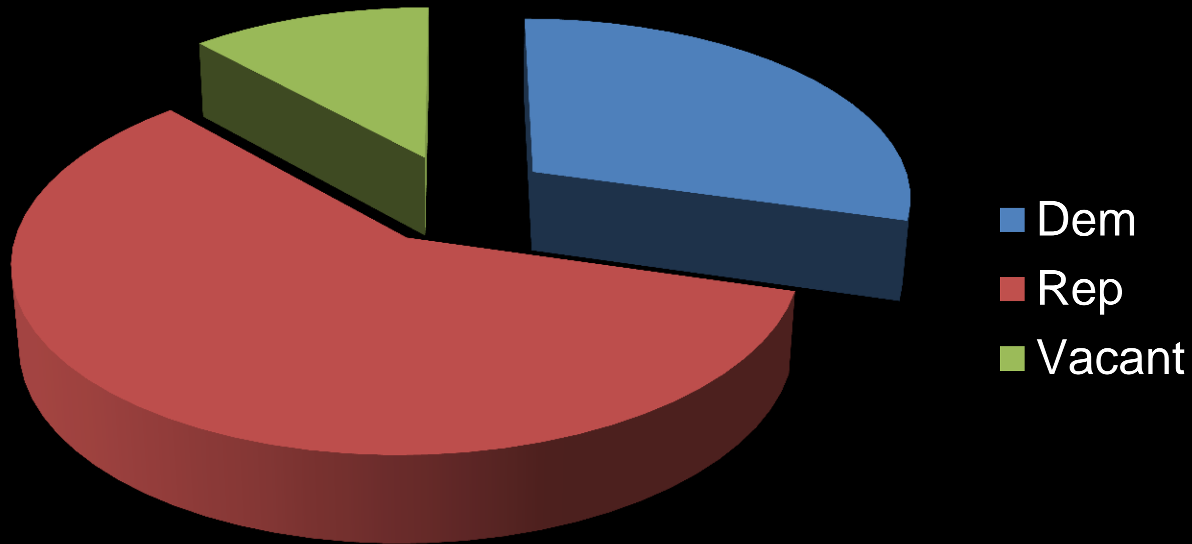
FIFTH CIRCUIT UPDATE

DAVID S. COALE

Texas Bar CLE

Advanced Civil Appellate Practice

September 11, 2015


Active Judges Fifth Circuit
Dem
Rep
Vacant

FORUM SELECTION

Atlantic Marine Construction v. District Court, 134 S. Ct. 568 (2013)

"[28 U.S.C.] Section 1404(a) therefore provides a mechanism for enforcement of forum-selection clauses that point to a particular federal district. And . . . a proper application of § 1404(a) requires that a forum-selection clause be 'given controlling weight in all but the most exceptional cases.'"

Atlantic Marine Construction v. District Court, 134 S. Ct. 568 (2013)

*"[disputes] **shall be litigated** in the Circuit Court for the City of Norfolk, Virginia, or the United States District Court for the Eastern District of Virginia, Norfolk Division."*

(emphasis added)

Waste Management of La. v. Jefferson Parish, (Nov. 30, 2014, unpublished)

*"Jurisdiction: This Agreement and the performance thereof shall be governed, interpreted, construed and regulated by the laws of the State of Louisiana and the parties hereto **submit to the jurisdiction** of the 24th Judicial District Court for the Parish of Jefferson, State of Louisiana. The parties hereby waiving [sic] any and all plea[s] of lack of jurisdiction or improper venue." (emphasis added)*

Waste Management of La. v. Jefferson Parish,
(Nov. 30, 2014, unpublished)

"Unlike their mandatory counterparts, permissive forum selection clauses allow but do not require litigation in a designated forum. As such, we have never required district courts to transfer or dismiss cases involving clauses that are permissive."

In re: Rolls Royce Corp., 775 F.3d 671 (2014)

"While Atlantic Marine noted that public factors, standing alone, were unlikely to defeat a transfer motion, the Supreme Court has also noted that section 1404 was designed to minimize the waste of judicial resources of parallel litigation of a dispute. The tension between these centrifugal considerations suggests that the need – rooted in the valued public interest in judicial economy – to pursue the same claims in a single action in a single court can trump a forum-selection clause."

In re: Rolls Royce Corp., 775 F.3d 641 (2014)

DISSENT:

"Simple two-party disputes are near a vanishing breed of litigation. It seems highly unlikely that the Supreme Court granted certiorari and awarded the extraordinary relief of mandamus simply to proclaim that a forum selection clause must prevail only when one party sues one other party."

PERSONAL JURISDICTION

Monkton Ins. Servs. v. Ritter,
768 F.3d 429 (2014)

Odessa, TX

v.

Cayman Islands

Monkton Ins. Servs. v. Ritter, 768 F.3d 429 (2014)

"It is . . . incredibly difficult to establish general jurisdiction in a forum other than the place of incorporation or principal place of business." (applying Daimler AG v. Bauman, 134 S. Ct. 746 (2014)).

"Ritter points to the following contacts to support specific jurisdiction: (1) Butterfield entered into an account contract with Geneva, through its owner and director, Ritter; (2) Self sent the account contract to Ritter in Texas; (3) Butterfield made wire transfers between Geneva's account in the Cayman Islands and bank accounts in Texas; and (4) Butterfield communicated with Ritter over the telephone. However, these facts cannot support a finding that Butterfield has purposefully directed ***its*** *activities towards Texas or purposefully availed* ***itself*** *of the privileges of conducting business in Texas."* (applying Walden v. Fiore, 134 S. Ct. 1115 (2014) (emphasis added)).

HOW TO PLEAD

Johnson v. City of Shelby, 135 S. Ct. 346 (2014)

"Petitioners stated simply, concisely, and directly events that, they alleged, entitled them to damages from the city. Having informed the city of the factual basis for their complaint, they were required to do no more to stave off threshold dismissal for want of an adequate statement of their claim."

Richardson v. Axion Logistics, L.L.C., 780 F.3d 304 (2015)

"While paragraph 5 of the complaint did include an undetailed allegation that Axion authorized the fraudulent billing practices, other portions of the complaint provided the facts necessary to support the allegation. Namely[:]

[-] paragraph 13 alleged that Axion's president tried to fire one of the dishonest employees because of his fraud but the CEO refused to allow it, and

[-] paragraph 14 alleges that Axion's president expressly admitted knowledge of the fraud. In addition,

[-] paragraph 16 alleges that Axion's president, after the vice president of administration informed him of fraudulent billing, directed that the client be billed (and the dishonest employee be paid) for the extra time. Finally,

[-] paragraphs 18 and 18a allege that Richardson reported the fraudulent billing to CEO and CFO, both of whom instructed him to keep quiet about the matter.

Taken together, these facts make plausible the allegation that Axion authorized the fraudulent billing practices of which Richardson complained.Taken together, these facts make plausible the allegation that Axion authorized the fraudulent billing practices of which Richardson complained."

Wooten v. McDonald Transit Associates, No. 13-11035, ___ F.3d ___ (June 7, 2015)

"Wooten's complaint contains the following factual allegations:

(1) Wooten is a former employee of McDonald Transit;
(2) Wooten was employed by McDonald Transit from 1999 until May 1, 2011;
(3) at the time he was fired, Wooten was a Class B mechanic earning $19.50 per hour, plus benefits;
(4) in October 2010, Wooten filed an age-discrimination claim with the EEOC, after which McDonald Transit 'discriminated and retaliated against [Wooten], and created a hostile work environment, until such time that [Wooten] was constructively discharged on or about May 1, 2011'; and
(5) McDonald Transit's unlawful conduct caused Wooten harm, including damages in the form of lost wages and benefits, mental anguish, and non-economic damages.

We hold that these allegations, while perhaps less detailed than McDonald Transit would prefer, are nevertheless sufficient to satisfy the low threshold of Rule 8."

Wallace v. Tesoro Corp., ___ F.3d ___ (July 31, 2015)

"Wallace also pleaded that he took steps to notify Tesoro personnel of the problem, and he further asserted that he believed the nondisclosure of the practice was intentional because it improved stock analysts' reporting on Tesoro and led to higher compensation for Tesoro's Senior Vice President of Marketing."

HOW TO CREATE A FACT ISSUE

Santacruz v. Allstate Texas Lloyds, (Nov. 13, 2014, unpublished)

Santacruz v. Allstate Texas Lloyds, (Nov. 14, 2014, unpublished)

LIABILITY: *"The extent of Allstate's inquiry into the claim consisted of its adjuster* ***taking photographs*** *of the damaged home. Significantly, Allstate* ***did not*** *attempt to* ***talk to the contractor****, who submitted an affidavit in this case describing what he observed concerning the roof and attributing the cause to wind damage. Nor is there any evidence showing that Allstate* ***obtained weather reports*** *or* ***inquired with neighbors*** *to see if they suffered similar damage, which would tend to show the damage was caused by wind rather than normal wear and tear."*

Santacruz v. Allstate Texas Lloyds, (Nov. 13, 2014, unpublished)

DAMAGES: *"Santacruz claimed three types of damages: (1) the replacement of the roof, supported by an* ***invoice*** *from Pedraza providing that Santacruz paid him $3,900 to repair the roof; (2) a* ***list*** *of damaged personal and household items compiled by Santacruz and his family with an estimate of the value of all the belongings; and (3) repair work needed for the damaged interior of the home, supported by an* ***estimate*** *from a contractor listing the repairs to be done. Further, Pedraza submitted an affidavit testifying to the necessity of repairing the roof, and Santacruz submitted photographs showing the extensive damage to the home's interior to support his claim that repairs were necessary."*

WHOOMP!

Isbell v. DM Records, Inc., 780 F.3d 304 (2014)

Isbell v. DM Records, Inc., 780 F.3d 304 (2014)

"The word 'Whoomp!' appears to be a neologism, perhaps a variant of 'Whoop!,' as in a cry of excitement."

Isbell v. DM Records, Inc., 780 F.3d 304 (2014)

"The only dispute is over the meaning of the Recording Agreement and the inferences that should be drawn from the numerous undisputed pieces of extrinsic evidence. This is a question of law for the court, not for a jury."

DAUBERT

Kovaly v. Wal-Mart Stores Texas, LLC, (Aug. 12, 2015, unpublished)

"Even if [the expert's] opinion that the pharmacist legally could have filled the emergency supply is an incorrect interpretation of Texas law, that does not render it unreliable in light of his qualifications, experience, and foundation for the opinion."

Meadaa v. K.A.P. Enterprises LLC,
756 F.3d 875 (2014)

“It is by no means clear how a [CPA] can obtain personal knowledge of the effects of the actions of one entity on other parties without reviewing the latter’s financial documents . . . .”

Barto v. Shore Construction, LLC
No. 14-31326, ___ F.3d ___ (Sept. 4, 2015)

"Barto's economist did not provide any reason to believ that Barto would continue to work past his statistical work-life expectancy. The only relevant evidence Barto presented at trial was his testimony that he plans to work "[a]s long as I can retire. Whatever the retirement age is." This scant evidence was not enough to show that Barto "by virtue of his health or occupation or other factors, is likely to live and work a longer, or shorter, period than the average."

ARBITRATION

PoolRe Ins. Corp. v. Organizational Strategies, Inc., ___ F.3d ___ (April 7, 2015)

"Arbitration is simply a matter of contract between the parties; it is a way to resolve those disputes — but only those disputes — that the parties have agreed to submit to arbitration."

BNSF Railway Co. v. Alstom Transp., 777 F.3d 785 (2015)

"[The] question for decision by a federal court asked to set aside an arbitration award . . . is not whether the arbitrator or arbitrators erred in interpreting the contract; it is not whether they clearly erred in interpreting the contract; it is not whether they grossly erred in interpreting the contract, it is whether they interpreted the contract."

Sharpe v. Ameriplan, 769 F.3d 909 (2014)

1. ***Policy Manual***
2. ***Broker Agreement***
   - -- *may only be amended in writing*
   - -- *incorporates Policy Manual*
   - -- *notes that Policy Manual may be amended at will*
3. ***Sales Director Agreement***
   - -- *rejects arbitration*
   - -- *may only be amended in writing*
4. ***Employer loses $5.5 million jury verdict***
5. ***Employer revises Policy Manual***
   - -- *adds arbitration clause*

Sharpe v. Ameriplan, 769 F.3d 909 (2014)

*"6.07.01. THE PARTIES AGREE TO SUBMIT ANY CLAIM, CONTROVERSY OR DISPUTE ARISING OUT OF OR RELATING TO THIS AGREEMENT (AND ATTACHMENTS) OR THE RELATIONSHIPOUT OF OR RELATING TO THIS AGREEMENT (AND ATTACHMENTS) OR THE RELATIONSHIP CREATED BY THIS AGREEMENT TO NON-BINDING MEDIATION **PRIOR TO FILING SUCH CLAIM CONTROVERSY OR DISPUTE IN A COURT**. . . . NOT WITHSTANDING THE FOREGOING, THE PARTIES MAY BRING AN ACTION (1) FOR MONIES OWED, (2) FOR INJUNCTIVE OR OTHER EXTRAORDINARY RELIEF, OR (3) INVOLVING THE POSSESSION OR DISPOSITION OF, OR OTHER RELIEF RELATING TO, REAL PROPERTY IN A COURT HAVING JURISDICTION AND IN ACCORDANCE WITH [THE NEXT PARAGRAPH] BELOW, WITHOUT SUBMITTING SUCH ACTION TO MEDIATION.*

*6.07.02. WITH RESPECT TO ANY CLAIMS, CONTROVERSIES OR DISPUTES WHICH ARE NOT FINALLY RESOLVED THROUGH MEDIATION, SALES DIRECTOR HEREBY IRREVOCABLY SUBMITS TO THE NON-EXCLUSIVE JURISDICTION OF THE STATE **COURTS OF DALLAS COUNTY, TEXAS AND THE FEDERAL DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION**.. . . VENUE FOR ANY LEGAL PROCEEDING RELATING TO OR ARISING OUT OF THIS AGREEMENT SHALL BE DALLAS COUNTY, TEXAS. . . . THIS AGREEMENT SHALL BE INTERPRETED AND CONSTRUED UNDER TEXAS LAWS."*

Sharpe v. Ameriplan, 769 F.3d 909 (2014)

"Any issue, dispute, claim or controversy (collectively, the 'Claim') between AmeriPlan or any officer, director, employee, manager, member, affiliate, legal counsel and/or advisor of AmeriPlan and IBO/Sales Director, arising out of or relating to the Policies and Procedures Manual then in effect, the IBO and/or Sales Director Agreements or any of the other documents, shall be resolved by binding arbitration at the AmeriPlan headquarters in Plano, Texas. The Claim shall be governed by the laws of the State of Texas."

Sharpe v. Ameriplan, 769 F.3d 909 (2014)

"[A]lthough the Manual could be amended without the need for a written agreement executed by all parties, such an amendment could not override a provision in the Broker and Sales Director Agreements. Otherwise, amendments to the Manual could undo the Broker and Sales Director Agreements in their entirety, rendering the "written amendment" requirement a nullity. . . . [Additionally,] AmeriPlan's argument that the dispute resolution provisions in the Sales Director Agreements apply to only a limited scope of claims 'not governed by arbitration' is also at odds with the contracts' broad language."

Murchison Capital Partners v. Nuance Communications,
No. 14-1819 (Aug. 11, 2015, unpublished)

"Although the arbitration clause as a whole is narrow, the 'relates to' language is broad. The clause does not require that the remedy sought in arbitration be the earnout consideration or that the claim relate to how the earnout consideration is calculated or distributed." Accordingly, "this securities fraud 'dispute' is arbitrable because it 'relates to' the representations that Nuance made about how to achieve the Earnout Consideration."

SANCTIONS

SanDisk

Waste Management v. Kattler, 776 F.3d 336 (2015)

1. ***DEFECTIVE NOTICE.*** *The order setting a hearing referenced a motion, by Pacer docket number, that only sought relief against Kattler and not the attorney. It was not a "show-cause order naming [both] Moore and Kattler as alleged contemnors[.]"*

2. ***PROMPT ACTION.*** *Kattler misled Moore as to the existence of a particular "San Disk thumb drive," Moore had acted prudently in consulting ethics counsel and withdrawing after he learned of the untruthfulness, and new counsel made a prompt disclosure about the drive that avoided unfair prejudice.*

3. ***CONFUSING ORDERS.*** *"[W]hile Moore clearly failed to comply with the terms of the December 20 preliminary injunction by not producing the iPad image directly to [Waste Management] by December 22, this failure is excusable because the order required Moore to violate the attorney-client privilege." Also, the order only "required Kattler to produce an image of the device only, not the device itself," which created a "degree of confusion"*

- *Test Masters Educational Services v. Singh Educational Services*, No. 13-20250 (Aug. 21, 2015) (vacating a contempt finding against an attorney for allegedly encouraging his client to make inappropriate online postings, finding inadequate notice and a lack of evidence that the attorney had personally violated the relevant injunction)

- *Oaks of Mid City Resident Council v. Sebelius*, 723 F. 3d 581, 585-86 (5th Cir. 2013) (reversing contempt order about injunction related to termination of a nursing home's Medicare contract)

- *Hornbeck Offshore Services LLC v. Salazar*, 713 F. 3d 787, 795 (5th Cir. 2012) (reversing contempt order, noting: "In essence, the company argues that by continuing in its pursuit of an effective moratorium, the Interior Department ignored the purpose of the district court's injunction. If the purpose were to assure the resumption of operations until further court order, it was not clearly set out in the injunction.")

VOTING RIGHTS

Veasey v. Abbott, __ F.3d __ (Aug. 5, 2015)

"[W]e conclude that the district court did not clearly err in determining that SB 14 has a discriminatory effect on minorities' voting rights in violation of Section 2 of the Voting Rights Act. As discussed below, we remand for a consideration of the appropriate remedy in light of this finding in the event that the discriminatory purpose finding is different."

FIFTH CIRCUIT UPDATE

DAVID S. COALE

Texas Bar CLE

Advanced Civil Appellate Practice

September 11, 2015