Fifth Circuit Update

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Jurisdiction and Procedure

***Escribano v. Travis Cty.*, 947 F.3d 265 (5th Cir. 2020)**

Six detectives of the Travis County Sheriff's Office sued Travis County alleging that they were entitled to overtime pay. Travis County asserted that the detectives were exempt as executive and highly compensated employees. At trial, the jury found that these exemptions did not apply, making Travis County liable for overtime pay. The district court entered judgment for the detectives, and, within 30 days of the judgment, Travis County sought judgment as a matter of law under Rule 50(b). The detectives moved for a new trial. The district court granted the motion for judgment as a matter of law and the detectives' motion for a new trial. Confusion followed, along with many more post-judgment motions, and the detectives ultimately sought to withdraw their motion for a new trial and to reinstate the verdict. But the district court refused, and the detectives appealed.

On appeal, the detectives argued that Travis County's Rule 50(b) motion was filed late and that, because Rule 50's deadline for seeking judgment as a matter of law is jurisdictional, the district court had no jurisdiction to rule on that motion. Relying on the reasoning of recent Supreme Court decisions, the Fifth Circuit joined at least five other circuits in holding that the time limits in Rule 50(b) are not jurisdictional. Unlike statutory deadlines, the deadlines that appear in court-made rules are treated as claim-processing requirements that do not restrict a court's authority.

Federal of Civil Procedure Rule 50(b) does not impose a jurisdictional deadline.

***Klocke v. Watson*, 936 F.3d 240 (5th Cir. 2019)**

Thomas Klocke was a student at the University of Texas Arlington who committed suicide after the University refused him permission to graduate after Nicholas Watson accused him of homophobic harassment. Thomas's father sued Watson and the University for defamation as the administrator of Thomas's estate. The University moved to dismiss under the Texas Citizens Participation Act ("TCPA"), which, on a certain showing, requires a court to dismiss the action and award attorneys' fees and costs. Klocke responded that the TCPA, as a procedural state statute, does not apply in federal court. The district court held that Klocke had waived the argument that the TCPA does not apply in federal court and granted the motion to dismiss.

On appeal, the Fifth Circuit held that Klocke had not waived his arguments and that the TCPA does not apply in federal court. Because the TCPA's burden-shifting framework imposes requirements beyond those in Federal Rules of Civil Procedure 12 and 56 and answers the same questions as those rules, the TCPA has no application in federal court. This reasoning was based on the Supreme Court's opinion in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393 (2010), and a recent decision by the D.C. Circuit, *Abbas v. Foreign Policy Group, LLC*, 783 F.3d 1328 (D.C. Cir. 2015 (Kavanaugh, J.). *Klocke* was distinguished from a previous Fifth Circuit decision—*Henry v. Lake Charles American Press, L.L.C.*, 566 F.3d 164 (5th Cir. 2009)—because that decision concerned a Louisiana statute and came before *Shady Grove*.

The Texas Citizens Participation Act does not apply in federal court.

***Frank v. P N K (Lake Charles) L.L.C.*, 947 F.3d 331 (5th Cir. 2020)**

Family members of a deceased casino patron who suffered a fatal accident at a Louisiana casino brought wrongful-death action in Texas against PNK (Lake Charles) LLC ("PNK"), the company that owned the gaming license for the casino where

the accident occurred. PNK was domiciled in Louisiana and had no business operations in Texas other than advertising in Texas through a variety of media platforms, including mailers, the internet, billboards, television commercials, and radio ads, and subsidizing charter buses to shuttle patrons between Texas and Louisiana. PNK removed the case to federal court and then sought to either transfer venue to Louisiana or to dismiss for lack of personal jurisdiction. The district court granted the motion to transfer venue, which resulted in the claims being dismissed due to Louisiana's statute of limitations. The Plaintiffs appealed, asserting the district court erred in not exercising personal jurisdiction over PNK.

On appeal, the Fifth Circuit held that sending advertisements into a state was insufficient to establish general jurisdiction over PNK. Recent Supreme Court precedent required a foreign entity's activities in a state to be so continuous and systematic as to render it at home in the state. But PNK's contact with Texas began and ended with its advertising activities—all other operations occurred entirely in Louisiana. At most, PNK performed a substantial amount of business with Texans, but not in Texas. Thus, the Court held that general jurisdiction did not exist and affirmed the district court.

Targeted advertising cannot establish general jurisdiction over a foreign entity.

Arbitration

Quezada v. Bechtel OG & C Constr. Servs. Inc., 946 F.3d 837 (5th Cir. 2020)

Nicole Quezada worked for Bechtel OG&C Constructive Services on a construction project. Under her employment agreement, Quezada had agreed to arbitrate workplace disputes. Quezada brought an arbitration dispute against Bechtel alleging discrimination, failure to accommodate, and retaliation in violation of the Americans with Disabilities Act ("ADA"). The arbitrator found that Quezada had shown discrimination because Bechtel refused to allow her to work overtime, but

that Quezada could not show discriminatory or retaliatory termination. The arbitrator found Quezada entitled to $500 in nominal damages for the denial of overtime opportunities. Quezada sought and obtained reconsideration of the nominal damages award. The arbitrator awarded about $300,000 in back and front pay, compensatory damages, nominal damages, attorneys' fees and costs, and interest.

Bechtel sought vacatur or, alternatively, modification, of the arbitration award in the United States District Court for the Southern District of Texas. Quezada moved to confirm the award. The district court found that it had subject-matter jurisdiction and that Bechtel was not entitled to vacatur. Bechtel appealed.

The Fifth Circuit *sua sponte* examined the basis for subject-matter jurisdiction of the motion for vacatur or modification. In *Vaden v. Discover Bank*, 556 U.S. 49 (2009), the Supreme Court adopted a "look through" approach for determining federal jurisdiction over a petition to compel arbitration. Under that approach, a federal court looks through the petition to determine whether it is predicated on an action that arises under federal law. The circuits have split over whether the same look-through approach applies to motions to confirm, vacate, or modify an arbitration award. The Fifth Circuit adopted the majority approach—that of the First, Second, and Third Circuits—holding that the "look through" approach also applies to motions to confirm, vacate, or modify an arbitration award. This decision was based on *Vaden* and practical considerations.

The look-through approach of *Vaden v. Discover Bank*, 556 U.S. 49 (2009), applies to motions brought to confirm, vacate, or modify an arbitration award.

Federal Law

***Energy Intelligence Grp., Inc. v. Kayne Anderson Capital Advisors, L.P.*, 948 F.3d 261 (5th Cir. 2020)**

Energy Intelligence Group sued Kayne Anderson Capital

Advisors for copyright infringement and violations of the Digital Millennium Copyright Act ("DMCA"), alleging that Kayne had improperly shared access to an Energy Intelligence publication with his employees. At summary judgment, the district court permitted Kayne to move forward on a mitigation defense against statutory damages under the Copyright Act and DMCA. In a pretrial memorandum, Energy Intelligence argued that Kayne could not invoke mitigation as a complete defense to statutory damages under the two Acts. The district court overruled this argument, and the jury found that Energy Intelligence could have reasonably avoided—mitigated—most of the copyright and DMCA violations. Both parties appealed.

Mitigation is not a complete defense to statutory damages under the Copyright Act or the Digital Millennium Copyright Act.

The appeal presented an issue of first impression: whether failure to mitigate is a complete defense to liability for statutory damages under the Copyright Act and DMCA. After an in-depth analysis of both Acts, the Fifth Circuit reversed and remanded, holding that mitigation is a not complete defense to statutory damages under the Copyright Act or DMCA. A mitigation defense applies to post-injury consequential damages and Energy Intelligence did not seek such damages. Instead, Energy Intelligence sought statutory damages that served deterrent and potentially punitive purposes and arose with, not after, the injury. As a result, mitigation cannot be a complete defense to the Copyright Act's or DMCA's statutory damages.

Collins v. Mnuchin*, 938 F.3d 553 (5th Cir. 2019) (en banc), *petition for cert. filed

Shareholders of Fannie Mae and Freddie Mac sued the Federal Housing Finance Agency ("FHFA"), its Director, the United States Treasury, and the Secretary of the Treasury—together, the "Agencies"—asserting violations of the Administrative Procedure Act ("APA") and Article II, §§ 1 and 3 of the United States Constitution. In 2008, the FHFA

appointed itself as Fannie Mae and Freddie Mac's conservator and made Preferred Stock Purchase Agreements with the Treasury to prevent them from defaulting. The Treasury and the FHFA later made amendments to these Agreements, which the Shareholders objected to. The Third Amendment replaced a quarterly 10% divided with variable dividends equal to Fannie Mae and Freddie Mac's entire net worth (except a capital reserve)—a decision that the Shareholders called a "net worth sweep." As to the APA claims, the Shareholders alleged that the FHFA exceeded its statutory conservator authority, the Treasury exceeded its securities-purchase authority, and the Treasury's adoption of the net worth sweep was arbitrary and capricious. The Shareholders alleged that the FHFA violated Article II, §§ 1 and 3 of the Constitution because, among other things, it is headed by a single Director removable only for cause.

The Agencies moved to dismiss all the claims. The Shareholders and the FHFA cross-moved for summary judgment on the constitutional claim. The district court dismissed the APA claims based on an anti-injunction provision preventing courts from taking actions to restrain the FHFA's exercise of powers or functions. The district court also granted summary judgment for FHFA on the constitutional claim. A Fifth Circuit panel affirmed the district court's decisions on the APA claims and reversed as to the constitutional claim. The Court granted rehearing *en banc*.

The claim that the Federal Housing Finance Agency ("FHFA") exceeded its statutory powers by amending Fannie Mae and Freddie Mac's financing agreements survives dismissal and the FHFA Director's for-cause removal protection is unconstitutional.

The Fifth Circuit, sitting *en banc*, held that the Third Amendment plausibly exceeded FHFA's statutory powers because the limited, enumerated conservator powers given to the FHSA did not encompass transferring substantially all the capital of Fannie Mae and Freddie Mac to the Treasury. The FHFA's design—an independent agency with a

single Director removable "for cause"—was held to violate separation of powers principles because granting removal protection and full agency leadership to a single Director stretched the independent-agency pattern beyond what the Constitution allows. As to remedies, the Shareholders were entitled only to a declaration that the FHFA's structure is unconstitutional.

Texas v. United States*, 945 F.3d 355 (5th Cir. 2019), *petition for cert. filed

This decision concerned the Affordable Care Act's ("ACA") individual mandate, which requires individuals to maintain health insurance or, if they do not do so, make a "shared responsibility payment" to the Internal Revenue Service. In a previous challenge, the Supreme Court upheld the individual mandate as a tax on an individual's decision not to purchase the insurance—a constitutional exercise of Congress's taxing power. In 2017, Congress set the shared responsibility payment at zero dollars. Afterward, two private citizens and eighteen states, including Texas, sued the United States, the Department of Health and Human Services, and other defendants, alleging that the individual mandate could no longer be characterized as a tax and was unconstitutional. The district court held that Texas and the other plaintiffs had standing because the individual mandate required them to purchase insurance, setting the shared responsibility payment to zero made the individual mandate unconstitutional, and the individual mandate could not be severed from any other part of the ACA. The United States and the other defendants appealed.

The Affordable Care Act's individual mandate is unconstitutional because it can no longer be construed as a tax, and no other constitutional provision justifies the exercise of congressional power.

On appeal, the Fifth Circuit affirmed the district court's rulings that the plaintiffs had standing and that the individual mandate was unconstitutional. Because Congress reduced the

shared responsibility payment to zero, the individual mandate could no longer be considered under Congress's taxing power. Relying on *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012), the Court concluded that no other constitutional provision could have authorized Congress to enact the individual mandate—rendering it unconstitutional. The Court, however, remanded for additional analysis on severability because the district court had not explained with precision how particular ACA portions turned on the individual mandate.

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

Shannon Rivenbark sued JPMorgan Chase Bank N.A., alleging that Chase violated the Fair Labor Standards Act ("FLSA") by failing to compensate her and other employees at call centers for tasks completed "off-the-clock." After moving to conditionally certify a collective action consisting of around 42,000 current and former employees, Plaintiffs asked the district court to send notice of the action all putative collective members. Chase opposed, claiming that 35,000 of the putative class members had waived their right to proceed collectively pursuant to binding arbitration agreements. The district court conditionally certified Plaintiffs' collective action and ordered Chase to produce the contact information for all putative collective members within two weeks. Chase appealed and filed a mandamus petition.

A district court errors when it requires notice of a pending FLSA collective action to be sent to employees who are unable to join the action because of binding arbitration agreements.

On appeal, the Fifth Circuit denied mandamus review but issued a published opinion under its supervisory authority. Chase's harm was irremediable on ordinary appeal because the issue of whether the notice should issue would be moot after final judgment. Resolving the question at issue was appropriate because it had recurred and divided courts. On whether Chase

had a clear and indisputable right to a writ of mandamus, the Court held that the district court erred by requiring notice of a pending FLSA collective action to be sent to employees who were potentially unable to join the action because of binding arbitration agreements. The issue of whether valid arbitration agreements existed must be determined before notices were sent, and alerting someone who cannot ultimately participate in the collective action would only have the effect of stirring up litigation. However, the Court denied mandamus relief and held the district court's error was not clear and indisputable because it had followed the lead of other courts in the circuit. The Court nonetheless instructed the district court to revisit its decision.

***Doe v. Mckesson*, 945 F.3d 818 (5th Cir. 2019)**

During a public protest against police misconduct in which the protestors blocked a public highway, an unidentified person hit the Plaintiff, a police officer, with a heavy object, causing serious injury. The Plaintiff filed suit against "Black Lives Matter," and Deray Mckesson, the organizer of the protest. The district court dismissed the Plaintiff's claims under Federal Rule of Civil Procedure 12(b)(6), holding the Plaintiff had failed to state a plausible claim against Mckesson. It also took judicial notice that Black Lives Matter was a "hashtag" and therefore an "expression" that lacked the capacity to be sued. The Plaintiff appealed.

On appeal, the Fifth Circuit reversed in part and affirmed in part. After holding that the Plaintiff had stated a claim for negligence under Louisiana law, the Court held the complaint should not be dismissed based on the First Amendment. The complaint's allegations that Mckesson had directed the demonstrators to engage in illegal and tortious conduct stated a claim because they plausibly alleged that Plaintiff's injuries were one of the

The First Amendment does not bar a negligence claim against a protest organizer who allegedly breached his duty of reasonable care while organizing and leading demonstration at which the plaintiff was injured by an unknown assailant.

consequences of the tortious activity directed by Mckesson. The Court further reasoned that Mckesson's conduct was not protected free speech because he ordered the demonstrators to violate a reasonable time, place, and manner restriction by blocking a public highway. Regarding the claims against Black Lives Matter, the district court erred in taking judicial notice of Black Lives Matter's capacity to be sued because the issue presented a mixed question of fact and law that was not immune from reasonable dispute. However, the Court went on to affirm the district court's dismissal of the claims against Black Lives Matter based on Louisiana law. The Court reversed in part, affirmed in part, and remanded the case for further proceedings.

***Horvath v. City of Leander*, 946 F.3d 787 (5th Cir. 2020)**

Brett Horvath was employed as a driver/pump operator by the City of Leander Fire Department. In 2016, the Department began requiring that all employees obtain TDAP vaccinations, but Horvath objected to the vaccination as a tenet of his religion. In response, the Department offered him the choice of two accommodations: (1) reassignment to the position of code enforcement officer with the same pay and benefits or (2) wear personal protection equipment, including a respirator, while on duty. Horvath rejected both accommodations and was terminated. Horvath filed suit against the City and the Department's Chief, alleging religious discrimination and retaliation in violation of Title VII, the Texas Commission on Human Rights Act ("TCHRA"), and 42 U.S.C. § 1983. The district court granted summary judgment in favor of the Defendants, and Horvath appealed.

The City of Leander did not violate a firefighter's religious freedom by discharging the firefighter after he refused to choose either of two accommodations to the municipality's vaccination requirement.

On appeal, the Fifth Circuit affirmed. Horvath's Title VII claims failed because the Defendants' offer for Horvath to be a code enforcer was a reasonable alternative with equivalent salary. The fact that Horvath preferred to remain in his current

position was insufficient for his claim to survive. Horvath's retaliation claims also failed because the City's proffered reason for Horvath's firing—defiance of a direct order—was a legitimate, non-discriminatory justification. Finally, Horvath's § 1983 claim failed because the City's respirator alternative would not burden Horvath's exercise of his religion. The Court affirmed the district court's judgment.