

# **FIFTH CIRCUIT UPDATE**

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**19<sup>TH</sup> ANNUAL ADVANCED**

**CIVIL APPELLATE PRACTICE COURSE**

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**CHAPTER 15**



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Texas Board of Legal Specialization Civil Appellate Law Advisory Commission: 1999 – 2005  
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“Civil Appeals to the Courts of Appeals,” *The Advocate*, Vol. 29, Winter 2004 (author).

Ethics Seminar, State Bar of Texas Litigation Section and Baylor University School of Law, December 2004 (seminar leader).

“Proportionate Responsibility and Designation of Responsible Third Parties Under House Bill 4,” The Judge Abner V. McCall American Inn of Court, November 2003 (author and speaker).

The Appellate Roadshow, State Bar of Texas Appellate Section, June 2003 (Waco panel moderator).

“Charitable Immunity and Liability,” Clergy and the Law Seminar, Waco-McLennan County Bar Association, March 2002 (speaker).

“Vicarious Liability for the Acts of an Independent Contractor,” The Judge Abner V. McCall American Inn of Court, January 2002 (panel moderator).

“Preservation of Error in Federal Court,” Nuts and Bolts of Appellate Practice, Texas Bar CLE, September 2001 (author and speaker).

“Summary Judgments and Appeals in Federal Court,” Federal Court Practice Seminar, Federal Bar Association (Waco Chapter), April 2001 (author and speaker).

“Employment Law Litigation in Federal Court,” Federal Court Practice Seminar, Federal Bar Association (Waco Chapter), April 1999 (author and speaker).

“1999 Legislative Update,” *The Appellate Advocate*, Vol. XII, No. 4, September 1999 (author).



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## FIFTH CIRCUIT UPDATE

### I. INTRODUCTION

This Fifth Circuit Update summarizes a sampling of published opinions issued by the Fifth Circuit in civil cases from September 2004 through July 2005. Particular attention has been given to cases involving jurisdictional and procedural issues of interest to the appellate practitioner.

### II. APPELLATE JURISDICTION

*Mire v. Full Spectrum Lending, Inc.*, 389 F.3d 163 (5<sup>th</sup> Cir., Oct. 25, 2004)

The Fifth Circuit dismissed an appeal from an order compelling arbitration, staying proceedings, and “administratively” closing the case. According to the court, 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; *i.e.*, administratively closed cases are not counted as active. In contrast, cases stayed, but not closed, are counted as active. Thus, an administratively closed case still exists on the docket of the district court and may be reopened upon request of the parties or on the court's own motion. That situation is the functional equivalent of a stay, not a dismissal, and is thus not an appealable order under the Federal Arbitration Act. Accordingly, the court did not have jurisdiction over the appeal.

*Ward v. Santa Fe Ind. School District*, 393 F.3d 599 (5<sup>th</sup> Cir., Dec. 10, 2004)

The plaintiffs, who sought and received an injunction and nominal damages in an action brought against a school district, brought an appeal from the district court judgment in their favor asserting, among other things, that the district court improperly failed to rule on the merits of their constitutional claim. The court *sua sponte* concluded that the plaintiffs lacked standing to appeal a judgment in their favor. According to the court, “[c]oncluding that the plaintiffs are not aggrieved by a failure of the district court to state the reasons for its entry of judgment in their favor does not weaken civil rights jurisprudence.” “Federal appellate courts review judgments . . . not opinions.”

*Schexnayder v. Entergy Louisiana, Inc.*, 394 F.3d 280 (5<sup>th</sup> Cir., Dec. 13, 2004)

The court held that it lacked jurisdiction to review a district court's remand of case to state court. Reviewing Supreme Court and prior Fifth Circuit authority, the court noted that it would lack jurisdiction

under 28 U.S.C. § 1447 if the district court based its remand order on either a lack of subject matter jurisdiction or a defect in removal procedure. An order is reviewable only if it “*affirmatively* states a non-1447(c) ground for remand.” According to the Fifth Circuit, the two grounds for the district court's remand decision constituted allowable § 1447(c) reasons: (1) that the removal petition was untimely under 1446(b); and (2) that its subject matter jurisdiction could not be based on an intervenor's federal claim. The court rejected the appellant's argument that the remand was not authorized because the first ground was not listed in the original motion to remand. As the court noted, the movant timely filed a motion to remand, and the remand order was not affirmatively based on a non-1447(c) ground; thus, the court lacked jurisdiction to review the decision.

*International Ass'n of Machinists and Aerospace Workers Lodge 2121 AFL-CIO v. Goodrich Corp.*, 410 F.3d 204 (5<sup>th</sup> Cir., May 18, 2005)

The Fifth Circuit held that it lacked jurisdiction to review the district court's order compelling arbitration. *See Mire v. Full Spectrum Lending, Inc.*, *supra*. The court also concluded that it did not have appellate jurisdiction on the theory that the district court's order was void for want of jurisdiction. The union had standing under Section 301(b) of the Labor Management Relations Act to bring suit on behalf of the retirees whose authorizations for the union to represent them in all the matters at issue in the suit were filed in district court below.

*Federal Trade Commission v. Assail, Inc.*, 410 F.3d 256 (5<sup>th</sup> Cir. May 19, 2005)

The Fifth Circuit directed the parties to address the following issue: “Whether the order(s) from which appeal is taken in this civil case is appealable based on the termination of the litigation, pursuant to R. 54(b), Fed. R. App., or the collateral order doctrine, or whether there exists [sic] some other bases of appellate jurisdiction.” The court concluded that it had jurisdiction based upon the language of the stipulated order that terminated the liability phase of the case: “The parties hereby consent to entry of the foregoing Order which shall constitute a final judgment and order in this matter. The parties further stipulate and agree that the entry of the foregoing order shall constitute a full, complete, and final settlement of this action.” Thus, the subsequent orders denying attorneys' fees, entered after the underlying litigation was settled, were final appealable orders.

*Eurasia International Ltd. v. Holman Shipping Inc.*, 411 F.3d 578 (5<sup>th</sup> Cir., June 7, 2005)

The court was compelled to dismiss the appeal of this action brought *in rem*. Because the *res* could no longer be delivered to the appellant, the “useless judgment” doctrine deprived the court of appeals of jurisdiction over the matter.

*Kitty Hawk Aircargo, Inc. v. Chao*, --- F.3d --- (5<sup>th</sup> Cir., July 20, 2005)

Although there was no evidence in the record proving that the Airline Pilots Association was the collective bargaining representative of the pilots, ALPA’s representation of the pilots was capable of accurate and ready determination by resort to a source (the administrative agency reporter) whose accuracy on the matter cannot reasonably be questioned. As the collective bargaining representative of the pilots, ALPA had standing to appeal a summary judgment in favor of an air cargo carrier. Next, the Fifth Circuit concluded that the carrier lacked standing to challenge the Department of Labor’s Administrative Review Board’s ruling in the district court. Because the carrier’s contract for transporting air cargo allowed it to pass its wages on to the U.S. Postal Service, the carrier had not established that, at the time it filed its complaint, it had suffered any injury-in-fact, or that there was a substantial likelihood that it would suffer an injury-in-fact in the future. Accordingly, the district court lacked jurisdiction over the carrier’s complaint.

### A. Interlocutory Appeals

*Estate of Davis ex rel. McCully v. City of North Richland Hills*, 406 F.3d 375 (5<sup>th</sup> Cir., April 11, 2005)

In an interlocutory appeal from the denial of a motion for summary judgment on qualified immunity grounds, the court “can review the materiality of any factual disputes, but not their genuineness.” In this case the court exercised jurisdiction and reversed the district court’s order, notwithstanding the district court’s determination “that Plaintiffs produced evidence *demonstrating a genuine issue of material fact* whether Shockley and Wallace were deliberately indifferent to Hill’s propensity to use excessive force, whether their conduct was objectively unreasonable in light of clearly established constitutional law.” The Fifth Circuit noted that when a district court denies summary judgment on the basis that genuine issues of material fact exist, it has made two distinct legal conclusions: that there are “genuine” issues of fact in dispute, and that these issues are “material.” According to the court, “[a]n officer challenges materiality when he contends that ‘taking all the

plaintiff’s factual allegations as true no violation of a clearly established right was shown.” The court determines whether a denial of summary judgment based on qualified immunity is immediately appealable by looking at the legal argument advanced. The appellants argued that, even if the plaintiffs’ factual allegations were taken as true, they were “not sufficient to constitute either gross negligence or deliberate indifference by the supervisors.” The court held that the issue of whether the evidence is sufficient to demonstrate deliberate indifference for supervisory liability is a legal issue that it may review on interlocutory appeal. Because the appellants challenged the materiality of the disputed facts, the Fifth Circuit had jurisdiction of the interlocutory appeal.

*Tanks v. Lockheed Martin Corp.*, --- F.3d --- (5<sup>th</sup> Cir., July 14, 2005)

The district court certified its decision for interlocutory appeal, and the Fifth Circuit granted Lockheed’s motion for leave to appeal the district court’s denial of its motion for summary judgment pursuant to 18 U.S.C. § 1292(b). Although the court of appeals ordinarily reviews a district court’s summary judgment ruling *de novo*, its appellate jurisdiction under § 1292(b) extends only to controlling questions of law; thus, the court of appeals would review only the issue of law certified for appeal.

*PCI Transportation Inc. v. Fort Worth & Western Railroad Co.*, --- F.3d --- (5<sup>th</sup> Cir., July 26, 2005)

The court noted that it had not previously addressed the question whether the denial of a remand order becomes reviewable when it is coupled with an interlocutory appeal of an injunction order under 28 U.S.C. 1292(a)(1). The Fifth Circuit concluded that, once appellate jurisdiction has been established by a nonfrivolous appeal, an appellate court is compelled to address questions of federal jurisdiction. Because the appeal of the denial of a motion for a preliminary injunction was both nonfrivolous and properly before the court, the court first considered the jurisdictional question whether the district court erred in denying the motion to remand the case to state court. The Court held that the Interstate Commerce Commission Termination Act completely preempted the plaintiff’s breach of contract cause of action. Because the plaintiff’s claim necessarily arose under federal law, the district court properly denied the motion to remand.

## B. Mootness

*de la O v. Housing Authority of the City of El Paso, Texas*, --- F.3d --- (5<sup>th</sup> Cir., July 18, 2005)

After the district court granted summary judgment that the Housing Authority's regulations were constitutional, the Housing Authority amended its regulations to be less constitutionally restrictive. The Fifth Circuit held that the under such circumstances, a decision to remand, aside from allowing for an evasion-of-review situation, would be inefficient. Consequently, the court concluded that the constitutionality of both sets of regulations was properly before it.

On a side-note, the court, citing the Seventh Circuit, reminded appellate practitioners that a perfunctory and conclusional assertion that a particular affidavit creates a factual conflict normally will not suffice. "Judges are not like pigs, hunting for truffles buried in briefs."

## III. ARBITRATION

*Republic Insurance Co. v. PAICO Receivables, LLC*, 383 F.3d 341 (5<sup>th</sup> Cir., Sept. 13, 2004)

The Fifth Circuit affirmed the district court's denial of a motion to compel arbitration of a contract dispute. The district court properly ruled that the movant waived its right to arbitrate its dispute by substantially invoked the judicial process to the prejudice of the party opposing arbitration.

*Kergosien v. Ocean Energy, Inc.*, 390 F.3d 346 (5<sup>th</sup> Cir., Nov. 2, 2004)

The Fifth Circuit reversed an order of vacatur of an arbitration award, holding that there was no "manifest disregard for the law." Manifest disregard for the law "means more than error or misunderstanding with respect to the law. The error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator. Moreover, the term 'disregard' implies that the arbitrator appreciates the existence of a clearly governing principle but decides to ignore or pay no attention to it."

## IV. CERTIFIED QUESTIONS

*Compass Bank v. King, Griffin & Adamson P.C.*, 388 F.3d 504 (5<sup>th</sup> Cir., Oct. 18, 2004)

The Fifth Circuit denied the appellant's motion to certify the following question to the Texas Supreme Court: whether Texas uses an actual knowledge test or

a foreseeability requirement for negligent misrepresentation claims against accountants.

## V. CIVIL RIGHTS

*Johnson v. Crown Enterprises, Inc.*, 398 F.3d 339 (5<sup>th</sup> Cir., Jan. 21, 2005)

The Fifth Circuit held that, because the plaintiff's § 1981 claims related back to the original complaint asserting a Title VII claim, the plaintiff's racial discrimination claim was not time-barred. According to the court, the § 1981 claims arose from the same conduct, transaction, or occurrence as the Title VII claims did. The two claims were based on identical allegations of discrimination. The only real difference between the claims was in the characterization of the plaintiff's status as an independent contractor or as an employee. Thus, the district court erred in concluding that the plaintiff's claims did not relate back under Rule 15 of the Federal Rules of Civil Procedure.

*Cavalier ex rel. Cavalier v. Caddo Parish School Board*, 403 F.3d 246 (5<sup>th</sup> Cir., March 1, 2005) (en banc)

The Fifth Circuit held that the consent decree directing the desegregation of public school system was no longer applicable to a magnet school and therefore could not be used to justify the racial quotas and balancing contained in the magnet school's admission policy. In addition, the court held that the school board's race-based admissions policy was not narrowly tailored to remedy the present effects of past segregation.

*Walker v. City of Mesquite, Texas*, 402 F.3d 532 (5<sup>th</sup> Cir., March 4, 2005)

Decision to build public housing in "predominantly white neighborhood" was not shown to have a racially discriminatory purpose.

*Cornish v. Correctional Services Corp.*, 402 F.3d 545 (5<sup>th</sup> Cir., March 8, 2005)

Private corporation operating juvenile correctional facility was not acting under color of state law, within the meaning of § 1983, when it allegedly made retaliatory dismissal of an employee after he reported alleged violations in the corporation's operation of the facility.

### A. First Amendment

*Communication Workers of America v. Ector County Hosp. Dist.*, 392 F.3d 733 (5<sup>th</sup> Cir., Dec. 1, 2004)

The Fifth Circuit panel affirmed a judgment as a matter of law in favor of a government employee who brought suit under § 1983, claiming that the anti-adornment provision of a county hospital's dress code policy violated his First Amendment rights. When a public employer adopts a policy that impinges on the speech of its employees, the court applies the *Pickering/Connick* balancing test, weighing the interests of the employee, as a citizen, to comment on matters of public concern against the interests of the government, as an employer, to promote efficiency in its providing of services. The court concluded that the speech at issue, as a show of support for the union, and serving as it did to inform other employees (and those members of the public who saw it) that a union organizing drive was in progress, indisputably concerned the employment terms and conditions of *all* potential union members, and thus involved a matter of public concern. The Fifth Circuit heard oral argument on rehearing *en banc* on May 23, 2005.

*Izen v. Catalina*, 398 F.3d 363 (5<sup>th</sup> Cir., Jan. 23, 2005)

The court concluded that IRS agent had sufficient independently verifiable information to establish probable cause for prosecution, and was thus entitled to summary judgment on the plaintiff's retaliation claim under the First Amendment.

*Henderson v. Stalder*, 407 F.3d 351 (5<sup>th</sup> Cir., April 13, 2005)

The court held that a claim, alleging that Louisiana's prestige license plate program facially discriminates against pro-choice views in contravention of the First Amendment, was barred by the Tax Injunction Act, 28 U.S.C. § 1341.

*Justice for All v. Faulkner*, 410 F.3d 760 (5<sup>th</sup> Cir., May 27, 2005).

The University of Texas literature policy requires all printed materials to bear the name of a person affiliated with the University or the organization responsible. The Fifth Circuit affirmed the district court's holding that the Literature Policy was invalid under the First Amendment. The court held that anonymous leafleting is a form of protected speech. The court further held that, as to student groups, the campus remains a designated public forum.

*Salge v. Edna Independent School Dist.*, 411 F.3d 178 (5<sup>th</sup> Cir., May 27, 2005)

“Whether an employee's speech addresses a matter of public concern must be determined by the *content, form, and context* of a given statement, as revealed by the whole record.” When a public employee speaks in his capacity as an employee and addresses personal matters such as personnel and employment disputes, rather than in his capacity as a citizen on a matter of public interest, his speech falls outside the protection of the First Amendment. When the speech in question merely touches on an element of personal concern in the broader context of a matter of public concern, however, a court is not precluded from concluding that an employee's speech as a whole addresses a matter of public concern.

### B. Immunity

*Porter v. Ascension Parish School Bd.*, 393 F.3d 608 (5<sup>th</sup> Cir., Dec. 10, 2004)

The Fifth Circuit held that high school principal and other school administrators were entitled to qualified immunity because the First Amendment rights of students were not clearly established.

*Roberts v. City of Shreveport*, 397 F.3d 287 (5<sup>th</sup> Cir., Jan. 13, 2005)

The Fifth Circuit held that the police chief was entitled to qualified immunity on a failure to train subordinate claim, absent evidence the subordinate officer's training had been inadequate; officer had received hundreds of hours of professional instruction, including training on use of deadly force.

## VI. EMPLOYMENT LAW

*Brennan v. Mercedes Benz USA*, 388 F.3d 133 (5<sup>th</sup> Cir., Oct. 5, 2004)

The court affirmed a summary judgment in favor of defendants because the plaintiff, as a student with a disability who enrolled in an auto mechanic program, could not prove “the requisite employer-employee relationship to have standing to sue” under the Americans with Disabilities Act. In addition, the summary judgment evidence did not demonstrate the necessary conduct to support a claim of intentional infliction of emotional distress.

*Patrick v. Ridge*, 394 F.3d 311 (5<sup>th</sup> Cir., Dec. 15, 2004)

The court held that the employer's proffered nondiscriminatory reason for its failure to promote

employee on first application, that she was “not sufficiently suited” for the position, was not sufficiently clear to afford employee realistic opportunity to show that reason was pretextual in this age discrimination case. The court further held that the proffered nondiscriminatory and nonretaliatory reason that the “best qualified” candidate was selected was not legitimate, where candidate selected was not even under consideration for job at time of denial of employee’s second promotion application.

*Hockman v. Westward Communications, LLC*, 407 F.3d 317 (5<sup>th</sup> Cir., Dec. 22, 2004)

The Fifth Circuit affirmed a summary judgment in this Title VII claim, holding that male coworker’s alleged harassment of female employee was not so severe and pervasive as to “affect term, condition or privilege of employment,” as required to support her hostile-work-environment claim. In addition, the female employee could not show that her employer had failed to take prompt remedial action to prevent sexual harassment by coworker.

*Machinchick v. PB Power, Inc.*, 398 F.3d 345 (5<sup>th</sup> Cir., Jan. 24, 2005).

The Fifth Circuit confirmed that, after the plaintiff offers evidence that “discriminatory animus played a role in the decision at issue,” the “burden of persuasion shifts to the defendant, who must prove that it would have taken the same action regardless of discriminatory animus.” The court first found that the plaintiff met his initial burden of establishing a prima facie case of age discrimination by producing uncontroverted evidence that he was qualified for his job, was terminated, and was a member of the protected class at the time of his termination. The court also found a fact issue that the plaintiff was “otherwise discharged because of his age” based upon evidence showing that weeks before he was terminated, a manager sent an e-mail to several employees discussing his intent to go forward with his plan to “strategically hire some younger engineers and designers.” In addition, the court held that “[o]nce the plaintiff meets this burden, the employer may seek to avoid liability by proving that it would have made the same employment decision in the absence of the illegitimate discriminatory motive. The employer’s burden on this score is effectively that of proving an affirmative defense.”

*Septimus v. University of Houston*, 399 F.3d 601 (5<sup>th</sup> Cir., Feb. 2, 2005)

Employer’s articulated reason for not hiring woman—that she was less qualified than the male candidate—was not pretext for gender discrimination

when there was no evidence that the plaintiff was qualified for the position.

*Keelan v. Majesco Software, Inc.* 407 F.3d 332 (5<sup>th</sup> Cir., April 12, 2005)

The Fifth Circuit adopted use of a “modified *McDonnell Douglas* approach” in age discrimination cases where the mixed-motive analysis may apply. After the plaintiff has met his four-element *prima facie* case and the defendant has responded with a legitimate nondiscriminatory reason for the adverse employment action, “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-motive[s] alternative).” The question of pretext versus mixed-motive treatment is only reached after a plaintiff has met his prima facie showing under the modified *McDonnell Douglas* standard and the defendant has responded with a legitimate nondiscriminatory reason. If the plaintiff demonstrates the protected characteristic was a motivating factor in the employment decision (meets the mixed-motive showing), which pursuant to *Desert Palace* may be achieved through circumstantial evidence, it then falls to the defendant to prove that the same adverse employment decision would have been made regardless of discriminatory animus. If the employer fails to carry this burden, plaintiff prevails.

## VII. INTERNATIONAL LAW

*Af-Cap, Inc. v. Republic of Congo*, 383 F.3d 361 (5<sup>th</sup> Cir., Sept. 17, 2004)

The Republic of Congo removed garnishment action to federal court. The district court dismissed, holding that the Republic’s contractual waiver was ineffective under the Foreign Sovereign Immunities Act because it was non-commercial. The Fifth Circuit reversed and remanded, finding that oil payments qualified as commercial activities not protected by the Act.

*Lim v. Offshore Specialty Fabricators, Inc.*, 404 F.3d 898 (5<sup>th</sup> Cir., March 24, 2005)

The Fifth Circuit held that seaman’s employment contract was controlled by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which preempted a Louisiana law prohibiting an employer’s use of choice of forum and choice of law clauses in employment contracts.

## VIII. JURISDICTION

*Dominguez-Cota v. Cooper Tire & Rubber*, 396 F.3d 650 (5<sup>th</sup> Cir., Jan. 7, 2005)

District court must decide subject matter jurisdiction before determining whether action is subject to dismissal under the forum non conveniens doctrine.

### A. Diversity

*Horton v. Bank One, N.A.*, 387 F.3d 426 (5<sup>th</sup> Cir., Oct. 5, 2004)

The Court interpreted a statute providing that national banking associations are deemed “citizens of the States in which they are respectively located” to mean that a national bank is located in the state of its principal place of business rather than each state in which it has a branch.

### B. Mootness

*McCorvey v. Hill*, 385 F.3d 846 (5<sup>th</sup> Cir., Sept. 14, 2004)

McCorvey, formerly known as Jane Roe, filed a Rule 60(b) motion for relief from the original judgment in *Roe v. Wade*. The Court held that, because the original Texas statute outlawing abortion had been repealed by subsequent acts of the Texas Legislature, McCorvey’s motion was moot.

*In re Scruggs*, 392 F.3d 124 (5<sup>th</sup> Cir., Nov. 19, 2004)

The order on appeal was moot because the Florida state court judgment had become final and no longer appealable long before the district court purported to reverse the Bankruptcy Court’s order lifting the automatic stay. Consequently, by the time the district court acted to reverse the Bankruptcy Court’s order, the sole case or controversy between the parties had ceased to exist as a matter of law. Under the doctrine of mootness, this deprived the district court of jurisdiction, making its order and the appeal of that order moot, thereby depriving the Fifth Circuit of appellate jurisdiction.

## IX. PROCEDURE

### A. Relief from Judgment

*United States ex rel. Garibaldi v. Orleans Parish School Board*, 397 F.3d 334 (5<sup>th</sup> Cir., Jan. 17, 2005)

The Fifth Circuit held that, in the absence of “extraordinary circumstances,” a change in controlling

decisional law after the finality of a judgment does not warrant reopening the judgment under Rule 60(b)(6). The circumstances here were not “extraordinary” because this case was not materially distinguishable from the “ordinary” case in which a subsequent change in controlling law is not held to justify relief from a prior final judgment under Rule 60(b)(6).

### B. Removal

*Smallwood v. Illinois Central Railroad Co.*, 385 F.3d 568 (5<sup>th</sup> Cir., Sept. 14, 2004) (*en banc*), *cert. denied*, 125 S.Ct. 1825 (2005)

The Fifth Circuit adopted the term “improper joinder” as being more consistent with the statutory language than the term “fraudulent joinder,” which had been used in the past. “Although there is no substantive difference between the two terms, ‘improper joinder’ is preferred.” The court notes that there are two ways to establish improper joinder: “(1) actual fraud in the pleading of jurisdictional facts, or (2) inability of the plaintiff to establish a cause of action against the non-diverse party in state court.” The court then adopts a singular test for the second method for establishing improper joinder: “whether the defendant has demonstrated that there is no possibility of recovery by the plaintiff against an in-state defendant, which stated differently means 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.” Finally, a majority of the *en banc* court, held that “[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, the requisite showing has not been made.”

*McDonal v. Abbott Laboratories*, 408 F.3d 177 (5<sup>th</sup> Cir., April 26, 2005)

Vaccine manufacturer removed a products liability action on the basis of diversity jurisdiction and federal question jurisdiction. The court held that, because the claims against some defendants were subject to the exhaustion requirements of the Vaccine Act, while the claims against other defendants were not, the common defense corollary to the improper joinder doctrine as articulated in *Smallwood* was inapplicable. Therefore, a remand of the case to state court would be unwarranted.

*Charter School of Pine Grove, Inc. v. St. Helena Parish School Board*, --- F.3d --- (5th Cir., July 13, 2005)

Ordinarily, arguments not raised in the district court cannot be asserted for the first time on appeal. “However, an argument is not waived on appeal if the argument on the issue before the district court was sufficient to permit the district court to rule on it.” Because “[r]ules of notice pleading apply with as much vigor to petitions for removal as they do to other pleadings,” the court looked to the notice of removal to determine if it was sufficient to raise § 1443 as a ground for removal. The court concluded that the language was insufficient to assert a factual basis for § 1443 removal.