

## **FIFTH CIRCUIT UPDATE**

**KATHERINE L. BUTLER**

Butler & Harris  
1007 Heights Boulevard  
Houston, Texas 77008  
(713) 526-5677  
[kabutler@igc.org](mailto:kabutler@igc.org)

State Bar of Texas  
**17<sup>TH</sup> ANNUAL ADVANCED CIVIL APPELLATE  
PRACTICE COURSE**  
September 11-12, 2003  
Austin, Texas

**CHAPTER 9**



Katherine L. Butler  
Butler & Harris  
1007 Heights Boulevard  
Houston, Texas 77008  
(713) 526-5677  
FAX (713) 526-5691

Education:

B.A. in Public Policy Sciences, Duke University, 1976  
J.D., The University of Houston, 1981

Professional Activities:

Law Clerk to The Honorable Reynaldo Garza, Judge of the U.S. Court of Appeals for the Fifth Circuit, 1981-83.

Partner, Butler & Harris, 1988 to present.

Board Certified, Civil Appellate Law, Texas Board of Legal Specialization.

Licensed to Practice before the Supreme Court of Texas, U.S. District Court for the Southern District of Texas, U.S. Courts of Appeal for the Fifth Circuit and Sixth Circuit, U.S. Supreme Court.

Member, American Bar Association, State Bar of Texas, Houston Bar Association, Texas Employment Lawyers Association, and National Employment Lawyers Association.

Law Related Publications and Speeches:

Author: *Effective Brief Writing for the Fifth Circuit*, Fifth Circuit Civil News (July 2002) *Sexual Harassment Cases: Lessons Learned*, TRIAL Magazine (Jan. 2001); *Chapter 8: The Trial*, O'Connor's Federal Rules -- Civil Trials (1996).

Selected Speaking Engagements: *Appeals – Maximizing Your Chances of Success*, State Bar Advanced Employment Law Course (2003), Houston, Texas; *Employment Law for the Appellate Practitioner*, State Bar of Texas' Sixteenth Annual Advanced Civil Appellate Practice Course (2002), Austin, Texas; *Getting What You Really Need in Discovery*, National Employment Lawyers Association Twelfth Annual Convention (2001); *Dealing with the Inevitable: A Guide to Avoiding Summary Judgment in Sexual Harassment Cases*, NELA Conference on Litigating Harassment & Hostile Environment Claims (2001); *Appealing to the Fifth Circuit*, University of Texas Seventh Annual Conference on Labor and Employment Law, Austin, Texas (2000); *Prevailing on Summary Judgment*, Conference of Hawaii Employment Lawyers Association, Honolulu, Hawaii (2000); *Effective Writing Techniques*, Texas and Louisiana Employment Lawyers Association Conference, Cuernavaca, Mexico (1999); *Recent Developments in Sexual Harassment Law*, Dallas Bar Association Employment Section (1999); *The "No Evidence" Summary Judgment One Year Later*, Houston Bar Association Conference on Practicing before the First and Fourteenth Courts of Appeals (1999).



**FIFTH CIRCUIT UPDATE –  
THOUGHTS ABOUT THE PAST YEAR**

TABLE OF CONTENTS

I. INTRODUCTION .....	1
II. SANCTIONS – AND THE NEED FOR OBJECTIVITY .....	1
III. MANDAMUS RELIEF .....	2
IV. ARBITRATION – CIRCUMVENTING THE COURTS .....	3
V. CLASS ACTION NEWS – OR REQUIEM FOR CLASS ACTIONS? .....	6
VI. FEDERAL TORT CLAIMS ACT CASES .....	7
VII. PUNITIVE DAMAGES .....	8
VIII. RECUSAL FOR BIAS – PUTTING YOUR EGGS IN THE WRONG BASKET? .....	8
IX. SOVEREIGN IMMUNITY – A CASE TO WATCH .....	9
RECALLING THE MANDATE .....	10



## FIFTH CIRCUIT UPDATE – THOUGHTS ABOUT THE PAST YEAR

by Katherine L. Butler  
Butler & Harris  
1007 Heights Boulevard  
Houston, Texas 77008

"Judges are not like pigs, hunting for truffles buried in briefs."

*United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991)

### I. INTRODUCTION

I like to use this quote because it says so much about what goes wrong in the appellate process. Too many of us, even we appellate lawyers who are supposedly above the fray, lack that most fundamental prerequisite for effective advocacy – objectivity. We talk at length, but often not about the issues that concern judges.

My role here today is not to talk about how badly we perform our jobs as appellate lawyers, but to give my thoughts about some important issues the Fifth Circuit has faced over the past year. Obviously, my important issues may not be your important issues. I do not profess total wisdom at this point. In fact, I am holding out until I turn 50 next year.

### II. SANCTIONS – AND THE NEED FOR OBJECTIVITY

The most eye-opening case of the past year for me is the case of *Dube v. Eagle Global Logistics*, 314 F.3d 193 (5<sup>th</sup> Cir. 2002). It is a case in which sanctions of \$71,117.75 were imposed on appellate counsel, principally the firm of Provost Umphrey.

The case first came to my attention when I learned that the oral argument panel in the case had informed the plaintiffs/appellants – several weeks before oral argument was scheduled – that their brief “grossly distorted the record, including manipulating selective quotes to create a false impression of the district court’s actions at a hearing on October 15, 2001.” (Memo at 1). The panel, in a 12-page memorandum, offered the plaintiffs the chance to rebrief or to dismiss the appeal. To my amazement, the plaintiffs chose to dismiss the appeal.

Then, I learned that the defendant had filed a motion for sanctions against the plaintiffs and their counsel.

That resulted in the published opinion cited above. In that case, the panel of Weiner, Stewart and Restani (a judge on the court of international trade) ordered sanctions against plaintiffs’ counsel in the amount of the attorneys’ fees incurred by the defendant – \$71, 117.75. In sanctioning the lawyers, but not the clients, the Court noted, “appellants generally are not held accountable for the offending tactics employed by their attorneys.”

After reading about this case, I wanted to know more – what tactics offended the Fifth Circuit and what kind of case was this anyway. I obtained copies of the offending briefs and reviewed them. Obviously, I am not a mind reader and so I do not actually know what was going on in the head of the appellants’ counsel and why they did not expect the very able counsel on the other side of this case to point out their misrepresentations of the record. My suspicion is that this is a case that proves why some parties need separate appellate counsel on a case. It appears to me that this is a matter on which the lawyers lost their objectivity.

For example, the appellants make the allegation that “the District Court summarily denied the motion for injunction, *without even having read it.*” (Brief at 9) (emphasis in original). The appellants then quote an exchange between Judge Hughes and defense counsel Nancy Patterson:

The Court: What do we need to get an effective date?

Ms. Patterson: The exhaustion and final resolution of any appeal or objections. That’s why the actions that I hear the plaintiffs are trying to take – they filed a motion for injunction on Thursday of last week, a motion with this Court asking for -

The Court: I hadn’t seen that....What’s the injunction about?

Ms. Patterson: They asked for the Court to enjoin any implementation of the consent decree and declare this decree void.

\* \* \*

The Court: [T]he request for an injunction is denied. I deny that on its face.

(Brief at 9). The problem with this excerpt is twofold. First, those four periods after the judge’s second remark actually hide the fact that more than a page of testimony

(including numerous comments by both Ms. Patterson and another lawyer) come between the end of one of the judge's sentences and the next. Second, the relief requested by the appellants was actually granted in the sentence following the last quote of the Court.

This is but one of the major problems with the appellants' brief. There are others of a similar magnitude, in my humble opinion. For example, the appellants repeatedly referred to themselves as "whistleblowers" (Brief at 4) and even claimed that they were the ones who "brought Eagle's lawlessness to official attention in the first place." (Brief at 26). The appellants also claimed that the "EEOC has praised Plaintiffs for taking 'extraordinary steps...to bring Eagle's violation of the law to EEOC's and the public's attention.'" (Brief at 4).

The Fifth Circuit's memo states that this characterization is totally inaccurate and quotes the EEOC as stating that "it would be inaccurate to conclude that the Commission's knowledge of the issues in this case stems exclusively from the information provided by the named plaintiff, as the use of the term 'whistleblower' might suggest to some." (Memo at 8).

Further, the brief as a whole suffers from a stunning lack of record support. Peppered throughout the brief are quotes such as the following:

The settlement now confirms the obvious – that the EEOC and Eagle agreed to "sell out" the rights of Eagle's victims to benefit the EEOC's own parochial interest, while allowing Eagle a huge discount on the value of Eagle's victims' claims.

(Appellants' Opening Brief at 31-32). This allegation was repeated elsewhere in the brief.

Moreover, Plaintiffs have reason to believe that Mr. Daffron provided assistance to Eagle in regard to the litigation and/or settlement here.

(Brief at 37). No evidence is offered to support this assertion.

This is a fascinating example, in my own view, of how lawyers can get too wrapped up in a case and lose all ability to be objective. This case carries a very strong message about the need for independent appellate counsel in some cases.

Another interesting sanctions case is the en banc case, *Whitehead v. Food Max of Mississippi, Inc.*, 332

F.3d 796 (5<sup>th</sup> Cir. 2003). It all started with a personal injury case for inadequate security at a K-Mart parking lot where a mother and daughter were abducted and the mother raped. After winning a \$3.4 million verdict, the successful plaintiff's lawyer took TV and newspaper reporters with him to the local K-Mart along with federal marshals to execute on the judgment. He took this action three days after the post-trial motions were denied. The district court learned of what was going on and informed the lawyer to stop his efforts. Later that day, the court directed K-Mart to post a bond, which it did. This turned out to be a fortunate event for the case, since K-Mart has now filed for bankruptcy.

The district court also awarded sanctions against plaintiff's counsel, in large part because he was "seeking to embarrass the defendant and call attention to himself as a tireless laborer of the bar attempting to obtain justice for his client when, in fact, there was no basis whatsoever in fact or in law for the actions taken." The district court found that the lawyer had obtained a writ of execution for an improper purpose and sanctioned him under Rule 11. A divided en banc Court of Appeals affirmed. The different views of the majority and dissent are well worth reading. According to the majority, which tacitly recognized that there was a basis for the actions taken, the plaintiff's lawyer is still appropriately sanctioned "where it is objectively ascertainable that an attorney submitted a paper to the court for an improper purpose." The Court also stated:

Although a district court is not to read an ulterior motive into a document "well grounded in fact and law," it may do so in exceptional cases, such as this, where the improper purpose is objectively ascertainable.

The improper purposes of the plaintiffs' lawyer, according to the majority, were the desire to embarrass K-Mart and promote himself.

### III. MANDAMUS RELIEF

Historically, the Fifth Circuit has been very reluctant to grant mandamus relief. This past year saw a couple of interesting cases. On the one hand, in *In re Benjamin Moore & Co.*, 318 F.3d 626 (5<sup>th</sup> Cir. 2002), the Fifth Circuit declined to issue mandamus relief in a case challenging the remand of a products liability case against paint manufacturers. The defendants claimed fraudulent misjoinder, arguing that the plaintiffs' claims did not arise out of the same transaction or occurrence or the same series of transactions or occurrences. In that case, the Fifth Circuit said that "we do not have jurisdiction to

review the district court's decision regarding misjoinder." 318 F.3d at 631. The Court quoted 28 U.S.C. 1447, which says that, except in civil rights cases, "an order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise."

However, in the widely-discussed but unpublished case of *In re Daimler Chrysler Corp.*, 2002 U.S. App. LEXIS 8756 (5<sup>th</sup> Cir. 2002), the Fifth Circuit not only granted mandamus relief against Judge Sam Kent, ordering him to recall remand orders, but also directed the chief judge of the Southern District to reassign both these cases and all future friction product claims to a different district judge. In the *Daimler Chrysler* case, the issues were (1) that Daimler Chrysler had filed for bankruptcy protection and a bankruptcy judge had ordered that all claims be transferred to Delaware; and (2) the Fifth Circuit (indeed, the same panel) had granted mandamus relief against a district judge in the Northern District of Texas on the same point in *In re Daimler Chrysler Corp.*, 294 F.3d 697 (5<sup>th</sup> Cir. 2002). According to the Fifth Circuit, Judge Kent's remand order in May 2002 had not mentioned its March 2002 granting mandamus on this very point.

Interesting sidelights on this *Daimler Chrysler* case are that, first, by the time mandamus was granted against Judge Kent, the district court in Delaware had ruled that the transferred cases were not "related" to the bankruptcy proceedings, should not be transferred to Delaware, but instead be remanded back to state court. 294 F.3d at 699. The Third Circuit, however, had stayed that order. *Id.* The Third Circuit issued its opinion on the issue in July of last year in *In re Federal-Mogul Global, Inc.*, 300 F.3d 368 (3<sup>rd</sup> Cir. 2002). In that opinion, it ruled that it did not have jurisdiction to consider the decision of the district court denying the friction product defendants' transfer motions and remanding the friction product claims to the state courts from which they were originally removed. 300 F.3d at 390. The basis was essentially the same utilized by the Fifth Circuit in *In re Benjamin Moore, Inc.* In the long run, Judge Kent's orders actually became the final resolution of the saga.

Another interesting recent mandamus case is *In re Horseshoe Entertainment*, 2003 U.S. App. LEXIS 13291 (5<sup>th</sup> Cir., July 1, 2003). The court in that case granted a writ of mandamus to force the district court to transfer venue in a Title VII case to Shreveport. The defendant had asked that the case be transferred under 28 U.S.C. 1404(a) for the convenience of the parties and witnesses. The district court denied the motion, but, on mandamus, a different result obtained. Judge Benavides dissented and noted that he "fear[ed] that the decision

will lead to the filing of unnecessary and unwholesome pretrial mandamus petitions by parties aggrieved by rulings on motions to transfer brought under 28 U.S.C.A. § 1404(a). Mandamus is an extraordinary writ and should not be a substitute for appeal." 2003 U.S. App. LEXIS 13291 at \* 17. Stay tuned to see what happens on this score.

#### IV. ARBITRATION – CIRCUMVENTING THE COURTS

Several interesting arbitration cases have appeared over the past year. The area of arbitration also was the topic of much discussion at the last Fifth Circuit Judicial Conference – and I heard concerns expressed from judges of all ideological stripes. I have heard a number of judges express concerns that some of the most important cases were exiting the system altogether and being decided in a private setting. I also heard some grousing about the fact that some arbitration agreements try to have the best of both worlds, having a private arbitrator decide the case, but then reserving the right to appeal issues of law if the defendant does not like how it comes out.

With regard to the second point, the Fifth Circuit decision in *Harris v. Parker College of Chiropractic*, 286 F.3d 790 (5<sup>th</sup> Cir. 2002), is instructive. In that case, the arbitration clause included the proviso that "the Award of the Arbitrator shall be binding on the parties hereto, although each party shall retain his right to appeal any questions of law, and judgment may be entered thereon in any court having jurisdiction." 286 F.3d at 793. As the Fifth Circuit later pointed out, the "difficulty in this case is that the parties have not specified the meaning of 'questions of law.'" *Id.* According to the appellant, questions of law included sufficiency of the evidence to support the arbitrator's findings. According to the appellee, of course, this was way too broad and would swallow up the arbitration agreement's rule that "the award of the Arbitrator is binding." *Id.*

The Fifth Circuit agreed with the appellee, ruling that "the arbitrator's legal determinations are intimately bound up with the facts, in such a manner that, if all mixed questions of fact and law were reviewed de novo, none of the arbitrator's findings would be final. ... the provision that the arbitrator's award should be binding would become meaningless." 286 F.3d at 794. The panel suggested that parties wanting to provide for a more extensive review should specify the standard of review in the arbitration agreement. But, given the wording of this agreement, the plaintiff/appellee won. There was no showing of the traditional reasons for vacating an arbitral award, such as evidence that the

arbitrator exceeded his authority, was partial or corrupt, or that the award was procured by corruption, fraud or undue means.

Another issue on which I saw light for the plaintiff is the issue of whether a parent's agreement to arbitrate claims binds his or her children. According to *Fleetwood Enterprises, Inc. v. Gaskamp*, 280 F.3d 1069 (5<sup>th</sup> Cir. 2002), "because the Gaskamp children are not signatories to the sales contract, are not third-party beneficiaries of the agreement or contract, and are not suing on the basis of the contract, they are not bound by the arbitration agreement signed by their parents." 280 F.3d at 1077.

In *Brown v. Nabors Offshore Corp.*, 2003 U.S. App. Lexis 16043 (5<sup>th</sup> Cir., Aug. 6, 2003), the Court confirmed what the U.S. Supreme Court made clear in *Circuit City Stores, Inc. v. Adams*, 121 S.Ct. 1302 (2001) – and that is that a seaman cannot be forced into arbitration. Section 1 of the Federal Arbitration Act exempts from arbitration "contracts of employment of seaman, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. §1. Even though admitting that Brown was a seaman, Nabors argued that he was not engaged in interstate commerce and thus could be forced into arbitration. Nabors argument seems a very strong statement about how some lawyer representing that company views the intellectual integrity of the Court. After all, the Supreme Court had specifically stated in the Adams case that the maxim *ejusdem generis* applied to the exemption clause – so that the residual clause would be defined by reference to the enumerated categories of workers which are recited just before it.

Finally, beware of getting an arbitration agreement if the individual is illiterate. In *American Heritage Life Ins. Co. v. Lang*, 321 F.3d 533 (5<sup>th</sup> Cir. 2003), a man who had completed only the first grade and could neither read nor write was given an opportunity to prove that he was fraudulently induced into signing an arbitration agreement. Why? He had no idea that he was making his X on arbitration agreements. He said that the insurance agent did not tell him. Thus, even though illiteracy alone is not enough to invalidate an arbitration agreement, the Court found both signs that he was fraudulently induced into signing the agreement and that there was no meeting of the minds. The case was returned to the district court for consideration of Lang's claims of fraud in the inducement. The plaintiffs did not fare so well on the remaining cases, where the Court addressed some interesting arbitration issues. The first issue relates to the myth that arbitrations are speedier than a trial on the merits. Second is the issue of what kinds of cases are properly sent to arbitration and what

kind of agreement will establish consent? Third up is the issue of the huge fees that can, as a practical matter, exclude many from bringing a claim in the first instance.

But before I get to these, a peculiar case. In *Investment Partners, L.P. v. Glamour Shots Licensing, Inc.*, 298 F.3d 314 (5<sup>th</sup> Cir. 2002), the Fifth Circuit was asked to void an arbitration agreement that excluded punitive damages because the plaintiff wanted to pursue a claim for treble damages. The problem? The Fifth Circuit said that these were not punitive damages and so the plaintiff was off the mark in claiming that it was denied the right to full relief in the arbitration clause. As the Fifth Circuit noted, quoting the U.S. Supreme Court, punitive damages serve the purpose of punishing the wrongdoer, whereas treble damages serve simply as a remedy to compensate the injured party. Thus, the plaintiff ended up with a bit of egg on its face, although it did certainly learn that it could pursue the remedy it wished.

In *Gulf Guaranty Life Ins. Co. v. Connecticut General Life Ins. Co.*, 304 F.3d 476 (5<sup>th</sup> Cir. 2002), the issue of delay in the process raised its head. Apparently, Gulf Guaranty filed litigation in 1996 and, in 1997, the matter was sent to arbitration. By January 2000, there was still no agreement as to the arbitrators who would hear the dispute. Gulf Guaranty then filed a second suit that alleged waiver of the agreement to arbitrate, among other things. That case ended in the district court in July of 2001 and this appeal resulted.

The Fifth Circuit rejected the notion that the appellees had waived their right to arbitrate – "mere delay falls far short of the waiver requirements..." 304 F.3d at 484 (quoting *Subway Equip. Leasing Corp. v. Forte*, 169 F.3d 324, 326 (5<sup>th</sup> Cir. 1999)) The Court noted that, in one of the few cases where it had found waiver, the party brought a state court suit that did not even mention the arbitration clause and, further, did not attempt to schedule an arbitration hearing until almost three years later. See *Miller Brewing Co. v. Fort Worth Distrib. Co., Inc.*, 781 F.2d 494, 497 (5<sup>th</sup> Cir. 1986).

Gulf Guaranty, the appellant, also sought damages for breach of the arbitration agreement, but the Fifth Circuit rejected that claim, saying that it had no authority under the Federal Arbitration Act to consider such challenges before an arbitral award was issued. 304 F.3d at 488.

This case shows why parties should be very clear about a selection process in the arbitration agreement and should preferably choose only one arbitrator to streamline the process.

One arbitration case that drew a strong dissent last year was *Walton v. Rose Mobile Homes, L.L.C.*, 298 F.3d 470 (5<sup>th</sup> Cir. 2002). This was yet another case against mobile home manufacturers, which routinely demand that consumers sign arbitration agreements. In this case, the district court refused to compel arbitration based on the argument that a claim made under the Magnuson-Moss Warranty Act could not be sent to arbitration. The Fifth Circuit reversed. The major issue in the case was whether the Court should defer to the Federal Trade Commission (FTC) finding that arbitration of such claims was not allowed. The Court said that, while the MMWA spoke about “informal dispute settlement procedures” before filing suit in court and even about the FTC establishing rules about these procedures, this does not in any way preclude arbitration. Arbitration is not normally considered an informal dispute resolution process. Thus, the FTC’s pronouncement on arbitration fell outside its authority.

The Court also considered the House Report on the purpose of the Act, which was “(1) to make warranties or consumer products more readily understood and enforceable; (2) to provide the Federal Trade Commission (FTC) with means of better protecting consumers; and (3) to authorize appropriations for the operations of the FTC for fiscal years 1975, 1976, and 1977.” 298 F.3d at 478. According to the majority, “we do not see any inherent conflict between arbitration and these purposes.” *Id.* It noted that some courts had disagreed.

In her dissent, Judge King noted that this was a classic *Chevron* case. The Act is ambiguous and the FTC has interpreted the Act to preclude arbitration. She argues that the Court is bound to defer to the FTC’s interpretation of the Act unless Congress has directly spoken to the issue or the construction is unreasonable. 298 F.3d at 480. She answered each in the negative. With regard to the FTC’s construction of the Act, Judge King noted that, among other things, the FTC had a number of permissible reasons for ruling as it did, including the fact that it thoroughly studied legislative history before making this decision. She also noted that the FTC had expressed a concern that binding arbitration agreements inadequately protect consumers. 298 F.3d at 487.

In *American Heritage Life Ins. Co. v. Orr*, 294 F.3d 702 (5<sup>th</sup> Cir. 2002), the Fifth Circuit faced the questions of (1) whether the Seventh Amendment bars mandatory arbitration; and (2) whether the cost of arbitration can be used to return a case to court. The plaintiff lost on both points. According to the Court, the “Seventh Amendment does not confer the right to a trial,

but only the right to have a jury hear the case once it is determined that the litigation should proceed before a court. If the claims are properly before an arbitral forum pursuant to an arbitration agreement, the jury trial right vanishes.” 294 F.3d at 711 (*quoting Cremin v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 957 F. Supp. 1460, 1471 (N.D. Ill 1997)).

As for the cost issue, which is at this point one of the few remaining arguments against arbitration for individuals, the Court said that the plaintiff had included only the bald statement that they could not afford the arbitration. But this testimony alone was deemed insufficient and speculative. 294 F.3d at 712. After all, the Court noted, the appellees had assumed the costs of initiating the arbitration. Further, while the loser had to pay the costs of the arbitrator, the Court said that who will ultimately prevail is subject to only speculation and thus not a ground for holding the agreement unenforceable. *Id.* Finally, the Court noted that the AAA rules allow the plaintiffs to request fee-paying relief, if necessary.

A particularly cautionary case in the arbitration context is *Personal Security & Safety Systems, Inc v. Motorola, Inc.*, 297 F.3d 388 (5<sup>th</sup> Cir. 2002). The parties to this dispute had two agreements – a stock purchase agreement and a licensing agreement. The licensing agreement had a mandatory arbitration clause, but the stock purchase agreement did not. But, when Personal Security filed a lawsuit under the stock purchase agreement, it found that the Fifth Circuit compelled arbitration nonetheless. According to the Court, because the two agreements were executed together as part of the same overall transaction, they are properly construed together. Lesson here? If you don’t want mandatory arbitration, you had better be very clear. Here, the arbitration clause in the licensing agreement stated that it covered “all claims, demands ... arising out of or relating to this Agreement...even though some or all of such claims allegedly are extra-contractual in nature...” 297 F.3d at 392. Note that a defendant tried a similar approach in *Cerveceria Cuauhtemoc Moctezuma S.A. de C.V. v. Montana Beverage Co.*, 330 F.3d 284 (5<sup>th</sup> Cir. 2003), arguing that a statute mentioned in the contract required arbitration. That, however, did not appeal to the Court since the statute at issue did not demand arbitration, but merely said that at the option of distributor or manufacturer, the parties “may” arbitrate certain issues.

Procedure: In the case of *Apache Bohai Corp v. Texaco China, B.V.*, 330 F.3d 307 (5<sup>th</sup> Cir. 2003), the defendant, Texaco, asked that the district court compel arbitration and either dismiss or stay the underlying

litigation. The district court granted the motion to compel arbitration but chose to stay rather than dismiss the litigation. Since the Federal Arbitration Act contains specific language that denies appellate jurisdiction over a nonfinal order staying proceedings pending arbitration, the Court dismissed the appeal. The plaintiff argued that the order compelling arbitration and staying was a de facto dismissal, but the Court said no way. The plaintiff also tried an end run – arguing that the Court should issue a writ of mandamus ordering the district court to enter an appealable final judgment. That did not fly either, as the Court noted that, to establish its entitlement to mandamus, the plaintiff had to show that the district court did not have the discretion to stay proceedings pending arbitration. The plaintiff could not make this showing; indeed, the Court noted that several of its prior cases had said that issuing a stay in such a situation was not an abuse of discretion. Lesson here – if you are seeking arbitration, it makes sense to ask that the case be stayed rather than dismissed entirely.

#### V. CLASS ACTION NEWS – OR REQUIEM FOR CLASS ACTIONS?

On the class-action front, the news is not rosy for plaintiffs, although I did see one case where class certification was affirmed, at least in part. That case, *McManus v. Fleetwood Enterprises, Inc.*, 320 F.3d 545 (5<sup>th</sup> Cir. 2003), was a claim that motor homes that could not tow cars were defective. The Fifth Circuit found that many of the issues in the case were not appropriate for class treatment, but ruled the district court did not abuse its discretion by certifying the claim for breach of implied warranty of merchantability under Rule 23(b)(3). Now that is news.

In the area of employment class actions, the Court last year issued *Smith v. Texaco, Inc.*, 86 FEP 1619 (5<sup>th</sup> Cir. 2002), an opinion that has now been withdrawn based on a settlement by the parties.

The interesting news about this case and its predecessor, *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5<sup>th</sup> Cir. 1998), is that creative defense lawyers have convinced the Fifth Circuit that 1991 amendments to Title VII of the Civil Rights Act of 1964 actually mean that most class actions cannot continue in this area of the law. The amendments purport to expand the remedies for one who suffers discrimination, adding mental anguish and punitive damages, as well as jury trials.

To step back, it is important to remember that the four basics of Fed.R.Civ.P. 23(a) are:

- (1) the class be so numerous that joinder of all members if impracticable;

- (2) there be questions of law or fact common to the class;
- (3) the claims or defenses of the representative parties be typical of the claims or defenses of the class; and
- (4) the representative parties will fairly and adequately protect the interests of the class.

Jumping these hurdles does not end the discussion. After looking at these basic issues, you look at Rule 23(b)(3), which permits certification where

the court finds that the question of law or fact common to the members of the law predominate over any questions affecting only individual class members, and that the class action is superior to other methods for a fair and efficient adjudication of the controversy.

Fed.R.Civ.P. 23(b)(3).

Because of the new damages permitted by the 1991 Civil Rights Act, the Court ruled that the class was properly decertified. First, the Court found that common questions did not predominate because of the individual nature of these damages inquiries. “Just as in *Allison*, the plaintiff’s claims for compensatory and punitive damages will focus almost entirely on facts and issues specific to individuals rather than to the class as a whole.” 86 FEP at 1620.

Second, the Court found that Seventh Amendment concerns dictate that the class action is not the superior vehicle for adjudicating the controversy. “To meet the requirements of the Seventh Amendment, one jury may have to hear all the issues regarding the pattern and practice claim. This same jury would have to determine the quantum of compensatory and punitive damages. This would require an enormous amount of time, potentially empaneling a single jury for a one-year period.” 86 FEP at 1630.

This was not a unanimous decision. Judge Reavley dissented. He felt that the majority did not give adequate deference to Judge Cobb’s findings that the class action was the superior method of addressing the concerns of 200 salaried black employees who suffered similar damages from an alleged policy of intentional discrimination. “One wonders where these two circuit judges have acquired the expertise to fault this experienced trial judge on the management of his trials.” 86 FEP at 1633.

Judge Reavley also faulted the majority for, on the one hand, recognizing the essentially factual nature of the certification inquiry, yet, on the other hand, not addressing any particular factual errors that were allegedly committed.

As for its ruling on the law, Judge Reavley challenged that as well. “Today’s decision and *Allison* cannot be reconciled with *Mullen v. Treasure Chest Casino, L.L.C.*, 186 F.3d 620 (5<sup>th</sup> Cir. 1999), *cert. denied*, 528 U.S. 1159 (2000). “In *Mullen*, we affirmed a district court order certifying, under Rule 23(b)(3), a class consisting of 100 to 150 crew members aboard a casino ship who allegedly suffered respiratory illnesses caused by a defective ventilation system aboard the ship. Even though we recognized that individualized proof of causation, damages, and contributory negligence would be necessary for each class member, we held that the predominance requirement of 23(b)(3) was met, since the common issues of seaman status, vessel status, negligence, and seaworthiness met the predominance requirement of Rule 23(b)(3).” 86 FEP at 1635. Judge Reavley also stated that there was controlling circuit precedent, *Jenkins v. Raymark Industries, Inc.*, 782 F.2d 468 (5<sup>th</sup> Cir. 1986), in which the Court held that punitive damages is a common question for class action resolution.

Judge Reavley also noted the irony of the Court’s decision. “The Act targets larger employers, yet our court interprets it to protect large employers from the formidable plaintiffs’ tool of Rule 23. If one doubts that the class action is an important tool to plaintiffs seeking redress for employment discrimination, witness the recent Coca-Cola settlement of an employee class action alleging race discrimination.” 86 FEP at 1634.

So are employment class actions dead? No, but cases seeking punitive and mental anguish damages are at best with Ted Williams at the moment.

From an outsider’s perspective, the most interesting thing about this entire discussion is the concern about the Seventh Amendment. Plaintiff’s lawyers have, for years, been touting the Seventh Amendment as a bar to forced arbitration – in, for example, the employment or consumer law context. They have had no success to date in convincing courts that the Seventh Amendment means what it says, but now they see that the Seventh Amendment is being used against them in the class action context.

Of course, it is not just individuals who are affected by the Fifth Circuit’s suspicions about class actions. In January of this year, the Fifth Circuit reversed the district court’s certification of a class in *Sandwich Chef of Texas, Inc. v. Reliance Nat’l Indem. Ins. Co.*, 319 F.3d

205 (5<sup>th</sup> Cir. 2003). The class was an attempt to gather together RICO fraud claims against worker’s comp insurance carriers (141 in all). The plaintiff alleged that the insurance companies had deliberately overcharged businesses who had voluntary worker’s comp insurance and that they had done so in violation of an approved rating plan. The district court had certified the class, but the Fifth Circuit reversed, finding that individual issues of reliance and causation defeated Rule 23(b)(3) predominance. Among other things, the Court found that each plaintiff would have to show individual reliance in order to make a RICO claim -- making causation an individual determination and a class action thus improper. The district court had believed that the matter was fairly simple to establish since the insurance companies’ own invoices show the overcharges, which the businesses paid. However, the defendants alleged that the businesses knew they were getting charged more than the filed rates – and that they had agreed to this. Thus, back to a case by case analysis.

And, on July 16, 2003, the Fifth Circuit issued its opinion in *Bell Atlantic Corp. v. AT & T, Inc.*, 2003 U.S. App. LEXIS 14324 (5<sup>th</sup> Cir., July 16, 2003), an anti-trust case that pitted businesses against a mega corporation. The lawsuit started as a challenge by Bell Atlantic to AT & T’s purported attempt at monopolization of the market for caller-ID services. Shortly after the suit was filed, two businesses intervened and moved to certify two classes of plaintiffs who claimed to have suffered antitrust injury because of AT&T’s conduct. The intervenors claimed harm as business customers based on AT & T’s refusal to pass caller ID information along its long-distance telephone network. The district court denied certification and the Fifth Circuit affirmed. Why? Because the Court found that the wide disparity in damages defeated predominance. The Court recognized that few cases are denied certification on this ground, since liability is generally severed from the damages portion. Check out the footnote on how the plaintiffs could, but did not, request bifurcation and you may cringe, as I did.

## VI. FEDERAL TORT CLAIMS ACT CASES

All is not dreary for the plaintiff’s bar at the Fifth Circuit. In the past year, the Fifth Circuit affirmed the two largest verdicts in the 55 year history of the Federal Tort Claims Act – though they were both trimmed. Both cases were medical malpractice cases in which infants were left with severe brain damage as a result of medical malpractice. *Lebron v. United States*, 279 F.3d 321 (5<sup>th</sup> Cir. 2002) and *Dickerson v. United States*, 280 F.3d 470 (5<sup>th</sup> Cir. 2002). In one case, “the government’s

physician fractured Karina's skull, creating a fist-size cavity filled with tissue and cerebral fluid, and crushed her right eye socket. This damage will never heal." 279 F.3d at 328.

## VII. PUNITIVE DAMAGES

In *Lincoln v. Case*, 2003 U.S. App. LEXIS 16143 (5<sup>th</sup> Cir., Aug. 7, 2003), the Fifth Circuit had an opportunity to interpret the recent U.S. Supreme Court case, *State Farm Mutual Auto. Ins. Co. v. Campbell*, 123 S.Ct. 1513 (2003), in the context of a Fair Housing Act case. At trial, the jury awarded \$500 in compensatory damages and \$100,000 in punitive damages for this case in which the landlord was happy to rent the apartment until he learned that the Japanese-American woman had an African-American boyfriend. On appeal, the punitive damages were reduced to \$55,000. The Fifth Circuit noted that the *Campbell* case stated that "[b]ecause there are not rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where a particularly egregious act has resulted in only a small amount of economic damages." 123 S.Ct. at 1524. In addition, the Court noted that the civil penalty for a first-time Fair Housing Act violation is \$55,000.

The Supreme Court has made it abundantly clear that our charge is to look closely at punitive damages awards, in light of the Gore guideposts. After considering each... we are persuaded that the \$100,000 punitive damages award must be remitted to \$55,000 in order to comport with due process. We find in this case that the statutory maximum civil penalty offers the appropriate award on this record.

Our holding in no way indicates our approval for Case's actions. We simply hold that in this case a punitive damages award coextensive with the statutory maximum civil penalty is reasonable and proportionate to the wrong committed.

2003 U.S. App. LEXIS 16143 at \*27-28. The ratio of punitive damages to actual damages thus ended up at 110 to 1.

## VIII. RECUSAL FOR BIAS – PUTTING YOUR EGGS IN THE WRONG BASKET?

In July, the Fifth Circuit entered an opinion in *Andrade v. United States*, 2003 U.S. App. LEXIS

14119 (5<sup>th</sup> Cir., July 14, 2003). This is the case brought by survivors and estates of Branch Davidians who died in Waco in 1993. The case was tried to an advisory jury, which ruled against the plaintiffs. The district judge then accepted their verdict. The issue on appeal was solely whether district judge Water Smith should have recused himself because he was biased against the plaintiffs.

The Court pointed out that the plaintiffs had to clear three hurdles to gain Judge Smith's recusal. They had to (1) show that alleged comments, actions or circumstances were "extrajudicial" in origin (i.e., most often arising from knowledge or relationships outside formal proceedings); (2) place the offending event into the context of the trial as a whole and (3) do so by an "objective" observer's standard. Then, to top it off, they had to show the district court's decision was not just wrong, but an abuse of discretion.

Among the evidence that the plaintiffs presented was Judge Smith's comment in a hearing that he had not read evidence before denying its admissibility and his comment to plaintiff's lawyer, "if you don't think I've got the guts to disregard the [advisory] jury's verdict, you're wrong." The plaintiffs also reference a newspaper article in which the judge allegedly said, after a weekend reviewing government surveillance tapes made in the compound during the siege, that the tapes would "blow the plaintiffs out of the pond."

Perhaps this sounds bad, but it was not bad enough for the Court. My own view is that when both the jury and the judge are against you, you cannot prevail by saying that the judge was biased against you. You must attack some other aspect of the proceedings. Instead, according to the opinion, the plaintiffs raised only one point – that the judge should have recused himself. As the Court pointed out

We must infer from these tactics that Appellants concluded that there were no colorable appellate issues concerning Judge's Smith's rulings, as opposed to his alleged bias.

That Appellants apparently reached this conclusion is a testament, however unintended, to the judge's overall capability. Real judicial bias, it is true, "infects the entire judicial process," but a harmless error standard of review applies nevertheless. Appellants argument for reversal is misplaced.

2003 U.S. App. LEXIS 14119 at \* 32-33 (citations omitted)..

## IX. SOVEREIGN IMMUNITY – A CASE TO WATCH

In *Pace v. Bogalusa City School Board*, 325 F.3d 609 (5<sup>th</sup> Cir. 2003), *rehearing en banc granted*, 2003 U.S. App. LEXIS 14621 (5<sup>th</sup> Cir. 2003), an interesting argument was suggested and, to date, accepted. First, a brief background. Travis Pace, the plaintiff, is a young man with cerebral palsy who is confined to a wheelchair. He complained about the lack of handicap accessible facilities at the Bogalusa High School. He ended up suing the school district, as well as various state defendants for the lack of access. The state defendants raised the expected Eleventh Amendment challenge, but Pace's lawyer thought she had a good retort, which is that the state had received federal funds that were conditioned on a waiver of immunity.

Where did it all go wrong for the plaintiff? Well, the Court said that, given the state of the law at the time, the defendant could not have known that it had sovereign immunity to waive by accepting federal funds.

Prior to *Reickenbacker*, the State defendants had little reason to doubt the validity of Congress's asserted abrogation of state sovereign immunity under § 504 of the Rehabilitation Act or Title II of the ADA. Believing that the acts validly abrogated their sovereign immunity, the State defendants did not and could not know that they retained any sovereign immunity to waive by accepting conditioned federal funds.

325 F.3d at 616. The Court also held that there was no waiver under IDEA, because

Prior to September 1998, no circuit court had held that § 1403 of the IDEA did not validly abrogate state sovereign immunity and this circuit did not hold so until today. Under the reasonable belief that the IDEA validly abrogated their sovereign immunity, the State defendant did not know that they retained any sovereign immunity to waive by accepting federal IDEA funds during the relevant time period.

325 F.3d at 617.

Thus, the state's decision to accept the funds did not operate as a voluntary waiver of sovereign immunity. Mr. Pace's Rehabilitation Act, IDEA, and ADA claims were thus dismissed on sovereign immunity grounds.

## Recalling the Mandate

by Robert E. McKnight, Jr.

Imagine your dismay: After the Fifth Circuit killed your case, the U.S. Supreme Court issues an opinion interpreting the governing law in a way that would have kept your case alive.

It's not that uncommon. After the Fifth Circuit held in *United States ex rel. Garibaldi v. Orleans Parish School Board*, 244 F.3d 486 (5<sup>th</sup> Cir. 2001), *cert. denied*, 122 S.Ct. 808 (2002), that local governments are not subject to *qui tam* actions under the False Claims Act, the Supreme Court in *Cook County, Illinois v. United States ex rel. Chandler*, 123 S. Ct. 1239 (March 10, 2003), held that they are. After the Fifth Circuit held in *Kazmier v. Widmann*, 225 F.3d 519 (5<sup>th</sup> Cir. 2000), that state governments enjoy sovereign immunity from claims based on the family leave provisions of the Family & Medical Leave Act, the Supreme Court in *Nevada Dept. of Human Resources v. Hibbs*, 123 S. Ct. 1972 (2003), held that they don't.

Is reviving your case possible?

Appellate courts use mandates, described in Federal Rule of Appellate Procedure 41, to transfer jurisdiction of cases back to the district courts, along with information on how the appeal was resolved and instructions on what to do next. Before issuance of the mandate, the court "ha[s] the power to alter or modify [its] judgment." *First Gibraltar Bank, FSB v. Morales*, 42 F.3d 895, 898 (5<sup>th</sup> Cir. 1995).

After issuance of the mandate, modification is possible only by convincing the court to recall the mandate. There is no FRAP or other congressionally-authorized rule of procedure governing recall of mandates. At most, the drafters of the 1968 appellate rules recognized the pre-existing practice and sanctioned its continuance: in the comment to the original version of FRAP 37, they acknowledged a party's "entitle[ment] to seek recall of the mandate" to include in it any omitted instructions on the award of judicial interest. Later, the Supreme Court confirmed the appellate courts' "inherent power to recall their mandates, subject to review for abuse of discretion." *Calderon v. Thompson*, 118 S. Ct. 1489, 1498 (1998).

Fifth Circuit Rule 41.2 provides the local standard for the exercise of discretion to recall a mandate: "Once issued a mandate shall not be recalled except to prevent injustice." This has barely changed in decades. In the 1939 edition of the court's rules, Rule 32 provided that

"[a] mandate once issued will not be recalled except by the court and to prevent injustice." Between then and now, the mandate itself went from being a creature of the court's rules to being written into the FRAPs, but the recall of mandates has remained a creature of the court's rules to be activated only for preventing injustice.

(Supreme Court mandates, on the other hand, were in some cases a creature of *statute*. According to the Judiciary Act of 1789, "the Supreme Court shall not issue execution in causes that are removed before them by writs of error, but shall send a special mandate to the circuit court to award execution thereupon." Sec. 24, 1 Stat. 73, 85.)

One case where the Fifth Circuit recalled a mandate after an intervening change in interpretation of the substantive law was *Sun Oil Co. v. Burford*, 130 F.2d 10 (5<sup>th</sup> Cir. 1942), *rev'd on other grounds*, 63 S.Ct. 1098 (1943). After its original decision in the case on a matter of state law, the Texas Supreme Court issued a contrary decision. The Fifth Circuit followed that decision in another case, and as a result its decisions before and after the Texas decision were in conflict. The court cited the conflict as the reason for recalling the mandate.

In *Wichita Royalty Co. v. City Nat'l Bank of Wichita Falls*, 97 F.2d 249 (5<sup>th</sup> Cir. 1938), the Fifth Circuit considered whether it should recall the mandate in a case that it decided before *Erie* compelled the court to base its decision on Texas caselaw. Because the court held that its decision was correct under Texas law, it denied the recall motion.

Otherwise, Fifth Circuit cases involving recall of mandates have involved reasons peculiar to the same case. *See, e.g., Meredith v. Fair*, 306 F.2d 374 (5<sup>th</sup> Cir. 1962) (recalling mandate where the wording of the original order "was so loose as to defeat the intentions of the Court"); *Masinter v. Tenneco Oil Co.*, 934 F.2d 67 (5<sup>th</sup> Cir. 1991) (recalling mandate to provide for judicial interest as required by FRAP 37).

Other circuits have recalled mandates due to changes in the Supreme Court's interpretation of the law. *See, e.g., Zipfel v. Halliburton Co.*, 861 F.2d 565 (9<sup>th</sup> Cir. 1988); *American Iron and Steel Institute v. EPA*, 560 F.2d 589 (3<sup>rd</sup> Cir. 1977) (but noting specifically that recall was based on other factors as well).

The First Circuit has observed in *dictum* that a contrary decision from the Supreme Court might justify recalling a mandate, *Legate v. Maloney*, 348 F.2d 164, 166 (1<sup>st</sup> Cir. 1965); the D.C. Circuit repeated that *dictum* in *Greater Boston Television Corp. v. FCC*, 463 F.2d 268, 278 n.12 (D.C. Cir. 1971), *cert. denied*, 92 S.Ct. 2042 (1972).

In *Calderon*, the Supreme Court held that a circuit court's *sua sponte* recall of a mandate to review the merits of an earlier denial of habeas relief is an abuse of discretion "unless it acts to avoid a miscarriage of justice as defined by our habeas corpus jurisprudence." 118 S. Ct. at 1502. This might be read to justify recalling a mandate in a case wrongly decided from the perspective of a later Supreme Court decision. But, at least in the Fifth Circuit, this holding in *Calderon* has apparently been applied only to the same habeas issue as in *Calderon* — whether the petitioner can show actual innocence. *Goodwin v. Johnson*, 224 F.3d 450, 459-61 (5<sup>th</sup> Cir. 2000), *cert. denied*, 121 S.Ct. 874 (2001).

Courts used to be limited to recalling mandates during the same term or session of their issuance. *See, e.g., Sun Oil*, 130 F.2d at 13. But since the 1948 enactment of 28 U.S.C. § 452, which provides that the "expiration of a session of court in no way affects the power of the court to do any act or take any proceeding," that limitation has vanished. *Kinnear-Weed Corp. v. Humble Oil & Refining Co.*, 296 F.2d 215 (5<sup>th</sup> Cir. 1961), *cert. denied*, 82 S.Ct. 142 (1961).

Assuming that each year the Supreme Court overrules some fairly recent appellate dispositions, the paucity of Fifth Circuit mandate recalls suggests a low likelihood of success. In *Calderon*, the Court wrote, "[i]n light of 'the profound interests in repose' attaching to the mandate of a court of appeals, ... the power can be exercised only in extraordinary circumstances.... The sparing use of the power demonstrates it is one of last resort, to be held in reserve against grave, unforeseen contingencies." 118 S. Ct. at 1498.

A change in the law does not seem to be one of them.

(*Ed. note:* The docket sheets in the *Garibaldi* and *Kazmier* cases show that plaintiffs' counsel have not moved the Fifth Circuit to lift the mandate in either case.)