FIFTH CIRCUIT SURVEY
June 2004-May 2005

FOREWORD .................. The Honorable Edith Brown Clement

SURVEY ARTICLES

ARBITRATION JURISPRUDENCE .................. Stephen K. Huber
BANKRUPTCY ................................. Tye C. Hancock
BUSINESS TORTS JURISPRUDENCE ............. Sofia Adrogué
CIVIL PROCEDURE ......................... Angela M. Laughlin
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LABOR AND EMPLOYMENT LAW .......... Stan Pietrusiak
RECENT DEVELOPMENTS IN FIFTH CIRCUIT BUSINESS TORTS JURISPRUDENCE

by Sofia Adrogué*

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The concepts and theories covered by this Survey are for discussion purposes only and are not intended

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I. Scope of the Article

The mission is succinct: to address areas in Fifth Circuit jurisprudence that cumulatively entail business torts. In essence, these are weapons available to parties in the traditional contract realm whose allure include punitive or treble damages and attorney’s fees. Parties utilize these causes of action in an
attempt to establish tort liability, enabling potential recovery of punitive damages and damages for mental anguish in an otherwise contractual context. Albeit not exhaustive of all the business torts cases making new law in the Fifth Circuit, this Article addresses case law in the antitrust and Civil Racketeer Influenced and Corrupt Organizations Act (RICO) arenas as well as "miscellaneous matters" in the business torts realm. These miscellaneous areas of law include, inter alia, class actions as well as trademark and copyright in a business torts context that similarly merit scrutiny. Therefore, traditional business torts are transgressed within Fifth Circuit jurisprudence as necessity or interest dictates.

II. MISCELLANEOUS BUSINESS TORTS JURISPRUDENCE

A. Antitrust: El Aguila Food Products, Inc. v. Gruma Corp.

In *Gruma Corp.*, the plaintiffs, seventeen manufacturers of tortillas, appealed a take-nothing judgment in favor of the defendant, also a manufacturer of tortillas.¹ A panel comprised of Circuit Judges W. Eugene Davis, Jerry E. Smith, and Harold R. DeMoss, Jr. considered whether the plaintiffs failed to offer sufficient evidence of damages and causation.² The plaintiffs challenged the defendant's efforts to induce retailers to advertise and promote its tortillas and to obtain display and shelf space in retail outlets.³ The plaintiffs specifically questioned the defendant's use of marketing agreements with retailers, which provided price reductions and other financial incentives in order to obtain and manage shelf and display space.⁴ The plaintiffs alleged that the actions violated the following: (1) section 1 of the Sherman Act and section 3 of the Clayton Act; (2) section 2 of the Sherman Act because they constituted monopolization and attempted monopolization; (3) the Robinson-Patman Act because they constituted price discrimination; and (4) state antitrust laws.⁵

Prior to trial, the defendant moved for summary judgment, arguing that the plaintiffs could not establish any antitrust violations as a matter of law.⁶ The defendant also moved to exclude damages and causation⁷ by the plaintiffs' designated expert witnesses on *Daubert* grounds⁸ The district court did not

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1. El Aguila Food Prods., Inc. v. Gruma Corp., 131 F. App'x 450, 451 (5th Cir. May 2005) (not designated for publication).
2. Id.
3. Id.
4. Id.
5. Id. at 452.
6. Id.
7. Id.
rule on the motion, but carried it to trial. During their case in chief, the plaintiffs offered an expert on damages to opine on the profits allegedly lost as a consequence of the defendant’s challenged conduct. The defendant renewed its Daubert objection, and after an extended voir dire examination, the trial court sustained the objection and excluded the witness. The plaintiffs then called their causation and antitrust injury expert, the defendant again renewed its objection, and the trial court excluded this expert as well.

The trial court dismissed the jury because the plaintiffs had no admissible evidence of antitrust damages or causation. The defendant moved for judgment as a matter of law and for the court to consider the pending motion for summary judgment. The trial court granted a take-nothing judgment in favor of the defendant holding that the plaintiffs’ claims failed as a matter of law, and the plaintiffs appealed.

The Fifth Circuit provided a review of antitrust liability. Under section 4 of the Clayton Act, private antitrust liability requires that a plaintiff show the following: (1) a violation of the antitrust laws, (2) the fact of damages, and (3) some evidence of the amount of damage. The court explained that the fact of damages is an issue of causation—the plaintiff is required to show that the unlawful conduct of the defendant constituted a material cause of its injury. The circuit court noted that to prove actual damages, the plaintiffs relied primarily on the damage expert’s model. The model was a “yardstick” measure of damages whereby he compared the plaintiffs’ sales history with sales data from the tortilla market as a whole. He based his approach on the assumption that absent the defendant’s illegal conduct, each of the plaintiffs would have performed to the rate of the market as a whole.

The Fifth Circuit opined that the expert made no effort to show a reasonable similarity between the plaintiffs’ firms and the earnings data upon which he relied. The expert did not consider whether the plaintiffs were even able to handle the excess capacity the projected rates of return entailed. Further, the court explained that by characterizing all of the losses as “lost

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9. El Aguila, 131 F. App’x at 452.
10. Id.
11. Id.
12. Id.
13. Id.
14. Id.
15. Id.
16. Id.
17. Id.
18. Id. at 453.
19. Id.
20. Id.
21. Id.
22. Id.
23. Id.
profits," the expert did not allow for losses based on other factors, such as available shelf space, the plaintiffs' failure to compete for shelf space, and their relative lack of efficiency.24

The court further acknowledged that even if the trial court admitted the expert's testimony, it would not have provided a sufficient basis on which the jury could have arrived at a reasonable estimate of actual damages.25 The plaintiffs did not offer any additional evidence of damages.26 Thus, the Fifth Circuit determined that the plaintiffs failed to offer sufficient evidence on which to base a principled award of money damages, and the district court properly granted judgment in favor of the defendant.27

The Fifth Circuit opted not to end its analysis with the proof of damages component—although it could have because antitrust liability requires proof of damages as well as causation—and also addressed causation.28 The circuit court reviewed the voir dire of the plaintiffs' causation expert and determined his opinion "amounted to abstract conclusions not adequately grounded in the facts of the case."29 The court explained that the witness failed to examine the sales data from the retailers in the relevant markets in making the determination of whether space allocation was disproportionate to sales.30 The expert did not tie the shelf space allocation to the retailers with which the defendant had marketing agreements.31 Moreover, he was unable to explain any of the alternative causes of the reduction in shelf space experienced by the plaintiffs, such as their failure to compete for it by offering incentives to retailers.32 Ultimately, the Fifth Circuit concluded that because the plaintiffs failed to present sufficient evidence of causation, their antitrust claims failed as a matter of law.33

B. Arbitration

1. Continental Airlines, Inc. v. International Brotherhood of Teamsters

The instant case addressing judicial review of arbitration awards arose out of the termination of a Continental employee.34 A panel composed of Circuit Judges Rhesa H. Barksdale, Charles Willis Pickering, Sr., and District Judge

24. Id.
25. Id. at 453-54.
26. Id. at 454.
27. Id.
28. Id.
29. Id.
30. Id.
31. Id.
32. Id.
33. Id. at 455.
Barbara Lynn, sitting by designation, considered whether the arbitration panel erred in determining that the employee had violated a last chance agreement by testing positive for alcohol. The Department of Transportation requires airlines to subject their employees to random alcohol breath tests. The Continental employee in this case was tested in accordance with this requirement and was found to have had a blood alcohol content above the legal limit for intoxication in Texas. As a result, he was discharged and subsequently filed a grievance contesting his termination. Assisted by his union, he entered into a “last chance agreement” with Continental under which he was allowed to return to work subject to the following terms: (1) submission to an Employee Assistance Program (the program) evaluation, (2) completion of rehabilitation if recommended by the program after evaluation, (3) termination upon the failure of future drug or alcohol tests, and (4) completion of another alcohol test upon the employee’s return to work.

Pursuant to the agreement, the employee went through evaluation and rehabilitation. Under the terms of the program, the employee was prohibited from alcohol consumption unless medication containing alcohol was prescribed by his physician with proper notice to the program staff. Adhering to these restrictions, after returning to work, the employee told the program director via voicemail that he had taken an over-the-counter cough medicine. The director of the program received this voicemail, but he did not return the employee’s call. A few days later, Continental tested the employee for alcohol; he tested positive due to the cough medicine. He was terminated and filed a grievance challenging his dismissal.

During the alternative dispute forum, the arbitrators concluded that the employee had not violated the agreement and ordered him reinstated. Continental disagreed and sought to have the arbitrator’s judgment in favor of the employee vacated. Both parties moved for summary judgment, and the district court upheld the award. Continental appealed.

35. Id.
36. Id. at 615.
37. Id.
38. Id.
39. Id. at 616.
40. Id.
41. Id.
42. Id. at 614.
43. Id.
44. Id.
45. Id.
46. Id.
47. Id.
48. Id.
49. Id.
The court commenced by articulating that the Railway Labor Act\(^{50}\) (RLA) controls disputes between airlines and their employees.\(^{51}\) The RLA divides such conflicts into two types—"major" and "minor"—and establishes mandatory procedures for resolving each kind.\(^{52}\) A major dispute involves the formation of a collective bargaining agreement governing pay rates, working conditions, and similar disputes.\(^{53}\) "A 'minor' dispute arises 'out of grievances or out of the interpretation or application of [collective bargaining] agreements ...'"\(^{54}\) Parties may only resolve minor disputes through binding arbitration.\(^{55}\) Both parties were in agreement that the dispute underlying the instant case was a minor dispute.\(^{56}\)

According to the Fifth Circuit, judicial review of arbitration awards arising from minor disputes is limited to the following inquiries: "(1) whether the Board failed to comply with the RLA[,] (2) whether the Board failed to confirm or confine itself to matters within the scope of its jurisdiction[,] and (3) whether the Board's decision was the result of fraud or corruption."\(^{57}\) The standard of review is highly deferential—unless the interpretation of the contract is "'wholly baseless and completely without reason,'" the interpretation must stand.\(^{58}\) Continental argued that because the arbitration board ignored an express term of the contract, a no deference standard of review should have been applied.\(^{59}\) The Fifth Circuit disagreed and held that the district court applied the correct standard of review.\(^{60}\)

Continental further asserted that the arbitrators nonetheless erred in that they ignored the requirement that medications containing alcohol must be prescribed by a doctor.\(^{61}\) Continental argued that the board added a "last chance warning" when it determined that the program director should have responded to the employee's voicemail.\(^{62}\) The Fifth Circuit reviewed the record.\(^{63}\) The uncontested evidence revealed that the employee's doctor never approved the use of the cough medicine, and because the agreement at issue required a doctor's approval, the employee was in violation.\(^{64}\) According to

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51. Cont'l Airlines, 391 F.3d at 616.
52. Id. at 616-17.
53. Id.
54. Id. (quoting Consol. Rail Corp. v. Ry. Labor Executives' Ass'n, 491 U.S. 299, 303 (1989)).
55. Id.
56. Id.
57. Id. (citing 45 U.S.C. § 153(q) (2000)).
58. Id. (quoting E. Air Lines, Inc. v. Transp. Workers Union, Local 553, 580 F.2d 169, 172 (5th Cir. 1978)).
59. Id.
60. Id. at 619.
61. Id.
62. Id. at 620.
63. Id.
64. Id.
the court, the failure of the director to return the phone call was irrelevant.\textsuperscript{65} The circuit court determined that the arbitrators’ interpretation failed to present an arguable construction of the agreements, and therefore, it did not need to address the other grounds raised by Continental.\textsuperscript{66} Thus, the court reversed the district court’s decision granting summary judgment for the union, vacated the arbitration award, and reinstated the discharge of the employee at issue.\textsuperscript{67}

2. Republic Insurance Co. v. Paico Receivables, L.L.C.

With a panel consisting of Circuit Judges W. Eugene Davis, Emilio M. Garza, and Edward Charles Prado, the Fifth Circuit considered whether a party to an insurance contract waived its right to arbitrate.\textsuperscript{68} The plaintiff was one of several insurance companies party to a reinsurance contract.\textsuperscript{69} The agreement contained an arbitration clause requiring any dispute between the parties to be settled through arbitration.\textsuperscript{70} One of the insurance companies experienced financial difficulties and entered into a provisional liquidation in the United Kingdom.\textsuperscript{71} As part of the liquidation, the insurance company assigned its rights to recover under the agreement at issue to the defendant.\textsuperscript{72} The defendant unsuccessfully sought to enforce the assignor’s rights against the plaintiff.\textsuperscript{73} Subsequently, the plaintiff filed suit seeking a declaration that the assignment was invalid because the assignor failed to obtain the plaintiff’s written consent.\textsuperscript{74} The plaintiff alternatively sought a declaration that the assignment transferred the assignor’s obligations under the agreement as well as its rights.\textsuperscript{75} The plaintiff failed to include an alternative pleading asserting its right to arbitration under the agreement.\textsuperscript{76} The defendant answered, asserting several counterclaims.\textsuperscript{77} The plaintiff responded by asserting nine affirmative defenses but still did not assert its right to arbitration.\textsuperscript{78}

Full scale discovery took place, and the plaintiff actively participated in the process.\textsuperscript{79} The plaintiff then amended its complaint and again failed to assert its right to arbitration.\textsuperscript{80} The parties filed motions for summary

\textsuperscript{65} Id.
\textsuperscript{66} Id.
\textsuperscript{67} Id.
\textsuperscript{68} Republic Ins. Co. v. PAICO Receivables, LLC, 383 F.3d 341, 342 (5th Cir. Sept. 2004).
\textsuperscript{69} Id. at 343.
\textsuperscript{70} Id.
\textsuperscript{71} Id.
\textsuperscript{72} Id.
\textsuperscript{73} Id.
\textsuperscript{74} Id.
\textsuperscript{75} Id.
\textsuperscript{76} Id.
\textsuperscript{77} Id.
\textsuperscript{78} Id.
\textsuperscript{79} Id.
\textsuperscript{80} Id. at 344.
judgment, and the court ruled the rights under the agreement were validly assigned to the defendant but also ruled the defendant assumed the assignor’s obligations. The court found that the defendant would be ‘“sorely prejudiced” if [the court] compelled arbitration . . . because “[i]n addition to incurring very significant legal fees, [the defendant] has participated in full-fledged discovery, expert preparation, and trial preparation.”’ The district court denied the motion to stay. This appeal followed.

The Fifth Circuit began its analysis by reminding practitioners as follows: “Waiver will be found when the party seeking arbitration substantially invokes the judicial process to the detriment or prejudice of the other party.” Therefore, whether the plaintiff waived its right to arbitration turned on whether it “substantially invoked” the judicial process and whether arbitration would prejudice the defendant. The circuit court explained that in order to invoke the judicial process, a party must “engage in some overt act in court” that shows its desire to resolve the dispute through litigation instead of arbitration. Further, the claim that the party seeks to arbitrate must be the same claim that it previously sought to litigate. The Fifth Circuit noted that the plaintiff undertook what the court termed “extensive litigation activities” prior to asserting its right to arbitration. Such activities included the following: (1) answering the defendant’s counterclaims, (2) conducting full-fledged discovery, including the taking of four depositions, (3) amending its complaint, and (4) filing pretrial motions. The Fifth Circuit concluded that the plaintiff demonstrated an intent to resolve the dispute through litigation rather than arbitration.

81. Id.
82. Id.
83. Id.
84. Id.
85. Id. (first and third alteration in original) (quoting district court opinion).
86. Id.
87. Id.
88. Id. (quoting Subway Equip. Leasing Corp. v. Forte, 169 F.3d 324, 326 (5th Cir. 1999)).
89. See id.
90. Id. (quoting Subway, 169 F.3d at 329).
91. Id.
92. Id.
93. Id. at 345.
94. Id.
The court then addressed whether prejudice to the defendant would result from enforcing the arbitration agreement.\textsuperscript{95} The lower court determined that due to the plaintiff's delay in asserting a right to arbitration, the defendant spent significant time and money engaging in discovery and defending a motion for summary judgment.\textsuperscript{96} Further, the discovery "was not limited solely to the nonarbitrable claims."\textsuperscript{97} The parties conducted discovery relating to the issues the plaintiff sought to arbitrate.\textsuperscript{98} The Fifth Circuit concluded that the prejudice the defendant would suffer if arbitration was compelled was significant, and therefore, the district court did not err in finding waiver and refusing to enforce the arbitration provision.\textsuperscript{99}

3. South Louisiana Cement, Inc. v. Van Aalst Bulk Handling, B.V.

This appeal, before a panel composed of Circuit Judges Harold R. DeMoss, Charles E. Stewart, and Edward Charles Prado, required the Fifth Circuit to consider whether arbitration orders, without a final decision from the arbitration panel, are immediately appealable.\textsuperscript{100} The case arose out of a business relationship between the parties.\textsuperscript{101} The parties entered into several contracts, all of which contained express arbitration provisions.\textsuperscript{102} The plaintiff brought suit over a business dispute, and the defendant filed a motion to compel arbitration and asserted several counterclaims.\textsuperscript{103} The district court granted the motion and referred all claims, including the counterclaims, to arbitration.\textsuperscript{104} The ruling stayed the litigation and administratively closed the case pending a final arbitration decision.\textsuperscript{105} The plaintiff appealed.\textsuperscript{106}

The Fifth Circuit considered whether the district court's order constituted an immediately appealable final decision.\textsuperscript{107} Appellate review of arbitration orders is subject to the provisions of section 16 of the Federal Arbitration Act.\textsuperscript{108} The circuit court explained that the statute provides the appellate courts with jurisdiction over "'final decision[s] with respect to an arbitration.'"\textsuperscript{109} Further, the statute specifically denies appellate jurisdiction over orders to stay

\begin{itemize}
\item \textsuperscript{95} \textit{Id.} at 346.
\item \textsuperscript{96} \textit{See id.} at 347.
\item \textsuperscript{97} \textit{Id.}
\item \textsuperscript{98} \textit{Id.}
\item \textsuperscript{99} \textit{See id.}
\item \textsuperscript{100} S. La. Cement, Inc. v. Van Aalst Bulk Handling, B.V., 383 F.3d 297, 298 (5th Cir. Aug. 2004).
\item \textsuperscript{101} \textit{Id.}
\item \textsuperscript{102} \textit{Id.} at 298-99.
\item \textsuperscript{103} \textit{Id.} at 299.
\item \textsuperscript{104} \textit{Id.} at 299-300.
\item \textsuperscript{105} \textit{Id.} at 300.
\item \textsuperscript{106} \textit{Id.}
\item \textsuperscript{107} \textit{Id.}
\item \textsuperscript{108} \textit{See} 9 U.S.C. § 16 (2000).
\item \textsuperscript{109} \textit{Van Aalst}, 383 F.3d at 300 (quoting 9 U.S.C. § 16(a)(3)) (alteration in original).
\end{itemize}
proceedings pending arbitration.  The court explained that its jurisdiction in
the instant case turned on whether the district court order constituted a final
decision.  The circuit court reiterated the long standing rule that “[a] final decision
is one that ‘ends the litigation on the merits and leaves nothing more for the
court to do but execute the judgment.’” Pursuant to this definition, an
arbitration order staying litigation pending the final decision of the arbitration
panel is not an appealable order. The court opined that in the instant case,
the district court “administratively closed” the case and entered a stay as
opposed to dismissing the claims. Unlike a dismissal, a stay postpones
proceedings and, therefore, lacks finality. Thus, the Fifth Circuit concluded
that a stay is not the functional equivalent of a dismissal and determined that
it did not have jurisdiction to consider the appeal.

4. California Fina Group, Inc. v. Herrin

With a panel comprised of Circuit Judges Harold R. DeMoss, Jr., Carl E.
Stewart, and Edward Charles Prado, the Fifth Circuit Court of Appeals
considered an issue of first impression—the meaning of the term “customer”
in Rule 10301(a) of the National Association of Securities Dealers (NASD)
Uniform Code of Arbitration (Arbitration Code). The plaintiff was a
securities firm that entered into an agreement with an individual pursuant to
which the plaintiff agreed to act as a broker-dealer for the purchase and sale
of various securities, and the individual was allowed to place buy-and-sell
orders through the firm in accordance with the agreement. The agreement
explicitly stated that the individual was an independent contractor and limited
the kinds of securities to those which the firm was authorized to sell.

The defendants were elderly persons with no investment experience, and
they alleged the independent contractor sold them fraudulent securities. The
plaintiff neither offered nor sold the securities listed. The defendants sought
arbitration with the NASD between themselves and the plaintiff, alleging that
the plaintiff was responsible for the independent contractor’s actions. In response, the plaintiff filed the case in district court in Texas, seeking the following: (1) a declaration that it did not have to arbitrate the claims alleged in the NASD arbitration, and (2) an injunction preventing the defendants from pursuing arbitration. The defendants filed a motion to compel arbitration, arguing that the Arbitration Code required the plaintiff to arbitrate as a third-party beneficiary of the contractor’s actions. Specifically, Arbitration Code Rule 10301(a) applies to all NASD members and requires arbitration for disputes between a “customer” and the member or “associated person.” The district court granted the motion and dismissed the plaintiff’s suit.

The Fifth Circuit noted that the Arbitration Code does not define customer or associated person. According to the NASD Conduct Rules, a “customer” is “any person who, in the regular course of such member’s business, has cash or securities in the possession of such member.” The court further noted, however, that in several other NASD rules, a customer is anyone other than a broker or dealer. Although the court reviewed the definition of associated person, neither party disputed that the independent contractor was such an entity. The applicability of the arbitration clause depended upon whether the defendants were considered customers under the Arbitration Code.

The Fifth Circuit reviewed the parties’ arguments in turn. The plaintiff maintained that the term “customer” should be narrowly construed when compelling arbitration pursuant to the Arbitration Code so that NASD members are required to arbitrate disputes with only their own customers, and not every customer of an independent contractor. The defendants argued that the negative definition of customer—anyone other than a broker or dealer—was included in several different NASD rules and should apply. The defendant asserted that, unlike the narrow definition, other financial organizations and the SEC used the broad definition.

The Fifth Circuit has never decided whether Rule 10301(a) requires a NASD-member firm to arbitrate claims with claimants who can only establish

123. Id.
124. Id.
125. Id. at 313-14.
126. Id. at 314.
127. Id. at 315.
128. Id. at 314.
129. Id. (quoting NASD Conduct Rule 2270(b)).
130. Id.
131. Id.
132. See id.
133. See id. at 314-15.
134. Id. at 314.
135. Id.
136. Id.
the status of customers of an associated person. The court looked to persuasive precedent and examined the Second Circuit case of John Hancock Life Insurance Co. v. Wilson. In Wilson, the Second Circuit, faced with this same question, determined that nothing in Rule 10301(a), or any other provision of the Arbitration Code, compels the court to do anything other than construe the term “customer” as meaning any person other than a broker or dealer. The Fifth Circuit deemed the reasoning of its sister circuit persuasive and found that Rule 10301(a)’s use of customer was broad enough to include those who have purchased securities from an associated person of a member firm and who are not themselves brokers or dealers. Therefore, the court of appeals affirmed the district court’s dismissal of the plaintiff’s suit and grant of the defendants’ motion to compel.

5. Smith v. Air Transport Local 556

In a per curiam opinion, the Fifth Circuit determined whether an arbitration panel had authority to modify its initial award. The plaintiff was a former president of the defendant union. The parties agreed to stay litigation and submit to binding arbitration. The court granted an initial arbitral award in favor of the plaintiff. Issues arose regarding additional costs, and the panel determined that it had authority to modify the award to tax such additional costs against the defendant. The plaintiff moved to confirm the award in district court, and the defendant opposed confirmation of the award as modified, but not the initial award. The district court disagreed with the plaintiff, vacated the modified award, and confirmed the original award. This appeal ensued.

To determine the scope of the arbitration panel’s authority to modify an arbitral award, the Fifth Circuit examined the arbitration agreement. The agreement at issue stated, in relevant part, as follows: “The arbitrators sua sponte may amend or correct their award within three business days after the award, but the parties shall not have a right to seek correction of the

137.  Id. at 315.
138.  254 F.3d 48 (2d Cir. 2001).
139.  Herrin, 379 F.3d at 317 (citing Wilson, 254 F.3d at 59).
140.  Id. at 318.
141.  Id.
143.  Id. at 374.
144.  Id.
145.  Id.
146.  Id.
147.  Id.
148.  Id.
149.  Id.
150.  Id.
award." The modification in this case occurred more than one month after the initial award. The plaintiff argued that the Fifth Circuit should defer to the panel's judgment and reinstate the award as modified because the court based its decision on evidence not presented to the district court. The circuit court, however, disagreed and viewed the issue as a matter of contract interpretation and therefore a matter for the courts.

The court opined that the plain language of the agreement stated that the arbitrators would not amend the arbitral award more than three days after the initial award. The Fifth Circuit concluded, based on this express limitation, that the modification was "beyond the reach of the arbitrators' power [and] [i]f an arbitral panel exceeds its authority, it provides grounds for a court to vacate that aspect of its decision." The plaintiff further argued that the agreement contained a limitation on the defendant's right to appeal "arbitrator misconduct"—a form of abuse of discretion by the arbitration panel. The circuit court, however, noted that the defendant did not appeal the merits of the arbitral award but objected to the plaintiff's request to confirm based on the power of the panel to modify the award, which is a question of law for the court, as discussed above. The court found that the defendant did not violate its agreement to waive appeal of certain matters. Therefore, the court affirmed the judgment of the district court vacating the award as modified and confirming the original award.


With a panel composed of Chief Judge Carolyn Dineen King and Circuit Judges Thomas M. Reavley and Emilio M. Garza, the Fifth Circuit Court of Appeals considered whether an employee consented to arbitration proceedings in a Title VII action. The plaintiff sued her employer and supervisor for employment discrimination. The court denied the defendants' motions to compel arbitration and stay the judicial proceeding. The district court

151. Id. (quoting R. at 154).
152. Id.
153. Id.
154. Id.
155. Id. at 375.
156. Id.
157. Id.
158. Id.
159. Id.
160. Id.
162. Id. at 759.
163. Id.
determined that the plaintiff had not assented to the employer's arbitration program, and the defendants appealed.\textsuperscript{164}

A year prior to the filing of the instant action, the plaintiff's employer instituted a compulsory arbitration program for employment related disputes.\textsuperscript{165} The plaintiff admitted that she received the following documents: (1) the Rules of Arbitration, which stated that both the company and the employee agreed that the procedures within the document would be the only method of dispute resolution, and (2) the Acknowledgment of Receipt of Rules for Arbitration, which provided that the employee both received the Rules of Arbitration and agreed to be bound by them by accepting or continuing employment.\textsuperscript{166} The plaintiff signed the acknowledgment form.\textsuperscript{167}

In the lower court, the plaintiff filed a response to the defendants' motion to compel arbitration and to stay the proceedings, alleging that although she signed the form, the signature showed only that she received the forms, not that she agreed to the alternative dispute resolution.\textsuperscript{168} She further alleged that her supervisor told her that arbitration would be optional for management level employees like herself.\textsuperscript{169} The district court found parol evidence allowable in this case, although normally inadmissible to vary the terms of a written contract, because of the ambiguity of the acknowledgment form.\textsuperscript{170}

The defendants alleged on appeal that the acknowledgment form was not ambiguous and the district court erred by allowing parol evidence and denying the motion to compel arbitration.\textsuperscript{171} The plaintiff defended the district court's decision on the same basis detailed above.\textsuperscript{172} The Fifth Circuit began its analysis by determining whether, under Mississippi contract law, the parties had formed a valid agreement.\textsuperscript{173} The court explained that the district court misunderstood how the two documents worked together to create a binding agreement to arbitrate.\textsuperscript{174}

According to the circuit court, the plaintiff, in signing the acknowledgment form, indicated that she received the rules.\textsuperscript{175} But this signature did not bind her to the arbitration program.\textsuperscript{176} The plaintiff became bound by her subsequent continued employment.\textsuperscript{177} The acknowledgment

\begin{footnotes}
\footnotetext[164]{\textit{Id.}}
\footnotetext[165]{\textit{Id.}}
\footnotetext[166]{\textit{Id.}}
\footnotetext[167]{\textit{Id.}}
\footnotetext[168]{\textit{Id.}}
\footnotetext[169]{\textit{Id.}}
\footnotetext[170]{\textit{Id.}}
\footnotetext[171]{\textit{Id. at 760-61.}}
\footnotetext[172]{\textit{Id.}}
\footnotetext[173]{\textit{Id. at 764.}}
\footnotetext[174]{\textit{Id.}}
\footnotetext[175]{\textit{Id.}}
\footnotetext[176]{\textit{Id.}}
\footnotetext[177]{\textit{Id.}}
\end{footnotes}
form notified the plaintiff how she would manifest her assent to be bound; she undisputedly continued her employment thereby manifesting her assent to be bound by the arbitration program. Continuing employment after receiving notice that such continued employment will constitute assent is a recognized method of forming a contract under Mississippi contract law. The court further opined that the agreement was not ambiguous, and therefore, the district court erred by looking at any parol evidence regarding what the plaintiff may have been told by her supervisor. Thus, the Fifth Circuit reversed the district court’s judgment and remanded for entry of an order granting the defendants’ request for arbitration.


In this consolidated appeal, a panel comprised of Chief Judge Carolyn Dineen King and Circuit Judges Reynaldo G. Garza and Fortunato P. Beavives considered whether the district court erred in refusing to award attorney’s fees to two attorneys whose clients had their assets frozen as part of a civil case brought by the Federal Trade Commission (FTC). Two separate entities hired two separate attorneys to defend them in cases filed by the FTC. Initially, the court issued a temporary restraining order to freeze the defendants’ assets. Once the court appointed a receiver, the restraining order converted to a preliminary injunction.

Robert Draskovich was retained by an individual defendant, who paid him a retainer from a company not named in the suit. The client assured Draskovich that the funds with which he was paid were not “tainted.” A stipulated judgment was entered into, which brought the proceedings against Draskovich’s client to a close. The client’s assets were to be liquidated, and all funds originating from the liquidation were demanded to be paid as consumer redress. The judgment contained a condition that permitted the attorneys to obtain and apply fees from the receivership estate. Draskovich petitioned the district court to permit him to retain the funds he previously

178. Id.
179. Id. (citing Edwards v. Wurster Oil Co., 688 So. 2d 772, 775 (Miss. 1997)).
180. Id. at 765.
181. Id.
183. Id.
184. Id.
185. Id. at 260.
186. Id.
187. Id.
188. Id.
189. Id.
190. Id.
The FTC and the receiver filed motions opposing the application and requesting that the court require Draskovich to return the retainer because it was paid in violation of the court’s asset freeze order. The trial court denied the fee application and granted the counter motions. Draskovich appealed, arguing as follows: “(1) the district court erred in finding that the fees he received were subject to the initial asset freeze[, ] (2) the district court’s order violated his client’s Sixth Amendment right to counsel[, ] and (3) the procedures the district court used in making its decision violated due process.”

The court similarly addressed the claims of another attorney, Dean Kajioka, who was also retained by one of the defendants. Kajioka received an initial retainer that came from an account linked to a company not named in the suit. When the fee-paying company was taken into possession by and under the control of the receiver, Kajioka called the receiver and objected, making particular note that this company was not named in any of the court papers. The receiver stated that it believed the company to be an affiliated entity of one of the defendant corporations and expressly included it in the preliminary injunction, although it had not been in the initial temporary restraining order. The receiver demanded that the retainer be returned, and Kajioka refused.

As a result, the FTC and the receiver were prompted to file motions requesting that the district court issue a show cause order to Kajioka to explain why he should not be held in contempt. The court issued the order and held a hearing. The district court declined to hold Kajioka in contempt but found that because no criminal prosecution had taken place, he could not have earned the entire retainer. However, the court allowed him to keep some of the retainer for services rendered and ordered him to return the rest of the funds to the receiver. Kajioka appealed raising identical issues as Draskovich.

The Fifth Circuit explained that the appellants’ fees were subject to the asset freeze order. The terms of the order covered not only the named

191. Id.
192. Id.
193. Id.
194. Id.
195. Id. at 261.
196. Id.
197. Id.
198. Id.
199. Id.
200. Id.
201. Id.
202. Id.
203. Id. at 252.
204. Id.
205. Id. at 250.
parties but also ‘all other persons or entities in active concert or participation with [the defendants].’ 206 The district court determined that the companies from which the attorneys’ retainers were paid were acting together with the defendants and, thus, were subject to the freeze order. 207 The Fifth Circuit opined that there was substantial evidence in the record to support such a determination. 208 Therefore, the court affirmed the district court’s ruling that the appellants’ retainer was paid with funds subject to the asset freeze order. 209

The circuit court then determined whether counsel has a duty to make inquiries as to the source of the fee when the attorney is put on notice that the fee may derive from frozen assets. 210 The Fifth Circuit held that an attorney does have such a duty. 211 First, the court reasoned that taking a fee from a pool of frozen assets is akin to taking a fee from the profits of a criminal activity, which is clearly not allowed. 212 Although the instant case did not involve a criminal matter, it was clear that the fees in question were derived from the defendants’ fraudulent scheme. 213 Thus, the court stated that “it seems entirely appropriate to apply to the instant case this general ethical obligation to ‘audit’ a client before accepting potentially tainted fees.” 214

The Fifth Circuit queried whether the attorneys discharged their duty of inquiry. 215 This issue entails whether the attorneys received sufficient notice to trigger the duty and whether they discharged it. 216 The court held that the circumstances of Draskovich’s payment should have made him aware that something was wrong. 217 He knew that his client was accused of carrying out a massive telemarketing fraud, that all of his client’s assets were frozen, and that purportedly unrelated third parties were paying the retainer. 218 The Fifth Circuit opined that these facts put Draskovich on notice and that he was required to do more than merely take the word of his client that fees were not tainted. 219 The court found that Kajioka was also on notice of the possibility that his retainer was paid out of tainted funds and that he did not discharge his duty of inquiry. Therefore, the Fifth Circuit held that the district court properly concluded both attorneys improperly accepted their retainers. 220
The court briefly addressed the attorneys’ argument that the district court’s orders violated their clients’ Sixth Amendment right to counsel. The Fifth Circuit noted that the Sixth Amendment only applies to criminal matters, and this was a civil case. Thus, the court dismissed the argument, finding no merit to the attorneys contention.

Finally, the appellants argued that the district court did not afford them due process because they did not have a full and impartial hearing. The appellants contended that where a contemnor asserts a genuine issue of material fact, it is incorrect for a court to order contempt sanctions without such a hearing. Again, the Fifth Circuit quickly dismissed this argument by stating that neither attorney was ever held in contempt. The court explained that “appellants’ attempt to characterize themselves as contemtors must fail for the simple reason that they were never held in contempt.” Therefore, the Fifth Circuit affirmed the district court’s orders from which the attorneys appealed.

D. Class Actions

1. Barrie v. Intervoice-Brite, Inc.

A panel comprised of Circuit Judges Fortunato P. Benavides, James L. Dennis, and Edith Brown Clement considered an appeal from the dismissal of a securities fraud class action alleging violations of § 10(b) of the Securities Exchange Act of 1934 and Securities and Exchange Commission Rule 10b-5. The corporate defendant, which was formed as a result of a merger, developed and sold software. The company represented that the merger was a success by citing impressive revenues and projecting strong earnings. Two years later, however, the company announced that it would report a loss, lower than projected revenues, and a decrease in earnings per share. A class action lawsuit ensued against the company and its chief officers.

The class alleged that the defendants committed securities fraud by releasing false and misleading statements regarding the merger and its
earnings, as well as revenue projections and results. The plaintiffs asserted that forecasting statements, press releases, and corporate documents made misleading statements based on improper accounting practices and that analysts relied upon these misleading statements in their reports. The defendants filed a motion to dismiss, which was granted without prejudice, permitting the class to file an amended complaint in compliance with the pleading requirements of the Private Securities Litigation Reform Act (PSLRA) and Federal Rule of Civil Procedure 9(b). The plaintiffs then filed the amended complaint; in turn, the defendants filed another motion to dismiss. The motion was granted, and the plaintiffs’ claims were subsequently dismissed with prejudice for failure to plead in conformity with the pleading requirements of the PSLRA and Rule 9(b). The plaintiffs appealed.

The Fifth Circuit considered the plaintiffs’ allegations; its analysis merits repetition. The plaintiffs alleged that the defendants violated § 10(b) by making false statements regarding revenues and earnings. The PSLRA includes higher pleading requirements for complaints made pursuant to securities class actions; plaintiffs must specifically identify the following: (1) each fraudulent statement, (2) the person who made the statement, (3) the reason why it was false, and (4) whether the statement was made with the requisite state of mind. Pursuant to Securities and Exchange Commission Rule 10b-5, plaintiffs must plead the following: (1) a misstatement or omission, (2) concerning a material fact, (3) made with scienter, (4) that the plaintiffs relied upon, and (5) that proximately caused the plaintiffs’ injuries. In securities fraud cases, Rule 9(b) also applies and requires the plaintiff to identify (1) the allegedly fraudulent statement, (2) the speaker, (3) the time and location of the statement, and (4) the reason why the statement was fraudulent.

On appeal, the plaintiffs alleged that the district court improperly applied the pleading requirements. Regarding the claim of fraud in revenue recognition, the plaintiffs alleged that the revenues were a result of violations of the American Institute of Certified Public Accountants Statement of

234. Id.
235. Id.
236. Id.
237. Id.
238. Id.
239. Id.
240. Id. at 255.
241. Id.
242. Id. at 256 (citing Southland Sec. Corp. v. INSpire Ins. Solutions Inc., 365 F.3d 353, 362 (5th Cir. 2004)).
243. Id. (citing Southland, 365 F.3d at 362).
244. Id.
Position 97-2 (SOP 97-2). The defendants asserted their accounting methods were not improper and provided a fact-based argument to support their assertion. The circuit court determined that a fact-based argument does not support a motion to dismiss. Because the accounting questions were in dispute, the court held that dismissal was inappropriate. The court reviewed the complaint and determined that the plaintiffs alleged with sufficient particularity that the defendants violated SOP 97-2.

The Fifth Circuit further reviewed the plaintiffs' allegations of fraudulent earnings projections. The complaint noted twenty-three allegedly fraudulent statements. Of those, six failed to adequately identify the speaker. Third-party analysts made eleven of the statements. In a third-party analyst situation, the plaintiff must plead facts that allow the court to infer that the defendant exercised sufficient control over the analyst and the analyst's reports to render the defendant liable for the statements in the reports. The complaint in the instant case did not identify which defendants supplied the allegedly false information to the analysts at issue, and therefore, the court held these claims failed as well. The other statements allegedly came from two identified corporate officers. The defendants asserted that the complaint did not specify which officer spoke and which officer failed to correct the misstatement, and therefore, it did not sufficiently identify who made the alleged misstatement or omission. The Fifth Circuit opined that in a case where the plaintiff specifically pleaded that one defendant knowingly made a false statement and the other knowingly failed to correct it, even if it is not specified who spoke and who remained silent, the fraud is sufficiently pleaded as to both defendants. Thus, the court held that the claims survived as to those statements.

After determining which statements the plaintiffs adequately pleaded as to the speaker, date and time, and why the statement was false, the circuit court considered whether the complaint adequately pleaded scienter and concluded
that it did.\textsuperscript{260} Therefore, the Fifth Circuit reversed in part the district court's dismissal and remanded the case for further proceedings.\textsuperscript{261}

Subsequently, the Fifth Circuit issued an order on rehearing.\textsuperscript{262} The order on rehearing concerned the Fifth Circuit's analysis involving the plaintiffs' allegations of fraudulent earnings projections.\textsuperscript{263} As mentioned before, the complaint identified twenty-three allegedly fraudulent statements.\textsuperscript{264} On direct appeal, the court noted that six of the statements failed to adequately identify the speaker.\textsuperscript{265} On rehearing, the court changed the number of statements failing to identify the speaker to three and made it clear that corporate officers may not be held responsible for unattributed statements solely because of their titles.\textsuperscript{266}


This appeal, before a panel composed of Circuit Judges Jerry E. Smith, Carl E. Stewart, and Edward Charles Prado, involved several securities class actions arising from Enron's downfall.\textsuperscript{267} The putative class members in each class action differed.\textsuperscript{268} The appellants in the instant case were members of the putative class and objected to a proposed partial settlement with one of the defendants.\textsuperscript{260} The trial court held a "fairness hearing" and ultimately approved the partial settlement.\textsuperscript{270}

The Fifth Circuit scrutinized the process for settlement approval.\textsuperscript{271} A proposed settlement is approvable if it is "fair, adequate, and reasonable and is not the product of collusion between the parties."\textsuperscript{272} In determining the appropriateness of a proposed settlement, the trial court considers the following factors: (1) evidence that the settlement was reached through fraud or collusion; (2) the complexity, cost, and length of the litigation; (3) the present stage of the litigation and the availability of discovery; (4) the probability of the plaintiffs' success on the merits; (5) the range of possible

\textsuperscript{260} \textit{Id.} at 263.
\textsuperscript{261} \textit{Id.} at 264.
\textsuperscript{262} Barrie v. Intervoice-Brite, Inc. (\textit{Barrie II}), 409 F.3d 653 (5th Cir. May 2005).
\textsuperscript{263} \textit{Id.} at 654.
\textsuperscript{264} \textit{Barrie I}, 397 F.3d at 260.
\textsuperscript{265} \textit{Id.} at 261.
\textsuperscript{266} \textit{Barrie II}, 409 F.3d at 653.
\textsuperscript{267} Newby v. Enron Corp., 394 F.3d 296, 298 (5th Cir. Dec. 2004).
\textsuperscript{268} \textit{Id.}.
\textsuperscript{269} \textit{Id.}
\textsuperscript{270} \textit{Id.} Due to the length and complexity of the facts in the instant case, this brief summary focuses on the approval process for a settlement and not the actual settlement proposed. See \textit{id.}
\textsuperscript{271} \textit{Id.} at 300.
\textsuperscript{272} \textit{Id.} at 301 (citing Cotton v. Hinton, 559 F.2d 1326, 1330 (5th Cir. 1977)).
recovery and certainty of damages; and (6) the opinions of counsel, the class representative, and the class members.273

The circuit court reviewed the record in the instant case and determined that the district court faithfully applied the above-detailed six-factor test.274 The district court found the following: (1) that there was no evidence of collusion or fraud; (2) that the complexity, length, and cost of the impending litigation was enormous for all parties involved; (3) that the future discovery would be expensive; (4) that the plaintiffs’ chances of prevailing on the merits were not good; (5) that assuming, arguendo, that the plaintiffs did prevail on the merits, the jurisdictional bars to recovery were significant; and (6) that class counsel and defense counsel agreed with the court’s judgment.275 The Fifth Circuit noted that there was extensive support in the record, specifically the transcript of the fairness hearing, to support each position.276 Therefore, the court affirmed the district court’s approval of the partial class settlement.277

3. Robinson v. Texas Automobile Dealers Ass’n

A panel comprised of Circuit Judges Jerry E. Smith, Emilio M. Garza, and Charles Willis Pickering, Sr. considered a challenge to the certification of a class action.278 Because this case addressed a change in the imposition of the Vehicle Inventory Tax (VIT), some background information is appropriate. In 1994, Texas changed the way it imposed the VIT.279 Prior to the change, the VIT was an overhead expense absorbed as part of the sales price of a car.280 After 1994, Texas began calculating the VIT as a percentage of the sales price for each car sold.281 Based on the advice of Texas regulatory agencies, the Texas Automobile Dealers Association (TADA) encouraged its members to itemize the VIT as a separate item, charged in addition to the sales price, on a sales contract.282 Although dealerships could still use the previous approach, a large number of the dealers began to list the VIT separately.283

The plaintiffs sued TADA and most of the dealerships that adopted the TADA plan, alleging violations of section 4 of the Clayton Act and section 1 of the Sherman Act.284 The plaintiffs alleged that by uniformly imposing the VIT as a separate item, the defendants engaged in price-fixing, conspired to

273. *Id.* (citing Reed v. Gen. Motors Corp., 703 F.2d 170, 172 (5th Cir. 1983)).
274. *Id.* at 208.
275. *Id.*
276. *Id.*
277. *Id.* at 311.
279. *Id.*
280. *Id.*
281. *Id.*
282. *Id.*
283. *Id.*
284. *Id.* at 419-20.
create a price-fixing regime, and benefitted from unjust enrichment. The plaintiffs moved to certify a plaintiff class pursuant to Rules 23(b)(2) and (3). The district court conditionally certified the proposed plaintiff class finding that common issues—specifically the VIT included in all sales contracts—predominated over individual issues. The defendants appealed the certification.

The Fifth Circuit commenced its analysis by finding that the facts necessary to sustain a price-fixing injury did not predominate. Although the plaintiffs asserted three separate claims, the circuit court considered only whether the plaintiffs defined a class whose members suffered an antitrust injury. To prove private antitrust liability under section 4 of the Clayton Act, the plaintiff must show the following: (1) a violation of the antitrust laws, (2) the presence of damages, and (3) an indication of the amount of damages. The “fact of damages” requirement means the actual damages for each member of the class. The court determined that this was impossible.

The court continued and further educated the litigants by stating that an antitrust violation requires an injury to the antitrust plaintiff. In a price-fixing case, class members may show damages through proof of purchase at a price greater than a competitive rate. The court noted that one common factor linked all aspects of the instant case—the payment of the VIT. The Fifth Circuit considered whether proof of payment of the VIT was sufficient to show an antitrust injury. The class included purchasers who negotiated the price of the car, which changed the VIT paid. Some purchasers negotiated in a top-line fashion, which does not address taxes, license fees, and similar expenses. Some purchasers negotiated in a bottom-line fashion, negotiating the cost of the entire transaction. To determine the method used by a purchaser, a court would have to hear evidence on every class member’s transaction. This assessment would destroy the alleged predominance

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285. Id.
286. Id.
287. Id.
288. Id. at 421.
289. Id. at 424.
290. Id. at 422.
291. Id. (citing Nichols v. Mobile Bd. of Realtors, Inc., 675 F.2d 671, 676 (5th Cir. 1982)).
292. Id.
293. Id. at 423.
294. Id. (citing Nichols, 675 F.2d at 676).
295. Id.
296. Id. at 423.
297. Id.
298. Id.
299. Id.
300. Id.
301. Id. at 424.
present in the proposed class. Therefore, the Fifth Circuit reversed the certification by the district court.


In a per curiam opinion, the Fifth Circuit Court of Appeals considered an interlocutory appeal from an order denying class certification. The district court, in what the Fifth Circuit called a "cogent opinion," held that the plaintiffs did not meet the predominance requirement of Federal Rule of Civil Procedure 23(b)(3). The district court reasoned that individualized proof was required to establish damages as to each class member as well as to determine whether each member could benefit from the fraudulent concealment doctrine, which extends the statute of limitations. The district court determined this defeated the required predominance and refused to certify the class.

The circuit court began its analysis by reiterating a now often used rule previously discussed in this Article: "The necessity of calculating damages on an individual basis, by itself, can be grounds for not certifying a class." In Bertulli v. Independent Ass'n of Continental Pilots, the court held that a district court did not abuse its discretion in certifying a class action where damages required individualized calculations, even though all other issues prior to damages were common ones. But the court also noted that the Bertulli opinion did not contain a rule that individualized damages can never be grounds for refusing to certify a class.

In the instant case, many of the plaintiffs negotiated their prices with the defendant because no standard price lists on which to estimate damages existed. The court stated that its responsibility was to "not allow damages to be determined by "guesswork" or "speculation" [and to] at least insist upon a "just and reasonable estimate of the damage based on relevant data." In the opinion of the circuit court, the plaintiffs who negotiated prices posed a

302. Id.
303. Id. at 426.
305. Id.
306. Id.
307. Id. at 301.
308. Id. at 297 (citing Bell Atl. Corp. v. AT&T Corp., 339 F.3d 294, 308 (5th Cir. 2003)); see also O'Sullivan v. Countrywide Home Loans, Inc., 319 F.3d 732, 745 (5th Cir. 2003) (holding that the district court abused its discretion by certifying the class because of the requirement to individually calculate damages).
309. Piggly Wiggly, 100 F. App'x at 298 (citing Bertulli v. Indep. Ass'n of Cont'l Pilots, 242 F.3d 290, 298 (5th Cir. 2001)).
310. Id.
311. Id.
312. Id. (quoting Lehmbr v. Gulf Oil Corp., 464 F.2d 26, 46 (5th Cir. 1972)).
problem. Although the defendant was willing to consent to a class restricted to buyers who relied on the price lists, the plaintiffs wanted to include the larger purchasers who negotiated their prices. The court opined that the plaintiffs should not complain about their inclusion now.

The plaintiffs argued that they offered expert testimony that specified how one could calculate damages in a "relatively straightforward manner" but that the district court failed to address the expert testimony. The Fifth Circuit noted that the district court did discuss the plaintiffs' expert opinion but believed that a general formula could not calculate damages for 52,000 plaintiffs with individual facts. The district court reasoned that too many independent factors existed in the bargaining process and that a general formula would not work. The circuit court explained that the district court did not have to accept the expert's view. "Class certification is a [sic] ultimately a legal determination for the court, based on the standards set forth in Rule 23, and the views of an expert in economics or any other field can at most inform that decision." Thus, the court held that the plaintiffs had not persuaded the district court that a reliable formula for damages was available.

The court then examined the fraudulent concealment issue. The plaintiffs based the extension of their limitations period, and therefore the potential class membership, on the fraudulent concealment doctrine. The circuit court noted as follows: "To avail himself of this tolling doctrine, [a]
...plaintiff must show that the defendants concealed the conduct complained of, and that he failed, despite the exercise of due diligence on his part, to discover the facts that form the basis of his claim. The district court held that some amount of individual proof would be required on this issue and again determined such individualized proof prevented class certification. The Fifth Circuit agreed and cited Sandwich Chef of Texas, Inc. v. Reliance National Indemnity Insurance Co. (previously summarized in this Article) in support of the district court's decision.

In Sandwich Chef, a RICO case, the Fifth Circuit held that the district court could not certify a class that required individualized proof and that it abused its discretion by certifying the class. But in the instant case, the court plainly stated that it expressed no opinion as to whether concerns about fraudulent concealment and individualized proof alone justified denial of class certification. Nonetheless, the court held the issue of fraudulent concealment in the instant case was another reason to determine the district court did not abuse its discretion when it refused to certify this class. Therefore, the Fifth Circuit affirmed the judgment of the district court.

E. Constitutional Torts: Izen v. Catalina

In a per curiam opinion, the Fifth Circuit considered for the second time the granting of summary judgment in favor of IRS agents against a Texas attorney. The relevant facts merit repetition. The plaintiff was a tax attorney who represented tax protestors and other defendants in criminal tax cases. Defendant IRS agent Catalina received a referral from the Waco, Texas, IRS office stating that the plaintiff failed to file tax returns from 1986 through 1988. The referral also included claims from an informant that the plaintiff took part in money laundering. Catalina conducted a preliminary investigation and concluded that the informant was unreliable. Catalina determined there was insufficient information to investigate the plaintiff for money laundering but did open a criminal tax investigation for failure to file

324. Id. (quoting Pony Creek Cattle Co. v. Great Atl. & Pac. Tea Co. (In re Beef Indus. Antitrust Litig.), 600 F.2d 1148, 1169 (5th Cir. 1979)).
325. Id. at 301.
326. Id. (citing Sandwich Chef of Tex., Inc. v. Reliance Nat'l Indem. Ins. Co., 319 F.3d 205 (5th Cir. 2003)).
327. Id. (citing Sandwich Chef, 319 F.3d at 211).
328. Id.
329. Id.
330. Id.
332. Id. at 365.
333. Id.
334. Id.
335. Id.
returns.\textsuperscript{336} The IRS abandoned the investigation when the plaintiff filed returns for the missing years.\textsuperscript{337} But upon receiving reports concerning one of the plaintiff's clients, Catalina ultimately commenced a money laundering investigation.\textsuperscript{338} Defendant IRS agent Climer was the undercover agent assigned to the investigation.\textsuperscript{339} Climer posed as a client seeking to deposit proceeds from the sale of stolen oil into a trust.\textsuperscript{340} Based on the investigation, the plaintiff was indicted for conspiracy to commit money laundering.\textsuperscript{341} Then, without offering an explanation, the United States withdrew the presentment for indictment.\textsuperscript{342}

The plaintiff filed suit alleging numerous constitutional and nonconstitutional torts.\textsuperscript{343} The district court dismissed the plaintiff's claims.\textsuperscript{344} The plaintiff appealed the following: (1) the dismissal of his Fourth Amendment malicious prosecution claim, (2) the dismissal of his First Amendment retaliation claim, (3) the dismissal of his Fifth Amendment claim, (4) the denial of his motion for disclosure of grand jury materials, and (5) the granting of summary judgment in favor of the defendants based on qualified immunity.\textsuperscript{345}

During its first review of the instant case, the Fifth Circuit reversed the dismissal of the malicious prosecution and retaliation claims on the basis that the district court had misconstrued the applicable law.\textsuperscript{346} Further, the court held that a genuine issue of material fact existed as to whether the plaintiff was prosecuted for representing criminal tax defendants.\textsuperscript{347} On remand, the plaintiff filed an amended complaint, which additionally asserted a Federal Tort Claims Act (FTCA) cause of action against the United States.\textsuperscript{348} The district court again granted summary judgment on all claims, and the plaintiff again appealed.\textsuperscript{349}

During its second review, the circuit court first addressed the malicious prosecution claim.\textsuperscript{350} The court explained that in the Fifth Circuit, plaintiffs do not successfully allege a constitutional violation by only satisfying the state law elements of malicious prosecution.\textsuperscript{351} Because the plaintiff did not state

\textsuperscript{336} Id.
\textsuperscript{337} Id.
\textsuperscript{338} Id. at 366.
\textsuperscript{339} Id.
\textsuperscript{340} Id.
\textsuperscript{341} Id.
\textsuperscript{342} Id.
\textsuperscript{343} Id.
\textsuperscript{344} Id.
\textsuperscript{345} Id.
\textsuperscript{346} Id.
\textsuperscript{347} Id.
\textsuperscript{348} Id.
\textsuperscript{349} Id.
\textsuperscript{350} Id.
\textsuperscript{351} Id. at 367.
a claim under the Fourth Amendment directly, the circuit court held that the district court properly granted the defendants’ motion for summary judgment on this claim. 352

The Fifth Circuit then addressed the plaintiff’s FTCA cause of action 353. This cause of action was based on the state torts of malicious prosecution, false arrest, intentional infliction of emotional distress, and negligence. 354 A claim under the FTCA requires exhaustion (i.e., plaintiffs must present their claims first to the appropriate agency and receive an adverse result prior to filing suit). 355 Although the plaintiff did file an administrative complaint with the IRS, the district court held that the scope of the claims in his amended complaint went beyond the claims asserted in his administrative complaint, and therefore, the claims failed for lack of exhaustion. 356 The Fifth Circuit determined that the district court properly dismissed the FTCA claim on this basis. 357

Finally, the circuit court addressed the First Amendment retaliation claim. 358 The First Amendment prohibits adverse action by the government against individuals for exercising their First Amendment rights. 359 In a criminal prosecution context, plaintiffs must establish the following to make out a retaliation claim: (1) that they were engaged in a constitutionally protected activity, (2) that the defendant’s actions caused an injury that would dissuade a person of “ordinary firmness” from again participating in such activity, and (3) that the defendant’s adverse action was substantially motivated by the constitutionally protected conduct. 360 The Fifth Circuit also requires that plaintiffs establish each of the common-law malicious prosecution elements. 361 Malicious prosecution requires lack of probable cause to prosecute. 362 For purposes of malicious prosecution, probable cause means “the existence of such facts and circumstances as would excite the belief, in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the crime for which he was prosecuted.” 363

In the instant case, the district court granted summary judgment because it found the plaintiff had not established the common-law elements of malicious prosecution, particularly whether the agents lacked probable cause.

352. Id.
353. Id.
354. Id.
356. Id.
357. Id.
358. Id.
359. Id. (citing Colson v. Grohman, 174 F.3d 498, 508 (5th Cir. 1999)).
360. Id. (citing Keenan v. Tejeda, 290 F.3d 252, 258 (5th Cir. 2002)).
361. Id.
362. Id. at 368 (citing Kerr v. Lyford, 171 F.3d 330, 340 (5th Cir. 1999)).
363. Id.
to prosecute. The circuit court determined that although the initial information received by Catalina was deemed unreliable, the subsequent investigation yielded reliable information concerning the plaintiff’s “questionable activities” sufficient to provide probable cause to seek an indictment. The court further reviewed the information that Catalina relied on in seeking the indictment and held that all of the evidence, taken in its entirety, demonstrated probable cause as a matter of law. Thus, the district court properly granted summary judgment on the retaliation claim. The Fifth Circuit, therefore, affirmed the dismissal of all the plaintiff’s claims.

**F. Contracts, Fiduciary Duty, and Fraud**

1. Interstate Contracting Corp. v. City of Dallas

This appeal, before Circuit Judges Reynaldo G. Garza and Edith Brown Clement and District Judge Leonard Davis, sitting by designation, arose out of a contract dispute between Interstate Contracting Corporation (ICC) and the City of Dallas (the City). ICC and the City entered into a fixed sum contract for levee construction. ICC then entered into a subcontract. The cost of the project to the subcontractor increased after its commencement due to a lack of suitable excavated material to be used as landfill. The subcontractor began manufacturing fill material. ICC informed the City of the increased work and cost, but the City informed ICC that it would deny the claims. ICC filed suit on the subcontractor’s behalf, asserting the following claims: (1) breach of contract, (2) quantum meruit, (3) breach of implied warranty, and (4) fraudulent inducement. The jury found that by breaching an implied warranty to provide accurate plans and specifications, and by failing to pay the additional expenses, the City breached its contract with ICC, and this appeal ensued.

Because there was no controlling precedent regarding whether ICC could bring claims on a subcontractor’s behalf, the Fifth Circuit certified the following questions to the Texas Supreme Court:

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364. *Id.*
365. *Id.*
366. *Id.*
367. *Id.*
368. *Id.* at 370.
370. *Id.*
371. *Id.*
372. *Id.*
373. *Id.*
374. *Id.*
375. *Id.*
376. *Id.*
(1) Does Texas law recognize pass-through claims, [i.e.,] may a contractor assert a claim on behalf of its subcontractor against the owner when there is no privity of contract between the subcontractor and the owner? (2) [If so] [w]hat are the requirements, if any, that need to be satisfied for a contractor to assert a claim on behalf of its subcontractor when there is no privity of contract between the subcontractor and the owner and who holds the appropriate burden of proof?  

In answering the first inquiry, the Texas Supreme Court found that Texas law does in fact recognize pass-through claims. In answering the second inquiry, the court noted that the requirement for bringing a pass-through claim in such a situation is that there must still be liability by the contractor to the subcontractor for the subcontractor’s damages. The contractor has the burden of showing that it has the right to pursue a claim on behalf of its subcontractor and that it is liable if it meets its burden. As a result of the subcontract agreements between ICC and its subcontractor, ICC had the ability to bring a claim on the subcontract on behalf of the subcontractor, but at the subcontractor’s expense. The Fifth Circuit determined that the terms of the subcontractor agreements satisfied the requirements for the ICC to bring a claim against the City on behalf of its subcontractor.

The circuit court reminded practitioners of the basics of contract interpretation. Under Texas law, whether contracts are unambiguous and the actual interpretation of these contracts is a question of law. An unambiguous contract is enforced as written. If a question of ambiguity arises, the “context of the surrounding circumstances” is used to determine a contract’s wording. “If the contract is then susceptible to only one interpretation, it is unambiguous.” In an ambiguous contract, the intent of the parties is a question of fact.

The Fifth Circuit then turned to analyzing ICC’s claims under the controlling contract. The court addressed ICC’s breach of contract claim regarding the plans and specifications first. ICC asserted that the City’s

377. Id. at 713.
378. Id.
379. Id.
380. Id.
381. Id.
382. Id.
383. Id. at 712.
384. Id. (citing Lessehoid Expense Recovery, Inc. v. Mothers Work, Inc., 331 F.3d 452, 456 (5th Cir. 2003)).
385. Id.
386. Id.
387. Id.
388. Id.
389. Id.
390. Id.
plans describing the project were defective because they indicated that on-site locations would provide sufficient landfill material and, due to the lack of fill material, any additional expenses should have been paid by the City. ICC asserted a breach of implied warranty claim on the same alleged misrepresentations. The Fifth Circuit examined the contract, highlighting the following provision: "The accuracy of this information [regarding the availability of fill material] is not guaranteed and it is not to be construed as part of the plans governing construction of the project."

In order to determine the City's liability for inaccurate plans and specifications, the court looked at whether Texas law recognizes such liability. The court, following the Texas Supreme Court, analyzed this issue under both breach of contract and breach of warranty theories, citing two seminal cases: *Lonergan v. San Antonio Loan & Trust Co.* and *City of Dallas v. Shortall.* *Lonergan* held that there must be express or implied language in the contract for an owner to breach the contract based on faulty plans. *Shortall* held that the contractors must rely on representations made by the owner without conducting additional investigation to recover costs incurred because of defective plans.

In assessing *Lonergan*’s effect on the facts of the instant case, the Fifth Circuit concluded that for the owner to be liable for providing defective plans, there must be contractual language indicating that the risk shifted to the owner. In this case, the contract noted the inadequacy of the plans, clearly shifting the risk to ICC. Because the risk of defective plans was allocated to ICC in the contract, the Fifth Circuit concluded that the City was not in breach.

The Fifth Circuit also addressed the breach of implied warranty claim. As explained above, *Shortall* held that for a contractor to recover for defective plans, the contractor must show the owner made an affirmative representation upon which the contractor justifiably relied and, therefore, performed no further investigation. If ICC’s reliance was not reasonable, the City would

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391. *Id.*
392. *Id.*
393. *Id. at 714.*
394. *Id. at 716.*
397. *Interstate Contracting Corp.,* 407 F.3d at 717.
398. *Id.*
399. *Id. at 720.*
400. *Id. at 721.*
401. *Id. at 723.*
402. *Id. at 725.*
403. *Id.*
not be liable.\textsuperscript{404} Because of the disclaimers, ICC's reliance was not justified.\textsuperscript{405} Thus, the City had not breached an implied warranty.\textsuperscript{406}

In addition to the above-discussed claims, the jury found the City liable on other claims for damages.\textsuperscript{407} The City argued on appeal that such claims were barred because ICC failed to observe the contractual claims and notice requirements.\textsuperscript{408} The City contended that the "claim procedures [were] a condition precedent to payment."\textsuperscript{409} The Fifth Circuit articulated that if the parties' intent is unclear, the terms will be interpreted as covenants.\textsuperscript{410} The contract, however, articulated the claims procedure using the words "condition precedent" to describe the claims procedure.\textsuperscript{411} Although condition precedents are not highly regarded, the Fifth Circuit recognized them in the instant case and determined the rest of ICC's claims were barred.\textsuperscript{412} Thus, the circuit court concluded as follows:

This case is decided on one of contract law's most basic principles-an unambiguous contract will be enforced as written. Although the jury found for ICC on both its breach of contract and implied warranty claims, the parties contractually and unambiguously agreed that ICC would bear the risk of defective plans and specifications. ICC's remaining contract claims are barred by ICC's failure to comply with the contractual claims process. Consequently, we reverse the trial court's judgment and render judgment that ICC take nothing.\textsuperscript{413}

2. Smith v. Waste Management, Inc.

With a panel comprised of Chief Judge Carolyn Dineen King and Circuit Judges E. Grady Jolly and James L. Dennis, the Fifth Circuit considered whether the district court erred when it dismissed the plaintiff's claims for fraud and negligent misrepresentation as derivative and barred by res judicata.\textsuperscript{414} The plaintiff was a former officer of a company that merged with the corporate defendant.\textsuperscript{415} At the time of the merger, the plaintiff held a number of shares that were converted into the defendant's shares.\textsuperscript{416} At one

\begin{itemize}
\item \textsuperscript{404} Id.
\item \textsuperscript{405} Id.
\item \textsuperscript{406} See id.
\item \textsuperscript{407} Id. at 726.
\item \textsuperscript{408} Id. at 727.
\item \textsuperscript{409} Id.
\item \textsuperscript{410} Id.
\item \textsuperscript{411} Id.
\item \textsuperscript{412} Id.
\item \textsuperscript{413} Id. at 728.
\item \textsuperscript{414} Smith v. Waste Mgmt., Inc., 407 F.3d 381, 382 (5th Cir. Apr. 2005).
\item \textsuperscript{415} Id.
\item \textsuperscript{416} Id.
\end{itemize}
point, the plaintiff owned 2.4 million of the defendant’s shares with a significant portion committed as collateral for personal business loans.\textsuperscript{417} To reduce his loan balances, the plaintiff’s accountant prompted him to sell a portion of his shares.\textsuperscript{418} The plaintiff decided not to sell based on public statements from the defendant.\textsuperscript{419}

According to a press release from the defendant, the company experienced a ninety-three percent income increase in addition to a seventy-nine percent earnings increase.\textsuperscript{420} During a conference call, the defendant predicted another significant increase in earnings.\textsuperscript{421} The defendant’s officers made similar statements at an industry convention.\textsuperscript{422} The plaintiff decided not to sell after hearing optimistic predictions about the defendant’s future earnings.\textsuperscript{423} Ultimately, however, the defendant’s earnings were markedly lower than predicted, and the stock price dropped significantly.\textsuperscript{424} The plaintiff’s stock was insufficient collateral to back his loans, and he was forced to file bankruptcy.\textsuperscript{425}

Because of the decline in share price, the defendant’s stockholders brought two derivative actions, which were consolidated and settled.\textsuperscript{426} The judgment dealt with all derivative claims by the defendant’s stockholders that related to the following: (1) the defendant’s revenue shortfall for the relevant period, (2) the defendant’s budgeting process for the relevant period, (3) public statements by the defendant or its officers regarding actual or projected financial performance during the relevant period, and (4) the defendant’s financial reporting and accounting practices for the relevant period.\textsuperscript{427} The plaintiff in the instant case sued alleging fraud and negligent misrepresentation and sought actual damages as well as punitive damages.\textsuperscript{428} The defendant moved to dismiss, arguing the plaintiff’s claims were derivative and barred by res judicata because of the final judgment in the prior action.\textsuperscript{429} The district court agreed and dismissed the plaintiff’s claims.\textsuperscript{430} This appeal ensued.\textsuperscript{431}

\textsuperscript{417} ld.
\textsuperscript{418} ld.
\textsuperscript{419} ld.
\textsuperscript{420} ld.
\textsuperscript{421} ld.
\textsuperscript{422} ld.
\textsuperscript{423} ld.
\textsuperscript{424} ld. at 382-83.
\textsuperscript{425} ld. at 383.
\textsuperscript{426} ld.
\textsuperscript{427} ld.
\textsuperscript{428} ld.
\textsuperscript{429} ld.
\textsuperscript{430} ld.
\textsuperscript{431} ld.
The Fifth Circuit first considered whether the plaintiff's claims were derivative. The circuit court controlled this issue. The circuit court considered the recent Delaware Supreme Court decision in Tooley v. Donaldson, Lufkin & Jenrette, Inc., which set forth a new standard for determining whether a claim is derivative, replacing the "special injury" test advocated by the plaintiff in the instant case. The plaintiff argued that his claims were not derivative because he alleged a "special injury" distinct from that suffered by the other shareholders—he made a specific decision, contrary to the advice of his accountant, not to sell his shares, which led to his bankruptcy. Tooley articulated the following test:

"Who suffered the alleged harm—the corporation or the suing stockholder individually—and who would receive the benefit of the recovery or other remedy? . . . The stockholder's claimed direct injury must be independent of any alleged injury to the corporation. The stockholder must demonstrate that the duty breached was owed to the stockholder and that he or she can prevail without showing an injury to the corporation."

The Fifth Circuit applied the test to the plaintiff's claims and determined the claims were derivative. The entire corporation was injured by the misrepresentation, not only the plaintiff. When misrepresentations regarding the corporation's financial condition are disclosed, there is injury to the entire corporation and not just the plaintiff. The district court held that because the plaintiff could not demonstrate an injury detached from the damage suffered by the defendant, his claims were derivative.

The Fifth Circuit then considered whether res judicata barred the plaintiff's claims. The court provided practitioners with a review of res judicata. The court of appeals explained as follows: "Res judicata prevents the relitigation of claims that have already been finally adjudicated or that should have been litigated in the prior lawsuit." Res judicata applies when the following circumstances are met: (1) a prior final judgment on the merits

432. Id.
433. Id.
435. Smith, 407 F.3d at 384.
436. Id.
437. Id. at 384 (quoting Tooley, 845 A.2d at 1035, 1039) (emphasis and citations omitted).
438. Id.
439. Id. at 384-85.
440. Id. at 385.
441. Id.
442. Id. at 386.
443. Id.
444. Id. (citing United States ex rel. Laird v. Lockheed Martin Eng'g & Sci. Servs. Co., 336 F.3d 346, 357 (5th Cir. 2003)).
has been made; (2) identical parties, or people in privity with them, were parties to the previous judgment; and (3) a second action was made that was based on the previous claims, or it was based on claims that could have been raised previously.\textsuperscript{445} The plaintiff admitted if his claims were in fact derivative, they were barred by res judicata.\textsuperscript{446} Thus, because the Fifth Circuit determined the plaintiff’s claims were derivative, it concluded they were barred by res judicata and affirmed the district court’s judgment.\textsuperscript{447}


Before a panel comprised of Circuit Judges Jerry E. Smith and Reynaldo G. Garza and District Judge Sarah Vance, sitting by designation, the plaintiff, an individual lender and president of a Louisiana corporation, brought suit in an attempt to recover on loans he made to a corporate borrower.\textsuperscript{448} The specifics of the transaction merit articulation. The chairman and principal shareholder of the company acquired properties from the owner of the defendant, also a Louisiana corporation.\textsuperscript{449} As part of the negotiations, the chairman agreed to indemnify the owner of the defendant company against the financial risk of owning and operating such a company.\textsuperscript{450} The parties memorialized this in a “put/call” agreement.\textsuperscript{451} This agreement allowed the chairman to buy and gave the defendant the right to call upon him to buy for a price that was equal to the defendant’s debts and liabilities.\textsuperscript{452} The chairman received a loan from the bank, the terms of which required him to stop drawing his salary from the company because of its weak financial condition.\textsuperscript{453} The plaintiff suggested that they advance their salaries to the defendant to ease the burden on the chairman.\textsuperscript{454} The plaintiff began advancing his salary of $14,000 per month to the defendant.\textsuperscript{455} The defendant, with the assistance of the chairman and the plaintiff, arranged a working capital infusion by refinancing the company’s debts through a loan.\textsuperscript{456} As collateral for the loan, the plaintiff originally agreed to put up $500,000 but later withdrew his offer.\textsuperscript{457} The chairman made up the difference.\textsuperscript{458} The loan

\textsuperscript{445} \textit{Id.}
\textsuperscript{446} \textit{Id.}
\textsuperscript{447} \textit{Id. at} 586-87.
\textsuperscript{448} \textit{Mumblow v. Monroe Broad., Inc.}, 401 F.3d 616, 618 (5th Cir. Feb. 2005).
\textsuperscript{449} \textit{Id. at} 619.
\textsuperscript{450} \textit{Id.}
\textsuperscript{451} \textit{Id.}
\textsuperscript{452} \textit{Id.}
\textsuperscript{453} \textit{Id.}
\textsuperscript{454} \textit{Id.}
\textsuperscript{455} \textit{Id.}
\textsuperscript{456} \textit{Id.}
\textsuperscript{457} \textit{Id.}
\textsuperscript{458} \textit{Id.}
included a large line of credit. The plaintiff continued to forward his salary to the defendant for another eight months after the loan was final. Nothing other than the cancelled checks existed to memorialize the agreement between the defendant and the plaintiff.

Four months after ceasing to forward his checks, the plaintiff demanded repayment of the loan. The defendant refused, and the plaintiff filed suit. The trial court concluded the following: (1) the choice of law is governed by Louisiana law; (2) Louisiana law applied to the transactions; (3) the loan was subject to an “implied suspensive condition” that required the defendant’s assets to be sold or merged and that suspended the plaintiff’s right to repayment until such time; and (4) the demand for payment by the plaintiff was premature due to the fact that the suspensive condition had not matured. The plaintiff appealed.

After determining that Louisiana law did in fact control the instant case, the Fifth Circuit turned to the question of whether the implied suspensive condition analysis applied by the district court was valid. Under Louisiana law, conditions on an obligation may be found by looking to relevant law, intent of the parties involved, or the contract. A finding that the parties intended an obligation to be conditional is a finding of fact reviewed for clear error. Clear error exists under the following circumstances: (1) substantial evidence does not support the findings; (2) the effect of the evidence was misapprehended by the court; and (3) if, although there is evidence which if credible would be substantial, the testimony considered as a whole convinces the court that the findings were so against the preponderance of the credible evidence that they do not represent the truth.

The trial court cited the plaintiff’s knowledge of the defendant’s weak financial condition as evidence that the parties intended the payment obligation to be conditional. The circuit court disagreed. The court reviewed the record and concluded that it did not contain substantive evidence leading the court to believe the parties intended such a restrictive suspensive condition. Further, courts do not infer such conditions absent compelling

459. Id.
460. Id. at 620.
461. Id.
462. Id.
463. Id.
464. Id.
465. Id.
466. Id. at 621-22.
467. Id. at 622.
468. Id. (citing Gebreyesus v. F.C. Schaffer & Assoc., Inc., 204 F.3d 639, 642 (5th Cir. 2000)).
469. Id. (citing Moorhead v. Mitsubishi Aircraft Int’l, Inc., 828 F.2d 278, 283 (5th Cir. 1987)).
470. Id.
471. Id.
472. Id.
proof. In the case of an oral agreement, such a condition should not be inferred unless the evidence clearly suggests that the parties agreed on the condition. The Fifth Circuit opined as follows:

Because suspensive conditions are disfavored and the burden of proof is on the party relying on the condition, the trial court should not have inferred a suspensive condition in the absence of evidence that would at least substantially support that inference. In this case, no such evidence exists, and the trial court’s inference is therefore clearly erroneous.

In contrast, the court did note that the inference that the parties did not intend to impose such a condition on repayment is supported by the evidence in the record. The plaintiff testified that he expected to demand repayment eventually. No witnesses were presented to contradict this intention. Accordingly, the Fifth Circuit concluded there was no condition on the plaintiff’s right to repayment and remanded the case for the trial court to determine when the plaintiff should be repaid.

4. Flores v. Millennium Interests, Ltd.

In a brief per curiam opinion, the Fifth Circuit certified unresolved questions to the Texas Supreme Court raising important issues of Texas law. The defendant developed residential subdivisions and financed his sales using contracts for deeds. The plaintiffs were families who purchased houses under this system. The defendant retained a financial services company to provide accounting and reporting services for the contracts. Annual statements were provided to the plaintiffs. In the interim, Texas revised its Property Code and subsequently required all sellers of executory contracts to provide their purchasers annual statements. The statute enumerated seven

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473. Id.
474. Id.
475. Id. at 622-23.
476. Id. at 623.
477. Id.
478. Id.
479. Id.
480. Id. at 625.
481. Flores v. Millennium Interests, Ltd., 390 F.3d 374, 374 (5th Cir. Nov. 2004).
482. Id. at 375-76.
483. Id. at 376.
484. Id.
485. Id.
486. Id.
items that were required in each statement.\textsuperscript{487} Two of the enumerated items were not included in the annual statements provided to the plaintiffs in the instant case.\textsuperscript{488}

The plaintiffs sued asserting claims, inter alia, under the Texas Property Code.\textsuperscript{489} The district court held that to claim damages such as the ones in the instant case, the purchaser “must show an actual injury resulting from the omission.”\textsuperscript{490} The district court further held that because the defendant’s omission did not result in any actual harm, it was not liable for statutory damages.\textsuperscript{491} The district court reasoned that a violation only occurs when no statement is sent at all, and the statements at issue were not deficient enough to constitute no statement at all.\textsuperscript{492} Thus, the district court entered summary judgment for the defendant, and this appeal followed.\textsuperscript{493} The Fifth Circuit opined that resolution of the instant case turned on the answer to two questions: (1) does the seller violate the statute if the statement provided does not strictly comply, and (2) if the seller through substantial compliance can satisfy the statute and does, is it necessary that the purchaser prove actual harm in order to recover any damages?\textsuperscript{494} The circuit court certified these questions to the Texas Supreme Court as important issues of Texas law that the Texas courts had not previously resolved.\textsuperscript{495}

5. Compass Bank v. King, Griffin & Adamson P.C.

In yet another per curiam opinion, the Fifth Circuit, once again, considered whether to certify a question to the Texas Supreme Court.\textsuperscript{496} The plaintiff appealed the dismissal of its complaint, and moved the Fifth Circuit to certify the following question: “[W]hether Texas uses an actual knowledge test or a foreseeability requirement for negligent misrepresentation claims against accountants.”\textsuperscript{497} The Fifth Circuit stated that certifying the issue would be “determinative” and then reiterated that certification is not used to answer all complex state legal issues that have not been answered by the state’s highest court.\textsuperscript{498} The court held that in light of a recent appellate court decision,\textsuperscript{499} and the sound arguments of the district court in the instant case,

\begin{flushleft}
\textsuperscript{487} Id.
\textsuperscript{488} Id.
\textsuperscript{489} Id.
\textsuperscript{490} Id. (quoting district court opinion).
\textsuperscript{491} Id.
\textsuperscript{492} Id.
\textsuperscript{493} Id.
\textsuperscript{494} Id.
\textsuperscript{495} Id. at 374.
\textsuperscript{496} Compass Bank v. King, Griffin & Adamson P.C., 388 F.3d 504, 505 (5th Cir. Oct. 2004).
\textsuperscript{497} Id.
\textsuperscript{498} Id.
\textsuperscript{499} Tara Capital Partners I, L.P. v. Deloitte & Touche, L.L.P., No. 05-03-00746-CV, 2004 WL
\end{flushleft}
the correct standard to apply to accountants in Texas is the actual knowledge standard. Consequently, the Fifth Circuit denied the plaintiff’s motion for certification and affirmed the decision of the district court.


In this litigation involving prototype corporate matters, a panel comprised of Circuit Judges E. Grady Jolly, Jacques L. Wiener Jr., and Charles Willis Pickering Sr., considered whether the district court erred in refusing to pierce the defendant’s corporate veil. The litigation arose out of a contract between the defendant, an American tire distributor with its principal place of business in Texas, and the plaintiffs, Swiss and Italian tire manufacturers and wholesalers. The Italian wholesaler received its tires from the Swiss manufacturers and sold the tires to the defendant’s corporation on credit for three years. The plaintiffs required that the defendant maintain a standard letter of credit for the fixed amount of $350,000 with his bank. But the plaintiffs allowed the defendant to reduce the amount to $150,000 one year later.

Three years after the beginning of their business relationship, the defendant received information from his bank that the letter of credit had been cancelled at the request of the plaintiffs’ bank. Later that day, an employee of the Italian wholesaler emailed the defendant and requested the letter amount be increased to $400,000 because the balance owed had reached $1,000,000. The defendant informed the employee that he would not increase the amount of the letter but did not tell the employee of the cancellation. The defendant continued to receive tires on credit from the plaintiffs. Later that year, still believing the letter of credit to be in place, the Italian wholesaler informed the defendant that because he owed over $700,000, payment for future tire shipments would be due upon receipt. A few months later, the plaintiffs learned that the letter of credit had been cancelled and stopped selling tires to the defendant’s corporation. An employee of the Italian wholesaler met
with the defendant in Texas to discuss a resolution of the outstanding debt.\textsuperscript{513} The defendant signed summaries reflecting a debt of about $400,000 to the manufacturers, and provided six post-dated checks totaling $105,000 payable to the plaintiffs to begin a payment plan.\textsuperscript{514} Four of the checks were later dishonored.\textsuperscript{515}

The plaintiffs sued the defendant for breach of contract and alleged the defendant was the alter ego of his corporation and used the corporation to defraud them.\textsuperscript{516} After motions for summary judgment disposed of the breach of contract issue in favor of the plaintiffs, the case proceeded to trial on the issue of whether the defendant had used his company to defraud the plaintiffs, warranting veil piercing.\textsuperscript{517} The district court found in favor of the defendant, and an appeal followed.\textsuperscript{518}

On appeal, the plaintiffs contended the evidence established as a matter of law that the defendant used his company to defraud them by, inter alia, fraudulently misrepresenting the status of the letter of credit.\textsuperscript{519} The Fifth Circuit commenced its analysis with a review of veil piercing under Texas law.\textsuperscript{520} A court may pierce the corporate veil under the following three scenarios: (1) if the corporation is found to be the alter ego of its owners-shareholders, (2) if the corporation is used to facilitate an illegal purpose, and (3) if the corporation is found to merely be a sham corporation used to perpetrate a fraud.\textsuperscript{521} The court further explained that the Texas Business Corporations Act article 2.21, section A(2) sets additional requirements in a breach of contract case.\textsuperscript{522} In such a case, the veil may be pierced if “the defendant shareholder ‘caused the corporation to be used for the purpose of perpetrating and did perpetrate an actual fraud on the obligee primarily for the direct personal benefit of the [share]holder.’”.\textsuperscript{523}

According to the Fifth Circuit, this case focused on a breach of contract based on the defendant’s alleged use of his company to perpetrate fraud.\textsuperscript{524} The circuit court first considered whether the defendant perpetrated an actual fraud when he failed to inform the plaintiffs that their bank had cancelled the letter of credit.\textsuperscript{525} Under Texas law, fraud is defined as the “misrepresentation of a material fact with intention to induce action or inaction, reliance on the

\textsuperscript{513} Id.
\textsuperscript{514} Id.
\textsuperscript{515} Id.
\textsuperscript{516} Id. at 142.
\textsuperscript{517} Id.
\textsuperscript{518} Id.
\textsuperscript{519} Id.
\textsuperscript{520} Id. at 143.
\textsuperscript{521} Id. (citing W. Horizontal Drilling, Inc. v. Jonnet Energy Corp., 11 F.3d 65, 67 (5th Cir. 1994)).
\textsuperscript{522} Id.
\textsuperscript{523} Id. (quoting TEX. BUS. CORP. ACT ANN. art. 2.21, § A(2) (Vernon Supp. 2005)).
\textsuperscript{524} Id.
\textsuperscript{525} Id.
misrepresentation by a person who, as a result of such reliance, suffers injury. The defendant must first have a duty to disclose a fact before his failure to disclose can be deemed fraudulent. A duty to disclose arises through law or agreement of the parties, but such a duty notwithstanding, if a misleading statement was made, even if the original disclosure was not legally required, the defendant must correct it.

The plaintiffs argued that the defendant's communication about the letter—that he could not increase the amount—after he knew the letter was cancelled conveyed a false impression that the letter was still in effect, which the plaintiffs relied upon to their detriment. The plaintiffs further asserted that the fraud should be attributable to the defendant because his actions were indistinguishable from those of his company. The court considered these arguments and determined the defendant did not have a duty to notify the plaintiffs that their own bank cancelled the letter of credit.

According to the court, at trial there was direct evidence of a lack of intent to deceive, as the defendant paid four times the letter's limit after the letter of credit was cancelled. Further, the defendant twice took the stand and explained he never intended to deceive the plaintiffs. The Fifth Circuit held that the plaintiffs failed to carry their burden to show that the defendant's failure to tell them of the cancellation actually damaged them, given that they received more from the defendant than they would have had the letter not been cancelled. The court ultimately determined that, based on the evidence, the district court's finding that the defendant lacked the intent to defraud was not error. Without the intent to defraud, the facts alone were insufficient to pierce the corporate veil, and the judgment was affirmed.

G. Copyrights, Trademarks, and Unfair Competition


Before a panel comprised of Circuit Judges Edith H. Jones, James L. Dennis, and Charles Willis Pickering Sr., the plaintiff, Ergonome, claimed Compaq unlawfully infringed on a copyright held in a teaching text explaining
ergonomically correct ways to use a computer.\textsuperscript{537} Compaq updated a booklet it included with the sale of personal computers regarding the same subject.\textsuperscript{538} The booklet included four illustrations and seven phrases similar to photographs and phrases in Ergonomie's book.\textsuperscript{539} The jury found in favor of Compaq and determined that any copying was de minimis and constituted fair use under 17 U.S.C. § 107.\textsuperscript{540}

The Fifth Circuit commenced by reminding practitioners of the elements of a copyright infringement claim.\textsuperscript{541} To establish a copyright infringement claim, a plaintiff must first prove ownership of a valid copyright.\textsuperscript{542} Copyright ownership is shown through proof of originality and statutory compliance.\textsuperscript{543} In the instant case, the defendant did not dispute that the plaintiff owned a statutorily compliant copyright.\textsuperscript{544} Further, as the court held below, as a matter of law, the portions of the material at issue allegedly copied by the defendant "reflected the necessary originality to qualify as copyrightable."\textsuperscript{545}

The circuit court elaborated that not all copying constitutes copyright infringement.\textsuperscript{546} Excepted from infringement is copying that amounts to a term known as "fair use."\textsuperscript{547} Section 107 contains a list on nonexclusive factors to be considered in evaluating fair use: (1) the purpose and character of the use—is it for commercial use or nonprofit educational purposes, (2) the nature of the copyrighted material, (3) the amount and substantiality of the portion of the material used in relation to the copyrighted work as a whole, and (4) the effect of the use on the potential market for the copyrighted work.\textsuperscript{548} The jury in the instant case received a fair use instruction.\textsuperscript{549}

On appeal, the plaintiff did not challenge the propriety of the fair use jury charge but argued that the court improperly excluded evidence of past lawsuits for repetitive stress injuries filed against Compaq.\textsuperscript{550} The plaintiff argued the pending lawsuits were evidence of the defendant's commercial motive to distribute the booklet—a factor enumerated by § 107 as relevant in determining fair use.\textsuperscript{551} The Fifth Circuit determined that this evidence would

\begin{footnotes}
\item[538.] Id. at 407.
\item[539.] Id.
\item[540.] Id. at 406.
\item[541.] See id. at 407.
\item[542.] Id.
\item[543.] Id. at 407-08 (citing Eng'g Dynamics, Inc. v. Structural Software, Inc., 26 F.3d 1335, 1340 (5th Cir. 1994)).
\item[544.] Id. at 408.
\item[545.] Id.
\item[546.] Id.
\item[547.] Id.
\item[548.] Id.
\item[549.] Id.
\item[550.] Id. at 409.
\item[551.] Id.
\end{footnotes}
be relevant to the plaintiff's motive theory. While the district court concluded that the plaintiff's true reason for seeking to introduce the evidence of the prior suits was to paint Compaq as a "bad company," the circuit court held that there was no abuse of discretion by the district court when the lower court held that the prejudicial and inflammatory nature of the evidence did not outweigh the probative value. The court further held that any error that may have resulted was harmless; the commercial use of the material at issue was evident from the fact that a copy of the booklet was included with every personal computer sold.

The plaintiff additionally argued that the evidence as to each of the four nonexclusive factors in § 107 pointed "so overwhelmingly in [its] favor that the district court erred in denying its motion for judgment as a matter of law." The court analyzed each factor in turn. In addressing the purpose and character of the use, according to the court, the use of the material at issue was obviously commercial. The circuit court explained that although commerciality weighs against a fair use finding, it does not end the inquiry.

The second fair use factor is the nature of the copyrighted work. As the U.S. Supreme Court has noted, "fair use is more likely to be found in factual works than in fictional works." The plaintiff's only argument on this factor was that because the district court found that the portions of the material at issue were sufficiently original to warrant a copyrightable finding, this factor must be resolved in its favor. The Fifth Circuit explained that the plaintiff's argument proved too little—fair use excuses otherwise actionable infringement. In order to be infringed upon, a work must be copyrightable; then the fair use determination is made. The nature of the work determination is beyond the initial inquiry. The court held that, based on the evidence presented at trial, the jury could have reasonably concluded that the material at issue was a factual work, and the second fair use factor favored the defendant.

552. Id.
553. Id.
554. Id.
555. Id.
556. Id. at 409-10.
557. Id. at 409.
558. Id. at 409-10. "
559. Id. at 410.
560. Id. (quoting Stewart v. Abend, 495 U.S. 207, 237 (1990)).
561. Id.
562. Id.
563. Id.
564. Id.
565. Id.
The third factor weighs the amount and substantiality of the material used in relation to the whole copyrighted work.\textsuperscript{566} As noted earlier, the portions at issue in the instant case were four illustrations and seven phrases.\textsuperscript{567} The evidence admitted at trial showed the entire copyrighted work contained eighty-eight photographs and illustrations and was over one hundred pages long.\textsuperscript{568} The Fifth Circuit held that based on this evidence, the jury could have reasonably concluded that the minimal portions used were insubstantial in relation to the copyrighted work as a whole.\textsuperscript{569}

Finally, the court considered the fourth factor—the effect of the use on the potential market for the copyrighted work.\textsuperscript{570} The Fifth Circuit determined that the plaintiff could not show that the defendant’s distribution of the booklet with the personal computers sold deprived the plaintiff of any sales.\textsuperscript{571} The plaintiff conceded that prior to the distribution of the booklet, it decided to stop marketing its book and focus only on software.\textsuperscript{572} Therefore, the jury could have reasonably decided that the use at issue had little or no effect on the market.\textsuperscript{573} Thus, the Fifth Circuit determined that it was not error for the jury to determine the use by the defendant was fair use, and it affirmed the district court’s judgment.\textsuperscript{574}

2. Scott Fetzer Co. v. House of Vacuums Inc.

With a panel composed of Circuit Judges Jerry E. Smith, Fortunato P. Benavides, and Charles Willis Pickering Sr., the Fifth Circuit addressed whether the plaintiff had successfully proven his trademark infringement claims.\textsuperscript{575} The plaintiff, a manufacturer of vacuums, brought suit against the defendant, a vacuum supply and repair store.\textsuperscript{576} The defendant advertised his store in the yellow pages and listed the plaintiff’s vacuums among the vacuums the store repaired and sold.\textsuperscript{577} The plaintiff filed in federal court under state and federal law alleging causes of action for the following: (1) trademark infringement, (2) unfair competition, and (3) trademark dilution.\textsuperscript{578} Both parties moved for summary judgment.\textsuperscript{579}

\textsuperscript{566} Id.
\textsuperscript{567} Id.
\textsuperscript{568} Id.
\textsuperscript{569} Id.
\textsuperscript{570} Id.
\textsuperscript{571} Id.
\textsuperscript{572} Id.
\textsuperscript{573} Id. at 411.
\textsuperscript{574} Id.
\textsuperscript{575} Scott Fetzer Co. v. House of Vacuums Inc., 381 F.3d 477, 477 (5th Cir. Aug. 2004).
\textsuperscript{576} Id. at 481.
\textsuperscript{577} Id.
\textsuperscript{578} Id. at 483.
\textsuperscript{579} Id.
The district court granted summary judgment in favor of the defendant on all of the plaintiff’s claims and denied the plaintiff’s cross motion.\textsuperscript{580} The district court held that with respect to the unfair competition and trademark infringement claims, the advertisement did not create a likelihood of consumer confusion and therefore did not infringe upon the plaintiff’s mark.\textsuperscript{581} Further, regarding the trademark dilution claim, the plaintiff failed to show actual dilution, which is required under federal and Texas law.\textsuperscript{582} The plaintiff appealed the grant of summary judgment, and the defendant appealed the denial of its request for attorneys’ fees.\textsuperscript{583}

The Fifth Circuit first analyzed the trademark infringement and unfair competition claims.\textsuperscript{584} The court explained that to prove trademark infringement and unfair competition, a plaintiff must show that the use of the mark at issue was “likely to cause confusion among consumers as to the source, affiliation, or sponsorship of products or services.”\textsuperscript{585} The court held that a “‘likelihood of confusion’ means that confusion is not just possible but probable.”\textsuperscript{586} The court noted that the likelihood of confusion standard governed the claims under Texas law as well.\textsuperscript{587}

The plaintiff argued that the advertisement was likely to confuse consumers in two ways.\textsuperscript{588} First, the plaintiff asserted that the defendant cannot truthfully claim to sell new vacuums because only the plaintiff’s dealers are authorized to sell its vacuums new.\textsuperscript{589} Second, the plaintiff alleged that the advertisement would falsely create an impression that the repair shop is affiliated or sponsored by the plaintiff.\textsuperscript{590} The circuit court disagreed.\textsuperscript{591}

The Fifth Circuit opined as follows: “Independent dealers and repair shops may use a mark to advertise truthfully that they sell or repair certain branded products so long as the advertisement does not suggest affiliation with or endorsement by the markholder.”\textsuperscript{592} The court noted that for all the discussion about authorization, the plaintiff admitted that new vacuums sometimes reach independent dealers, and these leaks in the distribution chain were well documented.\textsuperscript{593} Therefore, the Fifth Circuit determined that because

\textsuperscript{580.} Id.
\textsuperscript{581.} Id.
\textsuperscript{582.} Id.
\textsuperscript{583.} Id.
\textsuperscript{584.} Id.
\textsuperscript{585.} Id. (citing 15 U.S.C.A. § 1114(1) (West 2000 & Supp. 2004); Westchester Media v. PRL USA Holdings, Inc., 214 F.3d 658, 663 (5th Cir. 2000)).
\textsuperscript{586.} Id. (quoting Westchester, 214 F.3d at 663-64).
\textsuperscript{587.} Id. at 484.
\textsuperscript{588.} Id.
\textsuperscript{589.} Id.
\textsuperscript{590.} Id.
\textsuperscript{591.} Id.
\textsuperscript{592.} Id. (citing Trail Chevrolet, Inc. v. Gen. Motors Corp., 381 F.2d 353, 354 (5th Cir. 1967)).
\textsuperscript{593.} Id.
the defendant sells new cleaners manufactured by the plaintiff, it may use the mark to advertise that fact, so long as the advertisement does not suggest affiliation with or endorsement by the plaintiff.594

In assessing the affiliation and endorsement issue, the Fifth Circuit considered what it referred to as the "digits of confusion"—a flexible and nonexhaustive list of factors tending to prove or disprove the likelihood of consumer confusion.595 These factors are as follows: (1) the type of mark allegedly infringed, (2) the mark's similarities, (3) the product or service similarities, (4) the identity of the retail outlets and purchasers, (5) the defendant's intent, (6) the kind of advertising media used, and (7) evidence of actual confusion.596 The court explained that it must consider the application of the digits in light of the circumstances of the case.597 Additionally, the court considered the context in which a consumer perceives the marks at issue in the marketplace.598 "Prominent and pervasive use of a mark will suggest affiliation, but mere reference to a marked product will not."599

With those principles in mind, the court determined that the evidence was not sufficient for a reasonable jury to find likelihood of confusion as to affiliation.600 The Fifth Circuit noted that examination of the advertisement only hurt the plaintiff's case; the mark at issue appeared in a list of other brand names the defendant sold and repaired, and in fact, appeared towards the end of the list, reducing the chance of confusion.601 The plaintiff argued that the defendant wanted to mislead consumers, which was a position relevant to the sixth digit.602 The court opined that this was an unreasonable presumption in a situation where an independent dealer advertises that it can sell or service a branded product.603 In such situations, the defendant will always be using another's mark with knowledge that another actually owns the mark.604

The plaintiff also claimed to have evidence of actual consumer confusion.605 The plaintiff had an expert conduct a survey to determine if the yellow pages advertisement caused consumers to think that the defendant was an authorized dealer and repair shop.606 The expert hired by the plaintiff selected a survey universe consisting of owners of the plaintiff's vacuums,

594. id.
595. id. at 484-85.
596. id. (citing Westchester Media v. PRL USA Holdings, Inc., 214 F.3d 658, 664 (5th Cir. 2000)).
597. id. (citing Lyons P'ship v. Giannoulas, 179 F.3d 384, 389-90 (5th Cir. 1999)).
598. id. at 480.
599. id. at 485 (citing Pebble Beach Co. v Tour 181 Ltd., 155 F.3d 526, 546, 552 (5th Cir. 1998)).
600. id. at 486.
601. id.
602. id. (citing Elvis Presley Enter., Inc. v. Capece, 141 F.3d 188, 203 (5th Cir. 1998)).
603. id.
604. id.
605. id.
606. id. at 487.
identified through the plaintiff’s sales lists.\textsuperscript{607} The court determined that this group was already familiar with the plaintiff’s market techniques, and therefore, the survey did not demonstrate the advertisement’s effect on potential customers or customers who obtained a vacuum second-hand.\textsuperscript{608} The plaintiff argued that flaws in the manner in which the survey is conducted normally influence the weight the survey receives, not its admissibility.\textsuperscript{609}

The circuit court agreed but explained that in some cases “serious flaws in a survey will make any reliance on that survey unreasonable.”\textsuperscript{610} Otherwise, according to the court, any survey would require the parties to proceed to trial.\textsuperscript{611} Therefore, the circuit court determined that no reasonable jury could determine that the defendant’s advertisement created any likelihood of confusion, and thus, the district court properly granted summary judgment as to the “[plaintiff’s] claims of trademark infringement and unfair competition.”\textsuperscript{612}

The Fifth Circuit briefly considered the plaintiff’s claim of trademark dilution.\textsuperscript{613} Dilution can occur in one of two ways: (1) blurring, which involves a reduction “in the uniqueness or individuality of a mark [due to] its use on unrelated goods,” or (2) tarnishing, which “occurs when a trademark is ‘linked to products of [a lesser] quality, or is portrayed in an unwholesome or unsavory context.”\textsuperscript{614} The plaintiff’s theory of dilution was essentially one of tarnishing, asserting that the defendant repaired vacuums with used and rebuilt parts and not new parts like the authorized repair shops were required to do.\textsuperscript{615} The plaintiff reasoned that consumers would associate it with the inferior parts used by the defendant.\textsuperscript{616} The court opined as follows:

Trademark law does not entitle markholders to control the aftermarket in marked products. . . .

Under this theory, any rusted-out Impala “for sale” on blocks in a front yard would give rise to a cause of action for diluting the CHEVROLET mark. We refuse to encourage anti-dilution law to metastasize in this manner.\textsuperscript{617}

\textsuperscript{607} Id. at 488.

\textsuperscript{608} Id.

\textsuperscript{609} Id. (citing C. A. May Marine Supply Co. v. Brunswick Corp., 649 F.2d 1049, 1055 n.10 (5th Cir. 1981); Holiday Inns, Inc. v. Holiday Out In Am., 481 F.2d 445, 447 (5th Cir. 1973)).

\textsuperscript{610} Id. (citing Bank of Tex. v. Commerce Sw., Inc., 741 F.2d 785, 789 (5th Cir. 1984)).

\textsuperscript{611} Id.

\textsuperscript{612} Id. at 488-89.

\textsuperscript{613} Id. at 489.

\textsuperscript{614} Id. (quoting Hormel Foods Corp. v. Jim Henson Prods., Inc., 73 F.3d 497, 507 (2d Cir. 1996)).

\textsuperscript{615} Id.

\textsuperscript{616} Id.

\textsuperscript{617} Id. at 489-90 (citation omitted).
Finally, the circuit court addressed the defendant's motion for attorneys' fees. In order for the defendant to recover attorneys' fees, it must show that the plaintiff brought its claims in bad faith. The court explained that although the plaintiff's claims did not withstand scrutiny, they were not so implausible as to imply bad faith. Thus, the Fifth Circuit affirmed the district court's judgment on all counts.

H. Federal Procedure


This brief per curiam opinion merits scrutiny as it reminds practitioners of Fifth Circuit and Texas jurisprudence on some rudimentary, albeit essential, points of law. In this case, the Fifth Circuit Court of Appeals explained its reasons for reversing the lower court's judgment against the third-party defendants but did not detail the facts of the case. The basics articulated were as follows: (1) If the non-breaching party to a contract chooses "to treat [a] contract as continuing and insists the party in default continue performance, the previous breach [does not constitute an] excuse for nonperformance on the part of the party not in default", (2) "[T]he losing party in a contract dispute is not entitled to attorney's fees under Texas law", (3) The Fifth Circuit "will reverse a [trial court] discovery ruling only if it is 'arbitrary or clearly unreasonable' and the complaining party [proves] it was prejudiced by the ruling", (4) A district court does not abuse its discretion by excluding expert testimony because the expert was not timely designated, and (5) "An essential element of tortious interference is the existence of a contract subject to interference." After making these pronouncements, the circuit court reversed the judgment against the third-party defendants.

618. Id. at 490.
619. Id. (citing Procter & Gamble Co. v. Amway Corp., 280 F.3d 519, 527-28 & n.12 (5th Cir. 2002)).
620. Id. at 490-91.
621. Id. at 491.
623. Id.
624. Id. (quoting Gupta v. E. Idaho Tumor Inst., 140 S.W.3d 747, 756 (Tex. App.—Houston [14th Dist.] 2004, pet. denied)).
625. Id. at 82.
626. Id. (quoting Mayo v. Tri-Bell Indus., Inc., 787 F.2d 1007, 1012 (5th Cir. 1986)) (citing Hastings v. N.E. Indep. Sch. Dist., 615 F.2d 628, 631 (5th Cir. 1980)) (citation omitted).
627. Id.
628. Id. (citing Thrift v. Estate of Hubbard, 44 F.3d 348, 356 (5th Cir. 1995)).
629. Id.
2. Ramming v. Natural Gas Pipeline Co. of America

In this diversity action, the Fifth Circuit delivered a per curiam opinion regarding the proper application of Federal Rule of Civil Procedure 68.\textsuperscript{630} An overview of what transpired in the court below is beneficial. The district court ruled in favor of the plaintiffs on the issue of liability by granting summary judgment.\textsuperscript{631} The concerned parties then filed a Rule 41 Stipulation of Dismissal with Prejudice, stating that the parties' conflicting claims had been resolved and asked for a withdrawal of the summary judgment order.\textsuperscript{632} The parties further entered into a Rule 68 Offer of Judgment agreement that preserved the defendants' right to appeal the previous summary judgment order.\textsuperscript{633} "The parties submitted the written acceptance of the . . . Offer of Judgment [in conjunction] . . . with a form of judgment for the district court to sign."\textsuperscript{634}

On a conference call, the district court stated that it would not sign the judgment because it did not settle all of the issues.\textsuperscript{635} The parties then submitted their stipulated facts that contained another form of judgment mirroring the previous form.\textsuperscript{636} The district court refused to sign the parties' proposed judgment and then filed its own.\textsuperscript{637} The court's judgment deleted the defendants' right to appeal the previous summary judgment order but in all other aspects was the same as the judgment submitted by the parties.\textsuperscript{638} The defendants responded by filing a motion to amend judgment.\textsuperscript{639} The district court denied that motion, and this appeal followed.\textsuperscript{640} On appeal, the defendants argued that the district court erred in refusing to enter the parties' form of judgment and erred in denying the motion to amend judgment.\textsuperscript{641}

The Fifth Circuit first reviewed Federal Rule of Civil Procedure 68.\textsuperscript{642} Rule 68 allows defendants to submit an offer of judgment to plaintiffs more than ten days prior to trial.\textsuperscript{643} The plaintiff then has ten days to unconditionally accept that offer.\textsuperscript{644} A party needs to reserve a right to appeal

\textsuperscript{630} Ramming v. Natural Gas Pipeline Co. of Am., 390 F.3d 366, 368 (5th Cir. Nov. 2004). Rule 68 allows defendants to present an offer of judgment to plaintiffs at any time more than ten days prior to trial. Fed. R. Civ. P. 68.

\textsuperscript{631} Id.

\textsuperscript{632} Id.

\textsuperscript{633} Id.

\textsuperscript{634} Id.

\textsuperscript{635} Id.

\textsuperscript{636} Id.

\textsuperscript{637} Id.

\textsuperscript{638} Id.

\textsuperscript{639} Id.

\textsuperscript{640} Id. at 369-70.

\textsuperscript{641} Id. at 370.

\textsuperscript{642} Id.

\textsuperscript{643} Id. (citing Fed. R. Civ. P. 68).

\textsuperscript{644} Id. (citing Fed. R. Civ. P. 68).
prejudgment rulings in an offer of judgment, otherwise an appeal is not allowed.\textsuperscript{645} "If the plaintiff accepts the offer, either party [can] file the offer and acceptance with the clerk of the [relevant] court, who shall then enter the judgment."\textsuperscript{646} Generally, the court does not have discretion to refuse to enter the judgment, and the judgment is normally looked upon as self-executing.\textsuperscript{647}

The circuit court explained that there are limited circumstances under which a court has authority to review an offer of judgment: (1) "in a class action, pursuant to Rule 23" and (2) "in a case seeking injunctive relief."\textsuperscript{648} "Outside of those . . . circumstances, a court must enter a judgment accepted by the parties."\textsuperscript{649} Therefore, the Fifth Circuit held that the district court erred when it refused to sign the parties' offer of judgment and in denying the defendants' motion to amend judgment.\textsuperscript{650} According to the court, the case did not fall into one of the aforementioned limited circumstances, and the trial court did not have the authority to refuse to sign the judgment.\textsuperscript{651}

3. Gaddis v. United States

In an en banc opinion, the Fifth Circuit considered whether district courts tax guardian ad litem fees against the government in a Federal Tort Claims Act suit.\textsuperscript{652} The plaintiffs were broadsided in their car by a postal truck.\textsuperscript{653} The woman was pregnant with the couple's child.\textsuperscript{654} A few weeks later, she prematurely delivered their son with serious birth defects.\textsuperscript{655} The family sued the United States under the Federal Tort Claims Act\textsuperscript{656} for negligence.\textsuperscript{657} The plaintiffs requested that the court appoint a guardian ad litem for their son.\textsuperscript{658} The court granted the request and, after a bench trial, found the United States liable for the child's injuries, awarded damages, and taxed the guardian ad litem fees as costs pursuant to Federal Rules of Civil Procedure 54(d)(1).\textsuperscript{659} This appeal followed.\textsuperscript{660}

\textsuperscript{645} \textit{id.} (citing Shores v. Siclar, 885 F.2d 760, 763 (11th Cir. 1989)).
\textsuperscript{646} \textit{id.} (citing Fed. R. Civ. P. 68).
\textsuperscript{647} \textit{id.} (citing Mallory v. Eyrich, 922 F.2d 1273, 1279 (6th Cir. 1991)).
\textsuperscript{648} \textit{id.} at 371 (citing 12 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 3005 (2d ed. 1997)).
\textsuperscript{649} \textit{id.} (citing WRIGHT & MILLER, supra note 648, § 3005).
\textsuperscript{650} \textit{id.}
\textsuperscript{651} \textit{id.}
\textsuperscript{652} Gaddis v. United States, 381 F.3d 444, 447 (5th Cir. Aug. 2004).
\textsuperscript{653} \textit{id.}
\textsuperscript{654} \textit{id.}
\textsuperscript{655} \textit{id.}
\textsuperscript{657} \textit{Gaddis}, 381 F.3d at 447.
\textsuperscript{658} \textit{id.}
\textsuperscript{659} \textit{id.}
\textsuperscript{660} \textit{id.}
On appeal, the government argued the following: The Supreme Court ruled in *Crawford Fitting Co. v. J.T. Gibbons, Inc.* that the costs allowed by Rule 54(d) to a successful party in a federal action are limited to those enumerated in 28 U.S.C. § 1920, which does not mention guardian ad litem fees, and pursuant to Rule 54(d) and 28 U.S.C. § 2412(a)(1), costs may be taxed against the Government only as itemized in § 1920—the Government had not waived its sovereign immunity as to costs not authorized by statute.

The Fifth Circuit considered the Government's posture and analyzed the case before it. The Supreme Court explained in *Crawford Fitting* that 28 U.S.C. § 1821 sets limitations on the amount of litigants' witness fees that can be awarded, and § 1920 allows costs only within those limits to be taxed by the court. Specifically, the Supreme Court rejected the excessive costs awarded to the prevailing party, which included expert witness fees, concluding that absent specific statutory authorization for the taxation of litigants' experts as costs, federal courts are bound by the limitations in § 1920. The Supreme Court explained how the various statutory sections work together as follows:

"[Section] 1920 defines the term 'costs' as used in Rule 54(d). Section 1920 enumerates expenses that a federal court may tax as a cost under the discretionary authority found in Rule 54(d). It is phrased permissively because Rule 54(d) generally grants a federal court discretion to refuse to tax costs in favor of the prevailing party."

The Fifth Circuit noted that neither *Crawford Fitting* nor its lower court opinion specifically mention the propriety of taxing guardian ad litem fees as costs under Rule 54(d).

The court opined that the government's argument is inferable from the language of *Crawford Fitting* because § 1920 does not mention guardian ad litem fees, it does not include or define them as costs, and thus, such items are not taxable against the nonprevailing party pursuant to Rule 54(d). The court, however, rejected this argument based on the following: (1) Rule 17(c) constitutes the alternative statutory authorization *Crawford Fitting* requires to provide federal courts with the power and discretion to tax guardian ad litem fees against the nonprevailing party, including the Government; (2) even if Rule 17(c) did not constitute the alternative statutory authority required by

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662. Gaddis, 381 F.3d at 449-50.
663. Id. at 449.
664. Id. at 450 (citing *Crawford Fitting*, 482 U.S. at 441-42).
665. Id. (citing *Crawford Fitting*, 482 U.S. at 445).
666. Id. (quoting *Crawford Fitting*, 482 U.S. at 441-42).
667. Id. at 451.
668. Id. at 452.
Crawford Fitting, the phrase “court appointed experts” in § 1920(6) can be reasonably interpreted to include court appointed guardians ad litem, and therefore, their fees are taxable as costs, including against the Government; and (3) in light of Crawford Fitting, the Fifth Circuit’s precedent approves the district court’s taxation of guardian ad litem fees even against the Government.669 The court explained each basis in turn.670

Rule 17(c) is the source of the district court’s authority to appoint a guardian ad litem, which grants this power to provide minors and other incompetent persons fair access to the judicial system and allows a court to “‘make such other order as it deems proper for the protection of the infant or incompetent person.’”671 The Fifth Circuit reasoned that it is due to the need for protection of the minor that the courts must also have the inherent authority to tax the guardian ad litem fees against nonprevailing parties.672 Thus, the court opined that Rule 17(c) provides the alternative statutory authority required by Crawford Fitting to tax items other than those enumerated in § 1920 as costs against the nonprevailing party pursuant to Rule 54(d).673

Alternatively, the circuit court explained that if Rule 17(c) was not construed by the Supreme Court to constitute alternative statutory authority, § 1920(6) providing for the compensation of court appointed experts is reasonably read to include court appointed guardians ad litem.674 The court reasoned that guardians ad litem are similar to court appointed experts.675 Even though the guardian ad litem is an attorney, any legal work performed is not taxable; only the services provided in making sure that the minor has equal access to justice are considered taxable fees.676 Therefore, the court held that the provision for court appointed expert fees to be taxed against the nonprevailing party, including the government in a Federal Tort Claims Act action, includes court appointed guardian ad litem fees.677

Finally, the Fifth Circuit noted that if the Supreme Court was not to agree that § 1920(6) reasonably included guardian ad litem fees, its own precedent approved of taxing such fees against nonprevailing parties.678 As noted above, Crawford Fitting does not reference guardian ad litem fees.679 The court declined to read Crawford Fitting as restricting taxation in the instant case for

669. Id.
670. Id.
671. Id. at 454 (quoting Fed. R. Civ. P. 17(c)).
672. Id.
673. See id.
674. Id. at 455.
675. Id. at 456.
676. See id.
677. Id. at 457.
678. Id.
679. Id. at 458.
the following reasons: (1) no court in the Fifth Circuit has interpreted Crawford Fitting to exclude the taxation of guardian ad litem fees in a case similar to this; (2) other circuits have held that guardian ad litem fees can be taxed as court costs, including the Fourth, Eighth, Tenth and D.C. Circuits; (3) several district courts agree to tax guardian ad litem fees as costs; (4) no discussion of guardians ad litem appears in Crawford Fitting; and (5) there is no Supreme Court opinion addressing whether it is proper to tax guardian ad litem fees against the nonprevailing party.680 Thus, the Fifth Circuit concluded that district courts retain discretion to award guardian ad litem fees as court costs and assess them against the nonprevailing party, including the Government in a Federal Tort Claim Act action.681

4. Procter & Gamble Co. v. Amway Corp.

This case before a panel comprised of Circuit Judges Will Garwood, Patrick E. Higginbotham, and Jerry E. Smith involved a dispute making its third appearance in the Fifth Circuit Court of Appeals.682 The second incarnation was previously summarized in this survey. Procter & Gamble tried to prove that Amway and its distributors were the source of rumors linking it to Satanism.683 The plaintiff sued the defendant in federal district court in Utah, adding claims in four amended complaints.684 The Utah court granted the defendant’s motion to dismiss the third amended complaint, which included allegations of Amway conducting an illegal pyramid scheme.685 Procter & Gamble filed the fourth amended complaint, which included claims based not only on the Satanism rumor but also on a rumor indicating Crest toothpaste scratched teeth.686 The court dismissed the fourth amended complaint as untimely filed.687

In the interim, the plaintiff filed suit in district court in Texas alleging causes of action based on the Satanism rumor, the Crest rumor, and the pyramid scheme.688 It was after this filing that the Utah court entered a final judgment dismissing all of Procter & Gamble’s claims.689 The instant case proceeded to trial, and at the close of the plaintiff’s case in chief, the defendant moved for judgment as a matter of law.690 The district court granted

680. Id.
681. Id. at 459.
683. Id. at 498.
684. Id.
685. Id.
686. Id.
687. Id.
688. Id.
689. Id.
690. Id.
the motion, dismissing the plaintiff's Lanham Act claim based on res judicata of the Utah judgment.691 The remaining claims were dismissed on the merits.692 After the district court entered judgment, but prior to the Fifth Circuit hearing the appeal, the Tenth Circuit Court of Appeals reversed in part and remanded the Utah district court's judgment.693

During the instant case's first appearance in the Fifth Circuit, the court affirmed in part and reversed in part the district court's ruling on the merits.694 The court additionally found that the district court, at the time, had properly afforded the Utah case res judicata effect, and the dismissal had been proper when granted.695 But the subsequent reversal eliminated any res judicata bar, and the Fifth Circuit vacated on res judicata grounds.696 On remand, the Utah court dismissed all of the plaintiff's claims, and the Tenth Circuit affirmed.697 Shortly thereafter, the Texas district court granted the defendant's motion for summary judgment, and the plaintiff again appealed.698

The Fifth Circuit opinion provided practitioners with a review of the law of res judicata.699 The court explained that res judicata applies when the following conditions are present:

"(1) the parties to both [suits] are identical (or at least in privity); (2) the judgment in the first action is rendered by a court of competent jurisdiction; (3) the first action [resulted in] a final judgment on the merits; and (4) the same claim or cause of action is involved in both suits."700

The plaintiff contended that the district court erred in affording the Utah court's judgment of res judicata effect because the Utah court wrongly decided the case.701 The Fifth Circuit opined that the question of whether a "judgment on the merits was correct . . . does not enter into [a res judicata inquiry because] even an incorrect judgment is [to be given] res judicata effect."702 The court therefore held that the district court properly dismissed the plaintiff's claims and affirmed the judgment.703 Thus, in its third incarnation,

691. Id.
692. Id.
693. Id.
694. Id.
695. Id.
696. Id. at 499. The issues considered by the circuit court during the second incarnation of appeal did not concern the instant appeal. Id.
697. Id.
698. Id.
699. Id.
700. Id. (quoting Ellis v. Amex Life Ins. Co., 211 F.3d 935, 937 (5th Cir. 2000)).
701. Id. at 500.
702. Id. (citing Parsons Steel, Inc. v. First Ala. Bank, 474 U.S. 518, 525 (1986)).
703. Id. at 501.
the Fifth Circuit was able to finally dispose of the case based on the finality of the judgment in Utah.\textsuperscript{704}


In a per curiam opinion, a panel consisting of Circuit Judges E. Grady Jolly, W. Eugene Davis, and Edith H. Jones certified the following question to the Texas Supreme Court: "Does Texas public policy prohibit a liability insurance provider from indemnifying an award for punitive damages imposed on its insured because of gross negligence?"\textsuperscript{705} The facts merit articulation. An employee of Stephens Martin Paving was killed during an accident at work.\textsuperscript{706} Fairfield was the company's insurance carrier for both workers' compensation as well as employer liability coverage.\textsuperscript{707} The insurance company continued to pay workers' compensation benefits to the deceased's wife.\textsuperscript{708}

The deceased's wife filed suit against the employer claiming that gross negligence caused her husband's death, and she only sought punitive damages.\textsuperscript{709} The employer requested that its insurance company defend against the action; the insurance carrier did so initially but reserved the right to deny indemnification and costs.\textsuperscript{710} Subsequently, the insurance company filed the present action seeking a declaratory judgment that it had no duty to defend or indemnify because Texas public policy precluded indemnification for punitive damages awards.\textsuperscript{711} Furthermore, the insurance company moved for summary judgment, which the district court denied, holding that there is a duty to defend as well as a duty to indemnify against punitive damages awards.\textsuperscript{712} This appeal ensued.\textsuperscript{713}

In its analysis, the Fifth Circuit referenced \textit{Ridgway v. Gulf Life Insurance Co.},\textsuperscript{714} where it "made an \textit{Erie} prediction that Texas public policy did not bar indemnification of punitive damages awards."\textsuperscript{715} The court noted, however, that certain decisions of the Texas intermediate courts have "substantially undermined this conclusion."\textsuperscript{716} The court opined that the issue of whether such awards are insurable under Texas public policy is significant.

\textsuperscript{704} See id.
\textsuperscript{706} Id. at 436.
\textsuperscript{707} Id.
\textsuperscript{708} Id.
\textsuperscript{709} Id.
\textsuperscript{710} Id.
\textsuperscript{711} Id. at 437.
\textsuperscript{712} Id.
\textsuperscript{713} Id.
\textsuperscript{714} 578 F.2d 1026 (5th Cir. 1978).
\textsuperscript{715} Fairfield Ins. Co., 381 F.3d at 437.
\textsuperscript{716} Id.
for Texas law. Further, a split exists among the Texas intermediate courts regarding the resolution of this issue. Thus, the court sought resolution from Texas’s highest state court. This certification is significant and deserves follow up upon resolution.

J. Judicial Recusal: Sensley v. Albritton

Albeit not within the context of business litigation, this case merits scrutiny because it addresses the issue of judicial recusal. In this Voting Rights Act case, the Fifth Circuit considered, inter alia, whether the district court judge should have recused himself. Circuit Judges E. Grady Jolly, W. Eugene Davis, and Edith H. Jones comprised the panel that heard the case. Residents of a specific parish in Louisiana appealed the dismissal of their vote dilution challenge. At the close of the case, the plaintiffs filed a motion to recuse under 28 U.S.C. § 455(a), (b)(4), and (b)(5)(iii), alleging that the judge’s wife was an assistant district attorney in the office representing the defendants. The judge declined to recuse. Although the circuit court considered the merits of the plaintiffs’ constitutional claims, this survey only considers the court’s recusal analysis.

The court commenced by setting forth that a motion to disqualify filed under 28 U.S.C. § 455 is “committed to the sound discretion of the district judge.” Accordingly, recusal decisions are reviewed under an abuse of discretion standard. The plaintiffs identified, as noted above, three statutory bases for the recusal motion. Considering § 455(a), the Fifth Circuit opined that “[c]ourts have interpreted this statute to require recusal if a reasonable person, knowing all of the facts, would harbor doubts concerning the judge’s impartiality.” In examining this issue, the court noted first that there was no evidence of any direct financial interest in or connection between the district judge and the instant case. Similarly, the judge’s wife had no direct connection or financial interest in the case. The plaintiffs asserted that the

717. Id.
718. See id.
719. See id.
720. See id.
722. Id.
723. Id.
724. Id.
725. Id.
726. Id. at 598 (quoting Chitimacha Tribe of La. v. Harry L. Laws Co., 690 F.2d 1157, 1166 (5th Cir. 1982)).
727. Id.
728. Id. at 599.
730. Id.
731. Id.
judge, through his wife, stood to indirectly benefit from the outcome of the case. The plaintiffs argued that the judge’s wife’s position as an assistant district attorney is an at-will position and that this status created an incentive for her to ensure that the district attorney’s office was successful in the instant case.

According to the court, the argument that a judge’s impartiality may be questioned in any case in which a family member is employed by the office representing a party has been rejected. The court has recognized that a relative’s at-will employment with an agency or law firm representing a litigant is by itself insufficient to require recusal. In the instant case, the district court noted that unlike in the case of a law firm, the judge’s wife had no direct financial interest in the outcome of the case; district attorneys get the same salary whether or not the office is winning or losing specific cases. Therefore, the court held that the district judge did not abuse his discretion in declining to recuse himself under § 455(a).

The circuit court extended this reasoning to the determination that the judge did not need to recuse himself under § 455(b)(4) or (b)(5)(iii). The court noted that both subsections require recusal when a judge or the judge’s spouse has a financial interest in the case that could be substantially affected by the outcome. Financial interest is defined by the statute as “ownership of a legal or equitable interest,” and as noted above, the judge’s wife did not have any ownership, and therefore no financial interest in the cases won or lost by the district attorney’s office. Thus, the Fifth Circuit concluded that abuse of discretion did not exist in the district judge’s determination that his impartiality could not reasonably be questioned.

K. Jurisdiction

I. United States ex rel. Garibaldi v. Orleans Parish School Board

With a panel composed of Circuit Judges Thomas M. Reavley, Edith H. Jones, and James L. Dennis, the Fifth Circuit considered, for a second time, an appeal involving a *qui tam* action under the False Claims Act (FCA). In

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732. *Id.*
733. *See id.* at 600.
734. *Id.* (citing *United States ex rel. Weinberger v. Equifax, Inc.*, 557 F.2d 456, 463-64 (5th Cir. 1977)).
735. *Id.* (citing *Weinberger*, 557 F.2d at 463-64).
736. *Id.*
737. *Id.*
738. *Id.*
739. *Id.*
740. *Id.* at 601.
741. *Id.* at 601.
the previous appeal, the circuit court vacated the plaintiff's judgment on the verdict and rendered judgment for the defendant, holding that a school board is not a "person" who is subjected to liability under the FCA. 743 Subsequently, the U.S. Supreme Court decided Cook County v. United States ex rel. Chandler, 744 in which it held that local governments are "persons" subject to qui tam actions under the FCA. 745 Following the Chandler decision, the plaintiff in the instant action filed a motion in the district court pursuant to Rule 60(b)(6), requesting relief from the Fifth Circuit's final judgment in Garibaldi I. 746 The district court determined that Chandler overruled Garibaldi I, granted the plaintiff's motion, and reinstated the judgment in favor of the plaintiff. 747 The defendant school board appealed. 748

The Fifth Circuit identified the question before it as whether the decision in Chandler, combined with the facts of the instant case, gave rise to the "extraordinary circumstances" required for a district court to exercise its discretion under Rule 60(b)(6) and grant relief from a final judgment. 749 The court explained Rule 60(b)(6) authorizes a court to grant relief to a party from a final judgment for any reason justifying relief other than those grounds enumerated in clauses (b)(1) through (b)(5), 750 and only in "extraordinary circumstances." 751 The Fifth Circuit noted that it has previously held that a change in decisional law after the entry of a final judgment does not constitute extraordinary circumstances and is not by itself grounds for relief from such judgment. 752

The Fifth Circuit acknowledged that the district court found that the requisite extraordinary circumstances, having reasoned that the decision in Garibaldi I caused the circuit split regarding the definition of "persons" under the FCA upon which certiorari in Chandler was justified. 753 The district court determined the instant case fell within the extraordinary circumstances that the Fifth Circuit recognized in Batts v. Tow-Motor Forklift Co. 754 According to the Garibaldi district court, the Fifth Circuit stated in Batts that Rule 60(b)(6) relief is justified when "a subsequent court decision is closely related to the

2005).

743.  Id.
745.  Garibaldi, 397 F.3d at 336.
746.  Id.
747.  Id.
748.  Id.
749.  Id. at 337 (citing Hess v. Cockrell, 281 F.3d 212, 215-16 (5th Cir. 2002)).
750.  Id.
751.  Id.
752.  Id. (citing Bailey v. Ryan Stevedoring Co., 894 F.2d 157, 160 (5th Cir. 1990)).
753.  Id.
754.  Id. at 338 (citing Batts v. Tow-Motor Forklift Co., 66 F.3d 743, 747 (5th Cir. 1995)).
case in question, such as where the Supreme Court resolves a conflict between another circuit ruling and that case occurs.\textsuperscript{755}

The Fifth Circuit opined that the instant case is not atypical of the frequent instances in which the Supreme Court grants certiorari and renders a decision resolving a circuit split.\textsuperscript{756} In these cases, several litigants could argue that their case should be reopened because, if the relevant decision had been precedent at the time they filed suit, the outcome would have been different.\textsuperscript{757} The circuit court determined such cases, including the instant case, do not present the extraordinary circumstances necessary to justify reopening a judgment.\textsuperscript{758} Moreover, the court noted that the language from \textit{Batts} on which the plaintiff relied was dicta, and therefore "may not have received the considered judgment of the whole court."\textsuperscript{759} Thus, the Fifth Circuit concluded as follows:

\begin{quote}

[T]he great desirability of preserving the principle of finality of judgments preponderates heavily over any claim of injustice in this case. Disturbing the sanctity of the final judgment in this case would implicate the doctrine of res judicata in many other cases in which litigants may seek to reap the benefit of a change in decisional law after the judgments against them have become final.\textsuperscript{760}

\end{quote}

2. Dominguez-Cota v. Cooper Tire & Rubber Co.

In this brief per curiam opinion, the Fifth Circuit considered whether the trial court properly dismissed the plaintiffs' claims on forum non conveniens grounds.\textsuperscript{761} The underlying litigation involved an automobile accident in Mexico.\textsuperscript{762} The plaintiffs were all Mexican nationals and alleged that the car and the tires were both defective.\textsuperscript{763} The plaintiffs brought suit in state court in Mississippi and the defendants removed to federal court.\textsuperscript{764} The defendants then moved to dismiss the action based on forum non conveniens grounds.\textsuperscript{765} In granting the motion, the district court decided the forum non conveniens

\begin{itemize}
\item \textsuperscript{756} \textit{Id.}
\item \textsuperscript{757} \textit{Id.}
\item \textsuperscript{758} \textit{Id.}
\item \textsuperscript{759} \textit{Id.}
\item \textsuperscript{760} \textit{Id.} at 340.
\item \textsuperscript{761} Dominguez-Cota v. Cooper Tire & Rubber Co., 396 F.3d 650, 651 (5th Cir. Jan. 2005).
\item \textsuperscript{762} \textit{Id.} at 652.
\item \textsuperscript{763} \textit{Id.}
\item \textsuperscript{764} \textit{Id.}
\item \textsuperscript{765} \textit{Id.}
\end{itemize}
issue before determining whether it had subject matter jurisdiction over the controversy.\textsuperscript{766}

The Fifth Circuit considered whether the district court erred in dismissing the case before determining subject matter jurisdiction.\textsuperscript{767} The court noted that it is a well settled principle that, before proceeding with a case, a federal district court or appellate court has a duty to examine the basis of its subject matter jurisdiction, sua sponte if necessary.\textsuperscript{768} The plaintiffs asserted that the U.S. Supreme Court’s holding in \textit{Ruhrgas AG v. Marathon Oil Co.}\textsuperscript{769} grants courts the discretion to evaluate threshold ‘non-merits issues’ before ruling on subject matter jurisdiction.\textsuperscript{770} The plaintiffs characterized forum non conveniens as a non-merits issue and asserted that the district court properly dismissed the case.\textsuperscript{771} The circuit court determined that the plaintiffs read \textit{Ruhrgas} too broadly.\textsuperscript{772} In \textit{Ruhrgas}, the U.S. Supreme Court held that while federal courts are required to evaluate subject matter jurisdiction before considering the merits of a case, the district court in that case did not abuse its discretion by considering personal jurisdiction before it reached subject matter jurisdiction.\textsuperscript{773}

The Fifth Circuit disagreed with the plaintiffs’ argument that \textit{Ruhrgas} could be extended to all non-merits issues.\textsuperscript{774} The court reasoned that even if \textit{Ruhrgas} could be so read, a forum non conveniens inquiry is not entirely separate from the merits of the case.\textsuperscript{775} The circuit court reminded practitioners of the steps involved in a forum non conveniens inquiry.\textsuperscript{776} First, the defendant must show that an alternate forum is available and adequate.\textsuperscript{777} "An available forum is one where the case and all the parties can come within its jurisdiction . . . ."\textsuperscript{778} Then, the defendant must show the following: (1) the relative ease in accessing sources of proof; (2) the availability of a compulsory process to secure the attendance of unwilling witnesses; and (3) other factors affecting the case such as speed, expense, and enforceability of a judgment.\textsuperscript{779} If these factors do not indicate that another forum is better suited for trial, the court should examine public interest factors such as the following:

\textsuperscript{766} Id.
\textsuperscript{767} Id.
\textsuperscript{768} Id. (citing Torres v. S. Peru Copper Corp., 113 F.3d 540, 542 (5th Cir. 1997)).
\textsuperscript{769} 526 U.S. 574 (1999).
\textsuperscript{770} Dominguez-Cota, 396 F.3d at 652.
\textsuperscript{771} Id.
\textsuperscript{772} Id.
\textsuperscript{773} Id.
\textsuperscript{774} Id.
\textsuperscript{775} Id. at 653 (citing Van Cauwenberghe v. Biard, 486 U.S. 517, 527-28 (1988)).
\textsuperscript{776} Id.
\textsuperscript{777} Id. (citing Brokerwood Prods. Int’l (U.S.), Inc. v. Cuisine Crotone, Inc., 104 F. App’x 376, 383 (5th Cir. July 2004) (not designated for publication)).
\textsuperscript{778} Id. (quoting Brokerwood, 104 F. App’x at 383).
\textsuperscript{779} Id. (citing Brokerwood, 104 F. App’x at 383).
(1) administrative difficulties and court congestion, (2) the interest of having local controversies decided at home, (3) the interest of having a case decided in the same place as the law governing the issues, (4) avoidance of conflict of laws, (5) avoidance of the need to apply foreign law, and (6) the burden of jury duty to the citizens in an unrelated forum. The Fifth Circuit explained that in order to apply the above analysis, a court must look at the particular facts of a case, and to that extent, must reach the case’s merits. Thus, the circuit court held that it was unable to characterize forum non conveniens as a non-merits issue akin to personal jurisdiction and remanded the case to the district court to determine the subject matter jurisdiction issue.


A panel comprised of Circuit Judges Harold R. DeMoss Jr., James L. Dennis, and Edith Brown Clement considered whether a district court’s remand of a case was reviewable. The defendant, Entergy Services, was a group of affiliated companies that owned, operated, and provided telecommunication services to parts of several states, including Louisiana. Entergy began to upgrade its infrastructure with fiber optic cable lines. The plaintiffs claimed to own the land where Entergy installed the cables and filed suit against Entergy in state court. The action alleged Entergy engaged in civil trespass and fraud. An intervening plaintiff asserted a federal RICO claim pursuant to 18 U.S.C. § 1961 against Entergy. Entergy removed the case to federal court based on the federal RICO claim, and the plaintiffs filed a motion to remand. The plaintiffs argued that Entergy could not base removal jurisdiction on an intervener’s claim and that the intervention “followed deficient state procedure.” Entergy then filed an amended removal motion asserting federal jurisdiction on the argument that the trial court would have to construe the Public Utility Holding Company Act in order to resolve the trespass and fraud claims. The district court remanded the case to state court and this appeal ensued.

780. Id. at 653-54.
781. Id. at 654.
782. Id.
784. Id.
785. Id.
786. Id.
787. Id.
788. Id.
789. Id.
790. Id.
791. Id.
792. Id.
The Fifth Circuit began its analysis by reminding practitioners that "Congress has severely circumscribed the power of federal appellate courts to review remand orders." The controlling statute, 28 U.S.C. § 1447(d), provides as follows: "[A]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." The circuit court, however, explained that despite the statute's plain language, the U.S. Supreme Court has created a limited exception; in order for a remand order to be unreviewable, the district court must act within the strictures of § 1447(c)-(d). Only remands based on the grounds specified in § 1447(c) are precluded from review under § 1447(d). Read together, federal appellate courts lack jurisdiction under § 1447(d) if the district court based its remand order on either lack of subject matter jurisdiction or a defect in the removal procedure. If the order is to be reviewable, the district court must "affirmatively state[] a non-1447(c) ground for remand." The court provided the following examples of non-1447(c) grounds: (1) remands made at the discretion of the court, (2) remands on abstention, (3) remands based on § 1367 or § 1445(c), and (4) remands based on the discretionary powers of the district court pursuant to § 1441(c).

In the instant case, the district court based the remand on the following two factors: (1) Entergy filed its removal petition untimely under § 1446(b), and (2) Entergy could not base the petition on the intervening plaintiff's federal claim. The Fifth Circuit determined that these two grounds constituted allowable grounds for remand under § 1447(c) and consequently, that it lacked jurisdiction to review the district court's remand order.

A discussion of the Fifth Circuit's analysis merits scrutiny. Entergy argued that the circuit court had jurisdiction because a district court lacks authority to remand a case unless the reason for the remand was listed in the original motion for remand. Although the court opined that the Fifth Circuit case law contains no such ruling, Entergy argued this conclusion flows from the Fifth Circuit holding in In re Allstate. In Allstate, the circuit court held that a district court is not authorized to remand a case sua sponte for procedural defects. Entergy contended that although the plaintiffs filed a

793. Id. at 283.
794. Id. (quoting 28 U.S.C. § 1447(d) (2000)).
795. Id. (citing Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 711-12 (1996)).
796. Id. (citing Quackenbush, 517 U.S. at 711-12).
797. See id.
798. Id. (quoting Smith v. Tex. Children's Hosp., 172 F.3d 923, 926 (5th Cir. 1999)) (emphasis omitted).
799. Id.
800. Id.
801. Id.
802. Id.
803. Id.
timely motion, the district court remanded the case for reasons not asserted in the motion and thus acted beyond the scope of its authority under § 1447(c). Entergy argued that such a remand order is indistinguishable from a sua sponte motion.

The Fifth Circuit disagreed and stated as follows: "We find no grounds in the statutory language of §1447(c) or (d), and Entergy asserts none, to support such a holding." The Fifth Circuit distinguished motions from issues. In Allstate, no motion for remand was ever filed; the court’s sua sponte action was the equivalent of a motion. In the instant case, a motion was filed; the court merely raised an additional issue on its own. The circuit court opined that the statute’s own terms limit it to motions, not issues. Therefore, the Fifth Circuit held that it lacked jurisdiction to review the district court’s remand order under either of the defendant’s arguments and dismissed the appeal.

4. Reagan v. East Texas Medical Center

Albeit in a specialized area of law, this case merits scrutiny because it contains an issue of first impression under the Freedom of Information Act. With a panel composed of Circuit Judges E. Grady Jolly, Edith H. Jones, and Rhesa H. Barksdale, the Fifth Circuit considered whether the False Claims Act’s jurisdictional bar prohibited a qui tam lawsuit. The defendant operated a university hospital and hired the plaintiff to be an executive director. Shortly after her hiring, the plaintiff became suspicious of Medicare fraud, began investigating financial irregularities, and was subsequently terminated. Following the termination, the plaintiff reported her suspicions to both the Health Care Financing Administration and Blue Cross Blue Shield of Texas. She then filed suit in state court alleging she

805. Schexnayder, 394 F.3d at 283-84.
806. Id. at 284.
807. Id.
808. See id. at 285.
809. See In re Allstate Ins. Co., 8 F.3d at 220, 223.
810. See Schexnayder, 394 F.3d at 282, 284.
811. Id. at 284.
812. Id. at 285.
813. United States ex rel. Reagan v. E. Tex. Med. Ctr. Reg’l Healthcare Sys., 384 F.3d 168, 175 (5th Cir. Sept. 2004). This case addressed the issue of whether the plaintiff’s requests under the Freedom of Information Act constituted public disclosure. Id. at 173. Section 3730(e)(4)(A) of the False Claims Act enumerates several forms of public disclosures. See 31 U.S.C. § 3730(e)(4)(A) (2000). One of the enumerated items is an “administrative report.” Id. The district court held, and the Fifth Circuit agreed, that the agency response to the requests was an administrative report. Reagan, 384 F.3d at 174-75. Thus, the response constituted a public disclosure under the Act. Id. at 175.
814. Reagan, 384 F.3d at 171.
815. Id.
816. Id. at 172.
817. Id.
was terminated for refusing to participate in the defendant’s alleged Medicare fraud. While the state suit was pending, the plaintiff filed another action in federal court under the *qui tam* provisions of the False Claims Act (the Act) on behalf of the United States. The district court granted the defendant’s motion for summary judgment, holding the Act’s jurisdictional bar prohibited the suit.

The Act permits suits by private parties on behalf of the United States against anyone submitting a false claim to the government. But the Act contains a “public disclosure provision,” which removes a court’s jurisdiction if an action is based on the public disclosure of allegations unless the person bringing suit is the original source of the information. This jurisdictional inquiry, as the Fifth Circuit explained, requires a court to consider the following three issues: (1) whether the allegations were publicly disclosed, (2) whether the publicly disclosed allegations are the basis of the action, and (3) whether the plaintiff was the original source of the information in the public disclosure.

At the trial level, the district court held that the plaintiff’s allegations were publicly disclosed in three ways: (1) in the plaintiff’s state court lawsuit filed prior to the *qui tam* suit, (2) in the federal agency audits conducted prior to the filing of either suit, and (3) in the documents acquired by the plaintiff pursuant to the Freedom of Information Act. The Fifth Circuit agreed and further determined the instant suit was based, at least in significant part, upon the allegations in the state court lawsuit and, therefore, that the federal action was based upon the publicly disclosed allegations. The circuit court agreed and then turned to the issue of whether the plaintiff was the original source of such allegations.

The “original source” exception explicitly requires the satisfaction of the following: (1) The plaintiff must demonstrate that she directly and independently knew of the information forming the basis of the allegations; and (2) the plaintiff must demonstrate that she voluntarily informed the government of what she knew before filing suit. Applying this test to the facts of the instant case, the court determined that the plaintiff did not have independent knowledge of the information on which she based her allegations because she made public information requests to build the basis for the suit—

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818. *Id.*
821. *Id.*
822. *Id.* (citing 31 U.S.C. § 3730(e)(4)(A)).
823. *Id.* at 174.
824. *Id.*
825. *Id.* at 176.
826. *Id.*
827. *Id.*
her knowledge was derived from public records.\textsuperscript{828} Thus, the plaintiff was not the original source of the information upon which the \textit{qui tam} action was based.\textsuperscript{829} The Fifth Circuit, therefore, held that the False Claims Act jurisdictionally barred the claims and that the district court properly dismissed the plaintiff's suit for lack of jurisdiction.\textsuperscript{830}


In a per curiam opinion, a panel composed of Circuit Judges E. Grady Jolly, Jacques L. Wiener Jr., and Charles Willis Pickering Sr. considered whether a voluntary dismissal of an action was with or without prejudice to determine whether appellate jurisdiction existed.\textsuperscript{831} A fatal railroad-crossing accident prompted the case.\textsuperscript{832} The plaintiffs represented wrongful death beneficiaries and filed suit in state court, asserting claims under Mississippi's wrongful death statute.\textsuperscript{833} The defendants were the railroad company and three members of the train crew.\textsuperscript{834} The defendants made requests for admissions, asking the plaintiffs to admit there was no basis for the crew members to be joined in the action.\textsuperscript{835} The plaintiffs did not respond, and the defendants removed the action to federal court on the assertion that the crew members were fraudulently joined to defeat diversity jurisdiction.\textsuperscript{836} The plaintiffs filed a motion to remand, and after ordering and reviewing witness depositions, the district court dismissed the crew members from the action and denied the motion to remand.\textsuperscript{837}

The plaintiffs appealed to the Fifth Circuit.\textsuperscript{838} But, because the district court did not certify the remand decision for interlocutory appeal, the Fifth Circuit dismissed the appeal for lack of appellate jurisdiction.\textsuperscript{839} The district court entered a scheduling order and set the case for trial.\textsuperscript{840} In the interim, a related case with identical issues filed by another set of wrongful death beneficiaries against the same defendant proceeded to trial, and the jury rendered judgment for the defendant.\textsuperscript{841} The plaintiffs filed a pleading that "professed to rely on Federal Rule of Civil Procedure 54" and requested final

\textsuperscript{828} Id.
\textsuperscript{829} Id.
\textsuperscript{830} Id. at 178.
\textsuperscript{832} Id.
\textsuperscript{833} Id.
\textsuperscript{834} Id. at 497.
\textsuperscript{835} Id.
\textsuperscript{836} Id.
\textsuperscript{837} Id.
\textsuperscript{838} Id.
\textsuperscript{839} Id.
\textsuperscript{840} Id.
\textsuperscript{841} Id.
judgment in the instant case. The motion stated nothing as to whether the plaintiffs were seeking the dismissal with prejudice or without prejudice. The defendant, in its response, stated that the plaintiffs should have sought dismissal under Rule 41(a)(2) and asserted the defendant had no objection to a dismissal with prejudice. The district court’s dismissal order stated that it agreed with the defendant’s assertion that the dismissal was pursuant to Rule 41(a)(2) but failed to state whether the dismissal was with or without prejudice. This appeal followed.

The Fifth Circuit first addressed the plaintiffs’ attempt to manufacture appellate jurisdiction in order to obtain what the court referred to as a “quasi-interlocutory appeal.” The court opined that because the plaintiffs sought appellate review based on 28 U.S.C. § 1291, the court’s analysis should begin with that statute. The Fifth Circuit explained as follows:

Generally, all claims and issues in a case must be adjudicated in the district court, and a final judgment or order must be issued, before our jurisdiction can be invoked under § 1291. This “final judgment rule” creates appellate jurisdiction only after a decision that “ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.”

In Marshall, the lower court did not certify its denial for interlocutory appeal, and it failed to grant a final ruling in accordance with Rule 54(b) for the dismissed defendants.

Both parties admitted the parallel case dealt with the same defendant, identical facts, similar claims, and the same district judge. The plaintiffs preemptively filed the motion for final judgment rather than waiting for the defendant to raise the defenses of issue preclusion or res judicata. According to the court, “[i]n effect [p]laintiffs sought to manufacture a final judgment—and through it appellate jurisdiction—to obtain an immediate appellate ruling on the question of fraudulent joinder." The Fifth Circuit opined that the problem with this strategy is that it ran “head long” into the well-settled Fifth Circuit rule that a nonfinal order does not establish appellate

842. Id. at 498.  
843. Id.  
844. Id.  
845. Id.  
846. Id.  
847. Id.  
848. Id. at 499.  
850. Id.  
851. Id.  
852. Id.  
853. Id.
jurisdiction simply by dismissing the remaining claims without prejudice. The court explained that when a court grants a motion for voluntary dismissal, the movant receives what was asked for—a dismissal with no adjudication on the merits that permits the movant a later action for the same claim. Accordingly, a party may not use a voluntary dismissal without prejudice “as an end-run around the final judgment rule to convert an otherwise nonfinal—and thus non-appealable—ruling into a final decision appealable under § 1291.” The court noted that when a plaintiff agrees to a dismissal with prejudice, the rule does not apply because the plaintiff is barred from filing a later suit based on the same cause of action. Therefore, in Marshall, the crucial question became whether the voluntary dismissal was with or without prejudice.

The dismissal order was silent on whether the dismissal was with or without prejudice but did state that it was a dismissal “in accordance with Rule 41(a)(2).” Rule 41(a)(2) explicitly states that dismissals under the rule are without prejudice except when the order states the contrary. Plaintiffs’ appellate reply brief argued their motion pleaded entry of final judgment without prejudice. Accordingly, the Fifth Circuit determined that, given this assertion by the plaintiffs in addition to the language in Rule 41(a)(2), the dismissal at issue was without prejudice. Thus, the court dismissed the appeal because there was no appellate jurisdiction.


This Title VII litigation provided the Fifth Circuit the opportunity to consider whether the determination of an employer’s status as a Title VII employer confers subject matter jurisdiction or goes to the merits of a claim. Following Fifth Circuit precedent, a panel consisting of Circuit Judges Emilio M. Garza, Harold R. DeMoss, and Edith Brown Clement determined the question to be one of subject matter jurisdiction. The plaintiff sued her employer for sexual harassment under Title VII. The jury returned a verdict

854. Id. at 500.
855. Id. at 501 (quoting FED. R. CIV. P. 41(a)(2)).
856. Id. (citing Ryan v. Occidental Petroleum Corp., 577 F.2d 298, 302 (5th Cir. 1978)).
857. Id.
858. Id.
859. Id. at 501.
860. Id.
861. Id.
862. Id.
863. Id.
865. Id. at 221, 225.
866. Id. at 221.
in the plaintiff’s favor.\textsuperscript{667} The defendant filed a post-trial motion to dismiss, alleging that it “did not qualify as an ‘employer’ under [Title VII] because it did not employ more than 15 employees for 20 or more calendar weeks during the relevant time period.”\textsuperscript{668} After ordering post-trial discovery, the lower court changed the motion to dismiss to a motion for summary judgment and entered an order vacating the jury verdict and judgment holding that there was not subject matter jurisdiction.\textsuperscript{669} This appeal ensued.\textsuperscript{670}

On appeal, the threshold question for the Fifth Circuit was whether the status of an employer as a Title VII employer is relevant to subject matter jurisdiction or the merits of a claim.\textsuperscript{671} The plaintiff asserted there was a circuit split on the issue.\textsuperscript{672} The plaintiff cited cases from the Second, Seventh, and Federal Circuits, which all opined that this determination goes to the merits of a Title VII claim.\textsuperscript{673} The defendants argued that the court must follow its own precedent in the absence of U.S. Supreme Court jurisprudence urging otherwise.\textsuperscript{674} The Fifth Circuit cases of \textit{Dumas v. Town of Mount Vernon, Alabama},\textsuperscript{675} \textit{Womble v. Bhangu},\textsuperscript{676} and \textit{Greenlees v. Eidenmuller Enterprises, Inc.}\textsuperscript{677} all held that the determination of whether an employer is an employer for the purposes of a Title VII suit affects subject matter jurisdiction.\textsuperscript{678} Furthermore, the Fourth, Sixth, Ninth, Tenth, and Eleventh Circuits had all adopted this rule as well.\textsuperscript{679} The Fifth Circuit agreed and concluded that based on prior precedent as well as the majority of persuasive precedent, the determination of whether an employer is a proper Title VII employer is a matter of subject matter jurisdiction.\textsuperscript{680} Thus, if the employer is not a proper defendant under Title VII, the district court does not have subject matter jurisdiction, and the suit may be dismissed at any time.\textsuperscript{681} Therefore, the court affirmed the district court’s judgment vacating the jury award and dismissing the plaintiff’s claims.\textsuperscript{682}
7. Kelly v. Moore

With a panel consisting of Circuit Judges E. Grady Jolly, W. Eugene Davis, and Edith H. Jones, the Fifth Circuit considered the appellate jurisdiction available to it when a district court decides a motion for remittitur on grounds not cited by the movant. The plaintiff filed suit in federal district court for his mistreatment in connection with a routine traffic stop. The jury awarded the plaintiff $1,000,000 for compensatory damages and $500,000 for punitive damages. The plaintiff then moved for attorneys' fees as well as costs. The defendant responded by filing, inter alia, a Rule 59(b) motion for new trial or remittitur. The district court conditioned the grant of a motion for new trial for damages on the plaintiff’s acceptance of the court’s remittitur of the jury’s award. The trial court remitted the compensatory damages award down to $10,000 and the punitive damages award down to $5,000. The plaintiff declined to accept the remittitur and instead filed a notice of appeal; the plaintiff sought a reinstatement of the jury award.

The Fifth Circuit explained that prior to looking at the merits, it must be determined that the court has appellate jurisdiction. At issue was whether the grant of a new trial for damages was an appealable final order under 28 U.S.C. § 1291. The court explained as follows: “A decision is final under § 1291 when it ‘ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.’” An order that grants a new trial is usually not an appealable final decision but is instead an interlocutory order. An exception to this general rule, however, arises when the district court enters the decision without proper jurisdiction.

Cognizant that its jurisdiction was dependent upon the district court’s actions, the Fifth Circuit analyzed whether the district court had jurisdiction to enter the order for a new trial on damages. Rule 59 provides two means for a district court to grant a new trial. Rule 59(b) provides that a party

883. Kelly v. Moore, 376 F.3d 482, 482 (5th Cir. July 2004).
884. Id.
885. Id.
886. Id.
887. Id.
888. Id. at 483.
889. Id.
890. Id.
891. Id.
892. Id.
893. Id. (quoting Coopers & Lybrand v. Livesay, 437 U.S. 463, 467 (1978)).
894. Id. (citing Wiggs v. Courshon, 485 F.2d 1281, 1282 (5th Cir. 1973)).
896. Id.
897. Id.
may, within ten days after judgment, request a new trial.\textsuperscript{898} Rule 59(d) allows the court to order a new trial \textit{sua sponte}, also within ten days of judgment.\textsuperscript{899} But Rule 59(d) further allows a court to grant a timely motion for new trial for unstated purposes after giving the parties notice and opportunity to be heard.\textsuperscript{900} Further, under Rule 59(d), when the court grants a new trial on its own initiative or for reasons not stated in the timely motion, the court must specify the grounds for the new trial in its order.\textsuperscript{901} The Fifth Circuit reviewed the order in the instant case granting a new trial and determined that the district court complied with this requirement.\textsuperscript{902}

According to the court, appellate jurisdiction would not exist if the district court merely ruled on the Rule 59(b) motion that the defendant filed after the judgment.\textsuperscript{903} The defendant argued that although the court premised its decision on a legal theory not presented in the motion, the new trial ruling was in response to the Rule 59(b) motion.\textsuperscript{904} The defendant asserted that the Federal Rules of Civil Procedure only require that the district court grant the relief he sought and whether the basis for that relief diverges from those he cited is irrelevant.\textsuperscript{905} The Fifth Circuit disagreed, explaining that Federal Rule of Civil Procedure 7(b)(1) governs the Rule 59(b) pleading requirement and demands some degree of specificity.\textsuperscript{906} That Rule 59(d) allows a court to grant a motion for reasons not stated by the movant suggests the need for some specificity beyond the bare request for remittitur.\textsuperscript{907} The court reasoned that the district court’s ruling, based on legal theories not included in the defendant’s motion, was more appropriately characterized as a Rule 59(d) ruling.\textsuperscript{908}

The Fifth Circuit held that the district court failed to provide any requisite notice or opportunity to be heard before ordering the new trial and considered whether that error resulted in a lack of jurisdiction that fell within the narrow exception to the § 1291 finality requirement.\textsuperscript{909} The court explained that Rule 59(d)’s notice requirement, unlike Rule 59(b)’s ten day rule, does not affect the district court’s power to reach a motion’s merits.\textsuperscript{910} The court concluded that the district court’s decision was within its Rule 59(d) jurisdiction, making

\textsuperscript{898} Id.
\textsuperscript{899} Id.
\textsuperscript{900} Id.
\textsuperscript{901} Id. (citing Fed. R. Civ. P. 59(d)).
\textsuperscript{902} Id.
\textsuperscript{903} Id.
\textsuperscript{904} Id. at 484.
\textsuperscript{905} Id.
\textsuperscript{906} Id.
\textsuperscript{907} Id.
\textsuperscript{908} Id.
\textsuperscript{909} Id.
\textsuperscript{910} Id. at 485.
the instant appeal interlocutory rather than final and appealable under § 1291 and determining that the court was without appellate jurisdiction.911

L. Products Liability: Caboni v. General Motors Corp.

In a panel composed of Circuit Judges Rhesa H. Barksdale, Emilio M. Garza, and Harold R. DeMoss, the Fifth Circuit heard a second appeal in this products liability case.912 The plaintiff, while driving a pickup truck manufactured by the defendant, was involved in an accident in which his air bag failed to deploy.913 The plaintiff filed suit under the Louisiana Products Liability Act914 (LPLA) claiming damages for injuries, including his head hitting the steering wheel.915 The plaintiff alleged that the air bag, because it did not conform to the express warranty in the owner’s manual, was dangerous.916 The defendant, asserting diversity jurisdiction, removed the case to federal district court and filed a motion for summary judgment alleging that the plaintiff failed to establish the needed elements required for an express warranty claim under the LPLA.917 The district court granted the defendant’s motion.918

In Caboni I, the Fifth Circuit reversed and remanded for further consideration, concluding that material issues of fact existed as to the following: (1) whether the owner’s manual statement about the air bag was an express warranty, (2) whether the plaintiff was induced by the warranty to purchase the truck, (3) whether the truck conformed to the warranty, and (4) whether the falsity of the warranty caused additional injuries to the plaintiff.919 On remand, the jury found that the plaintiff had been injured and that the defendant was thirty percent responsible for the damages.920

The defendant filed a motion for judgment as a matter of law, which the court denied.921 The defendant additionally filed a motion to amend the judgment and grant remittitur, which was granted.922 The trial court awarded no damages for loss of future earning capacity and reduced the plaintiff’s medical expenses.923 The plaintiff refused the remittitur, and the court held a

911. Id.
913. Id.
915. Caboni, 398 F.3d at 358.
916. Id. at 359.
917. Id.
918. Id.
919. Id. (citing Caboni v. Gen. Motors Corp. (Caboni I), 278 F.3d 448, 455-56 (5th Cir. 2002)).
920. Id.
921. Id.
922. Id.
923. Id.
new trial on the loss of earnings and medical expenses. The jury returned a
verdict finding no damages for future medical expenses or loss of earning
capacity. Therefore, the trial court entered an amended judgment for a
lesser amount in favor of the plaintiff. The plaintiff filed a motion for new
trial, which the trial court denied. The defendant appealed the judgment.

On appeal, the defendant argued that the plaintiff failed to prove the
following: (1) that his truck did not conform to an express warranty and
(2) that he sustained an enhanced injury that was proximately caused because
the express warranty was untrue. The Fifth Circuit first addressed the
denial of the defendant’s motion for judgment as a matter of law. The court
reminded practitioners that “judgment as a matter of law is appropriate if
there is no legally sufficient evidentiary basis for a reasonable jury to find for
that party on that issue.” In reviewing the evidence, the appellate court is
required to draw all reasonable inferences in favor of the nonmovant and
cannot make credibility determinations or weigh the evidence.

The circuit court then reviewed the relevant LPLA provisions. A
plaintiff can show under the LPLA that a product is unreasonably dangerous
by demonstrating nonconformity with an express warranty, just as the plaintiff
asserted in the instant case. During oral argument, the defendant argued for
the first time that the owner’s manual did not constitute an express warranty
regarding the air bag because it was only a general description of the truck.
Because the defendant failed to brief this issue on appeal, the Fifth Circuit
determined the argument was waived.

The defendant further argued that the plaintiff’s air bag conformity
argument was without merit. The circuit court explained that the proper
inquiry under the LPLA was whether the product performed as described by
the language of the warranty, not whether it performed as it was designed to
perform. The defendant relied on the plaintiff’s expert witness at trial for
the proposition that the air bag did conform to the warranty because the truck
was not traveling at a speed that met the threshold level needed to deploy the

924. Id.
925. Id.
926. Id.
927. Id.
928. Id.
929. Id.
930. See id.
931. Id. (quoting FED. R. CIV. P. 50(a)(1)).
932. Id. (citing Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150 (2000)).
933. See id. at 360.
934. Id.
935. Id.
936. Id. (citing Yohey v. Collins, 985 F.2d 222, 224-25 (5th Cir. 1993)).
937. Id.
938. Id.
air bag and because the crash was not a head-on collision. The Fifth Circuit noted that there was more than ample evidence in the record to show that the air bag malfunctioned as described by the warranty. The testimony of the plaintiff’s expert provided evidence that the truck was traveling thirteen to eighteen miles per hour above the relevant threshold speed required in the owner’s manual and that the accident was a “near-frontal” crash, which was all that the owner’s manual required. The circuit court concluded that the defendant’s air bag argument failed because a reasonable jury could, and in fact did, arrive at a contrary verdict.

Finally, the defendant argued that the plaintiff failed to show the falsity of the express warranty proximately caused his damages. In the instant case, proximate causation required that the plaintiff show that he sustained more severe injuries than he would have received if the air bag deployed. The defendant argued that the plaintiff failed to present any expert testimony and that the jurors needed expert testimony to properly evaluate the issue. The defendant’s expert testified that the plaintiff’s injuries would have been the same whether or not the air bag deployed. The Fifth Circuit reviewed the expert testimony on direct and on cross-examination. The court explained that the trier of fact is not bound by expert testimony. The jurors are entitled to weigh the credibility of all witnesses, both expert and lay. Although the jury was free to accept or to not accept the testimony of the defendant’s expert, under the LPLA, the plaintiff had the burden of proving each element of the claim, including the enhanced injury element.

The plaintiff contended that, despite the contention that the defendant’s expert was the only expert witness to testify on this issue, he did in fact present expert testimony, including the following: (1) that he suffered head injuries from hitting the steering wheel, (2) that he probably would not have hit the steering wheel if the air bag had properly deployed, and (3) that he suffered a brain injury as a result of hitting the steering wheel. The Fifth Circuit distinguished the issues; this evidence proved only that he suffered an injury, not that the injury suffered was more severe because the air bag failed

939. ld.
940. ld.
941. ld.
942. ld.
943. ld.
944. ld. at 360-61.
945. ld.
946. ld.
947. ld. at 361.
948. ld.
949. ld.
950. ld.
951. ld. at 362.
to deploy.\textsuperscript{952} Because the plaintiff could not show that he suffered an enhanced injury as a result of the air bag failure to conform to the express warranty, the Fifth Circuit held that a reasonable jury could not have arrived at a verdict against the defendant, vacated the district court judgment, and rendered a take-nothing judgment against the plaintiff.\textsuperscript{953}

\section*{M. Securities}

\subsection*{1. Plotkin v. IP Axess Inc.}

A panel comprised of Circuit Judges Edith H. Jones, Jerry E. Smith, and Carl E. Stewart reviewed the district court’s dismissal of a securities fraud complaint.\textsuperscript{954} The complaint alleged that the defendants, a corporation and two individual defendants, made false and misleading statements in press releases and that the plaintiff purchased stock based on such statements.\textsuperscript{955} Two press releases were made in May.\textsuperscript{956} Both May releases announced a letter of intent and a purchase order.\textsuperscript{957} In the second May release, the defendants announced that the corporation received a multimillion dollar purchase order.\textsuperscript{958} The May releases also described the operations of the new customers and announced their contributions to the planned joint undertakings.\textsuperscript{959}

Each press release concluded with a boilerplate cautionary statement, explaining the press release contained forward looking statements that represented the defendants’ expectations and beliefs concerning future events.\textsuperscript{960} The statement cautioned that there could be no assurance as to the amount or timing of revenue.\textsuperscript{961} The deals illustrated in the statement “failed quickly and spectacularly.”\textsuperscript{962} The defendants’ auditor cautioned against booking revenue at the time of shipment because they were not persuaded of the customer’s ability to pay.\textsuperscript{963} After failing to receive any money from the purchase deal and having already sent the shipment, the defendants announced the deal’s collapse.\textsuperscript{964} In a shareholder letter published on the corporate website, the defendants asserted that one of the purchasers was unable to pay

\textsuperscript{952} Id.
\textsuperscript{953} Id. at 363.
\textsuperscript{954} Plotkin v. IP Axess Inc., 407 F.3d 690, 692 (5th Cir. Apr. 2005).
\textsuperscript{955} Id.
\textsuperscript{956} Id.
\textsuperscript{957} Id.
\textsuperscript{958} Id. at 693.
\textsuperscript{959} Id.
\textsuperscript{960} Id.
\textsuperscript{961} Id.
\textsuperscript{962} Id. at 694.
\textsuperscript{963} Id. at 693.
\textsuperscript{964} Id.
because one of its own customers delayed payment. There was no mention that such company filed bankruptcy three weeks earlier.

Another press release was made in August. This release announced that negotiation agreements were in place with major customers for the following month. Details were included regarding possible commercial shipments. The agreements never generated any business for the corporation. The plaintiff alleged the release "touted 'agreements' that never existed." According to the complaint, the price of the corporation's stock rose after each press release. After the announcement that the deals announced in the May releases fell through, the stock price "sank steadily." The plaintiff filed his initial federal complaint in Illinois, alleging, inter alia, claims under § 10(b) and § 20(a) of the Securities Exchange Act and Securities Exchange Commission Rule 10b-5.

The case was transferred to the Eastern District of Texas. The district court severed the claims against the corporation which had filed for bankruptcy. The individual defendants moved to dismiss for failure to state a claim upon which relief could be granted. The district court concluded as follows: (1) the plaintiff failed to identify a basis that would make the press releases false and misleading; (2) the plaintiff failed to adequately allege scienter; (3) the plaintiff failed to satisfy the pleading requirements in the Private Securities Litigation Reform Act (PSLRA); and (4) the statements were forward looking, accompanied by sufficient cautionary language, and therefore, not actionable. The claims were dismissed, and this appeal followed.

The Fifth Circuit began its analysis by reminding practitioners how a plaintiff must demonstrate a violation of § 10(b) and Rule 10b-5. Plaintiffs "must prove the defendant made a (1) misstatement or omission (2) of material fact (3) in connection with the purchase or sale of a security, which was made (4) with scienter, and upon which (5) the plaintiff's justifiably relied.
proximately causing injury to the plaintiffs." The PSLRA requires that a plaintiff plead these substantive elements with particularity; this incorporates, at a minimum, the pleading standard for fraud under Federal Rule of Civil Procedure 9(b). As the court noted, the Fifth Circuit has held that "the Rule 9(b) standards require specificity as to the statements (or omissions) considered to be fraudulent, the speaker, when and why statements were made, and why ... they are fraudulent." The court explained that "the pleading standard for scienter is especially challenging for plaintiffs." A valid complaint must plead specific facts giving rise to a 'strong' inference of scienter. The Fifth Circuit has also held that "scienter generally encompasses severe recklessness."

In the instant case, the court stated as follows: "Thus, a securities fraud plaintiff must prove that the defendant either consciously misbehaved in issuing the releases, or was so severely reckless that it demonstrates that the defendant must have been aware of the danger of misleading the investing public." The Fifth Circuit concluded that the plaintiff adequately pleaded that material omissions in the May releases rendered the releases misleading. A fair reading of the May releases would reasonably induce investors to believe the corporation had legitimate expectations of revenues from the deals. The court focused on the fact that a reasonable investor reading these releases would have formed the impression that the customer companies were significant international companies which could serve as credible business partners. The circuit court explained that these impressions were not dispelled by the standard warnings about forward-looking statements.

The plaintiff cited the customer's later bankruptcy as supportive of the fact that the defendants were severely reckless in insinuating the company was a large, stable, international corporation. The court of appeals held that although further discovery may refute such an inference, the inference was not unwarranted, and the allegations were specifically pleaded and defeat a motion to dismiss.

981. Id.
982. Id.
983. Id. (citing Nathenson v. Zogen Inc., 267 F.3d 400, 412 (5th Cir. 2001)).
984. Id. at 696-97.
985. Id. at 697.
986. Id. (citing Broad v. Rockwell Int'l Corp., 642 F.2d 929, 961-62 (5th Cir. 1981)).
987. Id. (citing Mercury Air Group, Inc. v. Mansour, 237 F.3d 542, 546 n.3 (5th Cir. 2001)).
988. Id.
989. Id.
990. Id.
991. Id. at 698.
992. Id.
993. Id.
The court utilized the same analysis to hold that the plaintiff had sufficiently pleaded scienter.\textsuperscript{994} Although the information regarding the customer’s financial condition may not have been known to the defendants until the customer filed bankruptcy, the fact that the bankruptcy happened so soon after entering the deal and that the defendants’ accountants were uncomfortable with the customer’s financial condition were sufficient to show that the defendants may have been severely reckless in publicizing the deal.\textsuperscript{995} Therefore, the Fifth Circuit held that the May press releases were sufficiently pleaded and did state a claim upon which relief might be granted.\textsuperscript{996} With regard to the August press release, the circuit court agreed with the trial court.\textsuperscript{997} The plaintiff failed to plead sufficient facts to prove anything in the August release was false or misleading.\textsuperscript{998} The August release did not announce deal agreements or deals, but rather, it announced that the defendant corporation was in negotiations to secure deals with some big, national clients.\textsuperscript{999} The Fifth Circuit held that there was nothing in the pleading to show this was misleading.\textsuperscript{1000} Negotiations and agreements were in place to possibly enter into a future deal; nothing had actually occurred, and no revenues were placed on the corporation’s books.\textsuperscript{1001} Thus, the circuit court concluded that the allegation regarding the August press release was not sufficiently pleaded to defeat the motion to dismiss.\textsuperscript{1002}

Ultimately, the court held that the plaintiff alleged a set of facts under which he could prove at trial that the May press releases were “deceptively selective disclosures” and had alleged specific facts in relation to the May releases, giving rise to a strong inference that the statements were made with scienter.\textsuperscript{1003} Therefore, the Fifth Circuit held that these claims were sufficiently pleaded and survived summary judgment.\textsuperscript{1004}

2. Krim v. PCOrder.com, Inc.

With a panel comprised of Circuit Judges Patrick E. Higginbotham, W. Eugene Davis, and Reynaldo G. Garza, the Fifth Circuit considered whether the plaintiffs in a securities fraud action had standing.\textsuperscript{1005} The defendant conducted an initial public offering (IPO) and then a secondary public offering

\textsuperscript{994} Id. at 698-99. 
\textsuperscript{995} Id. at 699. 
\textsuperscript{996} Id. at 700. 
\textsuperscript{997} Id. 
\textsuperscript{998} Id. 
\textsuperscript{999} Id. 
\textsuperscript{1000} Id. at 701. 
\textsuperscript{1001} Id. 
\textsuperscript{1002} Id. 
\textsuperscript{1003} Id. at 702. 
\textsuperscript{1004} Id. 
\textsuperscript{1005} Krim v. PCOrder.com, Inc., 402 F.3d 489, 489 (5th Cir. Mar. 2005).
(SPO) ten months later.1006 Along with each offering, the defendant filed a statement of registration with the SEC.1007 The plaintiffs were a group of investors who sought to file a class action pursuant to § 11 of the Securities Exchange Act of 1933.1008 Section 11 provides a cause of action to any person acquiring shares issued pursuant to an untrue registration statement.1009 In the instant case, the plaintiffs alleged that the defendant’s registration statements were misleading.1010 The district court denied class certification.1011 The district court held that § 11 is only available to the following plaintiffs: (1) those who purchased their stock during the relevant public offerings or (2) those purchasers that can “trace” their stock back to such offering.1012

In considering whether the lead plaintiffs could trace their stock to the IPO or SPO, the district court found that only one plaintiff was able to do so.1013 One lead plaintiff purchased his stock from a pool of stock that contained only IPO stock, and therefore, was able to satisfy the traceability requirement and establish standing.1014 The other two lead plaintiffs, however, could not make this showing.1015 At the time of their purchases, the stock pools had become contaminated with “outside shares,” and there was no way to track the individual shares in a contaminated pool.1016 Because of the intermingling of public offering and nonpublic offering shares in the market at the time of purchase by two of the lead plaintiffs, the putative class could not prove that all the stock from which they claimed damages was issued pursuant to a defective registration statement.1017 Therefore, the district court concluded that the lead plaintiffs could not serve as representatives of the class and denied certification.1018 The plaintiffs did not appeal the denial of the class certification but instead appealed the trial court ruling that standing was dependent upon direct traceability.1019

The plaintiffs argued that § 11 standing exists if statistics indicate a high mathematical probability that the shares at issue were purchased pursuant to the defective statement.1020 This probability is based on the number of shares purchased by each plaintiff and the number of public offering shares in the

1006. Id. at 491.
1007. Id.
1008. Id.
1009. Id. at 495.
1010. Id. at 491.
1011. See id.
1012. See id. at 492.
1013. Id.
1014. Id.
1015. See id.
1016. Id.
1017. Id. at 492-93.
1018. Id. at 493.
1019. See id. at 493-94.
1020. Id. at 495.
The Fifth Circuit first considered the language of the statute.\textsuperscript{1021} Section 11 provides almost absolute liability on a company issuing shares pursuant to a defective registration statement, regardless of the intent or lack thereof to provide misleading information.\textsuperscript{1022} The statute’s standing provision limits plaintiffs to “those who purchase securities that are the direct subject of the prospectus and registration statement.”\textsuperscript{1023} The circuit court noted that it recently held that aftermarket purchasers do not automatically lack standing.\textsuperscript{1024} Aftermarket purchasers have § 11 standing so long as they can demonstrate the ability to trace their shares to the faulty registration statements.\textsuperscript{1025} The court explained that in order “[t]o be able to take advantage of the lower burden of proof and almost strict liability under § 11, a plaintiff must meet higher procedural standards,” such as that required by the statute—to be able to trace the security for which the damages are sought to the statement that provides the defendant’s liability.\textsuperscript{1026}

The plaintiffs were aftermarket purchasers.\textsuperscript{1027} They argued that they could establish standing by showing a high probability by a preponderance of the evidence that their securities were issued pursuant to the faulty statement.\textsuperscript{1028} The Fifth Circuit opined that accepting “statistical tracing” would impermissibly enlarge the statute’s standing requirement.\textsuperscript{1029} The court further noted that the jurisprudence did not support § 11 standing based on the plaintiff’s statistical tracing theory.\textsuperscript{1030}

Thus, the Fifth Circuit held that aftermarket purchasers seeking § 11 standing must demonstrate that their shares are traceable to the allegedly faulty registration statement and determined that the statistical tracing method espoused by the plaintiffs was insufficient to meet this requirement.\textsuperscript{1031} Therefore, plaintiffs seeking to recover for securities fraud must still show that they purchased shares that were issued directly from the defective registration statement.\textsuperscript{1032} Accordingly, the Fifth Circuit affirmed the dismissal of the plaintiffs’ claims.\textsuperscript{1033}

\textsuperscript{1021} Id.
\textsuperscript{1022} Id.
\textsuperscript{1023} Id.
\textsuperscript{1024} Id. (quoting Fischman v. Raytheon Mfg. Co., 188 F.2d 783, 786 (2d Cir. 1951)).
\textsuperscript{1025} Id. (citing Rosenzweig v. Azurix Corp., 332 F.3d 854, 872 (5th Cir. 2003)).
\textsuperscript{1026} See id. at 495-96.
\textsuperscript{1027} Id. at 496 (citing Harden v. Raffensperger, Hughes & Co., 933 F. Supp. 763, 766 (S.D. Ind. 1996)).
\textsuperscript{1028} Id.
\textsuperscript{1029} Id. at 492.
\textsuperscript{1030} Id.
\textsuperscript{1031} Id. at 497.
\textsuperscript{1032} Id. at 502.
\textsuperscript{1033} See id.
\textsuperscript{1034} Id.
3. R2 Investments LDC v. Phillips

With a panel composed of Circuit Judges Rhesa H. Barksdale, Emilio M. Garza, and Harold R. DeMoss, Jr., the Fifth Circuit provided practitioners with a review of the elements of a securities fraud claim under § 10(b) and Rule 10b-5.1035 The plaintiff brought suit against the officers and directors of a now bankrupt company, alleging the following: (1) securities fraud, (2) common-law fraud, (3) conspiracy, and (4) negligent representation.1036 The suit was related to the defendants not completing a tender offer to repurchase certain notes previously issued.1037 The defendants moved to dismiss the federal securities claims for failure to state a claim.1038 The district court granted the motion and dismissed the state law causes of action as well, declining to exercise its supplemental jurisdiction.1039 This appeal followed.1040

In determining whether the plaintiff successfully stated a federal securities fraud claim, the Fifth Circuit reviewed § 10(b) and Rule 10b-5.1041 In order to successfully state a claim, a plaintiff must allege, in conjunction with the purchase or sale of a security, the following: (1) a misstatement or omission, (2) of a material fact, (3) made with scienter, (4) upon which the plaintiff relied, (5) that proximately caused the plaintiff’s injury.1042 Plaintiffs asserting such claims must also satisfy enhanced pleading requirements pursuant to the Private Securities Litigation Reform Act of 1995 (PSLRA) and Federal Rule of Civil Procedure 9(b).1043

The PSLRA requires a plaintiff to specify the following with particularity: (1) each allegedly misleading statement, (2) the reasons why it was misleading, (3) all the facts upon which the allegation was formed if the allegation is made “on information and belief,” and (4) the defendant’s requisite state of mind.1044 Rule 9(b) requires that a plaintiff plead with particularity all of the circumstances constituting the fraud, which has been interpreted to mean the plaintiff must specify the following: (1) the allegedly fraudulent statement, (2) the speaker, (3) the place and time of the statement, and (4) the reason the statement was fraudulent.1045

1036. Id.
1037. Id.
1038. See id.
1039. Id.
1040. Id.
1041. Id. at 641.
1042. Id. (citing Nathenson v. Zonagen Inc., 267 F.3d 400, 406-07 (5th Cir. 2001)).
1043. Id.
1044. Id.
1045. Id. (citing Southland Sec. Corp. v. INSpire Ins. Solutions Inc., 365 F.3d 353, 362 (5th Cir. 2004)).
The circuit court reviewed the complaint and agreed with the district court's dismissal. The plaintiffs asserted as the “actionable misstatement” that the defendants represented in certain SEC filings that the tender offer at issue would be completed by a certain date. Ultimately, the defendants were not able to complete the offer by the specified date. The Fifth Circuit opined that the fact that the defendants were not able to complete the tender offer on time does not render the statement that it has an obligation to repurchase the relevant notes untrue or misleading. Furthermore, the court reviewed the facts, or lack thereof, alleging the scienter of the defendants. Fifth Circuit jurisprudence defines scienter as follows: “An ‘intent to deceive, manipulate, or defraud or that severe recklessness in which the danger of misleading buyers or sellers is either known to the defendant or is so obvious that the defendant must have been aware of it.” Severe recklessness has been “limited to those highly unreasonable omissions or misrepresentations that involve not merely simple or even inexcusable negligence, but an extreme departure from the standards of ordinary care.” The plaintiff must allege facts sufficient to create a strong inference of scienter with regard to each defendant. The Fifth Circuit determined that the plaintiff in the instant case failed to do so. The court ultimately held that the plaintiff failed to allege any actionable misstatements with respect to the defendants’ SEC filings and that considering all the facts alleged in the complaint, the plaintiff also failed to sufficiently allege scienter. Thus, the judgment of the district court was affirmed.
### N. Select Business Torts Causes of Action Chart

<table>
<thead>
<tr>
<th>CAUSE OF ACTION</th>
<th>ELEMENTS</th>
<th>STATUTE OF LIMITATIONS</th>
</tr>
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<tbody>
<tr>
<td>Breach of Contract</td>
<td>1. Existence of contract;</td>
<td>Four years.</td>
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<tr>
<td></td>
<td>2. material breach;</td>
<td></td>
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<tr>
<td></td>
<td>3. causation; and</td>
<td></td>
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<td></td>
<td>4. damages.</td>
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<tr>
<td>Business Disparagement</td>
<td>1. Publication of disparaging words by the defendant about plaintiff's economic interests;</td>
<td>Two years.</td>
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<tr>
<td></td>
<td>2. falsity;</td>
<td></td>
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<td></td>
<td>3. publication with malice;</td>
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<td></td>
<td>4. publication without privilege; and</td>
<td>An action accrues on the date the defamatory matter is either published or spoken. The Discovery Rule may apply when the nature of the plaintiff's injury is inherently undiscoverable and the injury is objectively verifiable by physical evidence.</td>
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<td></td>
<td>5. publication caused special damages.</td>
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1061. Id.
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<tr>
<td><em>Civil Conspiracy</em></td>
<td>1. Two or more persons; 2. an object to be accomplished; 3. a meeting of the minds on the object or course of action; 4. one or more unlawful, overt acts; and 5. the proximate result of damages.</td>
<td>Four years.\textsuperscript{1063}</td>
</tr>
<tr>
<td><em>DTPA</em></td>
<td>1. Plaintiff is a consumer; 2. defendant engaged in false, misleading, or deceptive acts; and 3. these acts constituted a producing cause of the consumer's damages.</td>
<td>Two years.\textsuperscript{1065} Discovery Rule: Applicable.\textsuperscript{1066}</td>
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\textsuperscript{1062} See Triplex Commc'ns, Inc. v. Riley, 900 S.W.2d 716, 719 (Tex. 1995); Massey v. Armco Steel Co., 652 S.W.2d 932, 934 (Tex. 1983).
\textsuperscript{1064} See TEX. BUS. & COM. CODE ANN. §§ 17.01, 17.50(a) (Vernon 2002).
\textsuperscript{1065} Id. § 17.565.
\textsuperscript{1066} Id.
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<tr>
<td>Fraud</td>
<td>1. A material misrepresentation;</td>
<td>Four years. 1068</td>
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<td></td>
<td>2. which is false;</td>
<td>Discovery Rule: Applicable. 1069</td>
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<td></td>
<td>3. and which was either known to be false when made or was asserted</td>
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<td></td>
<td>without knowledge of its truth;</td>
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<td>4. which was intended to be acted upon;</td>
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<td></td>
<td>5. which was relied upon;</td>
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<td></td>
<td>and 6. which caused injury. 1067</td>
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<tr>
<td>Fraud by Omission</td>
<td>1. A material omission when there was a duty to speak;</td>
<td>Four years. 1071</td>
</tr>
<tr>
<td></td>
<td>2. which was intended to be acted upon;</td>
<td>Discovery Rule: Applicable. 1072</td>
</tr>
<tr>
<td></td>
<td>3. which was relied upon;</td>
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<td></td>
<td>and 4. which caused injury. 1070</td>
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1068. Procter & Gamble Co. v. Amway Corp., 242 F.3d 539, 566 (5th Cir. 2001); Jackson v. Speer, 974 F.2d 676, 679 (5th Cir. 1992).

1069. *Jackson*, 974 F.2d at 679.

1070. ABC Arbitrage Plaintiffs Group v. Tchuruk, 291 F.3d 336, 349 (5th Cir. 2002); Williams v. WMX Techs., Inc., 112 F.3d 175, 177 (5th Cir. 1997); see Phillips Petroleum Co. v. Daniel Motor Co., 149 S.W.2d 979, 987 (Tex. Civ. App.—Eastland 1941, writ dism’d judgm’t cor.).

1071. *Procter & Gamble Co.*, 242 F.3d at 566.

1072. *Id.*
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<tr>
<td><strong>Lanham Act § 43(a)</strong></td>
<td>1. Commercial advertisement that is false; or 2. commercial advertisement that is likely to mislead or confuse consumers.</td>
<td>Four years (borrows from Texas's fraud limitations period).(^{1074})</td>
</tr>
<tr>
<td><strong>Negligent Misrepresentation</strong></td>
<td>1. Defendant provides information in the course of his business, or in a transaction in which he has a pecuniary interest; 2. the information supplied is false; 3. the defendant did not exercise reasonable care or competence in obtaining or communicating the information; 4. the plaintiff justifiably relies on the information; and 5. the plaintiff suffers damages proximately caused by the reliance.(^{1075})</td>
<td>Two years.(^{1076}) Discovery Rule: May be applicable.(^{1077})</td>
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\(^{1074}\) See Procter & Gamble Co., 242 F.3d at 566.  
\(^{1075}\) Geosearch, Inc. v. Howell Petroleum Corp., 819 F.2d 521, 524 (5th Cir. 1987).  
\(^{1076}\) Tex. Soil Recycling, Inc. v. Intercargo Int'l Co., 273 F.3d 644, 649 (5th Cir. 2001).  
\(^{1077}\) See Kansas Reinsurance Co. v. Cong. Mortgage Corp. of Tex., 20 F.3d 1362, 1372 (5th Cir. 1994) (declining to apply the discovery rule to negligent misrepresentation). But see Tex. Soil Recycling, Inc., 273 F.3d at 649 (citing Kansas Reinsurance Co., 20 F.3d at 1372) (applying the discovery rule to negligent misrepresentation).
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<tr>
<td><strong>Robinson-Patman Anti-Discrimination Act</strong>&lt;sup&gt;1078&lt;/sup&gt;</td>
<td>Unlawful for any person engaged in commerce to discriminate in price between different purchasers of commodities of like grade and quality where the effect is to lessen, destroy, or prevent competition.&lt;sup&gt;1079&lt;/sup&gt; Several exceptions to this prohibition.&lt;sup&gt;1080&lt;/sup&gt;</td>
<td>Four years.&lt;sup&gt;1081&lt;/sup&gt;</td>
</tr>
<tr>
<td><strong>Sherman Act § 1</strong>&lt;sup&gt;1082&lt;/sup&gt;</td>
<td>1. Existence of a contract or conspiracy; 2. affecting interstate commerce and commerce with foreign nations; 3. that imposes a restraint on trade.&lt;sup&gt;1083&lt;/sup&gt;</td>
<td>Four years.&lt;sup&gt;1084&lt;/sup&gt;</td>
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1079. See id.  
1080. See id. §§ 13b-13c.  
1081. Id. § 15b.  
1082. Id. § 1.  
1083. Id.  
1084. Id. § 15b.
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| *Sherman Act* § 2¹⁰⁸⁵ | Two distinct claims:  
1. Monopolization—(a) monopolizing conduct (willful acquisition or maintenance of monopoly power); (b) coupled with monopoly power in the relevant market.  
2. Attempted Monopolization—(a) anticompetitive conduct; (b) intent to monopolize; (c) dangerous probability of obtaining monopoly.¹⁰⁸⁶ | Four years.¹⁰⁸⁷ |

¹⁰⁸⁵. See id. § 2.  
¹⁰⁸⁶. Id.  
¹⁰⁸⁷. Id. § 15b.
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<tr>
<td><em>Texas Free Enterprise and Antitrust Act of 1983</em>&lt;sup&gt;1088&lt;/sup&gt;</td>
<td>Unlawful practices defined: 1. “Every contract, combination, or conspiracy in restraint of trade or commerce is unlawful. 2. It is unlawful for any person to monopolize, attempt to monopolize, or conspire to monopolize any part of trade or commerce. 3. It is unlawful for any person to sell, lease, or contract for the sale or lease of any goods, whether patented or unpatented, for use, consumption, or resale or to fix a price for such use, consumption, or resale or to discount from or rebate upon such price, on the condition, agreement, or understanding that the purchaser or lessee shall not use or deal in the goods of a competitor . . .”&lt;sup&gt;1089&lt;/sup&gt;</td>
<td>Four years after the cause of action has accrued or within one year after the conclusion of any action brought by the state, whichever is longer. &lt;sup&gt;1090&lt;/sup&gt;</td>
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<sup>1089.</sup> *Id.* § 15.05.
<sup>1090.</sup> *Id.* § 15.25.
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| *Tortious Interference with Existing Contract* | 1. Plaintiff has a valid contract; 2. defendant willfully and intentionally interfered with the contract; 3. interference was a proximate cause of the plaintiff’s injury; and 4. plaintiff incurred actual damages or loss. | Two years.  
A cause of action accrues when the defendant interferes with the contract and causes harm to the plaintiff. The Discovery Rule may apply when the nature of the plaintiff’s injury is inherently undiscoverable, and the injury is objectively verifiable by physical evidence. |

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1093. Id. at 524.
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<tr>
<td><strong>Tortious Interference with Prospective Contract</strong></td>
<td>1. Reasonable probability that the plaintiff would have entered into a business relationship with a third person; 2. defendant intentionally interfered with the relationship; 3. defendant’s conduct was independently tortious or unlawful; 4. interference was the proximate cause of the plaintiff’s injury; and 5. plaintiff suffered actual damage or loss.</td>
<td>Two years.(^5) A cause of action accrues when the defendant’s interference with existing negotiations, which are reasonably certain of producing a contract, results in the termination of negotiations and harm to the plaintiff. The Discovery Rule may apply when the nature of the plaintiff’s injury is inherently undiscoverable and the injury is objectively verifiable by physical evidence.(^6)</td>
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<tbody>
<tr>
<td>Unfair Competition (Common Law)</td>
<td>Violation of the Lanham Act automatically provides a cause of action.¹⁰⁹⁷</td>
<td>Two years.¹⁰⁹⁸</td>
</tr>
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