

# **FIFTH CIRCUIT CIVIL UPDATE 2004**

## **DAVID J. SCHENCK**

Attorney at Law  
Hughes & Luce, LLP  
1717 Main Street  
Suite 2800  
Dallas, Texas 75201  
214/939-5967  
dschenck@hughesluce.com

©Copyright 2004 by David J. Schenck

State Bar of Texas  
**18<sup>TH</sup> ANNUAL ADVANCED CIVIL  
APPELLATE PRACTICE COURSE**  
September 9-10, 2004  
Austin

## **CHAPTER 8**



**DAVID J. SCHENCK**

Attorney at Law

[dschenck@hughesluce.com](mailto:dschenck@hughesluce.com)

Hughes & Luce, LLP  
1717 Main Street, Suite 2800  
Dallas, Texas 75201

Telephone: 214.939.5967  
Fax: 214.939.6100

**BIOGRAPHICAL INFORMATION**

Mr. Schenck is a partner in Hughes & Luce, L.L.P. He co-chairs the Firm's appellate practice with Justice James A. Baker.



## TABLE OF CONTENTS

I.	THE BIG PICTURE .....	1
II.	NEW RULES .....	1
A.	En Banc Decisions .....	1
1.	Kinney v. Weaver, No. 00-40557, 367 F.3d 337 (April 2004).....	1
2.	Castellano v. Fragozo, No. 00-50591, 352 F.3d 939 (December 5, 2003).....	2
3.	Arana v. Ochsner Health Plan, No. 01- 30922, 338 F.3d 433 (July 10, 2003).....	2
4.	Coggin v. Longview Indep. Sch. Dist., No. 00-40731, 337 F.3d 459 (July 2, 2003).....	2
5.	Whitehead v. Food Max of Miss., Inc., No. 00-60153, 332 F.3d 796 (May 2003), cert. denied, __ U.S. __, 124 S. Ct. 807 (2003). .....	2
B.	The Fifth Circuit in the Supreme Court .....	2
1.	Decisions on the Merits .....	2
a.	Frew v. Hawkins, No. 02-628, __ U.S. __, 124 S. Ct. 899 (2004).....	2
b.	Grupo Dataflux v. Atlas Global Group, L.P., No. 02-1689, __ U.S. __, 124 S.Ct. 1920 (June 2004).....	3
c.	Aetna Health v. Davila, No. 02-1845, __ U.S. __, 124 S.Ct. 2488 (2004). .....	3
2.	Cases Granted and Pending .....	3
a.	Aviall Services, Inc. v. Cooper Indus., Inc., 312 F.3d 677 (November 2004), cert. granted, __ U.S. __, 124 S.Ct. 981 (2004).....	3
3.	Smith v. City of Jackson, No. 02-60850, 351 F.3d 183 (December 2003), cert. granted, __ U.S. __, 124 S.Ct. 1724 (2004).....	3
III.	TRENDS AND RECENT DECISIONS .....	3
A.	Venue is Reviewable by Mandamus.....	3
1.	In re Horseshoe Entm't, No. 02-30682, 337 F.3d 429 (July 2003).....	3
2.	In re Volkswagen AG, No. 04-30303, 371 F.3d 201 (June 2004).....	3
B.	Arbitration is Going Strong .....	4
1.	Saturn Distrib. Corp. v. Paramount Saturn, Ltd., No. 02-20431, 326 F.3d 684 (April 2003). .....	4
2.	Cargill Ferrous Int'l v. Sea Phoenix MV, No. 01-31193, 325 F.3d 695 (April 2003).....	4
3.	General Warehousemen and Helpers Union Local 767 v. Albertson's Distrib., Inc., No. 02-10831, 331 F.3d 485 (May 2003). .....	4
4.	International Chem. Workers Union, Local 683c v. Columbian Chems. Co., No. 02-30185, 331 F.3d 491 (May 2003).....	4
5.	Pedcor Mgmt. Co., Welfare Benefit Plan v. Nations Personnel of Tex., Inc., No. 02-20878, 343 F.3d 355 (August 2003).....	4
6.	Hadnot v. Bay, Ltd., No. 03-40325 344 F.3d 474 (September 2003).....	4
7.	Action Indus, Inc. v. United States Fid. & Guar. Co., No. 02-60765, 358, F.3d 337 (January 2004).....	4
8.	Carter v. Countrywide Credit Indus., Inc., No. 03-10484, 362 F.3d 294 (March 2004).....	4
9.	Smith v. Rush Retail Ctrs., Inc., No. 03-50897, 360 F.3d 504 (March 2004).....	4
10.	Washington Mut. Fin. Group, LLC v. Bailey, No. 02-60794, 364 F.3d 260 (March 2004). .....	4
C.	Plaintiffs Continue to Suffer Losses in Most Discrimination Cases (With the Possible Exception of Age Cases).....	4
1.	Waldrip v. General Elec. Co., No. 01-30155, 325 F.3d 652 (May 2003). .....	4
2.	Henrickson v. Potter, No. 02-21155, 2003 U.S. App. LEXIS 15376 (June 2003).....	5
3.	Fuzy v. S&B Eng's. & Constructors, Ltd., No. 02-30472, 77 Fed. Appx. 289 (July 2003).....	5
4.	Ackel v. National Communications, Inc., No. 02-30460, 339 F.3d 376 (August 2003).....	5
5.	Jones v. Alcoa, Inc., No. 02-50097, 2003 U.S. App. LEXIS 21086 (August 2003), cert. denied, __ U.S. __, 124 S.Ct. 1173 (2004). .....	5
6.	Martinez v. Schlumberger, Ltd., No. 02-20173, 338 F.3d 407 (July 2003). .....	5
7.	Worthy v. New Orleans S.S. Ass'n / Int'l Longshoremen's Ass'n, No. 02-31168, 342 F.3d 422 (August 2003). .....	5
8.	Smith v. City of Jackson, No. 02-60850, 351 F.3d 183 (December 2003), cert. granted, __ U.S. __, 124 S.Ct. 1724 (2004).....	5
9.	Bodine v. Employers Cas. Co., No. 03-20190, 352 F.3d 245 (December 2003).....	5
10.	MacLachlan v. ExxonMobil Corp., No. 02-31249, 350 F.3d 472 (November 2003). .....	5

---

11. McGowin v. ManPower Int'l, Inc., No. 03-41201, 363 F.3d 556 (April 2004). .....	5
12. Hawkins v. Frank Gillman Pontiac, No. 03-20281, 2004 U.S. App. LEXIS 12868 (June 2004). .....	5
13. Palasota v. Haggard Clothing, No. 02-10844, 342 F.3d 569 (October 2003). .....	6

## TABLE OF AUTHORITIES

## CASES

Ackel v. National Communications, Inc., No. 02-30460, 339 F.3d 376 (August 2003).....	5
Action Indus, Inc. v. United States Fid. & Guar. Co., No. 02-60765, 358, F.3d 337 (January 2004). ....	4
Aetna Health v. Davila, No. 02-1845, __ U.S. __, 124 S.Ct. 2488 (2004).....	3
Arana v. Ochsner Health Plan, No. 01- 30922, 338 F.3d 433 (July 10, 2003).....	2
Bodine v. Employers Cas. Co., No. 03-20190, 352 F.3d 245 (December 2003). ....	5
Cargill Ferrous Int’l v. Sea Phoenix MV, No. 01-31193, 325 F.3d 695 (April 2003). ....	4
Carter v. Countrywide Credit Indus., Inc., No. 03-10484, 362 F.3d 294 (March 2004).....	4
Castellano v. Fragozo, No. 00-50591, 352 F.3d 939 (December 5, 2003) .....	2
Coggin v. Longview Indep. Sch. Dist., No. 00-40731, 337 F.3d 459 (July 2, 2003) .....	2
Cooper Industries v. Aviall Services Inc., 312 F.3d 677 (November 2004), cert. granted, __ U.S. __, 124 S.Ct. 981 (2004).....	3
Frew v. Hawkins, No. 02-628, __ U.S. __, 124 S. Ct. 899 (2004). ....	2
Fuzy v. S&B Eng’s. & Constructors, Ltd., No. 02-30472, 77 Fed. Appx. 289 (July 2003).....	5
General Warehousemen and Helpers Union Local 767 v. Albertson’s Distrib., Inc., No. 02-10831, 31 F.3d 485 (May 2003).....	4
Grupo Dataflux v. Atlas Global Group, L.P., No. 02-1689, __ U.S. __, 124 S.Ct. 1920 (June 2004).....	3
Hadnot v. Bay, Ltd., No. 03-40325 344 F.3d 474 (September 2003). ....	4
Hawkins v. Frank Gillman Pontiac, No. 03-20281, 2004 U.S. App. LEXIS 12868 (June 2004).....	5
Henrickson v. Potter, No. 02-21155, 2003 U.S. App. LEXIS 15376 (June 2003). ....	5
In re Horseshoe Entm’t, No. 02-30682, 337 F.3d 429 (July 2003).....	3
In re Volkswagen AG, No. 04-30303, 371 F.3d 201 (June 2004). ....	3
International Chem. Workers Union, Local 683c v. Columbian Chems. Co., No. 02-30185, 331 F.3d 491 (May 2003). ....	4
Jones v. Alcoa, Inc., No. 02-50097, 2003 U.S. App. LEXIS 21086 (August 2003), cert. denied, __ U.S. __, 124 S.Ct. 1173 (2004). ....	5
MacLachlan v. ExxonMobil Corp., No. 02-31249, 350 F.3d 472 (November 2003).....	5
Martinez v. Schlumberger, Ltd., No. 02-20173, 338 F.3d 407 (July 2003).....	5
McGowin v. ManPower Int’l, Inc., No. 03-41201, 363 F.3d 556 (April 2004).....	5
Palasota v. Hagggar Clothing, No. 02-10844, 342 F.3d 569 (October 2003).....	6
Pedcor Mgmt. Co., Welfare Benefit Plan v. Nations Personnel of Tex., Inc., No. 02-20878, 343 F.3d 355 (August 2003). ....	4
Saturn Distrib. Corp. v. Paramount Saturn, Ltd., No. 02-20431, 326 F.3d 684 (April 2003).....	4
Smith v. City of Jackson, No. 02-60850, 351 F.3d 183 (December 2003), cert. granted, __ U.S. __, 124 S.Ct. 1724 (2004). ....	3, 5
Smith v. Rush Retail Ctrs., Inc., No. 03-50897, 360 F.3d 504 (March 2004).....	4
Waldrup v. General Elec. Co., No. 01-30155, 325 F.3d 652 (May 2003).....	4
Washington Mut. Fin. Group, LLC v. Bailey, No. 02-60794, 364 F.3d 260 (March 2004).....	4
Whitehead v. Food Max of Miss., Inc., No. 00-60153, 332 F.3d 796 (May 2003), cert. denied, __ U.S. __, 124 S. Ct. 807 (2003).....	2

Worthy v. New Orleans S.S. Ass'n / Int'l Longshoremen's Ass'n, No. 02-31168, 342 F.3d 422  
(August 2003)..... 5

**STATUTES**

28 U.S.C. § 1913..... 1

## FIFTH CIRCUIT CIVIL UPDATE 2004

### I. THE BIG PICTURE

The Fifth Circuit continues to be one of the busiest courts in the United States. More than 8,600 cases were filed in 2003, of which approximately 3,000 were civil cases. The court is authorized 17 judges and is currently operating with 16, including the most recent recess appointment of former U.S. District Judge Charles Pickering to fill the seat vacated by Judge Politz and the confirmation and appointment of Judge Prado to the seat vacated by Judge Parker.

Notwithstanding the relatively heavy caseload, the Court is disposing of the average case within 10 months of filing the notice of appeal. Of course, this figure includes a large number of less complex matters that do not receive argument or other forms of extended judicial attention. While I have no statistical proof to support my opinion, I believe the average time to termination of an argued civil case is more than a year.

The Court is also struggling with severe budgetary constraints. Chief Judge King, who is currently chairing the Judicial Conference's efforts to address these issues on a nationwide basis, has been particularly clear about the need to reduce expenses. The Court may soon face reductions in support staff.

Astute observers will keep the Court's caseload in mind when writing briefs and preparing for argument. The prospects of the court's staff taking up research tasks or delving into issues that are not fully and clearly framed by the parties themselves are grim. Thus, if an opponent has taken material liberty with *controlling* authorities one does well to point this out very clearly and to say why. Conversely, the Court has little tolerance or patience for *ad hominine* attacks or argument over issues that will not prove dispositive of the case.

At argument, it is safe to assume that the judges have all read the briefs (or at least memoranda summarizing the arguments), but it is highly unlikely that the court will have delved into the record or attempted to become aware of more recent developments in the case law. For that reason, counsel should expect questioning on the factual record and should be very familiar with the case law, including any developments through the time of argument.

### II. NEW RULES

There have been a number of fee increases and the Court is currently contemplating a number of revisions to its rules, including fee increases.

By virtue 28 U.S.C. § 1913 and an order of the judicial conference, the fee for filing an appeal increased as of November 1, 2003 to \$255 from the

previous \$105. The fee for petitions for mandamus and the like is now \$250.

**Under proposed new Rule 30.1, the record on appeal would be handled differently.** Counsel and unrepresented parties would be obligated within twenty days of the record's completion to notify the district court of any errors in or omissions from the record. Failure to note such errors or omissions may result in denial of any motion for additional time to file a brief due to the alleged error. Also, the clerk is authorized to require the party requesting a copy of the record to pay shipping costs from the court. Previously, the court had absorbed the cost of releasing the record to counsel.

The rationale here is obvious. The Court is too often receiving requests for extensions of briefing deadlines based on ostensibly recently noted omissions from the record. Also, given the Court's current budgetary crisis, it is no longer interested in absorbing costs that should be borne by the litigants.

**New Rule 31.1 would change the requirements for filing and service of briefs.** The Court continues to move toward its inevitable electronic future. The new rule would require 7 paper copies of briefs to be filed together with a PDF file (not a document scanned into PDF form). The electronic version would have to state on the outside of the disk or cover the caption, cause number and identify whether the brief is for an appellant, appellee and presumably amicus or reply.

The service requirements call for an electronic version to be served on counsel either as served on the court or as agreed between the parties in writing. The certificate of service will also have to affirmatively indicate that service was made in both written and electronic form.

## MAJOR CASE DEVELOPMENTS

### A. En Banc Decisions

Rehearing before the full Fifth Circuit is exceptionally rare and the Court is generally hostile to requests for rehearing except in the unusual case where the panel decision conflicts with other, typically controlling authority or the issue is of overarching significance. The Court holds en banc sessions twice a year, in March and September, typically hearing three to five cases at each sitting. In 2003, five such cases were civil in nature:

1. *Kinney v. Weaver*, No. 00-40557, 367 F.3d 337 (April 2004).

This was an interesting civil rights case. An instructor in police tactics affiliated with a local college testified as an expert in an excessive force case. Various police chiefs and sheriffs boycotted the school and worked to obtain the instructors removal, allegedly in retaliation for the testimony. The instructor filed

suit and the police officers claimed qualified immunity. The officers claimed to be motivated by the disruptive effect the testimony had on police operations. Even assuming this motivation might be legitimate, the en banc court held the First Amendment rights of the instructor to teach and appear as a witness outweighed that interest and that reasonable officers would have known this.

Five Judges dissented in two separate opinions. Judge Jones would have found no First Amendment violation of the instructor's rights. Judge Barksdale would have found qualified immunity to the claim.

2. Castellano v. Fragozo, No. 00-50591, 352 F.3d 939 (December 5, 2003).

This civil rights case raised the question whether federal constitutional law provided any remedy where a state prosecution is initiated and leads to conviction of an offense based on knowingly false charges. A majority of the en banc court rejected the assertion of a Fourth Amendment claim, reasoning that the Amendment applied only to pretrial events. The majority went on to find that a claim could be stated under the Due Process Clause and remanded for further development of that theory.

The majority rejected the dissent's argument that the Plaintiff had waived the due process theory below or in the briefs on appeal. According to the majority, prior Fifth Circuit precedent on the issue did not give the Plaintiff an adequate opportunity to develop that claim.

A broader dissent authored by Judge Barksdale would have rejected the due process claim as well.

3. Arana v. Ochsner Health Plan, No. 01- 30922, 338 F.3d 433 (July 10, 2003).

This case arose from a state court action to declare settlement proceeds exempt from an insurer's reimbursement claim. The insurer removed the case to federal court, claiming field preemption under ERISA supported federal subject matter jurisdiction. A unanimous court overturned prior precedent requiring conflict preemption to support removal jurisdiction and found the Plaintiff's claim to fall within ERISA's preemptive reach, even though the claim was not seeking benefits.

4. Coggin v. Longview Indep. Sch. Dist., No. 00-40731, 337 F.3d 459 (July 2, 2003).

The Plaintiff in this civil rights case was a school teacher who had been discharged without a hearing and before the time had expired for him to appeal the determination that he had not timely requested a hearing. The en banc court held that the school board could be held liable for denying the teacher due process.

Six judges dissented from the finding of a due process violation collectively joining two opinions authored by Judges Garza and Jones.

5. Whitehead v. Food Max of Miss., Inc., No. 00-60153, 332 F.3d 796 (May 2003), cert. denied, \_\_\_ U.S. \_\_\_, 124 S. Ct. 807 (2003).

This was a sanctions case. Following the abduction and rape of a patron from a K Mart parking lot, the plaintiff patron obtained a sizeable verdict in a negligence case against K-Mart. Her counsel then obtained a writ of execution and proceeded to the K Mart with representatives of the media accompanying him. While the district court stayed execution, the attorney was interviewed, making what the Court described as hyperbolic and false assertions about K Mart's attitude and willingness to satisfy the judgment. The Court also noted that Plaintiff's counsel had been sanctioned at one earlier point in the case and had been generally unabiding of orders and instructions throughout trial. The en banc court upheld the sanctions, finding the writ of execution to have been sought prematurely and, under Rule 11, for an improper purpose.

Chief Judge King and two other judges dissented. She noted that the existing law regarding the scope of a stay of enforcement of judgments was not well settled so as to support sanctions and suggested that universally shared disgust for the attorney's tactics had clouded the majority's analysis.

## B. The Fifth Circuit in the Supreme Court

### 1. Decisions on the Merits

The Supreme Court heard three civil cases originating in the Fifth Circuit in the Court's most recent Term. The Fifth Circuit was reversed in each case.

a. Frew v. Hawkins, No. 02-628, \_\_\_ U.S. \_\_\_, 124 S. Ct. 899 (2004).

This case raised interesting questions about the intersection of Eleventh Amendment immunity and the *Ex Parte Young* doctrine. Texas state officials entered into a consent decree in order to resolve an earlier litigation concerning the state's implementation of a federal Medicaid program that had been brought under the *Ex Parte Young* fiction. When the Plaintiff's sued to enforce the specific terms of the settlement agreement and resulting consent decree, the officials invoked Eleventh Amendment immunity, claiming that the action could not proceed unless the claimed breach itself constituted a basis on which a claim might be brought in federal court. The Fifth Circuit agreed, creating a conflict with the Second and Seventh Circuits.

The Supreme Court granted certiorari and reversed. In a unanimous opinion, Justice Kennedy

found the consent decree enforceable as an extension of the *Ex Parte Young* doctrine. Once the defendants were properly before the court in the first instance, the district court's traditional equity power extended forward to include the power to enforce the terms of the consent decree, notwithstanding the Eleventh Amendment bar that might apply had the claim not resulted from a consent decree.

- b. Grupo Dataflux v. Atlas Global Group, L.P., No. 02-1689, \_\_\_ U.S. \_\_\_, 124 S.Ct. 1920 (June 2004).

This case presented an important question about when and how subject matter jurisdiction is tested. This was ostensibly a diversity suit between an American Plaintiff (a partnership) and a Mexican defendant. However, at the time the case was filed, two of the partners were citizens of Mexico. Under well settled law, a partnership shares the citizenship of all of its partners. That said, the Mexican partners had withdrawn from the partnership before the case was tried. The normal rule is that jurisdiction is tested as of the time of the filing in federal court.

On appeal, the Fifth Circuit ruled that the lack of diversity jurisdiction had essentially been cured prior to the entry of judgment. The Supreme Court reversed.

- c. Aetna Health v. Davila, No. 02-1845, \_\_\_ U.S. \_\_\_, 124 S.Ct. 2488 (2004).

In this important ERISA decision the Fifth Circuit held that state law claims related to an HMO's failure to cover certain medical procedures not to be preempted by ERISA. The Fifth Circuit reasoned that claims relating to eligibility and treatment decisions were not affected by the ERISA provision concerning fiduciary claims that preempts conflicting state law.

The Supreme Court reversed in a unanimous decision finding the claims to be covered by the ERISA provisions at issue.

## 2. Cases Granted and Pending

The Supreme Court has granted Petitions for Certiorari in two civil cases coming from the Fifth Circuit.

- a. Aviall Services, Inc. v. Cooper Indus., Inc., 312 F.3d 677 (November 2004), cert. granted, \_\_\_ U.S. \_\_\_, 124 S.Ct. 981 (2004).

**Question Presented:** May [a] private party who has not been subject of underlying civil action pursuant to CERCLA Sections 106 or 107 bring [an] action seeking contribution pursuant to CERCLA Section 113(f)(1) to recover costs spent voluntarily to clean up properties contaminated by hazardous substances?

The divided en banc Fifth Circuit found a claim to exist in late 2002. (Review Granted Jan 12, 2004.)

3. Smith v. City of Jackson, No. 02-60850, 351 F.3d 183 (December 2003), cert. granted, \_\_\_ U.S. \_\_\_, 124 S.Ct. 1724 (2004).

**Question Presented:** Should the Supreme Court grant certiorari to resolve five to three circuit conflict over whether disparate impact claims are cognizable under the ADEA?

As noted below, the Fifth Circuit found such claims not to be cognizable under the ADEA. (Review Granted March 29, 2004.)

## III. TRENDS AND RECENT DECISIONS<sup>1</sup>

### A. Venue is Reviewable by Mandamus

In another trend possibly related to the Court's heavy caseload, the Fifth Circuit has recently shown increasing willingness to use the mandamus writ to correct improper denials of convenience transfers. This may reflect an appreciation for the court's unwillingness, after a full trial, to reverse a case and remand for a second trial on the basis of an improper interlocutory decision on venue. Indeed, it is difficult to find any such case in recent times.

1. In re Horseshoe Entm't, No. 02-30682, 337 F.3d 429 (July 2003).

In this case, the Fifth Circuit began a retreat from its historic unwillingness to examine venue disputes prior to final judgment. Here, the Court held that an employer's motion to transfer venue under 28 U.S.C. § 1404 was required to be granted in an employment discrimination action.

The Court found that the transferee district was the location of the alleged unlawful employment practices. Also, the relevant employment records were maintained in the transferee district. Additionally, the employer had its principal office in the transferee district. The employee would have continued to work in the transferee district but for the alleged employment discrimination. There was no showing that any delay or prejudice would result from the transfer. Furthermore, the employee's choice of forum was not permitted under the special venue statute applicable to employment.

2. In re Volkswagen AG, No. 04-30303, 371 F.3d 201 (June 2004).

The Fifth Circuit reviewed a refusal to transfer for convenience and granted mandamus as a result of the district court's failure to apply the convenience factors properly. This was an automobile products liability case in which the accident and resulting investigation took place in a district other than the one in which it

<sup>1</sup> I am indebted to Jordan Klein, second-year student at University of Texas School of Law, for his assistance in identifying and describing the cases below.

was filed. As in Horseshoe Entertainment, the Court rejected the location of counsel as relevant to the venue question.

### B. Arbitration is Going Strong

The Fifth Circuit has readily found an agreement to arbitrate, read such agreements broadly and shown reluctance to review or set aside the results of the arbitration.

1. Saturn Distrib. Corp. v. Paramount Saturn, Ltd., No. 02-20431, 326 F.3d 684 (April 2003).

This was a statutory good faith and fair dealing case. The Court held the statutory duty upon which the claim was based to arise out of the franchise agreement, which contained a broad arbitration clause.

2. Cargill Ferrous Int'l v. Sea Phoenix MV, No. 01-31193, 325 F.3d 695 (April 2003).

Here, a bill of lading between a vessel owner and a cargo shipper incorporated an arbitration clause of another agreement, even though the space provided on the bills for identifying which charter party was blank.

3. General Warehousemen and Helpers Union Local 767 v. Albertson's Distrib., Inc., No. 02-10831, 331 F.3d 485 (May 2003).

The question whether a grievance covered an employee's discharge was for an arbitrator to decide. The question whether the union timely arbitrated the grievance was also for the arbitrator to decide.

4. International Chem. Workers Union, Local 683c v. Columbian Chems. Co., No. 02-30185, 331 F.3d 491 (May 2003).

This was an attempted challenge to an arbitrator's factual determinations. The Court refused to set aside the determinations, noting the various bases on which the arbitrator could have made credibility determinations.

5. Pedcor Mgmt. Co., Welfare Benefit Plan v. Nations Personnel of Tex., Inc., No. 02-20878, 343 F.3d 355 (August 2003).

Where an arbitration agreement is governed at least in part by the FAA and state law does not clearly forbid class arbitration (assuming it applies at least in part), then arbitrators, not the courts, decide whether the agreement allows class arbitration, applying the Supreme Court's 2003 Green Tree decision.

6. Hadnot v. Bay, Ltd., No. 03-40325 344 F.3d 474 (September 2003).

An offer of continuing at-will employment by the employer was adequate consideration to support the employee's agreement to arbitrate any employment disputes under Texas law.

7. Action Indus, Inc. v. United States Fid. & Guar. Co., No. 02-60765, 358 F.3d 337 (January 2004).

The Federal Arbitration Act's standard of review applied to an award arising from a dispute between a furniture manufacturer and a conveyor designer. While the agreement's choice-of-law provision called for Tennessee law to apply, the agreement did not expressly reference the Tennessee Uniform Arbitration Act, and did not modify or replace the FAA's rules.

8. Carter v. Countrywide Credit Indus., Inc., No. 03-10484, 362 F.3d 294 (March 2004).

An arbitration clause in an employer's contracts with employees did not conflict with the Fair Labor Standards Act. FLSA claims were subject to individually executed pre-dispute arbitration agreements. The clause was not invalid because it disallowed employees' collective action. Nor was the clause rendered invalid because arbitration would feature less extensive discovery than litigation or because it failed explicitly to mandate that the arbitrator grant attorney fees to the prevailing party.

9. Smith v. Rush Retail Ctrs., Inc., No. 03-50897, 360 F.3d 504 (March 2004).

The Federal Arbitration Act did not confer federal jurisdiction on the district court to vacate an arbitration award in a dispute between a former employee and an employer. An independent basis for federal subject matter jurisdiction was required.

10. Washington Mut. Fin. Group, LLC v. Bailey, No. 02-60794, 364 F.3d 260 (March 2004).

A borrower's alleged inability to read or understand the arbitration agreement did not render it unconscionable or unenforceable. Neither was the agreement rendered unconscionable by virtue of the lender's failure to inform the borrowers that they were signing an arbitration agreement, notwithstanding the borrower allegedly informing the lender of his illiteracy.

### C. Plaintiffs Continue to Suffer Losses in Most Discrimination Cases (With the Possible Exception of Age Cases)

The Fifth Circuit has not in recent years made itself famous as a forum friendly or receptive to claims of discrimination. That trend carried into 1993 with the possible exception of age discrimination cases.

1. Waldrip v. General Elec. Co., No. 01-30155, 325 F.3d 652 (May 2003).

A former employee's chronic pancreatitis did not substantially limit the major life activity of eating, and thus, it was not a "disability" within the meaning of the ADA.

2. Henrickson v. Potter, No. 02-21155, 2003 U.S. App. LEXIS 15376 (June 2003).

The Postal Service's denial of an employee's request for a custom chair to accommodate his carpal tunnel syndrome was not a "continuing violation" of the Rehabilitation Act, for purposes of the 45-day limitation period, where the employee had requested the custom chair on only one prior occasion.

3. Fuzy v. S&B Eng's. & Constructors, Ltd., No. 02-30472, 77 Fed. Appx. 289 (July 2003).

An unsuccessful applicant for a pipe fitter job failed to demonstrate that a 100 lb. lifting requirement was not job related, as required to support his claim that a pre-employment physical-capacity test to determine if the applicant could satisfy the requirement violated the Americans with Disabilities Act.

4. Ackel v. National Communications, Inc., No. 02-30460, 339 F.3d 376 (August 2003).

While three other women who had been groped, kissed and generally harassed stated valid claims, another female employee who was allegedly replaced and transferred from her position as a result of a supervisor's favoritism for yet another female employee and who was allegedly terminated for complaining about her replacement's favorable treatment could not show that she suffered discrimination based upon her gender, so as to establish a prima facie sexual harassment claim.

5. Jones v. Alcoa, Inc., No. 02-50097, 2003 U.S. App. LEXIS 21086 (August 2003), cert. denied, U.S. \_\_\_, 124 S.Ct. 1173 (2004).

African-American employees section 1981 claim was time barred where they alleged that they were assigned to work areas containing dangerous levels of asbestos dust between 1953 and 1970. The relevant alleged discriminatory act was when the employer assigned them to those areas, not when the employees were allegedly exposed to asbestos dust. Likewise, the claim was held not to toll until the plaintiffs became aware of the medical problems.

6. Martinez v. Schlumberger, Ltd., No. 02-20173, 338 F.3d 407 (July 2003).

In this case, the employer had no duty to disclose to plan participants, who inquired about possible amendments to the plan before they retired, that it was considering an early retirement offering. The Court held, as a matter of first impression in the Circuit, that an employer-administrator has no fiduciary duty under ERISA to honestly disclose whether it is considering amending its benefit plan.

7. Worthy v. New Orleans S.S. Ass'n / Int'l Longshoremen's Ass'n, No. 02-31168, 342 F.3d 422 (August 2003).

A local union's claim that the association which oversaw the pension, welfare, vacation, and holiday plan for its employees breached its fiduciary duty under ERISA by failing to get signatures of approval by the local, as a principal to the royalty escrow account was not justiciable.

8. Smith v. City of Jackson, No. 02-60850, 351 F.3d 183 (December 2003), cert. granted, U.S. \_\_\_, 124 S.Ct. 1724 (2004).

The disparate impact theory of liability was not cognizable under the ADEA. The Supreme Court will decide this matter in the coming Term.

9. Bodine v. Employers Cas. Co., No. 03-20190, 352 F.3d 245 (December 2003).

An employer's failure to terminate certain employees before a cut-off date, thereby eliminating eligibility for enhanced retirement benefits under a pension plan, was not a violation of ERISA.

10. MacLachlan v. ExxonMobil Corp., No. 02-31249, 350 F.3d 472 (November 2003).

An ERISA plan administrator did not abuse his discretion in concluding that employees of third parties and independent contractors were outside the plan definition of "regular employees" and thus ineligible for benefits.

11. McGowin v. ManPower Int'l, Inc., No. 03-41201, 363 F.3d 556 (April 2004).

A former employee's state law claims for fraud and conspiracy arising from a refusal to pay Employee Retirement Income Security Act benefits were completely pre-empted by ERISA. Thus, such claims were barred by the employee's failure to exhaust ERISA's administrative remedies.

12. Hawkins v. Frank Gillman Pontiac, No. 03-20281, 2004 U.S. App. LEXIS 12868 (June 2004).

The claims in this age discrimination case were dismissed in the district court on limitations grounds. The Plaintiff had been offered a "mandatory transfer" to a position he regarded as inferior. According to the Plaintiff's own testimony, he was told the decision was made to make room for "new blood" in his former position. When he asked what "new blood" meant, he was told "you know younger people."

The plaintiff quit and filed a charge (through his counsel) with the EEOC. Four years later, the EEOC issued a right to sue letter and sent it to the address of plaintiff's counsel, who had since retired and moved. The plaintiff did not receive the letter for a further three years until he went to the EEOC with his new

counsel. He filed suit within 90 days of that date. The court found the period to toll throughout that period and then, though the district court never reached the issue, considering the merits, concluded that the "you know younger people" comment could support a finding of age discrimination.

13. Palasota v. Hagggar Clothing, No. 02-10844, 342 F.3d 569 (October 2003).

The plaintiff in this case sued his former employer alleging age discrimination after the EEOC issued a finding of probable cause of discrimination. The employer had assigned the employee and many other older employees to less desirable sales positions at or about the same time as it hired younger employees to fill newly created jobs that included sales activities similar to those previously performed by the discharged older employees. In addition, the record showed a number of remarks by supervisors about the "graying sales force" and the need for "race horses" instead of "plow horses." A memo also complained of the large number of employees with the "same amount of tenure" as the Plaintiff "who are in their early fifties or older" and recommended developing a severance package. A jury found for the Plaintiff and found an intentional violation. The district court rejected the verdict and discounted the remarks as stray under Fifth Circuit jurisprudence. The Fifth Circuit reversed, severely limiting its "stray remarks jurisprudence" and holding that EEOC findings are entitled to evidentiary weight where they are admitted at trial. The Court also held that the plaintiff was not required to show that he had been replaced by any specific younger employee.