TEXAS TECH LAW REVIEW

BUSINESS TORTS

by Sofia Adrogué[*]

---

* Senior Counsel, Diamond McCarthy Taylor & Finley, L.L.P., Houston, Texas, sadrogue@diamondmccarthy.com. Ms. Adrogué focuses on complex commercial litigation, peer review proceedings in the health care arena, and class actions. *Texas Lawyer* has profiled her as one of *Texas Lawyer*'s top "40 Under 40" and she has been honored as one of "Five Outstanding Young Houstonians." She received her undergraduate degree from Rice University, magna cum laude, where she was a member of Phi Beta Kappa. She received her law degree from the University of Houston Law Center, magna cum laude, and was Chief Articles Editor of the University of Houston Law Review as well as a member of the Order of the Barons and the Order of the Coif. She clerked for the Honorable Jerre S. Williams, United States Court of Appeals for the Fifth Circuit. She is a frequent CLE speaker on topics such as business torts, managing complex litigation, expert witnesses, and joint ventures in litigation. Her publications include: articles regarding expert witnesses in *The Houston Lawyer*, *Texas Lawyer*, *The Trial Lawyer*, and the *Houston Law Review*; an article with *The Review of Litigation* on mass torts class actions and ethics; as well as a series of articles with the *Trial Diplomacy Journal* on the management of complex litigation. She has served as an adjunct professor teaching Mass Tort Litigation at the University of Houston Law Center.

I. SCOPE OF THE ARTICLE

The mission is succinct: to address arenas in Fifth Circuit jurisprudence that cumulatively entail "business torts." In essence, weapons available to parties in the traditional contract realm whose allure include, inter alia, punitive or treble damages and attorney's fees. Parties utilize such causes of action in an attempt to establish tort liability, enabling potential recovery of punitive damages and damages for mental anguish in an otherwise contractual context. Albeit not exhaustive of all the cases making new law in the Fifth Circuit, this article addresses case law in the antitrust, Civil Racketeer Influenced and Corrupt Organizations Act (RICO), as well as miscellaneous matters in the business tort realm. These areas of law include significant decisions regarding class actions and expert testimony in a business torts context that similarly merit scrutiny. Therefore, traditional business torts are transgressed within Fifth Circuit jurisprudence as necessity or interest dictates.

II. ANTITRUST JURISPRUDENCE

A. Spectators' Communication Network, Inc. v. Colonial Country Club[1]

The Fifth Circuit addressed antitrust causes of action by an on-site radio broadcaster of professional golf tournaments against a tournament sponsor, alleging that the radio broadcaster was excluded from broadcasting golf tournaments, as well as bringing state law claims for breach of contract and civil conspiracy.[2] Reviewing de novo the district court's grant of summary judgment entered in favor of the tournament's sponsor, Anheuser-Busch, Inc., Circuit Judge Higginbotham and Senior Circuit Judge Politz along with Senior Circuit Judge Gibson from the Eighth Circuit, sitting by designation, affirmed in part and reversed in part, opining as follows: (1) summary judgment was inapplicable because a question of fact existed on the antitrust claim; (2) there was no breach of contract; and (3) there was not enough evidence to find a civil conspiracy.[3] For the purposes of this article, the court's discussion of the antitrust allegations merits scrutiny. The court found as follows:

> We conclude that Spectators' made an adequate showing of an antitrust conspiracy that makes economic sense. Although Spectators' has not shown a horizontal boycott that would constitute a *per se* violation of the Sherman Act, it should be allowed the chance to prove its case under the rule of reason. We therefore reverse the entry of summary judgment for Anheuser-Busch on Spectators's [sic] antitrust claim.[4]

The road leading to the court's rationale deserves review. "The district court held, and Anheuser-Busch argue[d], that there was not sufficient evidence of a combination or conspiracy, because it would have been irrational for Anheuser-Busch to conspire to restrain competition in a market in which it was a purchaser."[5] However, according to the Fifth Circuit, "[b]y reasoning that a consumer would never wish to bring about a restraint of trade in the market where it buys, the district court has ignored salient facts of this case: Spectators' contends that Anheuser-Busch was both coerced and enticed to comply with the PGA's wishes."[6]

Providing further basics in the antitrust realm, the court stated as follows:

> Antitrust law has never required identical motives among conspirators, and even reluctant participants have been held liable for conspiracy. In *United*

---

1. 253 F.3d 215 (5th Cir. May 2001).
2. *Id.* at 216.
3. *Id.* at 215, 222, 225, 226.
4. *Id.* at 217.
5. *Id.* at 220.
6. *Id.*

> *States v. Paramount Pictures, Inc.*, the Supreme Court refused to distinguish between conspirators who fomented the conspiracy and those who only participated because they were coerced.[7]

After reviewing precedents from other circuits, the court concluded that sufficient evidence of a combination or conspiracy can exist when one conspirator lacks a direct interest in precluding competition, but is enticed or coerced into knowingly curtailing competition by another conspirator who has an anticompetitive motive.[8]

Thus, even though it was not directly in Anheuser-Busch's interest to eliminate competition in the market for on-site advertising at tournaments in the instant case, other facts in the record made it economically plausible for Anheuser-Busch to participate in a combination fomented by the PGA.[9] Finally, after a lengthy discussion regarding horizontal and vertical restraints, the court opined that the proper course was to "remand for consideration in the first instance by the district court of whether Spectators' has presented evidence of a vertical boycott constituting an unreasonable restraint of trade under the rule of reason."[10]

B. Den Norske Stats Oljeselskap As v. HeereMac Vof[11]

In this litigation, a Norwegian oil corporation filed an antitrust conspiracy claim against a company that provided heavy-lift barge services.[12] This case presented the Fifth Circuit with an opportunity to instruct practitioners on the basics of "United States antitrust laws and their application to foreign conduct."[13] With a panel comprised of Circuit Judges Jolly, Higginbotham, and Emilio M. Garza, the court held that antitrust laws did not apply to the plaintiff's claims that an anticompetitive conspiracy inflated its North Sea operating costs.[14]

The court's opening paragraph encapsulates its ruling and rationale cogently and merits recitation in its entirety:

> This appeal requires us to interpret the scope of the United States antitrust laws and their application to foreign conduct. The plaintiff is a Norwegian oil corporation that conducts business solely in the North Sea. It seeks redress under the United States antitrust laws against the defendants

---

7. *Id.* at 220-21 (citing *Paramount*, 334 U.S. 131, 161 (1948)).
8. *Id.* at 221-22.
9. *Id.*
10. *Id.* at 225.
11. 241 F.3d 420 (5th Cir. Feb. 2001), *cert. denied*, 122 S. Ct. 1059 (2002).
12. *Id.* at 422.
13. *Id.* at 421-22.
14. *Id.* at 421.

> for an alleged anticompetitive conspiracy that supposedly inflated the plaintiff's operating costs in the North Sea. Supreme Court precedent makes clear as a general proposition that United States antitrust laws "do not regulate the competitive conditions of other nations' economies." More specifically, today we are bound by the plain language of the Foreign Trade Antitrust Improvements Act (FTAIA). Thus, even though the plaintiff alleges that the antitrust conspiracy raised prices in the United States, it fails to assert jurisdiction under the antitrust laws because the plaintiff's injury did not arise from that domestic anticompetitive effect. Accordingly, we find that the district court properly dismissed the plaintiff's antitrust claims for lack of subject matter jurisdiction. It follows that we affirm the court's determination that the plaintiff lacked antitrust standing to bring these claims in United States federal court.[15]

Dissenting, Judge Higginbotham wrote a thorough opinion in which he agreed that this was not an easy case.[16] Nonetheless, he was "not persuaded that when illegal conduct produces these domestic effects, that Congress intended to close the door to a foreign company injured by the same illegal conduct."[17]

C. Lycon, Inc. v. Juenke[18]

With a panel comprised of Circuit Judges Stewart and Parker and Judge Goldberg from the U.S. Court of International Trade, sitting by designation, the Fifth Circuit considered litigation by a wholesale distributor of gas lift equipment for use in oil production against a gas lift equipment manufacturer, alleging price discrimination in violation of the Robinson-Patman Act.[19]

In this case, "Lycon sued EVI, alleging that EVI had violated federal antitrust laws by engaging in price discrimination in violation of [the Robinson-Patman Act], as well as asserting claims under Louisiana law for price discrimination, unfair trade practices, unfair sales, trade secrets violations, tortious interference, and breach of implied contract."[20] The district court granted EVI's motion for summary judgment "reasoning that 'Lycon [could not] prove that EVI's alleged price discrimination had a prohibited effect on competition. . . .' Having disposed of the only claim that provided a basis for federal question jurisdiction, the district court dismissed

---

15. *Id.* (citation omitted).
16. *See id.* at 431 (Higginbotham, J., dissenting).
17. *Id.* (Higginbotham, J., dissenting).
18. 250 F.3d 285 (5th Cir. Apr. 2001), *cert. denied*, 122 S. Ct. 209 (2001).
19. *Id.* at 285-86.
20. *Id.* at 286.

Lycon's remaining state law claims without prejudice pursuant to 28 U.S.C. § 1367(3)."[21]

Cognizant of its role in reviewing summary judgment de novo, the Fifth Circuit addressed the factors necessary to prove a § 13(a) violation and reviewed case law from several circuits.[22] After thorough scrutiny, the Fifth Circuit opined that "Lycon's allegation of price discrimination between itself and end user customers of EVI, who [were] not retailers and [did] not resell the product, [did] not raise the specter of real or potential injury to competition."[23] According to the court, "Lycon [did not have a] § 13(a) cause of action because it was not in competition with the allegedly advantaged end users."[24] Thus, the Fifth Circuit concluded that the "district court did not err in granting summary judgment to EVI based on its holding that, as a matter of law, Lycon could not prove that EVI's discriminatory pricing of gas lift equipment had a prohibited effect on competition."[25]

D. Bayou Fleet, Inc. v. Alexander[26]

With a panel comprised of Chief Circuit Judge King, Circuit Judge Parker, and District Judge Furgeson, sitting by designation, the Fifth Circuit affirmed judgment for the defendants.[27] In a nonjury trial, the plaintiff asserted a litany of causes of action, including violations of antitrust laws, a civil conspiracy claim under 42 U.S.C. § 1983, as well as the Louisiana Unfair Trade Practices Act.[28]

The litigation arose from a lengthy feud between two families owning competing businesses alongside the Mississippi River.[29] The Durants, owners of Bayou Fleet, alleged that the Clulees conspired with others to curtail the Durants' sand pit operations.[30] The alleged coconspirators included government officials, one of whom had settled with the Durants prior to trial.[31]

The Fifth Circuit instructed that the *Noerr-Pennington* doctrine "confers immunity to private individuals seeking anticompetitive action from the government."[32] Pointing to one of its recent rulings, the Fifth Circuit

---

21. *Id.* at 287.
22. *Id.* at 287-90; 15 U.S.C. §§ 13 (1994).
23. *Id.* at 289.
24. *Id.* at 289-90 (citing Sec. Tire & Rubber Co. v. Gates Rubber Co., 598 F.2d 962, 964 (5th Cir. 1979)).
25. *Id.* at 290.
26. 234 F.3d 852 (5th Cir. Nov. 2000), *cert. denied*, 532 U.S. 905 (2001).
27. *Id.* at 863.
28. *Id.* at 854.
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.* at 859 (citing United Mineworkers v. Pennington, 361 U.S. 657 (1965); Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961)) (other citations omitted).

reminded the parties that the *Noerr-Pennington* doctrine should be raised as an affirmative defense or it is waived.[33] An exception, however, provides that "where 'the matter is raised by the trial court [or the litigants] that does not result in unfair surprise, technical failure to comply precisely with Rule 8(c) is not fatal,' and . . . a court may hold that the defense is not waived."[34] Because the defense had been raised in a motion more than a year prior to trial, the district court concluded that the Durants were not unfairly surprised and dismissed the claim against the Clulees.[35] The Fifth Circuit agreed with the district court's application of the *Noerr-Pennington* doctrine in this context.[36]

III. CIVIL RICO JURISPRUDENCE[37]

A. Patterson v. Mobil Oil Corp.[38]

This recent Fifth Circuit decision reminds practitioners of the difficulty of obtaining class certification pursuant to Federal Rule of Civil Procedure 23(b)(3) for claims under the Racketeer Influenced and Corrupt Organizations Act (RICO).[39] Class certification is determined on a case-by-case basis depending on the elements of the relevant claim.[40] Due to the requirement of proving individual reliance under a civil RICO claim based on injuries from fraud, such a claim cannot easily meet class certification requirements under Rule 23(b)(2) or (b)(3).[41] In the instant case, Mobil appealed from an order of the district court certifying a bifurcated class against it in an action brought by employees asserting civil RICO claims.[42] With a panel comprised of Circuit Judges Higginbotham and DeMoss, and District Judge Kent, sitting by designation, the Fifth Circuit held that individual findings of reliance necessary to establish civil RICO liability and damages precluded certification of the class of employees.[43]

The alleged class of employees "assert[ed] that Mobil [fraudulently stated that it had complied] with Texas law requiring an employer to obtain

---

33. *Id.* at 860 (citing Acoustic Sys., Inc. v. Wenger Corp., 207 F.3d 287 (5th Cir. 2000)) (alteration in original).
34. *Id.* (quoting McConathy v. Dr. Pepper/Seven Up Corp., 131 F.3d 558, 562 (5th Cir. 1998)).
35. *Id.* at 860-61.
36. *Id.* at 862-63.
37. *See* Racketeer Influenced and Corrupt Organization Act (RICO), 18 U.S.C. §§ 1961-1968 (1994).
38. 241 F.3d 417 (5th Cir. Feb. 2001).
39. *Id.* at 418-19 (citing FED. R. CIV. P. 23(b)(3); 18 U.S.C. §§ 1961-1968).
40. *Id.*
41. *See id.*
42. *Id.* at 418-19.
43. *Id.* at 419.

workers' compensation insurance in order to benefit from the bar of negligence suits by injured employees."[44]

The class was defined as all Mobil employees in Texas who were injured in workplace accidents between the years of 1965 and 1993, and whose injuries generated a workers' compensation claim.[45] The theory was that such workers sustained an injury because Mobil fraudulently represented that it properly maintained workers' compensation insurance, thereby causing these injured employees to forego suits against Mobil for negligence.[46] Honorable Joe J. Fisher certified a bifurcated class under FED. R. CIV. P. 23(b)(3).[47] The class consisted of a class of employees who were injured between 1965 and 1981 as well as a class of employees who were injured in the workplace between 1982 and 1993.[48] Three days later, without an explanation, Judge Fisher recused himself from the case *sua sponte*.[49]

On appeal, the Fifth Circuit began its review of the district court's certification of this class by setting forth the basics in class actions—particularly such cases involving assertions under civil RICO.[50] According to the Fifth Circuit, "[c]laims for money damages in which individual reliance is an element are poor candidates for class treatment, at best."[51] The court has made plain that " 'a fraud class action cannot be certified when individual reliance will be an issue.' In *Bolin v. Sears, Roebuck & Co.*, [the Fifth Circuit] applied that rule to civil RICO claims."[52] In the instant litigation, the Fifth Circuit opted to "do so again, concluding that the district court erred as a matter of law in certifying this class because the predominance requirement could not be met."[53]

The Fifth Circuit further opined as follows: while the question of whether or not Mobil was a valid subscriber to the workers' compensation system may be an issue of fact common to the class, it did not predominate over the question of whether or not each member of the class suffered a RICO injury.[54] According to the court, it held on the facts of *Bolin*, and on the facts of *Castano*, and noted no compelling distinction in the case at bar.[55] "To determine reliance for each individual class member would defeat the

---

44. *Id.* at 418.
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.* at 418-19.
51. *Id.* at 419.
52. *Id.* (quoting Castano v. Am. Tobacco Co., 834 F.3d 734-745 (5th Cir.1996)) (citing *Bolin*, 231 F.3d 970, 978-79 (5th Cir. Oct. 2000)) (footnotes omitted).
53. *Id.* (footnotes omitted).
54. *Id.*
55. *Id.*

economies ordinarily associated with the class action device."[56] Further, for the court to decide only the question of whether Mobil was effectively insured under the Texas workers' compensation scheme would be nothing more than "the trial of an abstraction" for which the processes of subclassing and bifurcation are not a cure.[57] Thus, finding that class certification was improper under Rule 23, the court vacated the order granting class certification and remanded the case for further proceedings not inconsistent with its opinion.[58]

B. Proctor & Gamble Co. v. Amway Corp.[59]

With a panel comprised of Circuit Judges Smith and Dennis and District Judge Roettger, sitting by designation, the Fifth Circuit addressed an appeal from a manufacturer of household products seeking to reverse a dismissal of its lawsuit against a competitor and other defendants for defamation, fraud, violations of the Lanham Act, civil RICO, and Texas state law.[60] In a case worthy of a practitioner's review for basics in the Lanham Act, defamation, and civil RICO, the Court held as follows: (i) if the trier of fact found that the motivation behind the competitor's distributors' repetition to other distributors of rumor that the manufacturer was linked to Satanism was not economic, the speech was not commercial, and there could be no Lanham Act claim; however, if an economic motivation was found, the speech was commercial, and a violation of the Lanham Act could be found;[61] (ii) the manufacturer would not be required to show actual malice in proving its Lanham Act claim;[62] (iii) the manufacturer did not have standing to bring Lanham Act claim based on the competitor's alleged misrepresentations to its distributors about financial rewards of being a distributor;[63] and (iv) the manufacturer could maintain civil RICO claims based on the competitor's alleged spreading of rumor but could not assert RICO claims for injury based on the competitor's alleged illegal pyramid structure.[64]

The court's discussion of the civil RICO claims deserves particular attention. In a lengthy opinion, the court ultimately affirmed in part and

---

56. *Id.*
57. *Id.*
58. *Id. See also* Rivera v. AT&T, 141 F. Supp. 2d 719 (S.D. Tex. 2001) (holding that cable television subscribers who brought a class action against cable companies pursuant to RICO on behalf of all subscribers who incurred late fees failed to offer any allegations supporting either the notion that defendants collected an unlawful debt, or that an enterprise existed; thus plaintiffs could not recover any RICO damages).
59. 242 F.3d 539 (5th Cir. Feb. 2001), *cert. denied*, 122 S. Ct. 329 (2001).
60. *Id.* at 541-42.
61. *Id.* at 552-53.
62. *Id.* at 555.
63. *Id.* at 562.
64. *Id.* at 564-65.

reversed and remanded in part the issues addressed below.[65] The district court dismissed Procter & Gamble's ("P&G") civil RICO claims under Federal Rule of Civil Procedure 12(b)(6).[66] In its complaint, P&G argued that Amway spread false rumors that P&G practiced Satanism and that Amway harmed P&G's sales because Amway distributors and consumers were involved in an illegal pyramid scheme in violation of RICO §§ 1962(c) and (d).[67] The Fifth Circuit opined that "P&G listed mail fraud and wire fraud as the predicate acts for its [civil] RICO claims but [did] not claim to have relied on any of the misrepresentations that Amway allegedly made via mail and wire. Instead, P&G argue[d] that it [was] not required to allege and prove reliance."[68]

The Fifth Circuit provided an overview of civil RICO basics:

> In civil RICO claims in which fraud is alleged as a predicate act, reliance on the fraud must be shown: "[W]hen civil RICO damages are sought for injuries resulting from fraud, a general requirement of reliance by the plaintiff is a commonsense liability limitation."
>
> P&G points out . . . a narrow exception to this rule. "In general, fraud addresses liability between persons with direct relationships—assured by the requirement that a plaintiff has either been the target of fraud or has relied upon the fraudulent conduct of defendants."
>
> . . . [A] target of a fraud that did not itself rely on the fraud may pursue a RICO claim if the other elements of proximate causation are present.[69]

Thus, the Fifth Circuit opined that P&G's RICO claims that were based on the alleged spreading by Amway of the Satanism rumor in order to lure customers away from P&G were in fact claims upon which relief could be granted.[70] Further, P&G made allegations that Amway, by using the wire and mail, had attempted to lure away P&G's customers by fraud.[71] Though P&G did not rely on the fraud committed by Amway, the court opined that this fell under the narrow exception carved out by *Summit*, in which the court found that " '[i]n the current case, for example, the defendant's competitors might recover for injuries to competitive position.' "[72] Thus, according to the court, the reliance on the fraudulent rumor by P&G's customers sufficed to show

---

65. *Id.* at 542.
66. *Id.* at 545.
67. *Id.* at 564.
68. *Id.*
69. *Id.* at 564-65 (quoting Summit Props., Inc. v. Hoechst Celanese Corp., 214 F.3d 556, 562, 561 (5th Cir. 2000), *cert. denied*, 531 U.S. 1132 (2001) (citing Mid Atl. Telecom, Inc. v. Long Distance Servs., Inc., 18 F.3d 260, 263-64 (4th Cir. 1994))). The *Summit* court stated that *Mid Atlantic* "held open the possibility that a plaintiff company may not need to show reliance when a competitor lured the plaintiff's customers away by a fraud directed at the plaintiff's customers." *Id.* at 565 (quoting *Summit*, 214 F.3d at 561); *see infra* Part III.C.
70. *Proctor & Gamble, Co.*, 242 F.3d at 565.
71. *Id.*
72. *Id.*

proximate causation if such reliance affected the customers' decision to boycott P&G products.[73] Nonetheless, the Fifth Circuit held that the requirement that the alleged practice proximately caused the plaintiff's damages could not be met by P&G's civil RICO claims based on Amway's alleged illegal pyramid structure.[74] "Although some Amway distributors may have bought more P&G products 'but-for' being lured into joining Amway, injury to P&G did not flow directly from such inducements."[75] Further, too many intervening factors for proximate causation existed.

Reminiscent of the more prototypical civil RICO holdings, the court found that "[a]llowing RICO claims for such tenuous causation would open floodgates similar to those that we are unwilling to open under the Lanham Act."[76] In sum, the court "affirm[ed] the dismissal of P&G's RICO claims based on Amway's allegedly illegal pyramid scheme, [but reversed] the dismissal of the RICO claims based on Amway's spreading of the Satanism rumor."[77]

C. Summit Properties Inc. v. Hoechst Celanese Corp.[78]

With a panel comprised of Circuit Judges Higginbotham and Parker, and District Judge Ward, sitting by designation, the Fifth Circuit affirmed the district court's dismissal of civil RICO claims in a setting meriting scrutiny.[79] The claimants/appellants invited the Fifth Circuit to expand RICO to establish "a federal products liability scheme complete with treble damages and attorney fees for the benefit of end-users of defective products who never relied on manufacturers' alleged misrepresentations of product quality. [The court was] unpersuaded that RICO [could] be extended so far by such a marriage of distinct duties and liability regimes."[80]

Unlike the mail fraud context detailed in *Armco Industries Credit Corp. v. SLT Warehouse Co.*, the Fifth Circuit required the plaintiffs to establish the reliance element in this products liability context.[81] The court reasoned that here "[t]he causal connection between a misrepresentation and a subsequent harm . . . vanishes once the product travels beyond the entity who actually relied on the representation when making the purchas[e]."[82] Therefore, "when

---

73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. 214 F.3d 556 (5th Cir. June 2000), *cert. denied*, 531 U.S. 1132 (2001).
79. *Id.* at 557-58.
80. *Id.* at 557-59, 562.
81. *Id.* at 558 (citing *Armco*, 782 F.2d 475 (5th Cir. 1986)).
82. *Id.* at 560.

civil RICO damages are sought for injuries resulting from fraud, a general requirement of reliance by the plaintiff is commonsense liability limitation."[83]

IV. MISCELLANEOUS BUSINESS TORTS JURISPRUDENCE

A. Business Disparagement: C.P. Interests, Inc. v. California Pools, Inc.[84]

In an issue of first impression and with a panel comprised of Circuit Judges Emilio M. Garza and DeMoss, and Senior Circuit Judge Duhé, the Fifth Circuit addressed a salient topic: whether the costs associated with bringing litigation to stop business disparagement are themselves evidence of a pecuniary loss, thus satisfying the special damages requirement.[85] "The issue turn[ed] upon whether, under Texas law, attorney's fees can be a 'pecuniary loss' such that no other economic harm need be proven."[86] "As no Texas court ha[d] specifically addressed the issue, [the Court of Appeals stated that it had to] make an 'Erie guess' as to whether attorney's fees alone can constitute a sufficient pecuniary loss to support a claim of business disparagement under Texas law."[87]

As a federal court in a diversity case, the Fifth Circuit noted that it is "not in a position to fill any perceived gaps in Texas tort law."[88] According to the court, "[w]hen making an 'Erie guess, it is not our role to create or modify state law, rather only to predict it.' "[89] Existing Texas jurisprudence "provides every indication that attorney's fees are not considered a form of pecuniary loss and do not constitute special damages."[90]

After reviewing Texas Supreme Court precedent, the Fifth Circuit panel opined "that under Texas law, the attorney's fees incurred in bringing a lawsuit, where no additional pecuniary loss has been identified, do not establish the element of special damages required to support a claim of business disparagement."[91] Thus, it accordingly "vacat[ed] both the business disparagement injunction against California Pools and the award of $152,000 in general damages to C.P. Interests."[92]

---

83. *Id.* at 562; *see supra* notes 68-69 and accompanying text.
84. 238 F.3d 690 (5th Cir. Jan. 2001).
85. *Id.* at 694.
86. *Id.*
87. *Id.* (footnote omitted).
88. *Id.* at 695.
89. *Id.* (citation omitted).
90. *Id.* Under Texas law, the element of "special damages" is part of the business disparagement cause of action. *Id.* at 694-95 (citing Hurlbut v. Gulf Atl. Life Ins. Co., 749 S.W.2d 762, 767 (Tex. 1987)).
91. *Id.* at 696.
92. *Id.*

B. Class Actions

1. Berger v. Compaq Computer Corp.[93]

A recent case out of the Fifth Circuit reminds plaintiffs in the securities litigation realm of the hurdles commensurate with class action practice.[94] With a panel comprised of Circuit Judges Smith and Wiener, and Senior Circuit Judge Duhé, the Fifth Circuit reversed a district court's order certifying a plaintiff class and appointing class representatives.[95] On interlocutory review, the Court of Appeals held that the adequacy of the putative class representatives and of the representatives' counsel was improperly presumed and that the Private Securities Litigation Reform Act (PSLRA) raised the standard "adequacy" threshold for class representatives in securities fraud class litigation.[96]

Vacating and remanding the district court's order, the Fifth Circuit stated that the court "unquestionably adopted an incorrect legal standard" by stating that there is a presumption of adequate class representation by the putative representatives and by plaintiffs' counsel "in the absence of specific proof to the contrary."[97] According to the panel, the district court "invert[ed] the requirement that the party seeking certification bears the burden of proving all elements of rule 23(a). [Moreover], it effectively abdicate[d]—to a self-interested party—the court's duty to ensure that the due process rights of the absent class members are safeguarded."[98]

The Fifth Circuit further addressed an issue of first impression in the Circuit—the extent of the PSLRA's impact on a rule 23 inquiry.[99] The court opined as follows:

> Although, certainly, class representatives need not be legal scholars and are entitled to rely on counsel, plaintiffs do need to know more than that they were "involved in a bad business deal." Unoccupied space exists between these positions for the purpose of preserving meaningful consideration of the class representatives' knowledge about, or control of, the litigation.
>
> Any lingering uncertainty, with respect to the adequacy standard in securities fraud class actions, has been conclusively resolved by the PSLRA's requirement that securities class actions be managed by active, able class

93. 257 F.3d 475 (5th Cir. July 2001).
94. *Id.* at 477.
95. *Id.* at 482.
96. *Id.* at 481-84.
97. *Id.* at 481.
98. *Id.* at 482.
99. *Id.*

representatives who are informed and can demonstrate they are directing the litigation. In this way, the PSLRA raises the standard adequacy threshold.[100]

Thus, in sum, the Fifth Circuit remarked "that in complex class action securities cases governed by the PSLRA, the adequacy standard must reflect the governing principles of the Act and, particularly, Congress's emphatic command that competent plaintiffs, rather than lawyers, direct such cases."[101] Therefore, the court concluded that to the extent that the district court's adequacy analysis failed to assess the representatives' own qualifications " 'to take an active role in and control the litigation,' [it] departed from the correct legal standard" and thus required reversal.[102]

2. Perrone v. General Motors Acceptance Corp.[103]

With a panel comprised of the Circuit Judges Jones and Stewart, and Senior Circuit Judge Politz, the Fifth Circuit addressed the certification of a consumer class action.[104] The court addressed the issue of whether a class that brought actions under the Truth in Lending Act and the Consumer Leasing Act must prove detrimental reliance to recover damages under the statutes.[105]

The court affirmed the district court's denial of class certification due to the necessity of proving individual reliance as an element of a claim for actual damages; thus, no class action was certifiable.[106]

3. Spence v. Glock, Ges.m.b.H[107]

With a panel comprised of Circuit Judges Jones and Wiener and Senior Circuit Judge Duhé, the Fifth Circuit reversed a district court order certifying a nationwide class, deciding that the district court had inadequate support for its conclusion that the law of a single state, Georgia, would govern all of the class claims.[108] By failing to negate the possibility that the laws of fifty different states and the District of Columbia would apply, the district court abused its discretion in performing the choice of law analysis and certifying the class pursuant to Federal Rule of Procedure 23(b)(3); thus, the Fifth Circuit decertified the class.[109]

---

100. *Id.* at 483 (footnote omitted).
101. *Id.* at 484.
102. *Id.*
103. 232 F.3d 433 (5th Cir. Nov. 2000), *cert. denied*, 532 U.S. 971 (2001).
104. *Id.* at 433-35.
105. *Id.* at 434-35 (citing 15 U.S.C. §§ 1640(a)(1)-(2), 1667(d) (2000)).
106. *Id.* at 440.
107. 227 F.3d 308 (5th Cir. Sept. 2000).
108. *Id.* at 309-10.
109. *Id.* at 312-16.

In *Spence*, three Texas residents brought a class action on behalf of more than 50,000 Glock handgun owners residing in all fifty states and the District of Columbia.[110] The defendants were both the Austrian manufacturer of the handguns and the Georgia corporation that assembled and distributed the guns in the United States.[111] The nationwide class that the *Spence* plaintiffs sought to certify consisted of purchasers of particular models of Glock handguns.[112] The guns allegedly suffered from a design defect that caused the guns to jam or accidentally discharge, and the plaintiffs sought to recover the economic losses that resulted from the design defect.[113] In arguing that the proposed class met Rule 23(b)(3)'s predominance requirement, the plaintiffs asserted that all class claims would be governed by the laws of a single state, Georgia, where Glock, an Austrian corporation, based its United States operations.[114] The district court accepted the argument and certified the class.[115]

In reviewing and reversing that decision on appeal, the Fifth Circuit examined the question in light of the widely accepted choice-of-law equation that selects the laws of the jurisdiction having the most significant relationship to the controversy.[116] Relevant contacts to consider in assessing the extent of a state's connection to the issues include, inter alia, whether the injury occurred within the state, where the conduct causing the injury occurred, and whether any of the parties are state residents.[117]

In *Spence*, essentially none of those factors connected Georgia to the controversy.[118] The plaintiffs contended that the injuries occurred in Georgia, but the Fifth Circuit noted to the contrary that the alleged economic harm occurred in each state where the class members purchased the products.[119] The plaintiffs argued that the conduct causing the harm occurred in Georgia, but the basis for liability was the supposed defective design of the product, and that design activity occurred in Austria, not Georgia.[120] Finally, with regard to the parties' domiciles, it was true that Glock USA was based in Georgia, but that was not the company that was guilty of the disputed conduct.[121] The company responsible for design activities upon which the liability allegations were based was domiciled in Austria, not Georgia.[122]

---

110. *Id.* at 310.
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.* at 311-12 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 6, 145 (1969) (setting forth the "most significant relationship test")).
117. *Id.*
118. *See id.* at 312.
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*

The Fifth Circuit nevertheless observed that "Georgia [had] more than a negligible relationship to the tort issues," meaning that additional analysis was required.[123] A comparison needed to be made between Georgia's contacts and implicated state policies, and the contacts and policies of the other fifty interested jurisdictions.[124] The court found the "plaintiffs' attempt to finesse the choice of law by omitting comparison of laws other than Georgia's is surprising in light of" *Castano v. American Tobacco Co.*, which it found squarely on point.[125] The court also stated that the plaintiffs failed to provide the district court with a subclass plan in case the district judge found that Georgia law was not controlling.[126]

The Fifth Circuit surmised what a proper interest analysis might have shown had plaintiffs provided it.[127] Clearly, the court noted, states where the injuries occurred and the class members resided had an interest in the controversy: "ensuring that their consumers [were] adequately compensated in cases of economic loss."[128] However, how the other states' interests compared with Georgia's interests remained to be seen.[129] Georgia's laws might conflict with those interests if Georgia failed to provide the level of consumer protection that other states viewed to be sufficient.[130] Indeed, Georgia's status as the home state of the assembler/distributor might have caused it to favor the company's interests over those of the consumers and that possibility needed to be analyzed.[131] The possibility of diminished recovery in Georgia meant that the policies of other more generous jurisdictions had to be considered.[132]

The Fifth Circuit did not ultimately resolve that question, however, because the plaintiffs failed to provide the proper analysis to the district court and failed to sustain their burden of proof.[133] The court thus reversed the district court's certification order, not because of a definitive conclusion that fifty different states laws would apply, contrary to what the district court had ruled, but because the plaintiffs had failed to supply the necessary analysis upon which an appropriate choice of law determination could be made.[134] The Fifth Circuit summed up its holding as follows:

---

123. *Id.*
124. *Id.*
125. *Id.* at 313 (citing *Castano*, 84 F.3d 734 (5th Cir. 1996)).
126. *Id.*
127. *Id.* at 314.
128. *Id.*
129. *See id.*
130. *Id.*
131. *Id.*
132. *See id.*
133. *Id.* at 313-14.
134. *Id.* at 315-16.

> By not providing the district court with a sufficient basis for a proper choice of law analysis or a workable sub-class plan, the plaintiffs failed to meet their burden of demonstrating that common questions of law predominate. Therefore, the district court abused its discretion in certifying the class and the class is hereby decertified.[135]

C. *Damages:* Sulzer Carbomedics, Inc. v. Oregon Cardio-Devices, Inc.[136]

With a panel comprised of Chief Judge King, Circuit Judge Wiener, and District Judge Lynn, sitting by designation, the Fifth Circuit addressed, inter alia, the viability of a tortious interference claim with contractual relations under Texas law.[137] The case arose when a medical device manufacturer sued a competitor who had entered into a contract with the manufacturer's former independent sales representative.[138] The Carbomedics contract at issue contained a provision mandating that Texas law govern all the terms of the contract.[139] The contract provided as follows:

> In no event will either party be liable to the other for incidental, special or consequential damages, including but not limited to loss of anticipated revenues or profits or good will, for the [lawful] termination or cancellation of this Agreement for any reason whatsoever.[140]

After reviewing precedent, the Fifth Circuit opined that "[t]o allow St. Jude to enforce the limitation [of liability clause] would undermine the 'aim of awarding damages for tortious interference,' which is 'to place the injured party in the same economic position it would have been in had the contract not been breached.' "[141] According to Texas jurisprudence, "a party found liable for tortious interference with a contract may be liable for, among other things, 'emotional distress or actual harm to reputation, if [those injuries] are reasonably to be expected to result from the interference.' "[142]

The Fifth Circuit reminded practitioners that "the measure of damages for breach of contract and tortious interference with a contract are not necessarily the same."[143] Citing *Exxon Corp. v. Allsup*, the Fifth Circuit opined that "a claim for interference with contract is one in tort and . . . damages are not based on contract rules; therefore, it is not required that the loss incurred be

---

135. *Id.* at 316.
136. 257 F.3d 449 (5th Cir. July 2001).
137. *Id.* at 451.
138. *Id.*
139. *Id.* at 455.
140. *Id.*
141. *Id.* at 455 (quoting Marcus, Stowell & Beye Gov't Sec., Inc. v. Jefferson Inv. Corp., 797 F.2d 227, 231 (5th Cir. 1986)).
142. *Id.* at 455-56.
143. *Id.* at 456.

one within the contemplation of the parties to the contract itself at the time the contract was made."[144] Thus, the court held that the district court "did not err in determining that the limitation of liability provision in Carbomedics's contract with Clark did not preclude St. Jude's liability for tortious interference."[145]

D. Discovery Rules: A-Mark Auction Galleries, Inc. v. American Numismatic Ass'n[146]

A panel comprised of Circuit Judges Davis and Emilio M. Garza, and Judge Pogue, from the U.S. Court of International Trade, sitting by designation, dismissed this appeal for want of jurisdiction.[147] Worthy of a litigator's scrutiny, this case reminds us that discovery orders ordinarily are nonfinal and not immediately appealable.[148]

In this matter, the Fifth Circuit held that this dispute did not qualify under the *Cohen* doctrine as an appealable collateral order.[149] To qualify under this exception, the appellant must "demonstrate . . . that the order (1) conclusively determines the disputed question, (2) resolves an important issue completely separate from the merits of the action, and (3) is effectively unreviewable on appeal from a final judgment."[150]

Noting that discovery orders ordinarily fail under the third element of this test, the court reserved for another day the issue of whether a party seeking to appeal the denial of discovery is itself appealable.[151]

E. Experts—Challenging Experts in the New Millennium

When the United States Supreme Court decided *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the opinion fueled a brewing controversy and sparked a new generation of cases examining experts under a "*Daubert* challenge."[152] For centuries prior to *Daubert*, the use of experts during litigation had generated a similar dialogue. In 1858, the Court, in *Winans v. New York & Erie Rail Road Co.*, expressed its displeasure at the proliferation of expert testimony in federal trials:

---

144. *Id.* (citing *Allsup*, 808 S.W.2d 648, 660 (citing RESTATEMENT (SECOND) OF TORTS § 774A cmt. d (1977))).

145. *Id.*

146. 233 F.3d 895 (5th Cir. Dec. 2000).

147. *Id.* at 896.

148. *Id.* at 897 (citing Church of Scientology v. United States, 506 U.S. 9, 18 n.11 (1992)).

149. *Id.* at 898 (citing Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949)).

150. *Id.* at 898 (citations omitted).

151. *Id.* at 899 n.2.

152. *See* 509 U.S. 579 (1993).

> Experience has shown that opposite opinions of persons professing to be experts may be obtained to any amount; and it often occurs that not only many days, but even weeks, are consumed in cross-examinations, to test the skill or knowledge of such witnesses and the correctness of their opinions, wasting the time and wearying the patience of both court and jury, and perplexing, instead of elucidating the questions involved in the issue.[153]

Indicative of the maxim "the more things change, the more they stay the same," the Fifth Circuit in *In re Air Crash Disaster at New Orleans, Louisiana*, articulated the following frustration in 1986 with experts "for hire:" "Our message to our able trial colleagues: it is time to take hold of expert testimony in federal trials."[154] Judge Weinstein of the Eastern District of New York advocated a similar view: "An expert can be found to testify to the truth of almost any factual theory, no matter how frivolous. . . ."[155]

Accordingly, the question of the appropriate standard for determining the admissibility of expert testimony has long plagued the courts. Brethren of both the Texas Supreme Court, in *Gammill v. Jack Williams Chevrolet, Inc.*, and the Fifth Circuit, in *Moore v. Ashland Chemical, Inc.*, have referenced the need for guidance from the United States Supreme Court on the application of *Daubert*.[156] In *Gammill*, the Texas Supreme Court requested guidance on *Daubert*'s application to expert testimony based on skill and experience, or nonscientific expert testimony.[157] In *Moore*, the Fifth Circuit was unclear on *Daubert*'s application to clinical physicians, or scientific expert testimony.[158]

The guidance both the Texas Supreme Court and the Fifth Circuit sought from the United States Supreme Court on the application of *Daubert* was provided in the Court's ruling in *Kumho Tire Co. v. Carmichael*.[159] Any party whose case will turn upon expert testimony, whether based upon scientific, technical, or other "specialized" knowledge, should carefully analyze the testimony to be offered, and the bases for same, under each of the *Daubert* factors, if applicable, and ensure that the experts to be offered are prepared to address in a nonexclusive, flexible manner each *Daubert* factor.[160]

Whether the proposed testimony will meet all of the *Daubert* factors, or can even be evaluated under any of the *Daubert* factors, will simply depend upon the facts of the particular case, the expert, and the information available

---

153. 62 U.S. (21 How.) 68, 71 (1858).

154. 795 F.2d 1230, 1234 (5th Cir. 1986).

155. Jack B. Weinstein, *Improving Expert Testimony*, 20 U. RICH. L. REV. 473, 482 (1986).

156. *See Moore*, 151 F.3d 269, 274-79 (5th Cir. 1998) (granting rehearing en banc to clarify the standards district courts should apply in determining whether to admit expert testimony); *Gammill*, 972 S.W.2d 713, 722 (Tex. 1998).

157. *Gammill*, 972 S.W.2d at 722.

158. *Moore*, 151 F.3d at 274-79.

159. *See* 526 U.S. 137, 142-42 (1999).

160. *Id.* at 141.

to the expert.[161] The *Daubert* factors are not "holy writ."[162] Nonetheless, it is clear a litigant cannot assume that because the expert may have the credentials, that the court will accept the *ipse dixit* of the expert.[163] The objective of a court's gatekeeping requirement is the assurance of reliability and relevancy of the expert testimony at issue.[164]

1. Fifth Circuit Jurisprudence

a. St. Martin v. Mobil Exploration & Producing U.S., Inc.[165]

With a panel comprised of Circuit Judges Barksdale, Benavides, and Stewart, the Fifth Circuit addressed the sufficiency of a causation expert on grounds that the expert evidence was deficient under *Daubert*.[166] It did so within the context of "a suit for restoration and money damages arising out of the deterioration of a portion of the Mandalay Marsh in . . . Louisiana."[167] Suggesting its ultimate decision, the court commenced its discussion by refuting the defendant's assertion and citing to language such as the following: " 'As long as some reasonable indication of qualifications is adduced, the court may admit the evidence without abdicating its gate-keeping function.' "[168] Moreover, according to the Fifth Circuit, and again disagreeing with the defendants, " '[d]istrict courts enjoy wide latitude in determining the admissibility of expert testimony, and the discretion of the trial judge and his or her decision will not be disturbed on appeal unless manifestly erroneous.' "[169]

The court opined that the district court correctly considered alternative indicia of the reliability and relevance of an expert's testimony.[170] "[A] court could not rationally expect that a marshland expert would have published a peer-reviewed paper on each possible permutation of factors or each damaged area of the marsh."[171] Moreover, the "testimony was based on [the expert's] personal observation of the marsh in question and his general and undisputed expertise on marsh ecology and deterioration."[172]

Judge Barksdale, dissenting in part, stated that even if the expert was qualified to give expert testimony, the opinion he rendered failed to meet

---

161. *Id.* at 141-42.
162. *Id.* at 159 (Scalia, J., concurring).
163. *See id.* at 157 (quoting GE v. Joiner, 522 U.S. 136, 146 (1997)).
164. *See Moore*, 151 F.3d at 277.
165. 224 F.3d 402 (5th Cir. Aug. 2000).
166. *Id.* at 405.
167. *Id.* at 403.
168. *Id.* at 405 (quoting Rusing v. Kansas City S. Ry. Co., 185 F.3d 496, 507 (5th Cir. 1999)).
169. *Id.* at 406 (quoting Watkins v. Telsmith, Inc., 121 F.3d 984, 988 (5th Cir. 1997)).
170. *Id.* at 407.
171. *Id.* at 406.
172. *Id.* at 406-07 (footnote omitted).

Daubert's requirements; thus, the district court abused its discretion in admitting the testimony.[173] "Because the theory has *not* been published, or even tested, it could *not* possibly have been subject to peer review; there is *no* known error rate; and it *cannot* be generally accepted in the scientific community."[174]

b. Streber v. Hunter[175]

With a panel comprised of Circuit Judges Jones and Emilio M. Garza, and Senior Circuit Judge Reynaldo G. Garza, the Fifth Circuit affirmed in part and reversed in part the holding of the Western District Court of Texas in a suit involving claims of legal malpractice, DTPA violations, and breach of fiduciary duty, providing an instructive analysis on the use of experts in legal malpractice cases.[176] Albeit worthy of a litigator's attention, it is critical to note, as Judge Jones did in her concurrence, that the Fifth Circuit interpreted the DTPA in this matter prior to its most recent amendments.[177]

The case involved sisters who sued the attorneys who gave them tax advice after a tax deficiency was assessed with respect to an interest in a real estate joint venture their father had given them.[178] Following trial, a jury found for the sisters on all substantive counts, awarding actual damages totaling $2,172,788 and imposing DTPA "additional damages" against the attorneys.[179] One sister settled her dispute, while the other moved for entry of judgment.[180] The attorneys moved for judgment as a matter of law.[181] The district court entered judgment for the sister, and the attorneys appealed.[182]

The Fifth Circuit commenced by setting forth the basics of legal malpractice allegations in Texas.[183] "[A] legal malpractice claim sounds in tort and is evaluated based on negligence principles. A plaintiff must prove four elements to recover: (1) the defendant owed a duty to the plaintiff; (2) the defendant breached that duty; (3) the breach proximately caused the plaintiff injury; and (4) damages resulted."[184]

---

173. *Id.* at 413-14.
174. *Id.*
175. 221 F.3d 701 (5th Cir. Aug. 2000), *reh'g and reh'g en banc denied*, 233 F.3d 576 (5th Cir. Sept. 2000).
176. *Id.* at 712.
177. *Id.* at 741 (Jones, J., concurring) (noting previous application of DTPA to legal malpractice actions).
178. *Id.* at 712-17.
179. *Id.* at 717.
180. *Id.*
181. *Id.*
182. *Id.* at 718.
183. *Id.* at 722.
184. *Id.* (citations omitted).

In this case, the attorneys challenged the evidence on each prong of the test.[185] Breach of the standard of care must generally be proven by expert testimony, provided in this case by attorney Mike Cook.[186] The defendant attorneys claimed that there was insufficient evidence to prove that their malpractice, if any, was the proximate cause of the plaintiff's injuries.[187] The attorneys maintained that expert testimony was necessary to prove proximate cause, and that none was provided.[188] The plaintiff responded that expert testimony was unnecessary in this case because the issue was "one that lay people would ordinarily be competent to make."[189] The plaintiff "posit[ed] that once liability for negligence and breach of fiduciary were established, '[a]ny rational juror, who could do simple math, could understand that [the plaintiff] was severely damaged as a direct result of [the attorneys' actions].' "[190]

Guided by the decisions of the Texas courts, the Fifth Circuit agreed with the plaintiff.[191] While the attorneys were correct that mere claims of attorney negligence might not be cognizable under the DTPA, the plaintiff alleged that the attorneys affirmatively misrepresented facts and otherwise deceived her.[192] The Fifth Circuit opined that if the plaintiff "produced evidence of specific deceptive acts, her claim was cognizable under the DTPA as well as under the common law of legal malpractice."[193] The Texas Supreme Court articulated this as follows:

> Recasting the [plaintiffs'] DTPA claim as merely a legal malpractice claim would subvert the Legislature's clear purpose in enacting the DTPA—to deter deceptive business practices. If the [plaintiffs] had only alleged that [their attorney] had negligently failed to timely file their claim, their claim would properly be one for legal malpractice. However, the [plaintiffs] alleged and presented some evidence that [their attorney] affirmatively misrepresented

---

185. *Id.*

186. *Id.* at 724.

187. *Id.* at 726.

188. *Id.*

189. *Id.* at 726 (citing Arce v. Burrow, 958 S.W.2d 239, 252 (Tex. App.—Houston [14th Dist.] 1997), *rev'd on other grounds*, 997 S.W.2d 229 (Tex. 1999)). *See also* Delp v. Douglas, 948 S.W.2d 483, 495-96 (Tex. App.—Fort Worth 1997), *rev'd on other grounds*, 987 S.W.2d 879 (Tex. 1999) (The Fort Worth Court of Appeals in *Delp* stated that holding that expert testimony is not required to prove proximate cause in all cases). The Fort Worth Court of Appeals in *Delp* stated that

> [Defendants] urge[] us to adopt a rule that would require expert testimony regarding proximate cause in all legal malpractice cases . . . . While we agree that expert testimony on proximate cause may be required to prove some legal malpractice claims, we refuse to hold that it is required to prove all such claims. Instead, we believe the proper rule is one that would only require expert testimony on proximate cause in cases where determination of that issue is not one that lay people would ordinarily be competent to make.) *Id.*

190. *Streber*, 221 F.3d at 726 (citation omitted).

191. *Id.* at 726.

192. *Id.* at 727.

193. *Id.*

> to them that he had filed and was actively prosecuting their claim. It is the difference between negligent conduct and deceptive conduct. To recast this claim as one for legal malpractice is to ignore this distinction. The Legislature enacted the DTPA to curtail this type of deceptive conduct.[194]

Accordingly, the Fifth Circuit concluded that the attorneys' claim that Texas law forbids the fracture of a legal malpractice cause of action into malpractice and DTPA claims missed the mark.[195] Rather, both causes of action can apply.[196] In the instant case, the plaintiff had pointed to several acts that the Fifth Circuit concluded raised DTPA issues, including failures to disclose, unconscionable conduct, and misrepresentations.[197]

Judge Jones's concurrence emphasized the narrowness of the DTPA liability holding in the following three respects: (1) the opinion did not bear on recent DTPA amendments; (2) significant evidence before the jury had supported jury findings of actual misrepresentations amounting to more than mere legal opinions; and (3) she would not rely on the alleged nondisclosure of a conflict of interest in this case.[198]

2. Inquiries & Caveats in the Expert Testimony Realm

Based upon recent Fifth Circuit opinions that follow U.S. Supreme Court precedent, key considerations that make up the emerging expert witness jurisprudence can be summarized through the following inquiries and caveats:

1. Does the proffered testimony relate to expert subject matter under Rule 702, that is, scientific, technical, or other specialized matters?
2. How will the opinions assist the trier of fact?
3. How is the proffered testimony relevant?
4. Is the expert qualified based upon knowledge, skill, experience, training, or education?
5. Remember that qualifications alone are not dispositive of whether the expert opinions are admissible because the courts cannot rely on the *ipse dixit* of the expert.
6. Gate keeping requirements are applicable to all expert opinions, not just those based on scientific knowledge.
7. Are the expert's opinions based on a generally accepted methodology?
8. Has the methodology been tested?

---

194. *Id.* at 727-28 (quoting Latham v. Castillo, 972 S.W.2d 66, 69 (Tex. 1998)).
195. *Id.* at 726-28.
196. *Id.*
197. *Id.* at 728-29.
198. *Id.* at 741 (Jones, J., concurring).

9. Has the methodology been the subject of peer review and publication?
10. Does the methodology have a known and acceptable error rate?
11. During the performance of the methodology, were standards and controls properly maintained?
12. The trial court has the discretion to decide whether to apply any, all, or none of the *Daubert* factors to determine the reliability of an expert's opinion.
13. The trial court has the discretion to decide how to apply the *Daubert* factors in determining the reliability of an expert's opinion.
14. The trial court does not have the discretion to ignore the *Daubert* factors, and the failure to consider or apply one or more of the *Daubert* factors may be an abuse of discretion.
15. The trial court may also apply several other factors in addition to the *Daubert* factors to determine the reliability of an expert's opinion (*e.g.*, extrapolation, standard of care, alternative explanations).
16. While an expert's methodology must be generally accepted, the methodology need not be the only or predominate methodology in the field, nor need the court choose between competing alternative methodologies debated within the field, so long as there is sufficient evidence of reliability.
17. Are the opinions based on reliable supporting data or other bases of the type normally relied upon by an expert in the field?
18. Are any assumptions reasonable and specific to the facts of the case, as well as consistent with the undisputed facts and at least one party's view of the disputed facts?
19. Has the expert considered and addressed alternative explanations?
20. Did the expert apply the same care in preparing the evidence for the courtroom as she normally applies in performing a comparable analysis in the field?
21. Where an analysis, survey, or study is prepared specifically for litigation, it is a relevant consideration—but does not per se prevent admission of testimony—where the subject of the opinion is of the type typically developed solely for litigation (*e.g.*, damages analysis).
22. Was the methodology reliably applied?
23. Do the expert's opinions reasonably extrapolate from the results of applying the methodology to the conclusion reached?
24. While the expert's opinion must not be speculation, it need not be precise or completely without error.[199]

---

199. *See* Sofia Adrogué & Alan Ratliff, *Kicking the Tires After Kumho: The Bottom Line on*

F. Forum Selection: Waters v. Browning-Ferris Industries, Inc.[200]

Circuit Judge Emilio M. Garza, writing for the dissent, summarized the issue before the court as follows: "We can distill this case down to one key legal question: did Browning-Ferris Industries (BFI) unambiguously waive its right to remove to federal court?"[201] With a panel comprised of Circuit Judge Emilio M. Garza, Senior Circuit Judge Politz, and District Judge Head, sitting by designation, the Fifth Circuit reminded practitioners of the basics in the contractual ability to waive removal rights by parties.[202] Courts have held that a party may contractually waive its right of removal as long as it does so explicitly and unequivocally.[203]

The provision of the contract at issue follows:

> Company consents with respect to any action, suit or other legal proceeding pertaining directly to this Agreement or to the interpretation of or enforcement of any Employee's rights hereunder, to service of process in the State of Texas and appoints CT Corporation System, 811 Dallas Avenue, Houston, Texas 77002 or such other agent within Houston, Texas as shall be designated by Company in a written notice to Employee, as its agent, in such state for such purpose. Company irrevocably (i) agrees that any such suit, action, or legal proceeding may be brought in the courts of such state or the courts of the United States for such state, (ii) consents to the jurisdiction of each such court in any such suit, action or legal proceeding and (iii) waives any objection it may have to the laying of venue of any such suit, action or legal proceeding in any of such courts.[204]

BFI contended that this clause was ambiguous and provided Waters only the initial choice of where he may file his suit.[205] Acknowledging that a waiver of its removal rights does not have to include explicit words, such as " 'waiver of right of removal,' " BFI relied upon the Fifth Circuit's

---

Admitting Financial Expert Testimony, 37 HOUS. L. REV. 431 (2000); Sofia Adrogué & Alan Ratliff, *Kicking the Tires After Kumho: 2001 Update, Part I*, 24 THE TRIAL LAW. 252 (2001); Sofia Adrogué & Alan Ratliff, *Kicking the Tires After Kumho: 2001 Update, Part II*, 24 THE TRIAL LAW. 319 (2001) (discussing expert testimony jurisprudence and procedures).

200. 252 F.3d 796 (5th Cir. June 2001), *reh'g en banc denied*, 265 F.3d 1061 (5th Cir. July 2001).

201. *Id.* at 798 (Garza, J., dissenting).

202. *Id.*

203. *Id.* (citing McDermott Int'l, Inc. v. Lloyds Underwriters of London, 944 F.2d 1199, 1206 (5th Cir. 1991) (holding that a party must "explicitly" waive such a right); Regis Assoc. v. Rank Hotels (Mgmt.) Ltd., 894 F.2d 193, 195 (6th Cir. 1990) (stating "the case law makes it clear that such waiver must be clear and unequivocal"); Weltman v. Silna, 879 F.2d 425, 427 (8th Cir. 1989) (stating that "[w]aiver of the right to remove must be 'clear and unequivocal' ").

204. *Id.* at 797 (quoting contract).

205. *Id.*

interpretation of the forum selection clause in *McDermott*, a decision in which the court denied remand.[206]

However, according to the majority of this Fifth Circuit panel, *McDermott* is factually distinguishable from its prior decision in *City of Rose City v. Nutmeg Insurance Co.*[207] A reading of the contractual provision in the instant case lead the majority

> to the inescapable conclusion that the plaintiff negotiated with the defendant a clear right to establish "irrevocably" the place where his suit could be filed and heard. Reading each of the three clauses together, it [was] apparent that BFI (1) agreed that Waters may sue it in any court of Texas, (2) consented to the jurisdiction of any court in Texas to decide the case, and (3) waived any objection to venue in any court in Texas.[208]

A successful removal by BFI from the Wharton County district court to the United States District Court, Houston, Texas,

> would deprive [the] plaintiff of the benefits and conveniences he apparently sees . . . in Wharton County. The court is not free to relieve BFI of its contractual waiver of jurisdiction and venue in Wharton County, Texas. [Thus,] th[e] court affirm[ed] the district court's interpretation of this clause to be a forum selection clause in which the plaintiff ha[d] the right to choose the forum in which to bring his suit against the defendant.[209]

G. Fraudulent Joinder and Fraud

1. Jackson v. West Telemarketing Corp. Outbound[210]

Unsuccessful bidders for real estate brought a diversity action against a successful competitor for fraud, conspiracy, misappropriation, and other torts.[211] In their opinion, the Fifth Circuit reiterated the basics in choice of law principles applicable to transfers, statute of limitations for several torts, and fraud in general.[212] With a panel comprised of Circuit Judges Smith and Parker, and Senior Circuit Judge Politz, the Fifth Circuit affirmed the trial court's entry of summary judgment in the competitor's favor.[213]

The Court of Appeals held as follows: (i) the transferee court properly applied choice of law rules of its forum state rather than state law of the court

---

206. *Id.* at 797-98 (citing *McDermott*, 944 F.2d at 1200).
207. *Id.* at 797 (citing *City of Rose City*, 931 F.2d 13, 16 (5th Cir. 1991)).
208. *Id.* at 798.
209. *Id.*
210. 245 F.3d 518 (5th Cir. Apr. 2001), *cert. denied*, 122 S. Ct. 394 (2001).
211. *Id.* at 520-21.
212. *Id.* at 521-23.
213. *Id.* at 520, 525.

that had the transferred case for improper venue; (ii) under Texas choice of law rules, Texas law applied to the claims; (iii) tort claims were time-barred under Texas statute of limitations when not brought within two years of bidder's discovery of facts that should have led it to investigate alleged bid-rigging; and (iv) the bidder did not have fiduciary relationship with the competitor and thus could not be held liable in fraud.[214] A cursory overview of the court's holding regarding these matters is worthy of a litigant's attention.

With regard to the allegation that the trial court erred in applying Texas' choice of law rules, the court relied upon its previous decision in *Ellis v. Great Southwestern Corp.* in articulating its rationale.[215] In *Ellis*, the court addressed the choice of law principles applicable to transfers based on 28 U.S.C. §§ 1404(a) and 1406(a), opining as follows: " 'Accordingly, we conclude, as have the majority of authorities that have considered this question, that following a transfer under § 1406(a), the transferee district court should apply its own state law rather than the state law of the transferor district court.' "[216] Thus, the transferee court properly applied Texas choice of law principles rather than the laws of California.[217]

With regard to the district court's finding that the statute of limitations barred the tort claims, the court affirmed and articulated some basics in the statute of limitations realm meriting repetition in this article.[218]

> Under Texas law, claims for unfair competition, unfair trade practices, conversion, tortious interference with [a] contract, misappropriation of trade secrets, and conspiracy must be brought within two years from the time the cause of action accrues. In general, a cause of action accrues and limitations begin running when a wrongful act causes a legal injury. The discovery rule, however, "defers accrual of certain causes of action until the plaintiff knew, or exercising reasonable diligence, should have known of the wrongful act causing injury." The discovery rule affords protection in only limited instances, applying in (1) cases of fraudulent concealment; and (2) when the nature of the injury is inherently undiscoverable and the injury itself is objectively verifiable.[219]

Finally, with regard to the challenge on the fraud claim, the court affirmed the district court's finding of a lack of sufficient evidence.[220] According to the Fifth Circuit, in order to prove fraud, the Jacksons had to

---

214. *Id.* at 521-25.
215. *Id.* at 523 (citing *Ellis*, 646 F.2d 1099, 1109 (5th Cir. 1981)).
216. *Id.* (quoting *Ellis*, 646 F.2d at 1109).
217. *Id.*
218. *Id.* at 523-24.
219. *Id.* (citations omitted).
220. *Id* at 524-25.

establish the well-known elements: (1) a material misrepresentation; (2) that was false; (3) known to be false when made or asserted without knowledge of its truth; (4) made with intent that they would act on it; (5) that they actually did rely on it; and (6) that it caused injury.[221] The court noted that the claim at issue rested not on affirmative statements, but concealment. " 'Absent a fiduciary or confidential relationship, the failure to disclose information is not actionable as fraud.' "[222]

According to the court, no genuine issue of material fact was raised with respect to the Jackson's fraud claim.[223] As noted by the trial court, "the duty of good faith and fair dealing does not impose upon one party the burden of placing the interests of the other party ahead of their own, as would be the case in a fiduciary relationship."[224]

2. Perenco Nigeria, Ltd. v. Ashland, Inc.[225]

With a panel comprised of Circuit Judges Higginbotham, Wiener, and Dennis, the Fifth Circuit provided litigants with the basics in fraud and negligent misrepresentation causes of action in a suit arising out of negotiations for Nigerian oil interests.[226] In *Perenco*, the plaintiff, Perenco, a French oil and exploration company, tried to expand its efforts to Nigeria by purchasing Nigerian oil interests from the defendant, Ashland, by purchasing the stock of two of Ashland's subsidiaries.[227] During negotiations for the purchase, Perenco tried to include a provision in the contract conditioning the purchase on obtaining the Nigerian government's approval of the sale.[228] Ashland objected to the provision, assuring Perenco that structuring the transaction as a sale of stock rather than an assignment of oil interests circumvented the necessity of gaining approval of the Nigerian government and, even if the approval was needed, that the parties had already received tacit approval by the government.[229]

After executing the agreement, the Nigerian government disapproved of the sale and the parties terminated the agreement.[230] Perenco subsequently

---

221. *Id.* at 525 (citing Formosa Plastics Corp. v. Presidio Eng'rs and Contractors, Inc., 960 S.W.2d 41 (Tex. 1998) (quoting Sears Roebuck & Co. v. Meadows, 877 S.W.2d 281 (Tex. 1994))).

222. *Id.* (quoting Mitchell Energy Corp. v. Samson Res. Co., 80 F.3d 976, 985 (5th Cir. 1996) (citing Tempo Tamers, Inc. v. Crow-Houston Four, Ltd., 715 S.W.2d 658, 669 (Tex. App.—Dallas 1986, writ ref'd n.r.e.))).

223. *Id.*

224. *Id.* (citing Crim Truck & Tractor Co. v. Navistar Int'l Transp. Corp., 823 S.W.2d 591, 594 (Tex. 1992)).

225. 242 F.3d 299 (5th Cir. Feb. 2001).

226. *Id.* at 301.

227. *Id.*

228. *Id.* at 302.

229. *Id.* at 302-03.

230. *Id.*

sued Ashland alleging breach of contract, statutory and common-law fraud, and negligent misrepresentation.[231] Ashland moved for summary judgment, which the district court granted on the grounds that Perenco's breach of contract claim was moot because it chose recission of the contract in lieu of damages and that the fraud and misrepresentation claims were baseless because the representations were not of fact nor false and Perenco did not rely on the representations in any case.[232] The Fifth Circuit affirmed the lower court.[233]

The court began its analysis of the breach of contract and tort allegations by noting that the transaction at issue was complex and one at arms-length; both parties were sophisticated and well-represented corporations; and both had "extensive prior experience with the vagaries of oil exploration and production in Africa."[234] These "sophisticated and experienced parties" who are supported by legions of corporate lawyers as well as consultants and advisers, should not be allowed to "simply shut their eyes when entering into a complex, multi-million-dollar transaction in a volatile venue, then claim to have been deceived or misled when the deal later heads south."[235] The court further opined that although it admired the creativity used by Perenco in devising the theory of liability based on breach of contract, it was apparent to the court that these "so-called 'breach of contract' claims [were] essentially fraud claims in a different guise."[236]

According to the court, the core allegations that Perenco relied upon as the basis of its breach of contract claims were precisely the same as those that comprised the basis of its fraud claims: that Ashland falsely represented to Perenco "that the Minister had no problem" with the transaction.[237] However, "alleged misrepresentations that pre-date the very existence of a contract cannot constitute a breach of that contract."[238]

Moreover, the court found that Perenco could not show any damages recoverable on a breach of contract theory of liability.[239] The court stated that Perenco was only entitled to benefit of the bargain damages: to be put in as good of a position as it would have been in had Ashland not breached its duty under the contract.[240] Additionally, Texas law does not allow for the recovery of damages for loss of business reputation in a breach of contract case, and

---

231. *Id.*
232. *Id.* at 302-04.
233. *Id.* at 304-07.
234. *Id.* at 305.
235. *Id.*
236. *Id.*
237. *Id.*
238. *Id.*
239. *Id.*
240. *Id.*

therefore, Perenco was precluded from recovering such damages.[241] If the relevant information had been disclosed by Ashland, Perenco would have had the option to either refuse to contract with Ashland, or, alternatively, to reserve the right to terminate the contract in the event that the Minister began to interfere.[242] The court pointed out that under either of the above alternatives, Perenco would be in the same position in which it found itself during the case at bar.[243] "[A]s Perenco [could not] show that Ashland's alleged misrepresentation deprived Perenco of any benefit of its bargain, [the court concluded that] its breach of contract claim must fail."[244]

The court similarly analyzed Perenco's tort claims of common-law fraud, statutory fraud in the sale of stock, and negligent misrepresentation.[245] Although it agreed with the district court that Perenco's fraud claims could not survive Ashland's motion for summary judgment, it reached that conclusion via a somewhat different route.[246] The court first set forth the well-known elements for the cause of action of fraud.[247] It noted that

> [t]he elements of statutory fraud in the sale of stock are substantially the same, except that to recover actual damages, a plaintiff does not have to prove that the defendant knew a statement was false. Similarly, [it stated that] the primary difference between a cause of action for negligent misrepresentation and one for fraud is that a negligent misrepresentation claim does not require an actual intent to defraud, only that in doing so the party making the false statement acted negligently in doing so. [According to the court, a]ll three tort causes of action asserted by Perenco—common-law fraud, statutory fraud in the sale of stock, and negligent misrepresentation—require a showing of both reliance and damages. . . .
>
> [Moreover, u]nder well-established principles of Texas law, when a party discovers fraudulent inducement in the making of a contract, that party must choose within a reasonable time *either* to (1) stand to the bargain and seek damages for fraud, *or* (2) rescind the contract.[248]

Thus, the court "conclud[ed] that Perenco waived its right to bring a claim for damages when it knowingly and willingly rescinded its agreement with Ashland."[249]

---

241. *Id.*
242. *Id.*
243. *Id.*
244. *Id.*
245. *Id.* at 305-07.
246. *Id.* at 305-06.
247. *Id.* at 306.
248. *Id.* (footnotes omitted).
249. *Id.* at 307.

3. Coghlan v. Wellcraft Marine Corp.[250]

With a panel comprised of Circuit Judges Jolly, Jones, and Smith, the Fifth Circuit addressed a sua sponte dismissal of a case for failure to state a claim because the plaintiff had indeed stated several legally cognizable claims upon which relief might be granted.[251] In a thorough opinion, the court reversed and remanded in part, and affirmed in part, this litigation in which buyers of an Aquasport 205 recreational fishing boat manufactured by Wellcraft Marine Corporation sued alleging prototype business torts.[252]

The litigation arose as a result of the plaintiffs' reliance on Wellcraft's representations that the Aquasport 205 was made entirely of fiberglass—in fact, the deck of the Aquasport 205 was actually composed of 1.5 inches of plywood encased entirely within fiberglass.[253] The plaintiffs' suit seeking class certification on behalf of all similarly situated Aquasport owners alleged a claim against the manufacturer under the Magnuson-Moss Warranty Act (MMWA), for breach of the implied statutory warranty of fitness for a particular purpose, as well as for fraud, negligent misrepresentation, breach of contract, deceptive trade practices, unjust enrichment, and civil conspiracy.[254] In response to this laundry list of allegations, Wellcraft filed a limited motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), seeking dismissal on the pleadings of the MMWA and civil conspiracy claims.[255]

The district court analyzed the pleadings and came to the conclusion that the plaintiffs had failed to allege "any real damages," a required element for each cause of action.[256] Exceeding the scope of the 12(b)(6) motion before it, the district court sua sponte ordered all the plaintiffs' claims dismissed, pending a satisfactory attempt to replead.[257]

Although the plaintiffs sought through an amended pleading to cure the deficiencies of their first pleading, the district court again dismissed the claim because the plaintiffs "had failed to assert the requisite palpable injury."[258] Further, "the court denied leave to file the amended complaint and reiterated its order dismissing all claims."[259]

---

250. 240 F.3d 449 (5th Cir. Jan. 2001).
251. *Id.* at 451.
252. *Id.* at 451-56.
253. *Id.* at 451.
254. *Id.* (citing 15 U.S.C. §§ 2301-2312 (2000)).
255. *Id.*
256. *Id.*
257. *Id.*
258. *Id.*
259. *Id.*

The Fifth Circuit commenced by addressing whether the plaintiffs had a "justiciable controversy."[260] According to the court, "the district court did not consider whether Texas or Florida law, the only two arguable candidates, govern[ed the plaintiffs'] various state claims."[261] Rather, the district court dismissed the claim based on precedents borrowed from various other circuits and jurisdictions.[262] Regardless whether Texas or Florida law was applied, the Fifth Circuit opined that the plaintiffs "plead several legally cognizable claims that should not have been dismissed on the pleadings alone."[263]

In its analysis, the court provided a worthwhile lesson on "benefit of the bargain damages" vis-à-vis "out of pocket damages."[264] The Fifth Circuit found that Wellcraft and the district court misperceived the plaintiffs' burden at the pleadings stage.[265] "Whether the Appellants may ultimately succeed in proving benefit of the bargain damages is a test that awaits discovery. If, however, such damages are theoretically available for the causes of action they have pled, dismissal on the pleadings was premature."[266]

According to the court, its "task [was] to evaluate . . . state law claims"—specifically fraud, DTPA, breach of contract, unjust enrichment, and negligent misrepresentation—"for the availability of benefit of the bargain relief."[267]

After a thorough evaluation, the Fifth Circuit affirmed the district court's dismissal of the plaintiffs' unjust enrichment claim on the pleadings, but reversed and remanded on the dismissal of the claims for breach of contract, fraudulent misrepresentation, negligent misrepresentation, and deceptive trade practices.[268] The court noted that "[w]hile [it] share[d] the district court's implicit concern over the rise of 'no-injury' product liability law suits, the district court acted prematurely in dismissing this case sua sponte on the pleadings: the determination that there has been no injury in this case must be an evidentiary one, since the relevant state jurisdictions recognize benefit of the bargain damages for the claims that the [plaintiffs] allege."[269]

4. Hamilton v. Segue Software Inc.[270]

Affirming summary judgment for the defendants, a Fifth Circuit panel comprised of Circuit Judges King, Smith, and Parker delivered this per curiam

---

260. *Id.* 451-52.
261. *Id.* at 452.
262. *Id.*
263. *Id.*
264. *Id.*
265. *Id.*
266. *Id.*
267. *Id.* at 453.
268. *Id.* at 454-55.
269. *Id.* at 455 (citation omitted).
270. 232 F.3d 473 (5th Cir. Nov. 2000).

Fifth Circuit opinion.[271] In this case, a former employee had sued his former employer in state court for fraudulent inducement and breach of contract before the action was removed to federal court.[272] The district court entered summary judgment for the employer, ensuing an appeal.[273]

Reminding practitioners of the basics of employment contract, the Fifth Circuit held that: (i) under Texas law, the offer letter providing for a base salary at the "annual rate of $125,000.00" did not create a definite contract of employment for a one-year period; (ii) the employee failed to establish that his employer's offer to him of a particular management position was a misrepresentation, defeating employee's fraud in the inducement claim; and (iii) the employee could not establish fraudulent concealment as a basis for the fraud in the inducement claim based on the employer's failure to disclose the company's alleged accounting fraud.[274]

The court noted that the language of an offer letter providing for a base annual salary of $125,000 did not limit an employer's right under Texas law to terminate at will, nor did it create a definite length of employment.[275] If the contract had provided a specific employment term, the employee could only be terminated for cause.[276] The Fifth Circuit further observed that Texas law required such a provision to be unequivocal because term employment violates the presumption of at-will employment in Texas.[277]

After providing a thorough discussion of Texas law on fraudulent inducement, the panel affirmed the lower court's holding for the employer on this claim because it found no misrepresentation nor any duty to disclose in the employer/employee relationship to support a claim in a fraudulent concealment analysis.[278]

5. Collins v. Morgan Stanley Dean Witter[279]

With a panel comprised of Circuit Judges Jolly, Smith, and Barksdale, the Fifth Circuit articulated certain limits on the rights of option holders.[280] The case involved employees/plaintiffs who had sued Morgan Stanley based on its advice in a merger.[281] The court wrote as follows:

---

271. *Id.* at 476.
272. *Id.*
273. *Id.* at 477.
274. *Id.* at 476-81.
275. *Id.* at 477-78.
276. *Id.* at 478 n.3.
277. *Id.* at 479 (citing Montgomery County Hosp. Dist. v. Brown, 965 S.W.2d 501, 502 (Tex. 1998) (reaffirming this presumption)).
278. *Id.* at 480-81.
279. 224 F.3d 496 (5th Cir. Aug. 2000).
280. *Id.*
281. *Id.* at 497.

> Relying partly on the advice of Morgan Stanley, . . . the board of directors and stockholders of Allwaste, Inc. . . . voted to merge with Philip Services Corporation. . . . Each of the plaintiffs had earned stock options as part of his compensation while working at Allwaste.
>
> After the merger, Philip announced that it had filed inaccurate financial statements for several years. Upon the announcement, the stock of the now-merged Philip dropped significantly, damaging the value of the employees' post-merger options. The option holders responded by suing Morgan Stanley, claiming contract breach, misrepresentation, fraud, and other causes of action.[282]

The Fifth Circuit affirmed the district court's application of *Restatement (Second) of Torts*, section 552, which governs liability of accountants in Texas.[283] Agreeing with the lower court, the Fifth Circuit concluded that the plaintiffs, who had been neither board members nor shareholders in Allwaste, could not demonstrate the element of reliance, which requires action thereon.[284] The court explained that "[o]ne relies as a predicate to doing something. The options holders, however, played no role in effecting the merger. They neither authorized it, as did the Board, nor ratified it, as did the shareholders."[285]

6. Stinnett v. Colorado Interstate Gas Co.[286]

With a panel comprised of Circuit Judges Davis, Smith, and Wiener, the Fifth Circuit addressed the basics of Texas law on fraud and contract interpretation.[287] The court described the litigation as follows:

> Grounded in mineral exploration, development, and production in the panhandle of Texas with a history almost as long as that State's oil and gas industry itself, the case that engenders the instant appeal requires interpretation of contractual provisions contained in several agreements and application of such interpretation to facts that are either undisputed or have been determined by a jury.[288]

In the instant case, the Fifth Circuit affirmed the lower court's dismissal of the fraud claim.[289] Refusing to adopt the appellant's argument that a favored nation clause in a contract between an oil and gas lessor and its lessee

---

282. *Id.*
283. *Id.* at 501 n.7.
284. *Id.*
285. *Id.*
286. 227 F.3d 247 (5th Cir. Sept. 2000).
287. *Id.* at 250.
288. *Id.*
289. *Id.* at 254.

produces a fiduciary relationship, the court reminded the parties that absent such a relationship the fraud claim based on a failure to speak would not stand.[290] According to the court, Texas law does not impose liability for silence except where the silent party had a duty to speak, such as that arising from a fiduciary relationship, one not present in this case.[291]

On the contract claim, the Fifth Circuit affirmed the denial of recovery as well.[292] The review was a matter of law due to the lack of any ambiguity in the contracts at issue.[293] Echoing an old contract adage that "[a] contract is ambiguous only if its meaning is susceptible of multiple interpretations" under the accepted rules of contract construction, the court noted that the disagreement of lawyers over that construction does not necessarily constitute ambiguity under the law.[294] Therefore, the court was required to give effect to the clear written intent of the parties.[295]

Affirming the district court, the Fifth Circuit also found no liability under the doctrine of quasi-estoppel.[296]

> [The principle of] quasi-estoppel precludes a party from asserting, to another's disadvantage, a right inconsistent with a position [it has] previously taken. The doctrine applies when it would be unconscionable to allow a person to maintain a position inconsistent with one to which he acquiesced, or from which he accepted a benefit.[297]

The Fifth Circuit affirmed the district court's take-nothing judgment, but recognized that its result would not likely end the protracted hostilities between the parties and their predecessors.[298] The court further observed, however, that such a result was not required and is not the "mission" of the courts.[299]

H. Jurisdiction

1. Lewis v. Fresne[300]

With a panel comprised of Circuit Judges Barksdale, Senior Circuit Judge Garwood, and Circuit Judge Hall from the Ninth Circuit, sitting by

---

290. *Id.* at 253.
291. *Id.*
292. *Id.* at 254-58.
293. *Id.* at 254.
294. *Id.*
295. *Id.*
296. *Id.* at 259.
297. *Id.* at 258 (alterations in original) (footnote omitted).
298. *Id.* at 259-60.
299. *Id.*
300. 252 F.3d 352 (5th Cir. May 2001).

designation, the Fifth Circuit articulated for litigants the basics of personal jurisdiction. The court addressed whether a single telephone call and the mailing of allegedly fraudulent information can be sufficient to establish personal jurisdiction over nonresident defendants.[301] The court commenced its analysis with a recitation of the basics. The process of obtaining personal jurisdiction over a nonresident defendant is constitutionally permissible only if the nonresident "purposely availed himself of the benefits and protections of the forum state by establishing minimum contacts with the state" and such an exercise of jurisdiction "does not offend 'traditional notions of fair play and substantial justice.' "[302] Two types of "minimum contacts" exist—those that give rise to specific personal jurisdiction as well as those that give rise to general personal jurisdiction.[303] In the instant case, the appellant argued that specific jurisdiction was warranted due to the fact that the defendants' contacts with Texas " 'arise from, or are directly related to, the cause of action.' "[304]

The Fifth Circuit opined that sufficient evidence of minimum contacts existed to justify personal jurisdiction.[305] A single act by a defendant can be sufficient to confer personal jurisdiction so long as that act gives rise to the claim being asserted.[306] The court cited other cases where mere communications or negotiations with a resident of the forum state were not enough to subject a nonresident defendant to the forum state's jurisdiction.[307] These cases did not, however, involve an intentional tort.[308]

In this litigation, Lewis contended that all of the defendants intentionally defrauded him by lying about the ownership of the Nantucket Mad Martha's store.[309] The Fifth Circuit panel reminded litigants that it recently explained that "[w]hen the actual content of communications with a forum gives rise to intentional tort causes of action, this alone constitutes purposeful availment."[310] According to the court, the " 'actual content' " of Rosenfeld's and Farkas's communication to Lewis evidenced purposeful availment of the benefits and protections of Texas law.[311]

---

301. *Id.* at 355.

302. *Id.* at 358 (citing Wien Air Alaska, Inc. v. Brandt, 195 F.3d 208, 211 (5th Cir. 1999)).

303. *Id.*

304. *Id.* (citation omitted).

305. *Id.*

306. *Id.* at 358-59 (citing Brown v. Flowers Indus., 688 F.2d 328, 332-32 (5th Cir. 1982) (holding that a single telephone call initiated by the defendant was sufficient to confer personal jurisdiction)).

307. *Id.* at 359 (citing Aviles v. Kunkle, 978 F.2d 201, 205 (5th Cir. 1992) (per curiam) (one telephone call and one letter not enough to confer personal jurisdiction)).

308. *Id.*

309. *Id.*

310. *Id.* (citing Wien Air Alaska, Inc. v. Brandt, 195 F.3d 208, 213 (5th Cir. 1999)).

311. *Id.* (citing Collins v. Gospocentric Records, 2001 WL 194985, *2 (N.D. Tex. Feb. 22, 2001) (citing *Wien* for proposition that communications to plaintiff in Texas giving rise to intentional tort are sufficient to satisfy minimum contacts standard)).

Moreover, the court held that minimum contacts existed between Rosenfeld's law firm, Rosenfeld, Bernstein & Tannenhauser, LLP, and the forum state.[312] " '[A] partner's actions may be imputed to the partnership for the purpose of establishing minimum contacts.' "[313] Finally, it concluded that maintenance of the action against Rosenfeld, Farkas, and Rosenfeld, Bernstein & Tannenhauser, LLP in Texas would not offend traditional notions of fair play and substantial justice.[314] The court noted that Texas has a significant interest in providing a forum for the action because the injured party, Lewis, is a Texas resident.[315]

However, the court agreed with the district court that any evidence of minimum contacts between defendant Young and the forum state was insufficient to maintain personal jurisdiction.[316] Lewis's only allegation against Young was that he signed a letter that was forwarded to him in Texas stating that the lien of Vineyard Shops, Ltd. (of which Young was president and sole shareholder) on the Nantucket store was being assigned to Lewis; Young neither prepared the letter nor sent it to Lewis.[317] The court opined that this conduct was not enough for Young to reasonably anticipate that he would be hauled into court in Texas.[318]

2. Howery v. Allstate Insurance Co.[319]

With a panel comprised of Chief Judge King, Circuit Judge Higginbotham, and Senior Circuit Judge Duhé, the Fifth Circuit reminded practitioners of the basics of federal court jurisprudence.[320] Howery, an insured homeowner, sued his insurer for breach of contract and bad faith claims after Allstate denied his fire claim on the basis of suspected arson.[321] Allstate removed the litigation to federal court solely on the basis of a federal question. Allstate failed to plead diversity jurisdiction and to state the citizenship of the parties.[322] The district court entered summary judgment for Allstate on the bad faith claim and entered judgment on the jury verdict sustaining Allstate's defense of arson to the breach of contract claim.[323] On appeal, the Fifth Circuit held that they lacked jurisdiction over the parties

---

312. *Id.*
313. *Id.* (citing Sher v. Johnson, 911 F.2d 1357, 1366 (9th Cir. 1990)).
314. *Id.*
315. *Id.* (citing *Wien Air*, 195 F.3d at 215; Holt Oil & Gas Corp. v. Harvey, 801 F.2d 773, 779-80 (5th Cir. 1986)).
316. *Id.*
317. *Id.* at 359.
318. *Id.* at 359-60 (citing World-Wide Volkswagon Corp. v. Woodson, 444 U.S. 286, 296 (1980)).
319. 243 F.3d 912 (5th Cir. Feb. 2001), *cert. denied*, 122 S. Ct. 459 (2001).
320. *Id.* at 914.
321. *Id.*
322. *Id.*
323. *Id.* at 915.

because the claim did not contain a federal question and the evidence was insufficient to substantiate diversity jurisdiction.[324]

The Fifth Circuit commenced by reminding litigants of a few federal jurisdiction precepts.[325] "Federal courts are courts of limited jurisdiction."[326] The presumption is that a suit lies outside such limited jurisdiction.[327] The burden of establishing federal jurisdiction is placed on the party seeking the federal forum.[328] In *Howery*, "Allstate invoked the jurisdiction of the federal courts by removing Howery's state court case to federal court."[329] Thus, Allstate bore the burden; it had to prove that federal jurisdiction existed at the time of removal, or, at the very least, have alleged facts prior to the entry of judgment in the case that established federal subject-matter jurisdiction.[330] "Without the presence of such facts in the record, a federal court does not have jurisdiction over the case."[331]

The Fifth Circuit agreed that *Caterpillar v. Lewis* held that improper removal does not automatically nullify a later federal court judgment when the record establishes that the defect in federal jurisdiction was corrected before judgment.[332] However, "*Caterpillar* merely forgives 'untimely compliance' with the removal statute; it still requires that jurisdiction be established by the time judgment [is] entered."[333]

Thus, the court examined the record of the instant case to determine whether the facts or allegations established a basis for subject-matter jurisdiction at the time of removal or, at the latest, at the time of judgment.[334] The Fifth Circuit panel noted it "need not address the denial of the motion to remand if the district court lacked subject-matter jurisdiction."[335]

According to the court, "[f]ederal jurisdiction was sustainable then only if Howery's DTPA claim require[d] resolution of a substantial question of federal law."[336] The court opined that "the federal question in [the] case [was] not 'substantial.' "[337] Thus, as the state law issues overwhelmed the federal law issues, no federal question jurisdiction existed.[338] Further, "[w]hether for tactical reasons or out of mere inadvertence," the record did not contain

---

324. *Id.* at 915-21.
325. *See id.* at 916.
326. *Id.* at 916.
327. *Id.*
328. *Id.*
329. *Id.*
330. *Id.*
331. *Id.*
332. *Id.* (citing *Caterpillar*, 519 U.S. 61, 75-78 (1996)).
333. *Id.*
334. *Id.*
335. *Id.*
336. *Id.* at 918.
337. *Id.* at 919.
338. *Id.*

allegations or "evidence of diversity of the parties at any point in this case's odyssey through state and federal court."[339] Thus, as federal jurisdiction did not exist, the Fifth Circuit vacated the judgment of the district court and remanded the case to the district court with instructions to dismiss the case for lack of jurisdiction.[340]

I. Trademark Infringement, Misappropriation of Trade Secrets, and Unfair Trade Practices

1. Pizza Hut, Inc. v. Papa John's International, Inc.[341]

In a widely publicized advertising case, Pizza Hut sued Papa John's for false advertising based on its slogan, " 'Better Ingredients. Better Pizza.' "[342] With a panel comprised of Circuit Judges Jolly and Barksdale and Senior Circuit Judge Politz, the Fifth Circuit reversed the lower court's posttrial denial of Papa John's motion for judgment as a matter of law.[343] Papa John's appealed the district court's ruling under section 43(a) of the Lanham Act, arguing, inter alia, that its slogan was not a misrepresentation of fact.[344]

The Fifth Circuit instructed that section 43(a) of the Lanham Act, imposes liability on a defendant if the plaintiff proves:

> (1) A false or misleading statement of fact about a product; (2) Such statement either deceived, or had the capacity to deceive a substantial segment of potential consumers; (3) The deception is material, in that it is likely to influence the consumer's purchasing decision; (4) The product is in interstate commerce; and (5) The plaintiff has been or is likely to be injured as a result of the statement at issue.[345]

The court further observed that the first element requires " 'a plaintiff [to] demonstrate that a commercial advertisement . . . is either literally false or . . . likely to mislead and confuse customers.' "[346] The context of the statement often will be determinative of whether a consumer would reasonably rely thereon.[347] "If the statement is shown to be misleading, the plaintiff must also introduce evidence of . . . materiality" in that the statement impacted consumers.[348]

---

339. *Id.* at 921.
340. *Id.*
341. 227 F.3d 489 (5th Cir. Sept. 2000), *cert. denied*, 532 U.S. 920 (2001).
342. *Id.* at 491.
343. *Id.*
344. *Id.*
345. *Id.* at 495 (citing 15 U.S.C. § 1125 (2000)).
346. *Id.* (quoting Seven-Up Co. v. Coca-Cola Co., 86 F.3d 1379, 1390 (5th Cir. 1996)).
347. *Id.* at 495 n.5.
348. *Id.* at 495 (citing Am. Council of Certified Pediatric Physicians and Surgeons v. Am. Bd. of

According to the court, only statements of fact, not statements of opinion, are actionable under the Lanham Act.[349] Further, "[b]ald assertions of superiority" do not qualify for recovery.[350] " 'Puffery' or 'exaggerated advertising, blustering and boasting upon which no reasonable buyer would rely' " will not support a section 43(a) claim.[351] In the instant case, the Fifth Circuit addressed whether the evidence, viewed in the light most favorable to Pizza Hut, established that the slogan was misleading under section 43(a).[352] The court concluded that Papa John's slogan, standing alone, was merely nonactionable puffery.[353]

However, considering whether the slogan used in connection with advertisements comparing sauces and crusts was actionable, the court concluded that the combination could support recovery.[354] Nonetheless, the Fifth Circuit found insufficient materiality evidence, or deceit of consumers which affected their purchases, in this context to warrant any recovery.[355] Accordingly, the Fifth Circuit remanded the case for entry of judgment for Papa John's.[356]

2. Computer Management Assistance Co. v. Robert F. DeCastro, Inc.[357]

With a panel comprised of Circuit Judges Garwood, DeMoss, and Parker, the Fifth Circuit provided a good overview of causes of action in the copyright, trade secrets, and unfair trade practices arenas.[358] The Fifth Circuit outlined the elements that a plaintiff must prove to establish a claim for copyright infringement.[359] In essence, a plaintiff must prove: "(1) ownership of the copyrighted material and (2) copying by the defendant."[360] Proving ownership is shown with proof that the work is original and copyrightable and that plaintiff has complied with statutory formalities.[361]

To recover for misappropriation of trade secrets in Louisiana, the Fifth Circuit observed that a plaintiff must demonstrate: (1) the existence of a trade secret, (2) defendant's misappropriation of that secret, and (3) the loss

---

Pediatric Surgery, Inc., 185 F.3d 606, 614 (6th Cir. 1999)).

349. *Id.* at 495-96.

350. *Id.* at 496.

351. *Id.* (quoting Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134, 1145 (9th Cir. 1997)) (citation omitted).

352. *Id.* at 498.

353. *Id.* at 498-99.

354. *Id.* at 499-502.

355. *Id.* at 502-04.

356. *Id.* at 504.

357. 220 F.3d 396 (5th Cir. July 2000).

358. *Id.* at 400-05.

359. *Id.* at 400.

360. *Id.*

361. *Id.* (quoting Eng'g Dynamics, Inc. v. Structural Software, Inc., 26 F.3d 1335, 1340 (5th Cir. 1994)).

resulting from the misappropriation.[362] Statutory definitions of trade secret and misappropriation play a vital part in the analysis.[363]

To establish a claim of an unfair trade practice under the Louisiana Unfair Trade Practices Act, a plaintiff must prove "fraud, misrepresentation or other unethical conduct" within the specified language of the statute.[364] A trade practice violates the statute "only when it offends established public policy and is immoral, unethical, oppressive or unscrupulous."[365]

The Fifth Circuit affirmed the district court's holding of no liability for the remaining defendant on any of these theories (other defendants had settled previously with the plaintiff) and dismissed for lack of jurisdiction the remaining question of attorney's fees as a nonfinal order.[366]

362. *Id.* at 403 (quoting Reingold v. Swiftships, Inc., 126 F.3d 645, 648 (5th Cir. 1997)) (citations omitted).

363. *Id.* (quoting LA. REV. STAT. ANN. § 51.1431(2)(b), (4) (West 1987) (defining trade secret and misappropriation)).

364. *Id.* at 404.

365. *Id.* (quoting Schenck v. Living Centers--East, Inc., 917 F. Supp. 432, 439 (E.D. La. 1996)) (citation omitted).

366. *Id.* at 405-06.

V. SELECT BUSINESS TORTS CAUSES OF ACTION[367]

CAUSE OF ACTION	ELEMENTS	STATUTE OF LIMITATIONS
Breach of Contract	1. existence of contract; 2. material breach; 3. causation; and 4 damages.[368]	Four years.[369]
Business Disparagement	1. publication of disparaging words by the defendant about plaintiff's economic interests; 2. falsity; 3. publication with malice; 3. publication without privilege; and 4. publication caused special damages.[370]	Two years.[371] An action accrues on the date the defamatory matter is either published or spoken. The Discovery Rule may apply when the nature of the plaintiff's injury is inherently undiscoverable and the injury is objectively verifiable by physical evidence.[372]

367. The Author wishes to acknowledge Randy Carr, Associate of Diamond, McCarthy, Taylor & Finley, L.L.P., who authored in substantial part this table. *See also* MICHEL O'CONNOR & LESLIE C. TAYLOR, O'CONNOR'S TEXAS CAUSES OF ACTION (2001-02).

368. *See* Darwin v. Fugit, 914 S.W.2d 621, 627 (Tex. App.—Fort Worth 1995, writ denied).

369. *See, e.g.*, U.C.C. § 2-725 (2001).

370. Tzquino v. Teledine Monarch Rubber, 893 F.2d 1488, 1501 (5th Cir. 1990).

371. Dickson Constr., Inc. v. Fid. and Deposit Co. of Md., 960 S.W.2d 845, 858-50 (Tex. App.—Texarkana 1997).

372. *Id.* at 850.

CAUSE OF ACTION	ELEMENTS	STATUTE OF LIMITATIONS
Civil Conspiracy	1. two or more persons; 2. an object to be accomplished; 3. a meeting of the minds on the object or course of action; 4. one or more unlawful, overt acts; and 5. damages as the proximate result.[373]	Four years.[374]
DTPA	1. plaintiff is consumer; 2. defendant engaged in false, misleading or deceptive acts; and 3. these acts constituted a producing cause of the consumer's damages.[375] Certain acts are per se false, misleading or deceptive, the most pertinent being passing off goods or services as those of another.	Two years.[376] Discovery Rule: Applicable.[377]

373. Massey v. Armco Steel Co., 652 S.W.2d 932, 934 (Tex. 1983).
374. 15 U.S.C. § 15b (1994).
375. *See* TEX. BUS. & COM. CODE §§ 17.01, 17.41-17.63 (Vernon 1987).
376. *Id.* § 17.565.
377. *Id.*

CAUSE OF ACTION	ELEMENTS	STATUTE OF LIMITATIONS
Fraud	1. a material misrepresentation; 2. which is false; 3. and which was either known to be false when made or was asserted without knowledge of its truth; 4. which was intended to be acted upon; 5. which was relied upon; and 6. which caused injury.[378]	Four years.[379] Discovery Rule: Applicable.[380]
(i) Fraud by Omission	1. a material omission when there was a duty to speak; 2. which was intended to be acted upon; 3. which was relied upon; and 4. which caused injury.[381]	Four years.[382] Discovery Rule: Applicable.[383]
Lanham Act § 43(a)	1. commercial advertisement that is false; or 2. commercial advertisement that is likely to mislead or confuse consumers.[384]	Four years (borrows from Texas' fraud limitations period).[385]

378. *See* PROSSER & KEETON ON TORTS 728 (W. Page Keeton et al. eds., 5th ed., 1984).

379. Jackson v. Speer, 974 F.2d 676, 679 (5th Cir. 1992).

380. *Id.*

381. Williams v. WMX Technologies, Inc., 112 F.3d 175, 177 (5th Cir. 1997); *see* Phillips Petroleum Co. v. Daniel Motor Co., 149 S.W.2d 979, 987 (Tex. App.—Eastland 1941, writ dism'd judgm't cor.).

382. Proctor & Gamble Co. v. Amway Corp., 242 F.3d 539, 566 (5th Cir. Feb. 2001).

383. *Id.*

384. *See* 15 U.S.C. § 1125 (2000).

385. *See Proctor & Gamble Co.*, 242 F.3d at 566.

CAUSE OF ACTION	ELEMENTS	STATUTE OF LIMITATIONS
Negligent Misrepresentation[386]	1. defendant provides information in the course of his business, or in a transaction in which he has a pecuniary interest; 2. the information supplied is false; 3. the defendant did not exercise reasonable care or competence in obtaining or communicating the information; 4. the plaintiff justifiably relies on the information; and 5. the plaintiff suffers damages proximately caused by the reliance.	Two years.[387] Discovery Rule: May be applicable.[388]
Robinson-Patman Anti-discrimination Act[389]	Unlawful for any person engaged in commerce to discriminate in price between different purchasers of commodities of like grade and quality where effect is to lessen, destroy, or prevent competition. Several exceptions to this prohibition.	Four years.[390]

386. *See* RESTATEMENT (SECOND) OF TORTS § 552 (1977).

387. Tex. Soil Recycling, Inc. v. Intercargo Ins. Co., 273 F.3d 644, 649 (5th Cir. Nov. 2001).

388. Kansa Reinsurance Co., Ltd. v. Cong. Montg. Corp. of Tex., 20 F.3d 1362, 1372 (5th Cir. 1994) (declining to apply discovery rule to negligent misrepresentation); *but see Tex. Soil Recycling, Inc.*, 273 F.3d at 649 (citing *Kansa Reinsurance Co.* while applying discovery rule to negligent misrepresentation).

389. 15 U.S.C. § 13(a) (2000).

390. 15 U.S.C. § 15b (2000).

CAUSE OF ACTION	ELEMENTS	STATUTE OF LIMITATIONS
Sherman Act § 1[391]	1. existence of a contract or conspiracy; 2. affecting interstate commerce and commerce with foreign nations; 3. that imposes a restraint on trade.	Four years.[392]
Sherman Act § 2[393]	Two distinct claims: 4. Monopolization (a) monopolizing conduct (willful acquisition or maintenance of monopoly power) (b) coupled with monopoly power in the relevant market 5. Attempted Monopolization (a) anticompetitive conduct (b) intent to monopolize (c) dangerous probability of obtaining monopoly.	Four years.[394]

391. 15 U.S.C. § 1 (2000).
392. 15 U.S.C. § 15b.
393. 15 U.S.C. § 2 (2000).
394. 15 U.S.C. § 15b.

CAUSE OF ACTION	ELEMENTS	STATUTE OF LIMITATIONS
Texas Free Enterprise and Antitrust Act of 1983	Unlawful practices defined: "1. Every contract, combination or conspiracy in restraint of trade or commerce is unlawful. 2. It is unlawful for any person to monopolize, attempt to monopolize, or conspire to monopolize any part of trade or commerce. 3. It is unlawful for any person to sell, lease, or contract for the sale or lease of any goods, whether patented or unpatented, for use, consumption, or resale or to fix a price for such use, consumption, or resale or to discount from or rebate upon such price, on the condition, agreement, or understanding that the purchaser or lessee shall not use or deal in the goods of a competitor . . ."[395]	Four years after cause of action has accrued, or one year after conclusion of any action brought by the state, whichever is longer.[396]

395. TEX. BUS. & COM. CODE ANN. §§ 15.01, .05 (Vernon 1987).
396. *Id.* § 15.25.

CAUSE OF ACTION	ELEMENTS	STATUTE OF LIMITATIONS
Tortious Interference with Existing Contract	1. plaintiff has a valid contract; 2. defendant willfully and intentionally interfered with the contract; 3. interference was a proximate cause of the plaintiff's injury; and 4. plaintiff incurred actual damages or loss.[397]	Two years.[398] A cause of action accrues when the defendant interferes with the contract and causes harm to the plaintiff. The Discovery Rule may apply when the nature of the plaintiff's injury is inherently undiscoverable and the injury is objectively verifiable by physical evidence.[399]

397. 45 AM. JUR. 2d Interference § 6 (1999).
398. Jackson v. W. Telemarketing Corp. Outbound, 245 F.3d 518, 523-24 (5th Cir. Apr. 2001).
399. *Id.* at 524.

CAUSE OF ACTION	ELEMENTS	STATUTE OF LIMITATIONS
Tortious Interference with Prospective Contract	1. reasonable probability that the plaintiff would have entered into a business relationship with a third person; 2. defendant intentionally interfered with the relationship; 3. defendant's conduct was independently tortious or unlawful; 4. interference was the proximate cause of the plaintiff's injury; and 5. plaintiff suffered actual damage or loss.[400]	Two years.[401] A cause of action accrues when the defendant's interference with existing negotiations, which are reasonably certain of producing a contract, results in the termination of negotiations and harm to the plaintiff. The Discovery Rule may apply when the nature of the plaintiff's injury is inherently undiscoverable and the injury is objectively verifiable by physical evidence.[402]
Unfair Competition (Common Law)	Violation of Lanham Act automatically provides cause of action.[403]	Two years.[404]

400. Stewart Glass & Mirror, Inc. v. Auto Glass Disc. Ctrs., Inc., 200 F.3d 307, 316 (5th Cir. 2000).

401. Tex. Oil Co. v. Tenneco Inc., 917 S.W.2d 826, 832 (Tex. App.—Houston [14th Dist.] 1994, no writ), *rev'd on other grounds*, Morgan Stanley & Co. v. Tex. Oil Co., 958 S.W.2d 178 (Tex. 1997).

402. Hofland v. Elgin-Butler Brick Co., 834 S.W.2d 409, 414 (Tex. App.—Corpus Christi 1992, no writ).

403. *See* Inwood Labs, Inc. v. Ives Labs, Inc., 456 U.S. 844, 856 n.2 (1982) (White, J., concurring).

404. Coastal Distrib. Co. v. NGK Spark Plug Co., 779 F.2d 1033, 1038 (5th Cir. 1986); J.M. Huber Corp. v. Positive Action Tool of Ohio Co., 879 F. Supp. 705, 708-09 (S.D. Tex. 1995).