FIFTH CIRCUIT SURVEY – CIVIL PROCEDURE

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I. INTRODUCTION

During the period of this survey, July 2013 to June 2014, the Fifth Circuit issued opinions involving a number of significant civil procedure issues. These topics included personal jurisdiction, appellate jurisdiction, standing and necessary joinder, limitations and tolling in class actions and relation back on removal, abstention, ancillary jurisdiction to enforce orders on arbitration proceedings, and district courts' inherent power to allow an otherwise untimely appeal, among others.

II. PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

The Federal Judicial Conference Committee on Rules of Practice and Procedure (the Standing Committee) approved proposed amendments to the Federal Rules of Civil Procedure, including the "Duke Rules Package"[1] addressing Rules 1, 4, 16, 26, 30, 31, 33, and 34 and a revised version of Rule 37(e) on preservation.[2] The Duke Rules Package aims to improve the disposition of civil actions by reducing cost and delay, encouraging cooperation among the parties, and incorporating the concept of proportionality in the scope of discovery through early and active judicial case management.[3] The Standing Committee approved the proposed amendments with two revisions: (1) encouraging consideration and use of technology in the Committee Notes for Rules 26(b)(1), and (2) clarifying the role of prejudice in Proposed Rule 37(e)(2).[4] The proposed amendments were then referred to the Judicial Conference, which appears to have approved the proposed changes without revision.[5] The proposals then go to the United States Supreme Court for review. If approved, the amendments will take

1. The moniker was proposed at a conference at the Duke University School of Law in 2010.
2. COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 61 (2014), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Standing/ST2014-05.pdf.
3. *Id.* at 63.
4. *Id.* at 68, 315–18.
5. *Id.* at 63.

effect on December 1, 2015, absent congressional action. A public comment on the amendments began August 15, 2014, and closed February 17, 2015.[6]

III. SIGNIFICANT FIFTH CIRCUIT OPINIONS ON CIVIL PROCEDURE

A. Personal Jurisdiction—Ainsworth v. Moffett Engineering, Ltd.*;* Germano v. Taishan Gypsum Co. (*In re* Chinese-Manufactured Drywall Products Liability Litigation)*;* Companion Property & Casualty Insurance Co. v. Palermo

The Fifth Circuit addressed questions of personal jurisdiction in three cases during the survey period, making significant interpretations in light of the United States Supreme Court's plurality decision in *J. McIntyre Machinery, Ltd. v. Nicastro*.[7]

In *Ainsworth v. Moffett Engineering, Ltd.*, the Fifth Circuit addressed whether the United States Supreme Court's recent decision in *McIntyre* rendered the Fifth Circuit's stream-of-commerce approach to personal jurisdiction improper.[8] Ainsworth filed products liability and wrongful death actions against Cargotec and Moffett Engineering after an allegedly defective forklift, manufactured by Moffett Engineering and distributed in the United States by Cargotec, struck and killed her husband.[9] Moffett Engineering, headquartered in Ireland, moved to dismiss for lack of personal jurisdiction, which the district court denied.[10] Moffett Engineering then moved to reconsider in light of the *McIntyre* decision.[11] The district court again denied the motion. The Fifth Circuit affirmed, determining that the application of the stream-of-commerce approach does not run afoul of *McIntyre*'s narrow holding.[12] Recognizing that the stream-of-commerce test runs in tension with *McIntyre*'s plurality opinion permitting the "exercise of jurisdiction only where the defendant can be said to have targeted the forum" and not merely "have predicted that its goods will reach the forum [s]tate," the Fifth Circuit noted that a plurality is not binding precedent.[13] Instead, the holding of *McIntyre* "may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds."[14] Justice Breyer's

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6. *Id.* at 306.

7. J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2787 (2011).

8. Ainsworth v. Moffett Eng'g, Ltd., 716 F.3d 174, 176 (5th Cir.), *cert. denied*, 134 S. Ct. 644 (2013).

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 178; *see McIntyre*, 131 S. Ct. at 2791 (holding that a foreign corporation's single sale in New Jersey did not give the state personal jurisdiction over the corporation).

13. *McIntyre*, 131 S. Ct. at 2788; *Ainsworth*, 716 F.3d at 178.

14. *Ainsworth*, 716 F.3d at 178 (quoting Marks v. United States, 430 U.S. 188, 193 (1977)); *see McIntyre*, 131 S. Ct. at 2791–94 (Breyer, J., concurring).

concurring opinion in *McIntyre*, joined by Justice Alito, found that McIntyre's single sale in New Jersey was not an adequate basis to support jurisdiction under any of the Court's precedents on personal juris-diction.[15] Where "Cargotec [sold] or market[ed] Moffett products in all fifty states, and Moffett [made] no attempt to limit the territory in which Cargotec [sold] its products," the Fifth Circuit reaffirmed the stream-of-commerce approach to personal jurisdiction and affirmed.[16]

Similarly, in *In re Chinese-Manufactured Drywall Products Liability Litigation*, the Fifth Circuit again addressed the interpretation of *McIntyre*'s holding on the proper test for personal jurisdiction.[17] That case involved product liability claims arising from the sale of allegedly defective drywall from a Chinese manufacturer through a Virginia distributor.[18] After the district court entered default judgment, the Chinese manufacturer made an appearance and moved to dismiss based on lack of personal jurisdiction, which the district court denied.[19] On appeal, the manufacturer argued that the Fourth Circuit's precedent should apply, and under its stream-of-commerce-plus test—derived from Justice O'Connor's plurality opinion in *Asahi Metal Indus. Co. v. Superior Court of Cal., Solano Cnty.*—rather than the Fifth Circuit's stream-of-commerce test, personal jurisdiction failed.[20] The Fifth Circuit declined to reach that issue, finding that personal jurisdiction existed regardless of which circuit's approach the court employed.[21] Noting that in this case the "out-of-state defendant sold an allegedly defective product to a forum-resident," rather than to an out-of-state distributor, the court determined that fact itself constituted a significant contact with the forum, which, coupled with evidence that it also designed its product for market in Virginia, was sufficient to satisfy the Fourth Circuit's stream-of-commerce-plus test as well as the Fifth Circuit's stream-of-commerce test.[22]

In *Companion Property & Casualty Insurance Co. v. Palermo*, the Fifth Circuit affirmed the district court's dismissal of a legal malpractice action in the Northern District of Texas against two Louisiana lawyers and their law firm arising out of their representation of a South Carolina insurer at the behest of a Texas-based third-party claims administrator.[23] The insurer contended that the "[d]efendants purposefully directed activities toward

15. *Ainsworth*, 716 F.3d at 178.

16. *Id.* at 179.

17. Germano v. Taishan Gypsum Co. (*In re* Chinese-Manufactured Drywall Prods. Liab. Litig.), 742 F.3d 576, 584–93 (5th Cir. Jan. 2014).

18. *Id.* at 580.

19. *Id.* at 583.

20. *Id.* at 586; *see* Asahi Metal Indus. Co. v. Superior Court of Cal., Solano Cnty., 480 U.S. 102, 111–16 (1987) (plurality opinion).

21. *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, 742 F.3d at 586.

22. *Id.* at 588.

23. Companion Prop. & Cas. Ins. Co. v. Palermo, 723 F.3d 557, 561 (5th Cir. July 2013).

Texas by transacting business, and communicating, with" the Texas-based claims administrator—the sole entity with which the lawyers communicated in defending the indemnification claim, which represented one case in an ongoing business relationship that spanned several years.[24] The Fifth Circuit first noted that the Louisiana law firm lacked general personal jurisdiction because it maintained no offices or personnel in Texas, had no personal agent for service of process there, and transacted only limited and discrete business there.[25] The Fifth Circuit also explained that the Louisiana defendants' contacts with the Texas-based claims administrator were not sufficient to submit them to specific jurisdiction in the Texas court.[26] The court noted that the insurer was neither alleging that the Louisiana law firm and its attorneys owed fiduciary duties to the Texas claims administrator, nor alleging that the administrator suffered any injury.[27] Thus, "perhaps integral" to the Fifth Circuit's decision on this point was the fact that the substance of the insurer's claim did not arise from an injury committed or suffered in Texas.[28]

B. Appellate Jurisdiction—Herman v. Cataphora, Inc.

The plaintiffs in *Herman v. Cataphora, Inc.* sued the defendants in the Eastern District of Louisiana, and "the [d]efendants filed a motion to dismiss for lack of personal jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(2)."[29] The district court granted the defendants' motion to dismiss in one sentence but transferred the case to the Northern District of California in the next.[30] Because only one of the district court's orders could be effective, the Fifth Circuit was tasked with determining whether it had appellate jurisdiction at all.[31] The panel explained that because the court first granted the motion to dismiss, the court's decision was an appealable final order that invalidated the transfer.[32]

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24. *Id.* at 560.
25. *Id.*
26. *Id.* at 561.
27. *Id.*
28. *See id.* (citing, as an example, Tex. Civ. Prac. & Rem. Code § 17.042, which states that "a nonresident does business in this state if the nonresident . . . commits a tort in whole or in part *in this state*" (emphasis added)).
29. Herman v. Cataphora, Inc., 730 F.3d 460, 463 (5th Cir. Sept. 2013).
30. *Id.*
31. *See id.*
32. *Id.* at 463–64.

C. District Courts' Inherent Power to Allow an Otherwise Untimely Appeal—Perez v. Stephens*;* Diaz v. Stephens*;* Yesh Music v. Lakewood Church *(Motion to Vacate Voluntary Dismissal)*

In three cases, the Fifth Circuit addressed interpretative issues arising out of Rule 60(b)(6), which permits a district court to relieve a party from a final judgment for "any other reason that justifies relief" in addition to five other enumerated grounds.[33] These cases—*Perez v. Stephens*, *Diaz v. Stephens*, and *Yesh Music v. Lakewood Church*—illustrate the Rule 60(b)(6) dichotomy, which provides a "grand reservoir of equitable power to do justice" but must be limited to instances where "extraordinary circumstances are present."[34]

First, in *Diaz*, the Fifth Circuit indicated that recent developments in applicable case law did not demonstrate "extraordinary circumstances" justifying reopening the final judgment.[35] Diaz was convicted and sentenced to death by a Texas jury for "stabb[ing] one man to death and attempt[ing] to stab another man to death in the course of robbing both men."[36] Among other things, Diaz filed a Rule 60(b)(6) motion "claiming that recent changes in habeas law warranted relief from final judgment."[37] The district court denied Diaz's motion and held that the Supreme Court's recent decisions in *Martinez v. Ryan* and *Trevino v. Thaler* did not give rise to extraordinary circumstances within the meaning of Rule 60(b)(6).[38] Instead, the district court relied on Fifth Circuit precedent in *Adams v. Thaler*, which was decided weeks after *Martinez*, for the principle that a change in decisional law after entry of judgment does not constitute exceptional circumstances under Rule 60(b)(6).[39]

In contrast, in *Perez*, the Fifth Circuit addressed a more novel issue in a habeas challenge to a capital murder conviction—"[d]oes the district court have the power to allow an otherwise untimely appeal by using Civil Rule 60(b)(6) to reenter a judgment solely in order to permit such an appeal to become timely" where defendant is effectively abandoned by his counsel?[40] Perez was convicted and sentenced to death "for the killings of his ex-girlfriend, her roommate, and the roommate's nine-year-old daughter."[41] Following his conviction, Perez, through counsel, filed a writ of habeas

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33. FED. R. CIV. P. 60(b)(6).

34. *See* Yesh Music v. Lakewood Church, 727 F.3d 356, 363 (5th Cir. Aug. 2013) (quoting Batts v. Tow-Motor Forklift Co., 66 F.3d 743, 747 (5th Cir. 1995)) (internal quotation marks omitted).

35. Diaz v. Stephens, 731 F.3d 370, 379 (5th Cir. Sept.), *cert. denied*, 134 S. Ct. 48 (2013).

36. *Id.* at 372.

37. *Id.* at 374.

38. *Id.* (citing Trevino v. Thaler, 133 S. Ct. 1911 (2013); Martinez v. Ryan, 132 S. Ct. 1309 (2012)).

39. *Id.* at 375–76 (relying on Adams v. Thaler, 679 F.3d 312 (5th Cir. 2012)).

40. Perez v. Stephens, 745 F.3d 174, 177 (5th Cir. Feb.), *cert. denied*, 135 S. Ct. 401 (2014).

41. *Id.* at 175–76.

corpus, which was denied.[42] His counsel received notice of the denial but affirmatively decided not to file an appeal and did not notify Perez or the consulting attorney "of the judgment in time to timely file a notice of appeal."[43] Perez subsequently obtained new counsel who argued that Perez missed the deadline because his former counsel abandoned him.[44] The district court, finding that Perez was abandoned by counsel, granted a Rule 60(b)(6) motion and directed the clerk to reenter the original judgment so that Perez could file a timely appeal.[45] The Fifth Circuit dismissed the appeal, holding that the district court lacked the power to circumvent rules for timely appeals by granting the petitioner's motion for relief from its judgment.[46] The Fifth Circuit read Rule 60(b)(6)'s "extraordinary circumstances" exception in light of the codification of 28 U.S.C. § 2107 and the Supreme Court's decision in *Bowles v. Russell*, which "explained that courts lacked power to carve out equitable exceptions to Appellate Rule 4(a) [governing time for appeal] because the deadlines to appeal are jurisdictional statutory requirements under 28 U.S.C. § 2107."[47] Noting that the court lacks authority to create equitable exceptions to jurisdictional requirements, the Fifth Circuit found the use of "unique circumstances" in Rule 60(b)(6) to be inappropriate and concluded "that the district court lacked the power to circumvent the rules for timely appeals" in the way it did.[48]

In *Yesh Music*, the Fifth Circuit again took up interpretative issues arising out of Rule 60(b)(6) to consider "whether a voluntary dismissal *without prejudice* can be a '*final* judgment, order, or proceeding' within the meaning of Rule 60(b)."[49] The plaintiff, Yesh Music—comprised of two musicians who create ambient music—granted a limited license of one of their songs to Lakewood, a large Houston-based, non-denominational church, and sued after Lakewood used the track in a televised promotional broadcast, alleging violation of the license.[50] Yesh Music later dismissed this suit but re-filed it the following day in New York federal court.[51] At a hearing on Lakewood's motion for costs before the Texas district court, the parties agreed that the case would proceed in Texas and not in New York.[52] Yesh Music, therefore, voluntarily dismissed its New York suit under Rule 41(a)(1)(A)(i) and filed a motion for relief from a final judgment in the Texas

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42. *Id.* at 176.
43. *Id.*
44. *Id.* at 176–77.
45. *Id.* at 177.
46. *Id.* at 181.
47. *Id.* at 179 (citing Bowles v. Russell, 551 U.S. 205, 214 (2007)).
48. *Id.* at 179, 181.
49. Yesh Music v. Lakewood Church, 727 F.3d 356, 359–60 (5th Cir. Aug. 2013) (quoting FED. R. CIV. P. 60(b)).
50. *Id.* at 358.
51. *Id.*
52. *Id.*

court under Rule 60(b).[53] Lakewood contested the motion, asserting that the Texas district court lacked subject matter jurisdiction because Rule 60(b) provides for relief only "from *final* judgments" and a "voluntary dismissal under Rule 41(a) is not a final judgment."[54] Lakewood reasoned that because plaintiffs who dismiss their claim under Rule 41(a)(1)(B) are free to return to the dismissing court with the same claim, Rule 60(b) cannot be used because it applies only to a final judgment, order, or proceeding.[55] The Fifth Circuit disagreed with Lakewood's technical interpretation of Rule 60(b) and held that a plain reading of final means something that is practically "finished, closed, or completed."[56] Because a Rule 41(a)(1)(A) voluntary dismissal terminates, closes, and ends a cause of action, it is properly considered final for purposes of Rule 60(b).[57] The Fifth Circuit next determined that a voluntary dismissal without prejudice was a judgment, order, or proceeding under Rule 60(b) and affirmed the district court's grant of Yesh Music's 60(b)(6) motion because it would be inequitable to allow Lakewood to escape its court-sanctioned agreement.[58]

D. Mooting Claims with Rule 68 Offer of Judgment—Payne v. Progressive Financial Services, Inc.

In *Payne v. Progressive Financial Services, Inc.*, the Fifth Circuit addressed the circumstances under which a Rule 68 offer of judgment could moot the plaintiff's claims and render them subject to dismissal under Rule 12(b)(1).[59] Payne sued "Progressive for alleged violations of the Fair Debt Collection Practices Act (FDCPA)."[60] Progressive responded with an offer of judgment for $1,001, to which Payne did not respond.[61] Progressive then moved to dismiss under Rule 12(b)(1) on the ground that the offer of judgment rendered Payne's claim moot, leaving no live controversy for the court to resolve and depriving the court of jurisdiction under Article III.[62] The district court granted the motion to dismiss on the ground that the offer of judgment mooted Payne's FDCPA claims because it offered all the relief to which she was entitled.[63] The Fifth Circuit reversed, noting that an incomplete offer of judgment—"one that does not offer to meet the plaintiff's

53. *Id.*
54. *Id.*
55. *Id.* at 359.
56. *Id.* at 360 (quoting Gillespie v. U.S. Steel Corp., 379 U.S. 148, 172 (1964)) (internal quotation marks omitted).
57. *Id.*
58. *Id.* at 361–64.
59. Payne v. Progressive Fin. Servs., Inc., 748 F.3d 605, 607 (5th Cir. Apr. 2014).
60. *Id.* at 606.
61. *Id.*
62. *See id.* at 607.
63. *Id.* (citing Hrivnak v. NCO Portfolio Mgmt., Inc., 719 F.3d 564, 567–70 (6th Cir. 2013); Zinni v. ER Solutions, Inc., 692 F.3d 1162, 1167–68 (11th Cir. 2012)).

full demand for relief—does not render the plaintiff's claims moot" because "the court is capable of granting effectual relief outside the terms of the offer, and a live controversy remains."[64] Payne requested actual damages, and Progressive's Rule 68 offer of judgment did not meet Payne's full demand for relief because it did not include actual damages, leaving a live controversy for the court to resolve.[65]

E. Relation Back on Removal—Taylor v. Bailey Tool & Manufacturing Co.

In *Taylor v. Bailey Tool & Manufacturing Co.*, the sole issue before the Fifth Circuit was "whether a claim barred by limitations when filed in state court can be revived by Federal Rule of Civil Procedure 15(c) once the case is removed."[66] The answer to this question turned "on whether the Texas relation back statute or Federal Rule 15" governed.[67] Taylor filed a petition against his former employer in state court on March 4, 2011, alleging racial discrimination and retaliation in violation of Texas law.[68] "On December 18, 2012, Taylor filed an amended petition in state court" adding federal discrimination and retaliation claims.[69] The former employer "removed the case to federal court based on the newly asserted federal" claims and filed a motion to dismiss based on the fact "that Taylor's claims were barred by the applicable statutes of limitations."[70] Taylor argued that his federal claims "were not time-barred because they related back to the date of his original petition in state court pursuant to Federal Rule of Civil Procedure 15(c)(1)."[71] Although this was a matter of first impression for the Fifth Circuit, it noted that the two circuit courts to consider the issue have applied analogous state rules—not Rule 15.[72] The Fifth Circuit noted that pursuant to Rule 81(c)(1), the federal rules "apply to a civil action *after* it is removed from a state court."[73] It explained that it saw nothing in Rule 15(c) that would allow a state claim that was barred at the time of its filing to be revived once removed.[74] Thus, the Fifth Circuit applied the Texas statute and held that the claims were barred because the amended petition did not relate back.[75]

64. *Id.*
65. *Id.* at 607–08.
66. Taylor v. Bailey Tool & Mfg. Co., 744 F.3d 944, 945 (5th Cir. Mar. 2014).
67. *Id.* at 946.
68. *Id.* at 945.
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.* at 946.
73. *Id.*
74. *Id.* at 947.
75. *Id.*

F. Class Actions—Louisiana v. American National Property & Casualty Co.

In *Louisiana v. American National Property & Casualty Co.*, the Fifth Circuit held that when the Class Action Fairness Act (CAFA) supplies the basis for removal, "the general rule regarding federal jurisdiction over a removed case controls"—"[j]urisdictional facts are determined at the time of removal, not by subsequent events"—accordingly, CAFA continues to provide jurisdiction over individual cases after severance.[76] In that case, the State of Louisiana filed a class action against several insurers to recover on homeowners insurance policies assigned to the state by the policyholders "in return for State financial assistance in repairing and rebuilding their homes in the wake of the hurricanes."[77] The defendants removed to federal court.[78] On a certified question, the Louisiana Supreme Court held that anti-assignment clauses in the insurance policies did not violate Louisiana public policy, but the effect on post-loss assignments must be evaluated on a policy-by-policy basis.[79] The district court ordered the claims severed into individual claims, and the State filed 1,504 amended complaints—each given a new cause number and randomly assigned to a district judge.[80] The district judges ultimately remanded the severed cases to state court, holding that they lacked jurisdiction over the severed claims.[81] The Fifth Circuit reversed, holding that the general rule regarding federal jurisdiction over a removed case controlled—"[j]urisdictional facts are determined at the time of removal, not by subsequent events."[82] "Because at the time of removal CAFA supplied federal subject matter jurisdiction over these cases," the court held that CAFA continued "to provide jurisdiction over these individual cases notwithstanding their severance from the class."[83] The Fifth Circuit noted the *Honeywell* exception, requiring that an action severed from the original case have an independent jurisdictional basis, "which in turn calls for jurisdictional facts to be determined post-removal, at the time of severance."[84] In distinguishing its applicability, the Fifth Circuit noted that the claim at issue in *Honeywell*, as well as those in the authority relied on in that case, was before the court on supplemental jurisdiction and had never been invested with original federal jurisdiction.[85] Thus, *Honeywell* did not

76. Louisiana v. Am. Nat'l Prop. & Cas. Co., 746 F.3d 633, 635 (5th Cir. Mar. 2014).
77. *Id.* at 634.
78. *Id.*
79. *Id.* at 636.
80. *Id.*
81. *Id.*
82. *Id.* at 635.
83. *Id.*
84. *Id.* at 637 (citing Honeywell Int'l, Inc. v. Phillips Petrol. Co., 415 F.3d 429, 431 (5th Cir. 2005)).
85. *Id.*

justify "overruling the customary time-of-removal rule with respect to claims that are original federal claims" when removed.[86]

G. Collateral Order Jurisdiction Over Appeal of Denial of Texas Anti-SLAPP Motion to Dismiss—NCDR, L.L.C. v. Mauze & Bagby, P.L.L.C.

In *NCDR, L.L.C. v. Mauze & Bagby, P.L.L.C.*, the Fifth Circuit addressed whether it had jurisdiction to review the district court's denial of a motion to dismiss under the Texas Citizen's Participation Act's (TCPA) anti-SLAPP motion and whether the defendant law firm's advertisements fell within the TCPA's "commercial speech" exemption.[87] That case involved a suit brought by the owners of Kool Smiles dental clinics against a Texas law firm engaged in an advertising campaign to solicit former dental patients as potential clients, alleging trademark infringement, false advertising, and cyberpiracy under the Lanham Act.[88] The law firm filed a motion to dismiss under both Rules 8 and 12(b)(6), and the TCPA, which permits dismissal when a "defendant can show that the claim was brought to chill the exercise of First Amendment rights."[89] The district court denied the Texas anti-SLAPP motion, holding that the TCPA did not apply to the Lanham Act claims because the speech at issue fell within the commercial speech exemption to the TCPA.[90] The Fifth Circuit first addressed whether it had jurisdiction to consider the denial of a TCPA motion to dismiss on an interlocutory basis.[91] The Fifth Circuit concluded that an interlocutory appeal was appropriate pursuant to the collateral order doctrine, which confers limited appellate jurisdiction where the order (1) conclusively determines the disputed question, (2) resolves an important issue completely separate from the merits of the case, and (3) is effectively unreviewable on appeal from a final judgment.[92] Noting a similar decision in *Henry v. Lake Charles American Press, L.L.C.*, the Fifth Circuit found that the Texas anti-SLAPP statute had a purpose distinct from that of the underlying suit—to facilitate avoiding the burden of meritless litigation and its effect of chilling speech.[93] The Fifth Circuit then addressed the commercial speech exemption to the TCPA, making an "*Erie* guess" to predict that the Supreme Court of Texas would most likely hold that the law firm's solicitations were exempt because the speech arose from the sale of services in which the intended audience was

86. *Id.*
87. NCDR, L.L.C. v. Mauze & Bagby, P.L.L.C., 745 F.3d 742, 748–53 (5th Cir. Mar. 2014).
88. *Id.* at 745–46 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 27.003(a) (West 2011)).
89. *Id.* at 746.
90. *Id.*
91. *Id.* at 747–48.
92. *Id.* at 747–52.
93. *Id.* at 749 (citing Henry v. Lake Charles Am. Press, L.L.C., 566 F.3d 164, 175 (5th Cir. 2009)).

an actual or potential customer.[94] Notably, the Fifth Circuit did not address whether the TCPA applied at all in federal court because Kool Smiles failed to raise that argument before the district court and thus waived it on appeal.[95]

H. Judgment, Costs, and Attorney's Fees Under Rule 54—Moore v. CITGO Refining & Chemicals Co.*;* Tetra Technologies, Inc. v. Continental Insurance Co.*;* Richardson v. Wells Fargo Bank, N.A.

In *Moore v. CITGO Refining & Chemicals Co.*, the Fifth Circuit addressed under what circumstances the court may deny or reduce an award of costs under Rule 54, holding that reducing or eliminating a prevailing party's cost award based on its wealth—either relative or absolute—is impermissible as a matter of law.[96] *Moore* involved a suit by twenty-four plaintiffs claiming their employers misclassified them as exempt from the overtime-pay requirements of the Fair Labor Standards Act (FLSA).[97] Following several discovery disputes, the district court (1) issued two orders requiring the plaintiffs to produce documents and respond to interrogatories; (2) conducted two evidentiary hearings that included live testimony from eighteen of the plaintiffs; (3) concluded that seventeen of them had failed to participate in discovery, failed to properly supplement responses, and failed to preserve documents; and (4) dismissed their claims as a discovery sanction pursuant to Rule 37(b)(2)(A)(v).[98] The district court dismissed the additional claims for failing to provide any calculation or estimation of damages after a year of discovery and denied the plaintiffs' designation of an expert on damages as untimely.[99] The district court then granted summary judgment for the defendant, CITGO, on the plaintiffs' remaining claims on the ground that the plaintiffs could not show damages as an element of their claims.[100] CITGO then submitted a bill of costs that included $53,065.72 for deposition transcripts and $2,262.41 for copies.[101] Although CITGO was undisputedly the prevailing party, the district court reduced its "cost award based on (1) a finding of plaintiffs' good faith, (2) CITGO's enormous wealth, and (3) [the p]laintiffs' limited resources."[102] The Fifth Circuit joined four other circuits in expressly rejecting "relative wealth" as a ground for denying or limiting costs to the prevailing party.[103] The Fifth Circuit then turned to what consideration the district court could give to the plaintiffs' limited

94. *Id.* at 754–55.
95. *Id.* at 752.
96. Moore v. CITGO Ref. & Chems. Co., 735 F.3d 309, 320 (5th Cir. Nov. 2013).
97. *Id.* at 313; *see* 29 U.S.C. § 201 (2012).
98. *Moore*, 735 F.3d at 314–15; *see* FED. R. CIV. P. 37(b)(2)(A)(v).
99. *Moore*, 735 F.3d at 318.
100. *Id.*
101. *Id.* at 315 n.3.
102. *Id.* at 320 (quoting the district court's opinion) (internal quotation marks omitted).
103. *Id.*

resources.[104] The court determined that while "some circuits have permitted alteration of a cost award based on a combined finding of good faith and limited resources," in this case, where costs constituted a few thousand dollars per plaintiff who each made "in the neighborhood of $100,000 per year, it would have been reversible error for the district court to reduce the cost award based on a finding of 'limited resources.'"[105]

The appeal in *Tetra Technologies, Inc. v. Continental Insurance Co.*, arose from an insurance coverage dispute concerning an industrial accident off the coast of Louisiana.[106] Despite the fact that none of the parties addressed whether the district court fully disposed of any one claim, the Fifth Circuit was duty-bound to raise this issue and examine the basis of appellate subject matter jurisdiction in this case.[107] Though previously the Fifth Circuit had not "expressly adopted a method for determining what constitutes a distinct claim for relief under Rule 54(b)," the panel found that the court's precedent provided sufficient guidance.[108] The Fifth Circuit previously held that where a court disposes of "every affirmative defense raised by the defendant, the court still has not disposed of a 'claim' for Rule 54(b) purposes unless it makes an express holding as to liability."[109] In this case, the district court had resolved a legal issue but not the claim itself.[110] The Fifth Circuit, therefore, held that "the district court erred in entering judgment under Rule 54(b)."[111]

The plaintiff in *Richardson v. Wells Fargo Bank, N.A.*, filed suit against Wells Fargo in state court, raising claims related to the bank's foreclosure and Freddie Mac's attempts to evict the plaintiff.[112] Wells Fargo then removed the case to federal court, where the district court dismissed all of the plaintiff's claims.[113] At issue on appeal was whether Wells Fargo could move for attorney's fees pursuant to Rule 54(d)(2).[114] Here, the deed of trust at issue "provided for attorney's fees to compensate Wells Fargo, *inter alia*, for the prosecution or defense of a claim."[115] "The language of the contract and the nature of the claim [were] the dispositive factors concerning whether the fees [were] an element of damages or collateral litigation costs."[116] In this

104. *Id.*
105. *Id.*
106. Tetra Techs., Inc. v. Cont'l Ins. Co., 755 F.3d 222, 224 (5th Cir. June 2014).
107. *Id.* at 228 (quoting Union Planters Bank Nat'l Ass'n v. Salih, 369 F.3d 457, 460 (5th Cir. 2004)).
108. *Id.* at 230 (quoting Tubos de Acero de Mex., S.A. v. Am. Int'l Inv. Corp., 292 F.3d 471, 485 (5th Cir. 2002)) (internal quotation marks omitted).
109. *Id.* (citing Exxon Corp. v. Oxxford Clothes, Inc., 109 F.3d 1069, 1070 (5th Cir. 1997) (per curiam)).
110. *Id.*
111. *Id.* at 231.
112. Richardson v. Wells Fargo Bank, N.A., 740 F.3d 1035, 1037 (5th Cir. Jan. 2014).
113. *Id.*
114. *Id.* at 1036–37.
115. *Id.* at 1038.
116. *Id.* at 1039.

instance, the court concluded that the "motions for attorney's fees provided by contract [were] permissible under Rule 54(d)(2)."[117] Accordingly, the court reversed and remanded.[118]

I. Colorado River *Abstention*—African Methodist Episcopal Church v. Lucien

In *African Methodist Episcopal Church v. Lucien*, the Fifth Circuit considered whether the *Colorado River–Moses Cone* doctrine of abstention (*Colorado River* abstention) weighed in favor of staying a federal action while a remanded state eviction proceeding was pending.[119] Saint James, a local congregation, held record title to a property that was possessed by officeholders of African Methodist Episcopal Church (AME), the national church from which Saint James was attempting to disassociate itself.[120] Saint James filed a state-court eviction action against the Annual Conference—a regional division of AME—and three individuals.[121] AME countered by initiating a proceeding in federal court against Saint James, its attorney, and three of its trustees, seeking declaratory and injunctive relief from their efforts to obstruct AME's access to the property.[122] AME removed Saint James's eviction action to the same federal court, which ultimately denied Saint James's motion for remand.[123] The Fifth Circuit vacated the district court's ruling and held that Saint James had carried its burden of showing that remand was warranted.[124] Next, in determining whether *Colorado River* abstention was appropriate, the Fifth Circuit first noted that the state and federal actions were "parallel," despite the fact that the parties in both suits were not identical, because the interests of all parties named in either action undisputedly aligned either with Saint James's interest or with AME's.[125] Thus, the panel was convinced that the two suits were sufficiently parallel because the eviction proceeding would dispose of all claims asserted by AME in the federal action.[126] Turning to the application of *Colorado River* abstention, the panel explained the six factors a court must balance to determine whether exceptional circumstances warrant abstention:

> 1) assumption by either court of jurisdiction over a res, 2) relative inconvenience of the forums, 3) avoidance of piecemeal litigation, 4) the

117. *Id.* at 1040.
118. *Id.*
119. African Methodist Episcopal Church v. Lucien, 756 F.3d 788, 796–97 (5th Cir. June 2014).
120. *Id.* at 791–92.
121. *Id.* at 791.
122. *Id.*
123. *Id.* at 790.
124. *Id.* at 796.
125. *Id.* at 797–98.
126. *Id.* at 798.

> order in which jurisdiction was obtained by the concurrent forums, 5) to what extent federal law provides the rules of decision on the merits, and 6) the adequacy of the state proceedings in protecting the rights of the party invoking federal jurisdiction.[127]

The panel found that the first factor weighed heavily in favor of abstention because it is a long-standing rule that when a party invokes state jurisdiction over a state res, such as the church property, then that state court may exercise jurisdiction to the exclusion of any other court.[128] The second factor weighed slightly in favor of abstention because the additional half-hour drive to the federal forum was only marginally less convenient.[129] The Fifth Circuit found that the third factor also weighed heavily in favor of abstention because if both cases were to proceed, each court would be determining the same issues with respect to the same property, which could result in inconsistent rulings.[130] The fourth factor weighed only slightly in favor of abstention because this factor is measured in terms of how much progress has been made in the two actions rather than just the order in which the suits were filed.[131] The Fifth Circuit also noted that the district court's failure to remand Saint James's eviction suit did not weigh against abstention.[132] Finally, the panel found that both the fifth and sixth factors were neutral.[133] Thus, the Fifth Circuit held that "this case is the embodiment of that rare exception."[134]

J. Enforcement of Foreign Default Defamation Judgment—Trout Point Lodge, Ltd. v. Handshoe

In *Trout Point Lodge, Ltd. v. Handshoe*, the Fifth Circuit addressed whether a defamation-based default judgment obtained in Nova Scotia, Canada could be enforced against a blogger in Mississippi under the Securing the Protection of our Enduring and Established Constitutional Heritage Act (SPEECH Act).[135] The blogger published a series of articles about the owners of a hotel in Nova Scotia and alleged that the former Parish President of Jefferson Parish, Louisiana, who had pleaded guilty to federal bribery and theft charges, was engaged in various bad acts with the owners of the hotel.[136] The hotel owners brought a defamation suit in Nova Scotia and purportedly served a copy of their statement of claim on the blogger in Mississippi, who

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127. *Id.* (quoting Stewart v. W. Heritage Ins. Co., 438 F.3d 488, 491 (5th Cir. 2006)).
128. *Id.* at 798–99.
129. *Id.* at 800.
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.* at 800–01.
134. *Id.* at 801.
135. Trout Point Lodge, Ltd. v. Handshoe, 729 F.3d 481, 483 (5th Cir. Sept. 2013).
136. *Id.* at 484.

did not appear.[137] The Nova Scotia court awarded damages, and the hotel owners sought to enforce the judgment in state court in Mississippi.[138] The blogger removed and the district court granted the blogger's motion for summary judgment, finding that the hotel owners failed to show that the blogger "was afforded at least as much protection for freedom of speech in [the Nova Scotia] action as he would have in a domestic proceeding or, alternatively, that [he] would have been found liable for defamation by a domestic court," as required by the SPEECH Act.[139] The Fifth Circuit affirmed.[140] First, it held that a Canadian plaintiff "need not prove falsity as an element of its prima facie defamation claim," thus the hotel owners could not show that the Nova Scotia forum satisfied the first prong of the SPEECH Act, which requires a showing that free speech protection is at least as comprehensive as relevant domestic law before a foreign defamation law is considered recognizable and enforceable.[141] Second, it found that the hotel owners also failed to satisfy the second prong because they failed to prove falsity in the Nova Scotia proceeding, and a Mississippi court presented with the same facts and circumstances would not have awarded a default judgment in its favor for defamation.[142]

K. Protective Orders, Waiver—Moore v. Ford Motor Co.

Moore v. Ford Motor Co. stemmed from an attempt to enforce protective orders entered ten years prior to the appeal.[143] "After objecting to the confidential status of these documents, [the] plaintiffs distributed and used them in litigation against Ford competitors."[144] Ford moved to protect these documents, but the plaintiffs gave Ford general notification that they were objecting to the confidential status of some of the documents.[145] "[T]he magistrate judge found the documents to be protected by the agreed orders."[146] The issue before the court was whether the magistrate's determination that Ford did not waive the protective orders was clearly erroneous.[147] The majority of the panel found that the plaintiffs' actions, at best, only put Ford on notice that they considered Ford to have waived confidentiality.[148] The majority reasoned that the plaintiffs had not clearly

137. *Id.* at 485.
138. *Id.* at 485–86.
139. *Id.* at 486 (first alteration in original) (quoting the district court's opinion).
140. *Id.* at 496.
141. *Id.* at 488–89.
142. *Id.* at 490–92.
143. Moore v. Ford Motor Co., 755 F.3d 802, 803 (5th Cir. June 2014).
144. *Id.*
145. *Id.* at 803–04.
146. *Id.* at 803.
147. *Id.* at 806.
148. *Id.* at 808.

taken the position that the documents were improperly designated as confidential.[149] Thus, the Fifth Circuit held that the magistrate's determination was plausible and supportable by the record.[150]

L. Standing of Nonparty on Appeal; Necessary Joinder Under Rule 19— Sanchez v. R.G.L.

In *Sanchez v. R.G.L.*, the Fifth Circuit addressed unique procedural issues under the International Child Abduction Remedies Act (ICARA).[151] The mother, a native of Mexico, brought suit against her three children's aunt and uncle and against the children's temporary custodian.[152] She sought their return to Mexico under the Hague Convention on the Civil Aspects of International Child Abduction and its implementing legislation, alleging the children had been taken to the United States against her will.[153] The children were born and raised in Mexico, and their aunt and uncle took them to Texas either without their mother's permission or under false pretenses.[154] Their aunt and uncle agreed to return the children and instructed them to cross into Mexico where their mother and her boyfriend were waiting for them.[155] Instead, fearing their mother's boyfriend, the children presented themselves to the Department of Homeland Security (DHS) and were ultimately placed in DHS custody pending their application for asylum.[156] On their mother's petition for their return, the "children's ORR-appointed asylum attorney appeared informally at the hearing on the children's behalf, arguing that the court should allow the children to intervene through" a next friend or guardian *ad litem*.[157] The district court denied the children's request for representation, "concluded that [they] were 'wrongfully retained' within the meaning of the Convention," and ordered them returned.[158] "[A]fter the notice of appeal was filed but before briefing, the United States Citizenship and Immigration Services . . . granted the children asylum."[159] The children were the sole appellants.[160]

First, the Fifth Circuit addressed whether the children had standing to appeal because "the district court denied their motion to intervene as

149. *Id.*
150. *Id.*
151. *See generally* Sanchez v. R.G.L., 743 F.3d 945 (5th Cir. Feb.), *withdrawn and superseded on reh'g*, 755 F.3d 765 (5th Cir. June), *withdrawn and superseded on reh'g*, 761 F.3d 495 (5th Cir. Aug. 2014) (evaluating a claim under ICARA).
152. *Sanchez*, 761 F.3d at 499–500.
153. *Id.*
154. *Id.*
155. *Id.* at 500.
156. *Id.*
157. *Id.* at 501.
158. *Id.*
159. *Id.*
160. *Id.* at 502.

respondents."[161] The court concluded the children had standing because they participated in the hearings through their ORR-appointed asylum attorney and "both the equities and the children's strong personal stake in the outcome weigh[ed] in favor of" their right to appeal as de facto parties.[162] Second, the Fifth Circuit addressed whether joinder of the Government was required by Rule 19, holding that it was necessary to accord complete relief among the parties where the Government had been the temporary legal custodian of the children throughout the action and selected the children's physical custodian, and to avoid imposing potentially inconsistent legal obligations.[163] Third, the Fifth Circuit determined that, despite the fact that children are not typically represented in Hague Convention proceedings, the children should be represented pursuant to Rule 17(c)(2) but had no right to intervene under Rule 24(a) because their interests would be adequately represented by a court-appointed guardian *ad litem*.[164]

M. Jurisdiction Over Denial of Motion to Appoint an Arbitrator—Adam Technologies International S.A. de C.V. v. Sutherland Global Services, Inc.

In *Adam Technologies International S.A. de C.V. v. Sutherland Global Services, Inc.*, the Fifth Circuit addressed jurisdiction of the denial of a motion to appoint an arbitrator under the Federal Arbitration Act.[165] The plaintiff filed a demand for arbitration on an unpaid debt pursuant to the dispute resolution clause in the master services agreement.[166] The defendant filed an application to stay the arbitration in Texas state court pursuant to a different forum-selection and choice-of-law clause in a precedent agreement.[167] The plaintiff removed the state-court action and moved to stay the proceeding in favor of arbitration or, alternatively, to dismiss.[168] The district court granted the motion to dismiss for resolution by arbitration, finding that the master services agreement superseded the precedent agreement.[169] Following unsuccessful mediation with an attorney who had previously represented the plaintiff, the plaintiff and the defendant each appointed arbitrators who were to appoint a third arbitrator.[170] The defendant nominated the mediator as their party-appointed arbitrator, to which the plaintiff objected because of the nominee's former involvement in the

161. *Id.*
162. *Id.*
163. *Id.* at 506–07.
164. *Id.* at 507–08.
165. *See* Adam Techs. Int'l S.A. de C.V. v. Sutherland Global Servs., Inc., 729 F.3d 443, 444 (5th Cir. Sept. 2013).
166. *Id.*
167. *Id.*
168. *Id.* at 444–45.
169. *Id.* at 445.
170. *Id.*

controversy and ex parte communications with the parties.[171] The arbitral body sustained the objection, at which point the defendant filed a notice to arbitrate the removal of their appointed arbitrator, which the arbitral body denied per its rules.[172] More than six months after dismissing the claims in favor of arbitration and entering final judgment, the district court vacated that order, noting that it was unnecessary to determine that the master services agreement superseded the precedent agreement.[173] The court rested its decision instead on the general presumption in favor of arbitration and expressly left to the arbitrator the determination of whether the master services agreement, and thus the arbitration, controlled.[174] But the court did not expressly dismiss the suit in the amended order, stating only that it "grants in part and denies in part the motion to amend."[175] The defendant filed a motion to vacate the final judgment on the ground of fraud and exceptional circumstances under Rule 60(b).[176] While that motion was pending, the defendant moved to appoint the mediator as arbitrator pursuant to 9 U.S.C. § 5.[177] Both motions were denied.[178] The Fifth Circuit first addressed the jurisdictional questions raised by the post-judgment motions.[179] It held that the case remained dismissed despite the district court's second order amending its original dismissal, characterizing the first dismissal as the functional equivalent of an order compelling arbitration and the later proceedings as the district court evaluating "whether the dismissal that allowed the dispute to be taken to arbitration was being thwarted," thus making it subject to ancillary jurisdiction.[180] The Fifth Circuit relied on the Supreme Court's decision in *Kokkonen v. Guardian Life Insurance Co. of America*, which allows the use of ancillary jurisdiction to "enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees."[181] The Fifth Circuit found that the district court's second order was an evaluation of whether it must "vindicat[e] its authority by requiring parties to honor the court's decision that an obligation to arbitrate necessitated involuntary dismissal of a case."[182] Second, the Fifth Circuit addressed the merits, holding it was not error for the district court to refuse to appoint an arbitrator because there was no "lapse" within the meaning of § 5 of the Federal Arbitration Act, which

171. *Id.*
172. *Id.*
173. *Id.* at 445–46.
174. *Id.* at 446.
175. *Id.* (internal quotation marks omitted).
176. *Id.*
177. *Id.*
178. *Id.* at 447.
179. *Id.*
180. *Id.* at 449.
181. *Id.* at 450 (quoting Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 380 (1994)).
182. *Id.* at 449–50.

contemplates "a lapse in time in the naming of the arbitrator or in the filling of a vacancy on a panel of arbitrators, or some other mechanical breakdown in the arbitrator selection process."[183] Mere noncompliance with the procedural requirements of appointing an arbitrator did not justify court intervention under § 5.[184]

N. Tolling and Repose in Class Actions—Odle v. Wal-Mart Stores, Inc.*;* Hall v. Variable Annuity Life Insurance Co.

In *Odle v. Wal-Mart Stores, Inc.*, the Fifth Circuit addressed whether another circuit court's decision in prior class action litigation that excluded former employees from the class was a final adverse determination such that tolling of the statute of limitations ceased.[185] The plaintiff in that case was a former Wal-Mart employee who joined the *Dukes v. Wal-Mart Stores, Inc.* class action, a sex-discrimination action encompassing approximately 1.5 million women—one of the most expansive class actions ever certified in the United States.[186] The Ninth Circuit held that former employees such as Odle, who were no longer employed with Wal-Mart when the case was filed, "lacked standing to pursue injunctive relief under Rule 23(b)(2)" but did not address their ability to recover back pay and punitive damages.[187] The Ninth Circuit remanded to the district court for further consideration of class certification.[188] The Supreme Court, however, found that, even as narrowed to include only current employees, the class did not meet Rule 23(a)'s commonality requirement.[189] At the district court, the *Dukes* plaintiffs "moved to extend tolling of the statute of limitations as to 'all claims covered by the former certified class,'" which the court granted, setting a deadline of October 28, 2011, to file suit.[190] Odle filed suit in federal court in the Northern District of Texas on October 28, 2011.[191] Wal-Mart moved to dismiss on the basis of the statute of limitations, arguing that because the Ninth Circuit's decision was a "final adverse determination," Odle's last day to file a claim was January 18, 2011—ninety days after the judgment was issued.[192] The district court granted the motion, reasoning that once the Ninth Circuit made clear that Odle was no longer a part of the class, she could no

183. *Id.* at 451 (quoting BP Exploration Libya Ltd. v. ExxonMobil Libya Ltd., 689 F.3d 481, 486–87 (5th Cir. 2012)).

184. *Id.*

185. Odle v. Wal-Mart Stores, Inc., 747 F.3d 315, 317 (5th Cir. Mar. 2014).

186. *Id.* at 316–17 (citing Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571 (9th Cir. 2010), *rev'd*, 131 S. Ct. 2541 (2011)).

187. *Id.* at 317–18.

188. *Id.* at 318.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.* at 319.

longer rely on the rule tolling all claims for asserted members.[193] The Fifth Circuit reversed, holding that the Ninth Circuit's opinion in *Dukes* was not tantamount to a denial because it instructed the district court to consider Rule 23(b)(3) certification on remand, and thus continued the proceedings on the certification issue for former employee plaintiffs such as Odle.[194] Therefore, the Ninth Circuit's opinion was not a final, adverse resolution of class certification for those members.[195]

In *Hall v. Variable Annuity Life Insurance Co.*, the putative class of securities fraud plaintiffs included persons who purchased certain annuities with tax benefits that were allegedly misrepresented.[196] Their certification order was vacated in 2004 when the plaintiffs' counsel failed to comply with court-ordered expert witness deadlines.[197] Five years later, in 2009, the plaintiffs filed suit individually on the same securities fraud claims.[198] In response to a motion to dismiss based on the statute of limitations, the plaintiffs argued that, unlike a denial of certification, vacating an existing class certification effectively reinstated the motion for certification, entitling the putative class members to tolling.[199] "[T]he district court dismissed it as barred by the statute of repose."[200] The Fifth Circuit affirmed dismissal, holding that repose ceased to be tolled when the class certification order was vacated, which was tantamount to a decision "that only the named plaintiffs were parties to the suit" because vacatur of certification is akin to denial.[201] To hold otherwise, the Fifth Circuit reasoned, would permit non-class members "to sit on their rights indefinitely while awaiting full appellate review of a decision that [did] not legally apply to them."[202]

O. Compulsory Counterclaim—National Liability & Fire Insurance Co. v. R & R Marine, Inc.

National Liability & Fire Insurance Co. v. R & R Marine, Inc. arose "out of the sinking of a vessel owned by Hornbeck" while it was docked at another party's shipyard for repairs.[203] The shipyard's insurer, National, initiated suit to disclaim liability under its policy, and Hornbeck counterclaimed that the policy obligated National to cover all sums—

193. *Id.*
194. *Id.* at 322.
195. *Id.*
196. Hall v. Variable Annuity Life Ins. Co., 727 F.3d 372, 373–74 (5th Cir. Aug. 2013).
197. *Id.* at 374.
198. *Id.*
199. *Id.* at 375.
200. *Id.* at 374.
201. *Id.* at 378 (citing Taylor v. United Parcel Serv., Inc., 554 F.3d 510, 520 (5th Cir. 2008)).
202. *Id.*
203. Nat'l Liab. & Fire Ins. Co. v. R & R Marine, Inc., 756 F.3d 825, 828 (5th Cir. June 2014).

including salvage costs and damages.[204] Among other issues, the Fifth Circuit was tasked with determining whether Hornbeck's counterclaim was compulsory under federal law.[205] The panel noted that Rule 13(a)(1)(A)–(B) "defines a counterclaim as 'compulsory' if it (1) arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and (2) does not require adding another party over whom the court cannot acquire jurisdiction."[206] The Fifth Circuit also used the logical relation test to determine when a claim and counterclaim arise from the same transaction.[207] "A logical relationship exists when the counterclaim arises from the same 'aggregate of operative facts' in that the same operative facts serve[] as the basis of both claims or the aggregate core of facts upon which the claim rests activates additional legal rights, otherwise dormant, in the defendant."[208] The Fifth Circuit noted that Hornbeck's counterclaim arose out of the same occurrence—damage to the vessel—that is the subject of National's declaratory action.[209] The panel further noted that Hornbeck's counterclaim did not require that another party be added, and there was a logical relationship between National's disclaimer of liability and Hornbeck's counterclaim because the same facts underlie both causes.[210] Thus, the Fifth Circuit applied Rule 13(a) and noted that this promotes uniformity in the federal courts and prevents multiplicity of actions.[211]

P. Rule 56(d) When Facts Are Unavailable to the Nonmovant—McKay v. Novartis Pharmaceutical Corp.

The dispute in *McKay v. Novartis Pharmaceutical Corp.* spanned eight years and two forums.[212] The McKays sued Novartis, as the manufacturer of two prescription drugs for prostate cancer, for allegedly failing to warn the public about certain side effects.[213] "Novartis moved for partial summary judgment on the McKays' failure to warn claims" in Multidistrict Litigation (MDL) court.[214] The McKays filed a Rule 56(d) motion for additional time to discover Mr. McKay's own medical records.[215] The MDL court denied the McKays' motion, however, because the information they sought was

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204. *Id.* at 829–30.
205. *Id.* at 835.
206. *Id.* (quoting FED. R. CIV. P. 13(a)(1)(A)–(B)) (internal quotation marks omitted).
207. *Id.*
208. *Id.* (alteration in original) (quoting Revere Copper & Brass Inc. v. Aetna Cas. & Sur. Co., 426 F.2d 709, 715 (5th Cir. 1970)) (internal quotation marks omitted).
209. *Id.*
210. *Id.*
211. *Id.*
212. McKay v. Novartis Pharm. Corp., 751 F.3d 694, 697 (5th Cir. May 2014).
213. *Id.*
214. *Id.*
215. *Id.* at 699.

already available to them.[216] In reviewing the MDL court's denial of the Rule 56(d) motion, the Fifth Circuit noted that if a requesting party has not diligently pursued discovery, they are not entitled to relief.[217] The panel held that the MDL court acted within its discretion and agreed that the McKays could have obtained the documents through informal means.[218]

216. *Id.*
217. *Id.* at 700 (citing Beattie v. Madison Cnty. Sch. Dist., 254 F.3d 595, 606 (5th Cir. 2001)).
218. *Id.*