FIFTH CIRCUIT UPDATE

MARK TRACHTENBERG, *Houston*
Haynes and Boone, LLP

Co-authors:
KENT RUTTER
NATASHA BREAUX
Haynes and Boone, LLP
Houston

State Bar of Texas
32ND ANNUAL
ADVANCED CIVIL APPELLATE PRACTICE
September 6-7, 2018
Austin

CHAPTER 2

MARK TRACHTENBERG

HAYNES AND BOONE, LLP
1221 McKinney, Suite 2100
Houston, Texas 77010
Telephone: (713) 547-2528
Mark.Trachtenberg@haynesboone.com

Mark Trachtenberg is a partner at Haynes and Boone, LLP and is a member of its Appellate Section. He heads the Houston office of the firm as its Administrative Partner.

As a board-certified appellate specialist, he has handled numerous cases in the Texas Supreme Court, the United States Court of Appeals for the Fifth Circuit, and in various courts of appeals in Texas.

Mark has helped his clients achieve a successful resolution of their cases in a wide range of matters, including in the areas of bankruptcy, oil and gas, products liability, consumer class actions, arbitration-related appeals, and other business litigation. He has been recognized by The Best Lawyers in America (Woodward/White, Inc.), for Appellate and Commercial Litigation; named a "Texas Super Lawyer" in appellate law; a "Future Star" by Benchmark Litigation.

Mark is a graduate of the Yale Law School and received his Bachelor of Arts, *summa cum laude* from the University of Pennsylvania. Before joining Haynes and Boone, LLP, he served as a law clerk for the Honorable Lee H. Rosenthal, United States District Judge for the Southern District of Texas.

Mark is extensively involved in bar work. For the Houston Bar Association, he serves as the Chair of the Appellate Practice Section. For the American Bar Association's Business Law Section, he serves as the Chair of Appellate Subcommittee of the Business and Corporate Litigation Committee. He writes and speaks on a wide variety of topics, with a recent focus on arbitration issues and oil and gas law.

Mark also is a member of the American Law Institute and recently served on the Executive Committee of the Yale Law School Association by appointment. Outside the office, Mark devotes much of his volunteer time to the Anti-Defamation League, where he serves as a Vice-Chair of the Southwest Region and on its National Civil Rights Committee.

KENT RUTTER

HAYNES AND BOONE, LLP
1221 McKinney, Suite 2100
Houston, Texas 77010
Telephone: (713) 547-2211
Kent.Rutter@haynesboone.com

Kent Rutter, an accomplished appellate advocate with more than 20 years of experience, co-chairs Haynes and Boone's appellate practice group and serves as vice-chair of the Appellate Section of the State Bar of Texas. As a civil appellate specialist who is board certified by the Texas Board of Legal Specialization, Kent additionally serves as an officer of the Texas Association of Civil Trial and Appellate Specialists (TACTAS), an organization of board-certified attorneys. Kent is a former chair of the Appellate Practice Section of the Houston Bar Association and was the course director of the 2014 Advanced Civil Appellate Practice Course presented by the State Bar of Texas.

Kent was recognized by Chambers USA, Chambers & Partners, in Texas for Litigation: Appellate, 2018. He was selected for inclusion in Texas Super Lawyers, Thomson Reuters, 2012-2017, and was recognized in 2015 as one of the top 100 lawyers in Houston by Texas Super Lawyers, Thomson Reuters.

Kent often advises Haynes and Boone's clients regarding the chances of reversal in a potential appeal. His analysis draws on his experience in the appellate courts and from co-authoring an award-winning empirical study of the factors that most frequently result in reversal in the Texas appellate courts. Kent is often asked to lecture on the topic of evaluating appeals, as well as other areas of appellate practice, and has given presentations to hundreds of trial lawyers, appellate lawyers, and in-house counsel.

Kent is also active in the community at large. As a long-time member of the Alexis de Tocqueville Society of the United Way of Greater Houston, Kent has mentored young professionals with an interest in bettering their communities and supported a wide array of organizations that serve families in need.

NATASHA BREAUX

HAYNES AND BOONE, LLP
1221 McKinney, Suite 2100
Houston, Texas 77010
Telephone: (713) 547-2154
Natasha.Breaux@haynesboone.com

Natasha Breaux represents clients in a broad variety of litigation matters, focusing on appellate issues. As a former law clerk to federal judges at both the appellate and trial level, she understands first-hand how appellate and trial courts make decisions.

Natasha is an active member of numerous legal organizations, including the Appellate Section of the Texas State Bar, Appellate and Federal Practice Sections of the Houston Bar Association, Garland R. Walker American Inn of Court, and Texas Aggie Bar Association. Natasha has authored articles on civil procedure and Fifth Circuit case law updates, as well as spoken on federal court procedure at an attorney admission workshop for the United States Court for the Southern District of Texas. As a native Houstonian, Natasha is active in her community, including volunteering to represent clients pro bono.

Before her legal career, Natasha received her MBA and worked in business operations for an international company. She also worked abroad for a year. Through these experiences, she gained knowledge about international business operations, which allows her to better understand the goals and challenges of her international business clients.

TABLE OF CONTENTS

FIFTH CIRCUIT UPDATE

This paper highlights cases decided by the Fifth Circuit since the last Advanced Appellate Course in September 2017 that would be of greatest interest to civil trial and appellate practitioners. The case summaries below generally focus on the holdings and analysis that satisfy this test (e.g., jurisdiction, procedure, evidence) and omit other holdings in the cases that do not (e.g., interpretation of substantive federal statutes) or that do not break any new ground.

I. APPELLATE PROCEDURE AND JURISDICTION

A. *Cooper Indus., Ltd. v. Nat'l Union Fire Ins. Co.*, 876 F.3d 119 (5th Cir. 2017)

Key Holding: Only an "aggrieved party" may appeal a judgment and the determination of whether a party is an aggrieved party should be assessed by a review of the district court's judgment, not its opinion or order. The cross-appellant was not an aggrieved party because the district court awarded it a take-nothing judgment, and the arguments it sought to make should have been raised as alternate grounds for affirmance in its opposition brief.

Background: Cooper Industries sought insurance coverage from National Union under a commercial fraud policy to cover losses suffered when it invested pension funds in a Ponzi scheme. The district court granted National Union's motion for summary judgment and entered a take-nothing in its favor, finding that the language of the policy did not cover the claimed losses. The district court also granted Cooper Industries' motion for partial summary judgment, finding that two exclusions that National Union invoked also did not apply. Cooper Industries appealed and National Union cross-appealed from the granting of Cooper Industries' motion.

Analysis: The Fifth Circuit granted Cooper Industries' motion to dismiss National Union's cross-appeal because only an "aggrieved" party may appeal a judgment. National Union's argument that it qualified as an aggrieved party conflated the district court's opinion (the order) with its judgment, and appellate courts review the latter, not the former. Here, the there was nothing unfavorable to National Union in the district court's judgment. National Union contends that it is seeking relief beyond mere affirmance of the judgment because the district court's conclusions on the exclusions could dictate how the case is presented to a jury if we reverse and remand. But National Union was not required to raise this argument in a cross-appeal. Rather, National Union should have simply raised it as alternate grounds for affirmance in its opposition brief. The Court noted that "National Union's improper cross-appeal resulted in an over-length opposition brief and an additional reply (giving National Union over four thousand words of additional briefing)."

B. *ExxonMobil Corp. v. Starr Indemnity & Liability Ins. Co.*, 716 F. App'x 349 (5th Cir. 2018)

Key Holding: When a district court remands a case on a ground it mistakenly characterizes as jurisdictional, its remand order is unreviewable. That is so even though the order would have been reviewable had the district court characterized it correctly.

Background: Exxon sued several insurers in Texas state court. The insurers removed the case to federal district court. The district court remanded because one of Exxon's claims arose under Texas workers' compensation law and was therefore non-removable under 28 U.S.C. § 1445(c). When the insurers removed a second time, the district court initially denied Exxon's motion to remand, holding that a recent judgment signed by a Texas state trial court in a related case had "dissolved" Exxon's non-removable claim. A year later, however, the judgment in the related case was reversed on appeal. The district court granted Exxon's motion to remand, reasoning that the state appellate decision "revived" the non-removable claim and divested the court of subject matter jurisdiction. The insurers appealed the remand order.

Analysis: The Fifth Circuit dismissed the insurers' appeal. Under 28 U.S.C. § 1447, a remand order generally "is not reviewable on appeal or otherwise" unless the district court "clearly and affirmatively" invokes a ground for remand not specified in the statute. Here, if the district court had correctly identified the revival of the non-removable claim as a defect in removal procedure and remanded on that basis, its order would have been reviewable, because the statute does not authorize remands based on procedural defects more than thirty days after removal. But the district court failed to recognize the issue as a defect in removal procedure and mistakenly characterized it as a jurisdictional issue instead. Because a lack of jurisdiction is specified in the statute as a ground for remand, the order was unreviewable.

C. *Morgan v. Huntington Ingalls, Inc.*, 879 F.3d 602 (5th Cir. 2018)

Key Holdings: (1) Only those defendants with an independent right to remove to federal court have standing to appeal a remand order. (2) The removal clock begins running on the date of receipt of a deposition transcript indicating the propriety of removal, not the date of oral deposition testimony.

Background: Plaintiff brought suit in state court against multiple defendants, including Avondale Shipyards and Murphy Oil. Plaintiff's pleadings did

not indicate any basis for removal to federal court. During Plaintiff's deposition, though, he made statements that indicated removal was proper because his claims against Avondale gave rise to federal officer jurisdiction. Avondale received the deposition transcript eight days after the deposition, and thirty days after such receipt, removed the entire case including claims against Murphy Oil. Plaintiff contested removal as untimely. The district court agreed and remanded, holding the removal clock began running on the date of the relevant oral testimony and thus the 30-day removal deadline was missed. Both Avondale and Murphy Oil appealed the remand.

Analysis: *First*, the Fifth Circuit held Murphy Oil had no standing to appeal because it had no injury in fact. A bare procedural violation was not sufficient. Nor was Murphy Oil's interest in a federal forum. Because Murphy Oil could not have independently asserted federal officer jurisdiction and removed the case, Murphy Oil lacked standing to appeal the remand order. Only Avondale—the party with the right to remove—had standing.

Second, the Fifth Circuit held removal was timely and thus it vacated the remand order. As a matter of first impression, the Court adopted a bright-line rule that the removal clock begins running on the date of receipt of a deposition transcript indicating the propriety of removal. In reaching that holding, the Fifth Circuit parted ways with the Tenth Circuit, which has held the removal period commences with the giving of the oral deposition testimony.

D. *Nogess v. Poydras Center, L.L.C.*, 728 F. App'x 303 (5th Cir. 2018)

Key Holding: After sanctioning an attorney, a district court may not authorize an immediate appeal by entering a final judgment on sanctions under Rule 54(b).

Background: After defense counsel removed a wrongful-death case to federal court, a magistrate judge imposed Rule 11 sanctions and the district court affirmed. On defense counsel's motion for an immediate appeal, the district court entered a final judgment on sanctions under Rule 54(b).

Analysis: The Fifth Circuit *sua sponte* determined that it lacked appellate jurisdiction. *First*, Rule 54(b) authorizes a final judgment "as to one or more, but fewer than all, claims." The term "claims" means the plaintiff's causes of action and does not encompass sanctions. *Second*, the Fifth Circuit could not review the sanctions judgment by treating it as an interlocutory order. Even though the district court stated that it "granted" counsel's motion to certify an interlocutory appeal under 28 U.S.C. § 1292(b), it entered a final judgment under Rule 54(b) instead. The court did not certify in accordance with 28 U.S.C. § 1292(b) that the issue was "a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." *Third*, an appeal was not allowable under the collateral order doctrine, because the sanctions would be reviewable in an appeal from a final judgment on the merits of the case. *Fourth*, noting that the sanctioned attorneys remained counsel of record at the time the appeal was filed, the court declined to address an open question regarding whether an appeal may be considered where the sanctioned attorneys have withdrawn.

E. *Whole Woman's Health v. Smith*, 896 F.3d 362 (5th Cir. 2018)

Key Holding: Appellate jurisdiction existed over an interlocutory third-party discovery order that required the Texas Conference of Catholic Bishops to produce documents concerning fetal remains in a dispute about fetal-remains regulations.

Background: The Texas Department of State Health Services proposed regulations that would prohibit disposing of fetal remains in a landfill or sewer. Several health care providers licensed to perform abortions (Plaintiffs), brought suit against the Department challenging the regulations. The executive director of the Texas Conference of Catholic Bishops testified at the preliminary injunction hearing in favor of the Department and was scheduled to appear as a trial witness. The executive director testified about the Bishops' moral views and willingness to absorb some costs associated with burying fetal remains. Then Plaintiffs subpoenaed the Bishops for all documents concerning fetal remains and abortions, among others. The Bishops moved to quash the subpoena, contending it violated the First Amendment, the Religious Freedom Restoration Act, and the unduly burdensome rule of Federal Rule of Civil Procedure 45(d). The district court denied the motion to quash, and the Bishops appealed.

Analysis: The Fifth Circuit held it had appellate jurisdiction over the interlocutory third-party discovery order and then reversed on the merits. As to the jurisdictional issue, the Court found the standards of the collateral order doctrine were met, which permits appeals of interlocutory decisions that are conclusive, resolve important questions separate from the merits, and are effectively unreviewable on appeal from the final judgment. The Court reasoned that the order was conclusive as to the Bishops, the order resolved important and very novel issues, and any new trial ordered on later appeal would not directly benefit a third-party witness. The Court further explained that courts have limited ability to assess the strength of religious groups' claims about their deliberations for purposes of monitoring discovery, and that Fifth Circuit precedent holds that interlocutory court orders

bearing on First Amendment rights are subject to appeal pursuant to the collateral order doctrine.

The dissent would have held differently on both the jurisdictional issue and the merits. The dissent recognized that appellate jurisdiction would have been a close question if the discovery dispute was limited to a First Amendment claim. However, because the majority opinion ultimately reverses based on violation of the Federal Rules of Civil Procedure and not the First Amendment, the dissent would have found no appellate jurisdiction. The dissent also noted that a mandamus petition, rather than an interlocutory appeal, is the typical way to protect against the discovery of privileged documents.

II. ARBITRATION

A. *Archer & White Sales, Inc. v. Henry Schein, Inc.*, 878 F.3d 488 (5th Cir. 2017), *cert. granted* 138 S. Ct. 2678 (2018)

Key Holding: The gateway arbitrability determination was for the court to decide, not the arbitrator, even if the arbitration agreement included a clause delegating that determination to the arbitrator, because the assertion of arbitrability was "wholly groundless."

Background: Archer sued its competitor Henry Schein, Inc. (HSI) for antitrust violations. HSI moved to compel arbitration under a clause that provided: "[A]ny dispute arising under or related to this Agreement (except for action seeking injunctive relief . . .) shall be resolved by binding arbitration in accordance with the rules of the American Arbitration Association (AAA)." The district court held that it could decide the question of arbitrability, and that the dispute was not arbitrable because the plain language of the arbitration clause expressly excluded suits that involved requests for injunctive relief.

Analysis: The Fifth Circuit affirmed. In determining arbitrability, the Fifth Circuit applied the two-step inquiry adopted in *Douglas v. Regions Bank*, 757 F.3d 460, 464 (5th Cir. 2014). The first step inquires whether the parties "clearly and unmistakably" intended to delegate the question of arbitrability to an arbitrator. If so, the motion to compel arbitration should be granted in almost all cases, except if the argument that the claim at issue is within the scope of the arbitration agreement is "wholly groundless." If there is no such plausible argument, the district court may decide the gateway issue of arbitrability despite a valid delegation clause.

Here, the Court bypassed the first step in light of an ambiguity in the arbitration agreement—whether the invocation of the AAA Rules, which delegates arbitrability questions to the arbitrator, applied to actions seeking injunctive relief. Instead, the Court jumped to the second step and concluded that HSI's argument for arbitrability was "wholly groundless" because the arbitration clause expressly excludes actions seeking injunctive relief.

B. *Hebbronville Lone Star Rentals, L.L.C. v. Sunbelt Rentals Indus. Servs., L.L.C.*, No. 17-50613, 2018 WL 3719682 (5th Cir. Aug. 6, 2018)

Key Holding: The arbitrator exceeded his powers in reforming the contract based on mutual mistake when the arbitration clause empowered him only to resolve "dispute[s] over Seller's proposed adjustments" to a revenue calculation in an earnout provision, not disputes "regarding" or "arising out of" the revenue calculation.

Background: Lone Star sold its assets, customer lists, and customer contracts to a competitor, Sunbelt. The sales price included three future contingent payments or earnouts, which were dependent on the amount of revenue Sunbelt received from Lone Star's customer base. The sales contract provided a mechanism for Sunbelt to calculate the revenue figure and for Lone Star to propose an adjustment if it disagreed. The parties agreed that an arbitrator would resolve any "dispute[s] over [Lone Star's] proposed adjustments to [the] Revenue Calculation." After a dispute arose and an arbitrator was appointed, the arbitrator agreed with Lone Star's upward adjustment to the revenue calculation but also reformed the contract, concluding that the parties had made a mutual mistake when listing the revenue target for former Lone Star customers in the agreement. The district court vacated the portion of the arbitration award reforming the contract on Sunbelt's claim of mutual mistake.

Analysis: The clause empowering the arbitrator was a narrow one: it authorized the arbitrator only to resolve the parties' dispute over Lone Star's proposed adjustments to the revenue calculation. Had the provision extended to any dispute "regarding" or "arising out of" the revenue calculation, the outcome might have been different. By straying beyond the contractual language, the arbitrator "exceeded [its] power" and thus the arbitral order reforming the contract for mutual mistake was properly vacated.

III. CLASS ACTIONS

A. *City of Walker v. State of Louisiana*, 877 F.3d 563 (5th Cir. 2017)

Key Holding: When an appellate court has jurisdiction to review a remand order because it concerns Class Action Fairness Act ("CAFA") jurisdiction, the court does not have jurisdiction to review other issues decided in the remand order.

Background: Plaintiffs brought a class action suit in state court against the State of Louisiana and private firms that participated in the design and construction of an interstate widening project. Defendants removed the

case to federal court on three bases: CAFA jurisdiction, federal officer jurisdiction, and federal question jurisdiction. The district court remanded, and Defendants appealed.

Analysis: The Fifth Circuit held that it had jurisdiction to review the part of the remand order involving CAFA jurisdiction and federal officer jurisdiction, but not the part about federal question jurisdiction. The Court explained that remand orders generally are not reviewable on appeal, but there are exceptions for remand orders that involve CAFA jurisdiction and federal officer jurisdiction. Some other circuits hold that when review of a remand order involves CAFA jurisdiction, then the appellate court has jurisdiction to review every issue decided in the remand order. As a matter of first impression, the Fifth Circuit disagreed, holding the Court's jurisdiction to review a CAFA remand order stops at the edge of the CAFA portion of the order.

B. *Lester v. Exxon Mobil Corp.*, 879 F.3d 582 (5th Cir. 2018).

Key Holdings: (1) A motion to consolidate and transfer related state court suits effectuated a "mass action" that was properly removable under the Class Action of Fairness Act ("CAFA"). (2) CAFA may be invoked as a basis for removal even though one of the underlying suits comprising the mass action commenced before CAFA's 2005 effective date.

Background: In 2002, over 600 plaintiffs filed a petition in Louisiana state court (*Lester v. Exxon Mobil*) alleging personal injury and property damage claims arising from Naturally occurring radioactive material. The state court segregated Plaintiffs' claims into smaller trials, with each trial involving no more than 12 of the plaintiffs. In 2013, three of the plaintiffs filed a wrongful death and survival action seeking to recover for injuries to and the death of Cornelius Bottley, who prior to his death, had been a plaintiff in *Lester*. After the state court in *Lester* set a trial for a group of plaintiffs that included Bottley's claim, the *Bottley* Plaintiffs moved to transfer and consolidate their three-plaintiff suit with *Lester*. Exxon Mobil Corporation promptly removed both suits under CAFA. At the time of removal, over 500 plaintiffs remained in *Lester*. Both the *Bottley* and *Lester* Plaintiffs moved for remand asserting lack of subject matter jurisdiction. The district court denied remand and consolidated the cases. Plaintiffs brought a permissive appeal.

Analysis: CAFA authorizes the removal of "mass actions," defined as "any civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact." The Fifth Circuit concluded that the mass action inquiry is focused on what the plaintiffs' *proposed*, and the Court found that the *Bottley* Plaintiffs' filing of a motion to consolidate effectuated a mass action because *Bottley* plus *Lester* met the 100-person numerosity requirement. It did not matter that the state court was trying the cases in smaller increments. The Court found it significant that the *Bottley* and *Lester* Plaintiffs were represented by the same counsel.

The plaintiffs also argued that consolidation was improper because *Lester* commenced before CAFA's effective date and CAFA states that it does not apply retroactively. But the Fifth Circuit found that because *Bottley* was filed after CAFA's effective date, and because *Bottley* became a mass action upon Plaintiffs' proposed consolidation with *Lester*, CAFA was not being applied retroactively. Judge Graves, dissenting, would have found that counting *Lester*'s plaintiffs toward the 100-person threshold violated CAFA's prohibition on retroactive application.

IV. *ERIE* DOCTRINE

A. *City of San Antonio v. Hotels.com, L.P.*, 876 F.3d 717 (5th Cir. 2017)

Key Holding: In making an *Erie* guess about Texas statutory interpretation in the absence of a high court decision, the Fifth Circuit will follow the decision of an intermediate court—especially when the state's high court has refused review—unless there is "convincing evidence" that the high court would decide it differently.

Background: Texas municipalities impose hotel occupancy taxes for the use of hotel rooms. Online travel companies act as third-party intermediaries between hotels and consumers by facilitating reservations. These companies and the hotels enter into contracts whereby the hotels charge a confidential, discounted room rate, and the companies then charge the consumers an amount that includes the discounted room rate, a service fee, and a tax-recovery charge. The companies retain the service fees and forward the remainder to the hotels, which remit the taxes to the taxing authorities. In this class action, 173 Texas municipalities sued the travel companies for unpaid hotel occupancy taxes, claiming that the companies were required to collect and remit hotel occupancy taxes based on the discounted room rates and the service fees, as opposed to only the discounted room rates. The district court ruled for the municipalities, holding that both the discounted room rates and service fees were subject to the hotel occupancy tax. A similar lawsuit brought by the City of Houston had previously culminated in a decision by the Fourteenth Court of Appeals affirming a take nothing summary judgment against the City of Houston.

Analysis: The Fifth Circuit reversed, making an *Erie* guess that the Texas Supreme Court would hold only the discounted room rates paid by travel companies to hotels are subject to the hotel occupancy

tax—not the service fees travel companies charge to consumers. The Fifth Circuit relied principally on the Fourteenth Court's decision, giving weight to the Texas Supreme Court's denial of review from that decision and the Supreme Court's frequent application of the presumption that the reach of an ambiguous tax statute should be construed strictly against the taxing authority and liberally for the taxpayer.

V. JURY CHARGE PRACTICE

A. *Nester v. Textron, Inc.*, 888 F.3d 151 (5th Cir. 2018)

Key Holdings: (1) The district court did not abuse its discretion in using the Texas PJC's instruction for "safer alternative design" in a design defect claim without including an additional instruction that the safer alternative design must also be one that would not have imposed an equal or greater risk of harm to the public under other circumstances. (2) The Fifth Circuit will not presume harm if a broad form jury question (here "safer alternative design") commingles factually valid and factually invalid theories. (3) Federal courts are not bound by state law requiring bifurcation of liability from punitive damages; rather, bifurcation is a case-specific procedural matter within the sole discretion of the district court.

Background: Nester suffered permanent injuries when an unmanned utility vehicle ran her over. She filed a diversity suit against the vehicle's manufacturer in federal court and prevailed on a design defect claim. The jury question on "safer alternative design," an element of a design defect claim, tracked the language from the Texas Pattern Jury Charge ("PJC") and the relevant Texas statute. Defendant Textron complained that the instruction did not permit the jury to consider a required element—whether the proposed design would have imposed an equal or greater risk of harm to the public under other circumstances. Textron also complained that two of the four alternative designs proposed by Nester were factually unsupported and could not be commingled into a single broad-form question. Finally, Textron also complained of the district court's refusal to bifurcate liability and punitive damages into separate phases of trial.

Analysis: Under abuse-of-discretion review for jury instructions, reversal is appropriate only when the charge as a whole leaves the appellate court with "substantial and ineradicable doubt" as to whether the jury was properly guided in its deliberations and whether the challenged instruction affected the outcome of the case. The dispute here hinged on whether the challenged instruction was not substantially covered as part of the charge as a whole. For twenty years, Texas courts have been using the "safer alternative design" PJC without the suggested additional language from Textron. "The list of conceivable additions goes on," but a "commonly administered PJC is often a sensible place to draw the line." Further, the existing definition requiring Plaintiff to show that the alternative design "cannot substantially impair the product's utility" gave Textron the opportunity to raise its concerns about Nester's proposed designs. Thus, the district court did not abuse its discretion in submitting the "safer alternative design" question.

The Fifth Circuit rejected Textron's argument that it should presume harm from the submission of a broad form "safer alternative design" question when Plaintiff commingled factually valid and invalid theories. Instead, the Court will presume harm only when a charge commingles legally valid and invalid theories, not for the commingling of factual theories. Because Textron concedes there was sufficient evidence to support two of the four designs, the Fifth Circuit would "trust the jury to have sorted the factually supported from the unsupported."

Finally, the Texas statute requiring bifurcation of the liability and punitive damages phases does not apply in federal court. Bifurcation in federal court is a case-specific determination made in the sole discretion of the trial judge, and that discretion was not abused here.

VI. MANDAMUS

A. *In re Itron, Inc.*, 883 F.3d 553 (5th Cir. 2018)

Key Holding: Mandamus relief will be granted when the district court's abuse of discretion cannot adequately be corrected on appeal and the issue has "importance beyond the immediate case."

Background: Days before a corporate merger, the company being acquired assumed a contractual obligation to a third party. After closing, the third party sued the acquiring company on the obligation and a settlement was reached. The acquiring company then sued three officers of the company it had acquired, seeking as damages the cost of the litigation and settlement. In that litigation, a magistrate judge ordered the acquiring company to produce attorney-client communications, reasoning that the acquiring company waived any privilege by filing a lawsuit to which the communications were relevant.

Analysis: The Fifth Circuit held that the privilege was not waived under Mississippi law. The court then applied the three-part federal standard for mandamus relief. First, Petitioner had "no other adequate means to attain the relief," having exhausted every other opportunity for interlocutory review of the discovery ruling. Second, Petitioner's "right of issuance of the writ [was] clear and indisputable," as the error was "obvious and purely legal in nature." Third, mandamus relief was "appropriate under the circumstances" because the issue had "importance beyond the immediate case." Lower-court rulings had been inconsistent, and the incorrect approach threatened to

eliminate the attorney-client privilege "in a substantial swath of cases." The Court also cited "the sheer magnitude of the error's effect on this particular case," noting that the ruling would require the production of "approximately the entire universe of privileged documents from . . . litigation that engaged around fifteen . . . attorneys for two-and-a-half years." Judge Dennis dissented, holding that Petitioner had had failed to meet the high burden of showing that its right to the writ was "clear and indisputable."

B. *In re United States ex rel. Drummond*, 886 F.3d 448 (5th Cir. 2018)

Key Holding: An appellate court may issue a writ of mandamus to address a district court's undue delay in adjudicating a case properly before it.

Background: In this False Claims Act case, three of Relator's motions for partial summary judgment had been pending before District Court Judge Hughes for several years (since March 2014, April 2014, and May 2016). The case itself had been pending for over nine years. Relator petitioned for a writ of mandamus, requesting the Fifth Circuit to direct Judge Hughes to adjudicate the pending motions. Over six months after the petition was filed, Judge Hughes still had not resolved two of the motions.

Analysis: The Fifth Circuit granted the writ of mandamus and ordered Judge Hughes to adjudicate the motions within thirty days. The Court explained that the United States Supreme Court, as well as other circuits, recognize that an appellate court may issue a writ to address a district court's undue delay in adjudicating a case properly before it, as here.

VII. PUNITIVE DAMAGES

A. *Bear Ranch, L.L.C. v. HeartBrand Beef, Inc.*, 885 F.3d 794 (5th Cir. 2018)

Key Holding: Under Texas law, a plaintiff that obtains only equitable relief, not actual damages, cannot recover exemplary damages.

Background: Bear Ranch purchased Akaushi cattle, a rare breed from Japan, from HeartBrand. The contract contained restrictions on the sale of the cattle. Bear Ranch later purchased additional Akaushi cattle from other producers who had purchased the cattle from HeartBrand. The parties disputed whether the additional cattle were subject to the contractual restrictions. The district court entered judgment for HeartBrand, imposing a permanent injunction on Bear Ranch with respect to some of the cattle and a constructive trust on other cattle. The judgment also awarded attorney's fees and exemplary damages to HeartBrand.

Analysis: Applying Texas law, the Fifth Circuit reversed the award of exemplary damages. Section 41.004(a) of the Texas Civil Practice and Remedies Code provides that "exemplary damages may be awarded only if damages other than nominal damages are awarded." Here, the judgment awarded only equitable relief, not actual damages. The court noted that before Section 41.004(a) was enacted, the Texas Supreme Court had stated that equitable relief, in the form of an order returning property to the plaintiff, can sometimes support exemplary damages. Even in that case, however, the court ultimately held that exemplary damages were not recoverable because the equitable relief prevented any actual harm to the plaintiff and "presumed harm" will not support exemplary damages. Likewise, in light of the equitable relief HeartBrand obtained, it suffered only "presumed harm."

VIII. DISTRICT COURT JURISDICTION AND VENUE

A. *16 Front Street, L.L.C. v. Mississippi Silicon, L.L.C.*, 886 F.3d 549 (5th Cir. 2018)

Key Holding: When federal question jurisdiction is lacking at the time the original complaint is filed, the time-of-filing rule compels the dismissal of the claims. However, the time-of-filing rule does not compel the dismissal of additional claims asserted against new defendants in an amended complaint, provided the new claims raise federal questions.

Background: A company applied with the Mississippi Department of Environmental Quality ("MDEQ") to build a silicon plant. An environmental interest group filed a citizen suit under the Clean Air Act to enjoin construction. The original complaint named only the company as a defendant, while an amended complaint added MDEQ. The district court dismissed the claim against the company for lack of subject-matter jurisdiction, holding that the claim failed to meet the requirements of the Clean Air Act. The court dismissed the claim against MDEQ as well, reasoning that because jurisdiction was lacking at the time the original complaint was filed, the time-of-filing rule required dismissal of the entire case.

Analysis: The Fifth Circuit affirmed the dismissal of the claim against the company, but reversed the dismissal of the claim against MDEQ. The court explained that in the context of diversity jurisdiction, the time-of-filing rule generally instructs that the jurisdiction of the court depends on the facts as they existed when the case was filed. As an exception, however, when diversity jurisdiction is lacking at the outset because of the presence of a non-diverse party, the dismissal of the non-diverse party can "cure" the lack of jurisdiction. Similarly, this case involved a change in parties—the addition of MDEQ—which cured the lack of federal question jurisdiction. In reaching this conclusion, the Fifth Circuit distinguished cases raising a federal question that are filed in state court and removed to federal court. In those cases, the time-of-filing rule requires that jurisdiction be determined at the outset so that plaintiffs may not re-

plead following removal to eliminate the basis for federal jurisdiction.

B. *Trois v. Apple Tree Auction Ctr., Inc.*, 882 F.3d 485 (5th Cir. 2018)

Key Holdings: Where out-of-state defendants made misrepresentations while participating on a conference call to a Texas resident that led to a contract executed out-of-state, (1) the defendants were subject to specific personal jurisdiction in Texas for a fraud claim but not a breach-of-contract claim, and (2) Texas was a proper venue for the fraud claim.

Background: Plaintiff, a resident of Texas, owned certain collectable items. A Kentucky resident contacted Plaintiff about selling some of his collectibles through Apple Tree Auction Center, an Ohio company whose president was Samuel Schnaidt, a resident of Ohio. During several conference calls placed by the Kentucky resident to Plaintiff in Texas with Schnaidt on the line in Ohio, Schnaidt allegedly made misrepresentations about Apple Tree. Plaintiff then traveled to Ohio, where he and Apple Tree entered into an auction contract. When the contract fell short of Plaintiff's expectations, he sued Schnaidt and Apple Tree in Texas for breach of contract and fraud. The district court dismissed the breach-of-contract claim for lack of personal jurisdiction and dismissed the fraud claim for improper venue. Plaintiff appealed.

Analysis: *First*, the Fifth Circuit held Texas had no specific personal jurisdiction over Defendants for the contract claim because it was executed and performed solely in Ohio. The conference calls negotiating the agreement, standing alone, were insufficient purposeful availment of the benefits of Texas to establish jurisdiction over that claim. However, Texas had specific personal jurisdiction over Defendants for the fraud claim. Making misrepresentations on a phone call personally placed to a forum resident suffices to establish personal jurisdiction for a fraud claim, but a tortious response to one unsolicited phone call does not—which are opposite ends of a spectrum. This case fell in the fuzzy middle. The Court found that because Schnaidt was a willing and active participant on the conference call, he was more akin to an initiator of a call rather than a recipient of an unsolicited call; therefore, he was subject to specific jurisdiction in Texas for the fraud claim.

Second, the Court turned to whether Texas was a proper venue for the fraud claim. It held the district court erred in concluding Texas was an improper venue based on the fact that the contract execution and performance took place in Ohio. Because venue is proper where a substantial part of the events giving rise to *the claim* occurred, the proper focus is the events giving rise to the fraud claim, not the contract claim. Here, the misrepresentations directed at Texas gave rise to the fraud claim, so Texas was a proper venue for the fraud claim.

IX. DISTRICT COURT PROCEDURE AND EVIDENCE

A. *Hacienda Records v. Ramos*, 718 Fed. App'x 223 (5th Cir. 2018)

Key Holdings: Under the sham affidavit rule, it does not matter whether the challenged declaration or affidavit is prepared before or after the contradictory deposition testimony. Because of the abundant inconsistencies between them, the appellant could not use his declaration to defeat summary judgment. (The panel also had a lengthy discussion of Fifth Circuit precedent on the finality requirement for application of collateral estoppel but ultimately based its ruling on the merits. Judge Dennis, concurring in the judgment, would have applied collateral estoppel to bar the appellant's claims.)

Background: The district court dismissed copyright claims of various Tejano artists for lack of standing because they had assigned and transferred their rights to their attorney. That ruling issued after a judge in a previously filed case (*Guajardo*) had also dismissed the artists' claims for lack of standing, but before the district court entered final judgment. The district court also granted summary judgment against one of the artists (Ramos) who had not assigned his claims based on a previous contract he had entered with Hacienda. Ramos filed a declaration that he was never paid under the contract, but four days later gave deposition testimony that contradicted his declaration. The district court applied the "sham affidavit" rule in support of its summary judgment ruling.

Analysis: The Fifth Circuit engaged in a lengthy discussion of the "finality" requirement for collateral estoppel, noting the tension between the Restatement approach (adopted by some Fifth Circuit panels) that deems sufficient an order that "is sufficiently firm to be accorded conclusive effect," with the "more rigid" approach that equates finality for collateral estoppel purposes with the final decision requirement for purposes of appeal under 28 U.S.C. § 1291 (the approach most often adopted by the Fifth Circuit). The Court nevertheless declined to apply collateral estoppel because the judgment in *Guajardo* was not yet final for 28 U.S.C. § 1291 purposes when the district court ruled on standing. Instead, like the district court, it ruled against the Tejano artists on the merits. Judge Dennis would have upheld the dismissal of the claims on collateral estoppel grounds since a final judgment was entered in *Guajardo* before the Fifth Circuit considered the artists' appeal.

With respect to Ramos, the terms of the 1985 contract with Hacienda barred his own breach of contract claims. He could not avoid summary judgment with a declaration that denied he was ever paid under

the contract, when just days later he offered deposition testimony admitting that he probably received a contract advance and could not remember whether he had been paid other funds required under the contract.

B. *Howard v. Maxum Indemnity Co.*, 715 F. App'x 372 (5th Cir. 2018)

Key Holding: A choice-of-law argument is waived if it is not raised until a motion to alter the judgment under Federal Rule of Civil Procedure 59(e).

Background: Defendant moved to dismiss Plaintiff's claims, citing Texas law. Defendant recognized Oklahoma law might apply but asserted a conflict-of-law analysis was unnecessary because Texas and Oklahoma law did not conflict. In response, Plaintiff did not address the choice-of-law issue and also cited Texas law. After the district court applied Texas law and dismissed the case, Plaintiff filed a motion to alter the judgment under Rule 59(e) in which he argued for the first time that Oklahoma law controlled. The district court denied that motion, and Plaintiff appealed.

Analysis: The Fifth Circuit affirmed, finding Plaintiff waived the application of Oklahoma law. The Court reiterated settled law that failure to raise an argument in the district court waives that argument on appeal, including a choice-of-law argument. It was inconsequential that Plaintiff raised the argument in the motion to alter, because the Court does not consider arguments raised for the first time in a motion to alter.

C. *In re DePuy Orthopaedics, Inc., Pinnacle Hip Implant Prod. Liab. Litig.*, 888 F.3d 753 (5th Cir. 2018)

Key Holding: The denial of a motion for new trial is reviewed only for an abuse of discretion, but will be reversed where the district court erroneously admitted highly inflammatory evidence and counsel misled the jury into believing that key experts were testifying without compensation.

Background: In multidistrict litigation, thousands of plaintiffs claimed they were injured by hip implants manufactured by a subsidiary of Johnson & Johnson. In a bellwether trial, a jury awarded five plaintiffs $502 million. The district court denied all post-trial motions and entered a judgment on the verdict.

Analysis: The Fifth Circuit largely rejected Johnson & Johnson's arguments that Plaintiffs' claims failed as a matter of law. However, the court held that "egregious, multiple, and prejudicial" errors required a new trial. *First*, the district court allowed evidence that Johnson & Johnson subsidiaries had bribed Saddam Hussein's regime in Iraq. The district court reasoned that Johnson & Johnson "opened the door" by eliciting testimony on their corporate culture, but the Fifth Circuit disagreed, noting that plaintiffs' counsel specifically invited the jury to base its verdict on the alleged Iraqi bribes alone. *Second*, the district court admitted a resignation letter alleging racial discrimination, which was held to be error because the letter was both prejudicial and hearsay. *Third*, the district court denied Johnson & Johnson's Rule 60 motion for relief from judgment on the ground that Plaintiffs concealed payments to two expert witnesses. The district court reasoned that Johnson & Johnson failed to show that disclosing the payments "would have produced a different result at trial." The Fifth Circuit explained that the correct standard is not whether disclosing the payments would have changed the result, but whether concealing them prevented Johnson & Johnson from fully and fairly presenting its case. Citing repeated comments in which counsel told the jury that Plaintiffs' "unpaid" experts were more credible than Defendants' highly compensated experts, the Court held that Johnson & Johnson was entitled to a new trial.

D. *North Cypress Med. Ctr. Operating Co. v. Aetna Life Ins. Co.*, No. 16-20674, 2018 WL 3635231 (5th Cir. July 31, 2018)

Key Holding: (1) The district court abused its discretion in summarily denying Aetna's motion for leave to amend its counterclaim without providing adequate reasons. (2) The appropriate remedy for the district court's denial of leave to amend normally would be reversal, but under the circumstances presented here, that remedy would be "an exercise in futility." Thus, the Court examined the record itself and concluded that it supported denial of Aetna's leave to amend.

Background: Aetna moved to amend its counterclaim two years after the case began, four months before dispositive motions were due, and seven months before the close of discovery. It sought to add new claims (unjust enrichment, tortious interference, and breach of contract) and a new defendant (Plaintiff NCMC's CEO) to the litigation, and it claimed the amendment was prompted by documents it received six months before filing its motion. The district court summarily denied Aetna's leave to amend. The case proceeded to trial on Aetna's existing counterclaims and NCMC's claims.

Analysis: The Fifth Circuit concluded that the district court abused its discretion in summarily denying Aetna's motion without engaging NCMC's arguments of futility and "undue delay." Ordinarily, the remedy would be a reversal and remand with instructions to the district court to provide an explanation for why it denied the motion. But where remand would not be practical or efficient, the appellate court may examine the record to determine whether denial of leave to amend was justified. Here, a remand would have been an exercise in futility and would diminish judicial economy. The denial of

Aetna's motion was justified based on Aetna's undue delay, because adding the additional claims and a new defendant would fundamentally change the nature of the case and require NCMC to adopt an "entirely new defense." The Fifth Circuit also pointed out that Aetna could still pursue its claims in a parallel case.