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FIFTH CIRCUIT UPDATE

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I. INTRODUCTION

This paper reviews selected opinions of the Court Appeals for the Fifth Circuit over the last year on topics of general interest about civil litigation. This year, the Court was once again presented with a number of complex civil proceedings, involving arbitration, parallel proceedings in state and/or federal courts, and class actions. There were also a number of personal jurisdiction challenges, which is not surprising in the wake of the Supreme Court's plurality decision in *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011). And the Court continued to reinforce the rigorous requirements for expert witness testimony.

II. FIFTH CIRCUIT UPDATE[1]

A. Abstention/Anti-Injunction Act

American Family Life Assur. Co. v. Biles, 714 F.3d 887 (5th Cir. 2013) (per curiam), involved several different proceedings arising out of a claim by family members against an insurance company, its agent, and one of the beneficiaries of an accident insurance policy who claimed that the decedent's signature on the policy application had been forged. The insurer, Aflac, invoked the arbitration clause of the policy, and when plaintiffs failed to comply, initiated a proceeding in federal court seeking an order compelling arbitration. The decedent's family moved the federal court to abstain from entertaining the suit under *Colorado River Water Conserv. Dist. v. U.S.*, 424 U.S. 800 (1976), in favor of their state court suit and claimed that the arbitration provision was invalid because the decedent's signature was a forgery. In support, they submitted an affidavit from a handwriting expert opining that the signature was probably forged. The federal district court held a *Daubert* hearing on both parties' handwriting experts and eventually granted the motion to strike the family's expert, denied the motion to strike Aflac's expert, and entered a final judgment compelling arbitration. The court of appeals affirmed on all grounds. It held that there were no "exceptional circumstances" justifying abstention under *Colorado River*, the two suits were not parallel, and the other considerations for that abstention doctrine weighed in favor of going forward in federal court. As a result of the arbitration order, the district court also had the authority to stay the related state-court proceeding without violating the Anti-Injunction Act when it determined that doing so was "necessary to protect of effectuate its order compelling arbitration." *Id.* at 893.

In *Saucier v. Aviva Life and Annuity Co.*, 701 F.3d 458 (5th Cir. 2012), the Fifth Circuit reversed a district court's decision to abstain under *Colorado River*. The individual, Saucier, received an annuity as a result of a personal injury settlement and sold the future payments to RSL in exchange for a lump sum. Their agreement contained an arbitration clause. In a complex series of lawsuits and arbitrations, RSL, Saucier, and Aviva litigated the validity of Saucier's assignment of rights. Aviva ultimately interpled the challenged payment into the federal court's registry and asked for dismissal. The court of appeals held that the district court improperly abstained from exercising jurisdiction under *Colorado River*, in principal part because that court had already assumed jurisdiction over the disputed *res*—the annuity proceeds. Further, the fact that both the state and federal courts were in the same geographic area meant that the inconvenience factor of *Colorado River* weighed against abstention. The court also found that the avoidance of piecemeal litigation factor supported exercising jurisdiction because the issue was whether or not the parties should be forced to arbitrate: "[T]he fact that enforcing an arbitration agreement may lead to piecemeal litigation does not weigh in favor of abstention." *Id.* at 463. Finally, the motion to compel arbitration implicated a substantive federal issue. Thus, although the state court proceeding had progressed further, that factor was undercut by the other *Colorado River* factors and did not support the "exceptional circumstances" that are required to overcome "the strong presumption in favor of retaining jurisdiction." *Id.* at 462, 464.

Knoles v. Wells Fargo Bank, N.A., No. 12-40369, 2013 WL 617010 (5th Cir. Feb. 19, 2013) (per curiam), involved an appeal of a denial for a temporary restraining order against Wells Fargo taking possession of the plaintiff's home as a result of a non-judicial foreclosure. When the plaintiff failed to vacate, Wells Fargo successfully pursued a forcible detainer action in state court, and the plaintiff did not appeal. Instead, he filed a separate lawsuit, which Wells Fargo removed to federal court. The court of appeals held that the order was appealable under 28 U.S.C. § 1292(a)(1) even though framed as a TRO because Wells Fargo had participated in the hearing and the "relative lack of urgency make this motion more in the nature of a preliminary injunction in fact, though not in name." 2013 WL 617010, at *1. Although the district court denied the injunction based

[1] The author gratefully acknowledges the contribution of David Coale for summaries of a handful of cases that were previously reported in a paper jointly authored by Mr. Coale and the author that was presented at the State Bar of Texas' 29th Annual Litigation Update Institute on January 11, 2013.

on the *Rooker-Feldman* doctrine, the court of appeals upheld the ruling on a different ground—that it was barred by the Anti-Injunction Act from issuing relief that would have the "practical effect" of "enjoin[ing] Wells Fargo from enforcing a valid extant judgment of a Texas court." *Id.* at *3.

The court considered the relitigation exception to the Anti-Injunction Act in *Gibbs v. Lufkin Indus., Inc.*, No. 11-50524, 2012 WL 3892555 (5th Cir. Sept. 7, 2012). That provision permits a federal court in very limited situations to issue an injunction against a state court proceeding where the action is "necessary" either "in aid of its jurisdiction" or to "protect or effectuate" the federal court's judgment. 28 U.S.C. § 2283. In a sale of a technology company that went awry, the purchaser filed suit against the principals of the sold company for theft of trade secrets and related torts, and the defendants counterclaimed for patent and trademark infringement. *Gibbs*, 2012 WL 3892555, at *1. The state court severed the federal counterclaims and realigned the parties, and the defendants removed. *Id.* The federal court dismissed the federal claims and remanded to state court. *Id.* Both sides appealed, and while those appeals were pending, the state court set the matter for trial but invited the federal court to issue an injunction, which it did. *Id.* at *2. Observing that preclusion is typically determined by the second-filed court, the court noted that "'issuing an injunction under the relitigation exception is resorting to heavy artillery.'" *Id.* at *2 (quoting *Smith v. Bayer*, 131 S. Ct. 2368, 2375-76 (2011)). It held that the relitigation exception could not apply "[b]ecause the remanded issues were never decided by the federal district court" and the decisions on remand and dismissing the federal claims were still on appeal awaiting decision. *Id.* at *3.

B. **Appellate Procedure**

What happens when alternative theories are pursued against different defendants and the theory of recovery against one defendant is reversed on appeal, leaving the winning party from trial without a remedy? *Lowry Dev., L.L.C. v. Groves & Assocs. Ins. Inc.*, 690 F.3d 382 (5th Cir. 2012), discusses several different approaches, ultimately upholding the procedure used by the district court in this case. The case presented "a procedural oddity," with an insured suing both insurance company and agent over wind damage to a real-estate development for which the insurer denied coverage. *Id.* at *383-84. Summary judgment was granted to the developer, finding coverage, and the issue of whether wind coverage was intended was submitted to a jury, which found that there was no mutual mistake as between the agent and developer. *Id.* As a result, the trial court entered judgment in favor of the developer as against the insurer (wind coverage) and against developer as to the agent (negligence). *Id.* On appeal, the Fifth Circuit reversed the finding of coverage and held in favor of the insurer, finding that the policy did not cover wind damage. *Id.* On remand, the developer, sought "clarification" of the status of its claim against the agent. The district court treated the motion as one under Rule 60(b)(5), granted it, and reinstated the claim against the agent. *Id.*at 385. It then certified the issue for an interlocutory appeal. *Id.* The Fifth Circuit first construed the standard of review for such a motion, holding that the scope of Rule 60(b)(5) is reviewed de novo, while the application of the rule to the facts is reviewed for an abuse of discretion. *Id.* It held that the district court had properly construed the scope of the rule and not abused its discretion in granting relief under Rule 60(b)(5), a little used procedural vehicle. *Id.* at 385-86. The court noted that the developer could have taken a "protective appeal" to preserve its claims against the agent should the appeal be unfavorable, but refused to hold that rights had been forfeited as a result of its failure to pursue a protective appeal. *Id.*at 388. In so holding, the court rejected the agent's argument that it had been prejudiced, noting that "[h]aving a favorable judgment set aside is inherently prejudicial," but concluding that there was no "*extra* measure of unfair prejudice" that would "overcome an otherwise worthy Rule 60(b) motion." *Id.* at 389 (emphasis in original).

In a case involving the application of the automatic stay in bankruptcy to proceedings before state regulators, the court considered whether to permit one of the state agencies to appear as an amicus curiae. *See In the Matter of Wireless, Inc. (Halo Wireless, Inc. v. Alenco Communications, Inc.)*, 684 F.3d 581 (5th Cir. 2012). Considering the right to submit an amicus brief as "'a matter of judicial grace,'" the court struck the brief submitted by the state regulator. *Id.* at 596 (quoting *Nat'l Org. for Women, Inc. v. Scheidler*, 223 F.3d 615, 616 (7th Cir. 2000)). It noted that the agency had failed to intervene properly, but that its interests had been fully represented in the bankruptcy court and on appeal by other parties and considered that the brief did not "add[] anything consequential to our consideration of this case." *Id.*

In analyzing the effect of *Perdue v. Kenny A.*, 130 S. Ct. 1662 (2010), on its existing bankruptcy jurisprudence, the Fifth Circuit observed that it was duty-bound to "exercise restraint when determining whether a Supreme Court decision has produced an intervening change in the law: "[F]or a Supreme Court decision to change our Circuit's law, it must be