CIVIL PROCEDURE: 2014–2015

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I. INTRODUCTION

The Fifth Circuit issued several notable opinions concerning civil procedure during the period of this Survey, July 2014 to June 2015. The Fifth Circuit addressed a wide array of issues pertinent to the civil litigator, including personal jurisdiction, standing, class certification, and equitable estoppel in compelling arbitration.

II. SIGNIFICANT FIFTH CIRCUIT OPINIONS ON CIVIL PROCEDURE

A. Standing: North Cypress Medical Center Operating Co. v. Cigna Healthcare

In *North Cypress Medical Center Operating Co. v. Cigna Healthcare*, the Fifth Circuit addressed the issue of standing.[1] In this case, the plaintiff hospital sued an insurer, asserting, among other claims, ERISA claims for breach of healthcare plans administered or insured by Cigna.[2] The hospital, which had obtained assignments of benefits from its patients, principally argued that the insurer "failed to comply with plan terms and underpaid for covered services."[3] The insurer counter claimed, arguing that it paid more than was owed and that the hospital, which was an out-of-network provider, failed to charge the patients for co-insurance but billed the insurer as if it had.[4] The insurer also argued that the hospital—standing in the shoes of the patients—lacked standing to assert ERISA claims, reasoning that the insurer's failure to pay the hospital never caused "patients any injury because they were never at imminent risk of out-of-pocket expenses."[5] The district court granted summary judgment against the hospital and dismissed its ERISA claims for lack of standing.[6]

On appeal, the Fifth Circuit reversed and held that the hospital had Article III standing to bring its ERISA claims.[7] The Fifth Circuit noted: "An 'injury in fact—an invasion of a legally protected interest which is (a) concrete and (b) actual or imminent, not conjectural or hypothetical'—is the first 'irreducible constitutional minimum [element] of standing.'"[8] The Fifth Circuit also observed that a healthcare provider "may obtain standing

1. N. Cypress Med. Ctr. Operating Co. v. Cigna Healthcare, 781 F.3d 182, 191–95 (5th Cir. Mar. 2015).
2. *See id.* at 186, 190.
3. *See id.* at 186.
4. *Id.*
5. *Id.* at 192.
6. *See id.* at 190.
7. *See id.* at 194–95.
8. *Id.* at 192 (alteration in original) (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992)).

to sue derivatively to enforce an ERISA plan beneficiary's claim."[9] Relying on a Ninth Circuit case, the Fifth Circuit held that it was necessary to look at the rights of the patient at the time of the assignment, not after assigning their claims.[10] The Fifth Circuit noted that "a patient suffers a concrete injury if money that she is . . . owed contractually is not paid, regardless of whether she has directed the money be paid to a third party for her convenience."[11] The patient is denied the use of funds rightfully hers, and the "fact that she has directed the funds elsewhere does not change that reality."[12] In light of these principles, the Fifth Circuit was unpersuaded by other courts finding no Article III injury when there is no threat that patients will be billed.[13] Accordingly, the Fifth Circuit held that the hospital had standing to assert its ERISA claims.[14]

B. The Local Controversy Exception to the Class Action Fairness Act in 28 U.S.C. § 1332(d)(4)(A): Cedar Lodge Plantation, L.L.C. v. CSHV Fairway View I, L.L.C.

The Fifth Circuit addressed the local controversy exception to the Class Action Fairness Act (CAFA) in 28 U.S.C. § 1332(d)(4)(A) in *Cedar Lodge Plantation, L.L.C. v. CSHV Fairway View I, L.L.C.*[15] The plaintiffs brought a proposed class action against a group of apartment-owning and apartment-managing entities, alleging that the defendants exposed them to harm caused by underground sewage leaks.[16] The plaintiffs purported to represent a class of individuals and entities that either lived in the apartments, worked in the apartments, or owned property or a business in the immediate vicinity of the apartments.[17] Although the plaintiffs filed suit in Louisiana state court, the defendants removed the case to federal court under CAFA in 28 U.S.C. § 1332(d).[18] CAFA provides a district court with original jurisdiction over any civil action in which the amount in controversy exceeds $5 million and is a class action in which one of three diversity scenarios applies.[19]

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9. *Id.* at 191 (quoting Harris Methodist Fort Worth v. Sales Support Servs. Inc. Emp. Health Care Plan, 426 F.3d 330, 333–34 (5th Cir. 2005)).

10. *See id.* at 192–93 (citing Spinedex Physical Therapy USA Inc. v. United Healthcare of Ariz., Inc., 770 F.3d 1282, 1288–91 (9th Cir. 2014)).

11. *Id.* at 193.

12. *Id.*

13. *See id.* at 194.

14. *See id.* at 194–95.

15. Cedar Lodge Plantation, L.L.C. v. CSHV Fairway View I, L.L.C., 768 F.3d 425, 425–26 (5th Cir. Sept. 2014).

16. *See id.*

17. *Id.* at 426.

18. *Id.* at 425.

19. *See* 28 U.S.C. § 1332(d)(2) (2012).

After the defendants removed the case to federal court, the plaintiffs amended their complaint to add a Louisiana citizen as a defendant.[20] With the addition of the new defendant as a "significant local defendant," the plaintiffs "moved to remand the case to state court, arguing that the 'local controversy exception' to CAFA jurisdiction applied."[21] As described by the Fifth Circuit, the local controversy exception provides that a "district court 'shall decline to exercise jurisdiction' if, *inter alia*, the alleged conduct of at least one local defendant 'from whom significant relief is sought' 'forms a significant basis for the claims asserted by the proposed plaintiff class.'"[22] The district court found that the local controversy exception to CAFA applied and remanded the case to state court.[23]

The Fifth Circuit reversed and held that "application of the local controversy exception depends on the pleadings at the time the class action is removed, not on an amended complaint filed after removal."[24] The Fifth Circuit observed that under CAFA, "the local controversy exception applies to the district court's jurisdiction 'over a class action.'"[25] However, the Fifth Circuit noted that the definition in CAFA for "class action" refers to the "civil action *filed*."[26] The court also relied on a prior decision—*State of Louisiana v. American National Property & Casualty Co.*—for the proposition that "the time-of-removal rule prevents post-removal actions from destroying jurisdiction that attached in a federal court under CAFA."[27] Although the issue in *State of Louisiana* involved severance (not joining an additional defendant), the Fifth Circuit noted that the overriding principle still applied.[28] Because the court in *State of Louisiana* had definitively construed the relevant statutory language, the Fifth Circuit in *Cedar Lodge Plantation* held that its holding was binding insofar as the same language controlled the local controversy exception.[29] As a result, it is now the rule that "the local controversy exception depends on the pleadings at the time the class action is removed, not on an amended complaint filed after removal."[30]

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20. *See Cedar Lodge Plantation*, 768 F.3d at 425.
21. *Id.*
22. *Id.* at 426 (quoting 28 U.S.C. § 1332(d)(4)(A)(i)).
23. *See id.* at 425–26.
24. *Id.* at 426.
25. *Id.* at 428 (quoting 28 U.S.C. § 1332(d)(4)(A)(i)).
26. *Id.* (quoting 28 U.S.C. § 1332(d)(1)(B)).
27. *Id.* at 427 (citing Louisiana v. Am. Nat'l Prop. & Cas. Co., 746 F.3d 633, 639–40 (5th Cir. 2014)).
28. *See id.* at 428.
29. *See id.* at 428–29.
30. *See id.* at 426.

C. Improper Joinder for Purposes of Diversity Jurisdiction: Vaillancourt v. PNC Bank, N.A.

In *Vaillancourt v. PNC Bank, N.A.*, the Fifth Circuit addressed improper joinder for purposes of diversity jurisdiction.[31] The plaintiff, a Texas resident, sued the successor to her mortgagee, as well as her husband, certain unnamed defendants, and three individuals named substitute trustees by the mortgage holder.[32] The plaintiff alleged that her property was sold at foreclosure but that she never received notice of the sale.[33] The plaintiff asserted two federal and six state counts.[34] Because the federal claims were dismissed and the substitute trustees and the plaintiff's husband were Texas residents, the district court held that it lacked diversity jurisdiction.[35] In reaching its conclusion, the district court held that the substitute trustees and the plaintiff's husband were properly joined and, hence, their citizenship should be considered in the diversity analysis.[36] The district court refused to exercise supplemental jurisdiction over the state law claims and remanded them back to state court.[37]

On appeal, the Fifth Circuit reversed and held that the substitute trustees and the plaintiff's husband were not properly joined.[38] The court noted that, as an exception to the requirement of complete diversity, improper joinder may apply when "the party seeking removal (or challenging remand) demonstrates 'that there is no possibility of recovery by the plaintiff against an in-state defendant.'"[39] The Fifth Circuit held that the substitute trustees had introduced evidence demonstrating that they had provided the required notice, thereby undercutting the plaintiff's failure-to-notice claim.[40] Further, the plaintiff's allegation that the substitute trustees acted in bad faith by submitting a false affidavit was insufficient because the affidavit actually satisfied the Texas Property Code's requirements.[41] Finally, the court observed that the plaintiff had improperly joined her husband; she asserted no claims against him and hence he could not be liable to her.[42] Accordingly, the Fifth Circuit held that the only non-diverse parties had been improperly joined and hence the district court had diversity jurisdiction.[43]

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31. Vaillancourt v. PNC Bank, N.A., 771 F.3d 843 (5th Cir. Nov. 2014).
32. *See id.* at 845.
33. *See id.*
34. *Id.*
35. *See id.*
36. *See id.*
37. *Id.* at 844–45.
38. *Id.* at 848.
39. *Id.* at 847 (quoting McDonal v. Abbott Labs., 408 F.3d 177, 183 (5th Cir. 2005)).
40. *See id.* at 847–48.
41. *See id.* at 848.
42. *See id.*
43. *See id.*

D. Equitable Estoppel in Compelling Arbitration: Auto Parts Manufacturing Mississippi, Inc. v. King Construction of Houston, L.L.C.

In *Auto Parts Manufacturing Mississippi, Inc. v. King Construction of Houston, L.L.C.*, the Fifth Circuit addressed the much-litigated topic of when non-signatories to an arbitration agreement can be compelled to arbitrate a case against a party to the arbitration agreement under the doctrine of equitable estoppel.[44] In this case, the plaintiff, an automotive parts manufacturer, filed an interpleader complaint against a general contractor it hired to build a factory, as well as the subcontractor that the general contractor had hired.[45] A dispute arose between the general contractor and the subcontractor regarding the subcontractor's work and its entitlement to funds, so the plaintiff sought to interplead the funds.[46] After the plaintiff filed the interpleader action, the law firm that had represented the general contractor sued the plaintiff, alleging that the general contractor had not paid the law firm and that it was entitled to any amounts that the plaintiff owed the general contractor.[47] The law firm relied on a lien in its engagement letter with the general contractor.[48] The engagement letter also happened to contain an arbitration clause.[49]

Following the law firm's suit against the plaintiff, the plaintiff amended its interpleader action to join the law firm as a defendant because the firm was essentially seeking the interpleaded funds.[50] The general contractor and law firm sought to compel arbitration, arguing that the plaintiff and the subcontractor were bound by the arbitration clause in the engagement letter between the general contractor and the law firm.[51] The district court denied the motion.[52]

The Fifth Circuit affirmed and held that the district court properly denied the motion to compel arbitration.[53] The Fifth Circuit noted that neither the plaintiff nor the subcontractor were parties to the agreement containing the arbitration clause.[54] The Fifth Circuit recognized that a non-signatory to an arbitration agreement can be compelled to arbitrate under the doctrine of equitable estoppel, but held that doctrine did not apply in this case.[55] There was a dispute about whether federal, California, or Mississippi law on

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44. *See* Auto Parts Mfg. Miss., Inc. v. King Const. of Hous., L.L.C., 782 F.3d 186, 196–97 (5th Cir. Mar. 2015).
45. *Id.* at 188.
46. *See id.*
47. *See id.* at 189.
48. *See id.*
49. *See id.*
50. *See id.*
51. *Id.*
52. *See id.* at 189–90.
53. *See id.* at 198.
54. *See id.* at 197.
55. *See id.*

equitable estoppel applied, but the Fifth Circuit noted that, in the end, it did not matter because none of the standards were satisfied.[56] One ground for equitable estoppel under the federal standard is when a non-signatory sues "based upon" a contract containing an arbitration clause.[57] Under the California standard, "a non-signatory is bound to arbitrate when pursuing a claim that is 'dependent upon or inextricably intertwined' with the contract obligations."[58] Under the Mississippi standard, "a non-signatory is bound to arbitrate when its claims are 'directly dependent' on the contract."[59]

The Fifth Circuit held that the plaintiff could establish the existence of conflicting claims to the interpleaded funds—a prerequisite to the interpleader—by referencing the dispute between the general contractor and subcontractor alone, without reference to the Engagement Agreement.[60] The Fifth Circuit noted that "[c]laims cannot be inextricably intertwined with, directly dependent on, or based on a contract if they can be shown without reference to the contract."[61] The Fifth Circuit also observed that the policy reasons for applying equitable estoppel were absent: the plaintiff was "not trying to 'hav[e] it both ways' by seeking to hold [the general contractor] and [the law firm] liable pursuant to a contract that contains an arbitration provision and, at the same time, deny arbitration's applicability."[62] Thus, the Fifth Circuit affirmed the district court's denial of the motion to compel arbitration.[63]

E. Personal Jurisdiction: Monkton Insurance Services, Ltd. v. Ritter

The Fifth Circuit addressed the minimum standards for personal jurisdiction in *Monkton Insurance Services, Ltd. v. Ritter*.[64] The plaintiff sued the defendant (a Texas resident), alleging that the defendant had wrongfully received money from an entity managed by the plaintiff.[65] The defendant then filed a third-party complaint against a bank (Butterfield), alleging that the bank breached contracts with an entity owned by the defendant in failing to detect forgeries on withdrawals from the entity's bank account.[66] The bank, which was organized under Cayman law and located on Grand Cayman Island, moved to dismiss for lack of personal

56. *Id.*
57. *Id.* (citing Wash. Mut. Fin. Grp., LLC v. Bailey, 364 F.3d 260, 267–68 (5th Cir. 2004)).
58. *Id.* (citing JSM Tuscany, LLC v. Superior Court, 123 Cal. Rptr. 3d 429, 445 (Cal. Ct. App. 2011)).
59. *Id.* (citing Scruggs v. Wyatt, 60 So. 3d 758, 770 (Miss. 2011)).
60. *Id.*
61. *Id.*
62. *Id.* at 197–98.
63. *See id.* at 198.
64. Monkton Ins. Servs., Ltd. v. Ritter, 768 F.3d 429, 431 (5th Cir. Sept. 2014).
65. *See id.* at 430–31.
66. *See id.* at 431.

jurisdiction.[67] The district court denied the defendant's request for jurisdictional discovery and granted the bank's motion to dismiss.[68]

The Fifth Circuit affirmed the grant of the bank's motion to dismiss and the denial of the motion for jurisdictional discovery.[69] As to general jurisdiction, the Fifth Circuit noted that, following the Supreme Court's recent opinion in *Daimler AG v. Bauman*, it is "incredibly difficult to establish general jurisdiction in a forum other than the place of incorporation or principal place of business."[70] The bank was incorporated and had its principal place of business in Cayman.[71] The Fifth Circuit held that the communications between the bank and the defendant, and the wire transfers that the bank made to Texas banks, were initiated by the defendant and the entity he owned, not the bank.[72] Further, "performance" under the contracts between the bank and the entity, including the wire transfers, actually occurred in Cayman.[73] The Fifth Circuit held that the bank's website did not subject itself to general jurisdiction because the website showed, at most, that the bank conducted business "with Texas, not in Texas."[74]

As to specific jurisdiction, the Fifth Circuit held that the contacts relied upon by the defendant were insufficient, either because they related to actions taken by others (not the bank) or because they did not alone establish specific personal jurisdiction.[75] The Fifth Circuit noted that the contract entered into by the bank was with another Cayman entity and that, even if it had been with the defendant, "merely contracting with a resident of the forum state does not establish minimum contacts."[76] Finally, the Fifth Circuit held that the district court properly denied the motion for jurisdictional discovery because the defendant failed to make a prima facie showing of personal jurisdiction or explain how the discovery he requested would change the jurisdictional determination.[77]

F. Rule 11 Sanctions: Marceaux v. Lafayette City-Parish Consolidated Government

In *Marceaux v. Lafayette City-Parish Consolidated Government*, the Fifth Circuit addressed the circumstances under which sanctions may be

67. *Id.* at 430–31.
68. *Id.* at 431.
69. *See id.* at 434.
70. *See id.* at 432 (citing Daimler AG v. Bauman, 134 S. Ct. 746, 760 (2014)).
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *See id.* at 433–34.
76. *Id.* at 433 (quoting Moncrief Oil Int'l Inc. v. OAO Gazprom, 481 F.3d 309, 311 (5th Cir. 2007)).
77. *See id.* at 434.

issued under Federal Rule of Civil Procedure 11.[78] Fifteen current and former police officers sued the police department, the local government, and other officers and city officials for alleged violations of their constitutional rights and state law.[79] The plaintiffs claimed that they were punished after they revealed the defendants' misconduct.[80] The defendants moved to strike various parts of the plaintiffs' complaint and dismiss the suit, but the magistrate judge instead granted leave to amend, advising the plaintiffs that "many impertinent and scandalous parts should be removed."[81] However, "[i]nstead of omitting the controversial parts, the plaintiffs added to it."[82] The defendants again filed a motion to strike, which was granted, and also moved for sanctions under Rule 11 due to the plaintiffs' failure to properly amend.[83] The magistrate judge "concluded that plaintiffs' counsel had violated Rule 11(b), and he recommended—and the district court agreed—that they be ordered to pay $2,500 to the court and reimburse $5,000 to the defendants."[84]

On appeal, the Fifth Circuit affirmed the imposition of sanctions.[85] Sanctions were appropriate under Rule 11(b)(1) because the plaintiffs had resubmitted their original complaint with the amended complaint "for the improper purpose of causing unnecessary delay or needlessly increasing the cost of litigation."[86] The Fifth Circuit noted that "by reasserting the same impertinent, immaterial, and scandalous allegations—against which they had been warned—the plaintiffs forced further filings from the defendants and increased the cost and effort required by the court to comb through the complaint."[87] "[R]efiling the complaints, as well as issuing multiple subpoenas that were quashed, suggested an improper purpose to harass some defendants."[88]

The Fifth Circuit also held that sanctions were appropriate for violations of Rule 11(b)(2) relating to frivolous claims.[89] The Fifth Circuit observed that the plaintiffs had filed complaints "replete with obviously deficient

78. Marceaux v. Lafayette City-Parish Consol. Gov't, 614 F. App'x 705, 710–11 (5th Cir. June 2015).

79. *Id.* at 706–07.

80. *See id.* at 707.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 707–08.

85. *See id.* at 709.

86. *Id.* (citing FED. R. CIV. P. 11(b)(1)).

87. *Id.*

88. *Id.*

89. *See id.* Rule 11(b)(2) provides that by presenting a pleading, an attorney or unrepresented party "certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: . . . the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law." FED. R. CIV. P. 11(b)(2).

claims," including a Fifth Amendment due process claim in which no federal actor was a defendant.[90]

G. Rule 23 and Class Certification: Ticknor v. Rouse's Enterprises, L.L.C.

The Fifth Circuit addressed the requirements of predominance and superiority in class certification under Federal Rule of Civil Procedure 23(b)(3) in *Ticknor v. Rouse's Enterprises, L.L.C.*[91] Three plaintiffs filed a motion to certify a class action against a grocery store chain for alleged violations of the Fair and Accurate Credit Transactions Act (FACTA).[92] The plaintiffs claimed that the store violated FACTA by allowing credit card expiration dates to be printed on its store receipts.[93] The proposed class included "[a]ll persons who made in-store purchases from the Defendant using a debit or credit card, in a transaction occurring from May 8, 2010, through May 10, 2012, at one of the [specified] Rouses stores."[94] The district court denied class certification, finding that "the plaintiffs had not 'satisfied their burden of establishing that common issues predominate' because it would be necessary to determine 'whether each class member is a "cardholder," a "consumer," and received a receipt.'"[95] The district court also noted that the "'individual mini-trials' necessary to resolve each class member's claims would 'be impracticable and a waste of judicial resources'" and thus, the plaintiffs had "not carried their burden of showing a class action is a superior method for adjudicating this case."[96]

The Fifth Circuit affirmed and held that the district court did not abuse its discretion by denying certification on the basis of predominance and superiority.[97] The Fifth Circuit began by noting that certification under Rule 23(b)(3) requires that "(1) 'the questions of law or fact common to class members predominate over any questions affecting only individual members,' and (2) 'a class action is superior to other available methods for

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90. *Marceaux*, 614 F. App'x at 709.

91. Ticknor v. Rouse's Enters., L.L.C., 592 F. App'x 276 (5th Cir. Nov. 2014). Rule 23(b)(3) provides that a class action may be maintained if Rule 23(a) is satisfied and the court finds

> 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. The matters pertinent to these findings include: (A) the class members' interests in individually controlling the prosecution or defense of 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.

FED. R. CIV. P. 23(b)(3).

92. *Ticknor*, 592 F. App'x at 277.

93. *Id.*

94. *Id.* (alterations in original).

95. *Id.* (quoting the district court).

96. *Id.* (quoting the district court).

97. *Id.* at 279.

fairly and efficiently adjudicating the controversy.'"[98] The Fifth Circuit also observed that pertinent to these questions are "the likely difficulties in managing a class action" and that such difficulties "encompass [ ] the whole range of practical problems that may render a class action format inappropriate for a particular suit."[99] Regarding predominance, the plaintiffs needed to prove that they (1) were not using another's card to make their purchases, (2) were consumers, not business purchasers, and (3) took their receipts.[100] The Fifth Circuit noted that the defendant had established that the putative class members differed as to these factors.[101] For instance, the defendant showed that many customers leave its stores without their receipts.[102]

Regarding superiority, the Fifth Circuit held that the district court did not abuse its discretion in relying on the availability of attorney's fees and punitive damages as a basis for finding non-superiority.[103] The Fifth Circuit noted the difficulty in categorizing "prevailing plaintiffs whose costs are covered and who are guaranteed more than nominal damages as negative-value plaintiffs merely because they did not assert a larger actual-damages claim."[104] Notably, the court made it a point to emphasize the "broad discretion" enjoyed by district courts regarding certification, which "may lead to disparate results."[105] Indeed, the Fifth Circuit agreed with the Tenth Circuit that "'inconsistent results' regarding certification are 'no insurmountable objection' and must be permitted 'until, if ever, some more acceptable and general solution by amendments to the Rules or clarification by statute emerges.'"[106]

H. Proper Parties for an Action Under the Hague Convention on the Civil Aspect of International Child Abduction: Sanchez v. R.G.L.

Sanchez v. R.G.L. involved three minor children that were raised in Mexico and lived with their mother and her boyfriend.[107] Fearing for the children's safety, the children's aunt and uncle took them to El Paso.[108] The children's mother claimed that her children were taken without her permission and under false pretenses.[109] The aunt and uncle tried to return

98. *Id.* at 278 (quoting FED. R. CIV. P. 23(b)(3)).
99. *Id.* (alteration in original) (quoting Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 164 (1974)).
100. *Id.* (citing 15 U.S.C. § 1681(g)(1) (2012)).
101. *See id.* at 278–79.
102. *Id.* at 278.
103. *See id.* at 279.
104. *Id.*
105. *Id.*
106. *Id.* (quoting Wilcox v. Commerce Bank of Kan. City, 474 F.2d 336, 347 (10th Cir. 1973)).
107. Sanchez v. R.G.L. *ex rel* Hernandez, 761 F.3d 495, 499 (5th Cir. Aug. 2014).
108. *Id.*
109. *Id.* at 499–500.

the children to their mother; however, the children refused to cross into Mexico.[110] Instead, they presented themselves to the Department of Homeland Security (DHS).[111] The children claimed that they were in grave danger because their mother's boyfriend was a member of a gang and was involved in drug trafficking.[112] The DHS "determined that the children were unaccompanied alien children with a credible fear of returning to Mexico."[113] Therefore, the DHS transferred the children to the Office of Refugee Resettlement (ORR).[114] The ORR "placed the children in the physical custody of Baptist Services Child and Family Services" (Baptist Services), which in turn placed the children in a foster home.[115] Because the children were declared "unaccompanied alien children," the ORR initiated proceedings to remove the children from the country.[116] The children were appointed a pro bono counsel for these proceedings and they sought relief from removal by asserting asylum.[117]

During these proceedings, the children's mother filed suit in district court, claiming she was entitled to have her children returned to her under the Hague Convention on the Civil Aspect of International Child Abduction and also under the International Child Abduction Remedies Act.[118] The suit named Baptist Services and the children's aunt and uncle as defendants.[119] The district court held an evidentiary hearing regarding the mother's petition.[120] The aunt and uncle did not participate in the hearing, and Baptist Services participated but took no official position.[121] However, the district court allowed the children's attorney in the ORR proceeding to appear informally.[122] After the hearing, the district court ruled that the children should be returned but stayed the matter pending an appeal.[123] After filing their appeal, the children were granted asylum and were also in the process of being transferred into the custody of Catholic Charities.[124] On appeal, the children claimed that their mother did not have standing because she did not name the ORR as a respondent in her petition.[125] Additionally, they claimed that their asylum prevented them from being returned to Mexico.[126]

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110. *Id.* at 500.
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.* at 501.
120. *Id.*
121. *Id.* at 500–01.
122. *Id.* at 501.
123. *Id.*
124. *Id.* at 501–02.
125. *Id.* at 502.
126. *Id.*

The Fifth Circuit had to initially address whether the children had standing to pursue an appeal because they were not formal parties in the underlying proceeding.[127] To have standing for an appeal, a court must examine "'(1) whether the non-party actually participated in the proceedings below'; (2) whether 'the equities weigh in favor of hearing the appeal'; and (3) whether 'the non-party has a personal stake in the outcome.'"[128] The court found that the children met the first factor because their attorney actively participated in the proceeding below.[129] The children also satisfied the other two factors because their well-being was at stake.[130]

In the children's first argument, they claimed that their mother lacked standing to bring a claim under the Hague Convention.[131] For a party to have standing, he or she must suffer an injury in fact, there must be a causal connection between the injury and the act complained of, the injury must be fairly traceable to the defendant, and the injury must be redressable by a favorable decision.[132] The children claimed their mother lacked standing because she failed to include the ORR—the children's legal guardian.[133] The children claimed that the ORR was the only entity that had the authority to return the children to Mexico.[134] The Fifth Circuit rejected this argument because the Hague Convention only requires the party that has physical custody of the children to be joined in a lawsuit.[135] The court explained that suits seeking the return of a child under the Hague Convention do not involve deciding the child's legal guardian; that decision is left to a court in the child's home country.[136] Only the party that can return the child needs to be included.[137] Therefore, it is not necessary for the children's mother to join the ORR, which had legal custody of the children but not physical custody.[138] However, the Fifth Circuit concluded that joinder of the Government was required.[139] The court reasoned that without the Government's involvement, enforcing any order would prove to be difficult.[140] For their mother to achieve complete relief, the Government should be joined.[141]

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127. *Id.*
128. *Id.* (quoting SEC v. Forex Asset Mgmt. LLC, 242 F.3d 325, 329 (5th Cir. 2001)).
129. *Id.*
130. *Id.* at 502–03.
131. *Id.* at 504.
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.* at 505.
136. *Id.* at 506.
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.* at 507.
141. *Id.*

Next, the Fifth Circuit decided that the children should be appointed formal legal representation in the underlying proceeding because the children's fundamental interests were at stake and none of the other parties made an effort to protect the children's interests.[142]

The Fifth Circuit then rejected the children's claim that the granting of asylum prevented them from being returned to Mexico. To qualify for asylum, a person "must either have suffered past persecution or have a 'well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.'"[143] The granting of asylum is binding on the Attorney General or the Secretary of Homeland Security; therefore, these entities are prevented from returning the children.[144] However, the court noted that there was no authority stating that the granting of asylum prevents a district court from ordering that the children be returned.[145] Therefore, the granting of asylum did not prevent the children from returning to Mexico.[146] The granting of asylum, though, is relevant in the court's decision regarding the return of the children to Mexico.[147] Thus, the Fifth Circuit remanded the case to the district court with the instruction that the granting of asylum should be reviewed in determining the children's fate.[148]

I. Examining Motion to Transfer When Only Some Parties Have a Forum-Selection Clause: In re Rolls Royce Corp.

The issue before the Fifth Circuit in *In re Rolls Royce Corp.* was how a court should address a motion to transfer in a multiparty case when some, but not all, of the litigants signed a contract with a forum-selection clause.[149] The case stemmed from a helicopter crash that occurred over the Gulf of Mexico.[150] A helicopter owned by Petroleum Helicopters, Inc. (PHI) experienced engine failure.[151] The helicopter was forced to make an emergency landing on the water.[152] The emergency pontoon floats failed.[153] No one was injured, but the helicopter sank.[154]

PHI brought a suit in Louisiana state court against (1) Rolls Royce Corporation, the designer and manufacturer of the engine; (2) Apical

142. *Id.* at 508.
143. *Id.* at 509–10 (quoting 8 U.S.C. § 1101(a)(42)(A) (2012)).
144. *Id.* at 510.
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.* at 511.
149. *In re* Rolls Royce Corp., 775 F.3d 671, 673 (5th Cir. Dec. 2014).
150. *Id.* at 674.
151. *Id.*
152. *Id.*
153. *Id.*
154. *See id.*

Industries, Inc., the designer and manufacturer of the pontoon flotation system; and (3) Offshore Helicopter Support Services, Inc., the company that repaired and reworked the pontoon flotation system.[155] The defendants removed the case to federal court.[156] Rolls Royce then moved to sever the claims against it and requested that those claims be transferred to the Southern District of Indiana pursuant to a forum-selection clause.[157] The district court denied Rolls Royce's requests because not all of the parties in the action signed a contract with a forum-selection clause.[158] Rolls Royce then petitioned the Fifth Circuit for mandamus relief.[159]

A writ of mandamus is an extraordinary remedy and can only be granted when (1) a party has no other remedy, (2) the party shows that the right to issuance of a writ is clear and indisputable, and (3) the issuing court determines that the writ is appropriate under the circumstances.[160] The court held that the first element weighed in favor of mandamus.[161] Rolls Royce could not appeal an adverse final judgment under 28 U.S.C. § 1391.[162] Moreover, Rolls Royce could not bring an interlocutory appeal under 28 U.S.C. § 1292(b).[163] The court noted that, although the denial of a severance motion can be challenged through an appeal of a final judgment, the combination of a severance and transfer required different responses.[164]

The second element examines if "the district court 'relie[d] on erroneous conclusions of law' which 'produce a patently erroneous result.'"[165] When determining a motion to transfer, courts must take into account the private interests of the litigants and the interests of the public and judicial system.[166] When parties rely on a valid forum-selection clause, a court must weigh the private-interest factors in favor of transfer.[167] Only the public-interest factors may weigh against transfer.[168] However, the public-interest factors rarely defeat a motion to transfer, so the forum-selection clause should control in most cases.[169] When there are only two parties, a motion to transfer pursuant to a forum-selection clause is clear-cut.[170] But the analysis differs when multiple parties are involved and not every party has a forum-selection

155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.* at 675.
159. *Id.*
160. *Id.*
161. *See id.* at 677.
162. *Id.* at 676.
163. *Id.*
164. *Id.*
165. *Id.* at 677 (quoting *In re* Volkswagen of Am., Inc., 545 F.3d 304, 310 (5th Cir. 2008) (en banc)).
166. *Id.*
167. *Id.* at 678.
168. *Id.*
169. *Id.*
170. *See id.* at 679.

clause.[171] The court must still weigh the private-interest factors of the litigants that do not have a forum-selection clause.[172] This balancing, in turn, could require the court to send different parties to different district courts to pursue the same claim—resulting in parallel litigation.[173] The court noted that this, in turn, may overrule a forum-selection clause.[174]

The Fifth Circuit next addressed the motion to sever Rolls Royce's claims. A motion to sever requires an inquiry into private- and public-interest factors as well.[175] However, when combined with a motion to transfer, the focus is more on judicial efficiency.[176] "[W]hen considering a severance-and-transfer motion, the inquiry collapse[s] into an inquiry into the relative merits of convenience versus judicial economy."[177] Judicial economy is not the sole factor but plays an important role.[178] The court stated that a severance and transfer under these facts should unfold as follows:

> First, pursuant to *Atlantic Marine*, the private factors of the parties who have signed a forum agreement must, as matter of law, cut in favor of severance and transfer to the contracted for forum. Second, the district court must consider the private factors of the parties who have *not* signed a forum selection agreement as it would under a Rule 21 severance and section 1404 transfer analysis. Finally, it must ask whether this preliminary weighing is outweighed by the judicial economy considerations of having all claims determined in a single lawsuit. In so determining, the district court should consider whether there are procedural mechanisms that can reduce the costs of severance, such as common pre-trial procedures, video depositions, stipulations, etc. Such practices could echo those used by judges in cases managed pursuant to multidistrict litigation statutes.[179]

The Fifth Circuit held that the district court failed to properly consider the private factors of the parties who signed a forum-selection clause; therefore, mandamus was appropriate.[180] The court reversed and remanded the case with instructions to sever and transfer the claims against Rolls Royce.[181]

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171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.* at 680.
176. *Id.*
177. *Id.* (citing Liaw su Teng v. Skaarup Shipping Corp., 743 F.2d 1140 (5th Cir. 1984)).
178. *Id.* at 681.
179. *Id.*
180. *Id.*
181. *Id.* at 683.

J. Proper Notice for Suggestion of Death: Sampson v. ASC Industries

In *Sampson v. ASC Industries*, the Fifth Circuit examined proper service of a suggestion of death on a deceased-plaintiff's estate.[182] The original plaintiff, Rebecca Breaux, brought an age-discrimination claim against her employer, ASC Industries.[183] However, Breaux died before the case was resolved.[184] Breaux's attorney, Lurlia Oglesby, filed a statement in accordance with Federal Rule of Civil Procedure 25(a)(3), informing the court that Breaux had died.[185] The court stayed the action so Oglesby could file a motion for the substitution of a party.[186] However, Oglesby did not file a motion within the required time frame—ninety days.[187] ASC then filed a motion to dismiss, and the district court granted it.[188] After the district court granted the dismissal, Oglesby filed a motion to alter the judgment of dismissal and also filed a motion on behalf of Breaux's estate to name Breaux's daughter as the plaintiff.[189] Breaux argued that the time period had not run because Breaux's estate was never properly served.[190] The district court rejected this argument, finding that Oglesby represented Breaux's estate, so it had adequate notice that it needed to file a timely motion for substitution.[191] Oglesby appealed the decision.[192]

The Fifth Circuit said that a statement noting death under Federal Rule of Civil Procedure 25 must be served on all non-parties in accordance with Federal Rule of Civil Procedure 4.[193] "Personal representatives of a deceased-plaintiff's estate are non-parties that must be personally served under Rule 25."[194] The court stated that Oglesby's filing of the notice of death was not sufficient to start the time limit.[195] Notice to lawyers or service on lawyers will not suffice in starting the ninety-day time period.[196] Therefore, the court reversed and remanded the district court and held that a notice of death must be personally served on the deceased-plaintiff's estate.[197]

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182. Sampson v. ASC Indus., 780 F.3d 679, 680 (5th Cir. Mar. 2015).
183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.*
191. *Id.* at 680–81.
192. *Id.* at 681.
193. *Id.*
194. *Id.* (citing Barlow v. Ground, 39 F.3d 231, 233 (9th Cir. 1994)).
195. *Id.* at 682.
196. *Id.*
197. *Id.* at 683.

K. Use of Evidence at a Default Judgment Hearing: Wooten v. McDonald Transit Associates, Inc.

In *Wooten v. McDonald Transit Associates, Inc.*, the Fifth Circuit examined whether evidence presented at a default judgment hearing could cure a deficient complaint.[198] The appellee filed a suit against his former employer, alleging his employer violated the Age Discrimination in Employment Act (ADEA).[199] The employer (appellant) never answered or defended the suit, so the clerk entered a default judgment against it.[200] The court held a damages hearing in which the appellee provided live testimony.[201] The district court then entered default judgment for the appellee.[202] After the hearing, the appellant filed a motion to set aside the judgment, stating that it was never served with process and did not learn about the suit until after the default judgment.[203] The district court denied the appellant's motion to set aside the default judgment, so the appellant timely appealed both the default judgment and the order denying its motion.[204]

Here, neither party challenged that the default judgment was appropriate, but they disagreed, among other things, on the sufficiency of the appellee's allegations and whether the district court could consider evidence presented during the damages hearing.[205] "A default judgment is unassailable on the merits but only so far as it is supported by well-pleaded allegations, assumed to be true."[206] In *Nishimatsu*, the Fifth Circuit stated that a default judgment must have a "sufficient basis in the pleadings."[207] However, *Nishimatsu* did not elaborate on this requirement.[208] The court next examined the purpose and requirements of a sufficient complaint.[209] It stated that Federal Rule of Civil Procedure 8(a)(2) only requires that a complaint contain enough information to give the defendant fair notice of a plaintiff's claim and the "grounds upon which it rests."[210]

In this case, the court held that the complaint, although light on factual details, met the minimum standards under Rule 8(a)(2) to give the appellant notice of the appellee's claims and that the testimony provided at the damages hearing may be considered in determining the entry of a default judgment.[211]

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198. Wooten v. McDonald Transit Assocs., Inc., 788 F.3d 490, 493 (5th Cir. June 2015).
199. *Id.*
200. *Id.*
201. *Id.* at 494.
202. *Id.*
203. *Id.* at 495.
204. *Id.*
205. *Id.* at 496.
206. *Id.* (quoting Nishimatsu Constr. Co. v. Hous. Nat'l Bank, 515 F.2d 1200, 1206 (5th Cir. 1975)).
207. *Id.* at 498 (quoting *Nishimatsu*, 515 F.2d at 1206).
208. *Id.*
209. *Id.*
210. *Id.* (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)).
211. *Id.* at 497–98.

The court noted that this did not violate the requirements set out in *Nishimatsu*.[212] Here, the court determined that the appellee's complaint was sufficient to provide notice to appellant that it was being sued under the ADEA for discrimination and retaliation.[213] The complaint alleged (1) a protected activity; (2) an adverse employment action; (3) a causal connection; and (4) qualification—requirements for a valid ADEA claim.[214] Therefore, the court held that the complaint was "well-pleaded" for default judgment purposes, and the evidence submitted at the damages hearing "served a permissible purpose under Rule 55(b)(2)—to 'establish the truth of an allegation by evidence' or 'investigate any other matter.'"[215] The Fifth Circuit affirmed the district court's decision.[216]

L. An Examination of Personal Jurisdiction Under Franchise Agreements: Dontos v. Vendomation NZ Ltd.

The Fifth Circuit examined personal jurisdiction in a fraudulent transfer case in *Dontos v. Vendomation NZ Ltd.*[217] The plaintiffs, Jordan and Jennifer Dontos, were Texas residents who entered into a franchise agreement regarding vending machines with a company named 24Seven USA Franchising, Ltd., a Delaware Corporation.[218] The underlying defendants, John Halpern and George Perkman Denny, were listed as the principals of 24Seven.[219] The plaintiffs paid the requisite franchise fees; however, 24Seven never tendered the promised vending routes.[220] The defendants were experiencing some financial difficulties, so Halpern and Denny formed Bacon Whitney, LLC.[221] Bacon Whitney assumed control of the plaintiffs' money, vending service routes, and franchise agreement.[222] "However, plaintiffs were never accepted as a franchisee of Bacon Whitney."[223] The plaintiffs then filed suit in Texas state court, alleging "fraud, breach of the franchise agreement, and interference with contractual and business relationships."[224] The plaintiffs were awarded $6 million as a result of their lawsuit.[225] The plaintiffs were then contacted by the other defendant in the underlying suit, Vendomation, LLC, who offered to settle the plaintiffs'

212. *Id.* at 498.
213. *Id.*
214. *Id.* at 499.
215. *Id.* at 500 (quoting FED. R. CIV. P. 55(b)(2)(C)–(D)).
216. *Id.* at 502.
217. Dontos v. Vendomation NZ Ltd., 582 F. App'x 338, 339 (5th Cir. Sept. 2014).
218. *Id.* at 340.
219. *Id.*
220. *Id.*
221. *Id.*
222. *Id.*
223. *Id.*
224. *Id.* at 340–41.
225. *Id.* at 341.

claim for $500,000.[226] They accepted this offer but never received the money.[227]

During the state court proceeding, Bacon Whitley "had entered receivership in Massachusetts and was purchased by a corporation named Intellivend, in exchange for a $1,250,000 note."[228] The Bacon Whitley receiver then assigned the note to Halpern and Denny, which plaintiffs alleged was without sufficient consideration.[229] Vendomation then obtained the note from Intellivend and, as a result, owned five franchise agreements in Texas.[230] Vendomation then contacted the plaintiffs and demanded that they transfer their franchise agreements to Vendomation.[231]

The plaintiffs then filed the lawsuit in the Northern District of Texas, alleging that Halpern, Denny, and Vendomation engaged in "fraudulent asset transfer, fraud, negligent misrepresentation, civil conspiracy, and aiding and abetting."[232] The district court dismissed the plaintiffs' complaint on personal jurisdiction grounds and the plaintiffs appealed.[233]

Here, the plaintiffs only needed to make a prima facie showing of personal jurisdiction because the district court did not hold an evidentiary hearing.[234] A district court may assert personal jurisdiction over a nonresident when it comports with due process.[235] Due process is satisfied when the defendant has minimum contacts with the state; therefore, a suit against the defendant would "not offend traditional notions of fair play and substantial justice."[236] A district court "may assert either general or specific jurisdiction over a party."[237] General jurisdiction is established if the defendant has continuous and systematic contact with the state.[238] Specific jurisdiction is established when the defendant directed his or her actions towards the state and the plaintiff's injuries arose from those actions.[239] Once a plaintiff establishes minimum contacts, the burden shifts to the defendant to show that the assertion of jurisdiction is unfair and unreasonable.[240] But if minimum contacts have been established, it is rare for a court to find that the assertion of jurisdiction would be unfair and unreasonable.[241]

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226. *Id.*
227. *Id.*
228. *Id.*
229. *Id.*
230. *Id.*
231. *Id.*
232. *Id.*
233. *Id.* at 341–42.
234. *Id.* at 342.
235. *Id.*
236. *Id.*
237. *Id.*
238. *Id.*
239. *Id.*
240. *Id.* at 343.
241. *Id.*

Here, the court used a specific jurisdiction analysis regarding the plaintiffs' fraudulent asset transfer claim (plaintiffs only briefed that claim). The court concluded that all the defendants were subject to suit in Texas based on the plaintiffs' claim.[242] With respect to Halpern and Denny, the plaintiffs alleged that they created companies with the express purpose of fraudulently transferring assets that included the plaintiffs' franchise agreement.[243] Taking the plaintiffs' allegations as true, the Fifth Circuit held that this was enough to satisfy minimum contacts.[244] Vendomation was also formed for the very purpose of continuing the franchising business and, as a result, accepted the Texas franchise agreements.[245] The court held that it purposefully directed its business to Texas and, thus, satisfied minimum contacts as well.[246] The court held that the plaintiffs had sufficiently pleaded facts to establish minimum contacts and, therefore, reversed the district court decision and remanded the case for further proceedings consistent with its opinion.[247]

M. Answering in State Court May Prevent the Granting of Dismissal in Federal Court: In re Amerijet International, Inc.

In *In re Amerijet International, Inc.*, the petitioner appealed the district court's anti-suit injunction and also petitioned the Fifth Circuit for a writ of mandamus against the district court because it set aside the petitioner's voluntary dismissal under Federal Rule of Civil Procedure 41(a)(1)(A)(i).[248] For the purposes of this Survey, the focus is on the district court setting aside the voluntary dismissal. The petitioner and the respondent entered into two agreements regarding the operation of parabolic flights that simulate a weightless environment.[249] Under one agreement (the Engine Lease), the petitioner would lease engines to the respondent.[250] The other agreement (the Management Services Agreement) provided that the petitioner would operate the flights and provide maintenance services.[251] After the Engine Lease expired, the petitioner sent notice to the respondent that it was terminating the Management Services Agreement.[252] The notice also demanded that the respondent execute another engine lease or the petitioner would take

242. *Id.* at 345–46.
243. *Id.* at 346.
244. *Id.* at 347.
245. *Id.*
246. *Id.*
247. *Id.* at 348.
248. Amerijet Int'l, Inc. v. Zero Gravity Corp. (*In re* Amerijet Int'l, Inc.), 785 F.3d 967, 969 (5th Cir. May 2015).
249. *Id.*
250. *Id.*
251. *Id.*
252. *Id.* at 970.

possession of the engines.[253] The respondent declined, so the petitioner filed a temporary restraining order in state court that was granted that same day.[254] The respondent filed its own temporary restraining order, stating that it was in rightful possession of the engines.[255] The state court issued an order enjoining both parties from interfering with the engines.[256] The state court then dissolved the order based on joint motion by the parties.[257]

The respondent removed the case to federal court.[258] The following day, the petitioner filed a Rule 41(a) notice of voluntary dismissal without prejudice, stating that the respondent "has not answered or filed a motion for summary judgment," therefore, the action may be dismissed.[259] The district court issued an order setting a conference for the parties and rejected the petitioner's dismissal.[260] The parties represented that they had reached a settlement, so the court issued a "Final Dismissal."[261] However, the court retained jurisdiction to enforce the settlement.[262] The settlement fell through, and the petitioner filed a suit in the Southern District of Florida.[263] The district court then issued an order enjoining the petitioner from filing a suit anywhere else based on the same transaction.[264]

The petitioner then filed a writ of mandamus with the Fifth Circuit.[265] The petition sought a vacatur of the district court's order reopening the case, stating the district court did not have subject matter jurisdiction after the petitioner filed a Rule 41 voluntary dismissal.[266] The petitioner argued that the respondent had yet to file an answer or motion for summary judgment; therefore, the dismissal should have been automatic.[267] The Fifth Circuit acknowledged that when there is no answer or motion for summary judgment, a notice of dismissal under Rule 41 is "self-effectuating and terminates the case in and of itself."[268] However, this particular case was unique because it was initially filed in state court.[269] The respondent filed an answer in state court before the case was removed to federal court.[270] The Fifth Circuit held that an answer filed in state court is sufficient to preclude

253. *Id.*
254. *Id.*
255. *Id.*
256. *Id.*
257. *Id.*
258. *Id.*
259. *Id.*
260. *Id.* at 971.
261. *Id.*
262. *Id.*
263. *Id.* at 972.
264. *Id.*
265. *Id.*
266. *Id.*
267. *Id.* at 970.
268. *Id.* at 973 (citing Qureshi v. United States, 600 F.3d 523, 525 (5th Cir. 2010)).
269. *Id.* at 974.
270. *Id.*

voluntary dismissal by notice.[271] It stated that when a defendant has filed an answer in state court, having the defendant re-answer after removal would serve no purpose under Rule 41.[272]

N. Standing in a Class Action: In re Deepwater Horizon

In *In re Deepwater Horizon*, BP Exploration & Production Inc., BP America Production Company, and BP P.L.C. (BP) appealed three *Deepwater Horizon*-related settlement awards to nonprofits.[273] The case arose from the class action settlement of claims arising from the *Deepwater Horizon* oil spill.[274] In the below proceeding, the Claims Administrator determined that nonprofits may count donations and grants as revenue under the terms of the settlement agreement.[275] BP appealed this determination, claiming (1) the interpretation violated the terms of the settlement agreement; (2) the interpretation resulted in the class settlement violating Rule 23 and Article III standing; and (3) even if the interpretation was upheld, the three awards were still improper.[276] This Survey only examines BP's second argument.

"The Settlement Agreement negotiated by the parties and approved by the district court" created a Court-Supervised Settlement Program (CSSP).[277] Under this program, class members submit claims through the CSSP.[278] The Claims Administrator manages the CSSP.[279] The Claims Administrator makes a decision regarding a claim, after which a party may appeal to an Appeal Panel.[280] A party may then appeal the Appeal Panel's decision "to the district court of Judge Barbier in the Eastern District of Louisiana."[281] The Claims Administrator issues the awards under the business economic loss framework of the settlement agreement.[282] Under this framework, a party may recover if it experiences "[l]oss of income, earnings or profits . . . as a result of the DEEPWATER HORIZON INCIDENT."[283] Here, the Claims Administrator determined that "grant monies or contributions" can count as revenue for nonprofit entities.[284]

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271. *Id.* at 974–75.
272. *Id.* at 974.
273. Lake Eugenie Land & Dev., Inc. v. BP Expl. & Prod., Inc. (*In re* Deepwater Horizon), 785 F.3d 1003, 1006 (5th Cir. May 2015).
274. *Id.*
275. *Id.*
276. *Id.*
277. *Id.*
278. *Id.*
279. *Id.* at 1007.
280. *Id.*
281. *Id.*
282. *Id.*
283. *Id.* at 1014 (quoting § 1.3 of the Settlement Agreement).
284. *Id.* at 1007.

On appeal, BP argued that the Claims Administrator's interpretation of revenue to include grants and contributions to nonprofit entities included nonprofit entities with no injuries.[285] BP stated that this would violate Article III standing because the class now contained numerous parties that did not suffer an injury as a result of BP's actions.[286] To have standing, a party must suffer: "(1) an injury that is (2) 'fairly traceable to the defendant's allegedly unlawful conduct' and that is (3) 'likely to be redressed by the requested relief.'"[287] The Fifth Circuit had not previously addressed how to evaluate standing involving class certification and settlement approval.[288] However, the Fifth Circuit examined other circuits' approaches to the issue.[289]

The Second Circuit does not require each member of the class to submit evidence of standing; however, no class can be certified when members lack standing.[290] Therefore, the class has to be defined in a way that anyone meeting the definition has standing.[291] The second approach examines whether the named plaintiffs or class representatives have standing and ignores the absent class members.[292] Under this approach, having people included in the class who have not suffered injury does not prevent certification.[293] This is because many of the members are unknown or their claims may be unknown.[294]

In previous *Deepwater Horizon* decisions, the court declined to adopt a specific approach because standing was achieved under either approach.[295] BP claimed that the nonprofit entities failed to establish standing under either approach.[296] The court rejected this argument, stating that BP failed to explain how the interpretation allowed "entities to recover for injuries that were not *caused* by BP's" actions.[297] The qualification of contribution as revenue was "irrelevant to the causal connection between BP's conduct and decreases in contributions to nonprofits."[298] Therefore, the Fifth Circuit held that the Claims Administrator's definition did not violate Article III standing.[299]

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285. *Id.* at 1018.
286. *Id.* at 1020.
287. *Id.* at 1018 (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 590 (1992) (Blackmun, J., dissenting)).
288. *Id.* at 1019.
289. *Id.*
290. *Id.* (citing Denney v. Deutsche Bank AG, 443 F.3d 253, 263–64 (2d Cir. 2006)).
291. *Id.*
292. *Id.*
293. *Id.*
294. *Id.*
295. *Id.*
296. *Id.* at 1019–20.
297. *Id.* at 1020.
298. *Id.*
299. *Id.* at 1019–20.