U.S. Department of Justice

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January 25, 2013

United States Court of Appeals
for the Fifth Circuit
600 S. Maestri Place
New Orleans, LA 70130

Re: *USA* v. *State of Louisiana, et al.*, No. 12-90075

The United States files this letter pursuant to the Court's January 22, 2013, order directing the parties to address whether the district court order complained of can be appealed while a motion to reconsider the order is pending in the district court. It cannot, because this Court lacks jurisdiction to consider the non-appealable order in the first instance.

As indicated in the United States' January 7, 2013, motion to dismiss, the district court entered a discovery order on October 26, 2012. R. 145. State defendants then filed a joint motion for reconsideration or stay on December 13, 2012, ostensibly pursuant to Federal Rule of Civil Procedure 60(b), although the exact basis for relief was not identified.[1] R. 147. If a motion for relief from an order pursuant to Rule 60 is filed within 28 days after entry of the order, the time for filing a notice of appeal in the district court is tolled pending the entry of the order disposing of the motion and any appeal of that order would be premature. Fed. R. App. P. 4(a)(4)(A). When a motion is filed more than 28 days after the order appealed from, such as defendants' motion here, the motion is considered untimely and does *not* toll the time for filing a notice of appeal from the challenged order. Fed. R. App. P. 4(a)(4)(A); *Hamilton Plaintiffs* v. *Williams Plaintiffs*, 147 F.3d 367, 371 n.10 (5th Cir. 1998). If a defendant intends to appeal the original order after having filed an untimely Rule 60 motion, a defendant must file a notice of appeal in the district court within 60 days of the district court's order. Fed. R. App. P. 4(a)(1)(B)(i). Generally, when a defendant perfects an appeal within the time limit set forth in Rule 4, and where this Court has jurisdiction to consider the appeal, an untimely motion for relief filed in the district court would not divest this court of jurisdiction to consider the appeal. See *Winchester* v. *United States Attorney*, 68 F.3d 947, 950 (5th Cir. 1995) ("[A] perfected appeal divests the district court of jurisdiction."). The district court may retain power to *deny* a Rule 60 motion; if the district court is inclined to grant the motion, however, the appealing party must obtain leave of this Court to do so. Cf. *Travelers Ins. Co.* v. *Liljeberg Enters.*, 38 F.3d 1404, 1407 n.3 (5th Cir. 1994) (describing scope of district court's powers where Rule 60 motion is filed after a notice of appeal). In this case, *if* defendants had perfected an appeal from an *appealable* order, the untimely Rule 60 motion would *not* divest this Court of jurisdiction to

[1] A motion to alter or amend a judgment made pursuant to Rule 59(e) must be filed within 28 days after entry of judgment. Fed. R. Civ. P. 59(e).

consider the appeal. *Winchester*, 68 F.3d at 950. Defendants however, have *not* perfected an appeal, do *not* appeal from an appealable order, and have *not* satisfied the requirements for a permissive appeal. Thus, regardless of the pending motion for reconsideration in the district court, this Court lacks jurisdiction to consider defendants' appeal.

Defendants asserted in their petitions for permission to appeal that this Court had jurisdiction to consider their appeal under 28 U.S.C. 1291 through the collateral order doctrine established in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). This is incorrect, as the discovery order at issue here is not appealable under the *Cohen* doctrine. This Court's appellate jurisdiction is ordinarily limited to "final decisions of the district courts." 28 U.S.C. 1291. Included as final decisions are a "small class" of rulings deemed "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred." *Cohen*, 337 U.S. at 546. But "[t]he universe of orders from which collateral order review may be taken is relatively limited." *Martin* v. *Halliburton*, 618 F.3d 476, 482 (5th Cir. 2010). This Court recognizes very few (*e.g.*, denials of certain types of immunity; claims of double jeopardy; and the denial of an invocation of an anti-SLAPP statute). *Id.* at 482-483 n.10 & 11. Moreover, this Court has held that discovery orders are not generally appealable because they "do not constitute final decisions under Section 1291," and "are not appealable under the *Cohen* collateral order doctrine."[2] *Wiwa* v. *Royal Dutch Petroleum Co.*, 392 F.3d 812, 815 (5th Cir. 2004); see also *Church of Scientology* v. *United States*, 506 U.S. 9, 18 n.11 (1992); see also *A-Mark Auction Galleries* v. *American Numismatic Ass'n*, 233 F.3d 895, 899 (5th Cir. 2000) ("We start from the well-settled rule in this circuit that discovery orders may not be appealed under the *Cohen* exception.").

The reason for the general rule denying immediate appeals of discovery orders is simple: discovery orders, like the one here, are not beyond the scope of this court's review. *Goodman* v. *Harris Cnty.*, 443 F.3d 464, 468-469 (5th Cir. 2006) (dismissing appeal of discovery order for lack of jurisdiction where claimant could (1) move district court to limit disclosure and (2) seek review of any adverse judgment). "Courts have long recognized that a party sufficiently exercised over a discovery order may resist that order, be cited for contempt, and then challenge the propriety of the discovery order in the course of appealing the contempt citation."[3] *A-Mark*, 233 F.3d at 899 (quoting *MDK, Inc.* v. *Mike's Train House, Inc.*, 27 F.3d 116, 121 (4th Cir. 1994)). In fact, the Supreme Court recently held that a pre-trial discovery order implicating the attorney-client privilege was not appealable under the *Cohen* doctrine. *Mohawk Indus., Inc.* v.

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[2] This Court has asserted jurisdiction over the denial of a discovery order directed to a non-party to an underlying lawsuit pending in another circuit. *In re Rubin*, 679 F.2d 29 (5th Cir. 1982); *Wiwa*, *supra*.

[3] A few exceptions exist, although none is applicable here. "[A] discovery order directed at a disinterested third party is treated as an immediately appealable final order because the third party presumably lacks a sufficient stake in the proceeding to risk contempt by refusing compliance." *Church of Scientology*, 506 U.S. at 18 n.11 (citing *Perlman* v. *United States*, 247 U.S. 7 (1918)). The Supreme Court has also identified an exception to pre-contempt appeals by the President of the United States to avoid unnecessary constitutional confrontations between two coordinate branches of government. *United States* v. *Nixon*, 418 U.S. 683 (1974).

Carpenter, 130 S. Ct. 599, 603 (2009). The Court reasoned that post-judgment appeals, requests to certify an interlocutory appeal pursuant to 28 U.S.C. 1292(b), petitions for writs of mandamus, and challenges to contempt orders are sufficient to remedy errors and protect litigants' rights. *Id.* at 607-608. And recognizing that discovery orders may have implications beyond the case at hand, as defendants claim here, the Supreme Court explained that "protective orders," like the ones operating and available in this case, "are available to limit the spillover effects of disclosing sensitive information." *Id.* at 608.

Because the discovery order defendants have challenged is not a final, appealable order under 28 U.S.C. 1291, this Court does not have jurisdiction over the appeal *even if*, as defendants urge, this Court considers their petitions for permission to appeal as notices of appeal erroneously filed in the Court of Appeals. See Fed. R. App. P. 4(d).

Finally, this Court lacks jurisdiction to consider defendants' challenge to the discovery order under any subsection of Section 1292, regardless of the pending motion to reconsider. Section 1292(a) grants this court jurisdiction over certain identified, interlocutory appeals not at issue here. "Prospective appellants who seek to appeal interlocutory orders that do not qualify under [Section] 1292(a) are ordinarily limited to the certification procedure of [Section] 1292(b)."[4] *Martin*, 618 F.3d at 481. Where, as here, those procedures are not followed, this Court lacks jurisdiction. *Ibid.* Section 1292(e) permits appeals only where the Supreme Court has "prescribe[d] rules, in accordance with [28 U.S.C. 2072], to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided." 28 U.S.C. 1292(e). When the Supreme Court prescribes general rules of practice, procedure, and evidence, it must follow 28 U.S.C. 2073 and 2074. Because the Court has not done so to permit appeals of discovery orders, defendants' appeal is not authorized under Section 1292(e).

In sum, the order challenged is a non-appealable, discovery order. Even if this Court considers the petitions for permission to appeal as timely-filed notices of appeal, this Court lacks jurisdiction to consider the appeal under 28 U.S.C. 1291. Moreover, this Court lacks jurisdiction to consider the appeal under 28 U.S.C. 1292. For these reasons, this Court lacks jurisdiction to consider the appeal, regardless of the motion for reconsideration pending in the district court.

Respectfully submitted,

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[4] Appeals brought pursuant to 28 U.S.C. 1292(c) and (d) are not applicable here.

CERTIFICATE OF SERVICE

I hereby certify that on January 25, 2013, I electronically filed the foregoing letter brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

I certify that participants in this case who are registered CM/ECF users will receive service by the appellate CM/ECF system.

I further certify that counsel listed below will be served by first class U.S. mail, postage prepaid:

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