CIVIL PROCEDURE

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I. SUBJECT MATTER JURISDICTION—*ENABLE MISSISSIPPI RIVER TRANSMISSION V. NADEL & GUSSMAN, L.L.C.*

In *Enable Mississippi River Transmission v. Nadel & Gussman, L.L.C.*, the court addressed as a matter of first impression whether the Natural Gas Act's federal exclusivity clause creates federal jurisdiction in an action involving third-party interference.[1] The plaintiff in this case owned and operated a gas storage facility in Louisiana "pursuant to a Certificate of Public Convenience and Necessity issued by the Federal Energy Regulatory Commission (FERC) as authorized by the Natural Gas Act (the NGA)."[2] The plaintiff discovered that due to a geologic formation, gas it had injected underground for storage was leaking out to nearby wells.[3] The plaintiff then

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1. *See* Enable Miss. River Transmission v. Nadel & Gussman, L.L.C., 844 F.3d 495, 500 (5th Cir. Dec. 2016).
2. *Id.* at 496.
3. *Id.* at 496–97.

sued the defendant—the operator of one of the nearby natural gas wells—in federal district court, alleging the defendant was producing gas leaked from his storage facility and requesting a declaratory judgment to determine the ownership of the natural gas.[4]

The defendant moved to dismiss the complaint for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1).[5] The district court granted the motion, concluding that the plaintiff was essentially asserting a state law conversion claim and the defendant was not subject to regulation by the NGA.[6] The plaintiff appealed.[7]

On appeal, the Fifth Circuit affirmed the district court's decision, concluding that there was neither federal question jurisdiction nor exclusive federal jurisdiction over the suit.[8] Turning first to federal question jurisdiction, the court agreed with the district court's assessment of the plaintiff's claim as a state-law conversion claim.[9] The plaintiff responded by arguing that determination of ownership—an essential element of the state law conversion claim—could not be made without analysis of the NGA.[10] The court disagreed with this point, reasoning that federal regulations and laws regarding possessory interests applied only to the plaintiff and the plaintiff's customers, not the defendant.[11] The court further noted that Louisiana law addressed the property interest in the stored gas between the plaintiff and the defendant, thus concluding that "issues of federal law [were] not necessary to the resolution of this case."[12]

Turning next to the exclusive federal jurisdiction argument, the court considered, as a matter of first impression, the plaintiff's argument that by capturing the stored gas, the defendant was interfering with the plaintiff's rights and obligations under the NGA.[13] Following the reasoning of the Ninth and Sixth Circuits, the court disagreed.[14] The court reasoned that because the defendant had no statutory duty under the NGA, its conduct could not be a violation of the NGA even if the conduct interfered with the plaintiff's rights or obligations under the Act.[15] Thus, the court affirmed the district court's dismissal of the plaintiff's claim for lack of subject matter jurisdiction.[16]

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4. *Id.* at 497.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.* at 500–01.
9. *Id.* at 498.
10. *Id.*
11. *Id.* at 498–99.
12. *Id.*
13. *Id.* at 500.
14. *See id.* at 500–01 (citing Colum. Gas Transmission, LLC v. Singh, 707 F.3d 583, 588 (6th Cir. 2013); Williston Basin Interstate Pipeline Co. v. An Exclusive Gas Storage Leasehold & Easement in the Cloverly Subterranean Geological Formation, 524 F.3d 1090, 1092–94, 1102 (9th Cir. 2008)).
15. *See id.*
16. *Id.* at 501.

Going forward, it seems clear that plaintiffs subject to the NGA will not be able to rely on its provisions to keep ownership disputes in federal court.[17] Rather, the Fifth Circuit has determined that, regardless of the facial applicability of the NGA, state courts are best positioned to determine these state law causes of action.[18]

II. EXTRATERRITORIALITY—*ADHIKARI V. KELLOGG BROWN & ROOT, INC.*

In *Adhikari v. Kellogg Brown & Root, Inc.*, the Fifth Circuit considered, among other issues, the extraterritorial application of the Alien Tort Statute (ATS).[19] The plaintiff group consisted of the family members of twelve men who were kidnapped and murdered while traveling through Iraq to a United States military base, along with a survivor from the encounter.[20] Upon arrival at the military base, the deceased and survivor were to work for a Jordanian corporation that held a labor subcontract with the defendant.[21] The plaintiffs alleged that the Jordanian corporation and the defendant "'willfully and purposefully formed an enterprise with the goal of procuring cheap labor and increased profits,' and thereby engaged in human trafficking."[22] Although the plaintiffs eventually settled with the Jordanian corporation, the dispute with the defendant stretched out for six years before the district court granted summary judgment in favor of the defendant.[23] The plaintiffs moved for a rehearing, but the district court denied their request.[24] The plaintiffs appealed.[25]

On appeal, the plaintiffs argued that the defendant's involvement in the trafficking of the victims and the forced labor of the survivor constituted actionable torts under the ATS.[26] The defendant countered by arguing that the plaintiffs' "allegations of misconduct in foreign countries [were] barred by the presumption against extraterritoriality."[27]

The court noted that a "two-step inquiry governs the presumption's applicability to a statute."[28]

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17. *See generally id.*
18. *See id.*
19. Adhikari v. Kellogg Brown & Root, Inc., 845 F.3d 184, 190 (5th Cir. Jan. 2017).
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.* at 191.
24. *Id.*
25. *Id.*
26. *Id.* at 192. The ATS "provides jurisdiction for a 'modest number of international law violations' that are derived from federal common law." *Id.* (quoting Sosa v. Alvarez-Machain, 542 U.S. 692, 724 (2004)).
27. *Id.*
28. *Id.* (citing RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2101 (2016)).

> First, "we ask whether the presumption against extraterritoriality has been rebutted—that is, whether the statue gives a clear, affirmative indication that it applies extraterritorially." Second, "[i]f the statute is not extraterritorial, then . . . we determine whether the case involves a domestic application of the statute, and we do this by looking to the statute's 'focus.'"[29]

In the context of a claim under the ATS, the court grappled specifically with how to reconcile step two's "focus" inquiry with the "touch and concern" language the United States Supreme Court used in the recent *Kiobel v. Royal Dutch Petroleum Co.* case.[30]

Adopting an approach that largely comports with that taken by the Second Circuit, the court concluded:

> Thus, for ATS claims, "if the conduct relevant to the ATS's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad." But, "if the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory."[31]

Applying this framework to the facts of the case, the court concluded that the plaintiffs failed to allege that conduct relevant to the ATS's focus occurred in United States territory.[32] As a result, the court affirmed the grant of summary judgment below.[33]

Notably, Justice Graves wrote a separate opinion, concurring in part and dissenting in part, in which he argued that the majority adopted an "unnecessarily restrictive view as to the meaning of *Kiobel*'s 'touch and concern' language by engaging in a formalistic application of the *Morrison* 'focus' test."[34] Under the view of Justice Graves, the majority opinion renders meaningless prior Supreme Court precedent that would permit the extraterritorial application of the ATS.[35] Instead of the test adopted by the majority, Justice Graves would have courts consider all

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29. *Id.* (internal citations omitted).

30. *Id.* at 193–94. *Compare* Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 255 (2010) (considering a statute's focus when determining whether to apply a statute extraterritoriality), *with* Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124–25 (2013) (holding that the presumption against extraterritoriality applies to claims under the ATS, and thus the ATS only creates jurisdiction for claims that "touch and concern" the territory of the United States).

31. *Adhikari*, 845 F.3d at 194 (internal citations omitted); *see also* Mastafa v. Chevron Corp., 770 F.3d 170, 184 (2d Cir. 2014).

32. *Adhikari*, at 197–98.

33. *Id.* at 207.

34. *Id.* at 208 (Graves, J., concurring in part and dissenting in part).

35. *See id.*

> pertinent facts underlying the plaintiff's claim, such as the identity of the defendant, the nature of the defendant's liability (*direct or indirect*), the type of violation alleged, and any significant connections the alleged violation has to the United States, above and beyond necessary allegations of relevant conduct occurring in the United States.[36]

Justice Graves's separate opinion shows that while the Fifth Circuit currently takes a narrow approach to ATS cases, there may be room for argument in future cases with similar facts. Moreover, the apparent conflict between *Kiobel*, *Morrison v. National Australian Bank Ltd.*, and *RJR Nabisco, Inc. v. European Community*[37] makes it possible that the Supreme Court will provide further guidance on the extraterritorial application of federal statutes in the future.

III. PREEMPTION—*UNITED MOTORCOACH ASS'N V. CITY OF AUSTIN*

As regulations increase, so too will the arguments challenging them.[38] Such was the case in the recent Fifth Circuit opinion of *United Motorcoach Ass'n v. City of Austin*. The City of Austin enacted several ordinances regulating the provision and operation of charter bus services.[39] In sum, the ordinances required all operators to obtain a city permit, required the operators to display at all times a decal of the permit, and regulated various day-to-day activities, such as how to drop off passengers in relation to a curb.[40]

Unsurprisingly, the United Motorcoach Association (UMA) sued, seeking a permanent injunction against both the permitting and decal regulations.[41] UMA argued that federal law preempted the city's regulations.[42] The parties filed cross-motions for summary judgment, and the district court granted UMA a permanent injunction as to the decal regulations but denied it with respect to permitting.[43] UMA appealed.[44]

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36. *Id.* at 209 (emphasis in original).

37. *See* RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090 (2016) (considering the extraterritorial application of a RICO action); Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013); Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247 (2010).

38. *Compare* Geoffrey James, *Government Regulation Is Good for Business*, CBS NEWS, http://www.cbsnews.com/news/government-regulation-is-good-for-business/ (last updated Oct. 25, 2010, 11:04 AM) (touting the virtues of regulation), *with* Donna Borak, *Trump's War on Regulation Comes with Tradeoffs*, CNN MONEY (Aug. 17, 2017, 6:44 AM), http://money.cnn.com/2017/08/17/news/economy/trump-deregulatory-war-agenda/index.html (discussing the rate at which President Trump is cutting regulations that affect a variety of industries).

39. *See* United Motorcoach Ass'n v. City of Austin, 851 F.3d 489, 491–92 (5th Cir. Mar. 2017).

40. *See id.*

41. *Id.* at 492.

42. *Id.* Specifically, UMA argued that 49 U.S.C. § 14501, a federal statute captioned "Federal authority over intrastate transportation" preempted the city's regulations. *Id.*

43. *Id.*

44. *Id.*

On appeal, the Fifth Circuit looked at whether the city's regulation ran afoul of 49 U.S.C. § 14501, which states in relevant part: "No State or political subdivision thereof . . . shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to . . . the authority to provide intrastate or interstate charter bus transportation."[45] While the city agreed that its permitting regulation fell within § 14501(a)(1)(C), it argued that the exception to § 14501(a)(2) nonetheless saved the regulation from preemption.[46] Section 14501(a)(2) states: "Paragraph (1) shall not restrict the safety regulatory authority of a State with respect to motor vehicles," among other things.[47] UMA opposed this interpretation, asserting that the permitting regulations did not qualify as an exercise of the city's "safety regulatory authority" and that the ordinances were really a guise for economic regulation.[48]

The court disagreed with UMA, holding that the district court did not err in finding that the permitting regulations fell within the city's safety regulatory authority and that a nexus existed between the permitting regulations and safety.[49] The court noted that the exception to § 14501(a)(2) was created to ensure that its preemption of states' authority over motor carriers did not restrict "the preexisting and traditional state police power[s] over safety."[50] When analyzing whether a regulation is a preexisting and traditional state police power, "that a *type of regulation* is new is irrelevant."[51] What matters is that the "*exercise of authority* is within the state's traditional safety-regulatory authority."[52] After all, the "specific means of exercising such authority will doubtless change over time, but the nature of the authority itself will not."[53]

In this case, courts have long held the type of regulation at issue—permitting—to be within the state's "safety regulatory authority."[54] Additionally, the court found that the face of the ordinance evinces an intent to "protect the public health, safety, and welfare" of the city.[55] Finally, the court noted that the relation between regulation and safety appears obvious and logical.[56] As such, the fact that the city may also be accomplishing some

45. *Id.* at 493 (quoting 49 U.S.C. § 14501(a)(1)(C) (2018)).
46. *Id.*
47. *Id.* (quoting 49 U.S.C. § 14501(a)(2) (2018)).
48. *Id.*
49. *Id.* at 498.
50. *Id.* at 494 (citing City of Columbus v. Ours Garage & Wrecker Serv., Inc., 536 U.S. 424, 439 (2002)).
51. *Id.* at 496 (emphasis in original).
52. *Id.* (emphasis in original).
53. *Id.*
54. *See id.* (citing Cole v. City of Dallas, 314 F.3d 730, 734–35 (5th Cir. 2002)).
55. *Id.* at 498.
56. *Id.*

economic regulation through its permitting scheme did not remove the regulation from the exception of § 14501(a)(2).[57]

In light of this ruling, regulators would be wise to craft future ordinances as new exercises of a state's traditional police powers over safety. Even when the type of regulation is new, courts seem willing to broadly interpret exceptions to avoid federal preemption of local laws.[58] Similarly, attorneys challenging the regulations would be better served by attacking ordinances as going beyond a state's traditional police power, rather than asserting that such regulations were a guise for economic regulation.[59]

IV. CHOICE OF LAW—*IN RE LARRY DOIRON, INC.*

In *In re Larry Doiron, Inc.*, the Fifth Circuit considered a new spin on choice-of-law issues.[60] An employee was injured while executing a contract to perform flow-back services on an offshore natural gas well.[61] The employer of the injured man had a master services contract with the customer, on whose property the man was working at the time of the injury.[62] The contract contained an indemnity clause that required the employer to indemnify the customer for any personal injury claims that arose from work performed under the master services contract.[63] As a result, when the man sued the customer after his injury, the customer made a formal demand for indemnity on the employer, pursuant to the contract.[64] The employer refused to pay, arguing that the indemnity clause was void and unenforceable under Louisiana law.[65] The district court disagreed, and the employer appealed.[66]

On appeal, the court held that under *Davis & Sons, Inc. v. Gulf Oil Corp.*, maritime law, rather than Louisiana law, governed the master services contract.[67] As the court noted nearly two decades ago in *Davis*, "[d]istinguishing between maritime and non-maritime contracts 'turns on a minute parsing of the facts.'"[68] Deciding what law applies requires a two-part analysis.[69] First, courts determine whether a contract is maritime or

57. *See id.*

58. *See id.* at 494 (discussing earlier courts' broad construction of the safety regulation exception of § 14501(C)).

59. *See id.* (stating that the Fifth Circuit has rejected a standard whereby the court would inquire closely as to whether an ordinance addressed safety or was really a "guise for economic regulation").

60. Larry Doiron, Inc. v. Specialty Rental Tools & Supply, LLP (*In re* Larry Doiron, Inc.), 869 F.3d 338 (5th Cir. Feb. 2017).

61. *Id.* at 340–41.

62. *Id.* at 340.

63. *Id.* at 340–41.

64. *Id.*

65. *Id.* at 341.

66. *Id.*

67. *Id.* at 342 (citations omitted). Unlike Louisiana law, maritime law will not bar the enforcement of indemnity provisions in master services contracts. *Id.*

68. *Id.* (citing Hoda v. Rowan Cos., 419 F.3d 379, 380–81 (5th Cir. 2005)).

69. *See id.*

non-maritime in nature by looking to the historical treatment of the work performed.[70] If the work performed was historically maritime in nature, then maritime law will apply.[71] Second, if the historical treatment of the work is unclear, courts will instead consider six factors to determine what law applies.[72] Those factors are:

> 1) What does the specific work order in effect at the time of injury provide? 2) What work did the crew assigned under the work order actually do? 3) Was the crew assigned to work aboard a vessel in navigable waters? 4) To what extent did the work being done relate to the mission of that vessel? 5) What was the principal work of the injured worker? and 6) What work was the injured worker actually doing at the time of injury?[73]

Here, the court could not rely on the historical treatment of the work in question, as the Fifth Circuit had not previously considered the issue of whether flow-back operations were maritime or non-maritime in nature.[74] Thus, the court looked to each of the six factors to conclude that the master services contract was maritime in nature, and thus, maritime law applied.[75]

Notably, in reaching this conclusion, the court offered an important piece of guidance for future applications of the six-factor analysis.[76] When analyzing the factors, the "gravamen of [the] inquiry is not whether the contract required use of a vessel but whether the *execution* of the contract required a vessel."[77] While "incidental or preparatory use of a vessel" will not make a contract maritime, work that is "inextricably intertwined with maritime activities" will.[78]

V. STANDING

A. Barber v. Bryant

One issue that seems to arise frequently in today's age is a plaintiff's standing to bring a case. In *Barber v. Bryant*, the court considered whether residents of Mississippi had standing to challenge a state statute protecting those who hold the following three "religious beliefs or moral convictions":

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70. *See id.* (quoting Davis & Sons, Inc. v. Gulf Oil Corp., 919 F.2d 313, 316 (5th Cir. 1990)).

71. *See id.*

72. *See id.*

73. *Id.*

74. *Id.* at 343. Note that the court has previously considered both contracts for wireline services and contracts for casing services. *Id.* Wireline services were found to be non-maritime in nature, while case services were determined to be maritime. *Id.*

75. *See id.* at 346.

76. *See id.* at 344.

77. *Id.* (emphasis in original).

78. *Id.* (quoting Davis & Sons, Inc. v. Gulf Oil Corp., 919 F.2d 313, 317 (5th Cir. 1990)).

> (a) Marriage is or should be recognized as the union of one man and one woman; (b) sexual relations are properly reserved to such a marriage; and (c) male (man) or female (woman) refers to an individual's immutable biological sex as objectively determined by anatomy and genetics at time of birth.[79]

The statute protected those who acted in accordance with the above "beliefs" from discriminatory actions by the state "in the form of adverse tax, benefit, and employment decisions, the imposition of fines, and the denial of occupational licenses."[80] The statute also served as a defense in private suits between individuals regarding conduct covered by the statute.[81]

The plaintiffs sued to challenge the constitutionality of the Mississippi statute on the grounds that it violated the Establishment Clause and the Equal Protection Clause of the Fourteenth Amendment.[82] The district court agreed, issuing a preliminary injunction against the implementation of the statute.[83] The state appealed.[84]

On appeal, the Fifth Circuit concluded that the plaintiffs had no standing to sue as they had not suffered an "injury-in-fact" by the statute.[85] The court began its analysis by noting that standing to sue requires a plaintiff prove three elements: (1) an injury-in-fact, (2) a causal connection between the injury and the offending conduct, and (3) a likelihood that the injury will be redressed by a favorable decision.[86] To show an injury-in-fact, a plaintiff must prove "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical."[87]

Although the plaintiffs here tried to cast their injury-in-fact as a "stigmatic injury," the court rejected this argument.[88] The court reasoned that even stigmatic injuries must be concrete and particularized.[89] The court noted that due to this requirement, stigmatic injuries often arise under the Establishment Clause when a plaintiff's injury results from a personal

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79. Barber v. Bryant, 860 F.3d 345, 350–51 (5th Cir. Sept. 2017) (quoting HB 1523 § 2, 2016 Leg., Reg. Sess. (Miss. 2016)).

80. *Id.*

81. *See id.*

82. *Id.* at 350.

83. *Id.* at 352.

84. *Id.*

85. *Id.*

86. *Id.* (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992)).

87. *Id.* (quoting *Lujan*, 504 U.S. at 560).

88. *Id.* at 353.

89. *Id.*

encounter with a religious display.[90] When that display is then removed from the plaintiff's view, the standing disappears as an injury no longer exists.[91]

Similarly, when analyzing the Equal Protection Clause, stigmatic injury will only satisfy the injury-in-fact requirement when the exposure to a discriminatory message is accompanied by a corresponding denial of equal treatment.[92] "When plaintiffs ground their equal protection injuries in stigmatic harm, they only have standing if they also allege discriminatory treatment."[93]

In this case, none of the plaintiffs asserted anything more than a general stigmatic injury.[94] Specifically, while each of the plaintiffs claimed offense at the message sent by the statute, none claimed any imminent and definite discrimination resulting from the statute's implementation.[95] As a result, the court concluded that none of the plaintiffs had standing to sue.[96]

Moving forward, plaintiffs challenging a statute on the basis of its offensive message must be sure to allege either exposure to the offensive display during the course of the plaintiffs' daily activities or discriminatory treatment resulting from the offending message.[97] Attorneys taking these types of cases should carefully evaluate their plaintiff class and ensure that only those plaintiffs whose stigmatic injuries will satisfy the injury-in-fact requirement are included.

B. Lee v. Verizon Communications, Inc.

The court again addressed the question of standing in the case of *Lee v. Verizon Communications, Inc.*[98] In *Lee*, the Fifth Circuit had to reconsider whether a plaintiff's claim of incursion on his statutory right to "proper plan management" under ERISA was sufficient to satisfy the injury-in-fact requirement of standing in light of the recent Supreme Court case of *Spokeo Inc. v. Robins*.[99]

The court noted that *Spokeo* concluded that "violation of a procedural right granted by statute may in some circumstances be a sufficiently concrete, albeit intangible, harm to constitute injury-in-fact without an allegation of

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90. *See id.* (citing Murray v. City of Austin, 947 F.2d 147, 150–51 (5th Cir. 1991)). Note that a plaintiff cannot manufacture a confrontation for the purpose of gaining standing. *See id.* at 354. Rather, the personal encounter with the offending display must occur during the course of a plaintiff's regular day-to-day activities. *See id.*

91. *See id.* at 353–54.

92. *See id.* at 356.

93. *Id.* (quoting Moore v. Bryant, 853 F.3d 245, 251 (5th Cir. Mar. 2017)).

94. *Id.* at 358.

95. *Id.* at 357.

96. *Id.* at 357–58.

97. *See id.* at 353–58.

98. See Lee v. Verizon Commc'ns, Inc., 837 F.3d 523 (5th Cir. Sept. 2017).

99. *Id.* at 529; *see* Spokeo v. Robins, 136 S. Ct. 1540 (2016).

'any *additional* harm beyond the one Congress has identified.'"[100] Thus, the "deprivation of a right created by statute must be accompanied by 'some concrete interest that is affected by the deprivation.'"[101]

In *Lee*, the plaintiff alleged that the defendant violated its statutory duties under ERISA as a result of a plan amendment and subsequent annuity purchases.[102] The court reasoned that although these actions may be a violation of a procedural right granted by ERISA, the plaintiff's "concrete interest" in the plan—that is, his right to payment—"was not alleged to be at risk from the purported statutory deprivation."[103] Thus, the court concluded that, "[T]he mere allegation of fiduciary misconduct in violation of ERISA, divorced from any allegation of risk to defined-benefit-plan participants' actual benefits," would not constitute *de facto* injury sufficient to establish constitutional standing.[104]

VI. ATTORNEY'S FEES—*SPEAR MARKETING, INC. V. BANCORPSOUTH BANK*

In *Spear Marketing, Inc. v. BancorpSouth Bank*, the court addressed an interesting quandary in the context of statutory attorney's fees.[105] Spear Marketing, Inc. licensed banking software to BancorpSouth[106]—that is, until BancorpSouth terminated the agreement in favor of a new agreement with Argo Data Resource Corp.[107] Spear Marketing filed a litany of claims against BancorpSouth and Argo in Texas state court—including a claim under the Texas Theft Liability Act (TTLA).[108] All claims stemmed from Argo and BancorpSouth's alleged misappropriation, theft, and conversion of Spear Marketing's trade secrets.[109] Argo and BancorpSouth succeeded in removing the case to federal court because the claims were preempted by the Copyright Act.[110] Spear Marketing amended its complaint, attempting to alter the claims that were preempted by the Copyright Act.[111] Importantly, the factual underpinnings of the TTLA claim were changed in the First Amended Complaint to attempt to avoid the Copyright Act's preemptive reach.[112] The

100. *Id.* (emphasis in original) (quoting *Spokeo*, 136 S. Ct. at 1549).
101. *Id.* (quoting *Spokeo*, 136 S. Ct. at 1549).
102. *Id.* at 531.
103. *Id.* at 530.
104. *Id.*
105. Spear Mktg., Inc. v. BancorpSouth Bank (*Spear Marketing II*), 844 F.3d 464 (5th Cir. Dec. 2016).
106. *Id.* at 467.
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.* at 467–68 (citing 17 U.S.C. § 301 (2018) (expressly preempting all claims within the Copyright Act's subject matter)).
111. *Id.* at 468.
112. *Id.*

district court later denied Spear Marketing's motion for summary judgment on all nine claims.[113]

In the first appeal, the court determined that the original complaint is the correct yardstick when determining questions of preemption.[114] The court ultimately held that Spear Marketing's claims, as alleged in the original complaint, were indeed preempted by the Copyright Act for subject matter jurisdiction purposes.[115] It also held that summary judgment was proper as to the First Amended Complaint—either because Spear Marketing failed to show a dispute regarding an essential element or because it had waived its right to appeal.[116]

With that settled, BancorpSouth and Argo filed a motion for attorneys' fees and costs under the TTLA, asserting that they had prevailed on the merits.[117] Spear Marketing countered that fees were improper because the TTLA claims were preempted.[118] Thus, the district court faced a dilemma: "whether to treat [d]efendants as prevailing parties under the TTLA because they successfully defended against" Spear Marketing's TTLA claim, even though *Spear Marketing I* "later held the TTLA claim was completely preempted."[119] After finding that the TTLA claim was fully adjudicated, the district court awarded nearly $1 million in attorneys' fees to Argo and BancorpSouth.[120] Alternatively, it held that the award would be no different under the Copyright Act's attorney's fees provision.[121]

On the instant appeal, the court first addressed the fee award under the TTLA.[122] The court began with the maxim: district courts cannot "award attorneys' fees 'unless a statute or contract provides' the basis for such" award.[123] But a state law, such as the TTLA, can be the basis, so long as the law "supplies the rule of decision."[124] The court was not unsympathetic to the predicament of the district court.[125] The court stated the parties should not get attorney's fees because the TTLA claim was preempted.[126] At the same time, the court stated they should receive attorney's fees because the claim was ostensibly adjudicated on the merits when it was dismissed with prejudice.[127] Thus, the question came down to an interpretation of the effects

113. *Id.* at 468–69.
114. Spear Mktg., Inc. v. BancorpSouth (*Spear Marketing I*), 791 F.3d 586, 598 (5th Cir. 2015).
115. *Id.* at 597.
116. *Id.* at 591, 602–03.
117. *Spear Marketing II*, 844 F.3d at 466.
118. *Id.* at 471.
119. *Id.* at 470 (alteration in original).
120. *Id.*
121. *Id.*
122. *Id.* at 470–73.
123. *Id.* at 470 (quoting Baker Botts L.L.P. v. ASARCO LLC, 135 S. Ct. 2158, 2164 (2015)).
124. *See id.* (citing Walker Int'l Holdings, Ltd. v. Congo, 415 F.3d 413, 415 (5th Cir. 2005)).
125. *See id.* at 471.
126. *Id*.
127. *Id.*

of *Spear Marketing I*—whether preemption results in an adjudication on the merits or a nullity.[128]

In addressing the issue, the court focused its attention on which claims were actually held preempted rather than the broader question of the effect of the preemption on attorney's fees.[129] Specifically, *Spear Marketing I* only held that the TTLA claims were preempted as they appeared in the original complaint.[130] Because the TTLA claims in the first amended complaint were never held to be preempted and were later adjudicated on the merits, it supplied the rule of decision in the case and attorney's fees were correctly awarded under that statute.[131]

In the future, it is clear that while the original complaint is the correct pleading to measure preemption, preemption of those claims will not necessarily preclude an award of attorney's fees.[132] An adjudication on the merits of a claim allowing attorney's fees in an amended complaint can supersede the preemption determination.[133]

VII. FORUM-SELECTION CLAUSE—*BARNETT V. DYNCORP INTERNATIONAL, L.L.C.*

In *Barnett v. DynCorp International, L.L.C.*, the court again dodged an issue that has garnered a great deal of uncertainty and disagreement since the Supreme Court's *Atlantic Marine Construction v. United States District Court* opinion: is there a distinction—for choice-of-law purposes—between validity and enforceability of contractual forum-selection clauses?[134] In 2011, Jonathan Barnett, a United States citizen, signed on at DynCorp, a private contractor that provides logistics support for the United States Army and has its principal place of business in Texas.[135] The employment contract—and two extension contracts—implicated several venues, both foreign and domestic.[136] Barnett signed the contract in Texas.[137] His wages were to be paid in American dollars.[138] The contract designated that Kuwait's overtime rules and labor laws would apply.[139] And the choice-of-law and exclusive venue provisions designated Kuwait.[140]

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128. *See id.*
129. *See id.*
130. *Id.*
131. *See id.* at 473.
132. *See id.*
133. *See id.*
134. Barnett v. DynCorp Int'l, L.L.C., 831 F.3d 296 (5th Cir. July 2016).
135. *Id.* at 299.
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.*

In 2013, DynCorp sent a letter to Barnett informing him his services were no longer needed.[141] The letter promised certain severance benefits—including an end-of-service indemnity, unused leave credit, and the balance of his unpaid wages at the next scheduled pay date.[142] Apparently, this never came to pass; thus, in 2015, Barnett filed suit in a federal district court in Texas, asserting DynCorp had breached its contractual obligations and owed him myriad unpaid compensation and benefits.[143]

DynCorp moved for dismissal for *forum non conveniens* based on the forum-selection clause in the employment agreement.[144] Barnett responded that Texas Civil Practice and Remedies Code § 16.070 rendered the forum-selection clause void—and therefore unenforceable—because the litigation was directed at a forum with a limitations period short of two years for employment contract disputes (Kuwait has a one-year statute of repose on employment disputes).[145] The district court disagreed with Barnett and granted the motion to dismiss under the Supreme Court's *Atlantic* framework.[146] On appeal, the Fifth Circuit affirmed.[147]

In its analysis, the court began with the *Atlantic Marine Construction Co.* holding, which is implicated almost any time a forum-selection clause is present.[148] That case held that "absent unusual circumstances," a "valid" forum-selection clause designating a foreign or state tribunal requires *forum non conveniens* dismissal.[149] But, said the court, *Atlantic* does not necessarily control because the Supreme Court "presuppose[d] a contractually valid forum-selection clause."[150] Barnett's arguments—that validity is in question—brings *Atlantic*'s presumptive dismissal requirement into question.[151]

In working through the issues, the court first noted that *enforceability*—even in diversity cases—is always an issue of federal law in the Fifth Circuit.[152] And there is a presumption that the forum-selection clause is enforceable, overcome only by a showing from the attacking party that enforcement is "'unreasonable' under the circumstances."[153] Alternatively,

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141. *Id.*
142. *Id.*
143. *Id.* at 299–300.
144. *Id.* at 300.
145. *Id.* (citing TEX. CIV. PRAC. & REM. CODE ANN. § 16.070(a) (West 2017); Lee v. ITT Corp., 534 F. App'x 626, 626 (9th Cir. 2013) (referencing Kuwait's statute of repose)).
146. *Id.* (citing Atl. Marine Constr. Co. v. U.S. Dist. Court, 134 S. Ct. 568 (2013)).
147. *Id.* at 309.
148. *See id.* at 301.
149. *Id.* (citing *Atl. Marine*, 134 S. Ct. at 581–83, 583 & n.8).
150. *Id.* (citing *Atl. Marine*, 134 S. Ct. at 581 n.5; *In re* Union Elec. Co., 787 F.3d 903, 906–07 (8th Cir. 2015) (alteration in original) (pointing out that *Atlantic* did not address validity of forum-selection clauses)).
151. *See id.*
152. *Id.* (citing Haynsworth v. The Corp., 121 F.3d 956, 962 (5th Cir. 1997)).
153. *See id.* (citing *Haynsworth*, 121 F.3d at 963).

when the *interpretation* of a forum-selection clause is in issue, the Fifth Circuit uses the forum state's choice-of-law rules to determine which substantive law to use.[154] Still, this leaves open the question of which law governs validity.

After reviewing both Barnett's and DynCorp's respective positions on the validity-enforceability distinction (pointing out strengths and flaws in both), the Fifth Circuit ultimately concluded it could avoid the larger issue.[155] The court found an overlap in the inquiry—whether federal or state law is applied—that obviated the need to reach the thorny issue that has thoroughly perplexed both courts and scholars.[156]

First, the court reasoned that if the federal law alone were to control both the validity and enforceability issues, Barnett needed to show the clause was unreasonable using the four-factor *Haynsworth* framework provided by the Fifth Circuit.[157] Barnett waived consideration of all but the fourth factor: that "enforcement of the forum-selection clause would contravene a strong public policy of the forum state."[158]

The court noted that if, instead, validity was distinct from enforceability and controlled by state law, courts should turn to the forum state's choice-of-law rules.[159] Of course, this does not necessarily mean that Texas's substantive contract interpretation laws apply.[160] Instead, Texas's choice-of-law principles would determine whose substantive law to apply.[161] Because this contract contains a Kuwaiti choice-of-law provision, Texas rules dictate that Kuwaiti substantive law should apply unless the choice-of-law clause is unenforceable.[162]

Texas courts generally enforce a party's choice-of-law provisions, but courts have adopted the Restatement (Second) Conflict of Laws § 187 limitations.[163] First, the parties must have a "substantial relationship" to the chosen forum.[164] Here, this was established because the contract is to be performed in Kuwait.[165] Then the inquiry turns to whether application of Kuwaiti law "would be [(1)] contrary to a fundamental policy of a state [(2)] which has a materially greater interest than the chosen state . . . and

154. *See id.* (citing Weber v. PACT XPP Techs., AG, 811 F.3d 758, 770–71 (5th Cir. Jan. 2016)).
155. *See id.* at 302–04.
156. *See id.* at 303.
157. *Id.* at 303–04 (citing *Haynsworth*, 121 F.3d at 963).
158. *Id.* at 304 (citing *Haynsworth*, 121 F.3d at 963).
159. *Id.* (citing *Weber*, 811 F.3d at 770–71).
160. *Id.* (citing *Weber*, 811 F.3d at 770).
161. *Id.*
162. *Id.* (citing Nexen Inc. v. Gulf Interstate Eng'g Co., 224 S.W.3d 412, 417 (Tex. App.—Houston [1st Dist.] 2006, no pet.).
163. *Id.* at 305 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (AM. LAW INST. 1977)).
164. *Id.* (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (AM. LAW INST. 1977)).
165. *See id.*

[(3)] which . . . would be the state of the applicable law in the absence of an effective choice of law by the parties."[166]

But, said the Fifth Circuit, even if it assumed that Texas law applied in the absence of the choice-of-law provision (number 3), and that Texas had a materially greater interest in the statute of limitations period (number 2), Barnett would still need to show that "application of Kuwaiti law [would] contravene a fundamental policy of the state of Texas, as expressed in [§] 16.070."[167] This inquiry, almost word-for-word, tracks the federal enforceability inquiry in *Haynsworth*.[168] Thus, the clause's validity under state law in these circumstances is coextensive with its enforceability under federal law—that is, whether enforcing the chosen law "would contravene a [fundamental] policy of the forum state."[169]

The court then looked to Texas's choice-of-law rules to make the determination. First, the Texas Supreme Court has "made [it] clear that application of foreign [substantive] law 'is not contrary to the fundamental policy of the forum merely because it leads to a different result.'"[170] Rather, the question is if "a part of state policy [is] so fundamental that the courts of the state will refuse to enforce an agreement contrary to that law."[171] The Fifth Circuit concluded that the limitations provision in § 16.070 did not meet that standard (mainly) because the statute is directed at contractual provisions that seek to limit the period to bring suit, not contractual provisions that point to a different forum's substantive laws.[172] Thus, the Fifth Circuit affirmed the district court's dismissal of *DynCorp* by application of the *Atlantic* modified *forum non conveniens* framework.[173]

Given this holding, it is difficult to conceive of a scenario in which the Fifth Circuit, at least in Texas, would need to address the validity-enforceability distinction. The validity of forum-selection provisions with exclusive choice-of-law clauses, implicate, as a threshold matter, choice-of-law rules. And Texas's rules indicate that their validity, in large part, are dictated by whether the forum's laws would be *enforceable* under broader choice-of-law principles.[174] Therefore, if a party sitting in diversity in Texas challenges the validity of a forum-selection clause based

166. *Id.* (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (AM. LAW INST. 1977)).

167. *Id.* at 306.

168. *See id.* at 304 (providing the requirements for enforceability of forum-selection clauses); Haynsworth v. The Corp., 121 F.3d 956, 962 (5th Cir. 1997).

169. *See Barnett*, 831 F.3d at 308 (citing *Haynsworth*, 121 F.3d at 963).

170. *Id.* at 306 (quoting DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 680 (Tex. 1990)).

171. *Id.* (quoting *DeSantis*, 793 S.W.2d at 680).

172. *See id.* The Fifth Circuit also noted the unpredictability that would result from applying § 16.070 to contractual provisions. *Id.* at 308. Specifically, the legal differences between the limitations period discussed in § 16.070 and a statute of repose, like Kuwait's, could lead to absurd results—that is, the choice-of-law determination would not be dictated by settled principles, but by temporal proximity between the breach and termination of employment. *See id.*

173. *See id.*

174. *See id.* at 304.

on a conflict with substantive state law, the federal and state inquiries are collapsed into a hybrid enforceability determination.[175] And that determination centers entirely on whether the forum's laws contravene a strong public policy found in Texas law.

VIII. PRELIMINARY INJUNCTIONS—*CITY OF DALLAS V. DELTA AIR LINES, INC.*

In *City of Dallas v. Delta Air Lines, Inc.*—a complex and consequential dispute between Southwest Air Lines, Delta Air Lines, and the City of Dallas—the Fifth Circuit reviewed a preliminary injunction allowing Delta to maintain the status quo, operating five flights per day out of Love Field Airport.[176] In a split decision, Judges Davis and Reavley upheld the preliminary injunction, concluding that Delta had shown a substantial likelihood of success on the merits.[177] Judge Edith Jones dissented, reasoning that Delta was not a third party beneficiary and thus lacked standing to seek injunctive relief.[178]

Although this litigation began in 2015, it was set in motion decades ago and is merely another chapter in the storied and litigious history of Dallas's Love Field Airport.[179] Love Field, an airport owned by, and located in, the City of Dallas, has long been the subject of special federal legislation to protect the business interests of Dallas–Fort Worth International Airport (DFW).[180]

Back in the 1960s, Dallas and Fort Worth each had their own airport.[181] But for various economic reasons, the federal government decided it would only fund a single airport somewhere between the two cities—what became Dallas/Fort Worth International Airport (DFW).[182] The plan was to shut down the local airports, but the fledgling Southwest won several legal battles that allowed Love Field to stay open.[183] When the airline industry was deregulated in the 1970s, additional geographic restrictions were passed, allowing flights leaving Love Field to fly to destinations within Texas or to destinations in states contiguous with Texas.[184]

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175. *See generally id.*

176. City of Dallas v. Delta Air Lines, Inc., 847 F.3d 279, 281, 284 (5th Cir. Feb. 2017).

177. *Id.* at 280.

178. *Id.* at 291 (Jones, J., dissenting).

179. *See id.* at 284 (majority opinion). *See generally also*, Andrea Ahles, *Decades Later, Wright Amendment Lifted at Dallas Love Field*, FORT WORTH STAR-TELEGRAM (Oct. 11, 2014), http://www.star-telegram.com/news/business/article3877464.html.

180. *Delta*, 847 F.3d at 281.

181. *See* Ahles, *supra* note 179.

182. *See id.*

183. *See id.*

184. *See id.*

In 2006, instigated by Congress to find a way to remove the geographic limitations, Dallas, Fort Worth, the DFW Airport Board, Southwest, and American Airlines entered into a Five Party Agreement.[185] The Five Party Agreement removed the geographic restrictions after eight years, or by October of 2014.[186] In return, the number of gates at Love Field was reduced from thirty-two to twenty, with each gate allotted a maximum of ten flights per day.[187] Further, the Agreement allocated sixteen "preferential use" gates to Southwest, and two each to American Airlines and ExpressJet Airlines, Inc.[188]

The Five Party Agreement also contemplated that a new airline might someday seek to operate out of Love Field and set out accommodation procedures.[189] First, the City of Dallas, on behalf of the new entrant, should seek a voluntary accommodation from Love Field's then-existing carriers—that is, the Signatory Airlines.[190] Without a voluntary resolution, the City of Dallas could require the sharing of preferential lease gates.[191] The Agreement also required the parties to amend the Lease Agreements to reflect this agreement.[192]

Many of the provisions in the Five Party Agreement were adopted in the Wright Amendment Reform Act.[193] Specifically, the Act provided, "To accommodate new entrant air carriers, the City of Dallas shall honor the *scarce resource provision* of the existing Love Field Leases."[194] And the Act provides that the underlying Lease Agreements be amended, as necessary, to implement the Five Party Agreement.[195] But most importantly, the Act expressly states, "the Five Party Agreement is intended only for the benefit of the parties thereto and is not intended to create any third party beneficiary relationship with anyone."[196]

In the interim, United Airlines, Inc. succeeded to ExpressJet's two gates.[197] Meanwhile, American and U.S. Airways merged, and American Airlines' two-preferential use gates were transferred to Virgin America, Inc.[198]

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185. *Delta*, 847 F.3d at 281.

186 *See id.*

187. *Id.*

188. *Id.* at 281–82. The agreement also prohibited the subdivision of any gate in any form, a limitation on flight operations from 11:00 p.m. to 6:00 a.m., and a prohibition on international flights. *Id.*

189. *Id.* at 282.

190. *Id.*

191. *Id.*

192. *Id.*

193. *See id.*

194. *Id.* (emphasis and alterations in original) (quoting City of Dallas v. Delta Airlines, Inc., No. 3:15-CV-2069-K, 2016 WL 98604, at *2 (N.D. Tex. Jan. 8, 2016)).

195. *Id.*

196. *Id.*

197. *Id.* at 283.

198. *Id.*

Before the merger, Delta—who had no lease with Dallas at the time of the Five Party Agreement—subleased capacity for five daily flights from American on a month-to-month basis in 2009.[199] With the lease set to expire in October 2014 (which is when Southwest's geographic restrictions would be removed), Delta requested a voluntary accommodation from the Signatory Airlines, but a compromise could not be found.[200]

Delta then asked Dallas for mandatory accommodation in July 2014.[201] The City of Dallas ordered United to make the accommodation because it was underutilizing its gates—using only seven of the allotted twenty flights per day.[202] But, as it happens, Southwest was in the midst of negotiating the purchase of United's gates.[203] Based on the purchase, the city rescinded its accommodation demand.[204]

Once Southwest's purchase of United's gates was finalized, Southwest agreed to honor Delta's temporary gate usage agreement with United, but refused to extend it any further.[205] Delta asked the city again for an accommodation, and the city required it.[206] With the gate usage agreement set to expire, Delta, Southwest, and the city each filed competing motions for preliminary injunctions.[207] Delta sought a preliminary injunction to keep the status quo pending its declaratory judgment action.[208] Southwest sought an injunction to prevent Delta's trespass once its temporary gate usage agreement expired.[209] The city took the no-dog-in-the-hunt position, insinuating itself in the case only to urge the court to give it some sort of direction.[210]

The district court granted Delta's request for preliminary injunction because it found, *inter alia*, that Delta had shown a substantial likelihood of success on the merits regarding its status as a third-party creditor beneficiary under the Lease Agreement and that it was entitled to accommodation under the same.[211] Southwest appealed, asserting the district court was wrong on both counts.[212] Delta naturally agreed with the district court.[213] And the city

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199. *Id.* at 283–84.
200. *Id.* at 284.
201. *Id.*
202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.* at 285.
208. *Id.*
209. *Id.*
210. *See id.* The Fifth Circuit characterized it as: "The City requested, in the alternative, that the district court grant the relief requested by either Delta, the relief requested by Southwest, or any other appropriate relief." *Id.*
211. *Id.*
212. *Id.* at 286.
213. *Id.*

thought Delta was indeed entitled to an accommodation but that it lacked third-party creditor beneficiary standing.[214]

Turning to the merits, the Fifth Circuit took a very curious path to avoid the third-party beneficiary issue (a path that Judge Jones would call into question in her dissent, discussed below).[215] It reasoned that Delta's third-party status was of little importance because the parties to the leases, Southwest and the city (even if arguing in the alternative), sought preliminary injunctions based on competing interpretations of the leases.[216] In other words, if the court agreed with the interpretation requiring the accommodation, Delta's status as a third-party beneficiary was irrelevant—it had the relief it sought.[217] And if Southwest were correct and Delta was not entitled to an accommodation, Delta's right to sue again becomes irrelevant.[218]

Having avoided that thicket, the court turned to Southwest's remaining contention that the accommodation issue did not warrant a preliminary injunction.[219] The only preliminary-injunction requirement Southwest challenged was whether Delta and the city demonstrated a substantial likelihood of success on the merits for Southwest's breach of the Lease Agreements.[220]

For Delta to demonstrate a substantial likelihood that Southwest breached the Lease by refusing to provide an accommodation under § 4.06F of the Lease Agreement, Delta would need to show: "(1) the existence of a valid contract; (2) that Delta performed or tendered performance; (3) that Southwest breached the contract; and (4) that Delta was damaged as a result of the breach."[221] The Fifth Circuit then looked to the district court's rationale.[222]

Three of the four elements were non-controversial.[223] There was a contract.[224] Delta would certainly be damaged if it could no longer fly out of Love Field.[225] And the district court found that Delta performed its obligations under the accommodation procedure by seeking a voluntary

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214. *Id.*
215. *See id.*
216. *Id.*
217. *See id.*
218. *Id.*
219. *See id.*
220. *Id.* at 287. The court noted that the city's motion for a preliminary injunction was broader—seeking a general determination of its own rights. *See id.* But the court held that any differences were theoretical and of no practical consequence. *See id.*
221. *Id.* (quoting City of Dallas v. Delta Airlines, Inc., No. 3:15-CV-2069-K, 2016 WL 98604, at *9 (N.D. Tex. Jan. 8, 2016)).
222. *See id.*
223. *See id.*
224. *Id.*
225. *Id.*

accommodation from all signatory airlines.[226] The only real question was whether Southwest breached.[227]

Given the procedural posture of the case, the Fifth Circuit merely recapped the district court's reasoning and ultimately deemed it sufficient.[228] The district court focused on the language in § 4.06F of the Lease Agreement which required Southwest to "accommodate such Requesting Airline at its Lease Premises at such time that will not unduly interfere with its operating schedules."[229] But unfortunately, "unduly interferes with" was not defined in the instrument.[230] Further, the court cited extensive legislative history showing that the lack of a clearly defined procedure—and particularly the phrase "unduly interferes with"—was a recognized problem when these agreements were negotiated.[231]

Thus, the district court took to supplying a reasonable interpretation of the "unduly interferes with" language and found that it should be assessed at the time the accommodation request is made.[232] Essentially, the question was whether the requested flights could fit within the signatory airline's published schedule.[233] The district court found that, at the time of Delta's request, Southwest was not operating at full capacity.[234] Further, the district court reasoned that the Lease Agreement provided for preferential, not exclusive, use of gates.[235] Southwest could not prevent an accommodation by maximizing its own utilization.[236]

All told, the district court found that Delta established a substantial likelihood of success on the merits because Southwest likely breached the Lease Agreements by refusing to provide an accommodation.[237] The Fifth Circuit agreed, holding that the "Lease Agreement plainly establishes a duty to accommodate by both Southwest and the [c]ity."[238] With the operative language undefined, the Fifth Circuit concluded that the lower court's reasoning was persuasive regarding Southwest's duties under the Lease.[239]

Judge Jones dissented in a very persuasive opinion.[240] She reasoned it was error for the majority to avoid the outcome-determinative standing

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226. *Id.*
227. *See generally id.*
228. *See id.* at 290.
229. *Id.* at 287.
230. *Id.* at 288.
231. *Id.*
232. *See id.*
233. *See id.*
234. *Id.*
235. *Id.* at 289.
236. *See id.*
237. *Id.*
238. *Id.* at 290.
239. *Id.*
240. *Id.* at 291 (Jones, J., dissenting).

question—that is, Delta's third-party creditor beneficiary status.[241] Accordingly, in addressing the issue, Judge Jones disagreed with the majority's determination that the city seeking guidance established a "live controversy" which allowed the court to address the merits of the breach of contract claim.[242] She noted that the city had "repeatedly and consistently denied any legal claim against Southwest," seeking only "clarification."[243] This lack of an adversarial conflict between the city and Southwest—coupled with the city's agreement that Delta was not entitled to third-party status—destroyed any live controversy.[244] Because the majority avoided the third-party beneficiary analysis, Judge Jones went on to explain in the first instance that Delta could not overcome the presumption against third-party beneficiaries under Texas law.[245] And even if it could establish its third-party beneficiary status, she would have held the accommodation agreement was likely too vague to be enforced, thus Delta could not establish a likelihood of success on the merits.[246]

Given that a preliminary injunction is—as the majority recognized—an "extraordinary remedy," it is hard not to find the dissent persuasive.[247] The majority, in setting out the requirements to prove breach of contract, explicitly noted that establishing third-party beneficiary status was a prerequisite under Texas law.[248] The court side-stepped that requirement by taking the position that the city, not Delta, sought to enforce Delta's accommodation under the Lease Agreements.[249] It did so by stating the difference between the city and Delta's position is technical, if not academic.[250] But, as the dissent makes clear, the city throwing up its hands and seeking guidance was probably short of establishing a live controversy under the Declaratory Judgment Act.[251]

In any event, the uncertainty this decision may cause is tempered by the unique factual circumstances in this case. Given the dire consequences that would result for Delta by a deviation from the status quo, it is entirely possible that the court wanted this dispute settled on the merits and was sensitive to the consequences of a termination of Delta's services at Love Field. Indeed, the majority repeatedly reminded the reader that it was only

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241. *Id.*
242. *Id.*
243. *Id.* at 292.
244. *See id.*
245. *See id.*
246. *See id.* at 297 (citing KW Constr. v. Stephens & Sons Concrete Contractors, Inc., 165 S.W.3d 874, 883 (Tex. App.—Texarkana 2005, pet. denied)).
247. *See id.* at 285.
248. *Id.* at 287 (citing Maddox v. Vantage Energy, LLC, 361 S.W.3d 752, 756–57 (Tex. App.—Fort Worth 2012, pet. denied)).
249. *See id.*
250. *See id.*
251. *See id.* at 291–92 (Jones, J., dissenting).

agreeing with the district court "at this stage."[252] It is probably a foregone conclusion that the Fifth Circuit has not seen the last of this case.

IX. INTERVENTION—*WAL-MART STORES, INC. V. TABC*

This case is the latest in a series of lawsuits attacking components of Texas's alcoholic beverage regulatory regime.[253] Wal-Mart brought suit against the Texas Alcoholic Beverage Commission (TABC) asserting that the regulatory system operates in violation of the Equal Protection, Commerce, and Comity Clauses of the Constitution.[254] Wal-Mart's theory was that the system exclusively benefited a single class of liquor retailers, represented by the Texas Package Store Association.[255] The Association sought to intervene under Federal Rule of Civil Procedure 24(a), but the district court denied intervention.[256] The Fifth Circuit reversed.[257]

The Texas Alcoholic Beverage Code provides a comprehensive and far-reaching licensing system.[258] Broadly speaking, there are strict divisions between the three-tiers of the market: retailer's retail, wholesaler's wholesale, and brewers and distillers do just that.[259] But within the retail tier of the market, there are further divisions.[260] Specifically, only those with a package store permit are allowed to retail liquor—and these permits are severely restricted.[261] As a general rule, a corporation cannot own more than five package store permits, unless the holders of those permits are "related within the first degree of consanguinity"—ostensibly, to protect mom and pop shops who have fared well in their industry.[262] If this test is met, these permit holders can hold as many package store permits as they like in a combined entity.[263] Public corporations and franchisees are effectively precluded from employing a similar model.[264]

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252. *See id.* at 290.

253. *See, e.g.*, Cadena Commercial USA Corp. v. Tex. Alcoholic Beverage Comm'n, 518 S.W.3d 318 (Tex. 2017) (explaining in great detail, particularly in then-Justice Willett's dissent, the history and genesis of Texas's alcoholic beverage licensing system after Prohibition was repealed), *aff'g*, 449 S.W.3d 154 (Tex. App.—Austin 2014).

254. Wal-Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm'n, 834 F.3d 562, 564 (5th Cir. Aug. 2016).

255. *Id.* at 564–65.

256. *Id.*

257. *Id.*

258. *Id.* at 565 (citing TEX. ALCO. BEV. CODE ANN. § 22.01–.17 (West 2017)).

259. *See* Cadena Commercial USA Corp. v. Tex. Alcoholic Beverage Comm'n, 518 S.W.3d 318 (Tex. 2017).

260. *Wal-Mart*, 834 F.3d at 565.

261. *Id.* (citing TEX. ALCO. BEV. CODE § 22.01).

262. *Id.* (citing TEX. ALCO. BEV. CODE § 22.04–.05).

263. *Id.*

264. *Id.* (citing TEX. ALCO. BEV. CODE § 22.15–.16).

Wal-Mart took the position that this is a vast protectionist scheme enacted to benefit the existing permit holders.[265] The Association—comprised substantially of such permit holders—sought to intervene to aid the TABC in protecting its rights.[266] As mentioned, the district court denied intervention, and the Fifth Circuit took up this sole issue on appeal.[267]

First, the Fifth Circuit set out the test for intervention as of right under Rule 24(a):

> (1) the application . . . must be timely; (2) the applicant must have an interest relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest; (4) the applicant's interest must be inadequately represented by the existing parties to the suit.[268]

The court noted that timeliness is inherently "contextual," and absolutism measures should be ignored.[269] The Association's attempted intervention was thus timely because it "sought intervention before discovery progressed and because it did not seek to delay or reconsider phases of the litigation that had already concluded."[270]

The court was also satisfied that the Association had an interest relating to the "property or transaction that is the subject of the action" and that interest would be impaired by a disposition in this case.[271] The touchstone of that test, said the court, is whether the interest is "legally protectable."[272] "[A]n interest is sufficient if it is of the type that the law deems worthy of protection, even if the intervenor does not have an enforceable legal entitlement or would not have standing to pursue her own claim."[273]

In analyzing whether the Association had a legally protectable interest, the court first noted that in a parallel proceeding that similarly challenged Texas's alcohol regulatory system, the court held that the Association had standing to continue the lawsuit without the participation of the TABC.[274] Thus, because the Association had legal standing, its interests were clearly protectable.[275] But the court continued its analysis, specifically addressing Wal-Mart's contention that the Association's intervention to protect an

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265. *Id.*
266. *Id.* at 564–65.
267. *Id.*
268. *Id.* at 565 (quoting Texas v. United States, 805 F.3d 653, 657 (5th Cir. 2015)).
269. *Id.* (quoting Sierra Club v. Espy, 18 F.3d 1202, 1205 (5th Cir. 1994)).
270. *Id.* at 565–66.
271. *Id.* at 566.
272. *Id.* (quoting New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co. (*NOPSI*), 732 F.2d 452, 464 (5th Cir. 1984) (en banc)).
273. *Id.* (quoting *Texas*, 805 F.3d at 659).
274. *Id.* (citing Cooper v. Tex. Alcoholic Beverage Comm'n, 820 F.3d 730, 737 (5th Cir. Apr. 2016)).
275. *See id.*

economic interest was foreclosed by the Fifth Circuit's opinion in *New Orleans Public Service, Inc. v. United Gas Pipe Line Co. (NOPSI)*.[276]

In clarifying its holding in *NOPSI*, the court stated that the case "did not create a bar preventing all intervention premised on 'economic interests.'"[277] The court stated that *NOPSI* only prevents intervention when the "intervenor's relationship is too removed from the dispute."[278] Indeed, "economic interests can justify intervention when they are directly related to the litigation."[279] *NOPSI* was a purely private dispute between two publicly-traded corporations.[280] No state or federal regulations were involved.[281] The court determined that the putative intervenors were merely seeking to use intervention as an end-around to assert third-party beneficiary claims when they could not establish that right otherwise.[282] In this case, the court held, the Association had a legally protectable interest because it was the intended beneficiary of the very regulatory system Wal-Mart was attacking.[283]

Finally, the court addressed whether the Association had met its "minimal burden" to demonstrate inadequate representation.[284] Although the Association was ostensibly aligned with the TABC, the court concluded that the burden was met by pointing to several aspects of the defense strategy that diverged between the two.[285]

Thus, with intervention as of right established, the Fifth Circuit reversed without considering arguments concerning permissive intervention.[286]

276. *Id.* at 567–68 (discussing *NOPSI*, 732 F.2d at 464).
277. *Id.* at 567.
278. *Id.* at 568.
279. *Id.* (citing Sierra Club v. Espy, 18 F.3d 1202, 1207 (5th Cir. 1994)).
280. *Id.* (citing *NOPSI*, 732 F.2d at 454).
281. *Id.* (citing *NOPSI*, 732 F.2d at 456 n.3).
282. *Id.* (citing *NOPSI*, 732 F.2d at 464–65).
283. *Id.* at 569.
284. *Id*.
285. *Id.*
286. *Id.* at 569–70.