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**FIFTH CIRCUIT UPDATE**

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## **I. Introduction.**

Given its size and location, the Fifth Circuit has always had a flow of extremely important cases. That did not change this year. The Court of course handled its usual docket of commercial cases and criminal case in addition to many cases involving Constitutional rights and federal statutes. But on top of that, the Court decided several cases that got national attention, including a new challenge to the Affordable Care Act (that has now arrived in the Supreme Court), a challenge to the Consumer Financial Protection Board (which has also arrived in the Supreme Court), and a fraught dispute about abortion rights in the midst of the COVID-19 pandemic (which would have been resolved by the Supreme Court had Texas not changed its policy). Given the breadth of its production, it is extremely difficult to capture the flow of all of those cases in a single writing. This paper will try to cover some of the most interesting and important developments in the Court this year in a number of different topics.

In particular, I will provide an update on procedural cases, cases involving federal statutes, commercial cases, cases involving qualified immunity, cases involving attorneys' fees, cases involving personal injury matters, and cases that involve the application of state law in federal court.

In addition, we are at this writing in the middle of the COVID-19 pandemic. The disease has caused significant changes in the life of the Court. This memorandum will also discuss those changes and how they might affect your practice before the Court.

## **II. COVID-19.**

### **A. Oral arguments.**

Under threat of the pandemic, the Fifth Circuit has cancelled all in-person oral arguments. At the time of this writing, we do not yet know when the John Minor Wisdom Courthouse in New Orleans will reopen, or when the Court will begin to have in-person oral arguments again. Some observers have speculated that the Court may be able to hold in-

person argument before travel becomes safe by holding them in locations closer to counsel. I have no inside information. In any event, one should not expect to see the marble floors of the Fifth Circuit's home base for some time.

That doesn't mean that it is not conducting argument, however. To the contrary, although some panels of the Court have simply cancelled all of their arguments, or delayed them until the Court reopens, other panels have proceeded with video argument by WebEx. For example, in April a panel composed of Judges Owen, Higginbotham, and Judges Willett held a number of oral arguments. They were joined by several other panels. I have reviewed the recordings of these oral arguments and can report that they have generally been a success. To be sure, there have been some technical difficulties, but in general lawyers and judges were able to ask their questions and make themselves understood. In terms of en banc argument, the Court seems to have adopted an unusual system by which the Court will issue questions to counsel by a date certain, to be answered in writing within 24 hours. Given the difficulty of conducting a 16 member oral argument by video this is understandable, although perhaps the Supreme Court's structured oral argument (where each Justice has the opportunity to ask questions in order of their seniority) could also be an option going forward).

Presumably, if the emergency continues at the current pitch, I would expect many panels to participate in oral argument by video. I will note, however, that even if all Fifth Circuit judges decide to participate in video oral arguments, I would expect the aggregate number of arguments to nonetheless decline overall. We cannot yet know, but the conventional wisdom is that this would have some effect on reversal rates. We will have to see what happens in the aftermath of COVID-19, whenever that is.

## **B. COVID related litigation.**

At the current writing, there have been two major litigations directly related to COVID-19 that have already come to the Fifth Circuit and now have reached the Supreme Court of the United States.

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