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Fifth Circuit Update

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FIFTH CIRCUIT UPDATE

This paper summarizes opinions of general interest in civil litigation from the U.S. Court of Appeals for the Fifth Circuit, issued after mid-June of 2018. The cases are presented, loosely, in the order the issues they address would arise in a trial.

General Information

Recent appointments by President Trump have brought more issues to consideration for *en banc* review. An example is *Alvarez v. City of Brownsville*, which involved a difficult question about municipal liability for an alleged *Brady* violation during the plea bargaining process. The plaintiff won a $2.3 million judgment after a jury trial. The majority opinion found inadequate evidence of deliberate indifference for § 1983 liability; as to the *Brady* issue, it held that "case law from the Supreme Court, this circuit, and other circuits does not affirmatively establish that a constitutional violation occurs when *Brady* material is not shared during the plea bargaining process." From there, the sixteen judges that comprised this *en banc* panel authored six other opinions. 904 F.3d 382 (5th Cir. 2018). It is unclear how that breakdown may carry over to commercial cases, but the opinions are revealing insights into several judges' attitudes about structural and constitutional issues.

The Court made a general observation about its public role in a case brought by the Tampa Bay Buccaneers football team, seeking recovery through BP's *Deepwater Horizon* claims-processing system. The team appealed to the Fifth Circuit and asked that the courtroom be sealed for oral argument. In a single-judge order, Judge Costa reviewed the general requirements about sealing, noted that it was the court's decision and not the litigants', and rejected the request:

> As its right, Claimant ID 100246928 has used the federal courts in its attempt to obtain millions of dollars it believes BP owes because of the oil spill. But it should not able to benefit from this public resource while treating it like a private tribunal when there is no good reason to do so. ***On Monday, the public will be able to access the courtroom it pays for***.

BP Exploration & Production v. Claimant ID 100246928, 920 F.3d 209 (5th Cir. 2019).

Arbitration

The Fifth Circuit found a waiver of the right to arbitrate in *Forby v. One Technologies*, finding as to the requirement of prejudice: "The district court erred in concluding that Forby failed to establish prejudice to her legal position. When a party will have to re-litigate in the arbitration forum an issue already decided by the district court in its favor, that party is prejudiced." 909 F.3d 780 (5th Cir. 2018).

In another arbitration dispute, Papalote, a wind-power producer, had a dispute with the Lower Colorado River Authority; a key issue was whether a $60 million limitation-of-liability clause applied. Their contract had an arbitration provision that applied "if any dispute arises with respect to either Party's performance." The Fifth Circuit found that the dispute was not subject to arbitration, as it "is a dispute related to the the interpretation of the Agreement, not a performance-related dispute…." *Papalote Creek II v. Lower Colorado River Authority*, 918 F.3d 450 (5th Cir. 2019).

Personal Jurisdiction

On the topic of personal jurisdiction, recent Supreme Court cases emphasize that "[i]t is the defendant, not the plaintiff or third parties, who must create contacts with the forum State." *Walden v. Fiore*, 571 U.S. 277 (2014). An interesting test of that principle arose in *Carmona v. Leo Ship Management*, No. 18-20248, ____ F.3d ____, 2019 U.S. App. LEXIS 114070 (5th Cir. May 10, 2019), in which a stevedore sued for injuries incurred in Houston while unloading pipe from a globe-circling freighter. He sued LSM, the company that by contract operated the M/V Komatsushima Star. LSM did not own the ship "and could not direct where it traveled, what it carried, or for whom it worked," and thus tried to invoke *Walden* and related cases about jurisdiction arising from a "mere fortuity."

The Fifth Circuit observed:

- "[A] defendant's contacts with a forum and the purposefulness of those contacts are distinct–though often overlapping –inquiries. Although tortious conduct within a forum ensures the existence of contacts it does not always guarantee that such contacts were deliberate." (citation omitted);
- "Especially considering that the contract was freely terminable with two months' notice, LSM was hardly compelled to travel to Texas against its will. Rather, it made a deliberate choice to keep its employees aboard a ship bound for Texas" and thus "purposely availed itself" of the Texas forum;

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