2016–17 SUPREME COURT CIVIL PROCEDURE DECISIONS

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All Supreme Court decisions are important, but for federal civil practitioners nine issued during the 2016 term matter more than most. Two deal with sanctions, two with personal jurisdiction and five with other bread-and-butter subjects, from service of process to statutes of repose. This article briefly analyzes each of them, focusing most on the sanctions and jurisdictional opinions.

INHERENT POWER SANCTIONS

Both of the opinions issued addressing sanctions focus on inherent power sanctions—those imposed not pursuant to rule or statute but as a function of the court's inherent authority to punish abusive litigation practices undertaken in bad faith (see generally Chambers v. NASCO, Inc., 501 U.S. 32 (1991)).

Goodyear

In Goodyear Tire & Rubber Co. v. Haeger, 137 S.Ct. 1178 (2017), the Court limited attorney's fees awarded under the inherent power to those that would not have been incurred but-for the misconduct. Confronted with "truly egregious" misconduct by the defendant—withholding "crucial" test results in a design-defect products-liability case—the Central District of California had awarded the plaintiffs all attorney's fees they had incurred from the point in time that the defendant's misconduct commenced. (The District Court would have preferred to issue a default judgment, but the case had settled before the plaintiff became aware of the misconduct.) There was good authority for this award in the Ninth Circuit. See, e.g., Ingenuity13 LLC v. Doe, 651 F. App'x 716 (9th Cir. 2016) (doubling of attorney's fees awarded pursuant to inherent power was "appropriate" and "remedial" because it went to the party adversely affected by the misconduct.) Goodyear reversed, holding that only those fees incurred as a result of the misconduct may be awarded—not an award of all fees incurred during the period of misconduct.

Goodyear reflects the tension between (i) sanctions that are remedial or coercive—and thus subject to civil procedural norms—and (ii) those that are punitive and therefore subject to the criminal procedural protections of criminal contempt. While Goodyear does not use the term "contempt," it relies heavily on United Mine Workers v. Bagwell, 512 U.S. 821, 829 (1994), a seminal case holding that, if a fine is not compensatory, it "is civil only if the contemnor is afforded an opportunity to purge. . . . Thus, a 'flat, unconditional fine' totaling even as little as $50 announced after a finding of contempt is criminal if the contemnor has no subsequent opportunity to reduce or avoid the fine through compliance."

Goodyear's but-for causation test for attorneys' fee awards may seem intuitive, but there is another side to the story. Because dismissal or entry of a default judgment is an available inherent power sanction for egregious misconduct, some cases had reasoned that "stiff monetary penalties would certainly be appropriate, at least as long as they did not equal or exceed the damages which would be awarded in dismissal." Kleiner v. First Nat'l Bank, 751 F.2d 1193, 1209-10 (11th Cir. 1985) (penalty paid into court; stating that the "power to impose appropriate sanctions on attorneys practicing before it 'springs from a different source than does the power to punish for criminal contempt'"). Some cases had concluded that, since the purpose of a penalty paid into court is deterrence, "the district court should not consider [the amount of the adversary's attorney's fees at all" but, rather, "should only take into account those factors relating to effective deterrence of such misconduct in the future." Vollmer v. Publishers

Clearing House, 248 F.3d 698, 711 n.11 (7th Cir. 2001) (Rule 11 case; reversing sanctions).

It is hard to see why an inherent power penalty paid into court may be punitive and imposed without criminal contempt protections but an award of attorney's fees cannot. The question is what is "punitive." Even before Goodyear many courts held that, under Bagwell, if "significant" in size, financial sanctions amount to criminal contempt and require that criminal procedural safeguards be afforded. See, e.g., In re Dyer, 322 F.3d 1178, 1197 (9th Cir. 2003); Bradley v. American Household, Inc., 378 F.3d 373, 378–379 (4th Cir. 2004). More on this below.

State Farm

It is clear from the Supreme Court's second case this term addressing inherent power sanctions that monetary penalties are still permissible inherent power sanctions. State Farm v. U.S. ex rel. Rigsby, 137 S.Ct. 436 (2016) was primarily a False Claims Act ("FCA") case, addressing the question whether every violation of the FCA seal requirement of 31 U.S.C. § 3730(b)(2) requires dismissal of the violator's complaint (answer: no). In coming to this conclusion, the Court observed that dismissal remains an available sanction and elaborated that: "District courts have inherent power . . . to impose sanctions short of dismissal for violations of court orders.... Remedial tools like monetary penalties or attorney discipline remain available to punish and deter seal violations even when dismissal is not appropriate." Id. at 444.

But how is the imposition of non-purgative monetary penalties to be reconciled with the Bagwell dictate that any "a 'flat, unconditional fine' totaling even as little as $50 announced after a finding of contempt is criminal if the contemnor has no subsequent opportunity to reduce or avoid the fine through compliance?" It can't be that the difference lay simply in whether or not the court labels the penalty "contempt." The size of the monetary penalty matters. Under the post-Bagwell case law, financial sanctions paid into court, whether or not labeled "contempt," constitute criminal contempt if they are (i) substantial (not "petty") in amount, (ii) unconditional in character (lacking a purge provision), and (iii) imposed for conduct outside the presence of the judge. See generally Joseph, Sanctions: The Federal Law of Litigation Abuse § 28(B)(1) (5th ed. 2013). Goodyear is not inconsistent with this analysis.

PERSONAL JURISDICTION

The two personal jurisdiction opinions demonstrate that the Court meant what it said when it circumscribed general jurisdiction in Daimler AG v. Bauman, 134 S. Ct. 746 (2014) (a corporation's ties to the forum state must be so continuous and systematic as to render it essentially at home—generally, only its state of incorporation or principal place of business) and specific jurisdiction in Walden v. Fiore, 134 S. Ct. 1115 (2014) (the suit must arise out of or relate to the defendant's contacts with the forum state—the mere fact its conduct affects plaintiffs in the forum is insufficient). In addition, one of the new decisions provides helpful guidance on how to interpret potential statutory alternatives on which to predicate personal jurisdiction—alternatives that have assumed even greater significance in light of Daimer and Walden.

Bristol-Myers

The decision in Bristol-Myers Squibb Co. v. Superior Court, 137 S.Ct. 1773 (2017), stands for the proposition that general and specific jurisdiction entail entirely distinct analyses, and it is error to allow the factors relevant to one to influence the determination of the other. Several hundred out-of-state citizens sued Bristol-Myers in California state court for injuries from use of the drug Plavix. None of the plaintiffs suffered harm in California, and all of the conduct giving rise to their claims occurred elsewhere. The California Supreme Court agreed with the defendant that there was no general jurisdiction under Daimler (Bristol-Myers is a Delaware corporation headquartered in New York), but found specific jurisdiction. It applied a sliding-scale test for specific jurisdiction under which "the strength of the requisite connection between the forum and the specific claims at issue is relaxed if the defendant has extensive forum contacts that are unrelated to those claims." Reversing, the Bristol-Myers Court declared that activity by the defendant in California unrelated to the plaintiffs' claims was irrelevant to the specific-jurisdiction analysis. It concluded that, under Walden, "[w]hat is needed—and what is missing here—is a connection between the forum and the specific claims at issue." Id. at 1781.

BNSF

Given how demanding Daimler and Walden are, the plaintiffs in BNSF Railway v. Tyrrell, 137 S.Ct. 1549 (2017), wisely looked for a statutory basis for jurisdiction. In

deciding that jurisdiction was lacking, the BNSF Court clarified how to read a statute that seems to create personal jurisdiction but in fact merely sets venue.

The BNSF plaintiffs brought Federal Employers' Liability Act ("FELA") suits in Montana for injuries they suffered outside the state. Neither of them was a Montana citizen. Even though BNSF was doing substantial business in Montana (it had 2,061 miles of rail and 2,100 employees in the state), it was clear there was no general jurisdiction under Daimler because BNSF's principal place of business was Texas, its state of incorporation Delaware, and the percentage of its Montana operations to the corporate total was less slim on all metrics. Seeing the handwriting on the wall, the plaintiffs invoked statutory personal jurisdiction, citing § 6 of the FELA (45 U.S.C. § 56), which provides that: "[A]n action may be brought in a district court . . . in which the defendant shall be doing business at the time of commencing such action." There is no doubt BNSF was doing business in Montana. So it seemed this statute created jurisdiction over BNSF in Montana.

The BNSF Court ruled that the statute was not relevant to the jurisdictional analysis because it set venue only. The Court clarified that: "Congress generally uses the expression, where suit may be brought, to indicate the federal districts in which venue is proper. . . . In contrast, Congress' typical mode of providing for the exercise of personal jurisdiction has been to authorize service of process." BNSF usefully cites in support of this interpretative analysis pages 253-290 of the ALI's 2004 Federal Judicial Code Revision Project, containing excerpts from dozens of statutes—and thus statutory phrases in addition to "may be brought"—that might seem to create personal jurisdiction but in fact merely set venue. Id. at 1555.

STATUTES OF REPOSE, CLASS ACTIONS AND AMERICAN PIPE

CALPERS

Unconditional statutes of repose, unlike statutes of limitation, are not subject to equitable tolling under California Public Employees' Retirement System v. Anz Securities, Inc., 137 S. Ct. 2042, 2050-51 (2017). Addressing the statute of repose in the Securities Act of 1933, 15 U.S.C. § 77k, the CALPERS Court held that (1) "[t]olling is permissible only where there is a particular indication that the legislature did not intend the statute to provide complete repose but instead anticipated the extension of the statutory period under certain circumstances" and (2) "[t]he purpose and effect of a statute of repose . . . . is to override customary tolling rules arising from the equitable powers of the court." That holding was not unexpected. Nor was its application to the equitable tolling rule at issue—American Pipe v. Utah, 414 U.S. 538 (1974) (commencement of a class action suspends the applicable statute of limitations for all putative class members).

But there is an interesting nugget in the opinion. CALPERS interprets American Pipe as requiring that any motion to intervene by another putative class member after denial of class certification must be filed within the stub period of the statute of limitations to be timely ("the American Pipe Court reasoned that the class-action complaint 'was filed with 11 days yet to run' in the statutory period, so the motions for intervention were timely only if filed within 11 days after the denial of class certification").

But what happens if the proposed intervenor files a motion within the stub period but the motion is not ruled on until after it runs out? The Second Circuit ruled in July 2017 that moving to amend within the statutory period renders the claim timely even if the ruling comes afterwards. Pasternack v. Schrader, 863 F.3d 162, 175 (2d Cir. 2017) "for purposes of a statute of repose, when a plaintiff moves for leave to amend to add claims within the limitations period and attaches a proposed amended complaint to the motion, the claims are timely").

Class Actions—Appealability

What alternatives are available to a putative class action plaintiff if the District Court denies class certification and the Court of Appeals denies review under Fed. R. Civ. P. 23(f)? Under Microsoft Corp. v. Baker, 137 S.Ct. 1702 (2017), the plaintiff's choices include: (i) settling his or her individual claims, (ii) litigating the individual claims to conclusion, "mindful that the District Court could later reverse course and certify the proposed class" (no one should place big money on that), or (iii) petitioning the District Court to certify the class certification denial for appeal under 28 U.S.C. § 1292(b). What plaintiffs cannot do is dismiss their individual claims with prejudice and appeal under 28 U.S.C. § 1291. The Microsoft Court reversed the Ninth Circuit's decision to assume jurisdiction under § 1291 after it had declined discretionary review under Rule 23(f).

SERVICE OF PROCESS BY MAIL UNDER THE HAGUE CONVENTION

Water Splash, Inc. v. Menon, 137 S.Ct. 1504 (2017) held that § 10(a) of the Hague Convention on Service Abroad allows service of process by mail if that is permitted under domestic U.S. law and the destination country does not object. If either of these prerequisites is not satisfied, then service through diplomatic channels under § 10(b) or (c) is required. Note that the plaintiff in Water Splash effected service by registered mail, and that at least one of the drafting sources relied on by the Court assumed that registered mail would be used. That is the safest practice, although lower courts that were on the right side of the Circuit split resolved in Water Splash have held that certified mail, FedEx, DHL and other commercial mail carriers also suffice. See Ackourey v. Noblehouse Custom Tailors, 2013 U.S. Dist. LEXIS 163535 (E.D. Pa. Nov. 15, 2013) (collecting cases).

ARBITRATION: STATUTORY DISCRIMINATION IN FAVOR OF COURT SYSTEM

The Supreme Court has consistently held that the Federal Arbitration Act requires courts to place arbitration agreements on the same footing as other contracts, meaning that an arbitration agreement can be voided only on generally applicable contract defense (e.g., fraud) but not on rules that apply only to arbitration. Hence, it was not a surprise that Kindred Nursing Centers v. Clark, 137 S. Ct. 1421 (2017), reversed a Kentucky Supreme Court decision refusing to give effect to arbitration agreements signed by holders of general powers of attorney on the rationale that the power of attorney must specifically authorize waiver of access to the courts and trial by jury. The petitioner argued that the Kentucky rule did not single out arbitration agreements but that it actually applied to a broader class of contracts. Finding that, apart from arbitration agreements, the "class" was strained and in reality empty, the Court delivered one of the better lines of the term: "Placing arbitration agreements within that class . . . only makes clear the arbitration-specific character of the rule, much as if it were made applicable to arbitration agreements and black swans." Id. at 1428.

INTERVENTION: ARTICLE III STANDING

Resolving a Circuit split, the Supreme Court held that an intervenor must have Article III standing to pursue relief different from that sought by the parties in Town of Chester v. Laroe Estates, Inc., 137 S.Ct. 1645 (2017). There is at least one other Circuit split on intervention that Court might turn its attention to: May a magistrate judge who is conducting all proceedings by consent of the parties rule on a motion to intervene filed by a person who has not consented? For one view, *see* Davis v. Union Pac. RR, 2015 U.S. Dist. LEXIS 182824 (S.D. Tex. Aug. 6, 2015) (collecting cases).