

FEDERAL LITIGATION UPDATE

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Longarm Jurisdiction?

2011 U.S. Supreme Court

Goodyear Dunlop Tires v. Brown, 131 S. Ct. 2846.

No general personal jurisdiction based on product sales into a state.

J. McIntyre Machinery v. Nicastro, 131 S. Ct. 2780.

No specific personal jurisdiction based on a “stream of commerce” theory.

Ainsworth v. Moffett Engineering
F.3d ___, No. 12-60155 (5th Cir. May
9, 2013).

- “In *McIntyre*, Justice Breyer’s concurring opinion, joined by Justice Alito, furnished the narrowest grounds for the decision and controls here.”

- **NO:** Plaintiff “unilaterally transported” ice-shaving machine from Louisiana to Mississippi. *Irvin v. Southern Snow Mf’g*, No. 11-60767 (5th Cir. March 13, 2013, unpublished).
- **NO:** Alleged “alter ego” relationship among shipping companies. *First Investment Corp. of the Marshall Islands v. Fujian Mawei Shipbuilding*, 703 F. 3d 742 (5th Cir. 2012).
- **NO:** “Off-the-shelf” software contract that did not contemplate ongoing relationship. *Pervasive Software, Inc. v. Lexware GMBH & Co.*, 688 F.3d 214 (5th Cir. 2012).
- **NO:** Franchising dispute too remote from alleged contacts involving shipments of goods to the franchise. *ITL International v. Constenla, S.A.*, 669 F. 3d 493 (5th Cir. 2012).

***Get it Right the
First Time***

- **PRO:** Erroneous denial of motion to transfer venue. *In re Volkswagen*, 545 F.3d 304 (5th Cir. 2008) (en banc).
- **CON:** Erroneous denial of a motion to remand. *In re Crystal Power*, 641 F.3d 82 (5th Cir. 2011).
- **CON:** Denial of a motion to enforce a forum selection clause. *In re Atlantic Marine Construction*, 701 F.3d 736 (5th Cir. 2012), cert. granted, No. 12-929, 2013 WL 1285318 (U.S. Apr. 1, 2013).
- **CON:** Order requiring a psychiatric examination. *All Plaintiffs v. Transocean Offshore*, No. 12-30237 (Jan. 3, 2013, unpublished).

Daubert

Roman v. Western Manufacturing,
691 F.3d 686 (5th Cir. 2012)

“After [the expert] fully explained his method and calculations, the court held that while [Defendant’s] ‘cross-examination was quite effective,’ ultimately such doubts affected ‘the weight of the evidence,’ as opposed to the admissibility of his testimony.”

Brown v. Illinois Central Railroad,
705 F.3d 531 (5th Cir. 2013)

“Long emphasized his own ‘education and experience,’ urging that ‘[c]ontrary to some thinking, standards related to safety do not always have to be adopted by some official agency in order to exist.’ But we have long held that ‘[w]ithout more than credentials and a subjective opinion, an expert’s testimony that “it is so” is not admissible.’”

Arbitration

Klein v. Nabors Drilling,
710 F.3d 234 (5th Cir. 2013)

“Parties are always free to attempt to work together and reach a mutually beneficial result before absorbing the not insignificant costs associated with arbitration. Their decision to do so does not strip an arbitration agreement of its effect.”

Carey v. 24 Hour Fitness,
669 F.3d 202 (5th Cir. 2012)

“[T]he agreement allows 24 Hour Fitness to hold its employees to the provision to arbitrate while reserving its own escape hatch.”

Injunctions

***Hornbeck Offshore Services v. Salazar, No.
11-30936 (revised April 9, 2013)***

Interior Department was: “immediately prohibited from enforcing the Moratorium, entitled ‘Suspension of Outer Continental Shelf (OCS) Drilling of New Deepwater Wells’ dated May 28, 2010, and NTL No. 2010-N04 seeking implementation of the Moratorium, as applied to all drilling on the OCS in water at depths greater than 500 feet.”

Daniels Health Sciences v. Vascular Health Sciences, 710 F.3d 579 (5th Cir. 2013).

“Dr. Daniels testified that other scientists in the field were familiar with his work and that a poor knock-off would be associated with him to his reputational detriment. The district court did not err when it credited this unrebutted testimony and concluded that such harm was likely. . . . [T]he court heard testimony that an ill-conceived or even unsafe knockoff likely would damage DHS’s funding chances.”

Pleading

Dorsey v. Portfolio Equities,
540 F.3d 333 (5th Cir. 2008)

Fed. R. Civ. P. 9(b) requires a heightened level of pleading for fraud claims. “Put simply, Rule 9(b) requires the complaint to set forth ‘the who, what, when, where, and how’ of the events at issue.”

Patrick v. Wal-Mart,
681 F.3d 614 (5th Cir. 2012)

Allegation: “Defendants have engaged in a continuing pattern of bad faith . . . [and] have among other things, unreasonably delayed and/or denied authorization and/or payment of reasonable, necessary and worker’s comp related medical treatment, as well as permanent indemnity benefits, as ordered by [the state agency].”

Holding: The allegation “invokes three potentially cognizable theories of liability,” but “does not identify by date or amount or type of service, any of the alleged bad-faith denials and delays” (emphasis added)

Bowlby v. City of Aberdeen,
681 F.3d 215 (5th Cir. 2012)

*“ . . . no allegations regarding the types of businesses . . . the size . . . where they are located, or what laws and regulations they have violated.”
(emphasis added)*

***Highland Capital Management v.
Bank of America, ___ F.3d ___ (2012).***

“Highland alleged in its complaint that, notwithstanding their subsequent emails, the parties entered a binding and enforceable oral agreement on December 3, 2009—an agreement which, pursuant to the allegedly agreed-to standard terms of the LSTA, was not susceptible to the addition of non-industry terms or conditions.”

Mortgage Servicing

- **DTPA:** *James v. Wells Fargo*, No. 12-10861 (May 3, 2013).
- **Negligent Misrepresentation:** *Pennell v. Wells Fargo*, No. 12-40742 (June 9, 2013).
- **Estoppel:** *Milton v. U.S. Bank*, No. 12-40742 (Jan. 18, 2013).
- **Waiver:** *Water Dynamics v. HSBC Bank*, No. 12-10307 (Jan. 30, 2013).
- **MERS Assignment:** *Martins v. BAC Home Loans Servicing*, No. 12-20559 (Apr. 26, 2013).
- **Unreasonable Collection:** *Smith v. J.P. Morgan Chase*, No. 12-40816 (March 22, 2013).
- **Statute of Frauds:** *Gordon v. J.P. Morgan Chase*, No. 12-20333 (Jan. 3, 2013).

Monks Can Sell Caskets

***St. Joseph Abbey v. Castille*, ___ F.3d ____,
No. 11-30757 (5th Cir. March 20, 2013)**

“The deference we owe expresses mighty principles of federalism and judicial roles. The principle we protect from the hand of the State today protects an equally vital core principle – the taking of wealth and handing it to others . . . as ‘economic’ protection of the rulemakers’ pockets.”

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