

Litigation

Appellate Procedure

Petition for Rehearing

Comer Revisited: The Proposed Amendment to Fifth Circuit Rule 41.3



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If all goes as planned, the U.S. Court of Appeals for the Fifth Circuit will soon have a new [Circuit Rule 41.3](#)—the rule describing the effect of granting rehearing en banc.

But because the rule change is narrowly tailored to remedy the result in a highly unusual case—one where the court has a quorum to take a case en banc but subsequently loses the quorum before the en banc proceeding—the new amendment is unlikely to have much practical effect.

The Proposed Change

Currently, Rule 41.3 consists of just one sentence: “Unless otherwise expressly provided, the granting of rehearing en banc vacates the panel opinion and judgment of the court and stays the mandate.” A recently-proposed amendment, however, would add the following qualifier to that rule:

If, after voting a case en banc, the court lacks a quorum to act on the case for 30 consecutive days, the case is automatically returned to the panel, the panel opinion is reinstated as an unpublished (and hence nonprecedential) opinion, and the mandate is released. To act on a case, the en banc court must have a quorum consisting of a majority of the en banc court as defined in [28 U.S.C. § 46\(c\)](#).¹

Court Likely Motivated by Global Warming Class Action

Although the court gave no reason for the amendment, the change is likely being made in response to the events surrounding last year’s global warming class action, *Comer v. Murphy Oil USA*.²

Comer attracted a good deal of attention—not the least of which from industry—and for good reason.³ If plaintiffs could bring causes of action based on the theory of global warming, carbon-producing industries would face untold sums in tort liability exposure. All this in a circuit home to a number of the world’s largest oil companies,⁴ as well as its fair share of natural disasters.⁵

In *Comer*, a class of plaintiffs who owned property along the Mississippi gulf coast sued a plethora of major oil companies, alleging a chain of causation by which the companies all emitted greenhouse gases, which purportedly caused climate change. The climate change in turn allegedly caused Hurricane Katrina, which caused damage to the plaintiffs’ property.⁶ The district court found that the plaintiffs lacked standing to sue and dismissed the case.⁷ A panel of the Fifth Circuit reversed.⁸ Writing for the

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panel, Judge James L. Dennis (with whom Judge Carl E. Stewart joined) held that plaintiffs had standing to sue on their public and private nuisance, trespass, and negligence claims.⁹ Judge W. Eugene Davis concurred.¹⁰

Before the mandate issued, however, a majority of the Fifth Circuit voted to consider the case en banc.¹¹ Soon afterward, the court informed the parties that, although the court had a quorum at the time of the en banc vote, it no longer had a quorum.¹²

Under the court's interpretation of Federal Rule of Appellate Procedure 35(a) and 28 U.S.C. § 46(d), the quorum-less court could no longer hear the case.¹³ More significantly for the *Comer* plaintiffs, because the panel decision had already been vacated by operation of the vote to take the case en banc,¹⁴ the lack of a quorum to hear the case before the en banc court meant that the district court's opinion was effectively reinstated—in spite of its reversal by the panel.¹⁵

Such was the interpretation of a majority of the court, which released an order dismissing the appeal.¹⁶ Judges Davis and Stewart dissented, arguing that the court was not as constrained by Rule 41.3 as the majority asserted and lamenting that “[t]he dismissal of this appeal based on a local rule has the effect of depriving appellants of their right to an appeal and allows the local rule to trump federal statutes.”¹⁷ Judge Dennis, who issued his own dissent, would have found that there was a proper en banc quorum to hear the case under Rule 35(a) and 28 U.S.C. § 46(d).¹⁸

The *Comer* plaintiffs saw their Fifth Circuit victory vanish by operation of Rule 41.3. And, without any means for an appeal before a quorum-less Fifth Circuit, their only recourse was to the U.S. Supreme Court. Ultimately, though, the Supreme Court denied mandamus relief.¹⁹

Predictably, the result in *Comer* drew reactions from court observers.²⁰

Under the New Rule, the Court Would Have Heard the *Comer* Appeal

Unfortunately for the *Comer* plaintiffs, the court's new rule will have no impact on the outcome of their now-defunct case. Had the new Rule 41.3 been in effect, however, *Comer* would have come out quite differently.

Under the rule in place during *Comer*, the panel opinion was automatically and irrevocably vacated when a majority of the court voted to consider the case en banc.²¹ Under the proposed new version of the rule, taking the case en banc still vacates the panel opinion, but it does so only temporarily, or at least the vacating of the panel opinion is revocable.²² Under the proposed rule, if at any time after the court votes to take the case en banc it loses a quorum for 30 consecutive days (as presumably would have been the case in *Comer*), the panel opinion is automatically reinstated—albeit as an unpublished and therefore non-precedential opinion.²³

Thus, the dilemma present in *Comer*—where a quorum-less court could not take the affirmative action necessary to reinstate the vacated panel opinion—is to be solved by providing for reinstatement automatically by operation of the court's local rule.

The New Rule 41.3 Is Unlikely to Have Much Impact

The situation addressed by the proposed amendment is unlikely to crop up often. The new rule would only have an impact in a situation like that encountered in *Comer*—i.e., the en banc court must be confronted with the highly unusual circumstance where it has a quorum when it votes to take a case en banc, but subsequently loses that quorum at some point before the en banc court can issue a decision.

Before the quorum-less court issued its order dismissing the appeal in *Comer*, it asked the parties for letter briefs addressing the effect of the loss of a quorum.²⁴ Tellingly, none of the parties could point to a case anywhere where an en banc court had a quorum to vote to take a case en banc and then subsequently lost that quorum before it could hear the case. In the end, then, the proposed amendment to Rule 41.3 is designed to rectify a situation that is unlikely to come up again often, if it will ever come up again at all.

Fifth Circuit's Definition of Quorum Remains Unchanged

Of greater significance than what the court is proposing to do is what the court is *not* proposing to do. Although the Fifth Circuit is showing a willingness to alter the rule governing when and how panel opinions are vacated by an en banc vote in exceptional cases like *Comer*, it has given no indication that it is rethinking how it defines a quorum. Indeed, the court's proposed amendment to Rule 41.3 in the wake of *Comer* hints that it is sticking to its old definition.

The Fifth Circuit takes a restrictive view of 28 U.S.C. § 46(d)'s requirement that “[a] majority of the number of judges authorized to constitute a court or panel thereof, as provided in [28 U.S.C. § 46(c)] shall constitute a quorum.”²⁵ Under the court's interpretation of Section 46(d), a quorum consists of a majority of the total number of active judges on the court. Should any active judges recuse themselves in a particular case, there is no effect on the denominator of the quorum determination.

A few examples are helpful. The Fifth Circuit currently has sixteen active judges. If five of them were to recuse themselves, it would still take nine judges to constitute a quorum to hear a case en banc. If eight of the 16 active judges currently on the court were recused—even if the other eight all wanted to take a case en banc—there could be no en banc quorum to vote to take the case²⁶ or to decide it.²⁷

Counsel for the oil companies in *Comer* took the position that an en banc quorum for purposes of U.S.C. § 46(d) meant only a majority of those judges who were actually able to sit on the

court—i.e., that for purposes of calculation, the court should not include recused judges in the denominator.²⁸ Given the way the case turned out, there is some irony in the fact that it was the oil companies arguing for this interpretation of Section 46(d), while counsel for the plaintiffs argued for the restrictive definition.²⁹ One plausible explanation is that counsel for both parties discounted the effect of the current version of Rule 41.3, which effectively delivered the oil companies the result they sought without the court sitting en banc.

In any event, Judge Dennis, too, took the view that the court's definition of quorum in Section 46(d) was too restrictive.³⁰ Judge Dennis made a textual argument for the broader approach.³¹

By finding that it lacked an en banc quorum, the *Comer* court necessarily took the more restrictive definition requiring a majority of the court's active judges with recused judges counting against the majority.³² Had the court concluded otherwise, there would have been no need to debate whether the vacated panel opinion stayed vacated or whether it could be revived because there would have been an en banc quorum to decide the case. And, were the court inclined today to take the broader approach to quorum, there would seemingly be no need for its more limited amendment to Rule 41.3.

If the Fifth Circuit had announced a new Local Rule 35(a) taking the more liberal approach to what constitutes an en banc quorum in 28 U.S.C. § 46(d), that would have been notable. Although both changes would have prevented *Comer* from ending the way it did, unlike the proposed change to Rule 41.3, the quorum change would sweep beyond the precise circumstances in *Comer*.

After all, the new addition to Rule 41.3 requires an unusual combination of events to occur in order to have any impact: there needs to be the unlikely two-step of (1) having a quorum at the time the court votes to consider a case en banc, and then (2) not having a quorum to actually consider the case en banc.³³ By contrast, for a broader definition of quorum to matter, only one of those features—a court lacking a quorum under the court's current definition—would need to occur.

Conclusion

The Fifth Circuit is proposing to make a limited change to how and when the granting of en banc review will vacate panel opinions. To be sure, the proposed amendment to Rule 41.3 will prevent future *Comers* by ensuring that the panel opinion can be reinstated automatically should an en banc court ever lose its quorum. But the amendment to the rule is not calculated to make a significant difference in your practice.

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¹ See U.S. Court of Appeals for the Fifth Circuit, *Notice of Proposed Amendment to 5th Circuit R. 41.3*, available at <http://www.msnd.uscourts.gov/413pubcmt2011.pdf>.

² 585 F.3d 855 (5th Cir. 2009).

³ See, e.g., Christina M. Carroll and J. Randolph Evans, Bloomberg Law Reports®, *Insurance Law*, Vol. 4, No. 6, *Comer and Insurance: Who Will End Up Paying?* (June 7, 2010); *Global Warming: Here Come the Lawyers*, Businessweek (Oct. 30, 2006), at http://www.businessweek.com/magazine/content/06_44/b4007044.htm.

⁴ See, e.g., Jennifer A. Dlouhy, *Emissions Limits Sought*, Hous. Chron., at 1 (Jan. 16, 2009).

⁵ See, e.g., Jad Mouawad, *Storms Cast Spotlight on Energy's New Reality*, N.Y. Times, at C1 (Sept. 26, 2005).

⁶ See *Comer*, 585 F.3d at 859.

⁷ See *Comer v. Murphy Oil USA, Inc.*, No. 05-cv-00436, 2007 BL 253314, at *1 (S.D. Miss. Aug. 30, 2007).

⁸ See *Comer*, 585 F.3d at 855.

⁹ *Id.* at 864–67.

¹⁰ *Id.* at 880 (Davis, J., concurring).

¹¹ *Comer v. Murphy Oil USA*, 598 F.3d 208 (5th Cir. 2010).

¹² See *Notification, Comer v. Murphy Oil USA*, No. 07-cv-60756 (Apr. 30, 2010).

¹³ See *Comer v. Murphy Oil USA*, 607 F.3d 1049, 1053, 1055 (5th Cir. 2010).

¹⁴ See Rule 41.3.

¹⁵ See *id.* at 1056.

¹⁶ *Id.* at 1053–56.

¹⁷ *Id.* at 1056 (Davis, J., dissenting).

¹⁸ *Id.* at 1058–59 (Dennis, J., dissenting).

¹⁹ *In re Comer*, 131 S. Ct. 902 (2011) (mem.).

²⁰ See, e.g., Recent Case, *Fifth Circuit Leaves Panel Decision Vacated upon Loss of En Banc Quorum: Comer v. Murphy Oil USA*, 124 Harv. L. Rev. 624, 628–29 (2010) (arguing that although the court was correct that it did not have a quorum, the court did have the power to reinstate the panel opinion); Ilya Shapiro, *Global Warming Plaintiffs Hoisted On Their Own Petard*, Cato @ Liberty (June 2, 2010, 8:30 AM), <http://www.cato-at-liberty.org/global-warming-plaintiffs-hoisted-on-their-own-petard/> (stating that the court's dismissal was the “second-best result”); Howard J. Bashman, *Fifth Circuit's en banc disposition of global warming-related case can only be described as curiouser and curiouser*, How Appealing (May 28, 2010, 11:58 PM), <http://howappealing.law.com/052810.html#038172> (expressing confusion about the result).

²¹ See Fifth Circuit Local Rule 41.3 (as of July 31, 2011).

²² See U.S. Court of Appeals for the Fifth Circuit, *Notice of Proposed Amendment to 5th Circuit R. 41.3*.

²³ See *id.*

²⁴ See *Letter of Advisement, Comer v. Murphy Oil USA*, No. 07-cv-60756 (May 6, 2010).

²⁵ See *Comer*, 607 F.3d at 1054 (stating that the court had lost its quorum because “only eight judges in regular active service” were left “on a court of sixteen judges”).

²⁶ See 28 U.S.C. § 46(c).

²⁷ See 28 U.S.C. § 46(d).

²⁸ See Appellee’s Ltr. Br., *Comer v. Murphy Oil USA*, No. 07-cv-60756, at *1–5 (May 12, 2010); Appellee’s Ltr. Br., *Comer v. Murphy Oil USA*, No. 07-cv-60756, at *1–4 (May 17, 2010).

²⁹ See Appellant’s Ltr. Br., *Comer v. Murphy Oil USA*, No. 07-cv-60756, at *2–7 (May 12, 2010); Appellant’s Ltr. Br., *Comer v. Murphy Oil USA*, No. 07-cv-60756, at *1–3 (May 16, 2010).

³⁰ See *Comer*, 607 F.3d at 1058–59 (Dennis, J., dissenting).

³¹ See, e.g., *id.* (Dennis, J., dissenting) (discussing the Advisory Committee Notes to the 2005 amendment to Federal Rule of Appellate Procedure 35(a) and noting the similarity between language in 28 U.S.C. §§ 46(c) and 46(d)).

³² See *Comer*, 607 F.3d at 1054.

³³ See generally U.S. Court of Appeals for the Fifth Circuit, *Notice of Proposed Amendment to 5th Circuit R. 41.3*.