In the United States Court of Appeals
For the Fifth Circuit

No. 99-2000

WINJUDE PROPERTIES, INC.,

Appellee.

V.

DORIS MANKILLER

Appellant

On Appeal from the United States District Court
For the Southern District of Texas

APPELLEES' BRIEF OF WINJUDE PROPERTIES, INC.

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ATTORNEYS FOR APPELLEE

I. Certificate of Interested Parties.

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

Parties:	**Counsel:**
Appellant:	
Doris Mankiller 1000 Vermont Houston, Texas 77002	Ms. Birdie Fifth 440 Milam Houston, Texas 77002
	Mr. Mark Fourth (former counsel) 401 Crawford Houston, Texas 77002
	Mr. Brian Third (former counsel) 1000 Gulf Freeway Houston, Texas 77023
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	Mr. Erica First (former counsel) 1000 Smith Houston, Texas 77002
Appellees: Winjude Properties, Inc.	Tom Kirkendall Marvin Isgur Kirkendall & Isgur LLP 700 Louisiana, Suite 4200 Houston, Texas 77002 Attorney of record for Appellee

II. Statement Regarding Oral Argument.

Oral argument is unnecessary in this appeal. The appeal is frivolous and emanates from the United States District Court's denial of a motion under FED. R. CIV. P. 60(b)(4) to set aside a settlement contained in an agreed judgment that the appellant consented to over seven years ago. The dispositive legal issue in the appeal has been authoritatively decided recently, and the facts and legal arguments are adequately presented in the briefs and record. Accordingly, the decisional process would not be significantly aided by oral argument.

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V. Statement of Jurisdiction.

This Court has jurisdiction over this appeal under 28 U.S.C. § 1291.

VI. Statement of the Issues.

The only issue in this appeal is whether the United States District Court abused its discretion in denying appellant Doris Mankiller's motion under FED. R. CIV. P. 60(b)(4) ("the Rule 60(b)(4) motion") to set aside an agreed judgment that Mankiller approved over seven years ago and never appealed.

VII. Statement of the Case.

A. Course of Proceedings and Disposition in the Court Below.

The following sets forth the course of proceedings and disposition of this case in the District Court below. It also provides a summary statement of the essential facts involved in this appeal.

On December 4, 1990, Winjude Properties, Inc., ("Winjude") filed a civil action in the United States District Court for the Southern District of Texas, Houston Division, the Honorable E.H. Jurist presiding ("the District Court") against Doris Mankiller ("Mankiller") under 42 U.S.C. §§ 1983 and 1985 in which Winjude sought damages and injunctive relief. Doc. 1.

On December 21, 1990, Mankiller filed her original answer in Winjude's civil action in which she raised the defense that the District Court lacked subject matter

jurisdiction over Winjude's claims. Doc. 4, p. 1. Mankiller did not file a motion to dismiss Winjude's civil action.

On March 22, 1991, Winjude filed an Application for Temporary Restraining Order in which it requested the District Court to enjoin Mankiller from attempting to collect from Winjude's assets a $350,000 *instanter* Order on Motion for Payment of Guardian Ad Litem Fee dated November 21, 1990 ("the state court *instanter* order"). Doc. 6.

On March 28, 1991, Mankiller filed a Response in Opposition to Winjude's Application for Temporary Restraining Order in which she again asserted that the District Court did not have subject matter jurisdiction over Winjude's claims. Doc. 9, p. 1, Ex. "A", p. 2-3.

After a hearing on March 28, 1991, the District Court approved a temporary restraining order that enjoined Mankiller from enforcing the state court *instanter* order against Winjude's assets pending a preliminary injunction hearing. Doc. 7.

On May 20, 1991, the District Court approved a settlement between Mankiller and Winjude in the form of an agreed judgment ("the agreed judgment"). Doc 17. Under the agreed judgment, Mankiller agreed not to collect the state court *instanter* order from Winjude's assets. Doc. 17, p. 2, ¶ 2.

Mankiller did not appeal the agreed judgment.

Winjude fulfilled its obligations to Mankiller under the agreed judgment. Doc. 48, p. 2-3, ¶ 6-10. Mankiller accepted $90,000 from Winjude under the agreed judgment and a later arbitration settlement. Doc. 48, p. 2-3, ¶ 6-10.

Years later and without any notice, on December 2, 1997, Winjude learned that Mankiller had instructed a Harris County, Texas Constable to execute on Winjude's assets to collect on the state court *instanter* order. Doc. 36, Ex. "E".

On December 3, 1997, Winjude filed a motion with the District Court to enforce the agreed judgment, including Mankiller's agreement not to attempt to collect the state court *instanter* order from Winjude's assets. Doc. 36.

On December 12, 1997—over *six and a half years after* the District Court approved the agreed judgment—Mankiller filed her Rule 60(b)(4) motion with the District Court. Doc. 41.

After a hearing on December 15, 1997, the District Court approved an order on December 22, 1997 that enjoined Mankiller from execution on the state court *instanter* order and established briefing deadlines on the jurisdiction issue raised in Mankiller's Rule 60(b)(4) motion. Doc. 47.

On June 19, 1998, the District Court approved its Memorandum Opinion and Order denying Mankiller's Rule 60(b)(4) motion under principles of *res judicata*.

Doc. 50. Mankiller appealed from the District Court's Memorandum Opinion and Order. Doc. 51.

B. Statement of Facts.

The superficial statement of the case contained in Mankiller's appellant's brief neither adequately sets forth the essential facts in this appeal nor describes Mankiller's vexatious and litigious conduct in regard to this matter.

On December 4, 1990, Winjude commenced a civil action against Mankiller in the District Court that sought the following:

- Damages against Mankiller—who was acting as a special master and guardian *ad litem* in a state court case in which Winjude was a defendant—under 42 U.S.C. §§ 1983 and 1985 for conspiring with and improperly influencing then state district judge Ernest Womanizer (the "state court judge") to deprive Winjude of its due process rights. Doc. 1. In particular, Winjude's pleadings in the civil action alleged, *inter alia*, the following:
  - Mankiller was engaged in a sexual relationship with the state court judge. Doc.6, 1-8, Ex. "A";
  - Mankiller had given the state court judge an automobile during the state court lawsuit involving Winjude. Doc.6, 4, Ex. "B";

- ■ Mankiller was performing legal services for the state court judge at the time he approved the state court *instanter* order. Doc.6, 4, Ex. "A";
- ■ Mankiller's relationships with the state court judge denied Winjude its due process rights under the United States Constitution an applicable statutes protecting Winjude's constitutional rights. Doc. 1.

- Enforcement against Mankiller of an indemnity obligation that Mankiller had undertaken in favor of Winjude under a prior settlement in the state court case. Doc. 1, p. 3-5; and
- An injunction against Mankiller attempting to enforce the state court *instanter* order in violation of her contractual indemnity obligation to Winjude. Doc. 1, p. 7.

On December 21, 1990, Mankiller filed her original answer to Winjude's complaint in the civil action. In her answer, Mankiller specifically denied that the District Court had jurisdiction to consider Winjude's claims. Doc. 4, p. 1. Mankiller did not file a motion to dismiss Winjude's complaint.

Consequently, Mankiller placed this Court's jurisdiction into issue in the first pleading that she filed in Winjude's civil action. Doc. 4, p. 1. This is a key fact that ultimately undermines Mankiller's entire legal argument in this appeal.

On March 22, 1991, Winjude filed an Application for Temporary Restraining Order in which it requested that the District Court enjoin Mankiller from attempting to collect the state court *instanter* order from Winjude's assets. Doc. 6.

On March 28, 1991, Mankiller filed a Response in Opposition to Winjude's Application for Temporary Restraining Order. In her response, Mankiller again asserted that the District Court did not have subject matter jurisdiction over Winjude's claims. Doc. 9, p. 1, Ex. "A", p. 2-3.

After a March 28, 1991 hearing, the District Court approved a temporary restraining order that enjoined Mankiller from enforcing the state court *instanter* order against Winjude pending a preliminary injunction hearing. Doc. 7.

On May 22, 1991, following protracted negotiations and discovery leading up to the preliminary injunction hearing (Doc. 10), Mankiller and Winjude entered into a settlement that was incorporated in the agreed judgment. Doc. 17.

Under the agreed judgment, *inter alia*, Winjude paid Mankiller $35,000 and dismissed their federal damage and indemnity claims against Mankiller. Doc. 17, p. 7. In return, Mankiller agreed to the following in the agreed order:

- Not to enforce the state court *instanter* order against any of Winjude's assets. Paragraph 2 of the agreed judgment contains Mankiller's agreement not to attempt to collect the state court *instanter* order from Winjude's assets:

> Except as specifically provided in this Agreed Judgment, Mankiller shall not (i) enforce that "Order on Motion for Payment of Guardian Ad Litem Fee" made by the 157th District Court of Harris County, Texas in case numbers 87-28345 and 87-28345-B (the "State Court Lawsuits") and attached to this Agreed Judgment as Exhibit "A"; (ii) execute against the assets of or otherwise attempt to collect any sums from any plaintiff in this civil action, from any defendant in the State Court lawsuits, or from any affiliate of any plaintiff in this civil action or any defendant in the State Court Lawsuits; (iii) assign any rights arising under Exhibit "A" to any person; or, (iv) file or cause to be filed any legal action demanding or requesting any court to order payment to Mankiller by any defendant or any affiliate of any defendant in the State Court Lawsuits. Doc. 17, p. 2, ¶ 2.

- At her election, arbitration of the issue of whether Mankiller could collect the amount provided for under the state court *instanter* order from Winjude's assets. Doc. 17, p. 2-3, ¶ 4; and
- If she elected to arbitrate, then the payment terms under which Mankiller agreed that Winjude could pay the state court *instanter* order if Mankiller was successful in the arbitration. Doc. 17, p. 5-7;

Mankiller did not appeal the agreed judgment.

Subsequently, on September 18, 1991, Mankiller elected arbitration. Doc. 21 & 22. However, immediately prior to the initiation of the arbitration hearing on June 16, 1992, Mankiller and Winjude entered into a further settlement ("the arbitration settlement") that the parties' respective counsel dictated into the arbitration record. Doc. 28, Ex. "A".

Under the arbitration settlement, Mankiller agreed to elect either of the following alternatives within thirty days of June 16, 1992:

- To accept from Winjude (i) $55,000, and (ii) its cooperation in pursing collection of the state court *instanter* order from Winjude's insurers. Doc. 28, Ex. "A", p. 3-8; or
- To rescind the arbitration settlement, in which case the parties would return at a later date to arbitrate the issue of whether Mankiller could collect the state court *instanter* order from Winjude's assets. Doc. 28, Ex. "A", p. 3-8;

Under either of the these alternatives, the agreed judgment—including Mankiller's agreement not to collect the state court *instanter* order against Winjude's assets—remained in effect:

- If Mankiller chose the first alternative described above, then she received $55,000 and Winjude's cooperation in attempting to recover the balance of the amount set forth in the state court *instanter* order from Winjude's insurers. Under that alternative, Mankiller remained enjoined under the agreed order from collecting the state court *instanter* order from Winjude's assets; or
- If Mankiller chose the second alternative described above, then Mankiller could rescind the arbitration settlement and return to arbitration on the issue of whether she could collect the state court *instanter* order from Winjude's assets. But even if Mankiller had been successful in the arbitration, the agreed judgment set forth the payment terms upon which Winjude would have been required to pay Mankiller the balance of the state court *instanter* order. Accordingly, under this alternative, Mankiller also remained enjoined under the agreed judgment from attempting to collect the state court *instanter* order from Winjude's assets.

In short, *nothing* in the arbitration settlement modified in any respect the agreed judgment and Mankiller's agreement under that judgment not to collect the state court

instanter order from Winjude's assets. Doc. 17; Doc. 28, Ex. "A", p. 3-8; Doc. 54, p. 34-39.

Subsequently, Mankiller elected to forego her right to rescind the arbitration settlement. She accepted Winjude's $55,000 payment and cooperation in attempting to collect the balance of the state court *instanter* order from Winjude's insurers. Doc. 54, p. 21, L1-14. Consequently, under the agreed judgment and the arbitration settlement, Mankiller received a total of $90,000 ($35,000 under the agreed judgment and $55,000 under the arbitration settlement) from Winjude. Doc. 48, p. 2-3, ¶ 6-10.

Over the past seven years since entry of the agreed judgment, Mankiller has engaged a series of attorneys (apparently without informing any of them of her agreement not to execute on Winjude's assets contained in the agreed judgment) to attempt to enforce the state court *instanter* order in violation of the agreed judgment. Doc. 36, p. 2-3; ¶ 6-8; Ex. "C-1, C-2, D-1, D-2"; Doc. 28-31. In her actions that gave rise to this appeal, Mankiller—a licensed attorney—violated her agreement not to execute on Winjude's assets contained in the agreed judgment through her *sixth* different attorney that she has engaged in regard to the state court *instanter* order.

On September 23, 1993, Mankiller had an attorney file a motion with the District Court that requested a judgment in favor of Mankiller that was inconsistent with both the agreed judgment and the arbitration settlement. Doc. 28. After Winjude

objected to Mankiller's motion (Doc. 29), the District Court conducted a telephonic conference on October 26, 1993 in which the Court denied Mankiller's motion for judgment. Doc. 30. The District Court approved an order to that effect the next day. Doc. 31.

Again, Mankiller did not appeal the District Court's adverse October 27, 1993 order denying her motion for a judgment.

Despite the foregoing, Mankiller sequentially hired *yet two more* attorneys to make demands on Winjude by letters dated February 23, 1994 and March 25, 1994. Doc. 36, Ex. "C-1, C-2. As Winjude's counsel pointed out in their responses, both of these demands violated the agreed judgment and the arbitration settlement. Doc. 36, Ex. "D-1, D-2";

Years later and without any notice, Winjude received on December 2, 1997 a notice from the Harris County Constable's office that Mankiller was attempting to execute on the state court *instanter* order in direct violation of her agreement not to attempt collection of the state court *instanter* order contained in the agreed judgment. Doc. 36, p. 9-11, Ex. "E".

In a subsequent phone conversation on the evening of December 2, 1997, Mankiller informed Winjude's counsel that she was again attempting to enforce the state court *instanter* order and that she has hired *yet another attorney* (Ms. Birdie Fifth

of Houston) to represent her in her latest foray. Doc. 36, p. 3, ¶ 10. After Winjude's counsel conferred with Ms. Fifth on December 3, 1997 and she declined to confirm that Mankiller would comply with the agreed judgment, Winjude filed its motion with the District Court to enforce the agreed judgment against Mankiller. Doc. 36, p. 3, ¶ 11.

On December 12, 1997—over *six and a half years after* entry of the agreed judgment— Mankiller filed her Rule 60(b)(4) motion with the District Court. Doc. 41.

After a hearing on December 15, 1997, the District Court approved an order on December 22, 1997 that enjoined Mankiller from execution on the state court *instanter* order and established briefing deadlines on the jurisdiction issue raised in Mankiller's Rule 60(b)(4) motion. Doc. 47.

By a pleading dated January 5, 1998 filed with the District Court by one of Mankiller's former attorneys, Winjude discovered Mankiller's motive in violating the agreed judgment in attempting to collect the state court *instanter* order against Winjude's assets—Mankiller lost her state court lawsuit to collect the guardian *ad litem* fees against Winjude's insurers. Doc. 49, p. 1.

On June 19, 1998, the District Court approved its Memorandum Opinion and Order denying Mankiller's Rule 60(b)(4) motion under principles of *res judicata*.

Doc. 50. Mankiller appealed from the District Court's Memorandum Opinion and Order. Doc. 51.

VIII. Argument and Authorities.

A. Summary of the Argument.

This appeal is about a vexatious attorney litigant who simply refuses to abide by a settlement agreement set forth in an agreed judgment that she approved over seven years ago.

In her appellant's brief, Mankiller—a licensed attorney—concedes that she has intentionally violated the agreed judgment, but justifies her violation by rationalizing that the agreed judgment is void because the District Court lacked subject matter jurisdiction to approve it.

On a threshold basis, Mankiller's appeal is barred under principles of *res judicata*. Although she placed the jurisdiction of the District Court at issue at the outset of Winjude's civil action, Mankiller entered into the agreed judgment, enjoyed the benefits from doing so, and did not appeal the agreed judgment. Consequently, Mankiller's argument seven years later that the District Court lacked jurisdiction to approve the agreed judgment is barred by *res judicata*.

Moreover, Mankiller's contention that *res judicata* does not bar her appeal is contrary to justice and sound judicial policy. Mankiller argues that the law should allow a litigant to enter into a court-approved settlement judgment, enjoy the benefits from that settlement, not appeal the judgment approving the settlement, and then many years later obtain an order under FED. R. CIV. P. 60(b)(4) vacating the judgment for lack of jurisdiction. Such precedent would promote endless appeals and undermine the judicial policy in favor of consensual resolution of litigation.

Finally, even if *res judicata* did not preclude Mankiller's appeal, the District Court had subject matter jurisdiction over Winjude's claims against Mankiller. Winjude asserted valid claims for damages and injunctive relief against Mankiller under 42 U.S.C. §§ 1983 and 1985 that were partly measurable by the state court *instanter* order. However, Winjude's complaint did not request that the District Court serve as an appellate court regarding the state court *instanter* order. Consequently, the District Court had subject matter jurisdiction to approve the agreed judgment, and Mankiller is bound by her agreement to that judgment.

B. Standard of Review.

The denial of a Rule 60(b) motion is reviewed for an abuse of discretion. *In re Stangel,* 68 F.3d 857, 859 (5th Cir. 1995); *In re Gledhill,* 76 F.3d 1070, 1080 (10th Cir.

1996). A conclusion of law regarding subject matter jurisdiction is reviewed *de novo*. *New York Life Ins. Co. v. Brown,* 84 F.3d 137, 143 (5th Cir. 1996).

C. Argument.

1. Mankiller's voidness argument is barred under well-established principles of *res judicata*.

The determination of subject matter jurisdiction is subject to *res judicata* and may not be challenged in a collateral proceeding. *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 375-76 (1940); *Picco v. Global Marine Drilling Co.*, 900 F.2d 846, 850 (5th Cir. 1990). This bar against collateral attacks applies whenever the party challenging the judgment had the opportunity to challenge jurisdiction, but failed to do so. *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 376-77 (1940); *Picco v. Global Marine Drilling Co.*, 900 F.2d 846, 850 (5th Cir. 1990).

In approving the agreed judgment, this Court necessarily determined that it had jurisdiction over the parties and the subject matter. *Stoll v. Gottlieb*, 305 U.S. 165, 171-72 (1938); *Corbett v. MacDonald Moving Servs., Inc.*, 124 F.3d 82, 88 (2nd Cir. 1997). A party to a judgment that has an opportunity to litigate the issue of subject matter jurisdiction and fails to appeal that issue may not collaterally attack the judgment that the party later decides is unfavorable. *Insurance Corp. of Ireland, Ltd.*

v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 n.9 (1982); *Corbett v. MacDonald Moving Servs., Inc.*, 124 F.3d 82, 88-89 (2nd Cir. 1997).

Moreover, an agreed judgment is determinative of all issues just as if there had been a trial on the merits. *Sun Life Assurance Co. of Canada v. Clyce*, 512 F. Supp. 430, 433 (N.D. Tex. 1980). Any issue raised in the parties' pleadings that the judgment does not expressly dispose of is deemed to have been denied. *Sun Life Assurance Co. of Canada v. Clyce*, 512 F. Supp. 430, 434 (N.D. Tex. 1980).

Mankiller specifically challenged the District Court's subject matter jurisdiction in her answer to Winjude's complaint and in her response to Winjude's Application for Temporary Restraining Order. Accordingly, upon the District Court's approval of the agreed judgment, Mankiller's jurisdictional challenge was denied. By failing to appeal the agreed judgment, Mankiller is now barred under principles of *res judicata* from collaterally attacking the agreed judgment on jurisdictional grounds.

Indeed, the *Chicot County* rule has been applied specifically to Rule 60(b)(4) motions such as Mankiller's in the District Court. *Picco v. Global Marine Drilling Co.*, 900 F.2d 846, 850 (5th Cir. 1990). A party is prohibited from challenging a district court's jurisdiction in a Rule 60(b)(4) motion when the party had notice of the judgment being entered and had a full and fair opportunity to challenge the judgment

and the court's jurisdiction by appeal. *Picco v. Global Marine Drilling Co.*, 900 F.2d 846, 850 (5th Cir. 1990).

In part, *Picco* relied on the 1986 Second Circuit Court of Appeals decision in *Nemaizer v. Baker,* 793 F.2d 58 (2nd Cir. 1986), which involved a strikingly similar situation to this case. Mr. Nemaizer attempted to continue litigation after entering into an agreed stipulation that dismissed his prior lawsuit against Mr. Baker with prejudice. Subsequently, Mr. Nemaizer brought a Rule 60(b)(4) motion to set aside his stipulation on the grounds that the district court that had approved the stipulation lacked subject matter jurisdiction over state law claims. Even assuming that the district court lacked subject matter jurisdiction over Mr. Nemaizer's state law claims, the Second Circuit rejected Mr. Nemaizer's argument:

> Appellees next contend that they were not bound by the stipulation agreed between the parties because appellant improperly removed the original action from state court by claiming that ERISA preempted appellee's state-law claim. Because federal courts lack jurisdiction over an improperly removed case, appellees maintain that the order signed by the district judge was a nullity and therefore not binding. Even assuming that this case was not properly within the jurisdiction of the district court, appellees may not now collaterally attack that court's exercise of jurisdiction.
>
> * * *
>
> We assume without deciding that appellees correctly claim that this case was improperly removed and the district court improperly exercised its jurisdiction when it "so ordered" the stipulation. Nonetheless, the judgment entered in federal court was not void. . . .
>
> * * *

> Since a court has power to determined its own jurisdiction and, in fact, is required to exercise that power *sua sponte,* it does not plainly usurp jurisdiction when it merely commits an error in the exercise of that power. Rather, a court will be deemed to have plainly usurped jurisdiction only when there is a "total want of jurisdiction" and no arguable basis on which it could have rested a finding that it had jurisdiction.

Nemaizer v. Baker, 793 F.2d 58, 64-65 (2nd Cir. 1986).

As a consenting party to the agreed judgment, Mankiller—a licensed attorney—participated in the agreed judgment. After its approval, Mankiller did not appeal the agreed judgment. Mankiller's Rule 60(b)(4) motion and this appeal are simply the latest in a series of contrived attempts over the past seven years to breach her settlement with Winjude.

So long as a party participates in litigation, the decision emanating from that litigation is final unless overturned on appeal. This is true even if a jurisdictional issue that was not raised in that litigation or a subsequent appeal might have otherwise rendered that decision void. The Supreme Court stated this principle fifty years ago in the following passage:

> It cannot now be broadly asserted that a judgment is always a nullity if jurisdiction of some sort or other is wanting. It is now held that, except in case of plain usurpation, a court has jurisdiction to determine its own jurisdiction, and if it be contested and on due hearing it is upheld, the decision unreversed binds the parties as a thing adjudged.

United States v. United Mine Workers of America, 330 U.S. 258, n. 57 (1947).

The principle established in *United Mine Workers* is commonly referred to as the "bootstrap" principle. The Third Circuit explained the principle in the following manner:

> [A] void judgment remains void until such time as jurisdiction is finally determined to exist, and, by virtue of the federal courts' 'jurisdiction to determine jurisdiction,' is elevated by its 'bootstraps' to the status of a valid judgment [citations omitted] or litigation of the issue is precluded by the doctrine of *res judicata*."

Page v. Schweiker, 786 F.2d 150, 154 (3rd Cir. 1986).

The bootstrap principle has been concisely described in the following passage in regard to a voidness argument that is similar to Mankiller's:

> [W]here the facts giving rise to subject matter jurisdiction have themselves been established in a federal court, that court's judgment is not subject to attack for voidness after the time for appeal has passed.

Vechione v. Wohlgemuth, 426 F.Supp. 1297, 1308 (E.D. Penn.), *aff'd*., 558 F.2d 150 (3rd Cir.), *cert. denied*, 434 U.S. 943 (1977).

Accordingly, a collateral attack on a judgment based on an alleged lack of subject matter jurisdiction cannot be sustained. *Royal Ins. Co. of America v. Quinn-L Capital Corp*., 960 F.2d 1286, 1293 (5th Cir. 1992). If the party against whom judgment was rendered elects not to appeal, then the judgment becomes final and the court's subject matter jurisdiction is insulated from collateral attack. *Royal Ins. Co. of America v. Quinn-L Capital Corp*., 960 F.2d 1286, 1293 (5th Cir. 1992).

Indeed, Mankiller's argument that the District Court's agreed judgment is subject to continuous appeal and collateral attack is contrary to justice and sound judicial policy. The Supreme Court stated the following long ago:

> Courts to determine the rights of parties are an integral part of our system of government. It is just as important that there should be a place to end as that there should be a place to begin litigation. After a party has had his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision merely retries the issue previously determined.

Stoll v. Gottlieb, 305 U.S. 165, 172 (1938).

In 1931, the Supreme Court was confronted with a similar collateral attack on the issue of personal jurisdiction. Although the respondent had specially appeared, the trial court had found personal jurisdiction. A final and ultimately non-appealable judgment was entered. The respondent sought to avoid enforcement through a collateral attack on the original judgment in which he alleged an absence of jurisdiction. In rejecting the argument, this Court ruled as follows [citations omitted]:

> The substantial matter for determination is whether the judgment amounts to *res judicata* on the question of the jurisdiction of the court which rendered it over the person of the respondent. It is of no moment that the appearance was a special one expressly saving any submission to such jurisdiction. That fact would be important upon appeal from the judgment, and would save the question of the propriety of the court's decision on the matter.... [The respondent] had the election not to appear at all. If, in the absence of appearance, the court had proceeded to judgment, and the present suit had been brought thereon, respondent could have raised and tried out the issue in the present action, because it

> would never have had its day in court with respect to jurisdiction. It also had the right to appeal.... It elected to follow neither of these courses, but, after having been defeated upon full hearing in its contention as to jurisdiction, it took no further steps, and the judgment in question resulted.
>
> Public policy dictates that there be an end to litigation; that those who have contested an issue shall be bound by the results of the contest; and that matters once tried shall be considered forever settled as between the parties.

Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522, 524-25 (1931).

The *Baldwin* finality principles take on added importance when the Court is confronted with a vexatious litigant such as Mankiller. Under Mankiller's interpretation of *res judicata*, a party in a litigation matter could enter into a court-approved settlement, not appeal the judgment approving the settlement, enjoy the benefits of that settlement, and then petition the trial court seven years later to vacate the settlement judgment on the basis of lack of jurisdiction. In short, Mankiller's principle of *res judicata* would promote disingenuous maneuvering in settlement negotiations and render even agreed judgments subject to perpetual appeal. Such a result is utterly inconsistent with this Court's well-reasoned judicial policies of promoting consensual resolution of litigation and finality of judgments.

2. The District Court's approval of the agreed judgment was not a clear usurpation of power.

An exception to the *Chicot County* rule has been created to allow the consideration of a Rule 60(b)(4) challenging jurisdiction only when the trial court's decision is either "a clear usurpation of power" or made despite a "total want of jurisdiction." *Picco v. Global Marine Drilling Co.*, 900 F.2d 846, 850 n.6 (5th Cir. 1990). Mankiller attempts to take advantage of this exception by arguing that the District Court abused its discretion in denying her Rule 60(b)(4) motion because the District Court lacked subject matter jurisdiction under the *Rooker-Feldman* doctrine to entertain Winjude's complaint in the first place. In so doing, Mankiller mistakenly asserts that Winjude's federal claims against her in the District Court constituted an illegal federal appeal of the state court *instanter* order.

The *Rooker-Feldman* doctrine prohibits federal courts from exercising "subject matter jurisdiction to review final adjudications of a state's highest court or to evaluate constitutional claims that are 'inextricably intertwined with the state court's [decision] in a judicial proceeding.'" *Blake v. Papadukos,* 953 F.2d 68, 71 (3rd Cir. 1992) (alteration in original); *District of Columbia Ct. of Appeals v. Feldman,* 460 U.S. 462, 283 *n.* 16 (1983).

However, a party states a valid claim under 42 U.S.C. § 1983 when it is alleged that an official act of a judicial official was the product of an unlawful agreement or conspiracy. *Dennis v. Sparks*, 449 U.S. 24, 28 (1980); 42 U.S.C. § 1983. All persons acting in concert with the judicial official are acting under color of state law for purposes of § 1983. In this case, Mankiller's conduct was especially egregious in that she acted in conflicting capacities as (i) an *ad litem* for the benefit of minor children; (ii) a special master of the state court; and (iii) an individual attorney seeking to further her own personal financial interests.

In short, Winjude's federal damage claims against Mankiller were based upon (i) the wrongful use of her public position as a special master and guardian *ad litem,* and (ii) an ongoing, illicit sexual relationship with the state court judge who approved the state court *instanter* order. Winjude's independent federal damage claims against Mankiller arose from Mankiller's conspiracy with, and unlawful influence over, the state court judge.

The District Court properly exercised its jurisdiction in regard Winjude's claims. First, the mere fact that Winjude's damage claims were related to the state court *instanter* order does not mean that Winjude's claims were barred under the *Rooker-Feldman* doctrine. *Ernst v. Child & Youth Services of Chester County*, 108 F.3d 486, 491-92 (3rd Cir. 1997). Inasmuch as a District Court ruling that Mankiller

had violated Winjude's due process rights would not have required the District Court to find that the state court *instanter* order was erroneous, Winjude's § 1983 claims against Mankiller were not barred under the *Rooker-Feldman* doctrine. *Ernst v. Child & Youth Services of Chester County*, 108 F.3d 486, 491-92 (3rd Cir. 1997). Indeed, even the availability of a post-deprivation state tort remedy in favor of Winjude would not bar Winjude's § 1983 claims. *Augustine v. Doe,* 740 F.2d 322, 327-29 (5th Cir. 1984).

Winjude sought damages from Mankiller arising out of her wrongful contacts with the state court judge. The District Court could have awarded such damages without regard to the validity of the state court *instanter* order. Accordingly, the *Rooker-Feldman* doctrine was inapplicable to Winjude's complaint. *Lewis v. East Feliciana Parish School Board,* 820 F.2d 143, 146-47 (5th Cir. 1987).

In fact, Mankiller—under a separate agreement—had indemnified Winjude for losses such as those Winjude sustained under the state court *instanter* order. Consequently, in addition to its claims under §§ 1983 and 1985, Winjude's pleadings alleged that Mankiller's indemnity of Winjude created a "circular indemnity" that gave Winjude an additional direct damage claim against Mankiller and justified an injunction against Mankiller's collection of the state court *instanter* order against Winjude's assets pending adjudication of that indemnity claim. When a litigant raises

a federal question, the federal district court has jurisdiction over *both* the federal claim and those state claims that are intertwined with the federal claim. 28 U.S.C. § 1367; *Roche v. John Hancock Mut. Life Ins. Co.,* 81 F.3d 249 (1st Cir. 1996). Section 1367 applies with respect to state law claims related to a § 1983 claim. *Chudzik v. City of Wilmington,* 809 F.Supp. 1142 (D. Del. 1992); *Javid v. Scott,* 913 F.Supp. 223 (S.D.N.Y. 1996).

In short, Winjude's claims arose from Mankiller's improper actions as a special master and guardian *ad litem,* and her illicit relationship with the state court judge, not with the state court *instanter* order itself. As a result, Mankiller's reliance upon the *Feldman-Rooker* doctrine is misplaced, and her Rule 60(b)(4) motion is without merit.

IX. Conclusion

Supreme Court Justice Story once observed that "[i]t is for the public interest and policy to make an end to litigation ... [so that] suits may not be immortal, while men are mortal." *Browning v. Navarro*, 887 F.2d 553, 563-64 (5th Cir. 1989), quoting, *Ocean Ins. v. Fields*, 18 F. Cas. 532 (C.D.D. Mass. 1841). In *Browning*, this Court further opined that, "[l]ittle more need be said." *Browning v. Navarro*, 887 F.2d 553, 564 (5th Cir. 1989). Mankiller's behavior in this case underscores the wisdom of that statement.

Mankiller's delinquent Rule 60(b) motion should be denied. The District Court had jurisdiction to consider Winjude's federal damage claims. As such, this Court had jurisdiction to consider Winjude's related indemnity claims and request for injunctive relief, as well as jurisdiction to approve the agreed judgment. Inasmuch as Mankiller did not appeal the District Court's agreed judgment, Mankiller is barred from asserting any challenge to the District Court's jurisdiction in a later Rule 60(b)(4) motion under principles of *res judicata*.

Mankiller made a conscious and understandable election to hedge her risk of loss in the civil action before the District Court. In so doing, Mankiller accepted Winjude's $90,000 and cooperation in pursuing insurers in return for her agreement not to pursue collection of the state court *instanter* order against Winjude's assets. Mankiller's Rule 60(b) request is merely her latest artifice to undo her hedge and thwart a key settlement consideration—i.e., the injunction against her pursuit of collection of the state court *instanter* order—that Winjude bargained for and received under the agreed judgment.

Mankiller has consistently breached her agreements with Winjude, abused her professional responsibility to the civil justice system, and ignored the District Court's orders and admonitions. Accordingly, Winjude requests that this Court dismiss her appeal, for such other and further relief as is just.

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X. Certificate of Service.

I hereby certify that a true and correct copy of the foregoing instrument was duly served by first class United States mail to Ms. Fifth and Ms. Mankiller with proper postage affixed at the following addresses on June 1, 1999:

Doris Mankiller
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Birdie Fifth
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Tom Kirkendall

XI. Revised Certificate of Compliance.

Pursuant to 5th Cir. R. 32.2.7©), the undersigned certifies this brief complies with the type-volume limitations of 5th Cir. R. 32.2.7(b).

1. Exclusive of the exempted portions in 5th CIR. R. 32.2.7(b)(3), the brief contains 5721 words.
2. The brief has been prepared in proportionally spaced typeface using Wordperfect 8.0 in Times New Roman, 14 point type.
3. If the court so requests, the undersigned will provide an electronic version of the brief and/or a copy of the word or line printout.
4. The undersigned understands a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in 5th CIR. R. 32.2.7, may result in the court's striking the brief and imposing sanctions against the person signing the brief.

Tom Kirkendall