FIFTH CIRCUIT UPDATE

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ADMINISTRATIVE LAW

Chamber of Commerce of the U.S. of Am. v. U.S. Dep’t of Labor, 885 F.3d 360 (5th Cir. 2018).

In 2016, the Department of Labor (“DOL”) promulgated new regulations broadening the meaning of the term “fiduciary” in ERISA to include individuals who are paid in exchange for their investment advice. This new definition departed from the fiduciary test applied by DOL for over forty years that centered on the advisor forming a relationship of trust with the investors through regularly advising them on the particular needs of their plans and where the advisor’s counsel was the primary basis for the investor’s investment decisions. The Fiduciary Rule also created a Best Interest Contract Exemption (“BICE”), which allowed financial and insurance providers to be exempt from the obligations imposed by the new fiduciary definition if they entered into contracts with their clients that created duties of loyalty and prudence and excluded any exculpatory clauses, such as liquidated damages or class-action waivers.

The Court summarized the primary question of the case as being whether DOL’s new definition of an investment-advice fiduciary conformed to the ERISA statutes empowering DOL to regulate this industry. Applying the Chevron test, the Court concluded that ERISA was not ambiguous and that DOL’s Fiduciary Rule went beyond the statutory authority granted by Congress. In reaching this conclusion, the Court reasoned that Congress designed ERISA to incorporate many traditional common law terms and that “fiduciary” was such a term because Congress did not create a new definition for the term in ERISA. Thus, the Court rejected the dictionary definitions offered by DOL to support its new definition of fiduciary. The Court reasoned that holding otherwise would
undermine the context in which fiduciary appears in ERISA. The Court further held DOL’s definition contradicted ERISA’s text because it improperly combined the distinction Congress originally made between investment advisers, who it considered to be fiduciaries, and stockbrokers and insurance agents, who were not. It examined the widespread acceptance of this distinction among courts, state and federal legislatures, and agencies—including DOL—to support its conclusion that DOL’s new interpretation of fiduciary was contrary to the term’s well-established definition. The Court also held DOL’s definition was improper because it contradicted the use of the term in other provisions in ERISA. Finally, the Court rejected DOL’s reliance on ERISA’s purpose because it contradicted the statute’s text and because a perceived need to address a policy concern did not empower the agency to amend ERISA.

Turning next to step two of Chevron, the Court held DOL’s interpretation of ERISA to be unreasonable even if the statute were ambiguous. The Court relied upon the fact that it took DOL forty years to discover its new interpretation as evidence of the Rule’s unreasonableness. It also found the Rule to be unreasonable for a variety of other reasons, including the Rule’s: (1) attempt to regulate IRA plans that ERISA explicitly exempted from the DOL’s reach either directly or indirectly through BICE’s; (2) disregard for distinctions made by Congress between types of financial transactions and its inconsistent treatment of those transactions depending on their size; (3) use of BICE’s to impose duties and limitations not required by ERISA; (4) use of BICE’s to create private rights of actions not authorized by Congress; (5) disregard of other congressional efforts to empower the SEC to regulate IRA brokers and dealers; and (6) attempt to exert a novel and extensive power over a trillion-dollar investment market based on a long-existing statute. Thus, the Court vacated the entire Fiduciary Rule.

The Department of Labor’s “Fiduciary Rule” is inconsistent with its governing statutes and reaches beyond the agency’s statutory authority.
Chief Judge Stewart wrote a dissenting opinion stating the Fiduciary Rule was a reasonable recalibration of DOL’s previous regulatory framework to better regulate conflicted transactions for IRAs. He observed that nothing in ERISA’s text foreclosed DOL’s definition of fiduciary and that Congress empowered DOL to define technical terms in the statute. He also admonished the majority for relying on the common law and extra-statutory interpretations of fiduciary and found none of the sources cited by the majority unambiguously proved that the DOL acted outside of its statutory authority. Applying step two of *Chevron*, Chief Judge Stewart found DOL’s new interpretation to be reasonably and thoroughly explained and stated the majority failed to show the judicial deference required by *Chevron*. Thus, he would have upheld the rule as a reasonable exercise of DOL’s statutory authority under ERISA.

**Arbitration**

*Archer & White Sales, Inc. v. Henry Schein, Inc.*, 878 F.3d 488 (5th Cir. 2017)

Archer & White Sales, Inc. (“Archer”) sued Henry Schein, Inc. and Danaher Corporation, along with certain of Danaher’s wholly-owned subsidiaries (“Defendants”), alleging violations of the Sherman Antitrust Act and the Texas Free Enterprise and Antitrust Act. Defendants moved to compel arbitration pursuant to a clause in a contract between Archer and Pelton & Crane, an alleged predecessor-in-interest to Defendants. A magistrate judge compelled arbitration, but the district court reversed, holding that the court should decide arbitrability and the dispute was not arbitrable because the clause excluded suits involving requests for injunctive relief. Defendants appealed.

The Fifth Circuit affirmed the district court’s order. The Court declined to decide whether the parties “clearly and unmistakably” delegated the issue of arbitrability to the arbitrator, finding that while the agreement invoked the American Arbitration Association Rules, the arbitration
provision expressly exempted certain disputes, creating an ambiguity on this issue. Instead, the Court decided the case based on a finding that an assertion of arbitration here was “wholly groundless,” a concept recently outlined in the Court’s opinion in *Douglas v. Regions Bank*, 757 F.3d 460 (5th Cir. 2014). The Fifth Circuit agreed with the district court’s assessment that because the arbitration provision contained a carve-out for actions seeking injunctive relief, any action involving a claim for such relief was excluded from arbitration; the provision was not limited to actions seeking only injunctive relief or to claims for injunctive relief. Because Archer sought injunctive relief here, the action fell within the arbitration carve-out, and there was no plausible argument otherwise.

**Bankruptcy**


John F. Kelly, III filed for Chapter 7 bankruptcy in October 2014, and Barbara Rivera-Fulton was appointed as the trustee of his estate (“Kelly Trustee”). One of Kelly’s business entities—JFK Capital Holdings, LLC—was solvent and awaiting receipt of an $876,000 settlement check related to a separate bankruptcy proceeding. The law firms that had negotiated the settlement for JFK Capital had not received their legal fees and eventually filed a state-court suit to secure their claim against the settlement proceeds. In response, the Kelly Trustee filed Chapter 7 bankruptcy on behalf of JFK Capital, resulting in an automatic stay of the state litigation. Aaron Caillouet was appointed the trustee of the JFK Capital estate (“JFK Trustee”). The Kelly Trustee sought to consolidate the JFK Capital bankruptcy with the Kelly bankruptcy, but the JFK
Trustee opposed consolidation and sought to prioritize the law firms’ interests to the settlement proceeds. Both trustees hired lawyers to resolve these issues. The JFK Trustee eventually filed an uncontested application for fees, and the bankruptcy court, without explanation, reduced the trustee’s requested fees from 7% to 3% of money distributed. The district court vacated and remanded because the order contained no explanation for the reduction of the JFK Trustee’s fees.

The Fifth Circuit affirmed the district court’s order vacating the bankruptcy court’s order and remanded for a redetermination of an award consistent with the standards established in the Court’s opinion. The Court first found that creditors of the Kelly Estate had standing to participate in the appeal because the bankruptcy order concerned fees that would reduce funds otherwise available to those creditors.

The Court then addressed the issue of what constitutes a reasonable fee award for Chapter 7 trustees under 11 U.S.C. §§ 330 & 326. Chapter 7 trustees may receive two different types of compensation—a fee of $60 per case under § 330(b) and “reasonable compensation” under § 330(a). Section 330(a)(3) contains a list of relevant factors for courts to consider in awarding fees, but Congress removed Chapter 7 trustees from the list of professionals subject to those factors when it enacted the Bankruptcy Abuse Prevention and Consumer Protection Act (“BAPCPA”) in 2005. Instead, BAPCPA introduced a new provision to § 330 requiring courts to treat the reasonable compensation awarded to Chapter 7 trustees as a commission based on § 326, which sets a cap on the amount payable. This generated two approaches to determining reasonable compensation for Chapter 7 trustees. Under the first approach, § 326(a) is not simply a cap, but also a presumptively reasonable fixed commission rate generally subject to reduction only in rare cases. The second approach declined to presume § 326(a)’s percentages are reasonable,
but rather all facts and circumstances, including the § 330(a) factors, can be considered.

The Fifth Circuit ultimately adopted an interpretation in line with the first approach—that the percentage amounts listed in § 326 are presumptively reasonable for Chapter 7 trustee fee awards. Congress’s removal of Chapter 7 trustees from the § 330(a) factors and its directive to treat a trustee’s compensation as commission indicated that the trustee’s compensation should be determined on a percentage basis. The Court noted that there might be “extraordinary circumstances” triggering the remaining provisions of § 330 and thereby precluding a commission award. But to the extent any extraordinary circumstances analysis evaluates the reasonableness factors in § 330(a)(3), that analysis failed to take into account Congress’s purposeful revisions via BAPCPA.

_Lowe v. DeBerry (In re DeBerry), 884 F.3d 526 (5th Cir. 2018)._

Curtis DeBerry filed for Chapter 7 bankruptcy and claimed his home as exempt under Texas law. No objections to that claimed exemption were filed. Seven months later and with the bankruptcy court’s approval, DeBerry sold his home. DeBerry did not reinvest the proceeds from the sale into another home, instead transferring the money to his wife and a law firm that represented him in a separate criminal matter. The bankruptcy trustee then filed an adversary proceeding against the DeBerrys, the law firm, and the partners at the firm that received the funds (collectively, “appellants”), claiming that the proceeds from the home sale were no longer exempt. The bankruptcy court granted the appellants’ motion to dismiss the adversary proceeding, finding that when a Chapter 7 debtor sells his exempted Texas homestead post-petition, proceeds of the

The proceeds of the sale of a homestead that is owned at the commencement of a Chapter 7 bankruptcy remain exempt from the debtor’s estate even if those proceeds are not reinvested within the time frame required to invoke the proceeds rule under Texas homestead law.
A Chapter 13 debtor may exempt 100% of his or her interest in an asset, subject to the limitations in 11 U.S.C. § 522.

**Peake v. Ayobami (In re Ayobami), 879 F.3d 152 (5th Cir. 2018)**

In December 2015, the Advisory Committee on Bankruptcy Rules adopted a new Schedule C form allowing Chapter 13 debtors to check a box exempting from the bankruptcy estate “100% of fair market value, up to any applicable statutory limit” of certain property. Debtor Yemisi Ayobami checked the box, indicating that intent to take this exemption as to 14 of her 17 exemptions. Ayobami identified 11 U.S.C. § 522(d)(1), (3)–(5) as the specific laws allowing for her exemptions, but those provisions cap the value of a debtor’s exempted interest. After multiple rounds of objections, hearings, and orders, the bankruptcy court allowed Ayobami’s exemptions for certain assets, but only after she listed a claimed amount within the statutory limits. Upon
the parties’ request, the bankruptcy court certified for appeal the question of whether a debtor claiming federal exemptions under § 522 can exempt a 100% interest in an asset.

The Fifth Circuit answered the certified question affirmatively. Section 522(d) limits the value of certain property that may be exempted, but not a debtor’s interest that may be exempted. Thus, on its face, exempting a 100% interest in an asset does not violate § 522. But, the Court noted certain situations where § 522 would prevent exempting a 100% interest, such as where the statutory cap is exceeded. The Fifth Circuit declined to address whether claiming a 100% interest in an asset as exempt allows the debtor to take the asset itself and thereby potentially benefit from post-petition appreciation.

**Constitutional Law**

*City of El Cenizo, Tex. v. Texas*, 885 F.3d 332 (5th Cir. 2018).

In May 2017, the Texas legislature passed SB4 to prohibit sanctuary city policies. Of relevance to this case, SB4: (1) forbade local entities from adopting, enforcing, or endorsing a policy that prohibited or materially limited the enforcement of federal immigration law; (2) required law-enforcement agencies to comply with detainer requests from Immigration and Customs Enforcement (“ICE”), and (3) assessed criminal and civil penalties against officials who violated the law through fines and removal from office. In response to this law, several Texas cities, local officials, and advocacy groups challenged SB4 and sought a preliminary injunction. The district court partially granted the preliminary injunction.

The Fifth Circuit reversed and held SB4 was constitutional on its face save for one provision forbidding local governments from endorsing a policy prohibiting or limiting cooperation with federal immigration law enforcement. Specifically, the Court held the Texas law was not preempted by federal immigration law, did not violate the Fourth Amendment, and was not unconstitutionally vague.
Turning first to the preemption arguments, the Court examined whether SB4 was preempted through field preemption. As evidence of field preemption, the plaintiffs pointed to federal statutes addressing local cooperation with federal immigration enforcement and specifying when state and local officers can perform immigration-officer functions. In rejecting these arguments, the Court explained the federal statutes regulated how local entities may cooperate with federal immigration officials, not whether they could cooperate. The Court further reasoned that because Congress could not pass a law like SB4 requiring local cooperation with federal agencies, Congress could not have possibly occupied this field.

The Court next addressed the arguments relating to conflict preemption. It held the SB4 provision requiring local cooperation with federal immigration officers did not conflict with federal law because it explicitly required a federal request for assistance in order to take effect. Moreover, it stated federal law clearly contemplated local cooperation without a formal agreement, and SB4 did not implicate any federal limitations as to what local officials were permitted to do pursuant to enforcing federal law. Finally, the Court found SB4’s mandatory nature did not conflict with Congress’s intent for immigration cooperation to be voluntary. It reasoned that the mandatory nature of SB4 could not conflict with federal law because the Supreme Court had upheld similar mandatory immigration laws in the past and because Congress could not require mandatory action under the Tenth Amendment. As to an SB4 provision forbidding officers from preventing any inquiry into a detained person’s immigration status, the Court held no conflict existed because the Supreme Court had already upheld a similar provision in *Arizona v. United States*, 567 U.S. 387 (2012).

The Court next addressed a provision forbidding local officials from endorsing a policy that prohibits or materially
limits the enforcement of federal immigration law. The Court construed “endorse” to have a similar meaning to the words around it—adopt and enforce—and held it would have no meaning if it meant anything other than expressing support for something. Because a prohibition on this type of expression implicated protected political speech, the Court affirmed the district court’s injunction to the extent SB4 prohibited elected officials from engaging in protected speech.

Finally, in addressing the plaintiffs’ remaining arguments, the Court held SB4 did not violate the Fourth Amendment and was not unconstitutionally vague. The Court stated the provision requiring cooperation with ICE-detainer requests did not violate the Fourth Amendment because such requests were accompanied by warrants and because the knowledge of an alien’s immigration status could be imputed to local officials through the collective-knowledge doctrine. The Court also found the phrase “materially limits” was not unconstitutionally vague because materiality was not a vague concept to law enforcement or government officials.

**Hernandez v. Mesa**, 885 F.3d 811 (5th Cir. 2018) (en banc).

In June 2010, a fifteen-year-old Mexican citizen was shot and killed on the Mexico side of the U.S.-Mexico border by a U.S. Border Patrol agent who fired the fatal shots on American soil. The minor’s parents filed suit against the agent alleging damages on numerous grounds, including an implied claim under the *Bivens* doctrine. After an en banc Fifth Circuit rejected the claims on their merits and based on qualified immunity, the Supreme Court granted certiorari, rejected the Fifth Circuit’s approach to the case, and remanded for it to consider the propriety of the plaintiffs’ *Bivens* claim in light of the Court’s analysis in *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017), a case in which the Court refused to imply a *Bivens* cause of action against policymakers involved in the detention of suspected terrorists.

The Court began its analysis by discussing the origins of the *Bivens* doctrine and its current status as a disfavored remedy. It
then turned to the two-step test used by the Supreme Court in *Abbasi* to determine the viability of a *Bivens* claim. The first step is whether the case presented a “new context” under *Bivens* based on whether the case was different in a meaningful way from prior *Bivens* cases. The Court found that a cross-border shooting was a novel context under the Fourth Amendment because of the uncertainty of the application of constitutional rights to a Mexican citizen whose death occurred in Mexico. Likewise, the Court found any potential Fifth Amendment claims to be novel because it would recast a traditional Fourth Amendment claim as a Fifth Amendment claim and would require an extension of the Supreme Court’s decision in *Boumediene v. Bush*, 553 U.S. 723 (2008).

Turning next to the second step used by the Supreme Court in *Abbasi*, the Fifth Circuit examined whether any special factors counseled against implying a damages claim against the federal officer involved in the shooting. The Court’s analysis focused on whether it would be well-suited, absent congressional action, to consider the costs and benefits of allowing a damages action to proceed. The Court found three special factors counseled against implying a *Bivens* claim: (1) extending *Bivens* would interfere with the political branches’ oversight of national security and foreign affairs; (2) Congress has consistently declined to provide a damages remedy for aliens injured abroad; and (3) the extraterritorial nature of the case created the risk of a remedy with uncertain limits. Thus, the Court declined to recognize a *Bivens* claim.

Judges Dennis and Haynes issued separate concurring opinions. Judge Dennis concurred with the judgment and stated the Court needed not decide the *Bivens* question because the federal agent was entitled to qualified immunity. Judge Haynes wrote separately to note that the case was previously consolidated with other...
cases involving federal statutes and that those other appeals were not before the Court and needed not be addressed to resolve this case.

Judge Prado dissented, joined by Judge Graves. While agreeing that the case presented a new context, he would have held no special factors counseled against recognizing a Bivens remedy. He warned that the Court had been led astray by the empty labels of concerns for national security, foreign affairs, and extraterritoriality and stated none of the concerns discussed by the majority were persuasive. At its core, he would have analyzed the case as an instance where a federal law enforcement agent engaged in law enforcement duties killed an unarmed civilian, a common sphere of law enforcement under Bivens. Thus, he would have recognized a Bivens claim.

Zimmerman v. City of Austin, 881 F.3d 378 (5th Cir. 2018).

Donald Zimmerman, a former Austin City Councilmember, challenged four provisions of Austin’s campaign-finance law: (1) a $300 base limit per election per person, (2) an aggregate contribution limit prohibiting contributions from outside of Austin beyond a specified statutory cap, (3) a temporal restriction prohibiting all contributions made more than six months before an election, and (4) a provision requiring candidates to disgorge leftover campaign contributions. The district court upheld the base limit, held Zimmer lacked standing to challenge the aggregate contribution limit, and struck down the temporal restriction and disgorgement provision. The Court affirmed.

Regarding the base limit, the Court stated the limitation was not a content-based restriction on speech. While Zimmerman argued the law differentiated between campaign contributions and contributions to officeholders, the Court ultimately deferred to the City of Austin’s interpretation that the law was intended to treat challengers and officeholders the same because that interpretation did not conflict with the statute’s text. The Court also stated strict scrutiny was inapplicable because contribution limits burdened less speech than expenditure limits. Turning then to the closely-drawn test established by
the Supreme Court, the Court held Austin had demonstrated a sufficiently important interest in preventing actual corruption or its appearance. The Court also found the monetary limit to be permissible because it was per election and in-line with limits upheld by other courts. Thus, the limit did not prevent campaign advocacy or give incumbents an unfair advantage.

As to the aggregation limitation, the Court held Zimmerman had no standing to challenge the law. It held Zimmerman failed to show a serious intention to violate the law by merely choosing not to solicit from certain individuals outside of Austin. The Court stated such self-censorship must arise from a fear of prosecution that is not speculative, and it found the risk for Zimmerman to be speculative because it relied upon the actions of third-party donors, which meant the likelihood of prosecution was not inevitable. Moreover, the court found Zimmerman failed to establish either an intention to break the law or that the law resulted in the expenditure of additional resources.

Finally, the Court considered the temporal and disgorgement provisions. When examining the temporal limitation, the Court asked whether it was closely-drawn to the alleged goal of preventing corruption. The Court held that because Austin failed to produce evidence showing why contributions made more than six months before an election posed a greater risk for corruption than contributions made within the six-month window, the limitation was unconstitutional. Regarding the disgorgement provision, the Court first held Zimmerman had standing because he was not permitted to use the funds he had remaining after the election towards future campaigns. On the merits, the Court held the disgorgement requirement imposed an indirect burden on future expenditures and was therefore subject to

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A campaign-finance law’s base limit on contributions is constitutional, but a temporal restriction prohibiting all contributions made more than six months before an election and a provision requiring candidates to disgorge leftover campaign contributions are unconstitutional.
heightened scrutiny. Because Austin failed to show why the law was tailored to its interest in preventing corruption, the Court struck it down.

**Employment**

*Bridges v. Empire Scaffold, L.L.C.*, 875 F.3d 222 (5th Cir. 2017).

An employer required its employees to take buses from a parking lot to the job site (a refinery) on a first-come, first-serve basis from 5:00 a.m. until 6:15 a.m. The employees were not allowed to access the job site any other way. The bus ride took approximately 20 to 30 minutes. Upon arrival at the job site, the employees waited in a tent, without mandated activities, until their shifts began at 7:00 a.m. While waiting, the employees would chat, do nothing, or smoke. Compensation for their time began at 7:00 a.m.; the employees were not compensated for the bus ride or pre-shift wait time.

Employees filed suit against the employer, claiming the employer violated the Fair Labor Standards Act ("FLSA") by failing to compensate the employees for their pre-shift wait time, among other things. The district court granted the employer’s motion for summary judgment as to this claim.

The Fifth Circuit affirmed, holding that the Portal-to-Portal Act excludes the employees’ pre-shift wait time from being compensable under the FLSA. Although the Portal-to-Portal Act does not exclude activities performed before or after a regular work shift if those activities are an integral and indispensable part of the principal activities for which the employees are employed, here the employees did not perform any such integral and indispensable activities while waiting for their shifts to
begin. Therefore, the employees’ pre-shift wait time was not compensable. In so holding, the Court rejected the argument that the “predominant benefits test” applies when analyzing the compensability of pre-shift wait time, reaffirming the applicability of the “integral and indispensable test.”

**ERISA**

*Ariana M. v. Humana Health Plan of Tex., Inc.*, 884 F.3d 246 (5th Cir. 2018) (en banc).

Ariana M. was a dependent covered by a group health plan administered by Humana Health Plan of Texas, Inc. Ariana eventually sued Humana under 29 U.S.C. § 1132(a)(1)(B) after Humana denied coverage of continued partial hospitalization at a facility that treated eating disorders. The health plan contained a clause granting Humana full discretionary authority to interpret plan provisions, make eligibility decisions, and resolve fact questions related to coverage and benefits. The district court ultimately held that Humana did not abuse its discretion in finding that Ariana’s continued partial hospitalization was medically unnecessary. The district court therefore granted Humana’s motion for summary judgment and denied Ariana’s. A panel of the Fifth Circuit affirmed, rejecting Ariana’s argument that the court should employ a *de novo* standard of review to an administrator’s factual determinations, regardless of whether the ERISA plan contained a discretionary clause.

Sitting en banc, the Fifth Circuit reversed and remanded for further proceedings. When an ERISA plan lawfully delegates discretionary authority to the plan administrator, a court reviewing the denial of a claim is limited to an abuse-of-discretion assessment of the administrator’s decision based on the Supreme Court’s holding in *Firestone Tire & Rubber Co. v. Burch*, 489 U.S. 101, 115 (1989). If the plan does not have a valid delegation clause, a denial of benefits is reviewed using a *de novo* standard. For a quarter century, the Fifth Circuit had interpreted the Supreme Court’s holding as applying only to a denial of
benefits based on an interpretation of plan language, thus leading to a bifurcated standard of review to a denial of ERISA benefits. In *Pierre v. Connecticut General Life Insurance Co.*, 932 F.2d 1552 (5th Cir. 1991), the Fifth Circuit held that courts do not afford any deference to an administrator’s legal interpretation of a plan but review challenges to an administrator’s factual determination that a beneficiary is not eligible for coverage under the same abuse-of-discretion standard that applies when plans delegate discretion. The Fifth Circuit’s interpretation in *Pierre* initially created a split of authority with the Fourth Circuit, which held that *Firestone* set a default *de novo* standard for both legal and factual determinations. Since then, seven other circuits had all sided with the Fourth Circuit, leaving the Fifth Circuit as the only outlier. The Fifth Circuit therefore granted en banc review to reconsider its holding in *Pierre*.

The Court first considered Ariana’s argument that Texas law dictated the standard of review for ERISA cases. Texas recently enacted a law banning insurers’ use of discretionary delegation clauses, but the Court found the statute only rendered such clauses unenforceable. It did not attempt to prescribe the appropriate standard of review for federal courts in ERISA cases. And the Court did not address whether federal law preempted that state law in any event because Humana did not assert as much.

Turning then to *Pierre*, the Fifth Circuit overruled the case and held, like the majority of other circuits, that *Firestone*’s default *de novo* standard of review applied to a denial of benefits based both on legal or factual determinations unless the benefit plan gave the administrator discretionary authority to determine eligibility for benefits or to construe the terms of the plan. The Supreme Court’s use of “denial of benefits” language in *Firestone* did not distinguish denials based on contractual interpretation versus

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*A de novo standard of review applies to a denial of benefits, whether based on legal or factual determinations, unless the benefit plan gives the administrator discretionary authority to determine eligibility for benefits or to construe plan terms.*
factual assessment of eligibility. The Court also recited other circuits’ criticisms of the *Pierre* decision, ultimately finding many of those criticisms valid. The Court noted no evidence that joining the eight other circuits and applying *de novo* review to factual determinations would create an overwhelming burden on district courts. And the Supreme Court had decided additional ERISA cases also suggesting no distinction as to review of factual or legal rulings. The Court noted, however, that it would maintain its precedent largely limiting judicial review to the record before the administrator, noting that its leading case of *Vega v. National Life Insurance Services, Inc.*, 188 F.3d 287 (5th Cir. 1999) (en banc), overruled on other grounds by *Metropolitan Life Insurance Co. v. Glenn*, 554 U.S. 105 (2008), would continue to provide the guiding principles on the scope of the record for cases applying *de novo* review to fact-based benefit denials. The Court therefore reversed and remanded for further proceedings.

Judge Jolly dissented, joined by Judges Jones, Smith, Clement, and Elrod. Judge Owen also joined in the first part of that dissent. Judge Jolly argued that a holistic reading of *Firestone* made clear that the *de novo* standard applied only to legal questions, not to factual issues. *Firestone* instructed that trust law applied to an administrator’s actions and under such law, trustees have measured discretion to make determinations that fulfill the underlying purpose of the trust. Judge Jolly also pointed out that other circuit cases relied on by the majority were outdated by more recent Supreme Court authority suggesting that *Pierre* was correctly decided. And the Court’s quest for uniformity by joining the other circuits was illusory, as different circuits had different standards for reviewing evidence and some states, like Texas, have anti-discretionary-clause statutes.

Judge Owen wrote her own dissenting opinion, noting that the Supreme Court has not decided the appropriate standard of review when an ERISA plan administrator considers conflicting expert opinions and denies coverage. But if the principles of trust law apply, as the Supreme Court said they should, an
abuse-of-discretion standard should apply.

Judge Elrod also wrote a dissenting opinion, joined by Judges Jolly and Clement, relaying her view that the decision to remand to the district court was a waste of judicial resources because there was no genuine issue of material fact and the record established that the plan administrator did not err in declining to cover the additional partial hospitalization. Judge Elrod found no evidence to support the only possible area of disputed fact—whether one of the doctors was qualified to make a decision about the necessity of Ariana’s continued partial hospitalization. Thus, regardless of what standard applied, Judge Elrod would have affirmed the district court’s judgment in Humana’s favor.

FEDERAL LAW


After a fire at the home of Plaintiff Matthew Alexander’s former employer, the employer reported to the police that the fire was arson, deliberately started by Plaintiff. When making the police report, the employer provided Plaintiff’s cellphone number to the detective. The detective then contacted Plaintiff’s cellphone provider, Verizon, for location and call information from Plaintiff’s cellphone. Verizon released this information to the police, but only after the detective completed an Emergency Situation Disclosure Form attesting that the information sought involved arson with victims inside, and potentially involved the danger of death or serious physical injury to a person, thus necessitating the immediate release of information relating to the emergency. The detective signed the form and certified that Verizon could rely on the form to make an emergency disclosure pursuant to the Stored Communications Act (“SCA”).

Based on the cellphone information provided by Verizon to the police, a criminal proceeding was brought against Plaintiff for arson. Plaintiff then brought this civil lawsuit against
Verizon, alleging that Verizon violated the SCA. The district court granted Verizon’s motion to dismiss for failure to state a claim, holding that Verizon was immune from liability and entitled to a “good faith reliance” defense under the SCA.

The Fifth Circuit affirmed. The Court explained that the SCA provides immunity to service providers when disclosing information in accordance with the SCA. In addition, the SCA provides a complete defense for good-faith reliance on a statutory authorization. One such statutory authorization provides that a service provider may disclose a customer’s information to a governmental entity if the provider, in good faith, believes that an emergency involving danger of death or serious physical injury to any person requires disclosure of information relating to the emergency without delay. But the SCA does not define “good faith.”

There is a circuit split as to whether “good faith” should be determined using an objective or subjective test. As an issue of first impression, the Fifth Circuit held that an objective standard applies to good-faith requirements in the SCA. Under this objective standard, the Court found that based on the information provided by the police detective on the Emergency Situation Disclosure Form, Verizon acted reasonably in concluding there was an emergency that required it to act without delay. Hence, the Court concluded, Verizon was protected by the immunity and good faith defenses of the SCA.

*Boerschig v. Trans-Pecos Pipeline, L.L.C.,* 872 F.3d 701 (5th Cir. 2017)

Texas law allows a private natural-gas utility to condemn land for public use through eminent domain. When the Defendant Trans-Pecos Pipeline, a private natural-gas utility, exercised that authority and initiated proceedings to condemn a permanent pipeline easement on Plaintiff John Boerschig’s ranch, he sued the Defendant in federal court seeking to enjoin
the condemnation process. The Plaintiff contended Texas’ eminent domain scheme was an unconstitutional delegation of power to private entities. The district court refused to issue a preliminary injunction, and the Plaintiff appealed. During the pendency of the appeal, the Defendant completed construction of the pipeline on Plaintiff’s land.

As an initial matter, the Fifth Circuit held the appeal was not moot even though the pipeline was completed. Although a request for injunctive relief generally becomes moot when the event sought to be enjoined takes place, there is an exception when the defendant contemplates the act to be enjoined despite having notice of the request for injunctive relief, and the court can restore the status quo. Here, this exception applied because the Defendant began the pipeline construction after the district court denied Plaintiff’s request for a preliminary injunction and the Court could order the Defendant to return the Plaintiff’s land to its pre-condemnation state.

Turning to the merits, the Fifth Circuit affirmed the district court’s denial of the preliminary injunction. The Court explained that the Due Process Clause of the Fourteenth Amendment to the United States Constitution provides a “private nondelegation” doctrine that applies to the states, which prevents states from delegating too much power to private persons and entities. Although the private nondelegation doctrine has not been used since the early decades of the last century, its continuing force is generally accepted. However, here, it was unlikely the doctrine was violated because the eminent domain law at issue imposed a standard to guide the private companies (the condemnation must be necessary for public use) and provided for judicial review. Because the Plaintiff did not establish a likelihood of success, the Court affirmed denial of the preliminary injunction.
In 2005, Apache Corporation entered into a blanket master services contract with Specialty Rental Tools & Supply, L.L.P. (“STS”) The contract included an indemnity provision in favor of Apache and its contractors. In 2011, Apache issued an oral work order directing STS to perform “flow-back” services on a gas well in navigable waters in Louisiana. The order did not require a vessel, and neither party anticipated that a vessel would be necessary to perform the work. After attempting to complete the work, however, the STS crew suggested to Apache that it engage a barge equipped with a crane to lift some heavy equipment needed for the job. Apache agreed and contracted with Larry Doiron, Inc. (“Doiron”) for the crane barge. The Doiron crew arrived at the job site on the crane barge and unloaded the requested equipment. The STS crew then discovered that it needed different equipment, so, using the crane, both crews began removing the equipment previously unloaded. During that process, the crane operator struck and injured an STS crewmember with the equipment. Doiron filed a limitation of liability proceeding, and the injured crewmember filed a claim in that proceeding. Doiron, as Apache’s contractor, then filed a third-party complaint against STS, seeking indemnity under the terms of the master services contract. Doiron and STS cross-moved for summary judgment, and after concluding that maritime law applied rather than Louisiana law, the district court awarded Doiron indemnity. A panel of the Fifth Circuit affirmed.

Sitting en banc, the Fifth Circuit reversed and rendered judgment for STS. In doing so, the Court simplified the test for determining whether a contract for performance of specialty services to facilitate the drilling or production of oil or gas on navigable waters is maritime in nature. Since 1990, the Court had followed a multi-factor test set forth in Davis & Sons, Inc. v. Gulf Oil Corp., 919 F.2d 313 (5th Cir. 1990). But, a number of judges on the Court and other commentators were critical of the factually-intensive approach created by that test. The
Fifth Circuit therefore chose to follow the Supreme Court’s guidance in *Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 14 (2004), where the Supreme Court looked to the “primary objective” of the operative contracts and clarified that contract, rather than tort, principles should be used in determining whether a contract being sued upon is maritime. Based on *Kirby*, the Fifth Circuit adopted a two-pronged test to determine whether a contract in this context is maritime: (1) is the contract one to provide services to facilitate the drilling or production of oil and gas on navigable waters; and (2) if so, does the contract provide or do the parties expect that a vessel will play a substantial role in the completion of the contract? If the answer to both questions is yes, the contract is maritime. The Court further held that where the scope of the contract or the extent of the parties’ expectations regarding vessel usage is unclear, the parties may produce evidence of the work actually performed and the extent of vessel involvement in the job.

Applying this new test, the Fifth Circuit found that the contract was non-maritime. Apache’s work order required STS to perform down-hole work on a gas well accessible only from a platform. The use of the barge crane to lift equipment was an insubstantial part of the job, and the parties did not expect such work to be performed. And because the contract was non-maritime, it was controlled by Louisiana law, which bars indemnity.

**JURISDICTION/PROCEDURE**

*Annamalai v. Comm’r of Internal Revenue*, 884 F.3d 530 (5th Cir. 2018) (per curiam).

After the IRS Commissioner determined that two taxpayers were jointly liable for tax deficiencies, the taxpayers petitioned
the Tax Court for a redetermination. Almost three years later, the Tax Court entered its final decision in the matter on June 23, 2016. Approximately three weeks later, the taxpayers filed separate motions to vacate the June decision. On November 18, the Tax Court denied those motions. The taxpayers then filed a joint second motion to vacate the Tax Court’s decision, raising substantially the same grounds. After the Tax Court denied that motion on December 22, the taxpayers filed their notice of appeal on March 15, 2017.

Considering a jurisdictional issue of first impression, the Fifth Circuit held that where successive postdecision motions are filed to challenge a Tax Court decision, and those motions raise substantially the same grounds, the statutory ninety-day window to appeal the Tax Court’s decision runs from the Tax Court’s ruling on the first motion to vacate or revise. Federal Rule of Appellate Procedure 13 provides a ninety-day window to appeal Tax Court decisions, running from either: (1) the entry of the Tax Court decision; or (2) if a party moves to vacate or revise the decision, from the entry of the ruling on that motion. But the Rule and advisory committee notes do not address whether a party can reset the ninety-day clock by filing subsequent motions to vacate after the Tax Court rules on the first motion. The only on-point case came out of the Tenth Circuit, where that court held that a second motion to vacate on the same grounds did not restart the ninety-day clock. Two other circuits had adopted that reasoning in unpublished decisions. The Fifth Circuit agreed with that approach, also citing its precedent on successive motions for reconsideration under Rule 59. Because the taxpayers’ notice of appeal came 117 days after the Tax Court ruled on the first motion to vacate, the notice of appeal was untimely and the Court dismissed the appeal for lack of jurisdiction. The Court did not address the question of whether an exception should
be carved out for parties who move to vacate a second time on substantially different grounds, noting that in the civil context, the Court had allowed a second Rule 59 motion to interrupt the appeal clock when the motion presented a completely different ground for relief.

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

Charles Trois, a domicile of Texas, owned a collection of guns, artwork, and other items. Michael Barrick, a Kentucky citizen, contacted Trois about selling some of his collectibles through Apple Tree Auction Center, Inc., an Ohio auction center whose president is Samuel Schnaidt, a domicile of Ohio. Trois expressed interest during his initial call with Barrick, so Barrick contacted Trois in Texas by phone at least two more times. Schnaidt was on the line during these subsequent calls and allegedly misrepresented Apple Tree’s marketing tools and auction arrangements. The parties reached a preliminary agreement that Apple Tree would action Trois’s collectibles. Trois then traveled to Ohio, where he and Apple Tree entered into a contract to that effect. When the auction fell short of Trois’s expectations, Trois sued Schnaidt and Apple Tree in Texas state court for breach of contract and fraud. The defendants removed and then moved to dismiss based on lack of personal jurisdiction and improper venue. The district court dismissed the breach-of-contract claim for lack of personal jurisdiction and dismissed the fraud claim for improper venue. Trois appealed.

The Fifth Circuit affirmed the district court’s holdings on personal jurisdiction but reversed on improper venue. First addressing personal jurisdiction, the Court agreed with the district court that there was no specific personal jurisdiction over the contract claim because the auction contract was executed and performed solely in Ohio.

Ohio domiciles were subject to personal jurisdiction in Texas on a fraud claim based on participation in conference calls to Texas that allegedly included misrepresentations.
The conference calls negotiating the agreement, standing alone, were insufficient purposeful availment of the benefits of the forum state to establish jurisdiction over that claim. Turning to the fraud claim, the Court first determined that under Texas law, there was no agency relationship between Barrick and Apple Tree sufficient to support defendants’ minimum contacts with Texas. Barrick had a finder’s-fee arrangement with Apple Tree, but there was no evidence that the defendants controlled Barrick’s solicitations or directed him to solicit in Texas. Turning to the defendants’ contacts, the Court ultimately held that Schnaidt, a willing and active participant on the conference calls with Trois, was more akin to an initiator of a phone call, rather than a recipient of an uninitiated, unsolicited phone call. Thus, the defendants had the requisite minimum contacts with Texas to give the district court specific personal jurisdiction over the fraud claim.

The Fifth Circuit then held that the district court erred in dismissing the fraud claim for improper venue. Trois alleged that Schnaidt made numerous representations and intentionally concealed facts and that a majority of those alleged misrepresentations occurred during Schnaidt’s calls to Texas. Thus, a substantial part of the events giving rise to the fraud claim—the misrepresentations—took place in a business call to Texas. The Texas district court was therefore a proper venue for the fraud claim.

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

Plaintiffs brought a class action suit in state court against the State of Louisiana and private firms that participated in the design and construction of an interstate highway widening project. Defendants removed the case to federal court on three bases: (1) Class Action Fairness Act (“CAFA”) jurisdiction; (2) federal officer jurisdiction; and (3) federal question jurisdiction. The district court remanded, and Defendants appealed.

As an initial matter, the Fifth Circuit held that it had jurisdiction to review the part of the remand order involving CAFA jurisdiction and federal officer jurisdiction, but not
the portion dealing with federal question jurisdiction. The Court explained that generally, remand orders are not reviewable on appeal; but there are exceptions for remand orders that involve CAFA jurisdiction and federal officer jurisdiction. Some other circuits hold that when a remand order involves CAFA jurisdiction, then the appellate court has jurisdiction to review every issue decided in the remand order. As a matter of first impression, the Fifth Circuit disagreed, holding the Court’s jurisdiction to review a CAFA remand order stops at the CAFA portion of the order. Accordingly, the Court held it did not have jurisdiction to review the issue of federal question jurisdiction, despite having jurisdiction to review the issue of CAFA jurisdiction.

Turning to the merits, the Fifth Circuit affirmed the district court’s remand order as to CAFA and federal officer jurisdiction. The Court held the district court correctly declined to exercise CAFA jurisdiction under CAFA’s local controversy exception. And the Court further held federal officer jurisdiction was lacking because there was insufficient evidence that the defendant construction firm acted under a federal officer.


Plaintiff Aubrey Dick and her husband took out a $100,000 loan from Colorado Housing Enterprises, L.L.C. and Community Resources and Housing Development Corporation (“Defendants”). The loan was secured by a deed of trust granting the Defendants a lien on certain of Plaintiff’s real property. The Plaintiff defaulted on the loan in 2015. She then filed bankruptcy three different times, thereby obtaining a stay of separately scheduled foreclosure sales. All three bankruptcy proceedings were dismissed, and the last

When an appellate court has jurisdiction to review a remand order because it concerns Class Action Fairness Act jurisdiction, the Court does not have jurisdiction to review other issues decided in the remand order.
proceeding was dismissed with prejudice for two years. After the Plaintiff was notified of a foreclosure sale in early 2017, she filed suit in Texas state court and obtained an *ex parte* temporary restraining order. The Defendants then removed the case to federal court and gave notice of a new foreclosure sale on April 4, 2017. The district court denied the Plaintiff’s motion for a temporary restraining order and preliminary injunction, and the Plaintiff then filed a notice of interlocutory appeal of that order. The day before the scheduled foreclosure proceedings, Plaintiff filed an emergency motion for stay with the Fifth Circuit. On April 4, the trustee accepted a successful bid for the property at the foreclosure sale and, two hours later, the Fifth Circuit granted the motion to stay foreclosure proceedings.

The Fifth Circuit ultimately determined that the appeal had been rendered moot because the property had been sold. The Fifth Circuit rejected the Plaintiff’s argument that because the Defendants were the successful bidders at the foreclosure sale, the Court could order them to cancel or rescind the sale. Plaintiff relied on an unpublished Fifth Circuit opinion suggesting that the appeal might not be moot, but the Fifth Circuit found that unpublished opinion could not be extended to this situation based on controlling precedent established in *In re Sullivan Cent. Plaza, I, Ltd.*, 914 F.2d 731 (5th Cir. 1990). That case also foreclosed the Plaintiff’s argument that the appeal was not moot because Texas law provides a remedy of setting aside a foreclosure sale.

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

In 2002, over 600 plaintiffs filed suit in Texas state court in the *Lester* case. In 2013, 3 plaintiffs filed suit in Texas state court in the *Bottley* case with similar claims. The *Lester* plaintiffs and *Bottley* plaintiffs were represented by the same
A plaintiff’s motion to consolidate its case with another case can effectuate a “mass action” removable to federal court under the Class Action Fairness Act.
Morgan v. Huntington Ingalls, Inc., 879 F.3d 602 (5th Cir. 2018)

Curtis Morgan brought suit in state court against 78 defendants, including Huntington Ingalls, Inc., former alleged executive officers and insurers of Avondale Shipyards (“Avondale”), and Murphy Oil USA, Inc. (“Murphy Oil”), alleging that his employment at Avondale exposed him to asbestos and caused asbestos-related mesothelioma and other health problems. Morgan’s pleadings did not identify any vessels on which he worked. During Morgan’s deposition, he told Avondale that he worked at Avondale’s main yard and on one vessel. Avondale’s lawyer showed Morgan medical records indicating that he had worked on another vessel, and although Morgan could not recall that work, he stated that if the records indicated that he sustained injuries on a different vessel, then he agreed that he worked on that other vessel. Ten days after the deposition concluded, Avondale received the deposition transcript and, thirty days later, removed the case under the federal officer removal statute, 28 U.S.C. § 1442. Morgan contested removal as untimely and the district court agreed, holding that the removal clock began running on the date of the relevant oral testimony.

The Fifth Circuit vacated and remanded for further proceedings. The Court first found that Murphy Oil had no standing to appeal because it had shown no injury in fact, as a bare procedural violation was not sufficient by itself. Murphy Oil’s asserted interest in a federal forum was not enough, as Murphy Oil had no right to be in federal court; only Avondale could invoke the federal officer removal statute.

Turning to the timeliness of the removal, the Fifth Circuit held that Avondale timely removed after receipt of the deposition transcript. Section 1446(b)(3), procedure for removal of civil actions, provides that if a case is not removal under an initial pleading,
a defendant may remove within thirty days of receipt of an amended pleading, motion, order, or other paper from which it may be ascertained that the case is removable. Analyzing the plain meanings of the terms in the statute, the Court held that oral testimony at a deposition does not constitute “other paper” as contemplated by § 1446(b). Rather, the information giving notice of removal must be contained in a writing of some kind. That this is true was confirmed by the ejusdem generis canon of statutory construction, which provides that items in a list should be read similarly. Here, “other paper” should be read in conformity with the terms “pleading,” “motion,” and “order,” all of which are written documents. Such a bright-line rule would create a fairer environment for plaintiffs and defendants, encouraging prompt, proper removals while discouraging hasty, improper removals. In reaching that holding, the Fifth Circuit parted ways with the Tenth Circuit, which held that the removal period commences with the giving of the deposition testimony.

**Texas Law**

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

Texas municipalities impose hotel occupancy taxes for the use of hotel rooms. Online travel companies act as third-party intermediaries between hotels and hotel consumers by facilitating reservations. These travel companies and the hotels enter into contracts whereby the hotels charge a confidential, discounted room rate. The travel companies then charge the consumers an amount that includes the discounted room rate, a service fee, and a tax-recovery charge. The travel companies retain the service fees and forward the remainder to the hotels, which remit the taxes to the taxing authorities.

In this class action, 173 Texas municipalities sued travel companies for unpaid hotel occupancy taxes, contending that the travel companies were required to collect and remit hotel
occupancy taxes based on the discounted room rates and the service fees, as opposed to only the discounted room rates. The district court held that both the discounted room rates and service fees were subject to the hotel occupancy tax.

The Fifth Circuit reversed, making an *Erie* guess that the Texas Supreme Court would hold only the discounted room rates paid by travel companies to hotels are subject to the hotel occupancy tax—not the service fees travel companies charge to consumers—under the municipalities’ tax ordinances. Accordingly, the Fifth Circuit held that the travel companies were not liable for unpaid taxes on their service fees.

* Clyce v. Butler, 876 F.3d 145 (5th Cir. 2017) (per curiam)

When he was thirteen years old, Chance Clyce suffered serious injuries while detained at Hunt County Juvenile Detention Center. Clyce’s parents filed suit both individually and as his next friends against multiple defendants under 42 U.S.C. § 1983 and the Texas Tort Claims Act. The district court dismissed claims against two defendants and granted summary judgment in favor of the remaining defendants. The Fifth Circuit affirmed. At nineteen years old, Clyce then filed claims against multiple defendants and the Texas Juvenile Justice Department. Only one of the defendants in this new lawsuit was named in the prior lawsuit, and although some of the claims were the same as those asserted by his parents, Clyce asserted new claims as well. Defendants filed a motion to dismiss based on the statute of limitations and res judicata. The district court ultimately dismissed all of the claims as untimely, and Clyce appealed that dismissal as it related to three individual defendants.

The Fifth Circuit reversed. Civil rights claims under § 1983 are governed by the forum state’s statute of limitations for tort claims, which is two years in Texas. But this period is tolled for a
person under the age of eighteen, thereby allowing someone to file suit for personal injuries suffered as a minor before reaching the age of twenty. The Fifth Circuit rejected the district court’s judge-made exception to tolling where a next friend, represented by counsel, aggressively prosecutes a minor’s claims on his or her behalf. Neither the Texas code nor case law supported the premise that a next-friend lawsuit might impact or waive the tolling provision. The Court emphasized, however, that its conclusion did not permit Clyce to re-litigate the merits of any already decided claims.

Tolling a statute of limitations for minority is not impacted by a next-friend lawsuit.