

Appellate Practice and Procedure

by K. Todd Butler*

This Article reviews federal appellate procedure decisions in the Eleventh Circuit during the 2005 calendar year. Questions considered this year include the following: statutory limitations on federal subject matter jurisdiction, general federal judicial jurisdiction, the appellate jurisdiction of federal circuit courts of appeal, and requirements for preservation of the record for appeal. This year, we again include a section on the standards of review that the Eleventh Circuit applies in reviewing the orders of federal district courts. The particular standards reviewed include the *de novo*, abuse of discretion, and clear error standards.

I. STATUTORY LIMITATIONS ON JURISDICTION

Under Article III of the United States Constitution,¹ federal subject matter jurisdiction exists only if Congress creates jurisdiction.² It follows that Congress has the power to restrict federal judicial jurisdiction by statute. “[C]ourts ordinarily do not infer congressional intent to restrict their jurisdiction,”³ but federal courts may lack jurisdiction, even to review an administrative decision, where statutory language clearly and unequivocally shows congressional intent to foreclose judicial jurisdiction.⁴

This year, the Eleventh Circuit held that the Nicaraguan Adjustment and Central American Relief Act of 1997 (NACARA)⁵ shows clear and unequivocal intent to foreclose federal judicial jurisdiction and the court

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1. U.S. CONST. art. III.

2. U.S. CONST. art. III, § 1.

3. *Ortega v. U.S. Attorney General*, 416 F.3d 1348, 1350 (11th Cir. 2005).

4. *Id.*

5. Pub. L. No. 105-100, 111 Stat. 2193.

declined to review a petitioner's appeal from the Board of Immigration Appeals.⁶ Likewise, in *Sebastian-Soler v. U.S. Attorney General*,⁷ the court declined to review an Immigration and Naturalization Service deportation order based on the strict limitation provided by 8 U.S.C. § 1252(a)(2)(C).⁸ In *Chuang v. U.S. Attorney General*,⁹ decided by the Eleventh Circuit in 2004, this statute was held constitutional.¹⁰

II. GENERAL FEDERAL JURISDICTION

Under 28 U.S.C. § 1441,¹¹ a defendant can remove a case to federal court if the federal court would have had original jurisdiction of the subject matter and personal jurisdiction of the parties.¹² Original federal judicial jurisdiction is based on either federal constitutional, statutory subject matter, or diversity jurisdiction.¹³ Presumably under the McCarran-Ferguson Act,¹⁴ and unless the law of the respective state provided otherwise, federal diversity jurisdiction, and thus federal removal jurisdiction, is precluded if the subject matter of a lawsuit is limited strictly to the business of insurance.¹⁵ Thus, in *Cotton v. Massachusetts Mutual Life Insurance Co.*,¹⁶ subject matter jurisdiction would not have existed at the time of removal because the complaint was limited to matters involving the business of insurance; an order for dismissal or remand to the state court would have been proper.¹⁷ The district court would have had authority, and would have been obliged, to raise the question *sua sponte*.¹⁸ Likewise, the appellate court, or any court at any level, would have had jurisdiction to review the question.¹⁹ However, in *Cotton*, the Eleventh Circuit held that where the plaintiff amended the complaint to add a federal subject matter claim before the district court, or where anyone else raised the issue of improper removal, sufficient federal subject matter jurisdiction existed to dismiss.²⁰

6. *Ortega*, 416 F.3d at 1350.

7. 409 F.3d 1280 (11th Cir. 2005).

8. *Id.* at 1283; 8 U.S.C. § 1252(a)(2)(c) (2005).

9. 382 F.3d 1299 (11th Cir. 2004).

10. *Id.* at 1303.

11. 28 U.S.C. § 1441 (2005).

12. *Id.* § 1441(a).

13. U.S. CONST. art. III, § 2.

14. 15 U.S.C. §§ 1011-1015 (2005).

15. *See* 15 U.S.C. § 1012(b) (2005).

16. 402 F.3d 1267 (11th Cir. 2005).

17. *Id.* at 1280.

18. *Id.*

19. *Id.*

20. *Id.*

Issues of standing also raise the question of federal jurisdiction because the case-or-controversy requirement of Article III, Section 2 of the Constitution requires that a party must have

(1) . . . suffered an “injury in fact” that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury [must be] fairly traceable to the challenged action of the defendant; and (3) it [must be] likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.²¹

Even if these matters have not been considered at the trial court level, and even if the parties do not raise the issues, the court of appeals must raise them.²²

In *SEC v. ETS Payphones, Inc.*,²³ the Securities and Exchange Commission received an order freezing the assets of a company owned by a promoter.²⁴ The promoter lacked standing to appeal the freeze because the company was a nonparty and the promoter showed no obstacle preventing the company from asserting its rights.²⁵ Likewise, the case-or-controversy requirement negates federal jurisdiction if the issues are moot.²⁶ In the same case, where the company was no longer subject to an asset freeze, the court no longer had jurisdiction to consider the issue.²⁷

Similar to the issue of removal, the mootness rule is jurisdictional in nature.²⁸ It may, and where warranted it must, be raised by the appellate court sua sponte without regard to whether the district court considered the question, and without regard to whether the parties have briefed the issue.²⁹

III. APPELLATE JURISDICTION

Under 28 U.S.C. § 1292(a)(1),³⁰ the federal appellate courts have jurisdiction over “interlocutory orders of the district courts of the United States . . . granting, continuing, modifying, refusing or dissolving

21. *Sierra Club v. Tenn. Valley Auth.*, 430 F.3d 1337, 1344 (11th Cir. 2005) (quoting *Friends of the Earth, Inc. v. Laudlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000)).

22. *Id.*

23. 408 F.3d 727 (11th Cir. 2005).

24. *Id.* at 731.

25. *Id.* at 736.

26. *Id.*

27. *Id.*

28. *Nat'l Adver. Co. v. City of Miami*, 402 F.3d 1329, 1331-32 (11th Cir. 2005).

29. *Id.* at 1332.

30. 28 U.S.C. § 1292(a)(1) (2005).

injunctions, or refusing to dissolve or modify injunctions.³¹ Furthermore, if an order bars a party from litigating in another forum, it is an injunction subject to interlocutory appeal.³² If a district court's order commands or prevents action, is enforceable by contempt, and has a direct or irreparable impact on the merits of a controversy, then the order is an injunction subject to interlocutory appeal.³³ In *Alabama v. U.S. Army Corps of Engineers*,³⁴ the district court effectively entered an injunction when its order barred the Corps of Engineers from executing any further water supply contracts or agreements regarding water supply contracts, even though the order was couched in terms of barring participation in a separate case concerning similar matters.³⁵

As a general rule, a district court's order denying summary judgment is not subject to interlocutory review.³⁶ Where the motion for summary judgment seeks a determination that a defendant is entitled to qualified immunity, however, the district court's order denying immunity is subject to immediate interlocutory review.³⁷ If the interlocutory appeal of an order denying qualified immunity raises issues of both the sufficiency of the evidence and clearly established issues of law, as was the case in *Cook v. Gwinnett County School District*,³⁸ then the court of appeals has jurisdiction over both issues,³⁹ although the Eleventh Circuit typically accepts the district court's findings of fact and reviews only the questions of law.⁴⁰ The facts of the case are not established, however, by the appellate court's acceptance of a district court's finding of facts.⁴¹

IV. PRESERVATION OF THE RECORD

It is incumbent upon a party to perfect the record. A court of appeals will not consider issues that are not preserved for appeal. In *London v. Fieldale Farms Corp.*,⁴² the plaintiffs first argued on appeal that a

31. *Ala. v. U.S. Army Corps of Engineers*, 424 F.3d 1117, 1127 (11th Cir. 2005) (quoting 28 U.S.C. § 1292(a)(1)).

32. *Id.* at 1129 n.18.

33. *Id.*

34. 424 F.3d 1117 (11th Cir. 2005).

35. *Id.* at 1129.

36. *Cook v. Gwinnett County Sch. Dist.*, 414 F.3d 1313, 1315 (11th Cir. 2005).

37. *Purcell ex rel. Estate of Morgan v. Toombs County*, 400 F.3d 1313, 1319 (11th Cir. 2005).

38. 414 F.3d 1313 (11th Cir. 2005).

39. *Id.* at 1315.

40. *Id.* at 1316.

41. *Id.* at 1316 n.5.

42. 410 F.3d 1295 (11th Cir. 2005).

defendant's predator intent could be inferred from the special circumstances of the case.⁴³ The Eleventh Circuit rejected the argument because it was not preserved in proceedings before the district court.⁴⁴ A party is nevertheless entitled to rely on comments that the trial judge may make about the status of the record. For example, in *Cook v. Sheriff of Monroe County, Florida*,⁴⁵ the trial court made a tentative ruling in limine to exclude expert evidence.⁴⁶ Usually, where evidence is tentatively excluded, the party must re-introduce the evidence or the issue is considered waived.⁴⁷ However, in *Cook* the district court specifically stated:

Your record is protected on that. There is no difficulty at all in taking this to the Eleventh Circuit[,] [and] . . . It may be that [the] Appellate Court will say no, Judge King, you are wrong I feel very good that we have an Appellate Court that looks at all the cases and I am glad they are there because it's a safety valve, because I do make mistakes.⁴⁸

The trial judge's comments created the clear impression that the issue was preserved for appeal, and the Eleventh Circuit accordingly held that the party had not waived the issue.⁴⁹

V. STANDARDS OF REVIEW

Whenever a district court makes a decision of law, the Eleventh Circuit reviews the decision de novo, with no deference whatsoever for the district court's legal analysis.⁵⁰ The following decisions or rulings of district courts within the Eleventh Circuit were reviewed de novo this year: the interpretations and applications of statutes,⁵¹ including

43. *Id.* at 1302.

44. *Id.* at 1304-05.

45. 402 F.3d 1092 (11th Cir. 2005).

46. *Id.* at 1100.

47. *Id.* at 1109.

48. *Id.* at 1110 n.6.

49. *Id.*

50. See *Young v. New Process Steel, L.P.*, 419 F.3d 1201, 1203 (11th Cir. 2005); *Maverick Boat Co. v. Am. Marine Holdings, Inc.*, 418 F.3d 1186, 1191 (11th Cir. 2005); *HGI Assocs., Inc. v. Wetmore Printing Co.*, 427 F.3d 867, 873 (11th Cir. 2005); *Cotton*, 402 F.3d at 1277.

51. *Kehoe v. Fidelity Fed. Bank & Trust*, 421 F.3d 1209, 1211 (11th Cir. 2005); *McNutt ex rel. U.S. v. Haleyville Med. Supplies, Inc.*, 423 F.3d 1256, 1259 (11th Cir. 2005); *Johnson v. Meadows*, 418 F.3d 1152, 1155 (11th Cir. 2005); *Cooper v. Dillon*, 403 F.3d 1208, 1213 (11th Cir. 2005); *Tobin v. Michigan Mut. Ins. Co.*, 398 F.3d 1267, 1274 (11th Cir. 2005).

determinations of the constitutionality of statutes⁵² and local ordinances;⁵³ determinations of state law;⁵⁴ interpretations of contracts;⁵⁵ equitable tolling of a statute of limitations;⁵⁶ the interpretation of a term as used in the Federal Rules of Civil Procedure;⁵⁷ a denial of a motion pursuant to Federal Rule of Civil Procedure 12(b)(6);⁵⁸ a denial of a defendant's qualified immunity in a Section 1983 action;⁵⁹ rulings on motions for judgments as a matter of law,⁶⁰ including rulings on motions for summary judgment⁶¹ and motions for partial summary judgment;⁶² legal determinations underlying a preliminary injunction;⁶³ an application of the Noerr-Pennington doctrine;⁶⁴ rulings on federal subject matter jurisdiction,⁶⁵ including questions of standing;⁶⁶

52. *Konikov v. Orange County*, 410 F.3d 1317, 1321 (11th Cir. 2005); *Padgett v. Donald*, 401 F.3d 1273, 1277 (11th Cir. 2005); *United States v. Ballinger*, 395 F.3d 1218, 1225 (11th Cir. 2005).

53. *Tanner Adver. Group, L.L.C. v. Fayette County*, 411 F.3d 1272, 1274 (11th Cir. 2005).

54. *Price v. Time, Inc.*, 416 F.3d 1327, 1334 (11th Cir. 2005).

55. *Tobin*, 398 F.3d at 1274; *Vector Prods., Inc. v. Hartford Fire Ins. Co.*, 397 F.3d 1316, 1318 (11th Cir. 2005).

56. *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1153 (11th Cir. 2005).

57. *Klay v. All Defendants*, 425 F.3d 977, 982 (11th Cir. 2005).

58. *Shotz v. Am. Airlines, Inc.*, 420 F.3d 1332, 1334 (11th Cir. 2005); *McNutt ex rel. U.S.*, 423 F.3d at 1259; *Owens v. Samkle Auto., Inc.*, 425 F.3d 1318, 1320 (11th Cir. 2005); *FED. R. CIV. P. 12(b)(6)*.

59. *Bennett v. Hendrix*, 423 F.3d 1247, 1249 (11th Cir. 2005); 42 U.S.C. § 1983 (2005).

60. *Ledbetter v. Goodyear Tire & Rubber Co.*, 421 F.3d 1169, 1177 (11th Cir. 2005); *Koutsouradis v. Delta Air Lines, Inc.*, 427 F.3d 1339, 1343 (11th Cir. 2005); *Sanders v. Lull Intern., Inc.*, 411 F.3d 1266, 1269 (11th Cir. 2005); *Collado v. United Parcel Serv. Co.*, 419 F.3d 1143, 1149 (11th Cir. 2005); *Cooper*, 403 F.3d at 1219; *Cabello*, 402 F.3d at 1153; *Amend v. 485 Properties, LLC*, 401 F.3d 1255, 1258 (11th Cir. 2005).

61. *Morris v. Emory Clinic, Inc.*, 402 F.3d 1076, 1081 (11th Cir. 2005); *Amend*, 401 F.3d at 1258; *Vector Prods., Inc.*, 397 F.3d at 1318; *Sanders*, 411 F.3d at 1269.

62. *Nat'l R.R. Passenger Corp. (Amtrak) v. Rountree Transport & Rigging, Inc.*, 422 F.3d 1275, 1282 (11th Cir. 2005).

63. *BankWest, Inc. v. Baker*, 411 F.3d 1289, 1300 (11th Cir. 2005); *Palmer & Cay, Inc. v. Marsh & McLennan Companies, Inc.*, 404 F.3d 1297, 1308 (11th Cir. 2005).

64. *Andrx Pharm. Inc. v. Elan Corp., PLC*, 421 F.3d 1227, 1232 (11th Cir. 2005).

65. *MacGinnitie v. Hobbs Group, LLC*, 420 F.3d 1234, 1239 (11th Cir. 2005); *Sweet Pea Marine, Ltd. v. APJ Marine, Inc.*, 411 F.3d 1242, 1247 (11th Cir. 2005); *Samco Global Arms, Inc. v. Arita*, 395 F.3d 1212, 1214 n.4 (11th Cir. 2005); *Akouri v. State of Florida Dep't of Transp.*, 408 F.3d 1338, 1343 (11th Cir. 2005); *SEC v. Mutual Benefits Corp.*, 408 F.3d 737, 741 (11th Cir. 2005); *Webb v. Worldwide Flight Serv., Inc.*, 407 F.3d 1192, 1193 (11th Cir. 2005).

66. *Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1351 (11th Cir. 2005); *Bochese v. Town of Ponce Inlet*, 405 F.3d 964, 975 (11th Cir. 2005).

rulings on personal jurisdiction;⁶⁷ rulings regarding Eleventh Amendment immunity;⁶⁸ the immunity of a foreign sovereign under the Foreign Sovereign Immunities Act;⁶⁹ the grant of a motion for summary judgment in a civil rights action to a defendant claiming qualified immunity;⁷⁰ and rulings with respect to choice of law and conflicts of law.⁷¹

A federal circuit court of appeals reviews the decision of a district court for abuse of discretion when the district court has a "range of choice."⁷² The circuit court will not disturb the decision of the district court on appeal as long as it stays within that range, unless its decision is influenced by a mistake of law.⁷³ The district court strays outside its permissible range of decisionmaking when it fails to consider a relevant factor that should be given significant weight, when it gives significant weight to an irrelevant or improper factor, or when it commits a clear error of judgment.⁷⁴ By definition, the district court abuses its discretion when it makes an error of law.⁷⁵ In 2005 the Eleventh Circuit reviewed the following matters under the abuse of discretion standard: the grant of a preliminary injunction;⁷⁶ the scope of an injunctive order;⁷⁷ asset freezes;⁷⁸ denials of injunctive relief;⁷⁹ entries of orders sanctioning violations of orders compelling discovery;⁸⁰ denial of a party's motion to amend the complaint;⁸¹ dismissals of actions on

67. *Horizon Aggressive Growth, L.P. v. Rothstein-Kass, P.A.*, 421 F.3d 1162, 1166 (11th Cir. 2005); *McGow v. McCurry*, 412 F.3d 1207, 1214 n.2 (11th Cir. 2005).

68. *Williams v. Dist. Bd. of Trustees of Edison Cmty. Coll., Fla.*, 421 F.3d 1190, 1192 (11th Cir. 2005); *Abusaid v. Hillsborough County Bd. of County Comm'rs*, 405 F.3d 1298, 1303 (11th Cir. 2005); *Ass'n. for Disabled Ams., Inc. v. Florida Int'l Univ.*, 405 F.3d 954, 956 (11th Cir. 2005); U.S. CONST. amend. XI.

69. *Samco Global Arms, Inc.*, 395 F.3d at 1214 n.4; 28 U.S.C. § 1605 (2000 & Supp. 2004).

70. *Akins v. Fulton County*, 420 F.3d 1293, 1299 (11th Cir. 2005).

71. *Membreño v. Costa Crociere S.P.A.*, 425 F.3d 932, 935 (11th Cir. 2005); *McGow*, 412 F.3d at 1214 n.2.

72. *Guideone Elite Ins. Co. v. Old Cutler Presbyterian Church, Inc.*, 420 F.3d 1317, 1324 (11th Cir. 2005).

73. *Id.*

74. *Ameritas Variable Life Ins. Co. v. Roach*, 411 F.3d 1328, 1330 (11th Cir. 2005).

75. *BankWest*, 411 F.3d at 1300.

76. *BellSouth Telecomm., Inc. v. MCIMetro Access Transmission Servs., LLC*, 425 F.3d 964, 968 (11th Cir. 2005); *MacGinnitie*, 420 F.3d at 1241.

77. *Palmer*, 404 F.3d at 1308.

78. *ETS Payphones*, 408 F.3d at 731.

79. *Sierra Club*, 430 F.3d at 1346; *BankWest*, 411 F.3d at 1300.

80. *Cotton*, 402 F.3d at 1292.

81. *Corsello v. Lincare, Inc.*, 428 F.3d 1008, 1012 (11th Cir. 2005); *Andrx*, 421 F.3d at 1236.

grounds of forum non conveniens;⁸² denials of motions for continuances;⁸³ *Daubert* rulings,⁸⁴ awards of attorney fees,⁸⁵ including awards of attorney fees under the fee shifting provisions of the Americans with Disabilities Act⁸⁶ and in civil rights actions.⁸⁷

Findings of fact, at the trial level, are entitled to the greatest deference and a federal appellate court will reverse findings of fact only if the record lacks substantial evidence to support the findings, thus leaving the court with the firm conviction that the finder of fact made a mistake.⁸⁸ Even where the court sits as finder of fact in preliminary injunction proceedings, the trial court is regarded as being in a better position than the appellate court to evaluate the evidence presented.⁸⁹ Findings of fact are thus reviewed pursuant to the "clear error" standard.⁹⁰ Matters reviewed in 2005 pursuant to the clear error standard include the following: the similarity of disputed works in a copyright infringement action;⁹¹ and facts establishing the citizenship of parties to an action for purposes of deciding the issue of diversity jurisdiction,⁹² including findings about a corporate entity's principal place of business.⁹³

82. *Membreño*, 425 F.3d at 936.

83. *Rink v. Cheminova, Inc.*, 400 F.3d 1286, 1296 (11th Cir. 2005).

84. *McClain v. Metabolife Int'l, Inc.*, 401 F.3d 1233, 1238 (11th Cir. 2005); *Rink*, 400 F.3d at 1291.

85. *Maverick Boat Co.*, 418 F.3d at 1190.

86. *Cordoba v. Dillard's, Inc.*, 419 F.3d 1169, 1179 (11th Cir. 2005); 42 U.S.C. § 12205 (2005).

87. *Quintana v. Jenne*, 414 F.3d 1306, 1309 (11th Cir. 2005).

88. *Creel v. C.I.R.*, 419 F.3d 1135, 1139 (11th Cir. 2005).

89. *BankWest*, 411 F.3d at 1300.

90. *Nat'l R.R. Passenger Corp. (Amtrak)*, 422 F.3d at 1282.

91. *Maverick Boat Co.*, 418 F.3d at 1190.

92. *MacGinnitie*, 420 F.3d at 1239.

93. *Sweet Pea Marine, Ltd.*, 411 F.3d at 1247.