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Wed, Jun 04, 2025 1:19PM 54:54

SUMMARY KEYWORDS

Railway Children, Amtrak legal department, Seventh Circuit, oral argument, Christie Hebert, property rights, Minnesota, Eighth Circuit, COVID eviction moratorium, takings claim, sovereign immunity, Federal Arbitration Act, jurisdictional issues, Podium and Panel podcast.

SPEAKERS

Anthony Sanders, Christie Hebert, Patrick Eckler

A **Anthony Sanders** 00:00

"They were not railway children to begin with. I don't suppose they had ever thought about railways except as a means of getting to Maskelyne and Cook's, the Pantomime, Zoological Gardens and Madame Tussaud's. They were just ordinary suburban children, and they lived with their father and mother in an ordinary redbrick-fronted villa, with coloured glass in the front door, a tiled passage that was called a hall, a bathroom with hot and cold water, electric bells, French windows, and a good deal of white paint, and 'every modern convenience,' as the house agents say." Well, that's from the beginning of The Railway Children by E. Nesbitt, which some of you may have read in your younger days. It also seems to be a description of the legal department at Amtrak, which don't seem to realize that they are running a railway, or a railroad, as we say in this country. That came up at a particularly painful oral argument at the Seventh Circuit recently, and a resulting opinion that we will be discussing, plus more today on Short Circuit, your podcast on the Federal Courts of Appeals. I'm your host, Anthony Sanders, Director of the Center for Judicial Engagement at the Institute for Justice. We're recording this on Tuesday, November 26, 2024 and we are very excited because we have a special guest today down from Seventh Circuit land to tell us about this case and more, and we'll get to him in just a moment. But first, we have a familiar voice to Short Circuit listeners that we have not had on, however, in a little while, so it was about time to get her back and share her voice with all of you. And that is my colleague, Christie Hebert, down from our Texas office. So Christie, welcome back.

C **Christie Hebert** 01:59

Thanks, Anthony, glad to be here again.

A **Anthony Sanders** 02:00

So you have been so busy lately, Christie, tell our listeners a little bit about it. You've been up in Montana fighting for the homeless, you were helping at the Supreme Court earlier this year

on property rights, you've got all these things going on, and yet, you're based in in Austin, Texas. So that makes for a little bit of travel, I would think.

C Christie Hebert 02:23

That's right, but that's one of the great advantages of the Institute for Justice, is even though you may sit in a particular location, you have a national practice. So I currently have cases pending in Texas, which is great for me, because I get to be local counsel effectively here, in addition to litigating it. But I have cases pending in Georgia, Montana, New York, across the country, so that does allow a lot of travel, which can be difficult, but also lets you see different parts of the country. And most of my cases focus on property rights in unconventional ways. So that's pretty fun.

A Anthony Sanders 03:00

Yes, and we're going to talk about not a case of yours, but a case from the great state of Minnesota, in a little bit in the Eighth Circuit, where I am. But first we're going to hear from our special guest, and that is Donald Patrick Eckler. So Patrick is a partner at Freeman Mathis & Gary in the great city of Chicago. He is a graduate of the University of Chicago and the University of Florida for his law degree. He practices in all kinds of areas, in state and federal courts in Illinois and Indiana. But he's also a prolific writer and reporter on what's going on in the law, including in the Chicago Law Bulletin, which is a publication I'm very familiar with from about 20 years ago when I used to scour its Want Ads looking for a job. And he also co-hosts his own podcast, the Podium and Panel podcast with Dan Cotter, which all of you should go and check out and hear about the latest fun and cringy oral arguments from Illinois. So Patrick, welcome to Short Circuit.

P Patrick Eckler 04:14

Thank you, Anthony. It's a pleasure to be here. I really appreciate the invite, and look forward to discussing some of the idiosyncratic idiosyncrasies of the Seventh Circuit, and it is truly idiosyncratic.

A Anthony Sanders 04:28

Yes, and you cover that quite a bit on your podcast—and I should also say, Patrick has been a great promoter of Short Circuit. We don't even pay him, but the newsletter and the podcast—

P Patrick Eckler 04:40

But this is the payment!

A Anthony Sanders 04:41

Yes, yes. Checks in the mail, of course. So, you cover all these oral arguments on on your guys's podcast, which is something we don't do as much here. I encourage listeners to check that out. But this case you've brought to our attention—I mean, so many people have gone through this experience of a cringy oral argument with Judge Easterbrook, because you never know what he's going to ask. This happened to a colleague of ours earlier this year before him in a Seventh Circuit appeal. And often, I think they are unwarranted, some of the pointed questions (I won't call them attacks) that you get from Judge Easterbrook in the Seventh Circuit. This one, though, kind of seems like they should have known it was coming. And why don't you tell us about that?

P Patrick Eckler 05:36

Well before that, I want to talk a little bit about the podcast, because we do talk about arguments, yeah. And we have a segment on the show called Predictions Sure To Go Wrong, where we try to pick how we think it's going to turn outbased on oral argument. And I will say we're shockingly very good. We're at like 350-some and like 80, with some punts in there. So we're actually pretty good at it, but sometimes it's really obvious what's going to happen. That happens more often than you would expect. And the reason I started doing it was because you can learn so much by listening to what arguments are made, what arguments are persuasive, and what the judges and justices actually think. You get some unvarnished ideas as to what's really going on and what goes into making the sausage. And you also get to listen to some really great advocates. And that's very, very helpful. I started listening when I had some oral arguments, and wanted to get better. So let me listen to people that actually do this. Let me listen to this court that I'm going to be in front of, that I've never been in front of before. And so Dan and I have done this for about four years. We typically cover three oral arguments from the Illinois and Indiana courts of review, the Seventh Circuit and Supreme Court of the United States. As you mentioned, I have a column in the Chicago Daily Law Bulletin. I cover primarily civil justice issues,because my practice is what can fairly be called an insurance defense practice. I do tort work, insurance coverage, and professional liability—primarily the latter two—and Dan comes from a similar world. He has an insurance background. He started in what is now Locke Lord that will soon be whatever the combination is going to be with Troutman Sanders, but he has also gone into and out of insurance companies. He's a CPA. He's written a book called The Chief Justices, which covers mini biographies of the 17 Chief Justices, and he also has a column in the Chicago Daily Law Bulletin that focuses primarily on the Supreme Court of the United States. And he's been the president, I think, of nearly every bar association known to man, including the Chicago Bar Association. He's the current president of the National Council of Bar Presidents. He's a delegate to the ABA House of Delegates. You get the idea. So anyway—

A Anthony Sanders 08:05

I will say, for those practicing in Chicago, like I did for a few years, not to besmirch any other organization, but the Chicago Bar Association was a wonderful place to be a member and to go to meetings. I was chair of a committee one year, and it was a great place to get to know people. So that's a real treasure, maybe an unspoken treasure of Chicago practice is the bar association there. Yeah, I can't really go to those meetings anymore.

P

P Patrick Eckler 08:32

It is. I've been less involved of late, but may get more involved. But I was very active with the young lawyers section when I was such a young lawyer, but I'm no longer. No, no. They won't have me. I'm too young—err, too young. I'm too old. Now that happened very quickly, much quicker than I had hoped. But there it is. So you mentioned, Anthony, about this case, Montoya versus Amtrak, and this is an oral argument that we listened to when I mentioned the idiosyncrasies of the Seventh Circuit. And one of the great things I love about your show is you kind of get to know some of the things about the other courts. A couple of years ago, you guys did: what are the fancy courtrooms around? No one nominated anything in the Seventh Circuit. The courtrooms are, they're nice courtrooms. There's not, you know—

A Anthony Sanders 09:35

They're clean! And bright.

P Patrick Eckler 09:35

Yeah, they're nice. They're nothing like some of the courtrooms that were described in Portland and Denver, and some of these other courtrooms that were described as being quite majestic. No great views of the city, in fact, that's a whole different story of the buildings that are next door to the building that have had to be bought by the government, cleared out, and there's a dispute over whether they're going to tear them down because they're a threat to the judges and the juries—people being able to listen into the courtrooms. Because, so, there's two buildings, or three buildings, I think, that are immediately to the east of the Dirksen Center.

A Anthony Sanders 10:17

Yeah, there was a great sandwich place in one of those, and they said they closed down because they wouldn't renew the lease. And I think it had something to do with this expansion.

P Patrick Eckler 10:27

No, not expansion. The jail bought the buildings as a security concern, cleared them out, and now they're trying to figure out if they're going to destroy them or raze them, turn them into a park, or put federal officers in there. Because essentially the idea is that there are judges' courtrooms or chambers that have windows, and you could sneak in, or you could look through using electronic stuff, and this kind of a thing, and jury rooms are there, this kind of thing. So it's a whole security situation, but that means no great views.

A Anthony Sanders 11:07

I mean, there's not windows at all in the courtrooms. You're in a box.

P Patrick Eckler 11:11

Patrick Eckler 11:11

That's right, exactly. So the Seventh Circuit are self described "jurisdictional hawks." And that's not me saying that: then-Chief Judge Wood, who is now with the ALI, wrote describing them as jurisdictional hawks. And she did this in an opinion from February of 2020, and this opinion was so important, that she sent out an alert to every Seventh Circuit practitioner saying read these cases—and what was the horrible sin that had been committed? In the two cases that have been consolidated for this purpose, the lawyers had failed to properly show, under circuit rule, that there had been—the appointment of the magistrate who had ruled on the order, the consent to magistrate was not clear, so they sent the cases back because there was incident—

A Anthony Sanders 12:15

Did they get that off of ECF?

P Patrick Eckler 12:18

It was unclear, and there's a circuit rule that says you have to identify the date on which there was consent to the magistrate. And apparently they got tired of going into the ECF, and so they decided to make an example out of these lawyers and send them back. [Laughter]. So we get an alert,—I haven't gotten one before or since—but because I'm a Seventh Circuit filer, I get this alert. Did the building burn down? Did someone die? Oh, no, you guys didn't tell us about who the magistrate is, or that they had consent to the magistrate. Okay. Good, thanks. Good to know. That was, it was a pretty amazing thing. So the other thing about, if you're ever in front of Judge Easterbrook, I had a colleague from who's not from here arguing in the Seventh Circuit recently, going through who's on the panels—you don't find out till that morning, right when you get there. I don't know how it works in other circuits, but here, you don't find out till—

A Anthony Sanders 13:06

There are two or three where it's like that. But yeah, some circuits.

P Patrick Eckler 13:19

And so we get a call about who's on the panel, and we had prepared him that, if Judge Easterbrook is on the panel, you have got to know the cases they issued yesterday, because he will ask you, are you aware of the opinion the Supreme Court issued yesterday? Are you aware of the case being argued right now? That happened one time. He said they're arguing this case right now in Washington, DC. Why are you here? And so you had a great episode on Gilbank with Joe Diedrich, a case I followed and wrote about, and am in no way qualified to talk about, because I don't understand the depths of what was going on there. But it's not a surprise that the—

A Anthony Sanders 13:19

I don't think the judges understood either, but that's another story.

P Patrick Eckler 14:08

It's completely confusing. I hope that the nine wise souls in DC straighten that mess out and figure out what the answer is, because I don't know what it is. But it's appropriate that that came from the Seventh Circuit, where all 11 of them say, Please figure this out, because ultimately, it's a standing issue or jurisdictional issue, which is what this issue is here. They have taken the Trans Union case to the absolute extreme—there are some judges on the court that are happy about that, and they have expressed that, but that is the position of the court.

A Anthony Sanders 14:48

Yeah, that's the case where our friend Andy Hessick in North Carolina, they cited his article for exactly the opposite point that he made in the article about how the standing stuff is out of control. And they cite his article and say, see, clearly there's no standing here.

P Patrick Eckler 15:05

Yeah, and apropos of Judge Easterbrook's standalone concurrence in Gilbank, he extends the Heck bar to a place it's never gone before, acknowledging entirely that I'm extending it to a place that it's never gone before. But they are absolutely mavens about jurisdiction. If you have a case that involves an LLC and you haven't got chapter and verse on who all of the owners are, and the owners of the owners and the owners of the owners of the owners, they will send you "You have 14 days to figure it out." There was an argument a couple months ago where Judge Easterbrook said, "I went seven levels down, and the seven level down is an entity that doesn't appear to be diverse from your client. How was there jurisdiction?" And he asks this at oral argument, the lawyer's like: I don't know. [Laughter]. So if you have an LLC, get ready. I've had this where you have a case, and if it doesn't get straightened out enough in the district court, they will ask you to supplement and if they're not happy, you'll get it at oral argument. And just so you don't think—it's not just the litigants. Couple months ago, there was an argument where the order wasn't quite as final. There wasn't an order making the order final. There was just an opinion, and Judge Easterbrook says there are seven districts in this circuit, and six of them have figured out how to do that. Your case happens to be in the one that isn't and the one that isn't is in that building. It's in the Dirksen Center, where the judges in the Northern District don't enter final orders, so they're not quite sure, in the way that which they like them, so that they know that they're final and so they're equal opportunity. Everybody is—it's a free fire zone many times. So, that is a very long wind up, Anthony, thank you for indulging.

A Anthony Sanders 17:10

This upended the practice I was in, which was some of it was Taft-Hartley collection compliance and ERISA funds, when I was in Chicago. And there, when we'd have a settlement, we would have a final kind of just judgment dismissing the case, and then it would retain jurisdiction to enforce the Settlement Agreement, which would be Attachment A, Exhibit A. And there was some opinion I can't remember if it was Posner or Easterbrook but one of them, that said that does not comply with the rules, because the settlement has to be in the actual order. It cannot

be in an attachment. And this, like upended all of the practice of all these attorneys that had been doing it with the complicity of the district judges for years, and so for a while, we had to be very careful about putting it in the actual order, and then the opposing counsel, who would maybe not be used to this, would be like, Why are we putting it in this order? It's a lot more work instead of having an attachment. And you'd have to explain all this, and it was a complete mess. Oh, gotta be done.

P Patrick Eckler 18:01

But now you can understand what you're dealing with and what this is like here. So this is a case where we're not going to talk about the substance of the matter, because why. So this is an employment case, and Montoya brings an employment action against Amtrak. You might have noted Amtrak is a railroad company, public but a railroad company, and they have railroads.

A Anthony Sanders 18:43

Yeah, it's kind of public, kind of private—depends who you're talking to.

P Patrick Eckler 18:46

Exactly. But anyway, they run a railroad, as it turns out—a passenger one. And she makes an employment claim, I think it's age discrimination, doesn't matter. And the Amtrak moves to dismiss her claim on the basis that there was an arbitration clause, and the dispute in the case is whether the arbitration clause was enforceable or whether she had received notice of it. And so what ends up happening is the district judge can't figure out whether this is enforceable or not, and she says, Why don't you all meet and confer and come back? Well, instead of doing that, according to the opinion, Amtrak files a notice of appeal and cites to Section 16 of the Federal Arbitration Act, and what Section 16 of the Federal Arbitration Act provides is that you can immediately appeal on an interlocutory basis if the district court, or any court, frankly, doesn't enter a stay or dismiss a case that should properly be arbitrated. And both parties not only cite that, but they cite Section 1291, saying that if this is a final order, that is another basis for appellate jurisdiction. Well, this does not go well at the Seventh Circuit. Both lawyers get it pretty good. So the appellant here is Amtrak, and just to give you a flavor of how this went, the colloquy goes on for a while with Judge Easterbrook. He says to the lawyer for Amtrak, how can Amtrak not recognize that its employees are railroad workers and therefore exempt from the statute? That is not something that should come as a surprise to Amtrak and its lawyers. Now, why does Judge Easterbrook say that? Well, he says that because Section 1 of the FAA specifically exempts railroad workers from the application of the arbitration provisions of the Federal Arbitration Act. And to my point earlier about this being something that had come up recently, the Bissonnette case you'll remember from the last term of the of the Supreme Court of the United States dealt with these bakery workers who had delivered, and whether they fell within this—but railroad workers or railroad employees are specifically listed in Section 1 of the Federal Arbitration Act as being exempt. And so the only question here is appellate jurisdiction. And in the opinion, they go out of their way to say we are only talking about appellate jurisdiction, there may or may not be an enforceable arbitration agreement that is an issue of state law. They say go back to the district court and figure that out, but also, just so we're

clear, this wasn't a final order, so there was no appellate jurisdiction under Section 1291. It turned out that neither Amtrak nor opposing counsel who represented the plaintiff employee, had read the statute. They asked for supplemental briefing. They got supplemental briefing. They were unimpressed by that supplemental briefing. Supplemental briefing is also something that happens quite a bit in the Seventh Circuit. We're going to need another brief on X, Y or Z.

A Anthony Sanders 22:19

Yep. Our colleagues went through that earlier this year.

P Patrick Eckler 22:23

Usually on a jurisdictional issue, uh, because we need to figure out—I mean, have your ducks in a row on jurisdiction when you step up to that podium a couple blocks from where I'm sitting. They are serious about that; and some are not as scathing or direct as Judge Easterbrook. Judge Hamilton also jumped in on this one and asked similar questions, questioning whether there was jurisdiction, and just kind of picking up on it and doing it maybe a bit nicer than the way Judge Easterbrook does it, but he doesn't tolerate what he might view as not being prepared for the kinds of things that he believes you should be prepared for. And in this case, it was jurisdiction. They take it seriously. So you better too.

A Anthony Sanders 23:21

So Christie, you have been through a few oral arguments, both yourself and as a clerk for various judges. Have you seen any jurisdictional cringy stuff such as this in your neck of the woods?

C Christie Hebert 23:36

Not this particular item, but I one that sticks out in my mind, in terms of a cringy moment, was we had a motion in limine in a jury trial, and like, literally, the first words out of the mouth of one of the attorneys violated the motion in limine. Like, on the opening argument. And the judge who I was clerking for at the time, just absolutely lost it. It was a mistrial, so all of that jurisdiction was wasted, and he blew a gasket—justifiably, right? But that was like the most cringy moment I have ever witnessed. So, it happens a fair amount, even at the trial court level.

P Patrick Eckler 24:28

Yeah, I had a trial, my first jury trial, here in Illinois. It was a car accident. So there was a motion in limine about not mentioning insurance and the plaintiff kept mentioning his own insurance, and it doesn't matter they don't want insurance in the trial at all, and he almost declared a mistrial after the guy did it a second time. And so yes, I've seen that happen in

violating...this was not a lawyer and it wasn't the first thing out of his mouth. So the judge kind of was, he was very frustrated. He just sent the jury out the second time and laid into the plaintiff pretty good to not do this anymore. And then, of course, he did.

C Christie Hebert 25:12

[Laughter]. Sanctionable behavior.

P Patrick Eckler 25:15

Yeah, I was like, the jury got the point by then, so they knew they were supposed to—so it was okay, but it was a very small case.

A Anthony Sanders 25:25

The Federal Arbitration Act has had this language in it for literally 99 years, which makes me wonder about what Amtrak has been doing since it was created not that long after that, I think, when we nationalized the railroads. But setting that aside, Section 1291—rhat is like the thing that everyone appeals from when they have a normal federal case that is over, and this case was so obviously not over. I mean, bless them for trying this section 16 thing in the Federal Arbitration Act, but it tells me they must have just copied and pasted it from another brief and put it in and no one actually looks at that.

C Christie Hebert 26:16

Anthony, I have a question about that that maybe Patrick can shed some light on: both parties said that it was a final order under 1291, and they appealed. So I guess what's going on behind the scenes here? Is it something with the district court judge that these parties just wanted to be on appeal? You know, effectively, they're appealing conversations in a status conference from chambers for the no order. So like, what is going on in this case?

P Patrick Eckler 26:49

I think it may be a lawyer that's not very familiar with appellate practice and just didn't recognize that offhand comment—not an offhand comment, but a direction—from Judge Pallmeyer who was the district judge, about go meet and confer. That it didn't constitute a final order, and didn't really appreciate, didn't really think through or even perhaps understand what it meant for there to be a final order, and just was kind of along for the ride. It's the only explanation I could come up with. I don't know why the plaintiff, who was the appellee here—I mean, they should have filed a motion to dismiss for lack of appellate jurisdiction, instead of saying, Yep, there's appellate jurisdiction.

A Anthony Sanders 27:35

And I mean, I could even see, maybe this is too much crediting with too much going on, but I could see maybe you don't like how things are going before the district court. So you think, well, maybe I'll take this ride up, even though I'm the appellee, because maybe it would work out better.

P Patrick Eckler 27:55

I mean, things were going their way. The judge was not just rubber stamping what Amtrak wanted—to go to arbitration. The judge was like, I can't tell, and you haven't proved to me that the employee agreed to this arbitration agreement, and in the absence of that, you're not going to arbitration. You've got work to do to prove this to me, Amtrak. She had gotten some emails, and the question was whether those were sufficient to put her on notice, because none of them said arbitration. They just said, it's really important you look here, this may impact your rights. And so she gets three of them, doesn't open them, apparently, and doesn't actually agree to anything. But the consideration was her continued employment, is how the argument goes from the employer and the circumstance, and they're like, yep, you have arbitration.

A Anthony Sanders 28:47

Maybe not. Maybe this is all just a lesson for any law students listening to read the statutes. Dot your i's, cross your t's, and you might be better than a lot of lawyers out there just by doing that much.

P Patrick Eckler 29:04

That's not a lesson just for the law students. That's for the lawyers. Read the thing, read the statute, read the case, read whatever it is that is to be read and you will be ahead of many of your opponents.

A Anthony Sanders 29:19

I mean, that is kind of a larger legal lesson that we don't spend too much time on. But I do remember early in my career, you would ask a more experienced lawyer, like, how does this work? Some legal thing, and they would assert something like it's absolutely true. And then you would go to the rule book or the statute and say, No, that's not what it says. Or you look at the case and that's not actually what it says. And so you wonder, what, how, what are they relying on in their own practice? Are they looking at these cases and these statutes? And sometimes I think they're not, which, you know, you don't want to focus in on because you might start getting terrified about how things work, but it's something to keep in mind. Just because someone tells you the law is a certain way does not mean it actually is, unless, I guess they're wearing a robe. That might be different.

P Patrick Eckler 30:13

At least for that day, it is that way. So you go with that until it isn't. There was an opinion recently, or it was an argument a couple of years ago, rather, in the Illinois appellate court and

recently, or it was an argument a couple of years ago, rather, in the Illinois appellate court and the parties were given a case management order that really was kind of goofy. And the Appellate Justice says to the lawyers, this is for you lawyers and for anyone else listening, if you get an order that doesn't make any sense, or as to how a lawsuit should be handled, you make a record and you explain why this doesn't make sense, and you tell the judge that it doesn't make sense, and you make your records so that when you come here, you can tell us that you objected to this way in which the court wanted to do something. And so there it was: make a record, read the statute and—

C Christie Hebert 31:05

And check to make sure you have jurisdiction.

P Patrick Eckler 31:09

Yes, and check to make sure you have jurisdiction. That's always good place to start, especially in the Seventh Circuit.

A Anthony Sanders 31:12

Yes, but it's not the only circuit where funny things happen. So we're now going to turn to the Eighth Circuit and things maybe not making sense. So I thought this would be a great case to talk about, because it seems like it was an incredible waste of attorneys' time, what the Eighth Circuit has done in a couple different opinions in a case that went on for a while. Now, I don't think we covered this case on previous Short Circuits, but at one point we covered it in our newsletter, and we've talked about similar litigation. This is one of these challenges to COVID orders during the pandemic where landlords couldn't evict tenants, and they had a good argument. And then there was a bunch of litigation after that, and along the way, some issues arose that also kind of arose in a case that IJ had at the Supreme Court last year that Christy did a ton of work on, and so she's familiar with the lay of the land, and I thought it'd be great for her to tell us about the story of the Heights Apartments in Minnesota.

C Christie Hebert 32:32

Sure. Well, this decision recently came out in November of 2024, that's the last decision, but this case has been going on since 2020. And as you alluded to, Anthony, it's one of those executive moratoriums on eviction cases, and an apartment complex challenged that moratorium under 1983 and it sued both the Governor of Minnesota, which at the time was Walz and the AG in both their individual and official capacities, and that's going to be important in a second. And they alleged a host of claims, the most important of which, for our purposes, was a takings claim and a contracts clause claim. And back in 2020 the district court looked at that, and there was a motion to dismiss and dismiss the claims. And it went up to the the Eighth Circuit in 2022 and the Eighth Circuit looked at the claims and said, You know what? There is a viable takings claim here and a viable contracts claim here.

A Anthony Sanders 33:41

A Anthony Sanders 33:41

Contracts clause! Which we don't hear about very much. Hey, look at that.

C Christie Hebert 33:47

And sent it back down, and when it got back down to the district court, the district court entertained a 12(c) motion, which you don't hear about all that often: a Motion for Judgment on the Pleadings.

A Anthony Sanders 34:01

And that's what you get after the defendants filed an answer, basically, right? So before discovery—

C Christie Hebert 34:06

That's right. They say, effectively, it's so clear, based on the pleadings, that we are going to win. And a good practitioner knows that if you attach evidence to your 12(c), it converts to a summary judgment motion, so you don't do that, but effectively you're saying, based on purely if the allegation is alone, we're still going to win. So after our 12(b)(6) motion, they did a 12(c) motion, which was, you know, pretty good lawyering there. They got another bite at the viable claim apple, and this time they said, Hey, we have 11th amendment sovereign immunity for claims against our state officials in their official capacity. And then, hey, guess what? For the claims against our people in their individual capacity, they have qualified immunity, that lovely boogeyman we see all too often. And so the district court said, Okay, guess you're out of luck. And it went up to the Eighth Circuit again. And then in a lovely one page opinion, the Eighth Circuit said, yup, sovereign immunity applies here. The plaintiff only appealed the takings clause claim in the official capacity. So the real question here was, does the 11th amendment's sovereign immunity bar a takings claim against a state official?

A Anthony Sanders 35:38

Right and didn't appeal the qualified immunity stuff.

C Christie Hebert 35:39

They did not appeal the qualified immunity and they did not appeal the contracts claims. So that's just the takings claim on appeal. And in the interim, in the time period between when the Eighth Circuit had remanded and then thedecision, the Eighth Circuit had looked at the question of whether sovereign immunity bars a takings claim, and it didn't quite conclude that sovereign immunity bars a takings claim. Instead, the conclusion is, if state courts are open, then that claim should be heard in state court against a state court official. And as we know from DeVillier, there's really an open question here on the interplay of the Fifth Amendment takings clause and sovereign immunity. But courts keep saying, including the Supreme Court, if state courts are open, then we don't really need to worry about it. And to me, that really raises

the question of if the Fifth Amendment, if the takings clause, is enforceable if state courts are closed, then why would it matter whether state courts are open or not. If the Fifth Amendment is a mandatory thing against states, it shouldn't necessarily matter whether there's a state venue or not. So needless to say, these plaintiffs who'd gone up and down, up and down, up and down, were out of luck. And as you were kind of alluding to, Anthony, a lot of time, lot of paper, a lot of money wasted, when perhaps the Eighth Circuit could have addressed this issue and said, No, there's no viable claim on the front end back in 2022 but they did not.

P Patrick Eckler 37:35

I will say this, the contract clause has come up, and I actually have a case involving the contracts clause in one of my insurance coverage cases from Minnesota, as it turns out. And the most recent contracts clause case that I'm aware of from the Supreme Court of the United States is also from Minnesota, Sveen v. Melin, which dealt with a life insurance policy and whether he had to take off his ex-wife as a beneficiary, or if the statute that automatically removed the ex-wife was a violation of the contracts clause. So I don't know what it is about Minnesota and the contracts clause, but something's going on up there, in the great white north, Anthony, your neck of the woods up there, and the contract—

A Anthony Sanders 38:19

Well, they're great at interfering in contractual relationships in the great state of Minnesota.

P Patrick Eckler 38:23

Which is what they're doing to my client. And so I have an argument in the beginning of December, arguing that—I'm arguing this in Illinois, by the way, Illinois State Court just to make things...So it's an Illinois state contract, a contract entered into in Illinois, it's a policy of insurance. The accident occurs in Minnesota, and the claimant is trying to apply Minnesota PIP law to an Illinois contract where my client doesn't write in Minnesota, has no connections to Minnesota. And so we have 14th Amendment arguments, and also contracts clause arguments, because you're trying to modify a contract to have a coverage that doesn't exist.

A Anthony Sanders 39:08

Have you notified the Attorney General of Minnesota that you're calling into question...?

P Patrick Eckler 39:14

It's not a facial challenge. It's an as applied challenge. I have made that very clear number one and number two, there is a case that deals with this where the Supreme Court of Minnesota allowed this to happen, but in that case, the carrier wrote in Minnesota, so they couldn't make a lot of these 14th Amendment constitutional arguments that my client can make. And in fact, there's a footnote in that opinion that says there are some constitutional arguments that might

be able to be made, but they weren't made here, and so we're not going to address those. So the court even recognized, hey, there's something else you could argue here. So I'm arguing those. So yes.

A Anthony Sanders 39:54

So, that's wild that they...so my question is this: is sovereign immunity waiveable? For you people that deal with this far more often than I do?

C Christie Hebert 40:02

So, in DeVillier, effectively, the Supreme Court said yes, because there's a cause of action under Texas law in the Texas Constitution, and there's a Texas Supreme Court case saying, Yep, you can sue under the federal constitution. And that really is not something that's discussed here. There's an inverse condemnation cause of action in Minnesota, and whether there's a waiver there, or looking at the Minnesota Constitution, or how that works, wasn't part of the conversation. But it seems like the parties didn't raise that and it wasn't discussed, so they just skipped over it, and based on my knowledge, I think there's only one state in the country that doesn't have an inverse condemnation action. And it's Ohio, and I'm really unfamiliar with how condemnation works in Ohio, so I can't really speak about Ohio, but as far as I know, every state in the union has something where you can challenge the failure to pay, and that there's a real question about whether that, in and of itself, waives immunity. And one question that I have in DeVillier, the inverse condemnation claim was removed. So there was the waiver of suit, in fact.

A Anthony Sanders 41:19

That waives 11th amendment immunity itself, right? Which we don't have in this Eighth Circuit case.

C Christie Hebert 41:26

Right, so we don't have that same posture here. But if there is a viable cause of action under the takings claim that is mandatory— this kind of conversation that I was talking about before— wouldn't it make sense that you could file it in federal or state court? So there's just a question for me there.

P Patrick Eckler 41:48

So I looked at the case that they cite in the— by the way, we have a contest, Christie, as to who could have shorter opinions. Last week, I think they had two near-100 pages of opinions, and this week we got six pages total. [Laughter].Yours is a page.

A Anthony Sanders 42:06

Anthony Sanders 42:06

This is a much better show to prep for.

Patrick Eckler 42:09

Yeah, much easier.

Christie Hebert 42:10

Except, the one page opinion that I have incorporates all these other prior decisions and the decision that you're about to talk about from 2023 so it's like a nested opinion. [Laughter].

Patrick Eckler 42:28

It's a sneaky two page opinion, the first page of which is caption. So, in the in the EEE Minerals LLC versus North Dakota, which is the 2023 case where they said that the self executing damages remedy of the just compensation clause overrides a state's 11th amendment immunity. That's what they argued, and that's what the Eighth Circuit rejected. They talk about Knick v. Township of Scott and it's like, well, I don't understand. How did that not resolve the issue? You've mentioned DeVillier, how does Knick deal with this? Isn't that what they were trying to get rid of? This game that the states play in this context between state and federal court?

Christie Hebert 43:17

I would entirely agree with you, Patrick, but I know that a lot of people have tried to confine Knick to just a case against a municipality. And so therefore, 1983 applies, whereas in this case, it's against a state entity, and so you can't have a 1983 action. So I entirely agree with you, and I would say that Knick did decide this, in essence, that there is a self executing piece, but the Supreme Court has expressed at least some reluctance to make that broad, sweeping decision now. And I would say that what happens here is now the gamesmanship you're talking about, because it effectively says Williamson County, that case that Knick overruled, doesn't really matter, because you have to go to state court. You have to take your federal claim to state court. And as far as I know, generally your federal rights don't necessarily depend on having a state court venue first.

Anthony Sanders 44:16

Yeah, I guess one way to put it is Knick at least solved the problem with municipalities, which is where most land use litigation happens. This wasn't that. This was a state law. I mean, it's an order, but a state law. And so then you get all the state sovereign stuff sort of snuck in.

Christie Hebert 44:36

And all that kit and caboodle gets dragged in. Well, fortunately, you don't have that as often

And all that kit and caboodle gets dragged in. Well, fortunately, you don't have that as often. But still it shouldn't be that the state court and the states get to decide whether they're going to open their doors or not to federal takings claims.

A Anthony Sanders 44:52

I would like to bring up again this whole thing about two motions to dismiss. Well, one was the 12(c) motion for judgment on the pleadings, and the district court says that, to their credit, the plaintiff's attorneys in the district court in the second opinion—one of those opinions that I snuck in for you to read, Christy—is that they argued 11th amendment the first time. And the court says, Well, the first time, that was back during the pandemic when things were much more imminent. And so we were asking for declaratory and injunctive relief at that time, which is a whole is a lot easier to get when you're suing—

C Christie Hebert 45:37

Under Ex Parte Young.

A Anthony Sanders 45:38

Right, and now we're dealing with damages. And so now I can rule on it, even though everyone could see that this had been asked for. It's not like they came up with damages after the fact, and tried to latch them on, and the court could have dealt with them in that time. And instead they go up to the Eighth Circuit, they have this, I think, well written, 20 page opinion about how the contracts clause works and takings claims work, and they actually threw out other claims. And now two years later, it's like it was all just, oh yeah, we could have told you that before, but you know, whatever, two years later, all these attorney hours down the drain. It's just such an incredible waste of time. And if there's ever a claim for waiver of an immunity question, I think it should be here.

C Christie Hebert 46:33

Yeah, Anthony, I think you're right. And I think what's animating this decision is just fatigue with these COVID cases, like, I mean, let's just point it out. Like, this is a case about a moratorium on eviction back from 2020 there's been a lot of these cases. People are just over it, and they want these cases to be done. I mean, the plaintiffs here raised the mootness issue of like, this is a case of repetition yet evading review. The idea being the government could some time issue another executive order saying you can't evict people for some particular reason, the court declined to find the mootness exception applies. So I think what you see is the court going out of its way to find ways to get rid of this case. And so the fact that this was raised before, but it wasn't really considered, ah, we're gonna look at it again. And the fact that you had a 12(b)(6) motion last time, and now this is a 12(c), oh, but we're gonna do that anyway. And the fact that this mootness exception might be applied, we're not gonna consider that right now. So I think the court is really looking to get rid of this case, which means that the judges were motivated to find a reason to kick the case out.

P Patrick Eckler 47:54

I want to stand up for 12(c) motions, and I say this as a lawyer that has spent a great deal of my career doing insurance coverage, and in fact, read an opinion this morning from the Seventh Circuit that was decided by the district court on 12(c). Insurance coverage, so often is a question of law. Take the underlying complaint, take the policy, compare them. It's incredibly amenable to 12(c) motions for summary judgment, things like this. So I'm going to stand up for 12(c) motions. In this context, I have a problem, but that's a different one. But yes, they're a perfectly reasonable way to dispose of litigation.

C Christie Hebert 48:29

So, Patrick, do you do them, like, in a serial fashion, the 12(b)(6) and then a 12(c) later?

P Patrick Eckler 48:39

No one would ever call me a plaintiff's lawyer, but nine times out of 10, I'm the plaintiff—meaning I represent the insurance company that's filing the lawsuit. And so, on occasion, what'll happen—and we have a similar vehicle, and most of my work is in state court, to be sure, because insurance coverage oftentimes is and a lot of my clients are local companies and so that's where we belong, there isn't diversity—is we will file motions for judgments on the pleadings. What you were referencing early Anthony, about people just telling you, this is how things are. And one of those that came to my mind on motions for judgment on the pleadings. There's an 's' at that end of that word, pleadings. And sometimes people will file motions for judgment on the pleadings without having filed an answer. [Laughter]. And it's like, no, no, no, it's pleadings, complaint answer motion, not complaint answer or complaint motion. So yes, pleadings plural. You gotta do the answer thing, and then you can move. So I'm going to stand up for disposing things this way, though not in this case.

A Anthony Sanders 49:51

We have filed many 12(c) motions, I believe, at IJ over the years, and so we are not averse to them, maybe just the timing.

P Patrick Eckler 50:00

In this particular one, it is a bit galling.

A Anthony Sanders 50:03

Well, Patrick, this has been a great journey through the Seventh Circuit and its friends, and including its state court friends. So if people want to learn more about your pontifications about federal jurisdiction or what have you, where should they go?

P Patrick Eckler 50:25

The Podium and Panel podcast, which is available on all podcast platforms, we release it typically Sunday mornings. We'll see if it happens this Sunday morning. May not be till the afternoon, we've got some travel, Dan and I. But then also follow me on LinkedIn. I'm @Donald Patrick Eckler. I only go by my middle name, just to make things confusing, but yes, follow me on LinkedIn. I post there three times a day. Thanks to the scheduling function, I can write all my posts for the week, and I do, similar to the podcast, posts about Illinois, Indiana, Seventh Circuit, Supreme Court. And then I'm a leader in the defense bar. I'm a past president of an organization called the Professional Liability Defense Federation, and an officer in the Illinois Defense Counsel. And write amicus briefs with some regularity for the DTCI, which is the Defense Trial Counsel of Indiana, and the Illinois Defense Counsel. And while we were sitting here, I got an email from someone about an amicus brief on a very interesting issue that that's about all I could say about it. [Laughter]. And we'll be writing an amicus brief on that. So I wanted third party litigation funding and these kinds of issues that also tie to Minnesota, where the Minnesota Supreme Court got rid of the doctrine of champerty to allow for third party litigation funding. So more Minnesota ties, Anthony, but yes, so those kinds of trends in in civil litigation spend a good deal of my time in the social media world, which is confined to LinkedIn for me, which is probably more than enough.

A Anthony Sanders 52:08

Wow, that is some self discipline for you.

P Patrick Eckler 52:11

I tell you what, I was on Twitter for a long time, and that was bad for the mental health and and I got off Twitter 10 years ago—

C Christie Hebert 52:18

X, now, right?

P Patrick Eckler 52:19

Whatever. [Laughter]. It was so bad. The day I got rid of my account, I think the next day I just had a better mental health. I can't imagine the craziness over the last decade of what that must be like and what that must do to people's brains—

A Anthony Sanders 52:37

It's not like LinkedIn, I'll tell you that. But if people are wondering about the links between social media and promotion of public interest law, they can listen to the latest episode of Unpublished Opinions, which is our little round table podcast we have here at IJ. And we'll put a

link in the show notes to that, but we'll also put a link to where you can find Patrick and learn more about his practice. So thank you again for coming on, Patrick.

P Patrick Eckler 53:08
Thank you very much for having me.

A Anthony Sanders 53:09
Thank you, as always, Christy, for coming on.

C Christie Hebert 53:12
Of course, and Patrick, it's been great to get to know you.

P Patrick Eckler 53:15
Great to get to know you. Let me know if you're ever in the great white north.

C Christie Hebert 53:18
I will.

A Anthony Sanders 53:19
Minnesota is a little bit more great white than Chicago, but—

P Patrick Eckler 53:23
I agree. But we're still great, and north.

C Christie Hebert 53:26
Everything's north of Texas, right?

A Anthony Sanders 53:29
Cold when it blows off the lake.

P Patrick Eckler 53:31

Uh, indeed. People ask me why I moved here from Florida: the weather. And they think I'm joking.

A Anthony Sanders 53:37

And what's the answer?

P Patrick Eckler 53:40

The weather! I'm not joking.

A Anthony Sanders 53:42

You're a fan of wind, and you know, being cold until late May because the lake incubates the city and all that.

P Patrick Eckler 53:53

Yes. I brought a coat.

A Anthony Sanders 53:55

You know, the only month of the year the average temperature in Chicago is higher than Minneapolis is May, and it's because it takes so long for Lake Michigan to warm up.

P Patrick Eckler 54:05

Not last year, but in a typical year, you're right, yes.

A Anthony Sanders 54:10

And people can follow Christy's work at ij.org and the various cases that she has going on. I hope all of you have enjoyed this podcast, and please be sure to follow Short Circuit on YouTube, Spotify, Apple podcast and all other podcast platforms, and remember to get engaged.