

## By the Honorable Nancy Stein Nowak, Soledad Valenciano, and Melanie Fry

Judge Nowak's summaries of significant decisions rendered by San Antonio federal judges from 1998 to the present are available for keyword searching at Court Web found at <http://courtweb.pamd.uscourts.gov/courtweb/>. Full text images of most of these orders can also be accessed through Court Web.

If you are aware of a Western District of Texas order that you believe would be of interest to the local bar and should be summarized in this column, please contact Soledad Valenciano or Melanie Fry by phone at 554-5500 or by email at [svalenciano@coxsmith.com](mailto:svalenciano@coxsmith.com) or [mlfry@coxsmith.com](mailto:mlfry@coxsmith.com) with the style and cause number of the case, and the entry date and docket number of the order.

### Personal Jurisdiction

*Linton v. Douglas L. Johnson*, SA-10-CA-585-OG (Recommendations by Nowak, May 5, 2011; accepted by Garcia, May 31, 2011)

Court accepted Magistrate Judge's recommendation to grant motions to dismiss for lack of personal jurisdiction. Linton was a defendant in a California lawsuit brought against him by Armuth, who was represented by a California law firm. Linton sued the law firm, the lawyer, and its client, Grahn, all California residents, based on alleged strong-arm tactics by the California lawyer to settle *Armuth* and to obtain discovery in *Grahn* from Linton. Communications regarding *Grahn* occurred during Linton's attempts to settle *Armuth*. Linton failed to make a prima facie case of specific jurisdiction. There was not a substantial connection between the contacts and the operative facts of the litigation. Rather, the relied-upon communications were substantially related to settling the California-based litigation, *Armuth*, and the operative facts stemmed from such litigation, not

an injury in Texas. Linton also failed to make a prima facie case of general jurisdiction. Beyond the telephone calls and emails about the California litigation, which communications were not systematic or continuous, there was no purposeful availing of the privileges and protections of Texas law.

### Federal Tort Claims Act; Texas Civil Practices & Remedies Code

*Wood v. U.S.A.*, SA-10-CV-941-XR (Rodriguez, May 10, 2011)

Wood asserted that the Kerrville VA Health Care System violated the Federal Tort Claims Act. U.S. asserted as an affirmative defense that, pursuant to Tex. Civ. Prac. & Rem. Code § 74.503(b), future damages other than medical, health care, or custodial services awarded in a health care liability claim should be ordered paid in whole or in part in periodic payments, rather than by lump sum. U.S. later amended its answer to include an affirmative defense under § 74.503(a), also calling for periodic payments. Wood moved to strike such amendment, arguing that no authority supported periodic payments in an FTCA action. Finding no Fifth Circuit precedent, and given that discovery was ongoing and no favorable verdict had been entered for Wood, court denied the motion, permitting Wood to re-urge his motion should he receive a favorable verdict.

### Confirmation of Chapter 13 Plan; Standard of Review; U.S.C. § 1325(b)(3)

*Viegelahn v. Essex*, SA-10-CV-767-XR (Rodriguez, June 27, 2011)

Court reversed Bankruptcy Court's Order confirming Chapter 13 Plan. Court reviewed the Bankruptcy Court's Order *de novo* as no evidence was presented during the hearing on Trustee's objection to the confirmation of the Plan. Reconsidering the Trustee's claim that the Plan was not filed in good faith, Court applied the "totality of the circumstances" test to determine whether the good faith presumption offered to debtors was negated by aggravating factors. Although the debtors' proposed housing expenses satisfied 11 U.S.C. § 1325(b)(3), and were thus presumed to be made in good faith, aggravating circumstances rebutted such presumption such as retaining a \$600,000 home while

paying only 1% to unsecured creditors, including the IRS. Debtors had not explained why it was necessary to retain a home with mortgage payments four times the IRS standard for their area. Court found it against Congress' intent to protect those who purchased a homestead while simultaneously evading income taxes and to allow such individuals to retain their homestead while paying only 1% of the debt owed to unsecured creditors.

### Due Process; Immunity; Zoning Decisions

*Lee v. Whispering Oaks Home Owners' Assoc., et al.*, SA-11-CA-64-XR (Rodriguez, June 23, 2011)

The Lees' application to re-zone five lots in an upscale residential subdivision was denied. The Lees alleged due process violations and conspiracy. Assuming but not deciding that the Lees had a protected interest, court dismissed substantive due process claims holding the Lees failed to demonstrate that there was no rational basis to deny rezoning. Because the substantive due process claim failed, conspiracy on such basis also failed. Further, because the Lees could not show that public and private actors reached an agreement to commit an illegal act, allegations of conspiracy under 42 U.S.C. § 1983 failed. Any due process takings claim was unripe as the Lees had not yet sought just compensation. Because zoning decisions are considered legitimate legislative functions, the defendant-council person who voted against the application was entitled to absolute legislative immunity.

### Habeas Corpus Review; Extradition; 18 U.S.C. § 3184

*Picciochi v. U.S.A.*, SA-10-CA-331-FB (Biery, July 30, 2010)(reviewing Order of Mathy)

Magistrate Judge entered certification of extraditability and order of commitment ordering Picciochi subject to extradition to the Republic of Argentina. *See* SA-09-M-1085. Court agreed with Magistrate Judge's rationale and denied Picciochi's habeas corpus petition. Court found Magistrate Judge had jurisdiction as Picciochi was found in Pearsall, Texas, which is in the W.D. Texas, when Argentina filed its formal request for extradition,

even though he had been residing in California prior to being detained. Court could not address under habeas corpus review whether Magistrate Judge should have transferred venue but noted that it agreed with Magistrate Judge's decision. Picciochi's due process claims failed because there is no due process right to confidentiality of information in an asylum request; there is no constitutional right to a speedy extradition; and because Picciochi failed to show a defect in the extradition proceeding that rendered it fundamentally unfair and that prejudiced the outcome of the matter. Court found competent evidence that probable cause exists. (Note: See SA-09-M-1085 for discussion of the variety of evidence a magistrate may consider.) Extradition treaty provides that only competent authority, here the Secretary of State, and not court may determine whether extradition should not be granted because the charges or request are politically motivated.

**Arbitration; Credit Repair Organizations Act**

*Adams v. ACSO of Texas, Inc.*, SA-11-CA-0187-XR (Rodriguez, June 13, 2011)

Plaintiffs sued alleging violations of Credit Repair Organizations Act (CROA). ACSO moved to compel arbitration based on credit services contracts between the parties. Plaintiffs argued claims were not subject to arbitration, because Congress granted consumers the express "right to sue" in CROA. Court noted a Circuit split: Ninth Circuit held in *Greenwood v. CompuCredit*

that "right to sue" language in CROA precluded arbitration. Third and Eleventh Circuits held CROA claims are arbitrable. Court followed Third and Eleventh Circuits and held that the "right to sue" language in the statute does not exclude arbitration to settle CROA violations. Court granted ACSO's motion to compel arbitration, but stayed order pending Supreme Court's decision in *CompuCredit*.

**Motion to Transfer Venue**

*Sweet v. Indianapolis Jet Ctr., Inc.*, SA-10-CV-1039-XR (Rodriguez, June 22, 2011)

Court granted defendants' motion to transfer venue to Southern District of Indiana. Action "might have been brought" there because virtually every defendant resided in Indiana, and signing of employment agreement at issue occurred in Indiana. Further, transfer was justified for "the convenience of the parties and witnesses, in the interest of justice" because the bulk of the records were in Indianapolis, and majority of witnesses resided in Indiana and were within subpoena power of that court.

**Sovereign Immunity; Governmental Immunity; Texas Whistleblower Act**

*Bonillas v. Harlandale ISD*, SA-10-CV-1053-XR (Rodriguez, June 2, 2011)

Teacher filed suit in state court asserting claims for whistleblower retaliation and violation of the First and Fourteenth Amendments. HISD removed the case. HISD then argued federal court lacked jurisdiction to hear teacher's whistleblower claim, because


Texas Legislature had not waived state's sovereign immunity in any court other than state court. Court held Texas Whistleblower Act only waives state sovereign immunity in state court, not Eleventh Amendment immunity in federal court. However, Eleventh Amendment immunity only extends to state agencies when immunity is necessary to protect the state treasury. Texas independent school districts, including HISD, are not subject to Eleventh Amendment immunity. Court further held Texas Whistleblower Act provided unqualified waiver of governmental immunity from liability, and a waiver of immunity from suit in state courts. HISD waived its governmental immunity from suit by removing the case.



*Nancy Stein Nowak is a United States Magistrate Judge for the Western District of Texas. Since 1986, Judge Nowak has summarized significant decisions of the local judiciary for the Subpoena and the San Antonio Lawyer.*



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