

FIFTH CIRCUIT UPDATE

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FORUM SELECTION

Atlantic Marine Construction v. District Court,
134 S. Ct. 568 (2013)

“[28 U.S.C.] Section 1404(a) therefore provides a mechanism for enforcement of forum-selection clauses that point to a particular federal district. And . . . a proper application of § 1404(a) requires that a forum-selection clause be ‘given controlling weight in all but the most exceptional cases.’”

Atlantic Marine Construction v. District Court,
134 S. Ct. 568 (2013)

*“[disputes] **shall be litigated** in the Circuit Court for the City of Norfolk, Virginia, or the United States District Court for the Eastern District of Virginia, Norfolk Division.”*

(emphasis added)

Waste Management of La. v. Jefferson Parish,
(Nov. 30, 2014, unpublished)

*“Jurisdiction: This Agreement and the performance thereof shall be governed, interpreted, construed and regulated by the laws of the State of Louisiana and the parties hereto **submit to the jurisdiction** of the 24th Judicial District Court for the Parish of Jefferson, State of Louisiana. The parties hereby waiving [sic] any and all plea[s] of lack of jurisdiction or improper venue.” (emphasis added)*

Waste Management of La. v. Jefferson Parish,
(Nov. 30, 2014, unpublished))

“Unlike their mandatory counterparts, permissive forum selection clauses allow but do not require litigation in a designated forum. As such, we have never required district courts to transfer or dismiss cases involving clauses that are permissive.”

In re: Rolls Royce Corp., ___ F.3d ___ (Dec. 30, 2014)

“While Atlantic Marine noted that public factors, standing alone, were unlikely to defeat a transfer motion, the Supreme Court has also noted that section 1404 was designed to minimize the waste of judicial resources of parallel litigation of a dispute. The tension between these centrifugal considerations suggests that the need – rooted in the valued public interest in judicial economy – to pursue the same claims in a single action in a single court can trump a forum-selection clause.”

In re: Rolls Royce Corp., ___ F.3d ___ (Dec. 30, 2014)

DISSENT:

“Simple two-party disputes are near a vanishing breed of litigation. It seems highly unlikely that the Supreme Court granted certiorari and awarded the extraordinary relief of mandamus simply to proclaim that a forum selection clause must prevail only when one party sues one other party.”

PERSONAL JURISDICTION

Monkton Ins. Servs. v. Ritter,
768 F.3d 429 (5th Cir. 2014)

Odessa, TX



v.

Cayman Islands



Monkton Ins. Servs. v. Ritter,
768 F.3d 429 (5th Cir. 2014)

“It is . . . incredibly difficult to establish general jurisdiction in a forum other than the place of incorporation or principal place of business.” (applying Daimler AG v. Bauman, 134 S. Ct. 746 (2014)).

“Ritter points to the following contacts to support specific jurisdiction: (1) Butterfield entered into an account contract with Geneva, through its owner and director, Ritter; (2) Self sent the account contract to Ritter in Texas; (3) Butterfield made wire transfers between Geneva's account in the Cayman Islands and bank accounts in Texas; and (4) Butterfield communicated with Ritter over the telephone. However, these facts cannot support a finding that Butterfield has purposefully directed its activities towards Texas or purposefully availed itself of the privileges of conducting business in Texas.” (applying Walden v. Fiore, 134 S. Ct. 1115 (2014) (emphasis added)).

HOW TO PLEAD

Johnson v. City of Shelby, 135 S. Ct. 346 (2014)

“Petitioners stated simply, concisely, and directly events that, they alleged, entitled them to damages from the city. Having informed the city of the factual basis for their complaint, they were required to do no more to stave off threshold dismissal for want of an adequate statement of their claim.”

Richardson v. Axion Logistics, L.L.C.,
___ F.3d ___ (March 3, 2015, unpublished)

“Taken together, these facts make plausible the allegation that Axion authorized the fraudulent billing practices of which Richardson complained.”

ANTITRUST



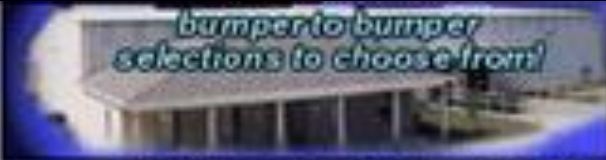
*Abraham & Veneklasen Joint Venture v.
American Quarter Horse Association,
___ F.3d ___ (Jan. 14, 2015)*

*“T]he antitrust laws are not intended as a device to review
the details of parliamentary procedure.*

. . .

*AQHA is a member organization; it is not engaged in
breeding, racing, selling or showing elite Quarter Horses.”*

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Felder's Collision Parts, Inc. v. All Star Adv. Agency,
___ F.3d ___ (Jan. 27, 2015)

“The price versus cost comparison focuses on whether the money flowing in for a particular transaction exceeds the money flowing out. The rebate undoubtedly affects that bottom line for All Star by guaranteeing that it makes a profit on any Bump the Competition sale. That undisputed fact resolves the case, as a ‘firm that is selling at a shortrun profit maximizing (or loss-minimizing) price is clearly not a predator.’”

HOW TO CREATE A FACT ISSUE

Santacruz v. Allstate Texas Lloyds,
(Nov. 13, 2014, unpublished)



Santacruz v. Allstate Texas Lloyds,
(Nov. 13, 2014, unpublished)

LIABILITY: “The extent of Allstate’s inquiry into the claim consisted of its adjuster **taking photographs** of the damaged home. Significantly, Allstate **did not** attempt to **talk to the contractor**, who submitted an affidavit in this case describing what he observed concerning the roof and attributing the cause to wind damage. Nor is there any evidence showing that Allstate **obtained weather reports** or **inquired with neighbors** to see if they suffered similar damage, which would tend to show the damage was caused by wind rather than normal wear and tear.”

Santacruz v. Allstate Texas Lloyds,
(Nov. 13, 2014, unpublished)

DAMAGES: “Santacruz claimed three types of damages: (1) the replacement of the roof, supported by an **invoice** from Pedraza providing that Santacruz paid him \$3,900 to repair the roof; (2) a **list** of damaged personal and household items compiled by Santacruz and his family with an estimate of the value of all the belongings; and (3) repair work needed for the damaged interior of the home, supported by an **estimate** from a contractor listing the repairs to be done. Further, Pedraza submitted an affidavit testifying to the necessity of repairing the roof, and Santacruz submitted photographs showing the extensive damage to the home’s interior to support his claim that repairs were necessary.”

WHOOOMP!

Isbell v. DM Records, Inc., ___ F.3d ___,
Nos. 13-40787 & 14-40545 (Dec. 18, 2014)



Isbell v. DM Records, Inc., ___ F.3d ___,
Nos. 13-40787 & 14-40545 (Dec. 18, 2014)

“The word ‘Whoomp!’ appears to be a neologism, perhaps a variant of ‘Whoop!,’ as in a cry of excitement.”

Isbell v. DM Records, Inc., ___ F.3d ___,
Nos. 13-40787 & 14-40545 (Dec. 18, 2014)

“The only dispute is over the meaning of the Recording Agreement and the inferences that should be drawn from the numerous undisputed pieces of extrinsic evidence. This is a question of law for the court, not for a jury.”

DAUBERT

Meadaa v. K.A.P. Enterprises LLC,
756 F.3d 875 (5th Cir. 2014)

“It is by no means clear how a [CPA] can obtain personal knowledge of the effects of the actions of one entity on other parties without reviewing the latter’s financial documents”



Aransas Project v. Shaw,
____ F.3d ____ (Dec. 15, 2014)

“Nowhere does the court explain why the remote connection between water licensing, decisions to draw river water by hundreds of users, whooping crane habitat, and crane deaths that occurred during a year of extraordinary drought compels [Endangered Species Act] liability.”

ARBITRATION

BSNF Railway Co. v. Alstom Transp.,
___ F.3d ___ (Feb. 5, 2015)

“[The] question for decision by a federal court asked to set aside an arbitration award . . . is not whether the arbitrator or arbitrators erred in interpreting the contract; it is not whether they clearly erred in interpreting the contract; it is not whether they grossly erred in interpreting the contract, it is whether they interpreted the contract.”

Sharp v. Ameriplan, ____ F.3d ____ (Oct. 16, 2014)

1. Policy Manual

-- *employer may amend at will*

2. Broker Agreement

-- *has arbitration clause*

-- *may only be amended in writing*

-- *incorporates Policy Manual*

3. Sales Director Agreement

-- *rejects arbitration*

-- *may only be amended in writing*

4. Employer loses \$5.5 million jury verdict

5. Employer revises Policy Manual

-- ***adds arbitration clause***

Sharp v. Ameriplan, ____ F.3d ____ (Oct. 16, 2014)

*“6.07.01. THE PARTIES AGREE TO SUBMIT ANY CLAIM, CONTROVERSY OR DISPUTE ARISING OUT OF OR RELATING TO THIS AGREEMENT (AND ATTACHMENTS) OR THE RELATIONSHIP OUT OF OR RELATING TO THIS AGREEMENT (AND ATTACHMENTS) OR THE RELATIONSHIP CREATED BY THIS AGREEMENT TO NON-BINDING MEDIATION **PRIOR TO FILING SUCH CLAIM CONTROVERSY OR DISPUTE IN A COURT.** . . . NOT WITHSTANDING THE FOREGOING, THE PARTIES MAY BRING AN ACTION (1) FOR MONIES OWED, (2) FOR INJUNCTIVE OR OTHER EXTRAORDINARY RELIEF, OR (3) INVOLVING THE POSSESSION OR DISPOSITION OF, OR OTHER RELIEF RELATING TO, REAL PROPERTY IN A COURT HAVING JURISDICTION AND IN ACCORDANCE WITH [THE NEXT PARAGRAPH] BELOW, WITHOUT SUBMITTING SUCH ACTION TO MEDIATION.*

*6.07.02. WITH RESPECT TO ANY CLAIMS, CONTROVERSIES OR DISPUTES WHICH ARE NOT FINALLY RESOLVED THROUGH MEDIATION, SALES DIRECTOR HEREBY IRREVOCABLY SUBMITS TO THE NON-EXCLUSIVE JURISDICTION OF THE STATE **COURTS OF DALLAS COUNTY, TEXAS AND THE FEDERAL DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION.** . . . VENUE FOR ANY LEGAL PROCEEDING RELATING TO OR ARISING OUT OF THIS AGREEMENT SHALL BE DALLAS COUNTY, TEXAS. . . . THIS AGREEMENT SHALL BE INTERPRETED AND CONSTRUED UNDER TEXAS LAWS.”*

Sharp v. Ameriplan, ____ F.3d ____ (Oct. 16, 2014)

“Any issue, dispute, claim or controversy (collectively, the ‘Claim’) between AmeriPlan or any officer, director, employee, manager, member, affiliate, legal counsel and/or advisor of AmeriPlan and IBO/Sales Director, arising out of or relating to the Policies and Procedures Manual then in effect, the IBO and/or Sales Director Agreements or any of the other documents, shall be resolved by binding arbitration at the AmeriPlan headquarters in Plano, Texas. The Claim shall be governed by the laws of the State of Texas.”

Sharp v. Ameriplan, ____ F.3d ____ (Oct. 16, 2014)

“[A]lthough the Manual could be amended without the need for a written agreement executed by all parties, such an amendment could not override a provision in the Broker and Sales Director Agreements. Otherwise, amendments to the Manual could undo the Broker and Sales Director Agreements in their entirety, rendering the “written amendment” requirement a nullity. . . . [Additionally,] AmeriPlan’s argument that the dispute resolution provisions in the Sales Director Agreements apply to only a limited scope of claims ‘not governed by arbitration’ is also at odds with the contracts’ broad language.”

SETTLEMENT

Sundown Energy, L.P. v. Haller,
(Dec. 8, 2014, unpublished)



Sundown Energy, L.P. v. Haller,
(Dec. 8, 2014, unpublished)

“Here, the district court erred by imposing several terms which either conflicted with or added to the agreement read into the record by the parties. Although the parties give the district court the authority to enforce and interpret the settlement agreement, the district court did not have the power to change the terms of the settlement agreed to by the parties.”

SANCTIONS



Waste Management v. Kattler, *___ F.3d ___ (Jan. 15, 2015)*

- 1. DEFECTIVE NOTICE.** *The order setting a hearing referenced a motion, by Pacer docket number, that only sought relief against Kattler and not the attorney. It was not a “show-cause order naming [both] Moore and Kattler as alleged contemnors[.]”*
- 2. PROMPT ACTION.** *Kattler misled Moore as to the existence of a particular “San Disk thumb drive,” Moore had acted prudently in consulting ethics counsel and withdrawing after he learned of the untruthfulness, and new counsel made a prompt disclosure about the drive that avoided unfair prejudice.*
- 3. CONFUSING ORDERS.** *“[W]hile Moore clearly failed to comply with the terms of the December 20 preliminary injunction by not producing the iPad image directly to [Waste Management] by December 22, this failure is excusable because the order required Moore to violate the attorney-client privilege.” Also, the order only “required Kattler to produce an image of the device only, not the device itself,” which created a “degree of confusion”*

FEATHERS

McAllen Grace Brethren Church v. Salazar,
764 F.3d 465 (5th Cir. 2014)

“[W]e find that the Department did not provide sufficient evidence that the policy of limiting permits for the possession of eagle feathers to members of federally recognized tribes survives the scrutiny required by [the Religious Freedom Restoration Act].”



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