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Federal Jury Charge Practice

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INTRODUCTION

This paper addresses a topic about which Texas appellate practitioners are well-versed—submission of the jury charge—but from a federal perspective. We begin with the standard of review, turn to the rules governing requests and objections to instructions (Federal Rule of Civil Procedure 51), and review the tools for preserving error and raising charge complaints when there is a preservation problem. We then turn to the form of the verdict and devote significant space to understanding the difference between general and special verdicts (Federal Rule of Civil Procedure 49), why special verdict forms are favored, and review preservation and other procedural issues associated with the form of the verdict. This paper concludes with a topic that has vexed Texas courts for more than a decade (the submission of multi-theory claims, damages theories, and defenses). This is an important set of topics for an appellate lawyer because of the many differences between state and federal jury charge practice and the role federal law has played in the evolution of Texas jury charge practice.

I. STANDARD OF REVIEW

Appellate complaints about the jury charge are reviewed for abuse of discretion. *Miles v. HSC-Hopson Servs. Co.*, 625 Fed. App'x 636, 640 (5th Cir. 2015). A two-part test is applied to an appellate jury-charge complaint. *See Navigant Consulting Inc. v. Wilkinson*, 508 F.3d 277, 293 (5th Cir. 2007). *First*, charge errors will lead to reversal "only if the charge as a whole creates a substantial doubt as to whether the jury has been properly guided in its deliberations." *Colley*, 2010 U.S. App. LEXIS 8618, *4; *Taita Chem. Co. v. Westlake Styrene, LP*, 351 F.3d 663, 667 (5th Cir. 2003) (complaining party must show that the charge as a whole creates "substantial and ineradicable doubt whether the jury has been properly guided in its deliberations"); *Johnson v. Sawyer*, 120 F.3d 1307, 1315 (5th Cir. 1997) (appellant must demonstrate that "the charge as a whole creates substantial and ineradicable doubt about whether the jury has been properly guided in its deliberations"). *Second*, even if the charge is erroneous, reversal is only appropriate if, based on the entire record, it affected the outcome of the case. *Navigant*, 508 F.2d at 293; *Eagle Suspensions, Inc. v. Hellman Worldwide Logistics, Inc.*, 571 Fed. App'x 281, 292 (5th Cir. 2014) (ample of evidence of foreseeable consequential damages overcame challenge that the district court did not explicitly instruct the jury on "reasonable foreseeability).

"Perfection" is not the standard; if the instructions are "generally correct," any error is considered harmless. *Taita Chem.*, 351 F.3d at 667. Even erroneous jury instructions are not cause for reversal if the complained-of instruction could not have affected the result below. *Colley*, 2010 U.S. App. LEXIS 8619, *9; *Navigant*, 508 F.3d at 293 ("even where a jury instruction was erroneous, we will not reverse if we determine, based upon the entire record, that the challenged instruction could not have affected the outcome of the case.") (internal quotations omitted). An instruction is harmless if it is "apparent that the jury did not consider" it or the instruction was immaterial to the jury's ultimate determinations. *Id*. at *10; *see Martin v. MBank El Paso, N.A.*, 947 F.2d 1278, 1281 (5th Cir. 1991) (erroneous reasonable reliance instruction harmless because jury found no negligent misrepresentation); *Perry v. Chevron U.S.A., Inc.*, 887 F.2d 624, 628 (5th Cir. 1989) (erroneous contributory negligence instruction harmless because of jury's no-causation finding).

A failure to give a particular instruction is harmful error only if the instruction (i) was substantially correct, (ii) was not substantially covered in the charge as a whole, and (iii) was so important that the failure to submit the instruction impaired the party's ability to litigate a claim or defense. *Kanida v. Gulf Coast Med. Pers., L.P.*, 363 F.3d 568, 578 (5th Cir. 2004). Courts have found any error in failing to submit an instruction harmless when, for example, another instruction "clearly subsumes" an issue or the instruction does not correctly state the legal standard. *Thompson v. Connick*, 553 F.3d 836, 864 (5th Cir. 2008).

Courts have considered the failure to give an instruction in the damages context. An instructive example is the *Eagle Suspensions* case. 571 Fed. App'x 281 (5th Cir. 2014). The district court submitted a "loss of use" damages measure to the jury. *Id*. at 291. Although this was quite clearly a consequential damages measure, the district court did not state that these damages must be "reasonably foreseeable." *Id*. On appeal, the Fifth Circuit held that the failure to include this additional instruction was not an abuse of discretion because the district court's instruction did state that damages must have been "proximately caused by the defendant Hellman's failure to comply with the agreement." *Id*. The proximate-cause instruction did the work of a foreseeability instruction and was sufficient to survive appellate review. *Id*. Of note, the Fifth Circuit observed that "although the challenged instruction likely should have been rendered clearer and more

explicit for the ordinary juror, the instruction was nonetheless correct." *Id*.

In contrast, if an instruction actually given improperly states the burden of proof on a defensive issue, reversal is appropriate. *SEC v. Snyder*, 292 Fed. App'x. 391, 405-07 (5th Cir. 2008) (reversing and remanding for new trial when defendant's reliance on accounting in securities fraud case improperly required the defendant to show that he asked for and received advice on a specific point from his accountant, citing to cases involving reliance on counsel as factor to be considered in determining good faith). The burden-of-proof problem often arises in fiduciary-duty cases. In *Eagle Suspensions*, the defendant complained that the district court improperly shifted the burden of proof requiring the defendant to show that it complied with its fiduciary duties. 571 Fed. App'x at 292-93. Applying Texas fiduciary-duty law, the Fifth Circuit concluded that the district court correctly placed the burden on the defendant because there was sufficient evidence that a relationship of trust and confidence existed between the plaintiff and defendant. *Id*. at 293.

A new trial is the proper remedy when the judgment is reversed based on charge error. *Aero Int'l, Inc. v. United States Fire Ins. Co.*, 713 F.2d 1106, 1113 (5th Cir. 1983); *see also Hartsell*, 207 F.3d at 276 (Dennis, J., concurring) (disagreeing with majority's limited remand and instead concluding that a new trial on issues of liability and damages was appropriate). To preserve an opportunity for a retrial based on a complaint that it was "impossible to know" whether the jury relied on insufficient evidence to support a trade-secrets claim in the context of a general verdict, the party was required to preserve that complaint by requesting a special verdict under Rule 49(a), a request for answers to questions under Rule 49(b), a charge objection under Rule 51, a verdict clarification, or a complaint about "inherent ambiguity" in the general verdict. *Wellogix, Inc. v. Accenture, L.L.P.*, 716 F.3d 867, 878 (5th Cir. 2013). The defendant raised none of these challenges at trial; therefore, the Fifth Circuit declined to consider the new-trial request. *Id*.

In a diversity case, state law governs the substance of a jury charge while federal law governs its form. *Broad Satellite Int'l, Inc. v. Nat'l Digital Television Ctr.*, 323 F.3d 339, 347 (5th Cir. 2003). "Unlike Texas courts, federal courts are free to tell juries the effects of their answers" or otherwise comment on the weight of the evidence. *Martin v. Texaco, Inc.*, 726 F.2d 207, 216 (5th Cir. 1984) (no error in telling the jury that plaintiff would not recover actual damages based on Texas workers' compensation law). This is true for both general and special verdicts, discussed in detail below. *See Perricone v. Kansas City So. R.R. Co.*, 704 F.2d 1376, 1378 (5th Cir. 1983) ("In a Rule 49(a) submission it is proper to tell the jury the effect of their answers to interrogatories.").

II. INSTRUCTING THE JURY

The current version of Federal Rule of Civil Procedure 51 became effective in 2003. These amendments repeal the former Rule 51 and put into place a new rule—both structurally and substantively—that clarifies certain aspects of charge practice that the former rule did not address. According to the Advisory Committee, the purpose of these amendments is to "capture many of the interpretations that have emerged in practice" and "make uniform the conclusions reached by a majority of decisions on each point." FED. R. CIV. P. 51 advisory committee's notes. In addition, the Committee noted, "[a]dditions are made to cover some practices that cannot now be anchored in the text of Rule 51." *Id*. That is, amended Rule 51 brings the procedural rules into line with established and accepted practices.

A. Requests

Rule 51(a) governs the timing of a party's request for jury instructions. The rule widens a party's opportunities to request jury instructions by creating two "phases" in which a requesting party may file requests for jury instructions *and* expressly grants district courts the authority to direct the parties to furnish a proposed jury charge before trial (although this was already the practice in most district courts).

The former rule did not expressly provide for a party to make a request for jury instructions "after the close of evidence" as the new rule does. And the new rule "replac[es] language that seemed to require parties to submit proposed instructions *only* at the close of evidence and during trial." Judge Lee H. Rosenthal, *Developments in the Federal Rules of Civil Procedure*, THE ADVOCATE, Winter 2003, at 96 (emphasis added).

Under the new rule, at the "close of evidence or an earlier reasonable time" (*as directed by the trial court*), a party may request that the court instruct the jury as indicated in the requests. FED. R. CIV. P. 51(a)(1) The committee recognized that setting a pretrial request deadline (as many courts have) may prevent consideration of evolving legal and evidentiary issues. *See* FED. R. CIV. P. 51 advisory

committee's notes. Accordingly, under the new rule, a party may also request jury instructions after the close of evidence in two circumstances: (1) if instructions on a particular issue "could not reasonably have been anticipated" when the party requested instructions under Rule 51(a)(1), or (2) with leave of court.[1] FED. R. CIV. P. 51(a)(2)(B).

The Fifth Circuit recently invoked the additional instruction rule in a Fair Labor Standards Act case. Before the district court read the jury instructions, plaintiff's counsel asked for an additional instruction based on a Labor Department regulation. *See Miles v. HSC-Hopson Servs. Co.,* 625 Fed. App'x 636, 640 (5th Cir. 2015). The district court provided the instruction, and on appeal, the defendants complained about the late request for an instruction. The Fifth Circuit—noting that the plaintiff followed Rule 51 and observing that defendants offered no reason the instruction was legally wrong—concluded that the district court did not abuse its discretion in providing this instruction.

Presenting a specific written request for an instruction is a prerequisite to challenging the failure to give an instruction on appeal. *Kanida*, 363 F.3d at 580; *see Colley*, 2010 U.S. App. LEXIS 8619, at *7 (failure to submit a vicarious-liability instruction waived any complaint about the failure to instruct the jury on vicarious liability). The proposed instruction must correctly state the law. *Federal Deposit Ins. Corp. v. Mijalis*, 15 F.3d 1314, 1318 (5th Cir. 1994). A party is not "entitled to have the jury instructed in the precise language or form [it] suggest[s]." *Wilson v. Zapata*, 939 F.2d 260, 270 (5th Cir. 1991); *Jackson v. Firestone Tire & Rubber Co.*, 788 F.2d 1070, 1075 (5th Cir. 1986) ("It is not incumbent upon a trial court to adopt verbatim any of the parties' suggested wording of specific instructions, issues, or definitions."). Keep in mind that "the defendant has no duty to ensure that the plaintiff has furnished jury questions covering all fact issues necessary to his cause of action." *Hadley v. VAM P.T.S.*, 44 F.3d 372, 375 (5th Cir. 1995) (rejecting plaintiff's contention that the defendant waived the failure to find actual damages as a predicate for exemplary damages by not objecting to the absence of an actual damages submission to the jury).

[1] The Committee recommends that courts use the heightened plain-error standard set out in Rule 51(d)(2) in determining whether the court should grant leave to file an untimely jury-instruction request. FED. R. CIV. P. 51 advisory committee's notes.

B. Providing Instructions and Permitting Objections

Rule 51 also sets out the preferred procedure for informing the parties of the court's instructions and the requirements for a timely and specific objection to the court's charge. The standard for specificity under the new rule is unchanged: the complaining party must state "distinctly the matter objected to and the grounds for the objection." FED. R. CIV. P. 51(c)(1). The objection must be brought to the trial court's attention. *Russell v. Plano Bank & Trust*, 130 F.3d 715, 719-20 (5th Cir. 1997). A "general" objection will not do. *Id*. Neither will objections directed to the charge as a whole that do not indicate "specific objections." *Positive Black Talk Inc v. Cash Money Records Inc.*, 394 F.3d 357, 368-69 (5th Cir. 2004) (complaints directed at copyright infringement charge in its entirety were not preserved). A request for an alternative instruction will not necessarily preserve a complaint for appeal. *Taita Chem*, 351 F.3d at 667; *Hartsell v. Dr. Pepper Bottling Co. of Tex.*, 207 F.3d 269, 273 (5th Cir. 2000) (submission of an instruction "that differs from that ultimately given" may not satisfy Rule 51's objection requirement). A proposed instruction must make the party's "position sufficiently clear to the court to satisfy Rule 51's objection requirement." *Kelly v. Boeing Petroleum Servs., Inc.*, 61 F.3d 350, 361 (5th Cir. 1995).

The amended rule "carr[ies] forward the opportunity to object" but "makes explicit the opportunity to object on the record." FED. R. CIV. P. 51 advisory committee's notes. The amended rule ties the court's obligation to inform the parties of the instructions and give them an opportunity to object together with the timeliness of an objection. Under Rule 51(b)(1), the district court "must inform the parties of its proposed instructions and proposed action on the requests before instructing the jury and before final arguments" and must "give the parties on opportunity to object on the record and out of the jury's hearing to the proposed instructions and actions on requests before the instructions and arguments are delivered." FED. R. CIV. P. 51(b)(1), (2). "The purpose of [Rule 51] is to permit counsel to argue effectively on the evidence and to know in advance the guiding principles under which closing argument should be made." *Jones v. Southern Pacific R.R.*, 962 F.2d 447, 451 (5th Cir. 1992).

Courts interpret these requirements to mean that the trial court "should not . . . allow[] the jury to retire to its deliberations before giving counsel the opportunity to object" to the jury charge. *Doucet v. Gulf Oil Corp.*, 783 F.2d 518, 523 (5th Cir. 1986). The

purpose of requiring objections before deliberations begin is to "prevent unnecessary retrials by forcing the parties to raise objections to the charge in time for the trial judge to correct any errors before the jury begins to deliberate." *Groden v. Allen*, 279 Fed. App'x. 290, 292 (5th Cir. 2008) (court provided opportunity for objections at the close of the plaintiff's case and heard oral objections after the charge was read, but before the jury began deliberations). Off-the-record objections do not preserve error. *Positive Black Talk*, 394 F.3d at 368-69 ("[O]ff-the-record objections, regardless of how specific, cannot satisfy Rule 51's requirements.").

The rule thus attempts to clean-up procedures district courts have traditionally used to handle charge objections and requires the court to provide the parties a specific opportunity to lodge objections *on the record*. *See, e.g., Pierce v. Ramsey Winch Co.*, 753 F.2d 416, 424 (5th Cir. 1985) (summarizing a variety of approved procedures for allowing parties to make objections); *Wilson v. Zapata Off Shore Co.*, 939 F.2d 260, 269-70 (5th Cir. 1991) (emphasizing the importance of the opportunity to present objections on the record); *Doucet*, 783 F.2d at 523 (failure to allow objections before the jury retires excuses formal compliance with Rule 51). The on-the-record requirement also resolved an apparent split of authority. *Compare Russell*, 130 F.3d at 720 n.2 (5th Cir. 1997) (holding that off-the-record objections do not satisfy Rule 51) *with Niehas v. Liberio*, 973 F.2d 526 (7th Cir. 1992) ("nothing in the text of Rule 51 requires the objection to be stated on the record").

If the district court follows this procedure, the objection is timely if the complaining party objects when the court provides the "opportunity" under Rule 51(b)(1). If a party does not learn of an instruction or an action on a request before the jury is instructed and before final jury arguments, as provided by Rule 51(b)(1), then the party must object "promptly after learning that the instruction or request will be, or has been, given or refused." FED. R. CIV. P. 51(c)(2)(B). Thus, the rule provides a limited fall-back mechanism for parties to object when the court fails to advise the parties of its proposed action on a request for jury instructions. *See Matherne v. Wilson*, 835 F.2d 752, 762 (5th Cir. 1988).

One issue that can arise under this provision of Rule 51 is the late arrival of an instruction, theory of liability, or damages submission in the court's charge. For example, in *Streber v. Hunter*, an additional damages measure for "the reasonable value of time spent 'attempting to resolve the situation'" "was thrown out during the charge conference, only to mysteriously appear in some copies of the jury charge, including the one read and presented to the jury." 221 F.3d 701, 733 (5th Cir. 2000) (suggesting the measure was included in the version of the charge read to the jury, but not distributed to the parties, as a result of a computer error of some kind). Despite the district judge's acknowledgement that this measure of damages should not have been awarded, the trial court "inexplicably" entered judgment on this measure. *Id.* The Fifth Circuit vacated this part of the damages award because the judgment violated the defendant's due-process rights. *Id*. The court explained: "Having the correct version of the jury instructions in front of [the parties], so as to have an opportunity to comment on each part of those instructions should they so choose, must be protected." *Id*.

C. Preserving Error under Rule 51

Under former Rule 51, to preserve charge error (for either giving a particular instruction or refusing to give a particular instruction), the complaining party was required to object to that instruction "before the jury retires to consider its verdict." Former FED. R. CIV. P. 51 (repealed Dec. 1, 2003). The amended rule maintains the distinction between instructions "actually given" and those that the district court fails to give. For instructions the district court actually gives, the complaining party must make a timely and sufficiently specific objection under Rule 51(c). FED. R. CIV. P. 51(c),(d)(1)(A); *Russell v. Plano Bank & Trust*, 130 F.3d 715, 719 (5th Cir. 1997) ("A prerequisite to our review of the instructions in this manner, however, is that the objection must have been brought to the attention of the district court."). The failure to do so waives a complaint about an improper jury instruction. *See Eastman Chem. Co. v. Plastipure, Inc.*, 775 F.3d 230, 240 (5th Cir. 2014) (complaint that the complained-of conduct discussed in jury instructions constituted commercial speech was not preserved because there was no objection during the charge conference).

The rule also creates a new exception for instructions requested, but not given. For a failure to give an instruction, the safest course remains to (1) make a proper request under Rule 51(a) and to (2) make a timely and sufficiently specific objection under Rule 51(c). *See* FED. R. CIV. P. 51(d)(1)(A),(B). Cases decided under former Rule 51 held that a request—by itself—was insufficient to preserve error. *See, e.g.,* FED. R. CIV. P. 51 advisory committee's notes; *McDaniel v. Anheuser-Busch, Inc.*, 987 F.2d 298, 306 (5th Cir. 1993).

The rule maintains this practice but also creates an exception to this "dual" assignment-of-error procedure

when the district court makes "a definitive ruling on the record" rejecting the request. FED. R. CIV. P. 51(d)(1)(B); *see also Taita Chem. Co. v. Westlake Styrene, LP*., 351 F.3d 663, 667 (5th Cir. 2003) (explaining that there is no reason to object if a "further objection would be unavailing"). "Only when the appellate court is sure that the trial court was adequately informed as to a litigant's contentions may the appellate court reverse on the basis of jury instructions to which there was no formal objection." *Russell*, 130 F.2d at 720. This definitive-ruling exception applies if a party "previously filed sufficient objections," a party does not object after the court "intimate[s] that no more objections would be heard," or an "emphatic ruling" renders any further objection futile. *Taita*, 351 F.3d at 667-68. That is, when a party properly requests an instruction under Rule 51(a) *and* the district court definitively rejects the request, a separate objection is not required.

D. A Series of Preservation Problems

1. Let's Move Along Counsel . . .

What happens when the trial judge—as is often the case—wants to move the case along and limits a party's ability to object? That issue has come up in two Fifth Circuit cases. In *Crist v. Dickson Welding, Inc.*, 957 F.2d 1281 (5th Cir. 1992), the party objected at the charge conference but did not raise its objection again after the final charge was provided. The district court had already ruled on the issue, and the court wanted to expedite the proceedings. The Fifth Circuit found no waiver. *Crist* reflects an interesting viewpoint about the relative importance of the charge conference—held before the final charge is presented to counsel. Objections at the charge conference do not "automatically relieve counsel of the duty to object at the close of instructions before the jury retires." *Id*. at 1287. Allowing the parties to object again after the final charge is presented to counsel is an "admirable practice and gives the judge the opportunity to modify his charge in light of objections informally stated at the charge conference." *Id*.

In *Thompson & Wallace of Memphis, Inc. v. Falconwood Corp.*, 100 F.3d 429 (5th Cir. 1996), plaintiffs' counsel offered to go through each of his objections, but the trial judge preferred that the objections be submitted as a "package." *Id*. at 433. The trial court ordered the same thing for the defendant. *Id*. The Fifth Circuit held that because the trial court did not allow the parties to specifically object to the failure to include proposed language (in this case the submission of whether a joint venture existed), there was no waiver of defendant's complaint. *Id*. The court reasoned that a "contrary rule would require litigants to disregard a court's directive. . . . While that may be necessary in other contexts, it is not called for here." *Id*.

2. Written Objections

What about written objections? In *Bender v. Brumley*, the defendants asserted that the plaintiff's complaints about the trial court's excessive-force charge were not preserved. 1 F.3d 271 (5th Cir. 1993). The Fifth Circuit disagreed. The plaintiff did not make oral on-the-record objections to the charge when the trial court sought objections. But the Fifth Circuit concluded that this failure was "immaterial" because the plaintiff had filed pretrial written objections to the jury instructions.

3. Was Error Preserved?

a. Yes

The Fifth Circuit has found error preserved in "close cases" even when the precise objection to an instruction actually given was not stated on the record. In *SEC v. Snyder*, the defendant never "specifically stated that the district court's instruction improperly shifted the burden of proof"—the issue presented on appeal. 292 Fed. App'x. 291, 405 n.2 (5th Cir. 2008). The defendant instead argued that he was not presenting accountant-reliance as an affirmative defense, made objections at the charge conference "in response to the SEC's contention that [the defendant] had the burden of proof," and he "directed the court to appropriate legal authority." *Id*. The court held that these objections taken together were sufficient "to bring into focus the nature of the alleged error." *Id*.

Castellano v. Fragozo is another such example. 352 F.3d 939 (5th Cir. 2003) (en banc). A divided en banc court was faced with the question whether malicious prosecution by itself violated the United States Constitution and is thus actionable under 42 U.S.C. § 1983. This was a unique case involving the plaintiff's claim that he was wrongfully convicted of arson. The defendants did not specifically object to the charge. 352 F.3d at 954. But they did "make their legal position clear . . . both by their motions for judgment as a matter of law, as well as by their explicit renewal of those motions at the charge conference in response to the judge's invitation to lodge" objections. *Id*. Their legal position was that the jury should not be allowed to consider "wrongful conviction" as an actionable claim under the Fourth or Fourteenth Amendment. *Id*. The court also observed that the

defendants appealed from the denial of the motions for judgment as a matter of law. *Id*.

On appeal, the plaintiff argued that any complaints about the jury charged should be reviewed only for plain error. The court disagreed. "Under the unique circumstances of this case, we apply an abuse of discretion standard, rather than plain error." *Id.* The court emphasized its "longstanding view that failure to object to a jury charge ordinarily limits review to plain error." *Id*. But because of the "unusual procedural history of this case, that the jury was charged contrary to the law of the case, and the fact that the nature of the defendants' continued objections to submitting the case to the jury went to the heart of this error, an abuse of discretion standard is appropriate." *Id*. at 954. n.86.

In *Hartsell*, the Fifth Circuit concluded that the defendant preserved its complaint about a jury instruction that required an employee to agree to the "day rate" before an employer could pay its employees at the "day rate"—as opposed to some higher rate—for overtime. 207 F.3d at 272-73. The defendant's proposed instruction did not include the agreement requirement (which was contrary to the charge submitted). *Id*. at 273. Two days before trial, the defendant filed a supplemental brief in support of its proposed instruction, citing legal authority about why the agreement requirement would be erroneous. *Id*. And at the pretrial conference, the district court questioned defense counsel about this legal authority. *Id*. Just before jury selection, the district court provided proposed jury instructions to counsel. These instructions included the agreement requirement; the issue was extensively discussed, and defense counsel stated that it intended to challenge the instruction. *Id*. Although apparently there was no formal objection to the final charge, the Fifth Circuit concluded that the defendant preserved the issue because the defendant's "position equating to an objection ha[d] previously been made clear to the trial court."

b. No

In contrast, in *Navigant Consulting*, the Fifth Circuit found that the defendants did not sufficiently preserve a complaint that the district court's fiduciary-duty instructions improperly shifted the burden of persuasion. 508 F.3d at 294. The trial court provided two opportunities to object to the charge. *Id*. At the close of the evidence, the trial court provided a preliminary version of the charge and gave the parties the opportunity to object. *Id*. The trial court then gave the parties the final charge and requested that they make their final objections. *Id*. During the first phase of objections, defendants' counsel stated: "We object to the burden on Question Number 6 [the fiduciary-duty question]," but added nothing more specific about this question. *Id*. When presented with the final charge, the defendants made no mention of the burden issue. *Id*. Observing that an objection "must be sufficiently specific to bring into focus the precise nature of the alleged error," the court concluded that no error was preserved as to the burden-of-persuasion issue and reviewed this issue under the plain-error standard. *Id*. The defendants did not satisfy this heightened standard.

Similarly, *Webb v. CAI Wireless Systems, Inc.* held that the defendants did not preserve complaints directed at a damages interrogatory in a fraud case. 113 Fed. App'x 21, 25 (5th Cir. 2004). The question submitted the following damages measure: "the value of the opportunity, if any, to receive stock options." On appeal the defendants asserted that causation was not submitted to the jury and that that the instructions associated with the damages question allowed the recovery of damages based on "loss of chance." *Id*. at 24-25. In the district court, defendant's counsel argued that the use of the term "opportunity" was improper and that the term should be replaced with "entitlement" based on the fact that the court had already dismissed the plaintiff's contract claim. *Id*. at 25. Defense counsel made this suggestion twice more but never explained precisely why "entitlement" was better than opportunity, other than the reference to the dismissed contract action. *Id*. The Fifth Circuit concluded that this "obscure objection did not provide the trial court with an opportunity to address either of his current contentions." Therefore, the court addressed these complaints under the plain-error standard, which defendants did not meet. *Id.* at 25-26.

Error was not preserved in *Russell*. 130 F.3d at 719-20. The plaintiff's complaint was that the jury instructions contained an inadequate definition of "qualified individual with a disability" for his claim under the ADA. The plaintiff submitted proposed instructions reflecting his view of the correct definition, but made only the following general objection: "[C]an we just have an objection that to the extent that the Plaintiff's requested instructions were not given, we would object on that ground?" *Id*. The district court overruled the objection and stated "to the extent the requested instructions of the Plaintiff are not substantially covered—given in the Court's charge, they are refused." *Id*. The Fifth Circuit held that the general charge objection "was not specific enough to apprise the district court of his particular problem with the challenged instruction." *Id*. at 720. The court also rejected the plaintiff's reliance on a

claimed "off the record" leveling of the objection, expressly disagreeing with the Seventh Circuit's decision in *Neihus v. Liberio*, 973 F.2d 526 (7th Cir. 1992), in which an affidavit stating that an objection was made off the record was held to preserve the claimed charge error for appellate review. The court also declined to excuse the failure to object based on the exception for objections that would be futile or unavailing because there was nothing in the record to show the plaintiff presented his "qualified individual with a disability" complaint to the trial judge. *Id*. The complaint was this reviewed—and rejected—under the "plain error" test. *Id*.

Sitting *en banc* in a § 1983 suit, the Fifth Circuit concluded that the defendant did not preserve a complaint about the district court's instruction that "reasonable suspicion" was required to authorize a strip search. *Jimenez v. Wood County, Tex.*, 660 F.3d 841 (5th Cir. 2011) (en banc). The court rejected two separate preservation arguments. It first ruled that simply mentioning an Eleventh Circuit decision on the question at a pretrial conference before the magistrate judge was not sufficient because it did not "satisfy the timing requirement set forth in Rule 51." *Id*. at 845. Second, the court rejected an argument that making a proper and timely charge-conference objection was "futile" because of controlling Fifth Circuit precedent. *Id*. at 846. Compliance with Rule 51 is required even if doing so might be futile. *Id*. Accordingly, the court reviewed the charge complaint under a plain-error analysis and concluded that the defendant did not meet that high standard. *Id*. at 847.

The Fifth Circuit recently applied a plain-error analysis in a Fair Debt Collection Practice Act. *Carrasco v. O'Toole*, 628 Fed. App'x 907, 908-09 (5th Cir. 2015). In this case, the plaintiff complained that the district court improperly directed the jury to consider two letters the debt collector sent him. But the plaintiff did not object to the district court's instruction at trial, as required by Rule 51(d)(2). As a result, the Fifth Circuit reviewed the instruction under a plain-error framework and concluded that the plaintiff's "substantial rights" were not violated.

c. Yes and No

Taita Chemical also explored the consequences of failing to object to jury instructions. In this case, the defendant complained that the charge did not sufficiently describe a corporate officer's duty to disclose. 351 F.3d at 668. The defendant made only a general objection and offered 103 proposed charges. *Id.* The court held that this approach did not distinctly state an objection sufficient to comply with Rule 51. *Id*. The court also rejected reliance on the definitive-ruling exception. *Id*. The defendant claimed that the issue was preserved based on a pretrial letter brief and arguments at the pretrial conference related to the duty-to-disclose issue and that because of the "prominence" of this issue, no objection was required. *Id*. The court rejected this argument as overbroad. *Id*. ("If [the defendant's] arguments prevailed, the exception would threaten to swallow the rule."). Because there was no "clear objection" on the issue and "no prior intimation" that the district court would not consider an objection, there was no emphatic ruling that would have rendered an objection futile. *Id*. In the absence of a sufficient objection, the complaint was reviewed only for plain error. *Id*.

The defendant in *Taita Chemical* did, however, preserve error on another issue—whether the jury was improperly instructed that it could hold the defendant liable for aiding and abetting a breach of fiduciary duty without finding any damage to the plaintiff. *Id*. at 670. Although the Fifth Circuit agreed that the defendant's oral objection was "unclear as to its basis," the defendant's proposed instruction submitted to the trial court "apprised the judge of the objection and its basis." *Id*. at 670 n.27 (explaining that the proposed instruction, in conjunction with the oral objection, was sufficiently clear to make the point that no aiding and abetting liability was proper without a damages finding). A proposed instruction can preserve error if the party's position is "sufficiently clear to the court." *Id*. The trial court's error was harmful because it allowed the jury to find for the plaintiff on the aiding and abetting claim without the plaintiff having to prove the essential element of damages. *Id*. at 671. The Fifth Circuit rendered judgment for the defendant on this claim. *Id*.

E. Plain Error

Although former Rule 51 did not address plain error, courts have adopted this stringent test to review unpreserved charge-error complaints on appeal in exceptional circumstances. *See* FED. R. CIV. P. 51 advisory committee's notes. The Fifth Circuit did so in *Highlands Ins. Co.* explaining:

> "Few jury charges in cases of complexity will not yield 'error' if pored over, long after the fact in the quiet of the library—if such an enterprise is to be allowed. It is not. The reality is that most such 'errors' will be washed away if the trial court is given a fair opportunity to consider them. . . . [The rules governing jury charge practice] vindicate powerful interests in

> orderliness and finality. They also reflect the central role of the United States District Court. It is not a way station or entry gate. Rather, trials are the heart of the system. Trial, not appeal, is the main event. The rules we enforce today tether these statements to reality."

Highlands Ins. Co. v. Nat'l Union Fire Ins. Co., 27 F.3d 1027, 1032 (5th Cir. 1994) (Higginbotham, J.) (adopting the plain-error rule in the civil context).

Rule 51(d)(2) adopts the plain-error standard and states that "[a] court may consider plain error in the instructions that has not been preserved as required" if the error affects "substantial rights." FED. R. CIV. P. 51(d)(2). The plain-error doctrine is triggered when a party fails to object to a jury instruction as required by Rule 51's "timing requirements." *Jimenez v. Wood County, Tex.*, 660 F.3d 841, 845-46 (5th Cir. 2011) (en banc). If a party does not object to proposed instructions "after the court announces its proposed instructions, and before the instructions and arguments are delivered," the party is limited to plain-error review. *Eagle Suspensions, Inc. v. Hellmann Worldwide Logistics, Inc.*, 571 Fed. App'x 281, 287 (5th Cir. 2014) (quoting *Jimenez*, 660 F.3d at 845-46).

The following factors guide the plain-error analysis: (1) was there error? (2) was the error plain? (3) did the error affect substantial rights? and (4) would the error, if not remedied, affect the fairness, integrity, or public reputation of judicial proceedings? *Taita Chem*., 351 F.3d at 668; *Highland Ins. Co.*, 27 F.3d at 1031-32 *see also* FED. R. CIV. P. 51 advisory committee's notes (identifying the following factors for plain-error analysis: (1) the obviousness of the mistake; (2) the importance of the error; (3) the costs of error correction; and (4) the effect of the verdict on nonparties). Plain-error review "is designed to prevent a miscarriage of justice where the error is clear under current law." *Taita*, 351 F.3d at 668.

In assessing the "obviousness" of the error, courts focus on the "clarity of the law 'at the time of appellate consideration.'" *Eagle Suspensions*, 571 Fed. App'x at 288 (quoting *Jimenez*, 660 F.3d at 847 n.10). In *Eagle Suspensions*, which addressed a charge complaint on federal preemption, the Fifth Circuit held that "the existing law is far from clear regarding the preemptive effect of federal common law in instances where, as in the present case, a shipment originates outside the United States and is lost before crossing the border." 571 Fed. App'x at 288-89.

F. Peremptory Jury Instructions

In some cases, the trial court may issue a peremptory instruction on a legal issue. That happened in *Gregory v. Mo. Pac. RR Co.*, 32 F.3d 160, 161-62 (5th Cir. 1994) in which the trial court told the jury that a railroad company violated a federal safety statute. Peremptory instructions are allowed if all the evidence, considered in a light most favorable to the complaining party "points so strongly and overwhelmingly in favor of [the plaintiff] that reasonable jurors could reach only one conclusion." *Id*. But if the evidence is "of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions," the issue should be submitted to the jury. *Id*. Because there was conflicting evidence about whether the railroad violated the statute, the Fifth Circuit reversed and ordered a new trial. *Id*. at 166.

G. Supplemental Jury Instructions

Supplemental jury instructions, in response to a question from the jury during deliberations, must be "reasonably responsive to the jury's question." *United States v. Stevens*, 38 F.3d 167, 170 (5th Cir. 1994). On appeal, the court considers whether "the original and supplemental instructions as a whole allowed the jury to understand the issue presented to it." *Id*. The district court has wide discretion in responding to jury questions and fashioning appropriate supplemental instructions. *Id*. If the district court simply instructs the jury to focus on the original instruction, that response is appropriate if the original instructions accurately capture the law. *Thompson v. Connick*, 553 F.3d 836, 862 (5th Cir. 2008) (response to jury instruction reiterated to the jury the correct standard for "deliberate indifference" and directed the jury to the portion of the instructions addressing that standard, arising in the context of wrongful conviction and imprisonment claim).

III. THE VERDICT

A. Special, General, or General with Questions?

Federal Rule of Civil Procedure 49 governs the form of the verdict. Rule 49(a) authorizes "special verdicts." Rule 49(b) empowers the district court to submit a "general verdict" with answers to written questions. A general verdict entails a number of detailed instructions and definitions followed by a question like "Do you find for the plaintiff or the defendant?" *See* Chief Judge Brown, *Federal Special Verdicts: The Doubt Eliminator*, 44 F.R.D. 245, 340

(1967) (describing a general verdict); *Guidry v. Kem Mfg. Co.*, 598 F.2d 402, 405 (5th Cir. 1979) ("After receiving the court's instructions, the jury weighs the facts in light of the court's instructions and renders a verdict for the plaintiff or the defendant.").[2] A general verdict "permits the jurors to import notions of lay justice, to temper legal rules and to render a verdict based on their consciences and their ideas of how the case ought to be decided without strict compliance with the rules laid down by the court." *Guidry*, 598 F.2d at 405. The form of submission is within the trial court's discretion, and the failure to object to the form waives any complaint on appeal that the form should have been a special verdict, as opposed to a general verdict. *McWilliams v. Texaco, Inc.*, 781 F.2d 514, 516 (5th Cir. 1986); *Dobbs v. Gulf Oil Co.*, 759 F.2d 1213, 1215 n.3 (5th Cir. 1985) ("The court has complete discretion as to whether a general or special verdict is to be used and as to the form of the special interrogatories used in a special verdict.").

This paper focuses on the "special verdict" form because of its prevalence in complex litigation and preferred status in the Fifth Circuit.[3] *Brown*. 44 F.R.D. at 345 (commending the special-verdict approach in "complex multi-party, multi-claim, multi-cross claim situations in which on Tinkers-to-Evers-to-Chance notions contingent, secondary liabilities or defenses are asserted, frequently under the spell of compulsory joinder, cross claim, or the like."); *Reo Industries, Inc. v. Pangea Res. Corp.*, 800 F.2d 498, 501 (5th Cir. 1986) ("Trial courts employ the Rule 49(a) special verdict in order to avoid confusion in the appellate stages of litigation and to avoid additional proceedings by identifying precisely the bases on which the jury rendered its verdict."); *Ware v. Reed*, 709 F.2d 345, 355 (5th Cir. 1983) ("[T]his case—with its multiple defendants claimed to be culpable in different degrees, charged by the plaintiff with numerous and sundry acts of verbal and physical abuse, some of which are constitutionally forbidden—impresses us as a prime candidate for this beneficial procedural device."); *Petes v. Hayes*, 664 F.2d 523, 525 n.1 (5th Cir. 1981) ("We have on many occasions requested, begged, pleaded with, urged, and ordained the district courts to employ this handy and workable device."); *Guidry*, 598 F.2d at 405-06 ("The special verdict permitted by Rule 49(a) is a splendid device for clarification of jury verdicts and for focusing the jurors' attention on the disputed facts. . . ."); *Tugwell v. A.F. Klaveness & Co.*, 320 F.2d 866 n. 2 (5th Cir. 1963) ("we specifically approve of the district court's use of special interrogatories, which can avoid the inscrutable mystery of a general verdict [and] impenetrable uncertainty. . . ."); *R.B. Co. v. Aetna Ins. Co.*, 299 F.2d 753, 756-57 (5th Cir. 1962) ("The fact is that one of the sometimes unexpected, but wholesome results of special interrogatories jury submissions is to emphasize the absolute necessity that there be first a clear understanding of the precise legal issues for jury resolution. . . ."). A brief overview of how the special verdict obtained this status is useful in understanding the benefits and pitfalls associated with the various forms of verdict.

Chief Judge Brown of the Fifth Circuit was the foremost proponent of the special verdict form. In his 1967 article, *Federal Special Verdicts: The Doubt Eliminator*, Chief Judge Brown began his defense of Rule 49(a) verdicts focusing on the unique role special verdicts can play in resolving facts and adjusting to unsettled legal questions:

> This weapon from the arsenal of the Federal Rules is the wonderful instrument of special verdicts under F.R.Civ.P. 49(a). . . . [I]t is remarkably effective in fact-resolution and the matching of such resolution against known, or changing, or contradictory legal principles.

Brown, *Federal Special Verdicts: The Doubt Eliminator*, 44 F.R.D. at 338. Special verdicts allow the district court to (i) "give precise instructions related directly to the case *and* to specific questions" and (ii) "obtain a specific fact answer as to each." *Id*. at 340; *see also Melear v. Spears*, 862 F.2d 1177, 1188 (5th Cir. 1989) (Higginbotham, J., concurring) ("By directing the jury to return distinct answers to questions about illegal conduct and officer immunity, the court can focus the jury's attention on the factual disputes peculiar to each issue."). A well-crafted special-verdict form "melds the general *charge* (not verdict) with the special answers to specific controlling issues of fact or legal-fact." *Brown*, 44 F.R.D. at 340 (emphasis in original.) When a single error infects a general verdict, the entire verdict is vitiated, thus requiring a new trial. *Id*. at 341. A special verdict, in contrast, "excises critical findings from which the proper choices can be made (by Trial or Appellate Court) and . . . demonstrates quite completely that other types of error have not affected the jury resolution." *Id*. at 341-42.

[2] *Guidry*, 598 F.2d at 405-06 ("Most civil jury cases in federal courts have been, and still are, resolved by a general verdict.").

[3] In contrast to the special verdict, a general verdict with answers to written questions under Rule 49(b) "seeks to meld a general verdict and special answers." Brown, 44 F.R.D. at 340. But this formulation risks a "high likelihood of conflict which extinguishes both" the general verdict and the special answers. *Id.*

A special verdict form can also prove useful when multiple theories of damages are involved, including separate measures, time-frames, or elements. *Texas v. Allan Construction Co.*, 851 F.2d 1526, 1536 (5th Cir. 1988) (suggesting the use of Rule 49(a) to submit damages questions for each possible time frame of damages to protect against reversal based on an improper "lumping of damages" problem); *Gautreaux v. Ins. Co. of N. Am.*, 811 F.2d 908, 916 n.5 (5th Cir. 1988) ("[I]n cases involving numerous elements of damages, using special interrogatories . . . to return an itemized award rather than a lump sum verdict, is not only helpful to the appellate court but will likely spare the parties the expense of a new trial on damages."); *In re Air Crash Disaster at New Orleans, La. On July 9, 1982*, 795 F.2d 1230, 1235 ("Whenever a general award that includes numerous elements of damages is greater than the legal maximum recoverable for any one element, it is impossible to determine on appeal whether the award is excessive or not. . . .").

This description of the special verdict might conjure up images of the dreadful Texas special-issue practice that existed before a charge was to be submitted in broad-form fashion "whenever feasible." *See* TEX. R. CIV. P. 277. Texas charge practice has evolved from the submission of each fact question raised by the pleadings in distinct and separate fashion, with no intermingling of factual or legal issues (special-issue submissions). *See Fox v. Dallas Hotel Co.*, 240 S.W. 517, 522 (Tex. 1922). In 1973, the Texas Rules of Civil Procedures abolished the "distinct and separate" submission requirements, allowing trial courts, within their discretion, to "broadly" submit issues. *See* TEX. R. CIV. P. 277 (superseded). And in 1988 the rules were changed to command the submission of broad-form questions "whenever feasible." TEX. R. CIV. P. 277. There has been some retreat from the broad-form approach over the last decade, particularly when a single broad-form submission commingles valid and invalid legal theories or damages measures. *See, e.g.*, *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 390 (Tex. 2000).

An introduction of Texas "special issue" practice was certainly not the intent of Rule 49(a) advocates and is not how Rule 49(a) verdicts have typically been implemented. *See* Brown, 44 F.R.D. at 340 n.5 ("I must make very clear I do not champion the Texas-Wisconsin system of special issues."); *id*. at 341 (describing the former Texas practice "as a trap for the jury"). Numerous examples exist of federal district judges in Texas submitting "special verdict" forms tracking both the form and substance of the Texas Pattern Jury Charges (which provide sample broad-form submissions of a host of commercial, personal-injury, and family-law cases). *See BCE Emergis Corp. v. Cmty. Health Solutions of Am., Inc.*, 140 Fed. App'x 204, 217-18 (5th Cir. 2005) (approving broad-form submission of trade-secrets claim arising under Kentucky law based on the nature of claims at issue and the discretion afforded trial judges in instructing the jury in this area).[4] And this author has been involved in several such cases. In any event, federal special verdicts do not compel a trial court to ask a jury "to supply a specific answer informing the court how they resolved that one issue. No party is entitled to a special verdict on each of the multi-faceted multitudinous issues essential to the resolution of a given case." *Miley v. Oppenheimer & Co.*, 637 F.2d 318, 334 (5th Cir. 1981); *see also Bryan v. Cargill, Inc.*, 723 F.2d 1202, 1204 (5th Cir. 1984) (an issue need not be "submitted twice through redundant special interrogatories").

That is not to say, however, that a Rule 49(a) verdict form is intended to be a broad-form submission. Instead, a special-verdict form requires a careful and deliberative crafting of the jury charge, both instructions and questions. It begins with a "firm, detailed explanation of controlling principles specifically related to the case" and concludes with the submission of specific questions that resolve the factual issues in dispute. Brown, 44 F.R.D. at 340, 345-46; *P&L Contractors, Inc. v. Am. Norit Co.*, 5 F.3d 133, 138 (5th Cir. 1993) ("It is the duty of the court and counsel to fashion special interrogatories which simplify the issues for resolution by the jury."). Sometimes, a broader negligence question may work; in other circumstances, a more detailed theory-by-theory approach to a claim may be appropriate. *See P&L*, 5 F.3d at 136 n.3 (identifying broad-form contract and quantum meruit claims along with broad-form excuse defenses); *Clegg v. Hardware Mut. Ins. Co.*, 264 F.2d 152 (5th Cir. 1959) (trial judges should employ the flexible tool of Rule 49(a) because it "gets the best out of a general charge and special issue verdict while overcoming or minimizing the shortcomings of each when used alone").

[4] *See also Bagby Elevator Co. v. Schindler Elevator Corp.*, 609 F.3d 768, 772-73 (5th Cir. 2010) (submitting punitive damages to the jury based on the Texas PJC); *Quanta Servs., Inc. v. Am. Admin. Group, Inc.*, No. 08-20252, 2008 U.S. App. LEXIS 24468, **11-12 (5th Cir. Dec. 2, 2008) ("It can hardly be an abuse of discretion for a federal district court to charge the jury in a manner pervasively used by the state which provides the governing law."); *Navigant*, 508 F.3d at 294-95 (extensive discussion of the Texas PJC formulation of fiduciary-duty instructions).

Broadcast Satellite Int'l, Inc. v. Nat'l Digital Television Ctr., Inc. is illustrative of the flexibility a federal district judge has in submitting a case arising under state law. 323 F.3d 339, 342 (5th Cir. 2003). The plaintiff sought the submission of a broad-form breach-of-contract question modeled after the Texas Pattern Jury Charge failure-to-comply question. *Id*. at 347. In diversity cases, state law governs the substance of a jury question, while federal law dictates its form. *Id*. "The *Erie* doctrine does not compel the use of pattern state instructions." *Id*. at 348. The district court viewed the pattern contract question as "too broad." The reason for the alleged breach "was the narrow issue that remained disputed," and no other issue was implicated that did not go to the jury." *Id*.

As demonstrated below in the section addressing the commingling of valid and invalid theories of recovery, the problems that Chief Judge Brown perceived with general verdicts cannot be wholly eliminated by using a special verdict under Rule 49(a). *See Barton's Disposal Serv., Inc. v. Tiger Corp.*, 886 F.2d 1430, 1434 (5th Cir. 1989) (Brown, J.) (overbroad special interrogatories did not adequately distinguish between private and governmental commercial activity, which improperly permitted the jury to apply the *Noerr-Pennington* doctrine to private commercial activity). Nevertheless, the special-verdict form remains the preferred approach in the Fifth Circuit. One of the other dangers of using a special verdict is the risk of submitting questions that omit an element of a claim. But, as discussed below, Rule 49(a)(3) can come to the rescue. *See Watkins*, 994 F.2d at 258 (explaining that deemed findings on omitted questions are "imperative if a special verdict—one that uses interrogatories—rather than a general verdict is to continue to be employed").

B. The Special Verdict Form—Preservation and Review

Rule 49(a) provides:

> (1) In General.
>
> The court may require a jury to return only a special verdict in the form of a special written finding on each issue of fact. The court may do so by:
>
> (A) submitting written questions susceptible of a categorical or other brief answer;
>
> (B) submitting written forms of the special findings that might properly be made under the pleadings and evidence; or
>
> (C) using any other method that the court considers appropriate.
>
> (2) Instructions.
>
> The court must give the instructions and explanations necessary to enable the jury to make its findings on each submitted issue.
>
> (3) Issues Not Submitted.
>
> A party waives the right to a jury trial on any issue of fact raised by the pleadings or evidence but not submitted to the jury unless, before the jury retires, the party demands its submission to the jury. If the party does not demand submission, the court may make a finding on the issue. If the court makes no finding, it is considered to have made a finding consistent with its judgment on the special verdict.

A special verdict form "requires the jury to return a written finding on each submitted issue of fact." *McDaniel v. Aneheuser-Busch, Inc.*, 987 F.2d 298, 306 (5th Cir. 1993). The only guidance supplied by the rule is that the form of the question must be "susceptible of a categorical or other brief answer" or that the court may use "any other method the court considers appropriate." FED. R. CIV. P. 49(a)(3). The precise form of the question is the "hardest part of the practice." *Guidry*, 598 F.2d at 406 (quoting *Moore's Federal Practice*).

If a party does not object to the wording of a question submitted to the jury, any complaint about that issue is waived, and a finding consistent with the judgment may be deemed. *Tyler v. Union Oil Co. of Cal.*, 304 F.3d 379 (5th Cir. 2002) (defendant failed to object to the form of the equitable estoppel question and therefore district could deem a finding that plaintiff was induced to delay filing suit); *Geosearch, Inc. v. Howell Petroleum Corp.*, 819 F.2d 521, 527 (5th Cir. 1987) (failure to object to ambiguities in the wording of interrogatory waived that issue for appeal). Likewise, the failure to object to the omission of an issue in the question constitutes waiver. *In re Letterman Bros. Energy Sec. Litig.*, 799 F.2d 967, 976 (5th Cir. 1986) (third-party claims waived based on failure to object to verdict form that did not submit the issues); *Central Progressive Bank v. Fireman's Fund Ins. Co.*, 658 F.2d 377, 381 (5th Cir. 1981) ("An

objection to an interrogatory, or lack thereof, must be made prior to the retiring of the jury or the objection is waived."). There is no requirement that a party propose a special interrogatory to complain about the failure to submit a question covering all of the elements of the plaintiff's claim, although that is certainly preferred. *Chemerton Corp. v. Bus. Funds, Inc.*, 682 F.2d 1149, 1171 (5th Cir. 1982). Either a request or an objection will suffice. *Id*.

Special interrogatories, like jury instructions, are reviewed for abuse of discretion. *Broadcast Satellite*, 323 F.3d at 342 ("Presenting the jury with a special verdict is within the discretion of the trial court."). Appellate review of the form and substance of a special interrogatory require timely and adequate objections so that the trial court has an opportunity to fix any errors. *Barton's Disposal Serv.*, 886 F.2d at 1434. A complaint about a special interrogatory is preserved when a party proposes and interrogatory that is legally accurate and objects to the interrogatory actually given to the jury. *Id*. at 1435.

In fashioning a special verdict form, the district court "must properly condition the interrogatories to minimize the possibility of conflicting or overlapping jury verdicts." *P&L*, 5 F.3d at 138 (reversing quantum meruit recovery when contract damages adequately compensated plaintiff). The district court commits reversible error if it does not submit a question on an issue of fact raised by the pleadings and evidence. *Solis v. Rio Grande Ind. Sch. Dist.*, 734 F.2d 243, 248 (5th Cir. 1984). On appeal, three factors determine whether the district court properly exercised its discretion: (i) did the question adequately present the issues to the jury? (ii) was the submission of the issues fair? and (iii) were the ultimate questions of fact clearly submitted. *Dreiling v. Gen. Elec. Co.*, 511 F.2d 768, 774 (5th Cir. 1975). "[A]cademic perfection is not demanded" in crafting the interrogatories. *Barton's Disposal Serv.*, 886 F.2d at 1435.

The district court also has wide discretion in interpreting special interrogatories. *P&L*, 5 F.3d at 137-38. ("The district court is in the best position to analyze the jury's intentions and thus is charged, in the first instance, with the obligation of giving effect to those intentions in light of the surrounding circumstances."); *Barton's Disposal Serv.*, 886 F.2d at 1434 ("Generally, a trial court is afforded great latitude in the framing and structure of the instructions and special interrogatories given to the jury… we are loathe to disturb that discretion absent a showing of abuse of discretion."). This is not unbridled discretion, however. The Seventh Amendment and Rule 58 require a district court to "enter judgment on the jury's answers if they are clear and consistent." *P&L*, 5 F.3d at 138. A party does not waive a complaint about the district court's interpretation of the verdict by failing to object to the interrogatory; it can raise this issued in a timely filed motion for judgment as a matter of law. *Geosearch*, 819 F.2d at 527. In *Geosearch*, the jury, without an instruction like the one mandated by Texas Rule of Civil Procedure that a jury cannot reduce damages based on comparative fault, awarded exactly 55% of the actual damages. *Id*. This amount was perfectly consistent with the jury's 45/55 apportionment of fault. *Id*. The defendant nevertheless sought to further reduce the damages award based on the comparative-fault finding. *Id*. The district court declined to do so, and the Fifth Circuit affirmed, based on the district court's broad discretion in interpreting a jury's verdict. *Id*. at 528.

C. Deemed Findings under Federal Rule of Civil Procedure 49(a)(3)

Rule 49(a)(3) addresses the failure to submit an issue raised by the pleadings and evidence:

> A party waives the right to a jury trial on any issue of fact raised by the pleadings or evidence but not submitted to the jury unless, before the jury retires, the party demands its submission to the jury. If the party does not demand submission, the court may make a finding on the issue. If the court makes no finding, it is considered to have made a finding consistent with its judgment on the special verdict.

Fed. R. Civ. P. 49(a)(3). If the district court submits a special-verdict form to the jury that omits a factual question raised by the pleadings and evidence, then the parties waive the right to a jury trial on that question. *Id*.; *Allied Bank-West, N.A. v. Stein*, 996 F.2d 111, 115 (5th Cir. 1993) (defendant waived jury trial on agency defense by failing to request a special interrogatory on that defense). This rule is broadly interpreted to mean that when a party fails to submit an issue to the jury, it waives only the right to a jury trial on that issue; it "does not waive the right to have that issue determined." *Bristol Tech, Inc. v. Microsoft Corp.*, 114 F. Supp. 2d 59, 81 (D. Conn. 2000); *see also Reo Indus., Inc., v. Pangaea Resources Corp.*, 800 F. 2d 498, 501 (5th Cir. 1986) (finding that "a party waives its right to a jury trial of an omitted issue" but "the judge may make a finding on such omitted issue."); *Therrell v. Georgia Marble Holding Corp.*, 960 F. 2d 1555, 1563 (11th Cir. 1992) (finding

that failure to demand an issue be submitted to the jury results in consent to judicial judgment on issue). Rule 49(a)(3) was designed to allow the judge to "supply an omitted subsidiary finding which would complete the jury's determination or verdict." *Anderson v. Cryovac, Inc.*, 862 F. 2d 910, 915-16 (1st Cir. 1988); *see also Watkins v. Fibreboard Corp.*, 994 F. 2d 253, 257-58 (5th Cir. 1993), *overruled on other grounds by Metro North Commuter R. Co. v. Buckley*, 521 U.S. 424, 437 (1997). This is quite different from Texas practice, where a party can waive an entire theory.

Under Rule 51, a party has the burden to request the submission of issues raised by its pleadings to the jury in the form of instructions, definitions, and questions. *See generally* FED. R. CIV. P. 51. If a party fails to request the submission of an issue or does not object to the failure to include the issue, the right to a jury trial on that question is waived. *MBank Fort Worth, N.A. v. Trans Meridian, Inc.*, 820 F.2d 716, 723-24 (5th Cir. 1987). If, on the other hand, a party requests the submission of a particular issue, the trial court cannot make a deemed finding against the party if the court refuses to submit the issue to the jury. *Solis v. Rio Grande City Ind. Sch.*, 734 F.2d 243, 249 n.5 (5th Cir. 1984). Although a party must ordinarily submit a request or object to the failure to include a question in the verdict to avoid an adverse deemed finding, this rule is not absolute. *McDaniel*, 987 F.2d at 306. If, for example, "it appear[s] that the district court, without objection by either party, specifically chose not to submit the issue to the jury," an adverse finding will not be deemed.

The importance of preserving error was reinforced in *Solis*. In that case, the defendant objected to the trial court's failure to submit the second of two elements that would serve as a basis for finding the defendant school district liable under § 1983. 734 F.2d at 248-49. Although a district court has discretion in charging the jury, the court "must submit all material issues raised by the pleadings and the evidence." *Id*. at 248. In explaining why the failure to submit the second element of the plaintiffs' claim to the jury warranted reversal, the Fifth Circuit observed "had the defendants not requested an interrogatory on this issue, Rule 49(a) would have permitted the Trial Judge to make or presume a favorable finding." *Id*. at 248-49. The lesson: even if you don't have the burden of proof on an issue, if the element should be submitted, you should object; otherwise, you risk an adverse deemed finding.

Under Rule 49(a)(3), when an issue raised by the pleadings is omitted from the special verdict form, and the trial court has not made a finding on that issue, a finding is deemed on that issue if the finding has evidentiary support and is consistent with the judgment. *McDaniel*, 987 F.2d at 306 (deeming that the proximate cause element was not satisfied consistent with the trial court's take-nothing judgment); *Webb v. City of Dallas*, 145 Fed. App'x 903, 907 (5th Cir. 2005) ("Further, to the extent that the court omitted any necessary factual issue in the jury instructions, we deem the court to have made such a finding in accord with the judgment."); *Reo Indus.*, 800 F.2d at 501 (deeming, consistent with the take-nothing judgment for the defendant, a finding that the defendant received no "substantial benefit" from misappropriation of trade secrets, which precluded a constructive trust remedy); *Molex v. Nolen*, 759 F.2d 474, 475 (5th Cir. 1985) (irreparable harm submission to the jury waived, and therefore irreparable-harm finding favorable to the plaintiff was deemed supporting injunctive relief); *James v. Meinke*, 778 F.2d 200, 207 (5th Cir. 1985) (deeming a finding for plaintiff on proximate-cause issue not submitted to the jury in fraud case).

Rule 49(a)(3), however, does not authorize a district court to "reform" a jury verdict. *See Gaia Techs. Inc. v. Recycled Prods. Corp.*, 175 F.3d 365, 370-71 (5th Cir. 1999). A district court's findings under Rule 49(a)(3) for unsubmitted issues are reviewed de novo. *Id*. at 370. This rule does not authorize a district court to reform a jury's findings on issues actually submitted to the jury. *Id*. Nor does it allow a trial court to "make findings contrary to the jury verdict." *Id*. (disapproving the district court's findings that the plaintiff met the elements of its claims, contrary to the jury's resolution of the issue); *Askanase v. Fatjo*, 130 F.3d 657, 670 (5th Cir. 1997) ("[A] Rule 49(a) finding cannot be inconsistent with the jury verdict.").

The Fifth Circuit has also declined to deem findings when it appears that the omission of a theory of recovery was intentional. *Cunningham v. Healthco, Inc.*, 824 F.2d 1448, 1458 n.3 (5th Cir. 1987) (refusing to deem that a fourth oral agreement existed because the "inclusion of a jury question to determine the existence of each the first three oral contracts served as an assurance that the failure to ask such a question with regard to the [fourth purported contract] was not an inadvertent omission").

D. Damages Issues

1. Apportionment

When a plaintiff has asserted multiple liability theories, the jury should be asked to separately assess

damages for each of those theories, especially when the plaintiff seeks some type of enhanced damages. The issue first came before the Fifth Circuit in a DTPA case, *Commonwealth Mortgage Corp. v. First Nationwide Bank*, 873 F.2d 859, 868 (5th Cir. 1989). In *Commonwealth*, the compensatory-damages question did not ask the jury to apportion damages based on specific liability theories. *Id*. at 869. Instead, it submitted a single compensatory damages question, which made it impossible to determine whether the jury made sufficient findings to support an award of "additional" damages under the DTPA. *Id*. The court therefore vacated the additional damages award. *Id*.

A similar apportionment issue arose in *Streber v. Hunter*, 221 F.3d 701 (5th Cir. 2000). The jury found for the plaintiff on negligence, breach of fiduciary duty, and DTPA violations. 221 F.3d at 731. The damages question did not requirement apportionment of damages on a claim-by-claim basis. *Id*. And as for additional damages under the DTPA, the jury was only instructed that it could consider additional damages for the DTPA claim. *Id*. Thus, the reviewing court could not determine whether the additional damages were proper because "it was unclear what proportion of the DTPA additional damage award was attributable to the DTPA violation rather than the common law torts." *Id*. at 732. The court again vacated the additional-damages award.

The Fifth Circuit's decision in *Hadley* presented an analogous issue with a different twist. 44 F.3d at 375. The jury separately found compensatory and punitive damages for a Title VII violation and was only asked to award punitive damages for the separate intentional infliction of emotional distress claim. *Id*. Because there was no specific finding of an amount of actual damages for the intentional-infliction claim, and such a finding is a prerequisite to recover punitive damages, the punitive damages award related to the intentional-infliction claim was vacated. *Id*.

2. Double Recovery

A double-recovery complaint—that the plaintiff was awarded more than one remedy for the same injury—is "essentially [an] objection to the jury instructions." *Tompkins v. Cyr*, 202 F.3d 770, 784 (5th Cir. 2000). This issue therefore must be preserved by objection at the charge conference; otherwise, any appellate review will be for plain error. *Streber*, 221 F.3d at 732-33.

The leading double-recovery case in the Fifth Circuit is *Tompkins v. Cyr*, 202 F.3d 770 (5th Cir. 2000), a case in which a physician and his wife recovered $8 million in damages against abortion protestors whose protests "exceeded the means permitted by law." 202 F.3d at 775. The protestors leveled two double-recovery challenges. First, they complained that the special verdict form allowed the plaintiffs to recover both emotional distress and mental anguish damages "when those are in fact the same thing." *Id*. at 783. Second, they argued that the plaintiffs recovered twice for the same injury, first under an intentional infliction of emotional distress theory and also for invasion of privacy. *Id*. No objection was made to the verdict form in the trial court. *Id*. The Fifth Circuit nevertheless addressed these complaints under the "plain error" standard.

Emphasizing that the court is "exceedingly deferential" to the district court in reviewing a charge complaint for plain error, the court explained there must be an "obviously incorrect statement of law" that caused an incorrect verdict, resulting in a substantial injustice. *Id*. at 784. As to the protestors first complaint—that the verdict form allowed the jury to award damages for both mental anguish and emotional distress—the court held that this was "not obviously incorrect in relation to existing law." *Id*.

But as to the second complaint—that the charge allowed multiple recoveries for the same injury—the court found plain error. The special verdict form contained a liability question for each claim and a separate damages question, with four blanks (past mental anguish, future mental anguish, past emotional distress, and future emotional distress). *Id*. at 785. But the charge did not state that the plaintiffs "were not entitled to recover twice for the same injuries." *Id*. The verdict thus authorized a recovery under two liability theories for the same harm (mental anguish and emotional distress). The verdict form was therefore "obviously erroneous" and the plain-error standard was satisfied. *Id*. Presumably an instruction like the following would have remedied the problem, leaving the trial court to form the judgment based on an election of remedies by the plaintiffs:

> In answering questions about damages, answer each question separately. Do not increase or reduce the amount in one answer because of the instructions in or your answers to any other questions about damages. Do not speculate about what any party's ultimate recovery may or may not be. Any recovery will be determined by the court when it applies the law to your answers at the time of judgment.

TEXAS PATTERN JURY CHARGES – BUSINESS, CONSUMER, INSURANCE & EMPLOYMENT, Comment to PJC 115.21 (2008 Ed.). And this is essentially what the Fifth Circuit did in *Cyr*—it reformed the judgment so that the plaintiffs could recover under the theory that provided the largest recovery.

E. Conflicts

If the jury returns potentially conflicting answers in its verdict, "the court must attempt to reconcile the answers, if possible, to validate the jury's verdict." *Watkins v. Fibreboard Corp.*, 994 F.2d 253, 256 (5th Cir. 1993). "The touchstone in reconciling apparent conflict is whether the answers may fairly be said to represent a logical and probable decision on the relevant issues as submitted." *White v. Grinfas*, 809 F.2d 1157, 1161 (5th Cir. 1987). The district court can use Rule 49(a)(3) to reconcile any potential conflicts. *Watkins*, 994 F.2d at 258 (deeming a finding on a lesser causation standard (for fear of asbestos exposure) to avoid conflict between liability and damages finding on the one hand and adverse finding on heightened "producing cause" issue on the other hand). The appellate court has "a constitutional mandate to reconcile apparently inconsistent jury verdicts and thereby avoid vacating and remanding for a new trial." *Wommack v. Durham Pecan Co.*, 715 F.2d 962, 968 (5th Cir. 1983). The failure to ask for resubmission does not preclude a challenge based on the consistency of the jury's answers. *Alverez v. J. Ray McDermott & Co.*, 674 F.2d 1037, 1040 (5th Cir. 1982).

Resubmission of the verdict is appropriate when the jury returns conflicting answers. This is the practice under Rule 49(a) (special verdicts) and Rule 49(b) (general verdict with answers to written questions). *Wavelinq, Inc. v. JDS Ligthwave Prods. Group, Inc.*, 289 Fed. App'x 755, 761 (5th Cir. 2008). Sometimes the verdict will simply be resubmitted to the jury with an instruction to further consider its answers. *See id*. The supplemental instructions may also be more direct. *Id*. (approving supplemental instructions that explained "how to allocate the damages based on each party's arguments and damages models"). Although a district court (unlike in Texas state court) may "comment on the evidence," it "may not comment on the ultimate factual issues to be decided." *Belton v. Fibreboard Corp.*, 724 F.2d 500, 505-06 (5th Cir. 1984) (rejecting district court's comment that, based on a settlement, the jury would have to award more damages if the plaintiffs were to get any recovering from the nonsettling defendant). Even-handed supplemental instructions that provide "plausible explanations for the jury's first verdict and instructed them how to clarify their intent to ensure that they understood the initial charge" are permissible. *Wavelinq*, 289 Fed. App'x at 764. Explaining how to use the admissible evidence without commentaries on the "weight" of that evidence are likewise okay. *Id*. But telling the jury the effect of its finding that the plaintiff was more than 50% responsible for his injury in a supplemental instruction will receive more exacting scrutiny. *Perricone v. Kansas City So. R.R. Co.*, 704 F.2d 1376, 1378-79 (5th Cir. 1983) (expressing concern about supplemental instruction but holding that "we will not listen to counsel complain about the trial judge's call when he then uttered not a peep"). There are a handful of Fifth Circuit decisions exploring these issues.

The Court first addressed this problem in *University Computing Company v. Lykes-Youngstown Corp*., 504 F.2d 518, 547 (5th Cir. 1974). The jury returned a verdict awarding punitive damages, but did not award any actual damages. The district court ordered the jury to continue its deliberations and reminded the jury that if it was its intent to find that the plaintiff was not injured, it could return a verdict for the defendant without any award for punitive damages. 504 F.2d at 547. The Fifth Circuit affirmed, explaining that "a trial court may order a jury to continue its deliberation if the verdict is contrary to the court's instructions" or "if the jury returns two inconsistent verdicts." *Id*.

In *Nance v. Gulf Oil Corporation*, the Fifth Circuit approved resubmission of the verdict when the jury initially found that Gulf Oil was neither negligent nor strictly liable but nevertheless found Gulf Oil 95% responsible for the injuries sustained by the plaintiff (there was no conditioning language here). 817 F.2d 1176, 1178 (5th Cir. 1987) ("[I]t has long been established in this Circuit that inconsistent special verdict answers may be resubmitted to a jury for clarification of the inconsistency."). Gulf Oil raised a Seventh Amendment challenge. But the court rebuffed this argument, concluding that "[b]ecause the answers in the first verdict were irreconcilable, there was no" constitutional violation. *Id*. at 1178. The Seventh Amendment requires entry of a judgment on the verdict if the jury's answers are consistent. *Id*. The court also rejected an argument that resubmission somehow coerced the jury into finding in favor of the plaintiff because the district judge "carefully cautioned the jury that by resubmitting the verdict form he was not in any way suggesting what decision should be reached." *Id*.

One year later in *Richard v. Firestone Tire & Rubber Co.*, 853 F.2d 1258, 1260 (5th Cir. 1988), the Court

was confronted with a jury finding that a tire rim was defective, but found that the defect did not cause the plaintiff's injury. 853 F.2d at 1260. Despite clear conditioning language informing the jury that it need not answer any further questions if it found no causation, the jury proceeded to find damages and apportion fault. *Id*. The trial court found that the jury's answers were inconsistent and resubmitted the verdict form to the jury. *Id*. The Fifth Circuit held that this was a proper exercise of discretion, noting in its earlier holding in *White* that "if the district court has correctly found that the jury's answer to a question that was supposed to terminate further inquiry is clear and disposes of the legal issues, on review we must ignore the jury's necessarily conflicting answers to any other questions." *Id*. (quoting *White*, 809 F.2d at 1161 (concluding there is broad discretion to ignore jury findings answered in violation of the court's instructions). Judge Jerry E. Smith issued a vigorous dissent, cautioning that a broad resubmission rule like that applied by the majority violates the defendant's Seventh Amendment rights:

> When a trial judge resubmits the completed verdict form to the jury because its answers to the special interrogatories appear inconsistent, the risk of a coerced verdict is substantial, even though the record may be unreflective of anything suggestive in the manner of resubmission. The fact of the resubmission itself may very well communicate to the jury that the trial judge regarded its findings unjust. The jury may then act not to reconcile the inconsistency but to revise the verdict in accord with its collective perception of the judge's attitude toward the case.
>
> The resubmission may also communicate to the jury the legal effect of its answers and thus facilitate any impulse it may have to "do justice" in the case. Of course, to the extent the jury is moved by such influences to disregard its institutional role of finding the facts on the basis of the evidence presented at trial, the command of the seventh amendment is violated.

Id. at 1263 (Smith, dissenting). Judge Smith would also have treated the jury's decision to answer the questions that it was instructed not to answer as immaterial and would have disregarded those answers. *Id*. at 1266 (expressing preference for enforcement of the proceed-no-further instruction).

IV. Multi-Theory Submission Problems

A. The General Rule

When the trial court submits more than one claim or defense in a single question, a new trial is appropriate if any one of those claims or defenses was incorrectly submitted to the jury.[5] *Reeves v. Acromed Corp.*, 44 F.3d 300, 302-03 (5th Cir. 1995) ("When a district court submits two or more alternative grounds for recovery to the jury on a single interrogatory and the plaintiff prevails, we ordinarily order a new trial if one of the grounds for recover is 'legally inadequate.'"). The reason? When erroneously submitted claims are commingled with validly submitted claims "there is no way to know that the invalid claim . . . was not the sole basis for the verdict." *Braun v. Flynt*, 731 F.2d 1205, 1206 (5th Cir. 1984); *see also Pan Eastern Exploration v. Huffo Oils*, 855 F.2d 1106, 1123 (5th Cir. 1988) ("[T]he reviewing court cannot determine whether the jury based its verdict on a sound or unsound theory.").

This rule is derived from the Supreme Court's decision in *Maryland v. Baldwin*, 112 U.S. 490 (1884). *Baldwin* held that "when a case is submitted to the jury on a general verdict, the failure of evidence or a legal mistake under one theory of the case generally requires reversal for a new trial because the reviewing court cannot determine whether the jury based its verdict on a sound or unsound legal theory." *Pan Eastern*, 855 F.2d at 1123; *see Muth v. Ford Motor Co.*, 461 F.2d 557, 564 (5th Cir. 2006).

This issue arises regularly in the context of general verdict forms. *See Jones v. Miles*, 656 F.2d 103, 106 (5th Cir. 1981) ("A nonspecific, general verdict is acceptable, even in a case alleging multiple theories of liability, if each of the several theories is sustained by the evidence and legally sound."); *Smith v. Southern Airways*, 556 F.2d 1347 (5th Cir. 1977); *see also Pan Eastern*, 855 F.2d at 1123 ("[W]hen a case is submitted to the jury on a general verdict, the failure of evidence or a legal mistake under one theory of the

[5] For a comprehensive and thoughtful analysis of the evolution of this issue in federal court, *see* Russell S. Post, *Harm Analysis for Multi-Theory Submission in Federal Court*, University of Texas Conference on State and Federal Appeals (June 4, 2004); Warren W. Harris, *et al.*, *Federal Jury Charge Practice: A Guide to Handling Jury Charges in Federal Courts*, THE APPELLATE ADVOCATE (Summer 2013).

case generally requires reversal for a new trial because the reviewing court cannot determine whether the jury based its verdict on a sound or unsound theory."); *Ratner v. Sioux Natural Gas Corp.*, 770 F.2d 512, 518 (5th Cir. 1995).

This rule has also resulted in reversals when a validly submitted theory is commingled with a legally erroneous or unsupported theory in a special verdict form. *Reeves*, 44 F.3d at 303-8 (failure-to warn theory was preempted and rendered a single liability question invalid); *Crist*, 957 F.2d at 1288 (commingling of agency and estoppel defenses); *Pan Eastern*, 855 F.2d at 1124 ("[W]e have reversed and remanded for a new trial when an interrogatory contained a complex question and the jury's categorical answer could been to either or both of the questions.").

When a verdict commingles valid and invalid factual bases for a single claim, reversal may also be warranted. *See Ratner v. Sioux Natural Gas Corp.*, 770 F.2d 512, 514-15 (5th Cir. 1985) (verdict form grouped six separate misrepresentations in a single common-law fraud question, but the breadth of the submission rendered it impossible for the appellate court to determine the basis of the jury's verdict).

Similar principles have been applied to the damages context. The *In re Air Crash Disaster* case discussed above provides a helpful context. 795 F.2d 1230 (5th Cir. 1986). The court submitted a single damages question to the jury, but that question lumped several damages elements together, making it impossible to determine whether the jury's damages award was excessive as to each of the individual damages elements. *Id*. at 1235-36. The Fifth Circuit ordered a new trial. *Id*. at 1235-37.

And courts have applied the commingling analysis to defensive theories. *Crist*, 957 F.2d at 1288 (commingling of agency and estoppel defenses in a single question).

B. Harmless-error Exception—the "Reasonably Certain" Standard

The Fifth Circuit has adopted a harmless-error exception to the *Baldwin* principle. *Muth*, 461 F.3d at 564-65; *Ward v. Freeman*, 854 F.2d 780, 790 (5th Cir. 1988); *Braun*, 731 F.2d at 1206 (allowing general verdict, which submitted legally erroneous claims along with valid claims, to stand "where it is reasonably certain that the jury was not significantly influenced by issues erroneously submitted to it"). *Braun* was an invasion-of-privacy case in which the trial court submitted a false-light theory (supported by the evidence) and an appropriation theory (lacking evidentiary support). Because the "entire focus" of the case was on the defendant's publication of an indecent photograph, the Fifth Circuit was "totally satisfied" and "reasonably certain" that the jury's verdict was not the result of an improperly submitted theory. 731 F.2d at 1206. *Muth* involved two design-defect allegations: (i) inadequate roof strength; and (ii) inadequate restraint system. 461 F.3d at 565. But the restraint-system allegation "played little role during trial." *Id*. It wasn't mentioned during jury selection or opening statement. And at closing, plaintiff's counsel only discussed the roof-strength issue. *Id*. On that basis the court concluded that it was "totally satisfied" or "reasonably certain" that the jury's conclusion was grounded in the roof-strength defect and that theory "alone." *Id*.

But in other cases involving both general verdicts and generally submitted interrogatories, the "reasonably certain" standard was not satisfied. *Ward*, 854 F.2d at 790 (court "could not determine which of the 29 Charges the jury relied upon in finding a violation of Rule 10b-5."); *see also Zaffuto v. City of Hammond*, 308 F.3d 485, 491 (5th Cir. 2002) ("Because we cannot know whether the erroneously-submitted Fourteenth Amendment claim or the properly submitted Fourth Amendment claim formed the basis for the jury's punitive damages award, a new trial is required on punitive damages."); *Rutherford v. Harris County*, 197 F.3d 173, 185 (5th Cir. 1999) (disparate impact claim generally submitted without differentiating between the individual basis for the claim was erroneous because the court was not "reasonably certain" that the jury did not basis its decision on erroneous theory); *Imperial Premium Finance, Inc.*, 129 F.3d 347, 354 (5th Cir. 1998) (ordering new trial because court was not "'reasonably certain' that the jury's verdict . . . was based on a sustainable theory of fraud [fraud by misrepresentation], rather than on a legally invalid and hence erroneously submitted theory [fraud by nondisclosure"); *Box v. Ferrellgas, Inc.*, 942 F.2d 942 (5th Cir. 1991) ("[W]e cannot say with reasonable certainty that the jury was not significantly influenced by the erroneous submission of negligent inspection and/or maintenance. . . .").

Of note, the question of multi-theory issues can arise in the context of jury instructions as well. One such example is discussed in the Fifth Circuit's decision in *Eastman* in which a false-advertising claim was submitted to the jury accompanied by an instruction that a statement may be either "literally" false or false "by necessary implication." 775 F.3d at 240-41. The

"necessary implication" doctrine had not been adopted in the Fifth Circuit—though it is the law in several other circuits. The court declined to reach decide whether to adopt that doctrine because the jury found that the complained-of statements were both literally false and misleading. The court thus concluded that the jury's finding rendered any error in the instruction harmless.

C. Preservation Issues

Preserving complaints under the presumed-harm rule in the context of a general verdict simply requires an objection to the "questionable theory or theories" (i.e., a substantive objection), not an objection to the form. *Pan Eastern*, 855 F.2d at 1124. This is the case because "the ambiguity" in the submission "arises from the nature of general verdicts and no party has a right to particular *kind* of verdict, general or specific." *Id*. (emphasis in original).

The Fifth Circuit, however, has not resolved how to preserve a presumed-harm complaint in the context of a special verdict. In *Pan Eastern*, the court did not reach the issue, but laid out two possible approaches. On the one hand, a substantive objection to the invalid or unsupported theory might be sufficient to preserve the complaint. But under the circuit's "normal strict rules requiring objection to the *form* of the charge and interrogatories, we might conclude that the plaintiffs' objections were inadequate to preserve the error and that the verdict can be sustained on any *one* of the possible alternative grounds." *Id*. (emphasis in original). Given the state of the law, the prudent approach is to level objections to both the form and substance of the question.

CONCLUSION

This paper has provided an overview of several federal jury charge issues, including the standard of review, preservation of error, instructions, and the proper use of special verdict forms. Many of the basic preservation rules should be familiar to appellate lawyers who have experience with state-court jury charges. But some aspects of federal charge practice are unique to federal law. Understanding these differences is critical to the effective preparation of and objection to the jury charge in federal court. An appreciation of these distinctions is also useful in understanding state jury-charge issues and potential future developments under state law.