2016 Appellate Advocacy Seminar

United States Court of Appeals for the Fifth Circuit

Civil Law Case Update

Notice of Appeal –

Sudduth v. Texas Health & Human Services Commission No. 15-50764

A notice of appeal of a District Court's judgment is timely filed when it is docketed in a District Court's Case Management/Electronic Case Files (CM/ECF) system and a notice of electronic filing of that appeal is sent to counsel. The notice of electronic filing received by plaintiff reflected that her appeal was filed one day late. Accordingly, the Fifth Circuit dismisses her appeal for lack of jurisdiction.

Wilson v. Navika Capital Group LLC No. 15-20204

Federal Rule of Appellate Procedure 3(c)(1)(A) states that a notice of appeal must "specify the party or parties taking the appeal by naming each one in the caption or body of the notice." Fed. R. App. P. 3(c)(1)(A). However, "an attorney representing more than one party may describe those parties with such terms as 'all plaintiffs,' 'the defendants,' 'the plaintiffs A, B, et al.,' or 'all defendants except X.'" *Id.* Because one attorney may represent all potential Rule 3(c)(1)(A), states that a notice of appeal must "specify the party or parties taking the appeal by naming each one in the caption or body of the notice." Fed. R. App. P. 3(c)(1)(A). In the instant case, because one attorney represented all five potential plaintiffs in this appeal, plaintiffs–appellants argued that the use of "Plaintiffs Wilson et al." was sufficient to comply with the requirements of Rule 3(c). Disagreeing, the Fifth Circuit concludes that "Plaintiffs Wilson et al." did not make it "objectively clear" which plaintiffs–appellants were involved in this appeal, and found that the descriptor was insufficient to comply with Rule 3(c). But, the notice of appeal was not deficient as to all plaintiffs–appellants. The appeal of all others was dismissed for want of jurisdiction.

Underwood v. General Motors, LLC No. 15-30831

Unmentioned orders fall outside the scope of the appellants' notice of appeal, and the Court lacks jurisdiction to review them.

Fair Debt Collection Practices Act –

Daugherty v. Convergent Outsourcing, Inc. No. 15-20392

Joining the Sixth and Seventh Circuits, the Fifth Circuit holds that a collection letter for a time-barred debt containing a discounted "settlement" offer—but silent as to the time bar and without any mention of litigation—could mislead an unsophisticated consumer to believe that the debt is enforceable in Court, and therefore violates the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. §§ 1692-1692p. The Third and Eighth Circuits have stated that "[i]n the absence of a threat of litigation or actual litigation, no violation of the FDCPA has occurred when a debt collector attempts to collect on a potentially time-barred debt that is otherwise valid."

Class Action–

Robertson v. Exxon Mobil Corp. No. 15-30920

This lawsuit alleged personal and property damages stemming from oil pipe-cleaning operations was filed in Louisiana state court and removed to Federal Court under the Class Action Fairness Act. The District Court allowed jurisdictional discovery and then ordered the case remanded to state court on the ground that defendants had not met their burden of showing that at least one plaintiff satisfies the individual amount-in-controversy requirement that CAFA applies to so-called "mass actions." Reversing the District Court, the Fifth Circuit holds that defendants did make the showing.

Forum Selection Clause – *Forum Non Conveniens* –

Barnett v. DynCorp International, L.L.C. No. 15-10757

Jonathan Barnett alleged that his former employer, DynCorp International LLC, failed to give him all of the pay and benefits he was owed for work he did in Kuwait. DynCorp moved to dismiss on the basis of *forum non conveniens*, arguing that the Agreement's forum-selection clause mandated that the action be litigated in Kuwait. Barnett opposed the motion, responding that the forum-selection clause was void under Texas law and unenforceable under Federal law. The District Court granted the motion, concluding that the forum-selection clause was valid, enforceable, and required dismissal under *Atlantic Marine Construction Co. v. United States District Court*, 134 S. Ct. 568 (2013). In an appeal highlights a lack of clarity about the role state law plays in diversity cases involving forum-selection clauses after *Atlantic Marine*, the Fifth Circuit affirms the judgment of the District Court, holding that Barnett failed to show that

enforcement of the parties' bargained-for choices of law and forum would contravene a strong or fundamental policy of the forum state.

Weber v. Pact XPP Technologies, AG No. 15-40432

Peter Weber appealed a judgment of dismissal, without prejudice, based on *forum non conveniens*. The District Court decided that the subject contract contained a valid and enforceable forum selection clause requiring litigation in Germany. The Fifth Circuit finds that the clause is mandatory and enforceable, and because no overwhelming public interest requires retention in Texas, it affirms.

Arbitration –

Nelson v. Watch House International, LLC No. 15-10531

Michael Nelson, a former employee of Watch House International, L.L.C., appealed from the District Court's order granting Watch House's motion to compel arbitration and dismissing Nelson's claims. The District Court held, *inter alia*, that the parties' arbitration agreement was not illusory under *In re Halliburton Co.*, 80 S.W.3d 566 (Tex. 2002). Concluding that the parties' agreement contains no *Halliburton*-type savings clause that requires advance notice before termination is effective, the Fifth Circuit reverses and remands.

Kubala v. Supreme Production Services, Inc. No. 15-41507

Ted Kubala brought a proposed Fair Labor Standards Act ("FLSA") collective action against his employer, Supreme Production Services, Incorporated ("Supreme"). After the action was filed but, according to Supreme, before it had learned of the suit, the company announced a new policy requiring employees to arbitrate employment disputes, including FLSA claims. The agreement indicated that an employee's continued employment was expressly conditioned on his acceptance of the terms of the agreement; it contained a "delegation clause" that assigned to the arbitrator the power to make gateway determinations as to the arbitrability of a specific claim. Kubala continued employment and accepted payment for his work. The District Court denied Supreme's motion to dismiss or compel arbitration. Holding that the arbitration agreement is binding and contains a delegation clause transferring the power to decide threshold questions of arbitrability to the arbitrator, the Fifth Circuit reverses and remands and directs the District Court to enter an order compelling arbitration.

Fair Labor Standards Act –

Naylor v. Securiguard, Inc. No. 14-60637

Department of Labor regulations generally exempt meal breaks from pay requirements but specify that such breaks ordinarily last at least thirty minutes. The employer in this case scheduled thirty-minute breaks for meals but imposed traveling obligations that ate into the employees' time for meals. The Fifth Circuit concludes that a jury could reasonably find that, because of these obligations, the breaks are more like mere rest periods and thus compensable under the Fair Labor Standards Act. Because it finds that a jury could find that the remaining meal breaks did not allow enough time for the employees to use the break for their own purposes to qualify as noncompensable, the Fifth Circuit reverses the District Court's grant of summary judgment in favor of the employer.

Civil Procedure –

Flagg v. Stryker No. 14-31169

An en banc Fifth Circuit decides that the District Court erred by dismissing the non-diverse defendants as improperly joined and exercising diversity jurisdiction over the remaining diverse defendants. An en banc majority concludes that the District Court did not err by concluding that the plaintiff had improperly joined the non-diverse defendants because the plaintiff had not exhausted his claims against those parties as required by the Louisiana Medical Malpractice Act.

Passmore v. Baylor Health Care System No. 15-10358

Section 74.351 of the Texas Civil Practice and Remedies Code requires plaintiffs in health care liability cases to serve an expert report within 120 days after the filing of a defendant's original answer. Robert Passmore and his wife brought this health care liability suit against Baylor Health Care System, Baylor Regional Medical Center of Plano, and nurse Kimberly Morgan to recover damages for injuries that Mr. Passmore suffered as a result of undergoing two back surgeries at Baylor Regional Medical Center. The Passmores filed their suit in Federal Court under the Court's bankruptcy jurisdiction. Following limited discovery, the defendants moved to dismiss because the Passmores had failed to serve an expert report in accordance with section 74.351's requirements, and the District Court ultimately accepted their position and dismissed the case with prejudice. The Fifth Circuit holds that section 74.351 applies in Federal Court and therefore reverses the judgment of the District Court.

Jones Act – Maritime - Pleadings

Thomas v. Chevron USA No. 15-20490

Wren Thomas, the captain of the *C-Retriever*, a supply vessel supporting Chevron's platform operations in the Agbami Field off the Nigerian coast. He sued Chevron USA, Inc. after he was kidnapped and tortured by pirates. In his original petition, Thomas alleged that he told Chevron that he feared pirate attacks. The District Court issued an opinion granting Chevron's motion for summary judgment and denying Thomas's motion for leave to amend. It concluded, "Thomas's motion to amend pleadings is denied because the proposed amendment would be futile." Thomas timely appealed. Because the notice Thomas gave of his intent to amend his complaint was sufficient under the Fifth Circuit's precedent, and because his amended claims would not have been futile, the Fifth Circuit vacates the District Court's judgment, reverses the District Court's ruling on Thomas's motion for leave to amend.

Attorney Liability –

Troice v. Proskauer Rose No. 15-10500

The Fifth Circuit rules that under Texas law, attorney immunity a true immunity of suit, such that denial of a motion to dismiss based on attorney immunity is appealable under the collateral order doctrine. The Court reverses the District Court's order denying defendants' motions to dismiss based on attorney immunity now that the Texas Supreme Court has clarified that there is no "fraud exception" to attorney immunity.

Trademark –

Pennzoil-Quaker State Co. v. Miller Oil & Gas Operations No. 13-20558

The holder of a trademark has certain rights, among them the power to prohibit another entity from using its mark without its consent. Those rights are subject to equitable defenses, including acquiescence, where the markholder affirmatively represents to another that it may use its mark, who then relies on that representation to its prejudice. Clarifying the role that undue prejudice plays in the analysis of acquiescence, the Fifth Circuit concludes that the defendant here failed to demonstrate that it was unduly prejudiced by any representations made by the markholder.

Experts –

Carlson v. Biormedic Therapeutic Systems No. 14-20691

David Carlson suffered severe injuries soon after being treated with the defendants' product, the ProNeuroLight. He and his wife brought this products liability suit against the defendants. At trial, the defendants' only witness was a chiropractor who had examined Carlson and had been trained to use the ProNeuroLight. Reversing the District Court, the Fifth Circuit holds that the District Court erred in allowing that witness to give expert testimony without first making a determination about his qualifications.

Civil and Constitutional Rights –

Mason v. Lafayette City-Parish Consolidated Government No. 14-30021

Officer Martin Faul fatally shot Quamaine Mason while responding to a reported armed robbery. Mr. Mason's parents, Brenda and Billy Mason sued Faul asserting Fourth, Fifth, Eighth, and Fourteenth Amendment violations. The Masons also brought *Monell* claims against Faul's employer, Lafayette City–Parish Consolidated Government and James Craft, Lafayette's Chief of Police. Faul raised the defense of qualified immunity. The District Court granted the defendants' motion for summary judgment and dismissed all of the Masons' claims. Finding there to be material fact issues that preclude summary judgment in favor of Faul on the basis of qualified immunity, the Fifth Circuit reverses the summary judgment as to Faul on the Masons' Fourth Amendment and state law claims.

Brinsdon v. McAllen Independent School District No. 15-40160

When Brenda Brinsdon was a sophomore at a high school in McAllen, Texas, she was required to participate in what defendants claim was a mock performance of the Mexican Pledge of Allegiance as an assignment for her Spanish class. She refused, and later filed suit, alleging the defendants violated her Constitutional rights. The District Court entered summary judgment for the defendants on some of Brinsdon's claims. After a trial on the remaining claims, it entered judgment as a matter of law for the defendants. The Fifth Circuit affirms.

Groden v. City of Dallas, Texas No. 15-10073

Groden is the author of several books claiming to reveal the truth behind the assassination of President Kennedy. Groden sells his books and magazines on the grassy knoll area of Dealey Plaza in Dallas. Groden alleged that his sales were legal but nevertheless annoyed a nearby business, the Sixth Floor Museum. Groden was arrested and the City charged him with violating Dallas City Code § 32-10, which prohibits selling merchandise in a park. The city courts, however, determined that Dealey Plaza is not a park and quashed Groden's indictment; the city appealed, and lost. Groden sued the City of Dallas and Gorka under 42 U.S.C. § 1983. Groden alleged that the City had adopted a policy—which he termed the "crackdown policy"—of arresting vendors in Dealey Plaza despite knowing that no law provided probable cause for the arrests/ The District Court identified two reasons to dismiss Groden's complaint against the city of Dallas. The Fifth Circuit finds that the first reason was founded on an error of law; the other was based on an erroneous reading of Groden's complaint. Accordingly, it reverses the dismissal of Groden's complaint against the City.

Howell v. Town of Ball No. 15-30552

Thomas Howell, a former police officer for the town of Ball, Louisiana, brought this action against the town of Ball and several individual defendants. Howell alleged that the defendants violated his First Amendment rights when he was fired for cooperating with an FBI investigation of public corruption. Howell also asserted a claim under the False Claims Act, alleging that he was fired in violation of the Act's whistleblower protections. The Fifth Circuit finds that the District Court erred in holding that Howell's involvement in the FBI investigation was not entitled to First Amendment protection. Although it holds that Howell asserted a violation of his right of free speech, it further holds that the right at issue was not "clearly established" at the time of his discharge. The District Court's dismissal of the individual defendants on the basis of qualified immunity was therefore affirmed. But, the Fifth Circuit reverses and vacates the grant of summary judgment for the town of Ball finding that Howell had demonstrated a viable claim of municipal liability under *Monell v. Department of Social Services*, 436 U.S. 658 (1978).

Sullivan v. City of Round Rock, Texas No. 15-51204

Officers Nathan Zoss, Kristen Mayo, and Aaron Ballew forcibly removed William Sullivan from his pickup truck after he refused to comply with their lawful commands to exit the vehicle. In the process, Sullivan, who was heavily intoxicated, morbidly obese, and handicapped, suffered a serious injury that rendered him a quadriplegic. A few months later, Sullivan died. In the ensuing civil lawsuit, the officers moved for summary judgment based on qualified immunity, which the District Court denied, finding that there were genuine disputes of material facts. The Fifth Circuit concludes that the District Court erred because, even on plaintiffs' version of the tragic facts, the officers did not violate Sullivan's constitutional rights.

Dearman v. Stone County School District No. 15-60506

Kristi Dearman sued the Stone County, Mississippi, School District under 42 U.S.C. § 1983, claiming the non-renewal of her teaching contract was in retaliation for expressing her First Amendment support for a candidate for school superintendent. Dearman further contended that her procedural due process rights under the Fourteenth Amendment were ignored, saying that she was deprived of a hearing to contest her discharge. The District Court granted summary judgment in favor of the School District. The Fifth Circuit affirms, explaining that Dearman has not shown that her protected speech was the cause of her discharge, nor has she shown that she was denied adequate pre-termination process under the Fourteenth Amendment.

Gonzlez v. Huerta No. 15-20212

Carlos Gonzalez drove his gold-colored sports utility vehicle (SUV) to Bendwood Elementary School to pick up his wife, a school employee. Gonzalez was accompanied by his thirteen-year-old daughter, who rode in the back seat. Gonzalez backed into a parking space in the school lot and waited for his wife. Another employee noticed his vehicle, deemed it suspicious, and contacted the school district police, who dispatched Officer Huerta to investigate. While en route, Huerta received additional information regarding a history of vehicle burglaries at the same location, although no evidence connected any of these prior incidents to a gold SUV. Huerta arrived at the school, matched Gonzalez's vehicle to the dispatcher's description, and approached the driver's side. Huerta then asked Gonzalez to produce his identification. Gonzalez asked for a justification for the request. Huerta repeated the request, and Gonzalez again asked for a justification. Huerta stated that he would provide a justification after Gonzalez provided his identification. Gonzalez produced a cell phone and stated that he was calling his attorney, but he hung up without speaking to anyone. Huerta then

handcuffed Gonzalez, removed him from the vehicle, and placed him in the back of the patrol car, holding him there for over thirty minutes. Gonzalez's wife eventually appeared, and once Huerta confirmed Gonzalez's identity and his purpose at the school, he released him. Gonzalez filed a § 1983 claim against Huerta alleging illegal detention, false arrest, and excessive force in violation of the Fourth Amendment. Huerta asserted qualified immunity and moved for summary judgment. The District Court granted the motion, finding that Huerta's investigative detention of Gonzalez was supported by reasonable suspicion and that Huerta was entitled to qualified immunity. Finding no violation of clearly established law, the Fifth Circuit affirms.

Allen v. Cisneros No. 15-20264

David Allen participated in several demonstrations throughout the City of Houston that led to his detention and arrest by police officers, Aaron Cisneros and Juan Montelongo. Allen brought claims under 42 U.S.C. § 1983 against Sergeant Cisneros and Officer Montelongo, among others, alleging that the officers violated his Constitutional rights. The District Court denied the officers' motion for summary judgment on qualified immunity grounds, and the officers appealed. Holding that the officers are entitled to qualified immunity, the Fifth Circuit reverses the District Court's order denying summary judgment.

IDEA Attorney's Fees –

D.G. v. New Caney Independent School District No. 15-20079

A mother proved in an administrative hearing that a school district had violated her child's right to a free appropriate public education by repeatedly placing him in isolation during school hours. Congress has provided that the prevailing party in such a hearing may file an action in federal court to recover reasonable attorneys' fees. This appeal questioned how quickly that action must be filed. The Fifth Circuit reverses the District Court's determination that a party who prevails in an administrative hearing under the Individuals with Disabilities Education Act must seek attorneys' fees no later than ninety days after the hearing officer's decision.

Title VII –

Combs v. City of Huntington No. 15-40436

Deadra Combs brought a Title VII sexual harassment suit against the City of Huntington asserting hostile work environment, quid pro quo, and retaliation claims. Combs succeeded only on her hostile work environment claim and was awarded a fraction of the damages she sought. Combs then moved for attorney's fees. After calculating the lodestar, the District Court reduced the fee award, concluding that the ratio between attorney's fees and damages was excessively disproportionate. Combs appealed, contending that the District Court abused its discretion by reducing the award. Because it finds that there is no requirement of strict proportionality between attorney's fees and damages, the Fifth Circuit vacates the fee award.

Porter v. Houma Terrebonne Housing Authority No. 14-31090

In this case, the Fifth Circuit considers a retaliation claim by an employee whose attempt to rescind her resignation was denied. Tyrikia Porter worked for the Houma Terrebonne Housing Authority for several years. She offered her resignation in June of 2012, but before finishing her employment, she testified against the Executive Director, Wayne Thibodeaux, claiming sexual harassment. When Porter attempted to rescind her resignation at the urging of other superiors at work, Thibodeaux rejected her rescission. In considering the factual context of a retaliation claim to determine if the employer has taken an adverse employment action, and in finding that Porter had demonstrated a substantial conflict of evidence on the question of whether her employer would have taken the action 'but for' her testimony, the Fifth Circuit reverses the District Court's grant of summary judgment.

RICO –

Allstate Insurance Company v. Plambeck No. 14-10574

The Fifth Circuit affirms a jury's verdict in favor of Allstate Insurance Company on the insurer's claims that a consortium of telemarketing companies, chiropractic clinics, and affiliated law offices spanning several states, violated the Racketeer Influenced and Corrupt Organizations Act.

Bankruptcy –

Janvey v. The Golf Channel, Inc. No. 13-11305

Stanford International Bank, Limited paid $5.9 million to The Golf Channel, Inc., in exchange for a range of advertising services aimed at recruiting additional investors into Stanford's multi-billion dollar Ponzi scheme. After the scheme was uncovered by the SEC and the District Court seized Stanford's assets, the Court-appointed receiver filed suit under the Texas Uniform Fraudulent Transfer Act (TUFTA) to recover the $5.9 million paid to Golf Channel. The District Court granted Golf Channel's motion for summary judgment, having determined that although Stanford's payments were fraudulent transfers under TUFTA, Tex. Bus. & Com. Code § 24.005(a)(1), Golf Channel had established the affirmative defense that it received the payments "in good faith and for a reasonably equivalent value," *id.* § 24.009(a). The Fifth Circuit initially reversed the District Court's judgment, reasoning based on the text of TUFTA, the comments in the Uniform Fraudulent Transfer Act (UFTA), and its binding precedent that the payments to Golf Channel were not for "value" because Golf Channel's advertising services could only have depleted the value of the Stanford estate and thus did not benefit Stanford's creditors. The Court certified the question to the Supreme Court of Texas which answered that "Golf Channel's media-advertising services had objective value and utility from a reasonable creditor's perspective at the time of the transaction, regardless of Stanford's financial solvency at the time." Recognizing that the Supreme Court of Texas is the authoritative interpreter of TUFTA , and that it is bound by its answer to its certified question when applying that statute, the Fifth Circuit affirms the District Court's grant of summary judgment for Golf Channel.

Personal Injury –

Guzman v. Jones No. 15-40007

Finding no abuse of discretion, the Fifth Circuit affirms the District Court's decision to admit evidence of plaintiff's medical expenses and refusing to provide an adverse jury instruction in defendants' favor based on spoliation of evidence after plaintiff underwent back surgery prior to a requested medical examination.

Intervention –

Entergy Gulf States La. v. EPA No. 15-30397

This appeal concerned a reverse-Freedom of Information Act ("FOIA") suit brought by Entergy Gulf States Louisiana, L.L.C. and Entergy Arkansas, Inc. against the United States Environmental Protection Agency to prevent the disclosure of documents requested by Sierra Club via a FOIA request. Sierra Club appealed the District Court's decision denying its motion to intervene of right in the reverse-FOIA suit. The Fifth Circuit reverses the District Court reasoning that because Sierra Club's interests diverge from EPA's interests in manners germane to this case, adversity of interest exists between Sierra Club and EPA. And, because adversity of interest exists, any same-ultimate-objective presumption of adequate representation is overcome, and the requirement that Sierra Club's interests be inadequately represented by EPA is satisfied.

Sommers v. Bank of America, N.A. No. 15-20775

The Fifth Circuit upholds the District Court's denial of a motion to intervene as of right, agreeing that the motion is untimely. The Court explains that what matters is not when the intervenor knew or should have known that his interests would be adversely affected but, instead, when he knew that he had an interest in the case.

Environment –

Louisiana State v. United States Army Corps of Engineers No. 15-30962

Following Hurricane Katrina, in which the breach of the Mississippi River-Gulf Outlet ("MR-GO") channel caused massive flooding, Congress directed the U.S. Army Corps of Engineers ("Corps") to close the MR-GO as a Federal navigation project and restore the surrounding ecosystem. To implement Congress's 2007 mandate that the deauthorization be "cost effective" and in accordance with a 2006 appropriation bill, the Corps sought a cost-sharing arrangement with the State of Louisiana. Louisiana objected to any cost-sharing arrangement and sued the Corps under the Administrative Procedure Act ("APA"), contending that the Corps' decision, expressed in two Corps reports to Congress, was arbitrary and capricious and an abuse of discretion because the relevant statutes require the Federal Government to bear 100 percent of the costs. The District Court agreed with Louisiana. The Fifth Circuit reverses the District Court's judgment that overturned the required cost-sharing between Louisiana and the Corps, finding that the cost-sharing constitutes a reasonable interpretation of ambiguous statutes.

Novation – Attorney's Fees –

HDRE Business Partners Limited Group, L.L.C. v. RARE Hospitality International, Inc. No. 15-30487

HDRE Business Partners Limited Group, L.L.C., appealed the District Court's award of attorneys' fees for RARE Hospitality International, Inc., under an attorneys' fees provision in a lease agreement between the parties that was subsequently novated by another agreement. Because it finds the attorneys' fees provision was extinguished when the lease was novated, the Fifth Circuit reverses the District Court's judgment awarding attorneys' fees.

Wrongful Termination / Defamation -

Swindol v. Aurora Flight Sciences Corp. No. 14-60779

Robert Swindol worked for Aurora Flight Sciences Corporation in Columbus, Mississippi. In May 2013, he parked his truck in Aurora's employee parking lot with his firearm locked inside. Aurora's management learned of the firearm and fired Swindol later that day for violating company policy prohibiting firearms on its property. Aurora's human resources manager then held a plant-wide meeting to inform employees that Swindol was a "security risk" and that they should call 9-1-1 if he was seen near Aurora's facility. The District Court dismissed Robert Swindol's wrongful discharge and defamation claims under Federal Rule of Civil Procedure 12(b)(6). It held that Mississippi's employment-at-will doctrine barred the wrongful discharge claim and that falsity had not been adequately alleged for the defamation claim. Finding that the wrongful discharge claim presented an important and determinative question of state law that had not been addressed by Mississippi courts, the Fifth Circuit certified the following question to the Mississippi Supreme Court: "Whether in Mississippi an employer may be liable for a wrongful discharge of an employee for storing a firearm in a locked vehicle on company property in a manner that is consistent with Section 45-9-55." Section 45-9-55(5) provides that a public or private employer may not establish, maintain, or enforce any policy or rule that has the effect of prohibiting a person from transporting or storing a firearm in a locked vehicle in any parking lot, parking garage, or other designated parking area. Answering the Fifth Circuit's certified question, the Mississippi court responded that this statute can make an employer liable for wrongful discharge. Because Swindol alleged he was terminated when Aurora enforced a legally impermissible firearms policy against him, and he sought damages. Based on the Mississippi court's response, the Fifth Circuit concludes that Swindol has stated a claim for wrongful discharge under Mississippi law. Because Swindol failed to allege the purported defamatory statements were false, the Fifth Circuit agrees that the dismissal of his defamation claim under Rule 12(b)(6) was proper

Summary Judgment -

Heinsohn v. Carabin & Shaw, P.C. No. 15-50300

Cynthia Heinsohn brought this action in Texas court against her former employer, Defendant-Appellee, the law firm of Carabin & Shaw, P.C. ("C&S"). She alleged violations of the Family Medical Leave Act and the Texas Commission on Human Rights Act. C&S removed the action to Federal Court. Following discovery, both C&S and Heinsohn moved for summary judgment. The Magistrate Judge recommended granting C&S's motion and denying Heinsohn's. The District Court agreed, and entered judgment. Heinsohn appealed. The Fifth Circuit reverses and remands, declaring that "[w]hen, as here, a motion for summary judgment is premised almost entirely on the basis of depositions, declarations, and affidavits, a court must resist the urge to resolve the dispute—especially when, as here, it does not even have the complete depositions. Instead, the finder of fact should resolve the dispute at trial."

Injunction/Stay –

Google, Inc. v. Hood No. 15-60205

Mississippi's Attorney General, James M. Hood III, believed that internet giant Google might be liable under state law for facilitating dangerous and unlawful activity through its online platforms. Hood's conflict with Google culminated in his issuance of a broad administrative subpoena, which Google challenged in Federal Court. The District Court granted a preliminary injunction prohibiting Hood from (1) enforcing the administrative subpoena or (2) bringing any civil or criminal action against Google "for making accessible third-party content to internet users." Hood appealed, arguing that the District Court should have dismissed Google's suit on a number of threshold grounds, and in any event erred in granting injunctive relief. Vacating the injunction, the Fifth Circuit concludes that the District Court erred in granting injunctive relief because neither the issuance of the non-self-executing administrative subpoena nor the possibility of some future enforcement action created an imminent threat of irreparable injury ripe for adjudication.

Americans with Disabilities Act –

Cannon v. Jacobs Field Services North America, Inc. No. 15-20127

Jacobs Field Services (JFS), a construction company, offered Michael Cannon a job as a field engineer at a Colorado mining site. But it quickly revoked the offer after learning that Cannon had a rotator cuff impairment that prevented him from lifting his right arm above the shoulder. Cannon brought suit under the Americans with Disabilities Act (ADA). The District Court granted summary judgment, finding that Cannon could not prove that he was disabled or a qualified individual. Because the first finding ignored Congress's expansion of the definition of disability when it amended the ADA in 2008 and a factual dispute exists on the second, the Fifth Circuit reverses.

Insurance –

Crose v. Humana Insurance Company No. 15-50559

On June 23, 2013, while Eleanor Crose attended a concert, her husband Ronald Crose ingested ecstasy. The next morning, Ms. Crose found Ronald lying down in the backyard, non-responsive with his face covered in vomit. He had suffered a stroke. Mr. Crose submitted a claim with Humana under the policy to cover the cost of medical services and treatments provided to Mr. Crose as a result of his stroke. Humana denied the claim, citing the policy's exclusion from coverage any loss due to being intoxicated or under the influence of any narcotic unless administered on the advice of a health care practitioner. Ms. Crose filed suit claiming breach of contract, unfair insurance practices, and prompt payment violations under the Texas Insurance Code. Humana filed a motion for summary judgment, which the District Court granted. Ms. Crose appealed. Affirming the District Court's judgment, the Fifth Circuit agrees that Humana met its burden to show that the term "narcotic" included ecstasy and that Mr. Crose's stroke was "due to . . . being under the influence" of ecstasy. The Court notes that there is ample evidence in the record that ecstasy can lead to a stroke and that ecstasy can lead to a stroke. The Court explains that the temporal proximity between an otherwise healthy man taking ecstasy and then experiencing severe headaches and having a stroke is relevant proof of causation.

Individuals with Disabilities Education Act –

Seth B. v. Orleans Parish School Board No. 15-30164

Under the Individuals with Disabilities Education Act and its implementing regulations, parents who disagree with a school district's evaluation of their child may be entitled to an independent educational evaluation (IEE) at public expense. The parents of Seth B., a child who had previously been diagnosed with autism, asked the Orleans Parish School Board for such an evaluation. After the board assented, Seth's parents obtained the IEE and sought reimbursement. The school board denied their request on the ground that the IEE did not conform to state criteria. A state administrative hearing officer and the District Court subsequently ruled that reimbursement was not warranted. In an issue of first impression, the Fifth Circuit vacates and remands the judgment of the District Court.

Constitutionality –

Harris v. Texas Veterans Commission No. 15-20105

Keith Harris is a resident of Texas and an honorably discharged veteran of the United States Army. He challenged the Constitutionality of the residency requirements in the Hazlewood Act, which provides tuition waivers at public universities for certain Texas veterans who enlisted in Texas or were residents of Texas at the time they enlisted. Dismissing Texas's asserted interest in promoting education by creating an incentive for Texans to graduate from high school and enlist, the District Court determined that the fixed-point residency requirement violated the Equal Protection Clause. Texas appealed. Finding that Texas has presented a rational basis for its residency-at-enlistment requirement and because Texas's decision to impose the condition on a portable benefit does not infringe Harris's right to travel, the Fifth Circuit reverses.

Immigration – Equitable Estoppel –

Gutierrez v. Lynch No. 14-60693

An Immigration Judge ordered that Orlando Gutierrez be removed from the United States. Gutierrez appealed the Immigration Judge's removal order to the Board of Immigration Appeals, which dismissed the appeal. Gutierrez petitioned the Fifth Circuit for review of the BIA's order. He claimed that he was not subject to removal because he became a lawful permanent resident before he turned eighteen, and thereby automatically became a United States citizen under the Child Citizenship Act of 2000.

The Fifth Circuit disagrees and denies Gutierrez's petition. Agreeing with the BIA, the Court holds that Gutierrez became a permanent resident in 2004, when USCIS formally approved his application, distinguishing that the I-89 Form that the INS officer certified in 2000 was not an "order of the Attorney General" approving Gutierrez's application for adjustment of status. The Court rejects Gutierrez's alternative argument that the United States is equitably estopped from removing him from the country because it unreasonably delayed issuing his lawful permanent resident card.

ERISA –

Gomez v. Ericsson, Inc. No. 15-41479

Ericsson, Inc. laid off Mark Gomez. Gomez was eligible for severance compensation if he complied with the terms of a Release and Severance Agreement. Ericsson determined that he did not comply with a provision requiring the return of all Ericsson property because work files were missing on the company laptop he returned. The District Court granted summary judgment to Ericsson, ruling that the company had not abused its discretion in denying severance pay. The Fifth Circuit explains that a provision requiring the return of property at the end of one's employment is reasonable and common. It is an expected part of a satisfactory departure from one's employer. And it is in line with the overall terms of the Plans that are aimed at providing severance to those who depart the company on good terms through no fault of their own. Accordingly, the Fifth Circuit affirms that the District Court did not err in ruling as a matter of law that the Plan allowed Ericsson to deny benefits on the ground that Gomez failed to meet the return of property condition.

Constitutional Rights –

Buehler v. City of Austin No. 15-50155

Officers of the Austin Police Department thrice arrested Antonio Buehler for interfering with police duties while he filmed APD interactions with other citizens. State magistrates and a grand jury found probable cause for each arrest, though the grand jury did not indict Buehler on more serious charges cited when he was arrested. Buehler sued the officers and the City of Austin for violating his Constitutional rights. The District Court granted summary judgment for the defendants, reasoning that under the Fifth Circuit's "independent intermediary doctrine," the officers could not be held liable for arrests the grand jury found supported by probable cause. Because the independent intermediary doctrine is established Circuit law and Buehler presented insufficient evidence to support a finding that defendants "tainted" the grand jury proceedings, the Fifth Circuit affirms.

Trademark – Attorney's Fees –

Baker v. Deshong No. 14-11157

The Fifth Circuit adopts the Supreme Court's standard in *Octane Fitness, LLC v. Icon Health and Fitness, Inc.*, 134 S. Ct. 1749 (2014), which expanded the standard under which a lawsuit presents an "exceptional case" meriting the award of attorney fees. In so doing, it reverses and remands the District Court's denial of defendant's request for attorney's fees under the Lanham Act.

Jurisdiction – Federal Officer Removal Statute –

Savoie v. Huntington Ingalls, Inc. No. 15-30514

From 1952 through 1976, the great majority of ocean-going vessels built at Avondale Shipyard in Louisiana fulfilled contracts from the Federal Government. The specifications for these Navy and Coast Guard vessels required asbestos insulation through at least 1968. In this lawsuit brought by survivors of a worker who allegedly contracted mesothelioma while working at the shipyard during this time, the question was whether strict liability claims based on the existence of asbestos at the shipyard give rise to Federal jurisdiction under the Federal officer removal statute. The District Court construed all of the plaintiffs' claims as negligence claims. It then found that Federal jurisdiction did not exist because the shipyard retained discretion in its safety policies and could have complied with both the Government's requirements for the vessels' construction and its state law duties of care. The Fifth Circuit holds that the Government's detailed specifications, to which the shipyard was contractually obligated to follow, that required the use of asbestos that allegedly caused Savoie's death, was enough to show a causal nexus between the Savoies' strict liability claims and the shipyard's actions under the color of Federal authority.

Federal Tort Claims Act –

Gibson v. United States No. 14-31303

William Gibson fell and sustained injuries while exiting a trailer or mobile home owned by the Federal Emergency Management Agency. Gibson and his wife, Rita Gibson, sued FEMA under the Federal Tort Claims Act. The Fifth Circuit reverses the District Court's grant of FEMA's motion for summary judgment finding that FEMA's decision here to allow customers to fend for themselves in entering and exiting trailers did not require the kind of policy analysis relevant to the exception.

False Claims Act –

Rigsby v. State Farm Fire & Casualty Co. No. 14-60160

In April 2006, Cori and Kerri Rigsby brought this qui tam action under the False Claims Act claiming that State Farm Fire and Casualty Company submitted false claims to the United States Government for payment on flood policies arising out of damage caused by Hurricane Katrina. At trial, the Rigsbys prevailed on a single bellwether false claim under the FCA. The District Court subsequently denied their request to conduct further discovery, and denied State Farm's motions for a new trial and judgment notwithstanding the verdict. Both parties appealed. These cross-appeals presented four issues: 1) whether the Rigsbys were entitled to further discovery; 2) whether the Rigsbys' alleged violations of the FCA's seal requirement independently warranted dismissal - the FCA requires that a "copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the government." 31 U.S.C. § 3730(b)(2). The complaint must be filed in camera and remain under seal until the Court orders it served on the defendant. *Id.*; 3) whether the District Court retained subject matter jurisdiction throughout the litigation; and 4) whether the jury's verdict was supported by sufficient evidence. The Fifth Circuit reverses the District Court's decision to deny the Rigsbys additional discovery, but affirms the District Court's decisions with respect to the seal violations, subject matter jurisdiction, and State Farm's motion for judgment as a matter of law. Although the Fifth Circuit determines that the Rigsbys violated the seal requirement, it nonetheless finds that the breaches do not merit dismissal.

SCOTUS granted a writ of certiorari on May 31, 2016, limited to the following question:

Section 3730(b) of the civil False Claims Act ("FCA") permits a private person to bring a civil action in the name of the United States Government for violation ofsection 3729 of the Act. Section 3730(b)(2) requires that a relator's complaint "shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders." 31 U.S.C. § 3730(b)(2).

A three-way Circuit split exists as to the standard for determining whether to dismiss a relator's claim for violation of the FCA's seal requirement. Depending on the circuit, such a violation (i) mandates dismissal of the relator's claim, as the Sixth Circuit has held; (ii) mandates dismissal if the violation incurably frustrates the congressional goals served by the seal requirement, as the Second and Fourth Circuits have held; or (iii) warrants dismissal only if the seal violation caused actual harm to the Government pursuant to the balancing test applied by the Fifth Circuit in this case and the Ninth Circuit.

SCOTUS will hear oral argument on Tuesday, November 1, 2016.