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Federal Jurisdiction and Procedure

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FEDERAL JURISDICTION AND PROCEDURE

*Keith B. Hall**

This Article discusses Fifth Circuit opinions published in 1999 regarding six topics—removal, abstention, appellate jurisdiction, default judgment procedure, standing, and the first-to-file rule.

I. REMOVAL

A. Post-Removal Joinder of Nondiverse Defendants

In *Cobb v. Delta Exports, Inc.*,¹ the Fifth Circuit addressed whether a district court permitting the post-removal joinder of nondiverse defendants may deny a motion to remand to state court on the basis that the nondiverse defendants were fraudulently joined.²

In *Cobb*, the City of Lake Charles engaged a contractor to remove tree limbs and other debris after an ice storm.³ The contractor hired a subcontractor, which in turn hired a second subcontractor.⁴ While removing debris, an employee of the second subcontractor backed a piece of heavy equipment into a vehicle on a city street, injuring Mr. Cobb, a Louisiana citizen.⁵

Mr. Cobb and his wife sued the second subcontractor and its insurer, both foreign domiciliaries, in state court.⁶ The defendants

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1. 186 F.3d 675 (5th Cir. 1999).

2. *See id.* at 676–77.

3. *See id.* at 676.

4. *See id.*

5. *See id.*

6. *See Cobb*, 186 F.3d at 676.

removed⁷ to federal court on the basis of diversity⁸ jurisdiction.⁹ After removal, the Cobbs filed an unopposed motion to amend their complaint¹⁰ to add claims against the first subcontractor, the employee who drove the equipment, the City, and the contractor, the latter two of which are Louisiana domiciliaries.¹¹ The federal district court granted the motion to amend, and the Cobbs subsequently moved to remand.¹² The court denied the remand motion, concluding that the two Louisiana-domiciled defendants had been “fraudulently joined.”¹³ Pursuant to the “fraudulent joinder” doctrine, the existence of diversity jurisdiction is not destroyed by a plaintiff’s fraudulent pleading of jurisdictional facts or by his assertion of claims against nondiverse defendants against whom the plaintiff has no possibility of establishing a cause of action.¹⁴

The Cobbs appealed the denial of their remand motion.¹⁵ The Fifth Circuit reversed, concluding that a remand was required by 28 U.S.C. § 1447(e), which states that “if after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State Court.”¹⁶

The Fifth Circuit concluded that the plain language of the statute gives the district court only two options—(1) deny joinder or (2) permit joinder and remand.¹⁷ Thus, a court may not permit joinder of nondiverse defendants and then fail to remand.¹⁸

The fraudulent joinder doctrine was inapplicable because “[t]he fraudulent joinder doctrine does not apply to joinders that occur *after* an action is removed.”¹⁹ The court reasoned that a

7. See *Cobb*, 186 F.3d at 676; see also 28 U.S.C. § 1441 (1994).

8. See *Cobb*, 186 F.3d at 676; see also 28 U.S.C. § 1331 (1994).

9. See *Cobb*, 186 F.3d at 676.

10. See *id.*; see also FED. R. CIV. P. 15(a).

11. See *Cobb*, 186 F.3d at 676.

12. See *id.*; see also 28 U.S.C. § 1447(c).

13. See *Cobb*, 186 F.3d at 676.

14. See *id.* at 677.

15. See *id.* at 676.

16. *Id.* at 677 (citing 28 U.S.C. § 1447 (e)).

17. See *id.*

18. See *Cobb*, 186 F.3d at 677.

19. *Id.* (emphasis added).

district court “would never” grant a request to join nondiverse defendants against whom recovery is impossible.²⁰ The court noted that because § 1447(e) gives a court discretion to prohibit joinder, a defendant has a chance at the time joinder is requested to argue that the plaintiff has no colorable claim against the party that he seeks to join and that joinder therefore should not be permitted.²¹

The Fifth Circuit also concluded that its interpretation of § 1447(e) was supported by legislative history—in particular by Congress’s rejection in 1988 of a proposed version of § 1447(e) that expressly would have given district courts the discretion to retain jurisdiction after permitting joinder of nondiverse defendants.²² Further, the court’s holding was required by Fifth Circuit precedent existing prior to the adoption of the current version of § 1447(e).²³ The precedent held that “post-removal joinder of a non-diverse, dispensable party destroys diversity jurisdiction.”²⁴

Finally, the court explained that *Cobb* was not controlled by the Supreme Court’s decision in *Freeport-McMoran, Inc. v. KN Energy, Inc.*²⁵ In *Freeport-McMoran*, two plaintiffs brought a diversity action.²⁶ After one of the plaintiffs transferred its interests to a nondiverse entity, the plaintiffs sought and obtained leave to amend their claim to substitute the nondiverse party pursuant to Federal Rule of Civil Procedure 25(c).²⁷ After a verdict for the plaintiffs, the court of appeals reversed, holding that the district court lacked subject matter jurisdiction after the substitution of the nondiverse party because the substitution destroyed diversity.²⁸ The Supreme Court reversed the appellate court and produced an opinion stating that “if jurisdiction exist[ed] at the time an action [was] commenced, such jurisdiction

20. See *Cobb*, 186 F.3d at 678.

21. See *id.*

22. See *id.* at 677.

23. See *id.*

24. *Id.* at 677 (citing *Hensgens v. Deere & Co.*, 833 F.2d 1179, 1181 (5th Cir. 1987)).

25. 498 U.S. 426 (1991) (per curiam), cited in *Cobb*, 186 F.3d at 678.

26. See *Freeport-McMoran*, 498 U.S. at 427.

27. See *id.*

28. See *id.*

may not be divested by subsequent events.”²⁹ In *Cobb*, however, the Fifth Circuit determined that the broad language of *Freeport-McMoran* was dicta and that the case’s holding was limited to Federal Rule of Civil Procedure 25 substitutions.³⁰ In making that determination, the Fifth Circuit relied on the language of § 1447(e) and opinions from two other appellate courts.³¹

In short, defendants may oppose post-removal joinder of nondiverse defendants against whom plaintiffs have no colorable claim. If, however, nondiverse defendants are joined, the district court loses subject matter jurisdiction and has no power to consider whether joinder was fraudulent.³² The Fifth Circuit expressly left open, though, the question of whether a district court may exercise its inherent power to recall its judgment and withdraw the order permitting joinder.³³

B. Review of Remand Orders

1. Remands Not Based on § 1447(c)

In *Giles v. NYLCare Health Plans, Inc.*,³⁴ the Fifth Circuit examined the circumstances under which 28 U.S.C. § 1447(d) prohibits appellate review of remands to state court and those under which federal preemption of state law provides federal question jurisdiction.³⁵

In *Giles*, the plaintiff’s son died while under the care of a medical group selected by her health maintenance organization (“HMO”).³⁶ The HMO offered its services through an employee benefit plan provided by the plaintiff’s employer.³⁷ The plaintiff brought claims against the HMO, the medical group, and two

29. See *Freeport-McMoran*, 498 U.S. at 428.

30. See *Cobb*, 186 F.3d at 680.

31. See *id.* at 680–81 (citing *Burka v. Aetna Life Ins. Co.*, 87 F.3d 478 (D.C. Cir. 1996); *Casas Office Machines, Inc. v. Mita Copystar of Am., Inc.*, 42 F.3d 668 (1st Cir. 1994)).

32. See *Cobb*, 186 F.3d at 678.

33. See *id.* at 678 n.8.

34. 172 F.3d 332 (5th Cir. 1999).

35. See *id.* at 336.

36. See *id.* at 335.

37. See *id.*

physicians that had treated her son.³⁸ The plaintiff's claims against her HMO included negligence in selecting the medical group, vicarious liability, breach of contract, breach of warranty, and misrepresentation.³⁹ The HMO removed on the basis that the Employee's Retirement Income Security Act ("ERISA") completely preempted the plaintiff's claims.⁴⁰ The plaintiff amended her complaint to dismiss claims for breach of contract, breach of warranty, and misrepresentation, which she conceded were preempted, and moved for a remand.⁴¹ The district court remanded, concluding that ERISA did not completely preempt the plaintiff's remaining claims and that the court should utilize its discretion to refrain from exercising supplemental jurisdiction.⁴²

The Fifth Circuit first examined whether it had jurisdiction to hear the appeal.⁴³ Pursuant to 28 U.S.C. § 1447(d), an order remanding a case removed to federal court generally may not be reviewed.⁴⁴ However, the Supreme Court has held that the prohibition on review of remands applies only to § 1447(c) remands—that is, remands based on either a defect in removal procedure or a lack of subject matter jurisdiction.⁴⁵ Accordingly, a litigant may appeal a remand based on discretionary grounds. These grounds include remands based on abstention and remands based on a court's discretion under certain grounds enumerated in 28 U.S.C. § 1367(c) not to exercise supplemental jurisdiction.⁴⁶ However, remand orders are reviewable only if the district court "clearly and affirmatively" relies on a ground for remand other than § 1447(c).⁴⁷ In this case, the district court had expressly stated that it was remanding based on its discretionary decision

38. *See Giles*, 172 F.3d at 335.

39. *See id.*

40. *See id.*

41. *See id.*

42. *See id.*

43. *See Giles*, 172 F.3d at 335.

44. *See id.* (citing 28 U.S.C. § 1447(d) (1994)).

45. *See id.* at 335–36 & n.1. *See e.g.*, *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127–28 (1995); *Angelides v. Baylor College of Med.*, 117 F.3d 833, 835–36 (5th Cir. 1997).

46. *See Giles*, 172 F.3d at 335–36.

47. *See id.* at 336.

not to exercise supplemental jurisdiction.⁴⁸ Thus, § 1447(d) did not bar review of the remand order.

Having determined that it could review the remand order, the court next examined whether a basis of subject matter jurisdiction existed.⁴⁹ The HMO argued that ERISA completely preempts plaintiff's claims and that this preemption created a federal question.⁵⁰ Preemption is based on the supremacy clause of the United States Constitution.⁵¹ When federal and state laws conflict, the state laws are preempted and have no effect.⁵² Thus, preemption by federal law sometimes is a defense to state law claims.⁵³ But under the well-pleaded complaint rule, the existence of a federal law defense to a state law claim does not provide federal question jurisdiction.⁵⁴ Rather, federal question jurisdiction exists only if the plaintiff's well-pleaded complaint is itself based in part on federal law.⁵⁵ Accordingly, ordinary or "conflict preemption" does not provide a basis for federal question jurisdiction.⁵⁶

On the other hand, the doctrine of "complete preemption" provides that federal legislation sometimes will so completely occupy a particular field that it leaves no room for operation of any state laws on the subject.⁵⁷ In such circumstances, any civil complaint raising claims in that field is necessarily federal in character, even if the claims purportedly are based on state law.⁵⁸ Thus, the

48. See *Giles*, 172 F.3d at 337-39.

49. See *id.*

50. See *id.* at 335, 338.

51. See U.S. CONST. art. VI, cl. 2.

52. See *id.*; see also JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 9.1, at 319 (5th ed. 1995).

53. See *Giles*, 172 F.3d at 337.

54. See *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 152-54 (1908); *Giles*, 172 F.3d at 337.

55. See *Mottley*, 211 U.S. at 152-54; *Giles*, 172 F.3d at 337-38.

56. See *Giles*, 172 F.3d at 337.

57. See, e.g., *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 66-67 (1987); *Giles*, 172 F.3d at 336.

58. See *Giles*, 172 F.3d at 336.

assertion of completely preempted state law claims raises a federal question and provides a basis for removal.⁵⁹

The Fifth Circuit reasoned that the plaintiff had originally raised both claims that possibly were completely preempted and claims that arguably were conflict-preempted.⁶⁰ The completely preempted claims, together with supplemental jurisdiction, had provided a valid basis for removing the entire case.⁶¹ However, pursuant to the plaintiff's motion, all of the completely preempted claims had been dismissed.⁶² The Fifth Circuit held that when a district court dismisses the claims that provide the basis for original jurisdiction, the district court has discretion whether to continue exercising supplemental jurisdiction over the pendant state law claims or to discontinue exercising supplemental jurisdiction and remand the remaining claims to state court.⁶³ In *Giles*, the Fifth Circuit held that the district court had not abused its discretion by remanding the state law claims to state court.⁶⁴ Accordingly, the Fifth Circuit affirmed.⁶⁵

2. Remands Based on 28 U.S.C. § 1447(c)

Another ERISA case, *Smith v. Texas Children's Hospital*,⁶⁶ illustrates the principle that if a remand is based on § 1447(c), then § 1447(d) generally bars appellate review.⁶⁷ In *Smith*, the defendant removed on grounds of complete preemption.⁶⁸ After completely preempted claims were dismissed, the court remanded, apparently based on a discretionary decision not to exercise supplemental jurisdiction.⁶⁹ The remand was appealed, and the Fifth Circuit sent the case back to the district court for reconsid-

59. See *Giles*, 172 F.3d at 337.

60. See *id.* at 338.

61. See *id.*; see also 28 U.S.C. § 1367 (1994) (supplemental jurisdiction).

62. See *Giles*, 172 F.3d at 338–39.

63. See *id.* at 338.

64. See *id.* at 339.

65. See *id.* at 339–40.

66. 172 F.3d 923 (5th Cir. 1999).

67. See *id.* at 924–25.

68. See *id.*

69. See *id.* at 925.

eration of an issue.⁷⁰ This time the district court remanded on the basis of § 1447(c), concluding that it lacked subject matter jurisdiction.⁷¹ The defendant appealed, arguing that the Fifth Circuit's prior handling of the case implicitly included a finding that subject matter jurisdiction existed and that such a finding was law of the case.⁷² The Fifth Circuit dismissed the appeal, stating that pursuant to § 1447(d) it lacked the authority to review the remand order even if the order was erroneous.⁷³

II. *BURFORD* ABSTENTION

In *Webb v. B.C. Rogers Poultry, Inc.*,⁷⁴ the Fifth Circuit examined whether a district court may exercise *Burford* abstention⁷⁵ if the plaintiff asserts no equitable claims and whether a claim in *quantum meruit* sounds in equity, thereby allowing remand.⁷⁶

The plaintiff in *Webb* was a state-appointed receiver for an insolvent insurer.⁷⁷ The receiver sued one of the insurer's policyholders to collect unpaid premiums, asserting three alternative causes of action, including one in *quantum meruit*.⁷⁸ The policyholder removed to federal court on grounds of diversity.⁷⁹ The receiver moved to remand, and the court granted the motion based on *Burford* abstention.⁸⁰ The policyholder appealed.⁸¹

70. See *Smith*, 172 F.3d at 925.

71. See *id.*

72. See *id.* at 926.

73. See *id.*; see also *Copling v. The Container Store, Inc.*, 174 F.3d 590, 596 (5th Cir. 1999) (holding that pursuant to 28 U.S.C. § 1447(d), the appellate court lacked jurisdiction to review remand).

74. 174 F.3d 697 (5th Cir.), *cert. denied*, 120 S. Ct. 399 (1999).

75. See *Burford v. Sun Oil Co.*, 319 U.S. 315, 317-18 (1943).

76. See *Webb*, 174 F.3d at 701, 703.

77. See *id.* at 699.

78. See *id.*

79. See *id.* (citing 28 U.S.C. §§ 1332, 1441 (1994) (establishing diversity jurisdiction and removal, respectively)).

80. See *Webb*, 174 F.3d at 699.

81. See *id.*

The court concluded that it had jurisdiction,⁸² then examined whether the exercise of *Burford* abstention was proper.⁸³ The various abstention doctrines permit federal courts in certain circumstances to abstain from hearing cases even though subject matter jurisdiction exists.⁸⁴ The *Burford* doctrine, for example, permits a federal court to abstain from hearing a case in deference to complex state administrative procedures.⁸⁵ Indeed, *Burford* abstention must be exercised by a federal court sitting in equity if timely and adequate state-court review is available, and either (1) the case involves difficult questions of state law bearing on public policy issues whose importance transcends the result in the case before the court, or (2) the federal courts' resolution of the case would disrupt state efforts to establish a comprehensive policy regarding an issue of significant public concern.⁸⁶ But, as was established by the Supreme Court in *Quackenbush*, a federal court has no authority to abstain pursuant to *Burford* if the court is not sitting in equity or considering an action in which the grant of relief is discretionary.⁸⁷

In support of the remand, the receiver argued that *Quackenbush's* limit on the authority to exercise abstention is not iron-clad.⁸⁸ The court rejected that argument, concluding that *Quackenbush* permitted no exceptions to its rule.⁸⁹ The court also dismissed the receiver's citation of a post-*Quackenbush* Fifth Circuit case that affirmed an abstention-based remand in an

82. The dismissal was a final order so that jurisdiction existed under 28 U.S.C. § 1291, unless it was otherwise prohibited. *See Webb*, 174 F.3d at 699. Although 28 U.S.C. § 1447(d) prohibits appellate review of remand orders based on defective removal procedure or the lack of subject matter jurisdiction, the statute does not bar appellate review of remands based on other grounds, such as abstention. *See id.* at 700.

83. *See Webb*, 174 F.3d at 701.

84. *See generally* *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716–23 (1996).

85. *See Webb*, 174 F.3d at 700. Other abstention doctrines include *Colorado River*, *Younger*, *Thibodaux*, and *Pullman*. *See generally* *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813–17 (1976); *Younger v. Harris*, 401 U.S. 37, 43–54 (1971); *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 25–31 (1959); *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 500–01 (1941).

86. *See Webb*, 174 F.3d at 702 (citing *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 361 (1989)).

87. *See Webb*, 174 F.3d at 701 (citing *Quackenbush*, 517 U.S. 730–31).

88. *See id.*

89. *See id.* at 702.

insurance case in which no equitable relief was sought,⁹⁰ noting that the cited case did not confront the issue of whether the nature of the relief sought precluded abstention.⁹¹

The receiver's final argument in favor of abstention was that *quantum meruit* is an equitable form of relief and that a court may abstain and remand a case that includes actions at law if at least one cause of action is based in equity.⁹² The court rejected the receiver's final argument because the court concluded that actions for relief in *quantum meruit* are legal, not equitable causes of action.⁹³

Thus, although the Fifth Circuit entertained the proposition that a state's plan to deal with insolvent insurers often will justify *Burford* abstention,⁹⁴ the court reversed the remand order on grounds that a court errs if it abstains in a case involving no claims for equitable or discretionary relief.⁹⁵

The court expressly stated that, because it determined that *quantum meruit* is a legal action, it did not reach the issue of whether the existence of one equitable claim would permit a court to abstain and remand an entire case if the case also included legal claims.⁹⁶ But a dissenting opinion implicitly reached that issue.⁹⁷ The dissenting opinion concluded that *quantum meruit* sounds in equity but failed to expressly address whether an entire case may be remanded based on abstention if some, but not all, claims sound in equity.⁹⁸ Because the dissent concluded that the district court's order remanding the entire case should be affirmed, the dissenting opinion implicitly answered that a single

90. See *Clark v. Fitzgibbons*, 105 F.3d 1049, 1052 (5th Cir. 1997).

91. See *Webb*, 174 F.3d at 702 & n.9.

92. See *id.* at 701 & n.6.

93. See *id.* at 704-05.

94. See *id.* at 701-02.

95. See *id.* at 699, 702, 704-05.

96. See *Webb*, 174 F.3d at 701 & n.6.

97. See *generally id.* at 705-10 (Politz, J., dissenting).

98. See *id.* at 707 (Politz, J., dissenting).

equitable claim may justify remanding an entire case based on abstention.⁹⁹

III. APPELLATE JURISDICTION

A. Simultaneous Remand to State Court and Finding of No Personal Jurisdiction

The issue before the Fifth Circuit in *Falcon v. Transportes Aeros de Coahuila, S.A.*¹⁰⁰ was a novel question of appellate jurisdiction¹⁰¹—whether a defendant may appeal a lower court's order by finding that personal jurisdiction exists, if the order is issued simultaneously with an order remanding the case to state court.¹⁰²

In *Falcon*, the plaintiff brought a wrongful death action after a plane crash in Mexico.¹⁰³ The defendants removed¹⁰⁴ the case to federal court, asserting the existence of federal question jurisdiction¹⁰⁵ under the federal common law of international relations and treaty interpretation.¹⁰⁶ The plaintiff then moved to remand¹⁰⁷ to state court, and the defendants moved to dismiss for lack of personal jurisdiction and *forum non conveniens*.¹⁰⁸

The court initially dismissed the case as to one of the defendants, the air carrier, for lack of personal jurisdiction.¹⁰⁹ But the court reversed itself after finding that new evidence established the existence of personal jurisdiction as to the air carrier.¹¹⁰ The court issued a new order that vacated the earlier dismissal and held that personal jurisdiction existed.¹¹¹ On the same day that

99. See *Webb*, 174 F.3d at 710 (Politz, J., dissenting).

100. 169 F.3d 309 (5th Cir. 1999).

101. See *Falcon*, 169 F.3d at 310 (“This appeal presents us with a novel question . . .”).

102. See *id.*

103. See *id.* at 310.

104. See *id.* at 311; see also 28 U.S.C. § 1441 (1994).

105. See *Falcon*, 169 F.3d at 311; see also 28 U.S.C. § 1331 (1994).

106. See *Falcon*, 169 F.3d at 311.

107. See *id.*; see also 28 U.S.C. § 1447(c) (1994).

108. See *Falcon*, 169 F.3d at 311.

109. See *id.*

110. See *id.*

111. See *id.*

the court issued the order holding that personal jurisdiction existed, it also issued an order remanding the case to state court for lack of subject matter jurisdiction.¹¹² The remand was not a reviewable order.¹¹³ The initially-dismissed defendant appealed, however, the order which held that personal jurisdiction existed.¹¹⁴

The air carrier argued that appellate jurisdiction existed under 28 U.S.C. § 1291 and the collateral order doctrine.¹¹⁵ Although interlocutory decisions generally may not be appealed, the collateral order doctrine provides that an interlocutory decision may be appealed under 28 U.S.C. § 1291 if the decision “finally determine[s] claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.”¹¹⁶

Further, even after a case has been remanded to state court, the doctrine permits federal appellate review of district court orders that preceded the remand order both “in logic and in fact” and that also are “conclusive,” meaning “functionally unreviewable in the state court.”¹¹⁷ In *Falcon*, the appellate court focused whether the jurisdiction order was conclusive, an issue that the court noted was one of first impression.¹¹⁸

The court reasoned that if the state court could reexamine the personal jurisdiction issue, the order was not conclusive and not

112. See *Falcon*, 169 F.3d at 311.

113. See 28 U.S.C. § 1447(d) (1994); see also *Falcon*, 169 F.3d at 311 n.1 (citing *Angelides v. Baylor College of Med.*, 117 F.3d 833, 835–36 (5th Cir. 1997) (holding that a remand based on lack of subject matter jurisdiction is not appealable)).

114. See *Falcon*, 169 F.3d at 311.

115. See *Falcon*, 169 F.3d at 311.

116. *Id.* (quoting *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)).

117. *Id.* at 311 (quoting *Angelides*, 117 F.3d at 837 (citing *City of Waco v. United States Fidelity & Guar. Co.*, 293 U.S. 140, 143 (1934); *Linton v. Airbus Industrie*, 30 F.3d 592, 597 (5th Cir. 1994))).

118. See *Falcon*, 169 F.3d at 311–12. The court cast the question of whether an order is “conclusive” as turning on whether the order is a “jurisdictional” issue that could be reviewed in a state court or a “substantive” issue that could not be reviewed in state court. See *id.* The court’s analysis, however (as well as the analysis in the case on which the *Falcon* court relied), focused on whether the order would have preclusive effect in state court, rather than whether the order should be labeled “substantive” or “jurisdictional.” See *id.*; see also *Angelides*, 117 F.3d at 837.

subject to federal appellate review.¹¹⁹ In turn, whether the state court could reexamine the personal jurisdiction issue or whether the district court's order had preclusive effect that would bar such reexamination would turn on the federal law of collateral estoppel.¹²⁰ The Fifth Circuit found that the order did not have preclusive effect because none of the requirements for the federal doctrine of collateral estoppel were satisfied.¹²¹ Accordingly, the personal jurisdiction order was subject to reexamination in state court, was therefore not "conclusive," and was not subject to federal appellate review.¹²² The appeal was dismissed.¹²³

B. Rule 54(b) Certification

In *Briargrove Shopping Center Joint Venture v. Pilgrim Enterprises, Inc.*,¹²⁴ the Fifth Circuit examined what circumstances permit appeal of a partial judgment, pursuant to Federal Rule of Civil Procedure 54(b), if the district court has not expressly stated that it finds "no just reason for delay" of an appeal.¹²⁵

In *Briargrove*, a shopping center owner found on its property, contaminants of a type sometimes used in dry cleaning operations.¹²⁶ The owner sued its former tenant, a former dry cleaner operator, asserting common law claims and a claim under the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601–9675.¹²⁷ The district court entered a declaratory judgment addressing only the CERCLA claim and finding the defendant liable on that claim.¹²⁸ The same day, the court entered a judgment that it captioned "Final Judgment."¹²⁹ This second judgment held the defendant liable for

119. See *Falcon*, 169 F.3d at 312–13.

120. See *id.* at 312.

121. See *id.* at 312–13.

122. See *id.*

123. See *id.* at 313.

124. 170 F.3d 536 (5th Cir. 1999).

125. See *id.* at 539.

126. See *id.* at 538.

127. See *id.*

128. See *id.* at 538.

129. See *Briargrove*, 170 F.3d at 538.

cleanup costs, pursuant to the findings in the declaratory judgment and closed with the sentence: "This is a Final Judgment."¹³⁰ The defendant appealed.¹³¹

The Fifth Circuit examined whether it had jurisdiction, noting that it has jurisdiction only from (1) final decisions under 28 U.S.C. § 1291, (2) interlocutory orders under § 1292, (3) judgments certified as final under Federal Rule of Civil Procedure 54(b), and (4) some other non-final order or judgment to which an exception applies.¹³² The district court's "Final Judgment" was not a final decision under § 1291 because it did not "end[] the litigation on the merits."¹³³ The common law claims and cross-claims remained.¹³⁴ Neither did the judgment satisfy the requirements of § 1292.¹³⁵ Thus, the Fifth Circuit had appellate jurisdiction only if the district court's judgment was appealable under Rule 54(b).¹³⁶

Under Rule 54(b), a "court may direct the entry of a final judgment as to . . . fewer than all of the claims . . . only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment."¹³⁷ In the absence of these requirements, an order that adjudicates fewer than all the claims does not terminate the action, no matter how the order is designated.¹³⁸ In order to satisfy the requirements of Rule 54(b), a district court must determine that it is rendering a final judgment and must determine that there exists no just reason for delay.¹³⁹ The Fifth Circuit has held that the district court need not use the words "no just reason for delay" in order to make a Rule 54(b) certification.¹⁴⁰ However, the order from which an appeal is taken, together with any portions of the record to

130. *Briargrove*, 170 F.3d at 538.

131. *See id.* at 537.

132. *See Briargrove*, 170 F.3d at 538.

133. *Id.* at 538-39.

134. *See id.*

135. *See id.* at 538-39.

136. *See id.* at 539.

137. FED. R. CIV. P. 54(b), *quoted in Briargrove*, 170 F.3d at 539.

138. *See Briargrove*, 170 F.3d at 539.

139. *See id.*

140. *Id.*

which the order refers, must show the district court's "unmistakable intent to enter a partial final judgment under Rule 54(b)."¹⁴¹

Here, the order did not show such an unmistakable intent. The district court did not refer to Rule 54, and neither party had filed a motion mentioning the rule.¹⁴² Further, before making a Rule 54(b) justification, a court must make at least some findings concerning the substantive issues relating to Rule 54(b) certification.¹⁴³ The district court, however, did not issue any orders or memoranda that discussed those issues.¹⁴⁴ That the district court styled its order "Final Judgment" does not satisfy Rule 54(b).¹⁴⁵ Indeed, Rule 54(b) makes clear that "however designated," an order is appealable as a partial final judgment under Rule 54(b) only if the Rule's substantive requirements are met.¹⁴⁶

Finally, the defendant argued that the district court's approval of a *supersedeas* bond indicated that the court intended a Rule 54(b) certification.¹⁴⁷ But in determining whether a court intended a Rule 54(b) certification, only the order from which appeal is taken, and any part of the record to which the order refers, may be consulted.¹⁴⁸ The appealed order did not refer to the *supersedeas* bond, so it could not be considered.¹⁴⁹ Further, the Fifth Circuit noted that even if it could consider the order approving a *supersedeas* bond, that order would not show an unmistakable intent that the order appealed from be certified under Rule 54(b).¹⁵⁰ Thus, the order was not appealable under Rule 54, and the appeal was dismissed.¹⁵¹

141. *Briargrove*, 170 F.3d at 539 (quoting *Kelly v. Lee's Old Fashioned Hamburgers, Inc.*, 908 F.2d 1218, 1220 (5th Cir. 1990) (en banc)).

142. *See id.* at 539-40.

143. *See Briargrove*, 170 F.3d at 539-40.

144. *See id.* at 540.

145. *See id.*

146. *See id.*

147. *See id.*

148. *See Briargrove*, 170 F.3d at 540.

149. *See id.*

150. *See id.*

151. *See id.* at 541.

IV. DEFAULT JUDGMENT PROCEDURE

The issue before the Fifth Circuit in *Rogers v. Hartford Life and Accident Insurance Co.*¹⁵² was whether waiver of service¹⁵³ constitutes an appearance for purposes of Federal Rule of Civil Procedure 55(b)(2), so as to trigger the rule's requirement that written notice be given at least three days prior to a hearing on an application for judgment by default.¹⁵⁴

In *Rogers*, the plaintiff brought an ERISA claim against his former employer and the insurer that provided benefits under the employer's long-term disability plan.¹⁵⁵ The former employer was served with process, and the insurer waived service of process.¹⁵⁶ After the defendants failed to answer timely, the clerk of court filed an entry of default at the plaintiff's request.¹⁵⁷ Later, after a hearing, the district court entered a default judgment against both defendants.¹⁵⁸ The defendants learned of the default judgment over a month later and moved to have the judgment set aside.¹⁵⁹ The court denied the motions, and the defendants appealed.¹⁶⁰

On appeal, the insurer pointed out that Rule 55(b)(2) requires that written notice be given to any defendant who has appeared in an action at least three days prior to a hearing on an application for a default judgment, and no such notice had been given.¹⁶¹ The insurer argued that it made an appearance by waiving formal service of process.¹⁶²

152. 167 F.3d 933 (5th Cir. 1999).

153. See FED. R. CIV. P. 4(d).

154. See *Rogers*, 167 F.3d at 936.

155. See *Rogers*, 167 F.3d at 935.

156. See *id.* The plaintiff made service by sending a copy of the summons and complaint to the plan administrator in New Orleans. See *id.* The plaintiff also requested that the insurer's out of state agent execute a waiver of service. See *id.*

157. See *id.*; see also FED. R. CIV. P. 55(a).

158. See *Rogers*, 167 F.3d at 935; see also FED. R. CIV. P. 55(b)(2). The district court opinion is reported in *Rogers v. Hartford Life and Accident Insurance Co.*, 178 F.R.D. 933 (S.D. Miss. 1997).

159. See *Rogers*, 167 F.3d at 935-36.

160. See *id.* at 936.

161. See *id.*

162. See *id.*

The Fifth Circuit noted that its policy favors resolving cases on the merits, rather than by default judgments.¹⁶³ Consistent with this policy, the court has taken an expansive view as to what constitutes an appearance under Rule 55(b)(2).¹⁶⁴ Under the court's expansive view, a defendant makes an appearance by taking any action that is responsive to the plaintiff's formal suit that gives the plaintiff a clear indication that the defendant intends to defend the suit.¹⁶⁵ Such action can even consist of informal acts that demonstrate that the defendant will contest the claim.¹⁶⁶ The insurer argued that these requirements were met by its waiver of service and by plaintiff's knowledge that the insurer had denied plaintiff's claim for benefits.¹⁶⁷

The court analyzed the interrelations of Rules 4, 12, and 55.¹⁶⁸ The court noted that a plaintiff may not obtain an entry of default or a default judgment unless a defendant has failed to answer as required by the Federal Rules.¹⁶⁹ In addition, a defendant is not required to answer until *after* service is made or waived.¹⁷⁰ Hence, a plaintiff is entitled to a default judgment only if the defendant fails to answer timely once the plaintiff has either served the defendant or secured a waiver of service.

The court next considered whether acceptance of formal service can constitute an appearance that triggers the notice requirement of Rule 55(b)(2).¹⁷¹ The court observed that the rule's language shows that its notice requirement is intended to apply only in *some* circumstances in which a plaintiff is entitled to seek a default.¹⁷² But, discounting waivers of service, the rule's three day notice would *always* apply if acceptance of service was an "appearance," because a plaintiff cannot be entitled to a default

163. See *Rogers*, 167 F.3d at 936.

164. See *id.*

165. See *id.* at 937.

166. See *Rogers*, 167 F.3d at 937.

167. See *id.*

168. See *id.*

169. See *id.* at 937; see also FED. R. CIV. P. 55.

170. See FED. R. CIV. P. 12(a); FED. R. CIV. P. 4(d)(3).

171. See *Rogers*, 167 F.3d at 937.

172. See *id.* at 937.

unless service has been made.¹⁷³ The court conceded that a waiving service is different from accepting service, but also noted that a defendant's waiver of service substitutes for the plaintiff making service, and that a waiver of service, like the making of service, triggers a defendant's obligation to answer.¹⁷⁴ Thus, concluded the court, neither accepting nor waiving service constitutes an appearance for purposes of Rule 55(b)(2), so as to require a written notice prior to a default judgment.¹⁷⁵

Finally, the Fifth Circuit rejected the defendants' argument that their failure to answer was excusable neglect and held that under the facts of *Rogers*, the district court did not abuse its discretion in refusing to set aside the default judgment under Rule 60(b)(1).¹⁷⁶ Accordingly, the district court's judgment was affirmed.¹⁷⁷

V. STANDING

A. Congressional Modification of Prudential Standing Rules Via NVRA

In *Association of Community Organizations For Reform Now v. Fowler*,¹⁷⁸ the Fifth Circuit addressed issues concerning both the constitutional and prudential limitations on standing.¹⁷⁹

In *Fowler*, the Association of Community Organization for Reform Now ("ACORN") brought suit against Louisiana officials, alleging that Louisiana's voter registration procedures violate several provisions of the National Voter Registration Act ("NVRA"), 42 U.S.C. § 1973 gg.¹⁸⁰ In particular, ACORN alleged

173. See *Rogers*, 167 F.3d at 937.

174. See *id.* at 937-38.

175. See *id.* at 938. The appellate court also held that the plaintiff's service on the former employer was a proper method of service under the Mississippi Rules of Civil Procedure and therefore proper under Federal Rule of Civil Procedure 4(e). See *Rogers*, 167 F.3d at 940. The district court did not abuse its discretion in refusing to set aside the default judgments under Rule 60(b)(1). See *id.* at 940-943.

176. See *id.* at 938.

177. See *id.* at 944.

178. 178 F.3d 350 (5th Cir. 1999).

179. See *id.* at 356-65.

180. See *id.* at 353.

that Louisiana violated the NVRA by failing to make voter registration materials available at public aid offices, by failing to include voter registration cards in packets that permitted driver's license renewals by mail, and by improperly purging names from voter rolls.¹⁸¹ The defendants moved for summary judgment on the ground that ACORN lacked standing.¹⁸² The district court granted the motion, concluding that ACORN lacked standing to sue on its own behalf or as a representative of its members.¹⁸³

Reviewing the district court's grant of summary judgment *de novo*,¹⁸⁴ the Fifth Circuit began by examining whether ACORN had standing to sue on its own behalf.¹⁸⁵ The court noted that standing is governed both by constitutional requirements and prudential limitations.¹⁸⁶ The constitutional requirements for standing arise from Article III's case or controversy requirement.¹⁸⁷ The prudential limitations on standing arise from jurisprudence only and can be modified or abrogated by Congress.¹⁸⁸

To bring a claim, a plaintiff must have Article III standing, *and* he must satisfy the requirements of prudential standing unless the requirements of prudential standing have been waived.¹⁸⁹ Addressing Article III standing first, the court noted that an organization's standing to sue on its own behalf is measured by the same standard as applies to individuals.¹⁹⁰ That standard requires that the plaintiff demonstrate "injury in fact" that is "fairly traceable" to the defendant's actions, "and that the injury will likely be redressed by a favorable decision."¹⁹¹ An

181. *See Fowler*, 178 F.3d at 355.

182. *See id.*

183. *See id.* at 355–56.

184. *See Fowler*, 178 F.3d at 356.

185. *See id.*

186. *See id.*

187. *See id.*

188. *See id.*

189. *See Fowler*, 178 F.3d at 356.

190. *See id.* (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378–79 (1982)).

191. *Id.*

organization can demonstrate injury in fact by showing “concrete and demonstrable injury to the organization’s activities.”¹⁹²

The court rejected ACORN’s assertion that its costs of litigation against the defendants qualified as an injury in fact.¹⁹³ If costs of litigating the very case in which standing is challenged qualified as an injury in fact, the requirement of injury always would be satisfied.¹⁹⁴ The court also rejected ACORN’s assertion that its costs of monitoring whether Louisiana complied with the NVRA qualified as an injury in fact.¹⁹⁵ The problem with ACORN’s allegation regarding its monitoring costs was that ACORN had suggested that its monitoring activity was part of its normal operations, not something done as a result of Louisiana’s alleged NVRA violations.¹⁹⁶

Finally, ACORN pointed to costs that it incurred in conducting voter registration drives.¹⁹⁷ The court concluded that most of ACORN’s voter registration activities were not shown to be the result of alleged NVRA violations by Louisiana.¹⁹⁸ But, ACORN’s summary judgment evidence showing that it conducted registration drives focused on people in “welfare waiting rooms, unemployment offices, and on Food Stamp lines” was sufficient to raise a genuine issue regarding whether ACORN would have incurred the expenses of those registration drives if Louisiana had complied with NVRA’s requirement that voter registration materials be available at public aid offices.¹⁹⁹ Thus, ACORN established Article III standing as to its claim regarding lack of voter materials at public aid offices.²⁰⁰ ACORN, however, failed to show Article III standing regarding its other claims because it failed to show injury arising from the other alleged NVRA

192. *Fowler*, 178 F.3d at 357 (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982)).

193. *See id.* at 358.

194. *See id.* at 358–59.

195. *See id.* at 359.

196. *See Fowler*, 178 F.3d at 359.

197. *See id.*

198. *See id.* at 360.

199. *See id.* at 361.

200. *See id.* at 362.

violations.²⁰¹ Accordingly, the district court's grant of summary judgment was reversed as to the claim regarding lack of voter materials at public aid offices, but was affirmed regarding ACORN's other claims brought on its own behalf.²⁰²

Because ACORN demonstrated Article III standing as to one of its claims, the court next addressed whether ACORN satisfied the requirements of prudential standing as to that claim.²⁰³ The prudential limitations on standing generally require that a plaintiff's grievance arguably falls within a zone of interest protected by the statute at issue, that a claim not raise purely abstract questions or generalized grievances best addressed by the legislative branch, and that the plaintiff be asserting its own rights, rather than those of others.²⁰⁴ The court's analysis, however, focused not on whether these requirements were met, but whether the requirements were waived by the NVRA.²⁰⁵

After acknowledging again that Congress may alter or abrogate the requirements of prudential standing, the court noted that the NVRA provides that after a "person who is aggrieved by a violation of NVRA"²⁰⁶ satisfies certain notice requirements, the "aggrieved person may bring a civil action in an appropriate district court."²⁰⁷ Although the NVRA does not define "aggrieved person," the court relied on jurisprudence interpreting similar language in other federal statutes and concluded that Congress had intended to abrogate the requirements of prudential standing in order "to extend standing under the [NVRA] to the maximum allowable under the Constitution."²⁰⁸ Further, based on the provision in 1 U.S.C. § 1, in federal statutes the word "person" includes corporations, associations, and various other entities,

201. *See Fowler*, 178 F.3d at 362.

202. *See id.* at 365.

203. *See id.* at 362–63.

204. *See Fowler*, 178 F.3d at 363.

205. *See id.* at 363–64.

206. *Id.* at 363 (quoting 42 U.S.C. § 1973gg–9(b)(1) (1994)).

207. *Id.*

208. *Id.*

except if provided otherwise, and because NVRA does not provide otherwise, ACORN qualified as a “person aggrieved.”²⁰⁹

The court then analyzed whether ACORN had representational standing to litigate claims of its members.²¹⁰ An association has representative standing if (a) its members would have standing to sue in their own right; (b) the interests that the association seeks to protect are germane to its purpose; and (c) neither the claim asserted nor the relief requested requires the individual members to participate in the lawsuit.²¹¹ The court concluded that except on the claim regarding the failure to supply voter registration materials at public aid offices, a claim on which ACORN had standing in its own right, ACORN failed to show that any of its members would have standing in their own right.²¹² Thus, ACORN’s representational standing was restricted to the same claim on which it had standing in its own right. Accordingly, the lower court’s grant of summary judgment was reversed as to the single claim, but otherwise affirmed.²¹³

B. Congressional Modification of Prudential Standing Rules Via FRCP 17

The Fifth Circuit discussed Federal Rule of Civil Procedure 17’s effect on third party standing limitations in *Ensley v. Cody Resources, Inc.*²¹⁴ In *Ensley*, the plaintiff formed a closely-held corporation, through which he did work for the defendant on numerous transactions.²¹⁵ The parties reduced their agreement to writing for a few early transactions, but not for later transactions.²¹⁶ The defendant eventually terminated its relationship with the plaintiff, who subsequently sued for shares of stock allegedly owed to him by the defendant in lieu of a

209. See *Fowler*, 178 F.3d at 364–65.

210. See *id.* at 365.

211. See *id.* at 365 (citing *Hunt v. Washington State Apple Adver. Comm’n*, 432 U.S. 333, 343 (1977)).

212. See *id.* at 365–67.

213. See *Fowler*, 178 F.3d at 367–68.

214. 171 F.3d 315, *reh’g denied*, 181 F.3d 98 (5th Cir. 1999).

215. *Id.* at 317.

216. See *id.* at 317–18.

commission for work on a transaction where terms were not reduced to writing.²¹⁷ At the close of the plaintiff's case-in-chief, the defendant moved for a judgment as a matter of law.²¹⁸ The court denied the motion and later entered judgment on a subsequent jury verdict that found the defendant liable in *quantum meruit*, but not in contract.²¹⁹

The defendant again moved for a judgment as a matter of law, arguing that the plaintiff lacked standing because the claim he asserted belonged to his closely-held corporation, not to him.²²⁰ The court initially granted the renewed motion.²²¹ But later, the court *sua sponte* reversed course, reasoning that the actual basis of the defendant's objection was a real-party-in-interest objection that was waived because it was not raised before trial.²²² The defendant appealed the court's reentry of judgment for the plaintiff.²²³

The Fifth Circuit noted that standing includes both constitutional limitations and prudential limitations on the claims that may be litigated in federal court.²²⁴ One of the prudential limitations is that a plaintiff generally may not bring a claim that is based on the rights of third parties.²²⁵ However, because the limitation on third party standing is not constitutional, the Congress may alter or abrogate the general prohibition on third party claims.²²⁶ In fact, Congress *has* altered third party standing limitations by regulating the real-party-in-interest objection through Federal Rules of Civil Procedure 12 and 17;²²⁷ those rules provide that a real-party-in-interest defense must be raised in a responsive pleading.²²⁸ Because the defendant waited until the

217. See *Ensley*, 171 F.3d at 318.

218. See *id.*; see also FED. R. CIV. P. 50 (judgment as a matter of law).

219. See *Ensley*, 171 F.3d at 318.

220. See *id.*

221. See *id.*

222. See *id.*; see also FED. R. CIV. P. 17.

223. See *Ensley*, 171 F.3d at 318-19.

224. See *id.*

225. See *id.*

226. See *id.* at 320.

227. See *id.*; see also FED. R. CIV. P. 12 (defenses must be asserted in responsive pleadings); FED. R. CIV. P. 17 (real-party-in-interest).

228. See *Ensley*, 171 F.3d at 320.

end of plaintiff's case-in-chief to assert its objection, the defense was waived.²²⁹ Accordingly, the district court's judgment was affirmed.²³⁰

VI. FIRST-TO-FILE RULE

The Fifth Circuit reviewed a district court's application of the first-to-file rule in *Cadle Co. v. Whataburger, Inc.*²³¹ In *Whataburger*, a company filed claims in the bankruptcy proceedings of a debtor in the Southern District of Texas, attempting to recover on a prior judgment.²³² After a setback in the bankruptcy proceeding, the company filed a complaint in the federal district court for the Western District of Texas.²³³ The complaint named associates and family members of the debtor as defendants, and alleged that the defendants helped the debtor fraudulently transfer assets to avoid payment on the prior judgment.²³⁴ The defendants moved to dismiss the complaint on the basis of the first-to-file rule, and the court granted the motion.²³⁵

The plaintiff appealed, asserting that the district court should not have applied the first-to-file rule without first determining whether the bankruptcy court had jurisdiction over his claim.²³⁶ In the alternative, the plaintiff argued that the district court should have transferred, rather than dismissed, the case.²³⁷ As a preliminary matter, the Fifth Circuit noted the standard of review.²³⁸ Generally, application of the first-to-file rule, a discretionary doctrine, is reviewed for abuse of discretion.²³⁹ But because the plaintiff raised issues regarding the nature and scope of

229. *See Ensley*, 171 F.3d at 320.

230. *See id.* at 321, 323.

231. 174 F.3d 599 (5th Cir. 1999).

232. *Id.* at 601.

233. *See id.* at 602.

234. *See Cadle*, 174 F.3d at 602.

235. *See id.*

236. *See id.* at 600, 602-03.

237. *See id.* at 600, 606.

238. *See id.* at 603.

239. *See Cadle*, 174 F.3d at 603.

the doctrine, rather than its application on the facts, the district court's ruling was reviewed *de novo*.²⁴⁰

Next, the appellate court examined the first-to-file rule itself.²⁴¹ The rule has the purpose of serving judicial economy and comity.²⁴² Under the rule, when related cases are pending before two district courts, the second court should determine whether there exists substantial overlap in the issues raised by the two cases.²⁴³ If substantial overlap exists, the second court generally must transfer its case to the court in which the first action was filed.²⁴⁴ Then, the court where the first action was filed determines whether the second suit should be "dismissed, stayed or transferred and consolidated."²⁴⁵

Addressing the plaintiff's arguments, the Fifth Circuit rejected the contention that a federal court should determine whether another court has jurisdiction before applying the first-to-file rule.²⁴⁶ The court contrasted the first-to-file rule with collateral estoppel, which applies only if the court making a prior ruling had jurisdiction.²⁴⁷ Both the first-to-file rule and collateral estoppel promote judicial economy, but they do so in different ways.²⁴⁸ Collateral estoppel prevents relitigation of issues on which a court already has ruled.²⁴⁹ But a ruling is void if rendered by a court that lacks jurisdiction.²⁵⁰ Thus, because collateral estoppel binds litigants to a *prior ruling*, it makes sense to require that a court apply collateral estoppel only after finding that the prior court had jurisdiction.²⁵¹

240. *See Cadle*, 174 F.3d at 603.

241. *See id.* at 603-06.

242. *See id.* at 603.

243. *See id.* at 605.

244. *See id.* at 605-606.

245. *Cadle*, 174 F.3d at 606.

246. *See id.* at 603.

247. *See id.* at 603-04.

248. *See id.* at 603.

249. *See id.*

250. *See Cadle*, 174 F.3d at 603-04.

251. *See id.*

In contrast to collateral estoppel, the first-to-file rule does not bind litigants to a prior ruling.²⁵² Instead, the rule promotes judicial economy by avoiding wasteful parallel litigation when there exists a *pending* case that raises substantially the same issues.²⁵³ Requiring the second court to examine whether the first court had jurisdiction might undermine judicial economy and result in both courts examining the same issue.²⁵⁴ While the jurisdiction of the first court might sometimes be worthy of consideration in deciding whether to follow the first-to-file rule, the first court itself is the court to consider that issue—after the second case is transferred to it.²⁵⁵ Thus, the district court in *Cadle*, as the “second” court, did not err by limiting its inquiry to whether a substantial overlap of issues existed.²⁵⁶ The district court erred by dismissing, however.²⁵⁷ The district court should have transferred and let the first court decide what to do with the transferred case.²⁵⁸ The Fifth Circuit vacated and remanded, with instructions to transfer the case to the first court.²⁵⁹

252. *See Cadle*, 174 F.3d at 604.

253. *See id.*

254. *See id.*

255. *See id.* at 606.

256. *See id.* at 605–06.

257. *See Cadle*, 174 F.3d at 606.

258. *See id.*

259. *See id.*