RECENT DEVELOPMENTS IN FIFTH CIRCUIT BUSINESS TORTS JURISPRUDENCE

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I. SCOPE OF THE ARTICLE

The mission is succinct: to address arenas in Fifth Circuit jurisprudence that cumulatively entail business torts. In essence, these are weapons available to parties in the traditional contract realm whose allure includes punitive or treble damages and attorney's fees. Parties utilize such causes of action in an attempt to establish tort liability, enable potential recovery of punitive damages, and award damages for mental anguish in an otherwise contractual context.[1] Albeit not exhaustive of all the business torts cases constituting new law in the Fifth Circuit, this article addresses case law in the business torts realm.[2] These areas of law include, *inter alia*, arbitration, contracts, procedure, and securities, as well as trademark and copyright in a business torts context that similarly merit scrutiny.[3] Therefore, traditional business torts are transgressed within Fifth Circuit jurisprudence as necessity or interest dictates.[4]

1. *See* PUNITIVE DAMAGES AND BUSINESS TORTS: A PRACTITIONER'S HANDBOOK 31-38 (Thomas J. Collin ed., Am. Bar Ass'n 1998).
2. *See infra* Part II.
3. *See infra* Part II.
4. *See infra* Part II.

II. BUSINESS TORTS JURISPRUDENCE

A. Arbitration

1. Petroleum Pipe Americas Corp. v. Jindal Saw Ltd.

With a panel comprising Chief Judge Edith H. Jones and Circuit Judges Jacques L. Wiener Jr. and Fortunato P. Benavides, the Fifth Circuit Court of Appeals considered an appeal from the district court's denial of a motion to stay litigation and compel arbitration.[5] The defendant was a steel manufacturer; the plaintiff was an affiliate of a petroleum company that purchased pipe from the defendant.[6] The plaintiff then supplied the pipe to third parties, a few of whom suffered well failures allegedly caused by the defendant's defective pipes.[7] The plaintiff notified the defendant that it had reached a settlement with the injured third parties.[8] This settlement was conditioned upon the defendant's agreement to a separate settlement with the plaintiff.[9] The defendant responded favorably to this proposal, and the parties reached a "comprehensive settlement agreement."[10] The agreement further included an arbitration clause.[11] The agreement referred to one specific pipe model.[12]

Subsequently, the plaintiff sent the defendant a demand letter alleging the defendant sold defective pipe models other than the one mentioned in the prior settlement.[13] On the same day, the plaintiff filed the instant suit in Texas state court alleging breach of contract and breach of warranty.[14] The defendant removed to federal court and filed an answer and counterclaim alleging that the plaintiff failed to fulfill its obligations under the settlement agreement.[15] The district court held an off-the-record conference in chambers in which it interpreted the settlement agreement "in a manner contrary to [the defendant's] interests."[16] The defendant alleged that this conference was an informal interpretation of the agreement and denied any rulings were made.[17] Ten days after the conference and one year after the plaintiff filed suit, the defendant moved to stay the litigation and compel

5. Petroleum Pipe Ams. Corp. v. Jindal Saw Ltd., 575 F.3d 476, 479-80 (5th Cir. July 2009).
6. *Id.* at 478.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* at 479.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*

arbitration.[18] The plaintiff objected, asserting *inter alia* that the defendant waived that right by substantially invoking the judicial process.[19] The district court denied the motion, and this appeal followed.[20]

The Fifth Circuit Court of Appeals thus addressed the issue of waiver.[21] The court explained that "[t]he question of what constitutes a waiver of the right of arbitration" is a fact-specific inquiry.[22] Waiver is found if the judicial process is substantially invoked to the detriment of the opposing party.[23] The failure to timely assert the right to arbitration is "particularly relevant" to this determination.[24] The court noted that to invoke the judicial process, "a party 'must . . . engage in some overt act in court that evinces a desire to resolve the arbitral dispute through litigation rather than arbitration.'"[25]

The Fifth Circuit applied the above principles to the facts of the instant case.[26] The plaintiff argued that the defendant's actions demonstrated a desire to litigate rather than arbitrate.[27] Before seeking to compel arbitration, the defendant (1) delayed seeking arbitration for a year after the suit was filed; (2) removed the case to federal court; (3) filed counterclaims; (4) participated in discovery; and (5) requested a ruling from the district court regarding the interpretation of the settlement agreement.[28] The plaintiff argued that the defendant sought to compel arbitration to avoid an anticipated unfavorable ruling on the interpretation of the settlement agreement.[29] The defendant did not contest that it took the first four actions alleged by the plaintiff but denied it sought any ruling on the merits from the district court.[30]

The Fifth Circuit reviewed the record and agreed with the defendant that the district court issued no legally binding orders or rulings at the informal conference in chambers.[31] At a later status conference, however, the district court gave "very strong indications" that it favored the plaintiff's interpretation of the agreement and was reluctant to consider further argument on the subject.[32] The Fifth Circuit opined that it was "firmly

18. *Id.*
19. *Id.* at 479-80.
20. *Id.* at 480.
21. *Id.* at 480-82.
22. *Id.* at 480 (citing Walker v. J.C. Bradford & Co., 938 F.2d 575, 576 (5th Cir. 1991)).
23. *Id.* (citing *Walker*, 938 F.2d at 577).
24. *Id.*
25. *Id.* at 480 (quoting Republic Ins. Co. v. PAICO Receivables, L.L.C., 383 F.3d 341, 344 (5th Cir. 2004)).
26. *Id.* at 481.
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*

convinced" that the district court indicated it was prepared to rule in favor of the plaintiff.[33] "The lack of a formal ruling [did] not convince [the Fifth Circuit] that [the defendant], having learned that the district court was not receptive to its arguments, should be allowed a second bite at the apple through arbitration."[34] Thus, the Fifth Circuit concluded that the defendant substantially invoked the judicial process, and therefore, waived its right to arbitration.[35] The judgment of the district court was therefore affirmed.[36]

B. Contracts

1. D&J Tire, Inc. v. Hercules Tire & Rubber Co.

With a panel comprising Circuit Judges Patrick E. Higginbotham, Emilio M. Garza, and Edward C. Prado, the Fifth Circuit Court of Appeals reviewed a grant of summary judgment on a fiduciary duty claim.[37] The appellant was a retailer that sold the appellee's goods as well as a stockholder.[38] The appellee conducted a business valuation, found that there were several interested buyers, and reported the valuation results.[39] Simultaneously, the appellant made a request to redeem its stock and apply the proceeds to an outstanding debt it owed the appellee.[40] The appellee's CFO stated that in order to complete the request, the appellant needed to execute a stock power of attorney to him.[41] The CFO further reported that the appellee considered the appellant's redemption a "hardship withdrawal," and thus, would honor redemption at 80% of the book value.[42]

In the interim, the board of directors also voted to move forward with the sale of the company to one of the interested buyers.[43] The shareholders approved the merger vote, and pursuant to the merger agreement, the shareholders received more than $60,000 per share—a significant amount more than the redemption amount received by the appellant.[44] The appellant accused the appellee's CFO of securities violations, fraud, and breach of fiduciary duty because the CFO failed to inform him of the possible upcoming merger.[45]

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33. *Id.* at 482.
34. *Id.*
35. *Id.*
36. *Id.*
37. D&J Tire, Inc. v. Hercules Tire & Rubber Co., 598 F.3d 200, 202 (5th Cir. Feb. 2010).
38. *Id.*
39. *Id.*
40. *Id.* at 202-03.
41. *Id.* at 203.
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*

The appellant filed suit alleging breach of fiduciary duty and vicarious liability, claiming entitlement to rescission based on these claims.[46] The appellee filed a motion to dismiss and a motion for summary judgment.[47] The district court stated that the stock power of attorney created a "limited mandate" without fiduciary duties, explaining (1) it only gave the CFO the power to effect the transfer to the Board upon consent, and (2) the parties agreed to the terms of the redemption before appointing the CFO as mandatary.[48] "As a result, the district court reasoned, any breach of fiduciary duty must stem from [the CFO's] duty to shareholders as an officer of [the appellee]."[49] The district court did not address the appellant's rescission claim, but found that Louisiana corporation law governed all claims for breach of a director's general fiduciary duty to shareholders because such suits must be brought within two years.[50] Accordingly, the district court granted the appellee's motion for summary judgment, and this appeal ensued.[51]

The Fifth Circuit first determined whether the district court properly applied Louisiana law to the appellant's claims.[52] The court stated that "Louisiana choice of law statutes mandate that [the court] apply the law of the state whose 'policies would be most seriously impaired if its law were not applied to that issue.'"[53] The court noted it "recently held that Louisiana law requires that 'the law of the place where the corporation was incorporated [governs] disputes regarding the relationship between the officers, directors, and shareholders and the officers' and directors' fiduciary duties.'"[54]

The Fifth Circuit found that because the appellee was a Connecticut corporation, the district court "should have applied Connecticut law to determine the scope of the fiduciary duties the directors owe to corporate shareholders."[55] The court noted, however, that Louisiana law applied to the appellant's breach of fiduciary duty claim, based on the CFO's duties as mandatary, as follows: (1) he and the appellant entered into the mandate in Louisiana; (2) Louisiana's policies would be most seriously impaired if another state law applied to actions by its citizens for breach of mandates entered into in Louisiana; and (3) Louisiana's policies would further be impaired if another state's law applied to actions by its citizens for

46. *Id.*
47. *Id.*
48. *Id.* at 203-04.
49. *Id.* at 204.
50. *Id.* (citing LA. REV. STAT. ANN. § 12:96 (2010)).
51. *Id.*
52. *Id.*
53. *Id.* (quoting LA. CIV. CODE ANN. arts. 3515, 3539 & 3542 (Supp. 2010)).
54. *Id.* (quoting Torch Liquidating Trust v. Stockstill, 561 F.3d 377, 385 n.7 (5th Cir. 2009)).
55. *Id.*

rescission of contracts based on fraud.[56] Thus, Connecticut law controlled the scope of the fiduciary duties, and Louisiana law controlled both the applicable statute of limitation and the question of whether a failure to fulfill fiduciary duties constituted fraud—warranting rescission of the contract.[57]

The Fifth Circuit addressed the limitations period.[58] "Under Louisiana law, actions for rescission of a contract based on fraud must be brought within five years after the plaintiff discovers the fraud."[59] The appellant filed its complaint just over three years after the merger at issue was announced, which was well within the five-year limitation period.[60] The court explained that the district court erred in applying the one-year statute of limitations because that period only applied to damages suits against directors or officers for breach of fiduciary duty.[61] The instant rescission claim did not seek damages, and it was against a corporation not a director or officer.[62] The appellant's rescission claim was not time barred; therefore, the court remanded to the district court to determine whether the appellant could prove that the company's directors failed to disclose a material fact, rendering the consent to the redemption null.[63]

The Fifth Circuit next reviewed Louisiana fraud law.[64] Pursuant to Louisiana law, consent of the parties is necessary for a valid contract—no valid contract exists where the consent was produced by error, such as fraud.[65] "'Fraud is a misrepresentation or a suppression of the truth made with the intention either to obtain an unjust advantage for one party or to cause a loss or inconvenience to the other. Fraud may also result from silence or inaction.'"[66] To claim fraud against a party to a contract, a plaintiff must show the following: "(1) misrepresentation, suppression, or omission of true information; (2) the intent to obtain an unjust advantage or to cause damage or inconvenience to another; and (3) the error induced by a fraudulent act must relate to circumstances substantially influencing the victim's consent to the contract."[67] Further, the defendant must have induced the plaintiff in a way that the plaintiff could claim that if he had

56. *Id.* at 204-05.
57. *Id.* at 205.
58. *Id.*
59. *Id.* (citing LA. CIV. CODE ANN. art. 2032 (Supp. 2010)).
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.* (citing Sonnier v. Boudreaux, 673 So. 2d 713, 717 (La. Ct. App. 1996); LA CIV. CODE ANN. art. 1948 (Supp. 2011)).
66. *Id.* (quoting LA. CIV. CODE ANN. art. 1953 (Supp. 2011)).
67. *Id.* (quoting Simmons v. Clark, 8 So. 3d 102, 110 (La. Ct. App. 2009)) (internal quotations omitted).

known the truth, he would not have acted as he did.[68] Moreover, "to find fraud from silence or suppression of the truth, there must exist a duty to speak or to disclose information."[69]

Connecticut law governed the existence of a fiduciary duty and its scope.[70] Under Connecticut law, an officer or director has a fiduciary relationship to the corporation and its stockholders.[71] The Fifth Circuit explained that Connecticut courts have not addressed whether directors and officers owe minority shareholders fiduciary duties when acquiring stock on the behalf of the corporation.[72] Other courts have found that such a duty does exist, and because the instant directors were acting in an official capacity when redeeming the appellant's stock, the Fifth Circuit opined that Connecticut courts would necessitate a fiduciary duty to disclose material facts in such a situation.[73] Thus, the appellant must show that the non-disclosed facts were material.[74] According to the United States Supreme Court, in order to make such a showing in securities cases, "there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information available."[75] The Fifth Circuit found that, upon remand, the appellant must show "that before redemption of the stock, the acquisition discussions had progressed far enough along that there existed a 'substantial likelihood' that a reasonable investor would have viewed the discussions as significantly altering the total mix of facts."[76]

The Fifth Circuit Court of Appeals finally turned to the mandate claim.[77] The court found, contrary to the analysis of the district court, that the appellant's claim was not time barred by Louisiana law.[78] A claim for breach of a mandate is subject to a prescriptive period of ten years, and the appellant filed suit well within this period.[79] The court also determined the scope of the mandate.[80] Under Louisiana law, "a mandate is a contract by which a person, the principal, confers authority on another person, the mandatary, to transact one or more affairs for the principal" and is not

68. *Id.*

69. *Id.* (quoting Greene v. Gulf Coast Bank, 593 So. 2d 630, 632 (La. 1992)) (internal quotations omitted).

70. *Id.* at 206.

71. *Id.* (citing Katz Corp. v. T.H. Canty & Co., Inc., 362 A.2d 975, 978-79 (Pa. 1975)).

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* (quoting Basic, Inc. v. Levinson, 485 U.S. 224, 231-32 (1988)) (internal quotations omitted).

76. *Id.*

77. *Id.* at 206.

78. *Id.*

79. *Id.*

80. *Id.* at 207.

required to be in a specific form.[81] A mandatary owes fiduciary duties to the principal.[82] "A mandatary must 'disclose to his principal all facts relating to his principal's affair.'"[83] In the instant case, the district court found that the stock power of attorney created a "limited mandate" because the appellant had previously agreed to the material terms of the redemption prior to entering into the mandate.[84] The court found that it must reverse because Louisiana law does not recognize the concept of a "limited mandate."[85] Therefore, the court directed the district court to allow the appellant, on remand, to present evidence of the scope of the agreement.[86]

The Fifth Circuit also considered the materiality of the non-disclosure.[87] If the appellant could show that the CFO had a duty to disclose material facts of the transaction, then the appellant must also show that the facts that were not disclosed were material.[88] The district court must make this determination according to Louisiana law.[89] Ultimately, the Fifth Circuit found that Louisiana law did not bar the appellant's claims and that the district court erred in its interpretation of Louisiana law; therefore, the court vacated the grant of summary judgment and remanded for further proceedings consistent with the opinion.[90]

2. Williamsonpounders Architects P.C. v. Tunica County Mississippi

With a panel comprising Circuit Judges Thomas M. Reavley, Edith Brown Clement, and Leslie H. Southwick, the Fifth Circuit Court of Appeals considered choice of law issues in a contract dispute.[91] The plaintiff, an architectural firm, entered into a contract with a Mississippi county to design a riverfront park.[92] The controlling contract contained a choice-of-law provision.[93] Under the contract, the plaintiff's principal place of business, Tennessee, governed any disputes.[94] Some changes to the contract were allegedly made orally.[95] The contract was performed in, and

81. *Id.*

82. *Id.* (citing Sampson v. DCI of Alexandria, 970 So. 2d 55, 59 (La. Ct. App. 2007)); *see also* Gerdes v. Estate of Cush, 953 F.2d 201, 205 (5th Cir. 1992) (stating that "a mandatary is a fiduciary").

83. *D&J Tire, Inc.*, 598 F.3d at 207 (quoting Woodward v. Steed, 680 So. 2d 1320, 1325 (La. Ct. App. 1996)).

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 208.

91. Williamsonpounders Architects P.C. v. Tunica Cnty. Miss., 597 F.3d 292, 294 (5th Cir. Feb. 2010).

92. *Id.*

93. *Id.* at 295.

94. *Id.*

95. *Id.* at 296.

the suit was brought in, Mississippi.[96] Several orders were entered, but the effect of the final decision by the district court was that Mississippi law applied.[97]

The only issue brought before the Fifth Circuit was whether the district court erred in applying Mississippi law.[98] The court provided practitioners with a review of choice-of-law analysis.[99] "A district court hearing a diversity suit is to apply the choice-of-law rules of the state in which the action is brought."[100] The court noted that an analysis of Mississippi's choice of law principles was necessary.[101]

Thus, the court engaged in a review of Mississippi law.[102] Mississippi courts give effect to the express agreement on choice of law by the parties, in the absence of anything violating Mississippi public policy.[103] The district court applied the "center of gravity" concept, which focuses on which forum has the most substantial contacts with the parties and the subject matter of the dispute.[104] Under Mississippi law, the law of a single state does not necessarily govern all issues in a case.[105] The center of gravity analysis is applied to each issue separately.[106] Further, when the center of gravity pulls on another state's law but that law is contrary to Mississippi public policy, Mississippi courts may apply and enforce Mississippi substantive law.[107] The district court applied Mississippi law to the breach of contract claim, holding that Tennessee law violated the Mississippi public policy against enforcing oral contracts against a county.[108]

The Fifth Circuit reviewed the contracts, as well as both Mississippi and Tennessee law, and found that the crux of the case was whether the Mississippi public policy at issue was a significant one.[109] The Fifth Circuit considered the Mississippi jurisprudence concerning enforcement of oral contracts against counties and determined that the public policy at issue was both significant and long-standing.[110] The court held that the Supreme Court of Mississippi would hold that this requirement—that such contracts not be oral—would override a choice-of-law provision that would cause the

96. *Id.* at 295.
97. *See id.*
98. *Id.*
99. *See id.*
100. *Id.* (citing Cherokee Pump & Equip., Inc. v. Aurora Pump, 38 F.3d 246, 250 (5th Cir. 1994)).
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.* (citing Boardman v. United Servs. Auto Ass'n, 470 So. 2d 1024, 1031 (Miss. 1985)).
105. *Id.* at 296 (citing *Boardman*, 470 So. 2d at 1031).
106. *Id.* (citing *Boardman*, 470 So. 2d at 1031).
107. *Id.* (citing *Boardman*, 470 So. 2d at 1031).
108. *See id.*
109. *See id.* at 297.
110. *See id.*

rule not to be applied.[111] Accordingly, the Fifth Circuit Court of Appeals affirmed the decision of the Mississippi district court.[112]

3. Northrop Grumman Ship Systems, Inc. v. Ministry of Defense of the Republic of Venezuela

With a panel consisting of Circuit Judges Thomas M. Reavley, Rhesa H. Barksdale, and Emilio M. Garza, the Fifth Circuit Court of Appeals heard an appeal concerning the denial of a motion to vacate a settlement order.[113] The facts are somewhat lengthy but merit summarizing for a full understanding of the court's rulings.[114] The plaintiff entered into a contract with the Republic of Venezuela to overhaul two ships in the Republic's navy.[115] The agreement provided that any disputes would be submitted to arbitration in Venezuela.[116] Disputes arose over costs, and the plaintiff filed suit in federal court in Mississippi.[117] The plaintiff alleged jurisdiction under the Federal Sovereign Immunities Act (FSIA).[118] The defendant failed to appear and a default judgment was entered.[119]

The plaintiff moved to compel arbitration, but requested that the court order arbitration in Mississippi instead of Venezuela.[120] The plaintiff argued that arbitration in Venezuela would be unreasonable due to political unrest.[121] The district court agreed and ordered arbitration in the United States, citing the "violently unstable political situation in Venezuela."[122] The defendant failed to respond to the order.[123] An arbitration site in Mexico City was selected and preliminary proceedings were held without the defendant's participation.[124]

The defendant retained two American attorneys and the Venezuelan Attorney General executed a written power of attorney authorizing the Americans to "carry out any and all legal actions necessary for the best defense of the rights and interests of the Republic."[125] The defendant moved to vacate the order, compelling arbitration outside of Venezuela.[126]

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111. *See id.* at 298.
112. *Id.*
113. *See* Northrop Grumman Ship Sys., Inc. v. Ministry of Def. of the Republic of Venez., 575 F.3d 491, 493 (5th Cir. July 2009).
114. *See id.* at 493-96.
115. *Id.* at 494.
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*

The court entered an order staying the arbitration in Mexico and compelled mediation before a magistrate.[127] Although the mediation concluded without agreement, the parties continued to attempt to negotiate a settlement.[128]

One of the defendant's attorneys contacted the plaintiff and stated that the defendant was willing to settle the monetary claims; the plaintiff accepted the offer.[129] The attorney circulated a letter confirming the agreement of opposing counsel; however, there was no indication that any Venezuelan official was informed of, or agreed to, the settlement.[130] The magistrate judge confirmed the settlement and dismissed the case.[131]

The Venezuelan Attorney General sent a letter objecting to the settlement and stating that the attorney was "not authorized . . . to compromise The Republic's trial" against the plaintiff and that the defendant expressly rejected the settlement.[132] The defendant moved to vacate the order of dismissal, arguing that the attorney, as the defendant's agent, only had authority to negotiate and did not have the authority to enter into a settlement.[133] The plaintiff responded with an affidavit from the attorney stating that he had orally been given the express authority to settle.[134] The defendant filed a notice pursuant to Federal Rule of Civil Procedure (FRCP) 44 that it intended to rely on Venezuelan law regarding the issue of the attorney's authority to settle.[135] The plaintiff argued that the notice of foreign law was untimely.[136]

The district court declined the defendant's request to rely on foreign law, agreeing with the plaintiff that the notice was untimely and that Mississippi law controlled under choice-of-law principles.[137] The district court applied Mississippi agency law and concluded that the attorney did have the authority to bind the defendant to the settlement.[138] Thus, the court denied the defendant's motion to vacate and ordered the enforcement of the settlement.[139] This appeal ensued.[140]

The Fifth Circuit considered the defendant's assertion that the district court erred in its determination that the defendant failed to provide timely

127. *Id.*
128. *Id.* at 495.
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.* at 496.
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.*

notice of its intent to rely on foreign law.[141] Rule 44 requires that a party that intends to rely on foreign law give notice to avoid unfair surprise.[142] "When the applicability of foreign law is not obvious, notice is sufficient if it allows the opposing party time to research the foreign rules."[143] In the instant case, the defendant filed the notice eighteen months after it initially moved to set the settlement aside.[144] The Fifth Circuit opined that although this was an extended delay, FRCP 44 does not set a time limit—it merely states one must avoid unfair surprise.[145] The plaintiff did not allege that it was prevented from responding or otherwise prejudiced by the delay.[146] The court noted that the plaintiff had at least five months to respond to and to note any discrepancies in the foreign law.[147] Further, the applicability of the foreign law directly affected the issue of the attorney's settlement authority.[148] Thus, the court concluded that that district court abused its discretion in denying the notice of foreign law.[149]

Next, the Fifth Circuit considered whether the district court erred in determining that Mississippi law governed the issue of settlement authority.[150] The court explained that because this case arose under the FSIA, the court must apply the choice-of-law rules of the forum state.[151] The court reviewed Mississippi law concerning contractual liability of a principal to a third person.[152] The local law of the state that has the most significant relationship to the parties and the transaction determines whether the action taken by an agent binds the principal.[153] The principal is bound by the agent's actions if he would be bound under the local law of the state where the agent dealt with the third person.[154] The plaintiff argued that this authorized the application of Mississippi agency law.[155] The Fifth Circuit agreed and held that the district court correctly selected Mississippi agency law as controlling the instant dispute.[156]

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141. *Id.*

142. *Id.* (citing FED. R. CIV. P. 44.1).

143. *Id.* at 497 (citing Thyssen Steel Co. v. M/V Kavs Yerakas, 911 F. Supp. 263, 266 (S.D. Tex. 1996)).

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 498.

150. *Id.*

151. *Id.* (citing Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 313 F.3d 70, 85 (2d Cir. 2002) (holding that "in FSIA cases, we use the forum state's choice of law rules to resolve '*all* issues,' except jurisdictional ones")).

152. *Id.* at 478 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 292 (1971)).

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* at 499.

Finally, the Fifth Circuit reviewed the defendant's contention that the district court erred in finding that the attorney had actual authority to enter the settlement under Mississippi law.[157] The court noted that, under Mississippi law, "the burden of showing that an attorney does not have the authority to enter a settlement is on the party denying such authority."[158] The plaintiff argued that a principal could confer the authority to enter a contract orally or by implication.[159] The defendant conceded that, in general, this is true, but due to its status as a sovereign, Mississippi courts would give effect to Venezuelan statutes requiring settlement authority be officially given in writing.[160] The Fifth Circuit explained that the Supreme Court of Mississippi has never considered whether courts should give effect to a foreign sovereign's rules for conveying actual authority to its agents.[161] Thus, the court acted as an *Erie* court and attempted to "forecast how the Mississippi Supreme Court would rule."[162]

The court considered the public contracts doctrine, often used by Mississippi courts.[163] This doctrine provides as follows: "In respect to public contracts where a particular manner of contracting is prescribed, the manner is the measure of power and must be followed to create a valid contract."[164] "Mississippi courts have applied this doctrine to deny the authority of government agents who are alleged to have bound government entities to contracts."[165] The Fifth Circuit opined that the crux of these cases was clear—anyone entering into an agreement with a government takes "the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority."[166] "[A] government entity has the power to define how and when it enters a contract, and, by extension, how and when its agents have authority to create contracts on its behalf."[167] Therefore, the Fifth Circuit predicted the Mississippi Supreme Court would "afford this same privilege to foreign sovereigns" and apply Venezuelan law to the issue of settlement authority.[168] The court further concluded that because the plaintiff could

157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.* at 500.
164. *Id.* (quoting Bruner v. Univ. of So. Miss., 501 So. 2d 1113, 1115 (Miss. 1987)) (internal quotations omitted).
165. *Id.* (citing Bd. of Trs. of State Insts. of Higher Learning v. Peoples Bank of Miss., 538 So. 2d 361, 364-65 (Miss. 1989)). "[T]he Supreme Court of Mississippi considered whether a high level employee could bind a state university to a lease contract. Applying the public contracts doctrine, the Court reasoned that the employee lacked authority because a state statute required the university's purchasing department to approve all lease contracts." *Id.* (internal citations omitted).
166. *Id.*
167. *Id.*
168. *Id.* at 501.

not produce a written document giving the attorney settlement authority as required by Venezuelan law, the actual authority to settle did not exist, and under Mississippi law, the settlement was not enforceable.[169] The district court erred in denying the defendant's motion to vacate.[170] The Fifth Circuit determined that the record was insufficient to determine the political conditions in Venezuela, and therefore, the issue of the arbitration forum clause should be resolved on the merits.[171] The Fifth Circuit remanded the case to the district court for proceedings not inconsistent with the opinion.[172]

C. Copyright

1. Maverick Recording Co. v. Harper

With a panel comprising Circuit Judges W. Eugene Davis, Edith Brown Clement, and Jennifer Elrod, the Fifth Circuit Court of Appeals heard a case regarding the online file-sharing of music.[173] The plaintiffs were record companies and owners of copyrighted music.[174] The defendant was an individual who was identified as sharing hundreds of digital audio files, including the plaintiffs' copyrighted material, with others over the Internet.[175] The plaintiffs filed suit claiming copyright infringement.[176] The district court granted the plaintiffs' motion for summary judgment on the copyright claims and denied the plaintiffs' request for statutory damages.[177] The plaintiffs requested damages of $750 per song as provided by 17 U.S.C. § 504(c)(1).[178] The defendant argued that she was an "innocent infringer" under § 504(c)(2), which provides that the court may reduce the damages to $200.[179] The defendant asserted that she thought "her actions were equivalent to listening to an Internet radio station."[180] The district court concluded that the innocent infringer issue was a question of material fact.[181]

Both parties moved for reconsideration and both motions were denied.[182] The district court clarified its finding that the defendant infringed

169. *Id.* at 501-02.
170. *Id.* at 502.
171. *Id.* at 503.
172. *Id.* at 504.
173. Maverick Recording Co. v. Harper, 598 F.3d 193, 194 (5th Cir. Feb. 2010).
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.* at 195.
178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.*

the plaintiffs' exclusive rights to reproduce and distribute the songs at issue.[183] The plaintiffs moved for entry of damages in the amount of $200 per infringed song—the minimum amount due from an innocent infringer.[184] The plaintiffs reserved the right to appeal the legal conclusion on the innocent infringer issue if the defendant appealed.[185] The district court granted the plaintiffs' motion and entered judgment against the defendant.[186] The defendant appealed, and the plaintiffs cross-appealed.[187]

On appeal, the defendant argued that there was insufficient evidence of infringement.[188] The issue before the Fifth Circuit was whether the plaintiffs made an undisputed showing that the defendant downloaded the files at issue.[189] The court noted that the defendant submitted no evidence that disputed the plaintiffs' showing that the defendant had in fact downloaded the files.[190] The court explained that the "uncontroverted evidence [was] more than sufficient to compel a finding that [the defendant] had downloaded the files . . . ."[191] Therefore, the Fifth Circuit concluded that the district court had properly rejected the defendant's argument that the evidence of infringement was insufficient.[192]

Next, the defendant argued that making audio files available to others by placing them in a folder accessible to users of a file-sharing network does not constitute distribution under the Copyright Act.[193] The circuit court reviewed case law in both the Fifth and other circuits, all of which held that downloading music from file-sharing networks constituted copyright infringement.[194] The Fifth Circuit held that the defendant had infringed on the plaintiffs' exclusive right to reproduce their songs by downloading the audio files to her computer without permission, thus, the district court correctly granted summary judgment on the infringement issue.[195]

Finally, the Fifth Circuit addressed the innocent infringer defense.[196] The district court held that a genuine issue of material fact existed as to

183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.* at 196.
190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.* at 197 (citing 17 U.S.C. § 106 (2006)).
194. *Id.* (citing MGM Studios, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005); BMG Music v. Gonzalez, 430 F.3d 888 (7th Cir. 2005); *In re* Aimster Copyright Litig., 334 F.3d 643, 645 (7th Cir. 2003); A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1014 (9th Cir. 2001); Alcatel USA, Inc. v. DGI Techs., Inc., 166 F.3d 772, 791 (5th Cir. 1999)).
195. *Id.*
196. *Id.* at 198.

whether the defendant was an innocent infringer.[197] The court of appeals explained that assuming *arguendo* that the defendant had made a prima facie showing that she was an innocent infringer, the defendant was unavailable as a matter of law.[198] The court explained that the defense is limited by the Copyright Act in § 402—when a proper copyright notice appears on the published recording to which a defendant has access, no weight is given to the innocent infringer defense.[199] The district court acknowledged that the plaintiffs provided such notice on each published recording, but found that regardless of the defendant's access to such information, she was not necessarily on notice of the copyrights, and therefore, a question remained as to whether she knew that the copyrights were applicable in a file-sharing setting.[200] The court of appeals explained that the plain language of the statute makes actual knowledge or intent irrelevant to its application.[201] "Lack of legal sophistication cannot overcome a properly asserted § 402(d) limitation to the innocent infringer defense."[202] The Fifth Circuit concluded that because the innocent infringer defense was not available as a matter of law, there were no issues left for trial and the plaintiffs were to be awarded the required statutory damages.[203]

D. Corporate Veil and Fraud

1. Shandong Yinguang Chemical Industrial Joint Stock Co. v. Potter

In this per curiam opinion, the Fifth Circuit Court of Appeals considered common law fraud claims and an attempt to pierce the defendant's corporate veil.[204] The plaintiff sold chemicals to a company owned by the defendant.[205] The parties entered into a total of eight contracts of sale.[206] The defendant's company failed to make payment on the last two contracts and then declared bankruptcy.[207]

The plaintiff asserted that the defendant made two types of misrepresentations in negotiating the last two contracts.[208] First, the defendant represented that his company was "in sound financial

197. *Id.*
198. *Id.*
199. *Id.* (citing 17 U.S.C. § 402(d) (2006)).
200. *Id.*
201. *Id.*
202. *Id.* at 199.
203. *Id.* at 198-99.
204. Shandong Yinguang Chem. Indus. Joint Stock Co. v. Potter, 607 F.3d 1029, 1031 (5th Cir. May 2010) (per curiam).
205. *Id.*
206. *Id.*
207. *Id.* at 1032.
208. *Id.* at 1031.

condition."[209] Second, the defendant made several representations that his company would make regular payments on its purchases.[210] Despite these assurances, the defendant failed to tell the plaintiff that the company had been unprofitable for the previous year and ultimately made no payments on either contract.[211] The plaintiff sued the company in Texas state court, and the parties entered into a settlement agreement on which the defendant company made one payment.[212] Just over one month later, the company filed for Chapter 11 bankruptcy and the plaintiff was left with a large unsecured claim.[213] The plaintiff then sued the defendant personally in federal court, alleging that the company committed fraud and fraudulent inducement; the plaintiff also sought to impose personal liability on the defendant by piercing the corporate veil.[214] The defendant filed a motion to dismiss under FRCP 12(b)(6), which the district court granted, holding the plaintiff did not meet the heightened pleading requirements for fraud pursuant to FRCP 9(b).[215] The court further held that the plaintiff lacked standing to pursue the veil-piercing claim.[216] This appeal followed.[217]

The Fifth Circuit first considered the fraud claims.[218] The court reminded practitioners of the elements of a fraud claim in Texas: (1) the defendant made a representation; (2) which was material; (3) and false; (4) made knowingly or recklessly; (5) with the intent that the plaintiff act on such representation; (6) the plaintiff relied on the representation; and (7) it caused the plaintiff injury.[219] The court explained that the plaintiff's allegations failed to meet the pleading requirements as to several of the elements.[220] Specifically, the plaintiff failed to sufficiently allege that the "sound financial condition" statement made by the defendant was material.[221] The court noted that a misrepresentation is a material one if a "reasonable person would attach importance to and be induced to act on the information."[222] The plaintiff did not plead that the defendant presented any supporting documentation regarding financial condition.[223] Further, the statement was made before the negotiations as a whole began—six

209. *Id.*
210. *Id.*
211. *Id.* at 1032.
212. *Id.*
213. *Id.*
214. *Id.*
215. *Id.*
216. *Id.*
217. *Id.*
218. *Id.*
219. *Id.* at 1032-33 (citing Ernst & Young, L.L.P. v. Pac. Mut. Life Ins. Co., 51 S.W.3d 573, 577 (Tex. 2001)).
220. *Id.* at 1033.
221. *Id.*
222. *Id.* (citing Citizens Nat'l Bank v. Allen Rae Invs., 142 S.W.3d 459, 478-79 (Tex. App.—Fort Worth 2004, no pet.)).
223. *Id.*

successfully fulfilled and paid for contracts came after the statement was made.[224] The court stated that, under the circumstances, the plaintiff's "bare assertion of materiality rings hollow."[225] Second, the plaintiff failed to sufficiently allege that the statement was false when made.[226]

The court considered the plaintiff's alternative theory that the defendant fraudulently induced the plaintiff into the last two contracts by repeatedly promising to make payments with no intent of performing.[227] Under *Spoljaric v. Percival Tours, Inc.*, a promise to do something in the future is actionable fraud if made with the intent to deceive or with no intent to perform.[228] A party's intent is determined at the time the representation is made, but can be inferred from subsequent acts.[229] Failure to perform, by itself, is not evidence of intent not to perform when the promise was made.[230] "'Slight circumstantial evidence' of fraud, when considered with the breach of a promise to perform, is sufficient to support a finding of fraudulent intent."[231] With these guidelines in mind, the Fifth Circuit reviewed the plaintiff's assertions in the instant case.[232] The plaintiff alleged that the defendant "funneled" money from the bankrupt company to another company—citing this as "slight circumstantial evidence" of fraud.[233] The court opined that although this might be a "close case" in light of the language in *Spoljaric*, given the heightened pleading requirements of Rule 9(b), the plaintiff's allegations did not plausibly plead a fraudulent intent not to pay at the time of the defendant's representations.[234]

Last, the Fifth Circuit considered the plaintiff's attempt to pierce the corporate veil.[235] The court explained that "piercing the corporate veil is not a separate cause of action," but a method of imposing personal liability on people who would otherwise be protected from liability for corporate debts.[236] This claim requires proof of actual fraud, and as discussed, the plaintiff in the instant case failed to sufficiently plead fraud.[237] Thus, the plaintiff failed to sustain a basis for holding the defendant personally liable

224. *Id.*
225. *Id.*
226. *Id.*
227. *Id.* at 1033-34.
228. Spoljaric v. Percival Tours, Inc, 708 S.W.2d 432, 434 (Tex. 1986).
229. *Id.*
230. *Id.* at 435.
231. *Id.* (quoting Maulding v. Niemeyer, 241 S.W.2d 733, 738 (Tex. Civ. App. 1951)).
232. *Shandong*, 607 F.3d at 1034.
233. *Id.*
234. *Id.* at 1035.
235. *Id.*
236. *Id.*
237. *Id.* at 1035-36.

for the contracts at issue.[238] Ultimately, the Fifth Circuit affirmed the district court's dismissal pursuant to FRCP 12(b)(6).[239]

E. Experts

1. Nuñez v. Allstate Insurance Co.

With a panel comprised of Circuit Judges Patrick E. Higginbotham and Carl E. Stewart Jr., and District Judge Feldman,[240] the Fifth Circuit Court of Appeals considered the exclusion of expert testimony offered in a contract suit on an insurance claim.[241] The plaintiffs' home was badly damaged during Hurricane Katrina, and they made a claim on their flood insurance policy with the defendant.[242] The plaintiffs filed suit, joining several other plaintiffs, to recover unpaid damages to their home.[243] The defendant removed, and the district court ordered the cases severed.[244] The plaintiffs presented an expert report, and the defendant filed a motion to exclude the proposed expert testimony.[245] The district court granted the motion to exclude the expert testimony as well as the defendant's motion for summary judgment.[246] The plaintiffs appealed.[247]

The Fifth Circuit considered several factual issues related to the insurance claim and then turned to the issue of the expert testimony.[248] The court reviewed Federal Rule of Evidence (FRE) 702, which provides that an expert may testify if (1) the testimony is based on sufficient facts and data; (2) the testimony is based on reliable principles and methods; and (3) the principles and methods have been applied reliably to the facts of the case.[249] The defendant raised three grounds for excluding the plaintiffs' expert: (1) his education was insufficient; (2) he admitted to a lack of training; and (3) he did not use any recognizable methodology in forming his opinion.[250]

The Fifth Circuit noted that four other judges in the same district, in similar cases, excluded the same expert's opinion.[251] After reviewing these holdings and the record in the instant case, the court held that the district

238. *Id.* at 1036.
239. *Id.*
240. Nuñez v. Allstate Ins. Co., 604 F.3d 840, 842 n.* (5th Cir. Apr. 2010) (sitting by designation from the Eastern District of Louisiana).
241. *Id.* at 842.
242. *Id.* at 842-43.
243. *Id.*
244. *Id.* at 842.
245. *Id.* at 843.
246. *Id.* at 844.
247. *Id.*
248. *Id.* at 845-47.
249. *Id.* at 847.
250. *Id.*
251. *Id.* at 848.

court did not abuse its discretion in excluding the expert testimony under FRE 702.[252]

2. Wells v. SmithKline Beecham Corp.

With a panel comprising Circuit Judges Patrick E. Higginbotham, Emilio M. Garza, and Edward C. Prado, the Fifth Circuit Court of Appeals considered the admissibility of expert evidence in a tort case based in diversity.[253] The plaintiff sued the defendant, a drug manufacturer, claiming that it failed to warn him that the drug he was taking for Parkinson's had a possible side effect—pathological gambling.[254] Under Texas law, the plaintiff was required to show both general and specific causation, i.e., that the drug at issue caused his gambling problem.[255]

The plaintiff engaged three experts to address causation.[256] All three experts relied upon the following in reaching their conclusions (1) published articles documenting correlations between the drug and gambling; (2) an unpublished study showing a connection between Parkinson's medications and gambling; (3) the defendant's internal data revealing case-specific associations between the drug at issue and gambling; and (4) the fact that the defendant changed the drug's label to warn about possible gambling side effects.[257] The defendant moved for summary judgment, asserting: (1) the expert opinions did not meet the admissibility requirements of *Daubert*; and (2) a lack of scientifically reliable data to support general causation precluded recovery.[258] The district court granted summary judgment, finding the expert opinions did not support the plaintiff's claim with scientifically reliable evidence of causation.[259] The plaintiff appealed.[260]

The Fifth Circuit began its analysis by explaining the *Daubert* requirements.[261] "*Daubert* requires admissible expert testimony to be both reliable and relevant."[262] An expert must present conclusions that are "ground[ed] in the methods and procedures of science."[263] The United States Supreme Court has suggested factors to assist the courts in evaluating the foundation of an expert's testimony.[264] Some suggestions include

252. *Id.*
253. Wells v. SmithKline Beecham Corp., 601 F.3d 375, 376 (5th Cir. Mar. 2010).
254. *Id.*
255. *Id.* at 377-78.
256. *Id.* at 378.
257. *Id.*
258. *Id.*
259. *Id.*
260. *Id.*
261. *Id.*
262. *Id.*
263. *Id.* (quoting Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 590 (1993)).
264. *Id.*

(1) whether the theory or technique used is generally accepted; (2) whether the theory has been peer reviewed and published; (3) can and has the theory been tested; (4) whether the rate of error is acceptable; and (5) controlling standards.[265]

The three experts in the instant case admitted at their depositions that no scientific basis existed to confirm their conclusions.[266] Under Fifth Circuit law, such admissions "drain the expert opinions of probative force."[267] The Fifth Circuit, however, explained that it is sensitive to the case-specific nature of a *Daubert* inquiry, and thus, closely examined the experts' methodology.[268]

The experts based their general causation conclusions on scientific literature, which they claimed showed an association between the drug at issue and a gambling problem.[269] The literature, however, did not provide the necessary "scientific knowledge" required under *Daubert*.[270] One expert called all but one of the studies "anecdotal evidence," and all of the experts conceded the studies were not statistically significant epidemiology.[271] The court stated that it has "frowned on causative conclusions bereft of statistically significant epidemiological support."[272]

The court explained why the bases for the experts' conclusions passed none of the relevant *Daubert* tests.[273] Without the expert testimony, the plaintiff could not prove general causation.[274] Therefore, the Fifth Circuit held that the trial court did not abuse its discretion in granting summary judgment for the defendant.[275]

F. Procedure

1. Dominguez v. Gulf Coast Marine & Associates, Inc.

With a panel comprising Circuit Judges Fortunato P. Benavides, Carl E. Stewart, and Leslie H. Southwick, the Fifth Circuit Court of Appeals reviewed the dismissal of an action seeking damages for injuries suffered in an oil drilling accident off the coast of Mexico.[276] The plaintiffs in the case were relatives of the workers who died in the accident, estate

265. *Id.* at 379 (citing Kumho Tire Co. v. Carmichael, 526 U.S. 137, 150 (1999)).
266. *Id.*
267. *Id.*
268. *Id.*
269. *Id.* at 380.
270. *Id.*
271. *Id.*
272. *Id.*
273. *Id.*
274. *Id.* at 381.
275. *Id.*
276. Dominguez v. Gulf Coast Marine & Assocs., Inc., 607 F.3d 1066, 1069 (5th Cir. May 2010).

representatives, and survivors.[277] Each plaintiff was a resident of Mexico, and all of the descendants were employees of either the Mexican national oil company or the Mexican private company that assists the national company with its drilling efforts.[278] The plaintiffs filed suit in federal court in Texas against four U.S. oil companies asserting negligence, gross negligence, and products liability claims.[279]

After limited discovery, the district court conditionally dismissed the case on forum non conveniens grounds, provided that the defendants (1) submit to Mexican jurisdiction; (2) waive all statute of limitations and laches defenses that were not possessed at the time of the original filing; and (3) agree to submit to discovery in Mexico in accordance with the Mexican procedural rules.[280] The dismissal would be effective when the defendants submitted a written statement asserting they intended to be bound by the above conditions, or if the defendants failed to do so by a certain date, the forum non conveniens motion was waived and the case would proceed to trial.[281]

The defendants met the deadline for filing the statement.[282] A few days later, the plaintiffs filed a notice appealing the order granting the conditional dismissal, afraid that the order would be construed as final and wary because the thirty-day deadline for appeal had arrived.[283] The district court then entered an order formally dismissing the case.[284] A week later, the district judge held a teleconference with counsel for all parties and informed them he had just discovered he held stock in the parent company of one of the defendants.[285] Accordingly, the judge entered orders vacating his order dismissing the case and recusing himself.[286] The case was then reassigned.[287]

The Fifth Circuit began by noting that before it could address the effect of the recusal on the merits of the appeal, it must first assure itself of its jurisdiction.[288] The court of appeals can only exercise jurisdiction over appeals from "final decisions."[289] The Fifth Circuit explained:

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277. *Id.*
278. *Id.*
279. *Id.*
280. *Id.* at 1069-70.
281. *Id.* at 1070.
282. *Id.*
283. *Id.* (citing FED. R. APP. P. 4(a)(1)(A) (providing that in a civil case, notice of appeal needs to be filed within thirty days of the entry of the judgment or order being appealed)).
284. *Id.*
285. *Id.*
286. *Id.*
287. *Id.* at 1071.
288. *Id.*
289. *Id.* (citing 28 U.S.C. § 1291 (2006)).

> One of the oddities produced by the unusual procedural posture of this case is that [the] plaintiffs ask us to dismiss their own appeal for lack of jurisdiction, so that they may return to the district court for [the newly assigned judge] to determine whether [the recused judge]'s dismissal is still valid.[290]

Specifically, the plaintiffs asserted that the Fifth Circuit lacked jurisdiction for the following reasons: (1) the plaintiffs appealed the original order conditionally granting the dismissal; (2) that order was not final; and (3) as an interlocutory order, it merged with the final dismissal that was later vacated upon the recusal.[291]

The court noted that the appeal was from the conditional dismissal order, and the parties disputed whether that order was final when entered, asserting that if it were not, the court lacked jurisdiction.[292] The Fifth Circuit opined that this was incorrect—even if the plaintiffs' notice of appeal were filed before the district court's dismissal of the case became final, the court could still have jurisdiction, as sometimes-premature notices of appeal relate forward to the date the dismissal becomes final.[293] The leading case on the issue is *FirsTier Mortgage Co. v. Investors Mortgage Insurance Co.*[294] In *FirsTier*, the U.S. Supreme Court held that FRCP 4(a)(2) "permits a notice of appeal from a non-final decision to operate as a notice of appeal from the final judgment only when a district court announces a decision that would be appealable if immediately followed by the entry of judgment."[295]

The Fifth Circuit applied the above jurisprudence to the instant case.[296] The conditional dismissal order was structured such that once the defendants complied, no further action was needed other than entering the order formally dismissing the case.[297] This was a "decision that would be appealable if immediately followed by the entry of judgment," and thus, the plaintiffs' notice of appeal relates forward to the date the order became final.[298]

Moreover, the Fifth Circuit noted that the order vacating the dismissal did not disturb appellate jurisdiction.[299] The court previously held when a notice of appeal is filed, the district court loses its ability to vacate or amend

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290. *Id.*
291. *Id.*
292. *Id.*
293. *Id.* at 1071-72 (citing FED. R. APP. P. 4(a)(2) (establishing that a notice of appeal filed after the court announces its decision but before the entry of judgment or order is treated as filed on the date of and after the entry)).
294. FirsTier Mortg. Co. v. Investors Mortg. Ins. Co., 498 U.S. 269 (1991).
295. *Dominguez*, 607 F.3d at 1072 (quoting *FirsTier*, 498 U.S. at 276).
296. *Id.*
297. *Id.*
298. *Id.*
299. *Id.* at 1073.

the orders that have been appealed.[300] The district court maintains jurisdiction over matters not involved in the appeal.[301] Therefore, it was appropriate for the judge to recuse himself because he still retained residual jurisdiction over the case.[302] The recusal did bring to the attention of the Fifth Circuit the "serious questions concerning the propriety of the dismissal that is now on appeal."[303] The court next turned to that question.[304]

The Fifth Circuit addressed the effect that the judge's stock ownership had on the appeal.[305] The plaintiffs asked the court to grant leave to file a motion with the district court pursuant to FRCP 60(b), which has been used as a means to vacate judgments issued by judges who should have recused themselves.[306] The plaintiffs asserted that they could not file a Rule 60(b) motion with the district court until the Fifth Circuit granted leave to do so because their notice of appeal stripped the district court of jurisdiction.[307] The defendants argued that the plaintiffs' request was not properly before the court of appeals because the plaintiffs did not seek Rule 60(b) relief in the district court.[308]

The Fifth Circuit asserted that the defendants were correct that the plaintiffs did not follow the usual procedural requirements for seeking relief under Rule 60(b).[309] The court explained that, although an effective notice of appeal strips a district court of the jurisdiction to grant a Rule 60(b) motion, litigants are not prevented from filing one in district court while an appeal is pending.[310]

> [T]he district court retains jurisdiction to consider and deny Rule 60(b) motions, and if it indicates that it will grant the motion, the appellant may then make a motion in the Court of Appeals for a remand of the case in order that the district court may grant such motion.[311]

The court of appeals opined, however, that the plaintiffs' failure to file a Rule 60(b) motion in the district court did not allow it to ignore that a judge subject to recusal entered the judgment it was reviewing.[312] The

300. *Id.* (citing Winchester v. U.S. Att'y for S. Dist. of Tex., 68 F.3d 947, 948-49 (5th Cir. 1995)).
301. *Id.*
302. *Id.*
303. *Id.*
304. *Id.*
305. *Id.*
306. *Id.* (citing Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 863 (1988)).
307. *Id.*
308. *Id.*
309. *Id.*
310. *Id.* at 1073-74.
311. *Id.* at 1074 (quoting Winchester v. U.S. Att'y for S. Dist. of Tex., 68 F.3d 947, 949 (5th Cir. 1995)).
312. *Id.*

statute governing recusal in the instant case was explained by the U.S. Supreme Court as neither prescribing nor prohibiting any particular remedy for recusal violations.[313] "Therefore, the failure of [the] plaintiffs to file a Rule 60(b) motion below, while regrettable, [did] not deprive [the Fifth Circuit] of authority to craft a remedy for . . . [the] possible violation . . . ."[314]

The Fifth Circuit asserted that the instant case arose under exceptional circumstances and noted that the plaintiffs did not speculatively claim for the first time on appeal that the judge should have recused himself.[315] Instead, the judge *sua sponte* recused himself after the notice of appeal had already become effective.[316] While the plaintiffs should have filed a Rule 60(b) motion in the district court out of an abundance of caution, the Fifth Circuit explained that the procedure for filing a post-appeal Rule 60(b) motion is not a "judicial tightrope to be walked at peril."[317] Thus, under the circumstances, the court could not review the merits of the forum non conveniens motion as though it had no knowledge of the recusal.[318]

Although the Fifth Circuit had authority to address the recusal violation, it determined that exercising this authority would be inappropriate because the record contained limited information concerning the stock acquisition at issue.[319] Given those considerations, the court remanded the case to allow the new district judge to indicate whether he is inclined to grant a Rule 60(b) motion vacating the dismissal of the case.[320] If the judge is so inclined, the court of appeals will remand the case in full so that the dismissal can be vacated and the forum non conveniens ruling relitigated.[321] The court, however, retained jurisdiction so that if the district judge denies the motion and the plaintiffs appeal the denial, it will be able to review both the denial of the Rule 60(b) motion and the merits of the forum non conveniens dismissal.[322] Consequently, the case was remanded for proceedings consistent with the opinion.[323]

313. *Id.* (citing 29 U.S.C. § 455 (2006); Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 862 (1988)).
314. *Id.*
315. *Id.* at 1075.
316. *Id.*
317. *Id.*
318. *Id.*
319. *Id.*
320. *Id.* at 1076.
321. *Id.*
322. *Id.*
323. *Id.*

2. Berick Stiftung v. Plains Marketing, L.P.

With a panel comprising Circuit Judges Harold R. DeMoss Jr., Jennifer Elrod, and Catharina Haynes, the Fifth Circuit Court of Appeals considered an appeal from a dismissal for lack of subject matter jurisdiction.[324] The dispute involved ownership interests in pipelines.[325] The plaintiff alleged in its complaint that it was a foreign corporation organized under the laws of Liechtenstein and the defendants were companies with principal places of business in Texas and Canada.[326] The defendants moved to dismiss, alleging that because the plaintiff and one of the defendants were both foreign citizens, there was not complete diversity among the parties.[327] The district court agreed and dismissed the complaint without prejudice.[328] This appeal followed.[329]

The Fifth Circuit began by reviewing jurisdictional basics.[330] A district court has original jurisdiction over civil actions where the amount in controversy exceeds $75,000 and is between (1) citizens of different states; (2) citizens of a state and citizens of a foreign state; (3) citizens of different states in which citizens of a foreign state are additional parties; and (4) a foreign state, as defined in 28 U.S.C. § 1603(a), as plaintiff and citizens of a state or of different states.[331] "A federal court cannot exercise diversity jurisdiction if one of the plaintiffs shares the same citizenship as any one of the defendants."[332]

In the instant case, the court was required to decide whether a "stiftung" created under the law of Liechtenstein is a foreign citizen for diversity purposes.[333] This was an issue of first impression in the Fifth Circuit.[334] The plaintiff argued that a stiftung is similar to a trust created under U.S. law, with the citizenship of its beneficiaries determining issues of jurisdiction.[335] The Fifth Circuit reviewed the U.S. Supreme Court case *Puerto Rico v. Russell & Co.* as persuasive precedent.[336] The case required the high Court to determine the citizenship of a Puerto Rican business entity for diversity purposes.[337] The Supreme Court held that the citizenship of the entity was determined by the citizenship of the entity, not by the

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324. Berick Stiftung v. Plains Mktg., L.P., 603 F.3d 295, 296-97 (5th Cir. Apr. 2010).
325. *Id.* at 297.
326. *Id.*
327. *Id.*
328. *Id.*
329. *Id.*
330. *Id.*
331. *Id.* (citing 28 U.S.C. § 1332(a) (2006)).
332. *Id.* (citing Whalen v. Carter, 954 F.2d 1087, 1094 (5th Cir. 1992)).
333. *Id.* at 298.
334. *Id.*
335. *Id.*
336. *Id.* (citing Puerto Rico v. Russell & Co., 288 U.S. 476, 481-82 (1933)).
337. *Id.*

citizenship of its individual members, because the entity was considered a juridical person according to Puerto Rican law.[338] Further, the Ninth Circuit had previously considered the diversity of another business entity created under the laws of Liechtenstein.[339] In *Cohn v. Rosenfeld*, the Ninth Circuit found *Russell* persuasive and looked to the nature of the entity under Liechtenstein law to determine if it was a juridical person.[340] The Fifth Circuit also followed *Russell* and looked to Liechtenstein law, finding that a stiftung is a juridical person and a legally and economically independent entity.[341] Thus, there was not complete diversity among the parties, and the Fifth Circuit Court of Appeals held that the district court did not err in dismissing the complaint.[342]

3. Saqui v. Pride Central America, L.L.C.

With a panel comprising Chief Judge Edith H. Jones and Circuit Judges Emilio M. Garza and Carl E. Stewart, the Fifth Circuit Court of Appeals heard an appeal involving the death of a Mexican citizen.[343] A Mexican oil company leased a vessel owned by the appellee, an American company.[344] The Mexican oil company provided the crew and controlled drilling operations in the Gulf of Mexico.[345] Another Mexican company provided the maintenance crew.[346] The decedent was employed as part of that crew.[347] An accident occurred killing the decedent.[348] The accident occurred in Mexican waters.[349] The Mexican Ministry of Labor and Social Security assumed jurisdiction over the accident and its investigation.[350] The investigation occurred entirely in Mexico, and according to accident reports, the decedent's family members were to be compensated according to Mexican law.[351]

The appellant, a representative of the decedent's estate and a Mexican citizen, filed suit in federal district court in Texas alleging the appellee failed to provide a safe workplace.[352] The appellee filed a motion to

338. *Id.*
339. *Id.*
340. *Id.* (citing Cohn v. Rosenfield, 733 F.2d 625, 628-29 (9th Cir. 1984)).
341. *Id.* at 298-99.
342. *Id.* at 299.
343. Saqui v. Pride Cent. Am., L.L.C., 595 F.3d 206, 208 (5th Cir. Jan. 2010).
344. *Id.*
345. *Id.*
346. *Id.*
347. *Id.*
348. *Id.*
349. *Id.*
350. *Id.*
351. *Id.*
352. *Id.*

dismiss on forum non conveniens grounds.[353] The appellee stated in its motion that it would agree to submit to jurisdiction in Mexico and make available there any witnesses under its control.[354] The appellant filed a response, arguing that Mexico did not provide an available forum.[355]

Both parties presented evidence as to whether Mexico was an available forum.[356] The appellee submitted an affidavit from an attorney licensed to practice in Mexico, stating that Mexico had jurisdiction to adjudicate the appellant's claims and that the laws of Mexico would provide the appellant with an adequate remedy.[357] The appellant countered with the affidavit of an expert in international law, which incorporated the affidavit of another attorney.[358] The incorporated affidavit stated that there is "preemptive jurisdiction" whenever a U.S. court dismisses a case based on forum non conveniens in favor of a Mexican forum.[359] Preemptive jurisdiction requires the Mexican court to reject jurisdiction, even if the defendant agrees to submit to the jurisdiction of the Mexican courts.[360] This expert relied on another case in which he was called as an expert in forming his opinion.[361]

The district court denied the appellee's motion to dismiss, determining that the parties' experts were equally credible.[362] The appellee filed a renewed motion to dismiss on forum non conveniens grounds, asserting that the appellant's expert in the incorporated affidavit was accused of committing fraud in the case on which his opinion relied.[363] The appellee took the appellant's primary expert's deposition, in which he admitted he relied heavily on the affidavit, which he incorporated into his.[364] The expert conceded that if the Mexican court decisions he relied on were obtained by fraudulent manipulation of the Mexican courts, they were weak authority for the proposition that a Mexican court could not hear the instant case.[365]

The district court in the instant case referred the renewed motion to dismiss to a magistrate judge.[366] The magistrate determined that it could not consider the appellant's expert credible and "that Fifth Circuit law consistently held that when a defendant submits to jurisdiction in alternate

353. *Id.*
354. *Id.*
355. *Id.*
356. *Id.*
357. *Id.* at 208-09.
358. *Id.* at 209.
359. *Id.*
360. *Id.*
361. *Id.*
362. *Id.*
363. *Id.*
364. *Id.*
365. *Id.* at 209-10.
366. *Id.* at 210.

forum, that renders the forum available for purposes of FNC analysis."[367] The magistrate recommended that the district court grant the renewed motion to dismiss if the appellee submitted to jurisdiction in Mexico.[368] The district court accepted the recommendation in its entirety, and the appeal ensued.[369]

In its review, the Fifth Circuit focused on the availability of Mexico as an alternative forum.[370] For a case to be dismissed for forum non conveniens, another forum must be available to hear the case.[371] "An alternative forum exists when it is both available and adequate."[372]

The appellant argued that the district court abused its discretion when it found that Mexico was an available alternative forum.[373] The Fifth Circuit explained that "[a]n alternative forum is available when 'the entire case and all parties can come within the jurisdiction of that forum.'"[374] Mexico's availability as an alternative forum was recently addressed by the Fifth Circuit in *In re Ford Motor Co.*, which involved claims transferred from the multi-district litigation (MDL) court back to the district court in Texas.[375] The court noted that "[w]e have held in numerous cases that Mexico is an available forum for tort suits against a defendant that is willing to submit to jurisdiction there."[376] The court further noted that in this case, the appellee agreed to submit to jurisdiction in Mexico, thereby making it an available forum.[377]

The other necessary consideration was whether Mexico was an adequate forum.[378] "An alternative forum 'is adequate when the parties will not be deprived of all remedies or treated unfairly, even though they might not enjoy the same benefits as they might receive in an American court.'"[379] The appellant argued that Mexico was an inadequate forum because: (1) the amount of damages is limited under Mexican law; (2) corruption in the Mexican courts; (3) long delays in the Mexican court system; and (4) a "virtual impossibility" to subpoena out-of-country witnesses.[380] The

367. *Id.*
368. *Id.*
369. *Id.*
370. *See id.* at 211.
371. *Id.* (citing Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254 n.22 (1981)).
372. *Id.* (citing *In re* Air Crash Disaster Near New Orleans, La., 821 F.2d 1147, 1165 (5th Cir. 1987) (en banc) (citations omitted), *vacated on other grounds sub nom.*, Pan Am. World Airways, Inc. v. Lopez, 490 U.S. 1032 (1989), *reinstated except as to damages by In re* Air Crash Disaster Near New Orleans, La., 883 F.2d 17 (5th Cir. 1989) (en banc)).
373. *Id.*
374. *Id.* (quoting *In re Air Crash*, 821 F.2d at 1165).
375. *Id.* at 211-12 (discussing *In re* Ford Motor Co., 591 F.3d 406, 412 (5th Cir. Dec. 2009)).
376. *Id.* at 212 (quoting *In re Ford Motor Co.*, 591 F.3d at 412).
377. *Id.*
378. *Id.*
379. *Id.* (quoting *In re Air Crash*, 821 F.2d at 1165).
380. *Id.*

magistrate addressed each of the errors pointed to on appeal.[381] The magistrate found that the fact that the amount of damages would be more limited under Mexican law did not provide a basis for finding Mexican courts inadequate.[382] The magistrate also found that the appellant failed to support her claims that corruption in the Mexican courts rendered Mexico an inadequate forum.[383] Further, the magistrate found the appellant's argument that Mexican courts are known for their long delays unpersuasive.[384]

The magistrate performed a thorough review of the appellant's arguments and determined that the appellant failed to demonstrate how the district court abused its discretion in adopting the magistrate's recommendation.[385] The Fifth Circuit Court of Appeals concluded that the record failed to establish how the district court's judgment was a clear abuse of discretion, and thus, affirmed the district court decision.[386]

4. Little v. KPMG L.L.P.

With a panel comprising Circuit Judges E. Grady Jolly, Harold R. DeMoss, and Edward C. Prado, the Fifth Circuit Court of Appeals heard an appeal from the dismissal of two class actions.[387] A partner at the defendant accountancy firm practiced public accountancy in Texas, although he did not have the required Texas license to practice.[388] It was alleged that this fact made the defendant's license and registration improper and its practice in Texas unlawful.[389] A public accountant at a public accountancy firm in Texas brought a putative class action against the defendant and several of its partners contending that during the class period, its members lost business to the defendant while it practiced in Texas's public accountancy market unlawfully.[390] A second putative class action was brought against the defendant by a group of its Texas clients contending that the defendant misrepresented the nature of its services.[391] The district court dismissed both actions on the merits, contending that the plaintiffs' claim of injury was too speculative to grant Article III standing and that the clients failed to plead an actual and concrete injury sufficient to give rise to a claim for

381. *Id.*
382. *Id.*
383. *Id.*
384. *Id.* at 212-13.
385. *Id.* at 213.
386. *Id.* at 213-14.
387. Little v. KPMG L.L.P., 575 F.3d 533, 535 (5th Cir. Jul. 2009).
388. *Id.* at 534.
389. *Id.*
390. *Id.* at 535.
391. *Id.*

which relief could be granted.[392] The putative classes appealed the dismissals.[393]

The Fifth Circuit consolidated the actions for appeal.[394] The court reviewed the Texas Public Accountancy Act (TPAA).[395] The TPAA, in effect during the class period, required firms of certified public accountants to register with the Texas State Board of Public Accountancy.[396] "A firm did not qualify to register unless each of its partners practicing public accountancy in Texas held a Texas public-accountancy license and certification."[397] Registration was a statutory prerequisite to obtain a firm license.[398] The partner at issue practiced public accountancy as a partner in the defendant's Houston office.[399] He held a New York public-accountancy license, but not a Texas public-accountancy license.[400] Despite this unlicensed practice, the defendant registered and received a license to practice public accountancy in Texas by concealing the partner's lack of a Texas license.[401]

The Fifth Circuit explained that at all times during the class period, the defendant represented to clients that it was registered and licensed to practice in Texas.[402] The representation was true, although the defendant had obtained the registration and license fraudulently and it was not qualified to hold the registration and license under the TPAA.[403]

The Fifth Circuit restated the distinct legal arguments raised by the two putative classes.[404] In the competitors' action, the legal argument was that during the class period, the defendant unlawfully participated in Texas's public accountancy market, obtaining clients that would otherwise have hired the competitors.[405] The defendant moved to dismiss, arguing *inter alia*, the claim of injury was too speculative to confer Article III standing or give rise to a claim for which relief could be granted.[406] The district court agreed and dismissed the claim.[407] In the clients' action, the substantive legal argument was that the defendant misrepresented that it was properly registered and licensed to practice in Texas, and as a result,

392. *Id.*
393. *Id.*
394. *Id.*
395. *Id.*
396. *Id.*
397. *Id.*
398. *Id.*
399. *Id.*
400. *Id.*
401. *Id.* at 535-36.
402. *Id.* at 536.
403. *Id.*
404. *Id.*
405. *Id.*
406. *Id.* at 537.
407. *Id.*

the clients bargained and paid for services they did not receive.[408] The clients alleged as follows:

> The market price for a properly-registered accountancy firm's services . . . exceeds the market price for the identical services of a firm whose registration and license are subject to mandatory revocation. This is so because the latter firm's services carry an element of risk: if the State Board revokes the firm's registration and license, the client: (A) must incur additional expenses to have the accounting work checked by a licensed accountant or accountancy firm and (B) may incur civil liability for sharing the firm's work with third parties while representing the work as having been performed by a firm that was registered and licensed.[409]

The clients asserted several causes of action, including the following: (1) actual and constructive fraud; (2) breach of fiduciary duty; (3) simple or gross negligence; (4) negligent misrepresentation; (5) breach of contract; (6) breach of warranty; (7) violations of the Texas Deceptive Trade Practices Act; and (8) RICO violations.[410] The defendant moved to dismiss, arguing *inter alia*, that the clients failed to state a claim for which relief could be granted.[411]

The Fifth Circuit first considered the issue of the competitors' lack of standing.[412] The constitutional minimum of standing contains three elements: (1) an injury in fact that is concrete and particularized as well as actual or imminent; (2) causation; and (3) redressability.[413] "[A]llegations of injury that is merely conjectural or hypothetical do not suffice to confer standing."[414] "A claim of injury generally is too conjectural or hypothetical to confer standing when the injury's existence depends on the decisions of third parties not before the court."[415]

In the instant case, the competitors' claim of injury is lost business.[416] The court of appeals explained that the claim requires the following chain of causation: (1) if the defendant's license had been revoked, the Texas clients would have sought to replace their accountant; (2) those clients would have replaced the defendant with one or more of the competitor plaintiffs; and (3) the clients would have paid for those services.[417] The Fifth Circuit opined that the notion that the defendant's Texas clients would

408. *Id.* at 538.
409. *Id.*
410. *Id.*
411. *Id.* at 539.
412. *Id.* at 540.
413. *Id.* (citing Croft v. Governor of Tex., 562 F.3d 735, 745 (5th Cir. 2009)).
414. *Id.* (citing DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 344-46, 350 (2006)).
415. *Id.*
416. *Id.*
417. *Id.*

have sought to replace the defendant required speculation.[418] That the clients would have replaced the defendant with one or more of the plaintiffs required more speculation.[419] That the clients who chose to take their business to the plaintiffs would have paid the plaintiffs as they did the defendant required even more speculation.[420] The Fifth Circuit concluded that the competitors' claim of injury depended on several layers of decisions by third parties, and thus, was too speculative to confer Article III standing.[421] The court further reviewed the facts alleged by the clients and determined that the clients did not plead enough facts to state a claim.[422] The Fifth Circuit, therefore, affirmed the dismissal by the district court.[423]

5. Benson v. St. Joseph Regional Health Center

With a panel comprising Circuit Judges Carolyn Dineen King, Carl E. Stewart, and Leslie H. Southwick, the Fifth Circuit Court of Appeals reviewed a grant of summary judgment in a suit regarding a medical peer-review process.[424] The individual plaintiff joined one of the defendant hospitals as an OB/GYN.[425] The plaintiff, after some time on the staff, underwent a peer-review process.[426] The peer review resulted in the plaintiff having his privileges at the hospital revoked.[427] The plaintiff filed suit in federal court in Texas, alleging both state and federal claims and arguing that the peer-review process was tainted.[428] The defendants answered and later moved for summary judgment.[429] The district court granted summary judgment on the state claims of qualified immunity grounds and granted summary judgment on the federal claims for other reasons.[430] The court denied all other motions due to mootness.[431] The plaintiff moved twice, unsuccessfully, to alter or amend the judgment, and this appeal followed.[432]

The Fifth Circuit first addressed the state statutory claims.[433] The Texas Medical Practice Act affords immunity to peer-review participants,

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418. *Id.*
419. *Id.* at 541.
420. *Id.*
421. *Id.*
422. *Id.* at 541-42.
423. *Id.* at 542.
424. Benson v. St. Joseph Reg'l Health Ctr., 575 F.3d 542, 544 (5th Cir. July 2009).
425. *Id.*
426. *Id.* at 544-45.
427. *Id.* at 545.
428. *Id.*
429. *Id.*
430. *Id.*
431. *Id.*
432. *Id.*
433. *Id.*

so long as they have acted without malice.[434] The district court explained that peer-review participants are presumed to have acted without malice.[435] The district court found that to overcome this presumption, a plaintiff bears the burden of proving malice by clear and convincing evidence.[436] The Fifth Circuit explained that the issue before it was whether the district court correctly employed the clear and convincing standard.[437] The court noted, however, that before it could reach that question, it must first determine whether the argument was properly preserved for review.[438]

Following the order of summary judgment, the plaintiff filed a motion to amend or alter judgment within the required ten-day period.[439] In this motion, the plaintiff did not argue that the district court erroneously used the clear and convincing standard.[440] He instead argued that substantial evidence of malice was produced, thus creating a genuine issue of material fact regarding actual malice.[441] This motion was denied.[442]

After the denial, the plaintiff filed what he referred to as a "Second Motion to Alter or Amend Judgment."[443] It was in this second motion that the plaintiff contested the district court's use of the clear and convincing evidence standard, asserting that the preponderance of the evidence standard was correct.[444] The defendants responded by arguing that the motion was successive, and in the alternative, the plaintiff was judicially estopped from making this argument.[445] Before the district court ruled on the second motion, the plaintiff filed a notice of appeal seeking review of the summary judgment and the denial of his first motion.[446] Then, the district court evaluated the second motion.[447] The court did not address the untimeliness or successive nature of this motion, but denied it, explaining that the plaintiff was judicially estopped from arguing that the courts used the wrong evidentiary standard.[448] After this denial, the plaintiff filed an amended notice of appeal seeking review of the grant of summary judgment and the denial of both motions.[449]

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434. *Id.*
435. *Id.*
436. *Id.*
437. *Id.*
438. *Id.*
439. *Id.* at 546 (citing FED. R. CIV. P. 59(e)).
440. *Id.*
441. *Id.*
442. *Id.*
443. *Id.*
444. *Id.*
445. *Id.*
446. *Id.*
447. *Id.*
448. *Id.*
449. *Id.*

The Fifth Circuit began by analyzing the effect of filing two motions under FRCP 59(e).[450] Only the first motion tolled the thirty-day time period for filing a notice of appeal.[451] The court noted that the plaintiff wisely filed a notice of appeal from his first motion without waiting for a ruling on his second motion as it satisfied the thirty-day requirement.[452] That first notice of appeal brought to the court "all matters identified in the motion that had been properly presented to the district court prior to that time."[453] The plaintiff, however, had not yet presented his argument to the district court on appeal—that the court used the wrong evidentiary standard—at the time of the notice of appeal.[454] In fact, this was the argument the defendant made.[455] The defendant further asserted that the plaintiff's argument in his first FRCP 59(e) motion, that he satisfied the clear and convincing standard, was a judicial admission that conceded the issue.[456] Thus, the Fifth Circuit found that the plaintiff adequately raised the impropriety of the motion.[457]

The Fifth Circuit explained that the federal rules "do not provide for a motion requesting a reconsideration of a denial of a reconsideration."[458] The court opined that if such a motion were permissible, a litigant could continually seek reconsideration and prevent finality of judgment.[459] In the instant case, while the plaintiff's first Rule 59(e) motion was timely, the court considered and denied it, thus exhausting the plaintiff's right to reconsideration.[460] The issue before the court of appeals then became whether the litigant had sufficiently presented to the district court an issue that appeared only in an improper FRCP 59(e) motion.[461]

The court of appeals began to answer the above question by noting "certain procedural flaws in Rule 59(e) motions are not fatal."[462] The court stated that it had previously treated "an untimely 59(e) motion to alter or amend the judgment as if it were a Rule 60(b) motion if the grounds asserted in support of the Rule 59(e) motion would also support Rule 60(b) relief."[463] The court said it saw no reason it could not treat an improperly successive Rule 59(e) motion the same way.[464]

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450. *Id.*
451. *Id.* (citing Charles L.M. v. Ne. Indep. Sch. Dist., 884 F.2d 869, 870 (5th Cir. 1989)).
452. *Id.*
453. *Id.*
454. *Id.*
455. *Id.*
456. *Id.* (quoting Martinez v. Bally's La., Inc., 244 F.3d 474, 476 (5th Cir. 2001)).
457. *Id.*
458. *Id.*
459. *Id.*
460. *Id.*
461. *Id.*
462. *Id.*
463. *Id.* (quoting Halicki v. La. Casino Cruises, Inc., 151 F.3d 465, 470 (5th Cir. 1998)).
464. *Id.*

Under Rule 60(b), a court may grant relief on the following grounds: (1) mistake; (2) inadvertence; (3) surprise; or (4) excusable neglect.[465] In the instant case, mistake is the only relevant ground—the mistake being an alleged substantive legal error by the district court.[466] The circuits are split as to whether a district court may reconsider, pursuant to Rule 60(b), legal errors it may have made in a judgment.[467] The Fifth Circuit rule is "a Rule 60(b) motion may be used 'to rectify an obvious error of law, apparent on the record.'"[468] If this is the purpose of the motion, the Fifth Circuit requires that the litigant file the Rule 60(b) motion within the time for taking appeal.[469] The focus on "obvious legal error" prevents a Rule 60(b) motion from being used as a substitute for appeal on disputed issues.[470]

In the instant case, the plaintiff did file his successive motion well within the time for taking an appeal.[471] Although the motion was proper as to time, the Fifth Circuit found, however, that it was not proper as to subject.[472] The court explained that it could not characterize the alleged legal error as an "obvious error of law."[473] The Fifth Circuit noted that although it might doubt whether the district court used the right evidentiary standard, the parties conceded that Texas state courts have never clearly expressed what standard should be applied to prove malice in this context.[474] Thus, if the court were to reach the merits of the plaintiff's claim, it is required to determine how the Texas Supreme Court would interpret state law.[475] This is not the kind of legal error permissible through a Rule 60(b) motion.[476] Thus, the Fifth Circuit found it should not treat the plaintiff's arguments as an exception to the requirement that the plaintiff must first present the issue to the district court before raising it on appeal.[477] Therefore, the district court's grant of qualified immunity to the defendant on the state law claims was not error.[478]

The Fifth Circuit then considered the federal antitrust claim.[479] To prove an antitrust claim, the plaintiff must demonstrate the following: (1) the defendant engaged in a conspiracy; (2) in restraint of

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465. *Id.* at 457 (citing FED. R. CIV. P. 60(b)(1)).
466. *Id.*
467. *Id.*
468. *Id.* (quoting Hill v. McDermott, Inc., 827 F.2d 1040, 1043 (5th Cir. 1987)).
469. *Id.* (citing *Hill*, 827 F.2d at 1043).
470. *Id.*
471. *Id.*
472. *Id.* at 547-48.
473. *Id.* at 548 (quoting *Hill*, 827 F.3d at 1043).
474. *Id.*
475. *Id.* (citing Beavers v. Metro. Life Ins. Co., 566 F.3d 436, 439 (5th Cir. 2009)).
476. *Id.*
477. *Id.*
478. *Id.* at 548.
479. *Id.* at 548-50.

trade; (3) in the relevant market.[480] "When there is no allegation that the alleged conspiracy is *per se* unreasonable, the plaintiff is required to demonstrate that the alleged conduct unreasonably restrains trade in light of actual market forces under the rule of reason."[481] The rule of reason requires that the finder of fact consider "all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition."[482] A violation requires proof that the practice had an actual adverse effect on competition.[483] The court of appeals applied these principles to the plaintiff's claims and agreed with the district court that the plaintiff did not raise a genuine issue of material fact.[484] Hence, the plaintiff's antitrust claim failed as a matter of law.[485]

Finally, the Fifth Circuit addressed the issue of leave to amend.[486] In addition, the plaintiff challenged the district court's denial of his motion to amend his pleadings.[487] The Fifth Circuit explained that a post-judgment amendment is only permissible when the judgment is vacated pursuant to FRCP 59 or 60.[488] Thus, once the district court enters judgment, it is proper to deny leave to amend "where the party seeking to amend has not clearly established that he could not reasonably have raised the new matter prior to the trial court's merits ruling."[489] The plaintiff in this case requested leave to amend his pleadings after the district court entered judgment and denied his first motion to reconsider.[490] While the plaintiff claimed that the delay in presenting the new claim was caused by the defendant's concealment of a document, the plaintiff had the document in his possession approximately nineteen months before he sought leave to amend.[491] Therefore, the denial of leave to amend by the district court was not an abuse of discretion, and the Fifth Circuit Court of Appeals affirmed the judgment of the district court.[492]

6. State Industrial Product Corp. v. Beta Tech., Inc.

With a panel comprising Circuit Judges Jerry E. Smith, Emilio M. Garza, and Edith Brown Clement, the Fifth Circuit Court of Appeals

480. *Id.* at 549 (citing 15 U.S.C. § 1 (2006)).
481. *Id.* (citing Golden Bridge Tech., Inc. v. Motorola, Inc., 547 F.3d 266, 270 (5th Cir. 2008)).
482. *Id.* (quoting Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 885 (2007)).
483. *Id.* (citing Tunica Web Adver. v. Tunica Casino Operators Ass'n, 496 F.3d 403, 412 (5th Cir. 2007)).
484. *Id.*
485. *Id.* at 550.
486. *Id.*
487. *Id.*
488. *Id.* (citing Vielma v. Eureka Co., 218 F.3d 458, 468 (5th Cir. 2000)).
489. *Id.* (quoting Briddle v. Scott, 63 F.3d 364, 380 (5th Cir. 1995)).
490. *Id.*
491. *Id.*
492. *Id.*

considered an appeal from a grant of summary judgment.[493] The plaintiff employed a sales representative who, while employed, signed an agreement prohibiting him from using "confidential customer information acquired in the course of his employment for a period of eighteen months after this employment ended."[494] The sales representative resigned and began work for himself selling products to his former customers.[495] The plaintiff filed suit against him for breach of contract and the parties settled; the judge issued a consent judgment barring the sales representative from using the confidential information at issue for eighteen months.[496] He then began working for the defendant.[497] The plaintiff moved to hold the sales representative in contempt for violating the terms of the consent judgment.[498] Again, the parties settled, and again, the judge issued a consent judgment with the same terms as the first.[499]

Five years after the sales representative began employment for the defendant, the plaintiff filed the instant suit alleging the defendant knew of the settlements but failed to ensure that the sales representative was complying with the consent judgments.[500] The plaintiff further alleged the defendant instructed other employees to solicit purchases from the plaintiff's customers in an attempt to circumvent the judgments.[501] The plaintiff sought compensatory and punitive damages based on business tort causes of action as well as contempt.[502] The defendant moved for summary judgment, which the district court granted, finding *inter alia* (1) that the plaintiff's business tort claims were barred by the statute of limitations; and (2) that the contempt claim could not be brought against the defendant because it was not a party to the consent judgments.[503] The plaintiff appealed.[504]

The Fifth Circuit addressed the statute of limitations issue.[505] The district court concluded that Mississippi's discovery rule was not applicable to the instant case because the claims did not involve a latent injury.[506] The Fifth Circuit noted that the parties agreed that business tort claims are governed by a three-year limitations period.[507] In Mississippi, the

493. State Indus. Prod. Corp. v. Beta Tech., Inc, 575 F.3d 450, 452 (5th Cir. July 2009).
494. *Id.* at 453.
495. *Id.*
496. *Id.*
497. *Id.*
498. *Id.*
499. *Id.*
500. *Id.*
501. *Id.*
502. *Id.*
503. *Id.*
504. *Id.* at 454.
505. *Id.*
506. *Id.*
507. *Id.*

limitations period runs from the time of injury, not discovery.[508] There is, however, an exception—in situations involving latent injury, "the discovery rule tolls the limitations period until the injury could have been reasonably discovered."[509] Notably, the cause of action accrues once the plaintiff discovers the injury, regardless of when the cause of injury is discovered.[510]

The court of appeals explained it must first determine whether the discovery rule applies to the instant case.[511] This determination depended upon whether the injury suffered by the plaintiff was a latent injury.[512]

> Under Mississippi law, a latent injury is "one where the plaintiff will be precluded from discovering harm or injury because of the secretive or inherently undiscoverable nature of the wrongdoing in question . . . [or] when it is unrealistic to expect a layman to perceive the injury at the time of the wrongful act."[513]

"For an injury to be latent it must be undiscoverable by reasonable methods such as 'through personal observation or experience.'"[514] In reviewing the injury in the instant case, the Fifth Circuit concluded that the discovery rule did not apply because the defendant's allegedly unlawful actions were "not undiscoverable by reasonable methods."[515]

The court then considered when the plaintiff's injury occurred, and thus, when the business tort claims accrued.[516] The plaintiff argued, for the first time on appeal, that the statute of limitations did not bar the claims because the business tort claims were continuous in nature.[517] In the alternative, the plaintiff argued that even if the claims were not continuous in nature, each time the defendant assisted in a prohibited sale, a new cause of action accrued.[518] The Fifth Circuit noted that the plaintiff did not raise either of these arguments in the district court.[519] Under the Fifth Circuit general rule, arguments not made at the trial level are waived and will not

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508. *Id.* (citing Commercial Servs. of Perry, Inc. v. FDIC, 199 F.3d 778, 780 (5th Cir. 2000); Wilson v. Retail Credit Co., 325 F. Supp. 460, 465 (S.D. Miss. 1971); Cent. Trust Co. v. Meridian Light & Ry., 106 Miss. 431, 63 So. 575, 576 (1913) ("noting that 'the time limited is to be computed from the day upon which the plaintiff might have commenced an action for the recovery of his demand'")).

509. *Id.*

510. *Id.*

511. *Id.*

512. *Id.*

513. *Id.* at 455 (quoting PPG Architectural Finishes, Inc. v. Lowery, 909 So. 2d 47, 50 (Miss. 2005)).

514. *Id.* (quoting *Lowery*, 909 So. 2d at 51).

515. *Id.*

516. *Id.*

517. *Id.*

518. *Id.*

519. *Id.* at 456.

be considered on appeal, barring "extraordinary circumstances."[520] "Extraordinary circumstances exist when the issue involved is a pure question of law and a miscarriage of justice would result from [a] failure to consider it."[521] In the instant case, the plaintiff did not argue that a miscarriage of justice would result from the appellate court's failure to consider its argument.[522] Because no extraordinary circumstances existed, the Fifth Circuit declined to consider such arguments.[523] Moreover, the court determined that because the discovery rule did not apply, and the business tort causes of action were not continuous, the district court was correct in holding that they were barred by the statute of limitations.[524]

Finally, the Fifth Circuit considered the contempt claim.[525] The court began by noting that pursuant to FRCP 65, under certain situations, consent judgments can be binding on nonparties.[526] Rule 65 controls injunctions and restraining orders issued by federal courts.[527] The court observed, "where [a] consent judgment involves an injunction or similar equitable relief, the injunction . . . will be enforced as any injunction is enforced."[528] The court opined that in the instant case, the settlement was clearly injunctive in nature; accordingly, Rule 65 governed the parties bound by it.[529]

Pursuant to Rule 65:

> [A]n injunction binds the parties as well as the parties' officers, agents, servants, employees, attorneys, and "other persons who are in active concert or participation" with any of the previously listed persons—so long as the persons claimed to be bound received "actual notice of [the injunction] by personal service or otherwise."[530]

The district court failed to consider whether the defendant was "a person in active concert or participation" with the sales representative at issue.[531] The Fifth Circuit concluded that the district court's conclusion that the defendant was not bound by the consent order was in error.[532] The court of appeals remanded the case for a determination of whether the defendant

520. *Id.* (citing N. Alamo Water Supply Corp. v. City of San Juan, 90 F.3d 910, 916 (5th Cir. 1996)).
521. *Id.* (quoting *N. Alamo*, 90 F.3d at 916).
522. *Id.*
523. *Id.*
524. *Id.* at 455-56.
525. *Id.* at 457.
526. *Id.* (citing FED. R. CIV. P. 65(d)(1)).
527. *Id.*
528. *Id.* (quoting SEC v. AMX, Int'l, Inc., 7 F.3d 71, 75 (5th Cir. 1993)).
529. *Id.*
530. *Id.* (quoting FED. R. CIV. P. 65(d)(2)).
531. *Id.* at 457-58.
532. *Id.* at 458.

received actual notice of the consent judgments and whether the defendant was "in active concert or participation" with the sales representative in violating such judgments.[533] Ultimately, the Fifth Circuit affirmed the order of summary judgment on the business torts claims and remanded for further proceedings on the contempt claim.[534]

G. Securities Regulation

1. Archdiocese of Milwaukee Supporting Fund, Inc. v. Halliburton Co.

With a panel comprising Circuit Judges Thomas M. Reavley, Edith Brown Clement, and Leslie H. Southwick, the Fifth Circuit Court of Appeals reviewed the denial of class certification on a private securities action.[535] The securities claim was based on the fraud on the market theory.[536] The Fifth Circuit immediately explained that under this theory, it is assumed that in an efficient market, all public information about a company is known to the market and reflected in the stock price.[537] Thus, when a company makes a public material misrepresentation about its business, a presumption exists that a person who buys the company's stock relied on false information.[538] The stockholder then suffers a loss when the misrepresentation becomes known and the stock price falls.[539] "It is the response of the market to the correction that proves the effect of the false information and measures the plaintiff stockholder's loss."[540]

In the instant case, the lead plaintiff claimed that the defendant made false statements about its business.[541] The plaintiff asserted that stockholders suffered financial loss when the defendant issued disclosures to correct the false statements and the market fell following the negative announcement.[542] The Fifth Circuit noted that in order to obtain class certification on its claims, the plaintiff was required to prove loss causation—that the corrected truth of the former false information actually caused the stock price to fall and resulted in the stockholders' losses.[543] The district court denied class certification, finding that the plaintiff failed to prove this causal relationship.[544] The plaintiff appealed, contending that

533. *Id.*
534. *Id.*
535. Archdiocese of Milwaukee Supporting Fund, Inc. v. Halliburton Co., 597 F.3d 330, 333-34 (5th Cir. Feb 2010).
536. *Id.* at 334.
537. *Id.*
538. *Id.*
539. *Id.* (citing Basic Inc. v. Levinson, 485 U.S. 224, 246-47 (1988)).
540. *Id.*
541. *Id.*
542. *Id.*
543. *Id.*
544. *Id.*

the district court applied the wrong standard for loss causation, requiring it to prove more than the law demands.[545]

The Fifth Circuit then provided practitioners with a review of the framework of a private securities fraud case.[546] A claim pursuant to § 10(b) of the Securities Exchange Act and Rule 10b-5 requires a showing of the following: "(1) a material misrepresentation (or omission); (2) scienter; (3) a connection with the purchase or sale of a security; (4) reliance; (5) economic loss; and (6) loss causation."[547] In a putative class, a plaintiff may create a rebuttable presumption of reliance pursuant to the fraud on the market theory, as discussed above.[548] Specifically, the plaintiff must show (1) the defendant made a public material misrepresentation; (2) the securities at issue were traded in an efficient market; and (3) the plaintiffs traded securities in the relevant time period between the misrepresentation being made and the revelation of the truth.[549]

In the instant case, the parties contested only the alleged misrepresentation.[550] The Fifth Circuit requires that plaintiffs establish loss causation to trigger the fraud on the market presumption.[551] This showing is required at the certification stage by a preponderance of the evidence.[552] The court of appeals explained that the district court correctly noted that this loss may be established by either an increase in stock price immediately after the release of the false information or by a stock price decrease immediately following the release of the corrective disclosure.[553] The plaintiff in the instant case relied on the latter.[554] Further, by relying on this price decline after the corrective disclosure, the plaintiff need also prove that its loss resulted directly because of the correction.[555] In other words, a plaintiff must show that the stock price fell because the truth made its way into the market and not because of some other reason, such as "changed economic circumstances, changed investor expectations," or other factors not related to the fraud.[556] The Fifth Circuit also explained that a subsequent disclosure that does not correct and reveal the truth of the previous statement is not sufficient to prove loss causation.[557] The court stated:

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545. *Id.*
546. *Id.* at 335.
547. *Id.* (citing Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 341-42 (2005)).
548. *Id.*
549. *Id.* (citing Greenberg v. Crossroads Sys., Inc., 364 F.3d 657, 661 (5th Cir. 2004)).
550. *Id.*
551. *Id.*
552. *Id.*
553. *Id.*
554. *Id.*
555. *Id.* at 336.
556. *Id.* (quoting Alaska Elec. Pension Fund v. Flowerserve Corp., 572 F.3d 221, 229 (5th Cir. 2009)).
557. *Id.*

> Causation therefore requires the [p]laintiff to demonstrate the joinder between an earlier false or deceptive statement, for which the defendant was responsible, and a subsequent corrective disclosure that reveals the truth of the matter, and that the subsequent loss could not otherwise be explained by some additional factors revealed then to the market. This requirement that the corrective disclosure reveal something about the deceptive nature of the original false statement is consistent with liability in a securities fraud action, where it is those who affirmatively misrepresent a material fact affecting the stock price that are held responsible for losses.[558]

The court also noted that the statement could not be confirmatory—confirmatory information is already known by the market and will not affect stock price.[559]

The Fifth Circuit reviewed the district court opinion and held that the district court correctly determined that the plaintiff presented no evidence that a false, non-confirmatory positive statement caused a positive effect on the stock price, and thus, the plaintiff was required to show that an alleged corrective statement caused a decrease in the stock price related to the earlier statement and that it was more probable than not that the decline was related to the corrective disclosure.[560] After having determined that the district court applied the correct standard, the Fifth Circuit reviewed the plaintiff's specific allegations and concluded that the plaintiff did, in fact, fail to meet the requirements for proving loss causation at the certification stage.[561] Thus, the district court's judgment denying certification was affirmed.[562]

H. Trademarks

1. Xtreme Lashes, L.L.C. v. Xtended Beauty, Inc.

With a panel comprising Circuit Judges Rhesa H. Barksdale, Harold R. DeMoss, and Carl E. Stewart, the Fifth Circuit Court of Appeals heard an appeal from summary judgment involving trademarks.[563] The facts of the case are lengthy and case specific.[564] Suffice it to say, the dispute involved kits used by cosmetologists to lengthen clients' eyelashes.[565] Of interest is the review of trademark law provided by the Fifth Circuit.[566] The court

558. *Id.* at 336-37 (citing Dura Pharms., Inc v. Broundo, 544 U.S. 336, 344 (2004)).
559. *Id.* at 337.
560. *Id.* at 338.
561. *Id.* at 339-44.
562. *Id.* at 344.
563. Xtreme Lashes, L.L.C. v. Xtended Beauty, Inc., 576 F.3d 221 (5th Cir. July 2009).
564. *Id.* at 225-26.
565. *Id.*
566. *Id.* at 226-27.

began by reminding practitioners that "[i]n a trademark infringement action, the paramount question is whether one mark is likely to cause confusion with another."[567] A "likelihood of confusion" is more than mere possibility—a plaintiff must show confusion is probable.[568] In evaluating the likelihood of confusion, courts examine the following nonexhaustive "digits of confusion": (1) type of trademark; (2) mark similarity; (3) product similarity; (4) outlet and purchaser identity; (5) advertising media identity; (6) defendant's intent; (7) actual confusion; and (8) care exercised by potential purchasers.[569]

The Fifth Circuit reviewed the facts of the case regarding each digit.[570] In this review, the court remarked on the digits in more depth.[571] The court explained that the type of trademark refers to the strength of the mark.[572] The stronger the mark, the more protection to which it is entitled.[573] Marks are generally placed into one of five categories: (1) generic; (2) descriptive; (3) suggestive; (4) arbitrary; or (5) fanciful.[574] Suggestive, arbitrary, and fanciful marks are deemed inherently distinctive and entitled to protection.[575] Generic marks receive no protection.[576] Descriptive terms merit protection only if they have a secondary meaning.[577] The correct classification is a factual issue.[578]

In the instant case, the plaintiff did not contend that the mark at issue had a secondary meaning. Thus, it was entitled to protection only if it was suggestive, arbitrary, or fanciful.[579] The court reviewed the record and concluded that the mark seemed to carry the indicia of a suggestive mark.[580] This determination is a fact issue for the jury, and for summary judgment purposes, the mark was entitled to protection.[581]

Next, the Fifth Circuit considered the marks' similarity, which is determined by comparing the marks appearance, sound, and meaning.[582] If two marks are distinguishable, the courts ask whether, under the specific circumstances of use, a reasonable person could believe the products have a

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567. *Id.* at 226 (citing Marathon Mfg. Co. v. Enerlite Prods. Corp., 767 F.2d 214, 217 (5th Cir. 1985)).

568. *Id.* (citing Bd. of Supervisors for La. State Univ. Agric. & Mech. College v. Smack Apparel Co., 550 F.3d 465, 478 (5th Cir. 2008)).

569. *Id.* at 227 (citing *Smack Apparel Co.*, 550 F.3d at 478).

570. *Id.* at 227-30.

571. *Id.*

572. *Id.* at 227.

573. *Id.*

574. *Id.*

575. *Id.*

576. *Id.*

577. *Id.*

578. *Id.*

579. *Id.*

580. *Id.*

581. *Id.*

582. *Id.* at 228 (citing Elvis Presley Enters., Inc. v. Capece, 141 F.3d 188, 201 (5th Cir. 1998)).

common origin or association.[583] The courts consider the context of use, such as labels, packaging, and advertising.[584] "Two marks must bear some threshold resemblance in order to trigger inquiry into extrinsic factors, but this threshold is considerably lower than the degree of similarity required where the plaintiff presents little or no evidence on extrinsic factors supporting infringement."[585] The Fifth Circuit considered the similarity of the marks in the instant case and concluded that the marks were similar enough to suggest a common origin or association, especially in light of several other digits that weighed towards confusion.[586] Because the issue of similarity is a jury issue, the Fifth Circuit held that it was improper for the district judge to weigh the factors instead of the jury.[587]

The court of appeals then reviewed product similarity, outlet and purchaser identity, advertising media identity, and actual confusion, finding that all of these digits weighed in favor of confusion.[588] The court found the defendant's intent was neutral.[589] The Fifth Circuit elaborated on the evidence of actual confusion.[590] The plaintiff showed several instances of actual confusion, but despite this evidence, the district court reasoned that "occasional confusion" is not the same as "market confusion."[591] The court determined that the evidence of confusion created a genuine issue of material fact.[592] The court opined: "To ignore this evidence as anecdotal or irrational tramples upon the province of the trier of fact."[593] Ultimately, because most of the factors weighed in favor of confusion, the Fifth Circuit Court of Appeals concluded that the district court erred in granting the defendant's summary judgment.[594] The court reversed the district court's grant of summary judgment and remanded for further proceedings consistent with the opinion.[595]

583. *Id.* (citing *Capece*, 141 F.3d at 202).
584. *Id.*
585. *Id.* (quoting Sun-Fun Prods., Inc. v. Suntan Research & Dev. Inc., 656 F.2d 186, 189 (5th Cir. Unit B Sept. 1981)) (internal quotations omitted).
586. *Id.* at 229.
587. *Id.*
588. *Id.* at 229-30.
589. *Id.* at 229.
590. *Id.* at 230.
591. *Id.*
592. *Id.*
593. *Id.*
594. *Id.* at 234.
595. *Id.* at 235.

III. SELECT BUSINESS TORTS CAUSES OF ACTION CHART

CAUSE OF ACTION	ELEMENTS	STATUTE OF LIMITATIONS
Breach of Contract	1. Existence of contract; 2. Material breach; 3. Causation; and 4. Damages.[596]	Four years.[597]
Business Disparagement	1. Publication of disparaging words by the defendant about plaintiff's economic interests; 2. Falsity, 3. Publication with malice; 4. Publication without privilege; and 5. Publication caused special damages.[598]	Two years.[599] An action accrues on the date the defamatory matter is either published or spoken.[600] The Discovery Rule may apply when the nature of the plaintiff's injury is inherently undiscoverable and the evidence objectively verifies the injury.[601]

596. *See* Pegram v. Honeywell, 361 F.3d 272, 288 (5th Cir. 2004).

597. U.C.C. § 2-725(1) (2009).

598. Hurlburt v. Gulf Atl. Life Ins. Co., 749 S.W.2d 762, 766 (Tex. 1987); *see also* Taquino v. Teledyne Monarch Rubber, 893 F.2d 1488, 1501 (5th Cir. 1990) (enumerating the elements of business disparagement).

599. Dickson Constr., Inc. v. Fid. & Deposit Co. of Md., 960 S.W.2d 845, 849 (Tex. App.—Texarkana 1997, no pet.), *superseded by statute on other grounds*, TEX. CIV. PRAC. & REM. CODE ANN. § 37.004 (West 2002), *as recognized in* Rice v. Louis A. Williams & Assocs., Inc., 86 S.W.3d 329, 334 (Tex. App.—Texarkana 2002, pet. denied).

600. *See id.* at 851.

601. *See id.* at 850.

CAUSE OF ACTION	*ELEMENTS*	*STATUTE OF LIMITATIONS*
Civil Conspiracy	1. "Two or more persons; 2. an object to be accomplished; 3. a meeting of minds on the object or course of action; 4. one or more unlawful, overt acts; and 5. damage as the proximate result."[602]	Five years.[603]
DTPA	1. Plaintiff is a consumer; 2. Defendant engaged in false, misleading, or deceptive acts; and 3. These acts constituted a producing cause of the consumer's damages to consumer's detriment.[604] Certain acts are per se false, misleading, or deceptive, the most pertinent being passing off goods or services as those of another.[605]	Two years.[606] Discovery Rule applicable.[607]

602. Massey v. Armco Steel Co., 652 S.W.2d 932, 934 (Tex. 1983); *see also* Triplex Commc'ns, Inc. v. Riley, 900 S.W.2d 716, 719-20 (Tex. 1995) (stating civil conspiracy requires specific intent).

603. *See generally* 18 U.S.C. § 3282 (2006) (providing general statute of limitation for offenses that are not classified as capital offenses).

604. *See* TEX. BUS. & COM. CODE ANN. § 17.50(a) (West 2002).

605. *See id.* § 17.46(b).

606. *Id.* § 17.565.

607. *See id.*

CAUSE OF ACTION	ELEMENTS	STATUTE OF LIMITATIONS
Fraud	1. A material misrepresentation; 2. Which is false; 3. And which was either known to be false when made or was asserted without knowledge of its truth; 4. Which was intended to be acted upon; 5. Which was relied upon; and 6. Which caused injury.[608]	Four years.[609] Discovery Rule applicable.[610]
Fraud by Omission	1. A material omission when there was a duty to speak; 2. Which was intended to be acted upon; 3. Which was relied upon; and 4. Which caused injury.[611]	Four years.[612] Discovery Rule applicable.[613]
Lanham Act § 43(a)	1. Commercial advertisement that is false; or 2. Commercial advertisement that is likely to mislead or confuse consumers.[614]	Four years (borrows from Texas's fraud limitations period).[615]

608. Trenholm v. Ratcliff, 646 S.W.2d 927, 930 (Tex. 1983); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 105, at 728 (5th ed. 1984).

609. Procter & Gamble Co. v. Amway Corp., 242 F.3d 539, 566 (5th Cir. 2001) (citing Jackson v. Speer, 974 F.2d 676, 679 (5th Cir. 1992)).

610. *See Jackson*, 974 F.2d at 679 (citing Quinn v. Press, 140 S.W.2d 438, 446 (Tex. 1940)).

611. Williams v. WMX Techs., Inc., 112 F.3d 175, 177 (5th Cir. 1997) (citing Cyrak v. Lemon, 919 F.2d 320, 325 (5th Cir. 1990)); *see* ABC Arbitrage Plaintiffs Grp. v. Tchuruk, 291 F.3d 336, 349 (5th Cir. 2002); Phillips Petrol. Co. v. Daniel Motor Co., 149 S.W.2d 979, 987 (Tex. Civ. App.—Eastland 1941, writ dism'd judgm't cor.).

612. *Procter & Gamble Co.*, 242 F.3d at 566 (citing *Jackson*, 974 F.2d at 679).

613. *Id.*

614. 15 U.S.C. § 1125(a) (2006).

615. *See Procter & Gamble Co.*, 242 F.3d at 566; *Jackson*, 974 F.2d at 679.

CAUSE OF ACTION	ELEMENTS	STATUTE OF LIMITATIONS
Negligent Misrepresentation	1. Defendant provides information in the course of the defendant's business or in a transaction in which the defendant has a pecuniary interest; 2. The information supplied is false; 3. The defendant did not exercise reasonable care or competence in obtaining or communicating the information; 4. The plaintiff justifiably relies on the information; and 5. The plaintiff suffers damages proximately caused by the reliance.[616]	Two years.[617] Discovery Rule may be applicable.[618]
Robinson-Patman Anti-Discrimination Act	Illegal "for any person . . . engaged in commerce to discriminate in price between different purchasers of commodities of like grade and quality" where the effect is to lessen, destroy, or prevent competition.[619] Several exceptions to this prohibition exist.[620]	Four years.[621]

616. Geosearch, Inc. v. Howell Petrol. Corp., 819 F.2d 521, 524 (5th Cir. 1987) (citing RESTATEMENT (SECOND) OF TORTS § 552 (1977)).

617. Tex. Soil Recycling, Inc. v. Intercargo Ins. Co., 273 F.3d 644, 649 (5th Cir. 2001).

618. *Compare id.* (applying the discovery rule to negligent misrepresentation), *with* Kansa Reinsurance Co. v. Cong. Mortg. Corp., 20 F.3d 1362, 1372 (5th Cir. 1994) (declining to apply the discovery rule to negligent misrepresentation).

619. *See* 15 U.S.C. § 13(a) (2006).

620. *See* § 13(b)-(c).

621. *Id.* § 15(b).

CAUSE OF ACTION	ELEMENTS	STATUTE OF LIMITATIONS
Sherman Act § 1	1. Existence of a contract or conspiracy; 2. Affecting interstate commerce and commerce with foreign nations; and 3. That imposes a restraint on trade.[622]	Four years.[623]
Sherman Act § 2	Two distinct claims: 1. Monopolization— a. Monopolizing conduct (willful acquisition or maintenance of monopoly power); b. Coupled with monopoly power in the relevant market. 2. Attempted Monopolization— a. Anticompetitive conduct; b. Intent to monopolize; and c. Dangerous probability of obtaining monopoly.[624]	Four years.[625]

622. *Id.* § 1.
623. § 15(b).
624. *See id* § 2.
625. § 15(b).

CAUSE OF ACTION	ELEMENTS	STATUTE OF LIMITATIONS
Texas Free Enterprise and Antitrust Act of 1983	Examples of unlawful practices: 1. "Every contract, combination, or conspiracy in restraint of trade or commerce is unlawful. 2. It is unlawful for any person to monopolize, attempt to monopolize, or conspire to monopolize any part of trade or commerce. 3. It is unlawful for any person to sell, lease, or contract for the sale or lease of any goods, whether patented or unpatented, for use, consumption, or resale or to fix a price for such use, consumption, or resale or to discount from or rebate upon such price, on the condition, agreement, or understanding that the purchaser or lessee shall not use or deal in the goods of a competitor . . . ."[626]	Four years after the cause of action has accrued or within one year after the state-brought action concludes, whichever is longer.[627]

626. TEX. BUS. & COM. CODE ANN. § 15.05(West 2002).
627. *Id.* § 15.25.

CAUSE OF ACTION	ELEMENTS	STATUTE OF LIMITATIONS
Tortious Interference with Existing Contract	1. Plaintiff has a valid contract; 2. Defendant willfully and intentionally interfered with the contract; 3. Interference was a proximate cause of the plaintiff's injury; and 4. Plaintiff incurred actual damages or loss.[628]	Two years.[629] An action accrues when the defendant interferes with the contract and causes harm to the plaintiff.[630] The Discovery Rule may apply when the nature of the plaintiff's injury is inherently undiscoverable, and the physical evidence objectively verifies the injury.[631]

628. Johnson v. Hosp. Corp. of Am., 95 F.3d 383, 394 (5th Cir. 1996) (citing Victoria Bank & Trust Co. v. Brady, 811 S.W.2d 931, 939 (Tex. 1991)).

629. Jackson v. W. Telemarketing Corp. Outbound, 245 F.3d 518, 523 (5th Cir. 2001).

630. *Id.* at 523-24.

631. *Id.* at 524.

CAUSE OF ACTION	*ELEMENTS*	*STATUTE OF LIMITATIONS*
Tortious Interference with Prospective Contract	1. Reasonable probability that the plaintiff would have entered into a business relationship with a third person; 2. Defendant intentionally interfered with the relationship, which caused the plaintiff's injury; 3. Defendant lacked privilege or justification to act; and 4. Plaintiff suffered actual damage or loss.[632]	Two years.[633] An action accrues when the defendant's interference with existing negotiations, which are reasonably certain of producing a contract, results in termination of negotiations and harm to the plaintiff.[634] The Discovery Rule may apply when the nature of the plaintiff's injury is inherently undiscoverable and the evidence objectively verifies the injury.[635]
Unfair Competition (Common Law)	Violation of the Lanham Act automatically provides a cause of action.[636]	Two years.[637]

632. Stewart Glass & Mirror, Inc. v. U.S. Auto Glass Disc. Ctrs., Inc., 200 F.3d 307, 316 (5th Cir. 2000) (citing Exxon Corp. v. Allsup, 808 S.W.2d 648, 659 (Tex. App.—Corpus Christi 1991, writ denied)).

633. *See* Snell v. Sepulveda, 75 S.W.3d 142, 143 (Tex. App.—San Antonio 2002, no pet.); Tex. Oil Co. v. Tenneco Inc., 917 S.W.2d 826, 832 (Tex. App.—Houston [14th Dist.] 1994), *rev'd on other grounds sub nom.* Morgan Stanley & Co. v. Tex. Oil Co., 958 S.W.2d 178 (Tex. 1997).

634. *See* Hill v. Heritage Res., Inc., 964 S.W.2d 89, 116 (Tex. App.—El Paso 1997, pet. denied).

635. *See* Varel Mfg. Co. v. Acetylene Oxygen Co., 990 S.W.2d 486, 498 (Tex. App.—Corpus Christi 1999, no pet.); Hofland v. Elgin-Butler Brick Co., 834 S.W.2d 409, 414 (Tex. App.—Corpus Christi 1992, no writ).

636. Inwood Labs., Inc. v. Ives Labs., Inc., 456 U.S. 844, 861 n.2 (1982) (White, J., concurring).

637. Daboub v. Gibbons, 42 F.3d 285, 290 (5th Cir. 1995) (citing TEX. CIV. PRAC. & REM. CODE ANN. § 16.003 (West 2002)); Coastal Distrib. Co. v. NGK Spark Plug Co., 779 F.2d 1033, 1037 n.5 (5th Cir. 1986); J.M. Huber Corp. v. Positive Action Tool of Ohio Co., 879 F. Supp. 705, 708 (S.D. Tex. 1995).