Washington and Lee Law Review

Volume 42 | Issue 2 Article 8

Spring 3-1-1985

II. Civil Procedure

that the Fourth Circuit interprets section 34-4 as providing the only exemption for unliquidated tort claims in Virginia. Debtors no longer can protect pending personal injury recoveries from creditors by filing voluntary petitions in bankruptcy before reducing those claims to payment.

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II. CIVIL PROCEDURE

A. *Filing Period Extensions for* Pro Se *Litigants in Civil Appeals*

Federal Rule of Appellate Procedure 4(a) (Rule 4(a))[1] establishes the time period in which a litigant may appeal as of right in civil cases.[2] Rule 4(a) allows an appellant thirty days from entry of judgment to file a proper notice of appeal.[3] Rule 4(a) also permits the district court to grant an additional thirty day extension for filing late notices of appeal,[4] provided an

is the only Virginia exemption for personal injury claims, considerations of fairness no longer should force courts to ignore the clear meaning of § 34-17 and *Zimmerman v. Morgan. See supra* notes 52-57 and accompanuing text (stating that § 34-17 and *Zimmerman* decision combine to preclude amendment of exemption schedules); VA. CODE § 34-17 (1984); Zimmerman v. Morgan, 689 F.2d 471 (4th Cir. 1982).

1. FED. R. APP. P. 4. Rule 4 of the Federal Rules of Appellate Procedure (the Rules) has its origin in former rule 73(a) of the Federal Rules of Civil Procedure which, before the adoption of the Rules, controlled the timing of appeals. *See* 9 J. MOORE, B. WARD, J. LUCAS, MOORE'S FEDERAL PRACTICE § 204.01[1] (2d ed. 1983) (discussing history of Rule 4) [hereinafter cited as MOORE]. Congress adopted the Rules on July 1, 1968. *See* Orders of the Supreme Court of the United States Adopting the Federal Rules of Appellate Procedure, July 1, 1968, 389 U.S. 1063 (1967). *See generally* Cohn, THE PROPOSED FEDERAL RULES OF APPELLATE PROCEDURE, 54 GEO. L. J. 431 (1966) (discussing history of uniform procedural rules and authority of Supreme Court to promulgate appellate rules).

2. FED. R. APP. P. 4(a). Rule 4(a) allows 30 days from the entry of judgment to file an appeal, and 30 days in which to seek an extension upon a showing of good cause or excusable neglect. *Id.*; *see infra* note 6 (discussing excusable neglect standard). Rules 4(a)(2) and 4(a)(4) control premature notices of appeal. *See* FED. R. APP. P. 4(a). Rule 4(a)(3) controls the timing of cross-appeals by the opposing party. *Id.; see* Ward, *The Federal Rules of Appellate Procedure*, 28 FED. B.J. 100, 101-102 (1968) (discussing rule 4(a)). Rule 4(b) controls the timing of appeals in criminal cases. *See* FED. R. APP. P. 4(b). *See generally* Note, *Timely Appeals and Federal Criminal Procedure*, 49 VA. L. REV. 971, 972-995 (1963) (discussing timing problems under the Federal Rules of Criminal Procedure).

3. FED. R. APP. P. 4(a). *See infra* note 4 (text of rule 4(a)). While rule 4 governs timing of appeals, rule 3 controls the actual mechanics of filing a notice of appeal. *See* FED. R. APP. P. 3. Under rule 3, the appellant must file a notice of appeal with the clerk of the district court within the time limits of rule 4. FED. R. APP. P. 3(a). The notice of appeal shall designate the party taking the appeal, the judgment from which the party is appealing, and the name of the court of appeal. FED. R. APP. P. 3(c). Rule 3 states that courts should not dismiss an appeal for mere informality. *Id.*

4. FED. R. APP. P. 4(a)(5); *see* FED. R. APP. P. 4(a). Rule 4(a)(1) provides in part

appellant requests the extension by motion within sixty days of judgment[5] and can show good cause or excusable neglect.[6] Courts face a problem when an appellant manifests the intention to appeal, but fails to make a motion for an extension of time within the prescribed period.[7] Appellants often

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> In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from;

FED. R. APP. P. 4(a)(1). Rule 4(a)(5) provides

> The district court, upon a showing of excusable neglect or good cause, may extend the time for filing notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a). Any such motion which is filed before expiration of the prescribed time may be *ex parte* unless the court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to the parties in accordance with local rules. No such extension shall exceed 30 days past such prescribed time or 10 days from the date of the entry of the order granting the motion, whichever occurs later.

FED. R. APP. P. 4(a)(5). The appellant must send the notice of appeal or motion for an extension of time to the district court. FED. R. APP. P. 4(a)(1). Rule 4(a)(1) provides, however, that if the appellant mistakenly files the notice in the court of appeals the clerk may transfer the appeal to the district court. *Id.*

5. FED. R. APP. P. 4(a). Under rule 4(a), the appellant must file motion with the district court requesting the extension of time. *Id.* The appellant must await the entry of a final judgment before seeking appellate review of the case. *Id.* The appellant may not file the motion later than 30 days after the initial filing period, a total of 60 days from the entry of judgment. *Id.* If the district court allows the extension of time, the appellant has 10 days from the date of the order in which to file. *Id.*

6. *See* FED. R. APP. P. 4(a)(5). Former rule 73(a) of the Federal Rules of Civil Procedure allowed the appellant to establish excusable neglect on the basis of failure to learn of the entry of judgment. *See* FED. R. CIV. P. 73(a) (1948). In 1966, the Supreme Court amended rule 73(a) eliminating the requirement that the appellant base excusable neglect on failure to learn of the court's entry of judgment. *See* FED. R. CIV. P. 73(a) advisory committee note (1967). The 1966 amendment allowed courts to grant an extension of time for excusable neglect of any type. *Id.* The Supreme Court incorporated the 1966 amendment to rule 73(a) into former rule 4(a). *See* FED. R. APP. P. 4(a) (1978); *supra* note 1 (discussing origin of rule 4(a) in former rule 73(a)). In 1979, the Advisory Committee suggested amending the rule to its present form requiring good cause or excusable neglect to cover situations in which the appellant seeks an extension before the expiration of the initial appeal period. *See* FED. R. APP. P. 4(a)(5) advisory committee note. The Fourth Circuit has held that the appellant has the burden of establishing excusable neglect. *See* Craig v. Garrison, 549 F.2d 306, 307 (4th Cir. 1977), *rev'd* 722 F.2d 1167 (4th Cir. 1983) (en banc). The advisory committee notes to former rule 73(a) state that the district court has power to extend time whenever an obvious injustice would otherwise result. *See* FED. R. CIV. P. 73(a) advisory committee note (1967). Thus, when an appellant reasonably depended on the regular course of mail delivery but the notice of appeal arrived two days after the expiration of the appeals period, a basis for excusable neglect may exist. *See* Sanchez v. Board of Regents of Texas Southern University, 625 F.2d 521, 522 (5th Cir. 1980); *see also* Calkins, *The Emerging Due Diligence Standard for Filing Delayed Notice of Appeal in Federal Courts*, 19 WILLAMETTE L.J. 609, 613 (1983) (discussing decision in which court adopted strict standards for accepting motions that are untimely due to excusable neglect); MOORE, *supra* note 1, 204.13[1] at 4-89 (discussing Rule 4(a)(5) good cause and excusable neglect standard).

7. *See, e.g.*, Campbell v. White, 721 F.2d 644, 645-46 (8th Cir. 1983) (notice of appeal

manifest an intent to appeal by filing a notice after the initial thirty day period, but within the second thirty day period when the court may grant an extension.[8]

Traditionally, most federal courts have treated a notice of appeal filed after the first thirty day period as an implicit motion for an extension of time.[9] In 1979, however, the Supreme Court adopted an amended rule 4(a)(5)

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two days late held fatal to appeal in absence of motion for an extension); Brooks v. Britton, 669 F.2d 665, 667 (11th Cir. 1982) (failure to move for extension of time held fatal to appeal); Pettibone v. Cupp, 666 F.2d 333, 334-35 (9th Cir. 1981) (notice of appeal two days late held fatal to appeal in absence of motion for extension); Ryals v. Estelle, 661 F.2d 904, 905-06 (5th Cir. 1981) (appeal dismissed because appellant filed notice of appeal 21 days late with no motion for extension); Mayfield v. United States Parole Comm'n, 647 F.2d 1053, 1055 (10th Cir. 1981) (notice of appeal filed three days late with no motion for extension of time held fatal to appeal). *But see* Grimm v. Shippen, 32 Fed. R. Serv. 2d (Callaghan) 1724, 1725 (9th Cir. 1981) (granting appeal despite lack of motion for extension to appeal), *vacated* No. 81-4427 (9th Cir. Jan. 14, 1982); Griffin v. George B. Buck Consulting Actuaries, Inc., 573 F. Supp. 1134, 1135 (S.D.N.Y. 1983) (court adopted reasoning of *Shah* panel and allowed pro se litigant's untimely notice of appeal to serve as a motion for an extension of time in which to file an appeal); *see infra* note 57 (analysis of *Grimm* and *Buck* decisions.)

Other courts established procedures for notifying untimely appellants of the need to move for an extension after the initial 30 day period. For example, in *Campbell v. White*, the Eighth Circuit ordered district court clerks to screen notices of appeal for timeliness and to advise *pro se* litigants when an extension motion was appropriate. *See* 721 F.2d at 647 (8th Cir. 1983). The *Campbell* court also ordered district court clerks to begin notifying all litigants of the 30 day appeal deadline and the 60 day period in which a motion for an extension must be filed. *Id. See also* Shah v. Hutto, 704 F.2d 717, 720 n.3 (4th Cir. 1983) (noting practice in one district court of screening appeal notices for timeliness and informing *pro se* litigants of need for extension motion).

8. FED. R. APP. P. 4(a). Rule 4(a) provides for two consecutive 30 day periods in which an appeal must be filed or an extension granted. *Id.* An appellant must file a notice of appeal within the first period unless good cause or excusable neglect prevents filing. *Id.* After the first 30 day period, the rule grants appellants 30 days in which to obtain an extension from the court for filing a notice of appeal. *Id. See* Silvia v. Laurie, 594 F.2d 892, 893 (1st Cir. 1979) (court has no jurisdiction over appeal when appellant fails to file timely notice of appeal). Untimely notice thus results when the appellant files after the first 30 day period but before the expiration of the second 30 day period. *See* FED. R. APP. P. 4(a)(1) & (5) (placing time limitations on filing of appeals and on motions for an extension for filing of appeals).

9. *See, e.g.*, Moorer v. Griffin, 575 F.2d 87, 90 (6th Cir. 1978) (*pro se* appellant's untimely notice of appeal allowed district court to consider whether notice was untimely due to excusable neglect); Craig v. Garrison, 549 F.2d 306, 307 (4th Cir. 1977) (court could not treat notice of appeal by *pro se* litigant as untimely until appellant had opportunity to establish excusable neglect), *rev'd*, 722 F.2d 1167 (4th Cir. 1983); Sanchez v. Dallas Morning News, 543 F.2d 556, 557 (5th Cir. 1976) (allowed district court to entertain tardy notice of appeal as motion for extension of time), *cert. denied*, 441 U.S. 911 (1979); Stirling v. Chemical Bank, 511 F.2d 1030, 1032 (2d Cir. 1975) (appellant's filing of notice of appeal within extension period and prima facie showing of excusable neglect allowed district court to treat notice as motion for extension of time); Alley v. Dodge Hotel, 501 F.2d 880, 884 (D.C. Cir. 1974) (appellant may meet filing requirement of rule 4(a) by substantial unequivocal effort to file), *cert. denied*, 431 U.S. 958 (1975); Torockio v. Chamberlain Mfg. Co., 456 F.2d 1084, 1087 (3d Cir. 1972) (district court could consider motion to validate untimely filing occurring within 30 day extension period), *aff'd*, 477 F.2d 1340 (1973).

that granted courts special extension powers with regard to requests for extensions filed in the last ten days of the extension period.[10] After the amendment to rule 4(a)(5), courts construed the rule to compel dismissal of late notices of appeal filed without a motion for extension of time[11] for lack of jurisdiction,[12] including some courts that previously had treated late appeal notices as implicit motions for extension.[13] In *Shah v. Hutto*,[14] the Fourth Circuit convened en banc[15] to rehear argument on a case in which a Fourth Circuit panel held that the 1979 amendment to rule 4(a)(5) did not affect the circuit's prior practice of allowing an untimely notice of appeal to serve as a motion for an extension of time.[16]

(5th Cir. 1981) (motion for extension of time is express requirement); Mayfield v. United States Parole Comm'n, 647 F.2d 1053, 1055 (10th Cir. 1981) (amendment to Rule 4(a)(5) requires motion for extension of time).

10. *See* Orders Of The Supreme Court: Amendments To The Federal Rules Of Appellate Procedure, Order Of April 30, 1979, 441 U.S. 969, 975 (1979). The amendment to rule 4(a)(5) also clarified the requirement that an appellant request an extension of time in the form of a motion. FED. R. APP. P. 4(a)(5). The amendment also allowed for courts to accept motions made *ex parte. Id.*; *see supra* note 4 (text of rule); *infra* notes 63-74 and accompanying text (comparison of former rule 4(a)(5) with amended rule).

11. *See, e.g.*, Campbell v. White, 721 F.2d 644, 646 (8th Cir. 1983) (amendment to rule 4(a)(5) mandates filing of motion to obtain extension of time); Pryor v. Marshall, 711 F.2d 63, 65 (6th Cir. 1983) (amendment requires appellant to make motion for extension of time); Brooks v. Britton, 669 F.2d 665, 667 (11th Cir. 1982) (amendment prohibits informal or implicit motions for extension of time); Wyzik v. Employee Benefit Plan of Crane Co., 663 F.2d 348, 348 (1st Cir. 1981) (amendment precludes treating untimely notice of appeal as substantial equivalent of motion to extend time); Bond v. Western Auto Supply Co., 654 F.2d 302, 304

12. *See supra* note 11 (listing cases in which failure to file motion for extension of time led to dismissal for lack of jurisdiction). The courts often speak of the requirement of a timely filing of a notice of appeal as "mandatory and jurisdictional." *See* Browder v. Director, Dep't of Corrections, 434 U.S. 257, 264 (1978) (30 day time limit of rule 4(a) is mandatory and jurisdictional). The timely notice of appeal is not jurisdictional in the sense of subject matter jurisdiction, but in the sense of a jurisdictional prerequisite, a precondition to the court's exercise of the jurisdiction which already exists. *See* MOORE, *supra* note 1, at 204.02[2] at 4-14 (use of term "jurisdictional" may be unfortunate because of connotations).

13. *See supra* note 7 (cases barring untimely notice of appeal filed without separate motion for extension); Sanchez v. Board of Regents of Texas Southern Univ., 625 F.2d 521 (5th Cir. 1980) (permitting untimely appeal without separate motion for extension, but with prospective holding that 1979 amendment to rule 4(a)(5) henceforth requires separate motion for extension before untimely appeal would be allowed); *infra* notes 59-65 and accompanying text (discussing reasoning of *Sanchez* court).

14. 722 F.2d 1167 (4th Cir. 1983) (en banc), *cert. denied*, 104 S. Ct. 2355 (1984).

15. *Id.* A majority of the circuit judges in active service may order a rehearing en banc. FED. R. APP. P. 35(a). The rehearing is not favored and ordinarily will be granted only to maintain uniformity of decisions in the circuit, or to reconsider a question of exceptional importance. *Id.*

16. *See* 722 F.2d at 1167. The panel decision in *Shah* was consistent with Fourth Circuit holdings prior to the 1979 amendment that an untimely notice of appeal could serve as a motion for an extension of time. *See* Craig v. Garrison, 549 F.2d 306, 307 (4th Cir. 1977), *rev'd*, 722 F.2d 1167 (4th Cir. 1983) (en banc); *infra* notes 35-40 and accompanying text (analysis of *Craig*).

In *Shah*, the appellants, incarcerated *pro se*[17] plaintiffs, brought a civil rights suit in the United States District Court for the Eastern District of Virginia.[18] The clerk of the court filed judgment against appellants on August 25, 1981.[19] The court informed the appellants of the thirty day time limit for filing notices of appeal.[20] The appellants mailed notice of appeal September 22, 1981.[21] As a result of an apparent delay in the postal service, the clerk of the district court did not receive and file the notice until September 25, 1981, one day after the appeal period had expired.[22] Unaware that the notice of appeal had been received untimely,[23] the appellants failed to file for an extension of time as permitted by rule 4(a)(5).[24]

In the panel decision of *Shah v. Hutto*,[25] the Fourth Circuit held that the late notice of appeal could serve as a motion for extension of time.[26] The court examined the Advisory Committee Notes ("Notes")[27] regarding the 1979 amendment to rule 4(a)(5) and concluded that the purpose of the amendment was to correct a problem unrelated to the case before the panel.[28]

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17. 722 F.2d at 1168. *Pro se* means "for himself" or self-representation. *See* BLACK'S LAW DICTIONARY 1099 (5th ed. 1979).

18. 722 F.2d at 1168, 1169. In *Shah*, the appellants were inmates at the Virginia State Penitentiary in Richmond. *Id.* The appellants brought their action pursuant to 42 U.S.C. § 1983 (1976). *Id.* at 1167.

19. 722 F.2d at 1167.

20. *Id.*

21. *Id.* The appellants mailed the notice of appeal from the Virginia State Penitentiary in Richmond. *See id.* at 1169.

22. *See id.* at 1169.

23. *Id.* Both the majority and the dissent of the panel decision in *Shah* suggested that the district courts should set up a system by which the clerks of the court would notify appellants that notices had failed to meet time requirements. 704 F.2d at 720 (majority); *id.* at 723 (dissent). The Eighth Circuit has ordered the clerks of district courts to furnish written notices to all litigants regarding the 30 day limitation period and the need for a motion for extension thereafter. *See* Campbell v. White, 721 F.2d 644, 647 (8th Cir. 1983). In addition, the Eighth Circuit ordered clerks to screen notices of appeal for untimeliness and advise *pro se* litigants when an extension motion is appropriate. *Id.* Other courts have suggested similar systems. *See* Pryor v. Marshall, 711 F.2d 63, 65 n.4, (6th Cir. 1983) (mechanism to inform *pro se* litigants of untimely appeal would be helpful); United States v. Lucas, 597 F.2d 243, 245 (10th Cir. 1979) (same). *But see* Mayfield v. United States Parole Comm'n., 647 F.2d 1053, 1055 n.5 (10th Cir. 1981) (courts have no positive duty to inform appellants of untimely motions of appeal).

24. *See* 722 F.2d at 1169; *see also* 704 F.2d at 719.

25. 704 F.2d 717 (4th Cir. 1983).

26. *See* 722 F.2d at 1167-68; 704 F.2d at 720-721.

27. FED. R. APP. P. 4(a)(5) advisory committee notes.

28. *See* 704 F.2d at 719. The notes of the advisory committee addressed the situation that confronted the Second Circuit in *In re Orbitec Corp. Id.*; *see* 520 F.2d 358 (2d Cir. 1975); FED. R. APP. P. 4(a)(5) advisory committee notes. The appellant in *In re Orbitec Corp.*, failed to file a notice of appeal along with a motion for an extension of time. *See* 520 F.2d at 360. The Second Circuit interpreted rule 4(a)(5) to require appellants to file both documents prior to the expiration of the 60 day period. *Id.* at 362; *see infra* notes 75-79 and accompanying text (discussion of *In re Orbitec Corp.*).

The *Shah* panel reasoned that the Notes did not seek to change the practice of allowing untimely notices of appeal to serve as motions for an extension of time.[29] The dissent reached the opposite result, arguing that the Notes[30] and the reasoning of opinions in other circuits[31] compelled a strict construction of rule 4(a)(5) as amended. However, the majority of the panel concluded that the 1979 amendment to rule 4(a)(5) did not alter the practice of allowing untimely notices of appeal to serve as motions for extension of time.[32] The Fourth Circuit reheard *Shah* en banc six months after the panel decision issued.[33] The en banc court reversed the panel decision and held that rule 4(a)(5) as amended in 1979 required an explicit motion for extension of time after the initial appeal period.[34]

In reversing the panel decision in *Shah*, the Fourth Circuit considered whether the rationale of *Craig v. Garrison*,[35] a preamendment Fourth Circuit decision allowing an untimely notice of appeal to serve as a motion for extension of time, conflicted with the requirements of the 1979 amendment.[36] *Craig* involved an appellant who filed notice of appeal three days after the thirty day statutory period had lapsed.[37] The appellant failed to request an

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The requirement in Rule 4(a)(5) that extensions be granted only upon motion derives from the rationale that the opposing party must be notified in order to contradict an assertion by the appellant of excusable neglect. *See* FED. R. APP. P. 4(a) advisory committee notes (citing cases requiring motion for extension).

29. *See* 722 F.2d at 1169; 704 F.2d at 720. The *Shah* panel noted that the Advisory Committee made no mention of the widespread practice of allowing untimely notices of appeal to serve as motions for extension of time. 704 F.2d at 720. *See supra* note 9 and accompanying text (discussing practice of allowing untimely notice to serve as motion for extension).

30. *See* 704 F.2d at 722 (Hall, J., dissenting). The dissent in *Shah* compared the text of preamendment rule 4(a)(5) with the text of the current rule and concluded that the amendment reemphasized the requirement of a formal motion. *Id.* Prior to the 1979 amendment, rule 4(a) provided that in civil cases involving an appeal as of right

> the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days of the date of entry of the judgment or order appealed from... Upon a showing of excusable neglect, the district court may extend the time for filing the notice of appeal by any party for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision. Such an extension may be granted before or after the time otherwise prescribed by this subdivision has expired; but if a request for an extension is made after such time has expired, it shall be made by motion with such notice as the court shall deem appropriate.

FED. R. APP. P. 4(a) (1978); *see supra* note 9 and accompanying text (discussing cases allowing untimely notice to serve as motion for extension of time under former rule 4(a)).

31. 704 F.2d at 723 (Hall, J., dissenting); *see supra* note 11 (cases holding that amended rule requires formal motion).

32. 722 F.2d at 1167; 704 F.2d at 721.

33. 722 F.2d at 1167.

34. 722 F.2d at 1168-69. The en banc court in *Shah* voted 6-4. *Id.* Judge Hall, who dissented from the panel majority, wrote the *Shah* en banc opinion. *Id.* at 1167. Judge Haynesworth, author of the panel opinion, wrote the *Shah* dissent. *Id.* at 1169.

35. 549 F.2d 306 (4th Cir. 1977).

36. 722 F.2d at 1167.

37. 549 F.2d at 307. The *Craig* opinion does not reveal the reason for the late arrival of the notice of appeal. *See id.*

extension of time pursuant to rule 4(a)(5).[38] The *Craig* court held that courts should not hold a *pro se* petitioner to the same standards as a member of the bar.[39] *Craig* further held that the district court could not deny an appeal as untimely without first inquiring of the litigant whether the delay was the result of excusable neglect.[40]

The *Shah* court overruled the *Craig* holding that courts may treat an untimely notice of appeal from a *pro se* litigant as a motion for extension of time in which to file.[41] The *Shah* majority reviewed the Notes to inquire whether an implicit request for additional time could satisfy the rule 4(a)(5) requirement of a motion.[42] The *Shah* court concluded that the literal language of rule 4(a)(5) and the Notes require a party to file an explicit motion for extension of time,[43] both for a request within the initial thirty day appeal period and within the thirty days following expiration of the appeal period.[44] Citing decisions in other circuits which strictly construe the motion requirement of rule 4(a)(5),[45] the *Shah* majority adopted the rule that courts may no longer treat a notice of appeal filed alone as a motion for an extension of time.[46]

The *Shah* majority additionally rejected the panel decision's holding that a court must afford *pro se* litigants an opportunity to correct the effect of untimely notices of appeal.[47] Adopting a strict reading of rule 4(a)(5), the court held that dismissal is mandatory when a party fails to meet the requirements of rule 4(a)(5).[48] The *Shah* court concluded that no justification

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38. *Id.* The *Craig* court speculated that the defendant may have been unaware of the requirements of rule 4(a). *Id.*

39. *Id. Craig* accords with other cases holding *pro se* litigants to less stringent standards than members of the bar. *See, e.g.*, Haines v. Kerner, 404 U.S. 519, 520 (1972) (courts should hold *pro se* appellants to less stringent standards in pleadings than members of bar); Moorer v. Griffin, 575 F.2d 87, 89 (6th Cir. 1978) (same); Alley v. Dodge Hotel, 501 F.2d 880, 883 (D.C. Cir. 1974) (courts should deal liberally with those untrained in law), *cert. denied*, 431 U.S. 958 (1975); Cramer v. Wise, 494 F.2d 1185, 1186 (5th Cir. 1974) (same).

40. 549 F.2d at 307. *Craig* held that courts must inform a *pro se* appellant of the requirements of rule 4(a). *Id.* Although the burden of establishing excusable neglect remains with the appellant, *Craig* held that courts must provide the appellant an opportunity to establish excusable neglect. *Id.*

41. 722 F.2d at 1168; *see supra* notes 35-40 and accompanying text (discussing *Craig*).

42. *See* 722 F.2d at 1168; FED. R. APP. P. 4(a) advisory committee notes (derivation of requirement that party must make request for extension of time by motion after initial 30 day period).

43. *See* 722 F.2d at 1168. *Cf.* 704 F.2d at 723 (Hall, J. dissenting) (allowing notice of appeal to serve as implicit extension contravenes literal reading of rule 4(a)(5)).

44. *See* 722 F.2d at 1168; *see also supra* note 28 (advisory notes explanation of motion requirement for extension request made after 30 day appeal period).

45. *See* 722 F.2d at 1168; *supra* note 7 (cases strictly construing motion requirement of rule 4(a)(5)).

46. *See* 722 F.2d at 1168; *infra* note 57 and accompanying text (discussing rule 4(a)(5) motion).

47. *See* 722 F.2d at 1168; *supra* note 39 (cases holding that *pro se* litigants are subject to less stringent standards than members of bar).

48. 722 F.2d at 1168. The majority of decisions construing the filing requirements of rule

existed for treating an untimely notice of appeal that did not manifest the appellant's desire for an extension of time as a motion for extension of time.[49]

The four judges joining in the dissent disagreed with the majority's reading of the 1979 amendment to rule 4(a).[50] The dissent criticized the majority's application of the amended rule to the facts in *Shah*.[51] Noting that the 1979 amendment added nothing to the pre-1979 requirement of a motion for an extension, the dissent maintained that the drafters of the amendment did not intend to eliminate the common practice of allowing untimely notices to constitute implicit motions under the rule.[52] The dissent concluded that, as a matter of law, the *Shah* panel decision was correct.[53]

In addition to arguing against a strict construction of the rule 4(a)(5) motion requirement, the dissent noted that the appellants had taken all necessary steps to secure an appeal.[54] According to the dissent, the appellants were unaware that the delay in postal service had rendered their appeal untimely, and the appellants therefore did not take advantage of their rights to obtain extensions for good cause.[55] The dissent concluded that the implicit motion for extension of time contained in the untimely filing satisfied the motion requirement of rule 4(a)(5).[56]

The *Shah* majority correctly noted that the rule of *Craig*, adopted by the panel decision in *Shah*, represents an anomaly among circuit decisions construing the post amendment rule 4(a)(5).[57] The *Shah* majority follows the

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4(a) since the 1979 amendment have involved *pro se* appellants. *See id.* (citing federal appeals court cases involving *pro se* litigants); *see also supra* note 7 (discussing recent cases construing rule 4(a)(5) filing requirements).

49. 722 F.2d at 1168-69. The majority opinion in *Shah* implied that something short of a formal motion might suffice as a motion for extension, provided the appellant manifested a request for additional time. *See id.*; *infra* notes 86-92 and accompanying text (discussing elements constituting sufficient request for extension under rule 4(a)(5)).

50. 722 F.2d at 1169 (Haynesworth, J., dissenting). The *Shah* dissent made a more extensive statement of its reasoning in the panel majority opinion. *Id.* at 1170; *see* 704 F.2d at 717-721.

51. 722 F.2d at 1169.

52. *Id.* at 1169-1170.

53. *Id.*; *see* 704 F.2d at 720 (rule 4(a)(5) becomes trap for inexperienced unless motion requirement is construed to include implicit motion for extension).

54. 722 F.2d at 1169.

55. *Id.*

56. *Id.* at 1169-70.

57. *Id.* at 1168. All circuit courts that have considered the 1979 amendment to rule 4(a)(5) have required that litigants request extension by motion. *See, e.g.*, Campbell v. White, 721 F.2d 644, 645 (8th Cir. 1983) (meaning of 1979 amendment to rule 4(a)(5) unambiguously requires motion); Nelson v. Foti, 707 F.2d 170, 171 (5th Cir. 1983) (*pro se* litigants no longer entitled to less stringent treatment in wake of 1979 amendment to rule 4(a)(5)); *see also supra* note 7 (citing cases requiring formal motion for extension). *But see* Grimm v. Shippen, 32 Fed. R. Serv. 2d (Callaghan) 1724, 1725 (9th Cir. 1981) (Ninth Circuit granted appeal despite lack of motion for extension to appeal), *vacated* No. 81-4427 (9th Cir. Jan. 14, 1982). *Grimm* resembled *Shah* procedurally, except that the *Grimm* appellants were not proceeding *pro se*. *See* 32 Fed.

logic of all circuits that have considered the issue of whether rule 4(a)(5) requires a separate motion.[58] In the earliest circuit decision construing the amended rule 4(a)(5), *Sanchez v. Board of Regents of Texas Southern University*,[59] the Fifth Circuit held that the amended rule 4(a)(5) put an end to the traditional practice of treating untimely notices of appeal as implicit motions for an extension of time.[60] The *Sanchez* court compared the text of the former rule 4(a)(5) with the amended rule and concluded that the newer rule prevented the court from treating an untimely notice of appeal as an implicit motion for an extension of time.[61] The *Sanchez* court relied on the Advisory Committee's explicit statement that an appellant must make a motion for a extension of time no later than thirty days after the expiration of the original appeal period.[62]

A comparison of former rule 4(a)(5) with the amended text substantiates the *Sanchez* court's statement that the amended rule required a motion in

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R. Serv. 2d at 1725. The *Grimm* appellants filed an untimely notice of appeal but, unaware that the notice was tardy, failed to file a motion for extension. *Id.* The Ninth Circuit held that the 1979 amendments to rule 4(a)(5) did not limit the power of the court to disregard procedural irregularities to avoid unfairness to litigants. *Id.* The court cautioned that an untimely notice of appeal ordinarily would serve as a motion for extension only in cases involving *pro se* litigants. *Id.* at 1725. The court dismissed the appeal in *Grimm* because the appellants had legal representation. *Id.* In all respects, however, the *Grimm* court indicated that given facts similar to those in *Shah*, the Ninth Circuit also would allow an untimely notice of appeal to serve as a motion for an extension of time. *Id.* Since the *Grimm* decision, however, the Ninth Circuit has interpreted rule 4(a)(5) restrictively. *See* Pettibone v. Cupp, 666 F.2d 333, 335 (9th Cir. 1981) (notice of appeal not equivalent to motion for extension of time); *see also* Griffin v. George B. Buck Consulting Actuaries, Inc., 573 F. Supp. 1134, 1136 (S.D.N.Y. 1983) (court did not require separate motion for extension of time).

The Second Circuit has not yet construed the effect of amended rule 4(a)(5) on untimely notices of appeal. In *Griffin v. George B. Buck, Consulting Actuaries, Inc.*, however, the District Court for the Southern District of New York allowed a *pro se* litigant's untimely written notice of appeal to serve as a motion for extension of time within which to file the appeal, where the delay occurred due to withdrawal of appellant's counsel. *See* 573 F. Supp. at 1134, 1135 (S.D.N.Y. 1983). The *George B. Buck* court relied on the Fourth Circuit's reasoning in the panel decision in *Shah*. *Id.* at 1135-1136.

58. *See supra* note 57 (discussing cases adopting strict view of amended rule 4(a)(5)).

59. 625 F.2d 521 (5th Cir. 1980).

60. *Id.* at 523. The *Sanchez* decision was the first rule 4(a)(5) case that the Fifth Circuit decided after the 1979 amendments. *See id.* The *Sanchez* holding was prospective only. *Id.* The appellant in *Sanchez* mailed a notice of appeal to the district court 28 days after the court entered final judgment. *See id.* at 522. The notice of appeal arrived in the office of the clerk of the district court two days after the appeal period expired. *Id.* The appellees moved to dismiss the appeal and the district court granted appellee's motion. *Id.*

61. *Id.* at 522-23. *See supra* notes 4 & 30 (texts of former and amended rule 4(a)(5)). The *Sanchez* court noted that commentators had criticized the liberal pre-amendment interpretation of rule 4(a)(5). 625 F.2d at 523. The *Sanchez* court also observed that while the appellant's deposit of the notice of appeal in the mail was not equivalent to filing notice with the clerk of the district court, the appellant reasonably had a right to rely on the due course of mail delivery, and that reasonable reliance constituted grounds for excusable neglect. *Id.* at 522.

62. *Id.* at 523. The *Sanchez* court stated that its former practice of allowing an untimely notice of appeal to serve as a motion for an extension of time arguably was a judicial gloss on the former rule 4(a). *Id.*

addition to the motion requirements of the original rule.[63] The conclusion of the *Sanchez* court, however, is without merit. The 1979 amendment to rule 4(a)(5) does not prevent courts from treating an untimely notice of appeal as an implicit motion for an extension of time.[64] A close examination of the Advisory Committee's rationale for the revision of rule 4(a)(5)[65] and of the policies underlying rule 4[66] reveals that the reasoning of the *Shah* dissent is substantially correct.

Prior to the amendment, rule 4(a)(5) provided that if an appellant could show excusable neglect, the district court could extend the time for filing a notice of appeal for a period not to exceed thirty days from the original filing time.[67] The former rule 4(a)(5) also provided that the court could grant the extension either before or after the initial thirty day period had passed.[68] If the appellant requested the extension after the initial thirty day period, however, the rule required the appellant to make the request by motion.[69] The amended rule 4(a)(5) provides that if the appellant can show good cause or excusable neglect, the district court can extend the time for filing a notice of appeal.[70] The amended rule requires that the appellant request the extension by filing a motion not later than thirty days after the expiration of the original appeal period.[71] By requiring the appellant to file a motion after the initial appeal period had expired, the former rule 4(a)(5) implied that a motion during the initial period was unnecessary.[72] Thus, while the amended rule more explicitly requires an appellant to file a motion to request an extension of time, the former rule 4(a)(5) already required a motion.[73] As the *Shah* dissent suggests, the drafters of the 1979 amendment were not concerned with the form of the necessary motion for extension, and for this reason the Notes do not address the practice of allowing untimely notices of appeal to be treated as motions for an extension of time.[74]

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63. *See supra* notes 4 and 30 (texts of former and current rule 4(a)(5)); *supra* notes 59-62 and accompanying text (*Sanchez* analysis).

64. See *Shah*, 704 F.2d at 721 (amendment to rule 4(a)(5) does not overrule prior practice of treating untimely notice as motion for extension of time).

65. *See* FED. R. APP. P. 4 advisory committee note (1979) (situation of *In re Orbitec Corp.* prompted revision of rule 4(a)(5)); *infra* notes 75-78 and accompanying test (*In re Orbitec Corp.* analysis).

66. *See infra* notes 93-101 and accompanying text (discussing policies of Rules).

67. *See* FED. R. APP. P. 4(a) (1978); *supra* note 30 (text of former rule 4(a)(5)).

68. *See supra* note 30 (text of former rule 4(a)(5)).

69. *See id.*

70. *See* FED. R. APP. P. 4(a)(5); *supra* note 4 (text of rule 4(a)(5)); *supra* note 6 (discussing excusable neglect standard).

71. *See* FED. R. APP. P. 4(a)(5); *supra* note 4 (text of rule 4(a)(5)).

72. *See* FED. R. APP. P. 4(a) advisory committee note (1978) (advisory committee expressly provides that amendment negates any implication that appellant may make informal application for extension of time to court); *supra* note 30 (text of former rule 4(a)(5)).

73. 722 F.2d at 1168; *see supra* notes 4 & 30 (texts of former and current rule 4(a)(5) both require appellant to make requests for extension of time by motion).

74. *See* 722 F.2d at 1168 (advisory committee notes to rule 4(a)(5) fail to mention practice of allowing late notices of appeal to serve as motions for extension of time).

In contrast to the *Shah* majority's finding that the 1979 rule 4(a)(5) amendment addressed appellants' motion procedures, the Advisory Committee discussed the amendment in terms of a remedy to a different problem that confronted courts applying rule 4(a)(5). In *In re Orbitec Corporation*,[75] the appellant made a timely motion for extension of time in which to file a notice of appeal, but the extension period expired before the appellant appealed.[76] The district court in *Orbitec* refused to extend the appeal deadline beyond the second thirty day period.[77] On appeal of the district court's order, the Second Circuit held that rule 4(a)(5) clearly required a notice of appeal to be filed within the second thirty day period, even though an appellant might file a motion for extension so late in the extension period that the sixty day limit on notices of appeal could prevent appellant from taking advantage of the extension.[78] As the *Shah* dissent observed, the Notes contemplate that an amended rule would reverse the result in *Orbitec* by allowing the district court to admit an appeal after the thirty day grace period, provided there had been a timely motion for an extension of time.[79] Both the existence of a motion requirement prior to the amendment and the Advisory Committee's failure to address the practice of treating untimely notices as motions for an extension of time indicate that the amendment to rule 4(a)(5) does not mandate the restrictive interpretation of rule 4 that the *Shah* majority adopted.

Further, a restrictive reading of amended rule 4(a)(5) would not serve the rule's procedural purposes of notice and particularity. The amendment requires the appellant to apply for an extension by a motion pursuant to rule 7(b)(1) of the Federal Rules of Civil Procedure.[80] Rule 7(b)(1) requires

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75. 520 F.2d 358 (2d Cir. 1975); *see* FED. R. APP. P. 4 advisory committee note (situation of *In re Orbitec Corp.* prompted revision of rule 4(a)(5)).

76. 520 F.2d at 359, 360. The appellant in *In re Orbitec Corp.* sought an appeal from a decision in a bankruptcy trial. *See id.* at 359. The appellant's attorney withdrew from the case after an argument over fees. *Id.* at 360. Proceeding without an attorney, the appellant alleged that a law clerk for the trial court misinformed the appellant that the court had not yet reached a decision in the case. *Id.* The law clerk denied the allegations of the appellant. *Id.* On April 3, 1975, the appellant learned that the court had entered judgment on February 28, 1975. *Id.* On April 18, 1975, 48 days after final judgment but within the period in which the court could grant an extension of time, the appellant moved for an extension. *Id.* at 359. The appellant failed to file a notice of appeal during the same period. *Id.* at 360.

77. *Id.* at 360.

78. *Id.* at 361. The appellant in *In re Orbitec Corp.* argued that she could not have filed a notice of appeal unless the court granted her the motion for an extension of time in which to appeal. *Id.* at 360. The appellant also argued that the court should allow the motion for an extension of time to serve as a notice of appeal. *Id.* at 361. The Second Circuit noted that inherent powers under the Federal Rules of Appellate Procedure authorized the court to treat the motion for extension as notice of appeal, but the Second Circuit refused to do so because of the appellant's repeated delays during the course of the trial. *Id.* at 362.

79. *See* 722 F.2d at 1169; *see also* FED. R. APP. P. 4(a) advisory committee note (amendment should remedy confusion displayed in *In re Orbitec Corp.*); *supra* note 76-78 (discussing *Orbitec* opinion).

80. FED. R. APP. P. 4(a) advisory committee note; *see* FED. R. CIV. P. 7(b)(1). Rule

that the motion be in writing and state with particularity the grounds for the motion.[81] The writing requirement of rule 7(b)(1) satisfies the procedural necessity for notice of the motion to all interested parties.[82] Rule 7(b)(1) requires particularity insofar as the appellant must state the grounds for the motion to sufficiently apprise the court of the appellant's position.[83] The obligation to specify the grounds of the motion does not require the appellant to designate grounds that are beyond the party's knowledge.[84] In determining

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7(b)(1) of the Federal Rules of Civil Procedure controls pleadings and the proper form for motions. *See* FED. R. CIV. P. 7. A motion is a request to the court for an order. *See* Dobie, *The Federal Rules of Civil Procedure*, 25 VA. L. REV. 261, 267 (1939).

81. FED. R. CIV. P. 7(b)(1). Rule 7(b)(1) states that a court's written notice that a party has made an oral motion fulfills the writing requirement. *Id.*; *see* United States v. 363 Cases, More or Less, "Mountain Valley Mineral Water," 143 F. Supp. 219, 223 (W.D. Ark. 1956) (although motion for directed verdict should be in writing, oral statement of grounds is sufficient compliance with rules); *see also* Raughley v. Pennsylvania R.R. Co., 230 F.2d 387, 391 (3d Cir. 1956) (requirement that motion be in writing provides simple procedure without too much emphasis on form and informal request for reargument with no notice is not sufficient).

Rule 7(b)(1) requires parties to state grounds for a motion with particularity. FED. R. CIV. P. 7(b)(1); *see* Steingut v. National City Bank of New York, 36 F. Supp. 486, 487 (E.D.N.Y. 1941). In *Steingut*, the plaintiff moved to have the district court remand the case to the New York Supreme Court. *See* 36 F. Supp. at 487. The defendants objected that the plaintiff's motion failed to state with particularity the grounds for the motion. *Id.*; *see infra* note 82 and accompanying text (particularity requires only that motion apprise court of party's position). The *Steingut* court held that the requirement of particularity was not a matter of mere form but was real and substantial. 36 F. Supp. at 487. The court also stated that it would overlook a party's failure to comply with the particularity rule if the failure was inadvertent. *Id.* The *Steingut* court held that the plaintiff's failure to state with particularity the grounds for the motion was not inadvertent and dismissed the motion. *Id.* at 488.

82. *See* 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1191, at 33 (1969) (writing requirement ensures that parties are informed of motion); *supra* note 81 (court's written notice of hearing of oral motion fulfills writing requirement which provides procedure without strict emphasis on form).

83. *See* United States v. 363 Cases, More Or Less, "Mountain Valley Mineral Water," 143 F. Supp. 219, 223 (W.D. Ark. 1956) (motion for directed verdict may lack precise statement of grounds as long as motion sufficiently apprises court of party's position). *Cf.* United States v. 64.88 Acres of Land, 25 F.R.D. 88 (W.D.Pa. 1960). In *64.88 Acres*, the government filed a motion for a new trial in a land condemnation case, 25 F.R.D. 88 at 89 (W.D. Pa. 1960). The government alleged as grounds for a new trial prejudice on the part of witnesses, procedural grounds, and excessive verdict. *Id.* Counsel for the government argued that the grounds were sufficient to advise the court of the government's position. *Id.* The court held that only the excessive verdict ground met the rule 7(b)(1) requirement of particularity. *Id.* The court held that the requirement of particularity demanded reasonable specification by the moving party. *Id.* at 90-91; *see also* McGarr v. Hayford, 52 F.R.D. 219, 221 (S.D. Cal. 1971) (reasonable specification requires only that court be able to understand movant's position).

84. *See* Alcaro v. Jean Jordeau, Inc., 3 F.R.D. 61, 61 (D.N.J. 1942). The plaintiff in *Alcaro* filed a motion for a new trial after the court rendered judgment for the defendant. *Id.* The motion listed five different grounds, the last ground stating that the plaintiff based the motion on whatever grounds she might discover in typing the notes of testimony. *Id.* The plaintiff later amended the motion to assert that the trial court failed to charge the proper law. *Id.* The defendant moved to strike the plaintiff's motion for lack of particularity. *Id.* The court overruled the defendant's motion to strike noting that the plaintiff's attorney drafted the motion without access to the charge of the court. *Id.*; *see also* 5 C. WRIGHT & A. MILLER, *supra* note

when a motion will be dismissed for lack of particularity, courts focus on whether the lack of particularity has prejudiced the opposing party.[85]

As the *Shah* panel majority indicated, the late notice of appeal under rule 4 satisfies the requirements of notice and particularity that courts have adopted in deciding what qualifies as a motion under rule 7(b)(1).[86] The notice of appeal is a writing that explicitly manifests the intention of the appellant to appeal and implicitly protects the appellant's right to appeal.[87] The notice of appeal informs the court and the opposing party that the appellant intends to appeal.[88] To require that the appellant specify grounds for an extension of time when the appellant is unaware that his appeal is untimely is to require the impossible.[89] The only acceptable grounds for a motion for an extension of time are good cause and excusable neglect.[90] Under facts like those in *Shah*, the untimely notice of appeal fulfills the requirement of particularity by apprising the court of the appellant's position.[91] The court, therefore, is able to comprehend the grounds of the motion

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82, § 1192, at 37 (obligation to particularize grounds of motion does not require impossibilities).

85. *See* King v. Mordowanec, 46 F.R.D. 474, 477 (D.R.I. 1969). In *King*, the plaintiff filed a motion with the court requesting the court to vacate an order of dismissal. *Id.* The defendant argued that the plaintiff's motion lacked the requisite specificity under rule 7(b)(1). *Id.* The court ruled that while the plaintiff's motion was not in compliance with the specificity requirements of rule 7(b)(1), the opposing counsel was aware of the grounds of the motion. *Id.* Since the court found counsel had notice of the grounds, the court allowed the motion. *Id.*; *see also* Monjar v. Higgins, 39 F. Supp. 633, 634 (S.D.N.Y. 1941), *aff'd*, 132 F.2d 990 (2d Cir. 1943). The plaintiff in *Monjar* objected to the defendant's motion for dismissal for lack of jurisdiction, arguing that the motion failed to meet the specificity requirements of rule 7(b)(1). *See id.* The court allowed the motion, ruling that because the plaintiff already knew the grounds for the motion, the lack of specificity did not prejudice the plaintiff. *Id.*

86. *See* 704 F.2d at 720-21. While the *Shah* panel decision did not discuss rule 7(b)(1), the court determined that an untimely notice of appeal is an implicit motion for an extension of time. *Id.* The Notes to the 1979 amendment state that appellants are to make motions for an extension of time in accordance with rule 7(b)(1). FED. R. APP. P. 4 advisory committee notes.

87. 722 F.2d at 1170 (Haynesworth, J., dissenting).

88. *See* FED. R. APP. P. 3 (clerk of district court must notify opposing party of court's receipt of notice of appeal).

89. *See supra* note 84 and accompanying text (obligation of particularity does not require appellant to designate grounds beyond appellant's knowledge); *supra* note 83 and accompanying text (particularity requirement need only inform court of appellant's position). The appellants in *Shah* were unaware that the notice of appeal was untimely because of a delay in postal service. *See* 704 F.2d at 719. Courts have held reliance on the due course of mail delivery to be reasonable and may consider an appellant's reliance on mail as a factor in determining excusable neglect. *See, e.g.*, Pryor v. Marshall, 711 F.2d 63, 65 (5th Cir. 1983) (delay in mail delivery may constitute excusable neglect); Sanchez v. Board of Regents of Texas Southern Univ., 625 F.2d 521, 522 (5th Cir. 1980) (reliance on mail delivery may provide grounds for excuse of untimely filing of appeal); Halfen v. United States, 324 F.2d 52, 54 (10th Cir. 1963) (untimely filing excused where appellant mailed appeal in time for delivery under normal circumstances).

90. FED. R. APP. P. 4(a)(5) (court may grant extension of time upon finding of good cause or excusable neglect); *see supra* note 6 and accompanying text (excusable neglect standard).

91. *See* Kenney v. Fox, 132 F. Supp. 305, 307 (W.D. Mich. 1955), *aff'd* 232 F.2d 288 (6th Cir.), *cert. denied*, 352 U.S. 855 (1956). In *Kenney*, the district court held that because a

and should be free to consider the motion despite mere technical infirmities.[92]

The question of possible prejudice to the opposing party raises the policy considerations of the Rules, and particularly of rule 4(a)(5).[93] The purposes of the Rules are to promote simplicity in procedure and to ensure the just resolution of disputes.[94] The Rules are not a rigid code that courts should construe without regard to the circumstances.[95] The time limitations of rule 4(a) establish a reliable limit for the parties,[96] as well as guard against dilatory tactics.[97] The basic rationale underlying rule 4(a) is to provide a finite period for litigation.[98] Subsection (5) of rule 4(a), however, balances the policies favoring finality with the desire to protect the rights of appellants.[99] The thirty day grace period of rule 4(a)(5) protects appellants who, for good

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motion to dismiss for failure to state a claim presented a single definite question, rule 7 required no further explanation other than the presence of the motion itself. *See* 132 F. Supp. at 307.

92. *See* McGarr v. Hayford, 52 F.R.D. 219, 221 (S.D. Cal. 1971) (court should avoid basing decision on technicalities if court can understand grounds of motion); United States v. 363 Cases, More Or Less, "Mountain Valley Mineral Water," 143 F. Supp. 219, 223 (W.D. Ark. 1956) (movant need not observe technical precision in stating grounds for motion but need only fairly apprise court of movant's position); *supra* note 83 and accompanying text (appellant's request for extension need only apprise court of appellant's position).

93. *See* Prettyman, *The New Federal Rules of Appellate Procedure—A General View*, 28 FED. B.J. 97, 97 (1969) (appellate rules should provide detail to help practitioner understand mechanics of process but should not hinder solution of minor problems). Judge Prettyman was the Chairman for the Advisory Committee on Appellate Rules. *Id.*; *see also* Ward, *supra* note 2, at 101 (task of advisory committee was to develop rules that were fair and simple and that eliminated unjust expense and delay); FED. R. APP. P. 4(a) advisory committee note (courts should not insist on literal compliance with rule 4 filing requirements over interests of fairness).

94. *See* In re Orbitec Corp., 520 F.2d 358, 362 (2d Cir. 1975) (noting that rigidity of former rule 4(a)(5) time limit conflicts with rule's purpose); *see also Annual Report of the Proceedings of the Judicial Conference of the United States*, at 7 (1958) (discussing purpose of proposed Federal Rules of Appellate Procedure).

95. Fallen v. Untied States, 378 U.S. 139, 142 (1964). In *Fallen*, an incarcerated *pro se* appellant mailed a notice of appeal from prison. *Id.* at 141. A delay in the mails caused the notice of appeal to arrive four days late. *Id.* The Court, discussing the predecessor to rule 4(b), determined that the Rules should ensure the just determination of proceedings. *Id.* at 142. The Court further stated that courts should construe the rules to secure simple and fair administration of justice. *Id.*

96. *See* C-Thru Products, Inc. v. Uniflex, Inc., 397 F.2d 952, 955 (2d Cir. 1968). The appellee in *C-Thru Products* argued that the appeal was untimely because the court had not entered an order allowing an extension within the 60 day appeals period. *Id.* at 954-55. The Second Circuit held that the time limitations of rule 4 served to set a period on which the parties to an action could rely, not to force a court into hasty decisions and destruction of the appellant's rights. *Id.* at 955.

97. *See* Files v. City of Rockford, 440 F.2d 811, 814 (7th Cir. 1971). The *Files* court determined that the basic reason for the rule 4(a) time limitations is to provide a definite point at which litigation ends. *Id.*

98. *See id.; supra* note 96 (discussing policy of rule 4(a)).

99. *See supra* notes 93-98 and accompanying text (discussing balance between interests of finality and appellant's rights). *See generally* Note, *Failure to File Timely Notice of Appeal in Criminal Cases: Excusable Neglect* 41 NOTRE DAME LAW. 73, 75-78 (1965) (discussing balance of interests of finality and appellant's rights in context of criminal trials).

cause or excusable neglect, fail to meet the initial deadline.[100] Allowing an untimely notice to satisfy the motion requirement for an extension will not prejudice the opposing party's right to notice of appeal since the appellant must file either a notice of appeal or a motion for an extension of time within the aggregate sixty day period allowed in rule 4(a)(5).[101] The *Shah* decision, however, prejudices the rights of the appellant who makes an untimely appeal and in good faith fails to file an explicit motion for an extension of time.[102]

In *Shah v. Hutto*, the Fourth Circuit overruled en banc the holding in *Craig v. Garrison* that courts may treat an untimely notice of appeal as an implicit motion for an extension of time.[103] Whether the plaintiff is *pro se* or a member of the bar, a mere notice of appeal will be void if the court receives the notice after the initial thirty day filing period without a separate motion for an extension.[104] The *Shah* decision adopts an unduly rigid construction of the 1979 amendment to rule 4(a)(5).[105] Since *Shah* bars district courts from recognizing good faith attempts by appellants seeking to discharge the filing and notice requirements of rule 4(a)(5), the holding promotes neither the interests of the appellant nor those of the opposing party.[106] The *Shah* court ruled consistently with courts in most other circuits in adopting a strict interpretation of the amended rule.[107] In doing so, the court eliminated the good faith exception formerly available to *pro se* litigants who make substantial attempts to meet the timing requirements of rule 4(a)(5) but fail to submit a motion for extension of time.

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100. *See* FED. R. APP. P. 4(a)(5) (court may grant extension of time upon finding of good cause or excusable neglect).

101. *See supra* note 8 (requirement of notice of appeal or motion for extension of time); *supra* note 88 (clerk of court must inform opposing party that appellant intends to appeal).

102. *See* 722 F.2d at 1169 (Haynesworth, J., dissenting) (court must interpret requirements of rule 4(a) flexibly to avoid unjust impairment of appellant's rights). *See also* 704 F.2d at 720 (rigid interpretation of rule 4(a) motion requirement traps unwary appellants).

103. *See* 722 F.2d at 1168.

104. *See id.*

105. *See id.* at 1167-1168.

106. *Id.*; *see supra* notes 93-102 and accompanying text (discussing policies underlying rule 4(a)); Alley v. Dodge Hotel, 501 F.2d 880, 884 (D.C. Cir. 1974). In *Alley*, the *pro se* appellant sent a motion for an extension of time to the district court. *Id.* at 885. A discrepancy developed over whether the motion arrived on the last permissible day or one day late. *Id.* The court held that because the appellant was proceeding *pro se*, considerations of fairness demanded that the court accept the motion and allow the appellant to demonstrate that the delay was not entirely the appellant's fault. *Id.* at 884, 886.

107. *See supra* notes 7 and 57 (majority of circuits strictly interpret post-amendment rule 4(a)(5)).

B. *In Personam Jurisdiction over Nonresident Insurers*

The due process clause of the fourteenth amendment to the United States Constitution imposes limitations on the power of a court to exercise in personam jurisdiction over a nonresident defendant.[1] Due process requires that the nonresident defendant maintain sufficient "minimum contacts" with the forum state to support the court's assertion of personal jurisdiction.[2] Courts typically employ a two part inquiry to determine whether a particular court may exercise personal jurisdiction over a nonresident defendant.[3] First, the court examines the language of the state long arm statute[4] to determine

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1. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291 (1980); Kulko v. California Superior Court, 436 U.S. 84, 91 (1978). In *World-Wide Volkswagen,* the Supreme Court reiterated that the due process clause prohibits state courts from rendering judgments against nonresident defendants whose rights the court is not authorized to adjudicate. 444 U.S. at 291. A court is authorized to render a valid judgment against the defendant when the defendant has received adequate notice of the suit. *Id.;* Mullane v. Central Hanover Trust Co., 339 U.S. 306, 313-14 (1950). The court also must have personal jurisdiction over the nonresident defendant. 444 U.S. at 291; International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

2. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945); Milliken v. Meyer, 311 U.S. 457, 462-63 (1940) (defendant's domicile in forum state is sufficient to bring absent defendant within forum state's jurisdiction). In *International Shoe,* the Supreme Court replaced the original jurisdictional test of *Pennoyer v. Neff* with the minimum contacts approach coupled with the requirement of fair play and substantial justice. 326 U.S. at 316; *see* Pennoyer v. Neff, 95 U.S. 714, 723 (1878) (states possess exclusive jurisdiction and sovereignty over persons and property within borders but cannot exercise direct jurisdiction over persons and property outside state lines). Minimum contacts confer upon the state the power to exercise jurisdiction over the nonresident defendant because contacts provide a substitute for the defendant's presence within the territory. *See* 326 U.S. at 316-17. The determination of whether the defendant maintains sufficient minimum contacts with the forum state for the state to exercise jurisdiction is not simply a mechanical or a quantitative test. *Id.* at 319. Rather, a finding of jurisdiction is dependent upon the quality and nature of the defendant's activities within the forum state. *Id.* In *World-Wide Volkswagen,* the Court stated that the minimum contact requirement served two functions. 444 U.S. at 291-92. First, the minimum contacts requirement protects defendants from having to litigate in a distant or inconvenient forum. *Id.* at 292. Second, the requirement of minimum contacts further operates to keep state sovereignty intact. *Id. See generally* Lilly, *Jurisdiction Over Domestic and Alien Defendants,* 69 VA. L. REV. 85 (1983) (analyzing current standards and limitations in personal jurisdiction suits involving domestic and alien nonresident defendants).

3. *See, e.g.,* Raffaele v. Campagni Generale Maritime, 707 F.2d 395, 396 (9th Cir. 1983) (court first must apply state long arm statute to determine whether defendant's conduct creates cause of action under statute and then must consider whether application of statute is consistent with due process); Mountaire Feeds, Inc. v. Argo Impex, S.A., 677 F.2d 651, 653 (8th Cir. 1982) (court must determine whether facts presented satisfy statutory requirements and whether court's assertion of personal jurisdiction satisfies due process); Craig v. General Finance Corp. of Illinois, 504 F. Supp. 1033, 1036 (D. Md. 1980) (application of Maryland's long arm statute is two step process requiring court to determine whether statute authorizes service on nonresident defendant and whether service of process violates due process).

4. *See* Prejean v. Sonatrach Inc., 652 F.2d 1260, 1264 (5th Cir. 1981) (court achieves jurisdiction over nonresident defendant by service of process under state long arm statute). The *Prejean* court maintained that a court may exercise personal jurisdiction over a nonresident

whether the facts presented satisfy the statutory requirements for the court's assertion of personal jurisdiction.[5] The court then considers whether the defendant's contacts with the forum state suffice as minimum contacts for the purpose of satisfying due process requirements.[6] The minimum contacts inquiry should focus primarily on the relationship among the defendant, the forum, and the litigation.[7] In *August v. HBA Life Insurance Co.*,[8] the Fourth Circuit utilized such a two part inquiry to determine whether a Virginia court could exercise personal jurisdiction over an out-of-state insurance company based on an insurance policy issued to a nonresident who later came to reside in Virginia.[9]

In *August,* an Arizona insurance company, HBA Life Insurance (HBA), issued to Scott August (August), also a resident of Arizona, a health insurance policy that covered August and his family.[10] In September 1977, the Augusts moved to Virginia and established residency.[11] While residing in Virginia, August paid four monthly premiums due on the insurance policy with checks drawn on a Virginia bank.[12] In December 1977, August filed a claim under the HBA policy on behalf of Mrs. August, who had received medical treatment and hospitalization.[13] In a letter to August, HBA stated that the policy did not cover Mrs. August's medical expenses because of limitations expressed in the provisions of the policy.[14] HBA enclosed in the

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defendant who has minimum contacts with the state only if the state long arm statute authorizes the court's assertion of jurisdiction. *Id.* at 1264. A federal court in a diversity action may assert jurisdiction over a nonresident defendant when consistent with the long arm statute of the forum state. Brown v. Flowers Indus. Inc., 688 F.2d 328, 331 (5th Cir. 1982), *cert. denied,* 103 S. Ct. 1275 (1983); *see* FED. R. CIV. P. 4(d)(7) and (e) (governing personal service upon non inhabitant of forum state). A federal court must follow the state court's construction of the state's long arm statute or interpret the statute in the same manner as the state's highest court would have interpreted the statute. *See* DeMelo v. Toche Marine, Inc., 711 F.2d 1260, 1264-65 (5th Cir. 1983) (federal court may exercise jurisdiction where state court could have done so); Prejean, 652 F.2d at 1264-65 n.3 (federal court required to follow state's highest court in interpreting state long arm statute). *See generally* Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois,* 63 U. ILL. L. F. 533 (1963) (comprehensive evaluation of Illinois long arm statute after eight years of judicial interpretation and construction).

5. *See* Insurance Corp. v. Compagnie Des Bauxites, 456 U.S. 694, 699, 708 (1982) (approving district court's finding that defendant had sufficient contacts with Pennsylvania to fall within Pennsylvania long arm statute). *See also* Copiers Typewriters Calculators v. Toshiba Corp., 576 F. Supp. 312, 318-21 (D. Md. 1983) (interpreting and applying Maryland's long arm statute).

6. *See id.* (applying minimum contact standards enunciated in Supreme Court rulings and followed in lower court opinions to determine whether court's exercise of personal jurisdiction over defendant comports with due process).

7. Shaffer v. Heitner, 433 U.S. 186, 204 (1977).

8. 734 F.2d 168 (4th Cir. 1984).

9. *Id.* at 170-73.

10. *Id.* at 170.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* In *August v. HBA Life Ins. Co.,* HBA Life Ins. Co. (HBA) denied the insurance

letter an elimination rider[15] which confirmed that the policy did not cover the losses resulting from Mrs. August's physical condition.[16] August, however, did not sign the elimination rider.[17]

August subsequently instituted an action against HBA in the Circuit Court of King and Queen County, Virginia, based on HBA's disclaimer of coverage.[18] August served HBA with process under Virginia's long arm statute.[19] The state court rendered a default judgment for the Augusts in April 1981, after HBA failed to file responsive pleadings.[20]

In July 1981, the Augusts filed a petition for bankruptcy in the United States Bankruptcy Court for the Eastern District of Virginia.[21] In pursuing the default judgment against HBA, the Augusts submitted to the bankruptcy court a complaint for turnover of property.[22] HBA moved to dismiss the complaint, maintaining that the bankruptcy court lacked jurisdiction over the property sought in the complaint.[23] The bankruptcy court determined that HBA did not have sufficient minimum contacts with Virginia to satisfy due process requirements.[24] The bankruptcy court accordingly ruled that the

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claim by August for essentially two reasons, both of which related to the terms of the policy. *Id.* at 170. First, HBA asserted that Mrs. August's illness, which required hospitalization, originated prior to the effective date of the policy. *Id.* HBA also claimed that Mrs. August had an extensive history of medical problems that the Augusts failed to disclose on the application for the policy. *Id.*

15. *See generally* 13A J. APPLEMAN, INSURANCE LAW AND PRACTICE § 7539 (discussing insurance policy modification by riders). A rider or endorsement issued in connection with the execution of an insurance policy becomes part of the insurance agreement. *See* Lumbermens Mut. Casualty Co. v. Sutch, 197 F.2d 79, 81-82 (3d Cir. 1952) (court must read insurance policy and endorsement in conjunction with each other to determine intent of parties).

16. 734 F.2d at 170. The elimination rider in *August* omitted from coverage under the original policy losses resulting from disease peculiar to the female organs suffered by Sharon August. *Id.*

17. *Id.* at 173.

18. August v. HBA Life Insurance Co., No. 82-0175-R, slip op. at 1 (E.D. Va. May 26, 1982).

19. 734 F.2d at 170; *see* VA. CODE § 8.01-328.1 (1983) (Virginia long arm statute); *infra* note 29 (text of § 8.01-328.1).

20. *August,* No. 82-0175-R, slip op. at 1-2.

21. 734 F.2d at 169.

22. *Id.* at 170; *see In re* August, 17 B.R. 628 (E.D. Va. 1982) (August's filing of complaint for turnover of property); 11 U.S.C. § 1301 (1984) (stay of action against codebtor after order of relief under bankruptcy code); *see also* 28 U.S.C. § 1471(e) (1984) (in complaint for turnover of property, bankruptcy court has exclusive jurisdiction over all debtor's property regardless of where property is located).

23. Defendant's Memorandum In Support of Motion To Dismiss at 9-10, August v. HBA Life Ins. Co., 17 B.R. 628, 629 (E.D. Va. 1982). In *August,* HBA asserted that the state court ruling which awarded a money judgment to the Augusts was void for want of personal jurisdiction over HBA. *Id.* HBA argued, therefore, that the bankruptcy court could not maintain the action pursuant to 28 U.S.C. § 1471(e) because the court lacked jurisdiction over the money award. *Id.;* 28 U.S.C. § 1471(e) (1984) (bankruptcy court maintains jurisdiction over all debtors property).

24. *See* 17 B.R. at 630-31 (*August* bankruptcy court's discussion of minimum contacts). In addition to *International Shoe* and *McGee v. International Life Insurance Co.,* the bankruptcy

state court default judgment was invalid and ordered the August's complaint dismissed for lack of jurisdiction.[25] In a memorandum opinion, the United States District Court for the Eastern District of Virginia affirmed the judgment of the bankruptcy court.[26]

On appeal, the Fourth Circuit reversed the judgment of the district court.[27] The Fourth Circuit used a bifurcated approach in considering whether HBA maintained sufficient contacts with Virginia to support the state court's exercise of in personam jurisdiction over HBA.[28] The Fourth Circuit first examined the language of section 8.01-328.1 of Virginia's long arm statute[29] to establish that the statute provided authority for the assertion of jurisdiction.[30] The Fourth Circuit then reviewed relevant Supreme Court decisions for guidance in determining whether HBA's contacts with Virginia satisfied established due process standards.[31] Following an assessment of HBA's

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court in *August* relied heavily upon *Danville Plywood Corp. v. Plain and Fancy Kitchens, Inc.* *Id.* at 630-31; *see* McGee v. International Life Ins. Co., 355 U.S. 220, 223 (1957) (upholding jurisdiction based on insurance contract consummated in forum state); International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (announcing minimum contacts approach to personal jurisdiction determination); Danville Plywood Corp. v. Plain and Fancy Kitchens, Inc., 218 Va. 533, 535, 238 S.E.2d 800, 801-02 (1977) (finding insufficient contacts to satisfy due process requirements for state's assertion of jurisdiction). In *Danville Plywood,* an agent for Danville Plywood called on Fancy Kitchens, Inc., a nonresident corporation at the corporation's place of business. 238 SE.2d at 801. In response to Danville Plywood's solicitation, Fancy Kitchens placed an order for plywood panels. *Id.* at 534. Fancy Kitchens received allegedly defective goods from Danville Plywood and declined to pay for the goods. *Id.,* 238 S.E.2d at 802. Fancy Kitchens' single contact with the state of Virginia was the order placed for plywood panels in response to Danville Plywood's solicitation. *Id.* at 535, 238 S.E.2d at 802. Danville Plywood subsequently instituted an action to recover the price of the goods. *Id.* at 534, S.E.2d at 802. In determining whether Virginia could exercise jurisdiction, the Supreme Court of Virginia ruled that Fancy Kitchens' acceptance of the purchase order in Virginia, and Kitchens' agreement to ship the panels F.O.B. buyer did not satisfy the minimum contact requirement. *Id.* at 535, S.E.2d at 802. The bankruptcy court in *August* believed that the facts in *Danville Plywood* were similar to the *August* facts because HBA had no contacts with Virginia except for the insurance policy issued to the Augusts. 17 B.R. at 631.

25. 17 B.R. at 631.

26. *August,* No. 82-0175-R, slip op. at 1.

27. 734 F.2d at 173.

28. *See id.* at 170-73.

29. *See id.* at 171. Section 8.01-328.1 of the Virginia Code provides in part: "A. A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action arising from a person's: 1. Transacting any business in this Commonwealth; 7. Contracting to insure any person, property, or risk located within this Commonwealth at the time of contracting . . ." VA. CODE § 8.01-328.1 (1983).

30. 734 F.2d at 171-72.

31. *Id.* at 172-73. *See, e.g.,* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297-98 (1980) (defendant subject to jurisdiction of court sitting in forum state where defendant has delivered products into stream of commerce with expectation that product will be purchased by consumers in forum state); Hanson v. Denckla, 357 U.S. 235, 253 (1958) (exercise of jurisdiction sustainable when defendant purposefully avails itself of the privilege of conducting activities within the forum state); McGee v. International Life Ins. Co., 355 U.S. 220, 223 (1957) (jurisdiction based on single insurance contract consummated in forum state); Interna-

contacts, the Fourth Circuit concluded that the exercise of in personam jurisdiction over HBA satisfied due process requirements.[32]

In addressing section 8.01-328.1 of Virginia's long arm statute, the Fourth Circuit expressed considerable doubt that the statute would apply to the facts as presented if the statute was interpreted strictly.[33] The Fourth Circuit submitted, however, that courts have construed Virginia's long arm statute to extend the assertion of personal jurisdiction to the limits imposed by the due process clause.[34] Virginia's long arm statute thus may confer jurisdiction in a Virginia court when a defendant's act constitutes a business transaction within the meaning of the statute and gives rise to a cause of action.[35] The Fourth Circuit suggested that courts should liberally construe section 8.01-328.1 to support long arm jurisdiction in all insurance contract cases as long as assertion of jurisdiction over the foreign insurer is consistent with due process.[36] The Fourth Circuit determined that the critical issue, therefore, was whether HBA maintained sufficient minimum contacts with Virginia to satisfy due process requirements.[37]

The Fourth Circuit began its inquiry into the sufficiency of HBA's contacts with Virginia by examining the due process standard enunciated in *International Shoe Co. v. Washington.*[38] In *International Shoe,* the Supreme

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tional Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (Supreme Court's pronouncement of requirement of minimum contacts as predicate to state's assertion of jurisdiction).

32. 734 F.2d at 173.

33. *Id.* at 171. The *August* court observed that § 8.01-328.1 of the Virginia Code permits a court sitting in the state to exercise jurisdiction over a nonresident defendant when the defendant has transacted business in the state or entered into an insurance agreement within the state. *Id.;* VA. CODE § 8.01-328.1 (1983); *supra* note 29 (text of § 8.01-328.1). The Fourth Circuit expressed doubt about the applicability of § 8.01-328.1 to the facts in *August* because the court recognized that the parties had not consummated the insurance agreement within Virginia nor had HBA transacted business in the state. *See* 734 F.2d at 171; VA. CODE § 8.01-328.1 (1983); *supra* note 29 (text of § 8.01-328.1).

34. 734 F.2d at 171, *citing* Danville Plywood v. Plain & Fancy Kitchens, Inc., 218 Va. 533, 534, 238 S.E.2d 800, 802 (1977) (Virginia's long arm statute grants Virginia courts jurisdiction over causes of action arising out of defendant's business transaction within state); *see* John J. Kolbe, Inc. v. Chromodern Chair Co., 211 Va. 736, 740, 180 S.E.2d 664, 667, (1971) (purpose of Virginia's long arm statute is to assert jurisdiction over nonresident defendants to fullest extent permissible under due process); *supra* note 29 (text of Virginia long arm statute).

35. *See* VA. CODE § 8.01-328.1 (1983); *supra* note 29 & 34 (text and interpretation of Virginia long arm statute).

36. 734 F.2d at 171-72. In HBA's brief filed with the Fourth Circuit in *August,* HBA argued that Virginia's statutory authority excludes from Virginia's jurisdiction foreign insurers that have entered into insurance contracts outside of Virginia with nonresidents of the state. Brief for Appellee at 23, August v. HBA Life Insurance Co., 734 F.2d 168 (4th Cir. 1984); *see* VA. CODE §§ 38.1-64, -67, -339, -98.1 (1983) (Virginia statutes governing insurance transactions in Virginia). HBA asserted that the Virginia statutes which the Augusts cited, authorizing jurisdiction based on insurance contracts delivered or issued in Virginia, could not confer jurisdiction over HBA because the instant parties had entered into the insurance agreement in Arizona. Brief for Appellee, *supra* at 22-23; *see* §§ 38.1-64, -67, -339, -98.1 (1983) (Virginia statutes cited by HBA in asserting that intent of statutory authority is to exclude from Virginia

Court laid the foundation for modern jurisdictional analysis by requiring the defendant to have certain "minimum contacts" with the forum state as a precondition to the state's assertion of jurisdiction over the nonresident defendant.[39] As acknowledged by the *August* court, the *International Shoe* test further provides that traditional notions of fair play and substantial justice govern maintenance of the suit.[40]

In addition to the standards set forth in *International Shoe,* the Fourth Circuit referred to the standard announced in *Hanson v. Denkla,*[41] which suggests that jurisdiction lies in the forum state when the defendant purposefully has availed itself of the privileges of transacting business within the forum state.[42] The Fourth Circuit, in considering the purposeful availment

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jurisdiction foreign insurers not transacting business in Virginia). The Fourth Circuit in *August* addressed individually each provision that HBA cited and concluded that Virginia's long arm statute differs in its purpose from the statutes cited by HBA. 734 F.2d at 171. The Fourth Circuit explained that the Virginia legislature intended Virginia's long arm statute, unlike the cited statutes, to confer jurisdiction in Virginia courts to the extent permissible under the due process clause. *Id.* at 171-72.

37. 734 F.2d at 172.

38. *Id.; see* International Shoe Co. v. Washington, 326 U.S. 310, 316 (1957) (announcing minimum contacts approach to personal jurisdiction inquiry).

39. *See* 326 U.S. at 316 (nonresident defendant must maintain minimum contacts with forum state as predicate to state's assertion of jurisdiction).

40. 734 F.2d at 172; *International Shoe,* 326 U.S. at 316. *Cf.* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980) (subjecting nonresident defendant to jurisdiction of court sitting in forum state must be "reasonable").

41. 357 U.S. 235 (1958).

42. 734 F.2d at 172; *see* Hanson v. Denckla, 357 U.S. 235, 253 (1958). In *Hanson,* a resident of Pennsylvania set up a trust with a Delaware trust company. 357 U.S. at 238. The trust's settlor subsequently moved to Florida where she executed a power of appointment in favor of her grandchildren. *Id.* at 239. Upon the settlor's death, a dispute arose between the beneficiaries. *Id.* at 240. A Florida state court suit ensued in which the court determined that the trust and power of appointment were ineffective under Florida law. *Id.* at 242. In determining whether the Florida court had jurisdiction over the Delaware trust company, the Supreme Court on certiorari observed that the defendant trust company had no contacts with Florida except for the receipt of occasional instructions from the trust's settlor while the settlor resided in Florida. *Id.* at 252. The Supreme Court stated that the defendant satisfies the minimum contacts requirements for in personam jurisdiction by purposefully availing itself of the opportunity to engage in business activities within the forum state. *Id.* at 253. The *Hanson* Court further maintained that a person's unilateral activity with the nonresident defendant does not satisfy minimum contact requirements. *Id.* The Court ruled that the Delaware trust company had no contacts with Florida that would suffice as minimum contacts to sustain the jurisdiction of the Florida court. *Id.* at 251. *See generally* Kuland, *The Supreme Court, The Due Process Clause And The In Personam Jurisdiction Of State Courts From Pennoyer To Denckla: A Review,* 25 U. CHI. L. REV. 569, 610-23 (1958) (discussing *Hanson*).

In *World-Wide Volkswagen,* the Supreme Court rejected the argument that a nonresident defendant is amenable to suit in the forum state when it was foreseeable that the defendant's product would be utilized in the forum state. 444 U.S. 286, 295-96 (1980). The Supreme Court reasoned that if foreseeability was a proper test of jurisdiction then the defendant seller would be amenable to suit in every state where the defendant could foresee the possibility of goods entering that market. *Id.* The Court stated that a foreseeability test thus would cause a defendant's product to serve as the defendant's agent subjecting the defendant to the jurisdiction

test stated that HBA did not purposefully avail itself of the privileges of conducting business in Virginia because HBA had no choice but to accept the premiums sent by August from Virginia.[43] The Fourth Circuit similarly concluded that HBA had not satisfied the purposefulness test of *World-Wide Volkswagen Corp. v. Woodson,*[44] which presupposes jurisdiction when the defendant has introduced its product into the stream of commerce with the expectation that the product will be utilized in the forum state.[45] The *August* court maintained that the language of the insurance policy indicated that HBA foresaw the possibility that the policyholder might relocate in another state.[46] The Fourth Circuit recognized, however, that under *World-Wide Volkswagen,* foreseeability is not a sufficient standard for sustaining a court's assertion of personal jurisdiction.[47] In rejecting foreseeability as a permissible criterion for upholding jurisdiction, the *World-Wide Volkswagen* court emphasized that the defendant's affiliation with the forum state must be such that the defendant could reasonably anticipate being haled into a court of

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of the state where the product caused injury. *Id.* at 296. The *World-Wide Volkswagen* Court suggested that a standard superior to a foreseeability test is whether the defendant reasonably could anticipate being haled into court in the forum state based on the defendant's affiliation with the state. *See id.* at 297 (defendant's conduct and connection with forum state must be such that defendant reasonably could anticipate being amenable to suit in state); *see also* Kulko v. California Superior Court, 436 U.S. 84, 97-98 (1978) (jurisdiction should lie in defendant's state of domicile since defendant could not reasonably anticipate being amenable to suit in California); Shaffer v. Heitner, 433 U.S. 186, 216 (1977) (defendant's affiliation with forum state of Delaware was not such that defendant had reason to expect to be brought before a Delaware court).

43. 734 F.2d at 172.

44. *Id.* at 173; *see* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297-98 (1980); *see infra* note 45 (discussion of *World-Wide Volkswagen*).

45. *World-Wide Volkswagen,* 444 U.S. at 297-98 (state has not exceeded jurisdictional powers by exercising jurisdiction over nonresident defendant when defendant delivers product into stream of commerce with expectation that consumers in forum state will purchase product). In *World-Wide Volkswagen,* the Supreme Court addressed the issue of whether an Oklahoma court could exercise jurisdiction over the nonresident defendants, a New York auto retailer and its wholesaler, in an action arising out of an automobile accident in Oklahoma involving an allegedly defective auto sold by the defendants. *Id.* at 268. The *World-Wide Volkswagen* Court implied that a defendant manufacturer or distributor should not be amenable to suit based on an isolated occurrence resulting from use of the defendant's product in the forum state. *Id.* at 297. The Court maintained, however, that a court reasonably may exercise jurisdiction over a manufacturer or distributor which intends to serve directly or indirectly that particular market. *Id.* In *World-Wide Volkswagen,* the defendant wholesaler distributed automobiles in New York, New Jersey, and Connecticut and the defendant retailer sold automobiles only in New York. *Id.* at 298. The *World-Wide Volkswagen* Court reasoned, therefore, that the defendants could not reasonably expect to be brought before an Oklahoma court and should thus not be subject to the jurisdiction of that state. *Id.* at 298-99.

46. 734 F.2d at 172. The provision of the policy in *August,* which suggested the possibility of the policyholders' relocation, provided that HBA would not adjust the premium rates paid by August unless HBA readjusted all policies similar in nature and held by persons residing in the same state. *Id.* at 170.

47. *Id.* at 173; *see World-Wide Volkswagen,* 444 U.S. at 295; *supra* notes 42 and 45 (discussion of personal jurisdiction standards enunciated in *World-Wide Volkswagen*).

that state.[48] The Fourth Circuit concluded, therefore, that the foreseeability of the Augusts' move to Virginia along did not create sufficient minimum contacts between HBA and Virginia.[49]

In further analyzing HBA's contacts with Virginia, the Fourth Circuit relied on the Supreme Court's ruling in *McGee v. International Life Insurance Co.*[50] In *McGee,* a California resident obtained a life insurance policy from an Arizona insurer which then transferred the policy obligation to a Texas

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48. 444 U.S. at 297; *see supra* notes 42 and 45 (discussing foreseeability and reasonable expectation tests addressed in *World-Wide Volkswagen*).

49. 734 F.2d at 173. The *August* court noted that some case law exists sustaining a court's exercise of jurisdiction over out-of-state liability insurers based on accidents and attendant injury within the forum state caused by automobiles covered by the insurer. *Id.* at 172-73; *see* Pugh v. Oklahoma Farm Bureau Mut. Ins. Co., 159 F. Supp. 155, 156-59 (E.D. La. 1958) (upholding Louisiana jurisdiction based on statute permitting service of process on nonresident liability insurer). The Fourth Circuit referred to *Pugh* because *Pugh* and automobile liability insurance cases similar to *Pugh* imply that foreseeability is a suitable criterion for upholding jurisdiction. *See* 734 F.2d at 172-73; *Pugh,* 159 F. Supp. at 158-59 (single accident within forum state constitutes sufficient contact with forum state to justify maintenance of suit over nonresident liability insurer having no contacts with forum state); *see also* Bevins v. Coment Casualty Co., 71 Ill. App. 3d 758, 28 Ill. Dec. 333, 390 N.E.2d 500, 504-05 (1979) (liability insurer agreeing to insure driver against all liability in any state, amenable to suit in West Virginia based on single contact arising out of insure's automobile accident in West Virginia). Foreseeability, as a criterion for upholding jurisdiction, may be implied in *Pugh* and similar cases because insurers with no contacts with the forum state are subject to the jurisdiction of the state by virtue of a policyholder having committed a wrong there. *See* 159 F. Supp. at 158-59. *Pugh,* however, did not consider foreseeability as a standard for upholding jurisdiction. *See id.* at 155-56. Rather, *Pugh* involved the issue of the validity of Louisiana's direct action statute, which authorizes Louisiana jurisdiction over nonresident liability insurers whose policyholders have been sued in Louisiana. *Id.* at 158-59; *see* LA. REV. STAT. ANN. § 13:3474 (West Supp. 1978). For a recent discussion addressing jurisdiction over an auto liability insurer based on a single contract arising out of an auto accident within the forum state, see *Rossman v. Consolidated Ins. Co.,* 595 F. Supp. 505, 508-09 (E.D. Va. 1984) in which the United States District Court for the Eastern District of Virginia relied in part on *August* and *Pugh* in upholding jurisdiction over a nonresident auto liability insurer.

In *Watson v. Employers Liab. Corp.,* the Supreme Court upheld the constitutionality of Louisiana's direct action statute. *See* Watson v. Employers Liab. Corp., 348 U.S. 66, 72-74 (1954). The Louisiana direct action statute provided for jurisdiction in a Louisiana court over suits in which either the insurer issued the policy in Louisiana or the injury occurred in the state. LA. REV. STAT. ANN. § 22:655 (West Supp. 1978). The *Watson* Court, in determining that the direct action statute did not violate due process, reasoned that Louisiana had a legitimate interest in protecting the legal rights of persons injured within its borders. 348 U.S. at 73; *cf.* Hess v. Pawloski, 274 U.S. 352, 356-57 (1927) (upholding constitutionality of Massachusetts statute authorizing service of process over nonresident defendants in proceedings arising out of accidents or collisions on Massachusetts highways in which nonresident defendant involved). Because *August* does not address the validity of a direct action statute, direct action statute decisions provide little guidance in assessing the sufficiency of contacts in relation to due process jurisdictional standards. *See* 734 F.2d at 170-73; Note, *Direct Action Statutes: Their Operational and Conflict-of-Law Problems,* 74 HARV. L. REV. 357, 360-63 (1960) (direct action statutes are legislatively created right of action intended to protect legal rights of injured parties).

50. 734 F.2d at 172-73; *see* McGee v. International Life Ins. Co., 355 U.S. 220, 221-23 (1957); *infra* notes 51-57 & 95-104 and accompanying text (discussion of *McGee* and comparison of *McGee* to *August*).

insurer.[51] Upon the death of the insured, the beneficiary of the policy filed a claim that the Texas insurer refused to pay.[52] The beneficiary then filed suit in a California state court and the state court rendered a judgment against the Texas insurer.[53] In determining whether the beneficiary could enforce the state court judgment, the *McGee* Court held that California could exercise jurisdiction over the Texas insurer based on the substantial connection between the insurance contract and the state of California.[54] The Fourth Circuit distinguished *McGee* from *August,* noting that in *August* the parties did not consummate the insurance agreement within the forum state nor had HBA negotiated the contract with the knowledge that the Augusts were moving to Virginia.[55] The *August* court stated, however, that the *McGee* ruling would support in personam jurisdiction over HBA if August had executed the elimination rider.[56] The Fourth Circuit submitted that the execution of the solicited rider would suffice as a minimum contact conferring jurisdiction over HBA.[57]

The Fourth Circuit concluded, however, in contrast to the district's view, that the elimination rider substantially modified the provisions of the policy even though August never executed the rider. In reversing the judgment of the district court, the Fourth Circuit explained that the elimination rider materially altered the policy by excluding coverage existing in the original policy.[59] The *August* court further maintained that a significant relationship existed between the Augusts' cause of action and HBA's solicitation of the elimination rider despite the fact that August never signed the rider.[60] Based primarily on HBA's solicitation of the elimination rider, the Fourth Circuit held that the Virginia state court properly exercised long arm jurisdiction over HBA.[61]

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51. 355 U.S. at 221.

52. *Id.* at 222.

53. *Id.* at 221.

54. *Id.* at 223. The *McGee* Court determined that the delivery of the policy in California, the mailing of the premiums from the same state, and the death of the insured in California constituted sufficient contacts with the forum state to confer jurisdiction. *Id.* The Court also emphasized that the state of California had an interest in providing the plaintiff with a forum. *Id.* The *McGee* Court further suggested that if the foreign insurer were not amenable to suit in the forum state, the insurer effectively would be judgment proof from individuals with moderate claims because policyholders would be unwilling to seek redress in distant forums. *Id; see* Travelers Health Assn. v. Virginia, 339 U.S. 643, 649 (1950) (due process does not forbid state from subjecting nonresident insurer to jurisdiction of state court to protect state residents from having to seek redress on moderate claims in distant states).

55. 734 F.2d at 172.

56. *Id.* at 173.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* The Fourth Circuit in *August* mentioned that the August's residency in Virginia and the continuation of the policy from Virginia via monthly premium payments further supported upholding jurisdiction over HBA. *Id.*

The dissenting opinion in *August* disagreed with the majority's determination that the solicitation of the elimination rider provided a sufficient contact with Virginia.[62] The dissent argued that the purpose of the rider was not to alter the policy but only to clarify the provision of the policy which disclaimed coverage.[63] The dissent asserted, moreover, that because HBA mailed the rider after the Augusts filed a claim under the policy, the solicitation of the rider could not operate as a contact with the forum state.[64] Finally, the dissent contended that the solicitation of the rider was not a business transaction between the parties because August never signed the rider.[65] The dissent suggested that the absence of a business transaction in the forum state made *August* distinguishable from *McGee* because the insurance agreement in *McGee* had been consummated in the forum state.[66]

The divergence between the majority and the dissent reflects a general inconsistency among courts in determining whether a single contact with the forum state is sufficient to constitute minimum contacts for the purpose of establishing personal jurisdiction.[67] When a single contact, out of which the plaintiff's suit arises, confers jurisdiction, the state is exercising "specific jurisdiction" over the defendant.[68] In exercising specific jurisdiction, the court's authority to adjudicate the matter arises out of the relationship between the litigation and the defendant's contacts with the forum state.[69] With "general jurisdiction," the court of a state has power to adjudicate the claim based on the defendant's contacts with the forum state that are unrelated to the litigation.[70] In a series of recent cases addressing personal jurisdiction issues, the Supreme Court reemphasized that a distinction exists

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62. *Id.* at 173-74 (Hall, J., dissenting).

63. *Id.* at 174.

64. *Id.*

65. *Id.* The *August* dissent noted that the Supreme Court has stated that mere solicitation in a state by a foreign corporation does not alone subject that corporation to the state's jurisdiction. *Id.* at 174 n.2, *citing* Philadelphia & Reading Ry. Co. v. McKibben, 243 U.S. 264, 267-68 (1917); Green v. Chicago Burlington & Quincy Ry. Co., 205 U.S. 530, 533-34 (1907).

66. 734 F.d at 174 (Hall, J., dissenting); *see McGee*, 355 U.S. at 221 (insurance agreement entered into in forum state of California); *supra* notes 51-57 and accompanying text (discussion of *McGee*); *infra* notes 95-104 and accompanying text (comparison of *McGee* to *August*).

67. *Compare* Mississippi Interstate Exp. Inc., v. Transp. Inc., 681 F.2d 1003, 1012 (5th Cir. 1982) (California defendant's single nonfortuitous contract entered into with Mississippi corporation satisfied minimum contact requirement necessary for Mississippi court to exercise personal jurisdiction) *with* Lakeside Bridge & Steel Co. v. Mountain State Const. Co., 597 F.2d 596, 603 (7th Cir. 1979) (single contract entered into by West Virginia corporation not sufficient contact for Wisconsin to assert jurisdiction), *cert. denied*, 445 U.S. 907 (1980). *See generally* Note, *Minimum Contacts and Contracts: The Breached Relationship*, 40 WASH. & LEE L. REV. 1639 (1983) (survey of circuit courts' application of Supreme Court personal jurisdiction precedent in minimum contact cases based on contract between nonresident defendant and party within forum state).

68. *See* von Mehren & Trautman, *Jurisdiction To Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1144-64 (1966) (discussing developments in specific jurisdiction cases).

69. *See id.* at 1144-45 (defining specific jurisdiction).

70. *See id.* at 1136-44 (discussing general jurisdiction).

between specific and general jurisdiction.[71] Moreover, the Court suggested that a court of a state may exercise specific jurisdiction over a defendant based on contacts less substantial than those required for the assertion of general jurisdiction.[72]

The Supreme Court determined in the companion cases of *Keeton v. Hustler Magazine*[73] and *Calder v. Jones*[74] that the relationship which existed among the defendants, the forum and the litigation satisfied the minimum contact requirement to assert specific jurisdiction over the defendants.[75] In *Keeton,* the plaintiff brought a libel suit against the defendant, Hustler Magazine, Inc., in the United States District Court for the District of New Hampshire claiming to have been libeled in five separate issues of the magazine.[76] Hustler's contacts with New Hampshire consisted of the monthly marketing of ten to fifteen thousand copies of the defendant's magazine.[77] In determining whether New Hampshire could assert jurisdiction over Hustler, the Supreme Court held that the defendant's monthly sale of magazines in the state satisfied the minimum contacts requirement of due process.[78]

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71. *See* Keeton v. Hustler Magazine, Inc., 104 S. Ct. 1473, 1481 (1984) (specific jurisdiction analysis); Calder v. Jones, 104 S. Ct. 1482, 1486 (1984) (same); Helicopteros Nacionales de Colombia, S.A. v. Hall, 104 S. Ct. 1868, 1872-73 (1984) (general jurisdiction analysis); *infra* notes 76-81 and accompanying text (discussion of *Keeton*); *infra* notes 82-88 and accompanying text (discussion of *Calder*); *infra* note 80 (discussion of *Hall*).

72. *See Keeton*, 104 S. Ct. at 1481 (less substantial activities in forum state sufficient to support jurisdiction where cause of action arises out of those activities).

73. 104 S. Ct. 1473 (1984).

74. 104 S. Ct. 1482 (1984).

75. *See Keeton*, 104 S. Ct. at 1481-82 (defendant Hustler's monthly sale of magazines in New Hampshire constitutes minimum contact sufficient to sustain jurisdiction in New Hampshire district court); *Calder*, 104 S. Ct. at 1486-88 (defendants' intentional conduct calculated to have impact in California subjects defendants to jurisdiction of California court); *see also* Shaffer v. Heitner, 433 U.S. 186, 204 (1977) (minimum contacts inquiry should focus on relationship among defendant, forum and litigation).

76. 104 S. Ct. at 1477. Although the plaintiff in *Keeton v. Hustler Magazine* was not a resident of New Hampshire, the plaintiff brought the suit in that state because New Hampshire was the only state with a statute of limitations that did not bar her otherwise untimely libel suit. *Id.* The Supreme Court in *Keeton* stated that although a plaintiff's residence may be relevant to the determination of jurisdiction, a plaintiff's lack of residence in the forum state will not defeat jurisdiction. *Id.* at 1481. However, the *Keeton* Court further recognized that the plaintiff's residence in the forum state may be an important consideration in the jurisdictional inquiry when the defendant's contact with the forum state results from the defendant's relationship with the plaintiff. *Id.* In *August*, HBA's only contact with Virginia resulted from HBA's relationship with the Augusts. 734 F.2d at 170, 172. The Fourth Circuit in *August* apparently gave considerable weight in the jurisdictional inquiry to the plaintiff's residence in the forum state. *See* 734 F.2d at 172-73; *infra* notes 114-18 and accompanying text (analysis of Fourth Circuit's reasoning in *August*).

77. 104 S. Ct. at 1477.

78. *Id.* at 1478. In *Keeton*, the Court emphasized that the defendant's monthly sale of magazines in New Hampshire was not a random or fortuitous event. *Id.* The *Keeton* Court maintained, rather, that the defendant's activity within the state was voluntary, allowing New Hampshire properly to assert jurisdiction. *Id.; accord* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297-98 (1980); *supra* note 45 (court sitting in forum state may

The Court noted, however, that the defendant's contacts with New Hampshire normally would not suffice as minimum contacts in a suit unrelated to the defendant's activities within the state.[79] The *Keeton* Court found the contacts to be sufficient for the New Hampshire district court to assert specific jurisdiction because the defendant's activity within the state gave rise to the cause of action.[80] In finding sufficient contacts, the Court reasoned that sustaining the New Hampshire district court's jurisdiction resulted in no unfairness to the defendant because the defendant, having purposefully entered that market, could have anticipated being haled before a New Hampshire court.[81]

The purposefulness of the defendant's activities in the forum state similarly provided a controlling factor in the *Calder* opinion.[82] In *Calder,* the plaintiff brought a libel suit in a California court against the editor and a reporter for National Enquirer, Inc. for erroneous statements made in the corporation's national weekly newspaper.[83] Although the defendants wrote and edited the article at the corporation's principal place of business in Florida, the article appeared in the newspaper, which has its largest circula-

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reasonably exercise jurisdiction over manufacturer or distributor which serves directly or indirectly that particular territory).

79. 104 S. Ct. at 1481.

80. *Id.* at 1481-82; *cf.* Helicopteros Nacionales de Colombia, S.A. v. Hall, 104 S. Ct. 1868, 1872-73 (1984) (defendant's contacts with forum state unrelated to plaintiff's cause of action). In *Hall,* the Supreme Court reiterated that when a suit does not arise out of a defendant's contact with the forum state, a defendant's contacts must be of a continuous and systematic nature to satisfy the minimum contact requirement for a state's assertion of general in personam jurisdiction. *See* 104 S. Ct. at 1872-73. In *Hall,* the survivors and representatives of four Americans killed in a helicopter crash in Peru brought a wrongful death action in Texas against the Colombian corporation, Helicopteros Nacionales de Colombia, S.A. (Helicol), which owned the helicopter. *Id.* at 1870. Helicol's contacts with Texas included the purchase of $4 million worth of helicopters, parts, and accessories from a Texas manufacturer and the sending of personnel to the same manufacturer for training. *Id.* Helicol also sent its chief executive officer to Texas to negotiate a pipeline contract with a Peruvian consortium and received checks drawn by the consortium on a Texas bank. *Id.* In determining whether the corporation maintained sufficient contacts with Texas for a Texas state court to assert general jurisdiction, the Supreme Court indicated that the case presented a general jurisdiction question because the suit did not arise out of Helicol's activities within Texas. *Id.* at 1872-73. The *Hall* Court held that Helicol's contacts with Texas did not satisfy the minimum contact requirement of due process because the contacts were not of a "continuous and systematic" nature. *Id.* at 1873-74; *accord* Perkins v. Benquet Consolidated Mining Co., 342 U.S. 437, 438 (1952) (upholding Ohio state court jurisdiction over foreign corporation on the basis of corporation's systematic and continuous contacts with forum state although contacts unrelated to cause of action).

81. 104 S. Ct. at 1481-82.

82. *See Calder,* 104 S. Ct. at 1487 (defendants' intentional conduct calculated to have deliberate impact in California operates to subject defendants to jurisdiction of California court); *infra* notes 83-88 and accompanying text (discussion of *Calder*).

83. 104 S. Ct. at 1484-85. In *Calder v. Jones,* the plaintiff joined as defendants the National Enquirer, Inc. (Enquirer) and the corporation's local distributor. *Id.* at 1484. The *Calder* Court did not address the constitutionality of subjecting these defendants to the jurisdiction of a California court because neither the Enquirer nor the distributor objected to California's jurisdiction. *Id.* at 1485.

tion in California.[84] The defendants in *Calder* lacked relevant contacts with California except for their responsibility for the published article.[85] The *Calder* Court, employing a specific jurisdiction analysis similar to that in *Keeton,* determined that the California court could exercise jurisdiction over the defendants based on their intentional conduct that was calculated to have a deliberate impact in the forum state.[86] The *Calder* Court, therefore, upheld the jurisdiction of the California court based solely on the effects in California of the defendant's conduct outside the state.[87] Perhaps more so than *Keeton, Calder* introduces a more expansive approach to the minimum contact requirement in specific jurisdiction cases because the *Calder* Court found jurisdiction despite the defendants' tenuous, but intentional, contacts with the forum state.[88] More importantly, both *Keeton* and *Calder* reemphasize the minimum contact approach endorsed in recent Supreme Court decisions which suggest that a nonresident defendant is subject to the jurisdiction of a court within the forum state when the defendant has affiliated itself voluntarily with the forum state by transacting or soliciting business in that state.[89]

The defendant's voluntary contact with the forum state is a factor absent

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84. *Id.*

85. *Id.* Defendant South, the author of the first draft of the challenged article in *Calder,* made frequent business trips to California and received business phone calls made from California. *Id.* Defendant Calder, the president and editor of the Enquirer, had made only two trips to California, both of which were unrelated to the suit. *Id.*

86. *Id.* at 1486-88; see *Keeton,* 104 S. Ct. at 1478-81 (*Keeton* analysis of minimum contacts). In assessing the sufficiency of the defendants' contacts with the forum state of California, the *Calder* Court observed that California served as the situs of the article and of the harm suffered. 104 S. Ct. at 1487. The Supreme Court reasoned that jurisdiction was proper because the defendants' conduct in Florida resulted in injury to the plaintiff in California. *Id.* at 1487-88. Most importantly, the *Calder* Court emphasized that the defendants' conduct was directed purposefully toward creating an impact in California and that the defendants therefore reasonably could anticipate being amenable to suit in a California court. *Id.* at 1487; *see* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980) (defendant's affiliation with forum state confers jurisdiction when defendant could reasonably anticipate being haled before a court of state); Kulko v. California Superior Court, 436 U.S. 84, 97-98 (1978) (same).

87. *See* 104 S. Ct. at 1487 (jurisdiction in California court proper based on effects of defendant's Florida activity).

88. *Compare Calder,* 104 S. Ct. at 1484-85 (nonresident defendant individuals having no relevant contacts with forum state other than assistance in publication of allegedly libelous article appearing in newspaper circulated in California are subject to jurisdiction of California court) *with Keeton* 104 S. Ct. at 1477-82 (Ohio corporation marketing monthly 10,000 to 15,000 copies of corporation's magazine in forum state amenable to suit in that state). *See* Hanson v. Denkla, 357 U.S. 235, 253 (1958) (jurisdiction over nonresident defendant proper when defendant exercises privilege of conducting activities within forum state thus invoking benefits of transacting business in that state); International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945) (same).

89. *See Calder,* 104 S. Ct. at 1484-88 (upholding California jurisdiction over Florida defendants having no relevant contacts with California except for intentional affiliation with allegedly libelous article circulated in forum state); *Keeton,* 104 S. Ct. at 1477-82 (defendant's monthly circulation of magazines in forum state was sufficient to uphold jurisdiction in forum

in *August*.[90] The defendant's contact with the state of Virginia in *August* resulted when the Augusts fortuitously moved to the forum state.[91] Thus, as the Fourth Circuit acknowledged, HBA did not purposefully avail itself of the benefits of conducting business in Virginia.[92] The Fourth Circuit in *August* nevertheless, upheld the Virginia court's assertion of jurisdiction notwithstanding HBA's adventitious association with the forum state.[93] The Fourth Circuit's reasoning in *August,* therefore, is inconsistent with the Supreme Court's rationale in recent personal jurisdiction decisions because the Supreme Court has assigned importance to whether the defendant's affiliation with the forum state was purposeful.[94]

Of the modern Supreme Court opinions delineating personal jurisdiction standards, *McGee,* perhaps the Court's most expansive pronouncement of permissible jurisdiction, most notably resembles the *August* decision.[95] Both the *McGee* Court and *August* court permitted states to exercise jurisdiction over nonresident insurance companies based on isolated insurance contracts

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state district court). *See also* Louis, *The Grasp of Long Arm Jurisdiction Finally Exceeds Its Reach: A Comment On World-Wide Volkswagen Corp. v. Woodson and Rush v. Savchuk*, 58 N.C. L. REV. 407, 422-33 (1980) (reviewing recent Supreme Court pronouncements of due process limitations on long arm jurisdiction and concluding that Court has espoused conduct-oriented approach to minimum contact analysis requiring defendant to have voluntarily established contacts with forum state).

90. *See* 734 F.2d at 170 (HBA's affiliation with Virginia resulted when Augusts unpredictably moved to Virginia).

91. *Id.*

92. *Id.* at 172; *see* Hanson v. Denckla, 357 U.S. 235, 253 (1958) (jurisdiction sustainable where defendant purposefully avails itself of the privilege of conducting activities within forum state); *supra* note 42 (discussion of *Hanson*).

93. 734 F.2d at 170-73. *But see Calder*, 104 S. Ct. at 1487 (recognizing that defendant's intentional actions aimed at creating impact in forum state may sustain jurisdiction; *Keeton*, 104 S. Ct. at 1478 (emphasizing that defendant's contacts with forum state were voluntarily established); Louis, *supra* note 89, at 422-33 (Supreme Court requires defendant to have voluntarily established contacts with forum state as predicate to state courts' assertion of jurisdiction).

94. *Compare* 734 F.2d at 170-73 (nonresident defendant's contact with forum state fortuitously resulted when plaintiffs moved to forum state) *with Calder*, 104 S. Ct. at 1487 (defendant's activity in Florida aimed at creating an impact in forum state of California constitutes sufficient contact with California for state's assertion of jurisdiction) *and Keeton*, 104 S. Ct. at 1478 (contacts based on defendant's purposeful marketing of thousands of magazines in forum state satisfies due process requirement) *and* Louis, *supra* note 39 at 422-33 (Supreme Court requires voluntary contacts with forum state). *See supra* notes 76-81 and accompanying text (discussion of *Keeton*); *supra* notes 82-87 and accompanying text (discussion of *Calder*).

95. 734 F.2d at 173 (upholding Virginia jurisdiction based on insurer's solicitation of insurance rider mailed to policyholder residing in forum state); *see* McGee v. International Life Ins., 355 U.S. 220, 223 (1957) (subjecting out-of-state insurer to jurisdiction of California court on grounds of substantial connection between formation of insurance contract and forum state); *see also supra* notes 10-17 and accompanying text (factual discussion of *August*); *supra* notes 51-57 and accompanying text (discussion of *McGee*); *infra* notes 96-101 and accompanying text (comparison of *McGee* to *August*); *see also* Lilly, *supra* note 2, at 89-91 (suggesting that *McGee* was Court's most expansive pronouncement of permissible jurisdiction).

held by residents of the forum state.[96] As the *August* dissent indicated, however, *August* provides a less convincing basis for warranting a state's exercise of jurisdiction over a nonresident insurer than *McGee.*[97] The parties in *August* consummated the insurance agreement outside the forum state.[98] In *McGee,* the insured purchased the insurance policy while residing in the forum state of California.[99] The Texas insurer assumed the policy obligation of the original insurer with the knowledge that the insured resided in California.[100] Significantly, the *McGee* Court upheld the California court's assertion of jurisdiction over the nonresident insurer based on what the Court determined was a substantial connection between the insurance contract and the forum state.[101] Lacking a similar connection between the formation of the insurance agreement and the forum state,[102] *August* essentially presents a situation in which the only contact connecting the litigation with the Commonwealth of Virginia is the insured's residence.[103] *August* thus represents a departure from strict adherence to the minimum contact standard enunciated in *McGee,* which endorsed an expansive jurisdictional allowance.[104]

Although unsupported by Supreme Court precedent, the Fourth Circuit's ruling in *August* upholding jurisdiction effectively based on the insured's residence is in accord with an earlier case from the Municipal Court for the District of Columbia.[105] In *Security National Life Insurance Co. v. Washing-*

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96. *See* 734 F.2d at 173 (Virginia state court may exercise jurisdiction over Arizona insurer based on insurance policy issued to Arizona resident who later came to reside in forum state of Virginia); *see also McGee,* 355 U.S. at 223 (California state court may exercise jurisdiction over Texas insurer based on insurance contract consummated in forum state).

97. *See* 734 F.2d at 174 (Hall, J., dissenting) (*August* differs from *McGee* because in *McGee* the insurer issued policy to policyholder in forum state whereas in *August* policyholder obtained policy while nonresident of forum state).

98. 734 F.2d at 170. In *August,* Scott August obtained the insurance policy while a resident of Arizona. *Id.*

99. 355 U.S. at 221.

100. *See id.* (Texas insurer assuming insurance obligations mailed reinsurance certificate to policyholder in California).

101. *Id.* at 223.

102. *See* 734 F.2d at 170. In *August,* the Fourth Circuit maintained that a close relationship existed between the Augusts' cause of action and HBA's solicitation of the elimination rider. *Id.* at 173. The Fourth Circuit determined that HBA's solicitation of the rider was a sufficient contact to allow Virginia to exercise jurisdiction. *Id.* Apparently, the Fourth Circuit believed that the relationship between the solicitation of the rider and the Augusts' cause of action was analogous to the situation in *McGee* in which the substantial connection between the formulation of the insurance agreement and the forum state served as the basis for upholding jurisdiction. *See id.* at 173 (close relationship existed between solicitation of rider and cause of action); *McGee,* 355 U.S. at 223 (California jurisdiction proper, based on substantial connection between insurance policy and forum state).

103. *See* 734 F.2d at 170 (August obtained insurance policy in Arizona and subsequently moved to forum state of Virginia).

104. *See supra* notes 95-102 and accompanying text (distinguishing *August* and *McGee*).

105. *See* Security Nat'l Life Ins. Co. v. Washington, 113 A.2d 749 (D.C.), *appeal denied,* 226 F.2d 251 (D.C. Cir. 1955) (District of Columbia has jurisdiction over nonresident insurer

ton, [106] the District of Columbia court determined that an out-of-state insurer's mailing of individual insurance certificates brought the insurer within the scope of a statute providing for service of process on foreign insurers transacting business in the District.[107] The defendant insurance company in *Security National* executed a group life insurance policy in Missouri on behalf of an association.[108] A representative of the association brought the policy back to the District of Columbia.[109] In connection with the group policy, the insured, a member of the association residing in the District, received in the mail a certificate of insurance indicating the insured's coverage under the group policy.[110] The widow of the insured eventually brought suit as beneficiary to recover proceeds on the policy.[111] Although the insurer maintained no significant contacts with the District except for mailing the individual certificates of insurance to the insured and others, the *Security National* court maintained that the statute authorizing jurisdiction over the foreign insurer did not offend due process.[112] The *Security National* court reasoned that if the out-of-state insurer was not amenable to suit under the statute, the insured's beneficiary, and other plaintiffs similarly situated, would have to travel to distant states to enforce their rights.[113]

Like the *Security National* court, the Fourth Circuit in *August* apparently gave great deference to the practical needs of the plaintiff.[114] In *August,* the Augusts faced the burdensome alternative of having to travel to a distant forum to litigate their claim.[115] Recognizing implicitly the disadvantage to the plaintiffs, the Fourth Circuit seemingly concluded that Virginia had a

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pursuant to District of Columbia statute authorizing service upon foreign insurers soliciting insurance business with District of Columbia residents through mail).

106. 113 A.2d 749 (D.C.), *appeal denied,* 226 F.2d 251 (D.C. Cir. 1955).

107. *Id.* at 751; *see* D.C. CODE ANN. § 35-423 (1951) (nonresident insurers are subject to service of process for soliciting, selling, or writing insurance on any District of Columbia resident).

108. 113 A.2d at 750.

109. *Id.*

110. *Id.* In *Security Nat'l Life Ins. Co. v. Washington,* members of the association paid premiums to the representatives of the association in the District of Columbia. *Id.* The representatives deposited premiums from members in a special account. *Id.* The insurer did not solicit directly association members, but rather, sought members through the association. *Id.*

111. *Id.*

112. *Id.* at 750-51. The *Security National* court determined that the District of Columbia statute protecting the rights of District residents was a proper act of the legislature despite possible adverse effects to entities residing outside the District. *Id.* at 757.

113. *Id.* at 751; *see McGee v. International Life Ins. Co.,* 355 U.S. 220, 223 (1957) (state has interest in providing plaintiff residents with forum); Travelers Health Assn. v. Virginia, 339 U.S. 643, 649 (1950) (due process permits states to protect citizens by enacting legislation making it unnecessary for policyholders to have to travel to insurer's residence to seek redress).

114. *See* 734 F.2d at 173 (Fourth Circuit's holding in *August*); *Security National,* 113 A.2d at 751 (legislation protecting legal rights of District residents under contract with foreign insurers is legitimate act of legislature and comports with due process).

115. *See* 734 F.2d at 169-70 (bankruptcy court dismissed August's complaint for turnover of property because court determined that HBA lacked sufficient minimum contacts with Virginia to satisfy due process); *see August,* 17 B.R. at 633 (same).

compelling interest in providing the Augusts with a forum.[116] The Supreme Court in *McGee,* in considering factors other than the defendant's contacts which might justify California jurisdiction, suggested that a state's interest in providing its residents with a forum may be a valid consideration in the jurisdictional inquiry.[117] Thus, although the *August* court overtly relied on *McGee* in assessing the sufficiency of HBA's contacts with Virginia, the Fourth Circuit apparently also followed *McGee* by assigning considerable importance in the jurisdictional analysis to the plaintiff's interest in litigating at home, and the state's interest in providing its residents with a forum.[118]

Although the *August* court did not address specifically the plaintiff's and state's interests as alternative bases for jurisdiction, the Fourth Circuit, nevertheless, apparently weighed the equities of maintaining the suit in Virginia in addition to analyzing the defendant's contacts with the forum state.[119] HBA's solicitation of the elimination rider, the expressed justification for jurisdiction, appears to have been the Fourth Circuit's talisman for upholding jurisdiction based on the implicitly recognized needs of the plaintiff and the state's interest in adjudicating the dispute.[120] *August* thus demonstrates the Fourth Circuit's preference for asserting jurisdiction based on the reasonableness of maintaining the suit over the sufficiency of the defendant's contacts with the forum state.[121] While the dissent would have adhered to the requirement of minimum contacts based on the quantity and quality of the defendant's contacts, the *August* majority has indicated that it favors expansive specific jurisdiction when the interests of the plaintiff

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116. *See* 734 F.2d at 173 (Fourth Circuit's holding in *August*); Vishay Intertechnology, Inc. v. Delta Int'l Corp., 696 F.2d 1062, 1069 (4th Cir. 1982) (interest of forum state is relevant factor in minimum contact analysis). Other circuit courts have determined that a state may have a particular interest in providing its plaintiff resident with a forum and should weigh this consideration in the jurisdictional analysis. *See, e.g.,* Insurance Co. of North America v. Marina Salina Cruz, 649 F.2d 1266, 1272 (9th Cir. 1981) (court should assess interest in forum state in determining reasonableness of exercising jurisdiction over nonresident defendant); Pedi Bares, Inc. v. P & C Food Mkts., Inc., 567 F.3d 933, 937 (10th Cir. 1977) (court should consider interest of state in providing forum in determining whether jurisdiction is proper); In-Flight Devices Corp. v. Van Dusen Air, Inc., 466 F:2d 220, 232 (6th Cir. 1972) (state's interest in resolving a dispute brought by plaintiff resident is important aspect of jurisdictional inquiry).

117. *See McGee,* 355 U.S. at 223 (recognizing state's interest in providing forum for residents seeking redress from out-of-state insurers refusing to pay claims).

118. *See* 734 F.2d at 173 (sustaining Virginia jurisdiction despite HBA's slight contacts with Virginia); *see also McGee,* 355 U.S. at 223 (maintaining that states have interest in providing forum to residents with moderate claims seeking redress from out-of-state insurers); *supra* notes 50-57 and accompanying text (Fourth Circuit's reliance on *McGee* in assessing HBA's contact with Virginia in *August*).

119. *See* 734 F.2d at 173 (Fourth Circuit's holding in *August*). In addition to recognizing the difficult position of the plaintiffs, the Fourth Circuit may also have considered the defendant's ability to cover the costs of litigating in a distant forum. *See id.; see also* von Mehren and Trautman, *supra* note 68, at 1150 (considering insurers' ability to spread cost of litigating interstate by adjusting premium charges).

120. *See* 734 F.2d at 173 (Fourth Circuit in *August* finding jurisdiction based on HBA's solicitation of elimination rider).

121. *See id.*

and the forum state favor the court's exercise of jurisdiction over the nonresident defendant.[122] The Fourth Circuit's rationale in *August,* however, is inconsistent with more recent Supreme Court reasoning as evidenced by the Court's latest personal jurisdiction cases reiterating the requirement of voluntary contacts by the defendant as a predicate to the state's assertion of jurisdiction.[123]

PETER J. WALSH, JR.

C. *Qualified Immunity Defense that Fails to Meet the Collateral Order Requirements Is Not Subject to Interlocutory Appeal*

Section 1291 of Title 28 of the United States Code grants to the United States circuit courts of appeal appellate jurisdiction over final judgments of the United States district courts.[1] The final judgment rule of section 1291 requires that a district court render final judgment in a lawsuit before an appellate court may grant an appeal.[2] An exception to the final judgment

122. *See* 734 F.2d at 173-74 (Hall, J., dissenting); *supra* notes 114-18 and accompanying text (discussion of interest of plaintiff and forum state).

123. *See supra* notes 89-94 and accompanying text (analysis of *August* in reference to recent Supreme Court rulings reiterating requirement of voluntary contacts by defendant with forum state).

1. 28 U.S.C. § 1291 (1982). Section 1291 of title 28 of the United States Code provides that the United States circuit courts of appeal have appellate jurisdiction of all final judgments from United States district courts. *Id.* Appellate review of final judgments from federal district courts to federal courts of appeal is available as a matter of right. *See* Coppedge v. United States, 369 U.S. 438, 441 (1962); 15 C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3901 (1976) (appellate review of final judgments is matter of right); Redish, *The Pragmatic Approach to Appealability in the Federal Courts,* 75 COL. L. REV. 89, 89-128 (1975) (discussion of appealability of lawsuits in federal courts). Section 1292(a) of title 28 of the United States Code allows interlocutory appeal for preliminary injunctions, receiverships and admiralty cases. 28 U.S.C. § 1292(a) (1982). Like § 1291, § 1292(a) appeal is available as a matter of right. *See* C. WRIGHT AND A. MILLER, *supra,* § 3901 (section 1292(a) appeal a matter of right). Section 1292(b) of title 28 of the United States Code provides for appellate review when the district judge and the circuit court agree that the issue, not otherwise appealable, involves a controlling question of law on which opinions differ substantially and that interlocutory appeal is necessary to accelerate the termination of the law suit. 28 U.S.C. § 1292(b) (1982). Interlocutory appeal under section 1292(b) is not a matter of right, but a matter of the judge's discretion. *See* 15 C. WRIGHT, A. MILLER & E. COOPER, *supra,* §§ 3901, 3929-31 (appeal under § 1292(b) is permissive); *see also* Note, *Interlocutory Appeals in the Federal Courts Under 28 U.S.C. § 1292(b),* 88 HARV. L. REV. 607, 617 (1974) (appeal under section 1292(b) requires certification by trial judge); Comment, *Interlocutory Appeals in North Carolina: The Substantial Right Doctrine, 18* WAKE FOREST L. REV. 857, 861 (1982) (§ 1292(b) appeal is discretionary).

2. 28 U.S.C. § 1291 (1982).

rule known as the collateral order exception has developed in federal courts for cases in which the appealed issue is separate from and collateral to the main issue of the lawsuit and the issue is virtually unreviewable after final judgment.[3] Issues under the collateral order doctrine are appealable as interlocutory appeals.[4] One example of an issue that is appealable under the collateral order exception is whether the defendant is immune from suit.[5] Immunity from suit provides protection for public officials from the risks and burdens of suits involving the official duties of public officials.[6] Absolute immunity affords total immunity from suit to a public official for any

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3. *See* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949) (decisions that are very important, separable from merits of case, and unreviewable at final judgment are immediately appealable notwithstanding final judgment rule); *see also* 15 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 1, § 3911 (description of collateral order doctrine). The *Cohen* collateral order doctrine comes from a line of Supreme Court cases that interpret § 1291 in a practical rather than a technical manner. *Cohen,* 337 U.S. at 546; *see* Cobbledick v. United States, 309 U.S. 323, 328 (1940) (Court allowed immediate appeal for one held in contempt for ignoring subpoena duces tecum because issue is severed from main issue of case); United States v. River Rouge Improv. Co., 269 U.S. 411, 413 (1926) (Court ruled that within condemnation suit some property awards were final and appealable while other awards were not final); Bank of Columbia v. Sweeny, 26 U.S. (1 Pet.) 567, 569 (1828) (appeal of mandamus denial not allowed before final judgment). The *Cohen* collateral order doctrine has four requirements for immediate appeal. *Cohen,* 337 U.S. at 546. First, the district court must make final disposition of the issue before appeal. *Id.* The *Cohen* court stated that no review before final judgment means that there should be no review of a court decision where the district court's decision is tentative, informal or incomplete. *Id.; see* 15 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 1, § 3911 (appeal available if no further consideration required by district court). The second requirement for collateral order appeal is that the issue be collateral to and separate from the merits of the case. *Cohen,* 337 U.S. at 546. In effect, the issue of the appeal must not affect the merits. *Id.; see* 15 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 1, § 3911 (explanation of separate from and collateral to requirement of collateral order doctrine). Third, the issue appealed must be effectively unreviewable if not reviewed immediately. *Cohen,* 337 U.S. at 546. Under this requirement, the risk of loss is too important to await final judgment. *Id.; see* 15 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 1, § 3911 (appeal allowed where waiting may result in irreparable injury). Fourth, a case must present a "serious and unsettled question" to be immediately reviewable. *Cohen,* 337 U.S. at 546.

4. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949).

5. *See* Nixon v. Fitzgerald, 457 U.S. 731, 743 (1982) (denial of absolute immunity claim appealable for President of United States); Helstoski v. Meanor, 442 U.S. 500, 508 (1979) (denial of absolute immunity under speech and debate clause of Constitution appealable); Abney v. United States 431 U.S. 651, 662 (1977) (appeal of absolute immunity denial allowable under double jeopardy clause).

6. *See* Harlow v. Fitzgerald, 457 U.S. 800, 806 (1982) (immunity is protection from suit). Legislative immunity originated in England with the Bill of Rights of 1688. 1 W.&M., 2 (1688). Originally, immunity was grounded in the common law from feudal struggles in England. *See* Freed, *Executive Official Immunity for Constitutional Violations: An Analysis and A Critique,* 72 NW.U.L. REV. 526, 528-29 (1977) (discussion of evolution of official immunity). Traditionally, the King was afforded absolute immunity. *Id.* The modern concept of immunity developed from these early feudal traditions. *Id.; see* Scheuer v. Rhodes, 416 U.S. 232, 239 n.4 (1974) (history of official immunity doctrine). The doctrine of official immunity in the United States developed from the 1871 case of *Bradley v. Fisher. See* Bradley v. Fisher, 80 U.S. 335, 347 (1871). In *Bradley,* a trial judge disbarred the attorney representing John Wilkes Boothe's

official acts.[7] Qualified immunity provides a lesser degree of protection than absolute immunity by protecting the public official from suit for reasonable acts by the official.[8] The United States Supreme Court has ruled on several occasions that lower court orders denying absolute immunity claims are immediately appealable without a final judgment on the merits under the collateral order exception.[9] Whether the collateral order exception applies to qualified immunity, however, is less clear. In *Bever v. Gilbertson,*[10] the Fourth Circuit examined whether a state governor and other state employees

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doctor for threatening the judge. *Id.* at 337. On review by the Supreme Court of a suit against the judge by the lawyer, the Court held that to preserve the proper administration of justice, a trial judge is immune from suit. *Id.* at 347. After *Bradley,* the courts extended immunity to cover a number of public officials. *See,* e.g., Nixon v. Fitzgerald, 457 U.S. 731, 757 (1982) (president has absolute immunity); Helstoski v. Meanor, 442 U.S. 477, 492-94 (1979) (absolute immunity for legislators under the speech and debate clause of the Constitution); Imbler v. Pachtman, 424 U.S. 409, 427 (1976) (absolute immunity for prosecutor); Eastland v. United States Servicemen's Fund, 421 U.S. 491, 502 (1975) (immunity for legislators in legislative acts); Wood v. Strickland, 420 U.S. 308, 321 (1975) (qualified immunity for school board members); Scheuer v. Rhodes, 416 U.S. 232, 247 (1974) (qualified immunity for state governor and executive aides); Barr v. Matteo, 360 U.S. 564, 574 (1959) (federal administrative officials have absolute immunity); Spalding v. Vilas, 161 U.S. 483, 498 (1896) (Postmaster General has absolute immunity).

7. *See* Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982) (absolute immunity provides complete protection from litigation).

8. *See id.* at 817-18 (qualified immunity protects official from suit for reasonable discretionary acts not in violation of constitutional rights of another).

9. *See* Nixon vs. Fitzgerald, 457 U.S. 731, 743 (1982) (denial of Presidents' claim of absolute immunity is appealable immediately); Helstoski v. Meanor, 442 U.S. 477, 492-94 (1979) (absolute immunity denial appealable as within collateral order doctrine); Abney v. United States, 431 U.S. 651, 662 (1977) (absolute immunity denial under double jeopardy clause appealable immediately); *see also* Forsyth v. Kleindienst, 700 F.2d 104, 105 (3d Cir. 1983) (denial of absolute immunity appealable for Attorney General); Chavez v. Singer, 698 F.2d 420, 421 (10th Cir. 1983) (order denying absolute immunity appealable for Department of Energy official).

10. 724 F.2d 1083 (4th Cir.), *cert. denied,* 105 S.Ct. 349 (1984). *Bever v. Gilbertson* was one of nine suits instituted by a number of terminated West Virginia Department of Highways employees that were appealed from the Northern and Southern districts of West Virginia. *Id.* at 1085. *Bever* was the first of the nine cases to be appealed to the Fourth Circuit. *Id.; see also* Douglas v. Galloway, 568 F. Supp. 966, 968 (S.D. W.Va. 1983) (suit by West Virginia Department of Highways employees against public officials for wrongful termination), *aff'd sub nom.* England v. Rockefeller, 739 F.2d 140 (4th Cir. 1983). The Fourth Circuit combined *Douglas* and *England* for review and heard the appeals concerning official immunity simultaneously. England v. Rockefeller, 739 F.2d 140, 142 (1984). In the combined case of *England,* West Virginia Department of Highways employees sued Governor Rockefeller and other public officials for conspiring to dismiss the plaintiffs for purely political reasons. *Id.* The officials moved for dismissal based on qualified and absolute immunity and the United States District Court for the Southern District of West Virginia denied the motions. *Id.* The defendants appealed to the Fourth Circuit under the collateral order doctrine. *Id.* The Fourth Circuit found that the Governor's claim of absolute immunity for acts he performed in his legislative capacity was appealable, but that the district court properly denied the Governor's absolute immunity because the Governor allegedly acted outside of his legislative authority. *Id.* at 143. On the qualified immunity claims, the Fourth Circuit in *England* ruled that *Bever v. Gilbertson* was dispositive in holding that orders denying qualified immunity are not appealable. *Id.* at 143.

could appeal a federal district court order denying claims of qualified immunity.[11]

In *Bever,* the West Virginia Department of Highways dismissed a large number of lower echelon employees because of an alleged need for a substantial reduction in expenditures.[12] The dismissed employees brought suit against West Virginia officials[13] alleging wrongful termination of employment constituting a violation of the employees' constitutional rights.[14] The plaintiffs claimed that the Department of Highways terminated only Republican employees, indicating that the sole criterion for dismissal was political party affiliation.[15] The dismissed employees sued the West Virginia officials both in their official and individual capacities.[16] The plaintiffs' complaint sought both monetary damages and injunctive relief.[17] The claim for equitable relief included a request to reinstate the plaintiffs in their former jobs.[18]

At trial in the United States District Court for the Southern District of West Virginia, the West Virginia officials asserted a defense of qualified immunity from the damage claim and moved for summary judgment.[19] The district court denied the defendants' motion.[20] The defendants thereafter petitioned the West Virginia district court for a permissive interlocutory appeal certificate[21] but the district court denied the certification.[22] The

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11. 724 F.2d at 1085.

12. *Id.*

13. *Id.* In *Bever,* the plaintiffs brought suit against West Virginia officials including Governor John D. Rockefeller, IV, Charles L. Miller, Commissioner of the West Virginia Department of Highways, Walter Gilbertson, District Engineer of the Department of Highways, John Gum, County Supervisor of Highways in Doddridge County and Wilton Williams, Chairman of Doddridge County Democratic Executive Committee. *Id.*

14. *Id.* In *Bever,* the terminated employees alleged that the terminations violated the plaintiffs' constitutional rights of free association. *Id.* Free association is a right protected by the first amendment to the United States Constitution. *See* NAACP v. Alabama, 357 U.S. 449, 460-62 (1958) (elevating free association to right covered by first amendment); U.S. CONST. amend.I (providing that citizens shall have freedom of religion, freedom of speech and right to assemble). The *Bever* plaintiffs claimed a violation of first amendment free association rights because the defendants allegedly dismissed the plaintiff employees solely on the basis of political affiliation. *Id.* at 1088; *see* Branti v. Finkel, 445 U.S. 507, 515-16 (1980) (employees cannot be terminated for purely political reasons); Elrod v. Burns, 427 U.S. 347, 356 (1976) (employees have constitutional right not to be discharged for solely political reason); *see also infra* note 49 (explanation of *Elrod* and *Branti*).

15. 724 F.2d at 1085; *see supra* note 14 (employee cannot be terminated solely for political reason).

16. 724 F.2d at 1085.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* The The district court in *Bever* denied the defendants' motion for summary judgment based on qualified immunity because the district court asserted that the defendants could not have believed that political dismissals were constitutionally permissible. *Id.; see supra* note 8 (qualified immunity does not protect acts that violate constitutional rights).

21. *Id.; see* 28 U.S.C. § 1292(b) (1982) (allowing permissive interlocutory appeal at the district court's discretion); *see also supra* note 1 (explanation of § 1292(b) permissive appeal).

22. 724 F.2d at 1085.

defendants then appealed to the Fourth Circuit pursuant to section 1291, claiming that a denial of qualified immunity was within the collateral order exception to the final judgment rule.[23] The Fourth Circuit dismissed the defendants' appeal, holding that the defendants' qualified immunity claim was not within the collateral order exception to the final judgment rule and that the defendants must await final district court judgment before appealing.[24]

In deciding that the denial of qualified immunity was not within the collateral order exception, the *Bever* court noted that the landmark Supreme Court case of *Cohen v. Beneficial Industrial Loan Corp.*[25] established four criteria for a successful appeal of an interlocutory order under section 1291.[26] In *Cohen,* the plaintiffs initiated a shareholder derivative suit[27] against Beneficial and several of Beneficial's directors alleging fraud and mismanagement of corporate funds.[28] The defendants, acting according to state statute, sought an order compelling the plaintiffs to post security to pay the costs of litigation in the event that the defendants obtained a favorable judgment.[29] The United States District Court for the District of New Jersey denied the defendants' motion for security, holding that a federal court was not required to follow the state security statute.[30] The United States Court of Appeals for the Third Circuit reversed the district court and held that a

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23. *Id.; see* 28 U.S.C. § 1291 (1982) (allowing appeal as matter of right after final judgment); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546-47 (1949) (orders that meet four collateral order requirements immediately appealable); *see also supra* note 1 (explanation of § 1291 appeals as matter of right).

24. 724 F.2d at 1089.

25. 337 U.S. 541 (1949).

26. 724 F.2d at 1085; *see* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949) (matter must be conclusively determined, separate from and collateral to main issue, effectively unreviewable at final judgment, and must present serious and unsettled question to be appealable prior to final judgment); *supra* note 3 (explanation of *Cohen* collateral order requirements).

27. Cohen v. Beneficial Indus. Loan Corp. 7 F.R.D. 352, 353 (D.N.J. 1947) (plaintiffs brought shareholder derivative action against defendants), *rev'd,* 170 F.2d 44 (3d Cir. 1948), *aff'd,* 337 U.S. 541 (1949). A shareholder derivative action is a suit by a shareholder or shareholders on behalf of a corporation in which the corporation itself does not bring the action. *See* General Elec. Co. v. Bucyrus-Erie Co., 563 F. Supp. 970, 973 (S.D.N.Y. 1983) (derivative action is by shareholders for corporation); 7A C. WRIGHT AND A. MILLER, *supra* note 1, § 1821 (derivative action is enforcement of corporate cause of action by one or more shareholders); *see also* FED. R. CIV. P. 23.1 (procedural guidelines for derivative action by shareholders).

28. *Cohen,* F.R.D. at 353.

29. *Id.* at 353-54; *see* N.J. REV. STAT. §§ 14:3-15, 14:3-17 (1945) (requiring security in derivative actions). Sections 14:3-15 and 14:3-17 of the New Jersey Revised Statutes provided that a corporation on whose behalf a derivative action is brought may require a security deposit by the plaintiff to cover the costs of litigation. *Id.* The statutes had the effect of forcing a plaintiff to reimburse the corporation if the plaintiff did not bring a successful complaint. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 544, 544-45 (1949). As a result of the security requirement, the statute discouraged insubstantial claims. *Id.*

30. *Cohen,* 7 F.R.D. at 353-54.

federal court is bound by state statutes and should follow state law.[31]

On writ of certiorari, the United States Supreme Court in *Cohen* examined whether the district court's denial of the defendants' motion to compel security was appealable.[32] The *Cohen* Court held that the order denying the motion for statutory security was appealable immediately and identified four criteria for determining the interlocutory appealability of a district court order.[33] First, the *Cohen* Court stated that the order must not involve the subject matter of the litigation.[34] Rather, the *Cohen* Court noted that the order must be collateral to the case.[35] Second, the Supreme Court asserted that the order must resolve conclusively an important independent question.[36] Third, the *Cohen* Court noted that the issue must be effectively unreviewable if the parties wait until final judgment.[37] Finally, the Supreme Court added that the order must present a serious and unsettled question to the court.[38] The *Cohen* Court concluded that the denial of the defendants' motion to compel security satisfied the collateral order criteria because the denial of the motion for security was a final disposition of an issue that was not an ingredient of the main cause of action.[39] Additionally, the Supreme Court held that the right to security was a serious and unsettled question.[40]

In analyzing the *Bever* decision within the *Cohen* framework for determining the existence of a collateral order exception, the Fourth Circuit stated that the *Bever* case failed to meet several of the four *Cohen* collateral order exception requirements.[41] Initially, the *Bever* court observed that the defendants claimed qualified immunity, which protects a public official from litigation only when a reasonable person would believe that the official's conduct violated no individual's constitutional rights.[42] The Fourth Circuit

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31. Beneficial Indus. Loan Corp. v. Smith, 170 F.2d 44, 55, 59 (3d Cir. 1948), *aff'd sub nom.* Cohen v. Beneficial Indus. Loan Corp. 337 U.S. 541 (1949).

32. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 547 (1949).

33. *Id.* at 546.

34. *Id.*

35. *Id.; see* 15 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 1, § 3911 (issue must be separate from and collateral to main issue of litigation for interlocutory appeal); *see also supra* note 3 (discussion of *Cohen* collateral order requirements).

36. *Cohen,* 337 U.S. at 546; *see* 15 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 1, § 3911 (district court must determine issue conclusively for collateral order exception to apply); *see also supra* note 3 (district court's decision must not be tentative or incomplete to fall within collateral order exception).

37. *Cohen,* 337 U.S. at 546; *see* 15 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 1, § 3911 (issue must be unreviewable at final judgment if not appealed immediately for collateral order exception to apply); *see also supra* note 3 (for collateral order exception to apply issue must require immediate appeal to avoid irreparable harm).

38. *Cohen,* 337 U.S. at 546; *see* 15 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 1, § 3911 (serious and unsettled question required for collateral order exception to apply); *see also supra* note 3 (discussion of *Cohen* collateral order doctrine).

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

40. *Id.*

41. 724 F.2d at 1088.

42. *Id.* at 1086. The *Bever* majority did not explain the derivation of the defendants' qualified immunity. *Id.* The Supreme Court case of *Scheuer v. Rhodes,* however, suggested that

also noted that qualified immunity only applied to immunity from suits for damages.[43] The *Bever* court stated that the defendants received no immunity from the requested equitable relief of an injunction and job reinstatement.[44] The *Bever* majority noted that with no immunity from equitable relief, the defendants would proceed to trial whether or not a court granted qualified immunity from the monetary damages claim.[45] The Fourth Circuit reasoned, therefore, that since trial would continue on the equitable relief, the appeal of qualified immunity would not conclusively determine the defendants' amenability to trial.[46] Additionally, as the trial would continue on equitable relief, the *Bever* court noted that the denial of the qualified immunity claim was not effectively unreviewable because the defendants were free to appeal the qualified immunity denial in an appeals court after final judgment.[47]

The second reason given by the Fourth Circuit for dismissal of the interlocutory appeal in *Bever* was that the case did not meet the *Cohen* "serious and unsettled" question requirement for a collateral order exception.[48] According to the *Bever* court, the law is well established that an employer may not dismiss an employee solely on the basis of political party affiliation.[49] The Fourth Circuit acknowledged that the West Virginia De-

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qualified immunity applied to a governor and his aides because of the importance and breadth of executive duties. *See* Scheuer v. Rhodes, 416 U.S. 232, 246-47 (1974) (state executives receive qualified immunity since members of state executive branch often must act quickly and rely on information provided by others).

43. 724 F.2d at 1086.

44. *Id.; see* Harlow v. Fitzgerald, 457 U.S. 800, 819 n.34 (1982) (expressing no view as to applicability of injuctive relief on official immunity); Rowley v. McMillan, 502 F.2d 1326, 1331 (4th Cir. 1974) (immunity has no application to suit for injuctive relief); *cf.* Supreme Court of Virginia v. Consumers Union, 446 U.S. 719, 731-32 (1980) (state legislators have absolute immunity from injuctive relief).

45. 724 F.2d at 1986-87.

46. *Id.* at 1087.

47. *Id.*

48. *Id.* at 1088; *see supra* note 3 (discussion of *Cohen* serious and unsettled question requirement).

49. 724 F.2d at 1088; *see* Branti v. Finkel, 445 U.S. 507, 515-16 (1980) (termination of employees on solely political criteria is unconstitutional); Elrod v. Burns, 427 U.S. 347, 356 (1976) (first amendment protects employees from political dismissal); *see also* Wren v. Jones, 635 F.2d 1277, 1286 (7th Cir. 1980) (balancing test weighs first amendment and state interests in determining legality of political terminations); *cert. denied*, 454 U.S. 832 (1981). The *Elrod* and *Branti* opinions present the proposition that an employer may not terminate employees solely for political affiliation or non-affiliation as long as such affiliation is not a critical part of required job performance. *See Branti*, 445 U.S. at 515-16 (employer may not terminate employee solely for political reason); *Elrod*, 427 U.S. at 356 (politically based employee terminations are unconstitutional). Both the *Elrod* and *Branti* Courts noted that the first amendment protects employees from political dismissal absent an overriding interest on behalf of the government. *See Branti*, 445 U.S. at 515-16 (employees protected by first amendment); *Elrod*, 427 U.S. at 356 (first amendment protects employees from political dismissals).

In arguing that the *Bever* dismissals were not purely political, the defendants in *Bever* relied on a Seventh Circuit opinion in which 25 Republican state employees sued for wrongful termination from the Illinois Transportation Department for political affiliation. *See* Wren v.

partment of Highways had some fiscal considerations in terminating the employees but that an economic motive did not entitle the West Virginia officials to use a political criteria for selecting which employees to terminate.[50] With clear Supreme Court precedent forbidding politically motivated terminations, the Fourth Circuit reasoned that the West Virginia officials knew they could not terminate employees for political reasons and, therefore, the terminations did not present a "serious and unsettled" question.[51]

In addition to asserting that the facts in *Bever* did not meet the requirements for a *Cohen* collateral order exception, the Fourth Circuit noted that a number of courts have examined the appealability of official immunity.[52] Several courts, including the *Bever* court, have noted that absolute immunity protects an individual from going to trial at all and that an order denying absolute immunity must be immediately appealable or the right not to be put to trial is irrevocably lost.[53] The *Bever* court stated, however, that the appealability of qualified immunity is less clear.[54] The Fourth Circuit observed that the United States District Court for the District of Columbia recently had ruled that an order denying a qualified immunity claim is

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Jones, 635 F.2d 1277, 1279 (7th Cir. 1980) (allowing political termination), *cert. denied*, 454 U.S. 832 (1981). The dismissal of the Republicans in *Wren* resulted from the earlier Illinois case of *Bradley v. Cellini* which required that 25 previously terminated Democratic employees of the Illinois Transportation Department be reinstated in the Transportation Department. *See* Bradley v. Cellini, No. 2795-69 slip op. at 1 (Circuit Court of Sangor County, 1973). Since *Bradley* required reinstatement of the 25 Democrats to the Illinois Transportation Department, the Illinois government terminated the existing 25 Republican members of the Illinois Transportation Department to make room for the Democrats. *Wren*, 635 F.2d at 1280. In *Wren*, therefore, the termination of the 25 Republicans was not purely political. *Id.* The Republican employees were dismissed to comply with the *Bradley* court order to reinstate 25 Democrats. *Id.* The Illinois Transportation Department only required 25 employees to operate so the 25 existing Republican Transportation Department employees had to be removed for fiscal reasons. *Id* at 1283. In reaching a decision, the *Wren* court used a balancing test in which the court weighed the competing interests of the State of Illinois and of the first amendment. *Id.* at 1286. The Seventh Circuit in *Wren* determined that the defendants proved that fiscal constraints justified the terminations. *Id.* at 1287. The *Bever* majority disregarded the *Wren* decision, noting that the court-ordered reinstatement of Democratic employees in *Wren* took the *Wren* decision out of the sphere of politically motivated dismissals. 724 F.2d at 1089. The Fourth Circuit noted that the *Wren* dismissals were in response to a court order. *Id.* The Fourth Circuit stated, however, that the *Bever* terminations were politically motivated. *Id.*

50. 724 F.2d at 1088-89.

51. *Id.* at 1088.

52. 724 F.2d at 1086; *see* Nixon v. Fitzgerald, 457 U.S. 731, 743 (1982) (immediate appeal available for presidential absolute immunity denial); Helstoski v. Meanor, 442 U.S. 500, 508 (1979) (denial of absolute immunity of member of Congress under speech and debate clause of constitution immediately appealable); Abney v. United States, 431 U.S. 651, 662 (1977) (pretrial claims of double jeopardy immediately appealable); *see also* Forsyth v. Kleindienst, 700 F.2d 104, 105 (3d Cir. 1983) (denial of absolute immunity of United States Attorney General immediately appealable); Chavez v. Singer, 698 F.2d 420, 421 (10th Cir. 1983) (denial of absolute immunity of Department of Energy employee immediately appealable).

53. 724 F.2d at 1086; *see supra* note 52 (discussion of cases holding absolute immunity immediately appealable).

54. 724 F.2d at 1086.

appealable immediately.[55] The *Bever* court indicated, however, that a panel of Fourth Circuit judges has disagreed with the District of Columbia Circuit's decision.[56] The Fourth Circuit, therefore, concluded that the *Bever* action did not meet the minimum requirements for a *Cohen* collateral order exception and the court dismissed the interlocutory appeal of the qualified immunity issue.[57]

The Fourth Circuit was correct in denying immediate appeal of the *Bever* defendants' qualified immunity claim under the collateral order exception.[58] All federal circuits are not in accord, however, on the interlocutory appealability of a qualified immunity claim.[59] The point of contention among the circuits centers on the United States Supreme Court case of *Harlow v. Fitzgerald,*[60] which held that the test for determining the existence of qualified immunity is purely objective.[61]

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55. *Id.; see* McSurely v. McClellan, 697 F.2d 309, 316 (D.C. Cir. 1982) (qualified immunity immediately appealable for same reasons as immediate appeal of absolute immunity); *infra* notes 74-83 and accompanying text (discussion of *McSurely* case allowing immediate appeal of qualified immunity); *cf.* Benford v. American Broadcasting Companies, Inc., No. 83-1168, slip op. at 7 (4th Cir. Apr. 11, 1983) (cited at 707 F.2d 504 (1983) (Fourth Circuit disagreed with District of Columbia Circuit and held qualified immunity not appealable immediately), *cert. denied*, 104 S. Ct. 107 (1983).

56. 724 F.2d at 1086; *see* Benford v. American Broadcasting Companies, Inc., No. 83-1168, slip op. at 7 (4th Cir. Apr. 11, 1983) (qualified immunity not immediately appealable when not effectively unreviewable upon final judgment) *cert. denied*, 104 S. Ct. 107 (1983); *infra* note 85 and accompanying text (discussion of *Benford*).

57. 724 F.2d at 1089. Notwithstanding the majority's conclusion that the *Bever* action did not meet the minimum *Cohen* collateral order requirements, the *Bever* dissent asserted that the facts of *Bever* did meet the *Cohen* collateral order exception requirements. *Id.* at 1090 (Hall, J., dissenting). The dissent disagreed with the *Bever* majority's finding that *Bever* did not present a serious and unsettled question. *Id.* at 1092. The dissenting opinion stated that economic necessity, not political motivation required the elimination of the plaintiff's jobs. *Id.* at 1092 n.5, 1093. Judge Hall asserted, therefore, that the defendants' action in dismissing the plaintiffs presented a serious and unsettled question because the motive for terminating the employees was a combination of political and fiscal reasons. *Id.* Finally, the dissent argued that the *Bever* majority's reliance on the plaintiff's request for equitable relief was unfounded because the defendants were not the proper parties for an equitable suit and, therefore, not subject to equitable claims. *Id.* at 1091. According to the dissent, the refusal to allow immediate appeal of the defendants' qualified immunity denial causes irreparable loss of the rights of qualified immunity. *Id.* at 1093.

58. *See infra* notes 88-103 and accompanying text (discussion of proper decision by *Bever* court).

59. *Id.* at 1086. *Compare* Forsyth v. Kleindienst, 729 F.2d 267, 274 (3rd Cir. 1984) (qualified immunity denial not immediately appealable) *and* England v. Rockefeller, 739 F.2d 140, 143 (4th Cir. 1984) (no interlocutory appeal of qualified immunity) *and* Benford v. American Broadcasting Companies, Inc., No. 83-1168, slip op. at 8 (4th Cir. Apr. 11, 1983) (denial of qualified immunity not immediately appealable), *cert. denied*, 104 S. Ct. 107 (1983) *with* McSurely v. McClellan, 697 F.2d 309, 316 (D.C. Cir. 1982) (qualified immunity immediately appealable under *Harlow*). *Cf.* Evans v. Dillahunty, 711 F.2d 828, 830 (8th Cir. 1983) (qualified immunity not appealable unless essential facts are not in dispute and immunity question solely a point of law).

60. 457 U.S. 800 (1982).

61. *Id.* at 819; *see* Comment, *Immunity: Eliminating The Subjective Element From the*

In *Harlow,* a civilian Air Force employee sued two senior White House aides for monetary damages.[62] The plaintiff in *Harlow* alleged that the defendants conspired to terminate the plaintiff's employment because the defendants feared that the plaintiff would reveal fraudulent purchasing practices within the government.[63] The defendants moved in the United States District Court for the District of Columbia for summary judgment based on qualified and absolute immunity but the district court denied the defendants' motion.[64] The defendants appealed the qualified immunity denial to the United States Court of Appeals for the District of Columbia Circuit which dismissed the appeal without an opinion.[65] The United States Supreme Court granted certiorari and ruled that senior White House aides are entitled to receive qualified immunity.[66] In granting immunity to the aides, the Supreme Court eliminated the old subjective test which required a factual determination of the officials' intentions.[67] The *Harlow* Court reasoned that the elimination of the subjective prong better facilitated resolution of qualified immunity claims on motion for summary judgment because the availability of qualified immunity would be determined by an objective legal test, not a subjective factual determination.[68] According to the *Harlow* Court, the qualified immunity test concerns whether a reasonable person would believe that his conduct violated established constitutional rights of another.[69]

In eliminating the subjective examination of an official's intentions when evaluating a qualified immunity claim, the Supreme Court evidenced an intention to allow more qualified immunity cases to be resolved on summary judgment.[70] *Harlow* did not, however, overrule or modify *Cohen* in any

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Qualified Immunity Standard in Action Brought Against Government Official, 22 WASHBURN L. J. 577, 586-88 (1983) (discussion of *Harlow*).

62. *Harlow,* 457 U.S. at 802.

63. *Id.* at 802-05.

64. *Id.* at 805-06.

65. *Id.* at 806.

66. *Id.* at 813.

67. *Id.* at 816-19.

68. *Id.; see* Comment, *Immunity: Eliminating The Subjective Element From the Qualified Immunity Standard in Action Brought Against Government Official,* 22 WASHBURN L. J. 577, 587-88 (1983) (subjective aspect of qualified immunity required factual determination and was incompatible with goal of eliminating frivolous suits).

69. *Harlow,* 457 U.S. at 819. In *Harlow,* the Supreme Court noted that the subjective prong requirement of a qualified immunity defense, which required an examination of an official's permissive intentions, was incompatible with the overall goal of eliminating frivolous suits against public officials because the subjective aspect required a factual determination by a court of law. *Id.* at 815-16; *see* Butz v. Economu, 438 U.S. 478, 507-08 (1978) (insubstantial claims should not proceed to trial).

70. *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (judge may determine qualified immunity on summary judgment); *see also* Bever v. Gilbertson, 724 F.2d 1083, 1086 (4th Cir. 1984) (Supreme Court in *Harlow* sought to facilitate summary judgment of claims against government officials); McSurely v. McClellan, 697 F.2d 309, 316 (D.C. Cir. 1982) (Supreme Court's *Harlow* decision evidenced intention to allow more qualified immunity summary dispositions).

way.[71] For an issue to qualify as a collateral order exception, all four of the *Cohen* criteria still must apply.[72] The federal circuits disagree, however, on whether the Supreme Court in *Harlow* manifested an intention to allow immediate appeal of an order denying a qualified immunity claim.[73]

The District of Columbia Circuit in *McSurely v. McClellan*[74] determined that the *Harlow* decision revealed an intention by the Supreme Court to allow immediate appellate review of qualified immunity claims because *Harlow* eliminated the subjective prong of the qualified immunity determination and thereby sought to facilitate summary judgment.[75] In *McSurely*, the plaintiffs sued a Kentucky state prosecutor and a United States Senator for damages resulting from alleged violations of constitutional rights when the Kentucky Commonwealth Attorney prosecuted the plaintiffs for sedition and a Senate Committee seized the plaintiffs' private papers.[76] Specifically,

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71. *See* 724 F.2d at 1086 (*Harlow* did not mention collateral order doctrine of *Cohen*).

72. *See id.*; (Fourth Circuit requires adherence to *Cohen* collateral order requirements).

73. *See id.; supra* note 59 (discussion of Third, Fourth, Eighth and D.C. Circuit opinions on qualified immunity appealability).

74. 697 F.2d 309 (D.C. Cir. 1982).

75. *Id.* at 316.

76. *Id.* at 312-14. In *McSurely v. McClellan*, the plaintiffs sued the defendants, alleging violation of the plaintiffs' constitutional rights under 42 U.S.C. §§ 1981, 1983 and 1985 and under the first, fourth, fifth and fourteenth amendments to the Constitution. *Id.* at 314; *see* U.S. CONST. amends I, IV, V, XIV; 42 U.S.C. §§ 1981, 1983, & 1985 (1983) (providing freedom from illegal searches, self-incrimination, discrimination, freedom of association). The plaintiffs were field organizers for the Southern Conference Educational Fund, Inc. in Pike County, Kentucky. *Id.* at 312. The Pike County Commonwealth's Attorney had the plaintiffs arrested under a local statute prohibiting sedition and the Commonwealth's Attorney seized the plaintiff's private papers. *Id.* at 313. Subsequently, the United States District Court for the Eastern District of Kentucky ruled that the Kentucky Sedition Statute was unconstitutional. *See* McSurely v. Ratliff, 282 F. Supp. 848, 852 (E.D. Ky. 1967). The district court in *McSurely*, therefore, ordered the Commonwealth's Attorney to place the seized papers in safekeeping. *McSurely*, 697 F.2d at 313. The assistant counsel for the Senate Committee on Government Operations learned about the papers and telephoned the Pike County Commonwealth's Attorney to talk about the seized items. *Id.* The Senate committee confirmed that the seized papers contained information on several organizations being investigated by the Committee. *Id.* at 314. The Committee attorney took copies of 234 seized papers back to Washington. *Id.* at 314. Upon learning that the Senate Committee had the papers, the plaintiffs sued to get back the papers and won. *See* McSurely v. Ratliff, 398 F.2d 817, 818 (6th Cir. 1968). The Senate Committee then subpoenaed the papers from the plaintiffs, but the plaintiffs refused to produce the subpoenaed documents. *McSurely*, 697 F.2d at 314. The Senate, therefore, initiated a contempt action which resulted in the plaintiffs' conviction for contempt of Congress. *Id.* The District of Columbia Circuit reversed the conviction on appeal because the subpoenas were issued as a result of an illegal search that was unconstitutional because the search warrant was not based on probable cause. *See* United States v. McSurely, 473 F.2d 1178, 1194 (D. C. Cir. 1972). The plaintiffs thereafter sued the defendants for damages. *McSurely*, 697 F.2d at 314. The defendants moved to dismiss the action based on legislative immunity. *Id.* The District of Columbia stayed the proceedings pending resolution of the prior criminal charges against the plaintiffs. *Id.* Finally, the District of Columbia Circuit vacated the stay and remanded the case for further proceedings. *See* McSurely v. McClellan, 426 F.2d 664 (D.C. Cir. 1970). On remand, the district court denied the defendants' motion for immunity. *McSurely* 697 F.2d at 314. On appeal to the District of Columbia Circuit, the *McSurely* court ruled that summary judgment was proper for the

the plaintiffs sought damages for loss of employment, invasion of privacy and humiliation and embarrassment caused by the actions of the defendants.[77] The defendants moved to dismiss in the United States District Court for the District of Columbia based on absolute legislative immunity.[78] The district court denied the defendants' motion[79] and the District of Columbia Circuit assumed jurisdiction on appeal under section 1291.[80] The District of Columbia Circuit remanded the case to district court to consider whether a state prosecutor enjoys absolute immunity for investigative actions.[81] The district court again denied a motion to dismiss by the defendants based on qualified or absolute immunity and the District of Columbia Circuit granted an appeal.[82] The *McSurely* court ruled that the district court's denial of the defendants' qualified immunity was appealable immediately because the Supreme Court in *Harlow* evidenced an intention to allow immediate appeal of denial of qualified immunity claims by eliminating the subjective prong of the qualified immunity analysis.[83] The Third,[84] Fourth[85] and

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defendants on the matter of the legality of the initial search of the plaintiffs' premises, but remanded the case for further consideration of immunity. McSurely v. McClellan, 553 F.2d 1277, 1339 (D.C. Cir. 1976) (en banc).

77. *McSurely*, 697 F.2d at 314.

78. *Id.* at 315.

79. *Id.*

80. *Id.; see* 28 U.S.C. § 1291 (1982) (allowing appeal from district court decision only after district court renders final judgment); *supra* note 1 (discussion of § 1291).

81. *McSurely*, 697 F.2d at 314.

82. *Id.* at 315.

83. *Id.* at 316.

84. *See* Forsyth v. Kleindienst, 729 F.2d 267, 274 (3d Cir. 1984) (qualified immunity not appealable immediately). *Forsyth v. Kleindienst* was the third in a series of Third Circuit *Forsyth* cases. *See id.* at 268-69 (*Forsyth III*); *see* Forsyth v. Kleindienst, 700 F.2d 104, 105 (3d. Cir. 1983) (*Forsyth II*) (absolute immunity immediately appealable); Forsyth v. Kleindienst, 599 F.2d 1203, 1208-09 (3d. Cir. 1979) (*Forsyth I*) (allowing immediate appeal of absolute immunity), *cert. denied*, 453 U.S. 913 (1981). In *Forsyth III*, the plaintiff sued former Attorney General John Mitchell for unconstitutional electronic surveillance of plaintiff's telephone conversations. *Forsyth III*, 729 F.2d at 268-69. The defendant moved for summary judgment based on absolute and qualified immunity. *Id.* at 269. the United States District Court for the Eastern District of Pennsylvania denied the defendant's motion and the Third Circuit, on appeal, remanded the case to the district court to consider absolute immunity. *Forsyth I*, 599 F.2d at 1209. Again the district court denied the defendant's motion for summary judgment based on absolute and qualified immunity and the defendant appealed. *Forsyth III*, 729 F.2d at 269. In *Forsyth III*, the defendant claimed that the *Harlow* Court's elimination of the subjective prong of the qualified immunity defense facilitated appeal of qualified immunity. *Id.* at 273. The Third Circuit ruled that *Forsyth III* was not a case with an insubstantial claim against the defendants like *McSurely* and, therefore, dismissed the qualified immunity appeal as premature. *Id.* at 274.

85. *See* Benford v. American Broadcasting Companies, Inc., No. 83-1168, slip op. at 2 (4th Cir. Apr. 11, 1983), *cert. denied*, 104 S. Ct. 107 (1983). In *Benford*, the plaintiff was an independent insurance agent who alleged that members of the Select Committee on Aging of the United States House of Representatives, the American Broadcasting Companies (ABC) and an ABC employee infiltrated the plaintiff's business. *Id.* The plaintiff alleged that the defendants set him up to make a cancer presentation to an elderly group and surreptitiously filmed the meeting for broadcast on the ABC news. *Id.* The plaintiff sued the American Broadcasting

Eighth[86] Circuits have stated, however, that the District of Columbia Circuit in *McSurely* interpreted *Harlow* too broadly and that in order to become a collateral order exception the appealed issue must satisfy the *Cohen* collateral order requirements.[87]

While the conflict among the federal circuits concerning the interpretation of *Harlow* is enlightening on the qualified immunity doctrine, a more important consideration is the *Bever* court's interpretation of the *Cohen* collateral order requirements.[88] The *Bever* court did not state that no qualified immunity claim is ever appealable interlocutorily.[89] The Fourth Circuit merely required strict adherence to *Cohen* collateral order requirements.[90] The four *Cohen* collateral order requirements are an attempt to balance the section 1291 policy of avoiding the inconvenience and costs of piecemeal appeals against the danger of creating injustice by delaying appeal until final judgment.[91] The policies behind the collateral order requirements remain true to

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Company and members of the Select Committee on Aging of the United States House of Representatives in the United States District Court for the District of Maryland. *Id.* The district court denied a summary judgment motion by the House Committee based on qualified immunity. *Id.* The Fourth Circuit, on appeal, held that the defendant could not appeal the qualified immunity denial immediately because the qualified immunity defense was not finally determined in the lower court. *Id.* The *Benford* court stated that the defendants still could prove the qualified immunity defense during trial. *Id.* at 19. The Fourth Circuit noted that the District of Columbia Circuit allowed immediate appeal of qualified immunity in *McSurely*, but the Fourth Circuit observed that the Supreme Court still intended to require a "serious and unsettled question" for interlocutory appeal. *Id.* at 7. Further, the *Benford* court noted that the Supreme Court did not intend to allow immediate appeal where the disappointed defendant still could prove qualified immunity at trial. *Id* .

86. *See* Evans v. Dillahunty, 711 F.2d 828, 830 (8th Cir. 1983) (*McSurely* interpreted *Harlow* too broadly). In *Evans*, a former prisoner brought suit against the former United States Attorney for the Eastern District of Arkansas alleging slander and a violation of the prisoner's fifth amendment rights. *Id.* at 829. The district court dismissed the suit for failure to state a claim. *Id.* The Eighth Circuit reversed and remanded. Evans v. Dillahunty, 662 F.2d 522, 527 (8th Cir. 1981). On remand to the Arkansas district court, the defendants moved for summary judgment based on official immunity and the district court denied the motion. *Evans*, 711 F.2d at 829. The defendants appealed to the Eighth Circuit. *Id.* The Eighth Circuit asserted that the District of Columbia Circuit interpreted *Harlow* too broadly. *Id.* at 830. The Eighth Circuit observed that the purpose of the requirement of final judgment before appeal is to avoid piecemeal appeals. *Id.* Therefore, in examining the appealability of an absolute or qualified immunity claim, a court should utilize two criteria. *Id.* First, the Eighth Circuit required that there be no dispute on the essential facts of the case. *Id.* Second, the immunity question must be a pure question of law. *Id.* Under the Eighth Circuit's analysis, qualified immunity is appealable if a case meets the dual requirements for immediate appeal. *Id.* at 830.

87. *See supra* notes 84-86 (discussion of Third, Fourth, and Eighth Circuit holdings concerning *McSurely*).

88. *See infra* text accompanying notes 89-94 (*Bever* court's interpretation of collateral order requirements).

89. *Id.* at 1089.

90. *Id.*

91. *See Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 511 (1950)* (goal of finality balances between avoiding injustice and avoiding piecemeal appeals); 15 C. WRIGHT, A. MILLER, & E. COOPER, *supra* note 1, § 3911 (collateral order doctrine seeks to balance between

the section 1291 policy of avoiding piecemeal appeals by ensuring that the district court contemplates no further review of the issue appealed.[92] Additionally, under the collateral order doctrine the appealed issue cannot be a step toward resolution of the merits of the case, and, therefore, immediate review will not be repetitive of issues concerning the merits of the case.[93] Finally, the requirements of irreparable injury and a serious and unsettled question ensure that courts only review important, nondiscretionary matters on interlocutory appeal.[94]

Based on the Fourth Circuit's strict adherence to the collateral order requirements, the *Bever* case was not appealable as a collateral order because the case did not present a "serious and unsettled question."[95] In addition, *Bever* was not effectively unreviewable upon final judgment since the case involved a request for equitable relief.[96] Other pre-*Bever* Fourth Circuit cases decided after *Harlow* also failed to meet all four *Cohen* collateral order requirements.[97] The Fourth Circuit may be more amenable to allowing interlocutory appeal of a qualified immunity claim if a case arises that meets all four *Cohen* collateral order requirements.[98] One consideration that may be important in the examination of future Fourth Circuit cases concerning the appealability of qualified immunity denials is the policy behind both the qualified immunity defense and the absolute immunity defense.[99] Absolute immunity provides total protection to a public official for official acts.[100] Absolute immunity must be appealable immediately to protect an official from the burdens imposed by trial.[101] Conversely, qualified immunity only

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piecemeal appeals and denying justice); *infra* note 111 (citing cases in support of avoiding piecemeal appeals).

92. *See* 15 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 1, § 3911 (*Cohen* final disposition requirement means that district court contemplates no further review).

93. *Id.*

94. *Id.*

95. 724 F.2d at 1088; *see supra* note 3 (case must present a serious and unsettled question for collateral order exception to apply).

96. 724 F.2d at 1086-87; *see supra* note 3 (issue must be effectively unreviewable upon final judgment for collateral order doctrine to apply).

97. *See* England v. Rockefeller, 739 F.2d 140, 143 (4th Cir. 1984) (adhering to *Bever* holding that qualified immunity denial not appealable until final judgment if *Cohen* collateral order requirements not met); Benford v. American Broadcasting Companies, Inc., No. 83-1168, slip op. at 8 (4th Cir. Apr. 11, 1983) (issue not effectively unreviewable upon final judgment because defendants could prove qualified immunity during trial), *cert. denied, 104 S. Ct. 107 (1983).*

98. *See* 724 F.2d at 1086 (reasons why qualified immunity defense not traditionally appealable immediately).

99. *See* Freed, *Executive Official Immunity For Constitutional Violations: An Analysis And A Critique*, 72 NW. U. L. REV. 526, 529 (1977) (notions of fairness, encouragement of accepting public duties and avoiding distraction of public official's attention from public business provide rationale for official immunity).

100. *See* Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982) (absolute immunity provides complete protection from litigation); Freed, *supra* note 99, at 527 (absolute immunity protects defendant not only from ultimate liability but from burdens of trial).

101. *See* Nixon v. Fitzgerald, 457 U.S. 731, 743 (1982) (denial of absolute immunity for

protects an official from the burdens of trial for reasonable acts within the realm of the official duties of the public official.[102] Limiting the qualified immunity protection only to reasonable acts makes it difficult for a qualified immunity claim to meet the *Cohen* effectively unreviewable requirement for collateral order appeals because the defendants are free to prove the qualified immunity defense any time during or after the trial.[103]

The Fourth Circuit's narrow reading of *Harlow* in *Bever* and other cases,[104] and the emphasis on the "serious and unsettled question" requirement in those cases, indicate that the Fourth Circuit requires strict adherence to *Cohen* collateral order principles to allow interlocutory appeal of an issue.[105] In the three cases concerning qualified immunity that the Fourth Circuit has examined since *Harlow,* the Fourth Circuit has denied the appealability of the denial of a qualified immunity claim.[106] The Fourth Circuit denied appealability of the qualified immunity denials because the cases did not meet the full Cohen requirements of finally determining a serious and unsettled question and because the cases involved either a request for equitable relief[107] or the potential for proof by the defendants of the qualified immunity defense during trial.[108] The *Bever* court's reliance on the

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President immediately appealable to avoid burden of trial).

102. *See* Harlow v. Fitzgerald, 457 U.S. 800, 818-19 (1982) (qualified immunity affords protection when defendant does not violate known constitutional rights of another).

103. *See* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949) (description of collateral order requirements); Bever v. Gilbertson, 724 F.2d 1083, 1086 (4th Cir.) (defendants free to prove qualified immunity defense during trial on merits), *cert. denied,* 105 S. Ct. 349 (1984); *see also* Benford v. American Broadcasting Companies, Inc. No. 83-1168, slip op. at 9 (4th Cir. Apr. 11, 1983) (qualified immunity defense may be proven during trial on merits), *cert. denied,* 104 S. Ct. 107 (1983).

104. *See* Bever v. Gilbertson, 724 F.2d 1083, 1086 (4th Cir.) (*Harlow* did not automatically allow interlocutory appeal of qualified immunity denials), *cert. denied,* 105 S. Ct. 349 (1984); *see also* England v. Rockefeller, 739 F.2d 140, 143 (4th Cir. 1984) (companion case to *Bever* holding that qualified immunity not immediately appealable); Benford v. American Broadcasting Companies, Inc., No. 83-1168, slip op. at 9 (4th Cir. Apr. 11, 1983) (qualified immunity not immediately appealable where collateral order requirements not met), *cert. denied,* 104 S. Ct. 107 (1980).

105. *See* 724 F.2d at 1086-89 (Fourth Circuit requires strict adherence to *Cohen* collateral order principles for interlocutory review); *see also* Benford v. American Broadcasting Companies, Inc., No. 83-1168, slip op. at 9 (4th Cir. Apr. 11, 1983) (*Benford* does not meet *Cohen* collateral order exception requirements), *cert. denied,* 104 S. Ct. 107 (1983).

106. *See* England v. Rockefeller, 739 F.2d 140, 143 (4th Cir. 1984) (qualified immunity appeal denied as not within collateral order doctrine); Bever v. Gilbertson, 724 F.2d 1083, 1086 (4th Cir.) (case did not meet collateral order requirements for appeal), *cert denied,* 105 S. Ct. 349 (1984); Benford v. American Broadcasting Companies, Inc., No. 83-1168, slip op. at 9 (4th Cir. Apr. 11, 1983) (interlocutory appeal of qualified immunity disallowed as not within collateral order doctrine), *cert. denied,* 104 S. Ct. 107 (1983).

107. *See* England v. Rockefeller, 739 F.2d 140, 143 (4th Cir. 1984) (*Bever* dispositive in denying qualified immunity appeal where defendants subject to request for equitable relief); Bever v. Gilbertson, 724 F.2d 1083, 1086-89 (4th Cir.) (presence of claim for injunctive relief caused suit to continue regardless of qualified immunity from damages and case did not present serious and unsettled question), *cert. denied,* 105 S. Ct. 349 (1984).

108. *See* Benford v. American Broadcasting Companies, Inc., No. 83-1168, slip op. at 9

defendant's demands for equitable relief may serve to limit *Bever* to cases involving requests for injunctive relief or reinstatement of a defendant's job. The *Bever* court's denial of interlocutory appeal of a qualified immunity denial, however, is consistent with the finality requirement of section 1291,[109] with the section 1291 overall goal of avoiding piecemeal appeals,[110] and with the Supreme Court precedent in *Cohen*.[111]

STOKELY G. CALDWELL, JR.

D. *Res Judicata: Alternative Claims in a Single Lawsuit—A Simple Principle Well Stated*

Once a court renders a valid[1] and final[2] judgment on the

(4th Cir. Apr. 11, 1983) (issue of qualified immunity not effectively unreviewable at final judgment), *cert. denied*, 104 S. Ct. 107 (1983).

109. 28 U.S.C. § 1291 (1982); *see supra* note 1 (discussion of § 1291).

110. *See* Evans v. Dillahunty, 711 F.2d 828, 830 (8th Cir. 1983) (avoidance of piecemeal appeal is important goal of rule requiring final judgment before appeal); 28 U.S.C. § 1291 (1982) (appeal available after final judgment); *see also* Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 374 (1981) (§ 1291 prohibits piecemeal appeal because allowing piecemeal appeal would inhibit district judge independence); United States v. Columbia Broadcasting Sys., Inc., 666 F.2d 364, 369 (9th Cir.) (confining appeal to final judgment minimizes disruption, delay and costs of piecemeal appeal), *cert. denied*, 457 U.S. 1118 (1982); United States v. Gurney, 558 F.2d 1201, 1207 (5th Cir. 1977) (avoidance of piecemeal appeal underlies § 1291); 15 C. WRIGHT, A. MILLER, & E. COOPER, *supra* note 1, § 3907 (discussion of purpose of § 1291).

111. *See* Cohen, 337 U.S. at 546 (discussion of collateral order requirements); *supra* notes 25-40 and accompanying text (discussion of *Cohen*).

1. *See* 7 J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 60.25[2], at 225 (1983) (judgment is valid when court rendering judgment has jurisdiction over subject matter of lawsuit and over parties) [hereinafter cited as MOORE'S FEDERAL PRACTICE].

2. *See* United States v. American Tel. & Tel. Co., 714 F.2d 178, 181 (D.C. Cir. 1983) (failure to appeal judgment makes judgment final and bars relitigation of matters court actually decided or that parties could have litigated); Miller Brewing Co. v. Joseph Schlitz Brewing Co., 605 F.2d 990, 995-96 (7th Cir.) (judgment is final for purposes of res judicata if decision is immune from reversal or amendment), *cert. denied*, 444 U.S. 1102 (1979); Lummus Co. v. Commonwealth Oil Ref. Co., 297 F.2d 80, 89 (2d Cir. 1961) (whether judgment that is final under statute governing appeals in federal courts is final for purposes of res judicata depends upon adequacy of hearing, opportunity for review, and lack of tentative aspect in decision), *cert. denied*, 368 U.S. 986 (1962). The Federal Rules of Civil Procedure provide that a judgment is final when entered pursuant to rule 58, which governs the entry of a judgment by a court clerk, and rule 79, which sets forth the books a court clerk must keep and entries the clerk must make in the books. *See* 1B MOORE'S FEDERAL PRACTICE, *supra* note 1, ¶ 0.409 [1.-1], at 301 & n.2 (when court clerk enters judgment in compliance with rules 58 and 79 judgment is

merits[3] of a case, the doctrine of res judicata[4] bars a subsequent suit upon the same claim[5] between the same parties.[6] Application of res

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effective for purposes of res judicata); *see also* FED. R. CIV. P. 58(2), 79(a) (rule 58(2) states judgment is effective only from time court clerk enters decision in accordance with record keeping procedures of rule 79(a)). To constitute a final judgment, a decision must dispose of at least one entire claim against a single party. *See* Liberty Mut. Ins. Co. v. Wetzel, 424 U.S. 737, 742-43 (1976) (court can not enter separate final judgment disposing of less than one claim against single party). An appeal from a judgment or a motion to set aside, vacate, or amend a judgment generally does not destroy the conclusive effect of the judgment. *See* 1B MOORE'S FEDERAL PRACTICE, *supra* note 1, ¶ 0.416 [1], at 514 (if party takes appeal from judgment or moves to set aside, vacate, or amend judgment, judgment's finality is not affected). *See generally* 18 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE & PROCEDURE, § 4432, at 298-304 (1981) (discussion of res judicata requirement of finality) [hereinafter cited as WRIGHT & MILLER].

3. *See* Harper Plastics v. Amoco Chem. Corp., 657 F.2d 939, 943 (7th Cir. 1981) (for purposes of res judicata judgment on the merits is defined as judgment based on legal rights as opposed to matters of practice, jurisdiction, procedure, or form) (citing Fairmont Aluminum Co. v. Commissioner, 222 F.2d 622, 625 (4th Cir.), *cert. denied*, 350 U.S. 838 (1955)); Keys v. Sawyer, 353 F. Supp. 936, 940 (S.D. Tex. 1973) (judgment is on merits if record shows that parties might have had their contentions determined according to their legal rights if parties had presented all their evidence and court had applied all relevant law), *aff'd*, 496 F.2d 876 (5th Cir. 1974); *see also* Swift v. McPherson, 232 U.S. 51, 56 (1914) (judgment on the merits does not include dismissal for lack of jurisdiction or absence of parties, or dismissal because plaintiff brought suit prematurely); 18 WRIGHT & MILLER, *supra* note 2, § 4427, at 270-71 (1981) (listing examples of court actions that constitute judgment on the merits); *but see id.* § 4435, at 330 ("on the merits" is inaccurate phrase and serves only to maintain idea that extent of res judicata preclusion is measured by factors other than validity and finality).

4. *See* 1B MOORE'S FEDERAL PRACTICE, *supra* note 1, ¶ 0.405[1] at 178-88 (general discussion of definition, function, and policy of res judicata). The term "res judicata" encompasses two doctrines that attach preclusive effect to a prior judgment. *See* 18 WRIGHT & MILLER, *supra* note 2, § 4402, at 7. The first doctrine, claim preclusion or true res judicata, bars reassertion of all issues relevant to the same claim between the same parties, whether or not the parties raised the issues at trial. *Id.; see* Commissioner v. Sunnen, 333 U.S. 591, 597 (1948) (res judicata precludes parties from relitigating issues that they raised or could have raised in earlier action); Stebbins v. Nationwide Mut. Ins. Co., 528 F.2d 934, 936-37 (4th Cir.) (res judicata bars issues actually litigated and susceptible of litigation), *cert. denied*, 424 U.S. 946 (1976). Claim preclusion bars assertion in a later case of the same transactional facts of a prior case in the form of a different cause of action or theory of relief. Young Engineers, Inc. v. United States Int'l Trade Comm'n, 721 F.2d 1305, 1314 (Fed. Cir. 1983). The second doctrine, issue preclusion or collateral estoppel, proscribes relitigation between the same parties or their privies of substantially identical issues actually litigated in and necessary to a prior judgment. Lawlor v. National Screen Serv. Corp., 349 U.S. 322, 327 (1955). The bar of collateral estoppel adheres regardless of whether the prior case was based upon the same underlying transaction or occurrences. *Lawlor*, 349 U.S. at 327; *see* RESTATEMENT (SECOND) OF JUDGMENTS (1982) § 13, introductory note (discussion of terminology included within concept of res judicata).

5. *See* RESTATEMENT, *supra* note 4, § 24 (claim includes all or any part of transaction or series of transactions out of which action arose). Considerations for determining whether a set of facts constitutes a transaction include the relation of the facts in time, origin, space or motivation, convenience of assessing the facts in a single trial, and business understandings or expectations that the parties would normally treat the facts underlying the suit as a group. *Id.*

6. *See* Federated Dept. Stores, Inc. v. Moitie, 452 U.S. 394, 398 (1981) (final judgment on merits precludes parties from relitigating issues raised in prior action); Saylor v. Lindsey,

judicata effectively allocates limited judicial resources, enforces the finality of judgments, and protects individuals from burdensome and repetitive litigation.[7] The knowledge that res judicata bars a second suit should motivate the parties to a lawsuit to litigate the action seriously.[8] Additionally, res judicata bars later assertion of any claim or theory that a party could have presented but neglected to present at the first trial.[9] The doctrine of res judicata, therefore, encourages parties to present all related claims in a single suit.[10] Furthermore, for res judicata purposes, a dismissal with prejudice constitutes a final adjudication on the merits.[11] When a party dismisses an action with

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391 F.2d 965, 968 (2d Cir. 1968) (res judicata bars subsequent action between same parties upon same claim or demand following earlier valid and final judgment rendered on merits); *see also* Lawlor v. National Screen Serv. Corp., 349 U.S. 322, 326 (1955) (judgment on merits in prior suit bars subsequent suit between same parties on same cause of action); Nash County Bd. of Educ. v. Biltmore Co., 640 F.2d 484, 486 (4th Cir.) (essential elements of res judicata include final judgment on merits in earlier suit, identity of cause of action in earlier and later suit, and identity of parties in suits), *cert. denied*, 454 U.S. 878 (1981); Englehardt v. Bell & Howell Co., 327 F.2d 30, 32 (8th Cir. 1964) (in subsequent action involving same parties, res judicata attaches to judgment on merits rendered in former action that was based upon same underlying transaction and precludes relief); 1B MOORE'S FEDERAL PRACTICE, *supra* note 1, ¶ 0.405[1], at 185 (valid, final judgment on merits is absolute bar to subsequent lawsuit on same claim or demand between parties).

7. *See* Brown v. Felsen, 442 U.S. 127, 131 (1979) (res judicata prevents vexatious litigation and fosters respect for judicial decisions); Commissioner v. Sunnen, 333 U.S. 591, 597 (1948) (doctrine of res judicata based on concerns of judicial economy and on public policy that certainty must exist in legal relations); *see also* 18 WRIGHT & MILLER, *supra* note 2, § 4403, at 12-13 (policies underlying res judicata include conservation of limited judicial resources, fostering of respect for final judgments, and prevention of repetitive litigation). Res judicata is not a technical rule but reflects a judicial interpretation of public policy and a desire to leave previous litigants free of repetitive and burdensome litigation. Federated Dept. Stores, Inc. v. Moitie, 452 U.S. 394, 401 (1981) (citing Hart Steel Co. v. Railroad Supply Co., 244 U.S. 294, 299 (1917)).

8. *See* 18 WRIGHT & MILLER, *supra* note 2, § 4403, at 14 (parties' awareness that res judicata prevents second opportunity to litigate case will motivate parties to regard immediate litigation seriously).

9. *See* Federated Dept. Stores, Inc. v. Moitie, 452 U.S. 394, 398 (1981) (res judicata prohibits relitigation of issues that were or could have been raised in earlier action between parties); Brown v. Felsen, 442 U.S. 127, 139 n.10 (1979) (res judicata forecloses all issues that parties could have litigated in prior action); Harper Plastics v. Amoco Chems. Corp., 657 F.2d 939, 945 (7th Cir. 1981) (res judicata bars later assertion of all grounds for relief that plaintiff could have raised in prior suit). *See generally* 1B MOORE'S FEDERAL PRACTICE, *supra* note 1, ¶ 0.405[1], at 181, 186-87, ¶ 0.410[2], at 363-64 (by proscribing relitigation of claims that plaintiffs could have presented in prior suit, res judicata prevents plaintiffs from splitting single cause of action into separate suits that state different grounds for recovery).

10. *See* 18 WRIGHT & MILLER, *supra* note 2, § 4403, at 14 (since plaintiff knows res judicata prevents future presentation of claims that plaintiff could have raised along with related claims in earlier suit, plaintiff will present all claims in first suit).

11. Young Engineers, Inc. v. United States Int'l Trade Comm'n, 721 F.2d 1305, 1314 (Fed. Cir. 1983) (res judicata may apply even though judgment results from dismissal with prejudice). A voluntary dismissal with prejudice operates as a final adjudication on the merits. *See* Astron Indus. Assocs. Inc. v. Chrysler Motors Corp., 405 F.2d 958, 960 (5th Cir. 1968) (stipulation of dismissal with prejudice constitutes final judgment on merits with res judicata effect); *see also* Lawlor v. National Screen Serv. Corp., 349 U.S. 322, 327 (1955) (dismissal of

prejudice, therefore, the doctrine of res judicata precludes the party from instituting a subsequent action grounded on the same transaction or occurrence that formed the basis for the first suit.[12] In *ITCO v. Michelin Tire Corp.*,[13] the Fourth Circuit considered whether a voluntary dismissal with prejudice of one claim should provide a res judicata bar to assertion of a related alternative claim in the same lawsuit.[14]

In *ITCO*, Michelin Tire Corp., a manufacturer of auto tires, and ITCO, a regional distributor of auto tires, had signed a yearly renewable dealer sales agreement authorizing ITCO as a retail dealer and servicer of Michelin products.[15] When Michelin refused to renew the dealership contract after three years, ITCO brought suit in the United States District Court for the Eastern District of North Carolina challenging Michelin's termination of the dealer relationship.[16] ITCO claimed that Michelin's termination of the dealer relationship constituted a conspiracy in restraint of trade violating section 1 of the Sherman Antitrust Act (Sherman Act).[17] Since ITCO had purchased tires from Michelin in large volume at quantity discount prices, ITCO was able to underprice smaller authorized Michelin dealerships.[18] ITCO contended that Michelin had conspired with disgruntled smaller dealers to remove ITCO from the tire market so that Michelin could combine with the smaller dealers to fix prices.[19] ITCO argued, therefore, that Michelin's termination of ITCO's

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previous suit with prejudice is adjudication on merits for res judicata purposes); Gambocz v. Yelencsics, 468 F.2d 837, 840 (3rd Cir. 1972) (dismissal with prejudice adjudicates merits as effectively as order entered after full trial).

12. *See* Young Engineers, Inc. v. United States Int'l Trade Comm'n, 721 F.2d 1305, 1314 (Fed. Cir. 1983) (claim preclusion or true res judicata bars subsequent lawsuit based upon same transactional facts involved in prior action).

13. 722 F.2d 42 (4th Cir. 1983), *aff'd per curiam on rehearing*, 742 F.2d 170 (1984), *cert. denied*, 105 S. Ct. 1191 (1985).

14. *Id.* at 50, 52.

15. *Id.* at 45.

16. *Id.* at 46.

17. *Id.; see* Sherman Anti-Trust Act, 15 U.S.C. § 1 (1982) (out-lawing agreements designed to restrain interstate trade or commerce).

18. 722 F.2d at 45-46. In *ITCO*, the Fourth Circuit found that besides underpricing smaller Michelin dealerships on the retail market, ITCO could compete effectively with Michelin itself in the wholesale market by selling Michelin products to tire retailers who were not parties to dealership agreements with Michelin. *Id.* The smaller authorized Michelin dealerships were thereby undersold by both ITCO and the unauthorized dealers to whom ITCO sold on a wholesale basis. *Id.*

19. *Id.* The Fourth Circuit in *ITCO* noted ITCO's assertion that Michelin had responded to the complaints of smaller dealers by terminating dealership agreements with four large distributors of Michelin products. *Id.* Prior to *ITCO*, the Fourth Circuit had decided antitrust claims that two of the three other large dealers had brought against Michelin. *Id.* at 44 nn.1, 2; *see* Bostick Oil Co. v. Michelin Tire Corp., 702 F.2d 1207, 1220 (4th Cir.) (directed verdict for Michelin on Bostick's related state act claim was improper since Bostick had presented evidence sufficient to send Sherman Act claims to trial), *cert. denied*, 104 S. Ct. 242 (1983); Donald B. Rice Tire Co. v. Michelin Tire Corp., 638 F.2d 15, 16-17 (4th Cir.) (upholding decision of trial court that Michelin's trade restraints primarily were for purpose of promoting interbrand competition and were not illegal under Sherman Act), *cert. denied*, 454 U.S. 324

dealership contract was part of an anticompetitive conspiracy violative of the Sherman Act.[20] In addition to the Sherman Act claim, ITCO alleged that Michelin's termination of the dealership violated section 75-1.1 of the North Carolina Unfair Trade Practices Act (North Carolina Act).[21] Section 75-1.1 provides that unfair or deceptive acts affecting commerce are unlawful.[22] To invoke the North Carolina Act claim ITCO relied upon the district court's pendent jurisdiction[23] or, alternatively, upon diversity of citizenship jurisdiction.[24]

(1981). Bostick Oil Co. v. Michelin Tire Corp., involved a factual situation virtually identical to the facts in *ITCO*. *See* 722 F.2d at 44 n.2 (facts and claim presented in *Bostick* closely parallel facts and claim raised in *ITCO*); *Bostick*, 702 F.2d at 1210-13 (discussion of facts and claim in *Bostick*). Bostick had alleged that Michelin's termination of the dealership agreement constituted a restraint of trade in violation of § 1 of the Sherman Act and § 39-5-20(a) of the South Carolina Unfair Trade Practices Act. *Bostick*, 702 F.2d at 1209; South Carolina Unfair Trade Practices Act, S.C. CODE ANN. § 39-5-20(a) (Law. co-op. 1976) (unfair methods of competition or deceptive practices in trade or commerce are unlawful). The trial court in *Bostick* granted a directed verdict for Michelin on both of Bostick's claims. *Bostick*, 702 F.2d at 1209. The fourth Circuit in *Bostick* reversed the district court's directed verdict and remanded both claims for trial. *Id.* at 1221. The *Bostick* court decided that Michelin's motivation for terminating the dealership contract with Bostick presented a factual issue requiring jury determination. *Id.* at 1215. Furthermore, the Fourth Circuit held that if Michelin had terminated the dealership contract to placate smaller Michelin dealers who were complaining that Bostick undersold the dealers, a per se violation of § 1 of the Sherman Act would exist. *Id.*

20. 722 F.2d at 46. In *ITCO*, Michelin answered ITCO's complaint of anticompetitive conspiracy by citing ITCO's failure to provide adequate retail servicing of Michelin products as the reason for termination of the dealership agreement. *Id.* at 45. ITCO contended that the question of sufficiency of ITCO's retail service presented only a minor dispute between Michelin and ITCO. *Id.* ITCO maintained that the smaller dealers complaints that ITCO was underpricing the smaller dealers prompted Michelin to terminate the dealer sales agreement with ITCO. *Id.* at 46.

21. *Id.; see* North Carolina Unfair Trade Practices Act, N.C. GEN. STAT. § 75-1.1 (1981) (North Carolina Act) (unfair methods of competition and deceptive acts or practices affecting commerce are illegal).

22. N.C. GEN. STAT. § 75-1.1 (1981); *see infra* note 27 (discussion of relationship between North Carolina Act and Sherman Act).

23. 722 F.2d at 46; *see* United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966) (doctrine of pendent jurisdiction provides that if state claim is so closely related to federal claim that two claims comprise in essence one case, federal court should hear state claim in connection with federal claim). Under the doctrine of pendent jurisdiction, a federal court can adjudicate a state claim even if the court has no independent basis of jurisdiction to hear the state claim. *Id.* The rationale behind the doctrine of pendent jurisdiction is that the Constitution allows federal courts to try all cases and controversies arising under the laws of the United States and that a closely related state claim merges with a federal claim to become one claim arising under the laws of the United States. *Id.; see* U.S. CONST. art. III, § 2 (federal courts may hear all cases and controversies arising under Constitution and laws of United States). To exercise pendent jurisdiction, a federal court must first find that the court has subject matter jurisdiction over the federal claim. *Gibbs*, 383 U.S. at 725. Second, the court must determine that both the federal and state claims derive from a common nucleus of operative fact. *Id.* Finally, the court must decide whether the plaintiff normally would be expected to bring the two claims in one lawsuit. *Id. See generally* Schenkier, *Ensuring Access to Federal Courts: A Revised Rationale for Pendent Jurisdiction*, 75 NW. U. L. REV. 245 (1980) (discussion of evolution and purposes of pendent jurisdiction).

24. 722 F.2d at 46; *see* U.S. CONST. art. III, §§ 1-2 (Congress may prescribe actions of

Without specifying a basis for jurisdiction, the North Carolina District Court accepted cross motions for summary judgment from ITCO and Michelin.[25] The district court denied both ITCO's and Michelin's motion for summary judgment on ITCO's Sherman Act claim but granted summary judgment in Michelin's favor on the North Carolina Act claim.[26] Since ITCO interpreted the North Carolina Act as allowing more legal theories of relief than the Sherman Act provided,[27] ITCO petitioned the district court for an immediate interlocutory appeal of the summary judgment decision on the North Carolina Act claim.[28] The district court denied ITCO's request for an interlocutory appeal.[29] ITCO then moved to dismiss the Sherman Act claim without prejudice so that a final, appealable judgment would exist.[30] Noting that the court already had expended considerable resources in preparing for trial, the district court denied ITCO's motion to dismiss without prejudice.[31]

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federal courts by such constitutionally acceptable rules as Congress chooses to establish); *see also* 28 U.S.C. § 1332 (1982) (providing diversity of citizenship jurisdiction to federal courts). Diversity jurisdiction allows federal courts to hear claims based on state law if the plaintiffs and defendants are citizens of different states and if the lawsuits involve amounts in controversy greater than $10,000. 28 U.S.C. § 1332 (1982).

25. 722 F.2d at 47. The opinion of the United States District Court for the Eastern District of North Carolina in *ITCO* is not published.

26. *Id.*

27. *Id.* at 47 n.7. In *ITCO*, ITCO's understanding that the North Carolina Act allowed more legal theories of relief than the Sherman Act appears to have been correct. *See id.* (ITCO's understanding that scope of North Carolina Act was broader than Sherman Act). Section 5 of the Federal Trade Commission (FTC) Act provides, word for word, the same proscription against unfair competition found in § 75-1.1 of the North Carolina Act. *Compare* 15 U.S.C. § 45(a)(1) (1982) (declaring unfair methods of competition and unfair or deceptive practices in or affecting commerce unlawful) *with* N.C. GEN. STAT. § 75-1.1(a) (1981) (proscribing unfair methods of competition and unfair or deceptive practices in or affecting commerce). The North Carolina Supreme Court has stated that the court would look to federal decisions construing the FTC Act for aid in interpreting § 75-1.1 of the North Carolina Act. Johnson v. Phoenix Mut. Life Ins. Co., 300 N.C. 247, 262, 266 S.E.2d 610, 620 (1980). The Supreme Court has interpreted the proscriptions of the FTC Act to be broader than the proscriptions of the Sherman Act and to include the proscriptions of the Sherman Act. *See* FTC v. Beech-Nut Packing Co., 257 U.S. 441, 453 (1922) (Sherman Act serves to declare public policy as guide to FTC in determining unfair methods of competition); ITCO v. Michelin Tire Corp., 722 F.2d 42, 48 (4th Cir. 1983) (section 5 of FTC Act draws within expanse of prohibitions conduct violative of § 1 of Sherman Act), *aff'd per curiam on rehearing*, No. 82-2177(L), slip op. at 3 (4th Cir. Aug. 29, 1984). Since the North Carolina Act parallels a statute broader than the Sherman Act, the North Carolina Act also must be broader than the Sherman Act.

28. 722 F.2d at 47 n.7; *see* 28 U.S.C. § 1292(b) (1982) (district court judge may allow immediate appeal of interlocutory order if judge decides that order involves question of law subject to substantial differences of opinion and that resolution of question would materially advance ultimate termination of lawsuit).

29. 722 F.2d at 47 n.7.

30. *Id.* at 47, 53. In denying ITCO's request to dismiss the Sherman Act claim without prejudice, the United States District Court for the Eastern District of North Carolina reasoned that to dismiss the claim without prejudice would, in effect, allow ITCO's motion for a preliminary appeal of the adverse summary judgment on the North Carolina Act claim. *Id.* at 53.

31. *Id.* at 53.

The district court ordered that the parties should proceed immediately to trial on the Sherman Act claim.[32]

Since the district court had denied both interlocutory appeal and ITCO's motion to dismiss the Sherman Act claim without prejudice, ITCO reluctantly dismissed the federal claim with prejudice so that the Fourth Circuit immediately could review the adverse summary disposition on ITCO's North Carolina Act claim.[33] ITCO recognized that the same evidence would be relevant to both the Sherman Act claim and the North Carolina Act claim.[34] Consequently, ITCO sought to preserve the right to present evidence relevant to the Sherman Act claim but also probative of a North Carolina Act violation if and when the Fourth Circuit overturned the trial court's summary disposition and remanded for retrial on the North Carolina Act claim.[35]

ITCO appealed to the Fourth Circuit the district court's order granting summary judgment for Michelin on the North Carolina Act claim.[36] Although on appeal the Fourth Circuit reversed the grant of summary judgment, Michelin contended that the court could not remand the case for retrial[37] because ITCO had dismissed the Sherman Act claim with prejudice.[38] Michelin contended that since dismissal with prejudice prevents retrial of the issue or claim dismissed, the doctrine of res judicata should preclude ITCO from asserting, under the North Carolina Act, the same price-fixing and unfair competition theory already dismissed with prejudice as part of ITCO's Sherman Act claim.[39]

In arguing that the district court's final disposition of the Sherman Act claim should bar ITCO from asserting on remand the related North Carolina Act claim, Michelin relied on the Fourth Circuit's earlier decision in *Nash County Board of Education v. Biltmore Co.*[40]. In *Nash*, the Fourth Circuit

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32. *Id.* The *ITCO* district court stated that having prepared for the *ITCO* case and having invested much time, the court was as conversant with the case as the court could ever be during the course of another trial. *Id.* Consequently, the court determined that dismissing the case without prejudice would have been inappropriate. *Id.*

33. *Id.* at 47, 53. The district court's summary disposition of ITCO's North Carolina Act claim did not constitute a final appealable judgment since the court left the Sherman Act claim for trial. *Id.; see* 6 MOORE'S FEDERAL PRACTICE, *supra* note 1, ¶ 56.21 [1.-2], at 1271 (summary adjudication of less than all claims in lawsuit constitutes interlocutory order that is not automatically appealable). To secure immediate review of the state law claim, ITCO had no choice but to dismiss the Sherman Act claim with prejudice. *See* 722 F.2d at 53 (refusing to grant preliminary appeal on North Carolina Act claim or dismissal of Sherman Act claim without prejudice).

34. *Id.* at 48-49; *see supra* note 27 (discussion of overlap of North Carolina Act and Sherman Act).

35. *Id.* at 51-52.

36. *Id.* at 47.

37. *Id.* at 50; *see infra* text accompanying notes 38-39 (summary of Michelin's res judicata argument in *ITCO*).

38. 722 F.2d at 50.

39. *Id.; see supra* note 12 (dismissal with prejudice operates as final adjudication of claim).

40. 722 F.2d at 52 n.15; *see* Nash County Bd. of Educ. v. Biltmore Co., 640 F.2d 484

held that a previous consensual dismissal with prejudice of a North Carolina Act claim acted as a res judicata bar to a later suit under the Sherman Act.[41] The Fourth Circuit in *Nash* noted that the plaintiff had based the North Carolina Act suit and the Sherman Act suit upon a common nucleus of operative fact and that the wording of the Sherman Act and the North Carolina Act was almost identical.[42] The *Nash* court determined, therefore, that the first and second lawsuits presented substantially identical claims.[43] Since the *Nash* case involved two distinct actions based on similar claims and both suits involved the same parties or their privies, the Fourth Circuit found that *Nash* satisfied the basic requirements of res judicata.[44] The *Nash* court, therefore, held that the final consent judgment on the North Carolina Act claim was a res judicata bar to the maintenance of a subsequent suit under the Sherman Act.[45]

In rejecting Michelin's argument that the trial court properly had granted summary judgment on the North Carolina Act claim, the *ITCO* court determined that Michelin's motivation for terminating the dealership agreement with ITCO presented a genuine issue of material fact crucial to ITCO's state law claim.[46] Summary judgment is proper only when no genuine issue of material fact relevant to the claim exists.[47] The Fourth Circuit, therefore,

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(4th Cir.), *cert. denied*, 454 U.S. 878 (1981); *infra* notes 41-45 and accompanying text (discussion of *Nash*).

41. *Nash*, 640 F.2d at 497.

42. *Id.* at 488.

43. *Id.*

44. *Id.* at 486, 497.

45. *Id.* at 497.

46. 722 F.2d at 45, 49. The Fourth Circuit in *ITCO* determined that Michelin's motivation for terminating the dealership agreement with ITCO presented a factual dispute. *Id.* at 45. The Fourth Circuit concluded that resolution of the factual dispute would determine whether Michelin's curtailment of the dealership contract constituted anticompetitive behavior violative of the Sherman Act and, therefore, the North Carolina Act. *Id.* at 49; *see* Donald B. Rice Tire Co. v. Michelin Tire Corp., 638 F.2d 15, 16 (4th Cir.) (if Rice had demonstrated that complaints of smaller rival tire dealers concerning Rice's price-cutting prompted Michelin to terminate dealership agreement with Rice, Rice might have proven conspiracy violative of Sherman Act), *cert. denied*, 454 U.S. 864 (1981). The *ITCO* court found significant that in *Bostick Oil Co. v. Michelin Tire Corp.*, the Fourth Circuit had held that a fact finder could have decided that Michelin's termination of the dealership agreement with Bostick violated § 1 of the Sherman Act. 722 F.2d at 49; *see* Bostick Oil Co. v. Michelin Tire Corp., 702 F.2d 1207, 1215 (4th Cir.) (if jury were to make factual determination that Michelin had terminated Bostick's contract because of smaller dealers' complaints, then Michelin would have violated § 1 of Sherman Act), *cert. denied*, 104 S. Ct. 242 (1983); *supra* note 19 (discussion of *Bostick*). The Fourth Circuit in *ITCO* noted the similarity of the factual situations and claims raised in *Bostick* and *ITCO*. 722 F.2d at 44 n.2, 49; *see Bostick*, 702 F.2d at 1210-13, 1215 (factual background and issues involved in *Bostick*). Additionally, the *ITCO* court noted that conduct violative of the Sherman Act also would violate the North Carolina Act. 722 F.2d at 48. The *Bostick* decision, therefore, suggested to the *ITCO* court that a fact finder could have decided in *ITCO* that Michelin's decision to terminate the dealership agreement violated the North Carolina Act. *See id.* at 49 (noting availability of theory of relief that would allow ITCO to prove violation of North Carolina Act).

47. *See* FED. R. CIV. P. 56(c) (court may grant summary judgment on claim only when

reversed the district court's summary disposition of ITCO's North Carolina Act claim and remanded the claim to the North Carolina district court for a full trial.[48]

In remanding the state act claim to the district court, the *ITCO* court rejected Michelin's res judicata argument.[49] The Fourth Circuit determined that applying a final decision on one claim as a bar to a related claim within the same suit would exceed the intended scope of the doctrine of res judicata.[50] The *ITCO* court found that Michelin had offered no case law supporting the argument that a final decision on a claim can bar assertion of a related claim within the same suit.[51] Furthermore, the Fourth Circuit noted that Michelin had relied on *Nash* to support the res judicata argument but the *ITCO* court concluded that the *Nash* decision was inapposite.[52] The court in *ITCO* noted that the basic judicial statement of res judicata requires two lawsuits.[53] Although *Nash* involved two distinct lawsuits brought in succession, *ITCO* concerned only one suit.[54] The Fourth Circuit decided, therefore, that *Nash* was distinguishable from *ITCO* and that since *Nash* involved two suits and *ITCO* involved one suit, only *Nash* fell within the scope of the rule of res judicata.[55] The Fourth Circuit determined that res judicata was inapplicable between the two claims in *ITCO* because the plaintiff had asserted both the North Carolina Act claim and the Sherman Act claim in the same lawsuit.[56]

In addition to stating that the basic rule of res judicata requires two lawsuits, the Fourth Circuit explained the rationale for not applying the doctrine to related claims within the same suit.[57] The *ITCO* court noted that two of the purposes res judicata serves are prevention of wasteful, duplicative lawsuits and enforcement of the finality of judgments.[58] The Fourth Circuit reasoned that by dismissing the Sherman Act claim voluntarily, *ITCO*

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there is no genuine issue of material fact).

48. 722 F.2d at 49, 53; *see* Premier Elec. Constr. Co. v. Miller-Davis Co., 422 F.2d 1132, 1138 (7th Cir.) (citing Poller v. Columbia Broadcasting Sys., 368 U.S. 464 (1962)) (courts should avoid summary judgment in antitrust cases where factual questions are central), *cert. denied*, 400 U.S. 828 (1970).

49. 722 F.2d at 50.

50. *Id.*

51. *Id.* at 52.

52. *Id.* at 52 n.15; *see supra* notes 40-44 and accompanying text (discussion of *Nash*).

53. 722 F.2d at 52 n.15; *see supra* text accompanying notes 1-6 (party to lawsuit must bring subsequent action for res judicata to apply).

54. 722 F.2d at 47, 52 n.15 (unlike *ITCO, Nash* involved two lawsuits); *see Nash*, 640 F.2d at 486 (plaintiff school district in *Nash* instituted action after consent judgment rendered in earlier state suit brought by Attorney General).

55. 722 F.2d at 52 n.15; *see Nash*, 640 F.2d at 497 (concluding that district court was correct in applying res judicata in *Nash*).

56. 722 F.2d at 52 & n.15.

57. *Id.* at 50-51, 52 n.15.

58. *Id.* at 52 n.15; *see supra* note 7 and accompanying text (purposes of res judicata include enforcement of finality of judgments and protection of individuals from vexatious litigation).

actually had furthered the res judicata principle of avoiding repetitive litigation.[59] The *ITCO* court noted that if ITCO had litigated the Sherman Act claim and lost, *ITCO* could have challenged on appeal the adverse grant of summary judgment of the North Carolina Act claim.[60] If the Fourth Circuit had reversed the summary disposition on appeal, a remand and an entire second trial would have followed.[61] The *ITCO* court decided, therefore, that *ITCO's* voluntary dismissal of the federal claim and immediate appeal of the state claim avoided the possibility that the *ITCO* case would require two trials.[62] The Fourth Circuit also recognized that res judicata serves to enforce the finality of judgments.[63] The *ITCO* court stated, however, that parties jeopardize society's interest in the finality of a judgment only when the parties attempt to litigate more than one lawsuit.[54]

The Fourth Circuit then examined the lower court record and determined that although the trial court had dismissed the Sherman Act claim with prejudice, the trial court had reserved ITCO's right to present evidence relevant to the Sherman Act claim as proof of a violation of the North Carolina Act.[65] The Fourth Circuit quoted conversations from the record between the district court judge, counsel for ITCO, and counsel for Michelin.[66] As the Fourth Circuit interpreted these discussions, the trial judge and counsel for Michelin had understood that if ITCO were successful on appeal, ITCO would have reserved the right to present evidence probative of a violation of the dismissed Sherman Act claim as long as ITCO were to offer the evidence to prove the North Carolina Act claim.[67]

While the Fourth Circuit determined that ITCO had reserved the right to use evidence relevant to the Sherman Act claim, the dissent in *ITCO* concluded that the parties and the North Carolina district court had not reached an understanding that ITCO could prove the state law claim with evidence relevant to the Sherman Act claim.[68] The dissent also adopted

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59. 722 F.2d at 50.

60. *Id.* at 50-51.

61. *Id.* at 51. Had ITCO lost on the Sherman Act claim and challenged the North Carolina district court's summary disposition of the North Carolina Act claim on appeal, the Fourth Circuit in *ITCO* could have permitted ITCO to go to trial based on any of the theories ITCO raised under the North Carolina Act. *Id.*

62. *Id.* at 51 (by dismissing Sherman Act claim ITCO prevented possible expense of second trial); *see supra* note 7 and accompanying text (res judicata serves to prevent repetitive litigation).

63. 722 F.2d at 52 n.15; *see supra* note 7 and accompanying text (effect of res judicata enforces finality of judgments).

64. 722 F.2d at 52 n.15.

65. *Id.* at 51; *see infra* note 94 (discussing *ITCO* court's examination of trial court record to determine intended res judicata effect of dismissal with prejudice).

66. 722 F.2d at 51-52.

67. *Id.*

68. 722 F.2d at 54 n.1 (Russel, J., dissenting). As did the majority in *ITCO*, the dissent quoted at length from discussions between the district court judge and counsel for both ITCO and Michelin. *Id.* at 54-55. The *ITCO* dissent noted that the district court judge had refused to rule on whether ITCO's voluntary dismissal of the Sherman Act claim would preclude ITCO's

Michelin's position that the *Nash* decision compelled the Fourth Circuit to give res judicata effect to the dismissal with prejudice of ITCO's Sherman Act claim.[69] The dissent found only one relevant distinction between *Nash* and *ITCO*.[70] The *ITCO* dissent noted that in *Nash* res judicata attached to a final judgment on a state antitrust claim and barred maintenance of a Sherman Act claim.[71] In *ITCO*, however, the defendant sought to use a dismissal with prejudice of a Sherman Act claim to bar a state antitrust claim.[72] The dissent stated that the *Nash* decision necessitated application of res judicata to the opposite order of claim preclusion presented in *ITCO* and did not distinguish *Nash* from *ITCO* on the basis that *Nash* involved two suits.[73] Instead, the *ITCO* dissent cited to a footnote in the Fourth Circuit case of *Bostick Oil Co. v. Michelin*[74] for the proposition that res judicata attaches to a final judgment to bar resurrection of the claim either in a subsequent action or on appeal in the same case.[75]

Bostick, like *ITCO*, concerned a large volume dealer of Michelin products which brought suit following Michelin's termination of a dealership agreement.[76] As the *ITCO* court noted, the facts in *Bostick* were virtually identical to the facts presented in *ITCO*.[77] The footnote that the *ITCO* dissent cited from *Bostick* stated that the *Bostick* court refused on appeal to hear a fraud claim that appeared identical to a fraud claim dismissed with prejudice at the district court level.[78] The *Bostick* court held that the plaintiff could not reassert the dismissed fraud claim under a different heading on appeal.[79] The

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future use of evidence relevant to both the Sherman Act claim and the North Carolina Act claim. *Id.* at 54 n.1. The dissent concluded, therefore, that the district court judge's statement suggested that the parties and the court had not reached a mutual understanding that ITCO had reserved the right to present evidence relevant to the Sherman Act claim for the purpose of proving the North Carolina Act claim. *Id.*

69. *Id.* at 54; *see supra* notes 54-62 and accompanying text (discussing Fourth Circuit's application of res judicata in *Nash*); *supra* notes 63-67 and accompanying text (discussion of Fourth Circuit's basis for distinguishing *Nash* from *ITCO*).

70. 722 F.2d at 54 (Russel, J., dissenting).

71. *Id.; see Nash*, 640 F.2d at 485, 497 (holding that res judicata precluded plaintiff from maintaining Sherman Act claim because of final judgment in earlier suit brought against same defendant on basis of state antitrust act).

72. 722 F.2d at 54 (Russel, J., dissenting).

73. *Id.*

74. 702 F.2d 1207 (4th Cir.), *cert. denied*, 104 S. Ct. 242 (1983).

75. 722 F.2d at 54 (Russel, J., dissenting); *see Bostick*, 702 F.2d at 1218 n.22 (since parties had agreed to dismiss plaintiff's fraud claim with prejudice at trial, plaintiff could not reassert on appeal same fraud claim under different statute); *supra* note 19 (discussion of *Bostick*).

76. *Bostick*, 702 F.2d at 1209. In *Bostick Oil Co. v. Michelin Tire Corp.*, Bostick alleged that Michelin's termination of the dealership agreement constituted restraint of trade and monopolization violative of the Sherman Act and the South Carolina Unfair Trade Practices Act. *Id.*

77. 722 F.2d at 44 n.2; *see Bostick*, 702 F.2d at 1210-13 (discussion of facts in *Bostick*).

78. 722 F.2d at 54; *see Bostick*, 702 F.2d at 1218 n.22 (since parties had agreed at district court to dismiss Bostick's fraud claim, Bostick could not re-label fraud claim and assert claim again on appeal).

79. *Bostick*, 702 F.2d at 1218 n.22.

dissent in *ITCO* interpreted the *Bostick* court's refusal to allow the plaintiff to proceed with the fraud claim as an application of res judicata to bar similar claims within the same lawsuit.[80] The dissent reasoned that *Nash* and *ITCO* could not be distinguished on the basis that Nash involved two lawsuits and *ITCO* involved only one suit.[81] The *ITCO* dissent, therefore, would have applied res judicata to bar ITCO from asserting portions of the North Carolina Act claim on remand.[82] The dissent, however, would have barred only those theories of relief available under the North Carolina Act that were similar to the theories available under the Sherman Act claim that ITCO had dismissed with prejudice.[83] The *ITCO* dissent would have allowed ITCO to present any theories of relief available under the North Carolina Act that were additional to and different from the theories available under the Sherman Act.[84]

Notwithstanding the dissent's assertion that res judicata can apply in the context of a single suit to bar an alternative claim, cases addressing the doctrine of res judicata support the *ITCO* majority's holding that the doctrine can bar only a second lawsuit.[85] The Supreme Court has stated specifically that res judicata applies only when a party brings a second or subsequent action.[86] The Supreme Court and the federal circuit courts consistently have phrased the rule of res judicata as requiring two distinct lawsuits for the doctrine to bar a cause of action.[87] Furthermore, the Supreme Court has

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80. 722 F.2d at 54 (Russel, J., dissenting). The *ITCO* dissent may have misinterpreted the *Bostick* court's refusal to allow Bostick to maintain an Unfair Trade Practices Act fraud theory as an application of res judicata to bar similar claims within the same suit. *Compare* 722 F.2d at 54 (citing footnote in *Bostick* for proposition that res judicata will attach to final judgment to bar resurrection of claim on appeal in same case) *with Bostick*, 702 F.2d at 1218 n.22 (footnote that *ITCO* dissent cited to support res judicata argument does not refer to res judicata). The *Bostick* court did not explain the rationale for refusing to allow Bostick to proceed with the fraud claim and did not refer to res judicata for support. *See Bostick*, 702 F.2d at 1218 n.22. Since the *Bostick* court concluded the discussion of Bostick's fraud claim by stating that the trial court properly had dismissed the fraud theory, the court simply may have decided that the fraud claim lacked merit. *See id* (lower court properly enforced parties' agreement to dismiss Bostick's fraud claim with prejudice).

81. 722 F.2d at 54 (Russel, J., dissenting).

82. *Id.* at 55.

83. *Id.*

84. *Id.*

85. *See, e.g.*, Lawlor v. National Screen Serv. Corp., 349 U.S. 322, 326 (1955) (doctrine of res judicata requires prior and second suit to operate to bar claim); Lovell v. Mixon, 719 F.2d 1373, 1376 (8th Cir. 1983) (doctrine of res judicata bars second suit); Premier Elec. Constr. Co. v. Miller-Davis Co., 422 F.2d 1132, 1138-39 (7th Cir.) (doctrine of res judicata contemplates two seperate actions involving same parties), *cert. denied*, 400 U.S. 828 (1970).

86. *See* G. & C. Merriam Co. v. Saalfield, 241 U.S. 22, 28 (1916) (res judicata applies only when party to earlier suit brings subsequent action).

87. *See* Lawlor v. National Screen Serv. Corp., 349 U.S. 322, 336 (1955) (Supreme Court's statement of doctrine of res judicata as requiring prior and second suit); Commissioner v. Sunnen, 333 U.S. 591, 597 (1948) (res judicata applies to repetitive suits); Heiser v. Woodruff, 327 U.S. 726, 733 (1946) (res judicata bars renewal of litigation in another court after first court has adjudicated original suit fully); Reed v. Allen, 286 U.S. 191, 199 (1932) (according res judicata effect to final judgment in prior suit to bar party to prior suit from instituting

stated repeatedly that before applying res judicata, a court must first determine that the case before the court falls within the intended scope of the doctrine.[88] In *ITCO*, the Fourth Circuit correctly determined that the doctrine of res judicata should not apply in the context of a single lawsuit to bar alternative claims.[89]

In addition to appropriately defining the scope and basic application of res judicata, the Fourth Circuit's opinion in *ITCO* manifests a clear understanding of the policies and purposes res judicata serves.[90] By barring later assertion of any claim or theory that a party could have or did present at an earlier trial between the same parties, res judicata prevents wasteful and repetitive litigation.[91] As the Fourth Circuit noted, by voluntarily dismissing the Sherman Act claim ITCO circumvented the possible necessity of two complete trials.[92] ITCO's voluntary dismissal with prejudice actually furthered the res judicata principle of preventing wasteful litigation.[93] The Fourth Circuit's refusal to use the dismissal of the Sherman Act claim as a res judicata bar to ITCO's assertion of the state law claim on remand may encourage other plaintiffs to follow ITCO's example and seek more efficient resolution of claims.[94]

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second suit); Young Engineers Inc. v. United States Int'l Trade Comm'n, 721 F.2d 1305, 1314 (Fed. Cir. 1983) (res judicata allows prior judgment to bar reassertion of claim in later suit); Lovell v. Mixon, 719 F.2d 1373, 1376 (8th Cir. 1983) (doctrine of res judicata bars subsequent suit); Nash County Bd. of Ed. v. Biltmore Co., 640 F.2d 484, 486, 488-89 (4th Cir.) (description of res judicata as doctrine for courts to apply between an earlier and later suit), *cert denied*, 434 U.S. 878 (1981); Astron Indus. Assocs. Inc. v. Chrysler Motors Corp., 405 F.2d 958, 960 (5th Cir. 1968) (citing Balt. S.S. Co. v. Phillips, 274 U.S. 316, 319 (1927)) (effect of judgment as res judicata is dependent upon similarity of cause of action in second suit); *see also* Dobbs, *Beyond Bootstrap: Foreclosing the Issue of Subject Matter Jurisdiction Before Final Judgment*, 51 MINN. L. REV. 491, 496 (1967) (res judicata applies only when there was final judgment in earlier suit and party to earlier suit brings second and distinct action based on same transaction).

88. *See* Brown v. Felson, 442 U.S. 127, 132 (1979) (since res judicata governs claims not previously litigated doctrine should be invoked only after inquiry demonstrates that specific case falls within intended scope of rule); *see also* Arizona v. California, 460 U.S. 605, 619 (1983) (res judicata does not operate to bar party from attacking final judgment if party attacks judgment in same judicial proceeding and before same court that rendered judgment); Kremer v. Chemical Constr. Corp., 456 U.S. 461, 481 n.22 (1982) (judgment must dispose of entire claim for doctrine of res judicata to bar subsequent suit).

89. 722 F.2d at 52; *see supra* notes 86-88 and accompanying text (Fourth Circuit correctly interpreted scope of res judicata to exclude single suit on direct appeal).

90. *See infra* notes 91-99 and accompanying text (Fourth Circuit's *ITCO* decision furthered res judicata principles of avoiding excess litigation and preventing splitting of cause of action).

91. *See supra* notes 1-9 and accompanying text (discussion of purposes and effect of res judicata).

92. 722 F.2d at 50; *see supra* notes 58-62 and accompanying text (discussion of Fourth Circuit's reasoning in *ITCO* that by voluntarily dismissing Sherman Act claim, ITCO avoided possibility of wasteful second suit).

93. *See supra* note 62 (ITCO's voluntary dismissal of Sherman Act claim furthered res judicata principle of preventing needless litigation); 1B MOORE'S FEDERAL PRACTICE, *supra* note 1, ¶ 0.405[1], at 179 (res judicata prevents repetitive suits and embodies legal precept that courts should avoid needless litigation).

94. *See* 722 F.2d at 52 (Fourth Circuit refused to use final judgment on Sherman Act

Another manner in which the doctrine of res judicata serves to curb repetitive litigation is by discouraging plaintiffs from splitting one cause of action into serveral suits.[95] Since res judicata will attach to a final judgment in a lawsuit to bar the parties to the suit from relitigating any claims that the parties could have raised in the action, res judicata prevents parties from splitting related claims into seperate suits.[96] Because ITCO did not split the Sherman Act claim and the North Carolina Act claim into seperate suits, *ITCO* could expect that res judicata would not attach to the final judgment on the Sherman Act claim to bar assertion of the North Carolina Act claim.[97] To defeat ITCO's expectation that res judicata could not bar the North Carolina Act claim, as the *ITCO* dissent would have done, might have set a precedent that would have discouraged future plaintiffs from bringing related claims in single, efficient actions.[98] By refusing to apply res judicata to

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claim to bar assertion of North Carolina Act claim on remand); *id.* at 47 n.7, 51 n.14 (ITCO considered economics of litigation in deciding to dismiss Sherman Act claim voluntarily and to seek review of summary judgment decision on state act claim). In refusing to use the judgment on ITCO's Sherman Act claim to bar the North Carolina Act claim, the Fourth Circuit in *ITCO* relied on the trial judge's right to exempt certain issues from the scope of res judicata's bar in addition to relying upon basic principles of res judicata. *Id.; see id.* at 54 (Russel, J., dissenting) (court may provide that plaintiff's voluntary dismissal with prejudice of suit will not constitute final judgment on suit for purposes of res judicata); 1B MOORE'S FEDERAL PRACTICE, *supra* note 1, ¶ 0.405[1], at 188 (courts may specifically exempt certain issues from scope of res judicata's bar). A court may expressly reserve the plaintiff's right to bring a second action based upon the same underlying claim or transaction. *Id.* The Fourth Circuit interpreted the trial court transcript to indicate that the district court had sought to qualify the order dismissing ITCO's Sherman Act claim with prejudice. 722 F.2d at 51. The *ITCO* court decided that the district court had sought to reserve ITCO's right to use evidence relevant to the dismissed federal claim to prove the North Carolina Act claim in the event of a remand on the North Carolina Act claim. *Id.* If the Fourth Circuit correctly interpreted the lower court record, res judicata would have been inapplicable in *ITCO* because the district court would have reserved ITCO's right to present all the North Carolina Act theories of relief on remand. *See* Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293, 295 (1943) (courts should determine intended res judicata effect of dismissal with prejudice from entire record); 1B MOORE'S FEDERAL PRACTICE, *supra* note 1, ¶ 0.405[1], at 188 (court may reserve right to bring later action on same underlying transaction in dismissal order). *But see* Weissinger v. United States, 423 F.2d 795, 798 (5th Cir. 1970) (courts should not attempt to modify normal res judicata effect of dismissal with prejudice by looking beyond formal order).

95. *See* 1B MOORE'S FEDERAL PRACTICE, *supra* note 1, ¶ 0.410[2], at 363 (res judicata prevents parties from splitting one cause of action into several suits).

96. *See* 18 WRIGHT & MILLER, *supra* note 2, § 4403, at 14 (res judicata encourages plaintiffs to bring all related claims together rather than splitting claims into piecemeal litigation); *supra* note 9 and accompanying text (res judicata bars later assertion of any claim or theory that parties could have raised at first trial).

97. *See* 722 F.2d at 46 (ITCO brought federal and state claims together in single action before federal district court).

98. *See* 722 F.2d at 55 (Russel, J., dissenting) (dissent would have barred ITCO's North Carolina Act claim on remand by according res judicata effect to dismissal with prejudice of Sherman Act claim). If the *ITCO* court had applied res judicata to bar ITCO's North Carolina Act claim, ITCO would have lost the advantage of avoiding the preclusive effect of res judicata by bringing alternative claims together in one suit. *See* 18 WRIGHT & MILLER, *supra* note 2, § 4403, at 14 (res judicata's preclusive effect encourages plaintiffs to bring all related claims together in one lawsuit).

alternative claims within a single suit, therefore, the Fourth Circuit furthered the purpose of res judicata of encouraging parties to present all related claims in one suit.[99]

In *ITCO*, the Fourth Circuit discussed the res judicata effect of a dismissal with prejudice of one claim upon a similar claim within the same suit.[100] The *ITCO* court simply adhered to the basic requirement that the doctrine of res judicata only applies as between two distinct suits.[101] The *ITCO* court's opinion, however, does provide a rare discussion of the rationale for not according res judicata effect to a final judgment on one claim to bar another claim within the same suit.[102] Additionally, the *ITCO* holding should induce plaintiffs to gather all related claims together in one suit.[103] The Fourth Circuit's decision in *ITCO* should encourage future plaintiffs to handle claims in an efficient manner consistent with the underlying principles of res judicata.[104]

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99. *See* 722 F.2d at 52 (application of res judicata in *ITCO* would defeat purpose courts designed doctrine to promote); *supra* notes 95-98 and accompanying text (res judicata operates to encourage parties to gather all related claims in one efficient suit).

100. 722 F.2d at 50-52; *see supra* notes 46-67 and accompanying text (*ITCO* court's discussion of res judicata's applicability to alternative claims within same suit).

101. *See* 722 F.2d at 52 (refusing to apply res judicata within context of single suit); *supra* notes 86-88 and accompanying text (courts have stated that application of res judicata requires two lawsuits).

102. *See* 722 F.2d at 52, 54 (inability of Michelin and *ITCO* dissent to produce any cases specifically holding that res judicata applies within single case indicates question is rarely addressed).

103. *See supra* notes 95-99 and accompanying text (by refusing to apply res judicata between claims within single lawsuit, *ITCO* decision furthers res judicata policy of preventing parties from splitting causes of action into separate suits).

104. *See supra* notes 84-98 and accompanying text (in refusing to apply res judicata in *ITCO*, Fourth Circuit recognized that ITCO had furthered principles of res judicata by presenting single, efficient action and thereby avoiding potential second lawsuit).

E. *Rule 45(d): Territorial Limits of Effective Service of Deposition Subpoenas*

Rule 45(d) of the Federal Rules of Civil Procedure governs the issuance of subpoenas for the taking of depositions.[1] Rule 45(d) details the proof of service procedure for issuance of the subpoena and authorizes the party requesting discovery to command the production of specified documents.[2] Rule 45(d) sets forth the attendance limitations for persons designated in the subpoena, distinguishing between residents and nonresidents of the deposing district.[3] Although rule 45(d)(2) provides for compulsory attendance at depositions of both resident and nonresident witnesses beyond district jurisdictional lines,[4] rule 45(d)(2) does not explicitly provide for a similar grant

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1. FED. R. CIV. P. 45(d). Federal Rule of Civil Procedure 45(d) applies only to witnesses or nonparties and does not include parties to the litigation. *Id.; see* Grey v. Continental Mktg. Assocs. Inc., 315 F. Supp. 826, 832 n.15 (N.D. Ga. 1980) (rule 45(d) inapplicable to parties); Young v. Clearing, 30 Fed. R. Serv. 2d 789, 791 (E.D. Pa. 1980) (rule 45 applies only to witnesses, not parties); *see also* 4 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 26.70[1.-1], at p. 447-49 (2d ed. 1984) (discussing location at which party may take deposition of nonparty witness under rule 45(d)). A party may compel a witness to attend a deposition only pursuant to the issuance of a subpoena. FED. R. CIV. P. 30(a); *see* Cleveland v. Palmby, 75 F.R.D. 654, 656 (W.D. Okla. 1977) (nonparty can be compelled to appear at deposition only by issuance of subpoena). The party compelling a witness' attendance at a deposition must give notice to other parties to the action. FED. R. CIV. P. 30(b)(1); *see* Srybnik v. Epstein, 13 F.R.D. 248, 249 (S.D.N.Y. 1952) (subpoena improper when defendant failed to give notice to plaintiff of witness' deposition).

2. FED. R. CIV. P. 45(d)(1). Rule 45(d)(1) provides in part:

> (1) Proof of service of a notice to take a deposition as provided in Rule 30(b) and 31(a) constitutes a sufficient authorization for the issuance by the clerk of the district court for the district in which the deposition is to be taken of subpoenas for the persons named or described therein. Proof of service may be made by filing with the clerk of the district court for the district in which the deposition is to be taken a copy of the notice together with a statement of the date and manner of service and of the names of the persons served, certified by the person who made service. The subpoena may command the person to whom it is directed to produce and permit inspection and copying of designated books, papers, documents, or tangible things which constitute or contain matters within the scope of the examination permitted by Rule 26(b), but in that event the subpoena will be subject to the provisions of Rule 26(c) and subdivision (b) of this rule.

Id.

3. *Id.* 45(d)(2). Rule 45(d)(2) provides:

> A resident of the district in which the deposition is to be taken may be required to attend an examination only in the county wherein he resides or is employed or transacts his business in person, or at such other convenient place as is fixed by an order of court. A nonresident of the district may be required to attend only in the county wherein he is served with a subpoena, or within 40 miles from the place of service, or at such other convenient place as is fixed by an order of court.

Id.

4. *Id.* The 1946 amendment to Federal Rule of Civil Procedure 45 gave the district courts the express power to compel a nonresident of the district to attend a deposition in a neighboring

of district jurisdictional limitations for valid service of a subpoena requesting appearance at a deposition.[5] Rule 45(d) thus is silent on the question of whether a district court has authority to serve a deposition subpoena outside the judicial district in which the court sits.[6] In *In re Guthrie*,[7] the Fourth Circuit considered whether rule 45(d) authorizes a district court to issue and serve a deposition subpoena outside the judicial district.[8]

The rule 45(d) issue in *Guthrie* arose during the course of discovery proceedings in an action stemming from an undercover investigation by the United States House of Representatives Select Committee on Aging concerning abuses in the sale of health insurance.[9] The plaintiff, an independent insurance agent, brought suit against staff members of the Select Committee on Aging, the American Broadcasting Companies, Inc., and several other individuals for the surreptitious videotaping and subsequent broadcast of a cancer insurance sales promotion meeting.[10] The United States District Court for the District of Maryland, at the request of the plaintiff, served a subpoena duces tecum upon the Clerk of the House of Representatives at the United States Capitol in Washington, D.C., ordering the clerk to appear at a

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judicial district by inserting the qualifying phrase "or at such other convenient place as is fixed by an order of court." 5A J. MOORE, *supra* note 1, ¶ 45.08 n.3, at 80-81.

5. *See* FED. R. CIV. P. 45(d)(2); *supra* note 3 (text of rule 45(d)(2)).

6. *See* FED. R. CIV. P. 45(d)(2). *Contra id.* 45(e). Rule 45(e) addresses service of a subpoena for a hearing or trial. *Id.* Rule 45(e)(1) permits service of a trial subpoena up to one hundred miles from the site of the hearing or trial regardless of whether service is within or outside the district. *Id.* 45(e)(1); *see infra* note 50 (text of rule 45(e)(1)).

7. 733 F.2d 634 (4th Cir. 1984).

8. *Id.* at 636-39.

9. *Id.* at 635. The Fourth Circuit in *In re Guthrie* addressed a collateral discovery issue arising out of *Benford v. American Broadcasting Co. Id. See generally* Benford v. American Broadcasting Co., 554 F. Supp. 145 (D. Md. 1982) (suit brought by plaintiff insurance salesman alleging various violations of federal statutes and common law torts for defendant's surreptitious videotaping and subsequent broadcast of plaintiff's sales presentation), *dismissed and remanded*, 707 F.2d 504 (4th Cir.), *cert. denied*, 104 S. Ct. 107 (1983); Benford v. American Broadcasting Co., 520 F. Supp. 1159 (D. Md. 1980) (ruling on defendant's motion to dismiss); Benford v. American Broadcasting Co., 502 F. Supp. 1148 (D. Md. 1980) (ruling on defendant's motion for summary judgment), *aff'd*, 661 F.2d 917 (4th Cir.), *cert. denied*, 454 U.S. 1060 (1981).

10. 733 F.2d at 635. Through arrangements made by an undercover congressional aid acting as an insurance sales trainee, the plaintiff in *In re Guthrie* presented his standard cancer insurance promotion to two Select Committee affiliates who were posing as elderly Maryland women. Benford v. American Broadcasting Co., 565 F. Supp. 139, 140 (D. Md. 1983). The American Broadcasting Companies surreptitiously videotaped the presentation. *Id.* The videotape aired on the ABC Nightly News. *Id.* The plaintiff in *Guthrie* alleged that the defendant's videotaping violated the Maryland Wiretapping and Electronic Surveillance Act, the fourth amendment to the United States Constitution, and title III of the Omnibus Crime Control and Safe Streets Act in addition to various common law violations. *Id; see* U.S. CONST. amend. IV; 18 U.S.C. §§ 2510-20 (1984) (Omnibus Crime Control and Safe Streets Act); MD. CTS. & JUD. PROC. CODE ANN. § 10-401 (1977) (Maryland Wiretapping and Electronic Surveillance Act). The defendants in *Guthrie* primarily relied upon the speech or debate clause of the Constitution and qualified immunity as defenses to the plaintiff's request for specified documents. *Guthrie*, 734 F.2d at 636; *Benford*, 565 F. Supp. at 140; *see* U.S. CONST. art. I, § 6, cl. 1 (speech or debate clause grants members of Congress privilege of free legislative debate).

deposition and requiring production of documents relevant to the Select Committee's investigation.[11]

The Clerk moved to quash the subpoena on the ground that the Maryland district court lacked jurisdiction to serve the deposition subpoena because the United States Capitol is located outside the District of Maryland, thirty-seven miles from the Maryland district court.[12] The Clerk asserted that rule 45 does not grant district courts the authority to serve deposition subpoenas on nonparty witnesses residing outside the judicial district in which the district court sits.[13] The district court, however, maintained that rule 45 permits service of a deposition subpoena on a witness residing within forty miles of the issuing court regardless of whether the witness resides outside the district.[14]

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11. 733 F.2d at 635-36. The district court in *Guthrie* served the subpoena upon Mr. Edmund L. Henshaw, who preceded Mr. Guthrie as Clerk of the House of Representatives. *Id.* at 635 n.2. Prior to March 22, 1982, the plaintiff had caused the District Court for the District of Columbia to serve a similar subpoena duces tecum upon the Clerk. *Id.* at 636. The plaintiff took the deposition of a representative for the Clerk on December 23, 1981. Appellant's Brief at 4, *In re Guthrie*, 733 F.2d 534 (4th Cir. 1984). At the deposition, the Clerk's representative delivered only some of the requested documents and answered questions. *Id.* Following the deposition, the plaintiff made a motion that the court demand compliance with the subpoena. *Id.* Counsel for the Clerk opposed the plaintiff's motion contending that the withheld documents were protected by the speech or debate clause of the Constitution. *Id.* The plaintiff, however, subsequently withdrew the subpoena issued by the District of Columbia district court. *Id.*

A court issues a subpoena duces tecum requesting the production of documents from a nonparty only in conjunction with the taking of a deposition. Ghandi v. Police Dept. of City of Detroit, 74 F.R.D. 115, 118 n.3 (E.D. Mich. 1977). In *Ghandi*, the plaintiffs did not intend to take a deposition but nonetheless served upon a nonparty a subpoena duces tecum requesting the production of documents. *Id.* at 117-18. The *Ghandi* court determined that a district court improperly serves a subpoena duces tecum if the discovery party has no intention of deposing the nonparty. *Id.* at 118, 118 n.3. *See generally* Welling, *Discovery of Nonparties Tangible Things Under the Federal Rules of Civil Procedure*, 59 NOTRE DAME L. REV. 110, 118-19 (1983) (discussing drawbacks of issuance of subpoena duces tecum being dependent upon litigants request to depose witness).

12. 733 F.2d at 636, 636 n.4.

13. *See* Appellant's Brief at 7, *supra* note 11 (Rule 45(d) does not provide for extraterritorial service of process).

14. *Id.* In *Guthrie*, the Maryland district court insisted that the court had inherent power to serve the subpoena outside the district despite commentary by Professor Moore suggesting lack of jurisdiction. Benford v. American Broadcasting Co., 98 F.R.D. 40, 41 (D. Md. 1983) (Maryland district court's *Guthrie* ruling); *see* 5A J. MOORE, *supra* note 1, ¶ 45.06 [1] n.6, at 56. Professor Moore has suggested that a district court must serve a deposition subpoena within the district in which the issuing court sits. *See* 5A J. MOORE, *supra* note 1, ¶ 45.06 [1] n.6, at 56; *infra* note 37 and accompanying text (discussion of Moore's views); *infra* note 38 (discussion of *Application of Johnson and Johnson*). In *Benford*, the Maryland district court inferred that rule 45(e) and rule 45(d) presented inconsistent provisions regarding service of subpoenas. 98 F.R.D. at 41-42. In suggesting that rule 45(d) and rule 45(e) are inconsistent, the *Benford* court apparently was referring to the absence of a service provision in rule 45(d) similar to the service provision of rule 45(e)(1) which provides for extraterritorial service. *See id.* at 41; *supra* note 3 (text of rule 45(d)(2); *infra* note 50 (text of rule 45(e)(1)). The *Benford* court determined that it was unnecessary to initiate the subpoena process in an auxiliary district court, maintaining that when dealing with inconsistent provisions of rule 45 the need for uniformity prevailed. 98

The Select Committee on Aging moved to intervene in the action and to obtain a protective order to prevent the plaintiff from inspecting the subpoenaed documents held by the clerk.[15] The district court, noting the Committee's already adequate representation in the litigation, denied the Committee's motion to intervene.[16] The Select Committee subsequently directed the Clerk to withhold the subpoenaed records from the plaintiff.[17] In response to the Clerk's failure to obey the subpoena, the Maryland district court issued a show cause order which directed the Clerk to show cause for refusing to permit inspection and copying of the requested documents.[18] The district court rejected the Clerk's defenses to the show cause order and held the Clerk in contempt of court.[19] The Clerk then filed a timely appeal from the contempt order.[20]

On appeal, the Fourth Circuit reversed the district court's judgment holding the Clerk in contempt, maintaining that the district court lacked

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F.R.D. at 41-42, *citing* SCM Corp. v. Xerox, 76 F.R.D. 214, 215-16 (D. Conn. 1977) (in deference to uniformity of interpretation, district courts must measure 100 mile provision included in several of federal rules along straight line on map); *see* FED. R. CIV. P. 4(f) (territorial limits of effective service); *id.* 32(a)(3)(B) (use of deposition in court proceedings of witness who is at distance greater than 100 miles from place of trial); *id.* 45(e)(1) (service of subpoena for hearing or trial). The district court in *Benford*, in asserting the need for uniformity, stated that the court's proximity to the witness eliminated the need to bifurcate the subpoena process. 98 F.R.D. at 42. In discussing bifurcation of the subpoena process, the *Benford* court presumably was referring to the necessity of having to initiate the subpoena process in an auxilliary district court when the court in which the action is pending lacks jurisdiction to serve the witness. *See id.*

15. 733 F.2d at 636. In *Guthrie*, the Select Committee cited the speech or debate clause of the Constitution as authority for a Committee's request order against disclosure of the documents. *Id.; see* U.S. CONST. art. I, § 6, cl. 1 (speech or debate clause). The speech or debate clause of the Constitution grants members of Congress a constitutional privilege or immunity of free legislative debate without fear of criminal liability. *See In re* Grand Jury Proceedings, 563 F.2d 577, 581 (3d Cir. 1977) (speech or debate clause grants immunity to members of Congress and their aides); U.S. CONST. art. I, § 6, cl. 1 (speech or debate clause).

16. *Benford*, 98 F.R.D. 42, 47 (D. Md. 1983). The district court in *Benford* stated that adequate representation, unnecessary delay and additional expense constituted reasons for denial of the Select Committee's request for intervention. *Id.* In response to the Select Committee's speech or debate clause defense to disclosure of the requested documents, the district court suggested that the defendants assert the defense at the trial stage if the plaintiffs attempt to admit the documents into evidence. *Id.*

17. 733 F.2d at 636; *see* H. R. Res. 176, 98th Cong., 1st Sess., 129 CONG. REC. H2456 (daily ed. April 28, 1983) (House Resolution ordering Clerk not to disclose requested documents to plaintiff); *see also* Appellant's Brief at 9-10, *supra* note 11 (discussing House Resolution 176).

18. 733 F.2d at 636. *See* Appellant's Brief at 11, *supra* note 11. The Clerk in *Guthrie*, in response to the show cause order, asserted that he was legally unable to comply with the order and that the Maryland district court lacked jurisdiction to issue the subpoena. *Id.* The Clerk also contested the show cause order on constitutional theories based on the publication clause and the speech or debate clause of the constitution. *Id.; see* U.S. CONST. art. I, § 5, cl. 2, § 6, cl. 1 (publication clause and speech or debate clause).

19. 733 F.2d at 636.

20. *Id.*

jurisdiction to serve the subpoena outside the District of Maryland.[21] The Fourth Circuit refused to accept the district court's determination that the court possessed inherent power to serve a deposition subpoena on a witness located outside the district of Maryland but within the forty mile bulge discussed in rule 45(d)(2).[22] The *Guthrie* court observed that although rule 45(d)(2) specifies the attendance limitations for persons designated in the subpoena, rule 45(d)(2) does not prescribe the territorial service limitations for deposition subpoenas.[23] The Fourth Circuit, therefore, held that under rule 45(d) a district court must serve a deposition subpoena within the judicial district.[24]

In considering the territorial limits of service of a deposition subpoena, the Fourth Circuit analyzed rule 45 with reference to rule 4(f) of the Federal Rules of Civil Procedure, which governs the territorial limits of effective service of process.[25] Recognizing that rule 4(f) defers treatment of service of subpoenas to rule 45, the Fourth Circuit focused on the provisions of rule 45 and in particular rule 45(d) in discerning the territorial service limitations of a deposition subpoena.[26] The Fourth Circuit reasoned that rule 45(d) may

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21. *Id.* at 639. The Fourth Circuit in *Guthrie* found it unnecessary to address the Clerk's claim that the speech or debate clause constituted reason for noncompliance with the subpoena. *Id.* at 636-37; *see* U.S. CONST. art. I, § 6, cl. 1 (speech or debate clause).

22. 733 F.2d at 637. In *Guthrie*, the Fourth Circuit maintained that a district court's deposition subpoena power is limited to the extent authorized by the Federal Rules. *Id.* The Fourth Circuit noted, however, that the district court might have believed that the court had implicit power under rule 45 to issue the subpoena. *Id.* A district court has inherent power to enforce all orders that the court validly implemented under the Federal Rules. *See* Shillanti v. United States, 384 U.S. 364, 370 (1966), *citing* United States v. Mine Workers of America, 330 U.S. 258, 330-32 (1947) (Black, J.J., concurring in part and dissenting in part) (discussing district court's power to enforce compliance with court orders through civil contempt). Additionally, district courts maintaining pending actions have inherent jurisdiction to compel answers at the taking of depositions from parties over whom the court has personal jurisdiction. Lincoln Laboratories, Inc. v. Savage Laboratories, Inc., 27 F.R.D. 476, 480 (D. Del. 1961). A district court in which an action is pending, however, cannot enforce deposition orders against a witness over whom the court lacks jurisdiction. *Id.; cf.* Shawmut, Inc. v. American Viscose Corp., 11 F.R.D. 562, 565 (S.D.N.Y. 1951) (district court sitting in district in which deposition is taken has power to limit oral examination and to modify subpoena issued pursuant to rule 45(d); FED. R. CIV. P. 30(d) (providing that either court maintaining principal litigation or court in district where litigant is taking deposition may terminate or limit deposition). In *Guthrie*, the United States District Court for the District of Maryland served both as the court maintaining the primary litigation and the court located in the district where the plaintiff was taking the deposition. 733 F.2d at 635.

23. 733 F.2d at 638; *see supra* notes 2-3 (text of rule 45(d)).

24. *See* 733 F.2d at 639 (Fourth Circuit's *Guthrie* holding).

25. *Id.* at 637. Rule 4(f) provides in part:

> All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held, and, when authorized by a statute of the United States or by these rules, beyond the territorial limits of that state. . . . A subpoena may be served within the territorial limits provided in Rule 45.]

FED. R. CIV. P. 4(f).

26. 733 F.2d at 637; *see supra* notes 2-3 (text of rule 45(d)). The *Guthrie* court recognized that rule 45 creates a distinction between deposition subpoenas and trial subpoenas. 733 F.2d

operate as a remedial discovery device available to litigants who are unable to compel the attendance of witnesses at a hearing or trial because of service and attendance limitations.[27] The *Guthrie* court noted that under rule 45(d) a litigant may cause any district court to serve a subpoena on a witness requesting the witness to appear at a deposition in the district in which the witness works or resides.[28] The Fourth Circuit suggested that the opportunity available to litigants to obtain deposition subpoenas in any district court provides litigants with access to nationwide discovery regardless of the location of the principal pending litigation.[29] The *Guthrie* court stated, however, that rule 45(d) imposes two restrictions on discovery through depositions.[30] First, a party must take a witness' deposition within the district of the court issuing the subpoena.[31] Second, the attendance limitations of rule 45(d)(2) restrict the distance a court may compel a witness to travel to attend a deposition.[32]

The Fourth Circuit maintained that rule 45(d)(2), which prescribes attendance limitations for persons designated in the subpoena, was not an attempt to address the territorial limits of effective service, but was intended to prevent the undue burden on subpoenaed nonparty witnesses of traveling long distances to attend depositions.[33] The *Guthrie* court noted, however, that under rule 45(d)(2) a relationship exists between the place of service of a nonresident witness and the location at which the district court may compel

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at 637; FED. R. CIV. P. 45(d), (e); *see* 5A J. MOORE, *supra* note 1, ¶¶ 45.07-45.09, at 59-84 (discussing subpoenas for taking depositions and subpoenas for hearing or trial). The Fourth Circuit additionally observed that rule 45(e)(1) prescribes the territorial service limitations of trial subpoenas. 733 F.2d at 637; *see infra* note 50 (text of rule 45(e)(1)).

27. 733 F.2d at 638; *see* Busch v. Sea World of Ohio, 95 F.R.D. 336, 341-42 (W.D. Pa. 1982) (rule 45(d)(1) permits deposing of witnesses to preserve testimony for trial). In *Busch,* an Ohio corporation wanted to call witnesses to trial but could not subpoena them because of the 100 mile service limitation of rule 45(e). 98 F.R.D. at 340-41. The corporate defendant in *Busch* asserted its inability to serve the nonresident witness as reason for transferring the case to the Northern District of Ohio. *Id.* The *Busch* court, however, denied the transfer request suggesting that the corporation should make use of depositions pursuant to rule 45(d)(1) to preserve testimony for trial. *Id.; see* Tatham v. Hoke, 469 F. Supp. 914, 917 (W.D.N.C. 1979) (suggesting discovery through depositions as alternative to joinder of parties). In *Tatham,* the plaintiff sued the defendant for negligently performing an abortion. 469 F. Supp. at 915. In an effort to establish his defense, the defendant in *Tatham* sought to join additional third party defendants who had also treated the plaintiff. *Id.* The district court maintained that the defendant need not join the third party defendants under rule 19 because those persons were available to defendant by way of deposition. *Id.* at 917; *see* FED. R. CIV. P. 19 (joinder of persons needed for just adjudication).

28. 733 F.2d at 638; *see supra* note 2 (text of rule 45(d)(1)).

29. 733 F.2d at 638.

30. *Id.*

31. *Id.; see* FED. R. CIV. P. 45(d)(1) (discussing proof of service requirements); *supra* note 2 (text of rule 45(d)(1)).

32. 733 F.2d at 638; *see* FED. R. CIV. P. 45(d)(2) (attendance limitations for persons designated in subpoena); *supra* note 3 (text of 45(d)(2)).

33. 733 F.2d at 638. In *Guthrie,* the Fourth Circuit noted that the Advisory Committee on Rules of Practice and Procedure has proposed amending rule 45(d)(2). *Id.* at 638 n.9; *see infra* notes 62-66 and accompanying text (discussion of proposed amendment to rule 45(d)(2) in relation to Fourth Circuit's *Guthrie* holding).

that witness to attend.[34] Rule 45(d)(2) provides that a district court may compel a nonresident witness to attend a deposition only in the county where the court serves the subpoena or within forty miles of the place of service.[35] Rule 45(d)(2) also authorizes the district court to compel a nonresident witness to attend a deposition at a convenient location determined by the court.[36] In ascertaining whether the provisions of rule 45(d)(2) permit a district court to serve a deposition subpoena outside the district but within forty miles of the court, the Fourth Circuit, recognizing the paucity of case law addressing the issue, relied on the work of one commentator which suggests that a district court issuing a deposition subpoena is powerless to serve the subpoena outside the judicial district.[37] This commentator noted that a district court must serve a deposition subpoena within the judicial district since rule 45(d)(2) does not have a provision similar to that embodied in rule 45(e), which governs trial subpoenas and permits extraterritorial service of subpoenas up to one hundred miles from the place of the trial.[38]

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34. 733 F.2d at 638.

35. FED. R. CIV. P. 45(d)(2); *see supra* note 3 (text of rule 45(d)(2)).

36. FED. R. CIV. P. 45(d)(2); *see supra* note 3 (text of rule 45(d)(2)).

37. 733 F.2d at 638-39. The *Guthrie* court quoted a footnote in Moore's treatise on civil procedure which states:

> Rule 45(d)(2) deals with the place at which a witness can be called upon to appear. It does not deal with the place at which the subpoena may be served. This is left governed by the general principles of territorial jurisdiction. Since service of a subpoena to take a deposition is unaided by the 100 mile provision of Rule 45(e), the subpoena must be served within the district.

Id.

38. *Id.*; 5A J. MOORE, *supra* note 1, ¶ 46.06[1] n.6, at 56. In commenting that a district court must serve a subpoena within the district, Professor Moore relied upon *Application of Johnson and Johnson*. 5A J. MOORE, *supra* note 1, ¶ 46.06[1] n.6, at 56; *see also* Application of Johnson and Johnson, 59 F.R.D. 174 (D. Del. 1973). In *Johnson and Johnson*, the petitioner caused the United States District Court for the District of Delaware to issue deposition subpoenas pursuant to § 24 of title 35 of the United States Code, which governs the issuance of subpoenas for the taking of depositions in patent and trademark cases. 59 F.R.D. at 176. Section 24 embodies Federal Rule of Civil Procedure 45, which governs the attendance of witnesses and the production of documents at depositions. *See* 35 U.S.C. § 24 (1984); FED. R. CIV. P. 45; *Johnson and Johnson*, 59 F.R.D. at 178. The petitioners in *Johnson and Johnson* had the subpoenas in question served on a corporate agent within the Delaware federal district where the corporation was incorporated. 59 F.R.D. at 176. The deposition subpoena requested individual affiliates of the corporation who resided in Connecticut and Norway to appear for depositions in Delaware. *Id.* In ruling on the validity of service of the subpoenas, the district court determined that the subpoenas did not fulfill the personal service requirements of rule 45(e) and that the court lacked subpoena power to compel attendance of the nonparty witnesses. *Id.* at 177-78. *Johnson and Johnson* is distinguishable from *Guthrie* because the witnesses in *Johnson and Johnson* did not reside or work within the attendance limits of rule 45(d)(2). *See id.* at 176; *Guthrie*, 733 F.2d at 635-36. The district court in *Johnson and Johnson*, therefore could not compel the witnesses to appear at the deposition regardless of the validity of service. *See Johnson and Johnson*, 59 F.R.D. at 176 & 178. Moreover, § 24, under which the court issued the subpoenas, expressly provides that a district court sitting within the district in which the deposition is held can only issue a subpoena for a witness residing or located within the district. 35 U.S.C. § 24 (1984). *Accord* 5A J. MOORE, *supra* note 1, ¶ 45.06[1] n.6, at 56; *supra* note 37 (text of Professor Moore's comment on service of deposition subpoenas).

The Fourth Circuit adopted the view that under rule 45(d) territorial jurisdiction governs service of deposition subpoenas.[39] The Fourth Circuit reasoned that the language of rule 45(d), which restricts the site of the deposition to the district in which the court issued the subpoena, indicates that the drafters of the Federal Rules of Civil Procedure did not intend service of a deposition subpoena to across district lines.[40] The Fourth Circuit also observed that litigants wanting to depose nonresident witnesses may overcome a territorial service limitation by causing the district court sitting in the witnesses' judicial district to issue and serve the deposition subpoena.[41] The Fourth Circuit, therefore, held that rule 45(d) authorizes a district court to serve a deposition subpoena only within the judicial district from which the court issued the subpoena.[42] The *Guthrie* court accordingly quashed the subpoena issued by the Maryland district court for lack of jurisdiction to perfect service of process.[43]

The *Guthrie* problem of whether rule 45(d) places territorial limitations on service of a deposition subpoena was a question of first impression in the Fourth Circuit.[44] As the *Guthrie* decision indicates, rule 45 is subject to

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39. 733 F.2d at 639.

40. *Id.* at 639, 639 n.11.

41. *Id.; see* FED. R. CIV. P. 45(d) (proof of service of notice for taking depositions of witness); *supra* note 2 (text of rule 45(d)(1)).

42. 733 F.2d at 639. The *Guthrie* court noted several cases that the parties cited in their briefs and determined that none of the cited cases squarely addressed the issue of whether a deposition subpoena must be served within the district. *Id.* at 368 n.10. For example, the appellant, the Clerk of the House of Representatives cited *Norris v. Georgia* and *Central Operating Co. v. Utility Workers of Am.* in support of the assertion that the Maryland district court lacked personal jurisdiction to issue the subpoena in the District of Columbia. Appellant's Brief at 16, *supra* note 11; see Norris v. Georgia, 522 F.2d 1006, 1009 n.2 (4th Cir. 1975) (district court cannot serve process outside district unless authorized by statute or rule); Central Operating Co. v. Utility Members of Am., 491 F.2d 245, 249 (4th Cir. 1974) (district court cannot acquire jurisdiction over nonresident defendant unless served with process as authorized by federal statute or rule). The Fourth Circuit noted, however, that neither *Norris* nor *Central Operating* involved service of a deposition subpoena under rule 45(d). 733 F.2d at 638 n.10; *see Norris,* 522 F.2d 1006; *Central Operating,* 491 F.2d 245. The *Guthrie* court similarly distinguished *Johnson and Johnson* by pointing out that *Johnson and Johnson* addresses the issue of where a corporate officer may be deposed pursuant to service on the corporation. *Id.; see* Application of Johnson and Johnson 59 F.R.D. 174, 176-78 (D. Del. 1973); *supra* note 38 (discussing *Johnson and Johnson*). Finally, the Fourth Circuit in *Guthrie* maintained that the plaintiff's only case authority in support of extraterritorial service concerned the attendance limitations of rule 45(d)(2) rather than the place of service of a deposition subpoena. 733 F.2d at 638 n.10; *see* United States v. Cotton Valley Operators Comm., 75 F. Supp. 1 (W.D. La. 1948) (ruling that court may recognize nonresident witness residing 37 miles from site of deposition to attend deposition).

43. 733 F.2d at 639.

44. *See supra* note 42 (Fourth Circuit distinguished cases cited by parties in *Guthrie*). A number of courts have considered the provisions of rule 45(d) in various contexts, but few, if any, have focused on the validity of a deposition subpoena served on a nonparty witness residing within the 40 mile provision of rule 45(d)(2) but beyond the district line. *See, e.g.,* Celanese Corp. v. Duplan Corp., 502 F.2d 188, 189 (4th Cir. 1974) (upholding general rule that witnesses and parties attending judicial proceeding outside territorial jurisdiction of residence are immune from process for purposes of another suit while in that jurisdiction), *cert. denied,* 420 U.S. 929 (1975); Cates v. LTV Aerospace Corp., 480 F.2d 620, 623 (4th Cir. 1973) (person

alternative interpretations concerning geographic service requirements because of the absence of a provision in the rule delineating the limits of valid service.[45] The Fourth Circuit's interpretation of rule 45 provides that a district court must serve a deposition subpoena within the court's judicial district.[46] An alternative construction, which the district court in *Guthrie* asserted, would permit a district court to serve a deposition subpoena beyond district lines provided that the court could compel the witness' attendance at the deposition in accordance with the attendance limitations of rule 45(d)(2).[47]

As the Fourth Circuit's inquiry in *Guthrie* indicates, rule 45 provides little guidance in ascertaining which interpretation of rule 45(d) the drafters of the rule intended.[48] Other provisions of the Federal Rules that operate similarly to rule 45(d) suggest that rule 45(d) was not drafted for the purpose of precluding extraterritorial service.[49] Rule 45(e)(1), for example, authorizes extraterritorial service of a subpoena for a hearing or trial.[50] Rule 45(e)(1) prevents inconvenience to witnesses and minimizes the cost of litigation.[51] Similarly, rule 17(f) of the Federal Rules of Criminal Procedure, which is substantially similar to rule 45(d) of the Federal Rules of Civil Procedure, permits extraterritorial service of a subpoena requesting a witness' appearance at a deposition.[52] Rule 17(f) takes into account the convenience of the witness

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designated by organization pursuant to rule 30(b)(6) to attend deposition and produce documents not required to travel outside limits prescribed by rule 45(d)(2)); Sykes Int'l Ltd. v. Pilch's Poultry Breeding Farms, Inc., 55 F.R.D. 138, 139 (D. Conn. 1972) (deposition issued in Connecticut and served on corporate official in Netherlands is void under rule 45(d)(2)); Elder-Beerman Stores Corp. v. Federated Dep't. Stores, 45 F.R.D. 515, 516 (S.D.N.Y. 1968) (foreign corporation doing business in judicial district is subject to subpoena duces tecum issued by district court although documents are physically located outside jurisdiction).

45. *See* 733 F.2d at 637-39 (Fourth Circuit's analysis of rule 45 to determine proper construction of that rule); FED. R. CIV. P. 45(d); *supra* notes 2-3 (text of rule 45(d)).

46. 733 F.2d at 639.

47. *See Benford*, 98 F.R.D. at 41-42 (*Benford* court's interpretation of effective service under rule 45(d)(2)); FED. R. CIV. P. 45(d)(2); *supra* note 3 (text of rule 45(d)(2)).

48. *See* 733 F.2d at 637-39 (Fourth Circuit's analysis of rule 45(d)); FED. R. CIV. P. 45(d)(2); *supra* note 3 (text of rule 45(d)(2)).

49. *See* FED. R. CIV. P. 45(e)(1) (addressing service of a subpoena for hearing or trial); *infra* note 50 (text of rule 45(e)(1)); FED. R. CRIM. P. 17(e), (f) (service and deposition provisions).

50. *See* FED. R. CIV. P. 45(e)(1). Rule 45(e)(1) provides in part:

> A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the district, or at any place without the district that is within 100 miles of the place of the hearing or trial specified in the subpoena, or at a place within the state where a state statute or rule of court permits service of a subpoena issued by a state court of general jurisdiction sitting in the place where the district court is held.

Id.

51. *See* Farmer v. Arabian Am. Oil Co., 379 U.S. 227, 234 (1964); FED. R. CIV. P. 45(e)(1) (service of subpoena for hearing or trial).

52. *See* FED. R. CRIM. P. 17(f) (addressing issuance of deposition subpoena and place of examination).

and the parties in determining where the court may require the witness to attend the deposition.[53] Rule 45(d)(2), which was also intended to protect witnesses from having to travel inordinate distances to attend a deposition, therefore, does not appear to present an intentional bar to extraterritorial service of a deposition subpoena.[54]

The Fourth Circuit's construction of rule 45(d) as precluding extraterritorial service, however, may create undue inconvenience for both the discovering party and the subpoenaed witness.[55] For example, under the Fourth Circuit's *Guthrie* decision a subpoenaed witness residing relatively close to the site of the deposition but outside the judicial district in which the deposition is to be taken is not amenable to service of process by the district sitting in that judicial district.[56] The same witness, nonetheless, is amenable to service of a deposition subpoena issuing from a district court sitting in the witness' judicial district.[57] The *Guthrie* ruling, therefore, forces the litigant to take the additional step of initiating the subpoena process in an ancillary court located in the witness' judicial district.[58] More importantly, under the Fourth Circuit's view, a district court located within the witness' judicial district may compel a witness to travel a greater distance than would be necessary if a neighboring district court located outside the district were

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53. *See id.* Federal Rule of Criminal Procedure 17(f)(2) provides: "The witness whose deposition is to be taken may be required by subpoena to attend at any place designated by the trial court, taking into account the convenience of the witness and the parties." *Id.* 17(f)(2). A district court's deposition subpoena power is broader in criminal than civil cases. 8 J. MOORE, *supra* note 1, ¶ 17.08, at 30.

54. *See* FED. R. CIV. P. 45(d)(2); *supra* note 3 (text of rule 45(d)(2)); *see also* Sykes Int'l Ltd. v. Pilch's Poultry Breeding Farms, Inc., 55 F.R.D. 138, 139 (D. Conn. 1972). In *Sykes*, the Connecticut district court cited rule 45(d)(2) and *Doble v. United States Dist. Court* for the proposition that service of a subpoena is limited by territorial restrictions. 55 F.R.D. at 139; *see* Doble v. United States Dist. Court, 249 F.2d 734, 734-35 (9th Cir. 1957) (under rule 45(c)(1) trial subpoena is void where witness resides more than 100 miles from place of trial); FED. R. CIV. P. 45(d)(2). In relying on *Doble*, the *Sykes* court apparently believed that rule 45(d)(2) operates similarly to rule 45(e)(1) in providing for effective service where compliance with attendance limitations is met. *See* 55 F.R.D. at 139.

The Advisory Committee's note of 1980 regarding rule 45(e)(1) indicates that the subpoena power of a particular district court is at least as extensive as, and often greater than, that of a state court of general jurisdiction in the state in which the district court sits. 5A J. MOORE, *supra* note 1, ¶ 45.01[19], at 14. *See* Wallace Prods. Inc. v. Falco Prods. Inc., 193 F. Supp. 520, 523 (E.D. Pa. 1957) (records of nonresident corporation with its place of business within 100 miles of district court are subject to subpoena by court but corporation itself is not subject to service of process issued out of such court). The drafters of the rules imposed attendance restrictions on district courts' subpoena power to prevent undue inconvenience to witnesses. 5A J. MOORE, *supra* note 1, ¶ 45.01[19], at 14.

55. *See infra* text accompanying notes 56-60 (effect of *Guthrie* holding on litigants and witnesses).

56. *See* 733 F.2d at 638 (Fourth Circuit's holding in *Guthrie*).

57. *See id.* (*Guthrie* requires district court to serve deposition subpoena within judicial district).

58. *See id.* (under rule 45(d)(2) litigant may cause only district court sitting within witness' judicial district to issue and serve deposition subpoena).

permitted to serve the subpoena.[59] Because the court issuing the subpoena maintains the authority to order a subpoenaed person to attend a deposition, the issuing court may compel the witness to attend the deposition at a distant site determined by the party requesting discovery even though a more convenient location exists in the neighboring judicial district.[60] Rule 45(d)(2), however, empowers the district court with the authority to designate the site of the deposition in a neighboring judicial district if that site would be more convenient for the witness and parties.[61]

A district court's option of setting the site of the deposition at a convenient place to facilitate attendance by the witness and parties is embodied in an amendment to rule 45 proposed by the Advisory Committee on Rules of Practice and Procedure.[62] The Advisory Committee's proposed amendment would increase the forty mile attendance limitation of rule 45(d)(2) to one hundred miles while disposing of the distinction between residents and nonresidents of the district.[63] The proposed amendment provides that a district court may require a subpoenaed person to attend a deposition within one hundred miles of the person's residence, place of business, location of actual service or at a convenient location fixed by the court.[64] In effect, the Advisory Committee's proposed amendment presents

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59. *See id.;* FED. R. CIV. P. 45(d)(2); *supra* note 3 (text of rule 45(d)(2)). Rule 45(d)(2), in part, provides that the court may require a resident of the district to attend a deposition at any location within the county where the witness works or resides. FED. R. CIV. P. 45(d)(2). Consequently, the court may compel the witness to attend a deposition at a distant site even though a more convenient location exists in the neighboring judicial district. *See id.* The court, however, may fix as the site of the deposition a location in a neighboring judicial district. *See id.* (providing that district court may require witness to appear for deposition at such other convenient place court orders). *But see* Producers Releasing Corp. de Cuba v. PRC Pictures, Inc., 176 F.2d 93, 95 (2d Cir. 1949) (convenience of witness is not dispositive factor under rule 45(d)(2) in district court's determination of convenient place).

60. *See* Ghandi v. Police Dept. of City of Detroit, 74 F.R.D. 115, 120 (E.D. Mich. 1977) (district court obtains jurisdiction over witness by subpoena issued pursuant to rule 45(c)); FED. R. CIV. P. 45(c) (service requirements for subpoenas); *id.* 45(d)(2); *supra* note 3 (text of rule 45(d)(2)).

61. *See* FED. R. CIV. P. 45(d)(2); *supra* note 3 (text of rule 45(d)(2)).

62. *See Preliminary Draft of Proposed Amendment To The Federal Rules of Civil Procedure,* Fed. R. Serv. 2d, Special Release at 4-5 (Aug. 1983) [hereinafter cited as *Preliminary Draft*]. The proposed amendment to rule 45(d)(2) provides that:

> A person to whom a subpoena for the taking of his deposition is directed may be required to attend at any place within 100 miles from where he resides, is employed or transacts business, or is served, or at such other convenience place as is fixed by an order of court.

Id. at 4.

63. *See id.* In the *Preliminary Draft,* the Advisory Committee's notes indicate that under today's conditions no basis exists for distinguishing between residents and nonresidents of a district. *Id.* at 5. The Advisory Committee commented that the distinction between residents and nonresidents in the existing rule 45(d)(2) often causes logistical problems in conducting litigation. *Id.* at 4.

64. *Id.; supra* note 62 (text of *Preliminary Draft*). Although at first glance the proposed amendment in the *Preliminary Draft* increasing the forty mile attendance limitation of rule

no solution to the issue of extraterritorial service as addressed in *Guthrie* because as in existing rule 45(d)(2), the proposed amendment measures attendance limitations in terms of either the witness' residence or place of business[65] and the site of the deposition.[66] Under both the existing rule 45(d)(2) and the proposed amendment, the location of the district court is not a consideration in determining where the district court may compel the witness to attend a deposition.[67] Consequently, the issue of whether a district court may serve a deposition subpoena by virtue of the court's proximity to the subpoenaed person remains uncertain under the proposed amendment to the rule.[68] The Fourth Circuit's decision in *Guthrie*, although potentially creating inconvenience to litigants as well as witnesses, nonetheless, creates certainty under both the existing rule and the proposed amendment concerning the proper district court for serving a deposition subpoena.[69] Rather than basing the district court's authority to serve a deposition subpoena on the court's proximity to the witness, the *Guthrie* ruling requires that the district court, in order to issue and serve the subpoena, be located in the witness' judicial district.[70]

In confining service of deposition subpoenas to within the judicial district, the Fourth Circuit in *Guthrie* has injected into rule 45(d), otherwise lacking a service requirement, a rigid rule for the territorial limits of service of deposition subpoenas.[71] After *Guthrie*, parties conducting discovery in the Fourth Circuit who seek to depose a nonresident, nonparty witness must cause the district court sitting within the witness' judicial district to issue

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45(d)(2) to one hundred miles appears to result in a provision similar to 45(e)(1), the two provisions remain remarkably dissimilar because the proposed amendment addresses attendance limitations whereas rule 45(e)(1) discusses service of trial subpoenas. *See Preliminary Draft, supra* note 62 at 4; FED. R. CIV. P. 45(e)(1) (subpoena for hearing or trial may be served at any place outside district that is within 100 miles of hearing or trial).

65. *See Preliminary Draft, supra* note 62 at 4. In the *Preliminary Draft*, the proposed amendment provides that a witness may be required to attend a deposition within one hundred miles of where the witness is served as an alternative to the distance from the witness' residents or place of work. *Id.*

66. *See supra* note 62 (Advisory Committee's proposed amendment to rule 45(d)(2)); *supra* note 3 (text of rule 45(d)(2)). *Compare* FED. R. CIV. P. 45(d)(2) *with Preliminary Draft, supra* note 62 (prescribing attendance limitations in terms of witness' residence or place of business and site of deposition).

67. *See* FED. R. CIV. P. 45(d)(2) (describing where district court may require subpoenaed witness to attend deposition but not addressing district court's location in relation to witness or site of deposition); *Preliminary Draft, supra* note 62, at 4 (proposed amendment to rule 45(d)(2) prescribing attendance limitation for subpoenaed persons in terms of witness' residence, place of business or where court served witness); *supra* note 3 (text of rule 45(d)(2)); *supra* note 62 (Advisory Committee's proposed amendment to rule 45(d)(2)).

68. *See Preliminary Draft, supra* note 62, at 4 (Advisory Committee's proposed amendment to rule 45(d)(2)); *supra* notes 65-67 (discussion of proposed amendment to rule 45(d)(2)).

69. *See* 733 F.2d at 639 (Fourth Circuit's holding in *Guthrie*); *supra* notes 56-60 (practical effects of *Guthrie* holding on discovering parties and witnesses).

70. *See* 733 F.2d at 639 (Fourth Circuit's holding in *Guthrie*).

71. *See supra* notes 39-42 and accompanying text (Fourth Circuit's reasoning and holding in *Guthrie*).

and duly serve the subpoena.[72] The Advisory Committee's proposed amendment to rule 45(d)(2), increasing the distance a witness may be compelled to travel to attend a deposition, does not effectuate the intent of the drafters of rule 45 with respect to service of deposition subpoenas since the Advisory Committee drafted the proposed amendments in terms substantially similar to those found in the existing rule.[73] Perhaps the Advisory Committee will take notice of the confusion now existing under rule 45(d) as indicated in *Guthrie*, and insert into the rule a provision clarifying the proper limits of effective service for deposition subpoenas.

PETER J. WALSH, JR.

F. *The Writ of Mandamus: An Unlikely Means of Appellate Relief for an Erroneous Change of Venue Order*

The writ of mandamus[1] is an appellate device which provides immediate review of a district court's interlocutory order.[2] Interlocutory orders do not

72. *See* 733 F.2d at 639 (Fourth Circuit's holding in *Guthrie*).

73. *See supra* notes 62-68 (discussion of Advisory Committee's proposed amendment to rule 45(d)(2)).

1. *See* Berger, *The Mandamus Power of the United States Courts of Appeals: A Complex and Confused Means of Appellate Control*, 31 BUFFALO L. REV. 37, 39 (1982). The writ of mandamus descended from the common law prerogative writ developed in England in the seventeenth century. *Id.* Developed within the province of the King's Bench, the common law prerogative writ compelled a public official to perform his public duty. *Id. See generally* Jenks, *The Prerogative Writs in English Law*, 32 YALE L.J. 523 (1923) (origin and historical purposes of prerogative writs). Sir Edward Coke considered the prerogative writ of mandamus as a judicial writ that issued from the King's Bench to compel a recalcitrant body to act under a Crown charter. Jenks, 32 YALE L.J. at 530.

2. *See* 16 C. WRIGHT, A. MILLER, E. COOPER, & E. GRESSMAN, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION § 3932, at 184 (1977 & Supp. 1983) [hereinafter cited as WRIGHT & MILLER]. A writ of mandamus may issue to provide interlocutory review of a district court's order. *Id.* Interlocutory appeals provide review of preliminary decisions in a case prior to the entry of a final judgment that completely disposes of all matters and issues in the case. *See* 16 WRIGHT & MILLER, *supra*, § 3920 at 6; *see also* 28 U.S.C. § 1292(b) (1982) (providing additional means for discretionary interlocutory appellate review). Section 1292(b) provides for interlocutory review if a federal district judge certifies that the order in question involves a controlling question of law and that appellate review of the interlocutory order will advance the disposition of the case. *Id.* After the district judge certifies interlocutory appellate review, the court of appeals may in its discretion permit or deny the appeal. *Id.; see also* Berger, *supra* note 1, at 38-39 (comparison of mandamus and § 1292(b) as means of attaining interlocutory appellate review). A writ of mandamus provides a broader means of acquiring an interlocutory appellate review than § 1292(b) because § 1292(b) requires both the district judge's certification of the issue and the court of appeals discretionary approval. *Id.* at 38.

address the merits of an action, but instead decide nondispositive issues or matters.[3] Appellate courts generally withhold review of interlocutory orders until the trial court renders a final judgment because interlocutory appeals would lead to piecemeal litigation and delay.[4] The writ of mandamus, therefore, provides a narrow exception to the general rule that the federal appellate courts may review only final judgments.[5]

A federal appellate court has the authority to issue a writ of mandamus in cases that lie within the court's prospective jurisdiction or that have come within the court's jurisdiction in the past.[6] A federal appellate court's

3. *See* Note, *Mandamus As A Means of Federal Interlocutory Review*, 38 OHIO ST. L.J. 301, 301 (1977) [hereinafter cited as *Mandamus*]. Interlocutory orders are preliminary determinations of nondispositive issues or matters that generally are subject to appeal only after the entry of a final judgment. *Id.*

4. *See* 28 U.S.C. § 1291 (1982). The final judgment rule states that federal courts of appeals have appellate jurisdiction over all final judgments of the district courts of the United States. *Id.; see also* Note, *Mandamus, supra* note 3, at 303. The federal courts of appeals generally favor postponing appellate review of interlocutory orders until a final judgment is rendered for a number of policy reasons. *Id.* For example, immediate review of interlocutory orders can delay the process of trial, frustrate judicial economy, and present additional burdens to already congested appellate court dockets. *Id.* For these reasons, interlocutory appeal by a writ of mandamus traditionally is reversed for exceptional cases. *Id.* at 311.

5. *See* Berger, *supra* note 1, at 40. The writ of mandamus exists to provide interlocutory appellate review in exceptional circumstances when courts of appeals should not follow the final judgment rule. *Id.; see also Ex parte* Fahey, 332 U.S. 258, 260 (1947) (mandamus is extraordinary remedy resorted to only in exceptional cases). In *Ex parte Fahey,* the United States Supreme Court denied a petition for a writ of mandamus to vacate a district court's order awarding attorney's fees. *Id.* The Supreme Court noted that the writ of mandamus is an extraordinary remedy that should be resorted to only in exceptional circumstances. *Id.* The *Fahey* Court withheld mandamus review stating that the petitioners could appeal the order awarding attorney's fees after the district court entered a final judgment in the case. *Id.; see also* Kerr v. United States District Court, 426 U.S. 394, 403 (1976) (petitioner must demonstrate clear and indisputable right to mandamus review). In *Kerr v. United States District Court,* the United States Supreme Court affirmed a denial of mandamus review of a district court's discovery order. *Id.* at 406. The Supreme Court stated that a party seeking issuance of a writ of mandamus must demonstrate an indisputable and unmistakable right to mandamus review and must prove special circumstances that prevent any other means of effective appeal. *Id.* at 403. The *Kerr* Court denied mandamus review because the petitioner could seek an *in camera* inspection of the documents requested by the district court's discovery order if the documents contained privileged material. *Id.* at 404-06.

6. *See* All Writs Act, 28 U.S.C. § 1651(a) (1982). The All Writs Act empowers the federal appellate courts to issue extraordinary writs, such as the writ of mandamus, that are necessary or appropriate in aid of the court's jurisdiction. *Id.; see also* 16 WRIGHT & MILLER, *supra* note 2, § 3932 at 185 (general discussion of All Writs Act). The statutory requirement in the All Writs Act states that the writ of mandamus may issue in aid of the court's jurisdiction. 28 U.S.C. § 1651(a) (1982). The requirement that a writ issue in aid of the court's jurisdiction means that the writ may issue if the case lies within the prospective jurisdiction of the court of appeals or has come within the court of appeals' jurisdiction in the past. 16 WRIGHT & MILLER, *supra* note 2, § 3932 at 185.

Appellate courts must consider two separate requirements in determining whether a writ of mandamus would issue in aid of the court's jurisdiction. *Id.* at 188. First, the case must have some independent basis of jurisdiction in the court in which the writ is sought. *Id.* Second, the writ of mandamus must issue in support of that independent basis of jurisdiction. *Id.* The two considerations indicate that a court may not issue a writ of mandamus to review a case that could never come before the court on appeal. *Id.* at 189.

authority to issue a writ of mandamus properly may be invoked to prevent a district court from acting outside the scope of its jurisdiction or to compel a district court to exercise its prescribed authority.[7] An appellate court's power to issue writs of mandamus is not confined, however, to a technical definition of jurisdiction.[8] A writ of mandamus properly may issue whenever a district court exceeds the boundaries of its judicial authority.[9]

Change of venue orders[10] are among the most common interlocutory orders that federal appellate courts review by writs of mandamus.[11] The courts' willingness to provide immediate review of change of venue orders

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7. *See* Kerr v. United States District Court, 426 U.S. 394, 402 (1976) (mandamus issues to correct judicial usurpation of power). In *Kerr v. United States District Court,* the United States Supreme Court stated that the writ of mandamus may issue to confine a district court to its prescribed jurisdiction or to compel an action a district court lacked the power to withhold. *Id.* The Supreme Court emphasized, however, that the availability of the writ of mandamus lies within the discretion of the federal appellate courts. *Id.* at 403; *see also Ex parte* Fahey, 332 U.S. 258, 260 (1947) (mandamus is extraordinary remedy reserved for exceptional cases).

8. *See* Will v. United States, 389 U.S. 90, 95 (1967). In *Will v. United States,* the United States Supreme Court stated that courts traditionally have issued the writ of mandamus only to confine an inferior court to its prescribed jurisdiction. *Id.* The Supreme Court noted, however, that the availability of a writ of mandamus is not confined to technical notions of subject matter or personal jurisdiction. *Id.* Rather, the Supreme Court emphasized that the writ of mandamus properly may issue to correct any judicial usurpation of power. *Id.*

9. *See* Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 382 (1953). In *Bankers Life & Cas. Co. v. Holland,* the United States Supreme Court held that a writ of mandamus may issue to correct a district court's decision that involved an abuse of judicial power. *Id.* The Court stated, however, that a writ of mandamus may not issue to review an interlocutory order that the appellate court merely thinks is erroneous. *Id.* at 383. The Supreme Court noted that a writ of mandamus provides review only in the exceptional case where there is a clear abuse of judicial discretion or authority. *Id.*

10. *See* 28 U.S.C. § 1404(a) (1982). Federal regulations provide that a federal district court may change the venue of any civil action to another district in order to provide a more convenient forum for both witnesses and parties and to support the interest of justice. *Id.* A district court, however, may change the venue of a civil action only to another district in which the suit could have been brought initially. *Id.*

11. *See* Berger, *supra* note 1, at 61. The largest percentage of published opinions concerning the issuance of writs of mandamus involve district court orders for change of venue. *Id.; see also* 16 WRIGHT & MILLER, *supra* note 2, § 3935 at 251. Numerous courts have sought to establish a standard for determining whether an appellate court should issue a writ of mandamus to review a district court's order for change of venue. 16 WRIGHT & MILLER, *supra* note 2, § 3935 at 251; *see, e.g.,* Roofing & Steel Metal Servs. v. La Quinta Motor Inns, 689 F.2d 982, 985 (11th Cir. 1982) (implying that mandamus may not issue to review district court's change of venue order unless district court abused its discretion); *In re* McDonnell-Douglas Corp., 647 F.2d 515, 516 (5th Cir. 1981) (district court's change of venue order is not reviewable by writ of mandamus unless district court abused its discretion); Federal Deposit Ins. Corp. v. Citizens Bank & Trust Co., 592 F.2d 364, 368 (7th Cir. 1979), *cert. denied,* 444 U.S. 829 (1979), (implying that mandamus may issue to review district court's change of venue order if district court disregarded compelling reasons for change of venue); Factors Etc., Inc. v. Pro Arts, Inc., 579 F.2d 215, 218 (2nd Cir. 1978), *cert. denied,* 440 U.S. 908 (1979), (mandamus may issue to correct change of venue order if district court abused its discretion); Toro Co. v. Alsop, 565 F.2d 998, 1000 (8th Cir. 1977), *cert. denied,* 435 U.S. 952 (1978), (mandamus may issue to review district court's change of venue order if district court abused its judicial power and responsibility).

reflects the federal courts' concern that effective appeal of a change of venue order may be impossible after the entry of a final judgment.[12] Moreover, the expense and delay that accompany an improper change of venue order may not be susceptible to correction on appeal from a final judgment.[13] In *In Re Ralston Purina Co.*,[14] the Fourth Circuit addressed the question whether a writ of mandamus may issue to provide immediate review of a change of venue order.[15]

In *Purina*, three plaintiffs filed a civil action against the Ralston Purina Company (Purina) in the United States District Court for the Western District of North Carolina.[16] The plaintiffs alleged that Purina practiced a company-wide policy of age discrimination[17] in violation of the Federal Age Discrimination in Employment Act.[18] Two of the *Purina* plaintiffs resided in Georgia and the third plaintiff resided in Pennsylvania.[19] None of the three *Purina* plaintiffs resided in the Western District of North Carolina.[20] The plaintiffs

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12. *See* Note, *Appellate Review of § 1404(a) Orders—Misuse of an Extraordinary Writ*, 1 J. MAR. J. PRAC. & PROC. 297, 298 (1968). After the entry of a final judgment in an appropriate forum, a change of venue order granting transfer to and retrial in another forum may compound the expense and inconvenience to the appealing party. *Id.* Moreover, after the district court enters a final judgment, an appellate court may hesitate to reverse the change of venue order and require a new trial. *Id.* In addition, after the district court enters a final judgment, the appellate court may consider the appeal of the change of venue order moot. *Id.*

13. *See* Kasey v. Molybdenum Corp. of America, 408 F.2d 16, 20 (9th Cir. 1969) (erroneous change of venue order may not receive adequate appellate review after final judgment). In *Kasey v. Molybdenum Corp. of America,* the United States Court of Appeals for the Ninth Circuit recognized that courts must narrow the scope of mandamus review to avoid the delay and expense of piecemeal interlocutory appeals. *Id.* at 19-20. The Ninth Circuit admitted, however, that a narrow scope of mandamus review essentially may deny effective appellate review in certain instances. *Id.* at 20. The Ninth Circuit recognized that without mandamus review, the delay and expense resulting from an erroneous change of venue order may not be capable of correction on appeal of a final judgment. *Id.; see also* Note, *Appealability of 1404(a) Orders: Mandamus Misapplied*, 67 YALE L.J. 122, 124 (1957) (successful appeal of change of venue order after final judgment will not enable inconvenienced party to recoup expenses resulting from erroneous change of venue order).

14. 726 F.2d 1002 (4th Cir. 1984).

15. *Id.* at 1004.

16. *Id.* at 1003. In *Purina*, plaintiff George King alleged that the Ralston Purina Company terminated King's employment in the Company's Chow Division in Georgia because of King's age. *Id.* Plaintiff Walter Elmer claimed that Purina's Grocery Products Division in Pennsylvania demoted Elmer to Assistant Regional Manager because of Elmer's age. *Id.* The third plaintiff, Morris Nelson asserted that Purina's Private Label Sales Group in Georgia demoted Nelson to salesman because of Nelson's age. *Id.*

17. *Id.* The plaintiffs in *Purina* alleged that the Ralston Purina Company engaged in a company-wide policy of dismissing or demoting employees approaching the age of 55. *Id.*

18. *Id.; see* 29 U.S.C. §§ 621-623(a)(1) (1982). The stated purpose of the Age Discrimination in Employment Act is to prohibit arbitrary discrimination in employment practices on the basis of age. 29 U.S.C. § 621(b) (1982). The Act prohibits employers from discriminating against any person with regard to compensation or conditions of employment because of the individual's age. *Id.* at § 623(a)(1).

19. 726 F.2d at 1003. In *Purina*, plaintiffs King and Nelson resided in Georgia. *Id.* The third plaintiff, Elmer, resided in Pennsylvania. *Id.*

20. *Id.*

contended, however, that the Western District of North Carolina was the most convenient forum because it was an equidistant point between the plaintiffs' residences in Georgia and Pennsylvania.[21]

Purina filed a motion with the district court to dismiss the plaintiffs' complaint for improper venue since the plaintiffs did not reside in the Western District of North Carolina and the transactions at issue did not occur in North Carolina.[22] Alternatively, Purina requested that the district court sever the plaintiffs' claims and transfer the claims to the respective jurisdictions in which each plaintiff resided.[23] The district court denied Purina's alternative motions to dismiss or to sever and transfer the plaintiffs' claims.[24]

After analyzing Purina's motions, the district court concluded that Purina's business operations in Charlotte, North Carolina made the Western District of North Carolina a corporate residence of the Ralston Purina Company and therefore a place of proper venue for suits against Purina.[25]

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21. *Id.* at 1003-04. In addition to alleging that the Western District of North Carolina was equidistant from the plaintiff's homes, the plaintiffs in *Purina* also emphasized that the Western District of North Carolina was the most convenient forum because a number of present and former employees of Purina who would testify on behalf of the plaintiffs resided in or near the district. *Id.* The plaintiffs further stated that the Western District of North Carolina was the most convenient forum because all of the plaintiffs had retained the services of counsel located in the district. *Id.* at 1004.

22. *Id.* at 1003. In *Purina*, defendant Purina sought to dismiss the plaintiffs' claims for improper venue because the plaintiffs' claims arose in different districts and had no logical or legal relationship to the Western District of North Carolina. *Id.* Purina also emphasized that the plaintiffs' claims would be controlled by the substantive law of Pennsylvania and Georgia and not by the law of North Carolina. *Id.*

23. *Id.* In *Purina*, the Ralston Purina Company contended that the plaintiffs' respective home jurisdictions in Georgia and Pennsylvania would provide more convenient forums for the litigation of the plaintiffs' claims. *Id.* First, Purina stated that the basis of each plaintiff's claim arose in their respective home jurisdictions of Pennsylvania and Georgia and not in the Western District of North Carolina. *Id.* Purina also alleged that Purina's witnesses located in Georgia and Pennsylvania would be inconvenienced by having to travel to North Carolina if the plaintiffs' claims were not severed and transferred. *Id.; see* Brief for Petitioner at 5, *In re* Ralston Purina Co., 726 F.2d 1002 (4th Cir. 1984). In support of Purina's motion to sever and transfer the plaintiffs' claims, Purina also stated that the divisions in which the plaintiffs had worked or were then working were administratively distinct and separate entities headquartered in different districts. Brief for Petitioner at 5, *Purina*. Purina emphasized that the specific circumstances leading to each plaintiffs' alleged termination or demotion therefore would be litigated more conveniently in the districts where the plaintiffs' claims arose. *Id. But see supra* note 21 and accompanying text (discussion of plaintiffs' arguments in *Purina* opposing change of venue order).

24. 726 F.2d at 1004.

25. *Id.; see* 28 U.S.C. § 1391(c) (1982). Federal law provides that the judicial district where a corporation is incorporated, licensed to do business, or actually doing business may be considered the corporation's residence and, therefore, a place of proper venue for suits against the corporation. 28 U.S.C. § 1391(c) (1982). Purina's business offices in Charlotte, North Carolina included the South Atlantic Regional Office of Purina's Grocery Products Division, a sales office of Purina's Chow Division, and a Purina feed mill. 726 F.2d at 1003. Because of Purina's business operations in Charlotte, the district court concluded that the Western District of North Carolina was a place of proper venue for suits against Purina. *Id.*

The district court also stated that the plaintiffs allegations of a company-wide policy of discrimination permitted the plaintiffs to join their claims in this action.[26] The district court emphasized that the plaintiffs' attempt to prove a company-wide policy of discrimination might be prejudiced and the presentation of evidence unnecessarily duplicated if the court severed and transferred the plaintiffs' claims.[27] The district court noted that a combined trial in North Carolina might inconvenience Purina and Purina's witnesses, but the court stated that mere inconvenience did not warrant severance and transfer of the plaintiffs' claims.[28]

In response to the district court's refusal to dismiss or transfer the plaintiff's claims, Purina filed a motion with the district court to permit an immediate appeal of the motion to sever and transfer.[29] The district court denied Purina's motion to permit an interlocutory appeal.[30] Purina subsequently filed a petition for a writ of mandamus with the United States Court of Appeals for the Fourth Circuit.[31] Purina asserted that the plaintiffs' claims should be severed and transferred because the claims arose in different districts and were factually unrelated.[32] Purina also alleged that the plaintiffs' claims had no relationship to the Western District of North Carolina and would not be governed by the law of North Carolina.[33] Finally, Purina

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26. 726 F.2d at 1004; *see* FED. R. CIV. P. 20(a). Rule 20(a) of the Federal Rules of Civil Procedure permits parties to join together in an action as plaintiffs if the parties' claims arise out of a common series of transactions or occurrences. FED. R. CIV. P. 20(a). The district court in *Purina* held that each plaintiff asserted a right to relief arising out of the same series of transactions or occurrences because each plaintiff alleged injury from the same company-wide policy of age discrimination. 726 F.2d at 1004; *see also* Brief for Respondent at 7, *In re* Ralston Purina Co., 726 F.2d 1002 (4th Cir. 1984). The plaintiffs asserted that the Age Discrimination in Employment Act (ADEA) specifically created a permissive joinder provision to enable aggrieved employees to join their claims against their employer in one lawsuit. Brief for Respondent at 7, *Purina; see* 29 U.S.C. § 626(b) (1982) (incorporating permissive joinder provision of 29 U.S.C. § 216(b) in ADEA); *see also* 29 U.S.C. § 216(b) (1982) (any one or more employees may maintain an action against their employer for themselves or on behalf of other employees similarly situated). The plaintiffs emphasized that Congress included the permissive joinder provision in the ADEA to achieve economy of time and effort and to grant additional bargaining power to aggrieved employees. Brief for Respondent at 9, *Purina*; *see* 29 U.S.C. § 626(b) (1982) (incorporating permissive joinder provision of 29 U.S.C. § 216(b) in ADEA); *see also* 29 U.S.C. § 216(b) (1982) (any one or more employees may maintain an action against their employer for themselves or on behalf of other employees similarly situated).

27. 726 F.2d at 1004. In *Purina*, the district court stated that the plaintiffs' attempts to prove a company-wide policy of discrimination would suffer if the court granted Purina's motion to sever and transfer the plaintiffs' claims. *Id.* The district court reasoned that the plaintiffs would suffer prejudice because each would be required to prove a company-wide policy of age discrimination in a separate case. *Id.*

28. *Id.*

29. *Id.*

30. *Id.; see supra* note 4 and accompanying text (appellate courts generally withhold review of interlocutory orders until trial court enters final judgment).

31. 726 F.2d at 1004. In *Purina*, defendant Purina alleged that the district court abused its discretion in not severing and transferring the plaintiffs' claims. *Id.*

32. *Id.*

33. *Id.*

contended that the plaintiffs had not presented sufficient evidence of a company-wide policy of age discrimination to warrant joinder of their claims.[34]

In reviewing Purina's motion for a writ of mandamus, the Fourth Circuit recognized that any delay in appellate review might prejudice Purina.[35] The Fourth Circuit noted that hearing the plaintiffs' claims together in North Carolina might inconvenience and prejudice Purina by requiring Purina to undergo a trial on the merits and secure the testimony of witnesses located in Georgia and Pennsylvania prior to an appellate ruling on the change of venue issue.[36] The Fourth Circuit emphasized, however, that the issuance of a writ of mandamus is reserved for exceptional cases.[37] Following the precedent established by the United States Supreme Court in *Allied Chemical Co. v. Daiflon, Inc.*[38] and *Roche v. Evaporated Milk Association*,[39] the

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34. *Id.*

35. *Id.*

36. *Id.* In *Purina*, the Fourth Circuit stated that a writ of mandamus should not issue merely because it would be inconvenient for Purina to undergo a trial on the merits prior to an appellate ruling on the change of venue issue. *Id.*

37. *Id. See supra* notes 4-5 and accompanying text (writ of mandamus is extraordinary remedy reserved for exceptional cases).

38. 449 U.S. 33 (1980). In *Allied Chemical Corp. v. Daiflon, Inc.*, the plaintiff brought an antitrust suit against all domestic manufacturers of refrigerant gas. *Id.* After the jury returned a verdict for the plaintiff, the trial court granted the defendants' motion for a new trial. *Id.* The plaintiff then petitioned the United States Court of Appeals for the Tenth Circuit for a writ of mandamus to instruct the trial court to reinstate the jury verdict. *Id.* at 34. After the Tenth Circuit granted mandamus review the plaintiff sought review of the Tenth Circuit's action in the United States Supreme Court. *Id.*

The Supreme Court stated that a trial court's order granting a new trial rarely will justify the issuance of a writ of mandamus. *Id.* at 36. The *Allied* Court held that before a writ of mandamus can issue a mandamus petitioner must demonstrate first, that he has a clear and indisputable right to mandamus review and second, that he has no other adequate means of appellate relief. *Id.* The Supreme Court stated that because the authority to grant a new trial is committed to the trial court's discretion, the plaintiff could not assert a clear and indisputable right to mandamus review. *Id.* The *Allied* Court further stated that the plaintiff could not establish that it had no other adequate means of appellate relief because the plaintiff could seek review of the propriety of the trial court's order after the entry of a final judgment. *Id.* The Supreme Court therefore reversed the Tenth Circuit's order granting mandamus review. *Id.* at 37.

39. 319 U.S. 21 (1943). In *Roche v. Evaporated Milk Assn.*, the grand jury sitting in the United States District Court for the Southern District of California indicted the defendants for conspiracy to fix evaporated milk prices. *Id.* at 22. The defendants filed pleas in abatement to the grand jury's indictment. *Id.* at 23. The district court granted the plaintiff's motion to strike the defendants' pleas in abatement. *Id.* at 24. The defendant then petitioned the United States Court of Appeals for the Ninth Circuit for a writ of mandamus to present at trial the issues raised in the pleas in abatement. *Id.* The Ninth Circuit issued a writ of mandamus stating that the district court erred in striking the defendants' pleas in abatement. *Id.* On a writ of certiorari, the Supreme Court in *Roche* stated that the issues presented in the case did not justify the issuance of a writ of mandamus because the district court had exercised its prescribed jurisdiction properly. *Id.* at 26. The *Roche* Court held that a writ of mandamus may issue only to correct an abuse of judicial authority or the unjustifiable refusal to exercise judicial authority. *Id.* at 31. The Supreme Court stated that a writ of mandamus should not issue in *Roche* because the

Fourth Circuit noted that a party seeking mandamus review must demonstrate a clear and indisputable right to the issuance of a writ of mandamus.[40] In *Roche*, the Supreme Court stated that because the mandamus review circumvents the general rule that appellate courts should review only final judgments, a writ of mandamus may issue only to correct an abuse of judicial authority.[41] In *Allied*, the Supreme Court refined its holding in *Roche* and established a two-prong test for determining whether a writ of mandamus may issue.[42] First, the *Allied* Court stated that before a writ of mandamus may issue, a mandamus petitioner must demonstrate an unmistakable and indisputable right to mandamus review.[43] Second, the Allied Court emphasized that a mandamus petitioner must demonstrate that he has no adequate means of appellate relief other than a writ of mandamus.[44]

The Fourth Circuit noted that a change of venue order, which is within a district court's discretion,[45] rarely can provide justification for the issuance of a writ of mandamus.[46] The *Purina* court emphasized that a writ of

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Roche district court had not abused its judicial power. *Id.* at 27. The *Roche* Court further stated that a writ of mandamus should not issue because any alleged error could be reviewed on appeal from a final judgment. *Id.*

40. 726 F.2d at 1004; *see supra* note 38 (mandamus petitioner must demonstrate clear and indisputable right to mandamus review and no other adequate means of appellate relief).

41. 319 U.S. at 31; *see supra* note 39 (*Roche* Court held that mandamus may issue only to correct an abuse of judicial power).

42. 449 U.S. at 35; *see supra* note 38 (discussion of *Allied* opinion).

43. *Id.; see supra* note 38 (mandamus petitioner must demonstrate clear and indisputable right to mandamus review).

44. 449 U.S. at 35; *see supra* note 38 (mandamus may not issue as substitute for appeal).

45. *See* Commodity Futures Trading Comm'n. v. Savage, 611 F.2d 270, 278-79 (9th Cir. 1979) (change of venue order is committed to district court's discretion). In *Commodity Futures Trading Comm'n. v. Savage*, the Commodity Futures Trading Commission (CFTC) filed suit against a commodity trader in the United States District Court for the Central District of California. *Id.* at 273. The CFTC alleged that the defendant had defrauded customers who resided in the Central District of California. *Id.* at 278. The defendant in *Commodity Futures* filed a motion in the district court to change the venue of the suit to the United States District Court for the Northern District of Illinois because the defendant resided and had executed the commodity transactions at issue in the Northern District of Illinois. *Id.* at 277. The district court in *Commodity Futures* denied the defendant's motion for change of venue to the Northern District of Illinois. *Id.* The United States Court of Appeals for the Ninth Circuit refused to grant a writ of mandamus in *Commodity Futures*, to review the district court's denial of the defendant's change of venue motion. *Id.* at 279. The Ninth Circuit stated that a district court judge enjoys broad discretion to determine whether the convenience of parties and witnesses and the interests of justice are best served by a change of venue. *Id.* at 279.

46. 726 F.2d at 1005. In stating that a change of venue order generally is not immediately appealable, the *Purina* court relied upon an earlier Fourth Circuit holding in *Jiffy Lubricator Co. v. Stewart-Warner Corp. Id.; see* Jiffy Lubricator Co. v. Stewart-Warner Corp., 177 F.2d 360, 362 (4th Cir. 1949), *cert. denied*, 338 U.S. 947 (1950). In *Jiffy*, the plaintiff, a North Dakota corporation, filed a patent infringement suit against the defendant in the United States District Court for the Eastern District of Virginia. 177 F.2d at 361. The defendant, a Virginia corporation with its principal place of business in Illinois, filed a motion in the district court to change the venue of the suit to the Northern District of Illinois. *Id.* The district court granted the defendant's motion and transferred the action to the Northern District of Illinois. *Id.* The plaintiff sought immediate review of the district court's change of venue order. *Id.* In denying

mandamus may issue only if a district court abused its judicial authority, and not in cases of abuse of a district court's discretion.[47] The Fourth Circuit stated, therefore, that a discretionary change of venue order may not provide a mandamus petitioner with a clear and indisputable right to mandamus review unless the district court clearly abused its judicial authority.[48] The *Purina* court noted that although Purina alleged that the district court had abused its discretion in denying Purina's change of venue motion, Purina failed to show that the district court had abused its judicial authority.[49] The Fourth Circuit held that for a mandamus petitioner to demonstrate a clear and indisputable right to mandamus review, the petitioners must show exceptional circumstances amounting to a judicial usurpation of authority.[50] The Fourth Circuit concluded, therefore, that Purina's allegation that the district court had abused its discretion by denying Purina's change of venue motion would not satisfy the Supreme Court's standard for the issuance of a writ of mandamus.[51]

Contrary to the majority's holding, the dissent in *Purina* contended that the case presented an extraordinary situation justifying the issuance of a writ of mandamus.[52] The dissent termed the plaintiffs' choice of venue a flagrant example of forum shopping and claimed that the plaintiffs' conduct presented substantial justification for the issuance of a writ of mandamus.[53] The dissent

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the plaintiff's motion for review, the United States Court of Appeals for the Fourth Circuit held that a change of venue order is not appealable until the district court has entered a final judgment. *Id.* The *Jiffy* court stated further that an order granting or denying a change of venue rests within the district court's sound discretion. *Id.* at 362.

47. 726 F.2d at 1005; *see* Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. at 35 (mandamus may issue only to correct usurpation of judicial authority); *see supra* note 38 (discussion of the *Allied* Court's holding).

48. 726 F.2d at 1005; *see* Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. at 36. In *Allied*, the Supreme Court stated that, unless a district court had abused its judicial authority, a matter committed to the district court's discretion would not provide a mandamus petitioner with a clear and indisputable right to mandamus review. 449 U.S. at 36.

49. 726 F.2d at 1004; *see supra* notes 31-34 and accompanying text (Purina alleged that district court's denial of change of venue motion was abuse of discretion).

50. 726 F.2d at 1005; *see* Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. at 35 (mandamus petitioner must show that clear and indisputable right to mandamus review exists and that no other adequate means of appellate relief is available); *see supra* note 38 (discussion of *Allied* Court's holding).

51. 726 F.2d at 1006; *see* Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. at 35 (mandamus is drastic remedy issued to correct judicial usurpation of authority); Roche v. Evaporated Milk Ass'n, 319 U.S. at 30 (mandamus may issue only to correct abuse of judicial authority and not as substitute for appeal).

52. 726 F.2d at 1006. In *Purina*, the dissent stated that a writ of mandamus should have issued because Purina would have been unable to obtain effective appellate relief after a final judgment had been entered. *Id.* The dissent stated that after Purina had endured the expense and inconvenience of defending against the consolidated actions an appeal of the change of venue order would be futile because appellate courts would hesitate to reverse a change of venue order and require a new trial. *Id.* Moreover, the dissent noted that appellate courts might even consider the issue moot. *Id.*

53. *Id.* at 1006; *see* Pain v. United Technologies Corp., 637 F.2d 775, 783 (D.C. Cir. 1980), *cert. denied*, 454 U.S. 1128 (1981). In *Pain v. United Technologies Corp.*, the United

also asserted that the Fourth Circuit's failure to issue a writ of mandamus would foster the practice of forum shopping, a practice specifically censured by the Supreme Court.[54] The dissent in *Purina*, therefore, asserted that interests of fairness demanded that a writ of mandamus issue to sever and change the venue of the plaintiffs' claims.[55]

Substantial disagreement exists, however, among the federal circuit courts of appeals concerning the appropriate use of mandamus as a remedy for a district court's abuse of discretion.[56] Specifically, the courts of appeals have disagreed on the standard courts should apply in deciding whether to issue a writ of mandamus to review a district court's change of venue order.[57] In *Purina*, the Fourth Circuit stated that a mandamus petitioner must show an abuse of judicial authority, not merely an abuse of discretion, to warrant issuance of a writ of mandamus.[58] Likewise, the United States Court of Appeals for the Eighth Circuit also has held that a writ of mandamus may issue to review a district court's change of venue order only if the district court abused its judicial power and responsibility.[59]

In *Toro Co. v. Alsop*,[60] the plaintiff, the Toro Company, petitioned the Eighth Circuit for a writ of mandamus to review a district court's change of venue order.[61] In *Toro*, the plaintiff had filed a patent infringement suit against the defendant, Weed Eater, Inc. (Weed Eater), in the United States District Court for the District of Minnesota.[62] On a motion by the defendant, the district court had severed one count of the plaintiff's complaint and had changed the venue of the severed count to the United States District Court for the District of Kansas.[63] The plaintiff petitioned for a writ of mandamus

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States Court of Appeals for the District of Columbia Circuit defined forum shopping as a party's strategy of forcing the trial at the most inconvenient forum for an adversary. 637 F.2d at 783. The *Pain* court stated, however, that the plaintiff's choice of forum should not be disturbed unless the plaintiff's choice would inflict unnecessary expense and trouble on the defendant. *Id.*

54. 726 F.2d at 1006; *see* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947). In *Gilbert*, the United States Supreme Court stated that a plaintiff may not choose an inconvenient forum for the purpose of harassing the defendant with unnecessary trouble and expense. 330 U.S. at 508.

55. 726 F.2d at 1006-07; *see supra* note 52 and accompanying text (dissent stated that mandamus should have issued because Purina would be unable to obtain any other means of effective appellate relief).

56. *See supra* note 11 (discussion of varying standards among courts of appeals for issuance of mandamus to correct erroneous change of venue orders).

57. *Id.*

58. *See supra* notes 47-50 and accompanying text (mandamus may issue to correct district court's abuse or judicial authority but not to review an alleged abuse of discretion).

59. *See* Toro Co. v. Alsop, 565 F.2d 998, 1000 (8th Cir. 1977) (mandamus may issue to review district court's change of venue order only if district court abused its judicial power and responsibility), *cert. denied*, 435 U.S. 952 (1978).

60. 565 F.2d 998 (8th Cir. 1977).

61. *Id.* at 1000.

62. *Id.* at 999.

63. *Id.* In *Toro*, the district court severed the count of Toro's complaint which charged that Weed Eater's patents were invalid, unenforceable, and not infringed. *Id.*

to review the district court's change of venue order.[64] The United States Court of Appeals for the Eighth Circuit held that a writ of mandamus may issue to review a district court's change of venue order only if the district court abused its judicial power and responsibility.[65] In reviewing the plaintiff's claim, however, the Eighth Circuit found that the district court had granted the defendant's change of venue motion because the patent infringement issues addressed in the severed count were embraced in a patent suit pending in Kansas.[66] The Eighth Circuit, therefore, denied mandamus review because the district court had not abused its judicial authority in granting a change of venue.[67]

In contrast to the views of the Fourth and Eighth Circuits, other circuit courts of appeals have stated that a writ of mandamus may issue whenever a district court clearly has abused its discretion.[68] The United States Court of Appeals for the Fifth Circuit, for example, has held that a writ of mandamus may issue to review a district court's change of venue order if the district court clearly abused its discretion.[69] In *In re McDonnell-Douglas Corp.*,[70] the defendant, McDonnell-Douglas Corporation, petitioned the Fifth Circuit for a writ of mandamus to review the district court's denial of the defendant's change of venue motion.[71]

In *McDonnell-Douglas*, the defendant had sought to change the venue of an admiralty action from the United States District Court for the Eastern District of Texas to the United States District Court for the Eastern District of Missouri.[72] The Texas district court had denied the defendant's change of venue motion because the plaintiffs were residents of Texas and the defendant was authorized to do business in Texas.[73] In considering the defendant's petition for a writ of mandamus, the Fifth Circuit noted that the convenience of parties and witnesses did not weigh so heavily in favor of the defendant as to justify a change of venue.[74] The Fifth Circuit, therefore, upheld the district court's denial of the defendant's change of venue motion because the district court had not clearly abused its discretion.[75] The United States Courts of Appeals for the Eleventh and Second Circuits also have held that to warrant mandamus review a petitioner must demonstrate that a district

64. *Id.* at 1000.
65. *Id.*
66. *Id.*
67. *Id.* at 1000-01.
68. *See supra* note 11 (discussion of varying standards among courts of appeals for issuance of mandamus to correct erroneous change of venue orders).
69. *See In re* McDonnell-Douglas Corp., 647 F.2d 515, 517 (5th Cir. 1981) (mandamus may issue to review a district court's change of venue order if district court failed to consider relevant factors or clearly abused its discretion).
70. 647 F.2d 515 (5th Cir. 1981).
71. *Id.* at 516.
72. *Id.*
73. *Id.* at 517.
74. *Id.*
75. *Id.* at 516-17.

court clearly abused its discretion in granting or denying a change of venue motion.[76] The United States Court of Appeals for the Seventh Circuit has agreed, holding that a writ of mandamus may issue to review a district court's change of venue order if the district court disregarded a compelling reason for change of venue or if the court abused its broad discretion.[77]

Despite varied standards among the United States circuit courts of appeal, the United States Supreme Court's recent decisions strongly support the Fourth Circuit's restrictive standard for mandamus review.[78] The *Allied* Court emphasized that the congressional policy against piecemeal appellate review would be undermined if mandamus issued in anything less than an extraordinary situation.[79] The congressional policy of avoiding the expense and delay of piecemeal appeals is not furthered, however, when a circuit

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76. *See* Roofing & Sheet Metal Servs. v. La Quinta Motor Inns, 689 F.2d 982, 984 (11th Cir. 1982). In *La Quinta*, the plaintiff, Roofing & Sheet Metal Services, Inc. (Roofing), filed suit in the Western District of Arkansas against the defendant, La Quinta Motor Inns (La Quinta), who failed to pay for services and materials under a contract for the reroofing of a La Quinta Motor Inn in Alabama. *Id.* at 984. The plaintiff brought suit in the Western District of Arkansas because the plaintiff was an Arkansas corporation and the contract at issue was executed in Arkansas. *Id.* On a motion by the defendant, the district court changed the venue of the case to the Southern District of Alabama because the case required investigation into the work performed in Alabama. *Id.* at 985. The plaintiff petitioned the Eleventh Circuit for mandamus review, but the Eleventh Circuit rejected the petition on the grounds that the court lacked the appellate jurisdiction to review a change of venue order of a district court located in the Eighth Circuit. *Id.* at 985-86. The Eleventh Circuit stated, however, that a writ of mandamus may issue to review a district court's change of venue order only if the district court clearly abused its discretion. *Id.* at 988; *see also* Factors Etc., Inc. v. Pro Arts, Inc., 579 F.2d 215, 218 (2nd Cir. 1978), *cert. denied,* 440 U.S. 908 (1979) (implying that mandamus may not issue to review a district court's change of venue order unless district court abused its discretion).

77. *See* Federal Deposit Ins. Corp. v. Citizens Bank & Trust Co., 592 F.2d 364, 367 (7th Cir. 1979), *cert. denied*, 444 U.S. 829 (1979). In *Citizens Bank*, the plaintiff, Federal Deposit Insurance Corporation (FDIC), filed suit against the defendant, Citizens Bank & Trust Company (Citizens Bank), in the United States District Court for the Northern District of Illinois. *Id.* The defendant filed a motion to change the venue of the case to the Northern District of Ohio where its witnesses were located. *Id.* at 367-68. The district court stated that a court must give some weight to the plaintiff's choice of forum and denied the defendant's change of venue motion. *Id.* In considering the defendants petition for a writ of mandamus, the United States Court of Appeals for the Seventh Circuit held that a writ of mandamus may issue to review a district court's change of venue order only if the district court disregarded a compelling reason for change of venue or if the district court abused its broad discretion. *Id.* Since the plaintiff asserted that it would need to depose Citizens Bank employees, who resided in Illinois, the Seventh Circuit stated that the convenience of the parties and witnesses did not weigh in favor of a change of venue to the Northern District of Ohio. *Id.* The Seventh Circuit, therefore, denied mandamus review stating that the district court did not abuse its discretion in denying Citizen Bank's change of venue motion. *Id.*

78. *See supra* note 38 (discussion of Supreme Court's holding in *Allied*).

79. *See* Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. at 35. In *Allied*, the United States Supreme Court stated that since the Judiciary Act of 1789 Congress has favored postponing appellate review until the trial court has rendered a final judgment. *Id.* The *Allied* court emphasized that the issuance of a writ of mandamus in anything less than an extraordinary situation would undermine the longstanding congressional policy against piecemeal appeals. *Id.* at 36.

court of appeals must evaluate the merits of a district court's discretionary judgment before deciding whether to grant mandamus review.[80] In the *Purina* case, the Fourth Circuit denied mandamus review only after evaluating the merits of the district court's ruling on Purina's change of venue motion.[81] For example, the Fourth Circuit had to analyze whether the plaintiffs' allegations that a company-wide policy of age discrimination necessitated the joinder of the plaintiffs' claims.[82] The Fourth Circuit in *Purina* concluded that the importance of hearing the plaintiffs' claims together outweighed any potential inconvenience to Purina in securing the testimony of its witnesses in Georgia and Pennsylvania.[83] If a petition for a writ of mandamus requires limited review of the merits of a district court's interlocutory order the mandamus process will involve the very expense and delay Congress sought to avoid in enacting the final judgment rule.[84]

In *Purina*, the Fourth Circuit's opinion stated and correctly applied the Supreme Court's most recent standards for the issuance of writs of mandamus.[85] The Fourth Circuit's holding is, therefore, consistent with a Supreme Court precedent. If a circuit court of appeals will evaluate the merits of a district court's change of venue order on a petition for a writ of mandamus and involve the expense and delay of interlocutory review, however, it is not sensible for the court to apply the stringent standard of abuse of judicial authority and deny mandamus review merely to preserve the integrity of the final judgment rule.[86] After a district court renders a final judgment, an appeal of an erroneous change of venue order will not provide adequate appellate relief. Circuit courts of appeals may hesitate to reverse a change of venue order and require a new trial or may consider the appeal of a change of venue order moot.[87] Moreover, even if an appeal of an erroneous

80. *See* Berger, *supra* note 1, at 79. One commentator has noted that the restrictive standards for the issuance of a writ of mandamus are not justified when circuit courts of appeals provide limited review of the merits of a district court's order to determine whether a writ of mandamus can issue. *Id.* The commentator stated first, that if a circuit court of appeals provides limited review of a district court's order and determines that the district court erred, it is not sensible for the court to refuse to issue a writ of mandamus merely to preserve the integrity of the final judgment rule. *Id.* at 83. Second, the commentator emphasized that if a circuit court of appeals allows the expense and delay of interlocutory review to determine whether a writ of mandamus can issue, the appellate court is in effect incorporating a more restrictive standard of review than normally applied on appeal from a final judgment. *Id.* at 79. Third, the commentator noted that the restrictive standards for the issuance of a writ of mandamus are not justified as a deterrent to piecemeal appeals if the circuit courts of appeals provide a limited review of a district court's orders whenever a party petitions for a writ of mandamus. *Id.* at 83.

81. 726 F.2d at 1005-06.

82. 726 F.2d at 1006.

83. *Id.*

84. *See supra* note 80 and accompanying text (policy against interlocutory appellate review does not justify restrictive standards for mandamus review).

85. *See* 726 F.2d at 1004-05.

86. *See supra* note 80 and accompanying text (policy against interlocutory appellate review does not justify restrictive standards for mandamus review).

87. *See supra* note 12 and accompanying text (circuit courts of appeals may hesitate to reverse a change of venue order after a final judgment).