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Civil Procedure

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CIVIL PROCEDURE

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INTRODUCTION

During the survey period, November 1, 1989 through October 31, 1990, the Sixth Circuit considered a wide range of procedural issues. The most noteworthy decisions dealt with the determination of a corporation's and dual national's citizenship for diversity jurisdiction, the reach of Michigan's long-arm statute, selecting the appropriate Kentucky statute of limitations in a section 1983 civil rights action in the wake of two recent U.S. Supreme Court decisions on this subject, and whether contractual forum selection clauses waive a party's right to remove. The Sixth Circuit also had occasion to reverse a district court's grant of judgment notwithstanding the verdict and a conditional grant of a new trial in a case where the movant

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had failed to move for directed verdict at trial and where the jury had returned a verdict in favor of the non-moving party twice. Finally, the court, sitting *en banc*, ruled that use of the designation "et al." in a notice of appeal is insufficient to meet the requirements of a notice of appeal under Rule 3(c) of the Federal Rules of Appellate Procedure, in light of the Supreme Court's 1988 decision in *Torres v. Oakland Scavenger Co.*[1]

I. Subject Matter Jurisdiction

The Sixth Circuit issued two opinions dealing with the determination of a party's citizenship for purposes of diversity jurisdiction. The first decision addressed the question of a wholly-owned subsidiary's citizenship. The other examined the question of whether diversity jurisdiction can exist when an individual has dual national citizenship.[2]

A. A Wholly-Owned Subsidiary's Principal Place of Business

In *Schwartz v. Electronic Data Systems, Inc.*,[3] a former employee of defendant Electronic Data Systems (EDS) sought

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1. 487 U.S. 312 (1988).

2. During the survey period the Sixth Circuit also resolved a pendent party jurisdiction issue in Stallworth v. City of Cleveland, 893 F.2d 830 (6th Cir. 1990). In that case, a husband and wife brought an action against the City of Cleveland. The wife sought damages for a violation of her civil rights under 42 U.S.C. § 1983. The husband sought damages under state law for loss of consortium. Because there was no diversity between Mr. Stallworth and defendant, the court dismissed for lack of jurisdiction, concluding that no authority existed for exercising pendent party jurisdiction over the husband's state law claim. *Id.* at 838. However, one of the cases cited by the court in support, Finley v. United States, 490 U.S. 545 (1989), was expressly overruled by Congress in December 1990 when it added a new section to title 28, United States Code, entitled, "Supplemental Jurisdiction." Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (1990), *to be codified at* 28 U.S.C. § 1367 (1990). *See* H.R. Rep. No. 734, 101st Cong., 2d Sess. 27-29 (1990), *reprinted in* 1991 U.S. Code Cong. & Admin. News 6873-75. Because jurisdiction was not founded solely on diversity jurisdiction in *Stallworth*, there is an argument that pendent party jurisdiction would now exist over Mr. Stallworth's loss of consortium claim under section 1367(a). *Compare* 28 U.S.C. § 1367(b) (1988). This issue will undoubtedly be revisited by the Sixth Circuit in the future.

3. 913 F.2d 279 (6th Cir. 1990).

recovery of damages for breach of an employment contract and for alleged fraudulent misrepresentations concerning the content of a training program for which he was hired. Plaintiff invoked the court's diversity jurisdiction. Schwartz is a citizen of Michigan. While EDS is a Texas corporation with its principal place of business in Dallas, it is also a wholly-owned subsidiary of General Motors Corporation, a Delaware corporation with its principal place of business in Michigan.[4] The diversity statute provides that "a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business . . . ."[5] Although the question was not raised below,[6] at oral argument the court requested the parties to submit supplemental briefs addressing the question whether EDS should be treated as a separate entity for purposes of diversity jurisdiction, or whether it should be treated as an alter ego of its corporate parent, General Motors.[7] The court announced the following guiding principle:

> When formal separation is maintained between a corporate parent and its corporate subsidiary, federal court jurisdiction over the subsidiary is determined by that corporation's citizenship, not the citizenship of the parent. So far as we can determine, every court of appeals that has considered the question has reached this conclusion.[8]

This rule applies even where the parent owns all the stock of the subsidiary and exercises close control over its operations, the court added.[9] Against this legal backdrop, the court found nothing in the record that would support a finding that EDS is not, formally, a separate corporation, although it is wholly-owned by General Motors.[10]

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4. *Id.* at 281.
5. 28 U.S.C. § 1332(c)(1) (1988).
6. *See* FED. R. CIV. P. 12(h)(3) (which states: "Whenever it appears by suggestion by the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action").
7. 913 F.2d at 282.
8. *Id.* at 283.
9. *Id.*
10. *Id.* at 284.

Chief Judge Merritt filed a lengthy dissenting opinion on this point.[11] He found that resort to corporation law on the relationship between parent and subsidiary was totally misplaced in the context of jurisdictional inquiries.[12] Unlike the majority, he would have found all of General Motor's wholly-owned subsidiaries, such as EDS, to be Michigan corporations, as well as citizens of the state in which they are incorporated and in which they have their principal place of business.[13] Consequently, under Chief Judge Merritt's view, because Schwartz is a citizen of Michigan, diversity jurisdiction would not exist in this case. Finding an absence of clear congressional expression on this point, Chief Judge Merritt noted that one of the chief reasons for giving corporations dual citizenship in 1958 was to reduce the case load of the federal courts in diversity cases.[14] He added that if the sole purpose of diversity jurisdiction is to provide a forum free from prejudice against outsiders, "then no reason recommends viewing a business that is wholly owned by a local business as any less 'local' than its owner."[15] With an eye to these legislative goals, Chief Judge Merritt concluded that it would frustrate Congress's intent to read the diversity statute in such a way as to permit jurisdiction under these circumstances.[16]

Chief Judge Merritt's views are commendable, but it will take either an act of Congress or a Supreme Court reversal to alter this legal landscape. Indeed, proposals have been made in this very connection to whittle down diversity jurisdiction even more by deeming corporations engaged in multistate activities to be citizens of every state in which they do business.[17] Nevertheless, in the absence of a clear expression by Congress or the Supreme Court to the contrary, the majority cannot be faulted for concluding that General Motor's Michigan citizenship

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11. Schwartz v. EDS, Inc., 913 F.2d 279, 286-94 (6th Cir. 1990) (Merritt, C.J., dissenting).
12. *Id.* at 286.
13. *Id.* at 286-87.
14. *Id.* at 289.
15. *Id.* at 290.
16. *Id.* at 291.
17. *See* Joiner, *Corporations As Citizens of Every State Where They Do Business: A Needed Change in Diversity Jurisdiction*, 70 JUDICATURE 291 (1987).

is not to be attributed to its wholly-owned subsidiary, EDS.

B. Individuals With Dual Citizenship and Diversity Jurisdiction

What is the citizenship, for diversity purposes, of a party with dual national citizenship? This was the question raised, but left unanswered, in *Von Dunser v. Aronoff*.[18] According to the pleadings, the plaintiff is an Austrian-born, naturalized U.S. citizen, and the defendant is a Michigan citizen.[19] After Von Dunser won a $727,170 judgment, Aronoff, for the first time on appeal, made his jurisdictional challenge. Aronoff claimed that, first, Von Dunser could not invoke alienage jurisdiction because he is a naturalized U.S. citizen, and that as an American citizen with no state domicile (Von Dunser lives in Europe), Von Dunser had no state citizenship and, consequently, there was no diversity jurisdiction.[20] Aronoff's alternative contention was that Von Dunser was a citizen of Florida at the time of the filing of the complaint, and so was Aronoff. Therefore, no diversity existed when the complaint was filed, the critical time inquiry in cases invoking diversity jurisdiction.[21]

Because none of these arguments were raised below, and because they entailed fact finding, the Sixth Circuit remanded. The court noted that the dual citizen has been "a troublesome creature for the courts in construing the diversity and alienage statute."[22] Considering that the policy for alienage jurisdiction is to avoid the danger of giving offense to foreign nations by denying their nationals a federal forum in suits against U.S. citizens, that policy would not be frustrated in a case such as this where the plaintiff is a naturalized U.S. citizen.[23] Nevertheless, the court refrained from expressly adopting or

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18. 915 F.2d 1071 (6th Cir. 1990).
19. *Id.* at 1072.
20. *Id.*
21. *Id.* at 1072-73.
22. *Id.* at 1073.
23. *Id.* at 1073-74 (citing Sadat v. Mertes, 615 F.2d 1176 (7th Cir. 1980)).

rejecting this position, ostensibly because of the unsettled factual record.[24]

In its remand to the district court, the Sixth Circuit acknowledged that the district court was not to be faulted for the state of record on appeal. It had had no occasion to make factual findings regarding jurisdiction because this issue was not contested by the parties.[25] The court nonetheless made the "suggestion" that "because the federal courts are courts of limited jurisdiction, it would be helpful if district courts made findings of fact on the predicates of subject-matter jurisdiction even where they appear unnecessary."[26] The court also gave the district court an open invitation to impose Rule 11 sanctions on one or the other party, depending on the court's ultimate findings.[27]

Although the Sixth Circuit refrained from explicitly adopting the Seventh Circuit's holding in *Sadat v. Mertes*[28] that no alienage jurisdiction exists where a party is a dual citizen of the United States and another country, the court came close to doing just that in its remand order. It was undisputed that Von Dunser is an Austrian national and also a naturalized American. A remand for fact finding regarding Aronoff's or Von Dunser's domicile in Florida is superfluous if Von Dunser is considered an Austrian. In that case, alienage jurisdiction exists.

Adoption of the Seventh Circuit's *Sadat* rationale, namely, that fears of perceived discrimination against aliens vanishes once that alien becomes a U.S. citizen, and thus no alienage jurisdiction exists in those circumstances, makes eminent good sense. What makes little sense, however, is the court's suggestion, which comes close to a direction, to the district courts to conduct arguably wasteful and unnecessary fact finding on jurisdiction in cases where it is not contested. While it is

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24. *Id.* at 1074. Elsewhere in the opinion, the court stated that even though Von Dunser's complaint alleges dual citizenship, "under *Sadat v. Mertes*, dual citizenship does not create alienage jurisdiction." *Id.* at 1075. The court thus comes very close to following *Sadat*.

25. *Id.* at 1075.

26. *Id.* at 1076.

27. *Id.* n.4.

28. 615 F.2d 1176 (7th Cir. 1980).

unfortunate that constitutional limits on federal court subject matter jurisdiction allow a losing party to contest that jurisdiction for the first time on appeal, unless such eleventh-hour challenges are commonplace, the cure seems worse than the malady. The district courts can wield the club of Rule 11 sanctions to deter and punish abuses.

II. PERSONAL JURISDICTION

In two cases focusing on issues of personal jurisdiction, the Sixth Circuit took up the questions of the reach of the Michigan long-arm statute and whether a non-resident defendant had sufficient minimum contacts with the forum state to render it amenable to jurisdiction there.

A. The Reach of a State's Long-Arm Statute

In *Michigan National Bank v. Quality Dinette, Inc.*,[29] the plaintiff Michigan National Bank was the assignee of contract claims against the non-resident corporate defendants. The Bank sued the defendants to recover on those contract claims, but the district court dismissed for lack of personal jurisdiction.[30] The district court rejected both of the Bank's arguments that the court had jurisdiction over the non-resident defendants, under either of Michigan's long-arm statutes, one providing for general personal jurisdiction over corporate defendants, the other providing for specific or limited personal jurisdiction.[31] The Bank brought suit to recover the purchase price of machinery used in the manufacture of furniture and delivered to the defendants in Alabama, their principal place of business. Although the defendants had business contacts with Michigan, those contacts did not give rise directly to the instant lawsuit.[32]

The Bank maintained that the defendants conducted a "continuous and systematic part of their general business" in Michigan, thus subjecting them to general personal jurisdiction

29. 888 F.2d 462 (6th Cir. 1989).
30. *Id.* at 464.
31. *Id.* at 463. The two statutes are MICH. COMP. LAWS §§ 600.711 and 600.715(1) (West 1990).
32. 888 F.2d at 463-64.

in the state,[33] *i.e.*, to suits in Michigan unrelated to their contacts with Michigan.[34] Section 600.711(3) provides:

> *Corporations; general personal jurisdiction* Sec. 711. The existence of any of the following relationships between a corporation and the state shall constitute a sufficient basis of jurisdiction to enable the courts of record of this state to exercise general personal jurisdiction over the corporation and to enable such courts to render personal judgments against the corporation.
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> . . . .
>
> (3) The carrying on of a continuous and systematic part of its general business within the state.[35]

Thus, for example, invoking general personal jurisdiction, General Motors would be amenable to suit in Michigan for any claim brought against it arising anywhere in the world because Michigan is General Motors' headquarters.

In reversing the district court's determination that the defendants did not maintain continuous and systematic contacts with Michigan, the Sixth Circuit cited three factors in support of its conclusion that such contacts did exist: (1) they retain an independent sales representative in Michigan; (2) they conduct mail order solicitations of Michigan businesses; and (3) they made over 400 sales totaling $625,000 in 1986 and 1987 in the state.[36] These factors were sufficient for the court to conclude that the defendants' contacts with Michigan were "continuous and systematic,"[37] thus rendering them amenable to suit in Michigan for claims not arising out of those Michigan contacts,

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33. *Id.* at 464. *See* Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984), where the Supreme Court explained: "It has been said that when a State exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum, the State is exercising 'specific jurisdiction' over the defendant." *Id.* at 414 n.8 (citations omitted). The Supreme Court further 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." *Id.* n.9 (citations omitted).

34. The phrase, "continuous and systematic part of its business," is drawn from the U.S. Supreme Court watershed decision, International Shoe Co. v. Washington, 326 U.S. 310, 317 (1945).

35. MICH. COMP. LAWS § 600.711(3) (West 1990).

36. 888 F.2d at 466.

37. *Id.* at 466-67.

simultaneously satisfying the Michigan long-arm statute and the due process clause of the fourteenth amendment.

Viewing this case as an unadorned exercise in statutory construction, the facts fit easily within the reach of the statute. Under Michigan case law, the linchpin for general personal jurisdiction under section 600.711(3) is corporate presence either in fact or through an independent agent.[38] Because the Michigan long-arm statute incorporates the term "continuous and systematic,"[39] a phrase used extensively by the Supreme Court in its personal jurisdiction decisions,[40] analyzing this statute under the due process clause was a straightforward proposition. As applied to the facts of this case, again, the statute clearly passes constitutional muster under the leading Supreme Court general personal jurisdiction cases.[41]

B. Minimum Contacts With the Forum State

Does a foreign bank that issues a letter of credit naming a Michigan resident as a beneficiary have sufficient minimum contacts with Michigan to support the exercise of personal jurisdiction over it? To this question, the Sixth Circuit answered "no" in *Chandler v. Barclays Bank PLC*.[42] Defendant Banque du Caire, an Egyptian bank, issued a letter of credit at the request of International Steel in favor of the plaintiff Chandler.[43] International Steel is also an Egyptian company and the buyer of steel products from the plaintiff Chandler in Michigan. After presentation of documents in New York to Barclays, the confirming bank, payment against the letter of credit was declined because of discrepancies in the documents. Banque du Caire also advised Barclays not to pay because of the discrepancies in the documentation.[44] Chandler thereafter

38. Kircos v. Lola Cars Ltd., 97 Mich. App. 379, 386, 296 N.W.2d 32, 35 (1980).

39. MICH. COMP. LAWS § 600.711 (West 1990).

40. *See, e.g.*, International Shoe Co. v. Washington, 326 U.S. 310, 317 (1945).

41. *See, e.g.*, World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) (dictum); Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437 (1952); International Shoe Co. v. Washington, 326 U.S. 310 (1945). *See also* Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984).

42. 898 F.2d 1148 (6th Cir. 1990).

43. *Id.* at 1150.

44. *Id.*

brought a diversity action to recover against the letter of credit. The district court dismissed his complaint against Banque du Caire for lack of personal jurisdiction.

The Sixth Circuit affirmed. Relying on decisions from the Third, Ninth, and Tenth Circuits, holding that the mere issuance of a letter of credit naming a resident of a particular state as beneficiary does not subject the issuing bank to the jurisdiction of that state,[45] the court rejected Chandler's contention that Banque du Caire had the requisite minimum contacts with Michigan.[46] Under the Supreme Court's "purposeful availment" test, first announced in *Hanson v. Denckla*,[47] the court disagreed with Chandler that Banque du Caire had "purposefully availed itself of the privilege of acting or causing a consequence to occur in Michigan."[48] The other federal courts which have analyzed the issuance of letters of credit as a jurisdictional hook have reached a uniform conclusion that standing alone this is not sufficient,[49] observing that the issuing bank's obligation under the letter of credit is independent of the underlying sales contract.[50]

Chandler next advanced a national contacts argument, arguing that the district court had jurisdiction over Banque du Caire based on its contacts with the United States as a whole. This argument was unavailing, however, in the absence of a federal long-arm statute.[51] This case being a diversity action, the district

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45. Leney v. Plum Grove Bank, 670 F.2d 878 (10th Cir. 1982); H. Ray Baker, Inc. v. Associated Banking Corp., 592 F.2d 550 (9th Cir.), *cert. denied*, 444 U.S. 832 (1979); Empire Abrasive Equipment Corp. v. H.H. Watson, Inc., 567 F.2d 554 (3d Cir. 1977).

46. 898 F.2d at 1151.

47. 357 U.S. 235 (1958).

48. 898 F.2d at 1151.

49. *See* cases cited *supra* note 45. *Contra* Van Schaack & Co. v. District Court, 189 Colo. 145, 538 P.2d 425 (1975).

50. 898 F.2d at 1153.

51. The two federal courts of appeals that have considered this very question have also rejected it in the absence of some statutory authorization. *Id.* at 1154 (citing Max Daetwyler Corp. v. R. Meyer, 762 F.2d 290 (3d Cir.), *cert. denied*, 474 U.S. 980 (1985); Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406 (9th Cir. 1977)).

court had to rely solely on the Michigan long-arm statute to secure personal jurisdiction over the defendant.[52] The constitutional reach of the state long-arm statute being, of course, limited to state contacts, the Sixth Circuit rejected this argument as well.[53]

Although the minimum contacts test has been buffeted by recent Supreme Court decisions,[54] if the test has any continuing efficacy as a genuine limit on a court's jurisdiction it has to be in cases such as *Chandler* where the defendant's forum contacts are so attenuated as to approach the vanishing point. Arguably, the minimum contacts test should be jettisoned altogether in favor of some broad "reasonableness" test which would resemble, if not mirror, the law of forum non conveniens. But such a shift in the law will have to await action by either Congress or the Supreme Court.

III. Choice-of-Forum Clauses and Waiving the Right to Remove

During the survey period, the Sixth Circuit issued two opinions involving choice-of-forum clauses. The same two issues were presented in both cases: (1) Does a forum selection clause constitute a waiver of the right to remove the action from state court to federal court? (2) Does an order of remand to the state court on the basis of the forum selection clause result in an appealable order? To the first issue, the court answered "no." To the second issue, the court answered "yes."

In *Regis Associates v. Rank Hotels (Management) Ltd.*,[55] Regis terminated a hotel management agreement it had with Rank and filed an action in Wayne County Circuit Court.

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52. Omni Capital International v. Rudolph Wolff & Co., 484 U.S. 97 (1987). The Supreme Court has expressly reserved the question whether a national contacts test is constitutional under the due process clause of the fifth amendment. *See* Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102, 113 n.* (1987).

53. 898 F.2d at 1154. The court also rejected Chandler's contention that Barclays was Banque du Caire's agent, thus rendering Banque du Caire amenable to suit in Michigan. *Id.* at 1154-55. The court concluded that Barclays assumed an independent contractual relationship with Chandler as the confirming bank, and thus there was no agency between it and Banque du Caire. *Id.* at 1155.

54. *E.g.*, Burnham v. Superior Court, 110 S. Ct. 2105 (1990) (transient jurisdiction over defendant physically present in the state at the time of service) (plurality); Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985).

55. 894 F.2d 193 (6th Cir. 1990).

Rank in turn filed a removal petition in district court, which triggered a motion to remand by Regis.[56] Regis argued that the parties' choice-of-forum clause in their management agreement constituted a waiver of the right to remove under 28 U.S.C. § 1441, the federal removal statute. That clause provided: "The interpretation and application of this Agreement shall be governed by the law of the State of Michigan and the parties hereby submit to the jurisdiction of the Michigan Courts."[57]

The district court granted Regis' motion to remand.[58] On appeal, Regis' initial argument was that the court lacked jurisdiction to entertain an appeal from an order of remand.[59] Its argument rested on 28 U.S.C. § 1447(d), which provides in part that "[a]n order remanding a case to the state court . . . is not reviewable on appeal . . . ."[60] The court agreed that the language of section 1447(d) was broad, but quickly added that it has been given a narrowing construction by the Supreme Court in *Thermtron Products, Inc. v. Hermansdorfer*,[61] where the Supreme Court stated:

> Section 1447(d) is not dispositive of the reviewability of remand orders in and of itself. That section and § 1447(c) must be construed together . . . . This means that only remand orders issued under § 1447(c) and invoking the grounds specified therein—that removal was improvident and without jurisdiction—are immune from review under § 1447(d).[62]

Agreeing with decisions from the Second and Ninth Circuits,[63] which have concluded that a remand order based on a district court's interpretation of a forum selection clause is reviewable on appeal, the Sixth Circuit denied Regis' motion to dismiss the appeal.[64]

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56. *Id.* at 194.
57. *Id.*
58. *Id.*
59. *Id.*
60. 28 U.S.C. § 1447(d) (1990).
61. 423 U.S. 336 (1976).
62. *Id.* at 345-46.
63. Karl Koch Erecting Co. v. New York Convention Center Dev. Corp., 838 F.2d 656 (2d Cir. 1988); Pelleport Investors, Inc. v. Budco Quality Theatres, Inc., 741 F.2d 273 (9th Cir. 1984).
64. 894 F.2d at 195.

Turning to the forum selection clause issue, the court stated that "[a]lthough the right to remove can be waived, the case law makes it clear that such waiver must be clear and unequivocal. . . . [I]t is the waiver of a statutory right that must be set forth, not the intent to rely on the statute."[65] Since the parties' clause did not expressly waive the right to remove, the court concluded, it had not been waived.[66]

In the second case, *In re Delta America Re Insurance Co.*,[67] the district court remanded an action to the state court on the basis of a forum selection clause in the parties' contract which provided:

> It is agreed that in the event of the failure of the Reinsurers hereon to pay any amount claimed to be due hereunder, the Reinsurers hereon, at the request of the Elkhorn will submit to the jurisdiction of any court of competent jurisdiction within the United States and will comply with all requirements necessary to give such Court jurisdiction and all matters arising hereunder shall be determined in accordance with the law and practice of such Court.[68]

Addressing the threshold question of the appealability of the remand order, the court concluded that, notwithstanding the district court's statement in the order of remand that "[t]his is not an appealable order," the appeal was properly before it, citing its earlier *Regis* decision as controlling.[69] Turning its attention to the waiver issue, the Sixth Circuit observed that in this case the controlling statute on the question of waiver of the right to remove was 28 U.S.C. § 1441(d), giving foreign states or instrumentalities the absolute right to remove to federal court. It was uncontested that the petitioning defendant was a foreign sovereign as defined by the Foreign Sovereign Im-

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65. *Id.*

66. *Id.* The court noted at the end of its opinion that this matter was a tempest in a teapot because the same Michigan law would be applied to resolve the parties' dispute, regardless of whether the case was tried in state or federal court. But because some litigants perceive a "home court" advantage in litigating in state court, this is one reason why diversity jurisdiction exists. *Id.* at 196.

67. 900 F.2d 890 (6th Cir.), *cert. denied*, 111 S. Ct. 233 (1990).

68. *See In re* Delta America Re Insurers Ins. Co., 900 F.2d 890, 892 (6th Cir.), *cert. denied*, 111 S. Ct. 733 (1990).

69. 900 F.2d at 892.

munity Act, 28 U.S.C. § 1603.[70] Although the foreign sovereign could waive its right to remove, the Sixth Circuit could see little advantage to the foreign state in doing so.[71] The court adopted a bright line test for determining whether such a waiver has been made:

> In order to provide maximum guidance for future cases involving foreign states, we hold that any claimed waiver of the right of removal stemming from contractual language must be explicit. It is easy enough to provide that, if a state court is selected as a forum, no right of removal attaches. There is no reason why courts should have to wrestle with these interpretative questions when the contracting parties can easily deal with the problem themselves. A bright line test will serve the parties as well as judicial economy.[72]

The court borrowed a page from its *Regis* decision and arrived at a simple test to apply when questions of waiver of the right to remove are presented. The parties are free to draft contract language which will remove doubts and ambiguities on the waiver question. Although the court qualified this bright line test as being applicable in "future cases involving foreign states,"[73] juxtaposing this decision with the language in *Regis* that a waiver of the right to remove must be clear and unequivocal,[74] one can reasonably conclude that the same bright line test will apply regardless of the party's status as a foreign sovereign.

IV. Selection of the Appropriate State Statute of Limitations in Federal Civil Rights Action

Following disciplinary measures taken against her after she attempted to stop what she considered to be an illegal abortion, the plaintiff, a nurse, filed a civil rights action under 42 U.S.C. § 1983.[75] The action was filed nearly three years after the final disciplinary decision was made. Collard maintained that the

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70. *See id.* at 891.
71. *Id.* at 893.
72. *Id.* at 894 (footnotes omitted).
73. *Id.*
74. Regis Associates v. Rank Hotel (Mgt.) Ltd., 894 F.2d 193, 195 (6th Cir. 1990).
75. Collard v. Kentucky Bd. of Nursing, 896 F.2d 179 (6th Cir. 1990).

applicable statute of limitations was Kentucky's five-year statute of limitations for "an action for an injury to the rights of the plaintiff not arising on contract and not otherwise enumerated."[76] The Sixth Circuit disagreed, finding that Kentucky's one-year general statute of limitations for personal injury governed.[77] Accordingly, the court affirmed the district court's dismissal based on the running of the statute of limitations.

The Sixth Circuit began its analysis by noting that because Congress has never legislated a statute of limitations in section 1983 actions, the courts are required to look to analogous state statutes of limitation under the congressional direction of 42 U.S.C. § 1988.[78] Because of the considerable confusion generated by Congress's referral to state law, the Supreme Court attempted to achieve some predictability in this area in *Wilson v. Garcia*.[79] In that decision, the Supreme Court directed the lower federal courts to apply only one statute in each state and that, in looking for the one applicable statute, section 1983 claims are to be characterized as personal injury actions.[80]

Since states had different limitations periods for bringing personal injury actions, nationwide uniformity was not possible even after *Wilson*, but matters were even more unsettled because many states had more than one statute of limitations governing personal injury actions. As a consequence, the Supreme Court revisited this issue in *Owens v. Okure*.[81] There, the Supreme Court observed that although a given state may have many limitations periods for personal injury actions, every state has a general or residual limitations period for personal injury actions.[82] The Supreme Court held that where a state has multiple statutes of limitations for personal injury actions, it is the residual statute of limitations for personal injury actions that is to apply in section 1983 actions.[83]

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76. KY. REV. STAT. ANN. § 413.120(6) (Michie/Bobbs-Merrill supp. 1990). *See Collard*, 896 F.2d at 181.

77. KY. REV. STAT. ANN. § 413.140(1)(a) (Michie/Bobbs-Merrill supp. 1990). *See Collard*, 896 F.2d at 182.

78. *Id.* at 180.

79. 471 U.S. 261 (1985).

80. *Id.* at 280.

81. 488 U.S. 235 (1989).

82. *Id.* at 245.

83. *Id.* at 249-50.

The Sixth Circuit was able to quickly reach the conclusion that, because Kentucky did not have multiple statutes of limitations for personal injury actions, Kentucky's one-year general personal injury statute of limitations was the applicable limitations period.[84] In the interests of uniformity and simplicity, the Supreme Court settled on "personal injury" statutes, rather than "personal rights" statutes, as the benchmark.[85] Conceding that Collard would have had a good argument that the five-year limitations statute for injury to the rights of a person was applicable had the *Wilson* and *Owens* cases not been decided, the fact remained that those two cases led the Sixth Circuit inexorably to the conclusion that Collard's section 1983 action was time barred.

It seems regrettable that a party's ability to enforce a federal right will vary from state to state depending on the state's applicable statute of limitations. In the four states comprising the Sixth Circuit, for example, the limitations period for section 1983 actions is three years in Michigan, two years in Ohio, and one year in Kentucky and Tennessee.[86] The Sixth Circuit did not view this disparity as desirable, but recognized that "the answer to the problem lies with Congress adopting a statute of limitations for federal civil rights actions."[87] This very proposal came before the 101st Congress, which took a middle course. In December 1990, Congress enacted a general four-year statute of limitations for actions brought to enforce rights created by any federal statute enacted after December 1990. Although it was proposed to make the new limitations statute retroactive, concerns were voiced that settled expectations of parties to former litigation might be disturbed by such an enactment. Consequently, the new federal limitations period was made prospective only. Unfortunately, hopes for nationwide uniformity in section 1983 actions were dashed.

V. Judgment Notwithstanding the Verdict and New Trial

In *Portage II v. Bryant Petroleum Corp.*,[88] two limited partnerships created to invest in oil and gas wells brought an

84. 896 F.2d at 181-82.
85. *Id.* at 182.
86. *See id.* at 183 n.4.
87. *Id.*
88. 899 F.2d 1514 (6th Cir. 1990).

action against several defendants alleging negligence and securities fraud in connection with information furnished plaintiffs about drilling sites.[89] The only remaining defendant at the time of trial was Simm, a petroleum engineer who prepared reports and projections on the commercial amount of gas and oil recoverable at selected sites.[90] At the close of all proofs, the district court prepared interrogatories for the jury which asked its members to assess the relative percentage of negligence committed by plaintiffs and defendant Simm. Under the applicable Ohio law, comparative negligence had to be assessed between the parties.[91] Counsel were never informed of the court's decision to use interrogatories, nor were they furnished with a copy of them even after their use came to light.[92] With regard to the first three well sites, the jury found plaintiffs more than fifty percent negligent, precluding their recovery for negligent misrepresentation. However, with regard to the next four well sites, the jury found defendant Simm more than fifty percent negligent. The district court thought the jury might be confused, so he returned it to the jury room for further deliberations.[93] Once again, the jury answered the interrogatory by stating that Simm was more than fifty percent negligent (on the first verdict, Simm was found eighty-two percent negligent; after further deliberations, Simm was found to be sixty-four percent negligent).[94]

During the course of the trial, Simm never moved for directed verdict. After the verdict, he moved "to dismiss all claims asserted against him or, alternatively, to grant a new trial."[95] The district court entered judgment in favor of Simm, and in the alternative granted a new trial on the issue of negligent misrepresentation.[96]

On appeal, the Sixth Circuit reversed and directed the district court to reinstate the jury's second verdict.[97] Noting the dif-

89. *Id.* at 1517.
90. *Id.* 1516-17.
91. *Id.* at 1517.
92. *Id.* at 1518.
93. *Id.*
94. *Id.*
95. *Id.* at 1519.
96. *Id.*
97. *Id.* at 1526.

ferences among a general verdict, a general verdict with interrogatories, and a special verdict (all provided for in Rule 49), the court concluded that the district court had used a general verdict with interrogatories, but had done so in an improper manner.[98] First, the district court failed to apprise counsel of its intention to use interrogatories with the jury and to give its members an opportunity to comment on their form. That was error.[99] More importantly, the Sixth Circuit determined that regardless of whether the device used was a general verdict with interrogatories or a special verdict, the result should have been the same.[100] The district court impermissibly ignored the interrogatory answers, contrary to all the evidence presented at trial that Simm was liable for negligent misrepresentation regarding the profitability of certain wells.[101]

The Sixth Circuit concluded that the district court's grant of Simm's motion to dismiss was tantamount to granting Simm judgment notwithstanding the verdict.[102] It is black letter law that judgment notwithstanding the verdict cannot be granted unless the party has moved for directed verdict.[103] A party who has failed to move for directed verdict at the close of all the evidence can neither ask the district court to rule on the legal sufficiency of the evidence supporting the verdict for his opponent nor raise the question on appeal.[104] Because Simm made no motion for directed verdict, the court found as a matter of law that the evidence was sufficient to support the jury's verdict.[105]

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98. *Id.* at 1524.
99. *Id.* at 1521.
100. *Id.* at 1521-22.
101. *Id.* at 1522.
102. *Id.* at 1523.
103. FED. R. CIV. P. 50(b).
104. 899 F.2d at 1522. The reason for this rule is that a judgment notwithstanding the verdict was not known at common law. Concerns were thus raised that granting judgment notwithstanding the verdict would be in violation of the seventh amendment right to a jury trial. To resolve this dilemma, the Supreme Court in Galloway v. United States, 319 U.S. 372 (1942), concluded that a motion for judgment notwithstanding the verdict was nothing more than a delayed motion for directed verdict, a procedural control over the jury known at common law. In order to complete the legal fiction, however, a necessary precondition to filing one's "delayed" motion for directed verdict was to first file a motion for directed verdict before the case was submitted to the jury.
105. *Id.* at 1523.

Finally, turning to the district court's conditional grant of a new trial, the court reminded Simm that "courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions . . . ."[106] Because the case turned largely on credibility resolutions, the great province of the jury, the court concluded that the jury carried out its function by not finding Simm as credible as the district court deemed.[107] Moreover, the district court's failure to state a basis for conditionally granting the new trial provided an additional reason for refusing to grant one on remand.[108] Rule 50(c) specifically directs the district court to state the basis for conditionally granting or denying the motion for a new trial. Finally, considering that two verdicts had been rendered on the same facts in favor of the same party, it would be rare indeed to grant a new trial under such circumstances.[109]

The Sixth Circuit's decision in *Portage II* serves as a reminder that the failure to move for directed verdict is fatal to a post-verdict motion for judgment notwithstanding the verdict. *Portage II* is also a reminder that although such a failure will not be fatal to a post-verdict motion for a new trial, the district court is not free simply to substitute its view of the evidence for that of the jury, especially where the same jury has returned a verdict in favor of the same party twice.

VI. Notice of Appeal

In *Torres v. Oakland Scavenger Co.*,[110] the Supreme Court held that a notice of appeal using the phrase "et al." failed to designate an appealing party and, as a consequence, did not confer jurisdiction over the party whose name was not expressly included in the notice. The Supreme Court explained:

> The purpose of the specificity requirement of Rule 3(c) is to provide notice both to the opposition and to the court of the identity of the appellant or appellants. The use of the phrase "et al.," which

106. *Id.* (quoting Tennant v. Peoria & P.U. Ry. Co., 321 U.S. 29, 35 (1944)).
107. *Id.* at 1524.
108. *Id.*
109. *Id.* at 1524-25.
110. 487 U.S. 312 (1988).

> literally means "and others," utterly fails to provide such notice to either intended recipient. Permitting such vague designation would leave the appellee and the court unable to determine with certitude whether a losing party not named in the notice of appeal should be bound by an adverse judgment or held liable for costs or sanctions. The specificity requirement of Rule 3(c) is met only by some designation that gives fair notice of the specific individual or entity seeking to appeal.[111]

Although the failure to name the party was unquestionably the result of clerical error in *Torres*, this did not deter the Supreme Court from concluding that Rule 3(c) of the Federal Rules of Appellate Procedure was not satisfied. The Supreme Court thus considers certain rules "sufficiently critical in avoiding inconsistency, vagueness, and unnecessary multiplication of litigation to warrant strict obedience even though application of the rules may have harsh results in certain circumstances."[112] Rule 3(c) is such a rule.

In *Minority Employees of the Tennessee Department of Employment Security, Inc. v. Tennessee Department of Employment Security*,[113] the Sixth Circuit sat *en banc* to review three panel decisions involving the question of whether jurisdiction was lacking over the purported appeals of individual plaintiffs because the notice of appeal failed to name them.[114] All three panels dismissed the appeal of the unnamed plaintiffs.[115] Because of an apparent conflict between those panel decisions and the Sixth Circuit's 1989 decision in *Ford v. Nicks*,[116] the court voted to rehear the three panel decisions

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111. *Id.* at 318.

112. Minority Employees v. Tennessee Dep't. of Employment Sec., 901 F.2d 1327 (6th Cir.) (en banc), *cert. denied*, 111 S. Ct. 210 (1990).

113. 901 F.2d 1327 (6th Cir.) (en banc), *cert. denied*, 111 S. Ct. 210 (1990).

114. *Id.* at 1330.

115. *See id.*

116. 866 F.2d 865 (6th Cir. 1989). *Ford v. Nicks* was a well-intentioned, but arguably misguided, effort to soften the sharp edges of the *Torres* decision. In *Ford v. Nicks*, the court distinguished *Torres* and accepted a notice of appeal containing "et al." because in the body of the notice the appellants had used the definite article in "the defendants," thereby sufficiently designating the appealing parties. *Id.* at 869.

en banc. In light of the holding and spirit of *Torres*, the court affirmed the three panel decisions in all respects and overruled its *Ford v. Nicks* opinion.[117]

In affirming the dismissal of the individual plaintiffs' appeals because of their failure to comply with a concededly technical rule, the court acknowledged the harsh result of such a decision and, therefore, sought to state as clearly as possible what constitutes a notice that complies with the rule in order to avoid or minimize such harshness in future cases.[118] The Sixth Circuit offered the following guidance:

> Plainly, after *Torres*, the safest way of securing appeal is for the party or parties seeking to appeal to state in the *body* of the notice of appeal the name of each and every party taking the appeal. A certain element of risk must always attend anything less than literal compliance, particularly in light of the variety of outcomes in this circuit and among the circuits. The careful litigant is put on notice to take particular care to avoid a danger we cannot protect against.
>
> Subject to that admonition, it would appear to us that there may be some departures from naming in the body of the notice that will not be found to be fatal. In the instant appeal, for example, where the corporate plaintiff was stated in the *caption* we conclude that the party was properly before the court although the body only referred to "plaintiffs."[119]

Thus, as long as the appellant's name appears on the face of the notice of appeal, the designation may fall within the language of Rule 3(c) that "[a]n appeal shall not be dismissed for informality of form or title of the notice of appeal."[120]

In a footnote, the court added the following:

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117. 901 F.2d at 1330.

118. *Id.* at 1331.

119. *Id.* at 1335 (footnote omitted).

120. *Id.* In his dissenting opinion, Judge Nelson would have found the specification "plaintiffs in the above case" as the parties taking the appeal a sufficient designation under Rule 3(c). Minority Employees v. Tennessee Dep't. of Employment Sec., 901 F.2d 1327, 1348 (6th Cir.) (Nelson, J., dissenting), *cert. denied*, 111 S. Ct. 210 (1990).

Judge Martin also dissented, arguing, first, that the designation "appellants" in the notice of appeal satisfies Rule 3(c), and, second, that the rule announced in *Torres* should be applied prospectively only. Minority Employees v. Tennessee Dep't. of Employment Sec., 901 F.2d 1327, 1348-49, 1351 (6th Cir.) (Martin, J., dissenting), *cert. denied*, 111 S. Ct. 210 (1990).

> it is evident that the bench and bar continue to be plagued by confusion in the interpretation of the language of Fed. R. App. P. 3(c). Both the majority and the minority in this case believe that a revision in the rule might be beneficial, and we respectfully urge that consideration be given to a change.[121]

The Author seconds the court's motion.

121. 901 F.2d at 1335 n.4.