Practice and Procedure

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McGovern v. American Airlines, Inc.\textsuperscript{1} emphasizes the very simple oft-neglected proposition that the plaintiff must allege jurisdiction and that where jurisdiction depends on diversity of citizenship, citizenship must be distinctly and affirmatively alleged. Senator George McGovern filed a complaint in the Southern District of Texas against American Airlines and a number of other corporate defendants for civil recovery of allegedly illegal campaign contributions to former President Nixon. The jurisdictional allegation read:

1. Plaintiff is a citizen of South Dakota. Defendants are corporations incorporated and having their principal places of business in states other than South Dakota. The matter in controversy exclusive of interest and costs is for a sum of excess of TEN THOUSAND DOLLARS ($10,000.00).\textsuperscript{3}

One of the defendants, Gulf Oil Corp., moved to dismiss, and dismissal was granted, without prejudice, on the ground that McGovern had failed to allege a jurisdictional basis and venue. Rather than refile and replead, as he was invited to do by the court, McGovern stood on his complaint and moved to vacate the dismissal. The district court, quite predictably, once again found the jurisdictional and venue allegation inadequate and again dismissed. The Fifth Circuit not only affirmed the district court's dismissal but also rejected McGovern's plea to amend. McGovern's refusal to cure the jurisdictional defect when on notice of the defect and his continued insistence on the "clearly defective allegation of diversity jurisdiction" convinced the court to decline to allow amendment.\textsuperscript{3}

\textit{Ed and Fred, Inc. v. Puritan Marine Insurance Underwriters Corp.}\textsuperscript{4} presented an interesting diversity party lineup. The plaintiff was an alien, incorporated under the laws of the Netherlands. There were two defendants, one incorporated under the laws of the Cayman Islands and the other incorporated under the laws of Massachusetts. Thus, an alien from

\textsuperscript{*} This article, with limited exceptions, does not discuss procedural aspects of cases decided in substantive law areas covered elsewhere in this survey edition.

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1. 511 F.2d 653 (5th Cir. 1975).
2. \textit{Id.} at 654.
3. \textit{Id.}
4. 506 F.2d 757 (5th Cir. 1975).
one country was suing a Massachusetts citizen and an alien from another country. The Fifth Circuit concluded that complete diversity was lacking. The Court's approach, which could be viewed as somewhat parochial, was that all aliens are just aliens and should be treated as one class of residents for purposes of determining whether there is complete diversity.

A number of 1975 Fifth Circuit decisions involved construction of state long-arm statutes. In tort cases, the court generally adopted expansive interpretations.

In *Sells v. International Harvester Co., Inc.*, a manufacturer who provided fan blades for use by International Harvester was sued along with International Harvester in the Southern District of Alabama for damages arising when one of its fan blades broke off from the engine of a truck being driven by the plaintiff, penetrated the floorboard, and cut the plaintiff's foot. The fan blade manufacturer was dismissed by the district court for lack of jurisdiction. The Fifth Circuit, observing that the Alabama long-arm statute extended to the limits of federal due process, found no violation of due process in requiring a manufacturer to defend products liability suits in states where accidents occurred if the manufacturer sold its products there for inclusion in the products of a national distributor and knew they ultimately would be used everywhere. The Fifth Circuit thus seemed to rest jurisdiction under the Alabama long-arm statute, at least as to tort cases, on an expansive "stream of commerce" theory.

Two similar cases dealt with the scope of state long-arm statutes in libel contexts. In *Edwards v. Associated Press*, the court construed the Mississippi long-arm statute, which permits long-arm service upon anyone "who shall commit a tort in whole or in part in this state against a resident of this state." In *Rebozo v. Washington Post Co.*, the court construed the Florida long-arm statute, which permits service upon anyone who "commits a tortious act within this state." In both cases, the defendants claimed first that there had been no tort committed within the state whose jurisdiction was sought to be invoked, and second that the first amendment gave jurisdictional insulation to newspapers and wire services beyond that available to other types of defendants. In both cases, the Fifth Circuit said the long-arm statutes should be construed as broadly as possible without offending traditional notions of fair play and substantial justice. In each case, the court found that the publication of allegedly libelous material within the forum state was the commission of a tort within that state for purposes of its long-arm statute. In each case, the court rejected the claim that the first amendment provided insulation for newspapers and wire services.

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5. 513 F.2d 762 (5th Cir. 1975).
6. 512 F.2d 258 (5th Cir. 1975).
8. 515 F.2d 1208 (5th Cir. 1975).
Two 1975 cases adopted restrictive interpretations of state long-arm statutes in construing "doing business" sections of the Texas and Georgia statutes. In *Arthur, Ross & Peters v. Housing, Inc.*, the plaintiff based its claim of Texas jurisdiction on negotiations carried on by mail between Texas and North Carolina, on the mailing of the contract to the plaintiff's Texas place of business for signing, and on the allegation that a portion of the contract was performed in Texas when the initial payment was mailed from Texas to North Carolina. The court specifically noted that the defendant's contact with Texas was exclusively through the mails. The court denied that this was sufficient to invoke the Texas long-arm statute. The court held that the quality, nature, and extent of the defendant's Texas contacts were not sufficient, taken individually or together, to satisfy the requirement that the defendant purposefully invoke the benefits or protection of the law of Texas, especially where the defendant had never sent any agent into nor caused any goods to be delivered into the state. *Pennington v. Toyomenka, Inc.* was similar to *Arthur, Ross & Peters*, except that the defendant had sent agents into Georgia. The court, however, noted that at the time the defendant sent its agents into Georgia the business in question had already been consummated.

*Mack Trucks, Inc. v. Arrow Aluminum Castings Co.* dealt with the question of whether "cause of action" in the Georgia long-arm statute would embrace all legal theories of relief growing out of the event that generated jurisdiction or whether it would be limited to those legal theories that directly arose from the event that generated jurisdiction. The court held that the jurisdiction, once conferred by a long-arm statute, embraced all theories of relief related to the jurisdiction-generating event and could include both tort and contract theories. This embracing of a possible contract theory could occur even where the defendant had not "transacted business" in the forum state sufficient to invoke the lone-arm statute as an independent matter.

## II. Federal Question Jurisdiction

The Fifth Circuit in 1975 defined the expanse of federal subject matter jurisdiction in a number of civil rights cases. In *Adkins v. Duval County School Board*, the court held that school boards were not "persons" under 42 U.S.C.A. §1983 so as to be subject to the jurisdiction of the federal court.
courts under 28 U.S.C.A. §1343. This decision was previewed by the Supreme Court’s decision in Monroe v. Pape, which had held that a municipality is not a “person” within section 1983, and Moor v. County of Alameda, which had held that a county was not a “person” within section 1983. The Fifth Circuit found no controlling distinction between a school board and a municipality or county. The court, therefore, held school boards not to be “persons” and affirmed the district court’s dismissal of the action for lack of jurisdiction under 28 U.S.C.A. §1343(3), the only claimed jurisdictional basis.

In Parish v. National Collegiate Athletic Association, the Fifth Circuit followed the lead of a number of other courts and held that the actions of the National Collegiate Athletic Association were “under color of state law” within the meaning of 42 U.S.C.A. §1983 so as to confer jurisdiction on district courts under 28 U.S.C.A. §1343(3). The court noted that only one court had ruled to the contrary and declined to follow that court’s analysis. The Fifth Circuit found that state-supported educational institutions and their members and officers played a substantial role in the NCAA’s program, and that state participation in or support of nominally private activity was a well recognized basis for a finding of state action.

Roane v. Callisburg Independent School District involved a determination of the expance of “property” interests protected by 42 U.S.C.A. §§1981 and 1983 so as to confer jurisdiction on the federal courts under 28 U.S.C.A. §1331. Roane, a school superintendent, was discharged by the Callisburg school board without a hearing, allegedly in violation of the fourteenth amendment. The Fifth Circuit noted the recent expansion of the number of property interests which had been held to be subject to the

   Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

28 U.S.C.A. §1343 (Rev. 1962) in subdivision (3) provides for jurisdiction in federal courts:

   To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

19. 506 F.2d 1028 (5th Cir. 1975).
22. In support of this conclusion the court cited Burton v. Wilmington Parking Auth., 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961), and Smith v. Young Men’s Christian Ass’n, 462 F.2d 634 (5th Cir. 1972).
23. 511 F.2d 633 (5th Cir. 1975).
fourteenth amendment’s procedural protections. Although the court noted that “the range of interests protected by procedural due process is not infinite,” it found that Roane had the equivalent of tenure in his administrative post under the “common law” of the Callisburg Independent School District and held that he did have a “property” interest protected by 42 U.S.C.A. §§1981 and 1983 so as to invoke jurisdiction under 28 U.S.C.A. §1331.

Greco v. Orange Memorial Hospital Corp. involved the breadth of the interpretation to be given to the phrase “state action” under section 1983. A physician sued the Orange Memorial Hospital Corp. and contended that the refusal of the hospital to permit its facilities to be used for the performance of non-therapeutic abortions was unconstitutional and deprived the physician of rights protected by section 1983. The district court dismissed the complaint, finding no “state action” to confer subject matter jurisdiction. The Fifth Circuit affirmed. The court noted that the doctrine of “state action” developed primarily in the area of racial discrimination. Absent a charge of racial discrimination, the court was “disinclined to press the state action doctrine and all that it entails into the internal affairs of a hospital.” The court refused to apply state action concepts designed to ferret out racially discriminatory policies to areas unaffected by racial discrimination, noting the “potentially explosive impact” such might have.

Somewhat similar analysis was applied in Mississippi v. McCollum, a case involving an interpretation of the removal provisions of 28 U.S.C.A. §1443. McCollum, a defendant in a Mississippi court charged with armed robbery, based his removal petition on the claim that he was being denied his right to a speedy trial in the state court. The Fifth Circuit, affirming the district court’s remand of the case to the state court, held that the

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26. 513 F.2d 873 (5th Cir. 1975).
27. Id. at 882.
28. Id. at 879.
29. 513 F.2d 285 (5th Cir. 1975).
30. 28 U.S.C.A. §1443 (Rev. 1973) provides for removal jurisdiction in civil and criminal actions brought in state courts

(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of the citizens of the United States, or of all persons within the jurisdiction thereof;

(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law.
removal statute applied only to cases involving denials of civil rights for racial reasons and not to deprivations of the right to a speedy trial. The court noted that McCollum was white, that he alleged no racial motive in connection with his inability to obtain a speedy trial, and that the right to a speedy trial was not a specific civil right couched in terms of equality but was rather a broad constitutional guarantee of general application. The court concluded that such a broad constitutional guarantee, as opposed to a specific civil right, could not serve as the basis for removal under 28 U.S.C.A. §1443.

The jurisdiction of the federal courts to review administrative action was the subject of several 1975 cases. In Ortego v. Weinberger, the court considered whether federal courts had jurisdiction to review, for abuse of discretion, the refusal of the Secretary of Health, Education and Welfare to reopen prior applications for disability benefits under the Social Security Act. This question had been presented to five other circuit courts. Only the Ninth Circuit had held that the Secretary’s decision was a matter of unfettered discretion and therefore was unreviewable. The other four circuits had held that the federal courts had jurisdiction to review the Secretary’s decision for abuse of discretion. The Fifth Circuit pointed to sections 10(a), 10(c) and 10(e) of the Administrative Procedure Act and found that the Act presented a clear right to judicial review without a correspondingly clear jurisdictional basis for review. The Fifth Circuit, nevertheless, sided with the majority of those courts ruling on the question and permitted review under section 10 of the Administrative Procedure Act.

A similar situation was presented in Winningham v. United States Department of Housing and Urban Development, which involved a challenge by a resident of a subsidized housing project, of the constitutionality of section 101 of the Housing and Urban Development Act of 1965, which authorizes rent supplements for tenants moving to a subsidized housing project from substandard housing but not for tenants who had not previously lived in substandard housing. The plaintiff alleged subject matter
The Fifth Circuit observed that subject matter jurisdiction existed only if the Housing and Urban Development Act of 1965 was an act regulating commerce. After reviewing the legislative history of the Act, the court concluded that the commerce clause was a significant source of the congressional power underlying the rent supplement program and that section 101 of the Act regulates commerce for purposes of conferring subject matter jurisdiction under 28 U.S.C.A. §1337.

In *Dickson v. Ford*, the Fifth Circuit affirmed a dismissal of an action on the ground that it stated a non-justiciable political question. The plaintiff had challenged the constitutionality of the Emergency Security Assistance Act of 1973 on the ground that it provided foreign assistance to the state of Israel, which "was created by and is an instrument of the larger entity known as the 'Jewish People'" and was thus prohibited by the establishment clause of the first amendment. The court held the question to be non-justiciable because it related to the power of the President and the Congress to conduct foreign affairs.

*Southern Electric Steel Co. v. First National Bank of Birmingham* held 12 U.S.C.A. §94, providing for venue of suits against national banks, to be a venue statute and nothing more. The court said it does not confer jurisdiction on federal courts to hear all matters involving national banks. Since the case did not involve diversity of citizenship and all legal questions were purely ones of state law, the court directed that the action be dismissed.

### III. Ancillary and Pendent Jurisdiction

*Nishimatsu Construction Co. v. Houston National Bank* was a claim brought by Nishimatsu against the bank to recover under a letter of credit. The bank denied its liability on the letter of credit and filed a third-party complaint against Southeast Construction Co. (Secon) and its agent Baize, alleging that they were obligated to reimburse the bank for any sums which it had to pay Nishimatsu under the letter of credit by a reimbursement agreement they executed in connection with the application for the letter of credit. The bank also alleged that Secon and Baize were liable to it on a demand note. Baize contended that the district court lacked subject matter jurisdiction over both claims asserted against him in the bank's

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37. This section grants district courts original jurisdiction over "any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

38. 521 F.2d 234 (5th Cir. 1975).


40. *Id.* at 235.

41. 515 F.2d 1216 (5th Cir. 1975).

42. 515 F.2d 1200 (5th Cir. 1975).
third-party complaint. With regard to the claim on the reimbursement agreement, the Fifth Circuit held that the claim was clearly within the ancillary jurisdiction of the district court. The court held the note claim not to be within the court's ancillary jurisdiction. The court reiterated that a claim, to be within the ancillary jurisdiction of a federal court, had to bear a logical relationship "to the aggregate core of operative facts which constitutes the main claim over which the court has an independent basis of federal jurisdiction." The court held that the bank's note claim lacked the requisite logical relationship to either the letter of credit claim against the bank or to the bank's third-party claim based on the reimbursement agreement. The court held the judgment based on the note void for want of subject matter jurisdiction.

*Florida East Coast Railway v. United States* presented an interesting pendente jurisdiction problem. Under the Flood Control Act of 1948, the U.S. Army Corps of Engineers undertook to implement the Central and Southern Florida Flood Control Project. Two levees of the project paralleled one of the railroad's branch lines known as the K-line. The Flood Control District acquired the land and the right of way for construction of the project and worked with the Corps of Engineers in construction. In 1968, the Corps of Engineers awarded the principal construction contract to Troop Brothers, Inc., which worked under the supervision of the Corps of Engineers and was responsible for completion in accordance with the plans and specifications drawn by the Corps. Troop Brothers in turn hired Cross Contracting Co. to perform the excavation work and to install some of the flood control project structures. In October, 1969, an extraordinarily heavy rainfall caused a washout on the K-line. After this washout, the Flood Control District and the Corps of Engineers both recognized the deficiencies in the design of the flood control system, but neither warned the railroad nor took any steps to correct the defects. In March, 1970, a second washout occurred during another heavy rainfall and caused the derailment of a Florida East Coast train. The railroad sued the United States and Cross claiming approximately $438,000 damages as a result of the two washouts. Cross filed a third-party complaint against the Flood Control District, and the United States filed a third-party complaint against Troop Brothers. Shortly thereafter, the railroad amended its complaint to assert claims directly against Troop Brothers and the Flood Control District. Troop Brothers unsuccessfully moved for a dismissal of the railroad's claims against it, contending that the district court had no jurisdiction over those claims because there was no diversity between Troop Brothers and the railroad. After a trial before the district court sitting

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43. *Id.* at 1205, quoting from *Revere Copper & Brass, Inc. v. Aetna Cas. & Sur. Co.*, 426 F.2d 709, 714 (5th Cir. 1970).
44. 519 F.2d 1184 (5th Cir. 1975).
without a jury, judgment was entered in favor of the United States on the ground that it was immune from liability for flood damages in connection with flood control projects. Cross and Troop Brothers were held liable on theories of negligent construction and negligent supervision. The Flood Control District was also found liable on a variety of theories.

On appeal, the Fifth Circuit found that there was no diversity between the railroad and Troop Brothers and that, therefore, the only viable basis for asserting the claim in a federal court was pendent jurisdiction. There were two difficulties with pendent jurisdiction: (1) the federal claim had been disposed of on the immunity issue and (2) the federal and the state claims were not asserted against the same party, since federal claims were asserted against the Government and the state claims were asserted against Troop Brothers, a third-party defendant. Nevertheless, the Fifth Circuit found that there was pendent jurisdiction and affirmed the district court. The court adopted the test of United Mine Workers v. Gibbs, requiring that the primary claim present a substantial federal question and that the pendent claim "derive from a common nucleus of operative fact." The Fifth Circuit found that the primary federal claim was substantial—not "so attenuated and unsubstantial as to be absolutely devoid of merit," "obviously frivolous," or "no longer open to discussion"—and that, therefore, the district court was not deprived of jurisdiction over the pendent claim just because it eventually concluded that the railroad could not recover from the United States. The court stated that the jurisdiction of the district court to hear the pendent claim is dependent upon the substantiality of the claim stated in the complaint, not upon the plaintiff's ultimately obtaining a judgment. The court also found that the pendent claim derived from the same set of operative facts as the main claim. Finally, the court held that the doctrine of pendent jurisdiction may be invoked to join a new party even though the only cause of action involving the new party is a state claim.

IV. Statutes Of Limitations

Carr v. Veterans Administration is another warning to persons who litigate with the Government that they can expect strict construction of all statutory language limiting rights of actions against the Government. The plaintiff's claim was held barred by 28 U.S.C.A. §2401(b)2 and Rule 15(c) of the Federal Rules of Civil Procedure because the U.S. Marshall

47. 519 F.2d at 1194, quoting from Hagans v. Lavine, 415 U.S. 528, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974).
48. 522 F.2d 1355 (5th Cir. 1975).
49. The statute sets out the basic statute of limitations for tort claims against the United States. The rule provides for relation back of amendments to the date of the original pleadings.
delayed eight days in serving the complaint; an amendment adding the
United States as a party was not timely since the Government had not
received notice within the six-month statutory period. The court rejected
the plaintiff's argument that delivery of process to the U.S. Marshall for
service was constructive notice to the United States, stating that such a
contention would mean the United States had instant notice of every com-
plaint once it was given to a federal marshall for service.

Two cases, *Equal Employment Opportunity Commission v. Griffin
Wheel Co.*50 and *Reeb v. Economic Opportunity Atlanta, Inc.*,51 involved
statute of limitations problems in the context of the equal Employment
§2000e-5(d), requiring that a person seeking relief from employment dis-
crimination file a charge with the Commission within ninety days after the
alleged unlawful employment practice occurred.52 The Fifth Circuit had to
consider whether the ninety-day provision barred a suit by a plaintiff who
had not learned or could not reasonably have learned of facts that would
support a charge of an unlawful employment practice until the specified
time period had already passed. The court determined that the time limi-
tations contained in the statute were not inflexible jurisdictional absolutes
and that they should be modified in appropriate cases in the interest of
giving effect to the broad remedial purposes of the Act. The court noted
that if there were concealment of facts, the party responsible for the con-
cealment would be estopped from asserting the statute of limitations as a
defense. The case was remanded to the district court for findings as to
when the plaintiff should have discovered the discrimination and whether
there was any concealment by the defendant.

posed the issue of the applicable period of limitations for an action brought
by the Commission under §706 of Title VII.53 The court referred to its
earlier opinion in *United States v. Georgia Power Co.*,54 which held that
where the Government is suing to collect sums due to individual citizens,
rather than to the Treasury, it was a private and not a public action, so
the general proscription against the application of state statutes of limita-
tion to the United States was not applicable. The court adopted the rea-
soning of *Beard v. Stevens*55 that where Congress has created federal rights
without prescribing a limitation period for enforcing them, the federal
courts should borrow the most closely analogous state statute of limitations

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50. 511 F.2d 456 (5th Cir. 1975).
51. 516 F.2d 924 (5th Cir. 1975).
52. The section has been redesignated as 42 U.S.C.A. §2000e-5(e) (Rev. 1974), and the
90-day time limit has been expanded to 180 days.
53. 42 U.S.C.A. §2000e-5 (Rev. 1974). This is the general enforcement provision empower-
ing the EEOC to prevent unlawful employment practices.
54. 474 F.2d 906 (5th Cir. 1973).
55. 372 F.2d 685 (5th Cir. 1967).
prescribed by the forum state. Thus, the court held an Alabama one-year statute to be applicable on the back-pay question, although it remanded the case to determine exactly when the statute commenced to run. Insofar as the Commission was seeking to enjoin practices contrary to the public policy of the United States — as opposed to bringing back-pay claims for individuals — the federal government or its agencies were suing to enforce rights belonging to the sovereign; therefore, state statutes of limitation were not applicable, the court decided.

*Poster Exchange, Inc. v. National Screen Service Corp.*\(^5\) dealt with the question of when the statute of limitations commences running in an unlawful antitrust conspiracy under sections 1 and 2 of the Sherman Act.\(^5\) The district court had held that the plaintiff’s claim was barred by the four-year statute of limitations found in 15 U.S.C.A. §15b on the theory that the plaintiff’s claim arose essentially from the defendant’s refusal in 1961 to continue dealing with the plaintiff. On appeal, the Fifth Circuit said the question was

> whether the alleged continuing conspiracy and monopoly . . . is to be treated for statute of limitations purposes as a single act . . . occurring with the original refusal to deal on May 16, 1961 . . . or whether it may be viewed as a continuing series of acts upon which successive causes of action may accrue.\(^6\)

The Fifth Circuit held the latter view to be correct and held that continuing antitrust conduct resulting in a continued invasion of a plaintiff’s rights may give rise to continually accruing rights of action. The court noted, nevertheless, that a newly accruing claim for damages must be based on some injurious act actually occurring during the limitations period and not merely on some consequence of a pre-limitations action. The court remanded the case to the district court for a determination of whether some specific injurious act actually occurred during the four-year limitation period.

V. Standing

*Korioth v. Briscoe*\(^9\) was a suit brought by a member of the Texas legislature as a United States citizen from Texas, a taxpayer, and a state legislator alleging that the establishment of regional planning agencies under Texas law violated both the federal and the Texas constitutions. The substance of Korioth’s challenge was never reached; the district court dismissed the action for lack of standing. The *Korioth* case provided the Fifth Circuit an opportunity to apply recent Supreme Court decisions in the

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56. 517 F.2d 117 (5th Cir. 1975).
58. 517 F.2d at 125.
59. 523 F.2d 1271 (5th Cir. 1975).
standing area. The Fifth Circuit analyzed Korioth's possible standing from each of the three perspectives claimed: citizen, taxpayer, and legislator. In analyzing whether citizen Korioth had standing, the court noted that the test was whether he had alleged any injury which distinguished him from the undifferentiated mass of the public; the specific, distinct injury might be small, the court observed, but some such injury had to be alleged in order for a litigant to have standing. The Fifth Circuit found that the thin ice which might have supported generalized citizen standing to pursue "public actions" seemed to have melted under Schlesinger v. Reservists Committee to Stop the War. The court said the major theme in the cases rejecting generalized citizen standing was that if all citizens are affected in an undifferentiated way by some alleged governmental illegality, recourse should be through the political process and that the political process was constitutionally preferred as a method for resolving such disputes. The court concluded that citizen Korioth had suffered no such distinct injury and did not have standing.

Korioth claimed taxpayer standing on the basis of Flast v. Cohen. The Flast tests for taxpayer standing are: (1) some logical link between the taxpayer status and the legislation being attacked and (2) a nexus between the taxpayer status and the precise nature of the constitutional infringement alleged, or, in other words, that the challenged enactment exceed specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power. The Fifth Circuit found Korioth challenging an incidental expenditure of tax funds in the administration of an essentially regulatory statute. Therefore, he was unable to show that the challenged enactment exceeded specific constitutional limitations imposed upon the taxing and spending power. The court noted:

We need not here decide what remains of the fading Flast doctrine, since Korioth would not have standing under the Flast test even if it were broadly construed.

Lastly, the court examined the standing of Korioth as a legislator. The court noted that those cases which had implied that a legislator had some special standing had been based on allegations that the challenged action undermined the effectiveness of the exercise of a specific power of the individual legislator. The court found that these cases did not indicate that a legislator, simply by virtue of that status, had some special right to invoke judicial consideration of the validity of a statute. Korioth v. Briscoe

62. 523 F.2d at 1277.
reflects the retreat, signalled by the recent pronouncements of the Supreme Court, from the advanced standing positions of the late 1960's and early 1970's permitting the bringing of "public actions."

*United States v. United States District Court* involved a petition by the United States for either (1) a writ of prohibition ordering the District Court for the Southern District of Texas to dissolve a preliminary injunction in a pending case and to dismiss the case or (2) a writ of mandamus directing the court to transfer the case to the District Court for the Eastern District of Texas. The standing problem was that the United States was not a party to the pending case. The Fifth Circuit denied the extraordinary relief requested by the United States and stated that it knew of no authority which would allow a non-party standing to seek a writ of mandamus or prohibition in the circumstances presented in the case. The court also said that, even if standing had existed, the United States had not shown any clear and indisputable right to any extraordinary writ.

In *Golden v. Biscayne Bay Yacht Club*, black and Jewish applicants for membership in the Biscayne Bay Yacht Club brought an action challenging the allegedly discriminatory admissions policies of the club. The defendant contended that the plaintiffs did not possess sufficient standing to assail the membership policies of the club. The Fifth Circuit made short shrift of this contention. It said that the indispensable requirement of standing was that the party have some personal stake in the outcome of the controversy; since the existing membership policies of the club being attacked had been the basis of the club’s refusal to accept the plaintiffs’ applications, the requisite standing was present.

VI. Three-Judge Courts

During the past year, the Fifth Circuit continued to express its dissatisfaction with the necessity for convening three-judge courts under 28 U.S.C.A. §2281.66

The court went beyond a mere expression of dissatisfaction, however, and construed the statute narrowly so as to further limit its use. Accordingly, the court held that a three-judge court is not required where an action is brought against local officials enforcing a local ordinance.67 This is true even though the state enabling statute, pursuant to which the local ordinance was enacted, is also being challenged.

A three-judge court need not be convened where an administrative "practice," as opposed to a rule or regulation, is being challenged, either.68

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64. 506 F.2d 383 (5th Cir. 1974).
65. 521 F.2d 344 (5th Cir. 1975).
66. See Driskell v. Edwards, 518 F.2d 890 (5th Cir. 1975).
67. Tramel v. Schrader, 505 F.2d 1310 (5th Cir. 1975). See also United States v. Texas, 508 F.2d 98 (5th Cir. 1975).
In *Hoffman v. United States Department of Housing and Urban Development,* the Fifth Circuit held that a three-judge bench is not required in an action challenging the constitutionality of a state power-of-sale, mortgage-foreclosure statute. In so holding, the court noted that the Texas statute regulates rights between private parties and, being self-effectuating, does not require enforcement by state officials.

In an effort to minimize further the burden imposed on the federal judiciary by the requirement of three-judge courts, the court held that once a statute has been declared invalid by the three-judge panel, all remaining issues should be remanded to a single judge. Accordingly, the ancillary question of attorney’s fees should be ruled upon by a single judge.

In *Weiser v. White,* a case of first impression in the Fifth Circuit, the court held that an appeal from the denial of intervention by a three-judge court must be to the Supreme Court. The Court bottomed its decision on the orderly process of judicial administration and noted that the Eighth Circuit had reached the same result.

VII. CLASS ACTIONS

In *LaChapelle v. Owens-Illinois, Inc.,* the court held that under the Age Discrimination in Employment Act of 1967 only “opt-in” kinds of class actions may be utilized in age discrimination cases. Accordingly, such actions cannot be maintained as class actions under Rule 23 of the Federal Rules of Civil Procedure. Under the opt-in kind of class action, no person can become a class action plaintiff unless such person affirmatively opts into the class by filing a written consent.

In *Pearson v. Ecological Science Corp.,* the court was confronted with an attack on certain district court orders enforcing a stipulation of settlement. Upholding the settlement orders, the Fifth Circuit held that the notice requirements of Rule 23(e) of the Federal Rules of Civil Procedure do not apply where the court has ruled that the action cannot be properly maintained as a class action and the settlement does not directly, adversely affect the rights of persons not before the court.

Finally, in *Jones v. Diamond,* the court assists the practitioner by reviewing many of the established legal principles applicable in class actions.

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69. 519 F.2d 1160 (5th Cir. 1975).
70. Bond v. White, 508 F.2d 1397 (5th Cir. 1975).
71. 505 F.2d 912 (5th Cir. 1975).
73. 513 F.2d 286 (5th Cir. 1975).
75. 522 F.2d 171 (5th Cir. 1975).
76. 519 F.2d 1090 (5th Cir. 1975).
VIII. STAYS, ABSTENTION, TRANSFER, AND CERTIFICATION

In Southwest Industrial Import and Export, Inc. v. Wilmod Co., the Fifth Circuit reviewed a denial of an application for a stay pending arbitration. The contracts giving rise to the suit had unlimited, unconditional, and concededly valid arbitration clauses providing that all disputes relating to or arising out of the contracts should be submitted to arbitration. The district court found that certain self-help measures of the seller and settlement negotiations which had been conducted between the seller and the buyer constituted a waiver by the seller of his right to arbitration. The Fifth Circuit reversed, holding that courts should endeavor to give full effect to arbitration agreements, not only to effectuate the intent of the parties but also to ease congestion of court dockets. The case would appear to be a message to district courts not to reach to find waiver of a party's contractual right to arbitrate, but rather, wherever possible, to stay proceedings to promote arbitration of disputes.

In Carr v. Grace, the court faced the question of whether a federal district court having concurrent jurisdiction to hear a case that had also been filed in a state court should dismiss rather than stay its proceeding pending state resolution of the suit. The district court had entered a dismissal without prejudice. The court admitted that in some fact settings a dismissal without prejudice arguably approximated a stay. However, in Carr, the statute of limitations had run on the federal claim, so, although the dismissal was “without prejudice,” the case could not be brought again. The court held that a federal court may not abdicate its authority simply because a similar action is pending in a state court.

The Fifth Circuit discussed the abstention doctrine in a number of cases. In Neal v. Brim, a Texas state district attorney brought a proceeding under 42 U.S.C.A. §1983 claiming that he was being deprived of due process by a state district judge who had convened a court of inquiry to determine whether the district attorney had acted unlawfully in the conduct of his office. The district attorney and the judge had frequently disagreed about the administration of justice in the district. In the court of inquiry proceeding the district attorney had moved to have the district judge excuse himself because of his personal bias toward the district attorney. The judge had denied the motion. The Fifth Circuit held that the district attorney's §1983 claim was not one wholly insubstantial or frivo-

77. 524 F.2d 468 (5th Cir. 1975).
78. Although the Southwest Industrial case was a per curiam opinion, it may be important in demonstrating the significant interest of the court in making its message clear to district courts, since orders denying stays are generally not appealable. See Anderson v. United States, 520 F.2d 1027 (5th Cir. 1975). The appealability issue is not discussed in Southwest Industrial.
79. 516 F.2d 502 (5th Cir. 1975).
80. 506 F.2d 6 (5th Cir. 1975).
lous and that, therefore, the federal court had jurisdiction in the case. The
court abstained, however, from ruling on the merits of the district attor-
yey’s claim on the ground that the Supreme Court of Texas has statutory
authority to issue extraordinary writs against any district judge who should
be disqualified. The Fifth Circuit noted the interest of Texas in maintain-
ing the fairness and integrity of its own judicial processes and held that
the Texas courts ought to have the first opportunity to resolve the issues
presented by the district attorney’s petition. The court suggested that the
district attorney proceed in the Texas courts without prejudice to his right
to reassert his federal claims to relief should he be denied effective relief
by the Texas courts.

In *Johns-Manville Products Corp. v. Doyal*, the Fifth Circuit held that
abstention is proper only where there is an issue of state law which is
uncertain. One judge dissented in *Johns-Manville* on the ground that
although the state law was relatively clear, there was then pending in the
Louisiana Supreme Court a case which might have a significant bearing
on the outcome of the claim presented to the federal court in *Johns-
Manville*.

In *MTM, Inc. v. Baxley*, the Fifth Circuit took occasion to apply the
recent Supreme Court decision of *Huffman v. Pursue, Ltd.*, holding that
a civil nuisance suit brought by the state is closely akin to a state criminal
proceeding and, therefore, federal courts should not enjoin such state court
proceedings in the absence of *Younger v. Harris* exceptions. Those excep-
tions are: (1) where enforcement of the state nuisance statute is under-
taken in bad faith for harassment purposes, (2) where not enjoining the
state proceeding would effect great and immediate irreparable injury, and
(3) where the state nuisance statute is so flagrantly unconstitutional that
no limiting construction by the state courts could possibly save it. The
court found none of the *Younger* exceptions applicable in *MTM* and af-
firmed the district court’s refusal to reach the merits of the plaintiff’s
request for a federal injunction.

In *Carter v. Ogden Corp.* the district court had enjoined Ogden from
filing or prosecuting any other suit against Carter. Ogden had brought an
action in a Delaware state court similar to one pending in the Louisiana
district court. The Delaware state court action had been removed by
Carter to the Delaware federal court. The Fifth Circuit held that the dis-
trict court’s injunction against Ogden was barred by 28 U.S.C.A. §2283.

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81. 510 F.2d 1196 (5th Cir. 1975).
82. Id. at 1198, citing Reetz v. Bozanich, 397 U.S. 82, 90 S.Ct. 788, 25 L.Ed.2d 68 (1970),
83. 523 F.2d 1255 (5th Cir. 1975).
84. 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975).
86. 524 F.2d 74 (5th Cir. 1975).
87. 28 U.S.C.A. §2283 (Rev. 1965) states:
The Fifth Circuit held that section 2283 means what it says and that the district court should not have enjoined the Delaware proceedings. Of course, at the time the injunction was granted, there was no action pending in any state court in Delaware, since the Delaware state court proceeding had been removed to the federal court. Apparently, the Fifth Circuit concluded that the federal district court in Delaware on removal was, under *Erie*, sitting as another state court; therefore, the proscription of section 2283 applied to the Delaware federal court sitting in a diversity action as well as to the state courts of Delaware.

In *Georgia-Pacific Corp. v. Federal Power Commission*, review of a Federal Power Commission ruling was sought in the Fifth Circuit. Under section 19(b) of the Natural Gas Act, proper venue for review of a FPC order is in the circuit "wherein the natural gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia . . . ." The Fifth Circuit concluded that venue was improper before it. The court speculated that venue was probably appropriate in either the Seventh Circuit or the Eighth Circuit on the basis of the petitioner's "principal place of business" but was unquestionably proper in the District of Columbia Circuit. The court recognized its inherent power to transfer a petition for review of an agency ruling to a circuit with proper venue and transferred the matter to the District of Columbia Circuit. The court, in an earlier opinion, had concluded that it was powerless to order such a transfer. In *Georgia-Pacific*, the court noted that subsequent cases had convinced it that it did have the inherent power to transfer a case even without any express statutory grant so providing.

*Barnes v. Atlantic & Pacific Life Insurance Co. of America* was, according to the Fifth Circuit, "a historic case." It was the first published opinion utilizing the certification provisions recently placed in the Alabama Constitution. Such certification procedures are already in effect in Florida and Louisiana. Although there is nothing new about certification of state law questions to state courts in *Erie* cases, the Fifth Circuit in 1975 seemed

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88. 512 F.2d 782 (5th Cir. 1975).
89. 15 U.S.C.A. §717r(b) (Rev. 1963).
90. Gulf Oil Corp. v. FPC, 330 F.2d 824 (5th Cir. 1964).
92. 514 F.2d 704 (5th Cir. 1975).
93. *ALA. CONST.* art. VI, §140(b)(3) states: "The supreme court shall have original jurisdiction . . . (3) to answer questions of state law certified by a court of the United States." *Quoted at* 514 F.2d at 705, n.1.
inclined to utilize the procedures where available. In addition to the Barnes case, questions were certified to state supreme courts in Tyler v. Insurance Co. of North America and in Nardone v. Reynolds.

IX. VOLUNTARY AND INVOLUNTARY DISMISSAL

Rule 41(a)(1) of the Federal Rules of Civil Procedure states:

[A]n action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs. . . .

Whether this rule means what it says was the subject of Pilot Freight Carriers, Inc. v. International Brotherhood of Teamsters. The appellant sought to read into Rule 41 the judicial interpretation given by the Second Circuit in Harvey Aluminum, Inc. v. American Cyanamid Co., in which that court refused to permit a plaintiff to dismiss by notice following an extensive hearing on a motion for preliminary injunction. In Pilot Freight, the appellant asked the Fifth Circuit to hold that a Rule 41(a) dismissal is unavailable to a plaintiff who has argued and lost a motion for preliminary injunctive relief. The plaintiff had been served with neither an answer nor a motion for summary judgment. The Fifth Circuit refused to apply to Rule 41(a)(1) the Harvey Aluminum gloss. The court held that if it engrafted onto Rule 41(a)(1) an interpretation preventing dismissal whenever the merits of a controversy had been presented to the court in any manner, it would amount to nothing less than an amendment and a comprehensive modification of Rule 41(a)(1). The court held that such an amendment might be an appropriate action by the Supreme Court and the Congress, but not by the Fifth Circuit.

In Riegel Fiber Corp. v. Anderson Gin Co., the Fifth Circuit denounced in a footnote the inconvenience that results from the promiscuous use of Rule 41(b) dismissals. The court stated that, except in unusually clear cases, a district judge should either carry the defendant’s Rule 41(b) motion with the case or deny it and let the defendant put on his evidence and then enter a final judgment at the close of that evidence.

The Fifth Circuit reversed a number of docket control dismissals which had been entered for docket offenses great and small but not quite great enough. In Greater Baton Rouge Golf Ass’n v. Recreation and Park Commission for the Parish of East Baton Rouge, the Fifth Circuit reversed a

94. 520 F.2d 341 (5th Cir. 1975).
95. 508 F.2d 660 (5th Cir. 1975).
96. 506 F.2d 914 (5th Cir. 1975).
97. 203 F.2d 105 (2d Cir. 1953).
98. 512 F.2d 784 (5th Cir. 1975).
99. 507 F.2d 227 (5th Cir. 1975).
dismissal with prejudice entered when the plaintiff's counsel was twenty-eight minutes late to a hearing. Plaintiff's counsel filed a motion to vacate the judgment under Rule 60(b) of the Federal Rules of Civil Procedure. He alleged that he had been detained at a hearing in a state court, that he had attempted to reschedule the state court argument for a later hour but had been assured by the state court judge that he would be through in time to make his federal court appearance, that the state court argument was lengthier than had been anticipated, and that counsel had been unable to depart the state courthouse until after he was scheduled to appear in federal court. The plaintiff's counsel had gone directly to the federal courthouse from the state courthouse. The Fifth Circuit concluded that although the plaintiff's counsel should have notified the district judge that he would be detained, a dismissal with prejudice was too harsh a remedy for the "inept, although unintentional" conduct of counsel. The court noted that counsel might well have been disciplined for his tardiness, but under the facts and circumstances, the plaintiff should not have been put out of court with prejudice.

Local 66, AFL-CIO v. Leona Lee Insulation and Specialties, Inc.100 was a similar case. The court described the case as being one

in which a too busy lawyer and a too busy Judge were trying to communicate through legitimate intermediaries with a resulting series of misunderstandings that in retrospect ought not to have occurred but which lack any suggestion of contumacious indifference to the Court of the kind we generally regard as requisite to the use of this severe sanction.101

The Fifth Circuit reversed the district court's order dismissing the appellant's case with prejudice because of the failure of its counsel to appear at the time the case was scheduled for trial. In Brown v. O'Leary,102 a plaintiff's case was dismissed sua sponte by the district court for want of prosecution because of the failure of the plaintiff's counsel to appear at a docket call. The plaintiff's counsel contended that he had received no notice of the docket call and that he would be prepared to try the case at anytime set by the court. The district court denied plaintiff's counsel's motion to reinstate the action. Extensive discovery had been undertaken and completed. The Fifth Circuit reversed, stating that although the district court should not be disturbed in the exercise of sound discretion in keeping its calender under control, the court would not approve sanctions that were not commensurate with the dereliction. The court held that where there was a lost or misdelivered notice of a docket call and there was no showing of prejudice to any party, a sua sponte dismissal and a refusal to reinstate the cause upon motion was an abuse of discretion.

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100. 516 F.2d 504 (5th Cir. 1975).
101. Id. at 505.
102. 512 F.2d 485 (5th Cir. 1975).
X. PARTIES AND INTERVENTION

In *United States v. T.I.M.E.-D.C., Inc.*, the Fifth Circuit examined the question of whether local teamsters unions representing the defendant's employees were indispensable parties in an employment discrimination case in which the international union was a party. Rule 19(a) of the Federal Rules of Civil Procedure provides for joinder of parties "if feasible." The Fifth Circuit concluded that the district court's refusal to require joinder of the local unions was correct, since they were scattered across the country. The court found that the international union played the major role in contract negotiations and in all other questions involved in the litigation and held that the locals, therefore, were not indispensable parties. In so ruling, the court aligned itself with a number of other courts on the question.

Two cases in the intervention area deserve note. *United States v. Allegheny-Ludlum Industries, Inc.* held that there was no intervention of right under Rule 24(a) of the Federal Rules of Civil Procedure in a "pattern of practice" case under section 707 of Title VII of the Civil Rights Act of 1964. This is to be distinguished from a case brought under section 706, which confers upon "persons aggrieved" a right to intervene in a civil action brought by the Equal Employment Opportunity Commission. In *Korioth v. Briscoe*, the Fifth Circuit made it clear that one of the factors appropriate for consideration by a district court considering a request for permissive intervention under Rule 24(b) of the Federal Rules of Civil Procedure was whether the main claim into which intervention was sought was legally sufficient. The court stated that it could not say that it was clearly unreasonable for the district court to "prefer not to create a commensalist for a non-existent host." The court noted that there was no apparent barrier precluding the potential intervenor from bringing a new action in its own name.

XI. PLEADING

Several 1975 cases dealt with questions of pleading and the time for pleading. In *Spartan Grain & Mill Co. v. Ayers*, the district court had

103. 517 F.2d 299 (5th Cir. 1975).
105. 517 F.2d 826 (5th Cir. 1975).
108. 523 F.2d 1271 (5th Cir. 1975). The facts of this case are summarized in the text accompanying note 59, supra.
109. Id. at 1279.
110. 517 F.2d 214 (5th Cir. 1975).
denied motions to amend answers in order to assert additional counter-
claims sixteen months after the original answers and counterclaims had
been filed. The district court's order had given no explanation for the
refusal to permit the filing of the amended answers. The Fifth Circuit held
this to be an abuse of discretion inconsistent with the spirit of the Federal
provides:

> When a pleader fails to set up a counterclaim through oversight, inadvert-
ence, or excusable neglect, or when justice requires, he may by leave of
court set up the counterclaim by amendment.

Similarly, Rule 15(a) of the Federal Rules of Civil Procedure provides that
a party may amend his pleadings "by leave of court or by written consent
of the adverse party." The Fifth Circuit suggested that these provisions be
applied liberally to accord with the overall goal of the Federal Rules of
resolving disputes on the merits and in a single judicial proceeding. Liberal
construction was particularly compelled when an omitted counterclaim
was compulsory. The court found the mere passage of time between an
original filing and an attempted amendment insufficient grounds for de-
nial of a motion to amend.

The importance of permitting amendments to assert compulsory coun-
terclaims was underscored in *United States Broadcasting Co. v. Armes*,”
in which the Fifth Circuit made it clear that where a claim should be
brought as a compulsory counterclaim in one action, it should be permitted
to be brought somewhere else in another action. A Texas district court had
enjoined a party from proceeding with a suit in another federal forum when
the claim sought to be raised in the other forum was appropriately viewed
as a compulsory counterclaim to the suit pending in the Texas district
court. The Fifth Circuit found no error in the injunction, since the "claim
clearly arises out of the same transaction as Armes' claim in the present
suit and should have been pleaded as a counterclaim in the Texas federal
court."  

Where a counterclaim should have been asserted in the pleadings but
was not, and the parties proceeded to trial on issues including the issue
which should have been asserted as a compulsory counterclaim, the mere
failure to amend the pleadings to assert the compulsory counterclaim will
not bar a judgment on the counterclaim. The Fifth Circuit so held in *Nat
G. Harrison Overseas Corp. v. American Tug Titan*.  
The court noted that
a pretrial stipulation had raised the contested issue and that the issue was
tried with the explicit consent of the opposing party. The court held that
the losing party would not be heard to complain on appeal of the failure

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111. 506 F.2d 766 (5th Cir. 1975).
112. *Id.* at 771.
113. 516 F.2d 89 (5th Cir. 1975).
of the counterclaimant to have made a formal motion to amend the pleadings under Rule 15(b). If the pleadings do not, however, sufficiently highlight an issue for trial and if the opposing party does not consent to trial of the issue, it is error to permit trial on that issue. The party on trial should have ample notice of the issues to be tried.\textsuperscript{114}

XII. Discovery

Two 1975 cases discuss the extent of a litigant's right to discovery and the extent to which the right can be limited by the trial judge. Dillon v. Bay City Construction Co.\textsuperscript{115} was a class action brought to enjoin an alleged pattern of racial discrimination in the sale of houses in a Mobile, Alabama, subdivision and to compel one of the defendants to sell a specific house to the named plaintiffs. The suit was filed on May 24, 1973. The individually named plaintiffs asked for a temporary restraining order and a preliminary injunction to prevent the sale of the house. Upon reaching an agreement with counsel for the defendants that the specific house in question would not be sold until after the hearing was conducted on the preliminary injunction, no hearing was sought on the temporary restraining order.

On May 30, 1973, the parties were notified that the district court intended to conduct the hearing on both the preliminary injunction and the merits on June 5, 1973. The plaintiffs received their notice on May 31, 1973, giving them only five days in which to prepare their case on the merits. Service was not even completed on all of the defendants until the very morning of the hearing. On June 5, there was some misunderstanding as to the scope of the hearing. The plaintiffs, thinking that their evidence had been put on solely for motion for preliminary injunction, rested their case. Immediately, the district judge apparently determined that it was unnecessary to hear any of the defendants' witnesses and began to announce his proposed findings of fact from the bench. The district judge held that there was no evidence that any class had been precluded from purchasing homes in the subdivision and directed that any possible claims should first be considered by the Department of Housing and Urban Development under 42 U.S.C.A. §3610. As to certain of the other defendants, the district judge found that there was no evidence of discrimination and therefore dismissed the case as to them.

An appeal was taken, challenging the decision of the district judge on several grounds including abuse of discretion in the advancement of the case on the merits in such an accelerated manner. The Fifth Circuit agreed, stating that the advancement completely inhibited the extensive discovery and investigation required in a class action and to which the plaintiffs were entitled under Rule 26 of the Federal Rules of Civil Proce-

\textsuperscript{114} Freeman v. Chevron Oil Co., 517 F.2d 201 (5th Cir. 1975).
\textsuperscript{115} 512 F.2d 801 (5th Cir. 1975).
The court recognized the inherent difficulties in proving a pattern of discrimination and particularly noted the necessity of discovery to assist in resolving whether the action was one appropriate for class action certification under Rule 23. The court did not elaborate on the extent of the plaintiffs' right to discovery under Rule 26. The nature of the court's comments, however, demonstrates that this would depend on the nature of the particular proceeding, the complexity of the issue presented, and the determination of the existence of a class.

A similar claim of premature termination of discovery was made in *Merren v. A/S BORGESTAD*, which involved the applicability of the Jones Act provision for a cause of action for damages for injured seamen. The district court had granted summary judgment for the defendant. The plaintiffs contended on appeal that they had not been given complete discovery and that the district court should not have granted summary judgment so as to terminate their right to discovery. In the *Merren* context, the Fifth Circuit rejected the contention and held that all the facts necessary for the district court to come to the conclusion that the plaintiffs could not make out a Jones Act case were then before the court and that any facts which might be brought out by further discovery would be superfluous and would have no relevance to the ultimate question.

In *Britt v. Corporacion Peruana de Vapores*, the Fifth Circuit reiterated that the decision to impose sanctions for failure to make discovery is one resting with the district court and not with the appellate courts and that sanctions are appropriate under Rule 37(d) of the Federal Rules of Civil Procedure only where there is a violation of a court order under Rule 37(a) compelling discovery.

**XIII. Trial**

The use of special masters is a subject of significant and increasing interest to trial practitioners and judges alike. *Cruz v. Hauck* was a class action, brought by indigent inmates of the Bexar County Jail in Texas, challenging the constitutionality of restrictions on their access to legal materials. The Fifth Circuit in an earlier appeal had remanded the case to the district court for an evidentiary hearing to be followed by specific findings of fact and conclusions of law on the merits of petitioners' objections and the Government's justifications for the rules. On remand, the district judge referred the matter to the U.S. magistrate to act as a

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116. 519 F.2d 82 (5th Cir. 1975).
118. 506 F.2d 927 (5th Cir. 1975).
120. 515 F.2d 322 (5th Cir. 1975).
special master to conduct the required evidentiary hearing. The class of prisoners did not object at any time to the reference of the case to the magistrate. After the hearing, the magistrate submitted proposed findings of fact and conclusions of law to the district judge. The district judge allowed the litigants to file objections but adopted the magistrate’s report with only minor modifications. The class of prisoners appealed to the Fifth Circuit once again, contending, among other things, that the case was improperly referred to the magistrate. Although the case was remanded to the district court on other grounds, the reference to the magistrate was upheld on the basis that the prisoners had waived their right to object. The court, however, did state:

In view of the grossly protracted nature of these proceedings, and to forestall any further appeals by either litigant, the district judge personally should conduct the proceedings on remand. 122

Thus, because of the waiver aspect of Cruz, most of the discussion on the subject of reference was dicta.

This discussion, although dicta, is significant for trial practitioners. In 1968, Congress enacted the Federal Magistrates Act, 123 which authorized the assignment, pursuant to rules adopted by the majority of all the judges in a district, of a magistrate to serve “as a special master in an appropriate civil action, pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts.” 124 Rule 53 of the Federal Rules of Civil Procedure similarly authorizes a court to appoint a special master. Rule 53(b), however, provides:

(b) Reference. A reference to a master shall be the exception and not the rule. In actions to be tried by jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it.

The court reviewed the history of special masters and particularly the Supreme Court cases construing the “exceptional condition” limitation on their use. 125 The court concluded that the “exceptional condition” limitation was a consequence of the perceived deficiencies in the master system and was not required by the Constitution. These perceived deficiencies were the expense and delay involved in references and the concern that references might be to persons not ordinarily experienced in judicial work,

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122. 515 F.2d at 332.
perhaps resulting in less public confidence in the factfinding process underlying a judicial judgment. The court saw no reason why parties to a lawsuit could not waive their objections to a reference. The court did indicate that if the underlying controversy was one of a widespread public interest, the need to maintain the confidence of the public in the factfinding process might become so important that a reference should be denied even where the litigants consented. The court also made it clear that parties' objections to a reference should be made prior to or at the time of the reference. If for some reason that was not feasible, the objection certainly should be made at the earliest possible opportunity. Any other procedure, the court found, would allow a party disappointed with the results of the reference to obtain a second bite at the apple by withholding his objection to the reference until after the master's report was filed. Objection to a reference could not be made for the first time on appeal.

Two 1975 cases dealt with objections to jury instructions. Wallace v. Ener\textsuperscript{126} held that Rule 51 of the Federal Rules of Civil Procedure\textsuperscript{127} does not require technical formality. The form of an objection is unimportant if the trial judge is made to understand the objecting party's position. The court found that the purpose of Rule 51 was to inform the trial judge of possible errors in his charge at a time when he still had the opportunity to correct them. In Wallace, the court found that all the appellant's assignments of error in charging the jury either were raised in the post-charge, pre-deliberation conference or were set out in written requests to charge which were filed with the court but which the court had refused to give. The Fifth Circuit found that the appellant's positions were clear enough to inform the trial judge of the possible error in his instructions and were, therefore, sufficient to preserve the appellant's assignments of error.

In Industrial Development Board v. Fuqua Industries, Inc.,\textsuperscript{128} the court held that an appellate court could notice a fundamental error in the charge despite a failure to object to the charge at the trial, but that it should do so only when it was sure that the trial court was adequately informed of the litigant's contentions. In Fuqua, the court found that the appellant had repeatedly and strenuously attempted to demonstrate his arguments to the trial court to no avail. The Fifth Circuit implicitly concluded that continu-

\textsuperscript{126} 521 F.2d 215 (5th Cir. 1975).
\textsuperscript{127} Rule 51 states:

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

\textsuperscript{128} 523 F.2d 1226 (5th Cir. 1975).
ing to argue his position, either by way of objections to the charge or otherwise, would have been to no avail. The court pointed to language in *Keen v. Overseas Tank Ship Corp.* which stated: "Nothing goes further to disturb the proper atmosphere of a trial than reiterated insistence upon a position which the judge has once considered and decided." Clearly, the safer procedure is to make one's objections to the jury charge immediately after the charge when given an opportunity to do so and not to rely on having strenuously argued a contention at some earlier point in the trial.

As to closing arguments to the jury, *Jeter v. St. Regis Paper Co.* made it clear that where there are multiple parties, the failure of the district judge to insist upon absolute equality of closing argument time will not be grounds for reversal. The *Jeter* court held that in the context of a four-day trial, the exposure of the jury to a few minutes more of argument on the defendant's position than on the plaintiff's is not reversible error. *Edwards v. Sears, Roebuck & Co.* presents a closing argument which the Fifth Circuit found "so far exceeded proper bounds and was so conducive to prejudicing the jury's verdict that it substantially affected the total fairness of the trial." The court found particularly indefensible the presentation of facts to the jury which had not been placed in evidence, counsel's discussion of the value which his own son would place on his father's life, references to counsel's personal association with the deceased, counsel's evoking the image of the deceased's children crying at the graveside and forlornly awaiting the return of their father, and counsel's urging the jury on the need for retributive payments from the defendants. The court found the total thrust of the argument to have created inherent unfairness sufficient to require correction by the trial court even in the absence of objection.

**XIV. INJUNCTIVE RELIEF, DAMAGES, AND ATTORNEY'S FEES**

Several recent opinions provide a laundry list of considerations confronting the district court in determining whether preliminary injunctive relief will be granted.

In *Johnson v. Penrod Drilling Co.*, the en banc court was presented with the recurring problems of inflation and income taxes in computing damages. The court held that possible future inflation is not to be included in a calculation of future damages. This view aligns the Fifth Circuit with

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129. 194 F.2d 515, 519 (2d Cir. 1952).
130. 507 F.2d 973 (5th Cir. 1975).
131. 512 F.2d 276 (5th Cir. 1975).
132. *Id.* at 283-84.
134. 510 F.2d 234 (5th Cir. 1975).
the majority rule among the circuit courts. Penrod also held that a jury should not be permitted to consider the impact of income taxes in calculating loss of future wages.

In Bonura v. Sea Land Service, Inc., the Fifth Circuit rejected the rigid third circuit rule which requires either expert actuarial evidence concerning the present value of future wages or mathematical guidance on the method of reducing gross loss to present value as a prerequisite to submitting loss of future earnings to a jury. In so holding, the Fifth Circuit was not ready to concede that the application of the present worth rule is beyond the undertaking of the average juror. Rather, the court believed that the typical juror is sufficiently aware of modern economics to be able to reduce gross loss to present value. The court went on to note, however, that it is better practice to present either expert mathematical testimony or actuarial tables to the jury in order to aid the jurors in "reducing gross future lost earnings to their present value."

Several recent decisions reviewed the right to recover attorney's fees. Under the "American Rule," attorney's fees are generally not recoverable unless provided for by statute or contract. As the court notes, however, there are three exceptions to the American Rule: (1) when the losing party has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons;" (2) the private attorney general theory; and (3) the common fund exception.

XV. APPEALABILITY, STANDARDS OF REVIEW, RES JUDICATA, AND POST-JUDGMENT REVIEW

Courts of appeals have jurisdiction of appeals from certain interlocutory orders of district courts, including, under 28 U.S.C.A. §1292(a)(1), those "granting, continuing, modifying, refusing or dissolving injunctions." In EEOC v. International Longshoremen's Ass'n, the Fifth Circuit was called upon to determine whether the statute gives the courts of appeals

138. Gates v. Collier, 522 F.2d 81 (5th Cir. 1975); Newman v. Alabama, 522 F.2d 71 (5th Cir. 1975); Bond v. White, 508 F.2d 1397 (5th Cir. 1975).
139. 511 F.2d 273 (5th Cir. 1975).
The jurisdiction of denials of permanent injunctions. The Equal Employment Opportunity Commission (EEOC) had sued to have the district court order the merger of thirty-seven segregated black and white local unions of the International Longshoremen's Association operating within Texas. For the most part, the locals opposed any such merger on the ground that the maintenance of such segregated unions was simply an amenity for those who wanted to associate with "their own." The EEOC and the Fifth Circuit were concerned that the maintenance of such segregated unions was "invidious, in that it denies equal opportunities to workers and potential workers, and is thus in violation of 42 U.S.C. §2000e et seq.," which is Title VII of the Civil Rights Act of 1964. The Southern District of Texas declined to find that the segregated unions in and of themselves were in violation of the law, indicating that any economic deprivation that resulted from the maintenance of the segregated locals could be corrected by a decree short of a required merger. The district court entered an interlocutory decree holding that the segregated locals were not required to merge and that any violations of Title VII could be corrected by abolishing separate hiring halls and by establishing common seniority classifications. The EEOC appealed to the Fifth Circuit.

There was no question that the district court's order was interlocutory. It basically ordered the locals to confer with the EEOC in establishing common seniority systems and hiring halls and to submit a plan to the district court after such consultation. The district court retained jurisdiction with "full power and authority to issue any additional orders necessary to insure equal employment opportunities. . . ." The question presented to the Fifth Circuit was the appealability of the district court's denial of the EEOC's requested permanent injunction against the maintenance of segregated unions and its requirement of a merger of the segregated locals. The Fifth Circuit noted that denials of preliminary injunctions had often been held appealable. The court reasoned that the grant or denial of a permanent injunction finally resolves issues to a greater degree than the denial of a preliminary injunction and that the potential for irrecompensable injuries stemming from the denial of permanent injunctions was greater than that to be expected from the denial of temporary injunctions. It concluded that a denial of a permanent injunction was appealable.

In Flowers v. Turbine Support Division, the Fifth Circuit held that denials of applications to proceed in forma pauperis are appealable. The court reasoned that an order denying in forma pauperis status finally decided an important issue of which review should not be deferred. Denial could result in the pauper litigant's being unable to successfully prosecute

140. Id. at 274.
141. Id. at 276.
142. 507 F.2d 1242 (5th Cir. 1975).
the case to a traditional final judgment. The court buttressed its decision on policies of judicial economy, noting that if the pauper proceeded to trial and lost, the final judgment on the merits would have to be reversed if the appellate court found that the denial of the in forma pauperis motion was error and that the party’s chances of prevailing had been prejudiced by denial. If the pauper declined to proceed to trial and the district court dismissed the action for want of prosecution, a reversal of the denial of pauper status would similarly be required if it appeared that the denial prevented the pauper from proceeding to trial or seriously prejudiced his chances of winning.

The Fifth Circuit in 1975 dealt with a number of cases involving technical aspects of perfecting appeals. In *Carr v. Grace*, the court declined to dismiss an appeal because of the appellant’s failure to post the appellate cost bond required by Rule 7 of the Federal Rules of Appellate Procedure. The court stated that the failure to post the cost bond should not, without more, result in dismissal of the appeal. In *Lashley v. Ford Motor Company*, the court ruled that an appellant is not entitled to an additional three days for filing a notice of appeal when he is informed of the district court’s entry of judgment by mail. The appellant’s counsel relied on Rule 6(e) of the Federal Rules of Civil Procedure and Rule 26(c) of the Federal Rules of Appellate Procedure, both of which provide for additional time after service of notice by mail. The Fifth Circuit held that the thirty-day requirement of Rule 4(a) of the Federal Rules of Appellate Procedure commences to run from the entry of the judgment and not from the service of the notice of the judgment on the appellant.

*Fidelity and Deposit Co. v. Usaform Hail Pool, Inc.* involved the failure of the district court clerk to serve notice of the entry of judgment upon the parties. The appellants did not learn of the entry of the judgment against them until 103 days after the judgment had been entered. The appellants immediately moved for a new trial or, in the alternative, for relief from judgment under Rule 60(b) of the Federal Rules of Civil Procedure or for leave to file the notice of appeal at that time. The district court denied the motion for a new trial and denied the motion for leave to file the notice of appeal but granted the motion for relief from judgment under Rule 60(b) of the Federal Rule of Civil Procedure. The district court then entered a new order vacating its previous order and re-entering its original findings of fact, conclusions of law, and judgment. The appellants then filed a notice of appeal from the newly entered judgment. Rule 77(d) of the Federal Rules of Civil Procedure specifically states:

Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed.

143. 516 F.2d 502 (5th Cir. 1975).
144. 518 F.2d 749 (5th Cir. 1975).
145. 523 F.2d 744 (5th Cir. 1975).
The Fifth Circuit found that the rationale of this provision was to enhance the finality of judgments by placing the entire burden of determining whether a judgment had been entered upon the parties. In other words, parties are obliged to inquire periodically of the clerk or the court to determine whether a judgment has been entered. The courts, including the Fifth Circuit, had strictly enforced Rule 77(d).1

The Fifth Circuit concluded that there must be an exception to Rule 77(d) where mitigating circumstances or special hardships are present. The court pointed to a recent District of Columbia Circuit opinion1 holding that Rule 60(b) of the Federal Rules of Civil Procedure should operate as a vehicle to allow a timely appeal where parties had no actual notice of the entry of judgment and the losing party moves to vacate the judgment within a reasonable time after he learns of its entry. The Fifth Circuit found mitigating circumstances in the appeal before it. The district court had assured counsel that repeated inquiries were not necessary and that counsel would be informed of the entry of judgment. Moreover, the court noted that an appeal was a virtual certainty, since the case had been pending for twelve years, had been appealed to the Fifth Circuit twice before, and approximately one million dollars was at stake on an issue where the parties were diametrically opposed. The court held that in such circumstances, where neither side knew of the entry of judgment, where counsel had promptly filed a notice of appeal after the action of the district court in vacating and re-entering its judgment, where counsel had relied upon express assurances from the district court that they need not make inquiries, and where appeal was a virtual certainty, the trial court acted properly in vacating and re-entering its judgment under Rule 60(b).

Stokes v. Peyton's, Inc.1 resolved an apparent conflict within the Fifth Circuit between Turner v. HMH Publishing Co.1 and Markham v. Holt.10 The issue on which the conflict existed concerned the effect of filing a notice of appeal which is premature because a motion for a new trial is pending, thus suspending the time for appeal and making the judgment unappealable until after the motion for a new trial is disposed of. Turner was a per curiam opinion holding that where a notice of appeal was premature because a motion for a new trial is pending, the appeal taken thereon was a nullity. Markham, on the other hand, had held that since there was no prejudice to the appellee and since valuable rights should not be lost where a party had done an act too soon, rather than too late, the appeal would be treated as being from the final judgment and would not be dismissed. The Fifth Circuit in Stokes agreed with Markham and held that it best comported with the spirit of the

146. See In re Morrow, 502 F.2d 520 (5th Cir. 1974).
147. Expeditions Unlimited Aquatic Enterprises, Inc. v. Smithsonian Institute, 500 F.2d 808 (D.C. Cir. 1974).
148. 508 F.2d 1287 (5th Cir. 1975).
149. 328 F.2d 136 (5th Cir. 1964).
150. 369 F.2d 940 (5th Cir. 1966).
Federal Rules "to secure the just, speedy and inexpensive determination of every action" and to avoid decisions based on mere technicalities.

One of the more interesting Fifth Circuit cases of 1975, because it was one of the greatest "race to the courthouse" cases of all time, was Shell Oil Co. v. Federal Power Commission. The Natural Gas Act provides that one aggrieved by an order of the Federal Power Commission (FPC) may obtain review in the "court of appeals . . . wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia. . . ." After the FPC announced its ruling in the Shell Oil case, the race to the courthouse commenced. The Fifth Circuit described the race as follows:

This race by Rodman and Shell was in terms of multiple petitions filed in interval of seconds. In each instance, the filings were accomplished by relays of persons stationed between the issuing point of the Federal Power Commission, the nearest available telephones, and the respective courts.

The various petitions were filed in the Fifth Circuit at 9:02:20, 9:02:22, 9:02:24, 9:02:30, and 9:02:45 on December 4, 1974. An appeal was filed in the District of Columbia Circuit at 9:03:30 on December 4, 1974. The court in a footnote stated:

We have carefully considered and reject Senator Abourezk's contrary contention based on the claim that the clocks in both the District of Columbia and Fifth Circuits were wrong at the time of the various filings. (The clerks of the two courts had synchronized the clocks just prior to the filings.)

The Fifth Circuit concluded that the race to the courthouse had been won by the runner filing with it and that, therefore, jurisdiction to review all appeals arising from the particular FPC opinion was in the Fifth Circuit. Edwards v. Sears, Roebuck & Co. was a significant 1975 remittitur case. The suit for $3.6 million arose from a death allegedly caused by defective automobile tires. After an extended trial the jury awarded the plaintiff $900,000. The defendants moved for a new trial and for judgments notwithstanding the verdict. The trial court denied these motions but found that the jury's verdict resulted from passion or prejudice and ordered the verdict reduced to $450,000. The question posed on appeal was when a remittitur, as opposed to a new trial, is the appropriate response to a jury verdict affected by passion or prejudice. The Fifth Circuit said that where

152. 509 F.2d 176 (5th Cir. 1975).
154. 509 F.2d 179 (5th Cir. 1975).
155. Id.
156. 512 F.2d 276 (5th Cir. 1975).
the “passion, prejudice, caprice, undue sympathy, arbitrariness or more taints only the damage award and not the liability assessment, the proper response is a remittitur or a new trial addressed to damages alone.” 157 The court added, however, that “if it appears that the improper jury action, in reasonable probability, affected both the liability and the damage issues, then a new trial as to both issues must be ordered.” 158 Applying those rules to the facts presented in Edwards, the court found the issue of liability to have been one strongly disputed. There was evidence that the deceased was driving at a highly excessive speed while under the influence of alcohol. There was substantial expert testimony for the defense indicating that there was no negligence and that the tires in question were not defective. The court concluded that the issues of liability and damages were both improperly influenced by the passions stirred up by improper argument of the plaintiff’s counsel, thus requiring a new trial on both damages and liability.

Gilbert v. St. Louis-San Francisco Railroad 159 dealt with the remittitur of punitive damages. The case grew out of the death of a hunter who went upon a trestle on the railroad’s right of way and was struck by a train. The jury returned a plaintiff’s verdict for $225,000. The defendant moved for a new trial. The district court denied the motion for a new trial conditioned upon the plaintiff’s acceptance of a $165,000 remittitur of punitive damages. The plaintiff appealed, claiming that the remittitur abridged her seventh amendment right to trial by jury. The plaintiff referred to earlier decisions, Gorsalitz v. Olin Mathieson Chemical Corp. 160 and Bonura v. Sea Land Service, Inc., 161 which established, at least as to compensatory damages, that a jury award could not be reduced below “the maximum which the jury could reasonably find.” The plaintiff contended that these decisions were equally applicable to punitive damages. The court rejected the plaintiff’s argument, stating that its logical extension would preclude a federal court from ever reducing a punitive damages award. The court reaffirmed its analysis of punitive damage remittiturs stated in Curtis Publishing Co. v. Butts: 162

The trial judge had the duty of determining whether as a matter of law (a) any allowance for punitive damages could be made, and (b) what the maximum would be. . . . Upon determining (b) he had then to decide whether to grant a new trial or require a remittitur as to the excess. The latter is a permissible course and does not infringe upon the Seventh Amendment’s guaranty of a jury trial.

157. Id. at 282.
158. Id. at 282-83.
159. 514 F.2d 1277 (5th Cir. 1975).
160. 429 F.2d 1033 (5th Cir. 1970).
161. 505 F.2d 665 (5th Cir. 1974).
162. 351 F.2d 702, 718-719 (5th Cir. 1965).
The court gave great latitude to the remittitur determination of the trial judge based on his having heard the testimony and viewed the witnesses’ demeanor. The court concluded that the plaintiff failed to demonstrate any abuse of discretion in the trial judge’s concern with the comparative culpability of the parties or with regard to what was a fair verdict in terms of his own experience as a judge.

In 1975, the Fifth Circuit decided a number of appeals concerning the adequacy of findings of fact and conclusions of law in non-jury matters. In *Sellers v. Wollman*, the court remanded a case to the district court for failure to provide any findings of fact or conclusions of law. In two other cases, *Echols v. Sullivan* and *Hydrospace-Challenger, Inc. v. Tracor/Mas, Inc.*, where the findings of fact and conclusions of law were stated in conclusory terms, the Fifth Circuit remanded matters to district courts. The court indicated that where findings are nothing more than broad general statements, stripped of underlying analysis or justification, meaningful review on appeal becomes impossible.

The court pointed out in *McCawley v. Ozeanosun Compania, Maritime, S.A.* that findings of fact and conclusions of law are not required to be stated specially if there is a written opinion and the findings of fact and conclusions of applicable law are stated therein. The purpose of requiring findings of fact and conclusions of law is to facilitate appellate review. The requirement need not be applied in such a technical manner as to prohibit review where there is a sufficient basis to consider an appeal on its merits.

Two additional cases, *Keystone Plastics, Inc. v. C & P Plastics, Inc.* and *Florida Board of Trustees of the Internal Improvement Trust Fund v. Charley Toppino and Sons, Inc.*, dealt with the practice of accepting findings of fact and conclusions of law prepared by counsel for the prevailing litigant. The court expressed disapproval of the practice of unconditionally adopting findings submitted by one of the parties to the litigation. Its objection to this practice was that it deserved assurance that the trial court had dealt with all conflicts in the evidence and had come to its own conclusions. The court noted that while the practice of adopting findings offered potential for abuse, it was not reversible error and that the “clearly erroneous” test of Rule 52(a) of the Federal Rules of Civil Procedure applied whether the court drafted its own findings or adopted findings submitted by a party. The *Keystone Plastics* opinion suggested a technique that should be utilized by trial judges to accommodate the need of assistance in preparing the findings with the imperative that the findings in fact be the trial court’s. The court suggested that the prevailing party be requested

163. 510 F.2d 119 (5th Cir. 1975).
164. 521 F.2d 206 (5th Cir. 1975).
165. 520 F.2d 1030 (5th Cir. 1975).
166. 505 F.2d 26 (5th Cir. 1974).
167. 506 F.2d 960 (5th Cir. 1975).
168. 514 F.2d 700 (5th Cir. 1975).
to submit proposed findings and conclusions to the court and to serve a
copy upon adverse counsel. The court then would hold a hearing attended
by counsel for all interested parties, would hear argument and requests for
modification and, thereafter, would enter findings and conclusions. Such
a procedure would have the virtue of assuring that the trial judge had the
benefit of suggestions and argument from both sides and would more likely
lead to independent determinations by the trial judge.

An area attracting substantial attention in 1975 was that of the proper
standards for review of motions for judicial disqualification under 28
U.S.C.A. § 144. In Davis v. Board of School Commissioners, the court
held that once a motion is filed under section 144, the judge should pass
on the legal sufficiency of the affidavit but not on the truth of the matters
alleged. The affidavits in Davis were held legally insufficient because the
allegation of prejudice was directed against the attorney for the party and
not against the party and because the requisite bias and prejudice must
be extra-judicial. That differences arise between a judge and a party in
some litigation is not a ground for a section 144 affidavit. This principle
was also set out in Curl v. International Business Machines Corp.

This issue also arose in Parrish v. Board of Commissioners of Alabama
State Bar, a case which was put en banc. The Alabama Black Lawyers
Association and eight named plaintiffs brought a class action alleging ra-
cisional discrimination by the Boards of Commissioners and Bar Examiners of
the Alabama Bar Association in their policies and practices governing
admission to the bar. The plaintiffs filed an affidavit pursuant to 28
U.S.C.A. §144 alleging that the district judge had been president of the
Montgomery County Bar Association at a time when its by-laws excluded
black members and that the district judge was acquainted with several
defendants in the suit. In support of the affidavit the plaintiffs appended
a transcript of a special hearing at which the trial judge had submitted to
cross-examination on issues relevant to his disqualification. The trial judge
stated, prior to his cross-examination:

169. 28 U.S.C.A. §144 (Rev. 1968) states:
Whenever a party to any proceeding in a district court makes and files a timely
and sufficient affidavit that the judge before whom the matter is pending has a
personal bias or prejudice either against him or in favor of any adverse party, such
judge shall proceed no further therein, but another judge shall be assigned to hear
such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or
prejudice exists, and shall be filed not less than ten days before the beginning of
the term at which the proceeding is to be heard, or good cause shall be shown for
failure to file it within such time. A party may file only one such affidavit in any
case. It shall be accompanied by certificate of counsel of record stating it is made
in good faith.

170. 517 F.2d 1044 (5th Cir. 1975).
171. 517 F.2d 212 (5th Cir. 1975).
172. 505 F.2d 12 (5th Cir. 1974).
173. 524 F.2d 98 (5th Cir. 1975).
Heretofore I had felt that a judge should recuse himself very quickly because it made the court appear more fair, but there are other obligations the court owes and I am afraid that I shan’t recuse myself but I want to give you an opportunity to put anything on record that you would like to put on the record.\textsuperscript{174}

The court reviewed two tests against which the legal sufficiency of an affidavit might be tested: (1) whether the facts set out support the reasonableness of the affiant's belief that bias or prejudice exists, and (2) whether the facts reasonably support a determination that bias or prejudice actually exists. The panel concluded that the appropriate test was the first one.

We conclude that a trial court cannot be free from “any hint or appearance of bias” unless a party's sworn belief of the existence of bias, supported by substantial facts, is of primary concern. Thus, we reject as invalid the so-called objective test.\textsuperscript{175}

The panel concluded that the district judge had applied the wrong test in the belief that it was his duty to decide the issue as to whether he was actually biased rather than whether there was a reasonable basis alleged for the belief of the plaintiffs that he was biased.

When the Parrish case was put en banc, the original panel's determination was reversed. The court en banc adopted the test which had previously been adopted by the Third Circuit: “That the facts be such, their truth being assumed, as would ‘convince a reasonable man that a bias exists.’”\textsuperscript{176} The en banc court reviewed the testimony appended to the section 144 affidavit and concluded that the affidavit did not require disqualification.

By the time the Parrish case reached the en banc panel, 28 U.S.C.A. §455 had been substantially amended to set out in detail when judges should disqualify themselves. The en banc panel thus viewed Parrish not only against section 144 but also against the amended standards of section 455. Section 455(a) requires that a judge disqualify himself in any proceeding in which “his impartiality might reasonably be questioned.” Section 455(b)(1) requires that the judge disqualify himself where he has “personal bias or prejudice concerning a party.” The en banc panel concluded that section 455 was intended to displace the subjective test for recusal with the so-called “reasonable factual basis-reasonable man test” in determining disqualification. The court then determined that under section 455 the facts alleged would not lead a reasonable man to infer that the district judge's “impartiality might reasonably be questioned.”

Standards for reviewing rulings on motions for new trial received substantial attention in 1975. The general rule is that a denial of a motion for

\textsuperscript{174} 505 F.2d at 16.

\textsuperscript{175} Id. at 21 (emphasis in original).

\textsuperscript{176} United States v. Thompson, 483 F.2d 528 (3rd Cir. 1973).
a new trial will be reversed only where there has been an abuse of discretion by the trial judge. In *Massey v. Gulf Oil Corp.*, the Fifth Circuit indicated that the standard for reviewing an order granting a motion for new trial is broader than for review of an order denying the motion. The court reasoned that the factors underlying review of a new trial motion are (1) deference to the trial judge, who has had the opportunity of observing the witnesses and considering the evidence, and (2) deference to the jury’s determination. Where the judge denies the motion for a new trial and leaves undisturbed the jurors’ determination, all factors point toward leaving the judge’s ruling undisturbed. Where the judge has granted a new trial, however, the competing factors oppose each other. Deference to the trial judge is subjected to the opposing tension of deference to the jury as the constitutional finder of fact. Where a new trial is granted on the ground that the verdict is against the weight of the evidence, scrutiny is even closer than where the ground is some undesirable influence that intruded into the trial, because the trial judge has substituted his judgment of the facts and the credibility of witnesses for that of the jury.

In *Ag Pro, Inc. v. Sakraida*, a case involving a motion for a new trial under Rule 60(b)(2) of the Federal Rules of Civil Procedure on the basis of newly discovered evidence, the Fifth Circuit indicated its intention to review very carefully the granting of new trials on the basis of claims of newly discovered evidence. Evidence which was available but not offered at trial because of a “half-hearted effort” to produce it will not support a motion for a new trial, and even if the trial court grants the motion, it is likely to be reversed on appeal.

In *Gamble v. Estelle*, the Fifth Circuit held that the standard for reviewing pro se complaints should be more liberal than for pleadings in general. The court pointed to the obvious fact that pro se applications are often by persons who are illiterate and unable to express themselves in the clear and unequivocal language required in legal pleadings, thus necessitating the more liberal standard of review.

In *United States v. Allegheny-Ludlum Industries, Inc.*, the Fifth Circuit noted that its review of consent decrees is narrow. The appellate court should interfere with the implementation of consent decrees only upon a clear showing that the district court abused its discretion in approving a settlement. The court noted that it had no authority to modify or rewrite a consent agreement of the parties. If it found an abuse of discretion by the trial judge in approving a settlement agreement, its only alternative would be to vacate the district judge’s approval of the settlement and remand for trial. The appellate court should not readily substitute its own

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178. 508 F.2d 92 (5th Cir. 1975).
179. 512 F.2d 141 (5th Cir. 1975).
180. 516 F.2d 937 (5th Cir. 1975).
181. 517 F.2d 826 (5th Cir. 1975).
notion of fairness and adequacy of relief for those of the parties and the district judge.

A number of interesting res judicata and collateral estoppel cases were presented to the Fifth Circuit during 1975. The doctrine of res judicata has two facets. The first is that the former adjudication bars future litigation between the same parties as to all issues actually raised in the prior adjudication. The second facet, and one not so easily remembered or applied, is that the former adjudication also bars future litigation between the same parties as to all issues which could have been raised in the prior adjudication. The relationship of these two facets was explored briefly in Hall v. Tower Land and Investment Co. There, the plaintiff-appellant filed a complaint which was virtually identical to a previous complaint which had been filed and dismissed for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure. The Fifth Circuit quickly concluded that both actions were brought against the same party seeking the same remedy in regard to the same property and that the same alleged right and wrong were involved in both actions. The court went on, however, to state that even if the plaintiff had taken the two counts of her complaint and used one of them in the first action and the other in the second action, res judicata would still prohibit relitigation, "for in both federal courts and Texas state courts a judgment is final not only as to all matters which were decided but also as to all matters which might have been tried." The court was, of course, on safe ground if both federal and state law were the same, even though one or the other was not applicable.

The interesting conflicts of law question suggested by Hall was presented to the Fifth Circuit in two other 1975 cases. In Aerojet-General Corp. v. Askew, the court held that federal law governed both the questions of the res judicata effect of a prior federal court judgment based on federal question jurisdiction and also the res judicata effect where the prior suit was brought only under diversity jurisdiction. The court stated: "The federal doctrine of res judicata bars relitigating any part of the cause of action in question, including all claims and defenses that were actually raised or could have been raised." The Fifth Circuit pointed out that where the forum state's law of res judicata was narrower than the federal law and where a litigant had an action involving both state and federal questions, the application of the narrower state law would permit a party to split his cause of action and thus circumvent the federal law of res judicata simply by not pleading his federal claim or defense. The Fifth Circuit held that the court in the second action must look beyond the pleadings to what

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183. 512 F.2d 481 (5th Cir. 1975).
184. Id. at 483.
185. 511 F.2d 710 (5th Cir. 1975).
186. Id. at 715.
could have been pleaded. The fact that the litigant in the earlier action had chosen to plead and litigate only the state law questions would not justify frustrating the federal law of res judicata. This determination by the Fifth Circuit is obviously one having significant policy overtones. The court explicated the policy considerations which it felt controlling:

The importance of preserving the integrity of federal court judgments cannot be overemphasized—out of respect for the federal courts and for the policy of bringing litigation conclusively to an end. If state courts could eradicate the force and effect of federal court judgments through intervening interpretations of the state law of res judicata, federal courts would not be a reliable forum for final adjudication of a diversity litigant's claim.187

The Fifth Circuit bowed politely to Erie considerations188 but decided that there were affirmative countervailing considerations and that the federal system was an independent system for administering justice to litigants who properly invoked its jurisdiction.

The Aerojet-General court acknowledged that there was "occasional dicta" suggesting that state law might govern res judicata in diversity cases but noted that the only two cases so holding189 had contained virtually no discussion of the choice of law problem. The Fifth Circuit declined to follow those cases. Three months later, the court added to the "occasional dicta" in Maher v. City of New Orleans190 when it stated:

Where federal jurisdiction is bottomed on state law, as in a diversity matter, state law principles of collateral estoppel govern, under the rationale of Erie Railway Co. v. Tompkins.

The court decided, however, that Maher was essentially a federal matter and that, therefore, federal notions of res judicata and collateral estoppel would control. The problem in Maher was that Louisiana law did not have the second facet of res judicata; the prior adjudication barred subsequent adjudication only as to matters actually litigated and not as to matters which might have been litigated. An action was brought in a Louisiana state court action on state questions. The subsequent action was brought in the federal district court stating federal claims. Under Louisiana law, the prior action had no res judicata effect as to the federal claims being asserted in the district court. Under the second facet of res judicata, however, since the federal questions could have been raised in the first action but were not, federal res judicata would seem to bar the second suit. Not so, said the Fifth Circuit. Even under federal law, the court said, the

187. Id. at 716.
190. 516 F.2d 1051, 1056 (5th Cir. 1975).
federal courts should eschew "rough hewn results" and should seek to balance carefully "the interests implicated in finality determinations." The court concluded, by way of a footnote, that since the state court had not addressed the federal questions and since a subsequent state court action would not seem to be barred by local res judicata rules, the fact that the matters raised "should have been litigated" in the earlier suit did not foreclose the present action. The court specifically noted that the prior action had been in a state court. Thus, certain of the policy considerations deemed important in Aerojet-General were not present in Maher. The federal courts were not involved in determining the scope of their own judgments. The Maher court stated that it did not have to decide whether the same result would have obtained had the initial suit been brought in the federal court operating under federal rules. Thus, Maher stands for the proposition that the second facet of res judicata may not be an absolute bar and may yield to other considerations in appropriate cases.

The Fifth Circuit failed to yield to the "might have been litigated" facet of res jusicata in other cases as well. In Stevenson v. International Paper Co., prior litigation (1) had complained of the transfer of blacks into white unions without some transitional protection and (2) had alleged that after the merger, the predominantly white unions had not fairly represented the interest of the new black members. A second action presented a much more general attack against the practices of the company and the unions, which, the plaintiffs claimed, perpetuated a system of employment discrimination. The defendants in the second action argued that it was barred by the first action on the ground that, even if the matters of discriminatory hiring, promotion, and seniority practices had not been raised in the earlier litigation, they could have been litigated there and, therefore, the plaintiffs were barred by res judicata from maintaining the second action. The Fifth Circuit concluded that the two actions were "not identical" and that the first action barred relitigation of the issues of merger and fair representation but did not bar consideration of the broader complaints made in the second action. The court did not directly address the defendants' contention that the second action was barred by the "might have been litigated" facet of res judicata.

The answer which was not given in Stevenson may have been given in Dore v. Kleppe, which, like Stevenson, was a class action. In Dore, the Fifth Circuit took a broadside swipe at the "might have been litigated" facet of res judicata:

But the federal rules do not require this . . . and we will not require it by any such harsh, and erroneous, application of the doctrine of res judicata.

191. Id. at 1056.
192. Id. at 1058, n. 31.
193. 516 F.2d 103 (5th Cir. 1975).
194. 522 F.2d 1369 (5th Cir. 1975).
Rule 18 merely permits the joinder of other claims against the same party, but, faced with a very real controversy, the pleader, to flee from res judicata, need not dream up all the imaginable disputes with the adversary dependent on the outcome of the then controversy and as to which predictions on consequential impact would involve theorizing on hypotheticals.\textsuperscript{193}

The court went on to emphasize the necessity for encouraging manageability of class actions by limiting both the size of the class and the complexity of the litigation. The court emphasized the "importance of maintaining manageable units for determination."\textsuperscript{194} The court clearly felt that to apply the "might have been litigated" facet of res judicata with too great enthusiasm in the class action context would be to encourage class plaintiffs to bring in all conceivable future issues and parties in direct conflict with the goal of "maintaining manageable units for determination." The court was undoubtedly correct insofar as it went. It might well have gone one step further, however, and balanced the administrative inconvenience of having less "manageable units for determination" against its own burgeoning docket, which is undoubtedly contributed to by repetitious relitigation such as that in \textit{Stevenson} and \textit{Dore}.

The Fifth Circuit refused to apply res judicata/collateral estoppel analysis in a number of other contexts. In \textit{International Ass'n of Machinists & Aerospace Workers v. Nix},\textsuperscript{197} the court held that res judicata does not bar the litigation of issues in a subsequent action where those issues could not have been litigated in the first forum. In \textit{Nix}, the subsequent action involved state law contract claims which could not have been brought before the National Labor Relations Board in the first proceeding. In the \textit{Poster Exchange} cases,\textsuperscript{198} the court refused to apply res judicata/collateral estoppel as a bar where the pleadings in the subsequent action might be construed to state new claims beyond those raised in prior suits and occurring since the prior suits. In \textit{Greene v. General Foods Corp.},\textsuperscript{199} the Fifth Circuit refused to find res judicata/collateral estoppel a bar where nineteen years had passed and the development of the law in the antitrust area had been substantial between the prior litigation and the subsequent litigation.

A somewhat similar analysis was applied in \textit{Hampton v. Graff Vending Co.},\textsuperscript{200} with regard to successive appeals. \textit{Hampton} involved a Robinson-Patman Act claim. In its first appearance in the Fifth Circuit,\textsuperscript{201} the court

\textsuperscript{193} \textit{Id.} at 1374-75.

\textsuperscript{194} \textit{Id.} at 1375.

\textsuperscript{197} 512 F.2d 125 (5th Cir. 1975).

\textsuperscript{198} Exhibitors Poster Exchange, Inc. v. Nat'l Screen Serv. Corp., 517 F.2d 110 (5th Cir. 1975); Poster Exchange, Inc. v. Nat'l Screen Serv. Corp., 517 F.2d 117 (5th Cir. 1975); and Poster Exchange, Inc. v. Nat'l Screen Serv. Corp., 517 F.2d 129 (5th Cir. 1975).

\textsuperscript{199} 517 F.2d 635 (5th Cir. 1975).

\textsuperscript{200} 516 F.2d 100 (5th Cir. 1975).

\textsuperscript{201} \textit{Hampton v. Graff Vending Co.}, 478 F.2d 527 (5th Cir. 1973).
had found that Hampton had established a prima facie case of primary-line price discrimination in chewing-gum sales against Graff Vending Co. and had remanded the case to the district court for consideration of injunctive relief and attorneys' fees. The district court on remand had granted both injunctive relief and attorneys' fees. In the second appearance before the Fifth Circuit, Graff questioned the federal court's jurisdiction, arguing that Hampton had failed to prove at least one purchase or sale "in commerce." This point had not been raised in the earlier appeal. The court held that the fact that the issue had not been raised before was not "fatal" because the law relating to Robinson-Patman jurisdiction had changed between the time of the first appeal and the second appeal.202

_Nishimatsu Construction Co. v. Houston National Bank_203 may indicate that the federal courts will take a much more active role in the review of default judgment. In _Nishimatsu_, the Houston National Bank was the holder of a contract signed "Southeast Construction Co., Ltd. by: Jack D. Baize." The bank obtained a default judgment against Baize and Southeast Construction Co. (Secon) jointly and severally for $82,208. Baize filed a notice of appeal, claiming that the judgment against him was erroneous since he had signed only as Secon's agent. The bank contended that a default judgment entered on well-pleaded allegations in a complaint established a defendant's liability and that Baize's appeal was an improper attempt to relitigate on appeal a matter concluded against him by his own default. The Fifth Circuit agreed with Baize and held that a default judgment is unassailable on the merits only insofar as it is supported by well-pleaded allegations. The court held that the defendant is not deemed to have admitted facts that are not well-pleaded and is not deemed to have admitted conclusions of law. The court stated:

In short, despite occasional statements to the contrary, a default is not treated as an absolute confession by the defendant of his liability and of the plaintiff's right to recover. . . . On appeal, the defendant, although he may not challenge the sufficiency of the evidence, is entitled to contest the sufficiency of the complaint and its allegations to support the judgment.204

The court found that the general averment that Baize had entered into a contract with the bank was contradicted and controlled by the contract, which showed that Baize signed only as an agent; therefore, the complaint, to the extent that it sought relief against Baize on the contract, was incapable of supporting a default judgment.

In _Baez v. S. S. Kresge Co._205, the Fifth Circuit reaffirmed that a district court's finding of fact was not conclusive on appeal. The court held that a jury's verdict must be set aside if it is contrary to the weight of the evidence. The court stated:

203. 515 F.2d 1200 (5th Cir. 1975).
204. _Id._ at 1206.
205. 518 F.2d 349 (5th Cir. 1975).
court is vested with substantial discretion to determine whether to reopen default judgments and that the Fifth Circuit would not "lightly overturn" such a district court determination. The case involved a complaint served on Kresge's registered Texas agent, mailed to Kresge's Michigan home office, and then lost in the mail between the Michigan home office and local Texas counsel. The Fifth Circuit, although indicating it probably would have opened the default, affirmed the district court's refusal to open and said Kresge should have established minimal internal procedural safeguards to prevent defaults from being suffered even in the event of the loss of the complaint in the mail.