STATE BAR LITIGATION SECTION REPORT

THE ADVOCATE

The "Best of" Litigation Update 2014

VOLUME 66

SPRING

2014

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EDITOR'S COMMENTS

LONNY S. HOFFMAN

THIS ISSUE OF THE ADVOCATE CONTAINS A "BEST OF" ARTICLES from the 2014 Litigation Update that was held in Austin, Texas in January. As a reminder, we no longer print a hard copy of this issue. The issue is available through a link on the Litigation Section's website, www.litigationsection.com. Once at this site, you can click on the link for THE ADVOCATE to download the Spring 2014 "Best Of" issue. You can also access and download all previously published symposium issues of the journal. Alternatively, you can access our past issues on Westlaw and Lexis.

I also want to take this opportunity to preview our next two symposia.

The Summer 2014 issue will be devoted to litigating in the federal courts. The idea for this issue is two-fold: to serve as a primer for lawyers who do not find themselves regularly in federal court; and to provide analysis for all lawyers and judges about some of the most recent and important developments on the civil side of federal practice, including pleading sufficiency, summary judgment, error preservation, attorneys' fees procedure and recovery, and much more. The issue will appear in mid-July.

We also have begun work on our Fall 2014 issue. It will be devoted to examining fiduciary duty: from the obligations that lawyers owe to their clients, generally, to looking at the law as it applies in a number of different subject matter areas. From family to probate law (and a whole lot in between), this symposium will examine fiduciary duties in numerous contexts. The issue should be out in mid-October.

Questions or comments about THE ADVOCATE are always welcome. My email address is LHoffman@.uh.edu.

Regards,

Lonny Hoffman
Editor in Chief

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CHAIR'S REPORT

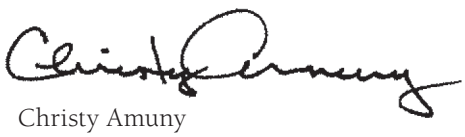
CHRISTY AMUNY

THE 2014 LITIGATION UPDATE INSTITUTE at the Four Seasons in Austin was an enormous success. The editors of THE ADVOCATE have done a fantastic job compiling the articles to bring you The Best of Litigation Update 2014. Thanks to all the contributors – to those who wrote the outstanding articles contained in this issue and those who spoke at the seminar. As you will see by these articles, the seminar truly brought forth the best of the best.

The Litigation Council continuously works to improve the Litigation Update Institute each year. We also strive to provide meaningful benefits to Litigation Section members. We have a number of initiatives aimed at educating attorneys, improving the profession and giving back to those in need. Here is what we have been up to this year and what is coming soon:

- New Litigation Section website, which will be easier to navigate and provide new benefits for our members, including free CLE, a membership directory, online editions of The Advocate in a searchable format, etc. The website will also host the videos of the Texas Legal Legends.
- *News for the Bar* is our quarterly online newsletter providing information on upcoming events, interesting articles and case law updates.
- Providing Summer Legal Internships where law students have an opportunity to work for various legal aid entities, obtain hands-on experience and understand first-hand the fulfillment and satisfaction of giving back to those in need.
- Providing grants to qualified recipients throughout the state for various projects/programs, most of which provide help to those less fortunate and who are in need of legal services.
- Sponsoring various events at the upcoming State Bar Annual Meeting, June 26-27, in Austin. An exceptional CLE track is scheduled for Thursday, June 26 from 1:30 pm to 4:45 pm. Speakers will include Barry Sorrels (Into the Belly of the Beast – Cross examination of hostile witnesses), Kim Askew, Brian Lauten and Michael Slack (It's Complicated – Tips on making complex cases simple), David Beck and Paula Sweeney (It's Like Pulling Teeth – Strategies for dealing with difficult witnesses) and Mike McCrum (I Can See Clearly Now – Perspective from a criminal defense lawyer on effective and time efficient courtroom presentations). On Friday, June 27, at 9:00 am, Bill Baxley and G. Douglas Jones will deliver a fantastic presentation entitled "Justice Delayed, Not Justice Denied: The Prosecution of the 16th Street Baptist Church Bombing Case." Following this presentation, Bob Black, past President of the State Bar of Texas, will be inducted as a Texas Legal Legend.
- We will follow the upcoming legislative session and provide members with information on bills relevant to our profession.
- Texas Legal Legends project, which inducts lawyers who have spent their professional careers principally serving others and taking on multiple things that are much bigger than themselves.

The above are just a few of the projects of the Section. Another shining example is The Advocate, published quarterly and providing symposiums on various legal issues. We are able to provide these benefits to our members and sponsor these projects through membership dues. Thank you for being a member. A special thanks to the Sustaining Members for their generous support. I encourage each of you to become a Sustaining Member so that we may continue our efforts. As always, please feel free to contact me with any questions, comments or suggestions as to how we can better serve you. My email is christy@bainlaw.net.



Christy Amuny
Chair, Litigation Section

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(As of April 2014)

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Brock C. Akers
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SUPREME COURT OF TEXAS UPDATE
November 1, 2012 – October 31, 2013

Presented By
HON. JEFFREY S. BOYD
Justice, Supreme Court of Texas

Written By
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Special thanks to all the Staff Attorneys and Law Clerks at the Supreme Court of Texas for their substantial contributions.

State Bar of Texas
30TH ANNUAL LITIGATION UPDATE INSTITUTE
January 9-10, 2014
Austin

CHAPTER 4

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Jeffrey S. Boyd was appointed to a vacancy on the Texas Supreme Court by Governor Rick Perry and took his seat on December 3, 2012. Before his appointment he served the governor for more than a year as his chief of staff. Before that, he was the governor's general counsel.

Boyd is a graduate of Abilene Christian University and earned his law degree summa cum laude from Pepperdine University, where he graduated second in his law school class. After graduation he clerked for Judge Thomas M. Reavley on the Fifth Circuit U.S. Court of Appeals.

Before he went to law school, Boyd worked as youth and family minister of the Brentwood Oaks Church of Christ in Austin.

He spent 15 years with Thompson & Knight L.L.P. in Austin in two stints. He left to join then-Texas Attorney General John Cornyn as deputy attorney general for general litigation and continued with Attorney General Greg Abbott. He rejoined Thompson & Knight as senior partner in 2003, then left in January 2011 for the Governor's Office.

Justice Boyd was named a Texas Super Lawyer for government practice in 2004 and in 2006-2010. He has served as board president and director of Volunteer Legal Services of Central Texas, as chair and director of Goodwill Industries of Central Texas and as a director of the Freedom of Information Foundation of Texas.

He and his wife, Jackie, have twin daughters and a son.

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SUPREME COURT OF TEXAS UPDATE

Phil Johnson
Justice
Supreme Court of Texas

I. SCOPE OF THIS ARTICLE

This article surveys cases that were decided by the Supreme Court of Texas from November 1, 2012 through October 31, 2013. Petitions granted during that time but not yet decided are also included.

II. ADMINISTRATIVE LAW

A. Judicial Review

1. El Paso Cnty. Hosp. Dist. v. Tex. Health & Human Servs. Comm'n, 400 S.W.3d 72 (Tex. May 17, 2013) [11-0830].

This appeal raised two questions about an earlier appeal and opinion from the Supreme Court. *See El Paso Cnty. Hosp. Dist. v. Tex. Health & Human Servs. Comm'n*, 247 S.W.3d 709 (Tex. 2008). The earlier appeal concerned a suit by fourteen Texas hospitals against the Texas Health and Human Services Commission (HHSC) and its Executive Commissioner, which challenged a "cutoff date" used by the HHSC in the collection of data used to calculate Medicaid reimbursement rates for inpatient services. In that suit, the hospitals asserted two claims for declaratory relief under section 2001.038 of the Administrative Procedure Act (APA). First, they claimed that the cutoff date was an invalid "rule" because it was not adopted via the APA's formal rule-making procedures. Second, they argued that the part of the agency's appeal rule, which HHSC applied to deny them administrative relief from the cutoff date's effect on their rates, was inapplicable. The Supreme Court agreed that the cutoff date was an invalid rule and that, as a result, the appeal rule, as interpreted by HHSC to deny the hospitals' administrative appeals, did not apply. The Court declared the cutoff-date rule invalid and enjoined its enforcement.

On remand to the district court, the hospitals argued that the Supreme Court judgment enjoining the enforcement of the cutoff-date rule should apply retroactively to provide them a basis to reopen their earlier administrative appeals and to seek reimbursement for the underpayment of past Medicaid claims calculated under the invalid cutoff-date rule. HHSC responded that the injunction should only operate prospectively because the earlier administrative proceedings were concluded before the Court's injunction and could not be reopened under agency rules. The district court agreed with the hospitals; the court of appeals agreed with HHSC. The court of appeals concluded that the Supreme Court's decision did not purport to reopen past rate determinations or closed administrative proceedings.

In considering the effect of its prior decision, the Supreme Court agreed with the court of appeals. Although the Court had previously concluded that the hospitals were entitled to a formal review with respect to individual claims data excluded by the invalid cutoff rule, it did not decide whether the hospitals could reopen past agency proceedings or obtain relief for past years. Nor had the Court expressly ordered HHSC to recalculate these hospitals' rates, although that relief was available to the hospitals prospectively under the agency's error-correction rules. The Court affirmed the judgment of the court of appeals.

B. Railroad Commission Authority

1. Tex. Coast Util. Coalition v. R.R. Comm'n, 357 S.W.3d 731 (Tex. App.—Austin 2011), *pet. granted*, 56 Tex. Sup. Ct. J. 277 (February 15, 2013) [12-0102].

At issue in this case is whether the Railroad Commission has authority to approve a cost of service adjustment (COSA) mechanism under its general authority to set rates granted by the Gas Utilities Regulation Act (GURA).

CenterPoint Energy, a gas utility under GURA, sought to change the rates it charges customers in its Texas Coast Division. In order to

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effect these changes, CenterPoint initiated rate cases under GURA with the municipalities located in the Texas Coast Division and with the Railroad Commission for unincorporated areas known as environs. As part of these changes, CenterPoint proposed the COSA which allows annual adjustments to the overall charge to customers for gas utility services based on a formula without a full rate case under GURA. Nine municipalities refused to accept the COSA as part of the new rates. CenterPoint appealed the municipalities' refusals to the Railroad Commission. The Commission approved the COSA as a formula rate under GURA for both the municipalities and environs. The municipalities, acting together as the Texas Coastal Utilities Coalition, and several state agencies, filed suit arguing that the Railroad Commission exceeded its authority in approving the COSA. The trial court agreed and remanded the case back to the Railroad Commission. The court of appeals reversed, holding that because the definition of "rate" in the statute is ambiguous, and because the Railroad Commission has broad authority under GURA, the Railroad Commission did not exceed its authority by approving a formula rate.

The Supreme Court granted the Texas Coastal Utilities Coalition's petition for review and heard oral argument on September 10, 2013.

C. Texas Water Code

1. Tex. Comm'n on Envtl. Quality v. Bosque River Coalition, S.W.3d , 56 Tex. Sup. Ct. J. 1225 (Tex. September 20, 2013) [11-0737].

In this case and a companion case, *Texas Commission on Environmental Quality v. City of Waco*, ___ S.W.3d ___ (Tex. 2013), the principal issue was whether the City of Waco and the Bosque River Coalition were entitled to contested case hearings challenging amended water-quality permits allowing larger herds at dairies in the Bosque River watershed. The Bosque River Coalition, a non-profit environmental protection group, alleged that landowners downstream from a dairy would suffer pollution from dairy-cattle waste runoff. The underlying question in both cases was whether the Commission on Environmental Quality properly determined that neither the City nor the coalition was an "affected person" entitled to contested case hearings challenging the Commission's permit approvals. The Coalition argued that determining status as an affected person is determining standing and must be, on disputed facts, decided in a contested hearing. It also argued that the Commission's conclusion that the dairies' amended water permits would be more protective of water quality than the original permits was irrelevant—thus arbitrary—to a determination that the coalition was not an affected person. Trial courts in each case affirmed the Commission's orders approving the amended water permits, but the court of appeals reversed each, agreeing that the Commission acted arbitrarily and holding that a substantial-evidence review was inapplicable because neither the city nor the coalition had a chance to develop an evidentiary record in a contested hearing.

The Supreme Court held, as it did in *City of Waco,* that a party's status as an affected person does not determine the right to a contested case hearing because the Water Code expressly exempts the proposed amendment from contested case procedures. The Coalition's claim to a contested case hearing was grounded in Water Code chapter 26. Section 26.028(c) generally extends the right to a public hearing in a permit application proceeding to a commissioner, the Commission's executive director, or an "affected person" upon request. Exempted from this general grant, however, are certain applications to renew or amend existing permits that do not seek either to increase the quantity of waste discharged or materially change the place or pattern of discharge and that maintain the quality of the waste to be discharged. The Commission argued that its classification of the dairy's application as a major amendment is not a concession that the Coalition is entitled to a contested case hearing because the terms major and minor amendment are not mutually exclusive. The Commission submitted that an application to amend may fit both definitions, as in this case. The distinction between the two is primarily significant because a contested case hearing is generally not available for minor amendments. But an amendment's classification as major does not conversely establish a contested case hearing right, even though a classification as minor may foreclose the right.

2. Tex. Comm'n on Envtl. Quality v. City of Waco, S.W.3d , 56 Tex. Sup. Ct. J. 931 (Tex. August 23, 2013) [11-0729].

At issue in this case was whether a city has standing to challenge the issuance of a permit for a "Concentrated Animal Feeding Operation" (CAFO). The O'Kee Dairy filed an application with the Texas Commission on Environmental Quality (TCEQ) to expand its herd from 690 to 999 cows and its total waste-application acreage from 261 to 285.4 acres. The City of Waco intervened, objecting to O'Kee's application and demanding a contested case hearing from the TCEQ. The City based its demand on Section 5.115 of the Texas Water Code, which permits contested case hearings for any "affected person." TCEQ issued an order declining the City's request, which was affirmed by the trial court. On appeal, the court of appeals found that the TCEQ acted arbitrarily and abused its discretion in declining to grant the City's request.

The Supreme Court reversed the court of appeals' judgment and affirmed the decision of the TCEQ. The Court found that, although the Water Code generally permits an "affected person" to hold a contested case hearing, the Code also contains exceptions. One such exception is for permit applications that would "maintain or improve the quality of waste authorized to be discharged," and neither seek to "increase significantly the quantity of waste authorized to be discharged," nor "change materially the pattern or place of discharge." The Court determined that there was evidence in the record to support the TCEQ's finding that this exception was met. Therefore, the Court held that the TCEQ did not abuse its discretion in denying the City's request for a contested case hearing.

III. ARBITRATION

A. Arbitrator Appointment and Removal

1. Americo Life, Inc. v. Myer, 371 S.W.3d 537 (Tex. App.—Dallas 2012), *pet. granted*, 56 Tex. Sup. Ct. J. 864 (August 23, 2013) [12-0739].

At issue in this case is whether the American Arbitration Association (AAA) has authority to remove an arbitrator who meets the qualifications required by the parties' contract but who does not meet AAA requirements promulgated after the contract was signed.

This case concerned an arbitration provision that allowed each party to appoint one arbitrator to a panel, subject to certain requirements. Under the contract, AAA was to conduct the arbitration proceedings. Pursuant to the agreement between Americo and Robert Myer, Americo and Myer submitted their dispute to arbitration under AAA rules. AAA removed the arbitrator selected by Americo. Later, the panel found in favor of Myer, and Americo filed a motion to vacate the award, arguing that AAA improperly removed the arbitrator Americo had selected. The trial court granted the motion. It held that Americo was entitled to any arbitrator that met the requirements set forth in the agreement and that the arbitrator removed by AAA met those requirements. The court of appeals reversed, holding that Americo had waived these arguments by not presenting them to AAA. The Supreme Court reversed the court of appeals' judgment and held that Americo had properly preserved its argument. On remand, the court of appeals found that the current AAA rules applied to the arbitration, so Americo's arbitrator could not be appointed unless he met the impartiality requirement of AAA rules. It also held that AAA rules were not in irreconcilable conflict with the express terms of the contract, which required independence without mentioning impartiality. The Supreme Court granted Americo's petition for review and heard oral argument on November 6, 2013.

B. Enforcement of Arbitration Agreement

1. Richmont Holdings, Inc. v. Superior Recharge Sys., 392 S.W.3d 633 (Tex. January 25, 2013) [12-0142].

At issue in this case was whether Petitioner Richmont Holdings established the existence of a valid arbitration provision encompassing the parties' claims. Richmont acquired the assets of Respondent Superior Recharge pursuant to an asset purchase agreement, which contained an arbitration provision. In conjunction with the asset sale, Richmont agreed to hire Jon Blake, who was an owner and manager of Superior Recharge. The employment agreement provided that Blake was to remain as general manager for two years. The employment agreement also contained a non-compete clause, but, unlike the

asset purchase agreement, it did not include an arbitration provision.

Blake was fired six months into the agreement and sued Richmont alleging, among other things, that Richmont fraudulently induced him into entering into the asset purchase and employment agreements. Richmont moved to compel arbitration pursuant to the asset purchase agreement. Superior Recharge responded that Richmont had waived its right to arbitrate. The trial court agreed with Superior Recharge and denied the motion. The court of appeals affirmed, but on different grounds, concluding that Richmont failed to establish the existence of an applicable arbitration agreement. The court therefore did not reach the issue of waiver.

The Supreme Court, in a per curiam opinion, reversed and remanded the case for the court of appeals to consider the issue of waiver. The Court held that when a claim falls within the scope of a valid arbitration agreement and there are no defenses to its enforcement, a court must compel arbitration. Finding that the asset agreement contained an arbitration provision that encompassed the parties' claims, the Court concluded that the court of appeals should have reached the issue of waiver.

C. Enforcement/Non-Signatories

1. Rachal v. Reitz, 403 S.W.3d 840 (Tex. May 3, 2013) [11-0708].

At issue in this case was whether an arbitration provision under the Texas Arbitration Act (TAA) in an inter vivos trust was enforceable against a trust beneficiary. Andrew Francis Reitz established an inter vivos trust naming his sons, James and John, as beneficiaries and his attorney, Hal Rachal, Jr., as successor trustee when he passed away. The trust included a provision requiring arbitration of any dispute involving the trust. When Rachal became trustee, the sons did not disclaim their interest in the trust. John Reitz (Reitz) subsequently sued Rachal for misappropriating trust assets and failing to provide an accounting. Rachal moved to compel arbitration under the TAA. The trial court denied the motion and a divided *en banc* court of appeals affirmed, holding that the arbitration provision was not a binding, enforceable contract between the parties to the trust.

The Supreme Court held that the particular agreement was enforceable against the beneficiary because the TAA requires enforcement of written agreements to arbitrate. An agreement is broader than a contract because it requires only mutual assent. Under the doctrine of direct benefits estoppel, a non-signatory to an agreement manifests his assent by accepting benefits under the agreement or suing to enforce its terms. Here, Reitz failed to disclaim his interest in the trust and accepted benefits therefrom. He also sued to enforce the trust's terms. Accordingly, Reitz assented to the trust's terms, including its arbitration provision. And because Reitz's claims fell within the scope of the provision requiring arbitration of any dispute regarding the trust, the court of appeals erred in affirming the trial court's denial of the motion to compel arbitration.

IV. ATTORNEYS

A. Fees

1. City of Laredo v. Montano, S.W.3d , 57 Tex. Sup. Ct. J. 26 (Tex. October 25, 2013) [12-0274].

This case concerned the evidence supporting an award of attorney's fees. Texas Property Code § 21.019(c) authorizes the trial court to award reasonable and necessary attorney's fees and expenses to the property owner when condemnation is denied. After the trial court awarded attorney's fees to a property owner in an eminent domain case, the condemning authority appealed the fee award. The court of appeals reduced part of the award, but otherwise affirmed. In a per curiam opinion, the Supreme Court reversed the award and remanded the matter to the trial court because of deficiencies in the property owner's proof.

The property owner's attorney testified that he had reasonably accumulated about 1,356 hours in the case. The attorney came to this number by multiplying his 226 weeks of active employment by a factor of six, representing his estimate of the average number of hours per week he worked on the case. The attorney, however, offered nothing further to document his time in the case other than the "thousands and thousands and thousands of pages" generated during his representation. The attorney conceded that he kept no records of his

time in the case, nor had he prepared any bills or invoices for his client.

The Court concluded that the attorney's generalizations that he spent "a lot of time getting ready for the lawsuit," conducted "a lot of legal research," visited the premises "many, many, many, many times," and spent "countless" hours on motions and depositions were not evidence of reasonable attorney's fees under the lodestar method of proof chosen by the property owner. Following *El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757 (Tex. 2012), the Court observed that a lodestar calculation requires certain basic proof, including itemizing specific tasks, the time required for those tasks, and the rate charged by the person performing the work. *Id.* at 765. The attorney conceded that he would have itemized his work and provided this information had he been billing his client. The Court concluded that a similar effort should be made when an adversary is asked to pay instead of the client.

2. In re Nalle Plastics Family Ltd. P'ship, 406 S.W.3d 168 (Tex. May 17, 2013) [11-0903].

At issue in this case was whether attorney's fees incurred in the prosecution or defense of a claim must be included in the security required to suspend enforcement of a money judgment pending appeal. Porter, Rogers, Dahlman, & Gordon, P.C. (Porter), a law firm, sued Nalle Plastics Family Limited Partnership for breach of contract, asserting that Nalle failed to pay legal fees it owed to Porter. A jury awarded Porter damages for the underlying breach, plus the attorney's fees that Porter incurred in the prosecution of its claim against Nalle. Nalle posted a supersedeas bond to suspend the judgment during appeal.

Because the bond did not include the attorney's fees that were awarded, Porter argued that the judgment had not been superseded. Porter asserted that Texas Civil Practice and Remedies Code section 52.006(a) requires that attorney's fees be included in appeal bonds either as "compensatory damages" or "costs" awarded in the judgment. The trial court ordered Nalle to deposit additional monies to cover the attorney's fees and Nalle sought appellate relief. The court of appeals denied Nalle's motion, holding that attorney's fees are both compensatory damages and costs. Nalle sought mandamus relief from the Supreme Court.

The Court conditionally granted relief and held that attorney's fees are neither compensatory damages nor costs for purposes of suspending enforcement of a money judgment during appeal. The Court noted that previous cases and numerous statutory provisions distinguish attorney's fees from damages in accordance with the American Rule, which bars recovery of attorney's fees unless specifically authorized by contract or statute. Further, the Court reasoned that previous cases require damages to be awarded before attorney's fees can be considered, thus indicating that they have always been viewed as distinct amounts. The Court noted that there are some instances in which attorney's fees can be considered damages, such as when the underlying suit itself involves the recovery of such fees.

The Court also rejected the idea that attorney's fees should be considered "costs." It noted that costs have been long recognized to be court costs—not litigation costs—unless specifically labeled otherwise. Attorney's fees have never been considered court costs, either in case law or statute.

B. Guardian Ad Litem Fees

1. Ford Motor Co. v. Stewart, Cox, & Hatcher, P.C., 390 S.W.3d 294 (Tex. January 25, 2013) [11-0818].

At issue in this case was whether evidence supported the continued appointment of a guardian ad litem and the trial court's subsequent fee award under Rule 173 of the Texas Rules of Civil Procedure.

Theresa Richardson, as next friend to her minor daughter I.F., sued Ford Motor Company and Bridgestone/Firestone North American Tire, L.L.C. after I.F. was injured in a one-car rollover accident. A pretrial judge was assigned to the case pursuant to Rule 11 of the Texas Rules of Judicial Administration. In 2003, the regular judge in the case approved a settlement between I.F. and Firestone. The regular judge found that the appointment of a guardian ad litem was unnecessary because there was no conflict of interest between Richardson and I.F. Six years later, Ford and I.F. jointly presented a settlement to the pretrial judge for his approval. Acting on

his own initiative, the pretrial judge appointed attorney John Milutin as I.F.'s guardian ad litem under Rule 173. Richardson challenged Milutin's appointment in the trial court, arguing that her interests were not adverse to I.F.'s because she made no claims in the lawsuit and had no financial interest in the settlement. In Milutin's response, he primarily took issue with the regular judge's prior approval of the Firestone settlement in 2003 and the amount of attorney's fees awarded in that settlement. The trial court denied Richardson's challenge. Richardson then unsuccessfully sought mandamus relief from the order appointing Milutin as guardian ad litem. The pretrial judge ultimately approved the settlement and, after overruling Ford's objection, ordered Ford to pay $40,000 to Milutin in guardian ad litem fees and expenses. A divided court of appeals affirmed. Ford appealed.

The Supreme Court reversed the court of appeals' judgment and remanded the case back to the trial court to recalculate Milutin's fee award. The Court held that a parent's obligation to provide her child with medical care, standing alone, does not create a conflict of interest within the confines of Rule 173. The Court provided that the pretrial judge should have removed Milutin at the time he considered Richardson's challenge and Milutin's response. The Court stated that any services rendered by Milutin after that time were not necessary and thus not compensable under Rule 173. Accordingly, the Court held that the pretrial judge abused his discretion when he awarded Milutin compensation for unnecessary services. Because there was sufficient evidence to show that Milutin necessarily spent some amount of time initially advising the pretrial judge as to whether there was a conflict of interest between Richardson and I.F., the Court remanded the case to the pretrial judge to determine Milutin's fee award, consistent with its opinion.

C. Malpractice

1. Elizondo v. Krist, S.W.3d , 56 Tex. Sup. Ct. J. 1074 (Tex. August 30, 2013) [11-0438].

In this attorney malpractice case, Jose Elizondo had been injured in the Texas City refinery explosion that occurred at the BP Amoco plant in 2005. He settled his case for $50,000. One of his attorneys, Ronald Krist, represented BP after the settlement. Jose and his wife sued Krist and other lawyers, claiming that the attorneys had failed to secure an adequate settlement for Jose and had obtained no settlement at all for Jose's wife on her loss of consortium claim. The attorneys moved for summary judgment on various grounds including no evidence of malpractice damages. The Elizondos submitted the affidavit of an attorney-expert, Arturo Gonzalez, who opined that the case, if competently handled, should have settled for far more than $50,000. The trial court granted summary judgment. The court of appeals affirmed.

The Supreme Court affirmed the court of appeals' judgment. The Court rejected BP's argument that the Gonzalez affidavit was insufficient because malpractice damages can only be shown by conducting a "suit within a suit" and establishing the judgment that would have been recovered after a trial prosecuted by competent counsel. The Court reasoned that in a mass tort case such as the BP refinery litigation, where thousands of cases had settled and indeed none had been tried to a verdict, an expert can rely on settlements obtained in similar cases in evaluating the damages sustained due to attorney malpractice. However, the Court concluded that the Gonzalez affidavit was too conclusory to defeat summary judgment because the affidavit merely declared that the settlement was inadequate without comparing specific settlements obtained in other cases.

The Court also concluded that the attorney-defendants, who had resisted discovery regarding other settlements, were not estopped from relying on the conclusory nature of the Gonzalez affidavit. After reviewing the record, the Court concluded that, despite numerous discovery skirmishes, the Elizondos had not taken the position in the trial court that (1) their expert needed discovery on specific dollar amounts obtained by other claimants, and (2) ruling on the summary judgment motions should be continued until such discovery could be obtained. Finally, the Court disagreed with the Elizondos that their lay testimony regarding their damages was sufficient to raise a genuine issue of material fact on the element of damages. While their lay testimony offered evidence of some damages,

proof of malpractice damages required expert testimony because the case settled for $50,000, and the adequacy or inadequacy of that amount depended on many factors, a balancing of which was beyond the expertise of most laypersons.

V. CIVIL FORFEITURE

A. Evidence

1. State v. Ninety Thousand Two Hundred Thirty-Five Dollars and No Cents in United States Currency ($90,235), 390 S.W.3d 289 (Tex. January 25, 2013) [11-0642].

At issue in this case was whether the trial court erred in granting Hermenegildo Godoy Bueno's motion for summary judgment in this civil seizure and forfeiture action brought by the State. Deputy Armando Gomez stopped a black Lincoln Navigator driven by Bueno and noticed a backpack and tote bag in the rear floorboard of the vehicle. After Bueno denied Deputy Gomez's request for consent to search the vehicle, Deputy Gomez called a K-9 unit to the scene. The K-9 unit's dog alerted positively for the odor of narcotics on the vehicle's exterior. Deputy Gomez and the dog's handler searched the vehicle, and inside the backpack and tote bag they discovered six clear plastic bags containing rubber band-wrapped bundles of cash totaling $90,235. According to a sworn statement, the dog alerted positively to the odor of narcotics on the money.

The officers seized the property, and the State instituted forfeiture proceedings alleging the property was contraband. Bueno answered the suit and filed a traditional motion for summary judgment attaching his own affidavit to the motion as summary judgment evidence. In the affidavit he asserted he was stopped for no valid reason and that he had lawfully acquired the vehicle and money. The trial court granted Bueno's motion without giving its reasons and the court of appeals affirmed. The court of appeals held that Bueno's affidavit conclusively established the State lacked a reasonable belief that a substantial connection or nexus existed between the property and any illegal drug dealing activities. It further held the State was required to specially except to Bueno's motion to complain on appeal that the motion did not encompass all of the State's forfeiture claims.

The Supreme Court reversed the court of appeals' judgment, holding that Bueno's affidavit failed to conclusively prove the officers had no reasonable belief the property had or would have a substantial connection with illegal activity as pleaded by the State. The Court remanded the case to the court of appeals to consider whether the warrantless search of the vehicle was illegal—an issue the court of appeals did not address. Because of its disposition, the Court did not address the court of appeals' holding that the State failed to preserve error for its argument that Bueno's motion did not include all of the State's claims.

B. Gambling Devices

1. State v. $1,760.00, 406 S.W.3d 177 (Tex. June 28, 2013) [12-0718].

At issue in this case is whether a non-immediate right of replay falls within the exclusion to the definition of "gambling device" in section 47.01(4)(B) of the Texas Penal Code. The Tarrant County Sheriff's Department obtained a search warrant for Magic Games Game Room after an investigation yielded information that eight-liners were awarding tickets to players that could be redeemed for future play on another day—referred to as non-immediate rights of replay. The Sheriff's Department seized thirty-seven eight-liners and $1,760 in cash from an automated teller machine (ATM) on the premises. The State initiated forfeiture proceedings under article 18.18 of the Texas Code of Criminal Procedure and the trial court ordered forfeiture of the devices. The court of appeals reversed, holding that the non-immediate right of replay fell within the exclusion to the definition of "gambling device" in section 47.01(4)(B) of the Penal Code. The court of appeals determined that the non-immediate rights of replay could be considered "novelties" under the exclusion, which the court of appeals defined as a "new event." The State petitioned the Supreme Court for review, arguing that "novelties" should be construed to mean small, tangible goods similar in form to "noncash merchandise prizes" and "toys," instead of a "new event." Under the State's proposed construction of "novelties," the State contended that a reward of a non-immediate right of replay prevents the statutory exclusion from applying to eight-liners.

The Supreme Court reversed the court of appeals' judgment and reinstated the judgment of the trial court. The Court determined the context of section 47.01(4) indicates that the Legislature intended "novelty" to mean other types of tangible items similar to "noncash merchandise prizes" and "toys"—not a "new event" as the court of appeals defined the term. Accordingly, the Court held that the eight-liners do not fall within the exclusion in section 47.01(4)(B) because the distributed tickets were not redeemable exclusively for noncash merchandise prizes, toys, or novelties as required by the statutory exclusion.

VI. CLASS ACTIONS

A. Class Certification

1. Phillips Petroleum Co. v. Yarbrough, 405 S.W.3d 70 (Tex. June 21, 2013) [12-0198].

Under Texas law, a party may pursue an interlocutory appeal of a trial court's order that certifies or refuses to certify a class in a suit brought under Rule 42 of the Texas Rules of Civil Procedure. The principal issue in this class action is whether a trial court's order allowing the post-certification addition of a new class claim altered the fundamental nature of the class, entitling the defendants to appeal the order. Royce Yarbrough (individually and as class representative) alleges that lessee Phillips Petroleum Co. and others (collectively Phillips) wrongfully underpaid royalties to Yarbrough and other lessors under natural gas leases. The Supreme Court previously considered the certification of this class—comprised of three subclasses— in *Bowden v. Phillips Petroleum Co.*, 247 S.W.3d 690 (Tex. 2008). The court of appeals had decertified all three subclasses, and *Bowden* affirmed, on predominance grounds, as to the two subclasses that asserted implied-covenant claims against Phillips. However, the Court found that class certification was appropriate for Yarbrough's subclass, which asserted a contract claim for breach of royalty provisions in the class members' leases. The Court also instructed the trial court to consider the effects of res judicata on the propriety of certification in light of the Court's intervening decision in *Citizens Insurance Co. of America v. Daccach*, 217 S.W.3d 430 (Tex. 2007), which held that normal res judicata rules apply to class actions and that trial courts must consider the effect of these rules when deciding whether to certify a class.

On remand from *Bowden*, the trial court, over Phillips's objection, allowed Yarbrough to add a class claim for breach of the implied covenant to market. In the court of appeals, Phillips filed both a petition for writ of mandamus, which was denied, and an interlocutory appeal, which was dismissed for want of jurisdiction.

The Supreme Court reversed, holding that the appellate courts had jurisdiction to consider the appeal and that the trial court erred in two respects. Applying *De Los Santos v. Occidental Chemical Corp.*, 933 S.W.2d 493 (Tex. 1996) (per curiam), in which the Court held that an order altering the fundamental nature of the class rendered the order immediately appealable, the Court explained that such an order is one that changes the class in such a way as to raise significant concerns about whether certification remains proper. The Court concluded that the trial court's order allowing Yarbrough to add an implied-covenant claim qualified as such an order because the new claim raised concerns as to predominance and typicality that were not present and thus not evaluated in *Bowden*. Addressing the merits, the Supreme Court held the trial court abused its discretion in (1) failing to hold a certification hearing with regard to certification of the new claim, and (2) failing to conduct the required rigorous analysis with regard to the effect of res judicata on the propriety of certification. The Court remanded the case to the trial court for further proceedings.

2. Riemer. v. State, 392 S.W.3d 635 (Tex. February 22, 2013) [11-0548].

This case involves the certification of a class of landowners along a stretch of the Canadian River in Hutchinson County in a takings claim against the State of Texas. The trial court denied certification, finding that the landowners failed to satisfy two of Texas Rule of Civil Procedure 42(a)'s prerequisites and any of the three Rule 42(b) requirements. The court of appeals affirmed, holding that certain conflicts identified by the trial court prevented the landowners from satisfying the requirement that the named plaintiffs in the class adequately represent the

entire class. The Supreme Court reversed, holding that the conflicts relied on by the trial court and court of appeals—potential conflicts between landowners on the north and south sides of the river, family disputes between a class representative and class member relatives, and potential conflicts between landowners who had signed a mineral boundary agreement setting out the location of the river banks and landowners who had not—were merely speculative and hypothetical, and therefore did not defeat the adequacy-of-representation requirement in Rule 42(a). The Court remanded to the court of appeals to address the remaining contested requirements of class certification.

B. Unclaimed Distributions

1. Highland Homes, Ltd. v. State, 2012 WL 2127721 (Tex. App.—El Paso 2012), *pet. granted*, 56 Tex. Sup. Ct. J. 864 (August 23, 2013) [12-0604].

At issue in this case is whether parties to a class action may agree to contribute unclaimed settlement amounts to charity or whether the unclaimed funds should be remitted to the comptroller under the unclaimed property provision of the Texas Property Code. Highland Homes withheld certain amounts from its subcontractors' paychecks if the subcontractors did not have adequate proof of insurance. Benny & Benny, one of Highland Homes' subcontractors, filed suit after it learned Highland Homes was not purchasing insurance with the withheld amounts as Benny & Benny believed. Rather, Highland Homes had been deducting the amounts to cover its own increased exposure. The trial court granted class action certification. The parties eventually settled, agreeing that Highland Homes would mail unlocated subcontractors a check at their last known addresses. Any checks unnegotiated after 90 days would be void. Unclaimed funds would be donated to the Nature Conservancy, a charity.

The State intervened, claiming that the unclaimed settlement funds were subject to the unclaimed property provisions of the Texas Property Code, and therefore should be handed over to the Comptroller. The trial court denied the State's motion for partial new trial and motion to modify the judgement. The court of appeals reversed and remanded to the trial court with instructions to strike the portion of the settlement agreement regarding unclaimed funds and held that unclaimed funds should be remitted to the comptroller in compliance with the Property Code. Highland Homes petitioned the Supreme Court for review, arguing that the unclaimed property law does not apply to the funds in this case. Under the law, only property that was actually owned can be considered "abandoned." Here, they argue, the identified non-participating class members do not have a property interest in the settlement funds. The State counters that the court of appeals was correct in concluding that identified non-participating class members do have a property right in the unclaimed funds. The State also argues that Highland Homes does not have standing to challenge the court of appeals' disposition of the unclaimed settlement funds because it no longer has any justiciable interest in those funds. The Court granted Highland Homes' petition for review and heard oral argument on November 7, 2013.

VII. CONSTITUTIONAL LAW

A. Equal Protection

1. In re Marriage of J.B. and H.B., 326 S.W.3d 654 (Tex. App.—Dallas 2010), *pet. granted*, 56 Tex. Sup. Ct. J. 863 (August 23, 2013) [11-0024], *consolidated for oral argument with* State v. Naylor, 330 S.W.3d 434 (Tex. App.—Austin 2011), *pet. granted*, 56 Tex. Sup. Ct. J. 864 (August 23, 2013) [11-0114], *and* In re State, 330 S.W.3d 434 (Tex. App.—Austin 2011), *argument granted on pet. for writ of mandamus*, 56 Tex. Sup. Ct. J. 864 (August 23, 2013) [11-0222].

At issue in these cases is whether trial courts have jurisdiction to grant a divorce to same-sex couples. Also at issue is whether the State may intervene in a same-sex divorce suit. J.B. and H.B. and Angelique Naylor and Sabina Daly are same-sex couples who were legally married outside of Texas. Both couples resided in Texas and eventually filed for divorce in Texas. The trial court in Naylor and Daly's suit approved their oral settlement agreement and granted their divorce. The State then filed a petition in intervention and filed a plea to the jurisdiction, arguing that Family Code section 6.204 deprives trial courts of jurisdiction over divorce suits of same-sex

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couples. The trial court denied the State's motion to intervene concluding it was untimely, and the State appealed. The court of appeals affirmed, agreeing the State could not intervene. In J.B. and H.B.'s divorce suit, the State intervened before a judgment was entered and filed a plea to the jurisdiction. The trial court denied the plea to the jurisdiction and struck the State's plea in intervention. The State filed an interlocutory appeal challenging the denial of the plea to the jurisdiction and filed a writ of mandamus regarding the order striking its intervention. The court of appeals held that the trial court abused its discretion by striking the State's intervention and that Texas courts do not have jurisdiction over a same-sex divorce suit.

In the Supreme Court, the State asserts that the Texas Constitution defines marriage as between one man and one woman, and because Family Code section 6.204 prohibits a governmental entity from giving effect to same-sex marriages, courts must decline to exercise jurisdiction over same-sex divorce cases. The State also argues that it may intervene in same-sex divorce cases because the State has a justiciable interest in defending its laws when their constitutionality is questioned. The parties to the divorces argue that the statutory language of section 6.204 does not deprive trial courts of jurisdiction over same sex divorce cases and a contrary construction would violate the Equal Protection Clause of the United States Constitution because it targets a particular class of persons for discrimination. Naylor and Daly also argue that the State could not intervene in their suit after a final judgment had been entered and the separation of powers doctrine counsels against granting the executive branch broad power to challenge judicial decisions.

Also at issue in this case is how the United States Supreme Court's recent decision in *United States v. Windsor*, 570 U.S. ___ (2013), in which the Court held that Section 3 of the Defense of Marriage Act violates the U.S. Constitution, impacts these appeals.

The Court granted the petitions for review, consolidated them for oral argument with the petition for writ of mandamus, and heard oral argument on November 5, 2013.

B. First Amendment Speech

1. Waste Mgmt. of Tex., Inc. v. Tex. Disposal Sys. Landfill, Inc., 2012 WL 1810215 (Tex. App.—Austin 2012), *pet. granted*, 56 Tex. Sup. Ct. J. 1212 (September 20, 2013) [12-0522].

At issue in this case is whether the jury's award of reputation damages to a corporation is supported by legally sufficient evidence that comports with Free Speech concerns.

In 1997, Waste Management and Texas Disposal competed to obtain landfill-services contracts with the cities of Austin and San Antonio. During that time, Waste Management published an "Action Alert" that was faxed to several members of the Austin environmental community, apparently attempting to boost its image by distinguishing its business from that of Texas Disposal's. Texas Disposal sued Waste Management for defamation. Texas Disposal alleged that Waste Management's Action Alert depicted Texas Disposal as having received an exception to operating under stringent environmental laws which caused the public to view Texas Disposal's landfills as less environmentally friendly. In the first jury trial, the jury found that Waste Management's Action Alert had defamed Texas Disposal but that Texas Disposal had suffered no damage. The trial court entered a take-nothing judgment against Texas Disposal, and the court of appeals affirmed. On rehearing, however, the court of appeals reversed and remanded for a new trial on defamation and defamation per se. The Supreme Court denied Waste Management's petition for review.

The second jury trial on Texas Disposal's defamation and defamation per se claims resulted in a verdict for Texas Disposal for $450,592.03 in mitigation expenses, $5,000,000 in reputation damages, and $10,000,000 in exemplary damages. The trial court statutorily reduced the exemplary damages and entered judgment for Texas Disposal. On appeal from this second jury verdict, the court of appeals affirmed.

The Supreme Court granted Waste Management's petition for review and Texas Disposal's cross-petition for review and heard oral argument on December 3, 2013.

C. Home Equity Loans

1. Fin. Comm'n of Tex. v. Norwood, S.W.3d , 56 Tex. Sup. Ct. J. 696 (Tex. June 21, 2013) [10-0121].

At issue in this case was the scope of an amendment to the Texas Constitution that authorized the Legislature to delegate to a state agency the power to interpret certain provisions of the Constitution governing home equity lending and whether agency interpretations made under this authority are beyond judicial review. Six homeowners sued the Credit Union Commission and the Finance Commission, challenging several of the Commissions' interpretations under the amendment. By final summary judgment, the trial court invalidated many of the interpretations. A divided court of appeals affirmed in part and reversed in part. The Supreme Court affirmed in part and reversed in part and rendered judgment.

The Court held that the Commissions' interpretations are subject to judicial review and concluded that the Homeowners had standing to bring suit because of the exceptional nature of the constitutional provision at issue. As to the Homeowners' substantive challenges, the Court began by determining that *de novo* review was proper. The Court concluded that consistent with the history, purpose and text of Article XVI, Section 50 of the Constitution, "interest" as used in Section 50(a)(6)(E) means the amount determined by multiplying the loan principal by the interest rate. The Court also concluded that the Commissions' interpretations of Section 50(a)(6)(N)—that a borrower may mail the required consent to the lender and close through an attorney-in-fact—contradicted the purpose and text of the provision and are therefore invalid. Finally, the Court agreed with the Commissions' interpretation that Section 50(g) includes a rebuttable presumption that notice is received three days after it is mailed. The Court affirmed the judgment of the court of appeals as to the third issue, reversed it as to the first and second issues, and rendered judgment.

Justice Johnson concurred in part and dissented in part, and dissented from the judgment. The dissent found that the record did not contain any facts showing how even one of the Commissions' interpretations caused the Homeowners a concrete, actual, imminent, particularized injury, and thus, the Homeowners did not have standing to bring suit.

2. Sims v. Carrington Mortg. Servs., LLC, *certified question accepted*, 56 Tex. Sup. Ct. J. 863 (August 23, 2013) [13-0638].

At issue in this case is the interpretation of Article XVI, section 50(a)(6) of the Texas Constitution. Section 50 permits home equity loans secured by a mortgage on the homestead. There are a number of limitations on such lending, and lenders who do not comply lose the right of forced sale of the homestead, as well as principal and interest on the loan. The Texas Constitution provides a safe harbor provision that exempts certain home equity loans from the limitations.

The underlying case is a class action lawsuit filed by Frankie and Patsy Sims (the Simses) against Carrington Mortgage Services, Inc. (CMS) in federal district court. The Simses initially obtained a home equity loan from CMS for $76,000. After falling behind on their payments, the Simses entered into two separate agreements with CMS over the course of a few years. Both agreements "capitalized" past-due interest, unpaid property taxes, and unpaid insurance premiums by adding them to the principal of the loan. After both agreements, the new balance of the Simses' loan was more than the appraised value of the property. Both agreements were titled "Loan Modification Agreement" and stated that all obligations under the original loan documents remained in effect except as modified by the agreement.

In their federal court lawsuit, the Simses alleged that the agreements violated various conditions of section 50(a)(6). The district court granted CMS's motion to dismiss. The United States Court of Appeals for the Fifth Circuit affirmed in part (on issues not relevant here) and certified the following question to the Texas Supreme Court:

1. After an initial extension of credit, if a home equity lender enters into a new agreement with the borrower that capitalizes past-due interest, fees, property taxes, or insurance premiums into the principal of the loan but neither satisfies nor replaces the original note, is the transaction a modification or a

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refinance for purposes of section 50 of Article XVI of the Texas Constitution?

Section 50 requirements apply to an original loan and its subsequent modification as a single transaction. A refinance, on the other hand, must *individually* comply with section 50. It is undisputed that the agreements in the underlying case do not individually comply with section 50. But, if the agreements are considered modifications, the Fifth Circuit asked the Texas Supreme Court to address the following, additional questions:

2. Does the capitalization of past-due interest, fees, property taxes, or insurance premiums constitute an impermissible "advance of additional funds"?
3. Must such a modification comply with the requirement that a home equity loan must have a maximum loan-to-value ratio of eighty percent?
4. Do repeated modifications like those in this case convert a home equity loan into an open-end account?

The Supreme Court accepted the certified questions from the Fifth Circuit and heard oral argument on December 4, 2013.

D. Religion Clauses

1. Episcopal Diocese of Fort Worth v. Episcopal Church, S.W.3d , 56 Tex. Sup. Ct. J. 1034 (Tex. August 30, 2013) [11-0265].

At issue in this case was the methodology to be used when Texas courts decide which faction is entitled to a religious organization's property following a split or schism. The Episcopal Church of the United States of America (TEC) is a "hierarchical church," divided into nine geographical provinces, and each province is further subdivided into geographical regions known as "dioceses." In 1983, the Diocese of Forth Worth formed the Corporation of the Episcopal Diocese of Fort Worth (the Corporation) to hold money and title to real property used for Diocesan purposes. When disagreements over church practices and beliefs arose between the Diocese of Forth Worth and TEC, over sixty churches in the Diocese voted to withdraw from TEC. TEC then filed suit to determine who was entitled to possession of the property held by the Corporation, including over sixty church buildings. The trial court granted TEC's motion for summary judgment, ordering the Diocese to surrender control of the Corporation and all church properties. The Diocese filed a direct appeal in the Supreme Court.

The Court first held that it had jurisdiction over the direct appeal. An appeal may be taken directly to the Supreme Court from an order of a trial court granting an injunction on the ground of the constitutionality of a statute. The Court held that the effect of the trial court's order and injunction requiring the defendants to surrender control of the Corporation was a ruling that the Non-Profit Corporation Act would violate the First Amendment if it were applied in this case.

The Court next held, relying on its decision in *Masterson v. Diocese of Northwest Texas*, ___ S.W.3d ___ (Tex. 2013), that the methodology referred to as "neutral principles of law" must be used by Texas courts when determining church property disputes. Under that methodology, courts defer to religious entities' decisions on ecclesiastical and church polity issues, such as who may be members of the entities and whether to remove a bishop or pastor, while they decide non-ecclesiastical issues such as property ownership and whether trusts exist based on the same neutral principles of secular law that apply to other entities. The trial court had granted summary judgment utilizing the deference method, under which a court determines where the religious organization has placed authority to make decisions about church property and then defers to and enforces the decision of the religious authority if the dispute has been decided within that authority structure. Because the record did not warrant rendition of judgment to either party based on neutral principles of law, the Court reversed and remanded to the trial court for further proceedings.

Justice Willett, joined by Justice Lehrmann, Justice Boyd, and Justice Devine, dissented. The dissent would have dismissed the case for want of jurisdiction, noting that direct appeal jurisdiction is exceedingly narrow. While the dissent recognized that the case had a First Amendment overlay, it pointed out that the trial court did not determine the constitutionality of a statute in its

order and verbally stated that its ruling was not based on constitutionality.

2. Masterson v. Diocese of Nw. Tex., S.W.3d , 56 Tex. Sup. Ct. J. 1048 (Tex. August 30, 2013) [11-0332].

At issue in this case was which legal methodology should be used to determine what happens to the property when a majority of the membership of a local church votes to withdraw from the larger religious body of which it has been a part. In 1974 the Episcopal Church of the Good Shepherd was admitted to the Diocese of Northwest Texas as a parish and incorporated under the Texas Non-Profit Corporations Act. The corporation enacted bylaws, including a requirement that it adhere to the Canons of The Episcopal Church of the United State of America (TEC). The corporation also took title to real estate used by the parish. The bylaws also provided that amendments to the bylaws would be by majority vote of parish members.

In 2006, due to doctrinal differences, a majority of parish members voted to amend the bylaws to withdraw the parish's membership in TEC and change the name of the corporation to Anglican Church of the Good Shepard. The withdrawing faction continued to use parish property so the Diocese and other Episcopal leaders (collectively, the Diocese) filed suit for a declaratory judgment that the property was held by those loyal to the Diocese and TEC. The former parish leaders (Anglican Leaders) filed a counterclaim asserting that they were entitled to retain control of the property. The trial court granted summary judgment for the Diocese, finding that the actions of the Anglican Leaders in seeking to withdraw Good Shepherd as a parish from the Diocese and TEC were void and all property of Good Shepherd is held in trust for TEC and the Diocese. The Anglican Leaders appealed and the court of appeals affirmed.

The Supreme Court first considered which of two constitutional methodologies for resolving church property disputes should be used by Texas courts. Under the deference method, a court determines where the religious organization has placed authority to make decisions about church property and then defers to and enforces the decision of the religious authority, if the dispute has been decided within that authority structure. Under the second approach, referred to as "neutral principles of law," courts defer to religious entities' decisions on ecclesiastical and church polity issues such as who may be members of the entities and whether to remove a bishop or pastor, while they decide non-ecclesiastical issues such as property ownership and whether trusts exist based on the same neutral principles of secular law that apply to other entities. The Court reviewed Texas law and concluded that Texas courts should use only the neutral principles methodology to determine property interests when religious organizations are involved. The Court then concluded that because the Diocese did not plead nor urge as grounds for summary judgment that they were entitled to the property on neutral principles grounds, they were not entitled to summary judgment. The Court remanded the case to the trial court for further proceedings.

Justice Boyd, joined by Justice Willett, concurred. The concurrence joined the Court's adoption of the neutral-principles approach in deciding non-ecclesiastical issues, but did not join the Court's addressing whether the adoption of the bylaws involved ecclesiastical decisions and whether the property was held in irrevocable trust for TEC. The concurrence argued that the parties should first be given the opportunity to develop their pleadings and the record under the neutral principles approach.

Justice Lehrmann, joined by Chief Justice Jefferson, dissented. The dissent also agreed that church property disputes should be resolved under the neutral-principles approach, but would have affirmed the judgment in favor of the Diocese. The dissent would have held that an irrevocable trust on the church property was created in favor of TEC, and even if not irrevocable, the corporation was estopped from revoking that trust.

E. Retroactive Legislation

1. Union Carbide Corp. v. Synatzske, 386 S.W.3d 278 (Tex. App.—Houston [1st Dist.] 2012), *pet. granted*, 56 Tex. Sup. Ct. J. 749 (June 28, 2013) [12-0617].

At issue in this case is the applicability of a law requiring pulmonary function testing in asbestos-related injury cases in a suit filed by the survivors of a man who died before the law came

into effect. In 2005, the Legislature enacted Chapter 90 of the Civil Practice and Remedies Code, setting out requirements for asbestos-related claims to proceed. It requires a written physician's report that "verifies that the exposed person has asbestos-related pulmonary impairment as demonstrated by pulmonary function testing." A "safety valve" provision permits a suit to proceed in "exceptional and limited circumstances" by filing a report from a physician that meets some but not all of the normal requirements.

Joseph Emmite was employed by Union Carbide Corporation for 35 years. He passed away in June 2005, three months before Chapter 30 became effective. Emmite's survivors (collectively, Synatzske) filed suit against Union Carbide, alleging that while employed by Union Carbide, Emmite was exposed to asbestos, and as a result contracted asbestosis which caused his death. Synatzske submitted several different physician's reports but no pulmonary function tests since none had been performed on Emmite since the 1960s. Union Carbide moved to dismiss Synatzske's claims for failure to file an adequate physician report. The trial court denied the motion and Union Carbide filed this interlocutory appeal. A divided en banc court of appeals held that Synatzske's reports did not satisfy the Chapter 90 requirements, but that those requirements as applied in this case violate the Texas Constitution's prohibition against retroactive laws. Union Carbide petitioned the Supreme Court for review. The Court granted its petition and heard oral argument on October 10, 2013.

F. Takings

1. Kopplow Dev., Inc. v. City of San Antonio, 399 S.W.3d 532 (Tex. March 8, 2013) [11-0104].

At issue in this case was whether an inverse condemnation claim for inability to develop property as previously approved is premature when a municipality constructed a flood control project partly on the property but the property has not yet flooded. Kopplow Development, Inc. purchased land in the City of San Antonio, filed a plat application to develop the land in 1996, and later obtained a vested rights permit from the City. The City subsequently constructed a flood control project partly on Kopplow's property that will inundate the tract in a 100-year flood. Kopplow filed an inverse condemnation claim and the City counterclaimed for a statutory taking of only a portion of the property. The trial court excluded some of Kopplow's evidence of damages before trial. At trial, Kopplow pursued inverse and statutory takings theories. After a favorable jury finding for Kopplow, the trial court entered judgment for Kopplow and both sides appealed. The court of appeals held that Kopplow's inverse condemnation claim was premature because the property had not yet flooded.

The Supreme Court held that Kopplow's claim was not premature because the claim was for the inability to develop the property as previously approved. The Court explained that its favorable references in previous cases to court of appeals' holdings that inverse condemnation claims were premature before flooding occurred were cases specifically about flooding and not about previously approved development. The Court further explained that its jurisprudence examining the recurrence of flooding in inverse condemnation claims is to assess whether the requirement that the taking be intentional is met for inverse condemnation. That intent was demonstrated here because the City determined before constructing the project that the project would inundate Kopplow's land. Accordingly, the Court reversed and remanded for the court of appeals to consider Kopplow's assertion that the trial court wrongfully excluded some of its evidence of damages.

2. Williams v. Tex. Gen. Land Office, 369 S.W.3d 276 (Tex. App.—Houston [1st Dist.] 2011), *pet. granted*, 56 Tex. Sup. Ct. J. 612 (June 7, 2013) [12-0483].

At issue in this case are whether (1) the claims for declaratory relief were improperly dismissed for lack of jurisdiction, (2) the State's actions amounted to a taking, (3) the artificial accretion "no self-help" rule applies to littoral property in Texas, and (4) discovery sanctions could be awarded against the State attorneys.

Beginning in 2001, the Porretto family attempted to sell their property but were unable to because of a cloud on their title due to the State's replenishment actions and claims concerning their beach property. Because of an inability to sell,

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the Porrettos sued the Texas General Land Office alleging interference with the Porrettos' good title and a governmental taking. The trial court tried the title dispute and takings claim to the bench and submitted the issues regarding property valuations and attorneys' fees to a jury. The trial court quieted title in favor of the Porrettos, concluded that certain State actions amounted to a taking without adequate compensation, and entered judgment on the jury's verdict awarding the Porrettos $5,012,000. The court of appeals held that the trial judge did not have subject matter jurisdiction to make the title declarations and dismissed the title claims, rendering judgment that the Porrettos take nothing. The Supreme Court granted their petition for review and heard argument on October 9, 2013.

VIII. CONTRACTS

A. Condition Precedent

1. McCalla v. Baker's Campground, Inc., S.W.3d , 56 Tex. Sup. Ct. J. 965(Tex. August 23, 2013) [12-0907].

At issue was whether a settlement agreement outlining a future contract is enforceable when the agreement contains all the material terms of the future agreement. Walt Baker owned property leased to Anthony and Cheryl McCalla, who held an option to buy the land if Baker decided to sell it. During the McCallas' lease, Baker leased the land to Steven and Karen Davis. The McCallas sued Baker and the Davises to void the third party lease and activate their option to buy the land. After obtaining a favorable jury verdict but prior to judgment, Baker and the McCallas entered settlement negotiations and ultimately agreed that the McCallas would purchase the land if the Davises' lease was declared void by the trial court. The settlement agreement contained a general release, a description of the property, a timeline for closure, and a price. After the trial court declared the lease void, Baker's successor-in-interest, Baker's Campground, refused to sell the land and brought a declaratory judgment to void the settlement agreement. The trial court granted partial summary judgment for the McCallas and held that the settlement agreement was enforceable. The court of appeals reversed and remanded on the basis that a fact issue existed as to whether the contract was presently binding or just an agreement to agree.

The Supreme Court reversed and held that the agreement's enforceability was a question of law, not of fact. As a matter of law, an agreement is enforceable as long as it contains all material terms, regardless of whether the agreement is to enter into a future contract. Courts should only refuse to enforce a future contract when material terms remain open to future negotiation. Here, the settlement agreement contained all material terms and was enforceable as a matter of law. The Court remanded the case to the trial court to address breach and affirmative defenses raised by Baker's Campground.

B. Interpretation

1. El Paso Field Servs., L.P. v. MasTec N. Am., Inc., 389 S.W.3d 802 (Tex. December 21, 2012) [10-0648].

At issue in this contract interpretation case was the allocation of risk of additional construction costs in light of a due diligence provision. El Paso Field Services, L.P., purchased an old pipeline and made plans to replace it. Before seeking bids, El Paso hired a survey company to map unknown obstacles in the pipeline's right of way, called "foreign crossings," and recorded them on "alignment sheets," which were given to prospective bidders. MasTec North America, Inc. submitted and subsequently won with a bid to dig up and replace the line. In the construction contract, El Paso agreed it exercised due diligence in locating foreign crossings. MasTec agreed to assume all risk, "notwithstanding" any other provision. While digging up the old pipeline, MasTec encountered more foreign crossings than were listed on the alignment sheets, which substantially increased the cost of the work. MasTec sued El Paso for breach of contract and fraud. At trial, the jury found that El Paso did not exercise due diligence in locating foreign crossings and that MasTec breached the contract by not completing the work. El Paso moved to disregard the jury findings and for judgment notwithstanding the verdict, which the trial court granted. The court of appeals reversed.

The Supreme Court held that MasTec assumed the risk of additional foreign crossings.

The Court explained that this interpretation gave meaning to both the due diligence provision and the all-risks provisions of the contract. The contract provided for a joint obligation by both parties, and MasTec agreed that El Paso had performed its due diligence in locating foreign crossings.

Justice Guzman, joined by Justice Medina and Justice Lehrmann, dissented. The dissent disagreed with the Court's interpretation of the due diligence provision and argued that it should be interpreted as an exception to the general all-risk provision. The dissent further explained that El Paso did not meet the industry standard for disclosing foreign crossings and therefore did not satisfy the due diligence requirement.

2. Port of Hous. Auth. of Harris Cnty. v. Zachry Const. Corp., 377 S.W.3d 841 (Tex. App.—Houston [14th Dist.] 2012), *pet. granted*, 56 Tex. Sup. Ct. J. 864 (August 23, 2013) [12-0772].

At issue in this case is whether an exculpatory clause in a contract between a port authority and a construction company exculpates the port authority from damages resulting from the port authority's alleged intentional misconduct.

Zachry Construction Corporation contracted with the Houston Port Authority to construct a wharf. The contract had a two-year deadline for completion with an interim "milestone" deadline. Under the terms of the contract, Zachry had the exclusive right to choose the method of performing the work. The contract also contained a clause precluding Zachry from recovering damages for delay "regardless of the source," unless the delay was due to the Port Authority's actions that "constituted arbitrary and capricious conduct, active interference, bad faith and/or fraud." After construction began, the Port Authority decided to increase the size of the wharf and the parties agreed to amend the contract accordingly. The Port Authority expressed concern about Zachry's construction method and requested that Zachry alter it. Zachry altered its construction method to accommodate the additional construction. Zachry did not complete construction within the two-year deadline and did not meet the interim milestone deadline. The Port Authority withheld $2.36 million as liquidated damages for Zachry's failure to meet the deadlines.

Zachry sued the Port Authority for breach of contract, alleging that the Port Authority failed to comply with the terms of the amended contract. Zachry sought the additional costs it incurred due to the construction method change and breach of contract by the Port Authority, and also alleged the Port Authority wrongfully withheld money due under the contract. The trial court found that the Port Authority had failed to comply with the contract and provision granting Zachry the right to choose the method of construction. The trial court instructed the jury that the no-damages-for-delay clause precluded recovery for delay damages unless the delay was due to the Port Authority's actions that "constituted arbitrary and capricious conduct, active interference, bad faith and/or fraud." The jury awarded Zachry $19,992,697 in damages—$18,602,697 for delay damages and the $2.36 million in withheld liquidated damages, less offsets and costs. The court of appeals reversed the trial court's award of delay damages, holding that the parties contemplated the delay that occurred when they negotiated the contract and the no-damages-for-delay clause exculpated the Port Authority from liability. The court of appeals also held that Zachry released any claims to the liquidated damages by signing a release form as part of periodic payment estimate documents.

Zachry appealed the court of appeals' decision. Zachry argues to the Supreme Court that the court of appeals' holding conflicts with Texas cases that have refused to apply a no-damages-for-delay clause when there is intentional misconduct. Zachry further argues that it is contrary to public policy to allow a party to prospectively exculpate itself from liability for intentional misconduct. As to the liquidated damages, Zachry argues that the Port Authority failed to conclusively establish Zachry's release of claims and that any release Zachry signed was limited and did not release Zachry's claims for sums withheld as liquidated damages.

The Court granted Zachry's petition for review and heard oral argument on November 6, 2013.

C. Statute of Frauds

1. Dynegy, Inc. v. Yates, S.W.3d , 56 Tex. Sup. Ct. J. 1092 (Tex. August 30, 2013) [11-0541].

At issue in this case was whether the statute of frauds' suretyship provision renders an oral agreement to answer for the debt of another unenforceable. James Olis, a former officer of Dynegy, Inc., was indicted on multiple counts of securities fraud, mail and wire fraud, and conspiracy. Olis hired Terry Yates to defend him and signed a written contract to pay Yates's fees. Dynegy's board passed a resolution to pay Olis's expenses if his actions were taken in good faith and in the best interest of Dynegy. When Dynegy concluded Olis failed this test, it withdrew funds escrowed for Yates and refused to pay Yates's fees. Yates alleged Dynegy made an oral promise to pay for expenses through trial. Dynegy disputed the extent of its promise. Yates brought claims for breach of contract and fraudulent inducement, and a jury found for him on both claims. The court of appeals affirmed the trial court, holding that Dynegy adopted the primary obligation to pay Olis's fees and, therefore, the statute of frauds was inapplicable.

The Supreme Court reversed the court of appeals' judgment and rendered judgment that Yates take nothing. The Court explained that once a party has established the applicability of the statute of frauds, the burden shifts to the opponent to plead and prove an exception. The Court recognized the main purpose doctrine may remove an oral promise from the statute of frauds when the consideration for the promise is primarily for the promisor's own benefit. Yates, however, failed to plead, prove, and secure a finding on the main purpose doctrine. The Court held this failure precluded Yates from recovery because Dynegy successfully pled the affirmative defense of statute of frauds.

Justice Devine filed a dissenting opinion, suggesting Dynegy assumed the primary obligation to pay for Olis's debt rendering the statute of frauds inapplicable, and that even if the statute applied, the main purpose doctrine removed the promise from the statute of frauds.

D. Warranties

1. Gonzales v. Sw. Olshan Found. Repair Co., 400 S.W.3d 52 (Tex. March 29, 2013) [11-0311].

At issue in this case was whether the implied warranty for good and workmanlike repair of tangible goods or property in *Melody Home Manufacturing Co. v. Barnes*, 741 S.W.2d 349, 354-55 (Tex. 1987) can be disclaimed or superseded. Nelda Gonzales hired Southwest Olshan Foundation Repair Co. (Olshan) to repair her foundation. The repair agreement required Olshan to perform the work in a good and workmanlike manner and required it to adjust the foundation for the life of the home due to settling. After the repair, Gonzales later called Olshan when she noticed more cracking in walls and doors and windows sticking. When Olshan was repairing the foundation in October 2003, an Olshan employee informed Gonzales "it's the worst job I have ever seen" and that she should hire an attorney. Olshan refused further repairs in July 2005. Gonzales sued Olshan in June 2006 for, among other claims, breach of express and implied warranties. The jury found that Olshan did not breach the express warranty but did breach the implied warranty of good and workmanlike repair as well as several provisions of the Deceptive Trade Practices Act (DTPA), and the trial court entered judgment on the verdict. The court of appeals reversed, holding that the implied warranty was actionable only under the DTPA, and Gonzales's claims were time-barred because she sued over two years after the claims accrued.

The Supreme Court held that Gonzales's express warranty superseded the implied warranty. The Court noted that the implied warranty for good and workmanlike repair of tangible goods or property, like the implied warranty for good and workmanlike construction of a new home, cannot be disclaimed but can be superseded if the parties' agreement specifies the manner, performance, or quality of how the service is to be performed. The express warranty here provided sufficient detail to supersede the implied warranty by requiring Olshan to perform the work in a good and workmanlike manner and adjust the foundation for the life of the home due to settling. Because the jury found that Olshan did not breach the express warranty, which superseded the implied warranty, Gonzales could

not recover on her warranty claims. The Court also held that Gonzales's DTPA claims were time-barred because she brought them after the statutory limitations period and period for tolling due to fraudulent concealment had expired. The Court affirmed the judgment of the court of appeals.

2. Man Engines & Components, Inc. v. Shows, 364 S.W.3d 348 (Tex. App.—Houston [14th Dist.] 2012), *pet. granted*, 56 Tex. Sup. Ct. J. 396 (March 29, 2013) [12-0490].

At issue in this case is whether the subsequent purchaser of "as is" used goods may sue the manufacturer of the goods for breach of the implied warranty of merchantability that allegedly occurred when the goods left the manufacturer's possession as part of its first sale of the goods. Doug Shows purchased a used yacht "as is" from an individual owner, knowing that the yacht and its engines were used. Man Nutzfahrzeuge Aktiengesellschaft had manufactured and installed the engines on the vessel. Two years after Shows purchased the yacht, the engines suffered a major failure. The following year, one of the engines failed beyond repair. Shows then sued Man Nutzfahrzeuge Aktiengesellschaft and its subsidiary, Man Engines & Components, Inc. (collectively "Man Engines"), asserting several causes of action, including breach of the implied warranty of merchantability under the Texas Business and Commerce Code.

A jury found Man Engines liable only for breach of the implied warranty of merchantability, and the trial court rendered judgment on the verdict. Man Engines then filed a motion for judgment notwithstanding the verdict. The trial court granted the motion and entered a take-nothing judgment against Shows. The court of appeals reversed and remanded with instructions for the trial court to render judgment on the jury's verdict. Relying on the Supreme Court's opinion in *Nobility Homes of Texas, Inc. v. Shivers*, 557 S.W.2d 77 (Tex. 1977), the court of appeals held that a subsequent purchaser of used goods may sue the manufacturer of the goods for a breach of the implied warranty of merchantability that allegedly occurred when the goods left the manufacturer's possession as part of the first sale of goods, even if the subsequent purchaser knew the goods were used when he purchased them.

Man Engines filed this petition for review, arguing that the court of appeals impermissibly expanded the holding in *Nobility Homes*. The Supreme Court granted Man Engines' petition for review and heard oral argument on October 8, 2013.

IX. DAMAGES

A. Lost Fair Market Value

1. Hous. Unlimited, Inc. Metal Processing v. Mel Acres Ranch, 389 S.W.3d 583 (Tex. App.—Houston [14th Dist.] 2012), *pet. granted*, 57 Tex. Sup. Ct. J. 10 (October 18, 2013) [13-0084].

This petition presents the following question: if real property has suffered environmental contamination and then is successfully remediated, can the property owner recover for the property's lost market value if, because of stigma attached to the harm, the property's value remains diminished after the remediation?

Houston Unlimited, Inc. Metal Processing (HUI) operates a metal processing plant adjacent to Mel Acres Ranch (Mel Acres). In late 2007, the lessee of Mel Acres noticed a spike in premature deaths and birth defects in its livestock. Around the same time, someone on HUI's property was seen dumping the contents of barrels into the ditch. Mel Acres retained an environmental consultant to test water samples in a pond on Mel Acres. The testing revealed various pollutants exceeding TCEQ action levels as a result of HUI's dumping. TCEQ fined HUI and ordered HUI to clean-up the contamination. Following extensive remediation, TCEQ oversight, testing and expert reports, TCEQ concluded that no further action was required.

Mel Acres sued HUI for trespass, nuisance, and negligence, seeking to recover lost market value as a result of the contamination. Mel Acres presented the testimony of a real estate appraiser who opined that Mel Acres's property value had permanently declined from about $2.3 million to $931,500 as a result of HUI's contamination. HUI's expert real estate appraiser, Robinson, was retained to provide an opinion only as to the amount of temporary damages, as opposed to permanent damage, and did not provide

controverting testimony as to lost market value. However, Robinson agreed on the $2.3 million valuation, agreed that Mel Acres would have to disclose the contamination in a future sale and that the contamination would be recorded in the deed records, and he could not rule out HUI contaminating Mel Acres in the future.

The jury awarded $349,312.50 to Mel Acres on the negligence claim. The jury did not find for Mel Acres on its claims for trespass and nuisance. The court of appeals affirmed, holding that a plaintiff-landowner need not show permanent physical damage to recover lost market value or "stigma damages" for injured property so long as the property suffered some physical injury, even if temporary, that resulted in a permanent diminution of the property's value. HUI filed a petition for review arguing that awarding Mel Acres damages for diminution in value after the property had been remediated to TCEQ's satisfaction was tantamount to a double recovery.

The Court granted HUI's petition for review and heard oral argument on December 5, 2013.

2. Phillips v. Carlton Energy Group, LLC, 369 S.W.3d 433 (Tex. App.—Houston [1st Dist.] 2012), *pet. granted*, 56 Tex. Sup. Ct. J. 396 (March 29, 2013) [12-0255].

There are two main issues in this case: (1) whether speculative evidence can be used to determine lost fair market value and (2) whether Texas's alter ego rules control.

Carlton Energy Group entered into an agreement with a gas company to provide funding for a methane extraction venture in Bulgaria. Carlton entered into an investment agreement with Gene Phillips to invest in the project, but after reviewing data about the venture, Phillips informed Carlton that he was not interested in being an investor. Meanwhile, a company connected to Phillips, EurEnergy, began directly negotiating with the gas company without Carlton's knowledge. Eventually, the gas company informed Carlton that it was no longer interested in the original funding agreement between it and Carlton. Believing that Phillips was involved in the failure of the funding agreement, Carlton sued Phillips, EurEnergy, and several other related companies, including Syntek and CabelTel, for tortious interference and breach of contract.

A jury found that Phillips failed to comply with its investment agreement with Carlton, that Phillips and EurEnergy maliciously interfered with Carlton's funding agreement with the gas company, that Phillips was responsible for the conduct of EurEnergy, and that Syntek and CabelTel were alter egos of EurEnergy. The jury awarded $66.5 million in damages for the lost fair market value of Carlton's interest in the project. This award was apparently based on the testimony and reports of two experts who presented evidence about the potential value of the failed project. The trial court granted a judgment notwithstanding the verdict in favor of Syntek and CabelTel, finding that there was no evidence to support the jury's alter ego finding. The trial court also suggested a remittitur to $31.16 million in actual damages because the jury's original award was not supported by factually sufficient evidence.

The court of appeals affirmed and found that the case was a lost fair market value case, thus Carlton was not required to prove lost profits, but could rely on the speculative testimony of the experts.

Phillips appealed, arguing that a lost fair market value analysis should require more than speculative evidence—the analysis should require that the lost value be determined with reasonable certainty, just as a lost profits analysis requires. Syntek and CabelTel also appealed, arguing that the rules of the state of incorporation (in this case, Nevada) should determine a company's alter ego status. It argues that the trial court and court of appeals erred in considering Texas's alter ego requirements, rather than Nevada's.

The Supreme Court granted the petitions for review and heard oral argument on September 11, 2013.

B. Sentimental Value Damages

1. Strickland v. Medlen, 397 S.W.3d 184 (Tex. April 5, 2013) [12-0047].

At issue in this case was whether emotional-injury damages could be recovered for the loss of a pet dog that was mistakenly euthanized. Kathryn and Jeremy Medlen sued Carla Strickland, an animal shelter employee, when

their dog was negligently euthanized while in the care of the shelter. Strickland specially excepted to the Medlens' claim for sentimental or intrisic-value damages. After the Medlens repleaded for only intrinsic-value damages, the trial court dismissed the suit for failing to state a claim for damages. The court of appeals reversed, holding that intrinsic or sentimental value could be recovered for the loss of a dog. The Supreme Court reversed and rendered judgment for Strickland.

The Court held that intrinsic damages for the loss of a dog are barred. The Court reaffirmed the rule stated in *Heiligmann v. Rose*, 16 S.W. 931 (Tex. 1891): Where a dog's market value is unascertainable, the correct damages measure is the dog's "special or pecuniary value" (its actual value)—the economic value derived from its "usefulness and services," not value drawn from companionship or other non-commercial considerations. The Court stated that the Medlens' claim for sentimental or intrinsic value was a component of loss-of-consortium damages, which relates to personal-injury damages and not property damages.

X. EMPLOYMENT LAW

A. Civil Service

1. City of Hous. v. Bates, 406 S.W.3d 539 (Tex. June 28, 2013) [11-0778].

This case presents two issues: (1) whether the phrase "any other authorized leave" in section 142.0071(e)(2) of the Texas Local Government Code encompasses only hours spent on paid leave for the purpose of determining a fire fighter's eligibility for overtime pay, and (2) whether the Local Government Code's statutory scheme regarding the payment of accumulated benefit leave upon retirement preempts the City of Houston's ordinances limiting the valuation of accumulated benefit leave to base salary and longevity pay only.

Roger Bates, Michael L. Spratt, and Douglas Springer spent their careers as fire fighters with the Houston Fire Department. Upon retirement, the City paid the fire fighters a lump-sum termination payment for accumulated but unused benefit leave. The City deducted previously paid overtime from Springer and Spratt's termination pay because they were on unpaid leave during the scheduled overtime periods. And per City ordinance, the City calculated the firefighters' "salary" for paying out accumulated but unused benefit leave by including only their base salary and longevity pay. The fire fighters sued the City, claiming that the City wrongfully deducted the overtime pay because section 142.0071(e)(2) requires the City to include hours spent on unpaid leave when determining overtime eligibility, and that the Local Government Code requires the City to include other forms of premium pay when calculating "salary."

The trial court found for the retired fire fighters on both claims and awarded reimbursement for overtime pay and additional termination pay. The court of appeals affirmed.

The Supreme Court reversed as to the issue related to overtime pay, but affirmed as to the issue related to termination pay. As for the overtime pay claim, the Court concluded that the context of section 142.0017 of the Local Government Code demonstrates that the Legislature intended that the phrase "any other authorized leave" to include only paid leave. Because it was undisputed that Springer and Spratt were on unpaid leave during the overtime period, the Court held that they were not entitled to reimbursement for the previously paid overtime. As for the termination pay claim, the Court held that the Local Government Code's scheme preempted the City's ordinance that required "salary"—for the purpose of calculating termination pay—to include only base pay and longevity pay. The Court reasoned that section 143.110 of the Local Government Code demonstrated that the Legislature did not intend the term "salary" as used in section 143.115 and 143.116 of the Local Government Code to be used interchangeably with the term "base salary." Thus, the Court concluded that "base salary" was a component of "salary," under the statutory scheme along with other forms of premium pay that a fire fighter received regularly. Applying this construction, the Court reasoned that while a City has discretion to choose whether or not it will offer certain categories of premium pay as part of a fire fighter's salary, sections 143.115 and 143.116 preempt the City from enacting ordinances that redefine salary to exclude those categories of premium pay for the purposes of

calculating termination pay. The Court held that the preempted provisions of the City's ordinance were unenforceable.

Justice Guzman, joined by Justice Boyd, dissented as to the overtime pay issue, reasoning that the term "leave" unambiguously includes unpaid leave. Justice Hecht, joined by Justice Lehrmann, dissented as to the termination pay issue, arguing that the Legislature did not intend a substantive change in the law when it replaced "salary"—as used in the former law—with "base salary" as the current law now provides.

B. Employment Contracts

1. Colorado v. Tyco Valves & Controls, L.P., 365 S.W.3d 750 (Tex. App.—Houston [1st Dist.] 2012), *pet. granted*, 56 Tex. Sup. Ct. J. 492 (April 19, 2013) [12-0360].

At issue in this case is whether employees' breach of contract claims are preempted by ERISA. If the employees' claims are not preempted by ERISA, the remaining issues are (1) whether the employees without written agreements formed valid unilateral contracts to entitle them to severance payments, and (2) whether the purchaser of the facility in which the employees worked was a successor to the employer.

Tyco Valves & Controls decided to close its valve manufacturing plant at its West Gulf Bank facility. The "Gimpel" unit employees worked at this facility. The human resources director created a document called "Tyco Valves and Controls Severance," which included a severance schedule for employees at the West Gulf Bank location. The employees presented evidence that this Schedule was posted on a bulletin board at their work facility. Tyco also had a company-wide severance plan under ERISA. When Tyco announced that it would attempt to sell the Gimpel unit, eleven of the employees entered into Retention Incentive Agreements (RIAs) which stated they were made "by and between Tyco Valves and Controls, its successors and assigns" and the specific employee listed in each RIA. Each RIA provided that if the employee stayed through the retention period as defined in the RIA but was not offered "Comparable Employment" with Tyco, Tyco would pay a retention bonus plus "the standard Severance in accordance to the severance schedule associated with the closure of this facility," or if offered "Comparable Employment" with Tyco, Tyco would pay a cash payment. The RIAs defined "Comparable Employment" but did not provide a severance schedule; however, the employees provided evidence that Tyco orally assured the employees they would receive the severance even if the Gimpel unit was sold. Although six of the employees in this case did not enter into RIAs with Tyco, they presented evidence that they were promised a standard severance according to the terms of the Schedule posted on the bulletin board. Dresser Rand Company entered into an Asset Purchase Agreement with Tyco. All of the employees in this case were terminated by Tyco and offered continued employment with Dresser. The employees stayed with the Gimpel unit through the retention period, and Tyco paid the retention bonuses under the RIAs. However, Tyco did not pay any severance to the employees.

The employees filed breach of contract claims against Tyco. The trial court rendered judgment for the employees, concluding that ERISA did not preempt the employees' claims, the oral agreements and the RIAs were valid and enforceable contracts, and Tyco breached them by failing to pay severance according to the terms of the Schedule. The court of appeals reversed and rendered judgment that the employees take nothing, holding that their claims were not preempted by ERISA but that there was not a valid oral agreement between the six employees and Tyco and there was insufficient evidence to support the trial court's holding that Tyco breached the RIAs because Dresser was Tyco's successor. The concurring justice concluded that the employees' claims were preempted by ERISA. The dissenting justice concluded that ERISA did not preempt the employees' claims, Dresser was not Tyco's successor, and thus Tyco remained liable to the employees for the severance it had promised them. The Supreme Court granted the employees' petition for review and heard oral argument on September 11, 2013.

2. Exxon Mobil Corp. v. Drennen, 367 S.W.3d 288 (Tex. App.—Houston [14th Dist.] 2012), *pet. granted*, 56 Tex. Sup. Ct. J. 864 (August 23, 2013) [12-0621].

This case involves two intertwined issues: whether detrimental activity provisions in an employee incentive program are enforceable and whether New York or Texas law governs the enforceability of the terms in the incentive programs. William Drennen worked as an executive for Exxon Mobil in Houston for over 30 years. Drennen participated in a 1993 and a 2003 Exxon Mobil incentive program. Both plans permitted Exxon to terminate outstanding incentive awards if the participating employee "engaged in a detrimental activity." Each incentive program also contained a choice-of-law clause stating that all actions taken under the Program would be governed by the laws of the State of New York. Drennen retired from Exxon in May 2007 and shortly thereafter went to work at Hess Oil Co. On August 1, 2007, Drennen was informed that his incentive awards had been canceled because Hess is a direct competitor of Exxon.

At trial, the jury found in Exxon's favor. The court of appeals reversed, holding the detrimental-activity provisions to be unenforceable covenants not to compete under Texas law. Exxon argues that there is no conflict between New York law and Texas law because the detrimental-activity provisions are not noncompete provisions. In the alternative, Exxon argues New York law is proper. Drennen argues that Exxon's contracts are covenants not to compete under Texas and New York law and that they are unenforceable restraints on trade. Drennen argues that the parties have no connection to New York that would support the application of that state's law, and that both parties have substantial connections to the State of Texas. The Supreme Court granted the petition for review and heard oral argument on November 6, 2013.

C. Procedural Rights

1. City of Round Rock v. Rodriguez, 399 S.W.3d 130 (Tex. April 5, 2013) [10-0666].

At issue in this case was whether section 101.001 of the Texas Labor Code granted unionized public-sector employees in Texas the right to have union representation during an internal investigatory interview when the employee reasonably believes the interview may result in disciplinary action. Round Rock Fire Chief Larry Hodge called Jaime Rodriguez into his office to conduct an internal interview stemming from a complaint Chief Hodge filed against Rodriguez alleging Rodriguez had misused his sick leave. Before the interview began, Rodriguez asserted the right to union representation, requesting to have a representative from the Round Rock Fire Fighters Association (Association) present during the interview. Chief Hodge denied the request. Rodriguez ultimately received a five-day suspension.

Rodriguez and the Association sued the City of Round Rock and Chief Hodge for a declaratory judgment, alleging that Chief Hodge and the City violated Rodriguez's right to union representation conferred by section 101.001 of the Texas Labor Code. Rodriguez and the Association also sought to enjoin Chief Hodge and the City from denying Rodriguez and other fire fighters their right to representation at future investigatory interviews. The trial court granted Rodriguez's summary judgment motion, and rendered judgment declaring that Rodriguez was denied his right to union representation under section 101.001, and entered injunctive relief as well. The court of appeals affirmed.

The Supreme Court reversed and rendered judgment that section 101.001 does not confer on public-sector employees the right to union representation at an investigatory interview. The Court initially noted that the right to union representation at an investigatory interview derives from the United States Supreme Court's decision in *NLRB v. Weingarten*, 420 U.S. 251 (1975), which is the seminal case regarding private-sector employee representation rights. The Court held that the language of section 101.001, however, was significantly different than the federal statute interpreted by the United States Supreme Court in *Weingarten*. The Court concluded that, by its plain terms, the statute makes it lawful for employees to form labor unions or other organizations, but says nothing about any rights that may attach once such unions are formed. Accordingly, the Court held that section 101.001 does not confer on public-sector

employees in Texas the right to union representation when an employee reasonably believes that an investigatory interview with the employer may result in disciplinary action.

Chief Justice Jefferson, joined by Justice Hecht and Justice Lehrmann, dissented. The dissent concluded that section 101.001 of the Labor Code grants Texas public employees a representation right. The dissent reasoned that the language of the section 101.001, which it noted was substantially similar to the language of the statute the United States Supreme Court interpreted in *Weingarten*, conveys the same right that *Weingarten* recognized.

D. Whistleblower Actions

1. Canutillo Indep. Sch. Dist. v. Farran, 409 S.W.3d 653 (Tex. August 30, 2013) [12-0601].

The primary issue in this case was whether an employee had a cognizable claim under the Texas Whistleblower Act. The Act covers good faith reports of a violation of law to an "appropriate law enforcement authority." Plaintiff Yusuf Farran claimed that he was fired from his position with the Canutillo Independent School District in retaliation for various complaints he had made to the District superintendents, internal auditor, and school board. The trial court granted the District's plea to the jurisdiction. The court of appeals reversed in part, concluding that certain complaints of financial irregularities could be pursued under the Whistleblower Act.

The Supreme Court concluded that the trial court correctly granted the plea to the jurisdiction, so the Court affirmed in part and reversed in part the judgment of the court of appeals and dismissed the case. Relying on *University of Texas Southwest Medical Center v. Gentilello*, 398 S.W.3d 680 (Tex. 2013), and other recent decisions, the Court held that the internal complaints Farran made to District personnel were not good-faith complaints to an appropriate law enforcement authority, because under *Gentilello* the complaint must be made to an official with authority to enforce the allegedly violated laws outside of the institution itself against third parties generally. In this case there was no proof of such authority.

The Court also held that a report by Farran to the FBI failed to support his claim because the record was clear that the District had already decided to terminate Farran before he made that report. Additionally, the Court held that Farran could not pursue an independent claim for breach of contract, because he had failed to exhaust his administrative remedies.

2. Tex. A&M Univ.–Kingsville v. Moreno, 399 S.W.3d 128 (Tex. February 22, 2013) [11-0469].

At issue in this case was whether a state university's sovereign immunity is waived under the Whistleblower Act when an employee only reported a violation of law to the university president.

Gertrud Moreno, the comptroller of Texas A&M University–Kingsville (TAMUK), sued TAMUK after she was terminated by her supervisor. Moreno sued under the Whistleblower Act, TEX. GOV'T CODE §554.002, alleging she was fired in retaliation for reporting to the university president, Rumaldo Juarez, that her supervisor had arranged for his daughter to receive in-state tuition in violation of state law. TAMUK filed a plea to the jurisdiction, asserting sovereign immunity. The trial court denied the plea, and the court of appeals affirmed.

The Supreme Court reversed the court of appeals' judgment. Consistent with *University of Texas Southwestern Medical Center v. Gentilello*, 398 S.W.3d 680 (Tex. 2013), decided on the same day, the Court held that the claim failed because the record showed that Juarez only had authority to ensure internal university compliance with state law. In *Gentilello*, the Court held that a supervisor was not "an appropriate law enforcement authority" if the supervisor's authority was limited to ensuring internal compliance by the employer with the law allegedly violated. Instead the supervisor must have authority to enforce the law against third parties. The Court reversed and dismissed the case for lack of jurisdiction.

3. Univ. of Tex. Sw. Med. Ctr. at Dallas v. Gentilello, 398 S.W.3d 680 (Tex. February 22, 2013) [10-0582].

At issue in this case was whether an employer's sovereign immunity is waived under the Whistleblower Act when an employee only reported violations of the law to a supervisory

faculty member who oversaw internal compliance with federal law at a state medical school.

Dr. Larry Gentilello sued his employer, the University of Texas Southwestern Medical Center at Dallas (UTSW) under the Whistleblower Act. UTSW filed a plea to the jurisdiction, arguing that its sovereign immunity was preserved because Gentilello did not report a violation of law to an "appropriate law enforcement authority," and thereby did not meet the jurisdictional requirements of the Whistleblower Act. The trial court denied the plea. The court of appeals affirmed the denial. The Supreme Court reversed and dismissed the case.

The Supreme Court held that an internal supervisor is not an appropriate law enforcement authority under the Act if the employee knows such supervisor's power extends only to ensuring internal compliance with the law allegedly violated. A supervisor is only an appropriate law enforcement authority if it is objectively reasonable for the employee to believe his supervisor possesses the ability to (1) regulate under or enforce the law allegedly violated or (2) investigate or prosecute criminal violations. A policy manual affirming the governmental entity's commitment to comply with the law does not make an employee's belief objectively reasonable. The Court dismissed the case for lack of jurisdiction.

4. Tex. Dep't of Human Servs. v. Okoli, 317 S.W.3d 800 (Tex. App.—Houston [1st Dist.] 2010), *pet. granted*, 56 Tex. Sup. Ct. J. 612 (June 7, 2013) [10-0567].

At issue in this case is whether an internal complaint by a government employee to his supervisor satisfies the Whistleblower Act requirement that the employee believed in "good faith" that he was reporting a violation of law to "an appropriate law enforcement authority."

Oliver Okoli was fired from the Texas Department of Human Services after reporting to his supervisor and higher ranking employees that employees were falsifying dates to create the illusion of efficiency. The Department has an Office of the Inspector General (OIG), which is authorized by statute to investigate fraud. None of the people that Okoli reported wrongdoing to worked within the OIG. A few years before reporting, Okoli signed a memorandum circulated around the Department that stated that when falsification of dates constitutes a violation of Penal Code section 37.10, "a referral to OIG will be made for possible prosecution."

The Department filed a plea to the jurisdiction, arguing that it was protected by sovereign immunity because Okoli had not established the elements of a claim under the Whistleblower Act. The TC denied the plea to the jurisdiction. The court of appeals initially affirmed because it held that the elements of the Whistleblower Act are not jurisdictional. The Supreme Court reversed on that point and on remand the court of appeals affirmed because it held that Okoli's reports met the elements required for jurisdiction.

The Supreme Court granted the Department's petition for review and heard oral argument October 9, 2013.

5. Univ. of Hous. v. Barth, 403 S.W.3d 851 (Tex. June 14, 2013) [12-0358].

At issue in this case is whether the trial court has subject-matter jurisdiction over a professor's whistleblower claim against the University of Houston. Specifically, the issue is whether administrative policies in the University of Houston's System Administrative Memorandum (SAM) are "law" under the Texas Whistleblower Act.

Stephen Barth, a professor at the University of Houston, sued the University under the Whistleblower Act for retaliation, which allegedly stemmed from Barth's reports that his supervisor had violated internal administrative policies within the University's SAM and other criminal and civil law. The trial court rendered a judgment in favor of Barth, awarding him damages and attorney's fees based on the jury's finding that the University had violated the Whistleblower Act. The court of appeals reversed, holding that the trial court lacked jurisdiction over part of Barth's claim due to his failure to timely file grievances. The court of appeals also held that the University had waived its legal sufficiency challenge pertaining to the elements of the remainder of Barth's whistleblower claim. Both parties appealed. The Supreme Court reversed and remanded the case to the court of appeals to

determine whether the trial court had subject-matter jurisdiction in light of the Court's decision in *State v. Lueck*, 290 S.W.3d 876, 881 (Tex. 2009). In *Lueck*, the Court held the elements of a claim under the Whistleblower act are jurisdictional and may not be waived. On remand, the court of appeals affirmed the trial court's judgment and held that the trial court had subject-matter jurisdiction over Barth's claim because the administrative policies located in SAM constituted "law" as the term is defined in the Whistleblower Act. The University appealed.

The Supreme Court reversed and dismissed Barth's suit against the University. The Court held that the SAM's administrative policies are not "rule[s] adopted under a statute" as required by the Whistleblower Act and, therefore, cannot form the basis of a claim as a violation of "law." The University's enabling statute provided authority to the board of regents to establish policies governing the University. The Court concluded that there was no evidence that the board of regents adopted the SAM's administrative polices, thus the policies could not be "rule[s] adopted under a statute." The Court also rejected Barth's argument that he was acting in "good faith" by reporting a violation of law because Barth failed to satisfy the objective prong of good faith. Moreover, the Court held that given Barth's legal training and experience as an attorney he failed to meet the objective component of the good faith test for reporting a violation of civil and criminal law to an appropriate law enforcement authority.

XI. FAMILY LAW

A. Child Support

1. Granado v. Meza, 398 S.W.3d 193 (Tex. April 19, 2013) [11-0976].

At issue in this case was whether evidence supported the trial court's finding that Pedro Meza owed $500 in child-support arrearages. Vilma Granado sought to enforce Meza's child support obligation through liens and a writ of withholding. Meza filed suit to lift the liens and remove the writ. Granado responded by asking the trial court for a determination of child-support arrearages under section 157.323(c) of the Family Code. At the hearing, Granado introduced the underlying child support order showing the total obligation to be $11,520 and the OAG payment record, showing Meza paid a total of $5,143.76. Testimony indicated that Meza had paid the Office of the Attorney General (OAG) in Corpus Christi the amounts the OAG requested. In 2002, the OAG closed Meza's case because the OAG believed that Meza owed less than $500 in arrearages. But this figure was based on a clerical error in the OAG's internal file indicating that the obligation ended in 1986, when the child was six years old, rather than in 1998, the date specified in the underlying child support order. The trial court ultimately found that Meza owed exactly $500 in child-support arrearages. The court of appeals affirmed, relying on the OAG's statement that Meza owed less than $500 and a statement in the OAG payment record indicating that other child-support registries may contain other records of child-support payments.

The Supreme Court reversed. Under *Office of the Attorney General of Texas v. Burton*, 369 S.W.3d 173, 175-76 (Tex. 2012), a trial court's determination of child-support arrearages may be overturned if there is no evidence to support the finding. Here, the Court held that because the clerical error in the OAG file could not modify the child-support obligation, the OAG's assertion that Meza owed less than $500 based on that clerical error was no evidence of the amount of arrearages owed. Further, Meza's own testimony that he paid only the OAG served to negate any possibility that other child-support registries may have records of payments made by Meza. Thus, because no evidence existed to support the trial court's determination of $500 in arrearages, the Court reversed the court of appeals' judgment and remanded the case to the trial court for further proceedings.

2. In re Office of the Attorney Gen., S.W.3d , 56 Tex. Sup. Ct. J. 360 (Tex. March 8, 2013) [11-0255].

At issue in this case was whether Section 157.162(d) of the Texas Family Code (the "purging provision") precludes a trial court from finding an individual in contempt if, at the time of a child support enforcement hearing, the individual has paid the amounts alleged to be delinquent in the motion to enforce but has missed additional payments between the filing of the

motion and the hearing. After his divorce, Noble Ezukanma was ordered to pay monthly child support. After missing some months' payments and making only partial payments on others, Noble was served by the Tarrant County Domestic Relations Office with a Motion to Enforce Payment by Contempt in June 2008. Noble responded by paying the alleged outstanding balance in full. Noble subsequently reverted to making partial payments and had accumulated a substantial arrearage by the time the hearing on the motion to enforce took place in February 2009. The trial court found Noble in contempt for failure to timely make three of the payments alleged in the motion to enforce. Additionally, the trial court reduced to a money judgment the amount of the arrearage that had accrued between the June payment and the February hearing.

Relying on the purging provision, Noble challenged the contempt order through a petition for writ of mandamus, arguing the trial court abused its discretion by holding him in contempt for the missed payments alleged in the motion to enforce because he had made those payments by the February hearing. The court of appeals, with one justice dissenting, agreed and granted mandamus relief, ordering the trial court to vacate its contempt order. The court of appeals held that, under the purging provision, a trial court is prohibited from holding an individual in contempt for failure to make specified child support payments if the alleged missed payments have been made in full, albeit late. The dissenting justice disagreed, concluding that the only reasonable interpretation of the provision requires the individual to be current on all child support payments at the time of the hearing.

The Supreme Court conditionally granted mandamus relief, holding that the trial court's order finding Noble in contempt was valid and should be reinstated. The Court held that the plain language of the purging provision allows a respondent to avoid a contempt finding for failure to make properly pled payments only if he or she is current in the payment of all amounts that have become due under the support order as of the date of the enforcement hearing, regardless of whether such payments were pled in the motion to enforce. The Court concluded that, while missed payments must be specifically alleged in the motion to enforce to serve as the basis for a contempt finding, the allegations in the motion do not limit the payments on which a respondent must be current to invoke the purging provision. The Court further held that this interpretation of the purging provision does not invoke due process concerns.

3. Office of the Attorney Gen. v. Scholer, 403 S.W.3d 859 (Tex. June 28, 2013) [11-0796].

At issue in this case was whether the affirmative defense of estoppel can be asserted in child support enforcement actions. At his former wife's request, Scholer signed an affidavit terminating his parental rights to their son. The affidavit also indicated that Scholer did not wish to receive notice of any court proceedings related to the termination. The mother did not finalize the termination in court and did not notify Scholer that his duties to their child had not changed. Scholer did not inquire about the status of the termination. Nine years later, The Office of the Attorney General of Texas sought to collect arrearages that had accumulated due to Scholer's failure to pay. Scholer argued that the mother, and thus the OAG as her assignee, were estopped from collecting the unpaid support.

The trial court determined that estoppel cannot be argued in child support enforcement actions. The court ordered Scholer to pay $77,875 in arrearages plus interest. The court of appeals reversed, holding that the OAG, as the mother's assignee, was subject to all affirmative defenses available to private parties, including estoppel.

The Supreme Court held that estoppel cannot be used as an affirmative defense in child support actions because it is not listed among the Texas Family Code's permissible defenses and is contrary to the best interest of the child. The Court reasoned that the Family Code allows only one affirmative defense when a party moves to enforce a child support order—the custodial parent must have voluntarily relinquished physical possession of the child to the non-custodial parent, who must have provided actual support. A court may only consider this affirmative defense for enforcement motions, in addition to other statutorily provided offsets and counterclaims. Other non-statutory determinations or adjustments of the child support amount are not permissible.

Further, the Court determined that because child support is a duty owed to the child and not a debt owed to the custodial parent, estoppel cannot apply. Citing the Family Code and its own precedent, the Court emphasized the importance of enforcing the duty owed to the child in order to protect his welfare, despite the parents' choices and behavior.

4. Tucker v. Thomas, 2011 WL 6644710 (Tex. App.—Houston [14th Dist.] 2011), *pet. granted*, 56 Tex. Sup. Ct. J. 100 (November 16, 2012) [12-0183].

At issue in this case is whether the Texas Family Code permits a trial court to tax an award of attorney's fees as child support—as opposed to as costs—in a non-enforcement modification suit. In 2005, Rosscer Craig Tucker II and Lizabeth Thomas were divorced. In the divorce decree, the trial court appointed Tucker and Thomas joint managing conservators of their three children, granting Thomas the exclusive right to designate the children's primary residence, and ordered Tucker to pay child support. In 2008, Tucker sought modification of the final order and requested the exclusive right to designate the children's primary residence. Thomas counterclaimed, seeking sole managing conservatorship and an increase in child support from Tucker. In connection with the suit, the trial court appointed an amicus attorney to represent the children's interests. After a bench trial, the trial court denied the relief sought by Tucker, denied Thomas's request for sole managing conservatorship, and increased Tucker's monthly child support obligation. Additionally, the trial court ordered Tucker to pay Thomas's attorney's fees and ordered Tucker and Thomas to each pay half of the amicus attorney's fees. The trial court characterized the attorney's fees as additional child support as opposed to costs. The consequence of such a distinction is that fees in the nature of child support are specifically enforceable by contempt.

The court of appeals considered the case *en banc* and issued a majority opinion, two concurrences, and a dissent. The majority affirmed the trial court's ruling holding that the Family Code implicitly authorizes a trial court to tax attorney's fees as child support if the fees are found to be necessary for the benefit of the child, regardless of the nature of the suit. The dissent argued that the Family Code distinguishes between the award of attorney's fees and costs in child support enforcement actions and in modification suits, permitting taxing the award as child support in the former but not the latter.

Tucker appealed to the Supreme Court arguing, as the dissent did, that the Family Code expressly permits the taxation of attorney's fees as child support in enforcement proceedings, but does not in modification suits. Therefore, in a modification suit, attorney's fees must be enforced under section 106.002 of the Family Code, which provides that a trial court "may order reasonable attorney's fees as costs" and that such fees "may be enforced . . . by any means available for the enforcement of a judgment for debt." TEX. FAM. CODE § 106.002. This issue has split the Texas courts of appeals. The Court granted the petition for review and heard oral argument on February 5, 2012.

B. Jurisdiction

1. In re Dean, 393 S.W.3d 741 (Tex. December 21, 2012) [11-0891].

At issue in this case was whether a Texas court has jurisdiction over a custody determination involving a child who was born in New Mexico and has lived there all of his life. Richard Hompesch and Carrie Dean were married in Texas. The couple separated shortly thereafter and, while pregnant with Richard's child, Carrie moved to New Mexico, where she gave birth a few months later. Since then, Carrie and her son have lived in New Mexico.

Richard filed for divorce in Texas before his son was born and requested orders regarding custody. Carrie filed for custody in New Mexico after giving birth, arguing that Texas lacked jurisdiction to decide custody because New Mexico was her son's "home state" for custody determination purposes. Pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act, which both Texas and New Mexico have adopted, the two courts conferred. Although the New Mexico trial court agreed that New Mexico was the child's home state, it nevertheless yielded to the Texas court on the basis that Richard filed his divorce suit in Texas first. The Texas court of

appeals denied mandamus, and Carrie petitioned the Supreme Court for mandamus relief. Her New Mexico action remains pending in the New Mexico Court of Appeals.

The Court conditionally granted mandamus relief, lifted its previous temporary stay of the Texas trial court's order, and ordered the Texas trial court to communicate with the New Mexico Court of Appeals. The Court held that the Texas trial court erred by improperly assuming jurisdiction. The Court reasoned that the Act sets forth a concrete definition of "home state" and four enumerated grounds—exclusive jurisdictional bases—for a Texas court to make a child custody determination. Under the circumstances here, New Mexico was the child's home state because he lived there since birth. Furthermore, the New Mexico court did not properly cede jurisdiction to Texas under one of the enumerated grounds in the Act. The Court also rejected Richard's alternative arguments that the Act was unconstitutional. The Court concluded that Texas lacked jurisdiction to determine the child's custody, but retained valid jurisdiction over Richard and Carrie's divorce itself.

Justice Lehrmann concurred, but wrote separately to emphasize that under the Act's enumerated grounds, New Mexico may decline jurisdiction if it determines that it is an inconvenient forum under the Act.

C. Mediated Settlement Agreements

1. In re Lee, 411 S.W.3d 445 (Tex. September 27, 2013) [11-0732].

At issue in this case was whether a trial court may refuse to enter judgment on a mediated settlement agreement (MSA) pursuant to section 153.0071 of the Texas Family Code if the court finds that the agreement is not in the best interest of the child. Stephanie Lee and Benjamin Redus are the divorced parents of one child. Redus filed a petition to modify the parent-child relationship and to recover excess child-support payments. Lee and Redus entered into an MSA, which provided that Redus would establish the child's primary residence and Lee would have periodic access to and possession of the child. It further provided that Lee's husband, a registered sex offender, would not come within five miles of the child. The associate judge determined that the MSA was not in the best interest of the child and refused to enter judgment on it. Lee then filed a motion to enter judgment on the MSA, to which Redus objected. At the hearing on the motion to enter judgment, Lee testified that she had allowed her husband to have contact with the child in violation of his probation conditions. The district judge denied the motion to enter judgment after finding that the MSA was not in the best interest of the child. The court of appeals denied Lee's request for mandamus relief.

The Supreme Court conditionally granted mandamus relief, holding that the district court abused its discretion in denying Lee's motion to enter judgment on the MSA and setting the case for trial. Section 153.0071(c) provides that a party is "entitled to judgment" on an MSA that meets certain statutory requirements "notwithstanding Rule 11, Texas Rules of Civil Procedure, or another rule of law." Section 153.0071(e-1) provides a narrow exception to this mandate, allowing a trial court to deny entry of judgment on an MSA that would not be in a child's best interest *if* a party to the MSA was a victim of family violence and the family violence impaired the party's ability to make decisions. Thus, the Legislature unambiguously limited the consideration of best interest in the context of entry of judgment on an MSA to cases involving family violence. Because there was no family violence with respect to Lee and Redus, the district court abused its discretion in denying the motion to enter judgment on the MSA on best-interest grounds. This interpretation is consistent with and furthers established Texas public policy favoring the peaceable resolution of disputes involving the parent-child relationship.

In a plurality opinion, Justice Lehrmann, joined by Justice Johnson, Justice Willett, and Justice Boyd, noted that the Court did not reach the issue of whether a trial court may deny entry of judgment on an MSA based on evidence that the MSA would endanger the child, as that issue was not presented or argued. The plurality also noted the numerous statutory mechanisms available to trial courts in protecting children's physical and emotional welfare.

Justice Guzman concurred, opining that a trial court may deny entry of judgment on an MSA based on evidence of endangerment, but that

no such evidence had been presented to the trial court in this case.

Justice Green, joined by Chief Justice Jefferson, Justice Hecht, and Justice Devine, dissented. Noting the Legislature's stated policy that the best interest of the child shall always be the primary consideration of the court in determining the issues of conservatorship and possession of and access to the child, the dissent concluded that a trial court has discretion to refuse to enter judgment on an MSA that could endanger the child's safety and welfare and is, therefore, not in the child's best interest. The dissent further concluded that there was evidence in the record that the MSA would endanger the child and that the trial court did not abuse its discretion in denying entry of judgment on the MSA.

D. Modification Suits

1. In re Blevins, 2012 WL 3137988 (Tex. App.—Waco 2012), *argument granted on pet. for writ of mandamus*, 56 Tex. Sup. Ct. J. 278 (February 15, 2013) [12-0636].

At issue in this case is whether the parental presumption applies in modification cases and whether the trial court abused its discretion in placing the children in Mexico with their Father. A.L.R. and R.M.R were placed with Melissa Blevins and her husband in March 2010 after DFPS was named managing conservator of the children. At multiple hearings and over the course of a year and a half, the trial court found that neither parent was working, the parents both continued to use drugs and associate with drug users, and that the children were flourishing with Blevins. Mother relinquished her parental rights and Father continued his prior behavior. The trial court found that naming Father as managing conservator would "significantly impair the child[ren]'s physical health or emotional development" and appointed DFPS as permanent managing conservator. In October 2011, the trial court reversed course and signed an order placing the children with Father and their paternal grandmother in Mexico. The court of appeals denied Blevins' request for mandamus and immediate temporary relief. The Supreme Court granted argument on Blevins' petition for writ of mandamus heard oral argument on October 9, 2013.

E. Spouse's Personal Liability

1. Tedder v. Gardner Aldrich, LLP, S.W.3d , 56 Tex. Sup. Ct. J. 557 (Tex. May 17, 2013) [11-0767].

At issue in this case was whether legal services provided to one spouse in a divorce proceeding are necessaries for which the other spouse is statutorily liable. Michael Tedder brought suit against his wife, Stacy Tedder, for divorce and custody of their two children. Stacy hired Gardner Aldrich, LLP to represent her in the proceedings. Her contract provided that the firm would "seek to have the court order [her] husband to pay for all legal fees incurred by [her]," but that Stacy would remain directly liable. After nearly two years of contentious litigation, a jury found that the couple should be joint managing conservators of their children. Gardner Aldrich withdrew as Stacy's counsel and then intervened in the case, suing both Stacy and Michael for its fees. Gardner Aldrich couched its claim in part as a sworn account. Stacy and Michael settled, agreeing, among other things, that the final decree would award Gardner Aldrich attorney's fees against Stacy only and would not award Stacy attorney's fees against Michael. The trial court rendered judgment in accordance with their agreement. The court of appeals rendered judgment for Gardner Aldrich against Michael and Stacy jointly and severally, holding that Michael was liable for Stacy's legal fees for two reasons: the obligation was a "community debt" and the legal fees were "necessaries" for which Michael was liable under Section 2.501 of the Texas Family Code.

The Supreme Court held that Michael was not liable for Stacy's attorney's fees. Addressing Gardner Aldrich's sworn account argument, the Court held that Michael was not required to file a sworn denial to contest liability to Stacy's account with Gardner Aldrich because a party is not required to swear to what he does not and cannot know. As to the court of appeals' holding that Michael was liable because the attorney fees were a "community debt," the Court held that marriage itself does not create joint and several liability; instead, one spouse's liability for debts incurred by or for the other is determined by statute. Under the applicable provisions of the Family Code, Michael is not liable for Stacy's attorney

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fees because he did not incur the debt as her agent and the debt is not for necessaries. The Court rendered judgment that Gardner Aldrich take nothing.

F. Termination of Parental Rights

1. In re E.C.R., 402 S.W.3d 239 (Tex. June 14, 2013) [12-0744].

At issue in this case was whether the State properly terminated a parent's rights to her child— after initially removing him for "abuse or neglect of the child" under section 161.001(1)(O) and chapter 262 of the Texas Family Code—when it did so based on evidence that the parent had not abused that child specifically, but rather another child of the same household.

E.C.R., an eight-month-old infant, was removed from his mother's home after police received reports that his mother, M.R., punched and dragged E.C.R.'s four-year-old half-sister by her ponytail down the street. E.C.R. was not present during this episode. M.R. eventually pleaded guilty to the third-degree felony of bodily injury to a child, and the Department of Family and Protective Services sent the daughter to live with her father.

The Department conducted an investigation as to E.C.R., who showed no signs of physical abuse. Nevertheless, the Department removed him from M.R.'s home after finding sufficient evidence that M.R.'s history of abusing her other children, her fragile mental state, and her criminal case and incarceration necessitated E.C.R.'s removal. The trial court appointed the Department as E.C.R.'s temporary managing conservator and signed temporary orders stating the conditions for E.C.R.'s return to M.R. Almost a year later, M.R. was unable to prove that she had complied with the court's orders, and the trial court terminated M.R.'s rights to E.C.R. M.R. appealed on the basis that E.C.R.'s initial removal, and thus the eventual termination order under subsection (O), was improper because he was removed for "risk" of abuse, rather than actual abuse or neglect.

The court of appeals agreed with M.R. and reversed the trial court's termination of M.R.'s rights to E.C.R., holding that abuse of the daughter was not evidence of abuse or neglect of E.C.R. The Department petitioned the Supreme Court for review.

The Court reversed the court of appeals' judgment and remanded to that court, holding that the Department had proved grounds for E.C.R.'s termination under subsection (O) as a matter of law. The Court stated that while subsection (O) required proof of "abuse" or "neglect," the terms had to be read in the context of the Family Code's related chapters to include risk of abuse or neglect of a child. The Court outlined the process by which an initial report of abuse or neglect is processed, following the statutory requirements for investigating abuse or neglect and removing a child from his parents. The Court emphasized chapter 262's focus on the "danger to the physical health or safety of the child" and concluded that the phrase encompassed risk of abuse or neglect. Accordingly, the Court held that M.R.'s abuse of E.C.R.'s sister, even outside the momentary physical presence of E.C.R., and the other evidence available justified the trial court's conclusion that E.C.R. faced an immediate danger to his physical health or safety, which satisfied subsection (O)'s "abuse or neglect of the child" standard.

2. In re S.M.R., 2012 WL 1441398 (Tex. App.—Houston [1st Dist.] 2012), *pet. granted*, 56 Tex. Sup. Ct. J. 749 (June 28, 2013) [12-0968].

At issue in this case is whether courts of appeals must consider grounds for parental rights termination that were pled but not found by the trial court. Also at issue is whether the court of appeals incorrectly reviewed the factual sufficiency of the evidence supporting the trial court's termination.

The trial court held that termination was warranted under subsections (D) and (E) of Section 161.001 of the Texas Family Code. The court of appeals reversed because of its determination that the evidence in support of subsections (D) and (E) was factually insufficient. The court of appeals refused to consider whether there was sufficient evidence to support termination under subsection (O), which the Department pled but on which the trial court did not base its termination decision.

The Supreme Court granted the terminated parent's petition for review and heard oral argument on September 11, 2013.

XII. GOVERNMENTAL IMMUNITY

A. Contract Claims

1. LAN/STV v. Martin K. Eby Constr. Co., Inc., 350 S.W.3d 675 (Tex. App.—Dallas 2011), *pet. granted*, 56 Tex. Sup. Ct. J. 277 (February 15, 2013) [11-0810].

At issue in this case is whether derivative governmental immunity or the economic loss rule bars Eby's negligent misrepresentation suit against LAN/STV. LAN/STV contracted to provide plans for a light-rail expansion to the Dallas Area Rapid Transit (DART), a governmental entity. DART then accepted a bid from Eby to construct the extension. After construction began, Eby encountered numerous delays and increased costs, and it attributed these problems to inaccuracies in LAN/STV's bid documents. Eby sued LAN/STV for negligence and negligent misrepresentation. The trial court granted LAN/STV's motion for summary judgment on the ground of derivative governmental immunity. Eby appealed, and the court of appeals reversed. On remand, the jury found LAN/STV made negligent misrepresentations and awarded Eby $2.25 million in damages. Both parties appealed. The court of appeals affirmed in all respects. LAN/STV then filed a petition for review in the Supreme Court.

LAN/STV argues that two statutes grant it derivative governmental immunity and therefore bar Eby's suit. LAN/STV also argues that the economic loss rule bars a claim for pure economic loss between parties in a contractual chain who do not have a contract with each other. The Court granted the petition for review and heard oral argument on October 8, 2013.

B. Interlocutory Appeals

1. City of Hous. v. Estate of Jones, 388 S.W.3d 663 (Tex. December 21, 2012) [10-0755].

At issue in this case was whether the court of appeals had jurisdiction over an interlocutory appeal from the denial of a motion to reconsider the denial of a plea to the jurisdiction. Kenneth S. Jones sued the City of Houston and amended his petition to assert a claim for breach of settlement agreement against the City. After an appeal from the denial of a plea to the jurisdiction, the City filed another plea to the jurisdiction, arguing that immunity for breach of a settlement agreement was not waived because its immunity on the underlying claims was not waived, and that its immunity was not waived by Local Government Code section 271.152 because the settlement agreement was not an agreement to provide goods or services. Jones agreed that immunity was not waived under section 271.152, but argued that immunity was waived for claims for breach of a settlement agreement. The trial court denied the plea, but the City did not appeal. After Jones passed away, the case was transferred to probate court and the City filed an amended plea to the jurisdiction. It made the same arguments made in its previous plea but also asserted an additional ground that immunity was not waived under section 271.152. The probate court construed the City's amended plea as a motion to reconsider the previous denial of its plea to the jurisdiction and denied it. The City filed an interlocutory appeal. The court of appeals held that it did not have jurisdiction to consider the grounds previously raised by the City in its initial plea to the jurisdiction but not appealed. The court considered the one new ground, but held the City had not shown immunity had not been waived under a different theory.

The Supreme Court held that the court of appeals did not have jurisdiction to consider any part of the merits of the interlocutory appeal. The City did not raise any new issues in its amended plea to the jurisdiction because Jones had conceded section 271.152 did not waive the City's immunity so the amended plea to the jurisdiction was substantively a motion to reconsider the denial of its previous plea. Permitting appeals from a motion to reconsider would effectively eliminate the requirement that appeals from interlocutory orders must be filed within twenty days after the challenged order is signed. That would work against the main purpose of the interlocutory appeal statute which is to increase efficiency of the judicial process. The Court dismissed the appeal.

2. Dallas Cnty. v. Logan, 407 S.W.3d 745 (Tex. August 23, 2013) [12-0203].

At issue in this case is whether courts must consider arguments raised by a party for the first time on interlocutory appeal when the party files a plea to the jurisdiction based on governmental immunity. Roy Logan, former county deputy

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constable of Dallas County, filed suit against the county under the Whistleblower Act for declaratory and injunctive relief. The trial court denied the county's plea to the jurisdiction based on governmental immunity, prompting the county to file an interlocutory appeal. On interlocutory appeal, the court of appeals affirmed the trial court's denial and refused to consider new arguments raised by the county for the first time on appeal. The Supreme Court reversed and remanded the case, finding that section 51.014(a) of the Texas Civil Practice and Remedies Code does not preclude an appellate court from considering immunity grounds first asserted on interlocutory appeal.

C. Premises and Special Defects

1. Tex. Dep't of Transp. v. Perches, 388 S.W.3d 652 (Tex. November 16, 2012) [11-0437].

At issue in this case was whether a concrete guardrail is a special defect for which the State's sovereign immunity is waived under the Texas Tort Claims Act (the Act). Jose Perches was killed when he crashed into a concrete barrier while attempting to make a left turn at the Bicentennial Underpass in McAllen. Perches's parents sued the Texas Department of Transportation (TxDot) and several engineering firms, alleging negligent maintenance and implementation of the roadway and traffic control devices. The trial court denied TxDot's immunity-based jurisdictional plea and severed the claims asserted against the engineering firms. On interlocutory appeal, the court of appeals affirmed, concluding that although the Percheses had not shown an immunity waiver for their negligent maintenance and implementation claims, they pleaded sufficient facts to demonstrate TxDot's waiver of immunity with respect to their special defect claims. The Supreme Court reversed in part, rendered judgment in part, and remanded the case to the trial court for further proceedings.

The Court held that guardrails placed according to plan cannot constitute a special defect under the Act. The Act does not define "special defect" but likens special defects to obstructions in the roadway. The guardrail was not an obstruction; the guardrail delineated the roadway's bounds. The guardrail did not impede travel or block the road for an ordinary user in the normal course of travel. Had Perches made the turn in accordance with the roadway's design, he never would have come into contact with the guardrail. The Court also agreed with the court of appeals that the Percheses did not plead sufficient facts demonstrating a waiver of immunity with respect to their premises liability claims.

D. Texas Tort Claims Act

1. City of Watauga v. Gordon, 389 S.W.3d 604 (Tex. App.—Fort Worth 2012), *pet. granted*, 56 Tex. Sup. Ct. J. 1213 (September 20, 2013) [13-0012].

At issue in this case is whether a police officer's intentional application of handcuffs can be properly characterized as negligence for which governmental immunity is not waived.

Russell Gordon was pulled over on suspicion of drunk driving. After approaching Gordon, City of Watauga police officers asked him to submit to a sobriety test. Gordon declined. As a result, the officers took Gordon into custody, handcuffing him once at the scene of the arrest, and a second time when Gordon was transported from a nearby police station to the City of Watauga jail. Gordon subsequently sued the City, alleging that the officers had placed the handcuffs too tightly around his wrists on both occasions, causing him injury.

In the trial court, the City filed a plea to the jurisdiction, asserting that it was immune from suit because the police officers' conduct, if tortious, was intentional, and therefore excepted from the Texas Tort Claims Act's waiver of governmental immunity. The trial court denied the City's plea to the jurisdiction, holding that Gordon had plead facts sufficient to establish a cause of action in negligence. On interlocutory appeal, the court of appeals affirmed.

The Supreme Court granted the City's petition for review and heard oral argument on December 4, 2013.

2. Tex. Adjutant Gen.'s Office v. Ngakoue, 408 S.W.3d 350 (Tex. August 30, 2013) [11-0686].

This case involved the interpretation and application of section 101.106 of the Texas Civil Practice and Remedies Code, which is the election-of-remedies provision of the Texas Tort

Claims Act (TTCA). At issue was the scope of section 101.106(b), which bars suit against a governmental unit when a plaintiff files suit against a government employee unless the governmental unit consents, and section 101.106(f), which generally provides for dismissal of a suit against a government employee for conduct that was within the scope of employment.

Michele Ngakoue was involved in a car wreck with Franklin Barnum, an employee of the Texas Adjutant General's Office (TAGO). Ngakoue filed suit against Barnum, but not his employer, alleging negligent operation of a motor vehicle, a claim for which the TTCA waives governmental immunity. Barnum filed a motion to dismiss the suit against him under section 101.106(f), arguing the collision occurred while he was acting within the course and scope of his employment with TAGO. Ngakoue filed an amended petition adding TAGO as a defendant, but failed to properly dismiss Barnum. TAGO subsequently filed a plea to the jurisdiction and a motion to dismiss itself under section 101.106(b), alleging that because Ngakoue had sued Barnum, but had not properly dismissed Barnum within thirty days of Barnum's filing a motion to dismiss as required by subsection (f), subsection (b) barred suit against TAGO. The trial court denied Barnum's motion to dismiss and TAGO's plea. The court of appeals reversed the order denying Barnum's motion to dismiss but affirmed the denial of TAGO's plea to the jurisdiction. The court of appeals reasoned that Ngakoue's failure to comply with subsection (f) did not result in suit against TAGO being barred under subsection (b) because the government consented to suit via the waiver of immunity in the TTCA.

The Supreme Court affirmed. Rejecting TAGO's argument that a governmental unit does not "consent" to suit under subsection (b) via a waiver of immunity contained in the TTCA, the Court went on to address the effect of subsection (f) on subsection (b)'s bar to suit against the government when suit is filed against an employee. Subsection (f) provides in part that if a suit is brought against a government employee for acts conducted within the general scope of employment, and suit could have been brought under the TTCA, then the suit is considered to have been filed against the employee in his official capacity only. Because a suit against a government employee in his official capacity is, in all but name only, a suit against the governmental unit itself, the Court held that such a suit does not trigger subsection (b)'s bar to suit against the government. The Court also addressed the impact of subsection (f)'s requirement that suit against an employee in his official capacity be dismissed on the employee's motion unless the plaintiff files amended pleadings substituting the governmental unit for the employee within thirty days of filing the motion. The Court held that subsection (f) is not an exception to subsection (b), but instead provides a procedure by which an employee who is considered to have been sued in his official capacity will be dismissed from the suit, whether by the plaintiff's amended pleadings or the trial court's order. Thus, a plaintiff's failure to amend his pleadings pursuant to subsection (f) does not bar subsequent suit against the government under subsection (b).

Justice Boyd, joined by Justices Johnson, Willett, and Guzman, dissented. The dissent concluded that subsections (b) and (f) are both triggered when a TTCA plaintiff sues a government employee based on conduct within the scope of employment, and that such plaintiffs can avoid dismissal of their claims against a governmental unit under subsection (b) only by complying with the procedure laid out in section 101.106(f). Because Ngakoue did not comply with subsection (f)'s procedure, the dissent opined, his claims against TAGO had to be dismissed under subsection (b). The dissent further concluded that Ngakoue's claims against TAGO did not fall within subsection (b)'s "consent" exception because Ngakoue did not comply with the jurisdictional requisites for waiver of immunity under the TTCA, which include the provisions of section 101.106.

XIII. INSURANCE

A. Hospital Lien Statute

1. McAllen Hosps., L.P. v. State Farm Cnty. Mut. Ins. Co. of Tex., 2012 WL 5292926 (Tex. App.—Corpus Christi 2012), *pet. granted*, 56 Tex. Sup. Ct. J. 1212 (September 20, 2013) [12-0983].

At issue is whether issuing a settlement draft made jointly payable to a lienholder and a

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claimant releases an insurer from liability under the Texas Hospital Lien Statute. Also at issue is whether a lienholder may maintain an action against an insurer drawer under Chapter Three of the UCC in cases where a settlement draft has been cashed without the endorsement of a co-payee lienholder. A driver insured by State Farm caused a multi-vehicle accident. McAllen Hospitals (Medical Center) provided medical services to the injured parties and then secured liens on their hospital bills. The injured parties filed bodily injury claims with State Farm. State Farm settled with two claimants and issued each a settlement check that was jointly payable to Medical Center and each claimant. The claimants cashed, and State Farm funded, the checks without Medical Center's knowledge or endorsement. Medical Center remains unpaid.

Medical Center sued State Farm, alleging a violation of the Texas Hospital Lien Statute for settling the claims without first resolving Medical Center's liens. The trial court granted State Farm's motion for summary judgment and denied Medical Center's cross-motion. The court stated that there was no genuine issue of material fact as to whether State Farm had discharged its duty to protect Medical Center's hospital liens. The court of appeals affirmed, holding that State Farm discharged its statutory duty by including Medical Center as a co-payee.

Medical Center filed a petition for review arguing that the court of appeals' holding goes against both the plain language and legislative scheme of the Texas Hospital Lien Statute. Medical Center alleges that the Legislature intended the Statute to protect hospitals' right to reimbursement after providing emergency medical service to injured victims who were unable to pay their bills. The Supreme Court granted Medical Center's petition for review and heard oral argument on December 4, 2013.

B. Policies/Coverage

1. Greene v. Farmers Ins. Exch., 376 S.W.3d 278 (Tex. App.—Dallas 2012), *pet. granted*, 57 Tex. Sup. Ct. J. 10 (October 18, 2013) [12-0867].

At issue in this case is whether an insurance company can deny a claim based on a policy condition that did not contribute to the insured's loss. Lawyane Greene owned a home with a homeowner's insurance policy on it issued by Farmers Insurance Exchange (FIE). The policy contained a vacancy provision, which suspended damage coverage sixty days after the house became vacant. Greene moved into a nursing home and put up the house for sale. Four months later, a fire spread from a neighboring property to Greene's house, causing damage. FIE denied coverage based upon the vacancy provision. FIE asserted that it was not required to show that the vacancy contributed to Greene's loss in order to deny coverage.

Greene brought the underlying action against FIE. The trial court held that FIE breached the insurance contract and that Greene's violation of the vacancy clause did not render the policy void. The trial court concluded that Insurance Code Section 862.054 required FIE to establish that Greene's violation contributed to the loss before it could assert the vacancy clause as a defense. As a result, the trial court awarded Greene damages. The court of appeals reversed, holding that section 862.054 did not apply and rendered a take-nothing judgment. The Supreme Court granted Greene's petition for review and will hear oral argument on January 7, 2014.

2. In re Deepwater Horizon, *certified question accepted*, 56 Tex. Sup. Ct. J. 1192 (September 6, 2013) [13-0670].

At issue in this case is whether an insurer can deny coverage to an additional insured on an umbrella insurance policy because the named insured has a contractual obligation to indemnify the additional insured for the covered loss. Transocean owned the Deepwater Horizon, an off-shore drilling unit that sank into the Gulf of Mexico in 2010 following an onboard explosion. At the time of the accident, the Deepwater Horizon was engaged in exploratory drilling activities under a Drilling Contract between Transocean and Birtish Petroleum (BP). The Drilling Contract required Transocean to name BP as an additional insured "in each of [Transocean's] policies, except Workers' Compensation for liabilities assumed by [Transocean] under the terms of this Contract." Another provision of the Drilling Contract that addressed pollution-related liabilities specified that Transocean would assume liability "for

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pollution or contamination . . . originating on or above the surface of the land or water." After BP notified Transocean's insurers of its pollution-related losses, the insurers filed a declaratory judgment action against BP in federal district court, seeking a declaration of no coverage. The district court granted summary judgment for the insurers. The United States Court of Appeals for the Fifth Circuit initially reversed, but on rehearing, the panel withdrew its decision and issued an order certifying the following questions to the Supreme Court of Texas:

1. Whether *Evanston Ins. Co. v. ATOFINA Petrochems., Inc.*, 256 S.W.3d 660 (Tex. 2008), compels a finding that BP is covered for the damages at issue, because the language of the umbrella policies alone determines the extent of BP's coverage as an additional insured if, and so long as, the additional insured and indemnity provisions of the Drilling Contract are "separate and independent"?
2. Whether the doctrine of *contra proferentem* applies to the interpretation of the insurance coverage provision of the Drilling Contract under the *ATOFINA* case, 256 S.W.3d at 668, given the facts of this case?

The Supreme Court accepted the certified questions on September 6, 2013 but has not yet scheduled oral argument.

3. Lennar Corp. v. Markel Am. Ins. Co., S.W.3d , 56 Tex. Sup. Ct. J. 893 (Tex. August 23, 2013) [11-0394].

Lennar Homes used exterior insulation and finish systems (EIFS) in hundreds of its homes in the 1990s. After learning that homes with EIFS suffered severe and often hidden water-related damage, Lennar undertook to remove the product from all the homes it had built and replace it with conventional stucco. Lennar notified its insurers that it would seek indemnification for the remediation costs, but the insurers refused to participate. Almost all homeowners accepted Lennar's remediation offer and the few that did sue settled. After its insurers denied coverage, Lennar sued. The trial court granted summary judgment for all insurers, but the court of appeals reversed in part, regarding Lennar's claims against two of its insurers. After remand, and a settlement with Lennar's primary insurer, the case went to trial with Markel as the only remaining defendant. The trial court rendered judgment on the verdict for Lennar. The court of appeals reversed and rendered judgment for Markel, but the Supreme Court reversed and affirmed the trial court's judgment for Lennar.

There were two issues presented to the Court: (1) whether an insurer who had not consented to a homebuilder's remediation program is nonetheless responsible for the costs if it suffered no prejudice as a result; and (2) whether an insurer is responsible for costs to determine property damage as well as the repair, and for costs to remedy damage that began before and continued after the policy period.

The parties accepted as law of the case the court of appeals' prior holdings that (1) Markel's liability would not be excused under a policy condition — forbidding Lennar from making a "voluntary payment" without the insurer's consent — unless Markel could prove, as a matter of fact, that it had been prejudiced by Lennar's remediation program; and (2) Lennar's costs to remove and replace EIFS as a preventative measure were not covered by the policy, and Lennar must therefore separate those costs from the costs to repair water damage to the homes.

Markel argued to the Court that it had shown prejudice as a matter of law, and even if it had not, that it could insist on compliance with a separate provision with similar "consent to settlement" language without proving prejudice. The Court rejected these arguments, concluding that the purpose of both provisions was the same and the requirement that Markel show prejudice from Lennar's non-compliance with either operated identically. Because Markel had failed to convince the jury that it was prejudiced by Lennar's settlements with homeowners, Lennar's settlements established both Lennar's legal liability for the property damages and the basis for determining the amount of loss that Markel was obligated to pay under the policy.

As to the second issue, the Court concluded that under no reasonable construction could the cost of finding EIFS property damage in order to repair it not be considered to be "because of" the damage and thus covered by the policy. Also,

there was no question that all the homes at issue suffered property damage, which began before or during the policy period and continued until it was repaired, and the policy expressly covered "continuous or repeated exposure to the same general harmful condition." Thus, the Court concluded that the policy covered Lennar's total remediation costs. The Court rejected apportioning the costs pro rata among Lennar's other insurers, instead leaving up to insurers who share responsibility for a loss to allocate it among themselves according to their subrogation rights.

Justice Boyd concurred, but wrote separately to address the prejudice issue. Justice Boyd would have held that the insurance policy did not cover Lennar's liabilities because Lennar incurred those liabilities through settlements to which Markel had not consented. However, because the Court's prior jurisprudence disregards a policy's consent requirement unless the insurer can prove harm or prejudice, he concurred in the opinion but urged the Court to say that the prejudice requirement stems from public policy, not from the basis of contract principles.

C. Prompt Payment Statute

1. Christus Health Gulf Coast v. Aetna, Inc., 397 S.W.3d 651 (Tex. April 19, 2013) [11-0483].

At issue in this case was whether contractual privity between a health care services provider and a health maintenance organization (HMO) is required in order for the health care provider to recover under the Prompt Payment Statute, Article 20A.18B of the Texas Insurance Code.

Christus Health Gulf Coast and a number of other hospitals (the Hospitals) sued Aetna, Inc. (Aetna) under Article 20A.18B when Aetna's delegated networks became insolvent and allegedly failed to pay over $13 million invoiced for the Hospitals' services provided to Aetna's enrollees under the agreements between the Hospitals and the delegated networks. The trial court denied the Hospitals' summary judgment motion and granted Aetna's summary judgment motion. The court of appeals affirmed, holding that the Prompt Pay Statute does not impose liability on an HMO in the absence of a contract between the HMO and the provider.

The Supreme Court affirmed the court of appeals' judgment. The Court found that the plain language of the Prompt Pay Statue required contractual privity between the health care services provider and an HMO. Thus, Aetna was not required to pay the Hospitals within the 45-day deadline imposed by Article 20A.18B, and Aetna did not violate the statute.

D. Reimbursement for Claims Paid but not Covered

1. Gotham Ins. Co. v. Warren E&P, Inc., 368 S.W.3d 633 (Tex. App.—El Paso 2012), *pet. granted*, 56 Tex. Sup. Ct. J. 492 (April 19, 2013) [12-0452].

At issue in this case is whether an insurance company, which has overpaid the insured under a mistake of fact caused by the insured's misrepresentation, has a right to seek reimbursement from the insured and from third parties that benefitted indirectly from the payment.

A well operated by Pedeco, Inc. blew out and caught fire. Pedeco represented to its insurance company, Gotham, that it owned a 100% working interest in the well and was operating the well when the blowout occurred. Relying on that representation, Gotham paid a total of $1,823,156.27 for Gotham's claims. But, in fact, two other parties also possessed interests in the well and together owned an 87.5% working interest. Gotham intervened in a lawsuit against the three parties and sought reimbursement of the overpaid insurance benefits. The trial court denied Gotham's claim. On appeal, the court of appeals reversed and remanded the case for further proceedings. Without holding any additional hearing, the trial court awarded Gotham reimbursement from the three parties in the amount that Gotham had pleaded in its original motion for summary judgment. On a second appeal, the court of appeals reversed the award because of the trial court's failure to conduct further proceedings, as previously ordered. On remand, the trial court conducted hearings and ordered Pedeco and its co-venturers to pay Gotham $1,823,156.27 plus interest and court costs. In a third appeal, the court of appeals reversed the trial court's judgment and ordered that Gotham take nothing from Pedeco et al.

In its petition to the Supreme Court, Gotham argues that it was entitled to restitution from

Pedeco because an insurer can seek reimbursement from the insured for payments made under a mistake of fact. Gotham further argued that it was eligible for restitution from Pedeco's co-venturers for unjust enrichment and subrogation. In reply, Pedeco and its co-venturers argue that the Court had ruled on a similar issue in two previous cases in a way that barred Gotham's claim for restitution.

The Court granted Gotham's petition for review and heard oral argument on October 8, 2013.

E. Subrogation

1. Allstate Ins. Co. v. Spellings, 388 S.W.3d 729 (Tex. App.—Houston [1st Dist.] 2012), *pet. granted*, 56 Tex. Sup. Ct. J. 1212 (September 20, 2013) [12-0824].

At issue in this case is whether the doctrine of equitable subrogation allows an insurer to settle a third-party claim against its insured and later stand in the shoes of that third party to recover liability payments from other alleged tortfeasors. Seventeen-year-old Amber Jeffrey was legally intoxicated when she lost control of her vehicle and collided with another vehicle occupied by Jim and Helen Haywood. The impact killed Amber and left the Haywoods severely injured. Allstate Insurance Company, the liability insurer for Amber and her father, Scott Jeffrey, settled with the Haywoods. Scott then filed a wrongful-death suit against five other parties (collectively "respondents") alleged to have contributed to the fatal event. Allstate claimed it was entitled to intervene based on contractual subrogation (for payments made to Scott) and equitable subrogation (for payments made to the Haywoods).

The respondents moved for summary judgment against Allstate, arguing Allstate was precluded from recovery under any subrogation theory because it abandoned the claims of its insured by settling with the Haywoods. The trial court granted summary judgment in favor of the respondents for claims based on payments made to the Haywoods and severed the equitable subrogation claim. The court of appeals affirmed, concluding Allstate was not entitled to recoup payments made to the Haywoods under an equitable-subrogation theory. The court of appeals distinguished this claim from *Frymire Engineering Co. ex rel. Liberty Mutual Insurance Co. v. Jomar International, Ltd.*, 259 S.W.3d 140 (Tex. 2008), based on the voluntary nature of Allstate's payment.

Allstate petitioned the Supreme Court for review. Allstate argues the court of appeals ignored this state's broad application of equitable subrogation in the insurance context. Specifically, Allstate contends *Frymire* provides direct support for its position. The respondents argue that Allstate used the guise of an equitable subrogation claim to bypass Texas law forbidding settling tortfeasors from seeking contribution. Respondents assert Allstate could only recover such contribution if the claim was prosecuted through its insured, rather than through settlement with the Haywoods. The Supreme Court granted the petition for review and heard oral argument on December 3, 2013.

XIV. INTENTIONAL TORTS

A. Defamation

1. Hancock v. Variyam, 400 S.W.3d 59 (Tex. May 17, 2013) [11-0772].

At issue in this case was the distinction between defamation per se and defamation per quod. Defamation per quod is a statement that tends to injure one's reputation, while defamation per se includes statements that injure one in her office, profession, or occupation. In a letter to his superior, Dr. Easwaran P. Variyam, the chief of the gastroenterology division, accused Dr. Joseph E. Hancock of violating department protocol when transferring patients to his care at the Texas Tech University Health Sciences Center. Hancock responded with a letter to the Chair of the Department, the dean of the medical school, a colleague, and the body reviewing the division's accreditation application, stating that Variyam had a reputation for lack of veracity and dealt in half truths. After Variyam was demoted from his position as chief of the division, he sued Hancock for defamation. The trial court granted partial summary judgment for Hancock on Variyam's claim for damages for removal as chief but Variyam's claims for damages for loss of reputation and mental anguish went forward. At trial, the trial court granted a directed verdict that Hancock's letter was defamatory per se, and the

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jury awarded $90,000 in actual damages for mental anguish and loss of reputation and $85,000 in exemplary damages. The court of appeals affirmed the judgment.

The Supreme Court held that Hancock's statements were not defamatory per se. A statement that injures one in her profession must attribute a lack of a peculiar or unique skill necessary for the proper conduct of the profession. While accusing a physician of being a liar is not defamatory per se, accusing him of dishonesty in billing practices would be defamatory per se. Here, Hancock accused Variyam of lacking truthfulness. But truthfulness is not a peculiar or unique skill necessary for the proper conduct of being a physician. Because Hancock's statements were not defamatory per se, Variyam must have had some evidence of his mental anguish and loss of reputation to recover the awarded damages. Variyam testified that he lost some sleep but still interacted with those who received Hancock's letter and that the letter did not affect his care of patients. This is not evidence of mental anguish because it fails to indicate a substantial disruption in daily routine or a high degree of mental distress. Likewise, Variyam offered no evidence of loss of reputation because there was no evidence that a recipient of Hancock's letter believed its statements. Because there was no evidence of actual damages, there could be no award of exemplary damages. The Court reversed the judgment of the court of appeals and rendered judgment that Variyam take nothing.

2. Neely v. Wilson, S.W.3d , 56 Tex. Sup. Ct. J. 766 (Tex. June 28, 2013) [11-0228].

At issue in this case is whether a media defendant should have prevailed at summary judgment on a defamation claim regarding its investigative broadcast of a physician. The broadcast began with the broadcaster asking the listener if they would want to know if their physician had been disciplined for self-prescribing and taking dangerous drugs and controlled substances, had a history of hand tremors, and had been sued several times for malpractice in the last few years. The broadcast then detailed allegations by former patients and their friends against the physician and indicated that the Texas Medical Board had disciplined the physician. The reporter then asked a representative of the Board why it did not require the physician to undergo drug testing. The media defendants moved for summary judgment, primarily arguing that they should prevail on truth as a defense because the broadcast accurately repeated the allegations of third parties. The trial court granted summary judgment for the media defendants without specifying the grounds. The court of appeals affirmed.

The Supreme Court held that a person of ordinary intelligence could conclude that the gist of the broadcast was that the physician was disciplined for operating on patients while using dangerous drugs and controlled substances. The Court concluded the physician raised a genuine issue of material fact as to the truth or falsity of that gist because evidence existed that he was not disciplined for taking dangerous drugs or controlled substances and that he never performed surgery while using dangerous drugs or controlled substances. The Court further concluded that the media defendants had not conclusively proven the application of the judicial/official proceedings or fair comment privileges, that there was a fact issue as to the defendants' negligence, and that the physician's professional association could maintain a defamation claim.

Chief Justice Jefferson, joined by Justice Green and Justice Lehrmann, dissented. The dissent concluded that the broadcast was substantially true as a matter of law because the Texas Medical Board was in fact concerned that the physician was not only self-prescribing, but also taking dangerous drugs and controlled substances.

XV. JURISDICTION

A. Personal Jurisdiction

1. Moncrief Oil Int'l, Inc. v. OAO Gazprom, S.W.3d , 56 Tex. Sup. Ct. J. 1023 (Tex. August 30, 2013) [11-0195].

At issue in this case was whether there was personal jurisdiction over Russian entities in Texas state court regarding misappropriation of alleged trade secrets from two meetings in Texas with a Texas company about a proposed joint venture in Texas. On two separate occasions, OAO Gazprom and Gazprom Export, LLC (collectively, Gazprom) met with Moncrief Oil

International, Inc. (Moncrief) in Texas, where Moncrief disclosed alleged trade secrets regarding a proposed joint venture with Gazprom and Occidental Chemical Corporation (Occidental) to build and operate a facility in Texas to import natural gas from Russia. Gazprom later met with Occidental to allegedly encourage it to pursue the joint venture without Moncrief. A Gazprom subsidiary subsequently established an entity in Texas to sell natural gas domestically. Moncrief sued the Gazprom entities for misappropriation of trade secrets and tortious interference. The trial court granted Gazprom's special appearance, and the court of appeals affirmed.

The Supreme Court held that there was personal jurisdiction over Gazprom as to the trade secrets claim. Gazprom claimed it did not purposefully avail itself in Texas because its intent in meeting with Moncrief in Texas was to discuss an unrelated federal suit. But what parties thought and said is no evidence of jurisdictional contacts. Rather, Gazprom's attendance at the meetings in Texas, where it received alleged trade secrets developed in Texas by a Texas company regarding a proposed Texas joint venture, was sufficient to confer jurisdiction. However, the Supreme Court held that there was no personal jurisdiction over Gazprom as to the claims that Gazprom tortiously interfered with Moncrief's relationship with Occidental. The tortious interference claims either arose from Gazprom's California contacts (which could not support jurisdiction in Texas) or from the contacts of a Gazprom subsidiary no longer in the proceeding that could not be imputed to Gazprom. The Supreme Court also affirmed the trial court's refusal to compel additional depositions because Moncrief did not demonstrate what additional jurisdictional contacts those depositions might reveal. The Court remanded for further proceedings.

XVI. JUVENILE JUSTICE

A. Jury Charge

1. In re L.D.C., 400 S.W.3d 572 (Tex. May 24, 2013) [12-0032].

At issue in this juvenile case was whether the trial court committed reversible error by submitting elements of an offense to the jury disjunctively, providing for the possibility of a less-than-unanimous verdict. L.D.C. fired gun shots at a party with houses and vehicles nearby. As he was running away through a field, he allegedly fired gun shots at a police officer when the officer was standing in front of houses. L.D.C. disputed that he was the person who fired at the officer. The trial court instructed the jury that they could find L.D.C. committed deadly conduct if, with requisite intent and recklessness, he shot either toward a vehicle, referring to the first shooting, or toward a habitation, referring to the second. L.D.C. did not preserve error by objecting to the disjunctive jury instruction. The jury found that L.D.C. committed deadly conduct and aggravated assault on a peace officer with a deadly weapon, and the trial court adopted the jury's findings. The court of appeals affirmed the aggravated assault adjudication but reversed on deadly conduct, applying the criminal standard for reversible error and concluding that the disjunctive jury instruction was reversible error.

The Supreme Court granted the State's petition for review regarding L.D.C.'s adjudication for deadly conduct and held that under either the civil or the criminal error preservation standard, the error in this case was not reversible. The Court reasoned that from the evidence and the jury's finding of aggravated assault, it was highly likely that the jury unanimously agreed that L.D.C. committed deadly conduct both during the party and in the field. The Court refused to base reversible error on the possibility that a jury member might act irrationally, which a correct instruction cannot prevent. Accordingly, the Court reversed the judgment of the court of appeals and rendered judgment for the State.

XVII. MARITIME LAW

A. Specific Orders Doctrine

1. King Fisher Marine Serv., L.P. v. Tamez, 2012 WL 1964567 (Tex. App.—Corpus Christi 2012), *pet. granted*, 57 Tex. Sup. Ct. J. 10 (October 18, 2013) [13-0103].

At issue in this maritime case is: 1) whether a general order given in an emergency should be the legal equivalent of a specific order; and 2) whether a jury charge objection presented before the charge is read to the jury but after the deadline posed by a docket control order is timely. In 2008, Jose H. Tamez injured his back while

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working aboard a drudging vessel. The injury occurred when Tamez responded to his captain shouting at him to assist him and another shipman attempting to lift and control a heavy object. Tamez aided the men, but may have failed to drop the tool he held, forcing him to lift with only one arm and causing the injury. When Tamez sued his employer King Fisher, King Fisher asserted that Tamez's negligent response to the order contributed to his injuries. Prior to trial, the trial court judge instructed the parties to have their proposed jury charges and objections before the court by a certain time. After that deadline, but before the charge was read, King Fisher made one objection that the trial court deemed untimely and refused to consider. A jury found that both King Fisher and Tamez were negligent and each was 50% responsible for Tamez's injuries, but determined that Tamez's actions were in response to a specific order. The trial court entered judgment on the verdict without reducing the recovery for Tamez's percentage responsibility. The court of appeals affirmed the trial court's application of the specific orders doctrine and found King Fisher waived its jury charge argument for untimeliness.

The Supreme Court granted King Fisher's petition for review and heard oral arguments on December 5, 2013.

XVIII. MEDICAL LIABILITY

A. Expert Reports

1. Certified EMS, Inc. v. Potts, 392 S.W.3d 625 (Tex. February 15, 2013) [11-0517].

At issue in this case is whether expert reports in health care liability cases are required to address every theory of liability pleaded by the claimant. Cherie Potts alleged that she was assaulted by a nurse who was an employee of the hospital staffing service owned by Certified EMS. Potts pleaded several theories of vicarious and direct liability against Certified EMS, but provided expert reports that only sufficiently addressed her vicarious liability theory. Certified EMS objected to the expert reports and, following Pott's attempt to cure the alleged deficiencies, moved to have the case dismissed. Certified EMS argued that the direct liability allegations made by Potts must be sufficiently addressed in an expert report.

The trial court denied Certified EMS's motion to dismiss and the court of appeals affirmed. The court of appeals held that because Potts's expert reports sufficiently addressed one of her pleaded theories, her entire case could proceed past the expert report stage. The court of appeals noted that the Texas Medical Liability Act only required that an expert report be provided for each health care liability claim, which the Act defined as a cause of action. Referencing the Supreme Court's discussion of causes of action in *In re Jordan*, 249 S.W.3d 416 (Tex. 2008), the court of appeals reasoned that an expert report need only be filed for each set of operative facts that gives rise to one or more bases for suing. Thus, an expert report that sufficiently addresses only one theory of liability within a cause of action is adequate.

The Supreme Court affirmed the court of appeals' judgment but declined to follow the court's reasoning concerning causes of action. It held that if a claimant's expert reports adequately address at least one pleaded theory of liability against a defendant the entire case may proceed against that defendant past the expert report stage. The Court found that the language of the Texas Medical Liability Act, the Legislature's intent, and the practical considerations involved in health care liability claims supported its holding.

2. CHCA Woman's Hosp., L.P. v. Lidji, 403 S.W.3d 228 (Tex. June 21, 2013) [12-0357].

The Texas Medical Liability Act (TMLA) requires a claimant to serve an expert report on each defendant against whom a health care liability claim is asserted no later than 120 days after the original petition is filed. At issue in this case is whether a claimant's nonsuit before the expiration of that deadline tolls the expert-report period. The Lidjis (as next friends for their child) sued CHCA Woman's Hospital for medical malpractice on April 2, 2009. They nonsuited their claims on July 27, 2009, 116 days after filing suit. The Lidjis filed a new lawsuit asserting health care liability claims against CHCA on April 15, 2011, and served an expert report on CHCA the same day. The trial court denied CHCA's motion to dismiss for failure to timely serve the expert report. On interlocutory appeal, the court of appeals affirmed, holding that a

nonsuit tolls the deadline for submitting an expert report.

The Supreme Court affirmed, holding that, when a claimant nonsuits a health care liability claim before the expiration of the statutory deadline to serve an expert report and subsequently refiles the claim against the same defendant, the expert-report period is tolled between the date nonsuit was taken and the date the new lawsuit is filed. The Court concluded that, while the statute neither expressly allows nor expressly prohibits tolling in the event of a nonsuit, construing the statute to allow tolling (1) promotes consistency with the TMLA's structure and the Court's precedent (2) protects a claimant's absolute right to nonsuit, and (3) promotes the TMLA's purposes of reducing expense and eliminating frivolous claims early in the lawsuit. Because the Lidjis nonsuited their claims before the expiration of the expert-report deadline and served a report on CHCA the same day they refiled their claims, the Lidjis complied with the TMLA's expert-report requirement, and CHCA was not entitled to dismissal.

3. TTHR Ltd. P'ship v. Moreno, 401 S.W.3d 41 (Tex. April 5, 2013) [11-0630].

At issue in this medical malpractice case was whether Moreno served TTHR Limited Partnership d/b/a Presbyterian Hospital of Denton (Presbyterian) with expert reports meeting the requirements of the Texas Medical Liability Act (TMLA). Claudia Moreno, pregnant with twins, was admitted to Presbyterian for difficulties associated with the pregnancy. Presbyterian's nurses had trouble monitoring Moreno, so they paged the physician on call. She and Moreno's regular doctor, Dr. Marc Wilson, attended to Moreno the next morning. Dr. Wilson induced labor and used forceps and vacuum extraction to deliver the second baby, F.C. F.C. suffered blood loss and a hypoxic-ischemic insult. It was later determined that his nervous system and kidneys were damaged.

Moreno, sued Presbyterian for its own alleged negligence and vicarious liability for the alleged negligence of its nurses and the doctors. After the trial court found that her two expert reports failed to show a causal connection between the alleged failures of the hospital and nurses to meet the applicable standards of care and F.C.'s neurological injury, it granted Moreno a thirty-day extension to cure the reports. Moreno filed a third report, and the trial court then held that Moreno had met TMLA's requirements. The court of appeals affirmed as to the adequacy of the reports regarding Moreno's claim that Presbyterian was vicariously liable for the doctors' negligence, but held that the reports were inadequate as to the direct liability claims and the vicarious liability claims based on the nurses' actions. The appeals court remanded the case for the trial court to consider granting another thirty-day extension for Moreno to cure her reports.

After the Supreme Court heard oral argument in this case, it held in *Certified EMS, Inc. v. Potts*, 392 S.W.3d 625 (Tex. 2013) that the TMLA does not require an expert report for each liability theory plead against a defendant. The Court found Moreno's expert reports addressing Presbyterian's alleged liability for the doctors' actions adequate and therefore concluded that her suit against Presbyterian—including her claims that Presbyterian has direct and vicarious liability for the nurses actions—could proceed. Accordingly, the Court did not need to consider whether the TMLA authorized the court of appeals to remand the case to the trial court for it to consider granting a second extension of time for Moreno to cure her reports.

4. Zanchi v. Lane, 408 S.W.3d 373 (Tex. August 30, 2013) [11-0826].

This case involved the expert-report requirement of the Texas Medical Liability Act (TMLA). At issue was whether a plaintiff complies with the TMLA's mandate that the report be served on a "party" by serving it on a defendant who has not yet been served with process. Reginald Lane filed health care liability claims under the TMLA against Michael Zanchi, M.D., and others. The TMLA requires a plaintiff to serve an expert report on each party within 120 days of filing a petition. Before Zanchi was served with citation, Lane sent an expert report to Zanchi's place of employment via certified mail within the 120-day deadline. After subsequently being served with citation, Zanchi filed a motion to dismiss, arguing that he was not a "party" to Lane's suit until he was served with process, so

any transmittal of the report to him before the date he was served with process could not satisfy the TMLA's requirements. The trial court denied the motion to dismiss, and the court of appeals affirmed.

The Supreme Court affirmed, holding that a defendant named in a health care liability claim under the TMLA is a party regardless of whether he has been served with process. The Court held that this interpretation of the term "party" is consistent with the common law as well as the purpose of the expert-report requirement, which is to eliminate frivolous claims early in the litigation while preserving meritorious ones. The Court went on to examine the TMLA's requirement that a defendant file and serve any objections to the sufficiency of an expert report within twenty-one days of service, holding that when a defendant is served with a report before being served with process, the objection period does not begin to run until service of process is accomplished. Because Zanchi filed no objections to the sufficiency of the report within twenty-one days of being served with process, such objections were waived. Finally, the Court held that the method of service of an expert report prior to service of process need not comply with the requirements of Rule 106 of the Texas Rules of Civil Procedure, which apply solely to service of citation.

B. Health Care Liability Claims

1. Bioderm Skin Care, L.L.C. v. Sok, 345 S.W.3d 189 (Tex. App.—Dallas 2011), *pet. granted*, 56 Tex. Sup. Ct. J. 277 (February 15, 2013) [11-0773].

At issue in this case is whether a claim for injuries arising out of laser hair removal constitutes a health care liability claim subject to the requirements of the Texas Medical Liability Act (TMLA). Bioderm Skin Care, LLC (Bioderm) is owned by Dr. Quan Nguyen, a licensed physician, and offers laser hair removal services. Sandee Sok purchased a package from Bioderm, which included multiple visits to have hair removed, and underwent hair removal procedures for over a year. Then, Sok allegedly suffered second-degree burns on her legs, which resulted in scarring. Sok contended that the burns were caused by the laser operator's negligence. The laser operator was not a licensed physician. Sok sued Bioderm and Dr. Ngyuen, asserting vicarious liability and seeking to recover damages for the burns she suffered. Sok did not file an expert report as required by the TMLA. Subsequently, Bioderm and Dr. Nguyen moved to dismiss the suit for Sok's failure to file an expert report, but the trial court denied their motion. The court of appeals affirmed, holding that, because Sok's claims were not health care liability claims, Sok was not required to file expert reports.

Bioderm and Dr. Nguyen filed a petition for review in the Supreme Court. They argue that Sok's claims are health care liability claims as defined in the TMLA. Consequently, they contend that when Sok failed to file an expert report, the trial court should have dismissed the claims. Specifically, Bioderm and Dr. Nguyen argue that Bioderm qualifies as a physician and/or health care provider and that laser hair removal is "treatment" under the TMLA. The Supreme Court originally denied the petition for review but then granted it on a motion for rehearing. The Court heard oral argument on September 9, 2013.

2. PM Mgmt.-Trinity NC, LLC v. Kumets, 404 S.W.3d 550 (Tex. June 28, 2013) [12-0451].

At issue in this case is whether the trial court properly refused to dismiss a claim that a nursing home unlawfully discharged a resident in retaliation for complaints made by the resident's family. The trial court found the family's medical expert report deficient and dismissed their remaining claims under the Texas Medical Liability Act (TMLA). The nursing home appealed, arguing that the court should also have dismissed the family's retaliation claim. The court of appeals affirmed, concluding that the retaliation claim was not a health care liability claim (HCLC) under the TMLA because it did not involve injury to or death of the claimant.

The Supreme Court reversed in part, affirmed in part, and remanded the case to the trial court. The Court reasoned that because the family did not appeal the trial court's determination that many of their claims were HCLCs, those claims were established to be HCLCs for purposes of the case. Because their retaliation claim was based on the same underlying facts as those HCLCs, the trial court should have dismissed the retaliation claim as an HCLC as well. The Supreme Court

remanded with orders to dismiss the case and to award appropriate attorney's fees and costs of court to the nursing home.

3. Psychiatric Solutions, Inc. v. Palit, S.W.3d , 56 Tex. Sup. Ct. J. 946 (Tex. August 23, 2013) [12-0388].

At issue in this case was whether an employee's claims against his mental health hospital employer alleging inadequate security and training were health care liability claims. Kenneth Palit was a psychiatric nurse at Mission Vista Behavioral Health Center. He was injured at work while restraining a patient during a behavioral emergency and sued the operators of the center (Mission Vista) regarding his personal injuries. When he failed to timely file an expert report, Mission Vista moved to dismiss. The trial court denied the motion to dismiss and the court of appeals affirmed.

The Supreme Court held that the claims were health care liability claims in light of the 2003 amendments to the Texas Medical Liability Act (TMLA). Those amendments broadened the TMLA to include claims by claimants, not just patients, for alleged departures from standards of medical care, health care, safety, or professional or administrative services directly related to health care. Palit's suit alleged that Mission Vista failed to provide proper security, a safe working environment, and training. These allegations claimed departures from accepted standards of health care and safety, making Palit a claimant and his claim health care liability claims. Because the TMLA requires dismissal of health care liability claims when no expert report is timely filed, the Court dismissed the claims and remanded to the trial court for an assessment Mission Vista's request for statutory attorney's fees.

Justice Boyd, joined by Justice Lehrmann, concurred. The concurrence agreed with the Court's disposition of the claims at issue, but disagreed with the Court's construction of the TMLA that claims of violations of safety standards do not have to be directly related to health care. But because the claims in this case were directly related to health care, the concurrence agreed they were health care liability claims.

C. Informed Consent

1. Felton v. Lovett, 388 S.W.3d 656 (Tex. November 30, 2012) [11-0252].

At issue in this case was whether the possibility that a patient, due to an undetectable physical condition, will suffer a severe, negative reaction to a procedure is a risk that is inherent in the procedure. Aaron Felton sought treatment for neck pain from Brock Lovett, a chiropractor. Lovett performed a forceful manipulation and Felton suffered a stroke resulting from a vertebral artery dissection. Felton sued, alleging that Lovett had failed to disclose the risks associated with the neck manipulations and was negligent in treating him. The jury failed to find that Lovett's negligence proximately caused Felton's injury, but did find that Lovett failed to disclose to Felton the risks inherent in treatment that could have influenced a reasonable person in making a decision to give or withhold consent. The trial court rendered judgment awarding the damages found by the jury, less offsets, plus prejudgment interest.

Lovett appealed. For the law governing Felton's claim for lack of informed consent, the court of appeals looked to Section 74.101 of the Medical Liability Act. The court of appeals concluded that the risk of a vertebral artery dissection was not inherent in the procedure Lovett performed because it only arose when some other factor or condition was present. Accordingly, the court reversed judgment for Felton and rendered judgment for Lovett.

The Supreme Court granted Felton's petition for review. The Court held that Felton's suit was not based on a failure to disclose the risks of "medical care or surgical procedure" and was not covered by Section 74.101. The Court instead applied the common law duty to "make a reasonable disclosure to a patient of risks that are incident to medical diagnosis and treatment." To determine whether the vertebral artery dissection and stroke Felton suffered was a risk inherent in Lovett's treatment, the Court asked whether the risk "exist[ed] in and is inseparable from the procedure itself." The Court held that the risk of vertebral artery dissection and stroke is inherent in the treatment Lovett performed on Felton, and Lovett should have disclosed the risk to Felton. The Court therefore reversed the judgment of the

court of appeals and remanded the case to the court of appeals to consider issues that court had not reached.

XIX. MUNICIPAL LAW

A. State Law Preemption

1. S. Crushed Concrete, LLC v. City of Hous., 398 S.W.3d 676 (Tex. February 15, 2013) [11-0270].

At issue in this case is whether the Texas Clean Air Act (TCAA) preempts a Houston ordinance. The City of Houston denied a permit to Southern Crushed Concrete (SCC) to move a concrete-crushing facility to a new location. The Texas Commission on Environmental Quality had previously issued a permit authorizing construction of the facility at the proposed location, but the concrete-crushing operations would violate a municipal ordinance's location restriction. SCC sued Houston, seeking a declaration that the city ordinance is preempted and an injunction against its enforcement. The parties filed cross-motions for summary judgment, and the trial court granted the City's motion, denied SCC's motion, and dismissed SCC's claims with prejudice. The court of appeals, with one justice dissenting, affirmed, holding that the ordinance is neither preempted nor unconstitutional.

The Supreme Court reversed the judgment of the court of appeals and rendered judgment for SCC, holding that the ordinance is preempted. The Supreme Court relied on section 382.113(b) of the TCAA, which provides that "[a]n ordinance enacted by a municipality . . . may not make unlawful a condition or act approved or authorized under [the TCAA] or the [TCEQ's] rules or orders." TEX. HEALTH & SAFETY CODE § 382.113(b). The Court explained that, because the ordinance makes it unlawful to build a concrete-crushing facility at a location that was specifically authorized under the TCEQ's orders by virtue of the TCEQ permit, the TCAA preempts the Houston ordinance.

XX. NEGLIGENCE

A. Affirmative Defenses

1. Dugger v. Arredondo, 408 S.W.3d 825 (Tex. August 30, 2013) [11-0549].

The issue in this case was whether the common law unlawful acts doctrine survives as an independent affirmative defense in light of Texas's proportionate responsibility scheme and the statutory affirmative defense provided in section 93.001 of the Texas Civil Practice and Remedies Code. Geoffrey Dugger, 25, and Joel Martinez, 21, spent one Friday evening watching TV, eating pizza, drinking tequilla, smoking a marijuana "blunt," and snorting "cheese"—a mixture of black tar heroin and Tylenol PM—in Dugger's bedroom in the house he shared with his parents. As the evening progressed, Martinez fell asleep on Dugger's bed and then began vomiting while still unconscious. Dugger tried to wake him to no avail and yelled down the hall to his parents. Dugger called Martinez's mother, Mary Ann Arredondo, and told her Martinez had been drinking and was throwing up. After about fifteen minutes, Dugger's father called 911, and an ambulance and police arrived at the Dugger house. Dugger never told the authorities nor Arredondo that Martinez had ingested heroin. Martinez died shortly after reaching the hospital.

Arrendondo sued Dugger under the wrongful death and survival statutes, alleging that Dugger was negligent both in failing to call 911 immediately and in failing to disclose Martinez's heroin use to the paramedics. Dugger raised an affirmative defense based on the common law unlawful acts doctrine, which bars a plaintiff from recovering if the plaintiff was engaged in an unlawful act at the time of the injury that was inextricably intertwined with the injury. The trial court granted summary judgment on Dugger's affirmative defense. The court of appeals reversed, holding that section 93.001 of the Civil Practice and Remedies Code supersedes the common law unlawful acts doctrine. Dugger appealed to the Supreme Court.

Affirming the court of appeals' judgment, the Supreme Court held that the common law unlawful acts doctrine is not available as an affirmative defense in personal injury and wrongful death cases. The unlawful acts doctrine fits within the categories of former common law

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defenses that are now exclusively controlled by Chapter 33's proportionate responsibility scheme, thus Chapter 33 controls over the unlawful acts doctrine in the wrongful death context. In light of Chapter 33's abrogation of common law defenses that provide a complete bar to plaintiff's recovery—including the unlawful acts doctrine—the Court interpreted subsection 93.001(c) as an indication that the Legislature intended the statutory affirmative defense to resurrect only a small portion of the unlawful acts doctrine by providing a complete bar to recovery only in the certain limited circumstances articulated by subsections 93.001(a)(1) and (2).

Justice Hecht, joined by Justices Willett and Devine, dissented. Justice Hecht reasoned that the unlawful acts doctrine is not merely contributory negligence that can be compared with other fault in allocating responsibility for a plaintiff's injuries. The dissent contended that neither the language of the statutory provisions at issue nor public policy support the holding of the Court, and the unlawful acts doctrine protects the integrity of the legal system. Accordingly, Justice Hecht would have held that the wrongful acts doctrine has not been abrogated by either the comparative responsibility scheme in Chapter 33 or section 93.001's affirmative defense.

B. Cause-In-Fact

1. Rodriguez-Escobar v. Goss, 392 S.W.3d 109 (Tex. February 1, 2013) [10-0511].

At issue in this case was whether there was legally sufficient evidence to support a jury finding that a doctor's failure to involuntarily hospitalize a patient who later committed suicide proximately caused her death. Beverly Goss was hospitalized for depression after she discharged a shotgun in her house and expressed suicidal thoughts to a police officer. After receiving some treatment she was transferred to another hospital where she was interviewed by Dr. Diego Rodriguez-Escobar. He concluded that she did not meet the criteria for involuntary hospitalization and released her, recommending out-patient treatment for her depression. Three days later, Goss committed suicide. Goss's family sued Dr. Rodriguez-Escobar for negligence in failing to involuntarily hospitalize her. The jury found against Dr. Rodriguez-Escobar and the trial court rendered judgment on the verdict. The court of appeals affirmed, but the Supreme Court reversed.

In the Supreme Court, Dr. Rodriguez-Escobar did not challenge the jury finding that he was negligent. Rather, he argued that the evidence was not sufficient to support a finding that his negligence proximately caused Goss's death. The Court agreed. A physician's failure to hospitalize a person who later commits suicide is a proximate cause of the suicide only if the suicide probably would not have occurred if the decedent had been hospitalized. The Court, therefore, considered whether absent the negligence of Dr. Rodriguez-Escobar—but for his negligence—Goss would not have committed suicide. According to testimony during trial, Goss likely would not have needed hospitalization for the rest of her life; she probably would not have shot herself while hospitalized; and hospitalization could have provided acute, immediate, short-term help, but her long-term status could not be predicted. The Court concluded this evidence that Goss's depression was to some degree treatable or that Goss would not have been able to shoot herself while hospitalized was not evidence that hospitalization would have made her suicide unlikely after she was released. The Court held that there was no evidence that Dr. Rodriguez-Escobar's failure to hospitalize Goss was a cause-in-fact of her suicide and rendered judgment in his favor.

C. Substantial-Factor Causation

1. Bostic v. Georgia-Pac. Corp., 320 S.W.3d 588 (Tex. App.—Dallas 2010), *pet. granted*, 56 Tex. Sup. Ct. J. 277 (February 15, 2013) [10-0775].

At issue in this case is whether the standard for proving that exposure to asbestos caused harm, set out in *Borg-Warner Corp. v. Flores*, 232 S.W.3d 765 (Tex. 2007), is appropriate when the harm is mesothelioma rather than asbestosis, and whether the plaintiffs satisfied the appropriate standard in this case.

After Timothy Bostic died from mesothelioma, family members filed wrongful death claims against a number of manufacturers of asbestos-containing products. At the time of trial, Georgia-Pacific Corp. was the only remaining defendant. The product at issue was Georgia-Pacific's asbestos-containing joint

compound, which Georgia-Pacific sold from 1965 until 1977, when the U.S. Government banned asbestos-containing joint compound. A jury found in the Bostics' favor, and the trial court rendered judgment on the verdict, awarding the Bostics $7.6 million in compensatory damages and $4.8 million in punitive damages. The court of appeals reversed, holding that under *Borg-Warner Corp.*, there was no evidence that Georgia-Pacific's product substantially caused Timothy Bostic's mesothelioma.

The Supreme Court granted the Bostics' petition for review and heard oral argument on September 9, 2013.

XXI. OIL AND GAS

A. Accommodation Doctrine

1. Merriman v. XTO Energy, Inc., 407 S.W.3d 244 (Tex. June 21, 2013) [11-0494].

At issue in this case was whether a mineral lessee failed to accommodate an existing use of the surface when the lessee drilled a gas well. Homer Merriman owns the surface rights of a forty-acre parcel of land. He leases fifteen other parcels of land for use in his cattle operation. Once a year, Merriman brings the cattle to his forty-acre "home tract" to sort and work them. XTO Energy, the lessee of the forty-acre tract's mineral estate, constructed a 13,000 foot producing gas well on the property. Merriman filed suit claiming that XTO failed to accommodate his existing use because the gas well prevented the annual sorting and working of his cattle. The trial court granted XTO's motion for summary judgment and denied Merriman's. The court of appeals affirmed.

The Supreme Court affirmed. To obtain relief on a claim that the mineral lessee has failed to accommodate an existing use of the surface, the surface owner has the burden to prove that (1) the lessee's use completely precludes or substantially impairs the existing use, and (2) there is no reasonable alternative method available to the surface owner by which the existing use can be continued. The Court disagreed with the court of appeals that Merriman had to prove he could not make *any* alternative use of the surface for general agricultural purposes or that he could not alternatively conduct his cattle operations on tracts he held by short term leases. But the Court still concluded that Merriman failed to present evidence that he had no reasonable alternatives for his "existing use" of the tract. He presented affidavit testimony that XTO's activities prevented him from using his existing pens and corral, but he did not provide facts or evidence showing that there was no reasonable alternative method for him to conduct the sorting, working, and loading activities somewhere else on the tract. Therefore, the Court concluded that Merriman failed to raise a material fact issue as to whether XTO failed to accommodate his existing use.

XXII. PROCEDURE—APPELLATE

A. Effect of Non-Suit

1. CTL/Thompson Tex., LLC v. Starwood Homeowner's Ass'n, Inc., 390 S.W.3d 299 (Tex. January 25, 2013) [11-0920].

At issue in this case was whether a plaintiff's nonsuit mooted an appeal of the denial of a motion to dismiss with prejudice for failure to comply with Texas Civil Practice and Remedies Code § 150.002(e), which states that a court may dismiss an action arising out of the provision of professional services by a licensed or registered professional if a plaintiff fails to include a certificate of merit. The Supreme Court held that the appeal was not mooted.

Respondent Starwood Homeowner's Association sued petitioner CTL/Thompson Texas for providing deficient geotechnical engineering services. CTL moved for dismissal with prejudice on the ground that the certificate of merit was deficient. The trial court denied this motion, and Starwood nonsuited before the appeal could be decided. The court of appeals held that this nonsuit deprived it of jurisdiction.

The Supreme Court reversed and explained that a motion for sanctions is affirmative relief that survives nonsuit if the nonsuit would otherwise defeat the purpose of the sanction. The Supreme Court held that section 150.002 motions for dismissal with prejudice survive nonsuit because the purpose of such motions is to deter frivolous lawsuits and they could not serve that purpose if plaintiffs could sidestep them with impunity. The Court remanded the case to the court of appeals.

B. Jurisdiction

1. In re J.M., 396 S.W.3d 528 (Tex. March 15, 2013) [12-0836].

At issue in this case was whether filing a motion for new trial and notice of appeal combined in one document can invoke appellate jurisdiction. Kimberly Spencer, the mother of J.M. and Z.M. filed a "Motion for New Trial or, in the Alternative, Notice of Appeal" with the trial court. The district clerk forwarded this filing to the appellate court as a notice of appeal. The court of appeals dismissed the suit for want of jurisdiction, holding the combined filing was not a bona fide attempt to invoke appellate jurisdiction. Spencer appealed.

The Supreme Court held that, because the combined filing was both titled a notice of appeal and expressed Spencer's intent to appeal the trial court's decision, the document was a bona fide attempt to invoke appellate jurisdiction. The Court reversed and remanded for the court of appeals to consider the merits of the appeal.

C. Post-Judgment Interest

1. Phillips v. Bramlett, 407 S.W.3d 229 (Tex. June 7, 2013) [12-0257].

This case involves the calculation of post-judgment interest and the jurisdiction of the trial and appellate courts after the Supreme Court remanded the case to the trial court for entry of judgment. The Court held that after its remand to the trial court, the trial court had jurisdiction to render a final judgment in the case, even if the judgment is erroneous. The court of appeals had jurisdiction to hear an appeal from the trial court's final judgment on remand, even though the Court had mandamus jurisdiction to enforce its prior judgment and even though the Court declined to exercise that mandamus jurisdiction. The Court also held that post-judgment interest ran from the date of the trial court's original judgment, rather than the remand judgment. Finally, the Court held that it was unnecessary for the trial court to vacate its original judgment in the case because the judgment had been reversed in its entirety on appeal, such that the judgment had no continuing effect; but for the same reason, the Court held that any error in vacating the judgment was harmless.

XXIII. PROCEDURE—PRETRIAL

A. Dismissal

1. Crosstex Energy Servs., L.P. v. Pro Plus, Inc., 388 S.W.3d 689 (Tex. App.—Houston [1st Dist.] 2012), *pet. granted*, 56 Tex. Sup. Ct. J. 492 (April 19, 2013) [12-0251].

At issue in this case is whether a defendant can waive its right to dismissal under section 150.002 of the Texas Civil Practice and Remedies Code due to the plaintiff's failure to file a certificate of merit, and if so, whether the defendant's conduct waived the dismissal right under the facts of this case.

Crosstex provides natural gas gathering and transmission pipeline services to energy producers and consumers. The Godley Compressor Station in Johnson County is a part of its operations. In late 2008, a gasket connection failed at the station, resulting in a fire and significant property damage. Crosstex sued Pro Plus, Inc.—a registered engineering firm and the principal contractor for the construction of the station—for negligence, negligent misrepresentation, breach of warranty, and breach of contract.

In early November 2010—a few days before limitations on some of Crosstex's claims were to run—the parties entered into a Rule 11 agreement that moved the expert-designation date to April 2011. After limitations had run, Pro Plus moved to dismiss Crosstex's claims due to Crosstex's failure to file a certificate of merit with its original petition, as required by subsection 150.002(a). Crosstex responded by arguing that Pro Plus had waived its right to dismissal by signing the Rule 11 agreement, and moved for an extension of time to file its certificate of merit. The trial court denied Pro Plus's motion to dismiss and ordered that Crosstex be given additional time to file its certificate of merit. Pro Plus appealed. The court of appeals reversed and remanded, holding that, even if the subsection 150.002(e)'s dismissal right could be waived, Pro Plus had not waived the dismissal right in this case. Thus, the court of appeals concluded that Crosstex's failure to file a certificate of merit with its original petition required dismissal of Pro Plus's causes of action. Justice Keyes dissented, arguing that Pro Plus waived its right to a certificate of merit by substantial participation in the litigation process.

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The Supreme Court granted Crosstex's petition for review and heard oral argument on September 10, 2013.

2. Jaster v. Comet II Constr., Inc., 382 S.W.3d 554 (Tex. App.—Austin 2012), *pet. granted*, 56 Tex. Sup. Ct. J. 685 (June 21, 2013) [12-0804].

At issue in this case is whether a defendant who files a third-party complaint or cross-claim must file a certificate of merit under the 2005 version of section 150.002(a) of the Texas Civil Practice and Remedies Code. In 2008, a homeowner, who was not a party to this appeal, sued Comet II Construction, Inc. and its principals, Joe and Laura Schneider, (collectively, Comet II), alleging that his house foundation was improperly designed and built. Comet II filed a third-party complaint seeking contribution and indemnity from Gary Wayne Jaster, a licensed professional structural engineer, and Austin Design Group (ADG), a seller of stock architectural plans. ADG filed a cross-claim against Jaster and Comet II for contribution and indemnity. None of the parties filed certificates of merit with their initial claims. Jaster filed motions to dismiss ADG's and Comet II's claims, arguing that Comet II's third-party complaint and ADG's cross-claim were deficient because they were not accompanied by a certificate of merit as required by section 150.002(a) of the Texas Civil Practice and Remedies Code. The trial court denied these motions to dismiss, and the court of appeals, with one justice dissenting, affirmed.

The Supreme Court granted Jaster's petition for review and heard oral argument on October 9, 2013.

B. Forum Non Conveniens

1. In re Ford Motor Co., 2012 WL 5949026 (Tex. App.—Corpus Christi 2012), *argument granted on pet. for writ of mandamus*, 56 Tex Sup. Ct. 1213 (September 20, 2013) [12-0957].

At issue is this case is whether decedents and wrongful death beneficiaries are a single "plaintiff" for purposes of section 71.051(h)(2), of the Texas Civil Practices and Remedies Code (CPRC) regarding forum non conveniens. Also at issue is whether only the decedent's residence is considered when determining whether a plaintiff is a "legal resident" of Texas under section 71.051(e), Texas-Resident Dismissal Exception, of the CPRC.

Juan Tueme Mendez was driving a Ford Explorer in Nuevo Leon, Mexico, when a tire allegedly failed, causing a rollover accident. Cesar Mendez Tueme, Juan's brother, was the front seat passenger and died in the accident. Both were Mexican citizens. Juan filed suit against his brother Cesar's estate. The estate was opened in the Probate Court of Hidalgo County. Yuri Tueme, Cesar's daughter and a Texas resident, was appointed administrator. Yuri then filed a third-party action against Ford and Michelin on behalf of the estate. Subsequently, Yuri and other family members intervened in the lawsuit to assert claims against Ford and Michelin, both individually and as wrongful death beneficiaries of the decedent. Two of the intervenors were Melva Uranga and her daughter, J.T., both U.S. citizens and Texas residents. J.T. is the child of Melva and Cesar. Juan later amended his petition to add claims against Ford and Michelin. Michelin has since settled with Real Parties.

Ford argues that under section 71.051(h)(2), the decedent and wrongful death beneficiaries are a single "plaintiff," and the residency of the decedent controls for the purposes of the statute's Texas-resident dismissal exception. Ford argues that the Texas Supreme Court has previously interpreted substantially similar language regarding the definition of "claimant" to mean that the two parties are considered one "plaintiff" for purposes of the statute. Ford further argues that treating the parties as a single plaintiff is consistent with the plain language of the statute and also with the general rule that "wrongful death action plaintiffs stand in the legal shoes of the decedent." Ford additionally argues that an intervenor assumes the same position as a "third-party plaintiff" and thus does not constitute a "plaintiff" under CPRC section 71.051(h)(2).

Real Parties in Interest argue that the express language of the statute inclusively defines "plaintiff," and that the statute contemplates that there may be multiple plaintiffs to a wrongful death or personal injury action. They further argue that there is no legal basis for holding that only the decedent's residence controls for determining the Texas-resident dismissal

exception, and that there is no express language in the forum non conveniens statute suggesting the decedent's residence controls.

Also at issue in this case is whether dismissal is warranted under the forum non conveniens factors in section 71.051(b).

The Supreme Court granted argument on the petition for writ of mandamus and heard oral argument on December 3, 2013.

C. Rule 167 Agreements

1. Amedisys, Inc. v. Kingwood Home Health Care, LLC, 375 S.W.3d 397 (Tex. App.—Houston [14th Dist.] 2012), *pet. granted*, 56 Tex. Sup. Ct. J. 749 (June 28, 2013) [12-0839].

At issue in this case is whether the common law mirror image rule applies to Rule 167 settlement agreements and, if so, whether the mirror image rule has been satisfied here. Amedisys, Inc. sued Kingwood Home Health Care, LLC. Kingwood sent a proposed Rule 167 agreement to Amedisys, and Amedisys sent an email back saying it accepted the proposed 167 agreement and attaching a purported acceptance. However, Amedisys's purported acceptance contained only some of the terms from Kingwood's offer. Kingwood declined to pay the settlement amount. Amedisys moved for the trial court to enter summary judgment enforcing the Rule 167 agreement, which the trial court did. The court of appeals, with one justice dissenting, reversed and remanded, finding that the purported Rule 167 agreement was not a binding agreement. The court of appeals held that Amedisys had not complied with the mirror image rule because it had not accepted all the terms of Kingwood's offer. The dissent argued that Amedisys had accepted all the terms of Kingwood's offer, and therefore the acceptance did comply with the mirror image rule. In its petition to the Court, Amedisys argues that the common law mirror image rule should not apply to Rule 167 agreements because they are governed by rule and statute rather than by common law. Amedisys further argues that, even if the mirror image rule does apply, Amedisys's acceptance did mirror all lawful terms of the offer. The Supreme Court granted Amedisys's petition for review and heard oral argument on October 10, 2013.

D. Statute of Limitations

1. Lexington Ins. Co. v. Daybreak Express, Inc., 393 S.W.3d 242 (Tex. January 25, 2013) [11-0597].

The issue in this case was whether an amendment adding a claim for cargo damage against a common carrier under the Carmack Amendment to the Interstate Commerce Act, 49 U.S.C. § 14706, relates back for limitations purposes, under Texas Civil Practice and Remedies Code § 16.068, to a timely-filed action for breach of an agreement to settle the damage claim. J. Supor and Son Trucking and Rigging Company engaged Daybreak Express, Inc. to transport computer equipment belonging to Burr Company Environments, Inc. Burr claimed that the equipment was damaged on arrival and that Daybreak agreed to settle. Lexington Insurance Co., as J. Supor's insurer and subrogee, sued Daybreak for breach of the settlement agreement, and later amended to add a cargo damage claim. Daybreak responded that the cargo damage claim was barred by limitations. The trial court rendered judgment against Daybreak on the cargo damage claim, but a divided court of appeals reversed, holding that the cargo damage claim was barred by limitations because this claim did not relate back to the timely-filed claim for breach of a settlement agreement. The Supreme Court reversed.

As the Court explains, under section 16.068, a claim added in an amended petition will not be barred by limitations if that claim relates back to a cause of action in an earlier, timely-filed pleading, "unless the amendment or supplement is wholly based on a new, distinct, or different transaction or occurrence." The Court concluded that Lexington's new claim related back to its original claim because both arose out of the same transaction or occurrence—the shipment of the computer equipment—and involved a common core of operative facts.

The Court, in granting in part Daybreak's limited motion for rehearing, substituted a new opinion that, instead of rendering judgment, remanded the case to the court of appeals for further proceedings.

E. Statute of Repose

1. Nathan v. Whittington, 408 S.W.3d 870 (Tex. August 30, 2013) [12-0628].

At issue in this case was whether a statute that suspends the running of a statute of limitations applies to a statute of repose that otherwise "extinguishes" a plaintiff's cause of action. Stephen Whittington initially filed suit in Nevada and prevailed on his claims against a former business partner. To collect on the judgment, he then filed another suit in Nevada against both his former partner and Marc Nathan. In the second suit, Whittington alleged that his former partner had fraudulently transferred assets to Nathan in violation of the Nevada Uniform Fraudulent Transfer Act. After six months, the Nevada court dismissed the case for lack of personal jurisdiction over Nathan. Less than sixty days later, Whittington filed suit in Texas under the Texas Uniform Fraudulent Transfer Act, alleging the same fraudulent transfer to Nathan.

The trial court found that Whittington's claim was extinguished under the Act's statute of repose and granted Nathan's motion for summary judgment. Whittington appealed, and the court of appeals held that section 16.064(a) of the Texas Civil Practice & Remedies Code suspended the expiration of the statute of repose, allowing Whittington to file this new suit within sixty days of dismissal in the Nevada court. The Supreme Court reversed the court of appeals' judgment, and reinstated the trial court's judgment of dismissal.

The Supreme Court held that statutes of repose are absolute in nature, and their key purpose is to eliminate uncertainties under the related statute of limitations to create a final deadline for filing suit that is not subject to any exceptions. The parties and the court of appeals agreed that the provision in the Fraudulent Transfers Act is a statute of repose rather than a statute of limitations. The Supreme Court held that section 16.064(a) of the Remedies Code applies only to a "statute of limitations." Therefore, because a trial court may dismiss a case for lack of jurisdiction long after the statute of repose extinguishes the cause of action, application of section 16.064 would frustrate the certainty the statute of repose provides.

Thus, the Supreme Court held that because the provision at issue in the Fraudulent Transfer Act is a statute of repose, and section 16.064 of the Remedies Code applies only to statutes of limitations, the latter does not save or revive Whittington's claim.

F. Summary Judgment

1. Nall v. Plunkett, 404 S.W.3d 552 (Tex. June 28, 2013) [12-0627].

This case presents a procedural issue concerning summary judgment motions. John Plunkett sued Justin Nall, Robert Nall, Olga Nall, and Justin Kowrach for personal injuries suffered at a New Year's Eve party at the Nalls' residence. Plunkett alleged that the Nalls, knowing that alcohol would be consumed, required all attendees who remained at the house after midnight to spend the night. Plunkett contends that the Nalls failed to enforce the rule. Around 2:00 a.m., Plunkett was severely injured when allegedly attempting to keep other guests from leaving the house in a friend's vehicle. Plunkett pled a negligence cause of action against the Nalls based on an undertaking theory and for premises liability. The Nalls moved for summary judgment, arguing that they owed no duty to Plunkett. The trial court granted the motion as to all claims except for the premises liability claim, which Plunkett eventually nonsuited. Plunkett appealed. The only issue briefed by Plunkett on appeal was whether the trial court erred by granting summary judgment on Plunkett's undertaking claim, arguing that the Nalls failed to address that claim. A divided court of appeals reversed, holding that the trial court erred in granting summary judgment due to the Nalls' failure to address Plunkett's negligent-undertaking theory in their motion.

The Supreme Court reversed the court of appeals' judgment and reinstated the trial court's judgment. The Court held that the Nalls' summary judgment motion specifically addressed the negligent-undertaking claim by arguing that *Graff v. Beard*, 858 S.W.2d 918 (Tex. 1993), forecloses the assumption of any duty (i.e., an undertaking) by a social host. The Court also concluded that Plunkett waived the issue of whether summary judgment was proper on the merits by failing to brief it on appeal.

G. Venue

1. In re Cook, 2012 WL 1288766 (Tex. App.—Austin 2012), *argument granted on pet. for writ of mandamus*, 56 Tex. Sup. Ct. J. 137 (December 14, 2012) [12-0308].

At issue in this case is whether, in deciding a writ for injunction brought by the Office of the Attorney General's Consumer Protection Division, a court should prioritize the permissive venue provision of section 17.47(b) of the Texas Deceptive Trade Practices Act (DTPA) in the Texas Business & Commerce Code, or the general mandatory venue provisions for injunctions in sections 15.0642 and 65.023(a) of the Texas Civil Practice & Remedies Code.

In 2011, the State—through the Consumer Protection Division of the Attorney General's Office—sued John Cook, two other individual defendants, and five related corporate defendants (collectively, the Cooks) for alleged violations of sections 17.46(a) and (b) of the DTPA. The Cooks were in the business of selling gasoline in Texas, and the State alleged they had engaged in "cross-dumping," or diluting their mid-grade and premium grade gasolines by mixing them with regular fuel, and misrepresented the integrity of the gasoline to Texas consumers. The State sued in Travis County, on the basis that the Cooks had allegedly "done business in" Travis County, pursuant to section 17.47(b) of the DTPA. The Cooks, however, argued that because the State was primarily seeking injunctive relief, the mandatory venue provisions for injunction suits in the Texas Civil Practice & Remedies Code applied. The Cooks denied "doing business in" Travis County, and instead requested that venue be transferred to Montgomery County, where all but one individual defendant was domiciled and the corporate defendants had their principal places of business.

The trial court denied the Cooks' motions to transfer venue, concluding that DTPA section 17.47 was a statutory injunction provision that trumped the generalized mandatory venue provisions. The court of appeals denied the Cooks' mandamus petition. The Supreme Court denied the Cooks' request for temporary relief, but granted argument on their petition for writ of mandamus and heard oral argument on February 6, 2013.

2. In re Fisher, 2012 WL 299546 (Tex. App.—Fort Worth 2012), *argument granted on pet. for writ of mandamus*, 56 Tex. Sup. Ct. J. 749 (June 28, 2013) [12-0163].

At issue in this case is whether a limited partner has standing to bring claims arising out of misrepresentations and mismanagement of the partnership by his co-partners. A second issue is whether the allegations implicate mandatory contractual forum-selections, thus requiring transfer to the agreed-upon forum.

In May 2007, Mike Richey sold his oilfield services company, Richey Oilfield Construction, Inc. (Richey Oil), to Nighthawk Oilfield Services, Ltd. (Nighthawk). Nighthawk was comprised of a general partner and at least two other limited partners, Mark Fisher and Reece Boudreaux. Mike Richey remained the president of Richey Oil, which became a wholly-owned Nighthawk subsidiary. Richey requested that he have check signing authority for the Richey Oil bank account, which was funded by Nighthawk's revolving line of credit with Bank of America. Richey was also given a limited partnership interest in Nighthawk. Shortly after the acquisition, Nighthawk made a $20 million special distribution to its partners. Six months later, the company requested funds from its limited partners. According to Richey, Fisher and Boudreaux asked him to loan the company $1 million which would be repaid plus ten percent in six months. Six months later, Richey requested repayment of the loan and Fisher refused. In January 2009, Fisher and Boudreaux asked Richey to sign a memorandum agreeing that the funds were a capital contribution, not a loan. Richey refused. In May 2009, Bank of America stopped payment on Richey Oil checks for insufficient funds and returned them to the payees. Richey alleges Fisher told the payees the lack of funds was Richey's fault. One month later, Nighthawk and Richey Oil filed voluntary chapter 7 bankruptcy petitions.

Richey filed suit in Wise County alleging causes of action for defamation, common-law and statutory fraud, various breaches of fiduciary duty, violations of the Texas Securities Act, and "aiding and abetting" of those claims against Fisher, Boudreaux, and Bank of America. Fisher and Boudreaux, together, and Bank of America,

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separately, filed motions to dismiss and pleas to the jurisdiction, arguing that Richey's claims, if meritorious, belong to the Nighthawk or Richey Oil companies or now the bankruptcy trustee, not to Richey individually, and therefore, Richey lacks standing to bring these claims. In the alternative, Relators argued that Richey's claims must be transferred because each implicates a mandatory contractual forum-selection clause. The trial court denied all requested relief. Relators separately sought a writ of mandamus from the court of appeals, which denied relief without opinion.

The Supreme Court granted oral argument on Fisher and Boudreaux's petition for writ of mandamus and heard argument October 10, 2013.

XXIV. PROCEDURE—TRIAL AND POST-TRIAL

A. New Trial Orders

1. In re Toyota Motor Sales, U.S.A., Inc., 407 S.W.3d 746 (Tex. August 30, 2013) [10-0933].

At issue in this case was whether an appellate court can conduct a merits-based mandamus review of the reasons given by a trial court for granting a motion for new trial under *In re Columbia Medical Center of Las Colinas Subsidiary, L.P.*, 290 S.W.3d 204 (Tex. 2009). Also at issue was whether the trial court abused its discretion by granting a new trial in the interest of justice and as a sanction. Richard King was thrown from a vehicle and died. The King family sued Toyota, and the trial court granted the Kings' motion in limine to exclude an officer's testimony that King was not wearing his seatbelt. After the jury returned a verdict in Toyota's favor, the Kings moved for a new trial, arguing that Toyota's attorney violated the motion in limine and subsequent evidentiary rulings by referring to the testimony during closing argument. The trial court granted the Kings' motion, and Toyota sought mandamus relief in the court of appeals. The court of appeals held it did not have authority under *Columbia* to conduct a review of the reasons given for the granting of a motion for new trial and denied relief.

The Supreme Court conditionally granted mandamus relief. The Court explained that *Columbia* requires a trial court to provide understandable, reasonably specific, legally appropriate reasons for granting new trial. Without merits-based review these requirements would be meaningless because trial courts could set aside a jury verdict for reasons that are facially valid but unsupported by law or evidence. The Court held that merits review was appropriate and that the trial court's reasons for granting new trial in this case conflicted with the record, which showed that it was the Kings' attorney who originally introduced the officer's testimony into the record. Because the record did not support the trial court's order, the Supreme Court conditionally granted relief.

Justice Lehrmann, joined by Justice Devine, concurred in the Court's judgment, emphasizing that trial courts must still be allowed significant discretion in deciding whether to grant a new trial.

B. Post-Judgment Appellate Timetable

1. Brighton v. Koss, S.W.3d , 56 Tex. Sup. Ct. J. 953 (Tex. August 23, 2013) [12-0501].

At issue here was whether a subsequent judgment that did not grant all relief requested in a motion to modify the previous judgment restarted and extended the appellate deadlines. This case arose out of a divorce decree entered by the trial court on October 18, 2010. Thirty days later, Tara Brighton filed a motion to modify the decree and six days later Gregory Koss filed a notice of appeal. The trial court signed a second judgment on December 22, 2010. Brighton filed a notice of appeal on March 7, 2011, seventy-five days after the trial court's second judgment. The court of appeals dismissed Brighton's appeal as untimely.

The Supreme Court reversed, holding that the second judgment signed on December 22, 2010 restarted and extended the appellate timetable. Brighton's motion to modify requested that the Court (1) correct the original decree to identify the properties against which the equitable lien attaches; (2) reform the decree to include repayment terms of the economic contribution award; and (3) order Koss to sign a lien note and/or deed of trust to secure the equitable lien. The judgment signed on December 22 included relief as to Brighton's first request but did not mention or address the latter two requests. Because the December 22 judgment did not correct all the errors in Brighton's motion to modify, the motion operated to extend the

appellate deadlines applicable to the second judgment. Under the extended deadline, Brighton had ninety days to file her notice of appeal from December 22, 2010, which she did. Therefore, the court of appeals incorrectly dismissed her appeal.

XXV. PRODUCTS LIABILITY

A. Design Defects

1. Kia Motors Corp. v. Ruiz, 348 S.W.3d 465 (Tex. App.—Dallas 2011), *pet. granted*, 56 Tex. Sup. Ct. J. 277 (February 15, 2013) [11-0709].

At issue in this car crash case is whether there was evidence of a design defect, Kia had a complete defense under Texas Civil Practice and Remedies Code section 82.008 to the design defect claim, and whether the trial court erred by admitting into evidence a spreadsheet listing other warranty claims because they were not reasonably similar to the claimed defect.

Andrea Ruiz was fatally injured in a head-on collision while driving her 2002 Kia Spectra. The Kia's passenger-side front airbag deployed in the collision, but the driver-side front airbag did not. The Spectra's Airbag Diagnostic Unit (ADU) indicated there had been an opening in the electrical circuit for the driver-side airbag until it was closed by the force of the impact. This open circuit was the reason the airbag did not deploy. The Ruiz family brought suit against Kia for negligently designed connectors in the airbag circuitry that became loose before the accident, creating an open circuit that prevented the airbag from deploying. At trial the trial court admitted into evidence a spreadsheet showing that 432 airbag-related claims had been submitted to Kia, 67 of which involved the same error code that Ruiz's Spectra's ADU registered. A jury found for the Ruizes, finding that Kia had negligently designed the Spectra's airbag circuitry, and the court of appeals affirmed.

On petition for review to the Supreme Court Kia asserts that it is entitled to invoke the rebuttable presumption of no liability under Civil Practice and Remedies Code section 82.008 because the 2002 Kia Spectra was in compliance with Federal Motor Vehicle Safety Standard 208 for Occupant Crash Protection. Kia also asserts there was no evidence of a design defect because the Ruizes' expert did not identify a specific defect. Finally, Kia argues that the spreadsheet admitted at trial was inadmissible to prove liability because the other incidents were not reasonably similar to the incident at issue. The Supreme Court granted Kia's petition for review and heard oral argument on September 9, 2013.

XXVI. REAL PROPERTY

A. Contract for Deed

1. Morton v. Nguyen, S.W.3d , 56 Tex. Sup. Ct. J. 955 (Tex. August 23, 2013) [12-0539].

At issue in this real estate contract for deed case was whether a buyer who exercised the statutory right to cancel and rescind a contract for deed under Subchapter D of the Texas Property Code must restore to the seller all benefits the buyer received under the contract. In January 2007, Hung and Carol Nyugen entered into a contract for deed to purchase a home from Kevin Morton. Over the next three years, the Nguyens made their required monthly payments, and Morton provided the Nguyens with annual statements, including the amount of interest paid each year and the balance remaining under the contract, but not all the required information under section 5.007 of the Property Code. Because Morton had violated the disclosure rules of Subchapter D, the Nguyens notified him in November 2009 that they were exercising their statutory right to cancel and rescind the contract for deed.

Morton sued the Nguyens for breach of contract, and they countersued for monetary damages, rescission, and statutory damages under the Property Code, the Finance Code, and the Deceptive Trade Practices Act. Morton alleged that he was entitled to a setoff in the amount of the fair market rental value of the property for the time the Nguyens occupied the house. Following a bench trial, the trial court rendered judgment for the Nguyens, awarding them rescission and cancellation of the contract for deed and damages, including statutory penalties and mental anguish, plus costs and attorney's fees. Both parties appealed. The court of appeals affirmed the trial court's judgment awarding the Nguyens rescission and restitution under the Property Code, attorney's fees, and mental anguish damages, but reversed the trial court's judgment regarding statutory penalties. Only Morton appealed, arguing that the court of appeals erred by denying

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him mutual restitution and affirming the awards of attorney's fees and mental anguish damages after reversing the claims for statutory penalties.

The Supreme Court held, in light of *Cruz v. Andrews Restoration, Inc.*, 364 S.W.3d 817 (Tex. 2012), that Subchapter D's cancellation-and-rescission remedy contemplates mutual restitution of benefits among the parties. While a buyer is entitled to "a full refund of all payments made to the seller," rescission requires that the buyer also restore to the seller the value of the buyer's occupation of the property; otherwise, the buyer receives a windfall. Because the trial court here did not consider the value of the Nguyens' interim occupation of the property for the purpose of an offset, the Court remanded the case to the trial court to determine the rental value of the property during the Nguyens' occupation. Additionally, the Court reversed the award of attorney's fees and mental anguish damages because the court of appeals reversed the only two causes of action that supported an award of attorney's fees or mental anguish damages—the claim for liquidated damages under section 5.077 of the Property Code and the Finance Code claims—and no remaining cause of action supported an award of attorney's fees or mental anguish damages.

Justice Boyd, joined by Justice Willett and Justice Lehrmann, concurred with the reversal of attorney's fees and mental anguish damages, but dissented from the Court's holding regarding mutual restitution. Justice Boyd would have held that the language of Subchapter D indicates that the cancellation-and-rescission remedy is unilateral. Because the Legislature has said that buyers are entitled to "a full refund of all payments made to the seller," the dissent disagreed that Morton was entitled to mutual restitution.

B. Easements

1. Brannan v. State, 390 S.W.3d 301 (Tex. January 25, 2013) [10-0142].

After storms moved the vegetation line landward of petitioners' beach houses, the Village of Surfside Beach refused to allow the houses to be repaired or to have access to utilities, and the State asserted that the houses encroached on a public access easement and must be removed. Petitioners sued, contending among other things that the State's assertion amounted to a constitutionally compensable taking of their property. The court of appeals rejected petitioners' claims.

The Supreme Court granted the petition, vacated the court of appeals' judgment, and remanded the case to that court for further consideration in light of *Severance v. Patterson*, 370 S.W.3d 705, 725 (Tex. 2012), a decision issued in the interim, which concluded that "avulsive events such as storms and hurricanes that drastically alter pre-existing littoral boundaries do not have the effect of allowing a public use easement to migrate onto previously unencumbered property."

2. State v. NICO-WF1, L.L.C., 384 S.W.3d 818 (Tex. November 2, 2012) [11-0312].

This appeal questioned the validity of a condition placed on a dedicated public-street easement by the grantor. The dedication provided for a 100-foot-wide street easement but also provided that the street's curb lines should be fifteen feet inside the street's boundary lines. The issue was whether the grantor could use a curb-line condition to mandate how the State was to construct the street. The lower courts concluded that a curb-line condition could be used to limit the State's use of the dedicated street easement. The Supreme Court concluded that it could not.

The Court noted that the establishment, design, construction, and control of public streets was primarily a governmental function over which the government had full authority. The grantor therefore could not dedicate land for a public street and still retain control over the land in derogation of the public right conveyed. Because the curb line condition purported to limit the State's control, the condition was void but did not otherwise affect the dedication. The Court accordingly reversed the court of appeals' judgment which had upheld the curb-line condition and remanded the case to the trial court for further proceedings on the State's encroachment claim against the abutting land owner.

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3. Hamrick v. Ward, 359 S.W.3d 770 (Tex. App.—Houston [14th Dist.] 2011), *pet. granted*, 56 Tex. Sup. Ct. J. 344 (March 8, 2013) [12-0348].

Two main issues are presented in this case: (1) whether an implied easement by prior use endures after the necessity that created the easement has ended and (2) whether and how the affirmative defense of bona fide purchaser can be used when there is a claim of implied easement by prior use.

In 1953, a property owner sold a land-locked portion of his property. He allowed the buyers to use a dirt road easement that he had previously constructed in order to access their land. Several subsequent purchasers used the same dirt road for purposes of ingress and egress. A subdivision developer purchased the properties surrounding the land-locked parcel (including the remainder of the original owner's property) in the 1990s. The developer constructed a paved road that created a new means of access to the land-locked parcel, then owned by Anna Bell Gomez. However, Ms. Gomez was unable to access the paved road because of a city ordinance that prohibited unplatted properties from accessing the road. Ms. Gomez continued to use the dirt path as the sole means of access to her property, as did the subsequent purchasers of the property, the Wards. The developer unilaterally recorded Ms. Gomez's limited rights to use the dirt path to access her property, then sold the servient property to the Hamricks.

The Hamricks did not wish for the Wards to continue to use the dirt path, particularly when the Wards began to use it as a way for heavy construction trucks to access their property. The Hamricks sued the Wards and obtained a temporary injunction, which required the Wards to plat their land and create access to the paved road. In the remainder of the suit, the Hamricks claimed the affirmative defenses of bona fide purchaser, estoppel, and waiver. The trial court found that an implied easement still existed (despite the paved road) and rejected the Hamrick's affirmative defenses. The court of appeals held that the Wards had established the existence of an easement by prior use, reasoning that necessity need only exist at the time such an easement is created and is not required to be continuous. However, the court of appeals held that the Hamricks should be permitted to argue the bona fide purchaser defense, disagreeing with the trial court on this issue.

Both sides sought Supreme Court review. The Hamricks argue that continuing necessity is a requirement for the continued use of an implied easement. The Wards argue that because the Hamricks were on notice of the dirt path easement, they cannot use the bona fide purchaser defense, which requires that a purchaser have no notice of a third party's interest in the property. Further, the Wards argue that attorney's fees should have been rendered in their favor.

The Court granted the petitions for review and heard oral argument on September 11, 2013.

C. Inverse Condemnation

1. City of Lorena v. BMTP Holdings, L.P., 409 S.W.3d 634 (Tex. August 30, 2013) [11-0554].

At issue in this case was whether a municipality validly applied a moratorium on sewer connections against a previously approved development. After approving BMTP Holdings, L.P.'s (BMTP) final plat for a subdivision containing seven lots, the City of Lorena enacted a moratorium on sewer connections due to capacity issues with its sewer. BMTP sued for a declaratory judgment that the moratorium could not validly apply to its seven lots and sought damages under an inverse condemnation claim for a regulatory taking. The trial court granted summary judgment to the City on both claims. The court of appeals reversed, holding that the Local Government Code prevents moratoria from applying to approved development.

The Supreme Court held that the Local Government Code prohibits moratoria from applying to development that a municipality has approved at any stage of development by requiring municipalities to include a summary of the evidence that the moratorium does not affect approved development. The Supreme Court therefore affirmed the court of appeals' reversal of the summary judgment for the City on the declaratory judgment claim. The Supreme Court also held that fact issues existed with respect to the extent of the government intrusion that the trial court must resolve before determining whether a taking had occurred. The Supreme

Court also remanded the issue of attorney's fees under the declaratory judgment claim.

Justice Lehrmann concurred but wrote to emphasize that the harsh result of the City not being able to enforce a moratorium against development it had approved was required by the statute, and that the Local Government Code also requires municipalities to weigh the impact of new development on utilities when approving the development.

Justice Hecht, joined by Chief Justice Jefferson, dissented. The dissent concluded that the Court's reading of the statute rendered a portion of it (prohibiting municipalities from imposing moratoria on unaffected areas) meaningless. The dissent would have held that the City made sufficient findings to justify the imposition of the moratorium on the property in question.

2. El Dorado Land Co., L.P. v. City of McKinney, 395 S.W.3d 798 (Tex. March 29, 2013) [11-0834].

The issue in this case was whether a reversionary interest, consisting of the grantor's right to purchase real property on the occurrence of a future event, is a sufficient property interest to support an inverse condemnation claim. In 1999, El Dorado Land Company sold several acres of land to the City of McKinney for use as a park. El Dorado's special warranty deed provided that the conveyance was "subject to the requirement and restriction that the property shall be used only as a Community Park." If the City decided not to use the property for that purpose, the deed further granted El Dorado the right to purchase the property. Ten years after acquiring the property, the City built a public library on part of the land. After learning about the library, El Dorado notified the City by letter that it intended to exercise its option to purchase. After the City failed to acknowledge El Dorado's rights under the deed, El Dorado sued for inverse condemnation. The City asserted the trial court did not have jurisdiction because El Dorado sought contract damages but did not plead a contract claim and lacked standing because it did not have a property interest in the land. The trial court granted the City's jurisdictional plea and the appeals court affirmed, holding that inverse condemnation traditionally requires a property interest and that El Dorado sought compensation for a right to repurchase property under a contract.

The Supreme Court reversed and remanded, holding that El Dorado's reversionary interest was a compensable property interest that qualified as a basis for inverse condemnation. Under the deed, El Dorado's possessory interest was contingent on the property's use. If the City violated the deed restriction, El Dorado retained the power to terminate the City's estate. The deed referred to this power or right as an option, but it effectively functioned as a power of termination or right of reentry, a future interest in land compensable under the Takings Clause of the Texas Constitution.

D. Nuisance

1. Natural Gas Pipeline Co. of Am. v. Justiss, 397 S.W.3d 150 (Tex. December 14, 2012) [10-0451].

At issue in this case was whether there was sufficient evidence in the record to support a jury's damages award for diminished property values caused by a permanent nuisance, when the only evidence presented was conclusory and speculative testimony from property owners. In 1992, the Natural Gas Pipeline Company of America built a compressor station in Lamar County. Severe noise, odor, and lights from the station soon began to seriously disrupt the nearby residents, and between 1992 and 1998, William Justiss repeatedly called to express his complaints to the Company. The Company consistently maintained that the station complied with governmental permits and made only minor remedial changes in response to Justiss's complaints. But in 1998, the Texas Commission on Environmental Quality (TCEQ) cited the station for a Category 5 odor violation—the most severe possible.

Soon after, Justiss and eleven other nearby residents sued the Company, alleging the station's operations constituted either a temporary or permanent nuisance, and demanded damages for their diminished property values due to the station's operations. The jury found that the noise and odor from the station first created a permanent nuisance on June 12, 1998, the date of the TCEQ citation, and awarded damages to nine of the twelve plaintiffs for their lost property values. The trial court entered judgment on the verdict.

The court of appeals affirmed, and the Company petitioned the Supreme Court for review.

While the Court agreed with the court of appeals that some evidence supported the jury's finding of the nuisance's accrual date, the Court reversed the court of appeals' judgment with respect to liability and the damages award and remanded the case to the trial court for a new trial. Though the plaintiff homeowners had testified that the station's operations decreased their property values, none of them offered or explained any factual bases for that conclusion. The Court reiterated its holding in *Porras v. Craig*, 675 S.W.2d 503 (Tex. 1984), which held that under the Property Owner Rule, an owner is qualified to testify as to her property value, but the owner's testimony must be based on market value, rather than merely intrinsic or speculative value of the property. The Court also relied on its previous decision in *Coastal Transp. Co. v. Crown Central Petroleum Corp.*, 136 S.W.3d 227 (Tex. 2004), which held that a qualified expert's bare conclusions, without more, would not support a finding of gross negligence. The Court concluded that the Property Owner Rule is an exception to the requirement that a witness must otherwise establish his qualifications to express an opinion on land values—that is, it fulfills the same role that expert testimony does; but an owner's simple offering of mere conclusory or speculative testimony will not support a judgment and award of damages. Similarly, naked assertions of "market value," without more to substantiate them, are insufficient. Property owners must provide the factual bases on which their opinions rest.

E. Recording of Real Estate Documents

1. Tex. Dep't of Transp. v. A.P.I. Pipe & Supply, LLC, 397 S.W.3d 162 (Tex. April 5, 2013) [10-1020].

At issue in this case was whether a judgment nunc pro tunc could change a condemnation action judgment's grant of land from a fee simple into an easement after the trial court's plenary jurisdiction over the condemnation action judgment had passed. The Supreme Court held that, although such a judgment nunc pro tunc could make a substantial change to the original judgment if it corrected a clerical error, the record did not reflect any such clerical error in this case. Therefore, the Court found that the judgment nunc pro tunc was void. Thus, API (the party claiming ownership under the judgment nunc pro tunc) held no ownership interest in the land and could not pursue an inverse condemnation action against the Texas Department of Transportation (TxDOT) over TxDOT's use of the land. The Court also held that the innocent purchaser doctrine did not protect API because the original condemnation action judgment was also recorded. Finally, the Court held that the equitable estoppel doctrine did not protect API because equitable estoppel usually does not apply against the State and this case did not present any reason to depart from that general rule. Accordingly, the Court dismissed the case against TxDOT.

Justice Lehrmann, joined by Justice Guzman, concurred, emphasizing that a judgment nunc pro tunc can make a significant change to an original judgment as long as the significant change corrects a clerical error in the original judgment. However, there was no evidence that there was a clerical error in the condemnation action judgment, so the judgment nunc pro tunc was void.

XXVII. TAXES

A. Sales Tax

1. Combs v. Health Care Serv. Corp., 401 S.W.3d 623 (Tex. June 7, 2013) [11-0283, 11-0652].

At issue in this case was whether the sale-for-resale exemption applied to purchases and leases of tangible goods and purchases of services by a federal government contractor to perform a federal government contract. As to the goods, the contract provided that the contractor immediately transferred title for the goods to the federal government. The Court held that this title transfer qualified as a "resale" of the goods under the statutory definition of the sale-for-resale exemption. A previous case also reached this result, and the Court held that the statute had not changed in any relevant way since that previous case. The Court further held that the contractor's purchase of services that were performed on the federal government's behalf also qualified as a sale-for-resale under the statutory language. Finally, however, the Court held that the taxpayer

was not due a refund on sales tax paid on certain leases of tangible personal property.

2. Combs v. Roark Amusement & Vending, L.P., S.W.3d , 56 Tex. Sup. Ct. J. 368 (Tex. March 8, 2013) [11-0261].

In this tax refund case, Roark Amusement & Vending sought a sales tax refund for taxes it paid on toys used to stock its coin-operated amusement machines. The trial court granted summary judgment for the Comptroller. The court of appeals, reversed, agreeing with Roark that the purchases of the toys qualified for the sale-for-resale exemption.

The Supreme Court affirmed the court of appeals judgment. It agreed with Roark that section 151.006(a)(3) of the Tax Code provided the applicable sale-for-resale exemption. This provision applies to a sale of "tangible personal property to a purchaser who acquires the property for the purpose of transferring it . . . as an integral part of a taxable service." The Court rejected the Comptroller's argument that the exemption only applies if a toy is transferred every time the game is played. Section 151.302(b) states that "[t]angible personal property used to perform a taxable service is not considered resold unless the care, custody, and control of the tangible personal property is transferred to the purchaser of the service," but the Court did not agree with the Comptroller that the use of "the purchaser" manifested legislative intent that a toy must be transferred each and every time the game is played. The Court noted that in conducting a plain meaning analysis of a statute, courts should not disregard the economic realities underlying the transactions in issue. In this case, the transfer of toys in a game of chance was an integral part of the taxable service.

The Court also rejected the Comptroller's alternative argument that the service was not a "taxable service" because section 151.335(a) exempts amusement services provided by coin-operated machines from the sales tax. Reviewing chapter 151 as a whole, the Court concluded that amusement services were defined in chapter 151 as taxable services, but were nevertheless subject to an exemption. In other words, the Court agreed with the court of appeals that a service can be a taxable service under the relevant provisions in chapter 151, including section 151.0101, whether or not it is actually taxed in the particular instance in question because of an exemption found later in the chapter. An exemption would not be necessary but for the fact that the service is a taxable service in the first instance.

B. 911 Tax

1. Tracfone Wireless, Inc. v. Comm'n on State Emergency Commc'ns, 397 S.W.3d 173 (Tex. April 5, 2013) [11-0473].

At issue in this case was whether the original emergency 911 fee (the e911 fee) statute, Tex. Health & Safety Code § 771.0711, which charges telephone users a tax to pay for 911 services, applied to prepaid wireless customers, even before the addition of a statutory section, § 771.0712, specifically imposing an e911 fee on prepaid wireless customers. The prepaid wireless providers had paid the fees out of their own pockets and requested a refund. The Supreme Court held that, regardless of whether § 771.0711 was ambiguous, it did not apply to the prepaid wireless providers. First, if the statutory text was unambiguous, prepaid wireless customers would now be subject to unconstitutional double taxation, because both provisions would now apply to prepaid service providers. Second, if the statutory text was ambiguous, the presumption in favor of the taxpayer would apply. Principles of agency deference do not trump the presumption in the taxpayer's favor in this circumstance (where the issue is discerning the scope of a tax rather than the scope of an exemption from a tax). Accordingly, the Court rendered judgment that Section 771.0711 imposed no e911 fee on the Prepaid Providers' wireless services.

XXVIII. TIM COLE ACT

A. Eligible Claimants for Compensation

1. In re Blair, 408 S.W.3d 843 (Tex. August 23, 2013) [11-0441].

The issue in this original mandamus proceeding against the Comptroller under Texas Government Code §22.002 was whether a person who would otherwise be entitled to compensation for wrongful imprisonment under the Tim Cole Act, TEX. CIV. PRAC. & REM. CODE §§ 103.001–.154, cannot recover because, before he was exonerated of that charge, he "is convicted"

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of another "crime punishable as a felony." *Id.* § 103.154(a). The Court denied mandamus relief, with plurality and concurring opinions adopting different rationales for denial, and four justices dissented based on their reading of the Act.

In 1994, Michael Blair was wrongfully convicted and sentenced to death for the 1993 murder of a seven-year-old girl. While Blair steadfastly maintained his innocence of murder, in 2003 he admitted to sexually abusing children in 1992 and 1993. In 2004, Blair pleaded guilty to four felony counts of indecency with a child and was given four life sentences, three consecutive and one concurrent. Blair is currently serving those sentences.

In 2008, the Court of Criminal Appeals set aside Blair's murder conviction based on DNA evidence establishing his actual innocence. In June 2009, Blair applied to the Comptroller for compensation for having been wrongfully incarcerated from 1993, when he was arrested for murder, to 2004, when he was sentenced for the sexual abuse felonies. That application was denied and the Supreme Court denied review. In 2011, Blair filed a second application for the same compensation. The Comptroller observed that the second application was "virtually identical" to the first.

The Tim Cole Act entitles a person who has been wrongfully imprisoned to compensation from the State, but payments terminate "if, after the date the person becomes eligible for compensation . . . , the person *is convicted* of a crime punishable as a felony." *Id.* § 103.154(a) (emphasis added). The plurality opinion discussed whether to construe the statutory phrase "is convicted" to refer to either: (1) a claimant's status as a felon, or (2) the act of a claimant's felony adjudication. The first construction would result in the denial of payments for wrongful imprisonment to a claimant who, during the time he would receive them, has been convicted of a felony, whether the conviction happened before or after he became eligible for compensation. The second construction would result in a felon-claimant's compensation being conditioned on the date of his felony conviction, barring compensation if the conviction occurred after the date the claimant becomes eligible.

Justice Hecht's plurality opinion, joined by Justice Green, Justice Guzman, and Justice Devine, adopted the first construction, reasoning that the second construction would lead to unreasonable results: it would treat felon–claimants who committed the exact same acts disparately on the basis of whether they were convicted of the felony before or after their eligibility for compensation for wrongful imprisonment. The plurality stated that it "will not read a statute to draw arbitrary distinctions resulting in unreasonable consequences when there is a linguistically reasonable alternative, as there is [here]." Accordingly, the plurality concluded that the Comptroller correctly denied Blair's claim for compensation. The plurality also concluded that the Act does not require claimants to submit an application to cure after a denial of compensation as a prerequisite of judicial review "if there is nothing to cure," as it found was the case here, and the plurality also concluded that the Act does not prohibit successive applications.

Justice Boyd, joined as to Part IV by Justice Willett and Justice Lehrmann, concurred in the decision. In Part IV of his opinion, Justice Boyd disagreed with the plurality opinion's construction of the phrase "is convicted," finding it to be an unreasonable construction. Justice Boyd concluded that only the second construction considered by the plurality was linguistically reasonable and would therefore have found Blair to be eligible for compensation had his petition not been procedurally barred from judicial review. Nonetheless, Justice Boyd concurred in the result, concluding that judicial review of Blair's second application was procedurally barred. In support of that conclusion, Justice Boyd reasoned that the Act prohibited successive applications and Blair's second application was successive. Justice Boyd further reasoned the Act required claimants to submit an application to cure to the Comptroller following a denial as a prerequisite of judicial review and Blair failed to submit such an application following the denial of his second application.

Justice Lehrmann, joined by Chief Justice Jefferson, Justice Johnson, and Justice Willett, dissented. Justice Lehrmann concluded that Blair was not procedurally barred from seeking judicial review of the Comptroller's decision for the same reasons as the plurality, but she would depart from the plurality and hold that Blair's felony

convictions do not foreclose eligibility for compensation under the Act.

XXIX. WORKERS' COMPENSATION

A. Exclusive Remedy

1. City of Bellaire v. Johnson, 400 S.W.3d 922 (Tex. June 7, 2013) [11-0933].

At issue in this case was whether a city's workers' compensation insurance provided the exclusive remedy for an employee of a staffing company who worked for a city. Johnson sued the City of Bellaire and Rosa Larson, an employee of the City, after losing an arm while working on a garbage truck driven by Larson. Johnson was a worker furnished to the City by Magnum staffing services. The City paid Magnum and Magnum paid Johnson. The City and Larson filed a plea to the jurisdiction and a motion for summary judgment, asserting governmental immunity. The trial court dismissed the case. The court of appeals reversed and remanded, concluding that the workers' compensation exclusive bar remedy did not apply. In a per curiam opinion, the Supreme Court reversed the judgment of the court of appeals and rendered judgment dismissing Johnson's claims.

The Court held that the evidence established as a matter of law that the City provided Johnson with workers' compensation coverage, and therefore his exclusive remedy was the compensation benefits to which he was entitled. The Court based its opinion on *Port Elevator-Brownsville, L.L.C. v. Casados*, 358 S.W.3d 238 (Tex. 2012), in which it held that, with certain exceptions not relevant to this case, an employee cannot avoid the exclusive remedy bar under the Texas Labor Code by arguing that he was not covered under the specific terms of his employer's workers' compensation insurance policy. The Court found that the evidence established as a matter of law that the City controlled the details of Johnson's work and thus that Johnson was its employee. The City's immunity from Johnson's suit would be waived by the Texas Tort Claims Act, but for the exclusive-remedy bar provided by the Workers' Compensation Act. Thus, as a matter of law, Johnson's exclusive remedy was the compensation benefits to which he was entitled. The Court rendered judgment dismissing Johnson's claims against the City and Larson for want of jurisdiction.

B. Payment of Benefits

1. DeLeon v. Royal Indem. Ins. Co., 396 S.W.3d 527 (Tex. November 16, 2012) [10-0319].

Severiano DeLeon suffered a back injury while in the course and scope of his employment. More than a year later, he had spinal fusion surgery. DeLeon's employer's workers' compensation insurance carrier, Royal Indemnity Co., paid medical benefits but contested the extent of his entitlement to impairment income benefits. Section 408.123 of the Labor Code requires that an impairment rating be based upon the Guides to the Evaluation of Permanent Impairment published by the American Medical Association. TEX. LAB. CODE § 408.123. The designated doctor appointed by the Texas Department of Insurance's Workers' Compensation Division determined that DeLeon had an impairment rating of twenty percent. The doctor based that decision on two advisories issued by the Division to guide the calculation of impairment ratings for workers who had undergone spinal surgery and who had not had pre-operative spinal flexion x-rays. The hearing officer accepted the designated doctor's rating, and the Division's appeals panel upheld the examiner's decision.

Royal Indemnity appealed the Division's decision to the trial court. While the appeal was pending, the court of appeals decided *Texas Department of Insurance Division of Workers' Compensation v. Lumbermens Mutual Casualty Co.*, 212 S.W.3d 870 (Tex. App.—Austin 2006, pet. denied). In that case, the court held that the Division acted ultra vires in issuing the advisories, which provided for the calculation of impairment ratings not based on the Guides, *id.* at 876–77, and the Division later repealed them. Based on *Lumbermens*, the trial court reversed the agency's decision and ruled that DeLeon had no valid impairment rating. The court of appeals affirmed.

The Supreme Court reversed the court of appeals' judgment and remanded DeLeon's case to the trial court with instructions to remand the case to the Division based on *American Zurich Insurance Co. v. Samudio*, 370 S.W.3d 363 (Tex. 2012). In that case, the Court held that the absence of a valid impairment rating that had been

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submitted to the agency did not deprive a reviewing court of subject matter jurisdiction. It also held that the Workers' Compensation Act permits a court to remand to the Division if it decides that the worker has no valid impairment rating.

2. Liberty Mut. Ins. Co. v. Adcock, S.W.3d , 56 Tex. Sup. Ct. J. 1161 (Tex. August 30, 2013) [11-0934].

At issue in this case was whether the Texas Workers' Compensation Act (TWCA) allows a permanent determination of lifetime income benefits (LIBs) to be re-opened. Ricky Adcock was determined to be eligible for LIBs under the TWCA in 1991 after losing the use of his foot and hand. The workers' compensation carrier sought to re-open that determination approximately ten years later when it believed Adcock had regained some use of his hand and foot. The Texas Department of Insurance, Division of Workers' Compensation (Division), re-opened the determination and held that Adcock remained entitled to LIBs. On judicial review, the trial court granted Adcock's motion for summary judgment and the court of appeals affirmed—holding that the Legislature removed the mechanism to re-open LIB determinations in 1989.

The Supreme Court affirmed, holding that the current version of the TWCA lacks any mechanism to re-open the LIB determination. The Court explained that the TWCA is a comprehensive statutory scheme, such that courts should not engraft new rights and remedies the Legislature did not incorporate. The Court reasoned that the Legislature removed the mechanism to re-open LIB determinations in 1989, making the LIB determination permanent in nature.

Justice Green, joined by Chief Justice Jefferson and Justice Hecht, dissented. The dissent concluded that the TWCA gives the Division the power to re-open the LIB determination, which is especially important because the Division cannot determine if a claimant who is eligible for LIBs will remain eligible for life.

3. State Office of Risk Mgmt. v. Carty, *certified question accepted*, 56 Tex. Sup. Ct. J. 863 (August 23, 2013) [13-0639].

The Supreme Court of Texas accepted the following certified questions from the United States Court of Appeals for the Fifth Circuit:

1. In a case involving a recovery by multiple beneficiaries, how should the excess net settlement proceeds above the amount required to reimburse a workers' compensation carrier for benefits paid be apportioned among the beneficiaries under section 417.002 of the Texas Labor Code?
2. How should a workers' compensation carrier's right under section 417.002 to treat a recovery as an advance of future benefits be calculated in a case involving multiple beneficiaries? Should the carrier's right be calculated in a case involving multiple beneficiaries? Should the carrier's right be determined on a beneficiary-by-beneficiary basis or on a collective-recovery basis?
3. If the carrier's right to treat a recovery as an advance of future benefits should be determined on a beneficiary-by-beneficiary basis, does a beneficiary's nonbinding statement that she will use her recovery to benefit another beneficiary make the settlement allocation invalid?

Christy Carty's husband died in a Texas Department of Public Safety training accident. Christy Carty, on behalf of herself and her three children, filed a products-liability and wrongful death suit against DPS, two DPS employees, Kim Pacific Martial Arts, and Ringside, Inc. The claims against DPS were dismissed on sovereign immunity grounds and the claims against the DPS employees were dismissed on official immunity grounds. Ringside settled with Carty for $100,000. Kim Pacific Martial Arts reached a settlement with Christy Carty and agreed to pay $800,000. State Office of Risk Management (SORM) intervened and sought reimbursement from the Kim Pacific settlement for workers' compensation benefits it paid to Carty and her children. Christy Carty is no longer eligible for benefits because she has remarried, however, the three Carty children remain eligible.

The district court held a prove-up hearing to determine whether the settlement should be

approved and how it should be apportioned. The district court approved the settlement and apportioned $290,000 for attorneys' fees and costs, $78,000 to SORM for reimbursement, $351,000 to Christy Carty, and $80,000 to the three children. Christy Carty indicated to the district court that she would use her payments to provide for her children. The district court also determined that SORM was entitled to suspend future payments to Carty's children until the value of the suspended payments equaled the amount of the settlement proceeds allocated to the children.

SORM appealed the settlement apportionment to the Fifth Circuit Court of Appeals. SORM contended that under the Texas Labor Code the district court was required to apportion its recovery in excess of past benefits in the manner that maximizes a carrier's ability to treat the recovery as an advance of future benefits. Alternatively SORM argued the entire recovery should be considered in determining the suspension of payments. SORM also argued that if one beneficiary intends to use the funds for the benefit of another beneficiary, SORM would be deprived of its subrogation rights.

The Fifth Circuit noted that Texas law is clear that a workers' compensation carrier has a first-money right of reimbursement for benefits paid, but Texas law is not clear on apportionment of recovery in excess of past benefits by multiple beneficiaries. The Fifth Circuit found there were colorable arguments under Texas law both in favor and against SORM's construction of the Labor Code. The Supreme Court accepted the certified questions on August 23, 2013 but has not yet scheduled oral argument.

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INSURANCE LAW UPDATE

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State Bar of Texas
30TH ANNUAL LITIGATION UPDATE INSTITUTE
January 9-10, 2014
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"Personhood and the Right to Privacy in Texas" *South Texas Law Review 48, no. 3* (Spring 2007) 575-611.
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INSURANCE LAW UPDATE

Litigation Update Institute (State Bar of Texas, January 9-10, 2014, Austin, Texas)

By William J. Chriss[1]

It is an axiom of insurance law that an insurance company cannot "create coverage" by waiver or estoppel.[i] This "hornbook" statement of law, however, is often misleading. The case law is clear that "conditions" of the policy are waivable, and in fact are often waived.[ii]

I. CONDITIONS

There are several "conditions" of the insurance policy which insurance companies can and do waive often. In general, a "condition" is any provision of the policy requiring an act to be performed by the insured as a prerequisite to payment or coverage under the policy. Most property policies have a separate section called "conditions," containing several numbered sections defined as conditions, and hence, as matters that can be waived by the insurance company, or that it can be estopped to assert. While insurance carriers often argue that it is the policyholder's burden to show compliance with conditions precedent in the policy in order to recover,[iii] there is substantial authority that failure of a condition does not BAR recovery, but only requires abatement until the condition is satisfied. See *State Farm Gen. Ins. Co. v. Lawlis*, 773 S.W.2d 948, 949 (Tex. App. – Beaumont 1989, no writ) (per curium) (citing *Humphrey v. Nat'l Fire Ins. Co*., 231 S.W. 750 (Tex. 1921)). In addition, substantial compliance is usually all that is required in connection with conditions precedent of a policy.[iv] Discussion of specific conditions that are commonly encountered follows.

A. Notice Of Loss

1. Requirement of Notice

Many policies provide that in case of loss, the insured should give prompt written notice of the facts relating to the claim. Note that there is usually no requirement to "make a claim" but only to give "notice of facts." Some policies do not even require that the notice be in writing. Most often the notice is called in to the agent by the insured, and the agent submits an ACORD form to the carrier in writing, in behalf of the insured. As with any other condition, this requirement can be waived by any action by the carrier inconsistent with relying upon it. This could include acknowledging the claim in writing without requesting further written notice, beginning an investigation, or making payment.[v] Again, acceptance of late written notice by the insuror or any conduct by the insurer inconsistent with an intention to rely on such notice to avoid liability accomplishes a waiver.[vi] By analogy to cases involving the condition requiring a proof of loss, many actions by the insuror will waive any requirement of prompt written notice, or else create an estoppel where the insuror cannot rely upon such failure to avoid the claim. Such acts include either recognizing partial liability on the claim or denying liability on the claim on grounds other than the failure to provide notice.[vii]

For this reason, it is almost never a good idea for an insured to sign a non-waiver agreement or to fail to object to a unilateral reservation of rights letter.[viii]

2. Late Notice

Carriers will sometimes defend on the basis that the insured did not promptly notify the carrier of the loss. There are several responses available to the insured in such circumstances. First, there are excuses for failing to give notice sooner. For example, if it is not reasonably possible to provide notice substantially sooner than it is made, such as an excusable lack of knowledge on the part of the insured that any claim needs to be made, such excuse will generally explain and avoid any defense of late notice. See *Williams v. Travelers Insurance Company*, 220 F.Sup. 411 (WD Tx. 1963). Where no specific time is given in the policy for giving notice or filing proofs of loss, a reasonable time is assumed.[ix] This invokes the standard of ordinary prudence.[x] "As soon as practical," or "immediately" requires only that notice be given within a reasonable time in light of all the circumstances.[xi] Lack of knowledge by an insured that will excuse the giving of notice or proof of loss can include mental incapacity.[xii] It may also include legal minority.[xiii] Although an insured is not automatically excused by ignorance of the notice requirements of the policy or an inability to read, lack of education in business matters may be considered in determining whether he acted reasonably under all of the surrounding circumstances.[xiv]

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Authorities are not uniform in connection with the effect of an insured's ignorance or lack of understanding as to how his insurance coverage relates to any occurrence or manifestation. Texas courts have held that an insured's ignorance of the existence of a policy, unmixed with his own negligence will constitute an excuse,[xv] but federal courts have held that an insured's failure to know he had coverage for a particular type of claim did not constitute a valid excuse for failure to give notice as to such claim.[xvi] On the other hand, an insured cannot be required to give notice of an accident or forward notice of a claim before he knows of the existence of the policy and the fact that he is covered thereby.[xvii] The best exposition of the categories of excuse available to an insured is found in *Employers Casualty Company v. Scott Electric Company*, 513 S.W.2d 642 (Tex.App.—Corpus Christi, 1974). That court held that there are four general categories of excuse for failure to give prompt notice to an insurance carrier: (1) the insured's lack of knowledge of the accident (or occurrence); (2) the insured's belief that the accident or occurrence was trivial and no claim could be made; (3) the insured's belief that he was not covered; and (4) insured's illness or incapacity.

The most common situation is where an insured notices damage to his dwelling, but either believes the damage to be trivial (not exceeding the deductible), or not caused by a peril covered under his insurance policy. For example, an insured might note some mold or mildew on the surface of a wall and not discover for a long period of time that there is a covered peril inside the wall, which has produced substantial contamination that will be expensive to remove. Two recent cases, by inference, lend support to the notion that the duty to give notice does not arise in such situations until such time as a reportable and significant loss arguably caused by a covered peril has been discovered. In *State Farm v. Rodriguez*, supra, an insured noticed some wall cracks that might be symptomatic of foundation movement, but did not make a claim until noticing a foundation crack that the court held was the first indication of actual covered foundation damage. In *Nicolau v. State Farm Lloyds*, 951 S.W.2d 444 (Tex. 1997), the Supreme Court gives a long factual chronology of the Nicolau's foundation problems. Over a several year period of time, repeated attempts were made to either investigate or repair foundation damage from soil movement to the Nicolau's dwelling. There was no evidence that the Nicolaus had any sophistication in such matters. Ultimately, the experts they consulted began to believe that there might be a plumbing leak under the foundation which would cause such repeated movement. Plumbing testing was promptly accomplished to investigate that hypothesis, and once the plumbing testing revealed a leak that would account for the foundation movement, the Nicolaus then reported their claim, several years after having first discovered the initial foundation movement without knowing it might be caused by a covered peril (a plumbing leak). The Supreme Court cites this long factual history without any criticism of the Nicolaus and with apparent understanding of why they reported the claim when they did.

3. Late Notice Defense

Even in the event that the policyholder cannot show substantial compliance, excuse, waiver, or estoppel as to a claim by the insurance company of late notice, this does not end the inquiry. In order to avoid payment under the policy for late notice, the insurance company must demonstrate a material breach of this policy condition. See *Hernandez v. Group Gulf Lloyds*, 875 S.W.2d 691 (Tex., 1994). In fact, under general contract law, failure of one party to an agreement to perform a condition will not excuse the other party's performance of the contract, unless the breach of contract thereby committed is material.[xviii] The use of this doctrine of materiality of breach to determine whether an insurance company can avoid payment under a policy for failure of an insured to perform a condition of the policy is expressly authorized by the Supreme Court's decision in *Hernandez*, supra. It is clear from that decision and others that the primary inquiry in determining whether the failure of an insured to perform any condition (not only the condition requiring prompt notice) is whether such failure to perform prejudices the insuror such that it will be deprived of the benefit that it could have reasonably anticipated from full performance. The less the insurance company is deprived of the expected benefit of prompt notice, the less material the breach. Other factors to be considered include: (1) the extent to which the insurance carrier can be adequately compensated for the part of the benefit of which it will be deprived; (2) the extent to which the insured will suffer forfeiture; (3) the likelihood that the insured will cure his failures; and (4) the extent to which the behavior of the insured comports with standards of good faith and fair dealing. This is obviously a fact-based inquiry. There is no hard and fast rule in connection with materiality has been established and in most instances, this will be an issue for the jury.[xix] This doctrine was amplified by the Supreme Court in *PAJ, Inc. v. The Hanover Ins. Co.* In that case the Court held that an insured's failure to timely notify its insurer of a claim or suit does not defeat coverage under the advertising injury (Coverage B) part of an occurrence-based commercial general liability policy if the insurer was not prejudiced by the delay. 2008 Tex. LEXIS at *18.

PAJ, Inc. had a CGL policy with Hanover that covered, among other things, injury arising out of copyright infringement. The policy required PAJ to notify Hanover of any claim or suit brought against it "as soon as practicable." In 1998, Yurman Designs, Inc. demanded that PAJ cease marketing a particular jewelry line and

ultimately sued PAJ for copyright infringement. PAJ failed to notify Hanover of the suit until "four to six months after litigation commenced." *Id.* at 2. PAJ filed a declaratory judgment action.

The parties stipulated in the declaratory judgment action that PAJ failed to notify Hanover as soon as practicable and that Hanover was not prejudiced by the lack of notice. Both sides moved for summary judgment. The trial court granted Hanover's motion, holding that Hanover was not required to demonstrate prejudice to avoid coverage under the policy. The court of appeals affirmed.

On appeal to the Texas Supreme Court, Hanover contended that the provision was a condition precedent, the failure of which defeated coverage regardless whether Hanover was prejudiced. PAJ argued that the provision was a covenant, the breach of which would excuse Hanover's performance only if the breach were material. PAJ also argued that, even if the requirement were specifically couched in "condition precedent" language, Texas law nonetheless would require an insurer to demonstrate prejudice before it could avoid coverage on this basis alone. The court "agree[d] with PAJ that only a material breach of the timely notice provision will excuse Hanover's performance under the policy." *Id.* at *3-4.

The court reasoned that "'when a condition would impose an absurd or impossible result, the agreement will be interpreted as creating a covenant rather than a condition.'" *Id.* at *15 (quoting *Criswell v. European Crossroads Shopping Ctr., Ltd.,* 792 S.W.2d 945, 948 (Tex. 1990)). The court concluded that a denial of coverage without a showing of prejudice would be such a result, imposing "draconian consequences for even *de minimis* deviations from the duties the policy places on the insureds." *Id.*, at *18. In reaching its conclusion, the court also noted that the timely notice provision "was not an essential part of the bargained-for exchange under PAJ's occurrence-based policy." *Id.*, at 17. Distinguishing such a policy from a claims-made policy, the court recognized that, with respect to occurrence-based policies, a notice requirement "'is subsidiary to the event that triggers coverage.'" *Id.* at *17 (quoting *Matador Petroleum Corp. v. St. Paul Surplus Lines Ins. Co.*, 174 F.3d 653, 658 (5th Cir. 1999)).

4. Article 21.55

Article 21.55 establishes time deadlines for responding to claims. If insurance companies violate these deadlines, statutory damages of 18 percent per annum are payable on the claim from the date of the violation, together with attorney's fees. To trigger the applicability of these penalties and deadlines, the insured must give written notice, even if oral notice would have been sufficient under the doctrines of excuse or waiver discussed above.

5. Pleading and Proof

The plaintiff should always plead in the original petition that all notices and proofs of loss or claim have been timely and properly given, sufficient to invoke coverage under the policy and the requirements of the Texas Insurance Code. Once such a pleading has been made, the insured enjoys a conclusive presumption of such facts, and no further proof is required of them unless the insurance company denies such pleading "specifically and with particularity" and under oath. See Texas Rules of Civil Procedure, Rule 93. Rule 93, Section 12, requires such a pleading to be verified by affidavit based upon personal knowledge. See *Schultz v. City of Houston*, 551 S.W.2d 494 (Tex.Civ.App. – Houston [14th], 1977). Verifications must be "positive and unequivocal." See *Golub v. Nelson*, 441 S.W.2d 220 (Tex.Civ.App. – Houston [14th], 1969); and *Cantu v. Holiday Inns, Inc.*, 910 S.W.2d 113 (Tex.App. – Corpus Christi, 1995). Pleadings and denials that do not meet these stringent requirements should be stricken as nullities.[xx] Global allegations that plaintiffs "fail to provide proper notice" are not sufficient. They must be both **specific and** made under oath based upon personal knowledge.[xxi]

B. Proof Of Loss

1. Policy Requirements

The HOB policy requires that proof of loss be given within 91 days of the insurance company's request on a standard form supplied by it. However, if such a sworn proof of loss is not requested within 15 days after receiving written notice from the insured of the claim, such requirement is waived. This waiver almost always occurs.

Although the proof of loss must be filed by the insured on a standard form supplied by the insurance company, this is probably a mere formal requirement, as it is settled law that substantial compliance with a proof of loss provision on a timely basis will suffice.[xxii] Where the insurance company furnishes no forms, the insured is free to use any form he wishes.[xxiii]

In addition, while the proof of loss must be sworn, it only needs state the insured's "best knowledge and belief" as to certain facts including: the time and cause of loss as best can be determined, the interest of the insured and all others in the property, including all liens on the property, other insurance which might cover the loss, and the actual cash value of each item of property and the amount of loss as alleged to each. If the insured elects to make claim for full replacement cost coverage (as opposed to actual cash value, which is full replacement cost minus depreciation),

the proof of loss should also state: the replacement cost of the dwelling, or other building, and the full cost of repair or replacement of the loss without deduction for depreciation. It is usually a simple matter to state the insured's best knowledge and belief, since most insureds do not have much information about the loss in the initial stages of the claim (the first 91 days). Besides, recall that substantial compliance will usually suffice.

2. Excuse, Waiver, and Estoppel

The same excuses that can be utilized in connection with the notice requirement of the policy are available in connection with proof of loss. Likewise, the same categories of acts that will waive an insuror's right to insist upon prompt written notice will also waive a requirement of proof of loss. In addition, there are several specific acts that an insurance company can commit which will accomplish a waiver and estoppel as to the requirement to file proofs of loss. The simplest is the one provided in the policy, which is to fail to request same on an insuror provided form within 15 days of receiving written notice of loss. Others include: denying the claim before proof of loss is due waives the proof of loss requirement as a matter of law;[xxiv] there are also some cases that seem to indicate that such a denial after the 91 day period may constitute waiver if not expressly based upon the insured's failure to file proof of loss;[xxv] an admission of partial liability on a claim or attempts to settle or pay after the 91 day period also accomplishes a waiver;[xxvi] and demanding an appraisal also accomplishes such a waiver.[xxvii] A little known statute that is not cited in the cases dealing with the sufficiency of proofs of loss and waivers of proofs of loss is Article 21.19 of the Texas Insurance Code (the so called anti-technicalities statute). This statute provides that insurers may NOT avoid liability under a policy for fraud committed in the claim-making or loss-notification process UNLESS there are misstatements or misrepresentations: that are of material facts; that are intentionally false; that are made with fraudulent intent; and that actually mislead an insurer AND cause it to lose or waive some otherwise valid defense.

C. Performance of Repairs to Obtain Full Replacement Cost

The policy provides for payment of the actual cash value of the loss, until such time as the property has been repaired. Once the property has been repaired, the insured may be paid any difference between the actual cash value of the loss and full replacement cost. However, the provision of the policy requiring actual repair before full recovery is a **condition**, and hence is subject to same rules of insurance and contract law as the other conditions mentioned above, i.e., it can be waived, the insurance company can be estopped to assert it, it may be substantially complied with, etc.

Some terms should be defined here. Full replacement cost is obviously the cost to repair or replace with like kind and quality the damaged property. Actual cash value is generally defined as full replacement or repair cost minus applicable depreciation or betterment. In other words, if I have a roof designed to last 20 years, and it is destroyed in the 19th year of its useful life, the full replacement cost would be the cost to repair with a new roof (that has another 20 years of life expectancy). The actual cash value would be such cost of repair minus the amount the roof has depreciated over the last 19 years, i.e., the extent to which the roof will be "bettered" by replacement with a brand new roof. The insurance policy recognizes this definition in the provisions relating to full replacement cost coverage by differentiating it from actual cash value (ACV) as being "without deduction for depreciation." Texas cases have recognized this same definition.[xxviii]

Other courts have defined actual cash value as the market value reduction caused to the damaged property. For example, see *Guarantee County Mutual Insurance Company v. Williams*, 732 S.W.2d 57 (Tex. App.—Amarillo, 1987).

There are cases holding that such condition can specifically be waived, in particular, by failing to plead it.[xxix] Hence, any of the acts normally held to constitute a waiver by the insurance company of any condition (denial of a claim, etc.) will support a waiver of the condition that the insured be required to actually replace the property before the full amount (including depreciation) is tendered. In the event the insured is concerned that such waiver cannot be established, it appears that proof of actual cash value may either be made by reference to reduction in market value or replacement cost minus depreciation. Additionally, the insured can argue that it would be judicially inefficient and superfluous to require that the insured first file suit over the actual cash value owed on a claim that has been essentially denied, and then wait to file suit again for the replacement cost. This is by analogy to those cases in contract law that do not require that a plaintiff sue each time a specific amount of money becomes owed once it becomes clear that the defendant refuses to perform the agreement. There is an old line of cases holding that any partial loss should be determined by reference to repair costs, rather than actual cash value, although these cases appear to be interpreting language in old form policies that has now been changed. For example, see *Lerman v. Implement Dealers Mutual Insurance Company*, 382 S.W.2d 285 (Tex. Civ. App.—Houston, 1964, ref. n.r.e.), *Gulf Insurance Company v. Carroll*, supra, and *Farmers Mutual Protective Association of Texas v. Cmerek*, supra. Likewise, where actual cash value is a difficult method of proof, and thus it is impracticable to determine actual cash

value, cost of repair or replacement within a reasonable time after loss are proper factors to be considered in determining the amount of the loss to be paid to the insured.[xxx]

D. Appraisal

Another technicality that insurance companies sometimes raise in order to delay or defeat an insured's suit for policy proceeds is to claim that the suit should be abated until such time as an appraisal can be had. This technique is seldom efficacious. First, appraisal is not a legitimate means to resolve disputes regarding coverage of the loss or any portion there of, the scope of the loss, or even method of repair. Rather, its function is limited completely to disputes over unit cost and other pricing issues once coverage, scope, and the amount and type of repairs have been agreed upon by the insured and the insuror.[xxxi] In addition, it has long been the law in Texas that the right to demand an appraisal can be waived by the insurance company under a number of situations including: refusal to appraise, denial of the claim, delaying resolution of the claim, failure to timely demand appraisal, acts inconsistent with an intention to appraise, appointment of a prejudiced appraiser, or any improper conduct during appraisal.[xxxii] The cases on waiving appraisal are useful and instructive because by analogy, one should argue that other conditions may be waived in the same way.

In the unlikely event that an appraisal is actually appropriate between an insured and an insurance company, i.e., the insurance company has totally agreed as to everything except the price of agreed covered repairs to address covered damage, there are several rules regarding the appraisal process. First, each party must appoint, at its own expense, a competent and disinterested appraiser. These appraisers then first meet to determine the identity of a third person to act as a neutral umpire of any disputes between them.

The Texas Supreme Court's recent decision in *State Farm v. Johnson* changed the law of appraisal in this state. Appraisal clauses provide that when the insured and the insurer disagree on the amount of a loss to property, either can invoke an "appraisal" by written demand. Each side then appoints a "competent and disinterested" appraiser to determine the monetary value of the loss. The two appraisers then appoint a third person to serve as umpire of any disputes between them. If they cannot agree on an umpire, then either side can obtain appointment of an umpire from any district judge in the county where the insured property is located. Any award signed by two members is ostensibly binding.

Until *Johnson*, Texas courts held that an appraisal only determined *the amount* of a loss, not causation or coverage. For example, if an insured makes a claim for hail damage, an appraisal was useless because the appraisal, under then-existing law, could not decide coverage, i.e., what damage was covered under the relevant policy and what damage was not. Under decades of decisions culminating as recently as 1989 in *Wells v. American State,* appraisal's function was effectively limited to disputes over unit cost and other pricing issues once coverage and the scope and the type of repairs were all agreed upon by the insured and the insurer. However, in *Johnson*, Justice Brister noted that valuing every partial loss inevitably requires *some* consideration of causation, e.g., did the wind injure three roof shingles or all of them, and he ruled that the injunction in previous cases against deciding coverage had been overblown. Now, appraisal can decide causation, scope, and virtually everything other than legal construction of the policy. *Johnson* has been used to radically expand the function of appraisal at the expense of the court system.

Johnson and its progeny also changed the law of waiver as regards appraisal, which could, like other conditions of the policy, such as formal proofs of loss, be waived by the insurer's claims handling. The 1930 Commission of Appeals (holding approved) case of *American Central Insurance Company v. Terry*, among several others, catalogued the plethora of situations where insurers almost always waived any right to appraise, including refusal to appraise, denial of the claim, delaying the claim, failure to timely demand appraisal, acts inconsistent with an intention to appraise, appointment of a prejudiced appraiser, or any improper conduct during appraisal. However, the Supreme Court's 2011 follow-up appraisal decision, *In re Universal Underwriters*, announced an additional requirement for proving waiver where there has been delay invoking appraisal, evidence of prejudice to the resisting party from the delay. The problem with this, as the Court itself noted, is that "it is difficult to see how prejudice could ever be shown…" Thus, there are now reported cases where carriers have been allowed to invoke appraisal even months after the claim has been refused or deferred and the policyholder has hired an attorney and filed suit. And carriers are now arguing in several courts that a policyholder cannot sue for breach of contract or bad faith, no matter how bad or dilatory the carrier's conduct, as long as it eventually demands appraisal and timely pays the appraisers' ultimate award. Carriers see appraisal as the ultimate "get out of jail free" card.

II. STOWERS DEVELOPMENTS

The Fifth Circuit's decision in *Pride Transportation v. Continental Casualty Co.* clarifies the application of the *Stowers* doctrine to multiple defendant/multiple insured scenarios. The court held that Texas recognizes no cause of action against an insurer for wrongfully *accepting* a Stowers offer to settle with some but not all defendants.

In this case, a trucking company (Pride) was sued as well as its driver as a result of an auto accident. The plaintiff offered to settle all his claims *against the driver only* in exchange for Pride's policy limits, expressly leaving pending the claims against Pride. The same policy covered both Pride and the driver/employee. The insurance carrier accepted. Since the policy limits had been exhausted by this settlement, Pride was left in the underlying case with no protection.

The e Fifth Circuit reasoned that the same *Stowers* rules that apply in the partial settlement of multiple plaintiff cases should apply in the partial settlement of multiple defendant cases. The multiple plaintiff scenario is governed by *Farmers Insurance Co. v. Soriano*. In that case, the court held: "when faced with a settlement demand arising out of multiple claims and inadequate proceeds, an insurer may enter into a reasonable settlement with one of the several claimants even though such settlement exhausts or diminishes the proceeds available to satisfy other claims." The Fifth Circuit held in *Pride* that "an insurer is not subject to liability for proceeding, on behalf of a sued insured, with a reasonable settlement . . . once a settlement demand is made, even if the settlement eliminates . . . coverage for a co-insured as to whom no *Stowers* demand has been made."

III. PROPERTY DAMAGE COVERAGE IN CONSTRUCTION CASES

In its 2013 opinion in *Lennar Corp. v. Markel American Insurance Co.*, the Supreme Court extended its holding in *Lamar Homes, Inc. v. Mid-Continent Casualty Co.*, 242 S.W.3d 1 (Tex. 2007) to provide correct and broad interpretations of the coverage provided to builders by commercial general liability policies. At issue in Lennar were the costs of removing EIFS cladding from the walls of a number of homes in order to find, identify, and address the precise locations of water damage that was known to exist in some quantity in unknown locations and that was the subject of customer complaints. Lennar discovered the EIFS problem and in an attempt to satisfy its customers and prevent exacerbation of the damage and litigation it undertook this investigation and remediation program. Lennar then claimed indemnity for the cost from its CGL carrier. The Court held that neither the "voluntary payments" exclusion in the policy, nor any exclusion in the policy barred coverage, even though the policy required the carrier's written consent to any settlement, which Lennar did not obtain. Reasoning that under *PAJ* this type of provision did not go directly to coverage but related to a technical requirement that could be waived, the Court decided that since the carrier had not shown prejudice from the failure to obtain consent, this could not be used to defeat coverage.

Interestingly, the holdings in *Lennar* and *Midcontinent* could be rendered meaningless if the Court decides another pending case the wrong way. That case on appeal on certified questions from the Fifth Circuit to the Texas Supreme Court, is *Ewing Construction Co., Inc. v. Amerisure Insurance Co.*, Case No. 12-0661. Amerisure argues in that case that the "contractual liability" exclusion applies to deprive the contractor, Ewing, of both a right to defense and a right to indemnity. The argument is that under the "economic loss rule" any damage to the thing constructed could only be recovered only through causes of action sounding in contract and/or warranty, such that the contractual liability exclusion in the policy would prevent coverage of any claim against Ewing by a dissatisfied owner. Under Ewing's interpretation, on the other hand, coverage is preserved because Ewing's liability was not in any way affected by the terms of its contracts with the homeowners. With or without them, his liability for property damage would be the same.

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[i] *General Life & Accident Insurance Company v. Lightfoot*, 737 S.W.2d 953 (Tex. App.—El Paso, 1987, writ den'd).

[ii] *Aetna Casualty & Surety Company v. Clark*, 427 S.W.2d 649 (Tex. App.—Dallas 1968, no writ); *Republic Insurance Company v. Silverton Elevators*, 493 S.W.2d 748 (Tex. 1973); and *Neilson v. Allstate Insurance Company*, 784 S.W.2d 735 (Tex. App.—Houston [14 Dist.] 1990, no writ).

[iii] *Grimm v. Grimm*, 864 S.W.2d 160, 161 (Tex. App.- Houston [14th Dist] 1993, no writ).

[iv] *Century Ins. Co. v. Hogan*, 135 S.W.2d 224, 228 (Tex. Civ. App.-Austin 1939, no writ); *Home Ins. Co. v. Scott*, 152 S.W.2d 413 (Tex. Civ. App.-El Paso 1941, writ dism'd); *Home Ins. Co. v. Greene*, 443 S.W.2d 326 (Tex. Civ. App.-Texarkana 1969, aff'd 453 S.W.2d 470).

[v] *National Surety Corporation v. Wells*, 287 F.2d 102 (5th Circuit, 1961).

[vi] *Sparks v. Aetna Life & Casualty Company*, 554 S.W.2d 228 (Tex. App.—Dallas 1977, no writ) and *Handover Insurance Company of New York v. Hagler*, 532 S.W.2d 136 (Tex. App.—Dallas 1975, ref. n.r.e.).

[vii] See cases under (B) Proof of Loss, infra.

[viii] *King v. Commercial Union Insurance Company of New York*, 306 F.Sup.9 (N.D.Tx 1969).

[ix] *Lewis v. Connecticut General Life Insurance Company*, 94 S.W.2d 499 (Tex. App.—Beaumont, 1936, writ ref'd).

[x] *State Farm County Mutual Insurance Company of Texas v. Plunk*, 491 S.W.2d 728 (Tex. App.—Dallas 1973, no writ).

[xi] *Continental Savings Assoc. v. US Fidelity & Guarantee Company*, 762 F.2d 1239 (5th Circuit, 1985, Amended on Rehearing in Part 768 F.2d 89).

[xii] *Proctor v. Southland Life Insurance Company*, 522 S.W.2d 261 (Tex. App.—Ft. Worth, 1975, ref. n.r.e.).

[xiii] *Dairy Land County Mutual Insurance Company v. Roman*, 486 S.W.2d 847 (Tex. App.—San Antonio, 1972, aff'd 498 S.W.2d 154).

[xiv] *State Farm County Mutual Insurance Company of Texas v. Plunk*, supra.

[xv] *Whitehead v. National Casualty Company*, 273 S.W.2d 678 (Tex. App.—Ft. Worth, 1954, writ ref'd).

[xvi] *McPherson v. St. Paul Fire & Marine Insurance Company*, 350 F.2d 563 (5th Circuit 1965).

[xvii] *National Surety Corporation v. Wells*, 287 F.2d 102 (5th Circuit, 1961), *Jack v. State*, 694 S.W.2d 391 (Tex. App.—San Antonio 1985, ref. n.r.e.), *Mead v. Johnson Group, Inc.*, 615 S.W.2d 685, 689 (Tex. 1981).

[xviii] See Restatement of Contracts, §274, 397 (1932) and *Ferrell v. Secretary of Defense*, 662 F.2d 1179 (5th Circuit, 1981). Insurance policies are contracts, and as such are subject to rules applicable to contracts generally. *Barnett v. Aetna Life Insurance Company*, 723 S.W.2d 663 (Tex. 1987).

[xix] *Members Insurance Company v. Branscum*, 803 S.W.2d 462 at 464 (Tex. App.—Dallas, 1991, no writ) and *Bell v. United States Fidelity & Guarantee Company*, 853 S.W.2d 187 (Tex. App.—Corpus Christi, 1993, no writ).

[xx] *Brown Foundation Repair & Consulting, Inc. v. Friendly Chevrolet Company*, 715 S.W.2d 115 (Tex.App. - Dallas 1986, writ ref. n.r.e.); and *Davis v. Young Californian Shoes, Inc.*, 612 S.W.2d 703 (Tex.Civ.App. - Dallas 1981, no writ).

[xxi] See *Austin Building Company v. National Union Fire Insurance Company*, 403 S.W.2d 499 (Tex.Civ.App. - Dallas 1966, writ ref. n.r.e.); Wade and Sons, Inc v. American Standard, Inc., ___S.W.2d ___ (Tex. App.-San Antonio Nov. 5, 2003)-Cause No. 04-02-00857-CV.

[xxii] *Turrill v. Life Insurance Company of North America*, 753 F.2d 1322 (5th Circuit, 1985); *First National Bank of Bowie v. Fidelity & Casualty Company of New York*, 634 F.2d 1000 (5th Circuit, 1981); *Rogers v. Aetna Casualty & Surety Company*, 601 F.2d 840 (5th Circuit, 1979); *Henry v. Aetna Casualty & Surety Company*, 633 S.W.2d 583 (Tex. App.—Texarkana, 1982, ref. n.r.e.).

[xxiii] *Proctor v. Southland Life Insurance Company*, supra.

[xxiv] *Viles v. Security National Insurance Company*, 788 S.W.2d 566 (Tex. 1990); *Angelo State University v. International Insurance Company of New York*, 491 S.W.2d 700 (Tex. App.—Austin 1973, no writ).

[xxv] See *American Casualty & Life Insurance Company v. McCuistion*, 202 S.W.2d 474 (Tex. App.—Ft. Worth, 1947, ref. n.r.e.), *Hazlitt v. Provident Life & Accident Insurance Company*, 212 S.W.2d 1012 (Tex. App.—San Antonio, 1948, aff'd 216 S.W.2d 805); *Austin Building Company v. National Union & Fire Insurance Company*, 403 S.W.2d 499 (Tex. App.—Dallas, 1966, ref. n.r.e. Appealed after remand 422 S.W.2d 763, aff'd 432 S.W.2d 697); *Service Mutual Insurance Company of Texas v. Territo*, 147 S.W.2d 846 (Tex. Civ. App.—Waco 1941, no writ).

[xxvi] *US Fidelity & Guarantee Company v. Bimco Iron & Metal Corp.*, 464 S.W.2d 353 (Tex. 1971).

[xxvii] *Alamo Casualty Company v. Trafton*, 231 S.W.2d 472 (Tex. Civ. App.—San Antonio, 1950, writ dis'd).

[xxviii] *Manhattan Fire & Marine Insurance Company v. Melton*, 329 S.W.2d 338 (Tex. Civ. App.—Texarkana 1959, ref. n.r.e.), *Gulf Insurance Company v. Carroll*, 330 S.W.2d 229 (Tex. Civ. App.—Waco, 1959), and *Farmers Protective Association of Texas v. Cmerek*, 404 S.W.2d 599 (Tex. Civ. App.—Austin, 1966, no writ).

[xxix] *Pollock v. Fire Insurance Exchange*, 423 N.W.2d 234 (Mich. App. 1988); *Columbia Mutual Insurance Company v. Sanford*, 920 S.W.2d 28 (Ark. App. 1996); *Bailey v. Farmers Union Cooperative Insurance Company of Nebraska*, 498 N.W.2d 591 (Neb. App. 1992); and *Zaitchick v. American Motorists Insurance Company*, 554 F.Sup. 209 (Sdny. 1982).

[xxx] See *Manhattan Fire & Marine Insurance v. Melton*, 329 S.W.2d 338 (Tex. Civ. App.—Texarkana 1959, ref. n.r.e.).

[xxxi] *Wells v. American States Preferred Insurance Company*, 919 S.W.2d 679 (Tex. App.—Dallas 1989, denied).

[xxxii] See *American Central Insurance Company v. Terry*, 26 S.W.2d 162 (Tex. Com. App., 1930, holding approved), and *Gulf Insurance Company v. Carroll*, supra.

ATTORNEY ADVERTISING UPDATE

DEBBIE SAVIANO, *Plano*
Social Media Design Strategist
Debbie Saviano, LLC

State Bar of Texas
30TH ANNUAL LITIGATION UPDATE INSTITUTE
January 9-10, 2014
Austin

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Debbie Saviano

Debbie Saviano spends her time helping professionals take Action and Create an Online presence by developing, nurturing and maintaining relationships. As a social media strategist, speaker and a champion for building relationships, Debbie is an advocate for Continuing the Conversation.

With a background in education and a degree in English, history and psychology, Debbie implements a practical approach to social media.

Debbie was a principal of 5 different campuses during her 1st career with grades from Pre-K to High School. Currently, Professionals choose Debbie for her distinct skill set in designing LinkedIn and Pinterest accounts. Speaking and training enable Debbie to remain close to those interested in continuing to learn and embrace technology as well as discovering innovative methods to build relationships.

Debbie has served her community through the Junior League and numerous other volunteer programs. In 2012, she was honored with an Innovative Women in Business award. She was also selected as one of fifty women from across the country to participate in the national program of Leadership America. In 2013, Interesting Talks London invited Debbie to speak at their event, allowing Debbie to build her relationships and reach across the Atlantic. In 2013, Debbie traveled to India as part of an International Leadership Program where she was one of 25 Women representing Leadership Women.

Debbie welcomes and encourages Conversations on "How to Make the World a Better Place" and using her skills and talents to do Good Things!

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ATTORNEY ADVERTISING UPDATE

SOCIAL MEDIA AND DIGITAL LEADERSHIP

Not since the Renaissance, in the 1400's has there been such an onslaught of available Information. History will reference this period as the Information Age, a time when the economy was built around Information.

As anyone can relate today, Information moves at Lightning Speed and as a highly technological global community the method of making Decisions and doing Business has altered dramatically. Technology affords the ability to expand the Reach as well as communicate and report any Event in Real Time.

As a well-respected and successful Professional, are You rising to the challenge and being viewed as an **Attorney with Digital Leadership?**

This new Environment requires companies and leaders to "rethink what digital means and how they respond to it" (Russell Reynolds Associates).

Thus, the discussion of **Social Media and Digital Leadership** is born**.**

For Companies and Professional alike to be Successful and even have an advantage it will require Digital Knowledge – Acceptance – Engagement and Leadership.

Attorneys are using Social Media at a different rate then How the Public actually searches for an Attorney On Line. 76% of the consumers went On Line in search of an Attorney (LexisNexis Martindale-Hubbell).

There is a reason **GOOGLE is a Company and a Verb** and when a consumer is in search of information they **"Google"** it.

What this means for Attorneys is they too must be current in not only the understanding of Technology but also the application. Nothing says Technology like **Social Media**.

Social Media is the **"Interaction among people around the world on a variety of Websites and Platforms where they Create – Share and Exchange Ideas and Information**.'

Digital Leadership is a much newer concept and is viewed as "**A Leader with new Attitudes, new Skills, and new Knowledge** (Ernest J. Wilson III)

A Leaders who r**ecognizes and embraces Technology as a means to Expand, Embrace, and Conduct Business through the advanced use of Technology**.

What makes Social Media unique is the Reach – Transparency –Frequency available to the participants. If over 2/3 of the public is embracing Technology and Social Media it would seem obvious that Attorneys do so as well.

SOCIAL MEDIA BUILDS TRUST

People do Business with those they Trust! It really is that simple. If others have Trust in You they will not only do Business with You but they will Sing Your Praises to all they know and become a Robust WORD of MOUTH Advertisement.

Social Media is the Ideal platform to Connect – Network and BUILD Relationships.

Social Media encourages and rewards Authentic – Honest – Transparent Interaction and is the perfect conduit to increase exposure to Your Business and develop Relationships in the process.

The next time You are dining out – waiting at the Elevator – out in public, notice what everyone around You has in common?

They are holding a **hand held Mobile Device.** It is through this same device that the Public is getting their Information. Whether it is where to Eat Dinner – Meet Friends after Work – Plan a Vacation –Get Directions OR **Hire an Attorney**, it is all being done **via the Internet**.

Important Questions to consider:

1. Do You have "Signage" on the Internet?
2. Do You engage on Social Media Platforms?
3. Are You using Compliance and Ethics as an Excuse to Not be Present on Social Media?
4. Do You have more than enough Clients?
5. Are You Ready to embrace Social Media?

Traditional PUSH Marketing is in decline and PULL Marketing is the new front-runner. Consumers are choosing Who to do with Business with and no longer favor the traditional sales model.

People Do Not want to be sold to!

Think about it and be honest with Yourself, when was the last time You opened up the "Yellow Pages" , the most traditional model of all Most people admit to taking this unsolicited form of advertisement directly to the Recycle bin. The Door-to-Door Sales model of Pushing – Convincing the Client they need Products and Services is diminishing and is even resented by many consumers.

No medium allows for **PULL Marketing** more than **Social Media**. With a consistent Social Media Plan You Educate – Inform – Interact with the Audience (Ideal Client).

SOCIAL MEDIA BUILDS RELATIONSHIPS

Eleanor Roosevelt coined it best "No one care how much You Know until they know how much You Care." Social Media encourage the develop Relationships. When there is a Relationship there is commitment and concern.

However, often times when people begin a Social Media Campaign they transfer their mindset of

Traditional Marketing Styles without recognizing it is a totally opposite Philosophy.

A solid Social Media Campaign relies on a "Deposits versus Withdrawals" mindset.

When You go to the Bank You Must have made Deposits prior to making a Withdrawal. Social Media follows the same model.

Following the Pareto Principle 80% of the time is devoted to making Deposits. Social Media Activity / Deposits are the ones which "Ask for Nothing in Return".

Effective Social Media Marketing Campaigns:

1. Target the Ideal Client & Audience
2. Present a Transparent and Authentic Image
3. Engagement by being Present
4. Present Information in a Non Sales format
5. BUILD Relationships

WHO IS YOUR IDEAL CLIENT?

Traditional Marketing embraced advertising and marketing to a broad marketplace. A list of Zip Codes is the primary determination and thus, a large percentage of those receiving the marketing materials are not the Ideal Client.

With Social Media, You are able to construct a Marketing Campaign designed fully for those who best need Your Services.

Considering Who the Ideal Client is involves a combination of **Demographics and Psychographics**. In most cases, Demographics are where the attention is given with Age – Gender – Location – Occupation and Income being the primary points of Interest. However, with "Big Data, the ability to gain unprecedented insight" (Oracle) opens up countless possibilities on what Information is available. Psychographics encompasses a much broader scope and includes Interests – Personality – Hobbies – Attitudes – Lifestyle and Opinions just to highlight a few.

Having a clearer picture of Who the Ideal Client is enables the Social Media Marketing Campaign to **Talk directly to the Ideal Client.**

Identifying the Ideal Client and incorporating Social Media affords opportunities to Network – Establish Expertise – maintain Client Relationships – - dispel negative stereotypes and perceptions, Build a Community and in the process acquire New Clients**.**

SOCIAL MEDIA POLICY

Lets get the first argument out of the way. Why You should Not use Social Media.

Often times, it is easy to "overthink" an issue and in the case of Social Media that is definitely the case. Many Attorneys avoid Social Media fearing the unknown and the Possibilities. However, in doing so, the benefits are overlooked.

Following the Law and adhering to specific guidelines and Ethics Rules is a given and yet choosing to Not engage in Social Media will soon become a hindrance for those who choose to Not jump aboard. The ship has sailed! As cited by Kevin O'Keefe he is "not aware of any ethical complaint or malpractice claim against the 10's of thousands of lawyers engaged in the online communities and networks" (Kevin O'Keefe – LexBlog).

For those who choose to exhibit Digital Leadership they will be ahead of many in their Industry and will have in place a strong and prosperous Social Media Foundation and a formidable Client base.

There is **Physical Space and Virtual Space** for conducting Business and the distinction is become less pronounced day by day.

A 1st Impression is just that and we only have the chance to deliver it One Time. In the traditional market most Business was conducted in the Physical Space and the parties had to be together in the room. Thanks to the advancement of Technology that is no longer the case. The Internet now makes it possible for Conference Calls – Live Stream Conferences and Virtual Meetings to take place without being in the same physical space.

Due to Internet access, Business is conducted on a Global Scale and the increase has created an enormous amount of Virtual Interactions.

A Virtual Representation on Social Media can either be homogeneous, meaning there is a clear and consistent portrayal of Who You are and the Services You provide OR one that is disjointed, confusing and inconsistent.

You have a Social Virtual Reputation whether You realize it or not.

Positive OR Negative dependent upon HOW You and Your Firm are represented.

Are You in Attendance OR Are You Absent?

Social Media Platforms are viewed as a means of Research and Reviews & Recommendations are an active part of the Process. Not being present sends a message in itself.

There are **5 Big Social Media Players** (Google – LinkedIn – Facebook – Twitter and Pinterest) and they each have a solid Purpose – Following and Benefit.

Is Your Social Media Platform within the Big 5 Current – Complete – Active?

Does it contain the 1st Impression You wish to convey?

Consumers are Researching and depending upon what they find will determine How You are Viewed.

Therefore, choosing to Not Participate categorizes You into a classification that might not be to Your liking.

Ask Yourself:

1. Do You view Personal & Professional as separate On Line?
2. Are You on the Big 5 Social Media Platforms?
3. Is Your LinkedIn Profile complete and active?
4. Is Your Image & Message Clear & Consistent?
5. Are You cognizant of the Importance the Public puts on Social Media as a Tool?

Let's first consider the separation of **Personal and Professional.**

In the beginning of Social Media and Technology in general the initial reaction was "Big Brother" was watching. People feared and rightly so, a loss of Privacy. The public was assured there would be a separation and we could indeed keep one separate from the other.

Now, years later, the reality is there is little that is really personal any longer.

Instead, of fearing this realization, look at it as an opportunity to create the Ideal Image that reflects Your Personality – Strengths – Values – Mission and Why You are the consummate Attorney.

THE BIG 5 SOCIAL MEDIA HANGOUTS

As for the **The Big 5 Social Media** Giants, and please know there are others and this is in continual flux, however, Google (Google + and You Tube), LinkedIn, Facebook, Twitter and Pinterest is where the Action is.

Google +

First hit the scene in 2011 and was designed to improve the way people get their Information by combining the features of several of the most popular SM sites. There are "Circles" which contain groups of people who are tagged based on designation by You. Friends – Co-Workers – Litigation Update Institute (any Circle Name of choice). Circles were created as an answer to the Personal & Professional dilemma.

Google Hangouts is an additional feature that is gaining in popularity and is basically a "Chat" feature.

Google is quickly becoming #2 behind Facebook, Outpacing Twitter with a 33% growth in less than a year.(Business Insider) Estimated global participants numbers over 500 M with growth continuing.

LinkedIn

Is recognized as the **Professional Social Media** platform and thus. it is imperative You are present. LinkedIn is considered a **VIRTUAL ROLODEX** and with over 250M Professionals with an annual income of $100,000 across All Industries You Must be in Attendance!

If You choose to engage in only one Social Media platform, this is the one to consider. Due to the importance of LinkedIn the following offers more details.

Professionals ARE On LinkedIn and therefore, it is a given for You to be present as well. However, the representation must be Professional and Complete. When someone is conducting "Research" they will visit both a Company (Firm Page and the Personal Profile) and therefore, both must be in alignment with the Professional Image and Message You wish to portray. The consumer wants to do Business with Individuals and thus the interest and importance of the Personal Profile. They will come searching so be prepared with a strong, professional Profile that is 100% complete.

When creating, designing the LinkedIn Profile keep in mind the information must be crafted in a fashion that Speaks to the Eye! With each word, ask Yourself, Will this keep the visitor Engaged and Interested? Does the information convey the Image and Message I wish to share? Is it an extension of my Website?

LinkedIn does not allow for a choice of font size or style but there are other options to utilize.

Talk to the "Skimming Eye" meaning it is necessary to use shorter sentences, bullet points, white space, use of icons ALL aimed at drawing attention. Take the time to complete the LinkedIn Profile and to take advantage of the "Space" inside LinkedIn.

The space = Real Estate and is thus valuable.

<u>LinkedIn – Personal Profile</u>

1. A **Professional Headshot** is a Must!
2. The **Headline** (Title) needs to speak directly to the Solutions You provide. Why You! In the beginning the Headline WAS the Title. Today, people want to Know How You Help Them – Expertise's – etc. and are not as interested in the Title.
3. **Contact Information** should be complete and give all the necessary information for how You can be contacted.
4. S**ummary** is a Mini Resume / Overview of You, the Firm and the Services and there is room for 2000 characters.
5. **Specialties** should be included throughout the Profile beginning with the Summary and most effective if also included in the Experiences.
6. **Experiences** are all of the positions throughout a Career and should be considered the "Foundation" for the current

position. What do You do today and How do You best serve the Client? How do the previous positions support and prepare for current position?

7. **Skills** are a quick reference to the Specialties and are the ideal location for others to endorse thus, giving credence to the Skills.
8. **Education** for many is handled in a fairly common practice and yet there is value to include Organizations – Sororities and Fraternities.
9. The 20% of the Pareto Principle is **Interests** section and allows for the inclusion of personal interests to compliment the professional Profile. (Ex. If You are a Pilot – Marathon Runner – Tennis Enthusiast) these can be the final determination of why someone chooses to do Business) Part of the Human psyche is to seek "Commonalities".

LinkedIn Firm (Company Page)

1. **Include an IMAGE** that Reflects the Firm and is a continuation of the Message from the Website. (This is an area of weakness for many as they do not have a consistent Image and Message across All Social Media)
2. The **COMPANY DESCRIPTION** should again be a continuation of the Website and include the Keywords, which differentiate You.
3. **Contact Information** is important and should include the Physical address – Website and Phone number.
4. **Products (**share the Products & Services that are offered and include White Papers – Videos – Photos – items that will show the Personal side.)
5. Encourage **All Employees to Follow** and insure that the Messaging is again consistent within the Experience section of the Firm

One of the most compelling reasons to be present and Active on LinkedIn is the simple fact it is Where Clients and Prospects are! The Bonus is Influencers, Thought Leaders, and Decisions Makers are also in attendance.

Facebook Personal Page

Facebook was the first Social Media platform and continues to be the most popular. Currently, Facebook boasts over 1.19 B monthly users and 874 Mobile users and is by far the largest SM Network. However, in recent months has been losing traction especially in the Business sector. Facebook IS the Social Platform. (Entrepreneur Magazine)

From a psychological standpoint, it is very difficult to move from a Social Mindset into a Professional one. Therefore, most would argue that trying to conduct Business on Facebook is a challenge.

Even though last year Facebook brought in $4b in advertising.

The biggest conversation around Facebook is the **Personal vs Professional conversation**.

As mentioned earlier, many have the belief that it is possible to separate the two and I would argue it is not a solid reality.

Take a look at the number of cameras that are present "Everywhere". Privacy is defined much differently and as technology improves we move closer to the reality that there is No Privacy in the Public sector.

Remember, all those Hand Held Devices?

They all have Cameras and no longer do people ask for permission before snapping a picture.

Twitter

Most individuals have a Love / Hate relationship with Twitter and I would argue that is due in large part to the Learning Style of the user.

Twitter is Noisy – Chaotic – Constant Chatter and some love it and others are easily irritated by it. However, the question arises is "Do Your Clients and Target Audience" like and use Twitter; after all, that is the question as, it is about them!

Twitter is credited with On the Ground coverage of the Egyptian Revolution and some go as far as to say helped in the Organization of the Revolution (Wired)

With monthly users of 232 M and as Titter prepares to go Public toward the middle of November, the (The New York Times) reported a sharp rise in Revenue to $169M.

Depending upon Your own Learning Style and preference of how information is received Twitter is a contender and with over 200M users, well worth considering as part of any Social Media Campaign.

Pinterest

All one has to do is ay Pinterst and for those who are familiar, the "Sighs and Smiles" emerge. Pinterest is a Visual Social Media Platform with more than 70M addicted users. Images increase Learning and therein lies the value of Pinterest. Images are Emotional Connectors and as a Visual Platform, Pinterest is Queen and this is supported by the fact it dominates Referral Traffic (Forbes)

Pinterst is similar to a large Bulletin Board separated by individual Mini Boards. Businesses have been slow to recognize the significance of Pinterst but that is quickly changing.

Businesses are beginning to take advantage of a very loyal customer base inside Pinterest and as they say "are joining the party".

So, we have covered all of the **Big 5 Social Media** platforms, shared some high points on each and hopefully by this point there is interest in either beginning the Journey OR stepping up what is already taking place.

As a respected member of the Community and regarded as an Expert in the field, Attorneys have the opportunity and I would argue the responsibility to engage in Social Media and present themselves as Digital Leaders for the purpose of Communicating Directly with those who are in need of Your Services, either today or tomorrow.

At some point, everyone needs Legal Advice and the Services of an Attorney.

ARE YOU A DIGITAL LEADER?

- Do You Value Social Media as a Marketing Tool?
- Are You using Social Media to attract the Clients who are in need of You and Your Services**?**
- Is Your Social Media Image & Message Clear & Consistent?
- Is Your Social Media Communicating Directly with Clients and Potential Clients.
- Have You Converted from the Mindset of Push to Pull Marketing?
- Do You have a Social Media Campaign designed to Communicate – Educate – Engage and Serve?

Hopefully, by now You are READY • WILLING • ABLE to embrace Social Media as a means to Serve Your Clients and the Marketplace. To step up to the podium of Digital Leadership!

Regardless, of where You are in the process "May You Continue the Journey – Exploration and Delivery!"

Let us ALL Continue the Conversations!

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FIFTH CIRCUIT UPDATE

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State Bar of Texas
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CHAPTER 10.1

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FIFTH CIRCUIT UPDATE

The Fifth Circuit covered a wide range of commercial litigation topics from the summer of 2012 to 2013. In particular, many opinions covered basic issues in the areas of contract law, insurance, and the business of mortgage servicing. Major opinions in the area of forum selection clauses and CAFA jurisdiction are under review by the Supreme Court. A number of cases also dealt with fundamental issues about sufficiency of evidence and appellate review after trial.

I. ABSTENTION

Overlapping state and federal cases about the rights to settlement proceeds led the district court to abstain under the *Colorado River* doctrine in *Saucier v. Aviva Life & Annuity Co.*[1] The Fifth Circuit reversed, finding no "exceptional circumstances" warranting abstention. In reviewing each of the relevant factors, the Court distinguished "duplicative litigation" — which does not warrant abstention — from "piecemeal" litigation in which a state court case has more relevant parties than a federal one.[2] The Court also reminded that "how much progress has been made" is more important in comparing the status of parallel cases than their respective filing dates.[3]

Plaintiffs obtained a preliminary injunction against enforcement of a school voucher program, alleging it violated a desegregation consent decree in *Moore v. Tangipahoa Parish School Board.*[4] The Fifth Circuit found an abuse of discretion in denying a stay pending appeal. One reason was *Pullman* abstention, which arises "when an unsettled area of state law . . . would render a decision on the federal issue unnecessary," and where the Court said the defendant had a "a strong likelihood of establishing" it in light of pending state litigation about the constitutionality of the law under state law. Another was jurisdiction under the All Writs Act, where the Court said the plaintiffs' evidence of harm was "based merely on general financial information and speculation." A dissent further discussed *Pullman* abstention and advocated outright dismissal of the case. The opinion appears to have been unpublished because of its expedited procedural posture, and a later panel will fully address the merits on a conventional briefing schedule.[5]

II. ANTITRUST

A consumer group sued under the Clayton Act about the market for funeral caskets, and then settled all compensatory damages with one of the defendants in *Funeral Consumers Alliance v. Service Corp. Int'l.*[6] The Fifth Circuit held that, even after that settlement, the group had standing to proceed against the remaining defendants for attorneys' fees.[7] Noting, however, that "[t]he fact that death is inevitable is not sufficient to establish a real and immediate threat of future harm," the Court found no standing for injunctive relief.[8] The Court also affirmed the denial of class certification, finding that the scope of the putative nationwide class fit poorly with the evidence of localized market activity for funeral services and casket sales.[9]

III. ANTI-SUIT INJUNCTION

The unpublished case of *Gibbs v. Lufkin Industries* reviews the basics of anti-suit injunctions.[10] The district court dismissed some of plaintiffs' claims (including the federal ones), remanded the remaining state claims, and enjoined pursuit of those claims during appeal of the dismissal ruling. The Fifth Circuit reversed, noting that the second court ordinarily determines the preclusive effect of a prior court's judgment, and that simultaneous *in personam* proceedings do not by themselves require an anti-suit injunction.[11] The Court distinguished its earlier case of *Brookshire Bros. v. Dayco Products*[12] as arising from the erroneous remand of the *same* proceeding.

IV. APPELLATE JURISDICTION

A dispute about guaranty obligations related to the purchase of a blimp was removed to federal court. In *McCardell v. Regent Private Capital LLC* the district court granted a motion to compel arbitration, stayed the case, and administratively closed it.[13] The Fifth Circuit reminded that administrative closure does not create a final judgment, and thus dismissed for lack of appellate jurisdiction over the interlocutory appeal.

Appellate jurisdiction over bankruptcy matters can become murky because finality is not always

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1 701 F.3d. 458 (5th Cir. 2012).

2 *Id.* at 464.

3 *Id.*

4 No. 12-31218 (Jan. 14, 2013, unpublished).

5 *Id.* at 4 n.1.

6 695 F.3d 330 (5th Cir. 2012).

7 *Id.* at 341-42.

8 *Id.* at 343.

9 *Id.* at 349 (distinguishing *United States v. Grinnell Corp.,* 384 U.S. 563 (1996)).

10 No. 11-50524 (Sept. 7, 2012, unpublished).

11 *Id.* at 6.

12 554 F.3d 595 (5th Cir. 2009).

13 No. 12-31089 (June 7, 2013, unpublished).

obvious. In an appeal from an individual's bankruptcy case, the Court reminded in *Sikes v. Crager*[14] that the test is whether a district court order is a "final determination of the rights of the parties to secure the relief they seek" or a "final disposition 'of a discrete dispute within the larger bankruptcy case.'"[15] The district court's finding that the debtor's Chapter 13 plan was not made in good faith "involve[d] a discrete dispute within her case" and created jurisdiction.

V. ARBITRATION

In 2011, the Court held in *Weingarten Realty v. Miller* that a stay is not automatic during an appeal about arbitrability, weighing in on an important procedural issue addressed by several other Circuits.[16] In a 2012 unpublished opinion, the Court addressed the merits and if the case affirmed the denial of the motion to compel arbitration under an "equitable estoppel" theory, offering a basic reminder about that concept — arbitration is not proper when the guaranty as to which the plaintiff sought a declaration was distinct from the loan agreement that contained the arbitration clause.[17]

The confirmation of an arbitration award in a construction dispute was affirmed in *Petrofac, Inc. v. DynMcDermott Petroleum Operations Co.*[18] The Court found: the arbitrator had authority, based on the parties' agreement to AAA rules, to determine whether a particular damages issue was arbitrable; the award was not procured by fraud, rejecting an argument that the claimant's damage calculation involved a "bait-and-switch" that pretended to abandon one theory; and the district court properly awarded prejudgment interest, particularly in light of the arbitration panel creating "a thirty-day interest-free window from the date of the award" for payment.

In *Albermarle Corp. v. United Steelworkers, a*n employer terminated two employees for safety violations.[19] An arbitrator, appointed under the parties' collective bargaining agreement, ordered them reinstated after a suspension. The district court vacated the award, and the Fifth Circuit reversed and reinstated. The Court found that "explicating broad CBA terms like 'cause,' when left undefined by contract, is the arbitrator's charge."[20] It distinguished prior cases that left an arbitrator no discretion as to whether certain rule violations required discharge.[21] The Court also rejected a challenge to the award on public policy grounds, reminding that "any such public policy must be explicit, well defined, and dominant."[22]

BP and Exxon disputed the condition of an offshore rig operated by Noble off the coast of Libya; Noble sought payment from either of them in *BP Exploration Libya Ltd. v. ExxonMobil Libya Ltd.*[23] The resulting three-party dispute ran into practical problems because the arbitration clause had a procedure for selecting three arbitrators that was only workable in a two-party dispute. The Fifth Circuit found that a "mechanical breakdown" had occurred that justified federal court intervention under the FAA, 9 U.S.C. § 5, but that the district court exceeded its authority by ordering that arbitration proceed with five arbitrators rather than the three specified by the agreement. The Court remanded with instructions as to the process for the district court to follow in forming a three-arbitrator panel.

Denied enforcement of a $26 million arbitration award in China's Fujian Province (that court finding the award invalid because an arbitrator was imprisoned during the proceedings), the plaintiff sought recognition in the Eastern District of Louisiana in *First Investment Corp. of the Marshall Islands v. Fujian Mawei Shipbuilding*.[24] The Fifth Circuit affirmed dismissal for lack of personal jurisdiction with three holdings: (1) the recent Supreme Court case of *Goodyear Dunlop Tires v. Brown*[25] removed doubt as to whether foreign corporations could invoke due process protection about jurisdiction; (2) the New York Convention did not abrogate those due process rights; and (3) no "alter ego" relationship among the relevant companies was shown that could give rise to jurisdiction. In a companion case, the Court affirmed a ruling that denied jurisdictional discovery based on "sparse allegations" of alter ego.[26]

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14 No. 11-30982 (Aug. 16, 2012).

15 *Id.* at 3 (quoting *Bartee v. Tara Colony Homeowners Ass'n*., 212 F.3d 277 (5th Cir. 2000).

16 661 F.3d 904 (5th Cir. 2011).

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18 687 F.3d. 671 (5th Cir. 2012).

19 703 F.3d 821 (5th Cir. 2013).

20 *Id.* at 826.

21 *Id.* at 824-25 (citing *E.I. DuPont de Nemours & Co. v. Local 900,* 968 F.2d 456 (5th Cir. 1992)).

22 *Id.* at 827; c*f. Horton Automatics v. Industrial Division of the Communication Workers of America,* No. 12-40576 (Jan. 4, 2013, unpublished) (reversing confirmation when labor arbitrator exceeded limited scope).

23 689 F.3d 481 (5th Cir. 2012).

24 703 F.3d 742 (5th Cir. 2013).

25 131 S. Ct. 2846 (2011).

26 *Covington Marine v. Xiamen Shipbuilding,* No. 12-30383 (Dec. 21, 2012, unpublished); *cf. Blake Box v. Dallas Mexican Consulate,* No. 11-10126 (Aug. 21, 2012, unpublished) (reversing jurisdictional discovery ruling).

The employee in *Klein v. Nabors Drilling* signed an Employee Acknowledgement Form that agreed to resolve disputes through the Nabors Dispute Resolution Program, describing the Program as "a process that may include mediation and/or arbitration."[27] The Fifth Circuit reminded that the basic legal framework asks: (1) is there a valid arbitration agreement to arbitrate? and (2) does the dispute in question fall within the scope of that agreement?[28] Here, the parties did not dispute that they had a valid agreement, or that Klein's age discrimination claim was a "dispute" within the meaning of the Program — the novel issue was whether the parties agreed that arbitration was mandatory. The Court carefully reviewed the Program and found that while it "preserve[d] options for nonbinding dispute resolution before final, binding arbitration," it clearly stated that it "create[d] an exclusive procedural mechanism for the final resolution of all Disputes" and thus required arbitration of Klein's claim.[29]

In *VT Halter Marine v. Wartsila North America,* a manufacturer of ship propulsion systems contracted with a ship operator, who in turn contracted with a shipbuilder. The manufacturer and the operator had a sales contract (with an arbitration clause), and the operator and the shipbuilder had a separate contract (without one).[30] The component manufacturer and shipbuilder had dealings as part of the overall relationship but did not have a direct contract. The shipbuilder sued the manufacturer for supplying allegedly defective parts. Its breach of warranty claim, derivative of the operator's rights, was conceded to be arbitrable. The tortious interference claim, however, could only be arbitrated under an estoppel theory since the shipbuilder was not a party to the manufacturer-shipbuilder contract. The district court's order was not clear about the basis for ordering arbitration of that claim, and the Fifth Circuit remanded for resolution of whether estoppel applied. The Court reminded that while orders compelling arbitration are usually reviewed de novo, an order compelling a third party to arbitrate under an estoppel theory is reviewed for abuse of discretion.[31]

In *Tricon Energy Ltd. v. Vinmar Int'l, Ltd. t*he Fifth Circuit affirmed the district court's confirmation of an arbitration award against challenges by both sides.[32] One party argued that they had no agreement to arbitrate, and the Court resolved that issue under general contract law principles: "Signature[] lines may be strong evidence that the parties did not intend to be bound by a contract until they signed it. But the blank signature blocks here are insufficient, by themselves, to raise a genuine dispute of material fact." The other party disputed the handling of postjudgment interest, but the Court concluded that the panel had only awarded post-award interest, leaving the district court free to impose the statutory postjudgment rate upon confirmation. The Court noted that parties may contract to have the arbitrator resolve the appropriate postjudgment rate.

The plaintiffs in *AFLAC v. Biles* sued in state court, alleging that AFLAC paid death benefits to the wrong person, and that the signature on the policy application was forged.[33] AFLAC moved to compel arbitration in the state court case and simultaneously filed a new federal action to compel arbitration. The state court judge denied AFLAC's motion without prejudice to refiling after discovery on the issue of the signatures' validity. In the meantime, the federal court granted AFLAC's summary judgment motion and compelled arbitration after hearing expert testimony from both sides on the forgery issue. The Fifth Circuit affirmed, finding that *Colorado River* abstention in favor of the state case was not required, and that the order compelling arbitration was allowed by the Anti-Injunction Act because it was "necessary to protect or effectuate [the federal] order compelling arbitration." The Court also found no abuse of discretion in the denial of the respondents' FRCP 56(e) motion, since it sought testimony that would only be relevant if the witness admitted outright to forgery.

Arbitrators in *Timegate Studios, Inc. v. Southpeak Interactive, LLC* awarded a videogame developer a perpetual license in certain intellectual property.[34] The district court vacated the award on the ground that the award went against the essence of the developer's contractual relationship with the game publisher. The Fifth Circuit acknowledged that the FAA's deference to arbitrators reaches its boundary if they "utterly contort[] the evident purpose and intent of the parties" with an award that does not "draw its essence" from the parties' contract.[35] Here, particularly in light of the arbitrator's findings about the publisher's intentional wrongdoing, the Court found the license "was a permissible exercise of the arbitrator's creative remedial powers" even if it was not wholly consistent

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27 710 F.3d at 234 (5th Cir. 2013).

28 *Id.* at 236.

29 *Id.* at 238.

30 No. 12-60051 (Feb. 8, 2013, unpublished).

31 *Id.* at 5 (citing *Noble Drilling v. Certex USA,* 620 F.3d 469, 472 n.4 (5th Cir. 2010)).

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33 714 F.3d 887 (5th Cir. 2013).

34 713 F.3d 797 (5th Cir. 2013).

35 *See id.* at 802-03.

with the parties' contract. The Court reviewed cases about arbitrators who exceeded their given authority and found them inapplicable to this situation: "Timegate committed an extraordinary breach of the Agreement, and an equally extraordinary realignment of the parties' original rights [was] necessary to preserve the essence of the Agreement."[36]

An unpublished opinion reversed the vacating of a FINRA arbitration award in *Morgan Keegan v. Garrett*.[37] The Court reversed a finding of fraudulent testimony "because the grounds for [the alleged] fraud were discoverable by due diligence before or during the . . . arbitration."[38] The Court also deferred to the panel's conclusions about the scope of the arbitration as consistent with the authority given by the FINRA rules.[39] Throughout, the opinion summarizes Circuit authority about the appropriate level of deference to the panel in an award confirmation setting.

The parties arbitrated whether certain offshore oil dealings violated RICO. *Grynberg v. BP, PLC*.[40] The arbitrator found that the claimant did not establish damage and dismissed that claim, noting that he lacked authority to determine whether any criminal violation of RICO occurred. The Fifth Circuit affirmed the dismissal of a subsequent RICO lawsuit on the grounds of res judicata, finding that the arbitrator's ruling was on the merits and not jurisdictional.

VI. ATTORNEYS' FEES

The appellants in *Texas Medical Providers v. Lakey* sought $60,000 in attorneys' fees after successful defense of civil rights claims about new abortion laws.[41] The Fifth Circuit rejected a request based on 42 U.S.C. § 1988, noting: "Lack of merit does not equate to frivolity . . . ."[42] The Court also rejected a request based on inherent power, which relied upon statements by plaintiff's counsel that they dismissed several challenges because the initial Fifth Circuit panel had declared all future appeals in the case would be heard by the same panel. It stated: "The short answer to this charge is that if courts treated as a willful abuse of process every self-serving statement of counsel at the expense of a judge or judges, there would be no end to sanctions motions."[43]

VII. BANKRUPTCY

After reviewing the application of judicial estoppel in the bankruptcy context as to a debtor's claim in *Love v. Tyson Foods*,[44] the Court applied the doctrine to a creditor's claim in *Wells Fargo v. Oparaji*.[45] After carefully reviewing the elements of that doctrine in this circuit, the Court found that Wells did not adopt "plainly inconsistent position[s]" in the debtor's two bankruptcies, observing that a creditor is not required to include all accrued liability in every revised proof of claim. The Court also found that the debtor's failure to follow the plan in his first bankruptcy barred him from now invoking the equitable remedy of judicial estoppel based on those proceedings.

Creditors sought to assert state law tort claims that once belonged to a bankruptcy estate in *Wooley v. Haynes & Boone LLP*.[46] The Fifth Circuit found that the reservation language in the reorganization plan was too vague to satisfy the requirements of the Code as to these claims: "Neither the Plan nor the disclosure statement references specific state law claims for fraud, breach of fiduciary duty, or any other particular cause of action. Instead, the Plan simply refers to all causes of action, known or unknown. As noted, such a blanket reservation is not sufficient to put creditors on notice."[47] The opinion reviews the handful of Fifth Circuit opinions that establish the guidelines on this basic topic in bankruptcy litigation, and contrasts with another recent opinion that found a set of avoidance claims had been properly reserved.[48]

The Fifth Circuit made a major contribution to the law of international insolvency proceedings in *Ad Hoc Group of Vitro Noteholders v. Vitro SAB de CV*.[49] The opinion affirms a series of rulings under Chapter 15 of the Bankruptcy Code (which implements the UNCITRAL model law on cross-border insolvency): that (1) recognized the legitimacy of the Mexican reorganization proceeding involving Vitro (the largest glassmaker in Mexico with over $1 billion in debt), (2) recognized the validity of the foreign representatives appointed as a result of that proceeding, analogizing their appointment process to the management of a debtor in possession in the U.S., and (3) denied to enforce the plan on the grounds of comity. The detailed comity analysis turns on the U.S. bankruptcy

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36 *Id.* at 807.

37 No. 11-20736 (Oct. 23, 2012, unpublished).

38 Slip op. at 8.

39 *Id.* at 10-12.

40 No. 12-20291 (June 7, 2013, unpublished).

41 No. 12-50291 (Feb. 26, 2013, unpublished).

42 *S*lip op. at 2.

43 *Id.* at 3.

44 677 F.3d 258 (5th Cir. 2012).

45 698 F.3d 231 (5th Cir. 2012).

46 714 F.3d 860 (5th Cir. 2013).

47 *Id.* at 866.

48 *Id.* (distinguishing *In Re Tex. Wyo. Drilling, Inc.,* 647 F.3d 547, 552 (5th Cir. 2011)).

49 701 F.3d 1031 (5th Cir. 2012).

system's disfavor for non-consensual, non-debtor releases. The framework of the opinion is broadly applicable to a wide range of cross-border insolvency situations and addresses issues of first impression about the scope of relief available under Chapter 15.

A partner in a bankrupt entity complained in *Smyth v. Simeon Land Development LLC* that the bankruptcy court had no jurisdiction to authorize the sale of claims he sought to assert individually.[50] Smyth did not obtain a stay of the sale order, however, rendering the appeal moot: "When an appeal is moot because an appellant has failed to obtain a stay, this court cannot reach the question of whether the bankruptcy court had jurisdiction to sell the claims."[51]

The bankruptcy court in *CRG Partners v. Neary* awarded a $1 million fee enhancement for a "rare and exceptional" result in the Pilgrim's Pride bankruptcy.[52] The Trustee objected, arguing that *Perdue v. Kenny A. ex rel Winn*[53] — a case rejecting a comparable enhancement under 42 U.S.C. § 1988 — impliedly overruled older Fifth Circuit authority that allowed them in bankruptcy. The Court carefully reviewed *Perdue* under the "rule of orderliness," a set of principles that guide a panel's fidelity to older panel opinions, and found *Perdue* distinguishable factually and for policy reasons.[54] The Court reminded that it had recently reached a similar conclusion as to the effect of *Stern v. Marshall*[55] on magistrate jurisdiction.[56]

Conversely, *ASARCO LLC v. Barclays Capital,*[57] the Court reversed an enhancement under section 328, stating: "Section 328 applies when the bankruptcy court approves a particular rate . . . at the outset of the engagement, and § 330 applies when the court does not do so." A "necessary prerequisite" to section 328 enhancement is that the professional's work was "not capable of anticipation." Here, the Court found that the length of the ASARCO bankruptcy and the exodus of its employees after filing led to "commendable" work by Barclays that was still "capable of being anticipated"[58] analogizing Barclays to a car buyer who finds a new Corvette "needed far more than a car wash."

The secured lender held a $39 million claim in the bankruptcy of a hotel development; a reorganization plan was approved over its objection in a "cram-down" that called for repayment of the debt over ten years at 5.5 percent interest (1.75 percent above prime on the date of confirmation). In *Wells Fargo v. Texas Grand Prairie Hotel Realty LLC,*[59] the parties agreed that this "prime-plus" approach was appropriate under the plurality in *Till v. SCS Credit Corp.*,[60] but disputed the proper rate. The Court rejected a threshold challenge based upon "equitable mootness" because it reasoned that the appeal could be resolved with "fractional relief" rather than rejection of the plan. On the merits, the Court reaffirmed that it would review the choice of a cramdown rate for clear error rather than de novo, citing *In re: T-H New Orleans Limited Partnership*.[61] After a thorough review of *Till* and subsequent cases, the court found no clear error in this prime-plus rate in this factual context.

A creditor successfully made a "credit bid" under the Bankruptcy Code for assets of a failed golf resort. Litigation followed between the creditor and guarantors of the debt, ending with a terse summary judgment order for the guarantors: "This is not rocket science. The Senior Loan has been PAID!!!!" In *Fire Eagle LLC v. Bischoff,*[62] the Fifth Circuit affirmed in all respects, holding: (1) the bankruptcy court had jurisdiction over the dispute with the guarantors because it had a "conceivable effect" on the estate; (2) the issue of the effect of the credit bid was within core jurisdiction and did not raise a *Stern v. Marshall* issue; (3) core jurisdiction trumped a forum selection clause on the facts of this case; (4) a transfer into the bankruptcy court based on the first-to-file rule was proper; and (5) the creditor's bid extinguished the debt. On the last holding, the Court noted that the section of the Code allowing the credit bid did not provide for fair-market valuation of the assets, unlike other Code provisions.[63]

The Bankruptcy Code requires that a plan receive a favorable vote from "at least one class of claims that is impaired under the plan."[64] In *Western Real Estate Equities LLC v. Village at Camp Bowie I, LP*, thirty-eight unsecured trade creditors of a real estate venture voted to approve the debtor's plan, while the secured creditor voted against it.[65] The secured creditor

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50 No. 12-50297 (April 18, 2013, unpublished).

51 Slip op. at 6.

52 690 F.3d 650 (5th Cir. 2012).

53 130 S. Ct. 1662 (2010).

54 *Id.* at 663.

55 131 S. Ct. 2594 (2011).

56 *See id.*

57 702 F.3d 250 (5th Cir. 2012).

58 *See id*. at 259.

59 710 F.3d 324 (5th Cir. 2013).

60 541 U.S. 465 (2004).

61 116 F.3d 790 (5th Cir. 1997).

62 710 F.3d 299 (5th Cir. 2013).

63 *Id.* at 308.

64 11 U.S.C. § 1129(a)(10).

65 710 F.3d 239 (5th Cir. 2013).

complained that the consent was not valid because the plan "artificially" impaired the unsecured claims, paying them over a three-month period when the debtor had enough cash to pay them in full upon confirmation. Recognizing a circuit split, the Fifth Circuit held that section 1129 "does not distinguish between discretionary and economically driven impairment."[66] The Court conceded that the Code imposes an overall "good faith" requirement on the proponent of a plan, but held that the secured creditor's argument here went too far by "shoehorning a motive inquiry and materiality requirement" into the statute without support in its text.[67]

The bankruptcy trustee in *Compton v. Anderson* filed several avoidance actions, and the bankruptcy court dismissed for lack of standing because the reservation of those claims to the trustee in the debtors' reorganization plan was not sufficiently "specific and unequivocal."[68] The Fifth Circuit reviewed several of its recent cases on this issue and reversed, concluding that "[i]n addition to stating the basis of recovery, the Exhibits referenced in the Reorganization Plan identified each defendant by name."[69] The case was remanded for further review, including the scope of a carve-out in the reservation for released claims.

VIII. CLASS ACTIONS – CAFA

In *State of Mississippi v. AU Optronics Corp.*, the Fifth Circuit reversed a remand order, finding that a suit brought to protect consumers by the Mississippi Attorney General was a "mass action" under CAFA.[70] Based on the analytical framework of Louisiana ex rel *Caldwell v. Allstate Insurance,*[71] the Court concluded that the numerical requirements of CAFA for a mass action were satisfied, and the "general public policy" exception in the statute was not. A concurrence endorsed the outcome but suggested that the "claim-by-claim" framework of *Caldwell* effectively mooted the public policy exception.[72] The Supreme Court has now granted certiorari in this case to resolve a circuit split about how CAFA should treat "parens patriae" actions.

IX. CLASS ACTIONS - CERTIFICATION

A putative plaintiff class alleged violations of federal securities law by alleged misstatements about asbestos liabilities, the quality of certain receivables, and the claimed benefits of a merger in *Erica P. John Fund Inc. v. Halliburton, Inc.*[73] Reviewing recent Supreme Court cases about relevant evidence at the certification stage, including one that reversed the Fifth Circuit about proof of loss causation, the Court held: "price impact fraud-on-the-market rebuttal evidence should not be considered at class certification. Proof of price impact is based upon common evidence, and later proof of no price impact will not result in the possibility of individual claims continuing."[74] The Court rejected a policy argument about the potential "in terrorem" effect of not considering such potentially dispositive evidence about the merits at the certification stage. The district court ruling about this evidence, and the resulting class certification, were affirmed.

After a 3-day hearing, a bankruptcy court certified a class for injunctive relief about foreclosure-related fees during the debtors' bankruptcy proceedings in *Rodriguez v. Countrywide Home Loans*.[75] The Fifth Circuit affirmed, finding that Countrywide's acts were "generally applicable" to the "narrowly certified . . . class of approximately 125 individuals."[76] The Court also found that the relevant records were readily searched and that Countrywide had a consistent "practice" even though it had no formal company policy as to the fees.[77]

Teta v. Chow involved a WARN Act claim asserted by a putative class in bankruptcy court.[78] The Fifth Circuit began its review by comparing the rules for adversary proceedings, which automatically adopt Fed. R. Civ. P. 23, with those for a class proof of claim, which would not automatically implicate that rule. Applying Rule 23, the Court agreed that factors unique to the bankruptcy process can be considered in certification of a class by a bankruptcy court, but remanded for additional explanation by the district court on the issues of numerosity and superiority.[79] A

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66 *Id.* at 245.

67 *See id.*

68 701 F.3d 449 (5th Cir. 2012) (citing *Dynasty Oil & Gas v. Citizens Bank,* 540 F.3d 351, 355 (5th Cir. 2008)).

69 *Id.* at 451-53.

70 701 F.3d 696 (5th Cir. 2012).

71 536 F.3d 418 (5th Cir. 2008).

72 *AU Optronics,* 701 F.3d at 803.

73 718 F.3d 423 (5th Cir. 2013).

74 *Id.* at 428; (citing Amgen, Inc. v. Connecticut Retirement Plans and Trust Funds, ___U.S. ___ (Feb. 27, 2013)).

75 695 F.3d 360 (5th Cir. 2013).

76 *Id.* at 365 (distinguishing *Wilborn v. Wells Fargo,* 609 F.3d 748 (5th Cir. 2010)).

77 *Id.* at 368 (distinguishing *Wal-Mart v. Dukes,* 131 S. Ct. 2541 (2011)).

78 712 F.3d 886 (5th Cir. 2013).

79 *Id.* at 900.

dissent would have simply reversed the denial of class certification.[80]

In *Ackal v. Centennial Beauregard Cellular*, the Fifth Circuit reversed the certification of a class of Louisiana governmental entities who contracted with the class defendants for cell phone service.[81] The Court reasoned that because Louisiana law requires many of the entities to follow a specific process before retaining outside legal counsel, the class was essentially "opt in" — a class structure expressly foreclosed by Rule 23(b)(3), which allows only class member "opt out."[82]

In *Ahmad v. Old Republic National Title Insurance*, the Court reversed a grant of class certification in a case about title insurance premiums.[83] The Court relied on *Benavides v. Chicago Title*,[84] which declined to certify a similar class of title insurance buyers because "[t]he resulting trial would require the factfinder to determine whether each individual qualified for the discount based on the evidence in his or her file."[85] The Court declined to distinguish *Benavides* even though a particular discount was mandatory once "the requirements of R-8 [a Texas Insurance Code provision]" were satisfied, because each plaintiff would present unique facts about those requirements. Therefore, the class did not meet the commonality requirement of Fed. R. Civ. P. 23(a)(2).[86]

X. CHARGE ERROR

The plaintiff in *RBIII, L.P. v. City of San Antonio* sought damages after the City of San Antonio razed a property without providing prior notice.[87] After a jury trial it recovered $27,500 in damages. The Fifth Circuit found that a key jury instruction on the City's defenses "improperly cast the central factual dispute as whether or not the Structure posed an immediate danger to the public, when the issue should have been whether the City acted arbitrarily or abused its discretion in determining that the Structure presented an immediate danger." Accordingly, "[b]ecause this error in the instructions misled the jury as to the central factual question in the case," the Court reversed and remanded for further proceedings. The Court's analysis summarizes how federal courts address the issue of harm in erroneous jury instructions that the Texas Supreme Court has engaged in its *Casteel* line of cases.[88]

XI. CONSTITUTIONAL LAW

In a rare but classical exercise of judicial review of a state law's "rational basis," the Fifth Circuit found a Louisiana economic regulation unconstitutional in *St. Joseph Abbey v. Castille*.[89] *The Associated Press* and the *Times-Picayune* provide some initial commentary. The Louisiana State Board of Embalmers and Funeral Directors barred an abbey of Benedictine monks from selling caskets. In late 2012, the Fifth Circuit certified a question to the Louisiana Supreme Court about the Board's authority, which that court declined to answer. The Fifth Circuit then reviewed the Board's actions and agreed with the district court that the regulation was not rationally related to the state's claimed interests in consumer protection or public health, affirming an injunction against its enforcement. The Court emphasized both the limited role of "rational basis" review and its importance when it does apply: "The deference we owe expresses mighty principles of federalism and judicial roles. The principle we protect from the hand of the State today protects an equally vital core principle – the taking of wealth and handing it to others . . . as 'economic' protection of the rulemakers' pockets."[90]

XII. CONSUMER

Wagner v. BellSouth Telecommunications underscores a recent holding that a reduced credit rating is not enough to establish damage under the Fair Credit Reporting Act.[91] The opinion also reminds that to recover mental anguish damages under the FCRA, a plaintiff must offer "evidence of genuine injury, such as the evidence of the injured party's conduct and the observations of others," and to demonstrate "a degree of specificity which may include corroborating testimony or medical or psychological evidence in support of the damage award." The Court also reviewed basic limitations principles under the FCRA and its Louisiana state analog.

McMurray v. ProCollect, Inc. involved a claim that a debt collector's demand letter contained

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80 *Id.* at 901.

81 700 F.3d 212 (5th Cir. 2013).

82 *Id.* at 219 (citing *Kern v. Siemens Corp.,* 393 F.3d 120 (2d Cir. 2004)).

83 690 F.3d 698 (5th Cir. 2012).

84 636 F.3d 699 (5th Cir. 2011).

85 *Ahmad,* 698 F.3d at 703.

86 *Id.* at 705.

87 No. 11-50626 (April 23, 2013).

88 *See* Casteel v. Crown Life Ins. Corp., 22 S.W.3d 378 (Tex. 2000).

89 No. 11-30757 (March 20, 2013).

90 *Id.* 226-27.

91 No. 12-31080 (April 5, 2013, unpublished) (quoting *Cousin v. Trans Union Corp.,* 246 F.3d 359, 371 (5th Cir. 2001)).

language that was inconsistent with, and that also overshadowed, the required notice required by 15 U.S.C. section 1692g(a), the Fair Debt Collection Practices Act.[92] As to the claim of inconsistency, the Court found no violation because the letter did not contain a deadline for payment that conflicted with the 30-day contest period in the FDCPA.[93] As to the claim of overshadowing, the Court found that the letter simply encouraged payment and did not make threats, and did not use fonts or spacing to minimize the effect of the statutorily-required notice.[94] On both claims, the Court reviewed the letter through the lens of an "unsophisticated consumer standard."[95]

The plaintiff in *Smith v. Santander Consumer USA* received $20,43.59 in damages for violation of the Fair Credit Reporting Act.[96] The Fifth Circuit agreed that damages were not recoverable solely for a reduced line of credit, but found sufficient other evidence about harm to the plaintiff's business and personal finances to affirm.[97] Appellate lawyers will find it interesting to compare the Court's analysis of a general federal verdict under the *Boeing* standard with the Texas damages submissions required by Harris County v. Smith.[98]

XIII. CONTRACT

The case of *Tekelec, Inc. v. Verint Systems, Inc.* presented a contract dispute, sufficiently intricate that the Court attached a four-color chart to its opinion to illustrate the facts.[99] In affirming summary judgment for the plaintiff on largely case-specific grounds, the Court reached two principal holdings: an assignee has a right to enforce a payment obligation even if the contract documents do not create an express enforcement right, and the contract payments were not "royalties or other patent damages" within the specific context of these parties' dealings, or as the terms "royalty" and "reasonable royalty" are generally understood.[100] The first holding draws upon the general principle in Texas law that a contract construction leading to an exclusive remedy is disfavored unless that intent is clearly stated[101] – an issue arising in contract litigation generally when potential equitable remedies are evaluated.

The case of *Nexstar Broadcasting v. Time Warner Cable* presented the appeal of the denial of a preliminary injunction, sought by an operator of TV stations (and creator of content) against a large cable company.[102] The dispute focused on whether the defendant could relay signals, originally created by the plaintiff, out of local broadcast markets. The key contract provision said: "[Nexstar] hereby gives [Time Warner] its consent, pursuant to Section 325(b) of the Act and the FCC Rules, to the nonexclusive retransmission of the entire broadcast signal of each Station (the "Signal") over each System pursuant to the terms of this Agreement," with "System" defined to mean all Time Warner Systems, with no geographic limitation. Citing Bryan Garner's dictionary of legal usage, the Fifth Circuit held: "The adverb 'each' is distributive—that is, [it] refer[s] to every one of the several or many things (or persons) comprised in a group." Accordingly, the grant of authority included all Time Warner systems, and no abuse of discretion in denying injunctive relief was found.

In *Ergon-West Virginia, Inc. v. Dynegy Marketing & Trad*e, the Fifth Circuit found that Dynegy had no duty under two natural gas supply contracts to attempt to get replacement gas after a declaration of force majeure in response to hurricane damage, affirming the district court as to one contract and reversing as to the other.[103] The first contract's force majeure clause required Dynegy to "remed[y] with all reasonable dispatch" the event. The Court found that "reasonable" was not ambiguous but that extrinsic evidence of industry standards (favorable to Dynegy) was properly admitted to give it full meaning (contrasting its approach with the district court's, which found the term ambiguous and admitted the testimony to resolve the ambiguity).[104] The second contract's provision had language about "due diligence" by Dynegy. The Court found the term ambiguous as both parties' readings of it were reasonable, and then held that the district court should have credited the same evidence here as it did for the first contract.

The defendant in *R&L Investment Property LLC v. Hamm* alleged fraudulent inducement into a land sales contract, and the plaintiff responded that a ratification occurred when the defendant signed a modification of a related lien note and deed of trust.[105]

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92 687 F.3d 665 (5th Cir. 2013).

93 *Id.* at 670.

94 *Id.* at 671.

95 *Id.* at 669 (citing *Nat'l. Fd'n of the Blind v. Abbott,* 647 F.3d 202, 208 (5th Cir. 2011)).

96 703 F.3d 316 (5th Cir. 2013).

97 *Id.* at 318.

98 96 S.W.3d 230 (Tex. 2002) (applying *Crown Life Ins. v. Casteel,* 22 S.W.3d 378 (Tex. 2000)).

99 708 F.3d 658 (5th Cir. 2013).

100 *Id.* at 663, 666.

101 *See id.* at 663 at n. 10.

102 No. 12-10935 (May 30, 2013, unpublished).

103 706 F.3d 419 (5th Cir. 2013).

104 *Id.* at 425.

105 715 F.3d 145 (5th Cir. 2013).

The Fifth Circuit agreed with the plaintiff, following the principle that "instruments pertaining to the same transaction may be read together . . . as if they were part of a single, unified instrument."[106] Because the defendant not only executed the ratification, but received the benefit of the related bargain, its claim for damages was foreclosed.[107]

In *Cambridge Integrated Services Group v. Concentra Integrated Services*, after reminding that a district court located in a state does not get deference in making an *Erie* guess about that state's law, the Fifth Circuit examined the effect of a release obtained by an indemnitor for potential claims against its indemnitee.[108] The Court found that the release precisely matched the terms of the indemnitor's obligations to the indemnitee, and thus extinguished its duty to indemnify against such claims in ongoing litigation. As to the duty to defend, however, the Court found summary judgment improper as issues about the claims "remained to be clarified through litigation."[109]

A group of chicken farmers supplied poultry to Pilgrim's Pride. After the company terminated its contracts and entered bankruptcy, the farmers sued for damages under a promissory estoppel theory, alleging that its oral promises of a long-term relationship induced them to invest in chicken houses. In *Clinton Growers v. Pilgrim's Pride,*[110] the Court affirmed summary judgment for Pilgrim's Pride, finding that the plain language of the contract specified a contract duration ("flock-to-flock," roughly 4-9 weeks), and foreclosed an estoppel claim about that topic.[111] Similarly, contract provisions about the farmers' compensation and maintenance obligations foreclosed other attempts to recast the subject of the estoppel claim.[112] The Court distinguished a prior Arkansas case about a commitment by Tyson Foods to supply hogs to a hog grower, both on legal grounds and on the strength of the evidence about the alleged misrepresentations by Tyson.[113]

An assignment of royalty interests for a continental shelf project had this "calculate or pay" clause: "The overriding royalty interest assigned herein shall be calculated and paid in the same manner and subject to the same terms and conditions as the landowner's royalty under the Lease." The parties disputed whether the clause simply required calculation of royalties in the same way as the government's royalty, or allowed suspension of the assigned payments during a period when the government's royalty right was suspended. In *Total E&P USA, Inc. v. Kerr-McGee Oil & Gas,*[114] applying Louisiana law, the majority found the clause ambiguous on that issue – further reasoning that at the time of contracting, legal principles that eventually became settled and could resolve the ambiguity were not yet settled. Noting that no cross-appeal was taken, the Court reversed a summary judgment and remanded for consideration of extrinsic evidence. A succinct concurrence noted an additional reason for finding ambiguity based on the grammar of the clause. A dissent took issue with the majority's analysis of other contract provisions and applicable law, and would have affirmed summary judgment about interpretation but reversed as to reformation for mutual mistake. Both the majority and dissent endorsed consideration of extrinsic evidence, for different reasons and purposes — a general topic which recurs with some regularity in the Court's contract opinions.

The parties' agreement in *Horn v. State Farm Lloyds* said: "State Farm agrees not to remove any Hurricane Ike cases filed by your firm to Federal Court."[115] Roughly a year later, the firm filed a 100,000-member class action against State Farm, who removed the case. State Farm argued that the agreement was intended to resolve large numbers of individual claims and extending it to a class action was not consistent with the specific consideration given. The Fifth Circuit affirmed the remand order, finding that the terms "any" and "cases" were not ambiguous.

XIV. COPYRIGHT AND TRADEMARK

Baisden v. I'm Ready Productions involved several challenges to a defense verdict in a copyright infringement case.[116] Among other holdings, the Fifth Circuit reminded that "[c]onsent for an implied [nonexclusive] license may take the form of permission or lack of objection," making the Copyright Act's requirement of a writing inapplicable.[117] The Court also reviewed a jury instruction that allegedly conflated the question of license with that of infringement — a potential problem since the burdens differ on the two

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106 *Id.* at 150 (citing *Fort Worth 150 v. City of Fort Worth,* 22 S.W. 3d 831, 840 (Tex. 2000).

107 *See id.* at 151 (citing *Fortune Production Co. v. Conoco, Inc.,* 52 S.W.3d 671, 678 (Tex. 2000)).

108 697 F.3d 248 (5th Cir. 2013).

109 *Id.* at 255.

110 706 F.3d 636 (5th Cir. 2013).

111 *Id.* at 641.

112 *See id.*

113 *Id*. at 641-43 (distinguishing *Tyson Foods, Inc. v. Davis,* 66 S.W.3d 568 (Ark. 2002)).

114 711 F.3d 478 (5th Cir. 2013).

115 703 F.3d 735 (5th Cir. 2013).

116 693 F.3d 491 (5th Cir. 2012).

117 *Id.* at 500-01 (reviewing *Lulirama Ltd. v. Axcess Broad. Servs.,* 128 F.3d 872 (5th Cir. 1997)).

points — but found that while "the question is not a model of clarity" it did not give rise to reversible error.[118]

Globeranger Corp. v. Software AG involved Texas state law claims about the development of a radio frequency identification system.[119] The defendants removed and obtained dismissal on the grounds of Copyright Act preemption. The Fifth Circuit agreed that section 301(a) of the Act creates complete preemption, and on the applicable test: "whether [the claim] falls 'within the subject matter of copyright'" and whether it "protects rights that are 'equivalent'" to those of a copyright[120] After thorough review of prior cases, the Court held that the conversion claim was likely preempted (thereby maintaining federal jurisdiction), but that the general basis for the claims included business practices excluded from copyright protection, making dismissal at the Rule 12 stage inappropriate.

Abraham v. Alpha Chi Omega involved Paddle Tramps Manufacturing who made wooden paddles with the emblems of several fraternities. A group of 32 fraternities sued to enjoin it for trademark infringement and unfair competition, and the company defended with unclean hands and laches.[121] The district court entered partial injunctive relief after a jury trial found for the company on the defenses. The Fifth Circuit affirmed the instructions given, finding that the appellant's arguments about unclean hands conflated elements of trademark liability with elements of the defense and that the laches instruction fairly handled the concept of "progressive encroachment." The Court also found sufficient evidence to support the "undue prejudice" element of laches, although calling it a "close question," and found that the district court properly balanced the equities — especially injury to the alleged infringer – in crafting the injunction. The opinion discusses and distinguishes other cases denying relief in related situations.

XV. DAMAGES

A federal jury awarded $4 million in compensatory damages for a car wreck in *Learmonth v. Sears, Roebuck & Co.*[122] The district judge interpreted the award to include $2.2 million in noneconomic damages, and then reduced that portion of the award to $1 million because of Mississippi's statutory cap on noneconomic damages. The plaintiff challenged the cap as violating the Mississippi Constitution's jury trial guarantee and separation of power provisions. The Mississippi Supreme Court declined to answer certified questions about those issues. The Fifth Circuit found that the cap did not violate the Mississippi Constitution. The Court declined to consider an argument that the *Erie* doctrine prevented the district judge from segregating the verdict as a matter of state substantive law, finding that the point was not asserted timely and was thus waived.

The plaintiff in *Smith Maritime v. L/B KAITLYN EYMARD* sought recovery for property damage and lost profits from allegedly negligent welding on a crane on a boat.[123] The Fifth Circuit found the plaintiff's tort claims for economic loss barred by *East River Steamship Corp. v. Transamerica Delaval*,[124] which "held that a manufacturer in a commercial relationship has no duty under either a negligence or strict products-liability theory to prevent a product from injuring itself." The Court concluded that "modification of a vessel," as distinguished from its "manufacture or repair," was "a distinction without a difference" for purposes of East River. The Court recognized that the errant crane had damaged living quarters that were being added to the vessel, but those quarters were not "other property" outside the *East River* doctrine given the wording of the parties' Asset Purchase Agreement.

The defendant in *Factory Mutual Insurance v. Alon USA*[125] stipulated to liability after an explosion at a waste treatment plant. The remaining issue was whether fair market value of the plant was the cost to replace it (roughly $6 million) or the cost of the plant's component parts (roughly $900,000). Under deferential clear error and abuse-of-discretion standards of review, the Fifth Circuit affirmed the district court's conclusions that: (1) the plant system was unique and the cost of its components did not fairly estimate its value;[126] (2) the plaintiff's expert "educated and interviewed . . . employees" about a key depreciation issue, and thus "did more than just repeat information gleaned from external sources";[127] and (3) the multiplier used to reflect installation expenses was "entirely reasonable[,]" "[g]iven the lack of useful

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118 *Id.* at 506.

119 691 F.3d 702 (5th Cir. 2012).

120 *Id.* at 706 *(citing Carson v. Dynegy,* 344 F.3d 446, 456 (5th Cir. 2003)).

121 708 F.3d 614 (5th Cir. 2013).

122 710 F.3d 249 (5th Cir. 2013).

123 No. 12-30378 (Jan. 3, 2013, publication ordered March 11, 2013).

124 476 U.S. 858, 871 (1986).

125 705 F.3d 518 (5th Cir. 2013).

126 *Id.* at 522 (distinguishing *Hartford Ins. Co. v. Jiminez,* 814 S.W.2d 551 (Tex. App.—Houston [1st Dist.] 1991, no pet.)).

127 *Id.* at 524 (distinguishing *U.S. v. Mejia,* 545 F.3d 179 (2d Cir. 2008)).

records and resources pertaining to this particular . . . plant."

The sales agreement for two tugboats provided for $250,000 in liquidated damages if the boat was used in violation of a noncompetition provision. In *International Marine LLC v. Delta Towing LLC,*[128] the Fifth Circuit applied federal admiralty law, using section 356 of the *Second Restatement of Contracts* as the guide, and placed the burden on the party seeking to invalidate the provision as a penalty. The Court quickly concluded that the second factor of that section — difficulty in proving damages – was established by evidence about the nature of the boat charter business to which the clause applied. The Court also found that the first factor — reasonableness of the estimated anticipated loss — was satisfied by evidence about the range of expected fees and contract duration.[129] The clause was thus enforceable.

The plaintiff in *Arthur J. Gallagher & Co. v. Babcock* obtained a $1.2 million judgment for violation of a noncompetition agreement in the insurance field.[130] The Fifth Circuit affirmed the enforceability of the agreement. As to its substance, the Court held that Gallagher's prohibition of employees from competing for accounts on which they actually worked at Gallagher was "*less* restrictive than allowed under state law."[131] As to geographic scope, the Court affirmed the district court's narrowing of the provision from 64 parishes to the 9 in which Gallagher actually provided insurance services. The Court vacated the damages because the key witness conflated the group of clients who chose to leave Gallagher after the employee left with the group of clients who actually followed Gallagher to his new employer.[132]

In *Westlake Petrochemicals v. United Polychem*, the plaintiff obtained judgment for $6.3 million under the UCC for breach of a contract to supply ethylene.[133] The Fifth Circuit affirmed on liability, finding that evidence about the need for credit approval did not disprove contract formation, defeat the Statute of Frauds, or establish a condition precedent.[134] The Court reversed and remanded on damages, finding that the plaintiff was analogous to a "jobber" and thus could recover lost profits but not the contract-market price differential.[135] The Court also reversed as to an individual's guaranty of the damages, finding a conflict between the termination provision of the guaranty and the plaintiff's argument about when liability accrued, which created an ambiguity that made the guaranty unenforceable under Texas law.[136]

XVI. DISCOVERY

In long-running litigation and arbitration about alleged environmental contamination in Ecuador, Chevron obtained discovery from U.S. courts several times under 28 U.S.C. § 1782 on the basis that a "foreign or international tribunal" was involved. In *Republic of Ecuador v. Connor,*[137] Chevron then successfully resisted a § 1782 application on the ground that the arbitration was not an "international tribunal." The Fifth Circuit applied judicial estoppel and reversed, asking: "Why shouldn't sauce for Chevron's goose be sauce for the Ecuador gander as well?[138] The Court dismissed a jurisdictional issue by characterizing § 1782 as a grant of administrative authority. It then rejected Chevron's arguments that judicial estoppel could not apply to legal issues and that reliance by earlier courts on Chevron's position had not been shown, reminding: "Because judicial estoppel is an equitable doctrine, courts may apply it flexibly to achieve substantial justice."[139]

A police dispatcher was terminated based on texts and pictures found on her cell phone in violation of department policy in *Garcia v. City of Laredo*.[140] The Fifth Circuit affirmed summary judgment on her claim that this data was protected by the Stored Communications Act[141], finding that the phone was not a "facility" and the data saved on it was not in "electronic storage" as the statute defined those terms.

The appellant in *All Plaintiffs v. Transocean Offshore* (the MDL relating to Deepwater Horizon) challenged an order requiring him to submit to a psychiatric exam.[142] Following *Mohawk Industries v. Carpenter,*[143] the Fifth Circuit held that the collateral

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[128] 708 F.3d 651 (5th Cir. 2013).

[129] *Id.* at 653 (citing *Farmers Exp. Co. v. M/V Georgis Prois,* 799 F.2d 159 (5th Cir. 1986)).

[130] 703 F.3d 284 (5th Cir. 2012).

[131] *Id.* at 291.

[132] *Id.* at 296.

[133] 688 F.3d 232 (5th Cir 2012).

[134] *Id*. at 240, 241, 242.

[135] *Id.* at 244 (citing *Nobs Chemical v. Koppers Co.,* 616 F.2d 212 (5th Cir. 1980)).

[136] *Id.* at 20-21.

[137] 708 F.3d 651 (5th Cir. 2013).

[138] *Id.* at 654.

[139] *Id.* at 655 (quoting *Reed v. City of Arlington,* 650 F.3d 571 (5th Cir. 2011) (*en banc*), and citing *New Hampshire v. Maine,* 532 U.S. 752 (2001)).

[140] No. 11-41118 (Dec. 12, 2012).

[141] 18 U.S.C. ch. 121.

[142] No. 12-30237 (Jan. 3, 2013, unpublished).

[143] 130 S. Ct. 599 (2009).

order doctrine did not allow appeal of this interlocutory discovery order. Any erroneous effect on the merits of the case could be reviewed on appeal of final judgment, and even if that review was "imperfect[]" to remedy the intrusion on his privacy interest, the harm was not so great as to justify interlocutory review of the entire class of similar orders. A concurrence noted that while mandamus review was theoretically possible, this party had not requested it as an alternative to direct appeal, and had not made a sufficiently specific showing of harm to obtain mandamus relief.

XVII. ERISA

After granting en banc review, and thus vacating the panel opinion in *Access Mediquip v. United Healthcare*, the full court reinstated the panel opinion and expressly overruled prior cases that were in tension with the panel's analysis of ERISA preemption of misrepresentation claims.[144]

XVIII. EXPERTS

An expert opined that a railroad crossing was unsafe and required active warning devices. *Brown v. Illinois Central Railroad.*[145] He contended that the crossing had "'narrow' pavement, 'skewed' angle, 'rough' surface and 'steep' incline" but did not tie those conclusions to a guideline or publications, relying instead on "education and experience." He also admitted that visibility at the crossing was adequate under the Transportation Department's standards.[146] Accordingly, the Fifth Circuit affirmed the district court's exclusion of his testimony under *Daubert*, calling it "transparently subjective."[147]

Roman v. Western Manufacturing examined a $1mm-plus verdict about severe injuries from a pump malfunction.[148] After noting: "It is not our charge to decide which side has the more persuasive case," the Court found that two qualified mechanical engineers met *Daubert* even though they lacked extensive experience with "stucco pumps," declining to "make expert certification decisions a battle of labels."[149] The Court also rejected technical challenges to the type of pump reviewed by the experts and the plausibility of their factual assumptions about its operation, stating "There was certainly contrary evidence, but that was for jurors to weigh."

Smith v. Christus St. Michaels presented a wrongful death claim about an elderly man, who suffered from recurrent cancer, who died from a fall in the hospital while being treated for a blood disorder.[150] The trial court granted summary judgment under the "lost chance" doctrine, finding a lack of evidence that the man would have been likely to survive his cancer. The Fifth Circuit reversed because it found his death was caused by a fall unrelated to his cancer or other treatment protocol.[151] The Court also reversed a ruling that the plaintiffs' expert testimony on causation was conclusory, finding that it "sufficiently explained how and why" as to the allegedly inadequate monitoring of the patient's bedside at night.[152]

XIX. FIRST AMENDMENT

In *Gibson v. Texas Department of Insurance*, a state regulator sought to prohibit an attorney from using the domain: "texasworkerscomplaw.com."[153] Even assuming the domain name was no more than commercial speech, the Fifth Circuit reasoned that the regulator failed to show that the name was inherently deceptive, and also "made no serious attempt to justify" its regulation as an effort to "prevent misuse of the DWC's names and symbols."[154] The Court thus reversed and remanded for consideration of the "misuse" issue, and to allow the attorney to show that the domain was "ordinary, communicative speech, and not merely . . . commercial speech." Its analysis reviewed several cases about trademark issues in the domain name context.[155]

XX. INSURANCE

On June 18, 2013, two separate panels — one addressing a chemical spill, the other a vessel crash into an oil well — reached the same conclusion in published opinions: when an insured fails to give notice within the agreed-upon period, as required by a "negotiated buyback" endorsement to a policy, the insurer does not have to show prejudice to void coverage. The cases were *Settoon Towing LLC v. St. Paul Surplus Lines Ins. Co.*[156] and *Starr Indemnity &*

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144 No. 10-20868 (Oct. 5, 2012).

145 705 F.3d 531 (5th Cir. 2013).

146 *Id.* at 535-36.

147 *Id.* at 537.

148 691 F.3d 686 (5th Cir. 2012).

149 *Id.* at 7.

150 No. 12-40057 (Nov. 13, 2012) (unpublished).

151 Slip op. at 8.

152 *Id*. at 10.

153 700 F.3d 227 (5th Cir. 2012).

154 *Id.* at 237.

155 *Id.* at n.1.

156 No. 11-31030.

Liability Co. v. SGS Petroleum Service Corp.[157] The notice provision was seen as part of the basic bargain struck about coverage. Both opinions — especially *Starr*, arising under Texas law — recognized the continuing viability of *Matador Petroleum v. St. Paul Surplus Lines Ins. Co.*[158] in this situation, notwithstanding later Texas Supreme Court cases requiring prejudice in other contexts arising from disputes about the main body of a policy. *Settoon* went on to address other issues under Louisiana insurance law, including whether the Civil Code concept of "impossibility," which focuses on a failure to perform an obligation, applies to a failure to perform a condition precedent such as giving notice.

The EPA and its state equivalent sued the owner of the "Big Cajun II," a coal power plant in Louisiana, seeking penalties, injunctive relief, and remediation of alleged environmental damage in *Louisiana Generating LLC v. Illinois Union Ins. Co.*[159] Applying New York law, the Fifth Circuit found that "Claims, remediation costs, and associated legal defense expenses . . . as a result of a pollution condition" potentially encompassed some of the relief sought by the EPA for past environmental problems.[160] The Court also found that an exclusion for "[p]ayment of criminal fines, criminal penalties, punitive, exemplary or injunctive relief" did not unambiguously exclude coverage for remediation required by an injunction order, reasoning that such a broad reading "would potentially swallow" the coverage for remediation costs.[161] Having found a duty to defend, the Court did not reach a question about whether New York law allowed indemnification for civil penalties imposed under the Clean Air Act.

The issue in *Berkley Regional Ins. Co. v. Philadelphia Indemnity Ins. Co*. was: "Does the failure to give notice to an excess carrier until after an adverse jury verdict constitute evidence of prejudice that forfeits coverage?"[162] The Court thoroughly reviewed Texas law about untimely claim notice, observing that it can void coverage if the insurer is prejudiced, but "[d]efining the contours of prejudice from the breach of a notice requirement . . . is not easy."[163] The Court applied that general principle to excess carriers, and found that this carrier had raised fact issues about prejudice from untimely notice (here, after an adverse jury verdict), as it was unable to investigate the matter or participate in mediation.[164] The Court observed: "The cows had long since left the barn when [the carrier] was invited to close the barn door."[165]

An insurance policy said: "Whenever any Assured has information from which the Assured may reasonably conclude that an occurrence covered hereunder involves an event likely to involve this Policy, notice shall be sent to Underwriters as soon as practicable . . . " In *Ins. Co. of N. Am. v. Board of Commissioners of the Port of New Orleans,*[166] clarifying an earlier opinion (and mandate) about this notice provision, the Fifth Circuit held: "[T]he duty of coverage is triggered for each underwriter who receives notice under the policy. . . We do not, however, hold the converse of this conclusion. In other words, we do not hold that all underwriters under the policy must receive notice as a condition precedent to a duty of coverage being triggered for any individual underwriter under the policy."

The insurers in *Pride Transportation v. Continental Casualty* faced a claim arising from a truck accident that left the victim a paraplegic, with evidence that the driver falsified her logs to make deliveries on time, brought by plaintiff's counsel who had won personal injury verdicts in the same county for amounts in excess of policy limits.[167] Under these circumstances, the Fifth Circuit agreed with the district court that the insurers did not incur *Stowers* liability under Texas law for *accepting* (rather than rejecting, the classic *Stowers* fact pattern) a settlement offer at policy limits and then withdrawing from the defense of the insured trucking company. The Court did not address potential issues arising from the specific release in this settlement (it only named the driver, and excluded the company) except to note that potential indemnity claims between them would fall within the "insured-v.-insured" exclusion.

The insured in *Kerr v. State Farm* filed a claim about a stolen fishing boat, but declined to give an examination under oath (EUO).[168]. State Farm claimed the material breach that prevented recovery on the policy. The insured said that State Farm was not prejudiced. The Fifth Circuit affirmed summary judgment for State Farm, citing "affidavits from members of [State Farm's] Special Investigative Unit stating that an EUO is an important tool in the claim investigation process and that by refusing an EUO, Kerr impeded State Farm's ability to gather

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157 No. 12-20545.

158 174 F.3d 653 (5th Cir. 1989)

159 719 F.3d 328 (5th Cir. 2013).

160 *Id*. at 334.

161 *Id.* at 335.

162 690 F.3d 342 (5th Cir. 2012).

163 *Id.* at 350.

164 *Id.* at 350-51.

165 *Id.* at 351.

166 No. 12-30705 (May 1, 2013, unpublished).

167 No. 11-10892 (Feb. 6, 2013, unpublished).

168 No. 12-30332 (Feb. 5, 2013, unpublished).

information about the claim." The Court declined to address an argument by State Farm that prejudice need not be shown when an EUO is refused in a first-party case.

In *Levy Gardens Partners v. Commonwealth Land Title Insurance,*[169] an apartment developer sought recovery on a title insurance policy after unfortunate zoning stopped the project. The Fifth Circuit affirmed the finding of coverage, concluding, among other matters, that: (1) state court rulings about zoning laws deserved deference by federal courts in later coverage litigation; (2) the state court preliminary injunction litigation about zoning had become a sufficiently "final decree" to trigger coverage; (3) delay in giving notice did not cause prejudice; and (4) the policy did not require the developer to invoke a "conditional use process."[170] The Court also found, however, that the policy "unambiguously restricts liability to the difference in the value of the title with and without the zoning encumbrance," thus limiting the insured's recovery to roughly $650,000 rather than several million in development expenses. In rejecting the insured's arguments about the policy, the Court also found no prejudicial violation of Fed. R. Civ. P. 8(c) about the pleading of defensive matters.[171]

In the case of *Downhole Navigator LLC v. Nautilus Insurance*, an insured retained independent counsel after receiving a reservation of rights letter from its insurer, arguing that the insurer's chosen counsel had a conflict at that point.[172] Applying *Northern County Mutual v. Davalos,*[173] the Court found no conflict because "'the facts to be adjudicated' in the underlying . . . litigation are not the same 'facts upon which coverage depends.'"[174] The Court did not see the recent Texas Supreme Court case of *Unauthorized Practice of Law Committee v. American Home Assurance Co.,*[175] which dealt with the responsibilities of insurers' staff attorneys who defend a claim for an insured, as changing this basic analysis under Texas law.[176]

The Deepwater Horizon rig operated under a drilling contract between BP and Transocean. The contract had indemnity provisions between BP and Transocean for pollution claims depending on whether the contamination originated above water. The contract also required Transocean to maintain BP as an additional insured under Transocean's liability coverage. In *Ranger Insurance v. Transocean Offshore*, the parties agreed that BP was entitled to some coverage as an additional insured, but disputed whether that coverage reached pollution liability, since the spill originated below water in BP's area of responsibility under the indemnity clauses.[177] The Fifth Circuit reasoned: (1) Texas law begins by examining the policy, which did not restrict pollution coverage when read in light of earlier cases involving similar clauses; (2) the terms of the drilling contract did not change that conclusion, as its indemnity provisions were sufficiently "discrete" from its additional insured provision. The opinion reviews what the Court saw as a consistent line of Fifth Circuit and Texas authority about the interplay of indemnity and "additional insured" clauses. In 2013, this case was certified to the Texas Supreme Court.

The insured in *Mid-Continent Casualty v. Eland Energy* recovered a multi-million dollar verdict against its insurer, alleging that the insurer's efforts to unilaterally settle a claim for environmental damage after Hurricanes Katrina and Rita undermined the defense of an ongoing class action about similar claims.[178] The district court granted JNOV and the Fifth Circuit affirmed. Recognizing that "[the insured] is understandably upset," the court rejected a common-law duty of good faith under Texas law in the handling of third-party insurance claims, dismissing as dicta or distinguishing several cases cited by the insured.[179] Potential claims under Louisiana law failed for choice-of-law reasons since the claim was handled in Texas. Claims based on the Texas Insurance Code failed to establish a causal link between the alleged misconduct and the ultimate settlement terms of the class action.[180]

In *First American Title v. Continental Casualty*, the Court analyzed a "claims-made-and-reported" policy under the Louisiana direct action statute, which allows an injured third party to directly sue the responsible party's insurer.[181] Notice was not given to the insurer during the required period. The Court concluded that unlike an occurrence policy, where a notice requirement is intended to protect the insurer and a failure to give notice will not bar a direct action, proper notice under this policy was a condition precedent to coverage and thus barred the direct

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[169] 706 F.3d 622 (5th Cir. 2013).

[170] *Id.* at 631-32.

[171] *See id.* at 637.

[172] No. 11-20469 (June 29, 2012).

[173] 140 S.W.3d 685 (Tex. 2004).

[174] *Downhole*, 686 F.3d at 328.

[175] 261 S.W.2d 24 (Tex. 2008)

[176] *Downhole*, 686 F.3d at 328.

[177] 710 F.3d 338 (5th Cir. 2013).

[178] No. 11-10649 (Feb. 22, 2013).

[179] *Id.* at 519, 523.

[180] *Id.* at 523-24.

[181] No. 12-30336 (Feb. 28, 2013).

action.[182] A concurrence agreed with the result but advocated a narrower ground for decision.[183]

In *GuideOne Specialty Mutual Ins. Co. v. Missionary Church,* a coverage case arising from a car accident by church workers on a lunch break, the Court reversed on the duty to defend, disagreeing with the district court's decision to consider evidence about the state tort litigation as inconsistent with Texas's "eight corners" rule.[184] Under that rule, the pleadings about the driver's status and activities could potentially trigger coverage, creating a duty to defend. The Court declined to apply a "very narrow' exception that could apply if a coverage issue did not "overlap with the merits of or engage the truth" of the facts of the case.[185] The Court ended by reversing an injunction against state proceedings about the accident, citing general cases about the scope of declaratory judgment actions and noting that the "relitigation exception" to the Anti-Injunction Act did not apply.[186]

The insured in *Jamestown Insurance v. Reeder* successfully minimized its liability with a winning appeal to the Texas Supreme Court.[187] He only gave notice of a claim at that point, however, and despite the result, ran afoul of the concept that "[o]ne of the purposes of a notice provisions . . . is to allow an insurer 'to form an intelligent estimate of its rights and liabilities *before* it is obligated to pay.'"[188] Because the insurer could have helped influence the trial result, or negotiated a settlement at the appellate level, the "delayed tender thwarted the recognized purposes of the notice provisions" and summary judgment was affirmed for the insurer.[189]

In *Sosebee v. Steadfast Insurance Co.*, the Fifth Circuit found that an insurer made an effective reservation of rights, reminding that "Louisiana follows a functional approach to the reservation of rights and we have rejected requirements for technical language . . . ."[190] The Court then analyzed whether the insurer waived that reservation, in the unusual setting of a direct action suit against the insurer while the insured was in bankruptcy. Finding no harm or prejudice to the insured from the conduct at issue, the Court held that no waiver occurred, and reversed and rendered summary judgment for the insurer.[191]

XXI. MORTGAGE SERVICING

In its first published opinion of 2013 about the merits of a wrongful foreclosure claim, the Fifth Circuit rejected the plaintiff's "show-me-the-note" and "split-the-note" arguments. *Martins v. BAC Home Loans Servicing LP*.[192] The Court noted that much of the relevant law is federal because of diversity between the borrower and the foreclosing entity. As to the first theory, the court cited authority that allowed an authenticated photocopy to prove a note, and said: "We find no contrary Texas authority requiring production of the 'original' note." As to the second, acknowledging some contrary authority, the Court reviewed the relevant statute and held: "The 'split-the-note' theory is . . . inapplicable under Texas law where the foreclosing party is a mortgage servicer and the mortgage has been properly assigned. The party to foreclose need not possess the note itself."

The Fifth Circuit addressed the *Rooker-Feldman* doctrine in the context of mortgage servicing in *Truong v. Bank of America*.[193] After a review of the doctrine ("'Reduced to its essence, the *Rooker/Feldman* doctrine holds that inferior federal courts do not have the power to modify or reverse state court judgments' except when authorized by Congress."), the Court found that it did not prevent a claim arising from alleged misconduct during the course of a foreclosure case. On the merits, however, the claim failed because of an exemption in Louisiana's unfair trade practices act for "[a]ny federally insured financial institution," and the Court affirmed claims dismissal on that basis.

The plaintiff in *Gordon v. JP Morgan Chase* alleged that a home foreclosure was prevented by the lender′s promises of a permanent loan modification under the Home Affordable Mortgage Program ("HAMP").[194] The Fifth Circuit agreed with the lender that the Statute of Frauds did not allow such a claim to proceed under Texas contract law. Because the SOF barred the contract claim, promissory estoppel could only arise if the lender orally promised to sign a writing that would satisfy the SOF, and that the writing was in existence at the time of the promise. Statements about future loan papers did not satisfy this rule.

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182 *See id.* at 1175.

183 *Id.* at 1177.

184 687 F.3d. 676 (5th Cir. 2012).

185 *Id.* at 686 (citing *GuideOne Elite v. Fielder Road Baptist Church*, 197 S.W. 3d 305 (Tex. 2006)).

186 *Id.* at 687.

187 No. 12-20437 (Jan. 17, 2013, unpublished).

188 *S*lip op. at 5 (emphasis in original).

189 See id.

190 701 F.3d 1012 (5th Cir. 2013) (citing *FDIC v. Duffy,* 47 F.3d 146, 151 (5th Cir. 1995)).

191 *Id.* at 1031.

192 No. 12-20559 (June 26, 2013).

193 24 F.3d 250 (5th Cir. 2013).

194 No. 12-20323 (Jan. 3, 2013, unpublished).

In *Pennell v. Wells Fargo Bank,*[195] the Fifth Circuit affirmed summary judgment for a servicer on a negligent misrepresentation claim under Mississippi law based on statements during loan modification discussions. The Court saw the statements as unactionable promises of future conduct. In reviewing the relevant cases, the Court distinguished two federal district court cases on their facts, while also diminishing their effect under *Erie* compared to controlling state court authority.[196]

Another 2013 mortgage case *James v. Wells Fargo Bank*,[197] affirmed judgment for a mortgage servicer on contact, promissory estoppel and tort claims about an unsuccessful HAMP modification negotiation. The holding of note is that the plaintiffs' DTPA claim failed as a matter of law.

The Fifth Circuit also affirmed the dismissal of contract, promissory estoppel, and tort claims under Texas law arising from the attempted negotiation of a loan modification during a foreclosure situation. *Milton v. U.S. Bank*,[198] The Court also found that this mortgagor-mortgagee relationship did not create an independently actionable duty of good faith, and that reliance on alleged representations that were inconsistent with the loan documents and foreclosure notice was not reasonable.[199]

The Fifth Circuit also affirmed the dismissal of claims about the foreclosure on a home used as collateral for a business loan. *Water Dynamics v. HSBC Bank*.[200] The holdings included: (1) the foreclosure price exceeded 50 of the claimed value, and was thus not "grossly inadequate" and appellants could not state a wrongful foreclosure claim, (2) appellants' prior breach of contract foreclosed their contract claims, and the contract modifications they alleged were barred by the Texas statute of frauds, (3) acts of the lender alleged to be inconsistent with the loan documents did not state a waiver claim, especially given the deed of trust's anti-waiver provision, and (4) "Appellants' allegations may demonstrate a failure to communicate between themselves and the lender, but they fall far short of . . . [showing] 'a course of harassment that was willful, wanton, malicious, and intended to inflict mental anguish and bodily harm'" so as to state a claim for unreasonable collection efforts.

In *Knoles v. Wells Fargo,*[201] the borrower lost a forcible entry & detainer (eviction) matter at trial in JP court and on appeal. The borrower then sued for damages, Wells removed, and the borrower unsuccessfully tried to get a TRO about possession from the federal district court. The district court denied relief based on the *Rooker-Feldman* doctrine about federal review of final state court judgments. The Fifth Circuit found that it had jurisdiction over the interlocutory appeal pursuant to 28 U.S.C. § 1292(a)(1), even though the appeal was nominally from a TRO, because the relief at issue was "more in the nature of a temporary injunction in fact, though not in name." The court deflected an argument about mootness to hold that the order sought a federal injunction against a final state court judgment in violation of the Anti-Injunction Act.

The borrowers in *Priester v. JP Morgan Chase* alleged two violations of the Texas Constitution about their home equity loan — not receiving notice of their rights 12 days before closing, and closing the loan in their home rather than the offices of a lender, attorney, or title company.[202] A cure letter was not answered and they sued for forfeiture of interest and principal under the state constitution. The Fifth Circuit affirmed the dismissal of the claim under the Texas 4-year "residual" limitations period, finding that was the prevailing view of courts that had examined the issue, and disagreeing with a district court that had found no limitations period. That court reasoned that a noncompliant home equity loan was void, but the Fifth Circuit concluded that the cure provision in the Constitution instead made it voidable. Tolling doctrines did not apply since it was readily apparent where the closing occurred. The Court also affirmed the denial of a motion for leave to amend to add new claims and non-diverse parties, reviewing the factors for both aspects of such a motion.

XXII. OIL AND GAS

The plaintiff in *Coe v. Chesapeake Exploration* won a $20 million judgment for breach of a contract to buy rights in the Haynesville Shale formation, against the background of a a "plummet[]" in the price of natural gas.[203] The Fifth Circuit affirmed. After review of other analogous energy cases, the Court found that the parties' writing had a sufficient "nucleus of description" of the property to satisfy the Statute of Frauds, even though some review

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195 No. 12-60595 (Jan. 9, 2013, unpublished)

196 *Id.* at 6-7.

197 No. 12-10861 (May 3, 2013, unpublished).

198 No. 12-40742 (Jan. 18, 2013, unpublished). S*ee also Gordon v. JP Morgan Chase* (contract and estoppel claims under Texas law) and *Pennell v. Wells Fargo Bank* (negligent misrepresentation claim under Mississippi law).

199 Slip op. at 5, 6.

200 No. 12-10307 (Jan. 30, 2013, unpublished).

201 No. 12-40369 (Feb. 19, 2013, unpublished).

202 No. 12-40032 (Feb. 13, 2013).

203 No. 11-41003 (Sept. 12, 2012).

of public records was needed to fully identify the property from that "nucleus."[204] The Court also found that the parties had reached an enforceable agreement and that Plaintiff had tendered performance, finding an "adjustment clause" specifying a per-acre price particularly relevant on the tender issue.[205]

"What follows is the tale of competing mineral leases on the Louisiana property of Lee and Patsy Stockman during the Haynesville Shale leasing frenzy," began *Petrohawk Properties v. Chesapeake Louisiana*.[206] The Fifth Circuit affirmed a finding that one of the dueling leases was procured by fraudulent misrepresentations as to the legal effect of a lease extension, rejecting several challenges to whether such a representation was actionable under Louisiana law, as well as an argument that the fraud was "confirmed [ratified]." The Court also rejected a counterclaim for tortious interference with contract, noting that Louisiana has a limited view of that tort and requires a "narrow, individualized duty" between plaintiff and tortfeasor.[207]

A Louisiana statute requires a well operator to provide landowners "a sworn, detailed, [and] itemized statement" about drilling costs. In *Brannon Properties v. Chesapeake Operating*[208]. The Fifth Circuit reversed a summary judgment for the operator, finding that the district court correctly concluded that its report lacked enough detail under the unambiguous language of the statute, and that the analysis should have ended there.[209] The Court faulted the district court for proceeding to analysis of the statute's purpose after reaching a conclusion that its terms were unambiguous, and also for finding an incorrect purpose inconsistent with those terms.[210]

XXIII. PERSONAL JURISDICTION

In 2011 in *J. McIntyre Machinery v. Nicastro*, the Supreme Court revisited the issue of specific personal jurisdiction over a manufacturer based on putting a product into the "stream of commerce."[211] While the fractured Court did not produce a majority opinion, the plurality and a 2-Justice concurrence expressed concern about a view of that doctrine that would allow jurisdiction in a particular state based on a manufacturer's general intent to do business across the country. The Fifth Circuit directly addressed that language in *Ainsworth v. Moffett Engineering*, finding that the plurality was not controlling, and that the 2-Justice concurrence was decided on the limited ground that no formulation of the doctrine would allow jurisdiction based on that manufacturer's small number of shipments into the forum.[212] Because the defendant in *Ainsworth* had over 100 shipments during the relevant time, jurisdiction was appropriate.[213] Language from past Circuit cases that may be inconsistent with *McIntyre* was noted but kept in place for now.[214]

The defendant in *Bowles v. Ranger Land Systems* did not have a bank account, registered agent, or office in Texas.[215] As a defense contractor, the company had a handful of employees at three Army bases Texas, but that presence was not substantial enough to create general jurisdiction. (The Fifth Circuit also found no abuse of discretion in denying further jurisdictional discovery based on these allegations.

Plaintiff purchased a shaved-ice machine in Louisiana, made by Southern Snow, a Louisiana-based business. She moved the machine to Mississippi, injured her hand while cleaning it, and sued for damages in Mississippi in the case of *Irvin v. Southern Snow Manufacturing*.[216] The Fifth Circuit agreed with the district court that she did not establish specific jurisdiction under a stream-of-commerce theory. Even assuming that Southern Snow had minimum contacts by making a substantial percentage of its sales into neighboring Mississippi, her claim did not arise out of those contacts because "Southern Snow sold the machine to a Louisiana customer and had no knowledge that, years later, Irvin unilaterally transported it into Mississippi."[217]

While of limited precedential value because it uses "plain error" review, *Ward v. Rhode* touches on

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204 *Id.* at 11-12.

205 *Id.* at 16, 17-18.

206 No. 11-30576 (as rev'd Aug. 2012).

207 *Id.* at 20-24 (citing *9 to 5 Fashions v. Spurney,* 538 So.2d 228 (1989)).

208 No. 12-30306 (Feb. 21, 2013, unpublished).

209 *See id.* ("The statute clearly connects the costs reported to the benefits received in exchange. . . . [I]t must tell the unleased mineral owner what it is getting for its money.").

210 *Id.* at 6-7.

211 131 S. Ct. 2780 (2011).

212 716 F.3d 174, 178 (5th Cir. 2013).

213 See id.

214 See id.

215 No. 12-51255 (June 16, 2013, unpublished).

216 No. 11-60767 (March 13, 2013, unpublished).

217 Slip op. at 3. The Court's emphasis on the "arising out of" factor echoes its recent opinion in *ITL International v. Constenla, S.A.*, 689 F.3d 493 (5th Cir. 2012).

the role of websites in personal jurisdiction.[218] Plaintiff alleged that the defendants placed a false "Scam Alert" about Plaintiff's debt settlement services on a website. The court observed: "The [Defendants'] website is interactive to the extent that it allows users to post their opinions about the debt-counseling services that they have used. However, it neither allows users to purchase products online, nor sells subscriptions to view its content. Therefore, the nature of the exchange of information is not commercial." Accordingly, it was "not clear or obvious" that the website's interactivity with Texans and the commercial nature of that interaction was sufficient to establish jurisdiction.

An Austin-based software developer sued a German software company for breach of contract and related torts in *Pervasive Software v. Lexware GMBH & Co*.[219] The Fifth Circuit affirmed the dismissal of the case for lack of personal jurisdiction, revisiting several key jurisdiction points for business relationships. The Court held that the parties' contracts alone would not create jurisdiction when the parties had no prior negotiations and did not envision "continuing and wide-reaching contacts" in Texas. The German company's Internet sales into Texas — 15 programs, costing roughly $66 each, over four years — did not establish "purposeful availment" for specific jurisdiction, or "continuous and systematic contacts" for general jurisdiction. The alleged acts of conversion occurred in Germany and thus did not create specific jurisdiction either.[220]

In the unpublished case of *Blake Box v. Dallas Mexican Consulate General*, the Fifth Circuit reversed a dismissal for lack of jurisdiction under the Foreign Sovereign Immunities Act because discovery was not allowed on whether a Mexican government representative had actual authority.[221] Acknowledging that the FSIA seeks to reduce litigation involving sovereigns, the Court found that authority "is a discrete issue conducive to limited discovery [and] the relevant documents reside exclusively with the defendant . . ."

XXIV. PLEADING

Two unpublished cases offer nuts-and-bolts insight on pleading requirements. A pro se copyright infringement complaint failed in *Richards v. BP Exploration & Production* when the plaintiff "[d]id not plausibly allege that the defendants copied any original work of authorship by her."[222] A qui tam suit under the False Claims Act failed to allege fraud with sufficient particularity. The Court noted in *Nunnally v. West Calcasieu Cameron Hospital* that while Fed. R. Civ. P. 9(b) applies to FCA claims, its application there is "context specific and flexible," and a plaintiff can plead with enough particularity "without including all the details of any single court-articulated standard–it depends on the elements of the claim in hand."[223]

In *Highland Capital Management v. Bank of America*, the Fifth Circuit reversed a Rule 12 dismissal of a claim for breach of an oral contract.[224] The Court noted the practical difficulty of applying the legal test for intent to be bound by an oral contract, largely developed on summary judgment records, in the pleading context.[225] The Court acknowledged that after the phone call in which the plaintiff alleged the contract formed, email called their deal "subject to" further amendment. The plaintiff, however, alleged sufficient facts about whether all material terms were agreed on in the call, the industry custom for the type of transaction, and the nature of the further discussions to state a plausible contract claim.[226] The Court affirmed the dismissal of a promissory estoppel claim for failure to adequately plead reliance.[227]

XXV. PRELIMINARY INJUNCTIONS

The Fifth Circuit affirmed a preliminary injunction about pharmaceutical development in *Daniels Health Sciences v. Vascular Health Sciences.*[228] The opinion offers a practical road map for basic issues in trade secret litigation. As to likelihood of success on the merits, the Court found adequate findings about damage, specific confidential information, a trade secret arising from a "compilation," and a confidential relationship between the parties.[229] As to irreparable injury, the Court found sufficient findings about reputational injury that was not speculative.[230] While it found no abuse of discretion in the district court's weighing of public and private interest factors, it did see a "close question"

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218 No. 12-41201 (May 3, 2013, unpublished) (applying *Mink v. AAAA Dev. LLC,* 190 F.3d 333, 336 (5th Cir. 1999)).

219 688 F.3d at 214 (5th Cir. 2012).

220 *Id*. at 229.

221 No. 11-10126 (Aug. 21, 2012, unpublished).

222 No. 12-30508 (April 3, 2013, unpublished).

223 No. 12-30656 (April 3, 2013, unpublished) (quoting *United States ex rel. Grubbs v. Kanneganti,* 565 F.3d 180, 189-90 (5th Cir. 2009)).

224 698 F.3d at 202 (5th Cir. 2012).

225 *Id.* at 209.

226 *Id.* at 210.

227 *Id.* at 211.

228 710 F.3d 579 (5th Cir. 2013).

229 *Id.* at 582-85.

230 *Id.* at 585.

about the overall scope of the injunction in light of the conduct at issue and the defendant's business plans and suggested that the district court "try to narrow the scope of its injunction on remand."[231]

While *Opulent Life Church v. City of Holly Springs* turned on First Amendment religion clause issues about the legality of a zoning ordinance, it offers some general insights about preliminary injunction practice.[232] Irreparable injury can potentially be shown from evidence about the likely loss of a lease, or a looming lack of building capacity (although the capacity issue in this case focused on religious practice.)[233] Even if evidence of injury is strong, the party opposing a preliminary injunction should have the opportunity to be heard and present evidence about the potential harm to it of an injunction so that the equities can be balanced.[234]

New Orleans taxicab owners challenged new city ordinances about their business and cars. The Fifth Circuit vacated a preliminary injunction in their favor, primarily on grounds related to the substantive constitutional issues in play, and affirmed the district court's denial of an injunction on other matters for lack of irreparable injury. *Dennis Melancon, Inc. v. City of New Orleans*.[235] Reminding that "when the threatened harm is more than de minimis, it is not so much the magnitude but the *irreparability* that counts for purposes of a preliminary injunction," the Court found that plaintiffs could later sue the city for costs of complying with the ordinances if they prevailed.[236] Footnotes address other potential theories of irreparable injury based on "impairment of contract" and privacy rights.[237]

XXVI. PROFESSIONAL LIABILITY

In *Colonial Freight Systems v. Adams & Reese*, the Fifth Circuit affirmed summary judgment for a law firm on a malpractice claim and for unpaid fees.[238] The plaintiff claimed, under Louisiana law, that the firm's "negligent failure to advise the company of its right to a jury" was malpractice. The Court rejected that claim because the plaintiff could only speculate about any loss resulting from that alleged failure.[239]

After the Army disclosed that a property was once a bomb range, the developer sued the law firm that advised on the issuance of bonds for the development in *Coves of the Highland Development District v. McGlinchey Stafford PLLC*.[240] The Fifth Circuit affirmed summary judgment for the firm, principally on the ground that the developer bought the property before it retained the firm as bond counsel. Of general interest, the parties' dispute about the engagement letter pitted a general description of the firm's work "regarding the source of payment and security for the Bonds" against a specific statement that the firm would rely on the developer for "complete and timely information on all developments pertaining to the Bonds . . . ."

XXVII. QUI TAM

The case of *Little v. Shell Exploration* presented an issue of first impression — whether a federal employee, even one whose job is to investigate fraud, may bring a *qui tam* action under the False Claims Act.[241] After review of the statutory text, the Court sided with a majority of other Circuits that have addressed the issue and concluded that one may. The Court acknowledged the practical issue of "how to ensure employee fidelity to agency enforcement priorities in the face of personal monetary incentives," but concluded that the government could address that issue with personnel guidelines and with its power to intervene and dismiss actions.[242] The Court remanded for consideration of whether the "public disclosure" and "original source" aspects of the Act barred the specific claims raised by these relators — matters the court noted that could limit the scope of the first holding.[243]

XXVIII. REMOVAL AND REMAND

In *Fontenot v. Watson Pharmaceuticals*, a long-running products liability and medical malpractice case about a transdermal pain patch, plaintiffs sought to add nondiverse health care providers to the case after removal.[244] The district court remanded pursuant to 28 U.S.C. § 1447(e). The Fifth Circuit dismissed for lack of appellate

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231 *Id.* at 586.

232 697 F.3d 279 (5th Cir. 2012).

233 *Id.* at 296.

234 *Id.* at 298.

235 703 F.3d 262 (5th Cir. 2012).

236 *Id.* at6 279.

237 *See id.* at 279 n.14, 280 n.15.

238 No. 12-30853 (May 15, 2013, unpublished).

239 Slip op. at 3 (citing *Teague v. St. Paul Fire & Marine Ins. Co.*, 10 So. 806 (La. Ct. App. 2009)).

240 No. 12-30096 (May 7, 2013, unpublished).

241 690 F.3d at 282 (5th Cir. 2012).

242 *See id.* at 290.

243 *Id.* at 294.

244 718 F.3d 518 (5th Cir. 2013).

jurisdiction, concluding that a remand for lack of subject jurisdiction was unreviewable under *Thermtron* just like a jurisdictional remand under 1447(c), and noting that all other circuits facing the issue reached the same conclusion.[245] The Court also found that the joinder ruling that led to the jurisdictional issue was unreviewable as a collateral order.[246]

The owner of technology that identified promising sites for gold mines sued an engineering firm for misusing its confidential information in the case of *Target Strike, Inc. v. Marston & Marston, Inc.*.[247] The Fifth Circuit found appropriate it appropriate after dismissal of the federal claim, when the claim had been litigated for an extended period and the timing of the remand motion seemed tactical "when the judicial tide appeared to turn . . ." (That holding contrasts with the recent opinion of *Enochs v. Lampasas County,*[248] which found an abuse of discretion in not remanding a case once all federal claims were eliminated at an early stage of the proceedings. The Court went on to find the plaintiff's claim time-barred because the sites were known to the plaintiff and the defendant's activity was public.

XXIX. SANCTIONS AND RELATED ISSUES

In *Kenyon International Emergency Services, Inc. v. Malcolm*, the Fifth Circuit found no abuse of discretion in an award of attorneys' fees under a Texas statute to the defendants in a suit to enforce a noncompetition agreement.[249] The Court clarified that "the key determination is [plaintiff's] knowledge of *reasonable limits*, not . . . its knowledge of the *reasonableness of the agreement.*"[250] As it saw the record, the plaintiff's CEO testified that the restrictions "were worldwide, overreaching in scope of activity, and basically indefinite in time."[251] The Court also reversed a sanction on the plaintiff's lawyer related to the unsealed filing of a "sexually-explicit Internet chat," reminding that "[i]ssuing a show-cause order is a mandatory prerequisite to imposing monetary sanctions *sua sponte*," and finding that the lawyer did not have an improper purpose in making the filing and thus did not fall within Rule 11.[252]

The Court released a revised opinion in *Hornbeck Offshore Services LLC v. Salazar*, which reversed a $530,000 finding of civil contempt against the Department of Interior about the deepwater drilling moratorium after the Deepwater Horizon incident.[253] After the disaster, the Interior Department imposed an offshore drilling moratorium, which the district court enjoined on the ground that Interior had not properly followed the Administrative Procedure Act. Interior then imposed a new moratorium supported by more detailed findings. The Fifth Circuit reversed the contempt award, noting that the district court had not based its ruling on a potential ground about Interior's authority, and stating: "In essence, the company argues that . . . the Interior Department ignored the purpose of the district court's injunction. If the purpose were to assure the resumption of operations until further court order, it was not clearly set out in the injunction."[254] A dissent expresses concern that "the majority opinion's approach may give incentive for litigants creatively to circumvent district court orders."[255]

Applying Fifth Circuit law, the Federal Circuit found an abuse of discretion in not awarding sanctions under Rule 11 and 38 U.S.C. § 985 for what it saw as a frivolous patent lawsuit, and remanded to the Eastern District of Texas for consideration of an appropriate award in the case of *Raylon LLC v. Complus Data Innovations*.[256] The court found that the plaintiff's claim construction was objectively unreasonable and that the district court erred in gave weight to the plaintiff's subjective motivation.[257]

In affirming summary judgment for the defense in the employment case of *Branch v. Cemex, Inc.,*[258] the Fifth Circuit reminded: "Although we appreciate and encourage vigorous representation by counsel, we will not tolerate representation that is 'zealous' to the point of false or misleading statements.[259] A footnote to that reminder noted: "'zealous' is derived from 'Zealots,' the sect that, when besieged by the Roman Legions at Masada, took the extreme action of slaying their own families and then committing suicide rather than surrendering or fighting a losing battle."[260]

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245 *Id.* at 521.

246 *See id.* at 521-22.

247 No. 12-50221 (April 17, 2013, unpublished).

248 641 F.3d 155 (5th Cir. 2011) (citing *Parker & Parsley v. Dresser Indus.,* 972 F.2d 580 (5th Cir. 1992)).

249 No. 12-20306 (May 14, 2013, unpublished).

250 *S*lip op at 6 (emphasis in original).

251 *Id.* at 6-7.

252 *See id.* at 14.

253 713 F.3d 787 (5th Cir. 2013).

254 *Id.* at 795.

255 *Id.* at 796.

256 700 F.3d 1361 (Fed. Cir. 2012).

257 *Id.* at 1367-68.

258 No. 12-20472 (March 26, 2013, unpublished).

259 *Id.*, slip op. at 2.

260 *Id.* at n.1.

The plaintiff's counsel in *Mick Haig Productions v. Does 1-670* served subpoenas on Internet service providers (ISPs) about the alleged wrongful download of pornographic material.[261] The district court found that the subpoenas violated orders that it had made to manage discovery, and imposed significant monetary and other sanctions on the lawyer.[262] The Fifth Circuit found that all of the lawyer's appellate challenges were waived — either because they were not raised below, or were raised only in an untimely motion to stay filed after the notice of appeal, and thus were waived. The Court declined to apply a "miscarriage of justice" exception to the standard waiver rules, stating that the lawyer's actions were "an attempt to repeat his strategy of . . . shaming or intimidating [the Does] into settling . . . ."[263]

In *Gonzalez v. Fresnius Medical Care*, the Court affirmed a JNOV on claims under the False Claims Act.[264] The Court agreed with the district court's conclusion that the plaintiff had not shown a wrongful patient referral scheme, noting that the number of referred patients stayed the same over time, whether or not the alleged conspiracy was in place.[265] The Court also agreed that a line of cases about claims "tainted by fraud" was limited to the fraudulent inducement context.[266] Finally, the Court affirmed a sanctions award under 28 USC § 1927 based on the plaintiff's changing testimony on whether she was asked to cover up the alleged scheme, noting differences between the deposition, the errata sheet afterwards, and then trial testimony.[267]

XXX. SERVICE

The plaintiff in *Moody National Bank v. Bywater Marine*[268] served its suit on a guaranty obligation by using the Texas longarm statute, which requires that the plaintiff provide the Texas Secretary of State with the defendant's "home or home office address."[269] The defendants in alleged that the plaintiff had only served a "mailing address," but the Fifth Circuit disagreed, holding that service on the address specified in the parties' contract for service of process satisfied the statute citing *Mahon v. Caldwell, Haddad, Skaggs, Inc.*[270]

The plaintiff in *Lozano v. Bosdet* did not serve a British defendant within the 120 days allowed by Fed. R. Civ. P. 4, or within an extension by the district court.[271] The Fifth Circuit, noting "that statutory interpretation is a 'holistic endeavor,'" applied a "flexible due-diligence" standard to find that dismissal was not warranted, especially since a refiled suit would likely be time-barred.[272] The Court aligned itself with the Seventh Circuit and rejected different readings of Rule 4(f) in the international context by the Ninth Circuit (unlimited time) and Second Circuit (120-day limit excused only if service is attempted in the foreign country), noting that it did not wish to require "immediate resort to the Hague Convention or other international methods."[273]

XXXI. SUFFICIENCY OF EVIDENCE

After a jury trial, the plaintiff won judgment of $336,000 for breach of a joint venture to bid a contract with the Air Force about upgrades to the Paveway laser-guided bomb program in the case of *X Technologies v. Marvin Test Systems*.[274] On the issue of causation, the Fifth Circuit quickly dismissed two challenges to a key witness's qualifications since he was not testifying as an expert, and also dismissed the effect of a claimed impeachment in light of the full record developed at trial.[275] The Court went on to affirm a directed verdict on a claimed defense of prior breach, finding that the agreement only imposed a one-way bar on multiple bids for the contract, and to affirm the judgment of breach, noting multiple uses of "team" in the record to describe the parties' relationship.[276]

In *Homoki v. Conversion Services*, a check processing company sued its sales agent and a competitor.[277] It won judgment for $700,000 against the competitor for tortious interference with the sales agent's contract with the company, and $2.15 million against the agent for past and future lost profits. The company and competitor appealed. First, the Fifth Circuit — assuming without deciding that the plaintiff had to show the competitor's awareness of an

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261 687 F.3d 649 (5th Cir. 2013).

262 *Id.* at 650-51.

263 *Id.* at 652.

264 689 F.3d 470 (5th Cir. 2012).

265 *Id.* at 476.

266 *Id.* at 476-77.

267 Id. at 480.

268 No. 12-40946 (May 14, 2013, unpublished).

269 Tex. Civ. Prac. & Rem. Code §§ 17.044(a), 17.045(a).

270 783 S.W.2d 769, 771 (Tex. App.—Fort Worth 1990, no writ).

271 No. 11-60737 (Aug. 31, 2012).

272 *Id.* at 7, 9.

273 *Id.* at 5-6.

274 719 F.3d 406 (5th Cir. 2013).

275 *Id.* at 413.

276 *See id.* at 413-14.

277 717 F.3d 388 (5th Cir. 2013).

exclusivity provision in the agent's contract — found sufficient evidence of such knowledge in testimony and the parties' course of dealing, and affirmed liability for tortious interference.[278] Second, the Court found that the plaintiff's "experience in managing his business for sixteen years" supported his damages testimony, and that "[w]hile [plaintiff]'s presentation of its damages evidence was far from ideal," also found sufficient evidence of causation on the interference claim.[279] Finally, the Court found that the plaintiff had given adequate notice of its claim of conspiracy to breach fiduciary duties (the joint pretrial order was not signed by the judge), but the plaintiff waived jury trial on that issue by not requesting a damages question — particularly given the significant dispute about causation in the evidence presented.[280]

In *Miller v. Raytheon Co.*, the Fifth Circuit affirmed liability for age discrimination and affirmed in part on damages.[281] The Court affirmed the verdict of liability, noting: "Considered in isolation, we agree with Raytheon that each category of evidence presented at trial might be insufficient to support the jury's verdict. But based upon the accumulation of circumstantial evidence and the credibility determinations that were required, we conclude that 'reasonable men could differ' about the presence of age discrimination."[282] It then reversed an award of mental anguish damages because "plaintiff's conclusory statements that he suffered emotional harm are insufficient," and rejected a challenge, based on the Texas Constitution, to the statutory punitive damages cap in the TCHRA.[283]

In *Wellogix, Inc. v. Accenture, LLP*, the district court entered judgment for the plaintiff — $26.2 million in compensatory damages and $18.2 million in punitives, after a remittitur – in a trade secrets case about software to make oil exploration more efficient.[284] Affirming, the Court: (1) reminded, in the opening paragraph, of the deference due to a jury verdict; (2) detailed the sufficient evidence before the jury of a trade secret, of its inappropriate use by the defendant, of damages, and malice; (3) rejected *Daubert* arguments about the scope of the plaintiff's computer science expert's testimony and the material considered by its damages expert; and (4) affirmed the punitive damages award because it was less than the compensatory damages and the issue of "reprehensibility" was neutral. The Court also analyzed aspects of the relationship between trade secret claims and the patent process. Footnote 4 of the opinion provides a useful guide to the federal courts' treatment of a "*Casteel* problem" in Texas jury submissions.

In the context of a denial of en banc rehearing, a concurring and dissenting opinion disputed whether an issue of charge error in an employment case had been preserved below in the case of *Nassar v. UT Southwestern Medical Center*.[285] The exchange about preservation echoes a similar one in the recent en banc case of *Jimenez v. Wood County*.[286]

In *Versata Software v. SAP America*, the Federal Circuit affirmed jury verdicts that could lead to a judgment in excess of $400 million.[287] That Circuit's review of a verdict is "reviewed under regional circuit law," as to which the Court observed: "The Fifth Circuit applies an 'especially deferential' standard of review 'with respect to the jury verdict.'"[288] In affirming the award for a reasonable royalty, the Court quoted the recent case of *Huffman v. Union Pacific R.R.*, which discussed "inference on the basis of common sense, common understanding and fair beliefs, grounded on evidence consisting of direct statement by witnesses or proof of circumstances from which inferences can fairly be drawn."[289]

XXXII. RECEIVERS

In *Netsphere v. Baron* "[t]he central issue on appeal is whether a court can establish a receivership to control a vexatious litigant." Applying an abuse of discretion standard, the Fifth Circuit answered "no."[290] The Court reviewed and rejected several rationales for imposing a receivership on a portfolio of disputed domain names, including preservation of jurisdiction, bringing closure to long-running litigation, payment of a series of attorneys and controlling vexatious litigation. It then addressed how to handle the fees related to the vacated receivership. The opinion thoroughly reviews prior Circuit precedent about the reasons for and proper boundaries of a receivership.

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278 *See id.* at 398.

279 *Id.* at 402.

280 *Id.* at 403-04.

281 716 F.3d 138 (5th Cir. 2013).

282 *See id.* at 148.

283 *Id.* at 147, 148.

284 716 F.3d 867 (5th Cir. 2013.

285 674 F.3d 448 (5th Cir. 2012).

286 660 F.3d 841 (5th Cir. 2011).

287 717 F.3d 1255 (Fed. Cir. 2013).

288 *Id.* 1261 (citing *Brown v. Bryan County,* 219 F.3d 450, 456 (5th Cir. 2000)).

289 675 F.3d 412, 421 (5th Cir. 2012).

290 703 F.3d 296 (5th Cir. 2012).

In a revised opinion in *Janvey v. Democratic Senatorial Campaign Committee,*[291] the Fifth Circuit withdrew its earlier holding that a federal equity receiver has standing to assert creditors' fraudulent transfer claims arising from a Ponzi scheme. The Court now holds that the receiver only has standing to assert the claims of the entities in receivership, but those entities are not considered to be "in pari delicto" with the operator of the scheme: "The appointment of the receiver removed the wrongdoer from the scene. The corporations were no more [the perpetrator's] evil zombies."[292]

XXXIII. RESTITUTION

The ALI's publication of the *Restatement (Third) of Restitution* in 2011 stirred interest in the important but arcane principles that define unjust enrichment. The Fifth Circuit addressed a classic restitution situation in *Boudreaux v. Transocean Deepwater, Inc.*[293] A seaman sought recovery for maintenance and cure after an injury; Transocean successfully established a defense based on the seaman's failure to disclose a previous medical condition; and Transocean sought restitution of money paid earlier. The majority rejected Transocean's position, finding a lack of support in prior case law, and noting that the scienter element of Transocean's defense was less demanding that a common-law fraud claim: The case for exercising our extraordinary power to create a new right of action has not been made. There is only the change of advocates and judges, by definition irrelevant to the settling force of past jurisprudence — always prized but a treasure in matters maritime.[294] A dissent, briefly citing the *Restatement*, argued that one other circuit had endorsed such a claim, and that allowing the claim struck the proper policy balance.[295]

A series of clerical errors led an insurer to overpay a $710,000 settlement by $510,000. In *National Casualty v. Kiva Construction,*[296] the insurer sued for breach of contract and "money had and received"; the insured counterclaimed for bad faith in the initial handling of the settlement. The Fifth Circuit affirmed the district court's summary judgment for the insurer. The Court's straightforward, opinion offers two cautionary notes — first, while the settlement agreement did not specify a time for payment of the full amount, a Louisiana statute did so specify (although the insurer complied), and second, the *Twombly* standards are not in play when the district court obviously considered evidence outside of the pleadings and said in its order that the counterclaims failed "based on the undisputed facts."

XXXIV. SUBJECT MATTER JURISDICTION

The district court dismissed a case about the misappropriation of trust assets under the "probate exception" to federal diversity jurisdiction in *Curtis v. Brunsting*,[297] applying the Supreme Court case of *Marshall v. Marshall.*[298] The Fifth Circuit stated that "*Marshall* requires a two-step inquiry into (1) whether the property in dispute is estate property within the custody of the probate court and (2) whether the plaintiff's claims would require the federal court to assume *in rem* jurisdiction over that property."[299] Finding no evidence that this inter vivos trust was, or even could be, subject to Texas probate administration, the Court reversed and remanded.

Servicios Azucareros v. John Deere arose from a suit by a Venezuelan company against a Louisiana-based affiliate of John Deere about the termination of a distributorship agreement in Venezuela.[300] The district court dismissed, finding that the plaintiff failed to adequately brief an issue of "prudential standing" about the ability of foreign plaintiffs to sue U.S. citizens in federal court. The Fifth Circuit found the standing issue "totally without merit," noting that alienage jurisdiction originated to allow British creditors to sue Americans after the 1783 Treaty of Paris and avoid a "notoriously frosty" reception in state court that hurt international commerce.[301] The Court also disagreed with the conclusion that the briefing amounted to a waiver, reviewing case law about the handling of similar dispositive motions.[302]

XXXV. VACATUR

Appellant sought review of an attachment order on the M/V OCEAN SHANGHAI. Appellee moved to dismiss the appeal, as the parties had settled, and the boat in question had left the jurisdiction. Appellant responded by asking for vacatur of the

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291 712 F.3d 185(5th Cir. 2013).

292 *Id.* at 6 (citing *Eberhard v. Marcu,* 530 F.3d 122, 132 (2d Cir. 2008). The Court also cited *Scholes v. Lehmann,* 56 F.3d 750 (7th Cir. 1995) (Posner, C.J.)).

293 721 F.3d 723 (5th Cir. 2013).

294 *Id.* at 728.

295 Id.

296 No. 12-20217 (Nov. 12, 2012, unpublished).

297 704 F.3d 406 (5th Cir. 2013).

298 547 U.S. 293 (2006).

299 *Curtis*, 704 F.3d at 409.

300 702 F.3d 794 (5th Cir. 2012).

301 *See id.* at 803.

302 *See id.* at 805-06.

attachment order. Recognizing that this request raised the novel question of vacatur of an interlocutory order rather than a final judgment, the Fifth Circuit found in *Farenco Shipping Co. v. Farenco Shipping PTE, Ltd.*[303] that no "exceptional circumstances" in either the parties' settlement, or the order's potential collateral estoppel effect would warrant its vacatur. With respect to the settlement, the Court observed that as a general matter: "Settlements are frequently made under difficult circumstances, and often represent the least bad of several bad options; this does not make such settlements involuntary."[304]

XXXVI. VENUE AND FORUM SELECTION

In re Radmax, Ltd. observed "Mandamus petitions from the Marshall Division are no strangers to the federal courts of appeals."[305] The Fifth Circuit went on to find a clear abuse of discretion in declining to transfer a case from the Marshall Division of the Eastern District of Texas to the Tyler Division. It found that the district court incorrectly applied the eight relevant 1404(a) factors, giving undue weight to potential delay and not enough weight to witness inconvenience, and quoting *Moore's Federal Practice* for the principle that "'the traditional deference given to plaintiff's choice of forum . . . is less' for intra-district transfers." Accordingly the Court granted mandamus pursuant to *In re Volkswagen*.[306] A pointed dissent agreed that the 1404(a) factors favored transfer but saw no clear abuse of discretion, noting that there was no clear Fifth Circuit authority on several of the points at issue in the context of intra-district transfers." The Fifth Circuit has since declined *en banc* reviews with a 7-8 vote.

In re Atlantic Marine Construction denied a mandamus petition about enforcement of a forum selection clause, finding no "clear abuse of discretion."[307] The majority and specially concurring opinions exchanged detailed views on whether Fed. R. Civ. P. 12(b)(3) or 28 U.S.C. § 1404(a) controls a forum selection issue, when the parties did not select state law to govern enforcement of the clause and venue would otherwise be proper in the district of suit. The Supreme Court has granted certiorari in the case in light of a circuit split on this issue.

The defendant in *Innovation First Int'l v. Zuru Inc.* removed a trade secret case about a toy robotic fish and then obtained dismissal on forum non conveniens grounds.[308] The Fifth Circuit found no abuse of discretion in the district court's conclusions that the design and production of the fish took place in China and that the bulk of witnesses and evidence were in China, and affirmed based on the analogous forum non conveniens case of *Dickson Marine v. Panalpina, Inc.*[309]

City of New Orleans Employees' Retirement System v. Hayward affirmed the dismissal, on forum non conveniens grounds, of putative shareholder derivative suits against BP arising from the Deepwater Horizon disaster.[310] Among other factors discussed, the Fifth Circuit noted and gave weight to the points that: (1) plaintiffs were "phantoms" for FNC purposes because of their attenuated interests in the case, (2) technological advances did not make geographical issues irrelevant in an FNC analysis [key witnesses and documents being located in the UK rather than Louisiana], (3) the UK had a substantial interest in applying its own, relatively new Companies Act, and (4) the BP derivative cases comprised one-third of the U.S. court's MDL docket.

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303 No. 12-31154 (March 4, 2013, unpublished).

304 *Id.,* slip op. at 2.

305 720 F.3d 285 (5th Cir. 2013).

306 545 F.3d 304 (5th Cir. 2008) (*en banc*).

307 701 F.3d 736 (5th Cir. 2012).

308 No. 12-10511 (revised April 3, 2013, unpublished).

309 179 F.3d 331 (5th Cir. 1999).

310 No. 12-20019 (Jan. 16, 2013, unpublished).

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CHAPTER 10.2

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U.S. SUPREME COURT UPDATE

1. INTRODUCTION

The Supreme Court's docket this year is extraordinarily deep with potential blockbuster decisions on campaign finance, abortion, affirmative action, public prayer, and presidential power. This paper focuses on cases of the most importance to business. The paper does not attempt to cover the cases in detail, but more simply aims to serve as a handy reference guide to some of the most important issues before the Court this year for business.[1]

2. KEY CASES THIS TERM

A. ***NLRB v. Noel Canning*** (Recess Appointments Clause/U.S. Constitution)[2]

In a case that many commentators consider the most important one of the 2013-2014 Term, the Supreme Court will consider the extent of the President's authority to bypass the Senate by making recess appointments. The U.S. Court of Appeals for the D.C. Circuit held that the President's appointments to the National Labor Relations Board (NLRB) in this case violated the Constitution—but the potential impact of the case extends far beyond the specific appointments at issue.

With respect to the NLRB alone, the stakes here are huge—as of July 2013, the NLRB has issued over 300 decisions since the D.C. Circuit invalidated the recess appointments in *Noel Canning*, and over 1,300 published and unpublished decisions, dating back to August 27, 2011, are now suspect. Depending upon the scope of the Supreme Court's eventual decision in this case, recess appointments to other boards and agencies could also be in the crosshairs.

B. ***Mississippi ex rel. Hood v. AU Optronics*** (Class Action Fairness Act)

The case involves a dispute between states and electronics manufacturers about whether restitution claims based on alleged price-fixing in the market for liquid crystal display panels should be heard in state or federal court. But the case could have far broader implications, as it presents the question whether a state's *parens patriae* action is removable as a "mass action" under the Class Action Fairness Act.

C. ***Mount Holly v. Mount Holly Gardens Citizens in Action*** (private rights of action/Fair Housing Act)

In a case closely watched by lenders and insurance companies, the Court was expected to decide whether the Fair Housing Act (FHA), which prohibits race discrimination in the sale or rental of housing, allows a private right of action for disparate impact claims. The Third Circuit said yes in a case involving claims that a small New Jersey town's plan to redevelop a blighted residential area violated the FHA because, although the plan was not motivated by intentional discrimination, it would have a disparate impact on some households. The case recently settled, however, and the Court dismissed the writ of certiorari.

D. ***DaimlerChrysler AG v. Bauman*** (personal jurisdiction)

Can a lawsuit proceed against a foreign corporation in the United States for alleged human rights violations abroad, based solely on the fact that an indirect corporate subsidiary performs services on behalf of the defendant in the forum state? The Ninth Circuit said yes and ruled against DaimlerChrsyler. The case could have broad implications given *amicus curiae* the U.S. Chamber of Commerce's argument in its brief that the due process clause does not permit the exercise of general jurisdiction over a parent corporation, whether foreign or domestic, based on the in-forum contacts of its wholly owned subsidiary.

E. ***Proskauer Rose LLP v. Troice; Willis of Colorado Inc. v. Troice; Chadbourne & Parke LLP v. Troice***[3] (securities class actions)

These cases arise from the Sanford ponzi scheme, and present the legal question whether the Securities Litigation Uniform Standards Act of 1998 ("SLUSA") precludes a state-law class action alleging a scheme of fraud that involves a misrepresentation about transactions in SLUSA-covered securities.

The petitioners argue that if the Fifth Circuit's decision is permitted to stand, a state law class action complaint that unquestionably alleges "a" misrepresentation "in connection with" the purchase or sale of a SLUSA-covered security nonetheless can escape the application of SLUSA by including other allegations that are farther removed from a covered securities transaction.

The Fifth Circuit sided with the Ninth Circuit in rejecting that argument, and held for the plaintiffs in the case. The case was argued on the first day of the Term in October 2013, and a decision is expected by the end of June.

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[1] Any opinions expressed herein are solely those of the author and do not necessarily represent those of her employer or its clients.

[2] Morgan Lewis represents a group of historians as amicus curiae in this case.

[3] Morgan Lewis represents one of the defendants in this case.

F. ***Medtronic, Inc. v. Boston Scientific Corp.*** (intellectual property)

In *Medlmmune, Inc. v. Genentech, Inc.*, 549 U.S. 118 (2007), the Supreme Court ruled that a patent licensee that believes its products do not infringe the patent and thus are not subject to royalty payments is "not required . . . to break or terminate its . . . license agreement before seeking a declaratory judgment in federal court that the underlying patent is . . . not infringed." The question now before the Supreme Court in *Medtronic* is whether in such an action, the licensee has to prove that its products do not infringe the patent, or whether (as is the case in all other patent litigation, including other declaratory judgment actions), the patentee must prove infringement.

G. ***Petrella v. Metro-Goldwyn-Mayer, Inc.*** (copyright)

This case presents the question whether the non-statutory defense of laches is available without restriction to bar all remedies for civil copyright claims filed outside of the three-year statute of limitations prescribed by Congress. The case was brought by Paula Petrella, daughter of boxer Jake LaMotta, against MGM in 2009 alleging various claims regarding the rights to the 1980 film Raging Bull. MGM obtained the rights to the movie in 1978, but Petrella renewed her rights in 1991 and notified MGM in 1998. The Ninth Circuit held that Petrella's copyright claim was barred by laches because she consciously delayed her suit for 18 years, and the delay was unreasonable.

H. ***Lexmark International, Inc. v. Static Control Components, Inc.*** (intellectual property)

In this intellectual-property case, the Supreme Court will consider the appropriate framework for determining a party's standing to maintain an action for false advertising under the Lanham Act, whether (1) the factors set out by the Supreme Court in *Associated General Contractors of California, Inc. v. California State Council of Carpenters* as adopted by the Third, Fifth, Eighth, and Eleventh Circuits; (2) the categorical test, permitting suits only by an actual competitor, used in the Seventh, Ninth, and Tenth Circuits; or (3) a version of the more expansive "reasonable interest" test, either as applied by the Sixth Circuit in this case or as applied by the Second Circuit in prior cases.

I. ***Highmark Inc. v. Allcare Management Systems; Octane Fitness v. Icon Health and Fitness*** (intellectual property)

In these cases, the Supreme Court will confront the standard for assessing attorneys' fees in intellectual property cases by considering (i) whether a district court's exceptional-case finding under 35 U.S.C. § 285, which permits the court to award attorneys' fees in exceptional cases based on its judgment that a suit is objectively baseless, is entitled to deference; and (ii) whether the Federal Circuit's two-part test for determining whether a case is "exceptional" under 35 U.S.C. § 285 infringes upon a district court's discretionary authority to award attorneys' fees, raises the standard for accused infringers (but not patentees) to recoup fees, and encourages patent plaintiffs to bring spurious patent cases to cause competitive harm or coerce unwarranted settlements from defendants.

J. ***Lawson v. FMR LLC; Sandifer v. United States Steel Corp.; United States v. Quality Stores, Inc.*** (labor and employment)[4]

In this trio of labor-and-employment cases, the Supreme Court will consider, respectively, (i) whether the employee of a privately held contractor or subcontractor of a public company is protected from retaliation by the Sarbanes-Oxley Act, 18 U.S.C. § 1514A (*Lawson*); (ii) what constitutes "changing clothes" within the meaning of the Fair Labor Standards Act (*Sandifer*); and (iii) whether downsizing payments made to employees whose employment is involuntarily terminated is taxable under the Federal Insurance Contributions Act (FICA) (*Quality Stores*).

K. ***Heimeshoff v. Hartford Life & Accident Insurance Co. and Wal-Mart Stores, Inc.*** (ERISA)

In its most recent ERISA decision, the Supreme Court confronted the question of when a statute of limitations accrues for judicial review of a disability adverse benefit determination under ERISA. The case involved a provision in a disability-benefits plan that required claimants to bring any claim for benefits within three years after the claimant's proof of loss was due. Such provisions are a standard feature of the insurance industry and reflect longstanding practice. In a unanimous decision, the Supreme Court held that such limitations are enforceable so long as the limitations period is of a reasonable length and there is no contrary controlling statute. The Court concluded those conditions were met in this case and the suit for disability benefits was untimely.

L. ***Environmental Protection Agency v. EME Homer City Generation*** (environmental law)

In this environmental-law case, utility companies challenged whether the U.S. Environmental Protection Agency (EPA) overstepped its authority when it issued a rule regulating air pollution that crosses state line. In a significant victory for the utilities, a divided panel of the D.C. Circuit vacated the EPA's rule. The cases

[4] Morgan Lewis represents the American Payroll Association as *amicus curiae* in the Quality Stores case.

raise subsidiary but significant issues of administrative law and judicial review of agency action, so the ultimate impact of the Court's ruling in the case will depend on the scope of that ruling.

M. ***American Chemistry Council v. Environmental Protection Agency*** ("Greenhouse gases" case) (environmental law)

The Supreme Court granted six petitions challenging the D.C. Circuit's decision to uphold the EPA's new emissions restrictions for automobiles and commercial and industrial facilities in a momentous decision that validated the EPA's use of the Clean Air Act to combat climate change. Selecting only a single issue from those raised by petitioners, the Supreme Court will decide whether the legal regime for dealing with pollution from cars and trucks (called "mobile sources") authorizes the EPA to deal with larger, stationary sources of emissions such as power-generating plants and factories.

N. ***Atlantic Marine Construction Co. v. J-Crew Management, Inc.*** (forum-selection clauses)

After the Supreme Court's decision in *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), the majority of federal circuits hold that a valid forum-selection clause renders venue "improper" in a forum other than the one designated by contract. In those circuits, forum-selection clauses are routinely enforced through motions to dismiss or transfer venue. The Third, Fifth, and Sixth Circuits followed a contrary rule that relied on a multi-factor "balancing" test. In a decision issued December 3, 2013, the Supreme Court resolved the conflict by holding that a forum-selection clause may be enforced by a motion to transfer under 28 U.S.C. § 1404(a), which provides that, "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented."

O. ***Walden v. Fiore*** (personal jurisdiction/"effects test")

This personal-jurisdiction case presents the question whether due process allows a court to exercise personal jurisdiction over a defendant whose sole "contact" with the forum State is his knowledge that the plaintiff has connections to that State. In addition, the case presents the question whether the judicial district where the plaintiff suffered injury is a district "in which a substantial part of the events or omissions giving rise to the claim occurred" for purposes of establishing venue under 28 U.S.C. § 1391(b)(2) even if the defendant's alleged acts and omissions all occurred in another district. The Ninth Circuit said yes, expanding the reach of federal courts by broadly interpreting the "effects test" for personal jurisdiction. The Supreme Court is expected to clarify the reach of the "effects test" in its opinion.

P. ***Northwest, Inc. v. Ginsberg*** (preemption)

This preemption case presents the Supreme Court with the opportunity to decide whether a claim under the implied covenant of good faith and fair dealing is preempted under the Airline Deregulation Act because such claims are categorically unrelated to a price, route, or service, notwithstanding that the claim at issue arises out of a frequent-flyer program and enlarged the terms of the parties' undertakings, which allowed termination in the airline's sole discretion. Petitioner and its *amici* argue that the Ninth Circuit's ruling in this case allows states to do through claims for breach of implied-by-law covenants what they cannot do through regulation by allowing a private plaintiff to enforce state policies that would enlarge or enhance the airline's self-imposed contractual obligations. A decision is expected by the end of June.

3. CONCLUSION

This Term, the U.S. Supreme Court will confront important issues to business in diverse areas ranging from intellectual property to environmental law, and from personal jurisdiction to preemption. Already this year the Court has issued impactful decisions on forum-selection clauses and abstention. Court watchers will have to stay tuned as the most difficult and contentious cases will not likely be decided until the end of June 2014.

ATTORNEY FEES UPDATE

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CHAPTER 12

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BACKGROUND, EDUCATION AND PRACTICE

Hayes Fuller is Board Certified in Personal Injury and Civil Trial Law by the Texas Board of Legal Specialization and a Certified Third Party Neutral for the United States District Court for the Western District of Texas, Waco Division. His current practice frequently involves questions of federal and state, procedural and substantive law associated with the vehicular, insurance, premises liability, products liability, wrongful death, contract, intentional tort, toxic tort and business tort claims. Most recently, he has been involved in defending complex, multi-party product liability and toxic tort/asbestos cases. To date, he has tried in excess of fifty cases to verdict and, since 1995, successfully mediated over seven hundred civil disputes.

Hayes earned his J.D. at Baylor University Law School in Waco where he was an Adjunct Professor of Discovery and Insurance Law. He has served as President of the Texas Association of Defense Counsel and as President of the Waco Chapter of the American Board of Trial Advocates. Hayes also has served as Chair of the State Bar of Texas Court Rules Committee and is currently a member of the Texas Supreme Court Advisory Committee, the Litigation Council of the State Bar of Texas, and the Abner V. McCall Inn of the American Inns of Court.

Licensed by the Texas Supreme Court in 1979, Hayes is admitted to practice in all Texas state and federal courts, the U.S. Court of Appeals for the Fifth Circuit and the United States Supreme Court.

Hayes is a partner in the Waco office of Naman, Howell, Smith and Lee, PLLC, where he currently serves as firm President and Managing Partner.

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BIOGRAPHICAL INFORMATION

Born: Corsicana, Texas
March 15, 1955

Education

- Baylor University School of Law, Waco, Texas, 1979 J.D.
- Baylor University, Waco, Texas, 1976
- B.A. Political Science
- Honors: *magna cum laude*
- Honors: Phi Beta Kappa

Bar Admissions

- United States District Court for the Northern District of Texas
- United States District Court for the Southern District of Texas
- Supreme Court of the United States of America
- United States District Court for the Eastern District of Texas
- United States Court of Appeals for the Fifth Circuit
- United States District Court for the Western District of Texas
- Supreme Court of the State of Texas

Certifications

- Texas Board of Legal Specialization, Civil Trial Law Certification
- Texas Board of Legal Specialization, Personal Injury Law Certification

Professional

- Texas Supreme Court Advisory Committee
- Texas Association of Defense Counsel
- Defense Research Institute, Inc.
- State Bar of Texas Litigation Council
- American Bar Association
- Waco McLennan County Bar Association
- American Board of Trial Advocates
- American Inns of Court
- Association of Attorney-Mediators
- Association of Defense Trial Attorneys

Civic

- Baylor Law School Alumni Association
- Baylor Bear Foundation
- Greater Waco Chamber of Commerce

Classes/Seminars Taught

- Negotiation and Dispute Resolution,
  Baylor University Hankamer School of Business, Fall 2006
- Discovery, Baylor University School of Law, 1998-2000
- Insurance, Baylor University School of Law, 2000-2003

Honors and Awards

- Martindale-Hubbell AV® rating, September 1, 1999
- Texas Bar Foundation, Life Fellow, 1999
- President's Award, Texas Association of Defense Counsel, 1997
  President's Award, Young Lawyers Association, 1993

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ATTORNEY FEES UPDATE

I. INTRODUCTION

One of my favorite legal sayings is "If you take care of a client for five years, he will take care of you for ten." But do not take the attorney-client relationship for granted. Although it is a simple contractual arrangement, each component of the relationship has its own set of nuances, problems, duties and considerations. This presentation explores the major components of the fee agreement and provides examples.

Multiple representation and waiver of conflicts is beyond the scope of the presentation.

II. WHAT ARE THE VARIOUS ROLES OF A LAWYER?

When you are forming a relationship with a client, or working on a matter for a client that has been assigned to you by a partner in your law firm, it is helpful to recognize at the outset what function you are performing. There are five distinct functions or roles of the lawyer. You may be called upon to act in one or several of these functions. They are:

- Advisor – providing a client with an informed understanding of the client's legal rights and obligations and explaining their practical implications.
- Advocate – zealously asserting the client's position under the rules of the adversary system.
- Negotiator – seeking a result advantageous to the client but consistent with requirements of honest dealing with others.
- Intermediary – reconciling, between clients, their divergent interests as an advisor and, to a limited extent, acting as a spokesperson for each client.
- Evaluator – examining a client's affairs and reporting about them to the client or to others.

TEX. DISCIPLINARY RULES PROF'L CONDUCT Preamble, ¶2.

III. THE ATTORNEY-CLIENT RELATIONSHIP

A. When Does the Relationship Begin?

It is important to note the relationship can begin without an official fee agreement between the attorney and client. Rather, because the attorney-client relationship is contractual in nature, it begins when an attorney agrees to render professional services for a client. This agreement may be express or implied from the conduct of the parties. See *Valls v. Johanson & Fairless, L.L.P.*, 314 S.W.3d 624, 633–34 (Tex. App.—Houston 2010, no pet.) (citing *Perez v. Kirk & Carrigan*, 822 S.W.2d 261 (Tex. App.—Corpus Christi 1991, writ denied)). In fact, the relationship can be formed even when there is no agreement for payment of a fee or no payment of a fee at all. The relationship may simply exist as a result of rendering services gratuitously. *Id.*

B. How Do We Determine Whether an Agreement Was Reached with the Client?

Because it is a creature of contract, the determination of whether an agreement has been reached is made by using objective standards of what the lawyer and possible client said and did, instead of looking at their subjective states of mind. *Terrell v. State*, 891 S.W.2d 307 (Tex. App.—El Paso 1994, pet. ref'd). It is not enough that either the lawyer, or the client, alone, thinks he has made a contract. It is not enough that the client just "thinks" that you represent him. There must be objective indications. *Vinson & Elkins v. Moran*, 946 S.W.2d 381 (Tex. App.—Houston [14th Dist.] 1997, writ dism'd by agr.). And the mere fact that a person pays the legal fee on behalf of another client does that necessarily make that person a client. *Roberts v. Healey*, 991 S.W.2d 873 (Tex. App.—Houston [14th District] 1999, writ denied).

C. What About Consulting with "Prospective Clients"?

Many times a lawyer will consult with a prospective client to determine whether or not he wants to undertake the representation. Be careful here. There are cases that broadly provide that the attorney's fiduciary obligations arise even during those preliminary consultations if the attorney discusses with the potential client his legal problems with a view toward undertaking representation. *See Nolan v. Foreman*, 665 F.2d 738 (5th Cir. 1982). However, because the attorney-client relationship is a creature of contract, it is the clear and express agreement of the parties that controls. *Parker v. Carnahan*, 772 S.W.2d 151 (Tex. App.—Texarkana 1989, writ denied).

The cases that talk about an attorney's duties toward someone with whom he consults about the possibility of representing him are generally focused on the professional obligations of the lawyer as he performs incidental services necessary to making a decision about taking the case. For instance, the confidentiality rules of 1.05 apply. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.05. To the extent that incidental legal services are performed (such as in accumulating medical records for review, or advising of the statute of limitations), the lawyer should use reasonable care.

There is very little case law available concerning duties toward a prospective client. Most of the law concerning these duties has to do with the use of confidential information obtained when interviewing a prospective client. But the Restatement of the Law

Governing Lawyers (Third) is helpful. The Restatement contemplates that when a person discusses with a lawyer the possibility of their forming a relationship, it is for a "matter." This is important because most preliminary consultations result in an agreement to perform only some incidental legal services in connection with the continued investigation of the matter, until such time that the lawyer determines whether or not to take the matter. Here is how the Restatement handles it in Section 15, Lawyers Duties to a Prospective Client:

> § 15. A Lawyer's Duties to a Prospective Client
>
> 1. When a person discusses with a lawyer the possibility of their forming a client-lawyer relationship for a matter and no such relationship ensues, the lawyer must:
>
> (a) not subsequently use or disclose confidential information learned in the consultation, except to the extent permitted with respect to confidential information of a client or former client as stated in §§ 61-67;
> (b) protect the person's property in the lawyer's custody as stated in §§ 44-46; and
> (c) use reasonable care to the extent the lawyer provides the person legal services.

So there is a definite distinction between the incidental legal services to be performed in the investigative stage and the ultimate "matter," which may or may not become the subject of the agreement.

D. Do Lawyers Have Duties That Extend Beyond the Agreement?

The answer is no. Of course the lawyer must always abide by the Texas Disciplinary Rules of Professional Conduct, but because it is based on contract, the legal relationship is defined by the "clear and express agreement of the parties as to the nature of the work to be undertaken." Annot., 45 ALR 3d 1181 (1972).

However, there may be a duty to inform someone that you do not represent them. The duty to so advise would arise if it can be determined that the attorney is aware or should be aware that his conduct would lead a reasonable person to believe that he was being represented by the attorney. *Parker,* 772 S.W.2d 151.

IV. FEE ARRANGEMENTS

A. Documenting the Attorney-Client Relationship or Agreement

It is best to document the attorney-client relationship in writing. A written document is not explicitly required except for contingent fee cases, TEX DISCIPLINARY R. PROF'L CONDUCT 1.04(D), and in cases involving association with or referral to a different law firm or lawyer. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.04(F). However, documenting all attorney-client relationships in writing is obviously preferable.

B. Establishing the Fee Agreement at the Outset

In Texas, attorneys are held to the highest standards of ethical conduct in their dealings with their clients. *Hoover Slovacek LLP v. Walton*, 206 S.W.3d 557, 561 (Tex. 2006). One of the most important and overlooked parts of an attorney conducting himself or herself in an ethical manner with clients—and in avoiding disputes and malpractice claims—is clearly establishing the fee agreement from the beginning of the attorney-client relationship.

C. Unreasonable Fee vs. Unconscionable Fee

An important thing to note about Rule 1.04 is that it does not prohibit an "unreasonable" fee, it only prohibits an "unconscionable" fee. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.04. Does this make sense? Yes. Remember, the disciplinary rules are written for the purpose of lawyer discipline. As bankruptcy courts, other judges or juries regularly reduce the amount of attorneys fees that have been sought at trial, the effect is that the factfinder regards some of the fees sought as unreasonable. If Texas Disciplinary Rule of Professional Conduct 1.04 was cast in terms of unreasonableness, a client would be entitled to file a grievance against the lawyer in every instance where a factfinder reduced the fees that were sought. It is for this reason that 1.04(a) contains the second sentence which defines "unconscionable."

D. Fee Contract vs. Fee Shifting

Remember that the attorney-client relationship is contractual in nature, and begins when an attorney agrees to render professional services for a client. The concept of the contract is important in the fee context because the fees charged to the client (authorized by contract) may not necessarily be the same as the fees recoverable from the adverse party under any of the causes of action described above. For example, a client agrees to pay a paralegal for all of his/her work, but only substantive legal work is allowed as a basis for recovery from the other party. Another example is that a client may make requests of the attorney to perform certain activities (which are to be paid for as authorized by the contract), but these activities may not

necessarily be necessary to the prosecution of the case, such that they may not be recoverable from the adverse party. What does all of this mean? It means that you should tell your client up front that just because his cause of action against the adverse party may authorize the recovery of attorney's fees, he will not necessarily recover one hundred percent of his fees. This is a frequent problem that is easy to remedy at the outset of the attorney-client relationship.

Remember, a client's agreement to pay a certain hourly rate is not necessarily proof that the rate is reasonable. By the same token, payment by the client does not necessarily prove the necessity of the fees.

V. WHAT SHOULD ENGAGEMENT LETTERS CONTAIN?

The following is a list of considerations for your engagement letters, including examples for reference.

A. Specific Identification of Who the Client Is

Remember, if the client is an organization, the lawyer represents the organization as distinct from its directors, officers, employees, members, shareholders or other constituents. The concern here is that the person that speaks to the lawyer on behalf of the organization must legitimately represent the organization and not be in conflict with the organization. The lawyer's role should be carefully spelled out. The comments to Texas Disciplinary Rules of Professional Conduct Rule 1.12 are very helpful in doing so.

Consider this example:

- Please understand that although this firm maintains its relationship with ABC, Inc. primarily through contact with President Smith, this firm represents ABC, Inc in this matter, as distinct from the company's directors, officers, shareholders or employees. ABC, Inc. agrees to immediately notify the firm should circumstances arise about whether the company has become adverse to President Smith or whether he ceases to legitimately represent the company.

B. Description of the Specific Objective or Objectives of the Representation

An attorney intending to represent the client in a limited capacity should clearly indicate the specific activities where the attorney will provide legal representation. For example, if an attorney agrees to represent the client in the initial lawsuit but not on appeal, in the event the client does not prevail, then the engagement letter should clearly specify when the attorney-client relationship ends.

Consider this example:

- The terms of this letter agreement will be applicable to all matters that we undertake for the Company or for any related or affiliated corporation, partnership, association or other entity, although we will not undertake representation on any other matter unless requested to do so in writing.

C. No Guarantees

Consider this example:

- We will use our best efforts in representing ABC, Inc., but we cannot assure that we will achieve a favorable outcome. Both the Company and our firm will have the right to terminate this representation upon written notification to the other; provided that in the event of a termination, the Company will remain liable for our fees and any expenses incurred by us on your behalf prior to such termination plus any fees and expenses incurred at your request in connection with the transition to substitute counsel.

D. Limitations on the Representation

Rule 1.02 provides that a lawyer may "limit the scope, objectives and general methods of the representation if the client consents after the consultation." If the client does consent, these limits need to be spelled out in the fee agreement.

However, too often, lawyers attempt to limit their professional duties to their client by having the client sign an agreement prospectively limiting the lawyer's obligation to communicate with the client. Remember that the fee agreement cannot limit the lawyer's duties so drastically that the representation would violate Rule 1.01 (Neglect) or 1.03 (Communication). For example, many fee agreements provide that the client consent to communication through legal assistants, agreeing not to call the lawyer directly. That is contrary to the duties of Rule 1.03 about a lawyer keeping a client reasonably informed about the status of the matter and promptly complying with requests for information.

Consider this example:

> ☛ You acknowledge that this firm does not act as ABC, Inc.'s general counsel and that our acceptance of this engagement does not involve an undertaking to represent your company or its interests in any matter other than that specifically described above. Our representation does not entail a continuing obligation to advise you concerning subsequent legal developments that might have a bearing on the affairs of the company.

E. Someone Else Pays the Bill

If someone other than the client is paying the fee, get the client consent to comply with T.D.R.P. 1.08(e).

Consider this example:

> ☛ Client consents that the firm will accept compensation from client's parents, Mr. and Mrs. Smith. Despite this arrangement, client understands that the firm owes its duties to the client, and that the firm will not allow this arrangement to interfere with the firm's professional judgment or its relationship with the client, and that information relating to representation of client will be maintained as confidential, even as to Mr. and Mrs. Smith.

Additionally, the statute of frauds' suretyship provision requires "a promise by one person to answer for the debt, default, or miscarriage of another person" to be in writing to be enforceable. TEX. BUS. & COM. CODE § 26.01(b). The Texas Supreme Court just recently held that this provision applies to promises to pay the legal fees of another. *See Dynegy v. Yates,* 56 Tex. Sup. Ct. J. 1092, 2013 Tex. LEXIS 679 (Tex. Aug. 30, 2013).

F. Clear Description of the Fee

The exact type of fee to be charged must be spelled out clearly in the engagement letter or at the very least, at the outset of the representation.

It is essential this part of the engagement letter be spelled out plainly. If the fee is to be an hourly rate, it should be so stated. If it is contemplated that the hourly rate will increase over time, that should be stated also. This is because it is improper to raise the fee mid-stream. The same thing goes for contingent fees. It is improper to raise the percentage of the contingent fee mid-stream without giving the client the opportunity to consult a lawyer. *Robinson v. Garcia*, 804 S.W.2d 238 (Tex. App.—Corpus Christi 1991, writ denied).

Consider this example:

> ☛ The billing rates for the professionals who may work on this matter vary in accordance with each person's experience and expertise. The hourly billing rates presently in effect range from $135 for associates newly admitted to the practice to $350 for our more experienced members of the firm. My billing rate is currently $300 per hour.
>
> As part of our efforts to provide you with cost-effective legal services, from time to time we may utilize the services of paralegals and other support personnel for routine tasks such as document organization and review that do not require the attention of an attorney. Some of this work may be substantive legal work to be done by a paralegal under the supervision of a lawyer. Other work may be clerical in nature. Our rates for paralegals currently range from $110 to $135 per hour.

A dangerous practice involves giving the lawyer the sole discretion to convert from an hourly rate to a contingent fee (or vice versa) during the course of the representation, or trying to decide the amount of the contingent fee up front for purposes of payment upon termination.

Consider this BAD example:

> ☛ Percentage of interest: client shall pay to attorney as compensation for his services, $250.00 per hour for the first sixty (60) days of representation of client and if no resolution thereafter client agrees to 25% of any recovery obtained on behalf of the client by settlement or compromise of the claim before suit is filed; or 33 1/3% of all recovery obtained for the client after suit is filed, regardless of whether or not the suit is actually tried, provided the claim is concluded before any appeal is made.

Note that in the above example, the lawyer could do nothing to try to settle the claim for 60 days, then convert to a contingent fee and file suit, all without the client's input.

"Convertible" fee agreements are susceptible to clients' claims that the lawyer has acquired too much control over the litigation.

Consider this BAD example:

> ☞ [Lawyer] is entitled to 33% of any amounts recovered. If you agree to settle this case for an amount that will pay less than $175 per hour for the time I invest, then I shall receive an amount over and above the 33% to compensate me at the rate of $175 per hour before you receive your portion of the settlement.

Note that this convertible fee agreement uses a client's decision to settle as a trigger to convert contingent fee representation into an obligation to pay hourly fees. It has been held that an agreement of this kind impermissibly burdens the client's exclusive right to settle a case. *See Compton v. Kittleson*, 171 P.3d 172 (Alaska 2007).

Another example is the following provision that was criticized in the Supreme Court in *Hoover*:

> You may terminate the Firm's legal representation at any time…. Upon termination by You, You agree to immediately pay the Firm the then present value of the Contingent Fee described [herein], plus all Costs then owed to the Firm, plus subsequent legal fees [incurred to transfer the representation to another firm and withdraw from litigation].

Hoover Slovacek LLP v. Walton, 206 S.W.3d 557, 558 (Tex. 2006).

The above provision is a BAD example and was held to be unconscionable. The Supreme Court noted the following problems: (a) the termination provision made no distinction between discharges occurring with or without cause; (b) it assessed the attorney's fee as a percentage of the present value of the client's claim at the time of discharge, in derogation of the quantum meruit and contingent fee measurements allowed by *Mandell & Wright v. Thomas*, 441 S.W.2d 841 (Tex. 1969); and (c) it required the client to pay the lawyer the percentage fee immediately at the time of discharge. *Id*. at 562. In this case, requiring the client to pay the percentage fee immediately at the time of discharge is contrary to the principle in the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 35 concerning the rule that a contingent fee lawyer "is entitled to receive the specified fee only when and to the extent the client receives payment." By requiring immediate payment, the termination provision also grants the lawyer a proprietary interest in the client's claim without regard to the ultimate results obtained, which would be a prohibited transaction. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.08(h).

Another example of a BAD convertible fee agreement was discussed in the case of *Wythe II Corp. v. Stone*, 342 S.W.3d 96 (Tex. App.—Beaumont 2011, pet. denied). In the *Wythe* case, the engagement letter provided as follows:

> As an optional alternative to the hourly bill basis, and at the sole option of said attorney, the attorney may elect to receive compensation for attorney's time on the basis of a specified contingency fee calculated as a percentage of the total recovery achieved by virtue of the undertaking which forms the basis of this agreement. . . . The attorney may designate this contingency fee option at any time during the representation.
>
> In the event the attorney has elected to be compensated on the basis of the contingency fee option, and subsequently withdraws from this representation, then said attorney shall receive an assigned interest equal to the contingency fee percentage that would have applied at the time of such withdrawal the same as if the matter had been settled in its entirety on the date of withdrawal.

Here, the client claimed that the unilateral option is unconscionable and that the termination provision fails to distinguish between terminations occurring with or without cause. The court concluded that this kind of unilateral option provision is generally unenforceable. However, this was an unusual case, and the contingent fee had been previously approved by a bankruptcy court. Importantly, the appellate court did not let the unenforceability of the contract provision preclude the attorney from collecting a fee. Rather, the court remanded the case for a jury trial on the amount of a reasonable fee.

The *Wythe* case teaches another lesson. There, the attorney sought to prove his fees for his fee collection suit by expert testimony that was a mixture of evidence that a forty percent (40%) contingency fee is customary in the jurisdiction and that the total number of hours put into the case were reasonable. However, the experts did not try to determine a reasonable fee based upon an hourly rate. The appellate court held that the supporting evidence did not provide significant justification for shifting the entire amount of the contingent fee to the client. Finding that the fee awarded by the jury was excessive, the court remanded the fee dispute with instructions for the trial court to

make a "determination of a reasonable fee based on an hourly rate, not determined as a percentage of damages." *Wythe II Corp.*, 342 S.W.3d at 108.

G. Monthly Billing

Consider this example:

- ☞ Our customary procedure is to send a statement to you each month for services rendered and expenses incurred during the previous month. Any statement not paid in full within thirty days after the date of the statement will be considered overdue. Overdue invoices may result in the discontinuance of our representation of the Company.

H. Clause Allowing Increase

If it is contemplated that the hourly rate will increase over time, that should be stated also. This is because it is improper to unilaterally raise the fee midstream. It is improper to raise a fee without giving the client the opportunity to consult a lawyer. *Robinson v. Garcia*, 804 S.W.2d 238, 248 (Tex. App.—Corpus Christi 1991, writ denied) (finding an increased percentage in a contingent fee case is subject to the same requirements as a regular fee). Also, there is a presumption of unfairness attaching to a fee contract entered into during the existence of the attorney-client relationship, and the burden of showing the fairness of the contract is on the attorney. *Id.* (citing *Archer v. Griffith*, 390 S.W.2d 735, 739 (Tex. 1964)).

Consider this example:

- ☞ The firm reviews it hourly rates annually, and you should anticipate an annual increase (in January) of not more than $10.00 per hour for each lawyer and paralegal working on this matter.

I. Clear Description About How Expenses Will Be Paid

Some expenses may be advanced by the lawyer; some expenses may be paid directly by the client, particularly for large items such as expert's fees, accountant's fees, etc.

Remember that a lawyer may advance or guarantee court costs, expenses of litigation or administrative proceedings, and reasonably necessary medical and living expenses to the client, and provide that the repayment of those expenses may be contingent upon the outcome of the matter. Other than that, providing financial assistance to a client in connection with pending or contemplated litigation is a "prohibited transaction" under Texas Disciplinary Rules of Professional Conduct Rule 1.08.

Consider this example:

- ☞ In addition to legal fees, the Company will be responsible for all out-of-pocket expenses incurred in connection with our representation. Such expenses include charges for filing and serving court documents, courier or messenger services, recording and certifying documents, court reporting investigations, long distance telephone calls and other forms of communication, copying materials, overtime clerical assistance, travel expenses, postage and other expenses. We may elect to forward statements we receive from suppliers to the Company for payment directly to the suppliers, particularly with respect to large expenditures.

J. Clear Description About How Disbursements Will Be Billed

The client needs to know at the outset what disbursements will be billed, and how. Is it proper for the lawyer to "mark up" these expenses such that when they are passed along to the client, the lawyer makes some profit on them? Yes, but only if it is reasonable and fully explained, and agreed to by the client at the outset. ABA Comm. on Ethics and Prof. Responsibility, Formal Op. 93-379.

Consider this example:

- ☞ Rather than building an increased overhead factor into our hourly rates, we believe it is appropriate that to the extent possible, costs for ancillary services performed by us be allocated to those of our clients who actually need and use them. Therefore, we will also bill for photocopying and other document reproduction, telecopying, computerized input and retrieval of documents, computerized research, overtime, word processing and similar work by employees, if required by you, or the nature of the services performed for you. We will charge for copies $.20 per page and for faxes $1.00 per page, although actual costs to us are less.

K. Disclosure About Recovery of Fees

Consider this example:

- The claims asserted in this matter may involve statutes that provide for the recovery by the successful party of attorneys fees from the other side. While the firm intends to seek the recovery of fees from defendants as part of your claims, please understand that the jury or Court may award none, or a reduced amount as part of your recovery. If that happens, you are still obligated to the firm for the fees as set out in this agreement. Of course, any recovery of fees from the other side belongs to you, and not the firm.

L. Retainers, "Non-Refundable" Retainers, and "Deposits"

The term "retainer" has been used to describe several different types of fee arrangements. The use of the word "retainer" is perhaps the most troublesome part of attorney fee agreements. This problem is compounded by the fact that case law sometimes refers to retainers as "general" or "special."

Generally a retainer is defined as monies paid in advance from which expenses and fees may be deducted. This goes in the lawyer's trust account until earned. See TEX. DISCIPLINARY R. PROF'L CONDUCT 1.14, cmt.2. Consider using the term "advance payment" or "deposit." These words are more descriptive than "retainer."

Consider this example:

- Client agrees to deposit the sum of $50,000 with the firm, to be billed against on an hourly basis as set out above. This advance deposit will be held in the firm's trust account until such time as it, or a portion of it is earned, at which time it will be made available to the firm's general account. Monthly statements will be sent to the client as provided above. These statements will be paid from the advance deposit thirty days after the date of the statements. At the conclusion of the matter, the balance of the advance deposit will be returned the client.

An "evergreen" retainer is one that must be replenished periodically. Spell this out carefully and provide that any unused retainer will be returned to the client at the conclusion of the matter.

Consider this example:

- In addition to payment of the monthly statements, we ask that the company wire a retainer in the amount of $10,000 to be held in our trust account and to be billed against. We ask that the trust balance be maintained at the level of $10,000, and our monthly statements will reflect the balance necessary to maintain that amount. Of course, at the conclusion of the litigation, any balance in the trust account will be promptly refunded to the company.

A "flat fee" is an amount agreed to at the outset which constitutes payment in full for the professional services rendered and the related expenses incurred in the representation contemplated.

Consider this example:

- My fee for this representation described above is $25,000. This is a fixed fee includes an expenses that I may advance, and is not dependent on the course or outcome of the litigation or upon the time I spend on the matter. The fee is due in a lump sum in advance. This money will be held in trust, and withdrawn by me by as earned. It will be considered earned as follows: 10% after initial interviews and case investigation; 40% after discovery, pre-trial motions and hearings; 50% after trial. The full fee will be considered earned upon termination of proceedings by trial or settlement, regardless of whether all proceedings have occurred and regardless of time expended or outcome. If my representation is terminated before completion of the engagement, I will be entitled to the reasonable value of my services, and any remaining balance will be refunded. I will notify you when funds are withdrawn from trust and will account for funds remaining in trust.

There can also be a "retainer" that is non-refundable; that is, an amount of money that the client pays you solely for the privilege of having you as his lawyer. *David J. Sacks, P.C. v. Haden*, 266 S.W.3d 447 (Tex.

2008); *Cluck v. Comm'n of Lawyer Discipline*, 214 S.W.3d 736 (Tex. App.—Austin 2007, no pet.). The "true retainer" is paid by the client solely for your availability, readiness, and the privilege of having you as his lawyer, apart from any other compensation. *Cluck,* 214 S.W.3d 736. Even though the Cluck case calls this arrangement a "true retainer," consider using the words "engagement retainer fee." This is even more descriptive and is endorsed by the Restatement (Third) of the Law Governing Lawyers § 34.

There is little case law on this topic and what is available is confusing. But we know one thing: all fees must be earned in some way – that is, a benefit to the client must follow. If the fee is nonrefundable, then spell out in the fee agreement that it is earned upon payment, and why. Tex. Comm. on Prof'l Ethics, Formal Op. 431, 49 Tex. B.J. 1084 (1986).

The key here is that the best way to make a "nonrefundable" fee truly nonrefundable, is to demonstrate and communicate to the client how it was actually earned upon payment. Otherwise, a dispute will most likely follow about whether it was earned in full. The lesson from *Cluck* is that the fee does not become nonrefundable just because it says "nonrefundable" in the contract. *Cluck*, 214 S.W.3d 736.

Consider this example:

> ☞ In addition to paying for the service on an hourly basis as set forth herein, the client agrees to pay firm an engagement retainer fee in the amount of $10,000. Such fee is paid in order to secure the firm's immediate availability and readiness to undertake this representation, and in recognition that due to the publicity of this matter, the firm is likely to be prevented from accepting other legal work in this area. The $10,000 engagement retainer fee is not refundable, and client agrees that it is earned by the firm immediately.

M. An Arbitration Clause?

It is permissible to include an arbitration provision in an attorney engagement letter with a client that covers disputes relating to fees or malpractice, as long as notice is given regarding certain advantages and disadvantages of arbitration, including the waiver of trial by jury and the loss of appellate review. To be enforceable, the arbitration provision must not limit the lawyer's liability. Due to a split in the Texas Court of Appeals, it may sometimes be necessary to include the signatures of both parties and counsel for both parties (i.e., independent counsel for the prospective client) on the agreement to avoid the possibility of arbitration being denied in the event a court decides legal malpractice is a personal injury claim (as the Corpus Christi Court of Appeals has done).

1. Professional Conduct in Texas

The Professional Ethics Committee for the State Bar of Texas (Committee) has issued an opinion on whether binding arbitration clauses in lawyer-client engagement agreements are permissible under the Texas Disciplinary Rules of Professional Conduct. Tex. Comm. on Prof'l Ethics, Op. 586, (2008). The opinion concludes that:

> It is permissible under the Texas Disciplinary Rules of Professional Conduct to include in an engagement agreement with a client a provision, the terms of which would not be unfair to a typical client willing to agree to arbitration, requiring the binding arbitration of fee disputes and malpractice claims provided that (1) the client is aware of the significant advantages and disadvantages of arbitration and has sufficient information to permit the client to make an informed decision about whether to agree to the arbitration provision, and (2) the arbitration provision does not limit the lawyer's liability for malpractice.

Id. The Committee points out that the State Bar of Texas "encourages voluntary arbitration as a preferred method of resolving fee disputes." *Id*. Texas Disciplinary Rule 1.08(a) requires business transactions between lawyers and clients to be fair and reasonable to the client. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.08(a). The Committee interprets this rule to mean a lawyer should not "attempt to include clearly unfair terms in the agreement, such as providing for the selection of the arbitrator solely by the lawyer, requiring arbitration in a remote location, or imposing excessive costs that would effectively foreclose the client's use of arbitration." Tex. Comm. on Prof'l Ethics, Formal Op. 586 (2008). Texas Disciplinary Rule 1.03(b) requires a lawyer to explain matters as necessary to clients in order for clients to make an informed decision regarding representation. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.03(b). To meet the requirements of this rule, a lawyer (when asking a prospective client to agree to a binding arbitration agreement) "should explain the significant advantages and disadvantages of binding arbitration to the extent the lawyer reasonably believes is necessary for an informed decision by the client." Tex. Comm. On Prof'l Ethics, Formal Op. 586 (2008). The scope of the explanation varies with the sophistication of the client.

Id. A large business may require no explanation while an individual may need to be advised of the following:

> *(1) the cost and time savings frequently found in arbitration, (2) the waiver of significant rights, such as the right to a jury trial, (3) the possible reduced level of discovery, (4) the relaxed application of the rules of evidence, and (5) the loss of the right to a judicial appeal because arbitration decisions can be challenged only on very limited grounds. The lawyer should also consider the desirability of advising the client of the following additional matters, which may be important to some clients: (1) the privacy of the arbitration process compared to a public trial; (2) the method for selecting arbitrators; and (3) the obligation, if any, of the client to pay some or all of the fees and costs of arbitration, if those expenses could be substantial.*

Id. These notices are required for attorney disciplinary issues rather than the validity of the arbitration clause. *See Sidley Austin Brown & Wood, LLP v. J.A. Green Dev. Corp.*, 327 S.W.3d 859, 865 (Tex. App.—Dallas, no pet.). The omission of an explanation of the advantages and *disadvantages* of arbitration will not by itself render an arbitration clause unenforceable. *Id*.

2. ABA Opinion

The American Bar Association (ABA) has issued an opinion on the topic of arbitration provisions in attorney engagement letters as well. ABA Comm. on Prof'l Ethics & Grievances, Formal Op. 02-425 (2002). The ABA looks to the Model Rules of Professional Conduct Rule 1.8(h). *Id.* at 3. This rule prohibits lawyers from prospectively agreeing to limit their legal malpractice liability. *Id*. The ABA agreed with many other authorities and decided that arbitration provisions prescribe the procedure to be used rather than limit any liability. *Id*; *see also In re Hartigan*, 107 S.W.3d 684, 689 (Tex. App.—San Antonio 2003, pet. denied) (approving ABA Opinion 02-425).

The ABA opinion applies Rule 1.4(b) to arbitration provisions in retainer agreements. ABA Comm. on Prof'l Ethics & Grievances, Formal Op. 02-425 (2002). This rule makes it necessary for a lawyer to explain the arbitration provision in a manner sufficient for the client to make an informed decision. *Id*. at 5. The scope of the explanation depends on the sophistication of the client, but should make certain things clear, for instance, the client is waiving "significant rights, such as the waiver of the right to a jury trial, the possible waiver of broad discovery, and the loss of the right to appeal." *Id*. Explanation might be needed in regard to whether the case will be decided by a single arbitrator or a panel of arbitrators and of the distribution of costs between the lawyer and client for arbitration. *Id*. at 6. The ABA ultimately concludes it is ethically permissible to include binding arbitration clauses in attorney-client engagement letters as long as the client has been given a sufficient amount of information regarding the advantages and disadvantages of arbitration and the lawyer has not used the provision to limit liability he may otherwise have. *Id*. at 7; *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 54 cmt. b (1998) ("A client and lawyer may agree in advance . . . to arbitrate claims for legal malpractice, provided that the client receives proper notice of the scope and effect of the agreement and if the relevant jurisdiction's law applicable to providers of professional services renders such agreements enforceable.").

3. Statutes & Cases

The Texas General Arbitration Act (TAA) provides a broad framework for using arbitration as a binding alternative to the court system. TEX. CIV. PRAC. & REM. CODE ANN. ch. 171 (West 1997). The Federal Arbitration Act (FAA) generally applies when the dispute involves interstate commerce. *See* 9 U.S.C. § 2 (1947). The FAA preempts the TAA if "(1) the agreement is in writing, (2) it involves interstate commerce, (3) it can withstand scrutiny under traditional contract defenses, and (4) state law affects the enforceability of the agreement." *In re Nexion Health at Humble, Inc.*, 173 S.W.3d 67 (Tex. 2005).

The TAA has two important caveats applicable to arbitration provisions in lawyer-client engagement letters. TEX. CIV. PRAC. & REM. CODE § 171.002(a). The first caveat says the TAA does not apply to an agreement for services in which the individual furnishes consideration of not more than $50,000, unless the parties agree in writing and the agreement is signed by each party and each party's attorney. *Id*. § 171.002(a)(2) & (b). This essentially means that independent counsel would have to advise the individual and sign the agreement in order to meet the exception. The second important exception excludes personal injury claims from the scope of the TAA, unless the parties to the claim agree in writing to arbitrate and the agreement is signed by each party and their attorneys. *Id*. § 171.002(a) (3) & (c). Once again requiring independent counsel to advise and sign, along with the client, an agreement to arbitrate in the engagement letter.

The Professional Ethics Committee for the State Bar of Texas notes in their opinion that the Texas Court of Appeals are "split on whether a legal malpractice claim is one for 'personal injury,' which under the Texas Arbitration Act can be the subject of an arbitration agreement only if the client has separate

representation in entering into the agreement." Tex. Comm. On Prof'l Ethics, Formal Op. 586, (2008); *compare In re Godt*, 28 S.W.3d 732, 738–39 (Tex. App.—Corpus Christi 2000, no pet.) (holding a legal malpractice claim to be a personal injury claim), *with In re Hartigan*, 107 S.W.3d 684, 689–91 (Tex. App.—San Antonio 2003, pet. denied) (holding that a legal malpractice claim is not a personal injury claim), *Miller v. Brewer*, 118 S.W.3d 896, 898–99 (Tex. App.—Amarillo 2003, no pet.), *and Taylor v. Wilson*, 180 S.W.3d 627, 629–31 (Tex. App.—Houston [14th Dist.] 2005, pet. denied). The Corpus Christi Court of Appeals is the only appellate court in Texas that has held legal malpractice to be in the category of personal injury; thus requiring each party to sign a written agreement as well as each party's attorneys to sign the agreement. *See Godt*, 28 S.W.3d 732. If the required signatures were not obtained, than the Corpus Christi court will not compel arbitration. *Id*. The Amarillo, Houston [14th district], and San Antonio courts have compelled arbitration under the TAA when an agreement to arbitrate has been found and the opposing party refuses to arbitrate. *See* TEX. CIV. PRAC. & REM. CODE § 171.021; *In re Hartigan*, 107 S.W.3d 684 (Tex. App.—San Antonio 2003, pet. denied); *Miller v. Brewer*, 118 S.W.3d 896 (Tex. App.—Amarillo 2003, no pet.); *Taylor v. Wilson*, 180 S.W.3d 627 (Tex. App.—Houston [14th Dist.] 2005, pet. denied).

Arbitration clauses in attorney-client engagement letters are permitted by The Professional Ethics Committee for the State Bar of Texas, the ABA, and by Texas state law. To satisfy the Professional Ethics Committee and the ABA, the lawyer must provide the client with information regarding the advantages and disadvantages of arbitration compared to judicial courts and the lawyer must not limit his liability in any way through the arbitration provision.

4. Enforceability

Note the TAA does not apply to agreements where the services will be less than $50,000 or personal injury claims, unless both parties sign the agreement and both sides have counsel. The Corpus Christi Court of Appeals considers legal malpractice to be a personal injury claim, thus triggering the extra requirement in the TAA. The remaining courts will likely enforce an arbitration provision (found in the attorney engagement letter) in a legal malpractice case when there is a valid agreement, which has been signed by the client. All Texas courts will enforce valid arbitration provisions (signed by the client) when there is a dispute as to legal fees and costs.

Think carefully about whether you want to provide an arbitration clause in your engagement letter. If you are engaged for a jury trial, it sends inconsistent signals to your client about your confidence in the jury system. If it is a case where your fee agreement may be discoverable or even admissible, a judge or a jury may wonder why you have confidence in them to try your client's case but not the potential case against you. And finally, if you are going to include should run it by your malpractice carrier first.

Consider this example:

☞ In the event that a disagreement arises, which we are not able to satisfactorily resolve between us, then you hereby agree that any and all disputes, controversies, claims, or demands arising out of or relating to this agreement, our relationship with you, or our performance of any current or future legal services, will be resolved exclusively by submission to binding arbitration in Amarillo, Texas. This includes, but is not limited to, disputes regarding attorney's fees or costs, claims of malpractice, breach of fiduciary duty, breach of contract, negligence, deceptive trade practices, fraud, or other legal theories sought to be asserted against us. Arbitration is to be conducted under the Texas Arbitration Act in accordance with the laws of the State of Texas. A single arbitrator who is both neutral and independent will conduct arbitration. The arbitrator will be chosen by mutual agreement of the parties. Arbitration costs will be allocated evenly among the involved parties. The arbitrator will have the authority to award any relief that a judicial court would have the jurisdiction to grant. The arbitrator will be permitted to award attorney's fees as he or she deems necessary and just.

Arbitration has both advantages and disadvantages. Arbitration requires both parties to submit to an arbitrator's decision. Arbitration often provides a quick, private, and less expensive forum for the resolution of disputes. The arbitrator's legal and factual decisions are binding and typically not subject to appellate review. By agreeing to arbitrate all disputes, you are waiving your right to a trial by jury. Rules of evidence tend to be less formal and discovery will often be limited. You are encouraged to consult with independent counsel to determine if arbitration is acceptable to you. By signing this

agreement, arbitration will become the sole forum for the resolution of any disputes, and both parties waive their right to submit their claims to a judicial court.

VI. CONTINGENT FEES

Too often a lawyer will use a standard contingent fee agreement or fail to spend the time necessary to draft an agreement that will be workable. Following are some of the critical areas that lawyers may not look at frequently, but need to understand completely.

Texas Disciplinary Rules of Professional Conduct Rule 1.04 is the place to start for compliance with a lawyer's obligations concerning attorney's fees in a contingency fee case. There is actually a lot of guidance in the rule for contingency fees.

A. Increase in Percentage

Generally, it is improper to raise the fee during the course of the representation unless the client has agreed to the increase. The same thing goes for percentage fees in a contingency situation. Of course, the client can agree up front that the percentage is different for each level: trial, appeal, etc. It is improper to raise the percentage of the contingent fee mid-stream without giving the client the opportunity to consult a lawyer. *Robinson v. Garcia*, 804 S.W.2d 238 (Tex. App.—Corpus Christi 1991, writ denied).

B. Expenses

In a contingent fee matter, are the expenses deducted from the entire recovery or from the client's share? Rule 1.04(d) recognizes how important this is to the client and mandates that it be set out in the written agreement. Give some thought to the definition of "gross recovery" in the contingency fee agreement. In a contingent fee matter, make sure to spell out whether the expenses are deducted from the entire recovery or from the client's share.

C. Calculating the Fee

Recall that Rule 1.08 does not allow a lawyer to acquire a proprietary interest in the cause of action or subject matter of the litigation, except a lawyer may contract in a civil case for a contingent fee permissible under Rule 1.04. Rule 1.04(f) is very clear that this permissible exception is only for a fee that is "contingent on the outcome of the matter for which the service is rendered . . . ."

This language should cause lawyers drafting contingent fee agreements to carefully describe not only the legal matter, but the objective or expectation of the matter. It is only in this way that the appropriate fee can be calculated from the outcome.

This detail is especially important when it is anticipated that counterclaims or offsets will be prosecuted by the defendant. In one case of that nature, the Supreme Court considered a contingent fee case where the plaintiffs recovered damages but the damages were offset by a balance due on their mortgage. *Levine v. Bayne, Snell & Krause*, *Ltd.,* 40 S.W.3d 92 (Tex. 2001). The lawyer tried to collect his percentage of the gross recovery which would have given the lawyer more fees than the plaintiffs recovered in the litigation. The Supreme Court did not allow that, relying on the Restatement (Third) of the Law Governing Lawyers § 35, which provided that the lawyer was entitled to receive the contingent fee "only when and to the extent the client receives payment."

D. Assignment of the Cause of Action

The Texas Supreme Court has recognized that a lawyer may take an assignment of part of a recovery and a part of the cause of action in a contingent fee case. *Dow Chemical Co. v. Benton*, 357 S.W.2d 565 (Tex. 1962). This is the exception to the general rule of prohibited transactions with clients. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.08(h). But this assignment cannot prevent a client from firing his attorney and employing a new one.

This assignment is separate and distinct from the common law "attorney's lien," which is a possessory lien against a client's property, money and papers for the amount due to the attorney for fees and expenses. See Tex. Comm. on Professional Ethics, Formal Op. 305 (May 1979).

Contrary to the Texas Supreme Court's position, the Professional Ethics Committee for the State Bar of Texas issued Opinion 61 related to assignments. The Committee concluded: "a lawyer representing a client in litigation may not acquire, by agreement with his client, a lien upon the subject matter of the litigation as a means of securing payments of the lawyer's fee . . . ." Tex. Comm. on Prof'l Ethics, Formal Op. 610, 74 Tex. B.J. 857 (2011). The 2011 Ethics Opinion distinguishes between a security interest and a contingent fee. *Id.* The Committee states that although a contingent fee is permissible, "a security interest to secure such a fee" does not follow. *Id.* Opining that the security interest itself must qualify as an exception under Rule 1.08(h), the Committee asserted "a proprietary interest in a litigation matter being handled by the lawyer who is seeking to acquire the security interest" does not fall within the scope of stated exceptions. *Id.*; see TEX. DISCIPLINARY R. PROF'L CONDUCT 1.08(h) (listing the two exceptions).

The Court's acceptance of a lawyer taking a security interest in his client's cause of action in relation to a contingent fee arrangement is advanced by the numerous benefits it provides to clients. Pursuing a claim through the legal system can be expensive, thus establishing a barrier between the people and the courts. RESTATEMENT (THIRD) OF LAWS GOVERNING

LAWYERS § 43 cmt. d (1998) (pointing to the lawyer's assurance of receiving a fee as "making it easier for people to secure competent representation when they have small means and meritorious claims"). Provided the percentage taken by the lawyer be reasonable and the arrangement is consensual, a lawyer should not be prohibited from taking a security interest in their client's cause of action. *See id.* (supporting the notion that rules of reasonableness and agreement between attorney and client should be maintained); TEX. DISCIPLINARY R. PROF'L CONDUCT 1.04 (requiring an arrangement for legal fees be reasonable).

The Dow Chemical decision remains the authority on a lawyer's ability to take an assignment of their client's cause of action in a contingent fee case. *Dow Chem. Co.,* 357 S.W.2d at 566 (describing the situation where an attorney contracts with his client to secure a percentage of the amount awarded). Remember, Texas Government Code Section 181.092(c) provides that committee opinions are not binding on the Supreme Court.

VII. INCLUDE INFORMATION ON WHAT HAPPENS IN THE EVENT OF WITHDRAWAL OR TERMINATION

If an attorney hired on a contingent-fee basis is discharged without good cause before the representation is completed, the attorney may seek compensation in quantum meruit or in a suit to enforce the contract by collecting the fee from any damages the client subsequently recovers. *Hoover Slovacek LLP v. Walton*, 206 S.W.3d 557, 561–62 (Tex. 2006). Alternatively, if an attorney is terminated for good cause, it appears that the attorney is not entitled to recover under the contingent fee contract; rather, he is limited to quantum meruit. *Rocha v. Ahmad*, 676 S.W.2d 149 (Tex. App.—San Antonio 1984, writ dism'd). Both remedies are subject to the prohibition against charging or collecting an unconscionable fee. *Id.* (citing TEX. DISCIPLINARY R. PROF'L CONDUCT 1.04).

Whether a particular fee amount or contingency percentage charged by the attorney is unconscionable under all relevant circumstances of the representation is an issue for a factfinder. On the other hand, whether a contract, including a fee agreement between attorney and client, is contrary to public policy and unconscionable at the time it is formed is a question of law.

The general rule for withdrawal and termination is (a) return the file, and (b) return any unearned fee. The assertion of an attorney's lien over the file while waiting on full payment of the fee is fraught with difficulties. Texas Disciplinary Rules of Professional Conduct Rule 1.15(d) provides that:

> Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a clients' interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payments of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law only if such retention will not prejudice the client in the subject matter of the representation.

Texas courts and the Fifth Circuit have held that an attorney may withhold a client's file as security for payment of a fee. *Griffith v. Geffen & Jacobsen, P.C.*, 693 S.W.2d 724 (Tex. App.—Dallas 1985, no writ); *Nolan v. Foreman*, 665 F.2d 738 (5th Cir. 1982).. But in doing so, the attorney had better be correct—or otherwise he violates Texas Disciplinary Rules of Professional Conduct Rule. 1.15(d). In every instance of withdrawal or discharge, the lawyer must take all reasonable steps to mitigate the consequences to the client. If returning the file is necessary for that, do you really want to hold on to it to force the payment of the fee?

VIII. ENCLOSE THE TEXAS LAWYER'S CREED

This mandate for professionalism was promulgated by the Supreme Court in 1989. Section II ¶1 of the Creed provides that an attorney should advise his clients of its contents when undertaking representation. It is recommended that the Creed be enclosed with the engagement letter, and that the letter spell out to the client that the lawyer intends to abide by it. If your client asks you to be abusive or pursue tactics for delay only, you can refuse easily by telling the client that he was told upfront that these tactics would not be undertaken. Plus, compliance with the Creed is the right thing to do.

IX. APPLICABLE RULES

When drafting a fee agreement, one should keep the existing disciplinary rules in mind. There are a number of rules addressing fees and fee agreements; however, some of the more important rules are as follows:

A. Fees

- Rule 1.04(c) indicates that the basis or rate of the fee shall be communicated to the client.
- Rule 1.04 provides that a contingent fee must state the litigation and other expenses to be deducted from the recovery, and whether the

expenses are to be deducted before or after the contingent fee is calculated.

- Rule 5.04 contains the general prohibition that a lawyer shall not share legal fees with a non-lawyer. Comment 3 of that rule clarifies that a lawyer and client can share the proceeds of an award in which both damages and attorneys' fees have been included.

B. Disciplinary Rule Limitations on Fee Agreements

Texas Disciplinary Rules of Professional Conduct Rule 1.04 provides:

(a) A lawyer shall not enter into an arrangement for, charge, or collect an illegal fee or unconscionable fee. A fee is unconscionable if a competent lawyer could not form a reasonable belief that the fee is reasonable.

(b) Factors that may be considered in determining the reasonableness of a fee include, but not to the exclusion of other relevant factors, the following:

1. the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
2. the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
3. the fee customarily charged in the locality for similar legal services;
4. the amount involved and the results obtained;
5. the time limitations imposed by the client or by the circumstances;
6. the nature and length of the professional relationship with the client;
7. the experience, reputation, and ability of the lawyer or lawyers performing the services; and
8. whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.

(c) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing; before or within a reasonable time after commencing the representation.

(d) A fee may be contingent on the outcome *of* the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (e) or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined. If there is to be a differentiation in the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, the percentage for each shall be stated. The agreement shall state the litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyers shall provide the client with a written statement describing the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(e) A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case.

(f) A division or arrangement for division of a fee between lawyers who are not in the same firm may be made only if:

1. the division is:
   i. in proportion to the professional services performed by each lawyer; or
   ii. made between lawyers who assume joint responsibility for the representation; and

2. the client consents in writing to the terms of the arrangement prior to the time of the association or referral proposed, including
   i. the identity of all lawyers or law firms who will participate in the fee-sharing arrangement, and
   ii. whether fees will be divided based on the proportion of services performed or by lawyers agreeing to assume

joint responsibility for the representation, and

iii. the share of the fee that each lawyer or law firm will receive or, if the division is based on the proportion of services performed, the basis on which the division will be made; and

3. the aggregate fee does not violate paragraph (a).

(g) Every agreement that allows a lawyer or law firm to associate other counsel in the representation of a person, or to refer the person to other counsel for such representation, and that results in such an association with or referral to a different law firm or a lawyer in such a different firm, shall be confirmed by an arrangement conforming to paragraph (f). Consent by a client or a prospective client without knowledge of the information specified in subparagraph (f)(2) does not constitute a confirmation within the meaning of this rule. No attorney shall collect or seek to collect fees or expenses in connection with any such agreement that is not confirmed in that way, except for:

1. the reasonable value of legal services provided to that person; and
2. the reasonable and necessary expenses actually incurred on behalf of that person.

(h) Paragraph (f) of this rule does not apply to payment to a former partner or associate pursuant to a separation or retirement agreement, or to a lawyer referral program certified by the State Bar of Texas in accordance with the Texas Lawyer Referral Service Quality Act, Tex. Occ. Code 952.001 et seq., or any amendments or modifications thereof.

The reason the entire rule is set out above is to enable several observations. First, note that this is one of the few disciplinary rules that really does define civil standards. The factors articulated by the Texas Supreme Court to be used to determine the reasonableness of attorneys' fees are taken from Texas Disciplinary Rule of Professional Conduct 1.04. *See Arthur Andersen & Co. v. Perry Equip. Corp*., 945 S.W.2d 812, 818 (Tex. 1997).

X. PROVING UP ATTORNEY'S AND PARALEGAL FEES

A. General Rules

Because the general rule in Texas is that each litigant must pay its own attorneys' fees, it is important to recognize the limited circumstances where the recovery of fees from the other party is allowed. These circumstances are:

- When authorized by statute, including Chapter 38 of the Texas Civil Practice and Remedies Code. There are over 157 statutes that authorize private litigants to recover fees.
- When authorized by a **contract** between the parties. Remember that as between the lawyer and client, the contractual provisions will control over Chapter 38, because the parties are always free to adopt different standards for the recovery of fees.
- Under principles of **equity**.
- Under the Texas **Loser Pays** rules

There is a great deal more to a complete understanding of charging and collecting attorneys' fees than knowing how to recover them at trial. However, this paper will discuss some preliminary observations about recovering attorneys' fees and paralegal fees, and then will point out a few of the most often-encountered pitfalls in the recovery process.

B. Recovering Attorney's Fees by Statute

For more than a century, Texas law has not allowed recovery of attorneys' fees unless authorized by statute or contract. *Tony Gullo Motors v. Chapa*, 212 S.W.3d 299 (Tex. 2006). This rule is so venerable and ubiquitous in American courts it is known as "the American Rule." *Id.* Absent a contract or statute, trial courts do not have inherent authority to require a losing party to pay the prevailing party's fees. *Id.*; *see e.g., Buckhannon Bd. & Care Home, Inc. v. West Virginia Dept. of Health & Human Res.,* 532 U.S. 598, 602 (2001) ("In the United States, parties are ordinarily required to bear their own attorney's fees-the prevailing party is not entitled to collect from the loser. Under this 'American Rule,' we follow a general practice of not awarding fees to a prevailing party absent explicit statutory authority.")

There are several statutes that provide for the recovery of attorney's fees, but this paper will discuss the most commonly cited statute, Chapter 38 of the Texas Civil Practice and Remedies Code. O'Connor's CPRC *Plus* provides a great non-exhaustive list of 157

statutes that provide for the recovery of attorneys' fees by private litigants.

Texas Civil Practice and Remedies Code Chapter 38 provides as follows:

> § 38.001. Recovery of Attorney's Fees
>
> A person may recover reasonable attorney's fees from an individual or corporation, in addition to the amount of a valid claim and costs, if the claim is for:
>
> (1) rendered services;
> (2) performed labor;
> (3) furnished material;
> (4) freight or express overcharges;
> (5) lost or damaged freight or express;
> (6) killed or injured stock;
> (7) a sworn account; or
> (8) an oral or written contract.
>
> § 38.002. Procedure for Recovery of Attorney's Fees
>
> To recover attorney's fees under this chapter:
>
> (1) the claimant must be represented by an attorney;
> (2) the claimant must present the claim to the opposing party or to a duly authorized agent of the opposing party; and
> (3) payment for the amount owed must not have been tendered before the expiration of the 30th day after the claim is presented.
>
> § 38.003. Presumption
>
> It is presumed that the usual and customary attorney's fees for a claim of the type described in section 38.001 are reasonable. The presumption may be rebutted.
>
> § 38.004. Judicial Notice
>
> The court may take judicial notice of the usual and customary attorney's fees and of the contents of the case file without receiving further evidence in:
>
> (1) a proceeding before the court; or
> (2) a jury case in which the amount of attorney's fees is submitted to the court by agreement.
>
> § 38.005. Liberal Construction
>
> This chapter shall be liberally construed to promote its underlying purposes.
>
> § 38.006. Exceptions
>
> This chapter does not apply to a contract issued by an insurer that is subject to the provisions of:
>
> (1) Title 11, Insurance Code;
> (2) Chapter 541, Insurance Code;
> (3) the Unfair Claim Settlement Practices Act (Subchapter A, Chapter 542, Insurance Code); or
> (4) Subchapter B, Chapter 542, Insurance Code.

Under Section 38.001, the term person includes a corporation, organization, the government or governmental subdivision or agency, business trust, estate, trust, partnership, association, and any other legal entity. *See* TEXAS CODE CONSTRUCTION ACT. The language of Section 38.001 which limits liability for attorney's fees to individuals and corporations is often overlooked, resulting in courts awarding fees against partnerships, limited liability companies, and limited partnerships. However, a federal district court has determined that the Texas Supreme Court, if presented with the issue, would hold that Section 38.001 is unambiguous, and would limit the recovery only as against individuals and corporations. *Baylor Health Care Sys. v. Nat'l Elevator Indus. Health Benefit Plan*, 2008 WL 2245834 (N.D. Tex. Jun. 2, 2008).

Chapter 38 is not a prevailing party statute. It simply provides for the recovery of attorneys' fees for a prevailing plaintiff, but does not provide for the recovery of fees for a prevailing defendant who was not successful on a counterclaim, but merely defends against a claim. *See Brockie v. Webb*, 244 S.W.3d 905, 910 (Tex.App.—Dallas 2008, pet. denied); *Energen Res. MAQ, Inc. v. Dalbosco*, 23 S.W.3d 551, 558 (Tex. App. Houston [1st Dist.] 2000, pet. denied).

With regard to demand and presentment, the plaintiff must plead and prove that it presented its claim for payment to the defendant or defendant's authorized agent. *Goodwin v. Jolliff*, 257 S.W.3d 341, 349 (Tex.App.—Fort Worth 2008, no pet.). No particular form of demand or presentment is required. *Id.* at 349. Presentment is simply a demand or request for payment and can be either written or oral. *Id.* In addition, there is no requirement that a plaintiff must present its claim at least 30 days prior to suit, and the claim can be made either before or after filing suit. *Board of Cnty. Comm'rs v. Amarillo Hosp. Dist.*, 835 S.W.2d 115, 127 (Tex.App.—Amarillo 1992, no writ); *VingCard A.S. v. Merrimac Hospitality Sys.*, 59

S.W.3d 847, 868 (Tex.App.—Fort Worth 2001, pet. denied). However, the act of filing suit alone is not sufficient to constitute a demand and presentment under the statute. *Goodwin*, 257 S.W.3d at 349.

Finally, the requirement of being represented by an attorney has been held to cover in-house counsel, a law firm represented by one of its own attorneys, and an attorney who represents herself. *Tesoro Petroleum Corp. v. Coastal Ref. & Mktg., Inc.*, 754 S.W.2d 764, 766–67 (Tex. App.—Houston [1st Dist.] 1988, writ denied) (in-house counsel entitled to recover attorneys' fees); *Campbell, Athey & Zukowski v. Thomasson*, 863 F.2d 398, 400 (5th Cir. 1989) (law firm entitled to fees after being represented by own attorney); *Beckstrom v. Gilmore*, 886 S.W.2d 845, 847 (Tex.App.—Eastland 1994, writ denied) (pro se attorney entitled to recover fees).

C. Recovery of Attorney's Fees Under "Loser Pays" Rules

1. Rule 91a Dismissal of Baseless Causes of Action

In 2011, the Texas Legislature passed House Bill 274, directing the Texas Supreme Court to promulgate new rules for early "dismissal of causes of action that have no basis in law or fact." In response, the Court adopted Rule 91a of the Texas Rules of Civil Procedure, effective on March 1, 2013, which is commonly referred to as the "Loser Pays" rule.

Rule 91a provides that: "Except in a case brought under the Family Code or a case governed by Chapter 14 of the Texas Civil Practice and Remedies Code, a party may move to dismiss a cause of action on the grounds that it has no basis in law or fact." TEX. R. CIV. P. 91a.1. A cause of action has no basis in law if the allegations, taken as true, do not entitle the claimant to the relief sought. *Id.* A cause of action has no basis in fact if no reasonable person could believe the facts pleaded. *Id.*

The motion to dismiss must be filed within 60 days of the first pleading containing the challenged cause of action is served on the movant. *Id.* 91a.3. The motion must be filed at least 21 days before it is heard and the motion must be granted or denied within 45 days after it is filed. *Id.*

The new rule requires the trial court to award attorney fees to the prevailing party: "Except in an action by or against a governmental entity or a public official acting in his or her official capacity or under color of law, the court must award the prevailing party on the motion all costs and reasonable and necessary attorney fees incurred with respect the challenged cause of action in the trial court." TEX. R. CIV. P. 91a.7; s*ee also* TEX. CIV. PRAC. & REM. CODE § 30.021. The official comment to Rule 91a explains that "[a]ttorney fees awarded under 91a.7 are limited to those associated with the challenged cause of action, including fees for preparing or responding to the motion to dismiss" *See* TEX. R. CIV. P. 91a, cmt.

As a result, the careful pleader must now "shoot with a rifle, and not a shotgun," since pleading every potential cause of action could result in an award of fees to the prevailing defendant. Alternatively, while the Rule 91 gives defendants some protection against frivolous claims, it is not a "one-way street." If unsuccessful, the defendant must pay the plaintiff the costs and attorneys fees incurred in responding to the motion to dismiss.

2. Texas Rule 167 Offer of Judgment

Rule 167 of the Texas Rules of Civil Procedure, was originally adopted in 2003 and was modified by amendments effective September 1, 2011. Based on the Federal Offer of Judgment Rule, Rule 167 provides for cost shifting if a party makes a reasonable settlement offer that is not accepted by the other side.

Only the defendant (defined as a party against whom a claim for monetary damages is made) may initially invoke Rule 167. The rule is invoked by filing a declaration with the court. TEX. R. CIV. P. 167.2(a). However, once the declaration is filed, all parties may then make offers under the Rule. *Id.* The Rule also sets out specific procedural requirements a settlement offer must meet to qualify under the rule. Specifically, the offer must:

1. be in writing;
2. state that it is made under Rule 167 and Chapter 42 of the Texas Civil Practice and Remedies Code;
3. identify the party or parties making the offer and the party or parties to whom the offer is made;
4. state the terms by which all monetary claims – including any attorney fees, interest, and costs that would be recoverable up to the time of the offer – between the offeror[s] on the one hand and the offeree[s] on the other may be settled;
5. state a deadline – no sooner than 14 days after the offer is served – by which the offer must be accepted; and
6. be served on all parties to whom the offer is made.

Id. 167.2(b). An offer must not include non-monetary claims and other claims to which the rule does not apply. *Id.* 167.2(d). The offer may be made subject to reasonable conditions, such as the execution of appropriate releases and indemnities. *Id.* 167.2(c). An offer may not be made within 60 days after the appearance of the offeror or offeree, whichever is later, or within 14 days before the case is set for trial. *Id.* 167.2(e). An offer may be withdrawn prior to

acceptance, but an offer that is neither withdrawn nor accepted by the stated deadline is deemed to have been rejected. *Id.* 167.3.

Rule 167 does not apply to any offer made in mediation or arbitration. *Id.* 167.7 Additionally, settlement offers made outside scope of 167 or not following any of its procedures will not be basis for litigation costs. *Id.; see, e.g., Orix Capital Mkts., LLC v. La Villita Motor Inns, J.V.,* 329 S.W.3d 30, 50 (Tex. App.—San Antonio 2010, pet. denied) (finding defendant did not comply with the procedures mandated under the statute). Thus, the parties are free to make and reject settlement offers outside the scope of 167 without risking any of the feeshifting provisions. Finally, Rule 167 does not apply to class actions, derivative actions, actions by or against the state or any of its political subdivisions, actions under the Family Code, actions to collect workers' compensation benefits, or actions in the justice of the peace courts. *Id.* 167.1.

If an offer properly made under Rule 167 is rejected, and the judgment on the monetary claims covered by the offer is "significantly less favorable" than the offer, the court *must* award the offeror litigation costs from the time the offer was rejected. *Id.* 167.4(a). "Significantly less favorable" is defined as: (1) if the offeree is a claimant, the judgment is less than 80 percent of the offer; or (2) if the offeree is a defendant, the judgment is more than 120 percent of the offer. *Id.* 167.4(b). Litigation costs covers court costs, reasonable deposition costs (for cases filed on or after Sept. 1, 2011), reasonable fees for not more than two testifying expert witnesses, and reasonable attorney fees. *Id.*167.4(c). However, awarded costs are capped at the total amount the claimant recovers or would recover before adding an award of litigation costs under this rule in favor of the claimant or subtracting as an offset an award of litigation costs under this rule in favor of the defendant.

While providing certain advantages, an offer of settlement under Rule 167 has significant inherent risks that any defendant should carefully consider before choosing to file a declaration under the Rule. Although only a defendant may make the initial declaration, once made the plaintiff is free to make an offer of settlement under the rule as well, thus invoking fee-shifting in favor of the plaintiff. This could have significant negative consequences for defendants, particularly in those cases where prevailing plaintiffs are not ordinarily entitled to recover attorney's fees. In those cases, the offeree plaintiff will never have to pay a defendant since, at worst, it will merely have judgment in its favor reduced. If the defendant prevails and obtains a take nothing judgment against the plaintiff, the defendant is not entitled to an award under Rule 167 because of the damages cap provision. Additionally, if the defendant imprudently rejects the plaintiff's offer, the plaintiff's costs could subject an offeree defendant to paying fees to the plaintiff it would not otherwise have been exposed to. Thus, in tort cases, an offer of settlement creates little additional risk for the plaintiff but considerable risk for the defendant.

3. Federal Rule 68 Offer of Judgment

The corresponding provision under the Federal Rules of Civil Procedure is Rule 68's Offer of Judgment. Under Federal Rule 68, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. FED. R. CIV. P. 68. If the offer is rejected and the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made. *Id.* While Rule 68 does not expressly include attorney fees as costs that may be recovered under Rule 68, the Supreme Court in *Marek v. Chesny* held that, "where the underlying statute defines 'costs' to include attorney's fees . . . such fees are to be included as costs for purposes of Rule 68." 473 U.S. 1, 6 (1985). Additionally, the Federal Rule does not limit the amount of recoverable costs like Texas's offer of settlement, meaning a strategically made offer of judgment could result in a prevailing plaintiff owing the losing defendant. However, like Texas's Rule 167, for Rule 68's cost-shifting provision to apply the plaintiff must prevail at trial. *See Delta Air Lines, Inc. v. August*, 450 U.S. 346, 352 (1981).

An offer of judgment under Federal Rule 68 entails considerably less risk than the offer of settlement under Texas Rule 167, namely because there is no provision allowing the plaintiff to make a corresponding offer. However, there are still key differences that a defendant should be aware of before making an offer of judgment under the Rule. For one, an offer of judgment under Rule 68 must be unconditional (whereas Texas allows for reasonable conditions) and the offer cannot be revoked during the 14-day evaluation period, absent exceptional circumstances (a Texas offer of settlement may be withdrawn prior to acceptance). Additionally, although a defendant need not admit liability to make an offer under Rule 68, if it is accepted the offer becomes a judgment. Whereas settlement agreements are often confidential, judgment under Rule 68 is public and could potentially invite other claims or have adverse consequences in subsequent or pending litigation.

D. Proving Up Attorneys' Fees in Court

1. The Lodestar Calculation

Texas courts, like federal courts, utilize the lodestar method to calculate fees. The lodestar method calculates fees by multiplying the number of hours expended by an hourly rate, the reasonableness of

which is determined by a variety of factors. The factors include:

(1) Benefits obtained for the plaintiff;
(2) The complexity of the issues involved;
(3) The expertise of the attorney;
(4) The attorney's inability to accept other legal work; and
(5) The hourly rate customarily charged in the region for similar legal work.

General Motors Corp. v. Bloyed, 916 S.W.2d 949, 960 (Tex. 1996).

The plaintiff should provide a lodestar figure calculated by multiplying the total hours reasonably spent working on the case by the reasonable hourly rate for the work. The lodestar calculation may be adjusted upward or downward depending on the *Johnson* factors. The *Johnson* factors include:

(1) The time and labor required;
(2) The novelty and difficulty of the questions;
(3) The level of skill required;
(4) The effect on other employment of the attorney;
(5) The customary fee;
(6) Whether the fee is fixed or contingent;
(7) Time limitations imposed by the client or the circumstances;
(8) The amount of money involved and the results obtained;
(9) The experience, reputation, and the ability of the attorney;
(10) The undesirability of the case;
(11) The nature and length of the attorney's relationship with the client;
(12) Awards in similar cases.

Johnson v. Ga. Hwy. Express, Inc., 488 F.2d 714, 717–19 (5th Cir. 1974).

In federal cases, the U.S. Supreme Court has barred the use of factors 6 and 7 above from consideration of the lodestar adjustment, but Texas courts have interpreted this bar to only apply to cases based on federal law and continue to allow these factors to be considered on cases involving state law. *See Dillard Dept. Stores v. Gonzales*, 72 S.W.3d 398, 412 (Tex. App.—El Paso 2002, pet. denied).

A Texas court has added a factor: the effect that the attorneys fees award would have on the law. *Bates v. Randall Cnty.*, 297 S.W.3d 828, 838 (Tex. App.—Amarillo, 2009). In this whistleblower case, the trial court awarded fees to the plaintiff in an amount less than 17% of the lodestar amount. The Court of Appeals reversed and remanded, concerned about the "chilling effect on future whistleblowers' willingness to bring suit."

Obviously, the attorneys' fees must be reasonable and necessary. The Texas Supreme Court has adopted eight factors to be used by the fact finder to determine the reasonableness of attorneys' fees, which are similar to the lodestar factors set out above:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal services properly;
(2) The likelihood that the acceptance of the particular employment will preclude other employment by the attorney;
(3) The fee customarily charged in the locality for similar legal services;
(4) The amount involved and the results obtained;
(5) The time limitations imposed by the client or by the circumstances;
(6) The nature and length of the professional relationship with the client;
(7) The experience, reputation, and the ability of the attorney performing the legal services;
(8) Whether the fee is fixed or contingent on results obtained.

Arthur Anderson v. Perry Equip. Corp., 945 S.W.2d 812, 819 (Tex. 1997). These factors are taken directly from Texas Disciplinary Rule of Professional Conduct 1.04(b), which is one of the few disciplinary rules that defines civil standards.

When proving up attorneys' fees, it is important for the testifying attorney to discuss the *Anderson* factors set forth above as well as a discussion that the hourly rates for the attorneys and paralegals that worked on the case were reasonable given their respective training and experience. The testifying attorney should also discuss the nature and extent of the legal services performed and that the number of hours worked in the case were reasonable and necessary. Upon proving the reasonableness and necessity of the rate and hours, then the testifying attorney should discuss the lodestar factors and whether the attorney believes that an upward or downward adjustment is required after application of the lodestar factors. Finally, as discussed in more detail below, the testifying attorney should discuss whether or not the fees should be segregated between claims or whether segregation is not required because the legal services for the claims (not the facts) are too intertwined for the fees to be segregated.

2. Lodestar is Presumed Reasonable

The Texas Supreme Court has recently reviewed the proper application of the lodestar method in determining contested attorney's fees. In *El Apple I, Ltd. v. Olivas,* 370 S.W.3d 757 (Tex. 2012), the court

addressed two issues in a fee-shifting case involving employment discrimination and retaliation claims brought pursuant to the Texas Commission on Rights Act. The high court determined that the trial court evidence was insufficient to make a lodestar calculation, and the case was remanded to the trial court.

The court went through a detailed analysis about the method in which the lodestar calculation should be made. Importantly, the court accepted the premise that the lodestar presumptively produces a reasonable fee, noting that exceptional circumstances may justify enhancements to the lodestar number. However, the court determined that the base lodestar in this case could not be determined because the trial court did not have in front of it legally sufficient evidence to calculate the fee. The court made it clear that this evidence must include documentation of the services performed, who performed them and the hourly rate then, along with their date and how much time the work required.

The Supreme Court recognized that in the past courts have regularly accepted attorney's fees applications that included lawyers' affidavits with estimates of the number of hours spent on a case. The court also recognized that the attorneys in the *El Apple* case may not even have contemporaneous billing records available. Nevertheless, the lawyers seeking attorney's fees were instructed to reconstruct their work to provide the information that the trial court needed to perform a meaningful review of their fee application.

Undoubtedly *El Apple* will change the practice of attorneys statewide and should cause lawyers to start maintaining contemporaneous time records. Just recently, in *City of Laredo v. Montano*, the Supreme Court revisited and reaffirmed its holding in *El Apple*. No. 12-0274, 2013 Tex. LEXIS 890 (Tex. 2013). In *Montano*, the court found the prevailing plaintiff's proof of attorney's fees—nothing more than "the 'thousands and thousands and thousands of pages' generated during his representation of the [plaintiffs] and his belief that he had reasonably spent 1,356 hours preparing"—insufficient under the standard set out in *El Apple*. *Id.* at *12 ("Gonzalez's testimony that he spent 'a lot of time getting ready for the lawsuit,' conducted 'a lot of legal research,' visited the premises 'many, many, many, many times,' and spent 'countless' hours on motions and depositions is not evidence of a reasonable attorney's fee under lodestar."). While acknowledging that a lodestar fee does not necessarily require time records or billing statements, the Court reaffirmed the basic holding of *El Apple*: a lodestar calculation requires certain basic proof, including itemizing specific tasks, the time required for those tasks, and the rate charged by the person performing the work. *Id.* at *13.

The *El Apple* court also commented that the case involved another indicator of a reasonable fee. The opposing party provided evidence of *its* fees. The court commented that this evidence was a "sure" indicator of a reasonable fee. This statement is contrary to the case of *MCI Telecommc'ns Corp. v. Crowley,* 899 S.W.2d 399 (Tex. App.—Fort Worth 1995, no writ) in which it was stated that the opposing party's fees are irrelevant.

3. Proving Up Attorneys' Fees in Federal Courts

Like Texas courts, federal courts follow a similar standard for the recovery of attorneys' fees. As set forth above, calculating attorneys' fees involves a two step process. The court initially calculates the "lodestar" fee by multiplying the reasonable number of hours expended on the case by the reasonable hourly rates for the participating attorneys. *Migis v. Pearle Vision*, 135 F.3d 1041, 1047 (5th Cir. 1998), citing *La. Power & Light Co. v. Kellstrom*, 50 F.3d 319, 324 (5th Cir. 1995). The court then determines if this lodestar figure should be adjusted upward or downward based on the twelve factors outlined in *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). Id.

The first step in this process is a determination of the number of hours reasonably expended on the litigation. *La. Power & Light Co.,* 50 F.3d at 324. The party seeking fees bears the burden of establishing that they are entitled to recovery, and this involves "presenting evidence that is adequate for the court to determine what hours should be included in the reimbursement." *Bode v. United States*, 919 F.2d 1044, 1047 (5th Cir. 1990). The number of hours awarded can be reduced by the court if documentation of those hours is "vague or incomplete." *La. Power & Light Co.,* 50 F.3d at 324 (citing *Alberti v. Klevenhagen*, 896 F.2d 927, 931 (5th Cir. 1990)).

Likewise, the testimony regarding reasonableness and necessity is basically the same as discussed above, although the Anderson factors do not apply in federal court.

E. Common Pitfalls Encountered in Proving Up and Recovering Attorney's Fees

1. Excessively Redacted Timesheets

Time records are not absolutely required in either federal or state courts for recovery of attorney fees. However, "the amount of time devoted to a case is an essential element of the computation of reasonable fees, and...it is difficult to determine that component without adequate documentation." *Copper Liquor Inc. v. Adolph Coors Co.*, 684 F.2d 1087, 1094 (5th Cir. 1982). Therefore, courts suggest that time records be kept and produced in order to prove reasonableness of fees. Federal courts, however, are much more insistent than state courts in strongly suggesting that an attorney keep time records.

The 5th Circuit strongly indicates that contemporaneous time records should be kept:

> "To support award of statutory attorneys' fees, prudent counsel should adhere to procedure pursuant to which contemporaneous, complete, and standardized time records are kept that accurately reflect work done by each attorney and time charges are voluntarily made available for inspection by district court or opposing counsel on request."

Copper Liquor Inc., 684 F.2d at 1094. On the other hand, the court also stated that "[a]ttorneys' fees were not to be denied on ground that counsel kept no records." *Id*.

However, the United States Supreme Court ruled in an action seeking fees under the 1976 Civil Rights Attorney's Fees Awards Act that since the starting point in assessing fees is a review of the number of hours expended, and the burden is on the party seeking fees, an award may be reduced if the documentation of hours by the attorney is inadequate. *Hensley v. Eckerhart*, 461 U.S. 424 (1983).

> "The fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates. The applicant . . . should maintain billing time records in a manner that will enable a reviewing court to identify distinct claims."

Id. In addition, the Fifth Circuit has excluded or reduced an award of attorneys' fees where the documentation was vague, general, and inadequate. *See, e.g., Watkins v. Fordice*, 7 F.3d 453, 457 (5th Cir. 1993) (excluding attorneys' fees because of vague, general, and inadequate documentation); *Alberti v. Klevenhagen*, 896 F.2d 927, 931 (5th Cir. 1990) (vague time entries may lead to a reduction of the number of hours awarded).

As for state court, none of the eight factors listed in Arthur Anderson mandates that time records be kept or produced; instead, Arthur Anderson only states that a fact finder "should consider" those factors. *Hanif v. Alexander Oil Co.,* WL 31087247 (Tex. App.—Houston [1st Dist.] Sept. 19, 2002, no pet.). "Although contemporaneous time records can be beneficial in assessing a claim for attorney's fees, they are not required." *Rio Grande Valley Gas Co. v. City of Edinburg*, 59 S.W.3d 199, 223 (Tex. App.—Corpus Christi 2000); *Richard Gill Co. v. Jackson's Landing Owners' Assn*, 758 S.W.2d 921, 928 (Tex. App.—Corpus Christi 1988, writ denied). A Texas appellate court has expressly refused to extend the United States Supreme Court finding that time records should be kept, stating that "under Texas law…billing records need not be introduced to recover attorney's fees." *Air Routing Intern. Corp. (Canada) v. Britannia*, 150 S.W.3d 682 (Tex. App.—Houston [14 Dist.] 2004, no pet.).

2. Segregation

For actions involving multiple claims, the segregation rules have changed drastically. For many years, Texas lawyers operated under the segregation rules of *Stewart Title Guar. Co. v. Sterling*, 822 S.W.2d 1 (Tex. 1992).

The Old Rule: The Sterling case held that as a general rule "the plaintiff is required to show that [attorney's] fees were incurred while suing the defendant sought to be charged with the fees on a claim which allows recovery of such fees." *Id.* at 10. But the Supreme Court added an exception to the general rule when the causes of action involved in the suit are dependent upon the same set of facts or circumstances and are so "intertwined to the point of being inseparable." In that situation, the party suing for attorneys' fees may recover the entire amount covering all of the claims, even if some of the claims would not support an award of attorney's fees.

Under that old rule, the emphasis was on the facts and circumstances that gave rise to the claims. However, the exception had threatened to swallow the rule and had been hard to apply consistently. The courts of appeals have disagreed about what makes two claims inextricably intertwined--some focusing on the underlying facts, others on the elements that must be proved, and others on some combination of the two. Some did not require testimony that claims are intertwined, while others did. When faced with fraud and breach of contract claims, some have held the claims inextricably intertwined, and others just the opposite.

The New Rule: Therefore, the Supreme Court announced the new rule in *Tony Gullo Motors v. Chapa*, 212 S.W.3d 299 (Tex. 2006). The Supreme Court stated that "[t]o the extent Sterling suggested that a common set of underlying facts necessarily made all claims arising therefrom "inseparable" and all legal fees recoverable, it went too far. *Id.* at 313. The emphasis is now on an analysis of the discrete legal services, to determine whether those services advance both a recoverable and an unrecoverable claim. If so, they do not need to be segregated. In other words, instead of concentrating on intertwined facts, courts now concentrate on intertwined legal services.

By example, the Supreme Court stated:

> Requests for standard disclosures, proof of background facts, depositions of the primary

> actors, discovery motions and hearings, *voir dire* of the jury, and a host of other services may be necessary whether a claim is filed alone or with others. To the extent such services would have been incurred on a recoverable claim alone, they are not disallowed simply because they do double service.

Id. With regard to proof, the Supreme Court held:

> This standard does not require more precise proof for attorney's fees than for any other claims or expenses. Here, Chapa's attorneys did not have to keep separate time records when they drafted the fraud, contract, or DTPA paragraphs of her petition; an opinion would have sufficed stating that, for example, 95 percent of their drafting time would have been necessary even if there had been no fraud claim. The court of appeals could then have applied standard factual and legal sufficiency review to the jury's verdict based on that evidence.

Id. at 314. Finally, the Supreme Court included a fallback if a party fails to provide evidence of segregation when segregation is required. The Supreme Court held that evidence of unsegregated fees for the entire case constitutes some evidence of what the segregated amount should be. Id. at 314. Therefore, in a case where segregation was required, but the attorney failed to introduce evidence of segregation, remand is required. *Id.*

Remember, whether fees should be segregated is a question of law and the issue of proper segregation is a mixed question of law and fact. *Penhollow Custom Homes, LLC v. Kim*, 320 S.W.3d 366 (Tex. App—El Paso, 2010, no pet.); *Endsley Electric, Inc. v. Altech*, 378 S.W.3d 15 (Tex. App.—Texarkana 2012, no pet.).

3. Pleading

A trial court cannot enter judgment on a theory of recovery not sufficiently set forth in the pleadings or otherwise tried by consent. *Herrington v. Sandcastle Condominium Ass'n,* 222 S.W.3d 99, 102 (Tex. App.—Houston [14th Dist.] 2006, no pet.); *see* TEX. R. CIV. P. 301. Thus, if a party seeks recovery of attorney's fees, it must properly plead its right to recover the same. A general allegation seeking recovery of attorney's fees is usually sufficient to place the opposing party on notice that the pleader seeks such fees. *See, e.g., Smith v. Deneve,* 285 S.W.3d 904, 916–17 (Tex. App.—Dallas 2009, no pet.). However, if a party pleads a specific ground for recovery of attorney's fees, the party is limited to that ground and cannot recover on another, unpleaded ground. *Heritage Gulf Coast Props. v. Sandalwood Apts., Inc.,* 2013 WL 5323983 (Tex. App.—Houston [14th] Sept. 24, 2013, no pet. h.).

E. Standard for Recovery of Paralegal Fees

Paralegal fees are not automatically recoverable as a subset of attorneys' fees. Many attorneys have their paralegals perform a good amount of clerical work. It may be easier for the paralegal to do this work, and it may be that it is performed better or faster by a paralegal than other clerical staff. However, just because the paralegal did the work does not mean that the time spent is recoverable from the adverse party. The recoverable amount must be for substantive legal work done under the direction of an attorney. When proving those amounts, the attorney as an expert needs to provide the factfinder with a description of the qualifications of this paralegal to do substantive legal work.

In order to recover for paralegal fees in connection with the recovery of attorneys' fees, the paralegal must have performed work that has traditionally been done by an attorney. *Gill Sav. Ass'n v. Int'l Supply Co.*, 759 S.W.2d 697, 702 (Tex. App.—Dallas 1988, writ denied). In addition, the evidence must establish all of the following:

1) the paralegals are qualified through education, training or work experience to perform substantive legal work;
2) the substantive legal work was performed under the direction and supervision of an attorney;
3) the nature of the legal work performed;
4) the hourly rate charged for the paralegal was reasonable and necessary; and
5) the number of hours expended by the paralegals were reasonable and necessary.

See id.; see also Clary Corp. v. Smith, 949 S.W.2d 452, 469–70 (Tex. App.—Fort Worth 1997, writ denied) (outlining the requirements necessary for recovery and finding evidence legally insufficient for recovery); *Moody v. EMC Servs.*, 828 S.W.2d 237, 248 (Tex. App.—Houston [14th Dist.] 1992, writ denied) (outlining the requirements necessary for recovery and finding evidence legally insufficient for recovery); *Multi-Moto Corp. v. ITT Commercial Fin. Corp.*, 806 S.W.2d 560, 571 (Tex. App.—Dallas 1991, writ denied) (outlining the requirements necessary for recovery).

In *Gill Savings*, the Dallas Court held that paralegal fees are includable in an attorneys' fee award, but require additional proof, stating:

i. Having determined that a legal assistant's time is properly includable in an attorney's fee award under certain conditions, we turn

to Gill's alternative argument that International did not put on the necessary proof to substantiate the award. *Gill Savings,* 759 S.W.2d at 705.

ii. The Court then found that the testimony and exhibits did not provide any help in determining the qualifications, if any, of the legal assistants, the nature of the work performed, or the hourly rate being charged. The Court, therefore, held that:

iii. [T]he evidence concerning the work performed by the legal assistants is legally insufficient to support the award. *Id.*

Activities performed by paralegals that fall under the realm of "substantive legal work," include:

1) conducting client or witness interviews;
2) drafting documents;
3) assisting with answering discovery;
4) drafting correspondence;
5) drafting pleadings;
6) summarizing depositions;
7) summarizing documents;
8) attending depositions;
9) attending court hearings;
10) attending trial.

Although this list is by no means exclusive, a good general guideline to follow is whether or not the work performed by the paralegal required some independent thought or a slightly higher level of cognitive thinking. Activities that would not fall under the realm of "substantive legal work," include the following:

1) Filing;
2) Scanning documents;
3) Copying documents;
4) Bates stamping documents;
5) Locating documents;
6) Making attorney's revisions to a document or pleading;
7) Faxing or emailing documents;
8) Arranging conference calls;
9) Notarizing documents;
10) Scheduling/travel arrangements.

If paralegals worked on a case, the attorney should testify about their experience, work, and fees. One rule of thumb is that paralegal fees are recoverable if the work performed by the paralegal was work that is traditionally done by attorneys. First, the evidence must establish that the paralegal is qualified through education, training, or work experience to perform substantive legal work. Next, testimony regarding work should include a description of the tasks involved, if there is a question on whether it qualifies as substantive legal work or clerical work, and that such work was supervised by an attorney. Finally, with regard to fees, similar to when proving up a reasonable attorney fee, the attorney should testify that that the hourly rate charged for the paralegal work was reasonable. It is not sufficient to testify simply about the total amount of paralegal fees. *Clary Corp*., 949 S.W.2d at 470; *see also Moody*, 828 S.W.2d at 248(invoices listing the total cost for various services performed by a paralegal were not sufficient to support the award of fees).

As a final point regarding paralegal fees, remember that just because your client has agreed to pay you for all the fees incurred by your paralegal on the case, this does not mean that all of the fees are recoverable in litigation. It may be advisable to state in your fee agreement that from time to time, a paralegal may perform clerical services out of necessity, but that the client still agrees to pay the paralegal rate for all hours. The client should know that you will keep this to a minimum but that it does happen.

F. What Your Client Pays You Is Not What You Can Recover

Most attorneys believe the maxim that simply because the client agreed to pay the invoices sent for the legal work performed, the attorney can recover all fees as reasonable and necessary. However, the mere fact that your client agreed to pay your rate does not mean that such an agreement between you and your client is binding on the opposing party, nor is it sufficient proof of the reasonableness of the rate. *See Smith v. Smith*, 757 S.W.2d 422, 424 (Tex.App.—Dallas 1988, writ denied); *Leal v. Leal*, 628 S.W.2d 168, 170–71 (Tex. App.—San Antonio 1982, no writ).

For example, if your client agrees to pay you $500 per hour for legal work on a case and you work 500 hours on the case, you will still need to prove up that that the rate is reasonable in the locale in which the case sits and that the hours expended on the case were necessary. Therefore, testimony that the fees and the hours are reasonable and necessary just because your client paid all your invoices is insufficient to properly prove up your entitlement to your fees. You still must go through all the requirements set forth in this paper in order to recover your fees.

Likewise, if you have the case on a contingent fee arrangement, it is insufficient to prove up your fees by testifying that your fees equate to a percentage of the damages awarded. A plaintiff seeking attorneys' fees from the defendant based on a contingent fee contract cannot ask for a percentage of the judgment; the plaintiff must seek attorneys' fees based on the work performed in the case. *Arthur Anderson v. Perry Equip. Corp.,* 945 S.W.2d 812, 819 (Tex. 1997); *see also San Antonio Credit Union v. O'Connor*, 115 S.W.3d 82, 106 (Tex. App.—San Antonio 2003, pet. denied)

(plaintiff must ask for attorney fees in a specific dollar amount, not as a percentage of the judgment). Even if a contingent fee is reasonable from the standpoint of the client and its attorney, it does not mean the fee can be recovered from the defendant. *Arthur Anderson,* 945 S.W.2d at 818. Therefore, when proving up attorneys' fees based on a contingent fee arrangement, you must still go through the reasonableness factors and lodestar calculation.

G. Jury Charge

Pattern Jury Charge 115.46 will be used by courts regardless of the terms of the fee agreement entered into by the attorney and the client. Texas Pattern Jury Charges – Business, Consumer, Insurance & Employment (2010 ed.). Here is the question:

> If you answered "Yes" to Question _____ *[applicable liability question]*, then answer the following question. Otherwise, do not answer the following question.
>
> QUESTION _____
>
> What is a reasonable fee for the necessary services of Paul Payne's attorney, stated in dollars and cents?
>
> Answer with an amount for each of the following:
>
> a. For representation in the trial court.
> Answer: _____
> b. For representation through appeal to the court of appeals.
> Answer: _____
> c. For representation at the petition for review stage in the Supreme Court of Texas.
> Answer: _____
> d. For representation at the merits briefing stage in the Supreme Court of Texas.
> Answer: _____
> e. For representation through oral argument and the completion of proceedings in the Supreme Court of Texas.
> Answer: _____

Note that the words "if any" are not included when asking about the amount of fees. This is because the jury does not determine whether fees are recoverable; rather, it only determines the reasonable and necessary amount.

XI. REVIEWING ATTORNEY'S FEES ON APPEAL

An appellate court will review a trial court's award for attorney's fees using a factual sufficiency of the evidence standard. *See Barker v. Eckman*, 213 S.W.3d 306 (Tex. 2006). The court, when reviewing a jury's verdict, will uphold the jury's determination unless after considering all the evidence the verdict was contrary to the overwhelming weight of the evidence. *Austin ISD v. Manbeck*, 338 S.W.3d 147 (Tex. App.—Austin 2011). *rev'd on other grounds*, 381 S.W.3d 528 (Tex. 2012).

In many cases, the award of attorney's fees is based on actual damages. In such cases, when an appellate court reduces the amount of actual damages, the court will also remand the case for a trial on fees unless the court is "reasonably certain that the jury was not significantly influenced by the erroneous amount of damages it considered." *See Barker*, 213 S.W.3d at 314. In *Barker*, the Texas Supreme Court held that the appellate court erred by not remanding the case for a new trial after actual damages were reduced from $111,983.58 to $16,180.14. *Id.* Not every reduction in damages will require a reversal, however because actual damages in *Barker* were reduced by one-seventh and attorney's fees were based in part on such damages, the court was not reasonably certain that the jury was not significantly affected by the erroneous amount. *Id.*

XII. ALTERNATIVE FEE ARRANGEMENTS

Alternative Fee Arrangements (AFAs) are generally defined as any fee agreement not predicated on billable hours, or "cost-plus pricing." These arrangements are intended to shift some or all of the client's legal fee risk to the lawyer, align more closely the interests of the client and lawyer, and provide both the lawyer and the client with predictable cash flow and budgeting. Currently, AFAs account for a relatively small percentage of the legal spend (estimates range from 10–25% of firm billings). *See, e.g.,* ALM's *2013 Alternative Fee Arrangements at Legal Departments and Law Firms* Report; Altman Weil Flash Survey 2011 *Law Firms in Transition,* available at http://www.altmanweil.com/lfit2011/; Russ Haskin, *Six Alternative Views on Alternative Fees,* LAW PRACTICE TODAY, June 2013, *available at* www.americanbar.org. However, economic pressure, new technology, and increased commoditization of legal services continue to force fundamental change in both the business and the practice of law and more clients are demanding alternative fee arrangements from their lawyers in order to obtain maximum value for dollars spent. Consequently, it is anticipated the implementation of AFAs will continue to trend upward; especially with the increase in competition among those providing legal services.

A. Making AFAs Profitable

While many view AFAs as the "new normal," at least one third of law firms report that AFAs are less profitable than hourly billing. *See* ALM's 2013 AFA report; Altman Weil *Law Firms in Transition*. Consequently, most firms and attorneys have been reactive in their decision to adopt or pursue alternative fee arrangements; doing so only when demanded by the client. However, the Altman Weil survey of large and midsize firm found: "Firms that are proactive in their pursuit of non-hourly business were more than twice as likely to report higher profitability on non-hourly projects compared to firms that are reactive." *Law Firms in Transition.* Regardless, the key to profitable alternative fee arrangements is thorough preparation by the attorney or law firm.

1. Know Your Costs

In order to know what the best fee arrangement is for any project, the attorney or firm must learn to estimate the cost of legal services. The best place to start is with historical data. Data mine your files to gather all the financial data for similar types of projects or cases and then analyze the profitability for each distinct piece of work. This may require updating financial reporting systems in order to collect the information. Additionally, time sheets can provide valuable data for determining the cost future jobs and profitability. The actual time spent on each function on the last several cases of that type is essential for cost analysis. When there have been dramatic differences in fees for roughly the same type of work, ascertain the reasons for such variances.

2. Emphasis on Project Management

The driving force behind many AFAs is rewarding efficiency by the attorney or law firm. Numerous project management tools exist to aid in efficiency and planning: resource allocation, scheduling, budget and time control, form production, expertise databases, case/deal management software, etc. Many firms also have begun employing non-lawyer professionals in project management for such tasks as analyzing and developing fee proposals, tracking progress against budget, evaluating and implementing new technology, and generating process-improvement initiatives.

3. Partnership with the Client

Successful alternative fee arrangements require investment in relationship building. The client and counsel must communicate from the outset to understand each other's expectations and share as much information as possible. Information on staffing, caseloads, time estimates, value, etc., must come from both sides of the table in order for an AFA to be profitable for both the attorney and the client. The optimal place to begin with AFAs is with the firm or attorney's best clients. These attorney-client business relationships are more secure, with more open communication. Because successful AFAs inevitably involve some amount of trial and error and need practice to improve, a good working relationship with the client is essential.

Additionally, successful AFAs require an understanding what the client wants. "AFAs are not about charging more than what an hourly rate might be—they are about charging an appropriate fee based on what value the client receives *and* how that client perceives value. . . . When spending money adds to the value of what a person has, the money spent is an investment and not an expense." Mark A. Robertson, *Marketing Alternative Fee Arrangements*. Law Practice Magazine Sept.-Oct. 2011, *available at* www.americanbar.org.

B. Types of Alternative Fee Arrangements

Listed here are some of the more common types of alternative fees arrangements.

- Contingency Fee: The attorney receives a fixed or scaled percentage of any recoveries in a lawsuit brought on behalf of the client as a plaintiff. The client can either pay the expenses of the litigation, or the attorney may take on the expenses as well. On the other side is the reverse contingency—the contingent fee is based on a percentage of the amount saved for the client in the litigation. For example, the fee is a percentage of the difference between the estimated exposure and the amount, if any, the client ultimately pays in damages or settlement, plus avoided litigation costs.
- Partial Contingency Fee: The attorney receives a reduced hourly rate plus a small percentage of any recoveries in the lawsuit.
- Fixed Fee or Flat Fee: The client and attorney agree on a predetermined price to perform a specific service or range of services, regardless of how much time is expended on the matter. The fixed rate can apply to a single matter, a range of matters, for repetitive tasks within a matter, or a certain rate of investment per month. A prudent attorney also should negotiate a safety valve provision allowing for renegotiation if additional, unexpected work arises.
- Capped fees: The attorney receives hourly rates charged up to a maximum cap; beyond that the attorney works at his or her own expense. Like with a fixed fee, it is prudent

to negotiate a safety valve in advance, for example both parties may agree to renegotiate if the fees exceed the cap by a certain number of dollars or hours.

- Holdback/Success Fee: The attorney is paid a portion of its fees up front, but has a portion withheld contingent upon success in the matter. If the matter is concluded successfully, the attorney receives a multiple of the holdback or an agreed upon success fee. While holdback/success fees are more commonly associated with acquisitions, sales or other similar transactions, "success" can be defined by the parties to reflect the nature of the matter. For example, "success" could include summary judgment, dismissal, or damages below a certain amount. The fee could also be set on budget- or time-dependent factors, where the holdback is payable to the attorney for his or her successful achievement of budgetary or timing objectives.
- Blended Rates: This arrangement sets an hourly rate for all timekeepers or specific levels of timekeepers (e.g. attorneys, paralegals). These types of arrangements encourage the law firm or attorney to assign work to the most appropriate level and minimize costs by moving the work down to the lowest cost level of staffing. The agreement also can provide for different rates for different levels, e.g. one blended rate for pretrial, another for appeals, etc.
- Fee Collars: This arrangement creates a fee range for which the law firm or attorney assumes the sole responsibility. Any variance at a set percentage above or below that range is shared evenly between the client and attorney. For example, if the agreement calls for a $100,000 fixed fee with a plus or minus 10 percent collar and actual fees are between $90,000 and $110,000, the fixed fee remains at $100,000. But if incurred fees are less than $90,000 or greater than $110,000, the parties share the difference.
- Volume Discounts: This generally involves an agreement by the attorney to handle certain cases for a reduced rate in return for getting a certain volume of work. For example, a 10% discount in return for a guarantee of 10,000 hours of work in the next year or for handling all of a certain type of case for the client. The larger the volume of work involved, the less risk that the attorney may be over- or under-compensated, as fees are likely to average out across the entire volume of work involved.
- Hybrids: A combination of two or more of the above.
- Value-Adjusted Hourly Billing: Legal matters billed in the traditional hourly way, but at the end the client is invited to subtract or to add any amount in order to reflect the value received, as perceived by the client.

ENERGY AND ENVIRONMENTAL CASE LAW UPDATE

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ENERGY AND ENVIRONMENTAL CASE LAW UPDATE

I. INTRODUCTION

Texas appeals courts have handled a number of energy and environmental cases in the past year. We have seen decisions involving executive duties, the Statute of Frauds, takings principles, the survival of overriding royalty interests, and interpretation of royalty, pooling, and exculpatory clauses. This paper includes a selection of energy and environmental cases decided in the past year. This paper includes both published and unpublished cases.

II. LEASE & JOA ISSUES

1. ***Merriman v. XTO Energy, Inc.***, 407 S.W.3d 244 (Tex. 2013).

Merriman owned the surface estate (but not the minerals) of a 40-acre tract on which he maintained a home, a barn, and permanent fencing and corrals related to his cattle operations. Once a year, he conducted a roundup which required additional temporary catch-pens and corrals to be used in conjunction with the permanent fencing and structures. Over Merriman's objections, XTO drilled a well very close to the barn and permanent facilities, and the well interfered with Merriman's annual roundup and related operations. At issue was the scope of the "existing use" of the surface estate to be considered when applying the accommodation doctrine.

The *Merriman* Court explained that, under the accommodation doctrine, a "party possessing the dominant mineral estate has . . . the right to use as much of the surface as is reasonably necessary to extract and produce the minerals. If the mineral owner or lessee has only one method for developing and producing the minerals, that method may be used regardless of whether it precludes or substantially impairs an existing use of the servient surface estate." The accommodation doctrine requires, however, that the mineral owner must use available alternatives in developing the minerals that "allows continued use of the surface by the surface owner."

To prove that the mineral lessee has failed to accommodate an existing use of the surface, the surface owner must show that (1) the lessee's use completely precludes or substantially impairs the existing use, and (2) there is no reasonable alternative method available to the surface owner by which the existing use can be continued. If the surface owner carries that burden, he must further prove that given the particular circumstances, there are alternative reasonable, customary, and industry-accepted methods available to the lessee which will allow recovery of the minerals and also allow the surface owner to continue the existing use.

The surface owner cannot satisfy his burden by showing that "the alternative method [of surface use] is merely more inconvenient or less economically beneficial than the existing method." Rather, the inconvenience or financial burden of the alternative method must be "so great as to make the alternative method unreasonable."

The Court summarized the underlying principle of the accommodation doctrine as "balancing the rights of surface and mineral owners to use their respective estate while recognizing and respecting the dominant nature of the mineral estate," and noted that "no bright lines can be drawn by which to categorize 'existing uses' of surface estates."

The Supreme Court held that Merriman's surface use should be characterized more narrowly to address the specific cattle operations at issue, rather than the broad "agricultural" use used by the court of appeals. A narrow definition of "existing use" favors the surface owner. Merriman's burden was substantially lower, because he only needed to demonstrate the lack of a reasonable alternative for his specific cattle operations. After reviewing the evidence, the Court concluded that, while the evidence showed added expense and inconvenience for Merriman's surface operations, there was no evidence that the cattle operation could not be conducted somewhere else on the tract. According to the Court, the evidence amounted to nothing more than evidence of additional expense and reduced profits, but it did not constitute evidence demonstrating the absence of a reasonable alternative.

2. ***Cabot Oil & Gas Corp. v. Healey, L.P.***, No. 12-11-00236-CV, 2013 WL 1282007 (Tex. App.—Tyler Mar. 28, 2013, pet. denied) (mem. op.).

Cabot was the operator and Healey was lessor of three oil and gas leases. There were multiple production units and numerous wells. The leases each provided the following:

> Lessee shall, during the drilling of any wells on the leased premises, furnish Lessor daily drilling reports, copies of all logs runs, monthly production reports for the life of said well(s), copies of all reports and forms filed with the State regulatory bodies in connection with such wells, well locations, dates of completion and abandonment. Lessee shall also furnish Lessor copies of any title opinions or title reports which Lessee may obtain on the leased premises.
>
> * * *
>
> Any breach by Lessee of any term, provision[,] or covenant in this lease shall be grounds for cancellation of this lease.

(together with any other remedies available to Lessor).

Healey alleged that Cabot and Cabot's predecessor had failed to furnish the information as required by the leases, suggested that the leases had terminated, and requested to be treated as a working interest owner in the pooled units. Cabot responded by attempting to provide the missing data. Healey sued seeking a declaratory judgment that the leases had terminated and that Healey was an unleased cotenant. The trial court signed a judgment that declared (1) termination of the leases, (2) the amount of production revenue and production expense for each of the four gas units, and (3) Healey' specific mineral interest ownership percentage in each of the units.

The case was tried as a declaratory judgment action rather than in trespass to try title. The court reviewed various Texas cases that were illustrative of the difference between the two causes of action, and concluded that, "with an exception not applicable here, a trespass to try title claim is the exclusive method in Texas for adjudicating disputed claims of title to real property." Because the case should have been in trespass to try title, Cabot contended that the declaratory judgment should be reversed, that attorney's fees could not be awarded, and that Healey had failed to meet the strict evidentiary burdens required in trespass to try title. The court held that Cabot failed to preserve error on all of those points by not filing special exceptions to the declaratory judgment claim prior to the submission of the charge under Texas Rule of Civil Procedure 90.185.

The opinion dealt also with evidentiary objections. Much of the proof required to establish drilling costs on each well depended on a business records affidavit with multiple records attached as provided by Cabot's predecessor. Healey objected that the exhibit was hearsay, constituted an impermissible summary, and failed to demonstrate that the costs set forth therein were reasonable and necessary. The trial court sustained Healey's objections and excluded the evidence; this decision was reversed on appeal. Of particular note, the court held that evidence that the costs were reasonable and necessary was not required to make the business records admissible.

Cabot also sought to preserve its leases by the affirmative defense of substantial performance, but the trial court refused Cabot's requested issue. The court noted that jury instructions are reviewed under an abuse of discretion standard and if any part of the question, instruction, or definition fails, then the court can deny the entire request. Instructions should not "advise the jury of the effect of its answers." Here, Cabot's submission regarding substantial performance included a number of extra nudging instructions that would have advised the jury that if they answered in the affirmative, Healey would not be able to terminate the leases. The court of appeals held that the trial court did not err by refusing to submit the proposed question.

3. ***Richmond v. Wells,*** 395 S.W.3d 262 (Tex. App.—Eastland 2012, pet. denied).

Richmond leased its minerals to Endeavor under a typical oil and gas lease, and Endeavor completed a well on the leased tract. Richmond sold the tract to Zugg, with Richmond retaining the minerals; the Richmond-to-Zugg warranty deed was made subject to oil and gas leases of record and excepted "all oil, gas and other minerals in, on or under said land reserved by prior grantors . . . ." Zugg then sold to Wells, and the Zugg-to-Wells warranty deed contained the same language. Richmond and Wells disputed who owned the right to receive royalties from the Endeavor well.

The trial court granted Wells motion for declaratory judgment, holding that both deeds conveyed the mineral estate, that Richmond reserved no interest in the mineral estate, that Richmond was not entitled to any proceeds from the mineral estate.

Richmond contended that Wells should have brought his claim as a trespass to try title. Under the lease to Endeavor, however, the lessor retained only a royalty interest and a possibility of reverter, which are non-possessory interests. Claims to a royalty interest and the possibility of reverter are not properly the subject of a trespass-to-try title cause of action, which addresses only possessory interests. In addition, the declaratory judgment statute provides that any person interested under a deed may have determined any question of construction arising under the deed and obtain a declaration of rights.

4. ***Maddox v. Vantage Energy, LLC***, 361 S.W.3d 752 (Tex. App. – Fort Worth 2012, pet. denied).

This case concerns the standing of members of a neighborhood association to sue individually for breach of contract regarding a contract between the association and an oil and gas company.

During summer 2008, oil and gas companies began approaching individual homeowners in southwest Fort Worth to attempt to obtain leases of the minerals under the homeowners' properties. Some property owners formed a non-profit, unincorporated association named Southwest Fort Worth Alliance ("SFWA") to negotiate the best possible lease terms for property owners in the area. SFWA ultimately reached an agreement for a uniform oil and gas lease with Vantage, the defendant. Vantage secured thousands of leases from property owners in the areas that had organized the SWFA. But, Vantage ceased all leasing activity as the price of natural gas plummeted in the fall of 2008. When the company refused to lease plaintiffs' property, plaintiffs filed suit for specific performance. Plaintiffs alleged that the agreement

between SFWA and Vantage constituted an enforceable contract. Plaintiffs further alleged that although they were not parties to the alleged contract, they were third-party beneficiaries and so were entitled to a lease that conformed to the provisions of the uniform lease. The trial judge granted defendant's motion for summary judgment on various grounds, and plaintiffs appealed.

The appeals court affirmed, holding that plaintiffs lack standing to pursue the litigation. The court applied the very strict standard for determining third-party beneficiary status, and found that plaintiffs did not meet this standard. Although plaintiffs live in one of the neighborhoods in which the homeowners' association participated in forming the SFWA, this fact did not make plaintiffs part of an "identified, discreet, limited group of individuals specifically intended to be third-party beneficiaries of the purported Vantage/SFWA contract." In fact, no map was attached to the agreement plaintiffs alleged constituted the contract. The court concluded that plaintiffs are, at most, merely incidental beneficiaries of the agreement, without standing to enforce it.

5. ***Ohrt v. Union Gas Corp.***, 398 S.W.2d 315 (Tex. App. – Corpus Christi 2012, pet. filed).

The Court in this case affirmed Texas law holding that, absent express lease language to the contrary, pooling is effective when an instrument identifying the pooled unit is recorded, regardless of the instrument's stated effective date.

Union Gas Corp. ("UGOC") executed oil and gas leases with several land owners. Plaintiffs' lease contained a pooling clause providing that the lessee would exercise its pooling right "by executing an instrument identifying such [pooled] unit and filing it for record." The lease limited the size of any pooled unit as to depths of 9000 feet or shallower to 320 acres, plus a 10% tolerance. In July 2000, UGOC drilled and completed a well on one of the leased tracts, and formed a 697.4935-acre pooled unit that included 82 acres of plaintiffs' land. On October 10, defendant filed a declaration of pooling stating that the pooling was effective as of the date of first production in July. In August through September 2000, defendant drilled and completed a well on plaintiffs' land and created a pooled unit of 690.73 acres. On January 15, 2001, defendant recorded a designation of pooling stating that the pooling was effective as of the date of first production. The division orders circulated by defendant later that month contained the identity and size of each unit, and each also stated that it was based on the date of first production from the orders' respective wells.

Plaintiffs executed the division orders and began receiving and accepting royalties based on the division orders. On October 30, 2001, plaintiffs' counsel sent a letter to defendant demanding royalties based on 100% of the production from the well on their land from the date of first production until the January date when the designation of pooling was recorded. UGOC suspended royalty payments to all royalty owners pending resolution of plaintiffs' claim. Plaintiffs subsequently filed suit claiming bad faith pooling, violation of the pooling clause in their lease, and the right to a royalty based on 100% of the production from the well on their land. After trial, the jury rejected the claims of bad-faith pooling and found that plaintiffs' acceptance of royalties based on the division orders constituted ratification, waiver, and estoppel, which excused any non-compliance with the terms of the pooling clause.

The appeals court affirmed. The court cited Texas cases holding that a pooling provision requiring that an instrument designating the pooled unit be recorded is effective on the date of recordation, regardless of the stated effective date of the instrument. The court affirmed this principle and held that the pooling in this case was effective only upon recordation. Nonetheless, the court refused to award plaintiffs full royalties up to the time of recordation because the jury found that plaintiffs' acceptance of royalties based on the division orders constituted ratification, waiver, and estoppel to assert this provision.

Plaintiffs contended this jury finding should be overturned on the basis of Section 91.402(h) of the Texas Natural Resources Code, which provides that a division order "shall not change … the lessee's specific … obligations under an oil and gas lease." But the court pointed out additional statutory language providing that division orders are binding until revoked. Accordingly, the appeals court held that by accepting payment under the division orders and failing to revoke that acceptance, plaintiffs were bound by the division orders. The court applied the same analysis to the jury's finding that the pooled unit violated the lease's depth limitation, i.e., plaintiffs' execution of division orders and acceptance of royalties on the improper unit constituted ratification, waiver, and estoppel.

The Plaintiffs have filed a petition for review to the Supreme Court of Texas. The Court has called for briefs on the merits, but as of this writing has not ruled on the petition.

6. ***Reeder v. Wood County Energy, LLC***, 395 S.W.3d 789 (Tex. 2012).

In this case, the Texas Supreme Court considered the extent to which an exculpatory clause taken from the 1989 Model Form JOA exempts an operator from liability for a broader range of activities than such clauses in previous model forms.

Plaintiff Reeder operated several wells in Wood County pursuant to a JOA containing the following exculpatory clause (emphasis added):

> Operator shall conduct **its activities under this agreement** as a reasonable prudent operator, in a good and workmanlike manner, with due diligence and in accordance with good oilfield practice, but in no event shall it have any liability as Operator to other parties for losses sustained or liabilities incurred except such as may result from gross negligence or willful misconduct.

Reeder's relationship with his working interest partners deteriorated. Reeder requested funds to make various repairs to the wells, but was denied. The Railroad Commission of Texas eventually suspended the wells' production. In May 2004, Reeder filed suit against his working interest partners asserting that he was the operator and had the exclusive right of possession of the wellbores for the purpose of producing oil. The working interest owners counterclaimed, alleging among other things that Reeder failed to obtain production in paying quantities as required by the JOA.

After a jury trial, the jury found Reeder breached his duty as operator by failing to maintain production in paying quantities or other operations in the relevant field. The trial court entered the verdict and awarded damages to the working-interest partners. Reeder appealed, challenging among other things the jury's findings that he breached the JOA. The appeals court affirmed.

The Texas Supreme Court considered whether the exculpatory clause in the JOA at issue sets the standard to adjudicate the breach of contract claims against Reeder, and whether there was sufficient evidence that Reeder's activities met this heightened standard. An exculpatory clause is a "clause in a contract designed to relieve one party of liability to the other for specified injury or loss incurred in the performance of the contract." The Court noted that the exculpatory clause in this case was taken from the 1989 model form JOA, which shields the operator from liability for "its activities **under this agreement**" unless there is a finding of gross negligence and willful misconduct.

The Court noted that the phrase "under this agreement" differed from prior versions of the Model Form JOA, which extended the heightened standard for liability to "all such operations," i.e., "all operations on the Contract Area." The Court concluded that the change of language is significant, because it broadens the clause's protection of operators by imposing the heightened liability standard to all activities under the JOA, rather than only those undertaken on the Contract Area. Here, the parties modeled their JOA after the 1989 model form – recognizing the distinction between "such operations" and "its activities under this agreement." The Court further found that there was insufficient evidence in the record to show that Reeder's activities met this heightened standard, and so reversed and rendered a take-nothing judgment.

III. INTERESTS IN LAND

1. *El Dorado Land Co., L.P. v. City of McKinney*, 395 S.W.3d 798 (Tex. 2013).

This was an inverse condemnation lawsuit in which the Texas Supreme Court determined whether an option in a conveyance to a municipality consisting of the grantor's right to purchase real property on the occurrence of a future event is a sufficient property interest to support an inverse condemnation claim.

El Dorado Land Company sold several acres of land to the City of McKinney for use as a park. El Dorado's special warranty deed provided that the conveyance was "subject to the requirement and restriction that the property shall be used only as a Community Park." If the City decided not to use the property for that purpose, the deed further granted El Dorado the right to purchase the property, which the deed described as an option. Ten years after El Dorado acquired the property, the City built a public library on part of the land. The City did not offer to sell the land to El Dorado or otherwise give notice before building the library. Upon learning about the library, El Dorado, notified the City that it intended to exercise its option to purchase. After the City failed to acknowledge El Dorado's rights under the deed, El Dorado sued for inverse condemnation.

The City argued that El Dorado's claim did not involve a compensable taking of property but a mere breach of contract for which the City's governmental immunity had not been waived. El Dorado argued that its right to purchase the property was a real property interest, in the nature of a reversionary interest, which El Dorado described as a right of re-entry. The City, on the other hand, contended that El Dorado's option was not a real property interest but a mere contract right. The trial court and court of appeals held that the grantor's retained right was not a compensable property interest under the Takings Clause of the Texas Constitution. The Texas Supreme Court reversed, holding that El Dorado retained a reversionary interest in the property that was compensable as a takings. The Court undertook a fairly detailed analysis of the nature of reversionary interests under the common law. A reversionary interest is a type of future interest in real property; specifically, a future interest that remains with the grantor. The common law had parsed the differences between the reversionary interests very precisely, but modern commentators have suggested that the distinctions have limited legal consequences.

El Dorado described its reversionary interest as a right of re-entry. Right of re-entry is a future interest created in the transfer that may become possessory upon the termination of a fee simple subject to a condition subsequent. The Court noted that under the deed, El Dorado's possessory interest was contingent on the property's use, and if the City violated the deed restriction, El Dorado retained the power to terminate the City's estate. The Court continued that while the deed referred to this power or right as an option, it nonetheless effectively functioned as a power of termination. Therefore, El Dorado's deed conveyed a defeasible estate (a fee simple subject to a condition subsequent) to the City with El Dorado retaining a conditional future interest – the power to terminate the City's defeasible estate on the occurrence of a condition subsequent.

The Court concluded that El Dorado's reversionary interest was a compensable taking by applying the reasoning of *Leeco Gas and Oil Company v. Nueces County*, 736 S.W.2d 629 (Tex. 1987). *Leeco* concerned a possibility of reverter, a kind of future interest that takes effect automatically upon the occurrence of some event, without requiring any action. A right of re-entry requires that the holder act to effect the transfer of the property right. The Court concluded that the distinction made no difference to the takings analysis. Accordingly, the Court concluded that El Dorado's right to purchase the property under the terms of the deed is an interest in real property, and the City's failure to permit El Dorado to redeem this option constitutes a takings that is compensable under the Takings Clause of the Texas Constitution.

2. ***Enbridge Pipelines (East Texas) L.P. v. Avinger Timber, LLC***, 386 S.W.3d 256 (Tex. 2012).

This condemnation case concerned the application of the value-to-the-taker rule in determining just compensation.

The predecessor-in-interest to Avinger Timber, the lessor, leased 23.79 acres in Marion County to a gas processing company so that the company could build and operate a gas processing facility. A gas processing facility was built, and easements were freely granted by the lessor for additional pipelines, roads, and high-voltage electric lines. Importantly, the lease required the lessee to remove the plant from the land and restore the lessor's land to its original condition upon termination of the lease.

Enbridge Processing, LP eventually took over as the lessee. When the expiration date of the lease was looming and the parties were unable to agree on a rental price for renewal, Enbridge Processing, LP merged with a public utility company (plaintiff) and filed a condemnation petition to condemn the land. The commissioners awarded Avinger Timber $47,580 for the condemned land, but the jury awarded $20,955,000 based on testimony from Avinger Timber's expert witness. The appeals court affirmed.

The Texas Supreme Court was called on to decide whether the trial court abused its discretion by admitting the expert's testimony, which allegedly violated the value-to-the-taker rule. This rule prohibits measuring land's value by its unique value to the condemnor (here, Enbridge) in determining the landowner's compensation. The court began by reviewing the principles of condemnation law. The objective of the condemnation process is "to make the landowner whole." The value-to-the-taker rule "prohibits an owner from receiving an award based on a tract's special value to the taker, as distinguished from its value to others who may or may not possess the power to condemn." Thus, in measuring the landowner's compensation for condemned property "the question is, what has the owner lost, not what has the taker gained." Further, there is a presumption that the highest and best use of the land is the existing use of the land.

The court held that the expert's testimony violated the value-to-the-taker rule by improperly focusing on the costs Enbridge saved by avoiding its obligation to remove the plant under the lease agreement. The avoidance of this obligation was unique to the condemnor, Enbridge. The court agreed that the expert could opine on the value of the land as a gas processing site, because that value is not unique to Enbridge. But Avinger Timber was not entitled to be compensated for the land's unique value to Enbridge under the lease's terms. The expert's testimony on this issue should have been excluded. Accordingly, the court reversed and remanded the case to the trial court.

3. ***City of Houston v. Trail Enterprises, Inc.***, 377 S.W.3d 873 (Tex. App.—Houston [14th Dist.] 2012, pet. denied).

Since 1967, the City of Houston has limited drilling within 1,000 feet of Lake Houston. In 1997, the City adopted a new ordinance that absolutely prohibited drilling within that control area; there is no provision for a variance or special exception from that prohibition.

The Houston drilling ordinance has been the subject of litigation involving inverse condemnation claims, including a case that resulted in a $16 million takings judgment against the City. *Trail Enters., Inc. v. City of Houston*, 255 S.W.3d 105 (Tex. App.—Waco, Nov. 21, 2007), *reversed*, 300 S.W.3d 736 (Tex. 2009).

The *Trail* cases involve a mineral lease that lies mostly within the "control area" of Lake Houston. The lessee sued the City for inverse condemnation through several lawsuits through the years, and for a number of years the cases were dismissed on various procedural grounds. The claims ultimately went to trial against

the City, and the jury rendered a verdict for the plaintiff on the inverse condemnation claims for some $16.8 million. Procedurally, however, the trial court did not render judgment against the City on the jury's verdict, but instead rendered a take-nothing judgment notwithstanding the verdict, dismissing the claims on the grounds that they were not ripe on a theory that the lessee had not applied for, and been denied, a drilling permit.

The court of appeals reversed that decision, because the drilling prohibition in the Houston ordinance was absolute; there was no provision for a variance or special exception, so any application for a variance would have been futile. At that point, the court of appeals did something unusual. The trial court had never rendered judgment on the jury's verdict, because it decided post-trial to dismiss on ripeness grounds. In order to streamline the process, presumably, rather than remand the case to the trial court to render judgment, the court of appeals took it upon itself to render judgment for the plaintiff on the jury's verdict of $16.8 million.

The City of Houston appealed to the Supreme Court of Texas, which reversed and remanded to let trial court render judgment in the first instance. *City of Houston* v. *Trail Enters., Inc.*, 300 S.W.3d 736 (Tex. 2009).

On remand, the trial court rendered the same money judgment based on the jury verdict—$16.8 million—but included a judgment that the City owned the mineral interest. In other words, that the City had taken or condemned that property interest and acquired it for the just compensation of $16.8 million.

Both sides appealed. The Fourteenth Court of Appeals reversed and rendered judgment that the mineral owner had failed to state a claim for a compensable regulatory taking. The opinion has a helpful and thorough application of the general law of regulatory takings.

The Supreme Court of Texas set out and discussed the test for regulatory taking in *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922 (Tex. 1998) and *Sheffield Dev. Co., Inc. v. City of Glenn Heights, Texas*, 140 S.W.3d 660 (Tex. 2004). Obviously, a physical taking of land or physical intrusion onto real property constitutes a government taking that triggers the obligation to pay just compensation. But government regulation of land use (such as the drilling restrictions in the Houston ordinance) can also constitute a compensable taking in three instances: 1. If the regulation does not substantially advance a legitimate governmental interest; 2. If the regulation denies the property owner all economically viable use of their property; or 3. If the regulation unreasonably interferes with the landowners' right to use and enjoy their property.

The third ground for finding a regulatory taking asks whether the regulation goes so far in restricting use of the mineral interest that it becomes a taking, and "in all fairness and justice," the burden of the restriction should be borne by the public. *Sheffield*, 140 S.W.3d at 677.

As a starting point, the philosophy of regulatory taking is not intended to guarantee profitability for landowners, or compensate for every impact on property values caused by government regulation. Rather, compensation is justified only when the impact by regulation goes so far that it is appropriate to shift the burden of regulation from the landowner to the government:

> "Government hardly could go on", wrote Justice Holmes in the first regulatory takings case in the United States Supreme Court, "if to some extent values incident to property could not be diminished [by government regulation] without paying for every such change in the general law." Yet, he continued, "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." "The general rule at least", he concluded, is "that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking", adding, "this is a question of degree--and therefore cannot be disposed of by general propositions." "[T]he question at bottom is upon whom the loss of the changes desired should fall."

Sheffield, 140 S.W.3d at 670 (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413, 415-16 (1922)).

The *Sheffield* Court stated that courts should consider three factors when deciding whether the regulation restricted land use to such an extent that it constitutes a taking. The factors are:

(1) whether the regulation had a severe economic impact on the property;
(2) whether the regulation significantly interfered with the landowner's reasonable, investment-backed expectation; and
(3) the character of the governmental action.

The court of appeals in *Trail* analyzed those elements and found that there had not been a compensable regulatory taking.

First, regarding the character of the governmental action, the court noted that the drilling ordinance was enacted to protect the water supply, which is a tremendously important interest. "Given the

importance of protecting the community's drinking water and possible pollution from new drilling near Lake Houston, we conclude that the first factor weighs heavily in favor of the City and against a finding of a compensable taking."

Second, the court looked at the reasonable investment-backed expectations of the landowners. This element does not look at lost expectation of profit, but rather hard investment that was made in the property. The court of appeals looked at: (1) the extent to which the landowners' actually invested in their properties in order to develop the minerals (not much); and (2) whether there were drilling restrictions or prohibitions already in place at the time they acquired their interests (there were). The court held: "Where, as here, landowners have failed to demonstrate that investments were made (i.e., put at risk) in the property with the reasonable expectation that new wells could be drilled, concepts of fairness and justice do not militate in favor of compensation." The court therefore concluded that the second factor therefore weighed against finding a taking.

Regarding the last element—adverse economic impact—the court found that although drilling was still permissible on about 70% of the plaintiffs' property, the plaintiffs showed that they had suffered significant economic impact from the drilling prohibition. The court concluded that the third factor weighed in favor of finding a taking.

Because 2 of the 3 elements weighed strongly *against* finding a compensable taking, the court of appeals held that the plaintiffs had not suffered a regulatory taking. The court therefore rendered judgment that the plaintiff mineral owners take nothing on their claims against the City of Houston.

4. ***Bradshaw v. Steadfast Financial L.L.C.***, 395 S.W.3d 348 (Tex. App.–Fort Worth 2013, pet. filed).

In this installment of a long-running royalty dispute between Betty Lou Bradshaw and lessees and other interest owners of 1,800 acres in Hood County, the court analyzed the duties owed by the executive rights holder to NPRI owners.

Plaintiff Bradshaw owned a right to one-half of royalty in 1,800 acres, which was part of a 2000-acre acre area in which defendant Steadfast owned the surface and mineral estates. In 2006, Defendant Steadfast conveyed the surface of the acreage to Range Resources and, at the same time, leased the minerals to Range Resources for a bonus of $7,505 per acre and a 1/8th royalty. Steadfast then assigned a portion of its royalty to three other parties. Plaintiff filed suit, alleging that Steadfast breached the fiduciary duty owed by an executive to the owner of an NPRI. Plaintiff alleged that in exchange for offering the lessee a 1/8th royalty, rather than the 1/4th then prevailing in the area, Steadfast had received a higher bonus and an above-market price for the surface estate. The trial judge granted summary judgment for all defendants and denied plaintiff's motion for summary judgment.

The appeals court reversed and remanded. After a detailed analysis of the line of cases dealing with the executive's duty to NPRI owners, the court concluded that Steadfast owed plaintiff a fiduciary duty, and that a fact issue existed as to its breach of that duty. The court also rejected defendants' estoppel by deed theory, holding that plaintiff's claim is not precluded by the language in the reservation creating the NPRI referring to a minimum lease royalty of 1/8th because the fiduciary duty arises from the parties' relationship, not the deed, and because in any case this language merely established a floor for the royalty.

The court's discussion of the evolution of Texas case law defining the nature of the duty the executive owes to NPRI owners effectively highlights the uncertain and highly fact-specific nature of this duty. The first Texas cases grounded a duty of "utmost fair dealing" in an implied covenant in the conveyance creating the NPRI. Later cases grounded a duty somewhere between a true fiduciary duty and ordinary good faith on the specific relationship between the executive rights holder and the NPRI owner. The *Bradshaw* court concluded that recent Texas Supreme Court case law supports a relationship theory based on the terms of the NPRI reservation and on the presence or absence of self-dealing.

5. ***Friddle v. Fisher***, 378 S.W.3d 475 (Tex. App.—Texarkana 2012, pet. denied).

This case also concerns the executive's duty to NPRI owners.

Plaintiff Friddle had acquired NPRIs amounting to 3/4th of royalty in production from an 84.7-acre tract in Hopkins County. In 1998, the Fishers, who owned the tract's mineral estate, executed a lease providing for a 1/8th royalty and containing a standard pooling clause. The Fishers did not notify plaintiff of the execution of the lease or the subsequent pooling of the leased acreage with an adjacent tract. A well was drilled and completed on the adjacent tract in 1999. The lessee paid the entire royalty allocable to the 84.7-acre tract to the Fishers.

Plaintiff eventually learned of the lease and the land's inclusion in a pooled unit, and in 2008 Friddle filed suit, alleging that the lessors had breached the fiduciary duty owed him by failing to notify him of the lease and pooling. Defendants contended that they had no duty to notify plaintiff because he had actual or constructive notice of the lease and pooled unit. Defendants also alleged a statute-of-limitations defense. The trial judge granted defendants summary judgment.

The appeals court reversed and remanded. The court emphasized case law articulating a duty of "utmost good faith," and held that if the executive knows the identity and location of an NPRI owner, this duty includes an obligation to notify the owner of an NPRI of a lease and of a pooling declaration or other agreement that may affect the NPRI owner's rights.

The court also addressed the statute of limitations. The Texas Supreme Court has stated that a person who is owed a fiduciary duty is relieved of the responsibility of diligent inquiry into the fiduciary's conduct and can invoke the discovery rule. The court concluded that there remained a fact issue as to whether Friddle had actual notice of the well, and so summary judgment on the statute-of-limitations defense would not have been appropriate.

6. ***SM Energy Co. v. Sutton***, 376 S.W.3d 787 (Tex. App.—San Antonio 2012, pet. denied).

This case applied the long-standing rule of *Sunac Petroleum Corp. v. Parks* that in Texas, an overriding royalty interest ("ORRI") does not survive termination of the leasehold it burdens absent an express provision to the contrary.

In 1966, Sutton leased 40,000 acres for oil and gas exploration and production. The lease permitted the lessee to release all or part of the leasehold estate "and thereby be relieved of all obligations as to the released acreage or interest." Sutton then assigned the lease to another oil company, reserving an overriding royalty of 5.46875%. The assignment provided:

> Said [overriding royalty] interest is to apply to all amendments, extensions, renewals or new leases taken on all or a part of the lease premises within one year after termination of the present lease.

The lease was re-assigned to Crimson Energy, which released about 22,000 acres back to the lessor in 2000. In 2001, one year and a day after the release, defendant's predecessor acquired three new leases covering the 22,000 acres. Production was obtained on the new leases, and in 2009 Sutton realized it was not getting paid on its override. Sutton then brought suit to quiet title to its interest in the new leases and for unpaid royalties. Defendant contended that Sutton's override in the 22,000 acres had been extinguished. The trial court granted the plaintiff summary judgment, ordering that the ORRIs burdened the 2001 leases.

The appeals court reversed and rendered. The court began with the rule stated in *Sunac Petroleum Corp. v. Parkes*, 416 S.W.2d 798, 804 (Tex. 1967): "Normally, when an oil and gas lease terminates, the overriding royalty created in an assignment of the lease is likewise extinguished." The court then applied *Fain & McGaha v. Biesel*, 331 S.W.2d 346, 348 (Tex. Civ. App. Fort Worth 1960, writ ref'd n.r.e, which held that a lease's release provision relieved the lessee of all obligations regarding released acreage, including any ORRI burdens. Because the 1996 lease specifically provides for a partial termination, the court held that the ORRI terminated upon the lessee's release of the acreage. The court also held that the savings clause in the instrument creating the ORRI does not provide for preservation of the interest only if the entire lease is terminated, and it does not provide for reinstatement of the ORRI in a lease executed more than one year after the release of a portion of the original lease. Accordingly, the court applied the long-standing rule that in the absence of a savings clause specifically applicable to the situation that has occurred, an ORRI does not survive the termination of all or any portion of the lease.

7. ***Stroud Prod., L.L.C. v. Hosford***, 405 S.W.3d 794 (Tex. App.—Houston [1st Dist.] 2013, pet. filed).

This suit involves two base leases that were burdened by a 5% overriding royalty held by Hosford. In December 2003, Stroud acquired the base leases and assumed operations. In January 2004, production ceased because of a minor mechanical problem, then in April 2004, the base leases terminated for failure to resume production within the 90-day continuous operations clause. In February 2004, however Stroud had acquired top leases on different terms on the same property. After the base leases had terminated, Stroud fixed the mechanical problem and promptly resumed production, but under the top leases. "Stroud admitted that he intentionally returned the well to production in June 2004, only after the [Base Leases] had terminated, [the Top Leases] had been obtained, and the 90-day continuous operations period had passed. He also admitted that he 'did not want any overriding royalty interest on the new leases' and [Hosford's] overriding royalty interests had been 'washed out.'" The assignments of overriding royalty on the base leases to Hosford did not contain renewal and extension clauses, amd the lease did not contain an express surrender clause.

The issue was whether Texas recognizes a cause of action for intentional termination of an overriding royalty interest. The court surveyed in detail relevant Texas cases on the duty a lessee owes to an overriding royalty interest holder under Texas law. The court concluded that no such duty exists as between Stroud and Hosford:

> No Texas court has yet recognized that a lessee generally owes any type of duty, whether it be an implied contractual covenant or a fiduciary-type duty, to protect the interest of an overriding royalty interest

holder so as to require the lessee to make repairs to well equipment, perpetuate the lease, and ensure that such overriding interests are not extinguished.

The two Texas Supreme Court opinions on topic, *Sunac Petroleum Corp. v. Parkes*, 416 S.W.2d 798 (Tex. 1967) and *Ridge Oil Co. v. Guinn Investments, Inc.*, 148 S.W.3d 143 (Tex. 2004), explain that although the question of whether any duty is owed is uncertain under Texas law, the language of the controlling documents and the circumstances and relationships of the parties should be considered when making such a determination. As to the circumstances and relationship of the parties, the court found no evidence of a formal fiduciary relationship between Stroud and Hosford, nor was there a special relationship of trust and confidence. Thus, there was no relationship duty.

The opinion includes a very thorough and helpful discussion of Texas case law analyzing the duties owed depending on whether there is: (1) an express surrender clause in the lease; or (2) an extensions and renewals clause in the instrument creating the override. The court concluded that while a party that engages in conduct to intentionally wash-out an overriding royalty interest may be subject to liability, because there was no evidence that Stroud violated any express or implied contractual duty and there was no evidence of the existence of a fiduciary or confidential relationship, Stroud did not commit an actionable wrong by intentionally terminating the base leases to extinguish Hosford's overriding royalty interest.

There is a lengthy dissent that reflects an understandable outrage with the equities of Stroud's intentional actions to wash out the valuable override.

IV. TRESPASS

1. *Key Operating & Equipment, Inc. v. Hegar*, 403 S.W.3d 318 (Tex. App.—Houston [1st Dist.] 2013, pet filed).

The issue in this case was whether a lessee can use the surface of one lease in a pooled unit to access a well on a different lease in that unit when the surface estate of the first lease had been severed from its mineral estate before the formation of the pooled unit.

Key had a lease on the Richardson tract and subsequently acquired oil and gas leases on the contiguous Curbo tract, whose surface estate had earlier been severed from the mineral estate. In 1994, Key built a road across the Curbo tract that it used to access its operations on both the Richardson and Curbo tracts. Key lost the lease on the Curbo tract in 2000, but the two brothers who owned Key acquired a 1/16th undivided mineral interest in the Curbo tract, which they then leased to Key. Key then executed and recorded a declaration of pooling that included ten acres from the Curbo acre tract with 30 acres of the adjacent Richardson acre tract.

In 2002, plaintiffs bought the surface estate and a 1/4th mineral interest in the Curbo tract. The road that Key was using to service the well on the Richardson tract crossed the plaintiffs' land near the home plaintiffs built. Plaintiffs tolerated the oil and gas traffic on the land until Key drilled a new well on the Richardson tract that increased Key's use of the road. Plaintiffs filed suit seeking a permanent injunction against Key's use of the road in connection with the wells on the adjacent Richardson tract, arguing that Key's use was limited to the Curbo tract and that none of the oil produced by the well on the Richardson tract actually came from the Curbo tract. The trial court found that all of the oil produced from the pooled unit came from the Richardson tract, and so enjoined Key from using the road on the Curbo tract for any purpose relating to the wells on the adjacent Richardson tract.

The appeals court affirmed. The court rejected the plaintiffs' contention that Key's surface rights would extend to the pooled area only if the lease authorizing pooling had been executed before the date the mineral estate was severed. If the surface is being used to access an off-lease well that is producing hydrocarbons from underneath the Curbo tract (with which the off-lease tract is pooled), then Key has an implied easement to use the surface for that purpose.

Here, however, the trial court found that, although subject to a pooling agreement with a mineral interest in the Curbo tract, the well on the adjacent tract was not producing any oil from the Curbo tract. Since the mineral severance happened before the pooling agreement, and the pooling agreement was not in plaintiffs' chain of title, plaintiffs were not subject to the pooling agreement. Thus, Key was properly enjoined from using the road across plaintiffs' land in connection with the well on the adjacent tract, because that well was not producing hydrocarbons from the Curbo tract's mineral estate.

Key filed a petition for review. The Court has called for briefs on the merits, but as of this writing has not ruled on the petition.

2. *FPL Farming, Ltd. v. Envtl. Processing Sys., L.C.*, 383 S.W.3d 274 (Tex. App.—Beaumont 2012, pet. filed).[1]

This case already found its way to the Texas Supreme Court on the issue of whether a regulatory permit absolved a defendant from potential liability for subsurface trespass. The Court held that it did not and

[1] Technically, this case qualifies as both an oil and gas case and an environmental case.

remanded the case to the appeals court. This time around, the appeals court addressed, among other things, the allocation of the burden of proof for the affirmative defense of consent.

EPS operates a non-hazardous wastewater disposal facility in Liberty County, Texas. EPS received permit from the Texas Natural Resources Conservation Commission (TNRCC) for a deep subsurface injection well into a tract adjoining that of the plaintiff, FPL Farming, and later requested and received authorization from the TNRCC to increase both the rate and volume of its injections. Plaintiff filed suit, alleging, among other causes of action, that the increased volume and rate of injection would constitute a trespass because the wastewater would migrate beneath its land. Based upon the jury's findings, the trial court ruled in favor of EPS. Plaintiff appealed, and the Beaumont court held that a permit granted by a state agency shields the party receiving the permit from liability for trespass resulting from its permitted operations. The Texas Supreme Court ruled that, with a few exceptions, an agency-issued permit does not shield the permittee from tort liability and remanded the case back to the court of appeals.

On remand, the Beaumont court reversed the trial court's judgment and remanded for a new trial. The court held that a surface owner has a property interest in the ground water beneath the surface, whether saltwater or freshwater. Further, an action in trespass is the most basic remedy available to protect an owner's right to the exclusive possession of its property. Thus, Texas law recognizes a cause of action for trespass regarding briny water at these depths, and FPL Farming has standing to pursue this claim.

The court then turned to the question of the plaintiff's alleged consent to the trespass. The trial court had given an instruction placing the burden of proving consent (or lack thereof) on the plaintiff. The appeals court found error in this instruction, holding that when an entry on an owner's property has occurred, the burden of proving that the owner consented to the entry is on the party alleged to have committed the trespass. The record indicated that the plaintiff was aware that defendant's injections would cause the injected wastewater to migrate beneath its property. There was also evidence, excluded from the jury, that plaintiff's predecessor withdrew its objections to the increased injections in return for a payment of $185,000. To this extent, the court found that there is some evidence of plaintiff's implied consent to the alleged trespass. Thus, the court remanded for a new trial.

EPS filed a petition for review from that decision. The Court has called for briefs on the merits, but as of this writing had not ruled on the petition for review.

V. STATUTE OF FRAUDS

1. *Coe v. Chesapeake Exploration, L.L.C.*, 695 F.3d 311 (5th Cir. 2012).

This case concerned whether a certain language in a letter agreement, together with an attached map, satisfied the Statute of Frauds for the purposes of conveying the referenced mineral leases.

In July 2008, Chesapeake entered into an agreement to purchase deep rights held by Peak Energy Corporation (Coe was Peak's representative) in certain oil and gas leases in the Haynesville Shale for $15,000 per acre. The terms and conditions section stated that "[t]he leases to be conveyed shall include approximately 5,404.75 net acres" and provided for adjustments to the purchase price of $15,000 per acre if the plaintiff delivered more or less than 5,404.75 acres. Attached to the agreement was a map that showed Harrison County and portions of neighboring counties. Several areas in Harrison County were highlighted and had "Peak" written next to them.

The parties mutually agreed to an extension of the closing date while plaintiff prepared a list of leases to be conveyed. In the meantime, natural gas prices plummeted, and Chesapeake indicated to Coe that it would not go through with the transaction. Peak and Coe filed suit to enforce the agreement. Chesapeake contended that the claimed agreement failed to satisfy the Statute of Frauds. After a bench trial, the district court ruled in favor of plaintiff and granted an award of $19,951,004.

The Fifth Circuit affirmed. The court first held that the July agreement was a binding contract. The agreement clearly states that it is "valid and binding" and contains all essential elements of a contract, including identification of the property to be conveyed, price, the closing date and the date for transfer of the leases. The provision that plaintiff would later provide a list of its leases that defendant could review does not make the agreement non-binding. Also, the absence of all closing documents does not render a purchase agreement unenforceable.

The court then applied Texas law interpreting the Statute of Frauds and held that the July agreement sufficiently identified the real property interests to be conveyed. The Statute of Frauds does not require that property subject to a contract for conveyance be identified by metes and bounds, but merely that it can be identified with reasonable certainty. Here, the map attached to the agreement outlined the areas that were identified as the plaintiff's leases. A statement that a named party is conveying **all** of its property within a defined area satisfies the "identifiable with reasonable certainty" standard. Similarly, the fact that plaintiff could deliver only 1,645 acres rather than the 5,400 referred to in the contract does not invalidate the agreement. An excessive discrepancy between the acreage listed in the contract and the acreage actually

deliverable is relevant only if there is a sale in gross of a designated tract, rather than a sale of land by the acre.

2. ***May v. Buck***, 375 S.W.3d 568 (Tex. App.—Dallas 2012, no pet.).

In this case, the court determined whether or not a description of conveyed acreage as "centered around" a particular location satisfied the Statute of Frauds.

In January 20, 2005, plaintiff and defendant entered into a letter agreement regarding the acquisition of mineral rights in Leon County. The agreement provided that the plaintiff would provide the capital to lease the acreage and defendant would then acquire the mineral rights. The agreement further provided that the parties would divide rights to the north and to the south of David Morris Gas Unit #1 "and [defendant would] assign [to plaintiff] all the mineral rights and a 100 acre spacing centered around the David Morris Gas Unit #1 in Leon County Texas." The agreement also stated that the acreage referred to was described in attached Exhibit A, which described "563.465 acres, more or less as described in the following four tracts" and included specific references to the deed records of Leon County for each tract.

Plaintiff provided the capital and defendant acquired the leases. But defendant then refused to assign any rights to plaintiff. Understandably, plaintiff filed suit. Defendant argued that the agreement was unenforceable under the Statute of Frauds because it failed to adequately describe the 100 acres centered around the unit well. After a bench trial, the trial judge agreed, and plaintiff appealed.

The appeals court affirmed. Again, an agreement does not have to contain a metes and bounds description to satisfy the Statute of Frauds, but it must provide sufficient information that a person familiar with the area can identify the land in issue. Although the appendix attached to the letter agreement provides an adequate description of the four tracts owned by the persons from whom the parties desired to acquire a lease, these tracts have boundaries different from the David Morris Gas Unit #1, and it is unclear whether the reference to the unit is to the unit itself or to the well located within the unit. Moreover, no document describes the shape or location of the "100 acre spacing centered around" the unit. Because, as the plaintiff admitted in his deposition, there are several different possible configurations of the land referred to in the agreement, the description fails to satisfy the Statute of Frauds.

VI. CONVEYANCES

1. ***Chesapeake Exploration, LLC v. BNW Prop. Co.,*** 393 S.W.3d 852 (Tex. App.—El Paso 2012, pet. denied).

Grantor owned a 3/9 mineral interest and 4/9 of the executive right in certain property. Grantor executed two separate deeds that expressly conveyed the 3/9 mineral interest to Grantee; the deeds, however, were silent as to the 4/9 executive right. At issue was whether the full 4/9 executive right passed under the two deeds or whether Grantor retained 1/9 of the executive rights.

The executive right is a separate and distinct property interest that may be conveyed or reserved with or without any of the other interests comprising the mineral estate. Under Texas law, however, it is presumed that all of the "bundle of sticks" is conveyed absent an express intent to reserve some of them. How to apply that general rule when the executive right is greater than the mineral estate that is expressly conveyed?

Two Supreme Court cases resolve the issue: *Day & Co., Inc. v. Texland Petroleum, Inc*., 786 S.W.2d 667 (Tex. 1990), and *Lesley v. Veterans Land Board*, 352 S.W.3d 479 (Tex. 2011). In *Day & Co.*, the grantor owned a 1/2 mineral interest and the entire executive right in the described lands, and executed a deed that reserved 1/4 of the mineral interest, but which was silent as to the executive right. The Court held that the grantor conveyed all his executive rights except the 1/4 of the executive rights included in the reserved 1/4 mineral interest (that is, he conveyed 3/4 of the executive rights). In *Lesley*, the grantor owned a portion of the mineral interest and the entire executive right in the described lands and executed deeds that expressly conveyed grantor's mineral interest but were silent as to the executive right. The Court again held that because the deeds did not except the executive right, the associated executive rights passed with the mineral interest under each of the deeds.

This case also dealt with deeds that conveyed a mineral interest without mentioning the executive right. The granting clauses, the subject to clauses, and the future lease clauses in the two deeds identified the 3/9 mineral interest, and the habendum clause in the deeds granted "the [3/9] mineral estate and all the rights and appurtenances 'thereto in anywise belonging . . . .'" Nothing in the deeds mentioned the executive right. Therefore, in the absence of an expressed intention to the contrary, the full 4/9 executive right passed with the mineral interest conveyed.

2. ***Hunsaker v. Brown Distrib. Co., Inc.***, 373 S.W.3d 153 (Tex. App.—San Antonio 2012, pet. denied).

In this case, the court examined and harmonized the entire deed, as well as an exhibit, to determine the mineral interest conveyed.

Plaintiff owned an undivided 1/4th interest in minerals underlying roughly 1,120 acres in La Salle County. Plaintiff executed a deed granting lands "as more particularly described in EXHIBIT A." The attached exhibit described the land by metes and

bounds and stated that the conveyance "also included … one-half (1/2) of all oil, gas and other minerals … in, on and under said property now owned by Grantor." The deed concluded with a statement that the conveyance was made subject to all outstanding reservations of record, listed the ownership of the outstanding 3/4ths interest in the minerals, and stated that the grantor reserved one-half of all the oil, gas and other minerals. The parties disputed whether the plaintiff had conveyed his entire one-quarter interest in the mineral estate or only half (i.e., 1/8th) of his interest in the minerals. The trial judge granted summary judgment for the defendant.

The appeals court reversed and rendered. The court emphasized the "four corners" rule of deed construction, as well as the necessity to "harmonize all parts" of the instrument to give effect to all provisions. Thus, although the granting clause of the deed appears to convey the grantor's entire mineral interest, the deed, when considered in its entirety, makes clear the intent to convey only half of the grantor's mineral interest. For example, Exhibit A states that the conveyance includes one-half of the mineral estate owned by the grantor. Further, the deed concludes by stating that the conveyance is made subject to all reservations now outstanding and of record, and includes a description of the ownership of the outstanding three-quarters interest in the minerals. Accordingly, the court concluded that the four corners of the instrument, with all provisions harmonized, conveyed only one half of the grantor's mineral interest.

3. ***Dupnik v. Hermis***, ___ S.W.3d ___, 2013 WL 979199 (Tex. App.—San Antonio Mar. 13, 2013, pet. filed).

Four individuals each owned an undivided 1/4 interest in the surface and minerals of a one hundred-acre tract in Karnes County, Texas. In 1983, they partitioned the surface estate into four equal parts of 24.68 acres, but each retained an undivided 1/4 mineral interest in the entire one hundred-acre tract. In 1991, Hermis conveyed one acre out of his divided 24.68 acre tract to Dupnik. In 1994, Hermis conveyed five more acres to Dupnik. Each time Hermis conveyed both the surface estate and the undivided mineral interest in the corresponding tract. In 1998, Hermis conveyed to Dupnik 24.68 acres "fully described in Exhibit A" with the blank for reservations on the form deed completed as "none." Exhibit A described the 24.68-acre interest conveyed as "Tract No. Two (the surface only)." The parties apparently used the same exhibit that was used for the 1983 surface partition deed.

Thirteen years later, Dupnik sought a declaration that Dupnik acquired Hermis' undivided 1/4 mineral interest in the entire one hundred-acre tract because the grantor failed to specifically reserve the mineral interest and because prior conveyances between the parties demonstrated an intent to convey the mineral interest.

Whether a deed is void or voidable determines the applicable statute of limitations in a trespass to try title suit. The statute of limitations does not bar a void deed, while voidable deeds are subject to a four year statute of limitations. A legally effective and facially valid deed is voidable and thus subject to the statute of limitations. Dupnik argued that the grant of the surface estate only and the reservation of "none" are irreconcilable, so the deed is void and there is no limitations bar. The court disagreed, determining that because the deed could simply be read as reserving no rights in the surface estate, the deed was facially effective and thus voidable.

Dupnik argued in the alternative that the discovery rule applied because he could not have known of the legal harm suffered or the meaning of the inconsistent terms in the deed until Hermis asserted an adverse claim. Regardless, the court found that because the terms of the deed appeared problematic, Dupnik had to exercise due diligence. The deed described the conveyance as "surface only," and as such, did not constitute the type of undiscoverable injury that the discovery rule protects against. Dupnik admitted that he did not read the entire 1998 deed, and the court held that he failed to exercise the due diligence required to rely upon the discovery rule.

Although the court held that the suit was barred by limitations, it went ahead and interpreted the deed. A reservation of mineral interests requires the use of clear language, but at least one Texas court has held that a grant of only the surface estate with no reservation can reserve the mineral estate. A reservation serves to narrow, limit, or reduce what otherwise passes in the grant. To harmonize the "surface only" grant with the reservation of "none," the court held that the grantor intended to convey the surface estate without reserving any surface interests that the grantor had in the surface estate.

4. ***Raven Res., LLC v. Legacy Res. Operating, LP***, 363 S.W.3d 865 (Tex. App.—Eastland 2012, pet. denied).

Raven had oil and gas properties to sell, and Legacy was looking to buy. Lee was employed by Raven and represented Raven in negotiations with Legacy. Eventually, Legacy sent an unsigned draft purchase and sale agreement to Raven. The document was labeled "DRAFT" and stated a purchase price of $26,626.00. The draft contained no details describing the properties to be conveyed. Raven's manager signed the draft and returned it to Legacy.

This is where things got interesting. Legacy decided that certain adjustments had to be made in the

extent of the property interests and sent a second draft to Lee, Raven's negotiator. In addition to making changes in the property to be purchased, the second draft reduced the price to $20,300.00, and provided that Legacy would pay 5% of the purchase price as earnest money. Lee, who had no authority to sign documents on behalf of plaintiff, decided not to inform Raven of the changes. Instead, he forged the manager's name to the second draft and returned it to Legacy. The parties closed the transaction by mail. Raven executed 35 "assignments and bills of sale" that incorporated the terms of the second draft by reference. Raven then transferred $18,925,000 into Legacy's bank account.

Three weeks later, Raven discovered that the amount deposited in its account by Legacy was $6,326,000 less than the purchase price set out in the original draft. Raven filed suit to rescind the assignments on the ground that the second agreement was void on the grounds of forgery. Legacy argued that Raven had ratified the second agreement and was estopped to deny its validity. The trial judge ruled for defendant, and plaintiff appealed.

The appeals court affirmed. True, the second agreement was void because of the forgery and was not validated by references to it in the assignments. Nonetheless, the terms of the second agreement were specifically incorporated into the assignments and thereby became terms of the assignments. Raven is bound by the assignments it executed and, like any other party to a transaction, is presumed to know the contents of documents it signs, including the contents of any document incorporated by reference. The assignments themselves constituted enforceable agreements that are binding on the parties. Thus, even if a signature on a letter agreement is forged, later assignments that incorporate the terms of the forged agreement are nonetheless valid.

5. ***Wynne/Jackson Dev., L.P. v. PAC Capital Holdings, Ltd.,*** No. 13-12-00449-CV, 2013 WL 485753 (Tex. App.—Corpus Christi June 6, 2013, pet. denied) (mem. op.).

This case concerns whether language in a deed reserving a nonparticipating royalty interest ("NPRI") reserved a "fractional royalty" or a "fraction of royalty."

In 1968, grantor executed three deeds conveying extensive tracts of land. The deeds reserved (emphasis added):

> … a non-participating royalty of **one-half (1/2) of the usual one-eighth (1/8) royalty** … provided, however, that although said royalty is non-participating and Grantee shall own and possess all leasing rights … Grantor shall, nevertheless, have the right to receive one-half (1/2) of any bonus, overriding royalty interest, or other payments, similar or dissimilar, payable under the terms of any oil, gas and mineral lease …

Defendants owned the land at issue and executed oil and gas leases providing for a one-fourth royalty. Plaintiff, which had acquired the NPRIs in the land, brought suit for a declaration that its NPRI interests entitled it to a fraction of lease royalty, and thus a right to a 1/8th royalty. Defendants contended that plaintiff had a "fractional royalty" entitling plaintiff to only 1/16th of production. The parties filed cross motions for summary judgment, and the trial court ruled in favor of plaintiff.

The appeals court reversed and rendered. The court discussed the distinction between a "fractional royalty" and a "fraction of royalty". A fractional royalty is a fixed amount of the minerals that are produced, regardless of what royalty is secured by any particular lease. A fraction of royalty "floats" in accordance with the size of the landowner's royalty contained in the lease. The court cited *Harris v. Ritter,* 279 S.W.2d 845 (Tex. 1955, in which the Texas Supreme Court construed a deed containing a reservation of an NPRI with language identical to the reservation at issue, though without the phrase "the usual", and concluded that, as a matter of law, it was a fractional royalty entitling its owner to 1/16th of production. The *Wynne* Court concluded that the addition of the phrase "the usual" in the instant deeds made no difference and held that the NPRI in question is a "fractional royalty" entitling plaintiff to the fixed amount of 1/16th of production, regardless of the size of the royalty in the lease.

The Court also remanded the award of attorneys' fees for the trial court to redetermine in light of the reversal on the merits.

VII. ENVIRONMENTAL

1. ***Texas Comm'n on Envtl. Quality v. City of Waco***, ___ S.W.3d ___, 2013 WL 4493018 (Tex. 2013).

The North Bosque River flows ultimately into Lake Waco, which is the sole source of drinking water for more than 160,000 people. Lake Waco struggles with algae blooms and other adverse effects caused by excessive discharge of phosphorus and other pollutants into the North Bosque watershed. The Legislature declared the North Bosque River watershed a "major sole source impairment zone," which required any "concentrated animal feeding operation," such as a commercial dairy, to implement heightened water-quality protections and obtain a modified permit.

A commercial dairy called O-Kee, located in the North Bosque River watershed, applied for an

amended permit that would: (1) require it to come into compliance with the new regulations, but also (2) allow an increase in both the size of the herd (from 690 to 999 cows) and the affected discharge acreage. The Texas Commission on Environmental Quality ("TCEQ") conducted a technical review and issued a draft permit to O-Kee.

During the period of public notice and comment, the City of Waco objected to the proposed draft permit. The TCEQ made some changes to the permit to address some of the City's objections but otherwise denied the objections. The City then filed a written request for a contested case hearing on the permit on the grounds that it was an "affected person" with a justiciable interest in O-Kee's permit application, because Lake Waco is the sole source of the City's drinking water. The TCEQ denied the request, concluding that the City did not qualify as an "affected person" as that term is defined in the agency's regulations. 30 Tex. Admin. Code § 55.203(c). On appeal from that decision, the court of appeals reversed, based on its analysis that "affected person" status was akin to general notions of standing, and the City satisfied that standard.

The Supreme Court reversed the court of appeals and affirmed the TCEQ's determination that the City was not an "affected person" entitled to initiate a contested case hearing. The Court noted first that Texas Water Code grants the TCEQ statutory authority to determine whether an individual is an "affected person." Pursuant to that authority, the TCEQ adopted this rule:

> (c) In determining whether a person is an affected person, all factors shall be considered, including, but not limited to, the following:
>
> (1) whether the interest claimed is one protected by the law under which the application will be considered;
> (2) distance restrictions or other limitations imposed by law on the affected interest;
> (3) whether a reasonable relationship exists between the interest claimed and the activity regulated;
> (4) likely impact of the regulated activity on the health and safety of the person, and on the use of property of the person;
> (5) likely impact of the regulated activity on use of the impacted natural resource by the person; and
> (6) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

30 Tex. Admin. Code § 55.203(c)(1)–(6).

Even if an individual meets the rule's factors, the TCEQ still has discretion to deny a contested case hearing when "when the proposed permit is an amendment or renewal and (1) the applicant is not applying to significantly increase the discharge of waste or materially change the pattern or place of discharge, (2) the authorization under the permit will maintain or improve the quality of the discharge, (3) when required, the Commission has given notice, the opportunity for a public meeting, and considered and responded to all timely public comments, and (4) applicant's compliance history raises no additional concerns." Tex. Admin. Code § 55.201(i)(5).

The TCEQ, in making its "affected person" decision, had made fact findings that O-Kee's new permit would result in less discharge, not more, and the new permit would improve the quality of the discharge notwithstanding that there were more cows contributing to the dairy's runoff. The Supreme Court deferred to those fact findings, and on that basis affirmed the agency's decision to deny a contested case hearing. The Court held: "We conclude that there is evidence in the record to support the Commission's determination that the proposed amended permit here did not seek to significantly increase or materially change the authorized discharge of waste or otherwise foreclose Commission discretion to consider the amended application at a regular meeting rather than after a con-tested case hearing. The Commission therefore did not abuse its discretion in denying the City's request for a contested case hearing on O–Kee's application for an amended permit."

2. ***Texas Comm'n on Envtl. Quality v. Bosque River Coalition***, ___ S.W.3d ___, 2013 WL 5302501 (Tex. 2013).

This is a companion case to *TCEQ v. Waco*, discussed above, and it was also authored by Justice Devine. Based on the reasoning in *TCEQ v. Waco*, the Court held that the Bosque River Coalition was not an "affected person" entitled to initiate a contested case hearing over the issuance of a renewal discharge permit for a dairy.

3. ***TJFA, Inc. v. Texas Comm'n on Envtl. Quality***, 368 S.W.3d 727 (Tex. App.—Austin 2012, pet. denied) (en banc).

BFI filed an application to expand its municipal-solid-waste-landfill permit for a landfill on the east side of Austin. TJFA owned land near the landfill and opposed the expansion. After a hearing, the TCEQ approved the proposed expansion and issued an order

granting the application for expansion. In its order, the TCEQ also ordered BFI and TJFA to each pay one-half of the $13,128.85 in transcript fees ($6,564.42 each) generated as a result of the hearing before the TCEQ.

TJFA filed a suit for judicial review of the TCEQ's decision. Because it was contesting the TCEQ's determination, TJFA did not pay its portion of the transcript fees, and BFI paid the full amount. On the day that it filed suit, TJFA gave the TCEQ a copy of the petition, but TJFA did not execute service of citation on the TCEQ until 41 days after it filed suit; service is required within 30 days.

At issue in this case is whether the 30-day deadline for service is jurisdictional, mandatory, or directory. Each would have a different impact on TJFA's appeal and the courts' ability to consider it.

The court first determined that the 30-day service deadline is not jurisdictional because it is not a "prerequisite to suit." The deadline necessarily comes after suit is filed. Filing a petition, not perfecting service, is how jurisdiction is invoked in a district court. Finally, parties can generally waive defects in service but cannot waive subject matter jurisdiction. The court also noted that

> there is a presumption against finding a statutory provision to be jurisdictional." *City of DeSoto v. White*, 288 S.W.3d 389, 394 (Tex. 2009); *see also Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 75–76 (Tex. 2000) (overruling line of cases holding that statutory provisions are mandatory and exclusive and endorsing modern trend of reducing vulnerability of final judgments by not characterizing statutory requirements as jurisdictional). Furthermore, that presumption may only be overcome "by clear legislative intent to the contrary." *City of DeSoto*, 288 S.W.3d at 394.

A concurring opinion, authored by Justice Rose, reiterated this presumption against finding statutory requirements jurisdictional: "I can think of few greater threats to the finality of a judgment than to deem post-filing service-of-citation requirements as jurisdictional."

The next question was whether the 30-day deadline as mandatory or directory. If it were directory, then the district court could excuse any failure to meet the deadline if TJFA proved that it had exercised diligence in trying to serve the TCEQ. If the deadline is mandatory, then the court cannot cut TJFA any slack on the late service.

The court concluded that the 30-day deadline is mandatory, not directory, precisely because it is a specific deadline. It does not simply require "prompt" service. It was therefore not error to dismiss TFJA's suit for failure to satisfy that deadline, irrespective of its diligence in trying to perfect service.

4. *Heritage on the San Gabriel Homeowners Assoc. v. Texas Comm'n on Envtl. Quality*, 393 S.W.3d 417 (Tex. App.—Austin 2012, pet. denied).

This is an administrative appeal by a group of landowners near Hutto challenging the TCEQ's order allowing Williamson County to expand its landfill, which was located near Hutto. The appeal involved: (1) four issues of statutory interpretation and substantial evidence; and also (2) a challenge to the TCEQ's decision to overturn the ALJ's decision regarding operating hours. The court of appeals affirmed the agency as to the first four issues, but reversed and remanded as to the decision to overturn the ALJ.

The landfill expansion was substantial. The County proposed to change the property area from approximately 202 acres to 575 acres, to increase the waste-disposal footprint from approximately 160 acres to 500 acres, and to vertically expand the existing landfill from 766 feet above mean sea level to approximately 840 feet above mean sea level. The ALJ had recommended that the permit be approved, but recommended hours of operation from 5 a.m. to 8 p.m. Monday through Friday, and 6 a.m. to 4 p.m. on Saturday. TCEQ approved the permit as recommended, except that it increased the hours during which the landfill could operate heavy machinery: from 3 a.m. to 10 p.m., Monday through Saturday. The Hutto landowners appealed the permit, and the district court affirmed.

The court of appeals set out the well-settled standards for reviewing an agency's factual determinations under substantial evidence review, and the standards for reviewing agency determinations of law. The court made the following rulings, among others:

- Affirmed the TCEQ's listing of Waste Management as "operator" of the landfill because Waste Management handles the day-to-day operations of the landfill under contract to the County, which owns the landfill. The Court determined that the statute was ambiguous regarding whether the "operator" must have ultimate control of the landfill, and deferred to the TCEQ's interpretation that focused instead on actual facility operations.
- Rejected the landowners' challenge that it was improper for Waste Management to submit the permit application on the County's behalf.

- Affirmed the TCEQ's interpretation of 30 Tex. Admin. Code 330.56(f)(4)(A)(iv) as requiring an analysis of stormwater discharge impact only at the permit boundary "to demonstrate that natural drainage pat-terns will not be significantly altered as a result of the proposed landfill development." The court found the rule ambiguous as to whether a downstream analysis of stormwater discharge was required to satisfy the general statutory mandate to safeguard proper and the environment. It therefore deferred to the TCEQ's policy decision not to require such downstream analysis because it was not inconsistent with the statute's language or plainly erroneous.

The TCEQ expanded the hours of operation from those recommended by the ALJ, but it did not, however, provide any explanation or support for the expansion of hours for the operation of heavy equipment and transportation of materials to and from the landfill. *See* Tex. Health & Safety Code Ann. § 361.0832(f) (West 2010) (requiring TCEQ to "fully explain" in its order "the reasoning and grounds for overturning each finding of fact or conclusion of law or for rejecting any proposal for decision on an ultimate finding"); accord Tex. Gov't Code Ann. § 2001.058(e) (West 2008). "The TCEQ rejected the hours of operation that the ALJs determined to be appropriate and expanded those hours, but in its written explanation stated only that it modified the applicable finding of fact and ordering provision to clarify different types of hours."

The issue was thus the failure to explain, not the expanded hours themselves. The court therefore reversed that portion of the permit and remanded to the agency to explain itself: "On remand, the TCEQ may resume exercising its discretion from the point at which it exceeded its authority, i.e., when it issued the order that failed to explain its reasoning and grounds for changing the operating hours."

5. ***Southern Crushed Concrete v. City of Houston***, 398 S.W.3d 767 (Tex. 2013).

This case involves whether the Texas Clean Air Act (TCAA) preempts a Houston ordinance. The Court held that it does.

In this case, the City of Houston denied Southern Crushed Concrete (SCC) a municipal permit to move a concrete-crushing facility to a new location, even though the TCEQ had previously issued a permit authorizing construction of the facility at the proposed location. The City denied SCC's application because the concrete-crushing operations would violate a City ordinance's location restriction.

The TCAA provides that "[a]n ordinance enacted by a municipality ... may not make unlawful a condition or act approved or authorized under [the TCAA] or the [C]ommission's rules or orders." Tex. Health & Safety Code § 382.113(b). The Court explained that the "plain language of section 382.113(b) unmistakably forbids a city from nullifying an act that is authorized by either the TCAA or, as in this case, the Commission's rules or orders."

Because the ordinance makes it unlawful to build a concrete-crushing facility at a location that was specifically authorized under the TCEQ's orders by virtue of the permit, the Court held that the Ordinance is preempted.

6. ***In re Lipsky***, ___ S.W.3d ___, 2013 WL 1715459 (Tex. App.—Forth Worth 2013, orig. proceeding).

This case involves Chapter 27 of the Texas Civil Practice nad Remedies Code, which was adopted to "encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury." Tex. Civ. Prac. & Rem.Code Ann. § 27.002.

The Lipskys drilled a well about two hundred feet deep to provide water to their home and property, and they also constructed a large holding tank. About 4 years later, Range drilled two natural gas wells near the Lipskys' property. According to the Lipskys, they soon began noticing problems with their water, and their water pump began experiencing "gas locking," meaning that the pump could not efficiently move water. The Lipskys contacted public health officials, who referred them to a consultant, who confirmed the presence of various gases in the Lipskys' water well.

The Environmental Protection Agency (EPA) issued an emergency order stating that Range's production activities had caused or contributed to the gas in the Lipskys' water well and that the gas could be hazardous to the Lipskys' health. The EPA required Range to, among other actions, provide potable water to the Lipskys and install explosivity meters at the property. The federal government, acting at the request of the EPA, later filed a lawsuit in a federal district court against Range, alleging that Range had not complied with requirements of the emergency order.

The Railroad Commission of Texas (RRC) also investigated the contamination of the Lipskys' water well. After calling a hearing and listening to testimony from several witnesses, the RRC issued a unanimous decision that Range had not contaminated the Lipskys' water. Thus, the RRC allowed production from Range's wells to continue.

The Lipskys sued Range for claims related to the contamination of their water well that, according to the Lipskys, resulted from Range's "oil and gas drilling activities." The Lipskys claimed that the contamination had caused the water "to be flammable." The Lipskys alleged that Range's drilling, including hydraulic fracture stimulation operations (fracking), affected their water source, and they contended that they could no longer use their home as a residence. Range counterclaimed with claims of business disparagement and conspiracy, contending that the Lipskys' allegations were made in bad faith in light of the RRC's order exonerating Range from any responsibility for the gas in the water well.

The Lipskys moved to dismiss Range's claims under Chapter 27, alleging that, through its affirmative claims, Range intended to suppress the Lipskys' right of free speech and their right to petition (including petitioning the EPA to act on the Lipskys' water contamination) and that Range had not provided clear and specific evidence establishing prima facie proof of each element of its claims. The trial court denied the motion to dismiss, and the Lipskys filed a mandamus petition to review that decision.

To prevail on a motion to dismiss under chapter 27, a defendant has the burden to show by a preponderance of the evidence that the plaintiff's legal action is "based on, relates to, or is in response to" one of the enumerated rights. § 27.005(b). If the defendant meets its burden, the plaintiff, to avoid dismissal, must then establish "by clear and specific evidence a prima facie case for each essential element of the claim in question." § 27.005(c).

To satisfy their initial burden to dismiss the claims against them under chapter 27, the Lipskys thus had the initial burden to establish by a preponderance of the evidence that Range's claims are based on, relate to, or are in response to their exercise of the right of free speech, right to petition, or right of association. The court on mandamus held that the Lipskys had satisfied their burden. For example, Range's pleading stated that its affirmative claims were based on the Lipskys' strategy to involve the EPA in the gas issue at the Lipskys' home; on communications with EPA personnel, which according to Range, the EPA "used ... in issuing the draconian ex parte order against Range"; on the Lipskys' statements about their drinking water; and on the Lipskys' communications with news media.

Moreover, under chapter 27, the exercise of the right of free speech occurs when a communication is "made in connection with a matter of public concern." § 27.001(3). The environmental effects of fracking in general, the specific cause of the contamination of the Lipskys' well, and the safety of Ranges operation methods are matters of public concern under chapter 27.

The burden then shifted to Range to being forward "clear and specific" evidence of each element of its claims for conspiracy and business disparagement. The court determined that Range satisfied that burden regarding the business disparagement claim as to Mr. Lipsky but had no evidence as to Mrs. Lipsky. It determined that Range had not satisfied its burden regarding each element of the conspiracy claim. The trial therefore should have dismissed those claims under Chapter 27. Because there is no interlocutory appellate remedy from that denial, and because the Lipskys have no adequate remedy by appeal, mandamus is the appropriate remedy to enforce Chapter 27 rights.

COULD YOU BE A LITTLE MORE SPECIFIC?

TEX. R. APP. P. 33.1 and the need for "sufficient specificity to make the trial court aware" of your complaint.

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With many thanks to
TIFFANY SHROPSHIRE
Archivist, Supreme Court of Texas,
for her work in locating archived materials
Related to the Adoption of Rules 33.1 and 52(a)

State Bar of Texas
30TH ANNUAL LITIGATION UPDATE INSTITUTE
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CHAPTER 16

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Could You Be a Little More Specific? TRAP 33.1, and when an objection "sufficient specificity to make the trial court aware" of the complaint.

Since September 1, 1997, Rule 33.1 of the Texas Rules of Appellate Procedure has required "]a]s a prerequisite to presenting a complaint on appeal" that the complaining party have "stated the grounds for the ruling . . . with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context." This rule applies in both civil and criminal cases.

Rule 33.1 is the latest of three general error preservation rules. The citation by courts of those general error preservation rules has seen exponential growth over the last quarter century or so. And courts have overwhelmingly held, in citing Rule 33.1, that error was not preserved. Those two dynamics alone make studying the workings of Rule 33.1 worthwhile. This paper will focus primarily on the specificity requirement of that rule, as applied in civil cases..[1]

1. A Picture (or Graph) is Worth A Thousand Words: The Exponentially Increasing Invocation of the General Error Preservation Rule by the Courts of Appeals in Civil Cases, and What That Means for Error Preservation.

What follows in this section of the paper is not a statistical study. Other than a brief stint working with an expert witness in about 1999, I have not dealt with statistics since my junior year in college. The words "regression analysis" have not even been spoken in the same room with any of the following percentages and numbers. But I still think the following measurements bear giving some thought.

A. The Exponentially Increasing Invocation of the General Error Preservation Rule by Courts of Appeals in Civil Cases.

People talk about "exponential growth" all the time, often doing so when the pertinent growth has not been exponential. But in looking at how often Texas courts have invoked the general error preservation rules in civil cases[2] over the 70-odd years such rules have existed, the growth has in fact been exponential.

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[1] Through September 13, 2012, at least 56 opinions of the Court of Criminal Appeals mentioned Rule 33.1, as opposed to at least 7 such opinions in the Supreme Court of Texas. Similarly, at least 682 opinions in the courts of appeals dealing with the application of Rule 33.1 in criminal cases were reported through that date, as opposed to only 275 opinions in civil cases.

[2] Unless otherwise stated, all observations and comments in this paper relate to civil cases, and do not include criminal cases.

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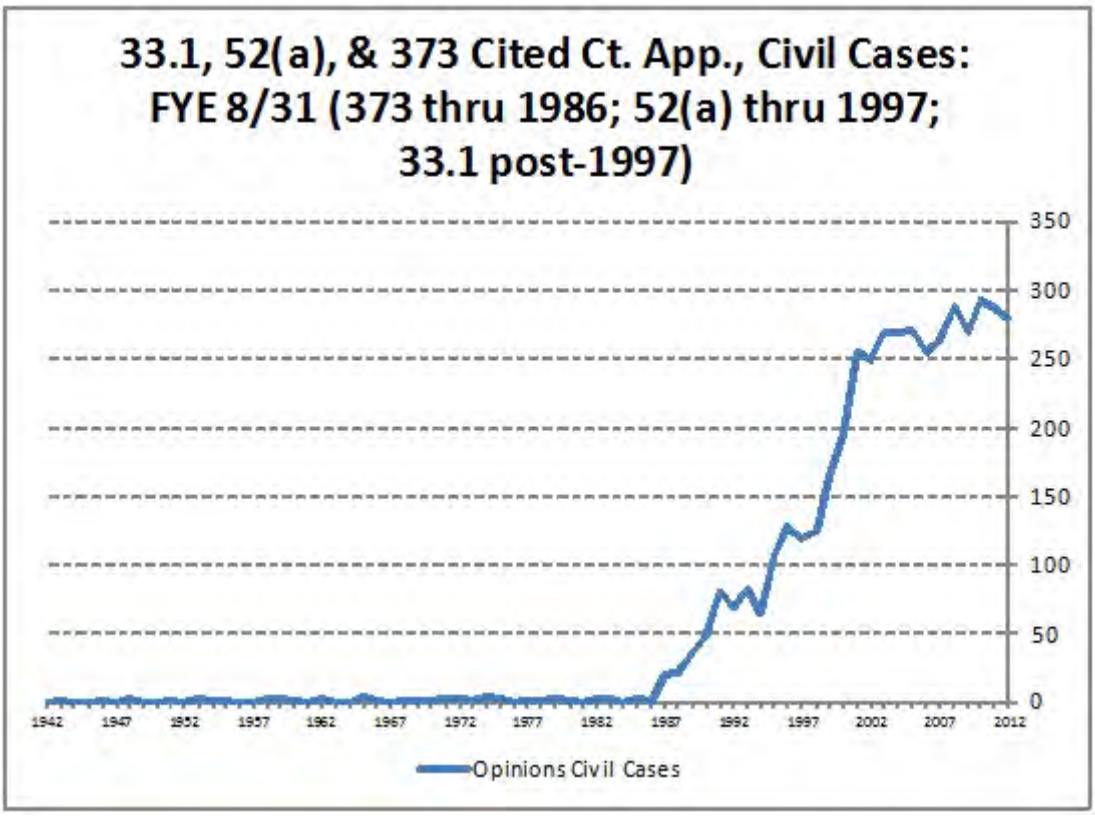
Texas has had three general error preservation rules (the "general error preservation rules"): TEX. R. CIV. PRO. 373, which existed from September 1, 1941 through August 31, 1986 (45 years); TEX. R. APP. P. 52(a), which existed from September 1, 1986, through August 31, 1997 (11 years); and TEX. R. APP. P. 33.1, which became effective September 1, 1997 (in existence at the writing of this paper for nearly 16 years). *See* Vernon's Ann.Rules Civ. Proc., rule 373, Historical Note (Repealed by Order of April 10, 1986, eff. Sept. 1, 1986); TEX. R. APP. P. 52(a). *Emerson v. Fires Out, Inc.,* 735 S.W.2d 492, 493 (Tex. App.–Austin 1987, no writ); *Delhi Gas Pipeline Corp. v. Lamb*, 724 S.W.2d 97, 101 (Tex. App.–El Paso 1986, writ ref'd., n.r.e.); TEX. R. APP. P. 33.1, John Hill Cayce, Jr., Anne Gardner, and Felicia Harris Kyle, *Civil Appeals in Texas: Practicing Under the New Rules of Appellate Procedure.* 49 BAYLOR L. REV. 872 (1997).

The following chart shows the number of opinions issued by Texas courts of appeals in civil cases which relied on any of the foregoing rules in any given year:



The foregoing chart reflects that, in the roughly 45 years of Rule 373's existence, courts of civil appeals did not expressly address Rule 373 more than about 94 times[3]–barely

[3] This count of cases citing Rule 373 comes from a combination of online searches, and reviewing the Notes of Decision for Rule 373 found in 4

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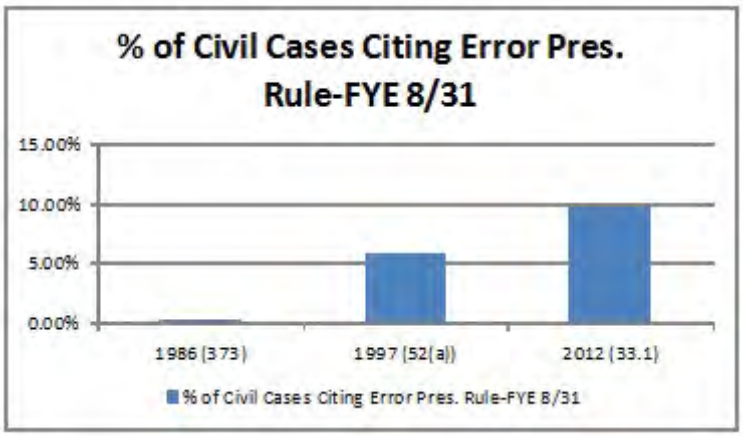
more than twice per year, on average. But when Rule 52(a) came in effect September 1, 1986, the number of civil cases in which courts of appeals cited to the general error preservation rules exploded–courts eventually cited Rule 52(a) in civil cases nearly 75 times as frequently as they cited to its predecessor, Rule 373.[4] The advent of Rule 33.1 (the current general error preservation rule) on September 1, 1997, saw yet another vast increase in case cites–it was eventually cited nearly twice as much as its predecessor, Rule 52(a).

Furthermore, it appears that this exponential growth cannot be explained by burgeoning dockets–we see the same exponential growth reflected in the percentage of opinions in civil cases in each of these years which expressly addressed any of these general error preservation rules:

Rule	FYE August 31	Total Opinions in Civil Cases Citing the Rule	Total Opinions in Civil Cases Decided On the Merits*	% of Total Cases Decided on Merits Citing Rule
33.1	2012	279	2902	9.6%
52(a)	1997	119	2040	5.8%
373	1986	1	2135	.05%



Vernon's Ann.Rules Civ.Pro., published in 1985, and the 1996 Cumulative Annual Pocket Part thereto.

[4] And on the criminal side of the docket, the courts of appeals–which handled no criminal appeals prior to the fiscal year ending 1987–went from citing Rule 373 in about 23 opinions during FYE 1987 to citing it in nearly 547 opinions in FYE 2012.

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* The "Total Opinions in Civil Cases Decided on the Merits" for each year was drawn from the Texas Judicial System Annual Reports for the pertinent year. Those Annual Reports may be found at http://www.courts.state.tx.us/pubs/AR2012/toc.htm. For each Annual Report, look for "Courts of Appeals Activity, Activity Detail," or the like, for the three years in question. I considered "Total Opinons in Civil Cases Decided on the Merits" to consist of all dispositions of civil cases for the various courts of appeals reflected in the Activity Detail *except* for those "Cases otherwise disposed" (which include abatement, bankruptcy stays, decisions on original proceedings, and other dispositions), and "Cases dismissed." It did not seem likely that opinions in those two categories would involve or address the general error preservation rules.

You will see later in the paper that not all opinions which cite the general error preservation rule actually apply or interpret it. For example, in the fiscal year ending 2012, about 258 of the 279 cases (about 92%) which mentioned Rule 33.1 actually interpreted and applied it. But the percentage of cases in 2012 which cited Rule 33.1 and actually interpreted and applied it was so high that comparing the opinion count as I've done in the foregoing table and chart seems to be a legitimate comparison of opinions citing the three rules. Any way you look at it, the tendency of the courts of appeals to invoke the general error preservation rule has increased exponentially over the years.

B. When the Courts of Appeals invoke the current general error preservation rule (Rule 33.1), they virtually always hold that error has not been preserved–for some reasons we should find instructive.[5]

I have not yet tried to do a survey of cases decided under Rule 373 or Rule 52(a) to determine how often courts of appeals held that error was not preserved under either of those two rules. Nor, in that regard, have I done a multi-year survey of the cases decided under Rule 33.1. But as to cases decided under Rule 33.1 during the fiscal year ending September 1, 2012, the courts of appeals held that error was not preserved 93% of the time. That means they found error was preserved only 7% of the time.

[5] All the numbers and percentages in this section of the paper come from opinions handed down by the courts of appeals in civil cases in the fiscal year ending August 31, 2012. That was the fiscal year which immediately preceded the first publishing of this paper.

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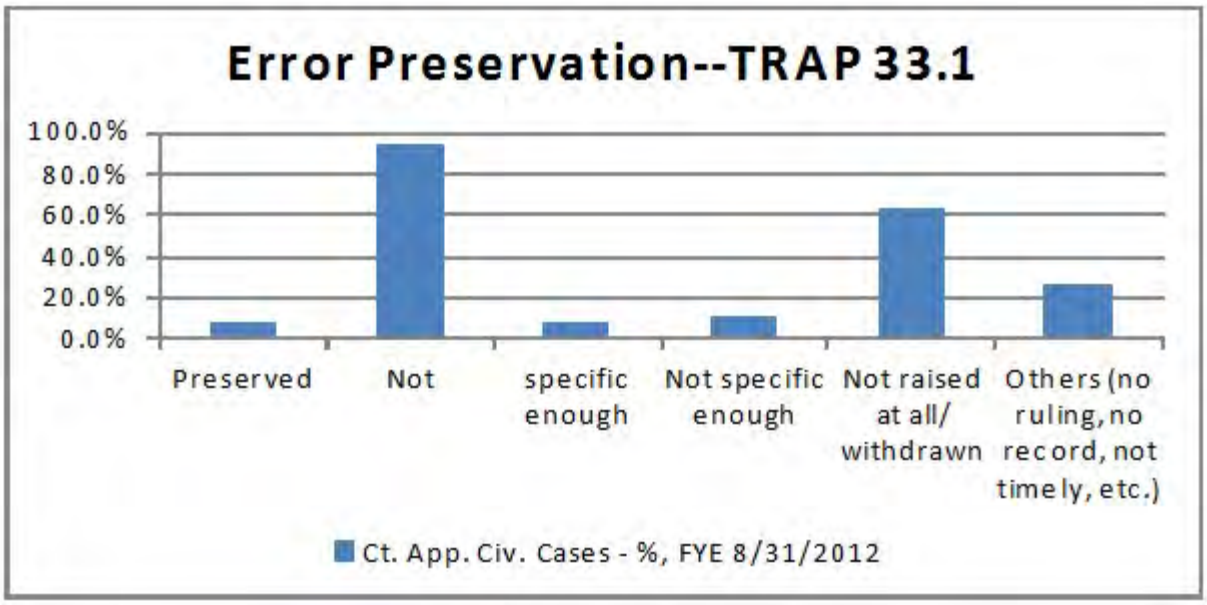
	Error Preserved	Error Not Preserved	Objection Specific Enough	Objection Not Specific Enough	Objection Not Raised at All	Other (no ruling, no record, not timely, etc.)
Cases	18	240	18	27	150	63
%	7%	93%	7%	10.5%*	62.5%*	27%[6]

* These are the percentages of the cases as to which error was not preserved.

Graphically, the foregoing numbers look like this:



I. When Courts of Appeals hold that error was not preserved under Rule 33.1, they do so about 90% of the time because an objection was not made at all, no record was made, no ruling obtained, or the objection was not timely.

The most interesting–and perhaps instructive–aspect of the foregoing numbers is how often the courts of appeals held that error was not preserved because of the failure of parties to comply with what I will call the "mechanical" aspects of Rule 33.1. When

[6] I rounded this number up by about .7% to account for one or two cases which were outliers and did not fit any category, thanks to such inventive lawyers as Chad Baruch. *See Basley v. Adoni Holdings, LLC*, 373 S.W.3d 577, 588 (Tex. App.–Texarkana 2012, no pet.)

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courts of appeals have held that error was not preserved, they so held: 62.5% of the time because of the failure to raise the objection at all; and 27% of the time because of the failure to get a ruling on the objection, or to bring forward a record of the objection or the ruling, or the failure to timely assert the objection. This latter category of failure is anything but mechanical, of course–e.g., pots of ink have been spilt and gigabytes of information have been encoded in discussing when an objection is timely, and when it is not. Still, these numbers underscore the importance of knowing when, and how often, one must assert a particular objection–and to ensure the record reflects that assertion and the trial court's ruling. And they emphasize the need to assert all grounds on which you intend to object to a ruling.

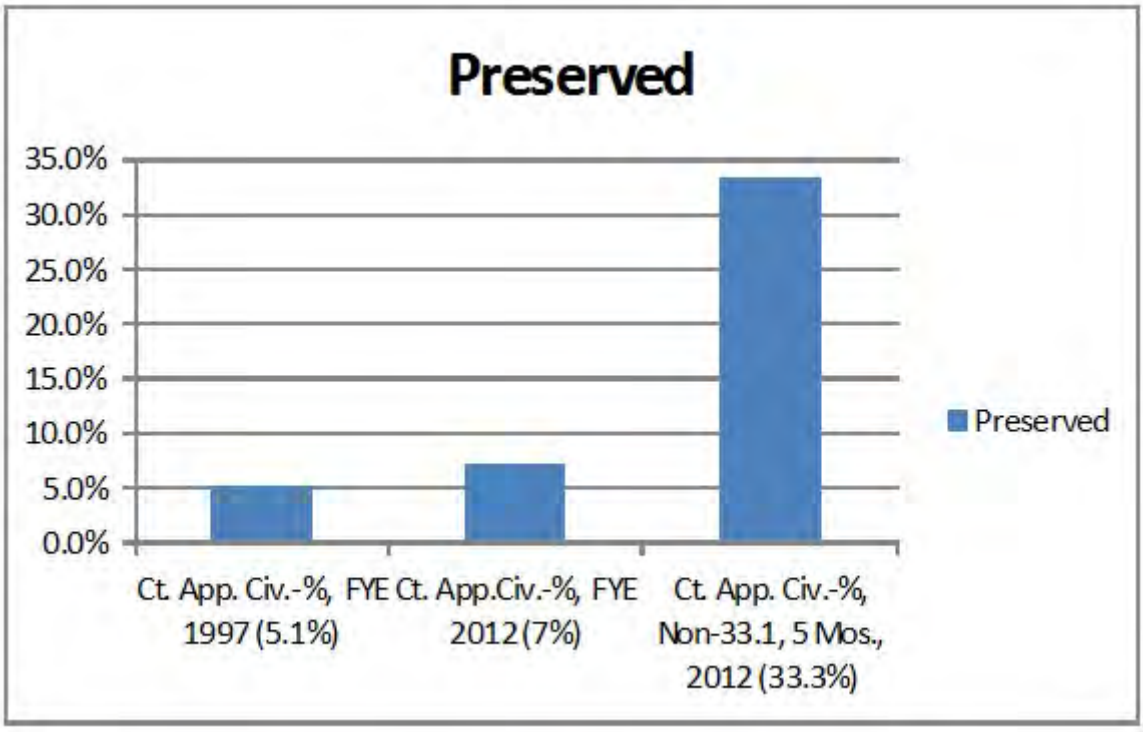
II. When courts of appeals rule on the specificity of an objection under Rule 33.1, they only find the objection sufficiently specific about 40% of the time.

Interestingly enough, when the courts of appeals actually decided whether a complaint was specific enough to make the trial court aware of the complaint, about 40% of the time the courts found the complaint sufficient–and about 60% of the time they found the complaint not sufficiently specific. More on that later in the paper.

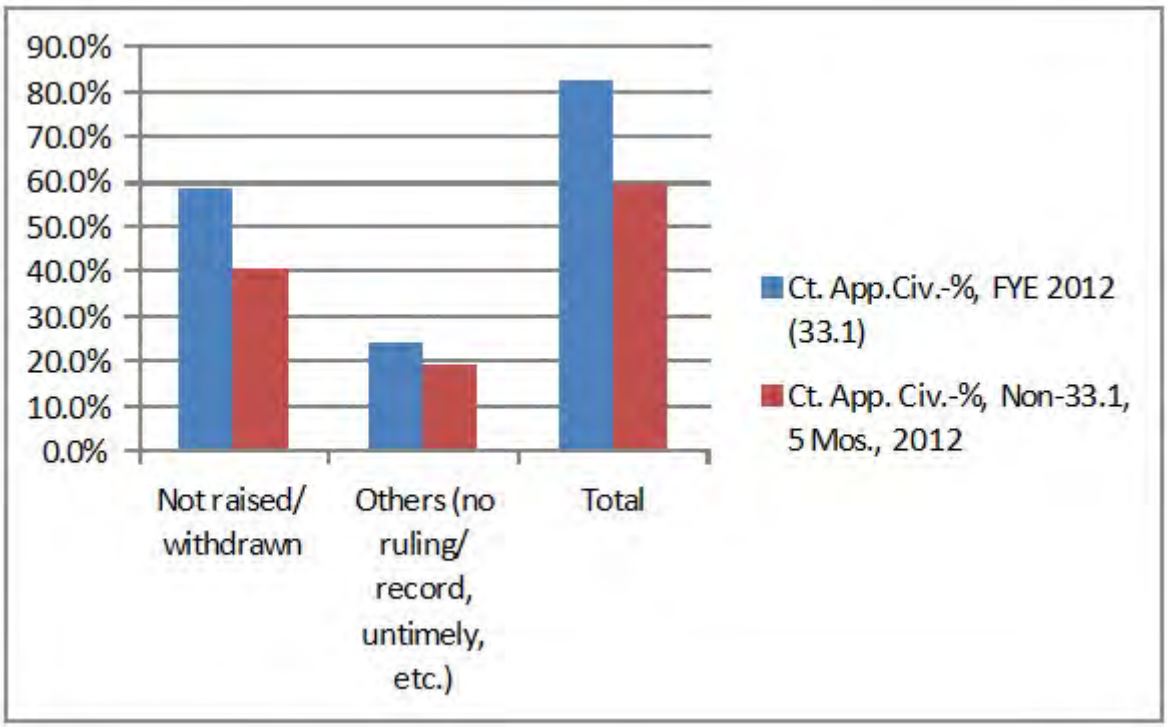
III. When courts of appeals rule on error preservation *without* invoking Rule 33.1, they find error preserved almost 5 times as often as when they invoke Rule 33.1. So if you intend to argue error was not preserved, cast that argument in the Rule 33.1 template.

Over the decades, courts of appeals have ruled on error preservation in cases in which they did not cite to the existing error preservation rule. That was true for Rule 373 and Rule 52(a), and it remains true today. In fact, in the last five months of FYE 2012 (i.e., April-August, 2012), there were at least 41 cases in which the courts of appeals issued opinions dealing with error preservation, but in which they did not cite Rule 33.1. This was about 29% as often, during that time span, as they issued opinions which cited Rule 33.1 and resolved error preservation issues (139). Not an insignificant number.

But what is more significant about those non-Rule 33.1 error preservation opinions is that the courts of appeals found error was preserved a little over 33% of the time-in other words, about five times as often as they did when they invoked Rule 33.1. Here is a graph showing that:



And, interestingly enough, in these non-33.1 error preservation cases, the courts of appeals were only about 3/4 as likely to find error waived as they were in cases in which they invoked Rule 33.1 in the error preservation analysis-59.% as compared to 82.5%:



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I don't know how to explain that phenomena-maybe parties who did not think their error preservation challenge was all that strong did not invoke Rule 33.1 in their briefing. But I think that this phenomena does emphasize that, if you intend to argue the other side did not preserve error–even if there is a specific Rule of Civil Procedure or Evidence you claim was not complied with-set out your challenge in a Rule 33.1 framework.

C. The Supreme Court Has Also Exponentially Increased its Tendency to Cite the General Error Preservation Rules–But It Has Been Much More Likely to Find Error Preserved Than the Courts of Appeals.

I. The tendency of the Supreme Court to rely on the general error preservation rules has roughly tracked that of the courts of appeals–and reflected an exponential increase.

The Supreme Court expressly dealt with Rule 373 only seven times during the four and a half decade existence of the Rule–about once every six years. *Hurst v. Sears, Roebuck & Co.*, 647 S.W.2d 249, 252 (Tex. 1983); *TM Productions, Inc. v. Blue Mountain Broadcasting Co.*, 639 S.W.2d 450, 451 (Tex. 1982); *PGP Gas Products, Inc. .v. Fariss*, 620 S.W.2d 559, 560 (Tex. 1981); *Patterson Dental Co. v. Dunn*, 592 S.W.2d 914, 921 (Tex. 1979); *State v. Wilemon*, 393 S.W.2d 816, 818 (Tex. 1965); *Plasky v. Gulf Ins. Co.*, 160 Tex. 612, 617, 335 S.W.2d 581, 584 (Tex. 1960); *Swanson v. Swanson*, 148 Tex. 600, 228 S.W.2d 156, (1950). In at least two cases, the Court dealt with error preservation without citing to Rule 373: *Pirtle v. Gregory*, 629 S.W.2d 919, 920 (Tex. 1982) (held, could not raise for the first time on appeal the failure of the defendant to join an indispensable third party, rejecting the argument that the absence of that third party was "fundamental error."); *Minus v. Doyle*, 141 Tex. 67, 170 S.W. 2d 220 (1943) (held, error not preserved).[7]

The Supreme Court expressly cited Rule 52(a) in about 25 opinions during the 11 years the Rule was on the books–on average, a little over two opinions a year, which was a rate about 14 times greater than the Court cited Rule 373 in that latter rule's 45 year run. *See* Appendices 2 and 3 for the list of cases and whether error was preserved.

In the first 15 ½ years of the existence of Rule 33.1 (i.e., through the end of April, 2013), the Supreme Court had expressly cited that rule in 64 opinions. See Appendix 4. Though 6 of those cases actually involved the application of Rule 52(a), the rate at which the Court dealt with Rule 33.1 was 75% greater than its tendency to deal with cases

[7] In *Minus*, the lawsuit was filed before Rule 373 became effective, it is unclear whether it was tried before the effective date, and the Supreme Court did not cite Rule 373. This case was included in the Notes of Decision mentioned in the prior footnote.

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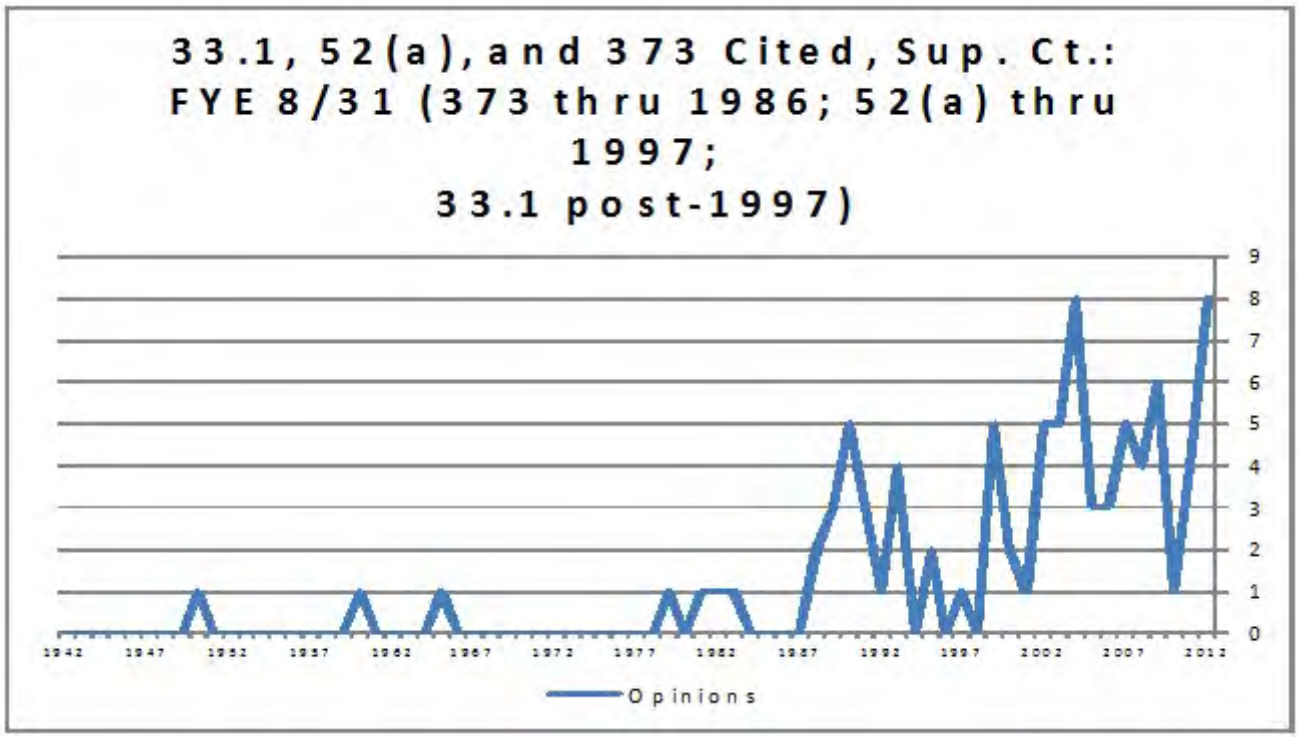
involving Rule 52(a), and was almost 25 times greater than the rate at which it dealt with cases involving Rule 373.

When charted, the Supreme Court's increased tendency to cite the general error preservation rules looks much like the tendency of the courts of appeals in that regard:



II. The Supreme Court has been much more likely to find that error was preserved, and more likely to find that a complaint was sufficiently specific, than the courts of appeals.

The Supreme Court held error was preserved in: 43% of its opinions which dealt with Rule 373; in 62% of the cases in which it dealt with whether error was preserved under Rule 52(a); and in 45% of the cases in which it dealt with whether error was preserved under Rule 33.1. See Appendices 1-4. The Supreme Court addressed whether an objection was specific enough in two of its Rule 373 cases–in one, it held the objection specific enough, in one it held the opposite. In 8 of the Rule 52(a) cases, the Court addressed whether a complaint was specific enough to preserve error–and in all 8 cases held that the complaint was specific enough (though in one case it held that both parties had also waived other issues). *See* Appendix 3. Interestingly, when the Court ruled on whether an objection was specific enough to satisfy Rule 33.1, it found the objection specific enough three times as often as it found the objection not specific enough. *See* Appendix 5.

So we see that the Supreme Court has found error preserved much more frequently

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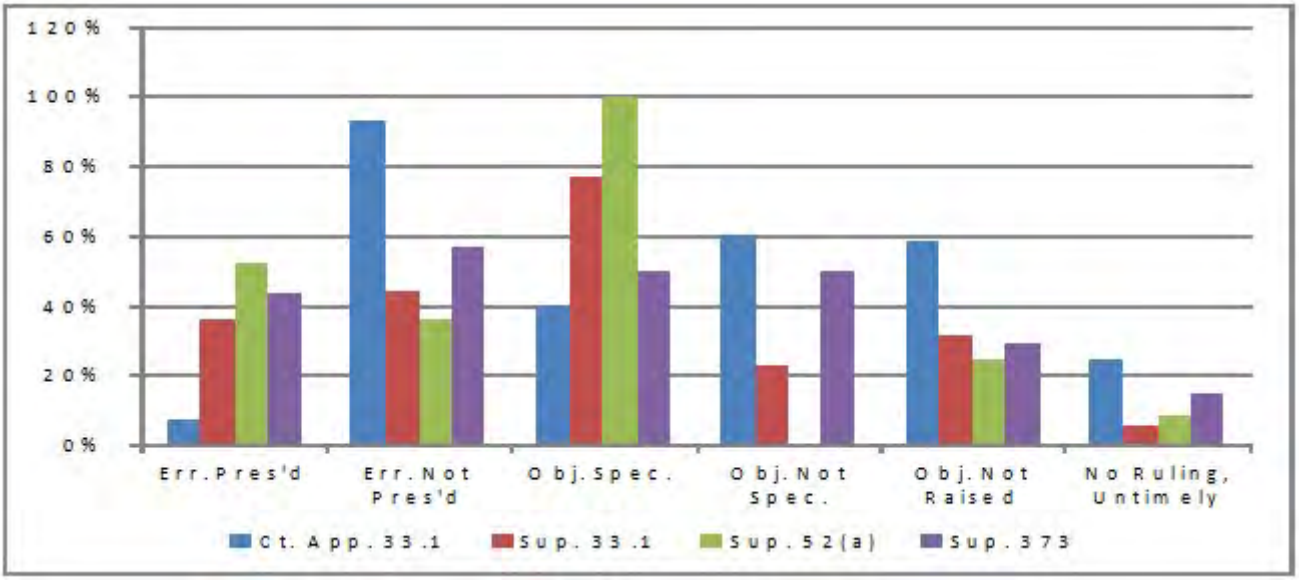
under all of the three Rules than did the courts of appeals interpreting Rule 33.1 for FYE 2012–in fact, the Supreme Court found error preserved anywhere from about 4 to 6 times more often than did the courts of appeals. And for the cases it decided over the last quarter century or more under Rules 52(a) and 33.1, the Supreme Court has been nearly twice as likely to find that an objection was sufficiently specific than did the court of appeals interpreting Rule 33.1 for the FYE 2012. The following table shows those comparisons:



So what can we take from these figures? Here are some thoughts:

- The Supreme Court is a court of discretionary jurisdiction (or at least it has been such a court for cases on which judgments became final on or after June 20, 1987, meaning virtually the entire life span of Rule 52(a) and the entire life of Rule 33.1. V.T.C.A., Government Code §22.001, Historical and Statutory Notes). One would not expect the Court to burden itself with a case where error preservation was a thorny problem on a major issue–unless it really wanted to address error preservation, or the issue fraught with waiver was not the central issue in the case for the Court. Hence, one would not expect for the Court to write opinions in as high a percentage of cases with preservation issues as the courts of appeals.

    - Put another way, the Supreme Court may be also be focused more on the jurisprudential questions, rather than error preservation questions, and may place its thumb on the side of the former. For example, there are cases in which the Supreme Court has addressed certain issues over a dissent or concurrence which argued that error was not preserved. There are four such cases decided by the Court under Rule 33.1, and one such case decided under Rule 52(a). As to

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Rule 33.1, *see Texas Mutual Insurance Company v. Ruttiger*, 381 S.W.3d 430, 464, n. 6 (Tex. 2012) (Jefferson, C.J., dissenting); *Tex. Comptroller of Pub. Accounts v. AG of Tex.*, 354 S.W.3d 336, 353 (Tex. 2013) (Wainwright, J., dissenting and concurring); *City of Dallas v. Abbott*, 304 S.W.3d 380, 396 (Tex. 2010)(Wainwright, J., dissenting); *City of San Antonio v. Pollock*, 284 S.W.3d 809, 822 (Tex. 2009) (Medina, J., dissenting); and *Perry Homes v. Cull*, 258 S.W.3d 580, 611 (Tex. 2008) (Johnson, J., dissenting). As to Rule 52(a), *see State Dep't Highways & Public Transp. v. Payne,* 838 S.W.2d 235, 242 (1992) (Mauzy, J., dissenting).

- But the Court was not a court of discretionary jurisdiction when Rule 373 was in effect, it was an error correction court. And when it was an error correction court, it found error preserved under Rule 373 almost 5 times as often as did the courts of appeals under Rule 33.1 for the fiscal year ending in 2012 (see graph above).

- This means that we may still want to give some thought to whether there is a disconnect between how stringently the courts of appeals view and apply the requirements of Rule 33.1, and the manner in which the Supreme Court has applied Rules 373, 52(a) and Rule 33.1. The potential for such a disconnect at least suggests the invocation of Supreme Court authority by analogy or comparison to show that error was preserved in a given case, even if the particulars of the case differ from the Supreme Court authority (i.e., "if the Supreme Court held that the objection in *Dunn* preserved error as to whether the trial court allowed unequal jury strikes, then my client preserved error as to _____." *See*, *Patterson Dental Co. v. Dunn*, 592 S.W.2d 914, 917, 921 (1979)."

- When faced with the question, the Supreme Court was most likely to find that error was preserved when deciding questions under Rule 52(a)–that is, the roughly 12 years from September 1986 through February 2000–while it was interpreting and applying Rule 52(a). This was right after the Court became a court of discretionary jurisdiction. As we will see later, the two 52(a) cases in which the Supreme Court dealt with specificity do not do much to shed light on when an objection is specific enough, and when it is not.

D. What Does This Track Record Tell Us?

I. What Does This Track Record Tell Us About the Courts?

First of all, it tells us that courts will overwhelming find waiver if the "mechanical grounds" are not satisfied. So if you plan on relying on an objection as a basis for appeal,

make sure you know when to make it, do so on the record, and get a timely ruling on the record. And if the mechanical grounds have not been satisfied, then do not think an appellate issue based on the objection will succeed.

II. What Does This Track Record Tell Us About . . . Us?

The "Us" being lawyers. I'm not sure. Without overstating it, I'm not aware of any other single rule that gets invoked more often in civil cases, to the detriment of points raised on appeal, than TRAP 33.1. The likelihood Rule 33.1 will be invoked seems to be increasing–it certainly has increased dramatically as compared to the invocation of the two prior general error preservation rules. And I suspect that the overwhelming majority of times a court of appeals discusses TRAP 33.1,it is prompted to do so by one party pointing out the other side had not preserve error. So I think that it means we have become increasingly more likely to challenge error preservation on appeal, if the basis exists for doing so-and that the courts of appeals have served as a receptive audience to our arguments in that regard.

But does the track record mean that an increasing number of trial lawyers do not know what they are doing? Not necessarily. There are legitimate reasons for not making an objection at trial sometimes–strategic, tactical, or practical (i.e., not wanting to irritate the judge on what seems a minor point, the upside not being worth the effort, etc.). But we do have to wonder if error preservation has taken a back seat at trial, or gotten lost in the trial lawyers' tool bag. Why would that be the case? If it was the case, is it because of the much discussed reduction in numbers of trials, especially jury trials, with an attendant rustiness in trial skills? Or does the track record result from the proliferation and increasing complexity of trial-related rules and rulings which a lawyer must satisfy to preserve error? Or can we blame the track record on some combination of the foregoing and other dynamics? I don't know.

But if a tactical, strategic, or practical reason explained not making the objection in the trial court, then it would also seem that the objection should not be raised on appeal, especially when the "mechanical grounds" render it unviable. So, at the very least, issues raised in an appeal should be evaluated carefully for error preservation–especially to confirm the "mechanical grounds" were met–before wasting the court's time and your own raising them in a brief.

2. A Brief History of Rule 33.1 and its two Predecessors–Rule of Civil Procedure 373, and TRAP 52(a) .

A. Before the Flood: Tex R. of Civ. P. 373, which was modeled after the still existing Federal Rule of Civil Procedure 46, became effective September 1, 1941.

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I. "[T]he mid-August heat was broken by a Texas thundershower, but in the air-conditioned Texas Hotel at Fort Worth the discussion raged . . . constantly."

The foregoing discussion culminated seven months of work by an "advisory committee appointed by the Supreme Court to assist it in the task of preparing rules of procedure for civil actions, to become effective September 1, 1941." Roy W. McDonald, Reporter, Supreme Court Advisory Committee, *Completed Rules Urge Liberal Interpretation*, 3 TEX. BAR J. 404, 404. And in the air-conditioned comfort of the Texas Hotel, the committee "completed its study of appellate procedure and the rules which it will recommend to the Supreme Court." *Id.* In doing so, the committee recommended the adoption, in whole or in part, of 35 of the 86 Federal Rules. *Id.* One of those rules was TEX. R. CIV. P. 373, which was modeled after FED. R. CIV. P. 46. *Id.*, at 405; Vernon's Ann.Rules Civ. Proc., rule 373, Historical Note (Repealed by Order of April 10, 1986, eff. Sept. 1, 1986).

B. Rule 373, entitled "Exceptions Unnecessary," eliminated the need for a formal exception to a trial court ruling, but required that the party "makes known to the court the action" desired of the court or the party's "objection . . . and . . . grounds therefor."

Rule 373 was noteworthy at the time because it "eliminates the necessity of formally noting an exception to the rulings of the trial court which are made over the objection of a party." *Id.* Rule 373 read, in parts pertinent to this paper, as follows:

> . . . it is sufficient that a party, at the time the ruling or order of the court is made or sought, *makes known to the court* the action which he desires the court to take or his objection at the action of the court and his grounds therefor; . . . .

Vernon's Ann.Rules Civ. Proc., rule 373 (Repealed by Order of April 10, 1986, eff. Sept. 1, 1986), *emphasis supplied.*

I. The Rules Advisory Committee recognized that the success of the new rules, including Rule 373, depended on courts liberally interpreting the same. In the ensuring four and a half decades, courts were not much prone to interpreting Rule 373 at all.

The committee realized that the "success of any reform in procedure rests . . . . upon the judiciary of Texas," and that "unless the rules . . . receive the liberal interpretation which has been presumed in suggesting them . . . the opportunity of reform will be lost." McDonald, at 406. In fact, the committee suggested interpreting all the proposed rules, including Rule 373, as follows:

> The proper objective of rules of civil procedure is to obtain a just, fair, equitable, and impartial adjudication of the rights of litigants under established principles of substantive law. To the end that this objective may be attained with as great expedition and dispatch and at the least expense both to the litigants and to the State as may be practical, *these rules shall be given a liberal interpretation.*

McDonald, at 406, citing to "Suggested Rule Number One." This exact language constitutes TEX. R. CIV. P. 1 to this day.

II. In the four and a half decades following the adoption of Rule 373, courts were not much prone to interpreting it at all.

As shown above, neither the Supreme Court nor the courts of civil appeals did not particularly give Rule 373 much of an interpretation at all, liberal or otherwise, though the first case which did cite Rule 373 noted that it was " the same as Federal Rule 46," and so relied on federal authority applying Federal Rule 46 in interpreting and applying Rule 373. *Davis v. Grogan Mfg. Co.*, 177 S.W.2d 213, 215 (Tex. Civ. App.– Texarkana 1943, writ ref'd.). The Supreme Court did not add much to the interpretation of Rule 373. It expressly dealt with Rule 373 only seven times during the four and a half decade existence of the Rule. *Hurst v. Sears, Roebuck & Co.*, 647 S.W.2d 249, 252 (Tex. 1983); *TM Productions, Inc. v. Blue Mountain Broadcasting Co.*, 639 S.W.2d 450, 451 (Tex. 1982); *PGP Gas Products, Inc. .v. Fariss*, 620 S.W.2d 559, 560 (Tex. 1981); *Patterson Dental Co. v. Dunn*, 592 S.W.2d 914, 921 (Tex. 1979); *State v. Wilemon*, 393 S.W.2d 816, 818 (Tex. 1965); *Plasky v. Gulf Ins. Co.*, 160 Tex. 612, 617, 335 S.W.2d 581, 584 (Tex. 1960); *Swanson v. Swanson*, 148 Tex. 600, 228 S.W.2d 156, (1950).[8] *See* Appendix 1 for a synopsis of all such cases. In four of the seven opinions the Court said that error had not been preserved, and in three opinions it concluded that error had been preserved. You can find a table summarizing these Supreme Court cases in Appendix 2 to this paper.

There were also times the Supreme Court (and probably the courts of appeals) dealt with error preservation during the existence of Rule 373, but did not expressly mention the Rule. For example, the Supreme Court held that a plaintiff could not raise for the

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[8] In an eighth case, it is unclear whether the Supreme Court ruled pursuant to Rule 373–the case was filed before Rule 373 became effective, it is unclear whether it was tried before the effective date, and the Supreme Court did not cite Rule 373. *Minus v. Doyle*, 141 Tex. 67, 170 S.W. 2d 220 (1943). This case was included in the Notes of Decision mentioned in the prior footnote. The Supreme Court held that error was preserved in that case.

first time on appeal the failure of the defendant to join an indispensable third party, rejecting the argument that the absence of that third party was "fundamental error." *Pirtle v. Gregory*, 629 S.W.2d 919, 920 (Tex. 1982); *see also*, *Minus*, 170 S.W.2d at 224, cited above. That raises the question of whether some kind of common law error preservation concepts overlaid, or ran parallel to, Rule 373, and, if so, whether those concepts survived the creation of subsequent error preservation rules.

III. The Supreme Court says that Rule 373 requires a complaint to identify the objection "sufficiently" for the trial judge "to know the nature of the alleged error."

In applying Rule 373, the Supreme Court set out the following test for determining whether a party had sufficiently objected so as to preserve error for appellate review:

> [The Appellants] made general objections to the need for [the Appellee] to prove strict compliance with the procedures governing condemnation but did not specifically direct the trial court's attention to the commissioners' failure to take the oath or the failure to include the oath in the record.
>
> The complaint must identify the objectionable matter or event *sufficiently* for the *opposite party to cure any deficiency* and *for the trial judge to know* the *nature* of the alleged error.
>
> . . . .
>
> These objections [made in this case] were too general to apprise the trial court of the complaint. The effect of these objections was to conceal the objectionable matter with uncertain and overbroad language.

Fariss, 620 S.W.2d at 560 (Tex. 1981), *emphasis supplied.* The Court's focus on the trial court knowledge of the nature of the error is supported by the language of Rule 373. In fact, in a prior case, the Court had similarly pointed out that the policy underlying the rules is to "give the trial judge a chance to correct his errors." *Wilemon*, 393 S.W.2d at 818. But no express language in Rule 373 supported the *Farris* Court's concern about giving the opposing party an opportunity to cure a deficiency. Interestingly, one of the last courts of appeal to interpret Rule 373 held that the test articulated in *Fariss* was satisfied, even though the court was dealing with a reporter's record which left "much to be desired," and even though the objection of the attorney at the trial court had been "paradoxical." *Castillo v. Castillo*, 714 S.W.2d 440, 442 (Tex. App.–San Antonio 1986, no writ).

IV. One case which applied Rule 373 spoke in terms of making the trial court "aware of" the issue–and perhaps provided a

foreshadowing of the test in Rule 33.1-- but provides no further help in helping determine when that "awareness" occurs, or whether "awareness" is judged by an objective or subjective standard.

In interpreting Rule 373, the Supreme Court did not expressly refer to making the trial court "aware" of the objection, as does the current Rule 33.1. But one court of appeals did hold that an issue was preserved for appeal when the trial court was "made aware of" the issue. *Bluebonnet Express, Inc. v. Employers Ins. of Wausau*, 651 S.W.2d 345, 353 (Tex. App.–Houston [14th Dist.] 1983, writ ref'd., n.r.e.), disapproved on other grounds by *Horrocks v. Texas Dep't of Transp.*, 852 S.W.2d 498, 499 n. 1 (Tex. 1993). But the *Bluebonnet* Court really does not help much in defining the fine line between when an objection is sufficient and when it is not. *Bluebonnet* issued the foregoing holding in the context of holding that, in a trial to the court, a motion for new trial was not necessary in order to assert "no evidence" points on appeal. *Id.* The *Bluebonnet* Court noted that "trial was to the court, and where lengthy and detailed objections to and delineation of the evidence occurred throughout the proceeding," no motion for new trial was necessary to preserve a no evidence point. *Id.*, at 352. It also noted that "[b]ecause of the provisions of TEX. R. CIV. P. 373, and the notions of judicial economy and fairness," the requirement remained that "a party must make known his position, in some fashion, to the trial court in order to preserve his point on appeal." *Id.*, at 261. Clearly, the trial court in *Bluebonnet* had to have known of the objections made by the appellant, but whether the "awareness" mentioned by *Bluebonnet* is judged by what the trial court actually knew, or what it should have known, or exactly how "aware" the trial court had to be about the complaint, *Bluebonnet* does not say.

C. On September 1, 1986, Rule 52(a) replaced Rule 373. Rule 52(a) gets cited twenty times as often as Rule 373, and it "carried forward" the provisions of Rule 373–or did it?

Effective September 1, 1986, Rule 373 was repealed, and replaced by TEX. R. APP. P. 52(a). *Emerson v. Fires Out, Inc.,* 735 S.W.2d 492, 493 (Tex. App.–Austin 1987, no writ); *Delhi Gas Pipeline Corp. v. Lamb*, 724 S.W.2d 97, 101 (Tex. App.–El Paso 1986, writ ref'd., n.r.e.). Rule 52(a) read, in pertinent part, as follows:

> In order to preserve a complaint for appellate review, the party must have presented to the trial court a timely . . . objection . . . stating the specific grounds for the ruling he desired the court to make if the specific grounds were not apparent from the context.

Gill v. State, 1998 Tex. App. LEXIS 3461, *3 n. 3 (Tex. App.– Dallas June 10, 1998, no pet.).

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I. The courts of appeals confirm Rule 52(a) "carried forward" Rule 373.

The Austin and El Paso courts of appeals fairly quickly held that Rule 52(a) "carried forward the provisions of Rule 373, and that the rationale of *Plasky* and other opinions decided under Rule 373 applied under Rule 52(a)." *Emerson*, 735 S.W.2d at 493, citing *Lamb*, 724 S.W.2d at 101. And there is no doubt you will find dozens, if not hundreds, of cases decided under TRAP 52(a) which cite, rely on, and apply cases decided under Rule 373.

II. One Supreme Court opinion and a couple of court of appeals opinions begin evaluating preservation of error by looking to whether the trial court was "aware of" the complaint.

a. Without mentioning TRAP 52(a), the Supreme Court talked about "awareness" in jury charge cases.

There were numerous cases in which the Supreme Court addressed whether error was preserved under Rule 52(a). You can find a compilation of those cases, and a synopsis of the rulings, in Appendices 2 and 3.

During the Rule 52(a) era, but on cases in which the Supreme Court did not expressly invoke Rule 52(a), the Supreme Court also began describing its error preservation analysis in terms of whether the party's complaint or objection made the trial court "aware" of the complaint–i.e., using the language which eventually found its way into Rule 33.1. In holding that a defendant preserved error to a jury charge by objecting to a question as a comment on the weight of the evidence, and requesting an instruction for the charge, the Court issued the following holding in an opinion by Justice Hecht:

> There should be but one test for determining if a party has preserved error *in the jury charge*, and that is whether the party *made the trial court aware* of the complaint, timely and plainly, and obtained a ruling. The more specific requirements of the rules should be applied, while they remain, to serve rather than defeat this principle.

State Dep't of Highways & Public Transp. v. Payne, 838 S.W.2d 235, 241 (Tex. 1992), *emphasis supplied.* In reaching this holding, the majority opinion in *Payne* did not expressly mention Rule 52(a), nor did it mention Rule 274, which (then as now) sets out the error preservation test for objecting to a jury charge–"a party objecting to a charge must point out distinctly the objectionable matter and the grounds of the objection." The dissenting opinion, on the other hand, did mention Rule 52(a). And the dissent also noted

that Rule 52(a) required the objecting party to state "the specific grounds" for the objection. The dissent would have held the error was not preserved:

> Although the State objected to the charge, it did so on the basis that the instruction was a comment on the weight of the evidence, not on the ground that it misstated the State's legal duty to Payne. I would hold that this objection did not adequately state the "specific grounds for the ruling [the State] desired the court to make." Tex. R. App. P. 52(a); see *Davis v. Campbell*, 572 S.W.2d at 663 (holding that a "no evidence" objection did not amount to a complaint that a special issue was immaterial).

Payne, 838 S.W.2d at 242 (Mauzy, J., dissenting).

The Court issued other opinions in which it used the "awareness" test to address whether a party had preserved error as to a jury charge. In at least two of these opinions, the Court relied on *Payne*, did not mention Rule 52(a), but (as in *Payne*) held that error was preserved. *Texas Dep't of Human Servs. v. Hinds*, 904 S.W.2d 629, 638-39 (Tex. 1995) (party "did not request the instruction that should have been given," but its proposal of an instruction taken from a concurring opinion in another Supreme Court decision preserved error because " there was no other Texas law to guide [the party and] the request called the trial court's attention to the causation element missing in Question No. 2."); *Alaniz v. Jones & Neuse, Inc.*, 907 S.W.2d 450, 451 (Tex. 1995) (Court held that party preserved error by objecting to the omission of future lost profits as an element of damages, when it had submitted requested charge which contained question which included future lost profits, which question trial court included in the jury charge, except for references to future lost profits, which it redacted). The Supreme Court subsequently reversed a court of appeals' decision that the trial court was not aware of a defendant's request for a question about unreasonable risk of harm. *Dallas Mkt. Ctr. Dev. Co. v. Liedeker*, 958 S.W.2d 382, 386, 387 (Tex. 1997), *overruled on other grounds by Torrington Co. v. Stutzman*, 46 S.W.3d 829, 840 (Tex. 2000). In doing so, the Court held that the trial court's admission that the question was submitted and ruled on, and was the subject of a lengthy discussion, "clearly preserved [the Defendant's] complaint that the case should have been submitted to the jury on a premises liability theory." *Id.* Once again, Rule 52(a) was not mentioned by the Court in *Liedeker*.

Between the decision in *Payne* and the decisions in *Hinds*, *Alaniz*, and *Liedeker*, the Court issued at least one jury charge opinion which did not mention rule 52(a), and did not mention the "awareness" test for an objection's specificity, but which did show what a battleground this area had become. That case was *Keetch v. Kroger*, in which the Court held that the party had not preserved error–even though the complaining party had requested exactly the jury question which the Supreme Court approved on a going forward basis. *Keetch v. Kroger Co.*, 845 S.W.2d 262, 267, 268 (Tex. 1992). In *Keetch*, the

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majority held that:

> we need not decide whether failure to submit in broad form was reversible error because [Plaintiff] did not provide the trial judge with any indication that her complaint was with the trial court's failure to submit in broad form. Error in the charge must be preserved by distinctly designating the error and the grounds for the objection.

Id., at 267. The concurrence in *Keetch* noted that:

> the objection the dissent refers to did not so much as hint that the trial court's granulated submission was improper or that the charge should have been in broad form. [Plaintiff] did request the same question the Court suggests today, but she requested no accompanying instructions. A party does not object to a failure to submit a jury charge in broad form by requesting questions without the necessary instructions.

The dissent in *Keetch* stridently pointed out that:

> By almost any measure, Keetch did a better job of preserving error in the charge than the State did in Payne.
> . . . .
> The majority cites only one case in support of its holding that error was waived: *Wilgus v. Bond*, 730 S.W.2d 670, 672 (Tex. 1987). ___ S.W.2d at ___. Notably, this is the main case relied upon in the dissenting opinion in *Payne*. ___ S.W.2d at ___. Apparently, defendants alone are to enjoy the benefit of the liberal Payne standard for preservation of error; plaintiffs are still governed by the strict *Wilgus v. Bond* standard.

Id., at 272,273.

Obviously, properly parsing and invoking error preservation cases from this time frame will provide a challenge.

b. A couple of courts of appeals began to use the "awareness" test, in reliance on *Payne* and while citing TRAP 52(a).

Several of the courts of appeals began to adopt and cite the Supreme Court's articulation of the error preservation test in *Payne* as whether "the party made the trial

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court aware of the complaint," and did so while mentioning Rule 52(a). *Yazdi v. Republic Ins. Co.*, 935 S.W.2d 875, 878 (Tex. App.–San Antonio 1996, writ denied) (held, error not preserved by party who, when interrupted by the trial court, did not thereafter "articulate a clear objection that would sufficiently apprise the trial court of the specific complaint" to the effect that the charge "may have had the effect of allowing the jury to return a verdict for [Plaintiff] if it found that [Defendant] had made only a false statement of an immaterial fact."); *Apache Corp. v. Moore*, 891 S.W.2d 671, 685 (Tex. App.–Amarillo , writ denied), *vacated and remanded* by 517 U.S. 1217, 116 S. Ct. 1843 (1996) (held, complaint was not preserved because party failed "to point out to the trial court distinctly the objection raised on appeal," thus failing to make "the trial court aware of its complaint."). Both *Yondi* and *Moore* specifically mentioned Rule 52(a) and *Payne*. *Yondi* did not hold that *Payne* interpreted Rule 52(a), but *Moore* held that since the Appellant failed to make "the trial court aware of its complaint timely and plainly" as required by *Payne*, it had not "preserved its complaint for our review" under Rule 52(a). There are more court of appeals opinions which recite the "awareness" test, but we will not cite them here as they did not address that particular issue.

D. Rule 33.1 rewrites Rule 52(a), but does it relax the specificity required to preserve error?

Rule 33.1 came into existence effective September 1, 1997, at the same time that a multitude of other TRAPS were amended or created. *See* John Hill Cayce, Jr., Anne Gardner, and Felicia Harris Kyle, *Civil Appeals in Texas: Practicing Under the New Rules of Appellate Procedure*. 49 BAYLOR L. REV. 872 (1997). It might be of some merit to consider how the Rule came into being, and comments of the Supreme Court leading up to its existence.

I. Supreme Court commentary regarding the shortcomings of error preservation rules, including Rule 52(a).

While Rule 52(a) was still in effect, that the Supreme Court was openly discussing the problems it was having with error preservation rules. This paper has already mentioned the difficulties and disputes aired concerning preservation of error in the jury charge area. In addition to the holdings discussed above, the Court mentioned in *Payne* that the procedure governing when and how to preserve error concerning the jury charge "is becoming worse, not better," despite the best intentions behind the endorsement of the broad form submission of jury questions. *Payne*, 838 S.W.2d at 241. And that opinion also specifically mentioned that the "flaws" in jury charge procedures "stem partly from the rules governing those procedures and partly from caselaw applying those rules." *Id.* Two years earlier, in another opinion by Justice Hecht, the Court had specifically discussed the apparent disconnect between the new trial rule (Rule 324) and Rule 52(a), with Rule 324 stating "that no complaints other than those specified in the rule need be raised . . . as a prerequisite to appeal," while Rule 52(a) provided that "a complaint is not

preserved for appellate review unless it is presented to the trial court and a ruling obtained." *Dunn*, 800 S.W.2d at 837, n. 9. The Court specifically noted that the "problems" about "[h]ow Rule 52(a) applies to complaints which cannot be raised prior to judgment but are not specifically required by Rule 324 to be raised in a motion for new trial, is unclear," and that "[t]hese problems should be considered in future amendments to the rules." *Id.*

II. The drafting of Rule 33.1–while recommending the "awareness" test, the SCAC Subcommittee recommended language which "contained a standard similar to the proposed jury charge rules."

In its 1992 opinion in *Payne*, the Supreme Court mentioned that "[l]ast year we asked a special task force to recommend changes in the rules to simplify charge procedures, and amendments are under consideration." *Payne*, 838 S.W.2d at 241. In 1995, the Supreme Court Advisory Committee ("SCAC") was well into its work revising the Rules of Civil and Appellate Procedure. In response to a concern voiced about waiver of error in the trial court by Luke Soules, who was then Chair of the Committee, by January 20, 1995 the Committee had already approved incorporating the following language for Rule 52(a):

> No complaint shall be considered waived if the ground stated is sufficiently specific to make the judge aware of the complaint.

Page 5296, Hearing of the Supreme Court Advisory Committee, January 20, 1995 (Morning Session), Archives of the Supreme Court of Texas (Appendix 6); *see also* Disposition Chart accompanying letter from Bill Dorsaneo to Luke Soules dated December 21, 1995, Archives of the Supreme Court of Texas (Appendix 7). The Committee's deliberations indicate that this language was "supposed to be the same standard as in the charge draft rules." *Id.*; Page 1, Rules Memorandum, TRAP 52, February 26, 1996, Archives of the Supreme Court of Texas (Appendix 8). Following the January 1995 discussions, the aforementioned Disposition Chart commented that this proposed language in rule 52(a) had in mind establishing that no waiver of error occurred in the trial court so long as "a request, objection, or motion is specific enough *to support the conclusion* that the trial court *was made fully aware* of the complaint." *Id.*, Disposition Chart, *emphasis supplied.*

A Rules Memorandum issued early in 1996 contained a draft of Rule 52(a) which contained the same specificity language cited above. Pages 1-6, Rules Memorandum, TRAP 52, February 26, 1996, Archives of the Supreme Court of Texas (Appendix 8). The author of this Memorandum is unknown, but the Memorandum contained at least some proposals from "LP," perhaps designating Lee Parsley, who was then the Rules Attorney for the Supreme Court of Texas. *Id.*, p. 6. Consistent with the aforementioned

Disposition Chart, the Subcommittee recommended the foregoing language for Rule 52(a) "so that the rule contained a standard similar to the proposed jury charge rules." *Id.*, page 1.

In a subsequent memorandum about seven months later, Lee Parsley forwarded to several members of the Supreme Court Advisory Committee some changes to TRAP 52 suggested by Justice Hecht. Page 1, Memorandum re: TRAP 47 and 52, October 30, 1996, Archives of the Supreme Court of Texas (Appendix 9). Though still designated Rule 52(a), for the purposes of this paper that proposal looked remarkably like the current Rule 33.1. It conditioned the preservation of error on stating the grounds for the ruling "with sufficient specificity to make the trial court aware of the complaint," unless "the specific grounds were apparent from the context." *Id.*, Page 2. This language made its way into the rule designated as Rule 33.1, to be effective September 1, 1997. Page 2, Proposed form of certain Texas Rules of Appellate Procedure, January 1, 1997, Archives of the Supreme Court of Texas (Appendix 7).

III. Comparing Rule 33.1 and its predecessors indicate that Rule 33.1 may have intended to relax the specificity requirements of Rule 52(a) and Rule 373.

Comparing the three general error preservation rules side by side, we see the following:

Rule 373 (1985 Rule)	Rule 52(a) (1987 rule)	Rule 33.1 (existing rule)
. . . it is sufficient that a party, at the time the ruling or order of the court is made or sought, *makes known to the court the action* which he desires the court to take or his objection at the action of the court *and his grounds therefor*; . . . ."	"In order to preserve a complaint for appellate review, the party must have presented to the trial court a timely . . . *objection* . . . *stating the specific grounds for the ruling he desired* the court to make *if the specific grounds were not apparent from the context*." *Gill v. State*, 1998 Tex. App. LEXIS 3461, *3 n. 3 (Tex. App.– Dallas June 10, 1998, no pet.)	"As a prerequisite to presenting a complaint for appellate review, the record must show that . . . the complaint was made to the trial court by a timely . . . *objection . . . that . . . stated the grounds for the ruling . . . sought . . . with sufficient specificity to make the trial court aware* of the complaint, *unless the specific grounds were apparent from the context*." *Emphasis supplied.*

For purposes of this paper, the foregoing comparison of Rules 373, 52(a) and 33.1 brings several questions and points to mind:

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1) Rule 373 did not mention the possibility that *context* might provide the specificity necessary to preserve error. Both Rule 52(a) and Rule 33.1 did make that clear. So in looking at and invoking cases decided under Rule 373, keep in mind that Rule 33.1 would allow the context in which an objection or complaint was made to make the objection sufficiently specific, while Rule 373 would not seem to allow looking to that context. In other words, there may be some instances when cases decided under Rule 373 held that error was not preserved, while under Rule 33.1 context might lead to a different result.

2) Rule 373 did not mention specificity at all–it said error was preserved if the party "makes known to the court . . . the grounds therefor." Rule 52(a) seemed to elaborate and make that requirement stricter–it required that the objection state "the specific grounds for the ruling," if the "specific grounds were not apparent from the context." Rule 33.1 seemed to relax the requirement of Rule 52(a) in this regard–it required the grounds be stated "with sufficient specificity to make the trial court aware of the complaint," while still allowing the specificity to be provided "from the context." So, on its face, Rule 33.1 arguably relaxed the specificity standards of Rule 52(a)–meaning that just because an objection was not specific enough under Rule 52(a) does not mean that it would fail to pass muster under Rule 33.1.

IV. The Comment to Rule 33 says it "is former Rule 52," and that "33.1 is rewritten."

On reading the "Notes and Comments" to Rule 33, you find this comment:

> Comment to 1997 change: This is former Rule 52. Subdivision 33.1 is rewritten.

TEX. R. APP. P. 33. Though the comments mention that Rule 52(b) and 52(d) are omitted as unnecessary, the comments provide no further guidance as to whether, or to what extent, the specificity requirements of Rule 52(a) are carried forward to Rule 33.1.

V. The Appellate Section of the State Bar of Texas suggested that Rule 33.1 has a more relaxed standard of specificity for an objection–but no court or commentator has expressly addressed that suggestion.

About five months before Rule 33.1 took effect, the Appellate Section of the State Bar of Texas published its Project entitled THE GUIDE TO THE NEW TEXAS RULES OF APPELLATE PROCEDURE 1997 (State Bar of Texas Appellate Section) (See Appendix 11). In the GUIDE, the Appellate Section expressly said that "[t]he new rule *relaxes* the former

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requirement of specificity for an objection." GUIDE, p. 10. The GUIDE also pointed out that Rule 33.1 also contained a "new provision" which required "that the complaining party must comply with the requirements of the Texas Rules of Civil or Criminal Evidence or the Texas Rules of Civil or Criminal Evidence." *Id.*

VI. Generally speaking, the 1997 TRAPS were intended to "refocus appellate procedure on the merits rather than technicalities."

In article which can still be found on the Supreme Court's website (as of the drafting of this paper), an by Justice Nathan Hecht and his former Staff Attorney Lee Parsley (which was updated by Justice Bob Pemberton when he was still Rules Attorney for the Supreme Court) had this to say about the 1997 revisions to the Rules of Appellate Procedure:

> In 1997, the Supreme Court promulgated an entirely new set of Rules of Appellate Procedure. The new rules were intended to make appellate practice more user-friendly, refocus appellate procedure on the merits rather than technicalities, and reduce cost and delay.

Nathan L. Hecht & E. Lee Parsley, *Procedural Reform: Whence and Whither*, MATTHEW BENDER C.L.E., PRACTICING LAW UNDER THE NEW RULES OF APPELLATE PROCEDURE 1-12 at § 1.02(b) & (c); *see* http://www.supreme.courts.state.tx.us/rules/history.asp

About sixteen years later, Justice Hecht had this to say in a speech he gave at an appellate seminar:

> Of course, we rewrote the rules of appellate procedure in 1997 to simplify them and facilitate presentation of the merits, but I hope that one of the most lasting contributions of the court I have served on will make to appellate practice in Texas is what Judge Ray wrote and I joined in *Dodge* [*Donwerth v. Preston II Chrysler-Dodge, Inc.*, 775 S.W.2d 634, 643 (Tex. 1989)]:
>
> > "This court has labored long and hard to remove as many procedural traps from our rules as possible. Litigants are entitled to have their disputes resolved on the merits, not on unnecessary and arcane points that can sneak up on even the most diligent of attorneys."
>
> So we have tried to eliminate in [sic.] the Rules' gotchas, occasions for waiver of arguments and issues, we have tried to take a very liberal approach to the presentation of those issues and encourage all of the appellate courts to decide those issues on the merits rather than on

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procedure."

Justice Nathan Hecht, Where We Are From, Where We Are Headed-A Senior Justice's Perspective, Remarks to the 23rd Annual Conference on State and Federal Appeals sponsored by the University of Texas School of Law (June 13, 2013).

VI. Apparently, neither the commentators nor courts expressly addressed the differences regarding specificity between Rule 33.1 or its predecessors, nor the Appellate Section's suggestion that Rule 33.1 relaxed the specificity requirements for error preservation.

Commentators did not underscore or comment on the GUIDE's observation that Rule 33.1 "relaxed" the specificity requirement of Rule 52(a). In her article for the 1988 Advanced Civil Appellate Course, Helen Cassidy mentioned that the GUIDE "covers the significant changes in the rules," and that "John Hill Cayce, Jr., Anne Gardner, and Felicia Harris Kyle have a comprehensive article on the rule changes, Civil Appeals in Texas: Practicing Under the New Rules of Appellate Procedure. 49 BAYLOR L. REV. 872 (1997)." Helen Cassidy, *One Year Under the New TRAP*, p. 1, State Bar of Texas 12th Annual Advanced Civil Appellate Practice Course (1998). (Author's note: I could not find Helen's entire article–if anyone has it, and it addresses 33.1, I would love to see it). This latter article mentioned that the "new Rule 33.1(a)(1) echoes former Rule 52(a), carrying forward the basic requirement of appellate practice--that to complain of any error on appeal, the record must reflect that the complaint was timely and properly made by request, objection, or motion, and ruled on by the trial court." *Id.*

The GUIDE was cited by a couple of the courts of appeals, in the context of whether a trial court had to expressly rule on objections to summary judgment evidence. *Wrenn v. G.A.T.X. Logistics, Inc.*, 73 S.W.3d 489, 498 (Tex. App.–Fort Worth 2002, no pet.); *Taylor-Made Hose v. Wilkerson*, 21 S.W.3d 484, 493 (Tex. App.–San Antonio 2000, pet. denied); *Frazier v. Khai Loong Yu*, 987 S.W.2d 607, 610 (Tex. App.–Fort Worth 1999, pet. denied); *Blum v. Julian*, 977 S.W.2d 819, 823 (Tex. App.–Fort Worth 1998, no pet.). But courts did not expressly refer to the guidance provided by the GUIDE about whether Rule 33.1 "relaxed" the specificity required of an objection in order to preserve appellate review.

The first courts of appeals which recited the specificity language found in Rule 33.1 equated that rule with Rule 52(a), without addressing the linguistic differences between the two rules:

> The purpose of the requirement that a specific objection be lodged in the trial court is to ensure that the trial court has the opportunity to rule on the issue. New TEX.R.APP.P. 33.1, like its predecessor

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> Rule 52(a), requires that to preserve a complaint for appellate review, the record must show that the complaint was made to the trial court in a fashion that states the grounds for the ruling sought with sufficient specificity to make the trial court aware of the complaint, unless the grounds were apparent from the context.

In the Interest of Shaw, 966 S.W.2d 174, 182 (Tex. App.–El Paso 1998, no pet.). *See also United Air Conditioning Co. v. Westpark Invs.*, 1998 Tex. App. LEXIS 4823, 89 n. 2 (Tex. App.–Houston [14th Dist.] August 6, 1998, pet. dism'd.) ("the substance of Rule 52(a) became part of Rule 33.1 of the Rules of Appellate Procedure."). I have not yet found a court of appeal decision which analyzed the differences between Rule 52(a) and Rule 33.1 concerning specificity. But courts of appeals pretty routinely began invoking specificity holdings from cases applying Rule 52(a) to decide cases under Rule 33.1 without expressly comparing the specificity language in the two rules. Interestingly, some courts did note that Rule 33.1 differed from Rule 52(a), in that Rule 33.1 "relaxes the former requirement of an express ruling [under Rule 52(a)] and codifies case law that recognized implied rulings." *Frazier v. Khai Loong Yu*, 987 S.W.2d 607, 610 (Tex. App.–Fort Worth 1999, pet. denied).

The Supreme Court also did not specifically address the question of whether Rule 33 relaxed the specificity requirements of Rule 52(a). It did comment that Rule 33.1 was "formerly" Rule 52(a). *Operation Rescue-National v. Planned Parenthood*, 975 S.W.2d 546, 569 n. 73 (Tex. 1998). In a Rule 52(a) case, the Supreme Court commented that "[i]n 1997, Rule 52(a) was rewritten as Rule 33.1"–and then the Court proceeded to hold that error had been preserved, because even though "the statements in the pleading [answer] and motion [for directed verdict] were not paragons of specificity," they "nevertheless identified for the trial court the issue to be ruled on and provided the trial court the opportunity to rule." *Osterberg v. Peca*, 12 S.W.3d 31, 40 n. 7 (Tex. 2000). *Peca* involved a First Amendment argument of some sort, and the Court noted that its holding that error was not waived under Rule 52(a) was also supported by a "[c]oncern for protecting First Amendment rights . . . [because] the Supreme Court will find waiver only in circumstances that are 'clear and compelling.'" *Id.* In another Rule 52(a) case, "the Court said that Rule 33.1 "supersedes former Rule 52(a)" and "is substantially unchanged" from the old rule. *In the Matter of C.O.S.* 988 S.W.2d 760, 764 (Tex. 1999). But *C.O.S.* did not involve whether an objection had been made with sufficient specificity–instead, it held that when "a statute directs a juvenile court to take certain action, the failure of the juvenile court to do so may be raised for the first time on appeal unless the juvenile defendant expressly waived the statutory requirement." *C.O.S.*, 988 S.W.2d at 768. So it cannot be said that *C.O.S.* was ruling on specificity at all, much less issuing a binding holding on whether the specificity requirements of Rule 33 equated with those of Rule 52(a). In several Rule 52(a) cases, in which the Court held that objections were sufficiently specific, the Supreme Court parenthetically noted that the "current version" of Rule 52(a) was "at . . . [Rule] 33.1," without comparing the specificity requirements of

either rule. *Wal-Mart Stores, Inc. v. McKenzie*, 997 S.W.2d 278, 280 (Tex. 1999); *Holland v. Wal-Mart Stores*, 1 S.W.3d 91, 94 (Tex. 1999).

You will find that courts of appeal still invoke authority decided under Rule 52(a) to decide whether an objection met the specificity test of Rule 33.1. Perhaps it is too late to urge that the specificity requirements of the two Rules differ, based on their respective wording and on the commentary by the State Bar Appellate Section. But it is an argument to keep in mind–especially if a case decided under Rule 52(a) holds that the objection you made was not specific enough.

3. What Rule 33.1 says, and how courts have applied it.

Having looked at historical trends and the pedigree of Rule 33.1, let's now look at the wording of the Rule and how it has been applied by courts over the course of a year. Before launching into that exercise, I want to commend to all the trial lawyers the really excellent, succinct, paper by Andrew Sommerman, in which he addresses what is required to preserve error on number of topics, which he lays out in chronological fashion as one proceeds through a lawsuit. *See* Andrew Sommerman, *Preserving Error and How to Appeal*, State Bar of Texas 27th Annual Advanced Civil Appellate Practice Course (2013). For a quick and ready reference on things which routinely raise their heads, it is an excellent resource. If possible, you should also watch the presentation made by his partner, Tex Quesada, on that paper at the 2013 Annual Advanced Civil Appellate Practice Course.

A. The Requisites of Rule 33.1.

Rule 33.1(a)(1) provides, for purposes of this paper, that:

- "[a]s a **prerequisite** to presenting a complaint for appellate review"
- "the **record** must show" that
- "the **complaint** was made"
- "**to the trial court**"
- "by a **timely** request, objection, or motion" that
- "stated the **grounds** for the ruling that the complaining party sought from the trial court" with
- "**sufficient specificity to make the trial court aware** of the complaint, unless the specific grounds were apparent from the context."

Whether docket management goals or other dynamics are involved, when we examine the cases applying Rule 33.1, we find that the courts of appeals take its rather draconian directives to heart. So this paper will delve into the requirement of Rule 33.1 that the grounds for the complaint be made with "sufficient specificity to make the trial court aware of the complaint."

B. In analyzing error preservation rulings for use in your case, make sure you are not comparing your apples to their oranges.

I. Make sure you do not forget to distinguish, where appropriate, authority decided under Rule 52(a).

I have already mentioned the possibility that Rule 33.1 may have relaxed the specificity requirements of Rule 52(a). THE GUIDE TO THE NEW TEXAS RULES OF APPELLATE PROCEDURE 1997 (State Bar of Texas Appellate Section) (See Appendix 8); *see*, as to the need for an express ruling, *Wrenn v. G.A.T.X. Logistics, Inc.*, 73 S.W.3d 489, 498 (Tex. App.–Fort Worth 2002, no pet.); *Taylor-Made Hose v. Wilkerson*, 21 S.W.3d 484, 493 (Tex. App.–San Antonio 2000, pet. denied); *Frazier v. Khai Loong Yu*, 987 S.W.2d 607, 610 (Tex. App.–Fort Worth 1999, pet. denied); *Blum v. Julian*, 977 S.W.2d 819, 823 (Tex. App.–Fort Worth 1998, no pet.). Without rehashing that material, if you find yourself arguing that error was preserved in your case, you will find that many, if not most, of the authority adverse to your position trace their lineage to authority decided under Rule 52(a). They will almost invariably do so, without bothering to discuss how the two rules might differ. Of course, if authority decided under Rule 52(a) militates in favor of your error having been preserved, use it.

If you find yourself arguing error was not preserved, relying on Rule 52(a) based authority, you can always point out cases which imply the two rules are the same, by saying that Rule 33.1 was "formerly" Rule 52(a), or that the latter was "rewritten" by the former, or that the current version of the latter can be found in the former. *Operation Rescue-National v. Planned Parenthood*, 975 S.W.2d 546, 569 n. 73 (Tex. 1998); *Osterberg v. Peca*, 12 S.W.3d 31, 40 n. 7 (Tex. 2000); *Wal-Mart Stores, Inc. v. McKenzie*, 997 S.W.2d 278, 280 (Tex. 1999); *Holland v. Wal-Mart Stores*, 1 S.W.3d 91, 94 (Tex. 1999); *see also In the Interest of Shaw*, 966 S.W.2d 174, 182 (Tex. App.–El Paso 1998); *United Air Conditioning Co. v. Westpark Invs.*, 1998 Tex. App. LEXIS 4823, 89 n. 2 (Tex. App.–Houston [14th Dist.] August 6, 1998, pet. dism'd.); John Hill Cayce, Jr., Anne Gardner, and Felicia Harris Kyle, *Civil Appeals in Texas: Practicing Under the New Rules of Appellate Procedure*. 49 BAYLOR L. REV. 872 (1997).

II. Be careful when relying on cases involving preservation of constitutional rights, due process or fundamental error–in which error either does not have to be preserved, or the specificity test is vastly relaxed.

In selecting authority to rely on, you need to make sure to not rely on authority involving due process or amount to fundamental error, unless your case involves such an issue. *See*, *e.g.*, *In the Interest of B.L.D.*, 113 S.W.3d 340, 349, 351, 354 (Tex. 2003). Additionally, you may want to consider whether other dynamics–such as protections afforded by the U.S. Constitution–might place a thumb on the scales in favor of whether

your clients have preserved error under Rule 33.1.[9] And, in the pertinent kind of case, you might want to take note of the fact that the Supreme Court has held that Rule 33.1 "applies to criminal as well as civil cases, as did [its] predecessor, Rule 52(a)." *In the Matter of C.O.S.* 988 S.W.2d 760, 765 (Tex. 1999) (in which the Court looked to error preservation rules followed by the Court of Criminal Appeals when deciding error preservation issues in juvenile proceedings). But in invoking the "fundamental error" doctrine, you might keep in mind how narrow a window of opportunity that doctrine provides:

> *In B.L.D.,* the Court recognized that, despite the fact that the fundamental-error doctrine has been labeled "'discredited,'" *id.* at 350 (quoting *Cox v. Johnson*, 638 S.W.2d 867, 868 (Tex. 1982) (per curiam)), the doctrine has been employed in "rare instances" to review "certain types" of unpreserved or unassigned error in civil cases. *Id.* For example, the doctrine has been invoked to review unpreserved [*9] issues regarding: (1) whether the record shows on its face that the trial court lacked jurisdiction, id. (citing *McCauley v. Consol. Underwriters*, 157 Tex. 475, 304 S.W.2d 265, 266 (1957) (per curiam)); (2) the failure to give mandatory statutory admonishments in a juvenile delinquency proceeding, id. (citing *In re C.O.S.*, 988 S.W.2d 760, 767 (Tex. 1999)); and (3) the constitutionality of the burden of proof instruction in a juvenile delinquency proceeding, id. (citing *State v. Santana*, 444 S.W.2d 614, 615 (Tex. 1969)). The Court noted that its application of the fundamental-error doctrine in the latter two cases rested on the "quasi-criminal" nature of juvenile delinquency cases. *Id.* (citing *C.O.S.*, 988 S.W.2d at 765; Santana, 444 S.W.2d at 615). In *B.L.D.*, the supreme court declined to extend the fundamental-error doctrine to jury charge error in parental termination cases. See *id.* at 351.

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[9] *Osterberg v. Peca*, 12 S.W.3d 31, 40 (Tex. 2000), *cert. denied* 2000 U.S. 4195 ("In their answer and their motion for directed verdict, the Osterbergs identified the constitutional rights at issue and the statutory provisions that, when applied, allegedly violate them. Although the statements in the pleading and motion were not paragons of specificity, they nevertheless identified for the trial court the issue to be ruled on and provided the trial court the opportunity to rule. We hold that the Osterbergs did not waive their First Amendment defenses to the application of Chapter 253. Concern for protecting First Amendment rights also supports this holding. When freedom of speech is at issue, the Supreme Court will find waiver only in circumstances that are "clear and compelling." *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 145, 18 L. Ed. 2d 1094, 87 S. Ct. 1975 (1967). This case does not provide 'clear and compelling' circumstances to justify finding that the Osterbergs' First Amendment arguments are waived.")

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Free v. Lewis, 2012 Tex. App. LEXIS 6639, *9-10 (Tex. App.–Corpus Christi-Edinburg Aug. 9, 2012, no pet.).

C. The tests courts have used to determine that the complaint was made "with sufficient specificity to make the trial court aware of the complaint."

By and large, the cases which deal with the specificity of a particular complaint or objection seem to do so on an ad hoc basis, without citing any general rules about interpreting or applying the specificity test of Rule 33.1. But before looking at ad hoc cases, and trying to glean guidance they provide, those cases which try to devise or apply general rules of interpretation bear examining.

I. General Rules in interpreting and applying Rule 33.1.

In Appendix5, you will find a compilation of a year's worth of cases in with the Supreme Court and the courts of appeals addressed the specificity requirements of TRAP 33.1, organized by whether or not error was preserved, and then organized by topic. That compilation might give you an overview of the kinds of cases in which courts address objection specificity, and how they deal with the same.

a. Substance takes precedence over form.

Generally speaking, substance takes precedence over form in determining specificity, and specificity is intended to promote judicial efficiency by giving the trial court an opportunity to correct error. But are their any helpful guidelines to determine specificity?

In applying Rule 33.1, the Supreme Court noted that "[W]e have long favored a common sense application of our procedural rules that serves the purpose of the rules, rather than a technical application that rigidly promotes form over substance." *Tex. Comm'n on Human Rights v. Morrison*, 381 S.W.3d 533, 536-37 (Tex. 2012), citing *Thota v. Young*, 366 S.W.3d 678, 690, 691 (Tex. 2012) (held, a party "did not have to cite or reference *Casteel* specifically to preserve the right" to object to a jury question's overbreadth). And one court of appeals also seemed to reflect the "substance over form" approach to applying Rule 33.1 when it noted that it would allow a "fair reading of the record in context" to show that a ruling was obtained and error was preserved as to the denial of a motion for continuance--even though "[c]ounsel's objection could have been clearer." *In the Interest of R.R.*, 2011 Tex. App. LEXIS 8394, *6-7 (Tex. App.–Houston [1st Dist.] Oct. 20, 2011, pet. denied)

b. The purpose behind general error preservation rules is to conserve judicial resources and to enhance the

accuracy of trial court decision making.

The Supreme Court has recently reaffirmed the purpose behind the general error preservation rules:

> There are "important prudential considerations" behind our rules on preserving error. *In re B.L.D.*, 113 S.W.3d 340, 350 (Tex. 2003). First, requiring that parties initially raise complaints in the trial court conserves judicial resources by providing trial courts the opportunity to correct errors before appeal. Id. Second, judicial decision-making is more accurate when trial courts have the first opportunity to consider and rule on error. Id. ("Not only do the parties have the opportunity to develop and refine their arguments, but we have the benefit of other judicial review to focus and further analyze the questions at issue."). Third, a party "should not be permitted to waive, consent to, or neglect to complain about an error at trial and then surprise his opponent on appeal by stating his complaint for the first time." *Id.* (quoting *Pirtle v. Gregory*, 629 S.W.2d 919, 920 (Tex. 1982) (per curiam)). For these reasons, to preserve this issue for appeal, the County needed to present its complaint to the trial court.

Mansions in the Forest, L.P. v. Montgomery County, 365 S.W.3d 314, 317 (Tex. 2012).

With regard to preventing "surprise" to an opponent, sometimes referred to as ensuring that the opposing party "is not blind-sided with a new complaint for the first time on appeal," be cautious about relying on your own surprise as a grounds to argue that the other side waived error. *Basic Energy Serv. v. D-S-B Props.*, 367 S.W.3d 254, 265 (Tex. App.– Tyler 2011, no pet.) (opinion withdrawn by agreement, appeal dismissed). That concept is without a doubt relied on in cases decided under Rule 33.1 and in cases decided under Rule 52(a), and dates back at least to Rule 373, even though none of those rules mentions or alludes to preventing surprise to the non-objecting party. Undoubtedly, the net effect of complying with Rule 33 should be that the party urging waiver is not surprised by a point on appeal. But whether or not opposing counsel is or should have been aware of the complaint is not part of the test set out in Rule 33.1–and if it looks like the objection was sufficiently specific to make the trial court aware, then protestations of surprise by an advocate probably won't be real persuasive. This might be especially true if you had tools available at trial to protect yourself, in response to whatever the party asserting error did. Sometimes, courts will not necessarily have any pity on you if you do not avail yourself of tools available to you. *Wal-Mart Stores, Inc. v. McKenzie*, 997 S.W.2d 278, 279-280 (Tex. 1999) (in a case decided under Rule 52(a), held, when a plaintiff could have amended his pleadings post-trial to assert a federal cause of action, the failure of the defendant "to resolve the legal issue [i.e., that the state cause of

action asserted by plaintiff only allowed equitable relief] before the trial court submitted the case to the jury" did not deprive the plaintiff of the ability to amend his pleadings; "[t]hus, [plaintiff's] claim that the timing of [defendant's] objection left him without recourse to cure any pleading defect is without merit.").

c. Is it enough that your objection on appeal comports with or is related to the objection you make at trial–or do the two have to be the "same," and the objection at trial had to enable the trial court to understand the "precise" nature or the alleged error?

This leads us to consider whether there are any tests which courts have suggested to assist in interpreting and applying the requirement of Rule 33.1 that the party "stated the grounds . . . with sufficient specificity to make the trial court aware of the complaint." Rule 33.1(a)(1)(A). Here are some which have been suggested:

- whether the objection made at trial "comport[s] with" the complaint on appeal. *Cajun Constructors, Inc. v. Velasco Drainage Dist.*, 380 S.W.3d 819, 827 (Tex. App.–Houston [14th Dist.] 2012, pet. denied), (citing *See Lundy v. Masson*, 260 S.W.3d 482, 507 (Tex. App.—Houston [14th Dist.] 2008, pet. denied), which in turn cited *State Dep't of Highways & Pub. Transp. v. Payne*, 838 S.W.2d 235, 241 (Tex. 1992); *Basic Energy*, 367 S.W.3d at 264. "Comport with" seems to have a fairly expansive meaning: " accord with; agree with," despite the fact that *Cajun Constructors* and *Basic Energy* found error was not preserved.
  http://oxforddictionaries.com/us/definition/american_english/comport

- whether the parties' discussions with the court on the record "relate[d] to" the issue on appeal. *Pitts & Collard, L.L.P. v. Schechter*, 369 S.W.3d 301, 312, n. 5 (Tex. App.– Houston [1st Dist.] 2011, no pet.) (dicta). Despite the fact that *Pitts & Collard* invoked the "relate to" test to indicate in dicta that an objection was not sufficiently specific, "related to" is a phrase "very broad in its ordinary usage," and "means to 'have reference to,' 'concern,' 'pertaining to,' 'associated with' or 'connected with.'" *Tex. Dep't of Pub. Safety v. Abbott*, 310 S.W.3d 670, 674-75 n. 2 (Tex. App.–Austin 2010, no pet.); *Crimson Exploration, Inc. v. Intermarket Mgmt., LLC*, 341 S.W.3d 432, 443 (Tex. App.–Houston [1st Dist.] 2010, no pet.).

Several other tests for sufficiency have been invoked by the courts, based in whole or in part on authority decided under Rule 52(a), the precursor to Rule 33.1. Those tests are:

- whether the party "adequately apprise[d] the trial court of the alleged

deficiencies [as to legal and factual sufficiency] in such a way that its objection can be clearly identified and understood." *Basic Energy*, 367 S.W.3d at 263-264. However, it appears this formulation conflated the requirements of Rule 33.1, holdings of courts interpreting Rule 52(a), and the specific language found in the rules governing motions for new trial and motions to modify judgments. *Id.* So this formulation may not be useful in a 33.1 analysis outside the confluence of legal and factual sufficiency challenges and motions for new trial or to modify. And it is subject to any criticism attendant to relying on Rule 52(a).

- whether the objection was specific enough "to enable [the] trial court to under stand [the] precise nature of the error alleged." *Basic Energy*, 367 S.W.3d at 263, citing *Lake v. Premier Transp.*, 246 S.W.3d 167, 174 (Tex. App.—Tyler 2007, no pet.)–which adopted and solely relied on, without discussion, authority decided under Rule 52(a).

- whether the objection on appeal was "the same as" that asserted in the trial court. *Basic Energy*, 367 S.W.3d at 265. However, while this test (which was supported solely with authority decided under Rule 52(a)) may confirm that objections have to be the "same" on appeal and at trial, but it does not provide much illumination as to how we determine whether a trial objection had "sufficient specificity to make the trial court aware of the complaint." Rule 33.1(a)(1)(A).

It may be there is no real helpful test for deciding the specificity issue, other than the plain language of the rule. There are a multitude of situations in which courts have held that specific objections were, or were not, sufficiently specific; we will look at some of those later in the paper. In the meantime, advocates may want to consider the following tools to ensure that the trial court was made aware of their complaint–keeping in mind that the purpose of the rule is "'to ensure that the trial court has had the opportunity to rule on matters for which parties later seek appellate review.'" *In re Smith*, 366 S.W.3d at 286-7; *Richard*, 2013 Tex. App. LEXIS 4813, at *55.

II. Is it arguments that we have to preserve, or issues?

In one case which commented that Rule 33.1 was "formerly" Rule 52(a), the Supreme Court held that because the petitioners conceded "they did not make this argument to the trial court . . .their complaint has not been preserved." *Operation Rescue-National v. Planned Parenthood*, 975 S.W.2d 546, 569 n. 73 (Tex. 1998). But it does not appear the Court was using the word "argument" to signify one of several lines of reasoning that would support a single objection–it appears the Court was using the word "argument" to refer to an objection. The "argument" which the petitioners did not make at the trial court was that "punitive damages cannot be assessed for conspiracy

absent a finding of actual damages for conspiracy." *Id.*

III. Things to keep in mind in order to preserve error in the trial court.

You cannot beat a brief which fully covers all the nuances of a point, and which was argued at length to the court, to provide "sufficient specificity to make the trial court aware of the complaint." But there are some things you can incorporate into your general routine at trial which might help provide the specificity necessary to preserve appeal.

a. Encourage conversations *on the record.*

i. Get the trial court to talk–and rule– *on the record*–and keep in mind that sometimes an exasperated judge will say the darnedest things.

What better way to show that the trial court was aware of your complaint than to have her or him say at the hearing on the motion for new trial that "I remember" an objection you previously made about excluding certain evidence? *Johnson v. Luchin*, 2012 Tex. App. LEXIS 8055, **15, 16 (Tex. App.– Houston [14th Dist.] Sept. 25, 2012). And isn't it great when the court of appeals specifically notes that "the dialogue in which the attorneys and the trial judge engaged, the record shows that the request by Jason's attorney for further instructions was apparent from the context, and the trial court implicitly denied the request." *Watts v. Watts*, No. 04-11-00777-CV, 2012 Tex. App. LEXIS 8978, *3, n. 1 (Tex. App.–San Antonio Oct 31, 2012). And it undoubtedly helps your error preservation argument when the record reflects that, in a hearing outside the presence of the jury, the trial court's comment that "Well, I understand your objection [that the other side's witness had injected insurance into the case], I overrule that objection. I overruled that at the time you made it"–that's the kind of thing that will lead the court of appeals to conclude that "the trial court clearly understood the basis of [the] general objection" which "has been preserved for our review." *Nguyen v. Myers*, 2013 Tex. App. LEXIS 2085, *13, 14 (Tex. App.–Dallas Feb. 14, 2013); *see also K.P. v. State*, 373 S.W.3d 198, *13 (Tex. App.–Beaumont 2012) (orig. proceeding) ("in light of the trial court's suggestion that it would conduct further proceedings, K.P.'s efforts were also sufficient to deem the trial court to be aware that K.P. objected to the trial court's failure to rule on his motions."). When the trial judge says "let the record show that this matter's already been ruled on twice, that this request that's made is carefully considered by this court and denied," that's at least one indicia that the trial court was aware of the objection. *Babcock v. Northwest Memorial Hospital*, 767 S.W.2d 705, 707-708 (Tex. 1989). Finally, when the court tells you to go do it yourself without giving you the relief you want, "the trial court clearly understood [the] request and just as clearly refused to grant it." *Ford Motor Co. v. Castillo*, 279 S.W.3d 656, 661-62 (Tex. 2009) (held, trial court telling party to conduct its own investigation as to outside influence in the drafting of a

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note from the jury preserved error as to request to conduct discovery on jury misconduct).

1. Get on the record *who the trial judge is*–let the trial judge's experience and insight shine through, thus enhancing your ability to argue on appeal that they understood what you were talking about.

If your trial judge took 75 jury verdicts in private practice, has sat on the bench for a decade, is board certified in two areas, has been reversed or affirmed (as a judge or as a lawyer) on a topic, or has spoken or published about an issue, etc.–well, the trial judge's abilities, intelligence, experience, and competence should have something to do with whether they were of a particular issue. So, through the process of the trial, start lining the record (perhaps outside the jury's presence) with the trial judge's experience and accomplishments, especially as they relate to the issues of most interest to you.

2. If the trial judge asks you to clarify your position–then clarify it. If you don't, there might be an implication the trial court was not made aware of your complaint.

This is sort of the express flip side of the prior section–no matter how tuned in the trial court is, if the judge asks you to "clarify" your objection, for goodness sake, don't just reiterate your "general statement that the argument was 'improper'"–that will pretty much lead the court of appeals to conclude that your objection "preserved nothing." *Gardner Oil, Inc. v. Chavez*, 2012 Tex. App. LEXIS 3655, *28 (Tex. App.– Tyler May 9, 2012, no pet.). And take notice that sometimes a judge's comments will show they did not understand the thrust of your objection; when that happens, take the opportunity to diplomatically try to get the point across to the judge. *Phillips v. Bramlett*, 288 S.W.3d 876, 883 (Tex. 2009) (held, objection that *argument* about other verdicts in the county not preserved when judge responded "'This is his argument, and it is not testimony.'").

A. Which brings to mind-do we judge the trial court's "awareness" using a subjective standard-i.e., whether this particular trial judge was aware-or an objective standard-i.e., whether this trial judge should have been aware.

The last case mentioned above brings to mind a question that, so far as I have found, has not been directly addressed by any court: as to the trial court's "awareness," do we apply an objective standard, or a subjective standard. In *Phillips*, here is what

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happened:

> Jury argument: "[Jury's] verdicts [in "this very conservative community"] didn't send much of a message [to doctors] at all."
> Objection: "I object to any testimony about the propriety of other trials and the verdicts . . . ."
> Ruling: "This is his argument, and it is not testimony."

Phillips v. Bramlett, 258 S.W.3d 158, 170 (Tex. App.-Amarillo 2007, rev'd, remanded on other grounds by 288 S.W.3d 876) Subsequently, the argument was repeated without objection, and there was no express ruling. The Court of Appeals recited the foregoing, and then held:

> "From the language . . . the trial court did not perceive the objection to be directed toward improper jury argument;"
> "[T]he court simply clarified that the statement was not evidentiary;" and
> Context does not provide the specificity, and there was no ruling.

Id. So the Court of Appeals held that error was not preserved.

When the Supreme Court addressed this matter, it mentioned that the argument was repeated without objection, and then held that:

> "The court of appeals here concluded that the . . . trial court's response indicated that it did not understand the objection . . . ."
> "We agree that this objection, without more, did not preserve error in this case."

Phillips, 288 S.W.3d at 883.

It is possible that the Supreme Court's holding that "without more, [this objection] did not preserve error in this case" could mean that error was waived by the failure to object to the later repetition of the argument, or the lack of a trial court ruling, or to imply there was a failure to satisfy all the requisites of for preserving error concerning improper jury argument. But set those aside for the moment, and accept the Supreme Court's statement that "the trial court's response indicated that it did not understand the objection." While it is clear the trial court distinguished between "testimony" and "argument" in responding to the objection, if that indicates the trial court did not understand the objection, doesn't the objection and response merit a discussion as to whether we should use an objective or subjective standard, and whether a "reasonable" trial court should have understood the objection to be directed toward improper argument?

I have not found a case which expressly addressed whether an objective standard

should ever be applied in deciding whether a trial court should have been aware of the objection, but perhaps the Supreme Court and Courts of Appeals should look for opportunities to specifically address that question.

3. Do not overlook the implication which comes from getting a ruling on the record, or the trial court's comment about a ruling.

While this paper will not deal with the requirement of Rule 33.1 that you obtain a ruling from the court, do not overlook the fact that eliciting a ruling from the court can serve as a springboard for arguing that, when taken in context, the court's ruling shows it was aware of the objection you were making. *Braglia v. Middleton*, 2012 Tex. App. LEXIS 1647, *9-10 (Tex. App.–Corpus Christi-Edinburg Mar. 1, 2012, no pet.) (denial of an oral request for continuance of trial on the heels of the last-minute withdrawal of nonsuit preserved error, especially when counsel argued that the withdrawal of the nonsuit was a "'180-degree' turnaround of which [counsel] had little or no notice."); *see also Scott's Marina at Lake Grapevine Ltd. v. Brown*, 365 S.W.3d 146, 154 n. 3 (Tex. App.–Amarillo 2012 pet. denied) (overruling of objection which counsel said was "based on the hearing that we've had outside the presence of the jury with regard to *Daubert* and those matters.")

ii. Get opposing counsel to talk *on the record.*

And it is not just comments of the trial court that might preserve error. For example, when an "objection sparked a discussion spanning roughly the next twenty-five pages of reporter's record," it makes it fairly easy for the court of appeals to "conclude that the judge implicitly overruled [the objection as to the jury instruction] by failing to change the jury charge at the conclusion of the charge conference." *State v. Colonia Tepeyac, Ltd.*, 2012 Tex. App. LEXIS 6407, *5-6 (Tex. App.–Dallas Aug. 2, 2012, no pet.).

iii. Have the jurors talk *on the record.*

At least during voir dire–their answers may show that your objections about bias, prejudice, the need for further questioning, etc., are valid. *In re Commitment of Hill*, 334 S.W.3d 226, 229 (Tex. 2011).

iv. Make sure you talk *on the record.*

Finally, take note of the obvious–your comments on the record can preserve error. For example, even though a "motion for new trial is [not] a model of clarity with respect to his first issue on appeal," when the record supplements the motion by showing that counsel "raised the issue of whether an agreement between the parties existed at the hearing on his motion for new trial," that will preserve error. *In re Marriage of Western*,

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2012 Tex. App. LEXIS 6432, *5-7 (Tex. App.–Waco Aug. 2, 2012, no pet.). Even doing no more than objecting to testimony "based on the hearing that we've had outside the presence of the jury with regard to *Daubert* and those matters" can preserve error. *Scott's Marina at Lake Grapevine Ltd. v. Brown*, 365 S.W.3d 146, 154 n. 3 (Tex. App.–Amarillo 2012 pet. denied).

1. But, while talking, don't take a position which undermines the relief you actually want.

For example, if you contend that you have the unilateral right to appoint an arbitrator under an arbitration agreement, then don't request that the trial court "appoint an arbitrator," and don't just argue that the trial court should "enforce the Rule 11 Agreement . . . [which] broadly addressed the validity and enforceability of the arbitration agreement and did not reference [your] right under the arbitration agreement to [unilaterally] select an arbitrator." *In re Directory Assistants, Inc.*, 2012 Tex. App. LEXIS 1662, *22-23 (Tex. App.–Corpus Christi-Edinburg, Feb. 29, 2012) (orig. proceeding).

b. Context can eliminate the need for stating the grounds for a ruling with specificity–but do not let context lull you into complacency.

Rule 33.1 expressly excuses a party from stating the grounds for the ruling if "the specific grounds were apparent from the context." Several cases discussed above, and some which will be discussed below, have rightfully relied on the context of the objection or complaint to find that error was preserved. But relying on context is dangerous. In any case which plays out over an extended period of time, and especially in multi-party, class action, or mass tort type litigation, the lawyers (and sometimes, judges) start speaking in a shorthand or code that they may understand, but that a newcomer to the case–like a court of appeals–may neither understand nor appreciate. For example, merely because counsel said "'[b]ut I'm the—I'm the plaintiff in that [other] cause'" and that "'I'd like my objection noted for the record'" does not preserve an objection that a consolidation of the two cases would deprive her clients "of the opportunity to present evidence or argument in support of their claims." *Tate v. Andrews*, 372 S.W.3d 751, 754 (Tex. App.–Dallas 2012, no pet.).

And do not overlook the temporal component of context, or that context can work against you if you are not specific in the grounds you state. While "counsel originally objected to the letter's admission into evidence on both statute of frauds and best evidence grounds," but after taking the witness on voir dire " reiterated his objection [only] on statute of frauds grounds, but he did not reiterate his best evidence objection," one court of appeals held that "[w]e are not convinced that Vela's counsel either made the trial court sufficiently aware of his best evidence objection or that he pursued that

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objection to an adverse ruling by the trial court." *Vela v. Colina*, 2011 Tex. App. LEXIS 8168, *7 (Tex. App.–Corpus Christi-Edinburg Oct. 13, 2011, no pet.).

c. You do not have to mention specific cases or statutes by name or number–but if you choose to do so, make sure you get them right.

You don't have to mention the seminal case or statute by name or number to preserve error–but if you choose to cite a statute make sure you get the particular subsections correct, because otherwise you would have been better off making a general reference to the statute. *Thota v. Young*, 366 S.W.3d 678 (Tex. 2012) (held, do not have to cite *Casteel* to preserve presumed harm analysis); *Russell v. Russell*, 2012 Tex. App. LEXIS 6925, *9 (Tex. App.–Houston [14th Dist.] Aug. 21, 2012, pet. denied) (Despite not specifically arguing the application of section 157.167, the party preserved error because "in her petition, [she] specifically requested that the trial court award attorney's fees. Also, in her motion for new trial, she presented evidence regarding the reasonable and necessary fees incurred."); *see also Congleton v. Shoemaker*, 2012 Tex. App. LEXIS 2880, *3-4 (Tex. App.–Beaumont Apr. 12, 2012, pet. denied) (held, an objection that "section 31.002(b) of the Civil Practice and Remedies Code did not authorize the powers listed in the proposed order" was sufficiently specific to advise the trial court of the basis for a complaint "that the trial court erred in granting the receiver the authority of a master in chancery."). *Compare with Wilson v. Dallas Indep. Sch. Dist.*, 376 S.W.3d 319 , 327-28 (Tex. App.–Dallas 2012, no pet.) (citing the a different subsection or statute at trial did not preserve error as to an objection concerning a different subsection or statute).

d. When objecting to experts, use the buzzwords.

An objection that damage estimates of expert "are not based upon any factual foundation" and are just hypothetical estimates will preserve error that "testimony is 'unreliable, incompetent and inadmissable' and there is no evidence 'to support an award of damages or to support the amount of damages awarded.'" *Kerr-McGee Corp. v. Helton*, 133 S.W.3d 245, 252-53 (Tex. 2004). And you can preserve error as the to lack of an expert's reliability by objecting that "the failure of this witness's methodology to meet the reliability standards as articulated by the Supreme Court in Gammill versus Jack William[s] Chevrolet as applying to all expert testimony." *Guadalupe-Blanco River Auth. v. Kraft*, 77 S.W.3d 805, 807 (Tex. 2002).

e. Do More Than You Have to Do–Don't Just File Something in Passing and Walk Away.

Or at least consider doing more than you think you have to. A perfect example is in the area of the jury charge, which I said earlier in this paper I would not delve into, and will not, except for these examples. The jury charge rules (Rules 271-279, and

especially 274) have very specific and extensive requirements for error preservation. When discussing error preservation related to the jury charge, courts often conflate, without distinction, the requirements of Rule 33.1 and the requirements of the jury charge rules. *See Basic Energy*, 367 S.W.3d at 263-264; *Dallas County v. Crestview Corners Car Wash*, 370 S.W.3d 52, 53-54 (Tex. App.–Dallas 2012, no pet.). That is not a criticism of those cases–it is merely to point out that the analysis used in those cases might not always be helpful in addressing whether error has been preserved in a case not involving a jury charge. And sometimes it is difficult to know exactly who has the burden to obtain a finding on a particular issue, which merely emphasizes the need to carefully identify the elements and burdens of causes of action, defenses, and exceptions to defenses to make sure you do not overlook obtaining a finding you need to obtain. *Dynegy v. Yates*, 2013 Tex. LEXIS 679, *10 (Tex. Aug. 30, 2013) (in a non-Rule 33.1 case, the Court held that "the burden was on [the plaintiff] to secure favorable findings on the main purpose doctrine [which was an exception to the statute of frauds defense pled by the defendant]. [The plaintiff's] failure to do so constituted a waiver of the issue under Rule 279 of the Texas Rules of Civil Procedure.").

But the jury charge area is instructive in pointing out that it may be provident to do more than you think you have to when trying to preserve error:

> Despite not having the burden to tender a correct question, TCHR submitted a proposed question that would only allow a finding of liability based on Morrison's termination—again indicating to the Court the over-broad nature of the question. We conclude the trial court was sufficiently put on notice and aware of TCHR's objection [so as to preserve the *Casteel* complaint].

Tex. Comm'n on Human Rights v. Morrison, 381 S.W.3d 533, 536-37 (Tex. 2012); *see also Thota v. Young*, 366 S.W.3d 678, 691 (Tex. 2012) (error preserved when party "made a specific and timely no-evidence objection to the charge question on Ronnie's contributory negligence and also specifically objected to the disputed instruction on new and independent cause. . . . [*And*] submitted a proposed charge to the trial court, which omitted any inclusion of Ronnie's contributory negligence and the new and independent cause instruction and presented the charge according to Young's theory of the case.").

This same concept applies outside the jury charge context. For example, if you want to trial court to rely on federal law instead of state law, give the trial court that federal authority. *In the Interest of B.A.L.*, 2012 Tex. App. LEXIS 1502, *8-10 (Tex. App.–Amarillo Feb. 27, 2012, no pet.).

f. Merely throwing paper at the trial court may not preserve error.

Emphasizing the need to do more than you have to–and, at least as to the jury charge, not just filing something and not bringing it to the trial court's attention in a hearing–is the following Supreme Court's holding, the importance of which is highlighted by juxtaposing it against the holdings in *Morrison* and *Young*, *supra*:

> Filing a pretrial charge that includes a question containing that subpart, when no other part of the record reflects a discussion of the issue or objection to the question ultimately submitted, does not sufficiently alert the trial court to the issue. A charge filed before trial begins rarely accounts fully for the inevitable developments during trial. . . . we have held that a party may rely on a pretrial charge as long as the record shows that the trial court knew of the written request and refused to submit it. *Alaniz*, 907 S.W.2d at 451-52. Thus, error was preserved where a party filed a pretrial charge, and the trial court used the very page from that charge that contained the requested question but redacted one of the subparts and answer blanks, and the party objected to the omission. *Id.* ***Again, trial court awareness is the key.*** Although trial courts must prepare and deliver the charge, we cannot expect them to comb through the parties' pretrial filings to ensure that the resulting document comports precisely with their requests—that is the parties' responsibility. It is impossible to determine, on this record, whether the trial court refused to submit the question, or whether the omission was merely an oversight. *Cf. Payne*, 838 S.W.2d at 239. As the court of appeals concluded, "[t]he trial court's overruling of [Protech's] objection does not show that it was refusing to submit a jury question or blank regarding attorney's fees incurred for preparation and trial," 323 S.W.3d at 585, and the record does not otherwise reflect a refusal to submit the question. We conclude the issue was not preserved for appellate review.

Cruz v. Andrews Restoration, Inc., 364 S.W.3d 817, 831 (Tex. 2012) (***emphasis supplied***).

In applying *Cruz*, it is important to note that, in the context of objections to the jury charge, Rule 273 specifically requires that "requests [for written questions, definitions, and instructions to be given to the jury] shall be prepared and presented to the court . . .within a reasonable time *after* the charge is given to the parties or their attorneys for examination." TEX. R. CIV. P. 273 (*emphasis supplied*). In other words, one of the rules governing jury charge specifically addresses the timing of when a requested question, definition, or instruction must be presented to the trial court. *Alaniz*, mentioned in *Cruz*, recognizes an exception to that Rule-based requirement when "the record shows that the trial court knew of the written request and refused to submit it." *Cruz*, 364 S.W.3d at

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831, referring to *Alaniz*, 907 S.W.2d at 451-52.

But even outside the jury charge context, it has been held that merely including a section in a verified answer about a lease's consequential damages section, without thereafter mentioning it in the trial court, "does nothing to make the trial court aware that [the party] believed the moving expenses qualified as consequential damages." *Breof BNK Tex., L.P. v. D.H. Hill Advisors, Inc.,* 370 S.W.3d 58, 68 (Tex. App.–Houston [14th Dist.] 2012, no pet.). "'With literally hundreds and perhaps thousands of cases on their docket, it is only reasonable that we require litigants to affirmatively direct the judge's attention to their complaints so the court can make a deliberate decision.' *Cecil v. Smith*, 804 S.W.2d 509, 515 (Tex. 1991) (Cornyn, J., dissenting)." *Id. see also In re Smith*, 366 S.W.3d 282, 286-287 (Tex. App.–Dallas 2012) (orig. proceeding) (the "bare assertion [that Defendants had not carried their burden to plead sufficient facts as to potentially responsible third party's liability], buried in a footnote, was not sufficient to satisfy Lewis's burden under section 33.004(g)(1) to establish that relators failed to meet their pleading burden.").

To the extent non-jury charge cases rely (directly or indirectly) on reasoning in jury charge cases and, hence, the specific timing requirements of Rule 273 (which only applies in the jury charge context), they might be subject to attack. But they do remind us that the test is whether the trial court was aware of the objection, and the need to make sure the record reflects that awareness.

g. Get those informal, off-the-record discussions *on the record.*

The foregoing all underscore the need to have all hearings recorded by the court reporter–a need that often understandably goes unsatisfied in jury trials, which invariably involve hearings outside the presence of the jury, in chambers, in passing, and, with the end of trial drawing near, the inclination of everyone to just get the case to the jury. But if you will make it a practice of starting every discourse with the court by looking at the court reporter and asking her or him to respond to "Are you ready?", or "Can you hear us alright?," you will find that bit of polite courtesy also reminds you to make sure you are preserving error.

If the judge insists on informal discussions in chambers without the presence of the court reporter–an admittedly valuable tool for moving things along–then make it a point when back in the court room, immediately before the jury is brought back, to ask the judge if you can take one minute to make a record of the discussions in chambers–and then take no more than one minute to do so. Doing something like that may also help you show that the trial court made a ruling. Remember the counsel who preserved error who got the judge to overrule his objection which the counsel said "based on the hearing that we've had outside the presence of the jury with regard to *Daubert* and those

matters." *Scott's Marina at Lake Grapevine Ltd. v. Brown*, 365 S.W.3d 146, 154 n. 3 (Tex. App.–Amarillo 2012 pet. denied). If the trial court denied your motion for continuance in an informal, off-the-record exchange, say so on the record. *In the Interest of R.R.*, 2011 Tex. App. LEXIS 8394, *6-7 (Tex. App.–Houston [1st Dist.] Oct. 20, 2011, pet. denied) (defense counsel said "[b]efore we get started, I wanted to renew my objection to the motion for continuance, which was previously denied."

And you might, from an error preservation standpoint, hope that opposing counsel rises to the bait and insists on rearguing things, thus making it even more likely that your complaint will be fleshed out.

IV. Some things to keep in mind if you argue on appeal that error was preserved.

First of all, keep in mind those types of objections and complaints which can be raised for the first time on appeal. We will not go into them now, but a short synopsis of the same can be found at Martin Seigel, *How to Beat Waiver Arguments*, 28 TEXAS LAWYER 12, June 18, 2012, at 22. Seigel reminded us of other ways around a situation if your issue really was not brought to the attention of the trial court: the waiver-proof issues (lack of subject matter jurisdiction, standing, mootness, most versions of sovereign immunity, the law of the case doctrine, attacks on void orders, defects in the substance of affidavits and questions about the judge's authority to hear the case, etc.); a new rule of law announced after the trial court's decision; plain error; miscarriage of justice; fundamental error; and, finally, when the other side just doesn't notice that you have argued something your party did not argue below (the waiver of waiver). *Id.*

But when you have to face a TRAP 33.1 analysis, here are a few things to keep in mind in deciding how to approach your problem.

a. The objection does not have to be perfect, as specific as it could have been, and it can be inartfully worded–so long as it indicates to the trial court the trial court's error.

Just because the objection was not as specific as it could have been does not mean it has been waived. *In re D.I.B.,* 988 S.W.2d 753, 760 (Tex. 1999) (held, questioning "whether the trial court's statement of the law regarding probation [i.e., that 'only a jury, not the court, could grant probation'] was accurate" were "sufficient to call the issue to the trial court's attention" even though the "objections were not as specific as they might have been."). And just because it "could have been clearer," error will be preserved if "a fair reading of the record in context shows that counsel presented specific grounds for his motion for continuance and secured a ruling on it." *In the Interest of R.R.*, 2011 Tex. App. LEXIS 8394, *6-7 (Tex. App.–Houston [1st Dist.] Oct. 20, 2011, pet. denied) (defense

counsel said "[b]efore we get started, I wanted to renew my objection to the motion for continuance, which was previously denied.") If the court rules that one of only two options is correct, and the party objects that the ruling is not accurate, error is preserved. *Id.* Similarly, in a case decided under Rule 52(a), even though an objection as to the trial court allowing a previously undisclosed witness to testify was "inartfully worded," it still preserved error. *McKinney v. Nat'l. Union Fire Ins. Co.*, 772 S.W.2d 72, 74 n. 3 (Tex. 1989) (party objected that "we have had no previous notice that they intended to call this man to testify as allowed under the Rules of Civil Procedure, that his testimony should not be allowed as he was not identified." The Court held that a "specific objection is one which enables the trial court to understand the precise grounds so as to make an informed ruling, affording the offering party an opportunity to remedy the defect, if possible." *Id.*). One case has held that error was preserved because of the objection or action of counsel "indicating to the trial court" the overbroad nature of the trial court's ruling. *Texas Commision on Human Rights v. Morrison*, 381 S.W.3d 533 (Tex. 2012) (jury charge).

b. Exhaustively mine the record.

As the following suggestions will show, your pitch for error preservation may not end with just looking at the two or three lines–or even pages–where something was discussed and ruled on. Other comments, filings, draftings, or rulings by the court, by the other party, by your trial lawyer, may show that, at least in context, the objection made by your trial lawyer was sufficiently specific to make the trial court aware of the complaint.

c. Make sure the record supports your position.

Just make sure that "the records excerpts relied on" by you show that the "context of the [subject matter of the]. . . discussion" made the trial court aware of the point you raise on appeal–because otherwise, the discussions show you did not preserve error. *Pitts & Collard*, 369 S.W.3d at 312, n. 5. For example, just because your trial counsel and opposing counsel discuss something on the record ad nauseum, and the trial court says something like "the way to resolve this is that this is a suit brought by [the plaintiff partnership] for 100 percent and then . . . however much the jury awards, we cut it in half," that does not mean that the court has ruled on, or been made aware of, an objection about the segregation of the defendant's claim for fees against the non-settling partner in the partnership. *Pitts & Collard*, 369 S.W.3d at 312, n. 5. Or if you intend to argue, for example, that the trial court misinterpreted federal law in calculating child support, then make sure you provide the trial court with that federal law–otherwise, the court of appeals will conclude that "the trial court was not presented with the relevant federal law and the relevant evidence to have arrived at a conclusion regarding the precise impact child support payments would have on SSI benefits. . . . Because the proper application of federal law was not presented to the trial court as such, we will not conclude that the

trial court abused its discretion by misinterpreting or misapplying federal law . . . Indeed, it appears that the trial court fully understood that child support payments would negatively impact SSI benefits and then applied Texas family law principles to the facts of the case." *In the Interest of B.A.L.*, 2012 Tex. App. LEXIS 1502, *8-10 (Tex. App.–Amarillo Feb. 27, 2012, no pet.).

d. Even in a case not involving jury charge error, look over the Supreme Court's rulings on jury charge cases to see if they support preservation in your case by analogy.

As pointed out earlier, many Supreme Court cases which deal with error preservation in the jury charge context find that error was preserved–even under the arguably stricter specificity requirements of Rule 274. So it might bear keeping in mind the various factors which supported a holding of error preservation in those cases, like:

- the submission of an objection to a jury question that it did not "accurately reflect the law," and submitted in writing a proposed question with the correct definition, and cases on which you rely, that will preserve error as to a jury question. *Ford Motor Company v. Ledesma*, 242 S.W.3d 32, 43-44 (Tex. 2007);

- A party does not have to state it wants two apportionment jury questions instead of one to preserve error, when it objects that the damage question could include recovery on a "legally non-viable theory." *Romero v. KPH Consol., Inc.*, 166 S.W.3d 212, 228-229 (Tex. 2005). The party also objected to the malicious credentialing question; if the trial court had sustained that objection there would have been no problem with the apportionment question. *Id.*

- In a case decided under Rule 52(a), a defendant preserved its complaint that the trial court refused to ask the jury about the plaintiff's knowledge of the culvert, based in some part because the following things showed that the trial court was "aware that the [plaintiff's knowledge of the culvert was disputed]": (1) the trial court's failure to submit the plaintiff's premise liability theory, which "could hardly have been an oversight;" (2) "very fact that [the trial court] included instructions concerning special defects in the charge [which] indicates that the trial court decided that the culvert was a special defect and not a premise defect;" and (3) "the trial court [allowing] the parties to present evidence and argument concerning [the plaintiff's] knowledge, which would have been irrelevant if the culvert was a special defect." *State v. Payne*, 838 S.W.2d 235, 239 (Tex. 1992).

- In *Payne*, the jury question requested by the Defendant also preserved error by asking the jury whether the plaintiff "had actual knowledge that the culvert was at the location in question." *Id.* Even though it was a specific question, instead of the broad form submission called for by TEX. R. CIV. P. 277, it "clearly called the trial court's attention to the State's complaint because it was the sole element of premise defect liability missing from the charge." *Id.*, at 239-240.

e. Look to other things that happened in the trial court.

This gets back to fully mining the record. The other things that you should look at include:

- juror's responses to voir dire questions. *In re Commitment of Hill*, 334 S.W.3d 226, 229 (Tex. 2011) (a juror's response to a voir dire question, for example, which might help "establish the propriety of the question and the trial court's abuse in denying . . . the right to ask it [of other jurors]."));

- admissions or contentions in the other side's pleadings. *Phillips v. Phillips*, 820 S.W.2d 785, 790 (Tex. 1991) (In a case decided under Rule 52(a), when the plaintiff pleaded "that she was 'entitled to damages . . . in the amount of ten (10) times all losses suffered,'" her "own pleading establishes that the contractual provision she relies upon is an unenforceable penalty under our decisions . . . as a matter of law," and the defendant "was not required to plead penalty as an affirmative defense.").

I. Look at the rulings and statements of the trial court, and do not limit yourself to looking only at ruling you complain of.

So as not to rehash the material set out above about the importance of trial counsel getting the trial court to talk and rule on the record, please refer back to the suggestions made there. But do not limit your review of the record to the specific line, lines, or pages in the record which contain the ruling you complain of. For example, in a case decided under Rule 52(a), a defendant preserved its complaint that the trial court refused to ask the jury about the plaintiff's knowledge of the culvert, based in some part because the following things showed that the trial court was "aware that the [plaintiff's knowledge of the culvert was disputed]": (1) the trial court's failure to submit the plaintiff's premise liability theory, which "could hardly have been an oversight;" (2) "very fact that [the trial court] included instructions concerning special defects in the charge [which] indicates that the trial court decided that the culvert was a special defect and not a premise defect;" and (3) "the trial court [allowing] the parties to present evidence and argument concerning [the plaintiff's] knowledge, which would have been irrelevant if the culvert

was a special defect." *State v. Payne*, 838 S.W.2d 235, 239 (Tex. 1992).

ii. Argue that the objection made, and relief requested, at trial are consistent with and imply the objection made on appeal.

To some extent, this is a corollary of the fact that the objection does not have to be perfect nor even as specific as it should have been. *Wheeler v. Green*, 157 S.W.3d 439, 441-42 (Tex. 2005) (held, asserting that "requests should not have been deemed admitted, the summary judgment should be set aside, and that Sandra would pay Darrin's costs if it was" was "sufficient to give the trial court notice of her request to withdraw deemed admissions and file a late response to the" summary judgment motion.). Other examples which fall in this category are:

- "At the hearing on Shoemaker's post-judgment application for turnover relief, Congleton argued that section 31.002(b) of the Civil Practice and Remedies Code did not authorize the powers listed in the proposed order. Congleton's objection was sufficiently specific to advise the trial court of the basis for his complaint [that the trial court erred in granting the receiver the authority of a master in chancery]." *Congleton v. Shoemaker*, 2012 Tex. App. LEXIS 2880, *3-4 (Tex. App.–Beaumont Apr. 12, 2012, pet. denied).

- Objecting that "that there was no evidence the sanctions were warranted and that the trial court failed to specify the reasons for imposing sanctions" was sufficiently specific "to make the trial court aware of the complaint [to appeal sanctions for allegedly filing a frivolous motion]." *Loya v. Loya*, 2011 Tex. App. LEXIS 8870, *9-10 (Tex. App.– Houston [14th Dist.] Nov. 8, 2011, no pet.).

- Asking to sever termination cases before trial against parents "because of potential conflicts between them," and after trial"because evidence showed actual conflict existed, and if he had only represented mother he would have pointed the finger at terminating only the father" was held to preserve "the argument concerning conflict of interest." *In the Interest of B.L.D.*, 113 S.W.3d 340, 345 (Tex. 2003);

- A motion to disregard a jury finding on modification, or alternatively, to render an order specifying a fixed geographical area for the children's residence was held to have preserved a legal sufficiency challenge to the modification finding as to the joint managing conservatorship. *Lenz v. Lenz*, 79 S.W.3d 10, 13-14 (Tex. 2002);

- In a case under Rule 52(a), an objection to the improper dismissal of a juror was preserved because the trial court stated that "pursuant to the provisions of Rule 292, the Court on its own motion has decided to go ahead and proceed with 11 jurors," and the attorney objected, suggesting "the proper remedy was not disqualification, but a further recess to allow the juror to return" after the inclement weather passed. *McDaniel v. Yarbrough*, 898 S.W.2d 251, 252 (Tex. 1994).

f. Keep in mind that a successful motion for j.n.o.v. preserves a whole host of stuff.

This might not have anything to do with specificity, but if you have prevailed on a motion j.n.o.v., you may also present issues on any ground that would vitiate the verdict or preclude reinstating the verdict, including grounds not raised in the j.n.o.v. *Ingram v. Deere*, 288 S.W.3d 886, 893 (Tex. 2009).

V. Some things to keep in mind if you are arguing on appeal that error was <u>not</u> preserved.

First of all, remember that the overwhelming majority of cases on the books hold that error was not preserved. Never overlook the opportunity to argue that "it is not clear from the record [even in context] what [the party's] objection was, whether he argued that the question was prejudicial, or whether he objected on some other grounds." *Parsons v. Greenberg*, 2012 Tex. App. LEXIS 888, *17-18 (Tex. App.–Fort Worth Feb. 2, 2012, pet. denied).

But not all your error preservation fights will be that clean, and it is sometimes difficult to ferret out cases that expressly hold that an objection or complaint was not specific enough is sometimes difficult. But here are some concepts and examples to keep in mind:

a. Your initial point should be that the insufficiently specific objection deprive you of the ability to cure the alleged deficiency at issue at a time when you had the ability to do so.

Keep in mind that courts have said that a party should not be able "to waive, consent to, or neglect to complain about an error at trial and then surprise his opponent on appeal by stating his complaint for the first time." *Mansions in the Forest, L.P. v. Montgomery County*, 365 S.W.3d 314, 317 (Tex. 2012), citing *In re B.L.D.*, 113 S.W.3d 340, 350 (Tex. 2003) and *Pirtle v. Gregory*, 629 S.W.2d 919, 920 (Tex. 1982) (per curiam). While Rule 33.1 does not say anything about protecting the non-objecting party, and the foregoing holding is based on authority decided under Rule 373, you should invoke this

policy consideration *especially* if you can show things you could have done in the trial court in response to a sufficiently specific objection. But anticipate, and be ready to answer a question about, why you did not do those things anyway.

b. Merely requesting relief without saying why one is entitled to it may not preserve error.

For example, a party which said he wanted to "call 'a rebuttal witness' without identifying the witness or its proposed line of questioning" did not preserve error as to a complaint that the party "needed more time to call Allice as a rebuttal witness to point out inconsistencies with his testimony and his discovery responses." *1.9 Little York, Ltd. v. Allice Trading Inc.*, 2012 Tex. App. LEXIS 2112, *22-23 (Tex. App.–Houston [1st Dist.] Mar. 15, 2012, pet. denied).

c. An objection buried in a filing does not make the trial court aware of anything.

Failing to bring to the trial court's attention an objection made in a filing, at least when that filing is not thereafter brought to the trial court's attention. *Cruz v. Andrews Restoration, Inc.*, 364 S.W.3d 817, 829-831 (Tex. 2012) (held, error not preserved as to jury charge by an appropriately worded proposed jury question which was not thereafter brought to the trial court's attention or rule on by the trial court). Outside the jury charge context, it has been held that merely including a section in a verified answer about a lease's consequential damages section, without thereafter mentioning it in the trial court, "does nothing to make the trial court aware that [the party] believed the moving expenses qualified as consequential damages." *Breof BNK Tex., L.P. v. D.H. Hill Advisors, Inc.,* 370 S.W.3d 58, 68 (Tex. App.–Houston [14th Dist.] 2012, no pet.). "'With literally hundreds and perhaps thousands of cases on their docket, it is only reasonable that we require litigants to affirmatively direct the judge's attention to their complaints so the court can make a deliberate decision.' *Cecil v. Smith*, 804 S.W.2d 509, 515 (Tex. 1991) (Cornyn, J., dissenting)." *Id. see also In re Smith*, 366 S.W.3d 282, 286-287 (Tex. App.– Dallas 2012) (orig. proceeding) (the "bare assertion [that Defendants had not carried their burden to plead sufficient facts as to potentially responsible third party's liability], buried in a footnote, was not sufficient to satisfy Lewis's burden under section 33.004(g)(1) to establish that relators failed to meet their pleading burden.").

Sticking with the theme that a nuance buried in a mound of material will not preserve error, a request for "revisions to [the] proposed modification order . . . [which] 'included the deletion of pages of items—such as conservatorship and travel—which were not part of the [Mediated Settlement Agreement]'" did not preserve error as to a complaint that "the inclusion of two specific items [e.g., a school zone issue] in those pages effectively changes the operation of provisions that were not modified by the parties' MSA." *Brantley v. Brantley*, 2012 Tex. App. LEXIS 1741, *7-9 (Tex.

App.–Houston [14th Dist.] Mar. 6, 2012, no pet.).

d. An objection as to one aspect of a claim, or evidentiary requirement, does not preserve error as to another aspect or requirement.

This particular line of attack indicates there is a continuum of sorts which ranges from an objection which is specific enough to a scenario where the objection in question was not made at all. Somewhere in the middle of that continuum are cases like the one which held that objecting that "that the statements . . . were statements of opinion" did not preserve error that those "statements were not material." *Allen v. Devon Energy Holdings, L.L.C.*, 367 S.W.3d 355, 369, n. 8 (Tex. App.–Houston [1st Dist.] 2012, pet. granted, remanded by, settled *by Devon Energy Holdings v. Allen*, 2013 Tex. LEXIS 20 (Tex., Jan. 11, 2013)).And if you argue that an objection was not preserved, you want to argue that the specific objection involved in the appeal was not made at all. So you would want to invoke the following cases:

- Held, error was waived because the party "did not frame additional inquiries or convey to the trial court that the thrust of any remaining [voir dire] questions would be different from the single one presented for a ruling." *Hyundai Motor Co. v. Vasquez*, 189 S.W.3d 743, 760 (Tex. 2006);

- A contention that a party "had properly obtained student approval" did not raise, nor preserve error, as to the contention that "it was exempt from the approval requirement altogether." *Dallas County Cmty. College Dist. v. Bolton*, 185 S.W.3d 868, 876 (Tex. 2005) ("In the trial court, the District contended only that it). Similarly, an objection on appeal that a jury charge included "an invalid legal theory" was not preserved by an objection that party "lacked standing to maintain a claim under article 21.21 for unfair settlement practices." *Rocor Int'l v. Nat'l Union Fire Ins. Co.*, 77 S.W.3d 253, 273 (Tex. 2002);

- arguments "which were plainly challenges to the validity of the contract as a whole, not the arbitration clause, specifically" did not preserve error as to an argument that "the Board never approved the arbitration clause and [the] Superintendent . . . thus had no authority to sign a contract containing an arbitration clause." *Aetna Life Ins. Co. v. Weslaco Indep. Sch. Dist.*, 2012 Tex. App. LEXIS 4379, *16-17 (Tex. App.–Corpus Christi-Edinburg May 31, 2012, no pet.);

- An objection that an expert's opinions were "unreliable" does not preserve error as to whether he was qualified. *Nissan Motor Co. v. Armstong*, 145 S.W.3d 131, 143-44 (Tex. 2004). Similarly, a challenge to "Parkhill's

qualifications to read and interpret the medical records generally" was not preserved by an objection which was "'partly a challenge to Parkhill's lack of expertise in pediatric matters or in matters related to the effects of drugs on unborn or newly born children and partly his potential interest and bias." *In the Interest of I.H.R.*, 2012 Tex. App. LEXIS 2001, *5-6 (Tex. App.–Texarkana Mar. 9, 2012, no pet.).

- "[A]n oral objection [to producing tax returns] based on relevance [does not preserve an objection based on] . . . the Fifth Amendment." *Valdez v. Progressive County Mut. Ins. Co.*, 2011 Tex. App. LEXIS 9773, *13 (Tex. App.–San Antonio Dec. 14, 2011, no pet.);

- Merely asserting "that the trial court was without authority to require her to reimburse Alvarez because the settlement agreement contained no such remedy" did not preserve error as to an argument that "the trial court erred in issuing a money judgment favoring Alvarez because (1) such judgment would only be proper if Garcia's conduct caused Alvarez to suffer damages and (2) Family Code section 9.010 does not support issuance of a money judgment under these circumstances" *Garcia v. Alvarez*, 367 S.W.3d 784, 788 (Tex. App.–Houston [14th Dist.] 2012, no pet.);

e. An objection to factual sufficiency, which sought only a new trial, does not preserve a legal sufficiency point.

"[A] challenge to the factual sufficiency of the evidence [to support the jury verdict" when "appellants did not request rendition of judgment in their favor . . . [but] sought only a new trial" did not preserve "a legal-sufficiency challenge in the trial court." *K.J. v. USA Water Polo, Inc.*, 383 S.W.3d 593, 599-600 (Tex. App.– Houston [14th Dist.] 2012, pet. filed). Similarly, asking "the trial court to vacate its order [granting a new trial] and reopen the case for additional evidence" was "not sufficiently specific to preserve the complaint" that the landlord "failed to establish that she provided a demand to vacate before filing suit and that, consequently, the trial court lacked good cause to grant a new trial." *Bovey v. Coffey*, 2012 Tex. App. LEXIS 3247, *4-5 (Tex. App.– Beaumont Apr. 26, 2012, no pet.).

3. Conclusion.

The tendency of courts to invoke the general error preservation rule in ruling on error preservation issues has boomed over the last quarter century. Courts of appeals have shown a tendency to hold error was not preserved an overwhelming majority of the time–mostly because the "mechanical" requirements of Rule 33.1 were not met: an objection was either not made, was not timely, was not ruled on, or the ruling or the objection is not on the record. Courts have been more likely to find that an objection was

specific enough to make the trial court aware of it, but the odds are still against error preservation on specificity grounds. There appear to be unexplored arguments supporting the proposition that 33.1 has a more relaxed standard for specificity than did either Rule 52(a) or Rule 373: the "awareness" language of Rule 33.1, the comments of the State Bar of Texas Appellate Section, and the comments of the Supreme Court and its advisory committee in the cases and work leading up to the adoption of Rule 33.1. There may not be a Rosetta Stone which assists in interpreting and applying Rule 33.1, which emphasizes the need to create, and mine, the record in your case to show that the trial court was aware of the objection at issue.

APPENDIX

(All Appendix items may be found online at:
http://www.stevehayeslaw.com/Paper130528.pdf)

1. Table of Supreme Court Cases Expressly Addressing Rule 373

2. Table of Supreme Court Cases Expressly Addressing Specificity of the Objection under Rule 52(a)

3. List of Supreme Court Cases Citing Rule 52(a)

4. Cases in which Supreme Court has cited Rule 33.1 (through 8/15/2013).

5. Cases in which error was preserved in the Supreme Court and Courts of Appeals, or in which error was not preserved in courts of appeals because of a lack of specificity (9/1/2011-8/31/2012).

6. Page 5296, Hearing of the Supreme Court Advisory Committee, January 20, 1995 (Morning Session), Archives of the Supreme Court of Texas.

7. Disposition Chart accompanying letter from Bill Dorsaneo to Luke Soules dated December 21, 1995, Archives of the Supreme Court of Texas.

8. Pages 1-6, Rules Memorandum, TRAP 52, February 26, 1996, Archives of the Supreme Court of Texas.

9. Page 1, Memorandum re: TRAP 47 and 52, from Lee Parsley, October 30, 1996, Archives of the Supreme Court of Texas.

10. Pages 1-2, Proposed form of certain Texas Rules of Appellate Procedure, January 1, 1997, Archives of the Supreme Court of Texas.

11. THE GUIDE TO THE NEW TEXAS RULES OF APPELLATE PROCEDURE 1997 (STATE BAR OF TEXAS APPELLATE SECTION).

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