Fifth Circuit Update

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Administrative Law

***Huawei Techs. USA, Inc. v. FCC*, 2 F.4th 421 (5th Cir. 2021)**

Huawei Technologies Co. provides telecommunications equipment and services. It is established and headquartered in China but has a U.S. subsidiary based in Plano, Texas (collectively, "Huawei"). Each year, the Federal Communications Commission ("FCC") dispenses money, called "universal service funds," to telecommunications providers to promote "universal service," which includes funds to foster affordable phone and interest services. In 2018, the FCC promulgated a rule, titled "In the Matter of Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs," which barred the use of universal service funds to buy equipment or services by a company "posing a national security threat to the integrity of communications networks or the communications supply chain." By an initial designation and then a report and final order, the FCC designated Huawei and its American subsidiary as posing a national security threats, cutting them off from universal service funds.

Huawei brought a petition for review of the FCC's final order in the Fifth Circuit. It argued that the final order (1) exceeded the FCC's statutory authority, (2) was arbitrary, capricious, and an abuse of discretion under the Administrative Procedure Act, (3) failed to comport with notice-and-comment requirements, (4) was void for vagueness and impermissibly retroactive, (5) violated the Constitution's Appointments Clause and due-process protections, and (6) was otherwise contrary to the law.

The Fifth Circuit considered and rejected each of Huawei's challenges, denying the petition for review. It began first with

ripeness. Huawei's challenge to the final order was ripe for adjudication, but its separate challenge to the FCC's initial designation of Huawei as a threat to national security was not. The scope of the FCC's authority was next considered. Contrary to Huawei's arguments, the FCC had authority to designate Huawei as a threat to national security because the FCC permissibly construed the Communication Act's "public interest" and "quality services" provisions to allow for consideration of national security threats when allocating universal-service funds. Huawei's contentions about the FCC's purported lack of national security expertise, a potential conflict with the President's national security authority, and the Secure Networks Act did not change this result.

Huawei's substantive challenges were addressed. As to the notice-and-comment procedures, while the FCC did not specify the precise rulemaking procedures that were adopted, the process provided Huawei with sufficient information to anticipate what the final rule would contain. So too did the final order survive arbitrary and capricious review; the FCC considered the relevant issues identified by Huawei and provided reasonable explanations for the decisions in the final order. It did not fail to consider any properly raised legal argument identified by Huawei. Nor did the FCC act unreasonably in applying cost-benefit analysis or rejecting a risk-based approach (in favor of a company-based approach) to designating national security threats to communications networks. The final rule was not vague or standardless because the FCC explained why it had adopted the "national security threat" standard, and it had no obligation to issue a comprehensive definition all at once. The FCC may give definitional content to this standard on a case-by-case basis.

Finally, Huawei argued that the final order must be set aside because the FCC failed to provide due process before the initial designation. But the

The application of a Texas statute limiting the availability of mail-in voting to voters over 65 and certain other limited classes of voters did not abridge plaintiffs' right to vote.

initial designation could only have caused reputational injury. Allegations of reputational damages fail to state a claim of denial of a constitutional right unless an infringement of some other interest accompanies them. Huawei could identify no "other interest" to accompany the reputational injury, and the initial designation was how the FCC afforded due process. Huawei thus failed to show a constitutionally protected reputational interest in pre-deprivation process.

Jobe v. NTSB, 1 F.4th 396 (5th Cir. 2021)

A helicopter crashed in 2011 during a sightseeing tour in Hawaii. The pilot and all four passengers died. The helicopter had been manufactured by French companies but was operated by a U.S. company. The National Transportation Safety Board ("NTSB") began investigating the crash, and, as part of the investigation, appointed representatives from the U.S. operator and French manufacturer to assist in the investigation. Tony Jobe, a lawyer who represented the families of the crash victim, filed a request for information, which the NTSB converted into one under the Freedom of Information Act ("FOIA"). The NTSB disclosed about 4,000 pages of documents but withheld the disclosure of 2,349 pages under "Exemption 5," which exempts "inter-agency or intra-agency memorandums or letters" from FOIA requests. A "consultant corollary" doctrine has been developed in connection with "Exemption 5," under which certain communications and materials exchanged with outside experts are deemed "intra-agency" and shielded from disclosure.

Communications between employees of the National Transportation Safety Board and outside consultants at aircraft manufacturers and operators are not subject to disclosure under the Freedom of Information Act.

Jobe sued the NTSB seeking additional disclosures. Both parties moved for summary judgment. The district court granted summary judgment in part and denied it in part. Among other rulings, the district court determined that documents and communications exchanged between

the NTSB and the U.S. and French companies were not "intra-agency" under Exemption 5 because the companies had self-interest in the outcome of the investigation.

The Fifth Circuit reversed and remanded. The word "intra-agency" covers records of communications between an agency and outside consultants if created to aid the agency's deliberative process. The U.S. and French companies did exactly that—aid the NTSB's investigation. These companies did not make claims necessarily adverse to those of the crash victims' families. Instead, the companies' employees participated in an investigation that had no adverse parties, was not conducted to determine any rights or liabilities, and were under the control of the NTSB's Investigator in Charge. Indeed, an NTSB report cannot be admitted in a civil action for damages. Given this context, the companies' employees acted enough like the NTSB's own personnel to deem their communications and exchanges with the NTSB "intra-agency" under Exemption 5 and its consultant corollary. That said, on remand, the district court was free to consider any potentially pertinent privilege against the discovery of documents and communications under judicial standards that would govern litigation against the NTSB—privileges which Exemption 5 incorporates.

The dissent disagrees. In its view, communications between a regulated party and the regulator are the precise sort of information that Congress intended for FOIA to allow the public to access, especially when the regulated parties have their own interests in mind—not the public's. Recognizing the principle that FOIA exemptions are construed narrowly, the dissent would hold that government communications with employees of regulated parties are subject to FOIA's disclosure mandate.

Arbitration

Jones v. Michaels Stores, Inc., 991 F.3d 614 (5th Cir. 2021)

In an employment dispute between Tiffany Jones and her former employer, an arbitrator ruled against Jones. Jones then

asked the district court to vacate the arbitrator's ruling, arguing that the arbitrator manifestly disregarded the law. Noting uncertainty about whether manifest disregard for the law has any role in determining whether to vacate an arbitration award, the district held that, even assuming it does, the arbitrator did not manifestly disregard the law.

The Fifth Circuit affirmed, yet it took the appeal as "an opportunity to emphasize at least one thing that we have directly resolved: 'manifest disregard of the law as an independent, nonstatutory ground for setting aside an award must be abandoned and rejected,'" quoting *Citigroup Global Markets, Inc. v. Bacon*, 562 F.3d 349, 358 (5th Cir. 2009), which is still binding precedent. Although there was "some murkiness in [the Court's] manifest-disregard caselaw," the Court no longer recognizes manifest disregard as a standalone ground for vacating an arbitration award. Rather, the statutory grounds for vacatur and modification of an arbitration award are the exclusive grounds.

Manifest disregard of the law is not an independent ground for vacating an arbitration award.

Constitutional Law

McDonald v. Longley, — F.4th —, 2021 WL 2767443 (5th Cir. July 2, 2021)

Three Texas attorneys sued the State Bar of Texas, alleging that mandatory Bar membership and dues violates their First Amendment rights to freedom of association and free speech. The plaintiffs took issue with a number of specific Bar activities, including (1) the legislative program, through which the Bar lobbies for bills drafted by sections of the Bar; (2) the Office of Minority Affairs, which seeks to enhance employment opportunities for minority, women, and LGBT attorneys; (3) a variety of activities aimed at making legal services available to the needy; and (4) miscellaneous activities, namely funding CLE programs, hosting an annual convention, and funding the

Texas Bar Journal. The plaintiffs also claimed that the Bar's procedures for objecting members to obtain a refund of their dues are unconstitutional.

The district court granted summary judgment to the Bar. The Fifth Circuit vacated in part, rendered partial summary judgment in favor of the plaintiffs, and remanded. Attorneys may constitutionally be mandated to join a bar association that engages in activities that are solely germane to regulating the legal profession or improving the quality of legal services, but not a bar association that engages in other, non-germane activities. Although some of the Bar's activities are germane, some are not and thus mandatory membership and dues are unconstitutional.

First, the legislative program is neither entirely germane nor non-germane. For example, lobbying for changes to Texas's substantive law is non-germane (such as amending the Texas Constitution's definition of marriage and amending Texas family law regarding grandparents' access to children) because it is wholly disconnected from the Texas court system or the law governing attorneys' activities, while lobbying for an exemption regarding the appointment of pro bono volunteers is germane because it relates to the law governing attorneys. Second, diversity initiatives are germane—even though they are highly ideologically charged—because they are a form of regulating the legal profession. Third, most (but not quite all) of the activities aimed at aiding the needy are germane. Fourth, the miscellaneous activities at issue are all germane.

Accordingly, the Bar "may not continue mandating membership in the Bar as currently structured or engaging in its current activities." Lastly, assuming that the plaintiffs can be compelled to join the Bar at all, the Bar may constitutionally use some sort of opt-out procedure for giving pro-rata dues refunds, but the current procedures are inadequate.

Mandatory membership in and dues to the State Bar of Texas as currently structured is unconstitutional because the Bar engages in activities that are not germane to regulating the legal profession or improving the quality of legal services.

Federal Law

***Sanchez v. Smart Fabricators of Tex., L.L.C.*, 997 F.3d 564 (5th Cir. 2021) (en banc)**

Gilbert Sanchez, an employee of an independent contractor, was performing welding work on a drilling rig in the Gulf of Mexico when he tripped on a pipe, injuring his ankle and back. He sued the rig owner and his employer. His employer moved for summary judgment, arguing that Sanchez was not a "seaman" under the Jones Act—a statute which allows injured employees to bring a personal-injury action against their employers. The district court found that Sanchez was not a "seaman" as defined under the Jones Act. His connection to the drilling rigs was not "substantial" in that his specific duties did not expose him to the "perils of the sea."

A panel of the Fifth Circuit reversed and remanded, holding that Sanchez was a "seaman" under the applicable test. En banc review was granted. After walking carefully through the relevant U.S. Supreme Court and Fifth Circuit precedent, the en banc panel concluded that whether plaintiffs are subject to the "perils of the sea" is insufficient to assess the nature of their employment. A court must also ask: (1) "Does the worker owe his allegiance to the vessel, rather than simply to a shoreside employer?"; (2) "Is the work sea-based or involve seagoing activity?"; (3) "(a) Is the worker's assignment to a vessel limited to performance of a discrete task after which the worker's connection to the vessel ends, or (b) Does the worker's assignment include sailing with the vessel from port to port or location to location?"

Based on these questions, Sanchez was not a "seaman." Sanchez had worked on two drilling rigs. The first he worked on only while it was docked; Sanchez did not work on it at sea. Sanchez did work on the second drilling rig at sea, but for less than 20 percent of his total employment. Moreover, after his work concluded on the at-sea rig, Sanchez "would have no further connection to the vessel."

The test for distinguishing between "seamen" and other maritime workers is clarified.

Sanchez's work on the second rig was "transitory" and thus not substantially connected enough to the at-sea drilling rig for him to be considered a "seaman" under the Jones Act.

Procedure

***MidCap Media Fin., L.L.C. v. Pathway Data, Inc.*, No. 20-50259, 2021 WL 1561379 (5th Cir. Apr. 20, 2021)**

In this breach-of-contract dispute, the district court issued a judgment after a bench trial, which the parties timely appealed in 2018. In 2019, the Fifth Circuit remanded to the district court to determine whether it had diversity jurisdiction, and thus the Fifth Circuit did not reach the merits of the judgment. On remand, the district court issued an order finding that it had diversity jurisdiction.

After the remand order issued, the appellant filed a motion to extend the time to file a notice of appeal of the merits judgment until after the resolution of a pending motion for attorneys' fees, under Federal Rule of Civil Procedure 58(e). The district court did not immediately rule on the motion for extension, so the appellant went ahead and attempted to file a notice appeal by the standard deadline—but the appellant inadvertently filed a day late. The district court eventually granted the motion for extension.

The Fifth Circuit dismissed the second appeal for lack of jurisdiction, holding the appellant did not timely file its notice of appeal. Although it had timely filed a notice of appeal in 2018, the Fifth Circuit's jurisdiction over that original appeal terminated once the remand mandate issued. Although the appellant had various options for maintaining the original appeal, such as seeking to recall the mandate to reinstate the original appeal, those options were not taken. Thus, the appellant needed to have filed a second notice of appeal

After resolution of a remand from the appellate court, usually a second notice of appeal must be filed to re-invoke appellate jurisdiction.

within 30 days of the remand order, which it did not do because it filed 31 days thereafter.

The Fifth Circuit rejected the appellant's three arguments that an exception applied to this general rule. First, the Fifth Circuit held that the remand was not limited and thus it did not retain jurisdiction that obviated the need for a new notice of appeal, because the Fifth Circuit's original opinion did not state that it was limited or that the appellate court retained jurisdiction. Second, the Fifth Circuit held that the district court did not have authority to grant an extension of time for filing the notice of appeal under Rule 58(e), because the original deadline to appeal had already lapsed when the district court purportedly granted the extension. Third, the Fifth Circuit held that—unlike Rule 58(e) or Rule 4(a)(4)(A)(iii)—a district court can revive an untimely notice of appeal after the original deadline to appeal has lapsed if the motion for extension is based on excusable neglect or good cause under Rule 4(a)(5), but Rule 4(a)(5) did not apply because neither the appellant nor district court had relied on that rule.

Texas Law

Douglas v. Wells Fargo Bank, N.A., 992 F.3d 367, 374 (5th Cir. 2021)

In this mortgage-foreclosure dispute, the Douglases sued Wells Fargo Bank for various claims related to the foreclosure sale of their home, violation of constitutional due process, and violation of the Texas Debt Collection Act (TDCA). The district court either dismissed or granted summary judgment in favor of Wells Fargo on all claims. The Fifth Circuit affirmed.

The foreclosure-sale claims hinged on the allegation that Wells Fargo failed to send a foreclosure notice in violation of the deed of trust and the Texas Property Code. Although the Douglases asserted that they did not receive the notice, that was not enough to create a factual dispute to defeat summary judgment, because the dispositive inquiry is not receipt of

notice, but rather service of notice.

The district court did not err in disposing of the constitutional due process claim either, when the Douglases raised it for the first time in response to the motion for summary judgment. The Fifth Circuit has taken two different approaches to claims raised for the first time in response to a motion for summary judgment: (1) hold that the new claim is not properly before the court, or (2) treat the new claim as a request for leave to amend and determine whether leave should be granted. Under either analysis, the Douglases' new claim failed.

The last issue was whether Wells Fargo violated section 392.304(a)(8) of the TDCA, which prohibits misrepresenting the character, extent, or amount of consumer debt. The full panel held that, even assuming statements by Wells Fargo about the amount due were inaccurate, they were not actionable because the inaccuracies did not lead the Douglases to think differently about the amount actually due. The majority also held that a telephone conversation, during which Wells Fargo purportedly agreed to accept a certain reduced payment to bring the loan current, was not actionable due to the statute of frauds. Because there is no dispute that the loan agreement was subject to the statute of frauds, any modification of the loan agreement was also subject to the statute of frauds. Therefore, the telephone conversation was unenforceable and thus could not be the basis of a TDCA violation.

The dissent disagreed with disposal of the TDCA claim based on the telephone conversation. The dissent faulted the majority for applying contract-law principles to a TDCA claim. Although the majority analysis might be right if the Douglases had asserted breach of contract, an enforceable contract is not a prerequisite for a TDCA claim. TDCA and contract claims can exist independently from one another. Therefore, the dissent would have held that the telephone conservation constituted an actionable representation under the TDCA.

An oral agreement to modify a loan that is unenforceable under the statute of frauds cannot be the basis of a Texas Debt Collection Act claim.