Survey of Civil Procedure

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I. INTRODUCTION

During the survey period the Sixth Circuit addressed a wide variety of procedural issues, ranging from the unsettled question of whether the citizenship of limited partners must be considered when the partnership is a party to a diversity action,¹ to whether an offending attorney’s ability to pay a monetary sanction must be taken into account when making an award under Rule 11.²

¹ SHR Ltd. Partnership v. Braun, 888 F.2d 455 (6th Cir. 1989). [Editor’s Note: At the time this article went to print, the United States Supreme Court handed down Carden v. Arkoma Associates, ___ U.S. ___, 110 S. Ct. 1015 (1990), a 5-4 decision holding that the citizenship of limited partners must be taken into account to determine whether diversity of citizenship exists among the parties. The Sixth Circuit’s decision in SHR Ltd. Partnership is wholly consistent with the Carden decision.]

II. SUBJECT MATTER JURISDICTION

The Sixth Circuit issued two opinions on diversity jurisdiction, one dealing with the domestic relations exception to diversity jurisdiction, and the other with whether the citizenship of limited partners must be considered when a diversity action is brought by a limited partnership. In view of an intercircuit conflict, this last question will require ultimate resolution by the U.S. Supreme Court.

A. Domestic Relations Exception to Diversity Jurisdiction

In the domestic relations exception opinion, Drewes v. Ilnicki, the plaintiff sued his former wife in the Northern District of Ohio alleging intentional infliction of emotional distress and interference with employment stemming from the defendant's purported refusal to allow the plaintiff to exercise visitation rights secured in a state court divorce action. The plaintiff also alleged that the defendant had written and telephoned false statements to his employer. The defendant answered and counterclaimed to recover arrearages in child support, alimony, and medical expenses. The district court dismissed the entire action sua sponte, concluding that it lacked subject matter jurisdiction under the "domestic relations exception" to diversity jurisdiction, first announced by the Supreme Court in 1859.

In reversing the district court, the Sixth Circuit acknowledged the continued vitality of the domestic relations exception, but determined that on the face of the pleadings filed in the present case it was not clear that the exception applied to either the plaintiff's claims of intentional infliction of emotional distress and interference with employment or to the defendant's counterclaim for arrearages in alimony and child support.

5. 863 F.2d 469 (6th Cir. 1988).
6. 863 F.2d at 470.
7. Id.
8. Id.
9. See id. at 470-71.
11. 863 F.2d at 471.
12. Id. at 471-72.
Citing a number of other court of appeals' opinions upholding the exercise of jurisdiction even when the claim has intra-family implications, the Sixth Circuit concluded that the district court could not decline jurisdiction merely because the tort action sprang from a former marital relationship. Provided that the determination of the claims filed in federal court does not require the court to resolve any of the ongoing divorce disputes (which may require a careful sifting of the claims in order to determine their true character), the district court must exercise diversity jurisdiction over the plaintiff's two tort claims. Conceding that the former wife's counterclaim presented a closer question, the court nevertheless concluded that on the face of the pleadings her counterclaim clearly did not involve "ongoing questions concerning the validity of the original divorce decree." Accordingly, the Sixth Circuit reversed and remanded for full consideration by the district court.

Although the domestic relations exception to diversity jurisdiction is not without its detractors, the exception received Supreme Court reaffirmation in 1988 in Thompson v. Thompson. The Sixth Circuit's decision is entirely consistent with an approach of giving a narrow construction to an exception to an express grant of federal court subject matter jurisdiction, as should most judicially-created exceptions to congressionally authorized exercises of federal court subject matter jurisdiction.

13. Id. at 471, (citing McIntyre v. McIntyre, 771 F.2d 1316, 1318 (9th Cir. 1985); Bennett v. Bennett, 682 F.2d 1039 (D.C. Cir. 1982); Jagiella v. Jagiella, 647 F.2d 561, 565 (5th Cir. 1981)).
14. Id. at 472.
15. Id. at 471. Cf. Rogers v. Janzen, 891 F.2d 95, 98 (5th Cir. 1989) (district court should decline jurisdiction where inquiry into allegations of sexual abuse of daughter will be required).
16. 863 F.2d at 471-72.
17. Id. at 472.
18. Id.
19. Id.
22. See, e.g., Redish, Abstention, Separation of Powers, and the Limits of
Federal courts should only abstain in domestic relations cases where the relief sought clearly touches upon local problems peculiarly unsuited to control by federal courts, e.g., the grant of a divorce or the modification of a support or custody award. Notwithstanding the strong state interest in domestic relations matters, coupled with the competence of state courts in settling family disputes, a federal court should not stay its hand to hear a diversity action stemming from, but still outside of, the domestic relations core. The Sixth Circuit's decision in *Drewes v. Ilnicki* is consistent with this view. Conceding that it may be difficult to glean from the pleadings alone the true character of the dispute, the Sixth Circuit nevertheless cautioned that dismissal of an action at the pleadings stage may be premature if the dismissal is based on the domestic relations exception to diversity jurisdiction.

**B. The Citizenship of Partnerships for Diversity Purposes**

In determining the citizenship of partnerships for diversity purposes, an unresolved question is whether the citizenship of the general partners alone is sufficient, or whether the citizenship of the limited partners must be considered as well. The circuits are split on this question. With its decision in *SHR Limited Partnership v. Braun*, the Sixth Circuit joins the Third, Fourth, Seventh, Eighth, and Eleventh Circuits in holding that the

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25. *Id.* at 472.


27. 888 F.2d 455 (6th Cir. 1989).
citizenship of limited partners is to be considered in cases invoking the district court's diversity jurisdiction. 28

In SHR Limited Partnership, a limited partnership brought a diversity action seeking an accounting from, and removal of, defendants as trust managers. 29 All the defendants were Michigan domiciliaries; the general partners were non-Michigan domiciliaries; and some of the limited partners were Michigan domiciliaries. 30 After denying the defendants' motion to dismiss for lack of subject matter jurisdiction, the district court certified the issue for interlocutory appeal pursuant to 28 U.S.C. section 1292(b), and the Sixth Circuit granted the defendants' motion for leave to appeal the district court's order. 31

The court began its discussion by noting the split of authority on this question. 32 The first line of decisions from the Second and Fifth Circuits 33 adopts a "real party to the controversy" test under which diversity jurisdiction is not defeated by the citizenship of limited partners if the general partners possess the exclusive authority to manage the business assets and to control all litigation. 34 The rationale for this view is that under the Uniform Limited Partnership Act limited partners are largely prevented from participating in actions by, or against, the partnership. 35 Therefore, only general partners may be considered "the real parties to the controversy." 36

Observing that the Supreme Court has consistently rejected the suggestion that unincorporated associations be treated the same as corporations for diversity purposes, 37 and surveying those circuits which consider limited partners' citizenship for diversity purposes, 38 the Sixth Circuit adopted the bright-line

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29. Id. at 455-56.
30. Id. at 456.
31. Id.
32. Id.
34. See SHR Ltd. Partnership, 888 F.2d at 456-57.
35. See id. at 457.
36. See id.
37. SHR Ltd. Partnership, 888 F.2d at 457.
38. Id. at 458-59.
rule followed in those circuits that have addressed this question by holding that the citizenship of each limited partner must be considered when determining diversity jurisdiction. Believing that this rule is truer to Supreme Court precedent in the area, the Sixth Circuit added that the rule "enables parties and counsel contemplating litigation involving a limited partnership to determine readily whether a limited partner's citizenship will preclude diversity jurisdiction. . . . Judicial economy is thereby promoted.

Against a backdrop of Supreme Court decisions refusing to treat unincorporated associations as a single entity for diversity purposes, the Sixth Circuit can hardly be faulted for joining the ranks of the five other circuits that have included the citizenship of limited partners for diversity purposes. The Court's opinion is open to criticism, however, insofar as it is driven by considerations of judicial economy, specifically, avoidance of an evidentiary hearing on the threshold issue of jurisdiction.

Take the situation, for example, where a limited partnership decides to bring suit. Assuming the accuracy of partnership records, counsel for a limited partnership should be able to determine the residence address of all limited partners. But physical presence in a state only meets half the test of citizenship for diversity purposes. Present intent to remain in that place must also be satisfied, and that question cannot be answered definitively without making specific inquiry of each limited partner into such factors as, for example, place of employment, voter registration, car registration, and location of bank accounts. Given the highly mobile character of American

39. Id. at 458-59.
40. Id. at 459.
41. Id. at 458.
42. See id. at 459.
43. Although § 2 of the Uniform Limited Partnership Act requires a certificate of formation containing the name and place of residence of each member, this information is not sufficient to answer definitively what the citizenship is of a given limited partner.
44. See C. Wright, supra note 23, at 146.
46. C. Wright, supra note 23, at 146; Federal Practice and Procedure, supra note 45, at 530-33.
society, a limited partner's citizenship for diversity purposes may change over the duration of the partnership. If counsel for a limited partnership concludes that one or more limited partners is not diverse from one or more target defendants, counsel will file her lawsuit in state court. If counsel concludes that complete diversity exists, she may elect to file in federal court. But counsel's conclusion either way is no guarantee that defense counsel will neither remove the state action to federal court in order to test the diversity issue nor launch an attack challenging subject matter jurisdiction if the limited partners file their action originally in federal court. Either scenario may lead to an evidentiary hearing on the citizenship of one or more limited partners.

Conversely, when a limited partnership is sued, the plaintiff may be unable to determine after reasonable inquiry whether all limited partners are diverse, even if plaintiff has been in regular contact with the partnership and has ready access to its records (as would a trustee). Most plaintiffs suing a limited partnership will be unable to determine whether complete diversity exists until after suit is filed and an evidentiary hearing held.

In short, the rule adopted by the Sixth Circuit in SHR Limited Partnership merits commendation in terms of its ease of application compared with the competing "real party to the controversy" test. However, whether its adoption will obviate the necessity of an evidentiary hearing on the threshold issue of jurisdiction, as suggested by the Sixth Circuit, is debatable.

C. Civil Rights Removal

In the aftermath of the Civil War there was great distrust in the ability or willingness of Southern courts to protect the civil rights of the newly freed slaves.47 One congressional response was the enactment of the Civil Rights Removal Act, 28 U.S.C. section 1443, intended to prevent the use of state courts as

instruments of harassment against blacks\(^{48}\) by permitting a state court defendant to remove civil actions or criminal prosecutions to the more sympathetic federal court if it can be shown that those state suits are:

(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law.\(^{49}\)

In *Conrad v. Robinson*,\(^{50}\) the Sixth Circuit examined the applicability of section 1443(1) in an appeal challenging the district court's *sua sponte* dismissal of a libel action brought in Ohio common pleas court and removed pursuant to section 1443(1).\(^{51}\) The Sixth Circuit reversed, holding that the action had been properly removed.\(^{52}\)

Robinson had filed a civil rights lawsuit against his union, the Laborers' International Union of North America, AFL-CIO Local 496 (Local 496), under Title VII of the Civil Rights Act of 1964,\(^{53}\) alleging that he had been removed from his position as a union steward and eventually laid off in retaliation for his attempts to fight an alleged policy of Local 496 limiting minority membership.\(^{54}\) Following settlement of this federal court action, Robinson gave an interview to the Cleveland Plain Dealer in which he stated that "Floyd Conrad, Local 496 business agent, ... said something about me not being on the team any longer and that he would get me fired . . . ."\(^{55}\)


\(^{50}\) 871 F.2d 612 (6th Cir. 1989).

\(^{51}\) *Id.* at 613.

\(^{52}\) *Id.* at 616. The Sixth Circuit noted that the district court should have ordered remand rather than dismissal of the case, but that in light of the court's reversal of the district court, no action was needed to correct that particular error. *Id.* at 613 n.1.


\(^{54}\) 871 F.2d at 613.

\(^{55}\) *Id.* at 613 n.3.
Over one year later, Conrad brought a libel action in state court against Robinson, alleging that Robinson had accused him of practicing racial discrimination in the Plain Dealer article.\textsuperscript{56} In his removal petition Robinson contended that Conrad's motive for filing the libel action was to retaliate against Robinson for engaging in protected activity under federal civil rights law, specifically filing the Title VII action and encouraging other blacks to join Local 496.\textsuperscript{57} Robinson added that his defense of retaliation could not be raised in the Ohio court action because under Ohio law Ohio courts lack jurisdiction over Title VII actions.\textsuperscript{58}

The Sixth Circuit had little difficulty in finding that the district court erred in its analysis. The district court applied the \textit{Mottley} "well-pleaded complaint" rule\textsuperscript{59} as the appropriate standard for determining whether the action was properly removable, thus focusing on the complaint rather than on defenses to it to see whether a federal question was presented.\textsuperscript{60} While the district court's analysis would have been proper had removal been requested under 28 U.S.C. section 1441(b) (the general federal question removal statute), removal in this case was requested pursuant to section 1443(1), "a very special statute to deal with specific and discrete problems involving removal of cases, civil or criminal, in which the defendant cannot enforce his claim of civil rights in the state court."\textsuperscript{61} Rather than looking to the claims of the plaintiff to determine whether the case is properly removable, section 1443(1) instead looks to the civil rights claims of the defendant to answer that question.

Applying a two-pronged test developed by the Supreme Court to determine whether a case is properly removable under section 1443(1), the Sixth Circuit concluded that Robinson had met his burden of establishing that removal was proper.\textsuperscript{62} The first

\begin{footnotesize}
\begin{enumerate}
\item [56.] \textit{Id.} at 613.
\item [57.] \textit{Id.} at 613-14.
\item [58.] \textit{Id.} at 614 (citing Fox v. Eaton Corp., 48 Ohio St. 2d 236, 358 N.E.2d 536 (1976)).
\item [59.] Louisville & Nashville R. Co. v. Mottley, 219 U.S. 467 (1911).
\item [60.] 871 F.2d at 614.
\item [61.] \textit{Id.} at 614.
\item [62.] \textit{Id.} at 614-16.
\end{enumerate}
\end{footnotesize}
inquiry asks whether "the right denied defendant . . . arises under a federal law that provides for specific civil rights stated in terms of racial equality."" Here, Robinson clearly met the first step of the test since his allegation of retaliation for his protests against racial discrimination is conduct expressly prohibited by 42 U.S.C. section 2000e-3, a civil rights law under section 1443. The second step of the test requires that the right in question be one that cannot be enforced in state court. In answering this question, the court must look at the acts of the defendant at issue to see if they constituted or were tied to protected activity. The Sixth Circuit concluded that the statements made by Robinson that were the subject of Conrad’s complaint, even though themselves not the protected activity, were closely tied to Robinson’s engaging in activity protected by Title VII. Coupled with the fact that Robinson’s claim of retaliatory motivation prohibited by Title VII could not be heard by an Ohio state court, the Sixth Circuit concluded that Robinson had satisfied the second step of the Supreme Court’s two-part test. Accordingly, the Sixth Circuit reversed and remanded with instructions to reinstate the case on the district court’s docket.

Despite the Supreme Court’s begrudging construction of section 1443(1), which has led one commentator to observe "the privilege promised by the civil rights removal statute has become relatively moribund," the Sixth Circuit nevertheless gave section 1443(1) a sympathetic reading in extending it to the facts of Conrad v. Robinson. In meeting the second-prong of the Supreme Court’s two-part test for removal under section 1443(1), the petitioner must usually show the existence of a

64. 871 F.2d at 615.
65. Id.
66. Id.
67. Id. at 615-16.
68. Id. at 616.
69. Id. at 614, 616.
specific state statute or constitutional provision that will lead to the denial of his rights in state court. Although there was no such Ohio statute or constitutional provision present in this case, the Sixth Circuit still concluded that removal was proper. Its decision is to be applauded for having the salutary effect of helping to revitalize an otherwise "moribund" civil rights statute.

III. PERSONAL JURISDICTION

In *Third National Bank in Nashville v. WEDGE Group Inc.*, the Sixth Circuit was asked to decide whether defendant WEDGE Group had sufficient minimum contacts with the state of Tennessee to support the exercise of personal jurisdiction over it in a diversity action. In diversity cases a federal court applies the law of the state in which it sits to determine whether it has personal jurisdiction over a nonresident defendant. The Tennessee long-arm statute provides for the exercise of personal jurisdiction over nonresident defendants on "[a]ny basis not inconsistent with the constitution of this state or of the United States," thus reducing all personal jurisdiction questions to a single due process inquiry. The Sixth Circuit acknowledged that WEDGE Group's contacts with Tennessee were not substantial, and that any exercise of general personal jurisdiction would therefore be violative of due process. Applying its

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72. See Redish, Revitalizing Civil Rights Removal Jurisdiction, 64 MINN. L. REV. 523 (1980).
73. 882 F.2d 1087 (6th Cir. 1989).
74. Third Nat'l Bank in Nashville v. WEDGE Group, 882 F.2d 1087 (6th Cir. 1989).
75. FED. R. CIV. P. 4(e).
77. See Masada Investment Corp. v. Allen, 697 S.W.2d 332, 334 (Tenn. 1985).
78. In Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408 (1984), the Supreme Court explained that "[w]hen a State exercises personal jurisdiction over a defendant in a suit not arising out of or related to the defendant's contacts with the forum, the State has been said to be exercising 'general jurisdiction' over the defendant." 466 U.S. at 414 n.9. See Brilmayer, How Contacts Count: Due Process Limitations on State Court Jurisdiction, 1980 S. CT. REV. 77, 80-81; von Mehren & Trautman, Jurisdiction to Adjudicate: A Suggested Analysis, 79 HARV. L. REV. 1121, 1136-44 (1966).
79. Third Nat'l Bank, 882 F.2d at 1089.
three-part test for determining whether personal jurisdiction may be exercised in a given case, the Court nevertheless found sufficient contacts with Tennessee to warrant the exercise of specific jurisdiction⁸⁰ over WEDGE Group,⁸¹ and reversed the district court’s order of dismissal for lack of personal jurisdiction.⁸²

Plaintiff Third National Bank in Nashville had extended loans of forty-two million dollars over a four-year period to The Rogers Companies (TRC), a construction firm with its principal place of business in Tennessee and wholly owned by WEDGE Group, a Delaware corporation with its principal place of business in Texas.⁸³ WEDGE Group officers served as TRC directors and met regularly in Tennessee to review and direct TRC operations.⁸⁴ The two companies entered into a tax sharing agreement that provided for an equitable sharing of each company’s federal income tax burden.⁸⁵ WEDGE Group officers participated in loan negotiations between TRC and Third National Bank, and agreed to make a capital contribution to TRC of $7.5 million, which WEDGE deposited with Third National.⁸⁶ TRC eventually defaulted on its loan obligations to Third National, forcing Third National to file a diversity action against WEDGE to enforce TRC’s rights under the tax sharing agreement.⁸⁷

Distilling Supreme Court jurisprudence on the subject of personal jurisdiction from International Shoe⁸⁸ to Burger King,⁸⁹ the Sixth Circuit has established a three-pronged test for de-
terminating whether the exercise of specific personal jurisdiction is appropriate in a particular case:

First, the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state. Second, the cause of action must arise from the defendant's activities there. Finally, the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable. 90

Applying these three factors to the facts of Third National Bank, the Sixth Circuit found that specific jurisdiction existed over WEDGE Group in Tennessee. 91 First, in view of WEDGE's active participation in the business affairs of TRC, its regular trips to Tennessee to oversee the TRC operations, and its participation in the loan agreement negotiations between TRC and Third National, the Sixth Circuit had "no hesitancy in concluding that, by these actions and contacts, WEDGE 'purposefully availed' itself of acting and causing consequences in Tennessee ...." 92 Second, given that the operative facts of the controversy were related to WEDGE's contacts with Tennessee, the court was satisfied that Third National's cause of action against WEDGE to enforce its rights under its security agreement with TRC had a substantial connection with WEDGE's contacts with Tennessee. 93 Turning finally to the question of whether exercising jurisdiction under these circumstances would be reasonable, the Sixth Circuit was convinced that no sufficiently compelling countervailing interests existed that outweighed Tennessee's legitimate interest in providing a forum for the adjudication of a dispute between a resident and nonresident. 94 To the extent Texas has an interest in the dispute, the court suggested that that interest could be accommodated by the application of Texas law to the resolution of

90. Southern Machine Co. v. Mohasco Indus., 401 F.2d 374, 381 (6th Cir. 1968).
91. 882 F.2d at 1087.
92. Id. at 1090.
93. Id. at 1091.
94. Id. at 1092.
the controversy. In sum, notwithstanding that WEDGE never directly conducted business, held title to property, or retained employees in Tennessee, it was nonetheless amenable to suit there.

The Sixth Circuit’s analysis and conclusion are entirely in step with International Shoe and its progeny, and in that respect Third National Bank is unremarkable. Of note, however, is Judge Keith’s concurring opinion in which he urged that a different analysis should be used for determining when jurisdiction may be properly asserted through the parent-subsidiary relationship. He would streamline the analysis by building on the Sixth Circuit’s decision in Velandra v. Regie Nationale Des Usines Renault, where the court ruled that when the corporate separation is fictitious, jurisdiction may be properly obtained through the parent-subsidiary relationship. Updating that rule, Judge Keith would hold that jurisdiction exists over a foreign parent corporation by virtue of jurisdiction over the local subsidiary if (1) “the absent parent instigated the subsidiary’s local activities,” or (2) “the absent parent and the subsidiary are in fact a single legal entity.” Terming the former “attribution” and the latter “merger,” Judge Keith would have found that WEDGE failed to maintain a separate corporate identity from TRC and effectively consummated a merger with TRC. Consequently, traditional notions of fair play and substantial justice would not be offended by holding WEDGE accountable in Tennessee for TRC’s conduct there.

Judge Keith’s alternative analysis in the corporate parent-subsidiary setting has the appeal of rejecting formalism in favor of functionalism. There is a certain artificiality in many analyses that attempt to distinguish a corporate parent from its subsidiary. Jurisdiction over parent or subsidiary should be possible in the forum state whenever the parent and subsidiary

95. Id.
97. 336 F.2d 292, 297 (6th Cir. 1964).
98. Id. at 296.
99. 882 F.2d at 1094 (Keith, J., concurring) (quoting Brilmayer & Paisley, Personal Jurisdiction and Substantive Legal Relations: Corporations, Conspiracies, and Agency, 74 CALIF. L. REV. 1, 12 (1986)).
100. 882 F.2d at 1094.
101. Id.
102. Id.
comprise a single functional economic entity, and either entity engages in forum activities that give rise to the action for which the entity is being sued.

IV. THE REFUSAL TO ASSERT JURISDICATION

Even when a federal court is vested with subject matter jurisdiction over an action and personal jurisdiction over a defendant, court-fashioned doctrines of judicial restraint may counsel against the exercise of that jurisdiction. Two of these doctrines are forum non conveniens and abstention, both of which were considered by the Sixth Circuit during the survey period.

A. Younger Abstention

In another civil rights case decided during the survey period, Litteral v. Bach, the plaintiff brought an action in federal court alleging a violation of her civil rights under 42 U.S.C. section 1985. The plaintiff was sued in Kentucky state court for back rent owed on business premises. Following a bench trial, judgment was entered against her. Litteral paid the back rent and filed an appeal. Under a Kentucky state statute, all further proceedings are stayed upon satisfaction of the judgment and timely filing of notice of appeal. Nevertheless, Judge Bach, who presided at the trial, signed a writ of restitution, ordered Litteral to deposit with the court $450.00 per month in rent pending the appeal, and further ordered that if she failed to make the deposit, her lessors could pursue their warrant of restitution for possession of the leased premises. Litteral thereafter filed her section 1985 action in federal court, alleging a conspiracy to deprive her of her civil rights and seeking compensatory and punitive damages. The district court abstained from taking jurisdiction of the action, concluding that the three-prong abstention test of Younger v. Harris

103. 869 F.2d 297 (6th Cir. 1989).
105. Litteral, 869 F.2d at 298.
106. Id. at 298.
had been satisfied. On appeal, the Sixth Circuit reversed in a per curiam opinion.\(^{108}\)

The Sixth Circuit began its analysis with an overview of Younger and its progeny,\(^{109}\) noting that although the Younger abstention doctrine had initially been limited to state criminal and quasi-criminal proceedings, it now extends to state civil proceedings if three factors are present: (1) there must be ongoing state judicial proceedings; (2) those proceedings must involve an important state interest; and (3) the state proceedings must afford the federal plaintiff a reasonable opportunity to raise her federal constitutional claims.\(^{110}\) Applying this test to the facts of Litteral, the Sixth Circuit concluded that abstention was not warranted because the pending state litigation did not involve a vital state interest.\(^{111}\) Moreover, the court added, because Litteral’s claim for money damages could not be addressed in the pending state proceedings, the district court’s dismissal was in error\(^{112}\) under the authority of Deakins v. Monaghan.\(^{113}\)

In Litteral, the Sixth Circuit gave the term, “an important state interest,” a narrow application, fortunately avoiding any broad principle of federal judicial noninterference with state judicial proceedings. Regrettably, it is difficult to know ex ante what constitutes “an important state interest” warranting dismissal, absent some guidance from the federal appellate courts. Even though the court was conclusory in stating that no vital state interest was at stake in this case, and did not explain what is “an important state interest,” sound judicial decision-making probably counsels against broad pronouncements on what constitutes an important state interest.

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108. 869 F.2d at 298.
110. 869 F.2d 299 (citing Middlesex County Ethics Comm. v. Garden State Bar Ass’n, 457 U.S. 423, 432 (1982)).
111. Id. at 299.
112. Id. at 300.
Even so, this is cold comfort for the lower federal courts and the civil rights litigants who will have to get their answer to this question on a case-by-case basis.

B. Forum Non Conveniens

In *Stewart v. Dow Chemical Co.*,\(^{114}\) citizens of New Brunswick, Canada, brought a diversity action against Dow Chemical alleging dioxin poisoning from a herbicide produced by Dow.\(^{115}\) Dow moved to dismiss on a number of grounds, including that of forum non conveniens.\(^{116}\) The district court granted Dow's motion to dismiss, conditioning the dismissal on the following: (1) that Dow consent to Canadian jurisdiction and accept service of process; (2) that Dow waive any statute of limitations defense; (3) that Dow make all the witnesses under its control available for testimony in Canada; (4) that Dow allow discovery in the Canadian courts of any materials which would be available under the Federal Rules of Civil Procedure; and (5) that Dow pay any judgment entered, subject to its right to appeal under Canadian law.\(^{117}\) Dow stipulated to these five conditions and the district court thereafter dismissed.\(^{118}\)

On appeal, the Sixth Circuit affirmed.\(^{119}\) Noting that the standard of appellate review is abuse of discretion by the trial court, the Sixth Circuit addressed the public and private interest factors that a court is to consider on a forum non conveniens dismissal motion,\(^{120}\) citing the two leading Supreme Court decisions on this subject, *Piper Aircraft Co. v. Reyno*,\(^{121}\) and *Gulf Oil Co. v. Gilbert*.\(^{122}\) The Court began its analysis remarking that although a plaintiff's choice of forum is to be given substantial deference, where a plaintiff is a foreigner, such as

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114. 865 F.2d 103 (6th Cir. 1989).
115. 865 F.2d 103, 104 (6th Cir. 1989).
116. *Id.* at 104.
117. *Id.* at 104-05.
118. *Id.* at 105.
119. *Id.* at 104.
120. *Id.* at 105-06.
Stewart, that choice is entitled to less deference because convenience of the forum selected cannot be presumed.123 Because an adequate alternative forum existed in Canada, and because both of the parties were prepared to proceed in a court in a foreign jurisdiction (thus eliminating inconvenience as an issue), the Sixth Circuit saw no error in the trial court's weighing of the public interest factors or in the conditions imposed on dismissal.124 Turning to an examination of the private interest factors — ease of access to proofs, availability of compulsory process, the cost of witness attendance125 — the Sixth Circuit again found no abuse of discretion in ordering dismissal, considering that most evidence and witnesses would be located in New Brunswick.126

The *Stewart* decision typifies the nearly complete deference accorded district court rulings on forum non conveniens motions.127 The opinion is potentially controversial, however, because of its blanket approval without discussion of the five conditions imposed by the district court in granting the motion to dismiss. With the exception of the fourth condition — that Dow allow discovery in the Canadian court of any materials that would be available under the Federal Rules of Civil Procedure — these conditions are unexceptional in forum non conveniens dismissals.128 However, in *In re Union Carbide Corp. Gas Plant Disaster at Bhopal*,129 the Second Circuit rejected the imposition of the same discovery condition in the district court's dismissal for forum non conveniens.130 The Second Circuit explained that "[b]asic justice dictates that both sides be treated equally, with each having equal access to the evidence in the possession or under control of the other."131 There,

123. 865 F.2d at 106 (citing Piper Aircraft Co. v. Reyno, 454 U.S. 235, 256 (1981)).

124. *Id.* at 106-07.


126. 865 F.2d at 107.


130. 809 F.2d at 205.

131. *Id.*
Union Carbide objected to the imposition of this unilateral discovery condition as being unfair. Here, by contrast, Dow unconditionally stipulated to this discovery condition and made no challenge to it on appeal. Consequently, it was left standing by the Sixth Circuit.

V. OFFER OF JUDGMENT

Rule 68 of the Federal Rules of Civil Procedure provides in part that:

[A] party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property . . . specified in the offer, with costs then accrued. . . . An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. . . .

The effect of Rule 68 is to permit a defendant to make a formal settlement offer, which the plaintiff may accept or reject. If the plaintiff rejects the offer, and then obtains a judgment for less than the offered amount, the plaintiff is precluded from recovering her own costs and must also pay the defendant’s costs incurred after the offer. Are attorneys’ fees part of the “costs” that are shifted to the plaintiff? May the defendant recover his post-offer costs if he, rather than the plaintiff, gets a judgment? The Supreme Court answered the first question in the affirmative when the underlying statute (there, 42 U.S.C. section 1988) defines “costs” to include attorneys’ fees, concluding in *Marek v. Chesney*, that contrary to the American rule against fee shifting, Rule 68 “costs” may include attorneys’ fees. The Supreme Court answered the second question in the negative in *Delta Air Lines, Inc.*

132. *Id.* at 201-02.
136. *Id.* at 9.
holding that on a literal reading of Rule 68, a defendant may recover its post-offer costs under Rule 68 only when the plaintiff recovers a judgment in an amount less than that offered by the defendant, but greater than zero dollars.

During the survey period, the Sixth Circuit had the opportunity to consider both of these Supreme Court decisions. In Oates v. Oates, the defendant made an offer of judgment pursuant to Rule 68 for $4,000, plus payment of "all court costs," in an action for damages alleging violations of the wiretapping provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. sections 2511 and 2520. The plaintiffs accepted the offer and thereafter attempted to recover attorney's fees as part of their court costs. The narrow question presented for the Sixth Circuit's review was whether 18 U.S.C. section 2520 defines attorney's fees as a part of "costs." If the statute does, then under the authority of Marek v. Chesney, those fees are included as costs for purposes of Rule 68. The Sixth Circuit concluded that the underlying statute does not permit an award of fees as part of Rule 68 costs and affirmed the district court's denial of a fee award.

The defendant and his lawyer allegedly tapped telephone conversations of defendant's wife and another party during the pendency of a divorce action. After accepting the offer of settlement, plaintiffs moved to recover attorney's fees as part of their Rule 68 costs. Plaintiffs argued that the plain meaning of 18 U.S.C. section 2520 includes attorney's fees

138. Id. at 351-52.
140. Id. at 204.
141. Id.
142. Id.
143. Id. at 206-08.
144. Id. at 204.
145. That section provides in part:
   Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter shall . . . (2) be entitled to recover from any such person — (a) actual damages . . . ; (b) punitive damages; and (c) a reasonable attorney's fee and other litigation costs reasonably incurred.

as costs for purposes of Rule 68. 146 Unlike section 1988, which, as construed by the Supreme Court in Marek, provides for an award of "reasonable attorney’s fees as part of the costs," the Sixth Circuit agreed with the district court's construction of section 2520 as providing for attorney's fees as part of recoverable damages, and that such fees were subsumed under the offer of judgment. 147 Conceding that the question was a close one, the Sixth Circuit nevertheless believed that as a policy matter, the American rule precluding attorney fee shifting should be followed "unless the underlying statute clearly defines attorney’s fees as an additional component of traditional ‘costs’ .... [W]e hold that attorney’s fees are not ‘costs’ for purposes of Rule 68." 148

The Oates decision is squarely in line with the Supreme Court’s admonition in Alyeska Pipe Line, 149 that "absent statute or an enforceable contract, litigants pay their own attorneys’ fees." 150 Awarding attorneys’ fees is an exceptional remedy. As the Sixth Circuit recognized in another appeal decided during the survey period, "[a]bsent such explicit [congressional] authorization, federal courts may exercise their inherent powers to tax attorneys’ fees only in the narrowly defined circumstances" of bad faith, willful disobedience of a court order, and the common fund doctrine. 151 Because none of those circumstances existed in Oates, the court was correct in rejecting plaintiffs’ contention.

The Supreme Court’s Delta Air Lines and Marek decisions converged into a second Rule 68 opinion decided during the survey period, Hopper v. Euclid Manor Nursing Home, Inc. 152 In Hopper, plaintiff sued her employer for terminating her in violation of Title VII of the Civil Rights Act of 1964, 42

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146. 866 F.2d at 205.
147. Id. at 205-07.
148. Id. at 208. For another opinion issued during the survey period rejecting a construction of Rule 68 as permitting an award of attorney's fees as part of costs, see Zackaroff v. Koch Transfer Co., 878 F.2d 387 (6th Cir. 1988).
150. Id. at 257.
152. 867 F.2d 291 (6th Cir. 1989).
U.S.C. section 2000e, and 42 U.S.C. section 1981. The nursing home made an offer of judgment of $750.00, which Hopper rejected. At a bench trial the district court rejected all but one of plaintiff’s claims and awarded her nominal damages of $100.00 for the section 1981 violation. At a post-trial hearing both parties requested an award of costs. Under the authority of *Marek*, Rule 68 costs include attorneys’ fees in a civil rights case. Because Hopper failed to get judgment in an amount in excess of the offer of judgment, the district court reluctantly agreed that the nursing home was entitled to attorneys’ fees as part of its Rule 68 costs. Shortly thereafter, the district court vacated its judgment *sua sponte* pursuant to Rule 60(b)(6) and entered judgment for the nursing home to negate the effect of the *Delta Air Lines* decision, of which the district court had been previously unaware. The nursing home challenged the district court’s action as an abuse of discretion.

Rule 60(b)(6) permits relief from a judgment for “any other reason justifying relief from the operation of the judgment.” The Sixth Circuit adheres to the view that relief under Rule 60(b)(6) is extraordinary, and the court here found no extraordinary or exceptional circumstances warranting Rule 60(b)(6) relief. More importantly, the Sixth Circuit stated:

> To allow the trial judge to change his evaluation of the merits of a claim based upon the belated discovery of a rejected offer of judgment would undermine Rule 68’s purpose of forcing plaintiffs to “think very hard” before proceeding with their suits. . . . Any power retained by the district court to change his evaluation of the case in order to avoid application of Rule 68 seriously undermines the goal of unbiased evaluation of the merits of cases and lessens the possibility for settlement.

153. *Id.* at 293.
154. *Id.* at 293.
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.* at 294.
160. *Id.*
161. *Id.* at 295 (quoting *Marek v. Chesney*, 473 U.S. at 11).
With victory in its grasp, the defendant in *Hopper* had it snatched away at the very end. Because Rule 68 does not, in and of itself, provide for an award of attorneys' fees, the nursing home, according to the Sixth Circuit, was entitled to attorneys' fees under Rule 68 only to the extent that an award of such fees was made under 42 U.S.C. section 1988. Here, the district court had refused to award the defendant its attorneys' fees under section 1988, and the defendant did not appeal the district court's denial. Accordingly, the Sixth Circuit expressed no opinion concerning the propriety of the district court's decision in that respect.

Besides making it clear that the operation of Rule 68 is mandatory, and at times harsh, the *Hopper* opinion sends a clear message to appellants that failing to appeal an issue can also have severe consequences. The lesson to appealing parties is to be thorough when raising issues on appeal.

### VI. Rule 11 Sanctions

During the survey period, the Sixth Circuit had the opportunity to determine the propriety of Rule 11 sanctions in three appeals. In *In re Summers*, the Sixth Circuit reversed the district court's imposition of Rule 11 sanctions in a case originally filed in state court, removed to federal court, and subsequently voluntarily dismissed pursuant to Rule 41(a)(1). In

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162. *Id.* at 296.
163. *Id.*
164. *Id.*
165. The Sixth Circuit sent a similar message in *Heussner v. National Gypsum Co.*, 887 F.2d 672 (6th Cir. 1989), decided during the survey period, where the Sixth Circuit granted the defendants' motion to dismiss all of the parties to the appeal except the named plaintiff Heussner because the plaintiffs failed to specify in their notice of appeal the parties taking the appeal, but instead used the designation "et al." in their notice of appeal. *Id.* at 675. The Sixth Circuit relied on the Supreme Court's decision in *Torres v. Oakland Scavenger Co.*, 108 S. Ct. 2405 (1988), which held that the federal appellate courts lack jurisdiction over any party who is not specified in the notice of appeal in accordance with *Fed. R. App. P.* 3(c). *Id.* at 675.
166. For a discussion of Rule 11, see generally G. SHREVE & P. RAVEN-HANSEN, *UNDERSTANDING CIVIL PROCEDURE* § 48[B] (1989), where the authors discuss and cite several articles treating Rule 11.
167. 863 F.2d 20 (6th Cir. 1988).
a case of first impression in the Sixth Circuit, the court followed the rule adopted in the Second, Fourth, and Ninth Circuits that "where a complaint is properly filed in state court and then removed to federal court, it is inappropriate for the federal court to apply Rule 11 sanctions for the filing of that complaint." 169 Without disputing that the defendant had been put to the burden and expense of defending against this lawsuit, the Sixth Circuit reminded the defendant that nothing prevented it from seeking sanctions in an Ohio state court. 170

In a second Rule 11 opinion, Davis v. Crush, 171 the Sixth Circuit again reversed the district court’s imposition of Rule 11 sanctions, on this occasion because the civil rights complaint filed by plaintiffs did not necessarily reflect a lack of reasonable inquiry into the facts or the law. 172 Two anti-abortion protesters, Davis and Johnson, were arrested for violating a state court preliminary injunction that had imposed time, place, and manner restrictions on picketers’ activities outside of a Planned Parenthood center in Cincinnati. 173 After their arrest, Davis and Johnson filed a section 1983 civil rights action in federal court against several state judicial and executive officials, alleging a conspiracy among the officials and Planned Parenthood to deprive them of their civil rights. 174 The district court dismissed the action under the authority of the Supreme Court’s Younger decision, and on the basis that the state judge enjoyed absolute immunity from damages for his official actions. 175 Shortly after dismissing the complaint the district court heard the defendants’ Rule 11 motion and imposed a $2,500 Rule 11 sanction, finding that, because various state remedies were available, the section 1983 action was intended to harass and that assertions made against at least two defendants were factually incorrect. 176

169. Id. at 21.
170. Id. at 22.
171. 862 F.2d 84 (6th Cir. 1988).
172. Id. at 88.
173. Id. at 86.
174. Id.
175. See id. at 87.
176. See id.
In order to prevail in an appeal from the imposition of Rule 11 sanctions, an appellant "must show that the district court abused its discretion in finding that his conduct was not reasonable under the circumstances."\textsuperscript{177} The Sixth Circuit in Davis conceded that striking the balance between vigorous advocacy and exploitive lawyering is a delicate task, but exhorted district court judges to exercise judicious restraint in the imposition of Rule 11 sanctions, lest they chill creativity.\textsuperscript{178} Without deciding whether Younger and its progeny required dismissal of the complaint, the Sixth Circuit concluded that there was room for reasonable disagreement as to whether abstention was required under the circumstances presented here.\textsuperscript{179} Similarly, the Sixth Circuit concluded that plaintiffs and their lawyers had not failed to conduct a reasonable inquiry into the facts on which the lawsuit was based.\textsuperscript{180} "To uphold the district court's imposition of Rule 11 sanctions in the instant case," the court stated, "would operate to chill the bringing of facially valid civil rights suits in federal court, a consequence that Rule 11 was never intended to promote."\textsuperscript{181}

In the third Rule 11 decision, Jackson v. The Law Firm of O'Hara, Ruberg, Osborne & Taylor,\textsuperscript{182} the Sixth Circuit upheld the imposition of Rule 11 sanctions for failure to make an adequate factual investigation prior to filing a legal malpractice action. Plaintiff Jackson sued the defendant law firm for alleged malpractice arising from its earlier representation of him. An investigation of docket sheets and other court records would have revealed, or at least put the plaintiff's lawyer on inquiry notice, that the law firm did not represent the plaintiff in a wrongful death action.\textsuperscript{183} In upholding the Rule 11 sanction, the Sixth Circuit stated that, although Rule 11's twin goals are deterrence and compensation, its principal goal is to deter.\textsuperscript{184}

\textsuperscript{177} Century Products, Inc. v. Sutter, 837 F.2d 247, 250 (6th Cir. 1988) (citations omitted).
\textsuperscript{178} 862 F.2d at 89.
\textsuperscript{179} Id. at 90.
\textsuperscript{180} Id. at 91.
\textsuperscript{181} Id. at 92.
\textsuperscript{182} 875 F.2d 1224 (6th Cir. 1989).
\textsuperscript{183} Id. at 1228.
\textsuperscript{184} Id. at 1229.
Therefore, "courts should impose the least severe sanction that is likely to deter." Thus, for the first time, the Sixth Circuit imposed a requirement on the district courts to make some inquiry as to an attorney's ability to pay a monetary sanction. The Sixth Circuit added that the Rule 11 movant has a duty to mitigate by bringing the Rule 11 violation promptly to the court's attention: "It is an abuse of discretion to award all fees claimed when a party has expended a great deal of time and effort defending patently frivolous claims that could have been dismissed on motion or request for a pretrial conference at an early stage in the proceedings."

The Sixth Circuit agreed with the district court that the plaintiff's attorney violated Rule 11 by failing to make a reasonable factual and legal inquiry before filing the malpractice complaint, and by signing papers subsequently filed in an attempt to argue the viability of the malpractice action. As to the appropriateness of the $40,000 Rule 11 fee award, the Sixth Circuit remanded for consideration of, inter alia, the plaintiff's attorney's ability to pay the sanction, directing the district court to make a specific finding in that regard and adding that "full recovery for reasonable time and expenses incurred by the offended party is not invariably required."

The Sixth Circuit's emphasis on the deterrent function of Rule 11 is noteworthy. Deterrence may be difficult to achieve, however, in cases (1) where the offending attorney has committed a Rule 11 violation that has cost the adverse party little in terms of time and money, and (2) where the offending attorney, or his client, is wealthy. May a court impose a Rule 11 sanction that exceeds the actual expenses incurred by the innocent party in defending against the offending litigation? The Sixth Circuit raised the issue in Jackson, recognizing "that imposing monetary sanctions pursuant to Rule 11 above a defendant's actual litigation costs may be construed as a

185. Id.
186. Id. at 1230.
187. Id. at 1230.
188. Id. at 1231.
189. Id. at 1232.
190. Id.
fine imposed for criminal contempt.' 191 The court suggested that such a Rule 11 sanction would not be prohibited per se, but that in such a case, greater due process safeguards might be applicable. 192