FIFTH CIRCUIT UPDATE

DAVID S. COALE

26th Annual Conference on State & Federal Appeals

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June 10, 2016

"The 5th U.S. Circuit Court of Appeals is widely viewed as one of the nation's most conservative federal appellate courts . . . "

PLEADINGS

Flagg v. Stryker Corp., (April 26, 2016, unpublished)

"Perhaps after discovery Flagg will not prevail, but at a pre-discovery stage of this case, in an area of law where **defendants are likely to exclusively possess the information** relevant to making more detailed factual allegations, we cannot say that he is merely on a fishing expedition."

Wallace v. Tesoro Corp.,
796 F.3d 468 (5th Cir. 2015)

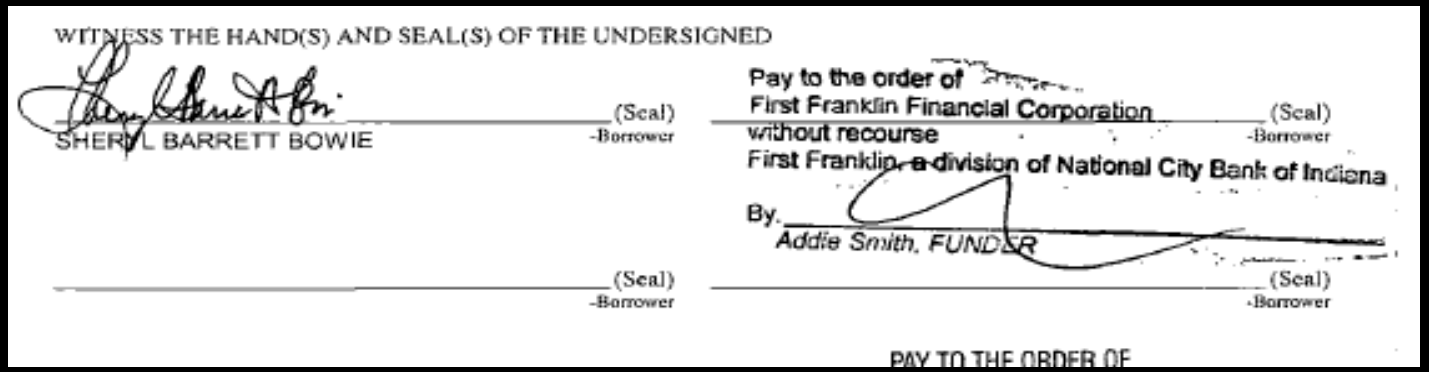
"[A]n employee who is providing information about potential fraud . . . **might not know** who is making the false representations or what that person is obtaining by the fraud; indeed, that may the point of the investigation."

Bell Atlantic Corp. v. Twombly,
127 S. Ct. 1955 (2007) (Stevens, J., dissenting)

"**[T]the proof is largely in the hands of the alleged conspirators** . . . It is therefore more, not less, important in antitrust cases to resist the urge to engage in armchair economics at the pleading stage."

Barrett-Bowie v. Select Portfolio Servicing,
(Nov. 25, 2015, unpublished)

"During the discovery conference, an attorney representing Select Portfolio showed an attorney employed by Gagnon, Peacock & Vereeke, P.C. (the Firm) the original blue ink note signed by Barrett-Bowie. . . . The Firm's attorney retained a copy of the original note and reported what she had seen to her colleagues at the Firm."



WITNESS THE HAND(S) AND SEAL(S) OF THE UNDERSIGNED

SHERYL BARRETT BOWIE (Seal) -Borrower

(Seal) -Borrower

Pay to the order of
First Franklin Financial Corporation (Seal) -Borrower
without recourse
First Franklin, a division of National City Bank of Indiana

By. *Addie Smith, FUNDER*

(Seal) -Borrower

PAY TO THE ORDER OF

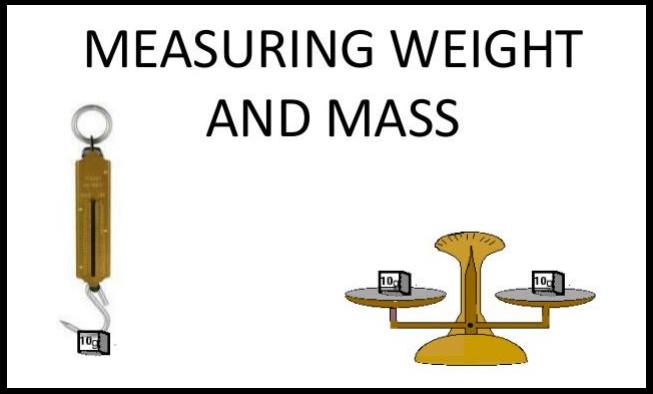
Barrett-Bowie v. Select Portfolio Servicing,
(Nov. 25, 2015, unpublished)

"The motion for summary judgment argued that Sentry Portfolio had shown Appellants the note on multiple occasions and that Barrett-Bowie admitted that PNC Bank was the noteholder but had not amended or dismissed any claims based on its contention to the contrary. In Barrett-Bowie's response, Appellants did not specifically address the show-me-the-note claims, but argued that '[s]ummary judgment is improper in this case because there are genuine issues of material fact on elements in **each of Plaintiff's remaining causes of action'** and urged that the motion for summary judgment **be denied 'in its entirety**.'"

MASS ACTION

Eagle US 2, LLC v. Abraham,
(Dec. 11, 2015, unpublished)

"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."



ATTORNEY IMMUNITY

Troice v. Proskauer Rose, 816 F.3d 341 (5th Cir. 2016)

"Plaintiffs alleged that, in representing Stanford Financial in the SEC's investigation, [Attorney] Sjoblom: sent a letter arguing, using legal authorities, that the SEC did not have jurisdiction; communicated with the SEC about its document requests and about Stanford Financial's credibility and legitimacy; stated that certain Stanford Financial executives would be more informative deponents than others; and represented a Stanford Financial executive during a deposition. **These are classic examples of an attorney's conduct in representing his client**." (citing *Cantey Hanger LLP v. Byrd*, 467 S.W.3d 484 (Tex. 2015).

Troice v. Proskauer Rose, 816 F.3d 341 (5th Cir. 2016)

"[P]laintiffs contend that attorney immunity applies only against party opponents, not third parties like plaintiffs. Yet in support, plaintiffs simply cite cases applying immunity against party opponents. Those cases do not rule out that immunity applies against other parties, and **several of them expressly contemplate the possibility, describing attorney immunity as applying against 'non-clients**.'"

- *Ortega v. Young Again* Products, No. 12-20592 (Nov. 27, 2013, unpublished) (finding qualified immunity for an attorney who allegedly took the wrong party's assets in collecting a judgment)

- *Lehman v. Holleman*, No 12-60814 (April 15, 2013, unpublished) (lawyer's letter accusing the other side of paying a witness was "absolutely privileged" because it "plainly related" to a judicial proceeding)

EXPERTS / *DAUBERT*

Carlson v. Bioremedic Therapeutic Systems, Inc.
No. 14-20691, ___ F.3d ___ (May 16, 2016)

- "While he does make diagnoses and orders tests as part of his chiropractic and alternative medicine practice, [his] qualifications do not align with or support his challenged medical causation testimony."
- "[A] district court must . . . perform its gatekeeping function by performing some type of *Daubert* inquiry and **by making findings** about the witness's qualifications to give expert testimony."
- Harm found when the expert was the sole defense witness, his testimony was cited in closing, and the defendants won.

ARBITRATION

Nelson v. Watch House Int'l, LLC ,
2016 WL 825385 (March 10, 2016)

"Here, the Plan provides that Watch House may make unilateral changes to the Plan, purportedly including termination, and that such a change 'shall be immediately effective upon notice to' employees. Watch House's retention of this **unilateral power to terminate the Plan without advance notice** renders the plan illusory under a plain reading of [*Lizalde v. Vista Quality Markets*, 746 F.3d 222 (5th Cir. 2014)]."

"Manifest Disregard"

- After *Hall Street Associates LLC v. Mattel, Inc*., 552 U.S. 576 (2008), the Fifth Circuit concluded that "manifest disregard of the law" was no longer a **nonstatutory** ground for vacatur of an arbitration award under the FAA.

- Other circuits have considered whether "manifest disregard" can be a **statutory** basis for vacatur.

- In *McKool Smith PC v. Curtis Int'l*, the losing party in an attorneys fee dispute made such a challenge to the arbitrator's award; the Court sidestepped the issue, finding support for the rulings in applicable case law. No. 15-11140 (May 23, 2016, unpublished)

- Almost simultaneously, the Texas Supreme Court rejected the "statutory basis" argument in *Hoskins v. Hoskins*, No. 15-0046 (May 20, 2016)).

VICIOUS POODLES

E.C. v. Saraco, (Jan. 4, 2016, unpublished)

"E.C. points to the testimony that Sky previously 'reared up' on his owner, that Sky had tender ears, and that E.C. did not know how to properly pet Sky."

ANTITRUST

MM Steel, L.P. v. JSW Steel (USA) Inc., 806 F.3d 835 (5th Cir. 2015)

- "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."

- "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."

- "A reasonable juror could have concluded that JSW's explanation for its supposedly independent refusal to deal was pretextual."

MANDAMUS

In re: American Lebanese Syrian Associated Charities, No. 15-11188 (March 3, 2016)

PANEL

"**We find the answer to the question far from clear**, so we cannot say the district court 'clearly and indisputably erred,' if it erred at all. Because Petitioners cannot meet the second prong of the test, they are not entitled to mandamus relief."

DISSENT

"I respectfully dissent and would be inclined to grant the writ of mandamus. . . . It is unfortunate that the Petitioner[s] should **be forced to litigate this case to conclusion**, if they can afford it, before resolving this difficult and novel jurisdictional issue."

Clear Error?

- *In re: Lloyd's Register North America*, 780 F.3d 283 (5th Cir. 2013) (Elrod, J., dissenting) ("Here, in its decision to mandamus the district court, the majority opinion creates two new legal rules about the doctrine of direct benefits estoppel, neither of which was compelled by our precedent. Because I do not believe the district court patently erred by not anticipating these two new rules, I respectfully dissent.")

- *In re: Radmax, Ltd*., 720 F.3d 285 (5th Cir. 2013) (Higginson, J., dissenting) ("I disagree that the district court's contrary ruling was a 'clear abuse of discretion' based on 'extraordinary errors' leading to 'a patently erroneous result' . . . ")

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