FIFTH CIRCUIT UPDATE

State Bar of Texas
30th Annual Litigation Update Institute
January 10, 2014

Forum

Atlantic Marine Constr. v. U.S. District Court, 571 U.S. ___ (Dec. 3, 2013)

- *"When the parties have agreed to a valid forum-selection clause, a district court should ordinarily transfer the case to the forum specified in that clause. Only under extraordinary circumstances unrelated to the convenience of the parties should a § 1404(a) motion be denied."*

In re Radmax, 730 F.3d 285 (2013)

- *"Mandamus petitions from the Marshall Division are no strangers to the federal courts of appeals."*

Personal Jurisdiction

Ainsworth v. Moffett Engineering, 716 F.3d 174 (2013)

- *"Our stream-of-commerce test, in not*
- *requiring that the defendant target the forum, is in tension with the plurality opinion, under which Moffett would likely not be subject to personal jurisdiction in Mississippi. But that does not answer the question before us."*

How to Plead

Jabary v. City of Allen, No. 12-41054 (Nov. 25, 2013, unpubl.)

- *"Jabaray's allegation that Terrell was the initiator and ringleader of the movement to have the Certificate revoked is supported by the fact Mayor Terrell initially suggested that Jabary needed to change locations and was rebuffed by Jabary. Furthermore, Terrell's monetary interest in a business in the shopping mall, where Jabary Mediterranean was seen as a public problem, indicates a motive for Terrell to spur forward the revocation."*

- ***SURVIVED:*** Plaintiff seeks discovery "to reveal either the draft loan modification agreement that JPMorgan allegedly prepared, or the terms of her promised modification based on the lender's standard formulae. In these ways, Martin-Janson argues, she would be able to prove that JPMorgan 'promise[d] to sign a written agreement which itself complies with the statute of frauds.'" *Martin-Janson v. JP Morgan Chase*, No. 12-50380 (July 15, 2013, unpublished).

- ***SURVIVED:*** "Were Gardocki to prove the facts alleged in his complaint, it is plausible the district court could find that JPMC breached the Mortgage contract by failing to endorse the reimbursement check in a timely manner, thereby causing Gardocki to fail to meet his monthly payment obligations." *Gardocki v. JP Morgan Chase*, No. 12-20733 (Aug. 8, 2013, unpublished).

- ***SURVIVED:*** "These allegations, at the least, show that BAC promised to *consider* the application before foreclosing on June 1, which the Millers allege that BAC did not do. In light of this showing, we conclude that BAC may have harmed the Millers by causing them, for example, to decline to liquidate property or seek alternative financing before the June 1 foreclosure date . . . ." *Miller v. BAC Home Loans Servicing LP*, 726 F.3d 717 (2013).

How to Create a Fact Issue

St. Bernard Parish v. Lafarge N. Am., No. 13-30030 (Dec. 19, 2013, unpubl.)

- *"There is a great deal of testimony supporting Lafarge's position, to be sure, and little to support the Parish's, but we are mindful of the summary judgment standard."*

Davis v. LeBlanc, No. 13-30030 (Dec. 19, 2013, unpubl.)

- *"I'm gonna 'whip that [expletive] Davis in the cell next to you'"*
- *"[T]hat [expletive] needs a good [expletive] whipping and it is worth the paperwork for him to get it."*

Daubert

***Moore v. International Paint LLC*,**
No. 13-30281 (Nov. 15, 2013, unpubl.)

"To be sure, reliable expert testimony often involves estimation and reasonable inferences from a sometimes incomplete record. . . . Here, however, the universe of facts assumed by the expert differs frequently and substantially from the undisputed record evidence."

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

"To be 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

Scuderio v. Radio One of Texas II,
No. 13-20114 (Oct. 24, 2013, unpubl.)

"[B]ecause the arbitration provision is in the handbook that contains the language allowing the employer to unilaterally revise the handbook, the agreement to arbitrate is illusory and unenforceable."

See also: Carey v. 24 Hour Fitness, 669 F.3d 202 (2012.)

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."

Sufficiency

Miller v. Raytheon Co.,
716 F.3d 138 (2013)

"Considered in isolation, we agree with Raytheon that each category of evidence presented at trial might be insufficient to support the jury's verdict. But based upon the accumulation of circumstantial evidence and the credibility determinations that were required, we conclude that 'reasonable men could differ' about the presence of age discrimination"

Whew!

***King v. Univ. of Texas Health Science Center*, No. 12-20795 (Nov. 4, 2013, unpubl.)**

"Her attorneys had busy trial dockets during November, and did not realize until early December that, under [a 2009 Supreme Court case], the thirty-day deadline for filing a notice of appeal applies in FCA qui tam actions in which the United States has not intervened."

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