Federal Rule of Civil Procedure 42(a) Consolidation, Appellate Finality, and *Hall v. Hall*

Prepared for the Judicial Conference Advisory Committees on Appellate and Civil Rules

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Executive Summary

A joint subcommittee of the Judicial Conference Advisory Committees on Appellate and Civil Rules requested a study on potential problems arising from the Supreme Court's 2018 decision in *Hall v. Hall*.[1] *Hall* held that consolidation of civil cases pursuant to Fed. R. Civ. P. 42(a) does not alter the independent nature of the actions for purposes of appellate finality. Under *Hall*, a case in a consolidation may become immediately appealable even when other cases in the consolidation remain pending in district court. The study examines the incidence of consolidated cases in the district courts with a focus on how often "original action final judgments" (OAFJs) create scenarios in which litigants may lose their appeal rights because of confusion about when to file a notice of appeal.

Two separate phases of the study were conducted. The first phase searched the dockets of all civil filings in 2015–2017 for Rule 42 consolidations to identify potential OAFJs. The key findings of the first phase:

- Rule 42 consolidation was ordered in 2.5% of civil case filings during the study period.
- OAFJs potentially raising *Hall* concerns occurred in about 2% of sampled consolidations.
- In none of the OAFJs examined did a litigant file an untimely appeal.

The second phase searched the dockets of civil filings in which an appeal was filed in 2019–2020 to identify additional potential OAFJs. It found:

- 3.5% of civil cases appealed in 2019–20 had been consolidated pursuant to Rule 42(a) in the district court.
- That estimate of 3.5% should be interpreted as a kind of upper bound, as it excludes criminal appeals and multiple appeals from a single district-court case.
- OAFJs occurred in about 6% of sampled consolidated cases identified in the appellate search.
- There was some confusion about timeliness of the notice of appeal in two cases in the sample, although neither instance unambiguously presents a *Hall* problem.

Practical problems related to confusion over when to file a notice of appeal are difficult to identify empirically, as they occur only when two relatively rare events to arise in the same case—a Rule 42(a) consolidation followed by an OAFJ—as well as the filing of an appeal (which is also relatively rare in civil cases). Neither phase of the research provides support for the view that the *Hall* immediate-appeals rule has resulted in widespread losses of appeal rights

1. Hall v. Hall, -- U.S. --, 138 Sup. Ct. 1118 (2018).

Background

In *Hall v. Hall*,[2] the Supreme Court held that consolidation of cases in district court pursuant to Fed. R. Civ. P. 42(a) does not affect the cases' independent nature for purposes of the final judgment rule regarding the timing of appeals. Regardless of what claims remain in other cases in the consolidation, any judgment in the district court wholly terminating one of the consolidated cases is final and appealable in that case.[3] Professor Bryan Lammon has described this as the "immediate-appeals rule."[4] Prior to the Court's *Hall* decision, the immediate-appeals rule governed the timing for filing of appeals in only the First and Sixth Circuits.[5] The other circuits followed a variety of approaches to appellate finality in consolidated cases, including the "deferred-appeals rule," the opposite of the immediate-appeals rule: a judgment in a consolidated case was not appealable until all cases in the consolidation were resolved in the district court (without a Rule 54(b) certification by the district court).[6]

The effect of the immediate-appeals rule is that any "original action final judgment" (OAFJ) in a Rule 42(a) consolidation starts the clock for the filing of a timely notice of appeal, no matter how long the remaining cases in the consolidated action take to resolve. In some instances, then, *Hall* could result in litigants losing their opportunity to appeal because of confusion over when to file a notice of appeal. The Court's unanimous opinion states that any potential difficulties arising from the decision should be taken up by the rulemaking committees: "If . . . our holding in this case were to give rise to practical problems for district courts and litigants, the appropriate Federal Rules Advisory Committees would certainly remain free to take the matter up and recommend revisions accordingly."[7]

A joint subcommittee of the Advisory Committee on Civil Rules and the Advisory Committee on Appellate Rules requested this Federal Judicial Center study to inform its *Hall v. Hall* discussions.[8] The study's goal was to identify examples of OAFJs and to estimate the incidence of any *Hall v. Hall* problems in practice. For purposes of this study, an OAFJ is defined in terms of the immediate-appeals rule. An OAFJ occurs when a court order effectively resolves all claims raised in a civil action consolidated with one or more other civil actions pursuant to Rule 42(a), prior to resolution of all claims raised in all the consolidated cases. Such an order likely represents a final, appealable judgment in the original action and may create a situation in which an unwary litigant loses the right to appeal by waiting to file the notice of appeal until the resolution of the entire consolidation.

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2. Hall v. Hall, -- U.S. --, 138 Sup. Ct. 1118 (2018).

3. In the typical civil case involving private parties, the notice of appeal must be filed within 30 days after entry of the judgment. Fed. R. App. P. 4(a)(1).

4. Bryan Lammon, *Hall v. Hall*: A Lose-Lose Case for Appellate Jurisdiction, 68 Emory L.J. Online 1001, 1004 (2018–2019).

5. *See id*. n.16 (citing 1st and 6th Circuit cases).

6. *See id*. n.17 (citing 9th and 10th Circuit cases).

7. *Hall*, 138 Sup. Ct. at 1131.

8. My Center colleagues George Cort, Tim Lau, and Jason Cantone provided invaluable assistance in conducting this research. The study design also benefited from input from members of the subcommittee and, especially, the reporters.

First Phase

Identifying Rule 42 Consolidations

To study the potential impact of *Hall* on consolidated civil actions, it was first necessary to identify the universe of consolidated civil actions. At the outset of this study, little was known about the incidence of Rule 42(a) consolidation in the district courts. The federal judiciary does not collect or report data about Rule 42(a) consolidations in a systematic fashion. For this reason, computerized searches of district court dockets were conducted for terms related to Rule 42(a) consolidations and for case events and subtypes related to consolidation. The results of these two searches were collated and then manually, and painstakingly, reviewed to identify cases in which a Rule 42(a) consolidation was ordered. This process excluded cases that were subject to multidistrict litigation consolidations, which are consolidated pursuant to 28 U.S.C. § 1407 instead of Rule 42(a). Multidistrict consolidation is related but legally distinct from Rule 42(a) consolidation, as it is governed by an earlier finality decision of the Supreme Court.[9]

This phase of the study included civil cases filed in 2015–2017 in all 94 districts. One caveat: not all cases in these filing cohorts had terminated in the district court at the time of the computerized searches in 2019–2020, so some of the cases filed in this period may have been consolidated at some point after the computerized searches were conducted. This affects not only the study's estimates of the numbers of consolidated cases but also its findings on disposition types and times.

For the search period, 20,730 civil cases were classified as part of Rule 42 consolidations (including lead and member cases). This estimate includes member cases filed in 2015–2017 consolidated with an earlier-filed or later-filed lead case. In terms of the incidence of consolidated cases, the estimate translates to 2.5% of civil filings having been part of a Rule 42(a) consolidation. This percentage was calculated using the overall figures from Table C-3, "U.S. District Courts—Civil Cases Commenced," for years ending December 31, 2015–2017, as the denominator.[10] For those three years there were 843,996 civil filings total.

For purposes of this phase of the study, each consolidation was assigned a lead case, which is typically the case assigned as lead by the court or the first-filed case; the number of consolidations is equal to the number of lead cases. The research identified 5,953 lead cases (and consolidations) in the 2015–2017 study period.

Basic Information on Consolidated Cases

Districts with the largest numbers of Rule 42(a) consolidations: In general, the number of consolidations in a district is largely a function of the district's civil caseload. The 20 districts with the largest number of consolidations (accounting for 62% of all consolidations) in the study period are: Texas Eastern, New Jersey, California Central, New York Southern, Texas Southern, New York Eastern, Illinois Northern, Louisiana Eastern, Pennsylvania Eastern, Texas Northern, Cali-

9. *See* Gelboim v. Bank of Am. Corp., 574 U.S. 405 (2015).

10. The data tables used may be retrieved at https://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables using the search function (Table C-3, reporting period terminating December 31).

fornia Northern, Maryland, Florida Southern, Delaware, Texas Western, Nevada, Florida Middle, Massachusetts, Georgia Northern, and Washington Western. The two districts at the top of the list, Texas Eastern and New Jersey, have large numbers of consolidated patent actions, which explains their prominence on the list.

Case types: Ten nature-of-suit codes accounted for more than half (58%) of all consolidated lead cases: patent, 13%; civil rights (other), 7%; other contract actions, 6%; prisoner civil rights, 6%; securities, 6%; bankruptcy appeals, 6%; motor vehicle personal injury, 4%; habeas corpus, 4%; insurance, 4%; and consumer credit, 3%.

Some of these nature-of-suit codes are among the most common for all filings. For example, the civil rights (other) code encompasses 28 U.S.C. § 1983 actions alleging violations of federal rights under color of state law, one of the most common types of federal cases (7% of consolidations versus 5% of all cases). But, clearly, patent cases are much more common among consolidated cases than among civil cases in general (13% of consolidations versus less than 2% of all civil cases).

Disposition of lead cases: 84% of lead cases had terminated in the district court as of the time of the analysis. About a third of terminated lead consolidated cases were coded as having settled in the district court (32%). The next most common disposition types were other dismissal, 22%, dismissed on motion, 13%, and voluntary dismissal, 10%. Other and voluntary dismissals are often really settlements; the three dispositions added together account for 64% of dispositions. Unsurprisingly, trial dispositions (jury and bench trials) accounted for only 2% of lead case dispositions.

Disposition times: For lead cases only, the average time from filing to termination in the district court was 517 days (17 months). Give that about one lead case in six was still pending as of the search date, however, the average disposition times are probably longer than this estimate. For all consolidated cases, the average time from filing to termination was considerably shorter, 379 days (12.5 months). The shorter time for member cases reflects the common district-court practice of closing the docket of member cases at the time of consolidation.

Incidence of OAFJs Among a Sample of Rule 42 Consolidations

This universe of 5,953 consolidations (consisting of 20,730 lead and member cases) was then used as the sampling frame for the next part of the analysis. The sample was initially 400 consolidations, randomly selected from a three-year termination cohort of lead consolidated cases, terminated October 1, 2016–September 30, 2019. The sample includes 12% of the consolidations terminating during this period. The *Hall* decision falls almost in the exact middle of that period, so there are roughly 18 months of case filings pre-*Hall* and 18 months of case filings post-*Hall*. A small number of sampled cases were excluded from the analysis because they were not, in fact, consolidations or because the lead case in the consolidation was still pending in district court (most of the loss of cases). That left 385 consolidations for analysis.

Table 1 shows the purpose of the consolidations, the average number of actions consolidated, average times from filing of the lead case to entry of the first order for consolidation (few consoli-

dations have more than one such order), and average disposition times of the lead cases in the consolidations.

Table 1: Summary statistics for the sample of Rule 42 consolidations

Purpose of consolidation	N	Percentage of sampled consolidations	Average number of actions	Mean from filing to consolidation order (days)	Mean disposition time (days)
All purposes	107	28%	2.7	200.5	609.8
Discovery only	22	6%	2.5	230.2	692.9
Pretrial generally	66	17%	4.8	153.5	498.5
Trial only	2	1%	2.0	492.5	792.5
Very limited purposes	3	1%	2.3	536.3	835.3
Unclear from order	185	48%	2.2	214.6	584.9
All	**385**	**100%**	**2.8**	**205.0**	**586.2**

It appears to be relatively common for courts to order consolidation of cases without stating the purposes (or scope) of the consolidation in the order. Almost half of the consolidation orders in the sampled cases did not clearly indicate the purposes of the consolidation but simply ordered "consolidation." Rule 42(a)(2) authorizes district courts to "consolidate the actions," and that is how many of these orders were worded. When the order simply granted the motion, the motion was checked to clarify the purpose of the consolidation. But the motions were also not specific in many cases. These ambiguous instances may best be considered consolidations "for all purposes," especially when the court orders the member case closed (another common practice).

The average number of actions included in a consolidation was 2.8. The modal number of actions included in a consolidation was two, observed in 75% of consolidations. The observed increase in the average number of actions in a consolidation for "pretrial generally" (4.8) is because this is the standard language used in Texas Eastern patent actions, which account for a relatively large chunk of that row in the table.

On average, the lead case was consolidated with one (or more) member case(s) about 205 days (6.7 months) after its filing date. The average disposition time for a lead case in a sampled consolidated action was 586.2 days (19.3 months). The estimate from the sampled cases is longer, by about two months (about 13% longer), than the average disposition time for all identified, terminated consolidated lead cases (17 months).

Dispositions of lead consolidated cases. Table 2 summarizes the ultimate disposition of lead cases in the consolidations. About 20% of lead cases are resolved by dispositive motion or trial; the rest are resolved primarily by settlement. The settlement rate is 48%; if one includes the voluntary dismissals as likely settlements, then the settlement rate is about 67%. Settlements here includes class settlements and Fair Labor Standards Act collective settlements. The "other" category includes orders affirming the bankruptcy court, remands to state court, and interdistrict transfers.

If one were to compare these results to the disposition types reported for all lead consolidated cases identified by the searches, settlements were still the most common disposition type, followed by voluntary dismissals, which often are, in fact, private settlements in which settlement is not reported to the court. The estimated settlement rate, combining the two, would be almost 70%. Dispositions by motion (Rule 12 or summary judgment) accounted for 17% of the sampled lead case dispositions, which is similar to the 13% rate for all identified lead cases. Trials accounted for 3% of dispositions in the sample. Note that, in general, the manual classification process yields better information on case disposition types than the categories reported by the courts. The courts' use of catch-all "other" disposition codes, in particular, creates interpretative uncertainty when using the courts' disposition data.

Table 2: Dispositions of Lead Cases in the Sample

Disposition type	N	Percentage of sampled consolidations	Average number of actions	Mean from filing to consolidation order (days)	Mean disposition time (days)
Settlement	183	48%	3.0	216.9	623.0
Voluntary dismissal	72	19%	2.8	178.7	517.8
Rule 12 dismissal	32	8%	2.5	212.7	555.0
Summary judgment	35	9%	2.4	190.1	651.3
Trial	12	3%	2.3	283.9	924.8
Other	51	13%	2.5	186.6	446.1
All	**385**	**100%**	**2.8**	**205.0**	**586.2**

Amended pleadings. An amended complaint was filed in 110, or in about 29%, of the consolidations after the consolidation order. It seems to be a relatively common practice to order an amended complaint after consolidation; this seems to be especially true in class actions. But amended pleadings are also a relatively common occurrence separate from the consolidation issue.

Number of consolidation orders. In almost all consolidations, there is just one consolidation order. This makes sense given that the modal number of actions in a consolidation is two. A second consolidation order can change the purpose of the consolidation (actions consolidated for discovery only may be ordered consolidated for trial, for example) or may add later-filed actions to the consolidation. There was more than one consolidation order in 27 (7%) of the sampled lead cases.

Deconsolidation/severance of actions. Deconsolidation orders or orders to sever consolidated cases were relatively uncommon, observed in 11 (3%) of the sampled consolidations. The *Can Do Air* case described in the next section of the report is an example of a consolidated action ordered to proceed on a deconsolidated basis.

Information on the OAFJs in the Sample

Nine OAFJs were identified in this sample of 385 consolidations, which translates to a rate of 2.3%. Of course, there are many more consolidated cases than consolidations. In this sample of 385 consolidations, there was a total of 1,078 actions. To provide a very rough estimate, the percentage of consolidated cases that resulted in an OAFJ was 0.8% (9/1,078).

In three of these nine instances, which are described first, no appeal followed the OAFJ; in six instances, there was a timely appeal of the OAFJ. In the six consolidations in the sample that presented potential *Hall* issues, then, no party lost its right to appeal through confusion over when to file the notice of appeal. Five of these OAFJs occurred before *Hall* was decided on March 27, 2018, and one after. (Strangely enough, the dates of the *Indian Harbor* case described *infra* sandwich the date on which *Hall* was decided—the granting of summary judgment ordered just before *Hall* was decided and the notice of appeal filed just after *Hall* was handed down.) Although it is unwise to generalize from just six instances, it appears that litigants acted as though *Hall*'s immediate-appeals rule governed prior to the decision, even in circuits that applied different finality rules in consolidated cases prior to *Hall*.[11]

No Appeal Filed (3 instances)

3d Circuit (1)

Wojak v. Borough of Glen Ridge (D.N.J. 2:16-cv-1605, filed Mar. 23, 2016) consolidated with *Sanders v. Borough of Glen Ridge* (D.N.J. 2:16-cv-8106, filed Nov. 1, 2016). Regulatory takings actions (regarding the drawing of school district boundaries) consolidated "for discovery and trial" on March 31, 2017. The district court dismissed all the claims in the *Sanders* action on February 15, 2018. No notice of appeal was filed. The *Wojak* action settled on April 5, 2019.

4th Circuit (1)

Kafka v. Hess (D. Md. 1:16-cv-1757, filed May 31, 2016) consolidated with *Hess v. Kafka* (D. Md. 1:16-cv-2789, filed Aug. 8, 2016). In this family dispute, Kafka filed a one-count declaratory judgment action against Hess in district court. Hess later filed against Kafka in state court; that case was removed to federal court and consolidated with the earlier filed case on November 11, 2016. The district court granted summary judgment in *Kafka* on June 6, 2017. No notice of appeal was filed. The *Hess* action was dismissed (by stipulation) in September 2017.

6th Circuit (1)

Browning v. University of Findlay (N.D. Ohio 3:15-cv-2687, filed Dec. 23, 2015) consolidated with *Allstate Indemnity Co. v. Browning* (N.D. Ohio 3:18-cv-1097, filed May 14, 2018). Students expelled from the university sued it and other defendants for defamation. In a separate action, one of

11. The sampled cases did not include any OAFJ examples from the First, Seventh, Eighth, Ninth, Tenth, Eleventh, or D.C. Circuits. This means only that there were none in the sampled cases, not that there were none in these circuits during the study period.

the defendants' insurers filed a lawsuit in state court seeking a declaratory judgment that it was not obligated to defend or indemnify the defendant in the defamation action. The two actions were consolidated on July 24, 2018, after the insurer's case was removed to federal court. The insurer moved for summary judgment, which was granted on February 21, 2019. No notice of appeal was filed. The *Browning* action settled and was closed on April 2, 2019. Interestingly, another insurer, State Farm, intervened in the lead case and obtained summary judgment on September 25, 2018; *that* judgment was certified for appeal pursuant to Rule 54(b), although it does not appear to have been appealed.

Appeal Filed (6 instances)

2d Circuit (2)

Document Technologies, Inc. v. West (S.D.N.Y. 1:17-cv-02405, filed Apr. 3, 2017) consolidated with *Document Technologies, Inc. v. LDiscovery, LLC* (S.D.N.Y. 1:17-cv-03433, filed May 9, 2017), and *Document Technologies, Inc. v. Hosford* (S.D.N.Y. 1:17-cv-03917, filed May 4, 2017). These cases stem from dispute over trade secrets and employment agreements; the three lawsuits were originally filed in different districts. After the cases were transferred to the Southern District of New York and consolidated, the district court dismissed *LDiscovery*, the action originally filed in the Eastern District of Virginia (judgment entered July 24, 2017), and the plaintiffs appealed (notice of appeal filed Aug. 23, 2017). The court of appeals affirmed on May 15, 2018. The other actions were stayed pending arbitration and later voluntarily dismissed on October 15, 2018.

Galanova v. Roberts (E.D.N.Y. 1:17-cv-03179, filed May 25, 2017) consolidated with *Galanova v. Portnoy* (E.D.N.Y. 1:17-cv-3212, filed June 1, 2018). *Roberts* is a pro se civil rights action; the court sua sponte consolidated it with the similar *Portnoy* case on June 6, 2018. The court granted the defendants' motion to dismiss the federal claims in *Portnoy* on August 13, 2018; the court declined to exercise supplemental jurisdiction over the remaining state claims and entered judgment. The plaintiff filed a notice of appeal of this order on September 10, 2018. The district court dismissed the other case and subsequently entered judgment on October 26, 2018; a notice of appeal of that order was filed on the same date. (The court of appeals consolidated these appeals, which were later (on June 21, 2019) dismissed because the appellant failed to file a brief.)

3d Circuit (1)

Kamal v. J. Crew Group, Inc. (D.N.J. 2:15-cv-190, filed Jan. 1, 2015) consolidated with *Parker v. J. Crew Group, Inc.* (D.N.J. 2:17-cv-1214, filed Feb. 22, 2017). *Kamal*, a Fair and Accurate Credit Transactions Act action, was filed in federal district court. A similar case, *Parker* was filed in Illinois state court, removed to federal court, and then transferred to the District of New Jersey. The two cases were consolidated on May 1, 2017. By the time *Parker* arrived in New Jersey, the district court was preparing to dismiss the *Kamal* case on a Rule 12(b)(1) motion (lack of Article III standing), which it did on June 6, 2017. *Parker* was ordered deconsolidated on the same day and later remanded to state court on January 11, 2018. The *Kamal* plaintiffs filed a notice of appeal within 30 days on June 20, 2017. The court of appeals (per Scirica, J.) affirmed the dismissal but remanded to the district court to amend its dismissal from "with prejudice" to "without prejudice."

Walking through the door opened by the Third Circuit, the *Kamal* plaintiffs filed a third amended complaint on May 14, 2019, long after the *Parker* case had been remanded. That complaint was again dismissed by the district court on September 10, 2019, and an appeal of that order was filed November 6, 2019 (after a motion for reconsideration had been denied). These events are noted only because the *Kamal* case appears in the sampled appellate cases discussed *infra*.

5th Circuit (3)

Aggreko, LLC v. Chartis Specialty Insurance Co. (E.D. Tex. 1:16-cv-297, filed July 21, 2016) consolidated *with Indian Harbor Insurance Co. v. Gray Insurance Co.* (E.D. Tex. 1:17-cv-80, filed Feb. 28, 2017). These insurance coverage actions involving an accident on an offshore oil rig were consolidated on June 8, 2017. In *Indian Harbor*, the later-filed case, the insurer-defendant moved for and received summary judgment on March 3, 2018, because its policy limits had been exceeded in the underlying incident. This order was appealed (notice of appeal filed Apr. 4, 2018), and the court of appeals affirmed (Dec. 2019). The remaining action was stayed pending the result of the appeal but had not been reopened as of this writing.

Villarreal vs. Horn (S.D. Tex. 1:15-cv-111, filed June 18, 2015) consolidated with *Villarreal vs. Horn* (S.D. Tex. 1:16-cv-267, filed Oct. 14, 2016). Plaintiffs filed two very similar immigration actions seeking the same relief under alternate theories; there were some factual differences between the cases. The district court consolidated the actions on November 8, 2016. Defendants moved to dismiss *Villarreal II*, and the court dismissed the second action as duplicative on September 23, 2017, concluding that the factual differences between the cases were not important. The plaintiffs filed a notice of appeal on September 24, 2017. That appeal was dismissed on January 3, 2018. Final judgment was entered in *Villarreal I* on June 18, 2018, and a notice of appeal was filed July 18, 2018 (amended July 19, 2018). The court of appeals affirmed in part and dismissed for lack of jurisdiction in part on March 31, 2020. (Because this is an immigration case, not all of the appellate documents were available on PACER.)

Wachob Leasing Co., Inc. v. Gulfport Aviation Partners, LLC (S.D. Miss. 1:15-cv-237, filed July 21, 2015) consolidated with *Allianz Global Risks U.S. Insurance Co. v. United States* (S.D. Miss. 1:16-cv-55, filed Feb. 19, 2016) and *Can Do Air, LLC v. Gulfport Aviation Partners, LLC* (S.D. Miss. 1:16-cv-60, filed Feb. 23, 2016). A National Guard helicopter struck a light pole with its rotors on the tarmac of the Gulfport-Biloxi airport. The light pole disintegrated and the debris damaged private planes; three suits were filed and subsequently consolidated. The *Allianz* case was voluntarily dismissed, probably because of a settlement, on November 29, 2016. The *Wachob Leasing* case was tried on both liability and damages, resulting in verdict for plaintiff. The court had ordered that the issue of liability in the consolidated actions was to be decided in the first trial. After the jury returned its verdict on liability and damages, the court entered final judgment in the lead case on March 15, 2017, and, on March 20, 2017, severed the member case, *Can Do Air*, in which only the issue of damages remained (after the finding of liability). The *Wachob Leasing* plaintiffs filed a notice of appeal (Apr. 13, 2017) of an earlier ruling on calculation of damages. The court of appeals affirmed the district court in July 2018. On a separate track, the *Can Do Air* case settled on November 17, 2017.

Second Phase

After consideration of the results of the first phase of the study, the joint subcommittee requested additional research into the incidence of OAFJs. Instead of extending the first phase of the study to cover filing years 2018 and 2019, using the same computerized docket searches conducted for all civil filings, 2015–2017, a different strategy using existing information from the appellate database was taken. Extending the first approach promised to be a great deal of effort for minimal reward.

In summer of 2021, the dockets of all district-court cases in which an appeal was filed in 2019 or 2020 were searched for Rule 42(a) consolidations. An important factor in the change of strategy was speculation that a search starting with appellate cases might uncover additional *Hall* issues (which generally arise only in cases in which appeals are filed). The deduplicated list of civil cases in which appeals were filed in 2019 or 2020 included 22,436 district-court cases. (The list was deduplicated because multiple appeals can be filed in a single district-court case; the same district-court case information can occur in the appellate database many times.) In conducting the computerized searches of the dockets of these district-court cases, the same search parameters were used as in the first phase of the study.

Manual review of the computerized search results identified 779 cases that had been consolidated in the district court and in which an appeal had been filed in 2019 or 2020. That translates into a consolidations-as-percentage-of-appeals rate of 3.5% (779 / 22,436). But this rate should be interpreted carefully. It represents the rate for deduplicated civil appeals; there are obviously more appeals, both in terms of cross-appeals and, of course, criminal appeals, that could be included in the denominator. Increasing the size of the denominator would mean, of course, a reduced rate of consolidations among appealed cases. However one calculates the rate, cases that were part of Rule 42(a) consolidations make up a relatively small part of the appellate docket.

Using these 779 cases as a sampling frame, a sample of 203 cases was examined for potential OAFJs. After this examination, seven cases were excluded from the analysis, primarily because the sampled case was not, after closer scrutiny, part of a Rule 42(a) consolidation. In two instances, however, the sampled case was excluded because the district court proceedings were too lengthy and complex to determine with any confidence whether OAFJs had occurred.

Eleven examples of OAFJs were identified among the sampled cases, as well as three ambiguous cases, described *infra* for the subcommittee's information. There were more ambiguous instances that might have been included, but the three examples provided give a sense for what was found in the searches. Note that the count of eleven includes the *Kamal* case discussed *supra*. There was some confusion on the part of parties over the timeliness of appeals in two of the cases, namely the *Center for Biological Diversity* (9th Circuit) and *Capshaw* (5th Circuit) entries *infra*. The *Cruz-Aponte* case may provide an example of an untimely appeal in a consolidated case, but it is a rather unusual example involving an incarcerated plaintiff whose appeal was dismissed for failure to comply with a show-cause order.

Examples of OAFJs

1st Circuit (1)

Cruz-Aponte v. Caribbean Petroleum Corp. (D.P.R. 3:09cv2092, filed Oct. 23, 2009) consolidated with, among others, *Garcia-Parra v. Caribbean Petroleum Corp.* (D.P.R. 3:09cv2148, filed Nov. 11, 2009). This consolidation involved claims arising from a fuel-tank explosion. Judgment was entered in the *Garcia-Parra* case on January 14, 2010, because the plaintiff, a prisoner, failed to comply with a court order regarding his prison account. A notice of appeal of that order was filed on May 5, 2010, but this appeal was dismissed by the court of appeals as untimely, on September 13, 2010. This appears to be an example of an untimely appeal of an OAFJ dismissed by the court of appeals. The notice of appeal was filed almost four months after judgment in the member case, and the First Circuit followed the immediate-appeals rule prior to *Hall*. However, the appellate record in this case indicates the appeal was dismissed for failure to comply with a show-cause order. This is an unusual case for inclusion in this report, as the First Circuit dismissed the appeal of the OAFJ in 2010. But the *Garcia-Parra* plaintiff, still incarcerated, filed a handwritten notice of appeal on July 27, 2020, which explains why the searches turned up this rather old case (originally filed in 2009). The lead case was rather complex, separate from the facts of the *Garcia-Parra* matter; final judgment in the lead case was entered February 18, 2016, although there was docket activity in the lead case after that date.

2d Circuit (1)

King v. Wang (S.D.N.Y. 1:14cv7694, filed Sept. 23, 2014) consolidated with *Wang v. King* (S.D.N.Y. 1:18cv8948, filed Sept. 30, 2018) on October 15, 2018. The *Wang* amended complaint raising Racketeer Influenced and Corrupt Organization (RICO) claims was dismissed on April 22, 2019; when a second amended complaint was not filed, the court ordered the case closed on January 27, 2020 (with prejudice). The notice of appeal was filed within 30 days, on February 26, 2020, but that appeal was voluntarily dismissed in June 2020. The *King* case was still pending in the district court as of this writing, although it appears that it may soon settle.

5th Circuit (1)

Harness v. Hosemann (S.D. Miss. 3:17cv791, filed Sept. 28, 2017) consolidated with *Hopkins v. Hosemann* (S.D. Miss. 3:18cv188, filed Mar. 27, 2018) on June 28, 2018. These actions are civil-rights challenges to felon disenfranchisement under Mississippi state law. The court granted summary judgment in the *Harness* case on August 7, 2019, severing the two actions; a notice of appeal of that order was filed within 30 days, on August 28, 2019. The court denied defendant's motion for summary judgment in the *Hopkins* case, which was stayed on the same date (Aug. 7, 2019); both sides in that case also filed appeals of that order. These appeals (consolidated) were argued en banc in the Fifth Circuit on September 22, 2021.

6th Circuit (1)

S.C. v. Metropolitan Government of Nashville & Davidson County (M.D. Tenn. 3:17-cv-01098, filed July 31, 2017), a civil rights (education) case, consolidated with three related actions, "for discovery and trial," on August 28, 2018. The court granted summary judgment for defendants in two of the consolidated actions on September 25, 2020. The docket entry for the order clearly states that these are final, appealable orders: "Nothing about the consolidation of these cases for discovery and trial shall be viewed as affecting the immediate appealability of those judgments." Judgment was entered in these cases on September 29, 2020, and notices of appeal were filed within 30 days, on October 19, 2020.

8th Circuit (1)

Residential Funding Co., LLC v. Home Loan Center, Inc. (D. Minn. 0:14cv01716, filed May 30, 2014) consolidated for pretrial purposes with *In Re: RFC and RESCAP Liquidating Trust Litigation* (D. Minn. 0:13cv3451, filed Dec. 12, 2013). Judgment was entered for plaintiffs in the *Home Loan* case on June 21, 2019. A notice of appeal was filed within 30 days on July 19, 2019, but that appeal was voluntarily dismissed Oct. 21, 2020. The master docket was administratively closed August 17, 2020, after resolution of another consolidated action.

9th Circuit (3)

Center for Biological Diversity v. U.S. Fish & Wildlife Service (D. Ariz. 4:17cv475, filed Sept. 25, 2017), an environmental action, consolidated with *Save the Scenic Santa Ritas v. U.S. Forest Service* (D. Ariz. 4:17cv576, filed Nov. 27, 2017) and *Tohono O'odham Nation v. U.S. Forest Service* (D. Ariz. 4:18cv189, filed April 12, 2018). The court granted summary judgment in the two *Forest Service* cases on July 31, 2019 (judgment entered Aug. 2, 2019); the intervenor defendants (copper mine operator) moved to correct the judgment and then appealed, after that motion was denied, on December 20, 2019. Judgment was entered in the lead case on February 11, 2020, after another ruling granting summary judgment to plaintiffs. It is somewhat unclear what remained of the case after the July 31, 2019, order and August 2, 2019, judgment. These cases are included in this report, though, because of an argument in one of the plaintiffs' motions, which appears to ignore the holding in *Hall v. Hall* altogether:

> **I. This Court's July 31, 2019 Order Is Currently Not Appealable**
>
> Federal Defendants' motion for a stay is contingent on whether there is an appeal of this Court's July 31, 2019 Order in the other two consolidated cases. ECF 252 at 2. Federal Defendants' motion fails to recognize or address, however, that the Court's July 31 Order is currently unappealable.
>
> The Ninth Circuit addressed this issue in *Huene v. United States*, 743 F.2d 703 (9th Cir. 1984). In *Huene*, the plaintiffs filed two cases against the Internal Revenue Service ("IRS") pursuant to the Freedom of Information Act, which were consolidated by the district court. *Huene*, 743 F.2d at 703. After the district court granted the IRS's motion for summary judgment in one of the two consolidated cases, the plaintiffs appealed. *Id.* After

> considering the various approaches to this issue in other circuits, the Ninth Circuit determined that "the best approach is to permit the appeal only when there is a final judgment that resolves all of the consolidated actions unless a 54(b) certification is entered by the district court." *Id.* at 705. As explained by the Ninth Circuit,
>
> > An appeal prior to the conclusion of the entire action could well frustrate the purpose of which the cases were originally consolidated. Not only could it complicate matters in the district court but it also could cause an unnecessary duplication of efforts in the appellate court.
>
> *Id.* at 704. The Ninth Circuit therefore held: "where an order disposes of only one of two or more cases consolidated at the district court level, the order is not appealable under 28 U.S.C. § 1291 absent a Rule 54(b) certification." *Id.* at 705; see also *Lasalle*, 1997 U.S. App. LEXIS at *2 ("In the Ninth Circuit, no appeal may be taken from a consolidated case without a Rule 54(b) certification from the district court."). Because the July 31, 2019 Order resolved only two of the three consolidated cases, and was not certified under Rule 54(b), the Ninth Circuit "lack[s] appellate jurisdiction to review it." *Id.*

Resp. in Oppos. re: Mot., at 1–2 (docketed Aug. 13, 2019). The last quoted sentence does not appear to be a correct statement of the law in August 2019, but the Ninth Circuit did follow the "deferred-appeals rule" prior to *Hall*.[12]

McCune v. Nova Home Loans (D. Ariz. 4:19cv600, filed Dec. 27. 2019), a pro se real-estate action, was ordered consolidated with *McCune v. PHH Mortgage* (D. Ariz. 4:19cv525, filed Oct. 10, 2019), on April 8, 2020. The order is ambiguous with respect to whether consolidation or reassignment was intended, because the district court granted defendant's motion to dismiss the member case on the same day as the order (April 8) and entered judgment in that case April 21, 2020. The notice of appeal in the *PHH* case was filed April 30, 2020. The *Nova Home Loans* case was dismissed by the court for lack of subject-matter jurisdiction on July 7, 2020; judgment entered the same day; notice of appeal filed on August 3, 2020.

Cormier v. Carrier Corp. (C.D. Cal. 2:18cv7030, filed August 15, 2018), a defective products case, was consolidated for pretrial purposes with *Oddo v. United Technologies Corp.* (C.D. Cal. 8:15cv1985, filed Nov. 25, 2015) on May 13, 2019. As of this writing, *Oddo* was still pending. One plaintiff in *Cormier* (Cormier) accepted an offer of judgment and the court entered judgment on March 2, 2021. The other *Cormier* plaintiff (Shoner) filed a notice of appeal of his dismissed claims on December 15, 2020 (after the offer of judgment was accepted but before judgment was entered). In contrast to the motion quoted in the *Center for Biological Diversity* case, the request for entry of judgment in the *Cormier* case cites *Hall,* possibly even correctly:

> In its October 22, 2018 decision on Carrier's motion to dismiss, this Court dismissed all claims asserted by Mr. Shoner, and allowed certain of Mr. Cormier's claims to proceed. (ECF 52.) The Court afforded the plaintiffs 14 days to amend the complaint, but they chose to stand on the original complaint. Therefore, all of Mr. Shoner's claims have been dismissed since October 22, 2018.

12. *Lammon*, *supra* note 4, at 1004.

> On May 16, 2019, the Court consolidated this action with the action in *Oddo v. United Technologies Corporation*, case number 8:15-cv-01985-CAS(Ex), for pretrial purposes only. (ECF 104.) However, "one of multiple cases consolidated under [Rule 42(a)] retains its independent character, at least to the extent it is appealable when finally resolved, regardless of any ongoing proceedings in the other cases." *Hall v. Hall*, 138 S. Ct. 1118, 1128-29 (2018).
>
> On November 16, 2020, Mr. Cormier accepted an offer of judgment in his favor from Carrier, inclusive of costs and fees. (ECF 116.) Mr. Cormier is entitled to entry of judgment under Rule 68, which states that after acceptance of an offer of judgment, "[t]he clerk must then enter judgment."
>
> As there are no longer any claims pending in this action, which retains its independent character from the *Oddo* action, final judgment should be entered in this action: (1) in favor of Mr. Cormier on the terms stated in the accepted Offer of Judgment, and (2) in favor of Carrier on Mr. Shoner's claims, which were dismissed October 22, 2018. Plaintiffs request entry of final judgment in this action in the form filed herewith.

Request for Entry of J., at 1 (docketed Dec. 4, 2020).

10th Circuit (1)

Securities and Exchange Commission v. Management Solutions (D. Utah 2:11cv1165, filed December 15, 2011), a lengthy SEC receivership action, consolidated with "ancillary" cases brought by or against the receiver, including *Miller v. Falconhead Property Owners Association* (D. Utah 2:14cv936) (Miller was the receiver). In that ancillary matter, the property owners' association challenged the receiver's disposition of the property at issue; the court rejected the association's challenge, entering judgment for the receiver on October 26, 2016. A notice of appeal of that judgment was filed within 30 days on November 22, 2016. The main receivership action closed on June 5, 2019.

11th Circuit (1)

Pinares v. United Technologies Corp. (S.D. Fla. 9:10cv80883, filed July 26, 2010) was the lead case in a large consolidation (more than 20 cases total) involving groundwater contamination in Palm Beach, Florida. Member case *Santiago v. United Technologies Corp.* (S.D. Fla. 9:14cv81385, filed Nov. 7, 2014), was consolidated with the lead case on July 14, 2016 (one of the acreage-injury cases); judgment was entered in *Santiago* on November 11, 2018, and a notice of appeal was filed December 10, 2018. The lead docket was closed November 4, 2019.

Three Additional, Ambiguous Instances

5th Circuit (1)

Capshaw v. White (N.D. Tex. 3:12cv4457, filed on Nov. 6, 2012), a qui tam action, was consolidated with *Bryan v. Hospice Plus LP* (N.D. Tex. 3:13cv3392, filed on Aug. 23, 2013) on

May 15, 2014; the *Bryant* docket was closed on that date. The court dismissed the *Bryan* relators, pursuant to Rule 12(b)(1), based on the first-to-file rule, on January 23, 2017; these relators then filed a motion for attorney fees, which was denied, and then a motion to reconsider, which was also denied. They then filed an appeal—styled as an interlocutory appeal—of these orders, on December 27, 2018, which the Fifth Circuit dismissed for lack of jurisdiction on April 10, 2019. The appellees' motion to dismiss the appeal argued that the court of appeals lacked jurisdiction because of the final-judgment rule, appearing to rely on a pre-*Hall* understanding:

> This Court lacks jurisdiction over this appeal. The December 11, 2018 Order (the "Appealed Order", Page ID #7316-17, Order, Doc. #433) from which this appeal is taken is interlocutory. That order denied reconsideration of a prior and also interlocutory Order (the "Fee Order", Page ID #6556-65, Order, Doc. #394), which denied attorneys' fees to counsel for two dismissed relators in this pending False Claims Act case. The district court denied attorney fees on the grounds that the statute's "first-to-file" bar precluded the dismissed relators from bringing their claims in the first place. Nine defendants remain in the underlying case, and no final judgment has been entered.
>
> The Appealed Order thus disposed of fewer than all claims or parties and did not direct entry of a final, appealable judgment under Federal Rule of Civil Procedure 54(b). Nor is the Appealed Order an immediately appealable "collateral order" under the doctrine announced in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546–47 (1949). Thus, this Court lacks jurisdiction over this appeal and should dismiss it.

Mot. To Dismiss, filed Feb. 12, 2019 (5th Cir. 18-11652), at 1–2. The *Capshaw* action was dismissed on October 2, 2019; judgment was entered on June 2, 2020. The *Bryan* relators filed a new motion for attorney fees on October 3, 2019, which the court denied on February 12, 2020. The Bryan relators filed a notice of appeal of this and other orders on March 9, 2020. The notice of appeal states that the order on February 12, 2020, "disposes of all remaining claims, although the District Court has yet to enter a separate final judgment." The *Capshaw* case is an instance where they may have been a *Hall v. Hall* issue, but the odd procedural posture of the case makes it difficult to determine whether and when the dismissed relators could have filed a timely appeal at some point in 2018–2019.

9th Circuit (2)

Griffin v. Sachs Electric Co., N.D. Cal. (5:17cv3778, filed June 30, 2017), a wage-and-hour dispute, was ordered consolidated with *Griffin v. McCarthy Building Co.* (5:18cv2623, filed May 3, 2018) on July 16, 2018. On May 28, 2019, the court granted summary judgment for defendant in the *Sachs* case; the court later entered judgment for the *McCarthy* defendants on December 2, 2018, and the plaintiffs filed a notice of appeal on December 6, 2019. The *McCarthy* case was also voluntarily dismissed on December 2, 2019. It is not clear why the court waited more than six months to enter judgment in the *Sachs* case, and the entry of judgment matters for the question at hand. It is clear from the status report, docketed June 7, 2019, that the summary judgment order only applied to the *Sachs* defendants and that the plaintiffs intended to settle with the *McCarthy*

defendants—which apparently happened, at which time judgment was entered in the *Sachs* case and a notice of appeal was filed.

Brown v. Arizona (D. Ariz. 2:17cv3536, filed Oct. 5, 2017) was consolidated with *DeGroote v. Arizona Board of Regents* (D. Ariz. 2: 18cv310, filed Jan. 1, 2018) for "the limited purpose of consolidating common defense-witness depositions." The court granted summary judgment in *Brown* on March 11, 2020, and a notice of appeal was filed March 31, 2020. *DeGroote* was settled and dismissed on June 5, 2020. If consolidation for discovery purposes is relevant to the inquiry, then there may be more relevant cases.

Conclusion

This report has shown that *Hall* issues are triply rare—they arise only in cases consolidated pursuant to Rule 42(a), and only when the cases in the consolidation terminate at different times, in OAFJs, and, even then, only when an appeal is filed. Consolidation occurs in 2–3% of civil cases, and then OAFJs occur in a relatively small percentage of consolidations. Consolidated cases also represent a small percentage of civil appeals, 3–4%. This report provides two estimates of the rate of OAFJs among consolidated cases. Starting from civil filings consolidated in the district court in 2015–2017, it finds that OAFJs occur in approximately 1 consolidation in 50. Starting from consolidated cases in which an appeal was filed in 2019–2020, OAFJs were more common, occurring in slightly more than 1 consolidation in 20. That OAFJs are more common in the appeals data makes sense given that OAFJs are more likely in cases decided on motion—the kinds of cases in which appeals are also more likely. Settled cases are less likely to give rise to appeals or OAFJs; settlements probably tend to resolve the consolidated cases at the same time.

Even when an OAFJ occurs, a *Hall* problem arises only when a litigant errs with respect to the finality of the judgment for purposes of appeal. These instances prove particularly difficult to find empirically (which is not the same thing as saying that they do not occur). The number of OAFJs discussed in this report (19) is too small from which to generalize. But it is interesting that, even in circuits that did not follow the immediate-appeals rule prior to *Hall*, litigants seemed somewhat inclined to file a notice of appeal after a judgment in a consolidated case without waiting for the entire consolidation to conclude.