

UT

The University of Texas School of Law

Presented:

The 2006 State and Federal Appeals Conference

June 1–2, 2006
Austin, Texas

**Fifth Circuit Update:
Significant Civil Decisions Since May 2005**

Macey Reasoner Stokes
Martha G. Newton

Author contact information:

Macey Reasoner Stokes
Baker Botts L.L.P.
Houston, Texas
macey.stokes@bakerbotts.com
713.229.1369

Martha G. Newton
Baker Botts L.L.P.
Houston, Texas
martha.newton@bakerbotts.com
713.229.1810

TABLE OF CONTENTS

	Page
INTRODUCTION	1
DISCUSSION	1
I. Subject Matter Jurisdiction	1
A. Case or Controversy	1
1. Standing	1
a. Standing to Sue and to Appeal	1
b. The Futility Exception to the Standing Requirement	2
2. Ripeness	2
3. Mootness	3
B. Immunity	4
1. State Sovereign Immunity	4
a. Waiver of Immunity from Suit by Removal	4
b. Waiver of Immunity from Suit under Section 504 of the Rehabilitation Act of 1973	6
2. Qualified Immunity	6
a. Suit Against Hospital Administrators Arising Out of Patients' Deaths	6
b. Suit Against State Officials for Destroying a Business	8
3. Judicial Immunity	8
C. Improper Joinder	9
1. Voluntary-Involuntary Rule	9
2. Application of <i>Smallwood</i> : The Common Defense Doctrine	10
3. Application of <i>Smallwood</i> : Pierce-the-Pleadings Inquiry	11
D. Other Jurisdictional Issues	12
II. Personal Jurisdiction	15
III. Abstention	16
IV. Summary Judgment	17
V. Evidence	18
A. Rule 701: Exclusion of Improper Lay Witness Testimony	18

B.	Rule 1002: Best Evidence Rule	18
C.	Rule 901: Authenticating a Writing.....	19
D.	Rule 1003: Admission of Duplicates	20
VI.	Appellate Jurisdiction	20
A.	Order Compelling Arbitration.....	20
B.	Order Denying Remand	22
VII.	Other Issues.....	22
A.	Judicial Estoppel	22
1.	Intentionality	22
2.	Judicial Estoppel of an Age-Discrimination Claim Based on Statements Made to Support a Claim for Social Security Disability Benefits	23
B.	Federal Rule of Appellate Procedure 28(j) Letter.....	24
C.	Improper Jury Argument.....	24

TABLE OF AUTHORITIES

CASES

	Page
<i>Am. Guar. & Liab. Ins. Co. v. Anco Insulations, Inc.</i> , 408 F.3d 248 (5th Cir. 2005)	16
<i>Atteberry v. Nocona General Hospital</i> , 430 F.3d 245 (5th Cir. 2005)	6
<i>Bennett-Nelson v. La. Bd. of Regents</i> , 431 F.3d 448 (5th Cir. 2005)	6
<i>Boone v. Citigroup, Inc.</i> , 416 F.3d 382 (5th Cir. 2005)	10
<i>Brazos Valley Coalition for Life, Inc. v. City of Bryan</i> , 421 F.3d 314 (5th Cir. 2005)	3, 4
<i>Braud v. Transport Service Company of Illinois</i> , ---F.3d---, No. 06-30088, 2006 WL 880051, at *1 (5th Cir., Apr. 6, 2006).....	12, 13, 14
<i>Brown v. Parker Drilling Offshore Corp.</i> , 410 F.3d 166 (5th Cir. 2005)	24, 25
<i>Calder v. Jones</i> , 465 U.S. 783 (1984).....	15
<i>City of Mesquite v. Aladdin’s Castle, Inc.</i> , 455 U.S. 283 (1982).....	4
<i>Cleveland v. Policy Management Systems Corp.</i> , 526 U.S. 795 (1999).....	23
<i>Colo. Water Conservation Dist. v. United States</i> , 424 U.S. 800 (1976).....	16
<i>Crockett v. R.J. Reynolds Tobacco Co.</i> , 36 F.3d 529 (5th Cir. 2006)	9
<i>De La O v. Housing Authority of the City of El Paso</i> , 417 F.3d 495 (5th Cir. 2005)	3
<i>Desert Palace, Inc. v. Costa</i> , 539 U.S. 90 (2003).....	17

