SIXTH CIRCUIT REVIEW

Obedience Versus Accuracy: How District Courts Apply Sixth Circuit Rule 32.1

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I. INTRODUCTION

Under Sixth Circuit Rule 32.1(b) (the Rule), as in most other circuits,[1] published opinions are binding on the court and can only be overruled by the court en banc.[2] If a Sixth Circuit district court determines that two published Sixth Circuit opinions conflict, it must set aside the later opinion and apply the

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[1] The Sixth Circuit's "first in time" approach is in line with most, but not all, circuits. The First, Third, Fourth, Fifth, Eighth, Ninth, and Federal Circuits share the Sixth Circuit's position that, in the absence of an intervening decision by a court of higher authority, only an en banc circuit court may overrule a prior published decision. Mahadeo v. Reno, 226 F.3d 3, 13 (1st Cir. 2000); Blair v. Scott Specialty Gases, 283 F.3d 595, 610–11 (3d Cir. 2002); United States v. Kirk, 528 F.2d 1057, 1063 (5th Cir. 1976); Foulk v. Charrier, 262 F.3d 687, 700–01 n.12 (8th Cir. 2001); Kotrous v. Goss-Jewett Co., 523 F.3d 924, 932–33 (9th Cir. 2008); George E. Warren Corp. v. United States, 341 F.3d 1348, 1351–52 (Fed. Cir. 2003). In the Second and Seventh Circuits, a panel may overrule a prior published opinion via "mini-en banc," a practice in which the overruling opinion is circulated to the entire court beforehand for a vote on en banc review. *See* 7TH CIR. R. APP. P. 40(e); Diebold Found., Inc. v. Comm'r, 736 F.3d 172, 183 n.7 (2d Cir. 2013). Mini en-banc has other uses too. *See* Alexandra Sadinsky, Note, *Redefining En Banc Review in the Federal Courts of Appeals*, 82 FORDHAM L. REV. 2001, 2025 (2014) (explaining that mini en-banc is also used "when a panel addresses a question of first impression" and "when a panel creates or continues a circuit split . . ."). In the Eighth Circuit, a panel may not overrule an earlier panel, but where an intra-circuit conflict has already come into being, a third, subsequent, panel is not required to follow the earliest decision but is "free to choose which line of cases to follow." Kilmartin v. Dormire, 161 F.3d 1125, 1127 (8th Cir. 1998).

[2] 6TH CIR. R. 32.1(b).

earlier one.[3] The way a district court approaches a potential conflict under the Rule reflects a choice (or a compromise) between obedience and accuracy.[4] When invoked at the trial level, this "first in time" rule makes the district court—which is otherwise bound by *all* Sixth Circuit decisions—the arbiter of whether an appellate panel exceeded its authority.

This Article identifies four approaches taken by district courts in recent decisions applying the Rule, and discusses how those approaches balance accuracy in applying the rule against obedience to the judicial hierarchy that requires district courts to defer to the appellate court.[5]

The "objective" approach focuses on accuracy in applying the Rule above all—perhaps believing that hierarchy is served well enough by the availability of appeal from its decision, which gives the appellate court the last word. The "conciliatory" approach seeks to balance accuracy and obedience by contriving to reconcile all prior published cases, although—like the *Marks v. United States* "narrowest holding" approach to Supreme Court precedent[6]—it can result in an outcome that neither panel would approve of and thereby fail to serve either principle. The "obedient" approach decisively chooses obedience to the appellate court over accuracy in adhering to the Rule. And the "substantive" approach incorporates the district court's opinion on the substance of the conflicting decisions into its application of the Rule, thereby arguably subverting the usual hierarchy in which the *appellate* court evaluates the *district* court.

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[3] *See* Drew D. Dropkin, *Important Conflict Being Overlooked in* Omnicare *Case*, LAW360.COM (Mar. 6, 2014, 1:21 PM), http://www.kslaw.com/imageserver/KSPublic/library/publication/2014articles/3-6-14_Law360_Dropkin.pdf [http://perma.cc/GB9F-CWSH].

[4] Some state courts have similar rules, dictating that a state appellate panel is bound by earlier panels in the absence of a ruling from the highest court or an en-banc-like determination. When a federal court applies this rule in a diversity case to set aside state court precedent, there is a similar tension between loyalty to the *Erie* principle of submitting to state court precedent and the desire to apply the rule accurately (where failure to do so would also be in conflict with *Erie*, since presumably a state court would apply the state rule). *See, e.g.*, Griffin v. Reznick, No. 1:08-cv-50, 2008 U.S. Dist. LEXIS 86974, at *17–20 (W.D. Mich. Oct. 28, 2008). Existing Supreme Court precedent on how to apply lower state court decisions in a diversity case appears to assume that conflict among state courts of appeal is permissible. *See, e.g.*, Air-Sea Forwarders, Inc. v. Air Asia Co., 880 F.2d 176, 186 (9th Cir. 1989). The extent to which federal courts in diversity cases are aware of and apply state-law equivalents of the Rule would be an interesting topic of inquiry beyond the scope of this Article.

[5] This Article takes the reasoning in each opinion at face value. Of course, published opinions may not always reflect all the considerations that factored into a decision. However, the written analysis in an opinion provides the law and methodology on which future litigants and courts will rely.

[6] Marks v. United States, 430 U.S. 188, 193 (1977).

II. OBJECTIVE APPROACH

Some courts appear to take a strictly "objective" approach: examine the two decisions and independently determine whether there is a conflict between them.[7] If the court perceives a conflict, it sets aside the later case and applies the earlier one, per the Rule. If the court does not see a conflict, it applies whichever precedent it deems more apposite to the case before it. While it may not be possible to be perfectly objective, a court applying this approach is making a good faith effort to do so.

An "objective" court reads the Rule literally, and wants—above all—to make the right choice between the two published opinions. Courts applying the "objective" approach see no need for a "thumb on the scale" in any direction. They make no special effort to reconcile cases that appear to be in tension.[8] They will even reject the Sixth Circuit's explicit distinction of an earlier published decision if they do not find the distinction persuasive.[9] Accuracy is the goal, and obedience—other than to the Rule itself—does not enter the analysis.

Applying the "objective" approach, a district court declined to apply *McCullum v. Tepe*,[10] which held that privately employed doctors working part-time at a prison do not receive the qualified immunity of prison-employed doctors, based on its own determination that *McCullum* was inconsistent with an earlier case granting qualified immunity to a prison-employed doctor.[11] In doing so, the district court ignored the analysis of *McCullum*, which clearly indicated that the court did *not* see privately-employed physicians as "legally and factually similar" to prison-employed physicians and saw itself as addressing a different situation rather than overruling prior case law.[12] The district court, relying solely on the Rule and its own "objective" analysis of the two opinions, concluded there was a conflict, notwithstanding the distinction drawn in *McCullum*.[13]

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[7] *See, e.g.*, *In re* Steward, 509 B.R. 123, 125 n.3 (Bankr. W.D. Mich. 2014) (setting aside later opinion, as "difficult to square with" an earlier one).

[8] *Id.*

[9] *See, e.g.*, R.L. Polk & Co. v. Infousa, Inc., 230 F. Supp. 2d 780, 785-86 (E.D. Mich. 2002) (declining to apply the Sixth Circuit's published opinion in *Therma-Scan* as inconsistent with its earlier published opinion in *Wynn*, despite *Therma-Scan*'s distinction of *Wynn*) (citing Wynn Oil Co. v. Thomas, 839 F.2d 1183 (6th Cir. 1988); Therma-Scan, Inc. v. Thermoscan, Inc., 295 F.3d 623 (6th Cir. 2002)).

[10] McCullum v. Tepe, 693 F.3d 696, 704 (6th Cir. 2012).

[11] Marcum v. Scioto Cnty., No. 1:10-cv-790-HJW, 2014 U.S. Dist. LEXIS 112100, at *66–67 (S.D. Ohio Aug. 13, 2014) (citing Reilly v. Vadlamudi, 680 F.3d 617 (6th Cir. 2012)).

[12] *See McCullum*, 693 F.3d at 700–04 (concluding that "there does not appear to be any history of immunity for a private doctor working for the government . . .").

[13] *See Marcum*, 2014 U.S. Dist. LEXIS 112100 at *67.

The Sixth Circuit's subsequent treatment of *McCullum* demonstrates that relying on a district court case[14] whose analysis hinges on application of the Rule is risky business. About a month after the district court held in *Marcum v. Scioto County* that *McCullum* was not good law, the Sixth Circuit relied heavily on *McCullum* in a published opinion in another qualified immunity case.[15] Given the Sixth Circuit's embrace of *McCullum*, relying on *Marcum* to ignore *McCullum*—and arguing that the panel embracing *McCullum* also violated the Rule—would be an imprudent litigation strategy, notwithstanding its theoretical coherence. But when there is no appeal, a decision like *Marcum* may stand—with no warning markers in services like LexisNexis and Westlaw—to indicate that it directly diverges from the Sixth Circuit.

An "objective" district court's willingness to openly disagree with and set aside a Sixth Circuit decision poses a challenge to the judicial hierarchy in principle, not just in practice. In practice, district courts almost always have the first crack at applying Sixth Circuit precedent, and often that means the opportunity to effectively "set aside" a published Sixth Circuit opinion by reading it narrowly and thereby declaring it inapposite to the instant case, or by reading an intervening Supreme Court case broadly to supersede it. However, even a district court thus contriving to avoid a published Sixth Circuit opinion is not openly disobeying or categorically ignoring Sixth Circuit precedent it acknowledges to be directly applicable. The end result may be the same, but the path taken makes a statement about the extent of a district court's duty to defer to the appellate court.

At the same time, an "objective" court's devotion to accuracy in applying the Rule could be framed as the ultimate in deference to the Sixth Circuit itself, because the Sixth Circuit made the Rule. "Objective" courts do not treat the Rule as an opportunity to favor a "better" decision over a "worse" one according to their own understanding of which is "better" from a policy perspective or "better" in the quality of reasoning or depth of analysis. They simply determine whether there is a conflict. As a practical matter, the "objective" approach likely increases uncertainty for litigants just as much as the "substantive" approach discussed below, but theoretically, the "objective" district court is doing its best to defer to the Sixth Circuit decision that the Sixth Circuit itself declared binding on all future panels.

III. CONCILIATORY APPROACH

Other courts believe themselves duty-bound to take a "conciliatory" approach: to reconcile the published cases, even when doing so requires some contriving and/or not very persuasive distinguishing. "Conciliatory" district

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[14] The same might be said about following a Sixth Circuit decision applying the rule, but arguably to a lesser degree.

[15] *See* United Pet Supply, Inc. v. City of Chattanooga, 768 F.3d 464, 479–83, 480 n.2 (6th Cir. 2014).

courts believe that "both [published opinions are binding] current law and should be distinguished so that they do not conflict."[16]

In some cases, the hard work of reconciling will have been done by the later Sixth Circuit panel. Where a later decision "specifically distinguish[es]" an earlier one, the later decision will "provide[] guidance in the present case"[17] to a "conciliatory" court.[18] The "conciliatory" court will consider itself "bound" to apply the later opinion's distinction, even when it has "no doubt" that the later opinion "contradict[s]" the earlier.[19]

In cases where the later published opinion does *not* explicitly distinguish the earlier one, "conciliatory" courts effectively turn the Rule into a rule of construction, a constraint applied to narrow the universe of acceptable interpretations to only those compatible with both cases. As one court explained, "to adopt [the defendant's] interpretation of that statement would mean that *Freeman* abridged *Nationwide Property* [an earlier Sixth Circuit case], which, as a subsequent panel, it cannot do," and that "the more appropriate reading" is a narrower one that reconciles the two cases.[20] In *Richards v. Johnson & Johnson*, the court reconciled five Sixth Circuit cases by treating "broad language in the later opinions" as dictum and limiting the earliest case to its facts, reasoning that "it cannot be assumed that one Sixth Circuit panel has overruled, *sub silentio*, the prior decision of another panel."[21] Under the "conciliatory" approach, setting aside *any* published Sixth Circuit case is unacceptable, or at least extremely undesirable.

As evidenced by the above examples, the "conciliatory" approach usually achieves its goal of avoiding any direct challenge to the hierarchy (i.e., setting aside any Sixth Circuit decision) *or* to the Rule (i.e., following a later published decision over an earlier one) by reading Sixth Circuit precedent

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[16] L & R Farm P'ship v. Cargill Inc., 963 F. Supp. 2d 798, 806 (W.D. Tenn. 2013).

[17] *See id.*; Chinn v. Warden, Mansfield Corr. Inst., No. 3:02-cv-512, 2013 U.S. Dist. LEXIS 91248, at *72 (S.D. Ohio June 28, 2013) ("[T]he question is not whether the distinction is persuasive, but whether it was made by a majority of a Sixth Circuit panel in a published decision.").

[18] *See Chinn*, 2013 U.S. Dist. LEXIS 91248, at *72.

[19] United States v. Edwards, No. 11-50728, 2012 U.S. Dist. LEXIS 134714, at *7–8 (E.D. Mich. Sept. 20, 2012) ("There is no doubt that *Lucido* and *Carey* are likely contradictory. As a general proposition, the court would normally be bound to follow *Carey*, the earlier decision. Here, however, the Sixth Circuit in *Lucido* already determined that *Carey* is not controlling precedent on the jurisdictional issue confronted here. Although the *Lucido* dissent presents a persuasive argument as to why this decision was contrary to Sixth Circuit law, this court is nevertheless bound by the majority's holding that *Carey* does not conflict with its ruling.") (citations omitted).

[20] Henry v. Michaels Stores, Inc., No. 2013 U.S. Dist. LEXIS 71046, at *4–6 (N.D. Ohio May 20, 2013) (reconciling Smith v. Nationwide Prop. & Cas. Ins. Co., 505 F.3d 401 (6th Cir. 2007) with Freeman v. Blue Ridge Paper Prods., Inc., 551 F.3d 405 (6th Cir. 2008)).

[21] Richards v. Johnson & Johnson, 688 F. Supp. 2d 754, 778–79 (E.D. Tenn. 2010) (reconciling five Sixth Circuit cases, three of which were published), *abrogated by* Engleson v. Unum Life Ins. Co., 723 F.3d 611, 620–21 (6th Cir. 2013).

narrowly. In addition to facilitating reconciliation, narrow readings have other advantages, such as reinforcing the strictures of Article III[22] and encouraging litigants to take care in distinguishing between holdings and dicta.

However, this method of resolving the tension between two published decisions can lead a "conciliatory" court to adopt a position that *neither* Sixth Circuit panel would have countenanced, thereby accomplishing neither obedience nor accuracy.[23] If reconciliation seems too contrived, it can undermine respect for the integrity of the judicial process and lead to an increasingly tangled web of jurisprudence with no coherent, bigger-picture framework.[24] Furthermore, the wording of the Rule[25] strongly suggests that the "first in time" published decision takes firm precedence over any subsequent decision, such that its interpretation should not change based on a later decision. The conciliatory approach creates the appearance of avoiding all conflict, but often fails to do so in reality.

IV. OBEDIENT APPROACH

In the "obedient" approach, district courts defer to what they perceive as the Sixth Circuit's current understanding of whether the two decisions conflict. Where the later of the two decisions explicitly distinguishes the earlier, and no subsequent Sixth Circuit discussion of the issue exists, this approach will reach the same outcome as the "conciliatory" approach. However, the difference between a "conciliatory" court and an "obedient" one is clear in cases where (1) the later of the two published Sixth Circuit opinions does not reconcile the two; or (2) additional subsequent Sixth Circuit opinions on the issue exist.

In these two cases, an "obedient" court will defer to what it perceives to be the Sixth Circuit's current position on the matter, even if that position is stated in an *unpublished* opinion and results in the setting aside of a *published*

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[22] Narrow readings make it less likely that the Sixth Circuit decisions will be read to resolve matters beyond the "case or controversy" directly before them. *See* U.S. CONST. art. III, § 2.

[23] *Cf.* Rappa v. New Castle Cnty., 18 F.3d 1043, 1058 (3d Cir. 1994) (explaining how the *Marks* rule is not always workable because it is not always possible to find a "common denominator" among multiple opinions in a "splintered" Supreme Court decision); Marks v. United States, 430 U.S. 188, 193 U.S. (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.") (internal quotation marks omitted).

[24] A helpful analogy is found in mathematics. When trying to detect the pattern that generated N data points, it is inadvisable to simply use the N-degree polynomial that will perfectly intersect (i.e. "reconcile") all N points. Instead, it is recommended to use the lowest-degree polynomial that will generate a reasonable curve, even if one point (an outlier) ends up far off the curve (i.e., a decision ends up being set aside completely). *See* JAAN KIUSALAAS, NUMERICAL METHODS IN ENGINEERING WITH PYTHON 3, at 111 (2013).

[25] 6TH CIR. R. 32.1(b) ("Published panel opinions are binding on later panels. A published opinion is overruled only by the court en banc.").

opinion. In the absence of subsequent decisions on the matter, an "obedient" court may look for subtler signs "suggest[ing]" the appellate court's position on whether or not a conflict exists, such as "refusal to take up the matter en banc."[26]

In particular, when the Sixth Circuit itself applies the Rule to set aside published decision *B* due to its conflict with an earlier published decision *A*, an "obedient" court will follow suit. In *McCarty v. Palmer*,[27] the district court declined to follow the published case of *Abela v. Martin*[28] due to its conflict with two earlier cases. The court did not independently compare and contrast *Abela* with the earlier cases or defer to *Abela*'s explicit distinguishing of the earlier cases, but simply relied on two unpublished post-*Abela* Sixth Circuit cases declining to follow *Abela* pursuant to the Rule.[29] There was no analysis or criticism of the unpublished decisions, no discussion of whether their application of the Rule was persuasive. The district court simply accepted that the consensus of the Sixth Circuit had moved away from *Abela*.

Similarly, in *Moore v. United States*, when deciding between the Sixth Circuit's published decisions in *United States v. Johnson* and *United States v. Bolka*—published four months after *Johnson* and explicitly distinguishing it—the magistrate judge did not conduct any independent analysis comparing *Bolka* and *Johnson* and did not defer to *Bolka*'s explicit distinguishing of *Johnson*.[30] Instead, the magistrate judge catalogued three unpublished post-*Bolka* Sixth Circuit decisions: one endorsing *Bolka*, a later one rejecting *Bolka* under the Rule, and a third one skirting the question.[31] The magistrate judge adopted the most recent Sixth Circuit decision to discuss *Bolka* and *Johnson* and concluded that "the current law in this circuit" had rejected *Bolka*.[32]

Under the "obedient" approach, accuracy gives way to obedience whenever the two are even slightly at odds. The Rule is turned on its head, because published decisions receive less and less deference as they recede in memory, while the most recent decisions—even unpublished ones—weigh most heavily in the district court's analysis. However, if practiced by all district courts, this approach would likely provide the most certainty for

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[26] *See* Spine Solutions, Inc. v. Medtronic Sofamor Danek, Inc., 928 F. Supp. 2d 956, 962 (W.D. Tenn. 2011) ("The court's refusal to take up the matter *en banc* also suggests that [the later panel decision contradicting earlier precedent] is now the rule in the Federal Circuit.").

[27] McCarty v. Palmer, No. 1:07-CV-663, 2010 U.S. Dist. LEXIS 104075, at *3–4 (W.D. Mich. Sept. 29, 2010), *vacated by* 461 F. App'x 445, 447 (6th Cir. 2012) (per curiam) (unpublished).

[28] Abela v. Martin, 380 F.3d 915 (6th Cir. 2004).

[29] *McCarty*, 2010 U.S. Dist. LEXIS 104075, at *3–4 (citing Alexander v. Smith, 311 F. App'x 875, 883 (6th Cir. 2009); Zimmerman v. Cason, 354 F. App'x 228, 234 (6th Cir. 2009)).

[30] Moore v. United States, No. 09-CV-10998, 2009 U.S. Dist. LEXIS 108057, at *22–25 (E.D. Mich. July 9, 2009).

[31] *Id.* at *24.

[32] *Id.* at *25.

litigants on average. And, a district court may believe that deferring to the Sixth Circuit's application of the Rule—created by the appellate court—leads to higher accuracy than district courts applying the Rule on their own.

Although decisions taking the "objective" approach or the "substantive" approach, are probably more likely to wind up at odds with the Sixth Circuit, even a district court applying the "obedient" approach—doing its best to apply the Rule the way the Sixth Circuit would—can also find itself ultimately "out in the cold."[33] In general, any reliance on the Rule ought to be viewed as a flag for en banc potential: if a district court perceives two decisions to be incompatible, then there is likely a viable argument that "en banc consideration is necessary to secure or maintain uniformity of the court's decisions."[34]

V. SUBSTANTIVE APPROACH

Finally, in a "substantive" approach, some district courts openly incorporate their view of the merits or quality of the two decisions into their analysis under the Rule. For example, in *In re Jones*, the bankruptcy court chose to set aside a Sixth Circuit published opinion "[f]irst," because it found the earlier opinion to be "more respectful of state sovereignty . . . and . . . more consistent with the tenor of the Constitution," and only "[s]econd," due to the Rule.[35] In *Kepley v. Lanz*,[36] the court cited the Rule to follow an earlier Sixth Circuit opinion because it "conducted a thorough analysis of the rationale underlying" the applicable state law, unlike the later opinion, which simply relied on a First Circuit case.[37] And a district court applied the Rule to set aside the Sixth Circuit case of *Clark v. Chrysler*, in part because it was "contrary to several Supreme Court opinions," even though the panel had considered and distinguished both of those Supreme Court opinions,[38] and, in

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[33] *See, e.g.*, *McCarty*, 2010 U.S. Dist. LEXIS 104075, at *3–4. In *McCarty*, the district court relied on two unpublished Sixth Circuit decisions flatly setting aside a published Sixth Circuit decision pursuant to the Rule. *Id.* Several months later the Sixth Circuit en banc reconciled the published decision with the unpublished decisions, which led to a reversal of *McCarty*. *McCarty*, 461 F. App'x at 447 (citing Guilmette v. Howes, 624 F.3d 286 (6th Cir. 2010) (en banc)).

[34] FED. R. APP. P. 35(a)(1); *see also* 6TH CIR. I.O.P. 35(a) ("A petition for rehearing en banc is an extraordinary procedure intended to bring to the attention of the entire court . . . an opinion that directly conflicts with . . . Sixth Circuit precedent.").

[35] *In re* Jones, 428 B.R. 720, 727 (Bankr. W.D. Mich. 2010), *rev'd sub nom. In re* Schafer, 455 B.R. 590 (B.A.P. 6th Cir. 2011), *rev'd* 689 F.3d 601 (6th Cir. 2012).

[36] Kepley v. Lanz, 992 F. Supp. 2d 781, 786–87 & n.1 (W.D. Ky. 2014).

[37] The district court had failed to notice that the earlier Sixth Circuit case was *un*published, and therefore non-binding. On motion for reconsideration, the court acknowledged that it was bound to follow the later, published opinion and reversed itself. *Kepley*, 992 F. Supp. 2d at 787–88 n.1.

[38] *In re* Welding Fume Prods. Liab. Litig., No.1:03-CV-17000, 2010 U.S. Dist. LEXIS 146067, at *343–44 (N.D. Ohio June 4, 2010) (citing the Rule to set aside Clark v.

any case, there was room to distinguish *Clark* from the earlier Sixth Circuit cases.[39] Courts taking a "substantive" approach apply the Rule to advance what they see as the more correct decision.

Although one might expect the Sixth Circuit to take offense to district courts injecting their view of the merits into applications of the Rule, its reviews of such decisions appear to focus on the merits of the question with no rebuke for overreaching. In one case, the Sixth Circuit affirmed the district court's applying the Rule to set aside a published Sixth Circuit opinion in favor of an earlier Federal Circuit opinion because the Federal Circuit had "correctly applied Sixth Circuit precedent, and thus, although the citation was in error, the substance of the district court's analysis was accurate."[40] Although it reversed in *Jones*, the Sixth Circuit stuck to the merits in its analysis and did not rebuke the bankruptcy court for choosing among Sixth Circuit precedents based on its own view of the "tenor of the Constitution."[41]

At first glance, the "substantive" approach appears to serve neither accuracy (in applying the Rule) nor obedience to the appellate court, and could even be viewed as "judicial activism" on the part of the district court. On the other hand, a "substantive" district court's tendency to examine circuit precedent critically and independently evaluate it—on the merits *and* as to whether a conflict exists—arguably adds value by drawing the Sixth Circuit's attention to a potential conflict and flagging flaws in one or both of the decisions. Those who believe that substantive considerations factor into every purportedly procedural decision might see the "substantive" approach as more transparent than the others, because it identifies the precise substantive issues that influenced the court's opinion.

VI. CONCLUSION

The above framework comes primarily from a non-exhaustive survey of approximately five years of district court precedent in the Sixth Circuit, and raises a number of interesting questions that would require a more extensive

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Chrysler Corp., 436 F.3d 594, 604 (6th Cir. 2006)). Normally, a district court must defer to the Sixth Circuit's interpretation of Supreme Court precedent, so the district court's opinion of whether *Clark* correctly analyzed Supreme Court precedent would not—without the Rule—permit it to ignore *Clark*. *See In re* Stasson, 472 B.R. 748, 753 (Bankr. E.D. Mich. 2012); Holtgreive v. Curtis, 174 F. Supp. 2d 572, 580 n.3 (E.D. Mich. 2001).

[39] *See In re* Heparin Prods. Liab. Litig., 273 F.R.D. 399, 408 (N.D. Ohio 2011) (reading *Clark* more narrowly and distinguishing it).

[40] Whitesell Corp. v. Whirlpool Corp., 496 F. App'x 551, 557 n.2 (6th Cir. 2012) (unpublished). The district court had mistakenly cited the Federal Circuit opinion as being a Sixth Circuit opinion, so this was not a typical "substantive" approach case where the district court allows its opinion of the issue's merits to play a role in its application of the Rule.

[41] *In re Schafer*, 689 F.3d at 606 ("Unlike the bankruptcy court, we do not read *Rhodes* to conflict with *Hood*, which had nothing to do with the issue of exemptions and, therefore, did not discuss *Rhodes*.").

empirical review of the much larger data set provided by the vast majority of circuits which have followed the Rule for decades. Among other things, it would be interesting to explore in a longer piece the relative prevalence of these approaches, relative rates of affirmance and reversal, to see when—if ever—reliance on the Rule elicits rebuke (not merely reversal on the merits, but criticism of the court's methodology) from an appellate court, and how often some of the potential problems discussed above (like a "conciliatory" court creating distinctions clearly not anticipated by either of the decisions it is attempting to reconcile) actually arise.