Appeal No. 22-15862

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARCIA STEIN, ET AL.,

Plaintiffs-Appellants,

v.

KAISER FOUNDATION HEALTH PLAN, INC., ET AL.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of California
Hon. Edward M. Chen, Senior District Judge
Case No. 3:16-cv-05337-EMC

APPELLEES' RESPONSE TO PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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INTRODUCTION

A panel of this Court unanimously affirmed the district court's dismissal of the *qui tam* action brought by Appellants Marcia Stein and Rodolfo Bone ("Relators"), finding it duplicative of three earlier-filed False Claims Act ("FCA") suits involving claims for payment to the Medicare Advantage program. Relators' petition for panel and en banc rehearing fails to meet the standards for such review and instead seeks to improperly relitigate Relators' prior arguments.

Relators' action ("*Stein*") was the fourth to accuse Kaiser Permanente-affiliated entities of engaging in an "upcoding" scheme to report diagnosis codes for Medicare Advantage members to the U.S. Centers for Medicare & Medicaid Services ("CMS") that did not comply with diagnosis-coding and documentation requirements. Recognizing that *Stein* failed to alert the government to any facts not contained within the three earlier-filed actions, the district court dismissed *Stein* without leave to amend under the FCA's first-to-file bar, 31 U.S.C. § 3730(b)(5). The bar ensures that, after a relator brings an action, no other relator can "bring a related action based on the facts underlying the pending action." A panel of this Court agreed, concluding that the first-to-file bar required *Stein*'s dismissal and that no amendment could cure that deficiency. Relators' attempt to second-guess that decision is meritless.

First, Relators seek en banc rehearing of whether the first-to-file bar is jurisdictional, but offer no basis for that extraordinary request. Rehearing en banc is appropriate only when it is "necessary to secure or maintain uniformity of the court's decisions" or "the proceeding involves a question of exceptional importance." Fed. R. App. P. 35(a). Neither condition applies. Ninth Circuit caselaw uniformly holds that the first-to-file bar is jurisdictional. While some Courts of Appeal have held that the bar is not jurisdictional, no Supreme Court opinion has reached that conclusion. And the panel here already declined to do what Relators now seek, explaining its decision not to sua sponte call for en banc review. Nothing has occurred that would justify a change in that determination. En banc review would be particularly inappropriate here because the jurisdictional question does not change the outcome of this appeal. Relators do not contend otherwise.

Second, the Court should also reject Relators' request for panel rehearing and, "barring that," rehearing en banc to reconsider the panel's application of the first-to-file bar's material-facts test. Relators seek no more than to reargue the key issues in their appeal, but parties cannot use rehearing—either panel or en banc—simply to relitigate their case. In attempting to do so, Realtors misstate the focus of the material-facts test, which compares underlying ***facts***, not legal requirements allegedly violated as Relators contend. The panel faithfully applied the test,

comparing the factual allegations in all four complaints and concluding that the earlier complaints encompassed the facts in *Stein*. Even under Relators' incorrect reading of the test, the earlier-filed complaints likewise encompassed the same Medicare Advantage program requirements at issue in *Stein*. The Court should reject Relators' baseless attempt to reargue the appeal in full.

ARGUMENT

I. The Court Should Reject Relators' Request for En Banc Rehearing to Determine Whether the First-to-File Bar Is Jurisdictional

The Court should reject Relators' petition for en banc review to determine whether the FCA's first-to-file bar is jurisdictional. *See* Dkt. 53, Petition ("Pet.") 1. Ninth Circuit precedent uniformly holds that the bar is jurisdictional. In any event, that issue has no bearing on the outcome of this case.

"An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." Fed. R. App. P. 35(a)(1)-(2). "Rehearing a case en banc is the exception," not the rule. *Kipp v. Davis*, 986 F.3d 1281, 1282 (9th Cir. 2021) (Paez, J., concurring in denial of rehearing). The "'function of en banc hearings is not to review alleged errors for the benefit of losing litigants.'" *Thompson v. Calderon*, 120 F.3d 1045, 1069 (9th Cir. 1997) (Kozinski, J., dissenting) (quoting *United States v. Rosciano*, 499 F.2d 173, 174 (7th Cir. 1974)), *rev'd on other*

grounds sub nom. Calderon v. Thompson, 523 U.S. 538 (1998). Under these standards, "it is very difficult to obtain en banc review." *Carver v. Lehman*, 558 F.3d 869, 879 (9th Cir. 2009). The petition does not meet these stringent standards.

First, en banc consideration of the jurisdictional question is not necessary to secure or maintain uniformity of this Court's decisions. Fed. R. App. P. 35(a)(1). The Ninth Circuit has resolved this question, concluding that the first-to-file bar is jurisdictional in *Lujan* and again sitting en banc in *Hartpence*. *United States ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181, 1186-87 (9th Cir. 2001) (explaining that 31 U.S.C. § 3730(b)(5) is a "jurisdictional bar"); *United States ex rel. Hartpence v. Kinetic Concepts, Inc.*, 792 F.3d 1121, 1130 (9th Cir. 2015) (en banc) ("We treat the first-to-file bar as jurisdictional."). And the Ninth Circuit is not alone—the Fourth, Fifth, and Tenth Circuits also have concluded that the bar is jurisdictional.[1] Recognizing the absence of an intra-circuit conflict, this Court already "decline[d] to sua sponte call for en banc review in this case." Dkt. 50-1, Memorandum ("Mem.") 3 n.1. Relators provide no reason to change that determination.

[1] *United States ex rel. Carter v. Halliburton*, 866 F.3d 199, 203 (4th Cir. 2017); *United States ex rel. Branch Consultants v. Allstate Ins. Co.*, 560 F.3d 371, 376-77 (5th Cir. 2009); *Grynberg v. Koch Gateway Pipeline Co.*, 390 F.3d 1276, 1278 (10th Cir. 2004).

Second, the jurisdictional question is not of exceptional importance justifying en banc review. Fed. R. App. P. 35(a)(2). In fact, this case is a poor vehicle for deciding the jurisdictional question because that question has no effect on the disposition of the appeal. *See Al-Bihani v. Obama*, 619 F.3d 1, 1 (D.C. Cir. 2010) (Sentelle, C.J., concurring in denial of rehearing) (voting with six other judges to not rehear case en banc because question at issue was "not necessary to the disposition of the merits"). In their briefing, the parties have debated whether the jurisdictional question affects the first-to-file analysis—specifically, whether a court should analyze original or amended complaints. Defendants[2] have argued that because the bar is jurisdictional, and jurisdiction generally is assessed at the outset of a case, the first-to-file analysis should focus on a comparison of the initial

[2] "Defendants" are Kaiser Foundation Health Plan, Inc.; Kaiser Foundation Health Plan of Colorado; The Permanente Medical Group, Inc.; Southern California Permanente Medical Group; Colorado Permanente Medical Group, P.C.; Kaiser Foundation Hospitals; Kaiser Foundation Health Plan of Georgia, Inc.; Kaiser Foundation Health Plan of the Mid-Atlantic States; Kaiser Foundation Health Plan of the Northwest; Kaiser Foundation Health Plan of Washington; The Southeast Permanente Medical Group; Hawaii Permanente Medical Group; Mid-Atlantic Permanente Medical Group; Group Health Permanente (n/k/a Washington Permanente Medical Group, P.C.); and Northwest Permanente, P.C. Because the various actions discussed herein do not name all of the same defendants, "Defendants" or "Kaiser" refers to the defendants named in the complaint(s) referenced in the relevant portion of the brief, unless indicated otherwise. Although Kaiser Permanente is not a legal entity, *see* 8-ER-1701; 1-ER-31; 3-ER-322-23, "Defendants" and "Kaiser" include Kaiser Permanente where named in the complaint at issue.

Stein complaint with *Osinek*, *Taylor*, and *Arefi*—the earlier-filed actions at the time the initial *Stein* complaint was filed. *See* Dkt. 35, Appellees' Ans. Br. 28-29. The district court agreed. 1-ER-18. Relators, on the other hand, have argued that the bar is not jurisdictional and that any analysis must consider their most recent amended complaint. Dkt. 21, Appellants' Opening Br. 12, 21 n.11.

Ultimately, this debate was—and is—of no consequence. The panel noted, without deciding, that *Hartpence* suggests that the district court should have considered all pending amended complaints at the time of the first-to-file analysis. Mem. 3 (citing *Hartpence*, 792 F.3d at 1125 & n.2 ("For purposes of determining jurisdiction, we look to the allegations in the amended complaints.")). But "any error would be harmless because the district court considered in the alternative the allegations Relators added in their amended complaint. Moreover, although the relators in *Osinek* and *Taylor* amended their complaints between when the Relators here filed their complaint and when Kaiser moved to dismiss this action, there were no material differences in the amended *Osinek* and *Taylor* complaints." *Id*. at 4. In other words, regardless of which complaints should have informed the first-to-file analysis, the outcome in this case would have been the same—complete dismissal of *Stein*.

Relators pin their hopes on Judge Forrest's concurrence, which advocated for overruling *Hartpence* in light of the clear-statement principle. Pet. 2. But as

Judge Forrest herself acknowledged, en banc review could wait until "***an appropriate time***." Dkt. 50-1, Concurrence 1.[3] Now is not that time. The panel did recognize "some tension" between *Hartpence* and the Supreme Court's clear-statement principle, Mem. 3, which provides that a rule is jurisdictional if Congress "clearly states that a threshold limitation on a statute's scope shall count as jurisdictional." *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012). Since *Gonzalez*, some Courts of Appeal have concluded that the first-to-file bar is not jurisdictional, primarily because the bar does not explicitly reference "jurisdiction."[4] But as the panel also recognized, even after the Supreme Court announced the clear-statement principle, "there is no 'intervening higher authority' that is 'clearly irreconcilable with' *Hartpence*." Mem. 2. The Supreme Court has never considered whether the first-to-file bar is jurisdictional.

Where there is neither an intra-circuit split, nor a clearly irreconcilable higher authority, nor an appeal turning on the jurisdictional question, the "appropriate time" for en banc review has not arrived. And if such review should

[3] All emphasis is added to, and citations and internal quotation marks omitted from, quoted passages unless otherwise indicated.

[4] *United States ex rel. Heath v. AT&T*, 791 F.3d 112, 120 (D.C. Cir. 2015); *United States ex rel. Hayes v. Allstate Ins. Co.*, 853 F.3d 80, 86 (2d Cir. 2017); *United States v. Millenium Labs., Inc.*, 923 F.3d 240, 249-51 (1st Cir. 2019); *In re Plavix Mktg., Sales Pracs. & Prods. Liab. Litig. (No. II)*, 974 F.3d 228, 232 (3d Cir. 2020); *United States ex rel. Bryant v. Cmty. Health Sys., Inc.*, 24 F.4th 1024, 1036 (6th Cir. 2022).

become warranted, it can await another case where the jurisdictional question will affect the outcome of the appeal.

II. The Court Should Deny Relators' Request for Rehearing on the Panel's Application of the Material-Facts Test

The Court should also reject Relators' request for rehearing—either panel or en banc—on the panel's application of the first-to-file bar's material-facts test. The petition improperly asks the panel to reanalyze all four complaints, even though the panel correctly applied the material-facts test by comparing the facts of the three earlier-filed complaints to the facts alleged in *Stein*. And regardless of whether panel rehearing is warranted, Relators provide no basis for en banc review of this part of the panel's decision—again, the en banc court does not rehear cases to "review alleged errors for the benefit of losing litigants." *Rosciano*, 499 F.2d at 174.

A. Panel Rehearing Is Unwarranted Because the Panel Properly Applied the Material-Facts Test

As an initial matter, Relators have not justified their request for panel rehearing, instead using their petition to improperly reargue the bulk of the appeal. "A properly drawn petition for rehearing serves a very limited purpose." *Armster v. U.S. Dist. Ct. for Cent. Dist. of Cal.*, 806 F.2d 1347, 1356 (9th Cir. 1986). Panel rehearing is proper only when the Court "has overlooked or misapprehended" a point of law or fact. Fed. R. App. P. 40(a)(2). A petition for rehearing is "not a

vehicle for a party to study and reargue his case anew." *United States v. Mageno*, 786 F.3d 768, 775 (9th Cir. 2015).

But that is precisely what Relators have done. The petition contends that the panel's analysis "conflicts" with the material-facts test. Pet. 4. It asks the panel to reanalyze each medical condition in *Stein*, contending the panel somehow overlooked all of the Medicare program requirements in the complaints. *Id.* at 4-5, 7-17. The Court should reject this overbroad request out of hand.

In any event, the panel correctly applied the first-to-file bar's material-facts test. The first-to-file bar provides that when a person brings a *qui tam* action, "no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." 31 U.S.C. § 3730(b)(5). The Ninth Circuit has held that a "material facts" test "should be used to determine if a 'related action [is] based on the facts underlying the pending action.'" *Lujan*, 243 F.3d at 1183. Under this test, the first-to-file bar prohibits *qui tam* actions that allege "the same material elements of fraud" as an earlier-filed *qui tam* action, even if the allegations "incorporate somewhat different details." *Id.* at 1189; *see also Hartpence*, 792 F.3d at 1123, 1131. The focus of the analysis is whether the United States "has enough information to discover related frauds" once it "knows the essential facts of a fraudulent scheme." *Lujan*, 243 F.3d at 1189.

In *Lujan*, the Court applied the material-facts test to determine that the first-to-file bar required dismissal of a later *qui tam* action. The first filer broadly alleged that an aircraft company defrauded the government by entering into agreements that improperly allocated project costs over multiple subcontracts involving multiple aircrafts. *Id.* at 1183-84. The second filer brought a similar complaint that addressed improper cost shifting "*within* the … program" for a specific aircraft, while the first filer had addressed "cost shifting *among*" the programs for that aircraft "and other aircrafts." *Id.* at 1185 (emphasis in original). The first-to-file bar required dismissal of the second filer's complaint because it included the same material elements as the first filer's complaint, even though the second filer alleged "somewhat different details." *Id.* at 1189.

Here, following *Lujan*'s reasoning, the panel correctly recognized that *Stein* alleged a fraud scheme "*within* the broad schemes alleged" by the three earlier-filed complaints. Mem. 4 (emphasis in original). The panel noted that Relators "simply provide more details about a few diagnoses"—sepsis, malnutrition, and aortic atherosclerosis ("AA")—included "'*within* the' overall upcoding scheme alleged in" the three preceding actions. *Id.* at 5 (quoting *Lujan*, F.3d at 1185-86). Given the overlap in underlying facts, "the first-to-file rule bars the Relators' complaint because the allegations in *Osinek*, *Taylor*, and *Arefi* alerted the government to the essential facts of [the] fraudulent scheme." Mem. 5.

To avoid that result, Relators misconstrue the nature of the material-facts test. They argue that the panel's decision "fails to acknowledge" that *Stein* alleged fraud premised on different Medicare program requirements than those at issue in *Osinek*, *Taylor*, and *Arefi*, and that absent *Stein*'s allegations, the government would not have discovered the fraud. *See* Pet. 5, 14. But this argument incorrectly focuses the first-to-file analysis on a comparison of legal requirements rather than facts. And even so, the earlier-filed complaints encompass not just the same material facts as *Stein* but also the same Medicare program requirements.

To start, the first-to-file analysis does not depend on whether an earlier-filed complaint puts at issue exactly the same ***legal*** requirements as a later-filed complaint. Rather, it depends on a comparison of the "material ***facts***" of the alleged fraudulent schemes. *Lujan*, 243 F.3d at 1189; *Hartpence*, 792 F.3d at 1123, 1132. Once the government is aware of the underlying ***facts***, it can determine for itself if those facts reflect violations of legal requirements.

Relators' argument is based on a misreading of *Hartpence*. They contend that *Hartpence* held that the first-to-file bar does not apply to a "related, but distinct fraud allegation" based "upon a different Medicare program requirement that was at issue in the prior file[d] action." Pet. 14. Not so. In *Hartpence*, the first and second filers alleged two distinct fraudulent schemes based on "different underlying ***facts***," which also happened to implicate two distinct Medicare

program billing requirements. 792 F.3d at 1130-31. The first filer alleged that a medical device manufacturer used a specific code to falsely certify that a wound treatment billed to Medicare complied with applicable coverage criteria. *Id.* at 1124-25, 1130. The second filer alleged that the manufacturer had failed to obtain "correct and completed Detailed Written Orders" before delivering the wound treatment device and beginning therapy, a billing requirement unrelated to the coverage criteria. *Id.* at 1125. Given that the "underlying ***facts***" of the two complaints were "materially different" and "exist[ed] completely independent of one another," the first-to-file bar did not apply. *Id.* at 1131-32.

Here, Relators point to no part of the panel's decision that overlooked material ***facts*** alleged in the underlying complaints. Instead, the panel concluded that the facts alleged in *Stein*—like those alleged by the second filer in *Lujan*—were a lesser-included part of a broader fraud scheme alleged by earlier-filing relators rather than a "completely independent" scheme. *See id.*; Mem. 4-5.

Although those factually similar allegations are alone sufficient to require *Stein*'s dismissal, the similarities do not end there—the earlier-filed complaints also put at issue the same Medicare program requirements alleged in *Stein*:

1. Sepsis

The panel correctly held that the first-to-file bar requires dismissal of Relators' sepsis allegations. Relators alleged that Defendants inappropriately

diagnosed sepsis, primarily in the hospital setting, by using a flawed diagnostic standard and then reported corresponding diagnosis codes for sepsis to CMS to support risk-adjustment payments. 7-ER-1515-19; 6-ER-1084-88. Relators insist that the sepsis allegations are distinct from the fraudulent schemes alleged in earlier-filed complaints. Pet. 14-15. They argue that the sepsis allegations are based on the Medicare program requirement that sepsis diagnoses "must be coded according to [specific coding guidelines called the] ICD-9 and/or ICD-10 Guidelines," whereas *Osinek*, *Taylor*, and *Arefi* focus on the requirement that diagnosis codes submitted to CMS "must be based on a 'face-to-face' encounter with the patient[.]" *Id.*

As the panel concluded, the earlier-filed complaints put at issue the same material facts as *Stein*'s sepsis allegations. *See* Mem. 4-5. *Osinek* alleged that Kaiser engaged in a widespread scheme to make Medicare Advantage members seem less healthy than they actually were, including by using internal guidance and policies to encourage diagnosis coding of medical conditions that should not have been coded and that members' symptoms did not reflect. 8-ER-1752, -1757-63; 6-ER-1222, -1227-34. *Taylor* alleged that Defendants flouted diagnosis-coding guidelines, diagnosing members with medical conditions that they did not have, that were not addressed by appropriate healthcare providers, and that were not supported by medical-record documentation. 8-ER-1643, -1658; 3-ER-385, -404.

And *Arefi* asserted a fraud scheme against over ten Kaiser-affiliated entities based on their use of diagnostic criteria "that find no support in medical literature or accepted standards of medical or coding practice," including an upcoding scheme related to sepsis. 8-ER-1548-51, -1574.

Osinek, *Taylor*, and *Arefi* also all put at issue the same basic Medicare program coding requirements at issue in *Stein*. Like *Stein*, *Osinek* and *Arefi* accuse Defendants of submitting diagnosis codes to CMS without proper support. *See* 6-ER-1233, 8-ER-1760-61 (*Osinek* alleging submission of "diagnostic codes for complex medical conditions without proper support"); 8-ER-1550 (*Arefi* alleging violations of requirements to properly diagnose, treat, and document medical conditions); 7-ER-1506-07, 6-ER-1075 (*Stein* alleging that Kaiser made "inaccurate and exaggerated diagnoses for sepsis that were not supported by properly documented medical records").

Taylor explicitly puts at issue the ICD coding guidelines—"an MA Plan may only submit a risk adjustment claim for a diagnosis that has been properly coded per ICD-9 standards." 8-ER-1652; *see also* 3-ER-400. *Taylor* also alleges that Medicare Advantage plans cannot submit diagnosis codes to CMS for diagnoses that do not exist, and plans must "correct … previously submitted risk adjustment claims when they discover … that those previously submitted claims were false." 8-ER-1643; 3-ER-449. These are the same types of Medicare program

requirements Relators contend Defendants violated. *See* Pet. 12. Indeed, Relators argue that the "fundamental requirement" for all diagnoses submitted to CMS "is that they are coded and documented in conformity with the *ICD-9 Guidelines*" and that Defendants' alleged failure to comply with ICD coding guidelines rendered "many, if not all, their Sepsis diagnoses invalid." *Id.* (emphasis in original).

If the United States investigated the earlier allegations about upcoding high-value medical conditions for Medicare Advantage members, there is no question that it would have discovered the alleged sepsis upcoding fraud *Stein* alleges.

2. Malnutrition

The panel also correctly determined that the first-to-file bar required dismissal of Relators' malnutrition allegations. Mem. 4-5. Relators alleged that Defendants submitted malnutrition diagnosis codes to CMS that were not supported by an appropriate provider type—that physicians "rubber stamped" dieticians' diagnoses rather than diagnose those members themselves after face-to-face visits. 7-ER-1525; 6-ER-1095; *see* Pet. 15.

The broad upcoding allegations in *Osinek*, *Taylor*, and *Arefi* encompass *Stein*'s malnutrition allegations. *Osinek* alleged a scheme to diagnose medical conditions without necessary support or documentation, including two types of malnutrition conditions. 8-ER-1757-58, -61-62; 6-ER-1222, -27-29, -32-33. *Taylor* accused Defendants of submitting diagnosis codes for medical conditions

not diagnosed by the appropriate "provider type" and not diagnosed as a result of face-to-face visits, just as *Stein* alleged occurred with malnutrition diagnoses. 8-ER-1643, 1676, 1680; 3-ER-404, -26-27, -34. *Taylor* also specifically alleged that "false claim[s] resulted from Kaiser coders and/or computer systems adding a malnutrition diagnosis where the treating physician had not." 8-ER-1676; 3-ER-426-27. And *Arefi* alleged that Defendants' upcoding scheme resulted in the submission to CMS of inappropriate diagnosis codes for malnutrition. 8-ER-1577.

Relators point to no flaw in the panel's conclusion that these earlier allegations barred Relators' later malnutrition allegations. *See* Mem. 4-5. Relators instead argue that *Osinek*, *Taylor*, and *Arefi* focus on the requirement that a provider can record a diagnosis in the medical record as a result of only a face-to-face visit, whereas the *Stein* malnutrition allegations concern "diagnoses from [] dieticians that were not authorized to make diagnoses, and failing to return resulting overpayments." Pet. 14-15.

But, as just explained, the earlier-filed complaints address the very type of program requirement underlying *Stein*'s malnutrition allegations—that diagnoses must be recorded in the medical record by the appropriate type of healthcare provider. If the United States investigated broad allegations about submitting diagnosis codes to CMS for conditions not diagnosed by the appropriate provider type, it would have discovered the more specific malnutrition scheme alleged in

Stein. Under the material-facts test, "simply adding factual details … to the essential or material elements of a fraud claim" will not save a later-filed *qui tam* action from dismissal. *Branch*, 560 F.3d at 378.

3. Aortic Atherosclerosis

The panel also correctly held that the first-to-file bar required dismissal of *Stein*'s AA allegations. Mem. 4-5. Relators alleged that Defendants submitted AA diagnosis codes to CMS when a healthcare provider noted the existence of AA in the medical record, which ran afoul of diagnosis-coding rules requiring diagnoses to be made as a result of face-to-face visits and not solely a result of, for example, diagnostic tests such as x-rays without further treatment documented in the medical record. 6-ER-1097-100; Pet. 15.

As the district court concluded, *Osinek* and *Stein* put at issue the "same kind of conduct," including "diagnosing a patient ***based on a test*** that took place after the patient visit." 1-ER-41; *see also* 8-ER-1755, -61; 3-ER-1231-32. *Taylor* specifically faulted Defendants for submitting diagnosis codes to CMS "where the only documentation to support the diagnosis was a ***radiologic or lab test***." 8-ER-1680; 3-ER-434. *Arefi* similarly criticized Defendants for not complying with diagnosis-coding guidelines that prohibited the reporting to CMS of diagnosis codes for medical "conditions that either did not exist at the time of a face-to-face physician encounter or were not being currently treated." 8-ER-1549-50.

The petition does not grapple with any of these earlier allegations, which encompass Relators' more narrow AA allegations. Indeed, allegations that Defendants improperly diagnosed patients based only on test results would have given the United States all it needed to discover the AA fraud alleged in *Stein*.

B. En Banc Rehearing Is Unwarranted Because the Panel's Application of the Material-Facts Test Does Not Threaten the Uniformity of the Court's Decisions or Raise a Question of Exceptional Importance

Finally, en banc review of the panel's material-facts analysis also is not warranted. There is no need to review the decision to "secure or maintain uniformity of the court's decisions," Fed. R. App. P. 35(a)(1), because the panel faithfully applied the Ninth Circuit's material-facts test, *see supra* 8-18. And Relators have not raised any "question of exceptional importance" requiring review of the panel's decision. *See* Fed. R. App. P. 35(a)(2). They simply ask the en banc Court to second-guess the panel's application of settled law to facts—an improper basis for en banc review. *See Rosciano*, 499 F.2d at 174; *Kipp*, 986 F.3d at 1282 (Paez, J., concurring in denial of rehearing) (rehearing en banc is not appropriate where the case "involves the application of settled legal standards to a set of facts").

CONCLUSION

For the foregoing reasons, the Court should reject the petition.

Dated: March 8, 2024

O'MELVENY & MYERS LLP

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 11. Certificate of Compliance for Petitions for Rehearing/Responses

9th Cir. Case Number(s): **Appeal No. 22-15862**

I am the attorney or self-represented party.

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/response to petition is *(select one)*:

[X] Prepared in a format, typeface, and type style that complies with Fed. R. App. P. 32(a)(4)-(6) and **contains the following number of words:** 4,175.
(Petitions and responses must not exceed 4,200 words)

OR

[ ] In compliance with Fed. R. App. P. 32(a)(4)-(6) and does not exceed 15 pages.

Signature: */s K. Lee Blalack, II* **Date:** March 8, 2024

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31 U.S.C.A. § 3730

§ 3730. Civil actions for false claims

Effective: December 27, 2022
Currentness

(a) Responsibilities of the Attorney General.--The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) Actions by private persons.--(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure.[1] The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall--

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) Rights of the parties to qui tam actions.--(1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2)(A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as--

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person's cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) Award to qui tam plaintiff.--(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting [2] Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(e) Certain Actions Barred.--(1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2)(A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in paragraphs (1) through (8) of section 13103(f) of title 5.

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4)(A) The court shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed--

(i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party;

(ii) in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or

(iii) from the news media,

unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who either (i) prior to a public disclosure under subsection (e)(4)(a), has voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based, or (2) [3] who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action under this section.

(f) Government not liable for certain expenses.--The Government is not liable for expenses which a person incurs in bringing an action under this section.

(g) Fees and expenses to prevailing defendant.--In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

(h) Relief from retaliatory actions.--

(1) In general.--Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, agent or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter.

(2) Relief.--Relief under paragraph (1) shall include reinstatement with the same seniority status that employee, contractor, or agent would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An action under this subsection may be brought in the appropriate district court of the United States for the relief provided in this subsection.

(3) Limitation on bringing civil action.--A civil action under this subsection may not be brought more than 3 years after the date when the retaliation occurred.

CREDIT(S)

(Pub.L. 97-258, Sept. 13, 1982, 96 Stat. 978; Pub.L. 99-562, §§ 3, 4, Oct. 27, 1986, 100 Stat. 3154, 3157; Pub.L. 100-700, § 9, Nov. 19, 1988, 102 Stat. 4638; Pub.L. 101-280, § 10(a), May 4, 1990, 104 Stat. 162; Pub.L. 103-272, § 4(f)(1)(P), July 5, 1994, 108 Stat. 1362; Pub.L. 111-21, § 4(d), May 20, 2009, 123 Stat. 1624; Pub.L. 111-148, Title X, § 10104(j)(2), Mar. 23, 2010, 124 Stat. 901; Pub.L. 111-203, Title X, § 1079A(c), July 21, 2010, 124 Stat. 2079; Pub.L. 117-286, § 4(c)(36), Dec. 27, 2022, 136 Stat. 4358.)

Notes of Decisions (2673)

Footnotes

1 See, now, Rule 4(i) of the Federal Rules of Civil Procedure.

2 So in original. Probably should be “Accountability”.

3 So in original. Probably should be “or (ii) has”.

31 U.S.C.A. § 3730, 31 USCA § 3730
Current through P.L. 118-39. Some statute sections may be more current, see credits for details.

United States Code Annotated
Federal Rules of Appellate Procedure (Refs & Annos)
Title VII. General Provisions

Federal Rules of Appellate Procedure Rule 35, 28 U.S.C.A.

Rule 35. En Banc Determination

Currentness

(a) When Hearing or Rehearing En Banc May Be Ordered. A majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless:

(1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or

(2) the proceeding involves a question of exceptional importance.

(b) Petition for Hearing or Rehearing En Banc. A party may petition for a hearing or rehearing en banc.

(1) The petition must begin with a statement that either:

(A) the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed (with citation to the conflicting case or cases) and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions; or

(B) the proceeding involves one or more questions of exceptional importance, each of which must be concisely stated; for example, a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue.

(2) Except by the court's permission:

(A) a petition for an en banc hearing or rehearing produced using a computer must not exceed 3,900 words; and

(B) a handwritten or typewritten petition for an en banc hearing or rehearing must not exceed 15 pages.

(3) For purposes of the limits in Rule 35(b)(2), if a party files both a petition for panel rehearing and a petition for rehearing en banc, they are considered a single document even if they are filed separately, unless separate filing is required by local rule.

(c) Time for Petition for Hearing or Rehearing En Banc. A petition that an appeal be heard initially en banc must be filed by the date when the appellee's brief is due. A petition for a rehearing en banc must be filed within the time prescribed by Rule 40 for filing a petition for rehearing.

(d) Number of Copies. The number of copies to be filed must be prescribed by local rule and may be altered by order in a particular case.

(e) Response. No response may be filed to a petition for an en banc consideration unless the court orders a response. The length limits in Rule 35(b)(2) apply to a response.

(f) Call for a Vote. A vote need not be taken to determine whether the case will be heard or reheard en banc unless a judge calls for a vote.

CREDIT(S)

(As amended Apr. 1, 1979, eff. Aug. 1, 1979; Apr. 29, 1994, eff. Dec. 1, 1994; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 25, 2005, eff. Dec. 1, 2005; Apr. 28, 2016, eff. Dec. 1, 2016; Apr. 27, 2020, eff. Dec. 1, 2020.)

ADVISORY COMMITTEE NOTES

1967 Adoption

Statutory authority for in banc hearings is found in 28 U.S.C. § 46(c). The proposed rule is responsive to the Supreme Court's view in *Western Pacific Ry. Corp. v. Western Pacific Ry. Co.*, 345 U.S. 247, 73 S.Ct. 656, 97 L.Ed. 986 (1953), that litigants should be free to suggest that a particular case is appropriate for consideration by all the judges of a court of appeals. The rule is addressed to the procedure whereby a party may suggest the appropriateness of convening the court in banc. It does not affect the power of a court of appeals to initiate in banc hearings *sua sponte*.

The provision that a vote will not be taken as a result of the suggestion of the party unless requested by a judge of the court in regular active service or by a judge who was a member of the panel that rendered a decision sought to be reheard is intended to make it clear that a suggestion of a party as such does not require any action by the court. See *Western Pacific Ry. Corp. v. Western Pacific Ry. Co.*, supra, 345 U.S. at 262, 73 S.Ct. 656. The rule merely authorizes a suggestion, imposes a time limit on suggestions for rehearings in banc, and provides that suggestions will be directed to the judges of the court in regular active service.

In practice, the suggestion of a party that a case be reheard in banc is frequently contained in a petition for rehearing, commonly styled “petition for rehearing in banc.” Such a petition is in fact merely a petition for a rehearing, with a suggestion that the case be reheard in banc. Since no response to the suggestion, as distinguished from the petition for rehearing, is required, the panel which heard the case may quite properly dispose of the petition without reference to the suggestion. In such a case the fact that no response has been made to the suggestion does not affect the finality of the judgment or the issuance of the mandate, and the final sentence of the rule expressly so provides.

1979 Amendment

Under the present rule there is no specific provision for a response to a suggestion that an appeal be heard in banc. This has led to some uncertainty as to whether such a response may be filed. The proposed amendment would resolve this uncertainty.

While the present rule provides a time limit for suggestions for rehearing in banc, it does not deal with the timing of a request that the appeal be heard in banc initially. The proposed amendment fills this gap as well, providing that the suggestion must be made by the date of which the appellee's brief is filed.

Provision is made for circulating the suggestions to members of the panel despite the fact that senior judges on the panel would not be entitled to vote on whether a suggestion will be granted.

1994 Amendment

Subdivision (d). Subdivision (d) is added; it authorizes the courts of appeals to prescribe the number of copies of suggestions for hearing or rehearing in banc that must be filed. Because the number of copies needed depends directly upon the number of judges in the circuit, local rules are the best vehicle for setting the required number of copies.

1998 Amendments

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Several substantive changes are made to this rule, however.

One of the purposes of the substantive amendments is to treat a request for a rehearing en banc like a petition for panel rehearing so that a request for a rehearing en banc will suspend the finality of the court of appeals' judgment and delay the running of the period for filing a petition for writ of certiorari. Companion amendments are made to Rule 41.

Subdivision (a). The title of this subdivision is changed from “When hearing or rehearing in banc *will* be ordered” to “When Hearing or Rehearing En Banc *May* Be Ordered.” The change emphasizes the discretion a court has with regard to granting en banc review.

Subdivision (b). The term “petition” for rehearing en banc is substituted for the term “suggestion” for rehearing en banc. The terminology change reflects the Committee's intent to treat similarly a petition for panel rehearing and a request for a rehearing en banc. The terminology change also delays the running of the time for filing a petition for a writ of certiorari because Sur. Ct. R. 13.3 says:

> if a petition for rehearing is timely filed in the lower court by any party, the time to file the petition for a writ of certiorari for all parties...runs from the date of the denial of the petition for rehearing or, if the petition for rehearing is granted, the subsequent entry of judgment.

The amendments also require each petition for en banc consideration to begin with a statement concisely demonstrating that the case meets the usual criteria for en banc consideration. It is the Committee's hope that requiring such a statement will cause the drafter of a petition to focus on the narrow grounds that support en banc consideration and to realize that a petition should not be filed unless the case meets those rigid standards.

Intercircuit conflict is cited as one reason for asserting that a proceeding involves a question of “exceptional importance.” Intercircuit conflicts create problems. When the circuits construe the same federal law differently, parties' rights and duties depend upon where a case is litigated. Given the increase in the number of cases decided by the federal courts and the limitation on the number of cases the Supreme Court can hear, conflicts between the circuits may remain unresolved by the Supreme Court for an extended period of time. The existence of an intercircuit conflict often generates additional litigation in the other circuits

as well as in the circuits that are already in conflict. Although an en banc proceeding will not necessarily prevent intercircuit conflicts, an en banc proceeding provides a safeguard against unnecessary intercircuit conflicts.

Some circuits have had rules or internal operating procedures that recognize a conflict with another circuit as a legitimate basis for granting a rehearing en banc. An intercircuit conflict may present a question of "exceptional importance" because of the costs that intercircuit conflicts impose on the system as a whole, in addition to the significance of the issues involved. It is not, however, the Committee's intent to make the granting of a hearing or rehearing en banc mandatory whenever there is an intercircuit conflict.

The amendment states that "a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of every other United States Court of Appeals that has addressed the issue." That language contemplates two situations in which a rehearing en banc may be appropriate. The first is when a panel decision creates a conflict. A panel decision creates a conflict when it conflicts with the decisions of all other circuits that have considered the issue. If a panel decision simply joins one side of an already existing conflict, a rehearing en banc may not be as important because it cannot avoid the conflict. The Second situation that may be a strong candidate for a rehearing en banc is one in which the circuit persists in a conflict created by a pre-existing decision of the same circuit and no other circuits have joined on that side of the conflict. The amendment states that the conflict must be with an "authoritative" decision of another circuit. "Authoritative" is used rather than "published" because in some circuits unpublished opinions may be treated as authoritative.

Counsel are reminded that their duty is fully discharged without filing a petition for rehearing en banc unless the case meets the rigid standards of subdivision (a) of this rule and even then the granting of a petition is entirely within the court's discretion.

Paragraph (2) of this subdivision establishes a maximum length for a petition. Fifteen pages is the length currently used in several circuits. Each request for en banc consideration must be studied by every active judge of the court and is a serious call on limited judicial resources. The extraordinary nature of the issue or the threat to uniformity of the court's decision can be established in most cases in less than fifteen pages. A court may shorten the maximum length on a case by case basis but the rule does not permit a circuit to shorten the length by local rule. The Committee has retained page limits rather than using word or line counts similar to those in amended Rule 32 because there has not been a serious enough problem to justify importing the word and line-count and typeface requirement that are applicable to briefs into other contexts.

Paragraph (3), although similar to (2), is separate because it deals with those instances in which a party files both a petition for rehearing en banc under this rule and a petition for panel rehearing under Rule 40.

To improve the clarity of the rule, the material dealing with filing a response to a petition and with voting on a petition have been moved to new subdivisions (e) and (f).

Subdivision (c). Two changes are made in this subdivision. First, the sentence stating that a request for a rehearing en banc does not affect the finality of the judgment or stay the issuance of the mandate is deleted. Second, the language permitting a party to include a request for rehearing en banc in a petition for panel rehearing is deleted. The Committee believes that those circuits that want to require two separate documents should have the option to do so.

Subdivision (e). This is a new subdivision. The substance of the subdivision, however, was drawn from former subdivision (b). The only changes are stylistic; no substantive changes are intended.

Subdivision (f). This is a new subdivision. The substance of the subdivision, however, was drawn from former subdivision (b).

Because of the discretionary nature of the en banc procedure, the filing of a suggestion for rehearing en banc has not required a vote; a vote is taken only when requested by a judge. It is not the Committee's intent to change the discretionary nature of the

procedure or to require a vote on a petition for rehearing en banc. The rule continues, therefore, to provide that a court is not obligated to vote on such petitions. It is necessary, however, that each court develop a procedure for disposing of such petitions because they will suspend the finality of the court's judgment and toll the time for filing a petition for certiorari.

Former subdivision (b) contained language directing the clerk to distribute a "suggestion" to certain judges and indicating which judges may call for a vote. New subdivision (f) does not address those issues because they deal with internal court procedures.

2005 Amendments

Subdivision (a). Two national standards--28 U.S.C. § 46(c) and Rule 35(a)--provide that a hearing or rehearing en banc may be ordered by "a majority of the circuit judges who are in regular active service." Although these standards apply to all of the courts of appeals, the circuits are deeply divided over the interpretation of this language when one or more active judges are disqualified.

The Supreme Court has never addressed this issue. In *Shenker v. Baltimore & Ohio R.R. Co.*, 374 U.S. 1 (1963), the Court rejected a petitioner's claim that his rights under § 46(c) had been violated when the Third Circuit refused to rehear his case en banc. The Third Circuit had 8 active judges at the time; 4 voted in favor of rehearing the case, 2 against, and 2 abstained. No judge was disqualified. The Supreme Court ruled against the petitioner, holding, in essence, that § 46(c) did not provide a cause of action, but instead simply gave litigants "the right to know the administrative machinery that will be followed and the right to suggest that the *en banc* procedure be set in motion in his case." *Id.* at 5. *Shenker* did stress that a court of appeals has broad discretion in establishing internal procedures to handle requests for rehearings--or, as *Shenker* put it, " 'to devise its own administrative machinery to provide the *means* whereby a majority may order such a hearing.' " *Id.* (quoting *Western Pac. R.R. Corp. v. Western Pac. R.R. Co.*, 345 U.S. 247, 250 (1953) (emphasis added)). But *Shenker* did not address what is meant by "a majority" in § 46(c) (or Rule 35(a), which did not yet exist)--and *Shenker* certainly did not suggest that the phrase should have different meanings in different circuits.

In interpreting that phrase, 7 of the courts of appeals follow the "absolute majority" approach. *See* Marie Leary, Defining the "Majority" Vote Requirement in Federal Rule of Appellate Procedure 35(a) for Rehearings En Banc in the United States Courts of Appeals 8 tbl.1 (Federal Judicial Center 2002). Under this approach, disqualified judges are counted in the base in calculating whether a majority of judges have voted to hear a case en banc. Thus, in a circuit with 12 active judges, 7 must vote to hear a case en banc. If 5 of the 12 active judges are disqualified, all 7 non-disqualified judges must vote to hear the case en banc. The votes of 6 of the 7 non-disqualified judges are not enough, as 6 is not a majority of 12.

Six of the courts of appeals follow the "case majority" approach. *Id.* Under this approach, disqualified judges are not counted in the base in calculating whether a majority of judges have voted to hear a case en banc. Thus, in a case in which 5 of a circuit's 12 active judges are disqualified, only 4 judges (a majority of the 7 non-disqualified judges) must vote to hear a case en banc. (The First and Third Circuits explicitly qualify the case majority approach by providing that a case cannot be heard en banc unless a majority of all active judges--disqualified and non-disqualified--are eligible to participate.)

Rule 35(a) has been amended to adopt the case majority approach as a uniform national interpretation of § 46(c). The federal rules of practice and procedure exist to "maintain consistency," which Congress has equated with "promot[ing] the interest of justice." 28 U.S.C. § 2073(b). The courts of appeals should not follow two inconsistent approaches in deciding whether sufficient votes exist to hear a case en banc, especially when there is a governing statute and governing rule that apply to all circuits and that use identical terms, and especially when there is nothing about the local conditions of each circuit that justifies conflicting approaches.

The case majority approach represents the better interpretation of the phrase "the circuit judges ... in regular active service" in the first sentence of § 46(c). The second sentence of § 46(c)--which defines which judges are eligible to participate in a case being heard or reheard en banc--uses the similar expression "all circuit judges in regular active service." It is clear that "all

circuit judges in regular active service" in the second sentence does not include disqualified judges, as disqualified judges clearly cannot participate in a case being heard or reheard en banc. Therefore, assuming that two nearly identical phrases appearing in adjacent sentences in a statute should be interpreted in the same way, the best reading of "the circuit judges ... in regular active service" in the first sentence of § 46(c) is that it, too, does not include disqualified judges.

This interpretation of § 46(c) is bolstered by the fact that the case majority approach has at least two major advantages over the absolute majority approach:

First, under the absolute majority approach, a disqualified judge is, as a practical matter, counted as voting against hearing a case en banc. This defeats the purpose of recusal. To the extent possible, the disqualification of a judge should not result in the equivalent of a vote for or against hearing a case en banc.

Second, the absolute majority approach can leave the en banc court helpless to overturn a panel decision with which almost all of the circuit's active judges disagree. For example, in a case in which 5 of a circuit's 12 active judges are disqualified, the case cannot be heard en banc even if 6 of the 7 non-disqualified judges strongly disagree with the panel opinion. This permits one active judge--perhaps sitting on a panel with a visiting judge--effectively to control circuit precedent, even over the objection of all of his or her colleagues. *See Gulf Power Co. v. FCC*, 226 F.3d 1220, 1222-23 (11th Cir. 2000) (Carnes, J., concerning the denial of reh'g en banc), *rev'd sub nom. National Cable & Telecomm. Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327 (2002). Even though the en banc court may, in a future case, be able to correct an erroneous legal interpretation, the en banc court will never be able to correct the injustice inflicted by the panel on the parties to the case. Moreover, it may take many years before sufficient non-disqualified judges can be mustered to overturn the panel's erroneous legal interpretation. In the meantime, the lower courts of the circuit must apply--and the citizens of the circuit must conform their behavior to--an interpretation of the law that almost all of the circuit's active judges believe is incorrect.

The amendment to Rule 35(a) is not meant to alter or affect the quorum requirement of 28 U.S.C. § 46(d). In particular, the amendment is not intended to foreclose the possibility that § 46(d) might be read to require that more than half of all circuit judges in regular active service be eligible to participate in order for the court to hear or rehear a case en banc.

2016 Amendments

The page limits previously employed in Rules 5, 21, 27, 35, and 40 have been largely overtaken by changes in technology. For papers produced using a computer, those page limits are now replaced by word limits. The word limits were derived from the current page limits using the assumption that one page is equivalent to 260 words. Papers produced using a computer must include the certificate of compliance required by Rule 32(g); Form 6 in the Appendix of Forms suffices to meet that requirement. Page limits are retained for papers prepared without the aid of a computer (i.e., handwritten or typewritten papers). For both the word limit and the page limit, the calculation excludes any items listed in Rule 32(f).

2020 Amendments

The amendment to Rule 35(e) clarifies that the length limits applicable to a petition for hearing or rehearing en banc also apply to a response to such a petition, if the court orders one.

Notes of Decisions (54)

F. R. A. P. Rule 35, 28 U.S.C.A., FRAP Rule 35
Including Amendments Received Through 3-1-24

End of Document

United States Code Annotated
Federal Rules of Appellate Procedure (Refs & Annos)
Title VII. General Provisions

Federal Rules of Appellate Procedure Rule 40, 28 U.S.C.A.

Rule 40. Petition for Panel Rehearing

Currentness

(a) Time to File; Contents; Response; Action by the Court if Granted.

(1) Time. Unless the time is shortened or extended by order or local rule, a petition for panel rehearing may be filed within 14 days after entry of judgment. But in a civil case, unless an order shortens or extends the time, the petition may be filed by any party within 45 days after entry of judgment if one of the parties is:

(A) the United States;

(B) a United States agency;

(C) a United States officer or employee sued in an official capacity; or

(D) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf--including all instances in which the United States represents that person when the court of appeals' judgment is entered or files the petition for that person.

(2) Contents. The petition must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended and must argue in support of the petition. Oral argument is not permitted.

(3) Response. Unless the court requests, no response to a petition for panel rehearing is permitted. Ordinarily, rehearing will not be granted in the absence of such a request. If a response is requested, the requirements of Rule 40(b) apply to the response.

(4) Action by the Court. If a petition for panel rehearing is granted, the court may do any of the following:

(A) make a final disposition of the case without reargument;

(B) restore the case to the calendar for reargument or resubmission; or

(C) issue any other appropriate order.

(b) Form of Petition; Length. The petition must comply in form with Rule 32. Copies must be served and filed as Rule 31 prescribes. Except by the court's permission:

(1) a petition for panel rehearing produced using a computer must not exceed 3,900 words; and

(2) a handwritten or typewritten petition for panel rehearing must not exceed 15 pages.

CREDIT(S)

(As amended Apr. 30, 1979, eff. Aug. 1, 1979; Apr. 29, 1994, eff. Dec. 1, 1994; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 26, 2011, eff. Dec. 1, 2011; Apr. 28, 2016, eff. Dec. 1, 2016; Apr. 27, 2020, eff. Dec. 1, 2020.)

ADVISORY COMMITTEE NOTES

1967 Adoption

This is the usual rule among the circuits, except that the express prohibition against filing a reply to the petition is found only in the rules of the Fourth, Sixth and Eighth Circuits (it is also contained in Supreme Court Rule 58(3) [rule 58(3), U.S.Sup.Ct.Rules). It is included to save time and expense to the party victorious on appeal. In the very rare instances in which a reply is useful, the court will ask for it.

1979 Amendment

Subdivision (a). The Standing Committee added to the first sentence of Rule 40(a) the words "or by local rule," to conform to current practice in the circuits. The Standing Committee believes the change noncontroversial.

Subdivision (b). The proposed amendment would eliminate the distinction drawn in the present rule between printed briefs and those duplicated from typewritten pages in fixing their maximum length. See Note to Rule 28. Since petitions for rehearing must be prepared in a short time, making typographic printing less likely, the maximum number of pages is fixed at 15, the figure used in the present rule for petitions duplicated by means other than typographic printing.

1994 Amendment

Subdivision (a). The amendment lengthens the time for filing a petition for rehearing from 14 to 45 days in civil cases involving the United States or its agencies or officers. It has no effect upon the time for filing in criminal cases. The amendment makes nation-wide the current practice in the District of Columbia and the Tenth Circuits, *see* D.C. Cir. R. 15 (a), 10th Cir. R. 40.3. This amendment, analogous to the provision in Rule 4(a) extending the time for filing a notice of appeal in cases involving the United States, recognizes that the Solicitor General needs time to conduct a thorough review of the merits of a case before requesting a rehearing. In a case in which a court of appeals believes it necessary to restrict the time for filing a rehearing petition, the amendment provides that the court may do so by order. Although the first sentence of Rule 40 permits a court of appeals to shorten or lengthen the usual 14 day filing period by order or by local rule, the sentence governing appeals in civil cases involving the United States purposely limits a court's power to alter the 45 day period to orders in specific cases. If a court of appeals could adopt a local rule shortening the time for filing a petition for rehearing in all cases involving the United States, the purpose of the amendment would be defeated.

1998 Amendments

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

2011 Amendments

Subdivision (a)(1). Rule 40(a)(1) has been amended to make clear that the 45-day period to file a petition for panel rehearing applies in cases in which an officer or employee of the United States is sued in an individual capacity for acts or omissions occurring in connection with duties performed on behalf of the United States. (A concurrent amendment to Rule 4(a)(1)(B) makes clear that the 60-day period to file an appeal also applies in such cases.) In such cases, the Solicitor General needs adequate time to review the merits of the panel decision and decide whether to seek rehearing, just as the Solicitor General does when an appeal involves the United States, a United States agency, or a United States officer or employee sued in an official capacity.

To promote clarity of application, the amendment to Rule 40(a)(1) includes safe harbor provisions that parties can readily apply and rely upon. Under new subdivision 40(a)(1)(D), a case automatically qualifies for the 45-day period if (1) a legal officer of the United States has appeared in the case, in an official capacity, as counsel for the current or former officer or employee and has not withdrawn the appearance at the time of the entry of the court of appeals' judgment that is the subject of the petition or (2) a legal officer of the United States appears on the petition as counsel, in an official capacity, for the current or former officer or employee. There will be cases that do not fall within either safe harbor but that qualify for the longer petition period. An example would be a case in which a federal employee is sued in an individual capacity for an act occurring in connection with federal duties and the United States does not represent the employee either when the court of appeals' judgment is entered or when the petition is filed but the United States pays for private counsel for the employee.

2016 Amendments

The page limits previously employed in Rules 5, 21, 27, 35, and 40 have been largely overtaken by changes in technology. For papers produced using a computer, those page limits are now replaced by word limits. The word limits were derived from the current page limits using the assumption that one page is equivalent to 260 words. Papers produced using a computer must include the certificate of compliance required by Rule 32(g); Form 6 in the Appendix of Forms suffices to meet that requirement. Page limits are retained for papers prepared without the aid of a computer (i.e., handwritten or typewritten papers). For both the word limit and the page limit, the calculation excludes any items listed in Rule 32(f).

2020 Amendments

The amendment to Rule 40(a)(3) clarifies that the provisions of Rule 40(b) regarding a petition for panel rehearing also apply to a response to such a petition, if the court orders a response. The amendment also changes the language to refer to a “response,” rather than an “answer,” to make the terminology consistent with Rule 35; this change is intended to be stylistic only.

Notes of Decisions (44)

F. R. A. P. Rule 40, 28 U.S.C.A., FRAP Rule 40
Including Amendments Received Through 3-1-24

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