

Presented:

The 2005 State and Federal Appeals Conference

**June 1 - 3, 2005
Austin, Texas**

**Fifth Circuit Update:
Significant Civil Decisions Since May 2004**

O. Rey Rodriguez

Author contact information:

O. Rey Rodriguez
Fulbright & Jaworski L.L.P.
Dallas, Texas

orodriguez@fulbright.com
214-855-8000

TABLE OF CONTENTS

	Page
INTRODUCTION	1
DISCUSSION	1
I. Jurisdiction.....	1
A. “Appellees” Seeking To Improve The Decision Below	1
B. Arbitration Matters.....	1
C. Copyright Cases – Curing Jurisdictional Defects	1
D. Disbursement Of Funds Deposited Into The Court’s Registry.....	2
E. Discovery Orders	2
F. Dismissal Under 12(b)(1) Inappropriate Where Key Contested Facts Go To Both Subject Matter Jurisdiction And Underlying Cause of Action.....	2
G. Diversity Jurisdiction – Improper Joinder	2
H. Diversity Jurisdiction — Lack Of A Certificate To “Do Business” In Texas Is Not Dispositive Of A Corporation’s Citizenship For Diversity Purposes	4
I. Diversity Jurisdiction — National Banks Are Not Citizens Of All States Where They Have Branches.....	5
J. Diversity Jurisdiction — Not Destroyed Where A Defendant Joins A Non-Diverse Party As Part Of A Counterclaim.....	5
K. Diversity Jurisdiction — Post-Filing Changes In Citizenship Cannot Cure Lack Of Diversity Jurisdiction	5
L. Final Judgments	6
1. Final Or Not	6
2. The Finality Trap	6
M. Forum Non Conveniens — May Not Be Considered In Advance Of Jurisdictional Inquiry.....	7

TABLE OF CONTENTS
(continued)

	Page
N. Mootness — Constitutional Challenges	7
O. Remand Orders	7
P. Standing	8
1. ADA Standing.....	8
2. Dormant Commerce Clause Challenges	8
3. ERISA § 502-(a)(2).....	9
4. Section 11 Claims	9
Q. Tax Injunction Act	10
R. Tolling Deadline To File Notice Of Appeal	10
S. Trial Court Jurisdiction Affected By Notice Of Appeal.....	11
T. <i>Younger</i> Abstention	11
II. Pre-Trial Matters.....	13
A. Dismissal — Claims By Unrepresented Corporations.....	13
B. Dismissal — Documents Attached To Complaints	13
C. Dismissal — Improper Venue (Agreement to Arbitrate)	14
D. Dismissal — Prohibited Conclusionary Allegations	14
E. Dismissal — <i>Res Judicata</i> Barring Derivative Claims.....	15
F. Motions To Amend Complaints.....	15
G. <i>Res Judicata</i> , Title VII Claims And Right-To-Sue Letters.....	16
H. Summary Judgment Arguments And Evidence Raised In Reply Brief	16
I. Summary Judgment Grounds.....	16

TABLE OF CONTENTS
(continued)

	Page
III. Preservation Of Error/Trial And Post-Trial	17
A. Constitutional Challenges	17
B. Jury Charge Error.....	17
C. Rule 50 Motions.....	18
D. Rule 59 Motions.....	18
E. Statute of Frauds Defenses In Fraudulent Inducement Cases.....	18
F. Waivers	19
IV. Standards of Review	20
A. ADEA — Mixed-Motive Analysis Used In Title VII Cases Applies.....	20
B. Agency Determinations	20
C. Arbitration — Confirmation/Vacatur Of Arbitration Awards	21
1. “Arbitrary And Capricious”	21
2. Power Of Arbitrators To Act	21
D. Arbitration — Existence Of An Agreement To Arbitrate	22
E. Arbitration — Parties May Customize Appellate Review In Their Agreements	22
F. Arbitration — Unconscionable Provisions	23
G. Arbitration — Waiver Of Arbitration Rights.....	23
H. Class Certification.....	23
1. Fraud On The Market.....	23
2. Notices Required Before Suit	24
3. Predominance.....	24

TABLE OF CONTENTS
(continued)

	Page
I. Class Settlements	25
J. Expert Testimony.....	25
1. Products Liability.....	25
2. Survey Evidence	25
K. FEELA Featherweight Standard	25
L. Failure To State A Claim Upon Which Relief Can Be Granted	26
M. Findings Of Fact	28
N. Injunctive Relief.....	28
O. Interlocutory Appeals Of Orders <i>Re</i> Injunctive Relief	28
P. Intervention Of Right.....	29
Q. Jury Verdict.....	29
R. Legal Insufficiency	31
S. Mandate.....	31
T. Plain Error.....	31
U. Remand Orders	32
V. Rule 60(b)(6) Motions Predicated On Changes In Substantive Law	33
W. Sanctions.....	33
X. Special Masters Under Rule 53.....	33
Y. Summary Judgment	34
Z. Transfers of Venue Under 28 U.S.C. § 1404(a)	36
V. Other Areas	38
A. Airbag Non-Deployment Cases — Expert Testimony	38

TABLE OF CONTENTS
(continued)

	Page
B. Contingent Fee Contracts — Admiralty Contexts	38
C. Judicial Estoppel	39
D. Law of the Case	39
E. Orders Limiting Post-Judgment Motion Practice	39
F. Preclusion.....	39
G. Preemption	40
H. Prior Precedent Rule	40
I. Recovery Of Non-Pecuniary Damages Prohibited In Jones Act Cases	40
J. Social Security Appeals	40
K. Waiver of Eleventh Amendment Immunity.....	41

INTRODUCTION

This paper provides a brief summary of selected holdings of the Fifth Circuit Court of Appeals in civil opinions handed down from approximately May 2004 through April 2005. The opinions selected for treatment in this paper are all published and bear on various topics of interest to the general civil appellate practitioner. The summaries focus on issues of jurisdiction, pre-trial matters, preservation of error and standards of review.

DISCUSSION

I. Jurisdiction

A. “Appellees” Seeking To Improve The Decision Below

In *Gulf Best Electric, Inc. v. Methe*, 369 F.3d 601 (5th Cir. 2004), the panel held that where a Longshore and Harbor Workers’ Compensation Act claimant raised an issue as an affirmative challenge to the Benefits Review Board’s decision (essentially in his favor) rather than as a defense to his employer’s appeal, his putative cross-application was properly characterized as a petition for review and, thus, time barred in view of the claimant’s failure to file a petition for review no later than sixty days following issuance of the order as required by 33 U.S.C. Section 921(c). 369 F.3d at 604. The panel dismissed the claimant’s request for review for lack of appellate jurisdiction. *Id.* at 607.

B. Arbitration Matters

Where a district court orders arbitration, administratively closes a case and stays proceedings pending arbitration, there is no final decision subject to review by immediate appeal under the FAA, 9 U.S.C. § 16. *South Louisiana Cement, Inc. v. Van Aalst Bulk Handling, B.V.*, 383 F.3d 297 (5th Cir. 2004). Applying this rule, the panel in *South Louisiana Cement* dismissed the appeal for want of jurisdiction. *See also Mire v. Full Spectrum Lending, Inc.*, 389 F.3d 163 (5th Cir. 2004) (dismissing for want of jurisdiction appeal from order compelling arbitration and administratively closing case and noting that the “effect of an administrative closure is no different from a simple stay, except that it affects the count of active cases pending on the court’s docket”).

C. Copyright Cases – Curing Jurisdictional Defects

In *Positive Black Talk Inc. v. Cash Money Records, Inc.*, 394 F.3d 357 (5th Cir. 2004), the panel adopted the rule that a number of other courts have followed — that a plaintiff who files a copyright infringement lawsuit before registering with the Copyright Office may cure the jurisdictional defect by registering the copyright after filing suit. 394 F.3d at 365-66. (17 U.S.C. § 411(a) sets forth the jurisdictional requirement that “no action for infringement of the copyright in any United States court shall be instituted until registration of the copyright claim has been made in accordance with this title.”). The panel also held that this type of jurisdictional defect could be deemed cured even where the plaintiff fails to amend his complaint after completing registration. *Id.* at 366.

D. Disbursement Of Funds Deposited Into The Court’s Registry

In *Craig’s Stores of Texas, Inc. v. Bank of Louisiana*, 402 F.3d 522 (5th Cir. 2005) (per curiam), a majority panel held that where it is determined that the district court lacks subject matter jurisdiction it is required to disburse disputed funds deposited in the court’s registry to the party that deposited them, failing agreement of the parties or a valid order to the contrary. *Id.* at 523-26. Judge Dennis, concurring with the reversal and remand but otherwise dissenting, wrote a detailed opinion explaining his conclusion that the case “should be remanded to the district court with instructions that it perform its statutory duty under Rule 27 and 28 U.S.C. §§ 2401 and 2042, to determine rightful ownership of the funds in the court’s registry and distribute those funds accordingly.” *Id.* at 526-32.

E. Discovery Orders

In *Wiwa v. Royal Dutch Petroleum Co.*, 392 F.3d 812 (5th Cir. 2004), the panel concluded that it had jurisdiction to immediately review the district court’s denial of a motion to compel attendance and produce documents and quashing the subpoena duces tecum directed to a non-party to an underlying class action pending in federal court in New York. 392 F.3d at 814. Noting that Rule 37(a)(1) required that the subpoena be sought in the Texas district court and that the Second Circuit could not entertain any appeal on this non-party discovery issue, the panel applied the rule adopted in other circuits considering the issue “that a party may immediately appeal the denial of a discovery order directed at a non-party to underlying litigation pending in another circuit.” *Id.* at 816 and fnt. 14.

F. Dismissal Under 12(b)(1) Inappropriate Where Key Contested Facts Go To Both Subject Matter Jurisdiction And Underlying Cause of Action

In *Montez v. Department of Navy*, 392 F.3d 147 (5th Cir. 2004), the panel reversed a district court’s dismissal of a Federal Tort Claims Act lawsuit on 12(b)(1) grounds – the Navy asserted that the tortfeasor was not acting within the scope of his naval employment when he crashed a Navy vehicle killing the plaintiffs’ daughter. 392 F.3d at 148. Noting that the defendant’s challenge to the court’s jurisdiction was also a challenge to the existence of a federal claim and thus an “intertwined attack,” the panel held that the jurisdictional issue could not properly be decided on 12(b)(1) motion. *Id.* at 150. The panel held that the district court was required to find that jurisdiction exists and deal with the objection as a direct merits attack on the plaintiffs’ lawsuit under either Rule 12(b)(6) or Rule 56. *Id.*

G. Diversity Jurisdiction – Improper Joinder

In a sharply divided *en banc* determination, a majority of the Fifth Circuit formally recognized a “common defense” type qualification to traditional improper-joinder analysis in diversity cases. The case — *Smallwood v. Illinois Central Railroad Company*, 385 F.3d 568 (5th Cir. 2004) (en banc) — represents the first time the entire Court has addressed the issue of improper joinder. (The Court expressly adopted the more descriptive phrase “improper joinder” over “fraudulent joinder.” 385 F.3d at 568, 571 n. 1).

The underlying case was a personal injury action involving a car/train collision at a railroad crossing. *Id.* at 571. Illinois Central Railroad removed the case to federal court arguing

that the plaintiff's claims against the only non-diverse defendant, the Mississippi Department of Transportation ("MDOT"), were barred by the Federal Railroad Safety Act and, thus, plaintiff had improperly joined that non-diverse defendant as there was no reasonable probability of recovery against it. *Id.* at 572.

The district court agreed, dismissed MDOT from the case, and denied the plaintiff's motion to remand. *Id.* Then, applying the "law of the case," the district court granted summary judgment for Illinois Central on the basis that the plaintiff's claim against the railroad was equally preempted. 385 F.3d at 572. As the Majority noted, "[t]he railroad won its case when it persuaded the district court that the claims against the in-state defendant, MDOT, were preempted." *Id.*

To establish improper joinder, the Majority held that the removing party must show actual fraud in the pleading of jurisdictional facts or, in the alternative, "that there is no reasonable basis for the district court to predict that the plaintiff might be able to recover against an in-state defendant." *Id.* at 573. The Majority adopted this specific phrasing of the alternative test in order "[t]o reduce possible confusion" and stated that it was rejecting all other phrasings of the test "whether the others appear to describe the same standard or not." *Id.*

To determine whether a plaintiff has a reasonable basis for recovery under state law, the Majority held that (1) the court may conduct a Rule 12(b)(6)-type analysis and (2), in its discretion and in the appropriate case, may pierce the pleadings and conduct a very limited, summary inquiry "to identify the presence of discrete and undisputed facts that would preclude plaintiff's recovery against the in-state defendant." *Id.* at 573-74. As examples of such facts, the Majority provided this list: "the in-state doctor defendant did not treat the plaintiff patient, the in-state pharmacist defendant did not fill a prescription for the plaintiff patient, a party's residence was not as alleged, or any other fact that easily can be disproved if not true." *Id.* at 573 fnt. 12 (citation omitted).

Ultimately, the Majority adopted the rule that, "when, on a motion to remand, a showing that compels a holding that there is no reasonable basis for predicting that state law would allow the plaintiff to recover against the in-state defendant necessarily compels the same result for the nonresident defendant, there is no improper joinder; there is only a lawsuit lacking in merit." 385 F.3d at 574. The Majority concluded that, "[i]n such circumstances, the allegation of improper joinder is actually an attack on the merits of plaintiff's case as such – an allegation that, as phrased by the Supreme Court in *Chesapeake & O.R. Co. v. Cockrell*, 'the plaintiff's case [is] ill founded as to all the defendants.'" *Id.* at 574 (citing *Chesapeake & O.R. Co. v. Cockrell*, 232 U.S. 146, 153, 58 L. Ed. 544, 34 S. Ct. 278 (1914)).

Stated differently, the requisite showing of improper joinder of the in-state defendant is not made out, "[w]hen the only proffered justification for improper joinder is that there is no reasonable basis for predicting recovery against the in-state defendant, and that showing is equally dispositive of all defendants rather than to the in-state defendants alone" *Id.* at 575.

The Majority vacated the judgment of the district court and remanded with instructions to remand to the state court for want of jurisdiction. *Id.* at 576-77.

McDonal v. Abbott Laboratories, Inc., No. 02-60773, 2005 WL 957142 (5th Cir. April 26, 2005) applied *Smallwood* in the context of a products liability action relating to a mercury-containing vaccine preservative.

The McDons had sued in Mississippi state court on behalf of their minor daughter who had suffered mercury poisoning allegedly resulting from a regime of childhood vaccines containing the preservative Thimerosal. The defendants were, broadly grouped, (1) manufacturers of the preservative, (2) manufacturers of the vaccines containing the preservative and (3) healthcare providers who had administered the vaccines containing the preservative. 2005 WL 957142 at *1-2. The district court had dismissed the removed action as to all defendants on the rationale that the plaintiffs could not pursue any claims until they exhausted their remedies in the Court of Claims as required under the Vaccine Act. *Id.* at *2-3.

The panel explained the core holding of *Smallwood* as follows:

We note that because the purpose underlying the improper joinder inquiry “is to determine whether or not the in-state defendant was properly joined, the focus of the inquiry must be on the joinder, not the merits of the plaintiff’s case.” *Smallwood*, 385 F.3d at 573. In other words, while the focus of the improper joinder inquiry examines whether the joinder itself was improper, the purpose of the inquiry must be whether or not there is a possibility of recovery against the local defendant. As long as the asserted defense applies uniformly to all defendants and dismisses the suit as a whole, the resident defendants were no more improperly joined than the non-resident defendants.

Id. at *4.

The panel noted that manufacturers of Thimerosal are not considered vaccine manufacturers covered by the Vaccine Act; this was precisely the holding of the relatively recent decision in *Moss v. Merck & Co.*, 381 F.3d 501, 503 (5th Cir. 2004). *Id.* at *5. Thus, claims against Thimerosal manufacturers may proceed irrespective of compliance of with the Vaccine Act as to other covered defendants. *Id.* (citing *Moss*, 381 F.3d at 504).

Because plaintiffs’ failure to comply with the Vaccine Act was **not** effective to insulate all defendants from liability, the panel held that “the common defense corollary to the improper joinder doctrine as articulated in *Smallwood* is inapplicable in the present case and therefore, remanding this case to the Mississippi state trial court from which this case was removed would be unwarranted.” 2005 WL 957142 *6. The panel reversed the district court’s dismissal of claims against the Thimerosal defendants and remanded for further consideration of those claims.

H. Diversity Jurisdiction — Lack Of A Certificate To “Do Business” In Texas Is Not Dispositive Of A Corporation’s Citizenship For Diversity Purposes

In a case of first impression in the Fifth Circuit, the panel in *Teal Energy USA, Inc. v. GT, Inc.*, 369 F.3d 873 (5th Cir. Tex. 2004) held that “a corporation’s failure to comply with the state law requirements for conducting business in that particular state will **not** preclude a finding that the corporation has its principal place of business in that state for purposes of

diversity jurisdiction; such failure is but one of many factors for that calculus.” 369 F.3d at 880 (emphasis added).

The panel noted that the Fifth Circuit had “yet to consider whether a corporation can have its principal place of business for diversity purposes in a state in which it is not authorized to do business” and then squarely concluded that “[w]hat constitutes citizenship for diversity purposes is a matter of federal law, and as such, cannot be made to depend on the particular nuances of the various state business codes.” *Id.* at 879, 880. The panel observed that a contrary rule “would elevate form over substance, allowing a corporation either to create or thwart diversity jurisdiction by the single expedient of not complying with state business regulations.” *Id.* at 880.

I. Diversity Jurisdiction — National Banks Are Not Citizens Of All States Where They Have Branches

In *Horton v. Bank One, N.A.*, 387 F.3d 426 (5th Cir. 2004), the panel concluded that 28 U.S.C. § 1348 was designed to “maintain jurisdictional parity between national banks on the one hand and state banks and corporations on the other” such that “a national bank is not necessarily ‘located’ in each and every state in which it has a branch” and thus a national bank has “access to federal courts by diversity jurisdiction to the same extent as a similarly situated state bank or corporation.” 387 F.3d at 436. The panel followed the Seventh Circuit’s holding in *Firststar Bank, N.A. v. Faul*, 253 F.3d 982 (7th Cir. 2001). *Id.* at 429. The panel held that a national bank’s citizenship for diversity purposes is limited to the bank’s principal place of business and the state listed in its organizational certificate and articles of association. *Id.* at 436.

J. Diversity Jurisdiction — Not Destroyed Where A Defendant Joins A Non-Diverse Party As Part Of A Counterclaim

In *State National Insurance Company, Inc. v. Yates*, 391 F.3d 577 (5th Cir. 2004), a panel held that the word “plaintiff” in § 1367(b) refers to the original plaintiff in the action — not to a defendant that also happens to be a counter-plaintiff, cross-plaintiff, or third-party plaintiff. 391 F.3d at 580. Thus, in the case before the panel, the district court had supplemental jurisdiction over the defendant’s counterclaims against the additional party, notwithstanding the lack of diversity between those two parties. *Id.* at 581. The panel vacated the district court’s erroneous dismissal of the case under Rule 19 which the district court had based on the incorrect premise that joinder of the non-diverse third party would destroy diversity jurisdiction. *Id.*

K. Diversity Jurisdiction — Post-Filing Changes In Citizenship Cannot Cure Lack Of Diversity Jurisdiction

Atlas Global Group, L.P. v. Grupo Dataflux, 375 F.3d 1218 (5th Cir. 2004) vacated a prior decision wherein a panel of the Fifth Circuit had held that a lack of complete diversity jurisdiction at the time of filing was cured when the non-diverse limited partners ceased to be partners in the subject entity, thus making it diverse from the defendant (*Atlas Global Group, L.P. v. Grupo Dataflux*, 312 F.3d 168 (5th Cir. 2002)). A 5-4 Supreme Court decision reversed the original *Atlas* decision and held that a post-filing change in citizenship resulting in complete diversity could not cure a lack of subject matter jurisdiction that existed at the time of filing in a

diversity action. 375 F.3d at 1218 (citing *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 124 S. Ct. 1920, 158 L. Ed. 2d 866 (2004)).

L. Final Judgments

1. Final Or Not

***McLaughlin v. Mississippi Power Co.*, 376 F.3d 344 (5th Cir. 2004) (per curiam)** involved a class action over easements. The district court signed an order purporting to dismiss the entire case but which, in fact, did not address all parties and claims. 376 F.3d at 350-51. The panel noted that there “are at least two exceptions to the rule that a district court must dispose of all issues for its decision to be final” — (1) “a decision is final if the only claims not disposed of by the district court were abandoned” and (2) “a decision that does not specifically refer to all pending claims will be deemed final if it is clear that the district court intended, by the decision, to dispose of all claims.” *Id.* (citations omitted).

The panel stated that, in the case before it, there was no argument that any claims had been abandoned so as to create a final judgment. And, while the district court’s order “did purport to dismiss the entire case,” the panel held that there was no actual intent to dismiss the entire case as evidenced by the fact that the district court did not close the case or direct the clerk to enter judgment after issuing its opinion and, in fact, the district court considered and ruled on other motions well after signing its dismissal order. *Id.* at 351.

The panel also concluded that it did not gain jurisdiction over the appeal once the district court finally dismissed the other claims. Following the holding in *United States v. Cooper*, 135 F.3d 960, 963 (5th Cir. 1998) (which analyzed the Supreme Court’s opinion in *FirstTier Mortgage Co. v. Investors Mortgage Insurance Co.*, 498 U.S. 269 (1991)), the panel held that it could consider premature appeals only in those cases where there has been an actual final decision, rendered without a formal judgment. 376 F.3d at 351, fn. 2. The panel observed that “our circuit formerly accepted premature appeals in cases where the judgment became final prior to the disposition of the appeal.” *Id.*

2. The Finality Trap

In ***Marshall v. Kansas City Southern Ry. Co.*, 378 F.3d 495 (5th Cir. 2004) (per curiam)**, the plaintiff-appellants fell victim to the “finality trap.” Seeking to appeal the district court’s denial of their motion to remand, they attempted to “manufacture appellate jurisdiction by voluntarily seeking dismissal of their claims” against the diverse defendant — the district court had previously ruled that the non-diverse defendants were fraudulently joined and had refused to certify an interlocutory appeal of that ruling. 378 F.3d at 496. Because “a party cannot use voluntary dismissal without prejudice as an end-run around the final judgment rule to convert an otherwise non-final and non-appealable ruling into a final decision appealable under § 1291,” the panel dismissed the appeal for want of jurisdiction. *Id.* at 499-501 (citing, *inter alia*, *Ryan v. Occidental Petroleum Corp.*, 577 F.2d 298 (5th Cir. 1978)).

M. Forum Non Conveniens — May Not Be Considered In Advance Of Jurisdictional Inquiry

In *Dominguez-Cota v. Cooper Tire & Rubber Co.*, 396 F.3d 650 (5th Cir. 2005) (*per curiam*), the panel held that a district court errs when it dismisses a case on forum non conveniens grounds without first determining whether it has jurisdiction. 396 F.3d at 652. In holding that forum non conveniens motions cannot be considered until jurisdictional disputes are resolved, the panel noted that it was in disagreement with two other circuits. *Id.* at 652. But the panel was persuaded by, *inter alia*, the reality that consideration of the public and private factors involved in forum non conveniens analysis is akin to a merits issue which cannot be reached in advance of resolution of subject matter jurisdiction. *Id.* at 653-54.

N. Mootness — Constitutional Challenges

Where a state statute claimed to be unconstitutional is subsequently repealed, expressly or by implication, the underlying controversy becomes moot such that there exists no controversy upon which Rule 60(b) relief may be granted. *McCorvey v. Hill*, 385 F.3d 846 (5th Cir. 2004).

O. Remand Orders

In *Dahiya v. Talmidge International, Ltd.*, 371 F.3d 207 (5th Cir. 2004), the majority dismissed the appeal of a remand order. The underlying case was a maritime personal injury action filed in Louisiana state court. 371 F.3d at 207. The defendants-appellants removed to federal court on the grounds that the dispute was subject to an arbitration agreement governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “Convention”), 9 U.S.C. §§ 201-08 (West 1999 & Supp. 2003). *Id.* The district court remanded for lack of subject matter jurisdiction and denied defendants’-appellants’ motions to compel arbitration and to stay the proceedings. *Id.*

The majority concluded that the remand order deprived the panel of appellate jurisdiction to consider “any part of the district court’s order.” *Id.* The majority noted the general rule that, “[a]fter a district court remands a case to state court for lack of subject matter jurisdiction, 28 U.S.C. § 1447(d) bars a federal appellate court from reviewing the remand ruling no matter how erroneous.” *Id.* at 209 (internal quotation marks and citations omitted).

Judge DeMoss dissented from the majority’s decision that the arbitration-related orders were not collateral, reviewable orders; he also concluded that the trial court clearly erred in refusing to compel arbitration and stay proceedings under the Convention per the defendants’-appellants’ motion 371 F.3d at 212, 225; *see also Dahiya v. Talmidge Intern., Ltd.*, 380 F.3d 218 (5th Cir. 2004) (Judge DeMoss, joined by Judge Smith, dissenting from the Court’s refusal to reconsider *en banc*).

P. Standing

1. ADA Standing

In *Brennan v. Mercedes Benz USA*, 388 F.3d 133 (5th Cir. 2004), the panel noted that that the Fifth Circuit had yet to address the proper scope of standing under Title 1 of the ADA. 388 F.3d at 135. In this suit brought by a technical school student allegedly suffering from various learning disabilities, the panel held that the plaintiff lacked standing to sue (making summary judgment appropriate) because he was neither an active employee nor prospective employee of any of the defendants. *Id.* at 126.

2. Dormant Commerce Clause Challenges

In *National Solid Waste Management Association v. Pine Belt Regional Solid Waste Management Authority*, 389 F.3d 491 (5th Cir. 2004), the panel considered a dormant Commerce Clause challenge to city and county ordinances requiring solid waste collected within their boundaries to be disposed of at facilities owned by the Authority (to which the cities and counties belonged). 389 F.3d at 493. Plaintiff waste-management companies sued for declaratory, injunctive and monetary relief under 42 U.S.C. § 1983. *Id.* at 495. The panel raised the issue of standing *sua sponte*. *Id.* at 497.

While the panel concluded that the plaintiffs met constitutional, Article III standing requirements (injury in fact, fairly traceable to defendant’s action, likely to be redressed by favorable decision), the panel determined that the plaintiffs failed to meet prudential standing requirements — the key inquiry for prudential standing in the case before it being whether the injury plaintiffs complained of is arguably within the zone of interests to be protected by the Dormant Commerce Clause. *Id.* at 498-99.

The panel analyzed the zone of interest question in two parts — whether plaintiffs had standing to challenge the ordinances as being facially discriminatory against out-of-state economic interests or whether plaintiffs could merely challenge the ordinances as being excessively burdensome to interstate commerce. *Id.* at 489. Noting that the plaintiffs did not ship any waste they collected in the subject area to any location out of state and also that the record failed to show any plans to do so or that interstate transportation of waste was at issue, the panel held that the plaintiffs’ injury was “not related to any out-of-state characteristic of their business” such that they did “not have standing to challenge the ordinances on the basis of a claim that they are facially discriminatory against out-of-state interests.” 389 F.3d at 499-500.

In contrast, the panel concluded that plaintiffs did meet the zone of interests test in regard to a challenge to the ordinances on the basis of excessive burden to interstate commerce. Noting that one of the plaintiffs had adduced evidence that some national and interstate waste contracts would be negatively affected by the higher costs associated with complying with the ordinances, the panel concluded that standing was satisfied — and noted that “when one of multiple co-parties raising the same claims and issues properly has standing, we do not need to verify the independent standing of the other co-plaintiffs.” *Id.* 501 and fnt. 18.

The panel wrote, “[a]n allegation that the plaintiff is involved in interstate commerce and that the *plaintiff’s* interstate commerce is burdened by the ordinance in question is sufficient to

satisfy the zone of interests test with respect to ordinances that assertedly impose an excessive burden on interstate commerce.” *Id.* at 500 (emphasis in original). Ultimately, however, the panel concluded that the subject ordinances did not disparately impact interstate commerce relative to intrastate commerce and rejected the plaintiffs’ challenge. *Id.* at 503.

3. ERISA § 502-(a)(2)

The majority panel in *Milofsky v. American Airlines, Inc.*, 404 F.3d 338 (5th Cir. 2005), a class action over alleged mishandling of individual pension accounts following an acquisition, held that the plaintiffs lacked standing to sue under ERISA § 502-(a)(2) because, “[t]he complaint contains no allegation that defendants violated fiduciary duties *vis-à-vis* the entire plan or that the Super Saver Plan itself sustained losses for which it, and not merely individual participants and beneficiaries, could obtain relief.” 404 F.3d at 343.

The majority rejected the argument that the claim inured to the benefit of the plan as a whole “just because the complaint requests that damages be paid to the plan instead of directly to the respective plaintiffs.” *Id.* The majority wrote, “[b]ecause this claim does not otherwise seek to vindicate rights of the entire plan—given that the alleged fiduciary breaches occurred only as to the members of the plaintiff class and were not directed to the whole plan membership—this claim does not benefit the entire plan.” *Id.* at 344. The majority stated in a footnote:

We stop short, however, of saying that there is no standing unless all plan participants would benefit from the litigation. The central question, in the context of an individual account plan, is whether the suit inures to the benefit of the *plan*, which occurs whenever all plan participants would directly benefit (by all having increased balances in their individual accounts) or when the suit seeks to vindicate the rights of the plan as an entity when alleged fiduciary breaches targeted the plan as a whole—whether the suit is filed by all plan participants or only a subset thereof.

Id. at 344 fnt. 16.

Chief Judge King dissented noting, *inter alia*, that several courts had reached the exact opposite conclusion as the majority and that the majority’s decision squarely conflicted with the Sixth Circuit’s determination of the issue. 404 F.3d 347-54. Chief Judge King found standing and concluded that there existed no administrative remedies for plaintiffs to exhaust before filing suit for breach of fiduciary duty and would have reversed the district court’s dismissal except as to defendant Towers Perrin (the benefits consulting firm against whom plaintiffs had made only conclusory allegations). *Id.* at 353-54.

4. Section 11 Claims

In *Krim v. PCOrder.com*, 402 F.3d 489 (5th Cir. 2005), the panel (Judge Higginbotham writing) held that while aftermarket purchasers of securities have standing to assert a Section 11 claim where they can affirmatively trace their shares to the faulty registration, sufficient tracing to confer standing is **not** established where the aftermarket purchasers can only establish a high statistical probability (even one exceeding 99%) that the shares they purchased include public offering shares. *Id.* at 495-97. Noting Section 11’s language limiting suit to “any person

[actually] acquiring such security,” [15 U.S. C. § 77k(a)], the panel illustrated the fallacy of plaintiffs’ statistical evidence as follows:

Taking a United States resident at random, there is a 99.83% chance that she will be from somewhere other than Wyoming [citing census information]. Does this high statistical likelihood alone, assuming for whatever reason there is no other information available, mean that she can avail herself of diversity jurisdiction in a suit against a Wyoming resident? Surely not.

Id. at 497 (footnotes and citations omitted).

Q. Tax Injunction Act

In *Stalder v. Keeler*, No. 03-30699, 2005 WL 845913 (5th Cir. April 13, 2005), the panel held that, as a consequence of the Tax Injunction Act (28 U.S.C. § 1341), it (like the district court) lacked jurisdiction over a First Amendment challenge to Louisiana’s prestige-license-plate program and the district court order enjoining the program had to be vacated. The TIA precludes a federal court from “enjoining, suspending or restraining the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such state.” 28 U.S.C. § 1341. The plaintiffs had sued to enjoin operation of Louisiana’s prestige-license-plate program because it offered license holders the option of selecting a “Choose Life” license plate for a small additional sum over and above the cost the plates themselves and related administrative costs. 2005 WL 845913 at *1. After careful analysis, the panel concluded that the additional sums related to the prestige-license plates were state “taxes” such that no federal court could entertain jurisdiction over the suit as framed — seeking to foreclose the availability of all prestige-license plates and the collection of state revenues for them. *Id.* at *3-9.

R. Tolling Deadline To File Notice Of Appeal

In *Moody National Bank v. GE Life and Annuity Assurance Co.*, 383 F.3d 249 (5th Cir. 2004), the panel held that GE’s motion styled “Motion to Alter or Amend the Judgment under Federal Rule of Civil Procedure 59(e)” in actuality only sought to have all costs taxed against Moody Bank. 383 F.3d at 250. The panel held that, as such, the motion was a request for collateral relief governed by Rule 54 — which would **not** toll the time period for filing an appeal. *Id.* The panel stated that “a motion’s substance, and not its form, controls.” *Id.* at 251 (citing *Edwards v. City of Houston*, 78 F.3d 983, 995 (5th Cir. 1996) (en banc)).

The panel observed that Appellate Rule 4(a)(4) was amended to include among those motions that toll the deadline for filing a notice of appeal motions for attorney’s fees under Rule 54 but only where timely filed and the district court affirmatively extends the time to appeal under Rule 58; importantly, no similar provision is made for motions to tax costs. *Id.* at 252-53. Noting that GE’s notice of appeal was filed 58 days after the district court signed its final judgment, the panel dismissed the appeal for lack of jurisdiction. *Id.* at 253.

S. Trial Court Jurisdiction Affected By Notice Of Appeal

In *Shepherd v. International Paper Co.*, 372 F.3d 326 (5th Cir. Tex. 2004), the panel vacated a trial court's post-appeal order granting plaintiffs' "motion for reconsideration" relative to International Paper's successful motion to dismiss their complaint for, *inter alia*, alleged failure of service. 372 F.3d at 327. The panel held that once the plaintiffs appealed the district court's order dismissing their case, the district court did not have jurisdiction to grant plaintiffs' motion for reconsideration (filed fourteen days after the judgment and which the panel treated as a Rule 60(b) motion for relief from judgment). *Id.* at 328. The panel noted that although the Federal Rules of Civil Procedure do not provide for a "motion for reconsideration," such a motion may be considered as either a Rule 59(e) motion to alter or amend judgment (when filed within ten days of the judgment or order) or as a motion for relief from judgment or order (when filed beyond ten days of the trial court's judgment or order). *Id.* at fnt 1.

In cases involving Rule 60(b) motions (filed more than ten days after judgment), the trial court may only "consider" or "deny" such a motion once the notice of appeal has been filed. 372 F.3d at 329. Without obtaining leave from the Court of Appeals, the district court has no jurisdiction to grant such a motion. *Id.* In cases where the district court indicates a willingness to grant such a motion filed more than 10 days from the judgment, the proper procedure is for the appellant to make a motion to remand the case so that the district may grant the Rule 60(b) motion. *Id.* at 329, 330 fnt. 3.

This rule "has been based on the concept that *while* the case is pending in the court of appeals, the district court, absent some form of remand or permission by the court of appeals, lacks jurisdiction over the case except to act in furtherance of the appeal." *Id.* at 331 (emphasis in original). The panel, like panels in other circuits, rejected as *dicta* language in *Stone v. INS*, 514 U.S. 386 (1995) suggesting that pendency of an appeal does not affect the district court's power to grant Rule 60 relief. *Id.* at 331 (citations omitted).

Judge Garwood, who wrote the opinion in *Shepherd*, was also on a different panel which, on the same day, filed *N.W. Enterprises, Inc. v. City of Houston*, 372 F.3d 333 (5th Cir. 2004). This case held that, because the Court of Appeals had already obtained appellate jurisdiction over the issues through a timely-filed notice of appeal, the district court lacked jurisdiction to enter an order of reconsideration partially reversing the injunctive relief it had previously granted. *Id.* at 338.

An exception to the final-judgment rule exists where the trial court's jurisdiction to grant a party's Rule 60(b) motion is challenged; in such circumstances, the Fifth Circuit has jurisdiction to determine whether the district court had jurisdiction to vacate the underlying judgment. *Shepherd v. International Paper Co.*, 372 F.3d 326, 328-29 (5th Cir. 2004).

T. Younger Abstention

Texas Association of Business v. Earle, 388 F.3d 515 (5th Cir. 2004) involved TAB's federal suit against the Travis County District Attorney seeking injunctive and declaratory relief relative to a grand jury investigation of TAB for alleged election code violations. 388 F.3d at 516. The plaintiffs sought an injunction against enforcement of certain grand jury subpoenas, an

order to enjoin the grand jury investigation and a declaration that TAB's election-related conduct constituted protected First Amendment activity. *Id.* The district court declined these requests in reliance on the abstention doctrine set forth in *Younger v. Harris*, 401 U.S. 37, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971). *Id.*

In affirming the district court's abstention ruling, the panel noted that "we review a district court's decision to abstain for abuse of discretion, provided that the elements for *Younger* abstention are present." *Id.* 518. The panel set forth the three-prong test for determining whether *Younger* abstention applies as: "(1) the dispute must involve an 'ongoing state judicial proceeding,' (2) an important state interest in the subject matter of the proceeding must be implicated, and (3) the state proceedings must afford an adequate opportunity to raise constitutional challenges." *Id.* at 519 (citing *Wightman v. Tex. Supreme Ct.*, 84 F.3d 188, 189 (5th Cir. 1996)).

II. Pre-Trial Matters

A. Dismissal — Claims By Unrepresented Corporations

The panel in *Memon v. Allied Domecq QSR*, 385 F.3d 871 (5th Cir. 2004) reversed a district court’s Rule 12(b)(6) dismissal with prejudice of claims asserted by a corporation unrepresented by counsel. The panel noted that dismissal with prejudice is an extreme sanction and that such a dismissal could not be sustained where the district court had given no direction to the unrepresented corporation to obtain counsel or even notice that it would dismiss with prejudice if it failed to engage counsel. 385 F.3d at 873-874. The panel declined to decide whether the standard of review was governed by 12(b)(6) or Rule 41(b) – holding that reversal was required under either standard. *Id.* at 873. The panel did note that “no precedent exists for dismissing under Rule 12(b)(6)” where a corporation purports to advance on claims without being represented by a licensed attorney. *Id.*

B. Dismissal — Documents Attached To Complaints

Kennedy v. Chase Manhattan Bank USA, NA, 369 F.3d 833 (5th Cir. 2004) involved married *pro se* plaintiffs suing under the Fair Credit Reporting Act (“Act”) after their applications for credit cards were rejected. They sued for alleged false pretenses in obtaining their credit information and the defendants’ failure to “adopt reasonable procedures for complying with the Act.” 369 F.3d at 837. The panel affirmed the trial court’s order dismissing the complaint for failure to state a claim and noted that the pre-approved credit card certificates (plaintiffs attached to their complaint) largely dis-pleaded any basis for a claim.

For instance, the pre-approved certificates established that they were conditional offers of credit under the Act such that the banks were allowed to (as they did) “withdraw the offers if the Kennedys were not credit-worthy based on the consumer reports.” *Id.* at 841-42. Further, “[b]ecause the complaint alleged the banks engaged in permissible acts, the complaint failed to state a claim upon which relief could be granted.” *Id.* at 842. Significantly, the panel also noted that the Kennedys signed the pre-approval certificates (attached to their complaint) and thereby “agreed to the terms of the offers and authorized the banks to access their credit information.” *Id.*

As for the claims against the credit agency defendants, the panel noted that, “[b]ecause the complaint simply alleged a violation of section 1681e without any supporting factual allegations, the Kennedys’ claims against the credit reporting agencies were nothing more than unsupported legal conclusions.” 369 F.3d at 843. The panel also noted that the pre-approval certificates “show the Kennedys signed the banks’ firm offers of credit and expressly authorized the banks to obtain their credit information from the credit reporting agencies.” *Id.* at 844. Finally, because the plaintiffs never alleged any inaccuracy in their credit reports, they failed to state a claim for violation of section 1681e of the Act — requiring a consumer reporting agency to follow reasonable procedures to assure optimal accuracy of reported information. *Id.*

Drs. Bethea, Moustoukas and Weaver LLC v. St. Paul Guardian Insurance Co., 376 F.3d 399 (5th Cir. 2004) involved an appeal of a Rule 12(b)(6) dismissal in a class action lawsuit brought by medical malpractice policyholders for alleged detrimental reliance and unjust

enrichment. 376 F.3d at 401. The panel affirmed the dismissal on grounds that “the insurance policy, being valid and unambiguous, precludes the possibility of any reasonable reliance on extra-contractual representations and justifies any enrichment St. Paul obtained.” *Id.* The plaintiff alleged that St. Paul had promised to provide tail coverage without limit through general language from (1) a St. Paul renewal letter explaining policy changes and (2) a marketing brochure. *Id.* at 404-5. The panel held that, “[g]iven that the insurance policy unambiguously defines the parties’ rights and limits the way to alter the policy, it was unreasonable to rely on informal documents as modifying material aspects of the policy.” *Id.* at 405. The unjust enrichment claims were barred under Louisiana law by the fact that the parties had an enforceable contract controlling their relationship. *Id.* at 408.

C. Dismissal — Improper Venue (Agreement to Arbitrate)

In *Lim v. Offshore Specialty Fabricators, Inc.*, No. 03-30380, 2005 WL 674910 (5th Cir. March 24, 2005), the defendant challenged the denial of its motions to dismiss for lack of subject matter jurisdiction and for improper venue which had been based on its assertion of arbitration rights in the underlying seaman employment contracts with the plaintiffs, Philippine citizens. *Id.* at pp. 1-2. The panel observed that “foreign arbitration clauses are deemed a ‘subset of foreign forum selection clauses in general’.” *Id.* at p. 4 (citing *Vimar Seguros y Reaseguros, S.A. v. M/V SKY REEFER*, 515 U.S. 528, 534 (1995)).

The panel observed that, “[o]ur court has noted, but declined to address, the ‘enigmatic question of whether motions to dismiss on the basis of forum selection clauses are properly brought as motions under Fed. R. Civ. P. 12(b)(1) [or] 12(b)(4)’” *Id.* at p. 4 (citing *Haynsworth v. The Corporation*, 121 F.3d 956, 961 (5th Cir. 1997), *cert. denied*, 523 U.S. 1072 (1998)). Noting that “our court has accepted Rule 12(b)(3) as a proper method for seeking dismissal based on a forum selection clause, we need not decide whether a Rule 12(b)(1) motion would be appropriate.” *Id.* Ultimately, the panel vacated the district court’s denial of the motion to dismiss and held that the Convention on the Enforcement of Foreign Arbitral Awards required arbitration of plaintiffs’ FLSA claims, notwithstanding claimed exceptions (including Louisiana’s strong public policy against forum selection clauses in employment contracts). *Id.* at pp. 4-8.

D. Dismissal — Prohibited Conclusory Allegations

In *Milofsky v. American Airlines, Inc.*, 404 F.3d 338 (5th Cir. 2005), the majority panel provided examples of conclusory allegations that are insufficient to state a claim that a defendant acted as an ERISA fiduciary. 404 F.3d at 342 fnt. 7 (“Compl. ¶ 16 (‘At all relevant times, Towers Perrin has been a fiduciary of the Super Saver Plan within the meaning of Section 3(21) of ERISA 29 U.S.C. § 1002(21), because it exercised discretion over the administration of the Super Saver Plan’) *id.* ¶ 31 (‘At all relevant times, defendant [] . . . Towers Perrin acted as [a] fiduciar[y] under Section 3(21)(A) of ERISA’); *id.* ¶ 35 (‘At all relevant times, American . . . and Towers Perrin were co-fiduciaries.’).”

E. Dismissal — Res Judicata Barring Derivative Claims

In *Smith v. Waste Management, Inc.*, No. 04-20380, 2005 WL 873329 (5th Cir. April 15, 2005), the panel applied *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004) to hold that an executive's claims for negligent misrepresentation and fraud relating to declines in the value of his Waste Management shares were purely derivative claims subject to the bar of *res judicata* as a result of a prior settlement of all shareholder claims relating to those declines. The panel noted that the Delaware Supreme Court's decision in *Tooley* discarded the "special injury test" for determining whether a shareholder's claim is direct or derivative. 2005 WL 873329 at *3.

The Delaware Supreme Court in *Tooley* held, "[t]he analysis must be based solely on the following questions: Who suffered the alleged harm — the corporation or the suing stockholder individually—and who would receive the benefit of the recovery or other remedy?" *Tooley*, 845 A.2d at 1035. That is,

The proper analysis has been and should remain that . . . a court should look to the nature of the wrong and to whom the relief should go. The stockholder's claimed direct injury must be independent of any alleged injury to the corporation. The stockholder must demonstrate that the duty breached was owed to the stockholder and that he or she can prevail without showing an injury to the corporation.

Id. at 1039.

Applying *Tooley*, the panel noted that no other court in the Fifth Circuit had at the time applied Delaware's new articulation of direct vs. derivative shareholder claims. 2005 WL 873329 *6 fnt. 3. The panel wrote that, "when a corporation, through its officers, misstates its financial condition, thereby causing a decline in the company's share price when the truth is revealed, the corporation itself has been injured." *Id.* at *4. Against this backdrop, the panel held that Smith's harm — "the drop in share price caused by the untimely disclosure of unfavorable financial data — was a harm that befell all of Waste Management's stockholders equally" such that Smith was only harmed indirectly as a result of his ownership of shares, and Smith "cannot prove his injury without also simultaneously proving an injury to the corporation." *Id.* Thus, the panel held that Smith's claims were derivative under Delaware law and barred by the prior Delaware settlement and final judgment. *Id.* at *4-6.

F. Motions To Amend Complaints

In *Mayeaux v. Louisiana Health Service and Indemnity Company*, 376 F.3d 420 (5th Cir. 2004), the panel affirmed the district court's decision to deny leave to amend a complaint for the third time and just five months before trial. The underlying case involved denial of benefits under an ERISA health insurance plan. The proposed amendment came years after litigation was commenced, asserted radically different bases of liability (including abandoning the underlying claim for denial of benefits) and would have arguably defeated federal subject matter jurisdiction. 376 F.3d at 423. The panel held that the district court had not abused its discretion in disallowing further amendment considering, *inter alia*, the plaintiffs' long delay in

proffering the fundamentally different claims, adding an entirely new party and undertaking these steps shortly before trial to the severe prejudice of the other parties. *Id.* at 427-28.

G. Res Judicata, Title VII Claims And Right-To-Sue Letters

In *Davis v. Dallas Area Rapid Transit*, 383 F.3d 309 (5th Cir. 2004), a panel addressed the question of whether a Title VII claim may be barred by *res judicata* if, when the earlier suit was filed, the plaintiff had not yet received a right-to-sue letter on other related claims arising from the same nucleus of operative facts. 383 F.3d at 315-16. Like panels in other circuits, the Fifth Circuit panel answered the question in the affirmative — following the analysis set forth in *Woods v. Dunlop Tire Corp.*, 972 F.2d 36 (2d Cir. 1992). To avoid preclusion in such circumstances, the panel stated that a plaintiff should request a stay in the litigation until all right-to-sue letters are received. 383 F.3d at 316.

H. Summary Judgment Arguments And Evidence Raised In Reply Brief

A panel in *Vais Arms, Inc. v. Vais*, 383 F.3d 287 (5th Cir. 2004) adopted the approach in other circuits that a district court may rely on arguments and evidence presented for the first time in a summary judgment reply brief as long as the court gives the nonmovant an adequate opportunity to respond with additional briefing and evidence. 383 F.3d at 292.

I. Summary Judgment Grounds

In *Boudreaux v. Swift Transportation Company, Inc.*, 402 F.3d 536 (5th Cir. 2005), a slip-and-fall plaintiff appealed the district court’s grant of no-evidence summary judgment against him. The plaintiff contended that he had slipped as a result of coming into contact with motor oil that, he asserted, had leaked from a Swift truck. 402 F.3d at 538-39. In its memorandum opinion, the district court concluded, “[a]s plaintiff has offered nothing more than his own testimony in support of only circumstantial evidence that his alleged accident was caused by an oil spill for which Swift was responsible, plaintiff has failed to show that a genuine issue of material fact exists as to Swift’s negligence.” *Id.* at 539.

Plaintiff-appellant Boudreaux complained, *inter alia*, that the district court “improperly weighed his credibility as a witness instead of accepting his deposition testimony as true for purposes of summary judgment.” *Id.* at 544. Noting the rule that “[t]his court may decide a case on any ground that was presented to the trial court” the panel concluded that “even if the district court improperly discounted Boudreaux’s testimony based on credibility concerns, we find that Boudreaux’s testimony, when taken as true, provides insufficient evidence to raise a genuine fact issue on his negligence claim.” *Id.* at 544 and fnt. 31. (quoting *Breaux v. Dilsaver*, 254 F.3d 533, 538 (5th Cir. 2001)).

III. Preservation Of Error/Trial And Post-Trial

A. Constitutional Challenges

In *Newby v. Enron Corporation*, 394 F.3d 296 (5th Cir. 2004), the panel rejected class settlement objectors' due process challenges, in part, for their failure to raise them in the district court. 394 F.3d at 309. The panel noted that litigants must allege constitutional violations with particularity and factual detail. *Id.* The panel rejected the argument that due process objections were preserved as part and parcel of the objectors' FED. R. CIV. P. 23 challenges. *Id.* at 310 ("It does not follow that, merely because considerations underlying procedural due process protection may be similar to those driving rule 23, a litigant cannot waive that protection (what would be a statutory, not a constitutional protection, no less) by failing to make the argument in front of a district court."). The panel also rejected the argument that the objectors had preserved a due process challenge through their pleadings in the trial court charging "lack of fairness, adequacy, or reasonableness to the class" *Id.* at 310. The panel held, "[t]his phraseology is not particular enough to justify a conclusion that the Rinis Objectors preserved the error, particularly because the phrase is also the operative language in lodging a non-constitutional objection to a settlement." *Id.*

B. Jury Charge Error

In *Perez v. Texas Department of Criminal Justice*, 395 F.3d 206 (5th Cir. 2004), an employment discrimination/disparate treatment case, the panel held that the district court had improperly charged the jury when it submitted the following:

To establish discrimination by using indirect evidence in this case, the plaintiff must prove by a preponderance of the evidence that one or more *similarly situated* non-Hispanic employees who engaged in criminal activity were treated more favorably. In comparing the nature of the offense at issue and the nature of the discipline imposed, the quantity and quality of *the other employees' misconduct must be of comparable seriousness* to the misconduct of the plaintiff.

395 F.3d at 211-12 (emphasis added).

The employer defendant filed a written pre-trial objection and proposed a replacement instruction asserting that "comparable seriousness" instructed the jury to apply too lenient a standard in determining whether the employees being compared were similarly situated to the plaintiff "because it suggested that the jury should focus solely on the seriousness of the employees' misconduct rather than the comparability of their overall circumstances." *Id.* at 212 and fn 8. The defendant renewed its objection at trial and the district court ruled. *Id.*

The panel agreed with the employer holding that "[a] correctly worded instruction would have made clear that the jury must find the employees' circumstances *to have been nearly identical to find them similarly situated.*" *Id.* at 213 (emphasis added). The panel reversed and

remanded on this basis. While the defendant argued that it was entitled to rendition because it conclusively established an affirmative defense, the panel refused to consider this argument because the defendant had “waived this issue by failing to object to the absence of a jury charge” on the defense. *Id.* at 215 fn. 11 (citing *McDaniel v. Anheuser-Busch, Inc.*, 987 F.2d 298, 306 (5th Cir. 1993) for the proposition that a “pretrial request for instructions is ordinarily insufficient to preserve error”).

In *Positive Black Talk Inc. v. Cash Money Records, Inc.*, 394 F.3d 357 (5th Cir. 2004), the panel applied the rule that generalized objections to a charge as a whole, as well as objections made off the record, fail to comply with Rule 51 and thus fail to preserve error. 394 F.3d at 368-69. Where specific objections are not preserved on the record, the appellate court reviews jury instructions only for plain error requiring the complaining party to show that the instructions made an obviously incorrect statement of law that was probably responsible for an incorrect verdict, leading to substantial injustice. *Id.* at 369.

C. Rule 50 Motions

In *Echeverria v. Chevron USA Inc.*, 391 F.3d 607 (5th Cir. 2004), the panel adopted the approach taken by the DC Circuit and Sixth Circuit that a trial court may not enter a judgment as a matter of law under Rule 50 until the plaintiff has been permitted to present essentially all of its evidence to the jury. 391 F.3d at 611-12. The panel wrote, “[r]ule 50 is intended to shorten and end needless trials, [citing *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 85 L. Ed. 147, 61 S. Ct. 189 (1940)] but that objective can be achieved by simply waiting until the plaintiff rests – at least, waiting until the plaintiff rests on liability.” *Id.* at 612.

D. Rule 59 Motions

Arguments that could reasonably have been raised or presented before the entry of judgment are not preserved for appellate consideration by raising them in a Rule 59 motion. *Santa Fe Snyder Corp. v. Norton*, 385 F.3d 884, 893 (5th Cir. 2004).

E. Statute of Frauds Defenses In Fraudulent Inducement Cases

Propulsion Technologies, Inc. v. Attwood Corp., 369 F.3d 896 (5th Cir. 2004) involved an appeal from a \$ 7 million+ judgment on a jury verdict in a breach of contract, fraudulent inducement and misappropriation claim over marine propellers. The panel reversed and rendered on the basis that the underlying agreement was unenforceable under the statute of frauds as a transaction in goods with no ascertainable quantity term. 369 F.3d at 898. In the trial court, the appellant had urged the statute-of-frauds defense in its first motion for judgment as a matter of law but only on the breach of contract claim; it first raised the defense as to the fraud claim in its renewed motion. *Id.* at 899. The panel stated that, “[w]e need not determine whether Attwood preserved the precise argument that the statute of frauds would bar the fraudulent inducement claim because Attwood preserved the issue otherwise with the motion it made.” *Id.* The panel reasoned as follows:

One of the expressed bases for its motion for judgment as a matter of law on the fraud claim was insufficient evidence that PowerTech relied on any misrepresentation to its detriment. This makes any issues preserved on the

invalidity of the contract dispositive of the fraud claim because, “without a binding agreement, there is no detrimental reliance, and thus no fraudulent inducement claim.”

Id. (quoting *Haase v. Glazner*, 62 S.W.3d 795, 798 (Tex. 2001)).

F. Waivers

Failure to raise an argument before the district court generally effects a waiver of that argument on appeal. *Vais Arms, Inc. v. Vais*, 383 F.3d 287, 291 (5th Cir. 2004) (holding that appellant had waived new argument that a person cannot abandon his surname in a trademark abandonment case).

Failures to raise and brief issues continue to create waiver in the Fifth Circuit. *Roberson v. Alltel Information Services*, 373 F.3d 647 (5th Cir. 2004) was an employment discrimination case where the employer had won its summary judgment motion. On appeal, the plaintiff-appellant-employee pointed to alleged misconduct of co-workers as evidence of discriminatory animus. 373 F.3d at 654 fnt. 9. The panel noted that the appellant’s brief nowhere contended that these actions should be imputed to the decision-maker and, thus, any such argument was waived on appeal. *Id.*; see also *International Truck and Engine Corp. v. Bray*, 380 F.3d 231, 231 (5th Cir. 2004) (“Because the Director has failed to provide any substantial legal analysis, we consider the Director’s sovereign immunity arguments waived as not adequately briefed on appeal); *McLaughlin v. Mississippi Power Co.*, 376 F.3d 344 (5th Cir. 2004) (“We are not disposed to salvage the district court’s [diversity] jurisdiction over this case by permitting IFN and MPC to raise for the first time on appeal an argument that would require us to permit one class representative to be dropped . . .”).

In the summary judgment context, unchallenged holdings of the trial court will stand on appeal and may foreclose appellate review of other aspects of the trial court’s rulings. *Shields v. Twiss*, 389 F.3d 142 (5th Cir. 2004) (holding that appellant’s failure to challenge trial court’s determination that defendant enjoyed official immunity barred appellant’s malicious-prosecution claim).

Non-jurisdictional issues truly raised for the first time in reply briefs are generally waived. *Karim v. Finch Shipping Co. Ltd.*, 374 F.3d 302, 307 (5th Cir. 2004) (finding waiver of challenge to appointment of law clinic under *in forma pauperis* statute where appellant “waited until his reply brief to contend the clinic was improperly appointed . . .”).

IV. Standards of Review

A. ADEA — Mixed-Motive Analysis Used In Title VII Cases Applies

In *Rachid v. Jack In The Box, Inc.*, 376 F.3d 305 (5th Cir. 2004), the panel held that the mixed-motive analysis used in Title VII discrimination cases post *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003) is equally applicable in ADEA cases. 376 F.3d at 312. “Under this integrated approach, called for simplicity, the modified *McDonnell Douglas* approach: the plaintiff must still demonstrate a prima facie case of discrimination; and, if the defendant meets its burden of production, the plaintiff must then offer sufficient evidence to create a genuine issue of material fact either (1) that the defendant’s reason is not true, but is instead a pretext for discrimination (pretext alternative); or (2) that the defendant’s reason, while true, is only one of the reasons for its conduct, and another motivating factor is the plaintiff’s protected characteristic (mixed-motives alternative).” *Id.* (citing *Rishel v. Nationwide Mut. Ins. Co.*, 297 F. Supp. 2d 854, 865 (M.D.N.C. 2003)) (internal quotations omitted). Holding that a “plaintiff can proceed on a mixed-motives theory even without direct evidence of discrimination,” the panel concluded that fact issues remained such that the summary judgment for the defendant was erroneous, and the panel reversed and remanded. *Id.* at 316.

B. Agency Determinations

In *Jupiter Energy Corporation v. Federal Energy Regulatory Commission*, No. 04-60041 (5th Cir. April 12, 2005), the panel applied the Administrative Procedure Act to FERC’s determination that one of Jupiter’s gas-handling system was “transportational” (vs. “gathering”) and was thus subject to FERC jurisdiction. The panel noted that under the Administrative Procedure Act, “an agency determination shall be set aside if it is ‘arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.’” *Id.* at pp. 6-7 (quoting 5 U.S.C. § 706(2)(A)). Because Jupiter’s system included pipelines upstream from a gathering pipeline, the panel concluded that FERC’s decision was “fatally flawed by the inconsistency of having the putative point where gathering ends and transportation begins upstream from a gathering pipeline.” *Id.* at p. 8. The panel vacated the decision of the Commission and remanded the case. *Id.* at p. 9.

In *Louisiana Environmental Action Network v. U.S. EPA*, 382 F.3d 575 (5th Cir. 2004), the panel applied the familiar standards set forth in *Chevron U.S.A., Inc. v. Natural Resource Defense Counsel, Inc.*, 467 U.S. 837 (1984). 382 F.3d at 581-82. While the panel found the EPA’s interpretation of the Clean Air Act to be reasonable, the panel also found that the administrative record failed to provide sufficient basis to affirm the EPA’s action. *Id.* at 581-87. Thus, the panel remanded to the EPA for additional consideration. *Id.* at 586-87 (citing *Fed. Power Comm’n v. Florida Power & Light Co.*, 404 U.S. 453, 744 (1972) (stating that remand to the pertinent agency for further consideration is appropriate where the agency decision cannot be affirmed on the existing administrative record)).

The panel also rejected one of the appellant’s arguments for its having “failed to raise the challenge before the EPA during the comment period on the final rule regarding the substitute contingency measure.” *Id.* at 584. The panel noted that, absent exceptional circumstances, a

party cannot judicially challenge agency action on grounds not presented at the appropriate time during the administrative proceeding below. *Id.*

C. Arbitration — Confirmation/Vacatur Of Arbitration Awards

1. “Arbitrary And Capricious”

Brabham v. A.G. Edwards & Sons Inc., 376 F.3d 377 (5th Cir. 2004) involved an interlocutory appeal from a district court order vacating an arbitration award in favor of an investor against his broker; the investor had moved to vacate the award for insufficiency (he had sought \$500k-\$800k in damages but was awarded approximately \$125k). 376 F.3d at 379-80. The district court vacated the award based on its conclusion that there was no rational basis for the award and it was “arbitrary and capricious.” *Id.* at 380. In reversing and remanding, the panel affirmatively rejected “[a]s a matter of first impression” the construct of “arbitrariness and capriciousness as an independent nonstatutory ground for vacatur under the FAA.” *Id.* at 385. The panel noted that this construct did apply, under Fifth Circuit case law, in the limited context of collective bargaining agreements. *Id.* at 383-85.

2. Power Of Arbitrators To Act

Smith v. Transport Workers Union of America, 374 F.3d 372 (5th Cir. 2004) (*per curiam*) involved review of a district court’s order vacating a modified arbitration award and confirming only the original award. 374 F.3d at 374. The panel noted that its “review of the district court’s confirmation or vacatur of an arbitrator’s award is *de novo*” while “review of the arbitrator’s award itself, however is, very deferential.” *Id.* (citing cases).

In the case before it, the parties’ arbitration agreement provided that, “[t]he arbitrators *sua sponte* may amend or correct their award within three business days after the award, but the parties shall not have a right to seek correction of the award.” *Id.* More than a month after the initial award, the arbitrators made a modification favoring Smith who argued that, without a transcript of the arbitration proceedings, the court must presume the evidence was adequate to support the award (including the modification). *Id.* The panel rejected the contention that it must defer to the arbitrators — writing, “we view the real question as a matter of contract interpretation and one for the courts, since it involves the question of the arbitrators’ authority.” *Id.* Because the arbitrators made their modification well beyond the three-day time limit imposed by the parties in their agreement, they exceeded their authority and thereby provided grounds for the district court to vacate that aspect of the decision. 374 F.3d at 375. Accordingly, the district court’s judgment vacating the modified award and confirming the original arbitration award was affirmed.

Beird Industries, Inc. v. Local 2297, No. 04-30333, 2005 WL 704966 (5th Cir. March 29, 2005) involved a district court’s vacatur of an arbitral award in favor of a union on its complaint over the employer’s decision to subcontract certain landscaping work. The panel noted it reviews a district court’s grant of summary judgment in a suit to vacate an arbitration award *de novo*. *Id.* at p. 2 (citing *Weber Aircraft Inc. v. Gen. Warehousemen & Helpers Union Local 767*, 253 F.3d 821, 824 (5th Cir. 2001)). The panel observed that an award cannot be set aside as long as the arbitrator’s decision “draws its essence from the collective bargaining

agreement” and the arbitrator is not fashioning “his own brand of industrial justice.” *Id.* at pp. 2-3 (quoting *Weber Aircraft*, 253 F.3d at 824 in turn citing *United Paperworkers Int’l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987)).

The panel observed that the contractual provision at issue did not limit the employer’s right to subcontract the subject work and that the arbitrator “recognized as much by stating that the language of the CBA does not limit Beaird’s right to subcontract.” *Id.* at p. 4. Thus, “the subcontracting provision is unambiguous.” *Id.*

The panel stated, “[i]t is well-established that courts may set aside awards when the arbitrator exceeds his contractual mandate by acting contrary to express contractual provisions.” *Id.* (citing *Delta Queen Steamboat Co. v. Dist. 2 Marine Eng’rs Beneficial Ass’n*, 889 F.2d 599, 604 (5th Cir. 1989)). Ultimately, the panel affirmed the district court’s decision to vacate the arbitration award because, in light of unambiguous provisions giving the employer the right to subcontract the work at issue, the arbitrator “failed utterly to draw his conclusions from the essence of the CBA.” *Id.*

D. Arbitration — Existence Of An Agreement To Arbitrate

The issue of a district court’s interpretation of an agreement to arbitrate and whether it binds the parties to arbitrate is an issue that is reviewed *de novo* while fact findings are reviewed only for clear error. ***California Fina Group, Inc. v. Herrin*, 379 F.3d 311, 315 (5th Cir. 2004)**. Importantly, “the federal policy favoring arbitration does not apply in a situation like this when a court is determining whether an agreement to arbitrate exists. Rather, it applies when a court is determining whether the dispute in question falls within the scope of the arbitration agreement already found to exist.” 379 F.3d at 316 fnt. 6 (citing, *inter alia*, *Volt Info. Scis., Inc. v. Bd. of Trs.*, 489 U.S. 466, 475-76, 103 L. Ed. 2d 488, 109 S. Ct. 1248 (1989)). Arbitrability is an issue for the court, not the arbitrator, to determine. 379 F.3d at 315-19 (citing *Will-Drill Res., Inc. v. Samson Res. Co.*, 352 F.3d 211, 214 (5th Cir. 2003)).

E. Arbitration — Parties May Customize Appellate Review In Their Agreements

In ***Prescott v. Northlake Christian School*, 369 F.3d 491 (5th Cir. 2004)**, the majority held that hand-written additions to an arbitration agreement providing that “[n]o party waives appeal rights, if any, by signing this agreement” created an ambiguity as to “whether, and if so, to what extent, the arbitration agreement expanded the scope of judicial review” 369 F.3d at 494, 495. The majority rejected the district court’s conclusion that the reservation language merely preserved appeal rights under the governing state arbitration act. *Id.* at 497. The majority held that such a construction rendered the handwritten modifications “surplusage, and therefore meaningless.” *Id.* The majority found amplification of the parties’ apparent intent to expand the scope of judicial review through their agreement to permit the courts to review written and oral communications from the arbitration. *Id.*

The majority ultimately vacated the district court’s order confirming the arbitration award and remanded for the district court “to take evidence on and contractually interpret the circumstances surrounding the making of the provision” and thereafter to re-evaluate the

challenges to the arbitration award under the appropriate standard. *Id.* The dissent disagreed with the conclusion that the “no waiver” provision even created an ambiguity and maintained that, even if there was an ambiguity regarding the parties’ intent to expand judicial review, “the very existence of ambiguity means that at best this clause may be deemed a failed attempt to alter the scope of review otherwise available under the [governing arbitration statute]” such that reversal and remand was inappropriate. 369 F.3d at 501-2 (*citing, inter alia, Action Industries, Inc. v. United States Fidelity & Guaranty Co.*, 358 F.3d 337, 340-41 (5th Cir. 2004)).

F. Arbitration — Unconscionable Provisions

In *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159 (5th Cir. 2004) several customers brought suit against their cellular telephone service providers alleging deceptive trade practices and breach of contract. 379 F.3d at 162. The companies unsuccessfully moved to compel arbitration under the FAA and written arbitration clauses in the customers’ service agreements. *Id.* While the panel reversed and directed arbitration as to two of the cellular providers, the panel affirmed the district court’s determination that the one-sided and one-way arbitration provision in the form contract used by Centennial Beauregard Cellular LLC was unconscionable and unenforceable under Louisiana law. *Id.* at 168-71.

G. Arbitration — Waiver Of Arbitration Rights

In *Republic Insurance Company v. PAICO Receivables, LLC*, 383 F.3d 341 (5th Cir. 2004), the panel noted that “we have not previously addressed the impact of a ‘no waiver’ provision in arbitration” 383 F.3d at 348. The provision at issue stated, “[t]he institution and maintenance of an action for judicial relief, the pursuit of provisional or ancillary remedies or other remedies provided for in this Agreement or the Related Settlement Documents shall not be deemed a waiver of a party’s right to demand arbitration or to continue arbitration.” *Id.* In light of the parties’ extensive use of the judicial system to litigate claims both arguably subject to arbitration as well as others that were not arbitrable, the panel held that the right to arbitrate had been waived. *Id.* The panel based its determination on the district court’s inherent power to control its docket and what it characterized as an abuse of the contractual non-waiver clause — conducting discovery and motion practice and then waiting until just days before a trial to move to stay and compel arbitration. *Id.* The panel agreed that the late-arbitration-seeking party had invoked the judicial process to the prejudice of the other party and affirmed the district court’s ruling that the right to arbitrate had been waived. *Id.* at 349.

H. Class Certification

1. Fraud On The Market

In *Unger v. Amedisys Inc.*, 401 F.3d 316 (5th Cir. 2005), the panel reversed a district court’s class certification order under Rule 23(b)(3) in a “fraud on the market” securities case. The panel held that the district court had failed to “engage in thorough analysis, weigh the relevant factors, require both parties to justify their allegations, and base its ruling on admissible evidence.” 401 F.3d at 325. The panel was extremely critical of the district court’s analysis and support behind its “efficient market” determination. The *Unger* opinion provides a cogent summary of the types of evidence and analysis necessary to support the “efficient market”

element in “fraud on the market” cases. Judge Dennis specially concurred and squarely disagreed with the majority’s statement that “courts have likened the degree of proof required [in determining market efficiency] to the standards used in preliminary injunction hearings . . . and 12(b)(2) jurisdictional contexts.” *Id.* at 325-26.

2. Notices Required Before Suit

In *Chevron USA, Inc. v. Vermillion Parish School Board*, 377 F.3d 459 (5th Cir. 2004), the panel faced the question of whether a notice given by counsel for a lessor on behalf of a putative class satisfies the requirement of Articles 137-141 of the Louisiana Mineral Code, requiring the lessor to give written notice of the lessee’s failure to make timely or proper payment of royalties as a prerequisite to a judicial demand for damages or dissolution of the lease. 377 F.3d at 461. (The case returned to the federal system after the Louisiana Supreme Court denied certification of this question in *Chevron USA, Inc. v. Vermillion Parish School Board*, 872 So. 2d 533 (La. 2004)). After reviewing the text of pertinent statute and case law, the panel concluded that the notice given by counsel for a lessor on behalf of a putative class does **not** satisfy the statutory requirements. 377 F.3d at 464. “Permitting class notice, particularly in a case such as this, upsets the careful balance established by Mineral Code Articles 137-141 between providing an incentive to lessees to promptly pay royalties, yet giving the lessee a reasonable way to avoid the harsh remedy of lease cancellation.” *Id.* The panel affirmed the district court’s denial of class certification on this basis. *Id.*

3. Predominance

In *Robinson v. Texas Automobile Dealers Association*, 387 F.3d 416 (5th Cir. 2004), the panel reversed the district court’s class certification order in a Rule 23(b)(3) antitrust class action over so-called Vehicle Inventory Tax (VIT) charges and over TADA’s protocol advising its members to itemize the VIT on each sales contract and charge it in addition to the regular price. 387 F.3d at 419-20. Plaintiffs alleged that by uniformly imposing the VIT as a line item, the defendants were engaging in horizontal price-fixing, conspiracy and had been unjustly enriched. *Id.* at 420.

The *Robinson* panel determined that class predominance did not exist and that the trial court had abused its discretion in certifying the class because class members who had negotiated from a bottom-line price (instead of negotiating a sales price first without regard to additional taxes and fees) would not have suffered an antitrust injury simply by paying a sum that included a VIT. *Id.* at 424. The panel concluded that this necessitated member-by-member analysis that would destroy any alleged predominance. *Id.* The panel also concluded that the need for individual inquiries was **not** obviated by the parol evidence rule because it did not apply (as neither side was assailing the validity or interpretation of underlying contracts) and, in any case, evidence of how the selling price was negotiated would not contradict the terms of the respective contracts. *Id.* at 424-25. Finally, the panel determined that the trial court had abused its discretion in failing to set forth how it would manage the “gigantic plaintiff class” of car buyers and the large number of defendants. 387 F.3d at 425-26.

I. Class Settlements

Newby v. Enron Corporation, 394 F.3d 296 (5th Cir. 2004) involved objector challenges to a partial class settlement covering purely foreign entity defendants – Andersen Worldwide Societe Cooperative, en liquidation and its foreign member affiliates. 394 F.3d at 299. The settlement is interesting in that it allocates a pool of funds to cover class litigation expenses relative to claims against other defendants and defers any disbursement of funds to class members until all the class litigation is resolved or settled. *Id.* at 300-01. The panel affirmed the settlement approval citing, *inter alia*, doubts surrounding the existence of personal jurisdiction over the foreign parties, minimal or non-existent potential liability for these foreign parties and serious difficulties in collecting any U.S. judgment against them. *Id.* at 306.

J. Expert Testimony

1. Products Liability

In *Guy v. Crown Equipment Corp.*, 394 F.3d 320 (5th Cir. 2004), a products case brought under the Mississippi Products Liability Act, the panel upheld the trial court’s pre-trial exclusion of the plaintiff’s design expert in a forklift accident case. The forklift at issue did not have a door or operator restraint device; when it collided with an obstacle, the operator fell out of the forklift and was injured. The panel held that the plaintiff’s expert had failed to test his roughly-described restraint concepts, failed to timely identify which he preferred as a feasible design alternative, and failed to show that the door alternative he ultimately settled on was feasible and would have, to a reasonable probability, prevented the harm without impairing the utility, usefulness, practicality or desirability of the product to users or consumers. 394 F.3d at 324-37.

2. Survey Evidence

In *Scott Fetzer Co. v. House of Vacuums, Inc.*, 381 F.3d 477 (5th Cir. 2004), a panel of the Fifth Circuit affirmed a district court’s decision to completely disregard expert survey evidence in a summary judgment unfair competition and trademark case. As evidence of alleged consumer confusion, the plaintiff engaged an expert who surveyed customers of the plaintiff and, referring to the allegedly offending phone book advertisement of the House of Vacuums, asked, “[l]ooking at this ad, would you say this company is in any way affiliated with, connected with, sponsored by, associated with or authorized by the Kirby Company?” 381 F.3d at 487. The panel noted that in assessing the validity of a survey, it looks to two factors: “first, the manner of conducting the survey, including especially the adequacy of the universe; and second, the way in which participants are questioned.” *Id.* at 487. Noting the extreme under inclusiveness of the survey group and the survey question “that begs its answer by suggesting a link between plaintiff and defendant,” the panel found the survey so badly flawed that it could not be used to create a question of fact on the likelihood of consumer confusion. *Id.* at 488-89.

K. FEOLA Featherweight Standard

In *Rivera v. Union Pacific R.R. Co.*, 378 F.3d 502 (5th Cir. 2004), the panel rejected challenges to a jury verdict on a negligent work-assignment case brought under the Federal Employer’s Liability Act. The panel noted the extremely deferential standard of review which

required the panel to “affirm the denial of defendant’s motion for judgment as a matter of law unless there is a complete absence of probative facts to support the conclusion reached by the jury.” 378 F.3d at 505. The panel aptly referred to the applicable standard as “FELA’s featherweight standard of review.” *Id.*

L. Failure To State A Claim Upon Which Relief Can Be Granted

***Plotkin v. IPaxess, Inc.*, No. 03-41380, 2005 WL 926974 (5th Cir. April 21, 2005)** involved review of a Rule 12(b)(6) dismissal of federal and state law securities fraud claims. The claims centered on press releases IPaxess had issued in May and August of 2000 touting multi-million dollar contracts for sale of its products and separate beta trials with other potential customers. While the district court dismissed all claims, the panel held that the underlying complaint **did** satisfy Rule 9(b)’s and the PSLRA’s pleading requirements as to the May press releases affirmatively representing that the company had entered into multi-million dollar sales contracts — contracts that ultimately netted the company zero revenues when the putative customers failed to pay for any orders and ceased doing business.

The panel noted that, on appeal, it conducted a *de novo* review of the district court’s dismissal of the securities fraud complaint. 2005 WL 926974 at * 4 (citing *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 865 (5th Cir. 2003)). The panel noted that, “[i]n determining whether Plotkin has ‘stat[ed] a claim upon which relief can be granted,’ FED. R. CIV. P. 12(b)(6), we must accept the well-pleaded facts alleged in Plotkin’s Complaint as true and construe the allegations in the light most favorable to Plotkin.” *Id.* (citing *Rosenzweig*, 332 F.3d at 865). The panel stated the rule that the reviewing court will “not accept as true conclusory allegations, unwarranted factual inferences, or legal conclusions.” *Id.* (citing *Southland Sec. Corp. v. INSpire Ins. Solutions, Inc.*, 365 F.3d 353, 361 (5th Cir. 2004)).

The panel determined that the press releases touting the new agreements “properly raised the inference that IPaxess expected its partners to perform under the agreements” and that “[t]he laudatory description of AGPI/Lynxus reinforced the expectation.” *Plotkin* at *6. While the press releases included boilerplate-type disclaimers, the panel observed that, “[t]he cautionary statements did not mention the potential uncertainty of AGPI’s or Lynxus’s ability to comply with the contracts.” *Id.* The panel concluded that Plotkin had successfully pleaded facts permitting the inference that the putative customers lacked the business potential to pay for the products they ordered.

The panel noted that the complaint alleged that “Lynxus was actually a very small company with reported revenues of \$7 million in 1999 and that AGPI was incorporated, by Lynxus’s CEO, less than six months before the news releases” and alleged that Lynxus filed for bankruptcy a mere eight months after the deals had been publicized. *Id.* at *6. The panel also found significant the fact that, “by the time of the lawsuit, AGPI’s status with the Georgia Secretary of State was ‘active/noncompliance,’ i.e., that it had not filed a timely annual registration statement with accompanying minimal fee.” *Id.* The panel also noted that IPaxess’s auditors had resigned over the company’s desire to reflect as revenue a \$700k shipment to Lynxus (the resignation came even after the company acquiesced in the auditors’ caution and restated its revenue) and further, “[t]he Complaint states that, contrary to the press releases, neither AGPI nor Lynxus engaged in the scope of operations attributed to it.” *Id.*

Acknowledging that some of the foregoing allegations concerned matters that occurred after the press releases, the panel stated that “allegations of later-emerging facts can, in some circumstances, provide warrant for inferences about an earlier situation.” *Id.* On this point, the panel wrote:

For example, the fact that a business files for bankruptcy on “Day Two,” may, under the right surrounding circumstances, provide grounds for inferring that the business was performing poorly on “Day One.” *See Novak v. Kasaks*, 216 F.3d 300, 313 (2nd Cir. 2000) (“even six months after the Class Period, substantial amounts of ‘Box and Hold’ inventory still dated from 1993 and 1994 . . . supports the inference that inventory during the Class Period was similarly dated.”). Further discovery may refute the inferences, but it is not unwarranted to infer that when a company’s big deal collapses so fast, something was amiss at the outset.

Plotkin at *6.

The panel concluded that the average investor would have been surprised to learn that “contrary to the depiction of AGPI/Lynxus in the press releases, the two companies were new, small and related to each other” — the panel noted that “[s]uch characteristics would tend to undermine the investor’s impression of the solidity of the new contracts and would imply instead that IPaxess had embarked on a speculative venture” and determined “[t]he omission of those facts was material to a reasonable investor’s appreciation of the implications of the deals for IPaxess’s bottom line.” *Id.* at *7.

The panel determined that scienter had been sufficiently pleaded because “Plotkin alleged specific facts about the agreements giving rise to a strong inference that IPaxess knew or was severely reckless in not knowing at the time of the releases that Lynxus/AGPI were not able or were not likely to be able to make the payments they contracted to make.” *Id.* The panel wrote:

According to the Complaint, IPaxess was a struggling company that announced to the public that it had reached agreements with Lynxus and AGPI that would bring them multimillion dollar revenues, which would amount to a thirty-fold increase from the revenues IPaxess reported in 1999. It is reasonable to assume, given the importance of these deals to the company, that IPaxess would have familiarized itself with the financial condition of Lynxus/AGPI and would have discovered details about their poor financial condition – including the facts that Lynxus earned revenues of \$7 million in 1999, and that AGPI was incorporated less than six months prior to the issuance of the May 25 releases. Given the reasonableness of the inference that Plotkin possessed material facts casting doubt on its contracting partners’ credibility, the district court was incorrect to fault Plotkin for failing to allege specific facts conclusively proving that IPaxess knew this information. *Cf. Novak v. Kasaks*, 216 F.3d 300, 308 (2d Cir. 2000) (stating that an egregious refusal to see the obvious, or to investigate the doubtful, may in some cases give rise to an inference of recklessness).

The panel ultimately concluded that the complaint had alleged state and federal securities fraud claims as to the May press releases touting the huge, new sales contracts but not as to the

August press release discussing beta trials with other entities (the panel concluded that this separate press release, unlike its predecessors, could not be read as an announcement of actual commercial sales agreements). *Plotkin* * 5-10.

M. Findings Of Fact

Where the lower court utilizes the wrong evidentiary standard, findings of fact will be reviewed not under the usual “clearly erroneous” standard but, instead, entirely *de novo*. ***Shafer v. Army & Air Force Exchange Service*, 376 F.3d 386, 396 (5th Cir. 2004)** (holding that special master and district court erroneously applied mere preponderance standard in civil contempt proceedings).

N. Injunctive Relief

In ***Doe v. Veneman*, 380 F.3d 807 (5th Cir. 2004)**, the panel passed on, *inter alia*, the injunctive relief attendant to a reverse-Freedom-of-Information-Act case involving farmers and ranchers who used poisons to control predation on livestock. The opinion provides a thorough discussion of the standards applicable to review of injunctive relief. 380 F.3d at 818-20. The panel ultimately found numerous aspects of the injunction at issue to be overbroad and vague.

O. Interlocutory Appeals Of Orders Re Injunctive Relief

Where the district court dissolves an injunction based on its legal determination that it lacks subject matter jurisdiction, the court’s order is reviewed not under the typical abuse of discretion standard but, instead, *de novo*. ***McLaughlin v. Mississippi Power Co.*, 376 F.3d 344, 353 (5th Cir. 2004)**.

In ***Planned Parenthood v. Sanchez*, 403 F.3d 324 (5th Cir. 2005)**, the panel reviewed a district court’s decision to grant a preliminary injunction against enforcement of a Texas statute that would have added anti-abortion conditions to disbursement of federal family planning funds. The panel noted that the ultimate decision to grant a preliminary injunction is reviewed for an abuse of discretion but that “[a] decision grounded in erroneous legal principles is reviewed *de novo*.” 403 F.3d at 329. The panel set out the well-established standards for preliminary injunctive relief as follows:

To obtain a preliminary injunction plaintiffs must show (1) a substantial likelihood of success on the merits, (2) a substantial threat that plaintiffs will suffer irreparable injury if the injunction is not granted, (3) that the threatened injury outweighs any damage that the injunction might cause the defendant, and (4) that the injunction will not disserve the public interest.

Id. at 329.

The panel in *Planned Parenthood* expressly held that there exists an implied cause of action to bring preemption claims seeking injunctive and declaratory relief even absent an explicit statutory claim. *Id.* at 333-34. The panel held, “[w]hile there may be some lack of harmony in the case law, the rule that there is an implied right of action to enjoin state or local

regulation that is preempted by a federal statutory or constitutional provision – and that such an action falls within the federal question jurisdiction – is well-established.” 403 F.3d at 334.

Ultimately, the panel found the subject state statute susceptible to an interpretation that would not cause it to be, on its face, conflict preempted; the panel ordered the injunction “dissolved unless the Appellees carry their burden of demonstrating that insisting on the use of affiliates [to obtain the subject funds] would so hinder their operations as to work in practical terms an impermissible prohibition by the State of Texas upon the ability of these Appellees to continue their abortion services using their own funds with no direct or indirect federal funding.” *Id.* at 343.

P. Intervention Of Right

In *Armstrong v. Capshaw, Goss & Bowers, LLP*, No. 03-11092, 2005 WL 697991 (*without page references*) (5th Cir. March 28, 2005), the district court had treated a motion to amend a complaint in intervention as a motion for leave to intervene and ultimately denied intervention. The intervenor had actually intervened in the predecessor state-court action and thereafter removed it to federal court. *Id.* at p. 2. The panel observed, “[b]ecause Armstrong’s motion to amend his complaint sought to justify his status as an intervenor in federal court, the district court properly treated it as a motion for leave to intervene.” *Id.* at p. 3. The panel noted, “[w]e have frequently instructed district courts to determine the true nature of a pleading by its substance, not its label.” *Id.*

Once the state-court intervenor removed the lawsuit, the action became governed by federal procedural rules and he “was therefore required to meet federal intervention standards to remain as an intervenor in the removed case.” *Id.* The panel noted that its review of the denial of a motion to intervene of right is *de novo*. *Id.* Concluding that the intervenor had no interests that would support his intervention, the panel affirmed the district court’s decision to deny intervention of right. *Id.* at p. 4.

Q. Jury Verdict

In *Interstate Contracting Corporation v. City of Dallas*, No. 02-10138, 2005 WL 928593 (5th Cir. April 22, 2005), the panel reviewed a \$3 million+ judgment on a jury verdict for a general contractor on its breach of contract and warranty claims (brought on behalf of a subcontractor) against the City of Dallas. The underlying contract was for levee construction, excavation to create storm water detention lakes and related work. 2005 WL 928593 at *1.

The panel had previously certified questions to the Supreme Court of Texas relative to whether ICC could bring claims on behalf of its subcontractor on a pass-through basis. *Id.* at *2-3. The Texas Supreme Court answered that Texas law does in fact recognize pass-through claim and set forth the requirements that need to be satisfied for a contractor to assert a claim on behalf of its subcontractor. *Id.* at *3-4 p. 5 (citing 135 S.W.3d 605, 610-20 (2004)). Determining that ICC met these requirements, the panel proceeded to consider the City’s challenge to the verdict and judgment for ICC.

Foreshadowing what was to come of ICC's recovery, the panel articulated the applicable standards of review as follows:

While we review the trial court's conclusions of law *de novo*, we uphold a jury's verdict unless it lacks a legally sufficient basis. *Hiltgen v. Sumrall*, 47 F.3d 695, 699-700 (5th Cir. 1995); *Watkins v. Petro-Search, Inc.*, 689 F.2d 537, 538 (5th Cir. 1982). We review the evidence and all reasonable inferences in the light most favorable to the jury's verdict. *Id.* at 700. Sitting as an *Erie* court, we rule on the issues as the Texas Supreme Court would rule. *Hanson Prod. Co. v. Ams. Ins. Co.*, 108 F.3d 627, 629 (5th Cir. 1997).

We review the district court's contract interpretation *de novo*. *T.L. James & Co. v. Traylor Bros. Inc.*, 294 F.3d 743, 746 (5th Cir. 2002) (citing *Musser Davis Land Co. v. Union Pac. Res.*, 201 F.3d 561, 563 (5th Cir. 2000)). Accordingly, we "review the record independently and under the same standard that guided the district court." *Id.* (quoting *Am. Totalisator Co. v. Fair Grounds Corp.*, 3 F.3d 810, 813 (5th Cir. 1993)). Under Texas law, determining whether a contract is unambiguous and interpreting an unambiguous contract are questions of law. *Leasehold Expense Recovery, Inc. v. Mothers Work, Inc.*, 331 F.3d 452, 456 (5th Cir. 2003). The court's primary concern is to enforce the parties' intent as contractually expressed, and an unambiguous contract will be enforced as written. *Id.* If a question relating to a contract's construction or ambiguity arises, the court examines the contract's wording in context of the surrounding circumstances. *Watkins*, 689 F.3d at 538. If the contract is then susceptible to only one interpretation, it is unambiguous. *Id.* Determining the parties' intent when expressed in an ambiguous contract is a question of fact. *Id.*

2005 WL 928593, *2.

Ultimately, the panel determined that the clear and unambiguous terms of the underlying contract and related documents, including clearly-worded disclaimers and strict notice-of-claim requirements, completely foreclosed ICC's claims — claims which were predicated mostly on additional expenses and difficulties relating to unanticipated subsoil conditions and deficient plans and specifications. *ICC*, at pp. 3, 6-29.

The panel concluded with this summary of its rationale and holding:

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

Id. at *18.

R. Legal Insufficiency

Johnson v. Louisiana, 369 F.3d 826 (5th Cir. La. 2004) involved a legal sufficiency challenge to a plaintiff verdict in a wrongful termination case brought by a former state motor vehicle inspector who had reported alleged instances of official misconduct, including alleged sexual harassment, by his supervisor. The panel noted that the jury’s verdict could be overturned “only if we conclude that, after viewing the trial record in the light most favorable to the jury verdict, there is no legally sufficient evidentiary basis for a reasonable jury to have found for the prevailing party.” 369 F.3d at 830 (citing *Mato v. Baldauf*, 267 F.3d 444, 450-51 (5th Cir. 2001)).

The panel stated that only final decision-makers may be liable for First Amendment retaliation employment discrimination under Section 1983 and held that, because the plaintiff had presented no evidence of a conspiracy between the decision-maker and any other of the numerous defendants, the district court had erred in allowing the jury to consider the liability of the non-decision-maker defendants. *Id.* at 831. Further, the panel held that, in passing on the liability of the employer, “the inquiry is limited to whether the employer believed the allegation [of employee misconduct] in good faith and whether the decision to discharge the employee was based on that belief” formed after a reasonable fact-finding inquiry *Id.* at 832. In *Johnson*, the record demonstrated that the decision-maker had relied upon an independent investigation of the facts, that the claimed victims of harassment denied the allegations, that the investigator concluded that the plaintiff was lying and possibly motivated by his recent demotion and that the plaintiff had failed to present any evidence in his own support even when asked to do so. *Id.* at 832.

Against this backdrop, the panel concluded that the decision-maker “reasonably found the facts to be that Johnson was lying and that he had fabricated the sexual harassment allegations.” *Id.* The panel vacated the judgment and remanded to the district court for entry of judgment in favor of the defendants.

S. Mandate

In *Stalder v. Keeler*, No. 03-30699, 2005 WL 845913 (5th Cir. April 13, 2005), the panel applied the “mandate rule” which “compels compliance on remand with the dictates of a superior court and forecloses relitigation of issues expressly or impliedly decided by the appellate court.” 2005 WL 845913 at *2 (quoting *United States v. Lee*, 358 F.3d 315, 321 (5th Cir. 2004)). In *Stalder*, the panel had previously remanded and permitted Keeler to add a facial challenge to Louisiana’s prestige-license-plate program. *Id.* On remand, the district court had entertained and sustained new claims and rationales to confer standing not only on Keeler, but on a separate co-plaintiff as well. *Id.* The panel held that even judicial economy considerations were “insufficient to overcome the appellate court’s express ruling” that Keeler (only) was being afforded an opportunity to amend her complaint. *Id.*

T. Plain Error

In *Septimus v. University of Houston*, 399 F.3d 601 (5th Cir. 2005), the panel applied plain error analysis to asserted jury charge error in a Title VII employment retaliation case.

Because the University did not object to the jury instructions in the district court, and its position was never made clear to the district court in some other manner, the panel noted that its “consideration of the issue is limited to plain error review.” 399 F.3d at 606-7.

The panel wrote, “[f]or an appellant to prevail under the plain error standard, it must show 1) that an error occurred; 2) that the error was plain, which means clear or obvious; 3) the plain error must affect substantial rights; and 4) not correcting the error would seriously impact the fairness, integrity, or public reputation of judicial proceedings.” *Id.* at 607 (citing cases). As the panel noted, “[t]he plain error exception is designed to prevent a miscarriage of justice where the error is clear under current law.” *Id.* (citing cases).

The panel found plain error relative to the district court’s instruction to the jury in this “pretext” (only) retaliation case — the district court had instructed the jury that it could find retaliation if the protected employee conduct was a “motivating factor” in the employer’s conduct. *Id.* at 607-8. Where, as in the case before it, the retaliation claim is brought on circumstantial evidence and as purely a “pretext” case, the panel held that the proper standard of proof on the causation element is that “the adverse employment action taken against the plaintiff would not have occurred ‘but for’ her protected conduct.” 399 F.3d at 608 (citing *Pineda v. United Parcel Service, Inc.*, 360 F.3d 483, 487 (5th Cir. 2004)). The panel observed that the “but for” evidentiary standard for pretext-only cases is well established in the Fifth Circuit. *Id.* at 608. “Thus, the disputed jury instruction amounts to plain error that should have been clear or obvious.” *Id.* at 609.

The panel concluded that, “[e]ven when the jury instructions are viewed in their entirety, the substitution of the phrase ‘motivating factor’ for ‘but for’ causation causes us to doubt substantially whether the jury was properly guided in its deliberations.” *Id.* at 608. By holding plaintiff to a lower standard in proving the causation element of her retaliation claims, the panel concluded that the substantial rights of the University were prejudiced. *Id.* The panel determined that because “the jury was improperly instructed, the outcome of this case may have been affected” and, thus “failing to correct this fundamental error could impact the fairness of the judicial process in this case and could result in a miscarriage of justice.” *Id.* at 608-9.

U. Remand Orders

The general rule that a remand order is not typically reviewable applies irrespective of whether the 28 U.S.C. § 1447(d) ground relied upon by the district court was in fact pleaded in the movant’s timely motion to remand. ***Schexnayder v. Entergy Louisiana, Inc.*, 394 F.3d 280, 282 (5th Cir. 2004)**. The panel rejected the non-movant defendant’s argument that a district court’s decision to remand on a ground not raised in the movant’s timely motion to remand was tantamount to a prohibited *sua sponte* motion to remand. The panel noted that, “[b]y its own terms, § 1447(c) is limited to *motions*, not *issues*.” 394 F.3d at 283 (emphasis in original). The panel held that “[s]o long as a procedurally-based motion for remand is timely filed, and the order is not affirmatively based on a non-§ 1447(c) ground, we will not review a district court’s remand order.” *Id.* at 285.

V. Rule 60(b)(6) Motions Predicated On Changes In Substantive Law

In *Garibaldi v. Orleans Parish School Board*, 397 F.3d 334 (5th Cir. 2005), the panel reversed the district court's grant of Rule 60(b)(6) relief predicated on a change in controlling law. The underlying plaintiffs had sued their employer, Orleans Parish School Board, for alleged violations of the False Claims Act, 31 U.S.C. § 3279 *et seq.* 397 F.3d at 336. The school board appealed after the plaintiffs prevailed in the lawsuit which was tried to a jury. On appeal, the school board succeeded with its argument that, as a local government unit, it was not subject to liability as a matter of law under the False Claims Act. *Id.* at 336. The plaintiffs were unsuccessful in obtaining Supreme Court review.

Although the Supreme Court ultimately decided a similar case and held that local government units in fact **could** be held liable under the False Claims Act, the panel held that there did not exist the requisite "extraordinary circumstances" necessary for Rule 60(b)(6) relief. *Id.* at 339-40. The panel noted that, "[a]fter almost every resolution of a circuit conflict there is a losing litigant somewhere who could argue similarly for reopening his case because it was decided erroneously in light of the subsequent Supreme Court decision." *Id.* at 338.

W. Sanctions

Compaq Computer Corporation v. Ergonome Inc., 387 F.3d 403 (5th Cir. 2004), a copyright case, involved what the panel termed an "egregious course of litigation and discovery abuse" that was "among the worst we have ever seen." 387 F.3d at 414. In affirming the district court's imposition of sanctions whereby Compaq's alter ego allegations were sustained against one of the individual plaintiffs (ultimately making the individual plaintiff liable for \$2.7 million in attorneys fees awarded to Compaq at the close of trial), the panel noted the plaintiff's repeated refusal to respond adequately to discovery aimed at proving alter ego, the plaintiff's multiple highly-questionable and unsuccessful petitions for mandamus, an unsupported motion requesting the judge recuse herself, another requesting that the district court refer the case for criminal prosecution and a bankruptcy case in New York, which the bankruptcy court found was a ruse to prevent potential liability of the individual plaintiff in the event Compaq prevailed (as it did) in the litigation. *Id.* at 412-13. During the course of litigation, the individual plaintiffs were held in contempt and fined for failing to respond adequately to Compaq's discovery. *Id.* at 413. The district had also warned that, if discovery was not complied with, it would find the particular plaintiff at issue to be the alter ego of Ergonome as a matter of law. *Id.*

The panel affirmed the imposition of sanctions holding that the sanction was just and specifically related to the particular claim at issue in the order compelling discovery. *Id.* at 413 (citing FED. R. CIV. P. 37(b)(2) and *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 707, 102 S. Ct. 2099, 2107, 72 L. Ed. 2d 492 (1982)).

X. Special Masters Under Rule 53

In *Shafer v. Army & Air Force Exchange Service*, 376 F.3d 386 (5th Cir. 2004), the panel reversed a district court's "wholesale" adoption of the report of a special master because, *inter alia*, (1) not all claims purportedly passed on by the special master had in fact been referred to the master by written order as required under Rule 53, (2) the master had applied the wrong

standard of proof to the one set of issues before it (contempt proceedings requiring application of the clear and convincing evidence standard), and (3) the master had exceeded his authority by granting relief the plaintiff herself had never requested. The panel noted that while the district court had the ability to expand the master's original grant of authority, it could only do so by amending the referral order with notice to, and opportunity to be heard by, the parties.

Y. Summary Judgment

In *Boudreaux v. Swift Transportation Company, Inc.*, 402 F.3d 536 (5th Cir. 2005), a plaintiff truck driver sued over his slip-and-fall accident which he attributed to oil that he claimed had leaked from the Swift Transportation truck he had parked next to at a truck stop. The panel affirmed the summary judgment noting that there existed no evidence that Swift had actual or constructive knowledge of the oil. 402 F.3d at 543. There was no evidence that the Swift truck driver had conducted an inspection of the truck before leaving the parking lot where the plaintiff came in contact with the oil. *Id.* at 543. While the plaintiff pointed to Swift's procedures requiring pre-trip inspections of its trucks, the panel held, "[w]e decline to impute constructive knowledge of the oil puddle to Swift based solely upon its own internal operating procedures requiring pre-trip inspections. Under Texas law, a company's self-imposed policy with regard to inspection, taken alone, does not establish the standard of care that a reasonably prudent operator would follow." *Id.* at 543.

The panel continued, "[i]n addition, Boudreaux presented no evidence of the actual procedure followed by Swift drivers when conducting pre-trip inspections, much less whether the procedure is designed to detect relatively small 'puddles' of seven to eight inches in diameter [the size of puddle plaintiff claimed to have walked through]." *Id.* at 543. The panel noted that the plaintiff had provided testimony as to his own pre-trip inspections and how they would reveal oil leaks, but concluded that "[t]his evidence does not directly speak to the manner in which Swift drivers conduct pre-trip inspections of their vehicles." *Id.* at fnt. 28. The panel also noted that the Swift inspections were described as Department of Transportation Requirements and that the relevant regulation "indicates that inspecting for oil leaks and puddles is not part of the inspection procedure required by the [DOT]" *Id.* at fnt. 29 (citing 49 C.F.R. § 392.7 (2003)).

Against this backdrop, the panel concluded, "we can find no basis in Boudreaux's evidence for concluding that the driver of the Swift truck would have located the oil puddle in the exercise of reasonable care." 402 F.3d at 543. The panel also noted that, "it is unclear whether the puddle existed at the time such an inspection would have occurred." *Id.* at 544. Holding that no reasonable jury could find in favor of the plaintiff, the panel affirmed the summary judgment in favor of Swift. *Id.*

Castillo v. City of Weslaco, 369 F.3d 504 (5th Cir. 2004) (per curiam) involved a Section 1983 case brought by several police officers alleging retaliation for their involvement with a competing police union. 369 F.3d at 505. The defendants unsuccessfully moved for summary judgment asserting qualified immunity. *Id.* The panel reversed and remanded with directions that the district court, in conformity with the standards set out in *Behrens v. Pelletier*, 516 U.S. 299, 309 (1996), "highlight the evidence that, if interpreted in the light most favorable to the plaintiffs, identifies conduct by the defendant that violated clearly established law." *Id.* at 506.

The panel noted that in cases where the district court fails to outline the relevant factual scenario and the evidence in the record establishing the relevant conduct, the Supreme Court has authorized the Court of Appeals to undertake that analysis for itself. *Id.* at 507. Here, however, the panel determined that remand would likely be a more efficient alternative. *Id.* On remand, the district court filed its supplemental order and therein concluded that it would modify its order to grant summary judgment with respect to two of the officers. *Castillo v. City of Weslaco*, 388 F.3d 464, 465 (5th Cir. 2004). The panel accordingly vacated the district court’s denial of summary judgment and remanded to the district court so that it could enter an order consistent with the findings in its supplemental order; the parties would then perfect and prosecute any appeals from that new order. 388 F.3d at 465.

***Goswami v. American Collections Enterprise, Inc.*, 377 F.3d 488 (5th Cir. 2004)** involved alleged unfair debt collections practices. The panel reversed part of a summary judgment order for the defendant on grounds that its false statements as to (1) the extent of authority it had to resolve the debt, and (2) the amount of time it was authorized to hold the settlement offer open, each constituted violations of the Fair Debt Collections Practices Act. 377 F.3d at 496. Finding the substance of the debt settlement letter at issue to be deceptive (a false “one-time, take-it-or-leave-it offer that would expire in thirty days”), the panel reversed and remanded this part of the summary judgment order. *Id.* at 495-96.

***Keelan v. Majesco Software, Inc.*, No. 04-10317, 2005 WL 834481 (5th Cir. April 12, 2005)** involved claims of national-origin discrimination claims brought by American workers against their Indian-owned employer. The district court granted the employer summary judgment holding that the plaintiffs had failed to demonstrate that similarly-situated Indian employees were treated more favorably than they were such that plaintiffs had failed to make out a *prima facie* case of pretext discrimination under *McDonnell Douglas*. *Id.* at *2. On appeal, the employees argued that “showing similarly situated employees were more favorably treated to meet the fourth element of *McDonnell Douglas* is not required to prove up a *prima facie* case of discrimination. *Id.*

However, in the district court, “[w]hile Appellants objected that their case should be treated under a mixed-motive theory per *Desert Palace*, they did not object to the similarly situated disparate treatment formulation of the fourth element of the *prima facie* case.” *Id.* at *5. The panel concluded that it could not address this point of error and wrote, “[b]ecause Appellants did not sufficiently object below, the district court did not have any opportunity to rule on their argument; Appellant’s legal argument on formulation is thus waived.” *Id.* (citing *Keenan v. Tejeda*, 290 F.3d 252, 262 (5th Cir. 2002) and *New York Life Ins. Co. v. Brown*, 84 F.3d 137, 141 n.4 (5th Cir. 1996)). The panel observed that, “[i]t is well settled in this Court that the scope of appellate review on a summary judgment order is limited to matters presented to the district court.” *Id.* (citing *Keenan*, 290 F.3d at 262 and *Frank C. Bailey Enters., Inc. v. Cargill, Inc.*, 582 F.2d 333, 334 (5th Cir. 1978)).

In ***Slaughter-Cooper v. Kelsey Seybold Medical Group P.A.*, 379 F.3d 285 (5th Cir. 2004)**, the panel affirmed a summary judgment for a physician practice group in a suit brought by one of its former members. The underlying contract included an automatic termination provision for members who suffered a disability lasting longer than three months. 379 F.3d at 286. The plaintiff physician had suffered injuries in a car accident and had been disabled for

more than three months at the time the practice group began sending her letters which, she later argued, constituted waiver of the automatic termination provision. *Id.* at 290. The panel held that, as a matter of law, no waiver could have occurred because once the agreement terminated automatically, “all rights and obligations arising from that agreement including the Clinic’s right to either rely on or waive the automatic termination provision evaporated along with the agreement.” *Id.*

***Vercher v. Alexander & Alexander, Inc.*, 379 F.3d 222 (5th Cir. 2004)** involved an appeal of a summary judgment upholding the denial of a plaintiff’s claims for long-term benefits under an ERISA plan. 379 F.3d at 223-24. In affirming the summary judgment, the panel noted that ERISA does not require plan administrators to accord special deference to opinions of treating physicians. *Id.* at 232-3 (citing *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 123 S. Ct. 1965, 155 L. Ed. 1034 (2003) and noting that *Black & Decker* effectively eliminated the “treating physicians rule” another Fifth Circuit panel had adopted in *Salley v. E.I. duPont de Nemours & Co.*, 966 F.2d 1011, 1016 (5th Cir. 1992)).

Z. Transfers of Venue Under 28 U.S.C. § 1404(a)

***In re Volkswagen AG*, 371 F.3d 201 (5th Cir. Tex. 2004) (per curiam)** arose from an auto crashworthiness products liability action filed in the Eastern District of Texas against various Volkswagen entities. 371 F.3d at 202. One of the defendants moved for and was granted permission to file its original third-party complaint against the owner and driver, respectively, of the other car involved in the collision — the Volkswagen defendants pointed to them as potentially responsible third parties. *Id.* Shortly thereafter, the defendants moved for a transfer of venue to the San Antonio Division of the United States District Court for the Western District of Texas (where the accident occurred and the two third-party defendants resided). *Id.* That motion was based on 28 U.S.C. § 1404(a) which provides that “for the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.” *Id.*

The panel noted that mandamus is appropriate to correct a trial court’s abuse of discretion in denying a 28 U.S.C. § 1404(a) motion to transfer venue “if the district court failed to correctly construe and apply the relevant statute, or to consider the relevant factors incident to ruling upon the motion, or otherwise abused its discretion in deciding the motion.” *Id.* at 202-3 (citing *Castano v. Jackson Marine, Inc.*, 650 F.2d 546, 550 (5th Cir. 1981)). The appropriate standards for deciding the propriety of a district court’s ruling on a motion to transfer under 1404(a) include: “a.) Did the district court correctly construe and apply the relevant statutes; b.) Did the district court consider the relevant factors incident to ruling upon a motion to transfer; and c.) Did the district court abuse its discretion in deciding the motion to transfer.” *Id.* at 203 (citing *In re Horseshoe Entm’t*, 337 F.3d 429, 432 (5th Cir.) *cert. denied*, 124 S. Ct. 826, 157 L. Ed. 2d 698 (2003) and *Ex Parte Chas. Pfizer & Co.*, 225 F.2d 720 (5th Cir. 1995)).

Ultimately, the panel granted the defendants’ petition for a writ of mandamus and ordered the trial court to transfer venue to San Antonio. The panel noted that the district had (1) failed to properly construe and apply Section 1404(a) because it did not consider in its analysis the convenience of the third-party defendants or the witnesses associated with the third-party complaint – noting that “[w]hen the distance between an existing venue for trial of a matter and a

proposed venue under § 1404(a) is more than 100 miles, the factor of inconvenience to witnesses increases in direct relationship to the additional distance to be traveled” -- (2) the district court failed to “consider that the site of accident, i.e., the Western District of Texas, became a relevant factor” as soon as the third-party defendants were added, (3) “failed to explain how the citizens of the Eastern District of Texas, where there is no factual connection with the events of this case, have more of a localized interest in adjudicating this proceeding than the citizens of the Western District of Texas, where the accident occurred and where the entirety of the witnesses for the third-party complaint can be located” and (4) the district court had erred and abused its discretion in considering as a relevant factor the location of the parties’ counsel. *Id.* at 205-6 (citing *In re Horseshoe*, 337 F.3d at 434 for the proposition that the location of counsel is irrelevant and improper for consideration in passing on a transfer of venue).

V. Other Areas

A. Airbag Non-Deployment Cases — Expert Testimony

In *Carboni v. General Motors Corp.*, 398 F.3d 357 (5th Cir. 2005), the panel vacated a judgment for the personal injury plaintiff and rendered a take nothing judgment on his defective airbag claims concluding that his failure to adduce expert testimony that his injuries had been enhanced as consequence of the bag's failure to deploy precluded him from recovering under the Louisiana Products Liability Act. 398 F.3d at 360-62. The panel held that whether an airbag's failure to deploy enhanced a plaintiff's injuries is not a part of the everyday experience of lay jurors such that expert testimony must be adduced. *Id.* at 362.

B. Contingent Fee Contracts — Admiralty Contexts

In *Karim v. Finch Shipping Co. Ltd.*, 374 F.3d 302 (5th Cir. 2004), involving an admiralty limitation of liability action, a panel of the Fifth Circuit affirmed a district court's decision to deny a plaintiff lawyer's motion to disburse his (then deported) client's settlement funds, the district court's decision to appoint independent counsel for that client, to investigate the planned allocation of funds under the contingent fee contract and ultimately to order a disbursement more favorable to the absent client. 374 F.3d at 304.

The client, a Bangladeshi national, was injured on a Finch vessel; the plaintiff lawyer undertook his representation under a contingent fee contract calling for, *inter alia*, a 40% gross contingency "or as allowed by law" if the case was tried. *Id.* A judgment for \$407k was obtained and, after the client was deported, affirmed. *Id.* at 304-5. Finch Shipping deposited the judgment amount into the court's registry, and plaintiff's counsel moved to disburse the funds. *Id.* at 305. The district court denied the motion citing "its duty to ensure that the rights of seamen, as wards of admiralty, are protected" and ordered the lawyer to submit a detailed accounting. *Id.* The accounting revealed that, under the lawyer's approach, the client — who was permanently disabled from returning to maritime work — would receive nothing. 374 F.3d at 305. The district court ordered that, after reimbursing litigation expenses, the remaining amount would be divided equally between lawyer and client and reasoned that "under both state and federal law a court has the power as well as the responsibility, particularly where seamen are concerned, to examine and modify contingent fee agreements." *Id.* at 306.

The panel affirmed the judgment of the district court, finding no abuse of discretion, and held "it may be proper for a district court, sitting in admiralty, to use its admiralty powers to alter a contingent fee contract for legal services entered into by an uncounseled seaman when he is absent at the time of the attempted disbursement of his judgment, as in this instance." *Id.* at 312. In response to the lawyer's contention that, even though the injured claimant might receive nothing from a recovery, a 40% contingency against the gross recovery is "reasonable because it is common," the panel wrote, "[i]f so, this is further evidence why seamen may need protection from such a practice." *Id.* The panel concluded, "[t]he use of such contingent fee contracts is one reason why admiralty courts may be required to intervene to protect a seaman's right to recover from a judgment in his favor when his attorney does not do so." *Id.*

C. Judicial Estoppel

In re Superior Crewboats, Inc., 374 F.3d 330 (5th Cir. 2004) raised the question of whether judicial estoppel prohibits debtors from prosecuting a personal injury lawsuit that they did not timely disclose to the bankruptcy court. 374 F.3d at 332. The panel noted that a district court’s judicial estoppel determination is reviewed for abuse of discretion. *Id.* at 334. The panel identified the requirements for judicial estoppel, in the case before it, as “(1) the party is judicially estopped only if its position is clearly inconsistent with the previous one; (2) the court must have accepted the previous position; and (3) the non-disclosure must not have been inadvertent.” *Id.* at 335.

The panel concluded that the trial court had abused its discretion in concluding that judicial estoppel did not apply; the record revealed that the debtors had taken wildly inconsistent positions on the value of the underlying personal injury suit, that the bankruptcy court had relied on their “no value” representations and that the debtors knew about, and actively prosecuted, the personal injury claim for many months before disclosing its existence. The panel reversed and remanded with instructions to dismiss the claim. *Id.* at 336. The panel specifically rejected the contention that the debtors were immunized from application of judicial estoppel by the fact that their late-disclosed claim was ultimately discharged by the trustee. *Id.* at 335 fnt. 4.

D. Law of the Case

In *Af-Cap Inc. v. Republic of Congo*, 383 F.3d 361 (5th Cir. 2004), the panel noted that law of the case is a discretionary, not jurisdictional, doctrine that may be disregarded if a prior holding is clearly erroneous and would work a manifest injustice. 383 F.3d at 367 fnt. 6. This exception to the law of the case applies “because of post-decision changes in evidentiary facts or the applicable law and not because the subsequent panel disagreed with the earlier panel’s conclusions.” *Id.* (citing cases). The panel noted that if a subsequent panel were to reverse a prior panel’s legal conclusion solely because it disagreed with it, that such a scenario would involve not only foregoing application of the law of the case doctrine but would also contravene the well-established prior precedent rule. *Id.* (citing *U.S. v. Short*, 181 F.3d 620, 624 (5th Cir. 1999)).

E. Orders Limiting Post-Judgment Motion Practice

In *Arsement v. Spinnaker Exploration Co.*, 400 F.3d 238 (5th Cir. 2005), the panel noted that the district court, in its order denying defendants’ motion for judgment as a matter of law, expressly prohibited the filing of any additional motions. 400 F.3d at 254. The panel wrote that the district court’s order was an “improper procedure” and reminded the court “that ordering parties to forgo their rights under the Federal Rules of Civil Procedure is outside the scope of its authority.” *Id.* The panel wrote, “[I]tigators are reminded that ‘no judge has [the] authority’ to prohibit them from filing motions allowed by the Federal Rules of Civil Procedure.” *Id.* (citing *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 502 (5th Cir. 2000)).

F. Preclusion

In *Vines v. University of Louisiana*, 398 F.3d 700 (5th Cir. 2005), the panel reviewed a district court’s denial of a motion for permanent injunction based on the relitigation exception to

the Anti-Injunction Act. The plaintiffs, former administrators and faculty members, asserted age discrimination claims against ULM. The panel noted the general rule that while a district court's denial of a motion for permanent injunction is reviewed for abuse of discretion, application of the relitigation exception to the Anti-Injunction Act is a question of law reviewed *de novo*. *Id.* at 704. Ultimately, the panel concluded that the individual discrimination plaintiffs were barred from pursuing their claims in state court because they were precluded, under principles of collateral estoppel, by the EEOC's unsuccessful federal litigation of issues key to those claims. *Id.* at 712-13. The prior state court determinations that collateral estoppel did not apply to preclude the state-court suits were found to be interlocutory and thus not binding on the federal courts. *Id.* at 705-6.

G. Preemption

In *Hesling v. CSX Transportation, Inc.*, 396 F.3d 632 (5th Cir. 2005), the panel addressed a question of first impression in the Fifth Circuit — whether a state negligence claim for delay in installing federally-funded railroad safety devices would be barred by preemption under the Federal Railroad Safety Act. After careful review of the case law, the panel answered in the affirmative. 396 F.3d at 643-46.

H. Prior Precedent Rule

The panel in *Arbaugh v. Y&H Corp.*, 380 F.3d 219 (5th Cir. 2004) applied the prior precedent rule to hold that whether or not a defendant is an employer under the statutory definition under Title VII is a subject matter inquiry such that the trial correctly raised the issue *sua sponte* and properly dismissed the lawsuit for lack of subject matter jurisdiction (well after verdict and judgment). 380 F.3d at 224-25. Under the Fifth Circuit's prior precedent rule, "one panel of this Court cannot disregard the precedent set by a prior panel, even though it conceives error in the precedent. Absent an overriding Supreme Court decision or a decision or change in the statutory law, only the Court *en banc* can do this." *Id.* at 225 (citing *Davis v. Estelle*, 529 F.2d 437, 441 (5th Cir. 1976)). Noting the split among the circuits on the Title VII issue, the panel found that the controlling Fifth Circuit precedent was *Dumas v. Town of Mt. Vernon-Alaska*, 612 F.2d 974, 980 (5th Cir. 1980) which held that a failure to qualify as an employer under Title VII deprives a district court of subject matter jurisdiction. 380 F.3d at 224.

I. Recovery Of Non-Pecuniary Damages Prohibited In Jones Act Cases

Resolving a split among district courts in the Fifth Circuit, a panel held in *Scarborough v. Clembco Industries*, 391 F.3d 660 (5th Cir. 2004) that neither a party who has invoked his Jones Act seaman status nor his survivors may recover non-pecuniary damages from non-employer third parties. 391 F.3d at 667-668.

J. Social Security Appeals

In *Higginbotham v. Barnhart*, No. 04-10197, 2005 WL 730577 (5th Cir. March 31, 2005), deciding an issue of first impression in the Fifth Circuit, the panel held that, in reviewing denial of supplemental security income benefits, the district courts **should** consider evidence that the claimant failed to present to the Administrative Law Judge but did submit for the first time to the Appeals Council because the Council's ultimate denial of the request for review is part of the

“final decision” at issue. *Id.* at *2-4. The *Higginbotham* decision places the Fifth Circuit among five other circuits that have adopted similar positions.

K. Waiver of Eleventh Amendment Immunity

Pace v. Bogalusa City School Board, 403 F.3d 272 (5th Cir. 2005) (en banc) provides a detailed analysis of Eleventh Amendment immunity and is a must-read for litigants facing such issues in the Fifth Circuit. The case turned on a disabled high-school student’s (ultimately rejected) claims under the Individuals with Disabilities Education Act (IDEA), Title II of the Americans with Disabilities Act and § 504 of the Rehabilitation Act. 403 F.3d at 274. The majority found that Louisiana had made a knowing waiver of applicable immunity to actions under the IDEA and § 504. *Id.* at 285-89. Because, on the facts before it, the rights and remedies available to the plaintiff under Title II “are identical to and duplicative of those provided in § 504” the majority did not address whether Title II of ADA abrogates sovereign immunity to the extent it implicates disability discrimination in access to public education. *Id.* at 288.

The concurring and dissenting Judges would have held that under the “limited and unusual circumstances” presented (including uncertainty in the case law at the time), Louisiana did **not** knowingly waive its Eleventh Amendment immunity by accepting federal education funds from 1996 to 1998. *Id.* at 297-303.