FIFTH CIRCUIT UPDATE

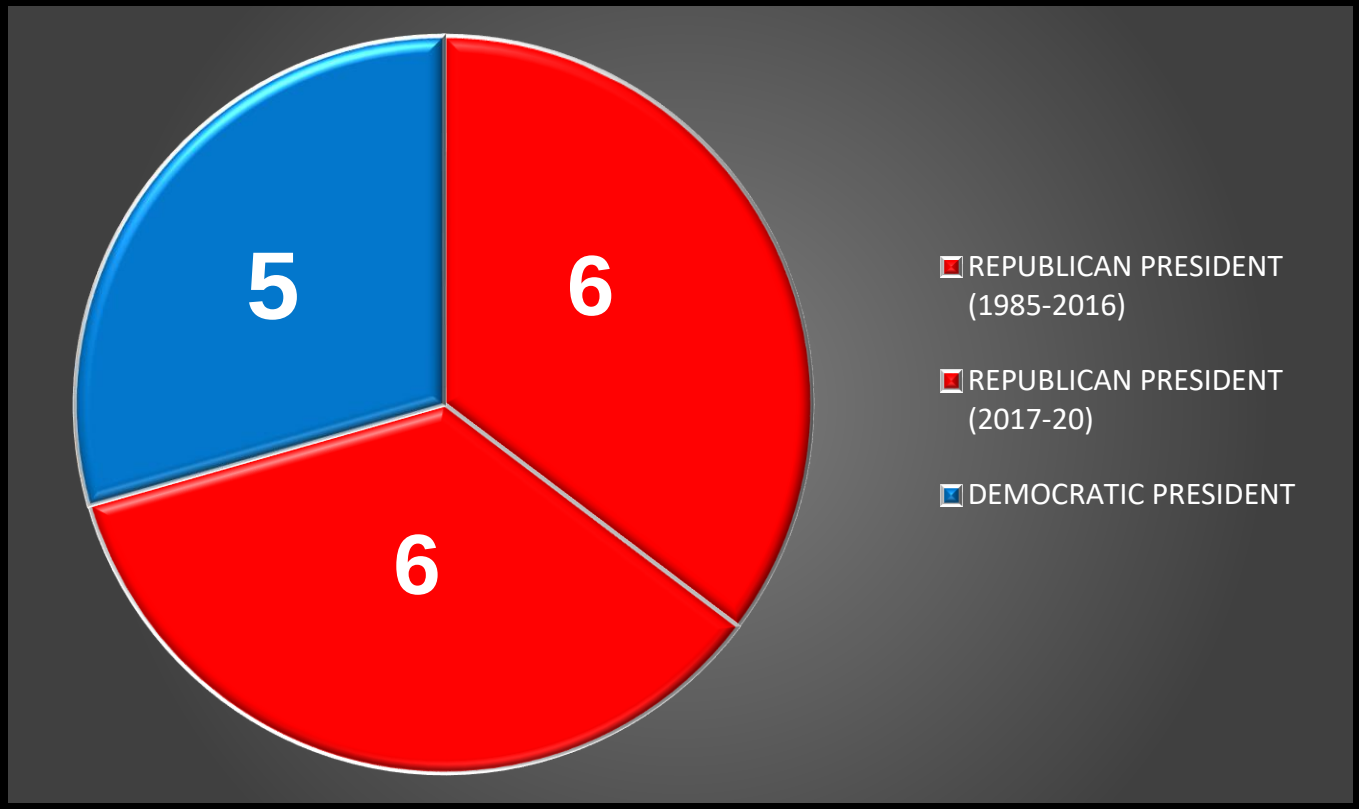
DAVID S. COALE

Austin Bar Association

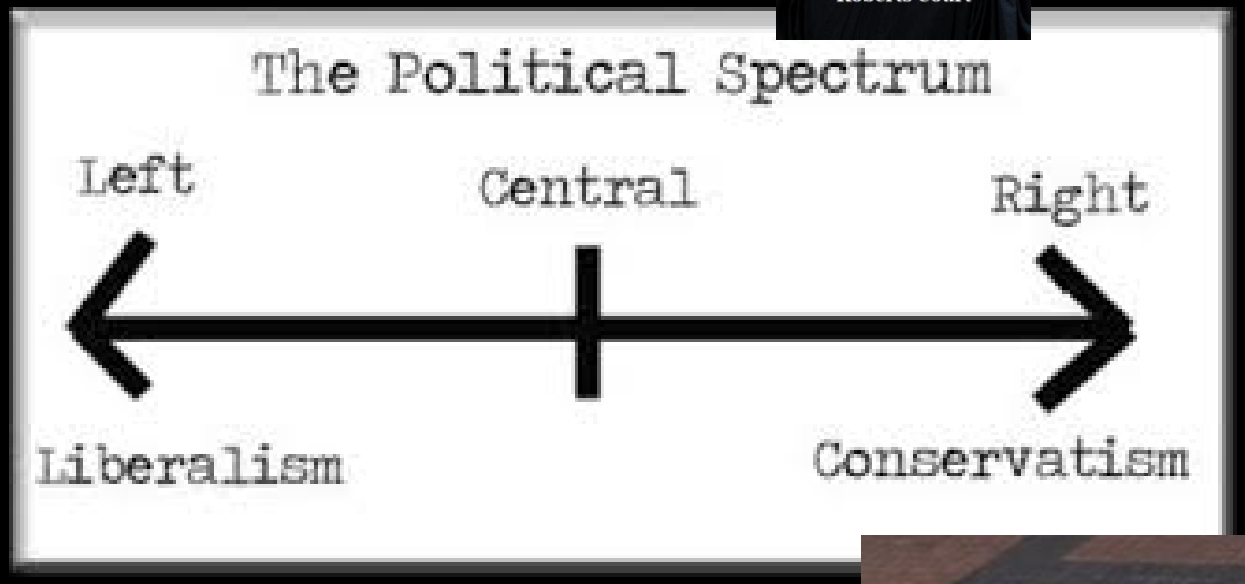
Appellate Law Section

May 20, 2021

ACTIVE JUDGES 2021




Roberts Court


The Political Spectrum
Left
Central
Right
Liberalism
Conservatism

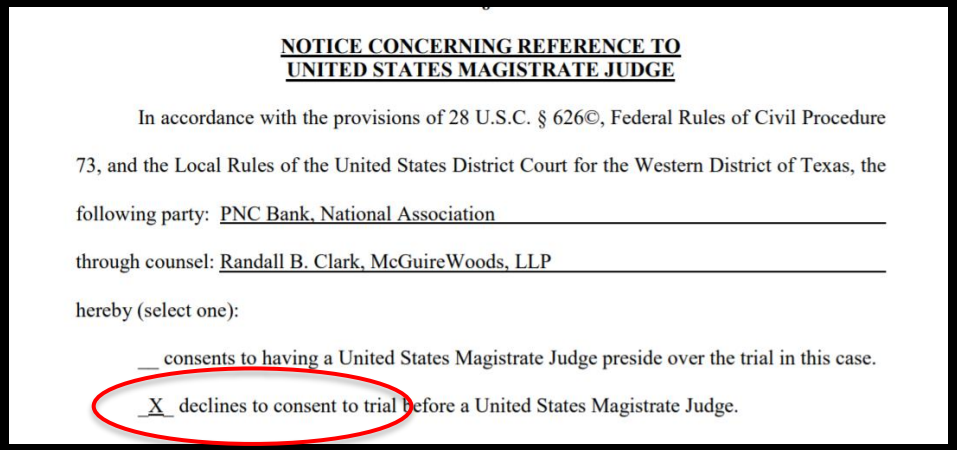

600

?

SUBJECT MATTER JURISDICTION

PNC Bank v. Ruiz,
989 F.3d 397 (5th Cir. 2021)

"[A]bsent its express refusal to consent, PNC's course of conduct during all proceedings before the magistrate judge likely would imply its consent. PNC signaled consent by conspicuously declining to object at any of the numerous opportunities it had for doing so and affirmatively litigating before the magistrate judge. But ***Its prior inconsistent statement, which it never expressly recanted, renders that subsequent conduct inconclusive*** *and precludes us from inferring clear and unambiguous consent."*



NOTICE CONCERNING REFERENCE TO UNITED STATES MAGISTRATE JUDGE

In accordance with the provisions of 28 U.S.C. § 626©, Federal Rules of Civil Procedure 73, and the Local Rules of the United States District Court for the Western District of Texas, the following party: PNC Bank, National Association

through counsel: Randall B. Clark, McGuireWoods, LLP

hereby (select one):

__ consents to having a United States Magistrate Judge preside over the trial in this case.

_X_ declines to consent to trial before a United States Magistrate Judge.

FDIC v. Belcher,
978 F.3d 959 (5th Cir. 2020)

MAJORITY: *"Because the district court on remand can 'fashion **some form of meaningful relief**,' appeal is not moot. Exactly what that relief might entail is beyond the scope of our concern. However, it is undisputed by the parties that the district court could strike Belcher's deposition testimony before the FDIC."*

DISSENT: *"I see no reason to override what common sense suggests: the appeal of an order requiring a deposition is **moot once the deposition is over**."*

McRaney v. North American Mission Board of the Southern Baptist Convention, 980 F.3d 1066 (5th Cir. 2020)

*"At this **early stage of the litigation**, it is not clear that any of these [necessary] determinations will require the court to address purely ecclesiastical questions. McRaney is not challenging the termination of his employment, and he is not asking the court to weigh in on issues of faith or doctrine[.] His complaint asks the court to apply neutral principles of tort law to a case that, on the **face of the complaint**, involves a civil rather than religious dispute." (citations omitted)*

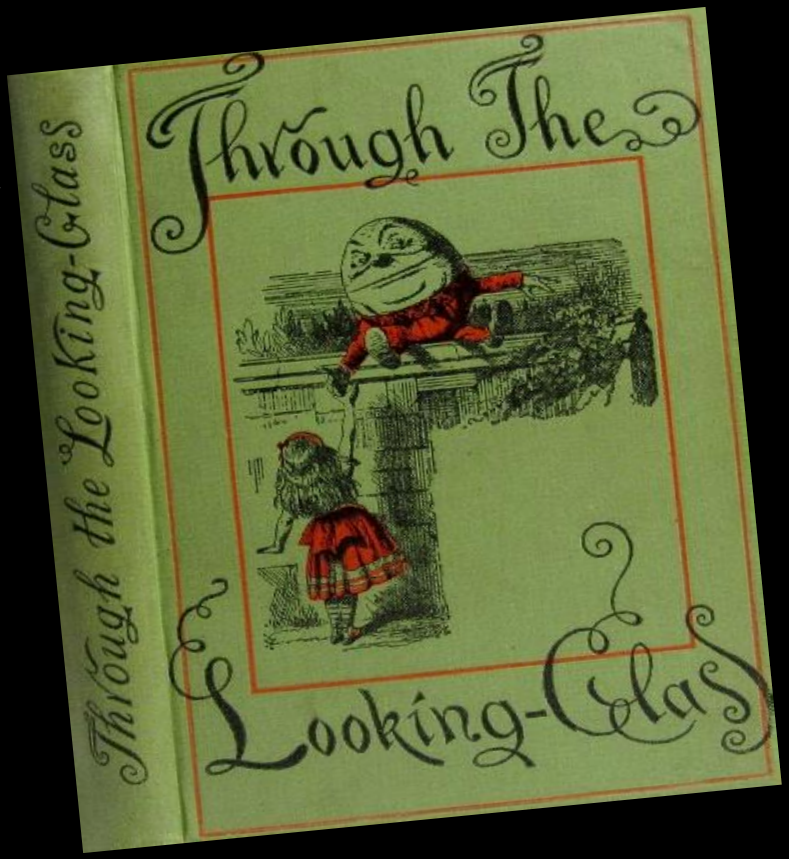
McRaney v. North American Mission Board of the Southern Baptist Convention, 980 F.3d 1066 (5th Cir. 2020)

FOR EN BANC REVIEW:	AGAINST EN BANC REVIEW:
Jones	Owen
Smith	Stewart*
Elrod*	Dennis
Willett	Southwick
Ho	Haynes*
Duncan	Graves*
Oldham	Higginson
Wilson	Costa*
	Engelhardt*

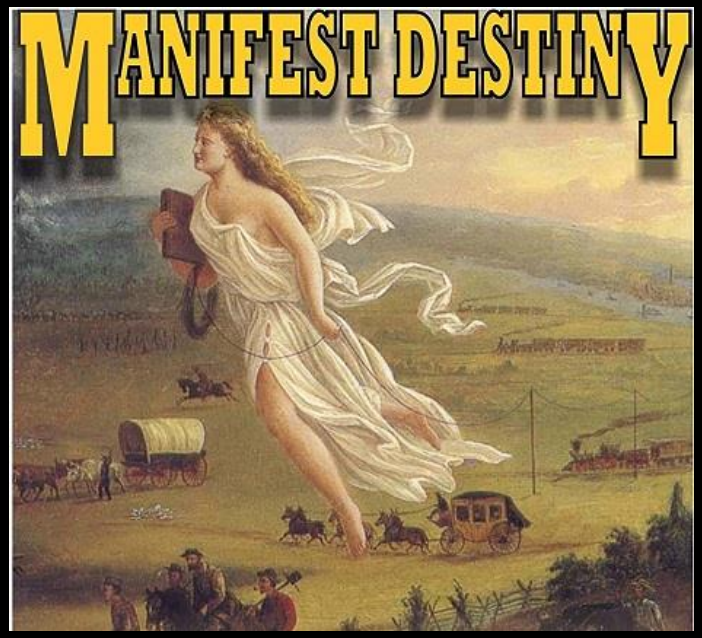
ARBITRATION

Polyflow LLC v. Specialty RTP LLC, 993 F.3d 295 (5th Cir. 2021)

*"Under that **'look through' analysis**, we hold that this underlying dispute presents a federal question. Polyflow's arbitration demand included at least three federal statutory claims under the Lanham Act …. What matters is that **a federal question**—the Lanham Act claims—**animated the underlying dispute**, not whether Polyflow listed them in its original complaint."*



Le v. Exeter Fin. Corp.,
990 F.3d 410 (5th Cir. 2021)



*"… an opportunity to resolve at least one thing that we have directly resolved [about Hall Street]: '**manifest disregard** of the law as an independent, nonstatutory ground for setting aside an award must be **abandoned and rejected**."*

PLEADINGS

- *Waste Management v. AIG*, 974 F.3d 528 (5th Cir. 2020)
  "The only relevant, AIG Claims-specific facts that Waste alleged in its complaint are that (1) AIG Claims served as the adjuster for ASIC and (2) 'On July 9, 2013, AIG Claims ***sent Waste Management a letter*** denying [certain] coverage …"

- *Colonial Oaks v. Hannie Devel.,*
  972 F.3d 684 (5th Cir. 2020)
  "The pleadings are devoid of allegations regarding ***what*** instructions the employees received, ***who*** gave the instructions, ***whether*** anyone followed the instructions, and ***whether*** Sellers were aware of the specific instructions given."

- *Umbrella Inv. Group v. Wolters Kluwer*, 972 F.3d 710 (5th Cir. 2020)
  "In this case, the only relevant fact that UIG has alleged beyond what little it alleges 'on information and belief' is that Wolters Kluwer ***provided 'written certification*** that the property subject to the loan was not in a flood hazard area … That fact alone can ground nothing more than speculation as to the cause of the error, and therefore, UIG has failed to state a claim for fraud."

AIG Europe, Inc. v. Caterpillar, Inc.,
831 Fed. Appx. 111 (2020)

1. ***Explanation.*** *"If AIG needed information from Caterpillar's experts to allow Faherty to complete his expert report, AIG should have* ***moved to compel*** *the depositions of those experts."*

2. ***Importance.*** *"AIG's claims do not turn on Faherty's report. Despite the exclusion, AIG* ***had experts*** *on causation."*

3. ***Prejudice.*** *"Faherty's report responded to the analysis of Caterpillar's experts, it also contained* ***new analyses and conclusions****. Defendants were not given the opportunity to challenge these conclusions on the critical issue of causation."*

4. ***Continuance?*** *"Yet another continuance would have delayed summary judgment and a* ***potential trial*** *even further."*

APPELLATE PROCEDURE

Automation Support, Inc. v. Philippi,
982 F.3d 392 (5th Cir. 2020)

> "We meant what we said, and we said what we meant." *See* DR. SEUSS, HORTON HATCHES THE EGG (1940). We once again AFFIRM the judgment of the district court.

Texas Democratic Party v. Abbott,
978 F.3d 168 (5th Cir. 2020)

> *"[E]ven an appellee's failure to file a brief does not cause an automatic reversal of the judgment being appealed. By appellate rule, so extreme a lapse does cause the appellee to lose the right to appear at oral argument. We also know that if we disagree with the grounds relied upon by a district court to enter judgment but discover another fully supported by the record, we can affirm on that alternative basis. … **[O]ur discretion to consider an argument not properly presented is 'more leniently [applied] when the party who fails to brief an issue is the appellee**."* (citations omitted).

Le v. Exeter Fin. Corp.,
990 F.3d 410 (5th Cir. 2021)

"[E]ntrenched litigation practices harden over time, including overbroad sealing practices that shield judicial records from public view for unconvincing (or unarticulated) reasons. ***Such stipulated sealings are not uncommon. But they are often unjustified.*** *With great respect, we urge litigants and our judicial colleagues to zealously guard the public's right of access to judicial records their judicial records—so 'that justice may not be done in a corner.'"*

Echeverry v. Jazz Casino Co., 988 F.3d 221 (5th Cir. 2021)	*Crown Life Ins. Co. v. Casteel* 22 S.W.3d 378 (Tex. 2000)
*"This court employs **a harmless-error 'gloss,'** meaning that if we are 'totally satisfied' or 'reasonably certain' based on the focus of the evidence at trial that the jury's verdict was not based on the theory with insufficient evidence, a new trial is unnecessary."*	*"[W]hen a trial court submits a single broad-form liability question incorporating multiple theories of liability, **the error is harmful** and a new trial is required when the appellate court cannot determine whether the jury based its verdict on an improperly submitted invalid theory."*

EVIDENCE

Hewlett-Packard Co. v. Quanta Storage,
961 F.3d 731 (5th Cir. 2020)

EXPERT: *"[W]e did quite a lot of work to understand the data that we received; and it was my understanding, based on that work, that the data was* ***purchases by the plaintiff HP, Inc.*** *formerly known as Hewlett-Packard Company. . . . In the data files that I received, the transactions identified the supplier; and in any cases in which the supplier was identified as an HP entity, I excluded those . . . . "*

FACT: *Q. So the purchaser might not have been HP, Inc. at a particular procurement event? It might have been some subsidiary of HP, Inc.?*

A. ***It could well have been, yes****. . . . I'm not exactly sure on how that was spread out, but it could very well have been.*

Hoover Panel Systems, Inc. v. HAT Contract, Inc., 819 Fed. Appx. 190 (5th Cir. 2020)

- ***Different subject matter.*** *"Hoover reads the opening paragraph to apply to the prototype, the* ***primary property*** *the confidentiality agreement was entered into to protect. Hoover argues that the first numbered paragraph applied to* ***other information*** *and communications that were not obviously confidential under the opening paragraph."*

- ***Different ways to perform.*** *"[Another possible] interpretation is that under the agreement, proprietary information is automatically confidential while all other information must be marked."*

- ***General v. specific.*** *"HAT reads the opening paragraph to speak generally about the content of the agreement, and the first numbered paragraph to provide the* ***specific instructions needed*** *to put the confidentiality agreement into effect."*

- ***Substance v. housekeeping****. "Another plausible reading is that the opening paragraph provides the scope for all information that is confidential while the first numbered paragraph functions as* ***a housekeeping paragraph****, providing instruction on how to mark information as confidential, but not requiring labeling as a condition precedent."*

TRADEMARK / COPYRIGHT

Perry v. H.J. Heinz,
994 F.3d 466 (5th Cir. 2021)

*"**It would be a coincidence to ever encounter both Mayochup and Metchup in the market**, much less get confused about the affiliation, sponsorship, or origin of the two products. Accordingly, no reasonable jury could conclude that Heinz's use of Metchup in advertising or the sale of its own product, Mayochup, created a likelihood of confusion."*

Digital Drilling Data Sysems LLC v. Petrolink Servcs., Inc., 965 F.3d 365 (5th Cir. 2020)

"Like the alleged misappropriation-of-trade-secrets claim in GlobeRanger, which required establishing improper means or breach of a confidential relationship, Digidrill's alleged unjust enrichment claim requires establishing wrongful conduct—i.e., inducing the MWD companies to violate the express terms of their DataLogger licenses—that goes ***beyond mere copying****."*

THE FINALITY TRAP

Williams v. Seidenbach
958 F.3d 341 (5th Cir. 2020) (en banc)

"Under 28 U.S.C. § 1291, courts of appeals may review only "final decisions" of the district courts.

Under our precedents, there is no final decision if a plaintiff voluntarily dismisses a defendant without prejudice, because the plaintiff 'is entitled to bring a later suit on the same cause of action.'

And in a suit against multiple defendants, there is no final decision as to one defendant until there is a final decision as to all defendants.

A potential complication arises when a case implicates both of those principles—that is, ***when a plaintiff sues two defendants, and then voluntarily dismisses one defendant without prejudice, while litigating against the other to conclusion****."*

(citations omitted, spacing added).

Williams v. Seidenbach
958 F.3d 341 (5th Cir. 2020) (en banc)

"[E]stablished rules of civil procedure provide many tools to avoid that alleged 'trap.' They include amendment of the complaint to remove claims or parties under Federal Rule of Civil Procedure 15(a); severance of parties under Rule 21; and entry of a partial final judgment under Rule 54(b). A plaintiff can also voluntarily dismiss a defendant with prejudice."

CBX Resources v. ACE Am. Ins. Co.,
959 F.3d 175 (5th Cir. 2020)

"To be sure, many cases applying the Ryan rule have multiple defendants, one or more of which was dismissed without prejudice while at least one defendant prevailed on the merits. But Ryan itself was an employment dispute with a single plaintiff suing a single defendant, his employer."

Firefighters' Retirement System v. Citco Group Ltd., 963 F.3d 491 (2020)

"Because the dismissal without prejudice in this case occurred after the order the Funds seek to appeal, we do not decide how Williams . . . would apply where the dismissal occurred before the adverse, interlocutory order."

SANCTIONS

Coastal Bridge Co. v. Heatec, 833 Fed. Appx. 565 (5th Cir. 2020)

OOPS: *"As a threshold matter, Because Coastal Bridge r**easonably should have anticipated litigation over the fire damage**, it had a duty to preserve the equipment."*

NO BAD FAITH: *"Adherence to **normal operating procedures** may counter a contention of bad faith. Here, an outdoor piece of industrial equipment was stored outdoors. The record does not support the finding that Coastal Bridge acted with a culpable state of mind."*

RELEVANT? *"Heatec **did not specifically request to examine** the pumps at the joint inspection. As such, the pumps are of questionable relevance for the purposes of its underlying claim that poor pump maintenance can be a cause of a heater fire."*

Texas Alliance for Retired Americans v. Hugh,
No. 20-40643 (5th Cir. March 11, 2021)

"Appellees did not notify the court that their latest motion to supplement the record filed on February 10, 2021 was nearly identical to the motion to supplement the record filed several months ago by the same attorneys, on September 29, 2020. Critically, Appellees likewise failed to notify the court that ***their previous and nearly identical motion was denied.****"*

SUBSTANTIVE DUE PROCESS

Hines v. Quillivan, 982 F.3d 266 (5th Cir. 2020)

MAJORITY: *"It is not irrational for a state to change in stages its licensing laws to adapt to our new, technology-based economy. If the Texas legislature finds the recently enacted changes on telemedicine successful, it may decide to expand those changes to include veterinarians. It is reasonable to have a* ***trial period*** *rather than to make a hasty policy change. Though we could conceive no rational basis for the law challenged in St. Joseph Abbey, we can conceive many rational bases here."*

DISSENT: *"It simply is not rational to allow telemedicine without a physical examination for babies but deny the same form of telemedicine for puppies on the ground that* ***puppies cannot speak****."*

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