DEVELOPMENTS IN FIFTH CIRCUIT CIVIL PROCEDURE: 2010-2011

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I. INTRODUCTION

During the period of this Survey, July 2010 to June 2011, attorneys adapted to new developments in federal civil procedure law. First, on December 1, 2010, important amendments to Federal Rules of Civil Procedure 8, 26, and 56 became effective.[1] These amendments were not merely stylistic, as many of the other recent amendments were. Instead, revised Rule 26 materially changes how discovery is conducted and information is exchanged with expert witnesses.[2] Likewise, Rule 56 was substantively amended to harmonize the text of the summary judgment rule with precedent and generally accepted district court practices.[3]

Second, the Fifth Circuit issued opinions on a number of significant civil procedure-related issues, including the exercise of supplemental jurisdiction, composing a permissible class action, granting leave to amend, and shifting discovery costs.[4] The court also addressed important but infrequently litigated issues, such as nonjusticiability and the "act of state" doctrine.[5] This was an

1. *See infra* Section II.
2. *See infra* Section III.M.
3. *See infra* Section III.A.
4. *See infra* Section III.
5. *See infra* Section III.

interesting and, in many ways, exciting year for civil procedure issues in the Fifth Circuit.

II. AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

On December 1, 2010, important amendments to Federal Rules of Civil Procedure 8, 26, and 56 became effective.

First, the Federal Judicial Conference Committee on Rules of Practice and Procedure recommended—and the Supreme Court adopted—changes to Federal Rule of Civil Procedure 8.[6] Specifically, new Rule 8(c) "deletes the reference to 'discharge in bankruptcy' from the rule's list of affirmative defenses that must be asserted in response to a pleading."[7] This change brings Rule 8(c) in line with 11 U.S.C. § 524(a), which provides that "a discharge voids a judgment to the extent that it determines the debtor's personal liability for the discharged debt."[8] The change was adopted to avoid "confusion" about the effect of the statute that had led to some "incorrect decisions . . . and . . . unnecessary litigation."[9] In addition, the rule is intended to highlight that "some categories of debt are excepted from discharge."[10]

Second, Rule 26, which governs discovery, was amended to provide work product protection to draft reports of testifying experts and, with three exceptions, to communications between attorneys and those experts.[11] The protection embedded in Rule 26(b)(4)(B) for drafts of reports or disclosures required under Rule 26(a)(2) applies to all witnesses identified under Rule 26(a)(2)(A), whether they are required to provide reports under Rule 26(a)(2)(B) or are the subject of disclosure under Rule 26(a)(2)(C).[12] The protection applies regardless of the form in which the draft is recorded (e.g., written, electronic, or otherwise) and also applies to drafts of any supplementation under Rule 26(e).[13]

The protection-accorded communications between attorneys and testifying experts under Rule 26(b)(4)(C) is subject to three exceptions: (1) communications "relat[ing] to compensation for the expert's study or testimony"; (2) communications that "identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed"; and (3) communications that "identify assumptions that the party's

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6. SUMMARY OF THE REPORT OF THE JUDICIAL CONFERENCE, COMM. ON THE RULES OF PRACTICE AND PROCEDURE 10 (Sept. 2009), http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/Combined_ST_Report_Sept_2009.pdf [hereinafter COMM. REPORT]; *see also* FED. R. CIV. P. 8 advisory committee's note (2010 amendments).

7. COMM. REPORT, *supra* note 6, at 10.

8. *Id.*

9. *Id.*

10. *Id.*

11. *See* FED. R. CIV. P. 26(b)(4)(B), (C); COMM. REPORT, *supra* note 6, at 10; FED. R. CIV. P. 26 advisory committee's note (2010 amendments).

12. FED. R. CIV. P. 26 advisory committee's note (2010 amendments).

13. *See id.*

attorney provided and that the expert relied upon in forming the opinions to be expressed."[14] Rule 26(b)(4)(C) limits protection "to communications between an expert witness required to provide a report under Rule 26(a)(2)(B) and the attorney for the party on whose behalf the witness will be testifying, including any 'preliminary' expert opinions."[15] Both Rule 26(b)(4)(B) and (C) combat the practice of attorneys and experts taking "elaborate steps to avoid creating any discoverable record and at the same time tak[ing] elaborate steps to attempt to discover the other side's drafts and communications."[16] These changes are significant. Prior to the amendment, a majority of courts held that Rule 26 created a bright-line rule requiring the production of any information considered by an expert, including draft expert reports and attorney–expert communications.[17]

Additionally, Rule 26 no longer requires disclosure of "data *or other information*" considered by testifying experts in forming their opinions as the previous version of Rule 26(a)(2)(B)(ii) did.[18] Instead, Rule 26(a)(2)(B)(ii) now requires disclosure of "facts or data" considered by the expert in forming opinions.[19] The Civil Rules Advisory Committee's notes indicate that:

> The refocus of disclosure on "facts or data" is meant to limit disclosure to material of a factual nature by excluding theories or mental impressions of counsel. At the same time, the intention is that "facts or data" be "interpreted broadly to require disclosure of any material considered by the expert, from whatever source, that contains factual ingredients."[20]

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14. FED. R. CIV. P. 26(b)(4)(C).

15. FED. R. CIV. P. 26 advisory committee's note (2010 amendments).

16. COMM. REPORT, *supra* note 6, at 11; *see also* Robert Anderson, *Full Disclosure No More: New Amendments to Rule 26 Extend Work Product Protection to Retained Expert Witnesses*, 30 TRIAL ADVOC. Q. 21, 22 (2011) (noting that "[t]he 2010 Amendments are the result of the Civil Rules Advisory Committee's realization that the 1993 Amendments did not have the desired effect of increasing the flow of information, but simply increased costs as parties worked around the disclosure requirements"); Leah Knowlton & Hart Knight, *The Risks and Benefits of the Rule 26 Amendments Regarding Expert Reports*, A.B.A., 25 IN-HOUSE LITIGATOR, J. COMM. ON CORP. COUNS. No. 3, at 1 ("These changes should encourage communications between attorneys and experts, saving time and money in developing expert testimony and discouraging time-consuming fishing expeditions for the expert's communications with trial counsel.").

17. Anderson, *supra* note 16, at 21; *see, e.g.*, Elm Grove Coal Co. v. Dir., Office of Workers' Comp. Programs, 480 F.3d 278, 302 n.24 (4th Cir. 2007) (holding that Rule 26's work product doctrine does not protect a testifying expert's draft reports); Reg'l Airport Auth. of Louisville v. LFG, LLC, 460 F.3d 697, 717 (6th Cir. 2006) (joining the overwhelming majority of courts that hold that "Rule 26 creates a bright-line rule mandating disclosure of all documents, including attorney opinion work product, given to testifying experts") (quoting Herman v. Marine Midland Bank, 207 F.R.D 26, 29 (W.D.N.Y. 2002)); *In re* Pioneer Hi-Bred Int'l, Inc., 238 F.3d 1370, 1375 (Fed. Cir. 2001) (holding that Rule 26(a)(2)(B) required disclosure of privileged material considered by an expert witness, regardless of whether the expert ultimately relied on that information). *But see* Haworth, Inc. v. Herman Miller, Inc., 162 F.R.D. 289, 294-95 (W.D. Mich. 1995) (adopting minority view).

18. *See* FED. R. CIV. P. 26 advisory committee's note (2010 amendments) (emphasis added); FED. R. CIV. P. 26(a)(2)(B)(ii).

19. FED. R. CIV. P. 26(a)(2)(B)(ii).

20. FED. R. CIV. P. 26 advisory committee's note (2010 amendments).

"The disclosure obligation extends to any facts or data 'considered' by the expert in forming the opinions to be expressed, not only those relied upon by the expert."[21] During the prior survey period, the Fifth Circuit addressed former Rule 26(a)(2)(B)(ii); that decision is addressed below in light of the amended rule.[22] The amendments also added Rule 26(a)(2)(C), which mandates summary disclosures of the opinions to be offered by expert witnesses who are not required to provide reports under Rule 26(a)(2)(B) and of the facts supporting those opinions.[23]

Third, the drafters substantially changed Rule 56 governing summary judgment for the first time in forty years.[24] Although the rules drafters expressly did not intend any "substantive change to the summary judgment standard,"[25] the amendment to Rule 56 implements four changes intended "to make the procedures more consistent across the districts, and to close the gap that has developed between the rule text and actual practice."[26] Amended Rule 56 implements new procedures for supporting factual positions, objecting to materials cited, considering cited and uncited materials, and submitting affidavits or declarations.[27] Amended Rule 56(a) directs a court to state on the record the reasons for granting or denying the motion.[28] Rule 56(b) implements a new timing provision.[29] And Rule 56(e) allows the court, in the event a party fails to properly support an assertion of fact or address another party's assertion of fact, to either give the party an opportunity to do so, consider the fact undisputed, grant the motion (assuming the movant is entitled to it), or issue any other appropriate order.[30] Due to the significant rewording and procedural changes to the rule, the text of amended Rule 56 is provided below:

> (a) MOTION FOR SUMMARY JUDGMENT OR PARTIAL SUMMARY JUDGMENT. A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

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21. *Id.*

22. *See infra* Part III.M (discussing Ecuadorian Plaintiffs v. Chevron Corp., 619 F.3d 373 (5th Cir. Sept. 2010)).

23. FED. R. CIV. P. 26 advisory committee's note (2010 amendments); *see* FED. R. CIV. P. 26(a)(2)(C).

24. COMM. REPORT, *supra* note 6, at 14.

25. United States v. Caremark, Inc., 634 F.3d 808, 814 n.5 (5th Cir. Feb. 2011); *see also* FED. R. CIV. P. 56 advisory committee's note (2010 amendments) ("The standard for granting summary judgment remains unchanged.").

26. COMM. REPORT, *supra* note 6, at 16.

27. *See id.* at 14-15, 17-18.

28. *See id.* at 15.

29. *Id.* at 14.

30. *See* FED. R. CIV. P. 56(a), (b), (c), (e).

(b) TIME TO FILE A MOTION. Unless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.

(c) PROCEDURES.

(1) *Supporting Factual Positions.* A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

> (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or
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> (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(2) *Objection That a Fact Is Not Supported by Admissible Evidence.* A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) *Materials Not Cited.* The court need consider only the cited materials, but it may consider other materials in the record.

(4) *Affidavits or Declarations.* An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

(d) WHEN FACTS ARE UNAVAILABLE TO THE NONMOVANT. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) defer considering the motion or deny it;

(2) allow time to obtain affidavits or declarations or to take discovery; or

(3) issue any other appropriate order.

(e) FAILING TO PROPERLY SUPPORT OR ADDRESS A FACT. If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:

(1) give an opportunity to properly support or address the fact;

(2) consider the fact undisputed for purposes of the motion;

(3) grant summary judgment if the motion and supporting materials—including the facts considered undisputed—show that the movant is entitled to it; or

(4) issue any other appropriate order.

(f) JUDGMENT INDEPENDENT OF THE MOTION. After giving notice and a reasonable time to respond, the court may:

(1) grant summary judgment for a nonmovant;

(2) grant the motion on grounds not raised by a party; or

(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

(g) FAILING TO GRANT ALL THE REQUESTED RELIEF. If the court does not grant all the relief requested by the motion, it may enter an order stating any

> material fact—including an item of damages or other relief—that is not genuinely in dispute and treating the fact as established in the case.
> (h) AFFIDAVIT OR DECLARATION SUBMITTED IN BAD FAITH. If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court—after notice and a reasonable time to respond—may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions.[31]

III. SIGNIFICANT FIFTH CIRCUIT OPINIONS ON CIVIL PROCEDURE MATTERS

A. Observations on Changes to Rule 56's Timing and Notice Provisions; Court's Procedural Error May Be Rectified by Ruling on a Motion for Reconsideration

In *J.D. Fields & Co. v. United States Steel International, Inc.*, the Fifth Circuit addressed the impact of one of the changes to Rule 56.[32] After J.D. Fields & Company (Fields) bought steel pipe from United States Steel International, a dispute arose, and Fields sued for breach of contract and fraudulent inducement.[33] The district court, sua sponte and without prior notice to Fields, signed a summary judgment order that Fields take nothing on its claim for fraudulent inducement.[34] Fields appealed.[35]

In evaluating the propriety of the court's order, the Fifth Circuit first noted that, under its precedent, prior to the amendment of Rule 56, "a court provid[ed] a party with adequate notice by adhering to the same time frame prescribed for a party's motion for summary judgment."[36] Specifically, in its decision in *Love v. National Medical Enterprises*, issued in 2000, the court held that adequate notice for a sua sponte grant of summary judgment is no less than "10 days before the time fixed for the hearing."[37] Amended Rule 56(c) "no longer contains this ten-day notice requirement."[38] Rather than retain that requirement, section (f) of the amended Rule "expressly recognizes" that district courts may grant summary judgment sua sponte without waiting a set period.[39]

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31. FED. R. CIV. P. 56.
32. J.D. Fields & Co. v. U.S. Steel Int'l, Inc., 426 F. App'x 271, 280-81 (5th Cir. May 2011).
33. *Id.* at 272-73.
34. *Id.* at 272, 280-81.
35. *Id.* at 272.
36. *Id.* at 280 n.9 (citing Love v. Nat'l Med. Enters., 230 F.3d 765, 770 (5th Cir. 2000)).
37. *Love*, 230 F.3d at 770-71 (quoting FED. R. CIV. P. 56(c) (2006) (amended 2010)).
38. *Fields*, 426 F. App'x at 280 n.9 (citing FED. R. CIV. P. 56(c)).
39. *Id.* ("After giving notice and a reasonable time to respond, the court may . . . consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute." (quoting FED. R. CIV. P. 56(f))).

In *Fields*, which was decided under the pre-amendment version of Federal Rule of Civil Procedure 56, the district court's failure to give Fields any notice of its intent to rule on Fields's fraudulent inducement claims was harmless error.[40] Although the district court erred in a technical, procedural manner, it rectified its initial error by considering and ruling on Fields's motion for reconsideration.[41] Litigators and appellate practitioners should be aware that the Fifth Circuit considers the trial court's error harmless where the court issues a sua sponte ruling for summary judgment without notice to the affected party but does allow that party to present a motion for reconsideration.[42]

B. Granting Leave to Amend Under Rule 15(a)(2): United States *ex rel.* Steury v. Cardinal Health, Inc.

In *United States* ex rel. *Steury v. Cardinal Health, Inc.*, the Fifth Circuit addressed granting leave to amend under Rule 15(a)(2).[43] The plaintiff, a former employee of a manufacturer, sued the successors of the manufacturer under the False Claims Act, 31 U.S.C. § 3729(a), and a number of similar state statutes on the basis that the manufacturer allegedly sold defective products to hospitals of the Veterans Administration.[44] The plaintiff amended the complaint to include additional allegations before the defendants answered.[45] The defendants moved to dismiss the complaint under Rule 12(b)(6).[46] The magistrate judge issued a recommendation "finding, inter alia, that [the plaintiff's] allegations of fraud did not satisfy the heightened pleading requirements of Rule 9(b) and thus failed to state a claim under Rule 12(b)(6)."[47] The magistrate judge recommended that the "complaint be dismissed without prejudice to the filing of an amended complaint within ten days."[48] The district court adopted the magistrate judge's recommendation; however, instead of granting the plaintiff leave to amend as recommended, the court entered a final judgment the same day dismissing the action.[49] The plaintiff argued on appeal that the district court erred in granting final judgment without granting leave to amend the complaint.[50]

The Fifth Circuit held that the district court erred in denying leave to amend and simultaneously granting final judgment.[51] The Fifth Circuit began

40. *Id.* at 281.
41. *Id.* (construing Winters v. Diamond Shamrock Chem. Co., 149 F.3d 387, 402 (5th Cir. 1998)).
42. *Id.* (quoting *Winters*, 149 F.3d at 402).
43. United States *ex rel.* Steury v. Cardinal Health, Inc., 625 F.3d 262, 270-71 (5th Cir. Nov. 2010).
44. *See id.* at 264-65.
45. *Id.* at 265.
46. *Id.* at 266.
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.* at 267.
51. *See id.* at 271.

its analysis by restating the general rule for granting leave to amend under Rule 15 as follows:

> A district court should "freely give leave" to amend a complaint "when justice so requires." Denial of leave to amend may be warranted for undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies, undue prejudice to the opposing party, or futility of a proposed amendment. We have held that a district court abuses its discretion, however, when it gives no reasons for denying a timely motion to amend, at least when the defendant would not be unduly prejudiced by the amendment.[52]

Here, the district court granted the plaintiff leave to amend in adopting the magistrate judge's report and recommendation "but nonetheless entered a final judgment before [the plaintiff's] time to amend expired (or even began for that matter)."[53] The court also noted that while the plaintiff had already amended her complaint once, this was done shortly after the complaint was served and before defendants filed an answer.[54] Further, there was no indication that the defendants would "suffer undue prejudice" if the plaintiff was permitted to amend her complaint, that an amendment would be futile, that the defects in the complaint were necessarily "incurable," or that the plaintiff had "unduly delayed [the] action" or was "pursuing it in bad faith."[55] Finally, the court rejected the defendants' argument that the plaintiff should have pursued a postjudgment motion to amend under Rules 59 or 60.[56] While this "may have been a prudent and even desirable strategy," the Fifth Circuit was unaware of any "rule requiring it instead of an appeal."[57] Thus, the Fifth Circuit vacated the final judgment and remanded with instructions to give the plaintiff ten days to file an amended complaint.[58]

C. Altering or Amending a Certification Order Under Rule 23(c)(1)(C) on Remand After an Appeal Under Rule 23(f): Gene & Gene, L.L.C. v. Biopay, L.L.C.

In *Gene & Gene, L.L.C. v. Biopay, L.L.C.*, the Fifth Circuit addressed a district court's ability to alter or amend a certification order under Rule 23(c)(1)(C) on remand after an appeal pursuant to Rule 23(f), and the role that the "law of the case" doctrine plays in this determination.[59] The plaintiff

52. *Id.* at 270 (citations omitted).
53. *Id.* at 271.
54. *Id.*
55. *Id.*
56. *See id.*
57. *Id.* (citing Rosenzweig v. Azurix Corp., 332 F.3d 854, 864 (5th Cir. 2003)).
58. *See id.*
59. *See* Gene & Gene, L.L.C. v. Biopay, L.L.C. (*Biopay II*), 624 F.3d 698, 702-05 (5th Cir. Oct. 2010).

business owner brought a class-action suit against an advertiser, alleging that the advertiser violated the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227, by sending unsolicited faxes to the plaintiff and an unidentified number of class members.[60] The district court granted the plaintiff's motion for class certification.[61] In the defendant's first interlocutory appeal under Rule 23(f), the Fifth Circuit reversed the district court's certification order and remanded the case, holding that "the determinative question of whether consent can be established via class-wide proof must . . . be answered in the negative."[62]

On remand, the plaintiff moved to reopen discovery, and discovery was ultimately reopened on the limited issue of class certification.[63] The district court recertified the class on remand, holding that an electronic database produced by the defendant during the reopened discovery created common questions of consent that predominated over individual questions.[64] The defendant filed a second interlocutory appeal under Rule 23(f), arguing that the Fifth Circuit's ruling in the first interlocutory appeal was the law of the case and that it foreclosed further discovery on remand and class recertification.[65]

The Fifth Circuit held that the district court erred in granting further discovery and class recertification on remand because the Fifth Circuit's decision in the first interlocutory appeal was the law of the case and the "substantially different" evidence exception to the law of the case doctrine did not apply.[66] Importantly, the Fifth Circuit held that the district court's decision could not be based on Rule 23(c)(1)(C), which provides that "[a]n order that grants or denies class certification may be altered or amended before final judgment."[67] The court recognized that in some scenarios a district court may properly alter or amend a certification order pursuant to Rule 23(c)(1)(C) after remand from the Fifth Circuit.[68]

> For example, if a district court certifies a class after preliminary discovery and the court of appeals affirms pursuant to Rule 23(f), and then during subsequent discovery it becomes clear that the district court needs to alter, amend, or even decertify the class, the district court can and should do so under Rule 23(c)(1)(C).[69]

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60. *Id.* at 700.
61. *See id.*
62. *Id.* (quoting Gene & Gene L.L.C. v. BioPay, L.L.C. (*Biopay I*), 541 F.3d 318, 329 (5th Cir. 2008)). The defendant argued "that a significant number of the faxes it sent were consented to by the recipients." *Biopay I*, 541 F.3d at 323.
63. *See Biopay II*, 624 F.3d at 700-01.
64. *Id.* at 701.
65. *See id.* at 702.
66. *See id.* at 702-04.
67. *Id.* at 702-03; FED. R. CIV. P. 23(c)(1)(C).
68. *See Biopay II*, 624 F.3d at 703.
69. *Id.* (footnote omitted).

But the discretion accorded district courts under Rule 23(c)(1)(C) only "extends on remand *to all areas not covered by the higher court's mandate*."[70] Here, discovery was complete when the plaintiff first moved for certification, and the Fifth Circuit had expressly decided the issue of class certification on the first appeal.[71] "[T]hat should be the end of the matter."[72] Consequently, the Fifth Circuit reversed the district court's decision to recertify the class and remanded to the district court for a determination and disposition of the plaintiff's individual claim against the defendant.[73]

D. "Futility" as a Ground for Denying Leave to Amend Under Rule 15(a)(2): Spotts v. United States

In *Spotts v. United States*, the Fifth Circuit addressed "futility" as a ground for denying leave to amend under Rule 15.[74] Prison inmates sued the federal government under the Federal Tort Claims Act, alleging state-law tort claims in connection with the decision of prison officials not to evacuate the plaintiffs in the aftermath of a hurricane.[75] After the district court dismissed those claims, the plaintiffs sought leave to amend to assert substantially the same claims in an action against individual penitentiary officers under *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*.[76] The district court adopted the magistrate judge's recommendation to deny leave to amend on the ground that leave would be futile because the *Bivens* claims were time-barred.[77] In appealing the district court's denial of leave to amend, the plaintiffs contended that the court applied the wrong statute of limitations and erroneously concluded that the claims began to accrue when the hurricane made landfall.[78] The plaintiffs argued that the court should have applied the state's residual, four-year limitations period to their *Bivens* claim.[79] Further, the plaintiffs argued that the accrual determination was incorrect because some inmates were not diagnosed with illness until more than a year after the hurricane made

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70. *Id.* (alteration in original) (emphasis added) (quoting Martin's Herend Imps., Inc. v. Diamond & Gem Trading U.S. Co., 195 F.3d 765, 775 (5th Cir. 1999)).

71. *Id.*

72. *Id.* (quoting United States v. U.S. Smelting Ref. & Mining Co., 339 U.S. 186, 198 (1950)).

73. *Id.* at 705. Judge Southwick filed a concurrence in which he disagreed with the two-member majority that the question of class certification was not left open on remand. *See id.* (Southwick, J., concurring). Judge Southwick argued that the district court did not err in allowing discovery and again considering the issue of class certification; however, nothing in the allegedly new evidence allowed certification. *See id.*

74. *See* Spotts v. United States, 613 F.3d 559, 573-74 (5th Cir. July 2010).

75. *Id.* at 565.

76. *See id. See generally* Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 389 (1971) (recognizing an implied cause of action for damages against federal officers alleged to have violated the plaintiff's Fourth Amendment rights).

77. *Spotts*, 613 F.3d at 565.

78. *See id.* at 573-74.

79. *See id.* at 573.

landfall, and in any event, the tort was continuing, given the officials' decision not to take remedial steps.[80]

The Fifth Circuit affirmed the district court's denial of leave to amend on the ground of futility.[81] The Fifth Circuit began its analysis by noting that although a district court's denial of leave to amend is generally reviewed for abuse of discretion, where, as here, "the district court's sole reason for denying such an amendment is futility, 'we must scrutinize that decision somewhat more closely, applying a de novo standard of review similar to that under which we review a dismissal under Rule 12(b)(6).'"[82] The court rejected the plaintiffs' statute of limitations argument, noting that federal civil rights claims filed in Texas are subject to Texas's two-year statute of limitations for personal injury.[83] The court also rejected the plaintiffs' argument regarding accrual, noting that the time of the actual diagnosis is not dispositive and that "a claim accrues and 'the limitations period begins to run the moment the plaintiff becomes aware that he has suffered an injury or has sufficient information to know that he has been injured.'"[84] Finally, the plaintiffs' argument regarding a continuing tort was unavailing because the plaintiffs did not "attempt to draw any causal connection between [the] evacuation decision and the continuing presence of mold on the [p]enitentiary walls."[85] Accordingly, the court held that the amendment would have been futile because the *Bivens* claims were time-barred.[86]

E. "Futility" As a Ground for Denying a Plaintiff Leave to Amend Under Rule 15(a)(2) Where Amendment Merely Supplements Existing Allegations and Plaintiff Has Failed to Present Evidence of Fraud

The Fifth Circuit's opinion in *Adams Family Trust v. John Hancock Life Insurance Co.*, addressed an unusual procedural issue.[87] The Adams Family Trust brought suit in Louisiana state court against John Hancock for fraud; John Hancock removed the action to federal court, and the parties conducted extensive discovery.[88] After John Hancock moved for summary judgment, the Trust sought leave to amend its complaint in order to allege fraud with greater particularity and to amend the scheduling order.[89] In its motion, the Adams Family Trust did not explain the "alternative demands" and claims it allegedly

80. *See id.* at 574.
81. *See id.*
82. *Id.* at 566 (quoting Wilson v. Bruks-Klockner, Inc., 602 F.3d 363, 368 (5th Cir. 2010)).
83. *Id.* at 573-74 (citation omitted).
84. *Id.* at 574 (quoting Piotrowski v. City of Hous., 237 F.3d 567, 576 (5th Cir. 2001)).
85. *Id.*
86. *Id.*
87. *See* Adams Family Trust v. John Hancock Life Ins. Co., 424 F. App'x 377, 380-81 (5th Cir. May 2011) (per curiam).
88. *See id.* at 379-80.
89. *See id.*

intended to assert against John Hancock, "did not give detailed reasons for why it needed its amendment," and did not "provide the district court with a copy of the proposed amendment."[90] The trial court denied the plaintiff's motion for leave and, one month later, granted summary judgment that the Adams Family Trust take nothing on its fraud claim.[91]

On appeal, the Fifth Circuit found that the Adams Family Trust waived any complaint about the errors in the summary judgment because its appellate brief only made passing reference—one "unadorned" sentence—that inadequately briefed those errors.[92]

Next, the panel held that the only issue properly preserved for appeal was the trial court's denial of the Trust's request to amend its complaint.[93] The trial court did not, however, abuse its discretion in denying the motion because granting the requested relief "would have been futile" for three reasons.[94] First, even according to the Trust, the proposed amendment addressed the same misconduct alleged in its state court petition and would do nothing more than supplement the same allegations that were already before the court.[95] Second, an amendment was not necessary or helpful because John Hancock never challenged the adequacy of the Trust's pleadings.[96] Rather, the pending challenge concerned the merits of the fraud claim, not whether it was pleaded with sufficient detail.[97] Third, the Trust—as the nonmovant facing possible disposition on the merits—had a burden to go beyond the pleadings and come forward with specific evidence or show that facts in the record precluded summary judgment.[98] Simply amending its complaint would not have changed the trial court's disposition of the summary judgment motion.[99]

This case should serve as a cautionary tale for attorneys unfamiliar with the rigors of federal practice. Regardless of the validity of the Adams Family Trust's claims against John Hancock, the Trust's opportunity to present its claims at trial was lost through an inadequate response to the motion for summary judgment and then harmed again by inadequate appellate briefing.

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90. *Id.* at 380.

91. *See id.*

92. *Id.* at 380 n.2 (citing Jones v. Sheehan, Young & Culp, P.C., 82 F.3d 1334, 1338 (5th Cir. 1996)) ("Rule 56 . . . saddles the non-movant with the duty to 'designate' the specific facts in the record that create genuine issues precluding summary judgment, and does not impose upon the district court a duty to survey the entire record in search of evidence to support a non-movant's opposition. Nor is it our duty to so scrutinize the record on appeal.").

93. *See id.* at 380.

94. *Id.* at 381.

95. *Id.*

96. *See id.*

97. *See id.*

98. *See id.*

99. *Id.*

F. Certification of a Class Under Rule 23(b)(1)(A), Rule 23(b)(2), and Rule 23(b)(3): Casa Orlando Apartments, Ltd. v. Federal National Mortgage Association

In *Casa Orlando Apartments, Ltd. v. Federal National Mortgage Ass'n*, the Fifth Circuit addressed all three grounds for certifying a class action under Rule 23(b).[100] The plaintiffs were mortgagors whose mortgages for low-income, multi-family housing were held or serviced by the Federal National Mortgage Association (Fannie Mae) and insured by the Department of Housing and Urban Development.[101] The plaintiffs sued Fannie Mae on behalf of themselves and those similarly situated for breach of fiduciary duty.[102] The plaintiffs argued they were required to sign a Regulatory Agreement, pursuant to which they were to establish funds with the mortgagee, including a fund intended to ensure that the mortgagors had money available to effectuate repairs on the properties.[103] According to the plaintiffs, the Regulatory Agreement created a fiduciary relationship between Fannie Mae and class members; Fannie Mae held the funds in trust for class-member mortgagors; and Fannie Mae breached its fiduciary duties by engaging in self-dealing with some of the mortgagors' funds, resulting in unjust enrichment.[104] The plaintiffs defined the class to include all mortgagors located anywhere in the United States whose mortgages: (1) were insured under certain provisions of the National Housing Act; (2) were held or serviced by Fannie Mae; and (3) required the mortgagors to make deposits in Reserve and Residual Funds, where such funds were uninvested in part or whole for any period of time.[105] The district court denied class certification.[106] The Fifth Circuit affirmed, holding that certification was not proper under either Rule 23(b)(1)(A), Rule 23(b)(2), or Rule 23(b)(3).[107]

1. Rule 23(b)(3)

First, the Fifth Circuit held that class certification could not be maintained under Rule 23(b)(3).[108] The court noted that in order for common issues to

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100. *See* Casa Orlando Apartments, Ltd. v. Fed. Nat'l Mortg. Ass'n, 624 F.3d 185, 201 (5th Cir. Oct. 2010).

101. *Id.* at 189.

102. *Id.*

103. *Id.*

104. *See id.* at 189-90.

105. *See id.* at 190.

106. *Id.*

107. *Id.* at 201.

108. *See id.* at 196. Rule 23(b)(3) provides that a class action may be maintained if "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." FED. R. CIV. P. 23(b)(3).

The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of

"predominate" and justify a Rule 23(b)(3) certification in a multi-state class action alleging breach of fiduciary duty, "each state must have the same standards for establishing fiduciary relationship and breaching the resulting duty."[109] Because the policies of the states and districts with an interest in the matter (Illinois, Texas, the District of Columbia) varied considerably with respect to the establishment of a fiduciary duty, the applicable burden of proof standards, and unjust enrichment, certification could not be maintained under Rule 23(b)(3).[110]

2. Rule 23(b)(1)(A)

The Fifth Circuit also held that class certification could not be maintained under Rule 23(b)(1)(A).[111] The Fifth Circuit began its analysis by clearing up some confusion on whether certification is proper under Rule 23(b)(1)(A) only when the defendant consents.[112] The court disclaimed its prior reliance in an unpublished decision on the principle that Rule 23(b)(1)(A) class certification depends on whether the defendant opposes the certification, stating, "[w]e find nothing in the plain text of Rule 23 that permits a defendant's veto over (b)(1)(A) certification."[113] Instead, class certification was not proper under the rule because separate actions would not result in incompatible standards of conduct for Fannie Mae.[114] Specifically, four of the ten remedies sought related to monetary compensation, and no inconsistency is created when courts award varying levels of money damages.[115] Further, varying results with respect to the plaintiffs' requested injunctive relief were not necessarily incompatible (e.g., an order requiring Fannie Mae to cease its relationship with an entity would not be incompatible with an order not requiring it to do so).[116] Indeed, varying

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separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

Id. at 23(b)(3)(A)-(D).

109. *Casa Orlando Apartments*, 624 F.3d at 194.

110. *See id.* at 195-96.

111. *See id.* at 198. The Fifth Circuit noted that the second subsection of this prong—Rule 23(b)(1)(B)—had also been deemed inapplicable by the district court, but the plaintiffs had not appealed that determination. *See id.* at 196 n.33. That subsection allows certification if "prosecuting separate actions by or against individual class members would create a risk of: (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class[.]" FED. R. CIV. P. 23(b)(1)(A).

112. *Casa Orlando Apartments*, 624 F.3d at 196-97.

113. *Id.* at 197.

114. *Id.*

115. *See id.*

116. *See id.*

judgments on the plaintiffs' requests for injunctive relief would simply reflect diverse state fiduciary law.[117]

3. Rule 23(b)(2)

Finally, the Fifth Circuit held that class certification could not be based on Rule 23(b)(2).[118] Certification is appropriate under this rule if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief is appropriate respecting the class as a whole."[119] Factors considered in this determination include: "1) whether the defendant's behavior is generally applicable to the class as a whole, and 2) whether injunctive relief predominates over monetary relief."[120] While Fannie Mae's behavior was generally applicable to the class as a whole, injunctive relief did not predominate over monetary relief.[121] Instead, monetary relief predominated because it was not merely "incidental" to the requested injunctive relief, i.e., did not "flow directly from liability to the class *as a whole*."[122] Given each state's varying laws on fiduciary duty, liability could not be proven for this nationwide class; hence, class-wide disgorgement was not feasible.[123] Further, "over sixty percent of class-qualifying mortgages [were] no longer operative. Thus, less than forty percent of the class would benefit from the proposed injunctive relief."[124] The percentage of the class benefitting from an injunction (40%) was insufficient for certification under Rule 23(b)(2).[125] The Fifth Circuit also distinguished prior cases on the ground that they were civil rights cases, stating that "[w]hile (b)(2) classes are not exclusively reserved for civil rights disputes, this class type is especially suited for those plaintiffs."[126]

Notably, the Supreme Court recently addressed a key aspect of the *Casa Orlando Apartments* opinion—namely, whether damages that are merely "incidental" to the injunctive or declaratory relief can be awarded to a Rule 23(b)(2) class.[127] In *Wal-Mart Stores, Inc. v. Dukes*, the Supreme Court addressed the Fifth Circuit's opinion in *Allison v. Citgo Petroleum Corp.*, a case relied upon by the Fifth Circuit in *Casa Orlando Apartments* for its conclusion that certification under Rule 23(b)(2) is improper where monetary relief predominates *unless certification is "incidental" to the requested*

117. *See id.* at 198.
118. *See id.* at 201.
119. *See id.* at 198 (citing FED. R. CIV. P. 23(b)(2)).
120. *Id.* at 198.
121. *See id.* at 198-99.
122. *Id.* at 199 (quoting Allison v. Citgo Petroleum Corp., 151 F.3d 402, 415 (5th Cir. 1998)).
123. *See id.*
124. *Id.* at 200.
125. *Id.*
126. *Id.* at 200-01.
127. *See* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2547 (2011).

injunctive or declaratory relief.[128] The Supreme Court left open the specific question of whether damages that are merely "incidental" to the injunctive or declaratory relief can be awarded to a Rule 23(b)(2) class as outlined in *Allison*:

> In *Allison v. Citgo Petroleum Corp.*, the Fifth Circuit held that a (b)(2) class would permit the certification of monetary relief that is "incidental to requested injunctive or declaratory relief," which it defined as "damages that flow directly from liability to the class *as a whole* on the claims forming the basis of the injunctive or declaratory relief." In that court's view, such "incidental damage should not require additional hearings to resolve the disparate merits of each individual's case; it should neither introduce new substantial legal or factual issues, nor entail complex individualized determinations." We need not decide in this case whether there are any forms of "incidental" monetary relief that are consistent with the interpretation of Rule 23(b)(2) we have announced and that comply with the Due Process Clause.[129]

Courts have noted that while the Supreme Court left the specific question concerning "incidental" monetary relief open, it apparently rejected the general notion that monetary damages are recoverable in a Rule 23(b)(2) class so long as they do not "predominate" over the injunctive or declaratory relief.[130]

G. District Court's Duty to Conduct a Rigorous Analysis of the "Predominance" Requirement in Certifying a Class Under Rule 23(b)(3): Madison v. Chalmette Refining, L.L.C.

In *Madison v. Chalmette Refining, L.L.C.*, the Fifth Circuit addressed a district court's duty to conduct a rigorous analysis of the "predominance" requirement in certifying a class under Rule 23(b)(3).[131] The plaintiffs attended a historical reenactment at a national battlefield when the defendant, a refinery adjacent to the battlefield, released an amount of petroleum coke dust that the plaintiffs alleged migrated over the battlefield.[132] The plaintiffs sued the defendant, seeking damages for personal injury, property damage, and various

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128. *See id.* at 2560 (citing Allison v. Citgo Petroleum Corp., 151 F.3d 402, 415 (5th Cir. 1998)); *Casa Orlando Apartments*, 624 F.3d at 199 n.52.

129. *Wal-Mart Stores*, 131 S. Ct. at 2560 (citations omitted) (quoting *Allison*, 151 F.3d at 415).

130. *See id.* at 2559 ("The mere 'predominance' of a proper (b)(2) injunctive claim does nothing to justify elimination of Rule 23(b)(3)'s procedural protections . . . . We fail to see why the Rule should be read to nullify these protections whenever a plaintiff class, at its option, combines its monetary claims with a request—even a 'predominating request'—for an injunction."); *see also* Morrow v. Washington, 277 F.R.D. 172, 202-03 (E.D. Tex. 2011) ("The *Wal-Mart* Court expressly rejected the general statement that monetary damages are recoverable in a (b)(2) class so long as they did not predominate over the injunctive or declaratory relief . . . . However, in reaching this ruling, the Supreme Court left open the more specific question of whether damages that are merely 'incidental' to the injunctive or declaratory relief can be awarded to a 23(b)(2) class as outlined in the Fifth Circuit's decision in *Allison*.").

131. *See* Madison v. Chalmette Ref., L.L.C., 637 F.3d 551, 556 (5th Cir. Apr. 2011).

132. *See id.* at 553.

mental and emotional injuries.[133] The plaintiffs moved for class certification under Rule 23(b)(3), defining the proposed class as "all persons entities (sic) located at the Chalmette National Battlefield in St. Bernard Parish, Louisiana, in the early afternoon of Friday, January 12, 2007 and who sustained property damage, personal injuries, emotional, mental, or economic damages and/or inconvenience or evacuation as a result of the incident."[134]

The district court certified the class under Rule 23(b)(3).[135] The Fifth Circuit reversed, holding "that the district court abused its discretion by failing to afford its predominance determination the 'rigorous analysis' that Rule 23 requires."[136]

The Fifth Circuit noted that to certify a class under Rule 23(b)(3), a party must "demonstrate both (1) that questions common to the class members predominate over questions affecting only individual members, and (2) that class resolution is superior to alternative methods for adjudication of the controversy."[137] Determining whether the predominance requirement is satisfied requires the court "to consider 'how a trial on the merits would be conducted if a class were certified.'"[138] "This, in turn, 'entails identifying the substantive issues that will control the outcome, assessing which issues will predominate, and then determining whether the issues are common to the class,' a process that ultimately 'prevents the class from degenerating into a series of individual trials.'"[139]

Here, the district court failed to conduct a rigorous analysis of the predominance requirement when it "failed to consider whether [the] case could be 'streamlined using other case management tools, including narrowing the claims and potential plaintiffs through summary judgment, [or] facilitating the disposition of the remaining plaintiffs' claims through issuance of a Lone Pine order.'"[140] Indeed, the district court conducted no analysis regarding how it would administer the trial.[141] Further, the district court failed to identify the substantive issues that would control the outcome, assess the issues that would predominate, and then determine whether the issues were common to the class, making it "impossible . . . to know whether the common issues would be a 'significant' portion of the individual trials."[142] Instead, "the district court

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133. *See id.*

134. *Id.* at 553-54 (alteration in original) (quoting Madison v. Chalmette Ref., L.L.C., No. 07-307, 2010 WL 2360677, at *3 (E.D. La. June 8, 2010)).

135. *See id.* at 554.

136. *Id.* at 556.

137. *Id.* at 554 (quoting Feder v. Elec. Data Sys. Corp., 429 F.3d 125, 129 (5th Cir. 2005)).

138. *Id.* at 555 (quoting Sandwich Chef of Tex., Inc. v. Reliance Nat'l Indem. Ins. Co., 319 F.3d 205, 218 (5th Cir. 2003)).

139. *Id.* (quoting O'Sullivan v. Countrywide Home Loans, Inc., 319 F.3d 732, 738 (5th Cir. 2003)).

140. *Id.* at 556 (second alteration in original) (footnote omitted) (quoting Steering Comm. v. Exxon Mobil Corp., 461 F.3d 598, 604 (5th Cir. 2006)).

141. *Id.* at 556-57.

142. *Id.* at 557 (quoting Castano v. Am. Tobacco Co., 84 F.3d 734, 745 (5th Cir. 1996)) (citing Bell Atl. Corp. v. AT&T Corp., 339 F.3d 294, 301 (5th Cir. 2003)).

simply concluded that '[t]he common liability issues can be tried in a single class action trial with any individual issues of damages reserved for individual treatment.'"[143] The district court's characterization of "the issue of liability as '[p]laintiffs were either on the battlefield and exposed to the coke dust or they were not'" was an oversimplification, given the existence of "significant disparities in terms of exposure, location, and whether mitigative steps were taken."[144] Consequently, the Fifth Circuit reversed and remanded so that the district court could conduct a more rigorous analysis of the predominance requirement.[145]

H. The Fifth Circuit Applies the Political Question Doctrine and the Rarely Seen "Act of State" Doctrine to Dismiss Under Rule 12(b)(1) and 12(b)(6)

In *Spectrum Stores, Inc. v. Citgo Petroleum Corp.*, the Fifth Circuit considered an appeal of a judgment dismissing the plaintiffs' action under Rule 12(b)(1) based on the political question doctrine and Rule 12(b)(6) based on the act of state doctrine.[146] Spectrum and the other plaintiffs (all gasoline retailers) brought class-action claims against more than twenty private and foreign-government-owned oil producers such as Citgo, the Saudi Arabian Oil Company, and Petroleos de Venezuela S.A.[147] In five cases, which were ultimately consolidated, the plaintiffs asserted antitrust and other claims against the oil producers challenging the existing structure of international energy policy.[148] To wit, the global economy is driven by petroleum-based products, and several oil-rich countries with bountiful petroleum resources formed a cartel, the Organization of Petroleum Exporting Countries (OPEC), in the 1960s to control production and secure the best market prices for their crude oil.[149]

Critically, after OPEC's inception, its members developed nationally owned oil production companies and subsidiaries that operate within the United States.[150] OPEC member nations *and* their U.S.-based operating entities participate in periodic meetings to fix prices of crude oil and refined petroleum products such as gasoline in the United States, primarily by limiting crude-oil production.[151] The plaintiffs' claims challenged the producing defendants' participation in "OPEC's price-fixing conspiracy to sell oil-based products at

143. *Id.* at 556 (alteration in original) (quoting Madison v. Chalmette Ref. L.L.C., No. 07-307, 2010 WL 2360677, at *7 (E.D. La. June 8, 2010)).

144. *Id.* at 557 (first quote quoting *Madison*, 2010 WL 2360677, at *6).

145. *See id.*

146. *See* Spectrum Stores, Inc. v. Citgo Petroleum Corp., 632 F.3d 938, 943, 945 (5th Cir. Feb. 2011), *cert. denied*, 132 S. Ct. 366 (2011).

147. *See id.* at 943 & nn.1-5.

148. *See id.* at 943-44.

149. *Id.* at 944.

150. *Id.*

151. *Id.*

anti-competitive prices in the United States" through section one of the Sherman Act, 15 U.S.C. § 1, and section four of the Clayton Act, 15 U.S.C. § 15.[152]

Once the cases were consolidated, Citgo and the other defendants moved to dismiss the case on the basis that the claims presented nonjusticiable political questions and failed to state a claim for which relief could be granted because the adjudication of the claims would contravene the act of state doctrine.[153]

The venerable Judge Sim Lake dismissed the plaintiffs' claims after finding that: (i) the complaints—at their core—challenged "the decisions of sovereign states to restrict the production of crude oil located within their own territories";[154] (ii) although the defendants alleged that the U.S.-based subsidiaries "facilitated, enabled, and provided direct assistance to the [OPEC] cartel's price-fixing scheme," the adjudication of the plaintiffs' claims would require the court to pass judgment on the legality of crude oil production decisions made by foreign sovereigns;[155] and (iii) irrespective of how "artfully worded" the complaint was drafted, "to limit reference to the actions performed by the sovereign members of the conspiracy" and to "minimize[] its description of the acts performed by the conspiracy's sovereign members," the actions attributed to the named defendants are actions that merely facilitate, enable, and assist the foreign sovereign state members of the conspiracy.[156] Ultimately, the district court concluded that the claims were nonjusticiable because trying them would interfere with the Executive Branch's "longstanding foreign policy that issues relating to crude oil production by foreign sovereigns be resolved through intergovernmental negotiation."[157] The plaintiffs appealed.[158]

The Fifth Circuit, at the outset of its analysis, agreed with the district court's characterization of the plaintiffs' allegations.[159] Specifically, nothing in the plaintiffs' complaint alleged an independent conspiracy based on refining decisions; all of the claims pointed back to OPEC and decisions by foreign states.[160]

Looking to the United States Supreme Court's seminal decision in *Baker v. Carr*, the Fifth Circuit analyzed whether subject matter jurisdiction existed.[161] In *Baker v. Carr* and subsequent jurisprudence, the Supreme Court established that '"[t]he concept of justiciability,' as embodied in the political question doctrine, 'expresses the jurisdictional limitations imposed upon federal

152. *Id.*
153. *Id.* at 945.
154. *Id.* (quoting *In re* Refined Petroleum Prods. Antitrust Litig., 649 F. Supp. 2d 572, 597 (S.D. Tex. 2009)).
155. *Id.* at 945-46 (alteration in original) (quoting *Refined Petroleum Prods.*, 649 F. Supp. 2d at 585).
156. *Id.* at 946 (quoting *Refined Petroleum Prods.*, 649 F. Supp. 2d at 586-87).
157. *Id.* (quoting *Refined Petroleum Prods.*, 649 F. Supp. 2d at 597).
158. *Id.* at 943.
159. *Id.* at 947.
160. *Id.*
161. *Id.* at 948-49 (citing Baker v. Carr, 369 U.S. 186, 198 (1962)).

courts by the "case or controversy" requirement of Art[icle] III.'"[162] The political question doctrine is not a black-line rule but a balancing test intended to accord due deference to other branches of government by "exclud[ing] from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch."[163] In *Baker v. Carr*, the Supreme Court set forth the seminal test for analyzing whether a claim presents a political question, "any one of which is sufficient to indicate the presence of a nonjusticiable political question":

> [1.] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2.] a lack of judicially discoverable and manageable standards for resolving it; or [3.] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4.] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5.] an unusual need for unquestioning adherence to a political decision already made; or [6.] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[164]

Applying the *Baker v. Carr* factors, the Fifth Circuit concluded that the plaintiffs' claims touched on a long list of Article I and Article II powers[165] and that the claims' impact on those textual provisions was material.[166] Here, the court believed that it was "asked essentially to reprimand foreign nations and command them to dismantle their international agreements," a serious charge indeed.[167] Supporting (or perhaps compelling) that conclusion, the Departments of State, Treasury, Energy, and Justice each filed briefs alleging that the litigation would frustrate national interests and jeopardize national security.[168]

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162. *Id.* at 948 (alterations in original) (quoting Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 215 (1974)); *see also* Massachusetts v. EPA, 549 U.S. 497, 516 (2007) (noting, in light of the fact that "Article III of the Constitution limits federal-court jurisdiction to 'Cases' and 'Controversies,'" that it is "familiar learning that no justiciable 'controversy' exists when parties seek adjudication of a political question").

163. *Spectrum Stores*, 632 F.3d at 949 (quoting Japan Whaling Ass'n v. Am. Cetacean Soc., 478 U.S. 221, 230 (1986)).

164. *Id.* (alterations in original) (block quote quoting *Baker*, 369 U.S. at 217).

165. *Id.* at 950 (citing U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations . . . ."); art. II, § 2, cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States . . . ."); art. II, § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, [and] other public Ministers and Consuls . . . ."); and art. II, § 3 ("[The President] shall . . . receive Ambassadors and other public Ministers . . . .")).

166. *Id.* at 950-51 (comparing material and nonmaterial impacts on powers delegated to the other branches).

167. *Id.* at 951.

168. *Id.* at 951-52.

Second, the claims were not manageable because they would ask the parties to litigate and the court to examine and "make a pronouncement on the resource-exploitation decisions of foreign sovereigns that control the global supply of oil."[169] The scope of the litigation implicated that the litigation would be unmanageable.[170]

With respect to the remaining factors, the panel emphasized that allowing the plaintiffs' claims to go forward would disrupt the nation's thirty-five year history of having OPEC-related disputes resolved "at the highest levels of the Executive Branch."[171] Litigation in an Article III court would be a much "blunter instrument" than the nation's choice to use negotiation as its primary tool to address concerns with OPEC nations.[172] Thus, permitting litigation to go forward would likely or "inevitably result in embarrassment" if the court's decision conflicted with the Executive Branch's position.[173] Thus, the panel concluded that each one of the *Baker* factors "counsel[ed] declining to adjudicate the merits" of plaintiffs' complaints and required affirmation of Judge Lake's order dismissing those claims.[174]

Finally, the panel concluded that the complaint also failed to state a claim for relief under the act of state doctrine.[175] That rarely seen doctrine has existed since at least 1897.[176] Under the act of state doctrine, "the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory."[177] Thus, a court will not review acts of state of a foreign power because such review "could embarrass the conduct of foreign relations by the political branches of the government."[178]

To determine whether the act of state doctrine applies, a court considers not only the acts of the named defendants but also *any* foreign nation's governmental acts that could be called into question by the adjudication of the suit.[179] The proponent of the defense must establish the factual predicate for the doctrine's application.[180] Here, the OPEC nations' decision about the exploitation and sale of their natural resources is a sovereign function and, therefore, an act of state that our federal courts will not question.[181]

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169. *Id.* at 952-53.
170. *Id.* at 953.
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.* at 954.
175. *Id.*
176. *See* Underhill v. Hernandez, 168 U.S. 250 (1897) (applying the act of state doctrine).
177. *Spectrum Stores*, 432 F.3d at 954 (quoting *Underhill*, 168 U.S. at 252).
178. *Id.* (quoting First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 765 (1972)).
179. *Id.* (citing Callejo v. Bancomer, 764 F.2d 1101, 1115-16 (5th Cir. 1985)).
180. *Id.* (citing Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 694 (1976)).
181. *Id.* (citing United States v. California, 332 U.S. 19, 38-39 (1947)).

I. Shifting Discovery Costs Under Rule 54: Rundus v. City of Dallas

In *Rundus v. City of Dallas*, the Fifth Circuit addressed a district court's ability to award costs incurred in responding to discovery under Rule 54, governing judgment costs.[182] The plaintiff sued the City of Dallas and the State Fair of Texas, a nonprofit corporation, under 42 U.S.C. § 1983, alleging that they violated his First Amendment rights by preventing him from distributing free Bible tracts at the Texas State Fair.[183] After a bench trial, the district court entered judgment in favor of the defendants on the ground that the State Fair was not a state actor and awarded the defendants costs incurred in making copies to respond to his discovery requests.[184] On appeal, the plaintiff first argued that the district court erred in ordering him to repay the defendants' costs incurred in responding to his discovery requests under Rule 54.[185] According to the plaintiff, the Supreme Court held in *Oppenheimer Fund, Inc. v. Sanders* that costs incurred in preparing discovery responses could not be assessed.[186] The plaintiff also argued that "Article V of the Federal Rules of Civil Procedure . . . creates an obligation to comply with discovery requests made under [that] article and bear the costs of compliance."[187] The Fifth Circuit panel noted, however, that the plaintiff did not cite any rule of procedure that, by its text, supported his argument.[188]

Subjecting Rundus's challenge to de novo review,[189] the panel found that *Oppenheimer* established a limited but clear precedent that "the responding party must bear the burden of *responding* to discovery requests."[190] While the City of Dallas and the State Fair of Texas acknowledged that they were required to bear their own costs *initially when actually responding to discovery*, they argued, and the trial court agreed, that the court could shift such costs at the conclusion of the litigation.[191] The Fifth Circuit agreed.[192] The panel distinguished *Oppenheimer* by noting that the Supreme Court did not mention or even attempt to analyze Rule 54.[193] Moreover, the *Oppenheimer* opinion directly addressed costs of provided notice arising out of a class action, not discovery costs, so the *Oppenheimer* decision did not address—or purport to address—whether, at the conclusion of the trial stage of litigation, discovery

182. *See* Rundus v. City of Dallas, 634 F.3d 309, 311 (5th Cir. Feb. 2011); FED. R. CIV. P. 54.
183. *Rundus*, 634 F.3d at 311.
184. *Id.* at 312.
185. *Id.* at 315 (citing Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 358 (1978)).
186. *Id.* (citing *Oppenheimer*, 437 U.S. at 340).
187. *Id.* (second alteration in original).
188. *See id.* at 315 & n.7.
189. *Id.* at 315 (citing Romaguera v. Gegenheimer, 162 F.3d 893, 895 (5th Cir. 1998) (interpreting the Rules is a legal question)).
190. *Id.* (quoting *Oppenheimer*, 437 U.S. at 358).
191. *Id.* at 315-16.
192. *Id.* at 316.
193. *Id.* (citing *Oppenheimer*, 437 U.S. at 358).

costs can be assessed against the losing party.[194] Rundus's reliance on *Oppenheimer* was misplaced.

Another decision, however, was controlling: the 1964 Fifth Circuit decision in *Harrington v. Texaco, Inc.*[195] In *Harrington*, the Fifth Circuit held that a trial court can assess discovery costs against the losing party at the conclusion of the litigation.[196] The *Harrington* court held that "the authority of the trial court to assess 'necessary and reasonable' costs incurred during discovery 'can hardly be doubted.'"[197] The Fifth Circuit, therefore, rejected the plaintiff's appeal and held that the trial court could (and did) properly assess discovery costs against the plaintiff.[198]

In light of the significant costs that modern discovery, particularly electronic discovery, may impose on a party, it is wise for a party to use this decision to apply for and recover an award of the discovery costs it incurred through the conclusion of the litigation.

J. The Fifth Circuit Nullifies a Local Rule that Would Have Scuttled a Valid Appeal: Darouiche v. Fidelity National Insurance Co.

In *Darouiche v. Fidelity National Insurance Co.*, the Fifth Circuit addressed a flood insurance policy holder's appeal of a summary judgment granted in favor of Fidelity on the issue of the insured's failure to satisfy conditions precedent to bringing suit.[199] As a preliminary matter, however, the panel considered whether it had jurisdiction to consider the appeal due to a question about the plaintiff's motion for new trial and notice of appeal.[200] Given the potentially dispositive nature of the issue—rejecting the appeal as untimely and determining, therefore, that the district court's judgment was final—the panel asked the parties to provide additional briefing on this "special issue."[201]

Pursuant to Federal Rule of Appellate Procedure 4(a)(1)(A), "Darouiche had 30 days 'after the judgment or order appealed from [wa]s entered' to file his notice of appeal in the district court."[202] The district court signed an order granting summary judgment on January 12, 2010, but the clerk did not formally enter the order on the docket until January 13.[203] As the Texas litigator may note, in Texas state court, deadlines are based on the date an order is signed,

194. *Id.*

195. *See id.* (citing Harrington v. Texaco, Inc., 339 F.2d 814, 822 (5th Cir. 1964)).

196. *Id.*

197. *Id.* (quoting *Harrington*, 339 F.2d at 822).

198. *Id.*

199. *See* Darouiche v. Fidelity Nat'l Ins. Co., 415 F. App'x 548, 549 (5th Cir. Mar. 2011) (per curiam).

200. *Id.* at 551 ("The filing of a timely notice of appeal, within thirty days after entry of the court's judgment, is mandatory and jurisdictional."); *see also* Bowles v. Russell, 551 U.S. 205, 214 (2007) (discussing the requirements of a timely appeal).

201. *Darouiche*, 415 F. App'x at 551.

202. *Id.* (alteration in original) (quoting FED. R. APP. P. 4(a)(1)(A)).

203. *See id.* & n.4.

but in federal court, deadlines are triggered by the entry of an order on the docket.[204]

Darouiche electronically filed his motion for a new trial on February 10, 2010, the last day to do so in light of the entry date of the summary judgment.[205] That pleading included a proposed order, but Darouiche filed the order as part of the same document, not as a separate attachment on the electronic filing (PACER) system.[206] The clerk for the United States District Court for the Eastern District of Louisiana flagged the motion as "deficient" because of Darouiche's failure to comply with local rules, which required a movant to file his proposed order granting the requested relief as a separate attachment.[207] Immediately after receiving notice of the alleged deficiency, "Darouiche filed a corrected motion that was identical in all respects to the earlier version except for the placement of the proposed order."[208] But, unfortunately, Darouiche filed the corrected motion after the deadline to file a motion for new trial under Federal Rule of Civil Procedure 59(b).[209] The district court summarily denied Darouiche's motion for new trial on May 14, 2010, and it did not address whether the plaintiff's motion was timely filed.[210]

Pursuant to Federal Rule of Appellate Procedure 4(a)(4)(A)(v), Darouiche's motion for new trial—if timely filed—would have extended his deadline to file a notice of appeal to June 11, 2010.[211] "But if Darouiche's motion for new trial was untimely, it 'd[id] not toll the running of the thirty-day clock to appeal to [the Fifth Circuit],'" and the appellate court lacked jurisdiction to hear the appeal.[212]

The Fifth Circuit determined that Darouiche's appeal was timely because, "[a]lthough the February 10 motion was deemed 'deficient,' the complained-of error was based solely on a local rule that requires a proposed order to be

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204. *Compare* TEX. R. CIV. P. 306a ("Beginning of periods. The *date of judgment or order is signed as shown of record shall determine the beginning of the periods* prescribed by these rules for the court's plenary power to grant a new trial [and for] motions to modify judgment, motions to reinstate a case dismissed for want of prosecution, motions to vacate judgment and requests for findings of fact and conclusions of law . . . ." (emphasis added)), *and* TEX. R. APP. P. 26.1 ("The notice of appeal must be filed within 30 days *after the judgment is signed*" subject to certain exceptions (emphasis added)), *with* FED. R. CIV. P. 59(b) (motion for new trial "must be filed *no later than 28 days after the entry of judgment*" (emphasis added)), *and* FED. R. CIV. P. 59(e) (deadline to file motion to alter or amend judgment runs from the date of entry), *and* FED. R. CIV. P. 60(c) (motion for judgment nunc pro tunc must be made no later than "a year *after the entry of the judgment* or order" (emphasis added)), *and* FED. R. CIV. P. 62(a) (enforcement of judgment), *and* FED. R. APP. P. 4(a)(1)(A) (notice of appeal must be filed "within 30 days after . . . the judgment or order appealed from" is entered); *see also* FED. R. APP. P. 4(a)(7) ("Entry Defined").

205. *See Darouiche*, 415 F. App'x at 551.

206. *See id.*

207. *See id.*

208. *Id.*

209. *See id.*

210. *See id.*

211. *See id.*

212. *Id.* (first alteration in original) (quoting Vincent v. Consol. Operating Co., 17 F.3d 782, 785 (5th Cir. 1994)).

electronically filed as a separate attachment."[213] The local rule, promulgated in the district court's aptly-named *Unique Procedures and Practices for Electronic Filing*, required that "[p]roposed orders must be submitted in PDF format as a separate attachment to an ex parte/consent motion."[214] As a preliminary matter, the rule, on its face, does not apply to a motion for new trial because that motion was neither an ex parte nor a consent motion.[215] Thus, the clerk improperly designated that the motion was deficient.[216]

More importantly, even if the rule applied to Darouiche's motion and the court rejected a pleading on the basis of a "minor formatting error," that rule would "unjustifiably elevate form over substance."[217] In fact, the panel stated that rejecting the pleading would nullify the rule under Federal Rule of Civil Procedure 83.[218] Rule 83(a)(1) states, in relevant part, "[a] local rule must be consistent with—but not duplicate—federal statutes and rules."[219] Rule 83(a)(2) provides that "[a] local rule imposing a requirement of form must not be enforced in a way that causes a party to lose any right because of a nonwillful failure to comply."[220] "Local rules generally have the force of law 'as long as they do not conflict with a rule prescribed by the Supreme Court, Congress, or the Constitution.'"[221] Here, the "separate attachment rule" would have caused Darouiche to lose his right to appeal if strictly enforced, and there was no indication that Darouiche's noncompliance was willful.[222] Therefore, the panel disregarded the local rule and concluded that Darouiche's motion for new trial and notice of appeal were timely filed.[223]

Darouiche did not fare as well on the merits. The Fifth Circuit affirmed the district court's summary judgment in favor of Fidelity.[224]

K. Relation Back of Amendments Under Rule 15(c)(1)(C): Tapp v. Shaw Environmental, Inc.

In *Tapp v. Shaw Environmental, Inc.*, the Fifth Circuit addressed relation-back of amended complaints substituting new defendants.[225] The plaintiff leased a trailer following Hurricanes Katrina and Rita.[226] The plaintiff

213. *Id.* at 552.
214. *Id.* & n.8.
215. *See id.* at 552.
216. *See id.*
217. *Id.*
218. *See id.*
219. FED. R. CIV. P. 83(a)(1).
220. FED. R. CIV. P. 83(a)(2).
221. *Darouiche*, 415 F. App'x at 552 (quoting Kinsley v. Lakeview Reg'l Med. Ctr. L.L.C., 570 F.3d 586, 589 (5th Cir. 2009)); *see* Contino v. United States, 535 F.3d 124, 126 (2d Cir. 2008).
222. *See Darouiche*, 415 F. App'x at 552.
223. *See id.*
224. *Id.* at 553-54.
225. *See* Tapp v. Shaw Envtl., Inc., 401 F. App'x 930, 932-33 (5th Cir. Nov. 2010) (per curiam).
226. *Id.* at 931.

"allegedly suffered severe burns when a different trailer she was occupying caught fire."[227] Believing that the trailer that caught fire was the trailer she leased, the plaintiff sued the original defendants on the grounds that they were allegedly connected to the trailer she leased.[228] When the plaintiff later determined that the trailer she leased was not the trailer that caught fire, she amended her complaint to add two defendants allegedly related to the second trailer.[229] Both defendants moved for summary judgment on the grounds that the claims against them were untimely because the plaintiff amended the complaint after the relevant limitations period expired.[230] The district court granted the motions, holding that the amended complaint did not relate back to the original complaint under Rule 15(c), and hence the claims were untimely.[231]

The Fifth Circuit reversed the district court's grant of summary judgment as to one defendant but affirmed the grant of summary judgment as to the other.[232] As to the first defendant, the court held that the plaintiff's amended complaint did relate back because the requirements of Rule 15(c)(1)(C) had been satisfied.[233] Under Rule 15(c)(1)(C), an amendment changing "the party or the naming of the party against whom a claim is asserted" relates back to the date of the original pleading

> if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:
>
> (i) received such notice of the action that it will not be prejudiced in defending on the merits; and
>
> (ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.[234]

Because "Rule 4(m) provides a 120-day time period in which a defendant must be served after a complaint is filed," and because the first defendant "executed a waiver of service of summons of the amended Complaint on June 25, 2008, exactly 120 days after the filing of [the plaintiff's] original Complaint," the first defendant received actual notice of the action and knew or should have known that it would have originally been sued but for the plaintiff's mistake.[235]

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227. *Id.*
228. *See id.* at 933.
229. *See id.* at 931.
230. *See id.* at 931-32.
231. *See id.* at 932.
232. *See id.* at 934.
233. *See id.* at 933-34.
234. *See id.* at 932-33 (quoting FED. R. CIV. P. 15(c)(1)(B)); FED. R. CIV. P. 15(c)(1)(B) ("An amendment to a pleading relates back to the date of the original pleading when: . . . (B) the amendment asserts a claim or defense *that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading* . . . ." (emphasis added)).
235. *Tapp*, 401 F. App'x at 933-34.

Consequently, the amendment did relate back to the original complaint as to the first defendant, and hence summary judgment as to that defendant was improper.[236]

In contrast, there was no evidence that the plaintiff served the amended complaint on the second defendant or that the second defendant was otherwise aware of the plaintiff's suit within the period outlined by Rule 4(m).[237] Thus, the district court correctly determined that the amended complaint did not relate back as to the second defendant, and hence summary judgment was proper as to that defendant.[238]

L. Certification of a Limited Fund Mandatory Class Under Rule 23(b)(1)(B) and Approving a Class Settlement Under Rule 23(e): In re Katrina Canal Breaches Litigation

In *In re Katrina Canal Breaches Litigation*, the Fifth Circuit addressed certification of a class under Rule 23(b)(1)(B) on a "limited fund" rationale, and the requirements for approving a final class settlement under Rule 23(e).[239] The "[a]ppellants, objecting members of a proposed settlement class of plaintiffs damaged or injured by Hurricanes Katrina or Rita, [sought] review of the district court's certification of a limited fund mandatory class under [Rule] 23(b)(1)(B) and its approval of a final class settlement."[240] Under the settlement, "the class would receive roughly $21 million—representing the limits of the available insurance proceeds, plus interest—in exchange for releasing all claims against the settling defendants related to the hurricanes and/or levee failures."[241] The dissenting class members based their objection on several grounds:

> [T]he proposed [limited fund mandatory] class did not qualify as a Rule 23(b)(1)(B) class under the standards established by the Supreme Court in *Ortiz v. Fibreboard Corp.*[;] . . . [C]ertifying a mandatory settlement class in a mass tort damages action violates due process[;] . . . the content of the notice was deficient and misleading[;] and . . . the settlement itself provided no benefit to the class while allowing counsel to seek an enhancement of costs.[242]

The Fifth Circuit reversed the district court's decision to certify the class under Rule 23(b)(1)(B), holding that the class could not be certified as a mandatory limited fund class in accordance with the *Ortiz* requirements

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236. *See id.* at 934.
237. *Id.*
238. *See id.*
239. *See In re* Katrina Canal Breaches Litig., 628 F.3d 185, 189 (5th Cir. Dec. 2010).
240. *Id.*
241. *Id.* at 190.
242. *See id.*; Ortiz v. Fibreboard Corp., 527 U.S. 815, 821 (1999).

because "the settlement fail[ed] to provide a procedure for distribution of the settlement fund that treat[ed] class claimants equitably amongst themselves."[243] The Fifth Circuit explained that "[a] 'limited fund' action, which aggregates numerous claims against a fund insufficient to satisfy them all, is one type of class action traditionally encompassed by Rule 23(b)(1)(B)."[244] In *Ortiz*, the Supreme Court "counseled against 'adventurous application of Rule 23(b)(1)(B)'" in light of the "serious constitutional concerns that come with any attempt to aggregate individual tort claims on a limited fund rationale."[245] The Fifth Circuit noted that while the Supreme Court left open the constitutional question of whether a mandatory limited fund rationale could, under some circumstances, be applied to a settlement class of tort claimants, it identified three "presumptively necessary" characteristics of a traditional limited fund:

> (1) the totals of the aggregated liquidated claims and the fund available for satisfying them, set definitively at their maximums, demonstrate the inadequacy of the fund to pay all the claims,
> (2) the whole of the inadequate fund [is] devoted to the overwhelming claims, and
> (3) the claimants identified by a common theory of recovery [are] treated equitably among themselves.[246]

Regarding the third requirement, class claims ordinarily should be capable of liquidation and pro rata distribution; however, the Supreme Court "contemplated that the unattainability of straightforward pro rata distribution would not necessarily disqualify a class action from adhering to the historical model, as long as the settlement otherwise provided for fair distribution amongst the claimants in the class."[247]

The Fifth Circuit found that the third requirement—that the claimants are treated "equitably among themselves"—was not satisfied because "[t]he class members in this case suffered a wide variety of injuries, ranging from property damage to personal injury and death, and no method is specified for how these different claimants will be treated vis-à-vis each other."[248] The settlement lacked any "procedures to resolve the difficult issues of treating such differently situated claimants with fairness as among themselves."[249] Indeed, the settlement's provision "for the appointment of a special master to 'provide to the Court a recommended disposition and protocol with regard to the remaining [settlement fund], and treatment of Claims of Class members' . . . simply punt[ed] the difficult question of equitable distribution from the court to the

243. *In re Katrina Canal Breaches Litig.*, 628 F.3d at 189.
244. *Id.* at 191 (citing *Ortiz*, 527 U.S. at 834).
245. *Id.* at 192 (quoting *Ortiz*, 527 U.S. at 845).
246. *Id.* at 192-93 (alterations in original) (quoting *Ortiz*, 527 U.S. at 838-39).
247. *Id.* at 193 (citing *Ortiz*, 527 U.S. at 855-56).
248. *Id.* at 193-94.
249. *Id.* at 194 (quoting *Ortiz*, 527 U.S. at 856).

special master, without providing any more clarity as to how fairness will be achieved."[250] Consequently, the Fifth Circuit held that the district court erred in certifying a mandatory limited fund class under Rule 23(b)(1)(B).[251]

The Fifth Circuit also reversed the district court's approval of the settlement under Rule 23(e).[252] Under Rule 23(e)(2), a court may approve a settlement proposal binding class members only upon a finding "that it is fair, reasonable, and adequate."[253] Here, the settlement was not fair, reasonable, and adequate because there was no demonstration "that the settlement will benefit the class in any way."[254] The settlement provided that various administrative costs be paid out of the settlement fund, that class counsel could seek reimbursement of "enhanced" costs and expenses, and that counsel of any class member could seek attorneys' fees.[255] Because there was "no indication in the record as to what these attorneys' costs and expenses" would be, the "district court erred by approving the settlement without any assurance that attorneys' costs and administrative costs [would] not cannibalize the entire $21 million settlement."[256] Further, "any 'enhancement' of costs [was] the functional equivalent of a fee[,]" thereby rendering the district court's approval an abuse of discretion because a court must determine that "fees claimed as part of the settlement are reasonable and that the settlement itself is reasonable in light of those fees" before approving a settlement.[257]

Finally, the Fifth Circuit held that the notice requirement of Rule 23(e)(1) was not satisfied.[258] "Rule 23(e) states that a court must 'direct notice in a reasonable manner to all class members who would be bound by the proposal' before approving a settlement."[259] Here, the court did not direct reasonable notice to the class "because—assuming that a *cy pres* distribution was permissible and feasible—the notice did not inform class members of the possibility that they would not receive any direct benefit from the settlement."[260] Further, the notice "was misleading insofar as it informed class members that class counsel and other counsel for class members would not seek any attorneys' fees from the settlement."[261] Thus, the Fifth Circuit reversed the district court's order certifying the mandatory limited fund class and approving the class settlement.[262]

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250. *Id.* (first alteration in original).
251. *See id.* at 199.
252. *See id.*
253. *See id.* at 194 (quoting FED. R. CIV. P. 23(e)(2)).
254. *Id.* at 195.
255. *Id.*
256. *Id.* at 195-96.
257. *Id.* at 196.
258. *See id.* at 198.
259. *Id.* at 197 (quoting FED. R. CIV. P. 23(e)(1)).
260. *Id.* at 198. The settlement proponents argued that there would be money remaining, after the payment of administrative costs and attorneys' fees, to effect a *cy pres* distribution. *Id.* at 196.
261. *Id.* at 198.
262. *Id.* at 199.

M. Waiver of Work-Product Protection in Expert Discovery: Ecuadorian Plaintiffs v. Chevron Corporation

In *Ecuadorian Plaintiffs v. Chevron Corp.*, the Fifth Circuit addressed the extent to which information disclosed by a consulting expert to a testifying expert is discoverable under Rule 26(a)(2)(B)(ii).[263] While the decision was rendered prior to the amendment to Rule 26(a)(2)(B)(ii), effective December 1, 2010,[264] it is nonetheless useful in understanding operation of the rule as amended.

1. Rule 26(a)(2)(B)(ii)

The plaintiffs, Ecuadorian citizens, sued Chevron in Ecuador, seeking to hold it liable as the successor to Texaco Petroleum Company for alleged pollution of the Amazon Rainforest during oil extraction.[265] While the lawsuit was pending in Ecuador, Chevron initiated proceedings in federal district court to employ a federal statute allowing district courts to order discovery in the United States for use in foreign proceedings.[266] Chevron believed that an expert appointed by the Ecuadorian court to produce a report describing the environmental effects of the operations had secretly colluded with the plaintiffs' U.S. consultants in drafting the report.[267] Over the plaintiffs' objection, the district court ordered the U.S. consultant to produce a list of documents that were turned over to the court-appointed expert in Ecuador, and subsequently to submit to a foundational deposition limited to whether the consultant collaborated with the Ecuadorian expert and the extent to which the consultant recognized his work in the expert's report.[268]

The Fifth Circuit affirmed, subject to an instruction that the district court refine the terms of the deposition on remand to reflect that similarities between the consultant's work product and the expert's report would be relevant to waiver only if they indicate that the expert more likely than not incorporated the consultant's work product into the report.[269] In rejecting the plaintiffs' argument that the consultant was shielded from discovery under the work product doctrine and the protection accorded nontestifying consultants by former Rule 26(b)(4)(B), the Fifth Circuit held that any protection would be waived if any of the consultant's documents were provided to the court-appointed expert.[270] Relying on former Rule 26(a)(2)(B)(ii), the Fifth Circuit noted "that when experts testify before a court, they must submit a report

263. *See* Ecuadorian Plaintiffs v. Chevron Corp., 619 F.3d 373, 377-78 (5th Cir. Sept. 2010).
264. *See* FED. R. CIV. P. 26(a)(2)(B)(ii).
265. *Ecuadorian Plaintiffs*, 619 F.3d at 375.
266. *See id.* at 375-76 (citing 28 U.S.C. § 1782(a)).
267. *Id.* at 375.
268. *See id.* at 376.
269. *See id.* at 379-80.
270. *See id.* at 377-78.

disclosing 'the data or other information' they have considered in reaching their conclusions."[271] Thus, "when the work product of [nontestifying] consultants is provided to testifying experts, immunity is waived for disclosed work product."[272] Because the court-appointed expert was "a testifying expert, the district court correctly determined that disclosure of documents to [the expert] would waive immunity from discovery under U.S. law."[273] Here, "clear evidence of a waiver [was] lacking," but it was appropriate for the district court to order a foundational deposition because it "may be used to determine whether any waiver took place."[274] Thus, the Fifth Circuit affirmed the district court's order of a foundational deposition, subject to an instruction on remand that the district court further refine the terms of the deposition.[275]

2. Amendment to Rule 26(a)(2)(B)(ii)

Notably, the Fifth Circuit in *Ecuadorian Plaintiffs* applied former Rule 26(a)(2)(B)(ii)—and its phrase "data or other information"—to hold that the consulting expert's act of providing protected documents to the testifying expert would constitute a waiver of the rule's protection.[276] While Rule 26(a)(2)(B)(ii) now requires an expert to disclose "facts or data" considered rather than "data or other information," the result likely is the same.[277] The Advisory Committee's notes to the rule indicate that the "refocus of disclosure on 'facts or data' is meant to limit disclosure to material of a factual nature *by excluding theories or mental impressions of counsel*" and to "alter the outcome in cases that have relied on the 1993 formulation in requiring disclosure of all attorney-expert communications and draft reports."[278] The notes also indicate that "facts or data" is to be "interpreted broadly to require disclosure of any material considered by the expert, from whatever source, that contains factual ingredients."[279] Thus, under amended Rule 26(a)(2)(B)(ii), the protection accorded the consulting expert's documents in *Ecuadorian Plaintiffs* arguably would have been waived to the extent they consisted of facts or data transmitted to, and considered by, the testifying expert.[280]

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271. *Id.* at 378 (quoting former FED. R. CIV. P. 26(a)(2)(B)(ii)).

272. *Id.*

273. *Id.* In a footnote, the Fifth Circuit addressed the argument that the court-appointed expert was himself a "court," in that he was similar to a special master, and hence the U.S. consultant was itself a testifying expert. *Id.* at 378 n.8. "If this were accepted," the consultant's act of providing documents to the expert "would also waive immunity from discovery, since testifying experts must disclose 'the data or other information' they consider in reaching their conclusions." *Id.*

274. *Id.* at 379.

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

276. *Id.* at 378.

277. FED. R. CIV. P. 26 advisory committee's note (2010 amendments).

278. *Id.* (emphasis added).

279. *Id.*

280. *See Ecuadorian Plaintiffs*, 619 F.3d at 378.

N. The Erie *Doctrine as Applied to State Laws Affecting the Distribution of Property in Class-Action Settlements Approved Under Rule 23(e):* All Plaintiffs v. All Defendants

In *All Plaintiffs v. All Defendants*, the Fifth Circuit addressed whether a state law governing the disposition of unclaimed property is substantive or procedural for purposes of the *Erie* doctrine, and whether Rule 23(e) conflicted with the law thereby allowing the district court to disregard the law in approving a class-action settlement.[281]

The plaintiffs "filed a class action antitrust suit against various oil companies."[282] The parties settled, and the district court entered settlement orders.[283] A settlement administrator sent checks in accordance with the settlements, but many of the checks went unclaimed.[284] After the district court decided to distribute the unclaimed funds by *cy pres* order to the Center for Energy and Environmental Resources at the University of Texas, the State of Texas intervened, arguing that under the state's Unclaimed Property Act, it had a right to "funds allocated to individuals with last known addresses in Texas, as well as a property right to investment income from those funds."[285] The Fifth Circuit reversed the district court's grant of summary judgment in favor of the plaintiffs, holding that the question of who has a property right to the unclaimed funds was substantive for *Erie* purposes, that the state's Unclaimed Property Act thus applied, and that Rule 23(e) did not preclude application of the Act to unclaimed funds allocated to class members.[286]

First, the Fifth Circuit held that that there was no direct conflict between Rule 23(e) and the state's Unclaimed Property Act that would preclude application of the latter to the unclaimed funds.[287] Recognizing that "[t]he Supreme Court has never determined whether Rule 23(e) permits a district court to disregard state unclaimed property laws," the Fifth Circuit nonetheless distinguished prior Supreme Court cases in which the language of Rule 23 was found to directly conflict with state law.[288] Here, there was no conflict between the Unclaimed Property Act and Rule 23(e) that would justify the district court's disregard for the former in fashioning the *cy pres* order because Rule 23(e) "contains no categorical rule entitling plaintiffs to *cy pres* distribution—and, in fact, does not mention *cy pres* distribution at all."[289] The Fifth Circuit also rejected the argument that the Unclaimed Property Act conflicted with

281. All Plaintiffs v. All Defendants, 645 F.3d 329, 337 (5th Cir. June 2011).
282. *Id.* at 330.
283. *Id.*
284. *See id.* at 330-31.
285. *Id.* at 331.
286. *See id.* at 337.
287. *See id.* at 335.
288. *See id.* at 333-35 (citing Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1436-38 (2010)).
289. *Id.* at 333.

Rule 23(e) by reducing the scope of the district court's discretion to approve a settlement.[290] Rule 23(e) merely empowers a court to approve a settlement; it makes no mention of a district court's discretion or authority to extinguish the right of recovery through a later *cy pres* order.[291]

Second, the Fifth Circuit held that the state's Unclaimed Property Act was substantive for *Erie* purposes and hence applied to the distribution of the unclaimed funds.[292] The Fifth Circuit noted that the current test for determining whether a state law is substantive or procedural is a combination of several tests developed by the Supreme Court, including whether the state law would significantly affect the outcome of the litigation (i.e., the "outcome determination" test), whether the state law is "bound up" with state-secured substantive rights and obligations (i.e., the *Byrd* analysis[293]), and whether application of the law comports with the "twin aims" of *Erie*: discouragement of forum-shopping and avoidance of inequitable administration of the laws.[294] Here, the first twin aim did not support the conclusion that the Unclaimed Property Act should apply because the availability of *cy pres* did not pose a significant threat of forum-shopping; however, the second twin aim did support applying the Act because permitting federal courts to disregard the Act in favor of *cy pres* distribution while state courts followed the state law would lead to inequitable administration of justice.[295] Specifically, if a district court could disregard the state law, not only would it eliminate the state's property right in the income from the unclaimed property based purely on the fact that the case happened to be settled in federal court, but identified class members that would have a right to recover their property from the state under the law "would instead lose that right of recovery forever—again, solely because the case was in federal court."[296] Further, the *Byrd* analysis supported applying the state law because "[t]he aspects of the Act that are arguably procedural are plainly 'bound up' with 'state-created rights and obligations'—that is, the state's underlying scheme of allocating property rights."[297] Consequently, the Fifth Circuit reversed, holding that the question of who has a property right to the unclaimed funds was substantive for *Erie* purposes, that the State's Unclaimed Property Act thus applied, and that Rule 23(e) did not preclude application of the Act to unclaimed funds allocated to class members.[298]

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290. *See id.* at 333-34.
291. *See id.* at 334.
292. *Id.* at 335.
293. *See* Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 535-38 (1958).
294. *All Plaintiffs*, 645 F.3d at 335-36.
295. *Id.* at 336-37.
296. *Id.* at 337.
297. *Id.* (quoting *Byrd*, 356 U.S. at 535).
298. *See id.*

O. Relinquishing Supplemental Jurisdiction Under 28 U.S.C. § 1367(a) on State Law Claims After a Plaintiff Amends the Complaint to Remove All Federal Claims: Enochs v. Lampasas County

In *Enochs v. Lampasas County*, the Fifth Circuit addressed a district court's refusal to relinquish jurisdiction over pendent state law claims after the plaintiff files an amended complaint deleting all federal claims.[299] The plaintiff sued the defendant in Texas state court, alleging violations of federal law under 42 U.S.C. §§ 1983 and 1985, violations of the Texas whistleblower statute, and common law defamation.[300] The defendant removed the entire case to federal district court.[301] The plaintiff moved to amend its complaint to delete all federal claims and simultaneously moved to remand the case back to Texas state court.[302] The district court denied the plaintiff's motion to remand, reasoning that the removal had been proper under 28 U.S.C. § 1441(a) based on the two federal claims and that the court had supplemental jurisdiction over the state law claims under 28 U.S.C. § 1367(a), given the existence of a "common nucleus of operative fact" between the federal and state claims.[303] The district court subsequently granted the defendant's motion for summary judgment on the remaining state law claims.[304]

The Fifth Circuit vacated the district court's order granting summary judgment and reversed its denial of the motion to remand.[305] In holding that the district court abused its discretion in failing to relinquish jurisdiction over the pendent state-law claims after the plaintiff amended its complaint to delete all federal claims, the Fifth Circuit held it was necessary to consider the statutory factors set forth in 28 U.S.C. § 1367(c), the common law factors of judicial economy, convenience, fairness, and comity, and the Supreme Court's instruction to guard against improper forum manipulation.[306]

1. Statutory Factors in 28 U.S.C. § 1367(c)

First, the Fifth Circuit held that the statutory factors in 28 U.S.C. § 1367(c) weighed in favor of remand: (1) the claim under the Texas whistleblower statute concerned "a novel Texas state law issue with no Texas Supreme Court guidance"; (2) the "state law claims predominated over the non-existent federal claims"; (3) the federal claims had been dismissed when the court granted the plaintiff's motion to file an amended complaint; and (4) there

299. *See* Enochs v. Lampasas Cnty., 641 F.3d 155, 157 (5th Cir. May 2011).
300. *See id.*
301. *Id.*
302. *See id.*
303. *See id.* at 157-58.
304. *See id.* at 158.
305. *See id.* at 163.
306. *See id.* at 158-59 (citing Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 357 (1988)).

was a "compelling reason" to decline jurisdiction given "the heavy balance of the common law factors in favor of remand."[307]

2. Common Law Factors

The Fifth Circuit also held that the common law factors of judicial economy, convenience, fairness, and comity weighed in favor of remand.[308] Regarding judicial economy, the Fifth Circuit noted that hardly any federal judicial resources had been devoted to the court's consideration of the state law claims at the time the federal claims were deleted; there was no need for either party to duplicate any research, discovery, briefing, hearings, or other trial preparation work; and there was "no indication that the district court had any 'substantial familiarity' . . . with the Texas state law claims."[309] Convenience, fairness, and comity also weighed in favor of remand: it was more convenient for the case to be heard in the Texas state court in Lampasas County, where all of the parties, witnesses, and evidence were located; it was "fair to have had the purely Texas state law claims heard in Texas state court," especially because there was nothing indicating that either party would be prejudiced; and "comity demand[ed] that the 'important interests of federalism and comity' be respected by federal courts, which are courts of limited jurisdiction and 'not as well equipped for determinations of state law as are state courts.'"[310]

3. Forum Manipulation

Finally, the Fifth Circuit held that even assuming the plaintiff had engaged in forum manipulation, "it was not so improper as to override the balance of the statutory and common law factors weighing heavily in favor of remand."[311] The court noted that guarding against improper forum manipulation is only one consideration, and the Supreme Court has "explicitly qualified [it] for situations such as this one, where other considerations weigh heavily in favor of remand."[312] In other words, forum manipulation is not "a trump card which overrides all of the other factors [the court is] instructed to consider and balance."[313]

Thus, the Fifth Circuit vacated the district court's grant of summary judgment and reversed the denial of the motion to remand because the balance of the statutory and common law factors weighed heavily in favor of remanding

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307. *See id.*
308. *Id.*
309. *Id.* at 159-60.
310. *Id.* at 160 (citing Parker & Parsley Petroleum Co. v. Dresser Indus., 972 F.2d 580, 588-89 (5th Cir. 1992)).
311. *Id.* at 161.
312. *Id.* at 160 (citing Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 357 (1988)).
313. *Id.* at 161.

the pendent Texas state law claims, and the allegation of improper forum manipulation was not a trump card that could defeat that heavy balance.[314]

314. *See id.* at 163.