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Fifth Circuit Update

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Fifth Circuit Update
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This paper summarizes civil cases, issued by the U.S. Court of Appeals for the Fifth Circuit since the 2017 UT Conference, which are of general interest to appellate practitioners. It covers these topics: appellate procedure, arbitration, contracts, discovery, evidence, jurors, jury charge, personal jurisdiction, mandamus, remedies, subject matter jurisdiction, and summary judgment procedure. Further information about these topics and other opinions in the past year can be found on my blog, www.600camp.com.

As general background, the Fifth Circuit stands on the cusp of having a full roster of 17 active judges, lacking only the confirmation of Texas's Andrew Oldham, and the nomination and confirmation of a successor to E. Grady Jolly of Mississippi. Assuming those events occur, 12 of the 17 active judges (71%) will have been appointed by Republican presidents, with the most (6 / 35%) by President Trump.

That said, notwithstanding the Fifth Circuit's reputation as a "conservative" court, that general label is not particularly useful in analyzing how any particular combination of judges may view a particular legal issue. For example, the Fifth Circuit recently denied *en banc* rehearing in the high-profile qualified immunity case of *Jauch v. Choctaw County*, where the panel denied immunity to a sheriff who had been sued over a lengthy period of pretrial detention.

From one perspective, the 9-6 vote showed a vote along "party lines," with all of the six votes for rehearing coming from judges appointed by Republican presidents (including both of President Trump's appointments as of that time), and with all five active judges appointed by Democratic presidents voting against rehearing. But from another perspective, the vote shows that the group of active judges appointed by Republican presidents is hardly a monolithic bloc, as it divided roughly in half on the vote. (Judges Clement, Prado, Elrod, and Haynes voting against review; Judges Jones, Smith, Owen, Southwick, Willett, and Ho voting for review).

Appellate Procedure

In an insurance coverage dispute, the district court granted both sides' motions for summary judgment as to the meaning of various policy terms. The net result was final judgment for the insurance company. The insured appealed; the insurer cross-appealed, and on that procedural point, the Fifth Circuit held that the cross-appeal was unnecessary, noting:

- "National Union is conflating the district court's opinion (i.e., the order) with its judgment. Appellate courts review judgments, not opinions. . . . To the extent that the district court rejected the arguments in National Union's cross-appeal, 'an appellee may urge any ground available in support of a judgment even if that ground was . . . rejected by the trial court.'" (citations omitted);

- The recent case of *ART Midwest v. Atlantic Limited Partnership XII*, 742 F.3d 206 (5th Cir. 2014), in which a party was not allowed to raise certain issues after not taking a cross-appeal, was distinguishable because judgment had actually been entered against that party on those issues. "Here, there is no adverse judgment against National Union, such that it might need to protect its rights—just some adverse reasoning"; and

- "This is not just formalism. 'A cross-appeal filed for the sole purpose of advancing additional arguments in support of a judgment is "worse than unnecessary", because it disrupts the briefing schedule, increases the number (and usually the length) of briefs, and tends to confuse the issues.' . . . In this case, National Union's improper cross-appeal resulted in an over-length opposition brief and an additional reply (giving National Union over four thousand words of additional briefing)." (citations omitted)

Cooper Indus. v. Nat'l Union Fire Ins. Co., No. 16-20539 (revised Dec. 11, 2017).

Arbitration

In *Archer & White Sales v. Henry Schein, Inc.,* No. 16-41674 (Dec. 21, 2017) , the plaintiffs alleged antitrust violations by distributors of dental equipment; seeking damages and injunctive relief. The defendants sought to compel arbitration, based on this arbitration clause in a relevant contract:

> Disputes. This Agreement shall be governed by the laws of the State of North Carolina. Any dispute arising under or related to this Agreement (except for actions seeking injunctive relief and disputes related to trademarks, trade secrets, or other intellectual property of Pelton & Crane), shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association [(AAA)]. The place of arbitration shall be in Charlotte, North Carolina.

The issue was whether arbitrability was for the courts to decide or the arbitrator. The Fifth Circuit applied "the two-step inquiry adopted in *Douglas v. Regions Bank*[, 757

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