# DECEMBER CLE BY THE HOUR

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## FEDERAL PROCEDURE

***Hon. Mark Hornsby***

*United States District Court, Western District*

# Update on Federal Jurisdiction and Procedure

Shreveport Bar Association

Mark L. Hornsby
U.S. Magistrate Judge

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December 10, 2019 at 10:45 a.m.

I. Jurisdiction

A. Oscar Cumpian v. Alcoa World Alumina, LLC, et al, 910 F.3d 216 (5th Cir. 2018): *On a question of improper joinder at the early stage of a case, it is error to use the no-evidence summary judgment standard because the determination is being made before discovery has been allowed.*

a. Plaintiff filed suit in Texas state court against Alcoa and PMIC for damages arising out of a workplace accident. Defendants removed the case based on an assertion of diversity jurisdiction and alleged that although PMIC and Plaintiff were both Texas citizens, PMIC had been improperly joined.

b. *The removing defendant has the burden:* The district court applied the wrong standard when it said that plaintiff did not show facts to support that PMIC owed him a duty. To prevail on an improper joinder claim, a removing party must put forward evidence that would negate a possibility of liability on the part of the nondiverse defendant. *Plaintiff's lack of affirmative evidence is not fatal.*

B. Midcap Media Finance v. Pathway Data, 929 F.3d 310 (5th Cir. 2019): *Despite the parties' agreement that diversity jurisdiction exists, the court has an independent duty to assess its own jurisdiction.*

a. One defendant was listed as a "resident" rather than a "citizen" of a state.

b. The LLC was identified as a Texas entity with its PPB in Texas.

c. After 3 years of litigation and a bench trial, the Fifth Circuit remanded back to district court. "The state courts have general jurisdiction. Federal ones do not. Respect for the state system and the strictly construed nature of federal jurisdiction requires our unflagging attention to these limits. We expect the same unflagging attention from litigants who invoke our jurisdiction."

C. In re Gee, 941 F.3d 153 (5th Cir. 2019): *A district court's obligation to consider a challenge to its jurisdiction is non-discretionary.*

a. Plaintiffs brought a "cumulative effects challenge" to Louisiana's laws regulating abortion. Plaintiffs argued that Louisiana's laws regulating abortion taken as a whole were unconstitutional, even if individual laws were not. Louisiana moved to dismiss arguing that the district court lacked jurisdiction because the plaintiffs did not have standing to challenge many of the individual laws included in the challenge. The district court refused to analyze plaintiff's standing to challenge each law and denied the motion to dismiss.

b. The district court should have considered plaintiffs standing to challenge each law.

D. Frank v. Gaos, 139 S.Ct. 1041 (2019): *The court has an obligation to determine whether it has jurisdiction before it can approve of a proposed class action settlement under Fed. Rule Civ. Proc. 23(e).*

a. Plaintiffs brought a class action suit against Google alleging that Google violated the Stored Communications Act. The plaintiffs alleged that Google transmitted internet users' search terms to the third-party website the user selected as a result of the Google search.

b. The parties reached a settlement that required court approval under Fed. Rule Civ. Proc. 23(e). The district court and the Ninth Circuit approved the settlement. Several class members objected to the settlement.

c. The Supreme Court granted certiorari and remanded the case to the lower courts to determine whether the plaintiffs have standing.

II. Summary Judgment

Rule 56(c)

Rajin Patel v. Texas Tech University, 2019 WL 5418084, (5th Cir. 2019): *Rule 56(c) permits a party to support or dispute summary judgment through unsworn declarations, provided their contents can be presented in admissible form at trial.*

a. Plaintiff asserted due process and equal protection violations against the University and several of its officials for its handling of allegations that he cheated on an exam. The district court granted summary judgment for defendants. Plaintiff appealed and argued, among other things, that the district court committed error when it refused to consider his expert reports because they were unsworn.

b. The court should have considered whether the reports were capable of being presented in a form that would be admissible in evidence.

c. The district court's evidentiary ruling was reviewed for abuse of discretion.

Rule 56(d)

Jonathan Raburn v. Community Management, LLC, 2019 WL 548598 (5th Cir. 2019): *Deferring summary judgment and ordering discovery is appropriate only if the nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its decision.*

a. Plaintiff sued Community, a property management company, for alleged violations of the FDCPA. The district court granted summary judgment for defendant, ruling that defendant was not a debt collector. Plaintiff appealed and argued, among other things, that the district court should have delayed ruling on the MSJ until discovery was complete.

b. Courts *may* defer ruling on summary judgment and allow discovery, but Rule 56 does not require that *any* discovery take place before summary judgment can be granted.

c. The court's denial of discovery is reviewed for abuse of discretion.

III. Fair Labor Standards Act – Discovery

Camesi v. Univ. of Pittsburgh Med. Ctr., 729 F.3d 239 (3d Cir. 2018): *The FLSA does not prevent the award of costs under the Federal Rules of Civil Procedure*.

a. Employees brought a class action suit against medical center. The district court decertified the class, and unnamed employees were dismissed. The named employees dismissed their claims so they could appeal. The district court then awarded the medical center $300,000 in costs for copies of files it made for discovery.

b. The FLSA does not displace Rule 54(d)(1), which states, "Unless a federal statute, these rules, or a court order provides otherwise, costs—other than attorney's fees—should be awarded to the prevailing party." And a defendant can still be considered a prevailing party where, as here, a plaintiff's claims are dismissed without prejudice.

IV. Expert witnesses – Medical Malpractice (Texas Law)

Coleman v. United States, 912 F.3d 824 (5th Cir. 2019)(Texas case): Federal Rule of Evidence 601 requires federal courts to apply state rules for expert witness qualification when determining the competency of expert witnesses to testify regarding medical malpractice claims that turn of questions of state substantive law.

V. ADEA in Hiring

Kleber v. CareFusion Corp., 914 F.3d 480, (7th Cir. 2019): *Older job applicants cannot invoke the ADEA to challenge hiring policies they believe have a discriminatory impact*.

a. Plaintiff filed a disparate impact claim against defendant, whose job description required that applicants have "no more than 7 years" of relevant experience.

b. Congress intended the ADEA to cover current employees, not outside job applicants.

VI. *Erie* Doctrine

A. Effect of Subsequent Intermediate State Appellate Court Precedent

FDIC v. Abraham, 137 F.3d 264 (5th Cir. 1998): On an *Erie* analysis of controlling state law, a ruling circuit court should not disregard its own prior precedent UNLESS:

a. There is a clearly contrary holding of the highest court of the state;

b. Subsequent statutory authority, squarely on point, is available for guidance; OR

c. There are subsequent intermediate state appellate court precedent *comprised of unanimous or near-unanimous holdings from several—preferably a majority—of the intermediate appellate courts of the state in question.*

B. Louisiana Law

Jorge-Chavelas v. Louisiana Farm Bureau Cas. Ins. Co., 2019 WL 1075454 (5th Cir. 2019): Under Louisiana's civilian methodology, *the decisions of Louisiana's intermediate courts are persuasive authority*, but the appellate court is not strictly bound by them.

a. Louisiana's Constitution, codes, and statutes are of paramount importance to its judges.

b. Unlike stare decisis, in the civil system numerous court decisions must agree on a legal issue to establish *jurisprudence constante* (constant jurisprudence). Even when that consensus exists, it is only persuasive.

VII. Developing Tort Doctrines

Meador v. Apple, 911 F.3d 260 (5th Cir. 2018): *If guidance from state cases is lacking, it is not for the federal appellate court to adopt innovative theories of recovery under state law.*

a. Plaintiff filed suit against Apple for not disabling the text feature when driving. The suit followed a car accident that was caused by a driver looking at her cell phone.

b. The appellate court concluded that the cell phone could not be a cause of the injuries in this case because the Texas cases cited by Plaintiff made it clear that acceptance of this causation theory would work a substantial innovation in Texas law.

VIII. Statutory Interpretation

84 Lumber Company v. Continental Casualty Company, et al, 914 F.3d 329 (5th Cir. 2019): *When a law is clear and unambiguous, and its application does not lead to absurd consequences, it shall be applied as written, with no further interpretation made in search of the legislative intent.*

a. Sub-contractor sued general contractor for failure to pay for a portion of work. Suit was filed under the Louisiana Public Works Act (LPWA). Defendant moved for summary judgment, alleging that Plaintiff failed to comply with the act's notice requirements, which require a subcontractor not in privity with a general contractor to send written notice of its claim by certified or registered mail to the general contractor's Louisiana office. Instead, plaintiff emailed notice to defendant's lawyer.

b. The notice requirements were clear and unambiguous, and they must be strictly construed. The notice emailed by plaintiff to defendant's lawyer did not comply with the statute as written. Even though the party did receive actual notice, the notice did not comply with the clear statute and thus was not sufficient. The law says nothing about actual notice.

IX. Rule 54(b) Judgment and Time for Appeal

Teresa Ann Johnson v. Ocwen Loan Servicing, LLC, et al, 916 F.3d 505 (5th Cir. 2019): A *Rule 54(b) Judgment starts its own 30-day clock for filing an appeal.*

a. Rule 54(b) allows entry of an appealable judgment on one or more claims even when trial court litigation remains for other claims. The district court entered a Rule 54(b) judgment rejecting all but one claim. Plaintiff waited until after the court resolved the final claim—more than 30 days after the Rule 54(b) judgment—to appeal rulings from both judgments. In her appeal, she argued that she was not untimely because the Rule 54(b) judgment was not authorized.

b. The appellate court did not answer the question of whether an appellant who fails to timely appeal a Rule 54(b) judgment may attack the validity of that partial judgment in an appeal of the final judgment.

X. Non-Compete Agreements

Brock Services v. Rogillio, 2019 WL 4023825 (5th Cir. 2019)

A non-compete must strictly comply with the requirements of Louisiana law. But if the provision is geographically overbroad, the court may rely on a severability clause to reform the overbroad provision and excise the offending language.

The non-compete included several named parishes, but also terms such as "within a 100 mile radius of any actual, future or prospective customer, supplier, [etc.]…."

The court's reformation only removed catch-all clauses that went beyond the listed parishes.

Even though restrictive covenants must be strictly construed, the trial court properly considered parole evidence to determine the parties' intent.

XI. Civil Rights – Excessive Force Under 42 U.S.C. § 1983

Valderas v. City of Lubbock, 774 Fed.Appx. 173 (5th Cir. 2019)

Police had a warrant for Plaintiff's arrest. The police set up a drug deal with Plaintiff using a confidential informant.

During the deal, Plaintiff noticed a car approaching the area at high speed. The car contained an arrest team, who had been notified that Plaintiff was considered armed and dangerous and had a violent criminal history.

Plaintiff claimed that he thought he was being ambushed and robbed, so he removed a gun from his waistband. All three officers saw him retrieve the gun. The CI then told Plaintiff that it was the police, so Plaintiff claimed he threw the gun into a car.

One officer yelled "gun". One officer fired five shots, striking Plaintiff 3 times.

The district court granted the officers summary judgment on the issue of qualified immunity. Plaintiff argued that the use of deadly force was no longer justified because he threw the gun in the car.

When evaluating a claim of qualified immunity "we engage in a two-part inquiry asking: first, whether taken in the light most favorable to the party asserting the injury, ... the facts alleged show the officer's conduct violated a constitutional right; and second, whether the right was clearly established."

To overcome a claim of qualified immunity in an excessive force case, the plaintiff "must show '(1) an injury, (2) which resulted directly and only from a use of force that was clearly excessive, and (3) the excessiveness of which was clearly unreasonable.' "

"The use of deadly force violates the Fourth Amendment unless the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others."

Valderas admits to pulling a gun from his trousers. He argues, however, that the exercise of deadly force was no longer reasonable once he threw the gun into the

vehicle and "turned to flee." Contrary to Valderas's assertions, the video footage does not show that he put his hands up, nor does it show that he was fleeing, when the shots were fired. See Scott, 550 U.S. at 380, 127 S.Ct. 1769 ("When opposing parties tell two different stories, one of which is blatantly contradicted by the record ... a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment."). Instead, Valderas only can be seen leaning into the car—not discarding the gun.

Given these facts, there is no genuine dispute but that Officer Mitchell's decision to use deadly force was reasonable under these circumstances. Our circuit has repeatedly held that an officer's use of deadly force is reasonable when an officer reasonably believes that a suspect was attempting to use or reach for a weapon.

Here, it is undisputed that Officer Mitchell saw Valderas intentionally brandish a firearm at the approaching officers. Although Valderas contends that he discarded the gun before he was shot, the events transpired in a matter of seconds, leaving Officer Mitchell with little time to realize that Valderas no longer possessed a gun before making the decision to open fire. Considering the totality of the facts and circumstances, a reasonable officer in Officer Mitchell's position would have reasonably perceived Valderas's actions to pose an imminent threat of serious harm at the time the shots were fired.

It follows that it was not unreasonable for Officer Mitchell to use deadly force to protect himself and others. Officer Mitchell was not required to wait to confirm that Valderas intended to use the gun before shooting.

Jason v. Tanner, 2019 WL 4252240 (5th Cir. 2019)

A prisoner whose skull was cracked by a fellow inmate with a prison-issued bladed yard tool can't sue prison officials. The prison warden and two officers have qualified immunity from Clarence Jason's civil rights suit.

The appeals court reversed a district decision allowing Jason to sue the officers for deliberate indifference to his safety and the warden for failure to train his officers. Jason, an inmate at Rayburn Correctional Center, was hit by a sling-blade, a manual weed-cutting tool consisting of a long wooden handle with a heavy (often hooked) steel blade at the end.

The blade had been issued to a third, uninvolved prisoner through a program that allows inmates to check tools out for several hours. The attacker got hold of the tool after its intended user abandoned it. There was no evidence the officers shirked their monitoring duties.

Although "one might have reservations about the sensibility" of a tool program that allows sling-blades, their alleged individual conduct doesn't show deliberate indifference to Jason's safety under Fifth Circuit law.

XII. Miscellaneous

A. Independent Medical Examination ("IME"):

Mager v. Wisconsin Central, 924 F.3d 831 (5th Cir. 2019): Court affirmed dismissal of lawsuit as a sanction for misbehavior of Plaintiff and his counsel during an IME. Plaintiff's counsel interfered with the IME and surreptitiously recorded it. Plaintiff refused to answer questions about his condition, medications, or how the injury occurred. Instead, Plaintiff referred the doctor to Plaintiff's deposition.

# Judge Hornsby's Tips and Observations for Federal Civil Court Practice

1. Be kind. Always. You should assume that a judge will read every email or letter that you exchange with opposing counsel.

2. Notify chambers immediately upon settlement, even if the paperwork has not yet been drafted.

3. Call chambers if you have a question or know of a potential problem. Judges do not like surprises.

4. Be prepared. The judge will be very prepared.

5. Do not assume you will get oral argument. Put everything in your brief.

6. Do not oppose a reasonable request for a short extension of time unless you have a good reason.

7. STOP USING ALL CAPS. No need to yell. Plus, it is hard to read.

8. Stop using string cites. Find and cite the most recent Fifth Circuit case and move on. Also, check Westlaw and Lexis for prior opinions written by your judge.

9. Do not waste all of your page limit with boilerplate law on standard of review or burden of proof – unless it is critical to your unique situation.

10. Motions for extension. Tell us why you need it.

11. Statements of Consent. Every motion for extension of time should contain a statement regarding whether the opposing party consents or opposes. Make a clear statement of the opposition.

Bad example: "Consent was sought but not obtained." What does that mean? Did you call at 5:30 on a Friday and the lawyer had left for the day?

12. Draft a precise order. Proofread your order. If you are not sure which judge will sign your order, use a generic signature line: "Judge".

13. Call your opponent. You can get a lot more done during a real conversation rather than through an exchange of emails.

14. Deliver paper courtesy copies of briefs to chambers. Include exhibits. Not sure if your judge wants a paper copy? Call chambers and ask.

15. Exhibits in CM/ECF. Label them with descriptions so we can find them. Example: “Exhibit 1 Change Order” or “Exhibit 2 Depo. of Plaintiff”.

16. Initial disclosures. Include contact information for witnesses. Plaintiff also must include a damages calculation, even if it is difficult at the time.

17. Treating physicians. No expert report is needed in the Shreveport division as long as the testimony and opinions are based on the treatment as reflected in the medical records. But be careful. Other courts may require more. Read Rule 26(a)(2)(C).

18. Removal. Check your form for LLC citizenship allegations. It is based on the citizenship of each member.

19. Do not assume you will get a continuance because you are very busy and have not done any work on your case.

20. We require the dispositive motion deadline to be three or four months before the pretrial conference. Do not ask for an extension that affects that deadline, unless you want a new trial date.

21. Sur-replies are strongly disfavored. Avoid them absent exceptional circumstances.

22. Do not send an associate to cover a status or pretrial conference for you. Instead, call chambers to ask about rescheduling so that you can attend. You are encouraged to bring law clerks and associates with you to the conferences.

23. Resist the urge to file a motion for more definite statement. Instead, propound discovery.

24. Avoid motions to dismiss under Rule 12(b)(6), unless you can terminate the whole case. Motions to dismiss are disfavored and are rarely granted.

25. Don’t file multiple motions for partial summary judgment. We know that you are trying to avoid the 25 page limit.

26. General objections. Don’t use them in your discovery responses. They are worthless.

27. Can you “Facebook” the prospective jury? Maybe, maybe not. Judges may differ on this. Ask your judge at the pretrial conference.