CIVIL PROCEDURE

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I. INTRODUCTION

During the period of this survey, July 2012 to June 2013, the Fifth Circuit issued opinions on a number of significant issues related to civil procedure. These topics included the United States Supreme Court's review of a Fifth Circuit case resolving a circuit split on the standard for reviewing motions for transfer under a contractual choice of venue clause; Article III standing; the scope of an injunction and requests for clarification of an injunction; the futility of amendment for purposes of final judgment; application of class certification standards; minimum contacts for personal jurisdiction; review of naturalization application under Rule 81; and timeliness of removal and improper joinder, among others.

II. SIGNIFICANT FIFTH CIRCUIT OPINIONS ON CIVIL PROCEDURE MATTERS

A. Transfer Pursuant to Contractual Forum Selection Clause: In re Atlantic Marine Construction Co.

In re Atlantic Marine Construction Co. involved a suit by a subcontractor against a contractor alleging the contractor's failure to pay for work performed on construction of a child development center at an Army base.[1] The plaintiff subcontractor filed suit in the Western District of Texas.[2] The defendant contractor moved to dismiss under Rule 12(b)(3) and 28 U.S.C. § 1406 on the ground that a forum-selection clause in the operative agreement required any suit to be brought in the Eastern District of Virginia.[3]

The district court denied the motion to dismiss or transfer the case, concluding that § 1404(a), not Rule 12(b)(3) or § 1406, was the proper procedural mechanism for enforcement and that the defendant failed to show why the interests of justice or the convenience of the parties and the witnesses

1. *In re* Atl. Marine Constr. Co., 701 F.3d 736, 738 (5th Cir. Nov. 2012), *rev'd sub nom.* Atl. Marine Constr. Co. v. U.S. Dist. Ct. for the W. Dist. of Tex., 134 S. Ct. 568 (2013).
2. *Id.*
3. *Id.*

weighed in favor of transferring the case to Virginia.[4] The defendant petitioned for writ of mandamus to direct the district court to dismiss or transfer the case.[5]

The Fifth Circuit denied the petition, noting that the federal circuit courts are divided on the issue of whether or not § 1404(a) is the proper procedural mechanism to enforce a forum-selection clause designating a specific federal forum, but that the district court followed the approach taken by a majority of district courts in the Fifth Circuit and a minority of the federal appellate courts.[6] Judge Haynes specially concurred, noting that the right to relief was not sufficiently clear and indisputable to justify the issuance of a mandamus,[7] but advocating a contrary result under the approach taken by a majority of circuits, permitting dismissal under Rule 12(b)(3) and § 1406.[8]

On appeal, the Supreme Court reversed.[9] The Court rejected defendant-petitioner's argument that a forum-selection clause may be enforced by a motion to dismiss under § 1406(a) or Rule 12(b)(3).[10] Instead, the forum-selection clause must be enforced by a motion to transfer under § 1404(a).[11] The Supreme Court, however, found that the court of appeals erred in failing to make three adjustments required in a § 1404(a) analysis when transfer is premised on a forum-selection clause.[12] First, the plaintiff's choice of law analysis carries no weight because "the plaintiff bears the burden of establishing that transfer to the forum for which the parties bargained is unwarranted."[13] For this reason, both the district court and the court of appeals erred in improperly placing the burden on the defendant in its § 1404(a) analysis.[14] Second, the court should not consider the parties' private interests in its § 1404(a) analysis because the parties have waived the right to challenge the preselected forum as inconvenient or less convenient for themselves or their witnesses.[15] Thus, the district court erred in giving any weight to the plaintiff's private interests, including the ability to call certain witnesses at trial, because such inconveniences were foreseeable when the plaintiff agreed to the forum-selection clause.[16] Third, when a party "bound by a forum-selection clause flouts its contractual obligation and files suit in a different forum, a § 1404(a) transfer of venue will not carry with it the original venue's choice-of-law rules."[17] The district court thus erred in holding that public interest favored

4. *Id.*
5. *Id.*
6. *Id.* at 739.
7. *Id.* at 743.
8. *Id.* at 746–47.
9. Atl. Marine Constr. Co. v. U.S. Dist. Ct. for the W. Dist. of Tex., 134 S. Ct. 568, 575 (2013).
10. *Id.*
11. *Id.*
12. *Id.* at 581.
13. *Id.*
14. *Id.* at 583.
15. *Id.* at 582.
16. *Id.* at 584.
17. *Id.* at 582.

Texas because Texas contract law would be more familiar to federal judges in Texas due to the fact that, as the appellate court clarified, Virginia law, and not Texas law, was applicable.[18]

B. Futility of Amendment for Purposes of Rule 15(a)(2) and Certification of a Final Judgment Under Rule 54(b): Crostley v. Lamar County, Texas

In *Crostley v. Lamar County, Texas*, the Fifth Circuit addressed futility as a ground for denying leave to amend under Rule 15(a)(2), as well as certification of a partial final judgment under Rule 54(b).[19] The plaintiff-arrestees sued a county, two officers, and a prosecutor for, among other things, false arrest and malicious prosecution after charges against them were dropped following a nine-month imprisonment.[20] After each defendant had filed a Rule 12(b)(6) motion to dismiss, the district court granted leave to amend to remedy pleading deficiencies with respect to claims against the two officers and the prosecutor, but dismissed all claims against the county without leave to amend.[21] The district court did not declare the order dismissing the claims against the county to be an appealable final judgment under Rule 54(b).[22]

After the deadline to join parties passed, the plaintiffs claimed they discovered new information about the county's investigation procedures and a third officer's role in the case.[23] Accordingly, the plaintiffs filed a motion for leave to amend to join the county as a defendant for a second time and to join the third officer as a defendant for the first time.[24] The district court denied the motion, finding futility in the amendment because the statute of limitations had lapsed.[25] The Fifth Circuit affirmed in part and reversed in part.[26] The Fifth Circuit held that the district court abused its discretion in denying leave to amend as to the county; however, it held that the district court did not abuse its discretion in denying leave to amend to add the third officer as a defendant.[27]

As to the county, the Fifth Circuit noted that it was undisputed that the original complaint against the county was filed before the statute of limitations had run.[28] Because the district court did not certify its initial order dismissing the claims against the county as a final judgment, the county "was still a party to the suit at the time [the plaintiffs] sought leave to amend their complaint."[29] Specifically, Rule 54(b) provides that a court may direct entry of a final

18. *Id.* at 584.
19. *See* Crostley v. Lamar Cnty., Tex., 717 F.3d 410, 419–22 (5th Cir. May 2013).
20. *See id.* at 413, 418.
21. *Id.* at 418.
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.* at 413.
27. *See id.* at 420–22.
28. *Id.* at 421.
29. *Id.* at 420.

judgment as to one or more, but fewer than all, claims or parties "only if the court expressly determines that there is no just reason for delay."[30] The Fifth Circuit held that although a court need not "mechanically recite" that there is no just reason for delay, the district court's intent to enter a partial final judgment "must be *unmistakable* on the face of the order or of the documents referenced in it."[31] Here, the Fifth Circuit held that there was no such unmistakable intent.[32] Because the dismissal of the claims against the county was not a final judgment, and because the order adjudicated fewer than all the claims or the rights and liabilities of fewer than all the parties, the dismissal did not end the action as to the county and could be "revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities."[33] Thus, the Fifth Circuit held that amending the complaint to again include the county as a defendant would not be "futile," and hence, it was error to deny the motion for leave to amend as it pertained to the county.[34]

As to the third officer, the Fifth Circuit held that an amendment to join the third officer would be futile.[35] The Fifth Circuit noted that the amendment would not relate back to the date of the original complaint under Rule 15(c) because there was no claim of confusion as to the third officer's identity.[36] Further, the statute of limitations could not be avoided under the doctrine of estoppel because the third officer never misrepresented his identity.[37] Finally, the statute of limitations could not be avoided under the doctrine of equitable tolling because mere unawareness of certain information prior to the officer's deposition did not constitute an "extraordinary circumstance," which is required by the doctrine.[38] Thus, the Fifth Circuit agreed with the district court that the amendment as to the third officer would be futile.[39]

C. *Scope of an Injunction Under Rule 65(d) and Requests for Clarification of an Injunction:* Daniels Health Sciences, L.L.C. v. Vascular Health Sciences, L.L.C.

The Fifth Circuit in *Daniels Health Sciences, L.L.C. v. Vascular Health Sciences, L.L.C.* addressed a problem frequently confronted by district courts—drafting an injunction that complies with the requirement in Rule 65(d)(1) that an "injunction must 'state its terms specifically' and 'describe in reasonable

30. *Id.* (quoting FED. R. CIV. P. 54(b)).
31. *Id.* (internal quotation marks omitted).
32. *See id.*
33. *Id.* at 421 (quoting FED. R. CIV. P. 54(b)).
34. *Id.* (internal quotation marks omitted).
35. *Id.* at 422.
36. *See id.* at 421.
37. *Id.*
38. *Id.* (internal quotation marks omitted).
39. *See id.* at 422.

detail' the conduct restrained or required."[40] The plaintiff-company was formed to research and provide a dietary supplement known as Provasca.[41] The plaintiff engaged the defendant to market its dietary supplement.[42] When that relationship ended, the defendant began selling another drug similar to Provasca.[43] The plaintiff sued the defendant for misappropriation of trade secrets, breach of contract, and trademark violations.[44]

The plaintiff sought a temporary restraining order and preliminary injunction, which the district court granted.[45] The district court's preliminary injunction prohibited "the use, dissemination, destroying, selling, conveying, or distributing of any information and/or intellectual property that [the defendant] and operatives received from [the plaintiff]."[46] The order also enjoined the defendant "from marketing, selling, advertising, distributing, or conveying any product bearing the word 'Provasca' or derivatives of that term; or product based on the science received and reviewed."[47] The defendant moved to clarify the scope of the preliminary injunction, but the district court denied the motion.[48] On appeal, the defendant argued that the injunction was overly broad since it would prohibit the defendant from disseminating copies of public third-party journals that the defendant received.[49] The defendant also argued that the preliminary injunction would bar it from selling drugs unrelated to the plaintiff's product if the drug was nonetheless based on the science "received and reviewed" from the plaintiff.[50]

The Fifth Circuit affirmed the grant of the preliminary injunction but remanded with instructions to narrow the preliminary injunction.[51] The Fifth Circuit noted that under Rule 65(d), an order granting an "injunction must 'state its terms specifically' and 'describe in reasonable detail' the conduct restrained or required."[52] Before ultimately holding that the district court's order had to be narrowed in light of Rule 65(d), the Fifth Circuit addressed a district court's duty to clarify an injunction.[53] Quoting the Supreme Court's opinion in *Regal Knitwear Co. v. NLRB*, the Fifth Circuit suggested that the ability to obtain a clarification of an injunction may depend on whether the

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40. *See* Daniels Health Scis., L.L.C. v. Vascular Health Scis., L.L.C., 710 F.3d 579, 586 (5th Cir. Mar. 2013) (quoting FED. R. CIV. P. 65(d)).
41. *See id.* at 580–81.
42. *See id.* at 580.
43. *See id.*
44. *See id.* at 580–81.
45. *See id.* at 580.
46. *Id.* at 585 (emphasis removed).
47. *Id.* at 585–86 (internal quotation marks omitted).
48. *Id.* at 581.
49. *See id.* at 586.
50. *See id.*
51. *See id.* at 580–81.
52. *Id.* at 586 (quoting FED. R. CIV. P. 65(d)).
53. *See id.*

party seeking clarification presents the court with specific scenarios that raise doubts as to the applicability of the injunction:

> *If defendants enter upon transactions which raise doubts as to the applicability of the injunction*, they may petition the court granting it for a modification or construction of the order. While such relief would be in the sound discretion of the court, we think courts would not be apt to withhold a clarification in the light of a concrete situation that left parties . . . in the dark as to their duty toward the court.[54]

The Fifth Circuit noted that the defendant asked the district court to clarify the injunction but never indicated its desire to disseminate third-party journal articles or market cholesterol drugs.[55] As to whether the injunction was overbroad, the Fifth Circuit held that the injunction was "quite broad relative to the 'reasonably detailed and sufficiently specific to the underlying action' standard."[56] Accordingly, it instructed the district court on remand to "try to narrow the scope of its injunction."[57]

D. "Minimum Contacts" for Purposes of Personal Jurisdiction: Pervasive Software, Inc. v. Lexware GmbH & Co. Kg

In *Pervasive Software, Inc. v. Lexware GmbH & Co. Kg*, the Fifth Circuit once again addressed "minimum contacts" for purposes of exercising either specific or general personal jurisdiction.[58] The Fifth Circuit held that the district court could not exercise personal jurisdiction and, hence, properly dismissed under Rule 12(b)(2).[59] The plaintiff, a Delaware corporation with its principal office in Texas, sued the defendant, a German corporation, for breach of contract, quantum meruit, unjust enrichment, and conversion arising out of the defendant's use of the plaintiff's software in the defendant's own software.[60] The defendant purchased the plaintiff's software in Germany from a third-party German software distributor.[61] The software package included a license agreement—the Derivative Software License Agreement (DSLA).[62] The court found that "[b]y purchasing and using the [plaintiff's] software package, [the defendant] signified that it entered into the DSLA with [the plaintiff]."[63] The DSLA contained a Texas choice-of-law clause.[64] The

54. *Id.* (alteration in original) (quoting Regal Knitwear Co. v. NLRB, 324 U.S. 9, 15 (1945)).
55. *See id.*
56. *Id.*
57. *Id.*
58. *See* Pervasive Software, Inc. v. Lexware GmbH & Co. Kg, 688 F.3d 214, 217 (5th Cir. July 2012).
59. *See id.*
60. *See id.* at 216–19.
61. *Id.* at 217.
62. *Id.*
63. *Id.*
64. *See id.*

defendant filed a motion to dismiss under Rule 12(b)(2) for lack of personal jurisdiction, which the district court granted.[65]

The Fifth Circuit affirmed and held that the district court could not exercise personal jurisdiction over the foreign defendant.[66] The Fifth Circuit began by noting the general rule that due process requires a court to exercise personal jurisdiction over an out-of-state defendant only if the defendant has "certain minimum contacts with [the State] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice."[67] As to specific jurisdiction, the Fifth Circuit noted that:

> Specific jurisdiction requires a plaintiff to show that: "(1) there are sufficient (i.e., not random, fortuitous, or attenuated) pre-litigation connections between the non-resident defendant and the forum; (2) the connection has been purposefully established by the defendant; and (3) the plaintiff's cause of action arises out of or is related to the defendant's forum contacts."[68]

Here, the Fifth Circuit held that the requirements were not satisfied.[69]

First, the Fifth Circuit held that neither the defendant's purchase and use of the plaintiff's software, nor the defendant's entry into the DSLA established purposeful contacts with Texas.[70] The Fifth Circuit observed that "an individual's contract with an out-of-state party *alone* [cannot] automatically establish sufficient minimum contacts in the other party's home forum."[71] The Fifth Circuit noted that there were no prior negotiations between the defendant and the plaintiff concerning the DSLA, which came with the software package that the defendant purchased in Germany from a German software distributor.[72] "Nothing in the DSLA or the manner of purchase suggested that either party envisioned a long-term interactive business relationship involving [the defendant's] purposeful future contacts with Texas."[73] Further, the Fifth Circuit held that the Texas choice-of-law clause in the DSLA was not sufficient in itself to establish personal jurisdiction where, as here, "the contacts [did] not otherwise demonstrate that the defendant 'purposefully availed himself of the privilege of conducting business in Texas.'"[74] Indeed, the Fifth Circuit noted the record demonstrated that the plaintiff had reached beyond Texas and into

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65. *See id.* at 219.

66. *See id.* at 217.

67. *Id.* at 220 (alteration in original) (internal quotation marks omitted).

68. *Id.* at 221 (quoting 1 ROBERT C. CASAD & WILLIAM B. RICHMAN, JURISDICTION IN CIVIL ACTIONS § 2-5, at 144 (3d ed. 1998)) (internal quotation marks omitted).

69. *See id.* at 222.

70. *See id.* at 222–25.

71. *Id.* at 222–23 (alteration in original) (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 478 (1985)) (internal quotation marks omitted).

72. *Id.* at 223.

73. *Id.*

74. *Id.* (quoting Stuart v. Spademan, 772 F.2d 1185, 1192 (5th Cir. 1985)).

Germany, not the other way around; unilateral activity of a plaintiff cannot satisfy the requirement of contacts with the forum state.[75]

The Fifth Circuit also rejected the plaintiff's argument that the parties' negotiation and execution of an addendum to another agreement between the parties—a European Manufacturing Partner Agreement (EMPA)—established purposeful contacts by the defendant with the State of Texas.[76] The Fifth Circuit noted that the addendum created no link between the EMPA and the DSLA, and even if it did, the two contracts together failed to establish specific personal jurisdiction.[77]

The Fifth Circuit also held that the defendant's internet sales website was insufficient to establish the necessary minimum contacts for specific personal jurisdiction.[78] The Fifth Circuit observed that the internet sales were minor; none of the sales resulted in actionable harm to anyone in Texas; only nine of the fifteen products were derived from the plaintiff's software; none of the plaintiff's claims arose from those internet sales; and the defendant's actions in making its "software internet-accessible were not purposely directed toward Texas or purposely availing of the privilege of conducting activities in Texas."[79] The Fifth Circuit emphasized that the defendant had no offices or sales agents in Texas, "solicit[ed] no business there through advertising targeted specifically to Texas," and "[its] only contact with Texas [was] a commercial, interactive website [that was] accessible globally but available only in the German language."[80] "This only coincidentally, and not purposely or deliberately, include[d] contact with a relatively few German taxpayers who happen[ed] to access it from Texas."[81] As to the plaintiff's claim for conversion, specific personal jurisdiction was not established because the tort did not occur "in whole or in part" in Texas, as required under the Texas long-arm statute.[82]

Finally, the Fifth Circuit held that the district court could not exercise general personal jurisdiction, which requires that the foreign corporation's "affiliations with the [s]tate are so 'continuous and systematic' as to render them essentially at home in the forum [s]tate."[83] The Fifth Circuit noted that the defendant "had only sporadic and attenuated contacts with the state of Texas, largely through its intermittent communications with [the plaintiff] and fifteen internet website sales, over a four-year period, to twelve German

75. *Id.* at 222, 224.
76. *See id.* at 225.
77. *Id.* at 226.
78. *Id.*
79. *Id.* at 226–27.
80. *Id.* at 228.
81. *Id.*
82. *See id.* at 229 (citation omitted).
83. *Id.* at 230 (quoting Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2851 (2011)) (internal quotation marks omitted).

taxpayer consumers with billing addresses in Texas . . . ."[84] The Fifth Circuit held that these were neither "continuous nor systematic."[85] Accordingly, the Fifth Circuit affirmed the district court's dismissal of the case under Rule 12(b)(2) for lack of personal jurisdiction.[86]

E. Improper Certification of Classes Under Rule 23 that Effectively Operate as "Opt Into" Classes: Ackal v. Centennial Beauregard Cellular, L.L.C.

In *Ackal v. Centennial Beauregard Cellular, L.L.C.*, the Fifth Circuit addressed whether a district court may certify a class that effectively operates as an "opt into" class.[87] The plaintiffs sought certification of several classes in a suit against cellular telephone service providers with whom the plaintiffs had contracted.[88] One of the classes consisted of various governmental entities within the State of Louisiana.[89] The district court denied the plaintiff's motion for class certification as to individual and corporate customers but "granted [the] motion as to the governmental customers, certifying a class composed of . . . [the] governmental entities."[90]

On appeal, the defendants argued that the district court erred in certifying a class that effectively operated as an "opt into" suit—a result that they claimed was impermissible under Rule 23.[91] Specifically, the defendants argued that the district court certified a class of governmental entities to be represented by private counsel; however, state law "require[d] that many of the entities satisfy various substantive criteria before they [could] retain private representation."[92] Thus, "[b]ecause those conditions were not satisfied as to most class members prior to certification," the defendants contended that the class required members to "opt into" the suit by satisfying the statute's requirements.[93]

The Fifth Circuit agreed and held that the district court abused its discretion in certifying a class that effectively operated as an "opt into" class.[94] The Fifth Circuit began by noting that where, as here, class certification is sought under Rule 23(b)(3), Rule 23(c)(2)(B)(v) "contains a so-called 'opt out' clause, providing that '[f]or any class certified under Rule 23(b)(3), the court must direct to class members . . . notice . . . that the court will exclude from the class any member who requests exclusion.'"[95] The Fifth Circuit noted

84. *Id.*
85. *Id.*
86. *See id.* at 231–32.
87. *See* Ackal v. Centennial Beauregard Cellular, L.L.C., 700 F.3d 212, 213–15 (5th Cir. Oct. 2012).
88. *See id.* at 213.
89. *See id.* at 213–14.
90. *Id.* at 215 (internal quotation marks omitted).
91. *See id.*
92. *Id.*
93. *Id.*
94. *See id.* at 219.
95. *Id.* at 216 (quoting FED. R. CIV. P. 23(c)(2)(B)(v)).

that such a proceeding "is to be distinguished from collective actions maintained under statutes like the Fair Labor Standards Act, 29 U.S.C. § 216(b), under which 'no person can become a party plaintiff and no person will be bound by or may benefit from [a] judgment unless he has affirmatively "*opted into*" the class.'"[96] The Fifth Circuit observed that Rule 23, however, does not require that class members affirmatively "opt in," nor is such a requirement mandated by due process considerations.[97] In fact, relying on a Second Circuit case, the Fifth Circuit noted that "[n]ot only is an 'opt in' provision not required, but substantial legal authority supports the view that by adding the 'opt out' requirement to Rule 23 . . . , Congress *prohibited* 'opt in' provisions by implication."[98] The Fifth Circuit stated that:

> This view is bolstered by the fact that, in drafting Rule 23, the Advisory Committee on Civil Rules "rejected the suggestion 'that the judgment in a [Rule 23](b)(3) class action, instead of covering by its terms all class members who do not opt out, should embrace only those individuals who in response to notice affirmatively signify their desire to be included.'"[99]

In light of these principles, the Fifth Circuit held that the district court abused its discretion by certifying the class.[100] The Fifth Circuit noted that the district court certified a class of governmental entities to be represented by private counsel; however, a specific Louisiana statute required "that many of [those] entities satisfy various substantive criteria before they [could] retain private representation."[101] The Fifth Circuit observed that "those conditions were not satisfied as to most class members prior to certification," so the class effectively required members to "opt into" the suit by satisfying the requirements of the statute.[102] The Fifth Circuit noted that, had the plaintiffs satisfied the requirements of the statute for all class members prior to seeking class certification, the result might be different.[103] Since a number of the proposed class members had not satisfied such requirements, however, the class effectively operated as an "opt into" class, which was impermissible.[104]

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96. *Id.* (quoting Sandoz v. Cingular Wireless LLC, 553 F.3d 913, 916 (5th Cir. 2008)).
97. *Id.* at 215–16.
98. *Id.* at 216 (alteration in original) (quoting Kern v. Siemens Corp., 393 F.3d 120, 124 (2d Cir. 2004)) (internal quotation marks omitted).
99. *Id.* (alteration in original) (quoting *Kern*, 393 F.3d at 124).
100. *Id.* at 219.
101. *See id.* at 215, 218.
102. *Id.* at 215, 219.
103. *See id.* at 219.
104. *See id.*

F. Applicability of Evidence to Rebut a Fraud-on-the-Market Presumption in Securities Fraud Cases for Standard for Class Certification: Erica P. John Fund, Inc. v. Halliburton Co.

In *Erica P. John Fund, Inc. v. Halliburton Co.*,[105] the Fifth Circuit revisited a securities fraud class action on appeal, once again, after it had been remanded by the United States Supreme Court following the district court's denial of class certification, which the Fifth Circuit had affirmed.[106] In its most recent incarnation on appeal, the case involved the district court's refusal to permit defendant Halliburton from challenging class certification on the basis that the alleged misrepresentations did not impact the price of the stock.[107]

The putative class of Halliburton shareholders alleged that Halliburton's president and CEO made fraudulent misrepresentations regarding its operations that caused shareholders to suffer material losses in 1999 and 2001.[108] In support of its claims, the plaintiff advanced the "fraud-on-the-market presumption" of reliance under which it is presumed that "the market price of a security in an efficient market will immediately incorporate any material, public representation, [and] a purchaser who buys a security at the market price will be presumed to have relied upon the representation."[109]

Defendant Halliburton sought to defeat class certification by offering price impact evidence to show that the alleged misrepresentations did not materially impact the market price of Halliburton stock and, therefore, the plaintiff was not entitled to the fraud-on-the-market presumption of reliance.[110] Price impact can be established "by showing (1) that the stock price increased following the allegedly false positive statements or (2) that there was a corresponding decrease in price following the revelation of the misleading nature of these statements."[111]

To establish a claim for securities fraud under Rule 10b-5,[112] the plaintiff must show "(1) a material misrepresentation, (2) scienter (deceptive intent), (3) a connection with the purchase or sale of a security, (4) reliance, (5) economic loss, and (6) loss causation."[113] In order for a plaintiff to invoke the fraud-on-the-market presumption, he must first "establish the prerequisites necessary for market price incorporation of information: (1) misrepresentation publicity, (2) misrepresentation materiality, (3) market efficiency, and (4) that

105. Erica P. John Fund, Inc. v. Halliburton Co., 718 F.3d 423, 427 (5th Cir. Apr. 2013), *cert. granted*, 134 S. Ct. 636 (2013).

106. Erica P. John Fund, Inc. v. Halliburton Co., 131 S. Ct. 2179, 2187 (2011).

107. *Erica P. John Fund, Inc.*, 718 F.3d at 427.

108. *Id.* at 426.

109. *Id.* at 429 (internal quotation marks omitted) (referring to Basic Inc. v. Levinson, 485 U.S. 224 (1988)). Note that *Levinson* is the seminal case recognizing the theory. *Id.*

110. *See id.* at 432–33.

111. *Id.* at 432 n.6 (citing Greenberg v. Crossroads Sys., Inc., 364 F.3d 657, 662 (5th Cir. 2004)).

112. 15 U.S.C. § 78j(b) (2012); 17 C.F.R. § 240.10b–5 (2013).

113. *See Erica P. John Fund, Inc.*, 718 F.3d at 428.

the plaintiff traded the shares between the time the misrepresentations were made and the time the truth was revealed."[114] To prevail on certification, the plaintiffs must first show that "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the [class representative(s)] are typical of [those] of the class; and (4) the [class representative(s)] will fairly and adequately protect the interests of the class."[115] The burden of establishing the requirements of class certification likewise falls on the party seeking certification.[116]

The issue in *Erica P. John Fund, Inc.* was whether evidence offered to generally rebut the fraud-on-the-market presumption of reliance should be considered as a matter of class certification or whether it must await trial on the merits.[117] This required the Fifth Circuit to analyze the elements of the fraud-on-the-market theory in light of the required showing for class certification under Rule 23.[118] The Fifth Circuit first noted, "Halliburton contends that its price impact evidence is intended only to generally rebut the fraud-on-the-market presumption of reliance without necessarily attacking one of the presumption's individual elements" in order to simply sever the causal link between the misrepresentation and the price paid or received by the plaintiff.[119] The Fifth Circuit then set its task as determining at what issue Halliburton's price impact evidence was directed within the Rule 23 framework.[120] First, it determined that price impact evidence was common to the class because it is an objective inquiry typically established by expert evaluation of the stock's price.[121] Second, it determined that there was no risk that a later failure of proof on the common question of price impact would result in individual questions predominating because materiality is an element of every fraud claim, and immateriality absolutely destroys both class and individual causes of action.[122] Finally, the Fifth Circuit returned to the general question it posed earlier as central to class certification analysis—not whether the plaintiffs will fail or succeed, but whether they will fail or succeed together.[123] Here it rejected Halliburton's argument that a plaintiff class that failed to show price impact would lose only the class-wide presumption of reliance, leaving individual plaintiffs with viable fraud claims.[124] The court noted that if Halliburton were to successfully rebut the fraud-on-the-market presumption,

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114. *Id.* at 429.
115. FED. R. CIV. P. 23(a); *Erica P. John Fund, Inc.*, 718 F.3d at 427.
116. *Erica P. John Fund, Inc.*, 718 F.3d at 428 (citing Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011)).
117. *Id.* at 433.
118. *Id.* at 432–33.
119. *Id.*
120. *Id.* at 432.
121. *Id.* at 433.
122. *Id.* at 433–34.
123. *Id.* at 431, 434.
124. *Id.* at 434.

then the claims of all individual plaintiffs would fail because they could not establish loss causation, an essential element of the fraud action on which they bore the burden of proof.[125] Notably, a Petition for Certiorari was filed in this case on September 9, 2013, and granted on November 15, 2013.[126]

G. Availability of Summary Judgment in a Petition for Review of Denial of a Naturalization Application Under Rule 81: Kariuki v. Tarango

In *Kariuki v. Tarango*, the Fifth Circuit addressed an issue of first impression in determining whether a district court could employ summary judgment under Rule 56 in the review of the denial of a military naturalization application by the United States Citizenship and Immigration Services (USCIS), or whether an evidentiary hearing was required under 8 U.S.C. § 1421(c).[127]

The plaintiff in that case overstayed a six-month visitor visa and then enlisted in the United States Army using a false passport stamp that indicated he was a permanent resident.[128] He was subsequently discharged for "fraudulent enlistment" and pled guilty to federal charges of falsely representing himself as an American citizen.[129] Nevertheless, he later applied for naturalization under a program that waives the residency requirement for qualifying military veterans.[130] When the USCIS denied his application and administrative appeal, the plaintiff petitioned for review from the district court under 8 U.S.C. § 1421(c).[131] The defendants moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure on the basis that the plaintiff could not demonstrate good moral character as a matter of law.[132] In response, the plaintiff requested an evidentiary hearing on his moral character.[133] The district court granted the defendants' motion without conducting an evidentiary hearing and entered final judgment.[134]

At issue on appeal was whether the language requiring a "hearing de novo" in the district court under 8 U.S.C. § 1421(c) impels an evidentiary hearing or whether the district court could adjudicate the matter without an evidentiary hearing under Rule 56.[135] Noting that the issue was a matter of first impression in the Fifth Circuit, the court answered in the negative, citing persuasive authority in other districts to hold that the district court's requisite

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125. *Id.*

126. Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. 636, 636 (2013); Petition for a Writ of Certiorari, *Erica P. John Fund, Inc.*, 718 F.3d 423 (No. 13-317).

127. Kariuki v. Tarango, 709 F.3d 495, 500–01 (5th Cir. Feb. 2013).

128. *Id.* at 499.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at 500.

133. *Id.*

134. *Id.*

135. *Id.*

hearing de novo regarding denial of a naturalization application encompasses review on summary judgment, without an evidentiary hearing.[136]

The Fifth Circuit focused its analysis on Rule 81(a)(3), which states that the Federal Rules of Civil Procedure, including Rule 56, "'apply to proceedings for admission to citizenship to the extent that the practice in those proceedings' (i) 'is not specified in federal statutes'; and (ii) 'has previously conformed to the practice in civil actions.'"[137] Here the Fifth Circuit rejected the plaintiff's structural argument that § 1421(c)'s last sentence, which provides that "[s]uch review shall be de novo, and . . . the court . . . shall, at the request of the petitioner, conduct a hearing de novo on the application," must be read to require an evidentiary hearing or else the first clause would be rendered superfluous.[138] Instead, the Fifth Circuit relied on its prior holding in *Aparicio v. Blakeway*, in which it clarified that the modifier "de novo" merely specifies that the standard of review would not be the deferential "arbitrary and capricious" standard often applied in administrative review, and that the last clause, "conduct a hearing de novo on the application," then clarifies that review is not limited to the administrative record.[139] Rather, "the court shall make its own findings of fact and conclusions of law," as articulated in the second clause.[140]

The Fifth Circuit also determined that it need not reach the plaintiff's legislative history argument.[141] After addressing additional evidentiary questions, the Fifth Circuit affirmed the district court's grant of summary judgment dismissing plaintiff's petition for review.[142] Although the decision is limited to an interpretation of the language of 8 U.S.C. § 1421(c), the analysis employed regarding Rule 81 may well be later analogized to other contexts encompassed by Rule 81.[143]

H. Class Certification in Bankruptcy: In re TWL Corp.

In *In re TWL Corp.*, the Fifth Circuit addressed narrow, but novel issues regarding the interplay between class certification considerations under Rule 23 and considerations unique to bankruptcy procedure.[144]

TWL Corp. involved a corporation that laid off the majority of its workforce before filing for Chapter 11 bankruptcy, and later converted to

136. *Id.* at 501–02; *see* Abulkhair v. Bush, 413 F. App'x 502, 507–08 n.4 (3d Cir. 2011) (per curiam); Cernuda v. Neufeld, 307 F. App'x 427, 431 n.2 (11th Cir. 2009) (per curiam); Chan v. Gantner, 464 F.3d 289, 295–96 (2d Cir. 2006) (per curiam).

137. *Kariuki*, 709 F.3d at 501 (quoting FED. R. CIV. P. 81(a)(3)).

138. *Id.* (quoting 8 U.S.C. § 1421(c) (2012)) (internal quotation marks omitted).

139. *See id.* at 502; Aparicio v. Blakeway, 302 F.3d 437, 440, 445 (5th Cir. 2002) (quoting 8 U.S.C. § 1421(c)) (internal quotation marks omitted).

140. *Kariuki*, 709 F.3d at 502 (quoting 8 U.S.C. § 1421(c)) (internal quotation marks omitted).

141. *Id.* at 503.

142. *Id.* at 508.

143. *See id*. at 500–03.

144. *In re* TWL Corp., 712 F.3d 886, 889–91 (5th Cir. Mar. 2013).

Chapter 7.[145] A former vice president for the debtor filed an adversary claim against the debtor alleging violations of the Worker Adjustment and Retraining Notification (WARN) Act, moved for class certification, and filed a class proof of claim on behalf of all former employees on the same grounds, pending the court's decision on TWL Corp.'s motion to dismiss the adversary claim.[146]

The bankruptcy court denied the former vice president's motion for "certification and granted the Trustee's motion to dismiss the adversary proceeding."[147] The district court affirmed the bankruptcy court's determination, and the former vice president appealed.[148]

In its order, the bankruptcy court held that the putative class plaintiff failed to satisfy Rule 23's numerosity and superiority requirements.[149] In its numerosity analysis, the bankruptcy court noted that none of the other 130 members of the putative class had filed a proof of claim in the bankruptcy court, and it deduced that this lack of participation indicated that the number of members would be manageable.[150] In addition, the bankruptcy court noted that the rules of bankruptcy procedure would be undermined because "class certification would negate the bar date by permitting those who missed the deadline to interpose claims into [the] case without establishing . . . excusable neglect," and the estate was already insufficient to pay all creditors in full, even without considering the WARN Act claims.[151] Thus, the bankruptcy court appeared to weigh these two bankruptcy-specific factors against numerosity in its Rule 23 analysis.[152] In its superiority analysis, the bankruptcy court found that a class action would not be a superior method of adjudication under Rule 23 in this case because the bankruptcy code "concentrates any WARN Act claims . . . by requiring former employees to seek allowance of such claims in order to share in any distribution from [TWL Corp.'s] estate[ ]."[153]

The Fifth Circuit first addressed the general applicability of Rule 23 in adversary proceedings in bankruptcy, noting that this circuit "has not [yet] addressed whether a *class* proof of claim even is permissible."[154] It then outlined a two-step process to apply Rule 23 in contested matters: first, the district court must exercise its discretion under Rule 9014 to apply Rule 23 to a contested proceeding; and second, if the district court decides to apply Rule 23, it must "determine whether the Rule [23] requirements for class certification

145. *Id.* at 889–90.
146. *Id.* at 890.
147. *Id.*
148. *Id.* at 890–91.
149. *Id.* at 891.
150. *Id.*
151. *Id.* (alteration in original) (quoting Memorandum Opinion and Order Regarding Plaintiff's Motion for Class Certification at 9, Teta v. TWL Corp., No. 08-42773 (Bankr. E.D. Tex. Mar. 23, 2011)) (internal quotation marks omitted).
152. *See id.*
153. *Id.* at 892 (final two alterations in original) (quoting Memorandum Opinion and Order Regarding Plaintiff's Motion for Class Certification, *supra* note 151, at 10) (internal quotation marks omitted).
154. *Id.*

have been satisfied."[155] Finally, the court "may consider the benefits and costs of class litigation to the estate."[156] Thus, the Fifth Circuit distinguished Rule 23's operation in the claims process from an adversary proceeding, in which Rule 23 is automatically applicable.[157]

The Fifth Circuit agreed with the appellant that the bankruptcy court appeared to have "conflated rules applicable in an adversary proceeding with those applicable in a contested matter."[158] Nevertheless, it rejected the appellant's contention that it is impermissible to consider bankruptcy-related factors in addressing class certification.[159] Ultimately, however, the Fifth Circuit found that while the bankruptcy court properly assessed Rule 23's superiority requirement, it failed to explain its rationale for denying class certification with sufficient particularity to permit the circuit to determine whether the record supported its decision.[160] Therefore, the Fifth Circuit remanded for "specific findings of fact and conclusions of law necessary to support the order [the bankruptcy court] issues on remand."[161]

I. Article III Standing and Class Certification: Funeral Consumers Alliance, Inc. v. Service Corp. Int'l

In *Funeral Consumers Alliance, Inc. v. Service Corp. Int'l*, the Fifth Circuit addressed issues of standing and class certification in antitrust litigation.[162] In the case, a nonprofit consumer rights organization known as the Funeral Consumers Alliance (FCA), together with eleven consumers, brought a class action suit against the largest casket manufacturer and the three largest casket distributors and funeral home chains in the United States.[163] The plaintiffs alleged violations of the Sherman Antitrust Act, including price-fixing, organizing a group boycott to suppress competition, conspiring to create a monopoly, and otherwise foreclosing competition from independent producers.[164] The district court denied the plaintiffs' motion for class certification under Rule 23.[165] After the plaintiffs settled with one of the defendants, the district court dismissed the action against the non-settling defendants for lack of subject matter jurisdiction.[166]

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155. *Id.* at 892–93 (citing 10 COLLIER ON BANKRUPTCY ¶ 7023.01 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2010)).
156. *Id.* at 893 (citing *In re* Computer Learning Ctrs., Inc., 344 B.R. 79, 86 (Bankr. E.D. Va. 2006)).
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.*
162. Funeral Consumers Alliance, Inc. v. Serv. Corp. Int'l, 695 F.3d 330, 343–50 (5th Cir. Sept. 2012).
163. *Id.* at 334–35.
164. *Id.*
165. *Id.* at 335.
166. *Id.*

In a 2–1 decision, the Fifth Circuit reversed and remanded the dismissal of the plaintiffs' Sherman Act claims for lack of subject matter jurisdiction, affirmed the dismissal of the plaintiffs' actions for injunctive relief, and affirmed the denial of class certification.[167]

First, the Fifth Circuit addressed whether the individual consumer plaintiffs–appellants had lost standing under § 4 of the Sherman Antitrust Act in order to decide their entitlement to attorneys' fees and costs against nonsettling defendants because their settlement with one defendant meant that no additional compensatory damages would be assessed.[168] The Fifth Circuit noted that the plaintiffs' right to recover attorneys' fees depended on "whether the plaintiffs [could] succeed in 'demonstrating that the defendant[s] violated the antitrust laws and [could] establish the fact of damage.'"[169] Relying on existing precedent, the court noted "that the structure of section 4 and the fact of damage analysis make the actual recovery of compensatory damages irrelevant to the recoverability of attorneys' fees."[170] The court stated that its holding in *Sciambra v. Graham News* applied even though antitrust liability had not been ascertained.[171] This approach was consistent with the congressional policy behind mandatory attorneys' fees and costs—to encourage suits to enforce antitrust laws and to discourage their violation.[172] This basis was found to distinguish such claims from impermissible suits for the "byproducts" of litigation or to protect an interest unrelated to injury-in-fact.[173] Judge Brown dissented from this section of the majority's opinion, and would have held that because plaintiffs received all they were entitled to, the case was moot with respect to statutory attorneys' fees.[174] In particular, Judge Brown noted that the majority's interpretation of the mandatory attorneys' fees provision of the Clayton Act as a basis for standing would exceed the constitutional limits of Article III.[175]

Second, the Fifth Circuit addressed plaintiffs' claims for injunctive relief, affirming the district court's holding that plaintiffs could not establish an irreparable injury or future threat that would not be remediable by a monetary award.[176] The court noted that there was no allegation that any of the individual plaintiffs would be charged with the task of purchasing a casket from any defendant, and that the individual plaintiffs could purchase a casket from someone other than defendants; thus, there was no support for the required

167. *Id.*
168. *Id.* at 336.
169. *Id.* (quoting Sciambra v. Graham News, 892 F.2d 411, 415 (5th Cir. 1990)).
170. *Id.* at 337 (quoting *Sciambra*, 892 F.2d at 415) (internal quotation marks omitted).
171. *Id.* at 338.
172. *Id.*
173. *Id.* at 340–41.
174. *Id.* at 351 (Brown, J., dissenting).
175. *Id.* at 352–53.
176. *Id.* at 342 (majority opinion).

finding of an actual or imminent injury.[177] Similarly, the FCA, as an organization, had failed to allege such a threat of injury to any of its individual members and thus was not entitled to associational standing.[178]

Finally, the Fifth Circuit affirmed the district court's order denying class certification, finding that the district court properly analyzed Rule 23(b)(3)'s predominance and superiority requirements.[179] Of particular note, the Fifth Circuit acknowledged that while "antitrust price-fixing cases are particularly suitable for class action treatment,"[180] individualized questions would predominate over common ones for the roughly one million purported class members, given the lack of a national market.[181] The Fifth Circuit further found that the district court properly followed Fifth Circuit precedent from *Alabama v. Blue Bird Body Co.*[182] in analyzing the factors to find that no national market for the goods and services at issue existed.[183]

J. Standard for Intra-District Transfer of Venue: In re Radmax, Ltd.

In *In re Radmax, Ltd.*, the Fifth Circuit clarified the manner in which factors are to be considered in adjudicating an intra-district motion to transfer under § 1404(a).[184]

Radmax came to the Fifth Circuit on mandamus after the district court denied a motion to transfer the case from the Marshall Division to the Tyler Division of the Eastern District of Texas.[185] The respective courthouses are approximately sixty miles apart.[186] The district court first analyzed the eight *Gulf Oil Corp. v. Gilbert* factors applicable to such a determination.[187] Under the *Gilbert* factors:

> A motion to transfer venue pursuant to § 1404(a) should be granted if the movant demonstrates that the transferee venue is clearly more convenient, taking into consideration (1) the relative ease of access to sources of proof; (2) the availability of compulsory process to secure the attendance of witnesses; (3) the cost of attendance for willing witnesses; (4) all other practical problems that make trial of a case easy, expeditious and inexpensive; (5) the administrative difficulties flowing from court congestion;

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177. *Id.* at 342–43.
178. *Id.* at 343–44.
179. *Id.* at 345.
180. *Id.* at 349.
181. *Id.* at 348.
182. Alabama v. Blue Bird Body Co., 573 F.2d 309, 328 (5th Cir. 1978).
183. Funeral Consumers Alliance, Inc. v. Serv. Corp. Int'l, 695 F.3d 330, 349 (5th Cir. Sept. 2012).
184. *See generally In re* Radmax, Ltd., 720 F.3d 285 (5th Cir. June 2013) (per curiam) (discussing factors for intra-district transfer).
185. *Id.* at 287.
186. *Id.* at 291.
187. *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947), *superseded by statute*, 28 U.S.C. § 1404(a) (2012).

> (6) the local interest in having localized interests decided at home; (7) the familiarity of the forum with the law that will govern the case; and (8) the avoidance of unnecessary problems of conflict of laws [or in] the application of foreign law.[188]

The district court determined that the fourth *Gilbert* factor weighed against transfer because the transfer would unavoidably result in delay for all parties and that the sixth *Gilbert* factor weighed only slightly in favor of a transfer because the local interest of the Tyler Division must be considered in deference to the plaintiffs' choice of venue.[189] The lower court concluded that "five were neutral, one was inapplicable, one 'weigh[ed] against transfer,' and one weighed 'slightly' in favor of a transfer."[190]

The Fifth Circuit reweighed the *Gilbert* factors and found that the district court "correctly labeled four factors as neutral, incorrectly labeled two as neutral that weigh in favor of transfer, labeled one as weighing against transfer that is neutral, and labeled one as weighing slightly in favor of transfer that, we find, weighs solidly in favor of transfer."[191] In doing so, the Fifth Circuit resolved what Judge Higginson cited in dissent as growing contrary treatment by the district courts.[192] First, the Fifth Circuit found that the district court had improperly found the relative ease-of-access factor to be neutral because both Marshall and Tyler had "roughly equal access to sources of proof" when it should have weighed it in favor of transfer under a relative, not absolute, ease-of-access standard because all of the documents and physical evidence were located in Tyler.[193] Second, the Fifth Circuit clarified that the 100-mile "threshold" rule it promulgated in *In re Volkswagen AG*[194] did not mean "that a transfer *within* 100 miles does not impose costs on witnesses" for purposes of venue-transfer analysis, only that distances greater than 100 miles should be afforded greater significance.[195] Third, the Fifth Circuit clarified that under the fourth *Gilbert* factor, the "garden variety" delay associated with a transfer should not be taken into consideration on a § 1404(a) motion to transfer.[196] Fourth, the Fifth Circuit recognized that "'the traditional deference given to plaintiff's choice of forum . . . is less' for 'intra-district transfers,'" finding that the local interest factor in this case weighs solidly in favor of transfer.[197]

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188. *Radmax, Ltd.*, 720 F.3d at 288 (alteration in original) (quoting *In re* Volkswagen of Am., Inc., 545 F.3d 304, 309, 315 (5th Cir. 2008) (en banc)) (internal quotation marks omitted).

189. *Id.* at 288–89.

190. *Id.* at 288 (alteration in original).

191. *Id.* at 290.

192. *Id.* at 293 n.4.

193. *Id.* at 288 (quoting the district court).

194. *In re* Volkswagen AG, 371 F.3d 201, 204–05 (5th Cir. 2004) (per curiam).

195. *Radmax, Ltd.*, 720 F.3d at 289.

196. *Id.*

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

In light of the factors as reweighed, the Fifth Circuit granted the writ of mandamus and ordered the district court to transfer the case from Marshall to Tyler.[198] Judge Higginson, in dissent, questioned whether the district court's contrary ruling justified a finding of clear abuse of discretion in light of the previous dearth of guidance from the Fifth Circuit, contrary district court opinions, and reasoned analysis.[199]

K. "Good Cause" for Failing to Timely Perfect Service of Process Under Rule 4(m): Thrasher v. City of Amarillo

In *Thrasher v. City of Amarillo*, the Fifth Circuit addressed application of Rule 4(m) relating to the time to serve process and "good cause" for a delay in service of process.[200] The plaintiff, acting pro se, sued an officer, a city, and others under 42 U.S.C. § 1983 based on an allegation of wrongful arrest.[201] The plaintiff failed to serve process within 120 days as required by Rule 4(m).[202] The district court entered an order requiring the plaintiff to show cause as to why the case should not be dismissed.[203] Three days before the deadline to show cause, the plaintiff "filed a motion requesting an extension of time to perfect service," and thereafter attempted to serve process himself.[204] The plaintiff violated Rule 4(c) when he personally served process and failed to provide a copy of the complaint.[205] Rule 4(c) requires service of a copy of the complaint by someone not a party to the suit.[206]

The district court granted the plaintiff an extension to perfect service of process, but the plaintiff missed this deadline.[207] The district court then dismissed the suit on the ground that the plaintiff failed to show good cause under Rule 4(m) for the delay in perfecting service.[208]

The Fifth Circuit affirmed the district court's dismissal of the case based on a finding that the plaintiff failed to show good cause under Rule 4(m).[209] The Fifth Circuit began by noting that proof of good cause requires "at least as much as would be required to show excusable neglect, as to which simple inadvertence or mistake of counsel or ignorance of the rules usually does not suffice."[210] Additionally, the Fifth Circuit noted that some showing of good

198. *Id.* at 290.
199. *Id.* at 290–92 (Higginson, J., dissenting).
200. Thrasher v. City of Amarillo, 709 F.3d 509, 511 (5th Cir. Feb. 2013).
201. *Id.* at 510.
202. *Id.*
203. *Id.*
204. *See id.*
205. *See id.*
206. *See id.* (citing FED. R. CIV. P. 4(c)).
207. *Id.*
208. *Id.*
209. *See id.* at 511.
210. *Id.* (quoting Winters v. Teledyne Movible Offshore, Inc., 776 F.2d 1304, 1306 (5th Cir. 1985)) (internal quotation marks omitted).

faith and some reasonable basis for noncompliance within the time specified is normally required.[211]

The Fifth Circuit rejected the plaintiff's argument that good cause existed based on his mental illness, his pro se status, the fact that he initially proceeded *in forma pauperis*, and his belief that he could serve process himself.[212] As to the plaintiff's pro se status, the Fifth Circuit held that a litigant's pro se status "neither excuses his failure to effect service nor excuses him for lack of knowledge of the Rules of Civil Procedure."[213] Further, the Fifth Circuit noted that the plaintiff had been "represented by counsel for over a month before service was perfected but offer[ed] no explanation for the delay during that time."[214] Additionally, the plaintiff argued that the extensive time he spent in an out-of-state treatment facility should excuse his failure to execute service.[215] The Fifth Circuit rejected this argument and held that even if the time he spent in treatment was subtracted from the total time, the plaintiff still failed to exercise due diligence.[216]

The Fifth Circuit also noted that even though a dismissal under Rule 4(m) is reviewed under a heightened standard when the applicable statute of limitations likely bars future litigation, dismissal was appropriate in light of the approximately ten-month delay between filing the complaint and perfecting service.[217] Finally, the Fifth Circuit noted that dismissal with prejudice was appropriate because the delay had been caused by the plaintiff himself and not his attorney, and lesser sanctions would not better serve the interests of justice.[218]

L. Standards for Timeliness of Removal and Improper Joinder: Mumfrey v. CVS Pharmacy, Inc.

In *Mumfrey v. CVS Pharmacy, Inc.*, the Fifth Circuit elaborated on the differing standards for evaluating "amount disputes" and "timeliness disputes" in determining whether a claim may be removed to federal court.[219]

Mumfrey involved a former employee who filed suit in state court against his former employer and a number of former supervisors individually, alleging retaliatory termination after the employee sought accommodation for a disability and because the employer had fired the employee after he filed a

211. *See id.*
212. *Id.* at 511–12.
213. *Id.* at 512 (footnotes omitted).
214. *Id.*
215. *Id.*
216. *See id.*
217. *See id.* at 512–13.
218. *See id.* at 514.
219. *See generally* Mumfrey v. CVS Pharmacy, Inc., 719 F.3d 392 (5th Cir. June 2013) (discussing standards of removal).

complaint with the Equal Employment Opportunity Commission.[220] Mumfrey's original petition failed to state an amount in controversy in keeping with Rule 47(b) of the Texas Rules of Civil Procedure at the time he filed his suit.[221] Mumfrey subsequently amended his petition to claim $3,375,000 in damages.[222] CVS removed the suit to federal court within thirty days of receiving Mumfrey's amended petition, arguing that non-diverse individual defendants had been improperly joined.[223] Mumfrey filed a motion to remand, arguing that the removal was untimely and the defendants were properly joined.[224] The district court found the removal timely and the individual defendants improperly joined.[225]

Analyzing the timeliness of removal, the Fifth Circuit identified the pertinent issue as whether the Original Petition triggered the thirty-day time period for removal even though it did not include a specific amount of liquidated damages.[226] The Fifth Circuit first distinguished the standards applying to "amount disputes," in which the plaintiff objects that the defendant has not met the amount in controversy, and "timeliness dispute[s]," in which the plaintiff objects that it was clear from the initial pleadings that the case was removable and the defendant missed the deadline to remove, identifying the issue at hand as a timeliness dispute.[227] The Fifth Circuit thus distinguished the "amount dispute" cases, which Mumfrey cited for the proposition that the jurisdictional amount was facially apparent despite the absence of an allegation that the damages sought were in excess of the federal jurisdictional amount, and faulted him for not citing *Chapman v. Powermatic, Inc.*[228] as the seminal case on timeliness disputes.[229]

The Fifth Circuit cited *Chapman* for a bright-line rule requiring the plaintiff to specifically allege that damages exceed the federal jurisdictional amount if the plaintiff wishes to trigger the removal clock for defendants.[230] Furthermore, the court identified dicta in its subsequent decision in *Bosky v. Kroger Texas, LP* as not supportive of the plaintiff's reliance on amount dispute cases to suggest that unspecified damage claims can provide sufficient notice of removability to trigger the removal clock.[231]

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220. *Id.* at 396.
221. *Id.* at 396–98.
222. *Id.* at 396–97.
223. *Id.* at 397.
224. *Id.*
225. *Id.*
226. *Id.* at 398–99.
227. *Id.* at 398.
228. Chapman v. Powermatic, Inc., 969 F.2d 160, 160 (5th Cir. 1992).
229. *Mumfrey*, 719 F.3d at 400 (citing *Chapman*, 969 F.2d at 160).
230. *Id.*
231. *Id.* (citing Bosky v. Kroger Tex., LP, 288 F.3d 208, 210 (5th Cir. 2002)).

The Fifth Circuit thus reiterated *Chapman*'s bright-line rule by holding that the removal clock did not start to run until CVS received the amended petition seeking $3,375,000 in damages.[232]

Mumfrey also required the Fifth Circuit to clarify the proper burden of proof to show improper joinder.[233] It noted that under the *Smallwood v. Illinois Central Railroad* test,[234] "not only is the initial burden on the defendant to show the complaint fails to state a claim [against non-diverse defendants], but if the court elects 'in its discretion[ ] [to] pierce the pleadings and conduct a summary inquiry,' the burden remains with the defendant."[235] Although the Fifth Circuit in *Mumfrey* found the trial court improperly placed the burden on the plaintiff by citing his failure to offer facts or an argument to support his theories against the non-diverse individual defendants, the Fifth Circuit nevertheless found the error to be harmless because CVS had, in fact, carried its burden.[236]

M. Requiring Leave to Amend Even When Amendment Is Within the Time Period for Amending in the Scheduling Order and Striking an Amendment Due to Joining Non-Diverse Parties: Priester v. JP Morgan Chase Bank, N.A.

In *Priester v. JP Morgan Chase Bank, N.A.*, the Fifth Circuit addressed the extent to which courts may require leave to amend even if an amendment is within the time period for amending in a scheduling order, as well as a district court's ability to deny an amendment in situations in which the amendment would add non-diverse parties.[237] The plaintiff–mortgagors sued the mortgage holder in state court for a declaratory judgment that the lien on the plaintiffs' homestead was void due to certain violations of the Texas Constitution.[238] They also sought damages for defamation on the ground that the mortgage holder had asserted that the plaintiff's payments were past due.[239]

The defendant removed the case to federal court and moved to dismiss the suit under the applicable statute of limitations.[240] The plaintiffs, "by order of the magistrate judge . . . , filed an amended complaint, and the motion to dismiss was denied."[241] The plaintiffs "then filed a second amended complaint and motion to remand and later a motion for leave to file a second amended

232. *Id.*

233. *See id.* at 401.

234. *Id.* (quoting Smallwood v. Ill. Cent. R.R., 385 F.3d 568, 573 (5th Cir. 2004)) (citing *In re* 1994 Exxon Chem. Fire, 558 F.3d 378, 385 (5th Cir. 2009)).

235. *Id.* at 402 (final two alterations in original) (quoting *Smallwood*, 385 F.3d at 573–75).

236. *Id.*

237. *See* Priester v. JP Morgan Chase Bank, N.A., 708 F.3d 667, 678–79 (5th Cir. Feb. 2013), *cert. denied*, 134 S. Ct. 196 (2013).

238. *Id.* at 671.

239. *Id.* at 671–72.

240. *Id.* at 672.

241. *Id.*

complaint."[242] After settlement negotiations failed, the defendant again filed a motion to dismiss, which the magistrate judge recommended the court adopt.[243] The plaintiffs "objected and filed a third amended complaint and a second motion to remand."[244] Nonetheless, "[t]he district court adopted the recommendation of the [magistrate judge], dismissed the suit, and struck the second and third amended complaints because they would have joined non-diverse parties, destroying jurisdiction."[245]

The Fifth Circuit affirmed the district court's order striking the amended complaints.[246] On appeal, the plaintiffs argued "that the amended complaints were filed in accordance with the court's scheduling order and that they were necessary to join outside parties and introduce additional claims."[247] Thus, the plaintiffs "argue[d] that they were not trying to amend under Rule 15(a) but instead were relying on the Rule 16(b) scheduling order, which they claim[ed] allowed them to amend essentially as many times as they wanted within the period afforded by the [magistrate judge] for amendment."[248] The Fifth Circuit, however, held that there were "no cases that support the [plaintiffs'] broad reading of Rule 16(b), which would allow unlimited amendments so long as a scheduling order did not explicitly require leave to amend."[249] The Fifth Circuit also noted that the plaintiffs misplaced reliance on a "sample scheduling order" appended to the Eastern District of Texas' Local Rules, because the sample scheduling order included no such broad language and, in any event, was "not a rule."[250] Thus, the Fifth Circuit held that the district court could require leave to amend, even though the amendment would have occurred within the time for amending stated in the scheduling order.[251]

The Fifth Circuit also held that the district court properly "struck the amended complaints because they sought to join non-diverse parties."[252] Citing 28 U.S.C. § 1447(e), the Fifth Circuit noted that "[i]f after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court."[253] The Fifth Circuit then discussed the traditional factors to consider in determining whether to permit joinder of non-diverse parties, including "the extent to which the purpose of the amendment is to defeat federal jurisdiction, whether plaintiff has been dilatory in asking for amendment, whether plaintiff will be significantly injured if amendment is not

242. *Id.*
243. *Id.*
244. *Id.*
245. *Id.*
246. *See id.* at 679.
247. *Id.* at 678.
248. *Id.* at 679.
249. *Id.* (citing FED. R. CIV. P. 16(b)).
250. *Id.*
251. *See id.*
252. *Id.*
253. *Id.* (quoting 28 U.S.C. § 1447(e) (2012)) (internal quotation marks omitted).

allowed, and any other factors bearing on the equities."[254] The Fifth Circuit held that the district court properly weighed each factor in concluding that the plaintiffs were joining "the additional defendants to defeat jurisdiction, that they were slightly dilatory, that they would not be injured by denial [of the amendments], and that the balance of the equities weighed in favor of denial."[255]

N. Propriety of Granting a Motion to Quash Without Providing an Opportunity to Respond to the Motion and Without Providing Reasons for Granting the Motion: Texas Keystone, Inc. v. Prime Natural Resources, Inc.

In *Texas Keystone, Inc. v. Prime Natural Resources, Inc.*, the Fifth Circuit addressed whether the district court properly granted a Motion to Quash discovery without providing an opportunity to the non-movant to respond to the motion and without providing reasons for granting the motion.[256] A defendant in litigation pending in London, England (the UK Litigation), filed suit in the Southern District of Texas "under 28 U.S.C. § 1782, which provides that interested parties to a foreign proceeding may apply to a United States district court to obtain discovery relevant to the foreign litigation from a non-party located in the United States."[257] In the UK Litigation, the plaintiff sued the defendant and others asserting various contractual and tort claims that arose out of the plaintiff's exclusion from certain production sharing contracts between the defendant and the government in Kurdistan, Iraq.[258] The defendant's suit in the United States sought authorization to subpoena documents and testimony from a third party that were relevant to its defenses.[259]

The district court granted the defendant's application to seek discovery, and the defendant served the subpoenas on the third party.[260] The third party, however, moved to quash the subpoenas on the ground that they were "invasive, unduly burdensome, and irrelevant."[261] The next day, the district court granted the Motion to Quash without providing the defendant an opportunity to respond.[262] Further, the district court provided no reasons on the record for its decision; instead, the court's order simply quashed the subpoenas.[263]

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254. *Id.* (quoting Hensgens v. Deere & Co., 833 F.2d 1179, 1182 (5th Cir. 1987)) (internal quotation marks omitted).

255. *Id.*

256. *See* Tex. Keystone, Inc. v. Prime Natural Res., Inc., 694 F.3d 548, 549 (5th Cir. Sept. 2012) (per curiam).

257. *Id.* at 549–50 (citing 28 U.S.C. § 1782 (2006)).

258. *Id.* at 550–52.

259. *Id.* at 551.

260. *Id.*

261. *Id.* at 552.

262. *Id.*

263. *Id.* at 552–53.

On appeal, the Fifth Circuit held that the district court abused its discretion by granting the Motion to Quash without providing the defendant with an opportunity to respond.[264] The Fifth Circuit also held that the district court abused its discretion when it failed to provide reasons for granting the Motion to Quash.[265] In reaching its holdings, the Fifth Circuit relied on two prior cases, one that held that a district court erred in quashing a subpoena the Federal Home Loan Bank Board had issued,[266] and another that held that a district court erred in not providing reasons for its decision to quash a subpoena and to grant a Motion to Compel.[267] The Fifth Circuit rejected the third party's attempt to distinguish these cases on the ground that they did not involve § 1782 proceedings.[268] According to the Fifth Circuit, the normal federal discovery rules applied once the court granted the § 1782 application, so the presence of § 1782 did not change the result.[269] Further, the Fifth Circuit rejected the argument that the defendant had an opportunity to respond to the Motion to Quash due to the defendant's § 1782 application.[270] The Fifth Circuit noted it was not possible to determine whether the district court relied on that filing when granting the Motion to Quash.[271] Indeed, there was no "evidence that the district court analyzed the factors for assessing whether [the] discovery requests were in fact unduly burdensome" for the purposes of Rule 45(c)(3)(iv).[272]

Thus, the Fifth Circuit held "that the district court abused its discretion by failing to provide . . . an opportunity to respond to the Motion to Quash and by providing no reasons for its decision."[273] Nevertheless, the Fifth Circuit declined to reach the question of how to "modify the subpoena[s] or otherwise address the merits of the Motion to Quash."[274] Instead, the Fifth Circuit vacated the district court's order granting the Motion to Quash and remanded to the district court with instructions to provide the defendant with a reasonable period to respond to the motion, and then to provide written or oral justifications for the basis of its ruling.[275]

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264. *See id.* at 555.

265. *See id.*

266. *See id.* (citing Sandsend Fin. Consultants, Ltd. v. Fed. Home Loan Bank Bd., 878 F.2d 875, 881 (5th Cir. 1989)).

267. *See id.* (citing Wiwa v. Royal Dutch Petroleum Co., 392 F.3d 812, 818–19 (5th Cir. 2004)).

268. *See id.* at 555–56 (analyzing *Wiwa*, 392 F.3d at 818–19; *Sandsend*, 878 F.2d at 881).

269. *See id.* at 554–55; *see, e.g.*, *Wiwa*, 392 F.3d at 815, 818–19; *Sandsend*, 878 F.2d at 877–78, 881; *see also* Heraeus Kulzer, GmbH v. Biomet, Inc., 633 F.3d 591, 597 (7th Cir. Jan. 2011).

270. *See Tex. Keystone Inc.,* 694 F.3d at 554–55.

271. *See id.*

272. *Id.* (citing FED. R. CIV. P. 45(c)(3)(iv)).

273. *Id.*

274. *Id.*

275. *Id.*