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Federal Litigation in the Fifth Circuit in the New Year

By David S. Coale of Lynn Tillotson – (Jan. 14, 2016) – The vibrant Texas economy drives business disputes into federal court and ultimately, the U.S. Court of Appeals for the Fifth Circuit. This article identifies ten recent cases from the Fifth Circuit that will likely influence commercial litigation in the year ahead. The specific areas of law include forum selection, federal jurisdiction over class actions, arbitration, civil procedure, and the substantive fields of antitrust and trademark.

1. Forum Selection Clauses are Enforceable. Aren't they?

The case of *In re: Rolls-Royce Corp.*, 775 F.3d 671 (5th Cir. 2014) arose when a helicopter crashed in the Gulf of Mexico. Its owner sued three defendants — Rolls-Royce, who built the engine bearing in question; the designer of the "pontoon flotation" system that deployed after the crash; and a repair company that worked on that system. Rolls-Royce sought severance and transfer to Indiana, citing a forum selection clause in its warranty, and relying on the recent Supreme Court case of *Atlantic Marine Construction v. Western District of Texas,* 134 S. Ct. 568 (2013). The district court denied its motions; in a 2-1 decision, the Fifth Circuit reversed.

The majority reviewed the applicability of *Atlantic Marine*. "For cases where all parties signed a forum selection contract, the analysis is easy: except in a truly exceptional case, the contract controls." For a situation such as this one, however, the analysis becomes more subtle: "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."

The dissent said that "the majority have erroneously and confusingly diminished the scope of *Atlantic Marine,*" concluding: "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. The Court is not naive about the nature of litigation today." The enforceability of forum selection clauses in multi-party cases should be a lively area for future litigation in light of these opinions.

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2. Avoiding CAFA Removal.

The Class Action Fairness Act ("CAFA") allows removal to federal court of certain "class actions" and "mass actions" that meet specified size and amount-in-controversy requirements. In a number of cases consolidated on appeal as *Eagle US 2, LLC v. Abraham,* No. 15-90024 (5th Cir. Dec. 11, 2015, unpublished), the defendants sought to remove under the "mass action" provisions of CAFA, arguing: "the fact that plaintiffs' counsel broke up their client base into multiple suits making identical allegations is not a tactic that prevents the assertion of jurisdiction under CAFA." ›

The Fifth Circuit disagreed, declining to "pierce the pleadings across multiple state court actions," noting that there had been no effort to consolidate the cases below, and observing: "Every other court of appeals confronted with this question has come to the same conclusion: that plaintiffs have the ability to avoid [CAFA 'mass action'] jurisdiction by filing separate complaints naming less than 100 plaintiffs by not moving for or otherwise proposing joint trial in the state court."

This brief, unpublished opinion may have considerable influence in how related lawsuits are filed and pursued on behalf of many plaintiffs.

3, 4, & 5. Arbitration is Final. Except When It Isn't.

BNSF Railway Co. v. Alstom Transportation presented a challenge to an arbitration award in a contract dispute about the maintenance of rail cars. 777 F.3d 785 (5th Cir. 2015). The Fifth Circuit brushed aside several challenges to the arbitrator's legal analysis, quoting the Seventh Circuit: "As we have said too many times to want to repeat again, 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."

As a counterpoint to this deferential holding about the result of arbitration, the Fifth Circuit reminded that it is not so deferential as to formation of an arbitration panel. In *Poolre Ins. Corp. v. Organizational Strategies, Inc.*, 783 F.3d 256 (5th Cir. 2015), several insurance-related businesses had a dispute. The businesses were not all parties to all relevant agreements, leading to confusion about whether arbitration should proceed with the AAA or ICC, and about how to select an arbitrator.

The district court found that the arbitrator was not appointed correctly, vacated the award, and the Fifth Circuit affirmed: "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."

Interestingly, the relevant contract required arbitrator selection "by the Anguilla, [British West Indies] Director of Insurance"—a nonexistent position. This error did not moot that provision, however, but simply implicated the section 5 of the FAA, which lets a district judge appoint an arbitrator if "a lapse in the naming of an arbitrator" arises.

Reinforcing the reminder that arbitration is a creature of contract, in *Chester v. DIRECTV, LLC,* No. 14-60247 (5th Cir. April 29, 2015, unpublished), the plaintiff sued for age discrimination and swore: "I do not remember signing any arbitration agreement, and dispute that I signed an arbitration agreement with Directv, LLC at anytime. . . . Had I been offered an arbitration agreement I would have attempted to continue my employment without signing it, and only would have signed it if the employer threatened to terminate me if it was not signed. . . . If I was threatened with termination if I did not sign an arbitration agreement I would remember it. Since I do not remember any such threat I am sure I did not sign an arbitration agreement."

DIRECTV, admitting that it lost the arbitration agreement, argued that it had a practice of having employees sign one of two form agreements. The Fifth Circuit was unimpressed, noting that the two agreements contained substantial substantive differences. DIRECTV further noted that it had lost Chester's entire file, not just the arbitration agreement; in response, the Court noted that DIRECTV was unable to provide arbitration agreements for 26 of the 87 other employees in the relevant office. Thus: "Considering the entire record, it is clear that, somewhere along the ›

way, DIRECTV's purported practice of collecting and filing arbitration agreements for all new employees broke down . . . ." In sum, while the substance of a valid arbitration award will receive great deference, the Fifth Circuit will carefully scrutinize the contractual basis for arbitration if challenged.

6. *Twombly:* Read the Whole Pleading.

Justin Richardson alleged that he was terminated, in violation of Louisiana's whistleblower statute, for revealing fraudulent time records and overbilling. The district court granted summary judgment and the Fifth Circuit reversed in *Richardson v. Axion Logistics,* 780 F.3d 304 (5th Cir. 2015). Applying the *Twombly* "plausibility" standard, the Court found adequate pleading about his employer's knowledge of the alleged misconduct, as well as the timeline of events leading up to his termination.

Noting the district court's focus on certain key averments in Richardson's pleading, the Court found that "other portions of the complaint provided the facts necessary" and that the pleading sufficed when "[t]aken as a whole." This broader focus is a helpful reminder in drafting and evaluating Fed. R. Civ. P. 12(b)(6) dismissal motions that rely on *Twombly's* specificity requirements.

7. Summary Judgment: The 40 Percent Solution.

A security company required that its employees travel to a designated break location at lunchtime, substantially eating into their 30-minute lunch break. The Fifth Circuit reversed summary judgment for the company on FLSA claims, reasoning: "Unlike a requirement that the employee stay in uniform, or even one that may result in the employee having to perform a duty on rare occasions, a jury could find that preventing the employee from eating—ostensibly the main purpose of the break—for twelve out of thirty minutes during every break is a meaningful limitation on the employee's freedom. The travel obligation thus cannot be deemed a mere 'inconvenience' as a matter of law." *Naylor v. Securiguard, Inc.,* 801 F.3d 501 (5th Cir. 2015).

Whether the "40 percent rule" carries over directly to other areas of summary judgment practice will remain to be seen. Nevertheless, *Naylor* provides a clear illustration of when an issue of fact becomes "genuine" and "material" for summary judgment purposes.

8. Dodging the Sanctions Bullet.

Waste Management sued Kattler, a former employee, for misappropriating confidential information and other related claims. A dispute about what information Kattler had in his possession expanded to include a contempt finding against Kattler's attorney, Moore. The Fifth Circuit reversed on procedural (notice) grounds and on substantive ones in *Waste Management v. Kattler,* 776 F.3d 336 (5th Cir. 2015).

On the merits, the Court found that Moore had acted prudently in consulting ethics counsel and withdrawing after he learned of his client's untruthfulness about the existence of a particular thumb drive, and that new counsel made a prompt disclosure about the drive that avoided unfair prejudice. Also, "while 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."

Further, the relevant order only "required Kattler to produce an image of the device only, not the device itself," which created a "degree of confusion" that excused the decision not to produce the actual iPad. These holdings provide good practical guidance for attorneys involved in difficult discovery situations. ›

9. The Sherman Act Lives.

Abandoning its reputation as a skeptic of antitrust claims, the Fifth Circuit recently affirmed a $150 million judgment in *MM Steel, L.P. v. JSW Steel (USA) Inc.,* a hard-fought battle among steel distributors on the Texas Gulf Coast. 806 F.3d 835 (5th Cir. 2015).

Factually, the court found that sufficient evidence supported the finding that JSW Steel conspired with others to harm the plaintiff MM Steel: "The fact that both [distributors' made . . . threats within several weeks of each other was sufficient evidence for a reasonable juror to conclude that JSW was aware of the horizontal conspiracy to exclude MM from the market." Then, when JSW responded by terminating its contract with MM, virtually guaranteeing a suit for breach, "[a] reasonable juror also could have concluded that JSW's abrupt decision to no longer deal with MM following those threats and JSW's statements regarding that decision tended to exclude the possibility of conduct that was independent of the distributor's conspiracy." The Court further observed that "[a] reasonable juror could have concluded that JSW's explanation for its supposedly independent refusal to deal was pretextual."

As to the controlling law, the Court said that "[t]he Supreme Court has consistently held that the per se rule [of antitrust liability] is applicable to group boycotts identical to the boycott alleged in this case." JSW argued that in the recent opinion of *Leegin Creative Leather Products v. PSKS,* 551 U.S. 877 (2007), when the Supreme Court eliminated per se liability for price-setting vertical agreements (i.e, exclusive dealing arrangements), it necessarily did so for horizontal agreements such as the one among distributors in this case.

The Fifth Circuit disagreed: "Purely vertical refusals to deal . . . frequently have procompetitive justifications, such as limiting free riding and increasing specialization. However, the crux of the group boycotts at issue in the cases in which per se liability has always applied is that members of a horizontal conspiracy use vertical agreements anticompetitively to foreclose a competitor from the market." The opinion has the potential to invigorate antitrust litigation in many situations where competing businesses allegedly join forces against another competitor.

10. How to be Equitable.

Pennzoil sued Miller Oil, the operator of a quick-stop oil change facility in Houston, for trademark infringement. Miller contended that after its original contract with Pennzoil lapsed in 2003, Pennzoil acquiesced to Miller's continued use of the marks. The district court agreed but the Fifth Circuit reversed in *Pennzoil-Quaker State Co. v. Miller Oil & Gas Operations,* 779 F.3d 290 (5th Cir. 2015).

The Court thoroughly reviewed its own, and other Circuits', approaches to the elements of the acquiescence defense, as well as the relationship of that defense to laches. It concluded that an element of the defense was undue prejudice to the defendant from the plaintiff's conduct, which usually involves "some form of 'business building.'" Here, the defendant's expenses associated with removing Pennzoil's marks did not satisfy that requirement, because they would not be related to business expansion.

While the defendant's claim about a "loss of identity" from removing Pennzoil's marks could qualify, it did not on this record: "Miller Oil does not proffer evidence of, for example, changes in its customer base, higher profits, or new business opportunities it was able to exploit because of the re-brand." Accordingly, Miller Oil did not meet its burden of proof.

This opinion – important in its own right in the area of trademark law – also illustrates how equitable arguments gain power when they can draw upon the real-world, practical impacts of the parties' actions.

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