

NOTE: This order is nonprecedential.

**United States Court of Appeals
for the Federal Circuit**

DAVID L. GIST, SR.,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

2013-1127

Appeal from the United States District Court for the Northern District of New York in case no. 09-CV-1361, Senior Judge Neal P. McCurn.

Before PROST, MOORE and O'MALLEY, *Circuit Judges.*

PER CURIAM.

O R D E R

The court considers whether this appeal should be dismissed or transferred to the United States Court of Appeals for the Second Circuit. The United States indicates that dismissal is appropriate. David L. Gist, Sr. appears to indicate that transfer is appropriate.

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Gist appeals from a judgment of the United States District Court for the Northern District of New York which dismissed for lack of subject matter jurisdiction his complaint of medical malpractice against a Department of Veterans Affairs medical facility.

Gist filed his notice of appeal in November 2012, more than eleven months after the district court entered judgment. When the United States is a party, the notice of appeal from a district court decision must be filed within 60 days of entry of judgment or order appealed from. Fed. R. App. P. 4(a)(1)(B). The statutory deadline for taking an appeal to this court is jurisdictional, mandatory, and cannot be waived. *See Bowles v. Russell*, 551 U.S. 205, 214 (2007). Gist's notice of appeal is untimely.

This court is a court of limited jurisdiction, which does not include jurisdiction in this matter. 28 U.S.C. § 1295. Pursuant to 28 U.S.C. § 1631, when an appeal is filed in a court that determines that it lacks jurisdiction, "the court shall if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed." However, since Gist's appeal is untimely, a transfer would not be in the interest of justice and instead dismissal is warranted.

Accordingly,

IT IS ORDERED THAT:

- (1) The appeal is dismissed.
- (2) All other motions are denied as moot.
- (3) Each side shall bear its own costs.

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FOR THE COURT

/s/ Jan Horbaly
Jan Horbaly
Clerk

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