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Class & Collective Action Group Newsletter

United States Supreme Court

Grant of *Certiorari*, Vacatur, and Remand in *Rocket Mortgage, LLC v. Alig* (U.S.)

Key Issues

Whether absent members of a class who may have suffered only a risk of injury have standing to sue under Article III, and whether a class can be or remain certified where absent class members have not suffered an Article III injury.

Background

A class of West Virginians brought suit against Quicken Loans Inc. and Title Source, Inc., alleging that, in the course of refinancing the plaintiffs' home mortgages, the defendants had provided third party appraisers with the borrowers' value estimates, intending to inflate the appraised value of the underlying home and the corresponding mortgage.[1] The district court certified the class and granted summary judgment for the plaintiffs on a breach-of-contract claim and a claim for unlawful inducement to contract under the West Virginia Consumer Credit and Protection Act.[2] For the breach-of-contract claim, the court awarded the amount of the appraisal fees the plaintiffs had originally paid, and for the unlawful inducement claim, the court awarded statutory penalties of $3,500 per refinanced mortgage.[3]

On appeal to the Fourth Circuit, Quicken and Title Source argued that there had been no showing that the absent class members had actually been injured by receiving an artificially inflated mortgage, and so the district court lacked jurisdiction under Article III to award damages to those absent class members.[4]

The Court of Appeals conceded that there was no evidence at all in the record regarding the home values of absent class members, and the court therefore could not determine "whether the appraisals for most class members were inflated" by the defendants' practices after all.[5] But the majority concluded that each plaintiff had purchased a "tainted" appraisal instead of the "independent" appraisal they had been promised: each appraisal had been rendered suspect "when defendants exposed the appraisers to the borrowers' estimates of value and pressured

[1] *Alig v. Quicken Loans Inc.*, 990 F.3d 782, 788-89 (4th Cir. 2021), *vacated and remanded by Rocket Mortgage, LLC v. Alig*, 142 S. Ct. 748 (2022).

[2] *Id.* at 790.

[3] *Id.*

[4] *Id.* at 791. The defendants also raised a number of arguments not discussed here, as they are less relevant to the ultimate petition for a writ of *certiorari*.

[5] *Id.* at 804 n.22.

them to reach those values."[6] This constituted a cognizable Article III injury.

After the Fourth Circuit decided *Alig v. Quicken Loans*, the Supreme Court handed down its decision in *TransUnion LLC v. Ramirez*.[7] There, the Court held that there was no Article III jurisdiction as to a large portion of a class of plaintiffs who had been improperly identified as potential criminals by a credit bureau. Plaintiffs whose erroneous credit reports had actually been disseminated to some third party had suffered a concrete injury akin to the traditional tort of defamation.[8] But plaintiffs whose false reports were never distributed had not suffered a concrete Article III injury.[9] The Court rejected the Ninth Circuit's holding that those plaintiffs had suffered an Article III injury because they were exposed to the danger that their false credit reports might be disseminated to a third party.[10] Risk that never materializes, or which is not independently harmful to a plaintiff, is not a cognizable Article III injury.[11]

About three months after *TransUnion* was decided, the *Quicken Loans* defendants (which had subsequently been renamed Rocket Mortgage, LLC and Amrock, LLC) sought *certiorari*.[12] They argued that the Fourth Circuit had committed the same error committed by the Ninth Circuit in *TransUnion*: basing Article III standing on a plaintiff's past exposure to risk, rather than a materialized injury.[13] Here, they argued, home appraisers had been "exposed" to borrower estimates of home value, which could have improperly influenced the ultimate valuation. But there was no evidence that the ultimate valuations had actually been influenced by this information; on the contrary, appraisers universally testified that they either had not seen or disregarded the borrowers' estimates, and many valuations were finally lower than the borrowers' estimates.[14]

Petitioners noted that at a minimum this inconsistency with *TransUnion* made a grant of *certiorari*, vacatur, and remand appropriate. But they argued that two additional issues made the case appropriate for plenary review. First, they contended that the Fourth Circuit had, breaking with other circuits, improperly held that the mere purchase of appraisal services constituted an Article III injury because that purchase bore with it the risk of an inflated mortgage.[15] Second, petitioners argued that this case presented the Court with the opportunity to resolve a question left open by *TransUnion*: whether Rule 23 permits a court to certify a class where some members have not suffered an Article III injury.[16]

Respondents sought to characterize the Fourth Circuit's decision as focused on a state law question: whether the provision of a borrower's estimate to an appraiser is an unconscionable inducement to contract under the West Virginia Consumer Credit and Protection Act, justifying the award of a statutory penalty irrespective of whether the appraisal of any particular class member's mortgage was influenced.[17] Article III standing, they argued, was not based on the risk that a "tainted" appraisal would inflate the value of a new mortgage, but on

[6] *Id.* at 791-92.

[7] 141 S. Ct. 2190 (2021).

[8] *Id.* at 2208-09.

[9] *Id.* at 2210.

[10] *Id.* at 2211.

[11] *Id.*

[12] Pet. for Writ of Cert., *Rocket Mortg., LLC v. Alig*, 142 S. Ct. 748 (2022) (hereinafter "Cert. Pet.").

[13] *Id.* at 19.

[14] *Id.* at 21.

[15] *Id.* at 23-27.

[16] *Id.* at 27-29.

[17] Br. in Opp'n to Cert. 6-7, *Rocket Mortg., LLC v. Alig*, 142 S. Ct. 748 (2022).

the plaintiffs' purchase of an appraisal that was actually "worthless as an impartial estimate of home value."[18]

Decision, Thoughts, and Takeaways

On January 10, 2022, the Supreme Court issued a brief order granting the writ of *certiorari*, vacating the judgment, and remanding the case for the Fourth Circuit to reconsider in light of *TransUnion*. Although the Court did not explain its reasoning, its action suggests several things about the Court's evolving approach to Article III and class actions.

First, it suggests the Court's continued commitment to using Article III as a check on the conferral of private causes of action by legislatures. *TransUnion* continued the work the Court began in *Spokeo, Inc. v. Robins*[19] by holding that Article III limits plaintiffs' ability to recover for violations of statutes even when the legislature expressly intended to provide that ability. Even assuming *arguendo* that, as a matter of state law, private plaintiffs were intended to recover for the statutory violations identified in *Rocket Mortgage*, the Court wants the Fourth Circuit to consider the possibility that Article III prevents them from using a federal forum to do so. This principle has not been limited to class actions,[20] but it is of particular significance to class actions because a corporate defendant might apply an unlawful policy or practice to a very large number of consumers or customers without the policy actually doing injury to many of those consumers. The easier it is for consumers to recover for simply being the subject of the unlawful practice, the easier it will be to certify an extremely large class, increasing the defendant's potential exposure. Moreover, where merely being subject to an unlawful policy is enough, classes will often be easier to certify on predominance grounds: it will often be relatively easy to show that a particular unlawful policy was applied to many consumers, but relatively burdensome to find out which of those absent plaintiffs were actually affected by the policy, and by how much.[21]

Second, on the other hand, the Court has again declined an opportunity to decide whether significant variations in the injuries suffered by class members pose problems for certification under Rule 23. In *TransUnion*, the Court declined to consider whether the class representative's particularly harrowing experience rendered his claims atypical and made him an unsuitable class representative.[22] Likewise, in *Rocket Mortgage*, petitioners asked the court to take plenary review of the case in order to determine whether a class can be certified without a showing that all class members suffered a cognizable Article III injury.[23] So although the Court's developing Article III injury jurisprudence is in many respects particularly dangerous for class action plaintiffs, the Court has not demonstrated a keenness to use Article III to attack Rule 23 directly. This could mean that the Court is more concerned with separation-of-powers questions than with the danger of large class actions as such.

[18] *Id.* at 10.

[19] 578 U.S. 330 (2016).

[20] *Spokeo* concerned a single plaintiff. *See also Thole v. U.S. Bank N.A.*, 140 S. Ct. 1650 (2020).

[21] *See Alig*, 990 F.3d at 793.

[22] *TransUnion*, 141 S. Ct. at 2114.

[23] Cert. Pet. at 28.

Federal Appellate Courts

Decision in *Earl v. Boeing Co.* (Fifth Circuit)

Key Issue

Whether a complete stay of discovery should be granted pending defendants' Rule 23(f) appeal of the district court's decision granting class certification.

Background

In 2019, plaintiffs, customers of Southwest and American Airlines, brought suit in the Eastern District of Texas on behalf of four putative classes alleging a conspiracy between Boeing and Southwest to conceal design defects in Boeing's 737 MAX 8 aircraft (the "737 MAX 8"). Plaintiffs contend that, had demand for Southwest and American Airlines customers known about the defects in the 737 MAX 8, demand for Southwest and American flights would have declined, resulting in lower ticket prices.[24] Plaintiffs thus allege that the undisclosed defects caused them an overpayment or premium price injury.

In 2021, the district court granted plaintiffs' motion for class certification.[25] With respect to predominance, the district court found, and defendants did not dispute, that there was clearly a common question of whether Southwest and Boeing engaged in a conspiracy that violated the Racketeer Influenced and Corrupt Organizations Act ("RICO"). However, defendants "heavily contested" whether there was predominance for purposes of RICO *standing* and "forcefully challenge[d]" plaintiffs' damages model as improperly relying on averaged and other aggregate calculations.[26] Defendants also denounced plaintiffs' damages theory as incapable of accounting for the complexity of the airline ticket marketplace and ticket-pricing systems.

Boeing and Southwest moved pursuant to Rule 23(f) for interlocutory review of the district court's decision to certify the classes, and the Fifth Circuit granted their motion. Boeing and Southwest then moved the district court for a full stay of proceedings, including discovery, pending resolution of their appeal. The district court granted only a partial stay of discovery, pausing any discovery "pertaining to class membership" but permitting "[a]ll other discovery, including discovery on the merits," to proceed.[27] Unsatisfied by the partial stay, Boeing and Southwest thereafter moved for a complete stay of all proceedings from the Fifth Circuit.

Decision

The Fifth Circuit panel granted defendants' motion for a stay of all proceedings pending the resolution of their Rule 23(f) interlocutory appeal of the district court's decision to certify the classes.

In its decision, the panel noted that Rule 23(f) expressly provides appellate courts with the authority to stay proceedings and that, when deciding whether to grant a stay, courts uniformly consider the four factors articulated in *Nken v. Holder*: (1) whether the movant makes a strong showing that it is likely to succeed on the merits; (2) whether the movant will be irreparably injured without a stay; (3) whether

[24] American Airlines customers allege that they would not have flown on 737 MAX 8 flights if not for the Boeing-Southwest conspiracy to hide the aircraft's safety issues, but there is no allegation that American Airlines participated in the purported conspiracy. *See* First Am. Compl. ¶ 53, *Earl v. Boeing Co.*, No. 4:19-cv-00507, 2021 WL 1080689 (E.D. Tex. Aug. 19, 2020).

[25] Memorandum Opinion & Order, *Earl v. Boeing Co.*, No. 4:19-cv-00507, 2020 WL 759385 (E.D. Tex. Sept. 3, 2021).

[26] *Id.*

[27] Memorandum Opinion & Order, *Earl v. Boeing Co.*, No. 4:19-cv-00507, 2021 WL 5415291 (E.D. Tex. Nov. 19, 2021).

other interested parties will be irreparably injured by a stay; and (4) where the public interest lies.[28] Additionally, where the district court has already denied a request for a stay pursuant to Rule 23(f), the appeals court owes some measure of deference to that decision. Without deciding the degree of deference owed to the district court in this case, the panel issued the stay because, no matter the standard, the district court was wrong to grant only a partial stay of discovery. According to the panel, there was a strong likelihood that class certification was granted in error, and the expense of proceeding with discovery—even if limited to the named plaintiffs' claims—would exceed the costs of any delay. The panel's concern was informed by the fact that the parties had already "litter[ed] the record" with "voluminous motions practice disputing the propriety of various discovery requests."[29]

In its assessment of the merits, the panel determined that there was a substantial likelihood that the class claims would fail because individual damages issues would predominate. Plaintiffs' theory of injury would require the unlikely showing of a "fairly uniform" price-deflating effect of public knowledge of the 737 MAX 8 defects "across all the various routes and dates (over 18 months) involved in this lawsuit."[30] With respect to irreparable harm, the panel noted that the district court had granted a partial stay to limit discovery to issues "pertaining to class membership," but that a partial stay was insufficient to reign in the already-costly discovery in this case.[31] The panel disagreed with the district court that the suit would at least proceed against the named plaintiffs after the appeal because, for reasons not specified, the named plaintiffs may lack standing. Moreover, even with discovery pertaining to the Rule 23 factors stayed, "the proportionality requirement imposed by Federal Rule of Civil Procedure 26(b) would impose far different constraints on discovery by eleven named plaintiffs than it would for classes of millions of air travelers."[32] The panel was doubtful that the district court had "draw[n] a workable line between permitted and non-permitted discovery."[33]

On the other hand, the panel found it implausible that a delay of discovery would irreparably harm plaintiffs or the public interest. And "[t]he upshot of a full stay here is that there will be one exhaustive round of discovery post-appeal, rather than two distinct rounds of discovery pending- and post-appeal."[34]

Accordingly, the panel granted defendants' motion to stay trial court proceedings, including all discovery, pending disposition of their Rule 23(f) interlocutory appeal.

Thoughts & Takeaways

The Fifth Circuit panel noted in its decision that other courts have been less willing to issue the relief that it granted, particularly where the district court has denied the same request. The Seventh Circuit, for instance, has stated that stays of discovery under Rule 23(f) should be infrequent—a sentiment echoed

[28] 556 U.S. 418, 434 (2009) (stating the factors for a stay).

[29] *Earl v. Boeing Co.*, 21 F.4th 895, 898 (5th Cir. 2021).

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.* at 900.

by the dissent in this case.[35] Although the majority stated that it was not deciding what measure of deference is owed because defendants satisfied even a rigorous standard for deference, the implication of the majority's ruling, according to the dissent, is that defendants easily stepped over a low bar.

Additionally, the panel's recognition that the kind of large-scale discovery typical for a class action is not necessarily proportional to the needs of an individual action has broader strategic implications; among other things, it may benefit defendants who are able to defeat class certification at an early stage of litigation, and could be used to support a motion to bifurcate early discovery such that merits discovery follows class certification discovery.

This case will likely continue to present issues of interests for class action law, as the Fifth Circuit considers whether the class was properly certified and whether plaintiffs lack standing. Although the panel did not divulge its basis for being skeptical of plaintiffs' standing, it could be directed toward the classes of American Airlines customers. American Airlines is not alleged to have participated in the conspiracy, and its sole link to the case is that customers claim that they would not have purchased American Airlines tickets for 737 MAX 8 flights if not for Southwest's and Boeing's alleged conspiracy to hide the aircraft's defects.

Read the opinion here.

Decision in *Waters v. Day & Zimmermann NPS, Inc.* (First Circuit)

Key Issue

Whether the U.S. Supreme Court's landmark ruling in *Bristol-Myers Squibb* limiting state courts' exercise of personal jurisdiction with respect to out-of-state plaintiffs extends to Fair Labor Standards Act ("FLSA") cases filed in federal court.

Background

This case involves an FLSA collective action filed in federal court by an employee of Day & Zimmerman and joined by numerous other out-of-state current and former employees. More than one hundred claimants from across the country filed opt-in consent forms to participate in the suit. Citing the Supreme Court's landmark decision in *Bristol-Myers Squibb*,[36] Day & Zimmerman moved to dismiss for lack of personal jurisdiction on the theory that the Fourteenth Amendment bars out-of-state opt-ins. The district court denied defendant's motion to dismiss,[37] and defendants successfully petitioned for interlocutory review.

Decision

At the outset, the panel considered whether it had appellate jurisdiction over the opt-in plaintiffs at this stage given that the district court had not yet conditionally certified them as similarly situated to the lead plaintiff. The FLSA permits named plaintiffs to bring collective actions on behalf of "other employees similarly situated."[38] Though not

[35] *Id.* (Elrod, J., concurring in part and dissenting in part). The dissent also emphasized that the advisory committee notes to Rule 23(f) state that the district court's "action and any explanation of its views should weigh heavily with the court of appeals." *Id.* According to the dissent, it should not be enough that defendants satisfy the *Nken v. Holder* factors for a stay—they must also "carry this burden so convincingly" that the appellate court is "justified . . . in disregarding the district court's decision to the contrary." *Id.*

[36] 137 S. Ct. 1773 (2017).

[37] *Waters v. Day & Zimmermann NPS, Inc.*, 464 F. Supp. 3d 455, 461 (D. Mass. 2020).

[38] 29 U.S.C. § 216(b).

required by the FLSA itself, courts typically require conditional certification toward the outset of the suit to demonstrate that the claimants are similarly situated. Because conditional certification is not a statutory requirement, the panel determined that the opt-in plaintiffs became parties the moment they filed their opt-in notices and, accordingly, that it could entertain the appeal.

Turning to the merits, the panel held that the personal jurisdiction holding in *Bristol-Myers Squibb* has no application to FLSA collective actions filed in federal court and affirmed the district court's denial of defendant's motion to dismiss.[39] The panel noted that the reasoning in *Bristol-Myers Squibb* "rests on Fourteenth Amendment constitutional limits on state courts exercising jurisdiction over state-law claims," but it is the Fifth—not the Fourteenth—Amendment's due process clause that governs federal courts' jurisdiction over federal-law claims.[40] The Fifth Amendment presents no barrier to an out-of-state plaintiff bringing federal claims in federal court, who instead will be permitted to maintain suit so long as they can show the requisite minimum contacts with the United States.

Rather than contend that minimum contacts were lacking or that there was insufficient service of process, defendant argued that Federal Rule of Civil Procedure 4(k) itself "operates as a free-standing limitation on the exercise of personal jurisdiction in collective actions."[41] The panel disagreed. Starting with the text, the panel noted that Rule 4's title is "Summons," and Rule 4(k) is subtitled "Territorial Limits of Effective Service." Both titles suggest the Rule is directed at service and not jurisdiction. On the other hand, nothing in the text suggests that the Rule constrains a court's jurisdiction once a party has been properly served. Although Rule 4(k)(1)(A) requires the court to look to state law (which is subject to the Fourteenth Amendment) to determine whether service was effective to establish jurisdiction, "this is not the same thing as saying that Rule 4 or the Fourteenth Amendment governs district court jurisdiction in federal question cases after a summons has been properly served."[42] According to the panel, the history of amendments to Rule 4 and the advisory committee notes are consistent with this reading, which is further bolstered by the legislative history of FLSA depicting a goal to broadly remediate wage and hour law violations against large, multi-state employers.

In holding that the Fourteenth Amendment does not apply to limit federal courts' jurisdiction in FLSA actions by way of Rule 4(k), the First Circuit diverged from the Sixth and Eighth Circuits to create a circuit split on this question.

Thoughts & Takeaways

The First Circuit's decision not to apply *Bristol-Myers Squibb* to FLSA cases filed in federal court could have sweeping consequences for forum shopping in class action litigation more broadly. In the Sixth and Eighth Circuits, plaintiffs in both state and federal court are required to satisfy specific jurisdiction by demonstrating a connection between the forum and the specific claims at issue, which in many cases will eliminate putative out-of-state class members or claimants who experienced their injuries outside of the forum state. In the First Circuit, plaintiffs will not face the same jurisdictional barrier in federal court. Because class and collective actions typically satisfy the monetary floor for diversity cases, the likely impact of the First Circuit's decision is that plaintiffs will merely be deprived of forum-shopping in state courts, and not their actual claims. But in closing one door to forum-shopping, the First Circuit opens another, as its decision incentivizes plaintiffs

[39] *Waters v. Day & Zimmermann NPS, Inc.*, 23 F.4th 84, 100 (1st Cir. 2022).

[40] *Id.* at 92.

[41] *Id.*

[42] *Id.* at 94.

to bring class and collective actions of a national character in the First Circuit, rather than the Sixth or the Eighth.

The dissent, which viewed the majority's ruling as having "seemingly wide-ranging effects on a slew of cases," would have deferred ruling on this question until the Circuit had occasion to consider it on a direct appeal.[43] Without taking a position on the issue, the dissent noted that there have been some calls to amend Rule 4(k)(1)(A) to expressly remove any implied link between the statutory requirements for personal jurisdiction in federal court and the rigorous Fifth Amendment due process limits imposed on state courts' exercise of personal jurisdiction.

Read the opinion here.

Federal District Courts

Decision in *Stoyas v. Toshiba Corp.* (Central Dist. of California)

Key Issue

Whether a class bringing claims against a foreign issuer of foreign securities can be adequately represented by domestic plaintiffs who acquired unsponsored ADRs.

Background

Stoyas v. Toshiba Corp. was a putative class action in the Central District of California bringing United-States- and Japanese-law securities fraud claims against Japanese electronics firm Toshiba.[44] However, Toshiba's common stock trades on the Tokyo Stock Exchange, not on any United States exchange.[45] The *Stoyas* plaintiffs had purchased Toshiba ADRs in the United States, but Toshiba had not sponsored those ADRs, which were traded over-the-counter.[46] Accordingly, the district court originally dismissed the plaintiffs' U.S. securities laws claims with prejudice as barred by *Morrison v. National Australia Bank Ltd.*, reasoning that Toshiba had neither listed its securities on a domestic securities exchange nor involved itself in a domestic transaction.[47] On appeal, the Ninth Circuit reversed, holding that *Morrison* was satisfied where the securities at issue were acquired in a domestic transaction, irrespective of whether the defendant was involved in sponsoring those securities.[48] On remand, and after plaintiffs had amended their complaint, the district court held that plaintiffs adequately alleged they had irrevocably acquired Toshiba ADRs in the United States, and the suit proceeded.[49]

Decision

The latest development in this series of cases is the district court's denial of class certification. As noted, the district court had previously held that the representative plaintiffs had adequately alleged that they acquired irrevocable liability for Toshiba securities when they acquired ADRs

[43] *Id.* at 100 (Barron, J., dissenting).

[44] No. 2:15-cv-014194, 2022 WL 220920, at *1 (C.D. Cal. Jan. 25, 2022).

[45] *Stoyas v. Toshiba Corp.*, 896 F.3d 933, 940 (9th Cir. 2018).

[46] *Id.* at 950.

[47] *Stoyas v. Toshiba Corp.*, 191 F. Supp. 3d 1080, 1095 (C.D. Cal. 2016) (citing *Morrison v. Nat'l Aust. Bank Ltd.*, 561 U.S. 247 (2010)).

[48] *Toshiba*, 896 F.3d at 949.

[49] *Stoyas v. Toshiba Corp.*, 424 F. Supp. 3d 821, 826 (C.D. Cal. 2020).

over-the-counter in the United States. However, applying that same test to a more developed record, the district court found that the transaction at issue had not passed the threshold of irrevocability when they purchased ADRs in New York.[50] The plaintiffs were not actually bound to take and pay the ADRs until their investment manager's broker acquired shares of Toshiba stock on the Tokyo Stock Exchange, which were subsequently converted into ADRs.[51] Under the applicable irrevocability test, this made the plaintiffs' transaction a foreign transaction that could not support a U.S. securities law claim, and accordingly made them atypical and improper class representatives.[52]

Thoughts & Takeaways

The Ninth Circuit's decision in *Toshiba*, and the subsequent district court decision denying the motion to dismiss, threatened massive domestic liability for companies issuing securities on exchanges outside the United States. Foreign issuers have little control over whether other parties sell ADRs for their securities over-the-counter in the United States, and under the Ninth Circuit's holding, those issuers might still be subject to U.S. securities liability based on such transactions. They may not even be aware of the existence of the ADRs that expose them to U.S. lawsuits.

To some extent, the district court used its class certification decision to decide this case on the merits, and in a way that may trim back what earlier looked like immense potential exposure for foreign issuers. The decision suggests that courts can be persuaded to look very closely at the formal details of an ADR transaction in order to determine whether it qualifies as domestic, and to use such inquiry to police claims with an insufficient domestic nexus.

Moreover, although this decision was made at the class certification phase, it may provide a basis for defendants to demand more robust allegations of a domestic transaction at the pleadings stage. Since plaintiffs are in possession of information about their own securities transactions, they should be in a position to provide these details at the pleading stage. And if dismissal cannot be secured on the pleadings, defendants would be advised to pursue discovery into the technical details of the transaction at issue in order to attack the typicality of the representative plaintiffs at class certification.

On the other hand, it may prove that there will be many class representatives whose ADR transactions are more easily shown to be domestic. For example, representatives who purchased an existing ADR in the United States, rather than an ADR for which foreign securities first had to be acquired, may be deemed to have engaged in a strictly domestic transaction. Courts and litigants will need to test how the various iterations of ADR transaction fit into the Ninth Circuit's "irrevocability" test.

Read the opinion here.

[50] *Toshiba*, 2022 WL 220920, at *4.

[51] *Id.*

[52] *Id.* at *5.

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