BAR ASSOCIATION OF THE FIFTH FEDERAL CIRCUIT

FIFTH CIRCUIT REPORTER

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FIFTH CIRCUIT UPDATE

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I. Scope of the Article

The goal is to capture those cases that are of interest to the business torts litigator that are not discussed in the Bankruptcy, Procedure, and Taxation Updates. As the author, I address, when pertinent, case law in the antitrust, “contorts,” and Civil Racketeer Influenced and Corrupt Organizations Act (“RICO”) arenas as well as any other miscellaneous matters in the business torts realm. Occasionally, this Update transgresses traditional “business torts” in the federal courts arena, and reports on state jurisprudence when necessity or interest dictates.

II. Antitrust Jurisprudence

- Coca-Cola Co. v. Harmar Bottling Co., et al.²

In this case worthy of a practitioner’s scrutiny, the Texas Supreme Court considered whether Texas courts can adjudicate and remedy anticompetitive injuries occurring in another state under the Texas Free Enterprise and Antitrust Act (T.F.E.A.A.).³ The facts of the case concerned marketing agreements the defendant had with retailers in Arkansas, Louisiana, Oklahoma and Texas.⁴ The agreements provided certain discounts if the

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4. Id.
retailers gave the defendant’s products preferential placement and advertised promotions. The defendant held a 75 to 80 percent market share, while the plaintiffs, other bottling companies, held about a 10 percent share. Essentially, the plaintiffs alleged that the defendant engaged in unreasonable restraint of trade and had monopolized, attempted to monopolize and conspired to monopolize the market, all in violation of T.F.E.A.A. The jury found for the plaintiffs, the court of appeals affirmed, and the Texas Supreme Court granted certiorari.

The defendant argued the district court could not entertain an action for damages and injunctive relief for injuries occurring in other states. The plaintiffs answered that the injuries they incurred outside Texas were actionable under the T.F.E.A.A. because they resulted from the defendant’s conduct within Texas. The plaintiffs also argued the use of marketing agreements throughout a regional market that extended into Texas harmed consumers in Texas by affecting their ability to receive the benefits of competition.

The Texas Supreme Court considered whether the Legislature intended for the T.F.E.A.A. to be enforced outside of Texas. The Court started with the principle that “a statute will not be given extraterritorial effect by implication, but only when such intent is clear.” The plaintiffs argued that according to one of the provisions of the statute, a plaintiff is not precluded from suing under the Act merely because interstate commerce is affected or involved, and, therefore, a plaintiff is entitled to sue because interstate commerce is affected or involved. The High Court opined that this argument was lacking in logic. The section at issue removed a defense to suit; it did not create the basis for one.

The Court then addressed the plaintiffs’ argument that another statute provision stated that as long as relief provided by the Act will promote competition in Texas commerce, the same relief can extend to conduct in another state to promote competition there. The Supreme Court found this argument unreasonable as well. The Court explained as follows:

What the Act says, rather plainly we think, is that it is to be used to promote competition in Texas, even if the trade or commerce involved extends outside Texas; it does not say that this is to be used to promote competition outside Texas as long as the trade or commerce involved extends into Texas.

The Texas Supreme Court opined that the fact that the defendant made decisions in Texas regarding the marketing agreements used in other states, negotiated some of those agreements in Texas, and used the same agreements in Texas did not bring redress of the resulting injuries in other states within the ambit of the T.F.E.A.A. The Court held that

5. Id.
6. Id.
7. Id. at *3.
8. Id.
9. Id.
10. Id. at *5.
11. Id. at *6.
12. Id.
14. Id.
15. Id.
16. Id. at *7.
17. Id.
18. Id.
19. Id.
the T.F.E.A.A. does not, in clear language, provide a cause of action for injury outside of Texas, and, thus, the Court would not imply one.20

The Court further assessed the plaintiffs’ claims of injury in Texas from the defendant’s use of marketing agreements in violation of the T.F.E.A.A.21 The defendant argued that the claimed violations required proof of market harm—i.e. “a substantial foreclosure of competition or a pervasive, adverse impact on price, output, or choice.”22 The defendant asserted that there was only evidence of harm in relatively isolated instances and that no evidence of substantial foreclosure or anti-competitive effect in any relevant market was present.23 The plaintiffs agreed that evidence of market harm was required to prove and unreasonable restraint of trade and monopolization, but argued that such evidence was not necessary to prove an attempt or conspiracy to monopolize.24

The High Court noted that the record was full of evidence that the defendant used its dominant market position to obtain from retailers agreements with terms it might not have otherwise been able to negotiate.25 The Court explained that unquestionably the defendant’s marketing agreements could have had anticompetitive and monopolistic effects, and the court of appeals concluded the jury was entitled to infer that the agreements did have just those effects.26 However, the Supreme Court opined that such an inference violated the rule of reason analysis that must be applied to such conduct.27 “There must be evidence of demonstrable economic effect, not just an inference of possible effect.”28 The Court stated that there was no evidence quantifying the effect of the defendant’s marketing agreements in any relevant market.29

The plaintiffs argued that even if they failed to show market harm, such failure was not fatal to the claims of monopolization, attempted monopolization and conspiracy to monopolize.30 The Texas Supreme Court explained that the 75–80 percent market share was sufficient to support a jury finding of monopolistic power, and, therefore, to prove monopolization, the plaintiffs were required to show only “the willful acquisition or maintenance of power as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident.”31 This required evidence of some harm to competition in the market, which as already explained, was missing from the instant case.32 The Court noted that for the same reason, the plaintiffs’ claim of conspiracy to monopolize failed.33 Further, to prove attempted monopolization, the plaintiffs were required to show: (i) the defendant had engaged in predatory or anticompetitive conduct; (ii) the defendant had a specific intent to monopolize; and (iii) there was a dangerous probability the defendant could achieve monopoly power.34 The Court explained that since there was evidence only that the defendant’s agreements could have had an adverse effect on competition, and not that they actually did, the existence of the

20. Id.
21. Id. at *11.
22. Id.
24. Id.
25. Id.
26. Id.
27. Id.
28. Id.
29. Id. at *12.
30. Id.
31. Id.
32. Id.
34. Id.
agreements alone could not prove the defendant engaged in predatory or anticompetitive conduct.\textsuperscript{35}

Accordingly, the Texas Supreme Court ordered that the court of appeals' judgment be reversed.\textsuperscript{36} Thus, the plaintiffs' claims of injury occurring in other states were dismissed.\textsuperscript{37} Finally, on the claims of injury occurring in Texas, a take nothing judgment was entered against the plaintiffs.\textsuperscript{38}

III. Miscellaneous Business Torts Jurisprudence

A. Arbitration

\textbullet{} \textit{Tittle v. Enron Corp., et al.}\textsuperscript{39}

With a panel comprising Circuit Judges Carolyn Dineen King, Carl E. Stewart and James L. Dennis, the Fifth Circuit Court of Appeals considered an interpleader action in which Enron defendants appealed the district court's denial of their motion to compel arbitration.\textsuperscript{40} The facts of the case concerned the interpretation of two fiduciary liability insurance policies, both of which contained arbitration clauses.\textsuperscript{41} However, of interest to practitioners, is the Court's analysis of the alternative dispute resolution issues, and the applicable Texas law.\textsuperscript{42}

The Circuit Court explained that the United States Supreme Court has enunciated four principles applicable in determining the arbitrability of a specific issue.\textsuperscript{43} First, arbitration is a matter of contract and a party cannot be required to submit to arbitration if it has not agreed to do so.\textsuperscript{44} Second, the question of arbitrability is a judicial determination, not one made by the arbitrator, unless the parties clearly provide otherwise.\textsuperscript{45} Third, in making its decision on arbitrability, the Court must not rule on the merits of the underlying claim.\textsuperscript{46} Fourth, if a contract contains an arbitration clause, there is a presumption of arbitrability.\textsuperscript{47}

The Fifth Circuit then commenced its analysis in earnest.\textsuperscript{48} When considering a motion to compel arbitration, a court employs the following two part analysis: (i) the court must determine whether the parties agreed to arbitrate the dispute at issue; and (ii) the court must determine whether external legal constraints foreclose arbitration of the claims.\textsuperscript{49} Within the first part of the analysis, two separate determinations emerge: (i) does a valid agreement to arbitrate exist; and (ii) if so, does the dispute in question fall within such agreement.\textsuperscript{50} Because neither party challenged the validity of the arbitration agreement, the court proceeded to determine whether the parties had agreed to arbitrate the claims.

35. Id.
36. Id. at *13.
37. Id.
38. Id.
39. 463 F.3d 410 (5th Cir. (Tex.) 2006).
40. \textit{Tittle}, 463 F.3d at 413.
41. Id.
42. Id.
43. Id. at 418.
44. Id. (citing \textit{AT & T Techs, Inc. v. Commc'n's Workers of Am.}, 475 U.S. 643, 648, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986)).
45. Id.
46. Id.
47. Id.
48. Id.
49. \textit{Tittle}, 463 F.3d at 419.
50. Id. (citing \textit{Webb v. Investacorp., Inc.}, 89 F.3d 252, 258 (5th Cir. 1996)).
clauses, the only issue in the instant case was whether the claims at issue fell within the scope of those clauses.\textsuperscript{51}

In considering the scope of the arbitration clauses, the Circuit Court provided a review of Texas jurisprudence.\textsuperscript{52} "To determine the scope of the [a]rbitration [c]lause at issue in this case, th[e] court must apply Texas rules of contract interpretation."\textsuperscript{53} Pursuant to Texas law, a court must read a contract in a way that gives meaning to all its terms, rendering the terms consistent with one another.\textsuperscript{54} "No single provision taken alone will be given controlling effect; rather, all the provisions must be considered with reference to the whole instrument."\textsuperscript{55}

The Fifth Circuit applied this analysis to the policies at issue, and determined that the arbitration clauses applied only to disputes arising out of or related to the contracts.\textsuperscript{56} Therefore, the Court had to determine whether the dispute at issue arose out of or was related to the policies.\textsuperscript{57} "A dispute ‘arises out of or relates to’ a contract if the legal claim underlying the dispute could not be maintained without reference to the contract."\textsuperscript{58} The Circuit Court opined that under this definition, the instant dispute did arise out of one of the policies, but was limited by its language.\textsuperscript{59} The clause at issue limited its scope to only disputes that included an insurer, and did not cover disputes between insureds.\textsuperscript{60} Since the instant case was a dispute between insureds, the Fifth Circuit concluded that the district court properly denied the motion to compel arbitration.\textsuperscript{61} Thus, the judgment of the district court was affirmed.\textsuperscript{62}

B. Contracts

\textit{\textcopyright Texas v. American Tobacco Co., et al.}\textsuperscript{63}

In this appeal involving litigation between the State of Texas and major tobacco companies, a panel comprising Circuit Judges Jerry E. Smith and Carl E. Stewart, and District Judge Andrew S. Hanen\textsuperscript{64} sitting by designation, considered the proper interpretation of a settlement agreement between the parties.\textsuperscript{65} The Circuit Court reviewed the facts of the case leading up to the agreement at issue as well as the agreement itself.\textsuperscript{66} The Court then summarized the arguments.\textsuperscript{67} The State argued that the agreement was unambiguous, and urged that the district court erred in considering evidence of the parties’ course of performance—i.e. parol evidence.\textsuperscript{68} Neither of the parties argued that the agreement was ambiguous, and the district court did not expressly find it so.\textsuperscript{69}

\begin{thebibliography}{99}
\bibitem{51} Id.
\bibitem{52} Id.
\bibitem{53} Id.
\bibitem{54} Id. (citing \textit{SAS Inst., Inc. v. Breitenfeld}, 167 S.W.3d 840, 841 (Tex. 2005)).
\bibitem{55} Id. (citing \textit{Coker v. Coker}, 650 S.W.2d 391, 393 (Tex. 1983)).
\bibitem{56} Id. at 420–21.
\bibitem{57} Id. at 421.
\bibitem{58} Id. at 422 (citing \textit{Ford v. NYLCare Health Plans of the Gulf Coast, Inc.}, 141 F.3d 243, 250 (5th Cir. 1998)).
\bibitem{59} Id.
\bibitem{60} \textit{Tittle}, 463 F.3d at 422.
\bibitem{61} Id. at 424.
\bibitem{62} Id. at 425.
\bibitem{63} 463 F.3d 399 (5th Cir. (Tex.) 2006).
\bibitem{64} Southern District of Texas.
\bibitem{65} \textit{Tobacco}, 463 F.3d at 401.
\bibitem{66} Id. at 401–05.
\bibitem{67} Id. at 405.
\bibitem{68} Id. at 405–06.
\bibitem{69} Id. at 406.
\end{thebibliography}
However, the evidence presented in the lower court dealt almost exclusively with the parties’ past performance. Therefore, the Fifth Circuit had to first address whether the agreement was ambiguous as a matter of law.

The Circuit Court provided practitioners with a review of Texas contract law. When construing a written contract, the primary responsibility of a court is to ascertain the parties’ intentions as expressed in such contract. According to Texas law, controlling in the instant case, a contract is viewed as of the time it was made, and not in light of later events. Whether a contract is ambiguous is a question of law to be decided by looking at the contract as a whole in light of the circumstances at the time when it was made. When parties disagree over the meaning of an unambiguous contract, the intent of the parties is determined from the agreement itself and the contract is enforced as written. If a contract’s meaning is uncertain or reasonably susceptible to more than one interpretation, it is ambiguous. The Fifth Circuit explained that a court interpreting an unambiguous contract is confined to the four corners of the document, and cannot look to parol evidence. Only after a contract is determined to be ambiguous may extrinsic evidence be considered for the purpose of ascertaining the parties’ intentions.

The Circuit Court evaluated the agreement at issue. In doing so, the Court noted that an ambiguity in a contract can be either patent or latent. “A patent ambiguity is evident on the face of the contract while a latent ambiguity ‘arises when a contract which is unambiguous on its face is applied to the subject matter with which it deals and an ambiguity appears by reason of some collateral matter.’” If a latent ambiguity is at issue, parol evidence is admissible to determine the intentions of the parties as expressed in the contract.

The Fifth Circuit Court of Appeals applied Texas contract law to the agreement at issue and concluded that the contract contained a latent ambiguity. Thus, the trial court did not err in using extrinsic evidence to determine the parties’ intent. Consequently, the district court’s judgment was affirmed.

© Fordoche, Inc. v. Texaco, Inc.

In this appeal before a panel comprising Circuit Judges Carolyn Dineen King, Rhesa H. Barksdale and James L. Dennis, the Fifth Circuit Court of Appeals considered a breach

70. Id. at 407.
71. Id.
72. Id.
73. Id. (citing Gen. Accident Ins. Co. v. Unity/Waterford–Fair Oaks, Ltd., 288 F.3d 651, 653 (5th Cir. 2002)).
74. Id. (citing Erway, Inc. v. Wood, 373 S.W.2d 380, 384 (Tex. Civ. App.—Dallas 1963, writ n.r.e.)).
75. Tobacco, 463 F.3d at 407.
76. Id.
77. Id. (citing Coker v. Coker, 650 S.W.2d 391, 393–94 (Tex. 1983)).
78. Id. (citing Sun Oil Co. v. Madeley, 626 S.W.2d 726, 732–33 (Tex. 1981)).
79. Id.
80. Id. at 408.
81. Id.
82. Id. (quoting Nat’l Union Fire Ins. Co. of Pittsburgh v. CBI Indus., Inc., 907 S.W.2d 517, 520 (Tex. 1995)).
83. Id.
84. Id. at 409.
85. Tobacco, 463 F.3d at 409.
86. Id. at 410.
87. 463 F.3d 388 (5th Cir. (La.) 2006).
of contract claim concerning a right of first refusal.\textsuperscript{88} The plaintiff and the defendant were parties to several different operating agreements concerning mineral leases, all of which contained right of first refusal clauses.\textsuperscript{89} The clauses required that either party, prior to selling any of its rights to a third party, first offer the sale to the other party to the agreement under the same terms contemplated with the third party.\textsuperscript{90} The plaintiff alleged the defendant did not fully comply with the right of first refusal clauses.\textsuperscript{91} The ultimate issue facing the Circuit Court was whether the defendant, based on the record, performed its right of first refusal obligations in good faith, and was thus entitled to summary judgment.\textsuperscript{92}

After a review of the facts and clauses at issue, the Fifth Circuit began its analysis.\textsuperscript{93} In order to answer the ultimate issue, the Circuit Court explained it must address the following: (i) identify the subject of the right of first refusal; (ii) determine whether the defendant unambiguously described the property offered for sale; and (iii) determine whether the same property was offered to the plaintiff under the same terms prior to selling to the third party.\textsuperscript{94} In reviewing the clauses, the Court noted that the plaintiff’s right of first refusal extended to the defendant’s entire working interest in its mineral leases.\textsuperscript{95} The pertinent language required the defendant make the offer to the plaintiff “...before the sale to a third party...of its interest...in the properties affected by th[ese] agreement[s].”\textsuperscript{96} The Circuit Court determined that the defendant violated the agreements in failing to offer the entirety of its interest in the property affected by the agreement to the plaintiff, and then selling the entirety to a third party.\textsuperscript{97}

The Fifth Circuit opined that the defendant failed to properly specify the property being offered in the letter sent to the plaintiff in an assumed effort to comply with the right of first refusal clauses.\textsuperscript{98} The record contained evidence that the plaintiff was unsure of the particulars of the property offered for sale, and made such concerns known to the defendant.\textsuperscript{99} The record further evinced that the defendant did not provide additional information in response to these concerns.\textsuperscript{100} The Court explained that without an unambiguous written document in the record showing that the defendant clearly described the property interest for sale in its offer to the plaintiff, it could not conclude as a matter of law that the defendant complied with the right of first refusal clauses.\textsuperscript{101}

The Fifth Circuit also addressed the defendant’s failure to offer the property interest to the plaintiff on the same terms it was sold to the third party.\textsuperscript{102} The Court noted that although it was unclear exactly what type of interest the defendant offered to the plaintiff, it was clear that it was less than the full interest sold to the third party.\textsuperscript{103} Thus, it was impossible to find the property to be offered to both the plaintiff and third party on the same terms.\textsuperscript{104} Therefore, the Court held summary judgment was improper.\textsuperscript{105}

\textsuperscript{88} Texaco, 463 F.3d at 388.
\textsuperscript{89} Id.
\textsuperscript{90} Id. at 389.
\textsuperscript{91} Id.
\textsuperscript{92} Id.
\textsuperscript{93} Id. at 389-92.
\textsuperscript{94} Id. at 392-93.
\textsuperscript{95} Id. at 393.
\textsuperscript{96} Id. at 394.
\textsuperscript{97} Id.
\textsuperscript{98} Texaco, 463 F.3d at 395.
\textsuperscript{99} Id. at 396.
\textsuperscript{100} Id.
\textsuperscript{101} Id. at 397.
\textsuperscript{102} Id.
\textsuperscript{103} Id.
\textsuperscript{104} Id.

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As Louisiana law specifically provides that good faith is an additional requirement to every contract, the Fifth Circuit performed such a "good faith" analysis. The Court noted that the record contained several implications of the defendant’s bad faith. Specifically, the plaintiff was offered a lesser interest for the same price at which the third party purchased the defendant’s full interest. The Circuit Court opined that this was arguably done to discourage the plaintiff from accepting the offer, and thus, was done in bad faith. Ultimately, the Fifth Circuit reversed the district court’s grant of summary judgment, and remanded the case for further proceedings.

*CIC Property Owners v. Marsh USA Inc.*

In this appeal before the Fifth Circuit, a panel comprising Circuit Judges E. Grady Jolly, Edward Charles Prado and Priscilla Richman Owen, confronted issues of fiduciary obligations relating to settlements of adversarial litigation. The plaintiff was a risk-management and insurance consulting firm that obtained volume discounts on insurance policies for owners of multi-family dwellings. The defendant began providing the plaintiff with brokerage services, such as finding insurers to underwrite coverage and disbursing the premiums collected. The plaintiff agreed to use the defendant’s services exclusively in return for promises that the defendant would provide the plaintiff with a firm price quote on excess property insurance, and would charge only fees and no commission for its services.

The plaintiff filed two lawsuits against the defendant in Texas state court. In the first, which was removed to federal court, the plaintiff accused the defendant of breaching the service agreement by charging premiums in excess of the price quote and by charging commissions in addition to fees. In the second suit, which remained in state court, the plaintiff accused the defendant of breaching the service agreement by failing to secure adequate insurance coverage. The parties settled both lawsuits and, under a Settlement Agreement, the defendant paid the plaintiff $1.5 million, the plaintiff dismissed its claims with prejudice, and further agreed to the following:

unconditionally release[ ], acquit[ ], forever discharge[ ], and covenant [ ] not to sue, without limitation, Marsh ... with respect to each and every right, claim, complaint, demand, cause of action, proceedings, and damages of whatsoever kind or nature which CIC now has, has had, or might have relating to or arising out of any act, transaction, or occurrence between the parties, including without limitation each and every claim for any type of relief or remedy whatsoever based upon any theory whatsoever, whether known or unknown at this time, and relating to or arising out of the Placement, the Brokerage Services, or any claims that have been or could have been brought in the Federal Lawsuit or State Lawsuit.

105. Id. at 398.
106. Id.
107. Texaco, 463 F.3d at 398.
108. Id.
109. Id.
110. Id. at 399.
111. No. 05–51575, 460 F.3d 670, 2006 WL 2329499 (5th Cir. (Tex.) Aug. 11, 2006).
113. Id.
114. Id.
115. Id.
116. Id.
117. Id.
118. Id.
After the settlement, however, the plaintiff's audit of one policy year revealed that the defendant was in possession of unearned premiums owed to the plaintiff.\textsuperscript{119} In response to the plaintiff's request for the return of such premiums, the defendant informed the plaintiff that it was also in possession of unearned premiums on another policy.\textsuperscript{120} The defendant wired the collective sum to the plaintiff.\textsuperscript{121} However, the plaintiff's further investigation revealed that the defendant actually owed more on the second policy at issue.\textsuperscript{122} The plaintiff then contacted other insurance carriers about possible overcharges from two policy years and discovered what it believed to be a pattern of overcharging by the defendant.\textsuperscript{123} The plaintiff's demands for further repayment were refused, and, thus, it brought this suit in Texas state court, asserting breach of contract and violations of Texas Insurance Code.\textsuperscript{124} The defendant removed to federal court and moved for summary judgment, arguing that the plaintiff's suit was barred by res judicata and the release of liability contained in the Settlement Agreement.\textsuperscript{125} The district court granted summary judgment on res judicata grounds.\textsuperscript{126}

This appeal presented two questions: (i) whether the district court erred in holding that the instant litigation was precluded by the previous litigation between the parties; and, if so, (ii) whether summary judgment is nevertheless proper based on the Settlement Agreement's release of liability.\textsuperscript{127}

The Court explained that the Settlement Agreement disposing of the two previous actions included the broad release quoted above. The plaintiff "without limitation...unconditionally release[d] and covenant[ed] ... not to sue [the defendant] with respect to each and every right, claim, complaint, demand, [etc.] ... which [the plaintiff] now has, has had, or might have relating to or arising out of any act, transaction, or occurrence between the parties ... whether known or unknown at this time." The Fifth Circuit stated the release on its face and in its substance reached the instant suit.\textsuperscript{128}

To counter enforceability of the release, the plaintiff argued that the defendant breached a fiduciary obligation by securing a release disadvantageous to the plaintiff.\textsuperscript{129} "A party owing fiduciary duties to another must show that an agreement between the two is fair and reasonable and that the party to whom the duty is owed was aware of all facts material to the agreement."\textsuperscript{130} The district court ruled that the defendant was a fiduciary of the plaintiff and that a material fact issue existed as to whether the defendant breached that duty by failing to meet the fair and reasonable standard in Keck, Mahin v. Nat. U.F. Ins., Pittsburgh, P.A.\textsuperscript{131}

The Fifth Circuit believed that the district court erred in analyzing the Settlement Agreement under Keck.\textsuperscript{132} The Court explained that even assuming, arguendo, the existence of a fiduciary relationship between the parties, the circumstances surrounding the negotiation and execution of the release fatally undermined the plaintiff's claim that the defendant owed and breached a duty to ensure that the Agreement was fair and

\begin{itemize}
\item \textsuperscript{119} Id.
\item \textsuperscript{120} Id.
\item \textsuperscript{121} Id.
\item \textsuperscript{122} Marsh, 460 F.3d 670, 2006 WL 2329499 at *1.
\item \textsuperscript{123} Id.
\item \textsuperscript{124} Id.
\item \textsuperscript{125} Id.
\item \textsuperscript{126} Id.
\item \textsuperscript{127} Id. at *2.
\item \textsuperscript{128} Id.
\item \textsuperscript{129} Id.
\item \textsuperscript{130} Id. (citing Keck, Mahin v. Nat. U.F. Ins., Pittsburgh, P.A., 20 S.W.3d 692, 699 (Tex. 2000)).
\item \textsuperscript{131} 20 S.W.3d 692 (Tex. 2000).
\item \textsuperscript{132} Marsh, 460 F.3d 670, 2006 WL 2329499 at *2.
\end{itemize}
reasonable. The Circuit Court opined that unlike the plaintiff in Keck, the plaintiff in the present suit was represented by its own counsel in a clearly adversarial negotiation. The parties terminated their business relationship two months before entering into the Settlement Agreement, and the plaintiff hired counsel to review the Agreement. The Agreement itself provided as follows: (i) the parties had an opportunity to consult with their attorneys; (ii) the parties voluntarily executed the Agreement after advice of counsel; and (iii) the Agreement was reviewed by counsel for the parties and approved as to form and content. The Fifth Circuit declined, absent supporting Texas authority, "to attach a presumption of unfairness to a settlement of a formal adversarial proceeding, entered into by two sophisticated parties separately advised by counsel." Consequently, the Court determined that Keck was inapplicable, and the Settlement Agreement’s fairness to the plaintiff was irrelevant.

The Fifth Circuit concluded that there being no other issue of fact or law raised to contest the enforceability of the release, full effect to its terms must be given, and, thus, because the Settlement Agreement barred the plaintiff’s claims, the defendant was entitled to judgment as a matter of law. Therefore, the Circuit Court affirmed the district court’s grant of summary judgment in favor of the defendant.

○ Sheshunoff Management Srvcs., L.P. v. Johnson

Albeit in the context of an employment case, this recent Texas Supreme Court opinion merits scrutiny as it appears to elaborate upon a new approach to Texas jurisprudence regarding covenants not to compete. The defendant worked for the plaintiff as an at will employee. After receiving a promotion, the defendant was given an employment agreement containing a covenant not to compete. The plaintiff told the defendant that signing the agreement was a condition of continued employment, and, thus, the defendant signed the agreement. Other than the covenant not to compete, the pertinent part of the agreement for purposes of this case was as follows:

To assist Employee in the performance of his/her duties, Employer agrees to provide to Employee, special training regarding Employer’s business methods and access to certain confidential and proprietary information and materials belonging to Employer, its affiliates, and to third parties, including but not limited to, customers and prospects of the Employer who have furnished such information and materials to Employer under obligations of confidentiality.

The covenant not to compete was for a term of one year after termination, and provided that the defendant would not provide consulting services to any of the plaintiff’s clients to whom the defendant had provided services within the previous year. After the agree-

133. Id.
134. Id.
135. Id.
136. Id.
137. Id.
138. Id.
139. Id
140. Id. at *3.
143. Id.
144. Id.
145. Id.
146. Id.
147. Id.
ment was signed, the defendant received confidential information as well as specialized training.\textsuperscript{148} Subsequently, the defendant left the plaintiff and went to work for one of the plaintiff’s clients.\textsuperscript{149} The plaintiff sued alleging breach of the covenant not to compete and sought injunctive relief and damages.\textsuperscript{150} The defendant moved for summary judgment arguing the covenant was unenforceable as a matter of law.\textsuperscript{151} The defendant argued that under footnote six of Light v. Centel Cellular Co.,\textsuperscript{152} the defendant’s promises to provide confidential information and specialized training were illusory at the time the agreement was made and the covenant was therefore unenforceable.\textsuperscript{153} The district court granted the motion for summary judgment and the court of appeals affirmed.\textsuperscript{154} This appeal followed.\textsuperscript{155}

The Texas Supreme Court provided an analysis of its holding in Light.\textsuperscript{156} In that case, the Court analyzed the requirements for enforceability of a covenant not to compete under section 15.50 of the TEX. BUS. & COM. CODE—the Covenants Not to Compete Act.\textsuperscript{157} The Court had held that otherwise enforceable agreement under the Act could come from at will employment so long as the consideration for any promise was not illusory.\textsuperscript{158} In footnote six, cited by the defendant in the instant case, the Court discussed the requirement that the covenant be “ancillary to or part of an otherwise enforceable agreement at the time the agreement is made.”\textsuperscript{159} The Texas Supreme Court articulated its departure from Light noting that it “disagree[d] with footnote six insofar as it precludes a unilateral contract made enforceable by performance from ever complying with the Act because it was not enforceable at the time it was made.”\textsuperscript{160} However, the Court stated that it did agree with Light’s recitation of basic contract jurisprudence in footnote six—that is, “if only one promise is illusory, a unilateral contract can still be formed; the non-illusory promise can serve as an offer, which the promisor who made the illusory promise can accept by performance.”\textsuperscript{161}

The Supreme Court further explained that Light had held that a unilateral contract can never meet the requirements of the Act because such a contract is not immediately enforceable when made.\textsuperscript{162} In the instant case, the Court revisited the issue of what “at the time the agreement was made” means.\textsuperscript{163} The Court opined: “There is no sound reason why a unilateral contract made enforceable by performance should fail under the Act.”\textsuperscript{164} The Court then held that a covenant not to compete is not unenforceable under the Act solely because the employer’s promise is executory when made.\textsuperscript{165} If the agreement becomes enforceable after it is made because the employer performs the promise

\textsuperscript{148} Id.
\textsuperscript{149} Id.
\textsuperscript{150} Id. at *2.
\textsuperscript{151} Id.
\textsuperscript{152} 883 S.W.2d 642 (Tex. 1994).
\textsuperscript{153} Sheshunoff, 2006 WL 2997287 at *2.
\textsuperscript{154} Id.
\textsuperscript{155} Id.
\textsuperscript{156} Id. at *3.
\textsuperscript{157} Id.
\textsuperscript{158} Id.
\textsuperscript{159} Id. at *4.
\textsuperscript{160} Id. at *5.
\textsuperscript{161} Id.
\textsuperscript{162} Id.
\textsuperscript{163} Id.
\textsuperscript{164} Sheshunoff, 2006 WL 2997287 at *5.
\textsuperscript{165} Id. at *9.
under the agreement and a unilateral contract is formed, the covenant is enforceable if all
the other requirements under the Act are met.166 The Texas Supreme Court concluded
that in the instant case, these other requirements were met—the agreement had become
enforceable when the plaintiff had provided the confidential information and specialized
training. Therefore, the High Court reversed the judgment of the court of appeals and
remanded the case to the trial court for further proceedings.167

C. Experts

* Mack Trucks v. Tamez168

Albeit in a personal injury context, this Texas Supreme Court case merits scrutiny
because of its thorough discussion of Texas expert jurisprudence. In this case involving a
fatal truck accident, the trial court excluded expert testimony regarding what caused a
post-accident fire that burned the truck and its driver.169 After the driver’s death, a suit
was filed against, among others, the truck’s manufacturer alleging that the defendant
defectively designed, manufactured and marketed the truck.170 The plaintiffs’ theories
were based on the contention that fuel from the truck’s fuel system originated the fire.171

In connection with the claims, the plaintiffs identified an expert on post-collision,
fuel-fed fires.172 The defendant moved to exclude the expert testimony as unreliable, and
moved for summary judgment.173 A Robinson hearing was scheduled and heard.174 During
the hearing, the plaintiffs’ expert testified.175 He opined that the fire was started by the
truck’s battery, which was located too close to the fuel tanks, igniting the fuel which in
turn ignited the truck’s cargo of crude oil.176 The trial court granted the motion to
exclude the expert testimony as to causation.177 The plaintiffs later moved for the trial
court to reconsider its decision, which the court denied but did allow the expert to testify
again to create a bill of exceptions.178 The trial court granted the defendant’s motion for
summary judgment.179

The court of appeals reversed the trial court’s judgment, concluding that the court
abused its discretion in excluding the expert testimony.180 The court of appeals deter-
mined that the testimony did provide some evidence of causation.181 The opinion
indicated that in reaching the decision the court considered the testimony from both the
Robinson hearing and the bill of exceptions.182 This appeal ensued.183

The defendant urged that the trial court correctly excluded the expert testimony.184
The defendant asserted, *inter alia*, that the court of appeals erred in considering the

166. Id.
167. Id. at *11.
170. Id.
171. Id.
172. Id.
173. Id.
174. Id.
175. Id.
176. Id.
177. Id.
179. Id.
180. Id. at *2.
181. Id.
182. Id.
183. Id.
184. Id.
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expert's causation testimony from both the Robinson hearing and the bill of exceptions.\textsuperscript{185} The plaintiffs argued that whether the bill of exceptions testimony was considered is not relevant because the testimony added nothing to the Robinson hearing testimony.\textsuperscript{186}

The Texas Supreme Court first considered the bill of exceptions testimony.\textsuperscript{187} In reviewing the bill testimony as well as the hearing testimony, the Court identified more than one piece of evidence that was discussed in the bill of exceptions testimony that was not discussed during the Robinson hearing.\textsuperscript{188} The Supreme Court noted that except for fundamental error, appellate courts are not authorized to consider issues not properly raised by the parties.\textsuperscript{189} The High Court has identified instances in which the record affirmatively and conclusively shows that the court rendering judgment was without subject matter jurisdiction as fundamental error.\textsuperscript{190} The court of appeals did not classify the trial court's refusal to allow the plaintiffs to present further evidence and to reconsider its ruling excluding the expert testimony as fundamental error and neither did the Supreme Court.\textsuperscript{191} The court of appeals erred in considering the testimony from the bill of exceptions without having first determined that the trial court erred in refusing to admit the testimony and reconsider its decision to exclude it.\textsuperscript{192} The Court opined that pursuant to the record and issues presented to it, it could not consider the bill of exceptions testimony in determining whether the trial court erred in excluding the expert's causation testimony.\textsuperscript{193}

The Texas Supreme Court then considered the reliability of the expert's testimony.\textsuperscript{194} The Court provided practitioners with a review of expert testimony jurisprudence.\textsuperscript{195} An expert witness can give testimony regarding scientific, technical, and other specialized matters if the expert is qualified and the opinion is relevant and based on a reliable foundation.\textsuperscript{196} The Court noted it has identified several non-exclusive factors that trial courts should consider when determining the reliability of expert testimony involving scientific knowledge: (i) the extent to which the theory has been or can be tested; (ii) the extent to which the technique relied upon the subjectivity of the expert; (iii) whether the theory has been subjected to peer review; (iv) the potential rate of error; (v) whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and (vi) the non-judicial uses that have been made of the theory or technique.\textsuperscript{197} The Court recognized that these factors may not apply when testimony is not scientific, but instead involves specialized knowledge.\textsuperscript{198} Even then, there must be some basis for the opinion to demonstrate its reliability—an expert's opinion alone will not suffice.\textsuperscript{199}

The Supreme Court addressed the reliability factors.\textsuperscript{200} The Court explained that the court of appeals noted that the expert's opinion applied his knowledge, training and

\begin{thebibliography}{9}
\bibitem{185} Id.
\bibitem{186} Id.
\bibitem{187} Id.
\bibitem{188} \textit{Tamez}, 2006 WL 3040534 at *2.
\bibitem{189} Id. at *3 (citing \textit{Interest of B.L.D.}, 113 S.W.3d 340, 350–52 (Tex. 2003)).
\bibitem{190} Id.
\bibitem{191} Id.
\bibitem{192} Id.
\bibitem{193} Id.
\bibitem{194} Id.
\bibitem{195} Id.
\bibitem{196} Id. (citing \textit{Tex.R. Evid.} 702).
\bibitem{197} Id.
\bibitem{188} \textit{Tamez}, 2006 WL 3040534 at *3.
\bibitem{199} Id.
\bibitem{200} Id. at *4.
\end{thebibliography}

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experience to the data and the methodology was not easily tested by objective criteria.201 The court of appeals concluded that under these circumstances the reliability of the expert’s opinion was not properly evaluated by the Robinson factor analysis, but instead used the analytical gap test.202 The defendant argued that the court of appeals’ analysis was flawed.204 The defendant contended that the inability to demonstrate at least one Robinson factor coupled with the inability to eliminate the truck’s cargo of crude oil as the source of the fire rendered the testimony unreliable.205 In contrast, the plaintiffs argued that because the expert’s testimony was based on his training and experience, not science, application of the analytical gap test was correct.206 The plaintiffs asserted that the opinion was reliable because there were no analytical gaps in the analysis.207

The Texas Supreme Court explained that in recognizing that the Robinson factors may not apply when testimony is not scientific, but instead involves specialized knowledge, it did not mean to imply that trial court should never consider the Robinson factors when evaluating such testimony.208 The criteria for assessing reliability will vary depending on the nature of the case.209 The High Court summarized as follows: “Thus, a trial court should consider the factors mentioned in Robinson when doing so will be helpful in determining reliability of an expert’s testimony, regardless of whether the testimony is scientific in nature or experience-based.”210

The Court then applied these criteria to the expert’s analysis as testified to at the Robinson hearing.211 The High Court found several “holes” in the analysis.212 The Court opined that the testimony at issue merely set out facts which were consistent with the expert’s opinions, and aided in his conclusion.213 The Court noted that “the reliability inquiry as to expert testimony does not ask whether the expert’s conclusions appear to be correct; it asks whether the methodology and analysis used to reach those conclusions is reliable.”214 Thus, the Texas Supreme Court concluded that the trial court did not abuse its discretion when it excluded the expert’s testimony on causation.215

D. Procedure

* Hall v. White, Getgey, Meyer Co., LPA*216

With a panel comprising Chief Judge Edith H. Jones, and Circuit Judges Harold R. DeMoss and Priscilla Richman Owen, the Fifth Circuit Court of Appeals heard a diversity appeal involving the law of the case doctrine.217 The case had a lengthy history, but the Court only recounted the facts necessary to understand the pertinent issues.218 The

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201. Id.
204. Id.
205. Id.
206. Id.
207. Id.
208. Id.
209. Id.
210. Id. (citing Kumho Tire v. Carmichael, 526 U.S. 137, 139, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999)).
211. Id. at *5–6.
212. Id. at *6.
214. Id. (citing Kerr-McGee Corp. v. Helton, 133 S.W.3d 245, 254 (Tex. 2004)).
215. Id.
218. Id.
plaintiff sued the defendant, a law firm, for legal malpractice in a diversity suit in which Texas law governed.\textsuperscript{219} A jury found as follows: (i) the law firm was negligent; (ii) the damages were $675,000; (iii) the defendant was 51\% responsible for the plaintiff’s injuries; and (iv) a settling party was 49\% responsible.\textsuperscript{220} The magistrate entered a settlement credit and judgment against the defendant with pre-judgment interest at 10\% per annum from the date the suit was filed, and post-judgment interest at the same rate.\textsuperscript{221}

Both parties appealed and the Fifth Circuit held that the settlement credit was too high and issued a mandate that provided that the district court’s judgment was affirmed as modified and remanded for further proceedings in accordance with the opinion.\textsuperscript{222} Neither the Circuit Court opinion nor the mandate expressly addressed interest.\textsuperscript{223} On remand, the district court followed the mandate, leaving the interest from the original judgment intact.\textsuperscript{224} The defendant filed a motion citing Federal Rule of Civil Procedure 37(b) and seeking to amend that judgment, asserting that the Fifth Circuit opinion and mandate failed to contain instructions regarding interest, and therefore, the district court lacked the authority to award interest.\textsuperscript{225}

The Fifth Circuit reviewed Rule 37(b).\textsuperscript{226} Rule 37(b) provides: “If the court modifies or reverses a judgment with a direction that a money judgment be entered in the district court, the mandate must contain instructions about the allowance of interest.”\textsuperscript{227} The defendant asserted, in the alternative, that if interest was awarded the rate of interest should be limited in accordance with the amendments to the Texas Financial Code.\textsuperscript{228}

While the motion to amend the judgment was pending in the district court, the plaintiff filed the following in the Circuit Court: (i) a petition for writ of mandamus seeking to require the lower court to lift the stay on post-judgment discovery; (ii) a petition for writ of prohibition seeking to prohibit the lower court from amending its judgment; and (iii) a motion to clarify the mandate.\textsuperscript{229} The plaintiff contended that the Fifth Circuit’s judgment and mandate necessarily included interest.\textsuperscript{230} The Court denied the petitions for mandamus and prohibition without prejudice.\textsuperscript{231} The magistrate entered an order in which she concluded that she had no authority to award interest, and further concluded the appropriate procedure for the plaintiff to recover interest was to file a motion to recall and reform the mandate.\textsuperscript{232} The plaintiff appealed, and it is that appeal which was the subject of the instant opinion.\textsuperscript{233} The plaintiff also filed, in the alternative, a petition for writ of mandamus to direct the district court to reinstate the judgment including interest and a motion to recall and reform the mandate.\textsuperscript{234}

The defendant responded to the plaintiff’s petition and motion by arguing, \textit{inter alia}, that the plaintiff had an adequate remedy by appealing the Second Amended Judg-

\textsuperscript{219} Id.
\textsuperscript{220} Id.
\textsuperscript{221} Id.
\textsuperscript{222} Id.
\textsuperscript{223} Id.
\textsuperscript{224} Id.
\textsuperscript{225} Id.
\textsuperscript{226} Id. at *2.
\textsuperscript{227} \textit{Hall}, 2006 WL 2686950 at *2.
\textsuperscript{228} Id.
\textsuperscript{229} Id.
\textsuperscript{230} Id.
\textsuperscript{231} Id.
\textsuperscript{232} Id.
\textsuperscript{233} Id.
\textsuperscript{234} Id.
The defendant also asserted the appeal was untimely. The Fifth Circuit determined the appeal was timely.

The first question the Fifth Circuit considered was whether the law of the case doctrine resolved the instant issue. The defendant contended that the Court decided the issues presented when it denied the plaintiff’s petition for writ of mandamus and its alternative motion to recall the mandate. The Fifth Circuit disagreed. The Circuit Court explained that the petition and alternative motion were presented in an original proceeding—the Court did not rule on the merits of the request to recall the mandate. The defendant urged the Circuit Court to deny the petition without reaching the merits by urging the plaintiff had an adequate remedy via appeal. The plaintiff had filed just such an appeal, which was the subject of the instant case. Further, the Court’s order in the mandamus proceeding did not rule on the motion to recall the mandate. The order merely declined to direct the district court to recall and reform its mandate. Thus, the Fifth Circuit concluded that the law of the case doctrine did not foreclose a motion to recall and amend the mandate as part of the instant appeal.

The Circuit Court also addressed the question of pre-and post-judgment interest. The magistrate had utilized Texas law to determine the rate of interest that applied. The Circuit Court noted that the post-judgment interest rate for judgments in federal courts is governed by federal statute—20 U.S.C. § 1961(a). Pre-judgment interest in a diversity case is governed by state law. At the time of the magistrate’s order, Texas law provided for a floor of 10% for pre-judgment interest. Subsequently, the legislature amended the rate to 5%. The new rate applied to final judgments signed or subject to appeal on or after the effective date of the amendment. Because the judgment on appeal was not entered until after the effective date of the amendment, the later rate controlled the interest rates in the instant case. Therefore, the Fifth Circuit reversed the district court judgment in part and remanded for calculation of award and interest in accordance with the opinion.

235. Id. at *3.
236. Id.
238. Id.
239. Id.
240. Id.
241. Id.
242. Id.
243. Id.
244. Id.
245. Id.
246. Id. at *4.
248. Id.
249. Id.
250. Id.
251. Id.
252. Id.
253. Id.
254. Id.
255. Id. at *7.
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- Skidmore Energy, Inc. v. KPMG, et al. 256

A panel comprising Circuit Judges Jerry E. Smith, Jacques L. Wiener, Jr. and Carl E. Stewart considered this appeal from a district court’s award of sanctions against the appellants and their trial counsel under Federal Rule of Civil Procedure 11. 257 The district court apportioned the sanctions three-fourths to trial counsel and one-fourth jointly to the appellants. 258 The subject of the instant appeal was solely the one-fourth apportioned to the appellants. 259

The Fifth Circuit Court of Appeals first reviewed the facts and proceedings of the case. 260 The lawsuit addressed an ongoing dispute that arose from oil and gas exploration activities in Morocco. 261 One year after the appellants were sued in Morocco for their alleged breach of contract, fraud, and mismanagement of the venture, they filed the instant lawsuit in the Northern District of Texas addressing the same matters already being litigated in Morocco. 262 The appellants alleged, inter alia, that the defendants were involved in financing terrorist organizations, money laundering, and organized crime. 263 The complaint was ultimately dismissed. 264 The appellees filed a motion in the district court for Rule 11 sanctions, asserting that the suit lacked both legal and factual evidentiary support. 265 Two hearings on the motion were conducted, at the conclusion of which, the district court found that Rule 11 violations had been committed and that the appellees’ reasonable litigation expenses and attorneys’ fees were an appropriate sanction. 266 This appeal followed. 267

The Circuit Court reminded practitioners that a district court abuses its discretion if it imposes sanctions based on: (i) an erroneous view of the law; or (ii) a clearly erroneous assessment of the evidence. 268 The Fifth Circuit first addressed the propriety of sanctions against the appellants. 269 According to the Court, the district court did not abuse its discretion in awarding sanctions against the appellants. 270 Rule 11 provides for sanctions against “the attorneys, law firms, or parties that have violated [the Rule] or are responsible for the violation.” 271 The Circuit Court considered the Advisory Committee notes which further made clear that:

If the duty imposed by the rule is violated, the court should have the discretion to impose sanctions on either the attorney, the party the signing attorney represents, or both, . . . and the new rule so provides . . . . Even though it is the attorney whose signature violates the rule, it may be appropriate under the circumstances of the case to impose a sanction on the client. 272

256. No. 05-10819, 455 F.3d 564, 2006 WL 1875394 (5th Cir. (Tex.) July 7, 2006).
257. Id.
258. Id.
259. Id.
260. Id.
261. Id.
262. Id.
263. Id.
264. Id.
265. Id.
266. Skidmore, 455 F.3d 564, 2006 WL 1875394 at *1.
267. Id.
268. Id. at *2.
269. Id.
270. Id.
271. Id.
272. Id.

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The Court opined that it has previously approved sanctions against a client as well as his attorney, because both have a duty "to conduct a reasonable inquiry into the facts or law before filing the lawsuit." \(^{273}\)

Although a represented party may be held responsible for a pleading that violates Rule 11, "the 1993 Amendment to the Rule specifically provides that monetary sanctions may not be awarded against a represented party for a violation concerning legally frivolous pleadings, which are within the province of lawyers." \(^{274}\) The appellants thus argued that the district court abused its discretion in sanctioning them for filing a legally frivolous pleading, and further asserted that the district court made no specific findings that they had knowingly participated in sanctionable conduct. \(^{275}\) The Fifth Circuit opined that although this last point was debatable, the district court would have abused its discretion if it had sanctioned the appellants for violating Rule 11 by filing a legally frivolous pleading. \(^{276}\)

The Circuit Court explained, however, that the district court did not sanction the appellants for the legally frivolous nature of their pleading—it sanctioned them for the factually groundless allegations in their complaint. \(^{277}\) The district court observed the lack of legal or factual support articulated for the pleadings, and repeatedly noted the failure by the plaintiffs to articulate any evidentiary support for their claims. \(^{278}\) Thus, the Fifth Circuit concluded that the district court did not abuse its discretion in awarding sanctions against the appellants based on the lack of support for the factual allegations in their pleading. \(^{279}\)

\(^{273}\) Id.
\(^{274}\) Id.
\(^{275}\) Skidmore, 455 F.3d 564, 2006 WL 1875394 at *2.
\(^{276}\) Id.
\(^{277}\) Id.
\(^{278}\) Id.
\(^{279}\) Id.

\(^{280}\) Acosta, et al. v. Master Maintenance and Construction, Inc., et al. 280

With a panel comprising Circuit Judges E. Grady Jolly, Patrick E. Higginbotham and Jerry E. Smith, the Fifth Circuit Court of Appeals considered whether the instant action fell under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the Convention Act"). \(^{281}\) The Court began by explaining that among "the Convention Act's provisions are jurisdictional grants giving the federal district courts original and removal jurisdiction over cases related to arbitration agreements falling under the Convention." \(^{282}\) This appeal asked whether the appellants' action was related to an arbitration agreement falling under the Convention Act and, thus, removable to federal court. \(^{283}\)

The appellants were three people of over 2,000 plaintiffs who brought state law tort actions alleging injuries stemming from an accident at a facility in Louisiana. \(^{284}\) Louisiana state law allows direct actions against a tortfeasor's insurers, and, therefore, the plaintiffs named as defendants, in addition to the tortfeasor and several of its contractors, two foreign insurers whose insurance policies included arbitration clauses governing disputes over coverage. \(^{285}\)

The plaintiffs amended their complaint to include intentional tort causes of action. \(^{286}\) The foreign insurers notified the tortfeasor in writing that they were disputing insurance coverage.
coverage as a result of the new allegations. Subsequently, the foreign insurers notified the tortfeasor that they had commenced arbitration pursuant to the policies’ arbitration clauses. The foreign insurers removed this and other related cases to federal court, arguing that allegations of intentional tort created a coverage dispute between them and the tortfeasor, invoking the arbitration clauses in the insurance policies and bringing the action within the ambit of the Convention Act.

The plaintiffs filed a motion for remand to state court shortly thereafter, which was denied by the district court. The foreign insurers filed a motion to compel arbitration and stay the plaintiffs’ actions. The plaintiffs filed a motion requesting certification of the remand denial for immediate appeal. While the motions were pending, a settlement agreement was negotiated, but the appellants elected not to participate and pursued litigation, which was dismissed with prejudice on summary judgment. The appellants appealed only the jurisdiction of the district court. The Circuit Court opined if jurisdiction existed, it was to be found in the Convention Act.

The removal provision of the Convention Act provides as follows:

Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending. The procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal. For the purposes of Chapter 1 of this title any action or proceeding removed under this section shall be deemed to have been brought in the district court to which it is removed.

The parties agreed that the arbitration clauses fell under the Convention Act as defined in § 202. The Fifth Circuit noted that it must decide whether the action “relates to” the arbitration clauses within the meaning of § 205.

The Circuit Court explained that § 205 does not explicitly define when an action “relates to” an arbitration agreement. “However, the federal courts have recognized that the plain and expansive language of the removal statute embodies Congress’s desire to provide the federal courts with broad jurisdiction over Convention Act cases in order to ensure reciprocal treatment of arbitration agreements by cosignatories of the Convention.” The Fifth Circuit opined that the unambiguous policy in favor of recognition of arbitration agreements falling under the Convention Act is reflected in provisions incorporating by reference the Federal Arbitration Act, and independently and explicit-

287. Id.
288. Id.
289. Id.
290. Id.
291. Id.
293. Id.
294. Id.
295. Id.
296. Id. at *2 (quoting 9 U.S.C. § 205).
297. Id.
298. Id.
299. Id.
300. 9 U.S.C. § 208.
ly empowering courts to compel arbitration in accordance with the arbitration agreements involved. 301

The Fifth Circuit kept these considerations in mind and turned to the statutory text and meaning of the statutory phrase "relates to."302 The Court needed to determine whether the subject matter of the underlying lawsuit "relates to" the arbitration agreement in the insurance policies at issue.303 In Beiser v. Weyler,304 the Circuit Court examined the plain meaning of "relates to," relevant Supreme Court dicta, and Congressional use of the phrase in other statutes.305 The Fifth Circuit interpreted the phrase to mean "whenever an arbitration agreement falling under the Convention could conceivably affect the outcome of the plaintiff’s case, the agreement ‘relates to’ the plaintiff’s suit."306 However, the Court emphasized that the adopted rule for that case was not exhaustive of the cases in which jurisdiction would be appropriate.307

In the instant case, the appellants asserted that the definition used in Beiser meant that jurisdiction was lacking in this case because Louisiana's direct-action statute canceled the binding effect of the arbitration clauses.308 Therefore, whatever was decided in the arbitration proceedings would not affect the outcome of the litigation.309 The Court explained that even if the asserted effect of the Beiser rule on the arbitration clauses was correct, it did not dispose of the jurisdictional question—Beiser did not purport to establish a comprehensive rule disposing of all cases.310 Thus, the Fifth Circuit returned to the statutory text to determine whether the Convention Act's grant of jurisdiction extended to this case.311

The Court consulted the American Heritage Dictionary of the English Language, and determined that "relate" means "to have connection, relation, or reference." 312 The Circuit Court stated that "it is unarguable that the subject matter of the litigation has some connection, has some relation, has some reference to the arbitration clauses here."313 The appellants' assertion against the insurers was, at least in part, an assertion of policy coverage of the insured's alleged torts.314 The arbitration clauses here provide the forum for the resolution of disputes.315 Therefore, they are related to the appellants' disputed assertion of coverage and, hence, to the subject matter of the claims against the insurers.316 "Stated as a rule, a clause determining the forum for resolution of specific types of disputes relates to a lawsuit that seeks the resolution of such disputes."317 Thus, the Fifth Circuit concluded that the district court correctly determined that the instant case "relates to" an arbitration agreement falling under the Convention.318

303. Id.
304. 284 F.3d 665 (5th Cir.2002).
305. Acosta, 452 F.3d 373, 2006 WL 1549959 at *2 (e.g., 28 U.S.C. § 1334 (giving federal district courts jurisdiction over any state proceeding that "relates to" a bankruptcy case)).
306. Id. (citing Beiser, 284 F.3d at 669 (emphasis in original)).
307. Id.
308. Id. at *3.
309. Id.
310. Id.
311. Id.
313. Acosta, 452 F.3d 373, 2006 WL 1549959 at *3.
314. Id.
315. Id.
316. Id.
317. Id.
318. Id.