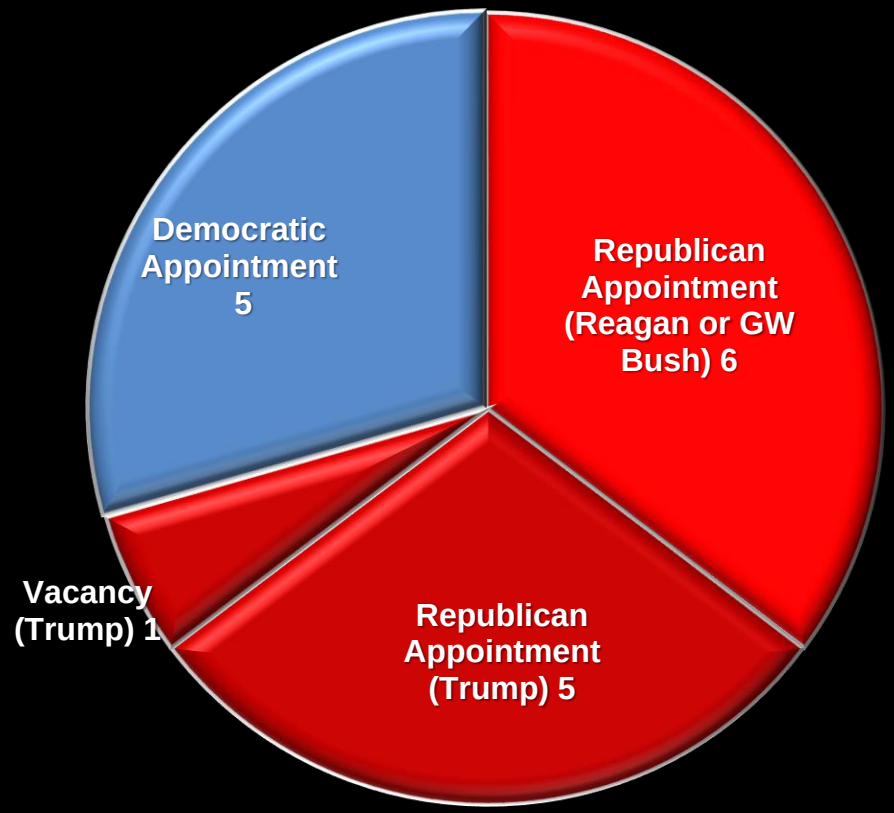
U.S. SUPREME COURT/ FIFTH CIRCUIT UPDATE

DAVID S. COALE

36th Annual Litigation Update Institute
State Bar of Texas
Austin, Texas
January 31, 2020

Fifth Circuit Active Judges 2020



ARBITRATION

Henry Schein, Inc. v. Archer & White Sales, Inc.,
139 S. Ct. 524 (2019).

"[T]he 'wholly groundless' exception . . . confuses the question of who decides arbitrability with the separate question of who prevails on arbitrability. ***When the parties' contract delegates the arbitrability question to an arbitrator, the courts must respect the parties' decision as embodied in the contract****."*

Archer & White Sales, Inc. v. Henry Schein, Inc., 935 F.3d 274 (5th Cir. 2019).

*"The most natural reading of the arbitration clause at issue here states that any dispute, **except actions seeking injunctive relief**, shall be resolved in arbitration in accordance with the AAA rules. . . . Given that carve-out, we cannot say that the Dealer Agreement evinces a 'clear and unmistakable' intent to delegate arbitrability."*

Lamps Plus v. Varela,
139 S. Ct. 1407 (2019).

*"**Courts may not infer from an ambiguous agreement that parties have consented to arbitrate on a classwide basis**. The doctrine of contra proferentem cannot substitute for the requisite affirmative "contractual basis for concluding that the part[ies] agreed to [class arbitration]."*

Walker v. Ameriprise Fin. Servcs., Inc.,
787 Fed. Appx. (5th Cir. 2019).

"An arbitrator exceeds his powers [under § 10(a)(4)] if he acts contrary to express contractual provisions.' ***Walker does not argue that the panel violated any express provisions of the arbitration agreement, but only that it incorrectly applied [FINRA] Rule 13504****."*

Soaring Wind Energy v. Catic USA, Inc., 946 F.3d 742 (5th Cir. 2020).

"This case involves two sides, but, more importantly, it features seven members; suppose Eris had tossed the ***Apple of Discord*** *into a Soaring Wind conference room, prompting a free-for-all among the parties–the arbiter selection process would have* ***remained the same****."*

MANDAMUS / INTERLOCUTORY APPEAL

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

- The district court's decision to require notice to several thousand "Arbitration Employees" was not a **"clear and indisputable"** error, given the state of the case law at the time of its decision; but

- Because the Fifth Circuit 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."

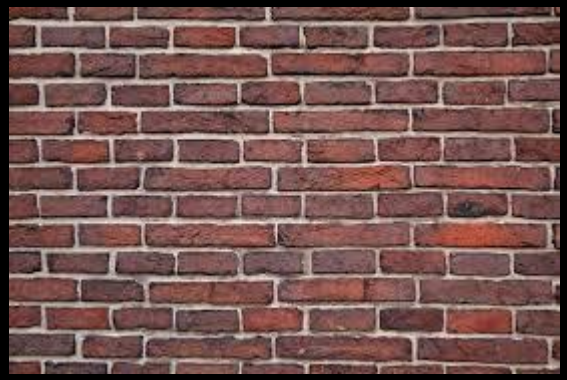
In re City of Houston,
772 Fed. Appx. 143 (5th Cir. 2019).

"Having reviewed the submissions of the parties, the documents in dispute, which are contained in Exhibit A to the City's motion to seal documents, and pertinent jurisprudence, we conclude that the electronic communications identified by the City in Tabs 3, 4, 5, 8 and 9 of Exhibit A fall within the attorney-client privilege and that ***mandamus relief is warranted with respect to such items****."*

ANTITRUST

Apple, Inc. v. Pepper,
139 S. Ct. 1514 (2019).

"The consumers here purchased apps directly from Apple, and they allege that Apple used its monopoly power over the retail apps market to charge higher-than-competitive prices. ***Our decision in Illinois Brick does not bar the consumers from suing Apple*** *for Apple's allegedly monopolistic conduct."*



IBC
ILLINOIS BRICK CO.

CLASS ACTIONS

Flecha v. Medicredit, Inc.,
946 F.3d 762 (5th Cir. 2020).

"Every member of the putative class received the same allegedly threatening letter from Medicredit. But the FDCPA penalizes ***empty*** *threats, not all threats. So the letter alone is insufficient to certify a class. As in Dukes, there is no 'glue' here 'holding the alleged reasons for all those [letters] together'—namely, evidence of a uniform intention by Seton regarding suit. So it is likewise 'impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question'* ***why was I threatened****."*

ERIE

BNSF Railway v. Panhandle Northern R.R.,
946 F.3d 705 (5th Cir. 2020).

""[I]in making an Erie guess, we must determine, in our best judgment, how we believe the Illinois Supreme Court would resolve whether the handling-carrier relationship between PNR and BNSF is terminable at will. And, ***as reflected in the [key Illinois Supreme Court] decision, careful analysis of the text of the contract is paramount*** *in making such a determination. Moreover, in the cases BNSF relies upon, the courts discussed the economics of the parties' agreements only after first examining closely the text of the contracts at issue and determining that there were termination provisions sufficient to take the contracts of indefinite duration out of the general rule of at-will termination.*

ATTORNEY IMMUNITY

Troice v. Greenberg Traurig LLP,
921 F.3d 501 (5th Cir. 2019).

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

- *"We conclude that the Supreme Court of Texas would not consider itself sure that the Texas Legislature intended to abrogate attorney immunity in the context of [Texas Securities Act] claims."*

EXPERTS

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

*"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 i**s an example of Rule applying his "specialized knowledge"** to "help the trier of fact . . . understand the evidence.*

DISCOVERY

JP Morgan Chase Bank v. Datatreasury,
934 F.3d 251 (5th Cir. 2019).

No abuse of discretion in:

- ***Time.*** Setting a time period for relevant information, considering the scope of the judgment and the pertinent licensing agreement;
- ***Subject matter.*** Focusing the relevant information by reference to the judgment itself rather than the broader definition of a "creditor" under the fraudulent-transfer statutes; and
- ***Proportionality*** of the requested information in light of the expense associated with older records.

TRADEMARK

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

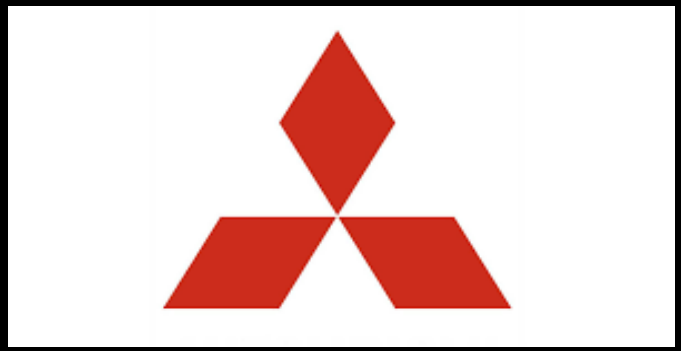
1. Trademark law protects marks – not process.

2. Purchaser confusion is the key – not "confusion" generally. The Court noted that confusion about the programs involving HISD students and their parents was relevant.

SUMMARY JUDGMENT/ PLEADINGS

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

"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."



PERSONAL JURISDICTION

Frank v. PNK (Lake Charles) LLC.,
No. 18-31060 (5th Cir. Jan. 21, 2020).

"[L]ocal advertising, as a standalone factor does not meet 'the demanding nature of the standard for general personal jurisdiction over a corporation.'" "

JURY CHARGE

Conestoga Trust v. Columbus Life Ins. Co.,
759 Fed. Appx. 227 (5th Cir. 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).

Not plain error to submit this jury question, without also asking whether the plaintiff had breached:

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 _____

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."*

JURY VERDICT REVIEW

Jones v. Portfolio Recovery Associates LLC,
No. 18-50703, 2019 WL 6799630 (5th Cir. Dec. 12, 2019).

*"[T]he jury could **reasonably infer** that the Synchrony Bank debt at issue was the QVC credit card, which was used exclusively for personal purchases, and, therefore, a consumer debt."*

REMEDIES

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

"[T]he district court did not abuse its discretion in determining that where [Defendant Retractable Technologies, Inc.] had not sufficiently demonstrated that its business suffered due to BD's false advertising and where BD had already taken significant steps to correct the false statements, ***disgorgement was not equitable*** *. . . 'an award of profits with no proof of harm is an uncommon remedy in a false advertising suit.'"*

U.S. SUPREME COURT/ FIFTH CIRCUIT UPDATE

DAVID S. COALE

36th Annual Litigation Update Institute
State Bar of Texas
Austin, Texas
January 31, 2020