Christopher Jackson

Partner
303.295.8305
Denver
cmjackson@hollandhart.com

Jessica Smith

Partner
303.295.8374
Denver
jjsmith@hollandhart.com

Tenth Circuit Clarifies an Ambiguity in the Final Judgment Rule

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In 'Adams v. C3 Pipeline Construction', the court clarified the scope of its appellate jurisdiction in cases where the district court fails to enter judgment as to a named but unserved party.

This month, the Tenth Circuit took up an often overlooked but critical issue on the scope of its jurisdiction: When a district court enters judgment as to all served parties but doesn't enter a judgment as to at least one *unserved* party, is there a final judgment to appeal? The court held that the question of a judgment's finality turns on the "substance and objective intent" of the district court's order. In doing so, the Tenth Circuit widened an already existing circuit split on the question.

Case Background

In *Adams*, plaintiff-appellant Jessica Adams worked for C3 Pipeline Construction, which provided construction and maintenance services pursuant to a contract it had with Alpha Crude Connector. *Adams v. C3 Pipeline Constr.*, No. 20-2055, 2021 U.S. App. LEXIS 32578, at *1-2 (10th Cir. Nov. 2, 2021). Adams filed a lawsuit against C3 and Alpha Crude's successors in interest, claiming that three C3 workers sexually harassed her and that both C3 and Alpha Crude's successors were liable for that conduct. Id. The successors-in-interest, which the court dubbed the "Plains Defendants," filed both an answer and a motion for summary judgment, arguing that the C3-Alpha Crude contract definitively proved that Alpha Crude did not "employ" the C3 workers who allegedly harassed Adams. Id.

The district court granted summary judgment as to the Plains Defendants after determining that no reasonable jury could conclude that Alpha Crude employed any C3 worker. Id. at *2. The same day that the district court ruled on the summary judgment motion, it issued an order commanding Adams to serve a summons and complaint on C3 (which had not yet been served) or face a dismissal without prejudice. Id. Adams served C3, and when C3 failed to answer the complaint, Adams secured a default judgment against the company for $20,050,000. Id. Within 30 days of the default judgment—but months after the district court granted the Plains Defendants' summary judgment motion—Adams filed a notice of appeal to challenge the district court's summary judgment order. Id.

On appeal, the Plains Defendants argued that the Tenth Circuit lacked jurisdiction because Adams's appeal was untimely—long past the 30-day

period after the district court granted summary judgment. Id. Adams responded by contending that the summary judgment order wasn't a final and appealable order because her claims against C3 were still unresolved. Id. Thus the Tenth Circuit was called on to decide the impact that C3's status as a named but unserved defendant had on the court's appellate jurisdiction.

The Tenth Circuit's Decision

In a published opinion, the appellate court sided with Adams, holding that the order granting summary judgment to the Plains Defendants wasn't a final judgment.

The court began by reciting the general rule about appellate jurisdiction: "'In general, federal circuit courts have jurisdiction to review only 'final decisions' of district courts.'" Id. at *15 (quoting *New Mexico v. Trujillo*, 813 F.3d 1308, 1316 (10th Cir. 2016)). Unless a court certifies a judgment under Rule 54(b), "'[a] final judgment must dispose of all claims by all parties … .'" Id. (quoting *Trujillo*, 813 F.3d at 1316). Turning to the question of the import of a named but unserved party, the court reviewed two of its previous decisions and a recent opinion from the D.C. Circuit.

In *Bristol v. Fibreboard Corporation*, the district court granted summary judgment as to some but not all of the defendants, and two of those remaining defendants were never served. 789 F.2d 846, 847 (10th Cir. 1986). There the court held that "[t]he fact that [the two defendants] were not considered in the order or judgment does not prevent the decision of the district court from being final," and because they "were never made parties to this lawsuit," the district court didn't need "to enter an order dismissing them prior to its entry of the order and judgment." Id. Next, in *Moya v. Schollenbarger*, the Tenth Circuit noted that "we have long recognized that the requirement of finality imposed by section 1291 is to be given a practical rather than a technical construction" and that as a result, "we look to the substance and objective intent of the district court's order, not just its terminology." 465 F.3d 444, 449 (10th Cir. 2006). And finally, in *Kaplan v. Central Bank of the Islamic Republic of Iran*, the D.C. Circuit held that "when a district court makes plain that it foresees further proceedings on unresolved claims against defendants who have yet to be properly served, a decision resolving all the claims against the properly served defendants is not a final, appealable judgment." 896 F.3d 501, 507 (D.C. Cir. 2018). From these three cases, the *Adams* court drew three conclusions: (1) per *Bristol*, the mere failure to consider an unserved defendant does not necessarily prevent a district court's order form being final; (2) per *Moya*, whether an order is a final judgment depends on its "*substance and objective intent*" of the district court; and (3) per *Kaplan*, no final judgment exists if the district court "makes clear" that it expects further proceedings. *Adams*, 2021 U.S. App. LEXIS 32578, at *18.

Applying those principles to the case at hand, the *Adams* court held that the district court's summary judgment order wasn't a final judgment. Because the district court entered an order requiring Adams to serve C3 and thereby contemplated further proceedings in the case, the summary judgment order wasn't final. Id. at *20. (At the same time, this holding didn't

get Adams very far: the court went on to affirm the district court's summary judgment order on the merits. Id. at *60-61.)

Though only briefly touched on in a footnote, id. at *19 n.4, the *Adams* decision further deepened an already-existing circuit split. Several circuits courts—including the Third and Fifth, and arguably the Second and Seventh—have adopted a bright line rule that an unserved, non-appearing defendant cannot prevent a judgment from being final. See *De Tore v. Jersey City Pub. Employees Union*, 615 F.2d 980, 982 n.2 (3d Cir. 1980) ("Although the district court has not entered an order dismissing these defendants, its orders concerning the other defendants are final and appealable because the unserved defendants never were made parties to this suit."); *Fed. Sav. & Loan Ins. v. Tullos-Pierremont*, 894 F.2d 1469, 1473 (5th Cir. 1990) ("We conclude that under *Nagle*, which we are bound to follow, the unserved status of a defendant (who has not answered or otherwise appeared) is controlling for purposes of finality and we will not look behind this status to review the prospects for future adjudication involving the unserved defendant."); *Charles v. Atkinson*, 826 F.3d 841, 843 (5th Cir. 2016) ("[T]he failure to dispose of unserved, nonappearing defendants does not prevent a judgment from being final and appealable.") (quotation omitted); *Sampson v. Village Discount Outlet*, No. 93-3296, 1994 U.S. App. LEXIS 35598, at *4 (7th Cir. Dec. 16, 1994) ("We now follow the majority of circuits that have considered this issue and hold that an order disposing of all claims except those claims against unserved defendants constitutes a final order under 28 U.S.C. §1291 … ."); *Leonhard v. United States*, 633 F.2d 599, 608–09 (2d Cir. 1980) ("When, however, the action is dismissed as to all defendants who have been served and only unserved defendants 'remain,' the circumstances are materially different. Now there is no reason for Rule 54(b) to preclude the immediate and automatic entry of a final judgment … ."). In contrast, the Eighth—and now the Tenth—Circuits have taken a different approach. *Adams*, 2021 U.S. App. LEXIS 32578, at *18; *Haley v. Simmons*, 529 F.2d 78, 79 (8th Cir. 1976) ("Since no dismissal as to the improperly served defendant-appellees appears in the record, we must assume that the district court retained jurisdiction for purposes of allowing further attempts to serve process. Accordingly, the rights and liabilities of all of the parties to the action have not yet been resolved.").

The Concurring Opinion

While all three judges on the *Adams* panel agreed in the ultimate disposition of the appeal, one judge parted ways on the reasoning. Judge Eid concurred in part and wrote separately to voice her concerns about how the majority interpreted *Bristol*, *Moya*, and *Kaplan*. In Judge Eid's view, the Tenth Circuit's *Bristol* decision laid out a clear rule, "that when a district court decision leaves claims unadjudicated that only relate to unserved, nonparty defendants, the judgment is final as to the served, party defendants." *Adams*, 2021 U.S. App. LEXIS 32578, at *61 (citation omitted). "And while there is an exception to *Bristol's* general rule that determines this case"—namely, the *Kaplan* rule, where the lower court's order "makes plain" that there will be additional proceedings related to those unserved defendants—Judge Eid "disagree[d] with how the majority converts this limited exception into a general guide … ." Id. at *62. Put

another way, Judge Eid was concerned that “the majority's approach throws uncertainty into finality—an issue that calls out for certainty … .” Id.

While the majority's and concurrence's approach may not seem all that different, Judge Eid addressed the potential problem she sees with the majority rule. In her view, “a district court may demonstrate that it contemplates further proceedings at any time before the thirty-day deadline to appeal the otherwise presumptively final judgment elapses,” and in that way, “*Bristol* creates a presumption that is rebuttable for a limited time.” Id. at *71. The majority rule, by contrast, only looks to the “substance and objective intent” of the purportedly final order. But what happens, Judge Eid asks, if the district court makes clear that it contemplates additional proceedings in an order issued “the next day, or a week later, or three weeks later?” Id. Because the majority rule “focuses only on the order being appealed from,” it cannot adequately address situations where the district court's intent is expressed at a later date. Id. To avoid continuing uncertainty over when and how a judgment becomes final, Judge Eid would adopt the bright line rule suggested by *Bristol* and carve out a specific, limited exception as articulated by *Kaplan*.

Conclusion

The *Adams* court's decision further deepened a circuit split and adopted a rule that arguably makes it more difficult for district courts and parties to know when a final, appealable judgment has been entered. But until the Supreme Court steps in to resolve this issue, district courts in the circuit will continue to apply the functional test articulated by the *Adams* decision.

Christopher Jackson and Jessica Smith are attorneys at Holland & Hart, specializing in complex commercial litigation. Chris is an experienced appellate advocate with a strong background in complex civil trials and state government investigations. Jessica leads the firm's religious institutions and First Amendment practice and handles a wide range of state and federal appeals.

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