COMMERCIAL LITIGATION

David S. Coale[*]

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* David Coale is a partner with the Dallas litigation firm of Lynn Tillotson Pinker & Cox, LLP. He is a former chair of the State Bar Appellate Section and publishes the blog 600camp.com, which monitors commercial litigation in the Fifth Circuit. He thanks Sherri Byrd for her patience and skillful editing.

The Fifth Circuit wrote on a wide range of important business topics during the survey period, including: fundamental issues of antitrust law,[1] the recurring problem of agreements defined by multiple—often inconsistent—documents in arbitration law,[2] and the BP settlement in the Deepwater Horizon litigation.[3] Several opinions continued to define key points in litigation involving mortgage servicers.[4] As to procedure, the court analyzed the kinds of allegations that can allow removal of state law claims to federal court[5] and gave several reminders that credibility issues can give rise to fact issues that defeat summary judgment.[6]

I. ADMINISTRATIVE LAW

In *Medco Energi US, L.L.C. v. Sea Robin Pipeline Co.*, the plaintiff—a natural gas producer—argued that the defendant pipeline company misrepresented how long it would take to make repairs after Hurricane Ike.[7] The Fifth Circuit held this claim preempted under the "filed rate" doctrine, under which a rate filed with The Federal Energy Regulatory Commission (FERC) is conclusive "[e]ven if a rate is misrepresented to a customer and the customer relies on that rate."[8] Otherwise, "[b]ecause [the plaintiff] only paid for interruptible service subject to these provisions, allowing recovery for damages incurred when it could not use [the defendant's] pipeline would conflict with the interruptible rate and the provisions of the [filed] tariff."[9]

The plaintiff in *Asadi v. G.E. Energy (USA), L.L.C.* was terminated after making an internal report of a potential securities law violation.[10] The Fifth Circuit affirmed the Rule 12 dismissal of his whistleblower claim based on

1. *See infra* Part II.
2. *See infra* Part IV.
3. *See infra* Part VII.
4. *See infra* Part VIII.
5. *See infra* Part XXXV.
6. *See infra* Part XL.
7. Medco Energi US, L.L.C. v. Sea Robin Pipeline Co., 729 F.3d 394, 396 (5th Cir. July 2013) (per curiam).
8. *Id.* at 398 (citing AT&T v. Cent. Office Tel., Inc., 524 U.S. 214, 222 (1998)).
9. *Id.* at 399.
10. Asadi v. G.E. Energy (USA), L.L.C., 720 F.3d 620, 621 (5th Cir. July 2013).

Dodd-Frank: "Based on our examination of the plain language and structure of the whistleblower-protection provision, we conclude that the whistleblower-protection provision unambiguously requires individuals to provide information relating to a violation of the securities laws *to the SEC* to qualify for protection."[11] The court acknowledged a more expansive SEC regulation on the point, but found it was not entitled to *Chevron* deference given the clarity of the statute.[12]

Burnett Ranches, Ltd. operates the sprawling Four Sixes and Dixon Creek ranches in the Texas Panhandle; "its history runs to Captain Samuel 'Burk' Burnett's land dealings in the 19th Century with Comanche chief Quanah Parker."[13] "The IRS contended that its current owner (Captain Burnett's great-granddaughter) was subject to accrual rather than cash accounting pursuant to a law against 'farm syndicate' tax shelters."[14] The Fifth Circuit affirmed summary judgment for the ranch as to an exception to that law for active farm operators:

> To accept the government's overly expansive reading of § 464 by crediting its overly narrow reading of the Active Participation Exception would be to sanction "administrative legislation" by an Article II executive agency. This we decline to do, agreeing instead with the district court that the government's efforts fail, grounded as they are in nothing more than the fact that legal title to Ms. Marion's interest in Burnett Ranches stands in the name of her S corp.[15]

The court concluded that "interest" has a broad, nontechnical meaning so long as it does not have a "narrowing modifier."[16]

II. ANTITRUST

As part of broader disputes about the bankruptcy of Pilgrim's Pride, chicken growers alleged that the corporation's decision to shut down a large facility violated the Packers and Stockyards Act of 1921.[17] In *In re Pilgrim's Pride Corp*., relying on its earlier 9–7 en banc decision, which held that a broader provision of the Act required proof of anticompetitive conduct, the

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11. *Id.* at 629.

12. *Id.* at 630 (citing Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–45 (1984)).

13. David S. Coale, *Giant.*, 600 CAMP (May 27, 2014), http://600camp.com/?cat=80; *see* Burnett Ranches, Ltd. v. United States, 753 F.3d 143, 145 (5th Cir. May 2014).

14. *Burnett Ranches, Ltd.*, 753 F.3d at 148–49; Coale, *supra* note 13.

15. *Burnett Ranches, Ltd*., 753 F.3d at 147–48 (footnote omitted).

16. *Id.* at 148.

17. *In re* Pilgrim's Pride Corp., 728 F.3d 457, 459 (5th Cir. Aug. 2013) (per curiam) (citing 7 U.S.C. §§ 181, 192(e)), *cert. denied*, 134 S. Ct. 1345 (2014).

Fifth Circuit held that § 192(e) of the Act imposes the same requirement.[18] The court then reversed a $25 million judgment for the growers, reasoning:

> In the instant case, PPC had overextended itself into the commodity chicken market, was producing more chicken than the market appeared to need, and was thereby driving the market price of chicken down at great cost to itself. Recognizing the damage inflicted by its own excess production, PPC wisely decided to stop flooding the market with unprofitable chicken . . . . Far from being a nefarious goal, higher prices are the natural consequence of a reduction in supply. If it is lawful for a business to independently control its own output, then it is also lawful for the business to hope for the natural consequences of its actions.[19]

The plaintiff in *Marucci Sports, L.L.C. v. NCAA* alleged that the "Bat-Ball Coefficient of Restitution Standard"—a testing protocol "to ensure that aluminum and composite bats perform like wood bats"—was really an anticompetitive device calculated to protect the NCAA's relationship with large bat manufacturers.[20] The Fifth Circuit affirmed dismissal, holding: (1) inadequate pleading of a conspiracy under *Twombly*, (2) inadequate pleading of an injury to "competition among non-wood baseball bat manufacturers" as opposed to its own, and (3) that the standard could fairly be called a procompetitive "rule and condition" of athletic competition.[21]

III. APPELLATE PROCEDURE

In *United States v. Transocean Deepwater Drilling, Inc.*, the Fifth Circuit reviewed the standards for a stay pending appeal.[22] The case involved an administrative subpoena related to the Macondo accident.[23] The court first analyzed the interplay between the typical four-factor test (likely success on the merits, irreparable injury, injury to the nonmovant, and the public interest) and a variant from *Ruiz v. Estelle*, which required "a substantial case on the merits when a serious legal question is involved," noting that the *Ruiz* analysis applies only if the other three factors are "*heavily tilted* in the movant's favor."[24] Here, the court found a failure to satisfy both tests: (1) it assumed that the movant had a "substantial case," in large part because the district court expressly said so in denying it relief; but (2) found no irreparable injury from providing the requested documents; and (3) found a

18. *Id.* at 460 (citing Wheeler v. Pilgrim's Pride Corp., 591 F.3d 355 (5th Cir. 2009) (en banc)).
19. *Id.* at 462–63.
20. Marucci Sports, L.L.C. v. NCAA, 751 F.3d 368, 372 (5th Cir. May 2014).
21. *Id.* at 375–77.
22. United States v. Transocean Deepwater Drilling, Inc., 537 F. App'x 358, 359 (5th Cir. July 2013) (per curiam).
23. *Id.* at 360.
24. *Id.* at 360–61 (quoting Ruiz v. Estelle, 650 F.2d 555, 565–66 (5th Cir. 1981)).

public interest in proceeding with their production, as there had already been a lengthy delay.[25]

In *United States ex rel. King v. University of Texas Health Science Center–Houston*, the district court dismissed the plaintiff's False Claims Act case on October 31, 2012.[26] The plaintiff then filed a notice of appeal and motion to extend time on December 5, 2012—thirty-five days later.[27] The plaintiff argued that her attorneys (1) mistakenly believed there was a sixty-day deadline, reasoning that the United States was the real party in interest, and (2) had busy trial dockets in November that kept them from noticing the error in time.[28] The district court granted the extension and the Fifth Circuit affirmed.[29] Applying *Pioneer Investment Services Co. v. Brunswick Associates L.P.* and *Halicki v. Louisiana Casino Cruises, Inc.*, the Fifth Circuit noted that while an attorney's legal error or scheduling problems could constitute inexcusable neglect, the defendant in this case was not prejudiced and the rule at issue was ambiguous.[30] The court also noted a distinction between review of a district court's finding of excusable neglect and a finding that neglect was not excusable.[31]

The Fifth Circuit reacted differently in *M.D. ex rel. Stukenberg v. Perry*.[32] The district court certified a large class of children in the Texas foster care system.[33] The State of Texas filed a petition for leave to appeal under Federal Rule of Civil Procedure 23(f) one day late.[34] Sidestepping the technical question whether the deadline was "jurisdictional" or simply "claims-processing," the Fifth Circuit held that the deadline controlled, noting that the "narrow window" set by the rule reflected a careful balance of policies.[35] The court also rejected a request to suspend the deadline under Federal Rule of Appellate Procedure 2, noting that Federal Rule of Appellate Procedure 26 expressly prohibits deadline suspension for a petition for permission to appeal.[36]

In *ART Midwest Inc. v. Atlantic L.P. XII*, the "ART entities" sued the "Clapper entities" for fraud in a real estate transaction, and the Clapper

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25. *Id.* at 365.

26. United States *ex rel.* King v. Univ. of Tex. Health Sci. Ctr.–Hous., 544 F. App'x 490, 492 (5th Cir. Nov. 2013) (per curiam), *cert. denied*, 134 S. Ct. 1767 (2014).

27. *Id.* at 493.

28. *Id.*

29. *Id.* at 494.

30. *Id.* at 493–94 (citing Pioneer Inv. Servs. Co. v. Brunswick Assocs. L.P., 507 U.S. 380, 395 (1993); Halicki v. La. Casino Cruises, Inc., 151 F.3d 465, 470 (5th Cir. 1998)).

31. *Id.* at 494.

32. M.D. *ex rel.* Stukenberg v. Perry, 547 F. App'x 543, 544 (5th Cir. Nov. 2013) (per curiam).

33. *Id.*

34. *Id.*

35. *Id*. at n.1.

36. *Id.* at 545; *see also* Bierwirth v. Countrywide Bank, FSB, 559 F. App'x 405, 405 (5th Cir. Apr. 2014) (per curiam) (dismissing an appeal filed thirty-one days after judgment).

entities countersued for breach of fiduciary duty.[37] A jury found against both sides.[38] The Clapper entities appealed, and the Fifth Circuit reversed on a legal issue and remanded for new proceedings on liability and damages.[39] The ART entities then sought to raise the fraud claim again.[40] The district court held the claim barred by the mandate rule, and on appeal from the second trial, the Fifth Circuit affirmed, reasoning:

> We hold that the ART entities' decision not to cross-appeal the jury's fraud findings in the first district court proceeding prevented them from raising the same rejected fraud claims in the second district court proceeding. Even though they prevailed on many of their claims in the first district court proceeding, the consensus of circuit authority supports that the ART entities could have filed a "protective" or "conditional" cross-appeal of the adverse fraud finding.[41]

The court otherwise affirmed, reversing one issue relating to the "double counting" of damages in light of the parties' correspondence.[42]

The Fifth Circuit held in *Naquin v. Elevating Boats, L.L.C.* that the damages judgment in a Jones Act case erroneously included compensation for mental anguish from seeing the death of another person.[43] The court disposed of the case as follows:

> [S]erious practical problems would be presented at trial if we were to save some elements of the damage award and retry only other elements of damage. "[W]here, as here, the jury's findings on questions relating to liability were based on sufficient evidence and made in accordance with law, it [i]s proper to order a new trial only as to damages." We therefore retain the jury's liability finding but order a new trial on damages.[44]

After the Supreme Court reversed the Fifth Circuit in *Mississippi ex rel. Hood v. Au Optronics Corp.*, and held that the suit was not a "mass action" under the Class Action Fairness Act (CAFA), Au Optronics argued that federal courts still had jurisdiction over the suit as a "class action."[45] The Fifth Circuit disagreed, finding that it had addressed and rejected that

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37. ART Midwest Inc. v. Atl. L.P. XII, 742 F.3d 206, 209 (5th Cir. Feb. 2014).
38. *Id.*
39. *Id.* at 209–10.
40. *Id.* at 210.
41. *Id.* at 212.
42. *Id.* at 214–15.
43. Naquin v. Elevating Boats, L.L.C., 744 F.3d 927, 930 (5th Cir. Mar.), *cert. denied*, 135 S. Ct. 357 (2014).
44. *Id.* at 941 (quoting Hadra v. Herman Blum Consulting Eng'rs, 632 F.2d 1242, 1246 (5th Cir. 1980)).
45. Mississippi *ex rel.* Hood v. Au Optronics Corp., 559 F. App'x 375, 376 (5th Cir. Mar. 2014) (per curiam).

argument in its prior panel opinion.[46] The court's treatment of the issue was not dicta because it was "an explication of the governing rules of law" that received the court's "full and careful consideration."[47] Because that analysis "was a proper holding, the law-of-the-case doctrine forbids its reconsideration."[48] Alternatively, the point was waived when Au Optronics did not appeal it to the Supreme Court.[49]

Colbert v. Brennan arose from the difficult litigation involving the noted Brennan family of New Orleans restaurateurs.[50] Ted Brennan filed an unopposed motion to dismiss an appeal, pursuant to an alleged settlement agreement.[51] Pursuant to Federal Rule of Appellate Procedure 42(b), "[a]n appeal may be dismissed on an appellant's unopposed motion if the parties agree about costs."[52] Two months later, he sought to reinstate the appeal.[53] Citing *Williams v. United States*, the Fifth Circuit held that the voluntary dismissal "voided" the notice of appeal, noting that "[h]e failed to file a new notice of appeal within the time limits required by Rule 4(a) or to seek relief in the district court as provided by Rule 4(a)."[54] The Fifth Circuit declined to apply any "equitable exceptions" to the rule that a notice of appeal is jurisdictional.[55]

Finally, in *Tetra Technologies, Inc. v. Continental Insurance Co.*, the district court ruled on several key issues in an insurance coverage dispute, declined to certify the rulings for immediate appeal under 28 U.S.C. § 1292(b) because it found no substantial ground for difference of opinion, and entered judgment on those matters pursuant to Federal Rule of Civil Procedure 54(b).[56] The Fifth Circuit held the judgment improper and dismissed on jurisdictional grounds for lack of a final and appealable order.[57] Rather than sounding the "death knell" of claims as required by Rule 54, the court concluded that the rulings would allow "Tetra and Maritech to prevail completely or not at all on their indemnification claim against Continental, depending on the resolution of certain factual issues."[58]

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46. *Id.*
47. *Id.* at 377.
48. *Id.*
49. *Id*. (citing Mississippi *ex rel.* Hood v. AU Optronics Corp., 134 S. Ct. 736, 741 & n.2 (2014)). *See generally* David Coale & Wendy Couture, *Loud Rules*, 34 PEPP. L. REV. 715 (2007) (exploring the growing tendency of courts to treat "loud rules" expressed in dicta as precedent for later decisions).
50. Colbert v. Brennan, 752 F.3d 412, 413 (5th Cir. May 2014).
51. *Id.* at 414.
52. *Id.* at 414–15.
53. *Id.*
54. *Id.* at 417 (citing Williams v. United States, 553 F.2d 420, 422 n.4 (5th Cir. 1977)).
55. *Id.*
56. Tetra Techs., Inc. v. Cont'l Ins. Co., 755 F.3d 222, 227 (5th Cir. June 2014).
57. *Id.* at 230–31.
58. *Id.* at 230 (internal quotation marks omitted).

> Thus, what we are presented with here is a request by the district court for us to sign-off mid-litigation on legal questions it considers non-contentions. Since the inception of the federal judiciary, however, our role has been to review final decisions of the trial courts, not to tinker with ongoing cases through piecemeal appeals . . . .[59]

IV. ARBITRATION

Bain Cotton Co. v. Chesnutt Cotton Co. involved a challenge to an arbitration award based on the arbitrators' denial of discovery.[60] In affirming the district court's rejection of the challenge, the Fifth Circuit stated:

> This appeal presents a quintessential example of a principal distinction between arbitration and litigation, especially in the scope of review. Had this discovery dispute arisen in and been ruled on by the district court, it is not unlikely that the denial of Bain's pleas would have led to reversal; however, under the "strong federal policy favoring arbitration, judicial review of an arbitration award is extremely narrow."[61]

As part of a complicated battle about arbitrability and arbitrator selection, a district court ruled: "Plaintiff's claims are dismissed for resolution by arbitration."[62] Later, the district court rejected a challenge to the arbitrator selection process.[63] On appeal, in *Adam Technologies International S.A. de C.V. v. Sutherland Global Services, Inc.*, the Fifth Circuit panel divided over how to apply *Kokkonen v. Guardian Life Insurance Co.*, which held that a court lacked ancillary jurisdiction to hear a dispute about the enforcement of a settlement provision in a dismissed action.[64] The majority reasoned:

> The judgment dismissing [the plaintiff's] initial lawsuit operated, in all practical effect, as the functional equivalent of an order compelling arbitration between these parties. We conclude that ancillary jurisdiction existed to allow the district court later to evaluate whether the dismissal that allowed the dispute to be taken to arbitration was being thwarted.[65]

The dissent did not read the district court's ruling as retaining jurisdiction.[66]

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59. *Id.* at 231.

60. Bain Cotton Co. v. Chesnutt Cotton Co., 531 F. App'x 500, 500 (5th Cir. June 2013) (per curiam).

61. *Id.* at 500–01 (quoting Rain CII Carbon, LLC v. ConocoPhillips Co., 674 F.3d 469, 471–72 (5th Cir. 2012)).

62. Adam Techs. Int'l S.A. de C.V. v. Sutherland Global Servs., Inc., 729 F.3d 443, 445 (5th Cir. Sept. 2013).

63. *Id.* at 446.

64. *Id.* at 449 (citing Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 379–81 (1994)).

65. *Id.* (footnote omitted)

66. *Id.* at 453 (Garza, J., dissenting).

The case of *Carey Salt Co. v. NLRB* dealt with a technical labor law question as to when negotiations between management and a union had reached an impasse.[67] The general framework the law uses, though, is of broad interest in court-ordered mediation, contractual dispute resolution clauses, and other situations where a party's good faith in negotiation can come into question.[68] The opinion centered on the factors identified by the National Labor Relations Board (NLRB) in *Taft Broadcasting Co.*: "(1) the parties' bargaining history; (2) the parties' good faith; (3) the duration of negotiations; (4) the importance of issues generating disagreement; and (5) the parties' contemporaneous understanding of the state of negotiations."[69] The Fifth Circuit also noted the general importance of overall good faith.[70]

In *D.R. Horton, Inc. v. NLRB*, the Fifth Circuit reviewed an NLRB decision that invalidated an arbitration agreement as to collective or class claims related to employment.[71] The district court deftly sidestepped a difficult constitutional issue (later resolved by the Supreme Court) about President Obama's "recess appointments" to the NLRB.[72] On the issue of enforcing an arbitration agreement, the Fifth Circuit reversed the NLRB.[73] The Board relied upon § 7 of the National Labor Relations Act, which guarantees the right "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[74] The court found that this statute did not create a right to pursue collective or class claims that trumped the language and policy goals of the Federal Arbitration Act.[75]

The plaintiff in *Diggs v. Citigroup, Inc.* sought to resist arbitration of an employment dispute, relying upon a study by Cornell professor Alex Colvin that concluded: "there is a large gap in outcomes between the employment arbitration and litigation forums, with employees obtaining significantly less favorable outcomes in arbitration."[76] The Fifth Circuit affirmed the district court's decision to exclude the study under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, noting that the study was not connected to the dispute at hand, and examined data from five years before its initiation.[77] The court also questioned, without resolving, the validity of comparing arbitration statistics from 2003–2007 with litigation statistics from the late 1990s.[78]

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67. Carey Salt Co. v. NLRB, 736 F.3d 405, 407 (5th Cir. Nov. 2013).
68. *See* 29 U.S.C. § 158a(1), (3), (5) (2014).
69. *Carey Salt Co.*, 736 F.3d at 412 (citing Taft Broad. Co., WDAF AM-FM TV, 163 NLRB 475, 478 (1967)).
70. *Id.*
71. D.R. Horton, Inc. v. NLRB, 737 F.3d 344, 348–49 (5th Cir. Dec. 2013).
72. *Id.* at 352–53.
73. *Id.* at 356.
74. *Id.* at 355 (emphasis omitted) (quoting 29 U.S.C. § 157 (2012)).
75. *Id.* at 362.
76. Diggs v. Citigroup, Inc., 551 F. App'x 762, 764 (5th Cir. Jan. 2014) (per curiam).
77. *Id.* at 765 (citing Daubert v. Merrell Dow Pharms., Inc., 113 S. Ct. 2786, 2796 (1993)).
78. *Id.*

In *ConocoPhillips, Inc. v. Local 13-0555 United Steelworkers International Union*, the company's Collective Bargaining Agreement said: "Discharge for a confirmed positive test under the substance abuse policy shall not be subject to grievance or arbitration. However, relative to such discharge the union continues to maintain the right to grieve and arbitrate issues around the integrity of the chain of custody."[79] The union began an arbitration to challenge an employee's termination for failing a drug test.[80] The arbitrator concluded that he had jurisdiction over that claim.[81] The company successfully opposed confirmation on the ground that the arbitrator lacked power to decide jurisdiction, and the Fifth Circuit affirmed, finding no provision that "clearly and unmistakably" granted such authority.[82]

In *21st Century Financial Services, L.L.C. v. Manchester Financial Bank*, the Fifth Circuit held that the language—"the parties agree to negotiate in good faith toward resolution of the issues, and to escalate the dispute to senior management personnel in the event that the dispute cannot be resolved at the operational level"—does not create (1) a requirement of negotiation by senior management before arbitration is invoked, or (2) a condition that any senior management negotiation fail before arbitration is invoked.[83] The language simply requires negotiation at the operational level.[84]

In *Crawford Professional Drugs, Inc. v. CVS Caremark Corp.*, several operators of drug stores sued pharmacy chains for misappropriating confidential information.[85] The defendants successfully compelled arbitration in the district court, and the Fifth Circuit affirmed the judgment.[86] Specifically (applying Arizona law), the Fifth Circuit held that the plaintiffs' allegations sufficiently invoked the terms of a contract that contained an arbitration agreement, compelling arbitration against nonsignatories on an equitable estoppel theory.[87] The court went on to reject the plaintiffs' argument that the contract, and its arbitration clause, were procedurally unconscionable contracts of adhesion.[88] It also found insufficient evidence to support the plaintiffs' argument that the clause imposed substantively unconscionable litigation costs.[89]

In *RW Development, L.L.C. v. Cuningham Group Architecture, P.A.*, the parties' letter agreement incorporated "AIA Document B151" with respect to

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79. ConocoPhillips, Inc. v. Local 13-0555 United Steelworkers Int'l Union, 741 F.3d 627, 629 (5th Cir. Jan. 2014).

80. *Id.*

81. *Id.* at 630.

82. *Id.* at 634.

83. 21st Century Fin. Servs., L.L.C. v. Manchester Fin. Bank, 747 F.3d 331, 338–39 (5th Cir. Mar. 2014).

84. *Id.* at 339.

85. Crawford Prof'l Drugs, Inc. v. CVS Caremark Corp., 748 F.3d 249, 253 (5th Cir. Apr. 2014).

86. *Id.*

87. *Id.* at 259–61.

88. *See id.* at 264–65.

89. *See id.* at 266–68.

"the services provided under this . . . Agreement."[90] That document states that all claims shall be adopted under the American Arbitration Association's Construction Industry Arbitration Rules.[91] Those Rules state that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction."[92] The Fifth Circuit found the incorporation of the other documents in the agreement to be effective, and accordingly, the arbitrator had jurisdiction to determine arbitrability—including whether the parties' dispute involved "services."[93]

In *Scudiero v. Radio One of Texas II, L.L.C.*, applying *In re 24R, Inc.*, an employer sought to enforce two arbitration agreements in an employee handbook, which also gave it the right to unilaterally "supersede, modify, or eliminate existing policies."[94] The Fifth Circuit noted a distinction between an arbitration clause that appears in a separate instrument from a handbook with such a provision and a clause that is part of the handbook.[95] Here, "because the arbitration provision is in the handbook that contains the language allowing the employer to unilaterally revise the handbook, the agreement to arbitrate is illusory and unenforceable."[96]

In *Lizalde v. Vista Quality Markets*, the Fifth Circuit revisited this issue; in this case, the parties' arbitration agreement gave the employer the power to terminate that agreement after following several procedural prerequisites, which made that agreement non-illusory.[97] In contrast, the parties' Benefit Plan had a "completely unconstrained" termination power.[98] And, the Arbitration Agreement acknowledged: "this Agreement is presented in connection with Company's [Benefit Plan]. Payments made under [the Benefit Plan] also constitute consideration for this Agreement."[99] The district court found the arbitration agreement illusory based on that connection.[100] The Fifth Circuit reversed, noting that both agreements' termination provisions were limited to "this Agreement" and "this Plan" respectively and thus "clearly demarcate their respective applications."[101]

In *Aviles v. Russell Stover Candies, Inc.*, the Fifth Circuit again engaged the issue of whether the unilateral power to change an arbitration clause

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90. RW Dev., L.L.C. v. Cuningham Grp. Architecture, P.A., 562 F. App'x 224, 224 (5th Cir. Apr. 2014) (per curiam).

91. *Id.*

92. *Id.* (alteration in original).

93. *Id.* at 226.

94. Scudiero v. Radio One of Tex. II, L.L.C., 547 F. App'x 429, 430 (5th Cir. Oct. 2013) (per curiam) (citing *In re* 24R, Inc., 324 S.W.3d 564, 567 (Tex. 2010) (per curiam)).

95. *Id.* at 431.

96. *Id.*; *see also* Carey v. 24 Hour Fitness, USA, Inc., 669 F.3d 202, 208 (5th Cir. 2012) (finding another arbitration provision illusory in an employment setting).

97. Lizalde v. Vista Quality Mkts., 746 F.3d 222, 224 (5th Cir. Mar. 2014).

98. *Id.*

99. *Id.* (alterations in original).

100. *Id.* at 225.

101. *Id.* at 227 (emphasis omitted).

makes the clause illusory and unenforceable.[102] This time, however, the court observed that the agreement subjected to arbitration "any and all claims challenging the validity or enforceability of th[e] [Waiver and Arbitration] Agreement."[103] Accordingly, the court affirmed the dismissal of the plaintiff's case in favor of arbitration, but vacated the magistrate judge's resolution of the enforceability issue because it "should have declined to decide either of those two issues."[104]

V. ATTORNEY'S FEES

The Fifth Circuit gave a practical example of the Texas requirement of "presentment" of a contract claim before fees may be recovered. In *Playboy Enterprises, Inc. v. Sanchez-Campuzano*, the court reminded that the pleading of presentment is procedural, and thus not a requirement in the federal system.[105] Proof of presentment is, however, a substantive requirement. In this case, sending a "Notice of Default" under a primary obligation was enough to "present" a claim for liability on a guaranty, noting the "flexible, practical understanding" of the requirement by Texas courts.[106] The court distinguished the Austin Court of Appeals case of *Jim Howe Homes, Inc. v. Rogers*, which found that service of a Deceptive Trade Practices Act (DTPA) complaint was not presentment of a later-filed contract claim on the ground that the Notice here went beyond mere service of a pleading.[107]

The City of Alexandria settled a lawsuit with an electricity supplier for a $50 million recovery.[108] A sordid dispute then broke out among the City and various lawyers who worked on the case and asserted a contingency interest in the recovery.[109] The Fifth Circuit's opinion in *City of Alexandria v. Brown* affirmed the district court's resolution of the dispute and provided an overview of when "quantum meruit" principles control over the terms of a contingent fee agreement.[110] As to one lawyer, relevant factors included the end of her involvement relatively early in the matter and seemingly unreliable time records during that involvement.[111] As to another, the district court noted that the contract created a "joint obligation" between him and

102. Aviles v. Russell Stover Candies, Inc., 559 F. App'x 413, 414 (5th Cir. Apr. 2014) (per curiam).
103. *Id.* (first alteration in original).
104. *Id.* at 415.
105. Playboy Enters., Inc. v. Sanchez-Campuzano, 561 F. App'x 306, 309 (5th Cir. Dec. 2013) (per curiam).
106. *Id.* at 310.
107. *Id.* (citing Jim Howe Homes, Inc. v. Rogers, 818 S.W.2d 901, 904–05 (Tex. App.—Austin 1991, no writ)).
108. City of Alexandria v. Brown, 740 F.3d 339, 342–43 (5th Cir. Jan. 2014).
109. *Id.* at 344–55.
110. *Id.* at 352–53.
111. *Id.* at 348.

another lawyer that made performance impossible after he was disbarred, requiring a quantum meruit analysis.[112]

In *Richardson v. Wells Fargo Bank, N.A.*, a mortgage servicer sought recovery of attorneys' fees pursuant to a provision in the deed of trust that referred to "paying reasonable attorney's fees to protect its interest in the Property and/or rights under this Security Instrument."[113] The issue was whether a Rule 54(d)(2) motion was an appropriate vehicle to make its claim, which turned on "whether the fees [were] an element of damages or collateral litigation costs."[114] The Fifth Circuit concluded this provision defined legal fees as collateral costs, not "an independent ground of recovery" where Rule 54 might become inapplicable.[115] The court went on to hold that "motions for attorney's fees provided by contract are permissible under Rule 54(d)(2)" after reviewing and rejecting authority that suggested otherwise.[116]

VI. BANKRUPTCY

"Equitable mootness" is a prudential doctrine that balances a litigant's interest in appellate review against the need for finality of a bankruptcy plan.[117] In *In re Age Refining, Inc.*, the Fifth Circuit declined to apply the doctrine, finding that Chase Capital Corporation had at best shown only "speculative" harm to other parties.[118] The court noted that the doctrine has three elements: "(i) whether a stay has been obtained, (ii) whether the plan has been 'substantially consummated,' and (iii) whether the relief requested would affect either the rights of parties not before the court or the success of the plan."[119] The opinion expresses skepticism that the doctrine can apply to an adversary proceeding.

Acceptance Loan had a lien on a Mississippi office building, which was the principal asset of S. White Transportation (SWT) when SWT went into bankruptcy.[120] Acceptance received notice of SWT's bankruptcy several times.[121] After plan confirmation, Acceptance sought a declaration that its lien survived.[122] The Fifth Circuit held in *In re S. White Transportation, Inc.* that "passive receipt of notice" did not constitute "participation" in the

112. *Id.* at 355–57.

113. Richardson v. Wells Fargo Bank, N.A., 740 F.3d 1035, 1038 (5th Cir. Jan. 2014) (emphasis omitted).

114. *Id.* at 1039–40.

115. *Id.* at 1038.

116. *Id.* at 1040.

117. Official Comm. of Unsecured Creditors v. Moeller (*In re* Age Ref., Inc.), 537 F. App'x 393, 397 (5th Cir. July 2013).

118. *Id.* at 398.

119. *Id.* at 397 (quoting *In re* Manges, 29 F.3d 1034, 1039 (5th Cir. 1994)).

120. Acceptance Loan Co. v. S. White Transp., Inc. (*In re* S. White Transp., Inc.), 725 F.3d 494, 495 (5th Cir. Aug. 2013).

121. *Id.*

122. *Id.* at 496.

bankruptcy under the rule of *In re Ahern Enterprises, Inc*.[123] Therefore, the general rule applied that a "secured creditor with a loan secured by a lien on the assets of a debtor who becomes bankrupt before the loan is repaid may ignore the bankruptcy proceeding and look to the lien for satisfaction of the debt."[124]

An unsecured creditor contended in *In re Schooler* that the gross negligence of a bankruptcy trustee allowed a key asset to escape the estate.[125] The district and bankruptcy courts agreed and ordered payment from Liberty Mutual's bond for the trustee.[126] The Fifth Circuit affirmed, finding that the relevant limitations period was set by a four-year federal statute rather than a two-year state statute and that the finding of gross negligence was not clearly erroneous.[127] Expert testimony was not necessary to establish gross negligence in this situation: "While the precise course of action the Trustee should have taken may be subject to reasonable debate, it requires no technical or expert knowledge to recognize that she affirmatively should have undertaken *some* form of action to acquire for the bankruptcy estate the assets to which it was entitled."[128]

Attorneys filed fee applications in a bankruptcy and the debtor responded with tort counterclaims in *In re Frazin.*[129] The bankruptcy court entered judgment for the attorneys.[130] The Fifth Circuit found a lack of jurisdiction over the DTPA counterclaim and remanded.[131] It reasoned that *Stern v. Marshall* overruled prior circuit precedent saying that bankruptcy courts could enter final judgments in all "core" proceedings.[132] Applying *Stern* to these claims, the court found that the malpractice claim was intertwined with the fee application, as was the fiduciary duty action (as it sought fee forfeiture), but "it was not necessary to decide the DTPA claim to rule on the Attorneys' fee applications" (including whether the claim was an impermissible "fracturing" of a professional negligence claim under Texas law).[133] The Fifth Circuit noted that the bankruptcy court may have jurisdiction to enter final judgment on the claim.[134] A dissent would not

123. *Id.* at 498 (citing Elixir Indus., Inc. v. City Bank & Trust Co. (*In re* Ahern Enters., Inc.), 507 F.3d 817, 822 (5th Cir. 2007)).

124. *Id.* at 496 (quoting Sun Fin. Co. v. Howard (*In re* Howard), 972 F.2d 639, 641 (5th Cir. 1992)) (internal quotation marks omitted).

125. Liberty Mut. Ins. Co. v. United States *ex rel.* Lamesa Nat'l Bank (*In re* Schooler), 725 F.3d 498, 500–01 (5th Cir. Aug. 2013).

126. *Id.* at 502.

127. *Id.* at 512–13.

128. *Id.* at 515.

129. Frazin v. Haynes & Boone, L.L.P. (*In re* Frazin), 732 F.3d 313, 317 (5th Cir. Oct. 2013), *cert. denied*, 134 S. Ct. 1770 (2014).

130. *Id.*

131. *Id.* at 324.

132. *Id.* at 319 (citing Stern v. Marshall, 131 S. Ct. 2594, 2596 (2011)).

133. *Id.* at 323–24.

134. *Id.* at 324.

remand "because no harm [was] done, at least in this case, and the district court [would] no doubt simply dismiss whatever [was] remanded."[135]

In *In re Flugence*, the plaintiff in a personal injury case was judicially estopped because her claim was not properly disclosed in her personal bankruptcy, even though it arose post-petition.[136] The trustee could pursue the claim, however, and its counsel could recover professional fees.[137] Accordingly, the Fifth Circuit declined to declare that the trustee's recovery was capped at the amount owing to creditors.[138]

In *In re Croft*, the debtor filed for bankruptcy after judgment was entered against him for attorneys' fees and sanctions in two lawsuits.[139] The debtor sought to lift the stay to pursue appeals of those judgments; the adverse parties in the lawsuits opposed, arguing that the debtor's defensive appellate rights were estate property and could be sold.[140] The district court ruled against the debtor and the Fifth Circuit affirmed.[141] Noting that only two courts have addressed this issue, and reached different results, the Fifth Circuit concluded that the rights had quantifiable value and were thus "property" under Texas law.[142] The court noted that the rights had value to the estate, since appellate success would reduce liability, as well as to the judgment creditors, who may be willing to pay some amount to avoid litigation expense and reversal risk.[143] "Whether the defensive appellate rights are sold depends upon whether the parties can agree on the value of those rights, *not* whether they have any value at all."[144]

Federal Rule of Bankruptcy Procedure 8002(a) says that the notice of appeal from bankruptcy to district court must be filed within fourteen days of the judgment or order at issue.[145] In *In re Berman-Smith*, Berman-Smith filed his notice of appeal to the district court thirty days after entry of final judgment.[146] After reviewing the continuing validity of its older precedent of *In re Stangel*, which held that this deadline is jurisdictional, the Fifth Circuit looked to the Tenth Circuit's opinion in *In re Latture*, which reached the same conclusion.[147] Because "the statute defining jurisdiction over

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135. *Id.* at 326 (Reavley, J., dissenting).

136. Flugence v. Axis Surplus Ins. Co. (*In re* Flugence), 738 F.3d 126, 128 (5th Cir. Nov. 2013) (en banc) (per curiam).

137. *Id.* at 131.

138. *Id.* at 131–32 (applying Reed v. City of Arlington, 650 F.3d 571, 573–77 (5th Cir. 2011)).

139. Croft v. Lowry (*In re* Croft), 737 F.3d 372, 374 (5th Cir. Dec. 2013) (per curiam).

140. *Id.*

141. *Id.* at 374, 376.

142. *Id.* at 375–77.

143. *Id.* at 376 n.2.

144. *Id.*

145. Smith v. Gartley (*In re* Berman-Smith), 737 F.3d 997, 1000 (5th Cir. Dec. 2013) (per curiam) (citing FED. R. BANKR. P. 8002(a)).

146. *Id.* at 999.

147. *Id.* at 1001–02 (citing Emann v. Latture (*In re* Latture), 605 F.3d 830, 836 (10th Cir. 2010); Stangel v. United States (*In re* Stangel), 219 F.3d 498, 500 (5th Cir. 2000) (per curiam)).

bankruptcy appeals, 28 U.S.C. § 158, expressly requires that the notice of appeal be filed under the time limit provided in Rule 8002," the time limit is jurisdictional.[148]

In *In re Green Hills Development Co., L.L.C.*, the Fifth Circuit found that a creditor lacked standing under § 303(b) of the Bankruptcy Code to file an involuntary bankruptcy proceeding because the creditor's debt was subject to a "bona fide dispute."[149] The court first held that the debtor had not waived arguments about § 303(b) by failing to file a conditional cross-appeal from the district court's dismissal order, finding that the arguments fell under the rule allowing affirmance on any argument supported by the record.[150] In reaching its conclusion, the Fifth Circuit noted that the claim had been subject to unresolved, multiyear litigation.[151] The court also observed that the 2005 amendments to the Code defined a bona fide dispute as one "to liability or amount"—a change which drew into question earlier authority that focused only on liability.[152] That change allows consideration of counterclaims related to the creditor's claim.[153]

In re Frost held that when a homestead is permanently exempted from a bankruptcy estate, the proceeds from a subsequent sale of the homestead are not permanently exempt.[154] Frost argued that *In re Zibman* was distinguishable because Frost sold his homestead *after* petitioning for bankruptcy, when the homestead was already exempted, while *Zibman* concerned homestead proceeds obtained *before* bankruptcy.[155] The Fifth Circuit found that distinction immaterial, concluding that once a debtor sells his homestead, the essential character of the homestead changes from "homestead" to "proceeds," placing it under a more limited six-month exemption.[156] Accordingly, when a debtor does not reinvest the proceeds within that period, the funds lose the protection of Texas law and are no longer exempt from the estate.[157]

A law firm appealed the disposition of its fee application in *In re Yazoo Pipeline Co*.[158] The district court vacated in part and remanded the case back to the bankruptcy court for the firm to make another fee request that provided

148. *Id.* at 1003.

149. Credit Union Liquidity Servs., L.L.C. v. Green Hills Dev. Co. (*In re* Green Hills Dev. Co., L.L.C.), 741 F.3d 651, 653, 655 (5th Cir. Feb. 2014).

150. *Id.* at 659–60.

151. *Id.* at 659.

152. *Id.* at 656.

153. *Id.* at 657–58 (disavowing Chi. Title Ins. Co. v. Seko Inv., Inc. (*In re* Seko Inv., Inc.), 156 F.3d 1005, 1007 (9th Cir. 1998), *superseded by statute*, 11 U.S.C.A § 303 (West 2004 & Supp. 2014)).

154. Viegelahn v. Frost (*In re* Frost), 744 F.3d 384, 385 (5th Cir. Mar. 2014).

155. *Id.* at 387–89 (citing Zibman v. Tow (*In re* Zibman), 268 F.3d 298, 300–01 (5th Cir. 2001)).

156. *Id.* at 387.

157. *Id.* at 388–89.

158. Okin Adams & Kilmer, L.L.P. v. Hill (*In re* Yazoo Pipeline Co.), 746 F.3d 211, 212 (5th Cir. Mar. 2014).

more necessary information.[159] The firm appealed to the Fifth Circuit, which concluded it had no appellate jurisdiction because the order was not final: "Given that the bankruptcy court must perform additional fact-finding and exercise discretion when determining an appropriate attorney's fee award, the district court's order requires the bankruptcy court to perform judicial functions upon remand."[160] A detailed dissent concluded that, while the district court's order required "more than a mechanical entry of judgment . . . it also involve[d] only mechanical and computational tasks that are 'unlikely to affect the issue that the disappointed party wants to raise on appeal.'"[161] Accordingly, the dissent warned that "refusing to hear this appeal undermines the long-recognized, salutary purpose of allowing appeals on discrete issues well before a final order in bankruptcy."[162]

At issue in *In re ASARCO, L.L.C.* was a fee enhancement associated with an exceptional recovery in fraudulent transfer litigation for a bankruptcy estate.[163] The Fifth Circuit credited the bankruptcy court's detailed findings about the quality of the law firms' work and the "rare and extraordinary" result.[164] In so doing, the Fifth Circuit reminded that "[b]ecause this court, like the Supreme Court, has not held that reasonable attorneys' fees in federal court have been 'nationalized,' the bankruptcy court's charts comparing general hourly rates of out-of-state firms and rates charged in cases pending in other circuits are not relevant."[165] The court rejected the firms' request for compensation from the estate for defending their fee applications, reasoning that the Code had sufficient protections against vexatious litigation, and declined to further expand the American Rule about defendants' fees.[166]

In *United States ex rel. Spicer v. Westbrook*, the Fifth Circuit held that bankruptcy debtors failed to make adequate disclosure of a potential False Claims Act (FCA) claim as an estate asset.[167] Accordingly, the trustee was the real party in interest and was able to take over the administration of the claim, even though he did not learn of it until after the bankruptcy closed and long after suit was filed on the claim.[168] As to the merits, the court affirmed dismissal, reminding that "a false certification of compliance, without more,

159. *Id.*

160. *Id.* at 216.

161. *Id.* at 220 (Southwick, J., dissenting) (quoting *In re* Lift & Equip. Serv., Inc., 816 F.2d 1013, 1016 (5th Cir. 1987)).

162. *Id.* at 222.

163. Asarco, L.L.C. v. Baker Botts, L.L.P. (*In re* ASARCO, L.L.C.), 751 F.3d 291, 293 (5th Cir. Apr.), *cert. granted*, 135 S. Ct. 44 (2014).

164. *Id.* at 298 (quoting *In re* ASARCO LLC, No. 05-21207, 2011 WL 2974957, at *7 (S.D. Tex. July 20, 2011)).

165. *Id.* at 297.

166. *Id.* at 301–02.

167. United States *ex rel.* Spicer v. Westbrook, 751 F.3d 354, 356 (5th Cir. May 2014).

168. *Id.* at 363–64.

does not give rise to a false claim for payment unless payment is conditioned on compliance."[169]

Placid Oil filed for bankruptcy, and the claim bar date, published in *The Wall Street Journal*, passed in 1987.[170] As summarized in *In re Placid Oil Co.*:

> By the early 1980s, Placid was aware, generally, of the hazards of asbestos exposure and, specifically, of Mr. Williams's exposure in the course of his employment. Prior to the Plan's confirmation, no asbestos-related claims had ever been filed against Placid, and the Williamses did not file any proof of claim.[171]

Applying *In re Crystal Oil Co.*, the Fifth Circuit affirmed summary judgment in the Williamses' subsequent tort suit against Placid: "Although Placid knew of the dangers of asbestos and Mr. Williams's exposure, such information suggesting only a risk to the Williamses does not make the Williamses known creditors. Here, Placid had no specific knowledge of any actual injury to the Williamses prior to its bankruptcy plan's confirmation."[172]

VII. CLASS ACTIONS

In *Hood ex rel. Mississippi v. JP Morgan Chase & Co.*, Mississippi brought six *parens patriae* actions, alleging inappropriate charges for credit card "ancillary services" in violation of state law.[173] Defendants removed under CAFA and on the ground of complete preemption, and the district court denied remand.[174] The Fifth Circuit reversed.[175] As to CAFA, the court found that the defendants (who had the burden) did not establish that any plaintiff had a claim of $75,000—especially when Mississippi offered evidence that the average yearly charge at issue was around $100.[176] The Fifth Circuit also observed that the defendants likely had similar information in their records.[177] The court acknowledged that federal usury laws have the effect of complete preemption, but found that the charges at issue in these

169. *Id.* at 366 (quoting United States *ex rel.* Steury v. Cardinal Health, Inc., 625 F.3d 262, 269 (5th Cir. 2010)).

170. Williams v. Placid Oil Co. (*In re* Placid Oil Co.), 753 F.3d 151, 153 (5th Cir. May 2014).

171. *Id.*

172. *Id.* at 157 (citing principles outlined in La. Dep't of Envtl. Quality v. Crystal Oil Co. (*In re* Crystal Oil Co.), 158 F.3d 291, 297 (5th Cir. 1998)).

173. Hood *ex rel.* Mississippi v. JP Morgan Chase & Co., 737 F.3d 78, 81–82 (5th Cir. Dec. 2013) (per curiam).

174. *Id.* at 82.

175. *Id.*

176. *Id.* at 86.

177. *Id.*

cases could not be characterized as "interest" within the meaning of those laws.[178]

In a 9–0 decision, the Supreme Court reversed the Fifth Circuit's panel opinion in *Mississippi ex rel. Hood v. AU Optronics Corp*.[179] After review of CAFA's language and structure, the Supreme Court concluded that an action brought on behalf of consumers by a state was not a "mass action" that could allow removal, since such an action has only one plaintiff, and the claims of the relevant consumers cannot be counted without "unwieldy inquiries."[180] The Supreme Court characterized the mass action provision of CAFA as a "backstop" to prevent the repackaging of a class action.[181]

The State of Louisiana sued several insurers in *Louisiana v. American National Property & Casualty Co.*, alleging it was the beneficiary of assignments made by the insured in return for help in rebuilding efforts after Hurricane Katrina.[182] The insurers removed to federal court under CAFA.[183] After extensive proceedings, the district courts ultimately severed the actions by individual policy and ordered remand to state court.[184] The Fifth Circuit reversed because "at the time of removal, these claims clearly possessed original federal jurisdiction as an integrated part of the CAFA class action."[185] Noting language in *Honeywell International, Inc. v. Phillips Petroleum, Co.* that "a severed action must have an independent jurisdictional basis," the court limited that language as "appl[ying] only to severed claims that are based on supplemental jurisdiction."[186]

Class actions were filed regarding the effects of an explosion at a chemical plant.[187] The Fifth Circuit agreed that CAFA jurisdiction had not been established.[188] Citing *Berniard v. Dow Chemical Co.*, the court held in *Perritt v. Westlake Vinyls Co.*: "[D]efendants overstate the reach of the plaintiffs' petitions by improperly equating the geographic areas in which potential plaintiffs might reside with the population of the plaintiff class itself. Further, the comparisons that the Defendants–Appellants make to damage recovery in similar cases is too attenuated to satisfy their burden."[189] The court also noted: "[B]ald exposure extrapolations are insufficient to

178. *Id.* at 89–92.
179. Mississippi *ex rel.* Hood v. AU Optronics Corp., 134 S. Ct. 736, 746 (2014).
180. *Id.* at 744.
181. *Id.* at 738.
182. Louisiana v. Am. Nat'l Prop. & Cas. Co., 746 F.3d 633, 635 (5th Cir. Mar. 2014).
183. *Id.* at 634.
184. *Id.*
185. *Id.* at 640.
186. *Id.* at 636, 640 (citing Honeywell Int'l, Inc. v. Phillips Petrol. Co., 415 F.3d 429, 431 (5th Cir. 2005)).
187. Perritt v. Westlake Vinyls Co., 562 F. App'x 228, 229–30 (5th Cir. Apr. 2014) (per curiam).
188. *Id.* at 229.
189. *Id.* at 231–32 (quoting Berniard v. Dow Chem. Co., 481 F. App'x 859, 864 (5th Cir. 2010) (per curiam)) (internal quotation marks omitted).

establish the likely number of persons affected by the release or, for those affected, the severity of their harm."[190]

A district court vacated a previously granted class certification in a securities case in 2004.[191] The putative class re-filed in Texas in 2009.[192] The district court found the action time-barred, concluding in *Hall v. Variable Annuity Life Insurance, Co.* that any tolling effect under *American Pipe & Construction Co. v. Utah* ended with the order of vacatur.[193] The Fifth Circuit affirmed, finding no meaningful distinction in this context between a vacatur order and a decision not to certify in the first instance.[194]

Odle v. Wal-Mart Stores, Inc. presents an interesting, though unlikely to recur, issue about the tolling of limitations during appellate review of class certification.[195] The question was whether one of the plaintiffs in the original *Dukes v. Wal-Mart Stores, Inc.* class action was barred by limitations when the Ninth Circuit's en banc ruling had remanded the "former employee" claims (which included hers) for further consideration under a different part of Rule 23 than what the district court used.[196] The Fifth Circuit concluded that, under the considerations detailed by *American Pipe & Construction Co.*, and later circuit cases applying it, the claim was not time-barred: "To rule otherwise would frustrate *American Pipe*['s] careful balancing of the competing goals of class action litigation on the one hand and statutes of limitation on the other, by requiring former class members to file duplicative, needless individual lawsuits before the court could resolve the class certification issue definitively."[197]

Finally, the Fifth Circuit has now resolved the challenges to BP's Deepwater Horizon settlement. This Article uses "First Panel" and "Second Panel" to distinguish the earlier opinions:

1. In October 2013, in three separate opinions, First Panel remanded for more fact finding as to accounting issues about the settlement.[198]
2. In January 2014, in a 2–1 decision, Second Panel affirmed the settlement over challenges based on Rule 23 and related standing issues.[199]
3. In March 2014, satisfied with the results of the remand, First Panel affirmed the mechanics of the settlement in a 2–1 decision.[200]

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190. *Id.* at 232 (alteration in original) (quoting *Berniard*, 481 F. App'x at 863).
191. Hall v. Variable Annuity Life Ins. Co., 727 F.3d 372, 372–74 (5th Cir. Aug. 2013).
192. *Id.* at 374.
193. *Id.* at 374–75 (citing Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 550–52 (1974)).
194. *Id.* at 377–78.
195. Odle v. Wal-Mart Stores, Inc., 747 F.3d 315, 316 (5th Cir. Mar. 2014).
196. *Id.* at 317–18.
197. *Id.* at 323 (footnote omitted) (citing *Am. Pipe & Constr. Co.*, 414 U.S. at 552).
198. *In re* Deepwater Horizon, 732 F.3d 326, 329 (5th Cir. Oct. 2013).
199. *In re* Deepwater Horizon, 739 F.3d 790, 795 (5th Cir. Jan.), *cert. denied*, 135 S. Ct. 754 (2014).
200. *In re* Deepwater Horizon, 744 F.3d 370, 373 (5th Cir. Mar.), *reh'g denied*, 753 F.3d 509, *reh'g denied en banc*, 753 F.3d 516, *cert. denied*, 135 S. Ct. 754 (2014).

4. On May 19, 2014:
   A. First Panel denied panel rehearing, concluding in a 2–1 opinion: "In settling this lawsuit, the parties agreed on a substitute for direct proof of causation by a preponderance of the evidence. By settling this lawsuit and agreeing to the evidentiary framework for submitting claims, the claimants did not abandon their allegations of Article III causation."[201]
   B. Second Panel also denied panel rehearing, in a 2–1 opinion, noting its complete agreement with the denial of panel rehearing by First Panel.[202]
   C. The full court denied en banc rehearing as to First Panel and also as to Second Panel, both over dissents that stressed Article III issues.[203]

VIII. CONSUMER

The year 2013 has seen a steady stream of unpublished opinions favoring mortgage servicers, followed by a published opinion affirming a Mortgage Electronic Registration System (MERS) assignment, and then a second published opinion rejecting arguments about the alleged "robo-signing" of assignment documents.

In *Reinagel v. Deutsche Bank National Trust Co.*, a suit arising out of foreclosure on a Texas home equity loan, the Fifth Circuit held: (1) borrowers could challenge the validity of assignments to the servicer, since they were not asserting affirmative rights under those instruments; (2) alleged technical defects in the signature on the relevant assignment created rights only for the servicer and lender, not the borrower; (3) the assignment did not have to be recorded, mooting challenges to defects in the acknowledgement; and (4) a violation of the relevant Pooling and Servicing Agreement related to the transfer of the note did not create rights for the borrower.[204] The opinion concluded with two important caveats: the court was not deciding whether the Texas Supreme Court would adopt the "note-follows-the-mortgage" concept, and it reminded: "We do not condone 'robo-signing' more broadly and remind that bank employees or contractors who commit forgery or prepare false affidavits subject themselves and their supervisors to civil and criminal liability."[205]

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201. *In re Deepwater Horizon*, 753 F.3d at 515–16.
202. *See id.* at 518.
203. *See id.*
204. *See* Reinagel v. Deutsche Bank Nat'l Trust Co., 722 F.3d 700, 705–08 (5th Cir. July), *amended and superseded on reh'g*, 735 F.3d 220 (5th Cir. Oct. 2013).
205. *Id.* at 709.

The borrower in *Martin–Janson v. JP Morgan Chase Bank, N.A.* alleged waiver and promissory estoppel claims arising from a foreclosure.[206] After reviewing the plaintiff's five allegations about the specific statements made, the court reasoned:

> Based on the foregoing factual allegations, Martin–Janson asserts that she seeks discovery to reveal either the draft loan modification agreement that JPMorgan allegedly prepared, or the terms of her promised modification based on the lender's standard formulae. In these ways, Martin–Janson argues, she would be able to prove that JPMorgan "promise[d] to sign a written agreement which itself complies with the statute of frauds."
>
> Viewing Martin–Janson's factual allegations, and the reasonable inferences to be drawn therefrom, in the light most favorable to her, we conclude that she has pled a plausible promissory estoppel claim that potentially avoids JPMorgan's statute of frauds defense.[207]

Accordingly, the court reversed a Rule 12 dismissal of the promissory estoppel claim, while affirming as to waiver.[208]

And, in *Miller v. BAC Home Loans Servicing, L.P.*, the Fifth Circuit began by reminding that the Texas fair debt collection statute is broader than the federal one and can encompass a servicer.[209] Here, the borrower stated a cognizable claim about the servicer misrepresenting its services (the status of a foreclosure), while failing to do so on several other misrepresentation claims based on other statutory provisions.[210] The court rejected a DTPA claim because the allegations related to a loan modification—an entirely financial transaction that did not involve a "good" or "service"—and the plaintiffs thus lacked standing.[211] In so doing, the Fifth Circuit distinguished authority, finding consumer status as to an original home-loan transaction where the goal can be called obtaining a house.[212] The court also found that the defendant properly raised the statute of frauds as a defense on a Rule 12 ground in opposition to the plaintiff's promissory estoppel claims.[213]

Similarly, in *Gardocki v. JP Morgan Chase Bank, N.A.*, a borrower alleged that the servicer mishandled an insurance issue, setting in motion events that led to a wrongful foreclosure.[214] Citing *Bell Atlantic Corp. v.*

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206. Martin–Janson v. JP Morgan Chase Bank, N.A., 536 F. App'x 394, 395 (5th Cir. July 2013) (per curiam).

207. *Id.* at 399 (alteration in original) (citations omitted).

208. *Id.* at 399–400.

209. Miller v. BAC Home Loans Servicing, L.P., 726 F.3d 717, 722 (5th Cir. Aug. 2013).

210. *Id.* at 723–24.

211. *Id.* at 725.

212. *Id.*

213. *Id.* at 725–26.

214. Gardocki v. JP Morgan Chase Bank, N.A., 538 F. App'x 459, 460 (5th Cir. Aug. 2013) (per curiam).

Twombly and *Ashcroft v. Iqbal*, and criticizing the lack of analysis by the district court, the Fifth Circuit held:

> Were Gardocki to prove the facts alleged in his complaint, it is plausible the district court could find that JPMC breached the Mortgage contract by failing to endorse the reimbursement check in a timely manner, thereby causing Gardocki to fail to meet his monthly payment obligations. But for this failure, foreclosure would have been improper. It is equally plausible that Gardocki will fail to meet his burden to prove the above facts, and that JPMC might successfully move for summary judgment.[215]

Outside the mortgage context, the Federal Trade Commission (FTC) sued debt negotiation companies, claiming that their ads deceptively promised substantial reductions in consumers' credit card debt.[216] The district court concluded that "deception" under § 5 of the FTC Act should be evaluated on the basis of all information disclosed by the companies to consumers up to the point of purchase, and entered judgment for the defendants.[217] In *FTC v. Financial Freedom Processing, Inc.*, the Fifth Circuit noted that the district court's analysis was "dubious," noting authority in other circuits that holds "each advertisement must stand on its own merits."[218] The FTC, however, elected to challenge the district court's finding about deceptiveness at the point of purchase.[219] Here, "while the Companies' radio ads and websites may be misleading—indeed, it is difficult to conclude that the websites are not deceptive—we are satisfied that substantial evidence supports the district court's finding."[220]

Verdin v. Federal National Mortgage Ass'n rejected several claims against a mortgage servicer.[221] As to a negligent misrepresentation claim, the Fifth Circuit held: "[The servicer's] only allegedly false representation—that [the borrower] should submit a request for postponement and 'not worry about the foreclosure'—relates to a promise to do something in the future."[222] The claim also failed because "Texas requires pecuniary loss independent from the loan agreement to support a negligent-misrepresentation claim," and alleged mental anguish did not satisfy that requirement.[223] Finally, the court rejected waiver and misrepresentation claims:

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215. *Id.* at 463 (citing Ashcroft v. Iqbal, 556 U.S. 662 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007)).

216. FTC v. Fin. Freedom Processing, Inc., 538 F. App'x 488, 489 (5th Cir. Aug. 2013).

217. *Id.*

218. *Id.*

219. *Id.* at 490.

220. *Id.* (footnotes omitted).

221. Verdin v. Fed. Nat'l Mortg. Ass'n, 540 F. App'x 253, 254 (5th Cir. Aug. 2013) (per curiam).

222. *Id.* at 255 (quoting Brief of Appellant Adrian Verdin at 33, *Verdin*, 540 F. App'x 253 (No. 12-40895), 2012 WL 5996182, at *23).

223. *Id.*

> [The borrower] is unable to demonstrate that [the servicer] made an absolute repudiation of an obligation because providing mixed signals of an intent to foreclose—i.e., suggesting that it would consider a postponement and not to worry about a foreclosure—does not rise to an absolute declaration of intent to abandon an obligation.[224]

In *Serna v. Law Office of Joseph Onwuteaka, P.C.*, the plaintiff alleged that a debt collector had sued him in an impermissible venue under the Fair Debt Collection Practices Act (FDCPA).[225] The defendants obtained summary judgment on limitations; the question was whether the offending act under the FDCPA—to "bring such action"—was filing of the suit or service.[226] The Fifth Circuit found that the term bring is ambiguous in this context, which justifies consideration of the statute's history and purpose.[227] It then concluded that "the FDCPA's remedial nature compels the conclusion that a violation includes both filing and notice" and reversed.[228] The dissent argued that the term was not ambiguous because the term "brought" refers only to filing in another provision of the statute.[229]

In one of the many unpublished cases dismissing "split-the-note" cases after *Martins v. BAC Home Loans Servicing, L.P.*, the Fifth Circuit addressed a foreclosure sale that had taken place while an ex parte temporary restraining order (TRO) purported to enjoin BAC, assignor of the note securing the deed of trust in favor of First Magnus Financial Corporation, from proceeding with a non-judicial foreclosure sale in *Hall v. BAC Home Loans Servicing, L.P.*[230] Because the TRO did not state why it was granted without notice, the Fifth Circuit concluded that it "did not meet the requirements of Texas Rule of Civil Procedure 680," making it "void under Texas law" and "a mere nullity."[231] Accordingly, the court could not support a wrongful foreclosure claim.[232]

In another opinion that happened to come out the same day as the slightly revised robo-signing opinion of *Reinagel*, the Fifth Circuit briefly reviewed the requirements for a summary judgment affidavit in a note case. In *RBC Real Estate Finance, Inc. v. Partners Land Development, Ltd.*, the affidavit purported to be based on personal knowledge and said that "[a]s an account manager at RBC [the witness] is responsible for monitoring and collecting the . . . Notes. Therefore, [he] is competent to testify on the

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224. *Id.* at 256.
225. Serna v. Law Office of Joseph Onwuteaka, P.C., 732 F.3d 440, 441 (5th Cir. Oct. 2013).
226. *Id.* at 443.
227. *Id.* at 446.
228. *Id.* at 445.
229. *Id.* at 450–51 (Smith, J., dissenting).
230. Hall v. BAC Home Loans Servicing, L.P., 541 F. App'x 430, 431–32 (5th Cir. Oct. 2013) (per curiam).
231. *Id.* at 433.
232. *Id.* at 434.

amounts due."[233] As to sufficiency, the Fifth Circuit quoted Texas intermediate appellate case law: "A lender need not file detailed proof reflecting the calculations reflecting the balance due on a note; an affidavit by a bank employee which sets forth the total balance due on a note is sufficient to sustain an award of summary judgment."[234]

A zealous borrower filed successive lawsuits arising from a foreclosure against U.S. Bank, its attorneys, and MERS in *Maxwell v. U.S. Bank, N.A.*[235] While MERS was not a party to the first two cases, it asserted res judicata, based on those cases' dismissals, arguing that it was in privity with the defendants.[236] The Fifth Circuit cited *Taylor v. Sturgell*, which described how res judicata reaches "a variety of preexisting substantive legal relationships between the person to be bound and a party to the judgment," including "preceding and succeeding owners of property, bailee and bailor, and assignee and assignor," as well as other relationships described as "privity."[237] Here, the mortgage documents identified MERS as "a nominee for" U.S. Bank, which satisfied *Taylor*.[238]

Among other issues in *Farkas v. GMAC Mortgage, L.L.C.*, a borrower disputed whether he had received proper notice of the servicer's identity, arguing that only the current mortgagee could send effective notice.[239] The Fifth Circuit affirmed a judgment against him on the grounds of quasi-estoppel, noting:

> The duration and regularity of these continued payments to mortgage servicers who had not been identified by current mortgagees constitute acquiescence to the validity of notice of transfer from one mortgage servicer to the next. The equitable relief afforded by quasi-estoppel assures that a party's position on a given issue is more than a matter of mere convenience but is instead a stance to which it is bound.[240]

The plaintiffs in *Moran v. Ocwen Loan Servicing, L.L.C.* ran afoul of the holding in *Priester v. JP Morgan Chase Bank, N.A.* that "liens that are contrary to the requirements of § 50(a) [of the Texas Constitution] are voidable rather than void from the start."[241] The plaintiffs sought certification

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233. RBC Real Estate Fin., Inc. v. Partners Land Dev., Ltd., 543 F. App'x 477, 479 (5th Cir. Oct. 2013) (per curiam).

234. *Id.* (quoting Hudspeth v. Investor Collection Servs., L.P., 985 S.W.2d 477, 479 (Tex. App.—San Antonio 1998, no pet.)).

235. Maxwell v. U.S. Bank, N.A., 544 F. App'x 470, 471 (5th Cir. Oct. 2013) (per curiam).

236. *Id.*

237. *Id.* at 473 (quoting Taylor v. Sturgell, 128 S. Ct. 2161, 2172–73 (2008)).

238. *Id.*

239. Farkas v. GMAC Mortg., L.L.C., 737 F.3d 338, 343 (5th Cir. Dec. 2013) (per curiam), *cert. denied*, 135 S. Ct. 281 (2014).

240. *Id*. at 344.

241. Moran v. Ocwen Loan Servicing, L.L.C., 560 F. App'x 277, 278 (5th Cir. Mar. 2014) (per curiam) (alteration in original) (quoting Priester v. JP Morgan Chase Bank, N.A., 708 F.3d 667, 674 n.14 (5th Cir.), *cert. denied*, 134 S. Ct. 196 (2013)).

to the Texas Supreme Court to correct what they contended was an erroneous holding in *Priester*.[242] The Fifth Circuit gave two valuable general reminders in this area. First: "It is a well-settled Fifth Circuit rule of orderliness that one panel of our court may not overturn another panel's decision, absent an intervening change in the law, such as by a statutory amendment, or the Supreme Court, or our *en banc* court."[243] Second "While the Texas Constitution allows this court to certify questions to the Texas Supreme Court, certification is not a proper avenue to change our binding precedent."[244]

Congress amended the Fair Credit Reporting Act to have a limitations period of "2 years after the date of discovery by the plaintiff of the violation that is the basis for such liability."[245] The plaintiff in *Mack v. Equable Ascent Financial, L.L.C.* argued that this amendment meant "he could not have discovered the violation until he had researched the statute."[246] The Fifth Circuit disagreed, finding that the amendment was made to equalize the treatment of different types of claims and that the plaintiff's reading "would indefinitely extend the limitations period."[247]

The plaintiffs in *Singha v. BAC Home Loans Servicing, L.P.* alleged a number of foreclosure-related claims, most of which were resolved by recent Fifth Circuit precedent.[248] Among them was a claim for unfair debt collection based on the common situation of failed negotiations regarding a loan modification.[249] As to that issue, the court observed:

> We do not announce a rule that modification discussions may never be debt collection activities. We do conclude, though, that the [plaintiffs'] particular factual allegations here—allegations of what occurred during the course of what they describe as more than fifty phone calls and other contacts during a protracted loan modification process—are not communications in connection with *collection* of a debt.[250]

IX. CONTRACTS

The Leas joined a wholesale membership club and made a $100 payment that day as part of the down payment.[251] Their contract did not include the starting date, interval, or date of the month when their installment

242. *Id.* at 279.
243. *Id.* (quoting Jacobs v. Nat'l Drug Intelligence Ctr., 548 F.3d 375, 378 (5th Cir. 2008)).
244. *Id.* (quoting Jefferson v. Lead Indus. Ass'n, 106 F.3d 1245, 1247 (5th Cir. 1997) (per curiam)).
245. Mack v. Equable Ascent Fin., L.L.C., 748 F.3d 663, 665 (5th Cir. Apr. 2014) (per curiam).
246. *Id.* (internal quotation marks omitted).
247. *Id.* at 666.
248. Singha v. BAC Home Loans Servicing, L.P., 564 F. App'x 65, 66 (5th Cir. Apr. 2014) (per curiam).
249. *Id.* at 67.
250. *Id.* at 71.
251. Lea v. Buy Direct, L.L.C., 755 F.3d 250, 252 (5th Cir. June 2014).

payments would be due over the next three years for the $3,995 membership fee.[252] In *Lea v. Buy Direct, L.L.C.*, the Fifth Circuit found that the Truth in Lending Act (TILA) applied because the Leas had entered a credit transaction, even if they had not bought any goods yet.[253] Then, recognizing that "[the defendant's] decision to leave the contract blanks unfilled was, at least in part, an accommodation to the Leas," the court nevertheless reversed the district court's summary judgment for the club on the Leas' TILA claim.[254] The court stated: "Perhaps our reversal falls into the category of letting no good deed go unpunished. Another perspective, though, is that TILA provides an unvarying set of rules that protect consumers who might otherwise voluntarily waive what they should not."[255] The court continued by saying: although "[w]e do not perceive any harm here . . . harm is not a prerequisite for [TILA] relief."[256]

The contract between Anadarko (oil producer) and Williams Alaska (refinery operator) had monthly invoicing, which they customarily "true-up" the following month to reflect the findings of an independent third party about the quality of oil transported.[257] After their contract terminated, the FERC discovered an error in how the quality of oil was determined.[258] The issue in *Anadarko Petroleum Corp. v. Williams Alaska Petroleum, Inc.* was whether the compensation for that error—an almost $9 million credit to Williams Alaska by the third party—was in turn owed to Anadarko.[259] In addition to other holdings unique to the parties' contract, the Fifth Circuit reminded that under the Texas Uniform Commercial Code: "Although the terms of a written agreement may not be contradicted by contemporaneous or antecedent evidence, terms may be explained by course of dealing or course of performance."[260] Here, the parties "consistently made [true-up] adjustments," supporting a reading that favored Anadarko, and the court reversed and rendered judgment for Anadarko for the $9 million credit amount.[261]

Deep Marine Technology provided construction support vessels to Biliton Petroleum Deepwater, Inc. (BHP), an offshore drilling company.[262] A BHP contractor sued for injuries arising from an "offshore personnel basket transfer" between a Deep Marine vessel and a BHP platform.[263] There

252. *Id.* at 251–52.
253. *Id.* at 253.
254. *Id.* at 254.
255. *Id.*
256. *Id.*
257. Anadarko Petrol. Corp. v. Williams Alaska Petrol., Inc., 737 F.3d 966, 968–69 (5th Cir. Aug. 2013).
258. *Id.* at 969.
259. *Id.*
260. *Id.* at 970.
261. *Id.* at 971–72.
262. Duval v. N. Assurance Co., 722 F.3d 300, 302 (5th Cir. July 2013).
263. *Id.*

was no dispute that the parties' Master Services Agreement required BHP to defend and indemnify Deep Marine from this claim.[264] The issue in *Duval v. Northern Assurance Co.* was whether BHP had to defend and indemnify Deep Marine's insurers, who were joined to the litigation under Louisiana's Direct Action Statute.[265] The Fifth Circuit noted that indemnity provisions are strictly construed and that: "The parties could have included the Contractor's insurers within the definition of 'Contractor Group,' as parties in other cases have done."[266] Based on that conclusion, the court rejected several theories about how the insurers could benefit from the indemnity provision and affirmed summary judgment against them.[267]

The defendant in *American General Life Insurance Co. v. Bryan* owned a company (IMG Inc.) through which he routed commission checks that he received for selling life insurance.[268] An insurer rescinded a policy and then sought repayment of the commission.[269] The agent defended on the ground that the insurer's agency relationship was actually with another company, "IMG Cap."[270] The Fifth Circuit found that issues about the scope of the parties' contracts were not appropriate for summary judgment, but the case was properly resolved by the doctrine of quasi-estoppel because the agent routinely used IMG Inc. for the handling of commissions and had not used IMG Cap.[271] Accordingly, it would be "unconscionable to allow [the agent] to hide behind the assignment . . . when his behavior over a multiple-year period was flagrantly inconsistent with the legal arguments he now urges us to adopt on appeal."[272]

The district court awarded attorneys' fees for a lawsuit filed in breach of a release, and the Fifth Circuit affirmed in *Dallas Gas Partners, L.P. v. Prospect Energy Corp*.[273] Among other arguments, the appellants contended that even if they were bound by the release, they did not breach it because they were not named plaintiffs in the offending action.[274] While admitting that they funded the lawsuit and directed the plaintiff entity to bring the suit, they argued that those actions did not violate the agreement not to "institute, maintain or prosecute any action."[275] The court found that maintain meant financial support.[276]

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264. *Id.* at 303.
265. *Id.*
266. *Id.* at 304.
267. *Id.* at 306.
268. Am. Gen. Life Ins. Co. v. Bryan, 538 F. App'x 516, 517 (5th Cir. Aug. 2013) (per curiam).
269. *Id.*
270. *Id.* at 517–18.
271. *Id.* at 519–20.
272. *Id.* at 520.
273. Dall. Gas Partners, L.P. v. Prospect Energy Corp., 733 F.3d 148, 151 (5th Cir. Oct. 2013).
274. *Id.* at 157.
275. *Id.* at 157–58 (quoting Prospect Energy Corp. v. Dall. Gas Partners, L.P., 761 F. Supp. 2d 579, 602–03 (S.D. Tex. 2011)).
276. *Id.* at 158.

CHS, Inc. v. Plaquemines Holdings, L.L.C. presented the interaction of the Bankruptcy Code and an old section of the Louisiana Civil Code (involving cases from 1828, 1849, and 1913).[277] The Louisiana Code provision provides: "When a litigious right is assigned, the debtor may extinguish his obligation by paying to the assignee the price the assignee paid for the assignment, with interest from the time of the assignment."[278] As the Fifth Circuit noted: "The law is aimed at preventing unnecessary litigation by reducing the ability of third parties to buy and sell legal claims for profit."[279] CHS, part owner—along with a bankrupt company of a tract of land—attempted to redeem that company's interest after it was sold as part of a dissolution case required by the bankruptcy.[280] The court held that the sale, conducted pursuant to bankruptcy court orders, fell within a "judicial-sale" exception to the Code provision that prevented CHS from using it here.[281]

The Fifth Circuit continued its conservative approach to the construction of guaranties in *McLane Foodservice, Inc. v. Table Rock Restaurants, L.L.C.*[282] In 1997, an investor in a restaurant chain guaranteed the chain's debts to PFS, a division of Pepsico.[283] Years later, McLane became the owner of PFS's operations after a series of sales transactions.[284] In 2010, a customer of McLane, called Table Rock, went out of business, owing McLane over $400,000 and sought to collect on the original guaranty.[285] The Fifth Circuit agreed with the district court that the guaranty only reached credit extended by PFS, that McLane was not an "affiliate" of PFS, and that the "successors, transferees and assigns" language in the guaranty could not expand the scope of the underlying guaranty obligation.[286]

The plaintiff in *Weeks Marine, Inc. v. Standard Concrete Products, Inc.* fell from a crane during a bridge construction project.[287] He sued Weeks Marine, the general contractor, who in turn sought indemnity from Standard Concrete, the manufacturer of the concrete fender modules for the project.[288] The district court granted summary judgment for the manufacturer and the Fifth Circuit affirmed.[289] A broader indemnity obligation in the original purchase order was limited by the additional terms and conditions to "actual damages relating to workmanship of Seller's (Standard Concrete)

277. CHS, Inc. v. Plaquemines Holdings, L.L.C., 735 F.3d 231, 233 (5th Cir. Nov. 2013).
278. *Id.* at 235 (quoting LA. CIV. CODE ANN. art. 2652 (2013)).
279. *Id.*
280. *Id.* at 234–35.
281. *Id.* at 241.
282. McLane Foodservice, Inc. v. Table Rock Rests., L.L.C., 736 F.3d 375, 376 (5th Cir. Nov. 2013).
283. *Id.* at 376–77.
284. *Id.* at 377.
285. *Id.*
286. *Id.* at 379.
287. Weeks Marine, Inc. v. Standard Concrete Prods., Inc., 737 F.3d 365, 367 (5th Cir. Dec. 2013).
288. *Id.*
289. *Id.*

product."[290] Accordingly, the plaintiff's claims, related to a steel component of the product made by another company, were not covered: "The steel modules are a component that Standard Concrete used to make *its* product; they are not the product itself. Standard Concrete's products are the pre-cast concrete fender modules. The common usage of 'product' distinguishes this term from components, tools, and equipment used in the manufacturing process."[291]

The parties' agreement in *APL Logistics Americas, Ltd. v. TTE Technology, Inc.* said: "Upon payment of the Lease Termination Fee, TTE will no longer have any obligations under Section 9.1A of the Agreement."[292] The district court found that the structure of the agreement meant that provision did not apply to all of the relevant buildings.[293] The Fifth Circuit disagreed: "While such a division may be analytically satisfying, it is unsupported by any other language in the MOU, such as, for example, a paragraph heading identifying a particular provision as only relating to one warehouse."[294]

After Washington Mutual Bank failed, the FDIC conveyed its assets and liabilities to JP Morgan Chase Bank.[295] Several landowners sought to enforce lease terms against Chase by virtue of that conveyance.[296] The Fifth Circuit affirmed summary judgment for these landowners in *Excel Willowbrook, L.L.C. v. JP Morgan Chase Bank, N.A.*[297] First, the Fifth Circuit "reluctantly" followed two other circuits, which found that a "no-beneficiaries" clause in the FDIC's assignment extinguished the landlords' rights, noting its own belief that the lease requirements were more in the nature of primary obligations.[298] But the court then agreed with the district court that the landlords were in privity of estate with Chase and could enforce the leases for that reason, characterizing the FDIC's argument to the contrary as "ignor[ing] eight centuries of legal history," and expressly disagreeing with an Eleventh Circuit case to the contrary.[299] As for concerns about expansive liability for FDIC assignees, the court observed: "The FDIC can avoid its present plight in future cases by drafting contractual provisions for the right it seeks to claim."[300]

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290. *Id.* at 368.
291. *Id.* at 370 (citing BLACK'S LAW DICTIONARY 1328 (9th ed. 2009)).
292. APL Logistics Ams., Ltd. v. TTE Tech., Inc., 549 F. App'x 247, 250 (5th Cir. Dec. 2013) (per curiam).
293. *Id.* at 249–50.
294. *Id.* at 251.
295. Excel Willowbrook, L.L.C. v. JP Morgan Chase Bank, N.A., 740 F.3d 972, 975 (5th Cir. Jan. 2014).
296. *Id*. at 975–76.
297. *Id.* at 985.
298. *Id.* at 978.
299. *Id.* at 979.
300. *Id.* at 983.

The Fifth Circuit reversed summary judgment on a construction subcontractor's promissory estoppel claim in *MetroplexCore, L.L.C. v. Parsons Transportation, Inc*.[301] The court noted in particular the specificity of the statements made to it by representatives of the general contractor, the parties' relationship on an earlier phase of the project, and the specific communications describing reliance.[302] The court relied heavily on the analysis of a similar claim by the Texas Supreme Court in *Fretz Construction Co. v. Southern National Bank*.[303]

At issue in *In re Bankston* were the damages arising from the termination of a contract about the operation of a gravel pit (sadly, not a magical gravel pit of rule-against-perpetuities lore).[304] The dispute was whether damages were capped at 180 days—the contract term for adequate notice of closure—or whether the closure of the pit was post-breach activity that is not relevant to damage calculation.[305] The Fifth Circuit sided with the bankruptcy court and reversed the district court's enlargement of the damages, concluding: "A contrary result would defeat the maxim of placing a non-breaching party in the same position they would have been had breach not occurred, and award [the plaintiff] more than their expectation interest."[306]

The plaintiff in *Jonibach Management Trust v. Wartburg Enterprises, Inc.* sued the defendant for breach of an oral contract—specifically, an agreement to exclusively market the plaintiff's products in the United States.[307] The defendant made three counterclaims, two of which were dismissed because they relied on an additional oral modification to the contract and could not satisfy the statute of frauds.[308] The third, however, survived before the Fifth Circuit, as it was essentially the mirror image of the plaintiff's claim—contending that the plaintiff wrongfully supplied goods to other distributors.[309] Among other reasons for that conclusion, the court noted that the plaintiff's "pleadings and testimony regarding the initial contract . . . constitute[d] judicial admissions," and reviewed the elements of such an admission.[310]

A restaurant showed the pay-per-view broadcast of a boxing championship without the approval of the holder of the licensing rights in *J&J Sports*

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301. MetroplexCore, L.L.C. v. Parsons Transp., Inc., 743 F.3d 964, 968 (5th Cir. Feb. 2014) (per curiam).
302. *See id.* at 977–81.
303. *Id.* (citing Fretz Constr. Co. v. S. Nat'l Bank, 626 S.W.2d 478, 483 (Tex. 1981)).
304. Hess Mgmt. Firm, LLC v. Bankston (*In re* Bankston), 749 F.3d 399, 401 (5th Cir. Apr. 2014).
305. *Id.* at 403–06.
306. *Id*. at 405.
307. Jonibach Mgmt. Trust v. Wartburg Enters., Inc., 750 F.3d 486, 488 (5th Cir. Apr. 2014).
308. *Id.* at 488–89.
309. *Id.* at 490.
310. *Id.* at 491 n.2.

Productions, Inc. v. Mandell Family Ventures, L.L.C.[311] The licensor sued the restaurant under the Cable Communications Policy Act, and the district court granted summary judgment to the licensor for $350 in statutory damages and $26,780.30 in attorneys' fees.[312] The Fifth Circuit reversed, reviewing two issues.[313] First, as to the licensor's claim under § 553 of the Act, the court found a fact issue as to whether the restaurant had been "specifically authorized . . . by a cable operator" to make the showing, which would bring the restaurant within a statutory safe harbor.[314] The court reviewed affidavit testimony of the cable company that at least showed "the [d]efendants did not steal, intercept, or obtain the broadcast under false pretenses."[315] Second, the court rejected a claim based on § 605 of the Act, holding that the section was limited to radio communications only (thereby siding with the Third Circuit in a split with the Seventh Circuit about the applicability of that section to cable television).[316]

X. DAMAGES

The sole issue for bench trial in *Union Oil Co. v. Buffalo Marine Services, Inc.* was the amount of damages caused by an oil spill.[317] Both sides appealed.[318] The Fifth Circuit affirmed.[319] As to the methodology used by the district court, the Fifth Circuit said: "Contrary to Buffalo's assertion, the 'reasonable certainty' with which Unocal was required to prove lost profits did not require it to identify lost opportunities from specific vessels that would have visited the terminal but for its closure following the spill. Considering figures from adjacent months was more than adequate."[320] The court found "no support in the actual numbers" for an argument about a seasonal spike in revenue during the relevant period.[321] Finally, the Fifth Circuit agreed that a claim determination from the National Pollution Fund Center was inadmissible as proof of damages under Federal Rule of Evidence 408.[322]

In the high-profile "data breach" case of *Lone Star National Bank, N.A. v. Heartland Payment Systems, Inc.*, the district court dismissed several

311. J&J Sports Prods., Inc. v. Mandell Family Ventures, L.L.C., 751 F.3d 346, 347 (5th Cir. May 2014).
312. *Id.*
313. *Id.* at 348, 353.
314. *Id.* at 348 (emphasis omitted) (quoting 47 U.S.C. § 553(a)(1) (2006)).
315. *Id.* at 350.
316. *Id.* at 351–53.
317. Union Oil Co. v. Buffalo Marine Servs., Inc., 538 F. App'x 575, 576 (5th Cir. Aug. 2013) (per curiam).
318. *Id.*
319. *Id.*
320. *Id.* (footnotes omitted).
321. *Id.*
322. *Id.* at 577.

banks' claims against a credit card processor after hackers entered its system and stole confidential information.[323] The banks did not have a contract with the processor.[324] They sought money damages for the cost of replacing compromised credit cards and reimbursing customers for wrongful charges.[325] Applying New Jersey law, the Fifth Circuit held that the economic-loss rule did not bar a negligence claim on these facts at the Rule 12 stage.[326] These banks were an "identifiable class"; Heartland's liability would not be "boundless" but would run only to the banks, and the banks would otherwise have no remedy.[327] The court also noted that it was not clear whether the risk could have been allocated by contract.[328] The court declined to affirm dismissal on several other grounds such as choice of law and collateral estoppel, "as they are better addressed by the district court in the first instance."[329]

A builder obtained a six-figure judgment against an architect, for cost overruns and lost profits, resulting from the architect's negligence.[330] The jury awarded distinct sums for negligence and negligent misrepresentation.[331] The Fifth Circuit found in *Garrison Realty, L.P. v. Fouse Architecture & Interiors, P.C.* that the causes of action were duplicative in this context and reversed as to the inclusion of the smaller award in the final judgment.[332] The court also held that the defendant had waived an argument for a partial offset as a result of a prior lawsuit, finding that offset had not been pleaded as a defense and that the plaintiff was prejudiced because it could have changed its trial proof had the issue been raised earlier.[333] On the pleading issue, the court noted that the defendant had alleged offset, but only claimed it was a bar "in whole" rather than "in whole or in part."[334]

The plaintiff in *Delahoussaye v. Performance Energy Services, L.L.C.* suffered back injuries while working on a drilling platform when a handrail fell on him.[335] The district court awarded general damages of $200,000, despite noting that the plaintiff had exaggerated his complaints of pain and was able to return to work.[336] The award was reviewed for clear error.[337] The

323. Lone Star Nat'l Bank, N.A. v. Heartland Payment Sys., Inc., 729 F.3d 421, 423 (5th Cir. Sept. 2013).
324. *Id.*
325. *Id.*
326. *Id.* at 424.
327. *Id.* at 426.
328. *Id.*
329. *Id.* at 427.
330. Garrison Realty, L.P. v. Fouse Architecture & Interiors, P.C., 546 F. App'x 458, 460 (5th Cir. Oct. 2013) (per curiam).
331. *Id.*
332. *Id.* at 463 (reversing as to the negligent misrepresentation award).
333. *Id.* at 465.
334. *Id.* (emphasis omitted).
335. Delahoussaye v. Performance Energy Servs., L.L.C., 734 F.3d 389, 391 (5th Cir. Oct. 2013).
336. *Id.* at 392.
337. *Id.*

Fifth Circuit reviewed prior awards in comparable cases and concluded that $200,000 was excessive in light of the district court's other fact-findings.[338] Reviewing precedent that established a "maximum recovery" guideline based on 133% of the highest previous recovery for a similar injury, the court remitted the damages to $86,450 (133% of $65,000—the highest comparable recovery found by the court).[339] The plaintiff could accept the remitted award or have a new trial on damages.[340]

A classic problem in restitution law involves how to disgorge profits that result in part from wrongful conduct (i.e., stealing a client) and in part from lawful action (i.e., doing quality work for that stolen client). In *Gulf & Mississippi River Transportation Co. v. BP Oil Pipeline Co.*, the Fifth Circuit addressed the profits of a pumping station located on a disputed tract of land.[341] Under the distinctive terminology of Louisiana law, the landowner argued that the profits were the "civil fruit" of the tract, while the pump operator argued that they came solely from the operation of the pumping business.[342] The Fifth Circuit remanded for clarification of "whether [the district court] was referring to natural fruits, civil fruits, or both" in its analysis of this point.[343] The discussion of the civil law in this area is difficult to follow because of the distinctive vocabulary, but it provides an interesting perspective on a recurring remedies issue.

The plaintiffs in *Garziano v. Louisiana Log Home Co.* made 88% of the installment payments for a build-it-yourself log cabin kit and then defaulted.[344] The log cabin company won summary judgment against several of the plaintiffs' contract and tort claims.[345] Before final judgment, however, it came to light that the company had resold several of the logs and actually was ahead on the transaction overall.[346] The district court denied a Rule 59(e) motion about this information and entered judgment.[347] The Fifth Circuit reversed, holding that the district court incorrectly focused on the plaintiffs' erroneous characterization of the issue as "unjust enrichment," and by doing so, "essentially granted LLH an impermissible double recovery—making the earnest money provision an unenforceable penalty."[348] The court remanded "with instructions for the district court to make findings on the amount of actual damages that LLH suffered and to amend the judgment to remit to the

338. *Id.* at 394–95.
339. *Id.*
340. *Id.* at 395.
341. *See* Gulf & Miss. River Transp. Co. v. BP Oil Pipeline Co., 730 F.3d 484, 486 (5th Cir. Sept. 2013).
342. *Id.* at 492.
343. *Id.* at 493.
344. Garziano v. La. Log Home Co., 569 F. App'x 292, 293 (5th Cir. May 2014) (per curiam).
345. *Id.*
346. *Id.*
347. *Id.*
348. *Id.* 299–302.

Garzianos any monies paid to LLH under the contract that were in excess of LLH's actual damages."[349]

The plaintiff recovered $12,200 in actual damages and $40,000 in punitive damages on his claim for race discrimination, and the Fifth Circuit affirmed in all respects in *Rhines v. Salinas Construction Technologies, Ltd*.[350] On the punitive damages award, the Fifth Circuit noted evidence that: (1) the employer falsely told the Equal Employment Opportunity Commission (EEOC) that the plaintiff had not complained about the workplace, (2) an employee admitted at trial that he signed a false affidavit about the use of racial slurs in the workplace, and (3) "the person who allegedly performed the [employer's] investigation testified before the jury that he did not investigate."[351] The court dryly summarized: "There was sufficient evidence to support the jury's award of punitive damages."[352]

XI. DISCOVERY

Twenty-four plaintiffs sued CITGO for alleged violations of the overtime pay laws.[353] The district court issued a second discovery order warning against destruction of personal emails by the plaintiff.[354] Then, after two evidentiary hearings, the district court dismissed the claims of seventeen plaintiffs for violating that order (but not the claim of an eighteenth), entering specific factual findings for each plaintiff.[355] The district court then dismissed four more claims after another hearing and set of findings.[356] In *Moore v. CITGO Refining & Chemicals Co.*, the Fifth Circuit found no abuse of discretion, noting the clarity of the discovery order, the hearing of live testimony, and prejudice to CITGO (namely loss of the ability to show that the plaintiffs were sending personal emails "on the clock," which had proven relevant in one of the cases that was not dismissed).[357] The court also reversed and rendered judgment for $50,000 in costs, holding that the district court's reduction of taxable costs to $5,000 due to CITGO's size and resources was not grounded in the applicable rule.[358]

Duoline Technologies, L.L.C. v. Polymer Instrumentation & Consulting Services, Ltd. presented an unusual appellate review of a discovery order, arising from an ancillary proceeding to enforce a subpoena for a

349. *Id.*
350. Rhines v. Salinas Constr. Techs., Ltd., 574 F. App'x 362, 365 (5th Cir. June 2014) (per curiam).
351. *Id.* at 368–69.
352. *Id.* at 369.
353. Moore v. CITGO Ref. & Chems. Co., 735 F.3d 309, 314 (5th Cir. Nov. 2013).
354. *Id.*
355. *Id.*
356. *Id.*
357. *Id.* at 317.
358. *Id.* at 319–21.

Pennsylvania case.[359] The plaintiff, Duoline, sought to depose Joseph Schwalbach, a former employee, about the business dealings between his new company and the defendant, Polymer.[360] Among other rulings, the district court limited the document requests and deposition scope to events during Schwalbach's employment by Duoline.[361] The Fifth Circuit noted that some evidence supported the plaintiff's theory of a connection between the businesses, and that logically, the plaintiff's theory relied upon events after Schwalbach left his job at Duoline.[362] The court did not find an explanatory affidavit from Schwalbach to be dispositive.[363]

XII. DUE PROCESS

Auto Parts Manufacturing Mississippi hired Noatex to build a manufacturing facility.[364] Noatex subcontracted with King Construction.[365] Noatex then questioned some bills sent by King.[366] King responded with a "Lien and Stop Notice" that trapped roughly $260,000.[367] In *Noatex Corp. v. King Construction, L.L.C.*, the Fifth Circuit affirmed the district court's conclusion that the Mississippi lien statute was unconstitutional, concluding: "The Stop Notice statute is profound in its lack of procedural safeguards. It provides for no pre-deprivation notice or hearing of any kind. . . . The statute even fails to require any affidavit or attestation setting out the facts of the dispute and the legal rationale for the attachment."[368] The court rejected an argument that post-attachment penalties for a false filing could save the statute, as well as an argument based on the importance of the interest in "promotion of the health of the construction industry," noting that no governmental official was involved in the attachment process.[369]

XIII. EMPLOYMENT

Villanueva worked for a Colombian affiliate of a publicly traded entity subject to Sarbanes-Oxley (SOX).[370] He alleged that he was terminated after reporting a scheme by his employer to understate revenue to Colombian tax

359. Duoline Techs., L.L.C. v. Polymer Instrumentation & Consulting Servs., Ltd., 557 F. App'x 379, 379 (5th Cir. Mar. 2014) (per curiam).
360. *Id.*
361. *Id.*
362. *Id.* at 380.
363. *Id.*
364. Noatex Corp. v. King Constr., L.L.C., 732 F.3d 479, 482 (5th Cir. Oct. 2013).
365. *Id.*
366. *Id.*
367. *Id.*
368. *Id.* at 485–86.
369. *Id.* at 486.
370. Villanueva v. U.S. Dep't of Labor, 743 F.3d 103, 104–05 (5th Cir. Feb. 2014).

authorities.[371] In *Villanueva v. U.S. Department of Labor*, the Fifth Circuit affirmed the Department of Labor's rejection of his claim for whistleblower protection under SOX, concluding: "Villanueva did not provide information regarding conduct that he reasonably believed violated one of the six provisions of *U.S.* law enumerated in § 806; rather, he provided information regarding conduct that he reasonably believed violated *Colombian* law."[372] The court did not reach the broader issue of whether § 806 applies extraterritorially.[373]

XIV. *ERIE*

The plaintiffs in *Young v. United States* alleged that the Interior Department negligently prepared two studies, which led to flooding along Interstate 12 in Louisiana, bringing federal litigation in 2008—although the last major flood was in 1983.[374] The plaintiffs argued that the "continuing tort" doctrine saved the claim from limitations because the improperly designed highway remained in place.[375] The Fifth Circuit affirmed dismissal, noting two controlling Louisiana Supreme Court cases.[376] The first, *Hogg v. Chevron USA, Inc.*, involved leaking underground gasoline storage tanks in which the court

> rejected the plaintiffs' contention that the failure to contain or remediate the leakage constituted a continuing wrong, suspending the commencement of the running of prescription. . . . [and explaining] that "the breach of a duty to right an initial wrong simply cannot be a continuing wrong that suspends the running of prescription, as that is the purpose of every lawsuit and the obligation of every tortfeasor."[377]

Similarly, the second case, *Crump v. Sabine River Authority*, held: "[T]he actual digging of the canal was the operating cause of the injury[, and t]he continued presence of the canal and the consequent diversion of water from the ox-bow [were] simply the *continuing ill effects* arising from a single tortious act."[378]

Boyett v. Redland Insurance Co. examined whether a forklift is a "motor vehicle" within the meaning of Louisiana's uninsured motorist statute and

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371. *Id.* at 105.
372. *Id.*
373. *Id.* at 104 n.1.
374. Young v. United States, 727 F.3d 444, 445–46 (5th Cir. Aug. 2013).
375. *Id.* at 446.
376. *Id.* at 449.
377. *Id.* at 448 (citing Hogg v. Chevron USA, Inc., 2009-2632, p. 17 (La. 7/6/10); 45 So. 3d 991, 1007).
378. *Id.* at 448–50 (alteration in original) (quoting Crump v. Sabine River Auth., 98-2326, pp. 8–9 (La. 6/29/99); 737 So. 2d 720, 727–28).

concluded that it is.[379] Its *Erie Railroad Co. v. Tompkins* analysis illustrates a feature of Louisiana's civil-law system that bedevils outsiders.[380] On the one hand, a court "must look first to Louisiana's Constitution, its codes, and statutes, because the 'primary basis of law for a civilian is legislation, and not (as in the common law) a great body of tradition in the form of prior decisions of the courts.'"[381] "Unlike in common law systems, '[s]tare decisis is foreign to the Civil Law, including Louisiana.'"[382] On the other hand, "[w]hile a single decision is not binding on [Louisiana's] courts, when a series of decisions form a constant stream of uniform and homogenous rulings having the same reasoning, *jurisprudence constante* applies and operates with considerable persuasive authority."[383]

In *Taylor v. Bailey Tool & Manufacturing Co.*, Taylor sued his employer in state court for violations of Texas law.[384] Later, he amended his pleading to add federal claims.[385] The defendant removed and moved to dismiss on limitations grounds.[386] Under Texas law, Taylor's new claims would not relate back because the original state-law claims were barred by limitations when he filed suit.[387] Under Federal Rule of Civil Procedure 15(c)(1), however, the claims would relate back because they "arose out of the conduct, transaction, or occurrence set out" in the original pleading.[388] Noting that Rule 81(c) says the Federal Rules "apply to a civil action *after* it is removed," the Fifth Circuit concluded that they did not "provide for retroactive application to the procedural aspects of a case that occurred in state court prior to removal to federal court."[389] Accordingly, it affirmed dismissal.[390]

XV. EXPERTS

In *Moore v. International Paint, L.L.C.*, the Fifth Circuit affirmed the exclusion of expert testimony regarding a plaintiff's cumulative benzene exposure, citing problems with assumed facts: (1) assuming an hourly rate of $6.00, when his rates were in fact $6.99, $7.44, and $8.00; (2) assuming,

379. Boyett v. Redland Ins. Co., 741 F.3d 604, 605 (5th Cir. Jan. 2014).
380. *Id.* at 606–07.
381. *Id.* at 607 (quoting Transcon. Gas Pipe Line Corp. v. Transp. Ins. Co., 953 F.2d 985, 988 (5th Cir. 1992)).
382. *Id.* (alteration in original) (quoting Am. Int'l Specialty Lines Ins. Co. v. Canal Indem. Co., 352 F.3d 254, 260 (5th Cir. 2003)).
383. *Id.* at 607 n.19 (quoting Eagle Pipe & Supply, Inc. v. Amerada Hess Corp., 2010-2267, p. 11 (La. 10/25/11); 79 So. 3d 246, 256).
384. Taylor v. Bailey Tool & Mfg. Co., 744 F.3d 944, 945 (5th Cir. Mar. 2014).
385. *Id.*
386. *Id.*
387. *Id.*
388. *Id.* at 946 (quoting FED. R. CIV. P. 15(c)(1)).
389. *Id.* (quoting FED. R. CIV. P. 81(c)(1)).
390. *Id.* at 947.

contrary to the plaintiff's deposition testimony, that he always worked with paint indoors, that his respirator always failed within an hour, and that he never received a replacement; (3) assuming, contrary to other deposition testimony, that the indoor spaces where the plaintiff worked were always unventilated; and (4) assigning an arbitrary number, with no record support, to the amount of time the plaintiff worked as a sandblaster rather than a painter.[391] The court held: "To be sure, reliable expert testimony often involves estimation and reasonable inferences from a sometimes incomplete record. . . . Here, however, the universe of facts assumed by the expert differs frequently and substantially from the undisputed record evidence."[392]

Ayala was killed by a propane heater explosion; his estate sued the manufacturer for damages.[393] In *Ayala v. Enerco Group, Inc.*, Ayala's wife testified that he was generally careful with the heater, although she did not observe him at the time of the accident.[394] While an expert identified several possible defects with the heater, the court held:

> [T]here was no evidence to suggest the Ayalas' heater itself was defective. He did not perform a structural analysis of the Mr. Heater or destructive testing of an example unit. His conclusions supporting that there could be a leak were based solely on the nature of the item itself. McPhate also admitted that he could not rule out other potential sources of a propane leak other than a defect in the heater, such as a faulty propane bottle or a failure by Mr. Ayala to secure the valve properly on the heater.[395]

Accordingly, the estate's claims failed.[396] The Fifth Circuit reversed a sanctions award against the plaintiff's counsel under 28 U.S.C. § 1927 for filing a second lawsuit because that filing did not show a "persistent" pattern of vexatious litigation as required by that statute.[397]

XVI. FALSE CLAIMS ACT

A remedy provision of the Anti-Kickback Statute provides:

> The Federal Government in a civil action may recover from a person—(1) that knowingly engages in conduct prohibited by section 8702 of this title a civil penalty equal to—(A) twice the amount of each kickback

391. Moore v. Int'l Paint, L.L.C., 547 F. App'x 513, 515–16 (5th Cir. Nov. 2013) (per curiam).
392. *Id.* at 516.
393. Ayala v. Enerco Grp., Inc., 569 F. App'x 241, 243 (5th Cir. May 2014) (per curiam).
394. *Id.*
395. *Id.* at 247.
396. *Id.* at 248.
397. *Id.* at 251 (emphasis omitted).

> involved in the violation; and (B) not more than $10,000 for each occurrence of prohibited conduct.[398]

In *United States ex rel. Vavra v. Kellogg Brown & Root, Inc.*, the Fifth Circuit found that the provision allows a suit against an employer for its employees' acts.[399] The court grounded its analysis in common-law agency principles and distinguished an earlier case that imposed a "purpose to benefit [the] employer" requirement in a somewhat analogous situation under the FCA.[400]

Babalola and Adetunmbi alerted authorities to Medicare fraud by the clinic they worked for.[401] Federal authorities investigated and the clinic's operators, the Sharmas, were indicted and pleaded guilty, accepting a criminal restitution obligation of over $40 million.[402] During the criminal proceedings, the whistleblowers filed an FCA suit against the Sharmas.[403] The Sharmas asserted an interest in the restitution proceeds, arguing that it was an "alternate remedy" within the meaning of the FCA that would give them "the same rights in such proceeding as [they] would have had if the action had continued under this section."[404] The Fifth Circuit disagreed in *United States ex rel. Babalola v. Sharma*, finding that other circuits' authorities "implicitly recogniz[e] that a qui tam suit must be filed before there is an alternate remedy."[405] A concurrence conceded that this reading of the FCA was correct, but called for Congressional intervention in situations like this where the plaintiffs "took the path of the Good Samaritan and without delay provided the government with the evidence needed to pursue the defrauders."[406]

XVII. FIRST AMENDMENT

Persons upset about posts on the Mississippi blog "slabbed.org" sued for defamation in Nova Scotia (some of the content related to a lodge owned there by a Mississippi resident).[407] After obtaining a default judgment, they sought to domesticate it in Mississippi; the defendant removed and resisted domestication under the SPEECH Act.[408] The Act, enacted in 2010, intends

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398. 41 U.S.C. § 8706(a)(1) (2011).

399. United States *ex rel.* Vavra v. Kellogg Brown & Root, Inc., 727 F.3d 343, 345 (5th Cir. July 2013).

400. *Id.* at 350 (quoting United States v. Ridglea State Bank, 357 F.2d 495, 499–500 (5th Cir. 1966), *superseded by statute*, 31 U.S.C. § 3729(b) (1986)).

401. United States *ex rel.* Babalola v. Sharma, 746 F.3d 157, 159 (5th Cir. Feb.), *cert denied*, 134 S. Ct. 2856 (2014).

402. *Id.*

403. *Id.*

404. *Id.* at 160 (quoting 31 U.S.C. § 3730(c)(5) (2010)).

405. *Id.* at 162.

406. *Id.* at 166 (Dennis, J., concurring).

407. Trout Point Lodge, Ltd. v. Handshoe, 729 F.3d 481, 484–85 (5th Cir. Sept. 2013).

408. *Id*. (citing 28 U.S.C. § 4102 (2012)).

to prevent "libel tourism" by plaintiffs who obtain judgments in jurisdictions with less protection of speech than the First Amendment.[409] The Fifth Circuit concluded in *Trout Point Lodge, Ltd. v. Handshoe* that the plaintiffs failed to meet their burden under the Act to prove either (1) that Canadian law—which allocates the burden to prove falsity differently than American law—offers as much free speech protection as Mississippi, or (2) a Mississippi court reviewing the allegations of the pleading would have found liability for defamation.[410] The court found that some of the pleading's allegations were conclusory and that others involved language that "[t]hough offensive . . . are not actionable."[411]

Marceaux v. Lafayette City-Parish Consolidated Government was a § 1983 case brought by former and current police officers against leaders of the Lafayette Police Department.[412]

> [T]he Officers communicated with the media concerning the case and maintained a website, www.realcopsvcraft.com (the "Website"), which contained: an image of the Lafayette Police Chief, a party in this suit; excerpts of critical statements made in the media concerning the Lafayette PD Defendants; certain voice recordings of conversations between the Officers and members of the Lafayette Police Department; and other accounts of the Lafayette PD Defendants' alleged failings.[413]

Acknowledging both the district court's discretion to issue gag orders regarding such communications and the powerful First Amendment protection against prior restraints, the Fifth Circuit found that the district court abused its discretion in ordering the shutdown of the entire website.[414] It remanded for consideration of a more narrowly tailored order.[415]

Texas allows charitable bingo if the sponsoring organization does not use the proceeds for political advocacy; several charities challenged that restriction on First Amendment grounds in *Department of Texas, Veterans of Foreign Wars v. Texas Lottery Commission*.[416] In a new opinion issued on panel rehearing, the Fifth Circuit rejected a standing challenge based on the interplay of the relevant law with other gambling laws (which, the state argued, made the lawsuit irrelevant) and then reversed an injunction against the law.[417] The court saw the case as controlled by *Rust v. Sullivan*, noting: "The challenged provisions in this case do nothing to restrict speech outside

409. *Id.* at 487.
410. *Id.* at 496.
411. *Id.* at 493.
412. Marceaux v. Lafayette City-Parish Consol. Gov't, 731 F.3d 488, 490 (5th Cir. Sept. 2013).
413. *Id.* at 490–91.
414. *Id.* at 494–95.
415. *See id.* at 495–96.
416. Dep't of Tex., Veterans of Foreign Wars v. Tex. Lottery Comm'n, 727 F.3d 415, 417–18 (5th Cir.) (per curiam), *vacated*, 734 F.3d 1223 (5th Cir. Aug. 2013).
417. *Id.* at 419–21.

the scope of the State's bingo program. Charities are free to participate in the bingo program and engage in political advocacy; they simply must not use bingo proceeds to do so."[418] For similar reasons, the court distinguished *Citizens United v. Federal Election Commission*.[419] The dissent argued that *Rust* was not controlling and the law was invalid under the "unconstitutional conditions" doctrine.[420]

In *NCDR, L.L.C. v. Mauze & Bagby, P.L.L.C.*, a law firm argued that the Texas "anti-SLAPP" statute protected its efforts to solicit former patients of a dental clinic as clients.[421] In a detailed analysis, the Fifth Circuit agreed that the district court's ruling against the firm was appealable as a collateral order.[422] The court then sidestepped an issue as to whether the anti-SLAPP statute was procedural and thus inapplicable in federal court, holding it had not been adequately raised below.[423] Finally, on the merits, the court affirmed the ruling that the law firm's activity fell within the "commercial speech" exception to the statute: "Ultimately, we conclude that the Supreme Court of Texas would most likely hold that M & B's ads and other client solicitation are exempted from the TCPA's protection because M & B's speech arose from the sale of services where the intended audience was an actual or potential customer."[424]

XVIII. FORUM NON CONVENIENS

In *Indusoft, Inc. v. Taccolini*, Indusoft sued in the Southern District of Texas, alleging theft of intellectual property.[425] Two defendants moved to dismiss on the ground of forum non conveniens.[426] The court affirmed dismissal, holding no error in (1) presuming that Brazil was an adequate alternate forum, (2) concluding that certain electronic data was more likely to be preserved in Brazil, (3) discounting the importance of one witness for whom compulsory process would not be available in Brazil, and (4) analyzing the interplay between the Texas case and related litigation in Brazil.[427] The court reversed and remanded dismissal of the other defendants' counter-claims, holding that it was erroneous to do so *sua sponte*.[428]

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418. *Id.* at 423–25 (citing Rust v. Sullivan, 500 U.S. 173, 178–81, 193, 196 (1991)).
419. *Id.* at 424–25 (distinguishing Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010)).
420. *Id.* at 430–35 (Stewart, C.J., dissenting).
421. NCDR, L.L.C. v. Mauze & Bagby, P.L.L.C., 745 F.3d 742, 745 (5th Cir. Mar. 2014).
422. *Id.* at 747–52.
423. *Id.* at 752.
424. *Id.* at 755.
425. Indusoft, Inc. v. Taccolini, 560 F. App'x 245, 247 (5th Cir. Mar. 2014) (per curiam).
426. *Id.* at 248.
427. *Id.* at 248–52.
428. *Id.* at 253 (citing Lozano v. Ocwen Fed. Bank, FSB, 489 F.3d 636, 643 (5th Cir. 2007)).

The district court granted a dismissal in favor of New Zealand—on forum non conveniens grounds—in *Royal Ten Cate USA, Inc. v. TT Investors, Ltd*.[429] The Fifth Circuit remanded for further consideration of what it saw as a key private-interest factor—"whether two key witnesses who reside in Texas would be amenable to process in New Zealand."[430] The witnesses in question were former party employees living in Texas, and the parties disputed whether those individuals' employment contracts obligated them to cooperate with litigation after their employment ended.[431] These witnesses' importance was heightened because they were particularly significant to one side, while the other side did not appear to have comparable problems with its likely witnesses.[432] The court did not express an opinion about the proper result on remand and noted that "[t]he decision regarding whether or not to take additional evidence is one that we leave to the sound discretion of the district court."[433]

Two boats collided. The district court dismissed the resulting tort litigation in favor of Mexico on forum non conveniens grounds in *Cotemar S.A. De C.V. v. Hornbeck Offshore Services, L.L.C.*[434] After that dismissal, the plaintiff seized the offending vessel in Louisiana.[435] The Fifth Circuit vacated and remanded for further analysis regarding two points.[436] The first point dealt with a potential time bar in the Mexican system.[437] "If access to relief in the Mexican courts has become time-barred for reasons not of Appellants' 'own making,' then the Mexican courts are no longer an available alternative forum."[438] Second, the "supervening change of circumstances" arising from the vessel seizure may affect the balancing of private and public factors because a transfer to Mexico would now likely result in duplicative proceedings.[439]

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429. Royal Ten Cate USA, Inc. v. TT Investors, Ltd., 562 F. App'x 187, 187 (5th Cir. Mar. 2014) (per curiam).

430. *Id.* at 190.

431. *Id.* at 190–91.

432. *Id.*

433. *Id.* at 191.

434. Cotemar S.A. De C.V. v. Hornbeck Offshore Servs., L.L.C., 569 F. App'x 187, 189 (5th Cir. May 2014) (per curiam).

435. *Id.* at 188.

436. *Id.*

437. *Id.* at 191.

438. *Id.* at 191–92 (citing Veba-Chemie A.G. v. M/V Getafix, 711 F.2d 1243, 1248 n.10 (5th Cir. 1983)).

439. *Id.* at 192.

XIX. GENERAL COURT INFORMATION

Two new briefing rules took effect in the Fifth Circuit on December 1, 2013.[440] The first eliminates the requirement of a separate statement of the case and consolidates a matter's procedural and substantive history into a single statement of facts.[441] The second standardizes record citations:

> For multiple record cases, parties will cite "ROA" followed by a period, followed by the Fifth Circuit appellate case number of the record they reference, followed by a period, followed by the page of the record. For example, "ROA.13-12345.123."
>
> In single record cases, parties cite the short citation form, "ROA," followed by a period, followed by the page number. For example, "ROA.123."[442]

This standardized form should help the court in electronically matching record citations and the actual record.[443]

XX. GUARANTY

In the earlier case of *Levy Gardens Partners 2007, L.P. v. Commonwealth Land Title Insurance Co.*, the Fifth Circuit concluded that a pleading regarding the extent of coverage was "fundamental to the complaint" and "did not raise a new matter outside of the complaint"; accordingly, it did not implicate the rules governing the pleading of affirmative defenses.[444] In contrast, in *LSREF2 Baron, L.L.C. v. Tauch*, the court held that a guarantor's defense of payment by the primary obligor was an affirmative defense.[445] After a review of Louisiana law on the topics of offset and setoff, which characterizes those matters as defenses, the court concluded that "[the plaintiff] simply had to allege in its complaint that there was an event of default, which is defined in the Loan Agreement, not in the Guaranty."[446] The court also agreed that the issue had not been raised in a "pragmatically sufficient time" as "all of the critical pretrial deadlines had passed or were about to expire."[447]

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440. U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT, ORDER: PUBLIC NOTICE OF THE CHANGES TO THE FEDERAL RULES OF APPELLATE PROCEDURE (FRAP) AND FIFTH CIRCUIT RULES EFFECTIVE DECEMBER 1, 2013 (Nov. 25, 2013), *available at* http:www.mssd.uscourts.gov/sites/mssd/files/public_notice_2013_rule_changes.pdf.

441. *Id.*

442. *Id.*

443. *See id.*

444. LSREF2 Baron, L.L.C. v. Tauch, 751 F.3d 394, 401 (5th Cir. May 2014) (citing Levy Gardens Partners 2007, L.P. v. Commonwealth Land Title Ins. Co., 706 F.3d 622, 633 (5th Cir. 2013)).

445. *Id.* at 399.

446. *Id.* at 401.

447. *Id.* at 402.

XXI. INSURANCE

James v. State Farm Mutual Automobile Insurance Co. involved the appeal of summary judgment for the insurer in a bad faith case brought under Mississippi law in which State Farm "tendered the policy limit on its uninsured motor vehicle coverage to Plaintiff–Appellant . . . nearly thirty months after [she] was injured in a car accident."[448] The majority opinion reversed in part, working through the delay and holding that a fact question existed as to whether State Farm lacked a justification for delay during certain portions of the thirty-month period.[449] The dissent took a different approach, stating: "The district court's more holistic approach of evaluating whether State Farm's actions throughout the course of the investigation constituted bad faith seems more in line with precedent."[450]

Two employees entered a series of unauthorized loan transactions on behalf of their employer and took the proceeds.[451] The employer's carrier denied coverage, arguing that the losses did not "directly" result from employee dishonesty, in part because the company never actually got the money.[452] The district court agreed, but the Fifth Circuit vacated and remanded in *BJ Services S.R.L. v. Great American Insurance Co.*, noting that the employees had apparent authority to enter the transactions, even if they did not have actual authority, and thus created binding contracts on behalf of their employer that made the losses "direct" within the meaning of the policy.[453]

After a hailstorm at a shopping center, the insured estimated the loss at close to $1 million, while the insurer estimated the loss at $17,000, resulting in *TMM Investments, Ltd. v. Ohio Casualty Insurance Co*.[454] The insurer invoked its contractual right for an appraisal, which came in around $50,000.[455] The insured sued, alleging that the appraisal improperly excluded damages to the HVAC system and that the panel of appraisers exceeded its authority by considering causation issues.[456] Applying *State Farm Lloyds v. Johnson*,[457] the Fifth Circuit agreed on the HVAC issue, but did not see that as a reason to invalidate the entire award, and reasoned that the appraisers

448. James v. State Farm Mut. Auto. Ins. Co., 743 F.3d 65, 67 (5th Cir. Jan. 2014).
449. *See id.* at 77.
450. *Id.* at 83 n.15 (Garza, J., dissenting).
451. BJ Servs. S.R.L. v. Great Am. Ins. Co., 539 F. App'x 545, 547 (5th Cir. Sept. 2013) (per curiam).
452. *Id.* at 546.
453. *Id.* at 553.
454. TMM Invs., Ltd. v. Ohio Cas. Ins. Co., 730 F.3d 466, 469 (5th Cir. Sept. 2013), *cert. denied*, 134 S. Ct. 1555 (2014).
455. *Id.*
456. *Id.* at 470.
457. *Id.* at 473 (citing State Farm Lloyds v. Johnson, 290 S.W.3d 886, 895 (Tex. 2009)).

were within their authority when they "merely distinguished damage caused by pre-existing conditions from damage caused by the storm."[458]

The subcontractor's policy at issue in *State Auto Insurance Companies v. Harrison County Commercial Lot, L.L.C.* excluded "property damage" to "your work."[459] "An endorsement added [the general contractor] as an additional insured only with respect to liability for . . . property damage . . . caused, in whole or in party [sic], by . . . [y]our acts or omissions . . . ."[460] The policy defined "you" and "your" with reference to the subcontractor, and the endorsement did not purport to modify that definition.[461] The insurer argued that the additional insured could only "stand[] in shoes no larger than those worn by the primary policyholder."[462] The Fifth Circuit did not disagree, but found that this specific endorsement created ambiguity when read along with the original policy, and thus affirmed the district court's summary judgment in favor of coverage.[463]

A Real Estate Investment Trust (REIT) sued the City of College Station, alleging that its zoning decisions were unconstitutionally irrational and unfair in *City of College Station, Texas v. Star Insurance Co*.[464] The city's Commercial General Liability (CGL) policy covered liability arising from "wrongful act[s]" of city officials, with an exclusion for liability arising from eminent domain or condemnation proceedings.[465] The district court granted summary judgment for the insurer and the Fifth Circuit reversed.[466] "As [the REIT's] constitutional and tortious interference claims may produce liability that does not 'arise out of' [its] inverse condemnation action, [the insurer] is liable for the City's defense costs."[467]

Seventy property owners sued St. Bernard Parish, alleging that it wrongfully demolished their properties in the wake of Hurricane Katrina (which flooded virtually every structure in that hard-hit area).[468] The Parish's insurer disputed coverage in *Lexington Insurance Co. v. St. Bernard Parish Government*.[469] Among other arguments, the insurer argued that there was no coverage because the policy had a $250,000 retention limit per occurrence, and that each demolition (none of which involved more than that

458. *Id.* at 475.

459. State Auto Ins. Cos. v. Harrison Cnty. Commercial Lot, L.L.C., 540 F. App'x 278, 278 (5th Cir. Sept. 2013) (per curiam).

460. *Id.* (internal quotation marks omitted).

461. *Id.* at 279 n.3.

462. *Id.* at 279.

463. *Id.*

464. City of College Station, Tex. v. Star Ins. Co., 735 F.3d 332, 335 (5th Cir. Nov. 2013).

465. *Id.* at 336 (alteration in original).

466. *Id.* at 341.

467. *Id.* at 340.

468. Lexington Ins. Co. v. St. Bernard Parish Gov't, 548 F. App'x 176, 177 (5th Cir. Dec. 2013) (per curiam).

469. *Id*.

amount) should be viewed as a separate occurrence.[470] The district court and Fifth Circuit ruled for the Parish.[471] The Fifth Circuit noted that the limit applied "separately to each and every occurrence . . . or series of continuous, repeated, or related occurrences" and that the word related has a broad meaning in the insurance context, covering logical or causal connections between acts or occurrences.[472] Here:

> [T]he acts alleged in the underlying actions are related because they all resulted from St. Bernard's ordinance condemning those properties that remained in disrepair following Hurricane Katrina. The fact that the properties in the underlying action were demolished at different times, in varying degrees, and at different locations, does not mean that these acts are not related.[473]

BAL Metals (BAL) stored roughly $500,000 of copper in a warehouse operated by Mundell Terminal Services.[474] Thieves stole the copper. BAL's insurance carrier paid the claim and then sued the warehouse as BAL's subrogee.[475] In *United National Insurance Co. v. Mundell Terminal Services, Inc.*, the warehouse asked its carrier for defense and indemnity; coverage litigation ensued, and the district court granted summary judgment for the warehouse's carrier.[476] The Fifth Circuit affirmed, reasoning that because a bailor is presumed to insure a bailee's interest as well as its own under Texas law, the policy was "other insurance" to BAL's coverage.[477] The court noted that the warehouse had a first-party-property-damage policy rather than liability coverage.[478] The court also concluded that another coverage argument—about the characterization of the metal under the policy's definition of "property"—had been waived because it was not presented with enough specificity to the district court.[479]

In *Lawyers Title Insurance Corp. v. Doubletree Partners, L.P.*, the title insurance company mistakenly left key provisions out of a policy due to a software problem, while the insured's surveyor incorrectly measured the extent of a "flowage easement" held on the development property by Lake Lewisville.[480] The Fifth Circuit held: (1) reformation was justified because the insured had reason to know of the title company's unilateral mistake; and (2) both sides had reasonable interpretations of (a) the scope of coverage for

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470. *Id.*
471. *Id.*
472. *Id.* at 179–80.
473. *Id.* at 180.
474. United Nat'l Ins. Co. v. Mundell Terminal Servs., Inc., 740 F.3d 1022, 1025 (5th Cir. Jan. 2014).
475. *Id.* at 1026.
476. *Id.*
477. *Id.* at 1028–29.
478. *Id.* at 1031.
479. *Id.* at 1030.
480. Lawyers Title Ins. Corp. v. Doubletree Partners, L.P., 739 F.3d 848, 854 (5th Cir. Jan. 2014).

survey error; (b) the "flowage easement exception"; and (c) the "created, suffered, assumed, or agreed to" exception, so coverage appeared likely.[481] Summary judgment for the insurer was reversed and the case remanded for further proceedings.[482] The court reversed a sanctions award against the insured's counsel under 28 U.S.C. § 1927 in connection with extra-contractual claims for lack of bad faith by the attorneys.[483]

Mississippi law allows a bad faith claim relating to handling of workers' compensation; Alabama law does not.[484] Williams, a Mississippi resident, was injured in Mississippi while working for an Alabama resident contractor.[485] In *Williams v. Liberty Mutual Insurance Co.*, the Fifth Circuit reversed and remanded the choice-of-law question, holding that § 145 of the *Restatement (Second) of Conflict Laws* (governing tort claims) applied rather than other provisions for contract claims.[486] Under that framework, Mississippi would give particular weight to the place of injury, and thus apply Mississippi law.[487] The opinion highlights the importance of the threshold issue of properly characterizing a claim before beginning the actual choice-of-law analysis.

The Fifth Circuit held that a subcontractor's CGL carrier had no duty to defend a construction-defect claim against the general contractor in *Carl E. Woodward, L.L.C. v. Acceptance Indemnity Insurance Co.*[488] The pleading alleged that the general contractor, through its subcontractor, "built the foundation piers in non-conformity with plans and specifications."[489] An accompanying engineer's report provided detail about related drainage problems.[490] The court concluded that the policy language meant that "claims for liability can be brought after ongoing operations are complete, but the underlying liability cannot be due to the 'completed operations.'"[491] A contrary holding, reasoned the court, "effectively converts a CGL policy into a performance bond."[492] Here, "[e]ven accepting the district court's factual finding that damage had occurred during ongoing operations, the only 'damage' supported by allegation is the construction that was not in conformity with plans and specifications," and "[l]iability for such damages arises out of completed operations."[493]

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481. *Id.* at 856–68.
482. *Id.* at 873.
483. *Id.* at 872; 28 U.S.C. § 1927 (2012).
484. Williams v. Liberty Mut. Ins. Co., 741 F.3d 617, 624 (5th Cir. Jan. 2014).
485. *Id.* at 619.
486. *Id.* at 621–22; RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971).
487. *Liberty Mut. Ins. Co.*, 741 F.3d at 623.
488. Carl E. Woodward, L.L.C. v. Acceptance Indem. Ins. Co., 743 F.3d 91, 102–03 (5th Cir. Feb. 2014).
489. *Id.* at 96.
490. *Id.* at 97.
491. *Id.* at 99.
492. *Id.* at 100.
493. *Id.* at 102.

In *Star-Tex Resources, L.L.C. v. Granite State Insurance Co.*, the parties disputed whether an "auto exclusion" barred coverage in a personal injury case.[494] The Fifth Circuit concluded that it was not possible to determine coverage from the plaintiff's pleading: "The complaint contains only one, brief sentence describing the facts of the accident. Importantly, it contains no description of *how* Esquivel caused the collision."[495] Therefore, it was appropriate to consider extrinsic evidence (beyond the "eight corners" of the pleading and policy) that the insured was driving a car at the time of the accident, as it was relevant to coverage and by itself did not go to liability.[496]

Rowland Trucking's insurance policy required that it maintain a fence around the entirety of its property.[497] The fence had gaps on the south and west sides. Thieves entered on the east side and stole $350,000 in videogame consoles.[498] In *W.W. Rowland Trucking Co. v. Max America Insurance Co.*, the Fifth Circuit affirmed judgment for the insured under the Texas Anti-Technicality Statute, which provides:

> Unless the breach or violation contributed to cause the destruction of the property, a breach or violation by the insured of a warranty, condition, or provision of a fire insurance policy *or contract of insurance on personal property*, or of an application for the policy or contract: (1) does not render the policy or contract void; and (2) is not a defense to a suit for loss.[499]

The court sidestepped an argument that the statute did not reach liability policies, finding that the policy here was a property policy notwithstanding its occasional use of the word "liability."[500]

The Fifth Circuit vacated its panel opinion in *Sawyer v. E. I. DuPont de Nemours & Co.* to certify two questions to the Texas Supreme Court—paraphrased slightly, they were (1) whether an at-will employee can sue for fraud for loss of employment, and (2) whether a sixty-day "cancellation-upon-notice" collective bargaining agreement (CBA) would change a "no" answer to (1).[501] The Texas Supreme Court answered those questions "no" as to the basic question about a fraud claim arising from at-will employment, and "in the situation presented, no" to the second question about the effect of the CBA.[502] "The Employees argue[d] that it would contravene public policy

494. Star-Tex Res., L.L.C. v. Granite State Ins. Co., 553 F. App'x 366, 368 (5th Cir. Jan. 2014) (per curiam).

495. *Id.* at 372.

496. *Id.* at 371–72 (citing Northfield Ins. Co. v. Loving Home Care, Inc., 363 F.3d 523 (5th Cir. 2004)).

497. W.W. Rowland Trucking Co. v. Max Am. Ins. Co., 559 F. App'x 253, 254 (5th Cir. Feb. 2014) (per curiam).

498. *Id.*

499. *Id.* at 255 (quoting TEX. INS. CODE ANN. art. 862.054) (emphasis added).

500. *Id.* at 258.

501. Sawyer v. E. I. DuPont de Nemours & Co., 689 F.3d 463, 470 (5th Cir. 2012) (per curiam).

502. Sawyer v. E. I. DuPont de Nemours & Co., 430 S.W.3d 396, 402–05 (Tex. 2014).

to allow an employer to benefit from its duplicity, but public policy is not better served by allowing contracting parties to circumvent their agreement."[503] The Fifth Circuit formally adopted that reasoning and affirmed in June 2014.[504]

Similarly, the Fifth Circuit vacated its panel opinion in *Ewing Construction Co. v. Amerisure Insurance Co.* to certify the question whether a CGL policy's "Contractual Liability Exclusion" would reach a contract in which a contractor commits to work in a "good and workmanlike manner."[505] The Texas Supreme Court answered "no":

> [A] general contractor who agrees to perform its construction work in a good and workmanlike manner, without more, does not enlarge its duty to exercise ordinary care in fulfilling its contract, thus it does not "assume liability" for damages arising out of its defective work so as to trigger the Contractual Liability Exclusion.[506]

The Fifth Circuit adopted that opinion and ruled accordingly.[507]

Finally, while the *Twombly* line of cases emphasizes the importance of detail in pleading, in the insurance context, too much detail can defeat coverage. In *State Farm Mutual Automobile Insurance Co. v. LogistiCare Solutions, LLC*, the Fifth Circuit affirmed a summary judgment for an automobile insurer as to the duty to indemnify, concluding that a "volunteer driver" for a healthcare provider fell within the policy's "for a charge" exclusion.[508] The driver received compensation that, while focused on reimbursement for expenses, could yield profit depending on the route taken and the number of passengers.[509] As to the duty to defend, however, the court reversed, holding that the following pleading did not unambiguously trigger the exclusion, as it did not allege that "(1) [the plaintiff] gave [the defendant] any payment for transporting her; (2) [the defendant] was operating a taxi service; or (3) the specific amount of compensation [the defendant] received for transporting [the plaintiff]:"[510]

> 11. Upon information and belief, Defendant Elizabeth W. Mosley, owned, operated, and controlled, or in the alternative, was doing business as Mosley's Transportation. Upon information and belief, the Defendant, Elizabeth W. [Mosley], owned, operated, and

503. *Id.* at 405.

504. Sawyer v. E. I. DuPont de Nemours & Co., 754 F.3d 313, 316 (5th Cir. June 2014) (per curiam).

505. Ewing Constr. Co. v. Amerisure Ins. Co., 690 F.3d 628, 629–30, 633 (5th Cir. 2012) (per curiam), *certifying question to* 420 S.W.3d 30 (Tex. 2014).

506. *Ewing Constr. Co.*, 420 S.W.3d at 38.

507. Ewing Constr. Co. v. Amerisure Ins. Co., 744 F.3d 917, 917 (5th Cir. Feb. 2014) (per curiam).

508. State Farm Mut. Auto. Ins. Co. v. LogistiCare Solutions, LLC, 751 F.3d 684, 687, 693 (5th Cir. May), *cert. denied*, 135 S. Ct. 725 (2014).

509. *Id.*

510. *Id.* at 692.

> controlled, or in the alternative, was doing business as LogistiCare of MS. Further, upon information and belief, the Defendant, Elizabeth W. Mosley . . . is in the business of transporting patients to and from their medical treatment facilities.
>
> 12. The Defendant, LogistiCare Solutions, LLC, in the regular course of business, operates and maintains a non-emergency medical transportation services business . . . .
>
> 13. That on or about March 19, 2010, the Deceased, Pearlie Graham, was being transported by the Defendant, Elizabeth W. Mosley, and riding as a guest passenger in a vehicle being driven and operated by the Defendant, Elizabeth W. Mosley, Individually and d/b/a Mosley's Transportation and/or d/b/a LogistiCare of MS, or in the alternative, [] was acting in furtherance of and within the course and scope of her employment with Defendant, LogistiCare Solutions, LLC . . . .[511]

XXII. JUDGMENT FINALITY

McGinnes Industrial Maintenance Corp. v. Phoenix Insurance Co. involved a company that received Potentially Responsible Party (PRP) letters from the Environmental Protection Agency (EPA), followed by a "Unilateral Administrative Order" requiring the company to do remedial work.[512] Its CGL insurer denied coverage, contending that these administrative communications under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) were not a "suit" that triggered the duty to defend.[513] At trial, the insured argued that the word suit was ambiguous and thus led to coverage, and the insurer argued that a broad reading of suit was inconsistent with the word "claim" in the policy and the word "petition" in the usual phrasing of the Texas "eight-corners" rule.[514] Finding the issue important and that "the parties each ma[d]e reasonable arguments" about it, the Fifth Circuit certified this question to the Texas Supreme Court: "Whether the EPA's PRP letters and/or unilateral administrative order, issued pursuant to CERCLA, constitute a 'suit' within the meaning of the CGL policies, triggering the duty to defend."[515]

In *Yesh Music v. Lakewood Church*, the plaintiff voluntarily dismissed a Texas suit under Rule 41, re-filed in New York, and then voluntarily dismissed that action as well.[516] Because the second dismissal was with

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511. *Id.* at 691–92 (alterations in original).

512. McGinnes Indus. Maint. Corp. v. Phx. Ins. Co., 571 F. App'x 329, 331–32 (5th Cir. June 2014) (per curiam).

513. *Id.* at 332.

514. *Id.* at 334.

515. *Id.* at 335.

516. Yesh Music v. Lakewood Church, 727 F.3d 356, 358 (5th Cir. Aug. 2013).

prejudice under the Federal Rules, the plaintiff sought relief under Rule 60(b) to allow reinstatement of the original case.[517] The defendant argued that a voluntary dismissal is not a "final proceeding" for Rule 60 purposes.[518] The Fifth Circuit affirmed the grant of Rule 60(b) relief.[519] The court acknowledged *Harvey Specialty & Supply, Inc. v. Anson Flowline Equipment Inc.*, which found no preclusive effect for a Rule 41 voluntary dismissal but concluded that one was still a final proceeding within Rule 60 because of its practical effect.[520] The court noted that the weight of authority from other circuits agreed with this conclusion.[521]

In *Scott v. Carpanzano*, the Fifth Circuit affirmed two default judgments and vacated a third, applying the basic federal standard: "whether the defendant willfully defaulted, whether a meritorious defense is presented, and whether setting aside the default judgment would prejudice the plaintiff."[522] Footnote 3 of the opinion notes that the standards under Rule 60(b)(1) and Rule 55 may diverge after a 2007 stylistic revision to Rule 55 but concludes they have not yet and did not on the facts of this case.[523]

XXIII. JUDICIAL ESTOPPEL

Gabarick v. Laurin Maritime (America) Inc. involved a barge accident that caused a large oil spill in the Mississippi River.[524] In the first lawsuit regarding the incident, the district court placed liability solely on the tugboat operator, noting the valid and enforceable charter agreement between it and the barge owner.[525] In a later case, the barge owner contended that the agreements were void *ab initio* because the tugboat operator entered without intent to perform.[526] The Fifth Circuit agreed that the new position was barred by judicial estoppel.[527] Key to its analysis was that while the barge owner's positions were in the alternative in the first action, which would not create estoppel: "Once a court has accepted and relied upon one of a party's several alternative positions, any argument inconsistent with that position

517. *Id.*
518. *Id.* at 359.
519. *Id.* at 364.
520. *Id.* at 360 (citing Harvey Specialty & Supply, Inc. v. Anson Flowline Equip. Inc., 434 F.3d 320, 324 (5th Cir. 2005)).
521. *Id.* at 360–61.
522. Scott v. Carpanzano, 556 F. App'x 288, 293 (5th Cir. Jan. 2014) (per curiam) (citing Jenkens & Gilchrist v. Groia & Co., 542 F.3d 114, 119 (5th Cir. 2008); Lacy v. Sitel Corp., 227 F.3d 290, 292 (5th Cir. 2000)).
523. *Id.* at 293 n.3.
524. Gabarick v. Laurin Mar. (Am.) Inc., 753 F.3d 550, 552 (5th Cir. May 2014), *cert. denied*, Am. Commercial Lines, LLC v. United States, 135 S. Ct. 956 (2015).
525. *Id.*
526. *Id.*
527. *Id.* at 557.

may be subject to judicial estoppel in subsequent proceedings."[528] The court also concluded that the district court's decision to stay the second case so the first could proceed did not compel an argument choice in that case that would make the application of judicial estoppel inequitable.[529]

XXIV. JURISDICTION—DIVERSITY

Su, a citizen of Taiwan, served on the board of Vantage, an offshore drilling contractor.[530] Vantage is incorporated in the Cayman Islands with its principal place of business in Texas.[531] Vantage sued Su in Texas state court for breach of fiduciary duty and related claims.[532] Su removed, remand was denied, and the district court certified the jurisdictional issue for interlocutory appeal in *Vantage Drilling Co. v. Hsin-Chi Su*.[533] The Fifth Circuit reversed and ordered remand, relying primarily upon *Chick Kam Choo v. Exxon Corp*.[534] Section 1332(a)(2) requires complete diversity, and § 1332(c)(1) deems a corporation a citizen of "every State and foreign state in which it is incorporated"—thus, "there are aliens on both sides of the litigation, complete diversity is lacking, and there can be no diversity jurisdiction."[535] Su argued that *Chick Kam Choo* could be read to allow federal jurisdiction to protect against local bias, but the court rejected that argument as inconsistent with the statute.[536]

XXV. JURISDICTION—SUBJECT MATTER GENERALLY

John Doe, a thirteen-year-old member of the Choctaw Indian tribe, had an internship at a Dollar General store on the Mississippi Choctaw reservation.[537] He was sexually molested in the store and sued the company for damages in tribal court in *Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians*.[538] After losing jurisdictional challenges in the tribal system, the company sued in federal court to enjoin the prosecution of the case.[539] The Fifth Circuit affirmed dismissal in favor of Choctaw jurisdiction.[540] Reviewing the Supreme Court authority in the area, it

528. *Id.* at 554.
529. *Id.* at 557.
530. Vantage Drilling Co. v. Hsin-Chi Su, 741 F.3d 535, 536 (5th Cir. Jan. 2014) (per curiam).
531. *Id.* at 535–36.
532. *Id.* at 536.
533. *Id*.
534. *Id.* at 537–38 (citing Chick Kam Choo v. Exxon Corp., 764 F.2d 1148, 1148 (5th Cir. 1985)).
535. *Id.* (internal quotation marks omitted).
536. *See id.* at 538–39.
537. Dolgencorp, Inc. v. Miss. Band of Choctaw Indians, 732 F.3d 409, 411 (5th Cir. Oct. 2013), *withdrawn*, 746 F.3d 167 (5th Cir. Mar.), *reh'g denied*, 746 F.3d 588 (5th Cir. Mar. 2014) (per curiam).
538. *Id*.
539. *Id.*
540. *Id.* at 419.

concluded: "[T]he ability to regulate the working conditions (particularly as pertains to health and safety) of tribe members employed on reservation land is plainly central to the tribe's power of self-government."[541] A strongly worded dissent criticized "[t]he majority's alarming and unprecedented holding," arguing that it "profoundly upsets the careful balance that the Supreme Court has struck" in the area.[542] Over another dissent, the full court denied en banc review in 2014.[543]

In *Venable v. Louisiana Workers' Compensation Corp.*, Venable had a heart attack on a drilling barge; he and its owner agreed to settle for $350,000.[544] The Louisiana Workers' Compensation Corporation (LWCC) initially indicated its agreement, but withdrew consent when it became evident that he would need a heart transplant.[545] Litigation ensued as to whether the LWCC could rely upon § 933 of Longshore and Harbor Workers' Compensation Act, which gives a carrier, such as LWCC, a veto right with substantial procedural safeguards.[546] The Fifth Circuit reversed summary judgment for Venable.[547] After a thorough and succinct review of the black letter law on federal question jurisdiction, the court held that § 933 gave the LWCC a defensive right that did not implicate Venable's "well-pleaded-complaint."[548] It also held that the tentative nature of the LWCC's alleged consent foreclosed ancillary jurisdiction over the claimed settlement under *Kokkonen*.[549]

Chesapeake sued two defendants to recover a large overpayment in *Chesapeake Louisiana, L.P. v. Buffco Production, Inc.*, and Harleton Oil & Gas intervened to claim a share of that payment.[550] The Fifth Circuit ruled: (1) Harleton should have been aligned as a plaintiff rather than a defendant since it "intervened to seek affirmative relief, not to protect its interests"; (2) that change destroyed diversity and mooted a summary judgment granted by the district court; (3) the case should then be remanded for the district court to consider whether Harleton is indispensable and its joinder requires dismissal of the entire action; but (4) the district court had jurisdiction over the defendants' counterclaims against Chesapeake, which involved different wells than the one relevant to Harleton.[551] "When an independent basis for jurisdiction exists with respect to a counterclaim, a federal court may

541. *Id.* at 416–17 (discussing Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 334–40 (2008); Montana v. United States, 450 U.S. 544, 564–66 (1981)).

542. *Id.* at 419 (Smith, J., dissenting).

543. *Dolgencorp, Inc.*, 746 F.3d at 589.

544. Venable v. La. Workers' Comp. Corp., 740 F.3d 937, 940 (5th Cir. Dec. 2013).

545. *Id.*

546. *Id.* at 941.

547. *Id.* at 946.

548. *Id.* at 943.

549. *Id.* at 945–46 (discussing Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 376–81 (1994)).

550. Chesapeake La., L.P. v. Buffco Prod., Inc., 564 F. App'x 751, 753 (5th Cir. May 2014) (per curiam).

551. *Id.* at 756.

adjudicate the claim even if the original claim was dismissed for lack of subject-matter jurisdiction."[552]

XXVI. OIL & GAS

A Louisiana mineral lease provided that the lessee would pay the lessor "one-eighth (1/8) of the market value at the mouth of the well of the gas so sold."[553] In *Cimarex Energy Co. v. Chastant*, the lessor claimed that the payment obligations extended to the benefits of a hedging program operated by the lessee/producer.[554] The Fifth Circuit agreed with the district court that it did not "require Cimarex to pay royalties on amounts generated through its separate financial activities."[555] The court distinguished a case about royalties on take-or-pay payments, noting: "Take-or-pay is, for these purposes, an alternative to actual production, or effectively a minimum production for purposes of rights under the lease. Hedging transactions do not serve that purpose. They are supplements to production, not substitutes."[556]

In *In re Energytec, Inc.*, the lower courts agreed that the sale of a pipeline system from a bankruptcy estate was free and clear of an obligation to pay certain fees to Newco.[557] The Fifth Circuit vacated, holding that the obligations arose from a covenant that ran with the land.[558] First, the court held that the lower court's reservation of the "free and clear" issue was sufficient to avoid § 363 of the Bankruptcy Code, which would otherwise moot the appeal for failure to get a stay.[559] On the merits, the court focused on "horizontal privity" between the parties at the time the covenant was created, expressing doubt that Texas in fact imposed such a requirement, but holding it satisfied in the conveyances here.[560] The court also concluded that the payment obligation ran with the land, as it related to transportation from the land and was secured by a lien on the entire pipeline.[561]

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552. *Id.* at 757 (citing McLaughlin v. Miss. Power Co., 376 F.3d 344, 355 (5th Cir. 2004) (per curiam)).

553. Cimarex Energy Co. v. Chastant, 537 F. App'x 561, 564 (5th Cir. Aug. 2013) (per curiam).

554. *Id.* at 563.

555. *Id.* at 566.

556. *Id.*

557. Newco Energy v. Energytec, Inc. (*In re* Energytec, Inc.), 739 F.3d 215, 218 (5th Cir. Dec. 2013).

558. *Id.* at 226.

559. *See id.* at 220–21.

560. *See id.* at 222–23 (discussing Wayne Harwell Props. v. Pan Am. Logistics Ctr., Inc., 945 S.W.2d 216, 218 (Tex. App.—San Antonio 1997, writ denied)).

561. *See id.* at 224–25 (distinguishing Refinery Holding Co., LP v. TMRI Holdings, Inc. (*In re* El Paso Refinery, LP), 302 F.3d 343, 346, 356–57 (5th Cir. 2002)).

XXVII. PERSONAL JURISDICTION

An insurance company complained in *Companion Property & Casualty Insurance Co. v. Palermo* that its counsel allowed entry of a consent judgment in a Louisiana case that wrongly imposed $400,000 in liability on it that another insurer should have covered.[562] The company, based in South Carolina, sued for legal malpractice in Texas, the location of the third-party administrator (TPA) who had overseen the counsel.[563] The Fifth Circuit held that the firm's relationship with the TPA was not enough to establish general jurisdiction and found no basis for personal jurisdiction in Texas over the Louisiana-based firm.[564] The counsel was in Louisiana, the alleged malpractice occurred in Louisiana, and the insured was in South Carolina: "Although [the firm's] contacts with [the TPA] are factually related—and perhaps integral—to the substance of [the plaintiff's] claim, the alleged malpractice does not arise from a breach of some duty owed to [the TPA]."[565]

The Chinese defendant in *Germano v. Taishan Gypsum Co.* (*In re Chinese-Manufactured Drywall Products Liability Litigation*)—part of the "Chinese Drywall" multi-district litigation (MDL) proceeding—sought to set aside a default judgment for lack of personal jurisdiction.[566] Applying Fourth Circuit law, which the court characterized as taking a "more conservative" approach to recent Supreme Court decisions than the Fifth Circuit, the court found jurisdiction under that circuit's "stream-of-commerce-plus" test.[567] It noted that the defendant sold directly into Virginia, made markings on its product specific to the Virginia customer, modified the design specifically for that customer, and had a plan to expand sales by leveraging the relationship with the customer.[568] The court also found a lack of excusable neglect, noting that service was proper under the Hague Convention and that the defendant delayed seeking legal counsel for many months.[569]

Then "[p]icking up where we left off in [*Germano*]," the Fifth Circuit affirmed personal jurisdiction in three other suits involving default judgments arising from the Chinese Drywall MDL litigation in the case of *Taishan Gypsum Co. v. Gross* (*In re Chinese-Manufactured Drywall Products Liability Litigation*).[570] Again, the court found jurisdiction for the same basic

562. Companion Prop. & Cas. Ins. Co. v. Palermo, 723 F.3d 557, 558–59 (5th Cir. July 2013).
563. *Id.* at 559.
564. *See id.* at 560–61.
565. *Id.* at 561.
566. Germano v. Taishan Gypsum Co. (*In re* Chinese-Manufactured Drywall Prods. Liab. Litig.), 742 F.3d 576, 583 (5th Cir. Jan. 2014).
567. S*ee id.* at 586 (citing Ainsworth v. Moffett Eng'g, Ltd., 716 F.3d 174, 178 (5th Cir.), *cert. denied*, 134 S. Ct. 644 (2013)).
568. *Id.* at 589.
569. *Id.* at 582–95.
570. Taishan Gypsum Co. v. Gross (*In re* Chinese-Manufactured Drywall Prods. Liab. Litig.), 753 F.3d 521, 526–27 (5th Cir. May 2014).

reasons related to the stream of commerce.[571] Applying Florida and Louisiana law, this opinion also features a detailed discussion of when an agency relationship can give rise to jurisdiction, applying the recent Supreme Court case of *Daimler AG v. Bauman*.[572]

The defendant was personally served in Louisiana; the question in *Gatte v. Dohm* was whether the plaintiffs fraudulently induced her to come there.[573] More specifically, the defendant (part owner of a Mexican clinic where the plaintiffs' relative had died) alleged she had been duped into travelling to Louisiana to return the decedent's ashes and personal effects to family members, as they were too distraught to travel themselves.[574] The district court did not address fraudulent inducement; the Fifth Circuit held that personal jurisdiction existed, noting a conflict between the affidavits submitted by the parties and applying the principle: "[C]onflicts between the facts contained in the parties' affidavits must be resolved in the plaintiff's favor for purposes of determining whether a *prima facie* case for personal jurisdiction exists."[575]

XXVIII. PLEADINGS—AMENDMENT

The plaintiff in *Butler v. Taser International, Inc.* sought to amend a negligence suit to add a new fraud claim after the deadline for motions to amend pleadings had passed.[576] In affirming the denial of leave to amend, the Fifth Circuit noted: "In his first amended complaint, Officer Butler pled a litany of facts that could have supported claims for fraudulent inducement and failure to warn. He alleged that TI had made false representations, and that TI's warnings regarding the dangers of a Taser shock were inadequate."[577] In other words, a point that weighs against a finding of prejudice—that the matters raised by the new pleading were already in issue—also weighed against a finding of good cause and justified denial of leave, especially after the deadline.

XXIX. PLEADINGS—*TWOMBLY/IQBAL*

The Fifth Circuit provided its most thorough recent review of the pleading requirements of *Twombly* and *Iqbal* in *In re Fish & Fisher, Inc*.[578]

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571. *Id.* at 540–42.

572. *See id.* at 530–32 (discussing Daimler AG v. Bauman, 134 S. Ct. 746, 759 & n.13 (2014)).

573. Gatte v. Dohm, 574 F. App'x 327, 331 (5th Cir. June 2014).

574. *Id.*

575. *Id.* at 330 (emphasis omitted) (quoting D.J. Invs., Inc. v. Metzeler Motorcycle Tire Agent Gregg, Inc., 754 F.2d 542, 545–46 (5th Cir. 1985)).

576. Butler v. Taser Int'l, Inc., 535 F. App'x 371, 371–72 (5th Cir. July 2013) (per curiam).

577. *Id.* at 372.

578. Merchs. & Farmers Bank v. Coxwell (*In re* Fish & Fisher, Inc.), 557 F. App'x 259, 259 (5th Cir. Feb. 2014) (per curiam).

The issue was whether the plaintiff pleaded a conversion claim relating to an attorney's distribution of certain funds in alleged violation of a court order.[579] The Fifth Circuit noted that such a claim was cognizable under Mississippi law and that the plaintiff's pleading might have satisfied *Conley v. Gibson*.[580] Under *Twombly* and *Iqbal*, however:

> The complaint did not specify what court issued the order, when it was issued, or to whom it was directed; the complaint did not describe what the order *required* and therefore whether the allegation of a violation is plausible or merely fantastical. Further, merely alleging a perfected security interest is insufficient to establish ownership, and the complaint did not describe whether the court order established M & F's possessory interest in the funds by reducing its claim to judgment.[581]

In *Jabary v. City of Allen*, the plaintiffs made constitutional claims arising from the revocation of the Certificate of Occupancy for his business ("a restaurant, hookah bar, and tobacco store" that also sold "K2" for a time).[582] The Fifth Circuit affirmed the Rule 12 dismissal of most defendants, but reversed and remanded as to two.[583] The holding of general interest relates to the pleading of the mayor's involvement in the decision, which was found adequate; the court specifically noted that the pleading said the mayor had suggested to Jabary that he move his business and that the mayor had a potential financial motive because he owned another business in the relevant mall.[584]

XXX. PREEMPTION

In a straightforward analysis of "conflict preemption," the Fifth Circuit agreed in *Simmons v. Sabine River Authority Louisiana* that the Federal Power Act (the enabling statute for FERC) "preempts property damage claims under state law where the claim alleges negligence for failing to act in a manner FERC expressly declined to mandate while operating a FERC-licensed project."[585] Here, plaintiffs claimed damages from flooding after spillway gates along the Sabine River were opened in late 2009; the court concluded that the claims "infringe[d] on FERC's operational control"

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579. *Id.* at 260–61.

580. *Id.* at 262 (citing Conley v. Gibson, 355 U.S. 41 (1957), *abrogated by* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007)).

581. *Id.* at 263.

582. Jabary v. City of Allen, 547 F. App'x 600, 602 (5th Cir. Nov. 2013).

583. *Id.* at 611.

584. *Id.* at 602–08.

585. Simmons v. Sabine River Auth. La., 732 F.3d 469, 471 (5th Cir. Oct. 2013), *cert. denied*, 134 S. Ct. 1876 (2014).

because "FERC, not state tort law, must set the appropriate duty of care for dam operators."[586]

In *Eckhardt v. Qualitest Pharmaceuticals, Inc.*, the Fifth Circuit reviewed tort claims under Texas law against generic drug manufacturers.[587] The court held that labeling claims were preempted under *PLIVA, Inc. v. Mensing*,[588] and products liability claims were preempted under *Mutual Pharmaceutical Co. v. Bartlett*.[589] The court also rejected misrepresentation claims against brand-name drug manufacturers under state law for lack of a duty from manufacturers to generic drug users.[590]

The plaintiff in *McKay v. Novartis Pharmaceutical Corp.* challenged the dismissal on preemption grounds—by an MDL court in Tennessee—of products liability claims about drugs made by Novartis.[591] The Fifth Circuit rejected an argument about inadequate time to get certain medical records, noting that the plaintiffs "sought formal discovery of evidence that was available to them through informal means" and also observed that two years passed from the filing of suit until Novartis sought summary judgment.[592] The court also affirmed the MDL court's grant of summary judgment on Texas state-law grounds about a breach of warranty claim, finding inadequate notice; as an *Erie* matter: "[T]he majority of Texas intermediate courts have held that a buyer must notify both the intermediate seller and the manufacturer."[593]

XXXI. PRESERVATION

The plaintiff in *Sanders v. Flanders* alleged legal malpractice arising from the handling of patent applications.[594] The Fifth Circuit did not engage the question whether he had shown lost profits with reasonable certainty, noting: "[C]ounsel admitted during oral argument that [the plaintiff] did not make any offer of proof concerning the lost-profit evidence that he would have otherwise presented but for the district court's hearsay ruling."[595]

In *Eagle Suspensions, Inc. v. Hellmann Worldwide Logistics, Inc.*, the Fifth Circuit reminded litigants to request a limiting instruction to help preserve evidentiary error:

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586. *Id.* at 476.

587. Eckhardt v. Qualitest Pharm., Inc., 751 F.3d 674, 675 (5th Cir. May 2014).

588. PLIVA, Inc. v. Mensing, 131 S. Ct. 2567, 2593 (2011).

589. *See generally* Mut. Pharm. Co. v. Bartlett, 133 S. Ct. 2466 (2013) (holding that federal law preempted products liability claims).

590. *Eckhardt*, 751 F.3d at 681.

591. McKay v. Novartis Pharm. Corp., 751 F.3d 694, 700 (5th Cir. May 2014).

592. *Id.* (citing Xerox Corp. v. Genmoora Corp., 888 F.2d 345, 354 (5th Cir. 1989)).

593. *Id.* at 706 (citing Bailey v. Smith, No. 13-05-085-CV, 2006 WL 1360846, at *4–5 (Tex. App.—Corpus Christi May 18, 2006, no pet.)).

594. Sanders v. Flanders, 564 F. App'x 742, 743 (5th Cir. Apr. 2014) (per curiam).

595. *Id.* at 745.

> Moreover, even if there is merit to this distinction, [the defendant] never requested a limiting instruction during trial that would have enabled the jury to consider the evidence regarding insurance only for permissible purposes. Where "counsel never requested a more complete limiting instruction," the district court "cannot [be] fault[ed] . . . for failing to give one spontaneously."[596]

Also, as to charge error, the court said:

> Essentially, [the defendant] now argues that the district court should have recalled [the defendant's] federal preemption argument from January and February 2013 when drafting the final jury instructions on March 20, 2013, even though [the defendant] itself never referenced this federal preemption argument in [the defendant's] objections to the proposed jury instructions.
>
> . . . [A] party cannot merely rely on "the fact that the court is already aware of its position as an excuse for a failure to make a specific, formal objection at the charge conference." Rule 51 specifically requires parties to make their objections after the proposed jury charge has been drafted and distributed for comment.[597]

XXXII. PRIVILEGE—ATTORNEY–CLIENT

The key question in most privilege disputes about in-house counsel is the distinction between legal advice or business discussion. The Fifth Circuit addressed that question and offered practical guidance for in-house counsel in *Exxon Mobil Corp. v. Hill*.[598] Exxon Mobil intervened in tort litigation to contend that the attorney–client privilege protected a short 1988 memo by an in-house lawyer.[599] The lawyer created the memo during negotiations between Exxon Mobil and ITCO, a company that would store oil production equipment for Exxon.[600] The memo recommended that Exxon Mobil, in response to an information request by ITCO, make a limited disclosure from a report it had about radioactivity associated with the equipment.[601] As the Fifth Circuit summarized: "Stein [the lawyer] suggested that Guidry [the client] disclose only Table IV [of the report], because it contained the only data that ITCO specifically had requested, and that Guidry remove the caption 'Table IV' so as not to flag the existence of other tables."[602] The

596. Eagle Suspensions, Inc. v. Hellmann Worldwide Logistics, Inc., 571 F. App'x 281, 286 (5th Cir. June 2014) (per curiam) (alterations in original) (citing United States v. Stevens, 38 F.3d 167, 170 (5th Cir. 1994)).

597. *Id.* at 288 (footnote omitted) (quoting Jimenez v. Wood Cnty., Tex., 660 F.3d 841, 845–46 (5th Cir. 2011) (en banc)).

598. *See generally* Exxon Mobil Corp. v. Hill, 751 F.3d 379 (5th Cir. May 2014) (addressing when a dispute between in-house counsel is legal advice and when it is simply a business discussion).

599. *Id.* at 381.

600. *Id.* at 380.

601. *See id.*

602. *Id.*

memo identified the sender as "Counsel," but did not otherwise say that the contents were privileged.[603]

The plaintiffs contended that the effect of this advice was to conceal information about dangerous levels of radiation.[604] The district court rejected Exxon Mobil's position about privilege, reasoning that it had not shown that the "primary or predominant" purpose for consultation with the lawyer was for legal advice,

> particularly in light of the fact that the [memo] itself does not contain any reference to a legal justification for Stein's advice, or legal concerns prompting Guidry to seek such advice. . . . [I]t appears from the face of the document that the primary purpose of Stein's advice to Guidry was to help secure more favorable contract terms.[605]

The Fifth Circuit vacated and remanded.[606] Stating that its conclusion would be the same even when reviewed under clear-error review, the court held:

> The manifest purpose of the draft [attached to the memo] was to deal with what would be the obvious reason Exxon Mobil would seek its lawyer's advice in the first place, namely to deal with any legal liability that may stem from under-disclosure of data, hedged against any liability that may occur from any implied warranties during complex negotiations.[607]

This opinion offers practical guidance for maintaining privilege as to in-house counsel. First, the memo is focused. Written in 1988, before long email chains became common, it presents a short exchange on a specific topic. Second, it has a specific audience—it is written to a specific person rather than a large group—or a "reply all." Finally, it is clear. The memo refers directly to legal concepts such as warranty liability and property interests. The memo's focus, audience, and clarity appear to have been critical for the court's analysis and the preservation of Exxon Mobil's privilege with its in-house counsel.

XXXIII. PROFESSIONAL NEGLIGENCE

In *Ortega v. Young Again Products, Inc.*, the plaintiff sued a judgment creditor and its counsel, claiming that they took assets that belonged to him

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603. *See id.* at 382.

604. *See id.* at 380.

605. Exxon Mobil Corp. v. Hill, No. 13-236, 2013 WL 3293496, at *7 (E.D. La. June 28, 2013), *vacated*, 751 F.3d 379 (5th Cir. May 2014).

606. *Exxon Mobil Corp.*, 751 F.3d at 383.

607. *Id.* at 382.

rather than the judgment debtor.[608] The Fifth Circuit recognized that Texas extends qualified immunity to claims by a third party against an attorney for conduct requiring the "office, professional training, skill, and authority of an attorney."[609] The focus is on the type of conduct, not its merit. Accordingly, removal of the case was proper because the attorney was fraudulently joined and dismissal for various reasons was affirmed.[610]

XXXIV. REMEDIES

The defendant in *Advanced Nano Coatings, Inc. v. Hanafin* "entered into an employment agreement with [the plaintiff] in which [the defendant] agreed to devote 100% of his professional time and effort to [the plaintiff] or its subsidiary."[611] "The district court . . . found that [the defendant] breached his fiduciary obligations . . . a finding [the defendant] does not dispute on appeal."[612] Quoting *ERI Consulting Engineers, Inc. v. Swinnea*, the Fifth Circuit noted that under Texas law, "if the fiduciary . . . acquires any interest adverse to his principal, without a full disclosure, it is a betrayal of his trust and a breach of confidence, and he must account to his principal for all he has received."[613] The court then held: "Accordingly, [the defendant's] breach of fiduciary duties obligates him to repay everything he gained by virtue of his position, including payments for his salary and any expenses he may have incurred."[614]

XXXV. REMOVAL

In *Moore v. Manns*, Moore sued PPG Industries and several local parties for injuries at a chemical complex; the defendants removed, arguing fraudulent joinder.[615] After some jurisdictional discovery, Moore sought to add three more local parties, but the district court denied him leave to do so.[616] The Fifth Circuit affirmed, first reminding: "If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court."[617] Accordingly, a district court should review such a proposed amendment "more closely than an ordinary

608. Ortega v. Young Again Prods., Inc., 548 F. App'x 108, 111 (5th Cir. Nov. 2013).
609. *Id.* (quoting Miller v. Stonehenge/Fasa-Tex., JDC, L.P., 993 F. Supp. 461, 464 (N.D. Tex 1998)).
610. *Id.* at 113–14.
611. Advanced Nano Coatings, Inc. v. Hanafin, 556 F. App'x 316, 318 (5th Cir. Feb. 2014).
612. *Id.* at 319.
613. *Id.* (quoting ERI Consulting Eng'rs, Inc. v. Swinnea, 318 S.W.3d 867, 872 (Tex. 2010)).
614. *Id.*
615. Moore v. Manns, 732 F.3d 454, 456 (5th Cir. Oct. 2013) (per curiam).
616. *Id.*
617. *Id.* (quoting 28 U.S.C. §1447(e)).

amendment."[618] Factors include the extent to which the amendment is solely for jurisdictional purposes, whether the plaintiff was dilatory, and potential harm to the plaintiff if the amendment is not allowed.[619] Here, the court agreed that the general responsibility for safety under which the new parties were sued did not trigger personal fault under Louisiana law, making the amendment tactical and impermissible.[620]

A recurring issue in federal litigation arises from cases that "overstay their welcome" in the federal courthouse—for example, where only state-law claims remain after dismissal of federal claims. A variation of that situation arose in *Energy Management Services, LLC v. City of Alexandria*, where a city sued its electricity provider.[621] After that litigation was removed to federal court, the city then removed a second suit, brought by its utility-consulting firm, on the ground of supplemental jurisdiction—after the first case had been settled.[622] The remand order was certified for interlocutory appeal and the Fifth Circuit reversed and remanded, finding that there was no original jurisdiction over the second case, as required by the removal statute.[623] The Fifth Circuit acknowledged that the district court could have continuing jurisdiction over matters related to the original settlement, which could potentially even extend to such matters involving third parties—but here, the second case had no connection to those settled matters.[624]

Plaintiff Jongh sued State Farm Lloyds and Johnson, a local insurance adjuster, relating to the handling of her property insurance claim for storm damage in *De Jongh v. State Farm Lloyds*.[625] State Farm answered and removed, arguing that (1) Johnson was improperly joined to destroy diversity; (2) Jongh had improperly named Lloyds, a separate entity; and (3) State Farm and Jongh were diverse.[626] The trial court ruled for the defendants after a one-day bench trial.[627] The Fifth Circuit agreed with the plaintiff—who appears to have raised subject matter jurisdiction for the first time on appeal:

> State Farm never became a party in this action. Jongh did not name State Farm as a defendant in her original petition; although it asserted in its answer and notice of removal that Jongh incorrectly named Lloyds as a

618. *Id.* (quoting Hensgens v. Deere & Co., 833 F.2d 1179, 1182 (5th Cir. 1987)).
619. *See id.*
620. *See id.* at 457.
621. Energy Mgmt. Servs., LLC v. City of Alexandria, 739 F.3d 255, 256 (5th Cir. Jan. 2014).
622. *Id.* at 257.
623. *Id.* at 261–62.
624. *See id.* at 260–61.
625. De Jongh v. State Farm Lloyds, 555 F. App'x 435, 436 (5th Cir. Feb. 2014) (per curiam).
626. *Id.*
627. *Id.*

> defendant, State Farm did not move to intervene or otherwise request that the district court substitute it as the proper party in interest.[628]

The court noted that the plaintiff, the "master of [her] complaint," consistently asserted that her claim was against Lloyds and not State Farm.[629] The judgment was vacated and the case remanded.[630]

In *Haase v. Countrywide Home Loans, Inc.*, the district court dismissed the plaintiff's Real Estate Settlement Procedures Act (RESPA) claim, declined to exercise supplemental jurisdiction over the remaining state-law claims, and remanded them to state court.[631] The appellees argued that "because this judgment remanded the remaining state claims to the state court without addressing their respective merits, it is not a final disposition of all claims in the case, and therefore not appealable under 28 U.S.C. § 1291."[632] The Fifth Circuit disagreed, concluding that "as a practical matter, remands end federal litigation and leave the district court with nothing else to do."[633]

The unfortunate plaintiff in *Robinson v. Wal-Mart Stores Texas L.L.C.* argued that her state-court petition referenced a $23,500 medical bill, which was in fact only $235.[634] The Fifth Circuit affirmed the denial of her motion to remand, reminding: "If at the time of removal it is facially apparent from the state-court petition that the amount in controversy exceeds $75,000, a plaintiff's subsequent request to amend her petition to 'clarify' the amount in controversy cannot divest jurisdiction."[635] The court also observed: "In addition, prior to removal, Wal-Mart proposed to Robinson that she stipulate to no more than $75,000 in damages in exchange for not removing the case to federal court," and the plaintiff declined to make that stipulation.[636]

In the recent case of *French v. EMC Mortgage Corp.*, these allegations were deemed to "reference[] the FDCPA by way of asserting a cause of action under this federal statute," and thus allowed removal:[637]

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628. *Id.* at 437.

629. *Id.* at 438 (quoting Elam v. Kan. City S. Ry. Co., 635 F.3d 796, 803 (5th Cir. 2011)).

630. *Id.* at 439.

631. Haase v. Countrywide Home Loans, Inc., 748 F.3d 624, 626 (5th Cir. Apr.), *cert. denied*, 135 S. Ct. 754 (2014).

632. *Id.* at 628.

633. *Id.* at 629 (applying Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 715 (1996)).

634. Robinson v. Wal-Mart Stores Tex., L.L.C., 561 F. App'x 417, 418 (5th Cir. Apr. 2014) (per curiam).

635. *Id.* at 417–18 (citing Gebbia v. Wal-Mart Stores, Inc., 233 F.3d 880, 882 (5th Cir 2000); Allen v. R & H Oil & Gas Co., 63 F.3d 1326, 1336 (5th Cir. 1995)).

636. *Id.* at 418.

637. French v. EMC Mortg. Corp., 566 F. App'x 285, 287 (5th Cir. Apr. 2014) (per curiam).

> *V. ILLEGAL MORTGAGE SERVICING AND DEBT COLLECTION PRACTICES*
>
> . . .
>
> Specifically in collection calls and notices, monthly statements, payoff statements, foreclosure notices, and otherwise, EMC routinely makes misrepresentations to borrowers about their loans, including: [6 topics]
>
> . . .
>
> Plaintiffs submit that Defendant EMC's conduct in this matter is in direct violation of the Texas Fair Debt Collection Practices Act, the Federal Fair Debt Collection Practices Act and the above referenced stipulated injunction.[638]

This case rested on *Howery v. Allstate Insurance Co.*, in which the following allegations did not create federal question jurisdiction, because "[f]rom its context, it appears that Howery's mention of federal law merely served to describe types of conduct that violated the DTPA, not to allege a separate cause of action under the FCRA":[639]

> The acts, omissions, and other wrongful conduct of Allstate complained of in this petition constituted unconscionable conduct or unconscionable course of conduct, and false, misleading, or deceptive acts or practices. As such, Allstate violated the Texas Deceptive Trade Practices Act, Sections 17.46, et seq., and the Texas Insurance Code, including articles 21.21, 21.21–1, 21.55, and the rules and regulations promulgated thereunder, specifically including 28 TAC Section 21.3, et seq. and 21.203.
>
> . . .
>
> Allstate's destruction of [Howery's] file . . . constituted a further violation of the Texas Deceptive Trade Practices Act, for which plaintiff sues for recovery. Allstate also engaged in conduct in violation of the Federal Trade Commission rules, regulations, and statutes by obtaining Plaintiff's credit report in a prohibited manner, a further violation of the Texas Deceptive Trade Practices Act. . . .[640]

While these holdings are consistent, the line between them is only a few words in a lengthy pleading. They underscore the importance of detail in considering whether removal is appropriate.

Similarly, in the published opinion of *Davoodi v. Austin Independent School District*, the Fifth Circuit revisited the recurring question of how substantial a federal question must be to create jurisdiction (and thus allow removal).[641] Notably, the court did not analyze whether the plaintiff stated a *claim* under federal law in the causes of action alleged in his pleading.

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638. David Coale, *How Much Federal Question Allows Removal*, 600 CAMP (Apr. 30, 2014), http://600camp.com/?p=2778.

639. Howery v. Allstate Ins. Co., 243 F.3d 912, 918 (5th Cir. 2001).

640. *Id.* at 915 (alteration in original).

641. Davoodi v. Austin Indep. Sch. Dist., 755 F.3d 307, 310 (5th Cir. June 2014).

Rather, the decision turned on how much the pleaded *facts* involved a violation of federal law. This focus contrasts with the framework of *Howery*, which rejected jurisdiction because "[f]rom its context, it appears that Howery's mention of federal law merely served to describe types of conduct that violated the DTPA, not to allege a separate cause of action under the FCRA," and because a violation of federal law was not an "essential element" of Howery's state-law claims.[642]

Davoodi sued in Texas state court, alleging state-law claims for national origin discrimination and intentional infliction of emotional distress, and a claim for retaliation without a specified basis in state or federal law.[643] The first of the two paragraphs in the "Facts" section of the petition said:

> On or about June 2, 2011 Plaintiff filed a Charge of Discrimination with the EEOC and the Texas Human Rights Commission. . . . This charge alleged that Defendant discriminated against Plaintiff based on his National Origin (Iranian). On February 3, 2012 the EEOC issued a Dismissal and Notice of Rights. The Texas Human Rights Commission did not issue a dismissal/ right to sue.[644]

The court noted that the incorporation of the charge made it "part of [the plaintiff's] complaint for all purposes," and created federal jurisdiction because the charge contained the averment and claim: "I have been and continue to be discriminated against, in violation of Title VII of the 1964 Civil Rights Act, as amended, [and] the Texas Commission on Human Rights Act, as amended, because of my national origin (Iranian)."[645] The court remanded as to the Rule 12 dismissal of the case, however, to allow the plaintiff a chance to replead under *Lozano v. Ocwen Federal Bank, FSB*.[646]

The movant's Rule 12 arguments, as reflected in the appellate record excerpts, address whether the plaintiff's pleading stated a claim for retaliation under either state or federal law.[647] The Fifth Circuit did not engage the basis for that claim in its analysis of federal question jurisdiction, focusing entirely on the fact allegations described above and the statement made to the EEOC.[648] *Allstate* can be reconciled with *Davoodi* because the mention of federal law in the *Allstate* pleading is substantially smaller as a percentage of the overall allegations.[649] That analytical framework—different than

642. *Howery*, 243 F.3d at 918.

643. *See Davoodi*, 755 F.3d at 308.

644. David Coale, *Federal Question? Where to Look . . .*, 600 CAMP (June 18, 2014), http://600camp.com/?p=2991 [hereinafter Coale, *Federal Question?*].

645. *Id.* (alterations in original).

646. *See Davoodi*, 755 F.3d at 311–12 (citing Lozano v. Ocwen Fed. Bank, FSB, 489 F.3d 636, 642–43 (5th Cir. 2007)).

647. Coale, *Federal Question?*, *supra* note 644.

648. *Id.*

649. *Id.*

Allstate's focus—may invite new removals based on a percentage-based analysis of a pleading's factual allegations.

XXXVI. RES JUDICATA/COLLATERAL ESTOPPEL

In *Meyers v. Textron, Inc.*, the Fifth Circuit affirmed the Rule 12 dismissal of a complaint on res judicata grounds.[650] Noting that res judicata is ordinarily an affirmative defense, the court reminded: "When all relevant facts are shown by the court's own records, of which the court takes notice, the defense [of res judicata] may be upheld on a Rule 12(b)(6) motion without requiring an answer."[651] On the merits, the court found no dispute that the plaintiffs in two cases were in privity given the control one had over the other.[652]

The plaintiff in *Bradberry v. Jefferson County, Texas* alleged that he was terminated from his job as a county corrections officer, in violation of federal law, because he was called to service in the Army Reserve during Hurricane Ike.[653] A key issue was whether a county administrative proceeding about his termination collaterally estopped his later federal lawsuit.[654] The Fifth Circuit, noting that administrative proceedings can create collateral estoppel if state law would allow it, held that the questions were different and no estoppel arose: "We conclude that a finding that Bradberry was discharged due to a disagreement about military service is not the equivalent of a finding that the County was motivated by his military status to discharge him."[655]

In *Grimes v. BNSF Railway Co.*, the district court applied collateral estoppel to a Federal Railway Safety Act suit, based on a fact-finding made by a type of arbitral panel called a Public Law Board (PLB) after an investigation and hearing by railroad personnel.[656] The Fifth Circuit vacated and remanded, noting:

> (1) the hearing was conducted by the railroad; (2) the plaintiff was represented by the union rather than an attorney; (3) the termination decision was made by a railroad employee, not by "an impartial fact finder such as a judge or jury"; (4) the rules of evidence do not appear to have

650. Meyers v. Textron, Inc., 540 F. App'x 408, 410 (5th Cir. Oct. 2013) (per curiam).

651. *Id.* (quoting Clifton v. Warnaco, Inc., Nos. 94-10226, 94-10657, 1995 WL 295863, at *6 n.13 (5th Cir. Apr. 18, 1995) (per curiam)).

652. *See id.*

653. Bradberry v. Jefferson Cnty., Tex., 732 F.3d 540, 543 (5th Cir. Oct. 2013).

654. *Id.* at 548–51.

655. *Id.* at 551–52.

656. Grimes v. BNSF Ry. Co., 746 F.3d 184, 185 (5th Cir. Mar. 2014) (per curiam).

> [controlled in the arbitral proceedings]; (5) and most crucially, the PLB's affirmance was based solely on the record.[657]

The court noted authority that rejects res judicata in this context but also noted that "estoppel may apply in federal-court litigation to facts found in arbitral proceedings as long as the court considers the 'federal interests warranting protection.'"[658]

XXXVII. SANCTIONS

A preliminary injunction forbade the Department of Health and Human Services (HHS) from "acting in accordance with the Notice of Termination . . . relative to [a nursing facility's] Medicare and Medicaid Provider Agreement."[659] After the injunction expired, HHS proceeded with termination.[660] In *Oaks of Mid City Resident Council v. Sebelius*, the Fifth Circuit reversed a contempt holding against HHS, agreeing with the Government's position that the injunction was designed to pause the termination process—but not to forbid a later termination unrelated to the specified notice.[661]

XXXVIII. STANDARDS OF REVIEW

A technical opinion about calculation of a Clean Water Act penalty for a wastewater spill, *United States ex rel. Administrator of EPA v. CITGO Petroleum Corp.*, offers a good general insight about sufficiency review.[662] In reviewing a challenge to the amount of wastewater at issue under the clear-error standard, the court reminded: "The government's argument on this issue is essentially that the court credited the wrong expert. 'Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.'"[663]

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657. *Id.* at 189.

658. *Id.* at 188 (discussing Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 223 (1985)).

659. Oaks of Mid City Resident Council v. Sebelius, 723 F.3d 581, 583 (5th Cir. July 2013) (quoting the district court's order).

660. *Id.* at 584.

661. *See id. See generally* Hornbeck Offshore Servs., L.L.C. v. Salazar, 713 F.3d 787 (5th Cir.) (reversing a contempt order against the federal government), *cert. denied*, 134 S. Ct. 823 (2013).

662. United States *ex rel.* Adm'r of EPA v. CITGO Petrol. Corp., 723 F.3d 547, 547 (5th Cir. July 2013).

663. *Id.* at 556 (quoting Bertucci Contracting Corp. v. M/V ANTWERPEN, 465 F.3d 254, 258 (5th Cir. 2006)).

XXXIX. STANDING/RIPENESS/JUSTICIABILITY

In *In re R.E. Loans, L.L.C.*, Wells Fargo faced a class action in California.[664] It attempted to get an antisuit injunction from a Texas bankruptcy court, which was denied.[665] The Fifth Circuit found the appeal moot because Wells Fargo's briefing focused on a consolidated complaint in the class case that was amended after the appeal began.[666] While the court noted: "An amended complaint supersedes the original complaint and renders it of no legal effect unless the amended complaint specifically refers to and adopts or incorporates by reference the earlier pleading," it did not resolve the appeal on that basis, simply finding that the new complaint significantly changed the relevant issues.[667]

Payne sued Progressive Financial in *Payne v. Progressive Financial Services, Inc.*, for violations of fair debt collection statutes, seeking statutory damages, actual damages, attorneys' fees, and costs.[668] Progressive made a Rule 68 offer of $1,001 in damages and fees to the date of the offer, to which Payne did not respond.[669] The district court reasoned that Payne had not pleaded a basis to recover actual damages and that the unaccepted offer mooted her claim for statutory damages because it exceeded the amount she could recover.[670] The Fifth Circuit reversed and remanded, finding that the district court's analysis of the actual-damages claim conflated jurisdiction with resolution of the merits; accordingly, Progressive's offer was incomplete because it did not address actual damages.[671] A footnote in the opinion reminds that a complete Rule 68 offer can moot a case, and the court did not reach the argument that the offer was incomplete because it did not include post-offer fees and costs.[672]

In its revised opinion in *Excel Willowbrook, L.L.C. v. JP Morgan Chase Bank, N.A.*, a dispute about the FDIC's rights upon assigning the assets of a failed bank, the new footnote 34 observes: "[T]he continued vitality of prudential 'standing' is now uncertain in the wake of the Supreme Court's recent decision in *Lexmark International, Inc. v. Static Control Components, Inc.* . . . ('[A] court . . . cannot limit a cause of action . . . merely because "prudence" dictates.')."[673]

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664. Wells Fargo Capital Fin., L.L.C. v. Noble (*In re* R.E. Loans, L.L.C.), 553 F. App'x 453, 454 (5th Cir. Feb. 2014) (per curiam).

665. *Id.* at 455–56.

666. *Id.* at 455.

667. *Id.* at 456 (quoting King v. Dogan, 31 F.3d 344, 346 (5th Cir. 1994) (per curiam)).

668. Payne v. Progressive Fin. Servs. Inc., 748 F.3d 605, 606 (5th Cir. Apr. 2014).

669. *Id.* at 606–07.

670. *Id.* at 607.

671. *Id.* at 608–09.

672. *Id.* at 608 n.1.

673. Excel Willowbrook, L.L.C. v. JP Morgan Chase Bank, N.A., 758 F.3d 592, 603 n.34 (5th Cir. Apr. 2014) (alteration in original) (citation omitted).

XL. SUMMARY JUDGMENT PROCEDURE

Davis, a Louisiana prisoner, was attacked and injured by another inmate, Anderson.[674] Davis sued under 42 U.S.C. § 1983 in *Davis v. LeBlanc*, alleging that several prison officials and doctors were "deliberately indifferent" to a "substantial risk of serious harm" to his safety.[675] Similar cases are filed frequently, summary judgment for the defense is common, and affirmance is near-universal under the demanding legal standards for such claims. Here, Davis offered a sworn declaration from another inmate who spoke to a guard–defendant shortly before the attack and was told by that guard "that Anderson was going to 'whip that [expletive] Ronnie Davis in the cell next to him' and 'that [expletive] needs a good [expletive] whipping and it is worth the paperwork for him to get it.'"[676] Summary judgment for that guard was reversed, and the case was remanded for further proceedings.[677] This opinion provides a clear—if graphic—example of how to create a fact issue and reminds that the Fifth Circuit does in fact review the record in the many prisoner cases presented to it.

In *Vinewood Capital, LLC v. Dar Al-Maal Al-Islami Trust*, "[t]he only evidence offered by Vinewood in support of the alleged oral contract between Vinewood and DMI for DMI to invest $100 million in real estate [was] Conrad's deposition testimony and affidavit."[678] The Fifth Circuit reminded: "[A] party's uncorroborated self-serving testimony cannot prevent summary judgment, particularly if the overwhelming documentary evidence supports the opposite scenario."[679] Therefore, "[a]s the district court concluded, Conrad's self-serving testimony is belied by the parties' contemporaneous written communications and written agreements and is therefore insufficient to create an issue of fact."[680]

Devon Enterprises was not re-approved as a charter bus operator for the Arlington schools after the 2010 bid process.[681] In *Devon Enterprises, L.L.C. v. Arlington Independent School District*, Devon argued that it was rejected solely because of its bankruptcy filing in violation of federal law; in response, the school district cited safety issues and insurance problems.[682] An email by the superintendent said, "[Alliance] was the company that [AISD] did not award a bid to for charter bus services because they are currently in

674. Davis v. LeBlanc, 539 F. App'x 626, 627 (5th Cir. Sept. 2013) (per curiam).
675. *Id.* at 628.
676. *Id*.
677. *Id.*
678. Vinewood Capital, LLC v. Dar Al-Maal Al-Islami Trust, 541 F. App'x 443, 448 (5th Cir. Oct. 2013) (per curiam).
679. *Id.* at 447 (citing Vais Arms, Inc. v. Vais, 383 F.3d 287, 294 (5th Cir. 2004)).
680. *Id.* at 448.
681. Devon Enters., L.L.C. v. Arlington Indep. Sch. Dist., 541 F. App'x 439, 440 (5th Cir. Oct. 2013).
682. *Id.* at 442.

bankruptcy."[683] Calling this email "some, albeit weak, evidence" that the filing was the sole reason for the decision, the Fifth Circuit reversed a summary judgment for the school district.[684]

A barge moored at a facility operated by Lafarge came loose during Hurricane Katrina and caused extensive damage.[685] The district court granted summary judgment to Lafarge in *St. Bernard Parish v. Lafarge North America*, finding that the plaintiff's damage theory was not scientifically credible in light of the observed weather conditions at the time.[686] The Fifth Circuit agreed that "[t]here is a great deal of testimony supporting Lafarge's position, to be sure, and little to support the Parish's, but we are mindful of the summary judgment standard."[687] It reversed and remanded, however, noting eyewitness testimony that was not consistent with the defendant's expert analysis.[688] The court distinguished and limited *Ralston Purina Co. v. Hobson*, which involved an unusual theory about the behavior of starving chickens, on the ground that its plaintiff could not prove the facts that his theory required.[689]

The Fifth Circuit again reached a similar holding in *Vaughan v. Carlock Nissan of Tupelo, Inc.*, in which Vaughan alleged that a car dealership unlawfully terminated her after she reported several irregularities there to Nissan.[690] The Fifth Circuit affirmed summary judgment for the dealership as to Mississippi's illegal-act exception to at-will employment, but reversed as to her tortious interference claim against the supervisor who terminated her.[691] The tortious interference claim requires proof of bad faith, which Vaughan sought to establish by showing that she was not fired until making a complaint that specifically named the supervisor.[692] The supervisor admitted that, at the time of termination, he knew Vaughan had complained to Nissan but said "he did not know the contents of the complaint."[693] The Fifth Circuit held that credibility issues about his claimed justifications for the firing, coupled with the ambiguity of his statement that Vaughn had "no right to report these things to Nissan" and the timing of the termination, created a fact issue that made summary judgment unwarranted.[694]

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683. *Id.* at 441 (alterations in original).

684. *Id.* at 442–43.

685. St. Bernard Parish v. Lafarge N. Am., 550 F. App'x 184, 185 (5th Cir. Dec. 2013) (per curiam), *cert. denied*, 134 S. Ct. 2877 (2014).

686. *Id.* at 186–90.

687. *Id.* at 192.

688. *Id.* at 192–93.

689. *See id.* at 192 (citing Ralston Purina Co. v. Hobson, 554 F.2d 725, 729–30 (5th Cir. 1977)).

690. Vaughan v. Carlock Nissan of Tupelo, Inc., 553 F. App'x 438, 439 (5th Cir. Feb. 2014) (per curiam).

691. *Id.* at 440–44.

692. *Id.* at 440.

693. *Id.* at 445 (emphasis omitted).

694. *Id.* at 446.

In reviewing a motion to dismiss under Rule 12(b)(6), the district court "must limit itself to the contents of the pleadings, including attachments thereto," and "may also consider documents attached to either a motion to dismiss or an opposition to that motion when the documents are referred to in the pleadings and are central to a plaintiff's claims."[695] In *Brand Coupon Network, L.L.C. v. Catalina Marketing Corp.*, without converting the Rule 12 motion into a summary judgment motion, the district court considered an affidavit "signed . . . a day before [the plaintiff] filed its opposition to Defendants' motion to dismiss, and weeks after the filing of the petition."[696] Accordingly, the Fifth Circuit vacated and remanded a dismissal under Rule 12 on limitations grounds.[697]

XLI. TAX

A business taxpayer claimed a deduction for a loan; the Fifth Circuit affirmed the tax court's holding that the transaction was not a loan in *DF Systems, Inc. v. Commissioner*.[698] Noting that "the absence of a formal loan agreement is not determinative" and acknowledging board minutes and the taxpayer's testimony supporting the conclusion that it was a loan, the court stressed the "absence of . . . objective economic indicia of genuine debt"—determinable sum to be repaid, specified interest rate, repayment schedule, maturity date, or collateral.[699] The court's analysis is of general interest in other business situations involving arguments about form over substance.

XLII. VENUE

Clients often ask: "What does Judge X think about my issue?" If Judge X has served on the Fifth Circuit for some time, her votes in two cases can provide good insight: (1) the denial of en banc rehearing in *Huss v. Gayden*,[700] a difficult *Daubert* case; and (2) the en banc opinion of *In re Volkswagen, Inc.*,[701] which granted mandamus relief for the denial of a § 1404 venue transfer motion from the Eastern District of Texas. A third case has now joined that list—the recent 7–8 vote to deny en banc rehearing for *In re Radmax, Ltd*.[702] The *Radmax* panel granted mandamus relief to

695. Brand Coupon Network, L.L.C. v. Catalina Mktg. Corp., 748 F.3d 631, 635 (5th Cir. Apr. 2014) (quoting Collins v. Morgan Stanley Dean Witter, 224 F.3d 496, 498 (5th Cir. 2000)).

696. *Id.*

697. *Id.* at 637.

698. DF Sys., Inc. v. Comm'r, 548 F. App'x 247, 247 (5th Cir. Dec. 2013) (per curiam).

699. *Id*. at 250 (citing Alterman Foods, Inc. v. United States, 505 F.2d 873, 879 (5th Cir. 1974); United States v. Williams, 395 F.2d 508, 510–11 (5th Cir. 1968)).

700. Huss v. Gayden, 571 F.3d 442, 442 (5th Cir. 2009).

701. *In re* Volkswagen, Inc., 545 F.3d 304, 304 (5th Cir. 2008) (en banc).

702. *See In re* Radmax, Ltd., 720 F.3d 285, 287, 290 (5th Cir. June 2013) (per curiam).

compel an *intra*-district transfer under § 1404.[703] Judge Higginson, who dissented from the panel, also dissented from the en banc vote, pinpointing the issue as whether the ruling "propounds appellate mandamus power over district judges which the Supreme Court has said we do not have."[704] The votes in *Huss*, *Volkswagen*, and *Radmax* signal much about a judge's philosophy as to the power and role of a district judge.

In a 9–0 opinion, the Supreme Court reversed a Fifth Circuit panel about the enforcement of a forum selection clause.[705] The panel opinion questioned enforceability when the district of suit was otherwise proper under the federal venue statutes; a strong concurring opinion by Judge Catharina Haynes argued otherwise.[706] The Supreme Court endorsed her position:

> When the parties have agreed to a valid forum-selection clause, a district court should ordinarily transfer the case to the forum specified in that clause. Only under extraordinary circumstances unrelated to the convenience of the parties should a § 1404(a) motion be denied. And no such exceptional factors appear to be present in this case.[707]

Procedurally, while the Supreme Court noted in its introduction that the case arose in a mandamus context, it nowhere discusses how that posture affects the analysis—a significant point that divided the Fifth Circuit's recent en banc vote about *In re Radmax*.[708]

In *Herman v. Cataphora, Inc.*, the plaintiffs sued for defamation based on critical comments about their role in the Chinese Drywall MDL that ended up on the *Above the Law* website.[709] The Fifth Circuit agreed with the district court that Louisiana had no jurisdiction over the defendants because that state was not the focal point of the statements.[710] It took issue, however, with the district court granting the motion to dismiss and then ordering a transfer.[711] It noted that a district court has authority to transfer under 28 U.S.C. § 1406(a) if it determines that it lacks personal jurisdiction, and therefore vacated the dismissal order and remanded with instructions to order transfer.[712]

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703. *Id.*

704. *In re* Radmax, Ltd., 736 F.3d 1012, 1013 (5th Cir. Oct. 2013) (Higginson, J., dissenting) (per curiam).

705. Atl. Marine Constr. Co. v. U.S. Dist. Court for the W. Dist. of Tex., 134 S. Ct. 568, 584 (2013).

706. *In re* Atl. Marine Constr. Co., 701 F.3d 736, 743–49 (5th Cir. 2012) (Haynes, J., concurring), *rev'd*, 134 S. Ct. 568 (2013).

707. *Atl. Marine Constr. Co.*, 134 S. Ct. at 581 (footnote omitted).

708. *Id.* at 568.

709. Herman v. Cataphora, Inc., 730 F.3d 460, 462 (5th Cir. Sept. 2013).

710. *Id.* at 464–66 (citing Calder v. Jones, 465 U.S. 783, 784–89 (1984); Clemens v. McNamee, 615 F.3d 374, 378–80 (5th Cir. 2010)).

711. *Id.* at 462.

712. *Id.* at 466.

In *BP Exploration & Production, Inc. v. Johnson*, the plaintiff in a Deepwater Horizon case sued in Texas to enforce an alleged settlement agreement.[713] BP asked the MDL panel to consolidate the case with the other Deepwater Horizon matters in the Eastern District of Louisiana.[714] Before the panel could rule, however, the Texas judge asked for summary judgment briefing and granted summary judgment to the defense on the ground that no agreement had been created.[715] The Fifth Circuit vacated the judgment and remanded with instructions to transfer to the MDL case, noting the complexity of the Deepwater Horizon litigation, and more generally: "It is typical in such scenarios for the court before which the tort claims are pending to determine whether a binding settlement agreement has arisen, as that court is already familiar with the parties and the claims and the proceedings."[716]

713. BP Exploration & Prod., Inc. v. Johnson, 538 F. App'x 438, 438 (5th Cir. Aug. 2013) (per curiam).

714. *Id.*

715. *Id.*

716. *Id.* at 439 (citing Mobley v. Montco, Inc., No. Civ. A. 03-1130, 2004 WL 307478, at *1 (E.D. La. Feb. 17, 2004)).