COMMERCIAL LITIGATION: 2014–2015

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Reflecting a strong energy sector and the generally vibrant economy of the Southwest and Gulf Coast, the Fifth Circuit wrote about a wide range of business issues during the survey period. Among other matters, it revisited basic principles of antitrust law, clarified important issues about the arbitration process, and applied new Supreme Court precedent in the area of

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personal jurisdiction. Several opinions suggest areas of likely future litigation.

I. ADMINISTRATIVE LAW

Aransas Project v. Shaw presented a challenge to an injunction against the Texas Commission on Environmental Quality (TCEQ), which prohibited the "TCEQ from issuing new permits to withdraw water from rivers that feed the estuary where" whooping cranes live.[1] The Fifth Circuit first rejected an argument for *Burford* abstention, determining that this case presented a "broader grant of administrative and judicial authority by state law to remedy environmental grievances" than a prior opinion in which the court allowed abstention in a similar environmental dispute.[2] The court then reversed the injunction, finding no causation "in the face of multiple, natural, independent, unpredictable and interrelated forces affecting the cranes' estuary environment."[3] While couched in language about proximate causation and environmental law, the court's analysis is a classic illustration of the recurring *Daubert* problem of excluding alternate causes.[4]

The court later denied en banc review over the dissent joined by three judges (with a fourth also voting for review).[5] The point of division was whether the panel "independently weigh[ed] facts to render judgment in violation of fundamental principles of federal law," or simply found that "the record permits only one resolution of the factual issue" after the correct law is applied.[6]

II. ANTITRUST

The plaintiffs in *Abraham & Veneklasen Joint Venture v. American Quarter Horse Ass'n* were quarter horse breeders who used cloning technology and sued the American Quarter Horse Association, alleging that its bar on the registry of cloned horses was anticompetitive and violated §§ 1 and 2 of the Sherman Act.[7] The district court agreed and entered an injunction, and the Fifth Circuit reversed.[8]

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1. Aransas Project v. Shaw, 775 F.3d 641, 641 (5th Cir. Dec. 2014) (per curiam).
2. *Id.* at 648–53 (citing Sierra Club v. City of San Antonio, 112 F.3d 789 (5th Cir. 1997)).
3. *Id.* at 663.
4. *See, e.g.*, Ayala v. Enerco Grp., Inc., 569 F. App'x 241, 247 (5th Cir. 2014) (affirming an exclusion of an expert who "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 [the plaintiff] to secure the valve properly on the heater").
5. Aransas Project v. Shaw, 774 F.3d 324, 325 (5th Cir. Dec. 2014) (on petition for rehearing en banc).
6. *Id.* at 325, 328 (quoting Pullman-Standard v. Swint, 456 U.S. 273, 292 (1982)).
7. Abraham & Veneklasen Joint Venture v. Am. Quarter Horse Ass'n, 776 F.3d 321, 325 (5th Cir. Jan. 2015).
8. *Id.*

With respect to the § 1 conspiracy claim, the court expressed skepticism about whether the Association's management could legally conspire with the Association, noting (without deciding),

> *American Needle*'s rejection of "single entity" status for organizations with "separate economic actors" [such as the NFL as to licensing] does not fit comfortably with the facts before us. AQHA is more than a sports league, it is not a trade association, and its quarter million members are involved in ranching, horse training, pleasure riding and many other activities besides the "elite Quarter Horse" market.[9]

The court then held that the plaintiffs had not shown a conspiracy, determining that their evidence about powerful members of the Association speaking out against cloning did not prove an actual agreement: "[T]he antitrust laws are not intended as a device to review the details of parliamentary procedure."[10]

As to the § 2 monopolization claim, the court observed: "AQHA is a member organization; it is not engaged in breeding, racing, selling or showing elite Quarter Horses."[11] Thus, because "[n]othing in the record . . . shows that AQHA competes in the elite Quarter Horse Market," no claim about its alleged monopolization of that market was cognizable.[12] The court distinguished other cases in which a trade association actually became a market participant and competitor.[13]

The plaintiff in the other major antitrust case, *Felder's Collision Parts, Inc. v. All Star Advertising Agency*, sold aftermarket parts for GM cars.[14] It sued GM and several dealers of original equipment manufacturer parts made by GM, alleging that they ran a pricing and rebate program (with the unfortunate name of "Bump the Competition") that amounted to predatory pricing.[15] The district court dismissed and the Fifth Circuit affirmed.[16]

Under the program, a dealer would offer a price significantly below the ordinary aftermarket part price.[17] Felder's argued the dealer was pricing beneath average variable cost—and thus, engaging in predatory pricing—and offered an example of a dealer selling a part for $119 that it bought from GM for $135.[18] The defendants pointed out that a key part of the program was a

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9. *Id.* at 328 (citing Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 195 (2010)).

10. *Id.* at 334 (alteration in original) (quoting Jessup v. Am. Kennel Club, Inc., 61 F. Supp. 2d 5, 12 (S.D.N.Y. 1999)).

11. *Id.* at 335.

12. *Id.*

13. *Id.*

14. Felder's Collision Parts, Inc. v. All Star Advert. Agency, Inc., 777 F.3d 756, 757 (5th Cir. Jan. 2015).

15. *Id.*

16. *Id.* at 764.

17. *Id.* at 758.

18. *Id.* at 758–59.

rebate to the dealer from GM based on sales, and including that rebate in the "cost" calculation turned the seemingly $15 loss in this example into a 14% profit.[19]

The Fifth Circuit agreed:

> The price versus cost comparison focuses on whether the money flowing in for a particular transaction exceeds the money flowing out. The rebate undoubtedly affects that bottom line for All Star by guaranteeing that it makes a profit on any Bump the Competition sale. That undisputed fact resolves the case, as a "firm that is selling at a shortrun profit-maximizing (or loss-minimizing) price is clearly not a predator."[20]

The court acknowledged that "Felder's no doubt is having a tougher time selling aftermarket equivalent parts for GM vehicles . . . . But antitrust law welcomes those lower prices for consumers of collision parts so long as neither GM nor its dealers is selling parts at below-cost levels."[21]

III. APPELLATE PROCEDURE

Federal Rule of Civil Procedure 62(f) says: "If a judgment is a lien on the judgment debtor's property under the law of the state where the court is located, the judgment debtor is entitled to the same stay of execution the state court would give."[22] In *MM Steel, L.P. v. JSW Steel (USA) Inc.*, the appellant faced an adverse judgment for over $150 million and sought a stay of execution based on this rule.[23] Reviewing the somewhat scattered authority about Rule 62(f) and its application in Texas, the per curiam majority concluded that the creation of a Texas judgment lien with an abstract of judgment "requires more than mere ministerial acts."[24] Accordingly, a Texas judgment is not a lien within the scope of Rule 62(f), and the appellant's motion to stay was denied.[25] The dissent saw the case as controlled by a different line of authority and observed: "The majority overstates the difficulty of filing an abstract of judgment. . . . It is a single page with a few simple fields, like names and addresses of the parties."[26]

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19. *Id.* at 762–63.
20. *Id.*
21. *Id.* at 764.
22. FED. R. CIV. P. 62(f).
23. MM Steel, L.P. v. JSW Steel (USA) Inc., 771 F.3d 301, 306 (5th Cir. Nov. 2014) (per curiam).
24. *Id.*
25. *See id.* (applying Rodríguez-Vázquez v. López-Martínez, 345 F.3d 13, 13–14 (1st Cir. 2003)).
26. *Id.* at 307–08 (Jones, J., dissenting).

IV. ARBITRATION

The parties' contract in *Al Rushaid v. National Oilwell Varco, Inc.* said: "Terms and conditions are based on the general conditions stated in the enclosed ORGALIME S2000."[27] The ORGALIME, in turn, had an arbitration clause.[28] The Fifth Circuit determined that the above language incorporated the arbitration clause into the contract, acknowledging that "multiple interpretations of 'based on' might be possible in the abstract," and the length and scope of the ORGALIME compared to the contract showed the parties' intent to incorporate its terms.[29] The court also rejected a waiver argument, holding that the acts of the party's codefendants could not be imputed to it, absent a reason to pierce the corporate veil.[30] Here, there was "no evidence in the record that [the party] has abused its corporate form. It merely declined to become a party to litigation without being formally served."[31]

In 2002, the plaintiff in *Douglas v. Regions Bank* opened a checking account with Union Planters Bank and signed a signature card with an arbitration provision.[32] That clause included a provision "delegating the question of a dispute's arbitrability to an arbitrator."[33] She closed the account a year later.[34] In 2007, Douglas was injured in a car accident, after which she sued her lawyer and his bank for allegedly embezzling her settlement funds.[35] That bank—Regions Bank—had acquired Union Planters in a 2005 transaction.[36] Regions Bank then moved to compel arbitration.[37]

The district court denied the motion on a successor-in-interest theory that Douglas did not defend on appeal.[38] She argued that the delegation provision was not relevant to this dispute, and the Fifth Circuit agreed, adopting a standard under which Douglas would only "bind herself to arbitrate gateway questions of arbitrability if the argument that the dispute falls within the scope of the agreement is not wholly groundless."[39] The dissent argued that recent Supreme Court authority foreclosed this test on related issues about an arbitrator's authority.[40]

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27. Al Rushaid v. Nat'l Oilwell Varco, Inc., 757 F.3d 416, 419 (5th Cir. July 2014).
28. *Id.* at 419–20.
29. *Id.* at 420–21.
30. *Id.* at 424.
31. *Id.*
32. Douglas v. Regions Bank, 757 F.3d 460, 461 (5th Cir. July 2014).
33. *Id.* at 462.
34. *Id.*
35. *Id.*
36. *Id.* at 461–62.
37. *Id.* at 461.
38. *Id.*
39. *Id.* at 464.
40. *Id.* at 464–65 (Dennis, J., dissenting) (discussing Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63 (2010)).

Sharpe v. Ameriplan Corp. re-engaged the recurring problem of an arbitration agreement governed by multiple documents.[41] The court focused on the following specific facts:

- The Policy Manual contained an arbitration clause;
- The Broker Agreement (which incorporated the Policy Manual) said that it could not be changed except by written agreement, but acknowledged that the Policy Manual could be changed at will; and
- Three of the four plaintiffs had Sales Director Agreements that contained a lengthy dispute-resolution provision, which began with a commitment to nonbinding mediation and concluded with detailed language that "claims, controversies or disputes" be "submit[ted] to the . . . jurisdiction" of courts in Dallas (the fourth had a much shorter provision that was simply a Dallas forum-selection provision for "any action" on the agreement).[42]

The court held that the shorter provision did not trump the arbitration clause, but that the longer one did: "The language in Guarisco's agreement demonstrates that AmeriPlan knew how to draft a narrow forum selection clause, and its decision in later Sales Director Agreements to add far more extensive language establishing a full dispute resolution process must be given effect as creating something beyond that."[43] The court distinguished its recent opinion of *Klein v. Nabors Drilling USA L.P.*, in which it held that language about non-binding mediation did not conflict with "an exclusive procedural mechanism for the final resolution of all Disputes falling within its terms."[44]

BNSF Railway Co. v. Alstom Transportation, Inc. presented a challenge to an arbitration award in a contract dispute about the maintenance of rail cars.[45] The Fifth Circuit brushed aside several challenges to the arbitrator's legal analysis, quoting the Seventh Circuit:

> As we have said too many times to want to repeat again, the question for decision by a federal court asked to set aside an arbitration award . . . is not whether the arbitrator or arbitrators erred in interpreting the contract; it is not whether they clearly erred in interpreting the contract; it is not whether they grossly erred in interpreting the contract; it is whether they interpreted the contract.[46]

41. Sharpe v. Ameriplan Corp., 769 F.3d 909, 912 (5th Cir. Oct. 2014).
42. *Id.* at 912–17 (alteration in original).
43. *Id.* at 916–17.
44. *Id.* at 917 (quoting Klein v. Nabors Drilling USA L.P., 710 F.3d 234, 239 (5th Cir. 2013)).
45. *See generally* BNSF Ry. v. Alstom Transp., Inc., 777 F.3d 785 (5th Cir. Feb. 2015).
46. *Id.* at 789 (quoting Hill v. Norfolk & W. Ry. Co., 814 F.2d 1192, 1194–95 (7th Cir. 1987)).

Finally, in *PoolRe Insurance Corp. v. Organizational Strategies, Inc.*, several insurance-related businesses had a dispute.[47] The businesses were not all parties to all relevant agreements, leading to confusion about whether arbitration should proceed with the American Arbitration Association (AAA) or International Chamber of Commerce (ICC) and about how to select an arbitrator.[48] The district court found that the arbitrator was not appointed correctly and vacated the award; the Fifth Circuit affirmed: "[A]rbitration is simply a matter of contract *between the parties*; it is a way to resolve those disputes—but only those disputes—that the *parties* have agreed to submit to arbitration."[49] Specifically, the relevant contract required arbitrator selection "by the Anguilla, [British West Indies] Director of Insurance"—a nonexistent position.[50] This error did not moot that provision, however, but simply implicated § 5 of the Federal Arbitration Act (FAA), which lets a district judge appoint an arbitrator if "a lapse in the naming of an arbitrator" arises.[51]

V. ATTORNEY'S FEES

David Peterson sued his former employer, Bell Helicopter Textron, for age discrimination under the Texas Commission on Human Rights Act (TCHRA) in *Peterson v. Bell Helicopter Textron, Inc.*[52] The jury not only found that age was a motivating factor in his termination but also that Bell would have terminated him even without consideration of his age.[53] The district court awarded no damages, but imposed an injunction on Bell about future age discrimination, and awarded Peterson attorney's fees of approximately $340,000.[54] The Fifth Circuit reversed.[55] Noting that the TCHRA allowed an injunction even in light of the unfavorable causation finding, the court determined that plaintiff's request came too late because Federal Rule of Civil Procedure 54(c) "assumes that a plaintiff's entitlement to relief not specifically pled has been tested adversarially, tried by consent, or at least developed with meaningful notice to the defendant."[56] Here, Bell showed that it would have tried the case differently had it known an injunction was at issue; accordingly, the court also vacated the fee award.[57]

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47. PoolRe Ins. Corp. v. Organizational Strategies, Inc., 783 F.3d 256, 258–60 (5th Cir. Apr. 2015).
48. *Id.*
49. *Id.* at 264 (alteration in original) (quoting First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 943 (1995)).
50. *Id.*
51. *Id.* at n.12 (quoting 9 U.S.C. § 5 (2012)).
52. Peterson v. Bell Helicopter Textron, Inc., 806 F.3d 335, 337 (5th Cir. Nov. 2015).
53. *Id.* at 338.
54. *Id.* at 339.
55. *Id.* at 342.
56. *Id.* at 340.
57. *See id.* at 343.

VI. BANKRUPTCY

In *Barron & Newburger, P.C. v. Tex. Skyline, Ltd. (In re Woerner)*, the en banc court revised the standard for recovery of professional fees in bankruptcy proceedings.[58] It first concluded that the "retrospective, 'material benefit' standard enunciated in *Pro–Snax* conflicts with the language and legislative history of § 330, diverges from the decisions of other circuits, and has sown confusion in our circuit."[59] Accordingly, the full court adopted "the prospective, 'reasonably likely to benefit the estate' standard endorsed by our sister circuits" for professional fee awards under 11 U.S.C. § 330.[60]

Among several issues addressed in the complicated bankruptcy appeal of *Templeton v. O'Cheskey (In re American Housing Foundation)*, the Fifth Circuit considered whether the "ordinary course of business" defense applied to alleged preferential transfers.[61] The court noted that a true Ponzi scheme is one with "operations built on the collection of funds from new investments to pay off prior investors."[62] Here, "only a portion of the funds collected by [Debtor] ([Creditor] estimates 9%) was used to pay Ponzi-like returns to investors," and the "record is clear that [Debtor] engaged in substantial legitimate business—owning or controlling approximately 14,000 housing units."[63] Therefore, the defense could apply and the court remanded the transfers for further consideration.[64]

In *Villegas v. Schmidt*, former bankruptcy debtors sued their trustee, alleging that he failed to sue an insurer who could have satisfied many creditors' claims.[65] The district court dismissed the suit because the plaintiffs did not first get leave from the bankruptcy court that appointed the trustee, and the Fifth Circuit affirmed under the century-old Supreme Court case of *Barton v. Barbour*.[66] The debtors contended that *Stern v. Marshall* implicitly overruled *Barton*, in part, because the bankruptcy court would lack final adjudicative authority over their state law tort claims.[67] The Fifth Circuit disagreed, holding that under *Barton*,

> [i]f a bankruptcy court concludes that the claim against a trustee is one that the court would not itself be able to resolve under *Stern*, that court can make

58. Barron & Newburger, P.C. v. Tex. Skyline, Ltd. (*In re* Woerner), 783 F.3d 266, 272–77 (5th Cir. Apr. 2015) (en banc).

59. *Id.* at 268 (citing and overruling Andrews & Kurth L.L.P. v. Family Snacks, Inc. (*In re* Pro-Snax Distribs., Inc.), 157 F.3d 414 (5th Cir. 1998)).

60. *Id.* at 276.

61. Templeton v. O'Cheskey (*In re* Am. Hous. Found.), 785 F.3d 143, 161–62 (5th Cir. June 2015).

62. *Id.* at 161 (citing Henderson v. Buchanan, 985 F.2d 1021, 1023 (9th Cir. 1993)).

63. *Id.*

64. *Id.* at 162.

65. Villegas v. Schmidt, 788 F.3d 156, 157 (5th Cir. May 2015).

66. *Id.* at 159; *see* Barton v. Barbour, 104 U.S. 126, 128 (1881).

67. *Villegas*, 788 F.3d at 158; *see* Stern v. Marshall, 131 S. Ct. 2594, 2607 (2011).

> the initial decision on the procedure to follow. Once a bankruptcy court makes such a determination, this court can review the utilized procedure.[68]

As a counterpoint, in *Carroll v. Abide*, the Fifth Circuit reversed the dismissal of a claim against a trustee because leave was not required.[69] The debtors sued, alleging that the trustee violated their Fourth Amendment rights in seizing a computer.[70] Again applying *Barton v. Barbour*, the court concluded: "[B]ecause the [debtors] complain of the bankruptcy trustee's conduct *while carrying out district court orders*, we conclude that the plaintiffs were not required to seek permission from the bankruptcy court before filing suit in the district court regarding the challenged conduct."[71]

In *Husky International Electronics, Inc. v. Ritz (In re Ritz)*, Husky, a seller of electronic components, sued Ritz, a director of a company that owed Husky $163,999.38.[72] Ritz was denied a bankruptcy discharge of that debt based on 11 U.S.C. § 523(a)(2)(A), which excludes from discharge "any debt . . . for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by . . . false pretenses, a false representation, or actual fraud."[73] The Fifth Circuit reversed, determining that this statute did not apply "where, as here, the debtor made no false representation to the creditor."[74] Specifically, the court rejected the Seventh Circuit's contrary reasoning in *McClellan v. Cantrell* as inconsistent with Fifth Circuit precedent and the Supreme Court's reasoning about the level of reliance required by this section in *Field v. Mans*.[75] The court acknowledged the argument that "actual fraud" is one of three scenarios listed in the statute, but stated that the canons of construction supporting this argument were "guides that need not be conclusive."[76] The court also noted that the fraudulent transfer provisions of the Code addressed situations in which the debtor did not make a direct misrepresentation.[77]

VII. CLASS ACTIONS—CAFA

The defendants in *Rainbow Gun Club, Inc. v. Denbury Onshore, L.L.C.* removed the case to federal court under the Class Action Fairness Act (CAFA), arguing that the 167 plaintiffs' claims were a "mass action."[78] The

68. *Villegas*, 788 F.3d at 158–59.
69. Carroll v. Abide, 788 F.3d 502, 507 (5th Cir. June 2015).
70. *Id.* at 504.
71. *Id.* at 505 (emphasis added).
72. Husky Int'l Elecs., Inc. v. Ritz (*In re* Ritz), 787 F.3d 312, 315 (5th Cir. May 2015).
73. *Id.* at 316 (alterations in original) (quoting 11 U.S.C. § 523(a)(2)(A) (2012)).
74. *Id.*
75. *Id.* at 317–20. *See generally* Field v. Mans, 516 U.S. 59 (1995).
76. *In re Ritz*, 787 F.3d at 320 (quoting Chickasaw Nation v. United States, 534 U.S. 84, 94 (2001)).
77. *Id.* at 320–21.
78. Rainbow Gun Club, Inc. v. Denbury Onshore, L.L.C., 760 F.3d 405, 407 (5th Cir. July 2014).

dispute centered on whether those claims, which alleged negligent operation of an oil well, arose from "an event or occurrence in the State" within the meaning of that statute.[79] The Fifth Circuit concluded that the ordinary meaning of those terms, CAFA's legislative history, and case law from other circuits supported the plaintiffs' position that "the exclusion applies to a single event or occurrence, but the event or occurrence need not be constrained to a discrete moment in time."[80] Drawing an analogy to the Deepwater Horizon accident, the court also rejected an argument based on allegations of multiple acts of negligence because that incident "was the event that resulted from a number of individual negligent acts related to each other."[81] Accordingly, the court affirmed the Louisiana state court.[82]

In *Cedar Lodge Plantation, L.L.C. v. CSHV Fairway View I, L.L.C.*, the plaintiff brought a class action in Louisiana state court against apartment owners and managers, which the defendants removed under CAFA.[83] The plaintiff then sought to add a local defendant and invoke the "'local controversy exception' to CAFA jurisdiction."[84] Citing *Louisiana v. American National Property & Casualty Co.*, the Fifth Circuit rejected this argument, noting that CAFA defines a class action as the "civil action *filed*."[85]

Finally, in declining to hear *Crutchfield v. Sewerage & Water Board of New Orleans*, the Fifth Circuit offered some rare guidance about what factors guide its discretion in accepting a petition to appeal under CAFA, noting that "no CAFA-related issues are raised in the petition for permission to appeal."[86]

VIII. CLASS ACTIONS—GENERAL

In *Mabary v. Home Town Bank, N.A.*, Mabary sued her bank because, while she received an on-screen notice about a $2.00 ATM fee, the machine did not have a posted external notice about the fee—a violation of the Electronic Funds Transfer Act (EFTA) at the time.[87] After looking to recent amendments to the EFTA that purportedly eliminated the bank's liability (if applicable), the district court dismissed Mabary's claim and denied

79. *Id.* at 408 (quoting 28 U.S.C. § 1332(d)(2)(B)(ii)(I) (2012)).

80. *Id.* at 410.

81. *Id.* at 412–13.

82. *Id.* at 413–14.

83. Cedar Lodge Plantation, L.L.C. v. CSHV Fairway View I, L.L.C., 768 F.3d 425, 425 (5th Cir. Sept. 2014).

84. *Id.*

85. *Id.* at 428 (quoting 28 U.S.C. § 1332(d)(4)(A) (2012)); *see* Louisiana v. Am. Nat'l Prop. & Cas. Co., 746 F.3d 633, 633 (5th Cir. 2014).

86. Crutchfield v. Sewerage & Water Bd. of New Orleans, 603 F. App'x 350, 351 (5th Cir. May 2015).

87. Mabary v. Home Town Bank, N.A., 771 F.3d 820, 823 (5th Cir. Nov. 2014), *withdrawn* Jan. 8, 2015.

certification of a related class.[88] The Fifth Circuit reversed, holding that Mabary had Article III standing as a result of EFTA's definition of "injury," even though she did receive one form of notice, and that the EFTA's amendments did not fall within the exception to the general presumption against statutory retroactivity.[89] The dissent took issue with the standing holding, calling it "respectfully, silly stuff" and reasoning, "Mabary cannot show that she suffered a cognizable injury in fact, so she can sue only if the existence of her statutory cause of action sufficed to satisfy Article III."[90]

Conversely, in *Ticknor v. Rouse's Enterprises, L.L.C.*, the Fifth Circuit held there was no abuse of discretion in denying certification in another consumer class action.[91] The plaintiff alleged that the defendant wrongfully printed the expiration dates of credit cards on its store receipts and sought to certify a class of "[a]ll persons who made in-store purchases from the Defendant using a debit or credit card, in a transaction occurring from May 8, 2010, through May 10, 2012, at one of the [specified]" stores.[92] Noting a split in national authority about similar class actions, and applying its own precedent from *Mims v. Stewart Title*, the court reasoned:

> The district court determined that the plaintiffs needed to prove that they: (1) were not using someone else's card to make their purchases, (2) were consumers rather than business purchasers, and (3) took their receipts. Rouse's argued that these factors differed among the putative class members. First, it noted one instance in which an individual had used his mother's credit card to make a purchase, suggesting there would be many similar situations. Second, Rouse's observed that it markets to professional chefs and other business customers who shop at its stores. These customers are not "consumers" protected under [the federal statute]. Finally, Rouse's showed that numerous customers leave its stores without their receipts.[93]

Accordingly, the district court properly denied class certification.[94]

IX. CONSUMER—MORTGAGE SERVICING

In loan-level litigation between a borrower and a mortgage servicer, the servicer often has the significant advantage of better record keeping. In *Tielke v. Bank of America*, however, the Fifth Circuit reversed a summary judgment for a servicer.[95] The court observed, as to the servicer's loan

88. *Id.*
89. *Id.* at 823–26.
90. *Id.* at 828, 830.
91. Ticknor v. Rouse's Enters., L.L.C., 592 F. App'x 276, 279 (5th Cir. Nov. 2014).
92. *Id.* at 277 (alterations in original).
93. *Id.* at 278 (internal citation omitted) (citing Mims v. Stewart Title Guar. Co., 590 F.3d 298 (5th Cir. 2009)).
94. *Id.* at 279.
95. Tielke v. Bank of Am., 581 F. App'x 408, 409 (5th Cir. Sept. 2014).

history statement, "we are unable to decipher this document with any certainty."[96] The main problem was whether the borrowers had truly fallen into default or whether the servicer was inaccurately carrying forward matters that their bankruptcy should have erased (compounded by confusion over the servicer's handling of an escrow account for insurance).[97] In a conclusion that should encourage careful record keeping by all parties, the court stated: "There are simply too many unanswered questions."[98]

In *Harris County v. MERSCORP Inc.*, three counties sued Mortgage Electronic Registration Systems, Inc. (MERS) for violations of various statutes related to the recording of deeds of trust (the Texas equivalent of a mortgage).[99] In a nutshell, MERS was listed as the beneficiary on a deed of trust, and the note was executed in favor of the lender.[100] "If the lender later transfers the promissory note (or its interest in the note) to another MERS member, no assignment of the deed of trust is created or recorded because . . . MERS remains the nominee for the lender's successors and assigns."[101] The counties argued that this arrangement avoided significant filing fees.[102] The Fifth Circuit affirmed judgment for MERS, holding that (1) procedurally, the Texas Legislature did not create a private right of action to enforce the relevant statute, and (2) substantively, the statute was better characterized as a "procedural directive" to clerks rather than an absolute rule.[103]

While disputes between borrowers and mortgage servicers are common, jury trials in those disputes are rare. But rare events do occur, and, in *McCaig v. Wells Fargo Bank (Texas), N.A.*, a servicer lost a judgment for roughly $400,000 after a jury trial.[104] A settlement agreement defined the underlying relationship in which "Wells Fargo [had] agreed to accept payments from the McCaigs and to give the McCaigs an opportunity to avoid foreclosure of the Property; as long as the McCaigs [made] the required payments consistent with the Forbearance Agreement and the Loan Agreement."[105] Unfortunately, Wells Fargo "'computer software was not equipped to handle' the settlement and forbearance agreements meaning 'manual tracking' was required."[106] This led to a number of accounting mistakes, which in turn led to unjustified threats to foreclose and other miscommunications.[107]

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96. *Id.* at 410.
97. *Id.* at 409.
98. *Id.* at 412.
99. Harris County v. MERSCORP Inc., 791 F.3d 545, 550 (5th Cir. June 2015).
100. *Id.*
101. *Id.* at 549.
102. *See id.* at 556.
103. *Id.* at 552, 555.
104. McCaig v. Wells Fargo Bank (Tex.), N.A., 788 F.3d 463, 471–72 (5th Cir. June 2015).
105. *Id.* at 471.
106. *Id.* at 480.
107. *Id.*

In reviewing and largely affirming the judgment, the Fifth Circuit reached two conclusions of broad general interest. First, while the "bona fide error" defense under the Texas Debt Collection Act (TDCA) allows a servicer to argue that it made a good-faith mistake, Wells Fargo did not plead that defense here, meaning that its arguments about a lack of intent were not pertinent to the elements of the Act sued upon by plaintiffs.[108] Second, the economic loss rule did not bar the TDCA claims, even though the alleged misconduct breached the parties' contract: "[I]f a particular duty is defined both in a contract and in a statutory provision, and a party violates the duty enumerated in both sources, the economic loss rule does not apply."[109] The dissent took issue with the economic-loss holding and would have held that all of the plaintiffs' claims were barred: "The majority's reading of these [TDCA] provisions specifically equates mere contract breach with statutory violations."[110]

X. CONTRACTS

Highland Capital sued Bank of America for the alleged breach of an oral contract to sell a $15.5 million loan.[111] After the Fifth Circuit reversed the dismissal of this claim under Rule 12(b)(6), it affirmed summary judgment for the defendant in *Highland Capital Management, L.P. v. Bank of America, N.A.*[112] Highland relied upon standard terminology promulgated by an industry association, while the bank pointed to evidence showing that, in this specific transaction, the bank was not familiar with that terminology and did not want it to control.[113] "Although industry custom is extrinsic evidence a factfinder can use to determine the parties' intent to be bound, its value is substantially diminished where, as here, other evidence overwhelmingly shows that the persons involved in the dealings were unaware of those customs."[114] The court also rejected an alternative theory that a prior transaction that involved the terminology continued to govern the parties' relationship, noting, "Whether a prior contract had a binding effect on the procedures available for future contract-formation is a legal question."[115]

Several other cases involved the thorny role of extrinsic evidence in contract interpretation. For example, in *Bluebonnet Hotel Ventures, L.L.C. v. Wells Fargo Bank, N.A.*, the Fifth Circuit considered whether there had been an error that "vitiates consent" because of a "failure of cause" about an

108. *Id.* at 481.
109. *Id.* at 475.
110. *Id.* at 489 (Jones, J., dissenting).
111. Highland Capital Mgmt., L.P. v. Bank of Am., N.A., 574 F. App'x 486, 487–88 (5th Cir. June 2014).
112. *Id.*
113. *Id.* at 488–89.
114. *Id.* at 489.
115. *Id.* at 491.

interest rate swap agreement, allowing its cancellation under Louisiana contract law.[116] In the course of affirming summary judgment for the bank, the court declined to consider emails written around the time of contracting, noting that "under Louisiana law, courts may only consider parol evidence when a contract is ambiguous."[117]

The same week as the en banc vote in the whooping crane litigation, the Fifth Circuit analyzed the song "Whoomp! (There It Is)."[118] The unfortunate song has been mired in copyright-infringement litigation for a decade; the district court entered judgment for the plaintiff for over $2 million, and it was affirmed in *Isbell v. DM Records, Inc.*[119] California law governed the assignment in question, and the court determined that the state "employs a liberal parol evidence rule" with respect to consideration of extrinsic evidence.[120] The appellant argued that the district court erred "in interpreting the Recording Agreement without asking the jury to make any findings on the extrinsic evidence."[121] The court disagreed, holding that the record did not present "a question of the credibility of *conflicting* extrinsic evidence": "The only dispute is over the meaning of the Recording Agreement and the inferences that should be drawn from the numerous undisputed pieces of extrinsic evidence. This is a question of law for the court, not for a jury."[122]

In the same vein, *Angus Chemical Co. v. Glendora Plantation, Inc.* involved an industrial facility with an easement "right to construct, maintain, inspect, operate, protect, alter, repair, replace and change" a pipeline.[123] The company plugged and abandoned its original 12" pipeline in favor of a new 16" one.[124] The key appellate issue was whether the right to "replace" a pipeline allowed the company to simply substitute one pipeline for another, or whether it also "impl[ied] a corresponding duty to remove" the old one.[125] The Fifth Circuit determined the term *replace* was ambiguous in this context, and that there was a material fact issue in the extrinsic evidence about which

116. Bluebonnet Hotel Ventures, L.L.C. v. Wells Fargo Bank, N.A., 754 F.3d 272, 276 (5th Cir. June 2014).

117. *Id.* at 277 (citing LA. CIV. CODE ANN. art. 2046 (2015)). To illustrate the indistinct line that separates holdings about the use of extrinsic evidence, see *Fruge v. Amerisure Mut. Ins. Co.*, 663 F.3d 743, 744 (5th Cir. 2011). Applying Louisiana law, the Fifth Circuit in that case held that "[p]arol evidence 'is admissible to show mutual error even though the express terms of the policy are not ambiguous.'" *Id.* (quoting Samuels v. State Farm Mut. Auto. Ins. Co., 939 So. 2d 1235, 1240 (La. 2006)).

118. Isbell Records Inc. v. DM Records, Inc. (*In re* Isbell Records, Inc.), 774 F.3d 859, 862 (5th Cir. Dec. 2014).

119. *Id.* The opinion notes: "The word 'Whoomp!' appears to be a neologism, perhaps a variant of 'Whoop!,' as in a cry of excitement." *Id.* at n.1.

120. *Id.* at 865.

121. *Id.* at 866.

122. *Id.* at 866–67 (quoting Morey v. Vannucci, 75 Cal. Rptr. 2d 573, 579 (Cal. Ct. App. 1998)).

123. Angus Chem. Co. v. Glendora Plantation, Inc., 782 F.3d 175, 177 (5th Cir. Mar. 2015).

124. *Id.* at 178.

125. *See id.* at 181.

meaning should prevail.[126] Therefore, it vacated the district court's summary judgment in favor of the chemical company.[127]

Finally, in *Sundown Energy, L.P. v. Haller*, a dispute arose because Sundown Energy could access its oil and gas production facility via the Mississippi River, but had to cross Haller's land to access it from the highway.[128] The parties litigated Sundown's rights and reached a settlement, which their counsel read into the record on the day set for trial.[129] The Fifth Circuit found that the parties had reached a settlement, which the district court had the authority to enforce pursuant to their agreement.[130] But the court reversed the district court's resolution of several logistical issues:

> Here, the district court erred by imposing several terms which either conflicted with or added to the agreement read into the record by the parties. Although the parties gave the district court the authority to enforce and interpret the settlement agreement, the district court did not have the power to change the terms of the settlement agreed to by the parties.[131]

XI. DISCOVERY

The defendants in *Fannie Mae v. Hurst* claimed that a foreclosure sale produced an unfair windfall for Fannie Mae on a substantial commercial property.[132] They alleged that Fannie Mae had a practice of making unfairly low bids on Gulf Coast properties.[133] The Fifth Circuit observed:

> As the district court held, evidence regarding Fannie Mae's other foreclosure practices throughout the Gulf Coast region would not impact whether the subject property was sold for the amount at which it would have changed hands between a willing buyer and seller having knowledge of the relevant facts. At most, such evidence might have suggested that Fannie Mae's conduct throughout the region affected the fair market value of the subject property. So long as the property was sold for fair market value, however, evidence of the various market forces influencing that value is not relevant to this case.[134]

Accordingly, the district court did not abuse its discretion in denying these discovery requests.[135]

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126. *Id.* at 181–82.
127. *See id.* at 183, 185.
128. Sundown Energy, L.P. v. Haller, 773 F.3d 606, 609 (5th Cir. Dec. 2014).
129. *See id.* at 610.
130. *Id.* at 613.
131. *Id.*
132. Fannie Mae v. Hurst, 613 F. App'x 314, 316 (5th Cir. June 2015).
133. *Id.* at 317.
134. *Id.* at 317–18.
135. *Id.* at 318.

XII. EMPLOYMENT

Halliburton, Inc. v. Administrative Review Board arose when Menendez, a Halliburton employee, complained about Halliburton's accounting practices to the Securities and Exchange Commission (SEC).[136] The employer received a letter from the SEC asking for retention of certain documents.[137] The employer then emailed Menendez's colleagues and "instructed them to start retaining certain documents because 'the SEC has opened an inquiry into the allegations of Mr. Menendez.'"[138] Relations with his co-workers deteriorated and he ultimately resigned.[139] In a detailed opinion, the Fifth Circuit affirmed a $30,000 damages award to Menendez on his claim for retaliation: "The undesirable consequences, from a whistleblower's perspective, of the whistleblower's supervisor telling the whistleblower's colleagues that he reported them to authorities for what are allegedly fraudulent practices, thus resulting in an official investigation, are obvious."[140]

In *Blanton v. Newton Associates, Inc.*, Blanton sued for employment discrimination, and after trial, there was "no question that Blanton was subjected to egregious verbal sexual and racial harassment by the general manager of the Pizza Hut store where he worked."[141] The issue on appeal was whether the employer had established "the *Ellerth/Faragher* affirmative defense"—essentially, that the employer acted reasonably to stop the harassment and the employee unreasonably failed to enlist the employer's aid.[142] The evidence showed a lack of training with the employer's anti-discrimination policies and that two low-level supervisors hesitated to report the harassment for fear of the general manager retaliating, but as soon as "Blanton did complain to a manager with authority over the general manager, Pizza Hut completed an investigation and fired her within four days."[143] Accordingly, the verdict and resulting judgment for the employer was affirmed.[144]

XIII. EVIDENCE

The parties in *Morton v. Yonkers (In re Vallecito Gas, L.L.C.)* disputed whether the laws of the Navajo Nation voided a gas royalty interest.[145] One

136. Halliburton, Inc. v. Admin. Review Bd., 771 F.3d 254, 255 (5th Cir. Nov. 2014).
137. *Id.*
138. *Id.*
139. *Id.* at 257.
140. *Id.* at 262.
141. Blanton v. Newton Assocs., Inc., 593 F. App'x 389, 390 (5th Cir. Feb. 2015).
142. *Id.*
143. *Id.*
144. *Id.* at 391.
145. Morton v. Yonkers (*In re* Vallecito Gas, L.L.C.), 771 F.3d 929, 931–32 (5th Cir. Nov. 2014).

party submitted a letter from an attorney for the Navajo Nation Department of Justice, opining that the "purported overriding royalty interest [was] invalid under the applicable provisions of the Navajo Nation Code and [was] completely void."[146] The Fifth Circuit affirmed the lower courts' conclusion that this letter was inadmissible hearsay and did not qualify for an exemption under Federal Rule of Evidence 803(8) or 803(15) (public records and statements about property interests); nor did the letter qualify for the general exception in Rule 807 (the former 803(24) and 804(b)(5), combined in 2011):

> Trustworthiness is the linchpin of these hearsay exceptions. We are persuaded by the district court's thorough explanation that the letter is untrustworthy, in large part because it was drafted by Morton's counsel and was prepared after Morton's counsel provided the Navajo Nation official with only one side of the story.[147]

To oppose a summary judgment motion in a mortgage servicing case, the plaintiffs in *Thompson v. Bank of America, National Ass'n* sought to introduce two documents: (1) "a printoff from the HOPE Loan Portal, an online log maintained by Impact [(a consultant hired by Plaintiffs)] to catalogue any updates with the [Plaintiffs'] loan-modification application," and (2) "a handwritten call log seemingly created by Impact employees as they contacted BOA for updates by telephone."[148] The Fifth Circuit affirmed their exclusion.[149] Noting that "[i]n the case of an exhibit purported to represent an electronic source, such as a website or chat logs, testimony by a witness with direct knowledge of the source, stating that the exhibit fairly and fully reproduces it, may be enough to authenticate"; the court observed:

> At no point does [Plaintiffs'] affidavit say that they have personal knowledge of the online log or that it represents an unaltered version of the website. . . . That is likely because, by all indications, those logs were created and maintained by Impact, not the Thompsons. Nor do the logs have characteristics that would authenticate them from their own appearance under Rule 901(b)(4).[150]

XIV. EXPERTS

At issue in *Meadaa v. K.A.P. Enterprises, L.L.C.* was the relative liability of four defendants for a $3.5 million claim.[151] In a summary judgment affidavit, an expert opined that transactions of Defendant 1 had not

146. *Id.* at 932.
147. *Id.* at 932–33 (citations omitted).
148. Thompson v. Bank of Am. Nat'l Ass'n, 783 F.3d 1022, 1027 (5th Cir. Apr. 2015).
149. *Id.*
150. *Id.*
151. Meadaa v. K.A.P. Enters., L.L.C., 756 F.3d 875, 878–79 (5th Cir. July 2014).

resulted in an unfair advantage to Defendants 2 or 3, and that Defendant 1 had kept its affairs separate from those of Defendant 4; to reach these conclusions, he had reviewed only financial documents from Defendant 1 and tax returns from Defendant 4.[152] The Fifth Circuit found no clear error in the district court's striking of this affidavit for a lack of personal knowledge.[153] Because "[i]t is by no means clear how a certified public accountant can obtain personal knowledge of the effects of the actions of one entity on other parties without reviewing the latter's financial documents . . . , it was incumbent upon him to explain how he acquired such knowledge."[154]

Macy v. Whirlpool Corp. involved a claim that a gas range made the plaintiffs sick from carbon monoxide emissions.[155] The Fifth Circuit affirmed the striking of their two causation experts under *Daubert*.[156] The first opined about the "general causation" link between carbon monoxide and health problems, but the main studies he relied on involved significantly higher concentrations than what were measured in the plaintiffs' apartment.[157] The second, "an accomplished engineer with significant expertise in vehicular accident reconstruction and fire and explosion analysis," did not have expertise on the issue in this case: "No gas appliance fire is at issue in this case; rather, the core claim here is that the gas range was defective because it emitted carbon monoxide in excess of an amount that is safe."[158]

XV. FALSE CLAIMS ACT

Characterizing the False Claims Act as "a statute that shadows every aspect of the administrative state," the Fifth Circuit addressed the following issue in *United States ex rel. Shupe v. Cisco Systems, Inc.*: "[W]hen the Government 'provides any portion of' requested money as to trigger the protection of the False Claims Act."[159] After an extensive review of the statute and precedent, the court concluded:

> [T]hat the FCC maintains regulatory supervision over the E-Rate program does not affect the Congress' decision, embodied in the program's independent structure, to externalize the cost of administering the program to a private entity. Because there are no federal funds involved in the program, and USAC[, an independent nonprofit charged with its

152. *Id.* at 880.
153. *Id.* at 881.
154. *Id.*
155. Macy v. Whirlpool Corp., 613 F. App'x 340, 341 (5th Cir. June 2015).
156. *Id.* at 344.
157. *Id.*
158. *Id.* at 345.
159. United States *ex rel.* Shupe v. Cisco Sys., Inc., 759 F.3d 379, 382–83 (5th Cir. July 2014).

> administration,] is not itself a government entity, we agree that the Government does not "provide[] any portion of" the requested money under the FCA.[160]

The relators in *United States ex rel. Lockey v. City of Dallas*, displeased with the City of Dallas's treatment of them in connection with the redevelopment of a downtown office building, "embarked on a fifteen-month investigation that involved compiling data and performing analyses of DHA properties, Low-Income Housing Tax Credit project locations, and City plans and reports."[161] After proceedings before HUD, they filed a qui tam lawsuit, alleging that the City and the Dallas Housing Authority submitted false claims that were not in compliance with their obligations under civil rights and fair housing laws.[162] The Fifth Circuit affirmed dismissal, concluding that the "overwhelming majority of the complaint is . . . based, not on the Relators' personal experiences with the City, but on their research of publicly disclosed information."[163]

XVI. INSURANCE

Echoing the earlier discussion about the general difficulties that arise in the use of parol evidence for contract interpretation, *Mt. Hawley Insurance Co. v. Advance Products & Systems, Inc.* illustrates those challenges in the area of insurance coverage.[164] When Advance Products and Systems, Inc. (APS) made a claim on its commercial property policy with Mt. Hawley Insurance Co. (Mt. Hawley), APS's recovery was limited by a "coinsurance provision" that applies if it "has not insured the full value of its income."[165] The parties differed on whether "income" referred to projected or actual net income.[166] The district court found ambiguity, but the Fifth Circuit reversed: "Although APS has a point—the language used in calculating the coinsurance penalty is imprecise—it does not render the contract ambiguous."[167] Based on the relationship between this provision, other parts of the policy, and the general purposes of coinsurance clauses, the court reversed a summary judgment for the insured.[168]

The coverage dispute in *Wisznia Co. v. General Star Indemnity Co.* involved a lawsuit in which "Jefferson Parish essentially asserted Wisznia

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160. *Id.* at 388 (last alteration in original) (citation omitted) (quoting 31 U.S.C. 3729(c) (2008)).
161. United States *ex rel.* Lockey v. City of Dallas, 576 F. App'x 431, 433 (5th Cir. Aug. 2014).
162. *Id.* at 433–34.
163. *Id.* at 436 (citing United States *ex rel.* Reagan v. E. Tex. Med. Ctr. Reg'l Healthcare Sys., 384 F.3d 168, 178 (5th Cir. 2004)).
164. Mt. Hawley Ins. Co. v. Advance Prods. & Sys., Inc., 597 F. App'x 780, 782 (5th Cir. Jan. 2015).
165. *Id.*
166. *See id.*
167. *Id.* at 784.
168. *Id.* at 785.

improperly designed a building and did not adequately coordinate with the builders during its construction."[169] Reviewing the allegations under Louisiana's "eight-corners" rule and summarizing the extensive Louisiana jurisprudence on the topic, the Fifth Circuit held that the claim fell within the policy's professional services exclusion.[170] Under those authorities, mere use of the word "'negligence' is insufficient to obligate a professional liability insurer to defend the insured," and "the factual allegations in the Jefferson Parish petition here do not give rise to an ordinary claim for negligence—such as an unreasonably dangerous work site."[171]

First Community Bancshares v. St. Paul Mercury Insurance Co. arose from class action suits that alleged that First Community Bank mismanaged its customers' bank accounts.[172] The bank's insurer admitted that there would be coverage under the professional liability policy but for the "fee dispute exclusion" (excluding claims "based upon, arising out of or attributable to any dispute involving fees or charges for an Insured's services").[173] While the collection of excessive overdraft fees was a major part of the pleadings, "at least some" of their allegations dealt with "First Community's providing misleading information on its account practices and customers' account balances—that do not have a causal connection to a disagreement that necessarily includes fees."[174] Accordingly, under Texas's eight-corners rule, the Fifth Circuit affirmed the judgment for the insured as to the duty to defend.[175]

A design firm proved at trial that Hallmark Design Homes built hundreds of houses using the firm's copyrighted plans without permission.[176] Hallmark filed for bankruptcy; the remaining issue in *Mid-Continent Casualty Co. v. Kipp Flores Architects, L.L.C.* was whether the claim was an "advertising injury" under Mid-Continent's various liability policies.[177] The Fifth Circuit affirmed judgment for the insured.[178] After noting that additional evidence can be offered in a coverage dispute about matters addressed in a prior lawsuit, the court held: "[I]t is undisputed that Hallmark's primary means of marketing its construction business was through the use of the homes themselves, both through model homes and yard signs on the property of infringing homes it had built, all of which were

169. Wisznia Co. v. Gen. Star Indem. Co., 759 F.3d 446, 447 (5th Cir. July 2014).
170. *Id.* at 449.
171. *Id.* at 451–53.
172. First Cmty. Bancshares v. St. Paul Mercury Ins. Co., 593 F. App'x 286, 288–89 (5th Cir. Nov. 2014).
173. *Id.* at 288.
174. *Id.* at 289.
175. *Id.* at 290–91.
176. Mid-Continent Cas. Co. v. Kipp Flores Architects, L.L.C., 602 F. App'x 985, 987–88 (5th Cir. Feb. 2015).
177. *Id.* at 988.
178. *Id.* at 1000.

marketed to the general public."[179] Because the homes themselves were "advertisements," Mid-Continent's policies covered the prior judgment.[180]

The Fifth Circuit visited the tension between excess and primary carriers in *RSUI Indemnity Co. v. American States Insurance Co.*, a bad-faith case under Louisiana law.[181] After a review of the cases on the issue, the court held

> that under the circumstances of this case, where an excess carrier alleges that a primary insurer in bad faith breached its duty to defend a common insured properly and caused exposure of the insured to an increase in the settlement value of the case above the primary policy limit, which the excess insurer must then satisfy on the insured's behalf, the excess insurer has a subrogated cause of action against the primary insurer for any payment above what it otherwise would have been required to pay.[182]

XVII. INTERPLEADER

In *Holt Texas, Ltd. v. Zayler (In re T.S.C. Seiber Services, L.C.)*, EnCana Oil & Gas (Encana) hired T.S.C. Seiber Services, L.C. (Seiber) as a general contractor, who in turn hired Holt Texas, Ltd. (Holt) and TransAmerica Underground Ltd. (TAUG) as subcontractors.[183] Seiber failed to make timely payments.[184] EnCana interpleaded the funds at issue, and Seiber then filed for bankruptcy—before entry of a final order in the interpleader case.[185] Holt and TAUG alleged that they had materialmen's liens under Texas law that removed the funds from Seiber's bankruptcy estate.[186] Seiber's bankruptcy trustee argued that the filing of the interpleader action "automatically satisfied its liability to Seiber, thus transferring legal possession of the funds to Seiber and the bankruptcy estate."[187] The Fifth Circuit disagreed with the trustee and reversed the bankruptcy court, reasoning, "If this were so, the interpleader would be the final judge of its own legal obligations relative to the dispute, by depositing a sum solely determined by it, washing its hands of any relationship to the dispute and walking away whistling Yankee Doodle."[188]

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179. *Id.* at 994.
180. *Id.* at 994–95.
181. RSUI Indem. Co. v. Am. States Ins. Co., 768 F.3d 374, 375 (5th Cir. Sept. 2014).
182. *Id.* at 382.
183. Holt Tex., Ltd. v. Zayler (*In re* T.S.C. Seiber Servs., L.C.), 771 F.3d 246, 248 (5th Cir. Nov. 2014).
184. *Id.*
185. *Id.* at 249.
186. *Id.*
187. *Id.* at 252.
188. *Id.*

XVIII. JURY WAIVER

Allstate did not request a jury trial in its original complaint in *Allstate Insurance Co. v. Community Health Center, Inc.*, but it did in response to the defendant's answer and counterclaim (which also included a jury demand that Allstate was entitled to rely upon).[189] After a summary judgment ruling, Allstate made a limited jury waiver on the remaining issue of damages.[190] The district court then vacated its summary judgment ruling and held a bench trial on all issues in the case—liability and damages.[191] The Fifth Circuit noted, "Although deference is generally accorded to a trial judge's interpretation of a pretrial order," this was "[a]t the very least . . . a 'doubtful situation'" that did not support the finding of "a knowing and voluntary relinquishment of the right" to jury trial pursuant to the Seventh Amendment.[192] The court also held there was harm because Allstate's case could survive a JNOV motion, noting that "the district court relied heavily on its weighing of the credibility of the witnesses' testimony at trial" in its fact-finding.[193] Accordingly, the court reversed and remanded for jury trial.[194]

XIX. OIL & GAS

Chesapeake's lease at issue in *Warren v. Chesapeake Exploration, L.L.C.* obliged Chesapeake to pay the Warrens a royalty based on "the amount realized by Lessee, computed at the mouth of the well."[195] A lease addendum said the royalty "shall be free of all costs and expenses related to the exploration, production and marketing of oil and gas . . . including, but not limited to, costs of compression, dehydration, treatment and transportation."[196] The addendum went on to say that "Lessor will, however, bear a proportionate part of all those expenses imposed upon Lessee by its gas sale contract to the extent incurred subsequent to those that are obligations of Lessee."[197]

The Warrens contended that this sentence defined certain shared expenses that should not have been deducted from the royalty.[198] The Fifth Circuit disagreed and affirmed the Rule 12 dismissal of their complaint, determining that the sentence only referred to "the cost of delivering

189. Allstate Ins. Co. v. Cmty. Health Ctr., Inc., 605 F. App'x 269, 270 (5th Cir. Mar. 2015).
190. *Id.*
191. *Id.* at 270–71.
192. *Id.* at 271–72.
193. *Id.* at 272.
194. *Id.*
195. Warren v. Chesapeake Expl., L.L.C., 759 F.3d 413, 419 (5th Cir. July 2014).
196. *Id.* at 416.
197. *Id.*
198. *Id.* at 418.

marketable gas to a sales point other than the mouth of the well."[199] But the court reversed the lower court's decision regarding another pair of plaintiffs with a different lease addendum.[200] Noting simply that it was different, the court held that their claim should not have been dismissed because it was not "apparent from the face of the complaint or its attachments" that they could not have conceivably stated a cause of action.[201]

After reviewing the phrase "computed at the mouth of the well" in the context of gas royalties in *Warren*, the Fifth Circuit returned to royalties in *Potts v. Chesapeake Exploration, L.L.C.*[202] That lease fixed the royalty as a percentage of "the market value at the point of sale," and would be free and clear "of all costs and expenses related to the exploration, production and marketing of oil and gas production."[203] Because Chesapeake's sales of gas occurred at the wellhead, this language allowed it to deduct a reasonable post-production cost for delivering the gas from the wellhead under *Heritage Resources, Inc. v. NationsBank*.[204] The court said that the fact that Chesapeake sold to an affiliate did not affect its conclusion under the terms of this lease.[205] The court also rejected a procedural argument about whether *Heritage* was binding precedent after the Texas Supreme Court's 4–4 vote on rehearing.[206]

XX. PERSONAL JURISDICTION

The case of *Monkton Insurance Services, Ltd. v. Ritter* arose when litigation broke out in Texas between Ritter, a Texas resident who owned an insurance company in the Cayman Islands, and the Cayman-based entity that managed the insurance company.[207] Ritter sought to join a Cayman-based bank to the Texas case, arguing that it failed to detect the manager's wrongdoing.[208] The district court dismissed for lack of personal jurisdiction and the Fifth Circuit affirmed.[209]

As to general jurisdiction, applying *Daimler AG v. Bauman*, the court observed: "It is . . . incredibly difficult to establish general jurisdiction in a forum other than the place of incorporation or principal place of business."[210]

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199. *Id.* at 419 (distinguishing Heritage Res., Inc. v. NationsBank, 939 S.W.2d 118 (Tex. 1996)).
200. *Id.* at 420.
201. *Id.*
202. Potts v. Chesapeake Expl., L.L.C., 760 F.3d 470 (5th Cir. July 2014).
203. *Id.* at 471–72.
204. *Id.* at 474–75 (citing *Heritage Res., Inc*., 939 S.W.2d at 120–24).
205. *Id.* at 475–76.
206. *Id.* at 476.
207. Monkton Ins. Servs., Ltd. v. Ritter, 768 F.3d 429, 430–31 (5th Cir. Sept. 2014).
208. *Id.*
209. *Id.* at 430.
210. *Id.* at 432 (applying Daimler AG v. Bauman, 134 S. Ct. 746, 760–61 (2014)).

The court also stated that a "sliding scale" analysis about the jurisdictional effect of a defendant's website

> is not well adapted to the general jurisdiction inquiry, because even repeated contacts with forum residents by a foreign defendant may not constitute the requisite substantial, continuous and systematic contacts required for a finding of general jurisdiction—in other words, while it may be doing business with Texas, it is not doing business in Texas.[211]

As to specific jurisdiction, the court noted that in *Walden v. Fiore*, the Supreme Court emphasized that a plaintiff's unilateral actions with respect to the forum cannot create personal jurisdiction.[212] Here, Ritter initiated the bank transactions at issue, running afoul of this principle.[213]

XXI. PLEADINGS—*TWOMBLY* AND *IQBAL*

On rehearing, the Fifth Circuit vacated its earlier panel opinion in *Wooten v. McDonald Transit Associates, Inc.*, which reversed a default judgment because of inadequate underlying pleadings, and replaced it with an opinion affirming the default judgment.[214] The new opinion holds that "[a]lthough Wooten's complaint contained very few factual allegations, we conclude that it met the low threshold of content demanded by Federal Rule of Civil Procedure 8 because it provided McDonald Transit with fair notice of Wooten's claims."[215] The court thus continues to reserve the question left open in *Nishimatsu Construction Co. v. Houston National Bank*: "We do not consider here the possibility that otherwise fatal defects in the pleadings might be corrected by proof taken by the court at a hearing."[216]

In *Richardson v. Axion Logistics, L.L.C.*, Richardson alleged that he was terminated in violation of Louisiana's whistleblower statute for revealing fraudulent time records and overbilling.[217] The district court granted summary judgment and the Fifth Circuit reversed.[218] The court applied the *Twombly* "plausibility" standard and found adequate pleading about his employer's knowledge of the alleged misconduct as well as the timeline of events leading up to his termination.[219] In so doing, the court emphasized the importance of taking allegations "together" rather than in isolation.[220]

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211. *Id.* (quoting Revell v. Lidov, 317 F.3d 467, 471 (5th Cir. 2002)).
212. *Id.*; *see* Walden v. Fiore, 134 S. Ct. 1115, 1123 (2014).
213. *Monkton*, 768 F.3d at 433.
214. Wooten v. McDonald Transit Assocs., Inc., 788 F.3d 490, 493–94 (5th Cir. June 2015).
215. *Id.* at 494.
216. *Id.* at 493 n.1. *See generally* Nishimatsu Constr. Co. v. Hous. Nat'l Bank, 515 F.2d 1200 (5th Cir. 1975).
217. Richardson v. Axion Logistics, L.L.C., 780 F.3d 304, 304 (5th Cir. Mar. 2015).
218. *Id.* at 304–05.
219. *Id.* at 306–07.
220. *Id.* at 307.

XXII. PREEMPTION

In *Barzelis v. Flagstar Bank, F.S.B.*, the Fifth Circuit addressed the preemption of state-law mortgage claims under the Home Owners' Loan Act of 1933 (HOLA), a statute governing federal savings associations.[221] The court reached three primary holdings.[222] First, "It may be the case . . . that a state law regulating interest-rate adjustments to protect borrowers is preempted by HOLA. But that does not prevent a bank and a borrower from voluntarily agreeing to substantially the same protections in their contract."[223] Second, "where a negligent-misrepresentation claim is predicated not on affirmative misstatements but instead on the inadequacy of disclosures or credit notices, it has a specific regulatory effect on lending operations and is preempted."[224] Finally, general consumer protection laws about debt collection practices "'that establish the basic norms that undergird commercial transactions'—do not have more than an incidental effect on lending and thus escape preemption."[225]

XXIII. PRELIMINARY INJUNCTIONS

In an intellectual property dispute with several pending motions, the district court in *Software Development Technologies v. TriZetto Corp*.[226] held a telephone conference and said the following about the pending application for preliminary injunction:

> I can see that there at least would be a fact issue as to whether or not the contract's violated, but that's a different proposition from concluding that a preliminary injunction should be granted.
>
> There are a lot of factors to take into account to decide whether or not, ultimately, there would—a breach of contract would be found to exist, such as, whether or not there's a possibility for some relief besides injunctive relief, such as the recovery of damages.
>
> I haven't found anything in the papers to indicate to me that the defendant couldn't respond to a judgment in damages, if required to do so.
>
> I don't—I don't think a preliminary injunction is necessary or appropriate in this case, so I'm going to deny that request.[227]

Observing that the district court's statement about damages "seems to relate more to [Defendant's] *ability* to respond to a judgment in damages,

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221. Barzelis v. Flagstar Bank, F.S.B., 784 F.3d 971, 972 (5th Cir. Apr. 2015).

222. *Id.* at 974–75.

223. *Id.* at 974.

224. *Id.* at 976.

225. *Id.* at 976–77 (quoting Preemption of State Laws Applicable to Credit Card Transactions, OTS Op. Letter, No. P–96–14, 1996 WL 767462, at *5).

226. Software Dev. Techs. v. TriZetto Corp., 590 F. App'x 342, 343 (5th Cir. Nov. 2014).

227. *Id.* at 344.

which does not relate to whether damages would be an adequate remedy," the Fifth Circuit vacated and remanded for a lack of findings of fact and conclusions of law under Federal Rule of Civil Procedure 52(a).[228]

XXIV. PRODUCTS LIABILITY

The plaintiff in *Casey v. Toyota Motor Engineering & Manufacturing North America, Inc.* alleged that the airbag in a Toyota Highlander did not properly inflate.[229] The district court granted judgment as a matter of law, and the Fifth Circuit affirmed.[230] As to the manufacturing defect claim, the court observed that "Casey . . . established only that the air bag did not remain inflated for six seconds" and relied on the alleged violations of Toyota's performance standards to prove a defect (rather than a technical explanation of the bag's performance).[231] The court rejected those allegations under Texas law and precedent from other jurisdictions: "Each piece of evidence submitted by Casey on this point is result-oriented, not manufacturing-oriented, and provides no detail on how the airbag is constructed."[232] As to the design defect claim, Casey relied primarily on a patent application for an allegedly superior design, which the court rejected because it was not tested under comparable conditions and it lacked a real-world track record as to feasibility, risk-benefit, and other such matters.[233]

XXV. SANCTIONS

The agreed protective order in *Moore v. Ford Motor Co.* established a fifteen-day period to seek protection after a challenge to a confidentiality designation.[234] After a protracted email exchange raised a question about Ford's compliance with this deadline, the Fifth Circuit disagreed with the plaintiffs' position that a waiver occurred, reasoning: "This interpretation may well be the better reading without more, but the parties' understanding of these agreed orders bears upon the interpretation, and the actions of both parties strongly suggest" otherwise.[235] Noting that "[a]lthough on de novo review a different outcome may obtain," the court held that the district court's conclusion that no waiver occurred was not clearly erroneous.[236] The dissent,

228. *Id.* at 345.
229. Casey v. Toyota Motor Eng'g & Mfg. N. Am., Inc., 770 F.3d 322, 325 (5th Cir. Oct. 2014).
230. *Id.* at 326.
231. *Id.* at 327.
232. *Id.* at 328.
233. *Id.* at 334–36.
234. Moore v. Ford Motor Co., 755 F.3d 802, 804 (5th Cir. June 2014).
235. *Id.* at 807 (footnote omitted).
236. *Id.* at 808.

among other arguments, noted that Ford had drafted the agreement and should bear the risk of ambiguity.[237]

In *Waste Management of Washington, Inc. v. Kattler*, a dispute about what information a former employee (Kattler) had in his possession expanded to include a contempt finding against his attorney (Moore).[238] The Fifth Circuit reversed, noting that the order setting a hearing referenced a motion, by Pacer docket number, that only sought relief against Kattler and not the attorney.[239] Accordingly, it was not an adequate "show-cause order naming Moore and Kattler as alleged contemnors."[240] On the merits, the court found that Kattler had misled Moore as to the existence of a particular thumb drive, that Moore had acted prudently in consulting ethics counsel and withdrawing after he learned of the untruthfulness, and that new counsel made a prompt disclosure about the drive that avoided unfair prejudice.[241] The court also held that, "while Moore clearly failed to comply with the terms of the December 20 preliminary injunction by not producing the iPad image directly to [Waste Management] by December 22, this failure is excusable because the order required Moore to violate the attorney–client privilege."[242]

XXVI. SUMMARY JUDGMENT PROCEDURE

The Fifth Circuit reversed a summary judgment for the insurer in a bad faith case in *Santacruz v. Allstate Texas Lloyd's, Inc*.[243] The insured alleged an inadequate investigation into her claim of covered wind damage to her home, and the court found fact issues on two matters.[244]

First, as to liability for bad faith, the court noted:

> The extent of Allstate's inquiry into the claim consisted of its adjuster taking photographs of the damaged home. Significantly, Allstate did not attempt to talk to the contractor, who submitted an affidavit in this case describing what he observed concerning the roof and attributing the cause to wind damage. Nor is there any evidence showing that Allstate obtained weather reports or inquired with neighbors to see if they suffered similar damage, which would tend to show the damage was caused by wind rather than normal wear and tear.[245]

237. *Id.* at 808, 811 (Elrod, J., dissenting).
238. Waste Mgmt. of Wash., Inc. v. Kattler, 776 F.3d 336, 338–40 (5th Cir. Jan. 2015).
239. *Id.* at 340–41.
240. *Id.* at 340.
241. *Id.* at 341–42.
242. *Id.* at 343.
243. Santacruz v. Allstate Tex. Lloyd's, Inc., 590 F. App'x 384, 390 (5th Cir. Nov. 2014).
244. *Id.* at 386–89.
245. *Id.* at 388.

Second, as to damages, the court said:

> Santacruz claimed three types of damages: (1) the replacement of the roof, supported by an invoice from Pedraza providing that Santacruz paid him $3,900 to repair the roof; (2) a list of damaged personal and household items compiled by Santacruz and his family with an estimate of the value of all the belongings; and (3) repair work needed for the damaged interior of the home, supported by an estimate from a contractor listing the repairs to be done. Further, Pedraza submitted an affidavit testifying to the necessity of repairing the roof, and Santacruz submitted photographs showing the extensive damage to the home's interior to support his claim that repairs were necessary.[246]

XXVII. TRADEMARK

Eastman Chemical, the manufacturer of a plastic resin used in water bottles and food containers, successfully sued Plastipure under the Lanham Act in *Eastman Chemical Co. v. Plastipure, Inc.*, alleging that Plastipure falsely advertised that Eastman's resin contained a dangerous and unhealthy additive.[247] Relying on *ONY, Inc. v. Cornerstone Therapeutics, Inc.*, Plastipure argued that "commercial statements relating to live scientific controversies should be treated as opinions for Lanham Act purposes."[248] The Fifth Circuit disagreed, noting that Plastipure made these statements in commercial ads rather than scientific literature and observed: "Otherwise, the Lanham Act would hardly ever be enforceable—'many, if not most, products may be tied to public concerns with the environment, energy, economic policy, or individual health and safety.'"[249] The court also rejected challenges to the jury instructions and to the sufficiency of the evidence as to its falsity.[250]

Pennzoil has several well-known trademarks for its motor oil products. It sued Miller Oil, which operates a quick-stop oil change facility in Houston, for infringing those marks.[251] Miller defended on the ground that after its original contract with Pennzoil lapsed in 2003, Pennzoil's dealings with Miller amounted to acquiescence in Miller's use of the marks.[252] The district court agreed, but the Fifth Circuit reversed in *Pennzoil-Quaker State Co. v.*

246. *Id.* at 389.

247. Eastman Chem. Co. v. Plastipure, Inc., 775 F.3d 230, 234 (5th Cir. Dec. 2014).

248. *Id.* at 235. *See generally* ONY, Inc. v. Cornerstone Therapeutics, Inc., 720 F.3d 490 (2d Cir. 2013).

249. *Eastman*, 775 F.3d at 236 (quoting Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 563 (1980)).

250. *Id.* at 238–40.

251. Pennzoil-Quaker State Co. v. Miller Oil & Gas Operations, 779 F.3d 290, 292 (5th Cir. Feb. 2015).

252. *Id.* at 292–93.

Miller Oil & Gas Operations.[253] The court concluded that an element of this defense was undue prejudice to the defendant from the plaintiff's conduct, which usually involves "some form of 'business building.'"[254] Here, the defendant's expenses associated with removing Pennzoil's marks did not satisfy that requirement because they would not be related to business expansion.[255] While the defendant's claim about a "loss of identity" from removing Pennzoil's marks could qualify, the court noted that, on this record, "Miller Oil does not proffer evidence of, for example, changes in its customer base, higher profits, or new business opportunities it was able to exploit because of the re-brand."[256] Accordingly, Miller Oil did not meet its burden of proof on this defense.[257]

During Mardi Gras, a form of folk art takes discarded beads and twists them into a dog shape, also known as a "bead dog."[258] A seller of king cakes obtained a trademark for its mascot based on that image and sued a jewelry maker who sold necklaces and earrings that also drew upon that image.[259] The Fifth Circuit affirmed summary judgment for the jewelry maker in *Nola Spice Designs, L.L.C. v. Haydel Enterprises, Inc*.[260] and reasoned:

1. The bakery's "Mardi Gras Bead Dog" mark was descriptive of its products;[261]
2. The mark was not inherently distinctive, and thus, may be protected only if it had acquired secondary meaning;[262]
3. Under the applicable seven-factor test, the bakery failed to establish that the mark had acquired secondary meaning;[263] and
4. While a dog itself cannot be copyrighted, its distinctive collar could potentially be, but on the record the court concluded that no reasonable juror could find the collars to be "substantially similar in protectable expression."[264]

The court also dismissed other related state law claims.[265]

In *World Wrestling Entertainment, Inc. v. Unidentified Parties*, World Wrestling Entertainment (WWE) sought ex parte seizure and temporary restraining orders under the Trademark Counterfeiting Act against unnamed

253. *Id.* at 300.
254. *Id.* at 297.
255. *See id*.
256. *Id.* at 299.
257. *Id.*
258. Nola Spice Designs, L.L.C. v. Haydel Enters., Inc., 783 F.3d 527, 534 (5th Cir. Apr. 2015).
259. *Id.* at 534–35.
260. *Id.* at 553.
261. *Id.* at 549–50.
262. *Id.* at 542–43.
263. *Id.* at 545–47.
264. *Id.* at 550–53.
265. *See id*. at 547, 553.

defendants selling fake WWE merchandise at live events.[266] The district judge denied relief, noting concerns about WWE's likelihood of success against an unknown defendant.[267] The Fifth Circuit, which reviewed the case because the district court certified the matter for interlocutory appeal, took a different view, noting, "WWE does not license third parties to sell merchandise at live events. . . . The resulting confined universe of authorized sellers of WWE merchandise necessarily 'identifies' any non-WWE seller as a counterfeiter."[268] The opinion also observed that "the very nature of the 'fly-by-night' bootlegging industry" involves "counterfeiters who, upon detection and notice of suit, disappear without a trace and hide or destroy evidence, only to reappear later at the next WWE event down the road."[269]

XXVIII. VENUE

The court decided three notable cases about forum selection clauses. The first, *Waste Management of Louisiana, L.L.C. v. Jefferson Parish*, presented a classic "permissive" forum selection clause:

> Jurisdiction: This Agreement and the performance thereof shall be governed, interpreted, construed and regulated by the laws of the State of Louisiana and the parties hereto submit to the jurisdiction of the 24th Judicial District Court for the Parish of Jefferson, State of Louisiana. The parties hereby waiving any and all plea[s] of lack of jurisdiction or improper venue.[270]

When Waste Management sued in Louisiana federal court, the defendant's forum non conveniens motion was denied, and the Fifth Circuit declined to review that denial by interlocutory appeal, noting, "Unlike their mandatory counterparts, permissive forum selection clauses allow but do not require litigation in a designated forum. As such, we have never required district courts to transfer or dismiss cases involving clauses that are permissive."[271] The court went on to hold that the Supreme Court's recent opinion in *Atlantic Marine Construction Co. v. U.S. District Court for the Western District of Texas* did not change that rule because that case involved a mandatory clause and the "vast majority of district courts deciding this issue

266. World Wrestling Entm't, Inc. v. Unidentified Parties, 770 F.3d 1143, 1144 (5th Cir. Nov. 2014).
267. *Id.* at 1144–45.
268. *Id.* at 1145.
269. *Id.* at 1144.
270. Waste Mgmt. of La., L.L.C. v. Jefferson Parish, 594 F. App'x 820, 820–21 (5th Cir. Nov. 2014) (alteration in original).
271. *Id.* at 821.

have rejected *Atlantic Marine*'s application to permissive forum selection clauses."[272]

The second case concerned a helicopter crash in the Gulf of Mexico.[273] Its owner sued three defendants: Rolls Royce, which built the engine bearing in question; the designer of the "pontoon flotation" system that deployed after the crash; and a repair company that worked on that system.[274] Rolls Royce sought severance and transfer to Indiana based on a forum-selection clause in its warranty, and relied on the Supreme Court's recent *Atlantic Marine* opinion.[275] The district court denied its motions; in a 2–1 decision, the Fifth Circuit reversed the district court's judgment in *In re Rolls Royce Corp*.[276]

After confirming that mandamus relief was available, despite the novel procedural context of a combined transfer and venue motion, the majority reviewed the applicability of *Atlantic Marine*.[277] "For cases where all parties signed a forum selection contract, the analysis is easy: except in a truly exceptional case, the contract controls."[278] For a situation such as this one, however, the analysis is more subtle:

> While *Atlantic Marine* noted that public factors, standing alone, were unlikely to defeat a transfer motion, the Supreme Court has also noted that section 1404 was designed to minimize the waste of judicial resources of parallel litigation of a dispute. The tension between these centrifugal considerations suggests that the need—rooted in the valued public interest in judicial economy—to pursue the same claims in a single action in a single court can trump a forum-selection clause.[279]

The special concurrence believed that the majority had "erroneously and confusingly diminished the scope of *Atlantic Marine*, concluding,"

> Simple two-party disputes are near a vanishing breed of litigation. It seems highly unlikely that the Supreme Court granted certiorari and awarded the extraordinary relief of mandamus simply to proclaim that a forum selection clause must prevail only when one party sues one other party. The Court is not naive about the nature of litigation today.[280]

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272. *Id.*; *see also* Atl. Marine Constr. Co. v. U.S. Dist. Ct. for W. Dist. of Tex., 134 S. Ct. 568, 581 n.5 (2013).
273. *In re* Rolls Royce Corp., 775 F.3d 671, 674 (5th Cir. Dec. 2014).
274. *Id.*
275. *Id.* at 674–75.
276. *Id.* at 683.
277. *Id.* at 677.
278. *Id.* at 679.
279. *Id.* (footnotes omitted).
280. *Id.* at 685 (Jones, J., specially concurring).

In the third case, Pearl Seas sued Lloyd's Register North America (LRNA) for inadequate performance in certifying a cruise ship.[281] "LRNA moved to dismiss on the ground of *forum non conveniens*" in favor of England, citing a forum-selection clause contained in its rules.[282] The district court denied the motion without explanation and the Fifth Circuit reversed in a 2–1 panel opinion in *In re Lloyd's Register North America, Inc.*, re-released after initial publication as a per curiam opinion.[283]

The court first held that, as in *In re Volkswagen*, which involved the denial of a motion to transfer venue, mandamus is appropriate in the context of forum non conveniens.[284] The court went on to hold that it is an abuse of discretion to "grant or deny a forum non conveniens motion to dismiss without written or oral explanation" as to the relevant factors, and that the plaintiff was plainly bound by LRNA's rules under the doctrine of direct-benefits estoppel because its claim referenced duties that had to be resolved by reference to the classification society's rules.[285] The dissent argued that the majority's analysis of direct-benefits estoppel expanded the court's prior holdings in two areas: the degree to which the claim incorporated the relevant rules and the timing of when the plaintiff learns of the rules.[286] The dissent also expressed concern that England would not recognize the substantive claim.[287]

The point of division between the majority and dissent—whether an error is clear or not so as to justify mandamus relief—resembles a similar split between the majority and dissent in the mandamus case of *In re Radmax*, which granted the writ as to the erroneous denial of an intra-district motion to transfer venue.[288] Interestingly, Judge Higginson was the dissenter in *Radmax* and also dissented from the denial of en banc review of that panel opinion, while here he formed part of the two-judge majority that granted mandamus relief.[289] Judge Smith, who was in the majority of the *Radmax* panel opinion, was the author of this opinion after its initial release as per curiam.[290]

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281. *In re* Lloyd's Register N. Am., Inc., 780 F.3d 283, 287 (5th Cir. Feb. 2015).
282. *Id.*
283. *Id.* at 294.
284. *Id.* at 289; *In re* Volkswagen of Am., Inc., 545 F.3d 304, 307 (5th Cir. 2008) (en banc).
285. *In re Lloyd's Register*, 780 F.3d at 290, 292–93 (citing Hellenic Inv. Fund, Inc. v. Det Norske Veritas, 464 F.3d 514 (5th Cir. 2006)).
286. *Id.* at 295 (Elrod, J., dissenting).
287. *Id.* at 296.
288. *See generally In re* Radmax, 736 F.3d 1012 (5th Cir. 2013) (per curiam).
289. *In re Lloyd's Register*, 780 F.3d at 286 (majority opinion).
290. *Id.*