



## FEDERAL UPDATE

by Matt Frederick and Susan Nassar

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### **Jurisdiction: Removal Pursuant to Federal Officer Removal Statute**

*Price v. Johnson*, No. 09-10389, --- F.3d ---, 2010 WL 850038 (5th Cir. Mar. 11, 2010).

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In an interview with the *Dallas Observer*, Congresswoman Eddie Bernice Johnson allegedly questioned Dallas County Commissioner John Wiley Price's ethics and accused him of "shaking down" land developers. Commissioner Price filed a verified petition under Texas Rule of Civil Procedure 202.1 to take a presuit deposition of Rep. Johnson, who then filed a notice of removal seeking to remove the petition to federal court under the federal officer removal statute, 28 U.S.C. § 1442(a)(1). Commissioner Price filed a motion to remand, which the district court granted on the ground that the presuit deposition proceeding was not a "civil action" subject to removal. Johnson appealed the remand order.

The Fifth Circuit began by noting that remand orders are generally barred from appellate review if based on a ground stated in 28 U.S.C. § 1447(c), *i.e.*, a defect in removal procedure or lack of subject matter jurisdiction. Under Fifth Circuit precedent, appellate jurisdiction does not exist unless the remand order affirmatively and clearly states a ground *not* included in § 1447(c). The district court's order stated that Representative Johnson failed to satisfy the "civil action" requirement of § 1442(a)(1). Because there was no other basis of federal subject matter jurisdiction asserted, the district court's order was clearly grounded in lack of subject matter jurisdiction. Accordingly, the Fifth Circuit found that it lacked appellate jurisdiction and dismissed the appeal.

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### **Judgments: Successive Registration of Judgments**

*Del Prado v. B N Development Co.*, No. 09-10581, --- F.3d ---, 2010 WL 1267170 (5th Cir. Apr. 5, 2010)

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In this case, the Fifth Circuit considered the question of "successive registration"—whether a judgment entered in one federal court and registered in a second federal court may then be re-registered and enforced in a third federal court. The statutory right to register a federal judgment is granted by 28 U.S.C. § 1963, which provides that "[a] judgment so registered shall have the same effect as a judgment of the district court of the district where registered

and may be enforced in like manner." The Fifth Circuit held that a registered judgment, like a rendered judgment, may be registered and enforced in another federal court.

The case arose out of a judgment against Ferdinand Marcos entered in a Hawaiian federal district court in 1995 and affirmed by the Ninth Circuit in 1996. The plaintiff registered the Hawaiian judgment in the Northern District of Illinois in 1997 and in the Northern District of Texas in 2005. When the plaintiff sought to enforce the judgment in Texas, the defendants notified the plaintiff that the Hawaiian judgment had expired under a Hawaiian statute providing a ten-year period for enforcement of judgments. The plaintiff moved successfully for an extension in the District of Hawaii, but the Ninth Circuit later vacated the extension. The plaintiff then registered the Illinois judgment (*i.e.*, the Hawaiian judgment registered in Illinois) in the Northern District of Texas and moved to amend its complaint in that court. The Texas district court denied the motion to amend and granted the defendants' motion to dismiss under Rule 12(b)(6).

On appeal, the plaintiff urged that both the Hawaii and Illinois judgments were valid and enforceable. The Fifth Circuit disagreed with respect to the former. The Ninth Circuit had held that the Hawaiian judgment became final on February 3, 1995. Accordingly, the plaintiff was precluded from relitigating the date the Hawaii judgment became final, and the plaintiff's attempted registration of the judgment on April 8, 2005 was ineffective.

The Fifth Circuit agreed, however, that the Illinois judgment remained valid and eligible for registration. The defendants argued that the Illinois judgment was not eligible for registration under § 1963 because it had not been "entered" pursuant to Rule 58 but, rather, merely registered pursuant to the statute. The court rejected this argument, noting that the judgment had clearly been entered as a judgment on the Northern District of Illinois's docket. Looking to the plain language of § 1963 and cases interpreting the statute, the court concluded that the Illinois registered judgment "had all of the attributes of a judgment rendered by the Northern District of Illinois," which implied that the judgment could be re-registered and enforced in the Northern District of Texas. In short, the Illinois judgment "was equivalent to a new federal judgment." Accordingly, the Fifth Circuit reversed, holding that the district court erred in holding that the judgment was not enforceable and that the court abused its discretion in refusing leave to amend the complaint.

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**Removal: Supplemental Jurisdiction Not Sufficient to Support Removal**

*Halmekangas v. State Farm Fire & Cas. Co.*, No. 09-31060, --- F.3d ---, 2010 WL 1407683 (5th Cir. Apr. 9, 2010).

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The Fifth Circuit considered whether the supplemental jurisdiction statute, 28 U.S.C. § 1367, and the removal statute, 28 U.S.C. § 1441, taken together, confer federal subject matter jurisdiction. With a straightforward analysis, the court concluded that they do not.

The first floor of Stephen Halmekangas's New Orleans home was flooded by Hurricane Katrina. Five days later, he lost the second and third stories as well when a fire burned his house to the ground. When he attempted to recover on his homeowner's policy with insurer ANPAC, he discovered that his agent had only sold him two floors' worth of insurance. ANPAC paid the policy limits on the top two floors. Halmekangas then sued ANPAC and its agent in Louisiana state court, asserting only state-law claims. One month later, he sued his flood insurer in federal court, asserting federal question jurisdiction. ANPAC then removed the state-court case, asserting supplemental jurisdiction under 28 U.S.C. § 1367. Unmoved by the plaintiff's objection that there was no subject-matter jurisdiction over ANPAC's case, the federal court granted summary judgment in favor of ANPAC.

The plaintiff appealed the summary judgment, then moved for dismissal. The Fifth Circuit vacated and remanded to the federal district court, with instructions to remand to state court. It explained that although § 1367 could combine with § 1441 to effect removal of claims outside a federal court's subject matter jurisdiction, § 1367 alone did not provide a sufficient basis for removal. Section 1367 does not grant original jurisdiction, and without a source of original jurisdiction, there was no basis for removal of ANPAC's case. The result would be the same, the court explained, even if the claims pending in federal court could have provided a basis for removal had they originally been joined with the state-court claims. Thus supplemental jurisdiction does not support removal of state-law claims even if claims arising out of a common nucleus of operative fact are already pending in federal court.

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**Full Faith and Credit: Foreign Adoption Decree, State Records**

*Adar v. Smith*, 597 F.3d 697 (5th Cir. 2010).

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In a case of first impression, the Fifth Circuit affirmed a mandatory injunction directing the Louisiana State Registrar to issue a new original birth certificate for a Louisiana-born child adopted in New York by two unmarried men, Oren Adar and Mickey Ray Smith. After obtaining a joint adoption decree in a New York state court, Adar and Smith applied for an amended Louisiana birth certificate listing both men as parents. The Registrar informed them that she was "not able to accept the

New York adoption judgment to create a new birth certificate" because Louisiana does not allow joint adoptions by unmarried couples, the Registrar has complete discretion to issue amended birth certificates for out-of-state adoptions, and she was only authorized to issue amended certificates in accordance with Louisiana law. The Registrar also relied on a Louisiana Attorney General opinion, requested after Adar and Smith's application, stating that Louisiana did not owe full faith and credit to the New York adoption because it violated Louisiana's public policy against adoption by unmarried couples.

Adar and Smith sued the Registrar in her official capacity seeking (1) a declaratory judgment that her refusal to issue an amended birth certificate violated the Full Faith and Credit Clause and the Equal Protection Clause and (2) a mandatory injunction requiring issuance of an amended certificate. The court granted the plaintiffs' motion for summary judgment, holding that Louisiana owed full faith and credit to the New York adoption decree, that the Full Faith and Credit Clause does not contain a public policy exception, and that § 40:76 of Louisiana Revised Statutes required the Registrar to issue an amended birth certificate upon receipt of the New York decree. The district court denied the Registrar's motion for new trial, which raised a standing defense and requested certification of the statutory question to the Louisiana Supreme Court.

The Fifth Circuit held that the plaintiffs had standing because (1) they alleged that Louisiana law required the Registrar to issue a birth certificate, and (2) they alleged that her refusal to do so had caused them injury, namely problems securing health insurance for the child and "problems encountered with airline personnel who suspected that [Adar and Smith] were kidnappers."

Turning to the full faith and credit issue, the court began by noting that "there is virtually universal acknowledgment that Louisiana owes full faith and credit to the New York adoption decree and *must* recognize that [Adar and Smith] are [the child's] legal parents." It rejected the Registrar's first argument—that the "preclusive effects of an out-of-state judgment do not compel another State to alter its public records"—on the ground that it failed to recognize the distinction between the voluntary restraint of *res judicata* principles and the constitutional command of the Full Faith and Credit Clause. The Registrar argued next that the New York adoption decree was not entitled to full faith and credit because, to the extent it incorporated the New York adoption statute, it was nothing more than an attempt to substitute New York law for Louisiana law. The court rejected this argument, noting that it would "swallow the Clause's curb on the states" by permitting a state to ignore any judgment incorporating a foreign state's statutory public policy. The court rejected the Registrar's third argument—that adoption decrees are fundamentally different kinds of judgments not entitled to full faith and credit—on the basis of precedent establishing that adoption decrees and other domestic-law judgments are entitled to full faith and credit. As for the Registrar's assertion that enforcing the New York adoption decree would violate Louisiana public policy, the court responded that Louisiana's public policy was irrelevant because there is no "roving public policy exception" to the Full Faith and Credit Clause.

Although the Louisiana statute<sup>1</sup> had not been interpreted by any court, the Fifth Circuit declined the Registrar's request for certification to the Louisiana Supreme Court on the ground that the statute was clear and unambiguous. The Registrar argued that the statute's use of the word "may" gave her complete, unreviewable discretion to issue or not to issue a certificate. The Fifth Circuit disagreed, explaining that the Registrar's interpretation would provide neither standards for the exercise of discretion nor procedural safeguards, thus rendering the statute an unconstitutional delegation of legislative authority under Louisiana law. Next, the Registrar maintained that the term "adoptive parents" could not be interpreted to include an unmarried homosexual couple because Louisiana statutes authorized joint adoption by married couples only and "limit[ed] state recognition to married heterosexual persons only." Focusing on the statute's plain language, the court found no ambiguity in the phrase "adoptive parents," which means simply "a father or mother who adopts a child." Because each adoptive father was an adoptive parent under the New York adoption decree, they were "adoptive parents" under the Louisiana statute.

Because the Full Faith and Credit Clause required Louisiana to give effect to the New York adoption decree, because the plaintiffs were "adoptive parents" under the Louisiana statutes, and because the Louisiana statutes did not give the Registrar discretion to deny a new birth certificate, the court affirmed the district court's grant of a mandatory injunction.

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**Jurisdiction: A corporation's principal place of business, for diversity jurisdiction purposes, is its "nerve center."**

*Hertz Corp. v. Friend*, 130 S.Ct. 1181 (2010).

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This potential class action involved an appeal from a remand order out of the Ninth Circuit. The case was originally filed in California state court and removed to federal court by Hertz Corporation ("Hertz") based on diversity. Hertz claimed that diversity of citizenship existed because it and the plaintiffs were citizens of different states. The plaintiff, on the other hand, claimed that Hertz was a California citizen, like themselves, and that diversity jurisdiction was lacking under § 1332(c)(1), which provides that "a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business." To show that its "principal place of business"

<sup>1</sup> The statute provided, in relevant part:

A. When a person born in Louisiana is adopted in a court of proper jurisdiction in any other state or territory of the United states, the state registrar may create a new record of birth in the archives upon presentation of a properly certified copy of the final decree of adoption . . . .

...  
C. Upon receipt of the certified copy of the decree, the state registrar shall make a new record in its archives . . . .

LA. REV. STAT. ANN. § 40:76.

was in New Jersey rather than California, Hertz submitted a declaration, stating that it operated facilities in 44 states, that California accounted for only a portion of its business activity, and that its corporate headquarters was in New Jersey, the place where its core executive and administrative functions primarily occurred. Based on Ninth Circuit precedent, the district court concluded Hertz was a California citizen and that it lacked diversity jurisdiction.

Like many jurisdictions, the Ninth Circuit previously applied a "business activities" or "place of operations" test to determine a corporation's principal place of business. Under that test, Ninth Circuit courts determined whether the amount of the corporation's business activity was "significantly larger" or "substantially predominated" in one state. Alternatively, if no state contained a substantial predominance of the corporation's business activities, courts in the Ninth Circuit applied the "nerve center" test to locate a corporation's principal place of business in the state where the majority of its executive and administrative functions were performed. Under the former test, the district court determined that Hertz's "principal place of business" was California because a plurality of the corporation's relevant business activity occurred there. The Ninth Circuit agreed with the district court and affirmed. Hertz appealed to the United States Supreme Court.

The Supreme Court rejected the business activities test and abrogated prior opinions in which the Ninth Circuit and other federal courts had taken a "business activities" approach to determine a corporation's "principal place of business" for diversity purposes. The Court noted that the "business activities" test was unusually difficult to apply because a corporation's business activities rarely occurred in one location. The approach therefore resulted in divergent and increasingly complex interpretations by the Courts of Appeal. In order to create a single, more uniform interpretation of the statutory phrase "principal place of business," the Court held that a corporation's principal place of business for diversity jurisdiction purposes is its "nerve center." Although some jurisdictions already applied the "nerve center" test, the Court noted that the test as applied by many circuits did "not go far enough." Under the "nerve center" test adopted by the Court, a corporation's principal place of business or "nerve center" is now defined as "the place where a corporation's officers direct, control, and coordinate the corporation's activities," which is normally where a corporation maintains its headquarters. Based on this holding, the Ninth Circuit's judgment was vacated and the case was remanded for further proceedings consistent with the Court's opinion.

In the wake of the *Hertz* decision, Texas practitioners should be careful in citing precedent related to corporate citizenship. For example, Judge Werlein recently noted that *Hertz* had abrogated the "total activity" test applied by the Fifth Circuit in *J.A. Olson Co. v. City of Winona, Miss.*, 818 F.2d 401, 414 (5th Cir. 1987). See *Astra Oil Trading NV v. Petrobras Am. Inc.*, No. H-09-1274, 2010 WL 918438, at \*5 (S.D. Tex. March 10, 2010).

