FIFTH CIRCUIT UPDATE

DAVID S. COALE

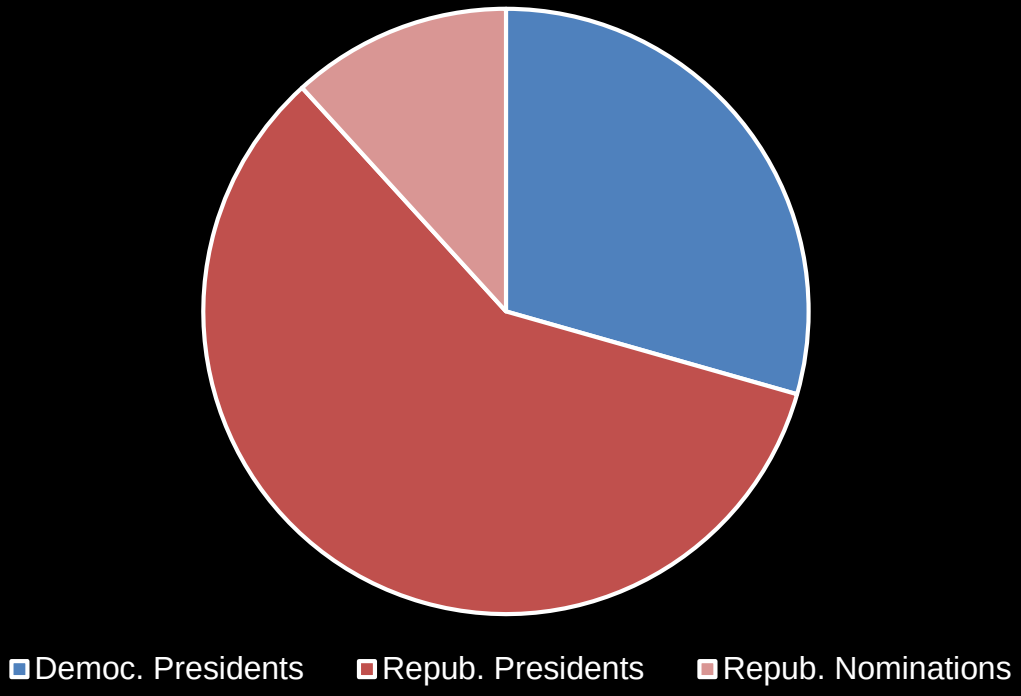
28th Annual Conference on State and Federal Appeals

University of Texas School of Law

Austin, Texas

June 15, 2018

Active Judges



"[W]e conclude that if the Plaintiffs prove that the Defendants operated a fraudulent pyramid scheme, a jury may reasonably infer from the Plaintiffs' payments to join . . . that they relied on Ignite's implicit representation of legitimacy, when in fact it was a fraudulent pyramid scheme."
***Torres v. S.G.E. Management,* 838 F.3d 629 (5th Cir. 2016) (en banc)**

JUDGES IN MAJORITY	JUDGES DISSENTING
Wiener*	Jolly
Costa*	Jones
Stewart	Clement
Davis	Owen
Smith	Haynes
Dennis	
Prado	
Elrod	
Southwick	
Graves	
Higginson	

"[[J]essica Jauch was indicted by a grand jury, arrested, and put in jail where she waited for 96 days to be brought before a judge and was effectively denied bail. . A pre-trial detainee denied access to the judicial system for a prolonged period has been denied basic procedural due process …."

***Jauch v. Choctaw County*, 837 F.3d 425 (5th Cir. 2017)**

JUDGES VOTING AGAINST EN BANC REVIEW	JUDGES VOTING FOR EN BANC REVIEWG
Stewart	Jones
Dennis	Smith
Clement	Owen
Prado	Southwick
Elrod	Willett
Haynes	Ho
Graves	
Higginson	
Costa	

APPELLATE PROCEDURE

Cooper Indus. v. Nat'l Union Fire Ins. Co., 876 F.3d 119 (5th Cir. 2017)

- ***Judgment ≠ Opinion.*** "National Union is conflating the district court's opinion (i.e., the order) with its judgment. Appellate courts review judgments, not opinions. . . . '[A]n appellee may urge any ground available in support of a judgment even if that ground was . . . rejected by the trial court.'"

- ***Rights ≠ Reasoning.*** "Here, there is no adverse judgment against National Union, such that it might need to protect its rights—just some adverse reasoning"

- ***These distinctions matter.*** "'A cross-appeal filed for the sole purpose of advancing additional arguments in support of a judgment is ***"worse than unnecessary***", because it disrupts the briefing schedule, increases the number (and usually the length) of briefs, and tends to confuse the issues.' . . . (giving National Union over four thousand words of additional briefing)."

ARBITRATION

Archer & White Sales v. Henry Schein, Inc.,
878 F.3d 488 (5th Cir. 2017), *stay granted*,
2018 U.S. LEXIS 1517 (March 2, 2018)

> "Disputes. This Agreement shall be governed by the laws of the State of North Carolina. Any dispute arising under or related to this Agreement (except for ***actions seeking injunctive relief*** and disputes related to trademarks, trade secrets, or other intellectual property of Pelton & Crane), shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association [(AAA)]. The place of arbitration shall be in Charlotte, North Carolina."

Archer & White Sales v. Henry Schein, Inc.,
878 F.3d 488 (5th Cir. 2017), *stay granted*,
2018 U.S. LEXIS 1517 (March 2, 2018)

> "The arbitration clause creates a carve-out for 'actions seeking injunctive relief.' It does not limit the exclusion to 'actions seeking only injunctive relief,' nor 'actions for injunction in aid of an arbitrator's award.' Nor does it limit itself to only claims for injunctive relief … . ***The mere fact that the arbitration clause allows Archer to avoid arbitration*** by adding a claim for injunctive relief does not change the clause's plain meaning."

Huckaba v. Ref-Chem, L.P., ___ F.3d ___,
No. 17-50341 (June 11, 2018)

". . . Execution and delivery of the contract with intent that it be mutual and binding . . . . "

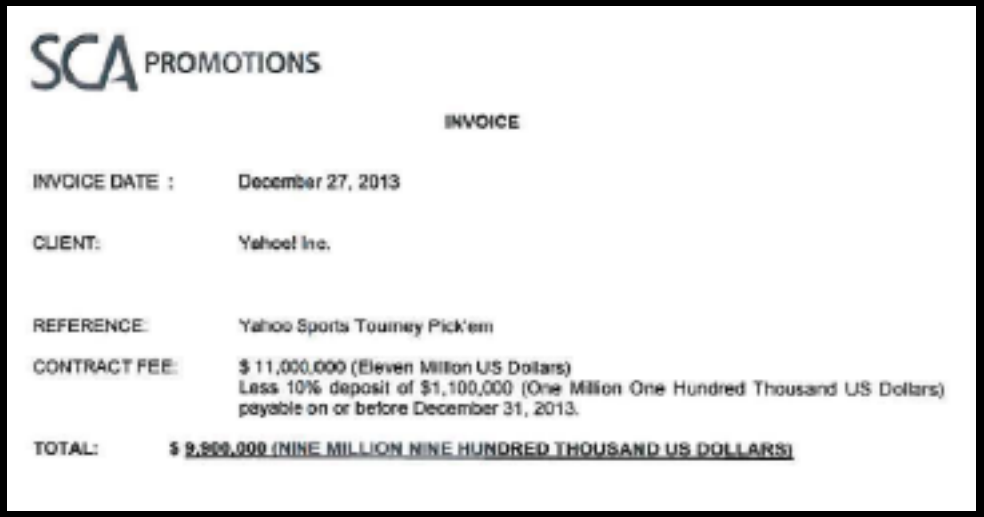

Employee
Employee Signature: Kimberly Huckaba
Print/Type Name: Kimberly Huckaba
SSN: REDACTED
Date: 9-16-2010
Ref-Chem L.P.
By:
Title:
Date:
truce, a concept of Truce, LLC

CONTRACTS

SCA v. Yahoo! Inc., 868 F.3d 378 (5th Cir. 2017)

Excluding the indemnity obligations of this paragraph 4(b) where each party's liability in connection therewith shall be limited to eleven million dollars ($11,000,000), and other than both parties obligation for payment of the prize amount in

"According to the district court, "[n]owhere does the Contract specify or identify the invoices, when they will be paid, or otherwise provide that the fee is $11 million." But the Contract . . . provides that "[t]his contract, including exhibits and attachments, represents the entire final agreement . . . [and] two invoices are attached to the Contract with pagination continuous with the rest of the Contract."



SCA PROMOTIONS

INVOICE

INVOICE DATE :	December 27, 2013
CLIENT:	Yahoo! Inc.
REFERENCE:	Yahoo Sports Tourney Pick'em
CONTRACT FEE:	$ 11,000,000 (Eleven Million US Dollars) Less 10% deposit of $1,100,000 (One Million One Hundred Thousand US Dollars) payable on or before December 31, 2013.
TOTAL:	$ 9,900,000 (NINE MILLION NINE HUNDRED THOUSAND US DOLLARS)

DISCOVERY

Stevens v. Belhaven Univ., No. 17-60652 (5th Cir. April 2, 2018, unpublished)

(1. Preservation letter) The court explained that counsel had received a letter demanding him to "preserve and sequester" the phone.

(2. Failure to preserve) The defendant "was therefore sur-prised to learn . . . that the phone had broken and was no longer in [plaintiff's] possession [but] had been taken . . . to a local AT&T store [where] she pur-chased a new phone."

(3. Lack of explanation) "In her deposition, [plaintiff] could not explain how some of the text messages were deleted from her phone before they were shared with the EEOC."

(4. Actual relevance of material at issue.) "When [she] did search her iCloud, moreover–. . . she identified new, material, and important evidence.

(5. In addition to (3), inconsistent explanation.) That . . . directly contradicts [her] ear-lier sworn statement that she had produced everything to [the defendant]."

EEOC v. BDO USA, 876 F.3d 690 (2017)

"Given the 'broad' and 'considerable discretion' district courts have in discovery matters, we will not analyze the privilege logs in the first instance."

EVIDENCE

Cox v. Provident Life, 878 F.3d 554 (5th Cir. 2018)

”Shelton, the treating physician, gave deposition testimony that, ‘to a reasonable degree of medical probability,’ ‘the trauma to [Cox’s] left knee when he fell in the hole on December 26, 2010, caused or contributed to the cause of his disability.’

In the same deposition, Shelton reaffirmed that ‘[e]ven though [Cox] may have had some pre-existing arthritis or chondromalacia,’ the injury ‘contributed to and caused part of [Cox’s] disability.’ The district court never grappled with these unequivocal statements, instead embracing contrary evidence presented by Provident suggesting Cox’s injury did not accelerate his arthritis.

That was error. ***This is a classic ‘battle of the experts,’ the winner of which must be decided by a jury***.”

In re: DePuy Orthopaedics, __ F.3d __,
Nos. 16-11051 *et seq.* (5th Cir. April 25, 2018)

- "The district court admitted several pieces of inflammatory character evidence against defendants—including claims of race discrimination and bribes to Saddam Hussein's Iraqi "regime"—reasoning the defendants had "opened the door" by repeatedly presenting themselves as "wonderful people doing wonderful things."

  . . .

- The district court allowed these repeated references to Hussein and the [Deferred Prosecution Agreement] because defendants had supposedly "opened the door" by eliciting test-mony on their corporate culture and marketing practices. This justification is strained, given that J&J owns more than 265 companies in 60 countries, and the Iraqi portion of the DPA addresses conduct by non-party subsidiaries. ***"[T]he Rules of Evidence do not simply evaporate when one party opens the door on an issue."***

JURORS

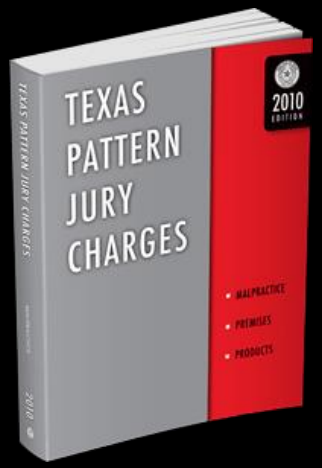
Benson v. Tyson Foods, ___ F.3d ___, No. 16-51115 (5th Cir. April 18, 2018)

"In light of the First Amendment interests at stake here, which [*Haeberle v. Texas Int'l Airlines*, 739 F.2d 1019 (5th Cir. 1984)] did not appear to fully appreciate, district courts in the future would be wise to ***consider seriously whether there exists any genuine government interest in preventing attorneys from conversing with consenting jurors***—and if so, whether that interest should be specifically articulated, in order to facilitate appellate review and fidelity to the Constitution."

JURY CHARGE

Nester v. Textron, Inc., ___ F.3d ___, No. 16-51115 (5th Cir. April 18, 2018)

"[A]s our prior cases indicate, ***a commonly administered PJC is often an entirely sensible place to draw the line***. . . . At the end of the day, Textron asks us to hold that the district court erred by refusing to deviate from a standard Texas instruction. That definition permitted Textron to make its arguments about various tradeoffs to the jury (it did so) and gave those jurors a means to find in Textron's favor (they balked)."



Nester v. Textron, Inc., ___ F.3d ___, No. 16-51115 (5th Cir. April 18, 2018)

"We will not reverse a verdict simply because the jury might have decided on a ground that was supported by insufficient evidence." (citing, *inter alia*, *Griffin v. United States*, 502 U.S. 46 (1991)).

REMEDIES

O'Donnell v. Harris County,
882 F.3d 528 (5th Cir. 2018).

"There is a significant mismatch between the district court's procedure-focused legal analysis and the sweeping injunction it implemented."

- The court can still "order that Trans-Pecos return Boerschig's land to its precondemnation state." *Boerschig v. Trans-Pecos Pipeline LLC*, 872 F.3d 701 (5th Cir. Oct. 3, 2017).

- Wrongful foreclosure – "this "court 'simply cannot enjoin that which has already taken place.'" *Dick v. Colorado Housing Enterprises*, 872 F.3d 709 (5th Cir. Oct. 4, 2017).

MANDAMUS

In re: DePuy Orthopaedics, Inc.,
870 F.3d 345 (5th Cir. 2017)

"***Despite finding serious error***, a majority of this panel denies the writ that petitioners seek to prohibit the district court from proceeding to trial on plaintiffs' cases."

"Petitioners claim that appeal is not an adequate remedy because the cost of having to defend more bellwether trials is 'unjustifiable' given the strength of their personal-jurisdiction claims. . . . At oral argument, the parties represented that each of the previous three bellwether trials lasted several weeks. But for appeal to be an inadequate remedy, there must be 'some obstacle to relief beyond litigation costs that renders obtaining relief not just expensive but effectively unobtainable.' ***Nor is the 'hardship [that] may result from delay'—such as the risk of substantial settlement pressure—grounds for granting a mandamus petition***."

In re: Itron, 883 F.3d 554 (5th Cir. 2017)

"Not all errors are correctable on mandamus. This one, however is."

1. Itron showed the "***inadequacy of relief by other means***" as to the erroneous disclosure of privileged documents, especially since it had "exhausted every other opportunity for interlocutory review of the magistrate judge"s order compellig production";

2. Itron established a ***clear abuse of discretion***: "[T]he magistrate judge failed to apply Mississippi"s Jackson Medical test for waiver, and misapplied even the broad, erroneous waiver test Defendants urge instead. . . . [B]oth aspects of this error are obvious and purely legal in nature."; and

3. "[C]orrecting this error is a ***proper exercise of our discretion***," noting "the issue's 'importance beyond the immediate case'" in other disputes about privilege, as "more district courts could mistakenly find waiver whenever attorney-client communications would be relevant."

PERSONAL JURISDICTION

Sangha v. Navig8 Shipmanagement, 882 F.3d 96 (5th Cir. 2018)

"Even though Navig8's email communications happened to affect Cpt. Sangha while he was at the Port of Houston, this single effect is not enough to confer specific jurisdiction over Navig8 . . . . The proper question is not whether Cpt. Sangha experienced an injury or effect in a particular location, but whether N***avig8's conduct connects it to the forum*** in a meaningful way."

Trois v. Apple Tree Auction Center, 882 F.3d 485 (5th Cir. 2018)

- ***Contract***: "The only alleged Texas contacts related to contract formation or breach are Schnaidt [Apple Tree's principal]'s . . . conference calls negotiating the agreement while Trois was in Texas."
- ***Fraud:*** "Although Schnaidt did not initiate the conference call to Trois in Texas, Schnaidt was not a passive participant on the call. Instead, he was the key negotiating party who made representations regarding his business in a call to Texas."

Gulf Coast Bank & Trust v. Designed Conveyor Systems, No. 17-30062 (Dec. 22, 2017, unpublished)

"Nowhere in [*Penn. Fire Ins. Co. v. Gold Issue Mining*, 243 U.S. 93 (1917).] did the Court hold that registering to do business in a state or appointing an agent for service of process acts as consent to any suit of any kind in that state. Instead, it merely concluded that defendants had consented to service of process in Missouri, resting largely on the fact that the state court had construed the Missouri statute to require such consent to suit for the service at issue. ***This case lacks what Pennsylvania Fire had***: a clear statement from the state court construing the statute to require consent. Gulf Coast does not identify any statute or agreement that requires foreign entities to expressly consent to any suit in Louisiana."

SUBJECT MATTER JURISDICTION

Griffith v. Alcon Research,
878 F.3d 130 (5th Cir. 2017)

"Although Griffith indeed ***referenced his dealings with the EEOC*** in his complaint, he ***did not mention Title VII or any similar federal statute***. As such, the district court lacked subject-matter jurisdiction and was not entitled to render judgment in Alcon's favor."

SUMMARY JUDGMENT PROCEDURE

Manson Gulf LLC v. Modern Am. Recycling Service, Inc., No. 17-30007 (Dec. 18, 2017).

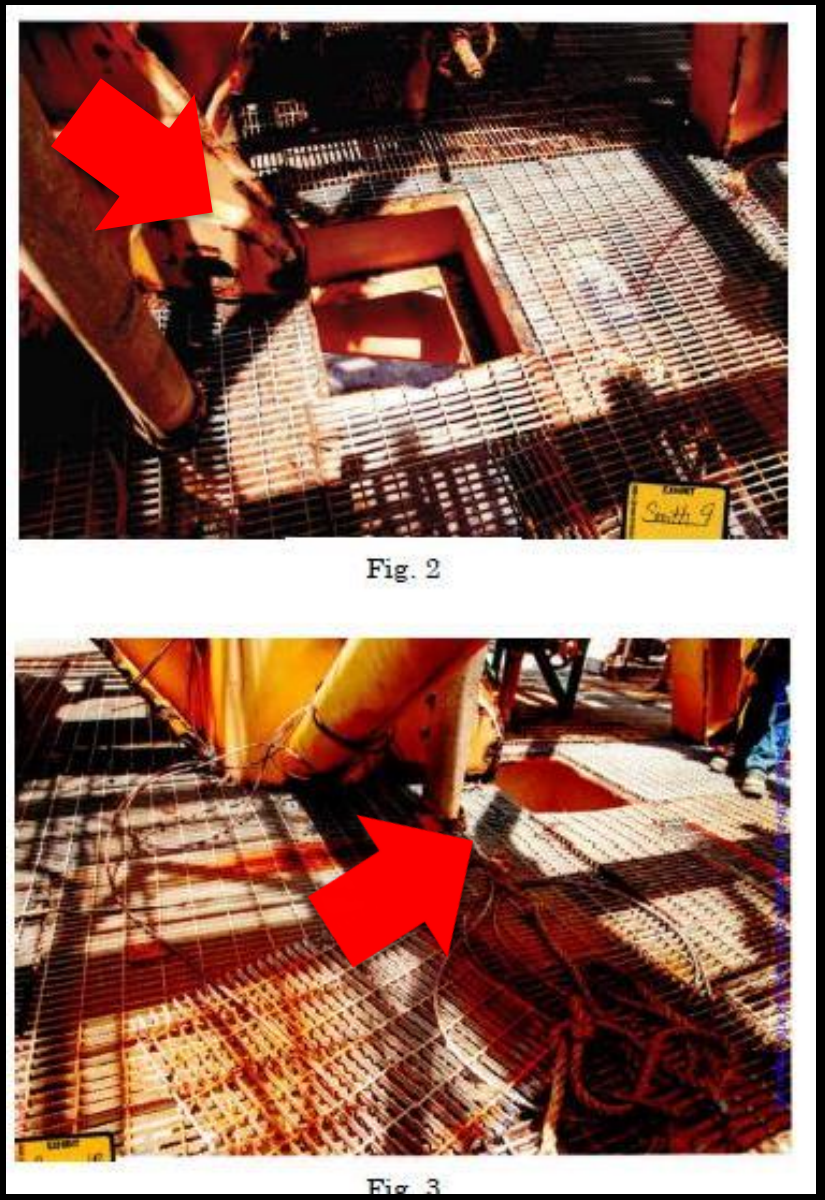


Fig. 2

Fig. 3

Manson Gulf LLC v. Modern Am. Recycling Serv., Inc., No. 17-30007 (Dec. 18, 2017).

> "True, the pictures taken directly over the hole, as one might expect, depict a visible opening. But the pictures taken from an angle–similar to the point of view of a person approaching the hole–depict the way in which the platform's grating, in [a witness's] words, can 'play ***tricks on your eyes***' and make the opening difficult to see.
>
> . . .
>
> Judicial efficiency is a noble goal, to be sure. But when an evidentiary record contains a material factual dispute (as this one does), ***we simply cannot bypass the role of the fact-finder***, whoever that may be."

Naylor v. Securiguard, Inc., 801 F.3d (5th Cir. 2015)

"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."

Shirey v. Wal-Mart Stores Texas, LLC,
No. 17-20298 (Oct. 30, 2017, unpublished)

"Photographic and video evidence demonstrate that the grape was, as the district court noted, almost invisible on the off-white floor. The evidence also fails to establish that any Wal-Mart employee was in proximity to the grape for a sufficient period of time. The few seconds during which the employee passed by the grape did not provide an objectively reasonable opportunity for him to see it, notwithstanding his employer's policy that he perform visual "sweeps" for hazards. Under these circumstances, the ***seventeen minutes*** during which the inconspicuous grape was on the floor did not afford Wal-Mart a reasonable time to discover and remove the hazard."

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