IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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No. 93-7573

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GREYCAS, INC.,

Plaintiff-Counter-
Defendant-Appellant,

versus

OCEAN TRANSPORT LIMITED NO. 1, OCEAN TRANSPORT, INC., WILLIAM R. CROSS and LAWRENCE E. KIESCHNICK,

Defendants-Third Party
Plaintiffs-Counter
Claimants-Counter
Defendants-Appellees,

versus

GREYHOUND FINANCIAL CORPORATION and DIAL CORPORATION,

Third Party Defendants-
Counter Claimants-
Appellants.

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Appeal from the United States District Court for the
Southern District of Texas
(CA-C-90-280)

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(April 11, 1995)

Before GARWOOD, JOLLY and SMITH, Circuit Judges.*

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion

PER CURIAM:

The district court below dismissed with prejudice all claims of all the various parties against each other on the basis of *res judicata* arising from the March 30, 1992, judgment of the 148th Judicial District Court of Nueces County, Texas (which judgment became final, in the sense of appealable, July 13, 1992), in cause No. 90-1146-E on the docket of said state court, a suit between the same parties essentially on all the same claims (the state suit). The said judgment in the state suit was appealed by both our appellants and by our appellees to the Court of Appeals for the Thirteenth Judicial District of Texas, at Corpus Christi, becoming cause No. 13-92-453-CV on the docket of that court, styled *Ocean Transport, Inc., et al. v. Greycas, Inc., et al.* After full briefing and oral argument of this appeal in our Court, we stayed further proceedings in our appeal pending final resolution of the state suit appeal. By opinion issued May 26, 1994, *Ocean Transport, Inc. v. Greycas, Inc.*, 878 S.W.2d 256 (Tex. App.SQCorpus Christi 1994, writ denied), as modified by order issued July 29, 1994, the Corpus Christi Court of Appeals ultimately affirmed the state trial court's judgment in all respects except that the appellate court (1) reformed the judgment so that the post-judgment interest on our appellants' monetary recovery from our appellees was eighteen percent per annum and (2) ordered a new trial on the issue of our appellant Greycas's claim for attorney's fees (under the provisions of the promissory note) against our appellees

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should not be published.

Kieschnick and Cross (as guarantors of the note). The Texas Supreme Court subsequently denied applications for writ of error, and motions for rehearing were likewise denied by that court, and the said judgment of the Corpus Christi Court of Appeals has become final. Thereafter, we received further briefs from the parties. We now dissolve the stay of this appeal that we previously entered.

In both the state suit and this suit appellees brought the same claims against appellants under the Texas Deceptive Trade Practices Act (DTPA), Tex. Bus. & Com. Code §§ 17.41 *et seq*. Appellants, in both the state suit and in this suit, sought in response recovery under Tex. Bus. & Com. Code § 17.50(c), which provides that if it is found that a DTPA claim "was groundless and brought in bad faith, or brought for the purpose of harassment, the court shall award to the defendant reasonable and necessary attorneys' fees and court costs." The state suit judgment, as ultimately affirmed, both denied appellees recovery on their DTPA claims and denied appellants any recovery on their section 17.50(c) claims, determining that appellees' DTPA claims, though not valid, were not groundless and made in bad faith or brought for purposes of harassment. The district court below held that appellants' section 17.50(c) claims (and appellees' DTPA claims) were barred by the state suit judgment. Appellants seek to avoid this result by urging that in the state suit appellees dropped some of their original DTPA claims, but that those dropped claims are included in the federal suit. We reject this contention. The fact that some of the DTPA claims originally made in the state suit were dropped would not prevent appellants from recovering in the state suit

under section 17.50(c) on account of those dropped claims. *See Kazmir v. Suburban Homes Realty*, 824 S.W.2d 239 (Tex. App.SQTexarkana 1992, writ denied). Except in only one respect, we agree with the district court that appellants' section 17.50(c) claims are barred by the state suit and judgment. The appellees' DTPA claims were brought in this federal suit nearly a year after the same claims were brought in the state suit; hence, the state suit does not preclude determination that the federal suit DTPA claims were groundless and in bad faith (or brought to harass), solely because of being obviously barred by limitations, even though it must now be assumed that such claims were not thus obviously barred when brought in the state suit. Hence, we vacate the dismissal of appellants' section 17.50(c) claims and remand such claims to the district court; on remand, the only issue respecting the section 17.50(c) claims shall be *whether*, assuming the DTPA claims were not so obviously barred by limitations as to be groundless and in bad faith (or brought to harass) when brought in the state suit,[1] they nevertheless had become so obviously barred by limitations when brought in the federal suit as to be (for that reason alone) groundless and in bad faith (or brought to harass). If on this basis appellants are found on remand to be entitled to section 17.50(c) recovery, such recovery shall be limited to their reasonable and necessary attorney's fees and court costs incurred in the federal suit in defending the federal suit

[1] It shall also be assumed, consistent with the state court suit and judgment, that the DTPA claims were without merit but were not (apart from any limitations bar when filed in the federal suit) groundless and in bad faith or for purposes of harassment.

DTPA claims.

The district court denied appellants' Rule 11 motion or motions, predicated at least in major part on the assertedly groundless character of the federal suit DTPA claims, for the same reason it denied appellants' section 17.50(c) claims. We accordingly vacate the district court's denial of Rule 11 relief to appellants and remand that matter on the same basis and for the same limited purpose as we have vacated and remanded the district court's denial of relief to appellants under section 17.50(c), and the same assumptions shall apply. Appellants further assert that they also sought Rule 11 relief for appellees' litigation conduct in the federal court suit and not solely on the basis of the lack of merit, obvious or otherwise, of the federal suit DTPA claims; on remand the district court shall also address these Rule 11 claims, which would not be precluded by the state suit and judgment. The district court on remand shall also address appellees' contention that appellants had waived their Rule 11 motions in the district court below. No Rule 11 recovery by appellants shall include any fees or expenses in the state suit or be based on conduct in the state suit.

As to the remainder of the judgment below, appellants' only contention is that the dismissal of their claims should be without prejudice rather than with prejudice. We agree in part only. We modify the remainder of the district court's judgment so that its dismissal of appellants' claims (other than their section 17.50(c) claims and their Rule 11 motions, which we have dealt with above) is expressly without prejudice to appellant Greycas's right to

pursue in the state court suit its claims against appellees Kieschnick and Cross for attorney's fees on the note (and their guaranties) as authorized by the final judgment of the Corpus Christi Court of Appeals in the state suit and to appellants' rights to enforce so much of the final state court suit judgment, as ultimately affirmed by the Corpus Christi Court of Appeals, as awards them relief, but in all other respects the dismissal of all appellants' claims (other than their section 17.50(c) claims and Rule 11 claims) is with prejudice.

Accordingly, the judgment below is

AFFIRMED in part; MODIFIED in part and AFFIRMED as so MODIFIED; and VACATED and REMANDED in part.[**]

[**] Each party shall bear its own costs on this appeal.