Bar Association of the Fifth Federal Circuit
2025 Appellate Advocacy Seminar

Summary of Issues for Oral Argument
On Tuesday, October 7, 2025

East Courtroom

CH Offshore Limited v. Mexiship Ocean CCC S.A. De C.V. (No. 24-20525)

This is an action for the attachment of funds in aid of a foreign arbitration under the Supplemental Admiralty Rules. In 2021 plaintiff, a Singapore company, bareboat chartered one of its vessels to defendant Mexiship Ocean CCC S.A. De C.V. (Mexiship Mexico), a Mexican company. Plaintiff alleges that after the charter terminated, Mexiship Mexico ignored plaintiff's contact efforts, retained possession of the vessel, and failed to pay the charter hire. As required by the charterparty, plaintiff initiated arbitration proceedings against Mexiship Mexico in Singapore. It obtained a partial final arbitration award of more than $1.6 million for past unpaid charter hire through July 26, 2023, and the arbitration panel directed Mexiship Mexico to return the vessel to plaintiff. According to plaintiff, Mexiship Mexico has not paid the award or returned the vessel, and plaintiff's maritime conversion claim remains pending in arbitration.

In 2024 Mexiship Mexico's CEO inadvertently copied one of plaintiff's employees on an email exchange with an unrelated company, Seahorse Marine & Energy Joint Stock Company, on an unrelated matter. Through the emails, plaintiff learned that under the terms of a settlement agreement between Seahorse and Mexiship Mexico, Seahorse was to pay more than $800,000 to Mexiship Mexico by placing those funds in a bank account held at Vantage Bank Texas in McAllen, Texas, in the name of "Mexiship Ocean CCC, LLC" (Mexiship Texas), a Mexiship Mexico affiliate based in Texas. Plaintiff then filed a complaint under Supplemental Admiralty Rule B seeking to attach the funds as security in aid of plaintiff's foreign arbitration. After being served with garnishment writs, Vantage Bank advised that two bank accounts in Mexiship Texas's name held almost $600,000 and that it had issued a CD to Mexiship Texas valued at about $1.5 million.

Defendant Mexiship Mexico moved for equitable vacatur of the writ of garnishment, and the district court ultimately denied that motion. Non-party Mexiship Texas then appeared and sought its own vacatur of the garnishment, arguing that the funds at issue did not belong to Mexiship Mexico. Further, if Mexiship Texas was the alter-ego of Mexiship Mexico, then the requirements of a Rule B attachment could not be met because Mexiship Mexico could then be found within the district by virtue of the presence of Mexiship Texas. After granting plaintiff time to conduct discovery, the district court granted Mexiship Texas's motion to vacate and denied plaintiff's request for leave to amend its complaint to assert Texas state attachment law as an alternative basis for maintaining the attachment of the funds. The district court found no evidence to

support the premise that Mexiship Texas maintained any property belonging to Mexiship Mexico within the State of Texas, let alone in an account at Vantage Bank Texas. Plaintiff appealed.

On appeal plaintiff argues that the district court's finding was clearly wrong because the Seahorse settlement agreement explicitly stated that the monies paid by Seahorse were being paid to Mexiship Mexico. Plaintiff avers it more than adequately met the standard for a Supplemental Admiralty Rule E(4)(f) hearing to oppose release from arrest or attachment. Plaintiff also argues that the district court abused its discretion by denying leave to amend.

Mexiship Texas counters that plaintiff is not able to satisfy the requirements of Rule B because defendant Mexiship Mexico does not have property in the district. It maintains that the funds at Vantage Bank Texas belong to Mexiship Texas and not to defendant Mexiship Mexico. Thus, the district court properly vacated the garnishment. Mexiship Texas also argues the district court properly determined plaintiff did not demonstrate good cause to warrant leave to amend.

National Infusion Center Association v. Robert F. Kennedy, Jr. (No. 25-50661)

This is a challenge to the drug price negotiation program of the Inflation Reduction Act of 2022 (IRA). Under the price negotiation program, the Centers for Medicare and Medicaid Services (CMS), the entity that administers Medicare on behalf of the Secretary of the Department of Health and Human Services (HHS), now negotiates the prices that Medicare will pay for certain prescription drugs. Under the terms of the IRA, drugs eligible for selection in the price negotiation program are those that account for the highest Medicare expenditures, have no generic or biosimilar competitors, and have been on the market for at least seven years. The statute sets out successive annual negotiation cycles. For the first negotiation cycle, CMS selects 10 such drugs with the highest Medicare expenditures for negotiations, with additional drugs to be selected for future negotiation cycles. A drug manufacturer that does not wish to participate in the price negotiation program can withdraw from Medicare and Medicaid or face an excise tax.

In August 2023 CMS selected the 10 drugs for the first negotiation cycle. It reached price agreements on five of the drugs with their manufacturers through a schedule of offers and counteroffers set forth in the statute. CMS sent final written offers to the remaining manufacturers. Assuming none withdraws from the negotiation agreement by December 2025, the prices will take effect on January 1, 2026. CMS also has selected drugs for the second year of the price negotiation program and is in the process of negotiating prices on them, to take effect January 1, 2027.

Plaintiffs are the National Infusion Center Association (NICA), a trade association for facilities that administer outpatient infusion treatments; the Pharmaceutical Research and Manufacturers of America, the trade association for the pharmaceutical and biotechnology industries; and the Global Colon Cancer Association, a group that advocates for colon cancer patients. They sued HHS and CMS challenging the constitutionality of the IRA's price negotiation program. According to plaintiffs, the prior market-based system for reimbursing drug purchases helped America to

be the world leader in pharmaceutical research and development, benefiting patients, manufacturers, and providers. They describe the new IRA system as compelling manufacturers to accept prices unilaterally dictated by CMS. They complain that if a manufacturer does not agree to participate in the sham "negotiation" or does not accede to CMS's price, the manufacturer is subject to a crippling excise tax. Further, they point out that the scheme is insulated from accountability because CMS claims it need not engage in notice-and-comment rulemaking, and the IRA forecloses administrative and judicial review of critical agency decisions.

The district court initially dismissed the case for lack of subject-matter jurisdiction and improper venue, concluding the Medicare statute required NICA to channel its claims through HHS. On an earlier appeal, the Fifth Circuit reversed and remanded. The parties then filed cross-motions for summary judgment, with plaintiffs asserting three distinct constitutional claims. First, they argued that the IRA violates the separation of powers and the nondelegation doctrine by delegating unconstrained authority to HHS. Second, the excise-tax penalty violates the Eighth Amendment's Excessive Fines Clause by inflicting massive penalties on conduct the government admits is not culpable. Third, excepting key agency implementation decisions from public input and insulating them from judicial review violates the Fifth Amendment's Due Process Clause.

The district court denied plaintiffs' motion and granted the government's, rejecting all three constitutional challenges. It first held the IRA does not violate the separation of powers and nondelegation doctrine because the statute "provides sufficient guidance to the HHS and CMS" to satisfy the "intelligible principle" standard. The district court declined to reach the merits of the excessive fines claim, concluding the excise tax "is a tax for [Anti-Injunction Act] purposes," and neither of the Act's exceptions apply. Finally, the district court rejected plaintiffs' due process claims, holding that plaintiffs have no "entitlement to sell [their] drugs to the Government at any price other than what the Government is willing to pay." Further, the district court concluded manufacturers lack any protected interest because their "participation in the Program is voluntary," and patients have no protected interest in obtaining access to specific products through Medicare. Plaintiffs appealed.

On appeal plaintiffs urge the Court to reverse the district court based on their three constitutional arguments. First they argue that the IRA violates the separation of powers and nondelegation doctrine and that the district court misapplied the nondelegation doctrine. Second, they contend the IRA violates the excessive fines clause because the excise tax is punitive and grossly disproportionate. Further, the Anti-Injunction Act does not apply. Finally, plaintiffs argue the IRA violates the due process clause because it deprives plaintiffs of protected interests and its procedures are constitutionally insufficient. They contend the district court's reasoning was mistaken on this issue as to manufacturers, providers, and patients.

The government seeks affirmance of summary judgment in its favor. It argues that the price negotiation program is fully consistent with the nondelegation doctrine because Congress set the policy for CMS to pursue and bounded CMS's authority in negotiating drug prices. It also argues the district court correctly rejected plaintiffs' excise-tax claims because the Anti-Injunction Act and the tax exception to the Declaratory Judgment Act bar those claims, the claims are not

redressable, and the excise tax complies with the Eighth Amendment. Finally, the price negotiation program complies with due process because it does not deprive plaintiffs of any protected interests.

Amicus curiae briefs have been filed by Protect Our Care, Families USA, Doctors for America, Public Citizen, Nationally Recognized Healthcare and Medicare Experts, Patients for Affordable Drugs, and Economists and Scholars of Health Policy.

En Banc Courtroom

United States v. Ray Anthony Shoulders (No. 24-10600)

Defendant was charged with one count of conspiracy to commit healthcare fraud under 18 U.S.C. § 1349, as well as 11 substantive counts of healthcare fraud under 18 U.S.C. §§ 1347 and 2. The indictment alleged that from August 2020 through December 2021, defendant worked as a physician's assistant at a pain management clinic and submitted false claims to Medicare by billing for injections of a particular amniotic product although defendant and his co-conspirators, Dr. Robert Menzies and physician's assistant Hayle Guiliat, actually purchased and used a product that was much less expensive and not approved by Medicare for pain management. The indictment included allegations that defendant and others knew the Medicare claims were false and fraudulent and that over the course of 17 months, defendant and others received about $614,000 from Medicare in payment of improperly billed claims. After a four-day trial, the jury convicted defendant on all counts. He was sentenced to 84 months of imprisonment, to run concurrently on all counts, and ordered to pay restitution of more than $614,000.

On appeal defendant makes two arguments. First he contends the district court erred in giving a deliberate ignorance charge. He argues that where, as here, the government premised its case on actual knowledge, a deliberate ignorance instruction is improper because it could cause the jury to convict on a lesser *mens rea* than knowing or intentional. Defendant cites *U.S. v. Lee*, 966 F.3d 310, 324 (5th Cir. 2020), for the rule that a deliberate ignorance instruction is appropriate when the evidence at trial raises two inferences: (1) the defendant was subjectively aware of a high probability of the existence of illegal conduct, and (2) the defendant purposely contrived to avoid learning of the illegal conduct. According to defendant, the government did not raise either inference at trial. Further, the error was compounded by the district court's refusal to include defendant's proposed clarifying language or good faith instruction. Second, defendant argues that the evidence was insufficient to convict him of a conspiracy. He contends the government did not present testimony from either of the unindicted co-conspirators to prove a conspiracy to defraud Medicare during the pertinent time period.

The government contends that the deliberate indifference charge was warranted because defendant was subjectively aware of a high probability of illegal conduct and purposefully contrived to avoid learning about the illegal conduct. Moreover, any error was harmless because the evidence showed actual knowledge. The government also contends a rational jury could find there was an agreement with two or more people to defraud Medicare. It points to evidence of numerous communications between defendant and his coconspirators demonstrating that they knew of and supported the plan to unlawfully bill Medicare for the injections.

BY Equities, LLC v. Carver Theater Productions, LLC (No. 24-30799)

This suit involves the historic Carver Theatre in the Treme neighborhood of New Orleans. On January 28, 2015, defendant Carver Theater Productions (CTP) executed a promissory note, referred to as "the new bridge loan note" in an original principal amount of $1,590,278, payable to the order of First NBC Bank (FNBC). The new bridge loan note refinanced a 2012 bridge loan of more than $2.8 million that was part of complex, tax-credit-assisted financing for the renovation of the Carver Theater. The new bridge loan was backed by a guaranty from defendant Eugene Oppman and a UCC security interest in CTP's assets. The primary anticipated source of repayment was listed as "tax credit equity proceeds" of various Louisiana tax credits, with "liquidation of collateral" and the Oppman guarantee as secondary sources of repayment.

FNBC was closed in April 2017, and the FDIC was appointed as receiver. The FDIC assigned the new bridge loan note to OSK VIII, LLC, effective October 18, 2017. On December 12, 2019, plaintiff purchased the note from OSK VIII, which assigned the note to plaintiff. In April 2020 plaintiff filed suit contending CTP was in default and had not made any payments on the note since December 12, 2019. Plaintiff sought to collect the full balance due on the note and to enforce its rights under the commercial guaranty and security agreement. It also requested attorney's fees and recognition of its security interest in the collateral described in the security agreement.

Defendants set forth two main defenses. First, they argued the bridge loan note could not be in default through any fault of theirs because, per their agreement with FNBC, the note was to be fully repaid through the facilitation of tax credits to be claimed and received by FNBC. Second, defendants argued that if there was a default, it was caused and intended by plaintiff. According to defendants, plaintiff conspired, through fraud, treachery, and interference, to steal over $5 million in real estate by acquiring the bridge loan note.

Beginning in April 2021, the case was stayed for two years pending the criminal prosecution of former FNBC president Ashton Ryan. Pertinent here, once the stay was lifted, the district court, on cross-motions for summary judgment, granted plaintiff's motion and denied defendants' motion. The district court held that the *D'Oench Duhme* doctrine prevented defendants from asserting that the bridge loan note was not in default. Defendants appealed.

On appeal defendants argue that *D'Oench Duhme*, codified at 12 U.S.C. § 1823(e)(1), does not apply here because they produced written credit memoranda from 2012 and 2015 establishing that the bridge loan would be fully repaid by FNBC through tax credits. They contend there are genuine issue of material fact as to whether the tax credits paid off the note. They also contend there are genuine issues of material fact as to whether plaintiff manufactured the alleged default.

Plaintiff counters that *D'Oench Duhme* limits defendants' fraudulent inducement defense and that the credit memoranda are insufficient to meet the requirements of § 1823(e)(1). Plaintiff also contends that defendants' affirmative defense that plaintiff somehow manufactured a default on the new bridge loan fails both legally and factually.

West Courtroom

United States v. Tony Lee Johnson (No. 24-11115)

At issue here is the denial of a motion to suppress. In 2006 defendant was convicted of possession with intent to distribute cocaine base and aiding and abetting. He was sentenced to 235 months' imprisonment. After completing his prison sentence, he was released. In July 2023, after defendant failed multiple drug tests in violation of his supervised release, the district court issued a warrant for his arrest. The U.S. Marshals Service partnered with the North Texas Fugitive Task Force and the Lubbock Police Department (LPD) to locate and arrest defendant. LPD Officer Pringle, who had worked as an LPD officer for 17 years and apprehended hundreds of fugitives as a task force officer with the marshal, investigated and learned defendant was a member of the Bloods gang and the primary suspect in a Lubbock homicide. Specifically, LPD believed defendant "revenge-killed" the suspect in his mother's drive-by shooting death. Officer Pringle also learned defendant resided with his girlfriend, Beatrice Simmons, who was a felon on probation or parole.

While surveilling the house where defendant and Simmons lived, officers identified defendant. When defendant and Simmons got into defendant's car to leave the residence, officers pinned the car in as defendant backed out of the driveway. Defendant opened his driver-side door and began to exit when officers ordered him to the ground. While a deputy marshal handcuffed defendant, another removed Simmons from the passenger seat and detained her nearby. As defendant was led away, he told Simmons to "pull the car back in the yard" and told Officer Pringle that he did not consent to any search of his car. He then told Officer Pringle the car belonged to Simmons. Officer Pringle approached the car and opened the driver-side door, where he saw a red bandana tied around the steering wheel – a symbol of the Bloods gang. In a vehicle sweep that lasted less than 30 seconds, Officer Pringle found a loaded handgun with a full magazine in the center console. Simmons was eventually allowed to enter the vehicle and move it into the driveway. Defendant was later charged with possession of a firearm by a convicted felon.

Defendant moved to suppress the evidence obtained from the search of his car, arguing the search was without reasonable suspicion. He contended that because he was handcuffed at the time of the search and would not be returning to the car, any potential danger to officers must have come from Simmons. Further, the fact that Simmons was a felon, if that was even known to Officer Pringle, was not enough to support the search. After a hearing, the district court denied defendant's motion to suppress. In its reasons for judgment, the district court relied partly on the facts known about defendant and his suspected involvement in a homicide. The district court also explained that Simmons's criminal history and close relationship with defendant created sufficient facts for Officer Pringle to reasonably believe she might pose a threat to the officers if she reentered the vehicle and accessed a weapon. Defendant entered a conditional guilty plea and received a 33-month sentence. He appealed the denial of his motion to suppress.

On appeal defendant argues that Officer Pringle lacked a reasonable belief that defendant or Simmons was dangerous, that the facts cited by the district court were insufficient, and that neither Simmons's potential status as a felon on probation or parole nor her association with a felon justified the search. He argues that reversal of his conviction is necessary.

The government counters that the search was warranted, pointing out that Officer Pringle knew about defendant's background and his intimate relationship with Simmons and that Simmons was a convicted felon on either probation or parole. The government contends that Officer Pringle's reasonable suspicion was further developed when defendant exited his car before being ordered to do so, closed the car door on exiting, told Simmons to pull the car into the yard, told Officer Pringle without prompting that he didn't consent to a search, and then claimed the car was not his. Taken together, those circumstances led Officer Pringle to believe defendant was concealing either narcotics or a firearm in the car. Because Simmons, who was not under arrest at the time of the sweep, was likely to reenter the car and could gain access to a weapon, the brief protective sweep was justified in the government's view.

George Anibowei v. Pamela Bondi (No. 24-11042)

Plaintiff challenges directives of the U.S. Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP) authorizing agents to search cell phones at the U.S. border without warrants. Plaintiff is a Texas immigration attorney who has faced repeated searches of his cell phone without a warrant when crossing the border. The first search was a "forensic" search in which agents downloaded and kept data on his phone, including communications protected by the attorney-client privilege. Later searches were "manual" searches in which agents scrolled through text messages, emails, and other private information by hand.

At issue here is plaintiff's claim under the Administrative Procedure Act (APA) seeking vacatur of ICE's and CPB's border search directives authorizing agents to conduct warrantless cell phone searches at the border. The district court dismissed that claim on two grounds. First, the district court held it lacked jurisdiction over plaintiff's APA claim based on 5 U.S.C. § 704's limitation of judicial review to those final agency actions where "there is no other adequate remedy in a court." The district court concluded plaintiff had an alternative remedy because, in lieu of an APA action, he could have pursued a constitutional claim and sought an injunction against enforcement of the offending policies. Second, applying *United States v. Castillo*, 70 F.4th 894, 898 (5th Cir. 2023), *cert. denied*, 144 S. Ct. 410 (2023), and *Malik v. U.S. Department of Homeland Security*, 78 F.4th 191, 200 (5th Cir. 2023), the district court held that the directives are lawful because warrants are never required to search cell phones at the border. Plaintiff appealed.

On appeal plaintiff urges the Court to take the case *en banc* and join the Fourth and Ninth Circuits in requiring warrants for many, if not virtually all, cell phone searches at the border. Plaintiff also argues that § 704 permits his suit because the APA expressly authorizes relief for violations of a "constitutional right." 5 U.S.C. § 706. Plaintiff contends § 704 precludes judicial review only in

narrow circumstances where Congress has created a special statutory mechanism for challenging the lawfulness of agency action, which is not the case here.

The government counters that the district court correctly dismissed plaintiff's APA challenge. It contends that, by calling for *en banc* review, plaintiff tacitly admits that existing precedent forecloses his argument that a warrant is required for border searches of electronic devices. Further, the government explains that the ICE and CBP policies are consistent with the Court's case law requiring, at most, reasonable suspicion for certain advanced searches of electronic devices. The government further contends that because the Court's binding precedent mandates dismissal of plaintiff's claim, the Court does not need to reach the district court's independent ground for dismissal under § 704. Regardless, the factual basis for the district court's analysis of the adequate-remedy issue is undisputed, and the district court did not err.

Sergio Sanchez Lozano v. Maria Isabel Herrera Perez (No. 25-10184)

This is a case under the Hague Convention on Civil Aspects of International Child Abduction. In 2015 Sergio Sanchez Lozano and Maria Isabel Herrera Perez were married in Durango, Mexico. They are natives and citizens of Mexico. They had two children, a son who is now 20 years old and MAS, now eight. As planned by Sanchez and Herrera, both children were born in the U.S. so that they would have birthright citizenship. Sanchez and Herrera divorced in 2021. Herrera was granted sole custody of the children, and Sanchez was granted visitation rights. Sanchez admits that he has struggled and continues to struggle with addiction to alcohol and recreational use of cocaine, which he buys from local dealers. Herrera contends Sanchez also was physically abusive to her and their children during the marriage. Sanchez represents that in June 2022 he and Herrera argued over occupancy of the family home, titled in Sanchez's name, and he prevailed. Herrera represents that Sanchez abruptly forced her and the children to leave the residence.

In December 2022 Sanchez and Herrera signed a document before a notary by which Sanchez agreed the children could travel to the U.S. with Herrera for a one-year period. The parties dispute the intent behind the document. In January 2023 Herrera removed the children to Texas with the help of her aunt and uncle. Once in Texas, Herrera remarried, moved into her husband's Fort Worth home, enrolled MAS in school, and began attending church services with MAS. Sanchez contends that in August 2023 he learned from his older son that MAS would not be returning to Mexico. Sanchez also states that after he was unable to secure MAS's return through negotiation, he waited for the travel authorization to expire before applying for MAS's return.

Sanchez filed the petition in this case in May 2024, seeking MAS's return under the terms of the Convention. After an evidentiary hearing, the district court denied Sanchez's request for MAS's return. Although the district court found MAS had been wrongfully retained in the U.S., it held that MAS should not be returned to Durango based on two exceptions to the Convention's return remedy. The first was that MAS's return would pose a grave risk of harm to MAS under Article 13(b) of the Convention. The second was that MAS had become "well-settled" in his new home under Article 12. Sanchez appealed.

On appeal Sanchez urges the Court to find that neither of the two exceptions applies. He argues that the district court based its finding of a grave risk of danger on Herrera's testimony that Sanchez abused alcohol and cocaine and dealt with drug dealers, without articulating how these findings would place MAS in grave risk of harm if returned to Durango under the parties' existing custody arrangement. Second, Sanchez argues that the well-settled exception is not available for timing reasons. For this exception to be considered, the district court was required to find that Sanchez filed his petition a year or more after the wrongful retention began. The district court determined that MAS's retention in the U.S. became wrongful three months after Herrera removed MAS from Mexico, which was more than a year before Sanchez filed his complaint. Sanchez argues the district court erred in making that finding, which resulted in the well-settled exception becoming available. Sanchez further argues that in any event, the thin record does not establish that MAS is actually well-settled in his new environment.

Herrera also addresses both exceptions. First, she contends she has shown by clear and convincing evidence that returning MAS to Mexico would subject him to grave risk or otherwise place MAS in an intolerable situation. Herrera emphasizes that the threat here is specific to MAS based on the totality of the evidence regarding Sanchez's past behavior towards her, their adult child, and MAS; Sanchez's drug addiction, alcoholism, and connection to Durango drug traffickers; the disappearance of his brother due to ties to the cartel; and his inability to stop abusing cocaine and alcohol. As for the well-settled exception, she argues that the district court correctly determined any wrongful detention began three months after MAS was removed to Texas, based on Sanchez's own testimony that he authorized the children to be present in the U.S. for only three months. She further argues she has shown that MAS is well-settled in Texas.

ChampionX Corporation v. AIG Insurance Company of Canada (No. 25-20030)

This is an insurance coverage dispute. Insurance Company of the State of Pennsylvania (ICSOP) issued foreign commercial general liability insurance policies to Ecolab, Inc., with effective dates from December 31, 2017, through December 31, 2020. AIG Insurance Company of Canada issued commercial general liability policies with identical dates to Ecolab Co., a wholly owned subsidiary of Ecolab, Inc. The policies contained broad-form named-insured clauses stating that the "Named Insured also includes … any subsidiary, associated, affiliated, allied, or acquired company … of which … the Named Insured … has more than 50% ownership interest in, exercise management or financial control over, or is required to provide insurance for." Nalco Canada was a wholly owned subsidiary of Ecolab, Inc.

In early 2018 Nalco Canada performed work for Highwood Oil Co., Ltd., including a risk assessment of various pipelines owned and operated by Highwood in Canada. In February 2018 Nalco Canada advised Highwood that the probability of corrosion in a particular pipeline was low. In July 2018 Highwood discovered three separate releases of oil emulsion from the pipelines.

In 2019 plaintiff acquired the Nalco Champion businesses, including Nalco Canada, from Ecolab, Inc. As part of that transaction, a separation agreement purported to assign plaintiff rights under the insurance policies regarding events occurring prior to the transaction.

The day after the transaction was completed, Highwood filed a claim with the Court of the Queen's Bench of Alberta, Canada, naming as defendants Nalco Champion, Ecolab, Nalco Canada ULC, and ChampionX Canada ULC, for negligent acts and breaches of duty. Highwood sought damages of more than $40 million, representing the cost to clean up and remediate the oil emulsion releases.

Plaintiff provided an initial notice of loss to ICSOP and AIG Canada, and the insurers denied coverage. Plaintiff then filed suit in Texas state court against both insurers. ICSOP removed the case to federal court. Pertinent here, plaintiff filed a motion for partial summary judgment on the duty defend against ICSOP. In response, ICSOP argued for the first time, and more than a year into litigation, that plaintiff lacked standing to bring suit because it was not an insured under the policies and that the policies' anti-assignment provisions prevented assignment of claims. The district court rejected plaintiff's argument that ICSOP had waived any defenses of lack of standing and non-assignability and ultimately concluded that plaintiff did not have contractual standing to sue the insurers. The district court then denied plaintiff's requests to add Ecolab and the other defendants in the Canadian suit as plaintiffs in this case. It granted summary judgment in favor of the insurers and dismissed plaintiff's claims. Plaintiff appealed.

On appeal plaintiff argues that ICSOP waived its affirmative defense that plaintiff lacked standing to bring claims under the policies by failing to assert that defense in either its denial of coverage or its answer. Plaintiff also argues that the district court abused its discretion by refusing to permit the addition of plaintiffs who have standing under the policies.

The insurers contend the district court correctly concluded plaintiff lacks contractual standing. They argue that any assignment of claims under the separation agreement was actually made to plaintiff's subsidiary, that under the terms of the assignment those rights expired in December 2022, and that, in any event, assignment is not permitted under the policies. Further, the insurers contend that even if plaintiff had standing, pollution exclusions preclude coverage for the allegations in the Canadian lawsuit. Separately, the AIG Canada policies' exclusion precluding coverage for "any and all professional services" applies. The insurers address plaintiff's waiver argument by explaining that ICSOP raised the standing issue immediately after it became aware plaintiff was claiming rights under the policies as an assignee rather than a true successor. The insurers also note plaintiff had months to attempt to cure its lack of contractual standing but was unable to do so. They further argue that plaintiff's attempts to join additional parties as plaintiffs were futile and would have prejudiced the insurers and that plaintiff failed to show good cause why it should be allowed to join parties after the district court's deadline.