



TRIAL AND APPELLATE ATTORNEYS

Fifth Circuit Update

*Recent Decisions of the United States
Court of Appeals for the Fifth Circuit*

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Decisions Prompting Recent Supreme Court Action

- *Newberry v. Stephens* – application for stay of execution denied by S. Ct. on 2/4/15
- *Ladd v. Texas* – application for stay of execution denied by S. Ct. on 1/29/15 (published 5th Cir. decision on 1/28 addressing Texas drug protocol)
- *Mata v. Holder*, 558 Fed. Appx. 366 (3/5/14), cert. granted 1/15/15
 - No jurisdiction to review Board of Immigration Appeals decision not to reopen removal proceedings
 - Conflict with all other Circuits
 - Amicus appointed to defend 5th Cir. decision [because Gov't won't]

Decisions in S. Ct. Pipeline

- *Brumfield v. Cain*, 744 F.3d 918 (2/28/14), cert. granted 12/5/14 – death penalty/mental retardation
- *In re ASARCO, L.L.C.*, 751 F.3d 291 (4/30/14), cert. granted 10/2/14 – recoverability of fees for pursuing fee application
- *Inclusive Communities Project, Inc. v. Texas Dep't of Housing and Community Affairs*, 754 F.3d 275 (3/24/14), already argued – disparate treatment vs. disparate impact under Fair Housing Act

Stays Pending Appeal

- *Campaign for Southern Equality v. Bryant*, 773 F.3d 55 (12/4/14) – stay allowing enforcement of MS law against same-sex marriage
- *Veasey v. Perry*, 769 F.3d 890 (10/14/14) – stay allowing enforcement of Texas Voter ID law, not overturned by Supreme Court
- *Whole Women's Health v. Lakey*, 769 F.3d 285 (10/2/14) – stay allowing enforcement of Texas abortion law; part of stay dissolved by Supreme Court to resurrect injunction against one part of law, 135 S. Ct. 399 (10/14/14)

Decisions Challenging Texas Government Actions

- *Aransas Project v. Shaw*, 775 F.3d 641 (12/15/14), en banc denied with dissent, 774 F.3d 324 – TCEQ and river authority permitting affecting whooping cranes; Endangered Species Act ruling reversed (causation) and injunction vacated
- *Fisher v. UT*, 758 F.3d 633 (7/15/14), en banc denied with dissent, 771 F.3d 274 – UT Law admission policy upheld
- *Planned Parenthood v. Abbot*, 748 F.3d 583 (3/27/14), en banc denied with dissent, 769 F.3d 330 – Texas abortion law upheld

More Decisions with Dissents from En Banc Denials

- *Luna v. Mullenix*, 773 F.3d 712 (12/19/14), en banc denial and dissent, 2014 WL 7269672 – trooper use of deadly force; immunity summary judgment denied
- *DolgenCorp, Inc. v. Mississippi Band of Choctaw Indians*, 746 F.3d 167 (3/14/14), en banc denial and dissent, 746 F.3d 588 – tribal jurisdiction over tort claim against non-member operator of store on tribal land was proper

En Banc Grant

- *Hernandez v. United States*, 759 F.3d 249, en banc granted, 771 F.3d 818
 - 15-yr old boy shot and killed by Border Patrol Agent in culvert between US and Mexico
 - Fractured decision, 1 concurrence and concurrence in judgment, 1 concurrence and dissent
 - First impression holdings
 - Alien Tort Statute did not waive US sovereign immunity
 - *Bivens* action permissible against Agent under 5th Amendment

Child Pornography

- *U.S. v. Fields* (2/9/15) – “keep away from children” condition of supervised release upheld
- *U.S. v. Montgomery*, 2015 WL 390156 (1/27/15) – consent to search cell phone cured any Fourth Amendment violation [child pornography]
- *U.S. v. Fernandez*, 2015 WL 178999 (1/14/15) – condition of supervised release requiring installation of monitoring software on computer vacated [child pornography]

Election Decisions

- *Justice v. Hosemann*, 771 F.3d 285 (11/14/14) – MS disclosure requirements for ballot initiatives do not violate the First Amendment
- *Scott v. Schedler*, 771 F.3d 831 (11/5/14) – provisions of National Voter Registration Act as implemented in LA
- *Catholic Leadership Coalition of Texas v. Reisman*, 764 F.3d 409 (8/12/14) – contribution limits held unconstitutional; PAC management requirements upheld

Displacement/Preemption

- *McBride v. Estis Well Service, L.L.C.*, 768 F.3d 382 (9/25/14) (en banc) – no punitive damages for unseaworthiness under Jones Act or general maritime law
- *United States v. American Commercial Lines*, 759 F.3d 420 (7/16/14), cert. denied – Oil Pollution Act displaces federal common law
- *In re Deepwater Horizon*, 745 F.3d 157 (2/24/14), cert. denied – OPA pre-empts state penalties for OCSLA oil spill

In re Deepwater Horizon BP's Class Settlement

- 739 F.3d 790 (1/10/14), en banc denied with dissent, 756 F.3d 320, cert. denied – BP challenged settlement class action and settlement approval that it had sought in MDL; important class certification decision post-*Comcast*, particularly given the vote to deny en banc rehearing
- 744 F.3d 370 (5/3/14), en banc denied with dissent, 753 F.3d 516, cert. denied – settlement agreement causation issues
- Dissents based on Article III standing

Environmental Law Decisions

- *Vine Street LLC v. Borg Warner Corp.*, 2015 WL 178981 (1/14/15) – seller of dry cleaning equipment not an “arranger” subject to Superfund liability
- *In re Deepwater Horizon*, 753 F.3d 570 (6/4/14), 772 F.3d 350 (11/5/14), en banc denied with dissent, 2015 WL 151806 – owners of oil well are liable under the Clean Water Act for civil penalties as a result of the oil spill
- *U.S. v. Transocean [etc.]*, 767 F.3d 485 (9/18/14) – Chemical Safety Board had jurisdiction under Clean Air Act to investigate oil spill from MODU as “stationary source”
- *Luminant Generation Co. v. EPA*, 757 F.3d 439 (7/3/14) – Notice of Violation of CAA is not reviewable as a “final agency action”

Antitrust Decisions

- *Felder's Collision Parts, Inc. v. All Star Advertising Agency, Inc.*, 2015 WL 390177 (1/27/15) – rebate practices not predatory pricing
- *Abraham and Veneklasen JV v. American Quarter Horse Ass'n*, 2015 WL 178989 (1/14/15) – insufficient evidence of conspiracy in restraint of trade; association that does not compete in market may not be liable for monopolization
- *Marucci v. NCAA*, 751 F.3d 368 (5/6/2014) – complete exclusion of bat supplier from college market not an antitrust violation because of competition among remaining three suppliers

Arbitration Decisions

- *BNSF Railway Co. v. Alstom Trans., Inc.*, 2-15 WL 507874 (2/5/15) – an arbitration panel does not “exceed [its] powers” so long as it even arguably interprets the parties’ agreement
- *Houston Refining, L.P. v. United Steel [etc.] Workers*, 765 F.3d 396 (8/25/14) – parties did not agree in collective bargaining agreement to let the arbitrator decide arbitrability; jurisdiction upheld under LMRA
- *Douglas v. Regions Bank*, 757 F.3d 460 (7/7/14) – agreement to arbitrate arbitrability in checking account agreement did not commit customer to arbitrate the arbitrability of non-contract claims against the bank not based on the checking account agreement

CAFA Decisions

- Mass tort claims under the Class Action Fairness Act
- *Cedar Lodge Plantation, L.L.C. v. CSHV Firway View I, L.L.C.*, 768 F.3d 425 (9/26/2014) – post-removal addition of local defendant did not require remand under local controversy exception
- *Rainbow Gun Club, Inc. v. Denbury Offshore, L.L.C.*, 760 F.3d 405 (7/23/14) – lessors’ claim based on reduction of production from gas well met the “local single event” exclusion from CAFA

Other Business Litigation Decisions Under Federal Statutes

- *Eastman Chemical Co. v. Plastipure Co.*, 775 F.3d 230 (12/22/14) – scientific dispute did not make false advertising claim subject to First Amendment
- *In re Isbell Records*, 774 F.3d 859 (12/18/14) – partial owner of copyright could recover 100% of copyright damages [“Whoomp! (There It Is)”]
- *Spritzberg v. Houston American Energy Corp.*, 758 F.3d 676 (7/15/14) – securities fraud allegations sufficient [reversal]

Constitutional Decisions in Civil Litigation

- *Fontenow v. McCraw*, 2015 WL 304151 (1/23/15) – claim for return of surcharge improperly imposed by DPS barred by 11th Amendment
- *Graziano v. City of Greenville*, 2015 WL 148998 (1/9/15) – police officer Facebook post criticizing city and police chief was private speech not protected by the First Amendment
- *VFW v. Texas Lottery Commission*, 760 F.3d 427 (7/28/14) – provisions of Texas Bingo Enabling Act prohibiting charity use of bingo proceeds to lobby held unconstitutional penalty against political speech
- *Texas Sons of Confederate Veterans, Inc. v. Vandergriff*, 759 F.3d 388 (7/14/14) – denial of specialty license plate application violated First Amendment because it constituted viewpoint discrimination (Confederate battle flag)
- *U.S. Bank, N.A. v. Verizon Communications, Inc.*, 761 F.3d 409 (7/30/14) – no right to jury trial for fraudulent transfer claim

Constitutional Decisions in Criminal Cases

- *U.S. v. Richards*, 755 F.3d 269 (6/13/14) – federal statute permissibly criminalized animal crush videos
- *U.S. v. Cannon*, 750 F.3d 492 (4/24/14) – federal hate crime statute permissible under the Thirteenth Amendment

Miscellany – Practice Issues

- *Waste Management, Inc. of Washington v. Kattler*, 2015 WL 178996 (1/14/15) – contempt for discovery non-compliance reversed
- *Exxon Mobil Corp. v. Hill*, 751 F.3d 379 (5/6/2014) – in-house counsel memo privileged under LA law

Further Miscellany

- *Wooten v. McDonald Transit Associates, Inc.*, 2015 WL 51251 (1/2/15) – default judgment vacated because of inadequate allegations in complaint, which could not be bolstered with testimony from the default hearing
- *Bell v. Itawamba County School Board*, 2014 WL 7014371 (12/12/14) – improper to punish student for posting video of song alleging improper conduct by coaches
- *Central States, Southeast and Southwest Areas Health and Welfare Fund v. Special Health Risk, Inc.*, 756 F.3d 356 (6/23/14) – plan fiduciary’s requested relief was not permitted by statute and federal common law was not available to fill a gap

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