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The Supreme Court's ADA Decisions and *Per Se* Disabilities

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Unlike many of the other topics addressed in the *Righting the ADA* series, the Supreme Court of the United States has not made any dramatic changes to the state of the law regarding the basic concept of what the Court has called “*per se* disabilities.” Yet, the Court’s ADA decisions have changed the legal perspective on the application of this concept. This policy brief examines the meaning and significance of the *per se* disabilities concept, what the Supreme Court has said about it, and the implications of the Court’s declarations.

The Concept of *Per Se* Disabilities

The Latin words “*per se*” mean through itself, by itself, or in itself. A *per se* disability is a condition that intrinsically, by its very nature, qualifies as a disability. To constitute a disability under the ADA definition, a physical or mental impairment must result in a “substantial limitation of one or more major life activities.” Therefore, a *per se* disability under the ADA would be a condition that *always* substantially limits at least one major life activity.

Designation of a condition as a *per se* disability would be quite helpful on a practical basis to persons having the condition. If a condition is so designated, every person who has the condition automatically meets the definition of an individual with a disability and does not have to prove the effect on major life activities in her or his particular circumstances. This would make it easier to obtain voluntary compliance with ADA requirements by covered entities, because both the covered entity and the individual with the condition would know up front that there is no possibility that an administrative enforcement agency or a court could rule that the condition does not meet the ADA definition. And in the event that a dispute is not resolved amicably and leads to the filing of an ADA administrative complaint or court suit, the issue of whether the person has a disability under the law would be removed from the conflict, thus lessening the evidentiary burdens and improving the strategic position of the complainant.

The Supreme Court’s Statements Regarding *Per Se* Disabilities

The Supreme Court has not yet declared any particular condition to be a *per se* disability, but it has recognized the concept of *per se* disability in cases in which it declined or decided it did not need to resolve the issue of whether particular conditions constituted *per se* disabilities.

In *Bragdon v. Abbott*, 524 U.S. 624, 641-42 (1998), the Court found that Ms. Abbott’s condition met the ADA definition of disability, but ruled that it did not have to decide the issue of *per se* disability: “In view of our holding, we need not address the second question presented, *i.e.*, whether HIV infection is a *per se* disability under the ADA.” Having stated that it was not going to reach the issue, however, the Court then devoted several pages of its opinion to a discussion of regulations, administrative interpretations, and prior court decisions supporting the Court’s conclusion that “HIV infection, even in the so-called asymptomatic phase, is an impairment

which substantially limits the major life activity of reproduction.” *Id.* at 647. This analysis approaches very close to declaring the condition to be a *per se* disability. In 1988, the U.S. Department of Justice had formally announced its conclusion that HIV infection constituted a “handicap” within the meaning of Section 504 of the Rehabilitation Act of 1973¹. Since in *Bragdon v. Abbott* the Court declined to declare expressly that HIV infection is a *per se* disability, the decision can be seen as something of a retreat from the Department’s position, although it certainly left open the possibility that the Court might accord the condition *per se* status at a later date.

In *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555 (1999), the Court ruled that monocular vision (vision in only one eye) was not a *per se* disability, but gave substantial support to the concept of *per se* disabilities by stating that “some impairments may invariably cause a substantial limitation of a major life activity” (*Id.* at 566). The Court thus accepted that some conditions may merit *per se* disability status, but concluded that it “cannot say that monocular vision does” (*Id.*). The Court observed that monocular vision encompasses variations on the degree of visual acuity in the weaker eye, the age of onset of vision loss, the extent of compensating adjustments in visual techniques, and the ultimate scope of the restrictions on visual abilities, and declared: “These variables are not the stuff of a *per se* rule” (*Id.*). In the absence of such a rule, the Court in *Kirkingburg* insisted on the normal process under the ADA of individualized demonstration of the existence of disabilities on a case-by-case basis. But the Court did recognize that *per se* disability status could be appropriate for some conditions.

The Court’s decision in *Sutton v. United Airlines*, 527 U.S. 471 (1999), issued on the same day as *Kirkingburg*, stressed the importance of individualized determinations of disabilities and of taking mitigating measures into account in determining whether the plaintiffs’ visual impairments (severe myopia) constituted a disability (527 U.S. at 483-84). The Court did not make any statements, however, that preclude the possibility that some other conditions might merit *per se* status.

In *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 122 S.Ct. 681, 692 (2002), the Court declared that carpal tunnel syndrome is a type of impairment “whose symptoms vary widely from person to person,” making an individualized assessment “particularly necessary.” The Court also observed that in such situations it is insufficient for individuals attempting to prove disability status merely to submit evidence of a medical diagnosis of an impairment; instead, they must offer evidence that the extent of the limitation caused by their impairment is substantial in terms of their own experience (*Id.* at 691). The Court said nothing, however, about the possibility of *per se* disability status for conditions having less variability in their impact on major life activities.

In sum, the Supreme Court’s decisions to date recognize that “some impairments may invariably cause a substantial limitation of a major life activity” (*Kirkingburg*), thus validating the concept

of *per se* disabilities, but the Supreme Court has not yet been presented with a condition that it views as meriting *per se* disability status.

The Consequences of the Supreme Court's Decisions Regarding *Per Se* Disabilities

With the Supreme Court having recognized the concept of *per se* disabilities, but having not yet ruled any conditions as meriting that status, the law remains in something of a flux. Most lower courts have been reluctant to recognize conditions as *per se* disabilities in the absence of Supreme Court recognition that the condition deserves such a designation. Accordingly, various lower courts have not accorded *per se* disability status to such conditions as alcoholism,² drug addiction,³ heart disease,⁴ seizures,⁵ diabetes,⁶ cancer,⁷ hemophilia,⁸ Tourette's Syndrome,⁹ asthma,¹⁰ Meniere's disease,¹¹ Hepatitis C,¹² and Attention Deficit-Hyperactive Disorder (ADHD).¹³ Trial courts have little risk of being second-guessed on appeal if they require an individualized showing of substantial limitation of a major life activity as a prerequisite to demonstrating a disability under the ADA. At worst, they may have required some unnecessary evidence to be introduced, but, until a higher court recognizes a condition to be a *per se* disability, a judge has little motivation to go out on a limb and declare a condition to automatically qualify as a disability. Recently, one federal district court judge declared that there are no conditions that constitute *per se* disabilities,¹⁴ a position that appears sharply inconsistent with the statements (discussed above) of the Supreme Court in *Bragdon v. Abbott*, *Albertson's, Inc. v. Kirkingburg*, and *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*.

The reticence by the trial courts has a spillover effect on the courts of appeals, who are rarely asked to review a finding of *per se* disability. This standoff means that it is very difficult for any condition to achieve *per se* disability status without some intervening action by the Supreme Court, one of the ADA enforcement agencies, or the legislative branch declaring a condition to merit designation as a *per se* disability. Perhaps if the courts grow tired of litigating over and over such obvious issues as whether, for example, a person with paraplegia has a disability under the ADA, they might find sufficient incentive to rule conditions to be *per se* disabilities.

Two federal district courts have taken the step that the Supreme Court approached but did not quite take in *Bragdon v. Abbott*—the designation of HIV infection as a *per se* disability.¹⁵ In one of those decisions, *Jones v. Rehabilitation Hosp. of Indiana*,¹⁶ the court discussed the ADA committee reports and federal regulatory guidance indicating that HIV infection should be considered a disability under the ADA, and concluded that “both the agency interpretations of the ADA and the Act’s legislative history support the conclusion that Congress intended HIV infection to be a *per se* disability.” Several other courts, however, have declined to go so far, and have refused to give HIV infection *per se* disability status.¹⁷ Although decided before the Supreme Court issued its ruling in *Bragdon v. Abbott*, the court’s ruling in one such case, *U.S. v. Happy Time Day Care Center*,¹⁸ illustrates some of the difficulties that arise in the absence of *per se* status. The court noted that “there is considerable support for the notion that HIV infection is a *per se* disability under the ADA and the Rehabilitation Act,” but nonetheless opted

to scrutinize the affected person's condition of HIV infection on an individualized basis. Having chosen to do so, the court was then forced to grapple with such thorny questions as the significance of procreation and sexual activities in the life of a three-year-old; whether such activities as caring for one's self, growing, socializing, and living do or do not constitute major life activities; and to what extent such activities are limited by HIV infection in a young child. Such troublesome complexities could have been avoided if HIV infection had been treated as a *per se* disability.

In the absence of recognition that HIV infection is always a disability, however, at least one court has ruled that a plaintiff's HIV infection and AIDS did not qualify as a disability under the ADA. In the case of *Gutwaks v. American Airlines*,¹⁹ a federal district court ruled that an airline employee with "full-blown AIDS" was not substantially limited in any major life activity. This appears to be an extreme and dubious example of the application of the elements of the ADA definition of disability, but it illustrates the risks that a litigant incurs in trying to establish the existence of a disability when the terms of the ADA definition are strictly interpreted. This ruling that a person with AIDS did not have a disability was particularly startling in light of the Supreme Court's earlier ruling in *Bragdon v. Abbott* that the plaintiff's asymptomatic HIV infection constituted a disability under the ADA. Given that the plaintiff in *Gutwaks* had a more advanced form of the condition than Ms. Abbott, it seems illogical that she had a disability under the ADA but he did not.

In *Bragdon*, the Supreme Court premised its decision on the effect of Ms. Abbott's condition on her major life activity of reproduction, while in *Gutwaks* the court was heavily influenced by the fact that Mr. Gutwaks indicated that he had no interest in fathering children. In *Bragdon*, the Supreme Court had discussed reproduction in the broader context of sexual activity,²⁰ but in *Gutwaks* the plaintiff premised his ADA claim solely on his assertion that his major life activity of procreation, not sexual activity, was substantially limited. Some lower courts have ruled that engaging in sexual relations is a major life activity,²¹ which, in light of the substantial impact HIV infection has on sexual activity (as the Supreme Court recognized in *Bragdon*), would be nearly tantamount to ruling that HIV infection is a *per se* disability.

Apart from HIV, the ADA committee reports and enforcement guidance have suggested a number of other conditions as likely candidates for *per se* disability status. Among these are the following:

paraplegia²²

deafness²³

hard of hearing/hearing loss²⁴

lung disease²⁵

blindness²⁶

mental retardation²⁷

alcoholism²⁸

A strong argument can be made that all of the physical or mental impairments in this list “invariably cause a substantial limitation of a major life activity” (*Kirkingburg*), essentially by definition. Thus, paraplegia automatically entails a substantial limitation on major life activities of walking and performing manual tasks. Deafness and other hearing impairments involve a substantial limitation on the major life activity of hearing. Lung diseases substantially limit the major life activity of breathing. Blindness engenders a substantial limitation on the major life activity of seeing. The condition of mental retardation denotes a substantial limitation on learning and thinking. Chronic inability to refrain from drinking to intoxication is the essence of the condition of alcoholism, and such intoxication causes substantial limitations on various major life activities such as thinking (and remembering), walking, performing manual tasks, and others. If this is true, such conditions could be accorded *per se* disability status.

Three other conditions—epilepsy,²⁹ diabetes,³⁰ and manic depressive syndrome³¹—were also deemed worthy of *per se* disability status in ADA committee reports and the *EEOC Compliance Manual*, but for many individuals these conditions can be mitigated through medication, dietary restrictions, and other means. In light of the Supreme Court’s decisions requiring the assessment of disability to take mitigating measures into account, as discussed in a previous policy brief in the *Righting the ADA* series (<http://www.ncd.gov/newsroom/publications/narrowing.html>), it is currently unlikely that any court would find these conditions to qualify automatically as disabilities under the ADA. Indeed, dicta in the Supreme Court’s opinion in *Sutton v. United Airlines* indicates that “find[ing] all diabetics to be disabled” would be “contrary to both the letter and the spirit of the ADA.”³² Subsequent to the Supreme Court’s rulings on mitigating measures, at least two federal courts have found that plaintiffs whose diabetes was controlled (at least to some degree) by blood sugar tests, insulin injections, and controlled diet, had failed to establish that they had a disability under the ADA.³³ Similarly, at least three lower courts have ruled that, in light of mitigation through medication, particular plaintiffs’ conditions of epilepsy did not qualify as a disability under the ADA definition.³⁴ One of those courts conceded that prior to the Supreme Court’s ruling in *Sutton* “a person suffering from epilepsy would receive nearly automatic ADA protection.”³⁵

Accordingly, perhaps the most significant implication on the concept of *per se* disabilities of the Supreme Court’s ADA rulings has been the elimination from eligibility for *per se* status of conditions that can be ameliorated through various mitigating measures.

There may be some potential downside to the designation of conditions as *per se* disabilities. If some conditions were recognized as automatic disabilities under the ADA, conditions not on the list might be presumed not to constitute disabilities at all. Such an inference would make it harder for persons having any impairment not accorded *per se* status to establish that their condition satisfies the ADA definition of disability. In theory, the fact that one condition always substantially limits one or more major life activities has no bearing whatever on whether some other condition does or does not have a substantially limiting effect for a particular individual. Nonetheless, the possibility that such a negative inference would be made in fact, with significant damaging consequences, cannot be discounted.

Moreover, the designation of a group of conditions as *per se* disabilities could reinforce the misconception that people really exist in two distinct groups—those with disabilities and those without—and that one can and should distinguish between the “truly disabled” and those with “undeserving” conditions. These myths about the ADA are discussed and refuted in a prior policy brief in the *Righting the ADA* series

(<http://www.ncd.gov/newsroom/publications/negativemedia.html>). That paper describes the “spectrum of abilities” reality of human differences, which involves infinite gradations and variations between different individuals for every category of human function. The same policy brief also discusses the problematic “medical model” of disability, which can also be implicated in the *per se* disability designation. The proof that one has a condition considered a *per se* disability would frequently involve medical evidence. This further shifts the focus of ADA proceedings away from the alleged discriminatory conduct and onto the medical assessment of one’s physical and mental characteristics—a shift that is quite contrary to the spirit of the ADA.

Such potential drawbacks make it imperative that any designation of *per se* disabilities should be done cautiously, if at all, and should be accompanied by thoughtful commentary explaining its rationale and minimizing the chances of its having negative consequences.

Conclusion

Designation of a condition as a *per se* disability amounts to a recognition that, by its nature, a particular condition *always* substantially limits at least one major life activity. Such a designation would be of considerable practical value for ADA claimants having the condition. The Supreme Court decisions relating to *per se* disability have endorsed the concept but have not granted such status to any specific impairments. In addition, the Court’s rulings on mitigating measures have narrowed the pool of potential *per se* disability candidates. In the absence of the Supreme Court having named any conditions as meriting such designation, the lower courts have been reluctant to rule conditions to be *per se* disabilities. Some likely potential contenders for *per se* status, based upon ADA committee reports and regulatory commentary are paraplegia, deafness, hearing loss (hard of hearing), lung disease, blindness, mental retardation, and alcoholism. Because of possible negative inferences about conditions not included in any list of

conditions accorded *per se* disability status and other potential drawbacks, any denomination of conditions for such status should be undertaken only with caution, and in the context of adequate explanatory commentary to minimize negative repercussions.

This policy brief was written for the National Council on Disability by Professor Robert L. Burgdorf Jr. of the University of the District of Columbia, David A. Clarke School of Law.

Endnotes

1. Memorandum from Douglas W. Kmiec, Acting Assistant Attorney General, Office of the Legal Counsel, Department of Justice, to Arthur B. Culvahouse, Jr., Counsel to the President, 8 FEP Manual (BNA) 405:1,4 (Sept. 27, 1988).
2. See, e.g., *Bailey v. Georgia-Pacific Corp.*, 306 F.3d 1162, 1167-68 (1st Cir. 2002.); *Reg'l Econ. Cmty. Action Program, Inc. v. City of Middletown*, 294 F.3d 35, 46-47 (2d Cir.2002); *Burch v. Coca-Cola Co.*, 119 F.3d 305, 316-17 (5th Cir. 1997); *Wilson v. Internat'l Broth. of Teamsters, Chauffeurs and Warehousemen*, 47 F.Supp.2d 1347, 1359 (S.D.Fla. 1999); *Goldsmith v. Jackson Memorial Hosp. Public Health Trust*, 33 F.Supp.2d 1336, 1341-42 (S.D.Fla.,1998).
3. See, e.g., *Zenor v. El Paso Healthcare System, Ltd.*, 176 F.3d 847, 860 (5th Cir. 1999).
4. See, e.g., *Weber v. Strippit, Inc.*, 186 F.3d 907, 913 (8th Cir. 1999).
5. See, e.g., *Deas v. River West, L.P.*, 152 F.3d 471, 476-79 (5th Cir. 1998).
6. See, e.g., *Kapche v. City of San Antonio*, 304 F.3d 493, 497-98 (5th Cir. 2002); *Beaulieu v. Northrop Grumman Corporation*, 161 F.Supp.2d 1135, 1142 (D.Hawaii 2000). See, also, *Sutton v. United Airlines*, 527 U.S. 471, 483-84 (1999) (dicta) (to “find all diabetics to be disabled” would be “contrary to both the letter and the spirit of the ADA”).
7. See, e.g., *Godron v. Hillsborough County*, 2000 WL 1459054, *2 n.3 (D.N.H.,2000); *Hirsch v. National Mall & Serv., Inc.*, 989 F.Supp. 977, 981-82 (N.D.Ill. 1997); *Pimental v. Dartmouth-Hitchcock Clinic*, 236 F.Supp.2d 177, 182 (D.N.H., 2002); *Schwertfager v. City of Boynton Beach*, 42 F.Supp.2d 1347, 1359 (S.D.Fla. 1999).
8. See, e.g., *Bridges v. City of Bossier*, 92 F.3d 329, 336 n. 11 (5th Cir. 1996).
9. See, e.g., *Lanci v. Andersen*, 2000 WL 329226, *3 (S.D.N.Y. 2000); *Purcell v. Pennsylvania Dept. of Corrections*, 1998 WL 10236, *8 (E.D.Pa. 1998).

10. See, e.g., *White v. Honda of America Mfg., Inc.*, 2003 WL 203111, *3-*4 (S.D. Ohio 2003); *Ventura v. City of Independence*, 108 F.3d 1378, 1997 WL 94688, at *1-*2 (6th Cir. 1997) (unpublished opinion) (individualized inquiry of effects of plaintiff's asthma); *Minnix v. City of Chillicothe*, 205 F.3d 1341, 2000 WL 191828, at *2 (6th Cir. 2000); *Heilweil v. Mount Sinai Hosp.*, 32 F.3d 718, 724 (2d Cir. 1994); *Boone v. Reno*, 121 F.Supp.2d 109, 111 (D.D.C. 2000); *Castro v. Local 1199, Nat'l Health & Human Servs. Employees Union*, 964 F.Supp. 719, 725 (S.D.N.Y. 1997); *Gaddy v. Four B Corp.*, 953 F.Supp. 331, 337 (D.Kan. 1997); *Emery v. Caravan of Dreams, Inc.*, 879 F.Supp. 640, 642-43 (N.D. Tex. 1995).
11. See, e.g., *Perkins v. St. Louis County Water Co.*, 160 F.3d 446, 448 (8th Cir. 1998).
12. See, e.g., *Quick v. Tripp, Scott, Conklin & Smith, P.A.*, 43 F.Supp.2d 1357, 1366-67 (S.D. Fla. 1999); *Ellis v. Mohenis Services, Inc.*, 1998 WL 564478, *3 (E.D. Pa. 1998); *Reese v. American Food Service*, 2000 WL 1470212, *5 (E.D. Pa. 2000).
13. See, e.g., *Bercovitch v. Baldwin School, Inc.*, 133 F.3d 141, 155 (1st Cir. 1998); *Davidson v. Midelfort Clinic, Ltd.*, 133 F.3d 499, 505-06 (7th Cir. 1998); *Demar v. Car-Freshner Corp.*, 49 F.Supp.2d 84, 89-90 (N.D.N.Y. 1999); *Bingham v. Oregon School Activities Ass'n*, 37 F.Supp.2d 1189, 1195 (D. Or. 1999).
14. *White v. Honda of America Mfg., Inc.*, 2003 WL 203111, *3 (S.D. Ohio 2003) ("No impairment constitutes a disability *per se*").
15. *Jones v. Rehabilitation Hosp. of Indiana*, 2000 WL 1911884, *3-*4 (S.D. Ind. 2000); *Ihekwe v. City of Durham, N.C.*, 129 F.Supp.2d 870, 879 (M.D.N.C. 2000).
16. 2000 WL 1911884, *3-*4 (S.D. Ind. 2000).
17. See, e.g., *Thomas v. New Commodore Cruise Lines Ltd.*, 202 F.Supp.2d 1356, 1360-61 (S.D. Fla. 2002); *Cruz Carrillo v. AMR Eagle, Inc.*, 148 F.Supp.2d 142, 145 (D. Puerto Rico 2001); *Solorio v. American Airlines, Inc.*, 2002 WL 485284, *4 (S.D. Fla. 2002); *U.S. v. Happy Time Day Care Center*, 6 F.Supp.2d 1073, 1078-79 (W.D. Wis. 1998).
18. 6 F.Supp.2d 1073, 1078-79 (W.D. Wis. 1998).
19. 1999 WL 1611328 (N.D. Tex. 1999).
20. See, e.g., 524 U.S. at 638 ("Reproduction and the sexual dynamics surrounding it are central to the life process itself."), 643 (noting Department of Justice's Office of Legal Counsel's characterization of "engaging in sexual relations" as a life activity under the Rehabilitation Act).
21. E.g., *McAlindin v. San Diego*, 192 F.3d 1226, 1234 (9th Cir. 1999); *Anderson v. Gus Meyer Boston Store*, 924 F.Supp. 763, 775 n. 24 (E.D. Tex. 1996); *Doe v. District of Columbia*, 796 F.Supp. 559, 568 (D.D.C. 1992) (under Rehabilitation Act).

22. See S. Rep. No. 101-116, at 22 (1989); H.R. Rep. No. 101-485, pt. 2 at 52 (1990) (Committee on Education and Labor); H.R. Rep. No. 101-485, pt. 3 at 28-29 (1990) (Committee on the Judiciary).
23. See S. Rep. No. 101-116, at 22 (1989); H.R. Rep. No. 101-485, pt. 2 at 52 (1990) (Committee on Education and Labor); *EEOC Compliance Manual* (Number 915.002, March 14, 1995) at p. 902-21.
24. See H.R. Rep. No. 101-485, pt. 2 at 52 (1990) (Committee on Education and Labor) (“hard of hearing”); H.R. Rep. No. 101-485, pt. 3 at 28-29 (1990) (Committee on the Judiciary) (“hearing loss”).
25. See S. Rep. No. 101-116, at 22 (1989); H.R. Rep. No. 101-485, pt. 2 at 52 (1990) (Committee on Education and Labor); H.R. Rep. No. 101-485, pt. 3 at 28-29 (1990) (Committee on the Judiciary).
26. See *EEOC Compliance Manual* (Number 915.002, March 14, 1995) at p. 902-21.
27. See H.R. Rep. No. 101-485, pt. 3 at 28-29 (1990) (Committee on the Judiciary).
28. See *EEOC Compliance Manual* (Number 915.002, March 14, 1995) at p. 902-21.
29. See S. Rep. No. 101-116, at 22 (1989); H.R. Rep. No. 101-485, pt. 2 at 52 (1990) (Committee on Education and Labor); H.R. Rep. No. 101-485, pt. 3 at 28-29 (1990) (Committee on the Judiciary).
30. See S. Rep. No. 101-116, at 22 (1989); H.R. Rep. No. 101-485, pt. 2 at 52 (1990) (Committee on Education and Labor); *EEOC Compliance Manual* (Number 915.002, March 14, 1995) at p. 902-21.
31. See *EEOC Compliance Manual* (Number 915.002, March 14, 1995) at p. 902-21.
32. 527 U.S. 471, 483-84 (1999).
33. See, e.g., *Orr v. Wal-Mart Stores, Inc.*, 297 F.3d 720 (8th Cir. 2002); *Nordwall v. Sears, Roebuck & Co.*, 46 Fed App. 364, 2002 WL 31027956 (7th Cir. 2002) (unpublished).
34. *Chenoweth v. Hillsborough Co.*, 250 F. 3d 1328 (11th Cir. 2001), *cert denied*, 534 U.S. 1131 (2002); *EEOC v. Sara Lee*, 237 F.3d 349 (4th Cir. 2001); *Todd v. Academy Corp.*, 57 F. Supp.2d 448 (S.D.Tex. 1999).
35. *Todd v. Academy Corp.*, 57 F. Supp.2d 448, 453-54 (S.D. Tex. 1999).