CURRENT ISSUES IN COMMERCIAL LAW

DAVID S. COALE

Fifth Circuit Bar Association

New Orleans, LA

October 2, 2017

"The 5th U.S. Circuit Court of Appeals is widely viewed as one of the nation's most conservative federal appellate courts . . . "

Political Conservatism

Article III Conservatism

7th Amendment Conservatism

PLEADINGS

Fed'l Ins. v. Northfield Ins., 837 F.3d 548 (5th Cir. 2016)

"But because of the ***breadth and generality*** of the allegations in ExxonMobil's state court petition, we cannot say that all of the claims fall clearly within the exclusion. . . . ***[1]*** ExxonMobil's petition does not attach any of the petitions in the Louisiana Litigation. . . . ***[2]*** ExxonMobil's petition asserts only that '[a]ll three lawsuits in the underlying [Louisiana] litigation allege environmental damage and seek restoration and remediation of the land subject to mineral rights purchased by the Wagner Group.' . . . [T]hese assertions do not clearly allege claims that are all excluded by the Pollution Endorsement."

CONTRACTS / SETTLEMENTS

Lake Eugenie Land & Devel. v. BP,
___ F.3d ___, No. 15-30377 (5th Cir. May 23, 2017)

"[In interpreting a settlement, surely some weight has to be given to what damages recoverable in civil litigation ***actually are***." "BP argues that the ISMs are necessary in order to ensure that the Claims Administrator can 'process claims in accordance with ***economic reality***,' quoting our opinion in *Deepwater Horizon I*."	"When we said, in *Deepwater Horizon I*, that the Claims Administrator should 'process claims in accordance with economic reality,' we assumed that doing so would comport with the text of the Settlement Agreement. That assumption has proven to be wrong in light of the moving, smoothing, and otherwise reallocation of revenue inherent in the ISMs. ***The Settlement Agreement grants claimants the right to choose their own Compensation Period***. Because ***the ISMs infringe upon that right***, the district court's approval of the ISMs was in error and is reversed."

SCA Promotions v. Yahoo!,
___ F.3d ___, No. 15-11254 (5th Cir. Aug. 21, 2017)

"According to the district court, '[n]owhere does the Contract specify or identify the invoices, when they will be paid, or otherwise provide that the fee is $11 million.' ***But the Contract references 'invoice(s)' several times***, and it provides that '[t]his contract, including exhibits and attachments, represents the entire final agreement between Sponsor [Yahoo] and SCA, and supersedes any prior agreement, oral or written.'"

Total E&P USA v. Kerr-McGee Oil & Gas, 719 F.3d 424 (5th Cir. 2013)

DISTRICT COURT:

"[T]he subject 'Calculate and Pay' clauses are not ambiguous because they ***clearly provide*** that the overriding royalties 'shall be calculated and paid in the same manner and subject to the same terms and conditions as the landowner's royalty under the Lease."

MAJORITY:

"Those clauses ***do not clearly and explicitly state*** that payment of overriding royalties shall be suspended . . . Consequently, . . . ***a court may not find that the parties intended to suspend the overriding royalty obligation based exclusively on the words*** of the calculate and pay clauses but must interpret the overriding royalty contracts further in search of the parties' common intent."

CONCURRENCE:

"Appellees' argument points to meaning from a different grammatical arrangement , , , , [***H[ad the sentence separated that dependent clause by commas . . . Appellees would have a stronger argument as to clarity of meaning.*** Given the language of the contracts, however, I cannot say that, for the reasons above, the sentence is free of ambiguity."

DISSENT:

"Because royalty suspension is a term or condition . . . and the 'calculate and pay' clauses of the assignment contracts make the overriding royalty interests subject to the same terms and conditions as the landowner's royalty under the lease, ***I respectfully dissent from the majority's conclusion that the assignment contracts are ambiguous***.. . . ***The district court erred by failing to admit Appellants' extrinsic evidence of mutual mistake***. When making a claim for reformation the claimant may offer parol[] evidence, not to vary the terms of the written instrument, but to show the 'writing does not express the true intent or agreement of the parties.'"

SUMMARY JUDGMENT

Naylor v. Securiguard, Inc., 801 F.3d (5th Cir. 2015)

"Unlike a requirement that the employee stay in uniform, or even one that may result in the employee having to perform a duty on rare occasions, a jury could find that preventing the employee from eating—ostensibly the main purpose of the break—for ***twelve out of thirty minutes during every break*** is a meaningful limitation on the employee's freedom. The travel obligation thus cannot be deemed a mere 'inconvenience' as a matter of law."

St. Bernard Parish v. Lafarge N. Am.,
No. 13-30030 (5th Cir. Dec. 19, 2013)

"There is a great deal of testimony supporting Lafarge's position, to be sure, and little to support the Parish's, but we are mindful of the summary judgment standard . . . ."

DRAFTING INJUNCTIONS

Scott v. Schedler, 826 F.3d 207 (5th Cir. 2016)

"[T]he injunction refers generally to the defendant's policies without defining what those policies are or how they can be identified."

- ***Test Masters Educational Services v. Singh Educational Ser****vices*, 791 F.3d 561 (5th Cir. 2015) (vacating contempt finding against an attorney for allegedly encouraging his client to make inappropriate online postings, finding inadequate notice and a lack of evidence that the attorney had personally violated the relevant injunction)

- ***Oaks of Mid City Resident Council v. Sebelius***, 723 F. 3d 581, 585-86 (5th Cir. 2013) (reversing contempt order about injunction related to termination of a nursing home's Medicare contract)

- ***Hornbeck Offshore Services LLC v. Salazar***, 713 F. 3d 787, 795 (5th Cir. 2012) (reversing contempt order, noting: "In essence, the company argues that by continuing in its pursuit of an effective moratorium, the Interior Department ignored the purpose of the district court's injunction. If the purpose were to assure the resumption of operations until further court order, it was not clearly set out in the injunction.")

DRAFTING INJUNCTIONS

LYNN PINKER COX HURST

600Camp.com

MANDAMUS

In re: DuPuy Orthopaedics, Inc.
___ F.3d ___ (5th Cir. Aug. 31, 2017)

	Judge Jones	Judge Smith	Judge Costa
1. Clear error?	**Yes**	**Yes**	N/A
2. Lack of adequate remedy?	No	**Yes**	**Yes**
3. Request?	**Yes**	**Yes**	No

In re: DuPuy Orthopaedics, Inc.,
___ F.3d ___ (5th Cir. Aug. 31, 2017)

"***Despite finding serious error***, a majority of this panel denies the writ that petitioners seek to prohibit the district court from proceeding to trial on plaintiffs' cases."

"Petitioners claim that appeal is not an adequate remedy because the cost of having to defend more bellwether trials is 'unjustifiable' given the strength of their personal-jurisdiction claims. . . . At oral argument, the parties represented that each of the previous three bellwether trials lasted several weeks. But for appeal to be an inadequate remedy, there must be 'some obstacle to relief beyond litigation costs that renders obtaining relief not just expensive but effectively unobtainable.' ***Nor is the 'hardship [that] may result from delay'—such as the risk of substantial settlement pressure—grounds for granting a mandamus petition***."

In re: Crystal Power Co., 841 F.3d 82 (5th Cir. 2011)

"***We confess puzzlement*** over why respondents insist on litigating this case in federal court even though, as our previous opinion explained, ***any judgment issued by the district court will surely be reversed*** — no matter which side it favors — for lack of federal jurisdiction due to improper removal."

In re: Trinity Indus., Inc., No. 14-41-67
(5th Cir. Oct. 10, 2014)

"The court is compelled to note, however, that this is a close case. The writ is timely and the litigation stakes–the potential for a $1 billion adverse judgment–are unusually high. ***This court is concerned*** that the trial court, despite numerous timely filings and motions by the defendant, has never issued a reasoned ruling rejecting the defendant's motions for judgment as a matter of law."

ARBITRATION

Nelson v. Watch House Int'l, LLC,
815 F.3d 190 (5th Cir. 2016)

"Here, the Plan provides that Watch House may make unilateral changes to the Plan, purportedly including termination, and that such a change 'shall be immediately effective upon notice to' employees. Watch House's retention of this ***unilateral power to terminate the Plan without advance notice renders the plan illusory*** under a plain reading of *Lizalde [v. Vista Quality Markets*, 746 F.3d 222 (5th Cir. 2014)].

Vine v. PLS Fin. Servcs., No. 16-50847
(5th Cir. May 19, 2017)

1. ***Substantially invoke judicial process***. "[B]y allegedly submitting false worthless check affidavits, PLS 'invoke[d] the judicial process to the extent it litigate[d] a specific claim it subsequently [sought] to arbitrate.' . . . [A]ll claims involve whether PLS misled or threatened Vine, Pond, and the class of PLS customers they purport to represent in order to obtain outstanding debt owed to PLS."

2. ***Prejudice***. "'Prejudice in the context of arbitration waiver refers to delay, expense, and damage to a party's legal position.' Here, Vine and Pond would have borne the costs of defending against any theft by check prosecution. In addition, they would have suffered the preclusive effect of a conviction in any subsequent litigation. Consequently, they have sufficiently shown detriment or prejudice.'" (citations omitted, both quotes).

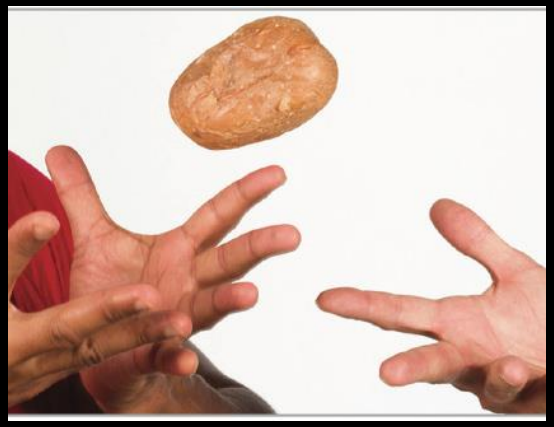
BNSF Railway Co. v. Alstom Transp.,
777 F.3d 785 (5th Cir. 2015)

"[The] question for decision by a federal court asked to set aside an arbitration award . . . is ***not*** whether the arbitrator or arbitrators erred in interpreting the contract; it is ***not*** whether they clearly erred in interpreting the contract; it is ***not*** whether they grossly erred in interpreting the contract, it is ***whether they interpreted the contract***

ANTI-SLAPP LAWS

Block v. Tanenhaus, ___ F.3d ___ (5th Cir. Aug. 15, 2017)

"Under the *Erie* doctrine, federal courts sitting in diversity apply state substantive law and federal procedural law. If there is a 'direct collision' between a state substantive law and a federal procedural rule that is within Congress's rulemaking authority, federal courts apply the federal rule and do not apply the substantive state law. . . . ***The applicability of state anti-SLAPP statutes in federal court is an important and unresolved issue in this circuit***."



A CLOSING NOTE ON "CONSERVATISM"

"[W]e conclude that if the Plaintiffs prove that the Defendants operated a fraudulent pyramid scheme, a jury may reasonably infer from the Plaintiffs' payments to join . . . that they relied on Ignite's implicit representation of legitimacy, when in fact it was a fraudulent pyramid scheme."
Torres v. S.G.E. Management, 838 F.3d 629 (5th Cir. 2016) (en banc)

JUDGES IN MAJORITY	JUDGES DISSENTING
Wiener*	Jolly
Costa*	Jones
Stewart	Clement
Davis	Owen
Smith	Haynes
Dennis	
Prado	
Elrod	
Southwick	
Graves	
Higginson	

CURRENT ISSUES IN COMMERCIAL LAW

DAVID S. COALE

Fifth Circuit Bar Association

New Orleans, LA

October 2, 2017