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GIVING TO THOSE LESS FORTUNATE....

Following in the footsteps of our predecessors who developed projects to improve access to justice for those less fortunate, the State Bar Appellate Section Council is pleased to announce that it has voted to contribute some much-needed funding to worthy charitable projects identified by our Appellate Section committees. Among those charitable projects are Texas Lawyers Care, the Texas Equal Access to Justice Commission, and the University of Texas Post-Conviction Project.

Texas Lawyers Care is the pro bono/legal services support project of the State Bar of Texas. It also serves as the staff for the Texas Equal Access to Justice Commission. Texas Lawyers Care works closely with the State Bar Board Legal Services Committee and the Legal Services to the Poor in Civil Matters Committee of the State Bar of Texas to encourage the involvement of all Texas attorneys, as well as other professionals, in providing legal services to the poor. Texas Lawyers Care also offers support, training, resource materials, and other assistance to staff and volunteers of all providers of legal services to the poor in Texas.

One of the specific endeavors of Texas Lawyer Care is a *Justice for All Calendar*. This calendar is sent to legal aid offices across the state to be distributed to their clients. More than being a simple calendar, it includes substantial information for the clients regarding basic legal rights and available social services. Among other things, the calendar provides information regarding the earned-income tax credit for low-income families, consumer protection standards, and information on Medicaid and Medicare. Funding for this calendar comes primarily from sections of the State Bar of Texas and the Texas Young Lawyers Association. Contributions to this project should provide a direct benefit to legal aid offices and their clients.

Additionally, the Section has voted to assist in the repayment of student loans of those lawyers who help those less fortunate. The Texas Equal Access to Justice Commission operates a student loan repayment assistance program to help lawyers performing legal services work for the poor repay their student loans. The program is administered through the Texas Bar Foundation, but the logistical details are handled by Texas Lawyers Care. The program gives \$100 per month to qualifying lawyers who work in legal services to help with their student loan payments.

The Texas Equal Access to Justice Commission's mission is to develop and implement policy initiatives designed to expand access to, and enhance the quality of, justice in civil legal matters for low-income Texans, also known as Legal Aid. In 1999, the Texas Legal Aid Community began a statewide planning process for delivering legal services to the poor. This approach resulted from the Legal Services Corporation's directive that each state receiving LSC funding must create a comprehensive, integrated delivery system of legal services to the poor.

The Supreme Court of Texas created the Texas Equal Access to Justice Commission to coordinate services for people who need legal help, but who may be unable to afford it or find it. The Commission's goals include reducing barriers to the justice system and increasing resources and funding for Legal Aid.

Further, the Section is contributing to the University of Texas Post-Conviction Project, which assists battered women who are incarcerated in Texas prisons as a result of less than adequate trial and/or appellate counsel with their parole proceedings. This Project is explained in more detail in an article by Alan York, Chair of that Committee, published in this

issue of the *Advocate*. We are pleased to contribute to this project, which takes the form of this contribution from the Section, as well as individual contributions of those Appellate Section Council Members (Marcy Greer, Daryl Moore and Amy Hennessee) who rotated off the Council last year and generously donated the cost of the plaques they otherwise would have received recognizing their services on the Appellate Section Council.

Often people do not make contributions to those less fortunate because they do not know who or how to help. We hope the Section's contributions will be an incentive to others, and that this article will provide you with some much-needed answers to those questions. We encourage you and your firms to support these worthy projects.

*****APPELLATE SECTION NEED-BASED*** SCHOLARSHIP PROGRAM**

The Appellate Section will make available a limited number of need-based scholarships for the Appellate Boot Camp and the Advanced Civil Appellate Practice Course to be held in Austin on September 8-10, 2004. The scholarships will reduce tuition for the Boot Camp to \$50 and tuition for the Advanced Course to \$100, although applicants with significant financial need may request a full scholarship. Scholarships are open to all members of the Texas Bar, although preference will be given to Section members. The Section will award no more than ten scholarships to each course. Applicants must submit a scholarship request no later than August 23 and scholarship awards will be announced no later than September 1. Scholarship recipients would pay the reduced tuition directly to the Section no later than September 7.

Applicants requesting a scholarship should submit a signed letter containing the following: (1) the applicant's name, address, phone number, bar number, and e-mail address; (2) whether the applicant is a member of the Appellate Section; (3) the course or courses for which a scholarship is requested; (4) a certification that the applicant is unable to attend the course in the absence of a scholarship; (5) a brief explanation of the basis for financial need (legal aid lawyer, new lawyer, sole practitioner, recent illness, etc.); and (6) a brief description stating how the course would benefit the applicant in his or her practice and how it would benefit the practice of appellate law in the state.

Applicants may submit a signed request to Pamela Stanton Baron, Post Office Box 5573, Austin, Texas 78763. Applications may also be submitted by e-mail to psbaron@austin.rr.com but applicants must also follow up by mail with a signed letter for the section files.

Some Practical Suggestions for Dealing With the Presumed Findings Rules in Texas Civil Procedure

Stacy R. Obenhaus, Gardere Wynne Sewell LLP

Under certain circumstances, the Texas Rules of Civil Procedure allow appellate courts to “deem” or “presume” that a trial court has made fact findings in support of the trial court’s judgment. The relevant rules are rule 279 and rules 296-299 of the Texas Rules of Civil Procedure, and there are several treatises and articles explaining these rules.¹ In this article I presume to add to the excellent literature on this subject by offering what I hope are five practical suggestions for dealing with the issues that these rules typically raise. I assume some familiarity with these rules and the case law interpreting them.

A. First suggestion: Watch for elements missing from the findings.

The first suggestion for practice is an obvious point: once the initial findings are made, keep an eye out for elements that are missing from those findings.

This applies to jury and nonjury cases. When the jury or trial court makes the initial findings, the losing party has a tendency to focus primarily on sufficiency of the evidence issues, i.e., what’s wrong with the findings that were made, and secondarily with claims or defenses *omitted entirely* from the findings. Claims or defenses only partially submitted and found should also be a primary focus when reviewing the express findings.

Remember the goal if you’re the appellant: along with everything else you’re supposed to worry about, an appellant wants (a) to defeat any presumed finding on an element of an opponent’s claim or defense—i.e., for which the opponent had the burden of proof—and (b) to obtain findings on elements of the appellant’s claim or defense if not all elements are in the jury’s findings or the trial court’s original findings.

A subtle problem in this regard is that in some cases where, say, where an express finding is made on only one element of a claim or defense, it may not be clear what claim or defense that express finding relates to. In a nonjury trial the rule is that “when one or more elements thereof have been found by the trial court, omitted unrequested elements, when supported by evidence, will be supplied by presumption in support of the judgment.” TEX. R. CIV. P. 299. What if the express finding could relate to more than one claim or defense that is at issue? An example of the problem was discussed by one court of appeals as follows:

“In this case, the trial court’s findings and conclusions clearly disclose that liability was sought and found against American Industries solely on the basis of its capacity as possessor of the property, not its capacity as lessor (or otherwise). Therefore, the fact that the evidence might have also supported the remaining elements of lessor liability if it had been asserted or that the findings made on possessor liability happen to overlap with some of those needed for lessor liability does not authorize us to impose liability based on presumed omitted elements of lessor liability where the findings and conclusions disclose that the trial court instead imposed liability exclusively on possessor liability and thus neither

¹ Good discussions of the case law in this area appear in various treatises and articles, including Elaine A. Grafton Carlson, 4 McDonald & Carlson, Texas Civil Practice §§ 22:52-22:58, at 484-503 (2d ed. 2001); Richard Orsinger, 6 McDonald, Texas Civil Practice ch. 18 (1992 & Supp. 2002); Jeremy C. Wicker, 1 Texas Civil Trial and Appellate Procedure § 7-10 (2002); *id.*, 2 Texas Civil Trial and Appellate Procedure § 8-6 (2002); and my own article at the Thirteenth Annual Conference on State and Federal Appeals sponsored by the University of Texas School of Law in Austin, Texas, in June 2003.

needed, found, nor omitted any additional findings on the remaining elements of lessor liability.”

American Industries, Life Ins. Co. v. Ruvalcaba, 64 S.W.3d 126, 148 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (Edelman, J., concurring).

This is particularly a problem in nonjury cases, because the rule does not provide a basis for deciding the issue. In a jury trial, on the other hand, the test is whether the jury has made findings on a element that is “necessarily referable” to a claim or defense in the case. TEX. R. CIV. P. 279. This issue was addressed in a recent supreme court case, where the court said: “Even if the question could be characterized as a partial submission of the equitable estoppel issue, the language submitted is not ‘necessarily referable’ to equitable estoppel . . . the question submitted in that case [i.e., the case on which the court of appeals had relied] at least included the necessary elements of false representation, materiality, and reliance, and *did not appear to be submitted as part of some other theory of recovery*, whereas Kenneco’s question was submitted as part of its Insurance Code/DTPA claim.” *Johnson & Higgins of Texas, Inc. v. Kenneco Energy, Inc.* 962 S.W.2d 507, 515-16 n.4 (Tex. 1998) (emphasis added).

At the very least, the live pleadings, any pretrial order setting forth the parties’ contentions, the parties’ arguments at trial, and any conclusions of law may provide the most reliable parameters for determining the claims or defenses to which a finding might relate—thus signaling the need to request express findings on omitted elements of that claim or defense.

B. Second Suggestion: Take action to avoid the presumed finding.

The second suggestion is obvious in theory: take action to avoid the presumed finding—i.e., *preserve error*.

In a jury case one avoids the presumed finding by doing what should be second nature anyway in a

jury case: depending upon the party’s particular burden, you preserve error by objecting to an omission from the charge or by requesting a submission to the charge. The reason is that in jury cases presumed findings are permitted only as to an element “omitted from the charge, without request or objection. . . .” TEX. R. CIV. P. 279; *see Turner, Collie & Braden, Inc. v. Brookhollow, Inc.*, 642 S.W.2d 160, 165 (Tex. 1982) (“Because TCB objected to the omission of an issue inquiring whether the line could be repaired, the trial court cannot be deemed to have made such a finding.”).

In nonjury cases one avoids the presumed finding by doing what appears counterintuitive: after requesting and receiving original findings, a party flags the issue by asking the trial court for an additional finding on the omitted element. Then, in the typical case, the party *hopes the trial court does nothing*.

The reason is that if the trial court upon timely request refuses to make a finding on the omitted element, the court of appeals will not presume a finding in favor of the judgment as to the omitted element. *Vickery v. Commission for Lawyer Discipline*, 5 S.W.3d 241 (Tex. App.—Houston [14th Dist.] 1999, pet. denied); *National Commerce Bank v. Stiehl*, 866 S.W.2d 706, 707 (Tex. App.—Houston [1st Dist.] 1993, no writ). This follows from the language of the rule that findings are presumed on appeal only as to “*omitted unrequested elements*.” TEX. R. CIV. P. 299 (emphasis added).

C. Third suggestion: Don’t rely on a global request for additional findings.

This suggestion concerns nonjury trials. The timely request for additional findings under rule 298 must actually propose specific findings on the relevant elements. “A bare request is not sufficient; proposed findings must be submitted.” *Alvarez v. Espinoza*, 844 S.W.2d 238, 241-42 (Tex. App.—San Antonio 1992, writ dismissed w.o.j.).

The request should therefore clearly identify elements omitted from the original findings and should propose specific findings on those omitted elements. But the question is whether the party should request a finding in support of the judgment against that party—and thereby risk running afoul of the “invited error” doctrine—or should request a finding contrary to that judgment—and risk running afoul of case law stating that a trial court has no obligation to make findings contrary to its judgment.

According to relevant case law, the losing party may avoid a presumed finding by proposing a finding that is *contrary to the trial court’s judgment*. See *Vickery v. Commission for Lawyer Discipline*, 5 S.W.3d 241, 255-56 (Tex. App.—Houston [14th Dist.] 1999, pet. denied) (“In other words, Rule 298 creates no presumption. An appellant may request findings that are contrary to the judgment under Rule 298 without fear that the court’s failure to make such findings will itself be interpreted as a finding against the appellant.”); *Boy Scouts v. Responsive Terminal Sys.*, 790 S.W.2d 738, 742-43 (Tex. App.—Dallas 1990, writ denied) (“This stance against a presumption of support is true even in a case where the party that does not have the burden of proof makes an additional request for a negative finding of fact with regard to an essential element of the opposing party’s case.”).

But the negative finding cannot be buried in a global request for additional findings, one that does not specifically point out what elements are missing from the trial court’s original findings. This is the teaching of *Vickery v. Commission for Lawyer Discipline*, which contains some ambiguous language on this point but which ultimately holds that “a request for negative findings contrary to a court’s judgment has no logical or legal significance toward rebutting the presumption of validity *unless the trial court is specifically alerted to the real issue*, i.e., one or more necessary elements have been omitted in the court’s original findings.” 5 S.W.3d at 256 (emphasis added). In explaining its holding, the court said:

A request for negative findings will rarely apprise the trial court that it has omitted an essential element in its original findings. . . . Here, Vickery did not make clear the issue he now advances on appeal. . . . Rather, Vickery submitted his requests for findings on the two omitted elements negatively, in the manner least likely to be approved by the trial court. Additionally, the two elements were then “buried” in a voluminous request for other findings that were largely immaterial and frequently repugnant to the judgment . . . did nothing to alert the trial court to the significance of his requests. . . . Were we to permit such a manipulation of the rule, the losing party could inundate the trial judge with requested findings, all of which were immaterial, contrary to the judgment, or slight variations of the original findings without ever disclosing that one such requested finding pertains to an omitted element. . . .

This is not to say the losing party may not submit a request for negative findings or findings contrary to the court’s judgment. For example, a hypothetical plaintiff might establish every element of his ground for recovery at trial and deny, but never refute, the defendant’s affirmative defense. If the trial court should find for the plaintiff, the defendant must request findings on his affirmative defense or waive it on appeal. Such a request, of course, would be contrary to the court’s judgment, but would also be absolutely essential to a proper resolution of the defendant’s appeal.

Id. at 254-56 (citing *Boy Scouts v. Responsive Terminal System*).

D. Fourth suggestion: In a jury case, challenge the factual sufficiency of the evidence to support possible deemed findings.

This fourth suggestion applies to jury cases only. In a nonjury case, if findings are presumed as a result of the failure to request findings or the failure to request additional findings, the sufficiency of the evidence to support the presumed findings may be challenged for the first time on appeal. *See American Nat'l Petroleum Co. v. Transcontinental Gas Pipe Line Corp.*, 798 S.W.2d 274, 278 (Tex. 1990); TEX. R. APP. P. 33.1(d) (“In a nonjury case, a complaint regarding the legal or factual insufficiency of the evidence . . . may be made for the first time on appeal . . .”).

But in a jury case the supreme court has suggested that a party seeking to avoid a presumed finding on grounds of factual sufficiency must have raised that issue in the trial court. *See In re J.F.C.*, 96 S.W.3d 256, 275-76 (Tex. 2002) (“It is only when there has been a factual sufficiency challenge that is preserved in the trial court that a deemed finding must be reviewed for factual sufficiency on appeal.”). This is not because of Texas Rules of Civil Procedure 324(b)—which requires that a challenge to the factual sufficiency of a jury finding must be raised in a motion for new trial—since the issue here is a the sufficiency of a finding by the court, not the jury. Rather, the reason is that despite the language in rule 279 that a finding will be presumed if there is “factually sufficient evidence” to support it, the supreme court will require only legally sufficient evidence to uphold a deemed finding in a jury case. *See In re J.F.C.*, 96 S.W.3d 256, 276 n.69 (Tex. 2002) (“When that rule was amended in 1988, there was no indication in the record of the rules proceedings that revised Rule 279 was meant to change the prerequisite of ‘evidence,’ which was maintained in Rule 299, to ‘factually sufficient’ evidence with respect to deemed findings.”); *id.* at 275-76 (“In the absence of a challenge to the factual sufficiency of the evidence, appellate courts must deem an omitted finding in support of a judgment if there is some evidence . . . to

support the omitted finding and the other requirements of Rule 279 have been met.”); *see also In re M.S.*, 46 Tex. Sup. Ct. J. 999 (July 3, 2003) (assuming *J.F.C.*’s analysis). *But see Crosbyton Seed Co. v. Mechura Farms*, 875 S.W.2d 353, 364 & n.9 (Tex. App.—Corpus Christi 1994) (“Since actual findings of the omitted items must be supported by factually sufficient evidence, the deemed findings must likewise be supported by factually sufficient evidence.”).

Although one may question the supreme court’s present interpretation of rule 279 in this regard, the court spoke unequivocally about it and so it appears that for now the court will not consider a factual sufficiency challenge to a deemed finding unless that issue has been preserved by a factual sufficiency challenge in the trial court.

F. Fifth suggestion: on appeal, specifically challenge the deemed finding.

Must the appellate court brief raise a point of error expressly arguing that the court may not deem a finding on an element omitted from the jury’s or trial court’s findings? There is case law suggesting that a challenge to the express findings is sufficient to preserve the point as to deemed findings:

The rule that unchallenged findings are binding on the appellate court cannot apply to presumed findings under Tex. R. Civ. P. 299 because these findings do not exist until after the court has determined that they are supported by the evidence, in which case it is too late to challenge the evidence supporting them. When appellants have challenged the express findings to which potential presumed findings relate, we do not believe that appellants are required to explicitly argue against all potential presumed findings under Tex. R. Civ. P. 299.

American Industries, Life Ins. Co. v. Ruvalcaba, 64 S.W.3d 126, 137 n.7 (Tex. App.—Houston

[14th Dist.] 2001, pet. denied). This holding makes some sense and is probably the best rule, but until more courts have spoken on this issue, an appellant should probably include a separate point of error that the appellee failed to obtain a finding on an omitted element of whatever claim or

defense is at issue, and that because there is insufficient evidence of the pertinent facts no finding can be presumed on that element.

MARK YOUR CALENDAR!!

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The Labyrinth Deepens – Jury Charge Practice after Harris County v. Smith

Richard P. Hogan, Jr., Hogan & Hogan, L.L.P.
Jennifer Bruch Hogan, Hogan & Hogan, L.L.P.

INTRODUCTION

Properly preserving error in the jury charge is likely the most difficult and complicated preservation task a trial lawyer faces. As the supreme court has acknowledged: “The rules governing charge procedures are difficult enough; the case law applying them has made compliance a labyrinth daunting to the most experienced trial lawyer.” *State Dep’t of Highways & Pub. Transp. v. Payne*, 838 S.W.2d 235, 240 (Tex. 1992). The supreme court promised, almost 12 years ago, to simplify charge practice: “We can, however, begin to reduce the complexity that case law has contributed to charge procedures.” *Id.* at 241.

Despite the supreme court’s promise, in the years since *Payne* was decided, it seems fair to say that the situation has not improved. “[T]he process of telling the jury the applicable law and inquiring of them their verdict [remains] a risky gambit in which counsel has less reason to know that he or she has protected a client’s rights than at any other time in the trial.” *Id.* at 240. In *Payne*, the court said that with broad-form practice, “the process is becoming worse, not better.” *Id.* at 241. The question we take on is, how much better and simpler have things gotten as we have moved away from broad-form submissions?

CHARGE SUBMISSION—HOW WE GOT HERE; THE DEVELOPMENT OF BROAD FORM

A. Purpose and Definition

The jury is charged with deciding the factual disputes necessary to form the basis of a judgment. *Tarter v. Metropolitan Sav. & Loan Ass’n.*, 744 S.W.2d 926, 928 (Tex. 1988). Under Rules 277 and 278 only “questions, instructions and definitions” are to be submitted to the jury. Rule 278 restricts submission to questions raised

by written pleadings and the evidence. However, all controlling fact issues must be submitted to the jury by way of questions or instructions in the charge. A litigant is entitled to have controlling questions submitted to the jury. *See Triplex Communications, Inc. v. Riley*, 900 S.W.2d 716, 718 (Tex. 1995). A controlling question is one that determines the outcome of the case. *See* 4 MCDONALD & CARLSON, TEXAS CIVIL PRACTICE § 22:14 (1992).

B. Form of Submission

Effective January 1, 1988, the first paragraph of Rule 277 was amended to require broad-form submission: “In all jury cases, the court *shall, whenever feasible*, submit the cause upon broad-form questions. The court shall submit such instructions and definitions as shall be proper to enable the jury to render a verdict.” TEX. R. CIV. P. 277 (emphasis added).

1. Development of Broad-Form Charges

The move to broad-form submission occurred incrementally over several decades. In 1973, Rule 277 was amended to provide:

It shall be discretionary with the court whether to submit separate questions with respect to each element of a case or to submit the issues broadly. It shall not be objectionable that a question is general or includes a combination of elements or issues.

See TEX. R. CIV. P. 277 (superceded). The 1973 amendment replaced previous language requiring that issues be submitted “distinctly and separately.” The requirement that issues be submitted distinctly and separately is generally traced to the court’s 1922 opinion in *Fox v.*

Dallas Hotel Co., 111 Tex. 461, 475, 240 S.W. 517, 522 (1922). In that case, the supreme court held that each of the defendant's contributory negligence allegations had to be separately submitted. *See id.* at 521-22. The court wrote that "the duty of the court in trials by jury" is three-fold: "First, to submit all the controverted fact issues made by the pleadings; second to submit each issue distinctly and separately, avoiding all intermingling; and third, to give such explanation and definition of legal terms as shall be necessary to enable the jury to answer each issue." *Id.* (emphasis added).

Following the 1973 amendment granting discretion to submit broad-form questions, the supreme court emphasized that the rule meant what it said. In *Mobil Chemical Co. v. Bell*, 517 S.W.2d 245, 255 (Tex. 1974), the court held the new rule meant that the jury could simply be asked whether a party was negligent. The court went farther in 1980 stating that the 1973 amendment to Rule 277 was designed to abolish the "distinctly and separately" requirement. *Brown v. American Transfer & Storage Co.*, 601 S.W.2d 931, 937 (Tex. 1980). Any lingering questions concerning the propriety of broad-form submissions were answered in *Burk Royalty Co. v. Walls*, 616 S.W.2d 911 (Tex. 1981), where the court stated that "a workable jury system demands strict adherence to simplicity in jury charges." *Id.* at 924. To that end, the supreme court overruled application of all cases construing Rule 277 prior to the 1973 revisions. *Id.* at 925. The following year, the supreme court reiterated its approval of "broad issues . . . as the correct method for jury submission." *Lemos v. Montez*, 680 S.W.2d 798, 801 (Tex. 1984).

In *Island Recreational Dev. Corp. v. Republic of Texas Sav. Ass'n.*, 710 S.W.2d 551 (Tex. 1986), the single broad-form question authorized by the court inquired "Do you find from a preponderance of the evidence that [Island] performed their obligations under the Commitment Letter in question?" *Id.* at 554. In another case, the court also approved a broad-form question asking whether a corporation "was

the alter ego of the defendant." *Castleberry v. Branscum*, 721 S.W.2d 270 (Tex. 1986). These mid-80s decisions approved submission of complicated legal questions to the jury in broad form, with appropriate explanatory instructions.

The transition from distinct and separate issues to broad-form questions was complete with the 1988 amendment to Rule 277.

2. Broad-Form Questions Under Rule 277

Under the 1988 amendment, "broad-form questions" shall be submitted "*whenever feasible*." TEX. R. CIV. P. 277 (emphasis added). The potential friction between the rule's use of the mandatory term "shall" and the qualifying phrase "whenever feasible" was promptly considered by the supreme court.

a. Shall/Whenever Feasible

In *Texas Department of Human Resources v. E. B.*, 802 S.W.2d 647 (Tex. 1990), the court stated "whenever feasible" means "[i]n any or every instance in which it is capable of being accomplished." *Id.* at 649. According to the court, the rule unequivocally requires the trial court to submit broad-form questions "unless extraordinary circumstances exist." *Id.* Nonetheless, the court provided no guidance for exactly what "extraordinary circumstances" would justify *not* using broad-form submissions in a jury charge.

E. B. also addressed concerns that broad-form questions might conflict with Rule 292, which requires the same ten jurors to vote and agree on the answer to each question submitted. The court rejected arguments that the jury was required to agree on the specific grounds for parental termination. Implicit in the jury's decision to terminate parental rights was the agreement of all ten jurors that the mother had endangered the child under one or more of the factors listed in the instruction. *Id.* at 649.

b. No Harmful Error for Failure to Use Broad-Form

The question remained whether the supreme court would reverse an otherwise error-free submission of separate and distinct special issues solely because of failure to comply with Rule 277's mandate to use broad-form questions. Early challenges failed to offer guidance because the question had not been preserved for appeal. *See, e.g., Keetch v. The Kroger Co.*, 845 S.W.2d 262, 267 (Tex. 1992).

Late in 1992, the supreme court handed down two cases that clarified the question of whether use of “granulated” submissions is harmful error. In *H. E. Butt Grocery Co. v. Warner*, 845 S.W.2d 258 (Tex. 1992), the court held that an otherwise correct separate and distinct submission would not be reversed for failure to submit broad-form questions. The court noted that the charge fairly submitted the disputed issues of fact containing the proper elements of the cause of action and incorporated the correct legal standard for the jury to apply. Thus, the court concluded that failure to submit requested broad-form questions and instructions was not “harmful error.” *Id.* at 259.

The same day the supreme court decided *Warner*, it also handed down *Westgate, Ltd. v. State of Texas*, 843 S.W.2d 448 (Tex. 1992). There, the court confirmed that it is not always reversible error to use separate and distinct special issues rather than broad-form questions and accompanying instructions. *Id.* at 457. By footnote, the court observed that Rule 277 is not absolute in requiring broad-form submission. Presaging its decision in *Crown Life Insurance Co. v. Casteel*, the court noted that submission of alternative liability standards, particularly when the law is unsettled concerning one or more of the theories of recovery, would present an appropriate use of the old special issue practice. *Westgate*, 843 S.W.2d at 455 n.6.

WHERE WE ARE WITH BROAD-FORM — NOTHING IS AS FEASIBLE AS IT SEEMS

The current rules require charge error to be preserved by requests or objections. Requests and objections do not serve the same purpose, and they currently cannot be used interchangeably. Broad-form submission has forced re-examination of traditional rules for preserving error.

A. Broad-Form Intensifies Preservation Complexity: Casteel

A decade after deciding *E.B.*, the supreme court first identified a set of “extraordinary circumstances” in which broad-form submission was “not feasible.” In *Crown Life Insurance Co. v. Casteel*, the supreme court determined that “it may not be feasible to submit a single broad-form liability question that incorporates wholly separate theories of liability.” *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 390 (Tex. 2000). Thus, when “a single broad-form liability question erroneously commingles valid and invalid *liability theories* and the appellant's objection is timely and specific, the error is harmful when it cannot be determined whether the improperly submitted theories formed the sole basis for the jury's finding.” *Id.* at 388 (emphasis added). Although Rule 277 says broad-form is clearly the preferred method of submission, “when the trial court is unsure whether it should submit a particular theory of liability, separating liability theories best serves the policy of judicial economy underlying Rule 277 by avoiding the need for a new trial when the basis for liability cannot be determined.” *Id.*; *see also Westgate, Ltd. v. State*, 843 S.W.2d 448, 455 n. 6 (Tex. 1992).

Prior to *Casteel*, courts rarely saw “extraordinary circumstances” that made broad-form infeasible. “The fact that a jury question contains more than one factual predicate to support an affirmative answer to a controlling question, or more than one element of a cause of action, does not render it defective.” *Missouri Pac. R.R. Co. v. Lemon*, 861 S.W.2d 501, 509 (Tex. App.—Houston [14th Dist.] 1993, writ dism'd); *see Texas Dept. of*

Mental Health & Mental Retardation v. Petty, 848 S.W.2d 680, 682 n.2 (Tex. 1992); *Scott v. Atchison, Topeka, & Sante Fe Ry. Co.*, 572 S.W.2d 273, 278-79 (Tex. 1978) (broad-form “can be accomplished very simply by listing the relevant acts or omissions [those raised by both pleadings and evidence] in a broad ultimate fact issue. . . [or] by a complementary instruction”); *Merckling v. Curtis*, 911 S.W.2d 759, 770 (Tex. App.—Houston [1st Dist.] 1995, writ denied) (different factual allegations did not present extraordinary circumstance that made broad-form infeasible); *Crawford v. Deets*, 828 S.W.2d 795, 800 (Tex. App.—Fort Worth 1992, writ denied) (distinct medical malpractice allegations did not present extraordinary circumstance that made broad-form infeasible); *Benjamin Franklin Sav. Ass'n v. Kotrla*, 751 S.W.2d 218, 222 (Tex. App.—Houston [14th Dist.] 1988, no writ) (single causation question for two different theories of recovery is not error).

Commingling valid and invalid theories of liability represents reversible error—although the trial court may not know of or agree with the invalidity at the time of submission. For example, in *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 389 (Tex. 2000), the charge included a single question with a single answer that could have been based on any one of thirteen independent grounds. Of the five DTPA laundry list grounds included, the plaintiff did not satisfy the required consumer status on four of those grounds. Because the jury was not asked separately about each of the plaintiff’s 13 theories of liability, the supreme court concluded that the jury could have based its affirmative answer solely on one or more of the erroneously submitted theories. *Id.* at 387-88; compare *Fox v. Dallas Hotel Co.*, 111 Tex. 461, 475, 240 S.W. 517, 522 (1922). As a result, the court held that “when a trial court submits a single broad-form liability question incorporating multiple theories of liability, the error is harmful and a new trial is required when the appellate court cannot determine whether the jury based its verdict on an improperly submitted invalid theory.” *Id.* at 388. Likewise, “[w]hen the trial court is unsure whether it should submit a particular theory of liability, separating liability

theories best serves the policy of judicial economy underlying Rule 277 by avoiding the need for a new trial when the basis for liability cannot be determined.” *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 390 (Tex. 2000). Since the holding in *Casteel*, harmful error may exist when the appellate court cannot determine whether the same ten jurors followed the same path to a verdict, based upon a legally valid theory with support in the evidence.

B. The Supreme Court Extends *Casteel*: *Harris County v. Smith*

The supreme court has not yet considered whether the holding of *Casteel* applies to the failure of a single element of a broad-form question on evidentiary grounds. In *City of Fort Worth v. Zimlich*, 29 S.W.3d 62,69 n.1 (Tex. 2000), the supreme court noted that “the City has not argued that it would be entitled to a new trial if the evidence was legally insufficient to support one or more of these theories of liability. Therefore, whether our decision in *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 389 (Tex. 2000), should be extended to cases in which there is no evidence to support one or more theories of liability within a broad form submission is not a question before us.” See also *In re A.V.*, 113 S.W.3d 355 (Tex. 2003) (refusing to review complaint on broad-form submission without objection to form or to evidentiary support of any theory submitted).

Before *Casteel*, courts routinely upheld damages awarded in a lump-sum as long as the evidence supported the total. See, e.g., *Brookshire Bros., Inc. v. Lewis*, 997 S.W.2d 908,921-22 (Tex. App—Beaumont 1999, pet. denied.) (“to successfully challenge a multi-element damage award on appeal, an appellant must address all of the elements and show the evidence is insufficient to support the entire damage award”) But, following *Casteel*, the supreme court rejected the approach of these cases and clarified that a broad-form damage finding may be reversible if any single element of damages lacks evidentiary support. See *Harris County v. Smith*, 96 S.W.3d 230 (Tex. 2002).

In *Harris County v. Smith*, 96 S.W.3d 230 (Tex. 2002), the trial court submitted two broad-form damages questions, each of which instructed the jury to consider several elements and award a single lump-sum amount. Harris County objected to the questions on the ground that one listed element in each question was supported by no evidence. *Id.* at 231-32. The trial court overruled the objections. *Id.* On appeal, the court of appeals concluded there was no evidence of the challenged elements, but held the submission error was harmless “because there was ample evidence on properly submitted elements of damage to support the jury’s awards to both plaintiffs.” *Id.* at 232. The supreme court reversed, relying on *Casteel* and holding that “[T]he trial court erred in overruling [the defendant’s] timely and specific objection to the charge, which mixed valid and invalid elements of damage in a single broad-form submission, and that such error was harmful because it prevented the appellate court from determining ‘whether the jury based its verdict on an improperly submitted invalid’ element of damage.” *Id.* at 234; *see also City of Garland v. Dallas Morning News*, 2002 WL 31662724 (Tex. App.—Dallas 2002, no pet.).

The Fourteenth Court of Appeals recently applied the teaching of *Harris County v. Smith* in *Lozano v. Lozano*, 2003 WL 22076661 (Tex. App.—Houston [14th Dist.] 2003, n.p.h.) (memorandum opinion). In *Lozano*, the defendants objected to a multi-element damages question with a single answer blank on the ground that “there was no evidence from which the jury could assess an amount of money for medical care,” *Lozano*, 2003 WL 22076661 at *4. On appeal, the defendants argued, “[t]he only evidence was with regard to future medical care or future health care services were [sic] by a psychologist who is not a medical doctor and cannot prescribe medicine.” *Id.*

The court of appeals did not hold that a psychologist’s testimony cannot support an award for future medical care, but the court did conclude there was no evidence to support an award of future medical care in this case. *Id.* at *4-*6. Without mentioning whether the defendants ever

asked for separate damages blanks, the court then concluded, “[b]ecause the trial court failed to segregate damages, the case must be remanded on all damages if we find reason to remand on one element of damages.” *Id.* at *6. The court then remanded the entire case, including liability, because “[t]he court may not order a separate trial solely on unliquidated if liability is contested.” *Id.*

C. The Court of Appeals Goes Further: *KPH Consolidation, Inc. v. Romero*

While the supreme court has not yet determined the result when one liability theory included in a broad form submission fails on no-evidence grounds, the Fourteenth Court of Appeals has skipped ahead. In *KPH Consolidation, Inc. v. Romero*, 102 S.W.3d 135 (Tex. App.—Houston [14th Dist.] 2003, pet. filed), the plaintiffs submitted two separate liability questions—one asking the jury to decide the Hospital’s negligence and one asking the jury to decide the Hospital’s malice in medical credentialing. The Hospital did not challenge the jury’s negligence finding. The Hospital did challenge the malicious credentialing claim, and the court of appeals concluded that there was no evidence the Hospital acted with conscious indifference. *Id.* at 146-55.

After concluding that no-evidence supported the credentialing claim, the court reversed the entire case, including the jury’s unchallenged negligence finding. *Id.* at 155-60. The court did so because the jury had answered a single apportionment question and single damages questions predicated on an affirmative answer to either liability theory. *Id.* The court found it “hard to believe that the 40% liability the jury attributed to the Hospital in question 3 was not based (1) partly on the liability it found for negligence (question 1), and (2) partly on the liability it found for malicious credentialing (question 2).” *Id.* at 159. The court likewise concluded that “the jury must have based part of the actual damages on negligence and part on malicious credentialing.” *Id.* at 160. The court therefore, “reversed and remanded for a new trial on negligence and damages.” *Id.*

Contrary to the court's holding in *Romero*, some courts hold *Casteel* does not apply and no error results from the failure of one of multiple theories of liability tied to a single damages question. See *Durban v. Guajardo*, 2002 WL 1042161 (Tex. App.—Dallas 2002, no pet.) (n.d.p.) (judgment can rest on damage finding if either of underlying liability findings find support in law and evidence); *Z.A.O., Inc. v. Yarbrough Drive Center Joint Venture*, 50 S.W.3d 531 (Tex. App.—El Paso 2001, no pet.) (even though several questions on different theories of liability failed, remaining question also tied to same damage question did not leave the court wondering whether jury based its award on valid theory); *Colonial County Mut. Ins. Co. v. Valdez*, 30 S.W.3d 514, 518-19 (Tex. App.—Corpus Christi 2000, no pet.) (*Casteel* error in one question to which single damage question tied rendered harmless in light of survival of other liability question tied to same damage question); see also *Samedan Oil Corp. v. Intrastate Gas Gathering, Inc.*, 78 S.W.3d 425, 452-53 (Tex. App.—Tyler 2001, pet. dismissed by agr.) (any error from multiple liability/single damage submission waived when no objection made to damage question for predication on multiple theories).

Other courts find harm arises from the tying damages to multiple theories, one of which fails. See *San Antonio Credit Union v. O'Connor*, 2003 WL 21502765 (Tex. App.—San Antonio 2003, no pet. h.) (linking intentional infliction, malicious prosecution, and defamation to single damage question reversible error when intentional infliction claim failed as a matter of law); *Custom Residential Paint Contracting, Inc. v. Klein*, 2001 WL 1318420/2002 WL 660200 (Tex. App.—Dallas 2002, pet. denied) (n.d.p.) (holding jury's DTPA finding defective and initially ordering remand for new trial even though contract question predicated on same damage finding left in tact but later accepting remittitur rather than remand).

Similar to the actual damage context, linking multiple theories of liability (and thus conduct) to a single penalty question may also cause a potential error if one theory fails on appeal. *San*

Antonio Credit Union v. O'Connor, 2003 WL 21502765 (Tex. App.—San Antonio 2003, no pet. h.) (malice finding linked to reversed intentional infliction claim required reversal of punitive damages); *Atrium Coso v. Bethke*, 2002 WL 31892204 (Tex. App.—Dallas 2002, no pet.) (n.d.p.) (finding of waiver of any *Casteel* error in linking single knowingly issue to multiple DTPA findings).

Finally, one court has extended the harm analysis in *Casteel* to instructions on inferential—rebuttal defenses. In *Urista v. Bed Bath & Beyond, Inc.*; 2004 WL306009 (Tex. App.—Houston [1st Dist.] February 19, 2004), the court held that “we cannot determine . . . conclusively” whether an unavoidable accident instruction might have led to the jury’s “no” answer to the negligence question. The instruction was erroneous, and the court held it was harmful error despite the holding in *Reinhart v. Young*, 906 S.W.2d 471, 474 (Tex. 1995) (inferential-rebuttal instruction was erroneous but did not result in an improper judgment).

WHERE ARE WE GOING—THE RULE OF UNINTENDED CONSEQUENCES

A. Unanswered Issues on Preservation

There are several unanswered questions regarding preservation of charge error complaints following *Casteel* and *Harris County v. Smith*. In *In re A.V.*, 113 S.W.3d 355 (Tex. 2003), a parental rights termination case, the Department alleged that a father’s rights should be terminated under TEX. FAM. CODE §§ 161.001(1)(N) and (Q). The trial court submitted two broad-form questions to the jury asking whether the father’s rights to each of two children should be terminated based on either or both sections (N) and (Q). *In re A.V.*, 113 S.W.3d at 357. The father did not object to the form of the charge. *Id.* Apparently, the father also did not object to the charge on the ground that no evidence supported one or the other statutory basis included in the charge. *Id.* at 362-63.

On appeal, the father argued that both of the submitted theories were unconstitutional, and he argued that there was no evidence to support termination of his parental rights under section 161.001(1)(N). *Id.* at 357. Presumably, the father preserved his no evidence complaint in a post-judgment motion—because the court makes no suggestion that this complaint was waived.

Nonetheless, after the supreme court overruled the father’s constitutional challenge to subsection (Q), the court held that it could affirm without reaching any of the father’s other complaints. *Id.* at 362. The court explained:

Puig did not argue to the trial court that because the charge was based on a theory without evidentiary support, the charge should not be submitted in broad form. To preserve this complaint, a party must make “[a] timely objection, plainly informing the court that a specific element . . . should not be included in a broad-form question because there is no evidence to support its submission. . . .” [FN40] The only specific objections Puig made to the charge were to request an instruction or definition on constructive abandonment and to argue the constitutionality of the statutes. . . .

The [trial] court overruled the objections. The record is clear—and Puig does not dispute—that he never objected to the question being submitted to the jury in broad form. In *Harris County v. Smith and Crown Life v. Casteel*, we emphasized the importance of a specific objection to the charge to put a trial court on notice to submit a granulated question to the jury. Because Puig did not make a specific and timely objection to the broad-form charge, he did not preserve a claim of harmful charge error.

Thus, any complaint regarding harmful charge error on broad-form submission was not preserved for review by the court of appeals, or by us. And because any complaint about the trial court submitting a broad-form question to the jury was waived, we look only to see if one of the grounds submitted to the jury is a valid ground upon which termination of parental rights could be based.

Id. at 362-63 (footnotes omitted).

What remains unclear after *A.V.* is whether the supreme court would have reached the same result if the father had lodged a no-evidence objection to submission of the subsection (N) ground before the charge was submitted. In other words, is it enough to object that particular theory is supported by no evidence, or must a party also specifically complain that the charge should not be submitted in broad form? It does not appear that the court of appeals required such a form objection in *Lozano*, but we do not yet know how the supreme court will rule.

We may get an answer when the court decides *S.W. Bell Telephone Co. v. Garza*. In that case, the defendant, Southwestern Bell, challenges the trial court’s submission of a single liability question that asked whether the defendant had disqualified *or* discharged the plaintiff in retaliation for filing a worker’s comp claim. Southwestern Bell asserts that the disqualification theory is invalid, and that because this invalid theory was commingled with the (valid) discharge theory, the entire case should be reversed. *See Southwestern Bell Tel. Co. v. Garza*, 58 S.W.3d 214 (Tex. App.—Corpus Christi 2001, pet. granted).

The only preservation asserted by Southwestern Bell is that it tendered a question that included only the discharge theory and its tender was implicitly overruled by the trial court. Southwestern Bell did not make any objections to the charge, including no objection about the broad-form submission. Consequently, depending

on the supreme court’s ruling on the merits of the case, we may learn more about preservation requirements.

As reflected in *Casteel*, even the supreme court has struggled to determine how error in the charge should be preserved. For example, in *Keetch v. The Kroger Co.*, 845 S.W.2d 262 (Tex. 1992) the supreme court declined to address whether it was error to submit a premises liability case under PJC 61.02 (separate and distinct issues) rather than PJC 61.04 (broad form). The court held on rehearing that error had not been preserved because the plaintiff did not distinctly designate the error, and the grounds for the objection as required by TEX. R. CIV. P. 274. However, that language replaced the original holding that error was not preserved because the plaintiff had failed to request a substantially correct broad-form submission.

In *Harris County*, the majority indicated that its segregation holding did not encompass “potential errors, such as factual insufficiency.” 96 S.W.3d at 235. But, could an objection to a broad-form submission combined with a later factual sufficiency complaint preserve error as the dissent suggests. *Id.* at 239.

B. Lawyers And Trial Judges Do Factorials—The Charge Matrix

The court of appeals’ opinion in *KPH Consolidation v. Romero* instructs trial courts and practitioners that the only way to prevent reversal of unchallenged liability findings is to submit separate apportionment questions and separate damages questions—on every theory. It is no Chicken Little prediction to say this is the end of broad form submissions in Texas.

From now on, the only safe way for trial courts and opposing lawyers to respond to no evidence objections will be to submit multiple liability, apportionment, and damages questions. To avoid a remand, every theory of liability, every combination of theories, and every combination of defendants will have to be separately submitted with its own apportionment and damages questions. This means lengthy jury charges in even “routine” cases. In *Romero*, for example— involving five plaintiffs, two non-settling defendants, two settling defendants, negligence theories against each defendant, and a malice theory against one defendant—the jury charge would have needed to include more than 175 questions.

***Submit your suggestions
and ideas for the *Advocate*
to Kimberly Phillips at
kphillips@gardere.com.**

An Interview with Chief Justice Thomas R. Phillips

David Hugin, Assistant Editor, *The Appellate Advocate*

Where were you born and raised?

Dallas.

What did your father do for a living?

My father was an insurance agent for fifty years, from 1935 to 1985. He worked for himself and for several different agencies, but he nearly always officed in the Houseman Building at 1505 Federal Street.

Did your mother work outside the home?

My mother worked for Sears Roebuck until she married my Dad in 1943, after which she was a homemaker. Of course, she always did a lot of church and volunteer work outside the home.

I assume prior to your moving to Austin you had spent most of your adult life in Houston? Anything you miss about Houston that you have not found in Austin?

I lived in Houston from 1975 until 1988, and I greatly enjoyed my time there. I met and married my wife Lyn and made many lifelong friends. Houston had lots of cultural attractions, as well as great restaurants, museums, and shopping. While walking from my law office to the courthouse, I might hear five or six different languages being spoken. The best thing about Houston was its can-do spirit and its openness to new ideas and new people. Where else can a young lawyer come to town, knowing no one, and become a general jurisdiction judge in less than six years, like I did?

What made you want to become a lawyer?

My maternal grandmother was a deputy county court clerk in Dallas for more than thirty years, so

I grew up thinking that lawyers, and especially judges, were very special people.

What do you remember as being your favorite classes in law school?

I endured law school rather than embracing it. I'm not sure whether this is because youth is always wasted on the young or because there were so many distractions in Cambridge, especially after three years in Waco, that a lack of interest in class work was entirely normal. The classes that I tolerated best generally had strong elements of history and government, such as Property (with Frank Michelman), Constitutional Law (with John Hart Ely), and Federal Courts (with Paul Bator). I had many other excellent professors, including Phil Areeda, Louis Jaffe, Robert Keeton, Lon Fuller, Andy Kaufman, and Stephen Breyer.

What type of litigation did you handle when you were in private practice?

I was assigned to the trial department at Baker & Botts, where I had been lead counsel in just enough cases to obtain Board Certification in Civil Trial Law. I was second chair in a number of cases to former State Bar President Thomas M. Phillips, who may not have always approved of my work but always was able to remember my name. I also worked with Joe Cheavens, Larry York, Mike Graham and Richard Josephson, among others. About half my time was spent representing plaintiffs in business fraud and commercial disputes, while the other half was spent representing defendants in personal injury or defamation cases.

Why did you decide to become a judge?

My mother says that as a very young child I liked to bow down to the bench, but I first consciously wanted to be a judge when I clerked for Justice

Ruel C. Walker at the Texas Supreme Court in 1974-75. I was attracted to the judiciary for several reasons. First, I found the task of finding the “right” answer more intellectually challenging and emotionally satisfying than the task of marshaling the best arguments to justify what your client has already done. Second, I enjoyed being a part of the governmental process without having to be a politician in the normal sense. And frankly, I enjoyed the perks of office, like robes, the raised dais, and spacious chambers, as well as the camaraderie among the judges, especially in Houston.

What was the most unexpected thing you encountered about serving on the bench when you became a judge?

Like most new judges who came from a large firm, I was surprised by the paucity of staff and equipment on the bench. Of course, that was 1981, and I think support is much better in both Harris County and at the Supreme Court now than it was then.

What do you enjoy most about being a supreme court justice?

This is truly one of the world’s great jobs. I get to work with some of the brightest legal minds in Texas, my fellow judges and our staff attorneys and law clerks. I have the opportunity to improve the administration of justice in Texas, particularly through promulgating new rules of procedure, evidence and administration. I have a bully platform to advocate improvements in the court system. The bench, the bar and the Legislature may not follow my advice, but they at least will listen. And people do actually read what I write - although perhaps they do so only because it’s their job.

What do you least enjoy about being a supreme court justice?

Well, the work is pretty unrelenting, and it’s impossible to do everything well. If you get really immersed in an opinion for a week or so, you get behind on petitions and arguments. And

if you don’t stay very alert while the Legislature is in town, bad things can happen.

What, if anything, is most helpful to the Court about oral argument?

Oral argument is the best opportunity for a justice to explore weaknesses in his or her own thinking about a case and to consider the ramifications of a possible holding.

What do you see as the biggest difference in the Court’s business between the writ v. petition system?

The petition system gives the justices a much better picture of the quality of advocacy at the bar. The law clerks have the ability to turn sow’s ears into silk purses through their high-quality independent research. We actually grant fewer petitions now than we did when we decided grants based solely on internal memos, and we seldom, if ever, dismiss a case as improvidently granted.

What do you think is the biggest mistake or opportunity missed by lawyers in their brief writing?

Any lawyer who quotes testimony, statutes or opinions out of context or who misstates their effects incorrectly risks losing credibility with the court on everything else they say. These lawyers insult our intelligence or our industry, and cheapen the entire adversary process. Frequently, they compound their errors by making ad hominem attacks on their opponents, which is often another sign of a problematic case.

Most of our readers know of your championing a different system for selection of our state court judges. What alternative system do you most favor and why?

I would unify the district and statutory county courts, then allow the governor to appoint all judges with the advice and consent of the Senate. Each judge would face the voters at the end of each term in a retention, or “yes/no,” election. Failing this, there are other procedural tweaks,

like signature petitions for high court and urban judges, that would make modest improvements.

I do not believe that the current judicial selection system fosters public respect for and confidence in our system of justice. In recent years, I have been appalled at the number of lawyers who believe that campaign contributions enhance their opportunities for success in some courts. I am even more appalled by the possibility that in some circumstances, hopefully very occasionally, they may be right. But I am most disappointed by those lawyers who try to get new business based on their record of judicial contributions. We have the perverse effect of lawyers contributing to judges, knowing as they give that their contribution will not buy influence, but hoping to persuade others that it does. That's the basic reason I refused to campaign for re-election in 2002, a luxury in which I could indulge because of the strength of my party's ticket.

Do you ever get the urge to return to private practice?

Yes, among other things.

What was best thing about private practice?

The emotional highs and lows of trial practice simply don't exist in judicial service, especially at the trial court level. There's a steady satisfaction in judicial service, but it seldom produces an adrenaline rush, and it took me several years to get used to that when I left practice.

What is best about being a judge?

When I became a judge, I was amazed each month when I got a check from all the people of Texas for serving them. It's a humbling and very satisfying experience. I enjoy the luxury of thinking about the law and being able to improve the legal system in one of the world's most significant legal jurisdictions.

When did you get started on your political button/memorabilia collection and what are some of your most prized pieces in your vast collection?

I started collecting political buttons when I found a Jim Wright for Senator button on a downtown Dallas street in 1961, and I started collecting campaign biographies a few years later when I bought an 1860 pamphlet "The Life of Stephen A. Douglas" at Aldridge's Book Store. My favorite items relate to Sam Houston's short-lived 1860 presidential campaign as the "People's Candidate."

J. Brett Busby, Mayer Brown Rowe & Maw LLP, Houston

ANTITRUST

***U.S. Postal Serv. v. Flamingo Indus. (USA) Ltd.*, 124 S.Ct. 1321 (2004).**

In a unanimous opinion by Justice Kennedy, the Supreme Court held that the U.S. Postal Service (USPS) is not subject to antitrust liability. Flamingo's suit claimed that USPS terminated its contract to make mail sacks in order to create a monopoly in mail sack production. The district court dismissed the claims but the Ninth Circuit reversed, concluding USPS had only limited antitrust immunity for conduct commanded by Congress.

The Supreme Court reversed. Congress has waived USPS's general immunity from suit, but the Sherman Act's prohibitions do not apply to it because it is not an antitrust person separate from the United States. Although it is an independent establishment of the executive branch, Congress gave USPS powers and responsibilities typical of a government agency and did not create it as an independent corporation. In the absence of an express congressional statement that USPS can be sued for antitrust violations, the Court held that it could not.

***Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 124 S.Ct. 872 (2004).**

In an opinion by Justice Scalia, the Court held that the 1996 Telecom Act did not disturb traditional antitrust principles, and it used those principles to reject Respondent's claim. The Act requires incumbent telephone companies to sell certain services to competitors at wholesale prices. Respondent, a competitor's customer, filed a monopolization class action alleging that incumbent Verizon discriminated against competitors in processing orders for service. The Second Circuit held that Respondent had stated a claim.

The Supreme Court reversed. It held that the Act, which contained an antitrust-specific saving clause, did not give Verizon implied antitrust immunity. The Court also held, however, that Verizon's alleged conduct did not fall within the limited rule of antitrust liability for a monopolist's refusal to deal with competitors. Verizon had not entered into a voluntary course of dealing with its rivals or refused to provide them with products it sold to others at retail prices. The Court took no position on the "essential facilities" doctrine adopted by some lower courts, concluding that the doctrine would serve no purpose here because the Act guarantees access.

Justice Stevens, joined by Justices Souter and Thomas, concurred in the judgment. He concluded that Respondent lacked standing because its alleged injury was derivative of that suffered by Verizon's competitors.

BANKRUPTCY

***Kontrick v. Ryan*, 124 S.Ct. 906 (2004).**

This case addresses whether the time limit for objecting to a debtor's bankruptcy discharge is jurisdictional or may be waived. Bankruptcy Rule 4004 requires a creditor to file a complaint objecting to discharge within a specified period, which the court can extend upon motion filed before the time expires. Without seeking an extension, a creditor belatedly amended his complaint to add a new objection to discharge. Yet the debtor filed an answer and the bankruptcy court sustained the creditor's new objection on the merits. Only then did the debtor argue that the amendment had been untimely. The lower courts held that the debtor had waived this argument.

In a unanimous opinion by Justice Ginsburg, the Supreme Court affirmed. The Court observed that the subject-matter jurisdiction of bankruptcy courts includes objections to discharges generally,

while time limits for objections appear only in the rules. It held that these “claim-processing” rules, even if unalterable by motion, are forfeited if a debtor fails to object before the court reaches the merits.

***Lamie v. U.S. Trustee*, 124 S.Ct. 1023 (2004).**

In an opinion by Justice Kennedy, the Court held that a debtor’s attorney could not recover fees for work done after a Chapter 11 reorganization proceeding was converted to a Chapter 7 liquidation proceeding because he had not been appointed by the Chapter 7 trustee. Affirming the decision of the Fourth Circuit, the Court reasoned that although the current statute was awkward and ungrammatical, it unambiguously failed to include attorneys as a category of persons eligible for compensation. The statute did make appointed professionals eligible for compensation, but the attorney had not been appointed by the trustee. The court rejected the argument that the grammatical soundness of the prior statute, which had made attorneys eligible, suggested that the current statute’s omission of attorneys was a drafting error. It also found that the legislative history was inconclusive.

Justice Scalia did not join the section of the Court’s opinion discussing legislative history. Justice Stevens concurred in the judgment, and Justices Souter and Breyer concurred but also joined Stevens’ opinion. They argued that it is appropriate to consult legislative history to determine whether a drafting error occurred, but concluded that the history supported the Court’s reading of the text.

EMPLOYMENT

***General Dynamics Land Sys., Inc. v. Cline*, 124 S.Ct. 1236 (2004).**

In this case, the Court held that the Age Discrimination in Employment Act (ADEA) does not prevent employers from favoring older employees over younger ones. When a collective-bargaining agreement cut promised post-retirement health benefits for current workers

under 50, the workers sued under the ADEA. The Sixth Circuit held that the ADEA’s clear prohibition of “discriminat[ion] . . . because of [an] individual’s age” applied to discrimination against younger workers.

The Supreme Court reversed in an opinion by Justice Souter. It held that the statutory findings and objectives, the limitation of ADEA protection to persons 40 and older, and the legislative history showed only an intent to protect older workers from discrimination in favor of younger ones. Although other references to age in the ADEA are not limited to old age, context suggests that the word was used in different sections with different intent. The Court refused to defer to the EEOC’s contrary interpretation, calling it clearly wrong.

Justice Scalia dissented, arguing that the Court should defer to the EEOC. Justice Thomas, joined by Justice Kennedy, also dissented. He contended that the plain text of the statute applies to discrimination based on youth as well as old age.

ENVIRONMENT

***Alaska Dep’t of Env’tl. Conserv. v. EPA*, 124 S.Ct. 983 (2004).**

By a 5-4 vote, the Court upheld EPA’s authority under the Clean Air Act to bar construction of facilities that do not use the best available pollution control technology (BACT). In this case, an Alaska agency issued a permit allowing a zinc mine to use certain pollution control equipment on its diesel generators. Although the agency originally found that a more expensive form of pollution control was BACT, it later concluded that cheaper equipment would satisfy the BACT standard. EPA found the agency’s BACT determination unreasonable and issued an order barring the permit.

The Ninth Circuit held that EPA properly exercised its discretion, and the Supreme Court affirmed in an opinion by Justice Ginsburg. It observed that the Clean Air Act authorizes EPA to issue orders blocking construction when the state

agency or the facility has not complied with requirements of the Act. EPA internal memoranda interpreted this oversight role to include ensuring that a state agency's BACT determination is reasonable in light of the statutory criteria. Although the memoranda did not merit *Chevron* deference, the Court found them worthy of respect. It concluded that the Act's assignment to state agencies of case-by-case authority to make BACT determinations did not exclude EPA review of whether those determinations were reasonable.

Justice Kennedy dissented, joined by the Chief Justice and Justices Scalia and Thomas. He argued that the express terms of the Act gave EPA no oversight over BACT determinations and that the majority had given EPA's interpretation too much deference.

HABEAS CORPUS

Banks v. Dretke, 124 S.Ct. 1256 (2004).

In this case arising under pre-AEDPA law, the Court held that Texas prosecutors violated *Brady v. Maryland*, 373 U.S. 83 (1963), by concealing significant exculpatory and impeaching evidence from defendant Banks. Banks was convicted of capital murder and sentenced to death. At the guilt phase of his trial, witness Cook testified that Banks admitted the killing. Cook denied having discussed his testimony with anyone. At the penalty phase, prosecutors argued that Banks was a future danger based on testimony from witness Farr that Banks retrieved a gun from Dallas in order to commit future robberies and "take care of" any trouble during those crimes. In his federal habeas petition, Banks raised *Brady* claims and offered a declaration from Farr that he was a paid informant who proposed, at police request, that Banks obtain a gun in Dallas. Banks also offered a declaration from Cook that the prosecution had intensively coached his testimony, and in response the state produced a transcript of the coaching. The district court granted habeas relief on the *Brady* claim regarding Farr but not on the claim regarding Cook. The Fifth Circuit reversed

as to Farr and denied a certificate of appealability (COA) as to Cook.

The Supreme Court reversed in an opinion by Justice Ginsburg, granting habeas relief to Banks on his Farr claim and holding that a COA should have issued on his Cook claim. Regarding Farr, the Court held that Banks had shown the three elements of *Brady*: (1) Farr's paid informant status was evidence advantageous to Banks; (2) the state knew about that status but kept it back, while assuring Banks that it would disclose all *Brady* material and allowing Farr's misstatements about his dealings with police to stand uncorrected; and (3) jurors might well have disregarded Farr's testimony, which was the prosecution's key evidence that Banks planned to commit future violence, if they had known about his status. The Court held that the latter two factors also showed cause and prejudice that excused Banks's failure to offer evidence supporting his claim in prior proceedings. As to Cook, the Fifth Circuit had denied a COA on the ground that this claim was not pleaded. The Court disagreed, holding that the trial-by-consent principle of Fed. R. Civ. P. 15(b) applies in the pre-AEDPA habeas context and that the Cook claim had been aired at an evidentiary hearing.

Justice Thomas, joined by Justice Scalia, concurred in part and dissented in part. He agreed with the Court's holding on the Cook claim but concluded that nondisclosure of Farr's informant status was not prejudicial.

Castro v. United States, 124 S.Ct. 786 (2003).

This case concerns a court's power to recharacterize a federal prisoner's motion as a federal habeas corpus claim under 28 U.S.C. § 2255, thereby restricting his ability to bring second or successive claims in the future. The district court treated Castro's *pro se* motion for new trial as a federal habeas claim and denied it. Later, when Castro filed a habeas claim, the court held that it was Castro's second claim and dismissed it.

The Supreme Court disagreed with this approach in an opinion by Justice Breyer. It held that a federal court cannot recharacterize a *pro se* litigant's motion as a first habeas claim unless it first informs the litigant of its intent to recharacterize, warns the litigant that recharacterization means any subsequent motion will be subject to the restrictions on second or successive claims, and provides the litigant an opportunity to withdraw the motion or to amend it so that it contains all the § 2255 claims he believes he has. Because Castro did not receive these warnings, the habeas claim should be treated as his first. Justice Scalia, joined by Justice Thomas, concurred in the judgment. He argued that other pleadings should never be treated as first habeas claims given the potential adverse effects of any recharacterization on *pro se* litigants.

PRIVACY

Doe v. Chao, 124 S.Ct. 1204 (2004).

This case concerns the availability of minimum statutory damages for violations of the Privacy Act. Claimants of black lung benefits sued the Department of Labor for releasing their social security numbers. The Government stipulated to an injunction against future releases, and the district court granted summary judgment to plaintiff Doe based on uncontroverted testimony about his distress concerning the disclosures, awarding him the minimum statutory damages of \$1,000. The Fourth Circuit reversed, holding that proof of some actual damages is required to qualify for the minimum award, and that Doe had not provided testimony to corroborate his claim.

The Supreme Court affirmed in an opinion by Justice Souter. It rejected the argument that proof of a statutory violation is enough to support a minimum award. Instead, the statute confines eligibility for damages to plaintiffs who suffer an adverse effect from an intentional or willful agency action, and they can only recover "actual damages sustained" with a guaranteed minimum of \$1,000. The Court found this construction consistent with traditional tort principles, and

noted that language authorizing general damages without reference to specific harm had been deleted from the bill.

Justice Ginsburg dissented, joined by Justices Stevens and Breyer. There was no dispute that Doe suffered an adverse effect from intentional or willful action, and she argued that the statutory text and legislative history showed that no actual damages were required. Justice Breyer also dissented, contending that the intentional or willful action requirement would adequately serve to limit the Government's liability.

RELIGION

Locke v. Davey, 124 S.Ct. 1307 (2004).

In an opinion by Chief Justice Rehnquist, the Court held that the exclusion of theology students from a Washington state scholarship program did not violate the Free Exercise Clause, reversing the Ninth Circuit's holding to the contrary. The Court reasoned that this case implicated the play in the joints between the Establishment and Free Exercise Clauses. Although the state could choose to permit scholarship recipients to pursue theology degrees, it was not required to do so. In particular, the Court rejected the argument that the program was presumptively unconstitutional because it was not facially neutral regarding religion. Instead, the Court held that the state's choice not to fund a category of instruction was different in kind from imposing criminal or civil sanctions on religious rites, denying ministers the opportunity to participate in political affairs, or forcing students to choose between religious beliefs and government benefits. It also discussed the historical pedigree of prohibitions against state funding of religion, and noted that nothing in the program or its operations suggested animus toward religion.

Justices Scalia and Thomas dissented. Justice Scalia argued that when a state makes a public benefit generally available, that benefit becomes part of the baseline against which burdens on religion are measured. Because the state withheld that benefit from some individuals solely on the

basis of religion, its program was subject to strict scrutiny and violated the Free Exercise Clause. Justice Thomas joined this dissent and also wrote separately to note that theology can be studied from a secular as well as a devotional perspective.

RIGHT TO COUNSEL

***Fellers v. United States*, 124 S.Ct. 1019 (2004).**

In this case, the Court clarified differences between the Fifth and Sixth Amendment rights to counsel. After Fellers was indicted for conspiracy to distribute drugs, officers went to his home to arrest him and discuss his involvement in drug distribution. Fellers made incriminating statements. After being taken to jail, Fellers signed a rights waiver and made more incriminating statements. The district court and Eighth Circuit declined to suppress the latter statements, holding that Fellers had not been interrogated at home and that his waiver was valid.

In a unanimous opinion by Justice O'Connor, the Supreme Court reversed. The Sixth Amendment right to counsel attaches upon indictment and is violated when officers "deliberately elicit" incriminating statements in the absence of counsel, not merely when (as under the Fifth Amendment) a custodial interrogation occurs. Under this standard, the Court held that the officers' conduct at Fellers' home violated his right to counsel. The Court noted that it had never decided whether statements made after a knowing and voluntary waiver are admissible notwithstanding a prior Sixth Amendment violation, and it remanded for the Eighth Circuit to consider that question.

SEARCH AND SEIZURE

***Groh v. Ramirez*, 124 S.Ct. 1284 (2004).**

In an opinion by Justice Stevens, the Court held that a warrant violated the Fourth Amendment because it did not describe the items to be seized. Groh, an ATF agent, prepared a warrant application and supporting affidavit that included

a detailed list of illegal weapons and explosives he proposed to seize from Respondents' Montana ranch. He also completed a proposed warrant form, which did not include or cross-reference the list. After a magistrate signed the form, Groh led a team to the ranch to execute the warrant, but they did not find any illegal items. He left only a copy of the warrant itself with Respondents, who brought a *Bivens* suit against him for violating the Fourth Amendment. The Ninth Circuit held that the warrant was invalid and rejected Groh's qualified immunity defense.

The Supreme Court affirmed. It held that the search was presumptively unreasonable because the warrant did not particularly describe the items to be seized. The other documents describing Groh's need to search and the limits of his authority were not made known to Respondents until later. In addition, because the items were not listed in the warrant, there was no written assurance that the magistrate found probable cause to support the broad search requested. The Court also rejected Groh's claim of qualified immunity, pointing out that he prepared the facially deficient warrant and thus could not reasonably rely on any assurance from the magistrate that it was valid.

Justice Kennedy dissented, joined by Chief Justice Rehnquist. He agreed with the Fourth Amendment holding but would have granted Groh qualified immunity, reasoning that he committed a clerical error that should be excused as a mistake of fact. Justice Thomas, joined by Justice Scalia and in part by the Chief Justice, also dissented. He contended that the text of the Fourth Amendment does not require a warrant, distinguished warrantless searches from searches under defective warrants, and argued that this search was reasonable despite any defects. He also would have granted Groh qualified immunity.

***Illinois v. Lidster*, 124 S.Ct. 885 (2004).**

In this case, the Court considered the validity of an arrest made at an informational checkpoint. One week after a fatal hit-and-run accident, police

set up a highway roadblock at the same location and time, creating lines of up to 15 cars in each lane. Police asked the occupants of each car if they had seen anything one week earlier and handed each driver a flyer requesting information about the accident. When Lidster swerved and nearly hit an officer at the checkpoint, the officer smelled alcohol on his breath and gave him a field sobriety test, which he failed. Lidster challenged his arrest and conviction for driving under the influence of alcohol, arguing that the checkpoint violated the Fourth Amendment. The Illinois Supreme Court agreed.

In an opinion by Justice Breyer, the Supreme Court reversed. The Court held that this situation was unlike the general crime control roadblock found unconstitutional *per se* in *Indianapolis v. Edmond*, 531 U.S. 32 (2000). Here, the stop's primary law enforcement purpose was not to determine whether a vehicle's occupants were committing a crime, but to ask members of the public for help in solving a crime likely committed by others. The Court concluded that a *per se* rule was inappropriate because the law ordinarily permits police to seek voluntary cooperation in an investigation, and brief information-seeking stops are unlikely to provoke anxiety or prove intrusive. The Court then evaluated the checkpoint under the reasonableness standard and upheld it, holding that the police appropriately tailored their stops to fit important criminal investigatory needs.

Justice Stevens dissented in part, joined by Justices Souter and Breyer. He found the reasonableness inquiry a close one and would have remanded that issue to the Illinois courts.

***Maryland v. Pringle*, 124 S.Ct. 795 (2003).**

In a unanimous opinion by Chief Justice Rehnquist, the Court found probable cause to arrest any and all occupants of a vehicle found to contain cocaine. Police stopped a car carrying three men and performed a consensual search, finding cocaine behind the rear-seat armrest and a large amount of cash in the glove compartment. They arrested all three occupants for possession

of drugs, including front-seat passenger Pringle. Pringle later confessed, but the Maryland Court of Appeals suppressed the confession as the fruit of an illegal arrest. It held that absent specific facts tending to show Pringle's knowledge and dominion or control over the drugs, there was no probable cause to arrest him.

The Supreme Court reversed. Although probable cause must be particularized with respect to the person to be seized, the Court held that on these facts it was a reasonable inference that any or all of the car's occupants had knowledge of, and exercised dominion and control over, the cocaine. Thus, a reasonable officer could conclude that there was probable cause to believe Pringle committed the crime of possession of cocaine, either solely or jointly.

SECURITIES

***SEC v. Edwards*, 124 S.Ct. 892 (2004).**

In this case, the Court held that an investment scheme promising a fixed rate of return can be an "investment contract" subject to federal securities laws. Respondent's company sold payphones to the public and leased them back for a fixed monthly payment, giving purchasers a 14% annual return on their investment. When the company went bankrupt, the SEC brought a civil enforcement action alleging that Respondent and the company violated registration requirements and antifraud provisions of the securities laws. The Eleventh Circuit held that the securities laws did not apply because the scheme did not offer either capital appreciation or participation in the enterprise's earnings, and the fixed return was not derived solely from the efforts of others.

The Supreme Court reversed in a unanimous opinion by Justice O'Connor. It observed that an "investment contract" subject to the securities laws involves an investment of money in a common enterprise with profits to come solely from the efforts of others. The Court interpreted this test flexibly, holding that profits refer to the return investors seek on their investment, not the return of the scheme in which they invest, and

may include dividends, other periodic payments, or the increased value of the investment. The Court saw no reason to distinguish between promises of fixed or variable returns for purposes of the test, which showed that Respondent's scheme was an investment contract.

SOVEREIGN IMMUNITY

***Frew ex rel. Frew v. Hawkins*, 124 S.Ct. 899 (2004).**

In a unanimous opinion by Justice Kennedy, the Supreme Court rejected Texas' Eleventh Amendment defense to enforcement of a federal consent decree. Mothers of children eligible for Medicaid screening sued Texas officials for injunctive relief, claiming that the state program did not meet federal requirements. Texas settled the case by agreeing to a consent decree that, unlike the general mandate of the federal statute, required officials to implement specific proposals. Later, when the mothers filed an action to enforce the decree, Texas argued that immunity barred the action because violations of the decree did not constitute violations of federal law. The Fifth Circuit agreed, but the Supreme Court reversed.

The Court held that *Ex parte Young*, which authorizes suits for prospective injunctive relief against state officials who violate federal law, permitted enforcement of the decree. The decree sprang from a federal dispute and furthered the objectives of federal law. While it implemented the law in a detailed way, requiring officials to take particular steps not specified in the statute, the officials agreed to this method of implementation when they asked the court to approve the decree. Enforcing the decree was consistent with *Ex parte Young* and vindicated the agreement that the officials reached to comply with federal law. The Court did not reach the mothers' argument that Texas waived its immunity by agreeing to the decree.

TREATIES

***Olympic Airways v. Husain*, 124 S.Ct. 1221 (2004).**

This case concerns the definition of an "accident" for which an international air carrier can be liable under the Warsaw Convention. Respondent and her husband, who had asthma, were seated three rows in front of the smoking section. A flight attendant refused three requests to reseal the husband. After a noticeable increase in smoking, the husband died. The district court and Ninth Circuit held that the attendant's refusal was an "accident" for which the carrier was liable.

In an opinion by Justice Thomas, the Supreme Court affirmed. It observed that an "accident" refers to an unexpected or unusual external event, not to a passenger's internal reaction to a normal, expected event. The Court rejected the carrier's argument that normal ambient smoke was the only relevant event, holding that a plaintiff need only prove that some link in the chain of causes leading to the injury was an unusual or unexpected external event. It concluded that the attendant's rejection of requests for assistance was a link in the chain and was unusual in light of industry standards, airline policy, and the simple nature of the request. It also noted that the Ninth Circuit had improperly followed a negligence-based approach to the accident inquiry.

Justice Scalia dissented, joined in part by Justice O'Connor. Relying on opinions by English and Australian courts interpreting the Convention, he argued that the attendant's failure to act was not an "accident."

Laurie Ratliff, Popp & Ikard, Austin

Michael S. Truesdale, Diamond McCarthy Taylor Finley Bryant & Lee, Austin

BUSINESS DISPARAGEMENT

***Forbes Inc. v. Granada Biosciences, Inc.*, 47 Tex. Sup. Ct. J. 162 (December 19, 2003) (Justice Schneider not participating).**

The issue in this case is what is the publication date when determining the existence of actual malice in a business disparagement lawsuit.

Forbes published an article discussing the financial condition of Granada Biosciences, Inc. and Granada Foods Corp. (“GBI”). According to GBI, Forbes represented that it would be allowed to review the article before publication. On October 25, GBI received what it believed was a draft of the article. According to GBI, Forbes represented that the article could still be corrected. That day, GBI reported to Forbes numerous false and misleading statements in the article. Forbes, however, had already mailed the article to subscribers on October 21. GBI’s stock dropped the day Forbes published the article. GBI sued Forbes for business disparagement.

The trial court granted Forbes’ motion for summary judgment. The court of appeals reversed. The court of appeals applied the “single publication rule” which provides that for limitations purposes, “publication is complete on the last day of the mass distribution” According to the court of appeals, the evidence created a fact issue as to Forbes’ state of mind at the time of publication, if the article was not published until after Forbes’ representation to GBI that the article could be corrected.

In an opinion by Justice O’Neill, the Court reversed and rendered judgment for Forbes. According to the Court, actual malice focuses on the defendant’s state of mind at the time of publication. In rejecting the application of the single publication rule, the Court recognized that

the rule’s purpose is to protect publishers from repeated liability based on reprinted publications. The rule does not assist in determining a publisher’s state of mind at the time of publication. The Court determined that the publication date is the date the issue is printed and mailed to subscribers. Forbes printed and distributed the article before its conversation with GBI on October 25. Because evidence of events occurring after the printing and distribution of an article has little bearing, if any, on the publisher’s state of mind during the editorial process, the October 25 conversation cannot constitute evidence of actual malice at the time of publication. Accordingly, the Court concluded that GBI failed to present evidence of actual malice and reversed and rendered.

INSURANCE COVERAGE

***Provident Life & Accident Ins. Co. v. Knott*, 47 Tex. Sup. Ct. J. 174 (December 19, 2003)**

The Court addressed two issues: what is the definition of “total disability,” and when does the statute of limitations commence on an insured’s extra-contractual claims.

The policies defined “total disability” as “due to Injuries or Sickness, you are unable to perform the duties of your occupation.” The policies also provided that for a total disability commencing on or after an insured turns sixty-five, the maximum benefit period was twenty-four months. For a total disability commencing before an insured’s sixty-fifth birthday, lifetime benefits were paid.

In June 1985, before turning sixty-five, Knott was injured and off work for two months. When he returned to work, he was able to perform some, but not all of his pre-injury duties. Provident promptly paid Knott \$7500 in total disability benefits in December 1985. Two months later,

Provident requested repayment of \$6250 because Knott's disability did not continue for ninety-days, a condition of coverage. The parties reached a settlement agreement and Provident paid Knott benefits until 1991. In December 1995, after turning sixty-five, Knott made a claim for total disability benefits. Provident paid benefits for the two-year period prescribed in the policy.

Contending he was totally disabled before turning sixty-five, Knott sued Provident for breach of contract, misrepresentation, bad faith and for violations of the Insurance Code and the DTPA. Provident moved for summary judgment arguing that "total disability" means an insured was unable to perform all of the duties of the insured's occupation. Because Knott could perform some of his duties, he was not totally disabled as a matter of law. Knott argued that total disability was a fact issue that depends on whether he was unable to perform "any substantial portion" of the duties of his occupation.

The trial court granted Provident's motion for summary judgment. The court of appeals reversed Knott's breach of contract claim and affirmed his extra-contractual claims. In an opinion by Justice Wainwright, the Court reversed Knott's breach of contract claim, affirmed on the extra-contractual claims and rendered judgment that Knott take nothing.

The Court noted that the policies defined "partial disability" as the inability to perform one or more of one's daily business duties. Reading the total and partial disability provisions together, the Court held that total disability means an insured was unable to perform all of the duties of his occupation. Because Knott was able to perform some of his job duties after his 1985 injury, he was not entitled to total disability benefits under the policies.

On his extra-contractual claims, Knott argued limitations commenced in 1998 when Provident notified him it had paid the maximum allowable benefits. Provident contended the date began in 1986 with its letter requesting a refund of total

disability benefits. According to the Court, a denial is sufficient if the insurer's decision and its reason are provided clearly and in writing. Provident's 1986 letter clearly conveyed its position that Knott was not totally disabled. Thus, the Court concluded that limitations commenced with the 1986 letter and ran before Knott filed suit.

TEXAS TORT CLAIMS

San Antonio State Hosp. v. Cowan, 47 Tex. Sup. Ct. J. 221 (January 9, 2004).

The issue in this case is whether providing personal property, that itself is not inherently unsafe, a "use" under the Tort Claims Act.

Cowan was involuntarily committed to the San Antonio State Hospital for depression and suicidal tendencies. The Hospital allowed Cowan to keep his suspenders and walker. Cowan used the suspenders and walker to commit suicide. Cowan's survivors sued for wrongful death. The trial court denied the Hospital's plea to the jurisdiction that asserted sovereign immunity. A divided court of appeals affirmed and held that the Hospital misused the suspenders and walker by providing them to Cowan, and therefore waived immunity from liability. In an opinion by Justice Hecht, the Court reversed and dismissed the Cowans' action.

The Cowans argued that the Hospital misused the walker and suspenders by allowing Cowan to have them. According to the Court, immunity is waived only when the governmental entity is itself the user of the property at issue. That is, the Hospital's immunity was waived only for its own use of the walker and suspenders, not Cowan's use of them. A governmental entity does not use property merely by allowing someone to use the property. As the Court has consistently stated, "use" means "to put or bring into action or service; to employ for or apply to a given purpose." "Use" does not mean "make available." Thus, by providing the suspenders and walker to Cowan, the Court concluded that the Hospital did not "use" them within the meaning of the Tort

Claims Act. Accordingly, because Cowan did not allege that the death was caused by the Hospital's use of the suspenders and walker, its immunity was not waived.

ARBITRATION

***J.M. Davidson, Inc. v. Webster*, 47 Tex. Sup. Ct. J. 196 (December 31, 2003).**

The issue in this interlocutory appeal is whether an arbitration agreement is enforceable when the employer unilaterally reserves the right to modify or terminate personnel policies without notice. In a 6-3 opinion by Justice Jefferson, joined by Chief Justice Phillips and Justices Hecht, Owen, Wainwright and Brister, the Court concluded the agreement was ambiguous and reversed the court of appeals' judgment and remanded to the trial court.

Pursuant to the agreement, the parties agreed to submit disputes to binding arbitration. The agreement further provided that Davidson "reserves the right to unilaterally abolish or modify any personnel policy without prior notice." When a dispute arose, Davidson filed a motion to compel arbitration. Davidson contended that the agreement was enforceable because it was supported by mutual promises to waive the right to litigation and submit disputes to arbitration. Webster rejoined that the agreement was illusory because Davidson was not bound by its terms. The trial court denied Davidson's motion. A divided court of appeals held the agreement was illusory and affirmed.

According to the Supreme Court, because it was unclear whether Davidson's right to unilaterally abolish or modify personnel policies also gave it the right to terminate the arbitration agreement, the agreement was ambiguous. The Court remanded to the trial court to determine the parties' intent in allowing Davidson to unilaterally abolish or modify personnel policies without prior notice.

In a dissenting opinion, Justice Schneider, joined by Justice O'Neill, concluded the agreement

unambiguously gave Davidson the right to terminate the entire agreement. Because Davidson reserved the right to unilaterally terminate the arbitration agreement, its performance was optional, thus rendering the arbitration agreement illusory. Accordingly, Justice Schneider would have held that the contract failed for lack of consideration.

In a separate dissenting opinion, Justice Smith concluded the phrase "without prior notice" prohibited Davidson from retroactively altering the arbitration agreement. According to Justice Smith, Davidson would be bound to arbitrate disputes arising prior to Davidson informing Webster of a change in the arbitration agreement. Justice Smith would have held that the agreement was unambiguous and compelled Webster to arbitrate.

PRODUCTS LIABILITY

***Ford Motor Co. v. Ridgway*, 47 Tex. Sup. Ct. J. 266 (February 6, 2004).**

The issue in this case is whether plaintiffs produced more than a scintilla of evidence on causation to defeat a motion for no-evidence summary judgment.

Mr. Ridgway was injured when his Ford truck caught fire while he was driving. The Ridgways sued Ford alleging negligence and products liability. In response to Ford's motion for no-evidence summary judgment, the Ridgways produced expert testimony that the fire originated in the engine compartment and that an electrical system malfunction "is suspected of having caused this accident." The expert, however, opined that the actual cause had not been determined. The trial court granted summary judgment. A divided court of appeals affirmed on the negligence claims, but reversed on the products liability claim.

In an opinion by Chief Justice Phillips, the Court reversed and rendered judgment that the Ridgways take nothing. According to the Court, the Ridgways' circumstantial evidence failed to

establish anything more than a suspicion of the fire's cause. The Ridgways' expert opined only that he suspected the electrical system caused the fire; he did not eliminate the fuel system as a cause and did not identify a defect when the truck left the manufacturer. Thus, the Court concluded that the Ridgways failed to produce more than a scintilla of evidence.

The Court rejected the Ridgways' argument that the definition of *res ipsa loquitur* in section 3 of the Third Restatement of Torts applied. While expressly declining to decide if section 3 was an accurate statement of Texas law, the Court noted that because section 3 applied to new or virtually new products, it was inapplicable to the facts.

Justice Hecht, joined by Justice Owen, concurred. After analyzing the Second and Third Restatements' provisions on *res ipsa* and Texas law on *res ipsa*, the concurrence concluded that section 3 of the Third Restatement "does not accurately restate Texas law."

NEGLIGENCE: COMMON CARRIERS

***Speed Boat Leasing, Inc. v. Elmer*, 47 Tex. Sup. Ct. J 182 (Dec. 19, 2003) (per curiam).**

This case addressed whether the operators of speed boats offering thrill rides owe the standard of ordinary care or the higher standard of care associated with common carriers. Concluding that such speed boats do not operate within the traditional definition of common carriers, the Court held that such operators do not owe the higher standard of care, and thus reinstated the trial court's judgment that plaintiff take nothing.

Plaintiff was a seventy-year old woman who fractured her spine during a ride on defendants' speed boat. Advertisements for the "Gulf Screamer" speed boat indicated it provided a "thrill" whereby customers would receive a "refreshing, exhilarating ride . . . screaming past" the beaches. It was disputed whether the captain gave a safety lecture and told the passengers that the ride in the front of the boat (where Plaintiff rode) was more rough.

At trial, the court instructed the jury on elements of simple negligence instead of under the higher standard of care governing commercial carriers. Plaintiff was found sixty-five percent negligent, and the trial court rendered judgment that she take nothing. The appellate court reversed, holding that the jury should have been instructed on the higher standard of care governing common carriers.

In its *per curiam* opinion, the Supreme Court noted its prior definition of "common carriers" included "those in the business of carrying passengers and goods who hold themselves out for hire by the public," and that common carriers are held to a higher standard of care when carrying passengers: the degree of care that would be exercised by a very cautious and prudent person under the same or similar circumstances. The policy rationale for the higher standard applicable to common carriers is to provide passengers with safety and convenience while traveling. The Court noted that references to common carriers in statutes and case law all turn on the role the entity plays providing transportation services.

To determine whether an entity that provides transportation is a common carrier, the Court noted it historically examined the entity's primary function, and whether the entity is in the business of transportation or whether transportation was only incidental to the primary business. Under that test, the Court concluded that while defendants transport passenger, their primary purpose is to entertain, not to transport. Its purpose was to provide people an exhilarating ride and not to transport them from point A to point B, and instead returning them to the same point of departure. Thus, because transportation is only incidental to the primary business of entertainment, defendants could not be considered common carriers. Instead, the transportation they provided was considered analogous to an amusement park ride, the operators of which are not common carriers. Accordingly, the Court concluded that the trial court did not err in instructing the jury under ordinary negligence

theories instead of under the heightened standard governing common carriers.

OIL AND GAS

***Natural Gas Pipeline Co. v. Pool*, 47 Tex. Sup. Ct. J. 153 (Dec. 19, 2003).**

The Supreme Court originally issued an opinion in these consolidated cases on August 28, 2003. On December 19, 2003, the Court denied motions for rehearing, withdrew its earlier opinion, and substituted a new opinion, making minor, non-substantive changes. For a discussion of this case, see 16 APPELLATE ADVOCATE 42 (Fall 2003).

EXPERT TESTIMONY

***Kerr McGee Corp. v. Helton*, 47 Tex. Sup. Ct. J. 248 (Jan. 30, 2004) (Justice O’Neill not participating).**

The underlying case alleged breach of the implied covenant to protect a leasehold against drainage. Plaintiff lessors sued lessee Kerr McGee alleging that its drilling operations on properties near the lease and its failure to drill protection wells on the lease breached its covenant to protect the lease from drainage. Plaintiffs alleged that an offset well should have been drilled on the lease, and offered expert testimony calculating royalties that would have flowed to plaintiffs from such a well had it been drilled and had it produced in quantities comparable to those generated by the off-lease wells. On cross-examination, Plaintiffs’ expert indicated that he had no factual basis for his projections about the quantities of gas that could have been produced from a protection well. Kerr McGee thereafter objected to his testimony as unreliable and moved to strike, and the trial court denied the motion and entered judgment in favor of the lessors. On petition for review, Kerr McGee argued that the expert’s testimony was unreliable, incompetent, and inadmissible, and that there was no evidence otherwise to support an award of damages or the amount of damages awarded.

The Supreme Court initially rejected several preservation of error arguments urged by Plaintiffs. First, the Court concluded that Kerr McGee did not waive its “no evidence” challenge by waiting until after cross examination to object to the testimony, concluding that a pre-trial objection was not necessary to preserve the error. Second, the Court concluded that Plaintiffs were not subjected to trial by ambush that could have been avoided by voir dire under Texas Rule of Evidence 705 because Kerr McGee made its objection during trial and because Plaintiffs had the opportunity to respond to the objection when the witness was recalled. Third, the Court rejected the argument that Kerr McGee waived its “no evidence” complaint by failing to object to exhibits summarizing the expert’s testimony. Because those exhibits were derived from and summarized the expert’s testimony, they would necessarily constitute no evidence if the expert’s testimony was determined to be unreliable. Finally, the Court concluded that the issues raised on appeal comported with the trial court objections, as both related to the lack of a factual foundation for the expert’s testimony.

As to the merits of the challenge to the reliability of Plaintiffs’ expert testimony, the Court noted that while the data examined by the expert may support an opinion that a protection well may have produced some quantities, that data did not necessarily support an opinion establishing any particular quantities the well would have produced, and it was not reasonable to assume that the well would have produced at the same rate as the off-lease wells. The Court found too great an analytical gap between the data and the opinions on quantities that could have been produced to conclude that the opinion was reliable. “In sum, even if the data [the expert] used is the type generally relied upon by petroleum engineers to estimate production, and even if the underlying facts and data [the expert] used are accurate, there is simply too great an analytical gap between the data and [the expert’s] conclusions for the conclusions to be reliable and therefore some evidence.” Absent any indication how the data was used to reach the expert’s conclusions, the Court concluded the testimony

was unreliable, and thus reversed the judgments below. In doing so, the Court rejected Plaintiff's request that, in the interest of justice, the case be remanded to the trial court, noting that the decision did not modify the evidentiary standard for recovery of damages in a breach of implied covenant case

Justice Hecht, joined by Justice Wainwright, joined the Court's opinion, with a clarification. The concurring justices agreed that there was an analytical gap between the data analyzed and the conclusions about quantities of production from the hypothetical well. They noted other practical problems with the reliability of the expert testimony as proposed for use for trial purposes as opposed to its use outside of court. They explained that in developing its wells, Kerr McGee had drilled nine wells, only two of which were successful and one of which was only marginally successful:

“If an expert could reliably have predicted where to drill, and if Kerr McGee would have preferred to drill only profitable wells, then surely it would have acquired the expert's advice instead of drilling six unsuccessful wells at considerable cost. Reliability does not mean one thing outside the courtroom and something less inside. If the industry would rely on expert analysis like Riley's to determine where to drill, then it was reliable for purposes of trial. If not, it should not have been admitted.”

DISCOVERY: “POSSESSION, CUSTODY OR CONTROL”

***In re Kuntz*, 47 Tex. Sup. Ct. J. 168 (December 19, 2003).**

In this discovery dispute, the Supreme Court addressed a question of first impression involving the proper interpretation and application of the phrase “possession, custody, or control” as found in the Texas Rules of Civil Procedure.

The underlying dispute arose in a suit by Vesta Kuntz seeking to enforce the division of property incident to her divorce from Hal. Vesta alleged that Hal, by virtue of his relationship with CLK Company, L.L.C. (“CLK”) may earn interests in oil and gas leases and properties by assignment from McMoRan Offshore Exploration Co. (“MOXY”). CLK served as MOXY's geophysicist consultant (MOXY was its only client) and would evaluate properties and forward letters of recommendation (LORs). Copies of the LORs were retained in CLK's office, and the agreement between CLK and MOXY provided that the data and information compiled by CLK for MOXY belonged exclusively to MOXY and prohibited disclosure of that information to third parties without MOXY's consent. Vesta sought from Hal copies of all LORs prepared by CLK during the duration of her marriage to Hal, and filed a motion to compel the production of LORs containing positive recommendations.

Hal asserted he did not have possession, custody or control over the letters, and that they were MOXY's trade secrets. Both CLK and MOXY declined his request for permission to produce the documents. After a hearing on the motion to compel, the district court ordered Hal to produce all LORs containing positive recommendations written during the marriage.

By mandamus, Hal argued he did not have possession, custody or control of the documents, even though it was undisputed that the letters were in his office and that he could access them anytime he wanted. MOXY filed an amicus brief arguing that while Hal had access to the LORs, that access was strictly limited to the use of the documents in furtherance of his employer's services performed for MOXY: “Like a bank teller with access to cash in the vault, Hal Kuntz has neither possession or any right to possess MOXY's trade secret LORs.”

Relying on federal authorities, the court noted that Hal's mere access to the LORs did not constitute “physical possession” of the documents under the definition of “possession, custody or control.” The Court noted that if required to produce the

LORs, Hal would be forced to violate confidentiality provisions contained within CLK’s operating agreements and the agreement between MOXY and CLK, potentially subjecting him to significant damages that could not be remedied by an appellate court.

Justice Hecht, joined by Justices Owen, Schneider and Wainwright concurred. They agreed that Hal did not have “possession, custody or control” of the documents within the meaning of Rule 192.3(b), and thus that Vesta sought discovery from the wrong person. They also concluded that Vesta was not entitled to production of the LORs because they constituted trade secrets under Rule 507 and she did not establish that they were essential to the fair adjudication of her claims.

Justice Wainwright filed a separate concurrence. He noted that the trial court was faced with the task of balancing multiple interests—the interest of MOXY in preserving its trade secrets with the interest of Vesta in verifying information contained within the LORS, and that the balancing task was complicated by the fact that Vesta sought discovery from Hal rather than MOXY. While giving deference to the trial court’s task in balancing various competing interests, Justice Wainwright observed that if the Court’s ruling would have been adverse to MOXY, then MOXY may have had a difficult time obtaining a different ruling in the trial court, as it had notice and fully participated in the prior proceedings in the trial court.





***APPELLATE SECTION CONTINUES ITS WORK WITH
THE POST-CONVICTION PROJECT***

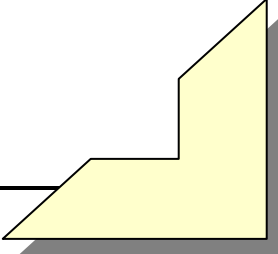
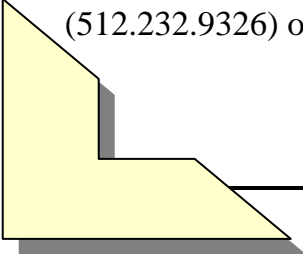
By: Alan York

One of the greatest opportunities we are given as attorneys is the chance to help out people who are struggling to get back on their feet. The Appellate Practice Section of the State Bar of Texas takes this challenge seriously and is always looking for ways to give back to the community. In that vein, at its February meeting, the Council of the Appellate Practice Section voted to continue its work with, and support of, the Post-Conviction Project.

The Post-Conviction Project operates under the direction of University of Texas Law School Professor Sarah Buel, and 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. 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. 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.

In January of 2002, the Post-Conviction 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.

For 2004, the Appellate Practice Section will donate \$2,000 to the Post-Conviction Project. These funds will be used to give women who are paroled from prison a little "starting out" money to pay for basic necessities. In addition, the Appellate Practice Section is recruiting lawyers and law students interested in taking part in the Post-Conviction Project. Anyone interested in helping out with this worth cause can contact Professor Sarah Buel at sbuel@mail.law.utexas.edu (512.232.9326) or Alan York at Alan@holman-keeling.com (713.223.2220).



Jon D. Brooks, The Rangel Law Firm, P.C.

***Lee v. American Airlines Inc.*, 355 F.3d 386 (5th Cir. 2004).**

This is an interesting case involving international law. The United States District Court for the Northern District of Texas certified the issue in this case for appeal.

Lee's flight from New York to London was delayed and ultimately canceled by American Airlines. Not satisfied with the service he received, Lee filed a federal class action complaint against American Airlines, asserting a claim under Article 19 of the Warsaw Convention. He sought to recover damages for delay, inconvenience, assorted expenses, loss of reasonably foreseeable business, loss of prepaid and/or non-refundable vacation expenses, and loss of a "refreshing, memorable vacation."

Pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, the district court granted judgment on the pleadings to American Airlines with respect to Lee's alleged damages for inconvenience and loss of a "refreshing, memorable vacation," reasoning that these allegations amounted to damages for mental injuries, unrecoverable under the Warsaw Convention. *See* Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 29, 1929, 49 Stat. 3000, T.S. No. 876 (1934), *reprinted in* 49 U.S.C. §§ 40105 (note) (2000) ("Warsaw Convention").

On appeal, Lee contended that his alleged damages for inconvenience and loss of a "refreshing, memorable vacation" are economic damages and not damages for mental anguish. Specifically, he alleged American Airlines inconvenienced him by forcing him to spend time in a terminal without adequate food, water, restroom facilities and information regarding the status of his flight, by forcing him to spend the

night in a dirty, substandard and unsafe motel room, and caused him to lose a full day of a memorable refreshing vacation. The Court agreed with the district court that, as alleged, Lee's so-called inconvenience damages are not easily quantifiable and do not result in real economic loss. These alleged damages, the Court held, are merely an attempted re-characterization of mental anguish damages, which are not recoverable under the Warsaw Convention. Consequently, the Court affirmed the ruling of the district court.

***Pineda v. United Parcel Service, Inc.*, ___ F.3d ___, 2004 WL 287141 (5th Cir. Fed. 16, 2004).**

This is an employment case. An El Paso jury awarded \$400,000 to Pineda as damages based on his state law claims that he was terminated by United Parcel Service ("UPS") in retaliation for engaging in protected conduct.

The Court withdrew its original opinion in this case after granting UPS's motion for rehearing, which was based, in part, on the Texas Supreme Court's recent decision in *Wal-Mart Stores, Inc. v. Canchola*, 121 S.W.3d 735 (Tex. 2003).

Pineda worked as a business manager for UPS in El Paso. He suffers from diabetes and took a ten-month medical leave of absence to treat his condition. While on leave, Pineda filed a charge of disability discrimination against UPS for allegedly delaying his return to work. Shortly thereafter he gave a deposition in a discrimination case brought by another UPS employee. Pineda was subsequently transferred to a UPS facility in Del Rio. While Pineda was working at the Del Rio facility, a UPS human resources manager investigated charges that Pineda had threatened violence against three of his coworkers. Pineda denied making any such threats. Pineda was first suspended and later fired. He filed this retaliation

suit under Texas law in state court and UPS removed to federal court. Pineda alleged he was fired because he had engaged in the protected activities of filing a discrimination charge and testifying in a discrimination case. When UPS countered that it fired Pineda pursuant to charges by Pineda's coworkers alleging that he had made threats of violence, Pineda asserted that the investigation was a pretext for UPS's retaliatory purpose. To support his contention, Pineda presented testimonial evidence that the alleged threats of violence never occurred and that UPS had not pursued similar charges of violence and threatened violence with similar vigor.

First, the Court easily disposed of Pineda's claim that in employment discrimination cases brought under Texas law, the employer commits an unlawful practice if discrimination was a "motivating factor" for the practice, even if other factors motivated the practice. He argued that the causation standard is not the more stringent "but for" standard. However, the Court noted that Pineda's argument was rooted in an interpretation of section 21.125(a) of the Texas Labor Code, which is expressly applicable only to cases involving charges of discrimination based on race, color, sex, national origin, religion, age, or disability. None of these bases for discrimination were at issue in Pineda's case because he alleged that his discharge was the result of retaliation for filing a discrimination complaint and for providing deposition testimony for someone else's claim. Thus, the Court held that the causation standard for Pineda's claim was the more stringent "but for" standard set forth in *Quantum Chemical Corp. v. Toennies*, 47 S.W.3d 473, 479 (Tex. 2001).

Second, the Court observed that to establish retaliation, Pineda relied solely on evidence suggesting that UPS's investigation came to an incorrect conclusion and was potentially motivated by concerns other than the prevention of workplace violence. The Court noted that the Texas Supreme Court in *Canchola*, however, while considering a factually similar case, held that to establish that an investigation into an alleged violation of a workplace policy was a

pretext for discrimination it is "not sufficient [for the plaintiff] to present evidence that the . . . investigation was imperfect, incomplete, or arrived at a possibly incorrect conclusion. Rather, the plaintiff must show that the reason proffered by [the defendant] is 'false, and discrimination was the real reason.'" In this case, Pineda presented evidence suggesting only that he did not commit the acts alleged by his coworkers and that UPS selectively investigated and terminated him. However, he presented no evidence that independently suggests that UPS falsely and selectively fired him *because* he engaged in protected activity, or that had he not engaged in that activity he would not have been terminated. It was Pineda's burden, the Court held, to present evidence demonstrating that he was fired for a prohibited reason. Pineda presented no such independent evidence to the jury. He did not therefore meet the "but for" causation standard. Accordingly, the Court held, as a matter of Texas law, Pineda cannot establish a retaliation claim, and therefore, there is insufficient evidence to support the jury's verdict in his favor.

***United State of America, ex rel., Riley v. St. Luke's Hospital, et al.*, 355 F.3d 370 (5th Cir. 2004).**

This is a *qui tam* action brought under the provisions of the False Claims Act (FCA). Riley, a former nurse for St. Luke's Hospital, filed this action against the hospital and physicians, alleging that they filed claims with Medicare and the Civil Health and Medical Program of the Uniformed Services (CHAMPUS) for services that were either medically unnecessary or rendered by an un-licensed physician. The district court dismissed Riley's claims under Rule 12(b)(6). The Court reversed and remanded.

The first issue the Court addressed was whether it had jurisdiction over the appeal. The Hospital Defendants argued that the Court lacked jurisdiction because Riley's notice of appeal was untimely. When the United States is not a party in an FCA suit, Rule 4(a)(1) allows sixty days from the entry of the judgment appealed to file a notice of appeal. Riley noticed her appeal July

16, 2002. The district court entered a “Final Judgment” on April 1, 2002, providing that “plaintiff shall take nothing” and referencing reasons given in a memorandum opinion which granted only St. Luke’s motion to dismiss. An “Amended Final Judgment” entered April 3 provided that “*defendants* will take nothing” and referenced reasons in an “amended” memorandum opinion dismissing in favor of all Defendants. On April 5, the district court vacated the April 3 defendants-take-nothing judgment and reinstated the April 1 plaintiff-take-nothing judgment.

Plaintiff and Defendants both filed post-judgment motions. After rulings, the district court issued the following “Amended Final Judgment,” entered June 26: “Pursuant to the Amended Memorandum Opinion and Order dated April 2, 2002, as modified by this Court’s order of June 25, 2002 (entered June 27), Plaintiff will take nothing by this suit. This Court’s Judgments (entered April 1 and April 3) are hereby vacated. This is a Final Judgment.”

The Hospital Defendants characterized the foregoing judgment as a mere clerical correction that followed their post-judgment Motion for Correction of Minor Mistakes. They argued therefore that this judgment would not interrupt or restart the time for appealing the real underlying judgment, the one entered April 1, from which Plaintiff’s appeal is untimely. They argued that Plaintiff’s post-judgment motion was also ineffective to extend the appellate deadline because it addressed a judgment that was vacated.

The Court disagreed. It stated that Rule 4(a)(4) of the Federal Rule of Appellate Procedure specifies several post-judgment motions which must be disposed of before a notice of appeal can be effective. One is a timely filed motion to alter or amend the judgment under Rule 59. Plaintiff moved to alter or amend judgment on April 5, which was timely and thus effected a tolling of the time for appeal under Rule 4(a)(4)(A). Plaintiff’s post-judgment motion was timely because it was “filed no later than 10 days after the judgment [was] entered.” As the Advisory

Committee’s noted about Rule 59(b), “The phrase ‘no later than’ is used—rather than ‘within’—to include post-judgment motions that sometimes are filed before actual entry of the judgment by the clerk.”

The Court also held that Plaintiff’s post-judgment motion was not moot because of the vacating of the April 3 judgment. Because her motion (except one part addressing the defendants-take-nothing error in the April 3 judgment) addressed the merits underlying the judgment as reflected in the memorandum opinions, it was not mooted by the district court’s vacating of the April 3 judgment, which corrected only the clerical error.

The Court held therefore that because Plaintiff’s motion to alter or amend judgment was timely, the time for filing an appeal ran from the entry of the order denying her motion or granting or denying any of the other motions listed in Rule 4(a)(4). Thus “by any count,” the Court found, Riley’s notice of appeal was timely and sufficient to confer appellate jurisdiction.

Second, the Court held that dismissal of Riley’s FCA action under Rule 12(b)(6) was inappropriate because the district applied the incorrect standard in making its ruling. The Court began by noting that a district court should dismiss for failure to state a claim only if “it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” A ruling on a Rule 12(b)(6) motion is reviewed on appeal under a *de novo* standard.

The Court noted the familiar rule that a complaint must be liberally construed in favor of the plaintiff and all well-pleaded facts accepted as true in addressing Riley’s assertion that the district court inappropriately made assumptions about “evidence” rather than accepting the well-pleaded allegations as true. Indeed, the Court noted, the district court’s opinion made several references to the evidence and few, if any, to the pleadings.

To the extent that the district court held that Riley’s claims failed “as unsupported by the evidence,” and noted that there was “no evidence” or “no credible evidence” on certain issues, the court was not applying the correct standard for a Rule 12(b)(6) motion. A Rule 12(b)(6) dismissal is not warranted just because the district court “believes the plaintiff is unlikely to prevail on the merits.” Even if it seems “almost a certainty to the court that the facts alleged cannot be proved to support the legal claim,” the claim may not be dismissed so long as the complaint states a claim.

The Court then addressed the elements of the FCA cause of action alleged by Riley and held that the allegations contained in her complaint were sufficient to survive a Rule 12(b)(6) motion. The Court concluded that the district court “misapplied the Rule 12(b)(6) standards in dismissing this matter.” The matter was therefore remanded to the district court for further proceedings.

Coserv Limited Liability Corp. v. Southwestern Bell Telephone Co., 350 F.3d 482 (5th Cir. 2003).

This is a summary judgment case involving an issue of first impression in the Fifth Circuit: An interpretation of the compulsory arbitration provision of the Telecommunications Act of 1996 (“Telecom Act” or “Act”), set forth at 47 U.S.C. § 252(b)(1).

Some background is important to understand the issues in this case. Southwestern Bell Telephone Company (“SWBT”) and Coserv Limited Liability Corporation (“Coserv”) are local exchange carriers subject to the Telecom Act. SWBT is an incumbent local exchange carrier (ILEC) that provides telecommunications services and operates telecommunications equipment throughout Texas. Coserv is a competitive local exchange carrier (CLEC) that provides telecommunications services and operates telecommunications facilities located at several apartment complexes in Texas. At each apartment complex, Coserv’s facilities include telecommunications equipment in a central

telephone equipment room as well as equipment and wires running to multiple buildings and individual apartments. In order to allow tenants to select telephone service from other telecommunications providers, Coserv allows other providers to bring a network connection to a single point in the central telephone equipment room. Coserv typically charges these other providers a one-time connection fee and a monthly service fee for the connection and use of its facilities. Coserv terms this practice “compensated access.”

The obligations of SWBT, Coserv, and all other local exchange carriers, both incumbents as well as competitors, are listed in § 251(b) of the Act. These obligations relate to the resale of telecommunications services, number portability, dialing parity, access to right-of-ways, and reciprocal compensation. In addition, the Act places six specific duties on ILECs, which relate to the duty to negotiate, interconnection, unbundled access, resale, notice of changes, and collocation.

In § 252, the Act specifies the procedures for an ILEC to fulfill its duty to negotiate. Upon receiving a request for an agreement pursuant to the duties listed in §251, an agreement can be reached through “voluntary negotiations” or through “compulsory arbitration.” Under the provision for voluntary negotiations, the parties are free to reach any agreement, *without* regard to the duties set forth in § 251. However, any voluntary agreement must be submitted to the state commission for approval. The compulsory arbitration clause provides that: “During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate *any open issues*” not resolved through voluntary negotiations. The meaning of the phrase, “any open issues,” is the subject of this appeal.

Coserv requested an interconnection agreement governing SWBT's duties under § 251. The parties proceeded with "voluntary negotiations" pursuant to § 252. Coserv sought to *add* to the negotiations its proposed rates, terms, and conditions for "compensated access." SWBT *refused* to negotiate issues relating to "compensated access." Voluntary negotiations over SWBT's § 251 duties continued but did not result in an interconnection agreement.

Coserv filed a petition for arbitration with the Public Utility Commission ("PUC"). Coserv identified several issues that it claimed remained "open" between the parties, including issues relating to "compensated access." However, SWBT argued that the PUC lacked jurisdiction to arbitrate issues relating to "compensated access" and the PUC ultimately agreed. The PUC subsequently entered an arbitration award setting forth an interconnection agreement governing SWBT's duties to Coserv under § 251 but refusing to consider the "compensated access" issues based on lack of jurisdiction.

Coserv brought this action in federal district court, challenging the PUC's jurisdictional finding. The district court agreed with the PUC and granted summary judgment. Coserv appeals the judgment of the district court.

The Court began its analysis of the statutory interpretation with the plain language and structure of the statute. Section 251 provides that an ILEC has: "[t]he duty to negotiate in good faith in accordance with section 252 of this title the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) of this section and this subsection."

With respect to voluntary negotiation, the Court noted that § 252 provides in relevant part that "upon receiving a request for interconnection, services or network elements pursuant to section 251 of this title, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without

regard to the standards set forth in subsections (b) and (c) of section 251 of this title. . . ." With respect to compulsory arbitration, the Act provides that "during the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate *any open issues.*"

Thus, the Court found, compulsory arbitration under § 252 begins with a request by a CLEC to negotiate with an ILEC regarding its obligations under § 251. An ILEC is *required* by the Act to negotiate about those duties listed in § 251(b) and (c). During negotiations, however, the parties are free to make any agreement they want without regard to the requirements of § 251(b) and (c). To that extent, the Court found, the parties are free to include interconnection issues that are not listed in § 251(b) and (c) in their negotiations. If the voluntary negotiations result in only a partial agreement, or in no agreement at all, either party can petition for compulsory arbitration of "any open issue." There is nothing in § 252(b)(1), the Court found, that limited "open issues" only to those listed in § 251(b) and (c). By including an open-ended voluntary negotiation provision in § 252(a)(1), the Court believed that the Congress clearly contemplated that the sophisticated telecommunications carriers subject to the Act might choose to include "other" issues in their voluntary negotiations, and to link issues of reciprocal interconnection together under the § 252 framework. In combining these voluntary negotiations with a compulsory arbitration provision in §§ 252(b)(1), the Court also believed that the Congress knew that these non-§ 251 issues might be subject to compulsory arbitration if negotiations fail. That is, Congress contemplated that voluntary negotiations might include issues other than those listed in § 251(b) and (c) and still provided that *any issue* left open after unsuccessful negotiation would be subject to arbitration by the PUC.

Accordingly, the Court held that where the parties have voluntarily included in negotiations issues

other than those duties required of an ILEC by § 251(b) and (c), those issues are subject to compulsory arbitration under § 252(b)(1). The jurisdiction of the PUC as arbitrator is not limited by the terms of § 251(b) and (c); instead, it is limited by the actions of *the parties* in conducting voluntary negotiations. It may arbitrate only issues that were the subject of the voluntary negotiations. The party petitioning for arbitration may not use the compulsory arbitration provision to obtain arbitration of issues that were not the subject of negotiations. The Court stated that its interpretation comports with the views of the other courts that have reviewed this provision in similar contexts. It also comports with the structure of the Act and the Court's recognition of the flexibility accorded state PUCs by the Act. The Court affirmed the summary judgment.

***Corfield, et al. v. Dallas Glen Hills, LP*, 355 F.3d 853 (5th Cir. 2003).**

This is a declaratory judgment action that addresses an issue of first impression in the Fifth Circuit: How is the citizenship of a Lloyd's of London underwriter suing on its own behalf determined for diversity purposes?

Plaintiff Liberty Corporate Capital, Ltd. ("Liberty") appealed from the district court's grant of Defendant Dallas Glen Hills LP's ("DGH") motion to dismiss for lack of subject matter jurisdiction based on the lack of diversity.

In August 2000, DGH claimed an insured commercial property loss on Lloyd's of London policy CRCTX99-1128 ("the Policy"). Liberty, acting through its wholly-owned subsidiary Liberty Syndicate 190 ("Syndicate 190") assigned an adjuster to inspect the property. Liberty determined that the policy provided no coverage for the claim. The Policy has a \$500,000.00 limit of which Liberty insured 32.79 percent of the risk.

Thomas Rokeby Conynghan Corfield ("Corfield"), a British subject and "active" underwriter for Syndicate 190, filed a declaratory judgment action on his own behalf and as the representative of Certain Underwriters at Lloyd's,

London subscribing to the Policy seeking a declaration of the parties' rights and obligations under the Policy. Corfield alleged that jurisdiction was based upon diversity of citizenship pursuant to 28 U.S.C. §§ 1332. Corfield's complaint failed to allege DGH's citizenship. Corfield alleged only that DGH was a Texas limited partnership.

DGH moved to dismiss the case pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction. DGH argued that for diversity purposes the district court must consider the citizenship of every underwriter subscribing to a Lloyd's policy when determining if complete diversity is satisfied. DGH also asserted that at least one underwriter on the Policy was a citizen of Texas as was at least one of DGH's partners. Thus, DGH argued that complete diversity was lacking. The district court agreed with DGH and concluded that the citizenship of each underwriter subscribing to the Policy must be considered for purposes of determining whether complete diversity is satisfied. Because DGH contended that at least one underwriter was a citizen of Texas, the district court concluded that the parties were not completely diverse. Thus, the district court granted DGH's motion to dismiss for lack of subject matter jurisdiction. The dismissal order is the subject of this appeal.

The Court noted that "the sole issue presented in this case is whether complete diversity requires that the court consider the citizenship of every underwriter subscribing to a Lloyd's of London policy when the lead underwriter sues only on its own behalf." However, before addressing the complex jurisdictional issues raised in this case, the Court observed that "a basic understanding of the organizational structure of Lloyd's of London and the unique characteristics of a typical Lloyd's insurance policy is necessary." The following is primarily the Court's overview of the organizational structure of Lloyd's:

Lloyds of London is not an insurance company but rather a self-regulating entity which operates and controls an insurance market. The Lloyd's entity provides a market for the buying and selling

of insurance risk among its members who collectively make up Lloyd's. Thus, a policyholder insures *at* Lloyd's but not *with* Lloyd's. The members or investors who collectively make up Lloyd's are called "Names" and they are the individuals and corporations who finance the insurance market and ultimately insure risks. Names are underwriters of Lloyd's insurance and they invest in a percentage of the policy risk in the hope of making return on their investment. Lloyd's requires Names to pay a membership fee, keep certain deposits at Lloyd's, and possess a certain degree of financial wealth. Each Name is exposed to unlimited personal liability for his proportionate share of the loss on a particular policy that the Name has subscribed to as an underwriter.

Typically hundreds of Names will subscribe to a single policy, and the liability among the Names is several, not joint. Most Names or investors do not actively participate in the insurance market on a day to day basis. Rather, the business of insuring risk at Lloyd's is carried on by groups of Names called "Syndicates." In order to increase the efficiency of underwriting risks, a group of Names will, for a given operating year, form a "Syndicate" which will in turn subscribe to policies on behalf of all Names in the Syndicate. A typical Lloyd's policy has multiple Syndicates which collectively are responsible for 100 percent of the coverage provided by a policy. The Syndicates themselves have been said to have no independent legal identity. Thus, a Syndicate is a creature of administrative convenience through which individual investors can subscribe to a Lloyd's policy. A Syndicate bears no liability for the risk on a Lloyd's policy. Rather, all liability is born by the individual Names who belong to the various Syndicates that have subscribed to a policy.

Each Syndicate appoints a managing agent who is responsible for the underwriting and management of each Name's investments. The managing agent receives this authority through contracts with each Name. The managing agent, which is typically a legal entity, appoints one of its employees to serve as the "active" underwriter for the

Syndicate. The active underwriter selects the risks that the Names in the syndicate will underwrite and has the authority to bind all Names in the Syndicate. The active underwriter has the authority to buy and sell insurance risks on behalf of all Names in the syndicate, and to bind the Syndicate members in these transactions. In practice, since many Names through their respective Syndicates are liable on a Lloyd's policy, the active underwriter from *one* of the underwriting Syndicates is designated as the representative of *all* the Names on the policy. This single underwriter, called the "lead" underwriter on the policy, is usually the only Name disclosed on the policy with all other Names remaining anonymous. The lead underwriter is typically the first to subscribe to the policy and typically assumes the greatest amount of risk. The Lloyd's corporate entity maintains records on the identity and last known residence of Names insuring risk in the Lloyd's market. That information is kept strictly confidential.

In sum, while an insured receives a Lloyd's "policy" of insurance, what he has in fact received are numerous contractual commitments from each Name who has agreed to subscribe to the risk. The Names are jointly and severally obligated to the insured for the percentage of the risk each has agreed to assume. The insured does not have to sue each Name individually however to collect on their individual promises because the typical Lloyd's policy contains a clause providing that "any [Name] can appear as representative of all [Names]." Thus, when litigation ensues over a Lloyd's policy, the only named Lloyd's party appearing in the litigation is usually the lead underwriter on the policy. The standard Lloyd's policy states "that in any suit instituted against any one of [the Names] upon this contract, [all the Names] will abide by the final decision of such Court or of any Appellate Court in the event of an appeal." Thus, each Name is contractually bound on an individual basis to the insured to adhere to any adverse judgment reached in the suit notwithstanding that only one Name participates in the litigation as a named party. Thus, a Syndicate, being only a grouping of Names, has no contractual relationship with the insured.

In this case, the Court observed that Syndicate 190 is a single-Name Syndicate with Liberty as its sole Name and underwriting member. Liberty is the lead underwriter on the Policy and insures 32.79 percent of the risk which is more than the risk insured by any other Name on the Policy. Liberty is a British corporation with its principal place of business in the United Kingdom. Thus, if only Liberty's citizenship is relevant for jurisdictional purposes, the Court found that the parties are therefore "completely diverse" because DGH is a citizen of Texas, Delaware, and New York. If, however, the citizenship of every Name subscribing to the Policy is relevant for jurisdictional purposes, the Court stated that the district court's dismissal was proper as Liberty has not alleged the citizenship of all Names subscribing to the policy, and at least one Name is believed to be a citizen of Texas.

In analyzing this issue, the Court reviewed several decisions of other circuit courts involving Lloyd's and diversity issues, which have respectively reached differing conclusions. Specifically, the Court considered decisions from the Sixth Circuit, the Seventh Circuit, the Third Circuit, and the Second Circuit. The Court found the reasoning of the Second Circuit to be most persuasive.

In reaching its decision, the Court noted that Liberty is suing only in its individual capacity as lead underwriter on the Policy. Thus, "Liberty is without question a real and substantial party to the controversy." Liberty is a subscribing Name on the Policy and is therefore directly bound via contract to DGH, the insured. Liberty's personal stake in the outcome is approximately \$163,950.00. Therefore, the Court found that this case did not present the situation where an agent with no personal stake in the controversy attempts to sue on behalf of his non-diverse principal in order to create diversity because "Liberty faces actual liability for the risk it assumed and therefore is a real party to the controversy."

Moreover, the Court found that the district court would have diversity jurisdiction over Liberty's individual claim against DGH because Liberty is

a British citizen and DGH is a citizen of Texas, Delaware, and New York. Thus, Liberty and DGH are completely diverse in citizenship. Further, the Court noted that Liberty's potential liability on the Policy is \$163,950.00, a sum well in excess of the jurisdictional amount.

Given that Liberty is a real party to the controversy and that the district court would have jurisdiction over Liberty's individual claim, the next logical question the Court addressed is whether a Name on a Lloyd's policy can be sued individually by an insured? As was noted by a district court in another case involving Lloyd's within the Second Circuit, "[i]t would be a strange law indeed that would hold that an individual, who had so clearly bound himself individually by contract, could not be sued individually to enforce that contractual obligation." Indeed, the Court concluded that "the very essence of a Lloyd's policy is that it is a collection of individual contracts running between the insured and each Name." Moreover, the Court believed that the estoppel provision contained in every Lloyd's policy, *i.e.*, that each Name will abide by a judgment rendered against any other Name, would not be necessary if litigation were always required to proceed against an underwriter in a representative capacity. The severability of each Name's liability to the insured lends further support to the conclusion that a Name can be sued individually. As previously discussed, the Court found that a Lloyd's policy is actually a collection of many bilateral contracts running between the insured and each Name. The Names contract directly with the insured and each Name contracts independently of any other Name. Because each Name's liability is several, the Court stated that Liberty's obligation to DGH is independent of any other Name's obligation to the insured. Thus, the Court held that "simple logic allows for no other conclusion but that an insured can sue a Name individually."

Having determined that an insured can sue a Name individually, the Court concluded, "it does not follow that the citizenship of the remaining Names on the Policy who are not parties to the case and are not before the court is relevant to

determining whether the parties are completely diverse. The fact that the Names' contract with the insured and the rules of Lloyd's are structured such that the other Names are affected by the judgment against a single Name does not bring those other parties before the court or make them relevant for the citizenship determination." Further, the Court stated, the fact that other parties are bound by a judgment against one obligor or forced to indemnify an obligor is insufficient to bring their citizenship into consideration when they are not parties to the suit.

In sum, the Court held that the district court had subject matter jurisdiction over this claim because DGH is alleged to be a citizen of Texas, Delaware, and New York, and Liberty is alleged to be a citizen of the United Kingdom. Liberty's 32.79 percent of risk is approximately \$163,950.00, an amount well in excess of the jurisdictional amount. The other subscribing Names were not parties before the Court and "their citizenship need not be considered when determining whether the parties are completely diverse." Thus, the district court erred in dismissing the action for lack of subject matter jurisdiction. The case was reversed and remanded.

TEXAS CONSTITUTION; HOME EQUITY LOANS

***Pelt v. U.S. Bank Trust National Association*, _____ F.3d _____, 2004 WL 234011 (5th Cir. February 9, 2004).**

In September 1998, the Peltses obtained a \$240,000 home equity loan from New Century. The loan was secured by their home in Duncanville, Texas. Plaintiffs ceased making payments on the loan in August 1999. In February 2000, New Century brought suit in state court against the Peltses for an expedited foreclosure of the lien securing the loan. In May 2003, the Peltses filed this suit in federal court against New Century and U.S. Bank Trust, the current holder of the loan. As a part of their lawsuit, the Peltses alleged that the home equity loan documents failed to comply with the requirements set forth in TEX. CONST. art. XVI, §

50 (a)(6) because they were not provided with copies of all closing documents at the closing of the loan. By way of their claims, the Peltses sought a declaration that the home equity loan was invalid and that they were entitled to a judgment of forfeiture of all principal and interest against New Century and U.S. Bank Trust.

The case went to trial in the district court on the Peltses' forfeiture issues and the bank's foreclosure issues. At trial, the Peltses introduced evidence that they did not receive copies of eight of the documents that they had signed in connection with the loan. New Century and U.S. Bank Trust provided evidence that unsigned copies of all the loan documents had been provided to the Peltses on the day of the closing and that signed copies of the documents had been provided to them shortly after the closing. The district court charged the jury, among other things, with the determination of whether New Century and U.S. Bank Trust had violated the provisions of TEX. CONST. art. XVI, § 50 (a)(6)(Q)(v). During its deliberations, the jury sent an inquiry to the district judge asking whether the lender was required to provide the Peltses with "signed copies" of the loan documents. The district judge then issued a supplemental instruction to the jury that "[T]he Texas Constitution requires that 'a copy of all documents signed by the owner be provided. It does not state that the owner be provided 'a signed copy.' It does require the owner to be provided with a copy of any documents that he or she signed at the time the home equity loan was made." The jury then returned a verdict in favor of New Century and U.S. Bank Trust. The Peltses subsequently filed a motion for new trial on the ground that the district court erroneously instructed the jury as to the meaning of the language in the Texas Constitution.

After that motion was denied, the Peltses sought review by the Fifth Circuit. On review, the Peltses argued that the district court erred when it instructed the jury that a lender may satisfy the requirements of § 50 (a)(6)(Q)(v) by providing the borrowers with unsigned copies of the home equity loan documents.

The Fifth Circuit first notes that this is a case of first impression in both the Texas and federal courts and then affirms the interpretation of § 50 (a)(6)(Q)(v) made by the district court. The Court found that “§ 50 (a)(6)(Q)(v) states that a lender must provide to the borrower a ‘copy of all documents signed by the owner’—it does not require, as the district court aptly pointed out in its supplemental instruction, that the owner be provided ‘a signed copy’ of each of these documents. Instead, the phrase ‘signed by the owner’ simply identifies which—of the numerous documents presented at the closing of the home equity loan—must be copied and given to the borrower: only those that the borrower actually signed in connection with the loan.”

***JURISDICTION; POST-JUDGMENT
DISCOVERY ORDERS***

Piratello v. Philips Electronics North America Corporation, ___ F.3d ___, 2004 WL 300038 (5th Cir. March 3, 2004).

Piratello was fired by Philips from his job as senior plant manager. He then filed an action in federal court for breach of contract and violations of ERISA. Philips counterclaimed for losses sustained as a result of certain allegedly fraudulent acts by Piratello. The case went to trial and resulted in the recovery by Philips of a judgment against Piratello for \$1,000,000 and the denial of all claims asserted by Piratello against Philips. While the appeal was pending, Philips began post-judgment discovery, to which Piratello refused to respond. Subsequently, the district court ordered Piratello to appear for deposition. Instead of appearing, Piratello filed a notice of appeal to the Fifth Circuit challenging the order requiring him to appear. Philips moved to dismiss the appeal filed by Piratello.

The Fifth Circuit points out the general rule that in order for a party to appeal a discovery order it “must refuse compliance, be held in contempt, and then appeal the contempt order.” *Church of Scientology v. United States*, 506 U.S. 9 (1992). It then considers this case as one of first impression as to whether the requirement of a

sanction prior to an appeal applies to post-judgment discovery orders to judgment debtors. The Court determines that there is no reason to treat differently pre- and post-judgment discovery orders: that post-judgment discovery orders are not appealable final orders.

Piratello also argues that the Court should not dismiss his appeal because the collateral order doctrine provides an exception to the requirement of finality. The Court finds that “[t]his court has indicated its agreement with the Fourth Circuit’s view that the availability of an appeal through a contempt order renders the collateral order doctrine inapplicable to discovery orders.” The appeal was then dismissed for lack of jurisdiction.

***EEOC; NOTICE OF RECONSIDERATION;
ISSUANCE***

Martin v. Alamo Community College District, 353 F.3d 409 (5th Cir. 2003).

Martin filed a complaint against Alamo with the Equal Employment Opportunity Commission (EEOC) alleging failure to accommodate her disability, harassment, and retaliation. EEOC investigated the claim, decided not to sue on Martin’s behalf, and issued a “Notice of Right to Sue” on September 17, 1999, giving Martin 90 days to file suit. Martin then filed her suit against Alamo on December 17, 1999. On that same day, however, EEOC mailed Martin a letter in which it informed her that it had rescinded its right to sue letter and had re-opened the case, which was subsequently sent to the Department of Justice (DOJ). Martin’s complaint was subsequently dismissed without prejudice by the district court. On August 18, 2000, DOJ decided not to sue on Martin’s behalf and issued Martin a second right to sue letter. On November 16, 2000, Martin refiled her complaint against Alamo. On November 27, 2001, Alamo filed a motion with the district court seeking dismissal of Martin’s lawsuit as time barred. On August 9, 2002, the district court granted Alamo’s motion to dismiss, finding that Martin had failed to timely file her lawsuit.

Martin argues on appeal to the Fifth Circuit that her right to sue under the first EEOC letter remained in effect because she had filed suit at the time the notice of reconsideration was issued. Specifically, Martin argues that “the date on which the notice of intent to reconsider ‘issued’ is not the date on which the notice was presumed to be received . . . as was held by the district court . . .” but is the day it was mailed from the EEOC’s office.

The Fifth Circuit construes the meaning of the word “issued” according to its ordinary meaning and determines that “based on the ordinary meaning of the word ‘issued’ in 29 C.F.R. § 1601.19(b), circulation or distribution of the Notice of Intent to Reconsider by the EEOC is required. Thus, the date that the notice was ‘issued’ in this case is the date on which the notice was deposited in the mail by the EEOC.” Accordingly, the district court erred in holding that the notice to reconsider was issued on the date that it was presumptively received. As the letter was postmarked on December 17, 1999, that was the date that it was issued.

The Court found that “under 29 C.F.R. §1601.19(b), when the notice to reconsider is issued on the same day that the complaint is filed, the issuance and filing are simultaneous (irrespective of the hours and minutes) and, consequently, the complaint has not been filed before the issuance of the notice.” As a result of Martin filing her complaint within 90 days of her receipt of the second right to sue letter, the Court finds her suit to have been timely. The Court reverses and vacates the district court’s dismissal of Martin’s case as time barred and remands the case to the district court for further proceedings.

CONSTITUTIONAL LAW; MALICIOUS PROSECUTION; FEDERAL COURTS

***Castellano v. Fragozo*, 352 F.3d 939 (5th Cir. 2003).**

Castellano was arrested and convicted in state court of arson in a fire at one of a chain of restaurants that he owned in San Antonio. After

three appeals to the Texas Court of Criminal Appeals, his conviction was set aside, remanded to the trial court, and eventually dismissed. The Court of Criminal Appeals found that Fragozo, a San Antonio police officer, and Maria Sanchez, one of Castellano’s employees, had conspired to alter tape recordings offered into evidence and otherwise collaborated to obtain Castellano’s conviction.

After the dismissal of the case against him, Castellano brought suit in state district court against Fragozo, Sanchez, and others for malicious prosecution and denial of his rights under the First, Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments. The case was removed to federal court, where it was tried and a \$3,500,000 judgment was entered against Fragozo and Sanchez. Fragozo and Sanchez appealed to the Fifth Circuit claiming, among other things, that the judgment rests on an impermissible blend of state tort and constitutional rights.

The Court reviews its decisional history of cases dealing with malicious prosecution claims in the context of Fourth and Fourteen Amendment claims. It notes that the Court and other circuit courts have “been inexact in explaining the elements of a claim for malicious prosecution brought under the congressional grant of the right of suit under 42 U.S.C. §1983.” The Court goes on to determine that it must return to the basics and, as a result of doing so, ultimately holds “that ‘malicious prosecution’ standing alone is no violation of the United States Constitution, and that to proceed under 42 U.S.C. § 1983 such a claim must rest upon a denial of rights secured under federal and not state law.” In determining whether federal law is implicated, the Court states that it will “insist on clarity in the identity of the constitutional violations asserted.”

The Court goes on to find that “our insistence that the anchor of constitutional claims be visible is demanded by our limited jurisdiction, as well as its practical utility in avoiding confusion and dilution of constitutional values. Here Castellano amended his complaint, purposely abandoning his claim under state law. He did so because our case

law said the elements of malicious prosecution under state law and under a § 1983 claim were the same. We have pulled that legal rug from all the parties.” As a result of its restatement of the law with respect to malicious prosecution claims under 42 U.S.C. § 1983, the Court then reversed the judgment and remanded the case for a new trial of Castellano’s federal and state claims.

JURISDICTION; FEDERAL ARBITRATION ACT

***Smith v. Rush Retail Centers, Inc.*, ___ F.3d ___, 2004 WL 299944 (5th Cir. March 3, 2004).**

Smith filed this action in district court seeking to vacate a favorable arbitration award made on the behalf of Rush Retail Centers, Smith’s former employer. The complaint alleged that “. . . the arbitrators engaged in ‘misconduct’ within the meaning of § 10(a) [of the Federal Arbitration Act] by revising the agreement, by refusing to apply Texas law . . . and by refusing to allow Smith to introduce impeachment evidence.” The district court dismissed Smith’s complaint, finding that there was no diversity or federal question and consequently no basis for federal jurisdiction. Smith appealed to the Fifth Circuit, arguing that the district court has jurisdiction to vacate the arbitration award under § 10 of the Federal Arbitration Act, which provides that “the United States court in and for the district wherein the [arbitration] award was made may make an order vacating the award upon the application of any party to the arbitration . . . where the arbitrators were guilty of misconduct. . . .”

The Court notes that the Fifth Circuit has not addressed this issue. It initially cites the case of *Moses H. Cone Mem’l Hosp. v. Mercury Construction Corp.*, 460 U.S.1 (1983) for the proposition that § 4 of the FAA, which provides for the filing of a petition to compel, “. . . does not create an independent basis for federal jurisdiction.” The Court then reviews the holdings of the Second, Sixth, Seventh, Ninth, Eleventh, and District of Columbia Circuits which have all determined that § 10 “. . . does not confer federal jurisdiction and that there must be

an independent basis for federal jurisdiction before a district court may entertain a petition to vacate an arbitration award.” The Court finds these holdings to be persuasive, finds that Smith’s complaint did not allege a federal question, and affirms the judgment of the district court dismissing his complaint.

CRIMINAL LAW; FOURTH AMENDMENT; DNA

***Groceman v. United States Department of Justice*, 354 F.3d 411 (5th Cir. 2004).**

Jeffrey and Bradley Groceman were convicted and jailed for armed bank robbery and conspiracy to commit armed bank robbery. While in prison, the Grocemans sued the United States Department of Justice, United States Bureau of Prisons, and the Federal Bureau of Investigation seeking to “enjoin them from collection and retention of samples of their DNA pursuant to the DNA Analysis Backlog Elimination Act of 2000 (the “DNA Act”). DNA samples collected under the DNA Act are included in the FBI’s Combined DNA Index System (“CODIS”) and used as a tool in law enforcement actions. By way of their lawsuit, the Grocemans alleged that collection of their DNA constituted “a violation of their Fourth Amendment right against unreasonable searches and seizures.” The district court dismissed the lawsuit under Rule 12(b) for failure to state a claim. The Grocemans then appealed to the Fifth Circuit.

The Court, in its discussion, points out that it has previously ruled against the position advocated by the Grocemans. In *Valasquez v. Wood*, 329 F.3d 420 (5th Cir. 2003), the Fifth Circuit found that collection and retention of blood samples from a prisoner “are reasonable in light of an inmate’s diminished privacy rights, the minimal intrusion involved, and the legitimate government interest in using DNA to investigate crime.” The Court notes that, since that time, other Circuits, such as the Second, Ninth, and Tenth, have, in varying aspects, diverged from the result adopted by the Fifth Circuit in *Valasquez*. The Court declines, however, to revisit its opinion in *Valasquez*, finding that “persons incarcerated after conviction

retain no constitutional privacy interest against their correct identification. . . . The DNA Act, accordingly, does not violate the Fourth Amendment, and its application does not infringe on these plaintiffs' constitutional rights.”

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***Stavinoha v. Stavinoha*, No. 14-02-01081-CV, 2004 WL 78170 (Tex. App.—Houston [14th Dist.] Jan. 20, 2004, no pet. h.).**

In a case of first impression, the Fourteenth Court extended the community property rules to certain deferred retirement benefits. *Stavinoha* involved a Houston police officer that had been a member of the officers pension system four years prior to his marriage. He became eligible to retire sixteen years later, but instead of retiring immediately, he elected to participate in the deferred retirement option plan (DROP). The plan offered an optional method to receive benefits available to pension system members with twenty or more years of credited pension service with the city. Under the DROP, the member continued working and receiving a salary, and the monthly retirement annuity the member could have received upon retirement as credited to a notional plan account in the member's name. When the member retired, thereby stopping the DROP, he would be entitled to receive the amount accumulated in the account in a lump sum, and was also entitled to receive payment of the monthly pension benefit.

In the summer of 2000, nearly four and one-half years after the officer began participating in the DROP, he and his wife petitioned for divorce. The property issues, which in large part hinged on whether the retirement benefits paid into the DROP account were community or separate property, were tried in a nine-day bench trial. The final divorce decree provided that (1) the monthly benefit credited to the DROP account from would be apportioned between the community and separate estates; (2) the monthly benefit credited into the DROP account after the date of the divorce, but prior to actual separation from service was 100% of the policeman's separate property; and (3) the monthly benefit paid after the officer's actual separation from service was apportioned between the community and separate estates.

The Fourteenth Court found that the court abused its discretion in finding that the post-divorce DROP credits and other disputed benefits were the officer's separate property. It held that the officer's retirement benefits, including retirement annuity, cost-of-living adjustment, and other benefits that had been deferred under the DROP should be characterized as community property, to the extent that they were earned during marriage. The officer was fully vested in deferred benefits under the DROP. The court further pointed out that all deferred benefits were earned during marriage, no deferred benefits were earned post-divorce, and the fact that the officer deferred receipt of the benefits did not alter their characterization as community property. The court also found that the well-established *Taggart* apportionment formula applied to the deferred community property retirement benefits, thereby allowing the court to determine the extent of the community interest in the disputed community benefits. The trial court's designation of the retirement benefits as separate, rather than community property, materially affected the property division, rendering it manifestly unfair and unjust. For that reason, the *Stavinoha* court reversed and remanded.

***Shirvanian v. Defrates*, No. 14-02-00447-CV, 2004 WL 35987 (Tex. App.—Houston [14th Dist.] Jan. 8, 2004, no pet. h.).**

In *Shirvanian*, the Fourteenth Court extended common-law fraud to protect shareholders wrongfully induced to hold stock, but only in certain circumstances. In this case, the appellants, Shirvanian and various family trusts, which were formerly the largest non-institutional shareholders of Waste Management, Inc., brought suit against the appellees, Waste Management and its former chief executives. The appellants asserted, *inter alia*, fraud, alleging that several in face-to-face and telephone conversations, the chief executives induced them not to follow through with their

¹ Thanks to Robin Schober for her help on these summaries.

plans to sell three million shares of Waste Management stock. The appellees filed special exceptions, which the trial court sustained without elaboration.

The basis of the appellees' special exception was that the appellants failed to state a cause of action because Texas does not recognize a common-law cause of action for a "holder claim," which here was a claim that the former executives induced the appellants to "hold" their stock rather than selling it. The appellees also argued that the court should adopt federal securities law, which bars such claims. No Texas court had addressed the question of whether a common-law fraud claim existed under such circumstances, and consequently, the *Shirvanian* court looked to authority from other jurisdictions. It relied heavily on a California Supreme Court case that interpreted California law to allow a holder's action for fraud because it was consistent with California law allowing a cause of action for fraud if the effect of the misrepresentation was to induce forbearance.

The court reasoned that this case involved an "ordinary case of deceit" based on direct misrepresentations, and its holding was limited to this narrow setting. However, the court also recognized that the U.S. Supreme Court's decision in *Blue Chip Stamps*, 421 U.S. 723 (1975) (holding that only purchasers and seller of securities can seek fraud damages under federal securities laws), did not preclude state law relief for a holder's actions, including those based on fraud. While it was sensitive to the notion that Texas should not encourage "strike suits" brought by any person who claims that he would have bought or sold shares based on information withheld by corporate officers, the court emphasized that this was not the case. Moreover, the court rejected the appellees' contention that allowing plaintiffs to assert holding claims in Texas state courts would make Texas an "attractive haven for complete bystanders, who given the flaws in their claims, have long been denied relief in federal courts." The *Shirvanian* court emphasized that the appellants' type of holding claim will always have a "very narrow

pool of plaintiffs." However, the court concluded that reversible error occurred because the trial court sustained the special exception when the appellants had sufficiently pleaded the elements of a fraud claim under well-settled Texas jurisprudence.

***Cortez v. HCCI-San Antonio, Inc.*, No. 04-02-00536-CV, 2004 WL 28354 (Tex. App.—San Antonio Jan. 7, 2004, no pet. h.).**

In another case of first impression, the San Antonio court of appeals held that intentional infliction of emotional distress (IIED) is recoverable under the survival statute. In this case, the resident of a nursing facility brought an action against the facility's current and previous owners, employees, and others, alleging various acts of negligence, assault, and IIED. The resident had fallen while attempting to transfer herself from her commode to her wheelchair. The resident died while the suit was pending. The jury awarded the plaintiff \$9 million in damages. The appellant, on behalf of the estate of the resident, challenged the trial court's apportionment of liability as to the facility's current owner and its employee.

On appeal, the appellant asserted that the trial court erred in granting a directed verdict on the IIED claim. The facility owner responded that such a claim does not survive the death of the resident. Under the Texas Survival Statute, "[a] cause of action for personal injury to the health, reputation, or person of an injured person does not abate because of the death of the injured person." While no Texas court had addressed this discrete issue, several federal courts, when interpreting Texas law, held that IIED claims did not fall within the statute. The Fifth Circuit in *Plumley v. Landmark Chevrolet, Inc.*, 122 F.3d 308, 311 (5th Cir. 1997), so held because IIED "does not injure health, reputation, or body." Disagreeing with the *Plumley* rationale, the court pointed to several Texas decisions that did recognize recovery of mental anguish damages – which does not require proof of physical injury – in actions under the survival statute. Given that body of case law, the court stated that it was not prepared to hold that a

claim for IIED did not survive the claimant's death.

Because the resident had raised enough evidence to raise a fact issue on IIED as to the employee, the court of appeals found that the trial court erred in granting a directed verdict in favor of the employee. The court did not reach the issue of whether the trial court erred in granting directed verdict in favor of the facility owner because the jury found that the employee was not acting within the scope of his employment. In view of the jury finding, the court deemed any error harmless. Read broadly, *Cortez* may support the assertion that other claims alleging non-physical injuries, such as IIED, can survive the Texas Survival Statute.

***CU Lloyd's of Texas v. Hatfield*, No. 14-02-01251-CV, 2004 WL 162947 (Tex. App.—Houston [14th Dist.] Jan. 29, 2004, no pet. h.).**

In another insurance case, the Fourteenth Court held that if an individual obtains an insurance policy under which the named insured is an individual doing business under another name, a policy provision, excluding coverage for automobiles owned by the named insured, operates to exclude coverage as to an automobile owned by that individual in his own name. In this case, the driver of a vehicle got into an accident in which the passenger in his car was injured. The vehicle was titled in the name of the driver's father, Benjamin F. May, Jr. At the time of the accident, May did business under the name of a sole proprietorship. The sole proprietorship held a commercial general liability insurance policy ("CGL policy") through CU Lloyd's. The policy listed the sole proprietorship and May, the proprietor, as the named insureds. The injured passenger sued the driver, his father, and the sole proprietorship. The Mays requested defense and indemnity from CU Lloyd's under the CGL policy but CU Lloyd's denied coverage under the policy. The trial court in that case rendered judgment against all of the defendants jointly and severally. CU Lloyd's subsequently filed a declaratory judgment suit against the son, father, and sole proprietorship (the Declaratory Judgment

Defendants) seeking interpretation of the coverage under the CGL policy. The Declaratory Judgment Defendants assigned their rights against CU Lloyd's to the injured passenger who in turn filed suit against CU Lloyd's.

CU Lloyd's moved for summary judgment, alleging that it had no duty to defend or indemnify because the named insured owned the vehicle involved in the accident, and the CGL policy excludes coverage for such casualties. In turn, the Declaratory Judgment Defendants moved for partial summary judgment against CU Lloyd's, which the trial court granted against CU Lloyd's for the amount of the judgment previously awarded to the injured passenger. CU Lloyd's appealed, alleging the trial court erred by (1) granting the Declaratory Judgment Defendants motion for summary judgment, (2) denying its motion for summary judgment, and (3) in granting judgment for an amount above the policy limit.

CU Lloyd's argued it had no duty to indemnify for an accident involving a vehicle owned by Benjamin F. May, Jr., because the named insured is a sole proprietorship and coverage under the policy is excluded for automobiles owned by the insured. CU Lloyd's contended that because the sole proprietorship and its proprietor are legally the same person, the exclusion in the CGL policy applied to preclude coverage for the accident. The Fourteenth Court agreed with CU Lloyd's, concluding that the "named insured," here the sole proprietorship and its proprietor, is not a separate and distinct entity from the owner of the vehicle in question—Benjamin F. May, Jr. Thus, the CGL policy did not provide coverage for the injured passenger's injuries because the vehicle was owned by the named insured. The court held that the sole proprietorship and its proprietor are one and the same for purposes of the CGL policy and thus the coverage exclusion in the policy for automobiles owned by the named insured applies. Consequently, CU Lloyd's had no duty to defend or indemnify the proprietor doing business as the sole proprietorship against the injured passengers' claims.

Gross v. Burt, No. 2-01-206-CV, 2004 WL 362245 (Tex. App.—Fort Worth Feb. 26, 2004, no pet. h.).

In a medical malpractice case, the Fort Worth court of appeals further defined when a doctor's legal duty arises. In *Gross*, the parents of twins born prematurely brought a medical malpractice action against a pediatrician, a pediatric ophthalmologist, and a pediatrician's employer, after the twins were diagnosed as being legally blind. After a jury trial, judgment was entered against Gross, the pediatric ophthalmologist. Gross challenged the judgment rendered against him, attacking the legal and factual sufficiency of the evidence to support the jury's finding that his negligence cause any harm to the twins. Gross had performed an initial examination of one of the twins in the neonatal intensive care unit. The only information or record that Gross maintained on the infant was the one-page examination sheet that he completed and the registration information the hospital had provided him. The sheet correctly showed the parents' names as Alyssa Taylor and Keith Burt, but the infants' last name was not shown as Taylor. Gross did not know that the parents had changed the infants' last name to "Burt" until after the instigation of the litigation. After the exam, he prepared an initial report that showed several findings, including stage I ROPs in the infant's right eye; the report listed the infant's last name as "Taylor." Even though Gross recommended a follow-up appointment, that was the only occasion on which Gross examined either of the twins. The twins did not appear at their subsequently-scheduled appointments, and Gross did not send a reminder notice to the parents as per his office policy.

On appeal, Gross argued that he had a limited physician-patient relationship with the infant that terminated upon completion of the initial ROP screening and that he never initiated such a relationship with an infant with the last name of "Burt." Among other facts, the parents pointed to a "Dear Patient" letter that was received after the initial examination, which coupled with other evidence, indicated a continuing physician-patient relationship. The majority of the court sided with

Gross. Although a previous physician-patient relationship is a factor to consider in determining whether the relationship and a continuing duty existed, the majority reasoned that it was not sufficient to establish such a relationship. The mere act of agreeing to see the patient at a later time was not determinative either. The court emphasized that a patient must, at a minimum, appear at the physician's office to seek medical care; this was especially the case when an intervening identification issue arises.

In *dicta*, the court reasoned that if it were to expand a duty of continued care to all patients who are seen at hospitals by consulting physicians beyond the hospital setting based solely upon the fact that they were seen by the physician at the hospital, there would be no end to the physician-patient relationship. If that were the case, all specialists or on-call physicians would be bound to "an endless duty of continued care even if they had completed their assigned duty at the hospital even if they had completed their assigned duty at the hospital and the patient failed to follow through." The court sustained Gross's issue on appeal.

In her dissenting opinion, Justice Walker concluded that the evidence did not conclusively establish termination of the physician-patient relationship. It was undisputed that an initial physician-patient relationship existed with respect to the ROP examination. Justice Walker's dissent focused on several cases discussing the continuing physician-patient relationship, and reasoned that once Gross examined the infant in the hospital and diagnosed him with ROP, he should have known that the infant required follow-up appointments with a pediatric ophthalmologist, especially when several ophthalmologic associations had approved guidelines requiring weekly visits for infants diagnosed with ROP. Based on those guidelines and Gross's post-examination conduct, Justice Walker reasoned that there was more than scintilla of evidence to demonstrate that Gross intended for the physician-patient relationship to continue and that the parents did not want to terminate that relationship.

***Robert Hageman/Fritz, Byrne, Head & Harrison, LLP v. Luth*, No. 03-03-00081-CV, 2004 WL 314968 (Tex. App.—Austin Feb. 20, 2004, no pet. h.).**

This case presents an interesting factual background, as well as an examination of the continuing viability of the doctrine of the extinguishment of judgment debts, or the extinguishment rule. Hageman and Luth were partners in a real estate venture. They were sued by Turner individually and together, doing business as their joint venture. A final judgment was entered against them both individually and as a joint venture. In a bankruptcy action, Hageman received a discharge of his debts, including the judgment. Turner's judgment was never enforced against Luth or the joint venture. Several years later, Hageman and Luth formed a new business partnership to develop and market a construction product. Eventually, Hageman sold all rights, title, and interest to the construction product to a third party. Luth contended that Hageman did so without his agreement or without giving him an accounting of the sale.

Luth then filed suit against Hageman and sought damages, arguing that he had an ownership interest in the product. In that suit, Luth was represented by the firm of Fritz, Byrne & Heard LLP (FBH). As part of Luth's agreement with FBH, he assigned it an undivided interest in this claim against Hageman. The parties eventually settled. Under the settlement terms, Hageman would pay Luth \$169,000 and they scheduled a settlement closing date. The settlement agreement did not mention the form of payment and directed that payment be made to Luth only. Neither Hageman nor his attorney was informed of the agreement between Luth and Hageman. Eventually, Hageman and Turner, who were both represented by the same law firm, began discussing the assignment of the rights of the Turner judgment to Hageman; Turner soon after executed an assignment of her rights in the Turner judgment to Hageman.

At the Luth-Hageman settlement conference, Hageman arrived with a sealed, clear plastic bag

containing \$183,250 in cash, which he proceeded to hide underneath a table. When the parties signed the settlement agreement, Hageman produced the plastic bag, presented it to Luth, and asked him to count the funds. A few moments after Luth finished counting the funds, two Travis County deputy constables entered the conference room and announced that they had a writ of execution for a judgment against Luth, who denied that the money was his. The deputy constable proceeded with the seizure.

FBH and Luth then filed this suit, seeking recovery of the seized funds. FBH claimed both tortious conversion on the part of Hageman and that it had a right to the funds. It also sought a declaration that the assignment of the Turner judgment was invalid because it represented satisfaction of Luth's obligation on the judgment. Luth and FBH sought attorneys' fees and exemplary damages in relation to the litigation over the funds. The district court granted partial summary judgment in favor of Luth and FBH, declaring that they were entitled to the funds and that Hageman's acquisition of the assignment of the Turner judgment operated to extinguish the judgment.

On appeal, Hageman argued that the trial court erred in concluding that the assignment of the Turner judgment operated to extinguish the judgment; he asserted that the extinguishment rule no longer existed in Texas because the common law upon which the rule was based no longer exists. The rule provides that if two parties are jointly and severally liable on a judgment, the acquisition of the judgment by one judgment debtor extinguishes the judgment for all judgment debtors. The court of appeals disagreed. It relied heavily on the reasoning of *Rich v. Smith*, 481 S.W.2d 162 (Tex. Civ. App.—Fort Worth 1972, writ ref'd n.r.e.). Hageman contended that the rule was based on the old common-law principle that there is no right of contribution between joint tortfeasors; because Texas allows contribution, he contended that the extinguishment rule lacks vitality in Texas. The court responded that Texas created a right of contribution in 1917, far before *Rich* applied the extinguishment rule, and thus,

contribution did not eviscerate the rule. The court also dispelled Hageman's argument that the rule is based on the "unity of release rule;" that rule was inapplicable because it pertains to situations when a party releases another from a cause of action that has yet to be adjudicated, while the extinguishment rule relates to a judgment already entered against the joint tortfeasors.

As to the issue of whether Hageman's obligation continued after discharge in bankruptcy, the court then interpreted Texas law in light of the federal approach. The court concluded that section 54.042(a)(2) of the property code mirrors the federal approach to the proper characterization of a discharge in bankruptcy. Thus, under Texas law, Hageman's obligation on the Turner judgment remained even though his obligation was no longer enforceable. Finding that the extinguishment rule maintains viability in Texas, and because Hageman's obligation on the Turner judgment continued after his bankruptcy discharge, the court concluded that the assignment of the Turner judgment to Hageman "effectively extinguished the judgment," which was satisfied in whole. Waxing poetic, the court reasoned that to hold otherwise would allow Hageman to "use the bankruptcy discharge as a sword to take unfair advantage, rather than as a shield to protect him from a fair start." The court affirmed the trial court's judgment on that issue.

***DeLaurentis v. United Servs. Auto. Ass'n*, No. 14-03-00164-CV, 2004 WL 349922 (Tex. App.—Houston [14th Dist.] Feb. 26, 2004, no pet. h.).**

The Fourteenth Court of Appeals scored a major victory for Texas renters' with possible claims of property damages due to mold. This case arose from an insurance coverage dispute between a policyholder who suffered mold damage to her apartment and an insurer who denied coverage under a renter's insurance policy. The policyholder sued the Insurer, asserting various common law claims and a DTPA claim. The trial court granted summary judgment in favor of the insurer. At issue on appeal was whether the policyholder's claim for mold damage, which

purportedly resulted from a leaking air conditioning unit in her apartment, was covered under her renter's standard-form insurance policy.

In August 2000, the policyholder had purchased a renter's insurance policy from the insurer, which used a Texas Homeowner's Policy Form B-T ("HOB-T policy") in issuing the policy. The following month, the policyholder discovered the air condition unit was leaking water into her bedroom closet, and that black mold was growing on one wall of the closet. In June 2001, the policyholder concluded that apartment management's efforts to remediate the mold were not effective; in fact, the mold had spread throughout her apartment. She filed a claim with the insurer, seeking compensation under her renter's insurance policy for temporary residence and for remediation for her possessions within the apartment. Despite the presence of two fungal items, the Insurer informed the Policyholder that her claims would be denied. The Insurer's representative stated that mold was not a named peril in the HOB-T policy. The trial court entered a judgment dismissing all of the Policyholder's claims.

The primary question on appeal was whether the trial court had erred in finding no coverage under the insurance policy. The Insurer contended that that Policyholder's claim for mold damage to her personal property was not covered because no named peril for "mold" was included in the HOB-T policy. Thus, the Insurer argued, the real claim is that mold – not the accidental discharge of water by the air conditioning system – caused her damage. To resolve the issue of whether mold must be specifically identified as a named peril or whether coverage existed because a "physical loss" was caused by a peril named in the policy, i.e., leaking water, the court examined the operative policy language. No Texas court had addressed that precise issue in construing the language of the standard HOB-T policy.

The court rejected the Insurer's contention that a named-perils policy excludes all risks not specifically included in the insurance contract, and because mold is not a named peril in the

policy, mold is excluded from coverage. Applying a plain language interpretation of the policy language, the court concluded that if a named peril, for example, the accidental discharge, leakage, or overflow of water from the air condition system, caused the mold in question, that damage would be covered under the HOB-T policy. That type of damage was not specifically excluded under the policy. Thus, the court reversed the trial court's judgment and remanded for further proceedings consistent with the opinion. In so doing, the court left open the door for not only mold claims under the HOB-T policy, but other unspecified risks, provided that there is a causal connection between the risk and one of the policy's named perils.

***Chair King, Inc. v. GTE Mobilnet of Houston*, No. 14-00-00711-CV, 2004 WL 162938 (Tex. App.—Houston [14th Dist.] Jan. 29, 2004, no pet h.).**

In *Chair King*, the Fourteenth Court of Appeals delivered one of the most sweeping interpretations of the federal Telephone Consumer Protection Act (TCPA) to date. The TCPA was intended to shield businesses from unsolicited fax advertisements on their fax machines. The Plaintiffs-Appellants challenged the trial court's judgment dismissing their private damage claims under the TCPA and their common-law claims and granting the Defendants-Appellees' motions for summary judgment. The Appellants, various commercial and professional entities in and around the major metropolitan areas in Texas, asserted that from as early as 1992, they had received numerous fax unsolicited advertisements from various fax advertising companies as well as GTE Mobilnet and Chick-Fil-A. The Appellants alleged, *inter alia*, a private damage claim under the TCPA. The district court granted summary judgment as to several defendants, including GTE Mobilnet and Chick-Fil-A; the latter became the only parties to the appeal after the other the advertising companies settled.

One of the primary issues on appeal was whether the TCPA required a state to authorize damage actions before a plaintiff can assert claims

pursuant to the Act. Two competing interpretations of the TCPA were at issue: the Appellees espoused an "opt-in" interpretation, under which private TCPA damage claims cannot be brought in state court until that state's legislature enacts legislation or that state's highest court issues a judicial rule that specifically permits those claims to be filed in state court. The Appellants' "opt-out" interpretation, by contrast, provides that states may have the ability to "opt out" by passing a statute declining to entertain TCPA damage actions in that state's court. Performing an intense statutory analysis, the court concluded that the relevant language of the statute did not have a plain and ambiguous meaning. After scrutinizing the language of the TCPA and considering the TCPA's policy purposes, the court agreed with the nine other states that had previously declined to adopt the opt-in interpretation. In reversing the district court, the court concluded that "Congress sought to penalize and discourage unsolicited fax advertisement because they are an unwelcome source of annoyance, disruption, and expense to consumers." Consistent with that congressional objective, the court held that the Appellants could assert TCPA damage claims as long as Texas law has not prohibited them from doing so.

The court also upheld the TCPA in the face of several constitutional challenges. Contrary to the district court, the *Chair King* court found that the TCPA applied to both interstate and intrastate fax advertisements, and congressional regulation of strictly intrastate fax transmission was within its commerce power because telephone and telephone lines – even when use solely for intrastate purposes – were part of the aggregate interstate system; consequently, they were inherent instrumentalities of interstate commerce. The court also held that the TCPA did not violate due process or free speech rights under the federal and state constitutions; nor did the Act violate the Equal Protection Clause of the U.S. Constitution on the basis that it unfairly discriminated between commercial advertisements and non-commercial solicitations.

Finally, in a question that had not been addressed by any other court nationwide, the court held that the state limitations period, as opposed to the federal residual limitations period, applied to TCPA claims because Congress left to the states the ability to control federal claims in the state-court system. Therefore, the two-year statute of limitation under Texas law applies in TCPA actions, as opposed to the four-year federal limitations period; that worked to the advantage of Chick-Fil-A, but not for GTE Mobilnet. Viewed in its entirety, *Chair King* reinforces the mandate of the TCPA, and in so doing, the ability for private citizens who receive unsolicited fax advertisements to obtain relief.

***TIG Ins. Co. v. Dallas Basketball, Ltd.*, No. 05-03-00134-CV, 2004 WL 352079 (Tex. App.—Dallas Feb. 25, 2004, no pet. h.).**

In this insurance case, the Dallas Mavericks basketball team brought an action against an insured that had issued it a commercial general liability, umbrella coverage and excess coverage policies. Putting on a full-court press, the Mavericks claimed that the insurer wrongfully refused to defend it against several Telephone Consumer Protection Act suits. The district court granted the Mavericks summary judgment on the issue of whether the claims against it fell within the policies' definition of advertising injury. Feeling that the district court blew the call, the insurers appealed.

Two issues were raised on appeal: first, whether the distribution of advertising to telephone fax machine owners was a "publication," thereby triggering coverage under the policies, and second, whether the insurer violated article 21.55 of the Texas Insurance Code when it refused their request for defense. The appellate court swatted away the insurer's claim that the underlying state court petitions did not involve "publications."

Resolution of the second issue was less of a slam dunk than the first. The insurer argued that article 21.55's deadlines and penalties did not apply to claims for a defense, but only to first-party claims for payment to an insured or beneficiary. After a

close examination of the language and purpose of article 21.55, the Dallas court determined that the entire structure of statutory provision presumes a tangible, measurable loss suffered by the insured for which he seeks payment from the insurance company. Any attempt to apply the statute's structure to a claim for defense was both unworkable and unintended by the legislature. The court focused on the fact that the insurer's breached the insuring policies, rather than the policies themselves, is what obligated the insurer to reimburse the Mavericks. As such, neither the Mavericks' claim for defense nor its claim for reimbursement of a defense was a "claim" as defined by article 21.55. In so concluding, the court recognized that its holding was counter to the holdings of other Texas state and federal courts; those cases, however, were complete airballs, either because they were based on faulty logic or no logic at all.

With the shot clock winding down, the court held that the claims for defense are fundamentally different from first-party claims for payment based on a loss suffered by the insured. Accordingly, the insurer's actions were not subject to the 18% penalty imposed by article 21.55. The court reversed the portion of the trial court's judgment applying article 21.55 to the Mavericks' claim for judgment and affirmed the trial court's judgment in all other respects. Consequently, the Mavericks' victory rang hollow. The ball will ultimately be in the supreme court's hands, however, as it recently granted a petition for review in *Northern County Mutual Insurance Co. v. Davalos*, 84 S.W.2d 314 (Tex. App.—Corpus Christi 2002), in which article 21.55 was applied to a failure to defend claim.

Joel M. Androphy, Berg & Androphy, Houston
Laura Beaver, Berg & Androphy, Houston

***In re Automotive Refinishing Paint Antitrust Litigation*, No. 02-4272, 2004 WL 258661 (3d Cir. Feb. 13, 2004).**

Joining the Ninth Circuit in a growing circuit court split, the Third Circuit held that the venue provision of the Clayton Act § 12, 15 U.S.C. § 22, is independent of the worldwide service of process provision for foreign corporations. The Third Circuit declined to join the reasoning of the Second and D.C. Circuits, which have held that the venue provision must be satisfied before worldwide service of process is available. The Third Circuit further held that personal jurisdiction in federal antitrust litigation is to be evaluated by the defendant's aggregate contacts within the entire United States, not according to the defendant's contacts in the state in which the federal court sits. This second holding is consistent with other circuit court decisions.

***Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205 (2nd Cir. 2004).**

Two cigarette distributors challenged New York's Contraband Statutes, which were enacted in response to the Master Settlement Agreement resulting from multiple lawsuits brought by several states against cigarette manufacturers. The appellants argued that the Contraband statutes conflicted with the Sherman Act and should be preempted, alleging the Contraband Statutes essentially gave effect to a "market-sharing and price-fixing cartel" found in the Master Settlement Agreement. The court first concluded that the statutes amounted to enforcement of a *per se* violation of the Sherman Act because the Master Settlement Agreement's market-share provisions created a restraint on competition. The court continued by holding that the statutes were preempted because they conflicted with the Sherman Act, and, further, they failed to escape preemption under state action immunity. The court found that New York failed to articulate a

clear, legitimate state policy for enforcing the anti-competitive market-share provisions of the Master Settlement Agreement and that New York provided no active supervision of the uncompetitive scheme.

***United States v. Cole*, 357 F. 3d 780 (8th Cir. 2004).**

The Eighth Circuit rejected the government's argument that the U.S. Sentencing Guidelines § 5K2.14, which allows for an upward departure "if national security, public health, or safety was significantly endangered," should apply to a false threat that Anthrax was present at an area school; the threat turned out to be empty. The court concluded that an empty threat, as opposed to an actual one, is not grounds for upward departure under § 5K2.14.

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***Garza v. State*, ___ S.W.3d ___, No. 1691-02 (Tex. Crim. App., Jan. 28, 2004) (not yet reported).**

The defendant filed a motion to suppress evidence seized from a van during an inventory, and requested a separate hearing on that motion. The trial court denied the request for a separate hearing, stating that he would hear the evidence as it was presented before the jury, and commenting that, “[i]f I grant your motion, [the jury is] not going to have any evidence, so they would be subject to an instructed verdict . . . and if I deny your motion [to suppress], it doesn’t make any difference, the jury gets to hear it all anyway.” The judge further stated, “any other ruling that either side wishes to make, then you will be instructed to approach the bench outside the presence of the jury and then we’ll make a determination as to that.” Therefore, the trial court ordered the motion to suppress to be carried with trial. The defendant did not object to the evidence that was seized during testimony, but he did make another objection when the exhibits were actually offered into evidence.

Though the general rule would require the defendant to object and obtain a ruling at the earliest opportunity, the specific pre-trial comments made by the judge in this case essentially directed the defendant to wait until all the evidence was presented before he obtained any ruling from the judge. From these comments, it is clear that any additional attempt by the defendant to object or obtain a ruling during the testimony of the officers would have been futile, because the judge had already told the defendant that he would not rule on the motion until the jury had heard the evidence. It was reasonable for the defendant to interpret the judge’s comments as an instruction to seek a ruling at the conclusion of the State’s presentation of evidence, and not sooner.

***State v. Medrano*, ___ S.W.3d ___, No. 1919-02 (Tex. Crim. App., Feb. 4, 2004) (not yet reported).**

The standard created for the admissibility of hypnotically enhanced testimony in *Zani v. State*, 758 S.W.2d 233 (Tex. Crim. App. 1988), is a highly specific framework applicable specifically to the admissibility of hypnotically enhanced testimony. To require an application of the general, broader standard of review would do a disservice to the trial courts, and it would be imprudent. Because this highly specific framework is a narrowly defined standard that seeks to ensure the reliability of a specific type of scientific evidence, and because *Zani* is faithful to the primary objective of ensuring reliability in the admission of scientific evidence, the standard in *Zani* remains the standard to be applied by Texas trial courts in assessing the reliability and determining the admissibility of hypnotically enhanced testimony.

***State v. Kersh*, ___ S.W.3d ___, No. 1868-99 (Tex. Crim. App., Feb. 4, 2004) (not yet reported).**

The State may appeal a trial court’s decision to ignore enhancement allegations that previously have been found to be true when assessing punishment at a subsequent hearing on the State’s motion to adjudicate the defendant’s guilt. Because the meaning of “sentence” under Articles 42.02 and 44.01(b) of the Texas Code of Criminal Procedure includes enhancement allegations, the State may appeal a trial court’s failure to consider those enhancement allegations.

***Ex parte Soffar*, ___ S.W.3d ___, No. 29980-02 (Tex. Crim. App., Feb. 11, 2004) (not yet reported).**

The decision of the Texas Court of Criminal Appeals in *Ex parte Powers*, 487 S.W.2d 101 (Tex. Crim. App. 1972), is modified so as to permit consideration of a subsequent state writ of habeas corpus, which is not otherwise barred by Article 11.071, Section 5 of the Texas Code of Criminal Procedure, if the federal court with jurisdiction over a parallel federal writ of habeas corpus enters an order staying its proceedings to allow the habeas applicant to pursue his unexhausted claims in Texas state court. Several federal appellate courts have suggested or entered a stay in their pending habeas proceedings in order to permit an inmate who has alleged a facially-cognizable “watershed” constitutional claim to return to state court to exhaust this previously unexhausted claim. *See Ex parte Soffar*, 120 S.W.3d 344, 347 n.7 (Tex. Crim. App. 2003).

COURTS OF APPEALS

***Sutherland v. State*, ___ S.W.3d ___, No. 1-03-808-CR (Tex. App.—Houston [1st Dist.], Feb. 19, 2004) (not yet reported).**

When a criminal defendant, who is not indigent, refuses to pay even for the clerk’s record, particularly when he or she is free on bond, the court of appeals will dismiss the defendants’ appeal under TEX. R. APP. P. 37.3(b).

***Delangel v. State*, ___ S.W.3d ___, No. 1-02-716-CR (Tex. App.—Houston [1st Dist.], Feb. 12, 2004) (not yet reported).**

An appeal, in which a defendant challenges the excessive amount of an appeal bond, is separate from any appeal of the conviction and punishment and must be perfected by a separate notice of appeal.

***Iles v. State*, ___ S.W.3d ___, No. 1-02-1032-CR (Tex. App.—Houston [1st Dist.], Jan. 29, 2004) (not yet reported).**

The statement in the defendant’s notice of appeal that he was appealing the denial of his motion to suppress was not sufficient to contradict the defendant’s previous waiver of his right to appeal. *Cf. Alzarka v. State*, 90 S.W.3d 321 (Tex. Crim. App. 2002). Furthermore, the defendant’s waiver of his right to appeal was not overridden by the trial court’s actions in (1) granting the motion to withdraw of the defendant’s trial attorney; (2) granting the defendant’s request for appointed counsel on appeal and a free record in response to his pauper’s affidavit; and (3) filing findings of fact and conclusions of law concerning the voluntariness of the defendant’s statement. These actions did not constitute permission to appeal. *Cf. Willis v. State*, 121 S.W.3d 400 (Tex. Crim. App. 2003).

***Tufele v. State*, ___ S.W.3d ___, No. 14-02-1271-CR (Tex. App.—Houston [14th Dist.], Feb. 5, 2004) (not yet reported).**

When a defendant waives his right to appeal at the time that he enters a plea of guilty, he will still be permitted to appeal errors alleged to have occurred during the punishment stage. The defendant could not have waived his right to appeal those subsequent errors when he previously entered into his plea of guilty. *See Ex parte Thomas*, 545 S.W.2d 469 (Tex. Crim. App. 1977). *Cf. Monreal v. State*, 99 S.W.3d 615 (Tex. Crim. App. 2003).

***Hargesheimer v. State*, ___ S.W.3d ___, No. 7-03-544-CR (Tex. App.—Amarillo, Jan. 23, 2004) (not yet reported).**

The defendant’s waiver of his right to appeal was invalid because it was entered prior to the time that he was sentenced. *See Ex parte Thomas*, 545 S.W.2d 469 (Tex. Crim. App. 1977). *Cf. Monreal v. State*, 99 S.W.3d 615 (Tex. Crim. App. 2003); *Blanco v. State*, 18 S.W.3d 218 (Tex. Crim. App. 2000). Furthermore, a court of appeals is not required to accept the trial court’s certification

that the defendant had waived his right to appeal. *Compare Walker v. State*, 110 S.W.3d 509 (Tex. App.—Waco 2003, no pet.) with *Daniels v. State*, 110 S.W.3d 174 (Tex. App.—San Antonio 2003, no pet.). Rather, when a defendant’s waiver of his right to appeal is invalid, the trial court would be offered the opportunity to amend its previous certification that the defendant had waived his right to appeal.

***Champion v. State*, ___ S.W.3d ___, No. 7-00-575-CR (Tex. App.—Amarillo, Jan. 30, 2004) (not yet reported).**

Because the State had not previously challenged the previous abatement of the appeal by the court of appeals—in which the court of appeals ordered the trial court to conduct a hearing on the defendant’s motion for new trial—the State was estopped from subsequently claiming that the evidence from that hearing could not be considered by the court of appeals because that hearing occurred outside the 75-day time period set forth in TEX. R. APP. P. 21.8.

Furthermore, even though this appeal began when the old version of the Texas Rules of Appellate Procedure were in effect, the court of appeals reviewed the defendant’s claim that the record had been lost and/or destroyed under the new version of the Texas Rules of Appellate Procedure. *See* TEX. R. APP. P. 34.6.

***Bowen v. State*, ___ S.W.3d ___, No. 11-02-350-CR (Tex. App.—Eastland, Jan. 15, 2004) (not yet reported).**

After the trial court granted the defendant’s motion for mistrial, the defendant filed an application for a pre-trial writ of habeas corpus, in which he claimed that being tried again for the previous offense would violate his right against double jeopardy. The defendant did not appeal the trial court’s denial of relief on the writ of habeas corpus, but attempted to raise the double jeopardy claim in the subsequent appeal from his conviction. The defendant waited too long to raise his double jeopardy claim.

***Ex parte Shoe*, ___ S.W.3d ___, No. 2-02-99-CR (Tex. App.—Fort Worth, Jan. 15, 2004) (not yet reported).**

An applicant for writ of habeas corpus is estopped from challenging an illegal lesser sentence for which he entered into a plea bargain agreement with the State. *Compare Ex parte McIver*, 586 S.W.2d 851 (Tex. Crim. App. 1979) with *Mizell v. State*, 119 S.W.3d 804, 805 n.8 (Tex. Crim. App. 2003).

***Butler v. State*, ___ S.W.3d ___, No. 1-02-1126-CR (Tex. App.—Houston [1st Dist.], Feb. 26, 2004) (not yet reported).**

A court of appeals does not have jurisdiction to review the trial court’s denial of a motion for new trial when the substance of the motion relates to the trial court’s determination to adjudicate the defendant’s guilt. When the substance of a defendant’s motion for new trial serves to challenge a trial court’s decision related to the adjudication of guilt process, the defendant may not circumvent the prohibition against appealing such determination—set forth in Article 42.12, Section 5(b) of the Texas Code of Criminal Procedure—by recasting his appellate challenge as a complaint that the trial court abused its discretion in denying his motion for new trial.

***Chavez v. State*, ___ S.W.3d ___, No. 1-02-921-CR (Tex. App.—Houston [1st Dist.], Feb. 19, 2004) (not yet reported).**

In an appeal from a trial court’s order denying post-conviction DNA testing, a defendant may not make a claim that the State denied him due process by destroying material DNA evidence. In an appeal brought under Chapter 64 of the Texas Code of Criminal Procedure, the court of appeals does not have jurisdiction to review such a claim. *See Johnston v. State*, 99 S.W.3d 698 (Tex. App.—Texarkana 2003, pet. ref’d); *Watson v. State*, 96 S.W.3d 497 (Tex. App.—Amarillo 2002, pet. ref’d).

Harris v. State, ___ S.W.3d ___, No. 6-02-176-CR (Tex. App.—Texarkana, Feb. 18, 2004) (not yet reported).

Consistent with *Richardson v. State*, 973 S.W.2d 384 (Tex. App.—Dallas 1998, no pet.), consideration of a reasonable alternative hypothesis is consistent with the scope of an appellate court’s duty to review all the evidence in a neutral light during a factual sufficiency review. However, in conducting a review of the factual sufficiency of the evidence to support a defendant’s conviction, the court of appeals will not consider **only** a reasonable hypothesis that is alternative to a hypothesis in support a finding of the defendant’s guilt. Rather, the court of appeals is still required to examine all of the evidence in a neutral light.

In re J.H., ___ S.W.3d ___, No. 3-03-197-CV (Tex. App.—Austin, Feb. 5, 2004) (not yet reported).

Because of the quasi-criminal nature of juvenile proceedings and because of the possibility that a determinate sentence of imprisonment will extend into adulthood, the criminal harm analysis should govern in juvenile appeals concerning the imposition of a determinate sentence. *See* TEX. R. APP. P. 44.2.

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