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COLUMNISTS

Nicholas M. Bruno is an associate at Beck Redden LLP, where he focuses his practice on civil appeals and complex civil litigation. He has successfully represented clients in a wide range of litigation, including catastrophic personal injury cases, complex discovery mandamus proceedings, and various health care and commercial litigation matters. He graduated from the University of Texas School of Law and clerked for the Honorable Harvey Brown of the First Court of Appeals.

Kelley Clark Morris is a partner at Wright, Close & Barger, LLP in Houston. She is Board Certified in Civil Appellate Law, and her practice focuses on civil appeals and litigation, with a particular emphasis on energy disputes. Kelley is a graduate of the Plan II Honors Program at The University of Texas at Austin and Baylor University School of Law. Kelley clerked for Justice Paul W. Green of the Supreme Court of Texas and Judge Lynn N. Hughes of the U.S. District Court for the Southern District of Texas.

Eleanor Mason attended Rice University and the University of Texas School of Law. She practiced at Bracewell LLP before joining the Fourteenth Court of Appeals as a staff attorney in 2017.

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Ryan P. Pitts is an associate in the appellate practice group of Haynes and Boone, LLP, where his practice focuses on complex commercial litigation and appeals. He graduated from Duke University School of Law. Afterward, he clerked at the federal

district and circuit levels, for the Honorable Lee H. Rosenthal of the U.S. District Court for the Southern District of Texas and for the Honorable Gerald Bard Tjoflat of the Eleventh Circuit Court of Appeals. He currently serves on the Council of the Houston Bar Association's Appellate Section.

Kelsi Stayart White is an appellate attorney at AZA. She provides appellate-support at the trial level and handles appeals in commercial and tort cases in both state and federal court. Kelsi is a graduate of the University of Texas School of Law. She served as a law clerk for Judge Leslie H. Southwick, a judge on the U.S. Court of Appeals for the Fifth Circuit. She attends St. Martin's Episcopal Church and is the proud mother of two toddlers.

JoAnn Storey focuses on appellate law and has been Board Certified in Appellate Law by the Texas Board of Legal Specialization since 1987. She is the past chair of the State Bar of Texas Appellate Section and past chair of the Houston Bar Association's Appellate Practice Section. Ms. Storey was a long-time member of the Texas Board of Legal Specialization's Civil Appellate Law Examination Committee and Civil Appellate Law Advisory Commission. She is a former adjunct professor at the University of Texas School of Law who taught appellate advocacy.

Oral Argument Statistics in the Houston Courts of Appeals

Nicholas Bruno

Conventional wisdom in the appellate community is that oral argument numbers have declined since the Covid-19 pandemic. The Office of Court Administration does not publish the precise numbers of oral arguments that each intermediate court of appeals holds every year, so data on this issue is scarce.

This article publishes some data that the Clerk of the First and Fourteenth Courts of Appeals graciously provided and publicly available data regarding the Texas Supreme Court.

Texas Supreme Court.

Again, the Office of Court Administration does not publish the number of oral arguments that the Texas Supreme Court holds. It does note, however, that "[m]ost regular causes are set for oral argument in open court and are reported in written opinions. However, a petition may be granted and an unsigned opinion (per curiam) issued without oral argument if at least six members of the court vote accordingly." OFFICE OF COURT ADMIN., ANNUAL STATISTICAL REPORT FOR THE TEXAS JUDICIARY (FY2022) 112 (2022), https://www.txcourts.gov/media/1456803/ar-statistical-fy-22-final.pdf.

Assuming most "regular causes" have oral argument, the number of arguments has actually grown at the Texas Supreme Court over the last decade:

SUPREME COURT

ACTIVITY

	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	10-Yr. Avg
Regular Causes[1]											
Added to Docket	94	93	91	100	117	135	93	110	99	123	**106**
Disposed	100	96	113	102	102	118	95	111	117	117	**107**
Pending at End of Year	48	45	22	20	35	52	50	48	30	36	**39**
Clearance Rate	106%	103%	124%	102%	87%	87%	102%	101%	118%	95%	**102%**

Id.

Of course, the Texas Supreme Court, as a court of last resort, is unique. Among other distinctions, it controls its own docket. And it is a state-wide court. Compared

to the number of appeals annually—the intermediate courts issue over 8,100 opinions a year (*id.* at 52)—this number is unlikely to drive the perception of whether Texas courts held as many oral arguments since the pandemic.

The Houston courts of appeals.

The two Houston courts of appeals, however, have had a marked drop in the number of oral arguments. The clerk's office provided the following statistics of cases submitted with oral argument from 2015 to the present:[1]

CASES SET FOR SUBMISSION ON ORAL ARGUMENT

Fiscal Year	First Court			Fourteenth Court		
	Total	CV	CR	Total	CV	CR
9/1/15 to 8/31/16	52	47	5	116	84	32
9/1/16 to 8/31/17	36	30	6	93	65	28
9/1/17 to 8/31/18	55	42	13	93	69	24
9/1/18 to 8/31/19	46	41	5	67	52	15
9/1/19 to 8/31/20	38	23	15	52	35	17
9/1/20 to 8/31/21	27	21	6	27	20	7
9/1/21 to 8/31/22	33	31	2	42	37	5
9/1/22 to 8/31/23	20	16	4	40	27	13

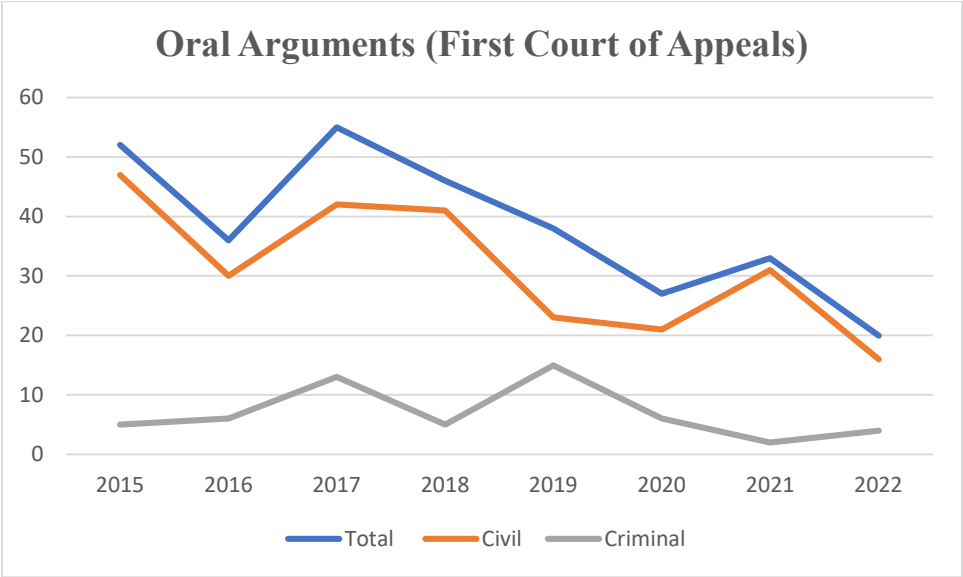
Arguments in criminal appeals (the "CR" columns in the graph above) have always been rare. Since the pandemic, however, there has been a marked drop-off in the number of oral arguments in criminal appeals (for example, from the height of 32 criminal oral arguments in the Fourteenth Court in 2015-16, the number fell to 13 in 2022-23). The number has fluctuated widely in the First Court, however, with the highest number of criminal oral arguments post-pandemic (four in 2022-23)

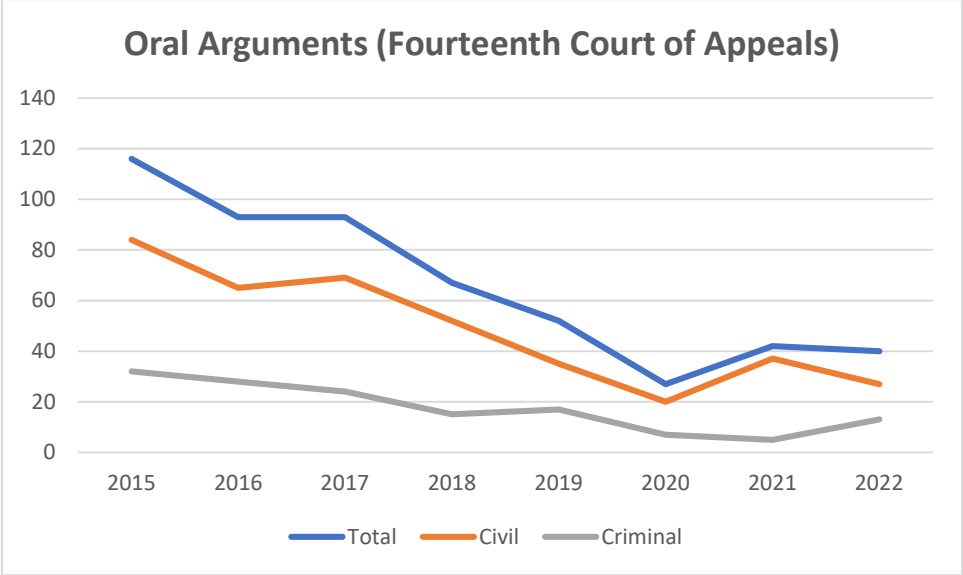
[1] This author passes along publicly his gratitude to the clerk's office for so graciously providing this data and going through the hard process of verifying the statistics provided in this article.

matching some pre-pandemic years (5 in 2018-19).

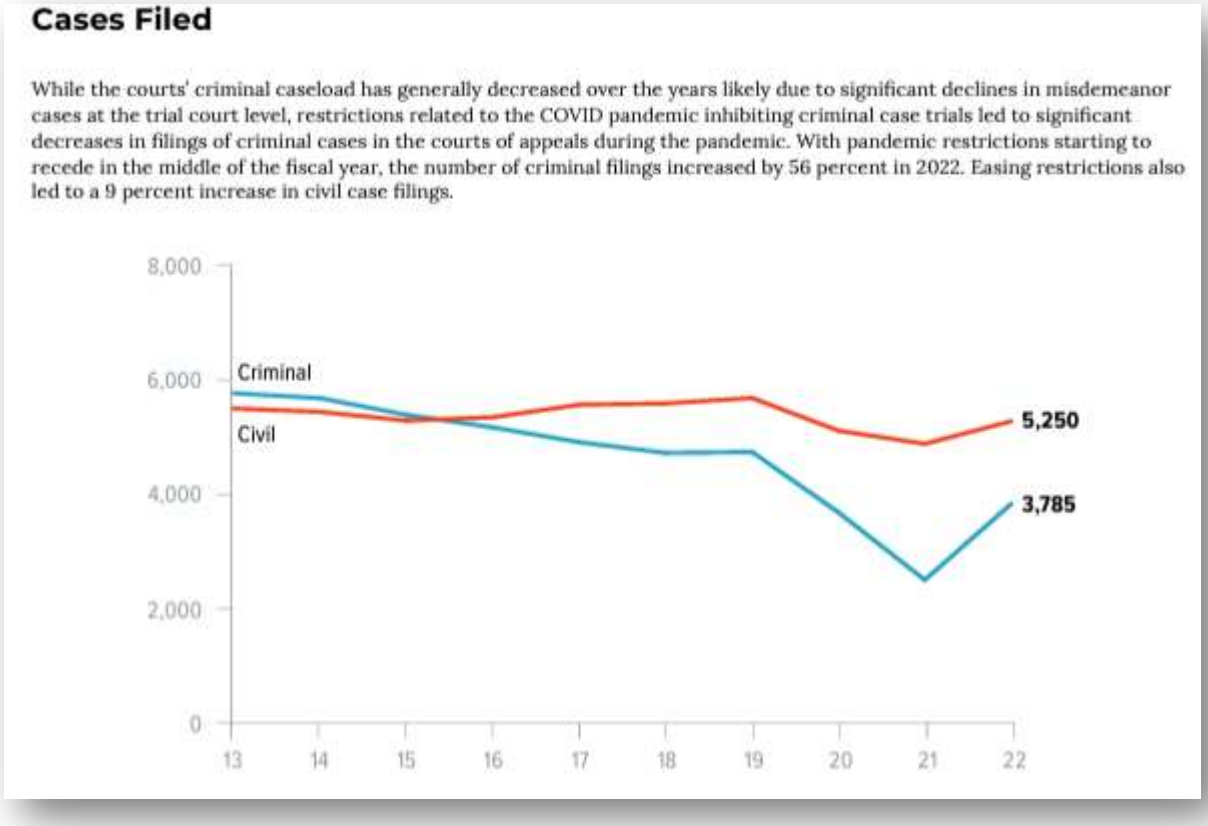
The number of civil oral arguments, however, has fallen dramatically in both courts. The First Court fell from a pre-pandemic high of 55 total oral arguments (2017-18) to 20 in 2022-23. Similarly, the Fourteenth Court of Appeals fell from a pre-pandemic high of 84 oral arguments in 2015-16 to 37 in 2022-23.

These charts provide a visual representation of this data over time:





None of this data is meant to criticize any court. Indeed, after a drop in the number of appeals during the pandemic, the intermediate courts now handle roughly the same numbers of appeals post-pandemic as they did pre-pandemic:



OFFICE OF COURT ADMIN., ANNUAL STATISTICAL REPORT FOR THE TEXAS JUDICIARY (FY2022) 49 (2022), https://www.txcourts.gov/media/1456803/ar-statistical-fy-22-final.pdf.

The post-pandemic world has changed. Perhaps appellate counsel are less likely to request oral argument. Clients may be less willing to agree to their counsel requesting oral arguments. New judges may have different opinions on the occasions when oral argument is necessary. But the data seems to confirm the new reality that, at least in the Houston courts, the number of oral arguments has fall in recent decades.

Chief Justice Terry Adams of the First Court of Appeals graciously offered to provide the following reaction to these statistics:

> The post-pandemic world has seen big changes in the practice of law. And our judicial system has been no exception to that. Oral argument by Zoom became the new normal and now we are back to in-person arguments. As the method and frequency of oral argument has changed to reflect the times, I think one thing has remained constant– the importance of oral argument. It provides transparency and enhances confidence in our judicial system. As we move forward, our Court is working diligently to return to our historical frequency on having oral argument and for that, again, to be the reality of appellate practice at our Court.

Chief Justice Tracey Christopher of the Fourteenth Court of Appeals also graciously agreed to provide the following reaction to these statistics:

> I personally enjoy oral arguments. But every judge has different criteria for granting argument. Here are my criteria—both sides have to ask for argument and the main issues in the case should be legal and not factual. I believe fewer appellees are requesting argument, leading to fewer grants. If you are denied argument, file a motion for reconsideration (it helps if it is an agreed motion).

Did You Know?

JoAnn Storey

If a "no evidence" complaint is raised only in a MNT, the only relief available is a new trial if the complaint is sustained on appeal. *Horrocks v. Texas Dep't of Transp.*, 852 S.W.2d 498, 498 (Tex.1993).

Case Updates from the First Court of Appeals

Garrett Meisman

***Taylor Morrison of Tex., Inc. v. Mason*, No. 01-22-00829-CV, 2024 WL 116935 (Tex. App.—Houston [1st Dist.] Jan. 11, 2024, no pet. h.)**

Panel consisted of Justices Kelly, Hightower, and Guerra. Opinion by Justice Hightower.

This memorandum opinion provides an interesting example of the circumstances in which an arbitration agreement can be enforced against a party that never signed the agreement.

James and Sandra Spencer entered a purchase agreement with Taylor Morrison of Texas, Inc., a homebuilder, for a home to be built in League City. The purchase agreement contained a clause requiring arbitration of any subsequent dispute over defects in the design or construction of the home. Four years after the original sale, the Spencers sold the home to James and Merry Mason.

The Masons later sued Taylor Morrison under the implied warrantees of habitability and good workmanship, alleging that the home had developed a severe mold infestation because of defects in Taylor Morrison's design and construction. They likewise brought claims for negligent construction and violations of the Deceptive Trade Practices Act. Taylor Morrison responded by filing a motion to compel arbitration, arguing that the arbitration clause in the original purchase agreement was enforceable against the Masons under the doctrine of direct-benefits estoppel. Taylor Morrison also asserted in a plea in abatement that the trial court was required to stay the proceedings pending completion of the arbitration. The trial court denied the motion to compel arbitration and the plea in abatement, and Taylor Morrison appealed.

The Court of Appeals reversed the trial court's order, explaining that non-signatories can be required to undergo arbitration of a dispute in six scenarios: (1) incorporation by reference, (2) assumption, (3) agency, (4) alter ego, (5) equitable estoppel, and (6) third-party beneficiary. The doctrine of direct-benefits estoppel, upon which Taylor Morrison relied, applies when a non-signatory plaintiff seeks to enjoy the benefits of a contract while simultaneously attempting to avoid the contract's burdens (e.g., the obligation to arbitrate disputes). Following the Supreme Court's decisions in Lennar Homes of Texas Land & Construction, Ltd. v. Whiteley, 672 S.W.3d 367 (Tex. 2023), and Taylor Morrison of Tex., Inc. v. Kohlmeyer, 672 S.W.3d 422, 425 (Tex. 2023), the Court of Appeals concluded that, although the Masons relied on implied warranties that are imposed by operation of law, those warranties arise from the written contract. The Masons were thus required to arbitrate their implied warranty claims

under the doctrine of direct-benefits estoppel. And because the negligence and DTPA claims similarly fell within the scope of the arbitration clause, the Masons were also required to arbitrate those tort claims. The court therefore held that the trial court abused its discretion in denying the motion to compel arbitration.

Relatedly, because the Masons' claims were properly referable to arbitration, the trial court was required to stay proceedings in under section 3 of the Federal Arbitration Act. So the Court of Appeals concluded that the trial court abused its discretion in denying Taylor Morrison's plea in abatement and remanded for further proceedings.

***Daniel v. Morris*, No. 01-22-00319-CV, 2024 WL 748081 (Tex. App.—Houston [1st Dist.] Feb. 22, 2024, no pet. h.)**

Panel consisted of Justices Goodman, Countiss, and Farris. Opinion by Justice Goodman.

This memorandum opinion illustrates the effect of the relation-back doctrine on a defense based on a statute of limitations.

David Daniel and Jennifer Morris entered a settlement agreement following litigation in the wake of their divorce. Daniel later sued Morris and the mediator that assisted in the settlement, arguing that they both violated the confidentiality provisions of the agreement by disclosing its terms on various occasions. Daniel also claimed that the mediator committed malpractice by violating his duty of confidentiality. The trial court granted summary judgment to Morris and the mediator on all of Daniel's claims, and Daniel appealed.

The Court of Appeals affirmed the summary judgment on all the breach-of-contract claims against Morris, except for one on which there was a genuine factual dispute. The court also affirmed as to the breach-of-contract claim against the mediator because, although he signed the settlement agreement, he was not a party thereto.

However, the court concluded that the trial court erred by granting summary judgment on the mediator malpractice claim on the ground that it was barred by the two-year statute of limitations. Daniel's mediator malpractice claim accrued on June 18, 2019, and he asserted that claim in an amended pleading on November 12, 2021—more than two years later. But in a pleading filed on May 8, 2020, Daniel had asserted a claim for "legal malpractice," in which he alleged that the mediator had negligently disclosed the settlement agreement. Because the legal malpractice and mediator malpractice claims arose from the same transaction or occurrence, the latter claim "related back" to Daniel's earlier pleading under Texas Civil Practice & Remedies Code § 16.068. The claim was therefore not barred by the statute of limitations. The Court of Appeals affirmed in part, reversed in part, and remanded for further proceedings.

Case Updates for the Fourteenth Court of Appeals

Eleanor Mason

***Massage Heights Franchising, LLC v. Hagman*, 679 S.W.3d 298 (Tex. App.—Houston [14th Dist.] 2023, pet. filed) (Poissant, J.)**

In Massage Heights Franchising, LLC, the Fourteenth Court of Appeals addressed issues of liability and damages with respect to a negligence claim arising from criminal conduct in the franchisor/franchisee context.

As a franchisor, Massage Heights Franchising licenses its business system to franchisees, who in turn operate a business offering therapeutic and massage services to the public under the "Massage Heights" name. While getting a massage at a franchisee location, Hagman was sexually assaulted by her masseuse. Hagman sued Massage Heights Franchising, the franchisee, and the masseuse, and the jury returned a verdict finding all defendants liable for negligence. The trial court entered judgment on the verdict and awarded Hagman $1.5 million in damages and $1.8 million in exemplary damages.

In one of its appellate issues, Massage Heights Franchising argued that the masseuse's criminal act was a superseding cause of Hagman's injury, thus insulating it from liability. Rejecting this argument, the court noted that a new and independent cause must "be both unforeseeable and a superseding cause of the injury." Concluding that this showing was not made here, the court pointed to evidence that (1) a criminal background check run on the masseuse returned multiple charges, (2) Massage Heights Franchising permitted its franchisees to hire masseuses with any kind of criminal background, and (3) the danger of sexual assault presented by a masseuse was foreseeable.

However, the court sustained Massage Heights Franchising's challenge to the exemplary damages award. Texas Civil Practice and Remedies Code Section 41.005 states that a court may not award exemplary damages against a defendant because of the criminal act of another. As the court stated, this bar extends to "exemplary damages for negligence occurring concurrently with a criminal act." Reasoning that Hagman's injury was "indivisible between [Massage Heights] Franchising's negligence and the concurrent criminal act of [the masseuse]," the court reversed the exemplary damages award.

***Pohler. v. Cavalry SPV I, LLC*, No. 14-22-00772-CV, 2023 WL 7141126 (Tex. App.—Houston [14th Dist.] Oct. 31, 2023, no pet. h.) (Hassan, J.)**

In *Pohler*, the Fourteenth Court of Appeals concluded Pohler was entitled to relief few appellants would request: arbitration of a debt collector's claims against him to collect an outstanding credit card balance.

Pohler owed approximately $8,000 on his Costco credit card when the account was closed for nonpayment and sold to Cavalry SPV I, LLC. Cavalry sued Pohler in justice court, and Pohler moved to compel arbitration under the terms of his credit card agreement. In relevant part, the agreement permitted arbitration of "any claim" excluding those filed in small claims court "as long as the matter stays in small claims court." The justice court denied Pohler's motion to compel and signed a judgment for Cavalry. Pohler appealed to the county court and reasserted his motion to compel. The county court denied the motion and entered judgment for Cavalry.

On appeal, the court reversed the denial of Pohler's motion to compel and remanded the case for further proceedings. The court concluded that when Pohler appealed his case to the county court, it was outside the arbitration provision's "small claims court" limitation and thus eligible for arbitration.

The court relied on two bases for this conclusion. First, Pohler's appeal from the justice court judgment was de novo, meaning that the entire case was presented "as if there had been no previous trial." Thus, the case "essentially proceed[ed] as a new action in the county court." And second, Texas statutes and case law indicate that county courts are separate and apart from small claims court. The court reasoned that, once Pohler appealed the case de novo to the county court, it was no longer "in small claims court" and could be arbitrated under the terms of the parties' agreement.

***Brast v. Brast*, 681 S.W.3d 788 (Tex. App.—Houston [14th Dist.] 2023, no pet. h.) (Poissant, J.)**

In *Brast*, the Fourteenth Court of Appeals concluded that actions in defense of property did not preclude a finding of family violence as necessary for issuance of a protective order.

The Brast parties got into a "scuffle" when a father and son tried to retrieve their dog from another family member. After hearing testimony, the trial court entered two protective orders against the father and son. The father and son appealed, arguing that the trial court's family violence finding was erroneous because their actions were justified since they were taken in defense against property, *i.e.*, the dog.

"Family violence" as necessary to warrant a protective order under the Texas Family Code refers to an act "intended to result in physical harm, bodily injury, assault, or sexual assault or that is a threat that reasonably places [a person] in fear of [the same], but does not include defensive measures to protect oneself." Tex. Fam. Code § 71.004(1). Considering the appellants' argument, the court noted that "[t]he plain language of the statute provides that acts in self defense are not family violence, but it contains no similar provision concerning the defense of property." Therefore, the court rejected the appellants' argument and concluded that acts in defense of property do not preclude a finding of family violence under the Texas Family Code.

Fifth Circuit Update

Kelsi Stayart White (AZA)

***SXSW, L.L.C. v. Federal Insurance Company,* No. 22-50933 (Oct. 5, 2023) (Willett, Engelhardt, and Oldham)**

This case is an important read for anyone alleging diversity jurisdiction in federal court or seeking to challenge an opponent's establishment of diversity jurisdiction.

By now most federal practitioners are familiar with the Fifth Circuit's precedent requiring an LLC's citizenship to be determined by the citizenship of its members. Many practitioners treat "member" synonymous with "owner," but in this decision, the Fifth Circuit held that these two terms cannot be used interchangeably. This is because certain states allow for LLCs to have members that are *not* owners. Thus, an allegation of the citizenship of *owners*—not all members—will not satisfy the standard for establishing diversity jurisdiction. The possibility of non-owner members and/or their citizenship must be addressed. Relatedly, the citizenship of members must be established at the time of the filing of the lawsuit; a belated attempt to establish diversity jurisdiction based on members' citizenship at the time a jurisdictional issue is raised (at district court or on appeal) will not suffice.

Because the plaintiff, SXSW, had not properly alleged the citizenship of all its members, the panel remanded the case to the district court to determine whether jurisdiction existed. The panel rejected the following efforts to show diversity jurisdiction on appeal: (1) plaintiff's counsel explaining "owner" and "member" were used interchangeably in the district court, (2) drawing inferences from the plaintiff's later membership structure to determine the membership structure as of the date of filing the complaint, and (3) treating the residence of an individual owner of an LLC as synonymous with his citizenship.

***Issam Abdallah, et al. v. Mesa Air Group, Incorporated, et al.*, No. 22-10686 (Oct. 13, 2023) (King, Smith, and Elrod)**

In this Section 1981 and Title VI case, the Fifth Circuit reversed a summary judgment for the defense and remanded in favor of two plaintiffs who had sued an airline for cancelling a flight based on allegedly discriminatory assumptions that the plaintiffs were security risks based on their race and national origins.

This fact pattern involved two unique aspects: all the passengers suffered the same harm from the cancelled flight and were rebooked on other flights to their destination; and the conditions of the airline ticket allowed the airlines to rebook in this manner. The airline defendants had argued, and the district court agreed, that the plaintiffs could not show differential treatment because they had been subjected to the same

rebooking as all other passengers and that the airline had not breached its agreement with them because the ticket conditions allowed for rebooking.

The panel disagreed with the district court's reasoning. It held that disparate treatment looks at whether the protected category or characteristic was a "but-for" cause of the particular experience *or* outcome. Here, the outcome would have been different but for the plaintiffs' protected class: the flight would not have been cancelled. Comparing the experience of the other passengers (cancelled flight) with the plaintiffs' experience is *one* way of establishing disparate treatment, but plaintiffs can also allege and establish that a certain outcome occurred because of their protected class. That is what the plaintiffs had done.

The panel then addressed the airline's argument that a Section 1981 claim requires a breach of contract, and so the use of discretion permitted under a contract cannot support a Section 1981 claim. The panel held that Section 1981 protects individuals from discrimination even in the exercise of *discretionary* benefits, privileges, terms, and conditions of a contract. For example, the Fifth Circuit has previously held that terminating someone under an at-will contract with discriminatory intent is actionable under Section 1981 even though that action cannot support a breach of contract claim.

Finally, as to the airline's claim for immunity under a federal statute that allows airlines to remove passengers that are or might be "inimical to safety," the panel imposed a "reasonableness" requirement on the airline's decision in consensus with sister circuits. The panel held that if an airline makes a passenger-removal decision on a discriminatory basis, it is not acting reasonably, but rather arbitrarily and capriciously, eliminating its claim for immunity.

The relevant facts were disputed on the record. The panel pointed to statements made by the pilot about the plaintiffs' names being "Arabic" or "Mediterranean." Additionally, the airline claimed certain actions by the plaintiffs were suspicious but could not provide a supporting explanation (like, why a hand wave was suspicious). Thus, the panel determined that the plaintiffs were entitled to a jury trial on their claims.

***Tesla v. NLRB*, No. 22-60493 (Nov. 14, 2023) (Smith, Southwick, and Higginson)**

In this decision, the Fifth Circuit held that the NLRB's recent rule regarding union insignia and company uniforms was unlawful. The NLRB had dictated that when an employer interferes in any way with its employees' right to wear union insignia, the employer must prove special circumstances justifying the interference. This rule would have made any company's uniform policy unlawful unless the employer could

prove special circumstances. Tesla challenged the rule by filing a petition for review and won.

Tesla's uniform policy required its employees to wear plain black clothes with the Tesla logo on them, which Tesla provided. Tesla required this uniform to ensure the paint jobs on vehicles were not impacted by employees' clothing (referred to as "mutilation"), and because it allowed managers to quickly identify employees' functions based on the color of their uniforms. Tesla did allow these employees to wear their own plain black clothing so long as it would not "mutilate" paint on the vehicles and did not pose any safety risks. In 2017, Tesla's unionized employees began wearing union shirts rather than their uniform shirts. At first, Tesla allowed it, but then Tesla noticed that mutilations were occurring on vehicles and so began strictly enforcing its uniform policy, although it did allow employees to put union stickers of any size on their uniforms.

The Fifth Circuit reviewed precedent and determined that Tesla's policy was distinguishable from prior situations on which the NLRB relied in establishing its new rule. Tesla did not prohibit union insignia categorically (*i.e.*, union stickers on the uniform were fine), and Tesla did not apply its policy outside of work areas and work times. The panel held that the NLRB was incorrectly and irrationally treating *any* restriction on union insignia as equivalent to a prohibition.

This decision is one of several the Fifth Circuit issued recently concerning agency action. Anyone handling a challenge to agency action should also take a look at *Wages and White Lion Investments, L.L.C. v. Food & Drug Administration*, No. 21-60766 (concerning the FDA's taking e-cigarette manufacturers on a "wild goose chase") and *Commodity Futures Trading Commission v. EOX Holdings, L.L.C. & Andrew Gizienski*, No. 22-20622 (reversing a conviction because the CFTC had not given fair notice of its interpretation of a rule and was engaging in rulemaking by prosecution).