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OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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June 1, 2011

Howard J. Bashman, Esq.
2300 Computer Avenue
Suite G-22
Willow Grove, Pennsylvania 19090

Dear Howard:

I write in my capacity as Chair of the Judicial Conference Advisory Committee on Appellate Rules to let you know the results of the Committee's consideration of your April 2010 suggestion concerning *Vanderwerf v. SmithKline Beecham Corp.*, 603 F.3d 842 (10th Cir. 2010), which held that the withdrawal of a Civil Rule 59(e) motion negated the motion's tolling effect and rendered the movant's appeal untimely.

The Committee discussed the issues raised by *Vanderwerf* at its fall 2010 and spring 2011 meetings. I enclose the relevant excerpts from the minutes of the fall 2010 meeting and the proposed draft minutes of the spring 2011 meeting (the latter draft has not yet been approved by the Committee). As you will see from the minutes, some participants suggested that the problems raised by *Vanderwerf* would be most acute if the case's holding were to be applied to instances where the would-be appellant is not the litigant who filed the tolling motion, and it was noted that no court has (as yet) applied *Vanderwerf*'s holding in such a context. Ultimately, there was no consensus in favor of a rulemaking response to this case, but the Committee appreciated the opportunity to consider it, and our Reporter will continue to watch for further case law developments in this area.

The Committee is grateful for your helpful suggestions concerning the Rules and looks forward to receiving more such suggestions in the future.

I hope you and your family (and the Phillies) are well.

Sincerely,

Jeffrey S. Sutton
Chair, Advisory Committee on Appellate Rules

JSS:jmf
Enclosure

cc: Peter G. McCabe
Andrea Kuperman
Catherine T. Struve

**Minutes of Fall 2010 Meeting of**
**Advisory Committee on Appellate Rules**
**October 7 and 8, 2010**
**Boston, Massachusetts**

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**B. Item No. 10-AP-E (effect of withdrawal of a timely-filed post-judgment motion on the time to appeal in a civil case)**

Judge Sutton invited the Reporter to introduce this item, which arises from Howard Bashman's suggestion that the Committee consider issues raised by *Vanderwerf v. Smithkline Beecham Corp.*, 603 F.3d 842 (10th Cir. 2010). In *Vanderwerf*, the district court granted summary judgment dismissing the Vanderwerfs' claims. They timely filed a motion under Civil Rule 59(e). After almost seven months elapsed with no decision on the motion, the Vanderwerfs withdrew the motion and (on the same day) filed a notice of appeal. A divided panel of the court of appeals dismissed the appeal as untimely. The majority reasoned that Appellate Rule 4(a)(4) "requires entry of an 'order disposing of [the Rule 59] motion' to give the appealing party the benefit of Rule 4(a)(4)(A)(iv)," and that the Vanderwerfs' withdrawal of their motion "leaves the record as if they had never filed the motion in the first place." Judge Lucero dissented, arguing that "[b]ecause the district court did not rule on the motion to alter or amend the judgment, the thirty-day filing deadline has not begun to run."

The Reporter observed that this is, as far as she could determine, the first decision to deny tolling effect to a motion because it was withdrawn. The Second, Seventh and Ninth Circuits have instead reasoned that a motion had tolling effect even though it was withdrawn – though in the Second and Ninth Circuit cases, the district court had in some way assented to the withdrawal of the motion. In an unpublished decision, the Sixth Circuit construed a tolling motion as denied on the date of its withdrawal; in that case, though, the motion was by the appellee rather than the appellant.

The Reporter suggested that if one takes the policy behind Rule 4(a)(4) to be promoting an efficient division of labor between the trial and appellate courts, then one might argue that, in hindsight, this policy is not at issue when a motion is withdrawn – because in hindsight it is clear that the appeal could have proceeded without any impediment from the ultimately-withdrawn motion. But such an argument could also be made as to a motion that is denied, and no one suggests that a motion lacks tolling effect as a result of being denied on its merits. The Reporter acknowledged the *Vanderwerf* majority's concern with the possibility than an appellant might make and then withdraw a tolling motion simply to achieve a unilateral extension of appeal time. But she suggested that this concern could be addressed through means other than denying the motion tolling effect – such as recourse to Civil Rule 11 or to 28 U.S.C. § 1927. In addition, such a concern would suggest denying tolling effect to a withdrawn motion only when the motion was made by the would-be appellant, and not when the motion was made by the appellee – but the text of Rule 4(a)(4) does not indicate any basis for a distinction between motions based on the identity of the movant.

There is textual appeal, the Reporter suggested, to Judge Lucero's argument that under the text of Rule 4(a)(4) the Vanderwerfs' appeal time had not yet begun to run. However, such an interpretation of the Rule could present a different policy concern – namely, that in such instances the appeal time might never start to run. This concern is similar to that which arose prior to 2002 in instances where a judgment was required to be set forth in a separate document and the separate document was not provided. In 2002, the Rules were amended to set an outer limit at which the appeal time would begin to run even if the requisite separate document was never provided. One possible approach in the context of withdrawn motions is that taken by the Sixth Circuit's unpublished opinion – namely, deeming the motion denied as of the date it is withdrawn.

An attorney member stated that she agreed with the *Vanderwerf* majority's reading of Rule 4(a)(4). The Rule, she suggested, cannot reasonably be read to allow a party to give itself a unilateral extension; when the motion is withdrawn, there never is an "order disposing of" a tolling motion. The Reporter asked whether such a reading of Rule 4(a)(4) would also counsel denying tolling effect to a withdrawn motion when the would-be appellant is someone other than the movant. The member responded that in such a situation the would-be appellant could ask the court not to permit the movant to withdraw the motion. Another attorney member agreed that Rule 4(a)(4) might be read to imply the requirement that an order ultimately be entered with respect to a motion in order for the motion to have tolling effect; this member drew an analogy to the way the language of Civil Rule 50 has been read. An appellate judge member recalled a Georgia state statute that provided that an appeal not decided within six months was deemed denied; he suggested that an analogous approach might be considered for motions not ruled upon by the trial court. Possible formulations were noted – that a motion might be "deemed denied if withdrawn," or "deemed denied because disposed of." A member suggested the possibility of adopting a rule providing that no motion of the types described in Appellate Rule 4(a)(4) can be withdrawn without leave of court. It was noted that such a provision would be placed in the Civil Rules rather than the Appellate Rules.

An attorney member observed that cases raising this issue are likely to be rare. An appellate judge member agreed that there is no need for the Committee to take action with respect to this issue. Another attorney member agreed that there is no urgent need for Committee action, though he observed that under the *Vanderwerf* court's approach it is not clear what a non-movant should do if a movant withdraws a tolling motion. By consensus, the Committee decided to keep this item on the study agenda for the moment, in order to consider further how one might address the latter scenario in the light of the *Vanderwerf* decision.

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# DRAFT

**Minutes of Spring 2011 Meeting of**
**Advisory Committee on Appellate Rules**
**April 6 and 7, 2011**
**San Francisco, California**
***(N.B.: These minutes have not yet been approved by the Committee)***

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## G. Item No. 10-AP-E (effect of withdrawal of a timely-filed post-judgment motion on the time to appeal in a civil case)

Judge Sutton invited the Reporter to introduce this item, which arose from Howard Bashman's suggestion that the Committee consider issues raised by *Vanderwerf v. SmithKline Beecham Corp.*, 603 F.3d 842 (10th Cir. 2010). The Reporter reminded the Committee that in *Vanderwerf*, the majority held that the withdrawal of a Civil Rule 59(e) motion deprived that motion of tolling effect and rendered the movant's appeal untimely. No consensus emerged, at the fall 2010 meeting, in favor of a rulemaking response to *Vanderwerf*. Members did express interest in considering further the situation faced by a non-movant who has relied on the tolling effect of a post-judgment motion that is subsequently withdrawn. One might question whether the *Vanderwerf* holding extends to cases in which the movant and the appellant are different parties. It would not seem to make sense to extend the *Vanderwerf* holding to situations in which the tolling motion is made (and then withdrawn) by a litigant other than the would-be appellant. Admittedly, no textual basis is readily apparent in Appellate Rule 4(a)(4) for distinguishing between appeals by the litigant that made the withdrawn motion and appeals by other litigants. However, there has as yet been no decision that applies *Vanderwerf* to an appeal by a non-movant. The Reporter suggested that the Committee consider whether, in the absence of such a decision, it is worthwhile to maintain this item on the study agenda.

A motion was made and seconded to remove Item No. 10-AP-E from the study agenda. The motion passed by voice vote without dissent.

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