

# CIVIL PROCEDURE

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## I. INTRODUCTION

During the period of this survey, July 2011 to June 2012, the Fifth Circuit issued opinions on a number of significant civil-procedure-related issues. These topics included discussions about the unraveling of an order from a removed judge, the application of foreign law, and clarifications to removal jurisdiction, intervention, sanctions, and class action certification.

## II. SIGNIFICANT FIFTH CIRCUIT OPINIONS ON CIVIL PROCEDURE MATTERS

*A. Observations on the Interplay Between Local Rules, Standing Orders, and the Federal Rules of Civil Procedure*

Although case law addressing this subject area has been historically sparse, there are several fairly recent cases that analyze the interplay between the Federal Rules of Civil Procedure, local rules, and standing orders.<sup>1</sup> For example, in *Webb v. Morella*, the district court dismissed the plaintiffs' action against their former attorney and awarded the defendant his attorney's fees and costs after deeming his motion to dismiss unopposed when the plaintiffs filed their opposition one day late and without the tables of contents and authorities required by the local rules.<sup>2</sup> The Fifth Circuit reversed and remanded, finding that the plaintiffs' failure to satisfy the local rules did not obviate the findings of contumacious conduct or extreme delay necessary to justify dismissing a case with prejudice.<sup>3</sup>

*B. Effect of Federal Court Jurisdiction and Venue Clarification Act of 2011 on Removal, Venue, and Jurisdiction*

The Federal Courts Jurisdiction and Venue Clarification Act of 2011 (JVCA) amended 28 U.S.C. § 1441(c)—removal of civil actions—and § 1446(b)(2)(c)—procedure for removal of civil actions—and is effective for all suits commenced on or after January 6, 2012.<sup>4</sup>

It has long been the rule in the Fifth Circuit that all properly joined and served defendants must join in the notice of removal or otherwise consent to removal within the thirty-day period set forth in 28 U.S.C. § 1446(b).<sup>5</sup> Failure

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1. See *Webb v. Morella*, 457 F. App'x 448 (5th Cir. Jan. 2012) (per curiam).

2. See *id.* at 450.

3. *Id.* at 452-54.

4. Federal Courts and Jurisdiction and Venue Clarification Act (JVCA) of 2011, Pub. L. No. 112-63, § 103, 125 Stat. 758, 759-60; see, e.g., *MB Fin., N.A. v. Stevens*, 678 F.3d 497, 498 (7th Cir. 2012); *John M. Floyd & Assocs. v. Fiserv Solutions, Inc.*, No. 4:11CV306, 2012 WL 405485 (E.D. Tex. Feb. 8, 2012) (mem. op.).

5. See, e.g., *Jones v. Scogin*, 929 F. Supp. 987, 988 (W.D. La. 1996) (citing *Getty Oil Corp. v. Ins. Co. of N. Am.*, 841 F.2d 1254, 1263 (5th Cir. 1988)).

to do so renders the removal defective.<sup>6</sup> While each defendant need not sign the notice of removal, there must be “some timely filed written indication from each served defendant, or from some person or entity purporting to formally act on its behalf in this respect *and to have the authority to do so*, that it has actually consented to such action.”<sup>7</sup> The JVCA codified the foregoing principles as follows: “When a civil action is removed solely under section 1441(a), all defendants who have been properly joined and served must join in or consent to the removal of the action.”<sup>8</sup>

The Second Circuit Court of Appeals in *Landesbank v. Aladdin Capital Management, LLC* applied the new rules under the JVCA and noted that “[e]very corporation is now treated for diversity purposes as a citizen of both its state of incorporation and its principal place of business, regardless of whether such place is foreign or domestic.”<sup>9</sup>

In *Elchehabi v. Chase Home Finance, LLC*, the United States District Court for the Southern District of Texas discussed the JVCA and noted that the Act rejected the Fifth Circuit’s previous “First-Served Defendant Rule” in determining the timeliness of multiple defendants’ consent to a notice of removal.<sup>10</sup> Instead, the JVCA requires that each defendant has thirty days from the time the notice of removal is received or served on that defendant in order to consent to removal.<sup>11</sup>

### C. *Forum Non Conveniens*

In 2012, there was only one case from the Fifth Circuit Court of Appeals on the issue of forum non conveniens.<sup>12</sup> There, the panel affirmed the district court’s order dismissing the action on forum non conveniens grounds when the dispute arose out of an explosion in Mexico.<sup>13</sup>

### D. *Arbitration*

In *Reed v. Florida Metropolitan University*, the Fifth Circuit Court of Appeals held that it is proper for the arbitrator(s) to determine whether the arbitration agreement allowed for class arbitration.<sup>14</sup> However, the court also held that “arbitrators should not find implied agreements to submit to class

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6. *Getty Oil*, 841 F.2d at 1263.

7. *Gillis v. Louisiana*, 294 F.3d 755, 759 (5th Cir. 2002) (quoting *Getty Oil*, 841 F.2d at 1262 n.11) (internal quotation marks omitted).

8. 28 U.S.C. § 1446(b)(2)(A) (2011).

9. *Bayerische Landesbank v. Aladdin Capital Mgmt. LLC*, 692 F.3d 42, 50 (2d Cir. 2012).

10. *Elchehabi v. Chase Home Fin., LLC*, No. H-12-1486, 2012 WL 3527178, at \*2 (S.D. Tex. Aug. 15, 2012).

11. *See id.*

12. *See Ibarra v. Orica U.S.A., Inc.*, No. 11-51094, 2012 WL 4353436 (5th Cir. Sept. 24, 2012) (per curiam).

13. *Id.* at \*1.

14. *Reed v. Fla. Metro. Univ.*, 681 F.3d 630, 633 (5th Cir. May 2012).

arbitration” absent explicit contractual consent to class arbitration in the written agreement.<sup>15</sup>

In *Lozano v. Bosdet*, the Fifth Circuit Court of Appeals expressly adopted the “flexible due diligence” standard, measured by “[g]ood faith and reasonable dispatch,” of the First and Seventh Circuits in determining the length of time in which a plaintiff must serve a foreign defendant under Rule 4.<sup>16</sup> The court noted that Rule 4(m)’s 120-day limitation does not apply but rejected the Ninth Circuit’s unlimited time frame.<sup>17</sup>

*E. Intervention as a Matter of Right by Publicly Minded Citizens: City of Houston v. American Traffic Solutions, Inc.*

In *City of Houston v. American Traffic Solutions, Inc.*, the Fifth Circuit addressed the rights of citizens to intervene as a matter of right in a declaratory action arising out of the cancellation of a city contract following the repudiation of that contract’s subject matter by public referendum.<sup>18</sup>

The underlying case involved the City of Houston, which passed an ordinance approving the use of red-light cameras and contracting with a contractor to install and run the system to photograph and ticket violators.<sup>19</sup> The intervenors were two brothers who launched a political campaign to force the city to discontinue the use of red-light cameras and who ultimately succeeded in passing a city charter amendment repudiating future use of the cameras.<sup>20</sup> Following the referendum, the city terminated the contract and sued for a declaratory judgment in federal court; the contractor counterclaimed.<sup>21</sup> Intervenors sought to intervene as of right pursuant to Rule 24(a)(2), which the district court denied, and the intervenors appealed.<sup>22</sup>

The Fifth Circuit reversed the denial of the motion to intervene, finding that “[t]he district court erred in declaring that the [intervenors] had to prove a ‘meaningful probability [of inadequate representation] derived from actual facts’” and, instead, engaging in a totality of the circumstances analysis.<sup>23</sup> The Fifth Circuit first noted that no federal authority or state law prohibited intervention of right in this type of case.<sup>24</sup> It then concluded that the intervenors had demonstrated a unique interest—sufficient to overcome the normal circumspection to allowing intervention of right by public-spirited

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15. *Id.* at 646.

16. *Lozano v. Bosdet*, 693 F.3d 485, 487-91 (5th Cir. Aug. 2012) (first quote quoting 1 STEVEN S. GENSLER, FEDERAL RULES OF CIVIL PROCEDURE: RULES AND COMMENTARY 60 (2012 ed.)).

17. *Id.* at 488.

18. *City of Hous. v. Am. Traffic Solutions, Inc.*, 668 F.3d 291, 293-94 (5th Cir. Jan. 2012).

19. *Id.* at 293.

20. *Id.* at 292-93.

21. *Id.* at 293.

22. *Id.*

23. *Id.* at 294 (third alteration in original) (quoting *City of Hous. v. Am. Traffic Solutions, Inc.*, N.H.-10-4545, 2010 WL 5140474, at \*3 (S.D. Tex. Dec. 12, 2010), *rev'd on other grounds*, 668 F.3d 291).

24. *Id.*

citizens—through their substantial personal involvement and investment in the campaign.<sup>25</sup> They had also “raised substantial doubts about the City’s motives and conduct in its defense of the litigation,” as demonstrated through its previous political opposition, its pecuniary motives not to protect the city charter amendment, and the general haste of the litigation.<sup>26</sup>

*F. Sanctions for Inadvertent Violation of a Court’s Protective Order: Smith & Fuller, P.A. v. Cooper Tire & Rubber Co.*

In *Smith & Fuller, P.A. v. Cooper Tire & Rubber Co.*, the Fifth Circuit addressed an award of sanctions against plaintiff’s counsel for inadvertently violating the terms of a protective order when it mistakenly copied the defendant’s trade secrets and confidential information onto discs that were disseminated to other plaintiff’s attorneys attending a conference.<sup>27</sup> The defendant discovered the violation when it received copies of those documents from plaintiff’s counsel in unrelated litigation and quickly moved to enforce the protective order.<sup>28</sup> The district court found that plaintiff’s counsel had not willfully violated the protective order but that sanctions were appropriate when the documents were produced in reliance upon the protections offered by the court and when plaintiff’s counsel had previously been sanctioned for willfully violating a similar protective order in another case.<sup>29</sup>

The Fifth Circuit affirmed the award of \$29,667.71 in fees and expenses.<sup>30</sup> The Fifth Circuit noted that Federal Rule of Civil Procedure 37(b) empowers courts to impose sanctions for failure to obey discovery orders by authorizing a broad range of sanctions, including contempt, and the payment of reasonable expenses, including attorney’s fees, caused by the failure to obey a discovery order.<sup>31</sup> District courts have broad discretion to fashion remedies suited to the misconduct, but the most severe remedies under Rule 37(b)—striking pleadings or dismissal of a case—are typically limited to cases in which the court has made a finding of bad faith or willful misconduct.<sup>32</sup> The Fifth Circuit noted that “[h]aving found no willful misconduct, the district court here imposed one of the least severe sanctions under its authority.”<sup>33</sup>

The Fifth Circuit addressed and refused to adopt the reasoning of the Eleventh Circuit in *Lipscher v. LRP Publications, Inc.*, which held that the district court lacked authority to impose Rule 37(b) sanctions for violations of Rule 26(c) protective orders because such orders were not “an order to provide

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25. *Id.*

26. *Id.* at 293-94.

27. *Smith & Fuller, P.A. v. Cooper Tire & Rubber Co.*, 685 F.3d 486, 487 (5th Cir. June 2012).

28. *Id.*

29. *Id.* at 487-88.

30. *Id.* at 488, 491.

31. *Id.* at 488.

32. *Id.* (citing *Pressey v. Patterson*, 898 F.2d 1018, 1021 (5th Cir. 1990)).

33. *Id.* at 489.

or permit discovery” within the scope of Rule 37(b)(2).<sup>34</sup> While noting that there was ample support for the imposition of Rule 37(b) sanctions for violation of Rule 26(c) protective orders in other circuits, the protective order was, in fact, granted “to provide or permit discovery” of confidential documents within the meaning of Rule 37(b) because it prescribed the method and terms of the discovery of such confidential material.<sup>35</sup>

*G. Relief from a Judgment or Order After a Judge Is Removed from Office for Judicial Misconduct: Turner v. Pleasant*

In *Turner v. Pleasant*, the Fifth Circuit took the unusual step of reversing, on the basis of equity, a final judgment for the defendants in a personal injury action, which it had previously affirmed in the wake of the subsequent impeachment and conviction of Judge G. Thomas Porteous, Jr., who presided in the bench trial.<sup>36</sup> The plaintiffs filed a motion for recusal of Judge Porteous during the original trial on the basis of his relation with defendant’s attorney.<sup>37</sup> Judge Porteous denied that motion and entered a judgment for the defendant.<sup>38</sup> The plaintiffs appealed, and the judgment was affirmed by the Fifth Circuit.<sup>39</sup> When Judge Porteous was subsequently impeached and removed from office for judicial misconduct, the plaintiffs filed a new complaint in equity seeking to set aside the prior judgment by alleging that the judgment was procured by fraud involving the district judge.<sup>40</sup> The newly appointed district judge dismissed the complaint on the basis of *res judicata*.<sup>41</sup> The Fifth Circuit then reversed, noting that “[r]es judicata must at times yield to a well-pled independent action in equity.”<sup>42</sup>

The Fifth Circuit found further support for overturning the judgment in Rule 60 of the Federal Rules of Civil Procedure but made clear that it also implicated the inherent power of the federal courts to manage their affairs and protect against judgments procured by fraud:

In order to prevent an independent action in equity from making null the limitations of the related Rule 60(b)(3) right to relief for one year after judgment due to fraud, the injustice to be remedied must be so severe as to overcome the purposes for the doctrine of *res judicata*. The actions are “governed not by rule or statute but by the control necessarily vested in courts to manage their own

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34. *Id.* (quoting *Lipscher v. LRP Publ’ns, Inc.*, 266 F.3d 1305, 1323 (11th Cir. 2001)) (internal quotation marks omitted).

35. *Id.* at 490 (quoting FED. R. CIV. P. 37(b)(2)(A)) (internal quotation marks omitted).

36. *Turner v. Pleasant*, 663 F.3d 770, 772 (5th Cir. Dec. 2011).

37. *Id.*

38. *Id.*

39. *See Turner v. Pleasant*, 127 F. App’x 140 (5th Cir. 2005) (per curiam).

40. *Turner*, 663 F.3d at 772.

41. *Id.*

42. *Id.* at 775-76 (citing *United States v. Beggerly*, 524 U.S. 38, 45-46 (1998)).

affairs.” The Federal Rules preserved a court’s power to hear an independent action to grant relief from a judgment.<sup>43</sup>

The Fifth Circuit thereby appeared to reserve the question of whether the court’s inherent equitable power to manage its affairs would permit it to reach beyond the one-year limit from the date of the entry of the judgment in Rule 60(c)(1).<sup>44</sup>

*H. Dismissal with Prejudice Is an Appropriate Sanction for a Plaintiff’s Perjured Deposition Testimony: Brown v. Oil States Skagit Smatco*

In *Brown v. Oil States Skagit Smatco*, the Fifth Circuit addressed a district court’s dismissal of the plaintiff’s claims with prejudice as a sanction for providing perjured testimony at deposition.<sup>45</sup>

The plaintiff, formerly a contract welder for the defendants, alleged claims of racial harassment and constructive discharge under Title VII.<sup>46</sup> In his deposition, he claimed that racial harassment was the only reason he quit.<sup>47</sup> However, the plaintiff had testified, just months earlier in another deposition in a personal injury suit arising out of an automobile accident, that he stopped working for the defendants solely due to injuries sustained in the accident.<sup>48</sup> Upon learning of the contradictory testimony, the defendants filed a motion for sanctions and a motion to dismiss the plaintiff’s claims with prejudice or, in the alternative, to issue a fraud finding.<sup>49</sup>

The Fifth Circuit noted that outright dismissal was a severe sanction within the court’s discretion but that it was appropriate only when lesser sanctions would be ineffective in deterring such conduct.<sup>50</sup> Under Fifth Circuit precedent, dismissal with prejudice requires “a clear record of delay or contumacious conduct by the plaintiff” and that “lesser sanctions would not serve the best interests of justice.”<sup>51</sup>

The Fifth Circuit took care to distinguish contumacious conduct, implying a stubborn resistance to authority, from conduct that is merely negligent.<sup>52</sup> Agreeing that the plaintiff had perjured himself through his contradictory deposition testimony, the Fifth Circuit panel then analyzed whether dismissal of his claims with prejudice was the “least onerous sanction [that would] address

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43. *Id.* at 775-76 (citations omitted) (quoting *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991)).

44. *Id.* at 775-77.

45. *Brown v. Oil States Skagit Smatco*, 664 F.3d 71, 76 (5th Cir. Dec. 2011) (per curiam).

46. *Id.* at 73.

47. *Id.* at 74-75.

48. *Id.* at 74.

49. *Id.* at 75.

50. *Id.* at 78-80.

51. *Id.* at 77 (quoting *Sturgeon v. Airborne Freight Corp.*, 778 F.2d 1154, 1159 (5th Cir. 1985)) (internal quotation marks omitted).

52. *See id.* at 77-78.

the offensive conduct.”<sup>53</sup> Analyzing the federal magistrate’s opinion, which was adopted by the district court, the panel found that an assessment of attorney’s fees would be meaningless as the plaintiff was proceeding *in forma pauperis* and would not be able to pay them and that dismissing only his constructive discharge claim would not constitute a deterrent because his contradictory testimony already effectively killed that claim.<sup>54</sup> The Fifth Circuit concluded that the district court did not abuse its discretion in dismissing the plaintiff’s claims with sanctions under these circumstances and affirmed the dismissal.<sup>55</sup>

*I. Whether Common Questions Predominate Using “Proxy Indicators” for Class Eligibility Under Rule 23: Ahmad v. Old Republic National Title Insurance Co.*

In *Ahmad v. Old Republic National Title Insurance Co.*, the Fifth Circuit addressed the commonality requirement necessary for class certification.<sup>56</sup> The named plaintiffs in this putative class action obtained a mortgage from the defendant for which they allegedly did not receive the discount on the premium required by the Texas Insurance Code.<sup>57</sup> The plaintiffs moved for class certification with a class definition based on persons who closed a refinancing of residential real property mortgage with the defendant within four years of the filing of the complaint and who were charged a premium that exceeded the discounted reissue premium rate.<sup>58</sup> The plaintiffs relied on the fact that the transactions at issue involved standard form documents from which the class members’ eligibility for the discount could be established by proxy indicators such as whether it had a GF number, was returned to a title company, or was a first lien in favor of an institutional lender.<sup>59</sup>

The district court issued an order granting class certification on the same day that the Fifth Circuit issued *Benavides v. Chicago Title Insurance Co.*, affirming denial of class certification on similar facts.<sup>60</sup> The district court denied the defendant’s motion for reconsideration in light of *Benavides*, and the Fifth Circuit granted an interlocutory appeal.<sup>61</sup>

The Fifth Circuit’s review of the certification question focused on the district court’s application of the commonality requirement of Rule 23(a)(2)

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53. *Id.* at 78 (quoting *Gonzalez v. Trinity Marine Grp., Inc.*, 117 F.3d 894, 899 (5th Cir. 1997)) (internal quotation marks omitted).

54. *Id.*

55. *Id.* at 80.

56. *Ahmad v. Old Republic Nat’l Title Ins. Co.*, 690 F.3d 698, 702 (5th Cir. Aug. 2012).

57. *Id.* at 699-701.

58. *Id.* at 700.

59. *Id.*

60. *Id.* at 701 (citing *Benavides v. Chi. Title Ins. Co.*, 636 F.3d 699 (5th Cir. 2011)).

61. *Id.*



and the predominance requirement of Rule 23(b)(3).<sup>62</sup> In concluding that the district court had misread the demands of Rule 23, the Fifth Circuit focused on “whether extensive file-by-file review w[ould] be necessary [to determine if] . . . a plaintiff qualified for the discount.”<sup>63</sup> Question 3 in particular— “[w]hat evidence is sufficient to qualify a borrower for the R-8 credit?”—was singled out in that it did not invite a “yes” or “no” answer or present a contention the “truth” or “falsity” of which could be established.<sup>64</sup>

The Fifth Circuit noted that, while the proxy indicators cited by the plaintiff would constitute evidence from which a reasonable jury could conclude that a borrower’s original mortgage was insured, file-by-file analysis would still be necessary to determine whether individual plaintiffs met the criteria for the deduction alleged to be wrongfully withheld.<sup>65</sup> The Fifth Circuit concluded that the district court abused its discretion in finding the Rule 23(b)(3) elements satisfied, so it reversed and remanded the case.<sup>66</sup>

*J. Accrual of a Claim for Temporary Benefits in a Workers’ Compensation Action for Purposes of the Statute of Limitations: Patrick v. Wal-Mart, Inc.-Store # 155*

In *Patrick v. Wal-Mart, Inc.*, the Fifth Circuit addressed the narrow but novel question of whether a plaintiff’s claim for bad faith denial of workers’ compensation benefits accrued for purposes of the statute of limitations at the time of the initial award sued upon or after a later determination of total disability, which had been reserved in the original order, and of the plaintiff’s failure to exhaust administrative remedies until eleven years later.<sup>67</sup>

The plaintiff’s legal saga began in 1997 when she injured her lower back while stocking shelves.<sup>68</sup> In the resulting workers’ compensation proceedings, an administrative law judge awarded the plaintiff temporary total disability benefits but reserved any decision on total disability.<sup>69</sup> On the record before the court, that determination was not made until 2005, with the plaintiff working other jobs and suffering additional injuries in the intervening years before filing a claim for additional benefits.<sup>70</sup> In these subsequent proceedings, another administrative law judge found that the plaintiff was totally disabled, a decision that was appealed through the administrative process and state courts in

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62. *Id.* at 702-04.

63. *Id.* at 704 (first alteration in original) (internal quotation marks omitted).

64. *Id.* at 701, 704 (internal quotation marks omitted).

65. *Id.* at 705.

66. *Id.*

67. *Patrick v. Wal-Mart, Inc.-Store # 155*, 681 F.3d 614, 618 (5th Cir. May 2012).

68. *Id.* at 616.

69. *Id.* at 617-18.

70. *Id.* at 616-17.

Mississippi until 2009.<sup>71</sup> In 2010, the plaintiff filed her state-court claim for bad faith refusal to pay benefits in 1999.<sup>72</sup>

The defendant argued that the claim accrued twenty days after the original 1999 administrative order and was now barred by Mississippi's three-year statute of limitations.<sup>73</sup> The plaintiff argued that the claim did not accrue until the state supreme court denied her writ of certiorari on the decision to award permanent disability benefits, making the state court of appeals's 2009 mandate a final decision.<sup>74</sup>

The Fifth Circuit analyzed a Mississippi Supreme Court case on a certified question on analogous facts to determine that, under Mississippi law, an administrative law decision remains interlocutory for purposes of exhaustion of remedies until a monetary sum is awarded but does not require that all potential benefits be awarded; "[i]nstead, a claim for bad faith in denying particular benefits is exhausted when an award of those benefits is final."<sup>75</sup> Thus, the 1999 order was sufficient to be an award, and the claim for initial benefits was exhausted in 2001 irrespective of when, or if, a determination of permanent disability was made.<sup>76</sup>

*K. Section 1927 Sanctions for Unreasonably and Vexatiously Multiplying Proceedings: Gonzalez v. Fresenius Medical Care North America*

In *Gonzalez v. Fresenius Medical Care North America*, the Fifth Circuit addressed the award of sanctions for unreasonably and vexatiously multiplying proceedings.<sup>77</sup> In the context of a qui tam action under the False Claims Act, in which an employee of a medical provider claimed that it submitted fraudulent claims to Medicare, the district court granted the defendants judgment as a matter of law on some claims; the jury returned a verdict for the defendants on all remaining claims; and the district court awarded the medical provider \$15,360 in attorney's fees from relator's counsel under 28 U.S.C. § 1927, finding that counsel unreasonably and vexatiously multiplied proceedings with respect to the retaliation suit.<sup>78</sup>

The Fifth Circuit upheld the award of sanctions, finding no abuse of discretion in the district court's finding that counsel for the relator had helped the relator push a meritless claim to trial.<sup>79</sup> The Fifth Circuit noted that the relator's testimony changed repeatedly—her pleadings alleged that she had been directed to participate in the alleged Medicare fraud, but in deposition, she

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71. *Id.* at 618.

72. *Id.*

73. *Id.* at 619.

74. *Id.*

75. *Id.* at 620.

76. *Id.*

77. *Gonzalez v. Fresenius Med. Care N. Am.*, 689 F.3d 470, 480 (5th Cir. July 2012).

78. *Id.* at 474.

79. *Id.* at 480.

testified that she had never been asked to lie to Medicare auditors or assist in fraud, answers that were changed in errata sheets.<sup>80</sup> During a second court-ordered deposition, the relator testified that the letter in which she repeated her allegations accurately described the situation during her employment; however, at trial, her story changed again—she testified that her first deposition had been accurate, that her attorney had helped her draft the letter referenced in her complaint, and that her attorney had “literally word[ed]” some of the errata sheet changes.<sup>81</sup> The district court thereon inferred bad faith on the part of counsel and awarded sanctions.<sup>82</sup>

The Fifth Circuit noted that counsel for the plaintiff “should at least have developed questions about the merits of Relator’s claim when she disclaimed a critical allegation from her complaint at the first deposition” and that the “relator’s testimony at trial supported the district court’s conclusion that counsel exerted improper influence over the drafting of the errata sheet.”<sup>83</sup>

The Fifth Circuit also rejected the argument that a hearing was necessary or helpful before imposing sanctions when the sanctionable actions appeared on the records and briefs before the court and no factual issues were raised.<sup>84</sup>

*L. Commonality Requirement in Class Actions: M.D. ex rel. Stukenberg v. Perry*

In *M.D. ex rel. Stukenberg v. Perry*, the Fifth Circuit addressed the commonality requirement necessary for class certification.<sup>85</sup> The named plaintiffs for the putative class action sought declaratory and injunctive relief on behalf of each of the approximately 12,000 children under the state’s Permanent Managing Conservatorship supervision to redress alleged class-wide injuries caused by the systemic deficiencies in the State of Texas’s administration of its system for long-term foster care.<sup>86</sup> The central complaint was that the state’s administration of the foster care system failed to maintain sufficient caseworkers to perform the critical tasks necessary to ensure the safety and well-being of the children in its care and, thereby, violated the class members’ liberty interests, privacy interests, and substantive due process rights under the Fourteenth Amendment; associational rights under the First, Ninth, and Fourteenth Amendments; and procedural due process rights under the Fourteenth Amendment relating to oversight of contracted substitute care.<sup>87</sup>

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80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 481.

85. *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 835 (5th Cir. Mar. 2012).

86. *Id.*

87. *Id.* at 836-38.

The plaintiffs only sought certification under Rule 23(b)(2).<sup>88</sup> Because “[a]ll class members [were] within the same system and subject to the alleged deficiencies in that system,” the district court certified the class, finding that the class satisfied commonality despite the fact that each class member experienced the alleged shortcomings in the state’s administration in a different way.<sup>89</sup> The district court also noted that the test for commonality is not intended to be demanding and would be satisfied even if there were some different claims or claims that required individualized analysis.<sup>90</sup>

The Fifth Circuit reversed, noting that “[a]lthough the district court’s analysis may have been a reasonable application of pre-*Wal-Mart* precedent, the *Wal-Mart* decision has heightened the standards for establishing commonality under Rule 23(a)(2), rendering the district court’s analysis insufficient.”<sup>91</sup> The district court’s analysis under *Wal-Mart* was deficient in that its formulation of the common questions of law lacked the specificity to permit effective appellate review and failed to look beyond the pleadings to make a meaningful determination of whether the alleged questions of law are capable of classwide resolution.<sup>92</sup> The Fifth Circuit expressly acknowledged that the conclusion on remand may be the same but that the district court must address each of the *Wal-Mart* requirements and “explain its reasoning with specific reference to the ‘claims, defenses, relevant facts, and applicable substantive law’ raised by the class claims.”<sup>93</sup>

The Fifth Circuit also held that the district court abused its discretion in finding that the proposed class could be certified under Rule 23(b)(2).<sup>94</sup> It again noted that, under *Wal-Mart*, the Supreme Court further expounded on the requirements of Rule 23(b)(2), determining that “Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class.”<sup>95</sup> Here, “[t]he proposed class [sought] at least twelve broad, classwide injunctions.”<sup>96</sup> The Fifth Circuit found that the proposed class claims did not satisfy Rule 23(b)(2) because they included claims for individualized injunctive relief such as expert panels to review particular issues.<sup>97</sup>

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88. *Id.* at 837.

89. *Id.* at 838-39 (first alteration in original) (quoting *M.D. ex rel. Stukenberg v. Perry*, No. C-11-84, 2011 WL 2173673, at \*5 (S.D. Tex. June 2, 2011), *vacated and remanded by* 675 F.3d 832) (internal quotation marks omitted).

90. *See id.*

91. *Id.* at 839; *see also* *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (“Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc.”).

92. *M.D. ex rel. Stukenberg*, 675 F.3d at 842.

93. *Id.* at 843 (quoting *McManus v. Fleetwood Enters.*, 320 F.3d 545, 548 (5th Cir. 2003)).

94. *Id.* at 845.

95. *Id.* at 846.

96. *Id.* at 845.

97. *Id.* at 846.

*M. Application of Iraqi Law: McGee v. Arkel International, LLC*

In *McGee v. Arkel International, LLC*, the Fifth Circuit addressed whether Louisiana law or the law of the nation of Iraq should apply to a wrongful death action.<sup>98</sup> Sergeant Christopher Everett, a Texas Army National Guardsman serving in Iraq, died by electrocution at a United States Army base in September 2005.<sup>99</sup> “Sergeant Everett was using a power washer to clean [an Army] Humvee.”<sup>100</sup> Following his death, the Army investigated and concluded that the generator powering the washer contained an improperly connected neutral grounding wire and that this defect “created an open short that[,] when closed by [Sergeant] Everett[,] resulted in the current conducting through his body.”<sup>101</sup>

The Army provided Sergeant Everett’s parents with a report regarding its investigation in April 2008, and in August 2008, the parents initiated an action in Texas state court alleging that three companies were liable for wrongful death under Iraqi Civil Code Articles 202-203.<sup>102</sup> The defendants removed the action to the United States District Court for the Southern District of Texas.<sup>103</sup> Shortly after removal, the parents filed an action in Louisiana state court with identical claims.<sup>104</sup> The target of this second action appears to have been Arkel, a Louisiana-based company that had a contract with the government that “made it responsible for the maintenance and repair of generator[s] at Sergeant Everett’s base” and that was specifically identified in the Army’s report regarding the electrocution.<sup>105</sup> The Louisiana state court action was removed to federal court and stayed pending a judgment in the Texas case.<sup>106</sup>

Next, “[i]n April 2009, the Texas federal court granted the plaintiffs’ motion to dismiss without prejudice, noting its belief that the plaintiffs’ claims arose under Iraqi law and that any court adjudicating them would apply Iraqi law.”<sup>107</sup> The plaintiffs also dismissed two of the three defendants in the Louisiana action, leaving only Arkel in either case.<sup>108</sup> “Arkel [then] moved for summary judgment, arguing that the [parents’] claims were barred by Louisiana’s one-year prescriptive period.”<sup>109</sup> The parents responded that, based on the application of Louisiana choice-of-law rules, Iraqi law governed and the longer period under an Iraqi statute of limitations applied.<sup>110</sup> “The district court

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98. See *McGee v. Arkel Int’l, LLC*, 671 F.3d 539, 542-43 (5th Cir. Feb. 2012).

99. *Id.* at 540.

100. *Id.* at 540-41.

101. *Id.* at 541 (second alteration in original) (internal quotation marks omitted).

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* (quoting *McGee v. Arkel Int’l, LLC*, 716 F. Supp. 2d 572, 582 (S.D. Tex. 2009)).

108. *Id.*

109. *Id.*

110. *Id.*

granted summary judgment and dismissed the action with prejudice,” and the parents appealed.<sup>111</sup>

Two of the Fifth Circuit panel’s three members, applying *Erie* and looking to Louisiana’s choice-of-law statutes, determined that a specific statute concerning safety and standards of conduct requiring the state to apply “the law of the state in which the conduct that caused the injury occurred” controlled over Louisiana’s general choice-of-law statute.<sup>112</sup> Although under the general statute Arkel had a persuasive argument that Louisiana law, not Iraqi law, would be the “most seriously impaired if its law were not applied to [the underlying] . . . issue,” the specific statute requiring the application of law of the state of the conduct that caused the injury applied in place of the general provision.<sup>113</sup> Thus, Iraqi law applied to the merits of the dispute.<sup>114</sup>

Next, the majority determined that Arkel was not immune from suit pursuant to Coalition Provisional Authority Order 17, which established general immunity for contractors providing services to the United States and coalition members in Iraq.<sup>115</sup> The majority found that although the order “provides contractors immunity from Iraqi laws relating to their contractual ‘terms and conditions’ and from Iraqi legal process, it does not create an immunity from Iraqi laws relating to tort claims brought in federal court in the United States.”<sup>116</sup> Thus, third-party claims for personal injury or death attributable to contractors’ acts may be “dealt with” under state or federal court laws and procedures.<sup>117</sup>

As a final step, the two panelists in the majority found that Louisiana law—which normally applies Louisiana’s own prescriptive periods even if the substantive law of another state (or nation) applies—contains an express exception when a claim would be barred under Louisiana law but not barred under the law of the state whose substantive law applies and when the “maintenance of the action in this state is warranted by compelling considerations of remedial justice.”<sup>118</sup> Thus, although Louisiana law would bar the parents’ wrongful death claim against Arkel, the parents sufficiently proved that Iraqi law would not bar their claim.<sup>119</sup> Critically, for the purpose of maintaining the action, Louisiana was the only available forum for a suit

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111. *Id.*

112. *Id.* at 542-43 (quoting LA. CIV. CODE art. 3543 (2011)) (internal quotation marks omitted).

113. *Id.* (quoting LA. CIV. CODE art. 3542 (2011), Louisiana’s general choice of law provision, and discussing art. 3543) (internal quotation marks omitted).

114. *Id.* at 543.

115. *Id.* at 543-44.

116. *Id.* at 544.

117. *Id.* (quoting Coalition Provisional Authority Order Number 17 (Revised) Status of the Coalition Provisional Authority, MNF—Iraq, Certain Missions and Personnel in Iraq § 18 (Iraq)) (internal quotation marks omitted).

118. *Id.* at 544-55 (quoting LA. CIV. CODE art. 3549(B) (2011)).

119. *Id.* at 545-47, 549.

against Arkel.<sup>120</sup> Iraq was not an available forum for the plaintiffs under Coalition Provisional Authority Order 17.<sup>121</sup>

Iraq “does not provide an available forum because of paragraph 3 of CPA Order 17 § 4. The Texas prescriptive period expired and, as Arkel insisted in the Texas proceeding, that state’s courts potentially lacked personal jurisdiction over Arkel.”<sup>122</sup> Arkel objected to and moved for dismissal for lack of personal jurisdiction when the plaintiffs sued them in Texas.<sup>123</sup> And, other security and practical concerns barred pursuit of the case in any other forum.<sup>124</sup> Thus, the exception to the Louisiana choice-of-limitations law provision applied, and the parents could maintain their suit in federal court in Louisiana.<sup>125</sup> The majority reversed and remanded the action for further proceedings.<sup>126</sup>

Chief Judge Jones dissented.<sup>127</sup> Jones argued that the majority glossed over key portions of Coalition Provisional Authority Order 17 and inaccurately determined that Iraqi substantive law should apply instead of Louisiana law.<sup>128</sup> She also found that the plaintiffs could have, but failed to, timely file suit against Arkel and that they made a choice based chiefly on convenience to sue in Louisiana and should not be so easily found to have satisfied the statutory requirement that “compelling considerations of remedial justice” required the displacement of Louisiana’s prescription.<sup>129</sup> Thus, she disagreed with each step of the majority’s analysis regarding choice of law.<sup>130</sup>

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120. *Id.* at 545-46.

121. *Id.* at 548.

122. *Id.*

123. *Id.*

124. *Id.* at 548-49.

125. *Id.* at 549.

126. *Id.* at 550.

127. *See id.* at 550-52 (Jones, C.J., dissenting).

128. *Id.* at 551-52.

129. *Id.* at 552 (quoting LA. CIV. CODE art. 3549(B)) (internal quotation marks omitted).

130. *See id.* at 550-52.