COMMERCIAL LITIGATION

David S. Coale[*]

* David Coale is a partner with the Dallas litigation firm of Lynn Tillotson Pinker & Cox, LLP. He is a former chair of the State Bar Appellate Section and edits the blog 600camp.com, which monitors commercial litigation in the Fifth Circuit. He thanks Sherri Byrd for her patience and skillful editing.

The Fifth Circuit covered a wide range of commercial litigation topics during the survey period. In particular, many opinions covered basic issues in the areas of contract law, insurance, and the business of mortgage servicing. Major opinions in the area of forum selection clauses and CAFA jurisdiction are now under review by the Supreme Court. A number of cases also dealt with fundamental issues about the sufficiency of evidence and appellate review after trial.

I. ABSTENTION

Overlapping state and federal cases about the rights to settlement proceeds led the district court to abstain under the *Colorado River* Doctrine in *Saucier v. Aviva Life & Annuity Co*.[1] The Fifth Circuit reversed, finding no "exceptional circumstances" warranting abstention.[2] In reviewing each of the relevant factors, the court distinguished "duplicative" litigation—which does not warrant abstention—from "piecemeal" litigation, in which a state court case has more relevant parties than in a federal case.[3] The court also reminded that "how much progress has been made" is more important in comparing the status of parallel cases than their respective filing dates.[4]

Plaintiffs obtained a preliminary injunction against enforcement of a school voucher program, alleging it violated a desegregation consent decree in *Moore v. Tangipahoa Parish School Board*.[5] The Fifth Circuit found an abuse of discretion in denying a stay pending appeal.[6] One reason was *Pullman* abstention, which arises "when an unsettled area of state law . . . would render a decision on the federal issue unnecessary."[7] Here, the court said the defendant had "a strong likelihood of establishing" the district court's error in light of pending state litigation about the constitutionality of the law at issue in the case as it was affected by the relevant state law.[8] Another reason was based upon jurisdiction under the All Writs Act, leading the court to note the plaintiffs' evidence of harm was "based merely on general financial information and speculation."[9] A dissenting opinion further discussed *Pullman* abstention and advocated outright dismissal of

1. *See* Saucier v. Aviva Life & Annuity Co., 701 F.3d 458, 461–62 (5th Cir. Nov. 2012).
2. *Id.* at 462–63.
3. *Id.* at 464.
4. *Id.* (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 21 (1983)).
5. Moore v. Tangipahoa Parish Sch. Bd., 507 F. App'x 389, 390 (5th Cir. Jan. 2013) (per curiam).
6. *Id.* at 392.
7. *Id.* at 395.
8. *Id.* at 396.
9. *Id.* at 397–98.

the case.[10] The decision appears to have been unpublished because of its expedited procedural posture, and a later panel will fully address the merits on a conventional briefing schedule.[11]

II. ANTITRUST

A consumer group sued under the Clayton Act about the market for funeral caskets and then settled all compensatory damages with one of the defendants in *Funeral Consumers Alliance, Inc. v. Service Corp. International*.[12] The Fifth Circuit held that, even after that settlement, the group had standing to proceed against the remaining defendants for attorneys' fees.[13] The court, however, noted that "[t]he fact that death is inevitable is not sufficient to establish a real and immediate threat of future harm," and thus, the court found no standing for injunctive relief.[14] The court also affirmed the denial of class certification, finding that the scope of the putative nationwide class fit poorly with the evidence of localized market activity for funeral services and casket sales.[15]

III. ANTI-SUIT INJUNCTION

The unpublished case of *Gibbs v. Lufkin Industries* reviews the basics of anti-suit injunctions.[16] The district court dismissed some of the plaintiffs' claims (including the federal ones), remanded the remaining state claims, and enjoined pursuit of those claims during appeal of the dismissal ruling.[17] The Fifth Circuit reversed, noting that the second court ordinarily determines the preclusive effect of a prior court's judgment and that simultaneous in personam proceedings do not by themselves require an anti-suit injunction.[18] The court distinguished its earlier case of *Brookshire Bros. Holding, Inc. v. Dayco Products, Inc.* as arising from the erroneous remand of the same proceeding.[19]

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10. *Id.* at 399–400 (Dennis, J., dissenting).
11. *Id.* at 404 n.1.
12. Funeral Consumers Alliance, Inc. v. Serv. Corp. Int'l, 695 F.3d 330, 334–35 (5th Cir. Sept. 2012).
13. *Id.* at 341–42.
14. *Id.* at 343.
15. *Id.* at 349 (distinguishing United States v. Grinnell Corp., 384 U.S. 563 (1966)).
16. Gibbs v. Lufkin Indus., 487 F. App'x 916, 918 (5th Cir. Sept. 2012) (per curiam).
17. *Id.*
18. *Id.* at 919–20.
19. *Id.* at 920 (distinguishing Brookshire Bros. Holding, Inc. v. Dayco Prods., Inc., 554 F.3d 595 (5th Cir. 2009)).

IV. APPELLATE JURISDICTION

A dispute about guaranty obligations related to the purchase of a blimp was removed to federal court.[20] In *McCardell v. Regent Private Capital, LLC*, the district court granted a motion to compel arbitration, stayed the case, and administratively closed it.[21] The Fifth Circuit reminded that administrative closure does not create a final judgment, and thus, dismissed the case for lack of appellate jurisdiction over the interlocutory appeal.[22]

Appellate jurisdiction over bankruptcy matters can become murky because finality is not always obvious.[23] In an appeal from an individual's bankruptcy case, the court stated in *In re Crager* that the test is whether a district court order is a "final determination of the rights of the parties to secure the relief they seek, or a final disposition of a discrete dispute within the larger bankruptcy case."[24] The district court's finding that the debtor's Chapter 13 plan was not made in good faith "involve[d] a discrete dispute within her case" and created jurisdiction.[25]

V. ARBITRATION

In 2011, the Fifth Circuit held in *Weingarten Realty Investors v. Miller* that a stay is not automatic during an appeal about arbitrability, weighing in on an important procedural issue that several other circuits had already addressed.[26] Then, in a 2012 unpublished opinion, the court addressed the merits of the case and affirmed the denial of a motion to compel arbitration under an equitable estoppel theory, offering a basic reminder about that concept—arbitration is not proper when the guaranty for which the plaintiff sought a declaration was distinct from the loan agreement that contained the arbitration clause.[27]

In *Petrofac, Inc. v. DynMcDermott Petroleum Operations Co.*, the Fifth Circuit affirmed the confirmation of an arbitration award in a construction dispute.[28] The court held that the arbitrator had authority, based on the parties' agreement to American Arbitration Association rules, to determine whether a particular damages issue was arbitrable; the award

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20. McCardell v. Regent Private Capital, LLC, No. 12-1136, 2012 WL 3270583, at *1 (5th Cir. Aug. 10, 2012).

21. *Id.* at *2.

22. *Id.*

23. *See* Sikes v. Crager (*In re* Crager), 691 F.3d 671, 673–74 (5th Cir. Aug. 2012).

24. *Id.* at 674 (quoting Bartee v. Tara Colony Homeowners Ass'n (*In re* Bartee), 212 F.3d 277, 282 (5th Cir. 2000)) (internal quotation marks omitted).

25. *Id.* at 675.

26. *See* Weingarten Realty Investors v. Miller, 661 F.3d 904, 906, 908 (5th Cir. 2011).

27. Weingarten Realty Investors v. Miller, 495 F. App'x 418, 420 (5th Cir. Oct. 2012) (per curiam).

28. Petrofac, Inc. v. DynMcDermott Petroleum Operations Co., 687 F.3d 671, 673 (5th Cir. July 2012).

was not procured by fraud, leading the court to reject an argument that the claimant's damage calculation involved a "bait-and-switch" that pretended to abandon one theory, and the district court had properly awarded prejudgment interest, particularly in light of the arbitration panel creating "a thirty-day interest-free window from the date of the award" for payment.[29]

In *Albemarle Corp. v. United Steel Workers*, an employer terminated two employees for safety violations.[30] An arbitrator, appointed under the parties' collective bargaining agreement (CBA), ordered them reinstated after a suspension.[31] The district court vacated the award, and the Fifth Circuit reversed and reinstated.[32] The court found "that explicating broad CBA terms like 'cause,' when left undefined by contract, is the arbitrator's charge."[33] It distinguished prior cases that left an arbitrator no discretion to decide whether certain rule violations required discharge.[34] The court also rejected a challenge to the award on public policy grounds, stating that "any such public policy must be explicit, well defined, and dominant."[35]

In *BP Exploration Libya Ltd. v. ExxonMobil Libya Ltd.*, BP and Exxon disputed the condition of an offshore rig that Noble North Africa Ltd. operated off the coast of Libya; conversely, Noble sought payment for its services.[36] The resulting three-party dispute ran into practical problems because the arbitration clause's procedure for selecting three arbitrators was only workable in a two-party dispute.[37] The Fifth Circuit found that a "mechanical breakdown" justified federal court intervention under the Federal Arbitration Act (FAA), but that the district court exceeded its authority by ordering that arbitration proceed with five arbitrators, rather than the three specified in the agreement.[38] The court remanded with instructions for the district court to follow when forming a three-arbitrator panel.[39]

In *First Investment Corp. of the Marshall Islands v. Fujian Mawei Shipbuilding, Ltd.*, the plaintiff petitioned an Eastern District of Louisiana court to recognize a $26 million arbitration award that a court in China's

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29. *Id.* at 675–76 (internal quotation marks omitted).

30. Albemarle Corp. v. United Steel Workers, 703 F.3d 821, 822 (5th Cir. Jan. 2013).

31. *Id.* at 823–24.

32. *Id.* at 822–23.

33. *Id.* at 826 (quoting Amalgamated Meat Cutters & Butcher Workmen of N. Am., Dist. Local No. 540 v. Neuhoff Bros. Packers, Inc., 481 F.2d 817, 820 (5th Cir. 1973)).

34. *Id.* at 824–25 (citing E.I. DuPont de Nemours & Co. v. Local 900 of the Int'l Chem. Workers Union, AFL-CIO, 968 F.2d 456, 458–59 (5th Cir. 1992) (per curiam)).

35. *Id.* at 827 (quoting E. Associated Coal Corp. v. United Mine Workers, Dist. 17, 531 U.S. 57, 62 (2000)) (internal quotation marks omitted); *cf.* Horton Automatics v. Indus. Div. of the Commc'n Workers of Am., AFL-CIO, 506 F. App'x 253, 256–57 (5th Cir. Jan. 2013) (reversing confirmation when labor arbitrator exceeded limited scope).

36. BP Exploration Libya Ltd. v. ExxonMobil Libya Ltd., 689 F.3d 481, 484–86 (5th Cir. July 2012).

37. *Id.* at 483–86.

38. *Id.* at 488–89 (citing 9 U.S.C. § 5 (1947)).

39. *Id.* at 496–97.

Fujian Province declined to enforce, finding the award invalid due to an arbitrator's imprisonment during the proceedings.[40] The Fifth Circuit affirmed dismissal for lack of personal jurisdiction with three holdings: (1) the recent Supreme Court case of *Goodyear Dunlop Tires Operations, S.A. v. Brown*, which removed doubt as to whether foreign corporations could invoke jurisdictional due process protection; (2) the New York Convention did not abrogate those due process rights; and (3) the parties could not prove an "alter ego" relationship among the relevant companies that could give rise to jurisdiction.[41] In a companion case, the court affirmed a ruling that denied jurisdictional discovery based on "sparse allegations" of an alter ego relationship.[42]

In *Klein v. Nabors Drilling USA L.P.*, an employee signed an Employee Acknowledgement Form agreeing to resolve disputes through the Nabors Dispute Resolution Program, which the agreement described as "a process that may include mediation and/or arbitration."[43] The Fifth Circuit noted that the basic legal framework asks, "(1) is there a valid agreement to arbitrate . . . and (2) does the dispute in question fall within the scope of that . . . agreement?"[44] Here, the parties did not dispute that they had a valid agreement or that Klein's age discrimination claim was a "dispute" within the program's meaning—the novel issue was whether the parties agreed that arbitration was mandatory.[45] The court carefully reviewed the program and found that while it "preserve[d] options for nonbinding dispute resolution before final, binding arbitration," it clearly stated that it "create[d] an exclusive procedural mechanism for the final resolution of all Disputes," and thus, it required Klein to arbitrate his claim.[46]

In *VT Halter Marine, Inc. v. Wartsila North America, Inc.*, a ship propulsion systems manufacturer contracted with a ship operator, who in turn contracted with a shipbuilder.[47] The manufacturer and the operator had a sales contract with an arbitration clause, and the operator and the

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40. First Inv. Corp. of the Marshall Islands v. Fujian Mawei Shipbuilding, Ltd., 703 F.3d 742, 745–46 (5th Cir. Jan. 2013).

41. *Id.* at 747–48, 751–53 (internal quotation marks omitted) (citing Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2850–54 (2011)).

42. *Cf.* Box v. Dall. Mex. Consulate Gen., 487 F. App'x 880, 886–87 (5th Cir. Aug. 2012) (per curiam) (reversing jurisdictional discovery ruling). *Compare First Inv. Corp.of the Marshall Islands*, 703 F.3d at 752–53 (finding no "alter ego" relationship sufficient to raise jurisdiction), *with* Covington Marine Corp. v. Xiamen Shipbuilding Indus. Co., 504 F. App'x 298, 302–03 (5th Cir. Dec. 2012) (per curiam) (holding the district court properly denied jurisdiction because no alter ego existed between the two entities).

43. Klein v. Nabors Drilling USA L.P., 710 F.3d 234, 238 (5th Cir. Feb. 2013) (internal quotation marks omitted).

44. *Id.* at 236–37 (quoting Sherer v. Green Tree Servicing LLC, 548 F.3d 379, 381 (5th Cir. 2008) (per curiam)) (internal quotation marks omitted).

45. *Id.* at 237.

46. *Id.* at 238–40.

47. VT Halter Marine, Inc. v. Wartsila N. Am., Inc., 511 F. App'x 358, 359 (5th Cir. Feb. 2013) (per curiam).

shipbuilder had a separate contract without one.[48] The component manufacturer and shipbuilder had dealings as part of the overall relationship, but did not have a direct contract.[49] The shipbuilder sued the manufacturer for supplying allegedly defective parts.[50] The shipbuilder conceded that its breach of warranty claim, which was derivative of the operator's rights, was subject to arbitration.[51] The court found that the parties could only arbitrate the tortious interference claim, however, under an estoppel theory because the shipbuilder was not a party to the manufacturer–ship operator contract.[52] The district court's order was not clear about the basis for ordering that claim's arbitration, and the Fifth Circuit remanded to resolve whether estoppel applied.[53] The court reiterated that while courts usually review orders compelling arbitration de novo, courts review an order compelling a third party to arbitrate under an estoppel theory for abuse of discretion.[54]

In *Tricon Energy, Ltd. v. Vinmar International, Ltd.*, the Fifth Circuit affirmed the district court's order confirming an arbitration award against both sides' challenges.[55] One party argued that there was no agreement to arbitrate, and the court resolved that issue under general contract law principles: "Signature[] lines may be strong evidence that the parties did not intend to be bound by a contract until they signed it. But the blank signature blocks here are insufficient, by themselves, to raise a genuine dispute of material fact."[56] The other party disputed the handling of post-judgment interest, but the court concluded that the panel had only awarded post-award interest, leaving the district court free to impose the statutory post-judgment rate upon confirmation.[57] The court noted that parties may contract to have the arbitrator resolve the appropriate post-judgment rate.[58]

The plaintiffs in *American Family Life Assurance Co. of Columbus v. Biles* sued in state court, alleging that American Family Life Assurance Company of Columbus (Aflac) paid death benefits to the wrong person and that the policy application contained a forged signature.[59] Aflac moved to compel arbitration in the state court case and simultaneously filed a new

48. *Id.*
49. *Id.*
50. *Id.* at 360–61.
51. *Id.* at 360.
52. *Id.* at 360–63.
53. *Id.* at 361–63.
54. *Id.* at 360 (citing Noble Drilling Servs., Inc. v. Certex USA, Inc., 620 F.3d 469, 472 n.4 (5th Cir. 2010)).
55. Tricon Energy, Ltd. v. Vinmar Int'l, Ltd., 718 F.3d 448, 451 (5th Cir. May 2013).
56. *Id.* at 456.
57. *Id.* at 459–60.
58. *Id.*
59. Am. Family Life Assurance Co. of Colombus v. Biles, 714 F.3d 887, 890 (5th Cir. Apr. 2013) (per curiam).

federal action to compel arbitration.[60] The state court judge denied Aflac's motion without prejudice to refile after the parties completed discovery regarding the signatures' validity.[61] In the meantime, the federal court granted Aflac's summary judgment motion and compelled arbitration after hearing expert testimony from both sides on the forgery issue.[62] The Fifth Circuit affirmed, finding that *Colorado River* abstention in favor of the state case was not required, and that the order compelling arbitration was allowed by the Anti-Injunction Act because it was "necessary to protect or effectuate [the federal] order compelling arbitration."[63] The court also found no abuse of discretion in the denial of the respondents' FRCP 56(e) motion because it sought testimony that would only be relevant if the witness admitted outright to forgery.[64]

Arbitrators in *Timegate Studios, Inc. v. Southpeak Interactive, L.L.C.* awarded a videogame developer a perpetual license in certain intellectual property.[65] The district court vacated the award on the ground that the award went against the essence of the developer's contractual relationship with the game publisher.[66] The Fifth Circuit acknowledged that the FAA's deference to arbitrators reaches its boundary if they "utterly contort[] the evident purpose and intent of the parties" with an award that does not "draw its essence" from the parties' contract.[67] Here, particularly in light of the arbitrator's findings about the publisher's intentional wrongdoing, the court found the license "was a permissible exercise of the arbitrator's creative remedial powers," even if it was not wholly consistent with the parties' contract.[68] The court reviewed cases about arbitrators who exceeded their given authority and found them inapplicable to this situation: "Timegate committed an extraordinary breach of the Agreement, and an equally extraordinary realignment of the parties' original rights [was] necessary to preserve the essence of the Agreement."[69]

An unpublished opinion reversed the decision to vacate a Financial Industry Regulatory Authority (FINRA) arbitration award in *Morgan Keegan & Co. v. Garrett*.[70] The court reversed a finding of fraudulent testimony "because the grounds for [the alleged] fraud were discoverable by due diligence before or during the . . . arbitration."[71] The court also

60. *Id.* at 890–91.
61. *Id.* at 890 n.1, 891.
62. *Id.* at 890–91.
63. *Id.* at 893.
64. *Id.* at 895.
65. Timegate Studios, Inc. v. Southpeak Interactive, L.L.C., 713 F.3d 797, 798 (5th Cir. Apr. 2013).
66. *Id.*
67. *See id.* at 802–03.
68. *Id.* at 804.
69. *Id.* at 807.
70. Morgan Keegan & Co. v. Garrett, 495 F. App'x 443, 443 (5th Cir. Oct. 2012) (per curiam).
71. *Id.* at 447.

deferred to the panel's conclusions about the scope of the arbitration as consistent with the authority given by the FINRA rules.[72] Throughout, the opinion summarizes circuit authority about the appropriate level of deference to the panel in an award confirmation setting.[73]

The parties arbitrated whether certain offshore oil dealings violated RICO in *Grynberg v. BP, PLC*.[74] The arbitrator found that the claimant did not establish damage and dismissed that claim, noting that he lacked authority to determine whether any criminal violation of the Racketeer Influenced and Corrupt Organizations Act (RICO) occurred.[75] The Fifth Circuit affirmed the dismissal of a subsequent RICO lawsuit on the grounds of res judicata, finding that the arbitrator's ruling was on the merits and not jurisdictional.[76]

VI. ATTORNEYS' FEES

The appellants in *Texas Medical Providers Performing Abortive Services v. Lakey* sought $60,000 in attorneys' fees after successfully defending civil rights claims about new abortion laws.[77] The Fifth Circuit rejected a request based on 42 U.S.C. § 1988, noting that a "[l]ack of merit does not equate to frivolity."[78] The court also rejected a request based on inherent power, which relied upon statements by plaintiff's counsel that they dismissed several challenges because the initial Fifth Circuit panel had declared all future appeals in the case would be heard by the same panel.[79] It stated, "The short answer to this charge is that if courts treated as a willful abuse of process every self-serving statement of counsel at the expense of a judge or judges, there would be no end to sanctions motions."[80]

VII. BANKRUPTCY

After reviewing the application of judicial estoppel in the bankruptcy context as to a debtor's claim in *Love v. Tyson Foods, Inc.*,[81] the Fifth Circuit applied the doctrine to a creditor's claim in *Wells Fargo Bank, N.A.*

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72. *See id.* at 449.
73. *Id.*
74. Grynberg v. BP, PLC, 527 F. App'x 278, 279 (5th Cir. June 2013) (per curiam).
75. *Id.* at 283.
76. *Id.*
77. Tex. Med. Providers Performing Abortion Servs. v. Lakey, 515 F. App'x 288, 289 (5th Cir. Feb. 2013).
78. *Id.*
79. *Id.*
80. *Id.*
81. Love v. Tyson Foods, Inc., 677 F.3d 258 (5th Cir. 2012) (revised Apr. 12, 2012).

v. Oparaji.[82] After carefully reviewing the elements of that doctrine in this circuit, the court found that Wells Fargo did not adopt "plainly inconsistent position[s]" in the debtor's two bankruptcies, observing that a creditor is not required to include all accrued liability in every revised proof of claim.[83] The court also found that the debtor's failure to follow the plan in his first bankruptcy barred him from invoking the equitable remedy of judicial estoppel based on those proceedings.[84]

Creditors sought to assert state law tort claims that once belonged to a bankruptcy estate in *Wooley v. Haynes & Boone, L.L.P.*[85] The Fifth Circuit found that the reservation language in the reorganization plan was too vague to satisfy the requirements of the Bankruptcy Code as to these claims:

> Neither the Plan nor the disclosure statement references specific state law claims for fraud, breach of fiduciary duty, or any other particular cause of action. Instead, the Plan simply refers to all causes of action, known or unknown. As noted, such a blanket reservation is not sufficient to put creditors on notice.[86]

The opinion reviews the handful of Fifth Circuit opinions that establish the guidelines on this basic topic in bankruptcy litigation and contrasts with another recent opinion that found a set of avoidance claims had been properly reserved.[87]

The Fifth Circuit made a major contribution to the law of international insolvency proceedings in *Ad Hoc Group of Vitro Noteholders v. Vitro S.A.B. de C.V.*[88] The opinion affirmed a series of rulings under Chapter 15 of the Bankruptcy Code (which implements the United Nations Commission of International Trade Law's Model Law on Cross-Border Insolvency) that (1) recognized the legitimacy of the Mexican reorganization proceeding involving Vitro (the largest glassmaker in Mexico, with over $1 billion in debt); (2) recognized the validity of the foreign representatives appointed as a result of that proceeding, analogizing their appointment process to the management of a debtor-in-possession in the United States; and (3) denied enforcement of the plan on the grounds of comity.[89] The detailed comity analysis turns on the United States

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82. Wells Fargo Bank, N.A. v. Oparaji (*In re* Oparaji), 698 F.3d 231, 235–36 (5th Cir. Oct. 2012).

83. *Id.* at 236.

84. *Id.* at 238.

85. Wooley v. Haynes & Boone, L.L.P. (*In re* SI Restructuring, Inc.), 714 F.3d 860, 862 (5th Cir. Apr. 2013).

86. *Id.* at 865.

87. *Id.* (distinguishing Spicer v. Laguna Madre Oil & Gas II, L.L.C. (*In re* Tex. Wyo. Drilling, Inc.), 647 F.3d 547, 552 (5th Cir. 2011)).

88. Ad Hoc Grp. of Vitro Noteholders v. Vitro S.A.B. de C.V. (*In re* Vitro S.A.B. de C.V.), 701 F.3d 1031, 1036 (5th Cir. Nov. 2012).

89. *Id.* at 1043–47.

bankruptcy system's disfavor of non-consensual, non-debtor releases.[90] The framework of the opinion is broadly applicable to a wide range of cross-border insolvency situations and addresses issues of first impression about the scope of relief available under Chapter 15.

A partner in a bankrupt entity complained in *Smyth v. Simeon Land Development, L.L.C.* that the bankruptcy court had no jurisdiction to authorize the sale of claims he sought to assert individually.[91] Smyth did not obtain a stay of the sale order, however, rendering the appeal moot.[92] "When an appeal is moot because an appellant has failed to obtain a stay, th[e] court cannot reach the question of whether the bankruptcy court had jurisdiction to sell the claims."[93]

The bankruptcy court in *CRG Partners Group, L.L.C. v. Neary* awarded a $1 million fee enhancement for a "rare and exceptional" result in the Pilgrim's Pride bankruptcy.[94] The trustee objected, arguing that *Perdue v. Kenny A. ex rel Winn*—a case rejecting a comparable enhancement under 42 U.S.C. § 1988—impliedly overruled older Fifth Circuit authority that allowed the enhancements in bankruptcy.[95] The court carefully reviewed *Perdue* under the "rule of orderliness"—a set of principles that guides a panel's fidelity to older panel opinions—and found *Perdue* distinguishable factually and for policy reasons.[96] The court reminded that it had recently reached a similar conclusion as to the effect of *Stern v. Marshall* on magistrate jurisdiction.[97]

Conversely, in *ASARCO, L.L.C. v. Barclays Capital, Inc.*, the court reversed an enhancement under 11 U.S.C. § 328, stating, "Section 328 applies when the bankruptcy court approves a particular rate . . . [at the outset of the engagement], and § 330 applies when the court does not do so."[98] A "necessary prerequisite" to § 328 enhancement is that the professional's work was "incapable of anticipation."[99] Here, the court found that the length of the ASARCO bankruptcy and the exodus of its employees after filing led to "commendable" work by Barclays that was still "capable of being anticipated"—analogizing Barclays to a car buyer who finds a new Corvette "needed far more than a car wash."[100]

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90. *Id.* at 1059.

91. Smyth v. Simeon Land Dev., L.L.C. (*In re* Escarent Entities, L.P.), 519 F. App'x 895, 897 (5th Cir. Apr. 2013) (per curiam).

92. *Id.* at 898.

93. *Id.*

94. CRG Partners Grp., L.L.C. v. Neary (*In re* Pilgrim's Pride Corp.), 690 F.3d 650, 653, 656 (5th Cir. Aug. 2012).

95. *Id.* at 654.

96. *Id.* at 663, 665.

97. *See id.* (citing Stern v. Marshall, 131 S. Ct. 2594 (2011)).

98. ASARCO, L.L.C. v. Barclays Capital, Inc. (*In re* ASARCO, L.L.C.), 702 F.3d 250, 260 (5th Cir. Dec. 2012) (alteration in original).

99. *Id.* at 257 (internal quotation marks omitted).

100. *See id.* at 264.

In *Wells Fargo Bank National Ass'n v. Texas Grand Prairie Hotel Realty, L.L.C.*, the secured lender held a $39 million claim in the bankruptcy of a hotel development.[101] A reorganization plan was approved over its objection in a "cram-down" that called for repayment of the debt over ten years at 5.5% interest (1.75% above prime on the date of confirmation).[102] Here, the parties agreed that this "prime-plus" approach was appropriate under the plurality in *Till v. SCS Credit Corp.*, but disputed the proper rate.[103] The court rejected a threshold challenge based upon "equitable mootness" because it reasoned that the appeal could be resolved with "fractional relief" rather than rejection of the plan.[104] On the merits, the court reaffirmed that it would review the choice of a cram-down rate for clear error rather than de novo.[105] After a thorough review of *Till* and subsequent cases, the court found no clear error in the prime-plus rate in this factual context.[106]

In *Fire Eagle L.L.C. v. Bischoff*, a creditor successfully made a "credit bid" under the Bankruptcy Code for assets of a failed golf resort.[107] Litigation followed between the creditor and guarantors of the debt, ending with a terse summary judgment order for the guarantors: "This is not rocket science. The Senior Loan has been PAID!!!!"[108] The Fifth Circuit affirmed in all respects, holding that (1) the bankruptcy court had jurisdiction over the dispute with the guarantors because it had a "conceivable effect" on the estate; (2) the issue of the effect of the credit bid was within core jurisdiction and did not raise a *Stern v. Marshall* issue; (3) core jurisdiction trumped a forum selection clause on the facts of this case; (4) a transfer into the bankruptcy court based on the first-to-file rule was proper; and (5) the creditor's bid extinguished the debt.[109] On the last holding, the court noted that the section of the Code allowing the credit bid did not provide for fair-market valuation of the assets, unlike other Code provisions.[110]

The Bankruptcy Code requires that a plan receive a favorable vote from "at least one class of claims that is impaired under the plan."[111] In *Western Real Estate Equities, L.L.C. v. Village at Camp Bowie I, L.P.*,

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101. Wells Fargo Bank Nat'l Ass'n v. Tex. Grand Prairie Hotel Realty, L.L.C. (*In re* Tex. Grand Prairie Hotel Realty, L.L.C.), 710 F.3d 324, 335 (5th Cir. Mar. 2013).

102. *Id.*

103. *Id.* at 332 (citing Till v. SCS Credit Corp., 541 U.S. 465 (2004)).

104. *Id.* at 328.

105. *Id.* at 331 (citing Fin. Sec. Assurance Inc. v. T-H New Orleans Ltd. P'ship (*In re* T-H New Orleans Ltd. P'ship), 116 F.3d 790 (5th Cir. 1997)).

106. *See id.* at 337.

107. Fire Eagle L.L.C. v. Bischoff (*In re* Spillman Dev. Grp., Ltd.), 710 F.3d 299, 303 (5th Cir. Feb. 2013).

108. *Id.* (quoting Spillman Inv. Grp., Ltd. v. Am. Bank of Tex., 401 B.R. 240, 256 (Bankr. W.D. Tex. 2009)) (internal quotation marks omitted).

109. *See id.* at 304–08.

110. *Id.* at 308.

111. 11 U.S.C. § 1129(a)(10) (2012).

thirty-eight unsecured trade creditors of a real estate venture voted to approve the debtor's plan, while the secured creditor voted against it.[112] The secured creditor complained that the consent was not valid because the plan "artificially" impaired the unsecured claims, paying them over a three-month period when the debtor had enough cash to pay them in full upon confirmation.[113] Recognizing a circuit split, the Fifth Circuit held that § 1129 "does not distinguish between discretionary and economically driven impairment."[114] The court conceded that the Code imposes an overall "good faith" requirement on the proponent of a plan, but held that the secured creditor's argument went too far by "shoehorning a motive inquiry and materiality requirement" into the statute without support in its text.[115]

The bankruptcy trustee in *Compton v. Anderson* filed several avoidance actions, and the bankruptcy court dismissed for lack of standing because the reservation of those claims to the trustee in the debtors' reorganization plan was not sufficiently "specific and unequivocal."[116] The Fifth Circuit reviewed several of its recent cases on this issue and reversed, concluding that "[i]n addition to stating the basis of recovery, the Exhibits referenced in the Reorganization Plan identified each defendant by name."[117] The case was remanded for further review, including the scope of a carve-out in the reservation for released claims.[118]

VIII. CLASS ACTIONS—CAFA

In *Mississippi ex rel. Hood v. AU Optronics Corp.*, the Fifth Circuit reversed a remand order, finding that a suit brought to protect consumers by the Mississippi Attorney General was a "mass action" under CAFA.[119] Based on the analytical framework of *Louisiana ex rel. Caldwell v. Allstate Insurance Co.*, the court concluded that the numerical requirements of CAFA for a mass action were satisfied, and the general public policy exception in the statute was not.[120] A concurrence endorsed the outcome, but suggested that the claim-by-claim framework of *Caldwell* effectively

112. W. Real Estate Equities, L.L.C. v. Vill. at Camp Bowie I, L.P. (*In re* Vill. at Camp Bowie I, L.P.), 710 F.3d 239, 242 (5th Cir. Feb. 2013).

113. *Id.* at 243.

114. *Id.* at 245.

115. *See id.*

116. Compton v. Anderson (*In re* MPF Holdings US LLC), 701 F.3d 449, 452 (5th Cir. Nov. 2012) (citing Dynasty Oil & Gas, LLC v. Citizens Bank (*In re* United Operating, LLC), 540 F.3d 351, 355 (5th Cir. 2008)).

117. *Id.* at 457.

118. *Id.*

119. Miss. *ex rel.* Hood v. AU Optronics Corp., 701 F.3d 796, 802 (5th Cir. Nov. 2012), *rev'd*, 134 S. Ct. 736 (2014).

120. *Id.* at 803 (citing La. *ex rel.* Caldwell v. Allstate Ins. Co., 536 F.3d 418 (5th Cir. 2008)).

mooted the general public exception.[121] The Supreme Court granted certiorari in this case to resolve a circuit split about how CAFA should treat parens patriae actions, and then reversed and remanded the case.[122]

IX. CLASS ACTIONS—CERTIFICATION

A putative plaintiff class alleged violations of federal securities law by alleged misstatements about asbestos liabilities, the quality of certain receivables, and the claimed benefits of a merger in *Erica P. John Fund, Inc. v. Halliburton Co*.[123] Reviewing recent Supreme Court cases about relevant evidence at the certification stage, including one that reversed the Fifth Circuit about proof of loss causation, the court held that "price impact fraud-on-the-market rebuttal evidence should not be considered at class certification. Proof of price impact is based upon common evidence, and later proof of no price impact will not result in the possibility of individual claims continuing."[124] The court rejected a policy argument about the potential "in terrorem" effect of not considering such potentially dispositive evidence about the merits at the certification stage.[125] The Fifth Circuit affirmed the district court's ruling about this evidence and the resulting class certification.[126]

After a three-day hearing, a bankruptcy court certified a class for injunctive relief about foreclosure-related fees during the debtors' bankruptcy proceedings in *Rodriguez v. Countrywide Home Loans, Inc*.[127] The Fifth Circuit affirmed, finding that Countrywide's acts were "generally applicable to the narrowly certified . . . class of approximately 125 individuals."[128] The court also found that the relevant records were readily searched and that Countrywide had a consistent "practice" even though it had no formal company policy as to the fees.[129]

In re TWL Corp. involved a WARN Act claim asserted by a putative class in bankruptcy court.[130] The Fifth Circuit began its review by comparing the rules for adversary proceedings, which automatically adopt Fed. R. Civ. P. 23, with those for a class proof of claim, which would not automatically implicate that rule.[131] Applying Rule 23, the court agreed that

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121. *AU Optronics Corp.*, 701 F.3d at 802.

122. *AU Optronics Corp.*, 134 S. Ct. at 737.

123. Erica P. John Fund, Inc. v. Halliburton Co., 718 F.3d 423, 426 (5th Cir. Apr. 2013).

124. *Id.* at 435 (footnote omitted) (citing Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 133 S. Ct. 1184 (2013)).

125. *Id.*

126. *Id.* at 436.

127. Rodriguez v. Countrywide Home Loans, Inc. (*In re* Rodriguez), 695 F.3d 360, 364 (5th Cir. Sept. 2012).

128. *Id.* at 365 (distinguishing Wilborn v. Wells Fargo Bank, N.A., 609 F.3d 748 (5th Cir. 2010)).

129. *Id.* at 368 (distinguishing Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2553–55 (2011)).

130. Teta v. Chow (*In re* TWL Corp.), 712 F.3d 886, 889 (5th Cir. Mar. 2013).

131. *Id.* at 893.

bankruptcy courts may apply factors unique to the bankruptcy process when considering class certification but remanded for additional explanation by the district court on the issues of numerosity and superiority.[132] A concurrence would have simply reversed the denial of class certification.[133]

In *Ackal v. Centennial Beauregard Cellular, L.L.C.*, the Fifth Circuit reversed the certification of a class of Louisiana governmental entities that contracted with the class defendants for cell phone service.[134] The court reasoned that because Louisiana law requires many of the entities to follow a specific process before retaining outside legal counsel, the class was essentially "opt in"—a class structure expressly foreclosed by Rule 23(b)(3), which allows only class member "opt out."[135]

In *Ahmad v. Old Republic National Title Insurance Co.*, the court reversed a grant of class certification in a case about title insurance premiums.[136] The court relied on *Benavides v. Chicago Title Insurance Co.*,[137] which declined to certify a similar class of title insurance buyers because "[t]he resulting trial would require the factfinder to determine whether each individual qualified for the discount based on the evidence in his or her file."[138] The court declined to distinguish *Benavides* even though a particular discount was mandatory once "the requirements of R-8," a Texas Insurance Code provision, were satisfied because each plaintiff would present unique facts about those requirements.[139] Therefore, the class did not meet the commonality requirement of Fed. R. Civ. P. 23(a)(2).[140]

X. CHARGE ERROR

The plaintiff in *RBIII, L.P. v. City of San Antonio* sought damages after the City of San Antonio razed a property without providing prior notice.[141] After a jury trial, the plaintiff recovered $27,500 in damages.[142] The Fifth Circuit found that a key jury instruction on the City's defenses "improperly cast the central factual dispute as whether or not the Structure posed an immediate danger to the public, when the issue should have been whether the City acted arbitrarily or abused its discretion in determining that the

132. *Id.* at 900.
133. *Id.* at 901.
134. Ackal v. Centennial Beauregard Cellular, L.L.C., 700 F.3d 212, 219 (5th Cir. Oct. 2012).
135. *Id.* at 218–19 (citing Kern v. Siemens Corp., 393 F.3d 120, 122 (2d Cir. 2004)).
136. Ahmad v. Old Republic Nat'l Title Ins. Co., 690 F.3d 698, 704 (5th Cir. Aug. 2012).
137. Benavides v. Chi. Title Ins. Co., 636 F.3d 699 (5th Cir. 2011).
138. *Ahmad*, 690 F.3d at 703.
139. *Id.* at 704.
140. *Id.* at 705.
141. RBIII, L.P. v. City of San Antonio, 713 F.3d 840, 842 (5th Cir. Apr. 2013).
142. *Id.* at 844.

Structure presented an immediate danger."[143] Accordingly, "[b]ecause this error in the instructions misled the jury as to the central factual question in the case," the court reversed and remanded for further proceedings.[144] The court's analysis summarizes how federal courts address the issue of harm in erroneous jury instructions—an analysis that the Texas Supreme Court had already begun to develop in its *Casteel* line of cases.[145]

XI. CONSTITUTIONAL LAW

In a rare, but classical exercise of judicial review of a state law's "rational basis," the Fifth Circuit found a Louisiana economic regulation unconstitutional in *St. Joseph Abbey v. Castille*.[146] The Associated Press and the Times-Picayune provided some initial commentary.[147] The Louisiana State Board of Embalmers and Funeral Directors barred an abbey of Benedictine monks from selling caskets.[148] In late 2012, the Fifth Circuit certified a question to the Louisiana Supreme Court about the Board's authority, which that court declined to answer.[149] The Fifth Circuit then reviewed the Board's actions and agreed with the district court that the regulation was not rationally related to the state's claimed interests in consumer protection or public health, affirming an injunction against its enforcement.[150] The court emphasized both the limited role of rational basis review and its importance when it applies: "The deference we owe expresses mighty principles of federalism and judicial roles. The principle we protect from the hand of the State today protects an equally vital core principle—the taking of wealth and handing it to others . . . as 'economic' protection of the rulemakers' pockets."[151]

XII. CONSUMER

Wagner v. BellSouth Telecommunications, Inc. underscored a recent holding that a reduced credit rating is not enough to establish emotional damages under the Fair Credit Reporting Act (FCRA).[152] The opinion also reminded that to recover mental anguish damages under the FCRA, a

143. *Id.* at 847–48.
144. *Id.* at 848.
145. *See* Crown Life Ins. Co. v. Casteel, 22 S.W.3d 378, 381 (Tex. 2000).
146. St. Joseph Abbey v. Castille, 712 F.3d 215, 227 (5th Cir. Mar. 2013).
147. *See* Brett Snider, *SCOTUS Puts Final Nail in Louisiana Coffin Case*, U.S. FIFTH CIRCUIT (Oct. 17, 2013), www.blogs.findlaw.com/fifth_circuit/2013/10/scotus-puts-final-nail-in-louisiana-coffin-case.html.
148. *St. Joseph Abbey*, 712 F.3d at 217–18.
149. *Id.* at 220.
150. *Id.* at 226–27.
151. *Id.*
152. *See* Wagner v. BellSouth Telecomms., Inc., 520 F. App'x 295, 298–99 (5th Cir. Apr. 2013) (per curiam); *see also* Cousin v. Trans Union Corp., 246 F.3d 359, 371 (5th Cir. 2001).

plaintiff must offer "'evidence of genuine injury, such as the evidence of the injured party's conduct and the observations of others,' and [must] demonstrate 'a degree of specificity which may include corroborating testimony or medical or psychological evidence in support of the damage award.'"[153] The court also reviewed the statute of limitations period under the FCRA and its Louisiana state analog.[154]

McMurray v. ProCollect, Inc. involved a claim that a debt collector's demand letter contained language that was inconsistent with and overshadowed the notice requirement in § 1692g(a) of the Fair Debt Collection Practices Act (FDCPA).[155] As to the claim of inconsistency, the court found no violation because the letter did not contain a deadline for payment that conflicted with the thirty-day contest period in the FDCPA.[156] Regarding the claim of overshadowing, the court found that the letter simply encouraged payment and did not make threats.[157] Moreover, the letter did not use fonts or spacing to minimize the effect of the statutorily required notice.[158] The court noted the two standards that could be used to review the letter, but declined to choose between them.[159]

The plaintiff in *Smith v. Santander Consumer USA, Inc.* received $20,437.50 in damages for violation of the FCRA.[160] The Fifth Circuit stated that damages were not recoverable solely for a reduced line of credit, but found sufficient evidence of harm to the plaintiff's business and personal finances to affirm the district court.[161] Appellate lawyers will find it interesting to compare the court's analysis of a general federal verdict under the *Boeing* standard with the Texas damages submissions required by *Harris County v. Smith*.[162]

XIII. CONTRACT

The case of *Tekelec, Inc. v. Verint Systems, Inc.* presented a contract dispute that was sufficiently intricate that the court attached a four-color chart to its opinion to illustrate the facts.[163] The court affirmed the

153. *Wagner*, 520 F. App'x at 298 (quoting *Cousin*, 246 F.3d at 371).

154. *See id.* at 297–98.

155. *See* McMurray v. ProCollect, Inc., 687 F.3d 665, 667 (5th Cir. July 2012) (discussing 15 U.S.C. § 1692G(A) (2012)).

156. *Id.* at 670.

157. *See id.* at 671.

158. *See id.*

159. *See id.* at 669 & n.3 (discussing the "unsophisticated consumer" standard and "least sophisticated consumer" standard and stating that the court need not choose between the two standards in this case).

160. Smith v. Santander Consumer USA, Inc., 703 F.3d 316, 317 (5th Cir. Dec. 2012) (per curiam).

161. *See id.* at 317–18.

162. *See generally* Harris Cnty. v. Smith, 96 S.W.3d 230 (Tex. 2002) (applying Crown Life Ins. Co. v. Casteel, 22 S.W.3d 378 (Tex. 2000)).

163. *See* Tekelec, Inc. v. Verint Sys., Inc., 708 F.3d 658, 660, 667 (5th Cir. Feb. 2013).

summary judgment for the plaintiff on largely case-specific grounds, and reached two principal holdings: (1) an assignee has a right to enforce a payment obligation even if the contract documents do not create an express enforcement right; and (2) the contract payments were not "royalties or other patent damages" within the specific context of these parties' dealings or as the terms "royalty" and "reasonable royalty" are generally understood.[164] The first holding draws upon the general principle in Texas law that a contract construction leading to an exclusive remedy is disfavored unless that intent is clearly stated—an issue generally arising in contract litigation when potential equitable remedies are evaluated.[165]

The case of *Nexstar Broadcasting, Inc. v. Time Warner Cable, Inc.* presented an appeal of the denial of a preliminary injunction sought by an operator of television stations and a creator of content against a large cable company.[166] The dispute focused on whether the defendant could relay signals originally created by the plaintiff out of local broadcast markets.[167] The key contract provision said, "[Nexstar] hereby gives [Time Warner] its consent, pursuant to § 325(b) of the [Communications Act of 1934] and the FCC Rules, to the nonexclusive retransmission of the entire broadcast signal of each [Nexstar] Station (the 'Signal') over each [Time Warner] System pursuant to the terms of this Agreement," with "System" defined to mean all Time Warner Systems, with no geographic limitation.[168] Citing Bryan Garner's dictionary of legal usage, the Fifth Circuit held, "The adverb 'each' is 'distributive—that is, [it] refer[s] to every one of the several or many things (or persons) comprised in a group.'"[169] Accordingly, the grant of authority included all Time Warner systems, and the court found no abuse of discretion in denying injunctive relief.[170]

In *Ergon-West Virginia, Inc. v. Dynegy Marketing & Trade*, the Fifth Circuit found that Dynegy had no duty under two natural gas supply contracts to attempt to get replacement gas after a declaration of force majeure in response to hurricane damage.[171] The Fifth Circuit affirmed the district court as to one contract and reversed as to the other.[172] The first contract's force majeure clause required Dynegy to "remed[y the event] with all reasonable dispatch."[173] The court found that "reasonable" was not

164. *Id.* at 662–65, 665 n.18 (internal quotation marks omitted).

165. *See id.* at 663 n.10.

166. Nexstar Broad., Inc. v. Time Warner Cable, Inc., 524 F. App'x 977, 978 (5th Cir. May 2013) (alterations in original).

167. *See id.* at 978–79.

168. *Id.* at 979 (alterations in original) (footnote omitted) (internal quotation marks omitted).

169. *Id.* at 983 (alterations in original) (citing BRYAN A. GARNER'S DICTIONARY OF LEGAL USAGE 303 (3d ed. 2011)).

170. *See id.*

171. Ergon-West Va., Inc. v. Dynegy Mktg. & Trade, 706 F.3d 419, 421–22 (5th Cir. Jan. 2013).

172. *Id.* at 422.

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

ambiguous but that extrinsic evidence of industry standards favorable to Dynegy was still properly admitted to give it full meaning.[174] The second contract's provision had language about "due diligence" by Dynegy.[175] The court found the term ambiguous because both parties' readings of it were reasonable, and stated that "the district court should have considered the same extrinsic evidence" here as it did for the first contract.[176]

In *R & L Investment Property, L.L.C. v. Hamm*, the defendant alleged fraudulent inducement into a land sales contract, and the plaintiff responded that ratification occurred when the defendant signed a modification of a related lien note and deed of trust.[177] The Fifth Circuit agreed with the plaintiff, following the principle "that instruments pertaining to the same transaction may be read together . . . as if they were part of a single, unified instrument."[178] Because the defendant not only executed the ratification, but also received the benefit of the related bargain, its claim for damages was foreclosed.[179]

In *Cambridge Integrated Services Group, Inc. v. Concentra Integrated Services, Inc.*, after stating that a district court located in a state does not get deference in making an *Erie* guess about that state's law, the Fifth Circuit examined the effect of a release obtained by an indemnitor for potential claims against its indemnitee.[180] The court found that the release precisely matched the terms of the indemnitor's obligations to the indemnitee, and thus, extinguished its duty to indemnify against such claims in ongoing litigation.[181] As to the duty to defend, however, the court found summary judgment improper because issues about the claims "remained to be clarified through litigation."[182]

In *Clinton Growers v. Pilgrim's Pride Corp.*, a group of chicken farmers supplied poultry to Pilgrim's Pride.[183] After the company terminated its contracts and entered bankruptcy, the farmers sued for damages under a promissory estoppel theory, alleging that its "oral promises of a long-term relationship induced them to invest in chicken

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174. *Id.* at 425 (contrasting its approach with the district court's, which found the term ambiguous and admitted the testimony to resolve the ambiguity).

175. *Id.*

176. *Id.* at 425–26.

177. *See* R & L Inv. Prop., L.L.C. v. Hamm, 715 F.3d 145, 146–47 (5th Cir. Apr. 2013).

178. *Id.* at 150 (quoting Fort Worth Indep. Sch. Dist. v. City of Fort Worth, 22 S.W.3d 831, 840 (Tex. 2000)) (internal quotation marks omitted).

179. *See id.* at 150–51 (discussing Fortune Prod. Co. v. Conoco, Inc., 52 S.W.3d 671, 678 (Tex. 2000)).

180. Cambridge Integrated Servs. Grp., Inc. v. Concentra Integrated Servs., Inc., 697 F.3d 248, 253 (5th Cir. Sept. 2012).

181. *See id.* at 254.

182. *Id.* at 255.

183. Clinton Growers v. Pilgrim's Pride Corp. (*In re* Pilgrim's Pride Corp.), 706 F.3d 636, 638 (5th Cir. Jan. 2013).

houses."[184] The court affirmed summary judgment for Pilgrim's Pride, finding that the plain language of the contract specified a contract duration ("flock-to-flock"—roughly four to nine weeks), and foreclosed an estoppel claim about that topic.[185] Similarly, contract provisions about the farmers' compensation and maintenance obligations foreclosed other attempts to recast the subject of the estoppel claim.[186] The court distinguished a prior Arkansas case about a commitment by Tyson Foods to supply hogs to a hog grower, both on legal grounds and on the strength of the evidence about Tyson's alleged misrepresentations.[187]

An assignment of royalty interests for a continental shelf project had this "calculate or pay" clause: "The overriding royalties described herein shall be calculated and paid in the same manner and subject to the same terms and conditions as the landowner's royalty under the Lease."[188] The parties disputed whether the clause simply required calculation of royalties in the same way as the government's royalty, or allowed suspension of the assigned payments during a period when the government's royalty right was suspended.[189] In *Total E & P USA, Inc. v. Kerr-McGee Oil & Gas Corp.*, applying Louisiana law, the majority found the clause ambiguous on that issue—further reasoning that, at the time of contracting, legal principles that eventually became settled and could have resolved the ambiguity were not yet settled.[190] Noting that no cross-appeal was taken, the court reversed a summary judgment and remanded for consideration of extrinsic evidence.[191] The concurring opinion noted an additional reason for finding ambiguity based on the grammar of the clause.[192] The dissent took issue with the majority's analysis of other contract provisions and applicable law and would have affirmed summary judgment about interpretation, but reversed on the grounds of reformation for mutual mistake.[193] Both the majority and dissent endorsed consideration of extrinsic evidence for different reasons and purposes—a general topic that recurs with some regularity in the court's contract opinions.[194]

The parties' agreement in *Horn v. State Farm Lloyds* said, "State Farm agrees not to remove any Hurricane Ike cases filed by your firm to Federal Court."[195] Roughly a year later, the firm filed a 100,000-member class

184. *Id.*
185. *Id.* at 641.
186. *See id.*
187. *Id*. at 641–43 (distinguishing Tyson Foods, Inc. v. Davis, 66 S.W.3d 568, 571 (Ark. 2002)).
188. Total E & P USA, Inc. v. Kerr-McGee Oil & Gas Corp., 711 F.3d 478, 485 (5th Cir. Mar. 2013) (internal quotation marks omitted), *vacated and superseded by* 719 F.3d 424 (5th Cir. June 2013).
189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.* at 495 (Higginson, J., concurring).
193. *Id.* (Garza, J., dissenting).
194. *See id.*
195. Horn v. State Farm Lloyds, 703 F.3d 735, 737 (5th Cir. Dec. 2012).

action against State Farm, which removed the case.[196] State Farm argued that the agreement was intended to resolve large numbers of individual claims and that extending it to a class action was not consistent with the specific consideration given.[197] The Fifth Circuit affirmed the remand order, which found that the terms "any" and "cases" were unambiguous.[198]

XIV. COPYRIGHT AND TRADEMARK

Baisden v. I'm Ready Productions, Inc. involved several challenges to a defense verdict in a copyright infringement case.[199] Among other holdings, the Fifth Circuit reaffirmed that "[c]onsent for an implied [nonexclusive] license may take the form of permission or lack of objection," making the Copyright Act's requirement of a writing inapplicable.[200] The court also reviewed a jury instruction that allegedly conflated the question of license with the question of infringement—a potential problem because the burdens differ on the two points—but found that, while "the question is not a model of clarity," it did not give rise to reversible error.[201]

GlobeRanger Corp. v. Software AG involved Texas state law claims about the development of a radio frequency identification system.[202] The defendants removed and obtained dismissal on the grounds of Copyright Act preemption.[203] The Fifth Circuit agreed that § 301(a) of the Act creates the applicable test, which is "whether [the claim] falls within the subject matter of copyright" and whether it "protects rights that are equivalent" to those of a copyright.[204] After thorough review of prior cases, the court held that the conversion claim was likely preempted (thereby maintaining federal jurisdiction), but that the general basis for the claims included business practices excluded from copyright protection, making dismissal at the Rule 12 stage inappropriate.[205]

Abraham v. Alpha Chi Omega involved Paddle Tramps Manufacturing, which made wooden paddles with the emblems of several Greek organizations.[206] A group of thirty-two organizations sued to enjoin Paddle Tramps Manufacturing for trademark infringement and unfair competition,

196. *Id.*
197. *Id.*
198. *Id.* at 742.
199. *See* Baisden v. I'm Ready Prods., Inc., 693 F.3d 491, 496 (5th Cir. Aug. 2012).
200. *Id.* at 500 (reviewing Lulirama Ltd. v. Axcess Broad. Servs., Inc., 128 F.3d 872, 879 (5th Cir. 1997)).
201. *Id.* at 506.
202. *See* GlobeRanger Corp. v. Software AG, 691 F.3d 702, 704 (5th Cir. Aug. 2012).
203. *Id.*
204. *Id.* at 706 (quoting Carson v. Dynegy, Inc., 344 F.3d 446, 456 (5th Cir. 2003)) (internal quotation marks omitted).
205. *Id.*
206. *See* Abraham v. Alpha Chi Omega, 708 F.3d 614, 617 (5th Cir. Feb. 2013).

and the company defended with unclean hands and laches.[207] The district court entered partial injunctive relief after a jury trial found for the company on its defenses.[208] The Fifth Circuit affirmed the instructions given, finding that the appellant's arguments about unclean hands conflated elements of trademark liability with elements of the defense and that the laches instruction fairly handled the concept of progressive encroachment.[209] The court also found sufficient evidence to support the undue prejudice element of laches, although calling it a close question, and found that the district court properly balanced the equities—especially injury to the alleged infringer—in crafting the injunction.[210] The opinion discusses and distinguishes other cases denying relief in related situations.[211]

XV. DAMAGES

A federal jury awarded $4 million in compensatory damages for a car wreck in *Learmonth v. Sears, Roebuck & Co*.[212] "[T]he district court interpreted the award to include $2.2 million in noneconomic damages, then reduced this portion of the award to $1 million pursuant to Mississippi's statutory cap on noneconomic damages."[213] The plaintiff challenged the cap as violating the Mississippi Constitution's jury trial guarantee and separation of power provisions.[214] The Mississippi Supreme Court declined to answer certified questions about those issues.[215] The Fifth Circuit found that the cap did not violate the Mississippi Constitution.[216] The court declined to consider an argument that the *Erie* Doctrine prevented the district judge from segregating the verdict as a matter of state substantive law, finding that the point was not asserted timely and was thus waived.[217]

The plaintiff in *Smith Maritime, Inc. v. L/B KAITLYN EYMARD* sought recovery for property damage and lost profits from allegedly negligent welding of a crane on a boat.[218] The Fifth Circuit held that the plaintiff's tort claims for economic loss were barred by *East River Steamship Corp. v. Transamerica Delaval, Inc.*, which "held that a manufacturer in a commercial relationship has no duty under either a

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207. *Id.*
208. *Id.*
209. *Id.*
210. *Id.*
211. *See id.*
212. Learmonth v. Sears, Roebuck & Co., 710 F.3d 249, 253 (5th Cir. Feb. 2013) (revised Mar. 20, 2013).
213. *Id.*
214. *Id.*
215. *Id.*
216. *Id.* at 267.
217. *Id.* at 256.
218. Smith Mar., Inc. v. L/B KAITLYN EYMARD, 710 F.3d 560, 562 (5th Cir. Jan. 2013) (per curiam).

negligence or strict products-liability theory to prevent a product from injuring itself."[219] The court concluded that "modification of a vessel," as distinguished from its "manufacture or repair," was "a distinction without a difference" for purposes of *East River*.[220] The court recognized that the errant crane had damaged living quarters that were being added to the vessel, but those quarters were not "other property" outside the *East River* Doctrine given the wording of the parties' Asset Purchase Agreement.[221]

The defendant in *Factory Mutual Insurance Co. v. Alon USA L.P.* stipulated to liability after an explosion at a waste treatment plant.[222] The remaining issue was whether fair market value of the plant was the cost to replace it (roughly $6 million) or the cost of the plant's component parts (roughly $900,000).[223] Under deferential clear error and abuse of discretion standards of review, the Fifth Circuit affirmed the district court's conclusions that (1) the plant system was unique and the cost of its components did not fairly estimate its value;[224] (2) the plaintiff's expert "educated and interviewed . . . employees" about a key depreciation issue, and thus "did more than just repeat information gleaned from external sources";[225] and (3) the multiplier used to reflect installation expenses was "entirely reasonable," "[g]iven the lack of useful records and resources pertaining to this particular . . . plant."[226]

In *International Marine, L.L.C. v. Delta Towing, L.L.C.*, the sales agreement for two tugboats provided for $250,000 in liquidated damages if the boat was used in violation of a noncompetition provision.[227] The Fifth Circuit applied federal admiralty law, using § 356 of the Restatement (Second) of Contracts as the guide, and placed the burden on the party seeking to invalidate the provision as a penalty.[228] The court quickly concluded that the second factor of that section—difficulty in proving damages—was established by evidence about the nature of the boat charter business to which the clause applied.[229] The court also found that evidence about the range of expected fees and contract duration satisfied the first factor—reasonableness of the estimated anticipated loss.[230] The clause was, thus, enforceable.[231]

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219. *Id.* (citing E. River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 871 (1986)).
220. *Id.* at 563.
221. *Id.* at 564–65.
222. Factory Mut. Ins. Co. v. Alon USA L.P., 705 F.3d 518, 519 (5th Cir. Jan. 2013).
223. *Id.* at 519–20.
224. *Id.* at 521 (distinguishing Hartford Ins. Co. v. Jiminez, 814 S.W.2d 551 (Tex. App.—Houston [1st Dist.] 1991, no writ)).
225. *Id.* at 525 (distinguishing United States v. Mejia, 545 F.3d 179, 198 (2d Cir. 2008)).
226. *Id.* at 527.
227. Int'l Marine, L.L.C. v. Delta Towing, L.L.C., 704 F.3d 350, 351 (5th Cir. Jan. 2013).
228. *Id.* at 354.
229. *Id.* at 355.
230. *Id.* (citing Farmers Exp. Co. v. M/V Georgis Prois, 799 F.2d 159 (5th Cir. 1986)).
231. *Id.* at 356.

The plaintiff in *Arthur J. Gallagher & Co. v. Babcock* obtained a $1.2 million judgment for violation of a noncompetition agreement in the insurance field.[232] The Fifth Circuit affirmed the enforceability of the agreement.[233] Regarding its substance, the court held that Gallagher's prohibition of employees from competing for accounts on which they actually worked at Gallagher was "less restrictive than allowed under state law."[234] Regarding geographic scope, the court affirmed the district court's narrowing of the provision from sixty-four parishes to the nine in which Gallagher actually provided insurance services.[235] The court vacated the damages because the key witness conflated the group of clients who chose to leave Gallagher after the employee left with the group of clients who actually followed Gallagher to his new employer.[236]

In *Westlake Petrochemicals, L.L.C. v. United Polychem, Inc.*, the plaintiff obtained judgment for $6.3 million under the Uniform Commercial Code (UCC) for breach of a contract to supply ethylene.[237] The Fifth Circuit affirmed on liability, finding that evidence about the need for credit approval did not disprove contract formation, defeat the Statute of Frauds, or establish a condition precedent.[238] The court reversed and remanded on damages, finding that the plaintiff was analogous to a "jobber," and thus, could recover lost profits but not the contract-market price differential.[239] The court also reversed as to an individual's guaranty of the damages, finding a conflict between the termination provision of the guaranty and the plaintiff's argument about when liability accrued, which created an ambiguity that made the guaranty unenforceable under Texas law.[240]

XVI. DISCOVERY

In long-running litigation and arbitration about alleged environmental contamination in Ecuador, Chevron obtained discovery from United States courts several times under 28 U.S.C. § 1782 on the basis that a "foreign or international tribunal" was involved.[241] In district court, Chevron then successfully resisted a § 1782 application on the ground that the arbitration was not an "international tribunal."[242] The Fifth Circuit applied judicial

232. Arthur J. Gallagher & Co. v. Babcock, 703 F.3d 284, 287 (5th Cir. Dec. 2012).
233. *Id.* at 288–92.
234. *Id.* at 291.
235. *Id.* at 292.
236. *Id.* at 296.
237. Westlake Petrochemicals, L.L.C. v. United Polychem, Inc., 688 F.3d 232, 235 (5th Cir. July 2012) (revised Aug. 7, 2012).
238. *Id*. at 240–42.
239. *Id.* at 244 (citing Nobs Chem. U.S.A., Inc. v. Koppers Co., 616 F.2d 212 (5th Cir. 1980)).
240. *Id.* at 246–47.
241. Republic of Ecuador v. Connor, 708 F.3d 651, 653 (5th Cir. Feb. 2013).
242. *Id.*

estoppel and reversed, asking, "Why shouldn't sauce for Chevron's goose be sauce for the Ecuador gander as well?"[243] The court dismissed a jurisdictional issue by characterizing § 1782 as a grant of administrative authority.[244] It then rejected Chevron's arguments that judicial estoppel could not apply to legal issues and that earlier courts' reliance on Chevron's position had not been shown, reminding that, "[b]ecause judicial estoppel is an equitable doctrine, courts may apply it flexibly to achieve substantial justice."[245]

A police dispatcher was terminated based on texts and pictures found on her cell phone in violation of department policy in *Garcia v. City of Laredo*.[246] The Fifth Circuit affirmed summary judgment, which denied her claim that the Stored Communications Act protected this data, finding that the phone was not a "facility" and the data saved on it was not in "electronic storage" as the statute defined those terms.[247]

The appellant in *All Plaintiffs v. Transocean Offshore Deepwater Drilling, Inc.*, the multi-district litigation (MDL) relating to Deepwater Horizon, challenged an order requiring him to submit to a psychiatric exam.[248] Following *Mohawk Industries, Inc. v. Carpenter*, the Fifth Circuit held that the collateral order doctrine did not allow appeal of this interlocutory discovery order. [249] Any erroneous effect on the merits of the case could be reviewed on appeal of final judgment, and even if that review was imperfect to remedy the intrusion on his privacy interest, the harm was not so great as to justify interlocutory review of the entire class of similar orders.[250] A concurrence noted that while mandamus review was theoretically possible, the appellant had not requested it as an alternative to direct appeal and had not made a sufficiently specific showing of harm to obtain mandamus relief.[251]

XVII. ERISA

After granting en banc review, and thus vacating the panel opinion in *Access Mediquip, L.L.C. v. UnitedHealthcare Insurance Co.*, the full court reinstated the panel opinion and expressly overruled prior cases that were in

243. *Id.* at 654.

244. *Id.* at 655.

245. *Id.* (quoting Reed v. City of Arlington, 650 F.3d 571, 576 (5th Cir. 2011) (en banc)) (internal quotation marks omitted).

246. Garcia v. City of Laredo, 702 F.3d 788, 790 (5th Cir. Dec. 2012).

247. *Id.* at 792–93; *see* 18 U.S.C. § 2701 (2012).

248. All Plaintiffs v. Transocean Offshore Deepwater Drilling, Inc., 505 F. App'x 355, 356–57 (5th Cir. Jan. 2013) (per curiam).

249. *Id.* at 358; *see generally* Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 106–07 (2009) (discussing the inability to immediately appeal orders adverse to attorney–client privilege).

250. *All Plaintiffs*, 505 F. App'x at 358–59.

251. *Id.* at 359–60 (Dennis, J., concurring).

tension with the panel's analysis of ERISA preemption of misrepresentation claims.[252]

XVIII. EXPERTS

An expert opined that a railroad crossing was unsafe and required active warning devices in *Brown v. Illinois Central Railroad*.[253] He contended that the crossing had a "'narrow' pavement, 'skewed' angle, 'rough' surface, and 'steep' incline" but did not tie those conclusions to guidelines or publications, relying instead on "education and experience."[254] He also admitted that visibility at the crossing was adequate under the Transportation Department's standards.[255] Accordingly, the Fifth Circuit affirmed the district court's exclusion of his testimony under *Daubert*, calling it "transparently subjective."[256]

Roman v. Western Manufacturing, Inc. examined a $1 million-plus verdict for severe injuries from a pump malfunction.[257] After noting that "[i]t is not our charge to decide which side has the more persuasive case," the court found that two qualified mechanical engineers met *Daubert* even though they lacked extensive experience with "stucco pumps," declining to "make expert certification decisions a battle of labels."[258] The court also rejected technical challenges to the type of pump reviewed by the experts and the plausibility of their factual assumptions about its operation, stating, "There was certainly contrary evidence, but that was for jurors to weigh."[259]

Smith v. Christus Saint Michaels Health System presented a wrongful death claim about an elderly man suffering from recurrent cancer who died from a fall in the hospital while being treated for a blood disorder.[260] The trial court granted summary judgment under the "lost chance" doctrine, finding a lack of evidence that the man would have been likely to survive his cancer.[261] The Fifth Circuit reversed because it found his death was caused by a fall unrelated to his cancer or other treatment protocol.[262] The court also reversed a ruling that the plaintiffs' expert testimony on causation

252. Access Mediquip, L.L.C. v. UnitedHealthcare Ins. Co., 698 F.3d 229, 230 (5th Cir. Oct. 2012) (en banc) (per curiam).
253. Brown v. Ill. Cent. R.R., 705 F.3d 531, 535–36 (5th Cir. Jan. 2013).
254. *Id.* at 536–37.
255. *Id.* at 536.
256. *Id.* at 537.
257. Roman v. W. Mfg., Inc., 691 F.3d 686, 691 (5th Cir. Aug. 2012).
258. *Id.* at 692–93.
259. *Id.* at 696.
260. Smith v. Christus Saint Michaels Health Sys., 496 F. App'x 468, 469 (5th Cir. Nov. 2012) (per curiam).
261. *Id.* at 470.
262. *Id.* at 471–72.

was conclusory, finding that it "sufficiently explained how and why" as to the allegedly inadequate monitoring of the patient's bedside at night.[263]

XIX. FIRST AMENDMENT

In *Gibson v. Texas Department of Insurance—Division of Workers' Compensation*, a state regulator sought to prohibit an attorney from using the domain "texasworkerscomplaw.com."[264] Even assuming the domain name was no more than commercial speech, the Fifth Circuit reasoned that the regulator failed to show that the name was inherently deceptive and also "made no serious attempt to justify" its regulation as an effort to "prevent misuse of the [department's] names and symbols."[265] The court thus reversed and remanded for consideration of the "misuse" issue[266] and to allow the attorney to show that the domain was "ordinary, communicative speech, and not merely . . . commercial speech."[267] Its analysis reviewed several cases about trademark issues in the domain name context.[268]

XX. INSURANCE

On June 18, 2013, two separate panels—one addressing a chemical spill, the other a vessel crash into an oil well—reached the same conclusion in published opinions: When an insured fails to give notice within the agreed-upon period, as required by a negotiated buyback endorsement to a policy, the insurer does not have to show prejudice to void coverage.[269] The cases were *Settoon Towing, L.L.C. v. St. Paul Surplus Lines Ins. Co.* and *Starr Indemnity & Liability Co. v. SGS Petroleum Service Corp*.[270] The court considered the notice provision as part of the basic bargain struck about coverage.[271] Both opinions—especially *Starr*, arising under Texas law—recognized the continuing viability of *Matador Petroleum Corp. v. St. Paul Surplus Lines Insurance Co*.,[272] notwithstanding later Texas Supreme Court cases requiring prejudice in other contexts arising from disputes

263. *Id*. at 473.

264. Gibson v. Tex. Dep't of Ins.—Div. of Workers' Comp., 700 F.3d 227, 232 (5th Cir. Oct. 2012).

265. *Id.* at 237.

266. *Id.* at 237–38.

267. *Id.* at 235.

268. *Id.* at 236.

269. *See* Settoon Towing, L.L.C. v. St. Paul Surplus Lines Ins. Co. (*In re* Complaint of Settoon Towing, L.L.C.), 720 F.3d 268, 278 (5th Cir. June 2013) (oil well); Starr Indem. & Liab. Co. v. SGS Petroleum Serv. Corp., 719 F.3d 700, 702–04 (5th Cir. June 2013) (chemical spill).

270. *Settoon Towing*, 720 F.3d at 268; *Starr Indem.*, 719 F.3d at 700.

271. *See Settoon Towing*, 720 F.3d at 279; *Starr Indem.*, 719 F.3d at 703.

272. Matador Petroleum Corp. v. St. Paul Surplus Lines Ins. Co., 174 F.3d 653, 653 (5th Cir. 1989).

about the main body of a policy.[273] *Settoon Towing* went on to address other issues under Louisiana insurance law, including whether the Civil Code concept of "impossibility," which focuses on a failure to perform an obligation, applies to a failure to perform a condition precedent such as giving notice.[274]

The EPA and its state equivalent sued the owner of the "Big Cajun II," a coal power plant in Louisiana, seeking penalties, injunctive relief, and remediation of alleged environmental damage in *Louisiana Generating L.L.C. v. Illinois Union Insurance Co*.[275] Applying New York law, the Fifth Circuit found that "[c]laims, remediation costs, and associated legal defense expenses . . . as a result of a pollution condition" potentially encompassed some of the relief sought by the EPA for past environmental problems.[276] The court also found that an exclusion for "[p]ayment of criminal fines, criminal penalties, punitive, exemplary or injunctive relief" did not unambiguously exclude coverage for remediation required by an injunction order, reasoning that such a broad reading "would potentially swallow" the coverage for remediation costs.[277] Having found a duty to defend, the court did not reach a question about whether New York law allowed indemnification for civil penalties imposed under the Clean Air Act.[278]

The issue in *Berkley Regional Insurance Co. v. Philadelphia Indemnity Insurance Co.* was, "Does the failure to give notice to an excess carrier until after an adverse jury verdict constitute evidence of prejudice that forfeits coverage?"[279] The court thoroughly reviewed Texas law about untimely claim notice, observing that it can void coverage if the insurer is prejudiced, but "[d]efining the contours of prejudice from the breach of a notice requirement . . . is not always easy."[280] The court applied that general principle to excess carriers and found that this carrier had raised factual issues about prejudice from untimely notice (here, after an adverse jury verdict), as it was unable to investigate the matter or participate in mediation.[281] The court observed, "The cows had long since left the barn when [the carrier] was invited to close the barn door."[282]

In *Insurance Co. of North America v. Board of Commissioners of the Port of New Orleans*, an insurance policy said, "Whenever any Assured has information from which the Assured may reasonably conclude that an occurrence covered hereunder involves an event likely to involve this

273. *Settoon Towing*, 720 F.3d at 276; *Starr Indem.*, 719 F.3d at 704.
274. *Settoon Towing*, 720 F.3d at 279–80.
275. La. Generating L.L.C. v. Ill. Union Ins. Co., 719 F.3d 328, 331–32 (5th Cir. May 2013).
276. *Id*. at 334.
277. *Id.* at 335–36 (internal quotation marks omitted).
278. *Id.* at 338.
279. Berkley Reg'l Ins. Co. v. Phila. Indem. Ins. Co., 690 F.3d 342, 345 (5th Cir. Aug. 2012).
280. *Id.* at 350.
281. *Id.* at 350–51.
282. *Id.* at 351.

Policy, notice shall be sent to Underwriters as soon as practicable . . . ."[283] Clarifying an earlier opinion (and mandate) about this notice provision, the Fifth Circuit held:

> [T]he duty of coverage is triggered for each underwriter who receives notice under the policy . . . . We do not, however, hold the converse of this conclusion. In other words, we do not hold that all underwriters under the policy must receive notice as a condition precedent to a duty of coverage being triggered for any individual underwriter under the policy.[284]

The insurers in *Pride Transportation v. Continental Casualty Co.* faced a claim arising from a truck accident that left the victim a paraplegic with evidence that the driver falsified her logs to make deliveries on time; the claim had been brought by plaintiff's counsel who had won personal injury verdicts in the same county for amounts in excess of policy limits.[285] Under these circumstances, the Fifth Circuit agreed with the district court that the insurers did not incur *Stowers* liability under Texas law for accepting (rather than rejecting—the classic *Stowers* fact pattern) a settlement offer at policy limits and then withdrawing from the defense of the insured trucking company.[286] The court did not address potential issues arising from the specific release in this settlement (it only named the driver and excluded the company) except to note that potential indemnity claims between them would fall within the insured-versus-insured exclusion.[287]

The insured in *Kerr v. State Farm Fire & Casualty Co.* filed a claim about a stolen fishing boat but declined to give an examination under oath (EUO).[288] State Farm claimed the material breach prevented recovery on the policy.[289] The insured said that State Farm was not prejudiced.[290] The Fifth Circuit affirmed summary judgment for State Farm, citing "affidavits from members of [State Farm's] Special Investigative Unit stating that an EUO is an important tool in the claim investigation process and that by refusing an EUO, Kerr impeded State Farm's ability to gather information about the claim."[291] The court declined to address an argument by State Farm that prejudice need not be shown when an EUO is refused in a first-party case.[292]

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283. Ins. Co. of N. Am. v. Bd. of Comm'rs of the Port of New Orleans, 524 F. App'x 103, 105 (5th Cir. May 2013) (per curiam).

284. *Id.* at 107.

285. Pride Transp. v. Cont'l Cas. Co., 511 F. App'x 347, 348–50 (5th Cir. Feb. 2013).

286. *Id.* at 353.

287. *Id.* at 352.

288. Kerr v. State Farm Fire & Cas. Co., 511 F. App'x 306, 307 (5th Cir. Feb. 2013).

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.* at 307 n.1.

In *Levy Gardens Partners 2007, L.P. v. Commonwealth Land Title Insurance Co.*, an apartment developer sought recovery on a title insurance policy after unfortunate zoning stopped the project.[293] The Fifth Circuit affirmed the finding of coverage, concluding, among other matters, that (1) state court rulings about zoning laws deserved deference by federal courts in later coverage litigation, (2) the state court preliminary injunction litigation about zoning had become a sufficiently "final decree" to trigger coverage, (3) delay in giving notice did not cause prejudice, and (4) the policy did not require the developer to invoke a "conditional use process."[294] The court also found, however, that the policy "unambiguously restricts liability to the difference in the value of the title with and without the zoning encumbrance," thus limiting the insured's recovery to roughly $605,000, rather than several million in development expenses.[295] In rejecting the insured's arguments about the policy, the court also found no prejudicial violation of Fed. R. Civ. P. 8(c) about the pleading of defensive matters.[296]

In the case of *Downhole Navigator, L.L.C. v. Nautilus Insurance Co.*, an insured retained independent counsel after receiving a reservation of rights letter from its insurer, arguing that the insurer's chosen counsel had a conflict at that point.[297] Applying *Northern County Mutual Insurance Co. v. Davalos*, the court found no conflict because "the facts to be adjudicated" in the underlying litigation are not "the same facts upon which coverage depends."[298] The court did not see the recent Texas Supreme Court case of *Unauthorized Practice of Law Committee v. American Home Assurance Co.*, which dealt with the responsibilities of insurers' staff attorneys who defend claims for the insured, as changing this basic analysis under Texas law.[299]

In *Ranger Insurance*, *Ltd. v. Transocean Deepwater, Inc*. the Deepwater Horizon rig operated under a drilling contract between BP and Transocean.[300] The contract had indemnity provisions between BP and Transocean for pollution claims depending on whether the contamination originated above water.[301] The contract also required Transocean to maintain BP as an additional insured under Transocean's liability

293. Levy Gardens Partners 2007, L.P. v. Commonwealth Land Title Ins. Co., 706 F.3d 622, 626 (5th Cir. Jan. 2013).

294. *Id.* at 631–32.

295. *Id.* at 628, 632, 636.

296. *See id.* at 632–33.

297. Downhole Navigator, L.L.C. v. Nautilus Ins. Co., 686 F.3d 325, 327 (5th Cir. June 2012).

298. *Id.* at 328 (quoting N. Cnty. Mut. Ins. Co. v. Davalos, 140 S.W.3d 685, 688 (Tex. 2004)).

299. *Id.* at 329; *see also* Unauthorized Practice of Law Comm. v. Am. Home Assurance Co., 261 S.W.3d 24 (Tex. 2008) (not followed as dicta).

300. Ranger Ins., Ltd. v. Transocean Deepwater, Inc. (*In re* Deepwater Horizon), 710 F.3d 338, 341 (5th Cir. Mar. 2013), *withdrawn on rehearing by* 728 F.3d 491 (5th Cir. Aug. 2013).

301. *Id.*

coverage.[302] The parties agreed that BP was entitled to some coverage as an additional insured, but disputed whether that coverage reached pollution liability because the spill originated below water in BP's area of responsibility under the indemnity clauses.[303] The Fifth Circuit reasoned that (1) Texas law begins by examining the policy, which did not restrict pollution coverage when read in light of earlier cases involving similar clauses; and (2) the terms of the drilling contract did not change that conclusion, as its indemnity provisions were sufficiently "discrete" from its additional insured provision.[304] The opinion reviews what the court saw as a consistent line of Fifth Circuit and Texas authority about the interplay of indemnity and "additional insured" clauses.[305] In 2013, this case was certified to the Texas Supreme Court.[306]

The insured in *Mid-Continent Casualty Co. v. Eland Energy, Inc.* recovered a multi-million dollar verdict against its insurer, alleging that the insurer's efforts to unilaterally settle a claim for environmental damage after Hurricanes Katrina and Rita undermined the defense of an ongoing class action about similar claims.[307] The district court granted JNOV and the Fifth Circuit affirmed.[308] Recognizing that "[the insured was] understandably upset," the court rejected a common-law duty of good faith under Texas law in the handling of third-party insurance claims, dismissing as dicta or distinguishing several cases that the insured cited.[309] Potential claims under Louisiana law failed for choice-of-law reasons because the claim was handled in Texas.[310] Claims based on the Texas Insurance Code failed to establish a causal link between the alleged misconduct and the ultimate settlement terms of the class action.[311]

In *First American Title Insurance Co. v. Continental Casualty Co.*, the court analyzed a "claims-made-and-reported" policy under the Louisiana direct action statute, which allows an injured third party to directly sue the responsible party's insurer.[312] Notice was not given to the insurer during the required period.[313] The court concluded that unlike an occurrence policy, in which a notice requirement is intended to protect the insurer and a failure to give notice will not bar a direct action, proper notice under this policy was a condition precedent to coverage and thus barred the direct

302. *Id.* at 342.
303. *Id.*
304. *Id.* at 349.
305. *Id.* at 342–43.
306. *Id.* at 345.
307. Mid-Continent Cas. Co. v. Eland Energy, Inc., 709 F.3d 515, 517 (5th Cir. Feb. 2013).
308. *Id.*
309. *Id.* at 519–20.
310. *Id.* at 524.
311. *Id.* at 523–24.
312. First Am. Title Ins. Co. v. Cont'l Cas. Co., 709 F.3d 1170, 1177 (5th Cir. Feb. 2013).
313. *Id.*

action.[314] The concurrence agreed with the result, but advocated a narrower ground for decision.[315]

In *Guideone Specialty Mutual Insurance Co. v. Missionary Church of Disciples of Jesus Christ*, a coverage case arising from a car accident by church workers on a lunch break, the court reversed on the duty to defend, disagreeing with the district court's decision to consider evidence about the state tort litigation as inconsistent with "Texas's eight corners rule."[316] Under that rule, the pleadings about the driver's status and activities could potentially trigger coverage, creating a duty to defend.[317] The court declined to apply a "very narrow" exception that could apply if a coverage issue did "not overlap with the merits of or engage the truth" of the facts of the case.[318] The court ended by reversing an injunction against state proceedings about the accident, citing general cases about the scope of declaratory judgment actions and noting that the "re-litigation exception" to the Anti-Injunction Act did not apply.[319]

The insured in *Jamestown Insurance Co., RRG v. Reeder* successfully minimized its liability with a winning appeal to the Texas Supreme Court.[320] Reeder only gave notice of a claim at that point, however, and despite the result, ran afoul of the concept that "[o]ne of the purposes of a notice provision . . . is to allow an insurer 'to form an intelligent estimate of its rights and liabilities before it is obliged to pay.'"[321] Because the insurer could have helped influence the trial result, or negotiated a settlement at the appellate level, the "delayed tender thwarted the recognized purposes of the notice provisions" and summary judgment was affirmed for the insurer.[322]

In *Sosebee v. Steadfast Insurance Co.*, the Fifth Circuit found that an insurer made an effective reservation of rights, reminding that "Louisiana follows a functional approach to the reservation of rights and we have rejected requirements for technical language."[323] The court then analyzed whether the insurer waived that reservation in the unusual setting of a direct action suit against the insurer while the insured was in bankruptcy.[324] Finding no harm or prejudice to the insured from the

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314. *See id.* at 1175.

315. *Id.* at 1177.

316. Guideone Specialty Mut. Ins. Co. v. Missionary Church of Disciples of Jesus Christ, 687 F.3d 676, 686 (5th Cir. July 2012) (internal quotation marks omitted).

317. *Id.*

318. *Id.* (citing GuideOne Elite Ins. Co. v. Fielder Road Baptist Church, 197 S.W.3d 305, 308–09 (Tex. 2006)).

319. *Id.* at 687 n.9 (citation omitted).

320. Jamestown Ins. Co., RRG v. Reeder, 508 F. App'x 306, 309 (5th Cir. Jan. 2013).

321. *Id.*

322. *See id.* (citation omitted).

323. Sosebee v. Steadfast Ins. Co., 701 F.3d 1012, 1021 (5th Cir. Nov. 2012) (citing F.D.I.C. v. Duffy, 47 F.3d 146, 151 (5th Cir. 1995)).

324. *Id.* at 1024–25.

conduct at issue, the court held that no waiver occurred and reversed and rendered summary judgment for the insurer.[325]

XXI. MORTGAGE SERVICING

In its first published opinion of 2013 about the merits of a wrongful foreclosure claim, the Fifth Circuit rejected the plaintiff's "show-me-the-note" and "split-the-note" arguments.[326] The court noted that much of the relevant law is federal because of diversity between the borrower and the foreclosing entity.[327] As to the first theory, the court cited authority that allowed an authenticated photocopy to prove a note and said, "We find no contrary Texas authority requiring production of the 'original' note."[328] Regarding the second theory, acknowledging some contrary authority, the court reviewed the relevant statute and held, "The 'split-the-note' theory is . . . inapplicable under Texas law where the foreclosing party is a mortgage servicer and the mortgage has been properly assigned. The party to foreclose need not possess the note itself."[329]

The Fifth Circuit addressed the *Rooker-Feldman* Doctrine in the context of mortgage servicing in *Truong v. Bank of America, N.A.*[330] After a review of the doctrine, the court found that it did not prevent a claim arising from alleged misconduct during the course of a foreclosure case.[331] On the merits, however, the claim failed because of an exemption in Louisiana's Unfair Trade Practices Act for "[a]ny federally insured financial institution," and the court affirmed the claim's dismissal on that basis.[332]

The plaintiff in *Gordon v. JP Morgan Chase Bank, N.A.* alleged that a home foreclosure was prevented by the lender's promises of a permanent loan modification under the Home Affordable Mortgage Program (HAMP).[333] The Fifth Circuit agreed with the lender that the Statute of Frauds (SOF) did not allow such a claim to proceed under Texas contract law.[334] Because the SOF barred the contract claim, promissory estoppel would only arise if the lender orally promised to sign a writing that would

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325. *Id.* at 1031.

326. Martins v. BAC Home Loans Servicing, L.P., 722 F.3d 249, 253 (5th Cir. June 2013).

327. *Id.*

328. *Id.* at 254.

329. *Id.* at 255.

330. Truong v. Bank of Am., N.A., 717 F.3d 377, 381–85 (5th Cir. Apr. 2013).

331. *Id.* at 382 ("'Reduced to its essence, the *Rooker-Feldman* doctrine holds that inferior federal courts do not have the power to modify or reverse state court judgments' except when authorized by Congress." (quoting Union Planters Bank Nat'l Ass'n v. Salih, 369 F.3d 457, 462 (5th Cir. 2004))).

332. *Id.* at 385 (citation omitted).

333. Gordon v. JPMorgan Chase Bank, N.A., 505 F. App'x 361, 364 (5th Cir. Jan. 2013) (per curiam).

334. *Id.* at 366.

satisfy the SOF and if the writing existed at the time of the promise.[335] Statements about future loan papers did not satisfy this rule.[336]

In *Pennell v. Wells Fargo Bank, N.A.*, the Fifth Circuit affirmed summary judgment for a servicer on a negligent misrepresentation claim under Mississippi law based on statements during loan modification discussions.[337] The court saw Wells Fargo's statements as unactionable promises of future conduct.[338] When it reviewed the relevant cases, the court distinguished two federal district court cases on their facts and diminished their effects under *Erie* compared to controlling state court authority.[339]

Another 2013 mortgage case, *James v. Wells Fargo Bank, N.A.*, affirmed judgment for a mortgage servicer on contract, promissory estoppel, and tort claims about an unsuccessful HAMP modification negotiation.[340] The court held the plaintiffs' Deceptive Trade Practices Act claim failed as a matter of law.[341]

Under Texas law, the Fifth Circuit also affirmed the dismissal of contract, promissory estoppel, and tort claims arising from the attempted negotiation of a loan modification during a foreclosure situation.[342] In *Milton v. U.S. Bank*, the court held that this mortgagor–mortgagee relationship did not create an independently actionable duty of good faith, and reliance on alleged representations inconsistent with the loan documents and foreclosure notice was not reasonable.[343]

In *Water Dynamics Ltd. v. HSBC Bank USA, N.A.*, the Fifth Circuit also affirmed the dismissal of claims regarding foreclosure on a home used as collateral for a business loan.[344] The holdings included that (1) the foreclosure price that exceeded 50% of the claimed value was not "grossly inadequate," and the appellants could not state a wrongful foreclosure claim; (2) the appellants' prior breach of contract foreclosed their contract claims and the contract modifications they alleged were barred by the Texas Statute of Frauds; (3) acts of the lender alleged to be inconsistent with the loan documents did not state a waiver claim, especially given the deed of

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335. *Id.* at 365.

336. *See id.*

337. Pennell v. Wells Fargo Bank, N.A., 507 F. App'x 335, 336 (5th Cir. Jan. 2013) (per curiam).

338. *Id.*

339. *Id.* at 338.

340. James v. Wells Fargo Bank, N.A., 533 F. App'x 444, 445–46 (5th Cir. May 2013) (per curiam).

341. *Id.* at 448.

342. Milton v. U.S. Bank, 508 F. App'x 326, 329–30 (5th Cir. Jan. 2013) (per curiam).

343. *Id.*; *see also* Pennell v. Wells Fargo Bank, N.A., 507 F. App'x 335, 337–38 (5th Cir. Jan. 2013) (per curiam) (discussing a negligent misrepresentation claim under Mississippi law); Gordon v. JP Morgan Chase Bank, N.A., 505 F. App'x 361, 364–65 (5th Cir. Jan. 2013) (per curiam) (discussing contract and estoppel claims under Texas law).

344. Water Dynamics Ltd. v. HSBC Bank USA, N.A., 509 F. App'x 367, 367–68 (5th Cir. Jan. 2013) (per curiam).

trust's anti-waiver provision; and (4) "[a]ppellants' allegations may [have] demonstrate[d] a failure to communicate between themselves and the lender, but they [fell] far short of . . . [showing] 'a course of harassment that was willful, wanton, malicious, and intended to inflict mental anguish and bodily harm'" so as to state a claim for unreasonable collection efforts.[345]

In *Knoles v. Wells Fargo Bank, N.A.*, the borrower lost a forcible detainer matter at trial in the local justice of the peace court and on appeal.[346] The borrower then sued for damages, Wells Fargo removed, and the borrower unsuccessfully tried to get a temporary restraining order (TRO) for possession from the federal district court.[347] The district court denied relief based on the *Rooker-Feldman* Doctrine, which concerns federal review of final state court judgments.[348] The Fifth Circuit held that it had jurisdiction over the interlocutory appeal pursuant to 28 U.S.C. § 1292(a)(1), even though the appeal was nominally from a TRO, because the relief at issue was "more in the nature of a preliminary injunction in fact, though not in name."[349] The court deflected an argument about mootness and held that the order sought a federal injunction against a final state court judgment in violation of the Anti-Injunction Act.[350]

The borrowers in *Priester v. JP Morgan Chase Bank, N.A.* alleged two violations of the Texas Constitution about their home equity loan: (1) not receiving notice of their rights twelve days before closing; and (2) closing the loan in their home rather than the offices of a lender, attorney, or title company.[351] The borrowers sent a cure letter that was not answered, and they sued for forfeiture of interest and principal under the state constitution.[352] The Fifth Circuit affirmed the claim's dismissal under the Texas four-year "residual" limitations period, finding that was the prevailing view of courts that had examined the issue and disagreeing with a district court that had found no limitations period.[353] That court reasoned that a noncompliant home equity loan was void, but the Fifth Circuit concluded that the cure provision in the Constitution instead made it voidable.[354] Tolling doctrines did not apply because the closing location was readily apparent where the closing occurred.[355] The court also affirmed the denial of a motion for leave to amend to add new claims and non-

345. *Id.* at 369–70.
346. Knoles v. Wells Fargo Bank, N.A., 513 F. App'x 414, 414 (5th Cir. Feb. 2013) (per curiam).
347. *Id.*
348. *Id.* at 415.
349. *Id.* at 414–15.
350. *Id.* at 415–16.
351. Priester v. JP Morgan Chase Bank, N.A., 708 F.3d 667, 671 (5th Cir. Feb. 2013).
352. *Id.*
353. *Id.* at 674–75 n.4.
354. *Id.* at 674 n.4.
355. *Id.* at 676.

diverse parties after it reviewed the factors for both aspects of such a motion.[356]

XXII. OIL AND GAS

The plaintiff in *Coe v. Chesapeake Exploration, L.L.C.* won a $20 million judgment for breach of a contract to buy rights in the Haynesville Shale formation against the background of a plummet in the price of natural gas.[357] The Fifth Circuit affirmed.[358] After it reviewed other analogous energy cases, the court held that the parties' agreement had a sufficient "nucleus of description" of the property to satisfy the Statute of Frauds even though some review of public records was needed to fully identify the property from that nucleus.[359] The court also held that the parties reached an enforceable agreement and that the plaintiff tendered performance because the agreement had an "adjustment clause" specifying a per-acre price that was particularly relevant on the tender issue.[360]

"What follows is the tale of competing mineral leases on the Louisiana property of Lee and Patsy Stockman during the Haynesville Shale leasing frenzy," began *Petrohawk Properties, L.P. v. Chesapeake Louisiana, L.P.*[361] The Fifth Circuit affirmed a holding that one of the dueling leases was procured by fraudulent misrepresentations regarding the legal effect of a lease extension, and rejected several challenges to whether such a representation was actionable under Louisiana law, as well as an argument that the fraud was confirmed.[362] The court also rejected a counterclaim for tortious interference with a contract, noting that Louisiana has a limited view of that tort and requires a "narrow, individualized duty between plaintiff and the alleged tortfeasor."[363]

A Louisiana statute requires a well operator to provide landowners "a sworn, detailed, [and] itemized statement" about drilling costs.[364] The Fifth Circuit reversed a summary judgment for the operator and held that the district court correctly concluded that its report lacked enough detail under the unambiguous language of the statute and that the analysis should have ended there.[365] The court faulted the district court for proceeding to the

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356. *Id.* at 679.

357. Coe v. Chesapeake Exploration, L.L.C., 695 F.3d 311, 314 (5th Cir. Sept. 2012).

358. *Id.*

359. *Id.* at 318.

360. *Id.* at 323.

361. Petrohawk Props., L.P. v. Chesapeake La., L.P., 689 F.3d 380, 383 (5th Cir. July 2012).

362. *Id.* at 386.

363. *Id.* at 395–96 (citing 9 to 5 Fashions, Inc. v. Spurney, 538 So. 2d 228, 232–34 (La. 1989)).

364. Brannon Props., LLC v. Chesapeake Operating, Inc., 514 F. App'x 459, 459 (5th Cir. Feb. 2013) (per curiam) (quoting LA. REV. STAT. ANN. § 30:103.1 (2013)) (internal quotation marks omitted).

365. *See id.* at 460 ("The statute clearly connects the costs reported to the benefits received in exchange . . . . [I]t must tell the unleased mineral owner what it is getting for its money.").

analysis of the statute's purpose after it reached a conclusion that the statute's terms were unambiguous, and also for finding an incorrect purpose inconsistent with those terms.[366]

XXIII. PERSONAL JURISDICTION

In a 2011 case, *J. McIntyre Machinery, Ltd. v. Nicastro*, the Supreme Court revisited the issue of specific personal jurisdiction over a manufacturer who places a product into the "stream of commerce."[367] While the fractured Court did not produce a majority opinion, the plurality and a two-Justice concurrence expressed concern about an interpretation of that doctrine that would allow jurisdiction in a particular state based on a manufacturer's general intent to do business across the country.[368] The Fifth Circuit directly addressed that concern in *Ainsworth v. Moffett Engineering, Ltd.*, finding that the plurality did not control and that the two-Justice concurrence created a narrow holding not intended to allow jurisdiction based on that manufacturer's small number of shipments into the forum.[369] Because the defendant in *Ainsworth* had over 200 shipments during the relevant time, the court considered jurisdiction appropriate.[370] The court noted language from past circuit cases that may be inconsistent with *McIntyre*.[371]

The defendant in *Bowles v. Ranger Land Systems, Inc.* did not have a bank account, registered agent, or office in Texas.[372] As a defense contractor, the company had a handful of employees at three military bases in Texas, but that presence alone could not create general jurisdiction.[373] The Fifth Circuit also found no abuse of discretion in denying further jurisdictional discovery based on these allegations.[374]

In *Irvin v. Southern Snow Manufacturing, Inc.*, the plaintiff purchased a shaved-ice machine in Louisiana, made by Southern Snow, a Louisiana-based business.[375] She moved the machine to Mississippi, injured her hand while cleaning it, and sued for damages in Mississippi.[376] The Fifth Circuit agreed with the district court that she did not establish specific jurisdiction under a stream of commerce theory.[377] Even assuming that Southern Snow

366. *Id.* at 462.
367. J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780 (2011).
368. *Id.* at 2785–94.
369. Ainsworth v. Moffett Eng'g, Ltd., 716 F.3d 174, 178 (5th Cir. May 2013).
370. *See id.*
371. *See id.* at 179.
372. Bowles v. Ranger Land Sys., Inc., 527 F. App'x 319, 322 (5th Cir. June 2013) (per curiam).
373. *Id.* at 321–22.
374. *Id.* at 322 n.2.
375. Irvin v. S. Snow Mfg., Inc., 517 F. App'x 229, 230 (5th Cir. Mar. 2013).
376. *Id.*
377. *Id.* at 233.

had minimum contacts by making a substantial percentage of its sales into neighboring Mississippi, her claim did not arise out of those contacts because "Southern Snow sold the machine to a Louisiana customer and had no knowledge that, years later, Irvin unilaterally transported it into Mississippi."[378]

While of limited precedential value because it uses "plain error" review, *Ward v. Rhode* touches on the role of websites in personal jurisdiction.[379] The Plaintiff alleged that the Defendants placed a false "Scam Alert" about the Plaintiff's debt settlement services on a website.[380] The court observed that the Defendants' "website is interactive to the extent that it allows users to post their opinions about the debt-counseling services that they have used. However, it neither allows users to purchase products online, nor sells subscriptions to view its content. Therefore, the nature of the exchange of information is not commercial."[381] Accordingly, it remained unclear or nonobvious that the website's interactivity with Texans and the commercial nature of that interaction sufficiently established jurisdiction.[382]

An Austin-based software developer sued a German software company for breach of contract and related torts in *Pervasive Software, Inc. v. Lexware GmbH & Co. Kg*.[383] The Fifth Circuit affirmed the dismissal of the case for lack of personal jurisdiction, revisiting several key jurisdiction points for business relationships.[384] The court held that the parties' contracts alone would not create jurisdiction when the parties had no prior negotiations and did not envision "continuing and wide-reaching contacts" in Texas.[385] The German company's internet sales into Texas—fifteen programs, costing roughly $66 each, over four years—did not establish "purposeful availment" for specific jurisdiction, or "continuous and systematic contacts" for general jurisdiction.[386] The alleged acts of conversion occurred in Germany and thus did not create specific jurisdiction either.[387]

In the unpublished case of *Box v. Dallas Mexican Consulate General*, the Fifth Circuit reversed a dismissal for lack of jurisdiction under the

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378. *Id.* at 232. The court's emphasis on the "[arising]-out-of" factor echoes its recent opinion in *ITL Int'l, Inc. v. Constenla, S.A.*, 669 F.3d 493 (5th Cir. Jan. 2012).

379. Ward v. Rhode, No. 12-41201, 2013 WL 5916775, at *1 (5th Cir. May 3, 2013) (applying Mink v. AAAA Dev. LLC, 190 F.3d 333, 336 (5th Cir. 1999)).

380. *Id.*

381. *Id.* at *3.

382. *Id.*

383. Pervasive Software, Inc. v. Lexware GmbH & Co. Kg, 688 F.3d 214, 216–17 (5th Cir. July 2012).

384. *Id.* at 223.

385. *Id.* at 224 (quoting Burger King Corp. v. Rudzewics, 105 S. Ct. 2174, 2186 (1985)) (internal quotation marks omitted).

386. *Id.* at 230.

387. *Id*. at 229.

Foreign Sovereign Immunities Act (FSIA) because the court had not permitted discovery on whether a Mexican government representative had actual authority.[388] Acknowledging that the FSIA seeks to reduce litigation involving foreign sovereigns, the court found that authority "is a discrete issue conducive to limited discovery, [and] the relevant documents reside exclusively with the defendant."[389]

XXIV. PLEADING

Two unpublished cases offer nuts-and-bolts insight on pleading requirements. A pro se copyright infringement complaint failed in *Richards v. BP Exploration & Production, Inc.* when the plaintiff did "not plausibly allege that the defendants copied any original work of authorship by her."[390] A qui tam suit under the False Claims Act (FCA) failed to allege fraud with sufficient particularity.[391] The court noted in *United States ex rel. Nunnally v. West Calcasieu Cameron Hospital* that while Fed. R. Civ. P. 9(b) applies to FCA claims, its application there is "context specific and flexible," and a plaintiff can plead with enough particularity "without including all the details of any single court-articulated standard—it depends on the elements of the claim in hand."[392]

In *Highland Capital Management, L.P. v. Bank of America, National Ass'n*, the Fifth Circuit reversed a Rule 12 dismissal of a claim for breach of an oral contract.[393] The court noted the practical difficulty of applying the legal test for intent to be bound by an oral contract—largely developed on summary judgment records—in the pleading context.[394] The court acknowledged that, after the phone call in which the plaintiff alleged the contract formed, an email stated their deal was "subject to" further amendment.[395] The plaintiff, however, alleged sufficient facts about whether all material terms were agreed upon in the call—the industry custom for this type of transaction—and the nature of the further discussions to state a plausible contract claim.[396] The court affirmed the

388. Box v. Dall. Mexican Consulate Gen., 487 F. App'x 880, 885 (5th Cir. Aug. 2012) (per curiam).

389. *Id.*

390. Richards v. BP Exploration & Prod., Inc., 533 F. App'x 378, 379 (5th Cir. Apr. 2013) (per curiam).

391. United States *ex rel.* Nunnally v. W. Calcasieu Cameron Hosp., 519 F. App'x 890, 895 (5th Cir. Apr. 2013) (per curiam)

392. *Id.* at 892–93 (quoting United States *ex rel.* Grubbs v. Kanneganti, 565 F.3d 180, 188 (5th Cir. 2009)) (internal quotation marks omitted).

393. Highland Capital Mgmt., L.P. v. Bank of Am., Nat'l Ass'n, 698 F.3d 202, 204 (5th Cir. Oct. 2012) (per curiam).

394. *Id.* at 209.

395. *Id.*

396. *Id.* at 210.

dismissal of a promissory estoppel claim for failure to adequately plead reliance.[397]

XXV. PRELIMINARY INJUNCTIONS

The Fifth Circuit affirmed a preliminary injunction about pharmaceutical development in *Daniels Health Sciences, L.L.C. v. Vascular Health Sciences, L.L.C.*[398] The opinion offers a practical road map for basic issues in trade secret litigation.[399] Concerning the likelihood of success on the merits, the court found adequate findings about damage, specific confidential information, a trade secret arising from a "compilation," and a confidential relationship between the parties.[400] Regarding irreparable injury, the court found sufficient findings about reputational injury that was not speculative.[401] While it found no abuse of discretion in the district court's weighing of public and private interest factors, it did see a "close question" about the overall scope of the injunction in light of the conduct at issue and the defendant's business plans and suggested that the district court "try to narrow the scope of its injunction" on remand.[402]

While *Opulent Life Church v. City of Holly Springs* turned on the First Amendment's religion clause, not issues concerning the legality of a zoning ordinance, it offers general insights on preliminary injunction practice.[403] A litigant can potentially show irreparable injury from evidence indicating the likely loss of a lease or a looming lack of building capacity (although the capacity issue in this case focused on religious practice).[404] Even if evidence of injury is strong, the party opposing a preliminary injunction should have the opportunity to be heard and present evidence about the injunction's potential harm so that the equities may be balanced.[405]

New Orleans taxicab owners challenged new city ordinances concerning their business and vehicles.[406] The Fifth Circuit vacated a preliminary injunction in the taxicab owners' favor—primarily on grounds related to substantive constitutional issues—and affirmed the district court's denial of an injunction on other matters for lack of irreparable injury.[407]

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397. *Id.* at 211.
398. *See* Daniels Health Scis., L.L.C. v. Vascular Health Scis., L.L.C., 710 F.3d 579, 580–81 (5th Cir. Mar. 2013).
399. *See id.*
400. *Id.* at 582–85.
401. *See id.* at 585.
402. *Id.* at 586.
403. *See* Opulent Life Church v. City of Holly Springs, 697 F.3d 279, 282 (5th Cir. Sept. 2012).
404. *See id.* at 296.
405. *See id.* at 298.
406. *See* Dennis Melancon, Inc. v. City of New Orleans, 703 F.3d 262, 265 (5th Cir. Dec. 2012).
407. *See id.*

Reminding that "when the threatened harm is more than de minimis, it is not so much the magnitude but the irreparability that counts for purposes of a preliminary injunction," the court found that plaintiffs could later sue the city for costs of complying with the ordinances if they prevailed.[408] Footnotes address other potential theories of irreparable injury based on "impairment of contract" and privacy rights.[409]

XXVI. PROFESSIONAL LIABILITY

In *Colonial Freight Systems, Inc. v. Adams & Reese, L.L.P.*, the Fifth Circuit affirmed summary judgment for a law firm on a malpractice claim and for unpaid fees.[410] The plaintiff claimed under Louisiana law that the firm's "negligent failure to advise the company of its right to a jury" was malpractice.[411] The court rejected that claim because the plaintiff could only speculate about loss resulting from that alleged failure.[412]

In *Coves of the Highland Community Development District v. McGlinchey Stafford, P.L.L.C.*, after the Army disclosed that a property was once a bomb range, the developer sued the law firm that advised on the issuance of bonds for the development.[413] The Fifth Circuit affirmed summary judgment for the firm, principally on the ground that the developer bought the property before it retained the firm as bond counsel.[414] Of general interest, the parties' dispute over the engagement letter pitted a general description of the firm's work "regarding . . . the source of payment and security for the Bonds" against a specific statement that the firm would rely on the developer for "complete and timely information on all developments pertaining to the Bonds."[415]

XXVII. QUI TAM

The case of *Little v. Shell Exploration & Production Co.* presented an issue of first impression—whether a federal employee, even one whose job is to investigate fraud, may bring a qui tam action under the False Claims Act.[416] After review of the statutory text, the court sided with a majority of

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408. *Id.* at 279 (quoting Enter. Int'l, Inc. v. Corporacion Estatal Petrolera Ecuatoriana, 762 F.2d 464, 472 (5th Cir. 1985)) (internal quotation marks omitted).

409. *See id.* at 279 n.14, 280 n.15.

410. *See* Colonial Freight Sys., Inc. v. Adams & Reese, L.L.P., 524 F. App'x 142, 145 (5th Cir. May 2013) (per curiam).

411. *Id.* at 143.

412. *See id.* at 143–44 (citing Teague v. St. Paul Fire & Marine Ins. Co., 10 So. 3d 806, 840–42 (La. Ct. App. 2009)).

413. *See* Coves of the Highland Cmty. Dev. Dist. v. McGlinchey Stafford, P.L.L.C., 526 F. App'x 381, 382–83 (5th Cir. May 2013) (per curiam).

414. *See id.* at 385.

415. *See id.* at 384–85 (internal quotation marks omitted).

416. *See* Little v. Shell Exploration & Prod. Co., 690 F.3d 282, 284 (5th Cir. July 2012).

other circuits that have addressed the issue and answered affirmatively.[417] The court acknowledged the practical issue of "how to ensure employee fidelity to agency enforcement priorities in the face of personal monetary incentives," but it concluded that the government could address that issue with personnel guidelines and with its power to intervene and dismiss actions.[418] The court remanded for consideration of whether the "public disclosure" and "original source" aspects of the Act barred the specific claims raised by these relators—matters that could limit the scope of the first holding.[419]

XXVIII. REMOVAL AND REMAND

In *Fontenot v. Watson Pharmaceuticals, Inc.*, a long-running products liability and medical malpractice case about a transdermal pain patch, the plaintiffs sought to add non-diverse health care providers to the case after removal.[420] The district court remanded pursuant to 28 U.S.C. § 1447(e).[421] The Fifth Circuit dismissed for lack of appellate jurisdiction, concluded that a remand for lack of subject matter jurisdiction was unreviewable under *Thermtron* just like a jurisdictional remand under § 1447(c), and noted that all other circuits facing the issue reached the same conclusion.[422] The court also found that the joinder ruling that led to the jurisdictional issue was unreviewable as a collateral order.[423]

The owner of proprietary technology that identified promising sites for gold mines sued an engineering firm for misusing its confidential information in the case of *Target Strike, Inc. v. Marston & Marston, Inc*.[424] The Fifth Circuit found the district court's supplemental jurisdiction appropriate after dismissal of the federal claim—when the claim had been litigated for an extended period—and the timing of the remand motion seemed tactical "when the judicial tide appeared to turn."[425] That holding contrasts with the recent opinion of *Enochs v. Lampasas County*, *Texas*, which found an abuse of discretion in not remanding a case once all federal claims were eliminated at an early stage of the proceedings. [426] The court

417. *See id.* at 286–89.
418. *See id.* at 291.
419. *See id.* at 294.
420. *See* Fontenot v. Watson Pharm., Inc., 718 F.3d 518, 519–20 (5th Cir. June 2013).
421. *See id.* at 519.
422. *See id.* at 521.
423. *See id.* at 521–22.
424. Target Strike, Inc. v. Marston & Marston, Inc., 524 F. App'x 939, 980 (5th Cir. Apr. 2013).
425. *See id.* at 943.
426. Enochs v. Lampasas Cnty., Tex., 641 F.3d 155, 157–60 (5th Cir. 2011) (citing Parker & Parsley Petroleum Co. v. Dresser Indus., 972 F.2d 580, 587 (5th Cir. 1992)).

went on to find the plaintiff's claim time-barred because the plaintiff knew about the sites and because the defendant's activity was public.[427]

XXIX. SANCTIONS AND RELATED ISSUES

In *Kenyon International Emergency Services, Inc. v. Malcolm*, the Fifth Circuit found no abuse of discretion in an award of attorneys' fees to the defendants under a Texas statute in a suit to enforce a noncompetition agreement.[428] The court clarified that "the key determination is [the plaintiff's] knowledge of reasonable limits, not . . . its knowledge of the reasonableness of the agreement."[429] As it saw the record, the plaintiff's CEO testified that the restrictions "were worldwide, overreaching in scope of activity, and basically indefinite in time."[430] The court also reversed a sanction on the plaintiff's lawyer related to the unsealed filing of a "sexually-explicit Internet chat," reminding that "[i]ssuing a show-cause order is a mandatory prerequisite to imposing monetary sanctions sua sponte," and finding that the lawyer did not have an improper purpose in making the filing and thus did not fall within Federal Rule of Civil Procedure 11.[431]

The court released a revised opinion in *Hornbeck Offshore Services, L.L.C. v. Salazar* that reversed a $530,000 finding of civil contempt against the Department of Interior (Interior) about the deepwater drilling moratorium after the Deepwater Horizon incident.[432] After the disaster, Interior imposed an offshore drilling moratorium that the district court enjoined on the ground that Interior had not properly followed the Administrative Procedure Act.[433] Interior then imposed a new moratorium supported by more detailed findings.[434] The Fifth Circuit reversed the contempt award, noting that the district court had not based its ruling on a potential ground about Interior's authority, and stating, "In essence, the company argues that . . . the Interior Department ignored the purpose of the district court's injunction. If the purpose were to assure the resumption of operations until further court order, it was not clearly set out in the injunction."[435] The dissent expressed concern that "the majority opinion's

427. *See Target Strike, Inc.*, 524 F. App'x at 944–46, 946 n.10.

428. Kenyon Int'l Emergency Servs., Inc. v. Malcolm, No. 12-20306, 2013 WL 2489928, at *4 (5th Cir. May 14, 2013).

429. *Id.* at *6.

430. *Id.* at *3.

431. *See id.* at *1, *5.

432. *See* Hornbeck Offshore Servs., L.L.C. v. Salazar, 713 F.3d 787, 793–94 (5th Cir. Apr. 2013).

433. *Id.* at 794.

434. *Id.* at 793–94.

435. *Id.* at 795.

approach may give incentive for litigants creatively to circumvent district court orders."[436]

Applying Fifth Circuit law, the Federal Circuit found an abuse of discretion in not awarding sanctions under Rule 11 and 38 U.S.C. § 985 for what it saw as a frivolous patent lawsuit, and remanded to the Eastern District of Texas for consideration of an appropriate award in the case of *Raylon, LLC v. Complus Data Innovations, Inc*.[437] The court found that the plaintiff's claim construction was objectively unreasonable and that the district court erred in giving weight to the plaintiff's subjective motivation.[438]

In affirming summary judgment for the defense in the employment case of *Branch v. Cemex, Inc.*, the Fifth Circuit reminded, "Although we appreciate and encourage vigorous representation by counsel, we will not tolerate representation that is 'zealous' to the point of false or misleading statements."[439] A footnote to that reminder noted that "'zealous' is derived from 'Zealots,' the sect that, when besieged by the Roman Legions at Masada, took the extreme action of slaying their own families and then committing suicide rather than surrendering or fighting a losing battle."[440]

The plaintiff's counsel in *Mick Haig Productions E.K. v. Does 1-670* served subpoenas on internet service providers (ISPs) about alleged wrongful downloads of pornographic material.[441] The district court found that the subpoenas violated orders that it had made to manage discovery, and imposed significant monetary and other sanctions on the lawyer.[442] The Fifth Circuit found that all of the lawyer's appellate challenges were waived—either because they were not raised below or were raised only in an untimely motion to stay filed after the notice of appeal.[443] The court declined to apply a "miscarriage of justice" exception to the standard waiver rules, stating that the lawyer's actions were "an attempt to repeat his strategy of . . . shaming or intimidating [the Does] into settling."[444]

In *Gonzalez v. Fresenius Medical Care North America*, the court affirmed a judgment notwithstanding other verdict on claims under the False Claims Act.[445] The court agreed with the district court's conclusion that the plaintiff had not shown a wrongful patient referral scheme, noting that the number of referred patients stayed the same over time, whether or

436. *Id.* at 796 (Elrod, C.J., dissenting).
437. Raylon, LLC v. Complus Data Innovations, Inc., 700 F.3d 1361, 1367 (Fed. Cir. 2012).
438. *Id.* at 1367–68.
439. Branch v. Cemex, Inc., 517 F. App'x 276 (5th Cir. Mar. 2013).
440. *Id.* at 277 n.1.
441. Mick Haig Prods. E.K. v. Does 1-670, 687 F.3d 649, 650 (5th Cir. July 2012).
442. *Id.* at 650–51.
443. *Id.* at 652.
444. *Id.*
445. Gonzalez v. Fresenius Med. Care N. Am., 689 F.3d 470, 473 (5th Cir. July 2012).

not the alleged conspiracy was in place.[446] The court also agreed that a line of cases about claims tainted by fraud was limited to the fraudulent inducement context.[447] Finally, the court affirmed a sanctions award under 28 U.S.C. § 1927 based on the plaintiff's changing testimony on whether she was asked to cover up the alleged scheme, noting differences between the deposition, the errata sheet, and the trial testimony.[448]

XXX. SERVICE

The plaintiff in *Moody National Bank, N.A. v. Bywater Marine, L.L.C.*[449] served its suit on a guaranty obligation by using the Texas long-arm statute, which requires that the plaintiff provide the Texas Secretary of State with the defendant's home or home office address.[450] The defendants alleged that the plaintiff had only served a "mailing address," but the Fifth Circuit disagreed, holding that service on the address specified in the parties' contract for service of process satisfied the statute, citing *Mahon v. Caldwell, Haddad, Skaggs, Inc*.[451]

The plaintiff in *Lozano v. Bosdet* did not serve a British defendant within the 120 days allowed by Federal Rule of Civil Procedure 4, or within an extension by the district court.[452] The Fifth Circuit, noting "that statutory interpretation is a holistic endeavor," applied a "flexible due-diligence" standard to find that dismissal was not warranted, especially because a refiled suit would likely have been time-barred.[453] The court aligned itself with the Seventh Circuit and rejected different readings of Rule 4(f) in the international context by the Ninth Circuit (unlimited time) and Second Circuit (120-day limit excused only if service is attempted in the foreign country), noting that it did not wish to require "immediate resort to the Hague Convention or other international methods."[454]

XXXI. SUFFICIENCY OF EVIDENCE

After a jury trial, the plaintiff won a judgment of $336,000 for breach of a joint venture to bid a contract with the Air Force for upgrades to the

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446. *Id.* at 476.
447. *Id.* at 476–77.
448. *Id.* at 480.
449. Moody Nat'l Bank, N.A. v. Bywater Marine, L.L.C., No. 12-40946, 2013 WL 5916719, at *2 (5th Cir. May 14, 2013) (per curiam).
450. TEX. CIV. PRAC. & REM. CODE ANN. §§ 17.044(a) (West 2008), 17.045(a) (West 2008).
451. *Bywater Marine, L.L.C.*, 2013 WL 5916719, at *3 (citing Mahon v. Caldwell, Haddad, Skaggs, Inc., 783 S.W.2d 769, 771 (Tex. App.—Fort Worth 1990, no writ)).
452. Lozano v. Bosdet, 693 F.3d 485, 490–91 (5th Cir. Aug. 2012) (quoting United States v. Johnson, 632 F.3d 912, 923 (5th Cir. 2011)).
453. *Id.* at 489 (quoting *Johnson*, 632 F.3d at 923) (internal quotation marks omitted).
454. *Id.* at 488–89.

Paveway laser-guided bomb program in the case of *X Technologies, Inc. v. Marvin Test Systems, Inc*.[455] On the issue of causation, the Fifth Circuit quickly dismissed two challenges to a key witness's qualifications because he was not testifying as an expert, and also dismissed the effect of a claimed impeachment in light of the full record developed at trial.[456] The court went on to affirm a directed verdict on a claimed defense of prior breach, finding that the agreement only imposed a one-way bar on multiple bids for the contract, and affirmed the judgment of breach, noting multiple uses of "team" in the record to describe the parties' relationship.[457]

In *Homoki v. Conversion Services, Inc.*, a check processing company sued its sales agent and a competitor.[458] The company won judgment for $700,000 against the competitor for tortious interference with the sales agent's contract with the company and $2.15 million against the agent for past and future lost profits.[459] The company and competitor appealed.[460] First, the Fifth Circuit—assuming without deciding that the plaintiff had to show the competitor's awareness of an exclusivity provision in the agent's contract—found sufficient evidence of such knowledge in testimony and the parties' course of dealing, and affirmed liability for tortious interference.[461] Second, the court found that the plaintiff's "experience in managing his business for sixteen years" supported his damages testimony and that "[w]hile [plaintiff's] presentation of its damages evidence was far from ideal," it also found sufficient evidence of causation on the interference claim.[462] Finally, the court found that the plaintiff had given adequate notice of its claim of conspiracy to breach fiduciary duties (the joint pretrial order was not signed by the judge), but the plaintiff waived jury trial on that issue by not requesting a damages question—particularly given the significant dispute about causation in the evidence presented.[463]

In *Miller v. Raytheon Co.*, the Fifth Circuit affirmed liability for age discrimination and affirmed in part on damages.[464] The court affirmed the verdict of liability, noting:

> Considered in isolation, we agree with Raytheon that each category of evidence presented at trial might be insufficient to support the jury's verdict. But based upon the accumulation of circumstantial evidence and

455. X Techs., Inc. v. Marvin Test Sys., Inc., 719 F.3d 406, 408 (5th Cir. June 2013).
456. *Id.* at 413.
457. *See id.* at 413–14.
458. Homoki v. Conversion Servs., Inc., 717 F.3d 388, 393 (5th Cir. May 2013).
459. *Id.*
460. *Id.*
461. *See id.* at 398.
462. *See id.* at 399, 401–02.
463. *See id.* at 403–04.
464. Miller v. Raytheon Co., 716 F.3d 138, 142 (5th Cir. May 2013).

> the credibility determinations that were required, we conclude that "reasonable men could differ" about the presence of age discrimination.[465]

It then reversed an award of mental anguish damages because "plaintiff's conclusory statements that he suffered emotional harm are insufficient" and rejected a challenge based on the Texas Constitution to the statutory punitive damages cap in the Texas Commission on Human Rights Act (TCHRA).[466]

In *Wellogix, Inc. v. Accenture, L.L.P.*, the district court entered judgment for the plaintiff—$26.2 million in compensatory damages and $18.2 million in punitive damages after a remittitur—in a trade secrets case about software to make oil exploration more efficient.[467] Affirming, the court (1) reminded, in the opening paragraph, of the deference due to a jury verdict; (2) detailed the sufficient evidence before the jury of a trade secret, of its inappropriate use by the defendant, of damages, and of malice; (3) rejected *Daubert* arguments about the scope of the plaintiff's computer science expert's testimony and the material considered by its damages expert; and (4) affirmed the punitive damages award because it was less than the compensatory damages and the issue of "reprehensibility" was neutral.[468] The court also analyzed aspects of the relationship between trade secret claims and the patent process.[469] Footnote 4 of the opinion provides a useful guide to the federal courts' treatment of a "*Casteel* problem" in Texas jury submissions.[470]

In the context of a denial of en banc rehearing, a concurring and dissenting opinion disputed whether an issue of charge error in an employment case had been preserved below in the case of *Nassar v. University of Texas Southwestern Medical Center*.[471] The exchange about preservation echoes a similar one in the recent en banc case of *Jimenez v. Wood County, Texas*.[472]

In *Versata Software, Inc. v. SAP America, Inc.*, the Federal Circuit affirmed jury verdicts that could lead to a judgment in excess of $400 million.[473] That circuit's review of a verdict is "reviewed under regional circuit law," as to which it observed, "The Fifth Circuit applies an 'especially deferential' standard of review 'with respect to the jury

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465. *Id.* at 145 (quoting Boeing Co. v. Shipman, 411 F.2d 365, 374 (5th Cir. 1969), *overruled by* Gautreaux v. Scurlock Marine, Inc., 107 F.3d 331 (5th Cir. 1997)).

466. *Id.* at 147–48.

467. Wellogix, Inc. v. Accenture, L.L.P., 716 F.3d 867, 872–74 (5th Cir. May 2013).

468. *See id.* at 872, 874–81, 885–86.

469. *See id.* at 875.

470. *Id.* at 878 n.4.

471. Nassar v. Univ. of Tex. Sw. Med. Ctr., 688 F.3d 211, 211–14 (5th Cir. July 2012).

472. Jimenez v. Wood Cnty., Tex., 660 F.3d 841, 846, 850 (5th Cir. 2011) (en banc).

473. *See* Versata Software, Inc. v. SAP Am., Inc., 717 F.3d 1255, 1260–68 (Fed. Cir. 2013).

verdict.'"[474] In affirming the award for a reasonable royalty, the Federal Circuit quoted the recent case of *Huffman v. Union Pacific Railroad*, which discussed "inference on the basis of common sense, common understanding and fair beliefs, grounded on evidence consisting of direct statement by witnesses or proof of circumstances from which inferences can fairly be drawn."[475]

XXXII. RECEIVERS

In *Netsphere, Inc. v. Baron*, "[t]he central issue on appeal [was] whether a court can establish a receivership to control a vexatious litigant."[476] Applying an abuse of discretion standard, the Fifth Circuit answered "no."[477] The court reviewed and rejected several rationales for imposing a receivership on a portfolio of disputed domain names, including preservation of jurisdiction, bringing closure to long-running litigation, payment of a series of attorneys, and controlling vexatious litigation.[478] It then addressed how to handle the fees related to the vacated receivership.[479] The opinion thoroughly reviews prior circuit precedent about the reasons for and proper boundaries of a receivership.[480]

In a revised opinion in *Janvey v. Democratic Senatorial Campaign Committee*, the Fifth Circuit withdrew its earlier holding that a federal equity receiver has standing to assert creditors' fraudulent transfer claims arising from a Ponzi scheme.[481] The court now holds that the receiver only has standing to assert the claims of the entities in receivership, but those entities are not considered to be "*in pari delicto*" with the operator of the scheme: "The appointment of the receiver removed the wrongdoer from the scene. The corporations were no more [the perpetrator's] evil zombies."[482]

XXXIII. RESTITUTION

The American Law Institute's publication of the Restatement (Third) of Restitution in 2011 stirred interest in the important, but arcane principles

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474. *Id.* at 1261 (quoting Brown v. Bryan Cnty., Okla., 219 F.3d 450, 456 (5th Cir. 2000)).

475. *Id.* at 1268 (quoting Huffman v. Union Pac. R.R., 675 F.3d 412, 421 (5th Cir. 2012)) (internal quotation marks omitted).

476. Netsphere, Inc. v. Baron, 703 F.3d 296, 305 (5th Cir. Dec. 2012).

477. *See id.*

478. *See id.* at 307–11.

479. *See id.* at 311–12.

480. *See id.* at 307–11.

481. Janvey v. Democratic Senatorial Campaign Comm., 712 F.3d 185, 188, 190 (5th Cir. Mar. 2013).

482. *Id.* at 190, 192 (quoting Eberhard v. Marcu, 530 F.3d 122, 132 (2d Cir. 2008) (internal quotation marks omitted). The court also cited *Scholes v. Lehmann*, 56 F.3d 750, 754 (7th Cir. 1995). *Id.*

that define unjust enrichment.[483] The Fifth Circuit addressed a classic restitution situation in *Boudreaux v. Transocean Deepwater, Inc*.[484] A seaman sought recovery for maintenance and cure after an injury; Transocean successfully established a defense based on the seaman's failure to disclose a previous medical condition, and Transocean sought restitution of money paid earlier.[485] The majority rejected Transocean's position, finding a lack of support in prior case law and noting that the scienter element of Transocean's defense was less demanding than a common-law fraud claim: "The case for exercising our extraordinary power to create a new right of action has not been made. There is only the change of advocates and judges, by definition irrelevant to the settling force of past jurisprudence—always prized but a treasure in matters maritime."[486] A concurring opinion argued that other courts had endorsed such a claim and that allowing the claim struck the proper policy balance.[487]

A series of clerical errors led an insurer to overpay a $710,000 settlement by $510,000.[488] In *National Casualty Co. v. Kiva Construction & Engineering, Inc.*, the insurer sued for breach of contract and money had and received; the insured counterclaimed for bad faith in the initial handling of the settlement.[489] The Fifth Circuit affirmed the district court's summary judgment for the insurer.[490] The court's straightforward opinion offers two cautionary notes—first, while the settlement agreement did not specify a time for payment of the full amount, a Louisiana statute did so specify (although the insurer complied), and second, the Twombly standards are not in play when the district court obviously considered evidence outside of the pleadings and said in its order that the counterclaims failed "[b]ased on the undisputed facts."[491]

XXXIV. SUBJECT MATTER JURISDICTION

The district court, applying the Supreme Court case of *Marshall v. Marshall*, dismissed a case about the misappropriation of trust assets under the probate exception to federal diversity jurisdiction in *Curtis v. Brunsting*.[492] The Fifth Circuit stated, "*Marshall* requires a two-step

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483. Michael Traynor, *The Restatement (Third) of Restitution & Unjust Enrichment: Some Introductory Suggestions*, 68 WASH. & LEE L. REV. 899, 899 (2011).

484. Boudreaux v. Transocean Deepwater, Inc., 721 F.3d 723, 724 (5th Cir. July 2013).

485. *Id.* at 724–25.

486. *Id.* at 728.

487. *See id.* at 728–29 (Clement, J., concurring).

488. Nat'l Cas. Co. v. Kiva Constr. & Eng'g, Inc., 496 F. App'x 446, 448 (5th Cir. Nov. 2012) (per curiam).

489. *Id.* at 447.

490. *Id.*

491. *Id.* at 450 n.5, 452 (alteration in original) (quoting Nat'l Cas. Co. v. Kiva Constr. & Eng'g, Inc., No. H-10-cv-3854, 2012 WL 90135, at *1 (S.D. Tex. 2012)).

492. Curtis v. Brunsting, 704 F.3d 406, 407 (5th Cir. Jan. 2013).

inquiry into (1) whether the property in dispute is estate property within the custody of the probate court and (2) whether the plaintiff's claims would require the federal court to assume in rem jurisdiction over that property."[493] Finding no evidence that this inter vivos trust was, or even could be, subject to Texas probate administration, the court reversed and remanded.[494]

Servicios Azucareros de Venezuela, C.A. v. John Deere Thibodeaux, Inc. arose from a suit by a Venezuelan company against a Louisiana-based affiliate of John Deere about the termination of a distributorship agreement in Venezuela.[495] The district court dismissed, finding that the plaintiff failed to adequately brief an issue of prudential standing about the ability of foreign plaintiffs to sue United States citizens in federal court.[496] The Fifth Circuit found the standing issue "totally without merit," noting that alienage jurisdiction originated in order to allow British creditors to sue Americans after the 1783 Treaty of Paris and to avoid a "notoriously frosty" reception in state court that hurt international commerce.[497] The court, reviewing case law about the handling of similar dispositive motions, also disagreed with the conclusion that the briefing amounted to a waiver.[498]

XXXV. VACATUR

In *Farenco Shipping Co. v. Farenco Shipping PTE, Ltd.*, the appellant sought review of an attachment order on the M/V OCEAN SHANGHAI.[499] The appellee moved to dismiss the appeal, as the parties had settled and the boat in question had left the jurisdiction; the appellant responded by asking for vacatur of the attachment order.[500] Recognizing that this request raised the novel question of vacatur of an interlocutory order rather than a final judgment, the Fifth Circuit found that no exceptional circumstances in either the parties' settlement or the order's potential collateral estoppel effect would warrant its vacatur.[501] With respect to the settlement, the court observed that, as a general matter, "[s]ettlements are frequently made under difficult circumstances, and often represent the least bad of several bad options; this does not make such settlements involuntary."[502]

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493. *Id.* at 409.
494. *Id.* at 410.
495. Servicios Azucareros de Venezuela, C.A. v. John Deere Thibodeaux, Inc., 702 F.3d 794, 797 (5th Cir. 2012).
496. *Id.*
497. *Id.* at 802–03 (quoting JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd., 536 U.S. 88, 94–96 (2002)).
498. *See id.* at 805–06.
499. Farenco Shipping Co. v. Farenco Shipping PTE, Ltd., 516 F. App'x 304, 304 (5th Cir. Mar. 2013) (per curiam).
500. *Id.* at 304–05.
501. *Id.* at 305.
502. *Id.*

XXXVI. VENUE AND FORUM SELECTION

The Fifth Circuit in *In re Radmax, Ltd.* observed, "Mandamus petitions from the Marshall Division are no strangers to the federal courts of appeals."[503] The Fifth Circuit went on to find a clear abuse of discretion in declining to transfer a case from the Marshall Division of the Eastern District of Texas to the Tyler Division.[504] It found that the district court incorrectly applied the eight relevant § 1404(a) factors, giving undue weight to potential delay and not enough weight to witness inconvenience, and quoted Moore's Federal Practice for the principle that "'the traditional deference given to plaintiff's choice of forum . . . is less' for 'intra-district transfers.'"[505] Accordingly, the court granted mandamus pursuant to *In re Volkswagen of America, Inc*.[506] A pointed dissent, noting that there was no clear Fifth Circuit authority on several of the points at issue in the context of intra-district transfers, agreed that the § 1404(a) factors favored transfer, but saw no clear abuse of discretion.[507] The Fifth Circuit has since declined en banc reviews with a 7–8 vote.[508]

In re Atlantic Marine Construction Co. denied a mandamus petition about enforcement of a forum selection clause, finding no clear abuse of discretion.[509] The majority and specially concurring opinions exchanged detailed views on whether Federal Rule of Civil Procedure 12(b)(3) or 28 U.S.C. § 1404(a) controls a forum selection issue when the parties did not select state law to govern enforcement of the clause and venue would otherwise be proper in the district of suit.[510] The Supreme Court subsequently reversed this judgment.[511]

The defendant in *Innovation First International, Inc. v. Zuru Inc.* removed a trade secret case about a toy robotic fish and then obtained dismissal on forum non conveniens (FNC) grounds.[512] The Fifth Circuit found no abuse of discretion in the district court's conclusions that the design and production of the fish took place in China and that the bulk of

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503. *In re* Radmax, Ltd., 720 F.3d 285, 287 n.1 (5th Cir. June 2013) (per curiam).

504. *Id.* at 290.

505. *Id.* at 289 (alteration in original) (quoting 17 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 111.21[2], at 111–55 (3d ed. 2013)).

506. *Id.* at 290 (citing *In re* Volkswagen of Am., Inc., 545 F.3d 304, 311 (5th Cir. 2008) (en banc)).

507. *Id.* at 292.

508. *In re* Radmax, Ltd., 736 F.3d 1012, 1012–13 (5th Cir. Oct. 2013) (per curiam).

509. *In re* Atl. Marine Constr. Co., 701 F.3d 736, 743 (5th Cir. Nov. 2012), *rev'd*, Atl. Marine Constr. Co. v. U.S. Dist. Court for the W. Dist. of Tex., 134 S. Ct. 568 (2013).

510. *Id.* at 743 (Haynes, J., specially concurring) (noting disagreement with the majority's analysis).

511. *Atl. Marine Constr. Co.*, 134 S. Ct. at 568.

512. Innovation First Int'l, Inc. v. Zuru Inc., 513 F. App'x 386, 388 (5th Cir. Feb. 2013) (per curiam).

witnesses and evidence was in China and affirmed based on the analogous FNC case of *Dickson Marine v. Panalpina, Inc*.[513]

City of New Orleans Employees' Retirement System v. Hayward affirmed the dismissal on FNC grounds of putative shareholder derivative suits against BP arising from the Deepwater Horizon disaster.[514] Among other factors discussed, the Fifth Circuit noted and gave weight to the points that (1) the plaintiffs were "phantoms" for FNC purposes because of their attenuated interests in the case, (2) technological advances did not make geographical issues irrelevant in an FNC analysis (key witnesses and documents being located in the United Kingdom rather than Louisiana), (3) the United Kingdom had a substantial interest in applying its own relatively new Companies Act, and (4) the BP derivative cases comprised one-third of the United States court's multidistrict litigation docket.[515]

513. *Id.* at 392–94.

514. City of New Orleans Emps.' Ret. Sys. v. Hayward, 508 F. App'x 293, 295 (5th Cir. Jan. 2013) (per curiam).

515. *Id.* at 297–98.