COMMERCIAL LITIGATION

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This Article surveys the published opinions of the U.S. Court of Appeals for the Fifth Circuit in the area of commercial litigation during the survey period. The court was particularly active in the area of arbitration, as well as bread-and-butter issues from diversity cases about insurance coverage and contract litigation. It also wrote interesting opinions about personal jurisdiction and pleading requirements.

I. APPELLATE PROCEDURE

In *Barber v. Shinseki*, the appellant sought review of a magistrate's electronic order dismissing his case.[1] The court first observed that the appellant did not appear to have consented to final disposition of his case by a magistrate as opposed to the district judge.[2] The court went on to note that "[t]he

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1. Barber v. Shinseki, 660 F.3d 877, 878 (5th Cir. Oct. 2011) (per curiam).
2. *Id.* at 879.

electronic order entered by the magistrate judge . . . [did] not appear on any document—electronic or otherwise—other than as merely a separate entry on the docket sheet" and, thus, did not comply with the requirement of Federal Rules of Civil Procedure Rule 58 that "every judgment shall be set forth on a separate document."[3]

In the case of *Jimenez v. Wood County*, the en banc court reviewed the requirements for preserving charge error.[4] The case presented a civil rights challenge to a county's strip-search policy as to misdemeanor arrestees.[5] At trial, the County made the objection, "Just one objection, Your Honor, the—the Court finding that this was a minor offense as a matter of law. For record purposes, we would object."[6] The court held that this objection preserved an argument as to whether the plaintiff was arrested for a minor offense but did not preserve an argument as to whether reasonable suspicion was required for the search at issue.[7] The court thoroughly reviewed the requirements of Federal Rules of Civil Procedure 51 as to both the substance and timing of a charge objection.[8] It rejected the County's argument that statements made at a pretrial conference were sufficient to preserve error here and that "any objection would have been futile" because of the state of the circuit precedent at the time.[9] Judge Smith's dissent suggests potential exceptions to the majority's approach to Rule 51, especially concerning the pretrial conference.[10]

II. ARBITRATION

In a significant case applying *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*,[11] the court vacated a class arbitration award as exceeding the arbitrator's authority in *Reed v. Florida Metropolitan University, Inc*.[12] The court found that the "any dispute" and "any remedy" clauses in the parties' agreement did not authorize class arbitration, acknowledging a different conclusion by the Second Circuit in *Jock v. Sterling Jewelers, Inc.*[13] Before reaching that result, the court reviewed the applicable American Arbitration Act

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3. *Id.* (second quote quoting Theriot v. ASW Well Serv., Inc., 951 F.2d 84, 86-87 (5th Cir. 1992)) (internal quotation marks omitted).

4. Jimenez v. Wood Cnty., Tex., 660 F.3d 841, 843 (5th Cir. Oct. 2011) (en banc).

5. *Id.*

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

7. *Id.* at 847-48.

8. *See id.* at 844-47.

9. *Id.* at 845-46.

10. *See id.* at 849-52 (Smith, J., dissenting); *see also* Nassar v. Univ. of Tex. Sw. Med. Ctr., 688 F.3d 211, 211-13 (5th Cir. July 2012) (presenting a similar exchange on a preservation issue).

11. *See* Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758 (2010) (holding that an arbitration panel can exceed its authority under the Federal Arbitration Act for imposing policy decisions).

12. *See* Reed v. Fla. Metro. Univ., Inc., 681 F.3d 630, 632 (5th Cir. May 2012).

13. *Id.* at 642-44. *But see* Jock v. Sterling Jewelers, Inc., 646 F.3d 113, 115 (2d Cir. 2011), *cert. denied*, 132 S. Ct. 1742 (2012).

rules and concluded that they allowed the threshold matter of class arbitration to be reviewed by the arbitrator.[14]

The employee handbook in *Carey v. 24 Hour Fitness* contained an arbitration provision and a "Change-in-Terms Clause" giving the employer "the right to revise, delete, and add to the employee handbook."[15] The court affirmed a holding that the arbitration provision was illusory and, thus, enforceable.[16] The court contrasted *In re Halliburton Co.*, in which a clause was enforced when the employer's right to amend the arbitration provision was specifically limited as to present disputes,[17] and favorably cited *Weekley Homes v. Rao*,[18] in which a provision requiring notice of a handbook was not sufficient to make an arbitration provision non-illusory.[19]

The court rejected two court challenges to a $17 million arbitration award in a dispute about coal pricing in the case of *Rain CII Carbon, LLC v. ConocoPhillips Co*.[20] The losing party argued that the arbitrator had failed to follow a specified "baseball" procedure, but the court found that the arbitrator's treatment of the proposed award was within the scope of his power to correct clerical issues.[21] The court also held that the award was "reasoned" under prior case law: "The only description of a reasoned award in this circuit was rendered in a footnote[:] '[A] reasoned award is something short of findings and conclusions but more than a simple result.'"[22] The court ended by suggesting that the parties could have contracted for more detailed findings and conclusions.[23]

In a dispute about termination of a Volvo truck franchise, Volvo sued the dealership under § 4 of the Federal Arbitration Act to compel arbitration.[24] Both businesses were Delaware corporations.[25] The district court held that there was federal question jurisdiction because some of the relief requested involved interpretation of a federal statute.[26] The Fifth Circuit applied the "look through" approach of the Supreme Court in *Vaden v. Discover Bank*, under which a court first "assume[s] the absence of the arbitration agreement" to determine if federal jurisdiction would exist without it.[27]

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14. *Reed*, 681 F.3d at 636.
15. Carey v. 24 Hour Fitness, USA, Inc., 669 F.3d 202, 204 (5th Cir. Jan. 2012).
16. *Id.* at 205-06 (citing Morrison v. Amway Corp., 517 F.3d 248, 257 (5th Cir. 2008)).
17. *In re* Halliburton Co., 80 S.W.3d 566, 568-70 (Tex. 2002).
18. *See* Weekley Homes, L.P. v. Rao, 336 S.W.3d 413, 420-21 (Tex. App.—Dallas 2011, pet. denied).
19. *See Carey*, 669 F.3d at 206-09.
20. Rain CII Carbon, LLC v. ConocoPhillips Co., 674 F.3d 469, 474 (5th Cir. Mar. 2012).
21. *See id.* at 473.
22. *Id.* (second alteration in original) (citation omitted) (second quote quoting Sarofim v. Trust Co. of the W., 440 F.3d 213, 215 n.1 (5th Cir. 2006)).
23. *See id.* at 474.
24. Volvo Trucks N. Am., Inc. v. Crescent Ford Truck Sales, Inc., 666 F.3d 932, 932 (5th Cir. Jan. 2012).
25. *See id.* at 934.
26. *See id.*
27. *See id.* at 937 (quoting Vaden v. Discover Bank, 556 U.S. 49, 62 (2009)) (internal quotation marks omitted).

Applying *Vaden*, the court found that the substantive issues in dispute were governed by state law.[28] It also held that the federal issue on which declaratory relief was requested did not create jurisdiction because it "[arose] only as a defense or in anticipation of a defense."[29]

In a case of considerable practical importance for litigation about arbitration clauses, the Fifth Circuit addressed a party's motion for a stay of district court proceedings during an appeal about the arbitrability of the matter in *Weingarten Realty Investors v. Miller*.[30] The court acknowledged a significant circuit split as to whether a notice of appeal automatically stayed the district court during an arbitrability appeal—with one school of thought (two circuits) holding that a case's merit is a matter distinct from whether it is arbitrable and another school (five circuits) holding that a notice of appeal automatically stays district court proceedings for efficiency reasons.[31] Recognizing that this issue turns on the application of *Griggs v. Provident Consumer Discount Co.* and its holding that a district court may adjudicate matters not involved in the appeal, the court concluded that under prior circuit precedent, a notice of appeal did not create an automatic stay.[32] The court went on to review the motion under the general four-factor test for a discretionary stay during appeal and again declined to order a stay, primarily because it believed the movant had a low chance of success on the merits under the contract documents and the doctrine of equitable estoppel.[33]

III. ATTORNEY'S FEES

In *Wal-Mart Stores, Inc. v. Qore, Inc.*, Wal-Mart sued several defendants about structural problems with a new store in Starkville, Mississippi.[34] Wal-Mart won some claims at trial, the share of which, for defendant Qore (a geotechnical services firm), was $48,600.[35] Pursuant to an indemnity provision that reached "any claim, demand, loss, damage, or injury (including Attorney's fees) caused by any negligent act or omission," the trial court awarded $810,000 in fees against Qore—the substantial majority of Wal-Mart's fees for the whole case.[36] The Fifth Circuit agreed that this provision justified a fee award but found the award excessive because Wal-Mart's fees could have been segregated and remanded for further proceedings.[37] The court noted that *Cobb v. Miller*, a civil rights case with an attorney's fee dispute,[38] raised policy issues

28. *See id.* at 936-37 (relying on *Vaden*, 556 U.S. at 53).
29. *Id.* at 939.
30. *See* Weingarten Realty Investors v. Miller, 661 F.3d 904, 906 (5th Cir. Nov. 2011).
31. *See id.* at 907-08.
32. *See id.* at 909-10 (applying Griggs v. Provident Consumer Disc. Co., 459 U.S. 56, 68 (1982)).
33. *See id.* at 910-14.
34. Wal-Mart Stores, Inc. v. Qore, Inc., 647 F.3d 237, 240-41 (5th Cir. July 2011).
35. *See id.* at 241.
36. *Id.* at 241-42 (internal quotation marks omitted).
37. *Id.* at 247-48.
38. Cobb v. Miller, 818 F.2d 1227 (5th Cir. 1987).

about "private attorney[s] general" that did not apply to this Mississippi state-law matter.[39]

IV. BANKRUPTCY

In *Waldron v. Adams & Reese, L.L.P.*, the largest creditor of a bankruptcy debtor paid the retainer fee for debtor's counsel.[40] That payment was not disclosed for some time, after which the trustee sought to disgorge counsel's fees on the grounds of a disqualifying conflict of interest.[41] The court affirmed the lower court's rulings, finding no disqualifying conflict on the "specific facts of [the] case."[42] It reviewed counsel's conduct during the bankruptcy case as well as prior representations of the debtors.[43] Then, applying the "clear error" standard of review, the court affirmed a sanction of partial disgorgement of twenty percent of the fee for the late disclosure.[44]

Countrywide Home Loans sought to recover certain post-petition attorney's fees in a Chapter 13 bankruptcy case in *Velazquez v. Countrywide Home Loans Servicing, L.P.*[45] The court reviewed the provisions of the relevant deed of trust and concluded that the word "and" in the phrase "do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property *and* rights under this Security Instrument" did not require that a recoverable fee involve both the protection of the lender's interest and the lien.[46] The court "respectfully disagree[d]" with the unpublished affirmance of a different result by another panel in *Wells Fargo Bank v. Collins*.[47]

The bankruptcy case of *Bandi v. Becnel* involved a dispute as to whether a debt was nondischargeable because it arose from fraud or whether it fell within an exception for statements about "financial condition" in 11 U.S.C. § 523(a)(2).[48] The court held that the phrase "financial condition" should be construed "to connote the overall net worth" of the debtor and, thus, did not include "[a] representation that one owns a particular residence or a particular

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39. *Qore*, 647 F.3d at 247-48 (quoting Fox v. Vice, 131 S. Ct. 2205, 2213 (2011)) (internal quotation marks omitted).

40. Waldron v. Adams & Reese, L.L.P. (*In re* Am. Int'l Refinery, Inc.), 676 F.3d 455, 459-60 (5th Cir. Mar. 2012).

41. *Id.* at 460.

42. *Id.* at 462 (quoting I.G. Petrol., L.L.C. v. Fenasci (*In re* W. Delta Oil Co.), 432 F.3d 347, 356 (5th Cir. 2005)) (internal quotation marks omitted).

43. *Id.* at 463-65.

44. *Id.* at 465-66.

45. Velazquez v. Countrywide Home Loans Servicing, L.P. (*In re* Velazquez), 660 F.3d 893, 894 (5th Cir. Oct. 2011).

46. *Id.* at 898-99 (internal quotation marks omitted) (comparing *Velazquez* with a similar interpretation in *Lanier v. Spring Cypress Investments*, No. 01-93-00414-CV, 1995 WL 489427, at *2 (Tex. App.—Houston [1st Dist.] Aug. 17, 1995, no writ)).

47. *Id.* at 899 n.5; *see* Wells Fargo Bank v. Collins (*In re* Collins), 437 F. App'x 314 (5th Cir. Aug. 2011) (per curiam).

48. Bandi v. Becnel (*In re* Bandi), 683 F.3d 671, 674-75 (5th Cir. June 2012), *cert. denied*, 133 S. Ct. 845 (2013) (quoting 11 U.S.C. § 523(a)(2)(A)-(B) (2006 & Supp. 2012) (internal quotation marks omitted).

commercial property" because the property could be subject to liens or other liabilities.[49] The Court reviewed a substantial body of law from its prior opinions, other circuits, and the Supreme Court about the intricacies of this statute and other related provisions of the Bankruptcy Code.[50]

In *Rapid Settlements, Ltd. v. Shcolnik*, bankruptcy creditors obtained a $50,000 arbitration award of attorney's fees against the debtor and appealed a summary judgment that the award was dischargeable.[51] The Fifth Circuit reversed, finding an issue of fact as to whether the fee award arose from "willful and malicious injury by the debtor" in pursuing meritless claims and was thus nondischargeable.[52] A thoughtful dissent questioned whether the majority's ruling would deter legitimate litigation demands and whether the court was inserting itself into matters resolved by the arbitrator.[53]

V. BUSINESS TORTS

The case of *LHC Nashua Partnership, Ltd. v. PDNED Sagamore Nashua, L.L.C.* presented several liability and damages issues in a contract case arising from a real estate development project.[54] While nominally applying New Hampshire law, the court addressed Texas law because it did not materially differ on the key points.[55] The court's holdings included the following: a promissory estoppel claim was not actionable given the scope of the parties' written contract; the plaintiff offered sufficient evidence of justifiable reliance on alleged misrepresentations; and a merger clause in the parties' agreement did not foreclose the misrepresentation claim.[56] The court's analysis of the merger clause focused on the recent Texas Supreme Court case of *Italian Cowboy Partners v. Prudential Insurance Co. of America*, which substantially clarified Texas law in that area.[57] The court affirmed an award of reliance damages but reversed an award of $25 million in lost profits, stating that the contract induced by fraud "contemplated a future closing transaction"; therefore, the plaintiff could not "recover lost profits flowing from an agreement to purchase property that never closed due to the failure of that agreement's express conditions."[58]

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49. *Id.* at 676 (first quote quoting § 523(a)(2)) (internal quotation marks omitted).

50. *See id.* at 675-79.

51. Shcolnik v. Rapid Settlements, Ltd. (*In re* Shcolnik), 670 F.3d 624, 627 (5th Cir. Feb. 2012).

52. *Id.* at 628-30 (quoting § 523(a)(6)) (internal quotation marks omitted). The debtor's threats included a "massive series of legal attacks . . . which will likely leave you disbarred, broke, professionally disgraced, and rotting in a prison cell." *Id.* at 627 (alteration in original) (internal quotation marks omitted).

53. *Id.* at 633 (Haynes, J., concurring in part and dissenting in part).

54. *See* LHC Nashua P'ship v. PDNED Sagamore Nashua, L.L.C., 659 F.3d 450, 453-55 (5th Cir. Sept. 2011).

55. *See id.* at 457.

56. *Id.* at 457-60.

57. *See id.* at 460 (citing Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am., 341 S.W.3d 323, 334 (Tex. 2011)).

58. *Id.* at 464-65.

Bohnsack v. Varco, L.P. presented a post-judgment appeal of successful claims for fraud and misappropriation of trade secrets about an oil-drilling device called the "Pit Bull."[59] The court ruled that (1) the evidence was sufficient to hold the defendant liable for statements of its outside counsel, to show that those statements were a "material factor" to the plaintiff, and to establish injury from lost profits; (2) the fraud damages awarded were benefit-of-the-bargain damages, not compensable under common-law fraud (discussing *Haase v. Glazner*[60]); (3) the fraudulent inducement claim failed because the defendant's statements only induced negotiations, not entry into a contract; and (4) the damages were compensable as misappropriation of a trade secret under the broad definition of "use" in Texas law and, in light of damages, evidence was sufficient to show that "the value a reasonably prudent investor would pay for the trade secret."[61]

The case of *Garriott v. NCsoft Corp.* presented a challenge to a $28 million judgment for breach of an employee's stock option contract.[62] After resolving a liability issue under South Korean law about the employee's termination, the court considered whether the judgment impermissibly considered post-breach stock appreciation.[63] The court faulted the defendant for not raising its challenge to the damages calculation in a *Daubert* motion, evidence objection, or charge objection, and it rejected the argument under plain error review, stating, "Displeased with the jury's decision, NCsoft now asks for a mulligan."[64] The court also found sufficient direct evidence, consistent with the expert models, as to when the employee would have sold his shares.[65]

In *In re Capco Energy, Inc.*, the court addressed two fundamental business tort issues.[66] The first issue involved a professional negligence claim about the evaluation of certain oil properties—the majority held that the professional's contract did not extend to the matters complained of and, thus, created no professional duty,[67] while the dissent could not "fathom how one [could] conclude that there was no contract" for those matters.[68] On the second issue, the court found a contractual disclaimer of reliance that defeated a fraud

59. Bohnsack v. Varco, L.P., 668 F.3d 262, 266 (5th Cir. Jan. 2012).

60. Haase v. Glazner, 62 S.W.3d 795, 798-99 (Tex. 2001).

61. *Bohnsack*, 668 F.3d at 274-76, 278-80 (first quote quoting Coffel v. Stryker Corp., 284 F.3d 625, 636 (5th Cir. 2002)) (internal quotation marks omitted).

62. Garriott v. NCsoft Corp., 661 F.3d 243, 245-46 (5th Cir. Oct. 2011).

63. *Id.* at 247-48.

64. *Id.* at 248.

65. *Id.* at 249 (stating that damages "may be too speculative if based on 'assumptions without basis in the real world'" but that the plaintiff "need not prove damages with mathematical certainty" (quoting Eymard v. Pan Am. World Airways (*In re* Air Crash Disaster at New Orleans, La. on July 9, 1982), 795 F.2d 1230, 1233 (5th Cir. 1986))).

66. Amco Energy, Inc. v. Tana Explor. Co. (*In re* Capco Energy, Inc.), 669 F.3d 274, 279-84 (5th Cir. Jan. 2012).

67. *Id.* at 281-82.

68. *Id.* at 287 (Owen, J., dissenting).

claim,[69] continuing the recent development of law on that issue in *Italian Cowboy Partners, Ltd. v. Prudential Insurance Co*.[70] and *LHC Nashua Partnership, Ltd. v. PDNED Sagamore Nashua, L.L.C.*[71]

In *Jones v. Wells Fargo Bank*, the court affirmed liability for conversion when a bank "reaccepted [a check] into an account other than that of the named payee, without the proper endorsement."[72] The opinion provided a detailed discussion of basic topics in the law of checks: who has the rights of a "holder" under UCC Article 3, what the proper safeguards are for check endorsements, and what the account holder responsibilities are for review of a bank statement.[73] The opinion concluded with review of the *in pari delicto* defense—a significant issue in some corporate governance cases—and noted how the defense can apply differently to receivers as compared to bankruptcy trustees.[74]

VI. CHOICE OF LAW

A bankruptcy trustee sued to avoid an alleged fraudulent transfer in the form of payments under a guarantee in *MC Asset Recovery, L.L.C. v. Commerzbank A.G.*[75] The court found that the trustee had standing, even though the debtor's creditors had been paid in full, because recovery would benefit the estate.[76] Then, applying the Restatement's "significant relationship" framework and focusing on policy issues, the court applied New York fraudulent conveyance law (which reached guarantees) as opposed to Georgia law (which did not).[77] The court vacated and reversed the lower court's dismissal of the case.[78]

In *McGee v. Arkel International*, the court addressed a thorny choice-of-law issue raised by a conflict between limitations provisions.[79] It held that Iraqi law was adequately proven under Federal Rules of Civil Procedure 44.1 through an expert's affidavit, which included a translation and cited a generally consistent website.[80] The court held that the action was time-barred under Louisiana law but not under Iraqi law and, thus, fell within a rarely used

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69. *Id.* at 283-84 (majority opinion).

70. Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am., 341 S.W.3d 323, 333 (Tex. 2011).

71. LHC Nashua P'ship Ltd. v. PDNED Sagamore Nashua, L.L.C., 659 F.3d 450, 460 (5th Cir. Sept. 2011).

72. Jones v. Wells Fargo Bank, N.A., 666 F.3d 955, 958 (5th Cir. Jan. 2012) (per curiam).

73. *Id.* at 959-65.

74. *Id.* at 965-68.

75. MC Asset Recovery, L.L.C. v. Commerzbank A.G. (*In re* Mirant Corp.), 675 F.3d 530, 532 (5th Cir. Mar. 2012).

76. *Id.* at 534.

77. *Id.* at 536-38 (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971)) (internal quotation marks omitted).

78. *Id.* at 538.

79. *See* McGee v. Arkel Int'l, LLC, 671 F.3d 539, 540 (5th Cir. Feb. 2012).

80. *See id.* at 547 (noting that defendant "did not put forth any alternative translation and has not suggested how the [plaintiff's] translation might be inaccurate").

Louisiana law exception allowing the action to proceed as "warranted by compelling considerations of remedial justice."[81]

VII. CLASS ACTIONS

The case of *Klier v. Elf Atochem North America, Inc.* presented the following challenge: "When modern, large-scale class actions are resolved via settlement, money often remains in the settlement fund even after initial distributions to class members have been made because some class members either cannot be located or decline to file a claim."[82] The court reviewed the district court's decision to make a *cy pres* distribution of unclaimed funds from a tort settlement to various charities.[83] The court began its analysis by stating that the Rules Enabling Act and Rule 23 of the Federal Rules of Civil Procedure "define the first—and often the last—arena of analysis," limiting *cy pres* distributions "only to rescue the objectives of the settlement when the agreement fails to do so."[84] Noting that the parties' settlement agreement did not provide for a *cy pres* distribution and that the agreement had a clause allowing the district court to change the distribution protocol "for the benefit of the Settlement Class Members," the court concluded that the unused funds were to be used for the benefit of another settlement subclass rather than as the district court had ordered.[85] The court went on to review several features of the parties' agreement, noting that the cases in this area "have necessarily taken case-specific approaches."[86] Chief Judge Jones wrote a concurrence that focused on situations when returning unused funds to the settling defendant would be appropriate.[87]

In *Williams v. Homeland Insurance Co. of New York*—a discretionary appeal accepted under the Class Action Fairness Act (CAFA)—the court affirmed the denial of a motion to remand, concluding that the local controversy exception to CAFA jurisdiction had been satisfied.[88] The opinion emphasized that "[t]he parties moving for remand bear the burden of proof that they fall within an exception to CAFA jurisdiction."[89] In this challenge to discounts made by a preferred provider organization (PPO) program, the court concluded that adding a claims administrator as a new party did not change the fact that "significant relief" was still sought from the in-state entity that operated the

81. *Id.* at 548 (quoting LA. CIV. CODE ANN. art. 3549(B) (2012)) (internal quotation marks omitted).
82. Klier v. Elf Atochem N. Am., Inc., 658 F.3d 468, 473 (5th Cir. Sept. 2011).
83. *Id.* at 472.
84. *Id.* at 475-76.
85. *See id.* at 476-77 (internal quotation marks omitted).
86. *Id.* at 478.
87. *Id.* at 480 (Jones, C.J., concurring).
88. Williams v. Homeland Ins. Co. of N.Y., 657 F.3d 287, 293 (5th Cir. Sept. 2011).
89. *Id.* at 290 (citing Preston v. Tenet Healthsystem Mem'l Med. Ctr., Inc., 485 F.3d 793, 797 (5th Cir. 2007)).

PPO network, thus satisfying that element of the local controversy exception.[90] The court went on to state that "a class arbitration is not a class action" and that, as a result, a prior arbitration did not implicate the requirement of the exception that no other class action have been filed against a defendant in the preceding three years.[91]

Conversely, in *Opelousas General Hospital Authority v. FairPay Solutions, Inc.*, the court reversed a remand order based on CAFA.[92] Applying the local controversy exception to CAFA jurisdiction, the court distinguished between the requirements of the exception that the class seek "significant relief" from an in-state defendant and that the defendant's conduct "form[] a significant basis for the claims asserted."[93] Finding "no effort to quantify or even estimate" the in-state defendant's alleged wrongdoing compared to the other defendants, the court held that the exception had not been established.[94] The court also rejected the argument that potential joint and several liability of the defendant could impute all other parties' wrongdoing to it for purposes of this exception.[95]

In the case of *Union Asset Management Holding A.G. v. Dell, Inc.*, the court reviewed the settlement of a shareholder class action against the arguments of two objectors.[96] The court first held that a class member does not have to file a proof of claim to have standing to object.[97] The court then reviewed and rejected several objections to the fairness of the settlement, emphasizing that a full evidentiary hearing is not necessarily required at a fairness hearing.[98] Finally, the court found no abuse of discretion in awarding an eighteen percent fee to the attorneys ($7.2 million) instead of requiring a lodestar calculation, rejecting a strict reading of *In re High Sulfur Content Gasoline Products Liability Litigation*.[99]

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90. *Id.* at 291-92 (quoting 28 U.S.C. § 1332(d)(4)(A)(i)(II)(aa) (2006)) (internal quotation marks omitted).

91. *Id.* at 292-93.

92. Opelousas Gen. Hosp. Auth. v. FairPay Solutions, Inc., 655 F.3d 358, 359 (5th Cir. Sept. 2011) (per curiam).

93. *Id.* at 361 (first quote quoting § 1332(d)(4)(A)(i)(II)(aa)) (second quote quoting § 1332(d)(4)(i)(II)(bb)) (internal quotation marks omitted).

94. *Id.* at 362.

95. *Id.* at 363 (citing Evans v. Walter Indus., Inc., 449 F.3d 1159, 1167 & n.7 (11th Cir. 2006)). The author was counsel for the appellant in the *FairPay* case. *Id.* at 359.

96. Union Asset Mgmt. Holding A.G. v. Dell, Inc., 669 F.3d 632, 637 (5th Cir. Feb. 2012), *cert. denied sub nom.* Schuleman v. Union Asset Mgmt. Holding A.G., 133 S. Ct. 317 (2012).

97. *Id.* at 638-39.

98. *Id.* at 641-42.

99. *Id.* at 642-44; *see* Silvestri v. Barrett (*In re* High Sulfur Content Gas. Prods. Liab. Litig.), 517 F.3d 220, 228 (5th Cir. 2008) ("This circuit requires district courts to use the 'lodestar method' to 'assess attorneys' fees in class action suits.'" (quoting Strong v. BellSouth Telecomm., Inc., 137 F3d 844, 850 (5th Cir. 1998))).

VIII. CONTRACT LITIGATION

The unpublished case of *Stanwood Boom Works, L.L.C. v. BP Exploration & Production, Inc.*, in the context of affirming summary judgment for the defendant in a contract case, gives a thorough summary of "black letter" Texas law about contract formation as well as the related situation of negotiations that are too tentative to create promissory estoppel.[100]

The dispute in *Preston Exploration Co. v. GSF, L.L.C.* was whether a contract to sell certain oil and gas leases satisfied the Texas statute of frauds.[101] Acknowledging that the parties' documents envisioned future title work, the court reversed the district court's conclusion that this remaining work barred the contract's enforcement under the statute, stating, "Such analysis reflects the conflating of two distinct principles—whether parties come to a meeting of the minds as to the subject matter of a contract with whether a writing's legal description is sufficient to meet the statute of frauds."[102]

The parties in *Ballard v. Devon Energy Production Co.* disputed when a provision about the effect of surrendering certain leases in an oil field Joint Operating Agreement would apply.[103] The court affirmed the denial of leave to amend the plaintiff's contract claims to add a fiduciary duty count based on a lengthy delay in raising the issue.[104] Applying Montana law, the court then concluded that, while the parties had both advanced facially plausible readings of the provision in isolation, the defendant's reading was more persuasive in the overall context of the entire development project.[105] The court affirmed summary judgment for the defendant, although it criticized the trial court for considering extrinsic evidence before attempting to construe the document on its face.[106]

In *Greenwood 950 L.L.C. v. Chesapeake Louisiana, L.P.*, the court found an ambiguity in a Louisiana mineral lease, seeing two reasonable ways to harmonize clauses about obligations to "*repair* all *surface* damages" and "*pay . . . all* damages."[107] On the threshold *Erie* issue, the court stated, "[W]e must look first and foremost 'to the final decisions of Louisiana's highest court' rather than this Court's prior applications of Louisiana law."[108]

The question in *Haggard v. Bank of the Ozarks, Inc.* was whether a guarantor's liability was limited under Texas law to the last $500,000 due on

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100. *See* Stanwood Boom Works, L.L.C. v. BP Explor. & Prod., Inc., 476 F. App'x 572, 574-75 (5th Cir. Apr. 2012) (per curiam).

101. *See* Preston Explor. Co. v. GSF, L.L.C., 669 F.3d 518, 522 (5th Cir. Feb. 2012).

102. *Id.* at 523.

103. *See* Ballard v. Devon Energy Prod. Co., 678 F.3d 360, 364 (5th Cir. Apr. 2012).

104. *Id.* at 365.

105. *Id.* at 367-70.

106. *Id.* at 366, 370.

107. Greenwood 950, L.L.C. v. Chesapeake La., L.P., 683 F.3d 666, 669-70 (5th Cir. June 2012) (alteration in original) (emphasis added).

108. *Id.* at 669 n.11 (quoting Holt v. State Farm Fire & Cas., 627 F.3d 188, 191 (5th Cir. 2010)).

the note of the principal obligor.[109] Comparing language in the guaranty that limited liability "to the last to be repaid $500,000, of the principal balance of the loan" with other terms that excused the creditor bank from first trying to collect from the principal, the court found the guaranty ambiguous and reversed a summary judgment for the bank.[110]

The court addressed the doctrine of mistake under Louisiana law in *Fruge v. Amerisure Mutual Insurance Co*.[111] After noting that choice-of-law issues are waived unless presented to the district court, the court considered reformation of an insurance policy under general contract principles.[112] The court began by noting that Louisiana law allows reformation in the case of mutual mistake and consideration of extrinsic evidence to prove such a mistake, even if the policy language is unambiguous.[113] It reviewed different post-accident reformation scenarios, noting that a Louisiana statute generally precludes a post-accident reformation to rescind coverage, and concluded that a reformation claim based on mutual mistake was cognizable in the post-accident setting presented in this case.[114] The court reversed and remanded, noting that the extrinsic evidence could potentially prove that no mistake occurred.[115]

Sawyer v. E.I. DuPont de Nemours & Co. presented employee claims of fraudulent inducement to leave jobs with DuPont for new positions at a wholly owned subsidiary.[116] The court began by reminding of the deference for intermediate appellate opinions in making an *Erie* guess about state law—here, the "at will" employment doctrine in Texas and its prohibition of fraudulent inducement claims about employment relationships.[117] Based on intermediate court authority, the court concluded that a CBA that was terminable on notice did not change the employees' at-will status, which, thus, barred their claims.[118] The court also held that oral representations to another group of employees were not sufficiently definite to change their at-will status, citing *Montgomery County Hospital District v. Brown*.[119] The panel affirmed the summary judgment for DuPont, but in a later proceeding, the court vacated the panel

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109. Haggard v. Bank of the Ozarks, Inc., 668 F.3d 196, 198 (5th Cir. Jan. 2012) (per curiam).

110. *Id.* at 201-02 (citing, as to the limitation language, NH Tex. Properties Ltd. P'ship v. Mittleider, 267 F. App'x 375, 376 (5th Cir. 2008)) (internal quotation marks omitted). The court emphasized that a "guaranty agreement is construed strictly in favor of the guarantor[,]" so "[i]f the guaranty is ambiguous, then the court must apply the 'construction which is most favorable to the guarantor.'" *Id.* at 201 (first quote quoting United States v. Vahlco Corp., 800 F.2d 462, 465 (5th Cir. 1986)) (second quote quoting Resolution Trust Corp. v. Northpark Joint Venture, 958 F.2d 1313, 1320 (5th Cir. 1992)) (internal quotation marks omitted).

111. *See* Fruge v. Amerisure Mut. Ins. Co., 663 F.3d 743, 747-48 (5th Cir. Nov. 2011) (per curiam).

112. *Id.* at 747-49.

113. *Id.* at 748.

114. *Id.* at 748-49.

115. *Id.* at 750.

116. Sawyer v. E.I. du Pont de Nemours & Co., 678 F.3d 379, 382 (5th Cir. Apr. 2012), *withdrawn and superseded by* 689 F.3d 463 (5th Cir. July 2012).

117. *Id.* at 383.

118. *Id.* at 386.

119. *Id.* at 384 (citing Montgomery Cnty. Hosp. Dist. v. Brown, 965 S.W.2d 501, 502 (Tex. 1998)).

opinion and certified the legal issues to the Texas Supreme Court.[120]

IX. *DAUBERT*

The Fifth Circuit has thoroughly debated the application of *Daubert* and its effect on the roles of judge and jury.[121] In *Huffman v. Union Pacific Railroad*, the court moved to the other end of the technical spectrum and analyzed the sufficiency of evidence in a FELA case about a former railway worker's alleged on-the-job injuries.[122] After a thorough analysis of the worker's allegations, the court held that expert testimony on causation was not necessary to support a jury finding for the worker but found that the worker had not presented enough evidence about the type of injury to satisfy even that standard.[123] Judge Southwick wrote for the majority, joined by Judge Owen, and Judge Dennis dissented.[124] The case analyzed FELA precedent but is of substantially broader interest on general causation issues.[125] The court also briefly analyzed and rejected a judicial estoppel argument.[126]

The court reviewed several *Daubert* rulings in the toxic tort case of *Johnson v. Arkema, Inc*.[127] Under an abuse-of-discretion standard, it affirmed the exclusion of experts based on weaknesses in reliance upon (1) analysis of whether the materials at issue belonged to a class of chemicals known to cause disease; (2) state and federal exposure guidelines; (3) animal studies; and (4) the temporal connection between exposure and illness.[128] The court then affirmed the exclusion of an opinion based on a differential diagnosis, concluding that it was based on an unreliable presumption about general causation.[129] The court concluded by reversing on a causation issue that did not require expert testimony, finding that the temporal connection between exposure and certain chronic injuries was close enough to allow trial while also finding that the connection was too attenuated as to related chronic injuries.[130] A concurring opinion took issue with the majority's reasoning as to one well-credentialed toxicology expert.[131]

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120. *Sawyer*, 689 F.3d at 464.
121. *See* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993).
122. Huffman v. Union Pac. R.R., 675 F.3d 412, 417 (5th Cir. Mar. 2012).
123. *Id.* at 425-26.
124. *Id.* at 414.
125. *See id.* at 416-17.
126. *Id.* at 417-18.
127. Johnson v. Arkema, Inc., 685 F.3d 452, 459 (5th Cir. June 2012).
128. *Id.* at 458-59.
129. *Id.* at 468.
130. *Id.* at 471.
131. *Id.* at 472-73 (Reavley, J., concurring).

X. INSURANCE

The plaintiff in *Kocurek v. CUNA Mutual Insurance Society* sued for fraud about the sale of a 2005 insurance policy on her husband's life.[132] The defendant persuaded the district court to dismiss on the pleadings, arguing that the plaintiff lacked standing because she was not a beneficiary of the 2005 policy and that the policy had a "one policy only" clause that barred claims under an earlier policy.[133] The Fifth Circuit disagreed and reversed, characterizing the plaintiff's claims as relating to the "practice of selling multiple policies to the same individual" and finding the one-policy-only provision potentially ambiguous and, thus, not a proper basis for dismissal on the pleadings.[134] The court affirmed dismissal of a DTPA claim because the plaintiff was not the consumer who bought the policy.[135]

Mid-Continent Casualty Co. v. Davis presented an insurance coverage dispute about a wrongful death claim by a construction worker.[136] Coverage turned on whether the worker was an employee or an independent contractor.[137] Applying the five-factor test from *Limestone Products Distribution v. McNamara*,[138] the court affirmed a holding that the worker was an independent contractor.[139] Key facts were that the worker provided his own tools and supplies, largely controlled his own schedule and tasks, and was provided a 1099 Form for tax purposes, rather than a W-2 Form.[140]

In *Continental Casualty Co. v. North American Capacity Insurance Co*., the district court required three primary carriers to split defense costs while not allowing the excess insurer to recover defense costs from the primaries.[141] The Fifth Circuit affirmed on the cost-splitting issue after careful review of the policies' coverage triggers, scope, and other insurance clauses.[142] The court reversed as to the excess carrier, finding it had a right of contractual subrogation and distinguishing *Mid-Continent Insurance v. Liberty Mutual*.[143]

Looney Ricks Kiss Architects, Inc. v. State Farm Fire & Casualty Co. presented the question of whether a breach of contract exclusion should be analyzed under a "but for" or an "incidental relationship" test to determine whether an insurance policy covered a claim for copyright infringement.[144]

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132. Kocurek v. CUNA Mut. Ins. Soc'y, 459 F. App'x 371, 372-73 (5th Cir. Jan. 2012).
133. *Id.* at 373.
134. *Id.* at 373-74.
135. *Id.* at 374.
136. Mid-Continent Cas. Co. v. Davis, 683 F.3d 651, 653-54 (5th Cir. June 2012).
137. *Id.* at 655.
138. Limestone Prods. Distribution v. McNamara, 71 S.W.3d 308, 312 (Tex. 2002).
139. *Davis*, 683 F.3d at 655-60.
140. *Id.* at 656-59.
141. Cont'l Cas. Co. v. N. Am. Capacity Ins. Co., 683 F.3d 79, 82 (5th Cir. May 2012).
142. *Id.* at 92-93.
143. *Id.* at 85-88; *see* Mid-Continent Ins. Co. v. Liberty Mut. Ins. Co., 236 S.W.3d 765 (Tex. 2007).
144. Looney Ricks Kiss Architects, Inc. v. State Farm Fire & Cas. Co., 677 F.3d 250, 256 (5th Cir. Apr. 2012).

After noting that under *Erie* the court's job "is to attempt to predict state law, not to create or modify it," the court concluded that Louisiana would use a but-for test.[145] Because the copyright claim "would exist even in the absence" of the parties' contractual relationship, the exclusion did not apply, and the insurer had a duty to cover and defend.[146]

In *National Casualty Co. v. Western World Insurance Co.*, the court addressed basic coverage issues under the Texas law about auto insurance.[147] It held that loading a patient into an ambulance was "use" of an automobile within the meaning of one policy[148] but did not fall within a "use" exclusion to another policy, reiterating that the standard for construing a coverage provision is different than the standard for construing an exclusion from coverage.[149] The court also found that the "professional services" and "other insurance" exclusions did not apply.[150]

The case of *Gilbane Building Co. v. Admiral Insurance Co*. involved an insurer's duty to defend and indemnify an injury claim under Texas law.[151] The court first reviewed the basic rules in the circuit for an *Erie* guess about state law.[152] The court found that Texas's "express negligence" rule was limited to contractual indemnity and did not bear on whether the plaintiff was an "additional insured."[153] The court then applied Texas's "eight-corners rule" and found no duty to defend, reiterating that this rule "consider[s] only the facts alleged in the pleadings and . . . not . . . factual assumptions or inferences that were not pleaded."[154] The court declined to recognize an exception to the eight-corners rule for claims involving a plaintiff's unpleaded contributory negligence.[155] The court concluded by affirming the district court's summary judgment for the insured on the duty to indemnify, applying a broader standard based on the facts proven in the underlying suit.[156]

Thompson v. Zurich American Insurance Co. presented a common law bad-faith action under the Texas law about the handling of a workers' compensation claim (Insurance Code rights being limited after *Texas Mutual Insurance Co. v. Ruttiger*[157]).[158] After stating that Rule 56 of the Federal Rules

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145. *Id.* (quoting SMI Owen Steel Co. v. Marsh USA, Inc., 520 F.3d 432, 442 (5th Cir. 2008)) (internal quotation marks omitted).

146. *Id.* at 257-58.

147. Nat'l Cas. Co. v. W. World Ins. Co., 669 F.3d 608, 611 (5th Cir. Feb. 2012).

148. *Id.* at 613-14 (citing Mid-Century Ins. Co. v. Lindsey, 997 S.W.2d 153, 158-59 (Tex. 1999)).

149. *Id.* at 614-15.

150. *Id.* at 615-17.

151. Gilbane Bldg. Co. v. Admiral Ins. Co., 664 F.3d 589, 592 (5th Cir. Dec. 2011).

152. *Id.* at 593-94 (citing Am. Int'l Specialty Lines Ins. Co. v. Rentech Steel, L.L.C., 620 F.3d 558, 564-66 (5th Cir. 2010)).

153. *Id.* at 595.

154. *Id.* at 596-99 (citing Zurich Am. Ins. v. Nokia, Inc., 268 S.W.3d 487, 492-93 (Tex. 2008)).

155. *Id.* at 600-01.

156. *Id.* at 601-02 & n.4 (acknowledging that "this may seem like an unusual result" but referring to a similar result in *D.R. Horton-Tex., Ltd. v. Markel Int'l Ins*. Co., 300 S.W.3d 740, 744 (Tex. 2009)).

157. *See* Tex. Mut. Ins. Co. v. Ruttiger, No. 08-0751, 2011 WL 3796353 (Tex. Aug. 26, 2011), *withdrawn and superseded by* 381 S.W.3d 430 (Tex. 2012).

of Civil Procedure asks "whether a rational trier of fact could find for the non-moving party,"[159] the court reviewed Texas case law on several issues in light of *Ruttiger* and found that, on the facts presented, none of the following showed bad faith: (1) the conflict between expert reports; (2) the lack of personal treatment of the plaintiff by the expert; (3) the expert's record of primarily working for insurance companies; (4) the expert's analysis of aggravation; or (5) the insurer's conduct after the initial review.[160] Footnotes in the opinion summarize the present state of the Texas law on several bad-faith claims-handling issues.[161]

In *Grissom v. Liberty Mutual Fire Insurance Co*., the trial court awarded $212,900 in damages for negligent misrepresentation based on the difference between the coverage a homeowner actually had at the time of Hurricane Katrina and the coverage he could have had under a preferred risk policy.[162] The Fifth Circuit reversed on preemption issues unique to flood insurance as well as on the viability of the claim itself, stating, "Because Liberty Mutual was not offering insurance advice, was not a fiduciary of Grissom, and did not offer any statement to Grissom to imply the lack of alternative insurance options, Mississippi law would not recognize negligent misrepresentation as a cause of action against Liberty Mutual . . . ."[163]

XI. JURISDICTION—PERSONAL

The U.S. Supreme Court wrote two major personal jurisdiction opinions in 2011: *Goodyear Dunlop Tires Operations, S.A. v. Brown*[164] (about general personal jurisdiction based on product sales into a state) and *J. McIntyre Machinery, Ltd. v. Nicastro*[165] (analyzing specific personal jurisdiction based on a "stream of commerce" theory). In *ITL International, Inc. v. Constenla, S.A.*—the Fifth Circuit's first lengthy personal jurisdiction opinion since then—the court held that a defendant's acceptance of fifty-five shipments of goods in Mississippi was "purposeful contact[]" but went on to find no specific jurisdiction because the parties' trademark dispute had too weak a link to those contacts.[166] The court did not address general jurisdiction and, thus, did not directly engage the *Goodyear* case.[167] In a related, unpublished opinion, the court also found no general personal jurisdiction on similar facts.[168]

158. *See* Thompson v. Zurich Am. Ins. Co., 664 F.3d 62, 64 (5th Cir. Dec. 2011).
159. *Id.* at 66 (quoting James v. Sadler, 909 F.2d 834, 837 (5th Cir. 1990)) (internal quotation marks omitted).
160. *Id.* at 67-70.
161. *See id.* at 66 n.3.
162. Grissom v. Liberty Mut. Fire Ins. Co., 678 F.3d 397, 398-99 (5th Cir. Apr. 2012).
163. *Id.* at 403.
164. *See* Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2848 (2011).
165. *See* J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780 (2011).
166. ITL Int'l, Inc. v. Constenla, S.A., 669 F.3d 493, 500-01 (5th Cir. Jan. 2012).
167. *See id.* at 498.
168. ITL Int'l, Inc. v. Café Soluble, S.A., 464 F. App'x 241 (5th Cir. Feb. 2012).

XII. JURISDICTION—SUBJECT MATTER

The plaintiff in *Arena v. Graybar Electric Co.* asserted a federal claim under the Miller Act (the statute for contractors' claims on government projects) and related state-law claims.[169] The court held that failure to comply with a bonding requirement was fatal to the Miller Act claim and, thus, to supplemental jurisdiction over the state claims.[170] The district court allowed an amendment to assert diversity jurisdiction, but the Fifth Circuit remanded for consideration of evidence submitted in response to the amendment that would defeat diversity if credited.[171] Echoing its recent decision in *Enochs v. Lampasas County*, which voided a judgment on state-law claims after dismissal of the federal claim,[172] the court reiterated that "[t]he court's reasoning of judicial efficiency to resolve [plaintiff's] state-law claims comes into play only when jurisdiction is proper."[173]

In *Illinois Central Railroad Co. v. Guy*, the court reviewed a jury verdict that two lawyers had improperly induced a railroad into settling asbestos exposure claims.[174] The court rejected jurisdictional challenges based on the *Rooker-Feldman* and *Burford* doctrines, finding sufficient distance between the facts of the case and the underlying state court proceedings.[175] The court also found sufficient evidence of affirmative acts of concealment and due diligence by the railroad to toll the statute of limitations,[176] although a dissent argued otherwise.[177] The court rejected a waiver defense, distinguishing the defendants' cases as arising when a fraud plaintiff accepted a benefit after it knew or should have known of fraudulent inducement.[178]

In *Technical Automation Services Corp. v. Liberty Surplus Insurance Corp.*, the court addressed, sua sponte, an issue about the jurisdiction of a U.S. magistrate judge after the Supreme Court's recent opinion in *Stern v. Marshall* limiting the bankruptcy courts' jurisdiction.[179] The court concluded that *Stern* did not directly overrule the prior circuit precedent of *Puryear v. Ede's, Ltd.*[180] and held, "[W]e will follow our precedent and continue to hold, until such time as the Supreme Court or our court *en banc* overrules our precedent, that federal magistrate judges have the constitutional authority to enter final judgments on

169. Arena v. Graybar Elec. Co., 669 F.3d 214, 219 (5th Cir. Jan. 2012).
170. *Id.* at 220.
171. *Id.* at 225.
172. *See* Enochs v. Lampasas Cnty., 641 F.3d 155, 163 (5th Cir. 2011).
173. *Arena*, 669 F.3d at 222.
174. Ill. Cent. R.R. v. Guy, 682 F.3d 381, 385-86 (5th Cir. May 2012).
175. *Id.* at 391-92.
176. *Id.* at 393.
177. *Id.* at 398 (Elrod, J., dissenting) ("I would reverse because doing nothing is not due diligence.").
178. *Id.* at 390 (majority opinion).
179. Technical Automation Servs. Corp. v. Liberty Surplus Ins. Corp., 673 F.3d 399, 401 (5th Cir. Mar. 2012); *see* Stern v. Marshall, 131 S. Ct. 2594, 2620 (2011).
180. *See* Puryear v. Ede's Ltd., 731 F.2d 1153, 1154 (5th Cir. 1984).

state-law counterclaims."[181] On the merits, the Fifth Circuit reversed the lower court's ruling that an "eight corners" analysis of an insurance coverage issue precluded consideration of a claim of mutual mistake.[182]

XIII. PLEADING—*TWOMBLY* / *IQBAL*

The plaintiff in *Patrick v. Wal-Mart* alleged, "Defendants have engaged in a continuing pattern of bad faith . . . [and] have among other things, unreasonably delayed and/or denied authorization and/or payment of reasonable, necessary and worker's comp related medical treatment, as well as permanent indemnity benefits, as ordered by [the state agency]."[183] The court held that this allegation "invok[ed] three potentially cognizable theories of liability" but was "devoid of facts to make it plausible" under *Twombly*—the pleading failed to identify the specific time or nature of such wrongs and "[did] not identify by date or amount or type of service, any of the alleged bad-faith denials and delays."[184] It found no abuse of discretion in not allowing further amendment, noting "repeated failure[s] to cure deficiencies."[185]

The plaintiff in *Bowlby v. City of Aberdeen* alleged a denial of procedural due process and equal protection rights as to the handling of her license to run a snow cone stand in a particular location.[186] The court applied *Twombly* and *Iqbal* to hold that she had not stated an equal protection claim, reiterating that a pleading should have facial plausibility from its "pleaded factual content" and should not offer only "labels and conclusions" or a "formulaic recitation of the elements of a cause of action."[187] The court found an actionable due process issue and rejected a challenge to its ripeness under both a specialized test for constitutional claims and general ripeness principles.[188]

Bass v. Stryker Corp. presents a technical analysis of whether state-law claims about a hip implant are preempted by the federal Medical Device Amendments to the Food, Drug, and Cosmetics Act.[189] The court held that the manufacturing claims could proceed as "parallel claims that do not impose different or additional requirements than the FDA regulations" and that certain implied warranty claims survived because they were based on violations of

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181. *Technical Automation Servs. Corp.*, 673 F.3d at 407.

182. *Id.* at 408-10.

183. Patrick v. Wal-Mart, Inc.-Store # 155, 681 F.3d 614, 622 (5th Cir. May 2012).

184. *Id.*

185. *Id.* (quoting U.S. *ex rel.* Willard v. Humana Health Plan of Tex., Inc., 336 F.3d 375, 386 (5th Cir. 2003)) (internal quotation marks omitted).

186. Bowlby v. City of Aberdeen, Miss., 681 F.3d 215, 224 (5th Cir. May 2012).

187. *Id.* at 227 (quoting Ashcroft v. Iqbal, 556 U.S. 662, 681 (2009)) (internal quotation marks omitted) (noting that there were "no allegations regarding the types of businesses . . . , the size . . . , where they [were] located, or what laws and regulations they ha[d] violated").

188. *Id.* at 226 (requiring a claim "fit for judicial decision" as to which delay "would cause . . . further hardship").

189. *See* Bass v. Stryker Corp., 669 F.3d 501, 506 (5th Cir. Jan. 2012).

federal requirements.[190] The court affirmed the dismissal on preemption grounds of other claims, including an alleged failure to warn.[191] The opinion provides a thorough example of how *Twombly* applies to a Rule 12 motion based on preemption.[192]

In an antitrust suit about fees for a golf voucher program, the defendant successfully moved to dismiss on the ground that the plaintiff had not alleged an effect on interstate commerce.[193] Substantively, the court acknowledged that, while the Supreme Court has "limited the reach of the Commerce Clause with respect to non-economic activity[,] the conduct alleged here—that is, bringing out-of-state tourists to play golf—falls squarely within the Supreme Court's commerce clause jurisprudence."[194] Procedurally, the court reviewed the plaintiff's allegations about the effect of the fees on out-of-state residents in light of *Twombly* and *Iqbal* and concluded that, while sparse, those allegations sufficed to allege an effect on interstate commerce.[195] The court reversed the lower court's dismissal of the case for lack of jurisdiction.[196]

XIV. PRECLUSION AND RELATED DOCTRINES

The case of *Weaver v. Texas Capital Bank* first presented a jurisdictional question under the *Rooker-Feldman* doctrine.[197] Texas Capital Bank had obtained a state court default judgment against a guarantor and contended that the guarantor's later adversary proceeding attacking the basis for that liability was an impermissible federal attack on a final state court judgment.[198] The Fifth Circuit Court of Appeals disagreed, holding that *Rooker-Feldman* was not implicated.[199] The court went on to reverse, however, holding that the guarantor's arguments to the bankruptcy court were defenses to the earlier state court action and, thus, barred by claim preclusion.[200] The opinion thoroughly reviews Texas claim preclusion law and its "transactional" approach to the application of the compulsory counterclaim rule.[201]

In *Stoffels ex rel. SBC Telephone Concession Plan v. SBC Communications, Inc.*, the court addressed issues about whether a "retiree concession" program involving long-distance discounts should be regulated as a

190. *Id.* at 515-16.
191. *Id.* at 515.
192. *See id.* at 509-15.
193. Gulf Coast Hotel-Motel Ass'n v. Miss. Gulf Coast Golf Course Ass'n, 658 F.3d 500, 502 (5th Cir. Sept. 2011).
194. *Id.* at 505 (citations omitted) (citing United States v. Lopez, 514 U.S. 549, 559, 567 (1995)).
195. *Id.* at 506-08.
196. *Id.* at 508.
197. Weaver v. Tex. Capital Bank N.A., 660 F.3d 900, 904 (5th Cir. Oct. 2011) (per curiam), *cert. denied*, 132 S. Ct. 2103 (2012).
198. *Id.* at 903.
199. *Id.* at 904.
200. *Id.* at 905-08.
201. *See id.*

retirement plan under ERISA.[202] In the court below, a district judge held a trial and made fact-findings, after which he recused himself.[203] The second judge vacated those findings in light of a new and related Fifth Circuit opinion—*Boos v. AT&T, Inc*.[204] The court held that Federal Rules of Civil Procedure Rule 54 gave the judge authority to do so, that the "law of the case" doctrine did not constrain his authority, and that this case was not materially different on the merits from *Boos*.[205]

The defendant in *Love v. Tyson Foods, Inc*. complained that an employee's wrongful discharge claim was barred by judicial estoppel because it was not properly disclosed in the employee's personal bankruptcy, and the court agreed, rejecting the employee's contention that the disclosure issues were inadvertent.[206] The court provided a thorough summary of how the Fifth Circuit defines the judicial estoppel doctrine, explaining that because the doctrine protects the judicial system rather than litigants, detrimental reliance is not ordinarily an element.[207] A detailed dissent criticized the majority for how it addressed the burden of proof and for how it applied the doctrine in the context of broader bankruptcy policies, noting earlier circuit authority in the area.[208]

The case of *Turner v. Pleasant* presented a rare attack on a judgment by an "independent action in equity."[209] The underlying dispute involved a personal injury case implicated by the misconduct surrounding disgraced former judge Thomas Porteous.[210] After a crisp summary of the pleading requirements of *Twombly* and *Iqbal*, the court considered whether the action could proceed, even though similar allegations were made and rejected in an earlier request for relief.[211] The court reversed the dismissal of the claim and remanded, concluding that the plaintiffs had sufficiently alleged "(1) a prior judgment which 'in equity and good conscience' should not be enforced; (2) a meritorious claim in the underlying case; (3) fraud, accident, or mistake which prevented the party from obtaining the benefit of their claim;" (4) lack of fault or negligence by the party; and "(5) the absence of an adequate remedy at law."[212]

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202. Stoffels *ex rel.* SBC Tel. Concession Plan v. SBC Commc'ns, Inc., 677 F.3d 720, 724 (5th Cir. Apr. 2012), *cert. denied*, 133 S. Ct. 318 (2012).

203. *See id.* at 723.

204. *See id.*; Boos v. AT&T, Inc., 643 F.3d 127 (5th Cir. 2011).

205. *See Stoffels*, 677 F.3d at 727.

206. Love v. Tyson Foods, Inc., 677 F.3d 258, 261-63 (5th Cir. Apr. 2012).

207. *See id.* at 261.

208. *See id.* at 267-69 (Haynes, J., dissenting).

209. *See* Turner v. Pleasant, 663 F.3d 770, 773 (5th Cir. Nov. 2011).

210. *Id.* at 773-75.

211. *Id.* at 775.

212. *Id.* at 776 (quoting and contrasting Addington v. Farmer's Elevator Mut. Ins. Co., 650 F.2d 663 (5th Cir. 1981)).

XV. PREEMPTION

The court reheard en banc the case of *Access Mediquip, L.L.C. v. UnitedHealthcare Insurance Co.*, decided by the panel in 2011, which presented a sophisticated question about when ERISA preempts certain misrepresentation claims.[213] In the panel opinion, the court wrote at some length to clarify earlier cases about preemption of state-law tort claims by ERISA.[214] Access claimed that United made representations about payment for certain medical devices for three insureds.[215] The court rejected a reading of *Transitional Hospitals Corp. v. Blue Cross & Blue Shield of Texas, Inc.* that would find preemption if an alleged misrepresentation dealt with the extent of coverage.[216] "The dispositive issue . . . is therefore whether Access's state law claims are dependent on, and derived from the rights of [the three insureds] to recover benefits under the terms of their ERISA plans."[217] Under that framework, the court held that Access's claims for misrepresentation were not preempted by *Transitional* but that its unjust enrichment and quantum meruit claims were preempted.[218]

In a detailed opinion that surveyed differing circuit opinions on several topics, the court held in *Roland v. Green* that "the purchase or sale of securities (or representations about the purchase or sale of securities) is only tangentially related to the fraudulent schemes alleged" in state class actions about the Allen Stanford scandal.[219] Therefore, the Securities Litigation Uniform Standards Act (SLUSA) did not preclude those actions.[220] The opinion will likely influence future cases about the scope of SLUSA in the Fifth Circuit.

Lofton v. McNeil Consumer & Specialty Pharmaceuticals presented a failure-to-warn claim based on a severe reaction to a common pain medicine.[221] The court concluded that the specific claim at issue, based on § 82.007 of the Texas Civil Practice and Remedies Code, required litigation about whether fraud on the FDA had occurred and was, thus, preempted.[222] The court acknowledged a circuit split on this preemption issue and also noted that it was

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213. *See* Access Mediquip, LLC v. UnitedHealthcare Ins. Co., 698 F.3d 229, 230 (5th Cir. Oct. 2012) (en banc), *reinstating* 678 F.3d 940 (5th Cir. Apr. 2012), *cert denied*, 133 S. Ct. 1467 (2013) (mem.) (No. 12-806).

214. *See* Access Mediquip, L.L.C. v. UnitedHealthcare Ins. Co., 662 F.3d 376, 382-86 (5th Cir. Nov. 2011).

215. *See id.* at 380-81.

216. *See id.* at 385 (citing Transitional Hosps. Corp. v. Blue Cross & Blue Shield of Tex., Inc., 164 F.3d 952 (5th Cir. 1999)).

217. *Access Mediquip*, 662 F.3d at 383.

218. *See id.* at 386-87.

219. Roland v. Green, 675 F.3d 503, 506-07 (5th Cir. Mar. 2012).

220. *See id.* at 507.

221. *See* Lofton v. McNeil Consumer & Specialty Pharms., 672 F.3d 372, 373 (5th Cir. Feb. 2012).

222. *See id.* at 379-80.

not addressing the issue about the severability of the parts of the Texas statute because that issue was raised for the first time on appeal.[223]

XVI. REMOVAL

BEPCO, L.P. v. Santa Fe Minerals, Inc. presented an appeal of a remand order, which was based in part on a contractual waiver issue (reviewable) and in part on a timeliness issue (not generally reviewable).[224] While the timeliness issue was arguably not presented within 30 days of the removal, the court held, "Whether a removal defect is not raised by a plaintiff in the motion to remand, or is raised more than 30 days after removal, does not matter. . . . [W]hat does matter is the timing of the remand motion."[225] Because the motion itself was timely and, thus, satisfied the statutory time limit, and because the remand order relied on a permissible statutory ground for remand, the court dismissed the appeal for lack of appellate jurisdiction.[226]

In *Oviedo v. Hallbauer*, the United States removed a case after the entry of a default judgment against two doctors associated with the federal government—and after their motion for new trial was overruled by operation of law under Texas rules.[227] After reviewing several potentially applicable removal statutes, the court held, "The weight of authority thus holds that, by the time the government filed its notice of removal in this case, there was no pending case to remove, inasmuch as nothing remained for the state courts to do but execute the judgment."[228] Given this conclusion about the timeliness of the removal, the court also rejected an argument based on the Federal Tort Claims Act that the state court may have lacked jurisdiction over this case.[229]

XVII. SANCTIONS

In *Brown v. Oil States Skagit Smatco*, the plaintiff in a wrongful discharge case testified that he left his job because of racial harassment and, while that case was pending, testified in a personal injury case that he left the same job because of a back injury.[230] Finding that the plaintiff "plainly committed perjury" with this inconsistent testimony, the court found no abuse of discretion in the sanction of dismissal of his employment suit.[231]

In *Smith & Fuller, P.A. v. Cooper Tire & Rubber Co.*, a law firm inadvertently distributed documents, designated as confidential under a

223. *See id.* at 380-81.
224. *See* BEPCO, L.P. v. Santa Fe Minerals, Inc., 675 F.3d 466, 469-70 (5th Cir. Mar. 2012).
225. *Id.* at 471.
226. *See id.*
227. *See* Oviedo v. Hallbauer, 655 F.3d 419, 420 (5th Cir. Sept. 2011).
228. *Id.* at 423-24.
229. *See id.* at 425.
230. Brown v. Oil States Skagit Smatco, 664 F.3d 71, 73 (5th Cir. Dec. 2011) (per curiam).
231. *See id.* at 80.

Rule 26(c) protective order, during a conference of personal injury lawyers.[232] Pursuant to Federal Rules of Civil Procedure Rule 37(b)(2)(C), the court ordered the firm to reimburse Cooper for its fees and expenses incurred in rectifying the situation.[233] The court held that the protective order was an "order to provide or permit discovery," as defined by Rule 37(b)(2); that the award was justified with "specific and well-reasoned grounds . . . that any lesser penalty would not have been an adequate future deterrent"; and that the affidavits of counsel were sufficient to establish the amount awarded.[234] The court noted that the firm had previously been sanctioned for another violation of a protective order involving Cooper.[235]

In *Davis-Lynch, Inc. v. Moreno*, a company sued two individuals (among others) alleging RICO violations.[236] The individuals asserted the Fifth Amendment in their answers and then withdrew those assertions after the plaintiff filed a summary judgment motion.[237] The court allowed one of those withdrawals, stating, "[A] party may withdraw its invocation of the Fifth Amendment privilege, even at a late stage in the process, when circumstances indicate that there is no intent to abuse the process or gain an unfair advantage."[238] It affirmed the denial of the other withdrawal, noting that it was done at the eleventh hour, before the close of discovery.[239] On the merits, the court reversed a summary judgment for the plaintiff, finding deficiencies with the plaintiff's allegations and proof of racketeering injury and activity.[240] The court cautioned against entry of "[a]n order that essentially amounts to a default judgment" in the summary judgment context.[241]

XVIII. VENUE

The case of *International Fidelity Insurance v. Sweet Little Mexico Corp.* rejected an argument that the U.S. Court of International Trade (CIT) had exclusive jurisdiction over a case between an importer and its surety about certain customs liabilities.[242] The court then found no abuse of discretion in proceeding with that case even though there was a first-filed action in the CIT between the importer and U.S. Customs.[243] Acknowledging some overlap between the basic issue of customs liability and the secondary issue of the surety's responsibility for that liability, the court held that, on these facts, "[t]he

232. Smith & Fuller, P.A. v. Cooper Tire & Rubber Co., 685 F.3d 486, 487 (5th Cir. June 2012).
233. *Id.* at 488.
234. *Id.* at 489-90 (first quote quoting FED. R. CIV. P. 37(b)(2)) (internal quotation marks omitted).
235. *Id.* at 488 n.2, 491.
236. Davis-Lynch, Inc. v. Moreno, 667 F.3d 539, 543 (5th Cir. Jan. 2012).
237. *Id.*
238. *Id.* at 548.
239. *Id.* at 549.
240. *See id.* at 550-55.
241. *Id.* at 554.
242. Int'l Fidelity Ins. Co. v. Sweet Little Mex. Corp., 665 F.3d 671, 671 (5th Cir. Dec. 2011).
243. *Id.* at 678.

'core issues' in the two forums [were] not the same."[244] The court concluded that, based on the terms of the surety contract, the importer had to reimburse the surety for payments made "regardless of the outcome of the proceedings before the CIT."[245] While the court's analysis of the first-filed and surety issues turned on the specific facts of the case, the issues addressed and the basic legal principles cited are broadly applicable to those topics.

244. *Id.*
245. *Id.* at 679-81.