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Jeanne E. Herrick-Stare

FEDERAL PRACTICE AND PROCEDURE

OVERVIEW

This survey of the large number of cases handed down by the Tenth Circuit Court of Appeals in the area of federal practice and procedure examines some of the more significant opinions including decisions on the discretionary function exception to the Federal Tort Claims Act, abstention under the *Pullman* doctrine, and failure to join an indispensable party.

I. JURISDICTION

A. *Subject Matter Jurisidiction*

1. Waiver of Governmental Immunity under the Federal Tort Claims Act

The Tenth Circuit Court of Appeals was presented with the question of whether the issuance of an allegedly misleading aeronautical chart by a government agency fell within the discretionary function exception[1] of the Federal Tort Claims Act.[2] In *Baird v. United States*,[3] the pilot of a small aircraft used a government-approved aeronautical chart to make a night landing at the Greenburg, Kansas airport. The symbols on the chart accurately indicated the length of the longest runway and the availability of runway lights from sunset to sunrise. There was no system, however, for symbolically informing the pilot that the lit runway was not the longest runway, and that it was not lit for its entire length. The plane overran the lit runway and crashed, killing two passengers and severely injuring a third passenger and the pilot.[4]

In a split decision, the court affirmed the trial court's dismissal of the claim on the ground that the design and approval of the chart specifications by the government fell within the discretionary function exception and, therefore, sovereign immunity barred the suit.[5] The majority, per Judge Seymour, relied upon *Dalehite v. United States*[6] which broadly defined discretionary judgment as "determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there

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1. 28 U.S.C. § 2860(a) (1976):
The provisions of this chapter and section 1346(b) of this title shall not apply to—
(a) any claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or employee of the government, whether or not the discretion involved be abused.

2. 28 U.S.C. §§ 2671-2680 (1976) (waiving governmental immunity from tort claims); 28 U.S.C. § 1346(b) (1976) (granting jurisdiction for such claims).

3. 653 F.2d 437 (10th Cir. 1981), *cert. denied*, 454 U.S. 1144 (1982).

4. 653 F.2d at 438.

5. *Id.* at 441.

6. 346 U.S. 15 (1953) (explosion of fertilizer produced according to specifications of a government fertilizer export program held not actionable because negligent decisions were made at a planning rather than an operational level).

is room for policy judgment and decision there is discretion."[7] Applying this standard to the federal agency responsible for the map's symbols, the Inter-Agency Air Cartographic Committee (IACC),[8] the court found that the IACC's determination of the extent of detail to be included in aeronautical charts was a discretionary design judgment.[9]

By challenging the IACC's judgmental activities in formulating and approving the substantive design of the chart, the plaintiffs challenged the design of all sectional charts. The court distinguished *Baird* from three categories of cases where the government's negligence has not been held to be protected by the discretionary function exception:[10] where negligence has occurred in the mechanical preparation of the chart, not in the substantive design;[11] where the wrong symbol was used on the chart;[12] and where the negligence involved an activity in which only governments engage.[13]

In a vigorous dissent, Judge Doyle argued that the breach of duty involved was more related to a governmental operational activity than it was to the planning function and thus, was not immune under the discretionary function exception.[14] Relying upon the reasoning of *Indian Towing Co. v. United States*,[15] Judge Doyle furthermore maintained that once the government undertook the responsibility of publishing aeronautical charts to minimize the danger of a hazardous activity, landing airplanes, it had a duty to depict fully and accurately those features which it had chosen to portray.[16] Judge Doyle argued this duty exists independently of any discretionary decision.[17]

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7. *Id.* at 35-36.

8. The Inter-Agency Air Cartographic Committee is a committee formed by agreement of the Departments of Defense and Commerce and the Federal Aviation Administration (FAA) to develop the final detailed and authoritative specifications for flight information in textual and chart form. 653 F.2d at 438-39.

9. *Id.* at 441.

10. *Id.*

11. *See, e.g.*, Reminga v. United States, 631 F.2d 449 (6th Cir. 1980) (televison tower's ground location inaccurately depicted on chart); Allnutt v. United States, 498 F. Supp. 832 (W.D. Mo. 1980) (aeronautical chart failed to comply with IACC standards).

12. *See, e.g.*, Murray v. United States, 327 F. Supp. 835 (D. Utah 1971), *aff'd*, 463 F.2d 208 (10th Cir. 1972) (chart erroneously depicted availability of night lighting); Sullivan v. United States, 299 F. Supp. 621 (N.D. Ala. 1968), *aff'd*, 411 F.2d 794 (5th Cir. 1969).

13. *See* Indian Towing Co. v. United States, 350 U.S. 61 (1955) (government held suable for negligent operation of a lighthouse); *see also* Smith v. United States, 546 F.2d 872 (10th Cir. 1976) (negligent failure to warn of thermal pools in undeveloped portion of Yellowstone National Park); Yates v. United States, 497 F.2d 878 (10th Cir. 1974) (negligent failure of FAA air controller to allow sufficient separation of air traffic actionable).

14. 653 F.2d at 444 (Doyle, J., dissenting). The impact of Judge Doyle's argument is diluted by his insistence that negligent acts by definition must be excluded from "policy decisions." *Id.* at 443-44. His definition of an "operational activity" as any activity performed negligently circumvents the *Dalehite* layering of protection for decisions made at the planning level. Judge Doyle avoids the possibility that a discretionary-function policy decision might be made negligently, or might negligently authorize acts which, if examined independently at the field or "operational" level, would be considered negligent. Such policy decisions, according to the majority in *Baird*, are protected by sovereign immunity.

15. 350 U.S. 61 (1955).

16. 653 F.2d at 445 (Doyle, J., dissenting).

17. *Id.* at 444-45. *Cf.* Allen v. United States, 527 F. Supp. 476, 486-87 (D. Utah 1981). *Allen* was a preliminary action in a suit brought by nearly 1,000 persons against the United States under the Federal Tort Claims Act for injuries sustained as a result of open-air nuclear

2. Waiver of Governmental Immunity under the Tucker Act

The Tucker Act[18] waives the government's sovereign immunity for certain claims for money damages by conferring jurisdiction on the Court of Claims, and in certain circumstances on the district courts. In the consolidated case *Amalgamated Sugar Co. v. Bergland*,[19] the Secretary of Agriculture appealed a summary judgment in favor of the plaintiff sugar companies. The trial court had granted injunctive and declaratory relief with respect to the eligibility of sugar as collateral for loans made as part of the price support program of the Food and Agriculture Act of 1977.[20] Prior to the entry of summary judgment, however, the companies repaid the loans the government had sought to recall.[21]

The court of appeals held that because the loans had been repaid prior to judgment, the district court did not have jurisdiction to hear the case.[22] The court employed two rationales. First, jurisdiction over a federal question[23] must involve a case or controversy.[24] After the loans were repaid, the only question remaining between the companies and the Department of Agriculture was the potential storage payments claim, a claim not presented by the plaintiffs.[25] Second, the Tucker Act grants concurrent jurisdiction of claims under $10,000 to the district courts and the Court of Claims, but gives jurisdiction of claims over $10,000 exclusively to the Court of Claims.[26] The potential storage payments claim exceeded $10,000 and, therefore, jurisdic-

testing in Nevada during 1951-62. The district court declined to allow the discretionary function exception to prevent trial on the merits because of lack of jurisdiction. The court characterized the issue of the scope of the discretionary function exception as a substantive issue of duty under tort analysis, as Judge Doyle did in his dissent in *Baird. Allen*, 527 F. Supp. at 487. On this basis, the court deemed the jurisdictional issues "inextricable" from the substantive claims, and ruled that jurisdictional defenses would be determined upon a complete record. *Id.* at 488. *Accord* Irving v. United States, 532 F. Supp. 840 (D. N.H. 1982) (personal injury suit alleging negligent performance of compliance enforcement inspection by government officers); Barnson v. United States, 531 F. Supp. 614 (D. Utah 1982) (Federal Tort Claims Act suits arising from cancer deaths of uranium mine workers).

18. 28 U.S.C. §§ 1346(a), 1491 (1976 & Supp. IV 1980).

19. 664 F.2d 818 (10th Cir. 1981).

20. 7 U.S.C. § 1446(f) (Supp. IV 1980). Prior to the 1977 Act, sugar prices were supported by a payment program which permitted the recipient processors to choose between the "last-in first-out" (LIFO) or "first-in first-out" (FIFO) inventory accounting methods, but then required them to adhere to their choice. The 1977 Act changed price supports to a loan program, utilizing processed sugar as collateral and guaranteeing government purchase if sugar prices fell below set levels. The plaintiff sugar companies participated in the payment program under the LIFO method, but changed to the FIFO method in fixing the amounts of sugar used as collateral and thus determining the amount of the loans under the loan program. The United States Department of Agriculture claimed that this interprogram switch in inventory methods rendered the sugar ineligible as collateral for the loans and thus called for pre-maturity loan repayment. 664 F.2d at 821.

21. *Id.* at 821-22. Repayment was made pursuant to stipulations that: a) but for the switch in accounting methods, the sugar was eligible as collateral for the price support program; and b) if the sugar companies won the subject litigation they would receive the benefits of the price support programs and program extensions. *Id.* at 822 n.5.

22. *Id.* at 824.

23. 28 U.S.C. § 1331 (1976).

24. U.S. CONST. art. III.

25. 664 F.2d at 823.

26. 23 U.S.C. § 1346(a) (1976).

tion was vested in the Court of Claims.[27] "[J]urisdiction of the Court of Claims cannot be evaded by framing a complaint to seek only injunctive, mandatory, or declaratory relief against governmental officials."[28]

3. Subject Matter Jurisdiction Barred by Statute

In *Cities Service Gas Co. v. Oklahoma Tax Commission*,[29] the Tenth Circuit affirmed the dismissal of a challenge by nine pipeline companies to the constitutionality of the Oklahoma Conservation Excise Tax,[30] as related to the [Oklahoma] Tax Credit Act.[31] The court based its dismissal on the jurisdictional bar of the Tax Injunction Act of 1937.[32]

In claiming that the federal court should maintain jurisdiction of the suit, the appellants argued that they were precluded from obtaining relief in the Oklahoma state courts because the Oklahoma Supreme Court had previously declared the challenged tax law constitutional.[33] They relied upon *Hillsborough v. Cromwell*,[34] asserting that if there is uncertainty surrounding the adequacy of the state remedy, a federal court should maintain jurisdiction over the claim.[35]

The court rejected this argument, holding that the likelihood of success in state courts is not a factor in determining whether uncertainty surrounds the adequacy of a state remedy.[36] The Tenth Circuit court relied upon the *Rosewell* test,[37] which focuses on the procedural adequacy of the remedy, rather than its substantive adequacy. Because the taxpayers in this case had a right to a full hearing before the Oklahoma Tax Commission with direct appeal to the Oklahoma Supreme Court, the *Rosewell* test of the opportunity for full hearing and judicial determination of the plaintiffs' claim was met.[38] Consequently, although the taxpayers were bound to lose under Oklahoma precedent, they were precluded from federal jurisdiction because Oklahoma provides an adequate procedural system for adjudicating challenges to its tax laws.

B. *Abstention under the* Pullman *Doctrine*

The *Pullman* doctrine[39] permits a federal court to abstain from ruling in those instances where: a) a federal constitutional claim is premised on an unsettled question of state law; b) determination by a state court might

27. 664 F.2d at 823-24.
28. *Id.* at 824.
29. 656 F.2d 584 (10th Cir.), *cert. denied*, 454 U.S. 1124 (1981).
30. OKLA. STAT. ANN. tit. 68, §§ 1107-1111 (West Supp. 1981-82).
31. *Id.* § 2357 D.
32. 28 U.S.C. § 1341 (1976). "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."
33. Post Oak Oil Co. v. Oklahoma Tax Comm'n, 575 P.2d 964 (Okla. 1978).
34. 326 U.S. 620 (1946).
35. 656 F.2d at 586.
36. *Id.* The court adopted the reasoning of the Third Circuit's opinion in Non-Resident Taxpayers Ass'n v. Municipality of Philadelphia, 478 F.2d 456 (3d Cir. 1973).
37. Rosewell v. La Salle Nat'l Bank, 450 U.S. 503 (1981).
38. 656 F.2d at 587.
39. Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941).

avoid or modify the constitutional issue; or c) important state policies might be disrupted by an erroneous decision of the federal court.[40] This abstention doctrine is an extraordinary exception to a court's duty to adjudicate cases before it, and as such, must be construed narrowly.[41]

In *Vinyard v. King*[42] the trial court abstained from hearing a case in which the plaintiff claimed that the termination of her employment at an Oklahoma state hospital violated her due process rights. The trial court found Oklahoma law unclear with respect to the existence of a property interest in continued employment.[43] The appellate court reversed, based upon its determination of the clarity of Oklahoma state law.[44] The court thereby declined to broaden the *Pullman* doctrine.[45]

Utilizing the Third Circuit's three-pronged test,[46] the court found Oklahoma law settled on the question of when a property interest is created,[47] although difficult to apply to the instant facts.[48] The court also found that no interference with important state programs would be caused by an erroneous federal adjudication.[49]

In *University of Oklahoma Gay People's Union v. Board of Regents*,[50] the Tenth Circuit reiterated earlier guidance to the lower courts[51] concerning the appropriate application of the *Pullman* doctrine. The suit challenged the University of Oklahoma Board of Regents' non-recognition of a homosexual group as a student organization. The trial court dismissed the federal action in view of a parallel action pending in the Oklahoma Supreme Court.[52]

The appellate court agreed that there were grounds for abstention, stating that state court resolution "in a particular way"[53] would leave no remaining constitutional issues. Nevertheless, it reversed the lower court's dismissal, stating that the proper action would be to reinstate the case on the docket and defer further action until state law issues were resolved in the

40. *See* D'Iorio v. County of Delaware, 592 F.2d 681, 686 (3d Cir. 1978). *See generally* Field, *Abstention in Constitutional Cases: The Scope of the* Pullman *Abstention Doctrine*, 122 U. PA. L. REV. 1071 (1974).

41. *See* County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 188-89 (1959).

42. 655 F.2d 1016 (10th Cir. 1981).

43. The sufficiency of a property interest triggering constitutional due process considerations is determined by state law. Bishop v. Wood, 426 U.S. 341, 344 (1976).

44. 655 F.2d at 1019.

45. *Id.* at 1021.

46. The court relied upon the test set forth in D'Iorio v. County of Delaware, 592 F.2d 681, 686 (3d Cir. 1978).

47. Singh v. City Serv. Oil Co., 554 P.2d 1367 (Okla. 1976) (circumstances under which employment contracts are terminable at will); Nation v. Chism, 154 Okla. 50, 6 P.2d 766 (1931) (general property right in employment *not* recognized).

48. The case involved a claimed implied contract between a coordinator of volunteer services and a hospital.

49. 655 F.2d at 1020. The court distinguished the non-renewal of non-tenured teacher contract cases on the basis that education is primarily a function of the state. *Id.* at 1020 n.7.

50. 661 F.2d 858 (10th Cir. 1981).

51. *E.g.*, Arrow v. Dow, 636 F.2d 287 (10th Cir. 1980); Western Food Plan, Inc. v. MacFarlane, 588 F.2d 778 (10th Cir. 1978). *See also* Zwickler v. Koota, 389 U.S. 241, 244 n.4 (1967).

52. The federal court parties stipulated that the state court action had identical circumstances and issues and that the purposes of the plaintiff organizations in the federal and state cases were identical although the membership lists were different. 661 F.2d at 859.

53. *Id.* at 860.

state court.[54] The court noted that caveats for deferral of federal court action are: a) unfair added expense to the litigants (not an issue in this case); or b) extended delay (to which the court directed the lower court's attention).[55]

C. *Jurisdiction over Interlocutory Appeal*

The collateral order doctrine[56] provides a narrow exception to the general requirement of a final judgment as a prerequisite to appellate review.[57] *Coopers & Lybrand v. Livesay*[58] provides a three-pronged test of the appealability of orders: a) the order must conclusively determine the issue in question; b) it must resolve an important issue completely separable from the merits of the action; and c) it must be effectively unreviewable on appeal from final judgment.[59]

The Tenth Circuit faced a difficult issue in applying the collateral order doctrine in *Cotner v. Mason*.[60] The appellant sought review of a district court order denying his motion for appointment of counsel in a civil action. The Tenth Circuit followed its own precedent[61] and dismissed the appeal based on lack of jurisdiction of a non-final order. The court reasoned that if the appellant were unsuccessful *pro se* at the trial court level, he could appeal the lack of appointed counsel as part of the final judgment. Post-judgment reversal and a new trial could remedy any injury to his asserted right. Thus, the third prong of the test of the appealability of an interlocutory order was not satisfied.[62] The appellant did not suffer irreparable injuries or lose a crucial collateral claim because of the court's denial of an immediate review of the order.[63]

The Tenth Circuit's holding on this issue places it in disagreement with five other circuits.[64] The court used a practical approach, finding that the appointment of counsel was similar to numerous other pretrial orders which eventually can be remedied by a full appellate review.[65] The court noted

54. *Id.*

55. *Id.*

56. This exception was first articulated in Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949).

57. *See* 28 U.S.C. § 1291 (1976).

58. 437 U.S. 463 (1978).

59. *Id.* at 468.

60. 657 F.2d 1390 (10th Cir. 1981) (per curiam).

61. May v. Jones, No. 79-1774 (10th Cir. June 23, 1980); Kennedy v. Burk, No. 79-1616 (10th Cir. Nov. 16, 1979); Nevarez v. Shaw, No. 76-1424 (10th Cir. Nov. 16, 1976) (absent extraordinary circumstances, orders denying appointment of counsel in civil cases are not immediately appealable as of right).

62. 657 F.2d at 1391.

63. *See* Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 376 (1981). *See also* Mathews v. Eldridge, 424 U.S. 319, 331 n.11 (1976).

64. "[A] decision on appellant's need for counsel must be made before the trial if it is to be of any practical effect to him." Ray v. Robinson, 640 F.2d 474, 477 (3d Cir. 1981). *See* Jones v. WFYR Radio/RKO Gen., 626 F.2d 576 (7th Cir. 1980); Hudak v. Curators of the Univ. of Mo., 586 F.2d 105 (8th Cir. 1978), *cert. denied*, 440 U.S. 985 (1979); Caston v. Sears, Roebuck & Co., 556 F.2d 1305 (5th Cir. 1977); Miller v. Pleasure, 296 F.2d 283 (2d Cir. 1961), *cert. denied*, 370 U.S. 964 (1962).

65. 657 F.2d at 1392.

the strong judicial policy against "piecemeal appellate disposition of what is, in practical consequence, but a single controversy."[66]

II. VENUE

In *Hospah Coal Co. v. Chaco Energy Co.*,[67] the court settled a dispute involving pre-trial procedural maneuvering by the defendants. Chaco Energy Co. and Texas Utilities Co. sued Santa Fe Industries (SFI) and several of its subsidiaries in the United States District Court for the Northern District of Texas for conspiracy, violation of antitrust laws, and common law fraud in the inducement, requesting declaratory judgment, rescission of contracts, injunctive relief, and treble damages.[68] SFI and the other defendants responded by filing an action in the United States District Court of New Mexico seeking a declaratory judgment and an injunction prohibiting the plaintiffs from proceeding further in the Texas action. The defendants based their request on a venue selection clause in a lease between the parties that provided for venue in New Mexico.[69] Finding that the Texas action was vexatious, the district court granted the defendants' injunction. SFI then went to Texas and entered a motion to stay or, in the alternative, to dismiss the Texas action.[70] Because the New Mexico injunction prevented Chaco from a Texas court-ordered response to the defendants' motion to stay, Chaco went to New Mexico and requested suspension of the injunction. The New Mexico District Court refused,[71] and Chaco appealed to the Tenth Circuit Court of Appeals.

The Tenth Circuit court stayed the New Mexico injunction pending appeal and expedited the hearing.[72] It found the ultimate issue to be: which district court (Northern Texas or New Mexico) shall make a determination on the issue of venue?[73]

The general rule is that when two courts have concurrent jurisdiction, the first court in which jurisdiction attaches has priority to consider the case,[74] except in cases involving a misuse of litigation through vexatious and oppressive foreign suits.[75] SFI claimed that jurisdiction first attached in New Mexico because service of process was achieved for the New Mexico action first. The court, however, followed Tenth Circuit precedent[76] and ruled that jurisdiction relates back to the filing of the complaint, and thus it

66. *Id.* (quoting Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 170 (1974)).

67. 673 F.2d 1161 (10th Cir.), *cert. denied*, 102 S. Ct. 2299 (1982).

68. 673 F.2d at 1162.

69. *Id.* Apparently, SFI feared being "home-towned" in a Texas federal court because the outcome of the litigation would affect Texas consumers. The Tenth Ciruit dismissed this argument, thus deferring to the ability of the district court to decide if it should accept venue. *Id.* at 1164 n.3.

70. *Id.* at 1162.

71. *Id.*

72. *Id.* at 1163.

73. *Id.*

74. O'Hare Int'l Bank v. Lambert, 459 F.2d 328, 331 (10th Cir. 1972).

75. *Id.*

76. Product Eng'g & Mfg. Co. v. Barnes, 424 F.2d 42 (10th Cir. 1970). *See also* FED. R. CIV. P. 3.

attached first in the Texas district court.[77] The court found that the Texas litigation was not vexatious, but involved a question of fact as to the applicability of the venue selection clause.[78]

The appellate court ruled that "the court which first obtains jurisdiction should first decide issues of venue."[79] It supported its holding with one of the cases relied upon by SFI, *Kerotest Manufacturing Co. v. C-O-Two Co.*[80] *Kerotest* warns against mechanical solution of multiple litigation problems.[81] The appellate court agreed with the principle of flexibility in determining which court has jurisdiction over the merits. Nevertheless, it found that the *Kerotest* Court paid deference to the district court's ability to determine the proper venue.[82]

Judge Barrett, writing for the court, admonished the defendants that rule 12(b) provides a procedure for objecting to improper venue,[83] and 28 U.S.C. § 1404(a) provides a procedure for requesting a change of venue.[84] He stated that it was improper to object to venue by filing suit for injunctive relief in a separate forum: declaratory judgments cannot be used as "yet another weapon in a game of procedural warfare."[85] The court remanded the case to the New Mexico District Court with instructions to dismiss the preliminary injunction which restrained the plaintiffs from proceeding in the Northern Texas District Court.

III. CLAIMS AND CLAIMANTS

A. *Failure to Join an Indispensable Party*

1. Interpretation of a Workmen's Compensation Statute

In *Miller v. Leavenworth-Jefferson Electric Cooperative, Inc.*,[86] the plaintiff was awarded damages for injuries suffered when the boom on the truck he was operating touched one of the defendant's high-voltage power lines.[87] In a post-trial motion, the defendant claimed that the plaintiff's employer was an indispensable party whose Kansas citizenship destroyed complete diversity between the California plaintiff and itself, a Kansas electric cooperative, thus defeating federal court jurisdiction.[88] The plaintiff cross-moved to dismiss the employer as an unnecessary party under rule 21[89] and the district court ruled in favor of this motion.

On appeal, the defendant pointed out that the plaintiff's employer was

77. 673 F.2d at 1163.
78. *Id.* The court also gave the district court guidance in settling those questions of fact. *Id.* at 1163 n.2. *See* The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972) (enforceability of venue selection clauses).
79. 673 F.2d at 1164.
80. 342 U.S. 180 (1952).
81. *Id.* at 183.
82. 673 F.2d at 1164.
83. *Id. See* FED. R. CIV. P. 12(b).
84. 28 U.S.C. § 1404(a) (1976).
85. 673 F.2d at 1164-65.
86. 653 F.2d 1378 (10th Cir. 1981).
87. *Id.* at 1379.
88. *Id.* at 1380.
89. FED. R. CIV. P. 21.

named in the pleadings as a party bringing the action, pursuant to the Kansas workmen's compensation statute.[90] Had the employer not been named, the plaintiff, who filed the lawsuit more than one year after the accident occurred, would have been precluded from bringing his action because of the statute of limitations.[91] The workmen's compensation statute allows an employer to bring an action within two years of the accident if the employee fails to do so.[92] The defendant argued that if the employer was required to be named as a party in order to bring the action, it was an indispensable party.[93]

The appellate court disagreed, finding the employer was not a necessary party under rule 19.[94] It held there was no abuse of discretion by the district court in dismissing the employer under rule 21.[95]

2. Status of Producers under an Oil and Gas Field Unit Agreement

In *Francis Oil & Gas, Inc. v. Exxon Corp.*,[96] the court also faced the issue of failure to join indispensable parties who would destroy diversity jurisdiction. The plaintiff was one of 194 producers in a unit oil production field in Texas. Under the unit agreement, his percentage of cost and production was allocated based on tract size, but his actual output of high-priced stripper oil was a much greater percentage than that of the unit as a whole. The unit had been formed among large producers, with the plaintiff as a small producer subsequently joining under protest. Exxon had separate purchasing contracts with each of the unit's producers, including the plaintiff.[97] Plaintiff brought suit against Exxon for the difference between the value of his actual output of stripper oil and the amount paid by Exxon under the formula imposed by the unit.

Exxon moved for summary judgment based on failure to join all the working interests of the unit as indispensable parties.[98] The district court dismissed the case for failure to join indispensable parties who would destroy diversity jurisdiction otherwise enjoyed by the plaintiffs.

The appellate court reversed, directing that a hearing[99] be held to accept evidence which would aid resolution of rule 19 issues. The court found that because of the dearth of facts on the record, it was impossible to determine whether all 194 members of the unit were indispensable parties.[100] Among the matters to be ascertained by the trial court on remand was

90. KAN. STAT. ANN. § 44-504 (1963 & Supp. 1981).
91. *Id.* § 44-504(b).
92. *Id.* § 44-504(c).
93. 653 F.2d at 1381.
94. FED. R. CIV. P. 19.
95. "Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just." FED. R. CIV. P. 21. *See also* Professional Investors Life Ins. Co. v. Roussel, 528 F. Supp. 391, 403 (D. Kan. 1981) (non-diverse defendants may be dismissed from a case under rule 21 for the preservation of diversity jurisdiction).
96. 661 F.2d 873 (10th Cir. 1981).
97. *Id.* at 874-75.
98. *Id.* at 875.
99. *Id.* at 879-80.
100. *Id.* at 880.

whether some of the interests were so small that they should not be forced to litigate.[101]

B. *Class Actions*

1. Class Certification to Avoid Mootness

In *Quintana v. Harris*,[102] the plaintiff brought an action to compel the Department of Health and Human Services to rule on Supplemental Security Income benefit applications within sixty days. Although the plaintiff had requested class certification in an effort to avoid mootness problems, the trial court dismissed the suit as moot.[103] The Tenth Circuit remanded for consideration of plaintiff's requested class certification.[104] On remand, the trial court then found that there existed a potential conflict of interest among the proposed class, denied class certification, and again dismissed plaintiff's individual claim as moot.[105]

Plaintiff filed a timely rule 59(e)[106] motion to alter or amend the judgment denying class certification, proposing a subclass which would avoid the conflict of interest existing in the original class. The district court denied the motion without comment,[107] and plaintiff appealed.

The Tenth Circuit again remanded the case for the district court to consider the merits of plaintiff's proposed subclasses. It relied upon the recent Supreme Court case of *United States Parole Commission v. Geraghty*,[108] which approved an appellate court order requiring a district court to consider *sua sponte* the possibility of certifying subclasses, thus permitting class proponents an opportunity to bear the burden of constructing proposed subclasses.[109] Because the plaintiff had actually requested certification of subclasses in the case before it, the Tenth Circuit held under *Geraghty* that the trial court's unexplained denial of the plaintiff's motion was "*a fortiori* an abuse of the discretion enjoyed by the District Court under 59(e)."[110]

Chief Judge Seth dissented, urging the case be remanded for the limited purpose of permitting the trial court to make findings or express specific reasons why the subclass certification was denied by the order entered in response to the rule 59(e) motion.[111] He declined to assume that the district court had not considered the proposed subclasses, but preferred to character-

101. *Id.*

102. 663 F.2d 78 (10th Cir. 1981).

103. *Id.* at 79.

104. Quintana v. Califano, 623 F.2d 128 (10th Cir. 1979). The Tenth Circuit also remanded the suit for determination of when mootness arose for purposes of the relation back doctrine of Sosna v. Iowa, 419 U.S. 393, 402 n.11 (1975).

105. The trial court believed that some members might not wish to compel early adjudication because of its possible adverse effect on the quality of the Secretary's deliberations. Quintana v. Harris, 88 F.R.D. 132, 133-34 (D.N.M. 1980).

106. FED. R. CIV. P. 59(e).

107. 663 F.2d at 79.

108. 445 U.S. 388 (1980).

109. *Id.* at 408.

110. 663 F.2d at 80.

111. *Id.* at 81 (Seth, C.J., dissenting).

ize the problem as the omission of an explanation or rationale for the court's action.

2. Intervention as a Class Member into Pending Litigation

The dismissal of a proposed class action against the Board of Education of Topeka for failure to comply with the desegregation order of *Brown v. Board of Education*[112] was considered by the Tenth Circuit in *Miller v. Board of Education*.[113] The trial court followed its own precedent[114] in holding that because the original *Brown v. Board of Education* case[115] was still pending, intervention was the proper procedure for presenting a claim that the Supreme Court's desegregation order had not been followed.

The appellate court agreed that because the district court still had jurisdiction of the original case, intervention was the proper procedure for the plaintiffs to use. The court quoted with approval the trial court's Memorandum and Order which stated that judicial economy and the risk of inconsistent judgments were policy reasons underlying its dismissal of the proposed class action.[116]

C. *Petition under Fictitious Name*

In *Coe v. United States District Court*,[117] the petitioner brought a mandamus action in which he alleged that the district court had abused its discretion in denying his request for anonymity. He also appealed the court's denial of his motion for amended complaint, in which he requested that, if his true name were used, the complaint and other pleadings be placed under seal.[118] The petitioner was a physician who was investigated by the State Board of Medical Examiners (Board) for professional misconduct.[119] The Board refused to withhold publicizing the formal complaint against the doctor.[120] Thereafter, the physician filed a section 1983 action seeking a declaratory judgment and injunctive relief against the Board to prevent it from conducting the public proceeding.[121]

The district court held that the public interest in knowing the identity of the physician outweighed his individual privacy interest.[122] In his man-

112. 347 U.S. 483 (1954) (*Brown I*) (racial discrimination in public education is unconstitutional); 349 U.S. 294 (1955) (*Brown II*) (directives for implementation of the original decision).

113. 667 F.2d 946 (10th Cir. 1982) (per curiam).

114. Brown v. Board of Educ., 84 F.R.D. 383 (D. Kan. 1979).

115. Brown v. Board of Educ., 139 F. Supp. 468 (D. Kan. 1955).

116. 667 F.2d at 948.

117. 676 F.2d 411 (10th Cir. 1982).

118. *Id.* at 413.

119. The formal complaint prepared by the Attorney General included charges of sexual or immoral improprieties. *Id.* at 412.

120. The Board had offered to conduct a non-public hearing on the condition the doctor suspend his practice of medicine until after the Board had heard and decided the case. The doctor refused, claiming that his practice would be irreparably harmed during the estimated 90 days that the process takes. *Id.* at 413 (quoting District Court Order of Mar. 4, 1982).

121. The plaintiff alleged deprivation of his fourteenth amendment due process rights, specifically irreparable harm to himself, his reputation, and his property interests. 676 F.2d at 412.

122. *Id.* at 414. The district court also expressed reservations concerning federal court jurisdiction. It suggested that the proper form for the plaintiff to challenge a state board's action

damus action before the Tenth Circuit Court of Appeals, the physician claimed that by refusing to allow him to bring the suit anonymously, the district court had foreclosed his right to a fair or meaningful opportunity to present his federal constitutional claims in a federal court.[123]

The Tenth Circuit denied the writ of mandamus, finding that the district court did not abuse its discretion in refusing to allow the petitioner to proceed under a pseudonym. The court relied upon its decision in *Lindsey v. Dayton-Hudson Corp.*,[124] which concluded that the use of pseudonyms is "an unusual procedure, to be allowed only where there is an important private interest to be recognized."[125] Rule 10(a) expressly requires the names of all parties to appear in the complaint.[126]

In weighing the public interest in disclosure against the physician's private interest in anonymity, the court examined the statutory purpose of the legislation which created the Board. This statute declares that the regulation of the practice of medicine is intended so "that the people shall be properly protected against unauthorized, unqualified, and improper practice of the healing arts in this state."[127] In view of this legislative purpose and the absence of any abuse of discretion on the part of the Board, the court found that the public proceedings against Dr. Coe did not violate any due process rights.[128] Further, the court ruled that because the public interest was paramount, the plaintiff did not have a right to have his pleadings placed under seal.[129]

IV. DISCOVERY AND PRETRIAL

A. *Preliminary Injunctions*

Whether the denial of a preliminary injunction was sufficient basis for granting summary judgment was one of the issues in *Thompson v. Kerr-McGee Refining Co.*[130] The plaintiff, a service station operator, sued under the Petroleum Marketing Practices Act[131] (the Act) for the unlawful nonrenewal of his franchise by Kerr-McGee. Under this Act, a court must issue a preliminary injunction if the franchisee shows: 1) the franchise has been terminated; 2) the existence of "sufficiently serious questions going to the merits to make such questions a fair ground for litigation;" and 3) the issuance of a preliminary injunction would impose less hardship on the franchisor than on

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was in state court. *Id.* (quoting District Court Order of Mar. 4, 1982). Judge Barrett and Judge Logan shared this concern. 676 F.2d at 418 n.2. Judge McKay did not concur in this footnote, but dismissed it as dicta. *Id.* at 418 (McKay, J., concurring).

123. 676 F.2d at 413.

124. 592 F.2d 1118 (10th Cir. 1979).

125. *Id.* at 1125.

126. FED. R. CIV. P. 10(a).

127. COLO. REV. STAT. § 12-36-102 (1973).

128. 676 F.2d at 417.

129. *Id.* at 418. The court distinguished *Coe* from its opinion in Crystal Grower's Corp. v. Dobbins, 616 F.2d 458 (10th Cir. 1980), on the basis that *Crystal Grower's* involved "non-disclosure, secrecy considerations arising from invocation of the attorney-client privilege and the work product doctrine, when there were no competing public interests." 676 F.2d at 418.

130. 660 F.2d 1330 (10th Cir. 1981), *cert. denied*, 455 U.S. 1019 (1982).

131. 15 U.S.C. § 2801 (Supp. IV 1980).

the franchisee without it.[132] Without elaboration, the trial court dissolved the temporary injunction against the franchisor.[133] After a trial on the merits, a jury awarded damages to the franchisee.[134]

On appeal, Kerr-McGee argued that the district court, by dissolving the temporary injunction, had implicitly determined that there were no material issues of fact.[135] Kerr-McGee submitted to the appellate panel that the basis for the lower court's denial of the preliminary injunction must have been the nonexistence of "sufficiently serious questions going to the merits to make such questions a fair ground for litigation."[136] In such circumstances, it argued summary judgment was appropriate. Kerr-McGee also contended that its rule 12(b)(6) motion to dismiss for failure to state a claim should have been granted.

The Tenth Circuit Court of Appeals disagreed. Although emphasizing that the situation was unusual, the court ruled the district court did not err in denying the appellant's motions for summary judgment and failure to state a claim.[137] The court distinguished the plaintiff's burden of proof at a hearing for a preliminary injunction from the burden of proof required at a trial on the merits.[138] At a preliminary injunction hearing a plaintiff must only establish that success on the merits is probable. Thus, a plaintiff may not present all of the evidence at the hearing, perhaps because of litigation strategy or because the case is not yet fully developed.[139] It would be unfair to the plaintiff to transform a hearing for a preliminary injunction into a trial on the merits, thus precluding the opportunity for him to present his entire case.[140]

B. *Protective Orders*

1. Payment of the Discovery Costs of a Subpoenaed Non-party

Florida v. Kerr-McGee[141] involved a protective order in a multi-district antitrust action against several large oil companies, which alleged price fixing, creation of artificial scarcity, and monopoly of the petroleum industry.[142] The suit was consolidated with similar suits brought by other states in the United States District Court for the Central District of California for coordinated pretrial proceedings.[143]

Discovery against non-parties to the antitrust action was authorized by order of the California judge supervising the coordinated pretrial proceed-

132. 15 U.S.C. § 2805(b)(2) (Supp. IV 1980).
133. 660 F.2d at 1387.
134. *Id.* at 1382.
135. *Id.* at 1386.
136. *Id.* at 1387 (quoting the second prong of the standard set forth in 15 U.S.C. § 2805(b)(2) (Supp. IV 1980)).
137. 660 F.2d at 1388.
138. *Id.*
139. *Id.*; *see* 7 J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 65.04 (4) (2d ed. 1982).
140. 660 F.2d at 1388. *See* Penn v. San Juan Hosp., Inc., 528 F.2d 1181 (10th Cir. 1978).
141. 669 F.2d 620 (10th Cir. 1982).
142. *Id.* at 622.
143. *Id.*

ings.[144] The State of Florida served Kerr-McGee, a non-party to the suit, with notice of deposition and a subpoena *duces tecum* for production of certain documents relating to the purchase, refining, and marketing of crude oil and petroleum products by Kerr-McGee and its subsidiaries.[145] The subpoena was eighteen pages long and contained thirteen categories of documents.[146] It cost Kerr-McGee almost $8,800 to produce the requested materials.[147]

Prior to delivering the requested documents, Kerr-McGee moved for a protective order conditioning the production of the documents upon the payment by Florida of the discovery costs. The District Court for the Western District of Oklahoma granted the motion and Florida appealed.[148]

The Tenth Circuit Court of Appeals, per Judge McWilliams, affirmed the trial court's order, finding that there was no abuse of discretion.[149] The court made three points in its analysis of the case. First, because Kerr-McGee was not attempting to quash the subpoena, but merely requesting limited protection, its burden as movant was less stringent.[150] Second, the court noted that Florida's argument that these costs were relatively insignificant to a corporation the size of Kerr-McGee cut both ways since Florida was not "penniless" either.[151]

Most importantly, the court held that because Kerr-McGee was not a party to the underlying antitrust action, its response to the subpoena would not inure to its benefit.[152] The court reasoned that although the discovery rules do not distinguish between parties to the action and non-parties,[153] a district court, using the discretion granted to it under rule 26(c), "should [not] be reluctant to place the costs of discovery upon the party deriving benefit therefrom."[154] The court found that in this situation, the burdens flowed to Kerr-McGee, while the benefits flowed to Florida.[155]

2. Attorney's Lien after Withdrawal from Representation

The adjudication of a fee dispute between a lawyer and his clients was at issue in *Jenkins v. Weinshienk*.[156] The lawyer, Jenkins, had gathered important information for his clients' defense in a civil action pending before District Judge Weinshienk, *Woodworth v. Stanley Vacation Club, Inc.*[157] His clients allegedly owed him at least $75,000 for previous legal work. In an attempt

144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.* at 622-23.
148. *Id.* at 622.
149. *Id.* at 624.
150. *Id.* at 623.
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.* at 624 n.3; *see* FED. R. CIV. P. 26(c). In its footnote, the court noted the Ninth Circuit's agreement with this position. *See* Dart Indus. Co. v. Westwood Chem. Co., 649 F.2d 646, 649 (9th Cir. 1980).
155. 669 F.2d at 624.
156. 670 F.2d 915 (10th Cir. 1982).
157. No. 81-818 (D. Colo. filed May 22, 1981) (default judgment entered Nov. 5, 1982).

to force his clients to pay their legal bills, Jenkins petitioned the trial court to withdraw from the *Woodworth* case. He refused, however, to hand over the files containing the essential information for his clients' pending litigation until they paid him his fees, including approximately $3,500 for work on the *Woodworth* case.[158]

Judge Weinshienk conditioned the withdrawal order on Jenkins either delivering the files to the substituted counsel or permitting the substituted counsel to photocopy the files. The judge later amended her order to require the clients to post a bond for $3,500 as security for the attorney's lien on the unpaid fees in the *Woodworth* case.[159]

The attorney petitioned the Tenth Circuit Court of Appeals for mandamus relief.[160] He claimed that under Colorado law, an attorney has a retaining lien[161] on all of his clients' papers until he is paid in full for his legal work, including amounts owed for matters unrelated to the litigation before the court. He argued that the trial court's refusal to recognize the full extent of the lien deprived him of a property right without due process of law.[162]

The appellate court determined that with limited exceptions, a trial court has ancillary jurisdiction[163] over the legal fees owed to an attorney only "*with respect to work done in the suit being litigated*."[164] The court noted that to hold otherwise would open the federal courts to fee litigation.[165]

Finding the trial court had limited jurisdiction over the fee dispute, the court held that under Colorado law, Jenkins had a retaining lien for the *Woodworth* fees.[166] The court refused to emasculate the "power and bite" of the attorney's lien because of its inconvenience to the clients.[167] Thus, the court directed the trial court to permit the lawyer to withhold the papers or to require the clients to post a bond sufficient to protect Jenkins' lien.[168]

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158. *Jenkins*, 670 F.2d at 917.

159. *Id.*

160. *Id.* The court found that this was an appropriate case for mandamus. The court drew an analogy to cases where a party claims a privilege not to disclose information. In such cases, waiting to appeal until a final decision is rendered provides an inadequate remedy. *Id.*

161. COLO. REV. STAT. § 12-5-120 (1973).

162. 670 F.2d at 917.

163. *Id.* at 918. The court relied upon the test for ancillary jurisdiction articulated in Morrow v. District of Columbia, 417 F.2d 728, 740 (D.C. Cir. 1969):

> [A]ncillary jurisdiction should attach where: (1) the ancillary matter arises from the same transaction which was the basis of the main proceeding, or arises during the course of the main matter; (2) the ancillary matter can be determined without a substantive new fact-finding proceeding; (3) determination of the ancillary matter through an ancillary order would not deprive a party of a substantive procedural or substantive right, and (4) the ancillary matter must be settled to protect the integrity of the main proceeding or to insure that the disposition in the main proceeding will not be frustrated.

164. 670 F.2d at 918 (emphasis in original). *Cf.* National Equip. Rental, Ltd. v. Mercury Typesetting Co., 323 F.2d 784, 786 (2d Cir. 1963); *see* Note, *Attorney's Retaining Lien over Former Client's Papers*, 65 COLUM. L. REV. 296 (1965).

165. 670 F.2d at 919.

166. COLO. REV. STAT. § 12-5-120 (1973). *See also* Collins v. Thuringer, 92 Colo. 433, 21 P.2d 709 (1933).

167. 670 F.2d at 920.

168. *Id.*

C. *Dismissal with Prejudice*

In *Joplin v. Southwestern Bell Telephone Co.*,[169] the appellate court found the trial court abused its discretion in dismissing with prejudice the cause of action of a *pro se* claimant because of lack of prosecution. The plaintiff had failed to file a pretrial memorandum with the court, despite the district court's warning that this would constitute sufficient grounds for dismissal of the suit.[170] The trial court dismissed the action, but failed to set forth its factual findings, judicial considerations, and legal reasoning in its order of dismissal.[171] In considering the severity of the sanction of dismissal with prejudice, the appellate court examined the United States Supreme Court's definition of "discretion:" "[J]udicial action . . . exercised not arbitrarily or willfully, but with regard to what is right and equitable under the circumstances and the law, and directed by reason and the conscience of the judge to a just result."[172] Using this standard, the Tenth Circuit court found the trial court had abused its discretion.

V. APPEALS

A. *Standards of Review*

1. Interpretation of State Law

The standard of review for federal district court interpretation of state law in diversity cases received careful attention by Judge Logan, joined by Judge McKay in *Evans v. C.E. Lumus Co.*[173]

An employee of an indemnified sub-contractor working on construction of the processing plant of a Wyoming trona mine was injured. The district court in Wyoming, in a case of first impression, applied a state statute invalidating indemnity contracts for personal injury or death or property loss or damage due to negligence or accident at mining operations,[174] and ruled the indemnity agreement void and unenforceable as against public policy.

The court articulated its standard of appellate review: "When a case in diversity involves the interpretation of a state statute, and there exist no authorities on point, the views of the federal district judge who is a resident of the state where the controversy arose carry extraordinary persuasive force, and will not be overturned unless 'clearly erroneous.' "[175]

Judge Logan's criticism of the "clearly erroneous" standard distinguished between review of the trial court's findings of fact, in which the "clearly erroneous" standard is suitable,[176] from its statements of law, in which it is not. He cited criticism of the Tenth Circuit position on this mat-

169. 671 F.2d 1274 (10th Cir. 1982).
170. *Id.* at 1275.
171. *Id.* at 1276.
172. Langnes v. Green, 282 U.S. 531, 541 (1931).
173. No. 80-1455 (10th Cir. Nov. 16, 1981) (Logan and McKay, JJ., concurring.)
174. WYO. STAT. ANN. §§ 30-1-131 to -132 (1977).
175. No. 80-1455, slip op. at 4.
176. *Id.* at 1 (Logan, J., concurring). He added that rule 54(a) of the Federal Rules of Civil Procedure does not limit review of a trial court's conclusions of law to a "clearly erroneous" standard. *Id.* at 1 n.1.

ter by leading commentators[177] and cases in which the United States Supreme Court intimated the appropriateness of a lesser standard.[178] He reminded the court that it had applied the "clearly erroneous" standard inconsistently in the past, sometimes substituting other language.[179]

Judge Logan's fundamental concern is that by adopting a "clearly erroneous" standard, the court of appeals precludes itself from independent review of the district court's interpretation of the state law in diversity cases, however capable that interpretation may be, thus foreclosing the litigant's right of appeal on that issue.[180]

2. Rulings on 60(b) Motions to Set Aside a Default Judgment

In *Thompson v. Kerr-McGee*, the appellate court referred to rule 60(b) as giving a court "a grand reservoir of equitable power to do justice in a particular case," and urged liberal construction to serve "substantial justice."[181] Nevertheless, in *Barta v. Long*,[182] the court found the trial court did not abuse its discretion in denying the defendant's rule 60(b) motion to set aside a default judgment.

Over a period of ten months, the defendant-appellants did not respond to repeated court notices, letters, and orders for response to interrogatories in a suit alleging common law fraud and securities fraud arising from an oil well venture.[183] Defendants changed attorneys but were at all times represented by counsel.[184] The plaintiffs moved for a default judgment, and after a hearing, the district court entered a default judgment for $234,360 compensatory damages and $50,000 punitive damages.[185]

Defendants filed a rule 60(b) motion to set aside the judgment on the ground of excusable neglect and a motion to permit answers and counterclaims to be filed. These motions were denied. Two and a half months after judgment, the defendants appealed the default judgment and the denial of the rule 60(b) motion.[186]

The appellate court first ruled that filing a rule 60(b) motion with the trial court does not toll the time in which an appeal from judgment may be

177. *Id.* at 2. *See* 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2588, at 752 (1971); 1A J. MOORE, W. TAGGART, A. VESTAL & J. WICKER, MOORE'S FEDERAL PRACTICE § 0.309 (2) n.28 (2d ed. 1982).

178. No. 80-1455, slip op. at 3 (Logan, J., concurring). Such Supreme Court cases using lesser standards include: Bernhardt v. Polygraphic Co., 350 U.S. 198, 204 (1956) ("special weight"); Township of Hillsborough v. Cromwell, 326 U.S. 620, 630 (1946) ("great deference"); Retiz v. Mealey, 314 U.S. 33, 39 (1941) ("great weight"). *See also* Thompson v. Consol. Gas Util. Corp., 300 U.S. 55, 74-75 (1937).

179. The Tenth Circuit Court of Appeals has used such standards as "carry extraordinary force;" "substantial or great weight;" "some weight;" and even "deference." No. 80-1455, slip op. at 2, (Logan, J., concurring).

180. *Id.* at 3-4.

181. 660 F.2d 1380, 1385 (10th Cir. 1981). *See* FED. R. CIV. P. 60(b). The court also cautioned that the motion to vacate should not serve as a substitute for appeal on the merits or a means of extending the time in which an appeal may be taken. *Id.*

182. 670 F.2d 907 (10th Cir. 1982).

183. *Id.*

184. *Id.* at 909.

185. *Id.* at 908-09.

186. *Id.* at 909.

taken, and therefore, the appeal was not timely.[187] In its examination of the trial court's denial of the defendants' request to set aside the default judgment, the court stated three requirements for the movant to set aside a default judgment under rule 60(b): 1) diligent effort to seek relief under rule 60(b) by filing the motion within a reasonable time; 2) demonstration that there was a good or acceptable reason for the default; and 3) a showing of a meritorious defense by more than bare conclusory statements unsupported by facts.[188]

The court ruled that the defendants' failures to comply with the orders of the court were deliberate.[189] The court summarily dismissed the defendants' contentions that the withdrawal of their counsel and their resulting confusion were sufficient excuses for their failure to answer the interrogatories. The court noted that such contentions overlooked the several orders, notices, and letters they received before the motion for sanctions was filed. The record showed that the defendants were represented at all times by counsel. Most revealing was the evidence that the individual defendants were experienced in litigation, and were concomitantly trying to set aside a similar default in another jurisdiction.[190]

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187. *Id.* The early case of United States v. Schlotfeldt, 136 F.2d 935 (7th Cir. 1943) was specifically discounted as authority for this issue, based on 7 J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 60.29 (2d ed. 1982). *See also* 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2871 (1973).

188. *Barta*, 670 F.2d at 909. *See In Re* Stone, 588 F.2d 1316 (10th Cir. 1978); Gomes v. Williams, 420 F.2d 1364 (10th Cir. 1970).

189. 670 F.2d at 909.

190. *Id.*