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## Courts & (and) Procedure

## COURTS & PROCEDURE

*Aviles v. Lutz*, 887 F.2d 1046

Author: Judge Baldock

Plaintiff, Aviles, brought this action alleging defamation and tortious interference with employment rights against several government agencies and various individuals acting within the scope of their government employment. The district court dismissed the complaint, holding that Aviles's action was barred under the doctrines of sovereign immunity, res judicata, and absolute immunity. Aviles appealed.

The Tenth Circuit held that the district court lacked subject matter jurisdiction over the claims against the government agencies. A claim for money damages against the United States can proceed only if Congress has waived sovereign immunity and consented to the action. 28 U.S.C. § 1346(b) waives the government's immunity from tort actions against the United States, but not against agencies of the United States.

Although under 28 U.S.C. § 2679(d)(1) the United States must be substituted as the defendant for individuals acting within the scope of their government employment, 28 U.S.C. § 2680 exempts from the provisions of section 1346(b) any claim arising out of libel, slander, or interference with contract rights. The district court, therefore, also lacked subject matter jurisdiction over the claims against the individuals.

The judgment was affirmed, but remanded with instructions to enter judgment dismissing the complaint for lack of subject matter jurisdiction.

*Burghart v. Frisch's Restaurants, Inc.*, 865 F.2d 1162

Per Curiam

Plaintiffs, Burghart and Gosselin ("Burghart"), brought a successful action for breach of lease against their commercial tenant, defendant, Frisch's Restaurants, Inc ("Frisch"). The district court awarded recovery of the premises, but no interest or damages. Frisch appealed, and the district court entered a stay of execution of the judgment. The court also ordered the posting of a supersedeas bond, the terms of which required the continuation of the monthly rental payments provided in the lease.

Following the Tenth Circuit Court's affirmation of the judgment, Burghart filed a motion to vacate stay and for supplemental relief. Burghart attempted to cover the losses caused by Frisch's retention of the property pending the appeal since the premises could have been re-rented at a higher rate. The district court vacated the stay, but denied supplemental relief holding that neither the original judgment nor the order fixing the bond on appeal provided for post-judgment relief broader than possession and receipt of the monthly rental.

On appeal from denial of relief, the Tenth Circuit stated that uncer-

tainty about the bond's scope cannot subject a party defending an appeal a judgment in its favor to a reduced judgment. Moreover, if Burghart thought the terms of the bond inadequate, he had a duty to ask the district court to condition the stay on an obligation greater than the rental payment required. The court's affirmance of the district court's refusal for supplemental relief was not based on the failure to object. Rather, it was based on recognition that the request was outside the relief already granted by the court's original judgment.

*Cayman Exploration Corp. v. United Gas Pipeline Corp.*, 873 F.2d 1357

Author: Judge McKay

Plaintiff, Cayman Exploration ("Cayman"), appealed the district court's dismissal of its claim under FED. R. CIV. P. 12(b)(6), against United Gas Pipeline Corporation ("United"), for violation of the Sherman Antitrust Act and Racketeer Influenced and Corrupt Organizations Act ("RICO"). The district court held that Cayman failed to allege facts sufficient that, if proved, would entitle Cayman to relief.

The Tenth Circuit upheld the district court's ruling. The court held that Cayman failed to establish that United practiced unreasonable restraint on trade. Moreover, Cayman did not establish that United was guilty of vertical or horizontal price-fixing. The court reasoned that Cayman failed to allege facts showing that the parties agreed to set a price at which the other would resell to third parties. The court also held that there were insufficient facts to show a conspiracy to establish horizontal price-fixing. Cayman did not identify the alleged conspirators. Moreover, Cayman did not establish that any companies had acted in a way contrary to the best interests of their business. In addition, the court found that Cayman's RICO claim failed. The court stated that a RICO claim must allege conduct of an enterprise through a pattern of racketeering activity. Cayman failed to allege racketeering activity with sufficient particularity.

*United States ex rel. Citizen Band Potawatomi Indian Tribe v. Enterprise Management Consultants, Inc.*, 883 F.2d 886

Author: Judge Seymour

Plaintiff, Citizen Band Potawatomi Indian Tribe ("Tribe"), brought an action against defendant, Enterprise Management, Inc. ("Enterprise"), seeking a declaration that two bingo management contracts were void. The Tribe subsequently ejected Enterprise from the bingo premises. The district court then granted Enterprise's motion for a preliminary injunction, ordering the Tribe to return the bingo premises and prohibiting any future interference. The Tribe appealed.

The Tenth Circuit reversed and vacated the injunction, holding that the district court's order contained no finding of fact or legal conclusion supporting its holding that Enterprise would suffer irreparable harm if the Tribe was not enjoined. Moreover, the district court did not balance the hardships or address Enterprise's likelihood of success on the mer-

its. Finally, because Enterprise failed to raise substantial and doubtful questions about the merits of the Tribe's claim, it was proper for the court to vacate the injunction rather than remand.

*Coal Corporation Operating Co. of America v. Hodel*, 876 F.2d 860

Author: Judge Tacha

Plaintiffs, Coal Corporation Operating Co. of America ("Coal Corporation"), filed this action in December 1985 to challenge the April 1984 decision by the Secretary of the Interior, Hodel, whereby the federal government assumed responsibility for the surface coal mining inspection and enforcement program of Oklahoma. The district court dismissed the case for lack of subject matter jurisdiction, and Coal Corporation appealed.

The Tenth Circuit held that section 525(a) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1276(a), requires that a petition for review of such action be filed within sixty days from the date of the Secretary's order. The court concluded that the sixty-day limitation period is jurisdictional and that Coal Corporation's action was time-barred.

*Colorado Building and Construction Trades Council v. B.B. Andersen Construction Co. and Bank IV, Topeka, N.A. v. Regional Transportation District*, 879 F.2d 809

Author: Judge Baldock

Defendant, Regional Transportation District ("RTD"), appealed a postjudgment order holding that the security interest of plaintiff, Bank IV, Topeka, N.A. ("Bank IV"), had priority over RTD's security interest.

The Tenth Circuit reviewed the appealability of the magistrate's postjudgment order under 29 U.S.C. § 1291. The court held that although the district court undoubtedly had power to enter a final appealable order, this jurisdiction could not be conferred on a magistrate. Section 636 of the Magistrates Act authorizes a magistrate to enter final judgments only where the district court designates the magistrate to do so and where both parties consent. The merits of RTD's appeal from the postjudgment proceedings could not be addressed until the district court had reviewed the magistrate's proposed ruling in favor of Bank IV. The court dismissed for lack of jurisdiction.

*Enterprise Management Consultants, Inc. v. United States*, 883 F.2d 890

Author: Judge Seymour (dissented in part as to sanctions)

Plaintiff, Enterprise Management Consultants, Inc. ("EMCI"), brought suit against defendants, Citizen Band Potawatomi Indian Tribe ("Tribe"), and officials of the United States government, seeking injunctive relief. EMCI sought an injunction to prevent the Tribe from enforcing disapproval of a bingo management contract, which the Bureau of Indian Affairs found in violation of 25 U.S.C. § 81.

The Tenth Circuit affirmed the district court's dismissal of the case. The court found that the suit against the Tribe was barred by the sovereign immunity doctrine. In addition, the Tribe did not consent to be sued. The court also found that EMCI's action could not be maintained for failure to join the Tribe as an indispensable party. The court reasoned that the action would affect the Tribe's interest in the contract. The court determined that even though the indispensable party issue was not previously raised, the issue could not be waived. Moreover, the court had a duty to raise the issue *sua sponte*. Finally, the court denied the Tribe's request for sanctions under FED. R. Civ. P. 11.

*Farmer's Insurance Co. v. Hubbard*, 869 F.2d 565

Author: Judge Barrett

Defendant, Hubbard, was a former agent of plaintiff, Farmer's Insurance Company ("Farmer's"). The district court found that Farmer's had terminated Hubbard's employment in bad faith and denied Farmer's motion for judgment notwithstanding the verdict or alternatively, a new trial. On appeal, Farmer's attempted to raise agency issues not raised to the district court.

The Tenth Circuit affirmed, stating that issues not addressed by the district court will not be considered on appeal. The court found that it was Farmer's duty to raise all theories, arguments, and issues at the trial level. Moreover, the court found the jury had sufficient actual evidence to reach its conclusion and that the conclusion was reasonable.

*United States v. Garcia*, 879 F.2d 803

Author: Judge Anderson

Defendant, Garcia, pleaded guilty to possessing and distributing a controlled substance of less than one kilogram in 1986. The district court subsequently sentenced Garcia, requiring him to serve a term of special parole. Garcia appealed, arguing that the term of special parole was illegal.

The Tenth Circuit upheld the district court's decision. The court explained that the applicable penalty provision for Garcia's offense was 18 U.S.C. § 1841 (b)(1)(A). This provision required offenders to serve a term of special parole. In 1984, however, Congress deleted the special parole term. Congress stated that the deletion of special parole would become effective November 1, 1987, for offenses involving under one kilogram. For offenses involving over one kilogram, the deletion of special parole would become effective in 1984. Following Congress' guidelines, the court held that Garcia must serve a term of special parole. The court reasoned that Garcia's offense involved under one kilogram, and further, Garcia committed the offense in 1986.

*Glenn v. First National Bank*, 868 F.2d 368

Author: Judge Brorby

Plaintiffs appealed the dismissal of their claim against defendant, First National Bank, alleging that the district court erred in not allowing them to amend their complaint.

The Tenth Circuit affirmed the district court's decision, holding that plaintiffs failed to exercise their right to amend their complaint prior to dismissal and failed to move for a leave to amend their complaint after dismissal.

*Harvey v. United Transportation Union*, 878 F.2d 1235

Author: Judge Logan

Plaintiff, Harvey, appealed the district court's findings regarding the legality of defendant, Atchison, Topeka & Sante Fe Railway Company's ("Railway"), seniority system. Specifically, Harvey claimed that collateral estoppel prevented the Railway from relitigating the issue. Harvey also appealed arguing that the district court used erroneous legal standards in determining whether the seniority system was legal.

The Tenth Circuit previously determined that Harvey's issue preclusion claim was never raised formally until over a year after trial, which was simply too late. The court stated that the notice requirement was especially important here due to the use of offensive issue preclusion. Moreover, the court found that the district court made clear legal errors. In particular, the district court erred in its application of four factors: (1) whether the seniority system discouraged employees equally from transferring between seniority units; (2) whether the seniority units are in the same bargaining units; (3) whether the seniority system had its genesis in racial discrimination; and (4) whether the seniority system was negotiated and whether it has been maintained free from any illegal purpose. In addition, the district court failed to consider relevant evidence outside the four factors. The court reiterated the importance of considering the totality of circumstances, even if they are not relevant to the four factors.

*Hilst v. Bowen*, 874 F.2d 725

Per Curiam

Plaintiff, Hilst, a physician, brought a *Bivens* action against defendant, Bowen. Hilst sought damages for a prior judicial determination that his due process rights were violated when he was suspended from participating in the Medicare reimbursement program. Hilst alleged that both the regulations themselves and the acts of Bowen's employees violated his due process rights. Bowen moved to dismiss on grounds that the suit against him in his official capacity was barred by sovereign immunity. Furthermore, he alleged that the doctrine of respondeat superior was inapplicable to a *Bivens* action because there was no allegation of his

personal involvement. The district court dismissed the claim, holding that it was against Bowen personally. Hilst appealed.

The Tenth Circuit upheld the district court's decision but on different grounds. The court ruled that a *Bivens* action for due process violations is not available against certain government officials. In particular, it is not available against officials who administer the Medicare program when a comprehensive remedy is provided to physicians suspended from participating in the program. Remedies available to Hilst included an elaborate administrative hearing and judicial review. Although the remedial framework did not provide Hilst with consequential damages, the remedies were found to be adequate and meaningful safeguards.

*Jordan v. Shattuck National Bank*, 868 F.2d 383

Author: Judge Logan

Plaintiff, Jordan, appealed a directed verdict for defendants on his claims for tortious breach of a confidential relationship and interference with contract.

The Tenth Circuit held that the district court erred in taking from the jury the issues of misuse of confidential information, malicious interference with Jordan's contract, and damages. The court reversed and remanded for a new trial.

*Klein v. Commissioner*, 880 F.2d 260.

Author: Chief Judge Holloway

Petitioner, Klein, appealed the tax court's decision sustaining deficiencies in income tax and civil fraud penalties under 26 U.S.C. § 6653(b) for the years 1966-1970. The tax court applied the well-established principle that Klein's conviction collaterally estops Klein from denying fraud for purposes of a civil tax case involving the same years.

The Tenth Circuit held that the tax court properly applied the requirements for the application of collateral estoppel. Moreover, the court stated that new evidence regarding Klein's mental condition which could have been discovered at the criminal trial did not significantly change the controlling facts and did not warrant an exception to the normal rules of preclusion. The court also found that it was within the tax court's discretion to conclude that the undisclosed suspicion that Klein was financing narcotics deals did not constitute a special circumstance warranting an exception to the application of collateral estoppel. The court affirmed the tax court's decision sustaining deficiencies in income tax and civil fraud penalties.

*Kunkel v. Continental Casualty Co.*, 866 F.2d 1269

Author: Judge Baldock

Defendant, Continental Casualty Co. ("Continental"), appealed the district court's exercise of jurisdiction in rendering a declaratory judgment. The declaratory judgment stated the limits of plaintiff, Kunkel's,



professional liability coverage, even though such coverage was dependent upon the outcome of a collateral suit which charged Kunkel with securities law violations.

The Tenth Circuit concluded that pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201 (1948), the district court properly exercised jurisdiction. The court reasoned that the district court's construction of Kunkel's policy limits not only clarified the legal relations of the parties, but it also clarified Continental's obligations.

*Lake Hefner Open Space Alliance v. Dole*, 871 F.2d 943

Author: Judge McWilliams

Plaintiff, Lake Hefner Open Space Alliance ("Lake Hefner"), sought a reversal of a federal highway administrative decision allowing the construction of a six-lane urban freeway in Oklahoma City. The district court granted a motion for summary judgment for defendants', Elizabeth Dole, joined by the City of Oklahoma and the Oklahoma City Municipal Improvement Authority. Lake Hefner appealed, arguing that the district court erred in finding that Lake Hefner had some burden of proof.

The Tenth Circuit agreed that, in resisting a motion for summary judgment, the opposing party has a burden to identify genuine issues of material fact. In response to Oklahoma City's motion, Lake Hefner did not set forth specific facts showing a genuine issue for trial. Moreover, the court was not persuaded that Lake Hefner's issues raised grounds for reversing the district court decision. The court therefore affirmed the summary judgment.

*Lowell Staats Mining Co. v. Philadelphia Electric Co.*, 878 F.2d 1271

Author: Judge Brorby

Lowell Staats Mining Company ("Staats"), brought suit against defendant, Philadelphia Electric Company and other electric companies ("Electric"), to enforce a judgment. Staats' suit was brought under several theories: alter ego, instrumentality, agency, successor corporation, and receipt of fraudulent conveyances. The district court removed the case from Colorado state district court because it found diversity jurisdiction. The district court subsequently dismissed the claims against all defendants. The court reasoned that the claims were barred by *res judicata*. Staats brought two separate appeals which were eventually consolidated.

The Tenth Circuit upheld all of the dismissals by the district court. The dismissals against the corporate officers, Robinson, Smith and Culver were upheld because the officers were found to be in privity with parties from the first case. Thus, *res judicata* prevented relitigation of those claims. The dismissals in favor of the corporations, Minerals Corporation, Pioneer Corporation, Pioneer Nuclear, Inc., and Mesa Operating Limited Partnerships were upheld based on the same principles of

*res judicata*. Moreover, the court upheld the district court's dismissal in the cases of Umetco and Philadelphia Electric Company, based on the principle of defensive collateral estoppel. Finally, the court summarily affirmed the district court's removal of the case to federal court.

*Magic Circle Energy 1981-A Drilling Program v. Lindsey (In re Magic Circle Energy Corp.)*, 889 F.2d 950

Author: Judge Brorby

The district court denied petitioners' writ of prohibition to prohibit the bankruptcy court from exercising *in personam* jurisdiction over the petitioners. Petitioners appealed the denial of the writ.

The Tenth Circuit dismissed, finding that it lacked jurisdiction. The court concluded that the district court's denial of the writ was not an adjudication of the merits of the petitioners' claim and therefore not a final order subject to appeal. Under 28 U.S.C. § 158(d), the courts of appeal have jurisdiction over appeals only from final orders of the district courts.

*Marshall v. El Paso Natural Gas Co.*, 874 F.2d 1373

Author: Judge Brorby

A jury awarded plaintiffs, the Marshalls, \$350,050 for diminution of property, \$50,000 for nuisance damages and \$5,000,000 in punitive damages relating to improper drilling and plugging of an oil and gas well on the Marshalls' property. Defendants, El Paso Natural Gas Company and Meridian Oil Production, Inc. ("Meridian"), appealed, asserting errors in three areas by the district court. First, Meridian asserted that the district court erred in refusing to refer factual issues to the Oklahoma Corporation Commission ("Commission"), under the doctrine of primary jurisdiction. Second, Meridian asserted that the district court improperly excluded evidence critical to its defense. Third, Meridian asserted errors relating to the award of punitive damages. Meridian first claimed that the award of punitive damages in excess of actual damages required the Marshalls to prove the necessary elements by clear and convincing evidence. Meridian next contended that the punitive damages bore no relation to the Marshalls' injuries. Meridian reasoned that the Commission might intervene and order Meridian to correct the problems on the Marshalls' property.

The Tenth Circuit affirmed the decision of the district court. First, the court stated that the district court is not required to defer factual issues to an agency under the doctrine of primary jurisdiction if the issues are routinely considered by the court or if the issues would be within the conventional knowledge of judges and jurors. Second, the court was persuaded that the district court did not abuse its broad discretion in determining that the probative value of the offered evidence was outweighed by its potential to confuse the jury. Third, the court held that the amended Oklahoma statute required the Marshalls to pass a threshold test of clear and convincing evidence prior to submitting the

issue of punitive damages to the jury. Once this threshold was met, the issue was properly submitted to the jury under the standard of preponderance of the evidence to determine the amount of punitive damages. Moreover, the court held that the district court was without discretion to reduce or eliminate punitive damages on the basis of events that might occur after the trial. The court affirmed the decision of the district court.

*Martinez v. Sullivan*, 874 F.2d 751

Author: Judge Seth

In 1973, the district court enjoined defendants, Sullivan, Secretary of the United States Department of Health and Human Services, and Blue Cross of New Mexico ("Sullivan"), from terminating benefits without an evidentiary hearing. After Sullivan failed to comply, the district court issued a remedial order to enforce implementation of its previous order. Plaintiffs Martinez and others similarly situated ("Martinez") filed a FED. R. CIV. P. 59(e) motion to clarify, alter or amend the remedial order. With the motion still pending, Sullivan filed a notice of appeal with the Tenth Circuit for review of the remedial order. Thereafter, the district court denied Sullivan's Rule 59(e) motion.

The Tenth Circuit dismissed the appeal for lack of appellate jurisdiction. The court held that Sullivan's notice of appeal was a nullity under Rule 4(a)(4) because it was filed before the disposition of the Rule 59(e) motion. Moreover, Sullivan failed to file a separate notice of appeal following denial of the motion.

*Maxey v. Fulton*, 890 F.2d 279

Author: Judge Tacha

Plaintiffs, Maxey and Cole, two former residents of a state institution for the mentally retarded, alleged violations of their constitutional, statutory and common law rights against defendant, Borren, the superintendent of the institution. Borren filed a motion for protection from discovery and a motion for summary judgment on the grounds of qualified immunity. Maxey and Cole moved to compel discovery. Hearings on all motions were referred to a magistrate. The district court adopted the magistrate's recommendation that Borren's motion for summary judgment be denied and that protective orders be considered if discovery became abusive or overly broad. Borren contended that the district court's order infringed upon his qualified immunity interests and he was therefore entitled to an appeal of right.

The Tenth Circuit recognized three situations in which denials of qualified immunity are appealable: (1) where the defendant clearly violated established law and is not entitled to immunity; (2) where, if the facts are as asserted by plaintiff, defendant is not immune; or (3) where there is a finding that a disputed material fact exists in the case. The court held that the order was not appealable on any of these grounds because the magistrate had merely temporarily denied Borren's motions in order to allow the parties to develop an adequate factual record on

which to resolve Borren's immunity claim. The magistrate specifically stated that Borren could reurge his motion at any time. However, the court also found that the district court's order did not adequately limit discovery to the question of qualified immunity. The court reversed the denial of a protective order and remanded with directions to limit discovery to the qualified immunity issue.

*McGeorge v. Continental Airlines, Inc.*, 871 F.2d 952

Author: Judge Moore

Plaintiff, McGeorge, claimed that defendant, Continental Airlines, violated the Rehabilitation Act and the Federal Aviation Act by requiring her and her guide dog to sit in a seat other than that originally assigned to her. McGeorge also asserted four pendent state claims arising from her removal from the airplane. McGeorge sought review of orders from two separate district courts. The district court for the District of Columbia dismissed McGeorge's federal claim, three of her four state claims, and transferred venue to the Western District of Oklahoma. The Oklahoma district court dismissed the remaining claim.

The Tenth Circuit held that it had no jurisdiction over the appeal from the District of Columbia court and dismissed that portion of the appeal. The court's jurisdiction arises pursuant to 28 U.S.C. § 1294(1), which directs that appeals from reviewable decisions be taken to the court of appeals for a circuit embracing the district. The District of Columbia is not within the territory of the Tenth Circuit. Though the order of the District of Columbia court was not immediately appealable, pending disposition of the Oklahoma claim, it was a reviewable decision within section 1294(1).

The Tenth Circuit affirmed the Oklahoma district court's dismissal of McGeorge's state battery claim. McGeorge failed to show that the police officer who allegedly committed the battery during her removal from the airplane was an agent of Continental Airlines. The court also held that the district court's decision to deny leave to amend the complaint to add a defamation claim was not an abuse of discretion. McGeorge's request came four years after her original complaint, and her argument that the defamation theory was implicit in the case failed to convince the district court.

*McNickle v. Bankers Life and Casualty Co.*, 888 F.2d 678

Per Curiam

Plaintiff, McNickle, appealed from the district court's denial of McNickle's Fed. R. Civ. P. 60(a) motion to order defendant, Bankers Life and Casualty Co. ("Bankers"), to pay prejudgment interest.

The Tenth Circuit found that the district court erred by mischaracterizing the Rule 60(a) motion as an original request for prejudgment interest. The court reasoned that the motion was not an original request because the complaint requested "interest" relief. Moreover,

McNickle's motion for supersedeas bond put Bankers on notice of their specific claim to prejudgment interest under Okla. Stat. tit. 36, § 3629(B) (Supp. 1986). Also, the district court erred in failing to determine a date certain from which Bankers' liability for prejudgment interest could accrue. Section 3629(B), which establishes the interest period to be "from the date the loss was payable pursuant to the provisions of the contract to the date of the verdict," together with the "Stipulated Facts" and the insurance policy, provided sufficient record from which to determine the date certain. The court concluded that these errors constituted an abuse of discretion. The court reversed and remanded for calculation and for award of prejudgment interest.

*Mullen v. Household Bank-Federal Savings Bank*, 867 F.2d 586  
Per Curiam

The district court granted the defendant Household Bank-Federal Savings Bank's ("Household"), motion to dismiss for lack of subject matter jurisdiction based on nondiversity. Plaintiff, Mullen, moved for leave to amend their complaint and to dismiss the nondiverse defendants. The district court denied the motion on the ground that even if diversity was established, Mullen's fraud claim was insufficiently stated. Mullen appealed the denial of their motion to amend.

The Tenth Circuit stated that leave to dismiss nondiverse parties should be granted freely, unless such amendment would be futile. The court found that district court had not abused its discretion in denying the motion. The court also denied Household's motion for injunctive relief to prevent further action by Mullen because Household failed to first seek relief in the district court. The court affirmed the district court's judgment and remanded for determination of the amount of sanctions to be awarded for Mullen's legally frivolous appeal.

*Pytlik v. Professional Resources, Ltd.*, 887 F.2d 1371  
Author: Judge Brorby

Plaintiff, Pytlik, brought this action against defendant, Professional Resources, Ltd. ("Professional"), and several others, including an Italian corporation. The district court dismissed the action against the Italian corporation for lack of personal jurisdiction and granted Professional's motion for a directed verdict on its wrongful discharge claim. Pytlik appealed the district court's grant of summary judgment in the defendants' favor on the remainder of Pytlik's claims.

The Tenth Circuit affirmed the dismissal of the Italian corporation. In a diversity suit, the plaintiff has the duty to support jurisdictional allegations in a complaint by competent proof of the supporting facts if the jurisdictional allegations are challenged by an appropriate pleading. Pytlik's complaint failed to allege any facts in support of its conclusory statement that the Italian corporation was conducting business in Oklahoma.

The court affirmed summary judgment on the remaining claims, finding no evidence to support any of Pytlik's allegations. The court further held that the directed verdict of Pytlik's wrongful discharge claim was improper. A nexus was established between Pytlik's termination and his hiring of an attorney to pursue his worker's compensation claim. Thus, the evidence established a prima facie case of retaliatory discharge. The order granting Professional's motion for directed verdict was reversed and remanded.

*Robinson v. Bowen*, 867 F.2d 600  
Per Curiam

Defendant, Bowen, appealed the district court's decision to award attorney's fees to the prevailing plaintiff, Robinson. The Tenth Circuit held that the district court violated Rule 36.3 of the Rules of Court for the United States Court of Appeals for the Tenth Circuit by relying upon an unpublished opinion. The court held, however, that the error was harmless and that the district court did not abuse its discretion. Accordingly, the court affirmed the district court's decision.

*Seneca-Cayuga Tribe v. Oklahoma*, 874 F.2d 709  
Author: Judge Seymour

Defendant, Oklahoma, brought an action in state court to enjoin plaintiffs, Seneca-Cayuga and Quapaw tribes (the "Tribes"), from operating high-stake bingo games on Indian trust lands. Oklahoma alleged that the bingo games violated state gaming laws. The Tribes subsequently brought an action in federal district court seeking declaratory and injunctive relief. Oklahoma then moved the district court to abstain from exercising jurisdiction because of the pending state action. The district court denied the motion and enjoined Oklahoma from proceeding with the state court suit against the Tribes and from interfering with the operation of the bingo games. Oklahoma appealed, asserting that under the abstention doctrine, the district court should have abstained from exercising jurisdiction.

In affirming the district court's decision, the Tenth Circuit ruled that the abstention doctrine was not appropriate. The court reasoned that the activities at issue were primarily of federal interest and outweighed state interests. Hence, the state court lacked jurisdiction. In addition, the court noted that the Tribes were sovereign entities. Consequently, the state suit was barred because the Tribes did not waive their sovereign immunity.

*Slade v. United States Postal Service*, 875 F.2d 814  
Per Curiam

The Tenth Circuit reviewed the district court's holding that plaintiff, Slade's, amendment to his complaint did not relate back to the original filing date pursuant to Fed. R. Civ. P. 15(c), leading to the district

court's dismissal of the action because it was time barred. Slade failed originally to name the proper party defendant, the Postmaster General, until after the limitations period had passed.

The Tenth Circuit found that notice of Slade's claim was imputed to the Postmaster General upon serving the Attorney General within the limitations period. The court reversed and remanded the case, holding that Slade could amend his complaint, consistent with the 1966 amendment to Rule 15(c). The amendment's purpose was to address problems raised when plaintiffs inadvertently named an improper party in suits against government agencies or officials. The Tenth Circuit found that service upon the Attorney General was complete upon mailing, which had been accomplished one day before the end of limitations period.

*Smith v. Phillips*, 881 F.2d 902

Author: Judge Logan

Petitioners, Smith, filed suit against the state, county, city and various officials alleging violation of the civil rights of Smith's decedent, who died while in custody in the county jail. After settlement or dismissal of the actions against most of the defendants, the petitioners and remaining defendants filed a Stipulation for Confidentiality Order and a Stipulation for Dismissal with Prejudice, pursuant to Fed. R. Civ. P. 41(a)(1)(ii). Defendant, Judge Phillips granted the order of dismissal but denied the confidentiality order. Judge Phillips then ordered that the terms of the settlement be made public.

The Tenth Circuit stayed the orders compelling disclosure of the settlement terms. The court held that the stipulated dismissal required no exercise of discretion by the district court, and such unconditional dismissal divested the district court of jurisdiction to order disclosure of the settlement terms. The court granted the writ of *mandamus* and ordered the sealed settlement document returned to counsel.

*Sommermeier v. Supreme Court of the State of Wyoming*, 871 F.2d 111

Author: Judge Tacha

Plaintiff, Sommermeier, appealed a court order which upheld rules of the Wyoming Supreme Court. These rules required an attorney be a Wyoming resident to be eligible for admission to the bar on motion instead of by taking a bar examination. Sommermeier argued that the residency requirement violated the privileges and immunities clause of article IV, § 2 of the United States Constitution.

The Tenth Circuit held Wyoming Supreme Court Rule 5(c) to be unconstitutional. The case was reversed and remanded with instructions that Wyoming admit Sommermeier to the bar of the state.

*Tripati v. Beaman*, 878 F.2d 351

Per Curiam

Plaintiff, Tripati, brought an action in district court against defend-

ant, Beaman, the clerk of the court. Tripati contended that Beaman was not properly processing his papers. The district court dismissed Tripati's action, finding that Tripati was abusing the court system by harassing opponents. The district court, therefore placed restrictions on Tripati's future filings. In particular, the district court directed Beaman to not file further complaints or pleadings without leave of the court. Furthermore, if leave were not granted in ten days, Beaman was to return the papers to Tripati.

The Tenth Circuit stated that litigants who have lengthy histories of abusing the court system must be given notice of and an opportunity to oppose in writing the district court's order before it is instituted. The court stated that the district court's injunction did not provide for notice and an opportunity to oppose the order. Consequently, the court vacated and remanded the district court's judgment which imposed restrictions on Tripati's future filings.

*Vaughan v. Smithson*, 883 F.2d 63

Per Curiam

Plaintiff, Vaughan, brought a breach of contract action in district court against the defendant, Smithson, for failing to provide their illegitimate child with material and financial support. The district court held for Vaughan, and Smithson subsequently appealed.

The Tenth Circuit held that Vaughan's claim, while framed in terms of contract, was nevertheless barred by the domestic relations exception to diversity jurisdiction. The court concluded that the claim required consideration of the child's personal needs and finances and the level of support required of the father. The court stated that state courts, with their knowledge in domestic relation matters, are better suited to make such determinations. Consequently, the court vacated the district court judgment and remanded with instructions to dismiss for lack of subject matter jurisdiction.

*Zuchel v. Spinharney*, 890 F.2d 273

Author: Judge Phillips, sitting by designation

The Tenth Circuit affirmed the district court's rejection of defendant, Spinharney's, motion for summary judgment based on qualified immunity. The court held that whether the defendant police officer's use of deadly force in arresting the deceased was objectively reasonable in light of the circumstances confronting him was a question for the jury. Given the discrepancies in the testimony, the court concluded that genuine issues of material fact precluded judicial determination of whether Officer Spinharney's conduct was objectively reasonable.