile the court itself, or is fraud perpetrated by officers of the court so that the judicial machinery cannot perform its impartial task of adjudging cases. *Id.*; *see* Keys v. Dunbar, 405 F.2d 955,

ject to the one-year limitation applicable to rule 60(b)(3) motions.[8] Courts, therefore, scrutinize rule 60(b) motions for relief from fraudulent judgments in order to distinguish rule 60(b)(3) actions from fraud on the court or independent actions for relief.[9] In *Great Coastal Express, Inc. v.*

957-58 (9th Cir.) (fraud must have prevented losing party from presenting case or defense in order to constitute fraud on court), *cert. denied*, 396 U.S. 880 (1969); Kenner v. Commissioner, 387 F.2d 689, 691 (7th Cir.) (unconscionable plan or scheme directed at influencing a court's decision constitutes fraud upon court), *cert. denied*, 393 U.S. 841 (1968); Hawkins v. Lindsley, 327 F.2d 356, 359 (2nd Cir. 1964) (fraud involving officer of court constitutes fraud on court); England v. Doyle, 281 F.2d 304, 309 (9th Cir. 1960) (unconscionable plan or scheme to improperly influence court's decision constitutes fraud on court); Lockwood v. Bowles, 46 F.R.D. 625, 631-32 (D.D.C. 1969) (fraud which attempts to defile court or improperly influence court by means of an unconscionable plan or scheme constitutes fraud on court); *see, e.g.*, Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 244 (1944) (involvement of an attorney in fraud constitutes fraud on court); Root Ref. Co. v. Universal Oil Prod. Co., 169 F.2d 514, 541 (3rd Cir. 1948) (involvement of attorney to improperly influence judge constitutes fraud on court), *cert. denied*, 335 U.S. 912 (1949). *See generally* MOORE, *supra* note 3, ¶ 60.33.

[8] FED. R. CIV. P. 60(b), *supra* note 1. Rule 60(b)(3) motions must be made within a reasonable time and no later than one-year after judgment. *Id.*; *see* Taft v. Donellan Jerome, Inc., 407 F.2d 807, 809 n.5 (7th Cir. 1969) (16 years that passed between entry of judgment and motion for relief precluded rule 60(b)(3) relief); Kathe v. United States, 284 F.2d 713, 715 (9th Cir. 1960) (expiration of one year forecloses rule 60(b)(3) relief in suit to vacate judgment in condemnation proceeding); Prickett v. Duke Power Co., 49 F.R.D. 116, 117 (D.S.C.) (rule 60(b)(3) relief denied two years after entry of summary judgment order), *aff'd*, 429 F.2d 984 (5th Cir. 1970); Williard C. Beach Air Brush Co. v. General Motors Corp., 88 F. Supp. 849, 851-52 (D.N.J. 1950) (even though one year had not expired rule 60(b)(3) relief denied since reasonable time limitation of rule had expired). *See generally* MOORE, *supra* note 3, ¶ 60.24[4].

Only a litigant's laches, however, will foreclose independent actions for relief from fraudulent judgments. *See* West Virginia Oil & Gas Co. v. George E. Breece Lumber Co., 213 F.2d 702, 706-07 (5th Cir. 1954) (litigant's laches or an applicable state statute of limitations are only time limits for initiating independent action); Fiske v. Buder, 125 F.2d 841, 845 (8th Cir. 1942) (laches represent only limit on appellant's independent action for relief from fraudulent judgment). The doctrine of laches forecloses relief when the party seeking relief has not exercised due diligence in presenting his claim or defense, and the opposing party has been prejudiced by such delay. Abraham v. Ordway, 158 U.S. 416, 420 (1895).

Finally, fraud on the court motions for relief are not subject to any time limitation. *See* Lockwood v. Bowles, 46 F.R.D. 625, 631 (D.D.C. 1969) (neither rule 60(b)'s one-year limitation nor doctrine of laches bars relief for fraud on court). *But see* Simons v. United States, 452 F.2d 1110, 1112 (2d Cir. 1971) (movant's prejudicial delay precludes relief from fraud on court); Seismograph Serv. Corp. v. Offshore Raydist, Inc., 263 F.2d 5, 23 (5th Cir. 1958) (appellant's laches influential in court's denial of relief from fraud on court). *See generally Report of Proposed Amendments to Rules of Civil Procedure for the District Courts of the United States*, 5 F.R.D. 477, 478 (1946) [hereinafter cited as *Proposed Amendments*] (rule 60(b) time limitation).

[9] *See* Kupferman v. Consolidated Research & Mfg. Corp., 459 F.2d 1072, 1078-81 (2d Cir. 1972) (attorney's failure to produce relevant document during trial did not constitute fraud on court). The rule 60(b) provision for granting relief for fraud on the court does not embrace all conduct of an adverse party of which the court disapproves, since to do so would render meaningless the one-year limitation applicable to rule 60(b)(3) motions. *Id.* at 1078; *see also* MOORE, *supra* note 3, ¶ 60.33 (if fraud on court provision of rule 60(b) is not kept within proper limits then one-year time limitation of rule 60(b)(3) motions will become meaningless). *See generally Relief From Civil Judgments*, *supra* note 7, at 79-80.

International Brotherhood of Teamsters,[10] the Fourth Circuit addressed the issue of whether perjury and fabricated evidence constituted either fraud upon the court or adequate grounds for an independent action for relief from a fraudulent judgment pursuant to rule 60(b).

The controversy[11] in *Great Coastal* arose out of a strike against Great Coastal Express Inc. (Great Coastal or the company) by Local 592 (the union) an affiliate of the International Brotherhood of Teamsters.[12] Great Coastal, the employer, brought an action in December 1970 for damages caused by union violence and illegal secondary boycotting.[13] Although witnesses for the company testified to widespread violence by the union against the company's employees and property,[14] the district court granted a directed verdict in favor of the union on the violence claim.[15] The jury, however, returned a verdict for the Great Coastal on the secondary boycott claim.[16]

On appeal, the Fourth Circuit affirmed on all issues.[17] The court ruled that the evidence supported the jury's finding that the union had committed illegal secondary boycotting of Great Coastal's customers.[18]

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[10] 675 F.2d 1349 (4th Cir. 1982).

[11] *Id.* at 1351. Contract negotiations between Great Coastal and the union broke down and Local 592 went on strike August, 1970. *Id.* On December 10, 1970, Great Coastal filed suit in Virginia state court. *Id.* The union removed the action to the Eastern District Court of Virginia. *Id.*; *see* Great Coastal Express, Inc. v. International Bhd. of Teamsters, 350 F. Supp. 1377, 1378 (E.D. Va. 1972) (district court opinion of original suit), *aff'd on other grounds*, 511 F.2d 839 (4th Cir. 1975).

[12] 675 F.2d at 1351.

[13] *Id.* An illegal secondary boycott exists when a labor organization having a labor dispute with an employer exercises coercive pressure on the employer's customers actual or prospective, to cause the customers to withdraw their patronage from the employer through fear of loss or damage to themselves if they continue to deal with the employer. Duplex Printing Press Co. v. Deering, 254 U.S. 443, 446 (1921); *see* Truax v. Corrigan, 257 U.S. 312, 318 (1921) (illegal secondary boycott exists when conspiracy of striking employees coerce employer's patrons to stop dealing with employer).

[14] 675 F.2d at 1351. Great Coastal alleged that the union was responsible for throwing a brick through the windshield of a company truck and firing a handgun through the trailer of the same truck. *Id.* Great Coastal also asserted that the union was responsible for the slashing of tires and airhoses on company trucks. *Id.*

[15] *Id.*

[16] *Id.* at 1352; *see supra* note 13 (secondary boycott defined); Great Coastal Express, Inc. v. International Bhd. of Teamsters, 350 F. Supp. 1377, 1378-80 (E.D. Va. 1972). Great Coastal had alleged damages resulting from secondary boycotting totaling only $942,005. *Id.* at 1378. The jury, however, returned a verdict for $1,300,000. *Id.* On the union's motion for judgment notwithstanding the verdict, the district court concluded that the damage award was substantially greater than the damages actually proven by Great Coastal. *Id.* at 1380. The court wrote that the excessive verdict resulted from the jury's being influenced by the widespread acts of violence allegedly committed against Great Coastal by the union. *Id.*; *see supra* note 14 (violent acts attributed to union). The court, therefore, granted a retrial on damages alone. 350 F. Supp. at 1382. The second jury, on retrial, returned a verdict of $806,093 and the court entered judgment on the secondary boycott claim in that amount. 675 F.2d at 1352.

[17] 511 F.2d 839, 848 (4th Cir. 1975).

[18] *Id.* at 844. The jury had complete dominion over the issue of whether the union had

The court also concluded that the evidence supported the jury's final liability verdict.[19] The court, therefore, held that the union had failed to overcome the verdict's presumption of validity[20] and affirmed Great Coastal's liability verdict.[21] The union eventually paid Great Coastal a total of $961,653.67, representing the judgment plus interest and costs.[22]

After the Fourth Circuit affirmed Great Coastal's money damages award, the union discovered that Great Coastal was responsible for several of the violent acts attributed to the union.[23] The union filed a motion to set aside the judgment in district court on December 14, 1978.[24] The court granted post-judgment discovery and conducted and evidentiary hearing.[25]

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committed illegal secondary boycotting. *Id.* The Fourth Circuit found that the district court had charged the jury properly on secondary boycotting. *Id.* The Fourth Circuit also found abundant evidence in support of the jury's conclusions that the union had induced, encouraged, threatened, or coerced employees of Great Coastal customers to withhold labor from their employers for the sole purpose of achieving the unlawful objectives set out in the National Labor Relations Act. *Id.*; *see* National Labor Relations Act, § 8(b)(4), 29 U.S.C. § 158(b)(4) (1976 & Supp. III 1979) (unfair labor practices). The Fourth Circuit deferred to the jury's conclusions, noting that the weight of the evidence and the credibility of the witnesses is within the sole province of the jury. 511 F.2d at 844; *see* Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355, 359-61 (1962) (jury assesses credibility of witnesses); Lavender v. Kurn, 327 U.S. 645, 648 (1946) (same).

[19] 511 F.2d at 847. The Fourth Circuit failed to find any evidence that the alleged acts of violence had influenced the second jury's liability verdict. *Id.*; *see supra* note 16 (district court had granted second trial on damages alone in which jury returned a verdict for $806,093).

[20] 511 F.2d at 846-47. The Fourth Circuit noted that a presumption exists in favor of a verdict's validity, provided the verdict is the result of honest judgment. *Id.* at 846; *see* Richmond v. Atlantic Co., 273 F.2d 902, 916 (4th Cir. 1960) (presumption in favor of validity of a verdict always exists if verdict is result of honest judgment). The court held that the union's failure to allege any error in the evidence, jury charges, or other relevant proceedings and the existence of abundant evidence establishing the union's culpability for illegal secondary boycotting dispositive of the union's failure to overcome the validity accorded the district court's verdict. 511 F.2d at 847.

[21] 511 F.2d at 847. After losing in the Fourth Circuit, the Supreme Court denied the union's writ of certiorari to overturn the liability verdict. Great Coastal Express, Inc. v. International Bhd. of Teamsters, 350 F. Supp. 1377 (E.D. Va.), *cert. denied*, 425 U.S. 975 (1976).

[22] 675 F.2d at 1352.

[23] *Id.* at 1352; *see* Great Coastal Express, Inc. v. International Bhd. of Teamsters, 86 F.R.D. 131, 135 (E.D. Va. 1980) (union's appeal to district court after discovering fraud). Testimony and evidence presented at an evidentiary hearing established Great Coastal's responsibility for the incident in which a brick had been pitched through the windshield and bullets fired through the trailer of a company truck. *Id.* at 135. The hearing also established Great Coastal's responsibility for other vandalism to company property. *Id.*; *see supra* note 14 (violent acts attributed to union in first trial).

[24] 86 F.R.D. at 134. Only the forum that rendered the original judgment has jurisdiction over rule 60(b)(3) motions. Aigner v. Shaughnessy, 175 F.2d 211, 212 (2d Cir. 1949) (jurisdiction over 60(b)(3) motions for relief limited to court which granted original judgment or order). The union, therefore, directed its motion for relief to the district court which had adjudicated the case originally. *Compare* 86 F.R.D. at 131 *with* 350 F. Supp. at 1377 (both cases heard in Eastern District Court of Virginia).

[25] 86 F.R.D. at 135.

At the hearing, two of Great Coastal's witnesses from the first trial admitted that part or all of their testimony had been false.[26] The district court held that, but for the union's failure to file its motion for relief from the judgment within the one-year limitation of rule 60(b)(3), relief from Great Coastal's judgment would have been forthcoming.[27] The court also held that the union could not evade the one-year limitation of rule 60(b)(3) through a rule 60(b)(6) motion.[28]

In addition to denying the union's rule 60(b)(3) motion, the district court denied the union's appeal for relief under the fraud on the court or independent action for relief provisions of rule 60(b).[29] The district court held that perjury and fabricated evidence do not rise to the level of fraud upon the court under the savings provisions of rule 60(b).[30] The district court also noted that the union had failed to allege attorney involvement in the fraud.[31] Finally, the district court concluded that per-

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[26] *Id.* One company witness from the first trial admitted at the evidentiary hearing that Great Coastal's terminal manager had ordered the witness to get a brick and destroy a company truck. *Id.* The same witness testified that he had thrown a brick through the windshield of the truck and fired shots from a revolver into the trailer of the truck. *Id.* The witness further admitted to having lied about this incident in the first trial. *Id.* The hearing also disclosed that another Great Coastal witness in the first trial had failed to tell the complete truth concerning the vandalism to the company truck. *Id.* The district court found as a fact that a substantial amount of Great Coastal's testimony regarding acts of violence in the first trial amounted to perjury. *Id.*

[27] *Id.* at 35; *see supra* note 8 (rule 60(b)(3) motions limited to within one-year of original judgment).

[28] 86 F.R.D. at 135-36. Rule 60(b)(6) encompasses contingencies not foreseen by the rule's drafters. *See* MOORE, *supra* note 3, ¶ 60.27[1] (rule 60(b)(6) applies to situations not enumerated in rule 60(b) which justify relief from judgment). The only time limitation on a rule 60(b)(6) motion is one of reasonable time. *See* Yanow v. Weyerhaeuser S.S. Co., 274 F.2d 274, 276 (9th Cir. 1959) (petitioner's delay of eleven months precluded rule 60(b)(6) relief). Rule 60(b)(3) motions, however, are subject to a one-year limitation and the reasonable time restriction. *See supra* note 8 (time restrictions of rule 60(b)(3) motions). If a court granted rule 60(b)(6) relief in a situation encompassed by rule 60(b)(3) the latter's one-year limitation would become meaningless. 86 F.R.D. at 137; *see* Klapprott v. United States, 335 U.S. 601, 613-15 (1949) (litigant cannot avoid one-year time limitation of rule 60(b)(1) through use of rule 60(b)(6) motion); Stancil v. United States, 200 F. Supp. 36, 38 (E.D. Va. 1961) (litigant cannot avoid one-year time limitation of rule 60(b)(1) through use of 60(b)(6) motion). *See generally* MOORE, *supra* note 3, ¶ 60.27[1].

[29] 86 F.R.D. at 137; *see supra* notes 6 & 7 (explanations of independent action and fraud on court provisions of rule 60(b)).

[30] 86 F.R.D. at 137; *see* Serzysko v. Chase Manhattan Bank, 461 F.2d 669, 671 (2d Cir.) (perjured testimony in securities fraud trial does not constitute fraud upon court), *cert. denied*, 409 U.S. 883 (1972); Dowdy v. Hawfield, 189 F.2d 637, 638 (D.C. Cir.) (perjury insufficient grounds for fraud on probate court), *cert. denied*, 342 U.S. 830 (1951); Armour & Co. v. Nard, 56 F.R.D. 610, 612 (N.D. Iowa 1972) (perjury and other third party misconduct do not constitute fraud on court). *But see* Toscano v. Commissioner, 441 F.2d 930, 933 (9th Cir. 1971) (taxpayer's perjured testimony constitutes strong enough showing of fraud on tax court to require hearing); Dausuel v. Dausuel, 195 F.2d 774, 776 (D.C. Cir. 1952) (wife's perjury, if substantiated, would constitute fraud on divorce court).

[31] 86 F.R.D. at 138; *see* MOORE, *supra* note 3, ¶ 60.33 (attorney involvement dispositive in distinguishing fraud upon court from fraud between parties); *see also* Hazel-Atlas Glass

jury and fabricated evidence were intrinsic[32] rather than extrinsic[33] forms of fraud and would not support an independent action for relief.[34] The district court, therefore, denied the union relief from Great Coastal's liability verdict.[35]

The union appealed[36] the denial of relief to the Fourth Circuit Court of Appeals.[37] The Fourth Circuit remanded the case to the district court for specific findings of fact.[38] In a memorandum of law, the district court provided the Fourth Circuit with the details of Great Coastal's fraud.[39] The district court found the company responsible for certain of the violent acts.[40] The district court also disclosed a scheme in which Great Coastal had paid the principals behind the violent acts for their silence.[41] The district court, therefore, concluded that Great Coastal was responsi-

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Co. v. Hartford-Empire Co., 322 U.S. 238, 241 (1944) (attorney involvement in fraud upon court); H.K. Porter Co. v. Goodyear Tire & Rubber Co., 536 F.2d 1115, 1118-19 (6th Cir. 1976) (attorney conduct involving misrepresentation and perjury would constitute fraud on court); Serzysko v. Chase Manhattan Bank, 461 F.2d 699, 702 (2nd Cir.) (absent attorney involvement, no fraud upon court), *cert. denied*, 409 U.S. 883 (1972); Kupferman v. Consolidated Research & Mfg. Corp., 459 F.2d 1072, 1078 (2nd Cir. 1972) (since attorneys are officers of court their dishonest conduct constitutes fraud upon court); United States v. International Tel. & Tel. Corp., 349 F. Supp. 22, 26 (D. Conn. 1972) (attorney involvement in the fabrication of evidence could constitute fraud on court), *aff'd without opinion*, 410 U.S. 919 (1973).

[32] 86 F.R.D. at 137; *see supra* note 4 (definition of intrinsic fraud).

[33] 86 F.R.D. at 137; *see supra* note 4 (definition of extrinsic fraud).

[34] 86 F.R.D. at 138. The district court noted that perjury and fabricated evidence are traditional forms of intrinsic fraud. *Id.*; *see supra* note 6 (fraudulent instruments and perjured testimony are insufficient to support independent action for relief).

[35] 86 F.R.D. at 138.

[36] 675 F.2d at 131; *see* Siberell v. United States, 268 F.2d 61, 62 (9th Cir. 1959) (per curiam) (abuse of discretion is the appellate standard of review for rule 60(b) motions); Title v. United States, 263 F.2d 28, 31 (9th Cir. 1959) (review of rule 60(b) motion limited to sound discretion of district court).

[37] 675 F.2d at 1352.

[38] *Id.*

[39] *Id.*

[40] *Id.* The district court found that the company had ordered employees to vandalize company property. *Id.* The district court found that Great Coastal's terminal manager had ordered a company employee to vandalize a company truck. *Id.*; *see supra* note 26 (damage to company truck attributable to company). In addition, the district court found the company responsible for other acts of vandalism against company property. 675 F.2d at 1352. In light of the evidence supporting the company's responsibility for certain of the acts of violence, the district court concluded that Great Coastal was responsible for manufacturing a substantial amount of testimony in the first trial on the acts of violence. *Id.*

[41] *Id.* The district court memorandum opinion revealed a scheme in which Great Coastal's president had paid the company employee responsible for damaging the company truck $500 for "a job well done." *Id.* The company did not record the $500 payment on its books. *Id.* The district court also found that Great Coastal had paid the terminal manager, who had ordered the vandalism, $12,000 from the manager's share of profits and that the payment of the terminal manager's share of profits violated the company's policy regarding profit-sharing. *Id.*

ble for manufacturing a substantial amount of testimony in the first trial on the alleged acts of violence.[42]

In passing on the merits of the union's appeal, the Fourth Circuit concluded that if the union had brought a timely motion[43] for fraud between the parties under rule 60(b)(3),[44] relief would have been forthcoming.[45] The six years that passed between the entry of Great Coastal's judgment and its motion to set aside judgment, however, placed the union's cause beyond the one-year limitation of rule 60(b)(3).[46] Furthermore, the Fourth Circuit agreed with the district court's ruling that the union could not avoid rule 60(b)(3)'s one-year time limitation through the use of a rule 60(b)(6) motion.[47]

The Fourth Circuit also rejected the union's motion for relief under rule 60(b) for fraud on the court.[48] The union based its fraud on the court motion for relief on the Supreme Court's decision in *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*[49] In *Hazel-Atlas*, Hartford-Empire Co. sought a patent for a "gob-feeding" process employed in the manufacture of glass bottles.[50] In an effort to help along the patent application, counsel for Hartford-Empire Co. had prepared an article praising the revolutionary benefits of the gob-feeding process.[51] Counsel for Hartford-

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[42] *Id.* at 1351-53. Although the company never denied the district court's conclusion that the company had committed fraud, Great Coastal did assert that the misrepresentations were harmless since the directed verdict in the first trial had eliminated the violence claim. *Id.* at 1352. Great Coastal argued that the judgment being assailed was the secondary boycotting issue which the Fourth Circuit had affirmed already. *Id.* at 1353; *see* 511 F.2d at 844-45 (abundant evidence existed to support jury's verdict on illegal secondary boycotting); *see also supra* note 18 (abundant evidence existed in support of jury's conclusion on the union's responsibility for illegal secondary boycotts).

The Fourth Circuit, however, refused to accept Great Coastal's argument that the directed verdict in the first trial eliminated any impact the fraud might have had on the court. 675 F.2d at 1354. The Fourth Circuit, on the contrary, held that the jury instructions given at the first trial permitted the jurors to consider the acts of violence as part of the totality of circumstances surrounding the union's liability for secondary boycotting. *Id.* The court also noted that Great Coastal's brief on appeal from the secondary boycott judgment contained repeated references to the alleged acts of violence. *Id.* In light of the jury instructions at the first trial and Great Coastal's reliance on the acts of violence on appeal, the Fourth Circuit concluded that Great Coastal's fraud had sufficient impact upon the secondary boycott judgment to allow the court to reach the merits of the union's rule 60(b) claim for relief. *Id.*

[43] 675 F.2d at 1355; *see supra* note 8 (time limitations on rule 60(b)(3) motions).

[44] 675 F.2d at 1355; *see supra* note 5 (analysis of fraud between parties).

[45] 675 F.2d at 1355; *see supra* note 5 (analysis of fraud between parties).

[46] 675 F.2d at 1355.

[47] *Id.*; *see supra* note 28 (litigants cannot avoid rule 60(b)(3) time limitation through use of rule 60(b)(6) motions).

[48] 675 F.2d at 1355.

[49] *Id.*; *see* Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 240-46 (1944) (fraud on the court doctrine); *see also Proposed Amendments*, *supra* note 8, at 479 (committee charged with amending rules cited *Hazel-Atlas* as an example of fraud on court).

[50] 322 U.S. at 239.

[51] *Id.* at 240.

Empire Co. then sought out a disinterested expert to fraudulently author the publication.[52] The fraudulent article influenced the patent office's decision to award Hartford-Empire Co. a patent on the gob-feeding process.[53] The fraudulent article also influenced an appellate court in upholding Hartford-Empire's patent in a patent infringement suit with Hazel-Atlas Glass Co.[54] Ten years after the patent infringement suit, Hazel-Atlas Glass Co. discovered the fraud behind the publication and brought suit for relief.[55] The Supreme Court granted Hazel-Atlas Glass Co. relief on the grounds that the fraudulent publication constituted fraud on the patent and appellate courts.[56] The Court classified Hartford-Empire Co.'s fraud as a deliberately planned and carefully executed scheme to defraud not only the patent office but also the court of appeals.[57] The Court, furthermore, referring to the legal monopoly created by a patent, noted that the fraud concerned issues of great public significance which transcended the interests of the litigants involved.[58] The Supreme Court therefore granted Hazel-Atlas Glass Co. relief from the fraudulent judgment which had been entered ten years earlier.[59]

The Fourth Circuit held *Hazel-Atlas* dispositive on the union's motion for relief under the fraud on the court provision of rule 60(b).[60] The court wrote that Great Coastal's fraud had not presented the two prerequisites of a successful fraud on the court motion.[61] First, Great Coastal's fraud had not involved a deliberately planned and carefully executed scheme to subvert the judicial process.[62] Second, Great Coastal's fraud had not involved an issue of public significance which transcended the interests of the individual litigants.[63] The court, in addition, noted that fraud on the court normally consisted of only the most egregious forms of fraud which are not discoverable in a judicial proceeding.[64] Perjury and fabricated evidence, the court stated, historically are not grounds for relief under the fraud on the court provision of rule 60(b).[65]

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[52] *Id.*

[53] *Id.* at 241.

[54] *Id.*

[55] *Id.*

[56] *Id.* at 245.

[57] *Id.* at 245-46.

[58] *Id.* at 246.

[59] *Id.* at 251.

[60] 675 F.2d at 1356-57.

[61] *Id.* at 1356.

[62] *Id.*; *see supra* text accompanying note 57 (*Hazel-Atlas* fraud characterized by deliberately planned and carefully executed scheme to defraud court).

[63] 675 F.2d at 1356; *see supra* text accompanying note 58 (*Hazel-Atlas* fraud involved issue of great moment which transcended interests of individual litigants).

[64] 675 F.2d at 1357; *see supra* note 7 (examples of egregious conduct constituting fraud on court).

[65] 675 F.2d at 1357; *see supra* note 30 (perjury and fabrication of evidence historically do not constitute fraud on court).

The Fourth Circuit therefore held that Great Coastal's perjury and fabrication of evidence did not rise to the level of fraud upon the court.[66]

The Fourth Circuit also rejected the union's independent action for relief under the second savings provision of rule 60(b).[67] The Fourth Circuit held the Supreme Court's decision in *Throckmorton v. United States*[68] dispositive of the union's independent action for relief.[69] In *Throckmorton*, the Court held that perjured testimony and fraudulent instruments were insufficient grounds for an independent action for relief from a fraudulent judgment.[70] According to the *Throckmorton* Court, only fraud extrinsic to the issues litigated in the original judgment supported relief by independent action.[71] The Fourth Circuit concluded that the union's independent action for relief failed since Great Coastal's perjury and fabrication of evidence were not frauds extrinsic to the issues litigated in the original judgment.[72]

The dissent in *Great Coastal* took exception with the majority's analysis of the union's fraud on the court motion.[73] The dissent stated that Great Coastal's fraud involved an issue of public importance that transcended the interests of the individual litigants since the fraud debased the laws enacted to ensure the free flow of commerce.[74] The dis-

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[66] 675 F.2d at 1357.

[67] *Id.* at 1357-58; *see supra* note 6 (independent actions for relief).

[68] 98 U.S. 61, 65-71 (1878); *see supra* note 6 (*Throckmorton* analysis).

[69] 675 F.2d at 1358; *see supra* note 6 (*Throckmorton* is seminal case on independent actions for relief from fraudulent judgments).

[70] 98 U.S. at 66; *see* Durham v. New Amsterdam Casualty Co., 208 F.2d 342, 345 (4th Cir. 1953) (perjured testimony does not constitute grounds for annulling a judgment in independent proceeding); Aetna Casualty & Sur. Co. v. Abbott, 130 F.2d 40, 43-44 (4th Cir. 1942) (perjured testimony does not constitute ground on which court can deny enforcement of prior judgment in independent action); Chrysler Corp. v. Superior Dodge, Inc., 83 F.R.D. 179, 186 (D. Md. 1979) (same); Prickett v. Duke Power Co., 49 F.R.D. 116, 118 (D.S.C.) (false affidavits employed to secure summary judgment did not constitute grounds for setting aside order), *aff'd*, 429 F.2d 984 (5th Cir. 1970).

[71] 98 U.S. at 66; *see supra* note 4 (intrinsic extrinsic distinction).

[72] 675 F.2d at 1358. The Fourth Circuit relied on the Fifth Circuit's analysis in *Addington v. Farmer's Elevator Mut. Ins. Co.*, in determining whether Great Coastal's fraud constituted intrinsic or extrinsic fraud. *Id.*; *see* 650 F.2d 663, 667-68 (5th Cir.), *cert. denied*, 102 S. Ct. 672 (1981); *supra* note 4 (intrinsic and extrinsic fraud defined). Under *Addington*, a litigant must prove five factors in order to prevail in an independent action. 650 F.2d at 668. First, a litigant must allege and prove the existence of an unconscionable judgment. *Id.* Second, a litigant must possess a good defense to the alleged cause of action on which the trial court had founded the judgment assailed. *Id.* Third, a litigant must prove fraud, accident, or mistake which prevented petitioner from obtaining the benefit of his defense. *Id.* Fourth, the litigant must prove the absence of fraud or negligence on his part. *Id.* Finally, the litigant must prove the absence of any adequate remedy at law. *Id.*; *see* Bankers Mortgage Co. v. United States, 423 F.2d 73, 79 (5th Cir.) (identical analysis employed), *cert. denied*, 339 U.S. 927 (1970); Chicago, R.I. & P. Ry. Co. v. Callicotte, 267 F. 799, 805-10 (8th Cir. 1920) (same), *cert. denied*, 255 U.S. 570 (1921).

[73] 675 F.2d at 1358-65 (Butzner, J., dissenting).

[74] *Id.* at 1364; *see supra* text accompanying note 58 (issue of great moment present in *Hazel-Atlas*).

sent also stated that the facts underlying Great Coastal's fraud established that Great Coastal had engaged in a deliberate scheme to defraud the National Labor Relations Board, the district court, and the appellate court.[75] The dissent, therefore, concluded that the court should have overturned the secondary boycotting judgment since the litigation culminating in the judgment for Great Coastal satisfied the two requirements of *Hazel-Atlas* fraud on the court.[76]

The Fourth Circuit's ruling that the union would have succeeded if the union had brought a timely motion under rule 60(b)(3) is in complete accord with established authority.[77] Perjury and the fabrication of evidence are adequate grounds for rule 60(b)(3) motions for relief.[78] The union, therefore, would have succeeded in obtaining relief from Great Coastal's judgment if the union had brought a timely motion.[79]

The Fourth Circuit properly rejected the union's motion for relief under the fraud on the court provision of rule 60(b).[80] The committee charged with amending the Federal Rules of Civil Procedure cited *Hazel-Atlas*[81] as an example of fraud on the court.[82] In addition, courts addressing the fraud on the court issue have relied consistently on the Supreme Court's decision in *Hazel-Atlas*.[83] Only frauds directed at subverting the

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[75] 675 F.2d at 1365; *see supra* text accompanying note 57 (deliberately planned and carefully executed scheme to defraud court present in *Hazel-Atlas*).

[76] 675 F.2d at 1366.

[77] 675 F.2d at 1355. The district court in which the union filed its motion to set aside the judgment had jurisdiction to adjudicate the rule 60(b) motion since the district court was the forum that had rendered the original judgment. *See* Aigner v. Shaughnessy, 175 F.2d 211, 213 (2d Cir. 1949) (only forum that rendered original judgment has jurisdiction over rule 60(b)(3) actions). *Compare* 350 F. Supp. at 1337 *with* 86 F.R.D. at 131 (both original suit and motion to set aside filed in Eastern District Court of Virginia). The evidence uncovered at the evidentiary hearing established that Great Coastal had committed perjury in securing the judgment against the union. 675 F.2d at 1351; *see* Peacock Records, Inc. v. Checker Records, Inc., 365 F.2d 145, 150 (7th Cir. 1966) (perjured testimony constitutes fraud within rule 60(b)(3)), *cert. denied*, 401 U.S. 975 (1967); Parker v. Checker Taxi Co., 238 F.2d 241, 244 (7th Cir. 1956) (applicant for 60(b)(3) relief has burden of proving fraud within rule 60(b)(3) by clear and convincing evidence), *cert. denied*, 353 U.S. 922 (1957). *See generally* MOORE, *supra* note 3, ¶ 60.24[5].

[78] *See supra* note 5 (perjury and fabricated evidence constitute grounds for rule 60(b)(3) relief).

[79] 675 F.2d at 1352.

[80] *Id.* at 1358.

[81] 322 U.S. 238 (1944); *see supra* text accompanying notes 48-59 (*Hazel-Atlas* discussion); *supra* note 7 (discussion of fraud on court motion under rule 60(b)).

[82] *Proposed Amendments*, *supra* note 8, at 479.

[83] *See* Serzysko v. Chase Manhattan Bank, 461 F.2d 699, 702 (2d Cir.) (court held that perjury in securities fraud trial did hot constitute fraud on court), *cert. denied*, 409 U.S. 883 (1972); Wilkin v. Sunbeam Corp., 466 F.2d 714, 717 (10th Cir.) (attorney's misstatements did not constitute fraud on court since jury had not credited attorney's testimony), *cert. denied*, 409 U.S. 1126 (1972); United States v. International Tel. & Tel. Corp., 349 F. Supp. 22, 29 (D. Conn. 1972) (government's failure to disclose details of settlement decree did not constitute fraud on court), *aff'd without opinion*, 410 U.S. 919 (1973); Jungersen v. Axel Bros., Inc., 121

judicial process, involving issues of great public significance will constitute fraud on the court under *Hazel-Atlas*.[84]

The Fourth Circuit's analysis of Great Coastal's fraud is consistent with *Hazel-Atlas*.[85] Great Coastal's fraud did not involve an issue of great public importance since a decision by the court in *Great Coastal* would only affect the interests of the litigants involved.[86] The only individuals that stood to benefit from a favorable judgment in *Great Coastal* were the union or the company. Hartford-Empire's fraud in *Hazel-Atlas*, on the other hand, involved the interests of the public at large since the fraud concerned a patent which is nothing more than a government sanctioned and enforced monopoly.[87] The Supreme Court, therefore, precluded Hartford-Empire Co. from subjecting the public to an illegal monopoly solely on account of Hazel-Atlas Co.'s failure to uncover the fraudulent publication within a year of judgment.[88] In *Great Coastal*, the absence of an issue of public significance precluded the Fourth Circuit from granting the union relief under the fraud on the court provision of rule 60(b).[89]

The union's fraud on the court motion for relief also failed since Great Coastal's fraud did not present a deliberate scheme aimed at defrauding the court.[90] Discrediting the union in order to extract a larger damage award from the union was the sole object of Great Coastal's fraud.[91] In *Hazel-Atlas*, on the other hand, defrauding the patent office and appellate courts into granting and upholding a patent on the gob-feeding process was the sole object of Hartford-Empire Co.'s fraud.[92] Hartford-Empire Co. had not conceived the fraudulent article after the fact in order to ensure its patent infringement judgment against Hazel-Atlas Co.[93] On the contrary, Hartford-Empire Co.'s fraud had involved a

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F. Supp. 712, 717-18 (S.D.N.Y. 1954) (perjury in patent invalidity suit did not constitute fraud on court), *aff'd*, 217 F.2d 646 (2d Cir.) (per curiam), *cert. denied*, 349 U.S. 940 (1955); Porcelli v. Joseph Schlitz Brewing Co., 78 F.R.D. 499, 501 (E.D. Wisc.) (perjury did not constitute fraud on court), *aff'd without opinion*, 588 F.2d 839 (7th Cir. 1978); Petry v. General Motors Corp., 62 F.R.D. 357, 360 (E.D. Pa. 1974) (false and misleading answers to interrogatories did not constitute fraud on court); Lockwood v. Bowles, 46 F.R.D. 625, 630 (D.D.C. 1969) (perjury did not constitute fraud on court since perjury did not involve court or officer of court). *See generally* MOORE, *supra* note 3, ¶ 60.33; WRIGHT & MILLER, *supra* note 3, § 2870.

[84] 322 U.S. at 245-46; *see supra* text accompanying notes 55-58 (two requirements of *Hazel-Atlas* fraud on court).

[85] 675 F.2d at 1352; *see supra* text accompanying notes 55-58 (two requirements of *Hazel-Atlas* fraud on court).

[86] 675 F.2d at 1352.

[87] 322 U.S. at 245.

[88] 322 U.S. at 245-46.

[89] 675 F.2d at 1352.

[90] *Id.*

[91] *Id.*

[92] 322 U.S. at 245-46.

[93] *Id.* at 240-42.

deliberately planned scheme to defraud the patent office and the appellate courts.[94] Since the object of Great Coastal's fraud was the union rather than the court, the Fourth Circuit's decision to deny the union's fraud on the court motion was correct.[95]

The Fourth Circuit also properly rejected the union's independent action for relief.[96] Although the merits of an independent action for relief in certain circuits turns on the unconscionability of the judgment assailed,[97] grounds for an independent action in the Fourth Circuit exist only when the original judgment had involved extrinsic rather than intrinsic fraud.[98] Perjury and fabricated evidence are classic forms of intrinsic fraud.[99] The Fourth Circuit, therefore, correctly denied the union's plea for equitable relief by independent action.[100]

The dissent, in failing to distinguish the nature of the fraud involved in *Hazel-Atlas* from the fraud present in *Great Coastal*, was incorrect.[101]

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[94] *Id.*; *see supra* text accompanying notes 55-58 (two requirements of *Hazel-Atlas* fraud on court).

[95] 675 F.2d at 1352.

[96] *Id.*

[97] *See* Marshal v. Holmes, 141 U.S. 589 (1891). The Supreme Court in *Holmes* granted a litigant equitable relief from a judgment which had been procured by intrinsic fraud. *Id.* at 592. The fraud consisted of a forged letter purportedly signed by the petitioner granting an agent authority to enter into agreements on petitioner's behalf. *Id.* Even though the alleged fraud, fabricated evidence, constituted intrinsic fraud pursuant to *Throckmorton*, the Court granted relief. *Id.* at 596. According to the *Holmes* Court, the dispositive element in weighing the merits of an independent action for relief is whether or not the judgment, as it stands, is unconscionable, and not upon the *Throckmorton* distinction between intrinsic and extrinsic fraud. *Id.*; *see Proposal For General Reform*, *supra* note 2, at 545 (dichotomy exists between *Throckmorton* and *Holmes*); Moore & Rogers, *supra* note 2, at 657-58 (*Holmes* decision contradicts *Throckmorton*). *But see* Chicago, R. I. & P. Ry. Co. v. Callicotte, 267 F. 799, 802-03 (8th Cir. 1920) (Eighth Circuit views *Holmes* as consistent with *Throckmorton*), *cert. denied*, 255 U.S. 570 (1921).

In Publicker v. Shallcross, 106 F.2d 949 (3d Cir.), *cert. denied*, 308 U.S. 624 (1939), the Third Circuit adopted the *Holmes* analysis of an independent action over the *Throckmorton* approach. *Id.* 960. The fraud in *Publicker* consisted of perjury. *Id.* Specifically rejecting the *Throckmorton* distinction between intrinsic and extrinsic fraud, the Third Circuit in *Publicker* found the *Holmes* approach to independent actions controlling. *Id.*; *see* Schum v. Bailey, 578 F.2d 493, 508 (3rd Cir. 1978) (*Holmes* rather than *Throckmorton* controlling in Third Circuit).

[98] 675 F.2d at 1352; *see* Durham v. New Amsterdam Casualty Co., 208 F.2d 342, 345 (4th Cir. 1953) (only fraud extrinsic or collateral to issue already tried supports independent action for relief in Fourth Circuit); Aetna Casualty & Sur. Co. v. Abbott, 130 F.2d 40, 43-44 (4th Cir. 1942) (same); Chrysler Corp. v. Superior Dodge, Inc., 83 F.R.D. 179, 186 (D. Md. 1979) (same); Prickett v. Duke Power Co., 49 F.R.D. 116, 118-19 (D.S.C. 1970) (same).

[99] *See supra* note 82 (perjury and fabrication of evidence are frauds intrinsic to issue already tried and do not support independent actions for relief); *supra* note 4 (perjury and fabrication of evidence constitute intrinsic frauds).

[100] 675 F.2d at 1352.

[101] *Id.* at 1358-65; *see supra* text accompanying notes 84-94 (Great Coastal's fraud did not involve a deliberately planned scheme to defraud a court on an issue of public significance).

Great Coastal's fraud presented a deliberately planned and carefully executed scheme to defraud the union, not the court, and therefore was distinguishable from *Hazel-Atlas*.[102] In addition, the dissent's assertion that Great Coastal's fraud involved an issue of public significance was also incorrect since the only parties involved and affected by the fraud were Great Coastal and the union.[103] The dissent, consequently, misapplied the *Hazel-Atlas* decision.

Finally, the Fourth Circuit's decision in *Great Coastal Express, Inc. v. International Brotherhood of Teamsters* establishes guideposts for the Fourth Circuit practioner seeking equitable relief from a fraudulent judgment.[104] The number of years that have passed between entry of a fraudulent judgment and a petition for relief is of principal concern to the practioner since the timeliness of a plea for relief determines which provision of rule 60(b) to proceed under.[105] Regardless of the type of fraud involved,[106] if a petition for relief is made within a reasonable time, not exceeding one year from the entry of the original judgment, a rule 60(b)(3) motion is in order.[107] The exact nature of the fraud involved in the original judgment becomes dispositive once the one-year limitation applicable to rule 60(b)(3) expires.[108] In the Fourth Circuit, *Throckmorton* remains dispositive of equitable relief by independent action.[109] Only fraud extrinsic to the issues litigated in the original judgment will support an independent action for relief.[110] *Hazel-Atlas*, on the other hand, remains dispositive of the definition of fraud on the court in the Fourth Circuit.[111] The presence of a deliberately planned and carefully executed scheme to defraud a court on an issue of great public significance remains the foundation for equitable relief from a judgment based upon the grounds of fraud on the court.[112] Such fraud will include bribery of a judge, juror, or any fraud involving an attorney as an officer of the

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[102] *See supra* text accompanying notes 89-94 (object of Great Coastal's fraud was union not court).

[103] *See supra* text accompanying notes 84-88 (Great Coastal's fraud affected only union and company).

[104] 675 F.2d at 1353-58.

[105] *See supra* note 1 (rule 60(b)).

[106] *See supra* notes 4 & 5 (any type of fraud, misrepresentation, or other wrongful acts committed by prevailing party in attainment of inequitable judgment constitutes grounds for rule 60(b)(3) relief); *supra* text accompanying notes 76-78 (if union had brought timely 60(b)(3) motion court would have granted union relief).

[107] *See supra* note 8 (time limitations of rule 60(b) petitions for relief from fraudulent judgments).

[108] *See supra* text accompanying note 9 (significance of allowing fraud on the court relief when basis of petition for relief is fraud between parties).

[109] *See supra* note 6 (*Throckmorton*); *supra* text accompanying notes 95-99 (*Throckmorton* controlling in Fourth Circuit).

[110] *See supra* note 97 (only extrinsic fraud supports independent action).

[111] *See supra* text accompanying notes 84-94 (*Hazel-Atlas* controlling in Fourth Circuit).

[112] *See supra* text accompanying notes 84-94 (elements of *Hazel-Atlas* fraud on court).

court.[113] Perjury and the fabrication of evidence alone will not amount to fraud on the court.[114]

WILLIAM RANDALL SPALDING

D. *Rule 63: Disability of a Judge*

The Federal Rules of Civil Procedure (the rules) function to ensure efficiency, economy, and fairness in civil trials.[1] Occasionally, however, the death or illness of a judge may impede the usual course of civil litigation.[2] Rule 63 of the Federal Rules of Civil Procedure (rule 63) provides for the substitution of judges when the original judge cannot complete the court's duties in a lawsuit.[3] Rule 63 specifies that substitution of

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[113] *See supra* notes 7 & 31 (egregious frauds which constitute fraud on court).

[114] *See supra* note 82 (perjury and fabrication of evidence do not constitute fraud on court).

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[1] *See* FED. R. CIV. P. 1 (courts should interpret Federal Rules of Civil Procedure to ensure fair, speedy, and inexpensive proceedings); Markham v. Holt, 369 F.2d 940, 943 (5th Cir. 1966) (Federal Rules of Civil Procedure require just, speedy, and inexpensive results).

[2] *See* St. Louis S.W. Ry. Co. v. Henwood, 157 F.2d 337, 342 (8th Cir. 1946) (substitution of judges interrupts trial). When a judge becomes disabled during a trial, litigation will either cease altogether or slow down while a new judge familiarizes himself with the record. *Id.*

[3] FED. R. CIV. P. 63. If the court has returned a verdict or made findings of fact or conclusions of law before the original judge becomes disabled, a substitute judge may exercise discretion to decide whether he should complete the trial. *Id.*

Rule 63 of the Federal Rules of Civil Procedure (rule 63) superseded the Act of June 5, 1900. Act of June 5, 1980, ch. 717, 31 Stat. 270 (formerly codified as 28 U.S.C. § 776). The 1900 statute permitted a substitute judge to sign a bill of exceptions when the judge who presided at trial was unable to sign due to sickness, death, or some other disability. *See id.* A bill of exceptions, which preserves a party's exceptions to issues of law, is valid only when a judge's signature appears on the bill. *See* Avery v. Bender, 119 Vt. 313, ____, 126 A.2d 99, 108 (1956) (parties preserve exceptions to rulings of law by filing bill of exceptions); Keeshin Motor Express Co. v. Glassman, 219 Ind. 538, ____, 38 N.E.2d 847, 849 (1942) (bill of exceptions not valid unless judge signed bill). A judge's mere absence did not constitute a disability that would permit a substitute judge to sign the bill under the 1900 act. *See* Walton v. Southern Pac. Co., 53 F.2d 63, 67 (9th Cir. 1931) (when original trial judge was absent from circuit, substitute judge could not sign bill of exceptions). Moreover, the substitute judge had to state in the bill of exceptions the reason that the original judge was unable to sign the bill. *See* Ulmer v. United States, 266 F. 176, 181 (2d Cir. 1920) (bill of exceptions invalid because substitute judge failed to explain on certificate why trial judge did not sign).

Prior to the Act of June 5, 1900, bills of exception required the signature of the judge who presided at the trial. *See* Malony v. Adsit, 175 U.S. 281, 288 (1899) (appellate court would not consider bill of exceptions without signature of trial judge); *see* Act of June 1, 1872, ch. 255, § 4, 17 Stat. 197 (judge who sat at trial must sign bill of exceptions). The adoption of rule 63 significantly expanded the 1900 statute. The current rule permits substitute judges to complete all of the court's duties when the original judge filed findings of fact and conclusions of law. FED. R. CIV. P. 63.

judges may occur after the first judge has filed findings of fact and conclusions of law or after the court has returned a verdict.[4] Although a judge's role is more active in nonjury trials than in jury trials,[5] rule 63 does not distinguish between the two types of trials in allowing judge substitution.[6] Traditionally, however, courts have applied the rule only to situations in which a judge tried the case without a jury.[7] The Fourth Circuit considered the application of rule 63 to a jury trial in *Whalen v. Ford Motor Credit Co.*[8]

In *Whalen*, Judge C. Stanley Blair died unexpectedly after the parties had completed three weeks of testimony.[9] Ford Motor Credit Company (Ford Credit) subsequently moved for a mistrial on the basis of rule 63.[10] Judge Herbert F. Murray, substituting for Judge Blair, denied the motion and heard two additional weeks of testimony before the trial ended.[11] On appeal, Ford Credit contended that rule 63 mandated a new trial due to the improper substitution of Judge Murray.[12] A Fourth Cir-

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[4] FED. R. CIV. P. 63. Rule 63 does not specify whether a judge or jury must return the verdict before a substitution occurs. *Id.*

[5] *See* FED. R. CIV. P. 52 (judge shall find facts in nonjury trials); Gupta v. East Tex. State Univ., 654 F.2d 411, 415 (5th Cir. 1981) (requirement that judge in nonjury trial find facts specially ensures that judge is careful when ascertaining facts); Address by Judge James C. Turk, Proceedings of Seminar for Newly Appointed United States District Judges (Sept. 14, 1976), *reprinted in* 75 F.R.D. 131, 131 (1978) (judge in nonjury trial must find facts and determine credibility of witnesses).

[6] FED. R. CIV. P. 63.

[7] *Compare* Thompson v. Sawyer, 678 F.2d 257, 267-69 (D.C. Cir. 1982) (new trial necessary when trial judge sitting without jury died before filing findings of fact and conclusions of law) *and* Arrow-Hart, Inc. v. Philip Carey Co., 552 F.2d 711, 713 (6th Cir. 1977) (absent stipulation by parties, judge could not substitute for another judge during nonjury trial when original judge died before filing findings of fact and conclusions of law) *with* Lever v. United States, 443 F.2d 350, 351 (2d Cir. 1971) (when judge died after filing findings of fact and conclusions of law, new judge permitted to handle posttrial motions).

[8] Whalen v. Ford Motor Credit Co., 684 F.2d 272 (4th Cir.) (en banc) (plurality opinion), *cert. denied*, 103 S. Ct. 216 (1982).

[9] *Id.* at 273.

[10] *Id.*

[11] *Id.* In *Whalen*, the substitute judge interpreted rule 63 as a grant of authority for substitute judges to exercise discretion when considering motions for mistrial. *Id.* at 273-74. Substitute Judge Murray reasoned that since rule 25 of the Federal Rules of Criminal Procedure (rule 25) permits judge substitution before the jury returns a verdict, substitute judges in civil trials should be able to continue trials when the trial judge dies before the end of testimony. *Id.* at 273.

[12] *Id.* at 274. Although judges may grant mistrials for a variety of reasons, judges usually grant mistrials because of some flaw in the proceedings. Hoffer v. Burd, 7 N.D. 278, ____, 49 N.W.2d 282, 292 (1951); *see, e.g.*, Beck v. Wings Field, Inc., 122 F.2d 114, 117 (3rd Cir. 1941) (prejudicial statement of witness is ground for mistrial); Jones v. Anderson, 404 F. Supp. 182, 186 (S.D. Ga. 1974) (trial judge may declare mistrial when juror appears biased against party), *aff'd*, 522 F.2d 181 (5th Cir. 1975); Baker v. St. Louis Pub. Serv. Co., 269 S.W.2d 78, 84-88 (Mo. 1959) (misconduct of counsel in opening argument is ground for mistrial); Printed Terry Finishing Co. v. Lebanon, 247 Pa. Super. 277, 299, 372 A.2d 460, 471 (1977) (new trial necessary when counsel communicated with juror without proving harmlessness of communication).

cuit Court of Appeals panel affirmed the trial court decision to deny the mistrial motion.[13] Yet upon en banc review, a Fourth Circuit plurality reversed the panel's decision and ordered a new trial.[14]

The *Whalen* plurality, in the en banc review, reasoned that rule 63 prohibits judge substitution prior to the filing of findings in both jury and nonjury trials since rule 63 does not specify either type of trial.[15] The plurality stated that the phrase "after return of verdict" implies that rule 63 applies to jury trials.[16] To support its position, the plurality cited some personal records of the Advisory Committee on the Civil Rules[17] and undertook a comparison of rule 63 with rule 25 of the Federal

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[13] *See* Whalen v. Ford Motor Credit Co., 32 Fed. R. Serv. 2d (Callaghan) 678, 679 (4th Cir. 1981). A circuit court of appeals may direct that a panel of three circuit judges hear a case on appeal from a district court. 28 U.S.C. § 46 (1976 & Supp. III 1979). A majority of the circuit judges in active service, however, may order that the court rehear an appeal en banc. FED. R. APP. P. 35(a). Usually, a circuit court will hear an appeal en banc to avoid inconsistent decisions or to address an extremely important issue. *Id.*

In *Whalen*, a Fourth Circuit panel majority reasoned that rule 63 is inapplicable to cases in which the judge dies before the court returns a verdict. 32 Fed. R. Serv. 2d (Callaghan) at 679-80. The panel majority pointed to the history of rule 63 to support its position. *Id.*; *see supra* note 3 (rule 63 represented expansion of powers of substitute judge). Consequently, the panel majority held that rule 63 did not require a mistrial in *Whalen*. 32 Fed. R. Serv. 2d (Callaghan) at 678. The *Whalen* dissent in the en banc opinion adopted the reasoning of the panel majority. Whalen v. Ford Motor Credit Co., 684 F.2d 272, 280 (4th Cir. 1982) (Butzner, J., dissenting) (en banc); *see infra* notes 26-42 and accompanying text. Similarly, the en banc plurality opinion represents the view of the panel dissent. 684 F.2d at 272 (plurality opinion) (en banc); *see infra* notes 15-25 and accompanying text.

[14] 684 F.2d at 274 (plurality opinion) (en banc). A plurality opinion represents the principal rationale of a court that fails to reach a majority opinion. *See* Note, *The Precedential Value of Supreme Court Plurality Decisions*, 80 COLUM. L. REV. 756 n.1 (1980) (plurality opinions occur when majority agrees on judgment but not rationale). Since plurality opinions do not reflect the view of a majority, plurality decisions are not as authoritative as majority opinions. *See* Alaska v. Troy, 258 U.S. 101, 111 (1922) (only majority opinions are binding on other courts).

[15] 684 F.2d at 274 (plurality opinion) (en banc); *see* FED. R. CIV. P. 63.

[16] 684 F.2d at 274 (plurality opinion) (en banc). The *Whalen* plurality contended that the language of rule 63 suggests that the rulemakers intended rule 63 to apply to both jury and nonjury trials. *Id.*; *see supra* note 3 (rule 63 permits judge substitution "after a verdict is returned or findings of fact and conclusions of law are filed").

[17] 684 F.2d at 275-78 (plurality opinion) (en banc). The *Whalen* plurality relied on personal records of the Advisory Committee on the Civil Rules, which met 25 years after the enactment of rule 63. *Id.* at 275-77. According to the plurality, the Committee understood rule 63 to prohibit judge substitution, absent consent of all parties, when a judge dies before filing findings of fact or conclusions of law. *Id.* The Committee records are available at four law libraries, Yale University, Harvard University, University of Chicago, and Tulane University. *Id.* at 275 n.8. The materials include records of a 1953 Committee meeting at which members recommended changing rule 63 to allow a substitute judge to continue a trial in which the original judge had not reached a decision. *Id.* at 275. The proposed amendment did not allow substitute judges to determine the credibility of witnesses, but would provide, nevertheless, for appropriate substitution in jury trials when the credibility of witnesses is an issue for the jury to decide. *Id.* According to the plurality's account of the meeting, the Committee members concluded that since parties often stipulate that a

Rules of Criminal Procedure (rule 25).[18] The court noted that originally, neither rule permitted judge substitution prior to a verdict.[19] In 1966, however, the Judicial Conference of the United States changed the criminal rules to allow substitution of judges during the course of a criminal trial.[20] According to the plurality, the lack of similar action by the Advisory Committee on Civil Rules indicates that the Committee did not intend to provide for a similar substitution during civil trials.[21]

Finally, the plurality considered whether rule 83 of the Federal Rules of Civil Procedure (rule 83) permitted judge substitution in *Whalen*.[22] The plurality noted that rule 83 allows judges to use discretion

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substitute judge may continue a trial that is in its final stages, amendment to rule 63 was unnecessary. *Id.* at 276. The plurality also quoted from a 1938 letter to Douglas Arant, Esq. from Professor James William Moore. *Id.* at 277. According to Moore, who served on the Advisory Committee to the Civil Rules, rule 63 allows substitution only if the original judge had filed findings of fact and conclusions of law. *Id.* The plurality found the opinions of the Committee members to be convincing evidence that rule 63 would not permit preverdict judge substitution absent consent of the parties. *Id.*

[18] *Id.* at 277. Rule 25 permits judge substitution during the course of a criminal trial before the jury returns a verdict. *See* FED. R. CRIM. P. 25(a) (substitute judge, after certifying familiarity with trial record, may continue criminal trial); FED. R. CRIM. P. 25(b) (substitute judge may continue criminal trial when original judge becomes disabled after court returns verdict).

[19] 684 F.2d at 277 (plurality opinion) (en banc); *see* Orfield, *Disability of the Judge in Federal Criminal Procedure*, 6 ST. LOUIS U.L.J. 150, 150 (1960) (original rule 25, which was virtually identical to rule 63, permitted judge substitution in criminal trial after verdict or finding of guilt).

[20] 684 F.2d at 277 (plurality opinion) (en banc). The Judicial Conference of the United States added paragraph 25(a) to rule 25 in 1966. *See* 2 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 391 at 55 n.1 (1969) [hereinafter cited as WRIGHT]. According to the *Whalen* dissent, the addition of subsection (a) to rule 25 was a reaction to Freeman v. United States, 277 F.732 (2d Cir. 1915). *See* 684 F.2d at 284 (Butzner, J., dissenting) (en banc). In *Freeman*, the appellant claimed that the substitution of judges during his criminal trial had denied him the sixth amendment right to trial by jury. *Id.* at 742. The Second Circuit noted that the substitute judge was unable to instruct the jury regarding the testimony of witnesses which the judge had read but not heard. *Id.* at 759. Although one of the judges was present at all stages of the trial, the *Freeman* court stated that defendants have a right to have the same judge preside throughout the trial. *Id.* 759-60. Moreover, the court held that neither the government nor the accused may consent to substitution of judges in a criminal trial. *Id.* at 759; *see infra* note 32 (*Freeman* held that both jury and judge must remain unchanged throughout trial).

Although the dissent attributed the 1966 amendment of rule 25 to *Freeman*, the Advisory Committee Note to the 1966 amendment points to the increase in the number of long criminal trials as the reason for the amendment. *See* FED. R. CRIM. P. 25 advisory committee note (substitution of judges accommodates increasing number of long trials).

[21] 684 F.2d at 278 (plurality opinion) (en banc). The *Whalen* plurality noted that the Advisory Committee on the Civil Rules was aware of the amendment to rule 25. *Id.*; *see supra* notes 18-20 and accompanying text (1966 amendment to rule 25 permits judge substitution during criminal trial). Thus, according to the plurality, the Committee's inaction evidences an intention not to allow judge substitution during civil jury trials. 684 F.2d at 278 (plurality opinion) (en banc).

[22] 684 F.2d at 278-79 (plurality opinion) (en banc); *see infra* text accompanying note 28

in situations for which the rules provide no specific guidance, provided that judges do not act inconsistently with the rules.[23] The plurality interpreted rule 63, however, as a positive prohibition on judge substitution during a civil trial.[24] Accordingly, the plurality deemed the application of rule 83 inappropriate to the present case since judge substitution would be inconsistent with the rules.[25]

The *Whalen* dissent contended, however, that rule 63 contains no positive prohibition against substitution of judges in jury trials.[26] Rather, the dissent stated that since rule 63 simply allows susbstitution after the jury returns a verdict, the rule is silent on whether substitution is improper before the jury returns a verdict.[27] The dissent reasoned that since rule 63 does not prohibit expressly the substitution of judges before the jury returns a verdict, rule 63 would permit substitution as a matter within the trial court's discretion.[28] In addition, the *Whalen* dissent noted that judge substitution in jury trials would have less impact

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(*Whalen* dissent argued that rule 83 permits judge substitution in jury trials); FED. R. CIV. P. 83 (when judges confront situations for which Federal Rules of Civil Procedure do not provide guidance, judges may act in any way not inconsistent with rules).

[23] 684 F.2d at 278 (plurality opinion) (en banc).

[24] *Id.* at 274.

[25] *Id.* at 278-79. In refusing to accept the argument that rule 83 permitted substitution, the *Whalen* plurality noted that a similar rule exists in the Federal Rules of Criminal Procedure. *Id.* at 278. Rule 57(b) of the Federal Rules of Criminal Procedure provides that the court may act in a manner not inconsistent with the criminal rules when no rule applies to a particular situation. FED. R. CRIM. P. 57(b). Notwithstanding rule 57(b), the Judicial Conference believed an amendment to rule 25 was necessary to provide adequately for situations in which a judge's disability arises during trial. 684 F.2d at 278-79 (plurality opinion) (en banc); *see* FED. R. CRIM. P. 25 advisory committee note (Judicial Conference amended rule 25 to provide for judge substitution during criminal jury trials). The Fourth Circuit concluded that if amendment to rule 25 was necessary to permit substitution during criminal trials, the absence of a similar amendment for civil trial substitution indicates that substitution during trial is impermissible. 684 F.2d at 278-79 (plurality opinion) (en banc).

[26] 684 F.2d at 281 (Butzner, J., dissenting) (en banc); *see supra* note 3 (discussion of rule 63).

[27] 684 F.2d at 281 (Butzner, J., dissenting) (en banc). The *Whalen* dissent noted that since the judge has a less active role in jury trials than in nonjury trials, nonjury trials interpreting rule 63 are not appropriate precedent for jury trials. *Id.* at 280. Moreover, the dissent criticized the plurality's use of unofficial records of the Advisory Committee. *Id.* at 281; *see supra* note 17 (*Whalen* plurality relied on unofficial records of Advisory Committee to prove purpose of rule 63). The dissent, relying on a Supreme Court case that warned against the use of unofficial legislative history, stated that the published notes of the Advisory Committee on the Rules of Civil Procedure are the only appropriate source of legislative intent. 684 F.2d at 282 (Butzner, J., dissenting) (en banc); *see* Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 118 n.13 (1980) (informal subsequent legislative history is unreliable source of legislative intent). The dissent concluded that the plurality inappropriately relied on a Committee meeting held 25 years after rule 63's inception. 684 F.2d at 282 (Butzner, J., dissenting) (en banc).

[28] 684 F.2d at 282 (Butzner, J., dissenting) (en banc).

on the outcome of the trial than in nonjury trials in which the judge makes the factual findings.[29]

The dissent criticized the plurality's position on several grounds.[30] First, the dissent pointed out that an analogy to the Federal Rules of Criminal Procedure demonstrates that preverdict substitution is permissible in civil jury cases.[31] The dissent noted that the adoption of rule 25(a) of the Federal Rules of Criminal Procedure was a reaction to *Freeman v. United States*.[32] The *Freeman* court held that the death of a trial judge during a criminal trial mandates a mistrial.[33] Since no court has made a similar ruling in a civil case, the dissent suggested that the Advisory Committee on the Civil Rules has had no reason to amend rule 63.[34]

Second, the dissent analogized rule 63 to rule 48 of the Federal Rules of Civil Procedure (rule 48) and concluded that rule 63 does not imply prohibition of judge substitution in jury trials.[35] The Supreme Court held in *Colgrove v. Battin*[36] that rule 48, which states that parties may agree to have a jury of less than twelve persons, does not imply that civil juries must consist of twelve jurors unless the parties stipulate.[37]

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[29] *Id.* at 280; *see* FED. R. CIV. P. 52(a) (judge sitting without jury must find facts); *see supra* note 5 (judge in nonjury trial must find facts and assess credibility of witnesses).

[30] *See infra* notes 31-42 and accompanying text.

[31] *See infra* notes 32-34 and accompanying text (Advisory Committee on Civil Rules has had no reason to amend rule 63 because no court has held that substitute judge must order mistrial when original judge becomes disabled before jury returns verdict).

[32] 227 F. 732 (2d Cir. 1915). In *Freeman*, a criminal case, judge substitution occurred after the government finished presenting its evidence. *Id.* at 759. The government had presented 106 witnesses, and the substitute judge familiarized himself with the testimony by reviewing court minutes. *Id.* According to the *Freeman* court, a trial judge should hear the same evidence that the jury hears, and reading testimony is not equivalent to hearing witnesses in person. *Id.* The *Freeman* court, therefore, held that both the jury and the judge must remain the same throughout the trial. *Id.* at 759-60; *see supra* note 20 (*Freeman* court held that neither government nor defendant may consent to judge substitution during criminal trial).

[33] 227 F. at 759.

[34] 684 F.2d at 284 (Butzner, J., dissenting) (en banc).

[35] *Id.* at 282; *see* FED. R. CIV. P. 48 (rule 48) (parties may agree to jury consisting of any number less than 12).

[36] 413 U.S. 149, 163-64 (1973).

[37] 684 F.2d at 282 (Butzner, J., dissenting) (en banc); *see* Colgrove v. Battin, 413 U.S. 149, 163-64 (1973) (rule 48 does not require 12 person jury). In *Colgrove*, the Supreme Court considered the constitutionality of a Montana statute that provides for a 6 person jury in civil trials. *Id.* at 149-50. The Court held that while the seventh amendment preserves the right of trial by jury, the seventh amendment does not require that juries consist of 12 persons. *Id.* at 157. The Supreme Court reasoned that the difference between the results of a 6 person jury and a 12 person jury would not be significant. *Id.* at 158. In addition, the *Colgrove* Court stated that rule 48 merely permits parties to stipulate to juries of less than 12 persons. *Id.* at 164. Rule 48, therefore, does not require a 12 person jury when parties fail to consent to a jury of less than 12. *Id.*

Similarly, the dissent argued, the plurality should not imply that rule 63 prohibits judge substitution when parties fail to agree to the substitution.[38]

Finally, the dissent dismissed an argument Ford Credit made that the plurality did not address.[39] Ford Credit contended that the seventh amendment entitled the parties to a mistrial because the seventh amendment right of trial by jury includes the right to have the same judge preside throughout the trial.[40] The dissent reasoned that the seventh amendment does include the right to a supervised jury, but that the same judge need not preside throughout the entire trial.[41] Furthermore, the dissent concluded that the seventh amendment does not require that the same judge preside throughout a civil jury trial any more than the seventh amendment requires a jury of twelve persons.[42]

The majority of courts that have considered rule 63 agree that the death of a trial judge after he has filed findings of fact and conclusions of law does not require a mistrial.[43] In nonjury trials, courts generally re-

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[38] 684 F.2d at 282 (Butzner, J., dissenting) (en banc). The *Whalen* dissent contended that the logic of *Colgrove* dictated that courts should not draw implications from the Federal Rules of Civil Procedure. *Id.*; *see* Colgrove v. Battin, 413 U.S. 149, 163-64 (1973) (rule 48 does not imply that juries must consist of 12 persons).

[39] 684 F.2d at 285 (Butzner, J., dissenting) (en banc); *see infra* note 41 and accompanying text (seventh amendment does not require same judge to preside throughout trial).

[40] 684 F.2d at 285 (Butzner, J., dissenting) (en banc). In a criminal case prior to the 1966 amendment to rule 25, the Ninth Circuit held that the same judge must preside throughout a criminal trial. *See* Simons v. United States, 119 F.2d 539, 544 (9th Cir. 1941) (defendant in criminal trial has right to have same judge preside throughout trial); *see also* Patton v. United States, 281 U.S. 276, 289 (1930) (right to trial by jury includes right to judicial supervision of jury); Capital Traction Co. v. Hof, 174 U.S. 1, 13-14 (1899) (right to trial by jury includes right to trial by jury under direction of judge).

[41] 684 F.2d at 285 (Butzner, J., dissenting) (en banc). In *Colgrove v. Battin*, the Supreme Court stated that the seventh amendment right to trial by jury is not a right to the procedure of 1791, when all juries consisted of 12 persons. Colgrove v. Battin, 413 U.S. 149, 156 (1973). The seventh amendment guarantees the substantive right to trial by jury rather than a right to any particular procedure. Walker v. Southern Pac. R.R., 165 U.S. 593, 596 (1897). The substantive aspects of trial by jury include the right to have a jury decide factual issues. *Id.* Since the size of a jury does not affect the jury's reliability, the *Colgrove* Court upheld the constitutionality of a state statute permitting juries of 6 persons. 413 U.S. at 157-60.

[42] 684 F.2d at 285 (Butzner, J., dissenting) (en banc). The *Whalen* dissent reasoned that the court is a continuous institution. *Id.* at 282. When one judge cannot complete a case, therefore, a substitute judge should continue the case unless judge substitution would prejudice the parties. *Id.* at 283. The *Whalen* dissent relied on *St. Louis Southwestern Railway Co. v. Henwood*, a bankruptcy case in which the Eighth Circuit concluded that a substitute judge could continue the trial unless judge substitution would impair justice. *Id.* at 282-83; *see* St. Louis S.W. Ry. Co. v. Henwood, 157 F.2d 337, 342 (8th Cir. 1946). In *St. Louis*, the original judge died after counsel had completed their arguments. *Id.* at 340. The substitute judge concluded that the parties did not have a right to a new trial. *Id.* Instead, the substitute judge viewed the issue of mistrial as a matter within the court's discretion. *Id.*

[43] *See* U.S. Gypsum Co. v. Schiavo Bros., Inc., 32 Fed. R. Serv. 2d (Callaghan) 1419, 1423 (3rd Cir. 1981) (substitute judge may reconsider legal conclusions of judge who re-

quire new trials when a judge dies before filing findings of fact and conclusions of law.[44] Virtually all courts agree that when credibility of witnesses is an issue, the importance of first-hand impression by the trial judge outweighs the general policy of judicial economy.[45]

The *Whalen* court is the first court to consider rule 63 in the context of a civil jury trial in which the judge died before the jury returned a verdict.[46] As the *Whalen* decision clearly indicates, rule 63 does not

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signed after filing judgment); Villareal v. Braswell Motor Freight Lines, 545 F.2d 978, 979-80 (5th Cir. 1977) (substitute judge may rule on motions for reconsideration when original judge died after filing findings of fact and conclusions of law); Lever v. United States, 443 F.2d 350, 351 (2d Cir. 1971) (when original judge has filed findings of fact and conclusions of law, substitute judge may rule on posttrial motions); Bangor & Aroostook R.R. v. Bhd. of Locomotive Firemen & Engineermen, 314 F. Supp. 352, 355-56 (D.D.C. 1970) (substitute judge may complete court's duties after original trial judge has stated conclusions of law).

[44] *See supra* note 7 (new trial necessary when judge dies before filing findings of fact and conclusions of law); *see also* Ten-O-Win Amusement Co. v. Casino Theatre, 2 F.R.D. 242, 243 (N.D. Cal. 1942) (substitute judge may not finish case if original judge did not file findings of fact or conclusions of law). *But see* Bromberg v. Moul, 275 F.2d 574, 576 n.1 (2d Cir. 1960) (court approved substitution of new judge after original judge died without making any findings). According to the *Bromberg* court, rule 63 does not address the situation in which a trial judge dies before filing findings of fact and conclusions of law. *Id.* Consequently, the *Bromberg* court stated that rule 63 did not prohibit judge substitution when the original judge died before reaching a decision. *Id.* In absence of an express prohibition on judge substitution, the *Bromberg* court approved the substitute judge's power to grant summary judgment to one of the parties. *Id.* at 576.

[45] *See, e.g.*, Anaya v. Romero, 627 F.2d 226, 227-28 (10th Cir. 1980) (absent stipulation by parties, original magistrate in hearing must determine any findings involving credibility of witnesses), *cert. denied*, 450 U.S. 926 (1981); Federal Deposit Ins. Corp. v. Siraco, 174 F.2d 360, 364 (2d Cir. 1949) (even when parties stipulated that substitute judge should continue case, new trial necessary because credibility of witnesses was issue); Sunshine v. Sunshine, 488 P.2d 1131, 1134 (Colo. App. 1971) (nothing in text of Colorado rule 63, which is same language as federal rule 63, gives successor judge power to judge credibility of witnesses). *But see* St. Louis S.W. Ry. Co. v. Henwood, 157 F.2d 337, 342-43 (8th Cir. 1946) (court permitted judge substitution when substitute judge determined witness' credibility by comparing record of oral testimony with witness' written statements prior to trial).

[46] *See supra* notes 9-14 and accompanying text (facts of *Whalen*). The Fourth Circuit in *Whalen* was the first court to interpret rule 63 as a prohibition against judge substitution when a judge sitting without a jury died before the jury returned a verdict. But a district court in *Burrill v. Shaughnessy* considered the effect of rule 63 on civil jury trials when a judge died after the jury returned a verdict. *See* Burrill v. Shaughnessy, 9 Fed. R. Serv. (Callaghan) 918, 919 (N.D.N.Y. 1946). In *Burrill*, the original judge died after the jury returned a verdict but before the judge filed any findings of fact or conclusions of law. *Id.* Although the *Burrill* court found that the jury had returned a verdict within the meaning of rule 63, the court ordered a mistrial on issues that the jury did not determine. *Id.* Thus, the *Burrill* court was reluctant to permit judge substitution even though the jury had returned a verdict in accordance with rule 63. *Id.*

Other courts have considered the effect of rule 63 on posttrial motions. *See* Miller v. Pennsylvania R.R. Co., 161 F. Supp. 633, 636 (D.D.C. 1958) (when trial judge died after jury returned verdict, another judge properly ruled on motion for new trial); Lashbrook v. Kennedy Motor Lines, 119 F. Supp. 716, 717 (W.D. Pa. 1954) (substitute judge ruled on motion for new trial when original judge died after jury returned verdict).

distinguish between jury and nonjury trials.[47] Yet the differences between the two types of trials are too significant to disregard.[48] Unlike the judge sitting without a jury, the judge in a jury trial does not make factual findings or determine credibility of witnesses. Although fairness to the parties may require a mistrial in some jury cases in which the judge is unable to finish the trial,[49] a requirement of mistrial in all jury cases would result in unnecessary litigation. Interestingly, the concurrence in *Whalen*, which enabled the plurality to prevail on the substitution issue, stated that rule 63 should treat jury trials differently than nonjury trials.[50]

Under the *Whalen* dissent's interpretation of rule 63, a successor judge may order a mistrial only to prevent potential prejudice to a party.[51] The dissent, therefore, would promote a balancing test in judge substitution disputes that would weigh the policy of judicial economy against the potential prejudice to the parties. The balancing test would result in more equitable resolutions of the substitution problem than the *Whalen* plurality's rigid rule will produce.[52] Since criminal trials afford protections to the defendant that generally exceed the protections which civil actions require, and since rule 25 allows judge substitution during criminal jury trials,[53] no practical reason exists for prohibiting judge substitution during all civil jury trials.[54] In addition, the Supreme Court has established that the substantive right to trial by jury in civil cases

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[47] *See* FED. R. CIV. P. 63 (substitute judge may complete trial when original judge dies after court returns verdict or judge files findings).

[48] *See supra* note 5 (rules require judge to find facts and determine credibility of witnesses in nonjury trial).

[49] *See supra* note 20 (substitute judge could not instruct jury on credibility of witnesses). If a judge's absence from part of the trial hinders the judge's ability to instruct the jury, perhaps fairness to parties would require a mistrial.

[50] 684 F.2d at 279-80 (Winter, C.J., concurring) (en banc). Chief Judge Winter's concurrence with the plurality enabled the court to reach a decision. *Id.* The Chief Judge stated that his support for the plurality opinion stemmed from the unseemliness of the *Whalen* facts and the potential for confusion should the court fail to reach a decision. *Id.* at 279. In hopes of avoiding similar conflicts, Chief Judge Winter has asked the Advisory Committee on the Civil Rules to reconsider an amendment to rule 63. *Id.* at 280. The subject of amendment to rule 63 is currently on the agenda for the next meeting of the Advisory Committee on the Civil Rules. Letter from Walter R. Mansfield, Chairman of Advisory Comm. on the Civil Rules, to Joy Rattray (September 20, 1982).

[51] 684 F.2d at 284 (Butzner, J., dissenting) (en banc).

[52] *See supra* notes 15-25 and accompanying text (*Whalen* plurality held rule 63 required mistrial when judge died before jury returned verdict or court filed findings of fact and conclusions of law).

[53] *See supra* note 20 (criminal rules permit judge substitution when substitute judge certifies familiarity with record).

[54] *See* Brief for Appellee at 53, Whalen v. Ford Motor Credit Co., 684 F.2d 272 (4th Cir.) (plurality opinion) (en banc) (since criminal rules permit judge substitution when defendant's liberty is at stake, civil rules should permit judge substitution when only money is at stake), *cert. denied*, 103 S.Ct. 216 (1982).

does not include the right to a particular procedure or form of jury trial.[55] Thus, judge substitution during jury trials presents no constitutional problem.[56]

In light of the *Whalen* decision, however, an amendment to rule 63 to clarify its scope is the only way to avoid similar rigid decisions when judge substitution is necessary. Absent an amendment to rule 63, parties under similar circumstances may cite *Whalen* as direct authority for a mistrial even when the interests of judicial economy and fairness to the parties suggest a different result.[57] Rule 63, therefore, should distinguish between jury and nonjury trials.[58] The death of a presiding judge in a jury trial usually will have little effect on the jury's verdict. Yet a retrial is both costly and time-consuming for all parties. Considering the congestion in the federal court system, courts should not grant mistrials indiscriminately.[59] Perhaps the Advisory Committee on the Civil Rules will react to the *Whalen* decision by amending rule 63.[60] In the meantime, Fourth Circuit attorneys should be prepared to begin a new trial whenever a judge becomes disabled in the course of a civil jury trial.

JOY MALLICK RATTRAY

E. *Supersedeas Bond Necessary for 28 U.S.C. § 1963*

Before Congress enacted section 1963 of title 28 of the United States Code (section 1963),[1] a creditor wishing to enforce a judgment against a debtor with assets in a foreign district had to obtain a separate judg-

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[55] *See* Walker v. Southern Pac. R.R., 165 U.S. 593, 596 (1897) (Supreme Court held seventh amendment provides only substantive right to trial by jury).

[56] *See supra* note 41 and accompanying text (dissent's argument that seventh amendment does not prohibit judge substitution during trial); *see generally* Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 337 (1966) (courts should not interpret seventh amendment as mandating specific procedure).

[57] *See supra* notes 9-14 and accompanying text (*Whalen* plurality held that rule 63 prohibited judge substitution when judge died before jury returned verdict).

[58] *See supra* note 4 (rule 63 does not specify jury or nonjury trial).

[59] *See* CIVIL TRIAL MANUAL 2, 3-5 (2d ed. 1981) (United States court system is overcrowded and number of cases is increasing); *Federal Courts; Still Slow and Expensive*, 28 U.S. NEWS & WORLD REP. 7 (Jan. 14, 1980) (backlog of cases partly due to increase in number of long, complex trials).

[60] *See supra* note 50 (subject of amendment to rule 63 is on agenda for Advisory Committee on Civil Rules).

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[1] 28 U.S.C. § 1963 (1976). Section 1963 provides that a judgment creditor who has secured a judgment in an action for the recovery of money or property in a federal district court may register the judgment in a foreign federal district by filing with the foreign district court a certified copy of the judgment. *Id.* Under § 1963, however, registration is

ment in the foreign district.[2] Courts required an independent action in the foreign district on the theory that a debtor had the right to contest the validity of the judgment according to the laws of the enforcing state.[3] Congress enacted section 1963 to streamline the procedure judgment creditors must employ to execute a judgment in a foreign district.[4] Section 1963 accomplishes the streamlining function by allowing a judgment creditor who has secured a judgment in an action for the recovery of money or property in a federal district court to register that judgment in a foreign district by filing with the foreign district court a certified copy of the judgment.[5] Under section 1963, however, a creditor can register the judgment only if the debtor has not filed an appeal of the judgment or if the judgment debtor's time for appeal has expired.[6] Since the wording of the statute permits registration only when the judgment is "final by appeal or by the expiration of time for appeal,"[7] section 1963 provides the judgment debtor a stay of execution of the judgment either until the appellate court has affirmed the district court judgment or until the thirty day time limit for appeal elapses.[8]

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not permissible unless the judgment has become final by appeal or the time for appeal has elapsed. *Id.*; *see infra* note 8 (28 U.S.C. § 2107 (1976) allows a party thirty days to appeal from district court judgment). A registered judgment has the same effect in the foreign district as the original judgment has in the district of trial. 28 U.S.C. § 1963 (1976).

[2] *See* Riley v. New York Trust Co., 315 U.S. 343, 349-50 (1942) (enforcement of judgment rendered in foreign state court usually depends upon separate judgment in action to enforce foreign judgment), *reh'g. denied*, 315 U.S. 829 (1942); Hilton v. Guyot, 159 U.S. 113, 227-28 (1895) (judgment creditor must obtain second judgment in local federal court to enforce judgment of foreign district court).

[3] *See* James v. Allen, 1 U.S. [1 Dall.] 188, 191 (1786) (local court can retry action according to local law although foreign court previously rendered independent judgment).

[4] *See* Urban Indus., Inc. of Ky. v. Thevis, 670 F.2d 981, 985 (11th Cir. 1982) (section 1963 is streamlined alternative to bringing second suit in foreign district); Bros, Inc. v. W. E. Grace Mfg. Co., 261 F.2d 428, 433 n.4 (5th Cir. 1958) (section 1963 provides extraterritorial enforcement machinery for enforcing judgments in foreign districts); *infra* text accompanying notes 54-70 (discussion of *Thevis* and *Bros*); *infra* text accompanying notes 37-42 (intent of Supreme Court Advisory Committee that drafted language of § 1963); *cf.* Juneau Spruce Corp. v. International Long & Warehouseman's Union, 128 F. Supp. 697, 700 (D. Hawaii 1955) (Congress designed registration statute to relieve both creditors and debtors of additional cost and harrassment of further litigation that otherwise would be incident to action on judgment in foreign district).

[5] 28 U.S.C. § 1963 (1976); *see supra* note 1 (language of § 1963).

[6] 28 U.S.C. § 1963.

[7] *Id.*

[8] *See* 28 U.S.C. § 1963 (1976) (language of § 1963 does not require filing of supersedeas bond); 28 U.S.C. § 2107 (1976) (party must file notice of appeal from district court judgment within thirty days after entry of final judgment). A supersedeas bond is a bond that a court requires of a judgment debtor who petitions to set aside a judgment and that makes the other party whole if the debtor's action is unsuccessful. *See* Ransom v. City of Pierre, 101 F. 665, 669 (8th Cir. 1900) (supersedeas bond merely operates to stay execution or other final process on judgment but does not vacate judgment, nor prevent either party from invoking judgment as estoppel); Louisville Trust Co. v. National Bank of Ky., 3 F. Supp. 925, 926 (E.D. Ky. 1933) (supersedeas bond is bond to pay damages that appellee may sustain by reason of an unsuccessful appeal); Wheeler v. Rea, 306 S.W.2d 294, 296 (Ky. 1957)

In contrast to section 1963, rule 62(d) of the Federal Rules of Civil Procedure[9] and rule 8(a) of the Federal Rules of Appellate Procedure,[10] which relate to execution of a creditor's judgment in the district of trial, permit a judgment debtor to stay the effects of an adverse judgment pending appeal only by filing a supersedeas bond.[11] Although the debtor's filing of a supersedeas bond is not mandatory, failure to file a bond allows the creditor to proceed with execution of the judgment against assets located in the district of trial regardless of the pending appeal.[12] In *Kaplan v. Hirsh*,[13] the Fourth Circuit considered whether

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(supersedeas bond is covenant to perform judgment and to pay all damages and costs); *cf.* Anderson v. Pickrell, 115 Ariz. 589, 590, 566 P.2d 1335, 1336 (1977) (superior court acted beyond its authority in staying execution of debtor's judgment pending appeal on basis of written understanding with court as substitute for filing of supersedeas bond).

[9] FED. R. CIV. P. 62(d). Rule 62(d) provides that when a debtor appeals a judgment, the debtor can obtain a stay of execution of the judgment only by filing a supersedeas bond in the district court. *Id.*; *see infra* note 10 (procedure for filing bond and staying execution of judgment). Rule 62(d) states further that the debtor may file the bond at or after the time of filing the notice of appeal or at the time of procuring the order allowing the appeal. FED. R. CIV. P. 62(d). Rule 62(d) provides that the stay is effective only when the district court approves the supersedeas bond. *Id.* Rule 62(d) does not set a statutory amount for a supersedeas bond. *See id.*; 11 C. WRIGHT & A. MILLER, FED. PRACTICE AND PROCEDURE § 2905, at 327 (1973). Unless local rules in a district regulate the amount of a bond, courts tend to follow guidelines described in now rescinded Civil Rule 73(d). *Id.* Congress rescinded rule 73(d) in 1968 when Congress adopted the Federal Rules of Appellate Procedure. *Id.* Former rule 73(d) provided that the bond amount should equal the amount of the judgment and any costs, interest, and damage that the appellate court deems appropriate. CIV. R. 73(d). If the judgment is for money not otherwise secured, the bond amount should cover the whole amount of the judgment remaining unsatisfied as well as costs on appeal, interest, and damages for delay. *Id.*

[10] FED. R. APP. P. 8. Rule 8 provides the procedure for obtaining a stay of execution of a judgment from a district court. *Id.* Rule 8 states that a debtor initially must file an application for a stay of the judgment or for approval of a supersedeas bond in the district court. *Id.* The debtor also must file in the district court an application for an order of the court pending appeal or an order modifying an injunction while an appeal is pending. *Id.*

[11] *See* FED. R. CIV. P. 62(d) (debtor can gain stay on execution of judgment in local district only by filing supersedeas bond in local district court); FED. R. APP. P. 8 (same); *supra* note 8 (defining supersedeas bond).

[12] *See* Sterling v. Blackwelder, 405 F.2d 884, 884 (4th Cir. 1969) (per curiam) (failure to comply with rule 62(d) resulted in dismissal of judgment debtor's appeal of order confirming judicial sale of appellant's property); Fidelity & Deposit Co. of Md. v. Davis, 127 F.2d 780, 782 (4th Cir. 1942) (dictum) (bond required if debtor desires to stay execution of judgment pending appeal); *see also* 9 J. MOORE, B. WARD & J.D. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 208.03 (2d ed. 1981) [hereinafter cited as 9 MOORE'S FEDERAL PRACTICE]; 7 J. MOORE & J. D. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 62.06 (2d ed. 1981) (judgment debtor's failure to file supersedeas bond permits prevailing party to treat judgment of district court as final despite the pendancy of an appeal). *But see* Federal Prescription Serv., Inc. v. American Pharmaceutical Ass'n, 636 F.2d 755, 758 (D.C. Cir. 1980) (power to grant stay within discretion of district court even if no bond filed); 9 MOORE'S FEDERAL PRACTICE *supra*, ¶ 208.06[1] at 8-18 (although rule 62(d) requires debtor's filing of supersedeas bond, district court may stay execution of judgment without requiring bond in absence of irreparable harm to appellee).

[13] 33 Fed. R. Serv. 2d (Callaghan) 1570 (4th Cir. 1982), *cert. denied*, 50 U.S.L.W. 3538 (U.S. April 26, 1982) (No. 81-1789).

courts should avoid the apparent inconsistency between section 1963 and the Rules of Civil and Appellate Procedure (rules) by interpreting section 1963 as implicitly requiring a debtor to file a supersedeas bond to stay the execution of the judgment.[14]

Dr. Harry Kaplan obtained a judgment against Samuel Hirsh in the United States District Court for the District of Columbia.[15] Although Hirsh filed a timely notice of appeal, he failed to file a supersedeas bond to stay execution of the judgment.[16] Kaplan then attempted to register the judgment in the United States District Court in the District of Maryland pursuant to section 1963.[17] The Maryland district court, however, refused to register the judgment on the theory that the judgment was not final by appeal under section 1963.[18] The Maryland district court effectively granted Hirsh a stay of execution by refusing to register the judgment even though Hirsh had failed to post a supersedeas bond.[19] Kaplan, the judgment creditor, appealed to the Fourth Circuit.[20]

The Fourth Circuit relied on *ITT Independent Credit Co. v. Lawco Energy Inc.*[21] in reversing the district court's holding.[22] In *Lawco*, the

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[14] 33 Fed. R. Serv. 2d (Callaghan) at 1570.

[15] Kaplan v. Hirsh, 91 F.R.D. 106, 107 (D. Md. 1981).

[16] *Id.*; *see supra* text accompanying notes 8-11 (necessity of debtor's filing of supersedeas bond to stay judgment pending appeal).

[17] 91 F.R.D. at 106. The Maryland district court in *Kaplan* considered the sole issue to be whether a district court could register judgment in a foreign court while an appeal was pending. *Id.* at 107; *see supra* note 1 (judgment creditor's registration procedure under § 1963).

[18] 91 F.R.D. at 106-07. In *Kaplan* the district court determined that section 1963 expressly required a judgment to be final by appeal before registration was permissible. *Id.* at 107. The *Kaplan* court determined that although Congress enacted § 1963 as a streamlined enforcement procedure for federal judgments, Congress intentionally limited the statute's application to judgments that are "final by appeal or expiration of time for appeal." *Id.* at 109. Since Hirsh had filed a timely notice of appeal and the appeal still was pending, the district court held that the judgment was not final by appeal under the requirements of § 1963. *Id.* The *Kaplan* district court concluded that final judgments were the most suitable subjects for a streamlined enforcement procedure because no danger existed that an appellate court later would reverse the original judgment, and the problem of collateral attack by the debtor was minimal. *Id.*

[19] *Id.* at 107. *But see infra* text accompanying notes 21-29 (Fourth Circuit's reasoning in reversing Maryland district court).

[20] Kaplan v. Hirsh, 33 Fed. R. Serv. 2d (Callaghan) at 1570. In *Kaplan* the sole issue on appeal before the Fourth Circuit was whether a creditor could register a judgment in a foreign district when the debtor failed to file a supersedeas bond pending appeal. *Id.*

[21] 86 F.R.D. 708 (S.D. W.Va. 1980). In *Lawco* the judgment creditor registered a judgment in a foreign district after the time had expired for the debtors to appeal the initial decision. *Id.* at 709-10. The debtors then attempted to quash registration of the judgment on the basis that an appeal of a motion denied by the original district court to set aside the judgment under rule 60(b) of the Federal Rules of Civil Procedure was pending at the circuit court level. *Id.* at 710. Although the *Lawco* court held that a rule 60(b) motion cannot qualify as an appeal under § 1963, the court noted the inconsistency between registration of a judgment in a foreign district under § 1963 and execution of a judgment in the local district

District Court for the Southern District of West Virginia stated in dicta that courts should interpret section 1963 consistently with the rules.[23] The *Lawco* court held that an interpretation of section 1963 that allows a stay of execution in a foreign district, regardless of whether the debtor filed a supersedeas bond, was inconsistent with the rules' allowing a judgment creditor to levy against a judgment debtor in a local district unless the debtor has filed a supersedeas bond.[24] Applying the *Lawco* court's rationale, the *Kaplan* court held that courts should interpret section 1963 as requiring a supersedeas bond to avoid an unconstitutional disparity in rights between judgment debtors based solely on the location of the debtor's assets.[25] The *Kaplan* court noted that under the rules a debtor with assets in the district of trial must file a supersedeas bond to gain a stay of execution pending appeal, while debtors with assets in a foreign district receive an automatic stay until expiration of the time for appeal.[26] The *Kaplan* court therefore reasoned that a supersedeas bond also was necessary under section 1963 to provide equal protection to debtors with assets within the district of trial.[27]

In *Kaplan*, the Fourth Circuit also expressed concern that a strict interpretation of the language of section 1963 might permit a debtor to escape creditors by filing a frivolous appeal without filing a supersedeas bond and then transferring property to another district.[28] The *Kaplan*

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under Federal Rule of Civil Procedure 62(d) and Federal Rule of Appellate Procedure 8(a). *Id.* at 712; *see supra* notes 8-11 (necessity of debtor's filing of supersedeas bond to stay execution of judgment pending appeal in judgment district).

[22] 33 Fed. R. Serv. 2d (Callaghan) at 1572.

[23] 86 F.R.D. at 712 (dicta); *see supra* note 21 (holding of *Lawco*).

[24] 86 F.R.D. at 712.

[25] 33 Fed. R. Serv. 2d (Callaghan) at 1571; *see* 86 F.R.D. at 712 (consistency with rule 62(d) of Federal Rules of Civil Procedure demands debtor file bond under § 1963). In determining that a debtor must post a supersedeas bond to stay execution of a judgment under § 1963, the *Kaplan* court followed the constitutional analysis that an Alabama district court applied in *Dorey v. Dorey*, 77 F.R.D. 721 (N.D. Ala. 1978), *rev'd in part on other grounds*, 609 F.2d 1128 (5th Cir. 1980). *See* 33 Fed. R. Serv. 2d (Callaghan) at 1571 n.1. In *Dorey*, a divorcee moved for execution of judgment for overdue alimony payments from her ex-husband in the United States District Court for the Northern District of Alabama. 77 F.R.D. at 721-22. The debtor husband attempted to avoid payment on the overdue alimony by filing a frivolous appeal and by switching his property and residency to Texas without filing a supersedeas bond under § 1963. *Id.* at 724. In finding for the creditor, the *Dorey* court held that a judgment creditor has a constitutional right to collect on the judgment against a debtor in any district in which the debtor's assets are located if the debtor has failed to file a supersedeas bond. *Id.* at 723. The *Dorey* court noted that a literal reading of § 1963 would give a resident of a nonjudgment district a "super-right" to escape execution of judgment without having filed a supersedeas bond. *Id.* at 723. *But see infra* note 56 (*Thevis* court's constitutional interpretation refuting *Dorey* court).

[26] 33 Fed. R. Serv. 2d (Callaghan) at 1571; *see supra* notes 1, 9, & 10 (difference between registration procedure and procedure for securing stay of local judgment).

[27] 33 Fed. R. Serv. 2d (Callaghan) at 1571.

[28] *Id.*; *see* Dorey v. Dorey, 77 F.R.D. 721 (N.D. Ala. 1978) (debtor attempted to avoid paying overdue alimony payments by filing frivolous appeal and by moving property and

majority concluded that interpreting section 1963 as implicitly including the rules' bond requirement would be the most effective way of preventing a debtor from escaping enforcement of the judgment through abuse of the appellate process.[29] The Fourth Circuit noted that the congressional purpose in enacting section 1963 was to provide a summary enforcement mechanism that would allow successful judgment creditors to levy against the assets of debtors in foreign districts without having to file independent actions in the foreign district.[30] The *Kaplan* majority reasoned that an interpretation of section 1963 which was consistent with the rules would advance the legislative purpose underlying section 1963.[31]

Judge Murnaghan dissented, arguing that the statutory language of section 1963 clearly provides that a judgment is not "final by appeal" if an appeal is pending.[32] Judge Murnaghan reasoned that any judgment which an appellate court could reverse is not final even though the judgment debtor has posted a supersedeas bond.[33] The dissent argued that the majority incorrectly interpreted the congressional intent underlying section 1963.[34] The dissent reasoned that Congress placed a higher value on finalizing judgments than on facilitating a creditor's collection of judgments in foreign districts.[35] Judge Murnaghan argued that an ex-

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residence without filing supersedeas bond or seeking stay of execution, which are unnecessary under § 1963), *rev'd in part on other grounds*, 609 F.2d 1128 (5th Cir. 1980); *supra* note 25 (discussion of *Dorey*).

[29] 33 Fed. R. Serv. 2d (Callaghan) at 1571; *see supra* notes 1, 9 & 10 (application of rules and § 1963).

[30] 33 Fed. R. Serv. 2d (Callaghan) at 1571-72; *see* ITT Indus. Credit Co. v. Lawco, 86 F.R.D. 708, 712 (S.D. W.Va. 1980) (dicta) (unjust not to interpret § 1963 as requiring filing of supersedeas bond); Dorey v. Dorey, 77 F.R.D. 721, 723 (N.D. Ala. 1978) (under § 1963, creditor can register judgment where judgment debtor has not filed bond), *rev'd in part on other grounds*, 609 F.2d 1128 (5th Cir. 1980). The *Kaplan* court noted that an interpretation of § 1963 as requiring the filing of a supersedeas bond was important to creditors who not always are able to bring an independent action on the judgment. 33 Fed. R. Serv. 2d (Callaghan) at 1571 n.3. The Fourth Circuit noted that if the creditor is unable to find the judgment debtor in the same district as the property, the debtor has frustrated service of process and has rendered collection impossible until the appellate process is complete. *Id.*

[31] 33 Fed. R. Serv. 2d (Callaghan) at 1571.

[32] *Id.* at 1572 (Murnaghan, J., dissenting).

[33] *Id.* at 1572; *see infra* note 48 (majority of courts interpret § 1963 strictly to grant stay of execution despite judgment debtor's failure to file supersedeas bond).

[34] 33 Fed. R. Serv. 2d (Callaghan) at 1572 (Murnaghan, J., dissenting).

[35] *Id.* The *Kaplan* dissent noted that rule 62(a) of the Federal Rules of Civil Procedure allows a prevailing creditor to levy on the debtor's assets ten days after judgment. *Id.*; *see* FED. R. CIV. P. 62(a) (creditor cannot execute judgment or institute proceedings for enforcement until expiration of ten days after entry of judgment). In contrast to rule 62(a), § 1963 clearly implies that a judgment creditor cannot register a judgment before expiration of the thirty day time limit for appeal. 33 Fed. R. Serv. 2d (Callaghan) at 1572-73. *See* 28 U.S.C. § 1963 (§ 1963 language requires that creditor cannot execute judgment until expiration of time for appeal). A foreign district court will allow a debtor's stay of execution of judgment

amination of the drafting process of section 1963 demonstrates that Congress never intended to permit the registration of a judgment while an appeal is pending.[36]

The dissent noted that the Supreme Court Advisory Committee on Rules of Civil Procedure originally drafted the provisions that would become section 1963 as proposed rule 77 of the original Federal Rules of Civil Procedure.[37] In deference to rule 77's potential influence on the substantive rights of both judgment debtors and judgment creditors, Congress enacted proposed rule 77 as section 1963.[38] Judge Murnaghan reasoned that since Congress did not change proposed rule 77 materially, an examination of the rule's evolution in the advisory committee provides insight into the legislative intent underlying section 1963.[39]

The dissent noted that in redrafting the language of rule 77, the Supreme Court Advisory Committee modified the focus of the rule.[40] Instead of emphasizing only the collection of the debt, the revised rule, as evidenced by the final proposed draft, also emphasized the finality of the judgment.[41] In addition to tracing the evolution of rule 77's language, the dissent cited a note accompanying the 1938 amendment of rule 77 in which the committee reemphasized that registration of a judgment in a foreign district was inappropriate if any change existed that an appeal would modify the judgment.[42] Judge Murnaghan concluded that the *Kaplan* majority's opinion conflicted with the legislative intent of section

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even though the debtor's failure to post a supersedeas bond within ten days following judgment would have made collection possible in the district where the court rendered judgment. 33 Fed. R. Serv. 2d (Callaghan) at 1572-73; *see supra* note 8 (under § 2107 party must file notice of appeal from district court judgment within thirty days after entry of judgment).

[36] 33 Fed. R. Serv. 2d (Callaghan) at 1573 (Murnaghan, J., dissenting).

[37] *Id.*; *see* 28 U.S.C. § 1963 reviser's note (1976) (§ 1963 follows recommendation of the Supreme Court's Advisory Committee on Federal Rules of Civil Procedure of 1937 which includes proposed rule 77).

[38] *See* Memorandum in Support of Rule 77, 14 U.S. Supreme Court Advisory Committee on Rules for Civil Procedure (1934-1939) (Papers of Edgar B. Tolman, University of Chicago Law School) [hereinafter cited as Tolman Papers].

[39] 33 Fed. R. Serv. 2d (Callaghan) at 1573 (Murnaghan, J., dissenting).

[40] *Id.* at 1574.

[41] *See* Tolman Papers, *supra* note 38. A 1936 tentative draft of rule 77 stated that if a stay of execution or a supersedeas bond was not in force, a district court could enforce the judgment in a foreign district. Tentative Draft II, Rule A 31 (January 15, 1936), 3 U.S. Supreme Court Advisory Committee on Rules For Civil Procedure, (1934-1939). The 1937 final proposed draft of rule 77 stated that a court may register a judgment entered in any district court which has become final through the expiration of time for appeal or by mandate on appeal. Final Report of the Advisory Committee on Rules (November, 1937), Tolman Papers, *supra* note 38.

[42] 33 Fed. R. Serv. 2d (Callaghan) at 1574 (Murnaghan, J., dissenting). The note accompanying the final amendment of rule 77 stated that the Advisory Committee believed that the courts should not register a judgment in another district while any chance of modification on appeal exists. Tolman Papers, *supra* note 38.

1963 and resulted in an interpretation that the Supreme Court Advisory Committee intentionally had declined to adopt.[43]

In addition to disagreeing with the *Kaplan* majority's interpretation of the congressional intent underlying section 1963, the dissent also disagreed with the majority holding that section 1963 would be unconstitutional without a bond requirement because section 1963 would afford disparate treatment to debtors whose assets were located in foreign districts.[44] Judge Murnaghan noted that although a creditor could not register a judgment for execution in a foreign district if an appeal of the judgment were pending, the creditor nonetheless could obtain execution by filing an independent suit on the judgment in the foreign district and obtaining a judgment based on the prior judgment.[45] The dissent reasoned that no inequity existed in requiring a judgment creditor to secure a judgment in the foreign district in which the judgment debtor had property, since other creditors residing within the district where the debtor's assets were located also had to obtain a judgment against a debtor in that district prior to collection of the debt.[46] Judge Murnaghan argued that requiring a creditor to secure a judgment in a foreign district when appeal was pending on the original judgment constituted no real hardship for the creditor.[47] The dissent concluded that the *Kaplan* majority should have upheld the Maryland district court's refusal to register the *Kaplan* judgment until the District of Columbia Court of Appeals acted on Hirsh's appeal.[48]

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[43] 33 Fed. R. Serv. 2d (Callaghan) at 1574 (Murnaghan, J., dissenting).

[44] *Id.* at 1575; *see supra* text accompanying note 25 & 27 (*Kaplan* majority reasoning that § 1963's disparate treatment of debtors is unconstitutional).

[45] 33 Fed. R. Serv. 2d (Callaghan) at 1574 (Murnaghan, J., dissenting); *see* Bros, Inc. v. W. E. Grace Mfg. Co., 261 F.2d 428, 433 n.4 (5th Cir. 1958) (summary judgment based on judgment in another district is enforceable even though appeal is pending and will remain enforceable until appellate court reverses original judgment); Juneau Spruce Corp. v. International Long & Warehouseman's Union, 128 F. Supp. 697, 700 (D. Hawaii 1955) (creditor always can enforce foreign judgment by bringing suit on judgment, even when § 1963 is unavailable because appeal of original judgment is pending); Slate v. Dickinson, 82 F. Supp. 416, 418 (W.D. Mich. 1949) (pendency of appeal from judgment of foreign district does not bar local suits based on foreign judgments); *see also* 7B, J. MOORE, M. WAXNER, H.B. FINK & D.M. EPSTEIN, MOORE'S FEDERAL PRACTICE ¶ 56.07 (2d ed. 1982) (section 1963 does not prevent judgment creditor from bringing action on judgment, and action may be advantageous when creditor cannot register original judgment because appeal still is pending). *But see* ITT Indus. Credit Co. v. Lawco Energy, Inc., 86 F.R.D. 708, 711 (S.D. W.Va. 1980) (because independent action in foreign district is impractical due to expense and high mobility of persons and property, interpreting § 1963 as requiring supersedeas bond provides practical solution to problem).

[46] 33 Fed. R. Serv. 2d (Callaghan) at 1576 (Murnaghan, J., dissenting).

[47] *Id.*; *see supra* text accompanying note 45 (since every creditor within district must obtain judgment against debtor, no inequity in requiring creditor with prior judgment from foreign district also to gain independent judgment).

[48] 33 Fed. R. Serv. 2d (Callaghan) at 1576 (Murnaghan, J., dissenting). The *Kaplan* dissent argued that even if disparate treatment of debtors or creditors exists, disparate treatment does not necessarily imply unconstitutionality. *Id.* The dissent reasoned that unless a

The Fourth Circuit majority's holding that section 1963 requires a judgment debtor to file a supersedeas bond is inconsistent with the holdings of the majority of courts that have interpreted the statutory language of section 1963.[49] The majority of courts considering the issue have followed the precedent of *Abegglen v. Burnham*,[50] in which the United States District Court for the District of Utah held that courts must interpret the word "final" according to the ordinary, usual, and natural meaning of the word.[51] Courts following *Abegglen* therefore hold that a case remains pending until an appellate court disposes of the case.[52] The majority of courts conclude that courts should not regard the judgment as final in any ordinary sense until the time limit for appeal has elapsed.[53]

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court suspects that a legislature created a classification as a means of discrimination, a statute should survive judicial scrutiny if the statute rationally promotes a legitimate government interest. *Id.*; *see, e.g.*, San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 55 (1973) (constitutional standard under equal protection clause is whether challenged state action achieves legitimate state purpose or interest), *reh'g denied*, 411 U.S. 959 (1973); McGinnis v. Royster, 410 U.S. 263, 270 (1973) (Supreme Court will not challenge classification that rationally furthers legitimate articulated government purpose). The *Kaplan* dissent concluded that § 1963 promotes legitimate governmental interests by achieving the congressional goal of providing a procedural shortcut to registering creditors' final judgments in foreign districts. 33 Fed. R. Serv. 2d (Callaghan) at 1576.

[49] *See In re* Professional Air Traffic Controllers, 18 BANKR. 894, 903 (Bankr. D.D.C. 1982) (since language of § 1963 is clear and unambiguous, judgment-creditor must await outcome of appeal to register judgment); Goldsmith v. Midwest Energy Co., 90 F.R.D. 249, 250 (N.D. Ohio 1980) (court may not register judgment in another district until judgment has become final by appeal or by expiration of time for appeal); Lipton v. Schmertz, 68 F.R.D. 249, 250 (S.D.N.Y. 1974) (§ 1963 bars creditor's registration of judgment in foreign district as long as appeal is pending); *cf.* United States *ex rel.* Goldman v. Meredith, 596 F.2d 1353, 1356 (8th Cir.) (noting without comment that clerk had refused to register judgment that debtor had appealed but not stayed), *cert. denied*, 440 U.S. 838 (1979); Olympic Ins. Co. v. H.D. Harrison, Inc., 413 F.2d 973, 974 (5th Cir. 1969) (although debtor failed to file supersedeas bond, plaintiff could not execute judgment outside district of trial until judgment became final); Gulf & S. Transp. Co. v. Jordan, 257 F.2d 361, 363 (5th Cir. 1958) (despite appellant's failure to file supersedeas bond, appellee could not collect or register judgment in other districts pursuant to § 1963).

[50] 94 F. Supp. 484 (D. Utah 1950). In *Abegglen* a judgment creditor assigned a favorable judgment obtained in the United States District Court for the District of Idaho. *Id.* at 485. The assignee then sought to register the judgment in the United States District Court for the District of Utah and succeeded in filing the judgment with the clerk. *Id.* Because an appeal of the Idaho judgment still was pending, the Utah district court granted a motion of the defendant debtors to strike the registration from the records and to quash execution on the judgment. *Id.* The *Abegglen* court held that courts should interpret § 1963 according to the statute's ordinary, usual, and natural meaning. *Id.* at 486. Additionally, the *Abegglen* court held that under the language of § 1963, a case remains pending until an appellate court disposes of the case, and courts should not regard the judgment as final in any ordinary sense until the disposition of the case occurs. *Id.*; *see supra* note 49 (cases following *Abegglen*).

[51] 94 F. Supp. at 486.

[52] *See supra* note 49 (cases following *Abegglen*).

[53] *Id.*

In addition to the Fourth Circuit, two other circuit courts have considered whether section 1963 requires a judgment debtor's filing of a supersedeas bond, and both circuits have taken a position contrary to the Fourth Circuit.[54] In *Urban Industries, Inc. of Kentucky v. Thevis*,[55] the Eleventh Circuit held that under the language of section 1963 a district court judgment is not "final by appeal" as long as an appeal is pending.[56] In *Thevis* a creditor obtained a judgment against a debtor in the United States District Court for the Western District of Kentucky.[57] Thevis, the judgment debtor, appealed the judgment but failed to file a supersedeas bond to obtain a stay of execution.[58] While Thevis' appeal was pending in the Sixth Circuit, the creditor registered the Kentucky judgment in the District Court for the Northern District of Georgia pursuant to section 1963 in an attempt to levy execution of any of Thevis' assets within the district.[59] Subsequent to Urban Industries' registration of judgment in the Northern District of Georgia, the Internal Revenue Service (IRS) assessed penalties against the judgment debtor for unpaid taxes and interest.[60] The judgment creditor then filed an action in the Georgia district court seeking a declaratory judgment, arguing that the creditor rather than the IRS was entitled to the debtor's property.[61] The Georgia district court held that the plaintiff's registration of the Kentucky judgment in the Northern District of Georgia was invalid because the registered judgment, which was still pending in the Sixth Circuit, was not final by appeal.[62] The Eleventh Circuit concurred with the district court's holding.[63]

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[54] *See* Urban Indus., Inc. of Ky. v. Thevis, 670 F.2d 981, 985 (11th Cir. 1982) (court must read § 1963 strictly to determine that judgment is not final while appeal is pending); Bros, Inc. v. W.E. Grace Mfg. Co., 261 F.2d 428, 433 n.4 (5th Cir. 1958) (same).

[55] 670 F.2d 981 (11th Cir. 1982).

[56] *Id.* at 985. In holding that § 1963 does not require a supersedeas bond, the *Thevis* court repudiated the constitutional analysis of the district court in *Dorey v. Dorey*. 670 F.2d at 985; *see* Dorey v. Dorey, 77 F.R.D. 721, 724-25 (N.D. Ala. 1978) (*Dorey* court holding that judgment creditor has constitutional right to collect on judgment against debtor in any district if debtor has failed to file supersedeas bond), *rev'd in part on different grounds*, 609 F.2d 1128 (5th Cir. 1980); *supra* note 25 (same). The *Thevis* court held that because § 1963's requirement of finality clearly is reasonable and rationally related to the purpose of making nonappellate judgments easily enforceable, § 1963 is constitutional. 670 F.2d at 985.

[57] 670 F.2d at 983. In *Thevis* a creditor attempted to levy against Thevis, a convicted pornography dealer who had escaped from prison. *Id.* The FBI later captured Thevis with $11,400 in cash and with jewels estimated at a value of $1,000,000. *Id.* Urban Industries obtained a judgment in the amount of $681,655 plus interest against Thevis in the United States District Court for the Western District of Kentucky. *Id.*

[58] *Id.*; *see supra* note 11 (necessity of debtor's filing of supersedeas bond to stay execution of judgment in local district pending appeal).

[59] 670 F.2d at 983.

[60] *Id.* The IRS assessed Thevis and his former wife for unpaid income taxes, penalties, and interest in the amount of $5,004,100.96 for the years 1972 through 1975. *Id.*

[61] *Id.*

[62] *Id.* at 983-84.

[63] *Id.* at 984.

Similarly, in *Bros, Inc. v. W. E. Grace Manufacturing Co.*,[64] the Fifth Circuit stated in dicta that courts should interpret section 1963 as barring registration of a judgment in a foreign district while an appeal is pending.[65] In *Bros* the plaintiff patentee obtained a judgment for patent infringement against a subsidiary of W. E. Grace Manufacturing Company in the United States District Court for the Northern District of Ohio.[66] Because the debtor's assets were located in Texas, the patentee attempted to enforce the Ohio judgment by moving for summary judgment in a Texas district court.[67] The Texas district court granted summary judgment on the basis of the Ohio judgment.[68] On appeal, the Fifth Circuit upheld the Texas district court's holding, noting that considerations of res judicata supported granting summary judgment.[69] In addition, the Fifth Circuit distinguished summary judgment from a "mere" registration of the judgment under section 1963, which the Fifth Circuit considered invalid in Texas because an appeal was pending in Ohio.[70]

The Fourth Circuit's holding in *Kaplan* ignored the express language of section 1963.[71] The Fourth Circuit rejected a literal interpretation of section 1963 on the ground that a literal interpretation would create an unconstitutional disparity in the rights of judgment debtors based on the location of the debtors' assets.[72] As the *Kaplan* dissent pointed out, however, courts traditionally have forced creditors to institute separate actions to reach debtors' assets in foreign districts.[73] If section 1963 is unconstitutional because the statute allows disparate treatment of debtors, then the procedure employed before the passing of section 1963 also was unconstitutional.[74]

The Fourth Circuit also based the *Kaplan* decision on the ground that section 1963 presented the potential for abuse of the appellate proc-

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[64] 261 F.2d 428 (5th Cir. 1958).

[65] *Id.* at 433 n.4 (dicta).

[66] Bros, Inc. v. W.E. Grace Mfg. Co., 158 F. Supp. 786, 787 (N.D. Tex. 1958). In *Bros* the patentee obtained a judgment against Gibson-Stewart Company, an Ohio distributor of W.E. Grace's machines. *Id.*

[67] *Id.*

[68] *Id.*

[69] 261 F.2d at 433.

[70] *Id.* at 433 n.4 (dicta).

[71] *See supra* note 1 (statutory language of § 1963); *supra* note 49 (courts applying strict interpretation of language of § 1963).

[72] 33 Fed. R. Serv. 2d (Callaghan) at 1571; *see supra* text accompanying notes 25 & 27 (*Kaplan* majority found that a strict reading of § 1963 created unconstitutional disparity in treatment of debtors depending on whether debtor resides in judgment district).

[73] 33 Fed. R. Serv. 2d (Callaghan) at 1575 (Murnaghan, J., dissenting); *see supra* note 2 (cases holding that enforcement of judgment rendered in foreign district depends upon local judgment to enforce foreign judgment). *But see supra* note 31 (if creditor is unable to find judgment debtor in same district as property, debtor has frustrated service of process and rendered collection impossible in foreign district).

[74] 33 Fed. R. Serv. 2d (Callaghan) at 1575 (Murnaghan, J., dissenting) (if § 1963 is unconstitutional, traditionally employed enforcement procedures also are unconstitutional).

ess by a debtor who files a frivolous appeal without posting a bond and subsequently transfers his property outside the district.[75] Courts, however, have sufficient procedural remedies to curb the abuse of the appellate process by debtors intent on avoiding creditors' judgments.[76] Section 1912 of title 28 of the United States Code,[77] for example, empowers a federal court of appeals to award the prevailing party in a lawsuit damages, or single or double costs, for delay in enforcement of the judgment on account of frivolous or dilatory appeals.[78] The appellate courts also can curb abuse of section 1963 through application of rule 38 of the Federal Rules of Appellate Procedure,[79] which allows a federal court of appeals to award damages and single or double costs to the appellee if the court determines that an appeal is frivolous.[80] The appellate courts' proper application of their punitive powers should provide an effective deterrent to debtors intent on abusing the appellate process and render the Fourth Circuit's liberal reading of section 1963 unnecessary.[81]

Although the majority opinion failed to examine thoroughly the legislative intent behind section 1963, the dissent demonstrated that the drafters intended section 1963 to allow for execution of a creditor's judgment in a foreign district only on the condition that the initial judgment no longer was subject to appeal.[82] The majority of courts agree that sec-

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[75] *Id.* at 1571; *see supra* text accompanying note 25 (creditor attempted to abuse appellate process by filing frivolous appeal and moving property from district without having to post supersedeas bond under § 1963).

[76] *See* notes 72 & 74 (methods of curbing debtors who attempt to abuse appellate process by frivolously appealing without filing supersedeas bond and then transferring property from judgment district).

[77] 28 U.S.C. § 1912 (1976). Section 1912 provides that whenever the Supreme Court or a court of appeals affirms a judgment, the court has discretion to award to the prevailing party fair damages for delay and single or double costs. *Id.*

[78] *See id.* (Congress delegates power to award damages for delay to appellate courts through § 1912).

[79] FED. R. APP. P. 38. Rule 38 allows a court of appeals to award fair damages if the court determines an appeal is frivolous. *Id.*

[80] *Id.*

[81] *See* A/S Siljestad v. Hideca Trading, Inc., 678 F.2d 391, 392 (2d Cir. 1982) (per curiam). In *Hideca*, Siljestad gained a "supplemental expansion" allowing for the payment of interest on cash awarded in arbitration with Hideca Trading for the wrongful cancellation of a voyage. *Id.* at 391. Hideca contended that the original award was final and that the arbitrators had no power to make a supplemental award of interest. *Id.* Although payment of interest was the sole issue on appeal, Hideca previously had refused to pay its share of costs of the arbitration, had refused to post a supersedeas bond pending appeal, and successfully had resisted an attempt by Siljestad to have the district court enforce the judgment under § 1963. *Id.* at 392. The *Siljestad* court held that the appeal was frivolous and exercised its discretion under § 1912 and rule 38 by awarding the creditor interest on the district court judgment, double costs, and $1000 or the attorney's fees of the creditor, whichever sum was less. 678 F.2d at 392.

[82] 33 Fed. R. Serv. 2d (Callaghan) at 1573-74 (Murnaghan, J., dissenting); *see supra* text accompanying notes 36-40 (history of § 1963 reveals drafters' interest in finality of judgment as well as streamlined method of executing judgment in foreign district).