

**AT&T CONFERENCE CENTER**

29<sup>th</sup> Annual Conference on State and Federal Appeals

June 20-21, 2019  
Austin, Texas

**Fifth Circuit Update**

**DAVID S. COALE**

Author Contact Information:  
David S. Coale  
Lynn Pinker Cox & Hurst, LLP  
Dallas, Texas

[dcoale@lynnllp.com](mailto:dcoale@lynnllp.com)  
214.981.3800

## Table of Contents

General Information .....	5
Arbitration.....	6
Personal Jurisdiction.....	6
Mandamus / Interlocutory Appeal.....	7
Attorney Immunity.....	9
Experts .....	11
Attorneys' Fees (state law).....	12
Trademark.....	13
Summary Judgment.....	14
Jury Charge .....	14
Findings of Fact .....	16
Jury Verdict Review.....	17
Remedies .....	17
Contempt.....	18

## Table of Authorities

### Cases

<i>Alonso v. Westcoast Corp.</i> , 920 F.3d 878 (5th Cir. 2019).....	15
<i>Alvarez v. City of Brownsville</i> , 904 F.3d 382 (5th Cir. 2018).....	5
<i>Baisden v. I’m Ready Prods., Inc.</i> , 693 F.3d 491 (5th Cir. 2012) .....	16
<i>Benge v. Williams</i> , 548 S.W.3d 466 (Tex. 2018).....	15
<i>BP Exploration &amp; Production v. Claimant ID 100246928</i> , 920 F.3d 209 (5th Cir. 2019).....	5
<i>Carmona v. Leo Ship Management</i> , No. 18-20248, ____ F.3d ____, 2019 U.S. App. LEXIS 114070 (5th Cir. May 10, 2019).....	6
<i>Cedar Lodge Plantation v. CSHV Fairway View I, LLC</i> , 753 Fed. Appx. 191 (5th Cir. 2018).....	11
<i>Conestoga Trust v. Columbus Life Ins. Co.</i> , No. 17-50073, 2019 U.S. App. LEXIS 145 (5th Cir. Jan. 3, 2019).....	15
<i>ENI US Operating Co. v. Transocean</i> , 919 F.3d 931 (5th Cir. 2019).....	16
<i>Forby v. One Technologies</i> , 909 F.3d 780 (5th Cir. 2018).....	6
<i>Griffin v. United States</i> , 502 U.S. 46 (1991) .....	14
<i>Halliburton Energy Services, Inc. v. Ironshore Specialty Ins. Co.</i> , No. 17-20678, ____ F.3d ____, 2019 U.S. App. LEXIS 11255 (5th Cir. April 17, 2019) .....	7
<i>Huss v. Gayden</i> , 571 F.3d 443 (5th Cir. 2009) .....	17
<i>In re DuPuy Orthopaedics, Inc.</i> , 870 F.3d 345 (5th Cir. 2017).....	9
<i>In re JPMorgan Chase</i> , 916 F.3d 494 (5th Cir. 2019) .....	8
<i>In re U.S. Bureau of Prisons</i> , 918 F.3d 431 (5th Cir. 2019) .....	18
<i>In re: Bryant</i> , 745 Fed. Appx. 215 (5th Cir. 2018) .....	8
<i>In re: Crystal Power Co.</i> , 641 F.3d 82 (5th Cir. 2011).....	9

<i>In re: Depuy Orthopaedics, Inc.</i> , 870 F.3d 345 (5th Cir. 2017).....	8
<i>In re: Trinity Industries</i> , 872 F.3d 645 (5th Cir. 2014) .....	9
<i>Ironshore Europe DAC v. Schiff Hardin LLP</i> , 912 F.3d 759 (5th Cir. 2019).....	11
<i>Matsushita Elec. Indus. Co. v. Epstein</i> , 516 U.S. 367 (1996). No. 18-30139 (April 10, 2019). .....	14
<i>Mohawk Indus. v. Carpenter</i> , 558 U.S. 100 (2009) .....	9
<i>Mustang Pipeline Co. v. Driver Pipeline Co.</i> , 134 S.W.3d 195 (Tex. 2004).....	16
<i>Nester v. Textron, Inc.</i> , 888 F.3d 151 (5th Cir. 2018) .....	14
<i>Papalote Creek II v. Lower Colorado River Authority</i> , 918 F.3d 450 (5th Cir. 2019) .....	6
<i>Retractable Technologies, Inc. v. Beckton Dickinson Inc.</i> , 919 F.3d 869 (5th Cir. 2019).....	18
<i>Roman v. Western Manufacturing</i> , 691 F.3d 686 (5th Cir. 2012).....	17
<i>Sandifer v. Hoyt Archery Inc.</i> , 907 F.3d 802 (5th Cir. 2018).....	12
<i>Seismic Wells LLC v. Sinclair Oil &amp; Gas Co.</i> , 750 Fed. Appx. 278 (5th Cir. 2018) .....	13
<i>Springboards to Education v. Houston ISD</i> , 912 F.3d 805 (5th Cir. 2019).....	14
<i>Troice v. Greenberg Traurig LLP.</i> , No. 17-11464, ___ F.3d ___, 2019 U.S. App. LEXIS 11230 (5th Cir. April 17, 2019) .....	10
<i>Walden v. Fiore</i> , 571 U.S. 277 (2014).....	6
<i>Wallace v. Andeavor Corp.</i> , 916 F.3d 423 (5th Cir. 2019) .....	12
<i>Waste Management, Inc. v. River Birch, Inc.</i> , 920 F.3d 958 (5th Cir. 2019).....	14
<i>Whole Woman’s Health v. Smith</i> , 896 F.3d 362 (5th Cir. 2018).....	9
<i>Williams v. Manitowoc Cranes LLC</i> , 898 F.3d 607 (5th Cir. 2018).....	17

## 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 be 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;

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](https://utcle.org/elibrary)

## Title search: Fifth Circuit Update

Also available as part of the eCourse

[2019 eConference on State and Federal Appeals](#)

First appeared as part of the conference materials for the  
29<sup>th</sup> Annual Conference on State and Federal Appeals session  
"U.S. Fifth Circuit Update"