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## A Primer on Precedent in the Eleventh Circuit

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# SPECIAL CONTRIBUTION

## A Primer on Precedent in the Eleventh Circuit

by Thomas E. Baker\*

### I. INTRODUCTION

A primer is a brief introductory and elementary reading on a subject,<sup>1</sup> and that is what this treatment of precedent in the Eleventh Circuit is meant to be. In two previous articles, I have considered the problems of precedent in the divided Fifth Circuit. Lest the reader wonder whether I have written one article under three titles, those prior efforts may be briefly described to summarize what has gone before and to introduce what follows here.

October 1, 1981, marked a milestone in the history of our federal courts. On that day, the Fifth Circuit Court of Appeals Reorganization Act of 1980<sup>2</sup> (Reorganization Act) divided the former Fifth Circuit into two autonomous judicial circuits: the new Fifth Circuit, composed of the District of the Canal Zone, Louisiana, Mississippi, and Texas, and the

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1. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1801 (1971).

2. Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. No. 96-452, 94 Stat. 1994 (1980) (codified at 28 U.S.C. §§ 1, 41 (Supp. V 1981)) [hereinafter cited as Reorganization Act].

new Eleventh Circuit, composed of Alabama, Florida, and Georgia.<sup>3</sup> Written on the eve of this historic event, *Precedent Times Three: Stare Decisis in the Divided Fifth Circuit*<sup>4</sup> (*Precedent Times Three*) considered "the novel issues of stare decisis raised by this division."<sup>5</sup> After tracing the evolution of the intermediate level of our federal courts,<sup>6</sup> *Precedent Times Three* traced the events leading up to the Reorganization Act.<sup>7</sup> Based on preliminary indications, I predicted that former Fifth Circuit case law would bind each of the three affected courts—the former Fifth Circuit that temporarily survives the division, the new Fifth Circuit and the new Eleventh Circuit.<sup>8</sup> A local rule was proposed as the preferred mechanism for accomplishing this task.<sup>9</sup> The analysis next turned to whether the division should affect the precedential value of the former court's decisions. Logically, binding the continuation of the former court would be nothing more than stare decisis.<sup>10</sup> After considering history,<sup>11</sup> legislative intent,<sup>12</sup> and judicial policy,<sup>13</sup> however, I argued against the wholesale transfer of former Fifth Circuit precedent into the two new courts.<sup>14</sup> Thus, while I prophesied that the judges of the two new courts would consider themselves bound by the former precedents and proposed a rule to make it happen,<sup>15</sup> I disagreed with that whole approach to the question.

The second article, *A Postscript on Precedent in the Divided Fifth*

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3. *Id.*

4. Baker, *Precedent Times Three: Stare Decisis in the Divided Fifth Circuit*, 35 Sw. L.J. 687 (1981) [hereinafter cited as Baker, *Precedent Times Three*].

5. *Id.* at 687.

6. *Id.* at 688-96.

7. *Id.* at 696-705.

8. *Id.* at 705-09.

9. *Id.* at 709-20.

10. *Id.* at 724-26. The Reorganization Act defines the former Fifth Circuit as "the fifth judicial circuit of the United States as in existence on the day before the effective date." Reorganization Act, *supra* note 2, § 10(1). The former court ceases to exist on July 1, 1984. *Id.* at § 11.

11. The only similar division, the 1929 creation of the Tenth Circuit, was inconclusive on the issue of precedent. Baker, *Precedent Times Three*, *supra* note 4, at 726-28.

12. *Id.* at 728-30. "Congress apparently intended the two new courts of appeals to be autonomous and independent, one from another and each from the former Fifth Circuit." *Id.* at 731 (footnote omitted).

13. *Id.* at 730-34.

14. While there is no question that the law of the former Fifth Circuit should be deemed uniquely persuasive for a time, no sufficiently weighty policy justification exists for requiring panels of the new courts to determine what the rule of the former Fifth Circuit stare decisis means with enough precision to follow it, but without the authority to create law interstitially.

*Id.* at 734 (footnote omitted).

15. See *supra* note 9 and accompanying text.

*Circuit*<sup>16</sup> (*A Postscript on Precedent*), took stock of the early experience under the Reorganization Act.<sup>17</sup> That early experience disclosed the general approach taken by the three courts; former Fifth Circuit decisions were deemed binding in each court.<sup>18</sup> In *A Postscript on Precedent*, the discussion distinguished among the former Fifth Circuit that temporarily continues,<sup>19</sup> the new Fifth Circuit,<sup>20</sup> and the new Eleventh Circuit.<sup>21</sup> Each posed unique questions of precedent. Finally, the article ended with a preliminary evaluation of how the two new courts were faring and made a few general observations on circuit splitting.<sup>22</sup>

My goal in this Article is much more modest than what I attempted to accomplish in *Precedent Times Three* and *A Postscript on Precedent*. This primer will cover only the way in which the new Eleventh Circuit has treated antecedent Fifth Circuit precedents. First, the various decisionmaking units that have evolved during the transition from one circuit to two circuits are identified and described. Second, two important Eleventh Circuit decisions are used to provide a temporal rule for resolving the question of precedential value. Third, decisionmaking unit output is divided on a time line. Finally, a graphic depiction summarizes the narrative. This primer is my last exploration of the purlieu of precedent in the divided Fifth Circuit. I anticipate a lawyering reader, not an academician. My anticipated readership is not even all lawyers. I hope this primer will aid the Eleventh Circuit practitioner in competently dealing with the hodge podge of precedent in that circuit. Because appellate lawyers help make law, the legal effect of this primer may be indirect but nonetheless it should be a significant tool in their hands.<sup>23</sup>

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16. Baker, *A Postscript on Precedent in the Divided Fifth Circuit*, 36 Sw. L.J. 725 (1982) [hereinafter cited as Baker, *A Postscript on Precedent*].

17. *A Postscript on Precedent* considered the first six months under the Reorganization Act. *Id.* at 731 n.35.

18. See generally *id.* at 731-39.

19. *Id.* at 731-32.

20. *Id.* at 733-34.

21. *Id.* at 734-39.

22. *Id.* at 739-42.

23. See generally Aldisert, *The Appellate Bar: Professional Responsibility and Professional Competence—A View from the Jaundiced Eye of One Appellate Judge*, 11 CAP. U.L. REV. 445 (1982).

Courts and commentators have made use of my two previous pieces. See, e.g., *International Horizons, Inc. v. Committee of Unsecured Creditors* (*In re International Horizons, Inc.*), 689 F.2d 996, 1002 n.13, 1004 n.17 (11th Cir. 1982); *Bonner v. City of Prichard*, 661 F.2d 1206, 1210 nn.6 & 7 (11th Cir. 1981) (en banc); Roth & Rahdert, *Practice Before the Fifth Circuit: Revisted*, 14 TEX. TECH L. REV. 17, 20 n.13 (1983).

## II. DECISIONMAKING UNITS

*Precedent Times Three* traced the history of the intermediate tier of our federal courts and that discussion will not be repeated here.<sup>24</sup> To understand the various forms of Eleventh Circuit precedent, however, one must identify and distinguish several separate decisionmaking units of the former Fifth Circuit as alternative sources of precedent.

Within the space of a generation from their 1891 creation,<sup>25</sup> the courts of appeals for the various circuits had inadequate judge power to handle their dockets. In response, Congress generally added more judges. More judges meant more permutations of three judge panels which, in turn, threatened the institutional values of uniformity among panel decisions and control of the law of the circuit by a majority of judges. The en banc court, composed of all the active members of the court sitting together, became one mechanism for preserving these dual values.<sup>26</sup> The decision of the en banc majority then became the law of the circuit.<sup>27</sup> But the en banc mechanism adds a layer of delay and drains dear judicial resources. A second mechanism, which is in effect a variant of stare decisis, was developed for reducing the need for en banc considerations. This second mechanism, the rule of interpanel accord, requires that a three-judge panel follow earlier decisions of any panel as binding precedent, absent an intervening en banc or Supreme Court decision.<sup>28</sup> The former Fifth Circuit, of course, had an en banc mechanism and heard initial appeals in panels under the rule of interpanel accord.<sup>29</sup>

Long the subject of popular and political debate,<sup>30</sup> the former Fifth Circuit's surfeited docket motivated Congress to add judges periodically until the solution became its own problem.<sup>31</sup> The Omnibus Judgeship Act of 1978<sup>32</sup> proved to be a watershed. The statute authorized twenty-six judgeships for the former Fifth Circuit. In addition, Congress authorized

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24. See generally Baker, *Precedent Times Three*, *supra* note 4, at 688-96.

25. No intermediate appellate court existed until the Evarts Act of 1891. Act of March 3, 1891, ch. 517 § 2-3, 26 Stat. 826, 826-27. In 1911, the circuit courts of appeal became the courts of appeals for the various circuits. Act of March 3, 1911, ch. 231, 36 Stat. 1087, 1131-35. See generally Baker, *Precedent Times Three*, *supra* note 4, at 688-96.

26. Baker, *Precedent Times Three*, *supra* note 4, at 720-23.

27. Indeed, the granting of a petition for rehearing en banc has the effect of vacating the panel opinion and staying the mandate. 11TH CIR. R. 26(K) (1983); FORMER 5TH CIR. R. 17 (1968). *But cf.* FED. R. APP. P. 35(c) (filing of suggestion for rehearing en banc does not automatically stay mandate).

28. Baker, *Precedent Times Three*, *supra* note 4, at 720-23.

29. *Id.* at 724 & n.275 (citing cases).

30. *Id.* at 696-703.

31. *Id.* at 704-05.

32. Pub. L. No. 95-486, 92 Stat. 1629 (1978) (codified at scattered sections of 28 U.S.C. (Supp. IV 1980); see Baker, *Precedent Times Three*, *supra* note 4, at 699-703.

the court of appeals to reorganize itself internally into administrative units and to reorder its en banc procedures by court rule.<sup>33</sup> Faced with the prospect of a court the size of the first United States Senate, the former Fifth Circuit Judicial Council considered what to do with the authority that Congress had delegated to it. The council acted more like the legislative body it resembled than the judicial body it had been before the dramatic increase in judge power. It appointed a committee, debated, tabled, debated some more, tabled again, debated further, and finally reached a compromise.<sup>34</sup> In May of 1980, the Judicial Council arranged itself into two administrative units: Unit A, composed of Louisiana, Mississippi, and Texas, and Unit B, composed of Alabama, Florida, and Georgia.<sup>35</sup> Appeals from each unit generally were to be heard by panels of judges from that unit, although the court expressly provided that "the authority of judges to act as members of this Court throughout this circuit shall in no way be diminished."<sup>36</sup> The administrative reorganization affected only the panel level. The judges preserved the unity of the en banc court, the judicial conference, and the judicial council.<sup>37</sup> Thus, the former Fifth Circuit had preunitization panels, Unit A panels, Unit B panels, and an en banc court. While the judges could not agree on how to reorder the en banc function, they unanimously petitioned Congress for the only conceivable solution—division into two autonomous circuits.<sup>38</sup> More appeals led to more judges, which led to more decisions by more panels. Ironically, the congressional solution of 1978 had made the situation intolerable. Despite the rule of interpanel accord, intracircuit conflicts became inevitable with so many judges and their permutations of three judge panels. The en banc process, which otherwise preserved the values of one law of the circuit and control by a majority of the judges, had become too complicated, time consuming, and cumbersome to be effective.<sup>39</sup>

The judges' unanimous petition of May 1980 triggered a flurry of congressional action<sup>40</sup> that culminated in the Reorganization Act, which di-

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33. Pub. L. No. 95-486, § 6, 92 Stat. 1629, 1633 (1978) (codified at 28 U.S.C. § 41 (Supp. II 1978)).

34. The Court's internal deliberations are described in Reavley, *The Split of the Fifth Circuit: Update and Finis*, 12 TEX. TECH L. REV. 1 (1981). See also Baker, *Precedent Times Three*, *supra* note 4, at 701-03.

35. FORMER 5TH CIR. R. 1 (1980).

36. *Id.*

37. Baker, *Precedent Times Three*, *supra* note 4, at 703.

38. *Id.* at 703 n.134.

39. *Id.* at 703-05.

40. *Id.* See generally Ainsworth, *Fifth Circuit Court of Appeals Reorganization Act of 1980*, 1981 B.Y.U. L. REV. 523; Hefin, *Fifth Circuit Court of Appeals Reorganization Act of 1980—Overdue Relief for an Overworked Court*, 11 CUM. L. REV. 597 (1980); Tate, *The Last Year of the "Old" Fifth* (1891-1981), 27 LOY. L. REV. 689 (1981).

vided the former court into two new courts along the same lines as the judicial council's unitization.<sup>41</sup> After the enactment of the division legislation, but before it became effective, the former Fifth Circuit judicial council adopted an interim local rule that supplemented the existing en banc procedures.<sup>42</sup> For decisions by the administrative unit panels on or after January 14, 1981, petitions for en banc review would be considered by only the judges in that unit; a Unit A en banc court and a Unit B en banc court were thus created. Apparently, the interim rule contemplated the theoretical but not actual possibility of a grand en banc of Unit A and Unit B to settle conflicts between the two.<sup>43</sup>

The last development in the sequence was the Reorganization Act itself. As part of the statutory transition procedure, the former Fifth Circuit continues to exist for matters submitted for decision before October 1, 1981.<sup>44</sup> That tribunal, in all its forms, will go out of existence on July 1, 1984.<sup>45</sup> Former Fifth Circuit decisions after October 1, 1981, carry an

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41. See *supra* text accompanying notes 30-39.

42. FORMER 5TH CIR. INTERIM R. (1981).

43. For panel decisions by Administrative Units of the Fifth Circuit bearing date on and after Jan. 15, 1981,

Whenever a majority of the Judges of Administrative Unit A who are in regular active service orders an appeal which has been submitted to a panel of Administrative Unit A to be reheard en banc, it shall be reheard by an en banc court composed of all judges of Administrative Unit A who are in regular active service.

Whenever a majority of the Judges of Administrative Unit B who are in regular active service orders an appeal which has been submitted to a panel of Administrative Unit B to be reheard en banc, it shall be reheard by an en banc court composed of all judges of Administrative Unit B who are in regular active service.

Decisions not specifically designated as made by an Administrative Unit are governed entirely by Fifth Circuit Local Rule 16. During the period that this Interim Rule conflicts with any provision of Fifth Circuit Local Rule 16, this Interim Local Rule shall control. All non-conflicting provisions of local Rule 16 remain in full force and effect.

FORMER 5TH CIR. INTERIM R. (1981). Judge Tate explained the theoretical problem created by unit en banc courts and the court's pragmatic resolution to ignore it:

Thus, if a majority of Unit A judges disagree with Unit B precedent, they were bound by it until in its own case, a Unit A en banc decision overruled it—following which, Unit B would be bound by this Unit A en banc opinion, until a Unit B opinion overruled. Despite theoretical difficulties that may be envisioned, the expectation was realized that, in fact, little practical problem would be created during the short transitional period between January and October, 1981.

Tate, *supra* note 40, at 692.

44. Reorganization Act, *supra*, note 2, § 9(1). For a summary of the statutory transition procedures, see Baker, *Precedent Times Three*, *supra* note 4, at 705-06.

45. Reorganization Act, *supra* note 2, § 11.

As part of their internal operating procedures, both new courts have established the initial oral argument date as the date of submission in orally argued appeals and the date on

asterisk in *Federal Reporter, Second Series*, and the notation "Former Fifth Circuit case, Section 9(1) of Public Law 96-452—October 14, 1980".<sup>46</sup> The Reorganization Act assigns matters submitted for decision after October 1, 1981, to the appropriate new court, either the new Fifth Circuit or the new Eleventh Circuit, which geographically correspond to the former Fifth Circuit Unit A and Unit B respectively.<sup>47</sup>

Just what the former Fifth Circuit<sup>48</sup> and the new Fifth Circuit<sup>49</sup> have done with the former's precedents is described in *A Postscript on Precedent*.<sup>50</sup> This primer is concerned only with the treatment afforded to the various manifestations of former Fifth Circuit decisions by the new Eleventh Circuit.<sup>51</sup> In summary, former Fifth Circuit case law originated from several decisionmaking units enumerated as follows. Before May 5, 1980, the former Fifth Circuit sat in (1) panels and (2) en banc irrespective of the state of origin of the appeal. In response to the congressional delegation in the Omnibus Judgeship Act of 1978, the court arranged itself into administrative units, (3) Unit A panels and (4) Unit B panels, but maintained a (5) unified en banc court. On January 15, 1981, in response to the Reorganization Act and impending congressional division, the Court reorganized its en banc function into a (6) Unit A en banc and a (7) Unit B en banc, apparently raising the possibility of a (8) theoretical only grand en banc for deciding unit en banc conflicts. The Reorganization Act added to these the (9) panel and (10) en banc new Fifth Circuit, as well as the (11) panel and (12) en banc new Eleventh Circuit. Holdings by all of these decisionmaking units are candidates for Eleventh Circuit precedent.

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which the third screening judge concurs in summary or nonargument calendar disposition as the submission date for all other appeals. United States Court of Appeals for the Eleventh Circuit, Internal Operating Procedures VI(A), at 18 (Oct. 1, 1981); United States Court of Appeals for the Fifth Circuit, Internal Operating Procedures 8, at 21 (Oct. 1, 1981). *Precedent Times Three* had suggested the beginning rather than the ending of the screening process as the date of submission. Baker, *Precedent Times Three*, *supra* note 4, at 706 n.152. The practical difference is that fewer appeals were deemed submitted under the courts' approach. Baker, *A Postscript on Precedent*, *supra* note 16, at 734-35 n.67.

46. The notation began with the last announced predivision en banc decision, *Bright v. United States*, 658 F.2d 999 n.\* (5th Cir. July 13, 1981) (en banc). See Baker, *A Postscript on Precedent*, *supra* note 16, at 731-32.

47. Reorganization Act, *supra* note 2, § 9(2). See Baker, *Precedent Times Three*, *supra* note 4, at 705-06.

48. The temporary version of the former Fifth Circuit that survives the division is but a continuation of the former court. Thus, the rule of interpanel accord, so ingrained in former Fifth Circuit law, has been followed to give predivision decisions binding effect. Baker, *A Postscript on Precedent*, *supra* note 16, at 731-32.

49. The new Fifth Circuit seems to view itself as but a continuation of its former self. All previously decided former Fifth Circuit decisions, whether submitted before or after October 1, 1981, are deemed binding in the new court. *Id.* at 733-34.

50. *Id.* at 731-39.

51. See generally *id.* at 734-39.



## III. DATES OF DECISION

In two decisions here summarized and discussed, the Eleventh Circuit has considered the precedential value of former Fifth Circuit case law in its various forms. The two decisions, taken together, identify and import precedent by decisionmaking unit and by date of decision. Having described the decisionmaking units, this primer next considers the new court's temporal analysis.

Court watchers did not have to wait long for an Eleventh Circuit answer to the questions raised in *Precedent Times Three*. A unanimous en banc court, in *Bonner v. City of Prichard*,<sup>52</sup> ruled on the issue in the first appeal to be heard and the first opinion to be published by the new court. The Eleventh Circuit held:

The decisions of the United States Court of Appeals for the Fifth Circuit (the "former Fifth" or the "old Fifth"), as that court existed on September 30, 1981, handed down by that court prior to the close of business on that date, shall be binding as precedent in the Eleventh Circuit, for this court, the district courts, and the bankruptcy courts in the circuit.<sup>53</sup>

In reaching this result, the en banc court generally followed the analysis, if not all the recommendations, in *Precedent Times Three*. A *Postscript on Precedent* tracked the court's analysis against the prior article.<sup>54</sup> First, the en banc court committed the new Eleventh Circuit to the absolute rule of interpanel accord that had been followed in the former Fifth Circuit.<sup>55</sup> Second, the court rejected the tabula rasa of beginning to judge in a new circuit without precedent.<sup>56</sup> The judges concluded, "We choose instead to begin on a stable, fixed, and identifiable base while maintaining the capacity for change."<sup>57</sup> Finally, the court selected the en banc decision in *Bonner* as the vehicle to transfer former Fifth Circuit precedent into the new court's jurisprudence as the foundation for build-

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52. 661 F.2d 1206 (11th Cir. 1981) (en banc). The procedural history of the en banc decision is described in Baker, *A Postscript on Precedent*, *supra* note 16, at 734-35 n.67.

53. 661 F.2d at 1207.

54. Baker, *A Postscript on Precedent*, *supra* note 16, at 734-39.

55. 661 F.2d at 1209. Baker, *A Postscript on Precedent*, *supra* note 16 at 736; Baker, *Precedent Times Three*, *supra* note 4, at 723-24.

56. 661 F.2d at 1211. In response to an informal questionnaire before the division, one judge who believed the old court's decisions should be binding stated as a reason: "a whole circuit with no precedent?" Baker, *Precedent Times Three*, *supra* note 4, at 708-09 n.171 (the judges' responses were anonymous).

57. 661 F.2d at 1211; *see also* Baker, *A Postscript on Precedent*, *supra* note 16, at 737; Baker, *Precedent Times Three*, *supra* note 4, at 711-18. Both appellant and appellees in *Bonner* urged the adoption of the former Fifth Circuit precedent, although appellees urged further that the en banc court overrule the controlling decision of the former court. This the court declined to do. 661 F.2d at 1211-12.

ing its own stare decisis.<sup>58</sup>

The court's holding in *Bonner* contained one important qualification.<sup>59</sup> The court accepted only decisions of the former Fifth Circuit decided on or before September 30, 1981.<sup>60</sup> Decisions after that date were left in "litigatory limbo":<sup>61</sup>

We reserve for future consideration the effect on Eleventh Circuit law or other categories of decisions by the old Fifth Circuit—for example, decisions handed down by the old Fifth after September 30, 1981 in cases submitted to that court for decision before October 1; possible future en banc decisions by the *old* Fifth changing what appeared to have been its rule as of September 30, 1981.<sup>62</sup>

This holding is one dimensional and temporal. Irrespective of the decisionmaking unit, a former Fifth Circuit precedent is binding as long as it was decided on or before September 30, 1981.<sup>63</sup> *A Postscript on Precedent* described the early experience of the Eleventh Circuit under the holding in *Bonner*. By then several Eleventh Circuit opinions expressly had invoked the en banc holding,<sup>64</sup> others had used language that equated the new court with the old court before the cutoff date,<sup>65</sup> and, as would be expected, panels of the new court had applied the rule of interpanel accord to their own prior decisions.<sup>66</sup> Since then, the Eleventh

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58. 661 F.2d at 1211. The court rejected other transfer techniques such as informal consensus, rulemaking, and panel decision. *Id.* at 1210-11. Baker, *A Postscript on Precedent*, *supra* note 16, at 737; Baker, *Precedent Times Three*, *supra* note 4, at 711, 713-20.

59. See 661 F.2d at 1209; Baker, *A Postscript on Precedent*, *supra* note 16, at 737-38. One reason for the qualification is the difference between holding and dictum. See Baker, *Precedent Times Three*, *supra* note 4, at 712-17. The issue on the merits in the case was controlled by *Mitchum v. Purvis*, 650 F.2d 647 (5th Cir. 1981) (Unit B). In order to follow *Mitchum*, the court could hold only that former Fifth Circuit precedent decided before the effective date of the Reorganization Act was binding. Any further comment would have been dictum. See Baker, *Precedent Times Three*, *supra* note 4, at 714 n.209; see also *supra* note 57.

60. See Baker, *A Postscript on Precedent*, *supra* note 16, at 737 n.81 (citing the last ten decisions in this category).

61. *Id.* at 737; see *infra* text accompanying notes 68-77.

62. 661 F.2d at 1209 n.5 (emphasis in original).

63. *Id.* at 1211 n.8. *A Postscript on Precedent* speculated why the court was wary of later-decided precedent in the former Fifth Circuit. Baker, *A Postscript on Precedent*, *supra* note 16, at 738 n.87. Although Unit B of the old court was composed of the same states and presided over by the same judges as the new Eleventh Circuit, Unit A of the old court corresponded to the states and judges of the new Fifth Circuit. After Jan. 15, 1981, the en banc court divided into units as well. See *supra* text accompanying notes 34-38. The court in *Bonner* stopped short of adopting the precedent of Unit A with which there was no opportunity to participate en banc. Tate, *supra* note 40, at 692.

64. Baker, *A Postscript on Precedent*, *supra* note 16, at 739 n.89 (citing cases).

65. *Id.* at 739 n.90 (citing cases).

66. *Id.* at 739 n.92 (citing cases).

Circuit has continued to adhere to the September 30, 1981, deadline by relying on previously decided precedents of the former Fifth Circuit.<sup>67</sup>

The second important temporal treatment of former Fifth Circuit precedent in the Eleventh Circuit came in a panel opinion, *Stein v. Reynolds Securities, Inc.*,<sup>68</sup> in which the court went out of its way to explore "litigatory limbo".<sup>69</sup> The dispositive issue on appeal had been decided in a former Fifth Circuit panel decision on October 15, 1981.<sup>70</sup> Application of the September 30, 1981, deadline in *Bonner* would have labeled the former Fifth Circuit precedent persuasive only and given the panel discretion to follow or to reject the reasoning there.<sup>71</sup> As originally decided and drafted, the panel opinion in *Stein* was a rather unremarkable application of the temporal rule in *Bonner*. Originally, the panel wrote a footnote that read as follows:

This former Fifth Circuit opinion, which was decided on October 15, 1981, is not binding precedent for the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206 (1981). The discussion of this issue in *Goff* [the relevant former Fifth Circuit decision], however, is persuasive, and we choose to follow that reasoning.<sup>72</sup>

Several months later, however, the panel mysteriously issued a corrected opinion in which this footnote was deleted and the following language was added at the corresponding point in the text of the opinion:

This Former Fifth Circuit opinion which was decided on October 15, 1981, by Unit A of that Court, is not binding precedent for the Eleventh Circuit. The discussion of this issue in *Goff* [the relevant former Fifth Circuit decision] is persuasive, however, and we choose to follow that reasoning. Had the decision been made by a non-unit panel of the Former Fifth, the full en banc court of the Former Fifth, the Unit B en banc court of the Former Fifth, or a Unit B panel of the Former Fifth Circuit, we would regard the decision as binding precedent which we would have to follow absent Eleventh Circuit en banc consideration. Unit A en banc decisions and Unit A panel decisions after October 1, 1981, are only persuasive, however, not binding precedent in the Eleventh Circuit.<sup>73</sup>

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67. See *infra* text accompanying notes 78-97.

68. 667 F.2d 33 (11th Cir. 1982). For a discussion of the inadequacies of the panel mechanism for dealing with the problem of precedent, see Baker, *Precedent Times Three*, *supra* note 4, at 713-16. Some of these inadequacies have been overcome, at least in part, by the en banc court's reliance on the *Stein* decision. See *infra* note 80. But see Baker, *Precedent Times Three*, *supra* note 4, at 716-17.

69. See *supra* text accompanying notes 60-62.

70. *Goff v. United States*, 659 F.2d 560 (5th Cir. Oct. 15, 1981) (Unit A).

71. See *supra* text accompanying notes 52-67.

72. 667 F.2d at 34 n.2 (original opinion issued Feb. 4, 1982).

73. *Id.* at 34 (corrected opinion issued June 28, 1982).

Thus, the panel quite deliberately issued a dictum<sup>74</sup> that provides a framework of analysis for measuring the precedential import of former Fifth Circuit decisions decided after the September 30, 1981, deadline. The panel's analysis answered the criticism of the self-limited en banc holding made in *A Postscript on Precedent*.<sup>75</sup> The en banc mechanism exists only to serve the policy of having one law of a circuit established by a majority of the judges. The rule of interpanel accord exists to save en banc resources. Hence, the rule of stare decisis in interpanel accord, in large part, depends on the identity of decisionmakers in prior and subsequent decisions.<sup>76</sup> Because Eleventh Circuit judges were the same judges who decided former Fifth Circuit decisions by Unit B panel and en banc, the decisions would bind the new court. Judges on the Eleventh Circuit, however, did not routinely participate in Unit A panel and en banc decisions.<sup>77</sup> Thus, there was no identity of decisionmakers and no policy reason to consider the decisions binding.

#### IV. NARRATIVE SUMMARY

The en banc decision in *Bonner v. City of Prichard* provided half the solution to the issue raised concerning old court precedent in the new court.<sup>78</sup> The second half of the formula came from dictum in *Stein v. Reynolds Securities, Inc.*<sup>79</sup> September 30, 1981 is the time line; the former decision controls *before* and the later decision controls *after*. Combining the two decisions into a formula for dealing with former Fifth Circuit precedent in the new Eleventh Circuit requires recognition of two variables: decisionmaking unit and time of decision. Their combined analyses have become sufficiently routine in Eleventh Circuit case law so that they can be readily summarized here.<sup>80</sup>

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74. See *Baker, Precedent Times Three*, *supra* note 4, at 715-16.

75. *Baker, A Postscript on Precedent*, *supra* note 16, at 738 n.87.

76. See *supra* text accompanying notes 25-29.

77. Panels in either unit sometimes included judges from the other unit. When matters were reheard in unit en banc, however, only judges of that unit participated. See, e.g., *Washington v. Strickland*, 673 F.2d 879 (5th Cir. 1982) (Unit B), *rev'd*, 693 F.2d 1243 (5th Cir. 1982) (Unit B en banc) (Judge Randall of Unit A wrote the panel opinion but did not participate in Unit B en banc rehearing).

78. See *supra* text accompanying notes 52-67.

79. See *supra* text accompanying notes 68-77.

80. The two decisions are complimentary and are used in tandem to discriminate between the decisionmaking units and dates of decision. See *Locke v. Allstate Ins. Co.*, 696 F.2d 1340, 1341 n.1, 1343 n.5 (11th Cir. 1983); *Johnson v. Smith*, 696 F.2d 1334, 1338 n.2 (11th Cir. 1983); *Ford v. Strickland*, 696 F.2d 804, 810 n.3, 814 n.5 (11th Cir. 1983) (en banc); *Sullivan v. Wainwright*, 695 F.2d 1306, 1310 n.7, 1311 n.9 (11th Cir. 1983); *Rubaii v. Lakewood Pipe of Texas, Inc.*, 695 F.2d 541, 543 n.4 (11th Cir. 1983); *United States v. Riola*, 694 F.2d 670, 672 n.3 (11th Cir. 1983); *United States v. Kent*, 691 F.2d 1376, 1378 n.4, 1382

The Eleventh Circuit panels have had occasion to follow *Bonner* and *Stein* in almost all their applications.<sup>81</sup> Following the new court's own analysis, the decisions may be grouped before and after the September 30, 1981, time line. Considering the old court's decision *before* that date, subsequent Eleventh Circuit panels have deemed the following categories of decisions binding and controlling: Former Fifth Circuit preunitization panel decisions;<sup>82</sup> former Fifth Circuit preunitization en banc decisions;<sup>83</sup> former Fifth Circuit Unit A panel decisions;<sup>84</sup> and former fifth circuit

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n.12 (11th Cir. 1982); *County of Monroe v. Department of Labor*, 690 F.2d 1359, 1363 (11th Cir. 1982); *United States v. Robinson*, 690 F.2d 873 n.2 (11th Cir. 1982); *In re Grand Jury Proceedings*, 689 F.2d 1351, 1352 n.1 (11th Cir. 1982); *International Horizons, Inc. v. Community of Unsecured Creditors (In re International Horizons, Inc.)*, 689 F.2d 996, 1002 n.13, 1004 n.17 (11th Cir. 1982); *Stafford v. Muscogee County Bd. of Educ.*, 688 F.2d 1383, 1387 n.1 (11th Cir. 1982); *Donovan v. Dillingham*, 688 F.2d 1367, 1370 n.3 (11th Cir. 1982) (en banc); *Allen v. Autauga County Bd. of Educ.*, 685 F.2d 1302, 1304 n.4 (11th Cir. 1982); *Proffitt v. Wainwright*, 685 F.2d 1227, 1237 n.17, 1261-62 n.52 (11th Cir. 1982); *Doe v. Busbee*, 684 F.2d 1375, 1378 n.2 (11th Cir. 1982); *Walker v. Ford Motor Co.*, 684 F.2d 1355, 1361 n.7, 1362 n.8 (11th Cir. 1982); *Michigan Tech Fund v. Century Nat'l Bank*, 680 F.2d 736, 739 nn.2 & 3 (11th Cir. 1982); *Banco Nacional de la Vivienda v. Cooper*, 680 F.2d 727, 730 n.3 (11th Cir. 1982).

When only the first half of the formula applies, the court relies on *Bonner* alone. *See, e.g.*, *Brown v. A. J. Gerrard Mfg. Co.*, 695 F.2d 1290, 1293 (11th Cir. 1983); *Goodwin v. Balkcom*, 684 F.2d 794, 804 n.11 (11th Cir. 1982); *Challenge Homes, Inc. v. Greater Naples Care Center*, 669 F.2d 667, 669 n.2 (11th Cir. 1982).

Likewise, when only the second half of the formula applies, the court relies on *Stein* alone. *See, e.g.*, *United States v. Lee*, 694 F.2d 649, 652 n.1 (11th Cir. 1983); *Carnegie v. Georgia Higher Educ. Assistance Corp.*, 691 F.2d 482, 483 n.1 (11th Cir. 1982); *Deweese v. Town of Palm Beach*, 688 F.2d 731, 733 n.3 (11th Cir. 1982); *United States v. Pierre*, 688 F.2d 724, 725 (11th Cir. 1982).

81. The en banc court for the Eleventh Circuit, of course, is not itself limited by the rule of interpanel accord. Just like the en banc court of the old Fifth Circuit, the new court sitting en banc has carte blanche over its own precedents and those of its panels. *See generally Baker, A Postscript on Precedent, supra* note 16, at 729-30, 732-49; *Baker, Precedent Times Three, supra* note 4, at 721-24. The only limit, of course, is the hierarchy of precedent in which Supreme Court pronouncements control. *See, e.g.*, *United States v. Contreras*, 667 F.2d 976, 979 (11th Cir.), *cert. denied*, 103 S. Ct. 109 (1982); *United States v. Thevis*, 665 F.2d 616, 626 (5th Cir.) (Unit B), *cert. denied*, 103 S. Ct. 57 (1982).

82. *E.g.*, *Lock v. Allstate*, 696 F.2d 1340, 1341 (11th Cir. 1983); *Johnson v. Smith*, 696 F.2d, 1334, 1338 (11th Cir. 1983); *United States v. Ward*, 696 F.2d 1315, 1317 (11th Cir. 1983); *Grand Union Co. v. United States*, 696 F.2d 888, 891 (11th Cir. 1983); *Brown v. A. J. Gerrard Mfg. Co.*, 695 F.2d 1290, 1293 (11th Cir. 1983); *Ward v. United States*, 694 F.2d 654, 658 (11th Cir. 1983).

83. *E.g.*, *United States v. Edwards*, 696 F.2d 1277, 1279 (11th Cir. 1983); *Daniels v. Twin Oaks Nursing Home*, 692 F.2d 1321, 1323-24 (11th Cir. 1982); *Stewart v. Ford Motor Credit Co.*, 685 F.2d 391, 393 (11th Cir. 1982); *United States v. Hawkins*, 681 F.2d 1343, 1345 (11th Cir.), *cert. denied*, 103 S. Ct. 354 (1982).

84. *E.g.*, *Sullivan v. Wainwright*, 695 F.2d 1306, 1311 (11th Cir. 1983); *United States v. Hastings*, 695 F.2d 1278, 1281 (11th Cir. 1983); *Archambault v. United Computing Sys., Inc.*, 695 F.2d 551, 552 (11th Cir. 1983); *Donovan v. Sarasota Concrete Co.*, 693 F.2d 1061,

Unit B panel decisions.<sup>85</sup> Neither traditional research techniques nor computer-enhanced research has disclosed an Eleventh Circuit panel decision that holds the new Eleventh Circuit bound by former Fifth Circuit Unit A en banc or former Fifth Circuit Unit B en banc decisions issued *before* September 30, 1981. Presumably, the holding in *Bonner* would make both binding.<sup>86</sup> By definition, there are no decisions on or before September 30, 1981, from the new Fifth Circuit panel and en banc and the new Eleventh Circuit panel and en banc since those courts did not even exist until October 1, 1981.<sup>87</sup> Considering the old court's decision *after* that date, subsequent Eleventh Circuit panels have deemed the following categories of decisions binding and controlling: Former Fifth Circuit preunitization panel decisions;<sup>88</sup> former Fifth Circuit preunitization en banc decisions;<sup>89</sup> former Fifth Circuit Unit B panel decisions;<sup>90</sup> and former Fifth Circuit Unit B en banc decisions.<sup>91</sup> Also binding directly under the rule of interpanel accord, of course, are decisions rendered *after* that date by a prior Eleventh Circuit panel<sup>92</sup> or en banc court.<sup>93</sup> Con-

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1065 (11th Cir. 1982); *International Horizons, Inc. v. Community of Unsecured Creditors (In re International Horizons, Inc.)*, 689 F.2d 996, 1001-02 (11th Cir. 1982).

85. *E.g.*, *United States v. Kent*, 691 F.2d 1376, 1378 (11th Cir. 1982); *Jones v. Weldon*, 690 F.2d 835, 836 n.2 (11th Cir. 1982); *Original Appalachian Artworks, Inc. v. Toy Loft, Inc.*, 684 F.2d 821, 831 (11th Cir. 1982); *Lamb v. Jernigan*, 683 F.2d 1332, 1335 n.1 (11th Cir. 1982); *Allison v. Western Union Tel. Co.*, 680 F.2d 1318, 1321 (11th Cir. 1982).

86. *See supra* text accompanying notes 52-67. There cannot be a grand en banc of the Unit A plus Unit B en banc courts before Sept. 30, 1981. *See supra* note 43. *But cf. supra* note 83 (former Fifth Circuit preunitization en banc court).

87. *See supra* text accompanying notes 2-3, 44-47.

88. *E.g.*, *United States v. Long*, 674 F.2d 848, 852 n.4 (11th Cir. 1982).

89. *E.g.*, *Frank Diehl Farms v. Secretary of Labor*, 696 F.2d 1325, 1331 (11th Cir. 1983); *Hance v. Zant*, 696 F.2d 940, 949 (11th Cir. 1983); *United States v. Borders*, 693 F.2d 1318, 1322 (11th Cir. 1982).

90. *E.g.*, *Locke v. Allstate Ins. Co.*, 696 F.2d 1340, 1343 (11th Cir. 1983); *Johnson v. Smith*, 696 F.2d 1334, 1338 (11th Cir. 1983); *Sullivan v. Wainwright*, 695 F.2d 1306, 1310 (11th Cir. 1983); *Rubaii v. Lakewood Pipe, Inc.*, 695 F.2d 541, 543 (11th Cir. 1983); *United States v. Riola*, 694 F.2d 670, 672 (11th Cir. 1983); *Florida Mach. & Foundry, Inc. v. OSHRC*, 693 F.2d 119, 120 (11th Cir. 1982).

91. *E.g.*, *United States v. Lee*, 694 F.2d 649, 652 (11th Cir. 1983); *United States v. Pierre*, 688 F.2d 724, 725 (11th Cir. 1982); *United States v. Roper*, 681 F.2d 1354, 1359 (11th Cir. 1982); *United States v. Harper*, 680 F.2d 731, 736 (11th Cir.), *cert. denied*, 103 S. Ct. 229 (1982).

92. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), committed the new court to an absolute rule of interpanel accord. That commitment has been followed by panels. *E.g.*, *Belke v. Merrill Lynch*, 693 F.2d 1023, 1025 (11th Cir. 1982); *Allen v. Autauga County Bd. of Educ.*, 685 F.2d 1302, 1304 (11th Cir. 1982); *United States v. Hawkins*, 681 F.2d 1343, 1345 (11th Cir.), *cert. denied*, 103 S. Ct. 354 (1982); *United States v. Holman*, 680 F.2d 1340, 1355 (11th Cir. 1982). *See also infra* note 93.

93. The many panel opinions already cited following the en banc ruling in *Bonner* are authority enough. *See supra* notes 88-91 (citing cases).

sidering other decisions made *after* that date, subsequent Eleventh Circuit panels have deemed the following categories of decisions nonbinding and only persuasive: Former Fifth Circuit Unit A panel decisions;<sup>94</sup> former Fifth Circuit Unit A en banc decisions;<sup>95</sup> and new Fifth Circuit panel decisions.<sup>96</sup> Although no example could be found, presumably consistency and the dictum in *Stein* would label after-decided new Fifth Circuit en banc decisions likewise merely persuasive.<sup>97</sup>

## V. GRAPHIC SUMMARY

My reader, if still with me, by now must be wondering what happened to my introductory good intentions to keep this primer brief and elementary. Had I more time, perhaps this primer could have been shorter.<sup>98</sup> Because I have already broken this promise, and because I have nothing more to offer, I draw no conclusions here.<sup>99</sup> Still, I do not think the narrative could be made any clearer, for this is a novel and quite complicated subject full of nuance. Nevertheless, I recognize that what has gone before has the smell of the lamp, and its smoke may do more to cloud than its light to illuminate. The following table is offered as a graphic summary which, if not suitable for framing, is worth considering as a visual depiction of this primer on precedent in the new Eleventh Circuit.

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94. *E.g.*, *Deweese v. Town of Palm Beach*, 688 F.2d 731, 733 (11th Cir. 1982); *Walker v. Ford Motor Co.*, 684 F.2d 1355, 1362 (11th Cir. 1982); *Original Appalachian Artworks, Inc. v. Toy Loft, Inc.*, 684 F.2d 821, 831 (11th Cir. 1982).

95. *E.g.*, *Ford v. Strickland*, 696 F.2d 804, 814 (11th Cir. 1983); *In re Grand Jury Proceedings*, 689 F.2d 1351, 1352 (11th Cir. 1982); *Profitt v. Wainwright*, 685 F.2d 1227, 1261-62 n.52 (11th Cir. 1982).

96. *E.g.*, *Hill v. Linaham*, 697 F.2d 1032, 1034 (11th Cir. 1983); *United States v. Butera*, 677 F.2d 1376, 1384 n.6 (11th Cir. 1982).

97. *See supra* text accompanying note 73; *see also supra* note 86.

98. "I have made this letter longer than usual because I lack the time to make it shorter." B. PASCAL, *PROVINCIAL LETTERS XVI*, *quoted in Hayes v. Solomon*, 597 F.2d 958, 986 n.22 (5th Cir. 1979), *cert. denied*, 444 U.S. 1078 (1980).

99. In *Precedent Times Three*, I raised more questions than I answered. Baker, *Precedent Times Three*, *supra* note 4, at 734-35. In *A Postscript on Precedent*, my conclusion shifted the inquiry to the broader issue of circuit splitting. Baker, *A Postscript on Precedent*, *supra* note 16, at 739-42. If the third time is the charm, here "being done is enough." Baker, *Constitutional Criminal Procedure*, 1982 Eleventh Circuit Survey, 34 *MERCER L. REV.* 1241, 1271 (1983) (footnote omitted).

## PRECEDENT IN THE ELEVENTH CIRCUIT

Decisionmaking Unit	Decisions Before October 1, 1981	Decisions After September 30, 1981
Former Fifth Circuit Panel	<i>precedent</i> <sup>100</sup>	<i>precedent</i> <sup>101</sup>
Former Fifth Circuit En Banc	<i>precedent</i> <sup>102</sup>	<i>precedent</i> <sup>103</sup>
Former Fifth Circuit Unit A Panel	<i>precedent</i> <sup>104</sup>	<i>persuasive</i> <sup>105</sup>
Former Fifth Circuit Unit A En Banc	<i>precedent</i> <sup>106</sup>	<i>persuasive</i> <sup>107</sup>
Former Fifth Circuit Unit B Panel	<i>precedent</i> <sup>108</sup>	<i>precedent</i> <sup>109</sup>
Former Fifth Circuit Unit B En Banc	<i>precedent</i> <sup>110</sup>	<i>precedent</i> <sup>111</sup>
Former Fifth Circuit Unit A plus Unit B En Banc	<i>nonexistent</i> <sup>112</sup>	<i>nonexistent</i> <sup>113</sup>
New Fifth Circuit Panel	<i>nonexistent</i> <sup>114</sup>	<i>persuasive</i> <sup>115</sup>
New Fifth Circuit En Banc	<i>nonexistent</i> <sup>116</sup>	<i>persuasive</i> <sup>117</sup>
New Eleventh Circuit Panel	<i>nonexistent</i> <sup>118</sup>	<i>precedent</i> <sup>119</sup>
New Eleventh Circuit En Banc	<i>nonexistent</i> <sup>120</sup>	<i>precedent</i> <sup>121</sup>

100. *See supra* note 82.  
 101. *See supra* note 88.  
 102. *See supra* note 83.  
 103. *See supra* note 89.  
 104. *See supra* note 84.  
 105. *See supra* note 94.  
 106. *See supra* note 86.  
 107. *See supra* note 95.  
 108. *See supra* note 85.  
 109. *See supra* note 90.  
 110. *See supra* note 86.

111. *See supra* note 91.  
 112. *See supra* note 43.  
 113. *Id.*  
 114. *See supra* note 87.  
 115. *See supra* note 96.  
 116. *See supra* note 87.  
 117. *See supra* note 97.  
 118. *See supra* note 87.  
 119. *See supra* note 92.  
 120. *See supra* note 87.  
 121. *See supra* note 93.