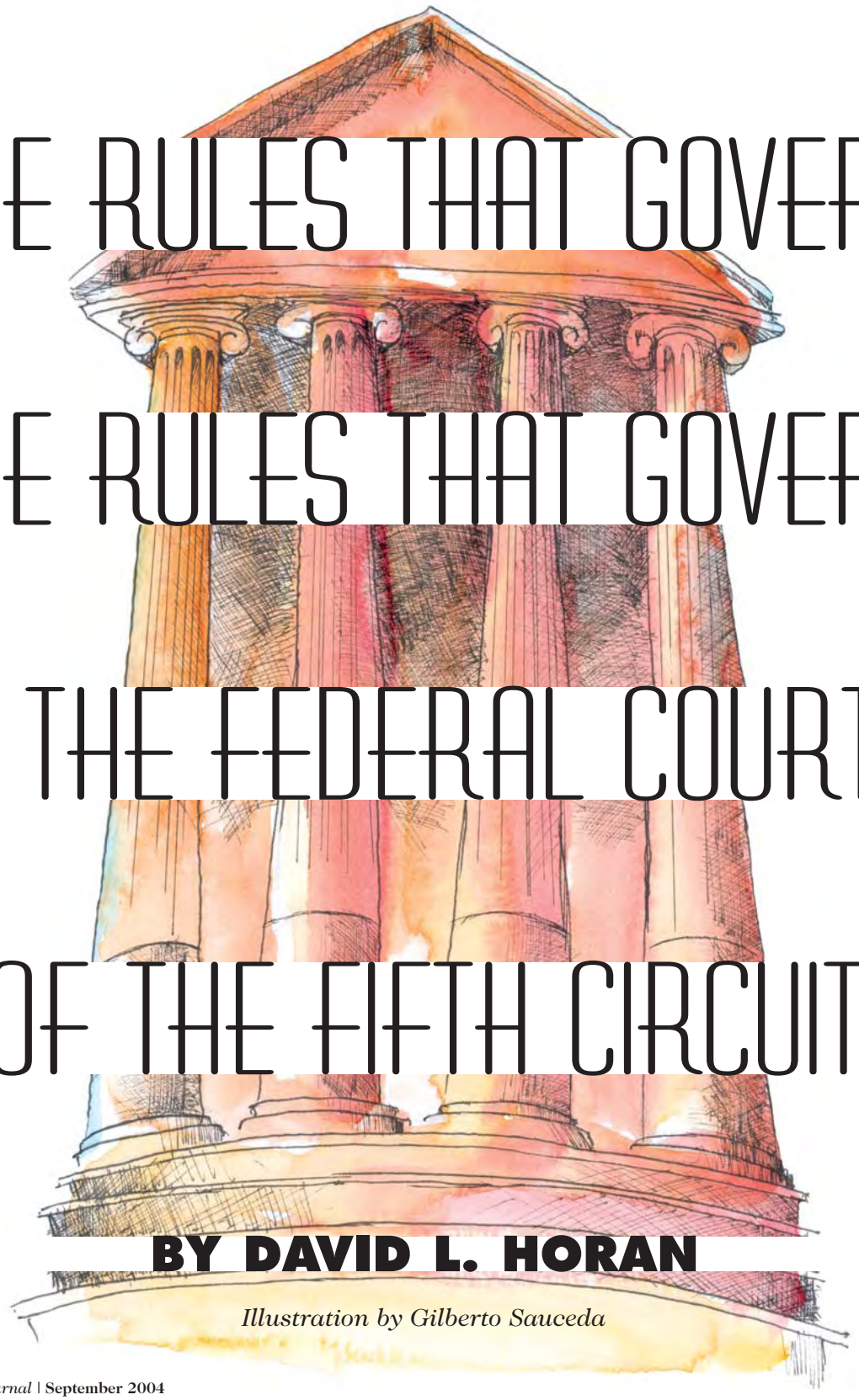
"What has the Fifth Circuit said on this issue?" This question is familiar to most attorneys practicing within the jurisdiction of the U.S. Court of Appeals for the Fifth Circuit. The import of this question will be especially familiar to junior attorneys whose task it is to determine the answer for any given case that will be briefed or tried.

The question admits of two basic answers: nothing or something. Nothing is a relatively rare answer. The Fifth Circuit is a rather active court that produces, and historically has produced, a large number of opinions, published or otherwise. It is fair to say that most cases do not present true issues of first impression.

The subject of this article is the other answer to the question: specifically, what rules of law govern when the Fifth Circuit has said *something* — or possibly conflicting somethings — on the issue presented in a given case.



THE RULES THAT GOVERN

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IN THE FEDERAL COURTS OF THE FIFTH CIRCUIT

BY DAVID L. HORAN

Illustration by Gilberto Sauceda

There are rules that governs these matters, familiar in general terms to any attorney from the first year of law school: *stare decisis*, *Erie*, dicta. Most lawyers practicing in the Fifth Circuit know these rules, or at least think they do. But these rules make or break the results of cases more often than one might think, so it is worth collecting and analyzing just what the rules are for thefederal courts of the Fifth Circuit.

Stare Decisis and Federal Law: When What the Fifth Circuit Said Goes[1]

Generally speaking, if the Fifth Circuit has said something on an issue of federal law, that decision is a binding precedent. The doctrine of *stare decisis* — that courts abide by and adhere to their own or a higher court's precedent from decided cases and do not disturb settled law — and its importance to common law courts is well known.[2] The Fifth Circuit is a self-described "strict *stare decisis* court."[3]

Under this doctrine, the court of appeals and the district courts of the Fifth Circuit are bound on matters of federal law by U.S. Supreme Court decisions and decisions of the Fifth Circuit sitting *en banc*.[4] Further, as is the rule in all of the federal courts of appeals, one panel of the Fifth Circuit cannot overrule a prior Fifth Circuit panel decision — right or wrong — unless and until that decision is overruled, either explicitly or implicitly, by the Supreme Court or the *en banc* Fifth Circuit.[5] Explicit overruling occurs when the Supreme Court or *en banc* Fifth Circuit cites a Fifth Circuit decision and expressly overrules or disapproves of it. Implicit overruling occurs when the result of a Supreme Court or *en banc* Fifth Circuit decision directly contradicts the holding of a prior Fifth Circuit panel decision without expressly citing or discussing that prior panel decision.[6]

A Fifth Circuit decision on a federal law issue will generally bind the parties and courts in the Court of Appeals and district courts of the Fifth Circuit.

Applying this rule when the *en banc* Fifth Circuit or the Supreme Court has explicitly overruled a prior Fifth Circuit decision is easy. More often than not, the *en banc* Fifth Circuit will be quite explicit when overruling its own panels' prior decisions or lines of decisions. When the *en banc* court has done so, an attorney should feel supremely confident requesting that a district court or a Fifth Circuit panel hold the prior panel decision to be overruled. However, explicit overruling by the Supreme Court of a prior court of appeals decision, when that decision is not before the court on a petition for writ of certiorari, is a bit much to hope for.

Attorneys will more often find themselves asking for a finding that the Supreme Court has implicitly overruled a prior Fifth Circuit panel or *en banc* decision. The Fifth Circuit has observed: "[F]or a panel of this court to overrule a prior decision, we have required a Supreme Court decision that has been fully heard by the Court and establishes a rule of law inconsistent with our own."[7] Moreover, the Fifth Circuit has explained: "Notwithstanding its relevance, the Supreme Court decision must be more than merely illuminating with respect to the case before us, because a panel of this court can only overrule a prior panel decision if 'such overruling is unequivocally directed by controlling Supreme Court precedent.'"[8] On the other hand, decisions of other circuits or district courts can never overrule a Fifth Circuit panel decision.[9]

A Fifth Circuit decision on a federal law issue will generally bind the parties and courts in the Court of Appeals and district courts of the Fifth Circuit. If neither the Supreme Court nor the *en banc* Fifth Circuit has explicitly or implicitly overruled the Fifth Circuit's prior panel decision that controls an issue, an attorney seeking to escape that decision's holding has no choice but to raise the issue before the district court or Fifth Circuit panel and, when the time is right, seek *en banc* rehearing to ask the full court of appeals to change the Fifth Circuit precedent.[10]

Stare Decisis and State Law: When What the Fifth Circuit Said Goes, Even If It Was Just a Guess

When faced with a state law issue in a federal case, an attorney's task in looking for controlling Fifth Circuit law does not change much from the task with regard to issues of federal law. Again, generally speaking, if the Fifth Circuit has said something on a state law issue, that decision will be a binding precedent.

Erie Guesses on a Clean Slate and the Decisions of the State's Highest and Intermediate Appellate Courts

Of course, the federal court's analysis in the first instance is different. A federal court deciding a state law issue

under either its diversity[11] or supplemental[12] jurisdiction must look to and follow the final decisions of the state's highest court. If such a decision is not available, the court must determine in its best judgment how the state's highest court would decide the issue if presented with the same case.[13] This is the familiar "*Erie* guess," so named for the Supreme Court's seminal decision in *Erie Railroad v. Tompkins*.[14] In making this guess, a federal court should look to the precedents of the state's intermediate appellate courts for guidance and defer to those courts' decisions unless convinced by other data that the state's highest court would decide the case differently than these intermediate courts' decisions.[15]

The Effect of Intervening State Law on a Prior Panel's State Law Determination

As it turns out, the Fifth Circuit's state law determinations, once made, are, like the Fifth Circuit's federal law determinations, not easily overturned by subsequent panels. The Fifth Circuit's strict *stare decisis* doctrine applies to a Fifth Circuit panel's interpretation of state law no less than a prior decision applying federal law.[16] A district court or subsequent Fifth Circuit panel is bound by a prior Fifth Circuit panel's interpretation of state law, notwithstanding any alleged existing confusion in the state's law, unless: (1) the *en banc* Fifth Circuit reaches a contrary interpretation[17]; (2) a subsequent state court decision or statutory amendment or other enactment makes the prior panel decision "clearly wrong"[18]; or (3) intervening decisions of intermediate state appellate courts are "clearly contrary" to the prior panel decision.[19]

This standard remained rather murky in application until a Fifth Circuit panel established a cleaner and clearer rule in 1998. The panel made clear that, to render a prior Fifth Circuit panel's interpretation of state law "clearly wrong," a subsequent decision of the state's highest court must constitute, "at a minimum, a contrary ruling squarely on point,"[20] or there must have been a "supervening enactment of a controlling statute."[21] The Fifth Circuit also clarified the effect of subsequent intermediate state appellate court decisions on the continuing effect of a prior Fifth Circuit panel's *Erie* guess. The panel held: "[W]hen our *Erie* analysis of controlling state law is conducted for the purpose of deciding whether to follow or depart from prior precedent of this circuit, and neither a clearly contrary subsequent holding of the highest court of the state nor a subsequent statutory authority, squarely on point, is available for guidance, we should not disregard our own prior precedent on the basis of subsequent intermediate state appellate court precedent unless such precedent comprises unanimous or near-unanimous holdings from several — preferably a majority — of the intermediate appellate courts of the state in question."[22]

For attorneys in the federal courts of the Fifth Circuit, the first source of controlling precedent on state law issues is Fifth Circuit case law. If the Fifth Circuit has spoken, attorneys must nevertheless investigate decisions from the state's highest and intermediate appellate courts or state statutory enactments that postdate the Fifth Circuit's first *Erie* guess on the issue. However, such intervening authority can only control the outcome of the case in the district courts and before a subsequent Fifth Circuit panel if: (1) the new statute or a decision from the state's highest court renders the prior panel decision "clearly wrong"; or (2) unanimous or near-unanimous holdings from several — preferably a majority — of the state's intermediate appellate courts are "clearly contrary" to the prior panel decision.

Conflicting Prior Panel Decisions: When the Fifth Circuit Has Said Too Much

The general rule is clear: panels of the Fifth Circuit cannot overrule or decide the same issue differently than a prior Fifth Circuit panel decision. A Fifth Circuit panel decision will usually

control a federal or state law issue in the district courts and before a subsequent Fifth Circuit panel. Generally, when the Fifth Circuit has said something on an issue, subsequent panels facing the same issue have consistently applied the same governing rules of law.

However, this usual state of affairs does not always come to pass in practice. Judges are human, and so are their clerks. Furthermore, the court of appeals expects the attorneys practicing before it to correctly present the state of the law on an issue properly raised for decision. Therefore, the scenario occasionally arises in which two Fifth Circuit panel decisions or lines of decisions directly conflict on an issue.

The Fifth Circuit's strict rule in such a situation follows logically from the fundamental prior panel decision rule: the earliest decision or line of decisions controls.[23] Of course, the other part of the core prior panel decision rule holds sway here, too: this "rule of orderliness has little persuasive force when the prior panel decision at issue conflicts with a Supreme Court case to which the subsequent panel decision is faithful."[24]

It is sometimes not enough to have a Fifth Circuit panel decision on point for your position on an issue, when your opponent has an *earlier*, contrary, on-point decision. In this context, the rule holds that first in time is first in line.

Vacated, Reversed, and Unpublished Panel Decisions: As If the Fifth Circuit Never Said a Thing

A prior Fifth Circuit panel decision will not control, no matter where in time it stands relative to other decisions on the same issue, unless it remains a viable authority. It should go without saying that a prior panel decision will not control if the decision or its holding on an issue was vacated or reversed by the *en banc* Fifth Circuit or the Supreme Court.

Less well understood is the important distinction between reversed and vacated panel decisions. In a nutshell, when the Supreme Court reverses the judgment of a Fifth Circuit decision, that decision remains binding precedent on all the decision's results, holdings, and explications of the governing rules of law other than the grounds on which the Supreme Court ruled and reversed. However, a Fifth Circuit decision that the Supreme Court or the *en banc* court of appeals has vacated has no precedential value whatsoever.[25] Further, a panel decision on which the Fifth Circuit grants *en banc* rehearing is automatically vacated by operation of Fifth Circuit Local Rule 41.3.[26] The panel decision will have no precedential effect, even if the *en banc* court of appeals reaches the same result on rehearing, unless the *en banc* court (or the panel on remand from the *en banc* court) explicitly reinstates the panel decision in whole or in part.[27]

Likewise, if an issue is discussed in an unpublished Fifth Circuit panel decision, attorneys must be aware that the Fifth Circuit recognizes a rather peculiar rule on the binding effect of unpublished decisions. Unpublished Fifth Circuit decisions "issued on or after Jan. 1, 1996, are not precedent, except under the doctrine of *res judicata*, collateral estoppel, or law of the case (or similarly to show double jeopardy, abuse of the writ, notice, sanctionable conduct, entitlement to attorney's fees, or the like)" but may be treated as "persuasive" authority.[28] However, unpublished Fifth Circuit decisions issued before Jan. 1, 1996 *are* "precedent" and binding on subsequent panels.[29]

To make matters less clear, though, the Fifth Circuit's Local Rule 47.5.3 observes: "[B]ecause every opinion believed to have precedential value is published, such an unpublished opinion should normally be cited only when the doctrine of *res judicata*, collateral estoppel, or law of the case is applicable (or similarly to show double jeopardy, abuse of the write, notice, sanctionable conduct, entitlement to attorney's fees, or the like)."[30] The cruel irony of this dualistic rule for attorneys practicing in the Fifth Circuit is that unpublished

decisions became more widely and readily available after 1996 with the advent of the Internet, greater availability of LexisNexis and Westlaw, and the recent publication of West Publishing's *Federal Appendix*.

Dicta, Alternative and Implicit Holdings, Silence, and Appellate Fact-finding: When It Isn't Clear If the Fifth Circuit *Has* Said Something

An attorney will sometimes face the question of whether a prior Fifth Circuit decision that discusses or mentions (or *could have* discussed or mentioned) the issue at hand has, for precedential purposes, said anything at all. Some attorneys take the position that, if the federal court of appeals took the trouble to write something in an opinion, what is said controls and far be it from them to suggest anything to the contrary. Although this cautious approach is understandable, the court of appeals itself and the district courts are likely to be more discriminating and to pay more attention to concepts like dicta and alternative holdings.

The question for an attorney seeking to answer what the Fifth Circuit has said on an issue thus often becomes what in a prior Fifth Circuit panel decision controls the decisions of later panels or district courts. Generally speaking, subsequent panels and district courts are bound by prior panel decisions' results, holdings (*i.e.*, those parts of the decisions that are necessary to those results), and explications of the governing rules of law.[31]

Conversely, dicta from a panel decision will not bind later panels or district courts,[32] but may be treated as persuasive authority.[33] The foundation for this rule lies in the nature of dicta: a dictum is language that "could have been deleted without seriously impairing the analytical foundations of the holding" and "being peripheral, may not have received the full and careful consideration of the court that uttered it."[34]

But a panel decision's alternative holdings, though strictly speaking not necessary to the panel's decision, are precedent, not dicta, and will bind future panels and district courts.[35] A district court or Fifth Circuit panel is bound by a prior panel's alternative rationales for the result the panel reached just as if each rationale was the only reason the prior panel offered for its decision.[36]

Likewise, a prior panel's implicit holdings, which are necessary but are not stated explicitly, are binding on future panels.[37] At the same time, a prior panel's silence on an issue, particularly an issue that was not raised by the parties before that panel, is not binding on subsequent panels or district courts squarely faced with deciding the issue.[38]

Finally, apparent factual findings or other statements of fact from prior Fifth Circuit decisions or even Supreme Court decisions are merely dicta and will not dispose of factual issues in the decisions of later Fifth Circuit panels or district courts.[39] Appellate courts do not properly engage in fact-finding,[40] and any such fact-finding is not binding under the doctrine of *stare decisis*.[41]

The Rules that Govern the Rules that Govern in the Federal Courts of the Fifth Circuit

An attorney seeking to answer the question "What has the Fifth Circuit said on this issue?" must do more than simply find a Fifth Circuit panel decision that discusses or mentions the issue. There are rules that govern the rules of law that govern federal and state law issues in the federal courts of the Fifth Circuit (and, for that matter, every circuit). As basic as the doctrines of *stare decisis* and *Erie* may seem when they are mentioned in cocktail-party conversations, attorneys practicing in Texas do well to keep them ever in mind as they brief and try their cases in the federal courts.

Notes

1. This article does not discuss other, more case-specific doctrines such as collateral estoppel, *res judicata*, law of the case, or the mandate rule.
2. *See generally Planned Parenthood v. Casey*,

505 U.S. 833, 854-55, 865-69 (1992) (discussing the importance of and reasons for adherence to precedent in accordance with the doctrine of *stare decisis*).

3. *FDIC v. Abraham*, 137 F.3d 264, 268 (Fifth Cir. 1998).
4. *Transcontinental Gas Pipe Line Corp. v. Transportation Ins. Co.*, 953 F.2d 985, 988 (Fifth Cir. 1992).
5. *Central Pines Land Co. v. United States*, 274 F.3d 881, 893 (Fifth Cir. 2001), *cert. denied*, 537 U.S. 822 (2002). Although sometimes referred to as "intra-circuit *stare decisis*," *e.g.*, *Billiot v. Puckett*, 135 F.3d 311, 316 (Fifth Cir. 1998), the *Central Pines* panel explained that this rule is "easily confused with traditional *stare decisis*" but actually "serves a somewhat different purpose of institutional orderliness," *Central Pines Land Co. v. United States*, 274 F.3d 881, 893 (Fifth Cir. 2001), *cert. denied*, 537 U.S. 822 (2002) (quoting *Montesano v. Seafirst Commercial Corp.*, 818 F.2d 423, 425-26 (Fifth Cir. 1987) ("But our rule that one panel cannot overturn another serves a somewhat different purpose of institutional orderliness, a distinction evidenced by our insistence that, in the absence of intervening Supreme Court precedent, one panel cannot overturn another panel, regardless of how wrong the earlier panel decision may seem to be.")).
6. *See Heidtman v. County of El Paso*, 171 F.3d 1038, 1042 n.4 (Fifth Cir. 1999) ("In setting forth the legal standards on which it based its decision to award liquidated damages, the district court stated, 'a lack of good faith is only shown when an employer "knew or suspected that [its] actions might violate the [Act] … ." *Reeves v. International Tel. & Tel. Corp.*, 616 F.2d 1342, 1353 (Fifth Cir. 1980) (quoting *Coleman v. Jiffy June Farms*, 458 F.2d 1139, 1142 (Fifth Cir. 1971)).' The district court's reliance on *Reeves* and *Jiffy June* is misplaced. The Supreme Court has specifically overruled *Jiffy June*, and in doing so implicitly overruled *Reeves*."); *see also Brabham v. A.G. Edwards & Sons Inc.*, No. 03-60679, 2004 U.S. App. LEXIS 13365 at *8 n.3 (Fifth Cir. June 28, 2004).
7. *Causeway Med. Suite v. Ieyoub*, 109 F.3d 1096, 1103 (Fifth Cir. 1997), *overruled on other grounds by Okpalobi v. Foster*, 244 F.3d 405, 427 n.35 (Fifth Cir. 2001) (en banc).
8. *Martin v. Medtronic, Inc.*, 254 F.3d 573, 577 (Fifth Cir. 2001), *cert. denied*, 534 U.S. 1078 (2002) (quoting *United States v. Zuniga-Salinas*, 945 F.2d 1302, 1306 (Fifth Cir. 1991)).
9. *See Oncale v. Sundowner Offshore Servs.*, 83 F.3d 118, 119 (Fifth Cir. 1996) ("Although our analysis in *Garcia* has been rejected by various district courts, we cannot overrule a prior panel's decision.") (footnote omitted), *rev'd on other grounds*, 523 U.S. 75 (1998). Even in the absence of a prior Fifth Circuit panel decision on point, the court of appeals does not observe a rule of inter-circuit *stare decisis*. *Taylor v. Charter Med. Corp.*, 162 F.3d 827, 832 (Fifth Cir. 1998). Nevertheless, on an issue of first impression in the Fifth Circuit, a panel of the court of appeals as a practical matter will not lightly create a inter-circuit conflict and is likely to follow the majority rule of its sister circuits. Indeed, the Fifth Circuit follows a policy of circulating draft panel decisions that would create a circuit split to the entire court of appeals to solicit a request for *en banc* consideration. *See Estate of Farrar v. Cain*, 941 F.2d 1311, 1316 n.22 (Fifth Cir. 1991), *aff'd sub nom.*, *Farrar v. Hobby*, 506 U.S. 103 (1992).

As basic as the doctrines of *stare decisis* and *Erie* may seem when they are mentioned in cocktail-party conversations, attorneys practicing in Texas do well to keep them ever in mind as they brief and try their cases in the federal courts.

10. *Cf. United States v. Tompkins*, 130 F.3d 117, 121 n.14 (Fifth Cir. 1997) ("Given our adherence to the maxim of *stare decisis* within our own court, this panel could not change the standard of review for voluntariness of consent — or anything else, for that matter — when, as here, doing so would constitute failure to follow precedent established in an earlier decision. The most that we could do if we agreed with Tompkins — which we do not — would be to follow existing precedent, note our concerns, and suggest (or let Tompkins suggest) rehearing *en banc*.")
11. 28 U.S.C. § 1332.
12. 28 U.S.C. § 1367.
13. *American Int'l Specialty Lines Ins. Co. v. Canal Indem. Co.*, 352 F.3d 254, 260 (Fifth Cir. 2003).
14. 304 U.S. 64 (1938).
15. *Webb v. City of Dallas*, 314 F.3d 787, 795 (Fifth Cir. 2002); *Herrmann Holdings Ltd. v. Lucent Techs., Inc.*, 302 F. 3d 552, 558 (Fifth Cir. 2002); *Holden v. Connex-Metalna Mgmt. Consulting GmBH*, 302 F.3d 358, 364-65 (Fifth Cir. 2002). This rule follows from the fundamental fact that a federal court's goal in applying state law pursuant to *Erie* is to predict (if necessary) and apply existing state law, not to create or modify it. *Holden v. Connex-Metalna Mgmt. Consulting GmBH*, 302 F.3d 358, 365 (Fifth Cir. 2002).
16. *American Int'l Specialty Lines Ins. Co. v. Canal Indem. Co.*, 352 F.3d 254, 270 n.4 (Fifth Cir. 2003).
17. It is worth noting that, as a practical reality, the Fifth Circuit almost never grants *en banc* consideration of state law issues.
18. *American Int'l Specialty Lines Ins. Co. v. Canal Indemnity Co.*, 352 F.3d 254, 270 n.4 (Fifth Cir. 2003).
19. *FDIC v. Abraham*, 137 F.3d 264, 269 (Fifth Cir. 1998).
20. *FDIC v. Abraham*, 137 F.3d 264, 269 (Fifth Cir. 1998).
21. *Woodfield v. Bowman*, 193 F.3d 354, 360 n.15 (Fifth Cir. 1999).
22. *FDIC v. Abraham*, 137 F.3d 264, 269 (Fifth Cir. 1998). Of course, the federal court could choose to adhere to the prior panel decision if it is convinced by other persuasive data that the state's highest court would decide the case differently than even a majority of the state's intermediate appellate courts. *See FDIC v. Abraham*, 137 F.3d 264, 268 (Fifth Cir. 1998).
23. *Southwestern Bell Tel. Co. v. El Paso County Water Improvement Dist. No. 1*, 243 F.3d 936, 940 (Fifth Cir. 2001).
24. *Kennedy v. Tangipahoa Parish Library Bd.*, 224 F.3d 359, 370 n.13 (Fifth Cir. 2000) .
25. *Central Pines Land Co. v. United States*, 274 F.3d 881, 893 n.57 (Fifth Cir. 2001), *cert. denied*, 537 U.S. 822 (2002).
26. Fifth Cir. Local R. 41.3.
27. *See Soffar v. Cockrell*, 300 F.3d 588, 590 (Fifth Cir. 2002)(en banc); *Burdine v. Johnson*, 262 F.3d 336, 338 n.1 (Fifth Cir. 2001) (en banc), *cert. denied*, 535 U.S. 1120 (2002).
28. Fifth Cir. Local R. 47.5.4; *Hawthorne Land Co. v. Equilon Pipeline Co.*, 309 F.3d 888, 892 n.3 (Fifth Cir. 2002).
29. Fifth Cir. Local R. 47.5.3; *Weaver v. Ingalls Shipbuilding, Inc.*, 282 F.3d 357, 359 & n.3 (Fifth Cir. 2002).
30. Fifth Cir. Local R. 47.5.3. *But see Weaver v. Ingalls Shipbuilding, Inc.*, 282 F.3d 357, 359 n.3 (fifth Cir. 2002).
31. *Gochicoa v. Johnson*, 238 F.3d 278, 286 n.11 (Fifth Cir. 2000).
32. *Id.*
33. *Ayoub v. INS*, 222 F.3d 214, 215 (Fifth Cir. 2000).
34. *United States ex rel. Rural Utils. Serv. v. Cajun Elec. Power Corp. (In re Cajun Elec. Power Coop.)*, 109 F.3d 248, 256 (Fifth Cir. 1997) (quoting *Sarnoff v. American Home Prods. Corp.*, 798 F.2d 1075, 1084 (Seventh Cir. 1986)); *see also Centennial Ins. Co. v. Ryder Truck Rental, Inc.*, 149 F.3d 378, 385-86 (Fifth Cir. 1998).
35. *Kanida v. Gulf Coast Med. Personnel L.P.*, 363 F.3d 568, 574 (Fifth Cir. 2004).
36. *See Pruitt v. Levi Strauss & Co.*, 932 F.2d 458, 465 (Fifth Cir. 1991).
37. *See Hollis v. Provident Life & Accident Ins. Co.*, 259 F.3d 410, 415 (Fifth Cir. 2001), *cert. denied*, 535 U.S. 986 (2002) (recognizing and following a prior Fifth Circuit panel decision's implicit holding); *Albarado v. Southern Pac. Transp. Co.*, 199 F.3d 762, 766 (Fifth Cir. 1999) (applying the rule of orderliness to determine whether an implicit holding of a prior panel decision controls in the face of explicit holdings of earlier decisions).
38. *Macktal v. U.S. Dep't of Labor*, 171 F.3d 323, 329 (Fifth Cir. 1999).
39. *Wooden v. Missouri Pac. R.R.*, 862 F.2d 560, 563-64 (Fifth Cir. 1989).
40. *Allen v. R & H Oil & Gas Co.*, 63 F.3d 1326, 1336 n.15 (Fifth Cir. 1995).
41. *Tennard v. Cockrell*, 284 F.3d 591, 598 n.9 (Fifth Cir. 2002) (Dennis, J., dissenting), *rev'd on other grounds sub nom., Tennard v. Dretke*, 124 S. Ct. 2562 (U.S. 2004).

David L. Horan is an associate with Hughes & Luce, L.L.P, where he is a member of the firm's appellate practice group. A graduate of Yale Law School, he clerked for the Hon. Patrick E. Higginbotham of the U.S. Court of Appeals for the Fifth Circuit in 2001-02.