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THE REVIEW OF LITIGATION

2016 VOLUME 36 2017

Limiting the Last-in-Time Rule for Judgments

Kevin M. Clermont*

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INTRODUCTION

The problem of inconsistent judgments on the same claim or issue no longer exists—in theory—thanks mainly to the law of res judicata. True, Edward Coke long ago lamented the "contrarieties of

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Ziff Professor of Law, Cornell University. I would like to thank for fruitful exchanges Sam Baumgartner, Zachary Clopton, Stéphanie Francq, Bob Hillman, Rosalie Jukier, Jan Kleinheisterkamp, Jeff Rachlinski, Stewart Schwab, Harumi Takebe, Barry Vasios, and the participants in Cornell Law School's summer faculty workshop.

verdicts and judgments one against the other."[1] But if the problem did still exist, it would be serious. First, society now recognizes an efficiency interest in avoiding inconsistent adjudications. At best, inconsistency would erode faith in our system of justice and diminish acceptability of its output. At worst, inconsistency would put a party into an impossible situation of conflicting obligations. Second, any decrease in the certainty and stability of repose would create inefficiency. Society has an interest in increasing certainty for the purposes of primary conduct; once a court determines legal relations, we all need to be able to act in the world with assurance that those relations are indeed fixed to some known extent. Society also has an interest in increasing stability in the judicial system; we all benefit when courts treat prior decisions, from the same or other courts, with respect and comity. Third, fairness further argues for equal treatment in similar circumstances, and for furtherance of reliance interests by consistently adhering to prior adjudication.[2]

One of the obvious purposes of our res judicata law is to minimize the possibility of inconsistent judgments.[3] However, the doctrine cannot completely eliminate that possibility. On the one hand, res judicata must be raised in the subsequent action by the party who seeks to take advantage of it.[4] If that party fails to assert the preclusive effect of the former adjudication, a judgment may be rendered in the subsequent action that is inconsistent with the former judgment. On the other hand, inconsistent judgments can result even when the party entitled to rely upon the initial judgment does assert it, but the subsequent court erroneously or willfully refuses to give it preclusive effect, or correctly refuses under its own conflicts law. The subsequent court may assert that some requirement of res judicata is lacking or some exception applies, and the resulting relitigation may then produce a different outcome.

Picture a Mississippi plaintiff who loses a judgment to a New York defendant in New York (Forum #1 or F-1). The plaintiff needs a more favorable forum. For that purpose, she brings an action upon the same claim in Mississippi (F-2). Mississippi disdains New York values and so refuses to recognize, or give effect to, the New York judgment, holding it unworthy of full faith and credit. Proceeding to the merits, the Mississippi court gives judgment for the plaintiff. This

---

1. Ferrer v. Arden (1598) 77 Eng. Rep. 263, 266; 6 Co. Rep. 7a, 9a (CP).

2. *Cf.* John C. McCoid, II, *Inconsistent Judgments*, 48 WASH. & LEE L. REV. 487, 488–91 (1991) (suggesting some of the following costs are often overstated).

3. ROBERT C. CASAD & KEVIN M. CLERMONT, RES JUDICATA: A HANDBOOK ON ITS THEORY, DOCTRINE, AND PRACTICE 31, 33 (2001).

4. *Id.* at 237.

denial of full faith and credit is unconstitutional,[5] so the defendant appeals, unsuccessfully. Finally, the plaintiff decides to go back nearer the defendant's home in pursuit of assets for enforcement, suing upon her Mississippi judgment in New Jersey (F-3).

Thus we encounter "inconsistent judgments," defined in the sense of F-1 and F-2 judgments, between the same parties or their privies, that differently decide the same claim or issue and that would each independently be preclusive in a new action in F-3. To be preclusive, both prior courts had to render valid and final judgments that are recognizable by F-3, where "valid" roughly means no more than that the rendering court possessed jurisdiction and afforded notice.[6] Besides this specific hypothetical, many different circumstances can generate inconsistent judgments.

When inconsistent judgments do come about, how should the law handle them? Under the well-known rule followed in the United States, when there are two inconsistent judgments, it is generally the later judgment that is entitled to res judicata effects.[7] That is, if by failure to assert or apply res judicata two inconsistent judgments are rendered, then the one later rendered has the controlling preclusive effects.[8] This somewhat arbitrary practice is called the last-in-time rule. It forms part of our constitutional doctrine of full faith and credit.[9]

So our New York defendant will have to pay in New Jersey.[10] Full faith and credit means that F-3 must bow to an erroneous, even unconstitutionally erroneous, judgment by F-2, and thus give no faith

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5. *See* Fauntleroy v. Lum, 210 U.S. 230 (1908) (holding that Mississippi cannot reject a sister-state judgment on the basis of local policy).

6. *See infra* note 120.

7. *See* Parsons Steel, Inc. v. First Ala. Bank, 474 U.S. 518 (1986) (giving strong support for the last-in-time rule in the federal-state-federal setting).

8. On the meaning of 'rendered, see RESTATEMENT (SECOND) OF JUDGMENTS § 14 (AM. LAW INST. 1982) ("For purposes of res judicata, the effective date of a final judgment is the date of its rendition, without regard to the date of commencement of the action in which it is rendered or the action in which it is to be given effect. ').

9. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 114 cmt. b (AM. LAW INST. 1971) ("The rule is based upon principles of res judicata and of full faith and credit. ').

10. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 15 cmt. c, illus. 1 (AM. LAW INST. 1982) ("A sues B on a promissory note. B denies that he executed the note. There is a trial resulting in a verdict for B, and judgment is rendered in B's favor. A brings a second action against B on the note, and B defaults, and judgment is given for A for the amount of the note and interest thereon. Thereafter A brings an action against B on the second judgment. The judgment for B in the first action is no defense. ').

and credit at all to F-1's judgment. Shocking? Now imagine that F-2 is a foreign nation:

> Suppose, for instance, the first judgment is an American judgment. If the second action takes place in Graustark, in the Graustark action one of the parties relies on the American judgment, the Graustark court says, "We will not give any credit to the judgment of an imperialist court," and so the Graustark court just rides over the American judgment.
>
> In that case it seems rather doubtful to me whether in the third action, which takes place in this country again, the court should prefer the Graustark judgment to the American judgment.[11]

Whatever the rationales for applying the last-in-time rule domestically, should an American F-3 ever prefer a foreign F-2 judgment to an American F-1 judgment?

Part I of this Article will lay out the range of application of the last-in-time rule under current law. Part II will question the basis for that rule. Part III will argue for proper limitations on the reach of the rule. The journey is worthwhile because considering how this rather technical problem has been and should be resolved reveals depths of not only res judicata and conflicts theory, but also of the legal process entailed in effectuating that theory.

I. PROBLEMS OF INCONSISTENT JUDGMENTS

These problems of inconsistency arise in a variety of circumstances. These problems also involve the whole range of res judicata, and the last-in-time rule applies throughout.

Repetitive litigation of a claim can occur when the plaintiff sues again to obtain a better outcome. More commonly, the plaintiff may sue again to seek enforcement elsewhere. Alternatively, the defendant may put the claim back in court by pursuing declaratory or

---

11. 41 A.L.I. PROC. 277 (1964) (Prof. Rudolf B. Schlesinger). This passage comes from the transcript of the American Law Institute's debates on what would become RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 114 (AM. LAW INST. 1971). Graustark is a fictional country near Romania that was the setting for several novels by George Barr McCutcheon, including BEVERLY OF GRAUSTARK (1904).

injunctive relief from the judgment or its enforcement.[12] Repetitive litigation of an issue can occur when the same issue arises in subsequent litigation, often in the course of a different claim. The issue could constitute part of the merits, or it could be a threshold issue such as jurisdiction.

The parties' incentives that result in inconsistency can cover a broad range. They may fail to raise res judicata as a result of default, out of ignorance, or by way of litigation strategy where one or both parties seek a fresh adjudication. Knowing that some law of res judicata will be in play also can shape strategy, especially through forum-shopping.

Sometimes the genesis of the problem is that something has gone wrong in the application of res judicata, joinder, lis pendens, forum non conveniens, or antisuit injunctions. But often, especially in international litigation, the genesis lies in the absence of control by a higher law or by a higher court of F-2's disrespect for F-1's judgment.

It is therefore important to get a handle on what exactly the last-in-time rule prescribes in all these circumstances. I shall lay out the prescriptions by surveying the rule's application across the three subdoctrines of res judicata.

A. Claim Preclusion

For a claim preclusion example, imagine a plaintiff who won a judgment but remains dissatisfied with the amount of damages awarded. Instead of seeking enforcement of the judgment, she may sue again on the original claim. The defendant relishes another try, especially because he risks less in the second suit (greater damages) than does the plaintiff (total loss). Although the claim merged in the prior judgment for the claimant,[13] neither party asserts res judicata, and so the court holds another trial on the merits of the original claim. The judgment reached in this second action might be for the defendant. Hence, inconsistent judgments can come into existence.

First, if the same claim is presented in a third action, the question will arise as to which, if either, of the now two inconsistent judgments is to be given preclusive effect in the third action. That is, if the originally successful plaintiff were now to bring a third action,

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12. GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 567, 1144–45 (5th ed. 2011).

13. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 17(1) (AM. LAW INST. 1982) ("[T]he claim is extinguished and merged in the judgment and a new claim may arise on the judgment ").

which might be either an action on the original claim or an action upon the first judgment, could the defendant invoke the second judgment as a defense? Yes, the second judgment is entitled to res judicata effect under the last-in-time rule.[14]

Second, if the defendant had raised the defense of res judicata in the plaintiff's second action, but the court had refused to consider or uphold it, the result would be the same as if the defense had not been raised, unless the second judgment is appealed and reversed.[15]

Third, if, instead of the defendant's winning the second action in the example, the plaintiff had won a judgment for a greater amount than had been awarded in the first action, maybe even by default, the second judgment would still be the one entitled to res judicata effect.[16]

B. Issue Preclusion

Now, for an issue preclusion example, in F-1 a fact issue may go in favor of *A* over *B*, the issue having been actually litigated and determined and been essential to the judgment. If the same issue arises in a second action in F-2 between the same parties but on a different claim, and *A* fails to raise collateral estoppel or F-2 refuses to consider or uphold it, another trial on the merits might produce an essential determination on the issue in favor of *B*. For a more concrete example, imagine a litigated determination of the value of some land for tax purposes. Both parties think that they could do better. So they both would decline to raise collateral estoppel in litigation of the different claim for a subsequent tax year's liability. Another trial on the merits might yield a different valuation.[17] Hence, again, inconsistent judgments can come into existence.

First, if the common issue appears in a third action in F-3 between the same parties on yet another claim, and *B* raises collateral

14. RESTATEMENT OF JUDGMENTS § 42 cmt. b (AM. LAW INST. 1942).

15. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 15 cmt. b (AM. LAW INST. 1982) ("[T]he later of the two inconsistent judgments is ordinarily held conclusive in a third action even when the earlier judgment was relied on in the second action and the court erroneously held that it was not conclusive.").

16. *See* RESTATEMENT OF JUDGMENTS § 42 cmt. b, illus. 3 (AM. LAW INST. 1942) (giving as an example a $1000 judgment in F-1 and a $600 judgment in F-2, where the second judgment is protected by the last-in-time-rule).

17. *See* Donald v. J.J. White Lumber Co. 68 F.2d 441, 442 (5th Cir. 1934) (applying the last-in-time rule).

estoppel, what happens in the face of the two inconsistent judgments? F-3 must accept the determination of F-2.[18]

Second, if F-3 and F-1 were in fact the same court, the result would still be that the determination of F-2 prevails. So even though F-1 acted first, and even though the proceeding in F-2 should have been precluded, the court in F-1 must ignore its own previous determination of the issue. Indeed, the result is the same if F-2 is the same court as F-1 or F-3 or both.[19] Although the first judgment normally would not be undone or otherwise overturned, it would stand shorn henceforth of any continuing relief including preclusive effects.[20]

Third, if the third proceeding were not a third action but merely an appeal in F-1 from the first judgment, perhaps even then the determination of F-2 should govern the disposition of the appeal, subordinating the earlier trial court determination in F-1 to the later determination of F-2.[21] Yet the appellate court in F-1 would naturally tend to resist this astounding application of the last-in-time rule. Indeed, the better approach is for the F-1 appellate court to review the lower-court decision in the ordinary way, treating res judicata as any other claim or defense that ordinarily had to have been presented below and thus not bowing to F-2.[22] But in the future, F-2's judgment would be the one with preclusive effects.

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18. *See* RESTATEMENT OF JUDGMENTS § 42 cmt. c, illus. 5–6 (AM. LAW INST. 1942) (giving specific examples in which the judgment of F-2 controls); RESTATEMENT (SECOND) OF JUDGMENTS § 15 cmt. c, illus. 3 (AM. LAW INST. 1982) (same).

19. *See* RESTATEMENT OF JUDGMENTS § 42 cmt. e (AM. LAW INST. 1942) (stating that the rule is applicable whether the actions are brought in the same or different states); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 114 cmt. a (AM. LAW INST. 1971) ("The rule is applicable irrespective of whether the later inconsistent judgment is rendered in the same State as the original judgment or in a different State.").

20. *See* 2 A.C. FREEMAN, A TREATISE OF THE LAW OF JUDGMENTS § 629, at 1327 (Edward W. Tuttle ed. 5th ed. 1925) (1873) (noting that the intervening results of the first judgment should remain in place, to the extent feasible); 18 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4404, at 80–81 (2d ed. 2002) (indicating that the first judgment stands, subject to relief from judgment or restitution).

21. *See* 18 WRIGHT ET AL. *supra* note 20, § 4404, at 77–78 (noting this situation presents a special problem); 18A *id.* § 4433, at 95–96 ("As in other settings, it seems better to accept the second trial-court judgment as binding for purposes of the last-in-time rule.").

22. *See, e.g.* Sosa v. DIRECTV, Inc. 437 F.3d 923, 927–28 & n.3 (9th Cir. 2006) (considering also what would happen if F-1 were to reverse); Canedy v. Boardman, 16 F.3d 183, 185 (7th Cir. 1994) ("But because the judgment in this case was first, there is no res judicata issue here."); Am. Postal Workers Union

C. *Jurisdiction to Determine Jurisdiction*

Finally, for an example that involves the subdoctrine of jurisdiction to determine jurisdiction,[23] *P* of F-1 might sue *D* of F-2 in F-1, which upon challenge finds that personal jurisdiction exists over *D*. F-1 gives judgment for *P* Then *P* brings an action upon the judgment in F-2, where *D*'s assets are. But on collateral attack, *D* asserts that the prior judgment is invalid. F-2 finds that F-1 lacked personal jurisdiction, even though the doctrine of jurisdiction to determine jurisdiction should have foreclosed that issue. F-2 gives judgment for *D*. Finally, *P* sues upon the first judgment in F-3. Upon a new collateral attack, the court in F-3 faces inconsistent judgments.

First, on the issue of personal jurisdiction, F-3 must accept the determination of F-2 as the last-in-time.[24]

Second, even if in the third action *P* had gone back to F-1 in order to utilize the first judgment, F-1 would be obliged to respect F-2's judgment over its own judgment.[25] However, *P* could now sue on his original claim, the statute of limitations permitting.[26]

Third, if F-1's judgment went instead by default, then F-2's decision on personal jurisdiction would not be an inconsistent finding, even if the cases' outcomes were inconsistent. F-2's finding on jurisdiction would be preclusive. It is in fact the only decision on F-1's personal jurisdiction, which decision is binding under the ordinary rules of issue preclusion.[27] Of course, if F-2 had rejected the collateral attack, that decision would have issue-preclusive effect.[28]

Columbus Area Local v. U.S. Postal Serv. 736 F.2d 317, 319 (6th Cir. 1984) (holding that dismissal of an action in F-2 did not mandate dismissal in F-1); *cf.* Transaero, Inc. v. La Fuerza Aerea Boliviana, 162 F.3d 724, 731 (2d Cir. 1998) (holding that F-1 on remand must apply F-2's judgment), *cert. denied*, 526 U.S. 1146 (1999); 18 WRIGHT ET AL. *supra* note 20, § 4404, at 78–80 (treating situation where F-2 has entered a preclusive judgment after the F-1 trial court has made various nonfinal rulings and before any appeal has been taken).

23. *See generally* KEVIN M. CLERMONT, PRINCIPLES OF CIVIL PROCEDURE 357–63, 377–78 (4th ed. 2015).

24. *See* RESTATEMENT OF JUDGMENTS § 42 cmt. b, illus. 4 (AM. LAW INST. 1942) (giving an example in which F-2's determination that F-1 lacked personal jurisdiction controls).

25. *See* Transaero, Inc. v. La Fuerza Aerea Boliviana, 162 F.3d 724, 731 (2d Cir. 1998) (holding that F-1 must apply F-2's judgment), *cert. denied*, 526 U.S. 1146 (1999).

26. *See* McDonald v. Mabee, 243 U.S. 90, 93 (1917) (implicitly allowing plaintiff to sue again on the claim); BORN & RUTLEDGE, *supra* note 12, at 1093.

27. *See* Transaero, Inc. v. La Fuerza Aerea Boliviana, 162 F.3d 724, 731 (2d Cir. 1998) (holding that F-1 must apply F-2's finding of F-1's lack of jurisdiction and so withdraw F-1's default judgment), *cert. denied*, 526 U.S. 1146 (1999);

II. DISSECTING THE LAW'S RESOLUTION

A. Rationales of the Rule

Think again of that last hypothetical: default judgment in F-1 and successful collateral attack in F-2. Such a situation, where there are technically no inconsistent findings but the judgments are fundamentally at odds, is quite common and is commonly treated as a variation of the problem of inconsistent judgments. It can arise not only when F-2 passes on F-1's invalidity but also where F-2 accepts another ground for F-1's nonrecognizability. F-2's decision on F-1's binding effect is controlling.

Picture a New York plaintiff who wins a judgment by jury verdict in New York. The defendant's assets in New York are few, so the plaintiff needs to enforce the judgment elsewhere. For that purpose, she brings an action upon the judgment in Mississippi. But the Mississippi judge unconstitutionally refuses to recognize the New York judgment, thus giving judgment for the defendant under the influence of local policy. The plaintiff appeals, unsuccessfully. She finally decides to go closer to home for enforcement, suing upon the first judgment in New Jersey. However, the plaintiff will fail in New Jersey.[29] As suggested above, the best explanation for the result in this particular situation rests not so much on any rule for inconsistent determinations, but rather on the rule that F-2's decision on the

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RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 114 cmt. b, illus. 2 (AM. LAW INST. 1971) (saying that F-2's finding is preclusive in F-3). The result rests on issue preclusion, not on claim preclusion, which should not apply to the special cause of action upon a judgment. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 110 cmt. a (AM. LAW INST. 1971) (treating such action's dismissal based on nonrecognition as being not on the merits); *cf.* RICHARD H. FIELD, BENJAMIN KAPLAN & KEVIN M. CLERMONT, MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE 766 (12th ed. 2017) (saying merger does not apply to a judgment upon a judgment).

For the similar treatment of the analogous problems involving arbitration awards, see 3 GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION §26.05[C][8], at 3636–38, § 27.02[D], at 3790–91 (2d ed. 2014). Because of the specialized complications of the interplay of res judicata with arbitration practices, this Article limits its focus to sequences of only court judgments.

28. *See* Arecibo Radio Corp. v. Puerto Rico, 825 F.2d 589, 592–93 (1st Cir. 1987) (holding that F-2's decision rejecting collateral attack has normal issue-preclusive effect).

29. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 482(2)(e) reporters' note 4 (AM. LAW INST. 1987) (stating that a state's decision not to recognize a foreign judgment is entitled to full faith and credit in other states); RESTATEMENT (SECOND) OF JUDGMENTS § 15 cmt. c, illus. 2 (AM. LAW INST. 1982) (noting that the judgment in F-2 is a defense in F-3).

recognizability of F-1's judgment in any other state is binding in F-3 under the ordinary rules of issue preclusion.

The value of this illustration is to reveal that the problem of inconsistent judgments often involves two decisions in F-2: an implicit or express decision on whether to respect F-1's judgment and then a treatment of the merits that differs from F-1's treatment. For those two decisions, different rationales arise to justify F-3's bowing to F-2's judgment as last-in-time.

1. Waiver/Preclusion on Issue of Full Faith and Credit

The party entitled to the benefit of res judicata in the second action was in a position to try to avoid the possibility of inconsistent judgments. On the one hand, if the benefitee failed to avail himself of the opportunity to invoke res judicata, and so allowed the matter to be relitigated, he should not be entitled to complain when the second determination is treated as conclusive in a third action. On the other hand, if the benefitee did assert his right to preclude, but the second court denied it, he should have sought correction of any error by appeal from the second court, as with any other error by a trial court.

The American Law Institute's most recent restatement of the rationale for the last-in-time rule buys into this line of waiver thinking. It reads thus:

> The considerations of policy which support the doctrine of res judicata are not so strong as to require that the court apply them of its own motion when the party himself has failed to claim such benefits as may flow from them. Accordingly, when a prior judgment is not relied upon in a pending action in which it would have had conclusive effect as res judicata, the judgment in that action is valid even though it is inconsistent with the prior judgment. It follows that it is this later judgment, rather than the earlier, that may be successfully urged as res judicata in a third action, assuming that other prerequisites are satisfied. Indeed, the later of the two inconsistent judgments is ordinarily held conclusive in a third action even when the earlier judgment was relied on in the second

> action and the court erroneously held that it was not conclusive.[30]

Nonetheless, the ALI has thereby formulated a mighty peculiar rationale. We are to apply the later judgment because the party who could have benefited from it waived its benefits by failing to urge the F-1 judgment on the F-2 court. However, the ALI's formulation goes on to provide the same result even though that party forwarded the F-1 judgment in the loudest terms possible. It seems that the waiver idea might sometimes give an added motivation to apply the last-in-time rule. But it seems not to qualify as a rationale, because the last-in-time rule applies even when the waiver notion is inapt.

Therefore, as the ALI shifts to the situation of the fighting benefitee, its rationale cannot be waiver. The ALI instead embraces the rationale of res judicata.[31] We should honor F-2's decision

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30. RESTATEMENT (SECOND) OF JUDGMENTS § 15 cmt. b (AM. LAW INST. 1982).

31. Similarly, some authorities forward the rationale that F-2 has implicitly vacated the F-1 judgment. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 114 (AM. LAW INST. 1971) (applying last-in-time 'if the earlier judgment is superseded by the later judgment"); 41 A.L.I. PROC. 278–79 (1964) (Prof. Michael Cardozo IV) (debating what would become the Second Restatement's § 114); 1 FREEMAN, *supra* note 20, § 102, at 181 (maintaining that in some states the later judgment governs, 'the presumption being that the first one has been vacated"). The RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 114 cmt. b (AM. LAW INST. 1971) combines the ideas of waiver and vacatur in its rationale:

> The rule of this Section is based upon principles of res judicata and of full faith and credit. It is appropriate that the losing party should be precluded from attacking the later inconsistent judgment if he has not sought review of this judgment both by the appellate courts of the State of rendition and by the Supreme Court of the United States or if the judgment has been affirmed by these courts. So, if under these circumstances the same issue has been differently decided in different actions between the parties, the determination that is later in time should control if it would have this effect under the local law of the State of rendition. Similarly, if the court in the second action gives consideration to the earlier judgment and decides, for some reason or other, that this judgment does not bar the action, the second judgment should control if it would have this effect under the local law of the State of rendition. To be sure, the later judgment may be erroneous and the first judgment correct. But the parties had the opportunity to litigate the point at issue before the second court to appeal from its judgment and ultimately to seek review by the Supreme Court. The parties should be bound by the later judgment so long as it remains unreversed and

because it is a "thing adjudged." A decision on res judicata is itself entitled to preclusive effect.[32] Indeed, given the complexity of res judicata decisions under American law, with its carefully delineated rules and narrowly crafted exceptions, there is especially good reason to adopt F-2's decision. The point of res judicata is to avoid having to reconsider the prior adjudication. So F-2's decision on res judicata should control even when it was clearly oblivious or wrong on full faith and credit.

Actually, there will be no inconsistent decisions on res judicata. F-1 could not decide the res judicata effects of its own judgment, as only a later case can decide res judicata.[33] Thus, the only decision on res judicata is F-2's. Because it is the only decision on point, this last-in-time judgment will govern. True, the result on a collateral attack for lack of jurisdiction might involve inconsistent jurisdictional decisions from F-1 and F-2, but the real issue for F-3 is the res judicata effect of F-1's conclusion on jurisdiction under the subdoctrine of jurisdiction to determine jurisdiction, and on that issue F-2 has given the only decision.

Rethink the situation in which F-2 decided that res judicata by F-1's judgment did not apply, because of some recognizability, validity, finality, or bindingness defect. F-2 had a reason to do so, and F2 often will have been right. The very idea of res judicata, even as to an earlier decision about res judicata, is that F-3 should not get involved in deciding whether F-2 was right or wrong. Moreover, F-3 simply has no authority to say that F-2 was wrong in deciding that res judicata did not apply. Only a higher court with jurisdiction over F-2 had the authority to review it.

Perhaps, then, waiver and preclusion can work in tandem as a rationale for the last-in-time rule, each rationale applying separately to different situations.[34] First, if the benefitee of the first judgment

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> provided that the judgment would have this effect under the local law of the State of its rendition. If the State where the later inconsistent judgment is rendered applies the ordinary rules of res judicata, this State will hold that the later judgment supersedes the earlier judgment to the extent that the judgments are inconsistent.

32. 18 WRIGHT ET AL. *supra* note 20, § 4404, at 65 & n.29.

33. *See* FIELD ET AL. *supra* note 27, at 293, 767–68 (explaining that only in a second action can res judicata be raised and decided).

34. Such a tandem motivation is known to the law: (a) if the defendant fails to raise personal jurisdiction correctly, the jurisdictional point is waived; but (b) if the defendant raises personal jurisdiction unsuccessfully, the point is precluded by the res judicata subdoctrine of jurisdiction to determine jurisdiction. CLERMONT, *supra* note 23, at 359–60, 363.

fails to invoke it in F-2, then waiver makes the second judgment binding. Second, if the benefitee does assert it, but the F-2 court rejects its bindingness, then F-2's decision on res judicata is binding and, consequently, so should its merits decisions be binding. Together, waiver and preclusion really drive the U.S. acceptance of last-in-time.

2. Simplicity of Looking to F-2 on Issue of Respect for F-1

Other arguments for the last-in-time rule, although hardly overwhelming and far less important than waiver/preclusion, do exist. The initial supporting argument is that looking at the later judgment involves less judicial effort.[35]

If F-3 were to take it upon itself to verify whether F-1's judgment should have been preclusive in F-2, it would have to reexamine that judgment's recognizability, validity, finality, and bindingness, which F-2's judgment may have already indicated are questionable, and probably also examine whether the winner in F-1 had waived the victory by not pushing it sufficiently in F-2. Alternatively, if F-3 were just to switch to a first-in-time rule, it would still have to reexamine the recognizability, validity, finality, and bindingness of F-1's judgment. By virtue of waiver/preclusion, F-3 can duck these questions and just look to F-2's judgment.

Admittedly, F-2's recognizability, validity, finality, or bindingness might be challengeable too. But in the situation of inconsistent judgments, the status of F-1's judgment is necessarily questionable. The status of F-2's judgment might be straightforward. Thus, it should on average slightly reduce the litigatory load to look to the often less challengeable judgment of F-2 rather than look to F-1's questionable judgment.[36]

3. Reliability of F-2 on the Merits

Another line of argument is that the later judgment is perhaps more apt to be well-contested, well-informed, and correct on the

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35. *See* William L. Reynolds, *The Iron Law of Full Faith and Credit*, 53 MD. L. REV. 412, 416 (1994) (noting that the F-3 court is spared the task of comparing the judgments of F-1 and F-2 and deciding which is correct).

36. *See also infra* note 214 and accompanying text (suggesting another way that first-in-time is actually the more complicated rule).

merits, as it usually resulted from relitigation and redetermination.[37] Additionally, if we abandon formalism for realism, F-2 may very well have manipulated its full faith and credit decision because it felt that F-1 was wrong on the merits. Although res judicata does not customarily look to whether the prior judgment was correct, the lawmaker when formulating a rule of res judicata need not ignore which decisions will on average tend to have been correct.[38]

Counterarguments to this reliability rationale do exist. First, in the most troubling cases, F-3 will have good reason to think that F-2 was wrong, especially on the res judicata effect of F-1's judgment. Any comfort drawn from the supposed wisdom of F-2's judgment is then likely scant. Second, the rest of the world, as we shall see,[39] follows the rule that the first-in-time judgment prevails. Therefore, it is at best a weak reason to favor the last-in-time judgment that it is slightly more reliable.

Other arguments, along the lines that F-2 somehow gave the more legitimate prior decision, vaporize on closer inspection. One such argument stresses that America's early last-in-time precedents arose in a federal nation nurturing full faith and credit, which aimed at converting the American sovereigns from a grouping of "independent foreign sovereignties" into "integral parts of a single nation."[40] The argument runs that this full faith and credit principle naturally implies looking at the nation's latest word without inquiring into whether it was erroneous. However, one could almost as easily argue that full faith and credit implies looking at the first word, given its having subsequently been disrespected. Moreover, elsewhere in the world, federalism has not led to a last-in-time rule.[41]

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37. *See* 18 WRIGHT ET AL. *supra* note 20, § 4423, at 619. One might think that the better-known last-in-time rule for treaties lends some tangential support. It extends the principle of *leges posteriors priores contrarias abrogant* (later laws abrogate prior contrary laws). But the principle rests on textual, structural, historical, and functional grounds different from the grounds for full faith and credit. *See generally* Julian G. Ku, *Treaties as Laws: A Defense of the Last-in-Time Rule for Treaties and Federal Statutes*, 80 IND. L.J. 319 (2005).

38. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 29 cmt. f (AM. LAW INST. 1982) ("Giving a prior determination of an issue conclusive effect in subsequent litigation is justified not merely as avoiding further costs of litigation but also by underlying confidence that the result reached is substantially correct. ').

39. *See infra* Part II-C.

40. V.L. v E.L. 136 S. Ct. 1017. 1020 (2016) (quoting Milwaukee Cty. v. M.E. White Co. 296 U.S. 268, 277 (1935)).

41. *See infra* text accompanying notes 137 (Canada) & 148 (Germany).

4. Finality on the Merits

One last rationale is quite different from waiver/preclusion, simplicity, and reliability. In order to avoid relitigation, one of the inconsistent judgments, be it the first-in-time or the last-in-time, must prevail. In other words, the goal of finality calls for having *some* rule in place, even an arbitrary one.

However, this finality argument is not too strong. Supporters of the rule may raise the specter of theoretically endless relitigation, but in fact that risk does not exist. The approach could be that neither F-1's nor F-2's judgment is binding and that F-3's fresh decision will act as the henceforth-preclusive tiebreaker. Alternatively, the system could provide, with nonfatal consequences to itself, that inconsistent results mean no preclusion ever on the point. Yet current law usually eschews both of these approaches,[42] except that inconsistent findings may prevent any future invocation of nonmutual collateral estoppel.[43]

In sum, the last-in-time rule exists because we would like one of the inconsistent judgments to be final, and it might as well be the later judgment both on the logic of waiver/preclusion and also in the interests of simplicity and reliability.[44] The rule is close to being an

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42. *But see* Shaw v. Broadbent, 29 N.E. 238, 241 (N.Y 1891) (holding that 'one estoppel neutralizes the other, and the question is left to be tried over"); *cf.* Bata v. Bata, 163 A.2d 493, 506 (Del. 1960) (dictum) ("It has been suggested that in the face of two conflicting foreign determinations, involving a common question but different causes of action, the court of the forum should disregard both and should proceed at once to the merits.'). No case has ever followed the *Shaw* holding, and several have expressly rejected it. *E.g.* Bd. of Dirs. of Chi. Theological Seminary v. People *ex rel.* Raymond, 59 N.E. 977. 980 (Ill. 1901).

43. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 29(4) cmt. f (AM. LAW INST. 1982) (listing as a discretionary factor against nonmutual preclusion that the 'determination relied on as preclusive is itself inconsistent with some other adjudication of the same issue"). Nonmutual collateral estoppel differs from the problem of inconsistent judgments in that only one of the prior judgments is potentially preclusive in F-3. The inconsistency of determinations is then just an argument, applicable only in the context of nonmutuality, against giving that judgment its normal preclusive effect.

For another example of nonpreclusion as the solution, the Second Restatement provides that where a judgment rests on alternative findings, neither is binding. *Id.* § 27 cmts. i, o; *see* FIELD ET AL. *supra* note 27. at 822–24 (criticizing the Second Restatement's approach).

44. For such a listing of reasons, see Robi v. Five Platters, Inc. 838 F.2d 318, 322–23 (9th Cir. 1988) (other citations omitted):

> When two inconsistent judgments exist, it is tempting for a court to reexamine the merits of the litigants' dispute and choose the result it likes best. There are important reasons to avoid this

arbitrary rule for the sake of having a rule, but it is not a particularly bad rule.

B. Development of the Rule

1. Emergence

The last-in-time rule merely happened. For the kinds of cases American courts were encountering, the foregoing rationales made last-in-time seem the natural solution. The rule's development adds to the sense of its arbitrariness.

Early on, the problem arose rarely, in state[45] and federal[46] cases. In the primitive problem's sequence of three actions, all three

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> temptation. First, if one party could have raised *res judicata*, but did not, that litigant must bear the cost of its tactic or inadvertence. Second, the most recent court to decide the matter may have considered and rejected the operation of the prior judgment as *res judicata*, and *its* decision should be treated as *res judicata* on the preclusive effect of the prior judgment. Finally, the last in time rule is supported by the rationale that it 'end[s] the chain of relitigation by stopping it where it [stands]' after entry of the [most recent] court's judgment, and thereby discourages relitigation in [yet another] court. *Id.* (quoting *Porter v. Wilson*, 419 F.2d 254, 259 (9th Cir.1969), *cert. denied*, 397 U.S. 1020, 90 S. Ct. 1260, 25 L. Ed.2d 531 (1970)). Therefore, even when we think that the most recent judgment might be wrong, we still give it *res judicata* effect, so that finality is achieved and the parties are encouraged to appeal an inconsistent judgment directly rather than attack it collaterally before another court.

45. *See, e.g. In re* McNeil's Estate, 100 P. 1086, 1090 (Cal. 1909) (involving a sequence of Pennsylvania, California, and California actions, where the winner in F-1 failed to raise the F-1 judgment in F-2); Tyrrell v. Baldwin, 6 P. 867, 869 (Cal. 1885) ("These judgments were rendered in actions between the same parties, in respect to the same subject-matter, and the rule in such cases is that the last judgment concludes."); Bank of Montreal v. Griffin's Estate, 190 Ill. App. 221, 226 (1914) (involving a sequence of three Illinois actions, where the winner in F-1 failed to raise the F-1 judgment in F-2: '[T]he judgment last in point of time is the judgment to which effect must be given '); Cooley v. Brayton, 16 Iowa 10, 19 (1864) (involving a sequence of three Iowa actions, where the winner in F-1 failed to raise the F-1 judgment in F-2: 'He failed to do so, and he is, beyond all question, bound and concluded by the latter decree '); Bateman v. Grand Rapids & I.R. Co. 56 N.W. 28, 29 (Mich. 1893) (involving a sequence of three Michigan actions, where the winner in F-1 failed to raise the F-1 judgment in F-2: 'Plaintiff had an opportunity, in the replevin case, to plead the former judgment, but neglected to do so, and must be held to have waived the estoppel.'); Marsh v. Mandeville, 28 Miss. 122, 128 (1854) (involving a sequence of federal,

would likely come in the same jurisdiction,[47] although occasionally the actions would be interjurisdictional but still all American.[48] Mostly the cases involved the situation in which the benefitee of the F-1 judgment failed to raise it in F-2, so that the waiver notion by itself made the last-in-time judgment the natural choice.[49] Eventually, as res judicata doctrine expanded in scope and the case law accumulated, some of the cases involved the court in F-2 actually rejecting F-1's judgment.[50] Still, the policy choice underlying the rule received little discussion in the courts.

A few of these cases emerged from the mists of history to obtain some prominence as standard cites.[51] Even cases not really involving inconsistent judgments came to recite the last-in-time rule as established law.[52] Last-in-time thereby became the accepted

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Mississippi, and Mississippi actions, where the winner in F-1 failed to raise the F-1 judgment in F-2).

46. *See, e.g.* Donald v. J.J. White Lumber Co. 68 F.2d 441, 442 (5th Cir. 1934) (involving a sequence of three federal actions, where the winner in F-1 failed to raise the F-1 judgment in F-2: 'But the government, for reasons of its own, chose not to rely on it in that suit, and in our opinion thereby waived it, and cannot assert it in this case. Where there are two conflicting judgments, the last in point of time is the one which controls. ').

47. *See, e.g.* Bank of Montreal v. Griffin's Estate, 190 Ill. App. 221 (1914) (involving cases all from the same state); Cooley v. Brayton, 16 Iowa 10 (1864) (same); Bateman v. Grand Rapids & I.R. Co. 56 N.W. 28 (Mich. 1893) (same).

48. *See, e.g. In re* McNeil's Estate, 100 P. 1086, 1090 (Cal. 1909) (involving a sequence of Pennsylvania, California, and California actions); Marsh v. Mandeville, 28 Miss. 122, 128 (1854) (involving a sequence of federal, Mississippi, and Mississippi actions).

49. *E.g.* Donald v. J.J. White Lumber Co. 68 F.2d 441 (5th Cir. 1934); *In re* McNeil's Estate, 100 P. 1086, 1090 (Cal. 1909); Bank of Montreal v. Griffin's Estate, 190 Ill. App. 221 (1914); Cooley v. Brayton, 16 Iowa 10 (1864); Bateman v. Grand Rapids & I.R. Co. 56 N.W. 28 (Mich. 1893); Marsh v. Mandeville, 28 Miss. 122, 128 (1854).

50. *See, e.g.* Southard v. Southard, 305 F.2d 730, 732 (2d Cir. 1962) ("The substantive defense that the Connecticut divorce was barred by the requirement that that state give full faith and credit to the Nevada decree was one that could have been and indeed apparently was raised in the Connecticut court. Whether that court actually passed upon the defense or not, principles of *res judicata* forbid us to consider it. The appellant's opportunity to attack the Connecticut decree on the merits died with his failure to appeal ").

51. *E.g.* Tyrrell v. Baldwin, 6 P. 867, 869 (Cal. 1885); Cooley v. Brayton, 16 Iowa 10 (1864).

52. *See, e.g.* Galvin v. Palmer, 66 P. 572, 573 (Cal. 1901) ("If two judgments have been entered in a cause, and the record—the judgment roll—is silent in reference to the reason therefor, the later in point of time must be deemed the true and final judgment in the case. '); Cummins v. Mullins, 210 S.W. 170, 172 (Ky. 1919) ("Where there are two conflicting judgments rendered by the same court

answer, and orthodox enough to appear in early treatises. The leading treatise on judgments stated the last-in-time rule from its first edition of 1873[53] until its fifth and last edition of 1925.[54] In between another treatise stated the rule nicely:

> The last judgment rendered in regard to a matter is *res judicata*.[55] The former judgment must be used to prevent it. But if he does not bring that fact to the attention of the court, or if he does do so, and it is disregarded, in either case the former judgment, the same as all other defenses, is concluded.[56]

Other treatises reaching this topic followed suit, similarly without real explanation or justification.[57] Certainly, neither treatises nor cases made reference to any of the little-known foreign approaches, such as the developing first-in-time rule in England.[58]

In 1886, the U.S. Supreme Court waded in. The little-cited *Dimock v. Revere Copper Co.*[59] involved three actions, as usual. First came Dimock's federal discharge in bankruptcy. Next came a Massachusetts judgment in an action by Revere against Dimock on promissory notes, in which Dimock failed to bring the discharge to the attention of the Massachusetts court and so suffered a loss. Lastly, Revere sued upon its judgment in New York. When Dimock then invoked the discharge, New York instead accepted the last-in-time judgment. The U.S. Supreme Court affirmed:

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upon the same rights of the same parties, growing out of the same contract, that which is later in time will prevail. ').

53. A.C. FREEMAN, A TREATISE ON THE LAW OF JUDGMENTS § 332, at 294 (S.F. A.L. Bancroft & Co. 1873) ("Last Judgment Prevails").

54. 2 FREEMAN, *supra* note 20, § 629, at 1326 ("[T]he last judgment controls and determines the rights of the parties. ').

55. The cases cited in support were Cooley v. Brayton, 16 Iowa 10 (1864), and Bateman v. Grand Rapids & I.R. Co. 56 N.W. 28 (Mich. 1893).

56. 1 JOHN M. VAN FLEET, RES JUDICATA: A TREATISE ON THE LAW OF FORMER ADJUDICATION § 9, at 91–92 (Indianapolis, Bowen-Merrill Co. 1895) (citing no cases for his assertion regarding nonwaiver situations).

57. J.C. WELLS, A TREATISE ON THE DOCTRINES OF RES ADJUDICATA AND STARE DECISIS § 339, at 278 (Des Moines, Mills & Co. 1878) ("[H]e cannot afterward attack the last decree. '); *see* HENRY CAMPBELL BLACK, A TREATISE ON THE LAW OF JUDGMENTS, INCLUDING THE LAW OF RES JUDICATA (2d ed. 1902) (1891) (making no mention of the point).

58. *See infra* text accompanying note 130.

59. 117 U.S. 559 (1886).

> We are of opinion that, having in his hands a good defence at the time judgment was rendered against him [in F-2], namely, the order of discharge [in F-1], and having failed to present it to a court which had jurisdiction of his case, and of all the defences which he might have made, including this, the judgment is a valid judgment, and that the defence cannot be set up here in an action on that judgment [in F-3].[60]

In 1939, the Supreme Court took a giant step further in its leading case on this problem. *Treinies v. Sunshine Mining Co.* involved a fight over mining company stock between stepdaughter and stepfather.[61] First, a Washington probate court, after making a litigated determination that it had subject-matter jurisdiction, held for the stepfather.[62] Second, he relied on that judgment in an Idaho proceeding, but the Idaho court found that the Washington court had lacked subject-matter jurisdiction.[63] The stepfather unsuccessfully appealed the full faith and credit question to the Idaho Supreme Court and then unsuccessfully petitioned for certiorari.[64] On remand, the trial court determined ownership in the stepdaughter, and the stepfather took no further appeal from that final judgment.[65] Third, Washington's subject-matter jurisdiction and the parties' ownership questions reappeared in an interpleader suit in the District of Idaho, which applied the last-in-time rule in favor of the stepdaughter.[66] The U.S. Supreme Court affirmed: "Even where the decision against validity of the original judgment is erroneous, it is a valid exercise of judicial power by the second court. One trial of an issue is enough."[67]

Any waiver argument based on a failure to assert res judicata in F-2 was unavailable on the facts of *Treinies*. Consequently, its holding represents a significant expansion of the last-in-time rule to nonwaiver situations. However, the Court did not explain or justify

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60. *Id.* at 566. Subsequently, the Supreme Court applied the last-in-time rule without formulating, explaining, or justifying it, once citing *Dimock*, Boynton v. Ball, 121 U.S. 457, 463–64 (1887), but usually not citing *Dimock*, *e.g.* Davis v. Davis, 305 U.S. 32, 39–40 (1938) (semble); Reed v. Allen, 286 U.S. 191, 199 (1932).

61. 308 U.S. 66, 69 (1939).

62. *Id.* at 69–70.

63. *Id.* at 74–76.

64. *Id.* at 74–75.

65. *Id.*

66. *Id.* at 75–76.

67. *Id.* at 78.

itself. None of the courts or the parties involved in the case expressly mentioned "last-in-time," and none cited *Dimock*. Their debate was over whether F-3 should reconsider the duty of F-2 to give full faith and credit to F-1's judgment[68] or whether full faith and credit to F-2's judgment meant ignoring possible errors in that judgment.[69] The Court simply barreled down the latter route by assuming that the latest judgment controlled.[70]

With *Treinies* recently entered on the books, the American Law Institute was compelled to address the matter for the first time. Its involvement would prove crucial because of the Supreme Court's failure to formulate the doctrine explicitly. In fact, through a series of four different projects over the years, the ALI has played an outsized role in the development of the doctrine.

In 1942, the Restatement of Judgments codified and extended the *Treinies* result, by sweepingly providing a last-in-time rule for all of res judicata, whether or not a waiver argument was available. Its blackletter stated: "Where in two successive actions between the same parties inconsistent judgments are rendered, the judgment in the second action is controlling in a third action between the parties."[71] The Restatement stated the rule not only as a matter of domestic res judicata law but also as the law governing interstate situations.[72] The appended comments gave no rationale, and the Restatement contained no reporter's notes. The section appeared in essentially identical form in the initial drafts[73] and seems to have received no group attention or discussion at the annual meetings.[74] The broad rule apparently was accepted as well-settled.

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68. Petitioner's Reply to Brief of Respondents Katherine Mason et al. at 13, 23–24, Treinies v. Sunshine Mining Co. 308 U.S. 66 (1939) (No. 4).

69. Brief of Respondent, Sunshine Mining Company at 28–34, 39–43, Treinies v. Sunshine Mining Co. 308 U.S. 66 (1939) (No. 4).

70. Subsequently, Supreme Court cases just applied the last-in-time rule, citing *Treinies* without formulating, explaining, or justifying the rule. *E.g.* Sutton v. Leib, 342 U.S. 402, 408 & n.7 (1952); Morris v. Jones, 329 U.S. 545, 552 (1947) (also emphasizing the benefitee's failure to have raised the F-1 judgment in F-2, an argument available on that case's facts).

71. RESTATEMENT OF JUDGMENTS § 42 (AM. LAW INST. 1942).

72. *Id.* cmt. e.

73. *Id.* § 305 (AM. LAW INST. Council Draft No. 1, Jan. 6, 1941) (setting forth a draft that differed from the final § 42 only in lacking what is now illustration 4 and having comments c and d in reverse order); *id.* (AM. LAW INST. Tentative Draft No. 1, Mar. 19, 1941) (setting forth the same draft except that it now included illustration 4).

74. *See* 19 A.L.I. PROC. 282 (July 1, 1941–June 30, 1942) (mentioning the idea only in connection with a different section, with Professor Austin W. Scott as the Reporter responsible for § 42 observing: 'It is the last thing that happens that

2. Challenge

By far the premier citation on this subject is the 1969 *Harvard Law Review* article by then-Professor Ruth Bader Ginsburg.[75] It was a simply constructed article. She focused on the internal American approach, putting international litigation to the side.[76] The article proceeded in just two parts.

The first part recited in detail the four leading Supreme Court precedents at that time.[77] She showed how those cases enshrined the last-in-time rule.[78] It applied not only where the benefited party waived the F-1 judgment by failing to assert it, but also where the party strongly resisted F-2's denial of full faith and credit.[79] It applied even where F-1 and F-3 were the same courts.[80]

The second part discussed three state cases that had flouted their seeming duty to apply the last-in-time rule, tending in particular to do so when F-1 and F-3 were the same courts.[81] These cases met

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counts. That is true where the judgments are inconsistent with each other, and it is the last one which makes it binding on the parties even though it is not in the first action. '); 18 A.L.I. PROC. 382–432 (July 1, 1940–June 30, 1941) (making no reference to the section at all).

75. Ruth B. Ginsburg, *Judgments in Search of Full Faith and Credit: The Last-in-Time Rule for Conflicting Judgments*, 82 HARV. L. REV. 798 (1969).

76. *Id.* at 804–05.

77. Sutton v. Leib, 342 U.S. 402 (1952) (involving a sequence of Illinois, New York, and Southern District of Illinois marital actions, where F-2 invalidated the F-1 judgment of divorce); Morris v. Jones, 329 U.S. 545 (1947) (involving a sequence of Illinois, Missouri, and Illinois liquidation actions, where the benefitee of the F-1 judgment failed to raise it in F-2); Treinies v. Sunshine Mining Co. 308 U.S. 66 (1939) (involving a sequence of Washington, Idaho, and District of Idaho ownership actions, where F-2 erroneously invalidated the F-1 judgment for lack of subject-matter jurisdiction); Dimock v. Revere Copper Co. 117 U.S. 559 (1886) (involving a sequence of District of Massachusetts, Massachusetts, and New York debt actions, where the benefitee of the F-1 judgment failed to raise it in F-2).

78. Ginsburg, *supra* note 75, at 800–11.

79. *See Treinies*, 308 U.S. at 77 (relating that the benefitee of F-1 even sought certiorari in the U.S. Supreme Court on F-2's denial of full faith and credit, although that was on an interim appeal rather than on review of the final decree).

80. *See Morris*, 329 U.S. at 551 ("That determination is final and conclusive in all courts. ').

81. *See* Ginsburg, *supra* note 75, 811–19 (discussing *Porter v. Porter.* 416 P.2d 564 (Ariz. 1966) (involving a sequence of Arizona, Idaho, and Arizona land actions, where the benefitee of the F-1 judgment failed to raise it in F-2); *Kessler v. Fauquier Nat'l Bank*, 81 S.E.2d 440 (Va. 1954) (involving a sequence of Virginia, Florida, and Virginia marital actions, where F-2 rejected the F-1 judgment upholding divorce); *Perry v. Perry*, 318 P.2d 968 (Wash. 1957) (involving a sequence of Washington, Massachusetts, and Washington marital actions, where the benefitee of the F-1 judgment failed to raise it in F-2)).

with the professor's clear disapproval[82] and prompted her to call on the Supreme Court to grant certiorari and put down the rebellion.[83]

A point made almost in passing in the article attracted the most attention and still receives regular citation. It was her suggested limitation on F-3's full faith and credit obligation to honor the last-in-time:

> But the Court has not yet considered the ultimate question: where credit for the first state's judgment is demanded but denied in the second state and the diligent pursuit of the appellate route concludes with a denial of certiorari, does the last-in-time rule still apply? Justification for the rule depends on both the full faith and credit obligation of the second state, and the availability of an impartial tribunal to correct the second state's error, should it fail to give the first judgment the respect constitutionally due it. When the impartial arbiter refuses to act, however, the second

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82. *See also id.* at 819–30 (disapproving three cases where the sequence was F-1, F-2, and F-1, and the last court followed the initial F-1 judgment even though it had not been entitled to full faith and credit, say, because it was nonfinal: *Kubon v. Kubon*, 331 P.2d 636 (Cal. 1958); *Colby v. Colby*, 369 P.2d 1019 (Nev. 1962); *Joffe v. Joffe*, 384 F.2d 632 (3d Cir. 1967)); *cf.* 18 WRIGHT ET AL. *supra* note 20, § 4404, at 78–80 (treating situation in F-1 where F-2 has entered a preclusive judgment after the F-1 trial court has made various nonfinal rulings and before any appeal has been taken).

83. Ginsburg, *supra* note 75, at 811–19. Despite her plea, the rebellion still simmers. *See, e.g.* Medveskas v. Karparis, 640 A.2d 543 (Vt. 1994) (involving a sequence of Vermont, Massachusetts, and Vermont support actions, where the benefitee of the F-1 judgment had raised it unsuccessfully in F-2). *But see, e.g.* Thoma v. Thoma, 934 P.2d 1066, 1070–71 (N.M. Ct. App. 1996) ("Cases like *Medveskas* exemplify the parochial attitude that the Full Faith and Credit Clause was intended to override."). Denial of certiorari without dissent in cases presenting the problem during her time on the Court include *Stauber v. McGrath*, 555 U.S. 969 (2008) (involving a sequence of Ohio, California, and Ohio paternity actions, where the benefitee of the F-1 judgment had raised it unsuccessfully in F-2; Ohio disregarded the California judgment, and both sides cited her article to the U.S. Supreme Court); *Bruetman v. Herbstein*, 537 U.S. 878 (2002) (involving a sequence of Southern District of New York, Argentina, and Northern District of Illinois actions, where F-3 disregarded the foreign-nation's nonfinal judgment); *Rash v. Rash*, 528 U.S. 1077 (2000) (applying below the last-in-time rule to a sequence of Florida, New Jersey, and Middle District of Florida marital actions, where the benefitee of the F-1 judgment had raised it unsuccessfully in F-2); and *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 526 U.S. 1146 (1999) (holding below that F-1 must apply F-2's finding of F-1's lack of jurisdiction and so withdraw F-1's default judgment). The Supreme Court has cited her article only once, in *Baker v. Gen. Motors Corp.* 522 U.S. 222, 236 n.9 (1998) (Ginsburg, J.).

> state's rejection of the first state's judgment should not automatically become the national solution to the matter in controversy. Rather, the court subsequently confronted with the conflicting judgments should, in effect, provide the check unsuccessfully sought from the Supreme Court.[84]

In her view, if the second action is brought in a different state from the state of the first judgment's rendition; the court in the second action refuses to accord preclusive effect to the first judgment; the appellate courts of the second state affirm; the U.S. Supreme Court denies certiorari; the matter arises in a third action; and the third court finds the second court's full faith and credit decision to be in contravention of the Full Faith and Credit Clause[85] and Act,[86] then the third court should give full faith and credit to the first court's judgment.[87]

3. Retrenchment

The second version of the Restatement of Conflict of Laws in 1971 added a section to treat inconsistent judgments. Expressly relying on the Restatement of Judgments' provision, it stated an elaborated blackletter rule:

> A judgment rendered in a State of the United States will not be recognized or enforced in sister States if an inconsistent, but valid, judgment is subsequently rendered in another action between the parties and if the earlier judgment is superseded by the later judgment under the local law of the State where the later judgment was rendered.[88]

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84. Ginsburg, *supra* note 75, at 831–32; *see id.* at 803–04 ("Hence, such a denial of certiorari seems hardly an appropriate basis for endowing F-2 with ultimate authority to displace F-1's adjudication with its own."), 805–06 ("However, when the national tribunal fails to act, despite a properly timed and formally correct invitation for review, some of the distinctions between interstate and international judgments, significant at earlier stages, lose force. Rather, the recognition forum should attempt to function as surrogate arbiter and view the case from the perspective the Supreme Court would have taken had it granted review.").

85. U.S. CONST. art. IV. § 1.

86. 28 U.S.C. § 1738 (2012).

87. *See generally* Ginsburg, *supra* note 75.

88. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 114 (AM. LAW INST. 1971).

Significantly, its final comment qualified the scope of the rule: "It is uncertain whether the rule of this Section will be applied to judgments rendered in a foreign nation."[89] Moreover, its initial comment ungrammatically and ambiguously added this qualification: "The rule of this Section is applicable if the later inconsistent judgment is valid (see § 92) and, provided at least, that the Supreme Court of the United States has not refused to review this judgment."[90] This was a last-minute bow to Professor Ginsburg, whose recently published article received a "see generally" citation in the reporter's note, the only citation to commentary in the note.[91] Unlike the Restatement of Judgments' provision on inconsistent judgments, this section in the Restatement (Second) of Conflict of Laws received hot debate at the annual meeting when first proposed in rather sweeping terms.[92] The provision was attacked on the ground that "it encourages relitigation" and "jurisdiction hunting."[93] On a deeper level, the concerns were over whether the section should extend to foreign-nation judgments[94] and whether it should extend to domestic judgments denying full faith and credit.[95] The section accordingly evolved over time to acquire its foreign-nation qualification and, eventually, the Ginsburg qualification.[96]

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89. *Id.* cmt. d.

90. *Id.* cmt. a. A paragraph added to the end of comment b helped to clarify:

> The rule may be different in a situation where the losing party has been denied review of the later inconsistent judgment by the Supreme Court of the United States. In such a situation, it might be thought inappropriate to require that conclusive effect be given under full faith and credit to the later inconsistent judgment.

91. *Id.* reporter's note.

92. *See* 41 A.L.I. PROC. 275–81 (1964) (defeating a motion to strike the section).

93. *Id.* at 276.

94. *See id.* at 277 (Prof. Rudolf B. Schlesinger); *see also id.* (indicating that the Reporter, Professor Willis L.M. Reese, agreed to qualify the section by adding comment d); *supra* text accompanying note 11.

95. *See* 41 A.L.I. PROC. 276–79 (Messrs. Sigmund Timberg & Robert M. Benjamin). The suggestion seemed to be that the section should apply only to a party who failed to raise full faith and credit in F-2 and pursue it all the way to the U.S. Supreme Court.

96. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 439a (AM. LAW INST. Tentative Draft No. 10, 1964) (setting forth the original draft, which would be applicable to recognizable foreign-nation judgments and which did not contain the Ginsburg qualification); *id.* (AM. LAW INST. Preliminary Proposed Final Draft No. 1, 1966) (adding the qualification for foreign-nation judgments as comment d);

The American Law Institute revisited the problem of inconsistent judgments in 1982's Restatement (Second) of Judgments. Its blackletter read: "When in two actions inconsistent final judgments are rendered, it is the later, not the earlier, judgment that is accorded conclusive effect in a third action under the rules of res judicata."[97] First, as the Judgments project treats only an internal law of res judicata, it does not touch foreign-nation judgments. Second, the drafting effort initially embraced and then abandoned the Ginsburg qualification.[98] The initial reporters, Professors Benjamin Kaplan and David L. Shapiro, posed her hypothetical of denied certiorari as the central question to be faced in drafting the relevant section.[99] In the preliminary draft submitted to the project's Advisers for discussion in October 1972, they followed the earlier Restatement of Judgments and the Restatement (Second) of Conflict of Laws, but added a comment that would allow F-3 to reconsider F-2's full faith and credit decision at the behest of a party denied certiorari.[100] Almost immediately, however, they retreated to a mere cross-reference to the reservation of the point in the Restatement (Second) of Conflict of Laws.[101] That approach carried forward,[102] producing no discussion at the annual meeting.[103] Essentially, the American Law Institute punted on Ginsburg.

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id. § 114 (AM. LAW INST. Proposed Final Draft Pt. 1, 1967) (editing out a reference to foreign-nation judgments in comment a).

97. RESTATEMENT (SECOND) OF JUDGMENTS § 15 (AM. LAW INST. 1982).

98. *See id.* at 38 n.13 (AM. LAW INST. Preliminary Survey, Nov. 26, 1969) (explaining that the Second Restatement would reach interstate situations because RESTATEMENT OF JUDGMENTS § 42 cmt. e (AM. LAW INST. 1942) reached them).

99. *Id.* at 36–38.

100. *Id.* § 41.2 cmt. e (AM. LAW INST. Preliminary Draft No. 2, Aug. 30, 1972) (citing the Ginsburg article):

> However, the constitutional compulsion should not apply if, when the earlier judgment was refused effect in the second action, the party injured contended that the refusal was a denial of full faith and credit, and attempted to carry this contention to the Supreme Court of the United States, but that Court refused review. In those circumstances a court asked to give effect to the later judgment is entitled to consider independently on the merits whether the earlier judgment should have been given conclusive effect under the full faith and credit clause, and if it decides that question in the affirmative, to give conclusive effect to the earlier rather than the later judgment.

101. *Id.* (AM. LAW INST. Council Draft No. 1, Dec. 21, 1972).

102. *Id.* (AM. LAW INST. Tentative Draft No. 1, Mar. 28, 1973).

103. *See* 50 A.L.I. PROC. 288 (1973) (giving brief description of the section by Justice Kaplan, who observed: "There the rule of the road, which is also, I think

The U.S. Supreme Court has since returned to the problem of inconsistent judgments, and its capstone message explained that, for American judgments, American law embodies the last-in-time rule seemingly unadorned by exceptions. In the *Parsons Steel* case,[104] the sequence began with plaintiffs suing a bank for fraud in an Alabama court. A couple of months later, they sued the bank for the same acts under a federal banking statute in the federal court for the Middle District of Alabama. The federal action went to judgment first (F-1), with a decision for the bank. The bank then asserted claim and issue preclusion in the state action, but the state court ruled against res judicata without giving reasons and awarded the plaintiffs $4,000,001 in damages (F-2), against which the bank filed post-trial motions. The bank immediately returned to the same federal district court, which decided that its prior judgment was claim-preclusive and so issued an injunction against enforcement by the state-court plaintiffs (F-3). The court of appeals affirmed in relevant part. The Supreme Court unanimously reversed the federal-court injunction:

> Once the state court has finally rejected a claim of res judicata, then the Full Faith and Credit Act becomes applicable and federal courts must turn to state law to determine the preclusive effect of the state court's decision.
>
> [T]he Full Faith and Credit Act requires that federal courts give the state-court judgment, and particularly the state court's resolution of the res judicata issue, the same preclusive effect it would have had in another court of the same State. Challenges to the correctness of a state court's determination as to the conclusive effect of a federal judgment must be pursued by way of appeal through the state-court system and certiorari from this Court.[105]

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supported in reason, is that it is the later of the two which is controlling in the third action.").

104. Parsons Steel, Inc. v. First Ala. Bank, 474 U.S. 518 (1986) (Rehnquist, J.).

105. *Id.* at 524–25. On remand the district court concluded that the Alabama decision was not preclusive because it was still nonfinal and so the court again

Maybe the ALI should have faced its reserved questions. Maybe the Supreme Court should have spoken more precisely, to avoid being seen as sidestepping those questions. If modern law had the gumption to answer, is the Ginsburg exception sound? No.

Although she had no case support for her exception, hers was a plausible proposal. It was arguable that the party claiming the benefit of the first judgment should not be bound by the preclusive effect of the second judgment if the Supreme Court denies certiorari. After all, the party could have done nothing more to avoid an inconsistent judgment, and the nation's neutral arbiter had failed to act. Moreover, her hypothetical has emotional force. It tempts because it involves a past error on preclusion when we are trying to decide about preclusion and because it inspires a distaste for respecting the disrespecting F-2. At the very least, her scenario works well to expose, on peculiarly wrenching facts, the somewhat arbitrarily cruel nature of the last-in-time rule.

Her solution was to cast preclusion aside as a rationale for the last-in-time rule. She in essence embraced waiver as the exclusive rationale. She would apply the last-in-time rule only when waiver, however attenuated, bolstered the second state's judgment. To accommodate the case law, she had to extend waiver to the extreme of requiring the benefitee to pursue the res judicata point as far as possible in F-2, going after the very final judgment all the way to certiorari whether or not it would be rational to do so. Then if the Supreme Court denied audience to the benefitee, the last-in-time rule would cease to apply.

Waiver makes the most sense, however, if what it means is failure to assert res judicata in F-2 at all. Prior cases had utilized preclusion as a partial rationale for stretching the last-in-time rule to situations where the benefitee had in fact asserted res judicata in F-2. A preclusion rationale would honor a final decision of F-2 on res judicata, while her approach would not if the loser banged unsuccessfully on the doors of the U.S. Supreme Court.

Her approach collides with the rest of res judicata doctrine. Res judicata frequently enshrines erroneous judgments, including those to which the Supreme Court has denied certiorari. It needs to do this to accomplish its aims. Errors in applying res judicata are no different from any kind of error. They certainly are no more serious than errors as to due process, equal protection, or the jury right, all being errors as to which res judicata routinely makes courts turn a

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enjoined its enforcement, and the court of appeals affirmed. First Ala. Bank of Montgomery, N.A. v. Parsons Steel, Inc. 825 F.2d 1475 (11th Cir. 1987).

blind eye despite the denial of certiorari. Her giving the relentless, but unsuccessful, res judicata disputant a break clashes with the treatment of all other litigants.[106]

To be consistent with the rest of res judicata, we should protect the second judgment here by the usual last-in-time rule. Additionally, the other rationales for the last-in-time rule carry over. They push toward application of the usual rule even in her extreme scenario. One judgment should prevail as final, without reexamining the merits of the prior judgments. Also, it is more reliable and simpler to accept the last judgment. Yet Professor Ginsburg would have F-3 second-guess F-2's preclusion decision when certiorari had been denied.

The later case law, such as it is, is against her. In *Porter v. Wilson*, the Ninth Circuit had to consider four lawsuits.[107] Arizona had issued the first judgment on ownership of a hotel. Idaho decided that Arizona's judgment was not binding for lack of personal jurisdiction and so rendered an inconsistent judgment.[108] Arizona then decided that the Idaho judgment did not deserve full faith and credit and so stuck to its view of the dispute, a decision on which the U.S. Supreme Court denied certiorari.[109] The District of Arizona, in a new diversity action, decided that the last judgment was binding, whether it was right or wrong, and the court of appeals affirmed: "Defendants' basic error, it seems to us, lies in the mistaken assumption that it was the role of the federal district court to review and revise the decision of the Supreme Court of Arizona on the issue presented to that court under the full faith and credit clause."[110]

In *First Tennessee Bank N.A. Memphis v. Smith*, a Mississippi probate judgment preceded an Arkansas probate judgment, which led to a federal interpleader action.[111] The Arkansas courts, right up to the state supreme court, had refused to recognize the Mississippi judgment because of lack of jurisdiction.[112] The aggrieved bank then had petitioned for certiorari, but the U.S.

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106. *See* 18 WRIGHT ET AL. *supra* note 20, § 4404, at 65–67; *cf.* PETER HAY, PATRICK J. BORCHERS & SYMEON C. SYMEONIDES, CONFLICT OF LAWS § 24.29, at 1485 (5th ed. 2010) (seeing her suggestion as foreclosed by *Treinies*).

107. 419 F.2d 254 (9th Cir. 1969).

108. *Id.* at 255–57.

109. *Id.*

110. *Id.* at 258.

111. 766 F.2d 255 (6th Cir. 1985).

112. *Id.* at 255–58.

Supreme Court denied the petition.[113] The federal courts applied the Arkansas judgment as last-in-time.[114]

4. U.S. Summary

Even if some authorities still equivocate on the Ginsburg and foreign exceptions, the blackletter American rule for American judgments is last-in-time.[115] As I have just argued, the Ginsburg exception is unsound and unsupported. But as I shall soon argue, American courts should be wary about extending the last-in-time rule to foreign-nation judgments.[116]

Whose law is dictating this rule and any exceptions? The governing law is the recognition law of F-3.[117] But that law may be subject to external constraints imposed by higher law. That is, this firmly established last-in-time rule, within the United States, is a matter of constitutional law under the Full Faith and Credit Clause in the interstate setting; a matter of the Full Faith and Credit Act and federal res judicata doctrine in the state-federal, federal-state, and

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113. *Id.*

114. *Id.*

115. *See* Rash v. Rash, 173 F.3d 1376 (11th Cir. 1999) (involving a sequence of Florida, New Jersey, and Middle District of Florida marital actions, where the benefitee of the F-1 judgment had raised it unsuccessfully in F-2), *cert. denied*, 528 U.S. 1077 (2000); Sydoriak v. Zoning Bd. of Appeals, 879 A.2d 494, 500 n.7 (Conn. App. Ct. 2005) (involving a sequence of three Connecticut zoning actions, where the benefitee of the F-1 judgment had failed to raise it in F-2); ROBERT L. FELIX & RALPH U. WHITTEN, AMERICAN CONFLICTS LAW § 42 (6th ed. 2011); HAY ET AL. *supra* note 106, § 24.29, at 1484–85; RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS §11.3 (6th ed. 2010); 18 WRIGHT ET AL. *supra* note 20, § 4404, at 60 n.23, § 4423, at 619 n.31 (citing many cases). The entirety of discussion on the rule in DAVID L. SHAPIRO, CIVIL PROCEDURE: PRECLUSION IN CIVIL ACTIONS 132 n.20 (2001), follows:

> If two inconsistent judgments are rendered in a single jurisdiction, the later of the two is the one entitled to preclusive effect. See RSJ § 15. The Supreme Court, in interpreting the constitutional obligation of Full Faith and Credit, has made this rule applicable to sister state judgments—even when the losing party in the second action tried without success to invoke the rules of preclusion in that action. Treinies v. Sunshine Mining Co. 308 U.S. 66 (1939).

116. *See infra* Part III-B.

117. RESTATEMENT OF CONFLICT OF LAWS § 450 cmt. e (AM. LAW INST. 1934); FELIX & WHITTEN, *supra* note 115, § 50; *see* CLERMONT, *supra* note 23, at 434–35 (explaining that in federal diversity actions, F-3's recognition law will be the local state's law).

federal-federal permutations;[118] or a matter of highly uniform state law if F-2 and F-3 are the same U.S. state.[119]

This governing law on recognition needs to be distinguished from other choices of law. Recognition for present purposes means only whether F-3 will look to a prior judgment, *provided that* it is valid, final, and preclusive under applicable law. A valid judgment is one of sufficient quality to withstand an attack in the form of a request for relief from judgment, which will typically lie only for lack of jurisdiction or notice and not for other error.[120] A final judgment is one that is not tentative or provisional, which in the United States generally means it was the trial court's last word on the merits.[121] Preclusion turns on all the rules and exceptions of res judicata law.[122]

When F-3 faces the question of whether F-2's judgment is valid and final, it normally should apply the law of F-2 (which is subject to any applicable external restraints, such as due process and other federal provisions imposed on and becoming part of the F-2's law).[123] When F-3 faces the question of the extent or reach of res judicata based on F-2's judgment, it normally should apply the res judicata law that F-2 would apply (including any applicable external restraints).[124] Thus, once over the initial recognition hurdle, the basic approach is retroverse, in the sense of turning backward to look at F-

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118. *See* FIELD ET AL. *supra* note 27, at 564, 891–905 (giving controlling law for the four basic permutations); *see also id.* at 905–906 (treating tribal courts).

119. RESTATEMENT (SECOND) OF JUDGMENTS § 15 (AM. LAW INST. 1982). *Compare* K.D. Kerameus, *Res Judicata: A Foreign Lawyer's Impressions of Some Louisiana Problems*, 35 LA. L. REV. 1151 (1975) (describing old civilian approach), *with* 1 LA. CIV. L. TREATISE, CIVIL PROCEDURE § 6:7 (2d ed. 2008) (describing the state's shift in 1990 to common-law preclusion).

120. CLERMONT, *supra* note 23, at 381–84.

121. *Id.* at 384–85.

122. *Id.* at 374–78.

123. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 92–93, 107 (AM. LAW INST. 1971); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 481(1), 482 (AM. LAW INST. 1987); *see* WILLIAM M. RICHMAN, WILLIAM L. REYNOLDS & CHRISTOPHER A. WHYTOCK, UNDERSTANDING CONFLICT OF LAWS § 115[b], [d] (4th ed. 2013) (discussing determination of lack of finality in a prior forum and how personal and subject-matter jurisdictional issues can impact the determination).

124. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 94–97 (AM. LAW INST. 1971) (amended 1988); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 481(1) cmt. c (AM. LAW INST. 1987); *see* HAY ET AL. *supra* note 106, § 24.2, at 1440–41, § 24.4, at 1444–45, § 24.29, at 1484 n.4 (discussing the application of the Restatement provisions).

2's view of its own judgment: F-3 lets F-2's law decide what F-2 conclusively adjudicated.[125]

C. Comparative Picture

Before getting to how American courts should treat inconsistent foreign-nation judgments, I need to take a look at how the rest of the world handles the problem of inconsistent judgments. This comparative study will shed light backward on the rationales and development of the American last-in-time rule, as well as forward on treatment of foreign-nation judgments.

In brief, the rest of the world does not follow our last-in-time rule. They follow a first-in-time rule. This comparison reinforces the feeling that our rule is a rather arbitrary one.

1. England and Most of Its Progeny

English and Commonwealth law on res judicata is middlingly expansive.[126] It was slower to develop than American law, and still does not reach as far.[127] It provides fairly narrow forms of claim preclusion and mutual issue preclusion.[128] Yet, it seems poised to expand res judicata further.[129]

On the problem of inconsistent judgments, England's treatises[130] and international cases[131] make clear that it follows the

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125. *See* RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE § 4 (AM. LAW INST. 2006) (proposing this approach with respect to recognition of foreign judgments); Robert C. Casad, *Issue Preclusion and Foreign Country Judgments: Whose Law?*, 70 IOWA L. REV. 53, 70–76 (1984) (discussing the application of this approach in a foreign-judgment context).

126. *See* Casad, *supra* note 125, at 62–63 (discussing English and Commonwealth law).

127. Kevin M. Clermont, *Res Judicata as Requisite for Justice*, 68 RUTGERS U. L. REV. 1067, 1071–73, 1094–96 (2016).

128. *Id.* at 1094–95.

129. *See id.* at 1095–96 (describing the move toward claim preclusion and nonparty use of preclusion).

130. *See* PETER R. BARNETT, RES JUDICATA, ESTOPPEL, AND FOREIGN JUDGMENTS: THE PRECLUSIVE EFFECTS OF FOREIGN JUDGMENTS IN PRIVATE INTERNATIONAL LAW § 4.72 (2001) ("Certainly if there are conflicting foreign judgments, each pronounced by a court of competent jurisdiction, the earlier judgment is recognized and given effect to the exclusion of the latter judgment."); K.R. HANDLEY, SPENCER BOWER AND HANDLEY: RES JUDICATA § 17.15 (4th ed. 2009) (stating that if the judgments relate to the same subject matter, the earlier prevails over the later).

first-in-time approach. It seemingly does so on the undertheorized idea that once things are settled, they should remain settled. But it seems to occur to no one that a subsequent decision of nonpreclusion might itself be entitled to preclusion. The Privy Council explained the split from the American approach:

> Some reference was made in the course of argument to the position in the law of the United States of America, where the last-in-time rule appears to be applied in the case of conflicting judgments, at least when the matter arises in an inter-state context where the "full faith and credit" clause of the Constitution applies. The rationale of the rule appears to be that the second judgment has the effect of deciding that the first judgment does not constitute res judicata so that the second constitutes res judicata of that issue as well as of any others that may have been raised. This is so whether or not the issue of res judicata was argued in the second proceeding by the party who was successful in the first, because on ordinary principles a party is not entitled to raise in a later proceeding a point which was open to him in an earlier one but which he did not take. Their Lordships do not consider that the position in the United States is of assistance for present purposes [132]

Worth noting is that in the international cases generating the first-in-time rule, the first judgment was most often an English judgment.[133]

English law provides the possibility of cross-estoppel, whereby the failure by the winner in F-1 to raise res judicata in F-2 will equitably estop that party, and so F-2 will be the preclusive

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131. *See* Vervaeke v. Smith [1983] 1 AC 145 (HL) (applying first-in-time rule to sequence of English judgment, Belgian judgment, and English action on validity of marriage); E.D. & F. Man (Sugar) Ltd. v. Haryanto [1991] 1 Lloyd's Rep. 429 (CA) (applying first-in-time rule to sequence of English judgment, Indonesian judgment, and English action on validity of contracts).

132. Showlag v. Mansour [1995] 1 AC 431, 443 (PC) (appeal taken from Jersey) (applying first-in-time rule to sequence of English judgment, Egyptian judgment, and Jersey action on who owns bank accounts).

133. Note that in all three of the leading cases in the two preceding footnotes, the first-in-time judgment was English.

judgment.[134] In other words, here England applies a last-in-time rule. These cross-estoppel cases most often are domestic cases. Their rule makes much sense. Failure to raise res judicata is a solid basis for waiver. Just like any other defense, the benefitee is obliged to raise or lose it.

Canada, as a federal country, provides an interesting variation. Its res judicata is founded on the English approach,[135] although it is not immune to influences from the more expansive American approach.[136] For two foreign-nation judgments or two intraprovincial judgments, a Canadian province follows England's first-in-time rule.[137]

The curious thing for an American, however, is that the Canadian federation does not have a full faith and credit provision. The provinces treat judgments from other provinces as foreign judgments.[138] When a province's judgment is inconsistent with another province's judgment or any other foreign judgment, the

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134. *See* Langdon v. Richards (1917) 33 TLR 325 (KB) (holding the government waived its right to res judicata by failing to raise the first judgment in the second action in a sequence of three English actions, and then apparently using F-2's result to dictate result in F-3); *cf.* Magrath v. Hardy (1838) 132 Eng. Rep. 990, 996 (holding in F-2 that a party failing to raise res judicata "has waived any benefit he might have derived from the estoppel"); HANDLEY, *supra* note 130, § 17.16 (seeming to suggest that the cross-estoppel 'sets the matter at large' without any preclusion, but actually speaking of the situation in F-2).

135. *See generally* DONALD J. LANGE, THE DOCTRINE OF RES JUDICATA IN CANADA (2000).

136. *See* JANET WALKER ET AL. THE CIVIL LITIGATION PROCESS: CASES AND MATERIALS 330 (7th ed. 2010) ("Pulled between the traditional rigidity of English law and the modern flexibility of US law, Canadian courts have developed this area of the law cautiously, borrowing elements from both the United States and the United Kingdom and developing a distinctively Canadian approach to issue estoppel.').

137. *See* Peter J. Cavanagh & Chloe A. Snider, *Canada*, *in* ENFORCEMENT OF FOREIGN JUDGMENTS IN 29 JURISDICTIONS WORLDWIDE 2014, at 28, 32 (Mark Moedritzer & Kay C. Whittaker eds. 2013) ("Where a foreign judgment that is sought to be recognised conflicts with a prior judgment involving the same parties or their privies, and each judgment (i) was pronounced by a court of competent jurisdiction and (ii) is final and not open to impeachment, the general rule is that the first in time must be given effect to the exclusion of the later in time.').

138. *See* Konstantinos D. Kerameus, *Enforcement Proceedings*, *in* 16 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW: CIVIL PROCEDURE § 10-9, at 8, § 10-25, at 19 (Mauro Cappelletti ed. 2014); *cf.* Morguard Invs. Ltd. v. De Savoye, [1990] 3 S.C.R. 1077 (Can.) (urging in dicta an approach based on full faith and credit). Registration statutes do simplify the process of enforcement for other provinces' judgments. *See* Kurt H. Nadelmann, *Enforcement of Foreign Judgments in Canada*, 38 CAN. B. REV. 68 (1960) (discussing registration statutes).

province will follow its own judgment, regardless of whether it was first or second.[139]

2. Civil-Law Countries

Civil-law res judicata is relatively narrow in scope. Its aim is merely to keep a cause of action, once resolved for either plaintiff or defendant, from being reconsidered. There is little by way of collateral estoppel and jurisdiction to determine jurisdiction, and no res judicata as to res judicata determinations.[140] However, there are signs in a number of countries of a doctrine on the brink of expansion.[141]

On the problem of inconsistent judgments, a striking aspect is the civil law's lack of discussion of the problem as a matter of domestic law. The domestic doctrine, such as it is today, favors the first-in-time rule. When inconsistent judgments inevitably came to present themselves in international litigation, the civilians had to confront it consciously. But defensibly parochial impulses were then in play, so that the codes tended to go with the local judgment whether first or last.

Why does this problem seem smaller to civilians? The explanation might be that we are more comfortable in acknowledging inconsistencies. More probably, the problem arises

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139. *See* Ryder Gilliland & Peter Smiley, *Canada*, *in* ENFORCEMENT OF FOREIGN JUDGMENTS 2016, at 2.7 (Oct. 3, 2016), http://www.iclg.co.uk/practice-areas/enforcement-of-foreign-judgments/enforcement-of-foreign-judgments-2016/canada ("Where there is a conflicting local judgment between the parties or there are local proceedings pending between the parties to the extent that the judgment is not final and conclusive, a foreign judgment will not be recognised or enforced in Canada. '); *see also* Civil Code of Québec, S.Q. 1991, c 64, art 3155 (Can.) ("A decision rendered outside Québec is recognized and, where applicable, declared enforceable by the Québec authority, except in the following cases (4) a dispute between the same parties, based on the same facts and having the same subject has given rise to a decision rendered in Québec, whether or not it has become final, is pending before a Québec authority, first seized of the dispute, or has been decided in a third State and the decision meets the conditions necessary for it to be recognized in Québec '). This code provision extends the preference for local proceedings into the arena of pending cases, so that the foreign judgment must bow to a case pending in Quebec. *See* Can. Post Corp. v. Lépine, [2009] 1 S.C.R. 549, para. 55 (Can.) (applying this part of art. 3155(4) so as to prefer a Quebec proceeding over an Ontario judgment).

140. *See* Clermont, *supra* note 127, at 1096–98 (discussing res judicata in civil law countries).

141. *See id.* at 1099–100; *cf.* Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ. May 25, 2016, [2016] I.L. Pr. 27, para. 7 (applying jurisdiction to determine jurisdiction to an English judgment).

less often. Why? I think the major reason is the limited scope of their res judicata. Narrower res judicata means that res judicata will apply less often in a second action, to say nothing of a third action. Moreover, without collateral estoppel, the problem would arise only in the more unlikely scenario of repetitive assertion of the same cause of action involving the same parties. In such a scenario the doctrines of res judicata and lis pendens usually will work well to prevent inconsistency from arising in the first place. The doctrines will work even better given that civil-law judges in F-2 can raise them sua sponte,[142] and given that the judges sitting without a jury will avoid inconsistent determinations thanks to the prior judgment being admissible in evidence on the merits.[143] Finally, civil-law countries define "inconsistent" narrowly.[144] The tendency is to require something like legal consequences that mutually exclude each other.[145]

Take Germany as the prime example.[146] Unlike Canadian and U.S. federalism, Germany treats a judgment of any German state as a German judgment, automatically enforceable anywhere in the country.[147] "Conflicts between judgments rendered by different German courts are usually resolved according to the priority principle (Prioritätsprinzip)—'first in time, first in right.'"[148] Although the same principle applies to conflicts between foreign judgments, when the inconsistency is between any German judgment and a foreign judgment, the German judgment prevails. The relevant code prohibits recognition of a foreign judgment between the same parties on the same subject matter if the "judgment is incompatible

142. *See* PETER L. MURRAY & ROLF STÜRNER, GERMAN CIVIL JUSTICE 547–49 (2004) (treating lis pendens); Albrecht Zeuner & Harald Koch, *Effects of Judgments (Res Judicata)*, *in* 16 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW: CIVIL PROCEDURE §§ 9-34 to -39, -47 (Mauro Cappelletti ed. 2014) (treating res judicata, but noting that France is an exception to the sua sponte practice).

143. Clermont, *supra* note 127, at 1099.

144. *See* MURRAY & STÜRNER, *supra* note 142, at 534–35 (describing German law on res judicata as narrow and discussing the German conception of irreconcilable judgments).

145. *See* Case 145/86, Hoffman v. Krieg, 1988 E.C.R. 645 (defining 'irreconcilable' judgments as having mutually exclusive legal consequences).

146. *See* MURRAY & STÜRNER, *supra* note 142, at 525–41 (discussing German recognition of foreign judgments).

147. Kerameus, *supra* note 138, § 10-9, at 8, § 10-25, at 18.

148. MURRAY & STÜRNER, *supra* note 142, at 534 (citing German Code of Civil Procedure [ZPO] Jan. 30, 1877, § 580(7)(a)).

with a judgment delivered in Germany, or with an earlier judgment handed down abroad that is to be recognized."[149]

Basing its recognition law on Germany's, Japan follows the same first-in-time approach.[150] Japan also nicely demonstrates the unwillingness of civil-law courts to recognize or enforce a foreign judgment that is inconsistent with a local judgment. The illustrative case is *Marubeni America Corp. v. Kabushiki Kaisha Kansai Tekkōsho*.[151] In light of the occasionally incensed reactions of the pertinent law review commentary,[152] I do not present this case as fully representative of Japanese law. Nevertheless, the particulars of the case merit consideration.

In 1968 Jerry Deutsch, an employee of the Boeing Company in Washington State, mangled his hand in a large mechanical press.[153] Boeing had bought the press from West Coast Machinery Co. (a Washington corporation), which had bought it from Marubeni America (a New York subsidiary corporation), which had bought it from Marubeni Japan (a Japanese parent corporation), which had bought it from the manufacturer Kansai Iron Works (a Japanese corporation in Osaka).[154]

F-1 Deutsch sued West Coast and Marubeni America in a state court of Washington, alleging a defective press and requesting

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149. ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], § 328(1)(3) (Ger.). This code provision continues on to make a foreign judgment bow to ongoing German proceedings. *See* MURRAY & STÜRNER, *supra* note 142, at 526 n.151, *cf. supra* note 139 (describing Canada's similar approach).

150. Morio Takeshita, *The Recognition of Foreign Judgments by the Japanese Courts*, 39 JAP. ANN. INT'L L. 55, 56, 71 (1996). For China, a country on whose res judicata I have written, Clermont, *supra* note 127, at 1126–40, the approach to inconsistent judgments will likely develop along the same civil-law lines. *See* JIE HUANG, INTERREGIONAL RECOGNITION AND ENFORCEMENT OF CIVIL AND COMMERCIAL JUDGMENTS 244 (2014) (looking to future); ZHENG SOPHIA TANG, YONGPING XIAO & ZHENGXIN HUO, CONFLICT OF LAWS IN THE PEOPLE'S REPUBLIC OF CHINA 169–71 (2016) (same).

151. Osaka Chihō Saibansho [Osaka Dist. Ct.] Dec. 22, 1977, Case No. 4257 (Wa) of 1975, 361 HANREI TAIMUZU [HANTA] 127 (Japan).

152. *See* Takao Sawaki, *Battle of Lawsuits: Lis Pendens in International Relations*, 23 JAP. ANN. INT'L L. 17, 17–19, 28 & n.25 (1979–1980) (criticizing this case at length); Takeshita, *supra* note 150, at 71 & n.16 ("This judgment of the Osaka District Court seems to be strongly in favor of a Japanese judgment in the sense that a foreign judgment may be rejected even if it was finally and conclusively given before the relevant Japanese judgment. Giving priority to a Japanese judgment in such a way as the Osaka District Court ruled would excessively jeopardize the international harmony of decisions In addition, that solution is inconsistent with the principle of *res judicata*.').

153. Deutsch v. W. Coast Mach. Co. 497 P.2d 1311, 1312 (Wash. 1972).

154. *Id.* at 1312–13.

$275,000.[155] By service in Japan, Marubeni America impleaded Kansai, which attacked jurisdiction.[156] The Supreme Court of Washington upheld jurisdictional power on the ground that Kansai had transacted business in Washington by building the press to Boeing's extensive specifications, by sending to Washington its engineers to test and inspect the press and to oversee repairs, and by sending replacement parts to Washington; moreover, the court found the exercise of jurisdiction not to be unreasonable in view of Kansai's other extensive business in the United States, the burden on Marubeni America, and the location of evidence.[157] On September 17, 1974, the trial court awarded Marubeni America a judgment against Kansai for $86,000.[158]

F-2. Meanwhile, Kansai was not asleep in Japan. It sued Marubeni America in the Osaka District Court to declare nonliability for indemnification.[159] After stretching to find jurisdiction, the Japanese court followed precedent to reject a lis pendens defense by construing the word "court" in the code's prohibition to mean that the prior action had to be pending in a Japanese court.[160] The Washington judgment, valid and final under Washington law, was not final under Japanese law because there was still time to appeal.[161] On October 14, 1974, the Osaka District Court ruled that Marubeni America had no right to indemnity under Japanese contract or tort law.[162]

F-3. Next, Marubeni America sued Kansai upon its Washington judgment in that same Japanese court. In 1977, the court rejected that claim, denying recognition on the ground that the Washington judgment was inconsistent with a Japanese judgment (its own 1974 judgment) and hence was contrary to the public policy of Japan, regardless of the two judgments' sequencing.[163]

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155. *Id.* at 1313.

156. *Id.*

157. *Id.* at 1315.

158. Sawaki, *supra* note 152, at 17.

159. *See* JOSEPH W.S. DAVIS, DISPUTE RESOLUTION IN JAPAN 349 (1996) (describing this common move 'as a tactic to thwart the recognition of foreign judgments").

160. *See* MINJI SOSHŌHŌ [MINSOHŌ] [C. CIV. PRO.] art. 142 ("No party shall file a suit concerning a matter presently pending before a court. ').

161. *See* TAKAAKI HATTORI & DAN FENNO HENDERSON, CIVIL PROCEDURE IN JAPAN § 7.09[3], [8][a] (Yasuhei Taniguchi et al. eds. rev. 2d ed. 2009) (discussing finality prerequisite).

162. Sawaki, *supra* note 152, at 18.

163. *See* MINJI SOSHŌHŌ [MINSOHŌ] [C. CIV. PRO.] art. 118(iii) (stating as a requirement for recognition that 'the contents of the judgment and the procedures for litigation are not contrary to the public order or morals of Japan"); HATTORI &

By any view, this ten-year battle of lawsuits is not a pretty picture. In the U.S. view, the Japanese court in 1974 should probably have given res judicata effect to the Washington judgment. But the Japanese court refused to go that route, and the result was inconsistent judgments. In the Japanese view, the Japanese court in 1977 was likely right in preferring its own prior judgment.

The civilians' preference for local judgments is further indulged by their willingness, as seen in *Marubeni*, to apply their own law to the validity, finality, and bindingness of the foreign-nation's judgment.[164] The result might then be that the foreign nation's judgment never gets into the running as an inconsistent judgment.

3. European Union

Under the 2015 revision of the Brussels Regulation, a member state must not recognize or enforce[165] another member state's judgment "if the judgment is irreconcilable with a judgment given between the same parties in the Member State addressed"[166] or "if the judgment is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed."[167] Irreconcilability arises when the two judgments entail "mutually exclusive legal consequences."[168]

The Regulation thus follows the first-in-time rule, except when F-2 and F-3 are courts of the same member state. However, the Regulation fails to cover the situation where F-1 and F-2 are courts of the same member state, which leaves the problem to the national law of F-1 and F-2.[169] F-3's national law governs when neither F-1

HENDERSON, *supra* note 161, § 14.03[1][a] & n.260 (discussing this public policy exception).

164. *See* FIELD ET AL. *supra* note 27, at 913–15 (contrasting U.S. and foreign approaches); Casad, *supra* note 125, at 75 (suggesting that foreign countries apply their own law, regardless of what they say they are doing).

165. Regulation (EU) No. 1215/2012 of the European Parliament and of the Council, 2012 O.J. (L 351) arts. 45–46.

166. *Id.* art. 45(1)(c).

167. *Id.* art. 45(1)(d).

168. PETER STONE, EU PRIVATE INTERNATIONAL LAW 243 (3d ed. 2014) (discussing Case 145/86, Hoffman v. Krieg, 1988 E.C.R. 645); BRUSSELS IBIS REGULATION 919–28 (Ulrich Magnus & Peter Mankowski eds. 2016).

169. *See* Case C-157/12, Salzgitter Mannesmann Handel GmbH v. SC Laminorul SA, [2014] 1 WLR 904, para. 26 (EU) (involving two Romanian courts

nor F-2 is a member state. The national law will normally provide that first-in-time governs.[170]

These EU provisions followed naturally from English and civil-law traditions. First, those traditions follow the first-in-time rule (*prior tempore, potior jure*).[171] Second, the indulgence for local judgments over foreign judgments is typical of international conventions.[172]

4. Comparative Summary

Occasional exceptions aside, the national and EU law that generally prevails in Europe, including in England,[173] fits a simple and coherent pattern: *the first judgment governs—unless one of the inconsistent judgments is a local judgment, which then prevails*. At a glance, the situation there stands in what seems to be stark contrast to the law of the United States.

Why? In this corner of the law, the solution is path-dependent. A legal system's rule arises in a certain context, and then it proceeds to have a life of its own.

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as F-1 and F-2 and a German court as F-3, with the European court concluding that the EU Regulation art. 45 did not apply and saying that 'the recognition and enforcement procedures enable a judgment to have the same effect in the Member State addressed as it would have had in the Member State of origin").

170. *See, e.g.* MURRAY & STÜRNER, *supra* note 142, at 534 (noting that the first-in-time rule governs in Germany, but there are exceptions).

171. Interestingly, however, the EU sometimes breaks with the orthodox first-in-time line. Its Regulation Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility adopts a last-in-time for judgments on parental responsibility for the care and custody of children. No. 2201/2003, 2003 O.J. (L 338) art. 23(e)-(f); *see* STONE, *supra* note 168, at 474 ("[T]he Regulation accepts the inherent nature of custody orders, as being open to modification by reason of a subsequent change in circumstances. ').

172. RONALD A. BRAND & PAUL HERRUP, THE 2005 HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS 119–22, 227. 278–79 (2008); Ginsburg, *supra* note 75, at 804 & n.33; *cf.* A GLOBAL LAW ON JURISDICTION AND JUDGMENTS: LESSONS FROM THE HAGUE 305 (John J. Barceló III & Kevin M. Clermont eds. 2002) (setting out art. 28(1)(b) of the draft jurisdiction-and-judgments treaty, which more simply provided that recognition or enforcement may be refused if 'the judgment is inconsistent with a judgment rendered, either in the State addressed or in another State, provided that in the latter case the judgment is capable of being recognized or enforced in the State addressed").

173. *See* Mukarrum Ahmed, *Brexit and English Jurisdiction Agreements: The Post Referendum Legal Landscape*, http://ssrn.com/abstract=2839342 (Sept. 15, 2016) (discussing the impact of the EU exit on the laws of England); Andrew Dickinson, *Back to the Future—The UK's EU Exit and the Conflict of Laws*, http://ssrn.com/abstract=2786888 (May 31, 2016) (same).

The early cases in the United States were domestic cases involving the benefitee's failure to assert res judicata in F-2.[174] For these, last-in-time seemed the natural answer. Because of the expansiveness of American res judicata, the cases presenting inconsistent judgments multiplied and last-in-time became entrenched. Because America's devotion to res judicata meant that we should honor decisions about res judicata, last-in-time came to apply in situations where the benefitee asserted res judicata unsuccessfully in F-2.

Elsewhere in the world, the problem tended to present itself with obviousness in international cases, and parochialism defensibly led to a preference for any local judgment. A lesser devotion to res judicata led to a first-in-time rule when the time came to backfill a solution for the problem's rarer contexts. This solution could be leavened by notions of waiver, however, as achieved by cross-estoppel in England where a relatively broader res judicata has led to a more developed law on inconsistent judgments.

But perhaps the difference between the American solution and that of the rest of the world is not as stark as a first glance suggests. If the United States were not to apply its last-in-time rule sometimes when a foreign-nation judgment was involved, and if other countries would adopt the British notion of cross-estoppel, the difference between the United States and the rest of world would become not at all stark. Indeed, the difference would shrink to the realm of cases where F-1 and F-2 are both domestic and F-2 actually decided, rightly or wrongly, to reject the benefitee's assertion of res judicata based on F-1's judgment. There American law alone opts for the last-in-time rather than the first-in-time.

That small remaining difference is explainable by the driving force of the American ardor for res judicata. It leads us to apply preclusion even to determinations about res judicata. We give definitive credit to F-2's resolution of the res judicata effect of F-1's judgment, while the rest of the world does not. Here lies the true difference between the United States and the rest of the world. Because we accept F-2's decision on res judicata, we choose last-in-time as the background rule, and they choose first-in-time.

174. *See supra* II.B.1.

III. LIMITING THE RULE FOR FOREIGN-NATION JUDGMENTS

Say, first, Pierre of France sues Doug of New York in a New York court for a large installment of interest on a French-made loan, and he loses by a defense of release of the obligation to pay interest. So, second, for all interest that has by then fallen in arrears, Pierre sues Doug in France and wins after the French court refuses to recognize the New York judgment and finds no release. Naturally enough, third, Pierre sues Doug in New York upon the French judgment to enforce it where Doug's assets are, and also sues Doug upon the underlying claim for all interest due, but he encounters a fight over recognition. Doug invokes the first New York judgment. Pierre invokes the second judgment, even though it likely is not preclusive under French law on the finding of no-release,[175] to argue that the later French decision should prevail over the prior New York judgment.

This hypothetical emerged during a classroom discussion. It struck me then as a situation where the arguments for the last-in-time rule vaporized. The second judgment being nonpreclusive and foreign seemed to scream for New York to honor its own prior judgment. Now to support that intuitive outcome, I shall separately consider how the two features of F-2's judgment—it is nonpreclusive and it is foreign—together destroy the rationales for the last-in-time rule.

A. Nonpreclusive Judgments

The *Pierre v. Doug* hypothetical raises the question of what to do with the last-in-time judgment if it is nonpreclusive. A conceivable approach would be to say it "doth put the matter at large,"[176] the old expression meaning that no preclusion applies. The idea would be that the last-in-time judgment controls, and it says there is to be no preclusion. But no case takes that approach. Moreover, looking to F-2's nonpreclusion would undo the rationale

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175. Because these are different claims, and because French res judicata provides little in the way of collateral estoppel, the F-2 judgment would probably not be issue-preclusive in F-3 on the claim for interest. FIELD ET AL. *supra* note 27, at 886–88; PETER HERZOG & MARTHA WESER, CIVIL PROCEDURE IN FRANCE 554 n.18 (Hans Smit ed. 1967); Clermont, *supra* note 127, at 1096–98; Zeuner & Koch, *supra* note 142, §§ 9-70 to -76. As to defeating the action upon the French judgment, see *infra* note 215.

176. 2 EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND; OR, A COMMENTARY UPON LITTLETON § 667, at 352b (London, J. & W.T. Clarke, 19th ed. 1832) (1628).

for having some priority rule, namely, that one of the preceding judgments should be the final word. Therefore, if the last-in-time judgment is nonpreclusive, F-3 should look to the first-in-time judgment if it would be preclusive.

This rather obvious qualification is better handled as part of the rule rather than as an exception to the rule. Accordingly, Professor Ginsburg could begin her article with this sentence: "Under traditional res judicata doctrine, where there are conflicting judgments and *each would be entitled to preclusive effect if it stood alone*, the last in time controls in subsequent litigation."[177]

Indeed, without a preclusiveness requirement, the last-in-time rule would be far too broad. Many subsequent determinations could be inconsistent in some sense and would potentially undermine a judgment's res judicata effects widely. Thus, preclusiveness should enter into inconsistency's definition. That is, to be inconsistent means that the prior judgments would preclusively resolve the claim or issue differently in F-3. If F-1 or F-2 does not yield preclusion on the claim or issue, there is no inconsistency, and hence the last-in-time rule does not come into play. For example, a decision that did not get reduced to a judgment would not be considered inconsistent. Or a judgment that is not recognizable, valid, or final would not come down to F-3. Likewise, a decision in a forum with a res judicata law too narrow to preclude the claim or issue would not come down to F-3.

An illustration would be where Driver 1 sues Driver 2 for negligence and wins, establishing negligence and the absence of contributory negligence. Passenger next sues Drivers 1 and 2 for negligence in the same accident and wins, establishing negligence against both. Then Driver 1 sues Driver 2 for contribution on the second judgment based on comparative fault. Even though Driver 2 might be able invoke the second judgment against Driver 1 for some purposes,[178] that judgment did not decide their comparative fault. So, Driver 1 should be able to invoke the first judgment to establish Driver 2's sole fault.[179]

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177. Ginsburg, *supra* note 75, at 798 (emphasis added).

178. RESTATEMENT (SECOND) OF JUDGMENTS § 38 (AM. LAW INST. 1982).

179. *Cf.* Brightheart v. McKay, 420 F.2d 242, 244 (D.C. Cir. 1969) (suggesting this solution); Neenan v. Woodside Astoria Transp. Co. 184 N.E. 744, 745 (N.Y 1933) (treating the different situation of pro rata contribution). The best counterargument is that the conflicting determinations call for relitigation, but that is not the usual route taken by our res judicata law. *See supra* notes 42–43.

An international example lies in *Ackerman v. Ackerman*.[180] First, the wife obtained a small New York judgment against the husband for failure to pay support.[181] Second, she sued the husband in California upon that judgment and for big amounts subsequently due, but her attorney mistakenly dismissed that action with prejudice.[182] Third, she sued in England for those subsequent amounts due, and the court rejected the California judgment and awarded her over a million dollars.[183] Fourth, she sued back in New York upon the English judgment, and the husband removed to the Southern District of New York on the basis of diversity.[184] The husband argued: "The English judgment , not being that of a sister state, is not constitutionally entitled to full faith and credit, nor to superseding effect under the last-in-time rule."[185] The district court nevertheless applied the last-in-time rule, observing that the English court had proceeded impartially, sensitively, and soundly. The court of appeals ducked that "knotty question,"[186] and instead ruled that New York would look to California res judicata law under which the California judgment was not preclusive.[187] With the California case off the table, there were no inconsistent judgments and so the English judgment governed.[188]

Ackerman illustrates the important point that while we search for the proper formal rule, we cannot blind ourselves to legal realism. Both the district court and the court of appeals wanted to apply the English result. They differed only in how to manipulate the rules so as to get there. The widest route to manipulation is nonpreclusion. A court wishing to evade a prior determination would simply identify a defect in the prior judgment's recognizability, validity, finality, or bindingness, which is often doable thanks to those doctrines' complicatedness. So, where F-1 faces a decision from F-2 that disrespected F-1's prior judgment, F-1 might very well be able to ignore F-2's "nonpreclusive" judgment without openly flouting its duty to give full faith and credit.[189] This dose of realism thus drives

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180. 676 F.2d 898 (2d Cir. 1982).
181. *Id.* at 899–900.
182. *Id.* at 900–01.
183. *Id.* at 901.
184. *Id.* at 901.
185. *Id.* at 903.
186. *Id.* at 902 n.5.
187. *Id.* at 905 (ruling that the wife had no meaningful opportunity to litigate in California).
188. *Id.*
189. *See, e.g.* First Ala. Bank of Montgomery, N.A. v. Parsons Steel, Inc. 825 F.2d 1475 (11th Cir. 1987) (treating, on remand, the Alabama judgment as

home the significance of the formal rule's prerequisite of preclusiveness as a path to the desired result.

This subsection's detour into nonpreclusion allows us better to understand the last-in-time rule. The law in the United States is that the last judgment governs—when two prior judgments offer preclusion of a claim or issue but would preclude differently.[190] This detour is also an appropriate introduction to foreign-nation judgments because often the foreign judgment will be nonpreclusive under the foreign nation's narrow res judicata law, and thus not even qualify as an inconsistent judgment.

B. American v. Foreign Judgments

"One of the key problems facing international litigants is the possibility of irreconcilable judgments or proceedings arising out of parallel litigation."[191] How should American law address an inconsistent foreign-nation judgment?

Because our conflicts law developed in the interstate setting rather than the international setting, our law does not show an instinctive wariness of foreign-nation judgments. The last-in-time rule is well-established enough that American courts presume it to apply even to international litigation, at least when two inconsistent foreign-nation judgments arrive at an American court.[192] The rationales of the last-in-time rule carry over from the all-domestic setting to this all-foreign setting.

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non-final in a sequence of Middle District of Alabama, Alabama, and Middle District of Alabama); *cf. e.g.* Herbstein v. Bruetman, 266 B.R. 676, 686 (N.D. Ill. 2001) (treating, on appeal, the Argentine judgment as non-final in a sequence of Southern District of New York, Argentina, and Northern District of Illinois), *aff'd*, 32 F. App'x 158 (7th Cir.), *cert. denied*, 537 U.S. 878 (2002).

190. *See, e.g.* United States v. Wexler, 8 F.2d 880 (E.D.N.Y 1925) (looking to F-1 in a sequence of divorce for adultery; nonappealable, nonreviewable, and hence nonpreclusive state naturalization proceeding approving morality; and federal cancellation of naturalization for immorality); Deere & Co. v. First Nat'l Bank of Clarksdale, 12 So. 3d 516, 522 (Miss. 2009) ("We begin by pointing out the obvious: The 'last-in-time' rule applies only where res judicata could have applied. "); Algazy v. Algazy, 135 N.Y.S.2d 123 (Sup. Ct. 1954) (disregarding F-2 and F-3 judgments in fourfold sequence of Nevada divorce, Romanian decree without jurisdiction, French decree without finality, and New York action), *aff'd mem.* 142 N.Y.S.2d 365 (App. Div. 1955).

191. S.I. Strong, *Recognition and Enforcement of Foreign Judgments in U.S. Courts: Problems and Possibilities*, 33 REV. LITIG. 45, 117 (2014).

192. *See, e.g.* Ambatielos v. Found. Co. 116 N.Y.S.2d 641 (Sup. Ct. 1952) (involving a sequence of contract actions in England, Greece, England, and New York).

Of course, the compulsion to follow the last-in-time rule lessens as we move from full faith and credit into the realm of comity.[193] The American court can consider local interests and policies in the context of special circumstances.[194] Thus, the last-in-time rule might presumptively apply,[195] but the American court can reject the F-2 judgment if F-1's judgment is clearly preferable.[196]

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193. *See* Hilton v. Guyot, 159 U.S. 113, 163–64 (1895) (' 'Comity, in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws. '). *See generally* Christopher R. Drahozal, *Some Observations on the Economics of Comity*, *in* ECONOMIC ANALYSIS OF INTERNATIONAL LAW 147 (Thomas Eger et al. eds., 2014); Joel R. Paul, *Comity in International Law*, 32 HARV. INT'L L.J. 1 (1991).

194. Chromalloy Aeroservs. a Div. of Chromalloy Gas Turbine Corp. v. Arab Republic of Egypt, 939 F. Supp. 907, 913 (D.D.C. 1996) (involving arbitration):

> 'No nation is under an unremitting obligation to enforce foreign interests which are fundamentally prejudicial to those of the domestic forum. *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 937 (D.C. Cir. 1984). '[C]omity *never* obligates a national forum to ignore 'the rights of its own citizens or of other persons who are under the protection of its laws. *Id.* at 942 (emphasis added) (quoting *Hilton v. Guyot*, 159 U.S. 113, 164, 16 S. Ct. 139, 143–44, 40 L. Ed. 95 (1895)[)]. Egypt alleges that, 'Comity is the chief doctrine of international law *requiring* U.S. courts to respect the decisions of competent foreign tribunals. However, comity does not and may not have the preclusive effect upon U.S. law that Egypt wishes this Court to create for it.

195. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 482(2)(e) cmt. g (AM. LAW INST. 1987) ("Courts are likely to recognize the later of two inconsistent foreign judgments, but under Subsection (2)(e) the court may recognize the earlier judgment or neither of them. '); Courtland H. Peterson, *Foreign Country Judgments and the Second Restatement of Conflict of Laws*, 72 COLUM. L. REV. 220, 256–57 (1972) (discussing the failure of the Restatement (Second) of Conflict of Laws to clarify this issue).

196. *Cf.* RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE § 5(c)(ii) (AM. LAW INST. 2006). This provision says that F-3 need not recognize a foreign judgment if 'the judgment is irreconcilable with another foreign judgment entitled to recognition or enforcement under the Act and involving the same parties. The pertinent comment explains that the F-3 court 'should inquire into the circumstances giving rise to the inconsistency" and usually should recognize the F-2 judgment only if the F-2 court had 'considered the other judgment or proceeding and declined to recognize it under standards substantially comparable to the standards set forth in

"Clearly" serves the purpose of enhancing predictability. "Preferable" will turn most heavily on how disrespectfully F-2 considered F-1's judgment.

Accordingly, the highly influential Uniform Act on recognition provides that a foreign-nation judgment *need not* be recognized or enforced if "the judgment conflicts with another final and conclusive judgment."[197] If F-3 does not recognize an F-2 judgment under the Act, then F-3 would look to the F-1 judgment. This provision thus handles two inconsistent foreign-nation judgments arriving at an American court.

What if, of the two inconsistent judgments, the first is American and the second is foreign?[198] Certainly, the flexibility of comity allows F-3 to disregard the foreign F-2. But the inclination might still persist to apply the last-in-time rule presumptively in favor of the foreign-nation judgment.[199] I shall show that the inclination here is misplaced.

One could indeed argue over whether F-3 must disregard the F-2 judgment in favor of an otherwise preclusive American judgment

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this Act. *Id.* cmt. j; *see* Victrix S.S. Co. v. Salen Dry Cargo A.B. 825 F.2d 709, 713–16 (2d Cir. 1987) (looking to F-1, under federal and state law, in sequence of Sweden, England, and Southern District of New York, when F-2 had disregarded F-1's bankruptcy proceeding); *cf.* Films by Jove, Inc. v. Berov, 250 F. Supp. 2d 156, 164–66, 175–77 (E.D.N.Y 2003) (looking to F-1, under federal law, in sequence of France, France, and Eastern District of New York, when F-2's 'interpretation is contradicted by an earlier ruling of the same court, upheld by the court of last resort, in a suit involving the same parties and identical legal issues, and, more significantly, when the interpretation appears very obviously mistaken based on the more probative evidence of Russian law furnished to this court by plaintiffs' experts"), *motion to vacate denied*, 341 F. Supp. 2d 199 (E.D.N.Y 2004).

197. UNIF. FOREIGN–COUNTRY MONEY JUDGMENTS RECOGNITION ACT § 4(c)(4) (2005), 13 (pt. II) U.L.A. 28 (Supp. 2015); *see* UNIF. FOREIGN MONEY–JUDGMENTS RECOGNITION ACT § 4(b)(4) (1962), 13 (pt. II) U.L.A. 59 (2002) (same); Byblos Bank Eur. S.A. v. Sekerbank Turk Anonym Syrketi, 885 N.E.2d 191, 192 (N.Y 2008) (looking to F-1 in sequence of Turkey, Belgium, and New York, when F-2 had exercised *révision au fond* and found the Turkish judgment to be 'affected by substantial error").

198. If the first judgment is foreign and the second is American, the last-in-time rule gives the desirable result. *See, e.g.* Perkins v. Benguet Consol. Mining Co. 132 P.2d 70 (Cal. Dist. Ct. App. 1942) (involving a sequence of ownership actions in the Philippines, New York, and California). But that right result derives less from the reasons for respecting the last judgment, and rather more from the reasons for preferring the local judgment over the foreign judgment.

199. *See* Perkins v. DeWitt, 111 N.Y.S.2d 752 (App. Div. 1952) (looking tentatively to the latest Philippine judgment in a sequence of ownership actions in the Philippines, New York, Philippines, and New York), *rev'g* 94 N.Y.S.2d 177 (Sup. Ct. 1950).

from F-1. This is *Ackerman*'s "knotty question."[200] This question of mandatoriness remains an open one, but I shall argue in support of mandatoriness.

As we have seen, the American Law Institute at first punted on the application of last-in-time to international litigation.[201] Then, in the Restatement (Third) of Foreign Relations Law, the ALI expressly adopted the discretionary approach of the Uniform Act,[202] thereafter attracting some case support.[203] Now, in its proposed statute on recognition, the ALI has extended the Uniform Act's approach, by providing, without case citation and only in a comment to its proposed statute, that F-3 *must not* respect a foreign-nation judgment over an American judgment:

> If recognition or enforcement of a foreign judgment is sought in a court in the United States and the judgment is asserted to be irreconcilable with a judgment rendered by a court in the United States, the court in the United States is obligated to recognize the judgment rendered in the United States and deny

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200. *See supra* text accompanying note 186.

201. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 114 cmt. d (AM. LAW INST. 1971) ("It is uncertain whether the rule of this Section will be applied to judgments rendered in a foreign nation. "); *supra* text accompanying note 96.

202. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 482(2) (AM. LAW INST. 1987) ("A court in the United States need not recognize a judgment of the court of a foreign state if (e) the judgment conflicts with another final judgment that is entitled to recognition "). The pertinent comment went on to say: 'If a later foreign judgment otherwise entitled to recognition in a court in the United States conflicts with an earlier sister-State judgment, there is no principle requiring automatic preference for the sister-State judgment. *Id.* cmt. g. But its only support was the lower-court opinion in *Ackerman*. *See id.* reporters' note 4. There was no section comparable to § 482 in the previous Restatement of Foreign Relations Law, and the new § 482(2)(e) prompted no debate other than on comment g. *See* 60 A.L.I. PROC. 508 (1983) (Prof. Charles Alan Wright) ("But as between a judgment of a sister State and a foreign judgment, I would think there would be not the slightest doubt you have to follow, you are constitutionally compelled to follow, the judgment of other State and to disregard the later judgment of the foreign court. ').

203. *See, e.g.* Derr v. Swarek, 766 F.3d 430, 437 n.4 (5th Cir. 2014) (citing the Restatement provision in a footnote); *In re* Bruetman, 259 B.R. 649, 672 (Bankr. N.D. Ill.) (observing, in a sequence of Southern District of New York, Argentina, and Northern District of Illinois: 'Indeed, parties who litigate to a conclusion in a United States court can hardly expect any United States court to give effect to a subsequent contrary ruling by a foreign court, and that should not be done here. '), *aff'd sub nom.* Herbstein v. Bruetman, 266 B.R. 676, 686 (N.D. Ill. 2001) (treating the Argentine judgment as nonfinal), *aff'd*, 32 F. App'x 158 (7th Cir.), *cert. denied*, 537 U.S. 878 (2002).

> recognition or enforcement to the foreign judgment. This obligation, derived from the command of the Full Faith and Credit Clause of the U.S. Constitution and the implementing legislation, is applicable regardless of whether the foreign action or the action in the United States was commenced first and regardless of which judgment was first entered.[204]

In other words, the ALI finally approved the approach followed in the rest of the world's countries to favor their own judgments. American courts would be wise to get on this bandwagon. The rest of the countries may know what they are doing here. There may even be a value in applying the same rule as other countries do for local-foreign inconsistencies. In any event, the rationales for the last-in-time rule do not carry over to this setting, and so the balance of policies tips to a first-in-time rule. If America were to get on the bandwagon, we would operate under the scheme summarized in the following table:

Treatment of Inconsistent Judgments by American F-3		
F-1	*F-2*	*Rule*
American	American	Last-in-Time
Foreign-Nation	American	Last-in-Time
Foreign-Nation	Foreign-Nation	Presumptively Last-in-Time
American	Foreign-Nation	First-in-Time

First, for the table's last row, the rationale of waiver weakens considerably when F-2 is a foreign-nation court. Although we have come to accept the last-in-time rule's forcing attendance in an

204. RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE § 5(c)(ii) cmt. j (AM. LAW INST. 2006). The early drafts provided in blackletter that an American court *need not* recognize a foreign-nation judgment irreconcilable with an American judgment, but the comment said instead that it *must not*. *E.g. id.* § 5(b)(ii) cmt. i (AM. LAW INST. Preliminary Draft No. 1, 2001). In response to arguments made at an annual meeting, 81 A.L.I. PROC. 292–94 (2004) (Prof. Mary Coombs & Mr. Michael Marks Cohen), the reference to American judgments dropped out of the blackletter, leaving just the comment. *See* RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE reporters' memorandum, at xviii (AM. LAW INST. Proposed Final Draft, 2005) (noting that the section was restructured to address the issue).

American F-2, we should be wary of increasing the compulsion on someone, who has won in the United States, to show up in the foreign-nation forum. We should also be wary of compelling someone, who has shown up abroad, to make what they may view as a hopeless contention that the foreign court should give res judicata effect to a prior American judgment. Indeed, it is puzzling how to contend that failure to argue preclusion under foreign law somehow constitutes waiver of the full faith and credit argument.

Second, an even more powerful point is that the preclusion rationale drops out altogether. If F-2 were within the full faith and credit circle, the binding effect of F-1's judgment would be the same question whether it is faced by F-2 or by F-3. But the res judicata question faced by a foreign-nation F-2 is a different question (should it, under the foreign law, recognize the American F-1 judgment?) from the one faced by an American F-3 (would it, under American full faith and credit, recognize the American F-1 judgment?). Thus F-2's res judicata decision should have little or no preclusive effect in F-3 (even making the unlikely assumption that a foreign nation would give issue preclusion to its own determinations about res judicata). Moreover, even if F-2 was wrong under F-2 law in denying res judicata to F-1's judgment, there was no possibility of getting a supranational court to correct the denial of preclusion.

Third, it is difficult to believe that looking at the later judgment is somehow simpler. If F-3 were instead to look to F-1's judgment, it could avoid the question of recognizability of a foreign-nation judgment and the task of testing the F-2 judgment's validity, finality, and preclusion under foreign law. It should on average reduce the litigatory load to look to the American judgment rather than the foreign-nation judgment.

Fourth, it is hard to work up enthusiasm for the proposition that the foreign-nation judgment is, on average, likely more correct or otherwise more acceptable than the prior American judgment. The foreign-nation court probably used different choice-of-law and substantive doctrines, and employed procedures that probably would not appeal to us, to come to an inconsistent decision. It is not being parochial to presume that F-1 produced a decision as likely reliable as F-2's.

Fifth, going beyond the rationales, independent arguments against the last-in-time rule exist in this context. Honoring the last-in-time would be an invitation to forum-shopping among foreign-nation courts by the F-1 loser, who could either sue abroad on the claim or seek an injunction or declaratory judgment of nonliability. A last-in-time rule would result in "judgment scrubbing," whereby a

compliant foreign-nation court could erase the effects of a loss in the United States.[205] By contrast, domestic forum-shopping is not such a concern, because full faith and credit stands as a defense to shopping.

Sixth, one purpose of the conflict of laws doctrine is to enhance the coherence of the country's legal system.[206] In this situation of conflicting local and foreign judgments, it is not coherent to treat the judgments as equals. The suggestion here is not for blind adherence to the American judgment. The suggestion is that a valid and final American judgment was originally entitled to a certain respect in American courts, and that the intervening foreign-nation judgment had no authority to defeat that respect. Nor was the foreign nation's decision on recognition even focused on that respect. To repeat, the foreign-nation court is operating under a different recognition regime. The foreign-nation judgment was not deciding the respect owed in America, but only respect under the foreign law. In any event, the American F-3 should feel little motivation to honor the judgment of a foreign nation that has refused to honor an American judgment, as they often do.[207]

Seventh, there is no case law standing in the way of the United States adopting a rule of local preference. A tricky illustration of the closest precedents lies in *Derr v. Swarek*.[208]

The first judgment in *Derr* came by voluntary dismissal with prejudice of a Mississippi action by the purchasers of Mississippi farmland against the German sellers.[209] Even though under Mississippi res judicata law the purchasers' claim was extinguished, the second judgment came in a suit by the sellers in a German court, which rejected res judicata to reach the merits of the contract dispute, granted the sellers a declaratory judgment of nonliability, and assessed nearly $300,000 in court costs against the purchasers.[210] For the third action, the sellers resorted to the Southern District of Mississippi to enforce the German judgment for costs.[211]

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205. The allusion is to the 'judgment laundering' practice of getting a compliant court to convert a shaky foreign judgment into an unassailable domestic judgment. CLERMONT, *supra* note 23, at 436–37.

206. *See* Hessel E. Yntema, *The Objectives of Private International Law*, 35 CAN. B. REV. 721, 724, 734–35 (1957) (discussing the view that "the essential objective is to co-ordinate the incidence of legal systems in conflicts cases").

207. Samuel P. Baumgartner, *How Well Do U.S. Judgments Fare in Europe?*, 40 GEO. WASH. INT'L L. REV. 173, 227–31 (2008).

208. 766 F.3d 430 (5th Cir. 2014) (2–1 decision).

209. *Id.* at 435.

210. *Id.*

211. *Id.*

The *Derr* federal district court rejected the German judgment, and the court of appeals affirmed. "Because federal jurisdiction was invoked by way of diversity of citizenship, we apply Mississippi law governing the recognition of foreign judgments."[212] In the federal court of appeals' view, the German court's failure to respect the purchasers' dismissal with prejudice of their claims against the sellers violated Mississippi public policy and rendered meaningless the right of the purchasers to put an end to litigation of their claims. "As the German declaratory judgment and attendant cost award issued only because the German court ignored the res judicata effect of the dismissal with prejudice, the district court did not abuse its discretion in refusing to extend comity to the judgment."[213]

The *Derr* facts seem to suggest a slight complication.[214] In one sense, the judgments were consistent, as the purchasers had lost in both F-1 and F-2.[215] But Germany would have decided differently if it had given the American judgment its claim-preclusive effect. How then can we refine the rule to empower Mississippi to look at Mississippi's prior judgment? We need to include this kind of case—when F-3 wants to look at F-1's judgment to knock out an action upon F-2's judgment—within the problem of inconsistency. Inconsistent judgments have to be made to include the situation where enforcing F-2's judgment in F-3 would defeat the claim preclusive-effect that F-1's judgment would have under its own res judicata law.

The *Derr* federal courts viewed the denial of recognition to the German judgment as a discretionary decision under Mississippi's comity-based state law.[216] They could go the Mississippi way because the case's facts of Mississippi (F-1), Germany (F-2), and Mississippi (F-3) put it outside the reach of any federal compulsion. In any event, because the federal district court had exercised its

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212. *Id.* at 436.

213. *Id.* at 437.

214. This complication is an additional argument against applying the first-in-time rule broadly. *See supra* text accompanying note 36. The last-in-time rule more simply sidesteps the complication in all but this foreign-nation judgment situation. *See supra* text accompanying note 10.

215. The *Pierre v. Doug* hypothetical presents the same complication. *See supra* text accompanying note 175. The first New York judgment and the French judgment are not inconsistent in all senses, as the New York judgment technically could not be used for preclusion in the later action upon the French judgment in F-3. But the New York judgment should have claim-precluded the French action, and so F-3 would want to escape the last-in-time rule.

216. *See* Derr, 766 F.3d at 442, 446 (noting that Mississippi has not enacted the Uniform Act, but it follows the usual public-policy exception to comity).

discretion against the German judgment, the court of appeals did not have to decide whether the district court was obliged to disregard the German judgment, under Mississippi or federal law.[217]

The ALI believes that the general American law should make mandatory the denial of recognition to the foreign-nation judgment.[218] In my view too, based on the reasons above, an American court must disregard a foreign-nation judgment inconsistent with an American judgment. Whether the foreign-nation court just ignored the American judgment, correctly rejected it under the foreign law, or erroneously denied respect under the foreign law, the American court should look to the American judgment. If the foreign country was trying to respect the American judgment but erroneously interpreted American law, that is a tougher call on which there is no case guidance. Because the line between naked disrespect and honest mistake could be rather fine and because many of the arguments for letting the local judgment control still apply, I would persist in saying the American court must disregard such a foreign-nation judgment. If, however, the foreign-nation court were, someday, to become mutually obligated by treaty to give the equivalent of full faith and credit to an American judgment, the balance would tip back to the last-in-time rule.[219]

The ALI simply attributed the mandatory preference for the local judgment to the Full Faith and Credit Clause and Act. I was less certain that these provisions address this point. No case has squarely addressed the point, because the court can duck it by disregarding the foreign judgment "in its discretion" as the *Derr* courts did. When the issue finally arises, I do think that an American court should hold that the preference is mandatory, at least as a matter of federal common law. Although the Uniform Act and some other state laws leave the preference for the local judgment discretionary, the

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217. The same issues are currently on appeal in the Fourth Circuit. The sequence of cases there was District of Maryland, Iraq, District of Maryland. The federal cases were in diversity, and Maryland is a Uniform Act state. *See* Iraq Middle Mkt. Dev. Found. v. Harmoosh, No. 15-CV-01124, 2016 WL 1242598, at *8–9 & n.9 (D. Md. Mar. 30, 2016) (rejecting Iraqi judgment on another ground), *appeal filed*, No. 16-1403 (4th Cir. Filed Apr. 11, 2016).

218. *See supra* text accompanying note 204.

219. An argument against constitutionalizing the preference for an American judgment would be that it might hamper our ability to enter into such treaties. *See generally* Kevin M. Clermont, *Jurisdictional Salvation and the Hague Treaty*, 85 CORNELL L. REV. 89, 124–27 (1999) (discussing similar constitutional issues in the context of jurisdiction). But recall that U.S. CONST. art. IV, § 1 authorizes congressional exceptions to full faith and credit. The implementing legislation could adjust the preference for local judgments.

mandatoriness of the federal law would override it when that federal law was applicable interjurisdictionally. If F-2 is a foreign nation and F-1 and F-3 are the same U.S. state, then state law would govern.

Nonetheless, I ultimately believe that the ALI was right that mandatoriness flows from the Full Faith and Credit Clause and Act. The way they work is to require that an American court give full faith and credit to an American judgment, subject only to narrow exceptions expressly provided by statute or by rare court decision based on a national policy.[220] In the situation under consideration, there is only one prior American judgment, and no statute or strong policy calls for an exception in favor of a last-in-time foreign judgment, so the Clause and Act impose a first-in-time rule.

CONCLUSION

The current American law on inconsistent judgments enshrines the last-in-time rule, despite the fact that it is out of step with the rest of the world's devotion to a broadly applicable first-in-time rule. Although America's law is a bit imprecise, not even defining the idea of "inconsistent" judgments, it shows lack of complete conviction only when the last-in-time judgment loser could not get review in the U.S. Supreme Court or when a prior domestic judgment goes toe-to-toe with a subsequent foreign-nation judgment. It is high time to refine the imprecisions and to resolve the uncertainties.

To do so, this Article proposes the following "blackletter" formulation:[221]

> **INCONSISTENT JUDGMENTS: When two (or more) prior judgments would preclude a claim or issue differently in a subsequent action, the last-in-time of the prior judgments will be recognized as controlling on the claim or issue.**
>
> **If, however, both judgments come from foreign nations, the flexibility of comity means the last-in-**

220. *See* CLERMONT, *supra* note 23, at 429–31 (discussing rule of full faith and credit under 'state-state' and 'state-federal' situations).

221. *See* Kasia Solon Cristobal, *From Law in Blackletter to 'Blackletter Law*, 108 LAW LIBR. J. 181 (2016) (tracing the history of this phrase's meaning from the off-putting use in law of very black Gothic type to the concise statement of the basic principles of a legal subject).

> **time judgment need not be recognized as controlling in circumstances that make the first-in-time resolution appear clearly preferable.**
>
> **Moreover, in an inconsistency between an American judgment and a foreign-nation judgment, including where enforcing the foreign-nation judgment would defeat the claim-preclusive effect that the American judgment would have under its own res judicata law, the foreign-nation judgment will not be recognized as controlling on the claim or issue.**

This formulation realizes the slight advantages of a last-in-time approach, while recognizing needed exceptions for treating foreign-nation judgments. Additionally, it accords with the American cases, intelligently reread, a case law position to which a goodly number of Supreme Court cases have pretty much committed us. Finally, given American law's current exception for foreign-nation judgments, and recalling the incipient acceptance abroad of waiver as an exception to their first-in-time rule, it turns out that America and the rest of the world are not so far apart in the treatment of inconsistent judgments after all. The consequential irony is that comparative law, which prompted my questioning of American law, ultimately reveals convergence and so provides support for the proposed reformulation.

Permissive Appeals in Texas Courts: Reconciling Judicial Procedure with Legislative Intent

Michael J. Ritter*

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I. INTRODUCTION

To make the civil justice system more cost-efficient,[1] the Texas Legislature—joining other states' legislatures and Congress—authorized permissive appeals in Texas state courts.[2] A "permissive appeal" is a direct appeal of an interlocutory order that the trial court has granted a party permission to appeal.[3] Before the Texas Legislature's enactment of the permissive appeal statute, the legislature generally had limited direct appeals in civil cases to appeals from final judgments and to certain categories of interlocutory orders.[4] The permissive appeal statute expanded appellate courts' jurisdiction to include appeals of an interlocutory order when the trial court has significant doubt about its ruling and concludes an immediate appeal would be more cost-efficient than relying on the final-judgment rule.[5] Because an immediate appeal from a variety of interlocutory orders could satisfy the statute's cost-efficiency standard, such orders elude precise categorization. Permissive appeals are thus an "exceptional exception to the final-judgment rule,"[6] which generally limits direct appeals to appeals from final judgments.[7]

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1. *See* Sen. Research Ctr. Engrossed Bill Analysis, Tex. H.B. 274, 82nd Leg. R.S. (2011) [hereinafter 2011 Bill Analysis] (noting the legislature's cost-efficiency goal).

2. Warren W. Harris & Lynne Liberato, *State Court Jurisdiction Expanded to Allow for Permissive Appeals*, 65 TEX. B.J. 31, 31 (2002) (citing TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(d)–(f) (West Supp. 2015) (providing Texas's permissive appeal statute)).

3. *E.g.* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(d)–(f) (containing Texas's permissive appeal statute).

4. Lehmann v. Har-Con Corp. 39 S.W.3d 191, 195 & n. 12 (Tex. 2001). For example, a court of appeals has jurisdiction over a direct appeal of an interlocutory order that appoints a receiver or trustee or that grants or denies a governmental unit's plea to the jurisdiction. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(1), (8).

5. *See infra* Part III.

6. Renée Forinash McElhaney, *Toward Permissive Appeal in Texas*, 29 ST. MARY'S L.J. 729, 744 (1998) (capitalization omitted).

7. *See id.* (recommending that Texas adopt a permissive appeal procedure similar to the federal permissive appeal statute); Benjamin J. Siegel, *Applying a 'Maturity Factor' Without Compromising the Goals of the Class Action*, 85 TEX.

Permissive appeal filings in the courts of appeals have significantly increased in the past five years.[8] From 2001 to 2011, courts of appeals issued opinions in approximately seventy permissive appeals.[9] After the 2011 amendments became effective, courts of appeals have issued opinions disposing of over one hundred permissive appeals.[10] As originally enacted, the permissive appeal statute required a party seeking a permissive appeal to obtain permission from the opposing side, the trial court, and the court of appeals.[11] In 2011, the legislature amended the statute to remove the requirement that the opposing side agree to the appeal.[12] Although petitions for permissive appeal have significantly increased, courts of appeals have been disinclined to regularly accept permissive appeals, expressing

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L. REV. 741, 767 (2007) (noting the federal statute authorizes federal courts of appeals to resolve 'novel legal issues [to] aid[] efficiency and engender[] judicial predictability by resolving legal disputes at the appellate level before conflicting holdings are set down by district courts in the same circuit facing similar individual claims.'); *accord* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a) (providing a person may appeal certain categories of interlocutory orders based on subject matter and party identity). The 'permissive appeal' exception to the final-judgment rule is exceptional also for the reason that appellate court jurisdiction is typically based on a right of appeal, rather than on judicial discretion. *Compare* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a) (providing a person may appeal certain interlocutory orders), *and* § 51.012 (West 2015) (providing a person may appeal a final judgment), *with* § 51.014(d) (providing a "trial court may permit an appeal").

8. A search of the 'Texas' database on WestlawNext for cases mentioning section '51.014(d)' (which contains the permissive appeal requirements in the trial court) from September 1, 2001, to September 1, 2011, returned sixty-six results. The search with the same criteria, conducted on October 29, 2016, for cases after September 1, 2011, returned one hundred forty-five results. However, the prior version of the permissive appeal statute applied to many of the appellate court decisions decided after September 1, 2011. Using a different methodology, Justice Jane Bland and Richard B. Phillips, Jr. determined 149 petitions for permissive appeals have been filed under the 2011 version of the permissive appeal statute. Jane Bland & Richard B. Phillips, Jr. Strategies for Certified Interlocutory Appeals in State Court, *in* Univ. of Tex. SCH. OF L. 26th Annual Conference on State & Federal Appeals, at 6–7 & n.5 (June 9–10, 2016).

9. *See supra* note 7.

10. *See supra* note 7.

11. Act of Sept. 1, 2001, 77th Leg. R.S. ch. 1389, § 51.014(e), 2001 Tex. Gen. Laws 3575 (West) (amended 2003) (current version at TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(e)).

12. *See* Act of Sept. 1, 2011, 82nd Leg. R.S. ch. 203, § 3.01, sec. 51.014, 2011 Tex. Gen. Laws 758. (showing under the prior version of the statute, the parties were required to agree to the appeal and agree that the order involved a controlling question of law) (amended 2013) (current version at TEX. CIV. PRAC. & REM. CODE ANN. § 51.014).

apprehension about appellate jurisdiction and relying upon the policy supporting the final-judgment rule.[13]

Most Texas courts of appeals have not expressly construed the provisions of the permissive appeal statute. In opinions disposing of permissive appeals, however, some courts of appeals have impliedly construed the statute in conflict with other courts.[14] Courts' implied constructions of the statute can be inferred from opinions explaining denials of petitions for permissive appeals, dismissals for want of jurisdiction, and dispositions of permissive appeals on the merits.[15] In the opinions that most clearly address the proper construction of the permissive appeal statute, courts of appeals have considered the statute's plain language and legislative history, as well as federal courts' construction of the analogous federal statute.[16] In addition to the requirements of the statute's plain language, courts of appeals have, in some cases, imposed additional jurisdictional requirements due to a concern about unconstitutionally rendering an advisory opinion.[17] Attempting to reconcile unclear and conflicting authority, some courts have imposed very stringent jurisdictional requirements for permissive appeals that lack a firm foundation in the statute's plain language and rules of statutory construction.[18]

The significant variations in judicial views of the permissive appeal statute might undermine the statute's purpose of promoting

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13. *See infra* Part IV.

14. *Id.*

15. *Id.*

16. *See* Hartford Accident & Indem. Co. v. Seagoville Partners, No. 05-15-00760-CV, 2016 WL 3199003, at *2–4 (Tex. App.—Dallas June 9, 2016, no. pet. h.) (mem. op.) (construing the permissive appeal statute with reference to federal law); Gulf Coast Asphalt Co. L.L.C. v. Lloyd, 457 S.W.3d 539, 544 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (citing McElhaney, *supra* note 6, at 747–49); Gulley v. State Farm Lloyds, 350 S.W.3d 204, 207–208 (Tex. App.—San Antonio 2011, no pet.) (construing the permissive appeal statute with reference to the permissive appeal statute's legislative history).

17. *See, e.g. Hartford Accident & Indem. Co.* 2016 WL 3199003, at *2–4 (concluding the appellant complied with subsection (d) but the statutory requirements were not met because there was no substantive ruling on the controlling question of law); Bank of N.Y Mellon v. Guzman, 390 S.W.3d 593, 596 (Tex. App.—Dallas 2012, no pet.) (noting the court had requested that the parties address the concern that, because 'the trial court[] fail[ed] to rule on the purported controlling issues of law, any opinion issued by this Court would be advisory.').

18. *See, e.g. Guzman*, 390 S.W.3d at 596 (suggesting that without the trial court's substantive ruling on the controlling question of law, the court of appeals opinion would be advisory); Borowski v. Ayers, 432 S.W.3d 344, 347 (Tex. App.—Waco 2013, no pet.) (construing the word 'involves' as requiring a trial court to make a substantive ruling).

cost-efficiency.[19] The relative lack of consistency in the jurisprudence could deter litigants from pursuing permissive appeals and trial courts from granting permission to appeal when a permissive appeal might be extraordinarily more cost-efficient than defaulting to the final-judgment rule.[20] Despite the number of apparent conflicts among the courts of appeals, the Supreme Court of Texas has not yet addressed the proper construction of the permissive appeal statute, and no comprehensive review of the basic jurisdictional requirements and prudential considerations for permissive appeals in Texas courts has yet been published.[21] A definitive clarification of the proper construction of the statute would safeguard the integrity of the permissive appeal procedure.[22] Although courts must strictly construe the permissive appeal statute because the statute is jurisdictional,[23] judicial constructions must be reasonable in light of the statute's primary purpose of promoting cost-efficiency.[24]

This Article posits that the plain language of the Texas permissive appeal statute, strictly construed in light of the statute's primary purpose of promoting cost-efficiency,[25] provides bright-line rules for determining whether a court of appeals has jurisdiction to accept a permissive appeal.[26] Specifically, under a strict plain-language construction, which is informed by the statute's legislative history, the sole jurisdictional pre-requisites to a permissive appeal are that (1) the trial court must permit an appeal in a written order

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19. *See* 2011 Bill Analysis, *supra* note 1 (demonstrating legislature's cost-efficiency goal).

20. *See* Lynne Liberato & Will Feldman, *How to Seek Permissive Interlocutory Appeals in State Court*, 26 APP. ADVOC. 287. 287. 290 (2013) (noting that while the permissive appeal requirements appear straightforward in theory, 'they have proven difficult to satisfy in practice. ').

21. The most recent law journal article discussing permissive appeals in Texas state courts was a 1998 article recommending that Texas adopt a permissive appeal procedure. McElhaney, *supra* note 6. Other analyses of the jurisprudence under the Texas permissive appeal statute have been limited to professional publications that offer overviews on the statute and applicable rules, judicial statistics, and practice tips. *E.g.* Bland & Phillips, *supra* note 8, at 1–21, Connie Pfeiffer, *Permissive Interlocutory Appeals in Texas*, 72 THE ADVOC. (TEX.) 48, 48 (2015); Liberato & Feldman, *supra* note 20, at 290–93; Harris & Liberato, *supra* note 2, at 51–52.

22. *See infra* Part V

23. *See, e.g. Borowski*, 432 S.W.3d at 347 (stating that the exceptional nature of interlocutory appeals requires strict construction).

24. *See* TEX. GOV'T CODE ANN. § 311.021(3) (West 2013) (providing a presumption for judicial construction of code provisions that the Texas Legislature intended 'just and reasonable' results).

25. 2011 Bill Analysis, *supra* note 1.

26. *See infra* Section V.A.2.a & V.A.2.b.

and (2) a party must file a timely application for permissive appeal in the court of appeals.[27] If these two requirements are met, a court of appeals may, in its discretion, accept or reject the appeal.[28] Although some of the permissive appeal statute's provisions guiding a trial court's decision to permit an appeal are relatively obscure, those obscurities should be resolved in favor of promoting cost-efficiency.[29] Furthermore, the failure to comply with the rules of civil and appellate procedure is not a jurisdictional defect, but a court of appeals may consider a deviation from proper procedure in determining whether to exercise its discretionary jurisdiction.[30]

Part II of this Article reviews the legal backdrop, including the federal permissive appeal statute and other states' statutes, against which the Texas Legislature enacted the permissive appeal statute. Part III analyzes the prior and current versions of the permissive appeal statute and the applicable rules of procedure. Part IV provides collections of authorities demonstrating splits among the Texas courts of appeals in construing the statute. Part IV also explicates an emerging view that the permissive appeal statute is a "certified question" statute similar to federal court certification of state-law questions to state courts. Part V outlines relevant principles of statutory construction helpful to separate jurisdictional requirements from prudential considerations, and, in applying those principles, makes recommendations for reconciling judicial procedure with the legislature's intent of promoting cost-efficiency. Part VI briefly concludes this Article.

II. PERMISSIVE APPEALS IN OTHER JURISDICTIONS

Congress adopted a permissive appeal procedure in 1958.[31] When enacting the federal permissive appeal statute, Congress created an exception to the general rule that the appellate jurisdiction of federal courts of appeals is limited to appeals from final judgments.[32]

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27. *Id.*

28. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(f) (West 2015) (providing an appellate court 'may' accept an appeal permitted by the trial court); *see also* TEX. GOV'T CODE ANN. § 311.016(1) (West 2015) (' 'May' creates discretionary authority or grants permission or a power. ').

29. *See* 2011 Bill Analysis, *supra* note 1 (stating the purpose of the bill is to promote cost-efficiency).

30. *See infra* Part V.

31. 28 U.S.C. § 1292 (2012); *see also infra* text accompanying notes 48–54.

32. Note, *Interlocutory Appeals in the Federal Courts Under 28 U.S.C. § 1292(b)*, 88 HARV. L. REV. 607, 608–10 (1975) [hereinafter *Harvard Note*].

Several states followed suit and adopted nearly identical permissive appeal statutes.[33] Other states enacted permissive appeal procedures that somewhat differ from the federal statute.[34]

A. The Federal Permissive Appeal Statute—28 U.S. Code § 1292(b)

Congress codified the federal permissive appeal statute to address judicial consternation about applications of the final-judgment rule.[35] In federal civil appeals, the final-judgment rule generally limits federal appellate courts' jurisdiction to appeals from final judgments.[36] The final-judgment rule requires that, to be appealable, a judgment "be final not only as to all the parties, but as to the whole subject-matter and as to all the causes of action involved" or "final in its nature of matters distinct from the general subject of the litigation."[37] The final-judgment rule tends to promote judicial efficiency by preventing the disruptive effects of appeals from interlocutory orders[38] and preventing cases from being "taken to the appellate court in fragments by successive appeals."[39]

Some judges have argued that there should be exceptions to the final-judgment rule because a strict application of the rule, in some cases, results in a substantial waste of resources.[40] Judge Jerome Frank of the Second Circuit championed the cause, noting "there are cases [in which an appellate court's dismissal] for want of jurisdiction[] works hardship, unnecessary delay and consequently injustice."[41] Acknowledging it would be unwise to require appellate courts to accept any appeal from any interlocutory order, he identified a "middle road."[42] Judge Frank proposed the adoption of a permissive appeal procedure, arguing,

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33. *See infra* Section II.B.
34. *Id.*
35. 28 U.S.C. § 1292(b).
36. Collins v. Miller, 252 U.S. 364, 370–71 (1920).
37. *Id.*
38. Rexford v. Brunswick-Balke-Collender Co. 228 U.S. 339, 346 (1913); *see* Weber v. United States, 484 F.3d 154, 160 (2d Cir. 2007) (denying leave for permissive appeal and noting, with respect to bankruptcy law, '[p]ermitting direct appeal too readily might impede the development of a coherent body of case-law").
39. *Rexford*, 228 U.S. at 346.
40. *E.g.* Audi Vision Inc. v. RCA Mfg. Co. 136 F.2d 621, 626 (2d Cir. 1943) (Frank, J. concurring).
41. *Id.*
42. *Id.*

> The refusal of an interlocutory appeal may, in actual result, deprive a party of any review at all where an appeal from the final decree is likely to be worthless so far as the money already paid out is concerned. The Bills of Rights in the Constitutions of many States provide, in varying forms, that every person ought to obtain justice freely and without being obliged to purchase it, an obviously basic principle of any decent legal system in a democracy. The needlessly excessive cost of litigation violates that principle, since, for ma[n]y citizens, it puts a prohibitive price on justice. A right lost for such want of ability to buy it is no right at all.[43]

Addressing likely criticism, particularly that a permissive appeal procedure would overload appellate courts with interlocutory appeals, Judge Frank noted that the court of appeals should have discretionary jurisdiction to avoid such an outcome, similar to how the Supreme Court of the United States exercises discretionary review over appeals from the federal courts of appeals.[44] He urged the Judicial Conference of the United States[45] to address his proposal and recommend that Congress adopt such a procedure.[46] Although the

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43. *Id.* at 626–27 (internal quotations omitted) (citing Magill v. Lyman, 6 Conn. 59, 62 (1825) (Hosmer, C.J. dissenting)). The Fifth Circuit has also explained that there is a strong justification for a permissive appeal procedure:

> [T]here are occasions which defy precise delineation or description in which as a practical matter orderly administration is frustrated by the necessity of a waste of precious judicial time while the case grinds through to a final judgment as the sole medium through which to test the correctness of some isolated identifiable point of fact, of law, of substance or procedure, upon which in a realistic way the whole case or defense will turn.

Hadjipateras v. Pacifica, S.A. 290 F.2d 697, 703 (5th Cir. 1961).

44. *Audi Vision*, 136 F.2d at 625–28 (Frank, J. concurring); *see* Zalkind v. Scheinman, 139 F.2d 895, 907–08 (2d Cir. 1943) (Clark, J. dissenting) (arguing that Judge Frank's proposal in *Audi Vision* was a slippery slope that would likely lead to appellate courts deciding procedural matters).

45. *Governance & the Judicial Conference*, U.S. COURTS, http://www.uscourts.gov/about-federal-courts/governance-judicial-conference (last visited Sept. 28, 2016) (explaining the Judicial Conference is the national policy-making body for the federal courts).

46. *Audi Vision*, 136 F.2d at 627–28 (Frank, J. concurring); *see* Harold Kleinman, *Federal Courts—Venue—Review of District Court Orders Under 28 U.S.C. 1404(A).—All States Freight, Inc. v. Modarelli, 196 F.2d 1010 (3d Cir. 1952)*, 31 TEX. L. REV. 587, 589 (1953) ("Judge Frank has suggested that a new

Judicial Conference initially rejected Judge Frank's recommendation, it eventually recommended a permissive appeal procedure to Congress.[47]

Congress accepted the Conference's recommendation "without amendment or debate on the basis of recommendations contained in committee reports and hearings."[48] Congress then enacted the federal permissive appeal statute, which provided:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after entry of the order: *Provided, however.* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.[49]

Congress thereby allowed a district court, in civil cases,[50] to permit an appeal of an order that is not otherwise appealable when the judge is of the opinion that an interlocutory appeal should be permitted.[51] If the district court states such an opinion in an order permitting an appeal, a federal appellate court has discretion to accept or reject the appeal.[52] "Since efficiency is the sole policy guiding application of the [federal permissive appeal statute], the struc-

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statute be enacted which would authorize the court of appeals to permit, in its discretion, appeals from interlocutory orders if it determines that that authorization is necessary or desirable to avoid substantial injustice. ').

47. *Harvard Note*, *supra* note 32, at 610–11.

48. *Id.* at 611.

49. 28 U.S.C. § 1292(b) (2016) (emphasis omitted).

50. The federal permissive appeal statute does not apply to criminal cases. United States v. Lowe, 433 F.2d 349, 349 (5th Cir. 1970). Whether a permissive appeal is available in a federal habeas proceeding is still an 'open and enigmatic question. Sampson v. United States, 724 F.3d 150, 159 (1st Cir. 2013).

51. *See* 28 U.S.C. § 1292(b) (providing the current text of the federal permissive appeal statute).

52. *Id.*

ture of the certification procedure suggests a congressional decision to allow the trial court to decide on a case-by-case basis how efficiency can best be achieved."[53] The district court's screening of orders for permissive appeals "serves the dual purpose of ensuring that such review will be confined to appropriate cases and avoiding time-consuming jurisdictional determinations in the court of appeals."[54]

Although the federal statute does not use the term "certification," courts and commentators often use that term to refer to the district court's act of permitting an appeal of an interlocutory order.[55] Federal courts, however, recognize a separate certification procedure by which federal courts certify controlling questions of state law to state courts.[56] As an alternative to staying the proceedings and requiring parties to initiate state court proceedings to pursue an answer to a controlling question of state law, the Supreme Court of the United States explained certification "save[s] time, energy, and resources and helps build a cooperative judicial federalism."[57] In response to the Supreme Court's approval of this certification procedure, several states amended their constitutions to authorize their respective supreme courts to issue advisory opinions answering controlling questions of state law certified by a federal court.[58] Federal courts have, much more recently, distinguished the two procedures, noting that in a permissive appeal, the appellate court's jurisdiction extends to reviewing whether the district court's order was correct and includes any question of law fairly included within the scope of the order.[59]

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53. *Harvard Note*, *supra* note 32, at 612.

54. Coopers & Lybrand v. Livesay, 437 U.S. 463, 474–75 (1978); *but see* Garner v. Wolfinbarger, 433 F.2d 117, 120 (5th Cir. 1970) ("The issue is not one of convenience to the litigants, or even to this court, but of appellate jurisdiction. ').

55. *See, e.g.* White v. Nix, 43 F.3d 374, 376 (8th Cir. 1994) ("This interlocutory appeal comes to us by certification under 28 U.S.C. § 1292(b). '); *Harvard Note*, *supra* note 32, at 612; *see* Martin H. Redish, *The Pragmatic Approach to Appealability in the Federal Courts*, 75 COLUM. L. REV. 89, 108 (1975) (discussing the 'Certification Requirement of 28 U.S.C. § 1292(b)").

56. *See, e.g.* Clay v. Sun Ins. Office Ltd. 363 U.S. 207, 212 (1960) ("Even without such a facilitating statute we have frequently deemed it appropriate to secure an authoritative state court's determination of an unresolved question of its local law. ').

57. Lehman Bros. v. Schein, 416 U.S. 386, 391 (1974).

58. 17A CHARLES ALAN WRIGHT, ET AL. FEDERAL PRACTICE AND PROCEDURE § 4248 (3d ed. April 2016 Update).

59. Yamaha Motor Corp. U.S.A. v. Calhoun, 516 U.S. 199, 204–05 (1996); Hawaii *ex rel.* Louie v. HSBC Bank Nev. N.A. 761 F.3d 1027, 1039 (9th Cir. 2014); Linton v. Shell Oil Co. 563 F.3d 556, 557 (5th Cir. 2009); Nuclear Eng'g Co. v. Scott, 660 F.2d 241, 246 (7th Cir. 1981); *but see* Madison Shipping Corp. v. Nat'l Mar. Union, 282 F.2d 377, 379 (3d Cir. 1960) ("Since this appeal was taken

Conversely, certification of a state-law question limits the state court to advising the federal court only on the controlling question of law. However, the federal permissive appeal statute grants federal appellate courts jurisdiction to answer *any* question necessary to determining whether the district court's order was correct or erroneous, not just the precise question of law that the district judge believed was controlling.[60]

The prerequisites for appellate court jurisdiction under the federal permissive appeal statute are: (1) the district court judge must "certify" (or state in the order) that the order to be appealed satisfies the "controlling question of law" and "material advancement" provisions; (2) a party must timely apply to the court of appeals for permission to appeal; and (3) "the court of appeals must decide in its discretion to exercise interlocutory review."[61] The failure of a party or the district court to identify the precise controlling question of law is not a jurisdictional defect that deprives the court of appeals of jurisdiction, but such a failure may factor into the appellate court's decision about whether to exercise its discretion to accept the permissive appeal.[62]

Federal appellate courts' primary inquiries for determining whether to accept a permissive appeal are whether (1) the order involves "controlling question of law"; (2) there is "substantial ground for difference of opinion" as to that question; and (3) an immediate appeal may materially advance the litigation's ultimate termination.[63] However, a court of appeals may accept or deny a permissive appeal on the basis of any consideration that the court finds persuasive, including docket congestion.[64] While the Supreme Court has suggested that "exceptional circumstances" must "justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment,"[65] it has not yet construed the "controlling question of law" and "material advancement" provisions of the statute.[66] And

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pursuant to Section 1292(b), Title 28 U.S.C. this court's review is limited to controlling questions of law as to which there is a substantial difference of opinion. ').

60. *Yamaha Motor Corp.* 516 U.S. at 205.

61. McFarlin v. Conseco Servs. LLC, 381 F.3d 1251, 1253 (11th Cir. 2004).

62. *Id.* at 1255.

63. *Id.* at 1253.

64. Coopers & Lybrand v. Livesay, 437 U.S. 463, 475 (1978).

65. *Id.* at 475–76 (quoting Fisons Ltd. v. United States, 458 F.2d 1241, 1248 (7th Cir. 1972)).

66. *Accord In re* Cement Antitrust Litig. 673 F.2d 1020, 1026 (9th Cir. 1981); *see also* Tracy Thomas Larsen, *The Appealability of Federal Court Orders Denying Stays in Deference to Concurrent State Court Proceedings*, 59 IND. L.J. 65, 81 (1984) ("Consistent with the congressional policy against interlocutory ap-

while some federal courts have noted that Congress intended the permissive appeal procedure to be applied sparingly[67] and only in "big cases,"[68] the "controlling question of law" and "material advancement" provisions have continued to elude consistent construction in the federal courts of appeals.[69] The Fifth Circuit court of appeals has noted, however, that the broad language of the permissive appeal statute permits "considerable flexibility operating under the immediate, sole and broad control of Judges so that within reasonable limits disadvantages of piecemeal and final judgment appeals might both be avoided."[70]

1. Controlling Question of Law

The federal permissive appeal statute does not clarify what the question of law must control,[71] and "[t]he cases do not interpret the term ['controlling'] literally."[72] "While Congress did not specifically define what it meant by 'controlling,' the legislative history of 1292(b) indicates that this section was to be used only in exceptional situations in which allowing an interlocutory appeal would avoid protracted and expensive litigation."[73] Although some courts have suggested that the determination of the question of law must be dispositive of the order[74] or be applicable to several cases pending be-

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peals, the House report on the bill and early court opinions indicated that permissive appeals should be reserved for exceptional cases.') (footnote and internal quotation marks omitted).

67. Milbert v. Bison Labs. Inc. 260 F.2d 431, 433 (3d Cir. 1958).

68. Redish, *supra* note 55, at 111 (noting *Milbert* established the 'big case' doctrine limiting permissive appeals to big cases to save an extraordinary amount of judicial and private resources).

69. *See* McFarlin v. Conseco Servs. LLC, 381 F.3d 1251, 1256 (11th Cir. 2004) ("We have not, however, previously set out any general principles about when we should exercise our discretionary authority under this important statute.').

70. Hadjipateras v. Pacifica, S.A. 290 F.2d 697. 703 (5th Cir. 1961).

71. 28 U.S.C. § 1292(b) (2016).

72. Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Assocs. Inc. 86 F.3d 656, 659 (7th Cir. 1996).

73. *In re* Cement Antitrust Litig. 673 F.2d at 1026; *see also Harvard Note*, *supra* note 32, at 618 (explaining that at a minimum 'a controlling question of law' .require[s] that reversal result in an immediate effect on the course of litigation and in some savings of resources either to the court system or to the litigants").

74. *See, e.g.* Weber v. United States, 484 F.3d 154, 159 (2d Cir. 2007) ("As we have explained, Congress passed 28 U.S.C. § 1292(b) primarily to ensure that the courts of appeals would be able to 'rule on ephemeral question[s] of law

fore a court,[75] the most prominent construction of "controlling" is that the question of law must control subsequent phases of the litigation.[76] "Although the resolution of an issue need not necessarily terminate an action to be 'controlling,'"[77] courts have held a question of law not to be controlling when the case needs more factual development;[78] when the question of law is committed to the district court's discretion;[79] and when a court determines there is an alternate, dispositive question of law that is not controlling of the litigation.[80] Some federal courts have sought to define more specifically what controlling questions the district court's order should involve.[81] For example, some courts have construed the "question of law" language in the federal statute as limited to pure questions of law.[82] Not included in this more limited construction are questions requiring the application of a fact-intensive legal standard and questions relating to whether a party has satisfied an evidentiary burden.[83]

2. Substantial Ground for Difference of Opinion

There is substantial ground for difference of opinion as to what constitutes "substantial ground for difference of opinion."[84] "The history of the [federal permissive appeal statute] indicates that this requirement was intended to bar frivolous and dilatory appeals."[85] However, federal courts generally have much more narrow-

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that m[ight] disappear in the light of a complete and final record' and to rule on 'knotty legal problems").

75. *See, e.g.* Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro in Amministrazione Straordinaria, 921 F.2d 21, 24 (2d Cir. 1990) ("[P]laintiffs argue that a question of law must be 'controlling' in a wider sense, that is, the resolution of the question must also have precedential value for a number of pending cases. We disagree. ').

76. *See, e.g. Sokaogon Gaming Enter. Corp.* 86 F.3d at 659 ("A question of law may be deemed 'controlling' if its resolution is quite likely to affect the further course of the litigation, even if not certain to do so. ').

77. *Klinghoffer.* 921 F.2d at 24.

78. *E.g.* Int'l Soc'y for Krishna Consciousness, Inc. v. Air Canada, 727 F.2d 253, 256 (2d Cir. 1984).

79. *E.g.* Garner v. Wolfinbarger, 433 F.2d 117, 120 (5th Cir. 1970).

80. *E.g.* Homeland Stores, Inc. v. Resolution Trust Corp. 17 F.3d 1269, 1272 (10th Cir. 1994).

81. McFarlin v. Conseco Servs. LLC, 381 F.3d 1251, 1258 (11th Cir. 2004).

82. *E.g. id.*

83. *Id.* at 1262; Ahrenholz v. Bd. of Trs. of Univ. of Ill. 219 F.3d 674, 676–77 (7th Cir. 2000); Cal. Pub. Emps. Ret. Sys. v. WorldCom, Inc. 368 F.3d 86, 96 (2d Cir. 2004); S.B.L. ex rel. T.B. v. Evans, 80 F.3d 307. 310–11 (8th Cir. 1996).

84. *See infra* Sections II.B & V.A.2.c.

85. *Harvard Note, supra* note 32, at 624.

ly construed the provision.[86] "[I]dentification of a sufficient number of conflicting and contradictory opinions would provide substantial ground for disagreement,"[87] but when the courts of appeals appear in agreement as to the legal principles involved in answering the controlling question of law, there is no substantial ground for difference of opinion.[88] Under this limited construction, "substantial ground for difference of opinion does not exist merely because there is a dearth of cases."[89] The Eleventh Circuit court of appeals has concluded that there is not a substantial ground for difference of opinion when the appellate court is "in 'complete and unequivocal' agreement with the district court."[90]

3. Material Advancement of the Litigation's Ultimate Termination

Federal courts of appeals generally agree that permissive appeals should be limited to exceptional cases.[91] But "neither the statutory language nor the case law requires that if the interlocutory appeal should be decided in favor of the appellant the litigation will end then and there, with no further proceedings in the district court."[92] Federal courts generally have construed the "material advancement" provision as requiring a permissive appeal "to avoid a trial or otherwise substantially shorten the litigation,"[93] or to address a "main" claim involved in the suit.[94] Conversely, procedural rulings that

86. *See infra* notes 93–96 and accompanying text.

87. White v. Nix, 43 F.3d 374, 378 (8th Cir. 1994) (internal quotations omitted).

88. *See* Caraballo-Seda v. Municipality of Hormigueros, 395 F.3d 7, 9 (1st Cir. 2005) ("The fact that two other district courts in Puerto Rico have arrived at a similar holding regarding [the Workforce Investment Act]'s non-preclusive effect on § 1983 claims. supports a finding that no 'substantial ground for difference of opinion' exists."); *see also In re* S. Afri. Apartheid Litig. Nos. 02 MDL 1499(SAS), 02 Civ. 4712(SAS), 02 Civ. 6218(SAS), 03 Civ. 1024(SAS), 03 Civ. 4524(SAS), 2009 WL 5177981, at *2 (S.D.N.Y Dec. 31, 2009) (concluding there is no substantial ground for difference of opinion because the legal principles at issue had been long settled).

89. *White*, 43 F.3d at 378.

90. McFarlin v. Conseco Servs. LLC, 381 F.3d 1251, 1258 (11th Cir. 2004).

91. *In re* Cement Antitrust Litig. 673 F.2d 1020, 1025–26 (9th Cir. 1982); U.S. Rubber Co. v. Wright, 359 F.2d 784, 785 (9th Cir.1966) (per curiam); Milbert v. Bison Labs. Inc. 260 F.2d 431, 433–35 (3d Cir. 1958).

92. Sterk v. Redbox Automated Retail, LLC, 672 F.3d 535, 536 (7th Cir. 2012).

93. *McFarlin*, 381 F.3d at 1259.

94. *Sterk*, 672 F.3d at 536; *see* Caraballo-Seda v. Municipality of Hormigueros, 395 F.3d 7, 9 (1st Cir. 2005) (holding appeal would not materially advance

would not significantly advance the litigation if reversed do not satisfy the "material advancement" provision.[95]

B. Other States Permissive Appeals Procedures

Several states have adopted permissive appeal procedures. Some states have modeled their statutes after the federal statute.[96] Other states have adopted a permissive appeal procedure by judicial rule or have not otherwise adopted a permissive appeal procedure.[97] The significant differences among the state permissive appeal procedures are the standards guiding a trial court's decision of whether to permit an appeal,[98] the types of cases to which the permissive appeal procedure applies and does not apply,[99] and the deadlines for filing a permissive appeal in the appellate court.[100] However, the two recurring themes in state permissive appeal procedures are the goals of

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the litigation's ultimate termination because other claims on the same facts would remain regardless of the appeal).

95. *See* Gottesman v. Gen. Motors Corp. 268 F.2d 194, 196 (2d Cir. 1959) ("It would seem axiomatic that appeals challenging pre-trial rulings upholding pleadings against demurrer could not be effective in bringing nearer the termination of litigation; on the contrary, they only stimulate the parties to more and greater pre-trial sparring apart from the merits. ').

96. *E.g.* KAN. STAT. ANN. § 60-2102(c) (West, Westlaw through 2016 Reg. and Spec. Sesss.); N.M. STAT. ANN. § 39-3-4(A) (West, Westlaw through 2d Reg Sess. 52nd Leg. 2016).

97. *E.g.* ALA. R. APP. P. 5 (West, Westlaw through May 15, 2016); ILL. COMP. STAT. S. CT. RULE. 308 (West, Westlaw through April 1, 2016).

98. *See* COLO. REV. STAT. ANN. § 13-4-102.1 (West, Westlaw through 2d Reg. Sess. 70th Gen. Assembly 2016) (allowing permissive appeals when 'review may promote a more orderly disposition or establish a final disposition of the litigation, and requiring that a majority of judges on the appellate court agree to accept the appeal); CONN. GEN. STAT. ANN. § 52-265a (West, Westlaw through enactments of 2016 Reg. Sess. and 2016 May Spec. Sess.) (providing the order to be appealed must involve a matter of 'substantial public interest' and 'delay may work a substantial injustice"); MINN. R. CIV. APP. P. 103.03 (West, Westlaw through July 1, 2016) (providing for a permissive appeal 'if the trial court certifies that the question presented is important and doubtful").

99. *Compare* COLO. REV. STAT. § 13-4-102.1 (providing for permissive appeals in civil cases), *with* IDAHO CRIM. R. 54.1 (West, Westlaw through Aug. 15, 2016) (allowing permissive appeals in criminal cases).

100. *Compare* MASS. GEN. LAWS ANN. ch. 231, § 118 (West, Westlaw through Ch. 249, except for Chs. 218 and 219, of the 216 2d. Ann. Sess.) (providing thirty days), *with* OR. REV. STAT. ANN. § 19.225 (West, Westlaw through 2016 Reg. Sess. Legislation eff. Through July 1, 2016. Revisions to Acts made by the Oregon Reviser were unavailable at the time of publication.) (providing ten days).

promoting cost-efficiency and the discretion to permit appeals in circumstances described by flexible subjective standards.[101]

III. TEXAS'S PERMISSIVE APPEAL STATUTE & RULES OF PROCEDURE

In 2001, Texas followed suit.[102] Between 2001 and 2011, the Texas Legislature came full circle about whether to model the Texas permissive appeal statute after the federal statute. In early January 2001, House Bill 978 was introduced to codify a permissive appeal procedure nearly identical to the federal permissive appeal statute.[103] The bill, had it been enacted, would have authorized district courts to permit an appeal of an order that was not otherwise appealable if the district court determined that the order involved a controlling ques-

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101. *See* ALA. R. APP. P. 5 (providing permissive appeals when appeal would materially advance the litigation's ultimate termination); ALASKA R. APP. P. 402(b) (West, Westlaw through June 1, 2016) (requiring "the sound policy behind the rule requiring appeals to be taken only from final judgments" to be outweighed by injustice due to the impairment of a legal right or the appeal to materially advance the litigation's ultimate termination); COLO. REV. STAT. ANN. § 13-4-102.1 (providing for permissive appeals when "immediate review may promote a more orderly disposition or establish a final disposition of the litigation"); CONN. GEN. STAT. § 52-265(a) (providing for permissive appeals in matters "of substantial public interest and in which delay may work a substantial injustice"); D.C. CODE ANN. § 11-721 (West, Westlaw through August 20, 2016) (providing for permissive appeals when appeal may materially advance the litigation's ultimate termination); IDAHO APP. R. 12 (West, Westlaw through Aug. 15, 2016) (permitting when the appeal "may materially advance the orderly resolution of the litigation"); IDAHO CRIM. R. 54.1 (same for criminal cases); KAN. STAT. ANN. § 60-2102 (West) (providing for permissive appeals when appeal may materially advance the litigation's ultimate termination); MINN. R. CIV. APP. P. 103.03 (authorizing permissive appeals when the question is "important" and "doubtful"); MISS. R. APP. P. 5 (West, Westlaw through June 1, 2016) (authorizing permissive appeals when "appellate resolution may: (1) Materially advance the termination of the litigation and avoid exceptional expense to the parties; or (2) Protect a party from substantial and irreparable injury; or (3) Resolve an issue of general importance in the administration of justice."); N.M. STAT. ANN. § 39-3-4 (providing for permissive appeals when appeal may materially advance the litigation's ultimate termination); 42 PA. STAT. & CONS. STAT. ANN. § 702 (West, Westlaw through 2016 Reg. Sess. Acts 1 to 101) (same); VT. R. APP. P. 5(b) (West, Westlaw through Aug. 15, 2016) (same).

102. *See infra* notes 104–09 and accompanying text.

103. Tex. H.B. 978, 77th Leg. R.S. (2001) (Introduced Version), http://www.capitol.state.tx.us/tlodocs/77R/billtext/html/HB00978I.htm (last visited Mar. 8, 2016); Actions for HB 978, TEXAS LEGISLATURE ONLINE, http://www.capitol.state.tx.us/BillLookup/Actions.aspx?LegSess=77R&Bill=HB978 (last visited Mar. 8, 2016) (showing HR 978 was filed January 25, 2001).

tion of law, if there was a substantial ground for difference of opinion and if an immediate appeal might materially advance the litigation's ultimate termination.[104] A court of appeals would have been authorized to permit the appeal if an application for permissive appeal was timely filed.[105] Upon consideration by the House Committee on Civil Practices, the bill was modified to require that the parties agree that the "controlling question of law" requirement was satisfied and also agree to the permissive appeal.[106] The House Research Organization's bill analysis noted that supporters of the bill had argued the statute "would promote judicial efficiency by allowing the trial court to certify a question for appeal" so that, if the trial court's ruling was incorrect, "the question could be sent to the appellate court for a ruling, [and] the resolution of the case would be more streamlined and efficient."[107] The Texas Legislature approved the bill, which was signed into law and became effective on September 1, 2001.[108]

In 2005, the legislature amended the permissive appeal statute.[109] House Bill 1294 was introduced to remove the requirement that the parties agree; to authorize any trial court to permit an appeal; and to clarify that if a court of appeals accepted the appeal, the appeal would be governed by the Texas Rules of Appellate Procedure and the date the court accepted the appeal "start[ed] the time for filing the notice of appeal."[110] The bill was modified after consideration by the House Committee on Civil Practices, and modified once again before the bill was engrossed.[111] The House's bill analysis noted that Texas courts of appeals had "shown confusion about the pro-

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104. Tex. H.B. 978, 77th Leg. R.S. (2001) (Introduced Version).

105. *Id.*

106. House Comm. on Civ. Pracs. House Committee Report—Bill Text, Tex. H.B. 978, 77th Leg. R.S. (2001), http://www.capitol.state.tx.us/tlodocs/77R/billtext/html/HB00978H.htm (last visited Mar. 8, 2016).

107. House Comm. on Civ. Pracs. Bill Analysis at 3, Tex. H.B. 978, 77th Leg. R.S. (April 9, 2001), http://www.hro.house.state.tx.us/pdf/ba77R/HB0978.pdf.

108. Actions for HB 978, TEXAS LEGISLATURE ONLINE, http://www.capitol.state.tx.us/BillLookup/Actions.aspx?LegSess=77R&Bill=HB978 (last visited Mar. 8, 2016) (showing HR 978 was filed January 25, 2001).

109. *See infra* notes 116–20 and accompanying text.

110. Tex. H.B. 1294, 79th Leg. R.S. (2005) (Introduced Version), http://www.capitol.state.tx.us/tlodocs/79R/billtext/html/HB01294I.htm (last visited Mar. 8, 2016).

111. Tex. H.B. 1294, 79th Leg. R.S. (2005) (Engrossed Version), http://www.capitol.state.tx.us/tlodocs/79R/billtext/html/HB01294E.htm (last visited Mar. 8, 2016).

cedure for taking a permissive appeal."[112] However, the Senate Committee on State Affairs, echoing this concern in its bill analysis, appears to have addressed the courts' confusion by repealing the provision that appellate courts had discretion to accept permissive appeals.[113] The Senate's modifications were accepted by the House, signed into law, and became effective as of June 18, 2005.[114] This amendment effectively stripped courts of appeals of the discretion to decline to hear permissive appeals.

The legislature amended the permissive appeal statute once again, and most recently, in 2011. House Bill 274 proposed to recodify the provision that granted appellate courts discretion to accept permissive appeals, to remove the requirements that the parties agree to the order permitting appeal, and to treat permissive appeals as accelerated appeals.[115] After consideration by the House Committee on Civil Practice, provisions were added to the bill to authorize any trial court in a civil action to permit an appeal and to do so upon a party's motion or upon the court's own motion.[116] A bill analysis explained that the bill was proposed "for the efficient resolution of certain civil matters in certain Texas courts" [117] and to "make the civil justice system more accessible, more efficient, and less costly to all Texans while reducing the overall costs of the civil justice system to all taxpayers."[118] Another bill analysis noted that the amendments "would

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112. Sen. Comm. on State Affairs, Engrossed Version—Bill Analysis, Tex. H.B. 1294, 79th Leg. R.S. (2005), http://www.capitol.state.tx.us/tlodocs/79R/analysis/html/HB01294E.htm (last visited Mar. 8, 2016).

113. Sen. Comm. on State Affairs, Bill Analysis, Tex. H.B. 1294, 79th Leg. R.S. (2005), http://www.capitol.state.tx.us/tlodocs/79R/analysis/html/HB01294S.htm (last visited Mar. 8, 2016).

114. Actions for HB 1294, TEXAS LEGISLATURE ONLINE, http://www.capitol.state.tx.us/BillLookup/Actions.aspx?LegSess=79R&Bill=HB1294 (last visited Mar. 8, 2016).

115. Tex. H.B. 274, 82d Leg. R.S. (2011) (Introduced Version), http://www.capitol.state.tx.us/tlodocs/82R/billtext/html/HB00274I.htm (last visited Mar. 8, 2016).

116. House Comm. on Judiciary & Civ. Juris. House Committee Report—Bill Text, Tex. H.B. 274, 82d Leg. R.S. (2011), http://www.capitol.state.tx.us/tlodocs/82R/billtext/html/HB00274H.htm (last visited Mar. 8, 2016).

117. Sen. Comm. on State Affairs, Engrossed Version—Bill Analysis, Tex. H.B. 274, 82d Leg. R.S. (2011), http://www.capitol.state.tx.us/tlodocs/82R/analysis/html/HB00274E.htm (last visited Mar. 8, 2016).

118. Sen. Comm. on State Affairs, Bill Analysis, Tex. H.B. 274, 82d Leg. R.S. (2011),

not cause a flood of new appeals" because the amendments "provide[d] for a two-tiered system of gate keeping to prevent inappropriate appeals."[119] The Senate approved the bill, which was signed into law and became effective on September 1, 2011.[120]

The current version of Texas's permissive appeal statute provides:

> (d) On a party's motion or on its own initiative, a trial court in a civil action may, by written order, permit an appeal from an order that is not otherwise appealable if:
>
> (1) the order to be appealed involves a controlling question of law as to which there is a substantial ground for difference of opinion; and
>
> (2) an immediate appeal from the order may materially advance the ultimate termination of the litigation.[121]

The permissive appeal procedure is not available for actions under the Family Code.[122] The legislature provided that a trial court's order permitting an appeal does not automatically stay the proceedings.[123] Either the parties must agree to the stay or the trial court or court of appeals must order a stay of the proceedings.[124] The statute further provides:

> (f) An appellate court may accept an appeal permitted by Subsection (d) if the appealing party, not later than the 15th day after the date the trial court signs the order to be appealed, files in the court of appeals having appellate jurisdiction over the action an application

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http://www.capitol.state.tx.us/tlodocs/82R/analysis/html/HB00274S.htm (last visited Mar. 8, 2016).

119. House Comm. on Judiciary & Civ. Juris. Bill Analysis at 6, Tex. H.B. 274, 82d Leg. R.S. (2011), http://www.hro.house.state.tx.us/pdf/ba82R/HB0274.pdf (last visited Oct. 23, 2016).

120. History for HB 274, TEXAS LEGISLATURE ONLINE, http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=82R&Bill=HB274 (last visited Mar. 8, 2016).

121. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(d), (f) (West Supp. 2015). This Article refers to subsection (d)(1) as "the 'controlling question of law' provision" and subsection (d)(2) as "the 'material advancement' provision.

122. *Id.* § 51.014(d-1).

123. *Id.* § 51.014(e).

124. *Id.*

> for interlocutory appeal explaining why an appeal is warranted under Subsection (d). If the court of appeals accepts the appeal, the appeal is governed by the procedures in the Texas Rules of Appellate Procedure for pursuing an accelerated appeal. The date the court of appeals enters the order accepting the appeal starts the time applicable to filing the notice of appeal.[125]

Shortly before the 2011 amendments became effective, the Supreme Court Advisory Committee met to discuss rules of procedure to implement the amendments.[126] At the Committee's meeting, Professor Dorsaneo described the effect of the 2011 amendments as follows: "[T]he parties' agreement to this interlocutory appeal is no longer a statutory requirement, so it is considerably more like what it was modeled on, 28 United States Code, section 1292(b). The parties' agreement aspect has been removed."[127] The Committee discussed the mechanics of how a trial court should permit an appeal, focusing primarily on whether the order to be appealed and the order permitting the appeal should be in the same written order.[128] At the Committee's recommendation, the Supreme Court of Texas promulgated Texas Rule of Civil Procedure 168, which provides in whole:

> On a party's motion or on its own initiative, a trial court may permit an appeal from an interlocutory order that is not otherwise appealable, as provided by statute. Permission must be stated in the order to be appealed. An order previously issued may be amended to include such permission. The permission must identify the controlling question of law as to which there is a substantial ground for difference of opinion, and must state why an immediate appeal may materi-

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125. *Id.* § 51.014(f).

126. *Meeting of the Supreme Court Advisory Committee*, TXCOURTS.GOV (Aug. 26, 2011), http://www.txcourts.gov/All_Archived_Documents/SupremeCourtAdvisoryCommittee/Meetings/2011/082611-trans.pdf [hereinafter *'Advisory Committee Meeting*"].

127. *Id.* at 21923 (comments of Professor William V. Dorsaneo III); *see* Liberato & Feldman, *supra* note 19, at 287 (noting that after the 2011 amendments, '[t]he state system for obtaining permissive interlocutory appeals now closely resembles the procedure governing federal interlocutory appeals").

128. *Advisory Committee Meeting*, *supra* note 126, at 21921–87.

> ally advance the ultimate termination of the litigation.[129]

The Supreme Court of Texas also promulgated Texas Rule of Appellate Procedure 28.3 to "set[] out the corollary requirements for permissive appeals in the courts of appeals."[130] The eleven subsections of Rule 28.3 require the party seeking a permissive appeal to file a "petition" (or "application" as the statute provides) for permissive appeal; provide where and when to file the petition; describe a petition's necessary contents, which include the order to be appealed; and provide rules for service, filing responses or cross-petitions, the length of the petition, and the filing of a docketing statement.[131] Rule 28.3 also provides that if an appellate court grants a petition for permissive appeal, "a notice of appeal is deemed to have been filed" on the date the appellate court grants the petition.[132]

IV JUDICIAL CONSTRUCTION OF TEXAS'S PERMISSIVE APPEAL STATUTE

Although permissive appeals dramatically increased after the 2011 amendments, appellate courts have been reluctant to accept them. This reluctance stems from judicial deference to the final-judgment rule and skepticism that appellate jurisdiction under the Texas permissive appeal statute is similar to appellate jurisdiction under the federal permissive appeal statute.[133] Because courts of appeals deny petitions for permissive appeals more often than they grant them, the many opinions disposing of permissive appeals tend to construe the statute in terms of what is not authorized rather than what is authorized.[134] In many cases, courts have re-cast prudential

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129. TEX. R. CIV. P. 168.

130. *Id.* cmt. Prior to the 2011 amendments to the permissive appeal statute, Rule 28.2 governed agreed appeals of interlocutory orders. *Id.* R. 28.2. *Accord id.* R. 28.3 cmt. ("Rule 28.2 applies only to appeals in cases that were filed in the trial court before September 1, 2011.").

131. *Id.* R. 28.3(a)–(j).

132. *Id.* R. 28.3(k). Rule 28.3(j) provides the petition will be determined no earlier than ten days after the petition is filed unless the appellate court orders otherwise. *Id.* R. 28.3(j).

133. *See infra* Sections IV.B & IV.C.

134. *See* Bland & Phillips, *supra* note 8, at 8–12 (describing cases in which courts have granted, denied, and dismissed petitions for permissive appeal); *cf.* Michael E. Solimine, *Revitalizing Interlocutory Appeals in the Federal Courts*, 58 GEO. WASH. L. REV. 1165, 1174 (1990) (noting "how few certified appeals are accepted by the [federal] circuit courts").

considerations supporting the denial of petitions for permissive appeal as statutory pre-requisites to appellate jurisdiction.[135] Conversely, appellate court opinions disposing of permissive appeals on the merits implicitly reflect views of what is sufficient under the statute. A comprehensive review of appellate court opinions reveals significant conflicts in how the courts of appeals construe the permissive appeal statute. Unlike the Supreme Court of the United States, which has clarified the federal permissive appeal statute,[136] the Supreme Court of Texas has not yet delineated the scope of appellate court jurisdiction under the Texas statute or the interlocutory orders to which permissive appeals should be limited.

A. Opinions in Accepted Permissive Appeals

After the 2011 amendments became effective, Texas courts of appeals have accepted permissive appeals in cases that implicitly clarify what orders satisfy the "controlling question of law" and "material advancement" provisions. Courts of appeals have granted permission to appeal orders denying motions for summary judgment;[137] granting partial summary judgment;[138] denying a non-governmental entity's plea to the jurisdiction;[139] granting a motion to dismiss;[140] and determining which state's law applies to the suit.[141] The "con-

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135. *See infra* Section IV.C.

136. Coopers & Lybrand v. Livesay, 437 U.S. 463, 475 (1978).

137. *E.g.* Anderson v. Stiniker, No. 07-16-00214-CV, 2016 WL 3364860, at *1 (Tex. App.—Amarillo June 15, 2016, no. pet. h.) (per curiam) (mem. op. order granting petition for permissive appeal); Montalvo v. Lopez, 466 S.W.3d 290, 290 (Tex. App.—San Antonio 2015, pet. filed); Arlington Surgicare Partners, Ltd. v. CFLS Invests. LLC, No. 02-15-00090-CV, 2015 WL 5766928, at *1 (Tex. App.—Fort Worth Oct. 1, 2015, no pet.) (mem. op.); Coll. Station Med. Ctr. LLC v. Kilaspa, No. 10-14-00374-CV, 2015 WL 4504361, at *2 (Tex. App.—Waco July 23, 2015, pet. filed); TIC Energy & Chem. Inc. v. Martin, 488 S.W.3d 344, 345 (Tex. App.—Corpus Christi 2015), *rev'd on other grounds*, No. 15-0143, 2016 WL 3136877 (Tex. June 3, 2016).

138. Johnson v. Liberty Cnty. No. 09-15-00410-CV, 2016 WL 4040143, at *3 (Tex. App.—Beaumont July 28, 2016, no. pet. h.); Doctors Hosp. at Renaissance, Ltd. v. Andrade, No. 13-15-00046-CV, 2015 WL 3799425, at *1 (Tex. App.—Corpus Christi June 18, 2015), *rev'd*, No. 15-0563, 2016 WL 3157535, at *1 (Tex. May 27, 2016) (holding court of appeals erred in determining a fact issue precluded summary judgment).

139. White Point Minerals, Inc. v. Swantner, 464 S.W.3d 884, 885 (Tex. App.—Corpus Christi 2015, no pet.).

140. Davis v. Motiva Enters. L.L.C. No. 09-14-00434-CV, 2015 WL 1535694, at *1 (Tex. App.—Beaumont Apr. 2, 2015, pet. denied) (mem. op.).

141. Merritt, Hawkins & Assocs. LLC v. Caporicci, No. 05-15-00851-CV, 2016 WL 1757251, at *1 (Tex. App.—Dallas May 2, 2016, no. pet. h.) (mem. op.);

trolling questions of law" in these cases have ranged from pure questions of substantive law, such as the constitutionality of a statute[142] and the construction or validity of contract, deed, or judgment,[143] to mixed substantive–procedural questions such as whether parties have demonstrated their entitlement to judgment as a matter of the applicable substantive law.[144]

B. Opinions Denying Permissive Appeals

Neither the permissive appeal statute nor Texas Rule of Appellate Procedure 28.3 expressly provides appellate courts with standards for determining whether to grant or deny a petition.[145] In the absence of express guidance, courts of appeals have considered the appealing party's compliance with the permissive appeal statute and the applicable rules of procedure. Courts of appeals generally require a party filing a petition for permissive appeal to "meet[] precise substantive requirements."[146] In some cases, courts of appeals have denied petitions for permissive appeal without specifically explaining what substantive requirement has not been met.[147] In other cases, courts of appeals have explained their denial of petitions for permis-

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Am. Nat'l Ins. Co. v. Conestoga Settlement Tr. 442 S.W.3d 589, 592–93 (Tex. App.—*San Ant*onio 2014, pet. denied); Winspear v. Coca-Cola Refreshments, USA, Inc. No. 05-13-00712-CV. 2014 WL 2396142, at *1 (Tex. App.—Dallas Apr. 9, 2014, pet. denied) (mem. op.).

142. *E.g.* Comcast Cable of Plano, Inc. v. City of Plano, 315 S.W.3d 673 (Tex. App.—Dallas 2010, no pet.).

143. *E.g.* Orca Assets, G.P. L.L.C. v. Dorfman, 470 S.W.3d 153, 155–56 (Tex. App.—Fort Worth 2015, pet. filed).

144. *E.g.* TIC Energy & Chem. Inc. v. Martin, 488 S.W.3d 344, 349 (Tex. App.—Corpus Christi 2015); *see also* Bland & Phillips, *supra* note 8, at 10–11 (listing interlocutory orders reviewed and substantive issues decided in permissive appeals).

145. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(d)–(f) (West Supp. 2015); TEX. R. APP. P. 28.3.

146. Pfeiffer, *supra* note 21, at 48.

147. *E.g.* Corley v. Hendricks, No. 02-16-00141-CV. 2016 WL 3213345, at *1 (Tex. App.—Fort Worth June 9, 2016, no. pet. h.) (per curiam) (mem. op.); Silver v. Tabletop Media, LLC, No. 05-16-00205-CV. 2016 WL 3006371, at *1 (Tex. App.—Dallas May 25, 2016, no. pet. h.) (mem. op.); Mercury Cty. Mut. Ins. Co. v. Hayman, No. 10-15-00014-CV. 2015 WL 457946, at *1 (Tex. App.—Waco Jan. 29, 2015, no pet.) (per curiam) (giving as the full text of the opinion, 'The Petition for Permission to Appeal Interlocutory Order filed on January 16, 2015 is denied. Accordingly, the appeal is dismissed for want of jurisdiction. ').

sive appeal based, in whole or in part, upon a failure to comply with Rule 28.3,[148] including the following:

- The petition does not contain the contents required by Rule 28.3, including a table of contents, index of authorities, issues presented, and a statement of facts.[149]

- The petition does not contain a copy of the written order in which the trial court granted permission to appeal as required by Rule 28.3(e)(2).[150]

- The petition does not argue clearly and concisely why the order to be appealed involves a controlling question of law as required by Rule 28.3(e)(4).[151]

If the petition complies with Rule 28.3(e)(2), then a copy of the order to be appealed will be attached to the petition.[152] When considering the order to be appealed, courts of appeals have denied review based on an order's failure to comply with Rule 168, including the following:

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148. Botla v. Del Toro, No. 04-15-00061-CV, 2015 WL 1089466, at *1 (Tex. App.—San Antonio Mar. 11, 2015, pet. dism'd) (mem. op.) (per curiam); Jefferson Cnty. Texas v. Swain, 452 S.W.3d 881, 882 (Tex. App.—Beaumont 2014, pet. denied); Jefferson Cnty. v. Swain, No. 09-14-00347-CV, 2014 WL 4952280, at *1 (Tex. App.—Beaumont Oct. 2, 2014, no pet.) (mem. op.); Edom Corner, LLC v. It's the Berry's, LLC, No. 12-14-00131-CV, 2014 WL 2609732, at *1 (Tex. App.—Tyler June 11, 2014, no pet.) (mem. op.) (per curiam).

149. Hernandez v. Dep't of Family & Protective Servs. 408 S.W.3d 8, 9 (Tex. App.—El Paso 2012, no pet.); Hernandez v. Dep't of Family & Protective Servs. 392 S.W.3d 188, 190 (Tex. App.—El Paso 2012, no pet.).

150. Faire v. FMP SA Mgmt. Grp. LLC, No. 04-15-00315-CV, 2015 WL 3503691, at *1 (Tex. App.—San Antonio June 3, 2015, no pet.) (mem. op.) (per curiam); Grace Instrument Indus. LLC v. Schmidt, No. 14-15-00390-CV, 2015 WL 3460559, at *1 (Tex. App.—Houston [14th Dist.] May 28, 2015, no pet.) (mem. op.) (per curiam).

151. *In re* Estate of Fisher, 421 S.W.3d 682, 685 (Tex. App.—Texarkana 2014, no pet.); *Hernandez*, 408 S.W.3d at 9; *Hernandez*, 392 S.W.3d at 190; Commerce & Indus. Ins. Co. v. Am. Jet Int'l Corp. No. 01-14-00488-CV, 2015 WL 2228423, at *1 (Tex. App.—Houston [1st Dist.] May 12, 2015, no pet.) (mem. op.) (per curiam).

152. TEX. R. APP. P. 28.3(e)(2).

- The order does not contain the trial court's permission to appeal.[153]
- The order does not identify the controlling question of law.[154]
- The order does not state the basis for the trial court's ruling or that the trial court made a ruling on the controlling question of law.[155]
- The order does not state why an immediate appeal would materially advance the litigation's ultimate termination.[156]

In other cases, courts of appeals have denied petitions for permissive appeal because the appellate court, disagreeing with the

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153. *E.g.* $30,459.00 in U.S. Currency v. State, No. 10-16-00114-CV, 2016 WL 1722224, at *1 (Tex. App.—Waco Apr. 28, 2016, no pet.) (mem. op.); Stancu v. Pace Realty Corp. No. 05-16-00047-CV, 2016 WL 658973, at *1 (Tex. App.—Dallas Feb. 18, 2016, no pet.) (mem. op.); Heinrich v. Strasburger & Price, L.L.P. No. 01-15-00473-CV, 2015 WL 5626507, at *1 (Tex. App.—Houston [1st Dist.] Sept. 24, 2015, no pet.) (mem. op.); Colvin v. B. Spencer & Assocs. P.C. No. 01-15-00247-CV, 2015 WL 2228728, at *1 (Tex. App.—Houston [1st Dist.] May 12, 2015, no pet.) (mem. op.) (per curiam); Bell v. Harris, No. 05-14-01281-CV, 2015 WL 302775, at *1 (Tex. App.—Dallas Jan. 23, 2015, no pet.) (mem. op.).

154. Armour Pipe Line Co. v. Sandel Energy, Inc. No. 14-16-00010-CV, 2016 WL 514229, at *2 (Tex. App.—Houston [14th Dist.] Feb. 9, 2016, no pet.) (mem. op.) (per curiam).

155. *E.g.* City of Houston v. Proler, No. 14-16-00030-CV, 2016 WL 1047889, at *4 (Tex. App.—Houston [14th Dist.] Mar. 15, 2016, no pet.) (mem. op.); *Armour Pipe Line*, 2016 WL 514229, at *4; De La Torre v. AAG Properties, Inc. No. 14-15-00874-CV, 2015 WL 9308881, at *2 (Tex. App.—Houston [14th Dist.] Dec. 22, 2015, no. pet.) (mem. op.) (per curiam); Vestalia, Ltd. v. Taylor-Watson, No. 01-15-00332-CV, 2015 WL 3799505, at *1 (Tex. App.—Houston [1st Dist.] June 18, 2015, no pet.); Great Am. E&S Ins. Co. v. Lapolla Indus. Inc. No. 01-14-00372-CV, 2014 WL 2895770, at *2 (Tex. App.—Houston [1st Dist.] June 24, 2014, no pet.) (mem. op.) (per curiam); McCroskey v. Happy State Bank, No. 07-14-00027-CV, 2014 WL 869577, at *1 (Tex. App.—Amarillo Feb. 28, 2014, no pet.) (mem. op.); Long v. State, No. 03-12-00437-CV, 2012 WL 3055510, at *1 (Tex. App.—Austin July 25, 2012, no pet.) (mem. op.). In other cases, courts have suggested they would not have denied the petition for permissive appeal if something in the record reflected the trial court's substantive ruling on the specific legal issue presented to the appellate court for termination. Stewart Title Guar. Co. v. Vantage Bank Tex. No. 04-15-00228-CV, 2015 WL 2124802, at *2 (Tex. App.—San Antonio May 6, 2015, no pet.) (mem. op.) (per curiam); *McCroskey*, 2014 WL 869577, at *1.

156. *In re* Estate of Marshall, No. 04-15-00521-CV, 2015 WL 5245268, at *1 (Tex. App.—San Antonio Sept. 9, 2015, no pet.) (mem. op.) (per curiam).

trial court, concludes (1) the order to be appealed does not involve a controlling question of law as to which there is a substantial ground for difference of opinion;[157] or (2) immediate appeal would not materially advance the litigation's ultimate termination, and given the following reasons:[158]

- The order to be appealed "may require [the court of appeals] to consider and decide more questions than just a single 'controlling question of law.'"[159]
- The controlling "question of law" is not specific enough because there are several sub-questions of law.[160]

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157. Courts of appeals have denied petitions for permissive appeal when the petition fails to convince the court of appeals that the order involves a controlling question of law as to which there is a substantial ground for a difference of opinion. Warren v. Weiner, No. 01-15-00432-CV, 2015 WL 4627404, at *1 (Tex. App.—Houston [1st Dist.] Aug. 4, 2015, no pet.) (mem. op.) (per curiam); Xenos Yuen v. Waller Cnty. Appraisal Dist. No. 01-14-00150-CV, 2014 WL 1803007, at *1 (Tex. App.—Houston [1st Dist.] May 6, 2014, no pet.) (mem. op.) (per curiam). Courts of appeals have also denied petitions because they disagree with the trial court's conclusion that its order involves a controlling question of law. Trailblazer Health Enters. LLC v. Boxer F2, L.P. No. 05-13-01158-CV, 2013 WL 5373271, at *1 (Tex. App.—Dallas Sept. 23, 2013, no pet.) (mem. op.) (per curiam); WC Paradise Cove Marina, LP v. Herman, No. 03-13-00569-CV, 2013 WL 4816597, at *1 (Tex. App.—Austin Sept. 6, 2013, no pet.) (mem. op.); Tex. Farmers Ins. Co. v. Minjarez, No. 08-12-00272-CV, 2012 WL 5359284, at *1 (Tex. App.—El Paso Oct. 31, 2012, no pet.) (mem. op.).

158. *See In re* Estate of Fisher, 421 S.W.3d 682, 685–86 (Tex. App.—Texarkana 2014, no pet.) (dismissing for want of jurisdiction and noting purpose of statute is judicial economy, which would not be served if permissive appeal is allowed at this stage, since an unhappy party is free to appeal the order which would be expected to result soon from the court's summary judgment ruling—an order admitting the will to probate and issuing letters testamentary and an order on those issues was a final judgment in the probate context); Autobuses Ejecutivos, LLC v. Cuevas, No. 05-13-01379-CV, 2013 WL 6327207, at *1 (Tex. App.—Dallas Dec. 4, 2013, no pet.) (mem. op.); *Trailblazer Health Enters.* 2013 WL 5373271, at *1.

159. Johnson v. Walters, No. 14-15-00759-CV, 2015 WL 9957833, at *1 (Tex. App.—Houston [14th Dist.] Nov. 17, 2015, no pet.) (mem. op.) (per curiam); *but see* Houston Expl. Co. v. Wellington Underwriting Agencies, Ltd. 352 S.W.3d 462, 468 (Tex. 2011) (affirming judgment of court of appeals even though the trial court presented two controlling questions of law and the court of appeals answered one so as to moot the other).

160. *Armour Pipe Line*, 2016 WL 514229, at *3–4.

- A fact issue would or might preclude the court of appeals from deciding the question of law.[161]

- The trial court's ruling and the question of law are not "controlling" because the trial court ruled on only one facet of the dispute that was not determinative of the ultimate dispute between the parties.[162]

- There is no ground for substantial difference of opinion regarding the controlling question of law because the question relates to a "well-settled" area of the law or there is no conflicting authority on the legal issue.[163]

- The question of law is not controlling and appeal would not advance the litigation's ultimate termi-

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161. *Id.* at *3; Undavia v. Avant Med. Group, P.A. 468 S.W.3d 629, 634-635 (Tex. App.—Houston [14th Dist.] 2015, no pet.); Fertitta Hosp. LLC v. O'Balle, No. 01-14-00193-CV. 2014 WL 5780329, at *4 (Tex. App.—Houston [1st Dist.] Nov. 6, 2014, no pet.) (mem. op.); *In re Estate of Fisher.* 421 S.W.3d at 685; *but see* Diamond Products Int'l, Inc. v. Handsel, 142 S.W.3d 491, 496 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (Frost, J. concurring) ("[T]hough it may be a rare occurrence, it is possible that, in some cases, a controlling question of law as to which there is substantial ground for difference of opinion might arise in the context of determining whether a fact issue exists in a summary-judgment context.').

162. Patel v. Patel, No. 05-16-00575-CV. 2016 WL 3946932, at *2 (Tex. App.—Dallas July 19, 2016, no pet. h.) (mem. op.); Austin Commercial, L.P. v. Tex. Tech Univ. No. 07-15-00296-CV. 2015 WL 4776521, at *2 (Tex. App.—Amarillo Aug. 11, 2015, no pet.) (mem. op.) (per curiam); *In re Estate of Fisher.* 421 S.W.3d at 684.

163. Workers' Comp. Sols. v. Tex. Health, L.L.C. No. 05-15-01504-CV. 2016 WL 945571, at *1 (Tex. App.—Dallas Mar. 14, 2016, no pet.) (mem. op.); Sill v. Forner, No. 05-15-00913-CV. 2015 WL 5795735, at *1 (Tex. App.—Dallas Oct. 5, 2015, no pet.) (mem. op.); Phoenix Energy, Inc. v. Breitling Royalties Corp. No. 05-14-01153-CV. 2014 WL 6541259, at *2 (Tex. App.—Dallas Oct. 17. 2014, no pet.) (mem. op.); Jones v. Neil, No. 05-14-00617-CV. 2014 WL 3605747. at *1 (Tex. App.—Dallas July 21, 2014, no pet.) (mem. op.); Target Corp. v. Ko, No. 05-14-00502-CV. 2014 WL 3605746, at *1 (Tex. App.—Dallas July 21, 2014, no pet.) (mem. op.); *but see* Anderson v. Stiniker, No. 07-16-00214-CV. 2016 WL 3364860, at *1 (Tex. App.—Amarillo June 15, 2016, no pet. h.) (per curiam) (mem. op. order granting petition for permissive appeal) (noting parties argued that the trial court's order involved an issue of first impression).

> nation because the question of law relates to the admissibility of evidence.[164]

Appellate courts' opinions denying petitions for permissive appeal include a variety of reasons for declining to accept a permissive appeal. Many of these reasons are at odds with federal courts' construction of the federal statute on which the Texas statute was modeled. Under some courts' rationales for denying petitions, some of the permissive appeals that other courts have accepted should not have been—and could not have been—accepted.[165]

While at least one court of appeals has suggested how the Texas statute's "controlling question of law" and "material advancement" provisions should be construed,[166] Texas courts of appeals have not yet developed a clear and uniform construction of the permissive appeal statute.[167] In *Gulf Coast Asphalt Co. L.L.C. v. Lloyd*, the court of appeals suggested the permissive appeal statute's provisions should be construed as follows: "If resolution of the question will considerably shorten the time, effort, and expense of fully litigating the case, the question is controlling."[168] Furthermore, "[s]ubstantial grounds for disagreement exist when the question presented to the court is novel or difficult, when controlling circuit law is doubtful, when controlling circuit law is in disagreement with oth-

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164. Gunter v. Empire Pipeline Corp. 395 S.W.3d 269, 271 (Tex. App.—Dallas 2013, no pet.).

165. *Compare* TIC Energy & Chem. Inc. v. Martin, 488 S.W.3d 344, 345–50 (Tex. App.—Corpus Christi 2015) (affirming trial court's denial of motion for summary judgment in permissive appeal case because the movant did not 'meet its summary judgment burden to establish its entitlement to judgment as a matter of law"), *rev'd*, No. 15-0143, 2016 WL 3136877 (Tex. June 3, 2016), *with* Corp. of President of Church of Jesus Christ of Latter-Day Saints v. Doe, No. 13-13-00463-CV 2013 WL 5593441, at *2 (Tex. App.—Corpus Christi Oct. 10, 2013, no pet.) (mem. op.) (denying a petition for permissive appeal because whether a movant demonstrated it was entitled to judgment as a matter of law was not a 'controlling question of law' because the controlling question of law was not specific enough). The court in *Hartford Accident & Indemnity Company v. Seagoville Partners* explained the question of law as to whether a party met its summary judgment burden was not necessarily a question of substantive law. *See* No. 05-15-00760-CV 2016 WL 3199003, at *2–4 & n.2 (Tex. App.—Dallas June 9, 2016, no pet. h.) (mem. op.).

166. Gulf Coast Asphalt Co. v. Lloyd, 457 S.W.3d 539, 544–45 (Tex. App.—Houston [14th Dist.] 2015).

167. *See* Liberato & Feldman, *supra* note 20, at 290–93 (collecting earlier cases and listing reasons why courts of appeals have denied petitions for permissive appeal).

168. *Gulf Coast Asphalt*, 457 S.W.3d at 544–45 (quoting McElhaney, *supra* note 6, at 747–49).

er courts of appeals, and when there simply is little authority upon which the district court can rely."[169] But even the *Gulf Coast Asphalt* court's suggested construction of the Texas permissive appeal statute somewhat differs from some federal courts' construction of the analogous federal statute,[170] and other Texas courts of appeals have not construed or applied the statute consistent with the *Gulf Coast Asphalt* court's construction.

C. *Opinions Dismissing for Want of Jurisdiction and the Development of the 'Certified Question' Construction*

One court of appeals, when construing and applying the Texas permissive appeal statute, has concluded the statute does not establish a "certified question" procedure similar to federal certification of controlling questions of state law to state courts.[171] Other courts of appeals, however, have implicitly construed the permissive appeal statute as a "certified question" statute by requiring a trial court to affirmatively state its substantive ruling on the controlling question of law identified in the order to be appealed. The "certified question" construction of the permissive appeal statute developed from an attempt to synthesize unclear and inconsistent case law. In *Diamond Products International, Inc. v. Handsel*, the court of appeals construed the 2001 version of the statute, appeared to conclude it did not lack jurisdiction, denied a petition for permissive appeal, and then dismissed the appeal.[172] The court noted that, although the

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169. McElhaney, *supra* note 6, at 749.

170. *See, e.g.* White v. Nix, 43 F.3d 374, 378 (8th Cir. 1994) (holding the 'substantial ground for difference of opinion' provision is not satisfied simply because there is a 'dearth of cases").

171. Gulley v. State Farm Lloyds, 350 S.W.3d 204, 207 (Tex. App.—San Antonio 2011, no pet.).

172. 142 S.W.3d 491, 494 (Tex. App.—Houston [14th Dist.] 2004, no pet.). Although courts often cite *Diamond Products* to support dismissing a permissive appeal for want of jurisdiction to accept the permissive appeal, a very careful reading of *Diamond Products* reveals that the court concluded it had appellate jurisdiction to determine whether to grant or deny the petition. *See id.* at 494–95. The *Diamond Products* court first noted the appellant's filing of a notice of appeal instead of an application for permissive appeal was not jurisdictional defect that deprived the court of jurisdiction. *See id.* at 493-494. The court reasoned that the notice of appeal was a bona fide attempt to invoke the court's appellate jurisdiction. *Id.* The court nevertheless decided to deny the petition for permissive appeal because it did not involve a controlling question of law. *Id.* The court then dismissed the appeal, but the dismissal followed the court's decision not to grant the petition for permissive appeal. *Id.* The court's opinion consistently suggests it was not persuaded to

appellant filed a notice of appeal instead of an "application" for permissive appeal, the notice of appeal was a bona fide attempt to invoke the court's appellate jurisdiction under the permissive appeal statute.[173] The court explained it was unnecessary to give the appellant an opportunity to correct the defect (filing a notice of appeal instead of a "petition" or "application") because the facts of the case were disputed and the court was not persuaded to exercise its discretionary jurisdiction to accept the appeal.[174]

Although the *Diamond Products* court appeared to conclude that it had discretionary jurisdiction but declined to exercise it, another court of appeals discussed the reasoning of *Diamond Products* to support its conclusion that the court lacked discretionary jurisdiction to accept a permissive appeal. In *State Fair of Texas v. Iron Mountain Information Management, Inc.*, the court of appeals dismissed the appeal for want of jurisdiction because "[n]either the trial court nor any party ha[d] identified a controlling question of law as to which there is a substantial ground for difference of opinion."[175] Although the *State Fair* court cited *Diamond Products*, the *State Fair* court's disposition and holding that it lacked jurisdiction were inconsistent with *Diamond Products*.[176] The *Diamond Products* court appeared to conclude it had jurisdiction, but nevertheless declined to exercise its discretion to accept the appeal because the trial court's order did not involve a controlling question of law.[177] Conversely, the *State Fair* court held that it was deprived of jurisdiction because

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exercise its discretionary jurisdiction to accept the permissive appeal. *See id.* Had the *Diamond Products* court concluded it did not have jurisdiction to grant the petition, the court likely would have dismissed the appeal without formally denying the petition. *See, e.g.* Double Diamond Delaware, Inc. v. Walkinshaw, No. 05-13-00893-CV, 2013 WL 5538814, at *2 (Tex. App.—Dallas Oct. 7, 2013, no pet.) (mem. op.) (dismissing petition for permissive review without denying petition because court concluded it lacked appellate jurisdiction when it was unclear whether trial court ruled on controlling question of law); Shannon v. Hall, No. 03-13-00312-CV, 2013 WL 4516144, at *2 (Tex. App.—Austin Aug. 22, 2013, no pet.) (mem. op.) (dismissing petition for permissive review without denying petition because court concluded it lacked appellate jurisdiction when trial court did not grant permission to appeal).

173. *Diamond Products*, 142 S.W.3d at 493.

174. *Id.* at 493-94.

175. 299 S.W.3d 261, 264 (Tex. App.—Dallas 2009, no pet.).

176. *Compare Diamond Products*, 142 S.W.3d at 494 (concluding appellate court had jurisdiction), *with* State Fair of Tex. v. Iron Mountain Info. Mgmt. Inc. 299 S.W.3d 261, 264 (Tex. App.—Dallas 2009, no pet.) (concluding appellate court lacked jurisdiction).

177. *Diamond Products*, 142 S.W.3d at 493-94.

of the parties' and trial court's failure to identify a controlling question of law.[178]

After *State Fair*, another court of appeals construed the permissive appeal statute consistently with the *Diamond Products* court. In *Gulley v. State Farm Lloyds*, the court of appeals noted that the record affirmatively showed the trial court expressly declined to make a substantive legal ruling on the controlling question of law before permitting the appeal.[179] The *Gulley* court concluded it had jurisdiction because "the statutory requirements for an agreed interlocutory appeal ha[d] technically been met."[180] Under *Gulley*, a trial court's substantive ruling on a specifically identified controlling question of law is not a jurisdictional requirement for a permissive appeal.[181] Thus, the court's decision in *Gulley* conflicted with *State Fair* (in which the court of appeals held it lacked jurisdiction when no controlling question of law was identified) but was consistent with *Diamond Products* (in which the court of appeals held it had jurisdiction even though it was clear there was no controlling question of law).

In *Colonial County Mutual Insurance Co. v. Amaya*, the court of appeals attempted to synthesize *State Fair* and *Gulley* first by noting that in *Gulley*, the trial court decided cross-motions for summary judgment, and thus there was only one controlling question of law on which the trial court could have made a substantive ruling.[182] The *Amaya* court attempted to distinguish *Gulley* because in *Amaya* there was more than one possible basis upon which the trial court could have denied the motion for summary judgment.[183] The *Amaya* court held it lacked jurisdiction because the trial court permitted an appeal of an order denying summary judgment without specifying its substantive ruling on a controlling question of law.[184] Although the *Amaya* court attempted to synthesize the holdings of *State Fair* and *Gulley*, the *Amaya* court's holding irreconcilably conflicted with *Gulley*. The trial court in *Gulley* expressly refused to make a substantive ruling, but this was not sufficient to deprive the court of appeals

178. *State Fair*, 299 S.W.3d at 264.

179. Gulley v. State Farm Lloyds, 350 S.W.3d 204, 208 n.2 (Tex. App.—San Antonio 2011, no pet.). The *Gulley* court, after holding that the trial court should have first made a substantive ruling, reversed the trial court's order and remanded so that the trial court could make a substantive ruling. *Id.*

180. *Id.* at 208 n.2.

181. *Id.* at 207–08 & n.2.

182. 372 S.W.3d 308, 311 n.1 (Tex. App.—Dallas 2012, no pet.).

183. *Id.* at 311.

184. *Id.*

of jurisdiction.[185] Conversely, the *Amaya* court held it lacked jurisdiction because the record did not affirmatively show the trial court had made a substantive ruling.[186]

Notably, the *Amaya* court concluded it lacked jurisdiction for a second reason: any opinion the court issued would necessarily be advisory because the order to be appealed was moot.[187] The order to be appealed was an order denying the appellant's motion for summary judgment.[188] The appellant's motion challenged the claims alleged in the appellee's first amended petition.[189] A supplemental record was filed in the appeal after oral argument "show[ing] that [appellee] filed her second, third, and fourth amended original petitions *after* [appellant] filed its amended motion for summary judgment, but *before* the trial court ruled on [appellant]'s motion."[190] The court concluded that "any decision [the court] would make would be based on a general order denying a motion for summary judgment challenging a pleading that alleged several claims but which was superseded before the motion was denied."[191] The court of appeals dismissed the appeal for want of jurisdiction "[b]ecause any opinion would be advisory."[192]

In *Bank of New York Mellon v. Guzman*, the court of appeals also dismissed the permissive appeal for want of jurisdiction.[193] "[T]he trial court denied both parties' motions for summary judgment because they 'failed to meet their burden'" and "nothing in the record show[ed] the trial court made a substantive ruling on any of the legal issues [the court was] being asked to decide."[194] Citing *State Fair*, *Amaya*, and *Gulley*, the court of appeals "conclude[d] that any opinion issued would necessarily be advisory because there is nothing in the record showing that the trial court ruled on the specific legal issues that are presented for us to decide."[195] Thus, the court in *Bank of New York Mellon* appeared to conflate the two jurisdictional defects noted by the court in *Amaya*.

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185. 350 S.W.3d at 208.

186. 372 S.W.3d at 311 & n.1.

187. *See id.* (dismissing appeal for want of jurisdiction because '[t]he trial court here did not rule on the controlling legal question presented in this agreed interlocutory appeal").

188. *Id.* at 309.

189. *Id.*

190. *Id.* at 310.

191. *Id.* at 311.

192. *Id.*

193. 390 S.W.3d 593, 594 (Tex. App.—Dallas 2012, no pet.).

194. *Id.* at 596.

195. *Id.* at 597.

Citing *Bank of New York Mellon*, *Amaya*, and *Gulley*, the court of appeals in *Borowski v. Ayers* construed the permissive appeal statute as requiring a trial court to "ma[k]e a substantive ruling on the controlling legal issue in the order" before the court of appeals has jurisdiction.[196] The *Borowski* court explained that in the case before it the "'controlling question' [was] really two 'questions'" and speculated that the trial court, which did not specify the basis for its order denying a motion for summary judgment, could have made several substantive rulings in support of its order.[197] The *Borowski* court noted that the trial court could have concluded a fact issue precluded summary judgment and thus, under *Diamond Products* (in which the court appeared to conclude it had jurisdiction but declined to exercise it), the court lacked jurisdiction because the permissive appeal statute does not permit an appeal when the facts are in dispute.[198] Courts have also cited *Diamond Products* for the proposition that the scope of appellate review in permissive appeals is limited to "the determination of controlling legal issues."[199]

A careful reading of these cases makes it apparent that many courts of appeals now construe the permissive appeal statute as establishing a "certified question" procedure. Under the "certified question" construction, a controlling question of law is presented for appellate court determination (i.e. "certified") by the trial court first making an express substantive ruling on that question of law.[200] For a court of appeals to have jurisdiction, the trial court's substantive ruling must be affirmatively stated in the order and, if it is not, the record must demonstrate there is only one possible substantive ruling the trial court could have made and that the trial court did, in fact, make that substantive ruling.[201] The scope of the appellate court's jurisdiction is limited to determining only the substantive ruling on the

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196. 432 S.W.3d 344, 347 (Tex. App.—Waco 2013, no pet.).

197. *Id.* at 348.

198. *Id.* (citing Diamond Prods. Int'l Co. v. Handsel, 142 S.W.3d 491, 494 (Tex. App.—Houston [14th Dist.] 2004, no pet.)).

199. *E.g.* Tex. Farmers Ins. Co. v. Minjarez, No. 08-12-00272-CV, 2012 WL 5359284, at *1 (Tex. App.—El Paso Oct. 31, 2012, no pet.) (mem. op.) (citing *Diamond Products*, 142 S.W.3d at 494); *accord* Gulf Coast Asphalt Co. L.L.C. v. Lloyd, 457 S.W.3d 539, 545 (Tex. App.—Houston [14th Dist.] 2015, no pet.)).

200. *See Borowski*, 432 S.W.3d at 347 (stating that a permissive interlocutory appeal is 'premised on the trial court having first made a substantive ruling on the controlling legal issue being appealed").

201. *Id.* at 347-48; Bank of N.Y Mellon v. Guzman, 390 S.W.3d 593, 596 (Tex. App.—Dallas 2012, no pet.); Colonial Cnty. Mut. Ins. Co. v. Amaya, 372 S.W.3d 308, 311 & n.1 (Tex. App.—Dallas 2012, no pet.); State Fair of Tex. v. Iron Mountain Info. Mgmt. Inc. 299 S.W.3d 261, 264 (Tex. App.—Dallas 2009, no pet.).

controlling question of law and does not extend to determining other legal issues that the order involves.[202] If reviewing the order requires the court of appeals to address any question that has not been properly "certified" or ruled on by the trial court, then the court of appeals lacks jurisdiction because any opinion addressing other questions of law would necessarily be advisory.

Under this view, when a court of appeals cannot determine whether the trial court made a substantive ruling on a question of law or what the trial court's substantive ruling was, a court of appeals cannot ascertain the scope of its jurisdiction and might render an advisory opinion regarding a question of law on which the trial court did not substantively rule and to which its jurisdiction does not extend.[203] This view, in essence, construes the permissive appeal statute as establishing a "certified question" procedure under which a court of appeals' jurisdiction is limited, like the Supreme Court of Texas when answering questions certified by federal courts, to reviewing a certified question of law and does not, like all other interlocutory appeals, authorize the court of appeals to decide any legal issue necessary to affirm or reverse the order.[204] To avoid rendering an advisory opinion under this construction, the certified question of law must be the same legal question the trial court answered by making a substantive ruling, and the appellate court's determination of the certified question must necessarily dispose of the appeal.[205]

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202. *Borowski v. Ayers*, — S.W.3d —, 2016 WL 5944769 at *11 (Tex. App.—Waco October 12, 2016, no pet. h.) (reversing a trial court's order denying a motion for summary judgment in an accepted permissive granted, and refusing to address alternative ground that would support trial court's order because the trial court's substantive ruling did not address that ground); *Borowski*, 432 S.W.3d at 347; *Gulf Coast Asphalt Co.* 457 S.W.3d at 545; *Minjarez*, 2012 WL 5359284, at *1.

203. *See Bank of N.Y. Mellon*, 390 S.W.3d at 594; McCroskey v. Happy State Bank, No. 07-14-00027-CV, 2014 WL 869577, at *1 (Tex. App.—Amarillo Feb. 28, 2014, no pet.) (mem. op.); Great Am. E&S Ins. Co. v. Lapolla Indus. Inc. No. 01-14-00372-CV, 2014 WL 2895770, at *1 (Tex. App.—Houston [1st Dist.] June 24, 2014, no pet.) (mem. op.) (per curiam).

204. *See Certified Question*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining 'certified question' as a point of law on which one court seeks guidance from another court by the process of "certification, and 'certification' as '[a] procedure by which [one court] asks [another] to review a question of law on which it needs guidance.'); *but see* Gulley v. State Farm Lloyds, 350 S.W.3d 204, 207 (Tex. App.—San Antonio 2011, no pet.) (concluding the permissive appeal statute is not a 'certified question' statute).

205. City of San Antonio v. Tommy Harral Constr. Inc. 486 S.W.3d 77, 84 (Tex. App.—San Antonio 2016, no pet.).

This view was recently expressed in *City of San Antonio v. Tommy Harral Construction*[206] and in *Hartford Accident & Indemnity Company v. Seagoville Partners*.[207] In *Tommy Harral*, the trial court denied the appellant's motion for summary judgment, stated the controlling questions of law involved in the order, and permitted an interlocutory appeal of that order.[208] Although the order complied with the permissive appeal statute and Texas Rule of Civil Procedure 158, the trial court's order did not affirmatively state it had actually made a substantive ruling on the questions of law presented in the order.[209] The court of appeals concluded it could not "surmise the trial court's substantive ruling on the legal issue presented for determination" because it was possible the trial court (1) decided not to make any legal ruling and have the "[appellate] court make the initial determination"; (2) concluded a fact issue precluded summary judgment; or (3) made other legal conclusions unrelated to the questions stated in the trial court's order.[210] The court further noted "any determination made by the trial court cannot possibly be consistent with the specific question of law presented for determination upon permissive appeal."[211]

After the court of appeals in *Hartford Accident* accepted the permissive appeal and the parties orally argued the case, the court granted a motion to dismiss, withdrew its order granting permission to appeal, and dismissed the appeal.[212] The trial court had denied a motion for summary judgment involving the construction of an insurance policy and signed an order permitting an appeal.[213] The court of appeals explained the trial court's order did not reflect it had made a substantive ruling on a controlling question of law for which there was a substantial ground for difference of opinion, only that it had determined the defendant was not entitled to summary judgment.[214] In a footnote, the *Hartford Accident* court noted that whether a defendant showed it was entitled to summary judgment was, indeed, a "question of law."[215] The court of appeals nevertheless concluded it lacked jurisdiction because the question of law on which the trial

206. *Id.* at 82.
207. No. 05-15-00760-CV, 2016 WL 3199003, at *1 (Tex. App.—Dallas June 9, 2016, no. pet. h.) (mem. op.).
208. 486 S.W.3d at 79-80.
209. *Id.* at 81.
210. *Id.* at 81.
211. *Id.* at 83.
212. 2016 WL 3199003, at *1, *4.
213. *Id.* at *1–2.
214. *Id.* at *4.
215. *Id.* at *2 n.1.

court apparently made a ruling was the sufficiency of the evidence, not the proper construction of the insurance policy.[216] Thus, the *Hartford Accident* court continued the more recent trend of requiring a trial court to properly certify a question of law for appellate determination by making an express substantive ruling on that question of law.[217]

In these and other cases,[218] courts of appeals have implicitly construed the scope of their appellate jurisdiction under the permissive appeal statute as limited to the trial court's ruling on a specific, controlling question of law. If the trial court's order requires the court of appeals to address any question of law on which the trial court did not affirmatively make a substantive ruling, the court of appeals lacks discretionary jurisdiction to accept the permissive appeal. The "certified question" construction directly conflicts with the *Gulley* court's view that the permissive appeal statute is not a procedure by which trial courts "certify" questions of law and differs from federal courts' construction of the federal permissive appeal statute, under which the order to be appealed controls the questions the appellate court may address.[219]

D. Lingering Questions

The opinions disposing of permissive appeals raise several important questions about the proper construction of the permissive appeal statute. What do the "controlling question of law" and "material advancement" provisions require? What are the jurisdictional requirements of the permissive appeal statute? To what extent do these jurisdictional requirements—which a court of appeals must answer to determine whether it *may* accept a permissive appeal—overlap with prudential considerations—which a court of appeals must answer to determine whether it *should* accept a permissive appeal?

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216. *Id.* at *4.

217. *Id.* at *2–4.

218. Other cases expressing this view are *Patel v. Patel*, No. 05-16-00575-CV, 2016 WL 3946932, at *2 (Tex. App.—Dallas July 19, 2016, no pet. h.) (mem. op.), and *Double Diamond Del. Inc. v. Walkinshaw*, No. 05-13-00893-CV, 2013 WL 5538814, at *2 (Tex. App.—Dallas Oct. 7, 2013, no pet.) (mem. op.).

219. *Compare Hartford Accident*, 2016 WL 3199003, at *2–4 (explaining the trial court must make a substantive ruling on the controlling question of law that is dispositive of the order), *with* Yamaha Motor Corp. U.S.A. v. Calhoun, 516 U.S. 199, 204 (1996) (holding that under the federal permissive appeal statute, 'the courts of appeals exercise jurisdiction over *any* question that is included within the order") (emphasis added).

V RECONCILING JUDICIAL PRACTICE WITH LEGISLATIVE INTENT

The Supreme Court of Texas has not yet construed the Texas permissive appeal statute to definitively answer any of the lingering questions about the permissive appeal statute's proper construction. If one considers canons of statutory construction and the statute's primary purpose of promoting cost-efficiency,[220] the lingering questions become somewhat less difficult to answer.

A. Separating Jurisdictional Requirements from Prudential Considerations

Considering applicable canons of statutory construction aids in separating the permissive appeal statute's jurisdictional requirements from prudential considerations.[221] Texas courts' "primary goal when construing a statute is to give effect to the Legislature's intent."[222] Texas courts give effect to the legislature's intent "by relying on the plain meaning of the text unless a different meaning is supplied by statutory definition, is apparent from the context, or the plain meaning would lead to an absurd or nonsensical result."[223] Texas courts avoid constructions that treat statutory language as surplusage.[224] The Texas Code Construction Act further provides:

> In construing a statute, whether or not the statute is considered ambiguous on its face, a court may consider among other matters the: (1) object sought to be attained; (2) circumstances under which the statute was enacted; (3) legislative history; (4) common law or former statutory provisions, including laws on the same or similar subjects; (5) consequences of a particular construction; (6) administrative construction of the statute; and (7) title (caption), preamble, and emergency provision.[225]

In construing the permissive appeal statute, courts of appeals have relied upon the statute's legislative history and considered that

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220. 2011 Bill Analysis, *supra* note 1.

221. *See* City of Houston v. Bates, 406 S.W.3d 539, 552 (Tex. 2013) (Guzman, J. concurring in part and dissenting in part) (noting Texas courts rely on numerous canons of construction to construe statutes).

222. Beeman v. Livingston, 468 S.W.3d 534, 538 (Tex. 2015).

223. *Id.*

224. Spradlin v. Jim Walter Homes, Inc. 34 S.W.3d 578, 580 (Tex. 2000).

225. TEX. GOV'T CODE ANN. § 311.023 (West 2015) (formatting omitted).

the statute is an exception to the final-judgment rule.[226] Because the statute expands appellate courts' jurisdiction, courts of appeals have construed the statute strictly.[227] However, a rule of strict construction should not be used to stray from reasonability.[228]

1. Jurisdictional Requirements

One of the first questions an appellate court must answer when it receives a notice of appeal (the filing that typically initiates a proceeding in the court of appeals) is whether the court has jurisdiction.[229] Ordinarily, the court of appeals' jurisdiction depends solely upon (1) the timeliness of the notice of appeal and (2) whether the appeal is from a final judgment or of an appealable interlocutory order as provided by statute.[230] While the Texas Legislature has sought to categorize interlocutory orders that are immediately appealable by subject matter and party identity,[231] the permissive appeal statute authorizes a trial court to permit an appeal of any interlocutory order, regardless of subject matter or party identity, if the statutory requirements are met.[232]

The permissive appeal statute's plain language sets forth the jurisdictional requirements for a permissive appeal.[233] If the trial court concludes (1) the order to be appealed involves a controlling question of law as to which there is a substantial ground for a difference of opinion and (2) an immediate appeal would materially advance the litigation's ultimate termination, then the trial court may permit an appeal in a written order. If a trial court permits an appeal, and if a party timely files an application or petition in the court of appeals, the court of appeals may accept the permissive appeal. This

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226. Borowski v. Ayers, 432 S.W.3d 344, 347 (Tex. App.—Waco 2013, no pet.); Gulley v. State Farm Lloyds, 350 S.W.3d 204, 206 (Tex. App.—San Antonio 2011, no pet.).

227. *Borowski*, 432 S.W.3d at 347: *Gulley*, 350 S.W.3d at 207.

228. Sharp v. F.W. Gartner Co. 971 S.W.2d 707. 709 (Tex. App.—Austin 1998, no pet.); *see*
FKM P'ship, Ltd. v. Bd. of Regents of Univ. of Houston Sys. 255 S.W.3d 619, 633 (Tex. 2008) ("We presume the Legislature intended a just and reasonable result by enacting the statute. ') (citing TEX. GOV'T CODE ANN. § 311.021(3) (West 2015)).

229. Gardner v. Stewart, 223 S.W.3d 436, 438 (Tex. App.—Amarillo 2006, pet. denied).

230. TEX. CIV. PRAC. & REM. CODE ANN. §§ 51.012, 51.014(a) (West Supp. 2015); Lehmann v. Har-Con Corp. 39 S.W.3d 191, 195 (Tex. 2001).

231. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a).

232. *Id.* § 51.014(d), (f).

233. *See infra* Sections V.A.2.a–V.A.2.c.

procedure is similar in substance to the federal permissive appeal statute.

When construing the "controlling question of law" and "material advancement" provisions, courts should rely on applicable canons of statutory construction[234] and consider the legislature's primary goal of cost-efficiency. Applying relevant canons of statutory construction, the permissive appeal statute's only requirements for appellate jurisdiction are (1) the trial court must permit an appeal of the otherwise non-appealable interlocutory order in writing, and (2) an application or petition for permissive appeal must be timely filed in the court of appeals.[235] If a party pursuing a permissive appeal follows the rules of procedure, an appellate court can determine whether these jurisdictional requirements have been met from the petition and the attached order to be appealed.

Although the permissive appeal statute requires a trial court to conclude the "controlling question of law" and "material advancement" provisions are satisfied before permitting an appeal, the statute does not expressly require that the trial court's conclusions be correct for the appellate court to have jurisdiction.[236] These considerations, unlike the "written permission" and "timely petition" requirements, are somewhat obscure, subjective, and often not determinable by the appellate court with much certainty when the court of appeals decides whether to accept the petition for permissive appeal. Rather, the "controlling question of law" and "material advancement" provisions supply trial courts and courts of appeals with prudential considerations that should guide them in deciding whether to grant permission to appeal or to accept a permissive appeal.[237] The statute's plain language does not support a construction that the prudential considerations are jurisdictional requirements, or vice versa. Constructions of the permissive appeal statute that jurisdictionalize the prudential considerations necessarily make the permissive appeal procedure less cost-efficient.[238]

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234. *See* City of Houston v. Bates, 406 S.W.3d 539, 552 (Tex. 2013) (Guzman, J. concurring in part and dissenting in part) (noting Texas courts rely on numerous canons of construction to construe statutes).

235. Although the permissive appeal statute requires the trial court to conclude the 'controlling question of law' and 'material advancement' provisions are satisfied, the plain language of the statute does not expressly require the trial court to state those conclusions (which the trial court implies when it grants permission to appeal) in its order. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(d).

236. *Id.*

237. *See infra* Section V.A.2.

238. *Cf.* Hadjipateras v. Pacifica, S.A. 290 F.2d 697, 702 (5th Cir. 1961) (noting the Fifth Circuit Court of Appeals 'has invariably approached [its jurisdic-

a. Written Permission

The trial court's written permission is a prerequisite to appellate jurisdiction under the permissive appeal statute.[239] The statute provides that a trial court may permit an appeal "by written order."[240] The statute's plain language requires the trial court to grant permission in a written order signed by the trial court.[241] Texas appellate courts are correct to dismiss permissive appeals for want of jurisdiction when the record shows the trial court did not give permission to appeal in writing.[242] Texas Rule of Civil Procedure 168 requires that the order to be appealed and the trial court's written permission to appeal be in the same written order.[243] Texas Rule of Appellate Procedure 28.3 requires that the order to be appealed, including the trial court's permission to appeal, be attached to the petition for permissive appeal.[244] If a party complies with Rule 168 and Rule 28.3, an appellate court should be able to determine from the petition (to which a copy of the order to be appealed will be attached) whether the "written permission" requirement has been satisfied.

b. A Timely Petition

A timely application or petition for permissive appeal is also a prerequisite to appellate jurisdiction under the permissive appeal statute.[245] The statute's plain language provides that a court of appeals may accept a permissive appeal if the petition is filed not later than the fifteenth day after the trial court signs the order to be appealed.[246] The *Verburgt v. Dorner*[247] rule regarding implied motions

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tion under the federal permissive appeal statute] in a way that avoids hypercritical technicalities in the construction and application of such statutes").

239. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(d); *see* Bahr v. Emerald Bay Prop. Owners Ass'n, Inc. No. 09-15-00363-CV. 2016 WL 1054506, at *1 (Tex. App.—Beaumont Mar. 17. 2016, no pet.) (mem. op.) (dismissing appeal for want of jurisdiction because trial court denied permission to appeal).

240. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(d).

241. *Id.*

242. *See infra* Section V.A.2.a.

243. TEX. R. CIV. P. 168.

244. TEX. R. APP. P. 28.3(e)(2).

245. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(f); Jarrar Holdings, LLC v. Clayton Williams Energy, Inc. No. 10-16-00204-CV. 2016 WL 3964469, at *1 (Tex. App.—Waco July 20, 2016, no pet. h.) (mem. op.); *In re* D.B. 80 S.W.3d 698, 702 (Tex. App.—Dallas 2002, no pet.).

246. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(f); *In re D.B.* 80 S.W.3d at 702.

247. 959 S.W.2d 615, 616 (Tex. 1997).

for extension of time to file the petition has been applied by one court of appeals to the late filing of a petition for permissive appeal.[248] The plain language of the permissive appeal statute further requires that the "application" (or "petition" under Rule 28.3) contain an explanation for why the case warrants an immediate permissive appeal.[249] Because the applicable rules of procedure require the order to be appealed and the trial court's written permission to be in one order and attached to the petition, an appellate court will be able to determine from the filing of the petition whether the petition was timely filed.

c. Controlling Question of Law & Material Advancement

The permissive appeal statute requires a trial court to conclude the "controlling question of law" and "material advancement" provisions are satisfied before permitting an appeal. [250] A court of appeals should presume a trial court concluded the provisions were satisfied when a trial court grants permission to appeal. Absent a complaint or evidence to the contrary, courts of appeals generally presume trial courts properly discharge their duties and perform acts required by law in accordance with the law.[251] Although appellate courts generally presume trial courts' orders are correct and rendered in accordance with the law, many courts of appeals have, in permissive appeals, declined to indulge this presumption. In disposing of permissive appeals, many courts of appeals have expressed skepticism about whether the trial court actually concluded the "controlling question of law" and "material advancement" provisions were satisfied and whether those conclusions were correct.[252] Courts of appeals

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248. Stolte v. Cty. of Guadalupe, 139 S.W.3d 406, 409 (Tex. App.—San Antonio 2004, no pet.).

249. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(f).

250. *Id.* § 51.014(d).

251. *See* Caruso v. Lucius, 448 S.W.2d 711, 716 (Tex. Civ. App.—Austin 1969, writ ref'd n.r.e.) (citing 31A C.J.S. *Evidence* § 146a, 1969) (noting the judicial presumption that officials properly perform legal duties); *cf.* Browning v. Prostok, 165 S.W.3d 336, 344 (Tex. 2005) (noting appellate court will affirm trial court's summary judgment on any theory supported by the record); BMC Software Belgium, N.V. v. Marchand, 83 S.W.3d 789, 795 (Tex. 2002) (noting appellate courts will imply all factual findings and legal conclusions necessary to support a trial court's ruling or judgment); Vallone v. Vallone, 644 S.W.2d 455, 460 (Tex. 1982) ("In reviewing the actions of the trial court, the appellate court will presume that the trial court exercised its discretion properly.").

252. *See supra* Section IV.C.

have generally expressed these concerns sua sponte when considering the court's appellate jurisdiction.[253]

However, the permissive appeal statute's plain language and other indicia of legislative intent suggest a trial court may permit an appeal if it concludes that the "controlling question of law" and "material advancement" provisions are satisfied. The plain language of the permissive appeal statute does not expressly require the court of appeals to consider whether the order to be appealed "involves a controlling question of law as to which there is a substantial ground for difference of opinion" or whether "immediate appeal from the order may materially advance the ultimate termination of the litigation."[254] Like the federal permissive appeal statute, those provisions are directed to the trial court in deciding whether to permit an appeal.[255] And, as discussed more fully in Section V.A.2, these provisions merely require the trial court to have significant doubt about its ruling and to conclude an immediate appeal would be significantly more efficient than defaulting to the final judgment rule.[256] When a trial court has such doubt and the motion is important enough to the case in terms of cost-efficiency, the trial court may permit the appeal and the court of appeals may accept the appeal as permitted by the statute.[257]

The phrase "appeal permitted by," added by the 2011 amendments, is arguably not satisfied unless the trial court correctly concludes the order to be appealed satisfies the "controlling question of law" provision and an appeal would materially advance the litigation's ultimate termination.[258] However, the 2011 amendments to the statute indicate the legislature intended to align the Texas statute with the federal permissive appeal statute.[259] The federal permissive appeal statute does not require the district court's opinion to be correct; the statute requires only that the district court be "of the opinion" that the "controlling question of law" and "material advancement" provisions are satisfied.[260] Prior to the 2011 amendments, the plain language of the permissive appeal statute required the parties to agree that the order to be appealed involved a controlling question of

253. *Id.*
254. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(d)(1)–(2).
255. *Id.*
256. *See infra* Section V.A.2.
257. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(f).
258. *See id.* § 51.014(f) (providing an appellate court 'may accept an appeal permitted by Subsection (d)").
259. *Advisory Committee Meeting, supra* note 126, at 21923.
260. 28 U.S.C. § 1292(b) (West 2016).

law.[261] The prior versions of the permissive appeal statute did not require the parties to be correct.[262] Thus, the legislative history of original statute, the legislative history of the 2005 and 2011 amendments, and the statute's primary goal of cost-efficiency do not lend support to construing the statute to require, as a prerequisite to appellate jurisdiction, a trial court's correct conclusions regarding the "controlling question of law" and "material advancement" provisions.

Instead, construing the permissive appeal statute as requiring the trial court to correctly conclude the "controlling question of law" and "material advancement" provisions are satisfied undermines the statute's goal of promoting cost-efficiency.[263] The "controlling question of law" and "material advancement" provisions, unlike other provisions requiring written permission and a timely petition, are somewhat obscure. Federal courts construing identical provisions have explained that determinations as to these standards should be made by the trial court to "avoid[] time-consuming jurisdictional determinations in the court of appeals."[264] Furthermore, the filing of a record, briefing on the merits, and even oral argument will often narrow and clarify the relevant issues for the court of appeals. The appellate court's determinations as to the correctness of the trial court's conclusions regarding the "controlling question of law" and "material advancement" provisions are thus much more likely to change while the appeal is pending.[265] If correct trial court conclusions regarding these provisions were prerequisites for appellate jurisdiction, courts of appeals would often be required to dismiss permissive appeals after the parties have paid for a record and for their attorneys to brief and orally argue the case.[266] Such a construction would make many permissive appeals, in some cases, inherently cost-inefficient.

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261. Act June 18, 2005, 79th Leg. R.S. ch. 1051, 2005 Tex. Gen. Laws 3512, *amended by* Act of Sept. 1, 2011, 82d Leg. R.S. ch. 203, § 3.01, sec. 51.014, 2011 Tex. Gen. Laws 758.

262. *Compare* Act June 18, 2005, 79th Leg. R.S. ch. 1051, 2005 Tex. Gen. Laws 3512 *with* Act of Sept. 1, 2011, 82d Leg. R.S. ch. 203, § 3.01, sec. 51.014, 2011 Tex. Gen. Laws 758.

263. 2011 Bill Analysis, *supra* note 1.

264. Coopers & Lybrand v. Livesay, 437 U.S. 463, 474–75 (1978) (addressing the federal permissive appeals process); *but see* Garner v. Wolfinbarger, 433 F.2d 117, 120 (5th Cir. 1970) ("The issue is not one of convenience to the litigants, or even to this court, but of appellate jurisdiction.").

265. *E.g. Tommy Harral*, 486 S.W.3d at 84; *cf.* McFarlin v. Conseco Servs. LLC, 381 F.3d 1251, 1255 (11th Cir. 2004) (noting that an appellate court's submission panel may reconsider the motions panel's decision about whether the case is appropriate for a permissive appeal).

266. Colonial Cty. Mut. Ins. Co. v. Amaya, 372 S.W.3d 308, 310 (Tex. App.—Dallas 2012, no pet.).

When a trial court permits an appeal, a court of appeals may presume the trial court concluded the "controlling question of law" and "material advancement" provisions are satisfied. Because these provisions may be presumed satisfied if the trial court grants permission to appeal in writing, the only two jurisdictional requirements of the permissive appeal statute are (1) the trial court's written permission to appeal and (2) a timely petition for permissive appeal. If a court of appeals disagrees with the trial court's conclusions regarding the "controlling question of law" and "material advancement" provisions, the court of appeals should decline to exercise its discretionary jurisdiction conferred by the permissive appeal statute.[267]

d. Necessity of a Substantive Ruling on the Controlling Question of Law

Several courts of appeals have held that the trial court's failure to make a substantive ruling on the controlling question of law is a jurisdictional defect that requires dismissal of the appeal for want of jurisdiction.[268] Some courts have explained that, considering the permissive appeal statute's legislative history, the legislature did not intend the statute to allow trial courts to "punt" difficult questions of law to the court of appeals.[269] In *Gulley*, the trial court stated affirmatively on the record it would not make a substantive ruling on the controlling question of law, and permitted an appeal for the court of appeals to decide the issue.[270] The court of appeals in *Gulley* concluded it had jurisdiction.[271] But after *Gulley*, courts of appeals have held that the trial court's failure to expressly state its substantive ruling in the order to be appealed, absent some clear indication from the record that the trial court made a substantive ruling on the precise

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267. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(f) (providing appellate court 'may' accept an appeal permitted by the trial court); *see also* TEX. GOV'T CODE ANN. § 311.016(1) (West 2015) (' 'May' creates discretionary authority or grants permission or a power. ').

268. *Tommy Harral*, 486 S.W.3d at 82–83; Borowski v. Ayers, 432 S.W.3d 344, 347 (Tex. App.—Waco 2013, no pet.); Bank of N.Y Mellon v. Guzman, 390 S.W.3d 593, 597–598 (Tex. App.—Dallas 2012, no pet.); *but see* Gulley v. State Farm Lloyds, 350 S.W.3d 204, 207–08 & n.2 (Tex. App.—San Antonio 2011, no pet.) (concluding the appellate court had jurisdiction even when trial court expressly declined to make a substantive ruling on the controlling question of law).

269. *Borowski*, 432 S.W.3d at 347: *Gulley*, 350 S.W.3d 204, 208 & n.2; *cf. Harvard Note*, *supra* note 32, at 612 ("Trial court certification was not viewed as an invitation to the trial judge to 'certify' difficult questions of general applicability to the courts of appeals. ').

270. *Gulley*, 350 S.W.3d at 206–08 & n.2.

271. *Id.* at 208 n.2.

question of law certified by the trial court, deprived the appellate court of jurisdiction.[272] Some courts have also expressed that in the absence of a substantive ruling, any opinion issued by the court of appeals would be advisory.[273] By requiring a trial court to expressly state the controlling question of law and why immediate appeal may materially advance the litigation's ultimate termination, Texas Rule of Civil Procedure 168 countenances appellate courts' skepticism about whether a trial court has fully considered the pending motion before making a ruling, signing an order, and permitting an appeal.[274]

Nevertheless, the permissive appeal statute's plain language simply does not require the trial court to affirmatively make a substantive ruling on the controlling question of law.[275] Courts have imposed the "substantive ruling" requirement based on comments in analyses of bills amending the permissive appeal statute[276] and held that such a substantive ruling is a pre-requisite to appellate jurisdiction.[277] In addition to lacking a clear foundation in the plain language of the permissive appeal statute, the "substantive ruling" requirement is also at odds with the presumption of proper official conduct because it imputes improper conduct (i.e. the "punting" of tough legal questions) to elected trial court judges.[278]

The "substantive ruling" requirement also renders less-than-perfect legal draftsmanship a jurisdictional defect. Under this re-

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272. *E.g. Tommy Harral*, 486 S.W.3d at 82–83.

273. *See, e.g. Bank of N.Y. Mellon* 390 S.W.3d at 596 (expressing the concern that because 'the trial court[] fail[ed] to rule on the purported controlling issues of law, any opinion issued by this Court would be advisory"); *see also Tommy Harral*, 486 S.W.3d at 80–81 (explaining that the record 'must reflect the trial court's substantive ruling on the specific legal issue presented for appellate-court determination [o]therwise, this court's opinion with regard to the requested legal determination would be an advisory opinion") (citations omitted); McCroskey v. Happy State Bank, No. 07-14-00027-CV 2014 WL 869577, at *1 (Tex. App.—Amarillo Feb. 28, 2014, no pet.) (mem. op.) ("[A]ny opinion we were to issue in this interlocutory appeal would necessarily be advisory because there is nothing in the record showing that the trial court ruled on the specific legal issues presented for us to decide. ').

274. TEX. R. CIV. P. 168.

275. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(d) (West Supp. 2015).

276. Gulley v. State Farm Lloyds, 350 S.W.3d 204, 206–08 (Tex. App.—San Antonio 2011, no pet.).

277. *Tommy Harral*, 486 S.W.3d at 84; Borowski v. Ayers, 432 S.W.3d 344, 347 (Tex. App.—Waco 2013, no pet.); *Guzman*, 390 S.W.3d at 596.

278. *See* Avelo Mortg. LLC v. Infinity Capital, LLC, 366 S.W.3d 258, 263 (Tex. App.—Houston [14th Dist.] 2012, no pet.) ("In the absence of evidence to the contrary, it is presumed that official acts or duties are properly performed and that a public official discharges his duty or performs an act required by law in accordance with the law. ').

quirement and the "certified question" construction of the statute, a trial court's general order denying a motion for summary judgment does not properly certify a question for appellate determination; the ruling must be more specific.[279] In determining how specific a ruling must be, courts applying the "substantive ruling" requirement have analyzed how the trial court phrased the controlling question of law and how it phrased its ruling on that that question in its order. In *Hartford Accident & Indemnity Company v. Seagoville Partners*, the trial court's order stated the "controlling questions of law" were whether an insurance policy covered either of two distinct activities of the insured.[280] The trial court made express substantive rulings that the insurance policy applied to one activity but did not apply to the other.[281] The court of appeals held this substantive ruling was not sufficient because "neither the trial court's order nor the record reflects the trial court made a substantive ruling with respect to the proper legal interpretation of [the policy]."[282] Similarly, in *City of San Antonio v. Tommy Harral Construction, Inc.*, the court of appeals explained:

> [T]he legal questions presented in [appellant]'s motion for partial summary judgment and on appeal touch upon the same statutes and same subject matter. However, though slight, there is distinction between the legal question presented in [appellant]'s motion for partial summary judgment and the legal question presented for determination on permissive appeal as well as that presented in [appellant]'s petition for permission to file an interlocutory appeal and appellate briefing.[283]

Thus, under the "substantive ruling" requirement, small variations between the phrasing of a trial court's substantive ruling and the phrasing of the "controlling question of law" may deprive the court of appeals of jurisdiction over the permissive appeal.[284] The implicit reason for the "substantive ruling" requirement is that a trial court must make a substantive ruling on the precise question of law presented for appellate court determination; otherwise, the control-

279. Hartford Accident & Indem. Co. v. Seagoville Partners, No. 05-15-00760-CV, 2016 WL 3199003, at *3–4 (Tex. App.—Dallas June 9, 2016, no pet. h.) (mem. op.).

280. *Id.* at *3.

281. *Id.*

282. *Id.* at *4.

283. City of San Antonio v. Tommy Harral Const. Inc. 486 S.W.3d 77, 84 (Tex. App.—San Antonio 2016, no pet.).

284. *Id.* at 81.

ling question of law is not properly certified and any appellate court opinion addressing the question would be advisory.[285]

However, the plain language of the permissive appeal statute does not require the "controlling question of law" to be a question of "substantive" law.[286] And as the *Hartford Accident* court acknowledged, whether a party has demonstrated its entitlement to judgment as a matter of law is, indeed, a "question of law."[287] A trial court's summary denial of a motion for summary judgment is a shorthand ruling on that precise question of law: the party has not demonstrated its entitlement to judgment as a matter of the applicable substantive law.[288] Such a ruling does not require the trial court to resolve factual issues or decide matters committed solely to the trial court's discretion. The Supreme Court of Texas also appears to have impliedly rejected the "substantive ruling" requirement. In *TIC Energy & Chemical, Inc. v. Martin*, a permissive appeal, the court of appeals held "that, because its motion did not establish that [the statute at issue] does not apply, [the appellant] did not meet its summary judgment burden to establish its entitlement to judgment as a matter of law."[289] Without expressing any apprehension about the court of appeals' jurisdiction, the supreme court reversed the court of appeals and rendered judgment in favor of the appellant.[290]

Courts' application of the "substantive ruling" requirement has also been inconsistent with the principle that "[c]ourts always have jurisdiction to determine their own jurisdiction."[291] If the court of appeals has doubt about its jurisdiction because the trial court's order raises a question about the trial court's intent, the court of appeals has jurisdiction to abate the appeal for the trial court to clarify its order.[292] If a trial court does not make an express substantive ruling on the precise controlling question of law, this may be a legiti-

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285. *Id.*

286. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(d), (f) (West Supp. 2015).

287. 2016 WL 3199003, at *2 n.1.

288. *See* TEX. R. CIV. P. 166a(c) (permitting a trial court to grant summary judgment only if the movant conclusively establishes its entitlement to judgment as a matter of law).

289. TIC Energy & Chem. Inc. v Martin, 488 S.W.3d 344, 349–50 (Tex. App.—Corpus Christi 2015), *rev'd*, No. 15-0143, 2016 WL 3136877 (Tex. June 3, 2016).

290. TIC Energy & Chem. Inc. v. Martin, 498 S.W.3d 68, 78 (Tex. 2016).

291. Hous. Mun. Emps. Pension Sys. v. Ferrell, 248 S.W.3d 151, 158 (Tex. 2007).

292. *See* Lehmann v. Har-Con Corp. 39 S.W.3d 191, 195 (Tex. 2001) (noting that '[i]f the appellate court is uncertain about the intent of the order [in the context of finality of judgments], it can abate the appeal to permit clarification by the trial court").

mate reason for a court of appeals to deny a petition for permissive appeal, but it does not automatically deprive the appellate court of jurisdiction over the permissive appeal. The court of appeals always has jurisdiction to abate the appeal and determine whether the trial court actually decided the controlling question of law, but failed to state so in its order or on the record.[293]

The absence of a specific substantive ruling on the controlling question of law also does not necessarily render any appellate court opinion advisory. The "advisory opinion" concern can be traced back to *Bank of New York Mellon v. Guzman*. The *Bank of New York Mellon* court cited *Colonial County Mutual Insurance Co. v. Amaya* for the proposition that a trial court must make a substantive ruling or the appellate court's opinion will necessarily be advisory.[294] But unlike in *Amaya*, in which the court expressed its "advisory opinion" concern because other filings in the trial court mooted the order to be appealed, nothing in *Bank of New York Mellon* suggests the appealed interlocutory order was moot.[295] Courts have, without an indication that the order to be appealed is moot, expressed *Amaya*'s concern that any opinion in a case that the trial court has not unquestionably made a precise substantive ruling on a specifically identified controlling question of law would be advisory.[296]

An advisory opinion is one that decides "abstract questions of law without binding the parties."[297] If a court of appeals affirms or reverses the interlocutory order to be appealed in a permissive appeal, the appellate court's judgment is binding under the "law of the case" doctrine.[298] So long as the appellate court's opinion addresses only the order to be appealed, the opinion is not advisory—even if the court of appeals decides different or additional questions of law

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293. *Id.*

294. Bank of New York Mellon v. Guzman, 390 S.W.3d 593, 596 (Tex. App.—Dallas 2012, no pet.) (citing Colonial Cty. Mut. Ins. Co. v. Amaya, 372 S.W.3d 308, 311 n.1 (Tex. App.—Dallas 2012, no pet.)).

295. *Guzman*, 390 S.W.3d at 595.

296. *E.g. id.* McCroskey v. Happy State Bank, No. 07-14-00027-CV, 2014 WL 869577, at *1 (Tex. App.—Amarillo Feb. 28, 2014, no pet.) (mem. op.); Great Am. E&S Ins. Co. v. Lapolla Indus. Inc. No. 01-14-00372-CV, 2014 WL 2895770, at *1 (Tex. App.—Houston [1st Dist.] June 24, 2014, no pet.) (mem. op.) (per curiam).

297. Brown v. Todd, 53 S.W.3d 297, 302 (Tex. 2001).

298. *See* Dernick Res. Inc. v. Wilstein, 471 S.W.3d 468, 477 (Tex. App.—Houston [1st Dist.] 2015, pet. filed) (noting "where the court of appeals' decision is not challenged in the supreme court, the law of the case doctrine ordinarily binds the court of appeals to its initial decision if there is a subsequent appeal in the same case").

than the trial court.[299] Therefore, Texas courts should reconsider the "substantive ruling" requirement, which is rooted in the "certified question" construction of the permissive appeal statute.[300]

e. Procedural Requirements & Formalities

Texas Rule of Civil Procedure 168 and Texas Rule of Appellate Procedure 28.3 provide additional procedural requirements for a permissive appeal.[301] It is also not uncommon for a trial court to state generally in the written order permitting an appeal that "the order to be appealed involves a controlling question of law" and that "immediate appeal may materially advance the ultimate termination of the litigation."[302] The plain language of Rule 168 and Rule 28.3, however, does not indicate that a failure to comply with the rules' procedural requirements or to recite the statute's provisions is a jurisdictional defect.[303]

2. Prudential Considerations

The proper construction of the "controlling question of law" and "material advancement" provisions is important when a trial court considers whether to permit an appeal and when a court of appeals considers whether to accept the permissive appeal.[304] Although the permissive appeal statute contains some obscure, undefined terms, the proper construction of the statute's provisions is informed

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299. *Cf.* Yamaha Motor Corp. U.S.A. v. Calhoun, 516 U.S. 199, 205 (1996) (holding a court of appeals may not address any order in the case, only the order of which the trial court permits appeal, and the court of appeals may address any issue fairly included in the order) (citing 16 CHARLES ALAN WRIGHT, et al. FEDERAL PRACTICE & PROCEDURE § 3929, 144–45 (1977) ("[T]he court of appeals may review the entire order, either to consider a question different than the one certified as controlling or to decide the case despite the lack of any identified controlling question.")).

300. *See supra* Section VI.C.

301. TEX. R. CIV. P. 168; TEX. R. APP. P. 28.3. Texas Rule of Civil Procedure 28.2 applies to agreed permissive appeals under the prior version of the permissive appeal statute. TEX. R. APP. P. 28.2.

302. *See* Borowski v. Ayers, 432 S.W.3d 344, 346 (Tex. App.—Waco 2013, no pet.) (discussing trial court's order finding that 'the order involves a controlling issue of law' and immediate appeal 'may materially advance the ultimate termination of this litigation").

303. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(d)–(f); TEX. R. CIV. P. 168; TEX. R. APP. P. 28.3.

304. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(d).

by the statute's plain language, primary purpose of promoting cost-efficiency, and legislative history, as well as the federal statute on which the Texas statute is modeled.[305]

The statute's plain language and legislative history support construing "controlling" as "dispositive of the motion or issue before the court." Like the federal statute, the Texas statute does not define or clarify what the question of law must "control[]."[306] The Texas Legislature adopted the term "controlling" from the federal permissive appeal statute.[307] The term "controlling" was used by the Supreme Court of the United States, around the same time that Congress enacted the federal permissive appeal statute, to describe the procedure of certifying questions of law to state courts; the question of law certified for a state court to answer was "controlling" because it was dispositive of the legal issue before the court, not necessarily the entire litigation.[308] Construing the term "controlling" to require the appealed order to be dispositive or nearly dispositive of the entire litigation would render the "material advancement" provision surplusage.[309]

"Question of law" is not further defined by the statute, and may be given its plain meaning: "[a]n issue to be decided by the judge, concerning the application or interpretation of the law" and therefore includes any type of legal question.[310] There is "a substantial ground for difference of opinion" if the trial court has significant doubt that it correctly answered what the trial court viewed as the dispositive legal question.[311] Thus, the "controlling question of law" provision is satisfied when the trial court has significant doubt about whether it correctly ruled on a motion or other request for relief. Given the clear cost-efficiency purpose of the statute, the "material advancement" provision is satisfied if permitting an immediate ap-

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305. TEX. GOV'T CODE ANN. § 311.023 (West 2015); Gulley v. State Farm Lloyds, 350 S.W.3d 204, 207–208 (Tex. App.—San Antonio 2011, no pet.).

306. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(d).

307. 28 U.S.C. § 1292(b) (2012).

308. Clay v. Sun Ins. Office Ltd. 363 U.S. 207. 212 (1960).

309. *See* Spradlin v. Jim Walter Homes, Inc. 34 S.W.3d 578, 580 (Tex. 2000) (noting Texas courts avoid constructions that treat statutory language as surplusage); *but see* Liberato & Feldman, *supra* note 20, at 293 (recommending that practitioners argue that the 'question of law drive[s] the litigation").

310. *Question of Law*, BLACK'S LAW DICTIONARY 1281 (10th ed. 2014).

311. *See infra* Section V.A.2.a; *cf.* MINN. R. CIV. APP. P. 103.03 (West, Westlaw through July 1, 2016) (reframing the 'controlling question of law' and 'material advancement' provisions as whether a question is 'important and doubtful"); *but see* Liberato & Feldman, *supra* note 20, at 293 (recommending that practitioners argue that 'there be a substantial difference of judicial opinions").

peal would, given the level of the trial court's doubt, likely be more cost-efficient than defaulting to the final-judgment rule.[312]

The trial court, acting as the first-tier gatekeeper, must determine whether it has significant doubt that it correctly ruled on a motion or other request for relief that is important to the case.[313] If the trial court has significant doubt that it correctly decided a legal question that is dispositive of an important motion before the court, and that immediate appeal would be significantly more cost-efficient than waiting for a final judgment, then the trial court should permit the appeal.[314] The court of appeals, acting as a second-tier gatekeeper, should then determine whether to accept the appeal based on similar considerations of cost-efficiency.[315] Because the permissive appeal statute is an exception to the final-judgment rule, trial courts should err on the side of not permitting an appeal and courts of appeals should err on the side of not accepting permissive appeals.[316]

a. In the Trial Court

The Texas permissive appeal statute, like the federal permissive appeal statute, delegates questions of appealability to trial judges who are the first-tier gatekeepers.[317] In determining whether to permit an appeal under the permissive appeal statute, the trial court should (upon a party's motion or its own) first assess how certain it is that it correctly disposed of a motion. If the trial court is certain that its ruling is correct, then the trial court likely will not conclude

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312. 2011 Bill Analysis, *supra* note 1.

313. *See* Harris & Liberato, *supra* note 2, at 31 (noting the permissive appeal statute 'will be most useful' when the trial court 'must make a close call"); House Comm. on Judiciary & Civ. Juris. Bill Analysis at 6, Tex. H.B. 274, 82d Leg. R.S. (2011), http://www.hro.house.state.tx.us/pdf/ba82R/HB0274.pdf (last visited Oct. 23, 2016) (noting the 2011 amendments re-instituted the two-tier system to prevent 'a flood of new appeals"); *cf.* MINN. R. CIV. APP. P. 103.03 (reframing the 'controlling question of law' and 'material advancement' provisions as whether a question is 'important and doubtful").

314. *Cf.* MINN. R. CIV. APP. P. 103.03 (reframing the 'controlling question of law' and 'material advancement' provisions as whether a question is 'important and doubtful").

315. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(d), (f) (granting appellate court authority to accept permissive appeal based on multiple considerations, including whether 'an immediate appeal from the order may materially advance the ultimate termination of the litigation").

316. *See* McElhaney, *supra* note 6, at 744 (calling permissive appeals '[a]n [e]xceptional [e]xception").

317. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(d) (giving discretion to the trial court to permit an appeal).

that "there is a substantial ground for difference of opinion" or that permitting an immediate appeal will be cost-efficient. But if the trial court has significant doubt that its legal ruling is correct, then a trial court will likely conclude "there is a substantial ground for difference of opinion."[318]

Similarly, if there are multiple alternative grounds for a motion, and the trial court has significant doubt that one supports the requested relief, but has no doubt that the other ground does, then permitting an appeal would not be cost-efficient because the legal question about which the trial court has doubt is not dispositive. In other words, there is not a "controlling question of law as to which there is a substantial ground for difference of opinion." Conversely, if the trial court has significant doubt about its conclusion as to a legal question that the trial court views as dispositive of a motion, the trial court may properly conclude "the order [on the motion] involves a controlling question of law as to which there is a substantial ground for difference of opinion."[319] A split in authority or a difficult novel legal issue will often explain why a trial court has doubt that its ruling is correct, but neither is necessary for a trial court to conclude there is "a substantial ground for difference of opinion."[320]

The "material advancement" provision is satisfied if the trial court concludes that the motion is important enough to the case that if the order were reversed upon an immediate appeal, the immediate interlocutory appeal would clearly be significantly more cost-efficient than requiring the parties to appeal from a final judgment.[321] In considering cost-efficiency, the trial court should rely upon its institutional knowledge and experience, as well as its knowledge of the litigation and the parties. The trial court should be relatively certain that an immediate appeal would be significantly more cost-efficient and thus justify deviating from the final-judgment rule.[322] If the trial court concludes an immediate appeal would be more cost-efficient,

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318. *Id.*

319. *Id.*

320. *Id.*

321. 2011 Bill Analysis, *supra* note 1.

322. *See* Hernandez v. Ebrom, 289 S.W.3d 316, 322 (Tex. 2009) (Jefferson, C.J. dissenting) (noting interlocutory appeals can be inefficient); *cf.* Rexford v. Brunswick-Balke-Collender Co. 228 U.S. 339, 346 (1913) (noting final-judgment rule avoids piecemeal litigation); *cf.* Weber v. United States, 484 F.3d 154, 160 (2d Cir. 2007) (denying leave for permissive appeal and noting, 'Permitting direct appeal too readily might impede the development of a coherent body of bankruptcy case-law. ').

then the trial court should permit the appeal (assuming the "controlling question of law" provision is satisfied).[323]

b. In the Court of Appeals

When determining whether to accept a permissive appeal, the court of appeals should act as the second-tier gatekeeper and consider whether it agrees with the trial court's decision to permit the appeal.[324] When reviewing a petition for permissive appeal, the court of appeals may presume the trial court fully considered the motion before it, analyzed the guiding rules and principles, encountered a dispositive question of law, reached a decision about that controlling question of law, and had significant doubt about its ruling.[325] However, a trial court's decision to sign an order ruling on the motion and granting permission to appeal without having completed all those

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323. This construction of the 'material advancement' provision is similar to the 'adequate remedy by appeal' standard applied in mandamus proceedings that requires a 'careful balance of jurisprudential considerations that determine when appellate courts will use original mandamus proceedings to review the actions of lower courts. In re Prudential Ins. Co. of Am. 148 S.W.3d 124, 136 (Tex. 2004). However, for mandamus purposes, a permissive appeal likely does not constitute an 'adequate remedy by appeal' that would foreclose the possibility of mandamus because the permissive appeal statute does not guarantee a party a right of appeal. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(d), (f) (providing trial court and appellate court discretion); *see also* In re Ford Motor Co. 988 S.W.2d 714, 725 (Tex. 1998) (discussing whether a 'right to appeal' would be an adequate remedy that would prevent the issuance of a writ of mandamus). Because the 'material advancement' standard and the 'adequate remedy by appeal' standard are similar, and mandamus does not require the trial court's permission to pursue relief in the court of appeals, the permissive appeal statute will likely continue to be used primarily to appeal rulings on motions for summary judgment.

324. House Comm. on Judiciary & Civ. Juris. Bill Analysis at 6, Tex. H.B. 274, 82d Leg. R.S. (2011), http://www.hro.house.state.tx.us/pdf/ba82R/HB0274.pdf (last visited Oct. 23, 2016) (noting the 2011 amendments reinstituted the two-tier system to prevent 'a flood of new appeals"); *see* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(f) (requiring an application for permissive appeal to demonstrate why the case is appropriate for a permissive appeal); *see also* TEX. R. APP. P. 28.3(e)(4) (requiring a party seeking a permissive appeal to argue 'clearly and concisely' why the 'controlling question of law' and 'material advancement' provisions are satisfied).

325. *See* Avelo Mortg. LLC v. Infinity Capital, LLC, 366 S.W.3d 258, 263 (Tex. App.—Houston [14th Dist.] 2012, no pet.) ("In the absence of evidence to the contrary, it is presumed that official acts or duties are properly performed and that a public official discharges his duty or performs an act required by law in accordance with the law. ').

tasks is not unprecedented.[326] *Gulley v. State Farm Lloyds* is the only reported case in which a court of appeals noted that the record affirmatively showed that the trial court expressly declined to make a substantive ruling on the controlling question of law before permitting an appeal.[327] Although that incident was isolated, courts of appeals have strictly required a clear indication—either from the written order itself or the record—that the trial court actually made a substantive ruling on the precise controlling question of law.[328]

Texas Rule of Civil Procedure 168 effectively requires a trial court to "show its" work by stating, in the written order, the controlling question of law and why an immediate appeal may materially advance the litigation's ultimate termination.[329] When a trial court's order does not comply with Rule 168, a court of appeals may infer the trial court has not sufficiently considered the "controlling question of law" and "material advancement" provisions.[330] But nothing in the permissive appeal statute or Rule 168 requires an appellate court to deny a petition for permissive appeal or dismiss the appeal simply because the trial court's order does not strictly comply with Rule 168's procedural requirements or explain its decision to permit an appeal.[331] Texas Rule of Appellate Procedure 28.3 contemplates that the petition for permissive appeal may contain a sufficient argument for why the case is appropriate for permissive appeal.[332] If it appears to the appellate court's satisfaction that the trial court has fully considered the motion before ruling on it, the court of appeals should then consider whether an immediate appeal would clearly be significantly more cost-efficient than waiting for a final judgment.

When deciding whether to grant a petition for permissive appeal, the court of appeals should also consider whether the trial court

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326. Gulley v. State Farm Lloyds, 350 S.W.3d 204, 207–08 (Tex. App.—San Antonio 2011, no pet.).

327. *Id.*

328. *E.g.* City of San Antonio v. Tommy Harral Constr. Inc. 486 S.W.3d 77, 81–82 (Tex. App.—San Antonio 2016, no pet.).

329. TEX. R. CIV. P. 168; *cf.* Clark-Dietz & Assocs.-Engineers, Inc. v. Basic Const. Co. 702 F.2d 67, 69 (5th Cir. 1983) (declining to hear the case because the trial court did not make first determination of the ruling).

330. *Cf.* McFarlin v. Conseco Servs. LLC, 381 F.3d 1251, 1255 (11th Cir. 2004) ("The district court's failure to specify the controlling question or questions of law it had in mind when certifying that the case meets the requirements of § 1292(b) is a factor we may consider in deciding how to exercise our discretionary power to review.').

331. TEX. R. CIV. P. 168.

332. *See* TEX. R. APP. P. 28.3(e)(4) (requiring a petition to clearly and concisely argue why the case is appropriate for a permissive appeal).

properly determined there is a controlling question of law as to which there is a substantial ground for difference of opinion.[333] A court of appeals should deny a petition based on an order's failure to satisfy this provision only if the trial court was, in the appellate court's decision, clearly correct on the law.[334] If the appellate court—when considering the petition for permissive appeal—determines the trial court's order is clearly correct, then accepting the permissive appeal would not be cost-efficient.[335] But if the appellate court disagrees with the trial court's ruling based on a legal principle that the court of appeals concludes is well settled, then permitting an appeal would likely be cost-efficient if the motion on which the trial court rendered an order was important enough to the case.[336] Considering the statute's primary purpose of promoting cost-efficiency, it would make little sense to construe the statute as requiring a court of appeals to deny a petition for permissive appeal to correct clear trial court error under well-settled law when correcting the trial court's order would have enormous cost-efficiency benefits. In such cases, courts of appeals should construe "a substantial ground for difference opinion" as including a difference of opinion between the trial court and the court of appeals, even if the court of appeals concludes the difference is on a well-settled legal principle.

c. Problems with Objectivity

Whether a trial court has significant doubt about a legal ruling on an important motion and whether an immediate appeal would clearly be significantly more cost-efficient are somewhat subjective standards. But the legislature did not intend to provide trial courts with strict, objective standards for determining whether to permit an appeal. The Texas permissive appeal statute, like its federal analog, does not contain clear, precise terms and—by design—does not outline clear, specific circumstances under which a trial court may grant

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333. *See* TEX. R. APP. P. 28.3(e)(4) (requiring a petition to argue 'clearly and concisely why the order to be appealed involves a controlling question of law as to which there is a substantial ground for difference of opinion").

334. *Cf. McFarlin*, 381 F.3d at 1258 (explaining there is no substantial ground for difference of opinion when the court of appeals and the trial court are 'in 'complete and unequivocal' agreement").

335. *Cf. id.* (applying this construction of the federal permissive appeal statute); *see* 2011 Bill Analysis, *supra* note 1 (stating the purposes of the most recent amendment to the permissive appeal statute were to promote cost-efficiency).

336. In such cases, the trial court's and the appellate court's disagreement would likely be based on a substantial ground for difference of opinion. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(d).

permission to appeal.[337] The permissive appeal statute's plain language and legislative history demonstrate the legislature's intent to provide flexibility to permit appeals of interlocutory orders that elude precise categorization based on subject matter or a party's identity.

The potential downsides to such flexible standards are the possibilities of piecemeal litigation and flooding appellate courts with permissive appeals.[338] The impact of these potentialities is significantly mitigated by appellate courts' broad discretion in determining whether to accept a permissive appeal.[339] If the court of appeals disagrees with the trial court, and concludes the trial court had no reason to doubt its ruling, or concludes that the order is not significant enough to the litigation, then the appellate court's decision not to accept the appeal prevents unwarranted piecemeal litigation.[340] And if the appellate court's docket is congested, the court has the discretion not to accept the appeal for that reason.[341] As Judge Frank suggested, if courts of last resort have the capacity to wisely determine when to exercise discretionary jurisdiction, then so too do the intermediate courts of appeals.[342]

d. Conclusion

If a trial court renders an interlocutory order that is not appealable, has significant doubt about whether its ruling on a dispositive legal question is correct, and concludes that reversal of its order

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337. *Id.*

338. HOUSE COMM. ON JUDICIARY & CIV. JURIS. Bill Analysis at 6, Tex. H.B. 274, 82d Leg. R.S. (2011), http://www.hro.house.state.tx.us/pdf/ba82R/HB0274.pdf (last visited Oct. 23, 2016) (noting the 2011 amendments reinstituted the two-tier system to prevent 'a flood of new appeals"); *see* Hernandez v. Ebrom, 289 S.W.3d 316, 322 (Tex. 2009) (Jefferson, C.J. dissenting) (noting interlocutory appeals can be inefficient); *cf.* Rexford v. Brunswick-Balke-Collender Co. 228 U.S. 339, 346 (1913) (noting final-judgment rule avoid piecemeal litigation); *cf.* Weber v. United States, 484 F.3d 154, 160 (2d Cir. 2007) (denying leave for permissive appeal and noting, '[p]ermitting direct appeal too readily might impede the development of a coherent body of bankruptcy case-law. ').

339. *Cf.* Hadjipateras v. Pacifica, S.A. 290 F.2d 697. 703 (5th Cir. 1961) (noting federal courts can apply the federal permissive appeal statute to avoid the disadvantages traditionally attributed to interlocutory appeals).

340. *Id.*

341. *Cf.* Coopers & Lybrand v. Livesay, 437 U.S. 463, 475 (1978) (noting federal courts of appeals have broad discretion to deny petitions for permissive appeal for any reason including docket congestion).

342. Audi Vision Inc. v. RCA Mfg. Co. 136 F.2d 621, 627 (2d Cir. 1943) (Frank, J. concurring).

on immediate appeal would clearly be significantly more cost-efficient than an appeal from a final judgment, the trial court should (on a party's motion or its own) sign a written order permitting an appeal. In deciding whether to accept a permissive appeal, the court of appeals should first determine whether it has jurisdiction by ensuring (1) the trial court has granted permission to appeal in writing, and (2) the petition for permissive appeal is timely filed. The court of appeals should dismiss the appeal for want of jurisdiction only if either of these requirements is not satisfied. If these jurisdictional prerequisites are satisfied, the court of appeals should then consider (1) whether the trial court was justified in doubting the propriety of its order; (2) whether reversal of the trial court's order on immediate appeal would clearly be significantly more cost-efficient than an appeal from a final judgment; and (3) whether any other reason justifies not accepting the permissive appeal. After analyzing these prudential considerations, the court of appeals should either grant the petition for permissive appeal or deny the petition and dismiss the appeal.[343]

B. Recommendations for Judicial Procedures Under the Permissive Appeal Statute

In addition to clarifying the Texas permissive appeal statute's jurisdictional requirements and prudential considerations, Texas appellate courts could increase the permissive appeal procedure's cost-efficiency (or reduce inefficiencies) by adopting procedures for the summary denial of petitions for permissive appeals and ensuring the permissive appeal is submitted before the justice or panel of justices that granted the petition for permissive appeal.

Texas courts of appeals have taken significantly different jurisprudential approaches when explaining the denial of a petition for permissive appeal.[344] Some courts have denied petitions for permissive appeal stating no more than, "The petition for permission to ap-

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343. Courts of appeals' orders denying a petition or dismissing for want of jurisdiction should mirror the Texas Supreme Court's orders on petitions for review. *See* TEX. R. APP. P. 28.3 n. & cmt. (noting that '[t]he petition procedure in Rule 28.3 is intended to be similar to the procedure governing petitions for review in the Supreme Court"). But because a petition for permissive appeal may also constitute a bona fide (but erroneous) attempt to invoke the court of appeals' mandatory jurisdiction, the court of appeals must dismiss the appeal for want of jurisdiction when it denies a petition for permissive appeal. *E.g.* E-Spectrum Advisors LLC v. Shenandoah Res. LLC, No. 05-16-01061-CV, 2016 WL 6236859, at *1 (Tex. App.—Dallas Oct. 25, 2016, no pet. h.) (mem op.).

344. *See supra* Part IV.

peal is denied."[345] Other courts have published opinions containing in-depth analyses explaining why the court denied the petition.[346] After the proper construction of the permissive appeal statute is settled, Texas courts should consider adopting a procedure for the summary denials of petitions for three reasons. The first is cost-efficiency; a standard, summary denial prevents unnecessary use of judicial resources to draft and publish lengthy opinions.[347] The second is to reduce the risk of apparent inconsistencies and to prevent a court of appeals from appearing obligated to accept or deny a permissive appeal based on prior cases.[348] Finally, an opinion explaining that there is no substantial ground for difference of opinion risks being advisory.[349] If a court of appeals denies a petition for permissive appeal based on the lack of a substantial ground for difference of opinion, then the appellate court unnecessarily suggests the trial court's order would be affirmed upon an appeal from a final judgment.[350] Furthermore, appellate courts' discretionary jurisdiction to accept a permissive appeal is similar to discretionary review in the Supreme Court of Texas.[351] When denying petitions for review, the supreme court ordinarily does so without explanation.[352] The courts of appeals

345. Tractor Supply Co. v. McGowan, No. 10-13-00340-CV, 2013 WL 6405779, at *1 (Tex. App.—Waco Dec. 5, 2013, no pet.) (mem. op.).

346. *See generally* Undavia v. Avant Med. Group, P.A. 468 S.W.3d 629 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (providing an in-depth explanation as to why the court was not accepting the permissive appeal).

347. 2011 Bill Analysis, *supra* note 1.

348. *See* Coopers & Lybrand v. Livesay, 437 U.S. 463, 475 (1978) (noting that under the federal permissive appeal statute, '[t]he appellate court may deny the appeal for any reason, including docket congestion").

349. *See* Valley Baptist Med. Ctr. v. Gonzalez, 33 S.W.3d 821, 822 (Tex. 2000) (per curiam) (noting Texas courts lack jurisdiction to render advisory opinions).

350. *See* Brown v. Todd, 53 S.W.3d 297, 302 (Tex. 2001) (describing an advisory opinion as one that decides 'abstract questions of law without binding the parties").

351. The comments to Texas Rule of Appellate Procedure 28.3 suggest the permissive appeal statute creates a discretionary review procedure in the intermediate courts of appeals. TEX. R. APP. P. 28.3 n. & cmt. The Supreme Court of Texas, when adopting Rule 28.3, commented that '[t]he petition procedure in Rule 28.3 is intended to be similar to the Rule 53 procedure governing petitions for review in the Supreme Court. *Id.* *see* Harris & Liberato, *supra* note 2, at 31 (arguing the petition for permissive appeal is similar to a petition for review in the supreme court).

352. *Cf.* Redish, *supra* note 55, at 105–06 ("The circuit courts have generally not been receptive to such applications and are not required to provide reasons for their decision on section 1292(b) petitions. ') (footnote omitted).

should consider the same approach when denying petitions for permissive appeal.

Texas appellate courts should also consider a procedure to minimize dismissing permissive appeals as improvidently granted. Under both the Texas and federal permissive appeal statutes, courts of appeals have occasionally withdrawn their acceptance of a permissive appeal and dismissed the appeal as improvidently granted.[353] Texas Rule of Appellate Procedure 56.1(d) authorizes the supreme court to dismiss petitions for review by: "set[ting] aside the order granting review and dismiss[ing] the petition or deny or refus[ing] review as though review had never been granted."[354] The Texas Rules of Appellate Procedure do not provide similar authorization for courts of appeals that have granted a petition for permissive appeal.[355] Instead, Rule 28.3(k) provides that a notice of appeal is deemed filed when a court of appeals grants a petition for permissive appeal. However, the permissive appeal statute and Rule 28.3 do not expressly prohibit a court of appeals from vacating an order accepting a permissive appeal.[356]

Even if courts of appeals have authority to dismiss accepted permissive appeals as improvidently granted and effectively strike a "deemed filed" notice of appeal, the permissive appeal statute and discretionary review in the Supreme Court of Texas serve very different functions. The primary purpose of discretionary review in the supreme court is to resolve important issues of state law.[357] If the supreme court determines that the record in a case in which it granted review does not permit the court to cleanly decide the important legal issue, then the supreme court may dismiss the petition as improvidently granted.[358] Conversely, the primary purpose of the permissive

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353. *E.g.* McFarlin v. Conseco Servs. LLC, 381 F.3d 1251, 1265 (11th Cir. 2004); *see* Coll. Station Med. Ctr. LLC v. Kilaspa, No. 10-14-00374-CV, 2015 WL 4504361, at *5 (Tex. App.—Waco July 23, 2015, no pet.) (Gray, J. dissenting) (noting he would dismiss the permissive appeal as improvidently granted); *cf.* Hartford Accident & Indem. Co. v. Seagoville Partners, No. 05-15-00760-CV, 2016 WL 3199003, at *2–4 (Tex. App.—Dallas June 9, 2016, no. pet.) (mem. op.) (dismissing the appeal for want of jurisdiction after the court had previously accepted the permissive appeal); City of San Antonio v. Tommy Harral Constr. Inc. 486 S.W.3d 77, 79 (Tex. App.—San Antonio 2016, no pet.) (same).

354. TEX. R. APP. P. 56.1(d).

355. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(f) (West Supp. 2015).

356. *Id.*

357. In re Schneider, 134 S.W.3d 866, 872 (Tex. App.—Houston [14th Dist.] 2004) (Frost, J. concurring); *see generally* TEX. R. APP. P. 56.1(a) (providing factors guiding the Supreme Court's discretion in granting review include important questions of state law).

358. TEX. R. APP. P. 56.1(d).

appeal statute is not to determine important issues of state law; its primary purpose is to promote cost-efficiency.[359] When an appellate court withdraws its permission to appeal after the case has been submitted, the parties will have likely paid for a complete record and for their attorneys to fully brief the merits of the appeal and, in some cases, to orally argue the case.[360] Withdrawing permission to appeal after the parties have paid for a record and for their attorneys to present the case is inherently cost-inefficient.

Because dismissing a permissive appeal as improvidently granted undermines the primary purpose of the permissive appeal statute, there should be a significant justification for such dismissals. Yet courts have dismissed permissive appeals as improvidently granted because a justice or panel on the court disagrees with another justice's or panel's decision to accept the appeal.[361] The likelihood of such dismissals could be reduced by having the same justice or panel that granted the petition for permissive appeal decide the case on submission. Such a rule would likely reduce "improvident grant" dismissals and limit such dismissals to rare cases in which a party's petition for permissive appeal misrepresented the trial court proceedings and the response did not bring the misrepresentation of the record to the court's attention.[362] This procedure would also promote

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359. 2011 Bill Analysis, *supra* note 1.

360. *E.g.* Hartford Accident & Indem. Co. v. Seagoville Partners, No. 05-15-00760-CV, 2016 WL 3199003, at *2–4 (Tex. App.—Dallas June 9, 2016, no. pet.) (mem. op.); Colonial Cnty. Mut. Ins. Co. v. Amaya, 372 S.W.3d 308, 310 (Tex. App.—Dallas 2012, no pet.).

361. *E.g.* McFarlin v. Conseco Servs. LLC, 381 F.3d 1251, 1255 (11th Cir. 2004). This can occur because some appellate courts have internal operating procedures by which one judge or panel of judges considers pre-submission matters (such as whether to grant a petition for permissive appeal) and a different judge or panel of judges is assigned to decide the merits of the appeal. *Id.* *see, e.g. Internal Operating Procedures of the Fourteenth Court of Appeals*, TXCOURTS.GOV, http://www.txcourts.gov/media/1247090/internal-operating-procedures-chart-01072016.pdf (last visited Mar. 8, 2016) (providing motions panels and submission panels); *Internal Operating Procedures—Third District Court of Appeals, Austin*, TXCOURTS.GOV 3 (July 2014) http://www.txcourts.gov/media/647953/3rdcoa-iop.pdf ("[M]otions filed before the appeal is submitted are assigned to the justice to whom the case was randomly assigned on filing. Motions filed after the case [is] submitted to a panel are assigned to that panel.").

362. Such a procedure would also avoid having an en banc court reconsider the issue, as is often required when one panel decides a legal issue in direct conflict with another panel's prior decision. *See, e.g. Internal Operating Procedures of the Fourteenth Court of Appeals*, *supra* note 361 (providing en banc consideration is limited to extraordinary circumstances or when "conflicts exist"). This rule would also promote cost-efficiency because the justice or panel that decided to grant per-

cost-efficiency by ensuring the permissive appeal remains with the justice or panel of justices that is the most familiar with the appeal.

VI. CONCLUSION

When enacting and amending the civil permissive appeal statute, the Texas Legislature intended to promote cost-efficiency.[363] And when construing the relatively obscure terminology that the legislature adopted from the analogous federal statute, Texas courts have sometimes conflated the statute's jurisdictional requirements with non-jurisdictional prudential considerations that should merely assist courts in determining whether to depart from the final-judgment rule for the sake of cost-efficiency. The Supreme Court of the United States has helped resolve some of the lack of uniformity in the federal courts in applying the federal permissive appeal statute. The Supreme Court of Texas should follow suit, clarify for the lower courts the jurisdictional requirements and prudential considerations for permissive appeals, and consider prescribing further rules to ensure that the permissive appeal statute remains a viable way to promote cost-efficiency in the civil justice system.

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mission to appeal would be more familiar with the case than a justice or panel who has little or no familiarity with the appeal.

363. 2011 Bill Analysis, *supra* note 1.

Are We Insane? The Quest for Proportionality in the Discovery Rules of the Federal Rules of Civil Procedure

Paul W Grimm*

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INTRODUCTION

A popular definition of insanity describes it as doing the same thing over and over again, and expecting different results. For over thirty years, the Federal Rules of Civil Procedure have been serially amended to require federal trial judges to ensure proportionality during pretrial discovery in civil cases. Proportionality requires that the costs to the parties are not unduly great given the stakes of the litigation. Still, many have complained that the federal judges have failed to promote proportionality. Recently, the Supreme Court approved yet another series of civil rules changes directing judges to ensure that discovery is proportional. But if the proportionality requirement has already been in the rules for over thirty years without inducing judges to fulfill their obligation to manage discovery, what makes

this latest amendment any more likely to achieve success? In short, why has achieving proportionality been such an elusive goal? Is it possible for judges to manage discovery so that it is proportional? If so, how are they to do so? And, if achieving proportionality is possible, why have judges failed to do so? Is it because they are resistant to doing what the rules require? Or do they lack the knowledge or training to succeed in the task?

These questions, and their answers, are the focus of this article. Based on a survey of forty-two district judges and sixty-eight magistrate judges, I conclude that the most likely reasons for the lack of success in achieving proportional discovery to date is a reluctance on the part of judges to view themselves as "case managers," as opposed to "dispute resolvers," and a lack of sufficient discovery management training for judges. In essence, new federal judges must figure out for themselves how to deal with discovery disputes in their cases. For new judges with substantial prior experience as civil litigators, this may not be too much to expect. But for those coming to the bench after a different career the task of managing discovery in hundreds of civil cases, while simultaneously handling an equivalent number of criminal cases, can be daunting. If the most recent changes to the civil rules are to have their intended result, a judicial education program must accompany their enactment. The program would teach judges the tools and techniques available to monitor and manage discovery in civil cases before problems develop (rather than waiting until a discovery dispute has occurred to become involved), and it would counteract the resistance of many judges to accept the obligation to do so.

Based on an analysis of nearly two hundred cases in which federal judges resolved discovery disputes, decided in the thirty plus years since 1983 (when the proportionality requirement first was adopted[1]), I conclude that judges can use a surprisingly large and flexible array of tools—alone or in combination—to achieve proportional discovery. Further, frequently recurring warning signs signal when a case is likely to involve discovery issues that threaten to make proportionality difficult to achieve. These can alert judges to the need to take action before the discovery costs spiral out of control or excessive delay in completing discovery occurs.

I start with a discussion of the criticisms expressed about the current state of things, as reflected in a series of surveys conducted in 2009, followed by a discussion of the civil procedure rules them-

1. *See* FED. R. CIV. P. 26 advisory committee's note to 1983 amendments (noting that discovery practices were 'disproportionate to the nature of the case, the amount involved, or the issues or values at stake").

selves, and the efforts over the last thirty years to require judges to monitor and manage discovery to achieve proportionality. While the obligation to do so is clear, the rules are nearly silent about how the judges are expected to accomplish this vital task, and the surveys similarly offer no helpful insight as to the techniques or procedures they should use to succeed.

Based on a survey of United States district and magistrate judges, I offer an explanation for why achieving proportionality may have been so difficult, and offer suggestions regarding judicial education about how to use the proportionality tools identified in the case analysis to be more successful at achieving proportionality.

Then, I identify a "toolkit" of techniques that a judge can employ—alone or in combination—to achieve proportionality. These techniques include: actively monitoring all cases and becoming more actively involved in managing them when needed, encouraging counsel and the parties to cooperate during discovery, adopting informal discovery dispute resolution methods, shifting the costs of discovery from the producing party to the requesting party, phasing discovery, using computer technology and sampling techniques to reduce the cost of reviewing voluminous electronic files, limiting the amount of time parties must spend responding to discovery requests, imposing sanctions for improper behavior, and capping the amount of discovery allowed based on an estimate of the likely range of recovery in a case. I also identify seven "red flags" that provide early warning signs to a judge of the need to intervene in a case to make sure that costs do not spiral out of control. These warning signs include cases involving complex litigation or multiple parties, cases where there is unusually great party or attorney animosity, cases involving discovery of electronically stored information, cases where there are issues regarding spoliation of evidence, *pro se* litigation, and asymmetrical litigation. In discussing these warning signs, I give examples of how a judge may intervene using the proportionality toolkit to keep costs in check.

My ultimate conclusion is that, by using these techniques and an aggressive education program regarding how to use the proportionality toolkit and recognize warning signs, it will be possible to achieve proportionality and stop the insanity.

Preliminarily, some perspective will help focus the analysis. In 2010, prominent federal and state judges, academics, and attorneys representing bar organizations, the government, and corporations, attended a conference that the Judicial Conference Advisory Committee on the Civil Rules ("the Advisory Committee") convened at the Duke University School of Law. The purpose was to take a

critical look at the current state of civil litigation in the United States and to identify specific strategies for improvement to enable it to better fulfill the goal of securing "the just, speedy, and inexpensive determination of every [civil] action and proceeding."[2] One goal of the conference was to evaluate discovery in civil cases in federal court and to focus on problems associated with discovery of electronically stored information ("ESI").[3] In advance of the Duke Conference, a number of prominent organizations[4] representing a wide variety of participants in the civil litigation process conducted surveys of their members to obtain their views regarding the effectiveness of the federal civil discovery rules. While the surveys showed areas of disagreement about the health of the federal civil litigation process, there was wide agreement that the process takes too long, is too expensive, and that the cost of discovery is disproportionately expensive relative to the value of the case or the importance of the issues at stake in the litigation.[5]

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2. FED. R. CIV. P. 1.

3. Emery G. Lee III & Thomas E. Willging, *Preliminary Report to the Judicial Conference Advisory Committee on Civil Rules,* FEDERAL JUDICIAL CENTER, 5 (October, 2009), http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf; Richard Marcus, *How to Steer an Ocean Liner.* 18 Lewis & Clark L. Rev. 615, 624 (2014).

4. Among those groups were the ABA Section of Litigation, the American College of Trial Lawyers (in conjunction with the Institute for the Advancement of the American Legal System), the Federal Judicial Center, the Association of Corporate Counsel, and the National Employment Lawyers Association ("NELA").

5. *ABA Section of Litigation Member Survey on Civil Practice: Detailed Report,* 2 (Dec. 11, 2009), http://www.uscourts.gov/sites/default/files/aba_section_of_litigation_survey_on_civil_practice_0.pdf (reporting that 89% of survey respondents believe that litigation costs are not proportional to the value in a small case and that 40% believe that litigation costs are not proportional to the value in a large case); *Final Report on the Joint Project of The American College of Trial Lawyers Task Force on Discovery and The Institute For the Advancement of the American Legal System*, 2, 7 (March 11, 2009), http://www.uscourts.gov/sites/default/files/final_report_on_the_joint_project_of_the_actl_task_force_on_discovery_and_the_iaals_1.pdf (reporting that a major theme that emerged from the survey was that the American civil justice system is in need of serious repair, and that '[s]ome deserving cases are not brought because the cost of pursuing them fails a rational cost-benefit test' and recommending that changes be adopted to the civil procedure rules to ensure that discovery is proportional); *Civil Litigation Survey of Chief Legal Officers and General Counsel Belonging to the Association of Corporate Counsel,* 1 (2009), http://www.uscourts.gov/sites/default/files/iaals_general_counsel_survey_0.pdf (reporting that 90% of respondents reported that the litigation process takes too long, and that 97% felt that it was too expensive and "that litigation costs are commonly out of line with the stakes of the case. Further reporting that nine out

Those familiar with the federal rules of civil procedure could view this nearly universal agreement only as an indictment of the effectiveness of more than thirty years of rulemaking efforts to ensure that discovery costs were proportionate. This is because the civil rules first were amended to require proportionate discovery in 1983, and that requirement (although revised and relocated various times within the rules) has been an overarching theme of the discovery process ever since.[6] Accordingly, the starting point for the analysis must be the rules themselves.

Part I of this article discusses the successive efforts of the civil rulemakers to require proportionate discovery by examining the changes in the rules of civil procedure addressing this requirement and the accompanying advisory committee notes that illustrate the goals of the rules and amendments. Part II discusses the results of surveys of United States district and magistrate judges regarding their attitudes toward handling discovery in civil cases, and the approaches they take to doing so. The survey results provide insight into why achieving proportionate discovery has been an elusive goal. Part III discusses the results of an examination of discovery opinions issued by federal judges in which they acknowledged this requirement and resolved discovery disputes with it in mind. The goal of Part III is to determine whether it is possible for judges to achieve proportional discovery and, if so, to identify an inventory of techniques that can be used to do so. Further, Part III identifies a number of risk factors that a review of the cases disclosed; these red flags presage the possibility of disproportionate discovery and can serve as an early warning of the need for a judge to exert more control over

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of ten respondents disagreed with the statement that 'litigation costs are generally proportionate to the value of the case.'); Rebecca M. Hamburg & Matthew C. Koski, *Summary of Results of Federal Judicial Center Survey of NELA Members*, Fall 2009, 6 (2010) ("[t]here was a universal sentiment among NELA respondents that the discovery process is too costly"). All of these surveys (for ease of reference, collectively referred to as the 'Duke Surveys") may be found at www.uscourts.gov/Rules-Policies/records-and-archives-rules-committees/special-projects-rules-committees/2010-civil.

6. *See, e.g.* FED. R. CIV. P. 26(b)(1) (1983) (requiring that '[t]he frequency or extent of use of the discovery methods set forth [in the civil rules] shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) *the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation.*') (emphasis added).

the discovery process. Finally, Part IV offers suggestions as to what ought to be done to improve the situation.

I. THIRTY YEARS OF AMENDMENTS

A. Overview and the 1983 Rule Amendments

The belief that discovery costs in federal court frequently are disproportionate to the value of the case has existed far longer than the thirty years during which the civil rules have required proportionality. The first codification of the Federal Rules of Civil Procedure occurred in 1938,[7] and by the 1950s commentators were noting the cost of discovery.[8] In a symposium regarding "The Practical Operation of Federal Discovery," William Speck reported the results of a field study that the Administrative Office of the United States Courts conducted regarding the use of discovery in the federal courts. The study indicated that response to the federal discovery rules was positive, but noted shortcomings, including "that the expense and time consumed by discovery is out of proportion to the value."[9]

The first attempt in the federal rules of civil procedure to address directly the proportionality issue in discovery occurred with the 1983 amendments to the civil rules. Specifically, the Advisory Committee amended Fed. R. Civ. P. 26(b) ("Discovery Scope and Limits") to contain the following language:

> The frequency or extent of use of the discovery methods set forth in [the discovery rules] shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more

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7. Marcus, *supra* note 3, at 618 (characterizing the period from 1938 to 1970 as a golden era of crafting federal procedural rules).

8. In 1951 Judge James M. Douglas, chair of the Judicial Conference Section on Judicial Administration, convened a symposium regarding discovery issues. James M. Douglas & Charles E. Clark, *The Practical Operation of Federal Discovery*, 12 F.R.D. 131 (1951).

9. *Id.* at 137. Focusing on the cost of deposition discovery, Speck further illustrated the proportionality concern. He disclosed that the survey revealed that the costs at that time of taking a deposition of 100-150 pages in length in an 'ordinary case' would be $200-300. He observed that '[i]f 100 to 150 pages of depositions are reasonable in a tort case worth $20,000, then 100,000 to 150,000 pages would be in proportion in a case worth $20,000,000. *Id.* at 138. At a cost of between two and three dollars a page, deposition discovery alone would run between $200,000 and $300,000 (in 1951 dollars) for a case where $20,000,000 was at issue.

> convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion [for protective order].[10]

Rather than adopt bright-line restrictions on the type of permissible discovery and how parties could employ it, the rules opted for providing the parties and judges with a multi-factor analysis of how to tailor the discovery in each case to its needs. Such a flexible approach necessarily requires that the court monitor and manage the case (where needed), as the parties cannot apply the cost-benefit factors identified in the rules in the abstract.

The Committee Note accompanying these changes explained why they were added and how the Committee hoped they would govern the conduct of discovery. The Committee observed that "the spirit of the rules is violated when advocates attempt to use discovery tools as tactical weapons rather than to expose the facts and illuminate the issues by overuse of discovery or unnecessary use of defensive weapons or evasive responses."[11] When parties employ such abusive techniques, "this results in excessively costly and time-consuming activities that are *disproportionate* to the nature of the case, the amount involved, or the issues or values at stake."[12] The Committee introduced the concept of proportionality as a limiting factor on the amount of discovery that the parties should seek, or the court should permit, in a civil case.

The Committee amended Rule 26(b)(1) with the goal of "guard[ing] against redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry."[13] Fundamentally, the new rule imposed on the trial judge the duty to guard against disproportionate discovery. The Committee plainly stated that "[t]he new sentence is intended to encourage judges to be more aggressive in identifying and discouraging discovery overuse,"

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10. FED. R. CIV. P. 26(b)(1) (1983).
11. FED. R. CIV. P. 26, Advisory Committee Note to the 1983 Amendments.
12. *Id.* (emphasis added).
13. *Id.*

noting that "[o]n the whole district judges have been reluctant to limit the use of the discovery devices."[14] Thus, the concept of the trial judge as an active participant in the monitoring and, as needed, the management of the discovery process in an individual case was integral to the Committee's view of how to combat disproportionately expensive or burdensome discovery.

The Committee designed the new Rule 26(b)(1)(i) "to minimize redundancy in discovery" and to "encourage attorneys to be sensitive to the comparative costs of different methods of securing information."[15]It also introduced subdivision (b)(1)(ii) "to reduce repetitiveness and to oblige lawyers to think through their discovery activities in advance so that full utilization is made of each deposition, document request, or set of interrogatories."[16] The concomitant amendment of Rule 26(g), governing the signing of discovery requests, responses, and objections, reinforced the notion that the attorneys conducting discovery had an independent duty to ensure that discovery in a case was not disproportionate.[17]

The Committee Note addressed in detail how Rule 26(g) should regulate attorney conduct during discovery. It stated: "Rule 26(g) imposes an affirmative duty to engage in pretrial discovery in a responsible manner that is consistent with the spirit and purposes of Rules 26 through 37 [which govern all the discovery devices]."[18] "If primary responsibility for conducting discovery is to continue to rest with the litigants, they must be obliged to act responsibly and avoid abuse."[19] Accordingly, the "certification duty requires the lawyer to pause and consider the reasonableness of his request, response, or objection," by making "a reasonable inquiry into the factual basis of his response, request, or objection."[20]

Having clearly stated the responsibility of both the trial judge and the litigants' lawyers to ensure proportionate discovery in each case, the Committee Note further addressed how the new Rule 26(b)(1)(iii) would guide them in doing so.

> The elements of Rule 26(b)(1)(iii) address the problem of discovery that is disproportionate to the individual lawsuit as measured by such matters as its na-

14. *Id.*
15. *Id.*
16. *Id.*
17. FED. R. CIV. P. 26(g) (1983); *Federal Rules of Civil Procedure as of April 28, 1983*, 97 F.R.D. 165, 173.
18. FED. R. CIV. P. 26(g) advisory committee's note to 1983 Amendments.
19. *Id.*
20. *Id.*

> ture and complexity, the importance of the issues at stake in a case seeking damages, the limitations on a financially weak litigant to withstand extensive opposition to a discovery program or to respond to discovery requests, and the significance of the substantive issues, as measured in philosophic, social, or institutional terms. Thus the rule recognizes that many cases in public policy spheres, such as employment practices, free speech, and other matters, may have importance far beyond the monetary amount involved. The court must apply the standards in an even-handed manner that will prevent use of discovery to wage a war of attrition or as a device to coerce a party, whether financially weak or affluent.[21]

Rule 26(b)(1)(iii) introduced a highly nuanced series of cost-benefit factors for the lawyers and judge to consider in each case to ensure proportionate discovery. Yet the Committee clearly designed the rule to protect against any mechanistic approach to limiting discovery. While Rule (26)(b)(1)(iii) introduced a cost-benefit analysis to determining how much discovery is appropriate in a given case, allowing consideration of the likely amount of recovery if successful, the parties and judge also were to consider the "value" of a case in light of its "philosophic, social, or institutional terms."[22] For example, public policy cases involving issues such as employment discrimination or free speech often require extensive discovery, yet may not produce a large-dollar judgment for the successful litigant. The lawyers and the judge had to factor in the type of case, the issues at stake (as measured by the goals of the litigants, as well as the broader societal issues implicated by the case), the relief requested, and the comparative resources of the parties. In short, the 1983 changes to the discovery rules sought to inaugurate a new approach to discovery.

B. The 1993 and 2000 Rule Amendments

Just ten years after the Committee amended Rule 26(b)(1) to adopt the proportionality standard it amended the rule again in subtle but important ways. First, it divided the paragraph into two numbered sub-paragraphs. The first contained the general discussion of

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21. FED R. CIV. P. 26(b)(1)(iii) advisory committee's note to 1983 Amendment.

22. *Id.*

the type of information that is subject to discovery; the second, titled "limitations," allowed courts to issue orders or adopt local rules to alter the numerical limits on discovery elsewhere contained in the rules and included the proportionality language with two revisions. First, former Rule 26(b)(1)(iii) became 26(b)(2)(iii), and the Committee revised it to say "the burden or expense of the proposed discovery outweighs its likely benefit," instead of "the discovery is unduly burdensome or expensive."[23] Second, the Committee revised Rule 26(b)(2)(iii) to add the following factor: "the importance of the proposed discovery in resolving the issues."[24] The Advisory Committee was concerned about the information explosion brought about by the increasing use of computer-based information systems, as well as the potential for vastly greater discovery costs associated with trying to obtain all relevant information stored on many computers. Accordingly, the message the Committee sent to judges was that they needed to restrict discovery further if necessary to prevent it from being oppressive. The 1993 changes also relocated the proportionality factors to the subsection of Rule 26 discussing limits on the number of depositions, interrogatories and requests for admission that an order or local rule could impose, thereby moving them from their original location at the beginning of the Rules defining the scope of discovery.[25] As will be seen, subsequent amendments to the rule further disassociated the proportionality factors from the language setting out the scope of discovery, a development now reversed by the 2015 changes to the Federal Rules of Civil Procedure that took effect on December 1, 2015.[26]

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23. *Compare* FED. R. CIV. P. 26(b)(2)(iii) (1993) *with* FED. R. CIV. P. 26(b)(1)(iii) (1983).

24. FED. R. CIV. P. 26(b)(2)(iii) (1993).

25. *Compare* FED. R. CIV. P. 26(b)(2) (1993) *with* FED. R. CIV. P. 26(b)(1) (1983).

26. Memorandum from Judge David G. Campbell, Chair, Advisory Committee on the Federal Rules of Civil Procedure, to Judge Jeffrey Sutton, Chair, Standing Committee on Rules of Practice and Procedure, regarding Proposed Amendments to the Federal Rules of Civil Procedure (June 14, 2014), Appendix B to Agenda Item E-19, September, 2014 meeting of The Judicial Conference of the United States Courts, Summary of the Report of the Judicial Conference Committee on Rules of Practice and Procedure (hereinafter 'Judge Campbell Memorandum") at Appendix B-8 ("As this summary illustrates, three previous Civil Rules Committees in three different decades have reached the same conclusion as the current Committee—that proportionality is an important and necessary feature of civil litigation in federal courts. And yet one of the primary conclusions of [the] comments and surveys at the 2010 Duke Conference was that proportionality is still lacking in too many cases. The previous amendments have not had their desired effect. *The Committee's purpose in returning the proportionality factors to*

In 2000, the Advisory Committee amended Rule 26(b)(1) (which defines the scope of discovery) to add the following sentence: "All discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii)."[27] As the Advisory Committee Note explained,

> a sentence has been added [to Rule 26(b)(1)] calling attention to the limitations of subdivision (b)(2)(i), (ii), and (iii). These limitations apply to discovery that is otherwise within the scope of subdivision (b)(1). The Committee has been told repeatedly that courts have not implemented these limitations with the vigor that was contemplated This otherwise redundant cross-reference has been added to emphasize the need for active judicial use of subdivision (b)(2) to control excessive discovery.[28]

The Committee acknowledged that, despite the presence of the proportionality factors as a limitation on the scope of discovery that had existed for seventeen years, they had not produced their intended effect. The courts had failed to implement these limitations with "vigor."

C. The 2006 Rule Amendments

In 2006, the Advisory Committee changed the Rules of Civil Procedure again to address concerns about the expense and burden that expansive discovery of electronically stored information (ESI) increasingly caused. It amended Rule 26(b)(2) "to address issues raised by difficulties in locating, retrieving, and providing discovery of some electronically stored information."[29] As part of these changes, the Committee divided Rule 26(b)(2) into three subparagraphs. The first contained the existing authority for courts to issue orders altering the limits in the rules on the number of depositions and interrogatories, and to issue local rules to limit the number of requests for admissions.[30] The second added new language to address issues as-

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Rule 26(b)(1) is to make them an explicit component of the scope of discovery, requiring parties and courts alike to consider them when pursuing discovery and resolving discovery disputes. ') (emphasis added).

27. FED. R. CIV. P. 26(b)(1) (2000).
28. FED. R. CIV. P. 26(b)(1) advisory committee's note to 2000 Amendments.
29. FED. R. CIV. P. 26(b)(2) advisory committee's note to 2006 Amendments.
30. FED. R. CIV. P. 26(b)(2)(A) (2006).

sociated with discovery of ESI from sources that are not readily accessible because of undue burden or cost.[31] The third contained the proportionality language introduced in 1983, and modified in 1993 and 2000.[32]

D. The Duke Conference

Despite the 2006 amendments to the Rules of Civil Procedure, complaints persisted that the costs of discovery in civil cases continued to be disproportionately expensive. The Advisory Committee hosted a conference to discuss these concerns and identify means to address them.

The Report to the Chief Justice identified the findings of the Duke Conference regarding the problems associated with the civil discovery process and underscored the failure of prior rulemaking efforts to achieve proportional discovery costs. Importantly, the Duke Conference highlighted the need to base future rulemaking changes on more than anecdotal information, and to consider empirical data as well.[33] Those who provided information to the Advisory Committee, and the participants at the Duke Conference, represented not just the views of institutional participants in the litigation process, on whom the costs and burdens of discovery most often fall, but also an extremely diverse group including judges, academics, lawyers from many types of practices, representing a range of plaintiffs, defendants, businesses, governments, and public interest organizations.[34]

The Advisory Committee recognized that "making changes to the Federal Rules of Civil Procedure [alone] is not sufficient to make meaningful improvements" in the civil litigation process.[35] Rather,

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31. FED. R. CIV. P. 26(b)(2)(B) (2006).

32. FED. R. CIV. P. 26(b)(2)(C) (2006).

33. Judicial Conference Advisory Committee on Civil Rules and Committtee on Rules of Practice and Procedure, Report to the Chief Justice of the United States on the 2010 Conference on Civil Litigation, at 2, http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/special-projects-rules-committees/2010-civil. The empirical data reviewed during the conference included a study that the Federal Judicial Center (FJC) performed of more than 3,500 cases that terminated in the last quarter of 2008, as well as surveys from the Litigation Section of the American Bar Association (ABA), the National Employment Lawyers Association (NELA), and members of the American College of Trial Lawyers. In addition, the Advisory Committee reviewed empirical information that the Searle Institute at Northwestern Law School and a consortium of large corporations provided regarding the actual costs of conducting discovery in civil litigation. *Id.*

34. *Id.*

35. *Id.* at 4.

"judicial education, legal education, and support provided by the development of materials to facilitate implementing more efficient and effective procedures"[36] needed to accompany future rules changes. The Duke Conference could be "described in two words—cooperation and proportionality—and one phrase—sustained, active, hands-on judicial case management."[37]

While the Advisory Committee acknowledged that rule changes alone would not fully ameliorate the problems that the Duke Conference identified, it concluded that properly focused rule changes could contribute to the needed solutions and it identified a number of desirable changes.[38] One of them focused on the need to emphasize further the proportionality requirement of Rule 26(b)(2). Specifically, the Advisory Committee observed that "[t]here is continuing concern that the proportionality provisions of Rule 26(b)(2), added in 1983, have not accomplished what was intended. Again, however, there was no suggestion that this rule language should be changed. Rather the discussion focused on proposals to make the proportionality limit more effective "[39] This recommendation resulted in an additional round of rulemaking changes by the Advisory Committee, which addressed the provisions of Rule 26(b)(2) that deal with proportionality and the scope of discovery.

E. The 2015 Rule Amendments

The major change proposed by the Advisory Committee with respect to proportionality was to move many of the proportionality factors from Rule 26(b)(2)(C)(iii) to Rule 26(b)(1) making them part of the scope of discovery.[40] Rule 26(b)(1) now reads in part:

> Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.[41]

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36. *Id.*
37. *Id.*
38. *Id.* at 5–10.
39. *Id.* at 8.
40. Judge Campbell Memorandum, *supra* note 27, at Appendix B-4.
41. FED. R. CIV. P. 26(b)(1).

The Advisory Committee recommended this change for three reasons. First, the findings of the Duke Conference demonstrated widespread consensus that, as currently practiced in federal court, discovery on the whole was disproportionately expensive and burdensome.[42] Second, the history of nearly thirty years of rulemaking designed to inculcate the proportionality factors into the conduct of discovery in civil cases had been unsuccessful in achieving the intended goal.[43] Finally, the Advisory Committee carefully addressed the concerns of those opposed to the change, to make clear its intent that courts should not interpret the changes in a manner that would allow the feared abuses to occur.[44]

First, the Advisory Committee Note to the changes to Rule 26(b)(1) explained that the changes did not impose any new responsibilities on the part of courts or the parties with respect to proportionality, stating that "[r]estoring the proportionality calculation to Rule 26(b)(1) does not change the existing responsibilities of the court and the parties to consider proportionality, and the change does not place on the party seeking discovery the burden of addressing all proportionality considerations."[45] This language addressed concerns that the proposed new rule language would place an impossible burden on a requesting party by requiring that party to demonstrate a factual basis for each of the proportionality factors, despite the fact that—without the desired discovery—they would not have the ability to do so.

Second, the Advisory Committee Note also addressed concerns that parties requested to provide discovery would use the new rule language to stonewall by making blanket, conclusory objections (often referred to as "boilerplate objections"), forcing the requesting party to incur the cost of filing a motion to compel. The Note stated: "Nor is the change intended to permit the opposing party to refuse discovery simply by making a boilerplate objection that it is not proportional. The parties and the court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes."[46] The Advisory Committee Note added a specific example of how the parties were to fulfill the "collective responsibility" requirement:

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42. Judge Campbell Memorandum, *supra* note 27, at Appendix B-6–B-7.
43. *Id.* at Appendix B-7–B-8.
44. *Id.* at Appendix B-8.
45. FED. R. CIV. P. 26 advisory committee's note to the 2015 Amendments.
46. FED. R. CIV. P. 26 advisory committee's note to the 2015 Amendments.

> The parties may begin discovery without a full appreciation of the factors that bear on proportionality. A party requesting discovery, for example, may have little information about the burden or expense of responding. A party requested to provide discovery may have little information about the importance of the discovery in resolving the issues as understood by the requesting party. Many of these uncertainties should be addressed and reduced in the parties' Rule 26(f) conference [requiring the parties to confer early in the case to develop a discovery plan] and in scheduling and pretrial conferences with the court. But if the parties continue to disagree, the discovery dispute could be brought before the court and the parties' responsibilities would remain as they have been since 1983. A party claiming undue burden or expense ordinarily has far better information—perhaps the only information—with respect to that part of the determination. A party claiming that a request is important to resolve the issues should be able to explain the ways in which the underlying information bears on the issues as that party understands them. The court's responsibility, using all the information provided by the parties, is to consider these and all the other factors in reaching a case-specific determination of the appropriate scope of discovery.[47]

Third, the Advisory Committee Note discussed the rationale for adding "the parties' relative access to relevant information" as a new proportionality factor, observing that the "new text [is intended] to provide explicit focus on considerations already implicit in present Rule 26(b)(2)(C)(iii)."[48] The Note observed that parties often enter litigation with vastly different access to the information that will be needed to resolve the case. It explained that "[s]ome cases involve what often is called 'information asymmetry.' One party—often an individual plaintiff—may have very little discoverable information [while] [t]he other party may have vast amounts of information, including information that can be readily retrieved "[49] In

47. FED. R. CIV. P. 26 advisory committee's note to the 2015 Amendments.
48. *Id.*
49. *Id.*

such circumstances, "the burden of responding to discovery lies heavier on the party who has more information, and properly so."[50]

Fourth, the Advisory Committee Note stressed the importance of active judicial monitoring of the discovery process in all cases, and, where needed, intervention to manage the process to prevent disproportional cost or excessive delay. It stated:

> The present amendment again reflects the need for continuing and close judicial involvement in the cases that do not yield readily to the ideal of effective party management. It is expected that discovery will be effectively managed by the parties in many cases. But there will be important occasions for judicial management, both when the parties are legitimately unable to resolve important differences and when the parties fall short of effective, cooperative management on their own.[51]

The abuses that opponents to the new rules feared would occur if the Supreme Court approved the new language should not occur for two reasons. First, the parties themselves have a duty, imposed by Rule 26(g)(1), to consider proportionality when making discovery requests, responding to them, or objecting to them. Necessarily implicit in this requirement, and reinforced by the requirement of Rule 26(f) that the parties confer early in the case to discuss discovery, is the expectation that there be cooperation between the parties. Second, when the parties themselves are unable or unwilling to fulfill their responsibilities, the rule obligates the court to step in to manage the discovery to ensure that it is proportional.

Fifth, the Advisory Committee Note stressed the importance of not attempting to measure proportionality solely in terms of the monetary value of the case. It reiterated Note language from the 1983 version of Rule 26(b) that explained the importance of considering the substantive issues in a case that involves little prospect of a large monetary recovery for the plaintiff, but nonetheless involves important societal issues.[52]

Finally, the Advisory Committee Note discussed how the judge and the parties should evaluate the parties' resources in determining whether the discovery sought is disproportionately burdensome or expensive and how the parties may use current and future

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50. *Id.*
51. *Id.*
52. *Id.*

technological advancements to reduce burden or expense. Specifically, the Advisory Committee noted that computer-based methods of searching ESI are being developed and should be considered as a way to reduce the expense of discovery.[53]

The Advisory Committee Notes accompanying the 2015 changes to the proportionality requirements of Rule 26(b) demonstrate the care and attention to detail that characterized the Committee's most recent changes. The Committee was under no illusion about the lack of success of earlier attempts, and took pains to identify why those efforts had not succeeded, so as to adopt measures that—if implemented by the parties and the court—would overcome the earlier failures. Reduced to their essence, the success of the new changes indeed will hinge on "cooperation," "proportionality," and "sustained, active, hands-on judicial case management."[54]

II. SURVEY RESULTS

In June and July 2015, I administered a survey to United States district and magistrate judges attending educational workshops sponsored by the Federal Judicial Center, the research and educational branch of the United States Courts. The judges voluntarily and anonymously filled out the survey at the end of an educational session about discovery. The district judge workshop was for judges sitting in courts in the Fourth Circuit.[55] A total of forty-two judges filled out the survey. The magistrate judge workshop was for judges sitting throughout the United States. A total of sixty-eight judges filled out the survey. The surveys were essentially the same, except that I asked district judges an additional question relevant only to them—whether they handled discovery disputes in their cases themselves or referred them to magistrate judges. Also, based on the responses to the question directed to district judges regarding their training, I refined the question regarding the training in discovery that magistrate judges had received. I asked both district and magistrate judges about: (1) their approach to handling discovery in civil cases (whether they actively managed the discovery process, or waited until there was a dispute before becoming involved); (2) the frequency with which they balanced the interests of the party requesting discovery against the burdens and expenses to the party from whom

53. *Id.*

54. Judge Campbell Memorandum, *supra* note 27. at Appendix B-2–B-3.

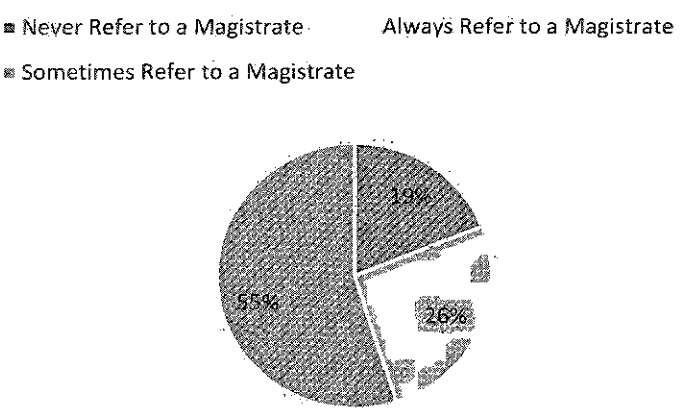
55. The Fourth Circuit consists of the states of Maryland, Virginia, West Virginia, North Carolina, and South Carolina.

discovery is requested (to assess their awareness of the proportionality requirement); (3) the specific techniques they had used when resolving discovery disputes (to determine which of the proportionality factors discussed in Part III they had actually used); (4) whether they had received training about how to monitor and manage discovery since becoming a judge; and (5) their experience level with civil discovery prior to becoming a judge.

A. Managing Discovery

19% of the district judges said they always keep discovery disputes for resolution, 26% said they always refer their discovery disputes to magistrate judges, and 55% said they sometimes keep discovery disputes to resolve themselves, and sometimes refer them. That is to say, 81% of the district judges refer discovery disputes to magistrate judges for resolution at least some of the time.

T-1 1 District Judges Handling Discovery Disputes

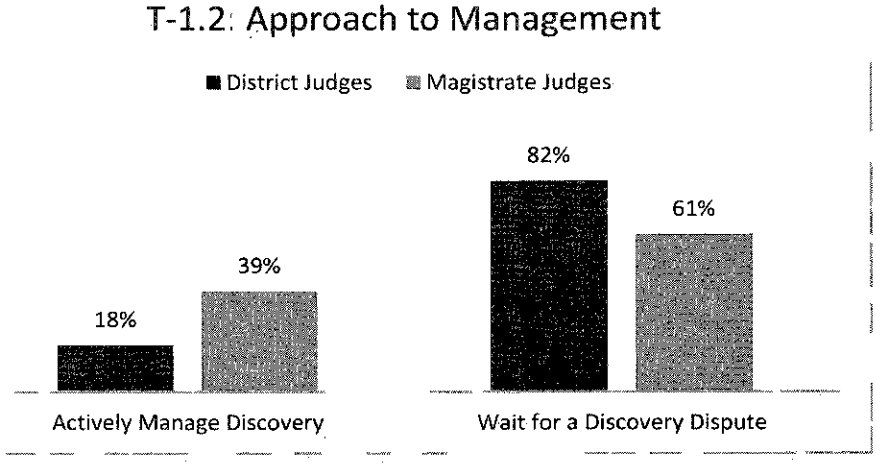


This is consistent with the results of the case analysis in Section III, where magistrate judges decided 67% of the reported cases that discussed the proportionality factors when resolving discovery disputes, and district judges decided only 28% of those cases.[56] The fact that magistrate judges are deciding so many discovery disputes may suggest that district judges are insufficiently experienced with the details of discovery practice in civil cases to fully appreciate the

56. *See* discussion *infra* Section III.A.

proportionality requirement or the benefit of actively monitoring and managing cases to achieve it. It may also raise questions about the optimal use of magistrate judges and whether they are becoming specialists in discovery.

I also asked the judges which of two choices best described their approach when the parties asked them to rule on a discovery dispute: "I actively manage the discovery process in my cases" or "I become involved in the discovery process when the parties have a dispute that results in the filing of a motion." Of the district judges, 18% said they actively managed the discovery process in their cases, while 82% said that they waited until a discovery dispute had blossomed into a motion to become involved in the process. Of the magistrate judges, 39% responded that they actively managed the discovery process in their cases, and 61% said that they waited for a discovery motion to become involved.

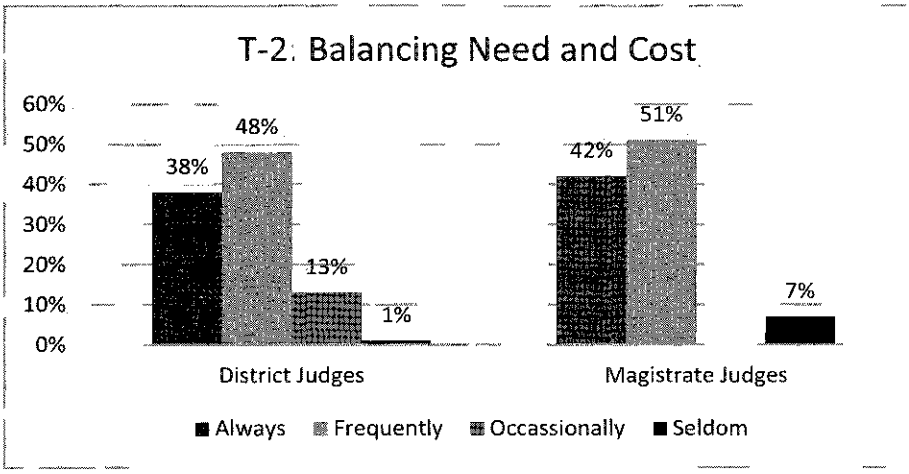


These responses indicate that both district and magistrate judges primarily view themselves as "dispute resolvers" rather than "active managers" of the discovery process, with this view being far more prevalent (82%) for district judges. Given the importance that the rulemakers placed on active judicial monitoring and management to achieve the objective of proportional discovery,[57] the survey responses suggest that much more needs to be done to educate judges about the benefits of active case management in achieving proportionality, and their obligation to do so.

57. *See infra* Sections II.E, III.B.1.

B. Balancing Need and Cost

I asked both district and magistrate judges how likely they were, when deciding a discovery dispute, to balance the interests of the party requesting the discovery against the burdens and expenses to the party from whom discovery is requested, within the following choices: always, frequently, occasionally, seldom, and never. The results of the survey are displayed in Table T-2 below. The possible implications of these responses are mixed.

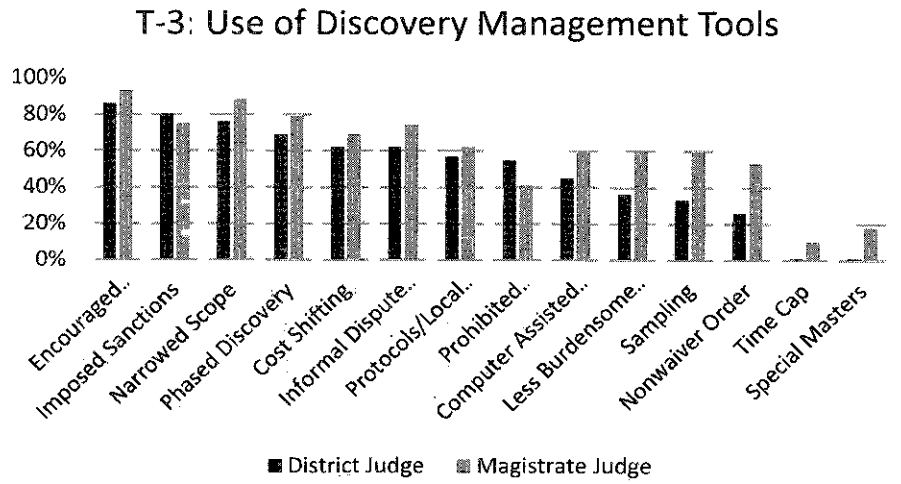


The "good news" is that 86% of the district judges and 93% of the magistrate judges were aware of the proportionality requirement, as they always or frequently took it into consideration when resolving discovery disputes. The "bad news" is that fewer than half of the judges always considered proportionality factors in resolving discovery disputes, despite the fact that the Rules require them to do so in all cases.

C. Specific Techniques

I asked both district and magistrate judges to identify which of the measures identified in Part III of this article as tools to achieve proportionality they had used when ruling on a discovery dispute. These tools are: encouraging the parties to cooperate during discovery; imposing sanctions on parties for failure to properly fulfill discovery obligations; narrowing the scope of discovery; conducting discovery in phases; cost shifting from the producing party to the requesting party; adopting informal methods of resolving discovery disputes; adopting discovery protocols, local rules, or standing orders governing the discovery process; prohibiting boilerplate objections;

computer search methodology for discovery of voluminous ESI; obtaining discovery from a less burdensome source; sampling when discovery was sought from voluminous sources; non-waiver orders pursuant to Federal Rule of Evidence 502; capping the amount of time a party had to spend on discovery; and using special masters or other neutrals to assist the parties during discovery. The responses of district and magistrate judges are laid out in Table T-3 below.



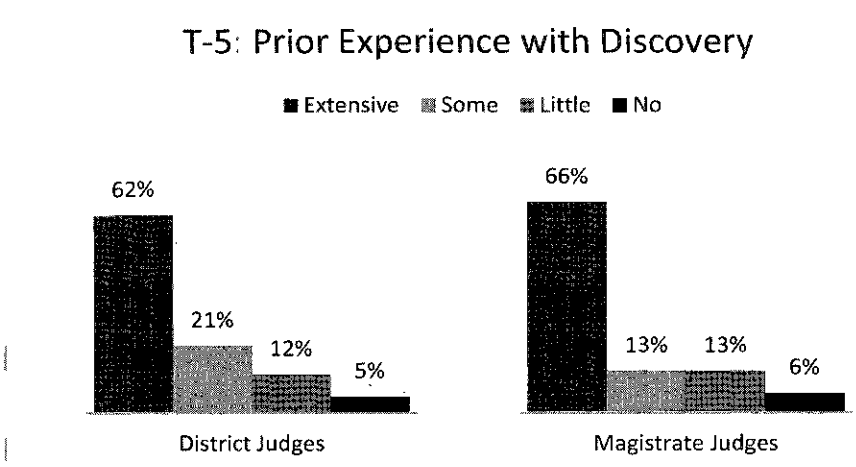
Several observations may be made from these responses. First, for most of the proportionality techniques identified in Part III of this article, more than 50% of both district and magistrate judges had employed them, suggesting that judges widely are using many of the proportionality tools in resolving discovery disputes. The flip side is that judges may not be sufficiently aware of some useful proportionality techniques (or how best to use them). This suggests that with education and encouragement, greater use (and more proportionality) may occur. The responses also show that, with the exception of imposing sanctions and prohibiting boilerplate objections, magistrate judges have more frequently used the proportionality techniques identified in Part III than district judges. Given the greater frequency with which magistrate judges have to manage discovery and resolve discovery disputes, this is not surprising, but it does underscore the need for greater training of district judges if the goal of proportional discovery is to be achieved. Finally, the responses provide useful information to the Federal Judicial Center when planning future educational programs on discovery for district and magistrate judges by identifying the most useful techniques to focus on, as well as those which appear to be underused.

D. Discovery Training

I asked both district judges and magistrate judges about the training they had received since becoming a judge regarding management of discovery in civil cases. Specifically, I asked the district judges if they had received training about discovery from any source, whether the FJC or another organization. 55% responded that they had, while 45% said they had not. Based on these responses, I refined the question before giving it to the magistrate judges, whom I asked how many had received training from the FJC "regarding how to handle civil discovery in a manner designed to achieve proportionality (balancing the need of the requesting party against the cost and burden to the producing party), considering what is at stake or at issue in the litigation." Only 25% of the magistrate judges responded that they had received such training, while 75% responded that they had not. The refined question about discovery training that I posed to the magistrate judges provides more useful information than the less specific question I asked the district judges, because it focused on education from the organization principally charged with educating federal judges, as well as on the specific type of training that could be expected to have the greatest effect on improving the management of discovery to ensure proportionality. The responses from the district judges suggest that while somewhat more than half have had some form of discovery training, nearly half have not. Three quarters of the magistrate judges had not received any training from the FJC regarding the proportionality requirement that the rules impose on federal judges. These responses suggest that more needs to be done with judicial education if greater proportionality is to be achieved.

E. Prior Experience with Discovery

Finally, I asked both district and magistrate judges about the level of their experience with discovery in civil cases before becoming a judge. Their responses are found in Table T-5 below.



Overall, the vast majority of federal judges come to the court with at least some discovery experience. Nonetheless, the responses are a reminder that there are federal judges who come to the bench without sufficient prior experience with the civil discovery process, and these judges would benefit from educational programs designed to teach them the fundamentals of this process and, more specifically, the importance of proportionality and the tools to achieve it.

The surveys conducted for this article provide useful insight about the attitudes of district and magistrate judges regarding discovery in general, and the obligation to manage discovery to ensure proportionality specifically. They were helpful in part because research failed to reveal any similar surveys conducted of federal judges concerning their attitudes toward discovery, and none of the surveys that were studied during the Duke Conference were directed at judges themselves. That said, it must be acknowledged that a survey of only 110 federal judges cannot be regarded as fully representative of the views and experiences of the more than 1200 district and magistrate judges who constitute the federal trial judiciary.[58] Nevertheless, a sampling of nearly 10% of the federal judiciary can provide useful insight regarding their approach to handling the discovery process in civil cases, their knowledge of the proportionality requirement, their experience with the tools for achieving proportionality, and their level of familiarity with discovery practice before becoming judges, at

58. There are 678 United States district judges. www.fjc.gov/federal/courts.nsf (follow 'How the Federal Courts are Organized' hyperlink; then follow 'Federal judges and how they get appointed' hyperlink). There are 531 United States magistrate judges. Peter G. McCabe, *A Guide to the Federal Magistrate Judge System*, FEDERAL BAR ASSOCIATION (August 2014, Updated October 2016), http://www.fedbar.org/News-From-the-FBA/A-Guide-to-the-Federal-Magistrate-Judges-System.aspx?FT=.pdf.

least for the purpose of beginning to understand the reasons why it has been so difficult to persuade the federal trial judges to fully embrace the notion of actively managing discovery to achieve proportionality.

III. TOOLS TO ACHIEVE PROPORTIONALITY

A. Overview

To identify cases in which judges demonstrated an awareness of the proportionality requirements of Rule 26(b), I designed computer search terms to capture the different rule number applicable to the proportionality factors between 1983 and 2006, during which time the Committee amended and renumbered the rules.[59] After trying various combinations of search terms, I selected and used three to search reported and unreported federal cases on the WestlawNext database.[60] The searches produced 193 cases, which I then reviewed and indexed to identify the type of judicial officer deciding the case,[61] the type of case or circumstance that led to the discovery dispute, and the method the judge used to resolve it.

In broad terms, the following observations can be made regarding the cases reviewed. First, the vast majority of cases (67%) were decided by United States magistrate judges, an unsurprising result given the frequency with which district judges refer pretrial case management or discovery disputes to them for resolution. In most of the remaining cases (28%), district judges issued the opinion, most often when ruling on objections that the parties raised to initial rulings by magistrate judges. In a very small number of cases (5%), bankruptcy judges or a special master issued the opinion.

Second, while the judges cited to the applicable version of Rule 26 containing the proportionality factors, they most often discussed them at the beginning of the decision, when citing to other portions of Rule 26 that govern discovery, and did not discuss the

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59. Because the 2015 rule changes did not become effective until December 1, 2015, no cases have been decided as of the writing of this article applying them.

60. The three search term combinations were: '((RULE FRCP 'FED. R. CIV. P. ')/3 26(B)(1) & (CUMULATIVE DUPLICATIVE BURDEN! EXPENS!)) & da(aft 1/1/1983 & bef 12/31/1995) & proportion!' '((RULE FRCP 'FED. R. CIV P. ')/3 26(B)(2) % INSURANCE) & da(aft 1/1/1993 & bef 12/31/2008) & proportion!' and '((RULE FRCP 'FED. R. CIV. P. ') 3 26(B)(2)(2)(C)) & da(aft 1/1/2006) & proportion!'

61. Types included district judge, magistrate judge, bankruptcy judge, and special master.

proportionality factors in detail when actually resolving the dispute.[62] In some cases, the judge would cite specifically to one of the proportionality subsections of Rule 26(b), such as Rule 26(b)(2)(C)(i) (which permits limiting discovery if it is "unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive");[63] Rule 26(b)(2)(C)(ii) (which allows the judge to limit discovery if "the party seeking discovery has had ample opportunity to obtain the information by discovery in the action")[64] or Rule 26(b)(2)(C)(iii) (which

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62. *See, e.g.* Equal Emp't Opportunity Comm'n v. FAPS, Inc. No. 10–3095, 2012 WL 1656738, at *33 (D.N.J. May 10, 2012) (Defendant objected to producing—during litigation phase—records previously produced during administrative investigation conducted by EEOC. Court cited 26(b)(2)(C) and the doctrine of proportionality generally before denying EEOC's motion to compel, because the discovery would be 'unreasonably cumulative.'); Equal Emp't Opportunity Comm'n v. Princeton Healthcare Sys. No. 10-4126, 2011 WL 2148660, at *11–*12 (D.N.J. May 31, 2011) (addressing discovery dispute, Court cited 26(b)(2)(C) and the doctrine of proportionality in general when describing the scope of discovery, but did not refer to it in detail when ruling on motion); Int'l Paper Co. v. Rexam, Inc. No. 11-6494, 2013 WL 3043638, at *7 (D.N.J. June 17. 2013) (citing 26(b)(2)(C)(ii) and the doctrine of proportionality generally, expressing concern that defendant's document production requests raised issues of proportionality, and requiring defendant to resubmit them after modifying them to address its concerns); Thompson v. C & H Sugar Co. No. 12-CV-00391, 2014 WL 595911, at *2 (N.D. Cal. Feb. 14, 2014) (discussing the scope of discovery, Court referenced 26(b)(2)(C) and the doctrine of proportionality without any detailed analysis in resolving discovery motions); Eisai Inc. v. Sanofi-Aventis U.S. LLC No. 08-4168, 2012 WL 1299379, at *4, *7 (D.N.J. Apr. 16, 2012) (addressing discovery dispute, Court cited 26(b)(2)(C) and the doctrine of proportionality in general, but did not cite any subsections or particularize how the rule should be used to resolve the dispute).

63. FED. R. CIV. P. 26(b)(2)(c)(1); *See, e.g.* Equal Emp't Opportunity Comm'n v. FAPS, Inc. No. 10–3095, 2012 WL 1656738, at *33 (D.N.J. May 10, 2012) (denying EEOC motion to compel because the same documents previously had been provided by defendant to the EEOC during the administrative investigation phase, and doing so again would be unreasonably duplicative or cumulative, citing 26(b)(2)(C)(i)); High Voltage Beverages, LLC v. Coca-Cola Co. No. 3:08CV367. 2009 WL 2915026, at *2, *5–6 (W.D.N.C. Sept. 8, 2009) (denying plaintiff's motion to compel defendant to review and produce ESI from an additional 17gb of information (1.5 million pages) considering production that already had been made, because it was unreasonably cumulative, contrary to 26(b)(2)(C)(i), and also found the additional production would contravene 26(b)(2)(C)(ii) and (iii)); Kleen Prods. LLC v. Packaging Corp. of Am. No. 10 C 5711, 2012 WL 4498465, at *11 (N.D. Ill. Sept. 28, 2012) (finding that through encouraging a cooperative approach and with active case management there were less burdensome, cumulative and duplicative ways for plaintiffs to obtain discovery, citing 26(b)(2)(C)(i) (as well as (ii) and (iii)).

64. *See, e.g.* High Voltage Beverages, LLC v. Coca-Cola Co. No. 3:08CV367. 2009 WL 2915026, at *2, *5–6 (W.D.N.C. Sept. 8, 2009) (denying

permits the judge to limit discovery if the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues).[65] However, even when citing to a specific proportionality factor, the discussion tended to be cursory and few cases contained an extensive discussion of the proportionality factors.[66]

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plaintiffs motion to compel the defendant to review and produce ESI from an additional 17gb (1.5 million pages) citing all three sub-sections of 26(b)(2)(C), including (ii), because defendant already had produced 1.7 million pages of ESI); Bowers v. Nat'l Collegiate Athletic Ass'n, 2008 WL 1757929, at *4–*6 (D.N.J. Feb. 27. 2008) (analyzing all three sub-sections of Rule 26(b)(2)(C) with respect to proportionality and found violations of all, including that plaintiff already had ample opportunity to obtain relevant information from prior discovery, citing Rule 26(b)(2)(C)(ii)).

65. *See, e.g.* In re Biomet M2a Magnum Hip Implant Prods. Liab. Litig. No. 3:12-MD-2391, 2013 WL 1729682, at *1–3 (N.D. Ind. Apr. 18, 2013) (denying plaintiffs' motion to compel defendant to do predictive coding search of ESI because defendant already had used keyword search, deduplication and statistical sampling to reduce 19.5 million documents to 2.5 million documents, then used technology assisted review ("TAR") on those documents to produce documents to plaintiffs, at a cost of $1.07 million. Plaintiffs wanted TAR used on the entire 19.5 million documents. The court declined, finding it was excessively burdensome given the likely value of doing the additional search. Although court did not specifically cite 26(b)(2)(C)(iii), its analysis was based on it); Eisai Inc. v. Sanofi-Aventis U.S. LLC, No. 08-4168, 2012 WL 1299379, at *2, *7 (D.N.J. Apr. 16, 2012) (noting that defendant had produced discovery from 110 custodians, involving 12 million pages, spending 4,200 hours collecting, and 86,000 hours of counsel review, at a cost of more than $10 million. Accordingly, it denied plaintiff's motion to require defendants to review documents from an additional 175 custodians because, *inter alia*, the burden or expense would outweigh the likely benefit. Court only cited 26(b)(2)(C), but analysis brings it within (iii)); High Voltage Beverages, LLC v. Coca-Cola Co. No. 3:08CV367. 2009 WL 2915026, at *2 (W.D.N.C. Sept. 8, 2009) (denying plaintiff's motion to compel defendant to review an additional 1.5 million documents, citing all three sub-sections of 26(b)(2)(C), including (iii) (cost would exceed likely benefits)); Kleen Prods. LLC v. Packaging Corp. of Am. No. 10 C 5711, 2012 WL 4498465, at *7–10 (N.D. Ill. Sept. 28, 2012) (finding that requiring the defendant to answer one particular interrogatory would violate 26(b)(2)(C)(iii) because it would require very detailed information to be compiled for each of 400 employees on a litigation hold list, and the cost would exceed any likely benefit); Chen-Oster v. Goldman, Sachs & Co. 285 F.R.D. 294, 305–06 (S.D.N.Y 2012) (noting that Rule 26(b)(2)(C)(iii) cautions that importance of litigation is not measured by potential amount of monetary recovery, but includes recognition of public interest litigation).

66. One case (that I decided) that discusses the proportionality requirement in depth is Mancia v. Mayflower Textile Servs. Co. 253 F.R.D. 354, 357–362 (D. Md. 2008). There I took an extensive examination of the proportionality factors,

Third, a review of the methods actually used by judges to resolve the disputes reveals a robust and creative assortment of techniques constituting a "proportionality toolkit." The proportionality toolkit provides examples that judges can draw on and tailor to their needs. These methods will be discussed in detail below. It is readily apparent that all of them are common-sense, pragmatic measures that judges may employ to achieve proportionality in an individual case, enabling the judge to tailor the response to the needs of the case, as guided by the proportionality factors in Rule 26.[67]

While the tools that judges may use to achieve proportional discovery are not inherently complex, the selection of the appropriate tool or tools in a particular case can be. Intelligently and fairly applying the tools requires the judge to have more than superficial knowledge of the issues and facts. The cases reviewed support the position that the Committee Notes took: that the most effective way to achieve proportional discovery is through active, hands-on management of the discovery process by court.

Finally, reviewing cases where parties asked judges to resolve actual disputes provides insight into identifying the circumstances and types of cases that are most likely to present proportionality problems. This helps judges to recognize and take appropriate actions to address proportionality issues as early in the litigation as possible. This underscores the importance of active judicial monitoring during discovery. These potentially troublesome cases will be discussed in detail below.[68]

B. Techniques that Judges Used to Achieve Proportionality

1. Active Judicial Monitoring and Management of Discovery

Perhaps the single most important technique that judges used to achieve proportionality was to engage in active monitoring of their cases, which enabled them to intervene as soon as problems arose that could lead to excessively burdensome or costly discovery. Indeed, all of the other techniques discussed in this article are but subsets of this method. The importance of active judicial monitoring of cases is reflected in the frequency with which it was cited in the var-

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citing both Rule 26(g)(1) as well as 26(b)(2)(C)(i)–(iii), and explained why cooperation among the parties and counsel was essential to achieving it).

67. *See infra* Section III.B.

68. *See infra* Section III.C.

ious surveys of lawyers that were reviewed by the Civil Rules Committee at the Duke Conference[69] and also discussed in the Advisory Committee Notes.[70]

In the cases surveyed, judges demonstrated active case monitoring and management in many ways. For example, they provided informal guidance to the parties, without actually having to rule, to point them in the direction of proportional discovery.[71] Or, they an-

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69. *See e.g. ABA Section of Litigation Member Survey on Civil Practice*, *supra* note 5, at 3 (containing the following survey findings: '78% of respondents believe that early intervention by judges helps to narrow the issues, and 72% believe that early intervention helps to limit discovery; '73% of all respondents believe that when a judicial officer gets involved early and stays involved, the results are more satisfactory to their clients; '[d]espite claims of discovery abuse and cost, 61% of respondents believe that counsel do not typically request limitations on discovery under available mechanisms; 76% do not believe judges invoke those protections on their own; and nearly 60% of respondents believe that judges do not enforce those mechanisms to limit discovery"); Final Report of the Joint Project of the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advance of the American Legal System, *supra* note 6, at (concluding that 'Judges should have a more active role at the beginning of a case in designing the scope of discovery and the direction and timing of the case all the way to trial. Where abuses occur, judges are perceived not to enforce the rules effectively. According to one Fellow, 'Judges need to actively manage each case from the outset to contain costs; nothing else will work. ').

70. FED. R. CIV. P. 26(b) advisory committee's note (1983) ("The rule [change introducing the proportionality factors] contemplates greater judicial involvement in the discovery process and thus acknowledges the reality that it cannot always operate on a self-regulating basis. '); FED. R. CIV. P. 26(b)(2) advisory committee's note (2000) ("The Committee has been told repeatedly that courts have not implemented [the proportionality factor] limitations with the vigor that was contemplated. This otherwise redundant cross-reference [to the proportionality factors] has been added to emphasize the need for active judicial use of subdivision (b)(2) to control excessive discovery. '); Judge Campbell Memorandum, *supra* note 25 at Appendix B-6 ("In its report to the Chief Justice, the Committee observed that '[o]ne area of consensus in the various [Duke] surveys was that district or magistrate judges must be considerably more involved in managing each case from the outset, to tailor the motions practice and shape the discovery to the reasonable needs of the case. ').

71. *See, e.g.* Teck Metals, Ltd v. London Mkt. Ins. No. CV-05-411, 2010 WL 4813807, at *2, *4–9 (E.D. Wa. Aug 25, 2010) (Court was called upon to resolve dispute regarding interrogatory and document production discovery. Citing Rule 26(b)(2)(C), the judge directed counsel to meet and confer and provided them with guidance how to minimize the production burden on the defendant, as well as suggestions regarding the form of production of ESI, and clarified the scope of what was relevant, and suggested the use of a protective order to address defense concerns.); Bottoms v. Liberty Life Assur. Co. of Boston, No. 11-cv-01606, 2012 WL 6181423, at *4–5 (D. Colo. Dec. 13, 2011) (addressing a discovery dispute, the judge discussed Rule 26(g) and Rule 26(b)(2)(C) and the requirement of proportionality, offering specific guidance how the parties could narrow the scope of

nounced their intention to actively monitor permissible discovery.[72] They adopted informal methods to expedite the resolution of discovery disputes without the need for full briefing. In that way, they achieved proportionality by reducing both the time needed to resolve the dispute and the cost to the parties of fully briefing the issues.[73] This method is particularly effective because parties frequently frame discovery disputes without extensive briefing.

Courts also achieved proportionality by ordering that the discovery be conducted in phases, allowing the parties to focus on the most important facts and issues in the case.[74] Similarly, when discovery involved voluminous document or ESI discovery, judges reduced the costs of reviewing the documents for relevance and privilege by ordering that the parties employ sampling.[75]

Frequently, courts demonstrated active case monitoring and management by intervening as needed to narrow the scope of discovery, promoting a more focused approach to discovery and reducing

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burdensome interrogatories to achieve proportionality); Plascencia v. BNC Mortg. Inc. LLC, No. 08-56305, 2012 WL 2161412, at *3, *6–8, *11 (Bankr. N.D. Cal. June 12, 2012) (giving guidance to the parties regarding how discovery practice should be conducted, referring counsel to a local rule that required proportionality analysis to be a part of any motion to compel discovery).

72. Boeynamems v. LA Fitness Int'l, LLC, 285 F.R.D. 331, 332 (E.D. Pa. 2012) (noting that the number and nature of discovery disputes in the case required him to conduct 'active discovery management' to keep the scope of discovery appropriate and to reduce the burden of discovery on the defendant).

73. Eisai Inc. v. Sanofi-Aventis U.S. LLC. No. 08-4168, 2012 WL 1299379, at *1 (D.N.J. Apr. 16, 2012) (permitting parties to submit informal letters outlining their positions regarding discovery disputes, instead of requiring them to submit formal memoranda); Raza v. City of New York, No. 13-CV-3448, 2013 WL 6177392, at *2 (S.D.N.Y Nov. 22, 2013) (holding a 'pre-motion' conference with the parties, attempting to resolve the dispute at the conference without the need for any briefing).

74. Chen-Oster v. Goldman, Sachs & Co. 285 F.R.D. 294, 300-01 (S.D.N.Y 2012) (noting that phasing discovery would help to keep it proportional); Fisher v. Fisher, No. WDQ-11-1038, 2012 WL 2050785, at *5 (D. Md. June 5, 2012) (narrowing the scope of discovery initially sought by plaintiff, initiated phased discovery to focus on the most important facts, and informed plaintiff that the possibility of further discovery would depend upon the results of the initial discovery); Tamburo v. Dworkin, No. 04 C 3317, 2010 WL 4867346, at *3 (N.D. Ill. Nov. 17, 2010) (ordering the parties to meet and confer to develop a phased discovery schedule, reminding them of their duty to cooperate in doing so).

75. Kleen Prods. LLC v. Packaging Corp. of Am. No. 10 C 5711, 2012 WL 4498465, at *5, *18 (N.D. Ill. Sept. 28, 2012) (encouraging parties to use sampling to reduce the cost of discovery of ESI); Quintana v. Clare's Boutiques, Inc. No. 5:13-cv-368, 2014 WL 234219, at *2 (N.D. Cal. Jan 21, 2014) (ordering that plaintiff be permitted discovery of a statistically significant sample of defendant's records).

burden and cost.[76] And, when the demands of their workloads did not permit them to actively monitor discovery, judges displayed a willingness to involve others who could, such as a magistrate judge, a special master, or other neutral monitor.[77] While referrals to magistrate judges are frequent, appointing a special master is infrequently done because of the expense to the parties. Alternatively, appointing a technical expert, such as a computer expert skilled in designing and implementing effective search protocols for large volumes of ESI to assist less technically sophisticated parties can be very effective, because the cost of the expert frequently is offset by the more efficient and less expensive methods identified by the expert.

Judges who have shown a willingness to actively monitor and manage the discovery in their cases (or appoint another to do it for them) have shown creativity, flexibility, and resourcefulness limited only by their own ingenuity. The mere knowledge that a judge is willing to make him or herself available to resolve discovery disputes has a deterrent effect against burdensome or disproportionate discovery. Lawyers are less likely to initiate disproportionate discovery or engage in discovery misconduct when they know the judge is watching and willing to be contacted as soon as a problem arises. It is no surprise, therefore, that lawyers and commentators identify active management by the trial judge as the most important ingredient to ensuring proportional discovery.[78]

Moreover, only intervening in cases that require intervention produces great benefits for the judge. Judges who confer with the parties to make their expectations clear about how discovery ought to be conducted at the start of each case, monitor all of their cases, and promptly step in to more actively manage those that require it find that they have fewer disputes, fewer motions to decide, fewer opin-

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76. Equal Emp't Opportunity Comm'n v. Princeton Healthcare Sys. No. 10-4126, 2011 WL 2148660, at *17 (D.N.J. May 31, 2011) (finding the temporal scope of plaintiff's discovery request was too broad and abstract, narrowing it to a period of six years initially, with the possibility of an additional four); Willnerd v. Sybase, Inc. No. 1:09-cv-500, 2010 WL 4736295, at *1 (D. Idaho Nov. 16, 2010) (granting plaintiff's motion to amend the complaint to add another claim, but ruled that that did not 'throw open the doors to begin discovery on the claim anew, and imposed 'tight restrictions' on the additional discovery on the new claim).

77. Eisai Inc. v. Sanofi-Aventis U.S. LLC, No. 08-4168, 2012 WL 1299701, at *11 (D.N.J. Apr. 16, 2012) (appointing a special master 'to expedite the timely resolution of any existing or prospective disputes regarding the designation of discovery' under a previously entered confidentiality order); United States v. Educ. Mgmt. LLC, No. 2:07-cv-461, 2013 WL 3863963, at *13 (W.D. Pa. June 23, 2013) (noting the Court had appointed a retired judge as a special master to resolve and narrow the discovery disputes raised by numerous motions).

78. *See supra* notes 73–74.

ions to write, and more time to devote to other cases. Active judicial monitoring and selective management of discovery in necessary cases makes sense not only because the rules require it, but also because it is in the judge's own interest.

2. Encouraging Cooperation among the Parties and Counsel

As noted, the Civil Rules Advisory Committee has recognized that you may distill what is needed to achieve the goals of revised Rule 26(b)(1) to two words and a phrase: "proportionality," "cooperation" and "sustained, active, hands-on judicial case management."[79] It follows that one of the most effective ways that judges can ensure proportional discovery is to make sure that counsel and the parties are aware of the benefits of cooperating during discovery and to encourage them to do so.

While proportional discovery in a case is not possible in the absence of cooperation between the parties and their counsel, the Federal Rules of Civil Procedure do not explicitly require cooperation. However, a duty to cooperate is implicit in the collective requirements of a number of rules. Rule 26(f) requires the parties to "confer as soon as practicable" to discuss the case and attempt "in good faith to agree on the proposed discovery plan," which they then must submit to the court in a written report.[80] Rule 26(g)(1) requires an attorney or party (if unrepresented) to sign every discovery request, response, or objection. The Rule states that the signature "certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry" the discovery request, response or objection is not "unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action."[81] Additionally, Rule 37 provides a significant number of sanctions that a court may impose for "failure to make disclosures or to cooperate in discovery."[82] And courts long have encouraged counsel

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79. Judge Campbell Memorandum, *supra* note 26, at Appendix B-2–B-3.

80. FED. R. CIV. P. 26(f).

81. FED. R. CIV. P. 26(g)(1).

82. FED. R. CIV. P. 37. While sanctions are available to deter and punish parties who fail to comply with the discovery rules or orders of the court, judges cannot expect to achieve cooperative discovery through imposition of sanctions alone. Indeed, the Committee Note to newly amended Rule 1 makes it clear that the emphasis on cooperation between the parties when they employ the discovery rules "does not create a new or independent source of sanctions." FED. R. CIV. P. 1 advisory committee's note to the 2015 Amendments. While failure to cooperate, stand-

and parties to cooperate during the discovery process to achieve proportionality.[83]

Furthermore, the 2015 changes to the Federal Rules of Civil Procedure include a revision to Rule 1 and its advisory note to further underscore the importance and value of cooperation. The revised Rule 1 now states: "[t]hese rules govern the procedure in all civil actions and proceedings in the United States district courts. They should be construed, administered, *and employed by the court and the parties* to secure the just, speedy, and inexpensive determination of every action and proceeding." (emphasis added).[84] Thus, absent cooperation between the parties, the court and the parties cannot "employ" the Federal Rules of Civil Procedure in a manner that fulfills the aspirational goals of Rule 1.

Accordingly, one of the most effective tools that judges employ to achieve proportional discovery is to ensure that counsel and the parties are aware of the benefits of cooperation and to encourage them to cooperate.[85] They do this by exhorting and admonishing the

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ing alone, is not subject to sanctions, it often leads to conduct that the rules prohibit, which may be sanctionable. Moreover, when cooperation is the goal, sanctions for conduct that violates the rules are effective when they are a last resort—the 'stick' that is appropriate only when the use of 'carrots' to persuade the parties of the mutual benefits of cooperation has failed. The most effective way to achieve cooperation during discovery is for the judge to be actively involved in monitoring all phases of the discovery process and to educate the parties at the start of each case how it is to their mutual advantage to reduce expense, delay, and burden by cooperating in the design and execution of focused discovery appropriate for the needs of the particular case.

83. *See, e.g.* Mancia v. Mayflower Textile Servs. Co. 253 F.R.D. 354, 357–58 (D. Md. 2008) (collecting cases) ("It cannot seriously be disputed that compliance with the 'spirit and purposes' of [the] discovery rules requires cooperation by counsel to identify and fulfill legitimate discovery needs, yet avoid seeking discovery the cost and burden of which is disproportionately large to what is at stake in the litigation. Counsel cannot 'behave responsively' during discovery unless they do both, which requires cooperation rather than contrariety, communication rather than confrontation.").

84. FED. R. CIV. P. 1; *see* Judge Campbell Memorandum, *supra* note 26, at Appendix B-21.

85. *See, e.g.* Thompson v. C & H Sugar Co. No. 12-CV-00391, 2014 WL 595911, at *5–6 (N.D. Cal. Feb. 14, 2014); Kleen Prods. LLC v. Packaging Corp. of Am. No. 10 C 5711, 2012 WL 4498465, at *1, *8–9, *12 (N.D. Ill. Sept. 28, 2012); Mancia v. Mayflower Textile Servs. Co. 253 F.R.D. 354, 357-61, 364-65 (D. Md. 2008); Perez v. Mueller, No. 13-C-1302, 2014 WL 2050606, at *5 (E.D. Wis. May 19, 2014); SEC v. Collins & Aikman Corp. 256 F.R.D. 403, 415 (S.D.N.Y 2009); Tamburo v. Dworkin, No. 04 C 3317, 2010 WL 4867346, at *3 (N.D. Ill. Nov. 17, 2010); *In re* Convergent Tech. Sec. Litig. 108 F.R.D. 328, 331 (N.D. Cal. 1985).

parties to cooperate,[86] educating them about the benefits of cooperation and providing examples of how to cooperate,[87] and, as a last resort, reminding them that uncooperative behavior can lead to impermissible conduct that could result in the imposition of sanctions.[88] Judges also promote cooperation by informing the parties about publications that discuss how they can achieve cooperation and the advantages of doing so.[89]

3. Adopting Informal Discovery Resolution Methods

When the parties have discovery disputes that they cannot solve without court intervention, the filing and resolution of motions to compel, motions for protective orders, or motions seeking sanctions can involve significant time and expense. The availability of

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86. *See* Thompson v. C. & H. Sugar Co. No. 12-CV-00391, 2014 WL 595911, at *5–6 (N.D. Cal. Feb. 14, 2014) (ordering the parties to meet and confer to agree on search methodology for ESI discovery that it described as 'incredibly broad, and admonished that '[t]his Court has emphasized the importance of the parties cooperating to iron out discovery wrinkles on their own"); Kleen Prods. LLC v. Packaging Corp. of Am, No. 10 C 5711, 2012 WL 4498465, at *1, *8–9, *12 (N.D. Ill Sept. 28, 2012) (admonishing lawyers on the requirement to cooperate in planning and executing discovery); *In re* Convergent Tech. Sec. Litig. 108 F.R.D. 328, 331 (N.D. Cal. 1985) (noting the excessive costs in pending commercial litigation and admonished counsel regarding the duty to be cooperative in the conduct of discovery and only seek court intervention in 'extraordinary circumstances' involving 'significant interests").

87. *See* Mancia v. Mayflower Textile Servs. Co. 253 F.R.D. 354, 357-61, 364-65 (D. Md. 2008) (discussing origin of duty to cooperate in discovery to achieve proportionality, citing Rules 26(g) and Rule 26(b)(2)(C)(1)-(iii), and provided specific guidance on steps that should be taken to do so).

88. *See* Perez v. Mueller, No. 13-C-1302, 2014 WL 2050606, at *5,*7 (E.D. Wis. May 19, 2014) (issuing order denying defense motion to dismiss and provided guidance regarding conduct of discovery, noting that the court was participating in the Seventh Circuit Electronic Discovery Pilot Program, principle 1.02 (Cooperation), which stated '[t]he failure of counsel or the parties to cooperate in facilitating and reasonably limiting discovery requests and responses raises litigation costs and contributes to the risk of sanctions").

89. SEC v. Collins & Aikman Corp. 256 F.R.D. 403, 414–15 (S.D.N.Y 2009) (analyzing discovery disputes stemming from a large volume of ESI sought in discovery, discussing the obligation of the parties to confer in developing a discovery plan, and drawing their attention to the Sedona Conference Cooperation Proclamation, which urges parties to work in a cooperative rather than adversarial manner to keep discovery costs from becoming burdensome); Tamburo v. Dworkin, No. 04 C 3317, 2010 WL 4867346, at *3 (N.D. Ill. Nov. 17, 2010) (requiring parties to meet and confer to agree on a phased discovery plan, and to be familiar with the Sedona Conference Cooperation Proclamation).

seemingly limitless discovery opinions means that even the most mundane discovery dispute can involve excessive briefing—with its attendant costs to the parties. Nonetheless, judges can resolve most discovery disputes with little or no briefing at all, if the parties notify them of the dispute as soon as it arises and the judges swiftly intervene. Accordingly, one of the most effective tools that judges use to reduce discovery costs and achieve proportionality is the adoption of informal discovery resolution methods that eliminate the need for formal briefing of disputes.[90] Examples of informal discovery resolution methods include: allowing the parties to submit brief letters outlining the issues, followed by a telephone conference;[91] requiring a "pre-motion" conference with parties to address and attempt informally to resolve discovery issues without any briefing at all;[92] and having informal discovery conferences (in person or by phone) in lieu of in-court hearings.[93]

Informal discovery dispute resolution measures can be particularly effective in promoting proportional discovery because they permit the judge to intervene in a dispute before it escalates to the filing of motions and counter-motions. When the parties know that the judge will become involved promptly if they behave improperly during discovery, they have less of an incentive to adopt delaying tactics such as making boilerplate objections, filing clearly deficient answers to interrogatories or document production requests, or misbehaving during a deposition. Moreover, when a judge adopts informal discovery resolution techniques, he or she can suggest resolutions without having to enter an actual ruling and can give guidance on measures the parties can take, focusing on problem solving rather than assessing blame or imposing sanctions. When a judge makes it clear how he or she expects the parties to conduct discovery during an informal conference, the parties learn to resolve disputes on their

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90. Indeed, the survey conducted for this article of district and magistrate judges indicated that 62% of the district judges had used informal methods to resolve discovery disputes, as did 74% of the magistrate judges. The cases reviewed also support the efficacy of informal discovery dispute resolution methods. *See, e.g.* Eisai Inc. v. Sanofi-Aventis U.S. LLC, No. 08-4168, 2012 WL 1299379, at *1 (D.N.J. Apr. 16, 2012); *In re* Morgan Stanley Mort. Pass-Through Certificate Litig. No. 09-CV-02137. 2013 WL 4838796, at *1 (S.D.N.Y Sept. 11, 2013); Raza v. City of New York, No. 13-CV-3448, 2013 WL 6177392, at *3 (S.D.N.Y Nov. 22, 2013); Willnerd v. Sybase, Inc. No. 1:09-cv-500-BLW. 2010 WL 4736295, at *3 (D. Idaho Nov. 16, 2010).

91. *See generally Eisai Inc.* 2012 WL 1299379, at *1, *In re* Morgan Stanley Mortg. Pass-Through Certificate Litig. 2013 WL 4838796, at *1.

92. *See generally Raza*, 2013 WL 6177392, at *2.

93. *See generally Willnerd*, 2010 WL 4736295, at *1.

own by anticipating what the judge's requirements and moderating their positions accordingly.

Additionally, the use of informal discovery resolution techniques makes efficient use of a judge's time. It takes far less time to read a two-page letter outlining a discovery dispute and hold a fifteen-minute telephone conference than it does to read a long motion (with memorandum), as well as an opposition and reply memorandum, and then draft a formal opinion. Even a judge with a busy trial docket can usually find an hour to address discovery disputes informally. Thus, judges who adopt informal discovery dispute resolution methods spend less time addressing discovery disputes, leaving more time to focus on the substantive issues in their cases.

The Civil Rules Advisory Committee has recognized the value of encouraging judges to adopt informal procedures to resolve discovery disputes to help minimize cost. The 2015 changes to Rule 16(b) gave courts the authority to "direct that before moving for an order relating to discovery, the movant must request a conference with the court."[94] The accompanying Advisory Committee Note explains the rationale for the new language:

> [T]he [scheduling] order may direct that before filing a motion for an order relating to discovery the movant must request a conference with the court. Many judges who hold such conferences find them an efficient way to resolve most discovery disputes without the delay and burdens attending a formal motion. [95]

Finally, adopting informal procedures to resolve discovery disputes is one of the most effective ways of implementing active judicial case management because it allows the judge to inject himself or herself at the first sign of a discovery problem, and—with little delay and cost—take action to resolve the problem before it spirals out of control. Because of its efficiency, the judge may use it as frequently as needed to keep a case on course to achieve proportionality.

4. Phasing Discovery

Judges also may keep costs and burdens in check by ordering that discovery occur in stages, with the initial phases focusing on the

94. Fed. R. Civ. P. 16(b)(3)(B)(v) (2015).
95. *Id.* advisory committee's note to the 2015 Amendments.

information most likely to be relevant to resolving the central claims and defenses, and additional phases allowed based on the result of the initial phase.[96] In one case, the court explained the rationale of its prior oral ruling resolving a series of discovery disputes, and addressed phased discovery as a means to keep discovery proportional, writing:

> I suggested that [counsel] consider 'phased discovery,' so that the most promising, but least burdensome or expensive sources of information could be produced initially, which would enable Plaintiffs to reevaluate their needs depending on the information already provided.[97]

Judges often order phasing when parties seek discovery covering a long span of time.[98] Ordering phased discovery is a convenient way for a court to achieve proportionality without having to issue an "all or nothing" ruling, but rather one that meets the legitimate concerns of both parties.[99] Finally, phasing discovery works best if counsel and the parties cooperate to identify the information that the requesting party needs most and soonest, and which the producing party can obtain from the most readily available sources. According-

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96. *See, e.g.* Equal Emp't Opportunity Comm'n v. Princeton Healthcare Sys. No. 10-4126, 2011 WL 2148660, at *11–12 (D.N.J. May 31, 2011); Chen-Oster v. Goldman, Sachs & Co. 285 F.R.D. 294, 300-01 (S.D.N.Y 2012); Mancia v. Mayflower Textile Servs. Co. 253 F.R.D. 354, 365 (D. Md. 2008); Bosh v. Cherokee Cnty. Governmental Bldg. Auth. No. 11-CV-376, 2013 WL 6150799, at *2–3, (E.D. Okla. Nov. 22, 2013); Fisher v. Fisher, No. WDQ-11-1038, 2012 WL 2050785, at *5 (D. Md. June 5, 2012); Tamburo v. Dworkin, 2010 WL 4867346, at *3 (N.D. Ill. Nov. 17, 2010).

97. *Mayflower Textile Servs. Co.* 253 F.R.D. at 365.

98. *See, e.g.* Equal Emp't Opportunity Comm'n v. Princeton Healthcare Sys. 2011 WL 2148660 at *16–17. (Plaintiff in class action discrimination case sought document discovery without any temporal limits. Citing Rule 26(b)(2)(C), the court found that the request was too abstract and unlimited and ordered initial discovery for a six year period, advising that depending on the results of the first phase, additional discovery was possible for an additional three years.).

99. *See generally, e.g.* Chen-Oster v. Goldman Sachs & Co. 285 F.R.D. 294 (S.D.N.Y 2012) (discussing phasing discovery as a means of achieving proportionality); Bosh v. Cherokee Cnty. Governmental Bldg. Auth. 2013 WL 6150799 at *2–3 (citing proportionality sections of Rule 26(b)(2)(C)(iii) and discussing how phasing discovery to focus first on a limited number of records could achieve it); Fisher v. Fisher, 2012 WL 2050785 at *3–5 (D. Md. June 5, 2012) (discussing proportionality under all three sub-sections of Rule 26(b)(2)(C), and imposing phased discovery, informing the plaintiff that additional discovery would be possible based on the results of the initial discovery).

ly, judges who order phasing often remind counsel of the need to cooperate to ensure selection of the appropriate initial discovery.[100]

5. Appointment of Judicial Adjuncts

Active judicial monitoring and management of discovery can reduce the amount of time needed to resolve discovery disputes by nipping them in the bud before they multiply in number and complexity. However, in the infrequent circumstance that a judge's schedule prevents active monitoring and management of discovery, or when a case is so large or complex that it requires a great deal of hands-on management that the judge cannot provide without sacrificing obligations to other cases, the appointment of a "judicial adjunct" such as a magistrate judge, special master, or other neutral to help manage the discovery may be an appropriate tool to ensure proportional discovery.[101] District judges most commonly appoint magistrate judges when they are unable or unwilling to monitor and manage discovery personally. Magistrate judges are judicial officers, and involving them does not impose additional expense on the parties. However, some circumstances may warrant the appointment of a special master, despite the cost, for multidistrict cases, mass tort litigation, large class actions, or especially complex intellectual property cases. Given the expense involved in appointing a special master, Federal Rule of Civil Procedure 53 requires that "[A] court must consider the fairness of imposing the likely expenses on the parties and must protect against unreasonable expense or delay."[102] Rule 53 only allows the judge to appoint a special master to perform duties with the parties' consent, if "some exceptional condition" warrants, or to "address pretrial and post-trial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district."[103]

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100. *See* Tamburo v. Dworkin 2010 WL 4867346 at *3 (N. D. Ill. Nov. 17, 2010) (ordering the parties to meet and confer to prepare a phased discovery schedule and reminding them of the obligation to cooperate in doing so).

101. *See, e.g.* Eisai Inc. v. Sanofi-Aventis U.S. LLC, No. 08-4168, 2012 WL 1299701, at *11 (D. N.J. Apr. 16, 2012) (In an antitrust case, the judge, faced with a complicated dispute regarding confidentiality order designations, appointed a special master to 'expedite the timely resolution of any existing or prospective disputes regarding the designation of discovery under the Confidentiality Order.'); United States v. Educ. Mgmt. LLC, No. 2:07-cv-461, 2013 WL 3863963, at *1–3 (W.D. Pa. June 23, 2013) (district judge appointed a retired judge as a special master to resolve and narrow discovery disputes raised by numerous motions).

102. FED. R. CIV. P. 53(a)(3).

103. FED. R. CIV. P. 53(a)(1)(A), (B), and (C).

A distinction must be drawn, between appointment of a true special master to exercise judicial duties under Rule 53 and the more frequent practice of appointing lawyers or experts to assist the parties with resolving discovery-related issues such as ESI. While these appointees may be referred to as "special masters" in an informal sense, they actually are mediators or facilitators and may even be volunteers who provide their services without cost.

For example, the United States District Court for the Western District of Pennsylvania has been particularly creative in its use of neutral third parties to resolve discovery disputes involving ESI.[104] Having "determined that litigants in this District may benefit from the appointment of Electronic Discovery Special Masters ('EDSMs') in appropriate cases, in order to assist in addressing ESI issues that may arise during the litigation,"[105] the court developed criteria for assessing the qualifications of these technical special masters, based on litigation experience (especially involving ESI), training and experience with computers and technology, and training and experience in mediation.[106] When the parties request, or the presiding judge determines that it is necessary, the judge appoints an EDSM from a list of pre-approved candidates and designates the duties to be performed. This may include "developing protocols for the preservation, retrieval or search of potentially relevant ESI; developing protective orders to address concerns regarding the protection of privileged or confidential information; monitoring discovery compliance; resolving discovery disputes."[107] If the EDSM must make findings of fact or conclusions of law, these must be presented to the court in the form of a report and recommendation, with the parties having the opportunity to object, after which the court will review them *de novo*.[108]

Appointment of a judicial adjunct to assist a judge in monitoring and managing discovery in cases where the court lacks the time to do so personally can be very effective in keeping discovery costs proportional in cases where the substantive issues, discovery issues, or both, are complex. Because the large dockets that most federal judges have limit the amount of time that a judge can spend

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104. *See Electronic Discovery Information*, UNITED STATES DISTRICT COURT WESTERN DISTRICT OF PENNSYLVANIA, www.pawd.uscourts.gov/ed-information (last visited January 6, 2016) (discussing the court's use of special masters and mediators to help resolve disputes regarding electronic discovery).

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

on any single case, those that demand far more judicial time than most are candidates for the appointment of a judicial adjunct.

6. Cost Shifting

Although the Federal Rules of Civil Procedure are silent about which party must bear the burden and expense of responding to legitimate discovery requests, the Supreme Court clearly articulated what is now known as "the American Rule," stating that "the presumption is that the responding party must bear the expense of complying with discovery requests."[109] The Court added, however, that the responding party "may invoke the district court's discretion under Rule 26(c) to grant orders protecting him from 'undue burden or expense' in doing so, including orders conditioning discovery on the requesting party's payment of the costs of discovery."[110] Thus, cost shifting is an available tool for judges to use in guarding against the excessive costs and burdens of disproportional discovery requests, and courts have been willing to use this method, though sparingly, when appropriate.[111]

Courts have been willing to order cost shifting when a party seeks discovery of ESI "from sources that the [producing] party identifies as not reasonably accessible because of undue burden or cost."[112] In such circumstances, Rule 26(b)(2)(B) permits the producing party to refuse to provide the ESI, in which case the requesting

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109. Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 358 (1978).

110. *Id.*

111. *See, e.g.* Thompson v. C & H Sugar Co. 12-CV-00391, 2014 WL 595911, at *6 (N.D. Cal. Feb. 14, 2014) (ordering cost shifting related to costs associated with reviewing and copying timesheets and payroll data plaintiff sought in employment discrimination case); Ameriwood Indus. Inc. v. Liberman, No. 4:06CV524, 2006 WL 3825291, at *5 (E.D. Mo. Dec. 27. 2006) (approving discovery of ESI on condition that plaintiff incur the costs associated with creating mirror images of computer hard drives, recovering information from the drives, and translating it into searchable format); Wood v. Capital One Servs. LLC, No. 5:09-CV-1445, 2011 WL 2154279, at *3–4 (N.D.N.Y Apr. 15, 2011) (discussing circumstances in which cost shifting would be justified, requiring plaintiff to pay for some or all of defendants' costs in order to achieve proportionality in discovery); Cochran v. Caldera Medical, Inc. No. 12-5109, 2014 WL 1608664, at *2–3, (E.D. Pa. Apr. 22, 2014) (discussing circumstances when cost shifting would be appropriate, noting that generally it is not unless discovery is sought from inaccessible sources); Major Tours, Inc. v. Colorel, No. 05-3091, 2009 WL 3446761, at *6 (D.N.J. Oct 20, 2009) (discussing proportionality requirement of civil rules and ordered plaintiff and defendant to share cost of ESI discovery from inaccessible source).

112. FED. R. CIV. P. 26(b)(2)(B).

party must then file a motion to compel its production.[113] The burden then shifts to the producing party to "show that the information is not reasonably accessible because of undue burden or cost," and if done successfully the court may order the discovery from inaccessible sources, but "may specify conditions for the discovery."[114]

When a producing party invokes Rule 26(b)(2)(B) successfully, courts have ordered complete or partial cost-shifting.[115] Because discovery of ESI involves particularly great risks of disproportionality, it is no surprise that courts most often order cost shifting for this type of discovery.[116] Courts also have ordered cost shifting in cases involving "asymmetrical discovery"—where the requesting party seeks substantial discovery from the producing party, but has relatively little information that the requesting party seeks in return.[117] Courts often order cost shifting only after determining that the requesting party already has obtained substantial discovery, but seeks additional burdensome and costly discovery of minimal relevance.[118]

Although courts have not been reluctant to order cost shifting when necessary to achieve proportional discovery, they have been very mindful that the producing party generally must bear the cost of discovery, as stated in *Oppeheimer*, and have not ordered cost shifting without careful analysis of the particular circumstances justifying

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113. *Id.*

114. *Id.*

115. *See, e.g. Cochran,* 2014 WL 1608664, at *2–3 (court noted that cost shifting generally is not appropriate unless discovery is sought from inaccessible sources); *Major Tours, Inc.* 2009 WL 3446761, at *6 (court ordered plaintiff and defendant to share cost of discovery of ESI from inaccessible source).

116. *See, e.g. Ameriwood Indus. Inc.* 2006 WL 3825291, at *5; *Wood,* 2011 WL 2154279, at *4; *Cochran,* 2006 WL 3825291, at *2–3; *Major Tours,* 2009 WL 3446761 at *6; Zubulake v. UBS Warburg, LLC, 217 F.R.D. 309, 317–24 (S.D.N.Y 2003); Wiginton v. CB Richard Ellis, Inc. 229 F.R.D. 568, 572–77 (N.D. Ill. 2004).

117. *See* Boeynaems v. LA Fitness Int'l, LLC, 285 F.R.D. 331, 338 (noting plaintiffs in potential class action had only been members of Defendant's fitness centers for a brief time and had little relevant discoverable information).

118. *See* Wood v. Capital One Sevs. LLC, No. 5:09-CV-1445, 2011 WL 2154279, at *4–6 (N.D.N.Y Apr. 15, 2011) (court noted that Plaintiff already had received a 'considerable amount' of discovery from interrogatories and document production requests, had received approximately 1,500 pages of documents, had deposed for two days a Rule 30(b)(6) witness, had received more than four hundred pages of emails from the other Defendant, from a computerized search using most of the search terms Plaintiff requested, and had taken a Rule 30(b)(6) deposition of the second Defendant's designee as well. Accordingly, the court allowed further discovery of marginally relevant information only if Plaintiff agreed to pay all or part of Defendants' costs).

it. For example, in *Zubulake v. UBS Warburg*,[119] the court crafted an often-cited seven-factor test to determine when cost shifting is appropriate if the requesting party seeks ESI from inaccessible, costly and burdensome sources. Those factors are:

(1) the extent to which the request is specifically tailored to discover relevant information; (2) the availability of such information from other sources; (3) the total cost of production, compared to the amount in controversy; (4) the total cost of production, compared to the resources available to each party; (5) the relative ability of each party to control costs and its incentive to do so; (6) the importance of the issues at stake in the litigation; and (7) the relative benefits to the parties of obtaining the information.[120]

A court's careful consideration of these factors balances the need of the requesting party for the information, against the potential burden on the producing party, and it ensures that the discovery ordered is proportional to what is at issue in the case.

Finally, the 2015 amendments to the Federal Rules of Civil Procedure provide explicit authority for cost shifting. Rule 26(c) now states that, in ruling on a motion for a protective order, the court may order discovery "specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery."[121]

7 Controlling the Scope of Discovery

Once a scheduling order is issued and discovery proceeds, the judge generally will not know exactly what discovery requests and answers the parties have served, unless a dispute arises requiring the court to resolve it. Accordingly, overly broad or repetitive discovery requests may impose a significant burden on a responding party if the requesting party seeks more discovery than is reasonably necessary. This can occur easily when parties serve document production requests and interrogatories on adverse parties, but do not file them with the court. Similarly, although the 2015 amendments to the Federal Rules of Civil Procedure narrowed the scope of discovery,[122] it

119. *Zubulake*, 217 F.R.D. at 317–24.

120. *Id.* at 322.

121. FED. R. CIV. P. 26(c)(1)(B).

122. Prior to the 2015 amendments to the Civil Rules, the scope of discovery under Rule 26(b)(1) allowed a party to obtain information that was not privileged or work product protected, if it was 'relevant to any party's claim or defense, and, thereafter, upon a showing of good cause, the scope of discovery could be expanded to include information more broadly relevant to the 'subject matter' involved in the litigation. The 2015 revisions to the scope of discovery permitted by Rule 26(b)(1) eliminates 'subject matter' discovery entirely, and limits the scope of dis-

had long been broadly defined as permitting discovery of "any matter not privileged that is relevant to the claim or defense of any party" and, upon a showing of "good cause," could be expanded to "discovery of any matter relevant to the subject matter involved in the action. "[123] Because parties typically file the most potentially abusive discovery—requests for production of documents and interrogatories—early in the litigation before they have much knowledge about the underlying facts, they tend to ask for far broader discovery than they are likely to need if the case goes to trial. Since requesting parties and producing parties often have opposing views on the appropriate scope of discovery, it is quite frequent that disputes about the proper scope of discovery arise. When this occurs, one method that courts have used to keep the discovery proportionate is to narrow the scope of discovery.[124]

Sometimes courts limit the scope of discovery at the outset, but permit the parties to obtain additional discovery based on the initial results.[125] This approach has the advantage of encouraging the requesting party to tailor the initial discovery requests to the most relevant information. By doing so, if it later seeks additional discovery, it will be able to demonstrate to the court that it should be allowed, based on the relevance of the initial discovery received. This type of sequential, focused discovery is far more likely to be proportional because it begins with what is clearly the most important information in the case. However, to discourage the parties from requesting overly broad information at the outset, the judge must

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covery to information 'relevant to any party's claims or defenses. Judge Campbell Memorandum, *supra* note 26, at Appendix B-9.

123. FED. R. CIV. P. 26(b)(1) (2000).

124. *See, e.g.* Salamone v. Carter's Retail, Inc. No. 09-5856, 2011 WL 310701, at *12 (D.N.J. Jan. 28, 2011); Equal Emp't Opportunity Comm'n v. Princeton Healthcare Sys. No. 10-4126, 2011 WL 2148660, at *17 (D.N.J. May 31, 2011); Int'l Paper Co. v. Remax, Inc. No. 11-6494, 2013 WL 3043638 at *7 (D.N.J. June 17, 2013); Barton v. RCI, LLC, No. 10-3657. 2013 WL 1338235, at *10–11 (D.N.J. Apr. 1, 2013); Emerson Elec. Co. v. Le Carbone Lorraine, S.A. No. 05-6042, 2009 WL 435191, at *1–2 (D.N.J. Feb. 18, 2009); Willnerd v. Sybase, Inc. No. 1:09-cv-500, 2010 WL 4736295, at *1–2 (D. Idaho Nov. 16, 2010).

125. *See, e.g. Salamone,* 2011 WL 310701, at *12 (permitting the plaintiff to obtain additional discovery because plaintiff initially had agreed to a more narrow scope of discovery, and based on the results, additional discovery was permitted because it was not unduly burdensome); *Princeton Healthcare System*, 2011 WL 2148660, at *8–9 (finding that temporal scope of plaintiff's discovery request was too broad and abstract, narrowing it to a period of six years, but stating that if the results of the initial discovery warranted additional discovery, plaintiff could seek to obtain discovery for an additional four years).

convince them that he or she will permit additional discovery if they target their initial requests narrowly and justify their subsequent requests based on the initial results. In other instances, the judge simply rules that disputed discovery requests are overbroad and narrows them without discussing the possibility of allowing more.[126] Thus, courts display a willingness to prohibit cumulative or duplicative discovery by narrowing the scope of discovery, particularly when they find that "the party seeking discovery has had ample opportunity to obtain the information by discovery."[127]

8. Prohibition of "Boilerplate" Objections

When lawyers propound interrogatories and document production requests during discovery, the party to whom they are directed must file a written response within thirty days.[128] Rule 33(b)(4) requires that, if a party responding to an interrogatory objects to it, "the grounds for objecting must be stated with specificity." Although, until the 2015 amendments, Rule 34 did not explicitly require that objections to document production requests be stated with particularity, courts had read that rule to require that objections to document requests also be stated with particularity.[129] The 2015 amendments now include an explicit requirement to specify the basis for any objection to a document production request.[130] This enables the requesting party to re-evaluate the propriety of the request as initially served, and to amend it if necessary to be more focused and less burdensome or expensive. Particularized objections facilitate a cooperative dialogue between counsel and enable them to revise objectionable requests in response to legitimate objections without adding to the cost of discovery by requiring the requesting party to

126. *See, e.g. Int'l Paper Co.* 2013 WL 3043638, at *7–8 (finding that defendant's discovery requests sought relevant information, but were sweepingly broad and ordering Defendant to refine and resubmit the requests being 'mindful' of the court's concerns about scope and proportionality); *Emerson Elec. Co.* 2009 WL 435191, at *1–2 (citing Rule 26(b)(2)(C), court narrowed the scope of questions to be asked of witness during deposition); *Willnerd*, 2010 WL 4736295, at *1–2 (ruling that permission that had been given to plaintiff to file an amended complaint did not "throw open the doors to [broad additional] discovery" but ordering that 'tight restrictions' were to be imposed on the scope of discovery appropriate with regard to the newly added claim).

127. FED. R. CIV. P. 26(b)(2)(C)(ii).

128. FED. R. CIV. P. 33(b)(2) (interrogatories) and 34(b)(2)(A) (document production requests).

129. *See, e.g.* Hall v. Sullivan, 231 F.R.D. 468, 470–72 (D. Md. 2005).

130. FED. R. CIV. P. 34(b)(2)(B).

file a motion to compel. In practice, however, it is not unusual for counsel to ignore the obligation to particularize objections, and to respond to each interrogatory and document request with a non-particularized "boilerplate" objection that it was "overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence." The absence of an explanation for why the request is objectionable deprives the requesting party of the information needed to determine whether it can be tailored to avoid a legitimate objection, delays the production of discovery needed to move the case forward, and usually leads to the filing of a motion to compel, requiring court resolution of the dispute.

Judges almost uniformly condemn the practice of making boilerplate objections, yet the practice persists.[131] Judges who make it clear to the parties that boilerplate objections will not be permitted help achieve proportional discovery by preventing an abusive practice that can add to the cost of discovery and undermine cooperation.[132]

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131. *See, e.g.* Mancia v. Mayflower Textile Servs. Co. 253 F.R.D. 354, 358 (D. Md. 2008) (citing cases that have held that boilerplate objections are inappropriate.) The court explained 'Rule 26(g) was enacted over twenty-five years ago to bring an end to the abusive practice of objecting to discovery requests reflexively—but not reflectively—and without a factual basis. The rule and its commentary are starkly clear: an objection to requested discovery may not be made until after a lawyer has 'paused and consider[ed]' whether, based on a 'reasonable inquiry, there is a 'factual basis [for the] objection. *Id.* (quoting FED. R. CIV. P. 26(g) advisory committee's note to the 1983 amendments).

132. *See, e.g.* Dawson v. Ocean Twp. No. 09-6274, 2011 WL 890692, at *17 (D.N.J. Mar. 14, 2011) (in a police misconduct civil rights case, the court prohibited 'generalized' boilerplate objections, stating 'the Court notes that 'it is not sufficient to merely state a generalized objection; instead, the objecting party must demonstrate that a particularized harm is likely to occur if the discovery be had by the party seeking it' ') (quoting G-69 v. Degnan, 130 F.R.D. 326, 331 (D.N.J. 1990)); D.J.'s Diamond Imps. LLC v. Brown, No. WMN-11-2027. 2013 WL 1345082, at *2, *4–10 (D. Md. Apr. 1, 2013) (noting that 'objections to interrogatories must be specific non-boilerplate, and supported by particularized facts where necessary to demonstrate the basis for the objection. '); Koch v. Koch Indus. No. 85-1636-C, 1992 WL 223816, at *1, *5, *9 (D. Kan. Aug. 24, 1992) ("A party will not be able successfully to oppose discovery on bare assertions of burdensomeness, oppressiveness, or irrelevance. Instead, the resisting party must show specifically, clearly and factually the basis for its objection. Affidavits or evidence may be used, and even may be required in some instances, to demonstrate burden. (internal citations omitted)).

9. Ordering Sampling of Voluminous Data Sources to Reduce Cost and Burden

In large cases such as class actions, intellectual property cases, Fair Labor Standards Act (FLSA) collective actions, and antitrust cases, the volume of information that the parties may have to review to respond to document production requests can be staggering, especially if they encompass ESI. The costs associated with reviewing a large database of ESI to see which records within it are relevant, or exempt from discovery because they are privileged or work product protected, can add significantly to the costs of discovery and create a real risk that the cost will be disproportionately expensive. Courts have turned to statistical sampling as a method of reducing costs without unduly sacrificing the ability of the requesting party to obtain relevant information to support its case.[133]

For example, one court observed that, in a diversity class action case asserting state wage and hour claims, the defendant had raised legitimate privacy concerns about allowing the putative plaintiff's class to discover payroll records of all of its employees. The court noted, however, that the plaintiffs had a legitimate need to conduct discovery of the pay records of the entire putative class to support their claims that the defendant's allegedly wrongful policies and practices were common across the class. The court resolved this dispute by resorting to sampling, ruling that

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133. *See, e.g.* Eisai Inc. v. Sanofi-Aventis U.S. LLC, No. 08-4168, 2011 WL 5416330, at *17 (D.N.J. Nov. 7, 2011) (ordering the supplementation of earlier discovery responses by using 'limited mutual sampling' of defendant's sales force as a means to achieve proportionality in an antitrust case); Kleen Prods. LLC v Packaging Corp. of Am. No. 10 C 5711, 2012 WL 4498465, at *5–6, *18 (N.D. Ill. Sept. 28, 2012) (encouraging parties to use sampling to reduce cost and burden of searching for ESI of low level custodians of records in a class action antitrust case); Chen-Oster v. Goldman, Sachs & Co. 285 F.R.D. 294, 304-07 (S.D.N.Y 2012) (discussing the benefits of using statistical sampling in connection with document discovery of ESI database to achieve proportionality in a class action employment discrimination case); Quintana v. Claire's Boutiques, Inc. No. 5:13-cv-00368, 2014 WL 234219, at *2 (N.D. Cal. Jan. 21, 2014) (ordering that Plaintiff be permitted discovery of a statistically significant sample of defendant's records, noting that such sampling advances the goal of proportionality); Heckler & Koch, Inc. v. German Sport Guns, GmbH, No. 1:11-CV-1108, 2014 WL 533270, at *4–5 (S.D. Ind. Feb. 7, 2014) (ordering parties to confer to reach agreement regarding appropriate size of sample pool of records that defendant was required to review, in an effort to achieve proportionality); Cranney v. Carriage Servs. Inc. No. 2:07-cv-01587, 2008 WL 2457912, at *2–3 (D. Nev. June 16, 2008) (citing proportionality requirement in issuing a protective order limiting discovery that defendants could obtain to ten percent of potential opt-in plaintiffs in FLSA collective action).

> [t]he right balance is struck by providing Plaintiffs' discovery of a statistically significant sample. In the specific context of class action discovery, sampling advances the goal of proportionality The court therefore ORDERS [defendant] to provide a 20% sample of putative class members' information but the court leaves it to the parties to work out the particulars of how the sample is selected (e.g., cluster sampling, stratified sampling, etc.). However, the sampling regime itself may not serve as a basis upon which to challenge the statistical sufficiency of the evidence.[134]

Similarly, in a copyright and trademark case, another court ordered the parties to jointly develop an appropriate sampling of the defendants' records, stating:

> The Court recognizes that information concerning replica firearms is potentially relevant to intentional misconduct by [Defendants]; however, it is too burdensome to request a list of all replica firearms, along with licensing information. The parties must find a way to manage discovery so that it is meaningful without implementing a scorched-earth policy. To ensure production of relevant information proportional to the needs of the case, Plaintiffs and Defendants are ordered to confer on an appropriately sized sample pool of replica firearms that will satisfy Plaintiffs' interrogatory for which Defendants must then produce any responsive documents.[135]

An added benefit of using sampling to reduce discovery costs is that ordering the parties to agree on the specific details of how it will be conducted promotes cooperation which also helps to keep discovery costs reasonable. In ordering sampling, however, a court must take care to require that the selection of the sample is in accordance with sound statistical methodology, to ensure that the sample obtained truly is representative of the entire population of data.

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134. *Quintana*, 2014 WL 234219, at *2.
135. *Heckler & Koch, Inc.* 2014 WL 533270, at *4.

10. Ordering that Discovery be Made from Less Burdensome or Expensive Sources

The Federal Rules of Civil Procedure permit discovery by multiple means: interrogatories, document production requests, requests to inspect tangible things or to enter onto land to conduct inspections, depositions (by oral examination and written examination), physical and mental examinations, and requests for admissions.[136] Lawyers are nothing if not inventive, and are prone to seek overlapping discovery by multiple methods. Doing so creates a real risk of disproportionate costs. Rule 26(b)(2)(C)(i) requires the court, either on its own or in responding to a motion, to limit the extent of discovery if it determines that "the discovery sought can be obtained from some other source that is more convenient, less burdensome, or less expensive."[137] Thus, when faced with a case in which a party seeks discovery from a source or by a means that is not cost-efficient, courts can redirect them to less costly or burdensome sources.[138]

11. Use of Protocols, Standing Orders, or Local Rules that Implement Proportionality Requirement

The Federal Rules of Civil Procedure require proportionality in the conduct of discovery. But many United States district courts have adopted local rules to supplement the Federal Rules, and individual district judges have issued standing orders or other directives to refine further how the parties are to conduct discovery in their cases. Authority for local rules and judge's directives appears in Rule 83. With respect to local rules, Rule 83(a) states that, "[a]fter giving

136. FED. R. CIV. P. 30–36.

137. FED. R. CIV. P. 26(b)(2)(C)(i).

138. *See, e.g.* Equal Emp't Opportunity Comm'n v. Princeton Healthcare Sys. No. 10-4126, 2012 WL 1623870, at *1, *3, *7, *10, *24 (D.N.J. May 9, 2012) (Court held informal conference call with counsel and brokered agreement to use 'less intrusive and time-consuming' method of discovering information about class members. The parties agreed to have each member of the putative class fill out a fact sheet, as opposed to having the plaintiff respond to defendant's burdensome interrogatories. After the parties failed to agree about the content of the questionnaire, the court ordered briefing and ruled that the questionnaire proposed by the defendant, with modifications, would be answered by the plaintiffs.); Kia Motors Am. Inc. v. Autoworks Distrib. No. 06-156, 2007 WL 4372954, at *9 (D. Minn. Dec. 7, 2007) (affirming an order by a magistrate judge directing that discovery sought by plaintiff be obtained in a less expensive and inconvenient manner than plaintiff had requested).

public notice and an opportunity for comment, a district court, acting by a majority of its district judges, may adopt and amend rules governing its practice."[139] Local rules "must be consistent with—but not duplicate—federal statutes and rules adopted under 28 U.S.C. §§ 2072[140] and must conform to any uniform numbering system prescribed by the Judicial Conference of the United States." [141] With respect to judge's directives, Rule 83(b) states:

> A judge may regulate practice in any manner consistent with federal law, rules adopted under 28 U.S.C. §§ 2072 and 2075, and the district's local rules. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.[142]

Thus, local rules and judges' directives must not be inconsistent with the Federal Rules of Civil Procedure.

Many district courts have enacted local rules that implement the proportionality requirement in the federal rules by adopting procedures that make discovery more cooperative, efficient, and less expensive or burdensome, and by encouraging judges to be available expeditiously and informally to resolve discovery disputes.[143] Others

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139. FED. R. CIV. P. 83(a).

140. *See* 28 U.S.C. § 2072(a) (granting authority to the Supreme Court to 'prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts and courts of appeals"); 28 U.S.C.§2072(b) (requiring that rules pursuant to this statute 'shall not abridge, enlarge or modify any substantive right").

141. FED. R. CIV. P. 83(a).

142. FED. R. CIV. P. 83(b).

143. *See, e.g.* D. Mass. R. 26.1(a) (providing that each 'judicial officer should encourage cost effective discovery by means of voluntary exchange of information among litigants and their attorneys[,]' such as by exchanging information without the need for formal discovery requests) and R. 26.3 (promoting 'efficient completion of discovery' by authorizing judges to 'phas[e] and sequenc[e] topics which are the subject of discovery"); N.D. Cal. R. 37-1(b) (permitting counsel to request that a presiding judge be available by telephone to resolve a discovery dispute if doing so 'would result in substantial savings of expense or time") and 37-2 (requiring each motion to compel to include a showing that 'the proportionality and other requirements of FED. R. CIV. P. 26(b)(2) are satisfied"); and D. Md. Loc. R. App'x A, Discovery Guideline 1.a. (stating that 'FED. R. CIV. P. 26 requires that discovery be relevant to any party's claim or defense; proportional to what is at issue in a case; and not excessively burdensome or expensive as compared to the likely benefit of obtaining the discovery being sought'

have adopted discovery guidelines, protocols or pilot projects that further implement the requirements of proportional discovery.[144] Judges frequently call the attention of counsel to local rules, guidelines, pilot projects and protocols, and by doing so promote proportional, cost-effective discovery.[145]

Similarly, some courts have reduced discovery costs by adopting the use of approved pattern discovery request forms (especially for interrogatories and document requests) that are useful for types of frequently filed cases involving similar fact patterns, claims, and defenses. Examples are adverse-action employment discrimination cases, FLSA cases and Fair Debt Collection Practices Act cases.

Use of pre-approved discovery request forms promotes proportionality by eliminating or reducing the wrangling that often occurs when parties spar over the appropriateness of discovery requests, or the clarity of the language used in them. When the requesting party uses court-approved discovery forms, there will be fewer objections to the form of the requests, because the producing

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adding that "parties and counsel have an obligation to cooperate in planning and conducting discovery to tailor the discovery to ensure that it meets these objectives").

144. *See, e.g.* D. Md. Loc. R. App'x A (adopting comprehensive Discovery Guidelines that explicitly note the requirement for proportional, cost-effective discovery, and the requirement that counsel cooperate during discovery to achieve it); Travelers Prop. Cas. Co. of Am. v. Cannon & Dunphy, S.C. 997 F. Supp. 2d 937, 944 (E.D. Wisc. 2014) (discussing the Seventh Circuit Electronic Discovery Pilot Program (Seventh Circuit Pilot Program), in particular principle 1.03, which requires application of the proportionality standard to ESI discovery); Swanson v. ALZA Corp. No. CV 12-04579-PJH, 2013 WL 5538908, at *2 (N.D. Cal. Oct. 7, 2013) (referring counsel to Northern District of California Guidelines addressing discovery of ESI which contain a requirement that it be proportional).

145. *See, e.g.* Kleen Prods. LLC v Packaging Corp. of Am. No. 10 C 5711, 2012 WL 4498465, at *3, *6, *18, *19 n.14 (N.D. Ill. Sept. 28, 2012)(ruling on multiple discovery issues in a class action antitrust case discussing ways to achieve proportionality, including cooperation among counsel, and informing counsel of the location of various model orders to assist them in doing so, including reference to the Seventh Circuit Pilot Program); *Travelers Prop. Cas. Co. of Am.* 997 F. Supp. 2d at 944 (discussing importance of proportional discovery, referencing the Seventh Circuit Pilot Program); Perez v. Mueller, No. 13-C-1302, 2014 WL 2050606, at *7 (E.D. Wis. May 19, 2014) (referencing its participation in the Seventh Circuit Pilot Project, specifically principle 1.03, which requires proportionality in discovery of ESI); Plascencia v. BNC Mortg. Inc. No. 08-56305, 2012 WL 2161412, at *3, *6, *8, *11 (Bankr. N.D. Cal. June 12, 2012) (providing guidance to parties on how to conduct discovery, referring them to local rules of court and discussing proportionality requirement of Northern District of California R 37-2); *Swanson*, 2013 WL 5538908, at *2 (referencing the Northern District of California Discovery Guidelines for ESI discovery, which require proportionality).

party knows that the court will not take kindly to objections to the form of requests the court already has approved.

When individual district courts and judges adopt local rules, guidelines, protocols, pilot programs and case management directives that further implement the proportionality requirement of Rule 26(b), and reference them during their case management conferences and in discovery rulings, they help promote the goals of Rule 26(b) by making all practicing before that court aware of the courts' expectations. Over time, this can improve the entire culture of how lawyers behave during discovery.

12. Encouraging the Use of Technology to Reduce the Costs of Discovery of ESI

Discovery of ESI can pose particular challenges to achieving proportionality, given the vast amount of potentially relevant electronic information, even in the most modest cases. The RAND Corporation has estimated that, of the three primary cost components of ESI discovery (collection, processing, and review), $0.73 of each dollar spent is attributed to attorney review, while only $0.08 is attributed to collection costs and $0.19 to processing costs.[146] RAND concluded that, "[i]f e-discovery production costs are ever to be addressed in any meaningful way, then the legal community must move beyond its current reliance on eyes-on review."[147] The technique with the most promise for meaningfully reducing costs of ESI discovery is known as "computer-categorized review—predictive coding."[148]

> Predictive coding is a process by which the computer does the heavy lifting in deciding whether documents are relevant, responsive, or privileged [It] automatically [assigns] a rating (or *proximity score*) to each document to reflect how close it is to the concepts and terms found in examples of documents attorneys have already determined to be rele-

146. Nicholas M. Pace & Laura Zakaras, *Where the Money Goes, Understanding Litigant Expenditures for Producing Electronic Discovery*, RAND Corporation, 41 (2012), www.rand.org/pubs/monographs/MG1208.html (follow 'read online' hyperlink or 'pdf file' hyperlink under the 'Full Document' heading) (hereinafter 'RAND Report").

147. *Id.* at 59.

148. *Id. See also* Da Silva Moore v. Publicis Groupe & MSL Group, 287 F.R.D. 182, 183 (S.D.N.Y 2012) (referring to predictive coding as 'computer-assisted review").

> vant, responsive or privileged. This assignment becomes increasingly accurate as the software continues to learn from human reviewers about what is, and what is not, of interest. This score and the self-learning function are the two key characteristics that set predictive coding apart from the less robust analytical techniques.[149]

RAND concluded that, while "[t]here are few published reports of predictive coding in actual discovery productions that provide sufficiently detailed cost comparisons with human-review approaches,"[150] this new technology holds the most promise for reducing the costs of ESI discovery.[151]

Because predictive coding is such a new technology, and the studies of its effectiveness in reducing ESI discovery costs as compared with traditional attorney-review are still few, it is understandable that parties may be reluctant to adopt its use (and benefit from its concomitant cost savings) until confident that courts will accept it as an appropriate alternative to more expensive traditional review procedures.[152] Thus, this new technology has not yet played a prominent role in making ESI discovery costs more proportional. That is beginning to change, as more courts speak approvingly of the use of predictive coding also known as Technology Assisted Review (TAR).[153]

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149. RAND Report, *supra* note,146 at 59.

150. *Id.* at 67.

151. *Id.* at 66–69.

152. *See Da Silva Moore*, 287 F.R.D. at 182–83 (The court began its decision by quoting an article previously written by the judge in which he stated '[t]o my knowledge, no reported case (federal or state) has ruled on the use of computer-assisted coding. While anecdotally it appears that some lawyers are using predictive coding technology, it also appears that many lawyers (and their clients) are waiting for a judicial decision approving of computer-assisted review.')

153. *See, e.g. Id.* at 183 ("This judicial opinion now recognizes that computer-assisted review is an acceptable way to search for relevant ESI in appropriate cases."); Hinterberger v. Catholic Health Sys. Inc. No. 08-CV-380S(F), 2013 WL 2250603, at *1–*3 (W.D.N.Y 2013) (discussing long dispute between plaintiff and defendant over proper method by which defendant would undertake production of voluminous emails sought by plaintiff. The court noted that it had suggested to the parties that they confer in an effort to agree on the use of predictive coding to accomplish the ESI production, and that the parties disagreed on how predictive coding would be used, but not on the usefulness of the method. The court declined to grant plaintiff's motion to compel the defendant to meet and confer with plaintiff to agree on an ESI discover protocol, because defendant expressed its willingness to do so, as long as the discussion included defendant's desire to use predictive coding to search for ESI.); Dynamo Holdings Ltd. P'ship v. Comm'r of Internal Revenue, 143 T.C. 183, 186-92 (U.S. Tax Ct. Sept. 17. 2014) (overruling

As more courts approve the use of this promising technology, and more studies demonstrate its appropriateness, and savings, lawyers and clients will overcome their reluctance to use it, and the cost of ESI discovery will decline.

At present, parties appear increasingly receptive to using TAR to search for privileged or work product protected information to prepare a privilege-log as Rule 26(b)(5)(a) requires. However, TAR is just as effective for segregating relevant from irrelevant documents when reviewing a large set of electronically stored information to find the documents responsive to a particular production request. Judges can promote proportionality by discussing the benefit of TAR during case management conferences and by helping parties understand the ways in which it can reduce the cost and time needed to conduct ESI discovery.

13. Evaluate Proportionality by Estimating the Range of Plausible Recovery and Costs of Discovery

Although some cases filed in federal court do not seek recovery of money damages, most cases aim to recover money. For the former, it is not feasible to estimate the plaintiff's range of likely recovery if successful, as compared to the foreseeable cost of discovery to arrive at a dollar amount of proportional discovery. For the latter, however, such an approach may provide a good thumbnail estimate of how to limit discovery to that which is proportional to what is at issue in the litigation. Expressed simply, there is little debate that the parties should not spend $500,000 on discovery to re-

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Respondent's request that Petitioners produce ESI on backup tapes or produce the tapes themselves under a 'clawback' agreement that prevented waiver of attorney-client privilege or work-product protection. Alternatively, the Court approved Petitioners' request to avoid burdensome and expensive pre-production review of voluminous ESI to preclude disclosure of privileged or protected information, by using predictive coding to identify information responsive to the discovery request, as opposed to document-by-document review. The court extensively discussed how predictive coding worked and its approval of this method of reducing burden and expense); *In re* Actos Products Liability Litigation, MDL No. 6:11-md-2299, 2012 WL 7861249, at *3–*8 (W.D. La. July 27. 2012) (approving agreement reached by parties to use predictive coding to search voluminous ESI); Rio Tinto PLC v. Vale S.A. No. 14 Civ. 3042 (RMB), 2015 WL 872294, at *1–*3 (S.D.N.Y March 2, 2015) (noting that predictive coding more recently has been referred to as 'technology assisted review' or 'TAR, noting its growing approval by courts, and approving the TAR protocol agreed to by parties to assist the search of voluminous ESI).

solve a case where the maximum likely recovery will not exceed $250,000.

While lawyers may feel that they lack sufficient information at the start of a case to make precise calculations of either the likely recovery or the total cost of discovery, few experienced lawyers file suit in federal court without some careful thought as to the likely recovery. If the action is based on diversity jurisdiction, a lawyer cannot file suit in federal court unless the case meets the jurisdictional minimum of $75,000 in controversy.[154] Similarly, an attorney asserting a claim must disclose "a computation of each category of damages claimed [as well as] materials bearing on the nature and extent of injuries suffered" as an initial disclosure that usually is due before formal discovery commences.[155] Most experienced lawyers can predict the reasonably foreseeable range of discovery expenses, of the discovery that they intend to seek from an adverse party. Estimating the range of likely recovery if successful and the foreseeable range of discovery expenses provides a useful way for the parties and the court to assess whether "the burden or expense of the proposed discovery outweighs its likely benefit,"[156] "considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action."[157]

By evaluating likely recovery and foreseeable expense, the court and the parties can arrive at a "discovery budget" for a particular case. Courts that take seriously their responsibility to ensure proportionality can assist the lawyers by suggesting a discovery budget, or directing them to prepare one if they are not willing to do it on their own. For example, during one of my cases, I approached this task as follows:

> I noted during the hearing that I had concerns that the discovery sought by the Plaintiffs might be excessive or overly burdensome, given the nature of this FLSA and wage and hour case, the few number of named Plaintiffs and the relatively modest amounts of wages claimed for each. Because the record before me lacked facts to enable me to make a determination of overbreadth or burden under Rule 26(b)(2)(C), I ordered counsel to meet and confer in good faith and do the following. First, I asked Plaintiffs and Defendants

154. 28 U.S.C. § 1332(a).
155. FED. R. CIV. P. 26(a)(1)(A)(iii).
156. FED. R. CIV. P. 26(b)(1).
157. FED. R. CIV. P. 26(g)(1)(B)(iii).

> each to estimate the likely range of provable damages that foreseeably could be awarded if Plaintiffs prevail at trial. In doing so, I suggested that the Plaintiffs assume for purposes of this analysis that their pending motion to certify a FLSA collective action would be granted, because doing so allows the parties to gauge the "worst case" outcome Defendants could face. I then ordered that counsel for Plaintiffs and Defendants compare these estimates and attempt to identify a foreseeable range of damages, from zero if Plaintiffs do not prevail, to the largest award they likely could prove if they succeed. I also asked Plaintiffs' counsel to estimate their attorneys' fees. While admittedly a rough estimate, this range is useful for determining what the "amount in controversy" is in the case, and what is "at stake" for purposes of Rule 26(b)(2)(C) proportionality analysis. The goal is to attempt to quantify a workable "discovery budget" that is proportional to what is at issue in the case.[158]

While estimating foreseeable recovery and discovery expenses to develop a discovery budget may not be effective in every case, it is a helpful tool for judges to use in those cases where the plaintiff seeks a money recovery.

14. Capping Time/Money Spent on Discovery

Federal Rule of Civil Procedure 26(b)(2)(C) requires the court to limit the "frequency or extent of discovery otherwise allowed" if necessary to achieve proportionality. Courts can do this by limiting the number of interrogatories, document requests, or depositions that may be taken, or the amount of time that each deposition may take.[159] Similarly, a court can reduce the burden and expense of

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158. Mancia v. Mayflower Textile Servs. Co. 253 F.R.D. 354, 364 (D. Md. 2008).

159. Fisher v. Fisher, No. WDQ-11-1038, 2012 WL 2050785, at *5 (D. Md. June 5, 2012) (discussing proportionality and expressing disappointment that the failure of the parties to provide accurate estimates of the amount of time and money already spent on discovery prevented the court from limiting additional discovery by imposing 'strict limitations on future discovery in the form of caps on the amount of time or money that the parties may expend' as a possible way to reduce cost and expense); Turner v. City of Detroit, No. 11-12961, 2012 WL 4839139, at *1 (E.D. Mich. Oct. 11, 2012) (directing that the deposition of the mayor have a time limit to reduce burden on the defendant); Marens v. Carrabba's Italian Grill,

document discovery by capping the amount of time that the producing party must spend responding,[160] or ordering that the requesting party share all or part of the costs.[161] By imposing numerical or cost limits on discovery, a court can facilitate phased discovery—requiring the parties to focus first on information most likely to affect the outcome of the case and conditioning further discovery on a showing that the results of the initial limited discovery justifies more, given the proportionality factors.

15. Enforcing Rule 26(g)(1) Certifications

Federal Rule of Civil Procedure 26(g)(1) requires that every discovery disclosure, request, response or objection must be "signed by at least one attorney of record in the attorney's own name—or by the party personally, if unrepresented—and must state the signer's address, e-mail address, and telephone number."[162] This signature "certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry,"[163] a discovery request, response, or objection is "neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action."[164] The Rules Committee intended Rule 26(g) to ensure that parties "engage in pretrial discovery in a responsible manner that is consistent with the spirit and purposes of Rules 26 through 37," and to "provide[] a deterrent to both excessive discovery and evasion" that "obliges each attorney to stop and think about the legitimacy of a discovery request, a response thereto, or an objection."[165]

Inc. 196 F.R.D. 35, 40-42 (D. Md. 2000) (discussing proportionality requirement, narrowing scope of document discovery to five year time frame, and ordering that amount of time defendant was required to spend searching for responsive documents was limited to 40 hours, permitting plaintiff to seek additional discovery if plaintiffs paid the actual cost of defendant's additional search time).

160. *See Marens*, 196 F.R.D. at 40–42 (imposing a 40 hour limit).

161. *See, e.g. id.* (permitting cost shifting); Zeller v. South Cent. Emergency Medical Servs. Inc. No. 1:13-CV-2584, 2014 WL 2094340, at *8, *10 (M.D. Pa. May 20, 2014) (ordering that plaintiff and defendant would share the cost of restoring and searching plaintiff's emails, but capping the plaintiff's maximum contribution at $1500).

162. FED. R. CIV. P. 26(g)(1).

163. *Id.*

164. FED. R. CIV. P. 26(g)(1)(B)(iii).

165. FED. R. CIV. P. 26(g) advisory committee's note (1983).

The certification requirement of Rule 26(g) imposes on lawyers and their clients a duty to consider proportionality in connection with all discovery requests, responses and objections that they make. Unfortunately, Rule 26(g) is one of the "least understood or followed[] of the discovery rules,"[166] and thus in practice has little moderating effect on the behavior of lawyers and clients during discovery.[167] Judges who are aware of the requirements of Rule 26(g) can insist that the lawyers and parties adhere to it (and thereby promote proportional discovery), and they can impose sanctions authorized by Rule 26(g) if the lawyers and parties do not.[168]

16. Reducing Discovery Costs through Use of Fed. R. Evid. 502

Another method judges use to promote proportional discovery involves encouraging the parties to take advantage of Federal Rule of Evidence 502, a remarkably helpful (but far too infrequently

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166. Mancia v. Mayflower Textile Servs. Co. 253 F.R.D. 354, 357 (D. Md. 2008).

167. There is some mystery about why Rule 26(g)(1) is so little understood, followed, or enforced. Its lack of use may be attributed in part to its location—it is placed deep within a very long and complex rule, and is easily overlooked. In addition, although Rule 26(g)(3) requires that a court 'must' impose an 'appropriate sanction' on an attorney or party who violates the rule, these sanctions seldom are imposed by courts. This may be because Rule 26(g)(1) was added to the Rules in 1993, at the same time that changes were made to Rule 11 (which allows sanctions for filing or maintaining a claim or defense without a sufficient factual or legal basis for doing so) to '[place] greater constraints on the imposition of sanctions' under that rule, to 'reduce the number of motions for sanctions presented to the court. FED. R. CIV. P. 11 advisory committee's note to 1993 amendments. The signal to constrain the imposition of Rule 11 sanctions and reduce the number of motions seeking them that are filed with the courts may have had a concomitant effect on judges' willingness to impose Rule 26(g)(3) sanctions, despite the fact that 11(d) states Rule 11 is inapplicable to discovery.

168. *See, e.g.* Morris v. Lowe's Home Ctrs. Inc. No. 1:10CV388, 2012 WL 5347826, at *4–5 (M.D. N.C. July 9, 2014) (addressing obligation of a party to make reasonable inquiry into factual bases for discovery response, discussing Rule 26(g) and noting that the record 'does not make clear whether Defendant satisfied its obligations' under Rule 26(g)); Cartel Asset Mgmt. v. Ocwen Fin. Corp. No. 01-cv-01644, 2010 WL 502721, at *10, *17–18 (D. Colo. Feb. 8, 2010) (extensively discussing proportionality requirements and obligations imposed by Rule 26(g), and finding that the Defendant failed to comply with those requirements and ordering Defendant to show cause why sanctions should not be imposed as a result of this failure); *Mancia v. Mayflower Textile Servs. Co.* 253 F.R.D. at 357-61 (extensively discussing requirements of Rule 26(g) and how it achieves proportionality, and ordering counsel to take further steps to comply with the rule).

used) rule that can reduce the costs of ESI substantially.[169] Rule 502 can eliminate the threat of waiver of attorney client privilege or work product protection if a party inadvertently produces such privileged or protected information in response to a document production request.[170] To accomplish this, counsel can enter into non-waiver agreements, such as "clawback" or "quick-peek" agreements, which provide that production of privileged or protected information to an adversary during discovery does not waive the protection afforded those materials, and the producing party may demand its return if it did not intend to produce it.[171]

One of the major purposes of Rule 502 was to

> respond[] to the widespread complaint that litigation costs necessary to protect against waiver of attorney-client privilege or work product have become prohibitive due to the concern that any disclosure (however innocent or minimal) will operate as a subject matter waiver of all protected communications or information. This concern is especially troubling in cases involving electronic discovery.[172]

Judges are able to facilitate the costs savings envisioned by Rule 502 by issuing orders pursuant to Rule 502(d), which states: "A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other federal or state proceeding."[173] Issuing a Rule 502(d) order encourages counsel to enter into non-waiver agreements under Rule 502(e), which then permits them to forego costly pre-production "eyes-on" review by an attorney or paralegal of each record that falls within the

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169. Paul W. Grimm, Lisa Yurwit Bergstrom & Matthew P. Kraeuter, *Federal Rule of Evidence 502: Has it Lived Up to Its Potential?* XVII Richmond Journal of Law and Technology 2 (2010) ("The enactment of Federal Rule of Evidence 502 in 2008 was intended to provide a vehicle to reduce the anxiety and costs associated with privilege review, but to date it has not lived up to its promise. The explanation for why Rule 502 has fallen short may have to do with the reality that a disappointingly small number of lawyers seem to be aware of the rule and its potential, despite the fact that the rule is over two years old.') (hereinafter 'JOLT Article").

170. FED. R. EVID. 502(b).

171. FED. R. EVID. 502(e) (providing that non-waiver agreements are binding on the parties to the agreement).

172. FED. R. EVID. 502 advisory committee's note to 2007 Amendment.

173. FED. R. EVID. 502(d).

scope of a document production request. It encourages them instead to use TAR, at much lower cost.[174]

Critically, the parties cannot achieve these protections and cost savings during ESI discovery unless they are willing to enter into Rule 502(e) agreements and courts are willing to give them the maximum possible protection by approving the agreement with a Rule 502(d) order.[175] Courts that encourage counsel to enter these agreements and then approve them in a 502(d) order can significantly promote proportionality in discovery where ESI is sought, which occurs with increasing frequency in contemporary litigation.

17 Imposing Sanctions for Discovery Abuse

Judges have vast authority to impose monetary and other sanctions against parties and attorneys that violate the discovery rules or abuse the discovery process. Acting in response to a motion or on his or her own authority, the judge may sanction a party or lawyer who fails to appear at a scheduling or other pretrial conference, is unprepared to participate in the conference, does so in bad faith, or fails to obey a scheduling or pretrial order.[176] A judge also may sanction a lawyer or party that violates Rule 26(g)'s certification requirement before making a discovery request, objection, answer, or disclosure.[177] Rule 37 contains six sub-sections that permit the court to impose sanctions against a lawyer or party that fails to provide required discovery; is evasive or incomplete in responding to discovery requests; violates an order compelling discovery; fails to disclose or supplement an earlier discovery answer or response, or to admit facts an adversary asks to be admitted; fails to attend its own deposition,

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174. *See* JOLT Article, *supra* note 169, at 55 (noting 'Rule 502(d) allows federal courts to limit the circumstances in which production of privileged or protected information constitutes a waiver. In this way, section (d) enables the courts to advance the goals of Rule 502—reduction of the expense of pre-production review for privileged and protected information and [adoption of] predictable uniform standards concerning waiver of privilege or protection—through court orders. ').

175. *See, e.g.* John B. v. Goetz, 879 F. Supp. 2d 787. 837 (M.D. Tenn. 2010) (finding that the parties had agreed to a 'clawback' agreement that permitted the defendants to produce voluminous ESI without the need to undertake a time-consuming comprehensive privilege review prior to production. Under the agreement, the defendant could assert privilege claims post-production if disclosure of privileged matter was unintentional).

176. FED. R. CIV. P. 16(f).

177. *See supra* Part III.B.15 and accompanying text; Branhaven, LLC v. Beeftek, Inc. 288 F.R.D. 386, 394 (D. Md. 2013) (imposing sanctions for violations of Rule 26(g) certifications).

serve answers to interrogatories, or respond to a request for inspection; fails to provide requested ESI; or fails to participate in the framing of a discovery plan.[178] The sanctions include monetary sanctions requiring the payment of reasonable attorney's fees and costs that the party improperly denied discovery incurred, as well as "case-dispositive" sanctions such as directing the fact-finder to take designated facts as established; prohibiting a disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters into evidence; striking pleadings (in whole or part); dismissing the action (in whole or in part); rendering a default judgment against the disobedient party; or treating the failure to obey a discovery order as a contempt of court.[179] Furthermore, a judge has inherent authority, upon a finding of bad faith or willful violations of the discovery rules, to impose monetary and other sanctions.[180] Finally, Congress has authorized courts to sanction an attorney who unreasonably and vexatiously multiplies the proceedings in a case.[181]

Despite this broad authority to sanction, judges properly are cautious in exercising it without a substantial justification. Discovery works best and most proportionately when the parties participate in the process cooperatively. Once one party seeks sanctions against another, the ability to initiate or maintain a cooperative approach becomes difficult, if not impossible. When faced with improper conduct during discovery the most effective thing a judge can do is to become more directly involved in managing the process, issuing clear orders as to what is expected, and informing the parties and counsel that—if disobeyed—sanctions may be imposed, then reminding them of the importance (and benefits) of cooperating in discovery.[182] Such a "carrot and stick" approach works better than indiscriminate imposition of sanctions every time a party or lawyer fails to fulfill a discovery obligation or comply "to the letter" with a court order. Sanctions can work against keeping costs proportionate,

178. FED. R. CIV. P. 37.

179. FED. R. CIV. P. 37(b)(2).

180. PAUL W. GRIMM, CHARLES S. FAX, & PAUL MARK SANDLER, DISCOVERY PROBLEMS AND THEIR SOLUTIONS, 331 (3d ed. 2013).

181. 28 U.S.C. § 1927.

182. *See, e.g.* Dongguk Univ. v. Yale, 270 F.R.D. 70, 80 (D. Conn. 2010) (In issuing orders addressing significant discovery violations, the judge cautioned, '[c]ounsel are on notice that failure to comply with court orders may result in sanctions including, but not limited to, costs and fees, preclusion of evidence or causes of action, and other appropriate sanctions up to and including dismissal of the case or entry of default judgment, but added, '[t]he Court hopes that counsel can work cooperatively to conduct discovery efficiently and minimize the expense and inconvenience to both parties. ').

in that they may embolden the non-sanctioned party to look for further opportunities to discredit an adversary by filing more discovery sanction motions. Thus, sanctions remain a useful tool for achieving proportionality when appropriate, but are best used sparingly, and only when there are no other viable options and the misconduct is extreme.

C. Factors that Increase the Likelihood of Disproportionate Discovery

The answer to the question "Is it possible for judges to manage discovery to ensure that it is proportional?" is an unqualified "Yes." Abundant tools exist for judges to use to achieve this important goal. Having discussed these tools, the final analysis necessary to appreciate fully how best to achieve proportional discovery is to identify the risk factors or red flags that indicate that a judge should intervene to ensure that discovery does not spiral out of control. In this regard, Rule 26(f) requires the parties to "confer as soon as practicable," but no later than, twenty-one days before a scheduling conference with the presiding judge.[183] Rule 16(b), in turn, requires the presiding judge to issue a scheduling order after having received the parties' Rule 26(f) report, or "after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference."[184] Rule 16(b) previously permitted the judge to consult with the parties (if unrepresented) or their attorneys by mail but the 2015 changes eliminated this provision because the Advisory Committee believed that "[a] scheduling conference is more effective if the court and parties engage in direct simultaneous communication. The conference may be held in person, by telephone, or by more sophisticated electronic means."[185] It is at this initial scheduling conference with the attorneys that the judge is in the best position to evaluate whether there are risk factors for disproportionate discovery, and discourage them.[186] The key is to do so early on, then moni-

183. FED. R. CIV. P. 26(f)(1).

184. FED. R. CIV. P. 16(b)(1)(B). Rule 16 permits courts to exempt certain categories of cases that are unlikely to involve discovery (such as social security disability matters, habeas corpus petitions, forfeitures, and reviews of certain administrative actions) from the requirement that the court issue a scheduling order or consult with the parties before issuing a scheduling order. *See, e.g.* FED. R. CIV. P. 16(b) advisory committee's note to 1983 amendments.

185. FED. R. CIV. P. 16(b) advisory committee's note to 2015 amendments.

186. *See* FED. R. CIV. P. 16(a)(3) (listing 'discouraging wasteful pretrial activities' as a purpose of the conference).

tor each case as it progresses, intervening as necessary to keep costs proportional.

1. Complex Cases

It does not require Napoleonic insight to realize that complex cases pose greater risks of disproportionate discovery than simple cases. An antitrust case will be more complex than a diversity jurisdiction automobile tort case. The key is for a judge to realize the types of cases that most frequently cause discovery disputes and to monitor those cases carefully to minimize this risk. The research done for this article showed that securities fraud cases,[187] class actions,[188] intellectual property cases,[189] commercial disputes,[190] trade secrets litigation,[191] and multi-district litigation[192] frequently have discovery disputes that can lead to disproportionate discovery costs. This suggests that judges assigned these types of cases should hold face-to-face scheduling conferences with the parties to discuss how to keep costs proportional, followed by monitoring to ensure further direct court involvement if needed.

2. Cases Where ESI Discovery is Sought

As the discussion of techniques that judges use to achieve proportionality demonstrated, there are many challenges associated with ESI discovery that can lead to disproportionately high costs.

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187. *See, e.g.* SEC v. Collins, 256 F.R.D. 403 (S.D.N.Y 2009) (securities fraud); In re Morgan Stanley Mortg. Pass-Through Certificate Litig. No. 09-CV-02137. 2013 WL 4838796 (S.D.N.Y Sept. 11, 2013) (potential class action securities suit).

188. *See, e.g.* John B. v. Goetz, 879 F. Supp. 2d 787 (M.D. Tenn. 2010) (class action); Ingersoll v. Farmland Foods, Inc. No. 10-6046-CV. 2011 WL 1131129 (W.D. Mo. Mar. 28, 2011) (class action).

189. *See, e.g.* Heckler & Koch, Inc. v. German Sport Guns, GmbH, No. 11-1108, 2014 WL 533270 (S.D. Ind. Feb, 7. 2014) (trademark); Nola Spice Designs, LLC v. Hayden Enters. No. 12-2512, 2013 WL 3974535 (E.D. La. Aug. 2, 2013) (trademark); Sprint Commc'ns Co. v. Comcast Cable Commc'ns, No. 11-2684, 2014 WL 1794552 (D. Kan. May 6, 2014) (patent).

190. *See, e.g.* Performance Sales & Mktg. v. Lowes Cos. No. 07-140, 2012 WL 4061680 (W.D.N.C. Sept. 14, 2012) (commercial dispute); *In re* Convergent Tech. Sec. Litig. 108 F.R.D. 328 (N.D. Cal. 1985) (large commercial case characterized by court as involving 'economic combat").

191. *See, e.g.* Cartel Asset Mgmt. v. Ocwen Fin. Corp. No. 01-cv-01644, 2010 WL 502721 (D. Col. Feb. 8, 2010) (misappropriation of trade secrets).

192. *See, e.g. In re* Actos Prods. Liab. Litig. MDL No. 11-2299, 2012 WL 7861249 (W.D. La. July 27, 2012) (multi-district products liability).

Given the ever-increasing variety of digital devices parties use, their tendency to use multiple devices, and the seemingly endless storage capacity available on computers, on removable storage devices and in the cloud, it is easy to see that a request to discover ESI related to a litigation event can involve unimaginably large amounts of data. The costs associated with reviewing ESI to locate what information must be produced, and implementing and monitoring a litigation hold to prevent spoliation or loss of ESI can be enormous. And, as the discussion above about the use of TAR and non-waiver orders pursuant to Federal Rule of Evidence 502 illustrates, ESI discovery can complicate a case and result in disproportionately high costs. For these reasons, cases in which parties seek extensive ESI can create a greater risk of burdensome costs,[193] and judges who actively monitor their cases to ensure proportional discovery are well served by addressing these issues early in the discovery process. By doing so, the judge can discuss cost saving measures such as using Rule 502 non-waiver orders, employing TAR to reduce the cost of ESI review, sampling, and phased discovery. Also, when a party seeks ESI from inaccessible sources, the judge can discuss cost-shifting.

3. Cases Involving Excessive Client Animosity

Nearly all litigation involves client animosity to some degree, as the events that lead to lawsuits seldom have benign effects on the parties. In most cases, the lawyers are able to manage their clients so that the animosity does not get out of control, and they can initiate discovery for legitimate information gathering purposes, rather than to burden or harass an adversary. Indeed, Rule 26(g)'s certification requirement prohibits initiation of discovery requests or serving discovery objections or responses for such improper purposes.[194] How-

193. *See, e.g.* SEC v. Collins, 256 F.R.D. 403, 407 (S.D.N.Y 2009) (ESI discovery estimated to involve in excess of 1.7 million documents); David v. Signal, No. 08-1220, 2010 WL 2723180, at *4 (E.D. La. July 6, 2010) (ESI discovery, including email); Wood v. Capital One Servs. LLC, No. 5:09-CV-1445, 2011 WL 2154279, at *1 (N.D.N.Y Apr. 15, 2011) (reviewing costs associated with ESI discovery estimated to exceed $5 million); Klein Prods. LLC v. Packaging Corp. of Am. No. 10 C 5711, 2012 WL 4498465, at *3 (N.D. Ill. Sept. 28, 2012) (ESI discovery sought, leading to dispute regarding search methodology); Thompson v. C & H Sugar Co. No. 12-CV-00391, 2014 WL 595911, at *1 (N.D. Cal. Feb. 14, 2014) (Involving dispute over search terms to be used for ESI discovery); In re Biomet M2a Magnum Hip Implant Prods. Liab. Litig. No. 3:12-MD-2391, 2013 WL 1729682, at *1 (N.D. Ind. Apr. 18, 2013) (ESI discovery sought, estimated 2.5 million pages and costs of $1-3 million involved).

194. FED. R. CIV. P. 26(g)(1)(B)(ii).

ever, there are instances where client animosity exceeds the ability (or willingness) of the lawyers or parties (particularly if self-represented) to control it, where the judge must intervene to prevent the use of discovery for improper purposes. If the judge fails to do so, the costs of discovery can escalate as repetitive disputes blossom into filing endless discovery motions, discovery demands seek information that is outside the scope of permissible discovery, or legitimate discovery requests are met with frivolous, boilerplate objections and refusals to produce requested information.[195]

When a court becomes aware that excessive client animosity is at play, prompt intervention can prevent the case from spiraling out of control. The court can prohibit parties from filing discovery motions until after participating in a telephone or in-person conference with the judge, impose page limitations and reduce time deadlines for briefing discovery motions, require phased discovery that conditions future discovery on the results of more narrow initial discovery, discuss (and where appropriate impose) cost-shifting, and impose sanctions. Further, judges who conduct in-person or telephonic discovery conferences with the parties are in a position to gauge the relationship between them, and to make clear at the outset their expectation that the parties will cooperate during discovery, as well as the consequences of improper discovery behavior.

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195. *See, e.g.* Kleen Prods. v. Packaging Corp. No. 10 C 5711, 2012 WL 4498465 (N.D. Ill. Sept. 28, 2012) (antitrust class action case marked by client animosity and characterized by uncooperative discovery leading to many discovery disputes requiring court intervention); Best Sign Sys. Inc. v. Chapman, No. 09-5244, 2012 WL 4505996 (D.N.J. Sept. 26, 2012) (involving allegations that former employee violated non-disclosure of confidential information agreement, discovery disputes reflective of client animosity); Oseman-Dean v. Ill. State Police, No. 11 C 1935, 2011 WL 6338834 at *1 (N.D. Ill. Dec. 19, 2011) (Employment discrimination case where client animosity resulted in seven separate discovery hearings and, despite court urging, the plaintiff 'resisted any significant narrowing [of her discovery requests] requiring the court to conduct hearings on the parties' disputes about almost every one of plaintiff's many discovery requests. '); Dongguk Univ. v. Yale Univ. 270 F.R.D. 70, 80 (D. Conn. Aug 17. 2010) (involving litigation between two universities over alleged failure to verify credentials of art history professor allegedly leading to 'destruction' of plaintiff university's reputation and its public humiliation and 'deep shame. In resolving numerous discovery disputes court had to admonish counsel that failure to comply with court orders could result in sanctions); D.J.'s Diamond Imps. v. Brown, No. WMN-11-2027. 2013 WL 1345082, at *1, *4 (D. Md. Apr. 1, 2013) (Case alleging tortious interference with contracts based on allegations that defendant used 'threats of physical harm, intimidation and unfulfilled promises' to interfere with plaintiff's contract rights resulted in acrimonious discovery disputes, for which court imposed sanctions).

Finally, in cases where there is excessive client animosity, and the clients are represented by counsel, the judge can order the clients themselves to be present in court or chambers when discovery issues are being discussed or disputes decided. Hearing a judge's comments ensures that the clients hear and understand the court's views (and the consequences of disregarding them). This is particularly useful if the judge suspects that the lawyers are not really trying to control client animosity or are even generating more billable time by encouraging it.

4. Cases Involving Attorney Animosity, Misconduct, Over-Zealousness or Over-Aggressiveness

As when there is excessive client animosity, when counsel behaves over-zealously or over-aggressively or engages in other litigation misconduct, discovery costs and burdens can become disproportionate.[196] While lawyers have an ethical responsibility to act as advocates for their clients, there is a concomitant duty "not to abuse legal procedure."[197] Further, both substantive and procedural law "establish[] the limits within which an advocate may proceed"[198] (which includes the discovery rules). And, while some lawyers attempt to justify misconduct during discovery as something that the adversary system requires, this is a flawed view of that system. As I wrote in an opinion:

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196. *See, e.g.* Equal Emp't Opportunity Comm'n v. Princeton Healthcare Sys. No. 10-4126, 2012 WL 1623870, at *1-*4 (D.N.J. May 9, 2012) (Overzealous advocacy of counsel contributed to discovery disputes and costs.); Cartel Asset Mgmt. v. Ocwen Nin. Corp. No. 01-cv-01644, 2010 WL 502721, at *10 (D. Col. Feb. 8, 2010) (Contentiousness of the litigation was caused in part by the failure of counsel to comply with discovery obligations imposed by Fed. R. Civ. P. 26(g)(1).); Cleversafe, Inc. v. Amplidata, Inc. No. 11 C 4890, 2014 WL 2609654 at *1 (N.D. Ill. June 11, 2014) (Highly adversarial conduct by counsel characterized by reciprocal claims of manipulation and gamesmanship during discovery that court had to resolve.); Moore v. Publicis Groupe, 868 F. Supp. 2d 137. 140–48 (S.D.N.Y 2012) (Discovery disputes and costs fueled in part by over-aggressive conduct of counsel.); Summerfield v. City of Chicago, 613 F. Supp. 2d 1004, 1014–15 (N.D. Ill. 2009) (Court commented on improper discovery conduct of counsel.); Maxtena, Inc. v. Marks, 289 F.R.D. 427. 448 (D. Md. 2012) (Animosity between counsel contributed to filing of multiple duplicative motions, needlessly driving up cost of litigation.).

197. ELLEN J. BENNETT, ELIZABETH J. COHEN & MARTIN WHITTAKER, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 309 (7th ed. 2011) (citing Comment 1 to Model Rule 3.1, *Meritorious Claims and Contentions*).

198. *Id.*

> A lawyer who seeks excessive discovery given what is at stake in the litigation, or who makes boilerplate objections to discovery requests without particularizing their basis, or who is evasive or incomplete in responding to discovery, or pursues discovery in order to make the cost for his or her adversary so great that the case settles to avoid the transaction costs, or who delays the completion of discovery to prolong the litigation in order to achieve a tactical advantage, or who engages in any of the myriad forms of discovery abuse that are so commonplace is hindering the adjudication process, and making the task of the "deciding tribunal not easier but more difficult," and violating his or her duty of loyalty to the "procedures and institutions" the adversary system is intended to serve. Thus rules of procedure, ethics, and even statutes make clear that there are limits to how the adversary system may operate during discovery.[199]

Judges who take seriously the duty to ensure proportional discovery can guard against discovery abuse at the hands of misbehaving lawyers. They can adopt local rules, standing orders, protocols, and guidelines that set forth expectations for conduct of counsel during discovery; they can encourage cooperation between counsel during discovery; and they may sanction lawyers for violating Rule 26(g)(1)(B)'s certifications requirements or impose monetary sanctions against a misbehaving attorney pursuant to Rule 37. Further, by making the court's behavioral expectations for counsel known at the initial scheduling conference, adopting informal discovery dispute resolution methods, and holding conferences in person or by phone during the discovery process, they can detect attorney misconduct as soon as possible and intervene before it gets out of control.

5. Litigation Involving Pro Se Parties

When one or more parties in federal litigation are proceeding without an attorney, the likelihood of increased discovery costs and disproportionate discovery escalates. Pro se litigants seldom have legal training, are less likely to understand (or even read) the discovery

199. Mancia v. Mayflower Textile Servs. Co. 253 F.R.D. 354, 362–63 (D. Md. 2008) (internal citations omitted) (referencing Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1162, 1216 (1958)).

rules, often are emotionally invested in their case, and do not regard themselves as officers of the court who have obligations beyond the advancement of their own goals. Pro se litigants are more likely to seek overly broad discovery from their adversaries and less likely to fully comply with their discovery obligations that the rules impose.[200] Cases involving pro se litigants also are far more likely to require disproportionately greater involvement by the court to keep discovery from spiraling out of control. Accordingly, judges should bear this in mind from the very beginning of the case and initiate procedures that will allow the court to monitor the discovery process and intervene as quickly as possible when necessary. Such procedures may include frequent status conferences, informal procedures to resolve discovery disputes, and requiring that the parties conduct depositions in a courtroom so that if disputes arise, the judge can rule on them immediately.

6. Cases Involving Issues of Spoliation of Evidence

"Spoliation is destroying, significantly altering, or failing to preserve property for another's use as evidence in pending or reasonably foreseeable litigation."[201] The duty to preserve evidence commences when a party "is on notice that evidence is relevant to pending litigation, or when it should have known that evidence would be

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200. *See, e.g.* F.T.C. v. Dutchman Enters. LLC, No. 09-141, 2010 WL 3034521 at *1, *3, *7 (D.N.J. Aug. 2, 2010) (ruling that '[d]efendants' alleged time and resource handicaps resulting from their *pro se* status cannot relieve them of their obligations' under the discovery rules and ordered them to provide the information requested. In doing so, the court rejected '[d]efendants' continuous assertion that they have been unable to review all of their documents and records due to the fact that they are proceeding *pro se*' and ordered further review and production of requested records.); N'jie v. Cheung, No. 09-919 (SRC), 2010 WL 3259793, at *1–9 (D.N.J. Aug. 16, 2010) (involving *pro se* plaintiffs alleging multiple causes of action relating to alleged breach of an option-to-buy clause in a lease agreement. Multiple discovery disputes arose due to failure of plaintiffs to comply with the scheduling order issued by the court, file status reports as required, or respond to legitimate discovery requests from the defendant, all of which required the court to hold multiple status conferences, concluding 'this matter has proceeded in an unacceptably slow fashion and the Court has no confidence that the parties will resolve the outstanding issues or be able to move forward without judicial intervention. Although the court concluded that the plaintiffs still had many unfulfilled discovery obligations, it found that extending the time to complete discovery would not be fruitful because of the inability of the parties to work with one another. Accordingly, the court entered an order closing fact discovery.).

201. GRIMM, DISCOVERY PROBLEMS, *supra* note 180, at 382.

relevant to future litigation."[202] Spoliation issues can be particularly troublesome when ESI is not preserved, because "[o]nce a party's duty to preserve is triggered, it must take action to prevent the loss of evidence by, *inter alia*, suspending its routine document retention or destruction policy and implementing a litigation hold."[203] The purpose of a litigation hold is to "preserve paper and electronic documents in a manner that allows relevant documents to be collected and searched; the hold's obligations must be communicated to employees without over-relying on employees to select responsive documents."[204]

If a party fails to preserve evidence that is relevant to pending or foreseeable litigation, courts "have the power to sanction litigants for spoliation of evidence under [Fed. R. Civ. P.] 37(b) and under their inherent authority to control litigation," provided the court finds that the failure to preserve was accompanied by a level of culpability that, depending on the law of the jurisdiction that governs the litigation, ranges from "bad faith/knowing destruction, gross negligence [to] ordinary negligence."[205] Similarly, spoliation sanctions comprise, in increasing order of seriousness: awarding attorneys' fees and costs, ordering that certain facts are to be taken as having been proved, precluding the introduction of evidence, giving the jury an adverse inference instruction, and case-dispositive sanctions.[206] Courts generally will refrain from imposing the most serious spoliation sanctions, however, unless there are "extraordinary circumstances" such as extreme culpability or the irreparable loss of highly relevant evidence that a party cannot obtain from other sources.[207]

Prior to the December 1, 2015 Rule amendments, the law of spoliation as it applied to the discovery process varied widely, depending on the jurisdiction where the action was pending. This caused great uncertainty among litigants as to what standard they would have to meet to avoid sanctions.[208] The new revisions to the civil rules, however, adopted a uniform national standard applicable

202. *Id.*
203. *Id.* at 383.
204. *Id.* at 384.
205. *Id.* at 384–85.
206. *Id.* at 385.
207. *Id.* at 385–86.
208. FED. R. CIV. P. 37(e) advisory committee's note to 2015 amendments (noting 'Federal circuits have established significantly different standards for imposing sanctions or curative measures on parties who fail to preserve electronically stored information. These [different standards] have caused litigants to expend excessive effort and money on preservation in order to avoid the risk of severe sanctions if a court finds they did not do enough. ').

to the duty to preserve ESI in civil cases, currently found in Fed. R. Civ. P. 37(e), which states:

> If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:
>
> (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
> (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:
> (A) presume that the lost information was unfavorable to the party;
> (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
> (C) dismiss the action or enter a default judgment.[209]

The presence of spoliation issues in a civil case can increase the cost and burdens of discovery dramatically, leading to disproportionate discovery. This is because ESI can so readily be deleted, over-written, altered, destroyed, or lost when new digital devices replace outdated hardware or software. When one party accuses another of spoliation of evidence in a civil case, it almost inevitably leads to requests to expand discovery to focus on the circumstances leading to the loss of the information, the state of mind of the party that failed to preserve it, and whether the lost or destroyed evidence may be recovered (from examination of back-up sources, or forensic examination of digital devices). Such expanded discovery can increase the cost of discovery exponentially, lead to complex motions practice, and consume a significant amount of the court's time to resolve.[210] Courts can mitigate the adverse consequences of spoliation

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209. FED. R. CIV. P. 37(e) (2015).

210. *See, e.g.* Victor Stanley, Inc. v. Creative Pipe, Inc. 269 F.R.D. 497 (D. Md. 2010) (Failure of defendant to preserve evidence and spoliation issues pervaded the litigation, significantly increasing the cost, consuming the resources of the court and resulting in imposition of severe sanctions, including contempt of court.); Rimkus Consulting Grp. Inc. v. Cammarata, 688 F. Supp. 2d 598 (S.D.

issues in discovery by holding in-person or telephonic conferences with counsel at the start of a case, discussing the duty to preserve in those conferences, and directing the parties to confer regarding steps that they should take to ensure appropriate preservation of essential evidence,[211] particularly ESI.

In appropriate cases, where it is evident from the start that there may be issues about the preservation and production of ESI, the court may find it helpful to order that an IT representative or ESI discovery vendor representative for each party be present at one or more discovery conferences. ESI preservation and spoliation issues are by their nature technical. Lawyers and clients may not be sufficiently knowledgeable about the technological issues in the case to make properly informed decisions about what should be done for this discovery. Having technical experts identify the appropriate preservation and production procedures and tailor them to the needs of the particular case help keep cost and burden under control.

At the first hint of a preservation problem, the court can intervene to ensure that any spoliation-related discovery is appropriate for the pending case, and prevent it from becoming the sole focus of the case at the expense of developing the substantive issues that will affect its resolution.

7 Cases Involving Asymmetrical Litigation

In cases where the parties have similar amounts of information potentially subject to discovery, each party is less likely to initiate excessive or burdensome discovery requests, for fear that the opposing party will respond in kind. The threat of "mutually assured destruction" operates to moderate discovery requests at the outset. This is not the case in litigation where one party has significantly less

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Tex. 2010) (Spoliation issues led to many discovery disputes and consumed significant amount of the court's time to resolve); Zubulake v. UBS Warburg, LLC, 217 F.R.D. 309 (S.D.N.Y 2003) (Spoliation issues contributed greatly to complexity of discovery, costs and disputes requiring court resolution.); Major Tours, Inc. v. Colorel, 720 F. Supp. 2d 587 (D. N.J. 2010) (Spoliation issues complicated conduct of discovery.); Danis v. USN Commc'ns, Inc. No. 98 C 7482, 2000 WL 1694325 (N.D. Ill. 2000) (same).

211. *See* FED. R. CIV. P. 16(b)(3)(B)(iii) (permitting the court to include in a scheduling order requirements providing for "preservation of electronically stored information"); Rule 26(f)(3)(C)(2015) (governing the discovery plan that the parties are to submit for approval to the court after they have met and conferred at the beginning of the case; it 'must state the parties' views and proposals on any issues about preservation of electronically stored information, including the form or forms in which it should be produced").

discoverable information than the other. The party with the lesser amount may be tempted to serve overly broad and expensive discovery requests on an opponent without fear of retaliation. Examples include employment discrimination cases (where the plaintiff may have relatively little information subject to discovery as compared to the defendant company that took the allegedly adverse action), products liability cases (where the plaintiff seeks discovery of massive amounts of information from the defendant regarding the development and marketing of the allegedly defective product, while having comparatively little information that the defendant will require in discovery), FLSA cases (where the defendant has most of the evidence regarding hours worked and wages paid), civil rights cases, and consumer fraud cases.

When one party in a case has little information but wants much from its adversary, the chances of disproportionately burdensome or expensive discovery increase greatly.[212] When this occurs, courts can intervene to mitigate the burden and expense by employing the techniques discussed above, including phased discovery, use of sampling, TAR or computer-assisted review, and, where necessary and warranted, cost allocation or shifting to the requesting party.

D. Implications of the Case Analysis

As the cases have revealed, federal judges display a remarkable degree of flexibility and ingenuity in using more than a dozen distinctly identifiable methods of managing discovery (alone or in combination) to balance the need of the requesting party against cost

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212. *See, e.g.* Boeynaems v. LA Fitness Int'l, LLC, 285 F.R.D. 331, 341–42 (E.D. Pa. 2012) (finding that the discovery requests were asymmetrical and, to prevent against excessively burdensome and costly discovery from the defendant, allocating discovery costs to the plaintiff rather than defendant). The court noted that '[t]he Court is persuaded, it appearing that Defendant has borne all of the costs of complying with Plaintiffs' discovery to date, that the cost burdens must now shift to Plaintiffs, if Plaintiffs believe that they need additional discovery. In other words, given the large amount of information Defendant has already provided, Plaintiffs need to assess the value of additional discovery for their class action motion. If Plaintiffs conclude that additional discovery is not only relevant, but important then Plaintiffs should pay for that additional discovery from this date forward. *Id.* at 341-42. In another case, the court noted that a class action, gender discrimination case in which plaintiffs sought extensive discovery of ESI from defendants on the issue of class certification created the risk of disproportionately burdensome and expensive discovery demands on defendants. Chen-Oster v. Goldman, Sachs & Co. 285 F.R.D. 294, 303–05 (S.D.N.Y 2012). To mitigate this and ensure proportionality, the court discussed the use of sampling and phased discovery. *Id.*

to the producing party, while taking into consideration what is at stake in the litigation. This is precisely what the proportionality requirement in the Rules of Civil Procedure requires them to do. So, if proportionality is achievable, and the tools to do so readily discernible, why have lawyers, bar associations, and even judges themselves continued to complain that judges are not monitoring and managing cases to achieve proportionality? As the case analysis in Part III demonstrates, it is neither because judges lack the tools to do so nor because there are insufficient warning signs to enable a judge to determine at an early phase of the litigation that there are problems with a case that threaten to make discovery costs disproportionate. The answer must lie with judges themselves—their attitudes towards their obligation to manage discovery proportionately, their experience with civil discovery before becoming a judge, and their knowledge of how to go about monitoring and managing discovery proportionately.

IV CONCLUDING THOUGHTS

As shown in Part I, the Civil Rules Advisory Committee has struggled with how to balance the goals of making sure that litigants are able to obtain sufficient factual information about a case to ensure that it is tried, settled or disposed of during summary judgment on its merits with preventing an excessive burden or cost on the party from whom discovery is sought. The Committee adopted the proportionality requirement to achieve this delicate balance in 1983. In the various amendments since then, the Committee has consistently emphasized the need for federal judges to be better educated about discovery issues and more proactive in curbing abuses. When the Committee proposed the 2015 amendments to the Civil Rules, it noted that the success of the new rules would require three essential ingredients: cooperation, proportionality, and "sustained, active, hands-on judicial case management," and it again recognized the need for educating judges about the importance of active case management to enable the new rules to succeed.[213] As shown in the discussion at Part III B.1, active judicial case management is the most important of all the tools for achieving that proportionality.

When judges are willing to become involved in the discovery process, there are abundant tools available for them to use. Most of these tools have enjoyed widespread use by federal judges. If parties

213. Judge Campbell Memorandum, *supra* note 26, at Appendix B 2-3.

and judges can achieve proportional discovery through the use of the tools the judges have at their disposal, then the widely held view that the serial changes to the Rules to require proportionality have not been successful must in large part be attributed to the reluctance of the judges to embrace the notion that they must become active in the management of the discovery process from its inception, and not passively wait until there is a dispute, and then resolve only that particular dispute.

The survey results show that the attitudes of a substantial number of the participating federal judges (82% of district judges and 61% of magistrate judges) do not appear to be in sync with the expectation of the Rules that they actively monitor and manage the discovery process to achieve proportionality. What the survey does not show, however, is why so many judges feel this way, and there are many possible explanations that may account for it.

As a practical matter, a federal judge who does not accept the notion that he or she must actively manage the discovery process has considerable power to simply decline to do so, and there is little that can be done about it.

It may also be that some judges are not opposed to actively managing the discovery in their cases but are simply overwhelmed by the number of cases that they have and thus do not have the time to do more than wait for a dispute. It takes time to actively monitor the discovery process. The judge must review the pleadings, confer with the lawyers, and then determine what discovery, in what sequence, is appropriate given what is at stake in the litigation. Where the lawsuit seeks only money damages and it is easy to predict the range of probable outcomes, this task can be done quickly. But if the case is complex or involves many parties, or what is at stake is not monetary, deciding on an appropriate discovery plan at the beginning of a case can be a difficult and time-consuming thing for a judge to do. Without training on how to do so efficiently, and the proper tools to use, an overworked judge may simply be unable to actively manage the process.

It may also be that some judges do not actively manage the discovery in their cases because they have never received training to do so. Even judges with extensive experience in civil discovery before they become judges do not necessarily appreciate the benefits of active management of discovery. After all, as lawyers, they were used to managing the discovery in their own cases and may have practiced before judges who did not become involved in discovery until there was a dispute. Without training to show them the benefits of active management of discovery and the tools for doing so, it is

unrealistic to expect them to develop that approach all on their own. Furthermore, nearly half of the surveyed district judges have had no training at all since becoming a judge on how to manage the discovery process. Nearly three-quarters of the surveyed magistrate judges—who handle most of the discovery disputes in federal court—have had no training at all in the proportionality requirement or how to manage cases to achieve it.

Judges are appointed with varying experiences as attorneys. The number of judges who were prosecutors or defense counsel in criminal cases, or who engaged in administrative law or commercial law fields that did not give them experience in civil discovery before being appointed, will vary over time. There must be a consistent emphasis during judicial education programs on the importance of achieving proportional discovery and the management tools available to do so effectively. Waiting until the discovery rules have been amended to implement judicial education about how best to monitor and manage discovery will be far less effective in achieving the goal of proportionality than consistent education on this topic on an ongoing basis with adjustments in emphasis depending on the experience mix of the judges being trained.

There are several significant take-away points that this article raises. First, we really do not know why it is that the judges have been reluctant to embrace the notion of actively managing the civil discovery process. This is a matter deserving further exploration. If active management is essential to achieving proportionality, and if the judges are resistant to doing so, learning the reasons why is essential to figuring out how to effectively address the problem. Without further study, rulemakers will have to continue to amend the rules based on anecdotal information, rather than specific data. If the goal of achieving proportionality is worth the time and effort that has been spent on it, then surely it is worth the additional time and expense to better understand the reasons why so many judges resist active management of the discovery process. The Federal Judicial Center should consider a comprehensive survey of federal judges to better learn their attitudes and practices regarding discovery. Once judges have been given the tools for achieving proportionality, they must be encouraged to use them, if only because it is in their own self-interest to do so. Judges who actively monitor discovery in all their cases, and who swiftly intervene to more directly manage cases where problems develop, have fewer discovery disputes overall, resolve those they do have more quickly, and thereby have more time to devote to the substantive issues in their cases.

Second, there is a clear need for more extensive education of judges in how to effectively manage discovery to achieve proportionality. The number of judges who have had little or no training regarding proportionality is significant, and initial training for newly appointed judges and continuing education for others seems essential to achieving the goal of proportionality. Because there are so many effective tools to achieve proportional discovery, training that is aimed at showing judges how to do so should be a priority. It should not be relegated to optional "break-out" sessions at judicial training programs, but instead should be required training of sufficient length and detail to give judges a strong foundation in exactly how to effectively manage discovery. Such education ideally should include practice using the proportionality tools in realistic case settings that allow the judges to appreciate the warning signals that discovery needs individualized management and to use the tools identified in Part III of this article. Further, developing sample orders, protocols, local rules and guidelines, as well as written and recorded reference tools that judges may access on the website of the Federal Judicial Center would allow judges to follow up live training sessions with additional educational materials that would make it easier for them to master the skill of active management of discovery.

Finally, there are ninety-four federal judicial districts in the United States.[214] Each court reflects the experience, culture, and customs of the judges and lawyers of that district. Many courts and judges likely have developed protocols, local rules, guidelines, and standard procedures that have proven effective in the management of discovery in civil cases. A systematic effort to identify what courts already have been doing that actually works should be undertaken so that the successes of those courts may be shared with others, educational programs may be tailored with this experience in mind, and materials may be archived for judges in other locations to use.

If the changes to the Civil Rules adopted in 2015 are to finally break the cycle of unsuccessful amendments to the rules to achieve proportionality, then the rule changes must be simply the first of many steps taken to achieve the goal. More study of the reasons why judges resist active management of discovery will suggest better ways to overcome this reluctance. More extensive and practical education of judges as to how they may use the many tools to achieve proportionality and recognize the warning signs that threaten to undermine it also will ensure that judges know about the tools they

214. *See Court Role and Structure*, US COURTS, www.uscourts.gov/about-federal-courts/court-role-and-structure (last visited Jan. 07, 2017).

need, how they may be employed most effectively, and why it is in their self-interest to do so. And harvesting the experience of judges and courts that already have figured out effective means to promote proportional discovery and making it available for other judges and courts will go a long way towards ensuring that, a decade from now, future members of the Civil Rules Advisory Committee are not again going through the amendment process to say—once more—that judges need to ensure that discovery is proportional. This article has shown that tools exist to achieve proportional discovery. What remains is to see whether the research, resources and educational effort needed to overcome judicial reluctance to adopt active hands-on management of discovery can be mustered to get the job done. Only if this occurs will it be possible to stop the insanity.

Are SEC Administrative Proceedings the New [Unconstitutional] Normal?

Lisa Newman*

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What is the proper classification of SEC Administrative Law Judges? Are SEC Administrative Law Judges inferior executive officers, subject to the Appointments Clause? Does the increasing use of SEC in-house administrative adjudication by its own judges violate due process? What considerations should corporate counsel be made aware of?

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I. INTRODUCTION

Administrative Law Judges (ALJs) play an essential role in the modern regulatory system, much of which is overseen by the United States Securities and Exchange Commission (SEC or the Commission). The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank) granted the SEC significant and increased power to enforce its provisions.[1] One of the most widely utilized provisions of the Dodd-Frank Act is the use of administrative proceedings to obtain monetary penalties. These proceedings are overseen by SEC ALJs and subject to limited review by traditional judges.[2] Prior to Dodd-Frank, the SEC could only bring administrative proceedings against SEC-regulated entities or their affiliates.[3]

The Dodd-Frank Act authorized the SEC to seek monetary penalties against a much wider array of offenders, including individuals and non-regulated entities, through administrative proceedings rather than in federal court.[4] Since its passage in 2010, SEC reliance on administrative proceedings has increased dramatically. In 2005, civil cases filed in federal court outnumbered administrative proceedings.[5] In 2012, however, the SEC brought almost twice as many administrative proceedings as civil actions.[6] In 2013 the SEC brought 469 administrative proceedings[7] and in 2014, a whopping 616.[8] This

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1. *See infra* Part II.E. (discussing the expansion of the SEC's powers under Dodd-Frank).

2. *See infra* Part III (explaining the processes of administrative proceedings process and judicial review).

3. See Kenneth B. Winer & Laura S. Kwaterski, *Assessing SEC Power in Administrative Proceedings*, LAW360, (Mar. 24, 2011), http://www.law360.com/articles/233299/assessing-sec-power-in-administrativeproceedings ("For any person who was not either a regulated entity or associated with a regulated entity the SEC could only obtain monetary penalties in a civil action before a federal district court in a civil action In 2010, as part of [Dodd-Frank], Congress granted the SEC broad authority to impose civil monetary penalties in administrative proceedings. ').

4. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, § 929P. 124 Stat. 1852, 1862-65 (2010).

5. *See infra* Graph 1 (providing statistics on the SEC's use of both administrative proceedings and civil actions).

6. *Select SEC and Market Data Fiscal 2012*, SEC, 3 tbl.2 (2012), http://www.sec.gov/about/secstats2012.pdf (462 administrative proceedings versus 272 civil actions).

7. U.S. Sec, & Exch. Comm'n, *Select SEC and Market Data Fiscal 2013*, 3 tbl.2 (2013), http://www.sec.gov/about/ secstats2013.pdf.

8. U.S. Sec. & Exch. Comm'n, *Select SEC and Market Data: Fiscal 2014*, 3 tbl. 2 (2014), http://www.sec.gov/about/ secstats2012.pdf.

phenomenon has been profiled by several newspapers, and some commentators and courts have cast doubt on the constitutionality of this practice.[9] The Wall Street Journal noted that "[t]he SEC won against 90% of defendants" from October 2010 through March 2015, a number that dwarfs the 69% of cases the SEC won against defendants in federal court during the same period.[10] In 2014, the SEC won 100% of the cases brought before its ALJs, as compared with winning 61% of cases brought to federal court.[11] The Wall Street Journal further noted that the SEC Commissioners "decided in their own agency's favor concerning 53 out of 56 defendants in appeals" of ALJ decisions.[12]

The SEC has publicly acknowledged its growing reliance on monetary penalties. In September 2013, SEC Chairwoman Mary Jo White stated that "we must make aggressive use of our existing penalty authority, recognizing that meaningful monetary penalties—whether against companies or individuals—play a very important role in a strong enforcement program."[13] Similarly, Andrew Ceresney, the Co-Director of Enforcement, said that "[m]onetary penalties speak very loudly and in a language any potential defendant understands. Enforcement needs to be aggressive in our use of penalties."[14]

In a speech, U.S. District Judge Jed S. Rakoff also questioned the constitutionality of SEC administrative proceedings and "urged the [Commission] to reconsider becoming 'a law unto itself' by increasingly bringing cases in-house instead of in court."[15] In commenting on the appeals of SEC administrative proceedings, Judge Rakoff noted that "the Court of Appeals invites the SEC to avoid even the extremely modest review it leaves to the district court by

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9. *See, e.g. infra* p. 3 and notes 15–16 (discussing recent constitutional criticism of the use of ALJs).

10. Jean Eaglesham, *SEC Wins With In-House Judges*, WALL ST. J. (May 6, 2015), http://www.wsj.com/articles/sec-wins-with-in-house-judges-1430965803.

11. Nate Raymond, *U.S. Judge Criticizes SEC Use of In-House Court for Fraud Cases*, REUTERS (Nov. 5, 2014), http://www.reuters.com/article/2014/11/05/sec-fraud-rakoffidUSL1N0SV2LN20141105.

12. Eaglesham, *supra* note 10.

13. Mary Jo White, Chair, U.S. Sec. & Exch. Comm'n, Remarks at the Council of Institutional Investors: Deploying the Full Enforcement Arsenal (Sept. 26, 2013) (transcript available at http://www.sec.gov/News/Speech/Detail/Speech/1370539841202).

14. Jean Eaglesham, *SEC Ramps Up Fine Amounts to Deter Misconduct*, WALL ST. J. (Oct. 1, 2013), http://online.wsj.com/news/articles/SB10001424052702303918804579109554149 46.

15. Raymond, *supra* note 11 (internal quotation marks omitted).

proceeding on a solely administrative basis."[16] He further addressed the constitutionality of reliance on ALJs, asking "from where does the constitutional warrant for such unchecked and unbalanced administrative power derive?"[17]

The SEC did not always have such broad administrative powers.[18] This Note will begin by commenting on the legislative history of the SEC prior to Dodd-Frank. After this background, the Note will continue by laying out the current statutory framework of ALJs, how they are currently used by the SEC, and the potential application of the Appointments Clause to their use. In conclusion, this Note will offer advice for corporate counsel who face actions against the SEC in future administrative proceedings.

II. LEGISLATION PRIOR TO DODD-FRANK

The SEC did not always pursue enforcement actions that were punitive in nature. Prior to the 1990s, SEC enforcement actions were primarily remedial.[19] In fact, in response to a Congressional request for a report on enforcement sanctions and remedies, the SEC stated that "the federal securities laws are presently viewed by the courts as remedial rather than punitive" and that non-monetary remedies were "effective in most cases" to provide remedial relief.[20] However, after the Insider Sanctions Trading Act of 1984, the Insider Trading and Securities Fraud Enforcement Act of 1988, and the Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Congress vested the SEC with greater authority to impose punitive sanctions for insider trading and other securities laws violations.[21] The SEC in turn gained three new consequential powers:

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16. S.E.C. v. Citigroup Global Mkts Inc. 34 F. Supp. 3d 379, 381 n.8. (S.D.N.Y 2014).

17. *Id.*

18. *See infra* Part II (discussing the historical limitations of the SEC's enforcement powers).

19. Paul S. Atkins & Bradley J. Bondi, *Evaluating The Mission: A Critical Review of the History and Evolution of the SEC Enforcement Program*, 13 FORDHAM J. CORP. & FIN. L. 367. 383 (2008).

20. *Id.* (citing Memorandum from John S.R. Shad, Chairman, U.S. Sec. & Exch. Comm'n, to Rep. Timothy E. Wirth, Chairman, Subcomm. on Telecomms. Consumer Prot. & Fin. of the H. Comm. Energy and Commerce 350 (Feb. 22, 1984)).

21. Atkins, *supra* note 19, at 385.

> (1) the ability to seek civil monetary penalties against persons and entities that may have violated federal securities laws; (2) the authority to bar directors and officers of public companies from serving in those capacities if they violated federal antifraud provisions; and (3) the authority to issue administrative cease-and-desist orders, temporary restraining orders, and orders for disgorgement of ill-gotten profits to violators of federal securities laws.[22]

A. The Insider Trading Sanctions Act of 1984

In 1982, the SEC asked Congress to increase its enforcement powers to allow it to impose "civil monetary penalties of up to three times the profit realized or loss avoided in insider trading cases."[23] In response, Congress passed the Insider Trading Sanctions Act of 1984, which authorized the SEC to procure treble damages in insider-trading cases and increased the maximum criminal fine for violations of the Securities Exchange Act of 1934 (Exchange Act).[24]

B. Insider Trading and Securities Fraud Enforcement Act of 1988

After an increasing number of high-profile insider-trading cases, Congress passed the Insider Trading and Securities Fraud Enforcement Act of 1988 (ITSFEA) under the assumption that broker-dealers "were not doing enough to detect and deter insider trading."[25] The ITSFEA again increased the SEC's authority to "impose penalties on persons who control a person who trades on material nonpublic information in violation of the law."[26] It also required both investment advisers and broker-dealers to "establish, maintain, and enforce written policies and procedures reasonably designed to prevent the misuse of material, nonpublic information."[27] The ITSFEA also expanded enforcement options by "vest[ing] private plaintiffs with authority to assist in the deterrence effort by creating

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22. *Id.*
23. *Id.* at 386.
24. *Id.* at 387.
25. *Id.* at 388.
26. *Id.*
27. *Id.* (quoting the Insider Trading and Securities Fraud Enforcement Act of 1988, Pub. L. No. 100-704, § 3, 102 Stat. 4677 (codified as amended in scattered sections of 15 U.S.C.)).

an express private right of action against insiders who trade[d] on material nonpublic information."[28]

C. *The Securities Enforcement Remedies and Penny Stock Reform Act of 1990*

In 1987, the Treadway Commission published a report identifying what it believed to be the causes of financial reporting fraud and issued recommendations to reduce such instances.[29] Initially, the SEC sought authority to impose penalties in administrative proceedings against entities (such as individuals or corporations) that the SEC did not directly regulate, including proceedings against issuers.[30] The SEC later modified these recommendations, specifically withdrawing its request for authority to seek monetary penalties against issuers in administrative proceedings.[31] However, the SEC was still not completely barred from seeking such monetary penalties—a modified proposal sought authorization for the SEC to seek such penalties, "but only in federal court proceedings."[32]

As enacted, the Securities Enforcement Remedies and Penny Stock Reform Act of 1990 (Remedies Act) vested the SEC with the authority to seek penalties against persons and entities directly regulated by the SEC, so long as such penalties were in the public interest.[33] The Remedies Act authorized ALJs to impose these civil penalties.[34] However, Congress limited the SEC's power to seek civil monetary penalties against issuers to federal court proceedings.[35] As one commentator notes, revisions in the SEC's proposal ensured that the judiciary could check the SEC's ability to broadly impose civil monetary penalties:

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28. Atkins, *supra* note 19, at 388.
29. *Id.* at 388–89.
30. *Id.* at 389.
31. *Id.* at 390.
32. *Id.* at 393.
33. *Id.* at 391, 393.
34. *Id.* at 393. Even though the Reform Act increased the SEC's administrative power, its procedural rules prevented the SEC from fully exercising this new power. In the 1990s, the SEC modified its Rules of Practice to reflect this concern. Some of the rule changes included an expedited discovery process, authorization for SEC ALJs to issue subpoenas for document production in the pretrial stage, and gave ALJs ten months to issue a decision. Ryan Jones, *The Fight Over Home Court: An Analysis of the SEC's Increased Use of Administrative Proceedings*, 68 SMU L. REV. 507, 508 (2015).
35. Jones, *supra* note 34, at 512.

> The concern among members of Congress and internally at the SEC was that if the same remedies were available to the SEC under both judicial and administrative proceedings, then the SEC might be perceived to have an incentive to conduct more enforcement actions through its own administrative proceedings, rather than before a federal district court judge. The final legislation did not include penalty authority in administrative proceedings precisely because there would be no oversight by Article III judges as there would be in civil proceedings. [36]

Between 1990 and 2002, the SEC usually refrained from actions against non-regulated entities in federal court. However, the SEC's enforcement strategy dramatically changed in the early 2000s in the wake of the Enron and WorldCom scandals. In response to a rising number of corporate scandals that took advantage of the investing public, Congress provided the SEC with broader powers and increased authority to enforce pre-existing laws by enacting the Sarbanes-Oxley Act.[37]

D. The Sarbanes-Oxley Act of 2002

In light of a litany of corporate scandals, Congress passed the Sarbanes-Oxley Act (Sarbanes-Oxley), which imposed significant reporting requirements on corporate officers and directors. Sarbanes-Oxley greatly increased the SEC's enforcement powers and further expanded the criminal penalties for violating securities laws.[38]

The Sarbanes-Oxley Act permitted the SEC to use administrative proceedings to bar officers and directors from their corporate positions, a remedy previously unavailable.[39] In addition, Sarbanes-Oxley contained a remedial provision, § 308(a), which allowed the SEC "to disperse the penalties obtained from wrongdoers to compensate harmed shareholders."[40] In administrative proceedings prior to Sarbanes-Oxley, the SEC could only strip securities laws violators of "ill-gotten gains" through the process of disgorgement.[41] Under Sar-

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36. Atkins, *supra* note 19, at 393–94.
37. Allison Fass, *One Year Later, The Impact of Sarbanes-Oxley*, FORBES (July 22, 2003), http://www.forbes.com/2003/07/22/cz_af_0722sarbanes.html.
38. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745.
39. Atkins, *supra* note 19, at 395.
40. *Id.*
41. *Id.* at 396.

banes-Oxley, the SEC made disgorged funds available "for restitution and other relief for those harmed by [a] defendant's misconduct."[42] Sarbanes-Oxley further expanded the SEC's powers by allowing it to collect monetary penalties to be deposited into the Federal Account for Investor Restitution Fund (Fair Fund), which provided restitution to aggrieved investors.[43] Although § 308(a) undoubtedly provided more money to victims of securities laws violations, it also incentivized the SEC to use administrative proceedings to seek monetary penalties to deposit in the Fair Fund. As noted above, the SEC could not use administrative proceedings against unregulated entities; the SEC was only authorized to seek monetary penalties against such entities in federal court.

The effects of the Sarbanes-Oxley Act were immediately apparent. In the time between the passage of the Remedies Act and Sarbanes-Oxley, the SEC brought only four cases seeking to impose penalties on issuers, with penalties aggregating less than $5 million.[44] In 2002, the SEC collected a $10 million penalty against Xerox.[45] In 2003, the SEC obtained twenty penalties equal to or greater than $10 million, and in 2004 it obtained 40 such penalties.[46]

E. The Dodd-Frank Act Wall Street Reform and Consumer Protection Act

On the heels of an economic meltdown, Congress passed Dodd-Frank in 2010.[47] Like previous legislative enactments, Dodd-Frank provided the SEC with increased authority to enforce securities laws. Most significant to the purposes of this Note, Dodd-Frank authorized the SEC to do what the Remedies Act and Sarbanes-Oxley had previously refused to do: it vested the SEC with the authority to pursue monetary penalties against unregulated entities in administrative proceedings in addition to federal courts.[48] Addition-

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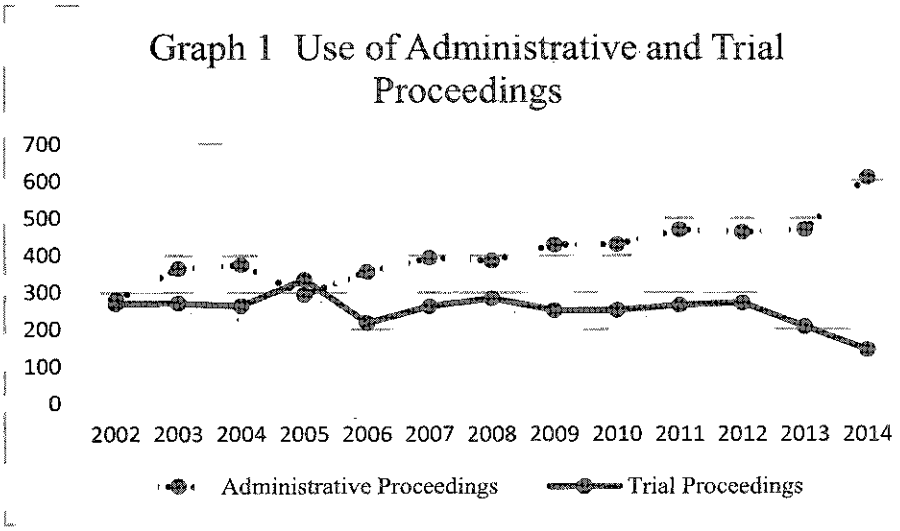
42. Jones, *supra* note 34, at 514.
43. Atkins, *supra* note 19, at 395–96.
44. *Id.* at 394.
45. *Id.* at 399.
46. *Id.* at 399–400.
47. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, § 929P. 124 Stat. 1852, (1862-65) (2010).
48. 15 U.S.C. § 77h-1 (2012) (Section 929P(a) of the Dodd-Frank Act amending § 8A of the Securities Act, § 21B(a) of the Securities Exchange Act, § 9(d)(1) of the Investment Company Act (15 U.S.C. § 80a-9 (2006)), and § 203(i)(1) of the Investment Advisers Act (15 U.S.C. § 80b-3 (2015)). *See also* Andrew Ceresney, Director of Enforcement, U.S. Sec. & Exch. Comm'n, Keynote Speech at New York City Bar 4th Annual White Collar Institute (May 12, 2015),

ally, Dodd-Frank granted the SEC authority to impose secondary liability on those employees who aided and abetted their company's illegal activities and to award whistleblowers with funds that did not go towards disgorgement or the Fair Fund.[49]

The graph below illustrates the SEC's growing reliance on administrative proceedings through the legislative history of SOX and Dodd-Frank.[50]



Prior to the Dodd-Frank Act, the SEC brought far fewer cases through administrative proceedings. In 2002, the year that Sarbanes-Oxley was passed, the SEC relied on both administrative proceedings and civil actions almost equally.[51] As Graph 1 illustrates, the SEC began favoring the use of administrative proceedings in the early 2000s.[52] Following the passage of Dodd-Frank in 2010, the SEC predictably increased the amount of cases brought in administrative proceedings.[53] However, in 2014, the number of administrative proceedings exploded: 610 proceedings were adjudicated as compared with

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https://www.sec.gov/news/speech/ceresney-nyc-bar-4th-white-collar-key-note.html ("As part of Dodd-Frank, Congress expanded the SEC's authority to obtain penalties against any person in an administrative proceeding including unregistered entities and individuals. Under this expanded authority, the Commission has been bringing more enforcement actions in the administrative forum, where it can now obtain the same remedies as in district court.").

49. Jones, *supra* note 34, at 516.

50. This data is compiled from the SEC's Enforcement Annual Reports and from Enforcement and Market Data Reports from 2002 to 2014.

51. *See supra* Graph 1.

52. *Id.*

53. *Id.*

145 civil actions.[54] According to the Director of Enforcement, 2014 was a record year with the "most ever [cases] filed in the history of the Commission," including many "first-of-their-kind actions."[55] SEC officials did not shy away from admitting that they increasingly used administrative proceedings—one SEC official commented that "[i]t's fair to say it's the new normal, we're moving toward using administrative proceedings more frequently."[56] More recently, SEC Commissioner Michael S. Piwowar acknowledged at the SEC Speaks conference that "Commission staff has recently indicated that [it] will recommend instituting more enforcement matters, including insider trading cases, through administrative proceedings rather than going through the federal district courts."[57] The Commissioner acknowledged that this announcement of the increased use of administrative proceedings followed two well-publicized losses in major insider-trading cases tried in federal court.[58] Without commenting on the accuracy of this connection, the Commissioner noted that the number of administrative proceedings had greatly increased as a result of Dodd-Frank, which gave the SEC the authority to seek a monetary penalty in administrative proceedings as well as in federal courts.[59]

Andrew Ceresney, Director of the SEC's Division of Enforcement, explained that the reason the SEC often "choose[s] to file in an administrative forum" is "largely because of efficiency."[60] He

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54. *Id.*

55. Andrew Ceresney, Director of Enforcement, U.S. Sec. & Exch. Comm'n, Remarks to the American Bar Association's Business Law Section Fall Meeting (Nov. 21, 2014), https://www.sec.gov/News/Speech/Detail/Speech/1370543515297.

56. Jean Eaglesham, *SEC is Steering More Trials to Judges It Appoints*, WALL ST. J. (Oct. 21, 2014), http://www.wsj.com/articles/sec-is-steering-more-trials-to-judges-it-appoints-1413849590.

57. Michael S. Piwowar, Commissioner, U.S. Sec. & Exch. Comm'n, Remarks at the 'SEC Speaks' Conference 2015: A Fair, Orderly, and Efficient SEC (Feb. 20, 2015), https://www.sec.gov/news/speech/022015-spchcmsp.html, (citing Ronald E. Wood, *SEC May Ramp Up Administrative Proceeding*, DAILY JOURNAL SUPPLEMENT (July 23, 2014), at 7, http://www.proskauer.com/files/uploads/Documents/Ron-Wood-article.pdf; Sarah N. Lynch, *U.S. SEC to File Some Insider-Trading Cases in its In-House Court*, REUTERS (June 11, 2014), http://www.reuters.com/article/2014/06/11/sec-insidertrading-idUSL2N0OS1AT20140611. James Meyers, *SEC Gives Itself Home-Court Advantage*, LAW360 (Aug. 5, 2014), http://www.law360.com/articles/563274/sec-gives-itself-home-court-advantage).

58. Piwowar, *supra* note 58.

59. *Id.*

60. Andrew Ceresney, Director, Division of Enforcement, U.S. Sec. & Exch. Comm'n, Remarks to the American Bar Association's Business Law Section Fall

acknowledged that filing a case in front of an ALJ would "quickly end[] the matter on a settled basis, among parties that have agreed to a settlement" and that there was "no need to have implementation of the parties' agreement subject to the competing demands of busy district court dockets."[61] Finally, Ceresney noted that the complexity of the subject matter and the Commission's expertise are also relevant factors in selecting administrative proceedings instead of bringing cases in federal court:

> Administrative Law Judges and the Commission have extensive knowledge and experience concerning the securities laws and complex or technical securities industry practices or products. If a contested matter is likely to raise unsettled and complex legal issues under the federal securities laws, or interpretation of the Commission's rules, it may make sense to file the case as an administrative proceeding to a Commission decision on the issue, subject to appellate review in the federal courts, may facilitate development of law.[62]

However, Ceresney also noted that "[t]he vast majority of the uptick in the numbers of actions we have brought as administrative proceedings are settled actions."[63]

Since it is clear that the SEC is relying on administrative proceedings now more than ever, the next part of this Note will go over the statutory framework for ALJs and for SEC ALJs.

III. STATUTORY AUTHORITY OF ALJS

Congress established the ALJ position statutorily, providing that "[e]ach agency shall appoint as many administrative law judges as are necessary for proceedings required to be conducted ..."[64] ALJs are governed by the Administrative Procedures Act (the APA)

Meeting (Nov. 21, 2014), http://www.sec.gov/News/Speech/Detail/Speech/1370543515297.VMnnAWjF9zM.

61. *Id.*

62. *Id.*

63. Andrew Ceresney, Director, Division of Enforcement, U.S. Sec. & Exch. Comm'n, Keynote Speech at New York City Bar 4th Annual White Collar Institute (May 12, 2015), https://www.sec.gov/news/speech/ceresney-nyc-bar-4th-white-collar-key-note.html.

64. 5 U.S.C. § 3105 (1978).

"in every case of adjudication required by statute to be determined on the record after opportunity."[65] Under the APA, agency adjudications are overseen by "(1) the agency; (2) one or more members of the body which comprises the agency; or (3) one or more administrative law judges appointed under [§] 3105 "[66] An agency employee who presides over investigative or prosecutorial functions may not also "participate or advise in the decision, recommend [a] decision, or [participate in an] agency review."[67] In total, thirty-four agencies employ administrative law judges.[68]

A decision issued by an ALJ becomes the final decision of the agency "unless there is an appeal to, or review on motion of, the agency within the time provided by rule."[69] ALJs are vested with broad statutory authority, including authorization to:

- Administer oaths and affirmations;
- Issue subpoenas authorized by law;
- Rule on offers of proof and receive relevant evidence;
- Take depositions or have depositions taken;
- Regulate hearings;
- Hold conferences for the settlement or simplification of the issues by consent of the parties or by the use of alternative means of dispute resolution;
- Inform the parties as to the availability of one or more alternative means of dispute resolution, and encourage use of such methods;
- Require the attendance at any conference of at least one representative of each party who has authority to negotiate;
- Dispose of procedural requests or similar matters;
- Make or recommend decisions;
- Take other action authorized by agency rule; and
- Require the attendance at any conference.[70]

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65. 5 U.S.C. § 554(a) (1978).
66. 5 U.S.C. § 556(b) (1990).
67. 5 U.S.C. § 554(d)(2) (1978).
68. *See Agencies Employing Administrative Law Judges*, ASSOCIATION OF ADMINISTRATIVE LAW JUDGES, http://www.aalj.org/agencies-employing-administrative-law-judges (last visited Nov. 2, 2016) (listing out the federal agencies which rely on administrative law judges).
69. 5 U.S.C. § 557(b) (1976).
70. 5 U.S.C. § 556 (1990).

On appeal, the head of each agency has the authority to reverse ALJs' decisions on both the facts and the law.[71]

A. Statutory Authority of the SEC ALJs

ALJs are selected by their parent agency "as are necessary" to conduct formal adjudicatory proceedings.[72] SEC regulations establish the Office of Administrative Law Judges.[73] Based on its needs, the SEC selects ALJs from a list of candidates provided by the government's Office of Personnel Management.[74] These appointments are not directly overseen by either the President or the Senate.[75] Their salaries are statutorily specified by Schedule 10 of Executive Order No. 13655.[76] SEC ALJs receive career appointments and are removable "only for good cause established and determined by the Merit Systems Protection Board" upon a formal administrative hearing before the Board.[77] Similarly, members of the Merit Systems Protection Board are protected by tenure and removable by the President "only for inefficiency, neglect of duty, or malfeasance in office."[78] The Civil Service Reform Act of 1978 also governs the employment of SEC ALJs.[79] It regulates ALJ employment by setting

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71. 17 C.F.R. § 201.410.

72. 5 U.S.C. § 3105 (1978).

73. 17 C.F.R. § 200.14 (2015).

74. 5 C.F.R. § 930.204 (2013).

75. *See* Bandimere v. Sec. & Exch. Comm'n, 844 F.3d 1168 (10th Cir. 2016), *pending pet. for reh'g en banc filed*, No. 15-9586 (Mar. 13, 2017) (noting the Commission's concession that 'ALJs are not appointed by the President, a court of law, or the head of a department. ')

76. 5 U.S.C. § 5311 (1990) (The Executive Schedule is a salary system given to highest-ranked positions in the executive branch).

77. 5 C.F.R. § 930.204(a) (2013); 5 U.S.C. § 7521 (1989). 'Good cause' is a somewhat uncertain and ambiguous standard. One law review article notes that the standard 'has permitted removal for, among other things, being absent for extended periods, declining to set hearing dates, [] having a 'high rate of significant adjudicatory errors, and potentially even insubordination. Kent Barnett, *Resolving the ALJ Quandary*, 66 VAND. L. REV. 797, 807 (2013). The Supreme Court has found that an officer cannot be 'discharged at the whim or caprice of the agency or for political reasons. Ramspeck v. Fed. Trial Exam'rs Conf. 345 U.S. 128, 142 (1953). The good behavior standard governing Article III judges may be different. Barnett cites the difference in the number of Article III judges impeached (15 in 200 years), and the number of ALJs impeached (over 20 between 1946 and 1992). Barnett, *supra*, at 808.

78. 5 U.S.C. § 1202(d) (1989).

79. 5 U.S.C. §§ 1101 *et seq.* (1978).

merit principles that guide agency personnel[80] and specifying which administrative and judicial remedies are available.[81]

IV SEC ADMINISTRATIVE PROCEEDINGS

The SEC is statutorily permitted to bring an action against a broad array of both private and public defendants. For example, the Exchange Act authorizes the SEC to bring an action against "any person" for violating the Act.[82] The SEC has made clear that its rules of practice are not to "be construed to limit the powers of the hearing officer provided by the Administrative Procedure Act."[83] The SEC may bring enforcement actions both administratively and in federal court, but there is no statutory guidance about when either venue is appropriate.[84] In 2014, the SEC initiated more than 600 administrative proceedings—about 35% more than the number of administrative proceedings brought in 2012.[85] In 2014, over 43% of the Commission's litigated enforcement cases were brought through administrative proceedings.[86] The SEC Rules of Practice provide that the SEC shall preside over all administrative proceedings, whether handled by the Commission or by a delegation of the case to an ALJ.[87]

If the Commission elects to delegate a case to an administrative proceeding, the Chief ALJ assigns it to a specific ALJ.[88] Once selected, the assigned ALJ presides over the entire matter, including hearings on the admission of evidence, and issues an initial decision.[89] The SEC initiates an administrative proceeding by issuing a

80. 5 U.S.C. § 2301 (2014).
81. *Id.* §§ 1204, 1212, 1214, 1215, 1221.
82. 15 U.S.C. § 78u(d) (2015).
83. Rules of Practice, 17 C.F.R. § 201.111 (2006).
84. 15 U.S.C. § 78u-1 (2012).
85. Susan D. Resley, *Dealing with the SEC's Administrative Proceeding Trend*, LAW360 (Jan. 13, 2015), http://www.law360.com/articles/610688/dealing-with-the-sec-s-administrative-proceeding-trend (The comparison is based on 2012 because the SEC did not release data for 2013.).
86. *Id.*
87. Rules of Practice, 17 C.F.R. § 201.100, *et seq* (2011). SEC regulations state that administrative proceedings 'shall be presided over by the Commission or, if the Commission so orders, by a hearing officer. 17 C.F.R. § 201.110 (2011). This includes 'an administrative law judge, a panel of Commissioners constituting less than a quorum of the Commission, an individual Commissioner, or any other person duly authorized to preside at a hearing. 17 C.F.R. § 201.101(a)(5) (2011).
88. 17 C.F.R. § 201.110 (2011).
89. 17 C.F.R. § 201.360(a)(1) (2011).

charging document of sorts, known as an Order Instituting Proceedings (OIP). The OIP contains allegations of SEC violations and sets a timeline in which the ALJ must enter an initial decision.[90] The SEC will set either a 120, 210, or 300 day timeline after a "consideration of the nature, complexity, and urgency of the subject matter, and with due regard for the public interest and for the protection of investors."[91] SEC administrative proceedings are different from federal court proceedings in several key ways: the proceedings are not subject to the Federal Rules of Evidence, cases are not tried in front of juries, and decisions are subject to a limited review process and an expedited timeline.[92]

A. Scope of Authority of SEC ALJs

The SEC describes its ALJs as "independent adjudicators" who "conduct public hearings in a manner similar to non-jury trials in the federal district courts."[93] According to the SEC Rules of Practice, ALJs' have the power to issue subpoenas, rule on the admissibility of evidence, order depositions, prepare initial decisions, and order sanctions, among other enumerated powers.[94] Additionally, the SEC enjoys significant control over the scope of issues presented within each administrative proceeding. These include ruling on dispositive motions, including pre-trial motions; granting or denying leave to amend an answer; dismissing cases or prohibiting the admission of evidence; requiring the SEC to file more specific statements of fact or law; granting or denying leave to move for summary disposition; dismissing for failure to meet deadlines; and reopening a hearing prior to filing of a final decision.[95]

At the conclusion of an administrative proceeding, an ALJ will issue an initial decision, which includes "[f]indings and conclusions, and the reasons or basis therefor, as to all the material issues of fact, law or discretion presented on the record and the appropriate order, sanction, relief, or denial thereof."[96] Review of this initial decision may take one of three avenues: (1) at the request of plaintiffs

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90. Office of Administrative Law Judges, SEC, https://www.sec.gov/alj (last modified on Oct. 22, 2015).

91. 17 C.F.R. § 201.360(a)(2).

92. *See Bandimere*, 844 F.3d at 1178.

93. Office of Administrative Law Judges, SEC, https://www.sec.gov/alj (last modified on Oct. 22, 2015).

94. 17 C.F.R. §§ 201.111–250.

95. *Id.*

96. *Id.* § 201.360(a)(1)(b).

or the Division of Enforcement within 21 days of the decision;[97] (2) "upon [the SEC's] own initiative or upon petition of a party to or intervener in such action,"[98] or (3) judicial review in the Court of Appeals in the home circuit or the DC Circuit.[99]

The Commission has discretion to grant a review upon a reasonable showing of error, mistake, or important policy.[100] If review of a decision is not pursued or declined by the SEC, the Commission will issue an order "that the decision has become final as to that party."[101] The decision of the ALJ thus becomes "the action of the Commission."[102]

B. SEC Review

If review is sought of the decision, the SEC will review the ALJ's initial decision *de novo*.[103] Review is "limited to the issues specified in the petition for review or the issues, if any, specified in the briefing schedule."[104] The Commission "may affirm, reverse, modify, set aside, or remand for further proceedings" any initial decision.[105] However, the SEC will often accept an ALJ's credibility findings.[106] The Commission may also remand a case to "hear additional evidence,"[107] but the Commission is required to review certain initial decisions.[108] If "a majority of participating Commissioners do not agree to a disposition on the merits, the initial decision shall be of

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97. *Id.* § 201.410(b).

98. 15 U.S.C. § 78d-1(b) (1987).

99. *Id.* § 78y(a)(1).

100. 17 C.F.R. § 201.411(b)(2) (In determining whether to grant review, the Commission shall consider whether the petition for review makes '(i) a prejudicial error was committed in the conduct of the proceeding; or (ii) the decision embodies: (A) a finding or conclusion of material fact that is clearly erroneous; or (B) a conclusion of law that is erroneous; or (C) an exercise of discretion or decision of law or policy that is important and that the Commission should review.').

101. 17 C.F.R. 201.360(d)(1).

102. 15 U.S.C. § 78d-1(c).

103. 17 C.F.R. §§ 202.411(a), 201.452.

104. *Id.* § 201.411(d).

105. *Id.* § 201.411(a).

106. Pelosi, Investment Advisers Act Release No. 3805, Investment Company Act Release No. 30,997, 2014 WL 1247415, at *2 (Mar. 27, 2014) ("The Commission gives considerable weight to the credibility determination of a law judge since it is based on hearing the witnesses' testimony and observing their demeanor. Such determinations can be overcome only where the record contains substantial evidence for doing so. (internal quotation marks omitted)).

107. 17 C.F.R. § 201.452.

108. 17 C.F.R. § 201.411(b)(1).

no effect, and an order will be issued in accordance with [that] result."[109]

C. Subsequent Judicial Review

Under the Exchange Act, an individual may seek judicial review of a Commission's final order in federal appellate court.[110] An appellate court has exclusive jurisdiction "to affirm or modify and enforce or to set aside the order in whole or in part."[111] However, the Commission's finding of fact, and by nature the ALJ's finding of fact, are conclusive "if supported by substantial evidence."[112] The court may also remand a case to the Commission for further proceedings to develop any additional material evidence.[113]

V POTENTIAL APPLICATION OF THE APPOINTMENTS CLAUSE TO SEC ALJS

Under Article II of the Constitution,

> [the President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.[114]

The Appointments Clause governs the appointment of all officers of the United States who "exercise[] significant authority pursuant to the laws of the United States."[115] As such, "any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be

109. 17 C.F.R. § 201.411(f).
110. 15 U.S.C. § 78y(a)(1) (1990).
111. *Id.* § 78y(a)(3).
112. *Id.* § 78y(a)(4).
113. *Id.* § 78y(a)(5).
114. U.S. CONST. art II, §2, cl. 2.
115. Buckley v. Valeo, 424 U.S. 1, 126 (1976) (per curiam).

appointed in the manner prescribed by § 2, cl. 2, of [Article II]."[116] The Supreme Court has defined "Officers of the United States" as including "all persons who can be said to hold an office under the government."[117] The degree of authority exercised by an officer must be "so 'significant' that it [would be] inconsistent with the classifications of 'lesser functionaries' or employees."[118] Any officer exercising such authority "must, therefore, be appointed in the manner prescribed by § 2, cl. 2, of Article [II]."[119]

Although the Supreme Court has long held that "[t]he Constitution for purposes of appointment very clearly divides all its officers into two classes,"[120] few cases have offered distinct criteria by which to distinguish principal and inferior officers. The Appointments Clause divides officers into two categories: (1) principal officers who must be appointed by the President, pursuant to the advice and consent of the Senate; and (2) inferior officers, who may be appointed through the advice and consent of the Senate, but whose appointment may also be done by the President, the courts, or heads of departments.[121]

Congress may appoint inferior officers "whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate."[122] The authority to appoint inferior officers is confined to three sources: "the President alone, the Heads of Departments, and the Courts of Law."[123] Neither the President, the courts, nor the SEC commissioners appoint ALJs.[124] Thus, the central question is whether SEC ALJs are inferior officers or mere employees.

The Appointments Clause is not applicable to governmental workers classified as "mere employees."[125] The Supreme Court has not "set forth an exclusive criterion for distinguishing between prin-

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116. Freytag v. Comm'r, 501 U.S. 868, 881 (1991) (quoting *Buckley,* 424 U.S at 126) (alteration in the original).

117. *Buckley*, 424 U.S. at 125–26 (quoting U.S. v Germaine, 90 U.S. 508, 509–10 (1879)).

118. *Freytag*, 501 U.S. at 881 (internal quotation marks omitted).

119. *Buckley*, 424 U.S. at 125–26.

120. *Germaine*, 99 U.S. at 509.

121. U.S. Const. art II, §2, cl. 2.

122. Edmond v. U.S. 520 U.S. 651, 663 (1997).

123. *Freytag*, 501 U.S. at 878 (internal quotation marks omitted).

124. *See e.g.* SEC Release No. 9972, 2015 WL 6575665, at *19 (acknowledging that SEC ALJs are not appointed by the President, the courts, or head of the SEC).

125. Buckley v. Valeo, 424 U.S. 1, 126 n.162 (1976) (citing Auffmordt v. Hedden, 137 U.S. 310, 327 (1890)).

cipal and inferior officers."[126] Regardless, the Court has held that the following officers are inferior officers: a district court clerk, an election supervisor, a vice consul temporarily charged with consul's duties, and a United States Commissioner in district court proceedings who was an independent counsel created by the Ethics in Government Act.[127] The Court previously looked to factors such as whether an employee may be removed by a higher executive, the scope of the officer's duties and jurisdiction, and the length of tenure.[128]

The Supreme Court has repeatedly emphasized the importance of the Appointments Clause as more than a frivolous concern for "etiquette or protocol."[129] Rather, it has recognized the Appointments Clause "among the significant structural safeguards of the constitutional scheme designed to preserve political accountability relative to important government assignments."[130]

In *Freytag v. Commissioner of Internal Revenue*, the chief judge of the U.S. Tax Court was statutorily authorized to assign a special trial judge (STJ) to four categories of hearings, the fourth of which is pertinent here.[131] In the first three categories, an STJ was authorized to "not only hear and report on a case but also to decide it."[132] Under the fourth category, an STJ was authorized "only to hear the case and prepare proposed findings of fact and an opinion," subject to final review by a regular judge of the Tax Court.[133]

The government argued that a special trial judge was not an inferior officer because a special trial judge "does no more than assist the Tax Court judge in taking the evidence and preparing the proposed findings and opinion" and thus, should be categorized as an employee rather than an inferior officer.[134] More specifically the government argued that "special trial judges may be deemed employees [in the fourth category of cases] because *they lack authority to enter a final decision*."[135] The Supreme Court expressly rejected this argument because it "ignore[d] the significance of the duties and discretion that special trial judges possess."[136] Instead of focusing on the finality of the decision, the Court emphasized that "[t]he office of

126. Edmond v. U.S. 520 U.S. 651, 661 (1997).
127. *Id.*
128. *Id.* (citing Morrison v. Olson, 487 U.S. 654, 671 (1988)).
129. *Id.* at 661.
130. *Id.* at 659, 663.
131. Freytag v. C.I.R. 501 U.S. 868, 873 (1991).
132. *Id.*
133. *Id.* at 874 (1991) (citing H.R.Rep. No. 98–432, pt. 2, p. 1568 (1984)).
134. *Id.* at 881 (internal citations and quotation marks omitted).
135. *Id.* (emphasis added).
136. *Id.*

a special trial judge is established by [l]aw, and the duties, salary, and means of appointment for that office are specified by statute."[137] The Court noted that STJs exercised significant discretion and had the power to "take testimony, conduct trials, rule on the admissibility of evidence, and enforce compliance with discovery orders."[138] In many ways, an SEC ALJ looks like the modern equivalent to a special trial judge.

A. Are SEC ALJs Inferior Officers or Mere Employees?

Much as it did with the special trial judges in *Freytag*, Congress established SEC ALJs by law, and the APA governs their salary, duties, and means of appointment.[139] Like the STJs who "take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders,"[140] SEC ALJs likewise take testimony, conduct trials, rule on the admissibility of evidence, issue subpoenas, and make substantive rulings.[141]

In determining whether SEC ALJs are more or less like the special trial judges in *Freytag*, it is worth considering whether the issuance of an initial decision by an ALJ is a preliminary decision or a final decision. As stated above, the Commission has the discretion to "affirm, reverse, modify, set aside, or remand for further proceedings" decisions of the ALJs.[142] However, the SEC will often accept an ALJ's credibility findings because those are based on "hearing witnesses' testimon[ies] and observing their demeanor[s]. Such determinations can be overcome only where the record contains substantial evidence for doing so."[143] Furthermore, a reviewing federal court "generally gives substantial deference to the factual findings of

137. *Id.* (internal citations omitted).

138. *Id.* at 881–82.

139. *See supra* Part III.A (discussing the APA and the details about ALJs' appointment).

140. Freytag v. Comm'r, 501 U.S. 868, 881-82 (1991).

141. *See* Samuels, Kramer & Co. v. Comm'r, 930 F.2d 975, 985–86 (2d Cir. 1991) ("[S]pecial trial judges are more than mere aids to judges of the Tax Court. They take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders. '); *supra* Part III (detailing the substantive powers of the ALJs).

142. 17 C.F.R. § 201.411(a) (2011).

143. *In re* Pelosi, Exchange Act Release No. 3805, 2014 WL 1247415, at *2 (Mar. 27. 2014). *See also In re* City of Miami, Florida, Exchange Act Release No. 8213, 2003 WL 1412636, at *1 n.4. (March 21, 2003) (The SEC 'give[s] considerable weight and deference to the trier of fact's credibility determinations and reject[s] them only where there is substantial evidence for doing so. ').

an ALJ, [and] this deference is even greater when credibility determinations are involved."[144]

Even though SEC ALJs issue an initial decision, there are no circumstances under which an ALJ's initial decision becomes final without further Commission action. For example, even if the Commission makes no changes to an ALJ's initial decision, it must still enter an order before the decision if finalized.[145] The finality order specifies the date on which sanctions, if any, take effect.[146] If a majority of participating Commissioners do not agree to the disposition of the case, the ALJs "initial decision shall be of no effect, and an order will be issued in accordance with this result."[147]

The only two circuits to consider whether or not the appointment of SEC ALJs violates the Appointments Clause have reached directly opposite results, with the Tenth Circuit holding that the appointments violate the Constitution and the D.C. circuit holding that they do not.[148] In *Bandimere v. SEC*, the Tenth Circuit held that the manner in which the SEC appoints its ALJs violates the Appointments Clause, because "(1) the position of the SEC ALJ was 'established by law,' (2) 'the duties, salary, and means of appointment are specified by statute,' and (3) SEC ALJs 'exercise significant discretion' in carrying out important functions.'" The first two conclusions are uncontroversial and accepted by both the Tenth Circuit and the D.C. Circuit. The third, whether or not SEC ALJs exercise significant discretion, is the crux of the disagreement between the two. The Tenth Circuit concluded that "SEC ALJs exercise significant discretion in performing important functions commensurate with the STJs' functions described *Freytag*."[149] These functions include taking testimony, regulating discovery depositions, ruling on the admissibility of evidence, ruling on dispositive and procedural motions, issuing subpoenas, and presiding over trial-like hearings.[150] The Tenth Cir-

144. Gimbel v. Commodity Futures Trading Comm'n, 872 F.2d 196, 199 (7th Cir. 1989).

145. 17 C.F.R. § 201.360(d)(2) (2011).

146. *Id.*

147. *Id.* § 201.411(f).

148. *Contra Bandimere*, 844 F.3d at 1170 (holding that the appointment of SEC ALJs violates the Appointments Clause), *with* Raymond J. Lucia Companies, Inc. v. Sec. & Exch. Comm'n, 832 F.3d 277 (D.C. Cir. 2016), *reh'g en banc granted, judgment vacated* (Feb. 16, 2017) (holding that the appointment of SEC ALJs does not violate the appointment clause).

149. *Bandimere*, 844 F.3d at 1179.

150. *Id.*

cuit also noted that credibility findings made by the ALJs were afforded "considerable weight during agency review."[151]

Much like the government argued in *Freytag*, the SEC argued that its ALJs did not exercise the significant discretion as required by *Freytag* because the orders of SEC ALJs cannot become final without the SEC issuing an order.[152] The court acknowledged that while the SEC retained discretion to review the decisions of an ALJ, it also retained discretion not to review because the agency had no statutory duty to review an unchallenged decision before entering a final order.[153] The Tenth Circuit rejected the SECs argument, concluding that "[fi]nal decision-making power is relevant in determining whether a public servant exercises significant authority. But that does not mean *every* inferior officer *must* possess final decision-making power. *Freytag's* holding undermines that contention."[154] Thus, the court concluded that "SEC ALJs exercise significant authority in part because their initial decisions can and do become final without plenary review," noting that over 90% of initial decisions by SEC ALJs become final without review by the SEC.[155]

The D.C. Circuit, on the other hand, concluded that SEC ALJs were not inferior officers because the initial decisions of the SEC ALJs became final only when the SEC affirmatively acted to issue an order.[156] In reaching its decision, the D.C. Circuit was bound by an earlier decision by the D.C. Circuit, *Landry v. FDIC*, in which the Court held that FDIC ALJs were not inferior officers because they were unable to issue final decisions for the agency.[157] The Tenth Circuit acknowledged this holding, and disagreed "with the SEC's reading of *Freytag* and its argument that final decision-making power is dispositive to the question at hand."[158]

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151. *Id.*

152. *Id.* at 10.

153. *Id.* at 9 n. 25.

154. *Id.* at 11.

155. *Id.* at 9 at n. 25.

156. *Lucia*, 832 F.3d at 286 ("[T]he parties principally disagree about whether [SEC] ALJs issue final decisions of the [SEC]. Our analysis begins, and ends, there.').

157. *Id.* at 285 (citing to Landry v. FDIC, 204 F.3d 1125, 1128 (D.C. Cir. 2000)). The *Landry* Court cited the Code of Federal Regulations, which noted that FDIC ALJs were only able to issue 'recommended decision[s], recommended findings of fact, recommended conclusions of law, and [a] proposed order. *Id.* at 245. (citing 12 C.F.R. § 308.38 (2016)) (italics omitted). The court noted, however, that FDIC ALJs were closely analogous to the STJs in *Freytag*.

158. *Bandimere*, 844 F.3d at 1182.

Since there is now a circuit split between the D.C. Circuit and the Tenth Circuit, aggrieved parties are likely to continue to bring constitutional challenges, arguing that SEC ALJs are inferior officers. However, plaintiffs wishing to challenge the constitutionality of SEC ALJs face a high hurdle in overcoming the standing requirement to bring such cases in federal court. Federal courts have original jurisdiction over claims arising under the Constitution.[159] In *Elgin v. Dep't of Treasury* established that Congress can restrict a federal court's ability to hear such claims if Congress establishes "a statutory scheme of administrative and judicial review"[160] that channels claims through the SEC's administrative process and then directly to an appropriate court of appeals, which has exclusive jurisdiction.[161] After *Elgin,* federal courts are less likely to allow a challenge if there is a comprehensive remedial scheme available.

Plaintiffs have had mixed success in bringing these constitutional challenges in district courts, and multiple circuit courts have found that the Securities Act has set up a comprehensive remedial scheme that prevents district courts from deciding on the merits of plaintiffs' claims.[162] Most recently, the D.C. Circuit held that securities laws provided the exclusive avenue for judicial review of claims.[163] It concluded that "the painstaking detail with which Congress set forth the rules governing the court of appeals' review of Commission action" demonstrated that "it is fairly discernible that Congress intended to deny [aggrieved respondents] an additional avenue of review in district court."[164]The Seventh Circuit also held that the administrative scheme of the Exchange Act established a meaningful judicial review mechanism, and was thus found to be the exclusive avenue for review.[165] Thus, it is likely that courts will require plaintiffs to first challenge the constitutionality of ALJ appointments in their initial administrative proceedings, which are subject to review by the relevant court of appeals, not through a stand-alone district court action challenging the constitutionality of those proceedings.[166]

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159. 28 U.S.C. § 1331 (1980).

160. 132 S. Ct. 2126, 2132 (2012).

161. *See e.g.* 15 U.S.C. § 78y(a)(3) (1990) (detailing the process for judicial review of final orders).

162. Jarkesy v. S.E.C. 803 F.3d 9, 16 (D.C. Cir. 2015).

163. *Id.* at 30.

164. *Id.* at 17 (internal citations omitted).

165. Bebo v. S.E.C. 799 F.3d 765, 775 (7th Cir. 2015).

166. Bennett v. S.E.C. 151 F. Supp. 3d 632, 635 (D.Md. 2015) (internal citations omitted).

VI. CONCLUSION

Since only a handful of federal courts have held that they have the jurisdiction to hear constitutional claims, corporate counsel will likely have to challenge the constitutionality of the appointment of SEC ALJs in a pending administrative proceeding. Many such challenges are currently being made.[167] Unsurprisingly, no ALJ has found that his or her own appointment is in violation of the Constitution.[168] Clients can then appeal these decisions to an appellate court. In light of the circuit split between the D.C. Circuit and the Tenth Circuit, defendants contesting the constitutionality of the appointments of SEC ALJs should be careful to preserve objections to the administrative proceeding process and to think carefully about challenging these proceedings in the courts of appeals which have not ruled on the issue. Regardless, all parties involved in related litigation should familiarize themselves with the most current law, as the field is constantly changing.[169]

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167. *See, e.g. In re* Timbervest, LLC Exchange Act Release No. 4197. 2015 WL 5472520 (Sept. 17. 2015) (challenging the constitutionality of the manner in which ALJs are appointed).

168. *See supra* Part V (discussing case law that favors the constitutionality of ALJs).

169. *Author's Note:* Litigation is ongoing over whether SEC Administrative Law Judges are classified as either 'inferior officers' or 'employees' for purposes of the Appointments Clause. When this paper was submitted for publication, no circuit courts had ruled on whether SEC ALJs are inferior officers or employees. The D.C. Circuit initially held that the Commission's ALJs are employees and thus constitutionally appointed. Raymond J. Lucia Companies, Inc. v. Sec. & Exch. Comm'n, 832 F.3d 277 (D.C. Cir. 2016), *reh'g en banc granted, judgment vacated* (Feb. 16, 2017). In December, the Tenth Circuit parted ways with the D.C. Circuit, concluding that SEC ALJs are unconstitutionally appointed because they are inferior officers under the Constitution. *See* Bandimere v. Sec. & Exch. Comm'n, 844 F.3d 1168 (10th Cir. 2016), *pending pet. for reh'g en banc filed*, No. 15-9586 (Mar. 13, 2017). The D.C. Circuit subsequently granted a request for a rehearing en banc and asked the parties to brief whether SEC administrative law judges are inferior officers or employees under the Appointments Clause and whether it should overrule a previous D.C. case, *Landry v. FDIC*, which was relied on by the panel in concluding that SEC ALJs are employees. *See* Raymond J. Lucia Companies, Inc. v. Sec. & Exch. Comm'n, No. 15-1345, 2017 WL 631744 (D.C. Cir. Feb. 16, 2017). It remains to be seen whether the administration will change the way in which it appoints the Commission's ALJs in light of these developments. In addition, the outcome of the rehearing in the D.C. Circuit may affect a pending case considering the constitutionality of the structure of the Consumer Financial Protection Bureau. *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1 (D.C. Cir. 2016), *reh'g en banc granted, order vacated* (Feb. 16, 2017). As pointed out by Judge Randolph in his concurrence in *PHH Corp.* the enforcement action initiated by the CFPB was initially overseen by an SEC ALJ, "pursuant to an agreement be-

tween the Bureau and the Securities and Exchange Commission. *Id.* at 55 (Randolph, J. concurring).

Paying the Piper: The Anatomy of a 9th Circuit Music Copyright Infringement Lawsuit

James Eastman*

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I. INTRODUCTION: THE PRE-"BLURRED LINES" MUSIC COPYRIGHT INFRINGEMENT CLIMATE

In 2008, Coldplay released their hit song, "Viva La Vida," which has since been downloaded over four million times.[1] A year later, Joe Satriani filed a copyright infringement lawsuit ("infringement lawsuit") alleging that "Viva La Vida" sounded similar to Satriani's instrumental track "If I Could Fly."[2] The parties later settled out of court.[3] In 2014, Sam Smith released his hit single "Stay With Me" which to this day has sold over four million digital copies.[4] A year later, Smith settled out of court with Tom Petty after Petty alleged that "Stay With Me" sounded similar to his 1989 hit "I Won't Back Down."[5] In the settlement terms, Smith agreed to pay ongoing royalties and give songwriter credit to Petty.[6] These two settlement agreements are a microcosm of the many music copyright infringement allegations ("infringement allegations") currently being settled outside of court or decided at trial.[7] This is in large part because infringement allegations usually do not survive summary judgment in cases that are not settled.[8] However, a recent California case may signal the end of settling infringement allegations before trial.

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1. Search Result for 'Viva la Vida, RIAA, https://www.riaa.com/gold-platinum/?tab_active=default-award&ar=COLDPLAY&ti=VIVA+LA+VIDA (last visited March 21, 2017).

2. Sean Michaels, *Coldplay Plagiarism Lawsuit Dismissed by Judge*, THE GUARDIAN (Sep. 16, 2009, 6:28AM), http://www.theguardian.com/music/2009/sep/16/coldplay-joe-satriani-lawsuit-dismissed.

3. *Id.*

4. Keith Caulfield, *Billboard 200 Chart Moves: Alanis Morissette's 'Jagged Little Pill' Hits 15 Million in U.S. Sales*, BILLBOARD (June 26, 2015, 4:48PM), http://www.billboard.com/articles/columns/chart-beat/6612876/alanis-morissette-jagged-little-pill-chart-moves.

5. Lorena O'Neil, *Sam Smith Will Pay Tom Petty Royalties for 'Stay With Me'* CNN (Jan. 27. 2015, 4:38PM), http://www.cnn.com/2015/01/26/entertainment/smith-petty-royalties-feat/.

6. *Id.*

7. *See* Valeria M. Castanaro, *'It's the Same Old Song' The Failure of the Originality Requirement in Musical Copyright*, 18 Fordham Intell. Prop. Media & Ent. L.J. 1271, 1272 (2008) (Other famous settlements include Vanilla Ice settling with Queen and David Bowie because Ice's song 'Ice Ice Baby' sound similar to Queen's 'Under Pressure, and the rap group 2 Live Crew settling over a claim that their song 'Pretty Woman' infringed on Roy Orbison's song of the same title.)

8. *See* Peters v. West, 692 F.3d 629 (7th Cir. 2012); Armour v. Knowles, 512 F.3d 147 (5th Cir. 2007); Pyatt v. Raymond, 2011 WL 2078531 (S.D.N.Y May 19, 2011), aff'd, Pyatt v. Raymond, 462 F. App'x 22 (2d Cir. 2012); Lyles v. Capital, 2012 WL 3962921 (S.D. Ohio Sept. 11, 2012); Currin v. Arista Records, Inc.

In *Williams v. Bridgeport Music Inc.* (the "Blurred Lines" case), Marvin Gaye's family obtained a landslide $7.3 million verdict against Robin Thicke and Pharrell Williams.[9] The "Blurred Lines" case result stands in stark contrast to the current music industry's inclination toward settling. Some artists fear that the days of settling are over, and that the "Blurred Lines" verdict will chill the creative process among recording artists due to an increase in artists filing similar suits.[10] While this note will ultimately argue that recording artists should not be alarmed by the "Blurred Lines" decision, understanding an infringement suit's structure through the lens of the "Blurred Lines" case may assist artists in protecting themselves in the future. Courts will likely look to the "Blurred Lines" decision for guidance in copyright infringement trials moving forward, as a large percentage of infringement lawsuits, like the "Blurred Lines" case, originate in California in the United States Court of Appeals for the Ninth Circuit.

This paper proceeds in four parts. Part II lays out the background necessary for understanding a copyright infringement lawsuit's elements. This section will begin by providing an overview of the "Blurred Lines" case, tracking the lawsuit from its inception to the most recent developments, followed by a brief history of music copyright law in the United States.

Part III examines each element of a music copyright infringement claim ("infringement claim") through the lens of the "Blurred Lines" case. For an infringement claim, a plaintiff must show (1) valid copyright ownership of a musical work and (2) that the defendant copied protected elements of plaintiff's work.[11] Lurking within these two elements are several sub-elements that a plaintiff must satisfy to prevail at trial. As such, this paper will thoroughly dissect both infringement claim elements, unpacking the issues that plaintiffs and defendants encounter while addressing each element's components.

Part IV offers recording artists advice on how to avoid ending up in court after creating a song that may sound substantially similar

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724 F. Supp. 2d 286 (D. Conn. 2010). In each of these cases, either the district court granted a motion to dismiss music copyright infringement claims, or a circuit court affirmed the district court's grant of a motion to dismiss.

9. Williams v. Bridgeport Music Inc. No. LA CV13–06004 JAK (AGRx), 2015 WL 4479500, at *1 (C.D. Cal. July 14, 2015).

10. Ed Christman, *'Blurred Lines' Verdict: How It Started, Why It Backfired on Robin Thicke and Why Songwriters Should Be Nervous*, BILLBOARD (Mar. 13, 2015 3:49 PM), http://www.billboard.com/articles/business/6502023/blurred-lines-verdict-how-it-started-why-it-backfired-on-robin-thicke-and.

11. Three Boys Music Corp. v. Bolton, 212 F.3d 477, 481 (9th Cir. 2000).

to another artist's work. This part will also discuss and dispel several of the music industry's fears about the negative effects the "Blurred Lines" verdict might have on recording artists.

Part V concludes this note by discussing the most likely effect the "Blurred Lines" verdict will have on recording artists in the music industry.

II. BACKGROUND

A. The 'Blurred Lines' Case Overview

Marvin Gaye was a famous American singer and songwriter.[12] In 1976, Gaye recorded the hit song "Got to Give It Up."[13] Gaye registered the "Got to Give It Up" musical composition with the United States Copyright Office ("Copyright Office") later that year.[14] The composition registered with the Copyright Office represented "the lyrics and *some* of the melodic, harmonic, and rhythmic features that appear in the recorded work."[15] After his death in 1984, Gaye's family ("Gaye Parties") came into ownership of the copyright interest in "Got to Give It Up."[16]

Robin Thicke and Pharrell Williams ("Thicke Parties") are two popular recording artists who released the song "Blurred Lines" in 2013.[17] "Blurred Lines" has sold over six million digital copies, and the corresponding music video has been viewed over 250 million times on Vevo and YouTube.[18]

After hearing "Blurred Lines," the Gaye Parties threatened the Thicke Parties with legal action, alleging that "Blurred Lines" infringed on "Got to Give It Up" because the two songs sounded substantially similar, especially in terms of their respective drum beats and bass lines.[19] After making a six-figure settlement offer to the Gaye Parties, which the Gaye Parties declined to accept, the Thicke Parties filed a preemptive complaint seeking declaratory relief that

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12. Williams v. Bridgeport Music Inc. No. LA CV13–06004 JAK (AGRx), 2014 WL 7877773, at *1 (C.D. Cal. Oct. 13, 2014).

13. *Id.*

14. *Id.* at 2.

15. *Id.* (emphasis added).

16. *Id.* at 5.

17. Williams v. Bridgeport Music Inc. No. LA CV13–06004 JAK (AGRx), 2015 WL 4479500, at *1-2 (C.D. Cal. July 14, 2015).

18. *Williams*, 2014 WL 7877773, at *2.

19. Emily Miao et al. *'Blurred Lines' Artists Lose Multimillion Copyright Dollar Lawsuit*, 22 No. 9 Westlaw Journal Intellectual Property 1 (2015).

their song did not infringe on the Gaye Parties' 1976 song.[20] The Gaye Parties responded with two counterclaims against the Thicke Parties. [21] In one of the counterclaims, the Gaye Parties alleged that "Blurred Lines" infringed their copyright interest in "Got to Give It Up."[22]

Both parties agreed to try the Gaye Parties' infringement counterclaim to a jury.[23] The trial began in February 2015 and lasted for seven days.[24] After a two-day deliberation, the jury found that "Blurred Lines" infringed the Gaye Parties' copyright in "Got to Give It Up" and awarded the Gaye Parties $4 million in actual damages.[25] The jury further awarded the Thicke Parties' "Blurred Lines" sales profits to the Gaye Parties, totaling $3.3 million in punitive damages. [26] In total, the jury awarded the Gaye Parties $7.3 million.[27]

In June 2015, both the Thicke Parties and the Gaye Parties filed motions with the California district court in response to the February verdict.[28] The court examined the Thicke Parties' request for remittitur and the Gaye Parties' "Motion for Injunctive Relief or an Ongoing Royalty."[29] After reviewing the case, the court remitted both the Gaye Parties' actual damages award from $4 million to $3.3 million and the award of Williams' profits from $1.6 million to $350,000.[30] Regarding the Gaye Parties' motions, the court ruled that "any past and ongoing reproduction, preparation of derivative works, distribution, sale or other transfer of ownership, rental, lease, lending, or public performance of 'Blurred Lines'" by the Thicke Parties infringes the Gaye Parties' copyright in "Got to Give It Up."[31] The court also granted the Gaye Parties' request for a "running royalty of 50% of the songwriter and publishing revenue of 'Blurred Lines'" in lieu of a full injunction that would have stopped the Thicke Parties from distributing and using "Blurred Lines" in the future.[32]

The "Blurred Lines" case is a useful lens for examining copyright infringement litigation. Courts in the Ninth Circuit will likely

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20. *Id.*
21. *Williams*, 2015 WL 4479500, at *1.
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.* at 2.
30. *Id.* at 26-29.
31. *Id.* at 38.
32. *Id.*

look to the "Blurred Lines" case for guidance due to the sizeable amount of the jury verdict, the publicity surrounding the case, and the court's mostly logical and clear analysis. As such, comprehending the "Blurred Lines" case's background will give future litigants a solid foundation for understanding how courts in the Ninth Circuit will likely address infringement lawsuits.

B. A Brief History of United States Copyright Law

The Founding Fathers envisioned a country in which its people could create expressive works without fear of others stealing or plagiarizing those works.[33] This idea is incorporated into the Constitution, which grants federal copyright protection for creative works.[34] The Constitution gives Congress the power to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[35] While Congress may grant creators monopolies over their copyrightable works, this privilege is not limitless, nor is it a means of solely giving the creator a "special private benefit."[36] Rather, this limited grant is a "means by which an important public purpose may be achieved."[37] More accurately, the copyright privileges are "intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired."[38]

Pursuant to the Constitution, Congress enacted the first Federal Copyright Act in 1790 ("1790 Act"), which gave authors of books, maps, and charts sole rights to print, reprint, or publish their works for fourteen years from recordation.[39] In 1831, Congress amended the 1790 Act to include musical compositions in the form of sheet music.[40] In 1856, Congress extended the 1790 Act to protect

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33. *See* THE FEDERALIST No. 43 (James Madison) ("The right to useful inventions seems with equal reason to belong to the inventors. The public good fully coincides in both cases with the claims of individuals. ').

34. U.S. CONST. art. I, § 8, cl. 8.

35. *Id.*

36. Sony Corp. v. Universal City Studios, Inc. 464 U.S. 417, 429 (1984).

37. *Id.*

38. *Id.*

39. *Id.*

40. Copyright Act of 1831, ch. 15, §§ 4, 1 Stat. 436 (current version at 17 U.S.C. § 102 (2006)).

"dramatic works" performed publically.[41] In 1897, Congress responded to growing concern among musical artists by extending the 1790 Act to apply to anyone publically performing a protected musical work.[42] This extension was a general protection that did not make any distinction between for-profit and not-for-profit public performances.[43] The 1897 amendment was therefore notoriously difficult to enforce, given the sheer number of people performing protected musical works in public.[44]

Congress then enacted the Copyright Act of 1909 ("1909 Act"), prohibiting unauthorized public performance of a copyrighted musical work only when performed forprofit.[45] The 1909 Act was likely an attempt by Congress to reach a balance between "permitting free enjoyment of music and allowing copyright owners sufficient protection for their marketable rights."[46] Copyright protection only attached to musical works if the work was published with a notice of copyright affixed.[47] If the artist did not publish the work, he or she had to deposit the composition with the Copyright Office in order for federal law to protect the musical work.[48] One glaring issue with the 1909 Act was the legislature's failure to define "publication," an omission that causes a great amount of confusion to this day. The 1909 Act underwent several changes over the years as technology progressed. One key addition came when Congress enacted the Sound Recording Act of 1971, which recognized sound recordings as protected by federal copyright law.[49] Prior to this act, only state statutes and common law protected sound recordings.[50]

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41. Lydia Pallas Loren, *The Evolving Role of 'For Profit' Use in Copyright Law: Lessons from the 1909 Act*, 26 SANTA CLARA COMPUTER & HIGH TECH. L.J. 255, 260 (2010).

42. *Id.*

43. Copyright Act of 1897, ch. 4, § 29 Stat. 481 (codified as amended at 17 U.S.C. § 102 (2006)).

44. Joanna Demers, *Sound-Alikes, Law, and Style*, 83 UMKC L. REV. 303, 304 (2014).

45. Copyright Act of 1909, ch. 320, § 1, 35 Stat. 1075 (codified as amended at 17 U.S.C. § 102 (2006)).

46. Loren, *supra* note 43, at 281.

47. Martin Bresslera & Robert L. Seigel, *Retroactive Protection of Visual Arts Published Without a Copyright Notice: A Proposal*, 7 Cardozo Arts & Ent. L.J. 115, 121-22 (1988).

48. Williams v. Bridgeport Music Inc. No. LA CV13–06004 JAK (AGRx), 2014 WL 7877773, at *8 (C.D. Cal. Oct. 13, 2014).

49. Eric Charles Osterberg, *Should Sound Recordings Really Be Treated Differently than Other Copyrighted Works? The Illogic of Bridgeport v. Dimension Films*, 53 J. COPYRIGHT SOC'Y U.S.A. 619, 630 (2006).

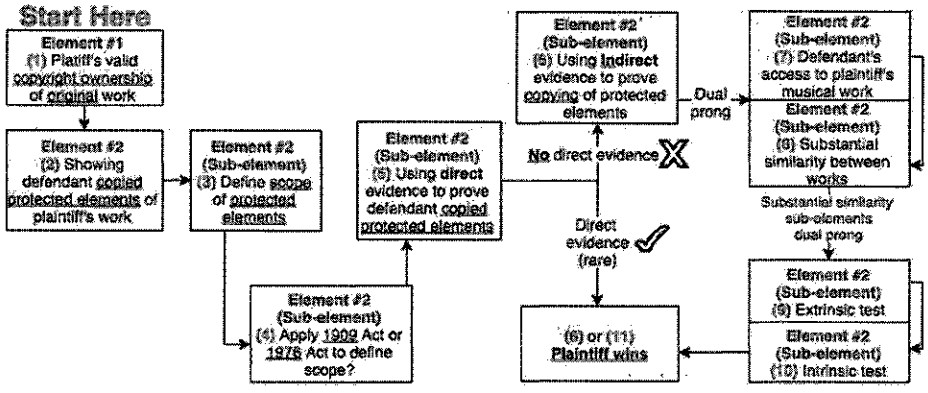
50. *Id.*

The most significant change to the Copyright Act occurred in 1976. The Copyright Act of 1976 ("1976 Act") superseded the 1909 Act and granted the public expanded rights under federal copyright law.[51] Instead of limiting protection to musical works published as musical compositions, copyright protection covered "original works of authorship fixed in *any* tangible medium of expression [such as] musical works, including any accompanying words."[52] The 1976 Act did not protect a recording artist's intangible ideas or emotions, only the expression of these ideas or emotions through a musical work.[53] The 1976 Act's goal was to "strike a balance between protecting original works and stifling further creativity."[54]

III. THE ANATOMY OF A MUSIC COPYRIGHT INFRINGEMENT LAWSUIT

A. The Elements of an Infringement Claim Overview

To establish a claim for copyright infringement, plaintiff must show (1) valid copyright ownership of an original musical work and (2) that defendant copied protected elements of plaintiff's work.[55] The elements and related sub-elements are mapped out in the following chart:[56]



51. *See* 17 U.S.C. § 106 (1976) (for example, expanding copyright protection to cover "reproduc[ing] the copyrighted work in copies or phonorecords").

52. 17 U.S.C.A. § 102 (1976) (emphasis added).

53. Nichols v. Universal Pictures Corp. 45 F.2d 119, 121 (2d Cir. 1930).

54. Bridgeport Music, Inc. v. Dimension Films, 401 F.3d 647. 656 (6th Cir. 2004).

55. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co. Inc. 499 U.S. 340, 361 (1991).

56. Flowchart created by the author using www.draw.io.

B. *Element #1 Showing Plaintiff's Valid Copyright Ownership*

Historically, showing that the plaintiff owns a valid copyright interest in the musical work is the simplest element of an infringement claim to prove. A Copyright Office issuing a valid copyright certificate to the plaintiff constitutes prima facie evidence that the plaintiff's ownership is valid.[57] In the "Blurred Lines" case, neither party contested that the Gaye Parties owned the "Got to Give It Up" copyright.[58] However, this note will still briefly investigate the valid ownership element, as a defendant can still obtain summary judgment on this point.

If a defendant can show that plaintiff's musical work is not sufficiently "original," the defendant may rebut a presumption of validity.[59] The defendant is not required to show that the plaintiff's *entire* musical work is unoriginal, rather only the parts that the plaintiff claims the defendant is infringing.[60] Courts in general have declined to define originality in copyright infringement cases.[61] The term as used in the 1976 Act does not include any "requirements of novelty, ingenuity, or esthetic merit."[62] The musical work need only be "original to the author and include a modicum of creative thought."[63] Musical works often satisfy the originality requirement, as they generally contain "some creative spark, 'no matter how crude, humble or obvious' it might be."[64]

In order to show that the plaintiff's musical work is not original, a defendant needs to hire an expert musicologist.[65] The expert musicologist then must demonstrate that plaintiff's work is not original by showing that it shares elements with either prior protected works or musical works not subject to copyright protection because they are in the public domain.[66]

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57. 17 U.S.C.A. § 410 (West 2015).

58. Williams v. Bridgeport Music Inc. No. LA CV13–06004 JAK (AGRx), 2014 WL 7877773, at *5 (C.D. Cal. Oct. 13, 2014).

59. Christine Lepera & Michael Manuelian, *Music Plagiarism: A Framework for Litigation,* 15-SUM ENT. & SPORT LAW. 3 (1997).

60. *Id.*

61. Castanaro, *supra* note 7, at 1277.

62. H.R. REP. NO. 94-1476 (1976).

63. Castanaro, *supra* note 7, at 1277.

64. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co. Inc. 499 U.S. 340, 345 (1991).

65. Lepera, *supra* note 59, at 4.

66. *Id.*

C. *Element #2: Showing Defendant Copied Protected Elements of Plaintiff's Work*

If a plaintiff proves that his copyright ownership of an original work is valid, the plaintiff must then show that the defendant (1) copied (2) protected elements of plaintiff's work.[67] The "Blurred Lines" court began their inquiry by first determining which parts of "Got to Give It Up" federal law protected.[68] To define the scope of protection, the court applied the 1909 Act's rule of law, as Gaye had copyrighted "Got to Give It Up" before Congress enacted the 1979 Act.[69] After the court determined the scope of protected elements, the court then examined whether the Thicke Parties had copied the protected elements.[70] In most cases, including the "Blurred Lines" case, direct evidence that the defendant copied the plaintiff's work is often not available.[71] Thus the plaintiff can alternatively establish copying through circumstantial evidence by showing the defendant had (1) access to the plaintiff's work, and that (2) the two works are "substantially similar."[72] To prove substantial similarity, the plaintiff must satisfy a dual extrinsic and intrinsic test.[73] This note will now examine each of these elements and sub-elements.

1. Defining the Scope of Protected Elements Before the 1976 Act

Several United States Courts of Appeals have ruled that the 1909 Act is the governing law in cases in which an artist registered his or her musical work prior to Congress enacting the 1976 Act.[74] Under the 1909 Act, an author may acquire statutory protection for a musical work through "publication" with proper notice of copyright.

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67. Three Boys Music Corp. v. Bolton, 212 F.3d 477, 481 (9th Cir. 2000).
68. *Id.* at 7–11.
69. *Id.* at 7.
70. *Id.* at 10.
71. Daniel E. Wanat, *Copyright Law: Infringement of Musical Works and the Appropriateness of Summary Judgment Under the Federal Rules of Civil Procedure, Rule 56(C)*, 39 U. Mem. L. Rev. 1037, 1040.
72. Smith v. Jackson, 84 F.3d 1213, 1219 (9th Cir. 1996).
73. *Id.* at 1218.
74. *See* Magnuson v. Video Yesteryear, 85 F.3d 1424, 1427 (9th Cir. 1996) ("[T]he Copyright Act of 1909 is the applicable law in this case because the copyright was secured in 1968, prior to the adoption of the 1976 Act. "); *see also* Norris Indus. v. ITT Corp. 696 F.2d 918, 920 (11th Cir. 1983) (finding that Norris' first registered copyright was granted before the January 1, 1978 effective date of the 1976 Act and therefore the 1909 Act applied).

[75] Alternatively, if a composition's author "deposit[ed] a manuscript copy of the music as an *unpublished* work prior to the sale of records," then the federal statutory scheme will protect it.[76] Thus a court will find a plaintiff's work protected in either of two situations: when the plaintiff (1) publishes the compositions with proper notice or (2) deposits unpublished compositions with the Copyright Office.[77]

Congress did not define publication in the 1909 Act.[78] The "Blurred Lines" court looked to Section 62 of the 1909 Act for guidance in defining the term.[79] In Section 62, "date of publication" is set "in the case of a work of which copies are reproduced for sale or distribution [as] the earliest date when copies of the first authorized edition were placed on sale, sold, or publically distributed by the proprietor of the copyright or under his authority."[80] While this section does not specifically define publication, it tells artists when federal law begins to protect their musical works. Even though a small inferential leap is missing in the court's analysis, the "Blurred Lines" court seems to imply that a defendant "publishes" his musical work when copies are placed on sale, sold, or otherwise publically distributed.

After attempting to define publication, the court held that Gaye satisfied the second method for protecting a musical work under the 1909 Act because he deposited the composition with the Copyright Office in 1976.[81] The scope of protected elements was not necessarily limited to the deposited composition.[82] If Gaye had deposited other versions of the composition with the Copyright Office, these would also serve to define the scope of protection.[83] Thus, the court held that the Gaye Parties' copyright was "not, as a matter of law, limited to the lead sheets deposited with the Copyright Office in 1976 and 1977."[84]

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75. Williams v. Bridgeport Music Inc. No. LA CV13–06004 JAK (AGRx), 2014 WL 7877773, at *8 (C.D. Cal. Oct. 13, 2014).

76. *Id.* (emphasis added).

77. *Id.*

78. *Id.*

79. *Id.* at *8.

80. 1909 Act, § 62, 35 Stat. 1075, 1087–88.

81. Williams v. Bridgeport Music Inc. No. LA CV13–06004 JAK (AGRx), 2014 WL 7877773, at *8 (C.D. Cal. Oct. 13, 2014) (depositing an unpublished work with the Federal Copyright Office as opposed to publishing the work with notice affixed).

82. *Id.*

83. *Id.*

84. *Id.* 'A 'lead sheet' is 'a score, in manuscript or printed form, that shows only the melody, the basic harmonic structure, and the lyrics (if any) of a composi-

Given that the lead sheets were not necessarily limiting, the Gaye Parties sought to broaden the scope of the musical work's protected elements, because the "Blurred Lines" song contained greater alleged similarities to the recorded version of "Got to Give It Up" than to the deposited lead sheets alone.[85] As such, the Gaye Parties claimed that the recorded version of "Got to Give It Up" was included within the scope of protected elements in the lead sheets because releasing the recorded version on phonograph constituted a publication.[86] However, the court disagreed.[87] The court interpreted the 1909 Act to mean that although the copyright was not limited to the lead sheets deposited with the Copyright Office, the Gaye Parties failed to publish or reduce the recorded version of "Got to Give It Up" to a more complete composition than the deposited lead sheets.[88] In coming to this conclusion, the court noted that releasing a phonograph did not constitute publication because Congress amended the 1976 Act to say that "[t]he distribution before January 1, 1978, of a phonorecord shall not for any purpose constitute a publication of [the] musical work embodied therein."[89] The amendment also worked retroactively because it "was a 'statement of what [the 1909 Copyright Act] has meant all along.'"[90] This meant that the amendment applied to both the 1976 Act *and* the 1909 Act. The Gaye Parties thus failed to provide evidence that their copyright in "Got to Give It Up" included extra material not included in the lead sheets.[91] Had Gaye reduced "Got to Give It Up" to a set of written lead sheets and deposited them with the Copyright Office in 1976, the Gaye Parties could have used the compositions to expand the scope of protection. The court ultimately held that the lead sheets alone defined the scope of the copyright, and did not include the expanded "Got to Give It Up" recording which contained additional elements.[92]

The "Blurred Lines" court engaged in problematic statutory interpretation when attempting to define publication for the purpose of defining the scope of protected elements. First, even though the "Blurred Lines" court acknowledged that the 1909 Act did not define

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tion. Charles Cronin, *I Hear America Suing: Music Copyright Infringement in the Era of Electronic Sound,* 66 HASTINGS L.J. 1187 (2015).

85. *Williams*, 2014 WL 7877773 at *7.

86. *Id.* at *9.

87. *Id.*

88. *Id.*

89. 17 U.S.C. § 303(b) (1998).

90. *Williams*, 2014 WL 7877773 at *9 (citing ABKCO Music, Inc. v. LaVere, 217 F.3d 684, 691 (9th Cir. 2000)).

91. *Williams*, 2014 WL 7877773 at *10.

92. *Id.*

publication, they continued on and adopted a different phrase's definition containing the word "publication" from another part of the 1909 Act, Section 62, even though Congress had specifically left "publication" undefined on purpose.[93] Second, using Section 62 of the 1909 Act to define publication means that an original work cannot be published, as Section 62 only refers to copies of works.[94] While this seemingly trivial discrepancy may not have any serious effect in the music world, it could bring serious repercussions in visual art sales.

Not only was the court's interpretation questionable, it was also unnecessary. Even if the "Blurred Lines" court avoided looking to Section 62 to define publication, the court still would have reached the same conclusion regarding the musical work's protected elements. As a matter of law, the recording could not be a publication due to Congress's retroactive amendment to the 1976 Act.[95] Further, Gaye had deposited the original lead sheets with the Copyright Office satisfying one of the disjunctive requirement for copyright protection, thus forgoing the need for him to "publish" the lead sheets.[96] Thus the court's attempt to define publication in this case should simply be interpreted as dicta.

Nevertheless, because the court *did* attempt to define publication, it is important to understand how other jurisdictions define the term, as a different approach may offer future litigants extra tools during trial. The United States Court of Appeals for the Eleventh Circuit found from surveying prior case law that publication occurs in two instances: (1) when "tangible copies of the work are distributed to the general public in such a manner as allows the public to exercise dominion and control over the work," or (2) when "the work is exhibited or displayed in such a manner as to permit unrestricted copying by the general public."[97] One disadvantage of the first approach is requiring that the copies be in "tangible" form. [98] Broad-

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93. *Id.* at *9; *see* W. Russell Taber, *Copyright D. Jà Vu: A New Definition of 'Publication' Under the Copyright Act of 1909*, 58 VAND. L. REV. 857, 867 n.71 (2005) (explaining that 'Congress intentionally omitted the definition of publication under the 1909 Act Congress apparently omitted the definition due to 'the difficulty of defining the term with respect to works of art where no copies are reproduced.'").

94. Taber, *supra* note 93, at 867 n. 71.

95. *Williams*, 2014 WL 7877773 at *9 (citing *ABKCO Music, Inc.* 217 F.3d at 691).

96. *Id.* at *8.

97. Estate of Martin Luther King, Jr. v. CBS, 194 F.3d 1211, 1215 (11th Cir. 1999).

98. Taber, *supra* note 93, at 875.

casting a song over the radio or streaming the song over the Internet would not constitute a publication, as the song is not being distributed via "tangible copies."[99] This result frustrates the 1909 Act's underlying policy of providing creators with an economic incentive to create musical compositions.[100] While the second approach does not expose itself to the first approach's "tangible" issue, the second approach allows for unapproved publication of the work.[101]

2. Defining the Scope of Protected Elements After the 1976 Act

For works copyrighted after Congress enacted the 1976 Act, "[c]opyright protection subsists in original works of authorship fixed in *any* tangible medium of expression "[102] The differences between the 1909 Act and the 1976 Act are vast. The 1976 Act abrogated the 1909 Act's requirement that artists physically deposit a paper musical composition with the Copyright Office, and the Act greatly expanded a musical work's protected elements.[103] Combined with the Sound Recording Act of 1971, "copyright protection *automatically* applies to original works of authorship when they are 'fixed in any tangible medium of expression,'" such as a sound recording on a CD or phonograph, along with any other music the author has written down.[104] Had Gaye copyrighted the "Got to Give It Up" sheet music after the enactment of 1976 Act, the "Blurred Lines" court would likely have admitted the recorded version into evidence.

Although the 1909 Act was rigid in defining the scope of protection, the 1976 Act has often made it harder for courts to discern what elements of a musical work federal law actually protects.[105] This issue often comes up during infringement lawsuits in which a plaintiff's musical work is not entirely his or her own work, such as when session musicians fill in, or when there are multiple musicians in the plaintiff's band.[106]

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99. *Id.*

100. Loren, *supra* note 43, at 281.

101. *Id.*

102. 17 U.S.C. §102 (1976) (emphasis added).

103. *Id.*

104. Williams v. Bridgeport Music Inc. No. LA CV13–06004 JAK (AGRx), 2014 WL 7877773, at *8 (C.D. Cal. Oct. 13, 2014) (emphasis added); *see also* Osterberg, *supra* note 52, at 630 (explaining the Sound Recording Act of 1971).

105. Gabriel Jacob Fleet, *What's in a Song? Copyright's Unfair Treatment of Record Producers and Side Musicians*, 61 VAND. L. REV. 1235, 1236-37 (2008).

106. *Id.*

3. Showing Defendant Copied Plaintiff's Work

Once the court has ruled on which portions of the musical work are protected, the plaintiff must show the defendant actually copied the plaintiff's protected work.[107] When available, the plaintiff can use direct evidence that the defendant infringed the work to prove this element.[108] However, if the plaintiff does not have direct evidence of copying (a more common scenario), he may prove infringement by showing (1) the defendant had access to the infringed song and (2) a "substantial similarity" exists between plaintiff's and defendant's song.[109] Within the substantial similarity sub-element, the plaintiff must satisfy a dual extrinsic and intrinsic test.[110]

i. Using Direct Evidence to Prove Defendant Copied Plaintiff's Work

Proving that the defendant directly copied the plaintiff's musical work is difficult, as plaintiffs seldom possess direct evidence of copying.[111] When a plaintiff does provide direct evidence that the defendant copied his or her work, courts have noted that the evidence's presence is "unusual"[112] and "rare."[113] While plaintiffs have successfully offered direct evidence in a few infringement lawsuits involving copying data and photography, the same cannot be said for musical works.[114]

In the "Blurred Lines" case, the Gaye Parties attempted to show they had direct evidence of copying.[115] First, the Gaye Parties submitted evidence that shortly before composing "Blurred Lines," Thicke told *GQ Magazine* that "'Got to Give It Up' was one of his 'favorite songs of all time,' and he wanted to 'make something like that, something with that groove.'"[116] He not only told *GQ* this story,

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107. Wanat, *supra* note 75, at 1040.

108. *Id.*

109. Fleet, *supra* note 110, at 1244.

110. Williams v. Bridgeport Music Inc. No. LA CV13–06004 JAK (AGRx), 2014 WL 7877773, at *6 (C.D. Cal. Oct. 13, 2014).

111. *See* Smith v. Jackson, 84 F.3d 1213, 1218 (9th Cir. 1996) ("direct evidence of copying is not available in most cases").

112. Marshall & Swift v. BS & A Software, 871 F. Supp. 952, 959 (W.D. Mich. 1994).

113. Rogers v. Koons, 960 F.2d 301, 307 (2d Cir. 1992) (in which there was direct evidence 'of copying the very details of the photograph that embodied plaintiff's original contribution").

114. *Id.*

115. *Williams*, 2014 WL 7877773 at *11.

116. *Id.*

but also Billboard.com, *Twitter Take Over*, *VH1*, *Fuse TV*, and Oprah Winfrey.[117] During his deposition, Thicke denied making such comments, and claimed that he was high and drunk during each interview.[118] The court ultimately held that regardless of Thicke's mental state, his statements did not constitute direct evidence of copying, as Thicke did not explicitly say that he intended to copy specific protected elements of "Got to Give It Up."[119] To establish direct copying, the Gaye Parties needed to show that the Thicke Parties "engaged in virtual duplication of a plaintiff's entire work."[120]

The Gaye Parties also offered a Universal Music Enterprise ("Universal") internal email as evidence. In the group email, a Universal executive discussed tying together "Got to Give It Up" and "Blurred Lines" for promotional purposes.[121] When the Gaye Parties examined the executive at trial and asked about an email where he described "Blurred Lines" as "utterly based" on "Got to Give It Up," the executive denied that these statements implied "Blurred Lines" was a copy.[122] These emails were also held not to be direct evidence of copying.

It is therefore not enough for the plaintiff to offer evidence that the defendant told the media on several different occasions that he wanted to make a song just like the one he or she allegedly infringed. Likewise, internal emails similar to the executive's email do not suffice. This is a high evidentiary bar, one that plaintiffs are unlikely to clear. Short of an admission akin to "I wanted to copy the hook and synthesizer melody in 'Song xyz' and that is exactly what I did," a plaintiff will have a very difficult time proving that a defendant directly copied his or her musical work.

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117. *Id.*

118. Eriq Gardner, *Robin Thicke's 'Blurred Lines' Deposition Unsealed: 'I Was High and Drunk' (Exclusive Video)*, THE HOLLYWOOD REPORTER (Oct. 24, 2015, 9:30 AM), http://www.hollywoodreporter.com/thr-esq/robin-thickes-blurred-lines-deposition-834403.

119. *Williams*, 2014 WL 7877773 at *11.

120. *Id.*

121. Daniel Siegal, *Universal VP Downplays Emails in 'Blurred Lines' IP Trial*, LAW360 (Feb. 26, 2015, 10:33 PM EST), http://www.law360.com/articles/625874/universal-vp-downplays-emails-in-blurred-lines-ip-trial (internal quotations omitted).

122. *Id.*

ii. *Using Indirect Circumstantial Evidence to Prove Defendant Copied Plaintiff's Work*

In the likely event that a plaintiff cannot provide direct evidence that the defendant copied his musical work, the plaintiff will have to establish copying through circumstantial evidence.[123] The plaintiff can do this by showing that (1) defendant had "access" to the protected work and that (2) a "substantial similarity" exists between the two works.[124]

a. Proving Defendant's "Access" to Plaintiff's Work

Although the Thicke Parties conceded that Thicke's admissions to the media fulfilled the access element, this element is worth exploring to benefit future litigants.[125] One court defined access as "hearing or having a reasonable opportunity to hear the plaintiff's work."[126] A plaintiff need not prove that the defendant *actually heard* the musical work, only that the defendant had a *reasonable opportunity* to hear the work.[127] Plaintiff can use three theories to prove defendant's access to the musical work when the defendant has not conceded this element.

The first theory is the "chain of events theory."[128] Under this theory, plaintiff would need to show that someone gave his protected musical work to another person, and then it passed through various hands before arriving with defendant.[129] "Bare possibility" of access

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123. *See* Baxter v. MCA, Inc. 812 F.2d 421, 423 (9th Cir. 1985) (noting a permissible inference of copying can be found if there is striking similarity); *see also* Kepner-Tregoe, Inc. v. Leadership Software, Inc. 12 F.3d 527. 532 (5th Cir. 1994) ("As direct evidence of copying is uncommon, plaintiffs generally demonstrate copyright infringement indirectly or inferentially.").

124. Arnstein v. Porter, 154 F.2d 464, 468 (2d Cir. 1946).

125. Williams v. Bridgeport Music Inc. No. LA CV13–06004 JAK (AGRx), 2014 WL 7877773, at *10–11 (C.D. Cal. Oct. 13, 2014).

126. Intersong-USA v. CBS, Inc. 757 F. Supp. 274, 281 (S.D.N.Y 1991).

127. *See* Bouchat v. Balt. Ravens, Inc. 241 F.3d 350, 354 (4th Cir. 2001) ("Bouchat was not required to prove that Modell in fact saw the drawings and copied them. Rather, Bouchat was merely required to prove that Modell had access to the drawings by showing Modell had the opportunity to view them."); *see also* Three Boys Music Corp. v. Bolton, 212 F.3d 477. 482 (9th Cir. 2000) ("We have defined reasonable access as 'more than a bare possibility.'").

128. *Three Boys Music Corp.* 212 F.3d at 482.

129. *See* Gaste v. Kaiserman, 863 F.2d. 1061, 1067 (2d Cir. 1988) (explaining that "[a]ccess through third parties connected to both a plaintiff and a defend-

through "speculation or conjecture" will not satisfy the access element.[130] In the music industry, plaintiff can prove the chain of events theory most easily through the "corporate-receipt doctrine."[131] One version of this doctrine, the "bare corporate receipt doctrine," says that plaintiff can prove access by showing that the "company employing the alleged infringer received the work."[132] While bare corporate receipt may be enough in some cases for plaintiff to demonstrate that defendant had reasonable access to the work, such reasonableness would depend on the facts of the case before the court.[133] In most jurisdictions, courts hold that the "bare corporate receipt doctrine" is not enough on its own to establish access.[134] In those jurisdictions, plaintiff still must show that there is a "substantial nexus" between the corporation and the alleged infringer.[135]

The second way a plaintiff can prove access is a combination of the "wide dissemination" and "subconscious copying" theories.[136]

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ant may be sufficient to prove a defendant's access to a plaintiff's work' even though it is an 'attenuated chain of events").

130. Margit Livingstona & Joseph Urbinato, *Copyright Infringement of Music: Determining Whether What Sounds Alike is Alike*, 15 VAND. J. ENT. & TECH. L. 227. 265 (2013); *accord* Moore v. Columbia Pictures Indus. 972 F.2d 939, 942 (8th Cir. 1992).

131. *See* Livingstona, *supra* note 130, at 265 (explaining the 'corporate-receipt doctrine' as: 'If the defendant is a corporation, the receipt of the plaintiff's work by one of the defendant's employees constitutes receipt by the employee who actually composed the accused work, so long as there is some connection between the two employees. ').

132. Stacy Brown, *The Corporate Receipt Conundrum: Establishing Access in Copyright Infringement Actions*, 77 MINN. L. REV. 1409, 1411, 1413 (1993).

133. *See id.* at 1432 ("Despite the apparent deviation from the policy, the court held that it was not significant enough to raise a genuine issue of fact as to access. ').

134. *See id.* (pointing out that courts discredit the doctrine as unreasonable considering the realities of modern business).

135. *See* Jorgensen v. Epic/Sony Records, 351 F.3d 46, 48 (2d Cir. 2003) ("Bare corporate receipt[,] without any allegation of a nexus between the recipients and the alleged infringer, is insufficient to raise a triable issue of access. '); *see also* Meta-Film Assocs. v. MCA, Inc. 586 F. Supp. 1346, 1357 (C.D. Cal. 1984) ("Where there is little, if any, nexus between the individual who possesses knowledge of a plaintiff's work and the creator of the allegedly infringing work, and where the defendant presents uncontroverted evidence negating transmission of the plaintiff's work (any part of which, if true, would refute plaintiff's case), the plaintiff must show something more than that he sent his work to a director who was under contract to the defendant and had an office on the defendant's lot. ').

136. *See* Three Boys Music Corp. v. Bolton, 212 F.3d 477. 482 (9th Cir. 2000) (explaining that 'in music cases the 'typically more successful route to proving access requires the plaintiff to show that its work was widely disseminated

The plaintiff can prove wide dissemination by demonstrating that his or her musical work was "widely distributed through extensive radio or television airplay record sales [or] via the Internet making practically any piece of music available (legally or illegally) with a mouse click."[137] Even if during trial a defendant successfully shows he or she had no conscious intent to write a song similar to the plaintiff's song, the wide dissemination and subconscious copying theories allow plaintiff to argue that defendant's infringement was subconscious.[138] In one well-known case, Bright Tunes Music Corporation alleged that former Beatles member George Harrison's song "My Sweet Lord" infringed on its song "He's So Fine."[139] During cross-examination, Harrison admitted that he had heard "He's So Fine" several years before writing "My Sweet Lord."[140] Despite going into detail about his self-directed creative process to lessen his admission's incriminatory effect, the court held that Bright Tunes had established Harrison's access to the work.[141] Bright Tunes was also able to establish access by showing that in the same year that Harrison heard "He's So Fine," its song was "Number One on the Billboard charts" in the United States for five weeks, and it was one of the "Top Thirty Hits" in the United Kingdom for seven weeks.[142]

It should be noted that Plaintiff can show defendant's access on far less evidence than Bright Tunes used during their case. In a Ninth Circuit case, Three Boys Music Corporation alleged that Michael Bolton's "Love Is a Wonderful Thing" infringed on their copyright on an Isley Brothers' song of the same name.[143] On appeal, the defendant parties contested the jury's finding that Bolton had reasonable access to the Isley Brothers' song.[144] The defendants argued that "access amount[ed] to a twenty-five-years-after-the-fact-subconscious copying claim."[145] The court conceded that the Isley

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through sales of sheet music, records, and radio performances. (citing 2 Paul Goldstein, *Copyright: Principles, Law, and Practice* § 8.3.1.1. at 91 (1989))).

137. Livingstona, *supra* note 130, at 265-66.

138. *See* Fred Fisher, Inc. v. Dillingham, 298 F. 145, 147 (S.D.N.Y 1924) ("[Defendant] must have followed, probably unconsciously, what he had certainly often heard only a short time before. I cannot really see how else to account for a similarity [between the musical works]. ').

139. Abkco Music, Inc. v. Harrisongs Music, Ltd. 722 F.2d 988, 990 (2d Cir.1983).

140. *Id.* at 998.

141. Bright Tunes Music Corp. v. Harrisongs Music, Ltd. 420 F. Supp. 177, 179 (S.D.N.Y 1976).

142. *Abkco Music, Inc.* 722 F.2d at 997.

143. Three Boys Music Corp. v. Bolton, 212 F.3d 477. 481 (9th Cir. 2000).

144. *Id.* at 484.

145. *Id.* (internal quotation omitted).

Brothers' song never topped the Billboard charts, had not been released on CD until a year after Bolton released his song, that rhythm and blues experts testified that they never heard the Isley Brothers' song, and that Bolton never admitted to hearing the Isley Brothers' song.[146] Nevertheless, the court upheld the jury's verdict as supported by substantial evidence of access because it was "entirely plausible that two Connecticut teenagers obsessed with rhythm and blues music could remember an Isley Brothers' song that was played on the radio and television for a few weeks, and subconsciously copy it twenty years later."[147] Under the low evidentiary bar that this *Three Boys Music* ruling set, plaintiffs will likely have the easiest time proving access under the combined wide dissemination and subconscious copying theories.

The third theory for proving access involves plaintiff showing a "striking similarity" between the musical works.[148] A plaintiff can use this theory when he is not able to establish access on a factual basis under the first two theories. To support this theory, plaintiff must show that "the similarity is of a type which will preclude any explanation other than that of copying."[149] There is currently a circuit split over whether a striking similarity is merely evidence of access requiring supplemental evidence (the majority approach), or whether its existence obviates any need to show access (the minority approach).[150] The distinction between the majority and minority approaches may be trivial, as there are internal inconsistences within each both types of jurisdictions' case law. The majority of courts have said that evidence of a striking similarity is enough on its own to satisfy the access element, while a minority of courts have conceded that the access element still remains, and as such more evidence is required.[151] Regardless of which type of jurisdiction the

146. *Id.*

147. *Id.*

148. *See id.* at 485 ("[I]n the absence of any proof of access, a copyright plaintiff can still make out a case of infringement by showing that the songs were 'strikingly similar. ').

149. Selle v. Gibb, 741 F.2d 896, 905 (7th Cir. 1984).

150. *See* Stewart v. Wachowski, 574 F. Supp. 2d 1074, 1098-99 (C.D. Cal. 2001) (in which the court gave an exhaustive overview of how several circuit courts view the 'striking similarity' theory, and how even within the Ninth Circuit there is no clear answer as to whether such evidence obviates or can be evidence of 'access").

151. For further explanation of the split, see Livingstona, *supra* note 130, at 267 (citing Bouchat v. Balt. Ravens, Inc. 228 F.3d 489, 494 (4th Cir. 2000) and Ty, Inc. v. GMA Accessories, Inc. 132 F.3d 1167, 1170 (7th Cir. 1997)):

court is in, a plaintiff would be wise to argue that any evidence of a striking similarity between his work and defendant's work fulfills the access prong.

Once plaintiff provides evidence that defendant had access to his musical work, some courts will apply an "inverse ratio" rule.[152] This rule says that the more evidence plaintiff has showing defendant's access to the work, the less evidence of substantial similarity is needed, and vice versa.[153] In the "Blurred Lines" case, the Gaye Parties argued that because Thicke's statements to the media constituted such strong evidence of access, they were required to prove a lesser degree of substantial similarity between "Blurred Lines" and "Got to Give It Up."[154] The court disagreed and held that because the defendants conceded access, the inverse ratio rule did not apply.[155] While the Ninth Circuit has stood by the inverse ratio rule in the past, the rule has come into question recently, so it would be wise for defendant to challenge plaintiff if he or she uses the inverse ratio argument.[156]

b. Proving Substantial Similarity

Once the plaintiff has shown that defendant had access to the allegedly infringed musical work, plaintiff must prove that his work and defendant's work are substantially similar.[157] The Ninth Circuit applies a two-part test to analyze this element: "an objective extrinsic test and a subjective intrinsic test."[158] In the "Blurred Lines" case,

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A closer comparison of the majority and minority rules regarding access and striking similarity, however, reveals that the differences between them are less meaningful than at first glance. One court applying the majority rule stated that 'striking similarity is one way to demonstrate access. In the same vein, a court applying the minority rule declared that the plaintiff "must produce evidence of access, all right, but a similarity that is so close as to be highly unlikely to have been an accident of independent creation is evidence of access.

152. Williams v. Bridgeport Music Inc. No. LA CV13–06004 JAK (AGRx), 2014 WL 7877773, at *11 (C.D. Cal. Oct. 13, 2014).

153. *Id.*

154. *Id.*

155. *Id.*

156. *See* David Aronoff, *Exploding the 'Inverse Ratio Rule*, 55 J. COPYRIGHT SOC'Y U.S.A. 125, 140 ("[T]here exists no means of measuring either access or similarity, so the term 'ratio' is at best a misnomer that conveys an air of undeserved legitimacy to the [Inverse Ratio Rule]. ').

157. *Williams*, 2014 WL 7877773, at *6.

158. *Id.*

the court first applied the objective extrinsic test, then directed the jury to implement the subjective intrinsic test.[159]

A court must grant summary judgment for the defendant if plaintiff is not able to provide sufficient evidence such that a jury could reasonably find extrinsic similarity.[160] The rationale is that without satisfying the extrinsic test, the plaintiff cannot satisfy the subjective intrinsic test. To carry out the extrinsic test, the court will "analytically dissect" the musical work by considering expert testimony.[161] "Analytical dissection" requires "breaking the works 'down into their constituent elements, and comparing those elements for proof of copying as measured by substantial similarity.'"[162] The Ninth Circuit inspects a diverse array of musical elements when deciding the extrinsic similarity issue. In the "Blurred Lines" case, the court inspected several of the musical work's elements using expert testimony.[163] These elements included: the "signature phrase" ("a primary identifying feature of a song and one of its most memorable elements"); "hooks" ("the most important melodic material of the work, that which becomes memorable melody by which the song is recognized"); "hooks with backup vocals"; "Theme X" (the "core theme"); "backup hooks"; "bass melodies" (including opening bass lines and descending bass lines); "keyboard parts"; "percussion choices"; "[h]armonic similarity"; and "[m]elodic similarity."[164] These compose most of the elements the Ninth Circuit has considered in similar past cases.[165] The conflicts between the expert testimony from the Thicke and Gaye Parties concerning substantial similarity between "Blurred Lines" and "Got to Give It Up" were sufficient to raise a genuine issue of material fact, and thus preclude summary judgment.[166] The court concluded that the Gaye Parties had sufficiently proven that elements of "Blurred Lines" might be substantially similar to protected elements of "Got to Give It Up."[167] Thus, because a genuine issue of material fact was present, the Gaye

159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.* at *12-18.
164. *Id.*
165. *See* Miah Rosenberg, *Do You Hear What I Hear? Expert Testimony in Music Infringement Cases in the Ninth Circuit*, 39 U.C. DAVIS L. REV. 1669, 1674 (2006) (containing an exhaustive list of elements the Ninth Circuit has examined in the past when applying the extrinsic test).
166. *Williams*, 2014 WL 7877773, at *19.
167. *Id.* at *20.

Parties satisfied the extrinsic test, and the substantial similarity issue went to the jury.[168]

Once the plaintiff has satisfied the extrinsic test, the court employs the intrinsic test.[169] The intrinsic test is the substantial similarity element's subjective prong.[170] It asks whether an "ordinary, reasonable person would find the total concept and feel of the works to be substantially similar."[171] This means that the jury, acting as "ordinary, reasonable" people, must apply the intrinsic test and decide, based on the evidence and testimony before them, whether there is a substantial similarity between the songs in question.[172] During the "Blurred Lines" trial, the Gaye Parties' musicologists testified that multiple parts of "Blurred Lines" sounded substantially similar to protected elements in "Got to Give It Up."[173] Conversely, the musicologist the Thicke Parties hired testified that "Blurred Lines" was not substantially similar.[174] Ultimately, the jury found in favor of the Gaye Parties after applying the intrinsic test.[175]

On appeal, the Thicke Parties argued that evidence and testimony presented during the trial did not sufficiently support the jury's finding that there was substantial similarity between the songs.[176] Since the jury is uniquely tasked with applying the intrinsic test, courts typically should not and do not reverse the jury's decision unless defendant can show the jury's determination is against the great weight of the evidence or is "otherwise improper."[177] The "Blurred Lines" court determined that the jury's conclusion did not fall into either of these exceptions, and upheld their finding.[178]

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168. *Id.* at *19.

169. Williams v. Bridgeport Music Inc. No. LA CV13–06004 JAK (AGRx), 2015 WL 4479500, at *21 (C.D. Cal. July 14, 2015).

170. *Id.* (internal quotations omitted).

171. *Id.*

172. *Id.*

173. *Williams*, 2014 WL 7877773, at *3 (One of the Gaye Parties' musicologists, Judith Finell, testified that a 'preliminary review comparing 'Give It Up' and 'Blurred' has revealed a constellation of eight substantially similar features thus far").

174. *See id.* at *3 (The Thicke Parties' musicologist, Sandy Wilbur, testified that '[t]here are no two consecutive notes in any of the melodic examples in the Finell Report that have the same pitch, the same duration, and the same placement in the measure. ') (emphasis omitted).

175. *Williams*, 2015 WL 4479500, at *1.

176. *Id.* at *22.

177. *Id.* (citing Sid & Marty Krofft Television Prods. Inc. v. McDonald's Corp. 562 F.2d 1157. 1164 (9th Cir. 1977)).

178. *Id.*

The Thicke Parties' greatest mistake was letting the substantial similarity issue reach the jury and not finding some way to settle with the Gaye Parties. It was far too risky for the Thicke Parties to believe that the jury would limit themselves to considering only protected elements of a song (namely the lead sheets) and not the recorded version of "Got to Give It Up." Due to the 1909 Act controlling the scope of protection in "Got to Give It Up," the judge allowed the Gaye Parties to reconstruct the song using only those elements in the deposited compositions, and not those elements in the recorded version of the song.[179] The judge permitted this to counter any prejudicial effect stemming from disallowing all recorded materials at trial for the Gaye Parties, as jurors are not often expert sheet music readers.[180] The Gaye Parties then compared the new restricted recording, as well as the sheet music, with "Blurred Lines" at trial.[181]

Given how prevalent the wide dissemination theory is in proving access, it seems odd that the court would not consider this theory at the intrinsic test stage of the case. "Got to Give It Up" is a well-known song, entering the Billboard 100 immediately when Gaye released it in 1977.[182] Similarly, the album "The Very Best of Marvin Gaye," which contained "Got to Give It Up," made the Billboard 100 in 2001.[183] "Blurred Lines" has been purchased over six million times, and the music video for the song had been watched over 250 million times online.[184] It would not be an unrealistic inferential leap to suggest that, given how widely disseminated both songs are, one or more jury members had heard both songs, and these jury members considered Gaye's recorded song even though they were instructed by the court not to do so. Hence, non-protected elements of "Got to Give It Up" might have influenced the jury's decision. This is an issue that future defendants should recognize and account for if the 1909 Act is controlling in their case. Given that the

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179. Trial Motion, Memorandum and Affidavit at Footnote 8, Williams v. Bridgeport Music Inc. No. 2:13-cv-06004-JAK-AGR, 2015 WL 4055871 (C.D. Cal. June 1, 2015) ("Plaintiffs submitted their own self-created recording of their purported representation of the lead sheet elements of 'Got to Give it up.'").

180. *Id.*

181. *Williams*, 2015 WL 4479500, at *7.

182. *Billboard Charts Archive, The Hot 100—1977 Archive*, BILLBOARD, http://www.billboard.com/archive/charts/1977/hot-100 (last visited Oct. 26, 2016).

183. Keith Caulfield, *Billboard 200 Chart Moves: Marvin Gaye Sales Up 246% After 'Blurred Lines' Trial*, BILLBOARD (Mar. 20, 2015, 7:42 PM), http://www.billboard.com/articles/columns/chart-beat/6509353/marvin-gaye-got-to-give-it-up-sales.

184. Williams v. Bridgeport Music Inc. No. LA CV13–06004 JAK (AGRx), 2014 WL 7877773, at *2 (C.D. Cal. Oct. 13, 2014).

"Blurred Lines" court declined to overturn the jury's verdict when the Thicke Parties made a similar argument, it may be impossible to restrict the jury's consideration strictly to the musical work's protected elements, even with crystal clear jury instructions.

IV ADVICE FOR AVOIDING LITIGATION

With this framework, litigants can successfully navigate an infringement lawsuit by anticipating and preparing for issues that may arise during trial. In the wake of the "Blurred Lines" case, defendants would be wise to avoid going to trial altogether, as the outcome can be unpredictable. The Thicke Parties' limitation of the jury's consideration to the lead sheets benefitted them greatly, yet even with this constraint, the Gaye Parties prevailed. If a party is able to win with such a hindrance, future litigants should be wary of trial. To avoid trial, future defendants can avoid several mistakes the Thicke Parties made before stepping foot into the courthouse, which likely affected the trial's outcome. If future defendants can learn from the Thicke Parties' pre-trial errors, they can avoid going to trial altogether and forgo catastrophic economic losses.

The first error the Thicke Parties made was not crediting their influences before releasing "Blurred Lines." Both Williams and Thicke are talented recording artists. Williams has worked as a recording artist and producer since 1992.[185] His r. .sum. boasts collaborations with some of the most highly respected and well-known recording artists in the industry, including Daft Punk, Jay-Z, Britney Spears, and Snoop Dogg.[186] Similarly, Thicke has worked in the music industry for over fifteen years and possesses a prolific pop discography.[187] In an interview after the "Blurred Lines" trial, Williams opined that the jury's verdict would hinder "any creator out there who is making something that might be inspired by something else" and that "[e]verything that's around you in a room was inspired by something or someone. If you kill that, there's no creativity."[188]

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185. *Pharrell Williams Biography*, BILLBOARD, http://www.billboard.com/artist/332084/pharrell-williams/biography (last visited Oct. 26, 2016).

186. *Id.*

187. *Robin Thicke Biography*, BILLBOARD, http://www.billboard.com/artist/367025/robin-thicke/biography (last visited Oct. 26, 2016).

188. Daniel Kreps, *Pharrell Talks 'Blurred Lines' Lawsuit for First Time Read*, ROLLING STONE (Mar. 19, 2015), http://www.rollingstone.com/music/news/pharrell-talks-blurred-lines-lawsuit-for-first-time-20150319.

Reading between the lines, Williams seems to suggest that "Got to Give It Up" inspired "Blurred Lines," but that the law does not punish a musical work for being inspired by another work. While he is technically correct, this is a weak argument for an artist like Williams. Given the Thicke Parties' long history in the music industry, they should have known to credit Gaye, especially after Thicke expressly stated that Gaye influenced him.[189] While recording artists do not need to be omniscient beings, it is clear that "Blurred Lines" and "Got to Give It Up" sound similar enough that the Thicke Parties should have feared putting the substantial similarity question to a jury. Experienced recording artists like the Thicke Parties should be cognizant of their musical work's influences. One defense might be, "I listen to thousands of songs a week; I cannot possibly keep track of everything that makes its way into my music." Nevertheless, when a song like "Blurred Lines" treads the fine line between replicating the feel of a song versus sounding substantially similar to a song, it is not enough to rely on this excuse. An artist need only be vigilant of the law, not fearful. If an artist believes in good conscience that his work does not sound substantially similar to another, this would come to light in either a settlement discussion or during litigation via one of the many elements discussed.

A second error by the Thicke Parties was preemptively suing the Gaye Parties for declaratory relief. The Thicke Parties offered the Gaye Parties a six-figure settlement to avoid litigation, which the Gaye Parties declined.[190] As a result, the Thicke Parties likely felt that their only options were to continue increasing the settlement amount or litigate. A settlement rejection does not necessarily warrant a preemptive suit, even under the guise of insuring that Los Angeles was the venue for the eventual trial.[191] Preemptively suing another party under similar facts to those in the "Blurred Lines" case instantly makes the moving party look like the bad guys. A better route would have been for the Thicke Parties to publicize that the Gaye Parties had turned down multiple settlement offers and sincere apologies from two of Gaye's biggest fans. The Gaye Parties then might have filed suit. Once they filed suit, the Gaye Parties' public image might have changed from that of a family concerned over Gaye's rights to the image of a family who were predominantly in-

189. *Williams*, 2014 WL 7877773 at *11.

190. Alex Pham, *Marvin Gaye's Family Rejected Robin Thicke's Six-Figure Offer*. BILLBOARD (Aug. 23, 2013, 10:30 AM), http://www.billboard.com/articles/news/5672505/marvin-gayes-family-rejected-robin-thickes-six-figure-offer.

191. Christman, *supra* note 9.

terested in seeing how much money they could get out of two famous pop artists. As such, the second piece of advice for potential defendants is to avoid underestimating how trial maneuvers may affect their image to the jury and public.

Looking forward to the future, it is unlikely the frequency of infringement suits will increase. A potential plaintiff should recognize the uniqueness of the facts of the "Blurred Lines" case and realize that, unless his situation matches the "Blurred Lines" facts, he will not be successful. First, "Got to Give It Up" and "Blurred Lines" sound incredibly similar, even to a layperson. Although the court disallowed the jury from considering the "Got to Give It Up" recording, the jury's verdict is likely a reflection of the similarity between the "Got to Give It Up" recording and "Blurred Lines." Second, a court will likely throw out a plaintiff's claim for not overcoming any one of the multiple elements or sub-elements that plaintiff must satisfy to survive a motion for summary judgment. Third, the potential plaintiff would need his adversaries to act like the Thicke Party did before trial and during depositions in order for the odds to be stacked in his favor.[192]

V CONCLUSION

When an interviewer asked Williams how he thought the "Blurred Lines" verdict would affect recording artists, he said that the jury's decision would chill recording artists' creative process.[193] It is important to note that this statement's source is from one of the parties who recently lost a sizeable infringement lawsuit. While his reaction is understandable, his prediction may not reflect the verdict's true effects on the music industry. The more likely result is that recording artists will become more mindful of giving credit where credit is due. If being a more conscientious artist is a bad trait that causes a "creative chill," perhaps recording artists need to reevaluate their principles rather than the judiciary needing to reevaluate a jury's verdict.

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192. Alex Young, *Video Released of Pharrell, Robin Thicke's Depositions in 'Blurred Lines' Case*, CONSEQUENCE OF SOUND (Oct. 24, 2015, 12:35 PM), http://consequenceofsound.net/2015/10/video-released-of-pharrell-robin-thickes-depositions-in-blurred-lines-case/ (containing videos of Williams being evasive and disrespectful during a deposition and of Thicke admitting he was intoxicated during previous media interviews).

193. Christman, *supra* note 10.

When *Forum non Conveniens* Fails: The Enforcement of Judgments in Foreign Courts Obtained After *Forum non Conveniens* Dismissal in the United States

Josh Burke*

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I. INTRODUCTION

As so many have over the course of American history, foreign plaintiffs frequently come to America's shores in search of greater opportunity.[1] Plaintiffs hope to ensure greater judgment or settlement amounts by taking advantage of favorable substantive and procedural laws in major tort actions.[2] In response, most defendants facing a major tort lawsuit brought by a foreign plaintiff attempt to get the action dismissed through a *forum non conveniens* motion.[3] Prior to the 21st century, having such a motion granted would normally be the end of the litigation.[4] If on the off-chance a foreign plaintiff decided to go ahead with litigation in another forum and won a favorable judgment, the defendant could still go to American courts to contest whether that judgment should be recognized and enforced.[5] Even if a defendant had previously argued that the alternative forum was adequate and available to obtain a *forum non conveniens* dismissal, the defendant could still successfully argue that the alternative forum's judgment should not be recognized and enforced

1. Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. 481, 490 (2011).

2. Jack L. Goldsmith & Alan O. Sykes, *Lex Loci Delictus & Global Economic Welfare: Spinozi v. ITT Sheraton Corp.* 120 HARV. L. REV. 1137. 1137 (2007).

3. Walter W. Heiser, *Forum Non Conveniens and Retaliatory Legislation: The Impact on the Available Alternative Forum Inquiry and on the Desirability of Forum Non Conveniens as a Defense Tactic*, 56 U. KAN. L. REV. 609, 609 (2008).

4. Christopher A. Whytock & Cassandra Burke Robertson, *Forum Non Conveniens and the Enforcement of Foreign Judgments*, 111 COLUM. L. REV. 1444, 1448 n.18 (2011).

5. *See id.* at 1463–64 (discussing obstacles for foreign plaintiffs in having judgments enforced in the United States).

in the United States.[6] This reversal of position reeks of hypocrisy because the defendant's argument that a judgment should not be enforced likely rests on the grounds that the foreign forum does not provide due process or impartial tribunals.[7] This, after standing before the court and extolling the "adequacy" of the foreign forum to prevail on their *forum non conveniens* motion.

This Note examines the current state of the interaction between the *forum non conveniens* doctrine and the enforcement of foreign judgments in the United States, and whether or not defendants can count on exploiting the difference in standards between the two doctrines. Part II examines the current state of both doctrines and how they have interacted with one another in recent cases. Part III surveys the current state of the foreign judiciary and explores the challenges for corporate defendants litigating in foreign countries, especially in the developing world. Part IV analyzes current domestic factors that make it more difficult for a corporate defendant to prevent the enforcement of a foreign judgment after the claim was previously dismissed on *forum non conveniens* grounds by an American court. Finally, Part V proposes that judicial estoppel should be strictly applied to cases where a defendant has argued for the adequacy of a foreign forum at the *forum non conveniens* stage, but argue the contrary position when attempting to prevent an American court from enforcing a foreign court's judgment on the same matter.

II. INTERACTION BETWEEN THE *FORUM NON CONVENIENS* DOCTRINE AND THE ENFORCEMENT OF FOREIGN JUDGMENTS

A. The Doctrine of Forum non Conveniens

Forum non conveniens disputes can be characterized as the game between the foreign plaintiff and the defendant to determine who will have an advantageous forum in the litigation.[8] The plaintiff

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6. *Id.* at 1475–76 ("Defendants have had success relying on the differences between the two foreign judicial adequacy standards to both dismiss litigation in favor of a foreign court and avoid enforcement of a resulting foreign court judgment.").

7. *See* Gregory H. Shill, *Ending Judicial Arbitrage: Jurisdictional Competition and the Enforcement of Money Judgments in the United States*, 54 HARV. INT'L L.J. 459, 493–94 (2013) (listing the grounds for non-recognition of foreign judgments in a majority of states).

8. *See* Russel J. Weintraub, *Introduction to Symposium on International Forum Shopping*, 37 TEX. INT'L L.J. 463, 463 (2002) ("'[F]orum shopping' is not an activity that should be associated with questionable ethics or doubtful legality. It is

seeks to defeat a *forum non conveniens* motion in order to take advantage of the United States' favorable tort laws. Specifically, the United States offers plaintiffs many possible theories of harm, making recovery for those harms more likely.[9] Furthermore, pre-trial discovery, contingency fee arrangements, and the courts' reluctance to force losing plaintiffs to pay the defendants' legal fees also draw foreign plaintiffs to America's shores.[10] Most importantly for foreign plaintiffs, the United States offers a jury trial and allows for punitive damages.[11] In sum, the United States allows foreign plaintiffs to sue for almost anything, search for everything, pay for nothing, and potentially rake in a ludicrous judgment.

Much to the relief of defendants, United States courts use the doctrine of *foreign non conveniens* to prevent plaintiffs from taking advantage of favorable American law if a more appropriate forum is available to adjudicate the case.[12] While a cynic may view this doctrine as a means of shielding corporate defendants from the consequences of their crimes,[13] American courts view the doctrine as an instrument to "promote the ends of justice."[14] Essentially, the plaintiff's desire for a favorable forum must be balanced against the burden placed on the defendant and the American courts of having the matter litigated away from where the injury may have occurred.[15]

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part of a lawyer's job to bring suit in the forum that is best for the client's interests. ').

9. Whytock, *supra* note 1, at 490–91.

10. *Id.*

11. Russell J. Weintraub, *International Litigation and Forum Non Conveniens*, 29 TEX. INT'L L. J. 321, 323 (1994) (quoting Lord Denning's statement that American juries 'are prone to award fabulous damages' from *Smith Kline & French Lab. Ltd. v. Bloch*, [1983] 1 W.L.R. 730, 734 (C.A. 1982)).

12. *See* Sinochem Int'l Co. v. Malay. Int'l Shipping Corp. 549 U.S. 422, 429 (2007) ("[W]hen an alternative forum has jurisdiction to hear [the] case, and trial in the chosen forum would establish oppressiveness and vexation to a defendant out of all proportion to plaintiff's convenience, or the chosen forum [is] inappropriate because of considerations affecting the court's own administrative and legal problems. ') (quoting American Dredging Co. v. Miller, 510 U.S. 443, 447–448, 114 S.Ct. 981, 127 L.Ed.2d 285 (1994)).

13. *See* Chenglin Liu, *Escaping Liability Via Forum Non Conveniens: ConocoPhillip's Oil Spill in China*, 17 U. PA. J. L. & SOC. CHANGE 137. 143 (2014) ("A defendant who seeks a forum non conveniens dismissal often does not do so in an effort to pursue an appropriate forum for the litigation. Rather, the defendant's real purpose is to move out of the United States and into a foreign forum that has a more defense-friendly substantive doctrine, procedural rules, and litigation culture. ').

14. Whytock & Robertson, *supra* note 4, at 1455.

15. *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 252 (1981) (Noting that preventing district courts from dismissing cases that would deny plaintiffs more

A defendant can be expected to fight vigorously to have a matter dismissed because it almost always ensures a more favorable outcome than litigating in the United States. In the majority of cases, the matter is never refiled in the alternative forum and the plaintiff receives nothing or a settlement far below the expected value of their claim.[16] Furthermore, even if the suit is refiled, it will likely be heard in a forum far less plaintiff-friendly than the United States.[17] However, in attempting to convince a judge that the burden of litigation of a matter in the United States is too great, the defendant will likely make several arguments that could haunt him when seeking to prevent recognition of the alternative forum's subsequent judgment on the matter.

1. The *Forum non Conveniens* Standard

In order to obtain a *forum non conveniens* dismissal, a defendant needs to establish that an alternative forum is both available and adequate.[18] If either of these thresholds is not met, a *forum non conveniens* motion will not be granted.[19] Once these two thresholds are met, the court will balance several public and private factors to

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favorable laws would cause '[t]he flow of litigation into the United States [to] increase and further congest already crowded courts.'); Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507–08 (1947) ("The court will weigh relative advantages and obstacles to fair trial. It is often said that the plaintiff may not, by choice of an inconvenient forum, 'vex, 'harass, or 'oppress' the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy. But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.').

16. *See* Weintraub, *International Litigation*, *supra* note 11, at 335 (citing David W. Robertson, *Forum Non Conveniens in America and England: 'A Rather Fantastic Fiction*, 103 L.Q. REV. 398, 419 (1987)) ("[T]he vast majority of foreign plaintiffs decided not to sue or settled for a fraction of the claim's 'estimated value' after a claim has been dismissed for *forum non conveniens*.).

17. *See* Heiser, *supra* note 3, at 618–19 (explaining that many countries do not allow for strict liability, damages that compensate for non-economic injuries, or punitive damages); Weintraub, *International Litigation*, *supra* note 11, at 323–24 (foreign forums often lack extensive pre-trial discovery, jury trials, and allow recovery for fewer causes of action than American courts).

18. Saqui v. Pride Cent. Am. LLC, 595 F.3d. 206, 211 (5th Cir. 2010) ("In order for a case to be dismissed for FNC, there must be another forum that could hear the case, and therefore the district court must first determine whether an alternative forum exists. An alternative forum exists when it is both available and adequate. (citations omitted)).

19. 14D CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3828 (4th ed. 2010) ("[A] court will not dismiss if the parties cannot seek justice in the courts of another sovereign.').

determine if it should exercise its discretion to dismiss the case.[20] Establishing that an alternative forum is "available" rarely presents a problem because defendants routinely waive all objections to the alternative forum based on "personal jurisdiction, service of process, or statute of limitations."[21] Courts also often insert a "return jurisdiction clause" into their dismissal orders that allows the plaintiffs to continue the lawsuit in the dismissing court if litigation in the alternative forum becomes impossible.[22]

2. Establishing a Foreign Forum's Adequacy

After the defendant has established that an alternative forum exists, he must establish that the alternative forum is adequate. In *Piper Aircraft*, the Supreme Court held that a forum should be considered adequate unless "the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all "[23] Court rarely find an alternative forum to be "inadequate or unsatisfactory" unless the plaintiff will be either denied any remedy or treated unfairly there.[24] Defendants can prove that the plaintiff will not be denied any remedy in the alternative forum simply by showing that some remedy, even a marginal one, exists.[25]

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20. Heiser, *supra* note 3, 612; *see Gulf Oil*, 330 U.S. at 508–09 (listing the private factors, including: ease of access to evidence, cost of obtaining voluntary witnesses, ability to compel nonvoluntary witnesses to testify, the possibility of a view of the premises, and practical problems related to the cost and speed of trial. The public factors include: congestion of American courts, burden of jury duty on a community with no relation to the litigation, the local interest in having local interests decided at home, and avoiding conflict-of-law issues.).

21. *Id.* at 614–15.

22. *Id.* at 615; *see also* Vasquez v. Bridgestone/Firestone Inc. 325 F.3d 665, 675 (5th Cir. 2003) (ruling that a failure to include a return jurisdiction clause constituted a *per se* abuse of discretion).

23. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254 (1981).

24. *See* Syndicate 420 at Lloyd's London v. Early Am. Ins. Co. 796 F.2d 821, 829 (5th Cir. 1986) ("[T]here will be circumstances in which the remedy afforded by the alternative forum will be so clearly inadequate or unsatisfactory that dismissal would not be in the interest of justice. Those circumstances do not arise unless a party will be deprived of any remedy or [will be] treated unfairly. (citations and internal quotations omitted)).

25. *See* Gonzalez v. Chrysler Corp. 301 F.3d 377, 382–83 (5th Cir. 2002) (holding that even though Mexico's cap on damages would prevent the suit from being brought in Mexico, Mexico provided an adequate forum); Satz v. McDonnell Douglas Corp. 244 F.3d 1279, 1283 (11th Cir. 2001) (holding that lack of discovery and fear of delay did not render Argentina an inadequate forum); Borden Inc. v. Meiji Milk Prod. Ltd. 919 F.2d 822, 829 (2nd Cir. 1990) ("[S]ome inconvenience or the unavailability of beneficial litigation procedures similar to those avail-

A forum may also be deemed inadequate if the court finds the plaintiffs will be treated unfairly by either the alternative forum's government or judiciary. While general claims of corruption or judicial bias are unlikely to succeed,[26] plaintiffs can establish the inadequacy of a forum by demonstrating that specific circumstances in the alternative forum will prevent them from receiving a fair hearing.[27]

In supporting a *forum non conveniens* motion, defendants usually sing the praises of the alternative forum with zeal. In *Delgado v. Shell Oil Co.*,[28] banana plantation workers from several countries alleged that they had suffered cancer and chemical castration as a result of exposure to dimochloropropane (DBCP), a chemical used in pesticides.[29] The workers filed suit in U.S. courts against American companies that manufactured or exported DBCP, or owned fruit farms in the countries the plaintiffs resided in.[30] To support their motion for *forum non conveniens*, the defendants presented affidavits from high-ranking judicial officials in twelve different countries, each proclaiming that their country's courts provided a remedy for the wrong and would treat the plaintiffs fairly.[31] The district court found the other forums adequate and granted the *forum non conveniens* motion.[32]

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able in the federal district courts does not render an alternative forum inadequate.').

26. *See* Stroitelstvo Bulg. Ltd. v. Bulg.-Am. Enter. Fund, 589 F.3d 417, 421 (7th Cir. 2009) ("[G]eneralized, anecdotal complaints of corruption are not enough for a federal court to declare that an EU nation's legal system is so corrupt that it can't serve as an adequate forum."); Tuazon v. R.J. Reynolds Tobacco Co. 433 F.3d 1163, 1179 (9th Cir. 2006) ("[A]necdotal evidence of corruption and delay provides insufficient basis for the district court's dramatic holding that the courts of the Philippines are an inadequate forum in this civil case.').

27. *See, e.g.* Licea v. Curacao Drydock Co. Inc. 537 F. Supp. 2d 1270, 1274 (S.D. Fla. 2008) (holding that Curacao was an inadequate forum because the plaintiffs had been forced to work there against their will, risked their lives to escape, and feared reprisals from Cuban agents in Curacao); Abiola v. Abubakar, 267 F. Supp. 2d 907, 918 (N.D. Ill. 2003), *aff'd*, 408 F.3d 877 (7th Cir. 2005) (refusing to dismiss case because the plaintiffs alleged that Nigerian courts were complicit in the human rights abuses that were the subject of the suit); Presbyterian Church of Sudan v. Talisman Energy, Inc. 244 F. Supp. 2d 289, 336 (S.D.N.Y 2003) (holding that Sudan was an inadequate forum because the energy company defendant collaborated with the government in ethnic cleansing).

28. 890 F. Supp. 1324 (S.D. Tex. 1995).

29. *Id.* at 1335.

30. *Id.* at 1336–40.

31. *Id.* at 1358–65.

32. *Id.* at 1372–73.

In *Aguinda v. Texaco Inc.*,[33] the Ecuadorian plaintiffs filed a class action against Texaco for damage to the environment and harm to the plaintiffs' health in 1993.[34] In what would be only a footnote in the litigation, which continues to this day, the Southern District of New York dismissed the case on *forum non conveniens* grounds.[35] In arguing for the motion, Texaco assured the court that "Ecuador would be an adequate alternative forum because it had an independent judiciary that provided fair trials."[36]

Plaintiffs filing the same DBCP claims in *Delgado* and the plaintiffs in *Aguinda* eventually refiled the cases in Nicaragua and Ecuador, respectively.[37] Much to the horror of the defendants in those cases, the foreign courts returned massive judgments for the plaintiffs.[38] As neither Shell Oil, Dole Food and Dow Chemical in the *Delgado* litigation nor Chevron (which had merged with Texaco)[39] in the *Aguinda* litigation had sufficient assets to satisfy the judgments in the respective forums, the plaintiffs turned to enforcing the judgments in the United States.[40] This forced the defendants to come before the court, hat in hand, and argue that the forums that had been perfectly adequate for *forum non conveniens* purposes should not have their judgments recognized in the United States.

B. Non-Recognition of Foreign Judgments in U.S. Courts

The defendant lawyer coming before an American court to convince the court to deny recognition of a foreign judgment will find the task much more difficult than establishing the adequacy of a foreign forum. United States courts tend to be among the most generous in recognizing and enforcing foreign judgments.[41] This stems

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33. 142 F. Supp. 2d 534 (S.D.N.Y 2001).

34. Chevron v. Donziger, 974 F. Supp. 2d 362, 387 (S.D.N.Y 2014), *aff'd*, 833 F.3d 74 (2d Cir. 2016).

35. *Id.* at 389–90.

36. *Id.*

37. *Donziger*. 974 F. Supp. 2d at 391; Osorio v. Dole Food Co. 665 F. Supp. 2d 1307, 1312(S.D. Fla. 2009), aff'd 635 F.3d 1277, 1279 (11th Cir. 2011).

38. *Donziger*. 974 F. Supp. 2d at 481 (initially awarding a $17.3 billion judgment against Chevron, which was later reduced to $8.646 billion dollars); *Osorio*, 665 F. Supp. 2d at 1312 (awarding a $97 million dollar judgment against Dole and Dow).

39. *Donziger*. 974 F. Supp. 2d at 391.

40. *Id.* at 391; *Osorio*, 665 F. Supp. 2d at 1312.

41. *See* Yuliya Zeynalova, *The Law on Recognition and Enforcement of Foreign Judgments: Is It Broken and How Do We Fix It?* 31 BERKELEY J. INT'L L. 150, 155 (2013) (In the United States, 'foreign judgments are enforced more regularly than in perhaps any other country. ').

from the presumption, articulated by the Supreme Court in *Hilton v. Guyot*[42] and followed by state statutes, that foreign money judgments should be considered conclusive, recognized, and enforceable.[43]

In the United States, state law governs the recognition of foreign judgments,[44] which means that the standards for recognition vary from state to state.[45] Once a foreign judgment has been recognized in an American jurisdiction, the judgment will almost always be enforced in any other state with jurisdiction over the defendant's assets.[46] Despite the differences in recognition standards between the states,[47] most states follow either the 1962 Uniform Foreign Money-Judgments Recognition Act (UFMJRA) or the 2005 revision called the Uniform Foreign-Country Money Judgments Recognition Act (UFCMJRA).[48] The remainder apply a common law standard that is anchored by the Supreme Court's decision in *Hilton*.[49]

Both the statutory Recognition Acts and common law standard allow for certain exceptions that provide grounds for courts to deny recognition of foreign judgments.[50] Under both Recognition Acts, these grounds are classified as either mandatory[51] or discre-

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42. 159 U.S. 113, 202–03 (1895) ("[W]here there has been opportunity for a full and fair trial abroad the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh, as on a new trial or an appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact.").

43. *See* Naoko Ohno v. Yuko Yasuma, 723 F.3d 984, 991 (9th Cir. 2013) (The presumption in favor of enforcement applies once the party seeking enforcement establishes that it falls under California's Uniform Act (modeled on the 2005 Uniform Foreign-Country Money Judgments Recognition Act)); *Osorio*, 665 F. Supp. 2d at 1322–23 (The Florida Recognition Act, modeled after the Uniform Money-Judgments Recognition Act, "presumes that foreign judgments are *prima facie* enforceable.").

44. Zeynalova, *supra* note 41, at 155.

45. Shill, *supra* note 7, at 462–63.

46. *Id.* at 490. ("[R]are is the state court that will resist the constitutional default rule of full faith and credit and deny enforcement of a sister-state judgment recognizing a foreign judgment.").

47. *See id.* (arguing that the specifics for the process of recognition vary widely from state to state).

48. Whytock & Robertson, *supra* note 4, at 1464–65.

49. Shill, *supra* note 7, at 492.

50. *Id.* at 492–99 (examining the standards for nonrecognition provided by the Uniform Statutes and the common law).

51. Under the Uniform Foreign-Money Judgments Recognition Act the mandatory grounds are:

> (1) the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law; (2) the foreign court did not

tionary[52] grounds for dismissal. A defendant who has won a *forum non conveniens* dismissal will have specifically waived the jurisdictional defenses and the defense that the forum was not convenient.[53] The defendant will only be able to utilize the mandatory nonrecognition defense that the judgment was rendered in a system that does not provide impartial tribunals that comport with the requirements of due process of law and the discretionary nonrecognition defenses that the judgment was obtained by fraud or is against public policy. A UFCMJRA jurisdiction will also provide the discretionary defenses of the judgment being rendered in circumstances that raise doubts of the integrity of the rendering court and that the *specific* proceedings leading to the judgment were not compatible with the due process of law.[54] Establishing any of these defenses places the defendant who

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> have personal jurisdiction over the defendant; or (3) the foreign court did not have jurisdiction over the subject matter.

Uniform Foreign-Money Judgments Recognition Act, § 4(a)(1)-(3). The Uniform Foreign-Country Money Judgments Recognition Act has nearly identical language. § 4(b)(1)-(3).

52. Both the UFCMJRA and the UFMJRA allow discretionary nonrecognition under the following circumstances:

> (1) the defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable him to defend; (2) the judgment was obtained by fraud; (3) the [cause of action] on which the judgment is based is repugnant to the public policy of this state; (4) the judgment conflicts with another final and conclusive judgment; (5) the proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be settled otherwise than by proceedings in that court; or (6) in the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action.

UFMJRA §(4)(b)(1)-(6); *see* UFCMJRA §4(c)(1)-(6) (using similar language). The UFCMJRA also allows for nonrecognition under these additional circumstances:

> (7) the judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment; or (8) the specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law.

UFCMJRA §4(c)(7)-(8).

53. *See supra* text accompanying note 21.

54. Whytock & Robertson, *supra* note 4, at 1468. (explaining that the drafters of the UFCMJRA desired to allow courts to analyze recognition questions on case-specific grounds, an approach rejected by the 7th Circuit, under the UFMJRA in

had previously won a dismissal on *forum non conveniens* grounds in the awkward position of having to attack the very judicial system the defendant had previously assured the court was adequate. This Note focuses on the due process exception's conflict with a *forum non conveniens* dismissal, as a defendant can always utilize the due process exception to justify nonrecognition of a judgment because it is a system-wide inquiry.

1. The "Due Process Exception"

A court may not recognize any judgment "rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law."[55] The key word in the statute is "system."[56] This means that in order to qualify for mandatory nonrecognition, the defendant must demonstrate that a country's entire judicial system fails to provide due process and offends notions of basic fairness.[57] As declaring another country's judicial procedures offend "basic fairness" could rub that country the wrong way,[58] a country's judicial procedures must be truly horrific before a court will refuse to recognize a judgment under the "due process" exception.[59]

Soc'y of Lloyd's v. Ashenden, 233 F.3d 473, 477–78 (7th Cir. 2000)). However, a wise plaintiff will avoid UFCMJRA jurisdictions to avoid allowing the defendant to have access to the final two defenses. *See* Shill, *supra* note 7, at 476 (explaining how plaintiffs seeking recognition of judgments can shop for the best forum for recognition).

55. UFMJRA, § 4(a)(1); *see also* UFCMJRA, § 4(b)(1) (using analogous language).

56. *See Ashenden*, 233 F.3d at 477 (explaining that the statute's use of the word 'system' indicated that case-specific facts should not be considered in recognition judgments).

57. *See id.* ("The statute requires only that the foreign procedure be 'compatible with the requirements of due process of law, and we have interpreted this to mean that the foreign procedures are 'fundamentally fair' and do not offend against 'basic fairness. (quoting Ingersoll Milling Machine Co. v. Granger, 833 F.2d 680, 687–688 (7th Cir. 1987) (emphasis omitted)).

58. *See* Christopher Lento, *Will What Happened in Ecuador Stay in Ecuador? How the Existing International Due Process Analysis May Be Ineffective in Keeping Fraudulent Foreign Judgments out of U.S. Courts*, 13 RICH. J. GLOBAL L. & BUS. 493, 515 (2014) (arguing that judges often feel compelled to uphold questionable judgments for fear of offending favored nations).

59. *See Ashenden*, 233 F.3d at 477 (Judge Posner explaining that in order to not enforce another nation's judgment on due process grounds, that nation's 'adherence to the rule of law and commitment to the norm of due process [must be] open to serious question. Posner gives as examples of such nations: 'Cuba, North Korea, Iran, Iraq, Congo. ').

In deciding whether the "due process" exception precludes the enforcement of a foreign judgment, courts look to whether the judicial system rendering the decision had "fundamentally fair" judicial procedures at the time the judgment was made.[60] As the cornerstone of the analysis is "fundamental fairness," courts have refused to recognize judgments made in countries where bribery and corruption are known to be prevalent in that country's courts.[61] American courts have also found that judiciaries lacking independence from the executive branch or those that are heavily influenced by politics lack sufficient due process.[62] Judgments in countries torn asunder by war and chaos are also deemed suspect.[63] American courts consider expert testimony,[64] state department advisories,[65] and circumstantial

60. *See id.* (A foreign court system must provide procedures that are 'fundamentally fair and do not offend against basic fairness' to have its judgments avoid nonrecognition under the due process exception.); Bridgeway Corp. v. Citibank, 45 F. Supp. 2d 276, 287 (S.D.N.Y 1999), *aff'd*, 201 F.3d 134 (2d Cir. 2000) (explaining that summary judgment was appropriate because a reasonable fact-finder could only conclude that Liberia's courts were not fair at the time of the decision).

61. *See* Osorio v. Dole Food Co. 665 F. Supp. 2d 1307, 1351–52 (S.D. Fla. 2009), *aff'd*, 635 F.3d 1277, 1279 (11th Cir. 2011) ("[T]he judgment was rendered under a system in which political strongmen exert their control over a weak and corrupt judiciary, such that Nicaragua does not possess a system of jurisprudence likely to secure an impartial administration of justice. (internal quotations omitted)); In re Perry H. Koplik & Sons Inc. 357 B.R. 231, 243–44 (Bankr. S.D.N.Y 2006) ("Where, as unfortunately is the case here, the judicial system for which comity is sought has been shown to have systemic corruption, the Court cannot grant that judicial system's determinations comity under either state or federal law. The court refused to honor an Indonesian judgment favoring an Indonesian bank due to widespread corruption in the Indonesian judiciary.).

62. *See* Chevron Corp. v. Donziger, 974 F. Supp. 2d 362, 609 (S.D.N.Y 2014), *aff'd*, 833 F.3d 74 (2d Cir. 2016) (finding the 'undue influence of the executive branch over the judiciary' as a reason to refuse to enforce the Ecuadorian judgment); Bank Melli Iran v. Pahlavi, 58 F.3d 1406, 1412–13 (9th Cir. 1995) (finding that Iranian courts did not provide due process, in part because Iranian courts were subject to political control).

63. *See Bridgeway*, 45 F. Supp. 2d at 286–87 (holding that Liberia's court could not provide adequate due process because courts had been in disarray due to civil war).

64. *See Osorio*, 665 F. Supp. 2d at 1349–50 (citing expert testimony to support the conclusion that Nicaragua lacked impartial tribunals).

65. *See Donziger*. 974 F. Supp. 2d at 609 (citing a State Department report that found the Ecuadorian judiciary lacked independence); *Osorio*, 665 F. Supp. 2d at 1347 (citing a State Department report when evaluating whether Nicaragua provided impartial tribunals); In re Perry H. Koplick & Sons, 357 B.R. 231, 239–40 (citing a State Department report that found Indonesia had extensive corruption in its courts).

evidence when making a decision on a foreign country's adherence to "due process."[66]

C. *Examples of the Interaction Between the Two Doctrines*

If a defendant argues that an alternative forum provides a fair and adequate forum for litigating a dispute, it would follow that courts would look rather unfavorably upon a defendant's attempt to have a foreign judgment from that forum be declared nonrecognizable due to a systematic failure to provide "due process." The doctrine of judicial estoppel, which prevents parties from making inconsistent arguments before a court in successive litigations, could be used by the courts to prevent defendants from making such arguments.[67] In reality, American courts have held that arguing the adequacy of a foreign forum in support of a *forum non conveniens* dismissal is not an absolute bar to arguing that the foreign forum systematically lacks due process.[68] Christopher Whytock and Cassandra Robertson labeled this discrepancy as the "Transnational Access-to-Justice Gap."[69] They argue that the "Gap" stems from the differences in the "lenient" standard applied to *forum non conveniens* analysis of a foreign forum's adequacy and the relatively "strict" standard applied to the nonrecognition analysis of a foreign forum's systematic due process.[70] However, an analysis of recent cases in which the "Gap" ap-

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66. *See Donziger*, 974 F. Supp. 2d at 610–617 (citing several events suggesting a lack of impartiality to find that Ecuador did not meet the impartial tribunal requirement); *Bridgeway*, 45 F. Supp. 2d at 287 (considering the fact that the civil war left the country in a state of chaos when deciding to refuse to enforce the Liberian judgment).

67. *See* Guinness PLC v. Ward, 955 F.2d 875, 899 (4th Cir. 1992) (holding that judicial estoppel prevents a party from taking inconsistent positions during judicial proceedings to protect the integrity of the judicial process by preventing parties from playing fast and loose with their arguments); Heiser, *supra* note 3, at 641–42 (suggesting a defendant that prevails in a *forum non conveniens* motion by presenting facts establishing the adequacy of a forum should be prevented from challenging that forum's fairness or adherence to due process at the enforcement stage).

68. *See Osorio*, 665 F. Supp. 2d at 1344 (holding that a change in the foreign country's laws allowed defendants to change their position on the adequacy of Nicaragua's courts without truly contradicting themselves).

69. Whytock & Robertson, *supra* note 4, at 1450–51.

70. *See id.* at 1473–74 ("[T]he differences between the foreign judicial adequacy standards at the forum non conveniens stage and the judgment enforcement stage are especially likely to create a transnational access-to-justice gap. Specifically, if a U.S. court grants a defendant's forum non conveniens motion to dismiss plaintiff's suit in favor of a foreign court, and the plaintiff obtains a judgment there

peared and of current trends reveals that the "Gap" is closing rapidly, if it ever existed. While courts' analysis of *forum non conveniens* may not get more stringent, new dangers of litigating in foreign courts, especially in developing nations, will make corporate defendants of large tort actions hesitate before asking for a *forum non conveniens* dismissal.

1. Shell, Dow, and Dole in DBCP Litigation

As discussed above, Shell Oil, Dow and Dole won *forum non conveniens* dismissals on DBCP tort claims filed by plaintiffs around the world in *Delgado v. Shell Oil Co.*[71] Despite the setback, different plaintiffs who claimed to have suffered similar harm due to exposure to DBCP filed suit in Nicaragua, winning $489 million dollars against Shell Oil[72] and $97 million dollars against Dole and Dow.[73] The key to such a stunning victory for the Nicaraguan plaintiffs was the passage of Special Law 364.[74]

The law, passed in retaliation for the *Delgado forum non conveniens* dismissals,[75] had several features that both the court deciding *Franco* (against Shell) and the court deciding *Osorio* (against Dole and Dow) found created a system that violated due process. Special Law 364 included an irrefutable presumption of causation, a minimum $15 million dollar bond for a defendant to be heard in court, accelerated procedures, and retroactive elimination of statutes of limitation for DBCP claims.[76] Unsurprisingly, the *Franco* court held that the law raised enough questions over due process to defeat

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and then seeks to enforce it in the United States, a U.S. court will assess the adequacy of the same foreign judiciary twice in the same transnational dispute. First, at the forum non conveniens stage, there will be an ex ante foreign judicial adequacy assessment under the lenient, plaintiff-focused standard. Then, at the enforcement stage, there will be an ex post assessment under the stricter, defendant-focused standard. ').

71. *See* Delgado v. Shell Oil Co. 890 F. Supp. 1324, 1372–73 (S.D. Tex. 1995) (dismissing claims against the defendants on *forum non conveniens* grounds).

72. Shell Oil Co. v. Franco, No. CV 03-8846 NM (PJWX), 2004 WL 5615656, at *1 (C.D. Cal. May 18, 2004).

73. Osorio v. Dole Food Co, 665 F. Supp. 2d 1307. 1312 (S.D. Fla. 2009).

74. *Id.* ("Since the passage of Special Law 364 in October 2000, over 10,000 plaintiffs have filed approximately 200 DBCP lawsuits in Nicaragua ').

75. *See* Heiser, *supra* note 3, at 622 (stating that the *Delgado forum non conveniens* dismissal prompted several Latin American countries to enact laws to counter *forum non conveniens* dismissals).

76. *Osorio*, 665 F. Supp. 2d at 1314–15.

a 12(b)(6) motion under California's UFMJRA.[77] The *Osorio* court ruled that Nicaragua did not provide due process of law under the Florida UFMJRA.[78]

The Nicaraguan plaintiffs, remembering the defendants' passionate embrace of Nicaraguan jurisprudence in the 1995 *Delgado* case, argued that because of the defendants' prior argument that Nicaragua would "offer the Nicaraguan plaintiffs a full and fair opportunity to present their claims,"[79] the defendants should be estopped from challenging Nicaragua's due process for recognition purposes.[80] The *Osorio* court found that the passage of Special Law 364 "fundamentally altered the legal landscape in Nicaragua."[81] The court held that the law's passage changed the circumstances so drastically that the defendants' arguments in *Delgado* were not "technically inconsistent" with their later argument that Nicaragua's judicial system lacked due process.[82] Interestingly, the *Franco* court, despite finding that Shell brought sufficient evidence of Nicaragua's lack of due process to defeat a 12(b)(6) motion,[83] declined to address Shell's claims that Nicaragua's courts failed to provide due process in its summary judgment opinion, relying instead on Nicaragua's lack of personal jurisdiction over Shell when granting summary judgment in favor of Shell.[84]

2. Chevron's Rumble in the Jungle and Manhattan

The litigation between Texaco/Chevron and Ecuadorian plaintiffs living in the Oriente region (represented by Steven Donziger) has spawned dueling websites,[85] a documentary,[86] and

77. *Franco*, 2004 WL 5615656, at *9.

78. *Osorio*, 665 F. Supp. 2d at 1352.

79. *See Franco*, 2004 WL 5615656, at *5 (stating that Shell offered the quoted statement as evidence supporting its argument that Nicaragua provided an adequate forum.).

80. *Osorio*, 665 F. Supp. 2d at 1344; *Franco*, 2004 WL 5615656, at *5.

81. *Osorio*, 665 F. Supp. 2d at 1344.

82. *Osorio*, 665 F. Supp. 2d at 1343–44.

83. *Franco*, 2004 WL 5615656, at *9.

84. Shell Oil Co. v. Franco, No. CV 03-8846 NM (PJWx), 2005 WL 6184247, at *13 (C.D. Cal. Nov. 10, 2005) ("Franco II"). In both *Franco* decisions the deciding judges found that Shell's prior waiver of personal jurisdiction did not apply to the case before the court because the plaintiffs were different than the plaintiffs who had their cases dismissed through a *forum non conveniens* motion. *Id.* at * 7.

85. *See* CHEVRONTOXICO—THE CAMPAIGN FOR JUSTICE IN ECUADOR (May 27, 2016), http://chevrontoxico.com/ (a website offering stories and opinions fa-

more than 20 years of litigation. As mentioned above, the first round of the litigation resulted in a *forum non conveniens* dismissal.[87] The Lago Agrio plaintiffs then sued Chevron, which had merged with Texaco, in Ecuador seeking damages for harm to the plaintiff's health and harm to the environment. Donziger had helpfully set up the "Amazon Defense Front" (hereinafter the "ADF"), which would facilitate any remediation ordered by the court.[88]

Donziger and the ADF then commenced all-out warfare to ensure a large judgment in the Lago Agrio plaintiffs' favor. The 2014 *Donziger* court laid out a long and detailed account of the ADF and Donziger's alleged malfeasance. According to the court, Donziger and the ADF falsified environmental reports and compelled experts to sign them,[89] blackmailed a judge to appoint a friendly expert,[90] pressured the president to pursue criminal charges against Texaco's lawyers,[91] and, as the coup de grace, wrote the judgment for the judge[92] and bribed the judge to enter the judgment as his own.[93] The judgment, written by the lawyers for the Lago Agrio plaintiffs, conveniently awarded a $17.3 billion dollar judgment against Chevron.[94] Of course, as Chevron had no assets in Ecuador, the plaintiffs needed to have the judgment recognized in a jurisdiction in which Chevron had assets.

In order to prevent the Lago Agrio plaintiffs from collecting against Chevron, the oil corporation filed an action against Donziger and the Lago Agrio plaintiffs (now defendants) alleging RICO, fraud, and conspiracy violations and seeking a declaratory judgment that the Ecuadorian judgment could not be enforced in the United States.[95] The Lago Agrio plaintiffs attempted to cut the proceedings off early by requesting a 12(c) motion for a judgment on the plead-

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vorable to the Lago Agrio plaintiffs); THE AMAZON POST—CHEVRON'S VIEWS AND OPINIONS ON THE ECUADOR LITIGATION (May 27, 2016), http://theamazonpost.com/ (a website offering news stories and opinions favorable to Chevron).

86. *See* Chevron Corp. v. Donziger, 974 F. Supp. 2d 362, 403 (S.D.N.Y 2014) (explaining that Steven Donziger, the attorney for the plaintiffs, recruited the film team to make a documentary favorable to the plaintiffs).

87. *Id.* at 389–90.

88. *Donziger*, 974 F. Supp. 2d at 391–92.

89. *Id.* at 406–12, 425–430.

90. *Id.* at 421.

91. *Id.* at 448–54.

92. *Id.* at 501.

93. *Id.* at 533.

94. *Id.* at 481.

95. *Id.* at 544.

ings, on the grounds that judicial estoppel barred Chevron from disputing the Ecuadorian judgment.[96] To support their motion, the Lago Agrio plaintiffs pulled out the affidavits, briefs, and declarations by witnesses that Texaco had provided to obtain a *forum non conveniens* dismissal, which generally stated the Ecuadorian courts were fair and void of corruption.[97] The *Salazar* court found no judicial estoppel on the basis that Texaco merged with a wholly owned subsidiary of Chevron, not Chevron itself.[98] Therefore Texaco's statements made during the *forum non conveniens* could not be attributed to Chevron.[99] In both *Salazar* and *Donziger* the courts also emphasized that, even if Texaco's arguments could be attributed to Chevron, they would not be truly inconsistent because Texaco's statements on Ecuadorian courts' adequacy applied to one time period (1990s–2001), and Chevron's arguments applied to a completely different time period (2003–2011).[100] This unnecessary reasoning appears to be a bridge too far, as State Department Human Rights Reports found the Ecuadorian courts to be "inefficient and susceptible to outside pressure" in both 1999 and 2000.[101]

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96. Chevron Corp. v. Salazar, 807 F. Supp. 2d 189, 194 (S.D.N.Y 2011).

97. *See* Chevron Corp. v. Donziger, 974 F. Supp. 2d 362, 389 (S.D.N.Y 2014) ("Texaco argued that Ecuador would be an adequate alternative forum because it had an independent judiciary that provided fair trials."); *Salazar*. 807 F. Supp. 2d. at 193 (stating that all evidence presented to support Texaco's *forum non conveniens* motion "[was] to the effect that the Ecuadorian courts were neither corrupt nor unfair.").

98. *Salazar*. 807 F. Supp. at 193.

99. *Donziger*. 974 F. Supp. 2d at 629–30; *Salazar*. 807 F. Supp. 2d at 195–97; *see also* Chevron Corp. v. Donziger, 886 F. Supp. 2d 235, at 243–44 (S.D.N.Y 2012) ("Donziger indeed has acknowledged that in naming Chevron as the sole defendant in the Lago Agrio Litigation, [the plaintiffs] sued 'the wrong party.').

100. *See Donziger*. 974 F. Supp. 2d at 629 ("[T]he statements concerning the characteristics of the Ecuadorian courts, even if binding on Chevron, pertained to an entirely different time period and entirely different circumstances and thus could not be controlling here."); *Salazar*. 807 F. Supp. 2d at 195 ("[T]he issue in *Aguinda* was whether Ecuador could provide an adequate forum for purposes of the *forum non conveniens* argument at the time the issue was argued in that case. While Texaco certainly argued throughout much of the 1990s and arguably as late as 2001 that it could, the issue here is different. The issue here is whether the Ecuadorian legal system—in the period 2003 through 2011, that in which the Lago Agrio was commenced and litigated provided impartial tribunals and procedures compatible with due process of law.") (emphasis omitted).

101. *See* U. S. DEP'T OF STATE, U.S. DEPARTMENT OF STATE COUNTRY REPORT ON HUMAN RIGHTS PRACTICES 2000—ECUADOR (2001), https://www.state.gov/j/drl/rls/hrrpt/2000/wha/766.htm ("The judiciary is constitutionally independent, but in practice is inefficient and susceptible to outside pressure."); U. S. DEP'T OF STATE, U.S. DEPARTMENT OF STATE COUNTRY REPORT ON HUMAN RIGHTS PRACTICES 1999—ECUADOR (2000),

The district court court ultimately declared that Ecuador failed to provide both due process and impartial tribunals at any time during the litigation in Ecuador.[102] The court highlighted judicial purges,[103] the president's hostility to international corporations,[104] the president's influence over the judiciary,[105] and US State Department reports expressing concern about corruption in Ecuador's courts.[106]

In its affirmation of the district court opinion, the Second Circuit avoided the question of the suitability of the Ecuadorian courts entirely.[107] Instead, the Second Circuit held that none of Texaco's prior agreements or arguments in prior cases precluded them from arguing that the Lago Agio plaintiff's fraudulent conduct should preclude enforcement of the plaintiff's judgment.[108] Though the circuit court opinion does not explicitly chastise Judge Kaplan's opinion, it twice mentions that there was "no need here to reach any question as to the institutional adequacy of the Ecuadorian judicial system."[109] This opinion provides even less protection to foreign corporations than the district court opinion because it expresses a severe hesitation to judge another country's judicial system, and it does not explicitly affirm that changed circumstances in a country's judicial system can allow for a court to contradict its prior statements on the suitability of a foreign country's judicial system.

3. Lessons from the Osorio and Donziger Cases

Looking at both cases, two trends appear that have bearing on the "Transnational Access-to-Justice Gap." The first lesson is that the doctrine of *forum non conveniens* may not be the silver bullet for defeating massive transnational tort actions it once was. The second

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https://www.state.gov/j/drl/rls/hrrpt/1999/385.htm ("Members of the Supreme Court preside over a judiciary that is constitutionally independent, but in practice is inefficient and susceptible to outside pressure. ').

102. *Donziger*. 974 F. Supp. 2d at 617.

103. *Id.* at 610–11.

104. *Id.* at 611–12.

105. *Id.* at 612–14.

106. *Id.* at 614–15.

107. Chevron Corp. v. Donziger, 833 F.3d 74, 127 (2d Cir. 2016) ("[W]e do not reach any contentions as to the Ecuadorian judiciary in general. ').

108. *Id.* at 129 ("There is no error in the district court's finding that neither the condition placed on Texaco's forum non conveniens agreement nor this Court's comments in any of our prior opinions obligated Chevron not to challenge a judgment which 'the LAPs wrote,' and which the sitting Ecuadorian judge 'signed as part of the quid pro quo for the promise of $500,000. ').

109. *Id.* *see also* note 115 for the other mention.

lesson is that, while none of the courts deciding the cases above found that judicial estoppel would preclude a "due process exemption" defense to a recognition action, those cases leave enough wiggle-room for a future court to slam the door on future defendants' attempts to argue for a "due process exemption" after arguing for a *forum non conveniens* dismissal.

III. NEW RISKS OF LITIGATING IN DEVELOPING COUNTRIES FOR CORPORATE DEFENDANTS

A century ago, most developing countries had very basic judicial systems primarily designed to enforce local laws.[110] As western nations have expanded commerce across the developing world, developing countries have sought to extend their laws to protect their citizens.[111] Courts in developing nations have expanded their jurisdictional scope and are more willing and able to adjudicate disputes with international parties.[112] The developments in both plaintiff-friendly procedural law and the willingness of courts in developing countries to adjudicate international disputes has increased the potential for plaintiffs to win judgments against multinational corporations in their home forums, whether previously dismissed on *forum non conveniens* grounds or not.

A. Procedural and Substantive Laws in Developing Countries Have Become More Plaintiff-Friendly

As previously discussed, the United States has long been regarded as a magnet forum, whose plaintiff-friendly laws have attract-

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110. *See* Manuel A. Gomez, *Will the Birds Stay South? The Rise of Class Actions and Other Forms of Group Litigation Across Latin America*, 43 U. MIAMI INTER-AM L. REV. 481, 487 (2012) ("As is the case for most countries that follow the civil-law tradition, Latin American procedural rules have historically focused almost exclusively on non-aggregate, individual litigation. ').

111. *See* Mark A. Behrens, Gregory L. Fowler & Silva Kim, *Global Litigation Trends*, 17 MICH. ST. J. INT'L L. 165, 167 (2008-2009) (explaining that the increase in American commerce has led many countries around the world to recognize class action lawsuits).

112. Pamela K. Bookman, *Litigation Isolationism*, 67 STAN. L. REV. 1081, 1119 (2015) ("[F]oreign courts may be increasingly attractive for foreign plaintiffs suing multinational corporations. '); Gomez, *supra* note 110, at 520 (discussing how the expansion of procedural protections and collective rights may pave the way for more Latin American plaintiffs to litigate their matters in their home forum).

ed the "aggrieved and injured of the world."[113] However, several scholars have noted that several "American-style" features of tort recovery have begun to be adopted in countries around the world. One such feature is the allowance for aggregate litigation.[114] Funding arrangements that make it possible for impoverished plaintiffs to bring major tort actions have also begun to gain limited acceptance.[115] The most important development however, from a pocketbook point-of-view, has been the growing acceptance of punitive damages, as Chevron learned.[116] While still somewhat limited, punitive damages have begun to gain traction around the world,[117] and could be seen as a useful tool for a government to transfer wealth from rich multinational corporations to its poor afflicted citizens.

These developments may shift a defendant corporation's analysis when assessing whether to file a *forum non conveniens* motion. During the 20th Century, any potential disadvantage attributable to having to litigate in the plaintiff's home forum was mitigated by the fact that the potential for damages was miniscule, due to caps on torts damages, the lack of aggregate litigation, and the lack of alternative litigation funding structures. As countries around the world begin to adopt such plaintiff-friendly litigation procedures and laws, American corporations must begin to consider whether the risk of a plaintiff refiling could outweigh the relatively predictable function of law in the United States.

B. Third Party Funding Allows Plaintiffs Greater Resources to Pursue Claims

During the 20th century, corporate defendants would often find that claims brought by poor plaintiffs in developing countries that were dismissed on *forum non conveniens* grounds would never

113. Weintraub, *Symposium*, *supra* note 8, at 463.

114. *See* Gomez, *supra* note 110, at 495–512 (discussing the availability of aggregate litigation across several Latin American countries and concluding that the trend in Latin America is to allow more access to aggregate litigation).

115. *See* Bookman, *supra* note 112, at 1112–13 (recognizing that contingency fee arrangements, conditional fee arrangements, and third-party litigation funding are gaining acceptance around the world); Cassandra Burke Robertson, *The Impact of Third-Party Financing on Transnational Litigation*, 44 CASE W. RES. J. INT'L L. 159, 168 (2011) (arguing that the legalization of alternative fee arrangements may lead to greater utilization of third-party financing).

116. *See Donziger*. 974 F. Supp. 2d at 481 (The Ecuadorian court awarded $17 billion, much of it punitive damages, to the Lago Agrio plaintiffs.).

117. *See* Behrens, Fowler, & Kim, *supra* note 111, at 192 (finding that several nations have changed their laws to allow recovery of punitive damages).

see the light of day again because the plaintiffs would be too poor to continue the litigation. However, the rise of third-party litigation funding has now allowed for these claims to be refiled.[118] While allowed for several years in England and Australia, third-party financing as a major industry is a recent development.[119] Though companies moving into the financing of third-party litigation have mainly focused on their home countries,[120] several scholars have recognized the potential for third-party financing to radically transform the litigation of transnational tort actions.[121]

An analysis of third-party financing's impact on the *Chevron* case demonstrates the potential effect third-party financing may have on transnational tort litigation. When the *Chevron* litigation began in 1997, Joseph Kohn, a Philadelphia attorney, provided most of the funding for the litigation, while also playing a significant role in the litigation itself.[122] After the *Aguinda* case was dismissed in 2001, Kohn played a lesser role in the litigation, though he still bankrolled the operation.[123] Eventually Kohn became suspicious of Donziger's tactics and withdrew his funding, after dumping $7 million into the litigation,[124] and renounced his stake in any judgment.[125] After Kohn's withdrawal, Donziger lined up an impressive army of fun-

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118. *See* Chevron Corp. v. Donziger, 974 F. Supp. 2d 362, 395–96 (S.D.N.Y 2014) (Following the *Aguinda* court's dismissal of the Lago Agrio plaintiffs' first suit in the United States, Joseph Kohn provided the funding to allow the litigation to progress in Ecuador.).

119. *See* Robertson, *supra* note 115, at 165–66 (explaining the history of third-party litigation financing in England and Australia).

120. *Id.* at 167–68 ("[M]ost litigation financing still occurs in single forum: U.S. companies financing small personal injury lawsuits in the U.S. for example, or Australian companies financing commercial litigation in Australia.').

121. *See* Deborah R. Hensler, *The Future of Mass Litigation: Global Class Actions and Third Party Litigation Funding*, 79 GEO. WASH. L. REV. 306, 323 (2011) ("The combination of global class actions with third-party litigation funding may prove to be a truly 'disruptive innovation' that changes the nature of private civil litigation worldwide.'); Robertson, *supra* note 115, at 168 ("The profitable experience of companies in Australia, England, and the U.S.—and their comfort in operating on a global scale—may spur the growth of litigation finance in other countries that permit litigation financing but do not have a well-developed litigation funding industry.').

122. *Donziger*. 974 F. Supp. 2d at 388–89.

123. *Id.* at 395–96.

124. Paul M. Barrett, *Lawyer Describes Fraud, Lies, and Acrimony in $19 Billion Chevron Case*, BLOOMBERG (Nov. 5, 2013), http://www.bloomberg.com/news/articles/2013-11-05/lawyer-describes-fraud-lies-and-acrimony-in-19-billion-chevron-case.

125. Chevron Corp. v. Donziger, 974 F. Supp. 2d 362, 472 (S.D.N.Y 2014).

ders: H5, who held a 1.25% interest;[126] Woodford Litigation Funding Ltd., who invested 2.5 million dollars into the litigation;[127] Russell DeLeon, who held a 7.5% stake in return for 23 million dollars invested;[128] the law firm Patton Boggs, which contributed its service for a quarter of the contingency fee;[129] and the litigation-funding firm Buford Capital, which promised 15 million dollars for a 5.545% interest.[130] The forty-seven indigenous people who were the named plaintiffs were in ninth place in the "distribution waterfall" scheme and were compelled to disclaim any guarantee of recovery.[131]

This multimillion-dollar collection of capital and services demonstrates that the combination of allegations of huge damages with sympathetic plaintiffs creates an intoxicating potion that can fuel many years of litigation in search of a unicorn judgment.

C. Political Leaders in Some Developing Countries Exert Influence over the Judiciary

One issue that has repeatedly plagued developing nations has been their lack of independent judiciaries. In a survey conducted by the World Economic Forum, over half of the countries surveyed returned results that more respondents from those countries believed their courts were closer to being "not independent at all" than entire-

126. Press Release, Chevron, H5 Settles With Chevron Over Ecuadorian Lawsuit (Sept. 3, 2015), https://www.chevron.com/stories/h5-settles-with-chevron-over-ecuadorian-lawsuit.

127. Press Release, Chevron, Another Key Funder of Fraudulent Ecuador Litigation Against Chevron Withdraws Support (May 4, 2015) https://www.chevron.com/stories/2015/Q2/Another-Key-Funder-of-Fraudulent-Ecuador-Litigation-Against-Chevron-Withdraws-Support.

128. Press Release, Chevron, Financial Backer of Fraudulent Ecuador Litigation Withdraws Support, Settles (Feb. 16, 2015), https://www.chevron.com/stories/2015/Q1/Financial-Backer-of-Fraudulent-Ecuador-Litigation-Withdraws-Support-Settles.

129. Paul M. Barrett, *The Fall of the House of Boggs*, POLITICO (Sept. 15, 2014), http://www.politico.com/magazine/story/2014/09/the-fall-of-the-house-of-boggs-110989?o=2.

130. *Donziger*. 974 F. Supp. 2d at 475–76.

131. Shill, *supra* note 7. at 482–83. The named plaintiffs were a group of forty-seven indigenous people who were presented with a seventy-five-page contract describing their entitlement to any monetary recovery. *Id.* The contract places them in ninth place in a 'distribution waterfall,' behind eight tiers of funders, lawyers, and advisers, and requires them to specifically disclaim any guarantee that they will receive a portion of any recovery owed to senior stakeholders. *Id.* Many indicated their assent to the contract by 'signing' it with a fingerprint. *Id.*

ly "independent."[132] Unsurprisingly, those countries who rated closer to "not independent at all" tended to be developing countries in Latin America and Africa,[133] places where plaintiffs may seek tort recovery in the United States due to distrust of their own country's courts.

While American corporations have long believed that dismissing these actions on *forum non conveniens* grounds could take care of the pesky problem of litigation, sending the litigation back to developing countries could be ruinous. Developing countries without independent judiciaries often also have a lack of respect for property rights.[134] When a tort action comes before a judge that can "punish" the evil multinational corporation and score a victory for the country's wronged citizens, rules may be bent to ensure the "right" side wins.[135] Corporations should be especially wary of countries that lack independent judiciaries and have governments with populist or anti-American tendencies.[136] In prior years, the thought of coming before an unfriendly judge to defend a massive tort action in a developing country was only an implausible nightmare.[137] Now, with third-party litigation funding and a willingness on the part of foreign

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132. *Competitiveness Rankings*, WORLD ECONOMIC FORUM (Sept. 3, 2014), http://reports.weforum.org/global-competitiveness-report-2014-2015/rankings/ (The applicable table can be found at Index Component 1.06: 'Judicial Independence.').

133. *See id.* (listing the countries towards the bottom, including Venezuela, Burundi, Paraguay, Angola, Burkina Faso, Madagascar, Chad, and Nicaragua, among others).

134. *See id.* (The applicable table can be found at Index Component 1.01, 'Property Rights. Many of the nations at the bottom of the 'Independent Judiciary' table also appear at the bottom of the 'Property Rights' table.).

135. *See* Chevron Corp. v. Donziger, 974 F. Supp. 2d 362, 534–35, 616 (S.D.N.Y 2014) (holding that the Ecuadorian judge agreed to fix and allow the plaintiffs to write the Ecuadorian judgment in return for a bribe. President Correa of Ecuador also signaled that some alteration of the rules may be acceptable by saying 'that he 'really loathed the multinationals, and 'he want[ed] our indigenous friends to win.'); Osorio v. Dole Food Co. 665 F. Supp. 2d 1307, 1318–19, 1326 (S.D. Fla. 2009) (declaring that because Special Law 364 allowed defendants to opt-out of DBCP litigation in Nicaragua by consenting to jurisdiction in the United States, the Nicaraguan court retained jurisdiction over the case).

136. *Global Opposition to U.S. Surveillance and Drone but Limited Harm to America's Image*, PEWREASEARCHCENTER (July 14, 2014), http://www.pewglobal.org/files/2014/07/2014-07-14-Balance-of-Power.pdf (Countries with widespread unfavorable views of the United States include, Argentina, Russia, and Greece, along with several Middle Eastern countries.); *The Return of Populism*, THE ECONOMIST (Apr. 12, 2006), http://www.economist.com/node/6802448 (analyzing the rise of populism in Latin America and its anti-capitalist trends).

137. *See supra*, note 16 (stating that most cases dismissed on *forum non conveniens* grounds are never refiled).

courts to hear those actions, that nightmare could become reality, which may give multinational corporations pause before instinctively filing a *forum non conveniens* motion.

D. High Stakes Litigation in Developing Countries May Invite Bribery

In many developing countries, judges are susceptible to bribery due to low salaries, an institutional acceptance of corruption, and fear of consequences.[138] Of the citizens in Latin America and Africa who had contact with the judiciary, almost 20% reported paying a bribe to get a favorable judgment.[139] In Asia and Eastern Europe, that figure dropped to 15% and 9%, respectively.[140] Generally, rich and powerful individuals and major corporations are the entities in society that have the money and power to influence courts through bribery and corruption. Thus, major corporations could assume that they would have little to fear from a judge in a developing country finding against them because the plaintiffs would have little to entice the judges with. However, third-party financing of international litigation throws a wrench into assumptions about bribery in the judiciary, as the massive amounts of capital accumulated may be utilized through whatever means are necessary for a victory.

IV NARROWING THE TRANSNATIONAL ACCESS-TO-LITIGATION GAP

A. Application of Judicial Estoppel

Despite the judgments in *Franco*, *Osorio*, and *Donziger*, the potential application of judicial estoppel to arguments that a previously adequate forum actually lacks due process and impartial tribunals may not be completely foreclosed. First, the judgments mentioned above relied on changed circumstances in finding that the defendants' arguments before and after the judgment in the foreign

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138. Mary Noel Pepys, *Corruption Within the Judiciary: Causes and Remedies*, *in* GLOBAL CORRUPTION REPORT 2007. 6 (Diana Rodriguez & Linda Ehrichs ed. 2007) (accessed via https://issuu.com/transparencyinternational/docs/global_corruption_report_2007_english?e=2496456/2664845).

139. Transparency International, *How Prevalent is Bribery in the Judicial Sector?*. *in* GLOBAL CORRUPTION REPORT 2007. 12 (Diana Rodriguez & Linda Ehrichs ed. 2007) (accessed via https://issuu.com/transparencyinternational/docs/global_corruption_report_2007_english?e=2496456/2664845).

140. *Id.*

forums were not inconsistent. Second, several American courts have suggested that defendants should be estopped from arguing that a previously adequate forum had morphed into an inadequate forum. Finally, American judicial attitudes may simply become hostile to defendant corporations who flip-flop on a forum's adequacy.

1. The DBCP Litigation and *Donziger* Do Not Preclude the Use of Judicial Estoppel

As discussed above, the circumstances surrounding both the DBCP cases and the Lago Agrio litigation were remarkable. Both the *Franco* and *Osorio* courts held that judicial estoppel could not be used to prevent the defendants from arguing the Nicaraguan courts denied them due process because Special Law 364 had fundamentally changed the legal landscape by rigging the system against DBCP defendant.[141] Also, both courts held that the *Franco* and *Osorio* plaintiffs could not hold the defendants to their prior endorsements of the Nicaraguan courts' integrity because none of those plaintiffs had been party to the *Delgado* litigation.[142] Though the courts accepted the defendants' allegations of the weakness of Nicaragua's courts, it is likely that the court may not have gotten to that point had the radical change in law and the absence of the *Delgado* plaintiffs not been at issue.

Each court that addressed the issue of judicial estoppel in the Lago Agrio litigation emphasized that judicial estoppel could not apply due to the fact that Texaco's *forum non conveniens* defenses could not be attributed to Chevron.[143] In both *Salazar* and *Donziger*, Judge Kaplan emphasizes that even if Texaco's statements could be attributed to Chevron, no inconsistency could exist between the two differing opinions because the respective statements "pertained to an

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141. *Supra* text accompanying notes 82, 83.

142. *See* Osorio v. Dole Food Co. No. 07–22693–CIV. 2009 WL 48189 at *15–17 (S.D. Fla. Jan. 5, 2009) ("In light of the alleged changes in Nicaragua since 1995, particularly the passage of Special Law 364, it is unclear whether the positions that the Chemical Company Defendants took in *Delgado* and in this case are inconsistent. "); Shell Oil Co. v. Franco, No. CV 03-8846 NM (PJWx), 2004 WL 5615656, at *5 (C.D. Cal. May 18, 2004) (holding that if the court accepted Shell's claim that 'the passage of Special Law 364 in 2000 'fundamentally altered the legal regime governing DBCP claims' since the Delgado decision' it prevented application of judicial estoppel).

143. *See* Chevron Corp. v. Donziger, 974 F. Supp. 2d 362, 630 (S.D.N.Y 2014) ("Chevron is not bound by any of the statements made in *Aguinda* by Texaco "); Chevron Corp. v. Salazar, 807 F. Supp. 2d 189, 195–97 (S.D.N.Y 2011) (expressing doubt that Texaco's statements made during the *forum non conveniens* stage could be attributed to Chevron).

entirely different time period and entirely different circumstances," giving defendants free reign to change positions on the alternative forum's adequacy.[144] This analysis appears flawed because the circumstances do not seem to have changed much in Ecuador from when Texaco made its *forum non conveniens* argument in the late 1990s and when Chevron made its arguments from 2003–2011.[145] Judge Kaplan's logic also seems to preclude the application of judicial estoppel to all cases because any argument that a rendering jurisdiction lacked impartial tribunals or due process will always apply to a different time period than the time period when the *forum non conveniens* motion was argued. Any plaintiff seeking to estop a defendant from flip-flopping on the adequacy of a foreign forum will need to work around this precedent.[146] Thankfully for plaintiffs, Judge Kaplan himself has helpfully provided just the precedent needed to do so.

2. Cases Supporting the Use of Judicial Estoppel

Two cases highlight the potential for defendants to be deemed judicially estopped from back-tracking on their prior endorsements of the foreign forum's judiciary. In *Pavlov v. Bank of New York Co. Inc.*, Russian plaintiffs filed a RICO claim against the Bank of New York for facilitating the looting and laundering of several Russian banks' assets.[147] The very same Judge Kaplan proceeded to dismiss the case on several grounds, including *forum non conveniens*.[148] The court found Russia to be an adequate forum despite the plaintiffs' concerns about corruption, among other concerns. Judge Kaplan addressed the Russian plaintiffs' worries about being able to collect a Russian judgment in the United States by stating that

144. *Donziger*. 974 F. Supp. 2d at 629; *see also Salazar*. 807 F. Supp. 2d at 195–98.

145. *See* text accompanying note 109. Of course, Judge Kaplan may have been frustrated with Donziger's arguments because he had been the one who facilitated the fraud and corruption that rendered the Ecuadorian forum unsatisfactory. *See Donziger*. 974 F. Supp. 2d at. 386–544 (giving a detailed account of Donziger's nefarious deeds, which offers some insight into Judge Kaplan's opinion of the plaintiffs' counsel).

146. The Second Circuit's opinion does not provide much help. Despite declining the opportunity to pass judgment on Ecuador's judicial system, it does not explicitly dismiss the proposition that a change in circumstances can allow a defendant to reverse arguments on the adequacy of a foreign judicial system. Chevron Corp. v. Donziger, 833 F.3d 74, 127–29 (2d Cir. 2016).

147. Pavlov v. Bank of New York Co. Inc. 135 F. Supp. 2d 426, 428–29 (S.D.N.Y 2001), *vacated on other grounds*, 25 Fed. Appx. 70 (2d Cir. 2002).

148. *Id.* at 433.

"[i]n view of BNY's staunch assertion here that the Russian legal system provides an adequate alternative forum, it quite likely would be estopped to mount such a challenge to a Russian money judgment in this case."[149] In a footnote Judge Kaplan specifically stated "BNY probably would not be heard to resist enforcement of a Russian money judgment in this matter on the ground that Russia does not provide impartial tribunals and procedures compatible with due process if it obtained a *forum non conveniens* dismissal here on the premise that a Russian forum would be adequate."[150] To say the least, the Judge Kaplan of 2001 and the Judge Kaplan of 2014 appear to be at odds over the possibility of using judicial estoppel to prevent defendants from attacking forums they had previously endorsed.[151]

Another case that can form the basis for arguing for the application of judicial estoppel is *Hubei Gezhouba Sanlian Indus. Co. Ltd. v. Robinson Helicopter Co. Inc.* The controversy in *Robinson Helicopter* centered on a helicopter crash that occurred in 1994 in the People's Republic of China. [152] Robinson Helicopter, an American defendant, argued that China provided an independent judiciary and followed due process of law, in the process of winning a *forum non conveniens* dismissal.[153] Despite being served, Robinson Helicopter failed to appear before a Chinese court to defend themselves in the Chinese suit against the company. The Chinese court thus awarded damages to the Chinese plaintiffs.[154] The Central District of California found the judgment to be recognizable and enforceable.[155] On appeal, the 9th Circuit, which had previously rejected application of judicial estoppel to the *Bank Melli* challenge, held that the verdict

149. *Id.* at 435.

150. *Id.* at 435 n.52.

151. *See* Memorandum of Law of Defendants Hugo Gerardo Camacho Naranjo and Javier Piaguaje Payaguaje in Support of Motion on Short Notice to Increase the Amount of the Bond Posted by Plaintiff Chevron Corporation, Chevron Corp. v. Donziger, 974 F. Supp. 2d 362 (2014) (No. 11-CV-0691), 2011 WL 1805297 n.4. ("Under similar circumstances, this very Court has noted the inequity that would result if a party which heaps praise on a foreign judicial system when convenient could later escape judgment by attempting to portray that system as unfit.').

152. Hubei Gezhouba Sanlian Indus. Co. Ltd. v. Robinson Helicopter Co. Inc. No. 2:06-cv-01798-FMC-SSx, 2009 WL 2190817. at *1 (C.D. Cal. July 22, 2009).

153. *Id.*

154. *Id.* at *2–3.

155. *Id.* at *7.

against Robinson Helicopter was "enforceable where rendered" under California's UFMJRA.[156]

Though not precedential under the 9th Circuit's rules, *Robinson Helicopter* does demonstrate that courts will apply the doctrine of judicial estoppel to cases when equitable considerations dictate.[157] This balancing of the equities appears to be a consistent factor in courts' analysis of whether to use judicial estoppel to prevent defendants from switching arguments when most convenient. In the case of the DBCP litigation and the Lago Agrio litigation, the situations before and after the *forum non conveniens* dismissals changed drastically. Conversely, in *Robinson Helicopters*, the court assumes that the foreign forum's laws and procedures would remain consistent during the time period between the *forum non conveniens* dismissal and the recognition suits. It seems that, although Chinese and Russian courts are hardly known for their impartiality and independence,[158] American judges are willing to hold defendants to the deals they bargained for during the *forum non conveniens* proceedings.

3. Potential for Hostility from American Courts

Though intended to be used rarely,[159] corporate defendants win about 50% of their request for *forum non conveniens* dismissal.[160] With such a broad usage, several commentators have questioned whether the *forum non conveniens* doctrine allows corporations to escape their just desserts rather than ensuring access to justice.[161] Furthermore, other commentators have cast suspicion upon

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156. Hubei Gezhouba Sanlian Indus. Co. Ltd. v. Robinson Helicopter Co. Inc. 425 Fed. Appx. 580, 581 (9th Cir. 2011).

157. *See id.* ("The balance of equities in this case tips in favor of Hubei. ').

158. *See* U.S. Department of State Country Report on Human Rights Practices 2014—China, UNITED STATES DEPARTMENT OF STATE, (June 25, 2015) ("Although the law states that the courts shall exercise judicial power independently, without interference from administrative organs, social organizations, and individuals, the judiciary did not in fact exercise judicial power independently. '); U.S. Department of State Country Report on Human Rights Practices 2014—Russia, UNITED STATES DEPARTMENT OF STATE, (June 25, 2015) ("The law provides for an independent judiciary, but judges remained subject to influence from the executive branch, the military, and other security forces, particularly in high-profile or politically sensitive cases. ').

159. *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947) ("[T]he plaintiff's choice of forum should rarely be disturbed. ').

160. Whytock, *supra note* 1, at 502–03.

161. *See* Heiser, *supra* note 3, at 621–22 ("[A] forum non conveniens dismissal in a transnational tort action often means a foreign plaintiff will be unable to

corporations that won dismissals on *forum non conveniens* grounds and then sought to prevent recognition of those judgments by the same courts that granted dismissal.[162] The frequency of successful dismissals on *forum non conveniens* grounds and the *Donziger* and *Osorio* courts' reluctance to utilize judicial estoppel to bar enforcements suggest corporations can rely on American courts to prevent enforcement of surprising adverse judgments in foreign courts. However, as American distrust and cynicism towards corporations increases while concern for human and environmental rights in developing countries also increases, corporations could find courts increasingly hostile to attempts to reject recognition of judgments rendered after the action had previously been dismissed on *forum non conveniens* grounds.

B. Potential for Judgments to be Enforced in Alternative International Forums

Historically, a refusal by United States courts to enforce a foreign judgment would likely doom a foreign plaintiff's hope for recovery if the defendant had insufficient assets in the foreign forum to recover a judgment. As stated above, United States courts are the most generous in the world in enforcing foreign judgments,[163] so failure to have a judgment enforced in the United States likely means that efforts to have the judgment enforced in other forums would fail as well. However, a combination of third-party financing and shifting international attitudes towards protections of human and environmental rights could mean that even a rejection by United States courts may not ultimately preclude collection of an adverse judgment rendered against a multi-national corporation.

1. Lago Agrio Enforcement Actions in Argentina, Brazil, and Canada

As examined above,[164] plaintiffs in developing countries have unprecedented access to funds to pursue high-dollar claims against multi-national corporations. Not only does this allow plaintiffs to refile claims that had previously been dismissed on *forum non conven-*

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adequately redress his injuries. "); Liu, *supra* note 14, at 143 ("[N]umerous forum non conveniens dismissals have, in effect, left plaintiffs with no meaningful remedies while allowing tortious MNCs to escape liability overseas. ").

162. Whytock & Robertson, *supra* note 4, at 1450.

163. *See supra* text accompanying note 43.

164. *See supra* text accompanying notes 123–36.

iens grounds in their home forum, but they also have the funds to attempt to enforce judgments in other forums all over the world.[165] Chevron's Ecuador saga provides an excellent example of a strategy using third-party financing to collect on a judgment in multiple forums and also of the exorbitant costs it takes for defendants to fight back such attempts.

Steve Donziger—the lead attorney on behalf of the Lago Agrio plaintiffs—and the litigation's financial backers realized that enforcing the Ecuadorian judgment in the United States could be challenging.[166] In order to calm investors' fears and to protect its own investment, Patton Boggs developed what would be called the "Invictus Strategy" to attempt enforcement against Chevron wherever its assets could be found.[167] Even before the *Donziger* court had ruled against the Lago Agrio plaintiffs in the United States, enforcement suits had been filed against Chevron in Brazil, Argentina, and Canada.[168] Though the Lago Agrio plaintiffs have suffered set-backs in Brazil[169] and Argentina,[170] the Canadian Supreme Court found that the Lago Agrio plaintiffs could seek recovery against a Chevron subsidiary in Canada, though the merits of the case have yet to be litigated.[171] Thus, once again, Chevron will have to litigate the validity of the Ecuadorian court's judgment against them. Though no forum outside of Ecuador has allowed for enforcement of the judgment, the litigation has taken a substantial toll on Chevron, to the tune of over

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165. *See* Robertson, *supra* note 115, at 170 (explaining that even when the potential to actually have a claim enforced is small, the potential recovery is so great that investors may see value in continuing to fund attempts at enforcement).

166. Chevron Corp. v. Donziger, 974 F. Supp. 2d 362, 476 (S.D.N.Y 2014).

167. *Id.* at 476–77.

168. *Id.* at 541.

169. *See* Paul Barrett, *Senior Brazilian Official Backs Chevron in Oil Pollution Case*, BLOOMBERG (May 18, 2015), http://www.bloomberg.com/news/articles/2015-05-18/senior-brazilian-official-backs-chevron-in-oil-pollution-case (detailing a senior Brazilian legal official's recommendation that Brazil not enforce the Ecuadorian judgment).

170. *See* Amrutha Gayathri, *Chevron Wins Lawsuit in Argentina Relating to Ecuador Environment Damages; Court Removes Freeze on Chevron Assets*, INTERNATIONAL BUSINESS TIMES (June 5, 2013), http://www.ibtimes.com/chevron-wins-lawsuit-argentina-relating-ecuador-environment-damages-court-removes-1291875 (stating that the Argentinian Supreme Court unfroze Chevron's assets and essentially 'tossed' the case).

171. *See* Nicole Hong and Kim Mackreal, *Canada's Top Court Rule in Favor of Ecuador Villagers*, THE WALL STREET JOURNAL (Sept. 4, 2015), http://www.wsj.com/articles/canadas-top-court-rules-in-favor-of-ecuador-villagers-in-chevron-case-1441384265 (stating that the Canadian court ruled that Canada could serve as a venue for a recognition and enforcement action against Chevron's subsidiary).

$2 billion.[172] Regardless of whether the Lago Agrio plaintiffs ever recover a dime of the Ecuadorian judgments, the cost to Chevron has been substantial and demonstrates the dangers facing corporate defendants when a plaintiff has the funding to litigate enforcement actions across the globe.

2. Impact of Environmental and Human Rights Campaigns

Movements for environmental and human rights have developed increased sophistication and political influence in the twenty-first century.[173] As a result, public opinion and western governmental policies have shifted towards favoring action to protect the environment[174] and human rights.[175] At the same time, public opinion of industries susceptible to international mass torts, such as the oil and gas industry, has never been lower.[176] As a result, corporations seeking to avoid enforcement of an adverse tort judgment rendered under suspect circumstances may face hostile publicity campaigns and media attention that put pressure on national leaders to enforce the

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172. Alexander Zaitchik, *Sludge Match: Inside Chevron's $9 Billion Legal Battle with Ecuadorean Villagers*, ROLLING STONE (Aug. 28, 2014), http://www.rollingstone.com/politics/news/sludge-match-chevron-legal-battle-ecuador-steven-donziger-20140828 (' 'Chevron has spent over $2 billion trying to wear us out and shut us down, [Donziger] says. ').

173. *See* Peter Willets, *The Role of NGOs in Global Governance*, WORLD POLITICS REVIEW (Sept. 27, 2011), http://www.worldpoliticsreview.com/articles/10147/the-role-of-ngos-in-global-governance (analyzing the influence of NGO's in setting international policy).

174. *See Attitudes of European Citizens Towards the Environment*, EUROBAROMETER, March 2008, at 37, http://ec.europa.eu/public_opinion/archives/ebs/ebs_295_en.pdf (explaining that two-thirds of Europeans would prefer that environmental, social, and economic factors be taken into account when measuring economic progress rather than purely economic factors); *Environment*, GALLUP (March 2016), http://www.gallup.com/poll/1615/Environment.aspx (alleging that 57% of Americans believe that protection of the environment should be given priority over economic growth).

175. *See Polls Find Strong International Consensus on Human Rights*, WORLD PUBLIC OPINION.COM (Dec. 7, 2011), http://www.worldpublicopinion.org/pipa/articles/btjusticehuman_rightsra/701.php (stating that analysis of several international polls found general consensus that power should be given to the UN to investigate human rights abuses and governments should take an active role in insuring economic rights).

176. *See Business and Industry Sector Ratings*, GALLUP (Aug. 2015), http://www.gallup.com/poll/12748/Business-Industry-Sector-Ratings.aspx (stating that 47% of Americans have a negative view of the oil and gas industry, and 43% have a negative view of the pharmaceutical industry).

judgment. While public opinion does not normally dictate court judgments, it may still influence cases with particularly sympathetic plaintiffs.

Once again, the Lago Agrio litigation demonstrates this point. From the very beginning of the litigation, Steven Donziger understood that influencing public relations would be important to any attempt to have a judgment enforced in the United States or elsewhere.[177] In furthering the public relations campaign, the Lago Agrio plaintiffs' team set up a website, "ChevronToxico," to release news and disseminate positive stories.[178] The plaintiffs' team also helped facilitate the creation of a documentary, *Crude*, to generate public support for the plaintiffs.[179] Donziger collaborated extensively with non-governmental organizations to lobby governments and influence public opinion on the Lago Agrio plaintiffs' behalf.[180] The result has been that the Lago Agrio plaintiffs have enjoyed *cause c. .lèbre* status in some liberal media outlets[181] and amongst some celebrities.[182] The public relations campaign has even led to support from political leaders around world.[183]

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177. Chevron Corp. v. Donziger, 974 F. Supp. 2d 362, 403 (S.D.N.Y 2014).

178. CHEVRONTOXICO: THE CAMPAIGN FOR JUSTICE IN ECUADOR, http://chevrontoxico.com (last visited May 16, 2016).

179. *See Donziger*, 974 F. Supp. 2d at 454 (detailing how Russell DeLeon, one of the funders of the litigation, financed the film and how Donziger recruited and gave access to the film team).

180. *Id.* at 404–05 (explaining that Amazon Watch, an NGO dedicated to protecting the rainforest and indigenous groups, was the most involved organization).

181. THE HUFFINGTON POST has taken the side of the Lago Agrio plaintiffs with stories such as: *Game Over: Chevron's RICO Case Spectacularly Implodes as Corrupt Ex-Judge Admits to Making It Up in Exchange for Chevron Payoff*, *Canada Decision Is Message to Chevron: Stop Deaths in Ecuador Now!*, and *Chevron's 'Amazon Chernobyl' in Ecuador: The Real Irrefutable Truths About the Company's Toxic Dumping and Fraud* (all accessed at http://www.huffingtonpost.com/news/chevron-ecuador/).

182. *See, e.g. Cher Produces Video Backing Ecuadorian Villagers in $19 Billion Fight with Chevron*, THE HUFFINGTON POST (Sept. 4, 2013), http://www.huffingtonpost.com/2013/09/04/cher-chevron_n_3868961.html (explaining Cher's support for the Lago Agrio plaintiffs); *Mia Farrow Visited Tuesday One of the Contaminated Sites*, THE DIRTY HAND OF CHEVRON (Jan. 29, 2014), http://www.thedirtyhand.com/mia-farrow-visited-tuesday-one-of-the-contaminated-sites (detailing Mia Farrow's visit to Ecuador and her statements condemning Chevron and Texaco); *Steven Donziger: Oil and Its Aftermath*, ALEC BALDWIN'S HERE'S THE THING ON WNYC (March 15, 2016), http://chevrontoxico.com/news-and-multimedia/2016/0315-steven-donziger-oil-and-its-aftermath (click on the play button to listen) (Alec Baldwin interviewing Donziger for Donziger to promote the Lago Agrio plaintiffs' case).

183. *See* Letter from Rep. James P. McGovern, United States Congress, to President Barack Obama (Nov. 17, 2008),

While winning the support of a few celebrities and legislators does not ensure a lawsuit's success, an aggressive and well-financed public relations campaign can have a significant impact on public opinion. Though most countries' judiciaries are somewhat insulated from the whims of public opinion, that insulation is not absolute. When a plaintiff has the resources to attempt to have a billion-dollar judgment enforced all around the globe, the chances of a sympathetic plaintiff finding a judge who will rule against an unpopular corporate defendant improve drastically. While managing the political climate in one forum may be challenging enough for a defendant corporation, managing multiple forums can become quite a daunting task.

V SIMPLIFYING ENFORCEMENT OF FOREIGN JUDGMENTS AFTER *FORUM NON CONVENIENS* DISMISSAL

The potential for major transnational tort litigation to extend over decades and cost millions of dollars serves no one's interests. As Whytock and Robinson note, the differences in the level of scrutiny applied to the foreign court at the *forum non conveniens* stage and the enforcement stage create a gap that allows a foreign jurisdiction to be deemed adequate to adjudicate the dispute but inadequate to have its judgment enforced. This gap allows for expensive and destructive gamesmanship that costs vast amounts of time and money. One factor contributing to that gap, exhibited in both the Lago Agrio and DBCP litigations, is that American courts have difficulty bringing themselves to enforce judgments that appear to be wildly unfair and fraudulent.[184] While in both cases the judgments may have been obtained by fraud, the precedent created contributes to the gamesmanship at issue. The gap can most easily be closed by stricter application of the doctrine of judicial estoppel to defendants' arguments against foreign forums they had previously endorsed, while also al-

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http://chevrontoxico.com/assets/docs/mcgovern-to-obama.pdf (calling for the President to make helping Ecuador remedy the pollution a priority); *EU Legislators Express Support for Chevron Victims in Ecuador, TELESUR* (April 16, 2015), http://www.telesurtv.net/english/news/EU-Legislators-Express-Support-for-Chevron-Victims-in-Ecuador-20150416-0035.html (stating that forty members of the European Parliament signed a statement demanding Chevron pay damages to the Lago Agrio plaintiffs).

184. *See supra*, text accompanying notes 95–102 (discussing the *Donziger* court's opinion that the lawyers representing the plaintiffs had orchestrated a fraudulent scheme to win the litigation) & 143 (discussing the *Osorio* court's opinion that Special Law 354 had radically changed Nicaragua's adherence to due process).

lowing an exception for cases where the opposing side commits fraud.

A. *Expanded and Stringent Use of Judicial Estoppel*

Courts should be more willing to utilize the doctrine of judicial estoppel to prevent defendants from taking inconsistent positions regarding the adequacy of a foreign forum during the *forum non conveniens* phase and the enforcement phase of a matter. Though decisions on the application of judicial estoppel lack much uniformity,[185] the purpose of the doctrine exists to protect courts from parties playing "fast and loose" with their arguments and to prevent parties from gaining an unfair advantage by taking inconsistent positions.[186] However, when presented with opportunities to apply judicial estoppel to defendants' arguments to prevent enforcement of a judgment, most courts have balked, largely due to the prospect of enforcing a judgment likely procured by fraud.[187] Thus, a solution must seek to eliminate the advantages defendants gain from making inconsistent arguments but also ensure that the court can refuse to enforce a foreign judgment procured by unethical or illegal means. In order to meet both objectives, courts should vigorously apply judicial estoppel to those defendants making inconsistent arguments on the adequacy of a foreign forum, making an exception only if the plaintiff obtained that judgment through fraud or bribery.

It may seem harsh to estop a defendant from attacking the adequacy of due process in a foreign forum, especially if the judgment appears unfair, but such a rule protects courts from making rulings that could impact international politics and also deters defendants from abusing the *forum non conveniens* mechanism. American courts generally dislike ruling that a foreign nation's entire judicial system is unfair and lacks due process.[188] Foreign nations certainly do not

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185. *See* 18B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4477 (2d ed. 2016) (stating that the section on judicial estoppel cannot provide a definitive overview of the doctrine because 'the cases afford little basis for confident conclusions").

186. *See* New Hampshire v. Maine, 532 U.S. 742, 750–51 (2001) (identifying three factors that should be considered when determining if judicial estoppel is appropriate: (1) a party's new position must be 'clearly inconsistent' from its first position; (2) whether a court's acceptance of a party's second position would create a perception that the court had been misled; and (3) whether the party taking an inconsistent position would gain an unfair advantage by taking that position).

187. *See infra*, text accompanying note 192.

188. *See* Chevron Corp. v. Donziger, 974 F. Supp.2d 362, 609 (S.D.N.Y 2014) ("The Court is far from eager to pass judgment as to the fairness of the judi-

like having their entire judicial system being declared unfit by an American judge. The responsibility to rule on the fitness of a foreign forum during the enforcement phase of litigation becomes especially sticky after an American court has declared that foreign country an appropriate forum to litigate a particular matter during the *forum non conveniens* phase. If, as was the case in both the Lago Agrio and DBCP litigation, a court rules that a judicial system has deteriorated between the time a *forum non conveniens* dismissal was obtained and when the foreign court made its judgment, the American trial judge essentially condemns the foreign nation's leaders who have overseen this disastrous deterioration of justice. United States District Court judges should not be forced to pass judgment on the effectiveness of a foreign regime's respect for justice. Furthermore, such a declaration may have an impact on relations with the foreign country that has been declared unfit, especially because that foreign country's citizens will be left without remedy. Using judicial estoppel to prevent defendants from switching arguments on the adequacy of a foreign forum prevents American judges from having to make such politically charged rulings.

The use of judicial estoppel will also diminish the incentive to abuse *forum non conveniens* motions. As discussed above, defendants of tort claims that arise from actions in a foreign country almost always file *forum non conveniens* motions because their chances of success are high and the likelihood of the action being refiled is minimal.[189] Furthermore, with the possibility that an American judge might refuse to enforce a judgment in a case that has been refiled in a foreign country, the chances of ever having to pay a foreign judgment won after a *forum non conveniens* motion are minimal. Preventing a defendant from contesting enforcement on the grounds of a foreign forum's fairness puts the onus on the defendant to ensure that the foreign forum truly is adequate. Motions for *forum non conveniens* usually do not involve extensive evidentiary finding and examination, because doing so would defeat the purpose of the *forum non conveniens* doctrine, which is to limit unnecessary cost and delay.[190] As courts rely on the defendant's statements of a for-

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cial system of another country '); Osorio v. Dole Food Co, 665 F. Supp. 2d 1307. 1347 (S.D. Fla. 2009) ("The Court admits that it is not entirely comfortable sitting in judgment of another nation's judicial system ').

189. *See* Heiser, *supra* note 3, at 609 ("The [*forum non conveniens*] motion is not only filed, but also granted, in nearly every case. ').

190. *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 258 (1981) (stating that requiring extensive investigation of the grounds for a *forum non conveniens* dismissal would defeat the purpose of the motion); *see also* Gulf Oil Corp. v. Gilbert,

eign forum's adequacy, defendants should be held to account for this position. This should be the case even if circumstances in the foreign forum change. A country's political and judicial systems do not deteriorate overnight and certain nations are more susceptible to political instability and undue political influence over the judiciary.[191] A defendant's declaration that a foreign forum is adequate for *forum non conveniens* purposes should be considered an acceptance of the risk of litigating in that forum by the defendant.

A defendant should only be able to avoid being estopped from contesting a foreign forum's fairness and adherence to due process during the recognition and enforcement phase if the plaintiff contributes to the unfairness of a proceeding. Though the analysis of a foreign forum's fairness and adherence to due process is based on a system-wide basis, a plaintiff should still be held accountable for exploiting the defects in a foreign forum's judicial system to win a favorable judgment. The rationale behind estopping a defendant from changing their position on a foreign forum's adequacy is that the defendant should be held to the bargain it made by offering the foreign forum, despite potential defects, as adequate. If a plaintiff improperly influences the foreign court through fraud or bribery, the bargain changes and the defendant should no longer be estopped from arguing the inadequacy of the forum. By attempting to improperly influence a foreign court, the plaintiff would essentially waive their right to advance a judicial estoppel defense during the recognition and enforcement phase. As a practical matter, a total bar on a plaintiff ever changing positions on the adequacy of a foreign forum would create a perverse incentive for the plaintiff to take any steps, no matter how repugnant, to ensure a favorable judgment.

Though simpler than other proposed solutions to the "Transnational-Access-to-Justice Gap,"[192] the solution proposed above requires little tweaking to existing law and may in fact reflect existing

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330 U.S. 501, 508 (1947) (stating that courts should consider whether a matter could be tried in an 'easy, expeditious and inexpensive' manner).

191. *See Ripe for Rebellion?* THE ECONOMIST, Nov. 18, 2013, http://www.economist.com/news/21589143-where-protest-likeliest-break-out-ripe-rebellion (article and chart identifying the countries most likely to experience social unrest in 2014).

192. *See* Whytock & Robertson, *supra* note 4, at 1493–1509 (laying out a detailed plan that calls for a heightened standard to win dismissal on *forum non conveniens* grounds, rigorous examination of the potential for enforcement of the foreign judgment in the United States, greater utilization of judicial estoppel with an exception carved out if the change in the foreign forum was not foreseeable, and several other adjustments to current law).

law.[193] Furthermore, the solution provides a restraint on both the defendant's and the plaintiff's worst impulses. The preclusion of being able to switch positions regarding the adequacy of a foreign forum will cause defendants to be more judicious in their use of the *forum non conveniens* defense. At the same time, the waiver of the judicial estoppel defense if a plaintiff acts fraudulently will also give plaintiffs pause before attempting to unduly influence foreign courts.

VI. CONCLUSION

The world is shrinking quickly for multinational corporations accused of massive torts. While in prior years a defendant could send a case to a far-flung part of the globe through a *forum non conveniens* dismissal and never worry about the case again, recent developments have thrown this assumption into doubt. As foreign countries modernize their judicial systems through plaintiff-friendly litigation mechanisms and plaintiffs with high-dollar claims can receive funding for the prosecution of their claims, more cases dismissed on *forum non conveniens* grounds will be re-filed. Furthermore, even if an American court would refuse to enforce a foreign judgment obtained under suspect circumstances, there is no guarantee that other nations would do the same. Looking forward, regardless of whether American courts apply the doctrine of judicial estoppel with greater rigor, defendants facing massive tort claims filed in an American court would be wise to evaluate whether they are, in fact, the party that cannot afford a *forum non conveniens* dismissal.

193. *See supra* Section VI.A.2 (arguing that the opinions in *Pavlov* and *Robinson Helicopter* suggesting that judicial estoppel should preclude a defendant reflect the current state of law, because both the *Donziger* and *Osorio* courts denied judicial estoppel defense, in part, to prevent a recognition of a judgment the plaintiff had obtained through improper means).