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NEW SECTION WEB SITE: www.tex-app.org

Charles "Skip" Watson, Mullin, Hoard & Brown, Amarillo

Most, if not all, members of our Section represent both sides of the docket as Appellant/Petitioners as well as Appellee/Respondents in the appellate courts of Texas. This report focuses not on our Section, but on our appellate courts and the law we assist in administering as officers of the court.

As the Texas Legislature ends its regular session, both the adequacy of our appellate courts and any certainty of what law they, and we, will apply, are still in question. The current uncertainty does not appear to be caused by the Legislature's occasional concern that the Supreme Court has used its statutory rule making authority to create substantive law. The current relationship of the two branches appears to be one of cooperation.

Instead, the budget shortfall, occasioned by the sudden evaporation of surpluses since the last session, is the direct cause of the appellate courts' concern. Initially, the courts were reportedly instructed to slash up to 15% from budgets that are well over 90% salary. Compromises have been offered and doubtless will come to pass. Anecdotal stories are all too common of cost-cutting suggestions reflecting an absence of awareness by individual Legislators of the needs of the courts.

Of greater concern should be any indication that the function and even the role of the Judicial Branch should be subject to the same percentage cuts imposed on state agencies. Appellate judges have long served the public at salaries set by the Legislature beneath every civil practitioner that appears before them. Their support has also been a fraction of those trying to persuade them. Now, there may be none. There certainly will be less. It is not overstatement to suggest that if the co-equal third branch of government is reduced to dispensing only the appearance of equal justice under law, the relative effectiveness of administrative agencies may become moot.

Uncertainty about what law the courts will be adjudicating is embodied by House Bill 4. By all accounts, the Senate has acted as a true deliberative body in its hearings on the House's vision of how civil law should be practiced in the new century. Apart from the broad substantive and procedural changes it represents, the current legislation raises deeper issues.

What some view as aiding efficient administration of justice in the form of shifting attorney and expert fees by offering of settlement, early reporting requirements without aid of discovery, and more caps, may be seen by others as restricting access to the courts. There is a certain symmetry in the current developments. If there are fewer lawsuits, there will be less appeals – hence the need for less judges and staff. The only question remaining is how our clients will redress the wrongs they suffer if not under law.

The changes made by the Legislature to our law and the system that administers it, may, or may not, be needed. They may prove inadequate to meet the need, or they may go too far. Regardless of how our practice may change, at least two things will not change: Our unique role in assisting the courts as they apply the law to the facts made at trial, and our ability to communicate to individual Legislators how the laws they make affect our roles as we daily attempt to obtain equal justice under law for our clients.

For the past three years, David Coale has been the backbone of this publication. He was the Section's first "experimental" volunteer editor, faithfully serving a three year term and setting a standard that will be hard to follow. Although being the editor of *The Advocate* must have consumed a large measure of David's time and energy, he managed a few other small accomplishments over the last three years as well, including ushering in his first-born son, Caleb Steven Coale, on March 10, 2000, and making partner at his law firm, Carrington, Coleman, Sloman & Blumenthal, L.L.P., on January 1, 2001. Who knows where he found the time. . . .

In addition to possessing a fine legal mind, David is also, apparently, an accomplished impersonator--a talent he was unable to take full advantage of in his position as editor. But he was able to use his skill and humor to make *The Advocate* a publication in which the Section can be proud.

We'll miss you, David. It's been a thankless task, so please now accept our thanks for a job well done.

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The Council of the Appellate Section has voted to approve the changes to the Section Bylaws as indicated below. These proposed revisions will be submitted to the entire Section for approval at the next Appellate Section Annual Meeting in Austin on September 11, 2003, in conjunction with the Advanced Civil Appellate Practice Course. If approved, they will be submitted to the State Bar for final approval and adoption.

STATE BAR OF TEXAS
APPELLATE SECTION

Bylaws

ARTICLE I

Name and Purpose

Section 1. This Section shall be known as the Appellate Section of the State Bar of Texas.

Section 2. The purpose of this Section is to promote the role and enhance the skills of members of the State Bar of Texas engaged in appellate practice and to improve the practice of appellate law in Texas. The Section shall further these goals by offering continuing legal education, disseminating materials on matters of interest and concern to the membership, and creating opportunities for the exchange of ideas among the membership of the Section. The Section also will cooperate with other Sections, promote the objectives of the State Bar of Texas, and encourage participation in the State Bar by appellate practitioners.

ARTICLE II

Membership and Dues

Section 1. Any member of the State Bar of Texas shall be enrolled as a member of the Section after registering with the Treasurer of the Section and paying annual dues. Any member of a non-lawyer division of the State Bar of Texas shall be enrolled as a non-voting member of the Section after registering with the Treasurer of the Section and paying annual dues.

Section 2. Dues shall be payable by June 1 of each year. The amount of the dues shall be by a vote of the Council, subject to the approval of the State Bar Board of Directors.

ARTICLE III

Officers and Council

Section 1. The officers of the Section shall be Chair, Chair-Elect, Vice-Chair, ~~Secretary, and~~ Treasurer, and Secretary.

Section 2. The Council shall consist of the five officers, the two immediate past Chairs, and nine other members to be elected by the Section to serve staggered three-year terms. Each member of the Council shall cast only one vote on Council actions. The President and President-Elect of the State Bar of Texas, the State Bar Board Advisor assigned to the Section, and the editor of the Section's Newsletter shall be ex-officio members of the Council, without the right to vote.

ARTICLE IV

Duties and Power of Officers

Section 1. The Chair shall preside at all meetings of the Section and the Council. If the Chair is absent, the Chair-Elect or Vice-Chair, in that order, shall preside. At each Annual Meeting of the State Bar of Texas, the Chair shall present a report of the work of the Section for the preceding year. The Chair shall appoint the Chairs and members of all Committees of the Section who are to hold office during the Chair's term. The Chair shall plan and supervise the program of the Section and the Annual Meeting of the State Bar of Texas, subject to the direction and approval of the Council. The Chair shall oversee the performance of all activities of the Section, keep the Council informed, and carry out its decisions.

The Chair shall perform other duties designated by the Council.

Section 2. The Chair-Elect, after consulting with the Chair, shall arrange for the appointment of the Chairs and members of all Committees who are to hold office during the upcoming term. The Chair-Elect shall aid the Chair in the performance of responsibilities at the request of the Chair. The Chair-Elect shall perform other duties and have other powers designated by the Council or the Chair.

Section 3. The Vice-Chair shall advance the purposes of the Section, in consultation with the Chair of appropriate Committees and other officers of the Section. The Vice-C~~c~~hair shall aid the Chair and the Chair-Elect in the performance of their responsibilities. The Vice-Chair will perform other duties and have other powers designated by the Council or the Chair.

~~**Section 4.** The Secretary shall consult with and assist all the officers of the Section with the work of the Section generally, as they may request. The Secretary shall be the custodian of all books, papers, documents, and other property of the Section, and shall keep a record of all meetings of the Section and of the Council, whether assembled or acting under submission. The Secretary shall assist the Chair in the preparation of the Section's annual report submitted in the Spring of each year for publication in the Texas Bar Journal, describing the activities and plans of the Section. In conjunction with the Chair, as authorized by the Council, the Secretary shall attend generally to the business of the Section.~~

Section 4~~5~~. The Treasurer shall maintain all financial records of the Section and collect, receive and account for the funds of the Section. This includes maintaining the Section's bank accounts, making deposits, writing checks, and preparing a financial report for the annual meeting. The Treasurer shall maintain the financial records so that they can be made available for inspection by any Section officer, upon reasonable notice. The Treasurer is authorized to hire a bookkeeper to do accounting for the Section, and may engage an auditor to prepare a financial report, if necessary. The Treasurer shall make a monthly report to the accounting department of the State Bar of Texas, which shall include copies of the Section's bank statement, canceled checks, deposit slips, and check register. The Treasurer shall prepare and submit to the State Bar Executive Director by July 15 each year a complete financial report for the preceding fiscal year ending May 31, which shall include a balance sheet and income statement, and a section budget for the current fiscal year. The Treasurer shall instruct the Section's depository to provide directly to the State Bar a duplicate of the bank statements, canceled checks, and deposit slips. Any expense incurred in providing duplicates to the State Bar shall be borne by the Section.

Section 5. The Secretary shall consult with and assist all the officers of the Section with the work of the Section generally, as they may request. The Secretary shall be the custodian of all books, papers, documents, and other property of the Section, and shall keep a record of all meetings of the Section and of the Council, whether assembled or acting under submission. The Secretary shall assist the Chair in the preparation of the Section's annual report submitted in the Spring of each year for publication in the Texas Bar Journal, describing the activities and plans of the Section. In conjunction with the Chair, as authorized by the Council, the Secretary shall attend generally to the business of the Section.

ARTICLE V

Duties and Power of Council

Section 1. The Council shall have general supervision and control of the affairs of the Section, subject to the provisions of the Charter and Bylaws governing the State Bar Act, and the State Bar Rules, Subtitle G, Appendix, TEX. GOV'T CODE ANN., Volume 3, Vernon's Texas Government Code, the policies adopted by the Board of Directors of the State Bar of Texas, and these Bylaws.

Section 2. No payments of money shall be made without the Council's authorization. For amounts of $500 or less, the Chair can give authorization on behalf of the Council. Amounts over $500 must be approved by the Council, either at a meeting of the Council, by conference call, by mail, by e-mail, or by fax.

Section 3. All binding action of the Council shall be by majority vote of those voting, provided that a quorum of not less than six voting members are present when any meeting is convened. Members of the Council may vote in person, by conference call, by mail, by e-mail, or by fax.

Section 4. The Council shall meet at least once during the term of the Chair, and as often as the reasonable needs of the Section require. Reasonable advance written notice of meetings shall be given to all members of the Council by the Chair or the Secretary.

Section 5. The Council shall annually appoint the Editor of the Section's Newsletter. Before filling a vacancy or appointing a new Editor, the Council shall solicit applications from Section members to serve as Editor of the Section Newsletter. The Editor shall serve at the pleasure of the Council. In no event shall an Editor serve as Editor for more than three consecutive years. The Council shall determine the form and general substance of the Section Newsletter. If the Council determines that the Editor should be compensated pursuant to Article X, Section 2, the Council shall provide for such compensation in the Section Budget. The Council may not bind the Section to an agreement to compensate the Editor for a term in excess of one year.

ARTICLE VI

Meetings of the Section

Section 1. The Annual Meeting of the Section shall be held during the Annual Meeting of the State Bar of Texas or such other place and time chosen by the Council, as permitted by applicable State Bar rules, with such program and order of business as may be arranged by the Council. The order of business and a program may be arranged by the Chair, subject to the direction and approval of the Council.

Section 2. Special meetings of the Section may be called by the Chair, upon approval of the Council, at a time and place determined by the Council. Reasonable notice of any special meeting shall be given to all Members of the Section.

Section 3. The Members of the Section present at any meeting shall constitute a quorum for transacting business.

Section 4. All binding action of the Section shall be by majority vote of the Members present.

Section 5. The procedure of Section meetings shall be governed by Robert's Rules of Order Revised, unless otherwise provided in these Bylaws.

Section 6. The Council has authority to act for the Section in matters that may come before the Section during intervals between the Annual and Special meetings of the Section.

Section 7. The Council may direct that a matter be submitted ~~in writing~~ to the Members of the Section for written vote. The Members of the Section may vote upon such submitted proposition by tendering their vote to the Secretary, in writing, with their signature, within a reasonable time prescribed by the Council. For purposes of this Section, an electronic transmission, including email, with the name of the sender shall constitute a signed writing of the Member. The Secretary shall record in the minutes of the Section the text of the proposition submitted, that it was submitted to all Members of the Section in writing without a meeting, and the vote. Binding action of the Section shall be by a majority of the votes received in accordance with the provisions of this section. Ballots may be transmitted by mail, fax, electronic mail,

including email, or any other reasonable and reliable means.

ARTICLE VII

Elections

Section 1. The officers, other than the Chair, shall be elected at the Annual Meeting of the Section. They shall serve one-year terms, beginning at the adjournment of the Annual Meeting at which they are elected, or until their successors have been elected and qualified. The Chair-Elect shall become Chair upon adjournment of the Annual Meeting.

Section 2. Three Members of the Council, other than the officers of the Section, shall be elected at the Annual Meeting of the Section. They shall serve three-year terms, beginning at the adjournment of the Annual Meeting at which they are elected and qualified.

Section 3. No non-officer Member of the Council who has served a full term may be elected to a successive term as a non-officer Member of the Council, unless at least one year has elapsed since that Member left the Council.

Section 4. Before each Annual Meeting of the Section, the Chair shall appoint a Nominating Committee of three members, consisting of one of the two immediate past Chairs, one of the non-officer Council members whose term is not going to expire at the next Annual Meeting, and one non-Council member of the Section who is not a candidate for a position on the Council. That Committee shall report nominations to the Section for the officers and Council Members scheduled to be elected at the Annual Meeting. No nominees shall be reported to the Section unless they have agreed to serve if elected. Other nominations may be made from the floor at the Annual Meeting, if the nominee has agreed to serve if elected.

ARTICLE VIII

Succession of Officers and Vacancies

Section 1. The Chair-Elect shall automatically assume the office of Chair at the end of the

Annual Meeting unless prevented by death or disability, or refusal to act as Chair. The Chair shall serve a term of one year.

Section 2. In the event of death, disability, or refusal of the Chair to serve during the term, the Chair-Elect shall perform the duties of the Chair for the remainder of the Chair's term or disability.

Section 3. In the event of the death, disability, or refusal of the Chair-Elect to serve during the term, the Vice-Chair shall perform the duties of the Chair-Elect for the remainder of the Chair-Elect's term or disability.

Section 4. In the event of the death, disability, or refusal of the Vice-Chair to serve during the term, the ~~Secretary~~ Treasurer shall perform the duties of the Vice-Chair for the remainder of the Vice-Chair's term or disability.

Section 5. Between Annual Meetings of the Section, the Council may fill vacancies in its own non-officer membership, or in the offices of ~~Secretary or~~ Treasurer or Secretary. Members of the Council and officers selected in this manner shall serve until the close of the next Annual Meeting of the Section. The remainder of any Council Member's unexpired term shall be filled by election at the next Annual Meeting, as provided in Article VII of these Bylaws.

Section 6. If any elected Member of the Council fails to attend a Council meeting held in conjunction with each of two successive Annual Meetings of the Section, the office held by the Member shall be vacated automatically, and the vacancy shall be filled according to these Bylaws.

Section 7. At the end of the term in office as Chair, the immediate past Chair shall serve as a member of the Council for the next two years.

ARTICLE IX

Committees

Section 1. Except as otherwise provided in these Bylaws, all Committees shall be appointed in accordance with the provisions of Article IV, and any Member of the Section, including members of the Council, may serve as a Committee Chair or as a member of a Committee.

Section 2. Committees shall be appointed, as needed.

ARTICLE X

Miscellaneous Provisions

Section 1. The fiscal year of the Section shall be the same as that of the State Bar of Texas.

Section 2. No salary or compensation shall be paid to any officer of the Section, member of the Council, or member of the Committee for their professional services or time, except that the Council may authorize reasonable compensation for the Editor of the Section Newsletter. Officers, members, ex-officio members of the Council, and persons whom the Chair has requested to attend a Council meeting shall be reimbursed for expenses reasonably and necessarily incurred on behalf of the Section by submitting requests and receipts to the Treasurer.

Section 3. Notices to Members of the Council may be given in writing, by fax or other electronic transmission, including email. Waiver of notice of any meeting may be made in writing before or after any meeting and attendance at a meeting shall constitute waiver of notice. Notice to Members of the Section with respect to any Annual or other meeting of the Section or any other matter may be given (a) in writing, (b) by publication in the Texas Bar Journal, The Appellate Advocate or any other publication of the Section or the State Bar of Texas that is distributed physically or by electronic transmission to the Members of the Section, (c) by fax, or (d) any other electronic transmission, including email.

Section ~~3~~4. No action by this Section shall become effective as the action of the State Bar of Texas until it is approved by the Board of Directors of the State Bar of Texas. Any

resolution adopted or action taken by the Section may, if requested by the Section, be reported by the Chair of the Section to the Annual Meeting of the State Bar of Texas for action by its Board of Directors.

Section 5~~4~~. The Section or its members may not, in the name of the Section, advocate or advance a political or social position.

Section 6~~5~~. The provisions of the Board of Directors Policy Manual § 10.05, attached as an appendix to these Bylaws, are adopted.

Section 7~~6~~. These Bylaws shall become effective upon their approval by the Board of Directors of the State Bar of Texas and by the Section.

ARTICLE XI

Amendments

These Bylaws may be amended at any Annual Meeting of the Section by a majority vote of the Members of the Section present and voting, provided that any proposed amendment shall first be approved by a majority of the Council and ~~written~~ notice of the proposed amendment in accordance with these Bylaws shall be provided to all Members of the Section at least 30 days prior to the Annual Meeting. No amendment shall become effective until approved by the Board of Directors of the State Bar of Texas.

Don't be caught unaware of the new revisions to the Texas Rules of Appellate Procedure. You can look at or download the changes from the Texas Supreme Court's web-site: http://courtstuff.com/sct/

Stop the Madness: There's No Need For Dual Proceedings in Arbitration Appeals

Elizabeth (Heidi) Bloch, Hilgers & Watkins, P.C., Austin

Picture this: you are trying to enforce an arbitration agreement in hopes of getting a quick and inexpensive resolution of a dispute for your client (that is, after all, what arbitration is all about, isn't it?). The other side resists, so you file a motion to compel. Either it is unclear or the parties dispute whether the Federal Arbitration Act ("FAA") or the Texas Arbitration Act ("TAA") applies to the question of enforceability. The trial court denies your motion to compel. What remedy do you have? In Texas, you must pursue both a mandamus action and an interlocutory appeal to challenge the trial court's order. *Jack B. Anglin Co., Inc., v. Tipps,* 842 S.W.2d 266 (Tex. 1992). In other words, you have to tell your client that they must pay for not one, but two separate appellate proceedings in order to enforce their right to have a quick and inexpensive resolution through arbitration.

In *Anglin*, the Texas Supreme Court for the first time addressed many questions arising upon appellate review of a trial court order denying a motion to compel arbitration. The parties in that case disputed whether the FAA or the TAA applied. One of the reasons that mattered, according to the Court, was that an interlocutory appeal would have been available to challenge the ruling if the TAA applied, but not if the FAA applied. The Court analyzed the interlocutory appeal and other provisions of the TAA and concluded that this procedure was available only if the ruling involved an arbitration agreement whose enforceability was governed by that statute. Ultimately, the Court held that litigants who are uncertain as to which statute applies must pursue parallel proceedings—an interlocutory appeal in the event the TAA applies, and a writ of mandamus in the event the FAA applies. *See also J.M. Davidson, Inc., v. Webster,*

49 S.W.3d 507, 511 (Tex.App.—Corpus Christi 2001, pet. granted). The appellate court will determine which statute applies, dismiss the proceeding corresponding to the inapplicable statute, and go forward with the appropriate proceeding.

Ironically, the *Anglin* opinion also concluded that Texas procedure controls determinations such as whether a disputed claim falls within the scope of an arbitration clause, even when the enforceability of that clause is governed by the FAA. *Anglin,* 842 S.W.2d at 268-69. An arbitration agreement governed by the FAA can, for example, be the subject of a motion to compel arbitration pursuant to Tex. Civ. Prac. and Rem. Code §171.021, requiring that the trial court determine the issue summarily. *Anglin*, 842 S.W.2d at 268-29. The Court recognized that a party denied arbitration in federal court is entitled to an interlocutory appeal under *federal* procedure, but federal procedural rules are not available in state court. *Id.* at 271-72, n10. The result after *Anglin* is that all of the procedures set forth in the TAA--filing an application in court to compel arbitration, holding a hearing thereon, seeking to confirm an award, etc.--apply to an arbitration clause whose enforceability is governed by the FAA, with one and only one exception: the interlocutory appeal procedures. Since no interlocutory appeal is available in that situation, the Court concluded that mandamus relief is appropriate.

There is some indication that the Court in *Anglin* did not conduct a careful study of the TAA, given the statement that "[b]oth the Texas and Federal Acts permit a party to appeal from an interlocutory order *granting* or denying a request to compel arbitration." *Id.* at 271-72 (emphasis added). While this is true under the FAA, the TAA permits an interlocutory appeal only from an order *denying* a request to compel arbitration, not from an order granting one. Some courts have dismissed this statement as dicta, but it is more accurately described as a mistaken statement about the TAA. *See Trico Marine Services, Inc. v. Stewart and Stevenson Technical Services, Inc.,* 73 S.W.3d 545 (Tex.App.—Houston [1st Dist.] 2002, no pet.); *In re Glazer's Wholesale Distributors, Inc.,* 2002 WL 727351, (Tex.App.—Dallas 2001, pet. granted); *Mohamed v. Auto Nation USA Corp.,* 89 S.W.3d 830 (Tex.App.—Houston [1st Dist.] 2002, orig. proceeding).

Even if Anglin was correctly decided under the version of the TAA that existed at that time, it no longer holds true under the current version of the statute. In Anglin, the Court even urged the legislature to "consider amending the Texas Act to permit interlocutory appeals of orders issued pursuant to the Federal Act." Id. at 272. What the courts have not yet recognized is that the legislature has done just that. The legislature amended the TAA in 1997 in a way that solves this problem and prevents the need for duplicative proceedings.

The statute in effect when Anglin was decided was Tex. Rev. Civ. Stat. Ann. art. 224-238-8. Working backward from the interlocutory appeal provision, the structure of the old statute was as follows:

* Article 238-2 allowed an appeal from "an order denying an application to compel arbitration made under Section A of Article 225";

* Section A of Article 225, addressing proceedings to compel arbitration, authorized a court to order arbitration "on application of a party showing **an agreement described in Article 224 of this Act**" (emphasis added);

* Article 224, in turn, was the provision addressing the validity and enforceability of arbitration agreements, and at various times has required signatures of counsel and certain notice provisions in order for an arbitration clause to be valid and enforceable.

In contrast, the scheme under the current statute is a two-step instead of a three-step process as follows:

* §171.098(a) allows an appeal from an order "denying an application to compel arbitration made under § 171.021";

* §171.021, addressing proceedings to compel arbitration, authorizes a court to order arbitration "on application of a party showing: (1) **an agreement to arbitrate**; and (2) the opposing party's refusal to arbitrate" (emphasis added).

Significantly, the current statute does not require the applicant to show an agreement to arbitrate that is valid under the TAA, as it specifically did under the old statute. Therefore, a court's order "denying an application to compel arbitration made under §171.021" could be addressing any agreement to arbitrate, not just one that is valid under that statute. In other words, the legislature has clearly indicated that trial courts may now compel arbitration of any "agreement to arbitrate," regardless of whether that agreement is enforceable under the FAA or the TAA. It thus follows that an interlocutory appeal is available to challenge trial court orders denying such an application.

This statutory change did not come about merely as part of the codification process when the TAA was incorporated into the Texas Civil Practice and Remedies Code in 1995. At that time, it was still a three-part process that allowed for an interlocutory appeal (old §171.017) of an order denying an application to compel arbitration made under old §171.002, which referred back to old §171.001--the enforceability provision. The changes referred to above in 1997 no longer track the availability of an interlocutory appeal back to a trial court's order regarding an arbitration agreement that is enforceable under the TAA.

The requirement of dual proceedings could only ever be justified by a very strict and technical reading of the old statute, because of the references back to the specific statutory provision governing the validity of arbitration agreements. An interlocutory appeal was thus available only if the validity of the agreement was governed by the TAA. Now, the statute no longer contains this language. Instead, consistent with the Court's holding in *Anglin*, Texas procedure should govern all aspects of a proceeding to compel arbitration, including an interlocutory appeal, even when the FAA governs the initial question of the validity or enforceability of the arbitration clause itself. The procedural device of an interlocutory appeal is every bit as available in that situation as it is when the FAA does not apply.

This conclusion is also consistent with the concept that application of the FAA is simply a question of statutory preemption that is limited to the enforceability of the arbitration clause itself. *Southland Corp. v. Keating*, 465 U.S. 1, 14-16, 104 S.Ct. 852,860-61 (1984); U.S. Const. Art. VI, Cl.2. The FAA will only preempt contrary state laws that require, for example, an arbitration clause to be signed by counsel for the parties in order to be enforceable. The FAA does not, however, supplant all relevant state law, and certainly not procedural rules. Even if the FAA applies to the enforceability of the arbitration clause, general principles of state contract law nonetheless govern other questions regarding the enforceability of the agreement as a whole. *In re Halliburton Co.,* 45 Tex. Sup. Ct. J. 720 (Tex. 2002). The FAA, therefore, is not a body of substantive law that addresses all aspects of an arbitration agreement. It follows then that the procedural tool of an interlocutory appeal is available no matter what substantive law applies.

Finally, as the Court correctly noted in *Anglin*, "efficiency and lower costs" are two of the primary benefits of arbitration. *Anglin*, 842 S.W.2d at 268. Both of these benefits are severely compromised when a party seeking to enforce an arbitration clause is required to pursue two separate proceedings through two levels of appellate review simply because there is a dispute as to whether the FAA or the TAA governs the enforceability of the arbitration clause in the first instance.

The Post Conviction Project: A Collaboration of the Texas Bar Association and Texas Law Schools

Sarah M. Buel, Clinical Professor, University of Texas School of Law

The Post Conviction Project creates law student and lawyer teams to assist battered women in prison with preparation of their parole requests. The Project was initiated because scores of battered women are incarcerated in Texas prisons as a result of less than adequate trial and/or appellate counsel. Many law students are eager to assist in drafting necessary memoranda, gathering recommendation letters, and completing the parole applications under the supervision of a practicing attorney. The student-lawyer collaboration allows both to share in the satisfaction of offering some measure of justice to battered women with no one else to whom they can turn. Occasionally, battered inmates have other legal problems with which they need assistance, and the lawyer-student team can decide if they wish to take the case or refer it to another team.

In January of 2002, the Project was able to secure parole release for Griselda Moreno, a San Antonio battered woman, thanks to the collaboration of St. Mary's and University of Texas Law students under the supervision of St. Mary's Professor Stephanie Stephenson. Ms. Moreno had received a 99-year sentence after being convicted of failing to protect her 5 year-old daughter, whom her husband had murdered while Ms. Moreno was at work.

Lawyers and law students interested in taking part in the Post Conviction Project can contact Sarah Buel at sbuel@mail.law.utexas.edu or at (512) 232-9326.

Dana Livingston Cobb, Attorney at Law, Austin
Omar Kilany, Carrington, Coleman, Sloman & Blumenthal L.L.P., Dallas

CASES DECIDED

Removal Jurisdiction/All Writs Act

Syngenta Crop Protection, Inc. v. Henson, 123 S. Ct. 355 (2002).

In this case, the Supreme Court addressed whether the All Writs Act, alone or in combination with ancillary enforcement jurisdiction, can furnish the basis for removal jurisdiction. The case arose out of a suit filed by Henson in Louisiana state court and a related class action already pending in federal district court in Alabama. After Henson intervened in the Alabama federal class action and participated in the class action settlement, the Louisiana state court stayed Henson's state court action. The class action settlement stipulated that Henson's state court suit shall be dismissed with prejudice upon the settlement's approval. After approval of the federal class action settlement, the Louisiana state court judge held a hearing to determine whether dismissal of the state court suit was proper. Henson argued that the federal class action settlement required dismissal of only some of his claims pending in state court. Upon learning that the state court trial judge allowed Henson's case to proceed, Syngenta removed that case to federal court in Louisiana, which then transferred the case to the Alabama federal district court that had approved the class action settlement. The notice of removal asserted federal jurisdiction under the All Writs Act, 28 U.S.C. § 1651, and under the supplemental jurisdiction statute, 28 U.S.C. § 1367. The Alabama federal court dismissed the suit as barred by the class action settlement and sanctioned Henson's counsel.

> **The meek shall inherit the earth, but not its mineral rights.**
>
> *-- J. Paul Getty*

On appeal, the Eleventh Circuit affirmed the sanctions but vacated the district court's order of dismissal, concluding that removal had been improper because there was no federal subject-matter jurisdiction. The Eleventh Circuit reasoned that 28 U.S.C. § 1441 authorizes removal of cases over which the federal courts otherwise have original jurisdiction. The Eleventh Circuit rejected the argument that the All Writs Act provides any federal subject-matter jurisdiction in its own right.

A unanimous Supreme Court affirmed. The Supreme Court held that the All Writs Act, alone or in combination with the existence of ancillary enforcement jurisdiction, is not a substitute for section 1441's requirement that a federal court have original subject-matter jurisdiction over an action for removal to be proper. The All Writs Act, which provides that "courts established by . . . Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions," does not authorize removal. Removal is instead governed by section 1441, which provides that "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed." Under the plain language section 1441, to properly remove the Louisiana action, Syngenta was required to demonstrate that original subject-matter jurisdiction lies in the federal courts. The All Writs Act does not provide federal courts with an independent grant of original jurisdiction. It cannot therefore confer the original jurisdiction required to support removal under section 1441.

The Supreme Court also rejected petitioner's argument that some combination of the All Writs Act and ancillary enforcement jurisdiction supported removal. Syngenta argued that Henson's maintenance of the state court

action undermined the federal class action settlement and that, in light of the Alabama federal court's retained jurisdiction over the settlement, ancillary enforcement jurisdiction was necessary and appropriate. Although ancillary jurisdiction may extend to claims having a factual and logical dependence on the primary lawsuit, the Supreme Court noted that Syngenta failed to explain how the Alabama federal court's retention of jurisdiction over the class action settlement authorized removal of the state court action. As the Court explained, removal of the state court action was not necessary to effectuate the class settlement because Syngenta could have either asked the Alabama federal court for an injunction ordering dismissal of the state suit or argued to the Louisiana court that the Alabama judgment barred all state claims. Thus, the Supreme Court held that invocation of ancillary jurisdiction, like invocation of the All Writs Act, does not dispense with the need for compliance with section 1441's statutory requirement of original federal court subject-matter jurisdiction.

Justice Stevens concurred, observing that courts of appeals that have allowed "All Writs removal" have relied in large part on the Court's "overly expansive" reading of the All Writs Act in *United States v. New York Telephone Co.*, 434 U.S. 159 (1977), from which Justice Stevens dissented. Justice Stevens indicated that he would vote to overrule that decision to avoid further confusion.

Express and Implied Preemption

Sprietsma v. Mercury Marine, 123 S. Ct. 518 (2002).

Jeannie Sprietsma died in a boating accident when she fell overboard and was struck by the propeller of the boat's engine. Her husband filed suit in Illinois state court against the engine manufacturer, Mercury Marine, alleging that the Mercury engine was an unreasonably dangerous product because it was not equipped with a propeller guard. Mercury moved to dismiss the action on the ground that the suit was preempted by the Fair Boating Safety Act. The trial court granted the motion, and the Illinois Supreme Court affirmed, although it rejected the express preemption rationale utilized by the trial court and instead found that the FBSA impliedly preempted the entire field of boating regulation.

The United States Supreme Court disagreed and reversed, holding that the FBSA did not preempt state law common law claims. The Supreme Court first examined the text of the express preemption clause —which applied to a "[state or local] law or regulation"—and held that it was properly interpreted to not reach common law claims. The Court concluded that the use of the terms "law" and "regulation" together indicated that Congress only intended to preempt "positive enactments," not the broad and expansive body of state common law remedies.

The Supreme Court also considered whether the Coast Guard's specific decision not to enact propeller guard regulation indicated an intent to preempt all state laws that might have that effect. A decision not to regulate, the Court found, indicated only that the data available to the Coast Guard at the time of the decision did not meet the FBSA's stringent criteria for federal regulation. Notably, the Coast Guard did not take steps to affirmatively prohibit the states from imposing their own form of propeller guard regulation; thus, the decision not to regulate could not be interpreted as an authoritative message of federal policy against propeller guards.

Finally, in the absence of statutory language expressly requiring it, the Supreme Court declined to find implied field preemption under the FBSA. The Court held it could not be said that Congress had intended to "occupy the field" of boating regulation and leave no room for states to supplement it.

Arbitration/Questions of Arbitrability

Howsam v. Dean Witter Reynolds, Inc., 123 S. Ct. 588 (2002).

In this case, the Supreme Court addressed whether a court or an arbitrator should decide if arbitration claims were barred by a time limit rule

contained within the National Association of Securities Dealers Code of Arbitration Procedure. Petitioner commenced an NASD arbitration against Dean Witter. Section 10304 of the NASD Code provides that no dispute shall be eligible for submission if six years have elapsed from the occurrence or event giving rise to the dispute. Dean Witter asked a federal district court to declare the dispute ineligible for arbitration and to enjoin the arbitration from proceeding, arguing that more than six years had elapsed since the events at issue had occurred. The district court dismissed the action, concluding that the arbitrator should interpret and apply the NASD rule. Concluding that section 10304 presented a "question of arbitrability," which is presumptively to be resolved by a court, the Tenth Circuit reversed.

The Supreme Court reversed. Justice Breyer, writing for the majority, held that the NASD time limit rule is a matter presumptively for the arbitrator, not for the court. The Supreme Court's opinion makes clear that while "questions of arbitrability" are for judicial determination unless the parties clearly and unmistakenly provide otherwise, not all potentially dispositive gateway questions are "questions of arbitrability." For example, a gateway dispute about whether parties are bound by a given arbitration clause and a disagreement about whether an arbitration clause in a concededly binding contract applies to a particular type of controversy raise "questions of arbitrability" for a court to decide. By contrast, procedural questions that grow out of the dispute and bear on its final disposition are presumptively not for the judge, but for an arbitrator, to decide. The Court concluded that the NASD time limit rule at issue here more closely resembled the gateway questions that were not questions of arbitrability, such as waiver, delay, or like defenses, and thus should be decided by the arbitrator.

Justice Thomas, concurring in the judgment, would have held that the issue should have been resolved, pursuant to the agreement's choice-of-law clause, by looking to New York law, which interprets section 10304 to require decision of this issue by an arbitrator.

Be wiser than other people if you can, but do not tell them so.

-- Lord Chesterfield

Personal liability of officers or owners of a corporation under the Fair Housing Act for the unlawful activities of the corporation's employee or agent

Meyer v. Holley, 123 S. Ct. 824 (2003).

Emma and David Holley, an interracial couple, tried to buy a house listed by Triad, Inc. A Triad salesman allegedly prevented the Holleys from buying the house for racially discriminatory reasons. The Holleys brought suit against the salesman and Triad under the Fair Housing Act ("FHA"), which prohibits racial discrimination in connection with the sale of a home. Later the Holleys brought a separate suit against David Meyer, Triad's president, sole shareholder, and licensed officer/broker, alleging that he was vicariously—and thus personally—liable under the FHA for the Triad salesman's unlawful actions. After consolidating the two suits, the district court dismissed the claims against Meyer, concluding that the FHA did not impose personal vicarious liability on a corporate officer.

The Ninth Circuit reversed, recognizing that while general principles of tort law did not extend personal liability to shareholders or officers for an employee's actions, the FHA extended liability for "those who direct or control or have the right to direct or control the conduct of another," even if they were not involved in the discrimination itself.

The Supreme Court reversed, holding that under the traditional vicarious liability rules incorporated into the FHA, it is the corporation, and not its officers or owners, that is subject to vicarious liability for torts committed by its employees or agents. The Court noted that it had only ever applied unusually strict vicarious liability rules when Congress had specified that such was its intent. In passing the FHA, however, Congress expressed no intent to extend these traditional rules, so the proper inference was that Congress intended ordinary tort principles to apply. Moreover, the Department of Housing and Urban Development had issued and interpreted its FHA regulations to provide that ordinary vicarious liability rules apply, and the Court deferred to the agency's reasonable interpretation of the statute.

Standard for Issuance of Certificate of Appealability under AEDPA

Miller-El v. Cockrell, 123 S. Ct. 1029 (2003).

Under the Anti-Terrorism and Effective Death Penalty Act (AEDPA), a state prisoner seeking federal post-conviction habeas relief does not have an automatic right to appeal a district court's denial or dismissal of his petition. Instead, the petitioner must first seek and obtain a "certificate of appealability" (COA)—essentially, he must ask permission from the court of appeals to initiate appellate review of his petition. And under the AEDPA, a COA will issue only when a petitioner demonstrates "a substantial showing of the denial of a constitutional right." The question in *Miller-El* addressed whether the Fifth Circuit properly required petitioner to meet a further substantive requirement that a petitioner establish by clear and convincing evidence that the state court's factual findings were unreasonable in light of the evidence presented in connection with the procedural COA determination.

The United States Supreme Court held that the Fifth Circuit erred in incorporating this additional substantive standard. First examining the gatekeeper function that the COA requirement plays in the AEDPA, the Court noted that there would be situations in which a COA would issue even when a petitioner would not necessarily succeed with his ultimate claim. A petitioner was not required to prove that all jurists would grant his petition for habeas corpus in connection with the issuance of a COA. As the Court wrote, "[d]eciding the substance of an appeal in what should only be a threshold inquiry undermines the concept of a COA. The question is the debatability of the underlying constitutional claim, not the resolution of that debate." Moreover, the Court noted that a court of appeals would not even have jurisdiction to engage in such an inquiry before it had concluded its threshold determination of whether a COA should

issue—and thus whether a substantive appeal should commence at all.

It was thus improper for the Fifth Circuit to incorporate a review of the evidence through a clear and convincing evidence standard into its determination of whether a COA should issue to Miller-El. Instead, a petitioner must demonstrate that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude that the issues presented are adequate to deserve encouragement to proceed further." With this standard in mind, the Supreme Court then examined and took note of the substantial quantum of evidence that Miller-El presented in connection with his *Batson* claim that his prosecutor's use of peremptory challenges were racially motivated, and held that Miller-El was entitled to the COA in his case.

Finality/One-Year Time Limit for Post-Conviction Relief under 28 U.S.C. § 2255

Clay v. United States, 123 S. Ct. 1072 (2003).

Section 2255 of Title 28 provides that a petitioner seeking post-conviction habeas relief must file her motion within one year of "the date on which the judgment of conviction becomes final." *Clay v. United States* answers the question of what does "*becomes final*" mean?

Petitioner Clay, having chosen not to seek certiorari from the United States Supreme Court on direct appeal of his conviction for arson and cocaine possession, filed his motion for post-conviction relief one year after the time for seeking certiorari expired. The district court and Seventh Circuit found that his motion was untimely under section 2255, holding that when no petition for certiorari is filed, a conviction becomes "final" on the date the appellate court issues its mandate in the direct appeal.

The Supreme Court reversed. (It is interesting to note at the outset that the United States actually supported Clay's position, leading the Court to invite an amicus to support the Seventh Circuit's opinion and advocate the shorter time period.) The Court first noted that the consistent weight of precedent held that finality in the post-conviction relief context attaches either when the Court affirms a conviction on the merits on direct review, denies a petition for certiorari, *or when the time for filing a petition for certiorari expires*. It was also significant to the Court that Congress had written section 2255 to refer to simply "the date on which the judgment of conviction becomes final," while its sister section 2244 (dealing with post-conviction relief from state convictions) specifically referred to "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." As the Court explained, "[w]hen Congress includes particular language in one section of a statute but omits it in another section of the same Act, . . . it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." In addition, the Court noted that to adopt a contrary interpretation of section 2255 would lead to a situation in which federal petitioners had a shorter time to seek post-conviction relief under section 2255 than would state prisoners under section 2244, a result that was not supported by prior caselaw or logic.

CASES GRANTED—NOT YET DECIDED

The Intersection of Qualified Immunity, § 1983, and *Miranda*

Chavez v. Martinez, 122 S. Ct. 2326 (2002) (No. 01-1444), *granting cert. to review* 270 F.3d 852 (9th Cir. 2001).

Oliverio Martinez was shot during a scuffle with police and rushed to the hospital. While Martinez was undergoing treatment at the hospital, a police officer persisted in questioning him despite the fact that he was blinded, paralyzed, and calling out in extreme pain. No criminal charges were ever filed against Martinez, but he brought suit under 42 U.S.C. § 1983 against the officer who questioned him, arguing that he was entitled to be free from coercive police questioning regardless of whether his statements were ever used at trial. In response,

the officer asserted qualified immunity.

The Supreme Court in this case will have to decide first whether a constitutional violation occurred at all in this case; that is, is a suspect's constitutional right against self-incrimination violated simply as a result of coercive questioning, even when the coerced statements are never used against him in a criminal case? If yes, the Court will then turn to the question of whether the claim was clearly established at the time of the interrogation, dictating whether the officer is entitled to assert qualified immunity.

This case was argued on December 4, 2002. As of press time, no decision has been rendered in this case.

Magistrate Authority/Consent to Civil Trial Jurisdiction

Roell v. Withrow, 123 S. Ct. 512 (2002) (No. 02-69), *granting cert. to review* 288 F.3d 199 (5th Cir. 2002).

This case presents the question whether post-judgment consent to trial before a magistrate judge under 28 U.S.C. § 636(c) cures failure of all parties consent pretrial. In this case, all parties voluntarily proceeded before the magistrate judge even though defendants did not consent to trial before the magistrate judge prior to trial, but did file consent forms expressly confirming their consent in a post-judgment filing with the district court.

The Fifth Circuit, rejecting the approach taken by the Seventh and Eleventh Circuits and instead following the Ninth Circuit, held that section 636(c) prohibits post-judgment consent and that the absence of express pretrial consent is a jurisdictional defect that cannot be waived. The Fifth Circuit based its decision primarily on the plain language of section 636(c)(1), which provides that "[u]pon the consent of the parties, a . . . United States magistrate [judge] . . . may conduct any or all proceedings in a nonjury civil matter and order the entry of judgment in the case . . . ." The Fifth Circuit reasoned that the use of "upon" and "may conduct" compels the conclusion that the statute requires that consent be given before a magistrate judge can act pursuant to section 636(c) and that the timing of the consent equates with a condition precedent to the magistrate judge's authority to act under section 636(c). The Fifth Circuit noted that the statute's legislative history and the court's own precedent were consistent with its reading of the statute.

The case was argued to the United States Supreme Court on February 26, 2003. As of press time, no decision has been rendered in this case.

Burden of Proof for a "Mixed-Motive" Employment Discrimination Claim

Desert Palace, Inc. v. Costa, 123 S. Ct. 816 (2003) (No. 02-679), *granting cert. to review* 299 F.3d 838 (9th Cir. 2002) (en banc).

In this case, an employer seeks review of a Ninth Circuit decision holding that a plaintiff in a "mixed-motive" employment discrimination case under Title VII is not required to put on direct evidence. This case arose when Caesars Palace Hotel and Casino terminated Catharina Costa, the only woman in her bargaining unit, citing disciplinary problems. The jury found that Caesars had committed an unlawful employment practice in its termination of Costa because gender was "a motivating factor," even if other factors also motivated the practice. 42 U.S.C. § 2000e-2(m). Under this "mixed-motive" claim, because Caesars failed to establish that Costa would have been terminated without consideration of her gender, the jury awarded, among other things, back pay and compensatory damages.

On appeal, Caesars argued that Costa should have been held to a special, higher standard of "direct evidence." A divided en banc Ninth Circuit disagreed, holding that Title VII imposes no special or heightened evidentiary burden on a plaintiff in a "mixed-motive" case. The Ninth Circuit observed that although Title VII imposes no special burden of proof on discrimination plaintiffs, some courts have

fashioned a heightened burden based not on the language of Title VII, but on the case that prompted the amendment of Title VII in 1991, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

In *Price Waterhouse*, all nine justices had essentially agreed that liability was inappropriate when the employer would have made the same employment decision absent gender discrimination —when the illegitimate factor was not a "but for" cause—but the Court divided over the nuances of the burden of proof. In a separate opinion concurring in the judgment in *Price Waterhouse*, Justice O'Connor made reference to the plaintiff's reliance on "direct evidence" of discriminatory motive, a reference that gave rise to a debate as to whether direct evidence is mandatory in mixed-motive cases. In 1991, in response to *Price Waterhouse*, Congress amended Title VII by adding the mixed-motive standard and an affirmative defense that limits the scope of remedies, but does not provide a defense to liability, if an employer demonstrates that it would have nonetheless made the "same decision." These amendments, while intended to overrule *Price Waterhouse*, did not address Justice O'Connor's comment about direct evidence.

After examining the language and history of Title VII, the Ninth Circuit held that a requirement of "direct evidence" was not consistent with the 1991 amendments to Title VII. The court thus affirmed the liability findings as well as the judgment for back pay and compensatory damages.

The United States Supreme Court granted the petition for certiorari, which presented the following two questions: (1) Did the Ninth Circuit err in holding that direct evidence is not required in Title VII cases to trigger application of the "mixed-motive" analysis set out in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)? (2) What are the appropriate standards for lower courts to follow in making a direct evidence determination in mixed-motive Title VII cases? The case is set for oral argument on April 21, 2003.

We must believe in luck for how else can we explain the success of those we don't like? -- *Jean Cocteau*

Class Action Arbitrability

Green Tree Financial Corp. v. Bazzle, 123 S. Ct. 827 (2003) (No. 02-634), *granting cert. to review* 569 S.E.2d 349 (S.C. 2002).

In this case, a lender seeks review of the South Carolina Supreme Court's decision allowing class arbitration of consumer-protection claims against the lender. The question presented by the petition for certiorari is whether the Federal Arbitration Act prohibits class-action procedures from being superimposed onto a two-party arbitration agreement that does not include any provision permitting class-action arbitration.

In its decision, the South Carolina Supreme Court rejected the lender's challenge under the FAA to two interrelated class-action arbitration awards, which together require the lender to pay nearly $27 million in statutory damages, attorneys' fees, and costs to two classes consisting of a total of more than 3,700 individuals. The lender challenged those arbitral awards on the grounds that the written arbitration agreement underlying them does not provide for class-action arbitration and the FAA does not permit class-action mechanisms to be superimposed onto private arbitration agreements absent the parties' consent. The arbitration agreement at issue, while silent on the question of classwide arbitration, provided for resolution of "[a]ll disputes, claims or controversies" arising from "this contract" "by binding arbitration by one arbitrator selected by us [the lender] with consent of you [the borrower named in the contract]." Over the lender's objection, the South Carolina Supreme Court ruled that class arbitration could be ordered—even though the agreement is silent as to classwide arbitration—if doing so would serve efficiency and equity, and would not result in prejudice.

The United States Supreme Court granted certiorari earlier this year. The case is set for oral argument on April 22, 2003.

Second or successive motions under the AEDPA

Castro v. United, 123 S. Ct. 993 (2003) (No. 02-6683), *granting cert. to review* 290 F.3d 1270 (11th Cir. 2002).

In this case, the Court will review two issues: (1) Whether a petitioner's post-conviction motion for new trial based on newly discovered evidence, which the district court unilaterally re-characterized and treated as a first motion for relief under 28 U.S.C. § 2255, counted against that statute's bar on second or successive petitions for relief; (2) Whether the Supreme Court has the jurisdiction to review the Eleventh Circuit's decision affirming the dismissal of a section 2255 petition for writ of habeas corpus as second or successive, an issue that the Court directed the parties to brief and argue.

As of press time, a specific date had not yet been set for oral argument. The case will be argued during the Court's October 2003 Term.

Eleventh Amendment Immunity

Frew v. Hawkins, 71 U.S.L.W. 3320 (U.S. Mar. 10, 2003) (No. 02-628), *granting cert. to review Frazar v. Gilbert*, 300 F.3d 530 (5th Cir. 2002).

In this Eleventh Amendment immunity case, petitioners had sued the State of Texas and certain state officials over the State's alleged mismanagement of a federal Medicaid program for early and periodic screening, diagnostic, and treatment services (EPSDT), a program that funds medical services to indigent children. Petitioners sought injunctive relief under 42 U.S.C. § 1983 and requested class certification. After the district court certified a class, the parties negotiated a consent decree, which the district court approved and entered. A couple of years later, petitioners filed a motion to enforce the consent decree, complaining that the State had not complied with a number of the decree's provisions. The state defendants argued that the district court lacked jurisdiction to grant relief under 42 U.S.C. § 1983

and that enforcement of the consent decree would violate the Eleventh Amendment. The district court rejected these arguments, denying the claim of Eleventh Amendment immunity and, in effect, refusing to modify the consent decree.

On appeal, the Fifth Circuit reversed, holding that (1) the State's violations of consent decree provisions for Medicaid EPSDT services did not give rise to individual rights enforceable under section 1983, and (2) the State did not unequivocally waive its Eleventh Amendment immunity with respect to enforcement of the consent decree. Concluding that the district court exceeded its jurisdiction, the Fifth Circuit vacated the district court's orders.

The United States Supreme Court granted certiorari on the following questions: (1) Do state officials waive Eleventh Amendment immunity by urging the district court to adopt a consent decree when the decree is based on federal law and specifically provides for the district court's ongoing supervision of the officials' decree compliance? (2) Does the Eleventh Amendment bar a district court from enforcing a consent decree entered into by state officials unless the plaintiffs show that the "decree violation is also a violation of a federal right" remediable under section 1983?

As of press time, a specific date had not yet been set for oral argument. The case will be argued during the Court's October 2003 Term.

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APPELLATE PROCEDURE—PARTIAL REPORTER'S RECORD

Bennett v Cochran, 46 Tex. Sup. Ct. J. 248 (Dec. 12, 2002) (Smith not participating)

This case addressed whether an appeal can challenge the legal and factual sufficiency of the evidence on appeal when the appellant requested only a partial reporter's record. In an appeal from a JNOV in a dispute among former law partners, the appellant alleged points relating to the sufficiency of the evidence after requesting only a partial reporter's record. The court of appeals affirmed the judgment of the trial court, concluding that by requesting only a partial reporter's record, the appellant waived its sufficiency complaints on appeal. By per curiam opinion, the Supreme Court reversed, holding that pursuant to the express terms of Texas Rule of Appellate Procedure 34.6(c), "an appellant need not take a complete reporter's record to preserve legal or factual sufficiency points."

The Court then addressed the alternative argument that the appellant waived the evidentiary sufficiency points by failing to comply with the requirement under Rule 34.6 to include in the request for a partial reporter's record a statement of the points or issues to be raised in appeal, and thus was not entitled to a presumption that the reporter's record contains the entire record for the purposes of evaluating sufficiency points. The Court concluded that while the statement of those issues was due at the time for perfecting the appeal and was nevertheless not filed until almost two months later, "nothing in the record indicates that [the appellant's] tardiness impaired [appellee's] appellate position." The Court concluded that the delay did not prevent appellee from identifying the relevant issues or supplementing the record.

The Court noted that an outright failure to submit a statement of points/issues would require the appellate court to affirm the trial court's judgment. But it rejected "strict compliance" with the terms of Rule 34.6 in favor of a more "flexible" approach which would not compel the denial of review of the merits when the appellee does not establish any prejudice from a "slight relaxation of the rule." In doing so, the Court reaffirmed a "commitment to ensuring that courts do not unfairly apply the rules of appellate procedure to avoid addressing a party's meritorious claim." Concluding that in this case the objectives of Rule 34.6(c) were served, the Court concluded that Rule 34.6 did not preclude review of the sufficiency points asserted in the court of appeals.

ARBITRATION—MECHANIC'S LIEN

CVN Group, Inc. v. Delgado, 46 Tex. Sup. Ct. J. 366 (Dec. 31, 2002) (O'Neill not participating)

This case involved the enforceability of a mechanic's lien in a construction dispute awarded by arbitration. The underlying contract provided that "claims, disputes or other matters in question between the parties to this agreement arising out of or relating to this Agreement or breach thereof shall be subject to and decided by arbitration." After a dispute arose, the contractor ("CVN") demanded arbitration, and sought damages and a lien against the homestead. The homeowner ("Delgado") argued in response that the lien claims were invalid because the lien affidavit was recorded late and because CVN did not record the contract as required. They raised no other defense to the lien issue and did not contest the arbitrator's authority to decide the validity of the liens. The arbitrator awarded CVN damages and found valid statutory and constitutional mechanics' liens for the full amount of the damages. Thereafter, the district court reduced CVN's damages, but denied CVN's request to foreclose on the lien, finding that the arbitrator exceeded its authority in granting the lien given CVN's failure to comply with the constitutional

and statutory lien requirements. The court of appeals reinstated the damage award but affirmed the refusal to foreclose the lien.

The Delgados argued that common law requires a court to overturn an arbitrator's award that is unconstitutional or otherwise violates public policy. Thus, the issue for the Supreme Court was under what circumstances should judicial enforcement of arbitration awards be withheld for reasons of legal or public policy.

The Court confirmed that "an illegal contract unenforceable by litigation should not gain enforceability through arbitration." But it also noted "it is no more against public policy to arbitrate whether a debt has arisen [from some activity rendering it unenforceable as opposed to from legitimate activities] than it is to litigate the same issue. The Court confirmed that "an arbitration award cannot be set aside on public policy grounds except in an extraordinary case in which the award clearly violates carefully articulated, fundamental policy." It explains that had the arbitrator wholly disregarded the constitutional and statutory requirements for perfecting a mechanic's lien on a homestead and held that a lien should be valid without regard to such requirements, that award would contravene public policy. But in this case the issue of the lien requirements was disputed before the arbitrator and the arbitrator concluded the requirements had been satisfied. "A mere disagreement with a judge does not violate public policy. Nothing in the arbitration proceeding indicates that the arbitrator completely disregarded the requirements for perfecting a mechanic's lien." Therefore, the Court held that the arbitrator's award did not violate public policy.

Justice Hankinson, joined by Justice Enoch, dissented. They took the position that "while parties may arbitrate their personal liability for a debt, a court must decide the validity of a lien. Doing so, they argued, would "preserve the distinction between the two separate remedies of personal judgment on a debt and foreclosure of a mechanic's lien on real property securing that debt." The dissent further argued that such a holding would allow the entity directed by the Legislature to divest people of their property to exercise "the cocomitent responsibility to see that all constitutional and statutory requirements are met." That holding would also strike a balance between favoring arbitration with ensuring a judicial role, as envisioned by the Legislature, in providing are constitutional and statutory requirements are met before foreclosure is ordered. The dissent would have held that the trial court had the authority to vacate the part of the arbitrator's award establishing the liens, but that the trial court erred in failing to conduct a full evidentiary hearing on the lien's validity. The dissent noted the distinction between the "in personam" action against the property owner and the in rem action against the property in the foreclosure action. At a minimum, the dissent argued, the judicial foreclosure requirement attached to mechanic's liens implies a determination by a court that the constitutional and statutory requirements for perfecting a claim have been met before that court orders foreclosure.

The dissent also noted that the majority of other jurisdictions generally require the commencement of proceedings in both the arbitration forum and a court of law to foreclose on a lien. These strikes follow a policy whereby "the court defers to arbitration the underlying debt claim but retains jurisdiction over the dispute, and later incorporates the amount of the arbitration award into its order of foreclosure." The dissent would have held that "while parties may agree to arbitrate a dispute on a debt arising from the parties' contract, the validity of a mechanic's lien securing that debt is for a court, not an arbitrator to decide."

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ARBITRATION—MODIFICATION OF AWARD

Callahan & Associates v. Orangefield Independent School District, 46 Tex. Sup. Ct. J. 270 (Dec. 19, 2002) (Smith not participating)

This case involved a contractual dispute about a construction projection that was submitted to arbitration. In that dispute, Orangefield Independent School District (OISD) sought cost of repair damages while Callahan & Associates (Callahan) sought breach of contract damages. During the arbitration OISD presented evidence of the costs of replacing a defective asphalt driveway with a concrete one, but it put on no evidence of what it would have cost to repair the driveway or replace it with another asphalt one. Callahan put on evidence of additional costs it had incurred for which it had not been compensated.

The arbitrator denied OISD's claims, indicating that while both OISD and Callahan were at fault with regard to the driveway failure, OISD put on no evidence of the cost to replace the asphalt driveway. The trial court severed the arbitrated claims from the underlying suit, and OISD moved to vacate the arbitrator's award of fees to Callahans and to modify the award to require Calalhan to pay OISD's damages. The trial court rendered judgment consistent with the arbitrator's award. The court of appeals concluded that there was more than a scintilla of evidence of the driveway's replacement cost sufficient to raise a genuine issue of material fact whether the arbitrator made an evident mistake or violated the common law by failing to award OISD damages for the replacement driveway.

In a per curiam opinion, the Supreme Court reversed the court of appeals. It concluded that the Texas Arbitration Act does not allow a reviewing court to modify or correct an award based on an arbitrator's evident mistake in failing to award damages. Instead, the Court noted, the Act only allows a court to modify or correct an award that contains an evident miscalculation of figures or an evident mistake in the description of a person, thing, or property referred to in the

award. Because the failure to award damages was not a basis for modifying an arbitrator's award, the Supreme Court reversed the court below.

OISD also argued that the additional award to Callahan violated the Texas Constitution to the extent the Constitution prohibits public entities from granting extra compensation to contractors for services already provided. However, the Court concluded that the argument was waived because it was not raised in the arbitration.

CHILD SUPPORT

Office of Attorney General v. Lee, 46 Tex. Sup. Ct. J. 221 (Dec. 5, 2002) (Smith did not participate)

This per curiam opinion raised two issues relating to child support actions. The first issue was whether child-support judgments accrue postjudgment interest when the judgment does not expressly award it. Danny Lee was ordered to pay child support in connection with his 1980 divorce. In 1987, a judgment was entered awarding $16,900 in arrearages and ordering his employer to withhold $500 from his monthly paychecks. That judgment did not specifically award prejudgment interest. Eleven years later, the Attorney General filed an administrative writ of withholding directing his employer to withhold $500.00 per month to pay an arrearage, contending that Lee owed more than $5,000 in accrued interest on the 1987 judgment. The master determined Lee had an arrearage of $1,000 in child support interest, but had overpaid his child support by $987, resulting in a $13 arrearage. On initial appeal, the trial court ordered that the Attorney General take nothing and permanently stayed the writ. The court of appeals affirmed, concluding that allowing postjudgment interest would constitute an impermissible modification of a judgment that has long since become final to add an obligation that was not originally included. The Supreme Court concluded that pursuant to the unambiguous terms of the controlling statute at the time, Texas Finance Code § 304.005, "*all* judgments of the courts in this state earn interest . . . ." Noting that the statute contains no requirement that a judgment specifically include an award of postjudgment interest, the Court explained that the judgment at issue was subject to the accrual of postjudgment interest.

The second issue was whether the Attorney General, as a Title IV-D agency, was exempt from paying appellate filing fees. The Court agreed that the Attorney General was exempt because Family Code Section expressly prohibits an appellate court from charging the Title IV-D agency any fees except as provided. The Court concluded that appellate filing fees are not specifically included in the enumerated allowed items that can be charged to a Title IV-D agency, while other specific filing fees are expressly listed. Thus, under the statute in effect at the time, a Title IV-D agency could not properly be assessed appellate filing fees.

CONSTITUTIONAL LAW

Bell v. Low Income Women of Texas, 46 Tex. Sup. Ct. J. 309 (December 31, 2002) (Hankinson not participating).

The issue in this case was whether the state's restriction on abortion funding violates various provisions of the Texas Constitution. Section 32.04(e) of the Human Resources Code provides that the Texas Medical Assistance Program ("TMAP") "may not authorize the provision of any service to any person under the program unless federal matching funds are available to pay the costs of the service." Pursuant to the Hyde Amendment, federal matching funds for abortions are available only if the pregnancy is the result of rape or incest or places the woman in danger of death.

Plaintiffs claimed the State's funding restrictions cause indigent women to delay or forgo medically necessary abortions, causing them harm. The trial court granted summary judgment for the State. The court of appeals reversed and held that the TMAP's funding

restrictions violate the Texas Equal Rights Amendment.

In an opinion by Justice O'Neill, the Court focused primarily on whether equality has been denied "because of" sex. The State argued that disparity is not based on sex because the restrictions in § 32.04 are facially neutral and simply prohibit funding on services that are not federally reimbursable. Plaintiffs focused on the Hyde Amendment and maintained that since only women can become pregnant, funding is denied because of sex.

In rejecting Plaintiffs' argument, the Court pointed out that medically-necessary, pregnancy-related services are funded. Thus, the classification is not directed at women as a class, but at abortion as a medical treatment. While the Court acknowledged that the funding restriction affects only women, the intent of TMAP was to conform to the federal social security program and to maximize federal matching funds. Further, the original enactment of § 32.04(e) was not directed at abortion funding because abortion was illegal in Texas when it was enacted.

The Court also rejected Plaintiffs' argument that the restriction on abortion funding should be considered suspect because women's child-bearing capacity has historically been a basis for denying women equality. Although the State cannot place undue burdens on a woman's freedom to terminate a pregnancy, it has the authority to promote a value judgment favoring childbirth over abortion and exercise that judgment in its allocation of public funds. According to the Court, while the adverse consequences of the restrictions on women might amount to an inference of discriminatory purpose, they are not proof of a discriminatory purpose. The Court concluded Plaintiffs failed to demonstrate that the funding restrictions reflect a purpose to discriminate because of sex. The Court further concluded that the funding restrictions are rationally related to legitimate governmental purposes of funding only those services for which federal reimbursement is available and encouraging childbirth and protecting potential life.

The Court held that the TMAP funding restrictions do not discriminate on the basis of sex and are rationally related to a legitimate governmental purpose, and therefore, the restrictions do not violate the Equal Rights Amendment, Equal Protection Clause or right to privacy of the Texas Constitution. The Court reversed the court of appeals' judgment and rendered judgment for the defendant.

CONTRACTS

Community Bank & Trust, S.S.B. v. Fleck, 46 Tex. Sup. Ct. J. 215 (December 5, 2002) (Smith not participating).

Fleck sued the Bank for honoring forged checks written on Wright's account before Wright's death. Fleck notified the Bank eleven months after the Bank sent the statement reflecting that the items had been paid. The deposit agreement required Wright to notify the Bank of an unauthorized signature or alteration within a reasonable time after a statement is made available, not to exceed fourteen days. Based on the agreement, the Bank refused responsibility for honoring the disputed checks. The Bank, however, did not deny that all conditions precedent to plaintiff's right to sue and recover had occurred and also did not raise the deposit agreement. In response to Fleck's summary judgment, the Bank argued that it had not received notice of the forgeries within fourteen days pursuant to the deposit agreement. Because the Bank failed to specifically deny Fleck's allegations and because it failed to plead the deposit agreement, the trial court granted Fleck's summary judgment. The court of appeals affirmed and held that the deposit agreement was void pursuant to Civil Prac. & Rem. Code § 16.071(a). That section provides that a contract stipulation requiring notice of a claim for damages within in less than ninety days is void. The court of appeals stated that its holding did not conflict with *American Airlines Employees Fed. Credit Union v. Martin*, 29 S.W.3d 86 (Tex.

2000), and to the extent it did, the court of appeals declined to follow *Martin*.

In this per curiam opinion denying the Bank's petition for review, the Court characterized the court of appeals' interpretation of *Martin* as "plainly incorrect" and expressly disapproved its construction of the case. In *Martin*, the Court stated that § 16.071 does not apply to bank deposit agreements when the notice to be given is not notice of a claim for damages, but rather notice of an unauthorized transaction. However, because the Bank did not raise the deposit agreement in its pleadings, no error was shown. The Court expressly offered no view on whether the fourteen-day notice requirement is reasonable under Bus. & Comm. Code § 4.103(a).

Centex Homes & Centex Real Estate Corp. v. Buecher, 46 Tex. Sup. Ct. J. 294 (December 31, 2002) (Schneider not participating).

The issue in this case was whether a homebuilder may disclaim the implied warranty of habitability and the implied warranty of good and workmanlike construction accompanying the sale of a new home.

Plaintiffs purchased homes built by Centex and signed a contract containing a one-year limited express warranty and a waiver of the implied warranties of good and workmanlike construction and habitability. Plaintiffs sought to certify a class against Centex and alleged among other matters, that the disclaimer was unenforceable as a matter of law. Centex argued the implied warranties can be waived. The trial court dismissed the proposed class. The court of appeals reversed, holding that a homebuilder may not disclaim or cause a buyer to waive the implied warranties of good and workmanlike construction and habitability.

In a 5-3 opinion on rehearing by Chief Justice Phillips, joined by Justices Hankinson, O'Neill, Jefferson and Smith, the Court withdrew its original opinion and issued a new opinion. According to the Court, the implied warranty of good workmanship focuses on the builder's conduct and requires a builder to construct a home in the same manner as a generally proficient builder under similar circumstances. The good workmanship warranty is a default warranty or "gap-filler" that attaches to a new home sale when the contract fails to articulate how the builder or structure will perform. Thus, the parties may contractually supersede the implied warranty of good workmanship. Accordingly, the Court held that the implied warranty of workmanship may be disclaimed when the agreement defines the "manner, performance or quality" of the construction. An agreement, however, cannot simply disclaim the good workmanship warranty.

The implied warranty of habitability looks to the finished product and serves to protect the buyer only from those defects that impair the very basis of the bargain. This warranty requires the builder to construct a home that is "safe, sanitary and otherwise fit for human habitation." This warranty only extends to latent defects that render the property unsuitable for its intended use and does not include defects either known by or expressly disclosed to the buyer. Because the average home buyer is without the expertise to discover defects in a new house, the warranty of habitability is an essential part of a new home sale. Accordingly, the Court held that the warranty of habitability may not be disclaimed generally and can only be waived to the extent defects are adequately disclosed. The Court affirmed the court of appeals' judgment and remanded to the trial court.

Justice Hecht dissented. According to Justice Hecht, without a more fully developed record regarding the nature and operation of the home construction industry, the result of the decision on disclaimers of warranties–whether helpful or not–cannot be determined. Among other matters, Justice Hecht criticized the majority's failure to delineate its opinion as applying prospectively. Justice Hecht also disagreed with the majority's failure to clarify its definition of express workmanship warranty when Centex and the amici indicated that express warranties guarantee results, not the manner of construction.

Justice Owen dissented and echoed Justice Hecht's concerns with the lack of an adequate factual record. According to Justice Owen, because the case was dismissed on the pleadings without evidence offered, the Court has "no idea what the practical impact of our holding will be on consumers."

Justice Enoch noted his dissent.

INSURANCE—CANCELLATION OF AUTO POLICIES

Ray Insurance v. Jones, 46 Tex. Sup. Ct. J. 248 (Dec. 12, 2002) (Smith not participating)

In *Ray Insurance v. Jones,* the Supreme Court denied the petition for review, but issued a per curiam opinion raising issue with two separate statements in the court of appeals' opinion. The case involved claims arising from the cancellation of an automobile insurance policy within the first sixty days of the issuance of a policy. Texas Insurance Code article 21.49-2B, § 4(i) , the provision at issue, states that an insurer "may cancel a personal automobile insurance policy it if has been in effect less than sixty days." The court of appeals read that provision as forming the only basis by which an insurer could cancel a policy: "Subsection (i) does not allow an insurer to cancel for any reason other than listed in the other subsections of § 4, and by implication would prohibit cancellation after sixty days." In denying the petition for review, the Supreme Court disapproved of that statement interpreting the statute.

Another issue on appeal was whether the insurer was estopped from alleging cancellation because it accepted premiums for payment. While the insurer alleged this argument had been waived by the failure to plead or present evidence of estoppel, the court of appeals noted, among other things: "pursuant to Rule 2 of the Texas Rules of Civil Procedure, we suspend the operation of Rule 94 of the Texas Rules of Civil Procedure to uphold appellant's estoppel claim as we do not believe appellees were surprised by such claim and will not be unfairly prejudiced thereby." The Supreme Court wrote to "disapprove any suggestion that Rule 2 of the Texas Rules of Appellate Procedure allows the courts of appeals to suspend rules governing pleading practice before the trial courts."

JURY CHARGE

Harris County v. Smith, 46 Tex. Sup. Ct. J. 263 (Dec. 19, 2002) (Schneider not participating).

The issue in this case was "whether the trial court committed harmful error by submitting a broad-form question on damages that included an element without any evidentiary support. In a personal injury suit brought by parents individually and as next friend for their children, the trial court submitted two jury questions on the issue of the parents' injuries. The first informed the jury that when determining Lynn Smith's damages the jury could consider four elements: physical pain and mental anguish, loss of earning capacity, physical impairment, and mental care. The second informed the jury that when determining Eric Smith's damages it could consider physical pain and mental anguish, physical impairment, and medical care. Harris County objected to both questions: to the first alleging there was no evidence of any "loss of earning capacity" and to the second alleging there was no evidence of any "physical impairment. The court overruled both objections, and the jury awarded Mr. Smith $90,000 and Mrs. Smith $3,100 in damages. The court of appeals agreed that the submission of the two contested points was erroneous, but that the error was harmless because sufficient evidence existed on the other bases for damages on which the damage awards could be predicated.

The Supreme Court reversed, relying on its earlier analysis in *Crown Life Ins. Co. v. Casteel*, 22 S.W.2d 378 (Tex. 2000). There, the Court had ruled that "when a single broad-form liability question commingles valid and invalid grounds and the appellant's objection is timely and specific, the error is harmful and a new trial is

required when the appellate court cannot determine whether the jury based its verdict on an invalid theory." The error in the submission is harmful under such circumstances because it prevents the appellate court from determining whether the jury based its verdict on an improperly submitted invalid element. The Court extended its earlier harmful error analysis beyond the question of liability and made it applicable to submissions relating to damages as well, and found error in the overruling of defendant's timely and specific objection to the charge, which mixed valid and invalid elements of damages in a single broad-form submission

Justice O'Neill, joined by Justices Enoch and Hankinson, dissented, finding no harmful error that probably presented the petitioner from properly presenting the case to the court of appeals. First, the dissent suggested there was ample evidence to support the jury's award under the elements properly submitted. The dissent rejected the argument that it was not possible to determine whether the jury based part of its award on an improper element. It noted that the charge instructed the jury to consider each element of damages separately, and to award damage if any were shown. Relying on the assumption that the jury properly followed the trial court's instructions, the dissent concluded that the improper submission necessarily was not harmful. The dissent further noted that only by assuming the jury disregarded those instructions could harmful error be found. Finally, the dissent relied heavily on the distinction between charge errors whereby a question fails to conform with the substantive law and errors based upon the sufficiency of evidence supporting a submission. It warned that the ruling would "undoubtedly resurrect the granulating and confusing charges that we long ago abandoned."

Reason is itself a matter of faith. It is an act of faith to assert that our thoughts have any relation to reality at all.

-- Gilbert Keith Chesterton

MANDAMUS—CLASS ACTION

In re E.I. DuPont de Nemours & Co., 92 S.W.3d 517 (Tex. 2002) (Smith not participating).

Pursuant to Civ. Prac. & Rem. Code § 71.052, Dupont sought to dismiss asbestos exposure claims filed against it by 8,000 plaintiffs. Section 71.052 allows a defendant to seek dismissal of asbestos exposure claims when the plaintiff was not a resident of Texas at the time the claim arose and if the plaintiff's claim arose outside Texas. Further, the statute provides that the trial court shall dismiss each claim against the defendant that was commenced on or after August 1, 1995, but before January 1, 1997, unless the plaintiff elects to refile in another state or to remain in Texas subject to limits on the amount of recovery. The statute applies to a civil action pending on the effective date (May 29, 1997) unless "a trial of a plaintiff's action" had already begun. Plaintiffs named DuPont as a defendant on September 10, 1996. At least two severed cases involving some plaintiffs had been tried.

DuPont argued that § 71.052 applied because the claims against it were asserted after August 1, 1995 and before January 1, 1997, and that of the few plaintiffs with contacts to Texas, Texas was not the most appropriate forum. Plaintiffs countered that § 71.052 did not apply because a claim against Dupont relates back to the date of the originally-filed suit. The trial courts denied DuPont's motions and the court of appeals denied DuPont's request for mandamus relief.

In an opinion by Justice Hecht, the Court rejected Plaintiffs' relation-back argument. Allowing a claim to relate back to an earlier-filed suit would defeat the purpose of the statute–to reduce asbestos claims by nonresidents. The Court also disagreed that the trials in severed actions barred the application of § 71.052. DuPont did not assert the application of the statute to the severed actions and the statute plainly applies to the actions where there have been no trials. Accordingly, the Court concluded that the

trial court abused its discretion in refusing to apply § 71.052.

The Court concluded that the facts were at least as compelling as those in *CSR v. Link* and that DuPont had no adequate remedy by appeal. The Court granted the petition for mandamus, but allowed Plaintiffs the opportunity to file the § 71.052(c) election.

MANDAMUS—ENFORCEMENT OF JUDGMENTS

In re Crow-Billingsley Air Park, Ltd., 46 Tex. Sup. Ct. J. 454 (Feb. 13, 2003) (Wainwright not participating).

In this per curiam opinion, the Court addressed a trial court's obligation to enforce an unsuperseded final judgment that has been

September 21. On September 19, the trial court again ordered the election to proceed, but suspended the results of the election until further determination by the court that the election complied with the July 23 judgment.

On the day of the election, Billingsley filed a motion to enforce the July 23 judgment and to declare the winners of the election as provided in the July 23 judgment. Both Billingsley and the zoning committee appealed the July 23 judgment before the trial court ruled on the motion to enforce. The zoning committee then moved to dismiss the enforcement action for lack of jurisdiction. The trial court granted the motion to dismiss, leaving the court-ordered election unresolved even though the July 23 judgment had not been superseded.

According to the Court, trial courts have a duty to enforce their judgments and the power to make supplemental rulings to assist in the enforcement of a declaratory judgment. The Court held that the trial court had jurisdiction over the motion to enforce the July 23 final judgment, notwithstanding the fact that it had been appealed. Because mandamus relief is available to vacate an order that erroneously denies a party's attempt to enforce an unsuperseded judgment, the Court conditionally granted the writ of mandamus.

The test of a first-rate intelligence is the ability to hold two opposed ideas at the same time, and still retain the ability to function. *--F. Scott Fitzgerald*

OIL & GAS

Anadarko Petroleum Corp. v. Thompson, 46 Tex. Sup. Ct. J. 414 (January 30, 2003) (O'Neill, Smith and Wainwright not participating).

This case interprets the meaning of a gas lease that continues for one year and "as long thereafter as gas is or can be produced." The lease further provided that, if production ceases for any reason, the lease "shall not terminate provided lessee resumes operations for drilling a well within sixty(60) days from such cessation." Production began in 1936 but in 1981 and again in1985, actual production ceased for longer than sixty days. Thompson sued for a declaration that the lease terminated in 1981 and sought damages for conversion. The trial court granted Thompson's summary judgment and the court of appeals affirmed.

In the original opinion by Justice Baker, the Court rejected Thompson's argument that permitting the capability of production to sustain the lease would allow the lessees to maintain the lease indefinitely without actual production. According to the Court, the implied duty to manage and administer the lease as a reasonably prudent operator, which includes the implied duty to market the gas reasonably, limits the lessee's ability to sustain the lease based on a well's capability of production. The Court held that a well either actually producing or capable of producing gas sustains the lease under the habendum clause. Further, the Court held that the cessation-of-production clause only applies if the lease would otherwise terminate under the habendum clause.

Also in its original opinion, in an issue of first impression, the Court approved the definition that "capable of production" means a well that will produce in paying quantities if it "is turned 'on' and it begins flowing, without additional equipment or repair." The Court reversed the court of appeals judgment and remanded to the trial court.

In its per curiam opinion denying the motion for rehearing, the Court clarified that the definition of "capable of production" did not overrule the requirement that for a well to produce in paying quantities or to be capable of producing in paying quantities, there must be a production facility near enough so that production could be marketed at a profit. Here, the well was connected to pipeline facilities and, notwithstanding periods of non-production, there was no question that the well was capable of producing in paying quantities.

The Court also clarified its discussion of the implied duty to manage and administer the lease as a reasonably prudent operator. According to the Court, the opinion did not intend to imply that the remedy for breach of an implied covenant to market production is forfeiture or termination of a lease. The Court has consistently held that the breach of an implied covenant in an oil and gas lease "does not automatically terminate the estate, but instead subjects the breaching party to liability for monetary damages, or in extraordinary circumstances, the remedy of a conditional decree of cancellation." Additionally, the Court noted as a practical matter, a lessee cannot sustain a lease based on a well's capability of production without actual production because paying damages for the failure to reasonably market the gas serves an incentive to obtain actual production.

PARENTAL TERMINATION

In re L.S.R., 92 S.W.3d 529 (Tex. 2002) (Smith not participating).

During the trial to terminate J.R.'s parental rights, the State offered evidence that as a juvenile, J.R. had received deferred adjudication for the offense of indecency with a child against his four-year old cousin. Family Code § 161.001(1)(L)(iv) provides for termination of parental rights if a parent has been convicted or placed on community supervision, including deferred adjudication, for being "criminally responsible for the death or serious injury of a child" under various Penal Code sections,

including indecency with a child. The court of appeals held there was no evidence to support termination under § 161.001(1)(L)(iv) because there was no showing that "J.R.'s cousin suffered death or serious injury as a result of his conduct." The court of appeals deleted this ground for termination and affirmed the judgment. Its per curiam denial of the petitions for review, the Court disavowed any suggestion that molestation of a four-year old or indecency with a child in general does not cause serious injury.

In re J.F.C., A.B.C., and M.B.C., 46 Tex. Sup. Ct. J. 328 (December 31, 2002).

In a termination of parental rights case, the parents did not object to the failure of the charge to include an instruction that termination must be in the children's best interest. Following a jury trial, the trial court terminated parents' parental rights. The court of appeals concluded that the omission was fundamental error that could be raised for the first time on appeal, that the error probably caused the rendition of an improper judgment and reversed and remanded.

In a 5-4 opinion authored by Justice Owen and joined by Chief Justice Phillips and Justices Hecht, Jefferson and Smith, the Court held that Rule 279 required the Court to supply the omitted finding in support of the judgment and that fundamental error cannot be used to avoid the application of Rule 279. Because parental rights may be terminated only upon clear and convincing evidence, the primary issue in this case is the application of the legal sufficiency standard of review in a case with the clear and convincing burden of proof.

According to the Court, the legal sufficiency review must consider "whether the evidence is such that a factfinder could reasonably form a firm belief or conviction about the truth of the matter on which the State bears burden of proof." In conducting the review, a court should review the evidence in a light most favorable to the judgment by: 1) assuming that the factfinder resolved disputed facts in favor of the finding if a reasonable factfinder could have done so, and 2) disregarding all evidence that a reasonable factfinder could have disbelieved or found incredible. If no reasonable factfinder could form a firm belief or conviction that the matter to be proven is true, the court must conclude the evidence is legally insufficient. In applying its articulated standard, the Court concluded that legally sufficient evidence supported the finding that termination of parental rights was in the children's best interest.

The parents also complained for the first time on appeal that the charge failed to require the same ten jurors to agree that a parent engaged in at least one of the Family Code § 161.001(1) types of conduct and that termination is in the best interest of the children. Thus, according to the parents, the use of broad-form submission in this context fails to satisfy federal due process requirements. Assuming the charge was erroneous in this regard, the Court did not reach the constitutional issue because the evidence conclusively established that both parents engaged in conduct described by § 161.001(1). Accordingly, error if any did not cause the rendition of an improper judgment.

The Court reversed the court of appeals' judgment and rendered judgment terminating the parent-child relationships. Justice O'Neill concurred in the judgment only.

Justice Hankinson, joined by Justice Enoch, dissented. Contrary to the majority's application of Rule 279, Justice Hankinson characterized the issue as whether in parental termination cases, due process requires review of charge errors to which no objection was made. While acknowledging that fundamental error has traditionally been limited to jurisdictional defects or important public interest or public policy matters, Justice Hankinson would have held that appellate courts may review "unpreserved charge error relating to the required statutory findings in a parental-rights-termination case under our common-law doctrine of fundamental-error review." Given the express mandate in the Family Code that termination must be in the best interest of the child, the dissent determined that the

omission of such instruction was error. However, in light of the evidence supporting termination, the dissent concluded the error was harmless. Justice Hankinson would have reversed the court of appeals' judgment and remanded to the court to consider the remaining issues.

Justice Schneider also dissented. According to Justice Schneider, the parents waived their right to review of the charge error by failing to object at the trial. Justice Schneider rejected the contention that due process mandates review of unpreserved charge error. According to Justice Schneider, the legislature provided sufficient protections–clear and convincing burden of proof and counsel for indigent parents–and did not opt parental termination cases out of the procedural and appellate rules for preservation of error. Justice Schneider would have reversed and remanded to the court of appeals for a factual sufficiency review on the termination grounds raised.

SUMMARY JUDGMENT—REVIEW OF ANCILLARY RULINGS ON RELATED MOTIONS

***Carpenter v. Cimarron Hydrocarbons, Corp.*,** 46 Tex. Sup. Ct. J. 290 (Dec. 31, 2002) (Schneider and Smith not participating)

This case involved the standard for review governing certain pre-summary judgment rulings on motions for leave to file late responses and to continue the summary judgment hearing and a governing post-summary judgment motion for new trial.

As to the pre-summary judgment motions, the Court concluded that a motion for leave to file a late summary judgment response should be granted when the non-movant establishes good cause by showing that the failure to timely respond (1) was not intentional or the result of conscious indifference, but the result of accident or mistake, and (2) that allowing the late respose will occasion no undue delay or otherwise injure the party seeking summary judgment. The Court declined to use the *Craddock* equitable standard used to review motions for new trial after default judgment has been entered in reviewing a motion for new trial filed after summary judgment when the non-movant had notice of the hearing and the opportunity to employ means available under the rules of civil procedure to alter the deadlines.

After suit was filed, Plaintiff's counsel withdrew. Ten days later Defendant filed a motion for summary judgment set for hearing forty-plus days later on April 30, 1999. Plaintiff retained new counsel on April 15, who contacted counsel for defendant to reach an agreement to continue the summary judgment hearing until June 4, 1999. New plaintiff's counsel assigned the summary judgment motion to an associate to brief, but did not calendar the hearing date. Two days before the hearing date, plaintiff's counsel was reminded of the hearing and learned that no response had been filed. Defendant's counsel would not agree to allow a late-filed response or to continue the hearing. Thereafter the trial court denied Plaintiff's motion for leave to file a late response and motion for continuance and granted Defendant's motion for summary judgment. Plaintiff filed a motion for new trial alleging the trial court abused its discretion in denying Cimarron's pre-summary judgment motions and alternatively that the summary judgment should be set aside on *Craddock* equitable grounds. The court conducted an evidentiary hearing and thereafter denied both motions.

On rehearing, the Supreme Court noted that the entry of summary judgment after the non-movant fails to respond raised different issues than raised by the typical default judgment contemplated by *Craddock v. Sunshine Bus Lines*, 133 S.W. 2d 124 (Tex. 1939) or *Ivy v. Carrell*, 407 S.W.2d 212 (Tex. 1966). In those cases, equitable principles are used to evaluate the motion for rehearing when defendants fail to learn of a pending lawsuit or trial setting until after default is taken: "In both cases, the defaulting party realized its mistake only after judgment, when the only potential relief available was a motion for new trial or to otherwise set aside the judgment." A different situation arises when a party learns of a summary judgment hearing in

advance of the hearing. The Court noted that the Texas Rules of Civil Procedure provide a party under such circumstances with the opportunity to seek additional time to file a response, either by moving for leave to file a late response or by requesting a continuance. Indeed, the Court noted, the party did in fact avail itself of these means to seek additional time. The Court thus refused to use *Craddock* to create a stopgap remedy for a defaulting party when a remedy is already provided by the rules.

The Court then considered whether the trial court abused its discretion in finding no good cause to allow for late filing of a response to the summary judgment motion. The Court discussed standard for "good cause" in other contexts and held that a motion for leave to file a late summary judgment response should be granted when a litigant establishes good cause by showing that "(1) the failure to respond was not intentional or the result of conscious indifference, but the result of accident or mistake, and (2) allowing the late response will occasion no undue delay or otherwise injure the party seeking summary judgment." Under that standard the Court concluded that the trial court did not abuse its discretion in refusing leave to file a late response: the motion offered no explanation for the failure to timely file and was not accompanied by supporting affidavits. The bare assertion of a docketing error, without an explanation of how the error occurred provided no basis for the trial Court to determine that an accident or mistake occurred. Instead, the motion merely argued no prejudice would follow were a late filing allowed. Because Cimmaron did not establish good cause, the Court found no abuse of discretion in denying leave and in denying a motion for new trial.

Justice Hecht filed a concurring opinion. He "would give the trial court more discretion to deny leave unless the failure to timely file is reasonably explained."

TORTIOUS INTERFERENCE

Tana Oil & Gas Corp. v. McCall, 46 Tex. Sup. Ct. J. 452 (Feb. 13, 2003) (Wainwright not participating).

The issue in this case was whether one who tortiously interferes with an attorney and his client by suing them in the same lawsuit is liable to the attorney for the value of the attorney's time and expenses incurred in defending himself.

Various parties, including Niemeyer, sued Tana in Fayette County over a lease. After the case settled, Niemeyer and others sued Tana again in Fayette County regarding lease disputes. Tana counterclaimed against Niemeyer and also sued Niemeyer's attorneys, the McCalls, in Nueces County. The McCalls then sued Tana in Travis County seeking to recover the value of their time and expenses incurred for defending themselves in the Nueces County suit. The McCalls did not allege that the Nueces County suit prevented them from representing Niemeyer, did not seek damages related to the Fayette County litigation and did not claim they incurred attorney's fees relating to the Nueces County suit. A take-nothing judgment was rendered in the Fayette County suit and the Nueces County suit was abated.

The McCalls proceeded to trial in Travis County contending that Tana tortiously interfered with their agreement to represent Niemeyer in Fayette County. Before the McCalls' rested, the trial court granted Tana's motion for directed verdict on the ground that the McCalls had not pleaded nor demonstrated actual damages. The court of appeals affirmed on all allegations except tortious interference, which it reversed and remanded.

In an opinion by Justice Hecht, the Court noted that there is no causal relationship between the tortious interference and the damages claimed by the McCalls. The time expended by the McCalls in defending the Nueces County suit could not have been caused by Tana's interference with the McCalls' legal

representation of Niemeyer in Fayette County. Thus, even if the McCalls could have established tortious interference, they would not have been entitled to the only damages they requested. Under these facts, the Court concluded there was no harm by the trial court's granting of a directed verdict before the McCalls rested. The Court reversed the court of appeals' judgment in part and rendered judgment that the McCalls take nothing.

TRUST AGREEMENTS

***Texas Commerce Bank, N.A. v. Grizzle*,** 46 Tex. Sup. Ct. J. 318 (Dec. 31, 2002) (Hankinson not participating)

This case tested the enforceability of an exculpatory clause contained within a trust agreement. The corporate trusts at issue contained clauses stating that "a Trustee shall not be liable for any act or omission except in the case of gross negligence, bad faith or fraud." The trusts at issue were created with one bank and then transferred pursuant to a bank merger. Because market forces caused the trust funds' value to decrease after the merger, the liquidation of the funds realized long-term capital tax losses. Plaintiff filed a class action lawsuit alleging a variety of claims including breach of fiduciary duty. Summary judgment was granted to the banks on the ground that the exculpatory clause contained in the trust agreement precluded liability. The court of appeals affirmed in part and reversed in part, concluding that as a matter of public policy, the trust's exculpatory clause could not vitiate a claim for self-dealing, and that fact issues existed on the claim for misrepresentation. The Supreme Court addressed how, consistent with public policy, an exculpatory clause can exonerate a trustee from liability.

The Court began by noting that a trust created under chapter 142 of the Property Code is an express trust to which the Texas Trust Code applies. Under the Trust Code's express language, a trust instrument's exculpatory clause can relieve a corporate trustee of liability for self-dealing defined as the misapplication or mishandling of trust funds, including the failure to promptly reinvest trust monies. Under the Trust Code, a conflict between the Code and the terms of a trust are to be resolved in favor of the terms of the trust, except that a trust may not relieve a trustee of certain enumerated prohibitions, none of which were implicated by the claims in this case. Noting that the Trust Code expressly allows a settlor to relieve a corporate trustee of liability for self-dealing subject to those exceptions, the Court concluded that "the Trust Code allows an exculpatory clause to relieve a corporate trustee from liability for self dealing unless the acts of self dealing violates the provisions of section 113.052 and 113.053 of the Trust Code." The Court rejected a public policy argument against enforcement of exculpatory provisions, noting that the public policy of the State of Texas is reflected in its statutes. It explained that with full awareness of the harshness that may result from the enforcement of exculpatory clauses, the Legislature nevertheless allowed only for limited exceptions to a settlor's general power to relieve a trustee of liability.

The Court then determined whether the underlying allegations constituted "gross negligence, bad faith, or fraud" such that they could not be subject to the exculpatory provision. The trustee's alleged failure to provide certain information to trust holders did not fit within any of the exceptions to the exculpatory clause, and allegations relating to delays in reinvesting funds, at most, amounted to allegations of the failure to exercise the degree of judgment required under the circumstances, and not bad faith. Concluding that the plaintiff failed to create a fact issue that the bank acted or failed to act as a result of gross negligence, bad faith or fraud, the Court held summary judgment was appropriate on those claims.

The Court then considered the implications of its rulings on the putative class represented by plaintiff. It explained that normally, if the claim of a sole class representative is defeated by summary judgment the entire case can be dismissed; if a putative class representative has no live individual claims,

the individual has no standing to bring suit on behalf of a class. And while there had been numerous attempts to add new putative class members as class representative, the Court concluded that focusing on those missed a crucial timing point. Before considering whether to grant intervention the trial court still had to first determine whether the plaintiff had standing to bring suit. Relying upon Federal Rule of Civil Procedure 23, which provides that a third party cannot intervene in a class action to save a claim as to which the original plaintiff never had, the Court concluded that the trial court properly rendered final judgment, but that the judgment was not res judicata against other individual plaintiffs in the putative class with claims against the banks.

TUFTA

First National Bank of Seminole v. Hooper, 46 Tex. Sup. Ct. J. 449 (Feb. 13, 2003)

This case asked whether the conveyance of a deed of trust lien exceeding the value of the debt it secured can support a claim for constructive fraud under the Texas Uniform Fraudulent Transfer Act ("TUFTA") absent evidence that the transferee intended to assist the debtor in evading creditors. The Supreme Court concluded that under such circumstances a claim does not arise because, "as a matter of law, the value of the interest in an asset transferred for security is reasonably equivalent to the amount of the debt it secures."

First National Bank loaned Thornton $300,000 in connection with the purchase of a gas pipeline system, and Thornton pledged security interests in various interests acquired, but not in pipeline easements or right-of-way contracts. The bank loaned an additional $100,000 over time. Thereafter, other parties (the "Hoopers") obtained a $950,000 judgment against Thornton. Two weeks later, the bank had Thornton sign a deed of trust, backdated to the date of the original loan, covering the pipeline easements and right-of-way contracts so that the entire pipeline system secured Thornton's debt, and the next day the bank filed the deed of trust in the county records. After the Hoopers then abstracted their judgment against Thornton, the bank began foreclosure proceedings and purchased the parts of the system leaving a net $80,000 deficiency on Thornton's loans. The Hoopers then alleged against the bank that the conveyance of the deed of trust lien was a fraudulent transfer under TUFTA. The jury found that Thornton, but not the bank, attempted to hinder, delay or defraud his creditors in transferring the deed of trust lien, and that Thornton was insolvent at the time. The jury also found that the value of the system was $700,000 at the time of the transfer and judgment was awarded to Hooper in that amount. The court of appeals affirmed, holding there was a variance in the value of the deed of trust and the value of the pipeline system at the time the lien was created, and therefore the bank failed to establish as a matter of law that it gave reasonably equivalent value for the deed of trust lien.

The bank argued on appeal that the Hoopers' section 24.005-6 TUFTA claims fail because the transfer of the deed of trust lien was made to secure a valid antecendent debt and thus, reasonably equivalent value was given as a matter of law. The Supreme Court concluded that what was conveyed "was not an asset or service whose value was subject to dispute, but a lien that had a defined value when it was created." Because the deed of trust merely perfected a security interest up to the amount of Thornton's debt, the value of the asset transferred was no more than the pre-existing debt it secured, and thus was a transfer allowed under section 24.004(a). The Court noted its conclusion was consistent with the Uniform Fraudulent Transfer Act upon which TUFTA was modeled. Concluding that the value of the deed of trust lien could not have exceeded the amount of the debt, the Court held that the bank gave reasonably equivalent value, defeating the TUFTA claim.

WORKERS COMPENSATION

Valley Forge Insurance Company v. Austin, 46 Tex. Sup. Ct. J. 423 (Feb. 6, 2003) (Wainwright not participating)

This opinion was issued in connection with the denial of a petition for review. The court of appeals below held that a claim for workers compensation benefits was not barred by the election-of-remedies doctrine, by concluding that Texas Labor Code section 409.009 abrogated the doctrine in workers' compensation cases where group health insurance is also involved. The Supreme Court concluded that the court of appeals did not need to reach that abrogation holding, and wrote to leave open the question whether section 409.009 does in fact abrogate the election-of-remedies doctrine in that context.

Texas Courts of Appeals Update

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I. Summary judgment.

A. Standard of review for no-evidence summary judgment.

*Barker v. Eckman***,** No. 01-01-00079-CV**,** 2003 WL 164287 (Tex. App.--Houston [1st Dist.] Jan. 23, 2003) (not designated for publication).

In this appeal, the appellants brought a challenge as to when the statute of limitations in a bailment case begins to run. Although the facts were not in dispute, and the court ruled in favor of the appellants on the disputed issue, the court ultimately held that the appellants had failed to satisfy the requirements for a legal sufficiency challenge, by failing to provide sufficient record citations. The court noted that merely citing to a summary of evidence compiled by the appellee, which had been entered into evidence, was insufficient to satisfy the burden under the two step process for legal sufficiency review.

The court of appeals' opinion appears to place the burden on the appellant of deciding what evidence is relevant and must be included in an Appellant's Brief to avoid waiving a legal sufficiency point. The failure to cite all relevant evidence may result in waiver. This seems to be a departure from other Texas appellate courts and the Texas Supreme Court, which place the burden of reviewing the record on the court itself, not on the appellant.

The court held that the failure of the appellant to follow the two step process resulted in waiver of the issue on appeal. The case provides little explanation for what would be sufficient to satisfy the citation requirements set forth in the opinion.

B. Trial judge's letter explaining his reasons for granting summary judgment cannot be considered on appeal as indicating the grounds on which the judgment was granted.

Sharpe v. Roman Catholic Diocese of Dallas, __ S.W.3d__, 2003 WL 164480 (Tex. App.--Dallas 2003) (designated, but not released, for publication).

This action arose from a dispute about who owned documents Sharpe took from a dumpster used by the Diocese. Sharpe claimed that he took the documents to collect evidence and expose the "vagaries" of the church. Some of the documents related to a pending lawsuit against the Diocese by another party. Sharpe contacted that party's attorney offering to show him the documents and seeking representation in his own action against the Diocese. After initially refusing to meet with Sharpe, the attorney subpoenaed the documents and took his deposition in the presence of the Diocese's counsel. That action settled.

The attorney maintained custody of the Sharpe documents. The Diocese requested that the attorney not return the documents to Sharpe without giving it an opportunity to file an appropriate motion to recover them, which it did. The trial court granted the motion, giving the Diocese custody of the documents. The court of appeals reversed the order in a prior appeal, reasoning that custody of the documents should be determined in a suit to which Sharpe is a party.

Sharpe then filed this action, in which he made a variety of allegations against the Diocese, its attorneys, and the attorney who had subpoenaed the documents. All the defendants moved for summary judgment on several grounds, including the two-year statute of limitations. In three separate orders, the trial court granted the motions. Although none of the orders recited particular grounds on which they were based, the trial judge did issue a letter explaining the basis for his rulings. The letter made no mention of the statute of limitations ground.

On appeal, Sharpe argued that the trial judge's letter reflected that he did not base his ruling on the statute of limitations. The court of appeals affirmed the judgment, with one exception. The court reasoned that a letter is not part of the judgment. The court's review is restricted to the terms of the order granting summary judgment. When that order does not specify the grounds, as here, the court will affirm if summary judgment was proper on any of the asserted grounds. The court did reverse as to Sharpe's fraud claim against the attorney he contacted. That claim was added by amendment after the attorney filed his motion for summary judgment. Unlike his other claims, Sharpe's fraud claim was not barred by limitations, given the four-year period.

II. Interlocutory orders.

A. Trial court's order in enforcement of a prior judgment is non-appealable.

Wall Street Deli, Inc. v. Boston Old Colony Ins. Co., __ S.W.3d __, 2003 WL 253697 (Tex. App.--Eastland 2003) (designated, but not released, for publication).

This appeal resulted from two orders the trial court entered relating to a 1996 judgment. The parties apparently contemplated future litigation, as the judgment, which was based on a settlement, provided that none of the parties could use the pleadings, settlement negotiations, or the settlement agreement itself in an effort to certify a class or to oppose certification in any other proceeding. Wall Street proceeded to do so twice, first arguing in a federal district court that the settlement agreement supported its class certification argument and then indicating its intent to make the same argument before the Fifth Circuit. Those actions prompted the trial court to enter two orders prohibiting Wall Street from using the settlement to argue in favor of class certification. Wall Street appealed the two orders.

The court of appeals dismissed the appeal for lack of jurisdiction on the basis that the trial court's orders were not appealable. Rather, the court concluded that the orders were made for the purpose of carrying into effect a prior judgment and thus were not themselves appealable. The court did not interpret the orders as modifying the judgment, which the trial court would have lacked jurisdiction to do, as its plenary power had long ago expired. But the court noted that, to the extent the orders did attempt to modify the judgment, they were void. The proper resolution of an appeal from a void order is to declare the order void and dismiss the appeal.

To the extent the orders merely reflected the trial court's opinion regarding the prohibited and permitted uses of the settlement agreement.

III. Appellate deadlines.

A. Effective date of judgment not determined by date of entry.

Coinmach, Inc. v. Aspenwood Apt. Corp., __ S.W.3d __, 2003 WL 253592, (Tex. App.--Houston [1st Dist.] 2003) (designated, but not released, for publication).

Following a jury verdict for the plaintiff, the defendant filed a motion for new trial. The defendant subsequently filed a notice of appeal. While the trial court still had plenary power, the judge signed the order granting the motion for new trial. The order was entered by the trial court clerk, but after plenary power would have expired. The defendant moved to dismiss the appeal on the ground that a new trial had been granted and the court of appeals lacked jurisdiction. The plaintiff responded that the trial judge was without jurisdiction to order a new trial because plenary power had expired before the new trial order was entered by the trial court clerk.

The plaintiff's argument centered on the fact that there was no order in the record granting a new trial at the time plenary power expired and that any order entered by the clerk after plenary power has expired is untimely, even if the order was signed before the expiration of plenary power.

After reviewing the plain text of TRCP 306a, which states that judgments are effective from the date signed, and TRCP 329b, which states that a motion for new trial is overruled if not signed 75 days after the date the judgment is signed, the court held that the date an order is signed is the date the order is effective. The timeliness of the entering of the order by the trial court clerk is of no consequence in determining the effective date of the order.

B. Deadline for perfecting a restricted appeal.

Maldonado v. Macaluso, __ S.W.3d __, 2002 WL 31756341,(Tex. App.--San Antonio 2002) (per curiam) (designated, but not released, for publication).

Following a default judgment, the defendant filed a motion to extend postjudgment deadlines and a motion for new trial, both of which were denied. The defendant then filed a restricted appeal claiming he had no notice of the judgment until nearly two months after the judgment had been signed. The notice of appeal was filed almost six months after the defendant received notice of the judgment.

The defendant argued that, under TRAP 4.2(a)(1), by filing a motion to extend postjudgment deadlines the deadline to file the notice of appeal was extended to six months from the date he received notice of the judgment, rather than six months from the date the judgment was signed. The court, however, noted that the express language of TRAP 4.2(a)(2) clearly exempts restricted appeals from the extension of deadlines provided for under section (a)(1) of that rule. Consequently, the notice of appeal filed by the defendant was almost two months late. The court of appeals dismissed the restricted appeal for lack of jurisdiction.

C. TRCP 306a, which extends appellate deadlines based on a

party's lack of notice of the judgment or appealable order, can apply to extend a statutory appellate deadline.

A.O. Smith v. Adair, ___ S.W.3d ___, 2003 WL 165793 (Tex. App.--Texarkana 2003, pet. filed).

This was an interlocutory appeal of a trial court's joinder order under section 15.003 of the CPRC. Three hundred fifty-five plaintiffs joined in an action filed in Harrison County, in which they alleged toxic exposure to the defendants' products. Eighty-four of the plaintiffs predicated venue solely on section 15.003(c), which permits a plaintiff to join an action if he or she can establish several elements, including an "essential need" to present the claims in that county.

As a threshold matter, the court considered whether it had jurisdiction. Section 15.003 specifies that an interlocutory appeal of a joinder decision must be perfected within 20 days of the date of the order. The defendants did not receive notice of the order until after than period expired. They then obtained an order under Rule 306a of the rules of civil procedure, in which the trial court found that the date they received actual notice of the order was September 17, 2002. The defendants then perfected their appeal within 20 days of that date.

Although several cases had applied Rule 306a in the context of a statutory appeal deadline, no case had analyzed whether it was proper to do so. This was a case of first impression. As the court stated, the question before it was whether a statute that allows an interlocutory appeal but does not contain a comprehensive appellate timetable operates outside the remaining rules-based framework for appeals. The court concluded that section 15.003(c) did not, and that Rule 306a applied to extend the appellate timetable despite a clear legislative intent for quick resolution of joinder appeals.

The court certainly appears to have reached the correct result. Depriving a party of its right to appeal because it did not receive the notice to which it is statutorily entitled seems unfair in the context of a tort suit, and could have more serious implications in other contexts. For example, as the court noted, section 547.070(b) of the Texas Health and Safety Code specifies a deadline for appeal in cases of court-ordered mental health confinement. A rule that blindly applied a statutory appeal deadline in the face of a lack of notice could result in continued confinement of a person solely because he or she was not properly advised of the court's order.

After concluding that it had jurisdiction, the court had little difficulty in concluding that the joining plaintiffs failed to meet their "very high" burden under section 15.003(c) to show an "essential need" to proceed in Harrison County. As the court recited, the Texas Supreme Court has made clear that considerations such as pooling of resources, judicial economy, and convenience are not equivalent to an essential need. The plaintiffs' mostly-identical affidavits failed to demonstrate why the plaintiffs could not pursue their claims in another county. Accordingly, the court of appeals reversed the trial court's joinder order and remanded the case for further proceedings.

D. To extend appellate deadlines, a request for findings of fact and conclusions of law must be appropriate.

International Union, United Auto., Aerospace, Agricultural Implement Workers of Am.-UAW v. General Motors Corp., __ S.W.3d __, 2003 WL 853737 (Tex. App.--Fort Worth 2003) (designated, but not released, for publication).

The court of appeals was asked to decide whether the appellants' request for findings of fct and conclusions of law following judicial review of an administrative decision by the Texas Workforce Comission based on agreed stipulations extended the deadline for perfecting the appeal. The parties tried the case on an agreed record. The agreed stipulations were not signed

and certified by the trial court as required by TRCP 263. Nonetheless, because the record showed tht the trial court decided the case solely on the stipulated facts, the court of appeals is peritted to treat the case as involving an agreed statement of facts.

When a case is tried to the court on an agreed statement of facts, the tria court is not called on to resolve any disputed factual matters, and no evidentiary hearing is required. Because there are no facts to find, findings of fact and conclusions of law have no purpose and should not be considered on appeal, so a request for them should not extend the appellate deadlines. Becuse the appellants waited until eighty days after the signing of the judgment to perfect their appeal, it was untimely and accordingly dismissed.

E. Motion for new trial does not trigger appellate jurisdiction.

C. Chambers Enters., Inc. v. 6250 Westpark, LP, __ S.W.3d __, 2003 WL 124499 (Tex. App.--Houston [14th Dist.] 2003, n.p.h.)

Final judgment was signed March 28, and a motion for new trial was made April 26. The notice of appeal was filed on August 2. The court of appeals dismissed, ut on rehearing, appellants urged that their April 2 motion for new trial was a "bona fide attempt" to invoke the court of appeals's jurisdiction under *Grand Praire I.S.D. v. Southern Parts Imports, Inc.*, 813 S.W.2d 499, 500 (Tex. 1991).

The court of appeals noted that there is some support for the appellants' position, particularly those cases where the filing of an affidavit of indigency was taken to be a bona fide attempt to invoke appellate jurisdiction and could be taken as an implied motion for extension of time to perfect the appeal. A motion for new trial, though, is directed to the continuing jurisdiction of the trial court, and does not necessarily imply that an appeal will be forthcoming. Even where a motion for new trial is required to preserve error, it is a mere prerequisite to an appeal, and not a substitute for the notice of appeal. To rule otherwise would mean that appellate jurisdiction would be invoked every time a party made a motion for new trial. The August 2 notice of appeal here was filed well after the 90 day deadline, so the appeal was dismissed.

IV. The record on appeal.

A. Judicial notice of oaths of office.

Thomas v. Burkhalter, 90 S.W.3d 425 (Tex. App.--Amarillo 2002, n.p.h.).

An inmate brought a wrongful deprivation of property action against state prison employees. The trial judge dismissed the case due to the inmate's failure to obtain permission from the state prior to filing suit. On appeal, the inmate complained that the trial judge in the case and the legislators that had drafted the statute on which the judge relied in dismissing the inmate's case had failed to take the appropriate oaths of office. The inmate requested that the court take judicial notice of the records of judicial oaths maintained by the Secretary of State.

The court, in refusing to take the requested judicial notice, analogized the records of the Secretary of State to records filed in a sister court. Without proof of those records the court could not take judicial notice of them. The court additionally noted that, even if the court could take judicial notice of the records, evidence of a failure to file with the Secretary of State is not proof that the oath was never taken. Only the failure to take the oath would deprive the official of their authority, not the failure to file.

B. Transcription of electronically recorded hearing required for review.

Hale v. Hospice at the Tex. Med. Ctr., __ S.W.3d __, 2003 WL 131793 (Tex. App.--Beaumont 2003).

An employee appealed pro se a decision of the Texas Workforce Commission denying her

claim for unemployment benefits. The trial court proceedings were recorded electronically and the tapes were filed with the appellate court. However, the employee never filed a transcript of the relevant portions of the audio recordings with the court. Even after being alerted to the requirement, the employee only filed an affidavit of indigency, which the court interpreted to be a request for a free transcript of the audio tapes. The court determined that the employee had not established her indigence properly, denied this request, and proceeded to decide the case based only on the brief the employee previously submitted.

The court held that in the absence of a transcript, there was no way to determine what evidence was offered at trial. In the absence of a transcript the court presumed that the evidence supported the trial court. The court so held even though they had the record evidence in the form of an audio tape.

Despite ruling that the appellant had failed to comply with both the briefing requirements and the record requirements, the court refused to hold that the appeal was frivolous. The court held that the procedural deficiency of the appeal did not require a holding that the appeal was not brought in good faith.

IV. Preservation of error.

A. Although a judicial admission relieves a party of the need to submit proof on a given point, the party still must preserve error by raising the admission at the appropriate time.

Sherman v. Merit Office Portfolio, Ltd., __ S.W.3d __, 2003 WL 262517 (Tex. App.--Dallas 2003) (designated, but not released, for publication).

Sherman leased office space from Merit. In 1997 Merit hired a contractor to replace the roof on the building. Sherman complained first that dust from the removal of the old roof made him ill and that the landlord failed to correct the problem. Sherman then complained that he was made ill by fumes from a gas-operated tar kettle outside his office, which the landlord refused to have moved. Sherman filed suit against Merit Office Portfolio alleging negligence and breach of contract claims. He alleged that a related company, Merit Texas Properties owned the building and that Merit Office Portfolio.

Merit Office moved for summary judgment during the course of the proceedings. In that motion, Merit Office stated that "[p]laintiff was a tenant in a building owned and maintained by [Merit Office] at all relevant times. The trial court never ruled on that motion.

At trial, Merit Office moved for, and the court granted, a directed verdict on the ground that there was no evidence that Merit Office "was the owner, occupier, or entity having control of the premises on which the incident occurred." Sherman responded to the motion but failed to raise Merit Office's statement in its motion for summary judgment that it "owned and maintained" the building as a reason to deny the motion. Sherman appealed.

Assuming that Merit's statement qualified as a judicial admission, about which the court seemed skeptical, the court held that Sherman waived his right to rely on the admission by failing to raise it in response to the motion for directed verdict. While a judicial admission relieves a party's burden of proving the admitted fact and bars the admitting party from disputing it, a judicial admission does not excuse the opposing party from having to preserve error. Accordingly, the court affirmed the judgment.

IV. Mandamus.

A. Mandamus review not available for grant of legislative continuance.

In re Smart, No. 04-02-00905-CV, 2003 WL 164277, __S.W.3d__ (Tex. App.--San Antonio 2003)

The plaintiffs brought a mandamus action after the trial court granted defendants a legislative continuance. The plaintiffs argued that the trial court abused its discretion in granting a legislative continuance after the defendants had represented to the trial court that they would not change or add new counsel. Upon this representation, the trial court entered an order that no changes in counsel would be permitted. The plaintiffs argued that the defendants were equitably estopped from seeking a legislative continuance after previously declaring they would not. The court of appeals held that, although the plaintiffs had been harmed or inconvenienced by the continuance, it was within the trial court's discretion to set aside its prior order preventing the defendants from changing or adding new counsel.

The plaintiffs also complained that the court abused its discretion in granting a legislative continuance outside the time window for doing so under CPRC § 30.003. The court of appeals held that the trial court abused its discretion in granting the continuance because it was not under a ministerial duty to grant the legislative continuance outside of the statutory time window. Nevertheless, the court of appeals held that the plaintiff had an adequate remedy by appeal, and thus denied mandamus.

B. Mandamus will not lie against successor judge.

In re Taylor, __ S.W.3d __, 2003 WL 132417 (Tex. App.--Waco 2003) (designated, but not released, for publication).

Taylor petitioned the court of appeals to issue a writ of mandamus against Judge Johnson, who had been the presiding judge of the district court. At the time the court considered the petition, though, Judge Meyer was the presiding judge. As there was nothing in the record indicating that Judge Meyer had refuse any of Taylor's requests, the petition was denied. [**Editor's Note:** Apparently this issue recently also arose during the Texas Supreme Court's consideration of the forum non conveniens mandamus petition in one of the Bridgestone/Firestone cases.]

V. Remand for further proceedings an appropriate remedy on appeal of ruling on motion to enforce settlement agreement.

Bayway Services, Inc. v. Ameri-Build Construction, L.C., ___ S.W.3d __, 2003 WL 851569 (Tex. App.--Houston [1st Dist.] 2003).

Ameri-Build sued Bayway under the DTPA. At mediation, the parties signed a settlement agreement. Ameri-Build then filed a motion for entry of judgment, to which it attached the settlement agreement. Although it did not respond to the motion, on the same day, Bayway filed a "statement" with the court that it did not consent to the settlement. The trial court signed the judgment in favor of Ameri-Build, and Bayway appealed.

The First Court of Appeals quickly dismissed Bayway's argument that the settlement agreement was not enforceable under Rule 11 because it was not filed with the trial court. The court noted supreme court authority for the proposition that Rule 11's filing requirement is satisfied so long as the agreement is filed before it is sought to be enforced.

The court then addressed Bayway's challenge to the legal sufficiency of the evidence supporting the judgment. Because Bayway did not have the burden of proof on the issue, the court considered whether, taking evidence and inferences in the light most favorable to the finding, there was more than a scintilla of evidence supporting it. The court concluded that there was not. The court considered Ameri-Build's motion for entry of judgment a motion to enforce the settlement agreement. Although that motion satisfied its pleading requirements for that breach of contract claim, Ameri-Build failed to present evidence in support of any of the elements of its claim. The court therefore reversed the judgment.

Although Bayway, having prevailed on its no-evidence point, would ordinarily be entitled to rendition of judgment in its favor, the court exercised its discretion to remand the case for further proceedings. The court noted that its discretion extended to circumstances in which there is a probability that the case has not been fully developed. The court also plainly considered it unfair to render judgment against a party who apparently had an enforceable settlement agreement.

The 2003 State Bar of Texas Annual Meeting will be held June 12-14, 2003 at the George R. Brown Convention Center in Houston. The Annual Meeting of the Appellate Section will be held on September 11, 2003, in Austin.

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Richard Crozier, Davidson & Troilo, P.C., Austin

Correction: In the last issue of *The Appellate Advocate*, the update for the Fifth Circuit inadvertently stated that motions for rehearing and for rehearing *en banc* had been denied in *Kinney v. Weaver*, 301 F.3d 253 (5th Cir. 2002). These motions remain pending before the Court.

Employment Law

***Thomas v. Choctaw Management/Services Ent*., 313 F.3d 910 (5th Cir. 2002)**

Heather Thomas and Mark Thomas are husband and wife. They brought this action against their former employer, CM/SE, and one of its employees alleging employment discrimination under Title VII and other state law violations. Specifically, the Thomases alleged discrimination based on "religion and pregnancy." They initially filed their claim with the EEOC but it was rejected. The claim was then filed in U.S. District Court. On CM/SE's motion to dismiss, the district court dismissed all claims with prejudice. On appeal to the Fifth Circuit, the only claim pursued by the Thomases was their Title VII claim.

The court noted that CM/SE is an unincorporated business venture owned 100% by the Choctaw Nation of Oklahoma, an Indian tribe that is recognized as such by, and has a treaty with, the United States. The court stated that Title VII provides unequivocally that the term "employer" does not include, among other things, an Indian tribe. According to the court, the Thomases artfully pled that CS/ME is a separate legal entity, a corporation organized and owned by the Choctaw Nation. The court rejected that contention because there was no genuine question raised by the pleadings to indicate that CS/ME is a corporation. Rather, the pleadings showed that it is a sole proprietorship owned by the Choctaw Nation. The court stated therefore that Thomas' Title VII claims are "without merit and legally frivolous."

Despite the claims advanced by the Thomases being without any merit, the court stated that the case presented an issue of first impression in the Fifth Circuit. The court took the opportunity to adopt the respective holdings reached in the Eight Circuit and Ninth Circuit. *See Dille v. Council of Energy Tribes*, 801 F.2d 373 (8th Cir. 1986); *Pink v. Modoc Indian Health Project*, 157 F.3d 1185 (9th Cir. 1998). The court held that Title VII's express exemption of Indian tribes from employer status eschews subject matter jurisdiction of the federal courts to hear employment discrimination complaints such as those advances by the Thomases in this case when brought against unincorporated commercial enterprises entirely owned and operated by recognized Indian tribes.

Certified Question/Privity of Contract

***Interstate Contracting Corp. v. City of Dallas*, ___ F.3d___, 2003 WL 244881 (5th Cir. Fed. 4, 2003)**

This case was filed in federal court based solely on diversity. One of the interesting aspects of this case is that the Fifth Circuit utilized the procedure of certifying unresolved questions of state law to the Supreme Court of Texas. The Fifth Circuit Court of Appeals found that "[n]o controlling precedent from the Supreme Court of Texas or the Texas Courts of Appeals exists to resolve the issues created by the conflicting contentions of the parties."

The facts relevant to the certified questions are not in dispute. The City of Dallas and ICC entered into a written contract for the construction of levees around a water treatment plant. In turn, ICC entered into a written sub-contract with Mine Services, Inc. ("MSI") for the levee construction and excavation. The material excavated was to be used to construct the levees

around the water treatment plant. After MSI began the project, it discovered that the material being excavated was not suitable for the levee construction. MSI therefore began manufacturing material by mixing sand and clay for the levee construction. ICC informed the City of Dallas of the problem MSI was experiencing and increased costs. The city refused to provide additional compensation. ICC nevertheless sought MSI's extra costs from the city. The city continued to deny the claim, which resulted in this lawsuit.

The U.S. District Court allowed ICC to bring claims for breach of contract against the City of Dallas on behalf of MSI. The jury found in favor of ICC.

On appeal, the city argued it was improper to allow ICC to prosecute the claim on behalf of its subcontractor, MSI, because there was no privity of contract between the city and MSI, which is essential under Texas law to maintain a breach of contract claim. ICC argued on appeal that its claim was proper even though there is no privity of contract between the city and MSI because it was allowed to maintain the claim on a "pass-through" basis. "Pass-through" claims are claims by an allegedly damaged party against an allegedly responsible party with whom it has no contractual relationship. The claims are presented by or through an intervening party in privity with both. Such a claim is described as an attempt by the parties to avoid an extra layer of litigation (*i.e.*, between themselves) with its attendant costs and risks by focusing on the party responsible. The Fifth Circuit found no controlling precedent from the Supreme Court of Texas or the Texas Courts of Appeals on this issue.

Therefore, the Court certified the following questions to the Supreme Court of Texas because of the absence of any authority from Texas and "the varied interpretations of these issues by other state courts":

(1) Does Texas law recognize pass-through claims, *i.e.*, may a contractor assert a claim on behalf of its subcontractor against the owner when there is no privity of contract between the subcontractor and the owner?

(2) What are the requirements, if any, that need to be satisfied for a contractor to assert a claim on behalf of its subcontractor when there is no privity of contract between the subcontractor and the owner and who holds the appropriate burden of proof? The Court concluded that the answers provided by the Supreme Court of Texas to these questions will determine the issues on appeal in this case.

Mandamus/Removal and Remand/Joinder

***In re Benjamin Moore & Co.*, 318 F.3d 626 (5th Cir. 2002)**

This is a mandamus case. The defendants sought to challenge an order of the district court that remanded a case to the state court where it was originally filed.

After the plaintiffs originally filed this products liability case in state court, the defendants removed it to federal court. The plaintiffs moved to remand. The defendants opposed remand and argued that several plaintiffs were fraudulently joined in the action only to defeat diversity jurisdiction. The district court granted the remand. After the defendants' motion for reconsideration was denied, the defendants filed their initial petition for writ of mandamus. They argued that the district court's failure to properly consider their misjoinder argument deprived them of their right to a federal forum. The Court denied the petition but held that the district must have inadvertently overlooked the argument about fraudulent joinder. Because it goes to the court's subject matter jurisdiction, the Court stated it was "confident" that the district court would take up the issue.

The district court then entered a subsequent order that clarified its earlier order. The district court ruled it was aware of the fraudulent joinder argument and "duly considered it, and found it to be without merit." The district court also stated that it did not address the

argument in its earlier order to remand because it was a "'bare, conclusory allegation' without any argument or evidentiary support."

From this second order of the district court, the defendants filed a second petition for writ of mandamus, asking the Court to address the joinder issue, sever the plaintiffs who were improperly joined, and retain jurisdiction where the remaining plaintiff have complete diversity with defendants.

On the second petition, the Court stated "we must first determine whether we have jurisdiction to consider the defendants' requests for relief." Citing 28 U.S.C. § 1447(d), the Court stated that except in civil rights cases, an order remanding a case to the state court from which it was removed is not reviewable on appeal or otherwise.

The Court noted that while the defendants are correct that our Court has held that joinder decisions are separable from a decision to remand a case for lack of subject matter jurisdiction, and thus subject for review by mandamus, the Court's prior decisions hold that more is required for the court to review the joinder decision. A separable order also must be "conclusive, in the sense of being functionally unreviewable in state court." Moreover, the order must "also be independently reviewable by means of devices like the collateral order doctrine."

The court observed further that "engaging in appellate review of the district court's joinder decision would lead to an impermissible advisory opinion, for our decision cannot reverse the remand order, which in any event has no effect, preclusive or otherwise, on the ongoing state litigation." Thus, the Court held it does not have jurisdiction to review the district court's decision regarding misjoinder. "Although that decision is separable from, and logically precedes, the remand, it is not conclusive, because the state court can consider misjoinder of the plaintiffs on remand." In sum, the Court found that the district court's decision on misjoinder, like its decision to remand the case to state court, is not reviewable "by appeal or otherwise." The defendants' second petition for writ of mandamus was therefore denied.

Personal Jurisdiction

***Central Freight Lines, Inc. v. APA Transport Corp*., ___ F.3d ___, 2003 WL 354951 (5th Cir. March 5, 2003)**

In this case, the district court dismissed a breach of contract suit brought by Central Fright Lines for lack of personal jurisdiction over the defendant, APA.

The Court reviews a district court's dismissal for lack of personal jurisdiction *de novo*. When, as in this case, the district court did not conduct an evidentiary hearing on defendant's motion to dismiss, the party seeking to assert jurisdiction is required only to present sufficient facts to make out a prima facie case supporting jurisdiction. The Court shall accept as true that party's uncontroverted allegations (so long as the allegations are not merely conclusory) and resolve all factual conflicts in favor of the party seeking to invoke the court's jurisdiction.

Exercising personal jurisdiction over a nonresident defendant is consistent with constitutional due process when (1) that defendant has purposefully availed himself of the benefits and protections of the forum state by establishing "minimum contacts" with the forum state, and (2) the exercise of jurisdiction over that defendant does not offend "traditional notions of fair play and substantial justice." Minimum contacts can be established either through contacts sufficient to assert specific jurisdiction, or contacts sufficient to assert general jurisdiction. When a nonresident defendant has purposefully directed its activities at the forum state and the litigation results from alleged injuries that arise out of or relate to those activities, the defendant's contacts are sufficient to support the exercise of specific jurisdiction over that defendant. General jurisdiction may be asserted when a defendant's contacts with the forum state are substantial and "continuous and systematic" but unrelated to the instant cause of action.

In this case, the Court found no general jurisdiction of APA because although APA has federal operating authority in Texas, "APA has never registered to do business in the state, has never maintained any kind of business office or records in the state, and has never paid franchise taxes in the state." Further, while APA "routinely arranges and receives interline shipments to and from Texas and apparently sends sales people to the state on a regular basis to develop business, negotiate contracts, and service national accounts, APA has never actually operated any trucks or picked up or delivered any freight in Texas.

However, the Court found that APA's activities supported specific jurisdiction. After providing a detailed analysis addressing APA's arguments against personal jurisdiction, the Court found that APA may not avoid the personal jurisdiction of the district court merely because APA did not physically enter the State of Texas to deliver freight to customers or interline freight to CFL for delivery to some other final destination in the southwestern United States. Although territorial presence and activity will frequently enhance a defendant's relationship to the forum state and reinforce the reasonableness of subjecting it to suit there, an inescapable fact of modern life dictates that a substantial amount of business will be transacted by mail and by electronic wire communications across state lines. So long as a commercial actor's efforts are "purposefully directed" toward a resident of another State, the mere absence of physical contacts within the forum state cannot defeat personal jurisdiction there. In this case, the Court determined that APA clearly did purposefully "reach out" to CFL in Texas by visiting CFL's headquarters and engaging in negotiations with CFL by mail and by telephone. Furthermore, the Court found that APA clearly did so with the goal of establishing a long-term association with CFL and with the foreseeable result of causing economic activity within the forum state. On account of this, the Court concluded that APA had fair warning that it could be sued in Texas for alleged breach of the Interline Agreement and for alleged intentional torts arising out of its performance under that agreement. The judgment of the district court was therefore reversed and remanded for further proceedings.

Declaratory Judgment/Ripeness

***Venator Group Specialty, Inc. v. Matthew/Muniot Family, LLC*, ___ F.3d ___, 2003 WL 361075 (5th Cir. Feb. 20, 2003).**

This case involves a dispute about a commercial lease. It presents a "ripeness" question. Venator brought a declaratory judgment action against Matthew, seeking an order declaring certain obligations under the commercial lease. The district court granted Matthew's motion to dismiss the case on the basis that the action lacked sufficient immediacy to constitute an actual controversy. The Court reversed and remanded.

The question before the Court was whether the district court properly dismissed Venator's declaratory judgement action, which is reviewed for abuse of discretion. Generally, the decision to grant declaratory relief is statutorily committed to the district court's discretion, even where the suit would otherwise meet the requirements of subject matter jurisdiction. However, in the case at bar, the district court dismissed Venator's complaint solely on justiciability grounds, finding that the complaint failed to "present a substantial controversy of such immediacy that a declaratory judgement is warranted," and this court reviews *de novo* the question of whether a controversy is ripe for adjudication.

In the declaratory judgement context, whether a particular dispute is ripe for adjudication turns on whether a substantial controversy of sufficient immediacy and reality exists between parties having adverse legal interests. Here, the district court determined that this case was unripe for two reasons: (1) a suspensive condition barred justiciability, and (2) the controversy could not be evaluated because the lease at issue was to be construed in accord with the law in place in January 2004.

First, the district court determined that a contingency exists which is a prerequisite to Venator's potential obligation under the lease, and

that the suspensive condition had not yet been met. Venator wanted an order declaring that its obligation to make alterations to the property by erecting interior walls was impossible to perform. The district court found that the potential dispute involving the interior wall provision of the lease was unjusticiably premature because “Venator’s obligation to construct and rebuild walls and other portions of the building is conditional upon Matthew making a request of it to do so and Venator does not allege that any such request has been made."

The Court observed that while the district court is correct that lease provision must first be invoked before the interior wall provision of the lease before Venator’s obligation will be triggered, it is important to remember that the very nature of relief in a declaratory context is *ex ante*. Citing 28 U.S.C. § 2201, the Court stated that the Declaratory Judgement Act offers the court an opportunity to afford a plaintiff equitable relief when legal relief is not yet available to him, so as to avoid inequities which might result from a delay in assessing the parties’ legal obligations. In deciding whether to grant declaratory relief, the court must necessarily assess the likelihood that future events will occur, but the court ought not require that those contingencies to have occurred at the time relief is sought, such as it would were it evaluating the availability of legal as opposed to equitable relief. Here, there were other factors, but the Court principally determined that “the physical circumstances surrounding the plot of land make it very likely” that the interior wall provision of the lease will be invoked. Therefore, the Court held that the suspensive condition identified by the district court as barring justiciability is significantly likely to occur as to warrant judicial intervention.

Second, the district court found that the potential controversy surrounding Venator’s obligation to rebuild the alley was premature for another reason. The district court found that the extent of Venator’s obligation to rebuild the alleyway cannot be assessed until January 2004, as that provision of the lease is to be construed in accord with the applicable building codes of January 2004. The district court found that Venator's claims with respect to the impossibility, impracticality and illegality of constructing the alley to be therefore speculative. The Court found, however, that the district court erred in holding that the fact that the lease provisions are expressly limited by the law of January 2004. Generally, all contracts and leases must be construed in accord with applicable laws. Consequently, in any instance in which a party requests an *ex ante* declaration of rights under a contract, those rights must be ascertained in advance of the time contemplated by the contract, and consequently a theoretically different set of applicable laws may be in place.

The Court observed that if this situation was sufficient to render a party’s claims speculative, “it would be difficult to imagine how *ex ante* relief could ever be provided in a contract dispute.” Accordingly, the Court held that the district court erred in concluding the fact that the alleyway provision is to be resolved in accord with the law in place at the time the lease term ends renders the controversy unjusticiable. The case was reversed and remanded to the district court.

Federal Tort Claims Act/De Novo Review/Delay/Prejudice

Wendell Hollis v. United States of America, Cause No. 01-51035, 2003WL689261 (5th Cir. March 3, 2003).

Wendell and Patricia Hollis, as next friends of their daughter, Mariana Hollis, brought suit under the Federal Tort Claims Act against the United States of America. The Hollises alleged that the William Beaumont Army Medical Center provided insufficient and negligent medical care, which rendered their daughter blind. A bench trial was conducted between January 30 and February 1, 1989. The parties submitted post-trial briefs to the district court. No further activity occurred in the case until, twelve years later, the district court rendered judgment for the defendant.

On appeal to the Fifth Circuit, the Hollises argue, among other points of error, that ". . . the district court, in waiting nearly 13 years to issue its opinion, misapplied important facts and failed to consider others, rendering review on appeal nearly impossible." Appellants argue that the Fifth Circuit, pursuant to *Keller v. United States*, 16 F.3d 16 (1st Cir. 1994) should ". . . review the entire record de novo, taking the place of the trial court."

The Fifth Circuit declined to follow *Keller v. United States*. The Court noted that it would review the record "with extra care" and, pursuant to *Ciccarello v. Graham*, 296 F.2d 858 (5th Cir. 1961), if there was ". . . affirmative evidence that the trier of fact had prejudiced the complaining party by abusing its discretionary powers in handling the case, [the Court] would order a new trial." Specifically, Appellants question the district court's ability following the 12-year delay to analyze the case when the transcript was completed after the district court entered its findings and conclusions. While finding the 12-year delay to be "egregious," the Court found that ". . . Appellants have nonetheless not successfully pointed out any misstatement of fact made by the district court as a result of the delay or any legal issue the court forgot to address, nor have they shown that the admittedly substantial delay prejudiced them." The Court further noted that "[w]e cannot help but think that while the district court's unexplained delay – even in the face of a growing criminal caseload – is inexcusable, plaintiff's counsel also bears a heavy responsibility for never having uttered a word to the trial court or this court seeking a ruling."

ADEA/TitleVII/Retaliatory Discharge/Counterclaim

Juan Hernandez v. Crawford Building Material Company, Cause No. 01-41393, 2003WL255731 (5th Cir. February 21, 2003).

Juan Hernandez, a Mexican immigrant, worked for Crawford Building Material Company from 1975 until June 17, 1999, when he was discharged by Crawford for miscutting a roll of carpet and failing to report the incident to his superiors. At the time of his discharge, Hernandez was 61 years old. Subsequently, Hernandez filed suit against Crawford alleging that Crawford terminated him in violation of the Age Discrimination in Employment Act ("ADEA") and Title VII. After Hernandez filed suit, one of Crawford's employees told Crawford that, while Hernandez was an employee, he stole building material from Crawford and sold those materials from his home. When Crawford filed its answer to Hernandez's lawsuit, it also included a counterclaim for theft against Hernandez. Hernandez then supplemented his original complaint to allege that Crawford's counterclaim ". . . amounted to a retaliatory employment action in violation of Title VII, the ADEA, and § 1981." Hernandez moved for summary judgment on his counterclaim. The district court granted the motion finding that Crawford ". . . lacked sufficient evidence to demonstrate to a jury that Hernandez had stolen Crawford's property."

The case subsequently went to trial on the merits. The jury refused to find that Crawford had discharged Hernandez because of his age or Mexican heritage. However, it did find that the filing of Crawford's counterclaim constituted a retaliatory employment action and awarded Hernandez $20,000 in compensatory damages and $55,000 in punitive damages. In subsequently filed motions for new trial and for judgment as a matter of law, the district court found that ". . . by failing to object to the jury charge on the law of retaliation, Crawford had not preserved the issue for later challenge."

On appeal to the Fifth Circuit, Crawford argued that ". . . an employer's filing of a counterclaim cannot constitute the 'ultimate employment decision' necessary to support a finding of retaliatory employment action under Title VII and the ADEA in the Fifth Circuit." Citing *Hartsell v. Dr. Pepper Bottling Co.*, 207 F.3d 269 (5th Cir. 2000), the Court determined that, because Crawford had failed to object to the jury charge on this issue, it could only be reviewed for plain error; that is, ". . . an obviously incorrect statement of law that was 'probably

responsible for an incorrect verdict, leading to substantial injustice'."

The Court notes that "[i]n the Fifth Circuit, only an 'ultimate employment decision' by an employer can form the basis for liability for retaliation under Title VII,' and that the Circuit has ". . . consistently refused to recognize retaliation claims that are dissimilar to the prohibited activities of § 200e-2(a) (1) [of Title VII]." After noting that this is a case of first impression in the Fifth Circuit, the Court found that ". . . given our strict interpretation of retaliation claims, an employer's filing of a counterclaim cannot support a retaliation claim in the Fifth Circuit." As the district court's jury instructions were incorrect statements of law that were probably responsible for an incorrect verdict, the judgment of the district court was reversed and remanded with instructions to dismiss Hernandez's retaliation claim.

Personal Jurisdiction/De Novo Review/General and Specific Jurisdiction/Reaching Out

Central Freight Lines Inc. v. APA Transport Corp., Cause No. 02-50702 2003WL354951 (5th Cir. March 5, 2003).

Central Freight Lines, Inc. ("CFL"), headquartered in Waco, Texas, and APA Transport Corp. ("APA"), headquartered in New Jersey, entered into an "Interline Agreement," an agreement under which each company would use the services of the other in its primary service area. A dispute between the parties as to the prices charged by APA for delivery subsequently developed. On June 28, 2001, CFL brought suit against APA in the Western District of Texas alleging breach of contract, breach of fiduciary duty, negligent misrepresentation, and tortious interference with CFL's contractual relationship with its consignor. On July 20, 2001, APA brought suit against CFL in the District of New Jersey alleging breach of contract based upon CFL's refusal to pay revenues called for by the Interline Agreement. On August 7, 2001, APA filed a motion to dismiss CFL's complaint for lack of jurisdiction or, alternatively, to transfer venue to New Jersey. Without conducting an evidentiary hearing, the district court dismissed CFL's complaint for lack of personal jurisdiction over APA.

On appeal to the Fifth Circuit, the Court noted that a review of a district court's dismissal for lack of jurisdiction is conducted de novo. When the district court does not conduct an evidentiary hearing on a motion to dismiss, the party asserting jurisdiction ". . . is required only to present sufficient facts to make out a prima facie case supporting jurisdiction." The district court should accept as true the proponent's uncontroverted non-conclusory allegations, resolving all conflicts in favor of the party seeking to invoke the court's jurisdiction. The Court also notes that the district court hearing the motion may exercise jurisdiction over a defendant to the extent permitted by the law of the forum state. The Court then discusses the difference between general jurisdiction ("when a defendant's contacts with the forum state are substantial and 'continuous and systematic' but unrelated to the instant cause of action") and specific jurisdiction (when a defendant's contacts with the forum state are related to the transaction in question and events giving rise to the specific cause of action pled). The Court then determined that while APA did not have the substantial, continuous, and systematic contacts with the State of Texas required for the exercise of general jurisdiction over this case, it did have sufficient contacts for the exercise of specific jurisdiction.

The Court looked at the actions of APA (1) sending representatives to Texas to meet with CFL at its headquarters in Waco, which ultimately led the parties to negotiate and enter into their Interline Agreement, (2) obtaining information about CFL to secure a partner in Texas, and (3) negotiating with CFL by telephone at its headquarters in Waco. "APA specifically and deliberately 'reached out' to a Texas corporation by telephone and mail with the deliberate aim of entering into a long-standing contractual relationship with a Texas corporation."

The Court also restates its rule that the "... 'unilateral activity' of a plaintiff who claims some relationship with a nonresident defendant alone cannot satisfy the requirement of contact with the forum state." The Court points out that ". . . a defendant can purposefully contact the form state and avail itself of the benefits and protections of the forum's laws by creating continuing obligations between itself and residents of the forum. . . . Thus, this circuit has held that a nonresident can establish contact with the forum by taking purposeful and affirmative action, the effect of which is to cause business activity (foreseeable by the defendant) in the forum state."

Insurance/Preauthorization/Exhaustion of Administrative Remedies

David Gregson v. Zurich American Insurance Company, Cause No. 02-20169 2003WL367192 (5th Cir. March 7, 2003).

David Gregson sustained an injury at work, which ultimately required back surgery. After surgery, Gregson's physician prescribed the antibiotic Levaquin to prevent infection. When Gregson sought to have the prescription filled at his pharmacy, Zurich American denied coverage for the medication. Gregson was subsequently unable to obtain coverage authorization from Zurich American for the medication before he became ill with a staph infection, which required hospitalization and further surgery. Gregson brought suit for damages against Zurich American alleging that " . . . the subsequent surgeries were the direct result of Zurich's failure to approve and cover the Levaquin prescribed by his physician." Zurich American filed a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted, alleging that Gregson was required to exhaust his remedies before the Texas Workers Compensation Commission (TWCC) before he could pursue his claim against Zurich American. Zurich American's Rule 12(b)(6) motion was subsequently granted by the district court.

On appeal, Gregson argued that, based on TWCC Advisory Opinion 98-06, he did not have to exhaust his administrative remedies at the TWCC prior to filing his civil action against Zurich American because (1) Zurich American ". . . had no right to dispute treatment for which preauthorization was not required" and (2) there was no administrative remedy available to him for Medical Dispute Resolution as that remedy is limited only to disputes over the reimbursement of expenses for medical treatment – not disputes over whether the treatment should have been provided. Zurich American argued that the district court's dismissal of Gregson's claims was required by the holding of the Supreme Court of Texas in *American Motorists Ins. Co. v. Fodge*, 63 S,W.3d 801 (Tex. 2001). In *Fodge*, the Supreme Court held that "Fodge's failure to obtain a *final* ruling from the TWCC on whether or not she was entitled to medical benefits was dispositive of her extra-contractual claims against the insurance carrier."

The Fifth Circuit distinguished *Fodge*, noting that ". . . the precise question here is whether an employee must initiate and exhaust administrative procedures with the TWCC when a carrier, who has agreed to provide all necessary and reasonable medical coverage, denies coverage of a medical benefit incident to the approved medical treatment." Gregson argues, and the Court accepts, that the answer to this question is found in TWCC Advisory Opinion 98-06. The Advisory Opinion sets forth the medical benefits that do not require preauthorization under 28 TEX. ADMIN. CODE § 134.600 (2002). After acknowledging that the Court is not bound by the advisory opinion, the Court agreed to give it " . . . deference so long as it is reasonable and it harmonizes with the plain language of the statute, its origin, and its purposes." The Court then found that, in this case, "... Zurich did not follow the procedures outlined by the Advisory and prospectively refused to grant coverage for Gregson's antibiotic instead of lodging a formal dispute with the TWCC or contesting the compensability of Gregson's injury. Accordingly, the Court found that the ". . . . question then, is whether Gregson had a duty to return to the

TWCC to initiate administrative proceedings once Zurich refused coverage even though Zurich did not follow the proper channels in refusing coverage. We find that he did not have such a duty."

The Court agrees with Gregson that Medical Dispute Resolution under TEX. LAB. CODE ANN. § 413.031 (Vernon 1996) does not apply so as to give Gregson a right to medical dispute resolution in this case, because Zurich never rendered a service to Gregson and because the filling of a prescription does not require preauthorization by the carrier. Further, the Court found that "[n]o other sections of the Texas Labor Code or Administrative Code require an employee, who seeks a medical benefit for which preauthorization is not required, to exhaust any particular administrative remedy." Accordingly, the Court ruled that ". . . Gregson was not required to exhaust an administrative remedy before he pursued his extra-contractual claims in court. . . ."

And whether you're an honest man, or whether you're a thief, Depends on whose solicitor has given me my brief.

--William S. Gilbert

Criminal Law/Search of Automobile/ Firearms/Motion to Suppress

United States of America v. Alvin C. Green, Cause No. 01-31359 2003WL943627 (5th Cir. March 11, 2003).

Law enforcement officers, pursuant to court authorization, tapped two cellular telephones used by Green, which provided proof of his activities trafficking in drugs and laundering money. Subsequently, Green was arrested by two Baton Rouge police officers. Before the arrest, the officers had followed Green to his home. When the officers arrived at Green's home, he ". . . was on his front door steps, around twenty-feet from his vehicle." When the officers advised Green that he was under arrest, he ran. Green was then tackled and handcuffed ". . . approximately six to ten feet from his vehicle. As Green was lying on the ground, handcuffed, surrounded by the arresting officer and three other Baton Rouge police officers called to the scene, another officer searched Green's vehicle and recovered a .357 caliber revolver found protruding from beneath the driver's seat."

Green was subsequently indicted and convicted of, among other things, ". . . possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1)." In pre-trial, Green sought to suppress the warrantless search of his vehicle, which motion was denied by the district court. After a jury trial, Green was found guilty of all counts, including the firearm count. Among other issues, Green appeals the district court's ruling refusing to suppress the search for and discovery of the firearm.

On appeal, Green argues that this case is governed by Chimel v. California, 395 U.S. 752 (1962) in which the Supreme Court found that ". . . an officer making a lawful custodial arrest may search the person in custody and the 'area "within his immediate control"' into which he might reach in order to obtain a weapon or to destroy evidence." The United States argues, on the other hand, that the case is governed by New York v. Belton, 453 U.S. 454 (1981) in which the Supreme Court held that " . . 'when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile'."

The Court notes that the Fifth Circuit has not addressed the issue of whether to apply *Belton* to a situation where the arrestee is outside his vehicle. The Court looks to the law of other circuits for instruction, finding that "[t]he Sixth and D.C. Circuits do not apply Belton where the police come upon the arrestee outside his vehicle" and that the Seventh Circuit ". . . applies Belton where the defendant exited the automobile immediately prior to his arrest." The Court declines to follow the reasoning of the Seventh Circuit. The Court finds that "[t]he principle

behind Belton and Chimel is to protect police officers and citizens who may be standing nearby from the actions of an arrestee who might gain access to a weapon or destructible evidence.

In this case, the officers approached Green after he exited his vehicle and was at his front door steps, around twentieth-five feet away from his vehicle. Although Green attempted to flee from the officers, the Government admits that at the time the search occurred, Green was handcuffed and lying face down on the ground surrounded by four police officers, approximately six to ten feet from his vehicle. The record contains testimony from the officer who searched Green's vehicle that, at the time of the search, Green was 'pretty secure' and that he and the other officers did not fear that their life or safety was in danger. Because none of the concerns articulated in Chimel and Belton regarding law enforcement safety and the destruction of evidence are present in this case, the Government cannot justify the search of Green's vehicle under Belton or Chimel. Accordingly, we conclude that the district court erred in denying Green's motion to suppress the weapon obtained from his vehicle." The Court reversed the denial of Green's motion to suppress the weapon and vacated Green's conviction for possession of a firearm.

Personal Jurisdiction/General and Specific Jurisdiction/Sliding Scale/ Internet/Passive and Interactive Websites

Oliver "Buck" Revell v. Hart G. W. Lidov, Cause No. 01-10521, 317 F.3d 467 (5th Cir. 2002).

Lidov, a professor at Harvard Medical School, wrote an article on the terrorist bombing of Pan Am Flight 103 over Lockerbie, Scotland in 1988. The article was posted by Lidov on the website maintained by the Columbia University School of Journalism. The article alleged a conspiracy among members of the Reagan Administration to cover-up their failure to prevent the bombing. In particular, the article singled out Revell, who at the time, had been an Associate Director of the Federal Bureau of Investigation. Revell, a resident of Texas, sued Columbia University, a resident of New York, and Lidov, a resident of Massachusetts, in the United States District for the Northern District of Texas, alleging damage to his professional reputation and emotional distress arising out of the defamation. The University and Lidov filed Rule 12(b)(2) motions to dismiss for lack of personal jurisdiction. The district court granted the motions to dismiss. Revell appealed to the Fifth Circuit.

The Court initially reviews the legal bases for the exercise of personal jurisdiction in a diversity case and then notes that "[a]nswering the question of personal jurisdiction in this case brings these settled and familiar formulations to a new mode of communication across state lines." Revell argues that ". . . the district court may assert general jurisdiction over Columbia, because its website provides internet users the opportunity to subscribe to the *Columbia Journalism Review*, purchase advertising on the website or in the journal, and submit electronic applications for admission."

The Court relies on the "sliding scale" approach for measuring an internet website's connection to a forum state, which was first used in *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F.Supp.1119 (W.D.Pa. 1997). In the sliding scale approach, a passive website, ". . . one that merely allows the owner to post information on the internet, . . . " will not provide sufficient contacts for the exercise of jurisdiction. On the other end of the scale, ". . . sites whose owners engage in repeated online contacts with forum residents over the internet. . . . " do provide a basis for the exercise of personal jurisdiction by the forum state.

With respect to the questions of general jurisdiction, the Court notes that the sliding scale ". . . is not well adapted to the general jurisdiction inquiry, because even repeated contacts with forum residents by a foreign defendant may not constitute the requisite substantial, continuous and systematic contacts required for a finding of

general jurisdiction." Citing *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952) and *Bird v. Parsons*, 289 F.3d 865 (6th Cir. 2002), the Court found that maintenance of such a website alone does not constitute a "substantial" contact with the State of Texas so as to allow its courts to exercise general jurisdiction over the University.

With respect to specific jurisdiction, Revell urges that ". . . given the uniqueness of defamation claims and their inherent ability to inflict injury in far-flung jurisdictions, [the Court] should abandon the imagery of *Zippo*. The Court finds that to be a "bold" but ultimately "unpersuasive" argument. The Court starts its analysis by narrowing the scope of its inquiry to the "contact out of which the cause of action arose." The Court finds that contact to be ". . . the maintenance of the internet bulletin board." Defendants argue that Columbia's website is passive and, under the *Zippo* standard, will not support an exercise of personal jurisdiction. Revell argues that Columbia's website is interactive, because it allows visitors to place orders, send information to be posted, receive information that has been posted, and participate in an open forum hosted by the website. He also argues the availability of those services in Texas provides sufficient contacts to support the exercise of jurisdiction by the Texas courts under *Calder v. Jones*, 465 U.S. 783 (1984). The Court distinguishes Revel's reliance on *Calder*, finding that, in order to meet the "effects" test of *Calder*, Revell must show that Texas was a focal point of the story and/or the harm suffered.

In this case, the Court found that ". . . the article written by Lidov about Revell contains no reference to Texas, nor does it refer to the Texas activities of Revell, and it was not directed at Texas readers as distinguished from readers in other states. Texas was not the focal point of the article or the harm suffered. . . . In sum, Revell has failed to make out a *prima facie* case of personal jurisdiction over either defendant." The Court affirms the district court's dismissal for lack of personal jurisdiction finding that "[c]onsidering both the 'effects' test of *Calder* and the low-level of interactivity of the internet bulletin board, we find the contacts with Texas insufficient to establish the jurisdiction of its courts."

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A defendant's waiver of appeal is effective, even if it was not negotiated.

Monreal v. State, ___ S.W.3d ___, No. 2289-01 (Tex. Crim. App., Mar. 12, 2003) (not yet reported).

A valid waiver of appeal prevents a defendant from appealing any issue without the consent of the trial court, even if that waiver of the right to appeal was not negotiated. ***Cf. Alzarka v. State,*** 90 S.W.3d 321 (Tex. Crim. App. 2002).

A trial court has the duty to appoint an indigent defendant an attorney on appeal, even if no notice of appeal has been filed by the defendant, if it is otherwise made clear to the trial court that the defendant does in fact desire to appeal.

Jones v. State, ___ S.W.3d ___, No. 1084-00 (Tex. Crim. App., Feb. 26, 2003) (not yet reported).

A trial court has the duty to appoint an indigent defendant an attorney on appeal, even if no notice of appeal has been filed by the defendant, if it is otherwise made clear to the trial court that the defendant does in fact desire to appeal. In this case, the defendant's trial attorney filed a "Motion to Withdraw and Defendant's Request for Court Appointed Counsel," which stated that the defendant desired a new appointed attorney "for the purpose of a motion for new trial, appeal and . . . a copy of the court reporter's notes." Attached to that motion was the defendant's affidavit, in which he stated that he was unable "to afford counsel on a motion for new trial and/or appeal [or] to pay for the court reporter's notes [in his case]." The defendant should not be penalized because his trial attorney failed to additionally have the defendant file a *pro se* notice of appeal with the trial court.

A defendant who enters a plea of guilty or no contest without an agreed recommendation from the State as to punishment may still appeal jurisdictional issues—such as a claimed defect in juvenile transfer proceedings.

Faisst v. State, ___ S.W.3d ___, No. 400-02 (Tex. Crim. App., Feb. 12, 2003) (not yet reported).

A claim that a defect in juvenile transfer proceedings requires reversal of the criminal conviction is a claim that the district court lacked jurisdiction to proceed with the criminal prosecution. A defendant who enters a plea of guilty without an agreed recommendation from the State as to punishment is always permitted to raise jurisdictional claims on appeal, even after the decision of the Texas Court of Criminal Appeals in ***Young v. State,*** 8 S.W.3d 656 (Tex. Crim. App. 2000).

In reviewing a defendant's claim that the evidence is factually insufficient to support his conviction, an appellate court should at least mention what the defendant asserts is the most important evidence supporting his claim that the evidence is factually insufficient.

Sims v. State, ___ S.W.3d ___, No. 1328-01 (Tex. Crim. App., Mar. 12, 2003) (not yet reported).

In reviewing a defendant's claim that the evidence is factually insufficient to support his conviction, an appellate court should at least mention what the parties assert is the most important or most relevant evidence supporting a claim that the evidence is factually insufficient. In this appeal from the defendant's conviction for driving while intoxicated, the court of appeals did not discuss an audiotape of the defendant's arrest and a videotape made at the police station, even though the defendant specifically relied upon those exhibits in support of his claim

that the evidence was factually insufficient to support his conviction. "As a general proposition, reviewing courts ought to mention a party's number one argument and explain why it does not have the persuasive force that the party thinks it does. The party may be dissatisfied with the decision, but at least he will know the reason he was unsuccessful. This practice maintains the integrity of the system and improves appellate practice."

In reviewing the factual sufficiency of the evidence to support a fact finder's rejection of a defendant's defense, a court of appeals should review all of the evidence in a neutral light and ask whether the State's evidence taken alone is too weak to support the finding and whether the proof of guilt is against the great weight and preponderance of the evidence.

Zuliani v. State, ___ S.W.3d ___, No. 1168-01 (Tex. Crim. App., Feb. 5, 2003) (not yet reported).

In reviewing the factual sufficiency of the evidence to support a fact finder's rejection of a defendant's asserted ***affirmative defense***, a court of appeals should determine whether the finding against the affirmative defense was so against the great weight and preponderance of the evidence as to be clearly wrong. However, in reviewing the factual sufficiency of the evidence to support a fact finder's rejection of a defendant's ***defense***, a court of appeals should review all of the evidence in a neutral light and ask whether the State's evidence taken alone is too weak to support the finding and whether the proof of guilt, although adequate if taken alone, is against the great weight and preponderance of the evidence.

A defendant's plea of guilty does not preclude the defendant's subsequent actual innocence claim on a post-conviction writ of habeas corpus.

Ex parte Tuley, ___ S.W.3d ___, No. 74,364 (Tex. Crim. App., Dec. 19, 2002) (not yet reported).

A defendant's plea of guilty does not preclude the defendant's subsequent actual innocence claim on a post-conviction writ of habeas corpus. The policy behind granting relief on a "bare innocence" claim is the same for a situation in which the defendant has entered a plea of guilty as it when a jury has returned a verdict of guilty. "We are confident that the convicting courts of Texas can tell the difference between a meritorious claim of actual innocence accompanied by compelling new evidence and a bogus claim accompanied by bare allegations of innocence."

For those appeals that were in effect before January 1, 2003, a defendant may amend his notice of appeal any time before his brief is filed in order to give the court of appeals "jurisdiction" over an issue that he desires to raise on appeal.

Bayless v. State, 91 S.W.3d 801 (Tex. Crim. App. 2002).

While the Texas Rules of Appellate Procedure provide the procedures that a defendant must follow in order to perfect a notice of appeal, they do not establish the jurisdiction of the appellate courts. Because there historically had been no statutory time limit on a defendant's right to appeal, permitting a defendant to file an amended notice of appeal does not have the effect of impermissibly enlarging or modifying a defendant's statutorily created right. Therefore, a defendant is permitted to file an amended notice of appeal curing any defects in an earlier filed notice of appeal. Furthermore, if a defendant files a timely "general" notice of appeal, amendments to the notice can be made any time prior to the filing of the defendant's brief. ***Cf. State v. Riewe,*** 13 S.W.3d 408 (Tex. Crim. App. 2000) (applicable only to State's appeals).

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Since the trial court certified that the defendant did not have the right to appeal, the court of appeals lacked jurisdiction over the appeal, even though the defendant entered a plea of guilty in accordance with a plea bargain with the State.

Comb v. State, **___** S.W.3d **___**, No. 1-03-37-CR (Tex. App.—Houston [1st Dist.], Mar. 13, 2003) (not yet reported).

Since the defendant's notice of appeal was filed after the effective date of the new amendments to the Texas Rules of Appellate Procedure, those new amendments applied to the defendant's appeal. Therefore, since the trial court certified that the defendant did not have the right to appeal, the court of appeals lacked jurisdiction over the appeal, even though the defendant entered a plea of guilty in accordance with a plea bargain with the State.

A defendant's waiver of appeal in his plea of guilty form can be rebutted an admonishment of the right to appeal in a written admonishments form.

White v. State, **___** S.W.3d **___**, No. 14-01-1251-CR (Tex. App.—Houston [14th Dist.], Feb. 13, 2003) (not yet reported).

A defendant's waiver of his right to appeal in a "boiler-plate" plea of guilty form is rebutted by the following statement in the contemporaneously filed written admonishments form:

> [I]f the punishment assessed by the Court does not exceed the punishment recommended by the prosecutor and agreed to by you and your attorney, the Court must give its permission to you before you may prosecute an appeal on any matter in this case ***except for those matters raised by you by written motion filed prior to trial***.

(emphasis in original). This statement constituted an admonishment from the trial court that the defendant could appeal, even without the trial court's permission, any matter that was raised in a pretrial motion. Therefore, the defendant still had the right to appeal.

If a defendant does not make a claim on appeal that requires a reporter's record, the State is not entitled to have a complete copy of the reporter's record.

Nguyen v. State, **___** S.W.3d **___**, No. 14-02-464-CR (Tex. App.—Houston [14th Dist.], Jan. 16, 2003) (not yet reported).

If a defendant does not make a claim on appeal that requires a reporter's record, the State is not entitled to have a complete copy of the reporter's record. ***Cf. Rowell v. State,*** 66 S.W.3d 279 (Tex. Crim. App. 2001).

It is better to be happy for a moment and be burned up with beauty than to live a long time and be bored all the while.

--Don Marquis

A court has no obligation to follow or distinguish unpublished opinions in criminal cases because they still have no precedential value.

Carrillo v. State, **___** S.W.3d **___**, No. 7-02-307-CR (Tex. App.—Amarillo, Mar. 4, 2003) (not yet reported).

Although unpublished opinions may now be cited by the parties in criminal appeals, a court has no obligation to follow or distinguish such

opinions because they still have no precedential value, even if that unpublished opinion arose out of the same appellate court. Parties have more flexibility in pointing out unpublished opinions and the reasoning employed in them rather than simply arguing, without reference, that same reasoning. Unpublished opinions can also be cited as an aid in developing reasoning that may be employed by the reviewing court, be it similar or different.

The court of appeals was not required to take judicial notice of a fact set forth in a government website because the defendant was the person responsible for providing the pertinent information, and its accuracy could reasonably be questioned.

Alakayi v. State, ___ S.W.3d ___, No. 14-02-381-CR (Tex. App.—Houston [14th Dist.], Feb. 13, 2003) (not yet reported).

The court of appeals was not required to take judicial notice of the victim's age at the time of the offense, based upon a print-out of the defendant's online "Sex Offender Registration Record" from the Texas Department of Public Safety's website. Judicial notice is inappropriate because the victim's age is not generally known in Harris County, Texas, and the accuracy of the online record can reasonably be questioned. The offender is the individual required to provide the information that gets placed on the website, and there is no requirement that the victim's age be verified. "A record based solely on self-reported information can reasonably be questioned."

In reviewing a juvenile court's disposition order, a court of appeals should apply an abuse of discretion standard of review, and not a legal sufficiency or factual sufficiency standard of review.

In re K.T., ___ S.W.3d ___, No. 4-02-43-CV (Tex. App.—San Antonio, Mar. 12, 2003) (not yet reported).

In reviewing the disposition or punishment assessed in a juvenile case, a court of appeals should apply an abuse of discretion standard of review, and not a legal sufficiency or factual sufficiency standard of review. A court of appeals should, therefore, defer to the trial court's findings of fact and determine *de novo* whether the facts supported by the record justify the trial court's disposition order in light of the purposes of the Juvenile Justice Code. "[I]f an issue involving both questions of fact and law is entrusted by statute to the trial court's discretion, Texas courts generally employ the abuse of discretion standard without regard to the standards for evidentiary review." The abuse of discretion standard of review is even more appropriate when the decision being reviewed emanates from a specialized court.

Advice is what we ask for when we already know the answer but wish we didn't.

--Erica Jong

Joel M. Androphy, Berg & Androphy, Houston

The First Circuit held that there is no constitutional or common law right to access to documents regarding existing financial legal debt and current inability to retain counsel that were submitted by a defendant in order to avail himself of government funding under the Criminal Justice Act, 18 U.S.C. § 3006A.

In re Boston Herald, Inc., __ F.3d __ 2003 WL 474403 (1st Cir. Feb. 26, 2003)

John J. Connolly, Jr, a former FBI agent, was arrested in a highly publicized criminal trial for impropriety in his relationships with FBI informants, including alleged organized crime figures such as James "Whitey" Bulger and Stephen Flemmi. Connolly applied for government funding under the Criminal Justice Act, 18 U.S.C. § 3006A for a portion of his attorneys' fees and legal expenses. He submitted financial affidavits and an additional document summarizing his total legal debt. This relief was granted by a magistrate judge and, in response to Connolly's motions, placed the documents he had submitted under seal. After Connolly's conviction, the Boston Herald sought to intervene in the case and to unseal these documents, arguing that it had a right of access to them under the First Amendment and the common law. A magistrate judge allowed the intervention but denied the motion to unseal and the district court affirmed. The Boston Herald filed both an interlocutory appeal and a petition for writ of mandamus with the First Circuit Court of Appeals.

To the First Circuit's knowledge, no federal court of appeals has considered whether there is a right of access to the narrow category of documents at issue here: those submitted by a criminal defendant to show eligibility for CJA funds. The court points out that the constitutional and common law rights of access have applied only to judicial documents. While the First Circuit is of the opinion that the CJA eligibility documents are not judicial documents, and as such would dispose of the Herald' s claims altogether, they are hesitant to decide the issue on that basis alone.

To analyze the constitutional question the court utilized the two "complementary considerations" put forth in *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8 (1986). First, whether materials like these have been open to the public in the past because a tradition of accessibility implies the favorable judgment of experience and second, whether public access plays a significant positive role in the functioning of the particular process in question. The First Circuit found that no case law existed to lend support to the existence of a relevant tradition of public access and that the "judgment of experience" does not support a constitutional right of access to CJA eligibility materials. They also found that disclosure would not play a positive role in the functioning of the process. In fact, disclosure is likely to play a negative role. The first Amendment does not grant a right of access, over the defendant 's objection, to financial documents submitted to demonstrate the defendant's eligibility for CJA funds. The current CJA framework, in which these materials are typically disclosed unless the court decides that the documents should be sealed, is constitutional.

Although there exists a presumption of public access to judicial records under common law, the First Circuit reiterates their opinion that the CJA documents do not qualify as such. Even if they were judicial records, the First Circuit would still decide that the magistrate judge correctly exercised his discretion in finding the right of public access overcome by countervailing interests. The decision as to common law access is best left to the sound discretion of the trial court to be exercised in light of the relevant facts and circumstances of the particular case. The magistrate's short but clear order balanced the public interest in the information against privacy interests, and his conclusion was not an abuse of discretion. Recognition of the importance of financial privacy is enshrined in public policy and

personal financial information, such as one's income or bank account balance, is universally presumed to be private, not public. The invasiveness of the disclosure sought here is further intensified because it would also reveal information regarding his wife and children.

The Ninth Circuit held that the inherent equitable power of a district court allows it to freeze the assets of a nonparty when that nonparty is dominated and controlled by a defendant against whom relief has been obtained in a securities fraud enforcement action.

SEC v. Hickey, __ F.3d __ 2003 WL 834700 (9th Cir. Mar. 7, 2003)

Hickey and the SEC entered into a consent decree in which Hickey admitted violating securities laws and pledged that he "shall not assert" that he did not violate federal securities laws if the SEC sought disgorgement in the future. The SEC was granted summary judgment by the district court on the disgorgement issue and Hickey was ordered to disgorge $1.1 million dollars. Hickey failed to disgorge any of his unlawful gains. A show cause hearing was held to determine if Hickey should be held in contempt. At this hearing the SEC argued that the assets of the John Hickey Brokerage Co., which was owned by Hickey's mother and formed after the SEC filed its complaint, should be considered as available to Hickey to satisfy the disgorgement order.

Evidence presented by the SEC including Hickey's employment agreement with Brokerage, which provided that the company would pay all business and personal expenses of Hickey whether or not they were business related and also the deposition of Hickey's mother who testified that she assigned all running of the business to Hickey. The district court issued an order holding Hickey in contempt and froze the Brokerage's assets except to pay utility and rent expenses.

On appeal, the Brokerage argued that the district court abused its discretion when it froze the Brokerage's assets because the Brokerage is not Hickey's "alter ego" as defined in California law, and a court may not engage in "reverse piercing" in the absence of an alter ego relationship. The Ninth Circuit found no abuse of discretion by the district court because that court never engaged in any type of "piercing" that required an alter ego relationship.

The Ninth Circuit held that the district court had the power to freeze the Brokerage's assets under its broad equitable powers, drawn from a tradition of allowing courts to reach third parties in order to effect orders in securities fraud enforcement actions. The district court was authorized to freeze Brokerage's assets as long as doing so was necessary to protect and give life to the disgorgement and contempt orders entered against Hickey. The necessity of the freeze was demonstrated by Hickey's complete control over the company and the fact that Hickey's only source of income was that which he paid himself through the Brokerage's assets. These facts differentiate this case from the Seventh Circuit's opposite holding in *SEC v. Cherif*, 933 F.2d 403 where no authorization was found to freeze the assets of a non party against whom no wrongdoing was alleged. Here, it is the unimpeded nature of Hickey's control that is the key fact justifying the district court's freeze. No such control existed in the Seventh Circuit case.

The Eleventh Circuit held that allegations that fiscal intermediary knowingly, recklessly, or negligently approved claims for payment were not actionable under the False Claims Act, 31 U.S.C. § 3729(a), due to statutory immunity under 42 U.S.C. § 1395h(i)(3), and the district court was instructed to strike them from the amended complaint.

U.S. ex rel Sarasola v. Aetna Life Ins., __ F.3d __ 2003 WL 175054 (11th Cir. Jan. 28, 2003)

The interlocutory appeal in this *qui tam* action presented the question of whether the immunity given to an insurance company occupying the role of "fiscal intermediary" in processing Medicare Part A claims bars a claim

that the fiscal intermediary breached its obligation to audit the records of a Medicare service provider.

The Eleventh Circuit noted that the statutory immunity is not so broad as to foreclose all claims against fiscal intermediaries. If Aetna failed to fulfill its contractual obligations to properly audit the Medicare claims, then it could be liable to the United States or a relator under the False Claims Act for submitting a claim for payment for auditing services never rendered. However, allegations that false claims were presented to Aetna pursuant to a scheme fashioned by the medical providers and Aetna and that Aetna knowingly, recklessly, or negligently approved such claims for payment are not actionable due to Aetna's statutory immunity and the allegations must be struck from the United States' amended complaint. Relators' *qui tam* claim is limited to the false claims, if any, Aetna presented to the Secretary for auditing the medical provider's records.

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