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Casteel: To Infinity and Beyond

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I. Introduction.

When Harry Tompkins had his encounter with the Erie Railroad in 1934, he probably never imagined that his name would go down in legal history among students of the federal courts. Something comparable must be true of an Austin insurance agent named Bill Casteel, whose lawsuit against Crown Life Insurance Company ended up in the Supreme Court and gave Texas lawyers a new phrase to remember: the Casteel doctrine.

The word "Casteel" now comes up routinely in Texas civil appeals. Lawyers and judges frequently speak of Casteel error, Casteel harm, or a Casteel problem. Unfortunately, not everyone has the exact same understanding of how the Casteel doctrine works, and some loose ends remain to be worked out by the courts. This paper looks at the current state of play.

A good way to understand the Casteel problem is to start with the familiar phrase, "*One rotten apple can spoil the whole barrel.*" Suppose a trial judge combines two or more disjunctive legal theories into a single jury question, but one of the alternatives turns out to be flawed, whereas at least one can survive review. Does the flawed theory contaminate the jury's answer? Or does the presence of the tenable theory save it?

Under the Casteel doctrine, the bad theory presumptively taints the whole finding. Texas courts start from the proposition that the faulty theory creates "presumed harm," which requires reversal unless the appellate court is persuaded that the faulty theory probably made no difference.

The idea is that the jury might have made a mistake and based its decision on the flawed theory instead of the valid one. Where the jury finding merely says Yes to a question about the occurrence of X or Y, we do not know whether the jury believed X, as opposed to believing Y, and if X turns out to be untenable, we must assume the worst by acting as though the jury was persuaded by X. This presumption can be rebutted – at least in theory – but the burden to rebut it falls on the party wanting to salvage the result.

This is not a new problem in American law. It comes up regularly in criminal cases, particularly where a general verdict of guilty contains multiple theories, at least one of which turns out to be unsound. For example, in *Griffin v. United States*, the United States Supreme Court confronted the issue at the constitutional level. 502 U.S. 46, 47 (1991). At least as a matter of federal constitutional law, the Court held that an "otherwise valid conviction" is not reversible merely because the verdict combined multiple liability theories, and the evidence supporting one of those theories turned out to be insufficient. *Id.* at 60.

Of course, state courts from across the country have also grappled with the issue in the criminal context – sometimes reaching the opposite result. *E.g.*, *State v. Hogrefe*, 557 N.W.2d 871, 881 (Iowa 1996) ("What we have then is a marshalling instruction that allows the jury to consider three theories of culpability, only one (chemicals for checks) of which

is supported by the evidence. With a general verdict of guilty, we have no way of determining which theory the jury accepted. Because there was insufficient evidence to support an instruction to consider all the checks, the district court erred in giving the marshalling instruction"); *State v. Sanford*, 808 N.W.2d 755 (Iowa App. 2011) (similar).

The Fifth Circuit has called this the "commingling" problem. In the years before the 1991 *Griffin* decision, the Fifth Circuit would presume that one rotten apple spoiled the whole barrel. *See E.L Cheeney Co. v. Gates*, 346 F.2d 197, 200 & n.4 (5th Cir. 1965); *Vandercook & Son, Inc. v. Thorpe*, 344 F.2d 930, 931 (5th Cir. 1965); *Travelers Ins. Co. v. Wilkes,* 76 F.2d 701, 705 (5th Cir. 1935); *Am. Sugar Refining Co. v. J.E. Jones & Co*., 293 F. 560, 562-63 (5th Cir. 1923) (Hugo Black arguing); *see Lyle v. Bentley*, 406 F.2d 325, 327-28 (5th Cir. 1969) (If "the court's instructions permit a verdict to be based on an issue not supported by sufficient evidence, the jury verdict must be set aside."); *see also Wilmington Star Mining Co. v. Fulton*, 205 U.S. 60, 79 (1907); *Maryland v. Baldwin*, 112 U.S. 490, 493 (1884).

But in the wake of *Griffin*, the Fifth Circuit has come down the other way. *Wellogix, Inc. v. Accenture, L.L.P.*, 716 F.3d 867, 878 n.4 (5th Cir. 2013); *Advocare Int'l L.P. v. Horizon Labs., Inc*., 524 F.3d 679, 696 n.67 (5th Cir. 2008); *Prestenbach v. Rains*, 4 F.3d 358, 361 n.2 (5th Cir. 1993). The court has acknowledged that *Griffin* arose in the criminal context but applied it nonetheless: "we will not reverse a verdict simply because the jury might have decided on a ground that was supported by insufficient evidence." *See Walther v. Lone Star Gas Co.*, 952 F.2d 119, 126 (5th Cir. 1992). Instead, the court will "trust the jury to have sorted the factually supported from the unsupported." *Nester v. Textron, Inc.*, 16-51115 (5th Cir. April 18, 2018).

Some jurisdictions refer to this situation as the "2-issue" problem. *Anderson v. S.C. Dep't of Highways & Pub. Transp.*, 322 S.C. 417, 419-20, 472 S.E.2d 253, 254-55 (1996); *Smoak v. Liebherr-America, Inc.*, 281 S.C. 420, 422-23, 315 S.E.2d 116, 118 (1984); *Anderson v. West*, 270 S.C. 184, 188-89, 241 S.E.2d 551 (1978); *Chua v. Hilbert*, 846 So. 2d 1179 (Fla. 4th DCA 2003); *Grenitz v. Tomlian*, 858 So. 2d 999 (Fla. 2003); *Whitman v. Castlewood Intern. Corp.*, 383 So. 2d 618 (Fla. 1980); *LRX, Inc. v. Horizon Associates Joint Venture*, 922 So. 2d 984 (Fla. 4th DCA 2005). The Nevada Supreme Court has collected some of the American authorities on this issue:

> There are two perspectives regarding general verdicts. On one hand, there is the absolute certainty rule, which almost always requires reversal when there is an invalid theory presented to the jury. *See Kern v. Levolor Lorentzen, Inc.*, 899 F.2d 772, 782, 790 (9th Cir. 1990) (Kozinski, J., dissenting) (citing United States Supreme court cases from 1884, 1907, 1959, and 1962). On the other hand, *other courts uphold a general verdict if there is sufficient evidence to support at least one viable theory*. *Kern*, 899 F.2d at 777–78; *McCord v. Maguire*, 873 F.2d 1271, 1273–74, *amended by* 885 F.2d 650 (9th Cir. 1989). In *Gillespie v. Sears, Roebuck & Co.*, the First Circuit stated that the rule in that circuit is "'a new trial is usually warranted if evidence is insufficient with respect to any one of multiple claims covered by a general verdict.'" 386 F.3d 21, 29 (1st Cir. 2004) (quoting *Kerkhof v. MCI WorldCom, Inc.*, 282 F.3d 44, 52 (1st Cir. 2002)). The First Circuit applies

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