FIFTH CIRCUIT UPDATE

DAVID S. COALE

29th Annual Conference on State and Federal Appeals
University of Texas School of Law
Austin, Texas
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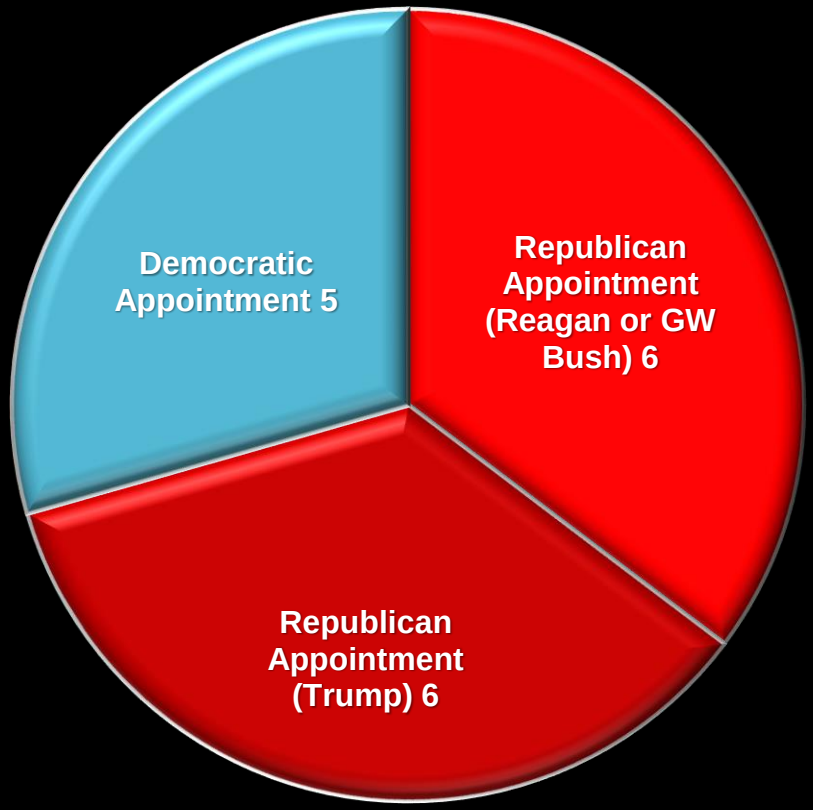
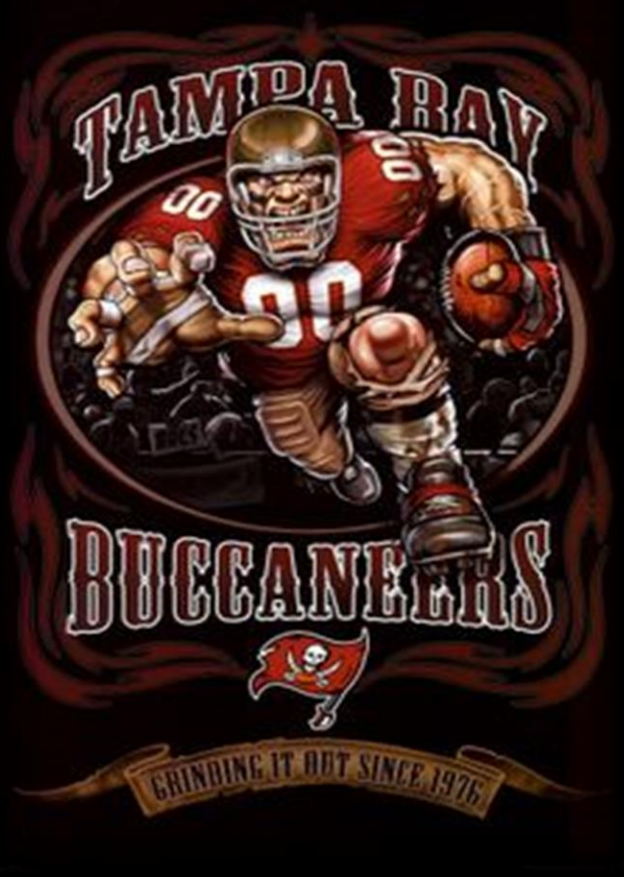
Fifth Circuit Active Judges 2019
(Assuming Confirmation of Hon. Sul Ozerden)



PUBLIC ACCESS

BP Exploration & Production v. Claimant ID 100246928, 920 F.3d 209 (5th Cir. 2019)

"As its right, Claimant ID 100246928 has used the federal courts in its attempt to obtain millions of dollars it believes BP owes because of the oil spill. But it should not able to benefit from this public resource while treating it like a private tribunal when there is no good reason to do so. ***On Monday, the public will be able to access the courtroom it pays for****."*



ARBITRATION

Papalote Creek II v. Lower Colorado River Auth.,
918 F.3d 450 (5th Cir. 2019)

Clause: ". . .if any dispute arises with respect to either Party's ***performance***."

Dispute: ". . . a dispute related to the ***interpretation*** of the Agreement, not a performance-related dispute…."

Trammell v. AccentCare, Inc.,
No. 18-50872 (5th Cir. June 7, 2019) (unpubl.)

"The district court applied the 'mailbox rule' to presume that Trammell received the company's proffered arbitration agreement even though she testified that she never received the contract and indicated to her employer that she was experiencing difficulties in receiving and sending mail. . . .
Because Trammell created a genuine issue of material fact regarding whether an arbitration agreement was formed, she is ***entitled to a jury trial*** under Section 4 of the FAA."

PERSONAL JURISDICTION

Carmona v. Leo Ship Management,
No. 18-20248, ___ F.3d ___, (5th Cir. May 10, 2019)

"Especially considering that the contract was freely terminable with two months' notice, LSM was hardly compelled to travel to Texas against its will. Rather, it made a deliberate choice to keep its employees aboard a ship bound for Texas and thus 'purposely availed itself" of the Texas forum."

Halliburton Energy Services, Inc. v. Ironshore Specialty Ins. Co., No. 17-20678, ____ F.3d ____ (5th Cir. April 17, 2019)

Four acts that do not create personal jurisdiction:

1. ***Counterclaiming.*** "[A] non-resident defendant may participate in litigation without submitting to the court's jurisdiction so long as it maintains its objection to personal jurisdiction. Relatedly, this court has also held that filing a counterclaim or 'third-party claim does not, without more, waive an objection to personal jurisdiction.'" (citation and footnote omitted);

2. ***Moving to compel arbitration.*** "Ironshore submitted to the court's jurisdiction for the sole purpose of compelling arbitration. By submitting to the court's power for this limited purpose and maintaining its personal jurisdiction motion to dismiss, Ironshore continued to object to 'the power of the court' and did not waive its personal jurisdiction defense."

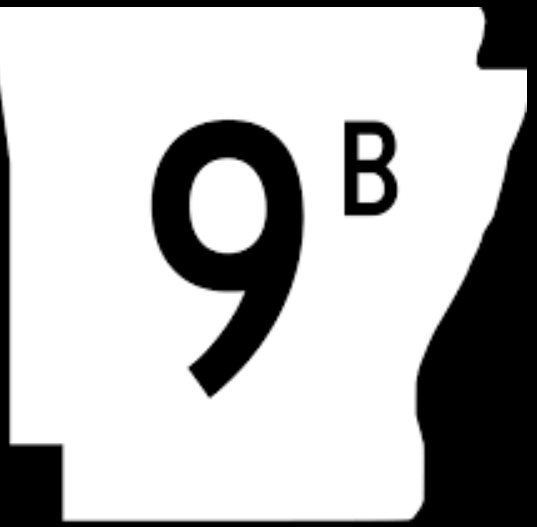
3. ***Demand letters.*** "Many other circuits have addressed similar scenarios in which a potential plaintiff sends a cease-and-desist letter threatening litigation to a potential defendant. None of these courts held that sending a letter amounts to purposeful availment."

4. ***Settlement agreement with Texas forum clause.*** "There are no allegations of suit-related contact between Ironshore and Texas other than Ironshore's participation as a defendant in litigation and the forum-selection clause in the settlement agreement . . . ."

PLEADING

Life Partners Creditors' Trust v. Cowley,
No. 17-11477, ___ F.3d ___, (5th Cir. May 31, 2019)

*"**If Rule 9(b) is the applicable pleading standard**, the Count 1 and 3 allegations satisfy it as well. Exhibit 4 sets out the details of the allegedly fraudulent transfers—including the transferor, transferees, amounts, and time period—and the complaint itself contains pages of allegations detailing the underlying fraudulent scheme."*



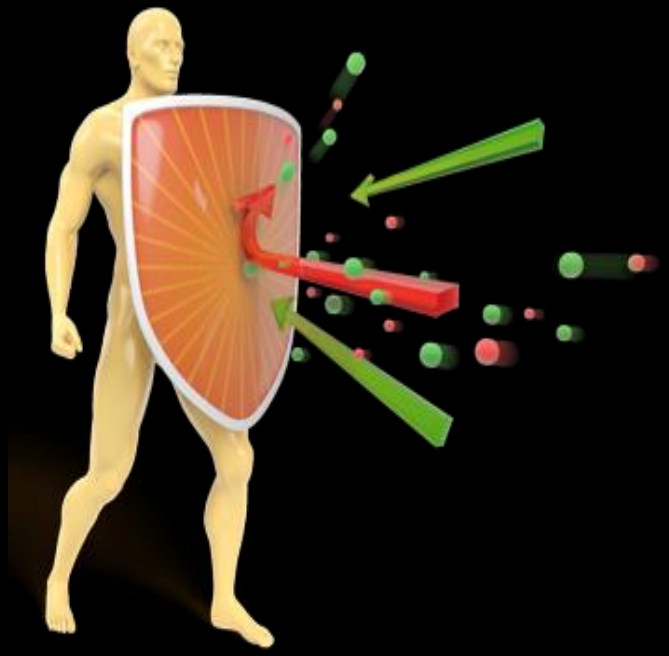
MANDAMUS / INTERLOCUTORY APPEAL

In re JPMorgan Chase, 916 F.3d 494 (5th Cir. 2019)

- An order requiring individual notice to 42,000 former Chase employees, as part of the conditional certification of a collective action under the FLSA, was not remediable by an ordinary appeal;
- The issue of whether notice should be sent to employees with arbitration agreements — roughly 30,000 of the relevant employees — "has importance well beyond this case, so mandamus relief would be appropriate";
- The district court's decision to require notice to those "Arbitration Employees" was not a "***clear and indisputable***" error, given the state of the case law at the time of its decision; ***but***
- After review of the law, the Court concluded that the district court was in fact wrong. As the court had now "issue[d] this published as a holding on these legal issues," it stayed the case for thirty days "[t]o ***facilitate . . . review***" of "its decision in light of this opinion, which is now binding precedent throughout the Fifth Circuit."

ATTORNEY IMMUNITY

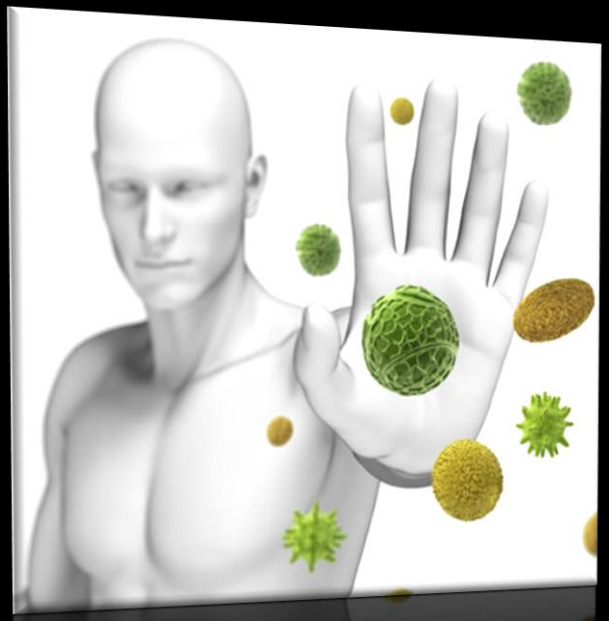
Troice v. Greenberg Traurig LLP.,
No. 17-11464, ____ F.3d ____, (5th Cir. April 17, 2019)



"We are persuaded the Supreme Court of Texas would apply the attorney immunity doctrine in the non-litigation context"

Ironshore Europe DAC v. Schiff Hardin LLP,
912 F.3d 759 (5th Cir. 2019)

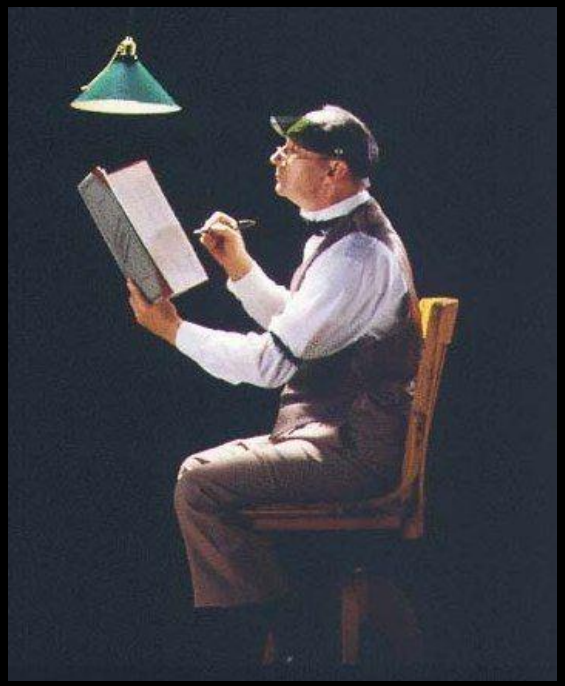
"[The type of conduct at issue in this case includes: (1) reporting on the status of litigation and settlement discussions; (2) providing opinions as to the strength and valuation of plaintiffs' claims; (3) providing opinions as to the perceived litigation strategies employed by opposing counsel and the potential prejudice of pre-trial developments; (4) providing estimates of potential liability; (5) reporting on the progress of a jury trial; and (6) reporting on pre-trial rulings and pre-trial settlement offers. We are satisfied that the kinds of conduct at issue in this case fall within the ***routine conduct attorneys engage in when handling this type of litigation****."*



EXPERTS

Wallace v. Andeavor Corp., 916 F.3d 423 (5th Cir. 2019)

"Rule [the expert]'s training, education, and experience included 'refinery economics, strategy management for commercial crude oil, business development,' and . . . "transfer pric[ing] between operating segments."' Notably, Rule did not deal explicitly with tax calculations, SEC reporting requirements, or investor relations. We conclude that Rule's declaration as to paragraph 22 could not have been based on his lay experience as a Tesoro employee but rather on specialized accounting knowledge. ***Rule's opinion on the application of tax accounting definitions to the SEC disclosures is an example of Rule applying his 'specialized knowledge'*** to "help the trier of fact . . . understand the evidence."



TRADEMARK

Springboards to Education v. Houston ISD
912 F.3d 805 (5th Cir. 2019)

What? Marks: "***HISD could have copied the methodologies used in the Read a Million Words campaign step by step***, and, whatever other problems that might have engendered, as long as it used clearly distinguishable nomenclature, Springboards would have no argument that HISD violated the Lanham Act in doing so."

Who? Purchasers: "HISD did not market the Houston ISD Millionaire Club to Springboards' potential customers—i.e., third-party school districts. There is no evidence of an intent to confuse. And ***Springboards' potential customers are sophisticated institutional purchasers that are not easily confused***. The only digit pointing unwaveringly in Springboards' favor is the similarity of the products. But even this does not strongly suggest a likelihood of confusion given the popularity of millionaire-themed literacy programs."

SUMMARY JUDGMENT

Waste Management, Inc. v. River Birch, Inc.,
920 F.3d 958 (5th Cir. 2019)

Majority: *"Noting that it is rare in public bribery cases that there is definitive 'smoking gun' evidence to show a payment was made to an official to influence the official to perform some act—and there is no such evidence here. It is critical in cases such as this that inferences from circumstantial evidence about intent and motives about which reasonable minds could differ be sorted out by the jury."*

Dissent: *"I don't like granting summary judgment to campaign-finance violators. Nor do I like giving the benefit of the doubt to disgraced ex-government officials. But, in the absence of evidence, it's what the law commands . . . ."*

JURY CHARGE

Conestoga Trust v. Columbus Life Ins. Co.,
No. 17-50073, 2019 U.S. App. LEXIS 145
(5th Cir. Jan. 3, 2019).

> *"While the misallocation of the burden of proof did not produce an 'irrational verdict' here, the evidence—though largely in favor of Columbus—is not so one-sided that Conestoga failed to present a genuine issue of material fact. Given that the jury was incorrectly instructed on the law on the sole issue before it,* ***we are left with 'a substantial doubt whether the jury was fairly guided in its deliberations****.'"*

Alonso v. Westcoast Corp.,
920 F.3d 878 (5th Cir. 2019)

1. Do you find by a preponderance of the evidence that Westcoast Corporation is liable for breach of contract for failing to perform obligations under the contract at issue?

Answer: YES X NO _____

that if "one party to a contract substantially breaches the contract, then the breaching party cannot enforce the contract it has breached or demand damages from the other party to the contract." Accordingly, RCS contends that

FINDINGS OF FACT

ENI US Operating Co. v. Transocean,
919 F.3d 931 (5th Cir. 2019)

"Under [Fed. R. Civ. P.] 52(a), implicit findings will not automatically be inferred to support a conclusory ultimate finding. The district court must lay out enough subsidiary findings to allow us to ***glean 'a clear understanding of the analytical process*** *by which [the] ultimate findings were reached and to* ***assure us that the trial court took care in ascertaining the facts***."

REMEDIES

Retractable Technologies, Inc. v. Beckton Dickinson Inc., 919 F.3d 869 (5th Cir. 2019)

*"**The district court's denial of disgorgement of profits from RTI's competitor was made against the larger backdrop** of its prosecution of a meritless antitrust claim against BD for conduct in the marketplace—during a time in which RTI nearly doubled its own sales and increased its share of the retractable syringe sub-market to two-thirds. RTI elected not to test its proof of Lanham Act damages before the jury, but rather to later argue, as now, that equity mandates disgorgement. Its effort to carry the flag of 'public interest' and guide the profits of its competitor to its own coffers here must fail. That effort must be taken outside—to the marketplace. There the public interest is best vindicated."*

CONTEMPT

In re U.S. Bureau of Prisons, 918 F.3d 431 (5th Cir. 2019)

Oral injunction? "[T]he oral injunction was not tentative, and the district court did not indicate that the sanction was open to further argument or reconsideration. Rather, the district court asked the BOP to affirm that it understood the scope of the injunction."

Inherent power? "Threatening government officials with individual contempt sanctions for complying with federal law, as the district court did here, is a clear abuse of discretion."

Specificity? "The district court made no explicit factual findings to support its decision to hold the BOP in contempt. Nor did it identify which specific court orders the BOP violated, notwithstanding the BOP's 'request that the Court clarify its order to reflect such findings as to how and when the Respondents violated an order of th[e] court.'"

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