FIFTH CIRCUIT UPDATE

DAVID S. COALE

30th Annual Advanced Civil Appellate Practice Course

Austin, TX

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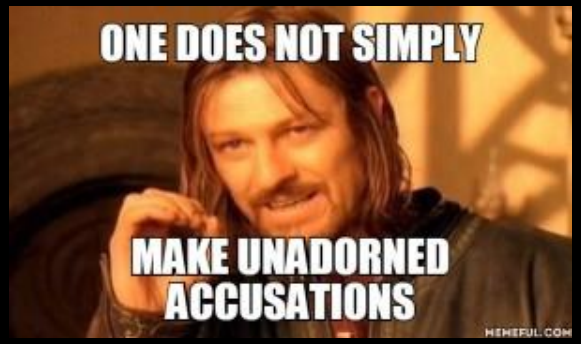
"The 5th U.S. Circuit Court of Appeals is widely viewed as one of the nation's most conservative federal appellate courts . . . "

PLEADINGS

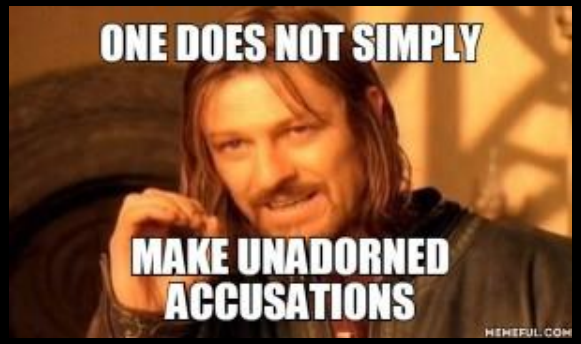
Flagg v. Stryker Corp., (April 26, 2016, unpublished)

"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."



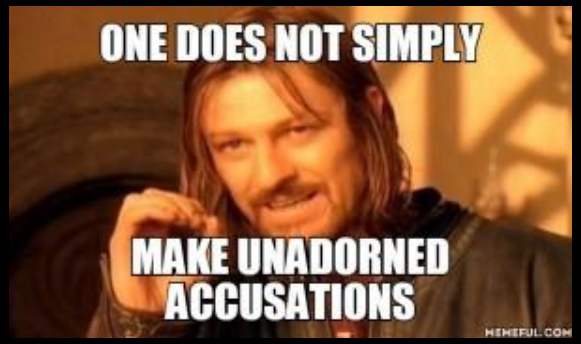
Wallace v. Tesoro Corp.,
796 F.3d 468 (5th Cir. 2015)

"[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,
550 U.S. 544, 586-87 (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."



Substantive Law Matters

Whitlock v. Lazer Spot
(Aug. 15, 2016, unpublished)

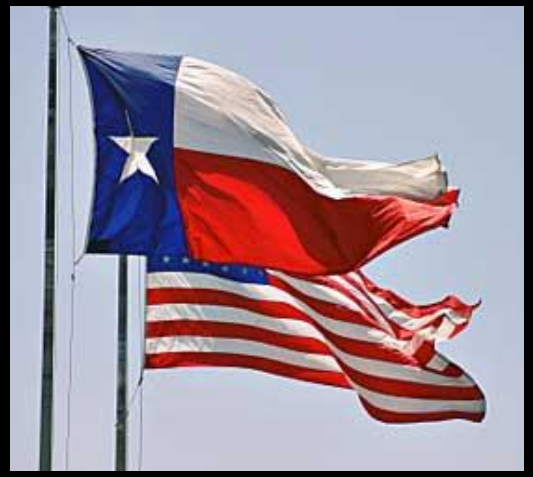
"The complaint fails to specify the [comparable] white employees' work violations" and "fails to allege the white employees' jobs"

Thomas v. Chevron USA
___ F.3d __ (Aug. 11, 2016)

"Thomas alleged that Chevron knew about of the real risk of piracy in the region and of the specific threats received by the [ship]. He alleged that despite its knowledge, Chevron requested that the [ship] take an unaccompanied support trip that would pass by the source of the recent threats. Finally, he alleged that Chevron broadcast his route information and locations over easily-accessible VHF radios, through which they could be heard by pirates known to be in the area."

Mastronardi v. Wells Fargo Bank (June 29, 2016, unpublished)

"The Mastronardis' claims against Estrada and Marin are insufficiently pled under either the federal standard or the revised Texas standard, which now tracks the federal standard." (citing, *inter alia*, Tex. R. Civ. P. 91a.1).



See also Int'l Energy Ventures v. United Energy Group, 818 F.3d 193 (5th Cir. 2016)

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 (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* (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)

- *Lassberg v. Bank of America* (Aug. 23, 2016, unpublished) ("Under Texas law, the doctrine of qualified immunity has 'long authorized attorneys to practice their profession, to advise their clients and interpose any defense or supposed defense, without making themselves liable for damages.")

EXPERTS / *DAUBERT*

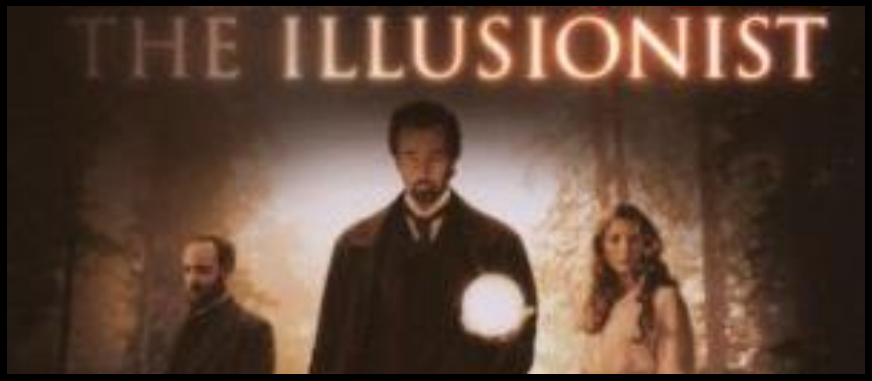
Carlson v. Bioremedic Therapeutic Systems, Inc. 822 F.3d 194 (5th Cir. 2016)

- "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 ,
815 F.3d 190 (5th Cir. 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. (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)).

INTELLECTUAL PROPERTY

Globeranger Corp.v Software AG, ___ *F.3d* ___ (Sept. 7, 2016)

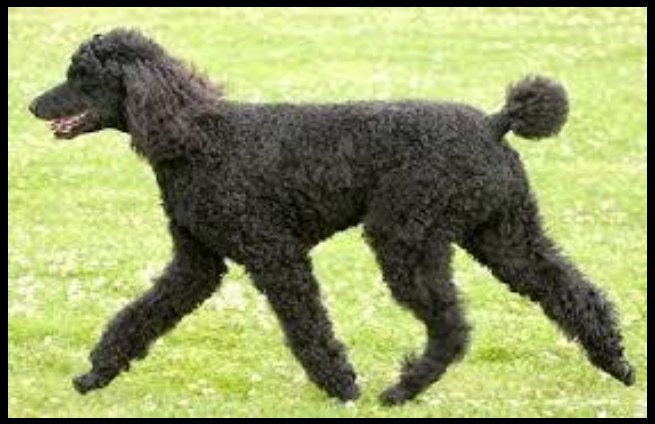
- "The different spheres of intellectual property protection can sometimes overlap."

- "But [Software AG] has not cited, nor can we find, any Fifth Circuit or Texas case law requiring greater specificity than what GlobeRanger provided at trial."

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."



CONTEMPT

Scott v. Shedler,
826 F.3d 207 (5th Cir. 2016).

"[T]he injunction refers generally to the defendant's policies without defining what those policies are or how they can be identified."

Diageo North America, Inc. v. Mexcor, Inc.,
No 15-20630 (Sept. 2, 2016, unpublished)

"We are hesitant to approve such open-ended language, particularly because in other contexts this court has held that such 'obey the law' injunction orders are not permitted."

MANDAMUS

In re: American Lebanese Syrian Associated Charities, 815 F.3d 204 (5th Cir. 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?

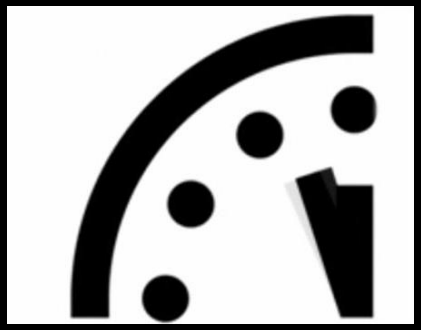
- *In re: Lloyd's Register North America*, 780 F.3d 283 (5th Cir. 2013) (Elrod, J., dissenting) ("Here, in its decision to mandamus the district court, the majority opinion creates two new legal rules about the doctrine of direct benefits estoppel, neither of which was compelled by our precedent. Because 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' . . . ")

NOTICES OF APPEAL

Sudduth v. Texas Health & Human Servcs. Comm'n, (July 18, 2016, unpublished)

"[T]he local rules and procedures here were sufficiently clear as to the requirements for timely filing, and the onus is on Sudduth, not the court, to be aware of and cure any deficiencies in the notice of appeal."



Wilson v. Navika Capital Group LLC, (Aug. 8, 2016, unpublished)

"[T]he plaintiffs .. were in 'continual flux' at the district court, as various groups of plaintiffs were dismissed at different times."

. . .

"The notice of appeal must: specify the party or parties taking the appeal by naming each one in the caption or body of the notice." (quoting Fed. R. App. P. 3)

INTERESTING *EN BANC* VOTE

"Section 74.351's regulation of discovery and discovery-related sanctions sets it apart from the pre-suit requirements in the cases cited by the defendants and brings it into direct collision with Rules 26 and 37." *Passmore v. Baylor Health Care System*, 823 F.3d 292 (5th Cir. 2016).

JUDGES FOR REVIEW

Jolly
Jones
Smith
Clement
Owen
Higginson
Costa

JUDGES AGAINST REVIEW

Stewart
Davis
Dennis
Prado
Elrod
Southwick
Haynes
Graves

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