Fifth Circuit Update

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Administrative Law

***Tex. Educ. Agency v. U.S. Dep't of Educ.*, 908 F.3d 127 (5th Cir. 2018)**

In fiscal year 2012, Texas made available roughly $33.3 million less for special education and related services than it did the previous year. The U.S. Department of Education ("DOE") determined that this reduction violated a provision of the Individuals with Disabilities Education Act ("IDEA") known as the "maintenance of state financial support" ("MFS") clause. Under the MFS clause, a state is forbidden from reducing the amount of state financial support for special education below the amount of that support for the preceding fiscal year. If such a reduction occurs, DOE is required to reduce the funds given to that state by the same amount the state reduced its financial support for special education. DOE determined through an administrative proceeding that Texas violated the MFS clause, and Texas petitioned the Fifth Circuit to review the agency's decision.

Because Texas violated the Individuals with Disabilities Education Act by reducing the amount of state funding for special education by $33.3 million, the US Department of Education's corresponding reduction in future federal funding was lawful.

The Fifth Circuit denied Texas's petition for review and held Texas had violated the plain text of the MFS Clause. Texas argued it had not violated the MFS clause because it had used a "weighted-student model" that determined its special education funding based on individual needs of each student with a disability, but the Court rejected this argument, finding it conflicted with the statute's requirement that a state not reduce the amount of its

financial support for special education. The Court also found such a methodology was inconsistent with another provision of IDEA that allowed the Secretary to waive the penalties under the MFS clause if DOE determines special education is being adequately funded by the state. Under Texas's methodology, a state—rather than DOE—would be the one determining if special education was properly funded. Finally, the Court rejected Texas's argument that the MFS clause violated the Spending Clause because the statute's plain text provided clear notice that Texas's weighted-student model contravened the statute's requirements.

***Forrest Gen. Hosp. v. Azar*, 926 F.3d 221 (5th Cir. 2019)**

Two Mississippi hospitals ("Hospitals") sued the U.S. Department of Health and Human Services ("HHS"), arguing that the federal government underpaid the Hospitals by incorrectly calculating their Disproportionate Share Hospital ("DSH") payments in the wake of Hurricane Katrina; these payments were designed to compensate hospitals that serve a significantly disproportionate number of low-income patients. In addition, in 2005 Congress approved additional Medicaid reimbursement for some hospitals, including the Hospitals, which provided coverage to evacuees displaced by Hurricane Katrina. Under this scheme, certain Medicaid benefits would be extended to providers serving patients who were not technically eligible for Medicaid. The Hospitals argued that HHS incorrectly interpreted federal statutory and regulatory law and selected too small of a numerator for the fraction of Medicaid reimbursement payments due to the Hospitals by reducing counts of patients who were not strictly eligible for Medicaid. The Hospitals challenged the exclusion of funding in an initial appeal to the Provider Reimbursement Review

Neither *Chevron* nor *Auer* deference applied to interpretations by the Department of Health and Human Services of a Medicaid statute and regulation concerning calculations for reimbursement of Disproportionate Share Hospitals.

Board, which agreed with Hospitals. HHS then appealed to the Centers for Medicare & Medicaid Services Administrator, who sided with HHS. This finding was affirmed by a federal district court, which gave substantial deference to HHS under the *Chevron* and *Auer* doctrines.

The Fifth Circuit Court of Appeals reversed, holding that both *Chevron* and *Auer* require textual ambiguity, and that the disputed DSH statute and regulation unambiguously cut the Hospitals' way and that absent ambiguity, judges—not regulators—must interpret the law. Starting its analysis with *Chevron*, the Court noted precedent requiring deference to agency interpretations of ambiguous statutes unless they are arbitrary, capricious, or manifestly contrary to the statute. The Court concluded that the applicable DSH statute unambiguously provided for a binary formula for calculating DSH eligibility. According to the plain meaning of the text, patients who are not actually Medicaid-eligible can still count toward the Hospitals' DHS numerator based on exceptions Congress made to address the healthcare needs of evacuees displaced by Hurricane Katrina. Similar analysis applied to *Auer* deference. Because the DHS regulation was not ambiguous, the district court erred in deferring to the interpretation of HHS. As with the DHS statute, the DHS regulation clearly contemplated that DHS reimbursement could be made available for patients who were not actually Medicaid-eligible.

Not only did the district court err in applying *Chevron* and *Auer* deference to HHS's interpretation of the DHS statute and regulation, but the unambiguous texts of both favored the Hospitals' argument that they were entitled to additional DHS reimbursement. Therefore, the Court reversed and remanded the case to the Medicaid contractor responsible for reimbursement of the plaintiff hospitals, with instructions to increase the share of funds to which the Hospitals were entitled under the DHS statute and regulation.

Arbitration

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

Plaintiffs, former call-center employees at Defendant JPMorgan Chase, alleged that Chase violated the Fair Labor Standards Act ("FLSA") and moved to certify a collective action with 42,000 current and former employees. Chase contended that 35,000 of the employees signed arbitration agreements. Plaintiffs did not contest that employees who had signed arbitration agreements should settle their disputes through arbitration, not the collective action.

The district court certified the collective action and ordered that all 42,000 current and former employees receive notice of the litigation. It reasoned that even if some of the employees had signed arbitration agreements, the court would not be able to make that determination until Chase filed a motion to compel arbitration. Thus, all 42,000 employees should receive notice. Chase petitioned to the Fifth Circuit for a writ of mandamus.

The Fifth Circuit denied mandamus, but it held that the district court erred in ordering notice to the employees who had signed the arbitration agreement. Unlike class actions, collective actions require members to affirmatively opt in and, thus, district courts have some discretion about when to facilitate notice to potential plaintiffs. However, the 35,000 employees with arbitration agreements were not potential plaintiffs. A district court may not require notice of litigation to employees who have signed valid arbitration agreements unless the record shows that the arbitration agreements would not prohibit the employees from participating in the collective action.

Employees who have signed arbitration agreements should not receive notice of collective action litigation.

The Fifth Circuit criticized the district court's decision as violating judicial neutrality, pointing to the district court's language that withholding notice about potentially "illegal" practices might "disenfranchise" the employees. However, the

Court ruled that the district court did not err so "clearly and indisputably" as to justify mandamus, which is only granted in extraordinary cases. Nonetheless, the Court published its opinion as a holding on the legal issues under its supervisory authority to correct errant caselaw, and it ordered the district court to revisit its decision in light of the opinion.

***Light-Age, Inc. v. Ashcroft-Smith*, 922 F.3d 320 (5th Cir. 2019)**

Attorney Clifford Ashcroft-Smith and Light-Age, Inc. arbitrated a legal-fee dispute through the Houston Bar Association's fee-dispute program. As part of their arbitration agreement, they agreed to be bound by the Fee Dispute Committee's ("FDC") rules and regulations. One of those rules authorized the Committee Chair to appoint arbitration panels consisting of three arbitrators, one of whom must be a non-lawyer member. The FDC selected Ana Davis as the non-lawyer member of the parties' arbitration panel. Davis is not a lawyer, but a full-time payroll manager for a law firm. Even though Davis exchanged multiple emails with the parties that listed the law firm as her employer in the signature line, Light-Age claimed it did not discover that Davis was a law-firm employee until after the arbitration hearing. Light-Age's CEO then called the FDC Chair to object to the panel. The panel issued its decision, awarding Ashcroft-Smith attorney's fees. Light-Age petitioned the district court to vacate the award, but the district court confirmed it.

A party with constructive knowledge waives a challenge to the composition of an arbitration panel by failing to object during the arbitration hearing.

The Fifth Circuit affirmed, finding that Light Age had constructive knowledge of Davis's employment and therefore waived its challenge to her appointment to the panel by failing to raise it at the arbitration hearing. The Court had previously recognized in an unpublished opinion that a party to an arbitration waives an objection to an arbitrator's conflict of interest if the party has constructive knowledge of the conflict at the time of the arbitration hearing

but fails to object. Other circuits also apply this constructive-knowledge standard to such objections. The Court did not find persuasive Light-Age's attempt to distinguish this authority because it involved a conflict of interest, which may be vacated under 9 U.S.C. § 10(a)(2), rather than an arbitrator not selected in accordance with the parties' agreement, which may be vacated under 9 U.S.C. § 5. Rather, applying a constructive-knowledge standard would serve the same policy interests—efficiency and finality of the arbitration process. Under that standard, Light Age had constructive knowledge because it could have discovered that Davis worked for a law firm by simply clicking on the link provided in her email signature or running a brief internet search.

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

Lower Colorado River Authority ("LCRA"), a conservation and reclamation district, filed a petition to compel arbitration in a dispute against Papalote Creek, a windfarm operator. The disputed question was whether ambiguous language in LCRA and Papalote's agreement limited LCRA's potential liability to $60 million. The agreement included a clause mandating arbitration for disputes arising with respect to either party's "performance." The district court compelled arbitration.

The Fifth Circuit reversed, explaining that the arbitration clause only required arbitration for disputes related to performance, and that the dispute over liability limitation was interpretative. Clauses using standard, broad arbitration provisions give rise to a presumption in favor of arbitrability. However, parties may use narrower language to limit arbitration to disputes related to interpretation or performance, at the exclusion of other categories of disputes. Papalote and LCRA's dispute was interpretative because the parties disagreed over the meaning of the text in their agreement.

An arbitration clause for "performance" disputes does not compel arbitration for other disputes.

***YPF S.A. v. Apache Overseas, Inc.*, 924 F.3d 815 (5th Cir. 2019)**

Defendant Apache agreed to sell certain assets to Plaintiff YPF under a Sale and Purchase Agreement ("SPA"), whereby the parties agreed to accept certain adjustments to the sales price and stipulated that any dispute about the price adjustments would be arbitrated. The parties selected KPMG as the "Independent Accountant" that would reach a "determination" on the appropriate adjustment. KPMG was required to "include the reasoning supporting the determination," and the parties would have a five-day review period following the determination to call attention to any "arithmetical inaccuracy in the determination." The engagement letter specified that the determination would be completed by KPMG partners Ginger Menown and Diego Bleger.

After a dispute arose, KPMG issued a determination concluding Apache owed YPF $9.8 million, which Apache objected to within the review period. Then Apache challenged the arbitration award on two grounds: (1) the replacement of Menown with a different KPMG partner during the review period was invalid, and (2) KPMG violated the requirement to provide its "reasoning" because it explained its methodological reasoning only, but not its arithmetical calculations. The district court rejected both arguments and confirmed the arbitration award set by KPMG.

A "reasoned" arbitration award only requires greater detail then what is required by a "standard" arbitration award (which is a mere announcement), and not as much detail as "findings and conclusions."

The Fifth Circuit affirmed. First, although the engagement letter specified "Menown and Bleger" shall conduct the "determination," the letter stated that "KPMG" shall conduct the review period. Thus, Menown was not required to participate in the review period.

Second, the reasoning supplied by KPMG was sufficient to meet the requirements of the SPA and the engagement letter. A "reasoned award" requires arbitrators to submit "something short of findings and conclusions but more than a simple

result." That is, the level of detail required by an arbitration award lies on a continuum, with "findings and conclusions" on one end (which is the exacting standard familiar to federal courts), the "standard award" on the other end (which is a mere announcement of the decision)—and a "reasoned award" in the middle. Also, because neither the SPA nor the engagement letter required KPMG to provide detailed mathematical calculations, the Court declined to read an implied provision requiring this level of detail into the agreements.

Constitutional Law

Okorie v. Crawford, 921 F.3d 430 (5th Cir. 2019)

In 2010, the Mississippi State Board of Medical Licensure began investigating whether Dr. Ikechukwo Okorie was overprescribing opioids and other pain substances. The Board eventually revoked Okorie's certification. Okorie sought recertification in 2014 after completing new pain management training. He received a temporary license, but the Board requested he appear at its next meeting to assist in its final determination. Before that meeting, a state court judge authorized an administrative inspection and issued a search warrant for medical records. No criminal sanctions were associated with any of the provisions relied on for the warrant. According to Okorie's complaint, a team of 9 law enforcement officials executed the warrant. On entering the clinic, Board investigator Jonathan Dalton brandished his gun and pushed Okorie into his office, then serving him the warrant. Okorie attempted to leave his office to discuss the warrant with his staff, but Dalton stopped him and pushed him down. Dalton eventually allowed Okorie to instruct his staff to fax the warrant to his lawyers and print the requested records, but Dalton stood next to him with his gun drawn. Okorie was detained in his office for the remainder of the search. After two hours, Okorie asked to go to the bathroom and Dalton refused. After Okorie pleaded with him, Dalton escorted Okorie to the bathroom

with his gun drawn, forcing Okorie to leave the bathroom door open and keep his hands visible. Three to four hours later, after the agents were done executing the search, Okorie was allowed to leave the clinic.

Okorie filed a 42 U.S.C. § 1983 lawsuit based on alleged Fourth Amendment violations. The district court dismissed the claims against all of the defendants except Dalton, who filed a Rule 12(c) motion to dismiss on the pleadings based on qualified immunity. The district court granted the motion, finding no constitutional violation and, in any event, that any violation would not be clearly established.

The Fifth Circuit ultimately affirmed, finding that Okorie did plead a Fourth Amendment unreasonable search, but because the law was not clearly established, Dalton was entitled to qualified immunity. Under *Michigan v. Summers*, 452 U.S. 692, 705 (1981), law enforcement may detain the occupant of a residence where a criminal search warrant is being executed, as long as the scope of the detention is reasonable. The Supreme Court has applied *Summers* to allow the seizure of occupants of a residence where officers searched for documents and computer files, not just contraband. The Court agreed with the prevailing view that *Summers* applies when the warrant is seeking evidence. However, here, the search warrant sought evidence only of civil violations, where the objective justification for seizing an occupant is more attenuated. In the criminal setting, a search warrant requires a judicial determination of probable cause to believe that someone in the home is committing a crime, meaning that it is not difficult to suspect that an occupant may be involved in that criminal activity. This level of suspicion is not far removed from the probable cause that allows a warrantless arrest. But probable cause of a civil violation generally does not allow a warrantless arrest. Given this fundamental distinction between criminal and

An hours-long detention of a person during an administrative search of a medical clinic or similar establishment, during which a gun is drawn, is unlawful absent heightened security concerns.

civil violations, the Court noted significant doubt on *Summers*' application to administrative searches, which generally involve lower stakes and less likelihood that someone present during the search will hide evidence or act violently.

Although not resolving whether detention incident to execution of an administrative warrant is allowed as a general matter, the Court concluded that the intrusiveness of this search rendered it unconstitutional. The scope of the detention here was more significant, as Okorie was detained at his medial office, in sight of his staff, rather than in the privacy of his own home. Beyond that, the detention lasted for three to four hours, a prolonged time given the relatively low level of danger attached to searching a medical clinic. The force applied and displayed was unreasonable, including Dalton's pushing, yelling, and drawing his gun while escorting Okorie into the hallway to instruct his staff and later to the bathroom. There was no indication that Okorie posed a safety threat to officers, and law enforcement's interest in administrative searches is less significant as compared to criminal ones. Nevertheless, because the law in this underdeveloped area was not clear enough when Dalton detained Okorie, Dalton had qualified immunity.

***Robinson v. Hunt County, Texas*, 921 F.3d 440 (5th Cir. 2019)**

Plaintiff Deanna Robinson brought a § 1983 claim against Hunt County and various employees of the Hunt County Sheriff's Office in their official and individual capacities after a post criticizing the Sherriff's Office was deleted from the Office's official Facebook page and Robinson, along with others who posted similar critical posts, were banned from the Facebook page. Robinson claimed the actions constituted impermissible viewpoint discrimination under the First and Fourteenth Amendments. The district court dismissed Robinson's claims and denied her request for a preliminary injunction.

Censorship of critical posts on the Hunt County Sheriff's Office's Facebook page was unconstitutional viewpoint discrimination.

On appeal, the Fifth Circuit affirmed in part and reversed in part. After affirming the dismissal of claims against the individuals because the rulings were not appealed, the Fifth Circuit examined whether deleting Robinson's Facebook post constituted viewpoint discrimination. Without deciding whether the Facebook page constituted a public or limited forum, the Court held deleting posts criticizing the Sherriff's Office and banning users for posting such remarks was impermissible viewpoint discrimination. The Court went on to hold the Sherriff of Hunt County was the final policymaker with authority over the Facebook page and that Robinson had plausibly pleaded that the policy of deleting critical comments was attributable to Hunt County based on a post from the Facebook page threatening to ban any "inappropriate" comments and the actions of actually deleting posts and banning users from the page for this reason. Finally, the Court reversed the district court's dismissal of Robinson's request for declaratory relief and remanded its denial of Robinson's motion for a preliminary injunction.

Employment Law

Nall v. BNSF Ry. Co., 917 F.3d 335 (5th Cir. 2019)

Plaintiff Michael Nall, a trainman, sued his employer, Defendant BNSF Railway Company, for disability discrimination and retaliation after he was diagnosed with Parkinson's disease and placed on medical leave. Nall presented evidence from doctors that he was capable of performing his job despite his Parkinson's disease. However, BNSF presented evidence that he had failed a field test and was placed on medical leave due to concerns about his ability to work safely. The district court granted summary judgment to BNSF.

The Fifth Circuit reversed the grant of summary judgment on the disability discrimination claim. Judge Elrod, writing for the panel, held that Nall had presented insufficient direct evidence of discriminatory animus and, thus, applied the *McDonnell*

Douglas burden-shifting framework for circumstantial evidence of discrimination. Under this framework, Nall needed to make the prima facie case for discrimination by showing: (1) he had a disability, (2) he was qualified for his job, and (3) he was subject to an adverse employment decision due to his disability. If he met the prima facie case, then the burden would shift to BNSF to articulate a legitimate, non-discriminatory reason for the adverse employment decision. If BNSF did so, then the burden would shift back to Nall to produce evidence that the articulated reason was pretextual. Here, summary judgment was improper because Nall satisfied his prima facie case and, even assuming BNSF established a non-discriminatory reason, there was a genuine material dispute about pretext. As to the retaliation claim, the Court affirmed.

Judges disagreed about whether the *McDonnell Douglas* burden-shifting framework applied in a discrimination case.

Judge Costa wrote a concurrence criticizing courts' frequent use of the *McDonnell-Douglas* framework. His concurring opinion argued that there was no doubt that Nall was fired due to safety concerns arising from his disability and, thus, there should be no dispute about the existence of discriminatory intent, direct evidence of discrimination, and causation. Rather, the question should be whether this discrimination was justified. Judge Costa stated, "This case should be an example of why *McDonnel Douglas* is not the be-all and end-all of proving discrimination."

Judge Ho dissented based on case-specific evidentiary reasons.

***Wittmer v. Phillips 66 Co.*, 915 F.3d 328 (5th Cir. 2019)**

Plaintiff Nicole Wittmer, a transgender woman, sued Defendant Phillips 66, her employer, for discrimination on the basis of transgender status under Title VII. The district court granted summary judgment for Phillips 66 because Wittmer failed to state a prima facie case of discrimination. The district court assumed that Title VII applies to transgender status and

sexual orientation, based on out-of-circuit rulings.

The panel majority (Judge Higginbotham, Judge Elrod, and Judge Ho) affirmed based on failure to state a prima facie case. However, Judge Ho, writing for the majority, also stated that Title VII does not prohibit transgender or sexual orientation discrimination. The district court should have applied a Fifth Circuit case from 1979, *Blum v. Gulf Oil Corp.*, which held that Title VII does not prohibit discrimination on the basis of sexual orientation.

Judge Higginbotham filed a concurrence, in which he disagreed that *Blum v. Gulf Oil Corp.* had "continued vitality" today, particularly after *Lawrence v. Texas* invalidated laws criminalizing same-sex sexual conduct. Since *Lawrence*, the Court has never relied on *Blum*. According to Judge Higginbotham, the Court in this case did not resolve whether Title VII today proscribes discrimination against someone because of transgender or sexual orientation status, "even with elegant asides" in the majority opinion.

Judge Ho then wrote a separate concurring opinion, in which he explained why he thinks *Blum* is correct. He interprets Title VII as prohibiting favoritism on the basis of sex, rather than requiring blindness to sex. Title VII could apply to transgender status and sexual orientation under the second theory, but not the first.

Title VII does not apply to discrimination on the basis of sexual orientation or transgender status.

Federal Law

Benjamin v. U.S. Soc. Sec. Admin. (In re Benjamin), 932 F.3d 293 (5th Cir. 2019)

Kenneth Benjamin was the designated beneficiary of his sister's Social Security disability benefits until the Social Security Administration ("SSA") determined the benefits had expired in April 2012 and sought to recoup over $19,000 of overpayment. Eventually, SSA's recoup efforts caused Benjamin to file

Chapter 7 bankruptcy, and he then filed an action in a federal bankruptcy court against SSA alleging it had illegally collected $6,000 from him in violation of its own regulations. Both the bankruptcy and the district court dismissed Benjamin's claims for lack of subject matter jurisdiction. Benjamin appealed to the Fifth Circuit.

The sole question on appeal was whether 42 U.S.C. § 405(h), which defines federal courts' jurisdiction to hear claims arising under the Social Security Act, barred Benjamin's claim. The relevant text states no claims arising under SSA's old-age, survivors, and disability insurance programs could be brought in federal court under 28 U.S.C. §§ 1331 and 1346. Benjamin argued his claim was not barred because it was brought under 28 U.S.C. § 1334, and SSA disagreed. Before this appeal, only the Ninth Circuit had adopted Benjamin's position, and decisions from the Third, Seventh, Eighth, and Eleventh Circuits supported SSA's interpretation.

42 U.S.C. § 405(h)—which states that no claim arising under the Social Security Act can be brought under 28 U.S.C. §§ 1331 and 1346—does not bar bankruptcy courts from exercising their jurisdiction under 28 U.S.C. § 1334.

The Fifth Circuit agreed with Benjamin. Relying on the statute's text, the Court explained that the text in no way prohibited an assertion of jurisdiction under § 1334 and instead only barred actions under §§ 1331 and 1346. The Court was critical of other Circuits' decision to apply a statutory interpretation tool known as the recodification canon—under which courts generally presume that no substantive change is intended in connection with a legislature's codification of existing law—just because the current version of § 405(h) was a codification of previously existing law. While acknowledging the utility of the recodification canon as a useful tool in some instances, the Court held that new and unambiguous text must govern even when the legislative history expresses an intent to make no change. Because § 405(h)'s text was not ambiguous, it could not be interpreted to bar actions under a section it did

not list. The Court therefore held the district court erred in holding the bankruptcy court's jurisdiction was barred.

The court remanded with instructions for the district court to determine whether Benjamin's claims were otherwise barred by a different portion of § 405(h) bar on all suits challenging SSA's disability determinations other than under a specific procedure outlined by the statute. As guidance for remand, the Court briefly analyzed the statute and determined this bar only applied to SSA's findings on a determination of disability, which means any claim not challenging a decision on a disability determination was not required to follow the statute's prescribed procedure. Thus, the Court reversed and remanded for further proceedings.

Jurisdiction and Procedure

***Carmona v. Leo Ship Mgmt., Inc.*, 924 F.3d 190 (5th Cir. 2019)**

Jose Carmona sued Leo Ship Management, Inc. after Carmona was injured unloading cargo from a ship docked outside of Houston and managed by the company. Leo is a Philippine corporation with its principal place of business in Manila. The company does not own or rent property in Texas, solicits no business in Texas, and has never contracted with a Texas resident to render performance there. Nor have any of its employees, officers, shareholders, or directors ever resided in Texas. Leo had contracted with the owners of the ship at issue to serve as the manager. In that capacity, Leo had no ownership interest in the ship and could not direct where it traveled, what it carried, or for whom it worked. But Leo and the ship's owners were required to maintain close communication, and Leo had advance notice that the ship would be docking in Texas to unload its cargo. The district court dismissed Carmona's suit for lack of personal jurisdiction after finding that Leo had no control over the ship's ports of call.

The Fifth Circuit affirmed in part, but also vacated and remanded in part. Texas's long-arm statute is coextensive with

the Due Process Clause of the Fourteenth Amendment, so the question was whether, for purposes of specific jurisdiction, (1) the defendant had minimum contacts with the forum state; (2) the plaintiff's cause of action arises out of or results from the defendant's forum-related contacts; and (3) the exercise of personal jurisdiction is fair and reasonable. There was no dispute that Leo made contacts with Texas when the vessel, containing its employees, docked outside Houston. In most cases, a defendant's commission of a tort while physically present in a state will readily confer specific jurisdiction. Yet, physical presence is not dispositive of the minimum contacts analysis. Rather, the defendant must have purposefully availed himself of the privilege of conducting activities in the state. A defendant's contacts with a forum and the purposefulness of those contacts are distinct, but overlapping, inquiries. Leo had purposefully availed itself of Texas when its employees voluntarily entered the jurisdiction aboard the ship, even though Leo had no control over the vessel's course. The management agreement contemplated that the ship would travel to locations throughout the word, and Leo received actual notice that the ship would be departing for Texas. Leo was hardly compelled to travel to Texas against its will given that the contract was freely terminable with two months' notice. Leo permitted its employees to enter Texas with the full knowledge of the intended destination.

Nevertheless, Carmona's claims must stem from Leo's contacts with Texas to find specific jurisdiction. A plaintiff bringing multiple claims arising out of different contacts must establish specific jurisdiction as to each claim. Most of Carmona's claims result from Leo's conduct in Texas after the ship's arrival there. Thus, the district court erred in dismissing those claims. But Leo presented undisputed evidence that a third party stowed the pipes aboard the ship

Foreign manager of a ship docked in Texas purposefully availed itself of Texas when its employees voluntarily entered the state's jurisdiction aboard the ship, but jurisdiction only existed for claim stemming from the defendant's activities in Texas.

while it was outside the United States. Because the claim that the pipes were improperly stowed does not stem from Leo's activities in Texas, the district court correctly dismissed that claim. Based on its holdings, the Fifth Circuit then remanded for consideration of the question of whether the exercise of personal jurisdiction accords with traditional notions of fair play and substantial justice.

***Ekhlassi v. Nat'l Lloyds Ins. Co.*, 926 F.3d 130 (5th Cir. 2019)**

The National Flood Insurance Act (the "Act") allows private insurance companies ("Write-Your-Own" or "WYO" carriers) to issue and administer flood-insurance policies underwritten by the Federal Government. 42 U.S.C. § 4072 provides that actions against such private insurers are subject to "original exclusive jurisdiction" in federal district court and also subject to a one-year limitations period. Ekhlassi insured his house in Houston, Texas, with a flood-insurance policy from Lloyds. Ekhlassi's home subsequently suffered flood damage after a rain storm on May 25, 2015, and Ekhlassi reported the loss to Lloyds the following day. In October 2015, Lloyds stated it would only process the claim for $3,768.26—substantially less than the $200,000+ in estimated repair costs that Ekhlassi suffered. After finishing its investigation, Lloyds affirmed its initial decision in January 2016 and concluded the storm did not cause much of the claimed damage. One year after this denial, Ekhlassi filed suit in Texas state court, claiming breach of contract by Lloyds. The action was removed to federal district court, and the district court granted summary judgment for Lloyds, ruling that Ekhlassi's claim was time-barred because the one-year limitations period under 42 U.S.C. § 4072 was triggered by the initial October 2015 letter rather than the January 2016 rejection of coverage.

42 U.S.C. § 4072 applies to lawsuits against "Write-Your-Own" insurance carriers, requiring such lawsuits to be brought in federal court within one year of the date of a denial of coverage or otherwise be time-barred.

The Court affirmed, holding that 42 U.S.C. § 4072 is applicable to actions against WYO carriers, that the district court had original exclusive jurisdiction, and that the one-year limitations period prescribed in § 4072 barred relief to Ekhlassi. Rejecting arguments by Ekhlassi that federal question jurisdiction applies to the exclusion of 42 U.S.C. § 4072, the Court noted that the applicability of § 1331 does not preclude applicability of § 4072 nor the applicability of the latter's one-year limitations period. Next, the Court noted that—consistent with the language of § 4072—multiple prior Fifth Circuit cases, as well as multiple other federal circuits, have applied § 4072 to WYO carriers. Echoing the Third Circuit's analysis that WYO carriers are functional equivalents to FEMA—due in part to provisions requiring FEMA to reimburse WYO carriers for defense costs and claim payments—as well as analogous language in other portions of the Act, the Fifth Circuit Court of Appeals concluded that a broader reading of § 4072 indicates that Congress intended the section to apply in suits against WYO carriers. Because § 4072 applied to Ekhlassi's suit, Ekhlassi did not timely file his suit in the correct court. In granting federal courts original exclusive jurisdiction over WYO carriers, § 4072 required Ekhlassi's suit to be brought in federal court within one year of receiving the denial letter; his filing in state court did not toll the effect of the statutory limitations period.

Judge Haynes wrote a concurrence agreeing that binding Fifth Circuit precedent mandated the conclusion by the majority that § 4072 applied to WYO carriers, while endorsing an alternative analysis by the Seventh Circuit Court of Appeals to the effect that WYO carriers are fiscal agents of the United States—not general agents—and, therefore, that a WYO carrier does not stand in the shoes of the FEMA administrator. Judge Haynes found the Seventh Circuit's textual analysis of § 4072 and conclusion that § 4072 does not apply to WYO carriers was more persuasive than the textual analysis in prior Fifth Circuit opinions.

***Hoyt v. Lane Constr. Co.*, 927 F.3d 287 (5th Cir. 2019)**

On December 29, 2015, Jeffery Hoyt hit a patch of ice in Wise County, Texas, slid off the road, and landed upside-down in a nearby body of water, drowning. On September 20, 2016, members of Mr. Hoyt's family ("the Hoyts") filed suit in Texas state court against C.E.N. Construction Co. ("CEN"), Storm Water Management, Inc. ("SWMI"), and Lane Construction Corporation ("LCC") based on their roles in constructing the road where the accident occurred. The Hoyts, CEN, and SWMI are citizens of Texas, and Lane is not. The three companies moved for summary judgment in the state district court, and the court granted CEN's motion and entered a "take nothing" judgment in CEN's favor. The Hoyts unsuccessfully engaged in settlement negotiations with SWMI but ultimately voluntarily dismissed SWMI without receiving compensation exactly one year and two days after the suit was filed. LCC immediately removed the case to federal court on the theory that diversity jurisdiction applied, and the Hoyts filed an emergency motion to remand—arguing that the removal was untimely. The federal district court denied the motion and rejected the argument that the voluntary-involuntary rule prohibited removal because CEN had been dismissed against the Hoyts' wishes. LCC then moved for summary judgment, which the federal district court granted—dismissing the Hoyts' claims with prejudice. The Hoyts appealed.

District court did not err in denying remand where it concluded the plaintiff's delay in voluntarily dismissing claims against non-diverse defendant until after the 1-year limit to remand expired constituted bad faith. However, remand was warranted based on multiple fact issues.

The Court affirmed the federal district court's exercise of jurisdiction over LCC but vacated and remanded the district court's grant of summary judgment and dismissal. An exception to the one-year removal time limit in 28 U.S.C. § 1446(c) allows a federal district court to exercise jurisdiction where the district court finds that the plaintiff acted in bad faith. In this case, the district court found that the

Hoyts acted in bad faith by improperly joining SWMI, which prevented complete diversity and precluded removal. The timing of the Hoyts' dismissal of SWMI—two days after the § 1446(c) removal deadline—was sufficient evidence of bad faith to support the district court's finding that the exception applied. Likewise, the voluntary-involuntary rule—which posits that where the case is not removable because of a joinder of defendants, only the voluntary dismissal or nonsuit by the plaintiff of a party or of parties can convert a nonremovable case to a removable one—did not apply because the Hoyts had a fraudulent purpose to defeat removal. Therefore, the district court properly denied the Hoyts' efforts to remand the case.

The Court then concluded that the district court improperly granted summary judgment for LCC, concluding that multiple genuine issues of material fact remain. First, LCC's statutory immunity argument failed because LCC failed to show as a matter of law that LCC complied with Texas Department of Transportation Standards regarding LCC's remedial measures in the wake of Mr. Hoyt's accident. Second, on the Hoyts' premises liability claim, the district court erred in concluding that no genuine issue of material fact existed regarding whether the ice patch where Mr. Hoyt slid off the road was a natural formation and whether LCC lacked actual knowledge of a dangerous premises condition at the time of the accident—LCC employees testified that on multiple occasions they worried that a car would slide off the road in the vicinity of Mr. Hoyt's accident, with or without ice. Finally, the district court erred in granting summary judgment for LCC on the Hoyts' gross negligence claim because the aforementioned evidence of premises liability also sufficed to create a genuine issue of material fact sufficient to show gross negligence.

Judge Haynes dissented on the issue of remand, stating that the district court applied the wrong legal standards in concluding that LCC had successfully demonstrated that the Hoyts improperly joined CEN, and thus that the voluntary-involuntary rule applied to preclude removal and the federal district court lacked jurisdiction under the bad faith exception to § 1446(c).

***In re Deepwater Horizon*, 928 F.3d 394 (5th Cir. 2019)**

In the ongoing series of disputes stemming from the settlement agreement reached regarding the Deepwater Horizon oil spill, an issue arose regarding the Claims Administrator's adjustment of claims for business economic loss—that is, the difference between a business's actual profits during a three-month period after the oil spill and its expected profits over that same period. In making such calculation, the settlement agreement requires that revenue be matched with the expenses *incurred*, which does not necessarily coincide with when revenue and expenses are *recorded*. To implement this, the Claims Administrator established two different methods of correcting unmatched financial statements: the default "AVMM" method and the industry-specific "ISM" method.

On prior appeal, the Fifth Circuit affirmed use of the AVMM method, rejected and reversed use of the ISM method, and remanded for further proceedings. The AVMM method appropriately matched revenues and expenses, but the ISM method inappropriately smoothed profits across an industry in addition to matching. On remand, the district court instructed the Claims Administrator to apply the AVMM method but not to reallocate or move revenues, except for the purpose of correcting errors.

On remand, the district court violated the Circuit's mandate.

The Fifth Circuit reversed the district court's instruction to the Claims Administrator, holding that the district court had not followed the Circuit's mandate on remand. The "mandate rule" is a subspecies of the law-of-the-case doctrine that constricts a lower court vis-à-vis a higher court. Because the Circuit ordered application of the AVMM method and AVMM method may entail revenue movement, the district court erred in prohibiting revenue movement.

***Sentry Select Ins. Co. v. Ruiz*, 770 F. App'x 689 (5th Cir. 2019)**

In an insurance case about the insurer's duty to defend or indemnify the insured, the district court entered findings of

fact and conclusions of law that held the insurer had a duty to defend. The district court deferred decision on the duty to indemnify and administratively closed the case pending conclusion of the underlying state-court litigation. The insurer appealed the deferral of judgment on indemnification.

The Fifth Circuit dismissed for lack of appellate jurisdiction. The Court explained: "'[A] district court order staying and administratively closing a case lacks the finality of an outright dismissal or closure.' By administratively closing the case, the district court retains jurisdiction, meaning it can 'reopen the case—either on its own or at the request of a party—at any time.'" Thus, the district court's deferral order—despite administrative closure—was an interlocutory order that did not provide the appellate court with jurisdiction.

Administrative closure of a district court case does not create an appealable order.

Jury Instructions

***Young v. Bd. of Supervisors of Humphreys Cnty., Miss.*, 927 F.3d 898 (5th Cir. 2019)**

Plaintiff Carl Young purchased three empty houses. Two weeks later, the County Building Inspector posted a condemnation notice on one of the properties—even though all of the properties complied with all applicable rules, ordinances, and laws—at the instruction of the president of the County Board of Supervisors. Then the Board voted unanimously to hold a condemnation hearing for Young's properties. Upon notice of Young's plan to sue the Board, it cancelled the condemnation hearing but never removed the condemnation notice. Young sued the Board under 42 U.S.C. § 1983 for posting a condemnation notice without a legal basis, claiming the Board was liable because it ratified the Inspector's condemnation decision. The jury rendered a verdict for Young, and the district court entered judgment on the verdict.

The Fifth Circuit affirmed, rejecting the Board's challenge to the verdict based on alleged errors in the jury instructions. One such alleged error was an instruction that the Board was liable if one of three things occurred: (1) the Board authorized a violation of Young's property rights, (2) the Board had given its president the authority to take the action he took, or (3) the Board ratified its president's actions after the fact. The Board objected to the second and third liability options. The Fifth Circuit held that there was legally sufficient evidence of option 3 (ratification). Therefore, even assuming the district court erred in providing option 2 to the jury, "any injury resulting from the erroneous instruction is harmless."

A jury instruction on a liability option was harmless—even if erroneous—because there was legally sufficient evidence of a different liability option.

Procedure

***Lopez v. Pompeo*, 923 F.3d 444 (5th Cir. 2019)**

Plaintiff Juan Lopez filed suit twice, seeking a judicial declaration of U.S. citizenship. In the first suit, the district court concluded that the suit was jurisdictionally barred because his claim had previously been rejected in two removal proceedings. On appeal, the Fifth Circuit affirmed the lower court ruling on a different ground, which was that Lopez was not within the United States at the time of the suit. Lopez filed suit a second time. The district court dismissed the second suit based on the res judicata effect of the first district court decision.

The Fifth Circuit reversed, holding that the first district court decision did not have res judicata effect because the appellate court affirmed on different grounds. Only parts of a district court holding affirmed by

When the Fifth Circuit affirms a district court decision on different grounds, the Fifth Circuit decision, not the district court's, has preclusive effect.

the Fifth Circuit have preclusive effect. Because Lopez cured the issue addressed by the Fifth Circuit opinion in his first suit, his second suit was valid.

Statutory Interpretation

***Reed v. Taylor*, 923 F.3d 411 (5th Cir. 2019)**

Plaintiff Jerry Reed was a civilly committed individual who was required under a now-repealed Texas law to use income from Social Security to pay for GPS monitoring or face criminal felony prosecution. Reed sued the state officials of the facility where he was committed under § 1983, alleging that the use of his Social Security income for the GPS monitoring violated a provision of the Social Security Act's anti-attachment provision that protects Social Security benefits from "execution, levy, attachment, garnishment, or other legal process." Reed alleged the threat of criminal prosecution qualified as an "other legal process" under the statute. The district court granted summary judgment on qualified immunity grounds, and Reed appealed.

The Fifth Circuit affirmed the district court. In doing so, the Court emphasized its duty to interpret the text of a statute as written and to interpret words according to surrounding structure and other contextual cues. In doing so, the Court applied the *ejusdem generis* canon, which requires general words following specific words in a list to be construed to include only objects similar in nature to the preceding specific words. Relying on this canon and a previous Supreme Court case analyzing the Social Security provision, the Court therefore held the phrase "other legal process" only included processes like execution, levy, attachment, and garnishment. Because the threat of criminal prosecution was not like any of these processes, the Court held the

Under the statutory interpretation canon of ejusdem generis, the phrase "other legal process" in the Social Security Act's anti-attachment provision did not apply to a Texas law that required civilly committed individuals to pay for GPS monitoring under the threat of criminal prosecution.

threat of prosecution was not an "other legal process."

The Court alternatively held the challenged conduct did not violate a clearly established right and that the officials were therefore entitled to qualified immunity. Judge Elrod concurred in the judgment and wrote separately to state the Court should have affirmed based only on the clearly established prong of the qualified immunity test. Because the law in question no longer existed, Judge Elrod stated resolving whether the Texas law violated the Social Security Act was unnecessary.

Texas Law

Jatera Corp. v. U.S. Bank Nat'l Ass'n, 917 F.3d 831 (5th Cir. 2019)

Through a series of transfers, U.S. Bank National Association became the owner of the note and security interest on Esther Randle Moore's home. After her husband died, all interest in the property was transferred to Moore, who then defaulted on the mortgage payments. The Bank's loan servicer notified Moore of its intent to accelerate the note, demanding full payment of the debt. The Bank then filed a foreclosure proceeding in state court, and Moore signed an agreed final judgment consenting to the foreclosure. Several months later, the Bank's new loan servicer, Select Portfolio Servicing, Inc. ("SPS"), sent a new default notice to Moore, informing her that she could cure the default with a specified payment of less than the full amount or the note would be re-accelerated. Over two years later, Moore conveyed her interest in the property to Scojo Solutions, LLC, which then transferred its interest to Jatera Corporation. SPS re-initiated foreclosure proceedings, and Jatera filed suit against the Bank and SPS, seeking judgment that the lien on the property was void under the four-year statute of limitations. After the Bank and SPS removed the suit to federal

Texas law does not recognize detrimental reliance as an exception to a lender's right to unilaterally withdraw an acceleration notice.

court, Jatera amended its complaint, asserting that Moore's detrimental reliance on the acceleration notice prevented the Bank and SPS from abandoning the acceleration. Moore was joined as a plaintiff and also sought a declaration that the lien was void. On cross-motions for summary judgment, the district court granted SPS's and the Bank's motions, holding that Moore had no standing and Jatera failed to show it detrimentally relied on the acceleration notice.

The Fifth Circuit affirmed. Under Texas law, a foreclosure proceeding on a real property lien has a four-year statute of limitations. If the note securing the property contains an optional acceleration clause, the action accrues when the holder exercises its option to accelerate. If the acceleration is abandoned, the limitations period is suspended until the lender exercises its option to re-accelerate the note. A request for payment of less than the full amount, after initially accelerating the entire obligation, constitutes an intent to abandon or waive the initial acceleration. The parties therefore did not dispute that the second notice of default sent by SPS could have constituted an abandonment of the earlier acceleration.

No Texas court had ever squarely held that detrimental reliance was an exception to a lender's right to unilaterally withdraw its exercise of the option to accelerate. Although a Texas intermediate appellate court opinion contained dicta suggesting such an exception existed, and that dicta had been cited several times, more recent federal and Texas state courts expressed doubts about whether such an exception exists. And in 2015, the Texas legislature enacted a statute providing no exceptions to a lender's right to unilaterally withdraw the acceleration. A statute is presumed to be enacted with complete knowledge of the existing law; yet, the Texas legislature chose not to include any exception in the statute. Making an *Erie* guess, the Court therefore found it unlikely the Texas Supreme Court would be willing to read such language into the statute.

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

This case involved claims against an attorney under a

respondeat superior theory alleging the attorney conspired with a client to further a fraudulent Ponzi scheme. The attorney moved for a judgment on the pleadings, and the district court granted the attorney's motion on the grounds that attorney immunity under Texas law precluded the plaintiffs' claims. The plaintiffs appealed, arguing that three purported exceptions to attorney immunity should apply because the attorney's acts: (1) were outside of the litigation context, (2) constituted criminal acts, and (3) violated the Texas Securities Act. The plaintiffs also asked the Fifth Circuit to certify the application of these alleged exceptions to attorney immunity to the Texas Supreme Court.

Under Texas law, attorney immunity precluded liability claims brought by non-clients because attorney immunity applies to (1) acts outside of the litigation context, (2) criminal acts while acting within the scope of representation, and (3) acts that violate the Texas Securities Act.

The Fifth Circuit denied the plaintiff's motion for certification and affirmed the district court's dismissal. On the issue of certification, the Court stated that while the Texas Supreme Court had not directly addressed these issues, the Texas court of appeals and arguments by counsel gave sufficient guidance for how the Texas Supreme Court would likely rule. Relying on a growing trend among the Texas courts of appeals, the Court held the attorney immunity doctrine applies outside of the litigation context. The Court next held attorney immunity applies even to criminal acts so long as the attorney was acting within the scope of representation. It based this holding on Texas courts' focus on whether an action was within the scope of representation rather than whether the act was criminal when analyzing attorney immunity. Finally, the Court held the Texas Securities Act did not abrogate attorney immunity. In reaching this conclusion, the Court noted that the Act did not explicitly abrogate immunity and that Texas courts had held attorney immunity applies to a comparable statute—the Texas Deceptive Trade Practices Act. Thus, the Court affirmed the district court's dismissal of the plaintiffs' claims.