Notable circuit splits on federal procedural issues

One issue dividing the circuits is whether a court may transfer part of an action while retaining the remainder.

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There are circuit splits involving almost everything. There are even circuit splits about circuit splits. See, e.g., *Cuellar de Osorio v. Napolitano*, 2012 U.S. App. Lexis 20177 (9th Cir. September 26, 2012) ("[T]here is currently a circuit split over whether the existence of a circuit split is evidence of statutory ambiguity") (M. Smith, J., dissenting). This article explores some circuit splits on procedural issues of practical importance.

• *District court review of magistrate judge's report and recommendation (R&R).* Under 28 U.S.C. 636(b)(1), a district court reviewing an R&R "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." In light of the fact that the review is de novo, the questions dividing the circuits concern whether the district judge may or must consider either legal arguments or evidence not submitted to the magistrate judge.

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At least one circuit (the U.S. Court of Appeals for the Fourth Circuit) has declared that the de novo nature of the review requires the district court to consider all legal arguments presented to it, even if they were not presented to the magistrate judge. But the majority rule (in at least the First, Fifth, Eighth, Ninth and Tenth circuits) is that the district court should not entertain arguments raised for the first time on review of the R&R. See *Amadasu v. Ngati*, 2012 U.S. Dist. Lexis 129283 (E.D.N.Y. September 9, 2012) (collecting cases); *Glidden v. Kinsella*, 386 F. App'x 535, 544 n.2 (6th Cir. 2010) (same). *Amadasu*, which was decided in a circuit that has taken no position on the question, followed the intermediate tack of the Eleventh Circuit, under which the district judge is vested with the discretion to decline to entertain new legal arguments. In taking this approach, *Amadasu* applied a district court-developed six-factor test to guide its exercise of discretion. 2012 U.S. Dist. Lexis 129283, at *16-*17.

Much the same circuit split exists as to whether the district court, in reviewing an R&R de novo, may, must or should not consider evidence not presented to the magistrate judge. See *Muhammad v. Close*, 798 F. Supp. 2d 869 (E.D. Mich. 2011) (collecting cases; entertaining new evidence in reviewing a summary judgment R&R).

The majority rule on these issues has the benefit of eliminating any possibility of gamesmanship and ensuring that the R&R process is not rendered nugatory. The differing Fourth and Eleventh circuit rules are faithful both to a notion of "de novo determination"—although de novo does not necessarily entail embracing new arguments or evidence, as ordinary appellate practice teaches—and to the last sentence of § 636(b)(1), which authorizes the district judge "to receive further evidence." The discretionary approach of the Eleventh Circuit has the most to commend it, with a heavy burden being placed on the party proffering the new material to justify why it was not submitted earlier.

• *Forum-selection clauses and* Erie. There is a split in the circuits as to whether a forum-selection clause is substantive or procedural within *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). The majority rule deems forum-selection clauses to be procedural, so federal law governs the determination. See *Wong v. PartyGaming Ltd.*, 589 F.3d 821, 827 (6th Cir. Ohio 2009) (collecting cases). The minority rule holds that the law governing the contract as a whole (whether state or foreign) also governs the enforceability of the forum-selection clause, *Phillips v. Audio Active Ltd.*, 494 F.3d 378, 385 (2d Cir. 2007), at least when "interests other than those of the parties" are not affected. *Abbott Labs. v. Takeda Pharm. Co.*, 476 F.3d 421, 423 (7th Cir. 2007).

• *Intervention as of right.* The circuits are split on the question of whether an intervenor who satisfies Rule 24(a)(2) (intervention as of right) must also satisfy the more stringent standing requirements of Article III, if there is already a party with constitutional standing in the litigation and aligned in interest with the putative intervenor. See *NAACP Inc. v. Dulin County, N.C.*, 2012 U.S. Dist. Lexis 12513 (E.D.N.C. February 3, 2012) (collecting cases; holding Article III standing not required).

Once the case or controversy requirement of Article III is satisfied by a party aligned in interest, it is difficult to see why, given the practicalities, the interested party should not be allowed to intervene in some capacity. If not, then by definition an interested party is silenced in a matter that affects it, and that may well lead to duplicative or wasteful litigation in another proceeding.

Note that the converse situation cannot occur—a party that has Article III standing cannot fail to satisfy the interest requirement of Rule 24(a)—because Article III standing requirements are stricter than those of the rule. See *American Farm Bureau Fed'n v. EPA*, 2011 U.S. Dist. Lexis 118233 (M.D. Pa. October 13, 2011) (observing that a finding that intervenors have constitutional standing " 'compels the conclusion that they have an adequate interest under the rule' ").

Another divisive intervention question concerns whether a litigant suing an insured in Action 1 may intervene in a declaratory judgment action (Action 2) that is brought by the insurer against the insured concerning the policy that ostensibly covers the insured in Action 1. The circuit-splitting question is whether the fact that the Action 1 litigant lacks a legally protectable interest in the insured's policy means that its interest in Action 2 is insufficient to satisfy Rule 24(a)(2). See *American Cas. Co. of Reading, Pa. v. Continental Props. Inc.*, 2012 U.S. Dist. Lexis 21949 (S.D. Ohio February 22, 2012) (collecting cases; permitting intervention).

• *Partial transfer of a lawsuit.* Under 28 U.S.C. 1631, a district court or court of appeals confronted with a case in which "there is a want of jurisdiction...shall, if it is in the interests of justice, transfer such action or appeal...to any other... court in which the action or appeal could have been brought at the time it was filed or noticed." The question dividing the circuits is whether a court may transfer part of an action—an individual claim or that part of the claim asserted against a particular defendant—while retaining the remainder. See *Johnson v. Mitchell*, 2012 U.S. Dist. Lexis 65934 (E.D. Calif. May 10, 2012) (collecting cases; ordering partial transfer).

Given that the court clearly could have transferred the individual claim had it been brought alone, the expedient answer is that partial transfer should be permitted. The statute, however, speaks only in terms of "the action or appeal," which raises a significant textual impediment.

• *Arbitration.* Among the arbitration issues on which the circuits are split, two are most significant for practical purposes. The first is whether the Federal Arbitration Act authorizes arbitrators to compel prehearing document discovery from third parties. See *McGreal v. AT&T Corp.*, 2012 U.S. Dist. Lexis 140686 (N.D. Ill. September 24, 2012) (collecting cases—Sixth and Eighth circuits permit it; Second, Third and Fourth do not).

The second is whether a motion to dismiss based on an arbitration clause must be filed under Rule 12(b)(6) or should be considered an attack on "improper venue" within Rule 12(b)(3). See *Washington v. Roosen, Varchetti & Olivier, PLLC*, 2012 U.S. Dist. Lexis 141048 (W.D. Mich. September 17, 2012). If the motion is made under 12(b)(6), extraneous evidence is precluded. If it is a 12(b)(3) motion, however, the evidence is permitted. It all boils down to the meaning of "venue" in the rule.

• *Discovery in aid of foreign arbitration.* One of the most interesting unsettled questions involving arbitration is whether 28 U.S.C. 1782—which authorizes the taking of evidence in the United States "for use in a proceeding in a foreign or international tribunal"—extends to foreign arbitration. This question has been lingering since the seminal decision of the U.S. Supreme Court in *Intel Corp. v. Advanced Micro Devices Inc.*, 542 U.S. 241 (2004). See Joseph, "International Discovery," NLJ, August 2, 2004, at 12. Prior to *Intel*, the circuit decisions held that private international arbitration did not fall within the statute. But the principal scholar that Intel relied on—and cited more than a half-dozen times—had disagreed in an article that was itself twice cited by Intel for other reasons. See Hans Smit, "American Assistance to Litigation in Foreign and International Tribunals," 25 Syracuse J. Int'l. L. & Com. 1, 5 (1998).

In the first post-*Intel* circuit-level decision to address the issue, the Eleventh Circuit ruled in June that a private international arbitration—which was subject to limited judicial review akin to the review available under the Federal Arbitration Act—did constitute "a proceeding in a foreign or international tribunal" within § 1782. *Application of Consorcio Ecuatoriano de Telecom S.A.*, 685 F.3d 987 (11th Cir. 2012). In light of the fact that this is the first circuit-level decision to address the issue since *Intel*, the question is whether the pre-*Intel* decisions in other circuits retain viability.

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