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Officers

Warren W. Harris, Chair
Bracewell & Giuliani LLP
713-221-1490 Fax: 713-221-1212
warren.harris@bracewellgiuliani.com

Robert M. "Randy" Roach, Jr., Chair-Elect
Cook & Roach, L.L.P.
713-652-2032 Fax: 713-652-2029
rroach@cookroach.com

Douglas Alexander, Vice-Chair
Alexander DuBose Jones & Townsend LLP
512-482-9301 Fax: 512-482-9303
dalexander@adjtlaw.com

Daryl Moore, Treasurer
Storey, Moore & McCally, P.C.
713-529-0048 Fax: 713-529-2498
daryl@heightslaw.com

Marcy Hogan Greer, Secretary
Fulbright & Jaworski, L.L.P.
512-474-5201 Fax: 512-536-4598
mgreer@fulbright.com

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Section Web Site: www.tex-app.org

Pamela Stanton Baron, Attorney at Law, Austin

As my term as Chair of the Appellate Section comes to a close, I wanted to report to you on the Section's accomplishments over the past year.

I hope you had a chance to attend the Appellate Boot Camp and the Advanced Civil Appellate Practice Course at the Four Seasons in Austin on September 7-9. Heidi Bloch did a superb job as course director, and the speakers and topics were excellent. The Section's scholarship committee, chaired by Mike Truesdale, awarded court-attorney scholarship and need-based scholarships to both courses in its continuing effort to make CLE affordable for all.

The Section Annual Meeting was very well attended. The Section honored Helen Cassidy by presenting the first Cassidy Award for excellence in an appellate CLE presentation to the Honorable John G. Hyde. The winners of the appellate limerick contest were announced, and the winning entries are reprinted elsewhere in this issue. The reception with the judiciary following the meeting was also well attended. Photos from the course and the reception will be posted to the Section website (www.tex-app.org) soon. And, all Section members took home the new Section tote bags emblazoned with: "I think [too much], therefore I am . . . an appellate lawyer." Many thanks to Annual Meeting Chair LaDawn Conway, Membership Chair Liz Wiley, and Bench-Bar Liaison Chair Cindy Timms for their combined efforts to make the meeting and reception such a success.

Editor Kim Phillips and Assistant Editors Heidi Bloch, Dana Cobb, David Hugin, and Todd Smith, together with numerous contributors, have brought us four issues of the Appellate Advocate filled with excellent articles relating to appellate law. They have added the Judicial Spotlight feature and photographs to the publication. In addition, this year the Section issued a special edition of the Advocate on the internal operating procedures of all the appellate courts. Cindy Timms, Mike Truesdale, Jerry Bullard, and Samara Kline did a great job getting the information together for that issue.

The Section provided CLE not just for three days in September, but throughout the year. The Appellate Roadshow, under the supervision of committee chair Bill Boyce, was presented in Lubbock and Amarillo. The Section worked with the Judicial Section to provide speakers on appellate topics for their annual meeting. The Section prepared a CLE video for the appellate courts to use for in-house training of new court attorneys, with Daryl Moore taking the lead on this project.

The Section continues to reach out to those in financial need through its pro bono committee, co-chaired by Jeff Levinger and Marcy Greer. The committee is working on a pilot project with the Austin Court of Appeals to identify through the docketing statement cases appropriate for pro bon referral. The committee is also working with the Women's Advocacy Project to obtain appellate precedent on important issues relating to domestic violence. The committee placed several pro bono cases and would like to thank volunteers Bruce Thomas, Buddy Hanby, Becky Melton, Jennifer Nawotka, Meredith Parenti, and John Sepehri for their efforts.

The Professionalism Committee distributed copies of the Standards for Appellate Conduct to all the appellate courts, and the Standards are now posted on all of the appellate courts' websites. Chair Kevin Dubose arranged for appellate lawyers to speak at most of the law schools in Texas on the Standards and appellate ethics. (As a reminder, the Standards require that a copy be provided to the client.)

Heritage and Section History Committee Chairs Jane Webre and JoAnn Storey are helping to

ensure that the rich history of appellate law in Texas is preserved by interviewing former chief justices of the appellate courts and former chairs of the Appellate Section. Those interviews appear in the Advocate on a regular basis.

Finally, the Section continues to improve website content. Thanks to Steve Hayes, all articles from the UT and State Bar appellate courses in 2004 are posted. Website Chair Brett Busby has added a calendar page showing local appellate bar events, a committee page, and a photo page. Scott Rothenberg continues the difficult task of trying to keep the membership directory current. With 1700 plus members, frequent moves, and no ability to link to the State Bar's data base (their fault, not ours), it is a huge undertaking. The Section has also sent more e-mail updates to Section members this year in an effort to pass news on timely.

These are only some of projects and some of the people who have worked to benefit the Section. There are many more—authors, volunteers, speakers, and a host of others—who have given their time. Thanks to everyone.

It has been my privilege to serve as Chair of the Appellate Section this past year. Thanks for giving me the opportunity to work with such a dedicated, intelligent, and fun group of people.

Pam Baron
Immediate Past Chair, Appellate Section
psbaron@austin.rr.com

Laws alone can not secure freedom of expression; in order that every man present his views without penalty there must be spirit of tolerance in the entire population.

– Albert Einstein
(1879-1955)

Warren W. Harris, Bracewell & Giuliani LLP, Houston

As the incoming Chair of the Appellate Section, I would like to express a heartfelt thank you to Pam Baron for all of her work on behalf of the section and its members over the past year. Pam has been genuinely enthusiastic in all of her activities with the section.

If you know Pam, you know she is organized. She has also been a tireless worker and leader. Because of her leadership, the section's committees and council have accomplished a great deal this past year, only a small part of which is outlined in Pam's outgoing Chair's Report.

A common theme you may see is that the section's activities over the past year have focused on service to the section's members. Pam has ensured that our section's members have good reason to join and remain members of the section.

As we begin the bar year, I would like to encourage those section members who are not currently involved with the section to join a committee, write an article for The Appellate Advocate, or otherwise get involved. You can see many of the section's involvement opportunities on the website at www.tex-app.org. Please feel free to send me an email or contact any member of the section council and let us know what you are interested in doing with the section.

I would also like to hear your ideas as to what the section can do for you. If there is something that you believe the section could do to improve your practice and help you service your clients, please let me know.

Warren W. Harris
Chair, Appellate Section
warren.harris@bracewellgiuliani.com

JoAnn Storey, Storey, Moore & McCally, P.C., Houston

Helen Cassidy, November 22, 1940–June 11, 2004

Helen Cassidy received her bachelor's degree with honors from Lamar State University, and her law degree with honors from the University of Houston Law Center. Helen was an accomplished lawyer with a state-wide reputation for her knowledge of and respect for the practice of law. She became board certified in civil appellate law in 1988. She was Chair of the Appellate Practice Section and of the Criminal Law Section of the Houston Bar Association, as well as Chair of the Appellate Section of the State Bar of Texas. She served for many years on the Civil Appellate Law Exam Commission for the Texas Board of Legal Specialization. Helen served as Chief Staff Attorney for the Fourteenth Court of Appeals for almost 15 years before entering private practice, which she enjoyed and excelled at until shortly before her death.

Helen was an advocate for equality for every person. She marched for civil rights in the 60s, women's rights in the 70s, and gay rights in the 80s. She was an early feminist, the first chair of the Texas Women's Political Caucus and a national board member for the National Organization for Women. She was a loyal Democrat, a Democratic precinct chair, a long-time member of the Harris County Democrats, and the Democratic Nominee for Justice of the First Court of Appeals in 1994.

During the State Bar of Texas Advanced Civil Appellate Practice Course this year, the State Bar Appellate Section Council recognized Helen's lifelong commitment to legal excellence by establishing the Helen A. Cassidy Award. Each year, the award will be presented to the person who received the highest evaluations for his or her contribution at the previous year's Advanced Civil Appellate Practice Course.

It is impossible to catalogue all of Helen's achievements or to adequately describe the wondrous impact Helen had upon her family, her friends, and her colleagues. The following remarks—in Helen's own words and in the words of her friends—provide a small window into the person Helen was.

"I'm a loud-mouthed, opinionated, middle class, middle-aged white female, who grew up in a little bitty piss-ant Texas town. And a lot of people think I'm crazy. ... But I never really stopped to wonder why I'm not like other people. What I spend a lot of time wondering is why more people are not like me."—Helen Cassidy

"Helen uses language the way it was meant to be used. She communicates ideas and values directly, clearly, and with just enough volume to cut through the ambient BS. Her language can be coarse and withering when directed at foolish ideas and foolish people but its larger freight is compassion and advocacy for those in need of an advocate."—Tom Fowler.

"Helen didn't sit on the sidelines. As an appellate lawyer, Helen fought for adherence to the rule of law and for the integrity of the appellate process. To carry on Helen's legacy, we will all need to summon our inner Helen; we must (1) keep in mind the goal of fairness and justice; and (2) react with utter derision and scorn to all that is contrary to that goal."—Mark Steiner

"Helen was always pushing the envelope. She was an outspoken public advocate for those who had no voice. She was selfless and spent most of her adult life doing things for other people. Helen was a living example of what one person with non-negotiable integrity can accomplish in a lifetime."—Daryl Moore

"It was people like Helen who carved the way and made it all possible for women. She served as an inspiration to keep going and to help women to do better in the legal profession."—Tracy Willi

"Helen was truly inspirational. What she achieved in helping out others is truly incredible. She was the most plain-spoken and rights-anchored person I have ever known. I do not know another lawyer who was so true to her convictions and who acted on them as a lawyer. She was also funny as hell."—Doug Alexander

"While many of us stand around shuffling our feet and asking if there's anything we can do, or making some token safe gesture, Helen would simply, and quietly, and lovingly do something healing, caring, helpful, and productive. I am going to dedicate myself to working harder to be more like Helen in that respect in the days to come."—Scott Rothenberg

"A phone call to Helen usually resulted in 30 minutes of side-splitting laughter."—Kevin Dubose

"Everything Helen did gained her the respect of her peers and that is almost as important, if not as important, as the love we all have for Helen."—Rusty McMains

"I loved to bask in that wonderful humor."—Sharon Callaway

"One of the most important lessons I learned from Helen was that working around the law and working around judges is just too important to be taken seriously."—Bill Boyce

"Helen taught us that humor really is a good tool in our game and that candor is not a bad trait to have if you're a lawyer."—Mike Hatchell

"Helen was a role model to women in the profession in a lot of ways. Helen never would tell you something that wasn't true; you always knew where you stood with Helen—whether she was happy with you, not happy with you—she always would tell you. I valued her opinion, her judgment and her absolute candor in assessing the merits of a case or the merits of a brief."—Pam Baron

"I learned grammar and how to write concisely and clearly from Dr. Cassidy. I have never known a more intelligent, more good-heated, funnier person than Helen. She was a real friend because she told you the truth about yourself—whether you wanted to hear it or not."—Paul Taparauskas

"Helen was a joy to know."—Ralph Brock

"I don't want to attend any more appellate seminars knowing that Helen won't be there. For me, that was the great attraction—time with Helen, laughing, talking, enjoying each other's company. She was a treasure, and I won't forget her."—Hon. Deborah Hankinson

A Haiku for Helen from Heidi Bloch:

NO WORDS CAN DESCRIBE
HOW YOU'VE TOUCHED EACH ONE OF US
OH YOU WACKY GAL

"We love you, and we miss you, and we want you back."—Hon. Sarah Duncan

Felicia Harris Kyle, Beck, Redden & Secrest, Houston

Felicia Harris Kyle: **FHK**
Chief Justice John Cayce: **JC**

FHK: Chief Justice Cayce, thank you for taking time out of your busy schedule to do this interview.

JC: I'm happy to do it. And thank you, Felicia, for volunteering to interview me. I know you are busy also. I'm glad to see you again and I appreciate the opportunity this has given us to visit with one another.

FHK: Me, too. Well, I guess the best place to start is the beginning:

When and where were you born and raised?

JC: I was born on March 17, 1953 in Rochester, Minnesota shortly after my parents moved there from Fort Worth when my father was appointed to a fellowship at the Mayo Clinic. I have to brag on my dad a little here—at the time, he was the youngest medical student in history to graduate from UT medical school, and to serve as a fellow at Mayo was a high honor. We returned to Fort Worth three years later with a younger brother in tow.

FHK: What did your parents do for a living?

JC: My father practiced surgery in Fort Worth for thirty years. My mother was a homemaker, interior designer and former model. Dad passed away in 1999. Mom now lives in Southern California and is married to a retired Air Force Colonel.

FHK: What were your main interests growing up?

JC: Sports and just about any kind of outdoor activity. School work was a distant second until I went to college.

FHK: I heard you competed in rodeos when you were in high school. Is that true?

JC: Yes. My family moved out to the country when I was ten or eleven and my brother, Mark, and I owned and rode a champion cutting horse. When I entered high school, I began riding bulls and occasionally did some steer wrestling. I quit competing in rodeos after I got stomped on by a bull who had killed a contestant the previous year. He left an impression of one of his hoofs in the middle of my back and nearly stepped on my head. I had a sore back and my hat was ruined but it could have been worse. A couple of my friends went on to compete in the professional rodeo circuit.

FHK: What did you do after high school?

JC: The fall after I graduated in 1971, I went to Abilene Christian University to play football. An ankle injury ended my playing career just a few weeks into the season and I left ACU after one semester. I enlisted in the Navy the following year. Two years later, the team I played with at ACU won the national Division II championship.

FHK: What did you do in the Navy?

JC: I was in a special forces unit called the Seabees which provides combat-ready construction support for Navy and Marine military operations. I joined my battalion shortly after it returned from its last tour of duty in Vietnam and spent the majority of my time constructing facilities at various naval bases overseas. I also participated in some recovery operations. The war was winding down by then so I didn't see any combat.

FHK: When did you decide to go back to college?

JC: After fulfilling my obligation to the Navy, I returned to Fort Worth and began a land surveying business with a friend of mine in 1975. He was a licensed surveyor whom I had worked with during the summers when I was in high school. I enjoyed surveying but I knew it wasn't what I wanted to do the rest of my life. I eventually decided to go back to college the next year.

FHK: What made you decide on UTA?

JC: I have to blame that decision on my wife, Diane. She and I were junior high sweethearts and when I returned to Fort Worth following my military service we got married. At the time, Diane was a hotel executive in Arlington and UT Arlington seemed to be the most logical place for me to go to school. It was also affordable for someone relying on the GI Bill to pay for tuition and expenses.

FHK: What was your major?

JC: I started out as a Journalism major because I liked to write. I changed my majors to Political Science and History when I decided that I wanted to be a lawyer.

FHK: What were the reasons you decided to get into law?

JC: There were several. For one thing, I viewed the law as a way to help others and to be an agent of change in society. I also believed that I had the qualities necessary to be an effective advocate, and the thrill of fighting for a cause in the courtroom appealed to my competitive side. I was also very interested in government and the role the law plays in it.

FHK: Were you active in politics while in college?

JC: During my senior year, yes. I organized UTA's first political club for college students. The first major campaign I worked in was former Chief Justice John Hill's unsuccessful campaign for Governor in 1978. He and my father were good friends and I traveled around North Texas campaigning with members of his staff including his son, Graham. It was a great experience.

FHK: Tell us about your law school experience?

JC: Despite the rigors of law school, my three years at St. Mary's rank among some of the most enjoyable years of my life. The first year, however, started out a little rough. For reasons I can't remember, I didn't apply for admission to law school until the admissions deadline for most schools had passed. I thought I might have to wait another year until I received word that I had been accepted to attend St. Mary's. Several days later, however, before I even had a chance to celebrate, Diane learned that she was pregnant. After a good deal of discussion, I reluctantly agreed to go on to San Antonio alone so Diane could continue working to maintain her health insurance benefits. As a consequence, I spent the first semester at St. Mary's living in a dormitory on the university campus with no transportation. It was a miserable three and a half months but the isolation probably helped me do better in my studies than I

might have otherwise. Our oldest daughter, Heather, was born shortly after the end of the semester and we all went back to San Antonio together.

I worked part-time with a downtown law firm my first two years to supplement the income I received from the GI Bill and student loans. All I remember about my third year was working ridiculously long hours on the law journal as editor in chief.

FHK: I heard you are a good friend and former classmate of Senator John Cornyn. Is that true?

JC: I do consider John to be a very good friend, but we were not classmates. I believe he was a couple of years ahead of me at St. Mary's.

FHK: Did you know what kind of lawyer you wanted to be after law school?

JC: When I entered law school, my ambition was to work in legal aid representing the poor. Those career plans changed when I discovered that I could not support my family and pay off my school loans with the low pay legal aid lawyers were making at the time. Beyond that, all I knew was I wanted to be in the courtroom trying cases or arguing appeals.

FHK: What did you do after law school?

JC: My first job out of law school was as a briefing attorney for the Supreme Court of Texas. I worked for Justice Charles Barrow who later went on to serve as the dean of Baylor Law School. I think my salary was in the neighborhood of $20,000.

FHK: I remember fondly my year working as your B.A. What are your fondest memories working for Justice Barrow?

JC: Working with Justice Barrow was one of the most inspiring experiences of my legal career. I consider him to be one of the finest jurists in the court's history, along with former Chief Justices Joe Greenhill and Jack Pope with whom I also had the privilege of working. Justice Barrow was not only a scholar, but he was also a man of enormous integrity, courage and decency. In the words of our new U.S. Supreme Court Chief Justice, John Roberts, Justice Barrow was a "modest judge" -- he respected precedent and had no agenda other than to strictly interpret and apply the law in a fair and impartial manner. His writing style was crisp and efficient; he never said more in his opinions than necessary to decide the case. I learned a great deal from him and I have always been proud of the fact that he allowed me to write as many opinion drafts as he did.

Justice Barrow also had a great sense of humor. For example, each year he would take his briefing attorneys to his ranch in South Texas to brand calves. I'll never forget when he put me in a pen with five or so calves that were more than a year old, which meant they were about the size of a steer. I chased those "calves" around the pen and tried to throw them while they kicked and drug me through the mud. Judge Barrow almost fell off the fence laughing. I left the ranch with some scrapes and bruised ribs. I think my ego was a little bruised, too.

FHK: What did you do after you left the supreme court?

JC: We returned to Fort Worth and I began practicing trial and appellate law with a law firm whose founding partner, Atwood McDonald, was a former chief justice of my court. My supervising partner was Sam Day, who, as you know, was later appointed as a justice to the court and served with me until his retirement in 2003.

I left the McDonald firm in 1987 to become a partner in Shannon, Gracey, Ratliff & Miller where I stayed until my election to the chief justice position in 1994.

My practice in the early years consisted of commercial litigation and personal injury defense. I stumbled into a specialized category of litigation called "lender liability" when the collection suits I filed on behalf of some bank clients drew counterclaims for fraud, DTPA and other causes of action. They were challenging cases to work on because they typically involved complex commercial transactions and novel theories of recovery. When the banks and savings and loans I represented failed, I switched sides and began representing borrowers who had been sued by federal receivers. When this work began to wind down in the late 80s, I gradually began taking on more and more appellate work. By the early 90s virtually 100% of my practice was civil appellate law.

FHK: What is your most memorable experience as a young lawyer in private practice?

JC: I had many; it's really hard to say which is the "most" memorable. I was involved in several interesting cases in my early years of practice with some of the finest lawyers in the state and I learned valuable lessons from all of them.

Like most young lawyers, I spent my first four or five years living in fear that I would be sued for malpractice. One of the first cases I handled as a young lawyer was a slip and fall. I'll never forget it because I missed the deadline for filing the answer and a default judgment was rendered against my client. I eventually persuaded the trial judge to set it aside, but not before losing some sleep and a whole lot of pride. I learned from my mistake and have never missed a deadline since, although I have had one or two extended from time to time. I also received some "pay back" from the other lawyer who is now a trial judge and a good friend—I've had the occasion to reverse him once or twice over the years.

FHK: You handled some high profile cases as a trial and appellate lawyer. Which one was the most rewarding?

JC: That one is easy: *Elbaor v. Smith* [845 S.W.2d 240 (Tex. 1991)]. This was a medical malpractice case in which my doctor client had been sued along with a hospital and several other doctors for negligence in treating a woman who had been involved in car accident. All of the defendants settled before trial except my client who maintained that he had done nothing wrong. The other defendants entered into a Mary Carter settlement agreement which allowed them to remain parties in the trial and receive reimbursement of their settlement money out of any recovery against my client. At trial, they all sided with the plaintiff and accused my client of negligence. The jury was not allowed to know about the settlement. As you might guess, the jury found my client liable and rendered a verdict against him for several million dollars.

On appeal to the supreme court, I argued that these types of settlement agreements were against public policy. The supreme court agreed, reversed and remanded the case for new trial and overturned several decades of case law upholding the agreements. When the case was retried without the involvement of the settling defendants my client was exonerated.

FHK: What made you decide to run for Chief Justice your first time out instead of Justice?

JC: I wanted to be directly involved in the administration of the court as well as judicial decision-making and I knew that I would be in a better position to do that as chief justice.

FHK: Tell us about your campaign in 1994.

JC: My 1994 campaign proves that timing is everything in politics. I ran against a popular Democrat incumbent with a familiar name who was a tireless campaigner and considered to be unbeatable. I campaigned while maintaining a law practice, raised very little money, lost all the bar polls, and received no endorsements. I won with about 53% of the vote.

FHK: How old were you when you became Chief Justice?

JC: I took office on January 1, 1995, so I was 41 years young at the time. I am told that made me the youngest chief justice in the history of my court and for a while I was the youngest appellate court chief justice in the state. That is not all that remarkable when you consider that former supreme court Chief Justice Tom Phillips was in his late 30's when he became chief, as was Chief Justice Wallace Jefferson, whom I might add is doing a fantastic job.

FHK: In the more than ten years you have been Chief Justice, you have enjoyed a lot of success. What do you view as your greatest accomplishment?

JC: I have been very fortunate throughout my judicial career to be surrounded by exceptional judges and staff like you who make me look good. They are the ones who deserve the credit for whatever success I've had as a chief. Having said that, I think the administrative and organizational changes that have been made during my watch have been good ones. One of my most satisfying, and perhaps most enduring, accomplishments was leading the effort to construct our new court facility. I didn't know about the court's deplorable housing and storage conditions until I arrived in January 1995. Although my initial efforts to address the problem met strong opposition, the Tarrant County commissioners eventually agreed to build us a new facility and gave us virtual control over the design and construction of the facility. We dedicated it in October 1998.

FHK: I know a lot of people believe you should be on the supreme court. Do you have any aspirations in that regard?

JC: It is always a compliment to have my name mentioned as a possible candidate or nominee for supreme court, but I really don't spend a lot of time thinking about it. I love being chief justice of the Fort Worth court and I would love working as a justice on the supreme court. As you know, I ran in a three way primary race for the supreme court in 2002 and lost to two good trial judges from Harris County. Since then, I have been on the short end of several short lists for appointment. If another vacancy occurs on the court, I will consider my options but not until then. There are, by the way, a number of other experienced judges in the state whom I believe would do a fine job as supreme court justices.

FHK: Tell us about your experience sitting on the supreme court as a visiting justice?

JC: Governor Bush appointed me in January 2000 to sit as a justice in a case styled *In re George* [28 S.W.3d 511 (2000)]. Current supreme court justice, Scott Brister, who was then on the trial court, and former Chief Justice Tom Ramey of the Tyler Court of Appeals, were also specially appointed to sit on that case due to the recusal of Justices Gonzalez, Hankinson

and Enoch. The other members of the *George* court included Chief Justice Phillips, Justice Hecht, Justice Owen, Justice Abbott, Justice Baker and Justice O'Neill. The issue we decided was whether attorneys can have access to the work product of their client's previous attorney when that attorney has been disqualified for representing the opposing party in a prior, unrelated matter. The decision was split 5-4 in favor of allowing limited access.

I was recently appointed by Governor Perry to sit on another case, *Hyundai vs. Vasquez*. With the exception of Justices Hecht and O'Neill, the composition of the court is entirely different than it was when I was assigned to hear the George case. It's amazing what a difference five years have made.

FHK: Aside from your work as a judge, you stay very busy with community, family and church activities. Do you mind sharing about your involvement in those activities?

JC: In 1991, Diane and I started a marriage ministry at our church in which we were very actively involved until January of this year. Having struggled in the early years of our marriage, we have always had a passion for sharing the lessons that God taught us for overcoming conflict with other couples who are experiencing crises in their marriages. I also serve on the boards of two faith-based organizations, one of which I helped found about ten years ago to work closely with the family court system in Tarrant County in addressing the needs of children of divorce and their parents and to rehabilitate "deadbeat" dads.

FHK: You just returned from working with a Hurricane Katrina disaster relief team on the Louisiana Gulf Coast. What was that experience like?

JC: I felt very fortunate to have an opportunity to help in some small way. We spent the better part of five days in the New Orleans area during Labor Day week delivering food and supplies to hospitals and relief centers, cleaning out flood damaged homes and participating in isolated recovery efforts. The physical devastation we encountered was indescribable, but it was the heartache and despair of the evacuees that impacted me the most. It was encouraging to see the outpouring of support coming from all over the country and the gratitude of the people we were able to help.

We have since established a base of operations in Algiers, and our mission in the months ahead is to help some of the people in the surrounding community rebuild their homes. I hope to go back in the near future but I don't know if that will be possible.

FHK: What do you do for recreation?

JC: My favorite pastime at the moment is spending time with my wife and two daughters, Heather and Meredith, and playing with my 5 year old granddaughter, Kaitlyn. I recently picked golf back up after 25 years. I also enjoy hunting, snow skiing and water sports.

As you know, I've ridden motorcycles since I was about thirteen years old and I still love it. Over the past few years I've taken motorcycle trips to places all over the continental United States. I rode solo up to Yellowstone last July. Diane rides with me occasionally and really enjoys it so long as I stay within the speed limit and make plenty of pit stops along the way.

When I'm not doing something outdoors, I read anything I can get my hands on. I prefer non-fiction, especially history, and I usually read more than one book at a time.

I recently finished "1776," as well as an account of the sinking of the USS Indianapolis, and I'm about half way through a biography of Winston Churchill. One book I would recommend every lawyer and judge read is, "What Kind of Nation: Thomas Jefferson, John Marshall and the Epic Struggle to Create a United States" by an attorney named James Simon. It does an excellent job of documenting the important role Chief Justice Marshall played in shaping the role of the judiciary in the early days of our nation's history and the opposition he faced.

FHK: What type of motorcycle do you ride?

JC: Harley Davidson Electra Glide. When I was younger, I used to call them "geezer bikes."

FHK: I remember you told me that you competed in marathons and triathlons. Do you still do that?

JC: No, I haven't competed in either type of event since 1991. You can probably tell that by looking at my waistline. I still run, swim and ride a bicycle for exercise but the distances I cover are much, much shorter. Rock climbing was another one of my favorite recreational pursuits before I regained my sanity.

FHK: What do you know now as an appellate judge that you wish you knew as a practicing lawyer? Any words of wisdom you can share?

JC: As a practicing appellate lawyer, I don't know that I fully appreciated just how demanding the work of an intermediate appellate court judge has become on a court our size. If there is anything I regret about my job it is that, to keep up with the substantial volume of work we have, I have had to strictly ration the amount of time I devote to cases and rely on my staff to assist with opinion drafting more than I would prefer. Not only are we required to participate in, research and write hundreds of opinions each year on a wide range of legal subjects, in addition to ruling on hundreds of motions, but we are under constant pressure to expedite our work to keep up with a fast-growing caseload. The result is that the overall quality of our work sometimes suffers.

Short of adopting drastic measures such as giving courts of appeals discretionary review power or the authority to issue one-sentence summary affirmances, the only real solution to this problem is for the legislature to add justices where needed. In the meantime, appellate lawyers can help relieve the tension by writing brief briefs that contain full and accurate citations and record references; keeping requests for extensions of time and other pre-submission motions to a minimum; requesting oral argument only when necessary for a meaningful review of the appeal; and filing motions for rehearing only when there is a sincerely held belief that we got it wrong. By conserving the court's time, these simple practices can help us give our cases more of the attention they deserve.

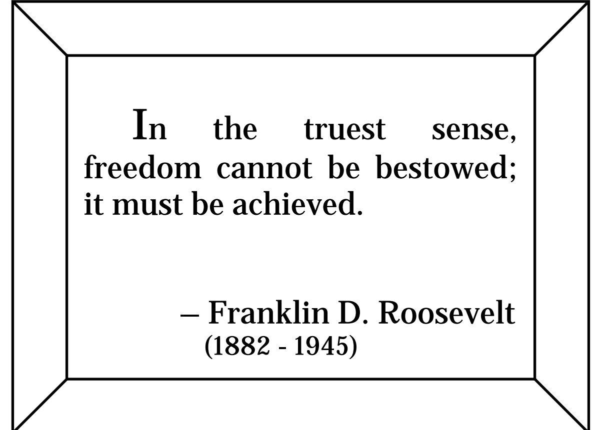
FHK: How do you hope history remembers you as Chief Justice of the Second Court of Appeals?

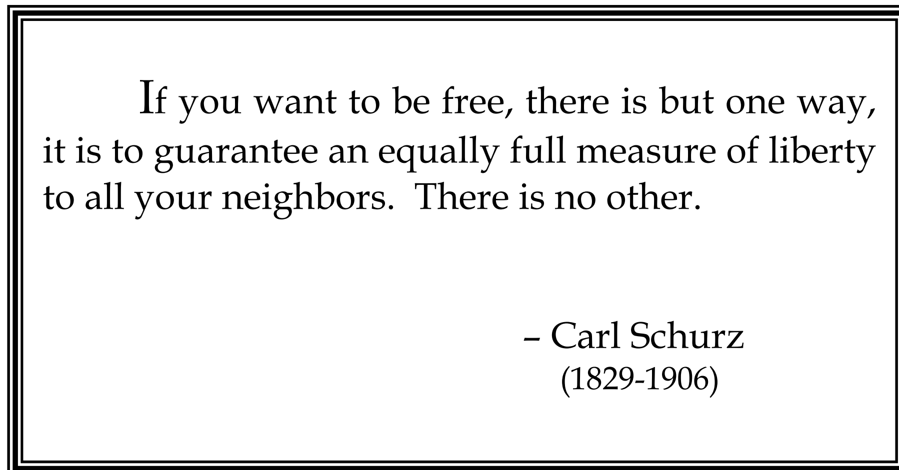
JC: As a court administrator, I would like to be remembered for showing kindness and respect to everyone from the janitor up and for working hard to serve the very best interests of the court, its members and the practicing bar. As an appellate judge, I hope I'll be remembered as someone who was always willing to listen to the considered views of his colleagues, but who, in the end, had the integrity to do what he believed was right rather than what was popular or expedient. Mark Twain

once said, "Whenever you find yourself on the side of the majority, it's time to pause and reflect." I am grateful that, as an appellate judge, I have the time to pause and reflect on my decisions. I may not always make the right call, but whether I do or not I hope to be remembered as an honest, fair and thoughtful judge who could always be counted on to be faithful to the law and the facts regardless of the outcome.

FHK: I have no doubt that you will, Judge Cayce. Thank you again for spending this time with me.

JC: You're welcome. It was fun.





Questions/Answers from Past Appellate Section Chair Ralph H. Brock

JOANN STOREY, Storey, Moore & McCally, P.C., Houston

I'm here today with Ralph Brock, who was the first Chair of the Appellate Section of the State Bar of Texas. And we are here to get Ralph's comments about the formation of the Appellate Section of the State Bar of Texas.

JoAnn Storey: **JS**
Ralph H. Brock: **RHB**

JS: Good afternoon, Ralph.

RHB: Good afternoon, JoAnn.

JS: Let's talk about your involvement in the Appellate Section. You were the first chair of the Section.

RHB: Um-hmm–by accident.

JS: Well, start at the beginning. Tell us how you got involved, what prompted that and some of the early steps that you took, and others with you, to create the section.

RHB: Well, it wasn't my idea at all. I went to an appellate seminar in San Antonio in 1985. And during the seminar Mike Hatchell and Michol O'Connor made an announcement to the group about the possibility of starting an appellate section, and asked everybody who was interested to leave a business card. So, I left my business card. After I didn't hear anything, I finally asked Mike if we were going to do anything. And in October, 1986, during the Fifth Circuit Seminar in New Orleans, Mike, Marvin Sloman and I decided to constitute ourselves an ad hoc committee to get an appellate section started. Later, Mike suggested we bring in Roger Townsend. It was really the four of us that kind of got it going. Mike contacted the State Bar and said, "How do you organize a section?" At that time, it was pretty simple. You had to have a petition with about 50 names, had to have a set of bylaws, and a two-year budget of around $2000 each year. I contacted the State Bar asked for sample bylaws, and started putting together the bylaws. Mike did the petition and drafted a statement of need for the appellate section. Marvin prepared the proposed budget. And this took about six months, going back and forth with correspondence, but we put it all together and it finally made it to the Board agenda. A section has to be approved by the Board.

JS: The Board of the State Bar?

RHB: State Bar Board, yes. The Board was meeting in El Paso, and I was delegated to go to the Board meeting and present the case for the creation of the section, because I lived the closest to El Paso. And I didn't really want to do that.

JS: Okay.

RHB: And I asked Joe Nagy, the president-elect who was from Lubbock, whether I really needed to be there. And he said, "Nah, it'll go through automatically." And it did. I found out later, they put these things on a consent agenda as a rule.

JS: Alright.

RHB: So, I didn't go to El Paso, and the next thing we knew, we had been approved and …

JS: Off and running.

RHB: … off and running, except we had to get organized at this point. We had an appellate seminar coming up. And I guess, because of my involvement in getting the Section started, I was on the planning committee. We met here in Austin. And this is the famous Oyster Bar episode.

JS: I was wondering where that came in. Tell us about that?

RHB: After the planning committee, Mike suggested that we would go over to the Oyster Bar, which was next door to the State Bar building, and see what we needed to do to get the section organized.

JS: I'm sorry to interrupt, but who is "we" at this point?

RHB: Mike was there, and Roger, and Marvin and Wayne Scott, and John Watts, and I. And we were sitting there having a beer and talking about who would be what officers and how we would get it going.

JS: When did the Oyster Bar meeting take place? What year was that?

RHB: It was in April, 1997.

JS: And, at this point, the section has been approved by the State Bar Board?

RHB: Yes.

JS: So, we have the formality in place, and now it's a matter of …

RHB: Really getting a slate together. I thought Mike or Roger or somebody like that should be the chair. At that time the Texaco–Pennzoil case was going on. Really big litigation–billions of dollars. Mike was on one side Roger was on the other. Mike said, "I can't do it right now," and Roger said he couldn't, either. So they picked me to start off as the first chair. It was by default rather than by merit.

JS: What was the next step after the Oyster Bar meeting?

RHB: Well, to try just get the word out. The State Bar may have included something in the packets at the annual meeting. And we got a room reserved at the Annual Meeting, and I didn't know if anybody was going to be there or not, because I didn't know how much interest there was. We had at least the minimum of 50 signatures that we needed, but we didn't know if they would come to the Annual Meeting or not.

JS: Where was the Annual Meeting held that year?

RHB: It was in Corpus.

JS: Alright.

RHB: And I was going to be the Chair, and I'd never been on any kind of a section council. And I happened to run into a fellow, and he said, "Well, I'm chair of the Litigation Section, and we are going to have a council meeting in here in a little while, if you'd like to just come along and sit in on it." Of course, I didn't know this was one of the biggest sections in the Bar, but I sat in on the Litigation Section council meeting just to see what happened in a council meeting. And that was the only education that I had before we started.

JS: At the Annual Meeting–did people come?

RHB: Yes, we had a crowd of about twenty lawyers and judges. The program was a preview by Rusty McMains of what to expect on the upcoming specialization exam. A lot of the people who were there

had signed up for the specialization, and that was one of the ways we promoted the Annual Meeting, offering a chance to get a preview of the exam. So, a lot of the people who were there were planning to take the exam.

JS: What was your greatest challenge during your tenure as chair?

RHB: I think my biggest challenge was trying to hold council meetings as cheaply as I could because we didn't have a lot of money to pay for them with. So, we'd try to hold the council meetings in conjunction with seminars and other things where we knew everybody was going to be there anyway.

JS: Can you tell us what you feel the greatest accomplishment was that you had during the year that you were chair?

RHB: I think it was getting Lynne Liberato to edit the newsletter.

JS: Tell us about that.

RHB: After our meeting had ended, Lynne came up told me she had journalism experience, and asked did I have anyone to edit the newsletter? And I said, "No." And I had wondered who I was going to get to edit the newsletter, and this just fell into my lap. And so I said, "You're hired."

JS: {Laughs}

RHB: And she edited it for five years after that.

JS: And did you step in after she stepped out?

RHB: I did.

JS: Can you remember when that was.

RHB: It was in 1992.

JS: And how long were you editor of the newsletter?

RHB: I was editor for the next six years. I was involved in it from the beginning, laying it out and sending it to the State Bar to be reproduced. I think we just made up the name, the Appellate Advocate. The first issue was eight pages.

JS: Really?

RHB: I chose red for the color bar because red and black were my school colors.

JS: So, the way The Advocate looks today … it hasn't changed has it?

RHB: Not really. No.

RHB: One of my favorite magazines is the Atlantic Monthly. So I copied their style, where a main article would be two columns wide and something that wasn't the lead story would be three columns. And I used about the same size type font that they used–or tried to …

JS: Very interesting. Well, I've very much enjoyed visiting with you. I've learned quite a bit, as I expected I would. So, I just want to say, thank you very much for taking the time to answer my questions.

RHB: Well, thank you. I appreciate the opportunity. I've enjoyed it very much.

JS: Thank you, Ralph.

Interlocutory Appeals from Orders Denying Arbitration Under the Texas Arbitration Act: Federal Law Does Not Preempt Jurisdiction

Roger W. Hughes, Adams & Graham, LLP, Harlingen

A party that files an interlocutory appeal over the denial of arbitration under Texas law now faces the argument that federal law deprives Texas appellate courts of jurisdiction. Often, a contract containing an arbitration clause arguably affects interstate commerce. In that case, a party may seek to enforce arbitration under both the federal and state laws: the Federal Arbitration Act ("FAA") and the Texas Arbitration Act ("TAA"). 9 U.S.C. §1, *et seq.*; TEX. CIV. PRAC. & REM. CODE ANN. §171.001, *et seq.* (Vernon 2005). The TAA provides an interlocutory appeal from an order denying relief under the TAA; however, review of a denial of relief under the FAA must be by mandamus. TEX. CIV. PRAC. & REM. CODE ANN. §171.098 (Vernon 2005); *Jack B. Anglin Co., Inc. v. Tipps,* 842 S.W.2d 266, 271-72 (Tex. 1992). In short, the unsuccessful movant must pursue both mandamus and interlocutory appeal in order to obtain the "quick and inexpensive" resolution by arbitration. *See* Elizabeth Bloch, Stop the Madness: There's No Need for Dual Proceedings in Arbitration Appeals, THE APPELLATE ADVOCATE, p. 9 (Spring 2003). In most cases, the two proceedings are consolidated; if the appellate court orders arbitration under the FAA, the TAA claim is deemed moot because full relief was granted under the FAA. *In re Valero Energy Corp.*, 968 S.W.2d 916, 917 (Tex. 1998); *In re L & L Kempwood Assoc.*, L.P., 9 S.W.3d 125, 128 (Tex. 1999).

However, three courts of appeal have held that if the FAA applies to the contract, then relief under the TAA is preempted and an interlocutory appeal must be dismissed for want of jurisdiction. *In re Mony Securities Corp.*, 83 S.W.3d 279, 283 (Tex. App.—Corpus Christi 2002, orig. proc.); *Pennzoil Co. v. Arnold Oil Co., Inc.*, 30 S.W.3d 494, 498 (Tex. App.—San Antonio 2000, no pet.); *Verlander Partnership v. Verlander*, 2003 WL 304098, *3 (Tex. App.—El Paso 2003, no pet.) [unpublished]. However, in *Texas Commerce Bank v. Univ. Tech. Inst. of Tex., Inc.*, 985 S.W.2d 678 (Tex. App.—Houston [1st Dist.] 1999) the Houston court appears to have rejected the preemption argument. *Id.* at 679-80. Under this "no jurisdiction" rule, the appellate court then may summarily dismiss the mandamus petition over the FAA without opinion.

The upshot is that, if the appellee concedes the contract affects interstate commerce, the appellate court dismisses the TAA interlocutory appeal for want of jurisdiction and then may summarily deny the FAA mandamus without discussion or analysis. *See e.g. Peterson Constr. Co. v. Sungate Dev., L.L.C.*, 2003 WL 22480613 (Tex. App.—Corpus Christi-Edinburg 2003, pet. denied) (memorandum opinion). Given that trial courts often do not make findings when denying arbitration, the party demanding arbitration now faces summary, unexplained denial in both the trial and appellate courts.

This "no jurisdiction" rule cannot be justified under federal or Texas law. Texas law creates jurisdiction to review the denial of relief under the TAA, whether or not the contract affects interstate commerce. The FAA does not preempt granting arbitration under the TAA or appellate review of a denial of TAA relief. The "no jurisdiction" rule not only makes denying arbitration easier than granting it; it encourages appellees to engage in "position-shifting" and frustrates review by the Texas Supreme Court.

A. TAA provides for interlocutory appellate review of denial of TAA relief regardless of whether the contract affects interstate commerce.

The court of appeals has jurisdiction of an order (1) denying a motion to compel arbitration under the TAA, or (2) staying a pending arbitration

proceeding. TEX. CIV. PRAC. & REM. CODE ANN. §171.098(a) (Vernon 2005). No part of the TAA provides it does not apply to contracts affecting interstate commerce. The vacation of an FAA award can be appealed under the TAA section 171.098. *See J.D. Edwards World Solutions Co. v. Estes, Inc.*, 91 S.W.3d 836, 839 (Tex. App.—Fort Worth 2002, pet. denied). Therefore, there is no express reason under section 171.098(a) why the court of appeals cannot review an order denying relief under the TAA simply because the FAA might also apply.

B. The FAA does not preempt enforcement of an arbitration clause under state law or appellate review of orders denying relief under state laws that permit arbitration.

1. Federal preemption of state jurisdiction requires proof Congress intended to totally displace state courts as well as state law.

There are two types of federal preemption. There is "ordinary preemption" in which the state law conflicts with federal law and is preempted. *Mills v. Warner Lambert Co.*, 157 S.W.3d 424, 426-427 (Tex. 2005). This can occur in three ways. *Id.* at 426 citing *Great Dane Trailers, Inc. v. Estate of Wells*, 52 S.W.3d 737, 743 (Tex. 2001). First, the federal act expressly preempts state law. *Id.* Second, implied preemption can occur when the statute's scope indicates a Congressional intent that federal law preempt the field exclusively. *Id.* Third, implied preemption occurs when there is an actual conflict such that the party cannot comply with both federal and state law or the state law obstructs the Congressional purposes. *Id.* at 427. However, ordinary preemption simply creates an affirmative defense; it does not oust the state court of jurisdiction to consider the dispute. *Id.* citing *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987).

"Preemption of jurisdiction" occurs only when the federal law establishes not only that federal law controls, but that Congress intended the claims be heard exclusively in a federal forum. *Id.* This kind of preemption rests on the creation of an exclusive federal forum rather the mere existence of a preemption defense. *Id.* The presumption of concurrent jurisdiction with state courts can be rebutted by express statutory language, unmistakable legislative history, or a clear incompatibility between state court jurisdiction and federal interests. *Id.* at 428.

2. The FAA does not preempt either state court jurisdiction or state laws that permit arbitration.

In light of the Texas Supreme Court's exhaustive review of preemption in Mills, it is clear that the FAA (1) does not create "preemption of jurisdiction" to review the denial of relief under the TAA, and (2) does not create "ordinary preemption" against those parts of the TAA that would compel arbitration.

The Congressional purpose of the FAA was to foreclose state legislative attempts to undercut enforcement of arbitration agreements. *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984). It preempts state laws that withdraw the power to enforce arbitration agreements or that are unfavorable to arbitration. *Id.* at 16 n.10; *Great West. Mort. Corp. v. Peacock*, 110 F.3d 222, 230 (3rd Cir. 1997), cert. denied, 522 U.S. 915 (1997); *New England Energy, Inc. v. Keystone Shipping Co.*, 855 F.2d 1, 4-5 (1st Cir. 1988).

The FAA preempts only laws frustrating arbitration. *Southland Corp.*, 465 U.S. at 16; *Specialty Healthcare Management, Inc. v. St. Mary Parish Hosp.*, 220 F.3d 650, 654 (5th Cir. 2000); *New England Energy*, 855 F.2d at 4-5. The FAA does not contain any express preemptive provision, "nor does it reflect a congressional intent to occupy the entire field of arbitration." *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 477 (1989). The FAA does preempt state law but only to the extent that it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Hines v. Davidowitz*, 312 U.S. 52, 67

(1941); *Volt Information Sciences, Inc*., 489 U.S. at 477. State arbitration laws may apply when they do not undermine the goals of the FAA. *Specialty Healthcare Management, Inc*., 220 F.3d at 654; *ASW Allstate Painting & Const. Co., Inc. v. Lexington Ins. Co*., 188 F.3d 307, 310 (5th Cir. 1999). The Texas Supreme Court has held that the procedural sections of the TAA apply to determining a motion to enforce under the FAA. *Jack B. Anglin Co*., 842 S.W.2d at 268-69; *Trico Marine Services, Inc. v. Stewart & Stevenson Tech. Serv., Inc*., 73 S.W.3d 545, 548 (Tex. App.—Houston [1st Dist.] 2002, no pet.).

It does not undermine the FAA to allow state appellate courts to review the denial of relief under the TAA simply because the contract also affects interstate commerce. States may ordinarily establish their own procedural rules for the arbitration process. *Volt Information Sciences, Inc*., 489 U.S. at 476 ("[t]here is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate"). The FAA does not pre-empt state court rules of appellate jurisdiction. *State ex rel. Dunlap v. Berger*, 567 S.E.2d 254, 271 (W.Va. 2002), cert. denied, 537 U.S. 1087 (2002); *Bush v. Paragon Prop., Inc*., 997 P.2d 882, 887-88 (Wash. App. 2000). Therefore, the FAA does not pre-empt state procedure concerning whether orders granting or denying arbitration can be appealed. *Wells v. Chevy Chase Bank FSB*, 768 A.2d 620, 626 (Md. 2001); *Toler's Cove Homeowners Ass'n, Inc. v. Trident Const. Co., Inc*., 586 S.E.2d 581, 584 (S.C. 2003); *Stein v. Geonesco, Inc*., 17 P.3d 1266, 1269-70 (Wash. App. 2001); *Simmons Co. v. Deutsche Finan. Serv. Corp*., 532 S.E.2d 436, 439-40 (Ga. App. 2000); *Weston Sec. Corp. v. Aykanian*, 703 N.E.2d 1185, 1188-89 (Mass. App. 1998, rev. denied). *See also* Annotation Pre-emption by Federal Arbitration Act of State Laws Prohibiting or Restricting Formation or Enforcement of Arbitration Agreements, 108 A.L.R. FED. 179, §§18, 18.5 (1992).

The Texas Supreme Court has stated that that the FAA will pre-empt TAA restrictions on what agreements to arbitrate are enforceable. *In re Nexion Health at Humble, Inc*., ___ S.W.3d ___, 2005 WL 1252271, *2 (Tex. May 27, 2005). There the issue was whether the FAA pre-empted TAA section 171.002(c)'s requirement that a personal injury claimant's attorney sign the agreement. *Id*. at *2. The factors that determine whether the FAA preempts the TAA are whether (1) the agreement is in writing, (2) it involves interstate commerce, (3) it can withstand scrutiny under traditional contract defenses, and (4) state law affects the enforceability of the agreement. *Id*. Because TAA section 171.002(c) added an additional requirement (counsel's signature), it interfered with enforceability under the FAA and was pre-empted. *Id*. The broad statement about pre-empting the TAA must be read as applying only to enforceability of the agreement itself. It should not be read as applying to a court's jurisdiction to grant relief under the TAA.

Two cases indicate the Texas Supreme Court has not accepted the argument that the FAA preempts state appellate court jurisdiction. *See In re L & L Kempwood Assoc., L.P*., 9 S.W.3d at 125; *EZ Pawn Corp*., 934 S.W.2d at 87. In *Kempwood*, when the Texas Supreme Court determined the FAA controlled, it dismissed the companion appeal as moot. *Id*., 9 S.W.3d at 128. If the FAA preempted the TAA totally, then the Texas Supreme Court would have dismissed the appeal for want of jurisdiction. Likewise, in EZ Pawn, after this Court determined the contract selected the FAA, it denied the writ of error on the companion TAA appeal. *EZ Pawn*, 934 S.W.2d at 88; *see EZ Pawn Corp. v. Rodriguez*, Case No. 96-0469, 40 Tex. S. Ct. J. 85 (Tex. 1996). The companion appeal was not "dismissed for want of jurisdiction." *Id*.

Some quote *Jack B. Anglin Co*., 842 S.W.2d at 271, as support for the "no jurisdiction" rule. There, the Texas Supreme Court said that orders denying a motion to compel under the FAA are not reviewed by interlocutory appeal under section 171.098(a). *Id*. at 272. However, Anglin

did not hold that any appeal under the TAA must be dismissed if the FAA applied; that was not an issue because Anglin did not pursue an appeal. *Id*. at 268. The entire passage makes it clear that the FAA preempts only state laws that prevent arbitration.

However, under the supremacy clause of the United States Constitution, U.S. Const. art. VI, cl. 2, the Federal Act preempts all otherwise applicable state laws. *Perry [v. Thomas*], 482 U.S. [483,] 489 107 S.Ct. [2520], 2525 [(1987)]; *Southland Corp*., 465 U.S. at 14-16, 104 S.Ct. at 860-61 (Federal Act creates substantive rules applicable in state and federal courts to prevent states from limiting the enforceability of arbitration agreements); *see also Batton [v. Green*], 801 S.W.2d [923,] 927 [(Tex. Civ. App.—Dallas 1990, no writ)] (the Federal Act is substantive and is the law of Texas).

The primary purpose of the Federal Act is to require the courts to compel arbitration when the parties have so provided in their contract, despite any state legislative attempts to limit the enforceability of arbitration agreements. [citations omitted]. To this end, the Federal Act preempts state statutes to the extent they are inconsistent with that Act. [citations omitted].

Jack B. Anglin Co., 842 S.W.2d at 271 [emphasis added]. The entire passage, including the citation to Southland Corp., makes it clear that preemption is limited to state laws that are inconsistent with enforcement of arbitration agreements.

C. Public policy should favor hearing appeals over denial of state law remedy even if the contract affects interstate commerce.

The "no jurisdiction rule" is a judge-made rule that is not commanded by either the FAA or the TAA. Therefore, the courts can and should abrogate it.

The "no jurisdiction" rule poses a hidden procedural roadblock to compelling arbitration. A TAA appeal requires reviewing briefs and writing a dispositive opinion; a mandamus petition challenging the denial of FAA relief can be summarily denied without an opinion. TEX. R. APP. P. 47.1, 47.4, 52.8(a). The judicial bias against entertaining mandamus petitions is well known; mandamus power is to be exercised "sparingly and deliberately." *Deloitte & Touche LLP v. Fourteenth Court of Appeals*, 951 S.W.2d 394, 396 (Tex. 1997); Elaine Carlson, MCDONALD & CARLSON TEXAS CIVIL PRACTICE 2D §35:1 (1998). Moreover, appellate jurisdiction is mandatory; mandamus power is a matter of privilege. Carlson at §35:10. Because the rule requires automatic dismissal of the TAA appeal, the appellant is left with only the disfavored, discretionary remedy of mandamus.

Thus, the "no jurisdiction" rule poses a subtle pressure to find the FAA applies and invoke preemption. This rule hinders only appeals over the denial of arbitration because section 171.098(a) does not apply to orders compelling arbitration.

Second, the "no jurisdiction" rule encourages position-shifting by the party opposing arbitration. The TAA contains provisions barring enforcement of certain arbitration agreements, *e.g*., personal injury claims, workers compensation benefits, the consideration exceeds $50,000.00, etc. TEX. CIV. PRAC. & REM. CODE ANN. §171.002(a) (Vernon 2005). Precisely because the FAA would preempt those restrictions, the appellee will often argue to the trial court that the contract does not affect interstate commerce and the TAA restrictions bar enforcement. If trial court agrees and denies arbitration, the appellee is free to do an "about face" in the court of appeals, concede the FAA applies, and the TAA appeal is dismissed for lack of jurisdiction. Again, this leaves the appellant with only the disfavored remedy of mandamus.

Third, if the FAA mandamus is summarily denied, effective Supreme Court review is hindered. Because the lower courts have not analyzed or sharpened the issues, the petitions to the Supreme Court must address every issue

raised in the trial court. Given the Supreme Court's fifteen page limitation on the petitions for review and for mandamus, petitioner must waste valuable pages addressing frivolous issues rather than focusing on the critical ones. The result is the Supreme Court is deprived of a focused analysis that would enable the Court to determine whether the case presents an error worthy of its attention.

Texas public policy strongly favors arbitration. *Jack B. Anglin Co.*, 842 S.W.2d at 268. The Legislature has given the courts of appeal jurisdiction to hear interlocutory appeals from an order denying arbitration under the TAA. TEX. CIV. PRAC. & REM. CODE ANN. §171.098(a) (Vernon 2005). Section 171.098(a) does not exclude contracts affecting interstate commerce. The "no jurisdiction" rule obstructs Texas' policy favoring arbitration by relegating interlocutory enforcement of arbitration under all contracts that affect interstate commerce solely to the disfavored remedy of mandamus. Therefore, the judge-made "no jurisdiction" should be ended in order to implement Texas' strong public policy and the jurisdiction the Legislature gave the courts of appeal to hear TAA appeals.

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THE DALLAS BAR ASSOCIATION'S APPELLATE LAW SECTION PRESENTS ITS FALL CLE EVENT—

Judges and Juries:

Perspectives on the Jury System and Appellate Review presented by Texas Supreme Court Justice Scott Brister and United States District Judge Sam Sparks (1 hr.)

and

Perspectives on Judicial Independence presented by Former Texas Supreme Court Justice James Baker and UT Law Professor Lino Graglia (1 hr.)

November 1, 2005 at the Belo Mansion
3:00 p.m. to 5:15 p.m. (registration begins at 2:45 p.m.)
CLE credit application pending
Reception (with refreshments provided) to follow

Please forward your registration information (name, law firm, and address) and $40 registration fee (with checks made payable to the DBA Appellate Law Section) to Michael Northrup as indicated below. Checks mailed after October 21, 2005 must be for $50 (space permitting).

c/o Michael Northrup
Treasurer, DBA Appellate Law Section
Cowles & Thompson
901 Main Street, Suite 4000
Dallas, TX 75202
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Beth M. Fain, Winstead Sechrest & Minick, Houston
Paul Simon, Winstead Sechrest & Minick, Houston

In the summer of 2004, by a five-to-four decision, Texas fell in line with the vast majority of American jurisdictions in holding contractual jury waivers are enforceable.[1] *In re Prudential Ins. Co.*, 148 S.W.3d 124 (Tex. 2004). Because it is, of course, a supreme court decision, *In re Prudential* is the first Texas contractual-jury-waiver case that controls across the state and is, moreover, the first case to address the issue of whether a trial court's failure to enforce such a provision is entitled to mandamus review. Earlier, the Houston Court of Appeals held that contractual jury waivers are enforceable in Texas the year before. *See In re Wells Fargo Bank Minnesota N.A*, 115 S.W.3d 600 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding [mand. denied]).

At least one district court opinion from within all thirteen (13) federal circuits and the courts of eighteen (18) states have addressed the issue of the enforceability of contractual jury waivers.[2] Of these, only Georgia has held that jury waivers are *per se* unenforceable, but only if the contract is governed by Georgia law. *See Bank South, N.A. v. Howard*, 444 S.E.2d 799 (Ga. 1994). On the other hand, Georgia courts will enforce a contractual jury waiver if the contract is governed by the laws of another state, and that state's substantive law would enforce the waiver. *See Manderson & Assoc. v. Gore*, 389 S.E.2d 251 (Ga. App. 1989).

TEXAS COURTS CONSIDER CONTRACTUAL JURY WAIVERS

Rivercenter Associates v. Rivera

Contractual jury waiver enforceability first appeared to confront the supreme court in 1993. *See Rivercenter Assocs. v. Rivera,* 858 S.W.2d 366 (Tex. 1993). In that case, the supreme court was seemingly presented with the question of whether pre-litigation contractual jury waivers should be enforced in Texas, but declined to consider the question because the party seeking to enforce the waiver waited too long to attempt to enforce it. *Id.* at 367–68. The underlying cause of action involved a commercial lease and surety agreements. *Id.* at 367. Rivercenter, the lessor, sued the lessee and its surety to recover rental payments after the lessee defaulted on its lease, and the defendants filed a jury demand. *Id.* Four months later, Rivercenter filed a motion to quash, claiming defendants waived their right to a jury by contract. *Id.* The trial court overruled the

[1] In the Spring of 2005, Sinead O'Carroll addressed the mandamus aspects of *In re Prudential*. *See Has the Supreme Court of Texas Altered What it means to Have "No Adequate Remedy by Appeal" and Other Questions Raised by the Court's Recent Opinions In re Prudential and In re AIU,* Vol. XVII, No. 4, THE APPELLATE ADVOCATE, at 11–15. This paper focuses only on the enforceability of contractual jury waivers, not on the mandamus points covered by O'Carroll.

[2] *See, e.g., Great Earth Int'l Franchising Corp. v. Milks Dev't.*, 311 F. Supp. 2d 419 (S.D.N.Y. 2004) (enforcing jury waiver provision in franchise agreement and stating they are favored in commercial agreements); *Connecticut Nat'l Bank v. Smith*, 826 F. Supp. 57 (D.R.I. 1993) (enforcing jury waiver provision in corporate loan and security agreement and stating such waivers are "repeatedly" enforced); *Lowe Enters. Residential Partners, L.P. v. Eighth Judicial Dist.,* 40 P.3d 405 (Nev. 2002) (enforcing waiver in commercial note and guarantee agreements); *L & R Realty v. Connecticut Nat'l Bank*, 715 A.2d 748, 755 (Conn. 1998) (enforcing jury waiver provision in commercial loan agreement and stating courts tend to treat commercial jury waiver provisions as "presumptively enforceable"); *Barclays Bank v. Heady Elec. Co.*, 571 N.Y.S.2d 650 (N.Y. App. Div. 1991) (enforcing a jury waiver provision in a commercial note agreement and stating that jury waivers are generally enforceable); *but see Grafton Partners, L.P. v. Superior Court*, 116 P.3d 479 (Ca. 2005) (holding contractual jury waiver unenforceable and noting that, in California, pre-dispute jury waivers must conform to state statute).

motion to quash and Rivercenter then brought an action seeking mandamus relief. *Id.* at 368.

In the mandamus action, the Texas Supreme Court noted Rivercenter had been notified of the jury demand the day it was filed, but delayed filing its motion to quash for over four months. *Id.* Based on this, the supreme court stated it would not decide the jury waiver issue: "We do not reach the parties' arguments concerning the constitutionality of jury waiver provisions generally or those concerning the enforceability of the provision at issue in this cause." *Id.* at n.2.

In re Wells Fargo

In 2003, the Houston Court of Appeals decided *In re Wells Fargo*. 115 S.W.3d 600 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding [mand. denied]). *Wells Fargo* was a mortgage note and related guaranty suit; both instruments had jury waivers. The waivers stated, in all capital letters and bold print, "Maker hereby agrees not to elect a trial by jury of an issue triable of right by jury, and waives any right to trial by jury fully to the extent that any such right shall now or hereafter exist . . . ." *Id.* at 603. Nonetheless, the mortgagor filed a jury demand and the suit was put on the jury docket. Wells Fargo immediately filed a motion to enforce the jury waiver, but the trial court denied the motion. Subsequently, Wells Fargo petitioned the Houston Court of Appeals for mandamus relief. *Id.*

In considering the enforceability of the waiver under Texas law, the court noted that parties in Texas frequently waive the constitutional right to a jury by means other than contractual jury waivers including, "agreeing to a bench trial . . . failing to timely pay a jury fee . . . failing to timely request a jury trial . . . failing to appear for trial . . . [and] failing to object to a bench trial despite a properly perfected jury request." *Id.* at 606–07. Additionally, the court stated that while the issue had not yet been decided in Texas, contractual jury waivers had already been enforced in the majority of states that had considered the issue.

The mortgagor claimed the jury waiver provision was invalid because it was not executed by all real parties (although its general partner signed the loan documents for the partnership, it did not sign them in its individual capacity), and because the waiver was not given knowingly and voluntarily.[3] In rejecting the first claim, the court noted the general partner had signed the loan documents and was a "maker," a broad term as to the instruments which included "legal representatives," which would include a general partner. *Id.* at 309.[4]

The court next considered the mortgagor's claim that the waiver was not entered into knowingly and voluntarily. *Id.* at 609. Because the waiver stated on its face it was given knowingly and voluntarily, the court held the burden shifted to the mortgagor to show that it was not. Conceding the mortgagor's claim that the form was standardized, the court still found no evidence in the lower court record to support the claim the term was "take it or leave it." *Id.* at 610.[5]

The mortgagor further claimed the waivers could not have been knowing and voluntary because the parties could not know, at the time they signed the waivers, the claims that might arise in the future. *Id.* at 610. The court disposed of this argument by noting it was equally applicable to arbitration agreements which are routinely enforced. *Id.* at

[3] The court also considered the impact of a choice of law issue because Wells Fargo and Cyrus disagreed as to whether Texas or Louisiana law applied to the dispute. The court determined that a choice of law analysis was unnecessary, however, because there was no conflict of law between Texas and Louisiana on the issue of contractual jury waivers. Similarly, the court dismissed Cyrus's claim that the waiver was invalid because it would be a nullity under Louisiana law, noting that this claim was inconsistent with Mortgagor's position that it had a right to a jury trial. *See id.* at 605–08.

[4] The court also disposed of the alleged lack of proper execution argument by observing the note's obligations were joint and several. *Id.* at 309.

[5] The court also rejected the mortgagor's explanation for the lack of record evidence–lack of time to submit evidence–because the mortgagor did not object to the lack of nor ask for more time in the trial court. *Id.* at 610.

610 (citing *Prudential Sec. Inc. v. Marshall*, 909 S.W.2d 896, 898 (Tex. 1995)). Additionally, the court noted the waivers themselves provided that they were intended to cover, "'each instance and each issue as to which the right to a trial by jury would otherwise accrue,'" sufficiently covering all potential litigation. *Id.* at 610.

The court conditionally granted the writ of mandamus. *Id.* at 611–12. In doing so the court simply stated, "because all Real Parties knowingly and voluntarily executed contracts which contained provisions explicitly waiving the right to a jury trial, the trial court abused its discretion by refusing to enforce the waivers as written and setting this case on the jury docket." *Id.* at 611. The court did not limit or qualify this holding. Rather, the holding suggests that at least in the commercial context, the court would uphold a jury waiver provision so long as the waiver was given knowingly and voluntarily.

The Texas Supreme Court Weighs in With In re Prudential

Two issues were analyzed in *In re Prudential*: (1) the enforceability of the jury waiver, and (2) the appropriateness of mandamus relief.[6] The first issue will be discussed here.

Briefly, a factual and procedural background: the case involved a dispute over a restaurant lease. Nine months into the lease, the lessee and its guarantors (collectively, the "lessees") sued the lessor claiming a foul odor was disrupting their business; they demanded a jury and paid the fee. *Id.* at 128. The lessor filed a motion to quash the demand relying on a waiver clause in the lease: "Tenant and Landlord both waive a trial by jury of any or all issues arising in any action or proceeding between the parties hereto or their successors, under or connected with this Lease, and any of its provisions." The trial court denied the motion, the lessor sought and was denied mandamus relief at the court of appeals, and the supreme court agreed to hear argument.[7]

The lessees' two subordinate arguments, neither of which appeared to have been endorsed by the trial court and both of which were rejected by the supreme court, were contractual jury waivers violated provisions of the Texas Constitution and Tex. R. Civ. P. 216.[8] After explaining the lessees had conceded the right to trial by jury could be waived by a failure to comply with Tex. R. Civ. P. 216 and first noting both that such provisions are silent as to the circumstances of appropriate waiver, and moreover, that personal rights generally can be waived, the supreme court explained more particularly: "Nothing in the constitutional provisions themselves suggests that parties are powerless to waive trial by jury under any other circumstances, before or after suit is filed." And in further rejection, and most succinctly, Rule 216 details "prerequisites to a jury trial, not guarantees of one." *Id.* at 130.

The lessees' principal argument against the jury waiver was such an agreement is contrary to public policy as expressed in constitutional provisions and Rule 216 because such waivers would grant to parties the private power to fundamentally alter the civil justice system. The supreme court rejected the public policy argument because parties already have the power to fundamentally alter the manner in which disputes are resolved, albeit with some restrictions, by agreeing to a choice of law, designating venue, waiving in personam jurisdiction, and even opting out of the civil justice system altogether through

[6] Sinead O'Carroll's recent piece thoroughly explores the second issue and thus it will not again be discussed here. *See supra* note 1.

[7] The procedure was slightly more cumbersome than that, and while the details of it are not important to this discussion, in short, the supreme court learned the trial judge who denied the motion to quash had left office and abated its proceedings to let the current judge reconsider the motion. The reconsideration was denied, and the case subsequently being reinstated on the supreme court's active docket. *Id.* at 129.

[8] The court's opinion was unusually thorough in the way it explained and dismissed all of the lessees' general legal arguments. This piece will mirror the same approach in its summary.

arbitration. *Id.* at 131. And to buttress the point, the supreme court pointed out and rejected the lessees' argument that it does not offend public policy to encourage arbitration but it does so offend to allow jury waivers because they manipulate the prescribed public justice system: "Public policy that permits parties to waive trial altogether surely does not forbid waiver of trial by jury." *Id.*

The supreme court next rejected the lessees' attempted analogy between contractual jury waivers and confession-of-judgment, the latter long-forbidden in Texas. Explaining simply there is no statute prohibiting contractual jury trial waivers, as there is with confession-of-judgment clauses, the court held the analogy does not hold. *Id.* at 132.

In what might be considered at least a slight repeat of their public policy argument, the lessees next argued trial by jury is too fundamental a private and public benefit to be waived by agreement. Seeing no distinction between waiver by agreement and waiver by absence of request, the supreme court rejected this argument too. And in what seems a throw-away argument, the lessees argued parties are more likely to trust a jury verdict, which in rejecting it, the supreme court summarily pointed out seems at least an inconsistent thing to say as to parties that have agreed to judicial resolution of their dispute. *Id.*

In a seeming negation of too broad a reading of its holding, the supreme court short-circuits the last of the lessees' arguments: the possibility permitting contractual jury waivers could cause a party to take unfair advantage of another party to extract such waivers from the "reluctant or unwitting." *Id.* at 132. With a pithy waive of its hand, the supreme court concedes an agreement made in "such circumstances" would be unenforceable, and, then further explains that enforcing contractual jury waivers is preferable to leaving parties with "arbitration as their only enforceable option." *Id.* [9]

After disposing of the last of the lessees' general legal arguments and before analyzing the lessees' arguments that even if some contractual jury waivers are permissible the particular one at issue was not, the supreme court quickly noted the "overwhelming weight of authority" endorses contractual jury waivers and is correct. *Id.* at 133.

The lessees' first problem with the instant waiver was it was not entered into knowingly and voluntarily. Pointing out undisputed facts which inexorably lead to one conclusion (*e.g.*, both sides had counsel, there were a number of changes to the lease, the waiver was crystal clear, *etc.*), the supreme court held the waiver was knowing and voluntary. The lessees' second problem was they were fraudulently induced into executing the lease because of the underlying complaint in the lawsuit (*i.e.*, the lessor's concealment of the fact the premises suffered a recurring odor of sewage). What might be reasonably summarized as a critique that such a holding would immunize fraud suits from jury waivers, the supreme court dismissed the fraud argument by explaining there must be an allegation of fraud specifically as to the waiver itself. Being none there, the fraud argument was rejected. *Id.* at 133–34.[10]

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[9] What goes unrationalized as well as uncommented upon by the dissent–the latter not surprising given its emphasis on the mandamus issue–is the subtle incongruity of the logic of the argument in this section of the opinion in the face of a prior section's emphasis that "[s]tate and federal law not only permit but favor arbitration agreements." *Id.* at 132 & n.21.

[10] And finally in some cleanup, the court disposes of the argument of one of the party's who comprise for purposes of this piece of collective "lessees," the guarantors, that the waiver does not apply to them because it is only in the lease and not the guaranty, by noting the guaranty itself required the guarantors to fulfill all of the terms of the lease, one of which, of course, is the jury waiver. *Id.* at 135.

The Future of Contractual Jury Waivers in Texas

The holding in *In re Prudential* defined Texas law regarding contractual jury waivers in Texas, but the supreme court did not unconditionally embrace them. Rather, it carefully crafted its holding, implicitly defining a knowing and voluntary waiver as one given by sophisticated parties, represented by counsel, after adequate negotiations. In contrast, the Houston Court of Appeals' holding in *In re Wells Fargo* just months before could be considered broader.

Specifically, under the facts of *In re Wells Fargo*, the jury waiver provision was included in a standardized form. There was no evidence the term was in fact negotiated, but the court found the mortgagor failed to present evidence they were *prohibited from* negotiating it, and therefore, did not focus on this aspect of the transaction. In addition, the court noted because the term "maker" in the loan documents included all legal representatives, non-signatories could be bound by the waiver. *In re Prudential*'s more limited holding arguably calls into question whether Texas courts will be guided by an *In re Wells Fargo* methodology in the future.

Many other jurisdictions are moving toward a policy of enforcing commercial jury waiver provisions with few limitations. *See supra* note 1. Given the Texas Supreme Court's analogy to arbitration agreements, it would seem that contractual jury waivers may go the way of these widely accepted and encouraged arbitration agreements, joining the ranks of the jurisdictions listed above.[11]

With the supreme court's new members, and with two justices on either side no longer on the court that decided *In re Prudential*, it will be interesting to watch whether mandamus continues to be expanded, a topic beyond the scope of this article. For now, the general rule for enforceability of commercial contractual jury waivers in Texas has been clearly spelled out by *In re Prudential*.

The rule as sketched out now is poised to be an enduring one. It is difficult to imagine a legal argument against general enforceability that was not made by the *In re Prudential* lessees' counsel. And the supreme court rejected them all.

[11] As Sinead O'Carroll analogously pointed out, the majority in *In re Prudential* was comprised of Justices Hecht, Owen, Smith, Wainwright and Brister, while the Dissent consisted of Chief Justice Phillips, and Justices O'Neill, Jefferson and Schneider. But since these cases were decided, Chief Justice Phillips and Associate Justices Smith, Schneider and now Owens have left the court. Justices Green, Medina and Johnson are new to the court.

J. Brett Busby, Mayer, Brown, Rowe & Maw L.L.P., Houston
Erin Glenn Busby, Bracewell & Giuliani LLP, Houston

ADMINISTRATIVE LAW

Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 125 S.Ct. 2688 (2005).

Title II of the Communications Act of 1934 subjects all providers of "telecommunications service" to mandatory common-carrier regulation. The Federal Communications Commission concluded that cable companies that sell broadband Internet services do not provide "telecommunications service" under the Act, and hence are exempt from mandatory common-carrier regulation under Title II. Rather, these companies are information-service providers not subject to common-carrier regulation. The Commission concluded that cable companies, like non-facilities-based Internet Service Providers, offer "a single integrated service that enables the subscriber to utilize Internet access service . . . and to realize the benefits of a comprehensive service offering."

Numerous parties petitioned for judicial review of the Commission's order. The Ninth Circuit vacated the Commission's ruling to the extent it concluded that cable modem service was not "telecommunications service" under the Communications Act, holding that this result was dictated by its opinion in *AT&T Corp. v. Portland*, 216 F.3d 871 (9th Cir. 2000), a case in which the court interpreted the phrase "telecommunications service" but that did not involve review of an administrative proceeding and in which the Commission was not a party.

In an opinion by Justice Thomas, the Supreme Court held that the Commission's determination was entitled to *Chevron* deference. Because the court of appeals did not hold that its prior judicial construction followed from the unambiguous terms of the statute, that construction did not trump the agency's construction.

Applying the *Chevron* framework, the Court found that the Commission's interpretation of a telecommunications "offering" was not unambiguously precluded by the language of the statute. The Commission's conclusion that cable modem service is an "information service" was not challenged. The Commission determined whether that service also included a telecommunications "offering" by looking to the nature of functions the end user is offered. From the consumer's point of view, it concluded, cable modem service is not a telecommunications offering because the consumer uses the high-speed wire always in connection with the information-processing capabilities provided by Internet access, and because the transmission is a necessary component of Internet access. This reading of "offering" as a stand-alone offering of telecommunications follows both from the ordinary meaning of the word and also from the regulatory history of the Communications Act, including the Commission's traditional distinction between "basic" and "enhanced" service.

The Court also concluded, under *Chevron*'s second step, that the Commission's construction was a reasonable policy choice. Even when users access a third-party's website via a cable modem ISP, they are using the information service provided by the cable company. The Commission provided a reasoned explanation for treating cable modem service differently from DSL service, which is also used to provide broadband Internet access.

Justice Stevens concurred, stating that the Court's holding that a court of appeals' interpretation of an ambiguous provision in a regulatory statute does not foreclose a contrary reading by the agency would not necessarily be applicable to a decision by this Court, which would presumably remove any pre-existing ambiguity. Justice Breyer also concurred, noting that the Court has held that a formal rulemaking proceeding is

neither a necessary nor a sufficient condition for according *Chevron* deference to an agency's interpretation of a statute.

Justice Scalia, joined in part by Justice Souter and Justice Ginsburg, dissented. The relevant question, he argued, was whether the individual components in a package being offered still possess sufficient identity to be described as separate objects of the offer. In this case, the high-speed access offered as part of cable modem service possesses such identity and, therefore, the cable companies are providing a telecommunications offering. Justice Scalia also disagreed with the Court's holding that the Ninth Circuit was not bound by its earlier interpretation of the language of the Communications Act, arguing that it resulted in "judicial decisions subject to reversal by Executive officers."

COMMERCE CLAUSE

***Am. Trucking Ass'ns v. Mich. Pub. Serv. Comm'n*, 125 S.Ct. 2419 (2005).**

In this case, the Court rejected a dormant Commerce Clause challenge to the $100 flat fee Michigan imposes on trucks engaged in intrastate commercial hauling. Trucking companies argued that the fee discriminates against interstate carriers and unconstitutionally burdens interstate trade. Specifically, they pointed out that trucks engaged in both interstate and intrastate hauling engaged in less intrastate business but paid the same fee as trucks carrying only intrastate loads. The Michigan courts ruled against the companies, and the Supreme Court affirmed in an opinion by Justice Breyer.

The Court applied a variety of dormant Commerce Clause tests, concluding that the flat fee passed each one. It is imposed only on intrastate transactions, does not facially discriminate against interstate or out-of-state activities or enterprises, and applies evenhandedly to all carriers making domestic journeys. The Court also observed that the flat per-truck assessment was likely fair because the costs it seeks to defray – e.g., regulating vehicle size and weight—vary on a per-truck basis, not a per-intrastate-mile basis.

***Gonzales v. Raich*, 125 S.Ct. 2195 (2005).**

This case addressed whether Congress's Commerce Clause authority includes the power to prohibit local cultivation and use of marijuana for doctor-recommended purposes in compliance with California law. After federal DEA agents seized marijuana from a woman who used it to treat her serious medical condition, she and others sought to enjoin the federal government from enforcing the Controlled Substances Act (CSA) against them. The district court denied a preliminary injunction but the Ninth Circuit reversed, holding that the CSA was an unconstitutional exercise of Commerce Clause authority as applied to intrastate, noncommercial cultivation and possession of marijuana under California law.

The Supreme Court vacated and remanded in an opinion by Justice Stevens. Analogizing this case to *Wickard v. Filburn*, 317 U.S. 111 (1942), the Court held that Congress may regulate purely intrastate activity that is not itself commercial when failure to regulate that activity would undercut regulation of an interstate commodity market. Given the enforcement difficulties of distinguishing between local and imported marijuana and concerns about diversion of medical marijuana into illicit channels, the Court concluded Congress had a rational basis for finding that failure to regulate intrastate marijuana growth and possession would leave a gaping hole in the CSA.

The Court distinguished its decisions in *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000), observing that the activities regulated there had nothing to do with commerce or any economic enterprise. In contrast, marijuana is a commodity for which there is an established interstate market, and prohibiting its intrastate possession is a rational means of regulating commerce in the drug. The Court also noted that *Lopez* and *Morrison* found statutes to be outside Congress's

power in their entirety. Here, however, the Ninth Circuit excised individual applications of a valid and comprehensive statutory scheme. The Court rejected that approach, stating that when a class of activities is regulated and that class substantially affects commerce, courts should not excise individual instances of the class as having only a trivial connection to commerce.

Justice Scalia concurred in the judgment, reasoning that Congress's authority to regulate intrastate possession of marijuana was conferred by the Necessary and Proper Clause, not by the Commerce Clause alone.

Justice O'Connor dissented, joined by Chief Justice Rehnquist and Justice Thomas. She argued that the Court's rule, which allows Congress to nestle questionable assertions of its authority into comprehensive regulatory schemes, removed meaningful limits on the Commerce Clause and was irreconcilable with *Lopez* and *Morrison*. In her view, because both federal and state law recognized that medical drug use could be segregated and regulated differently, the appropriate scope of analysis was the use of marijuana for medical purposes—not the CBA as a whole. She concluded that such use was not economic, did not substantially affect interstate commerce, and was not a necessary part of the interstate drug control scheme. Justice Thomas also dissented, contending that banning medical marijuana was neither necessary to stem interstate drug trafficking nor a proper encroachment on state police powers. He also criticized the Court's use of the "substantial effects" test of Congress's Commerce Clause authority as rootless and malleable.

CRIMINAL LAW

***Arthur Andersen LLP v. United States*, 125 S.Ct. 2129 (2005).**

This case addressed the proper elements of the crime of "knowingly . . . corruptly persuad[ing]" another party to withhold documents from or alter them for use in an official proceeding. Arthur Andersen was convicted of corrupt persuasion and the Fifth Circuit affirmed, holding that the district court's jury instructions were correct because no consciousness of wrongdoing was necessary to convict.

The Supreme Court unanimously reversed and remanded in an opinion by Chief Justice Rehnquist. It held that "knowingly" modifies "corruptly persuades," limiting criminality to those persuaders conscious of their wrongdoing. This limitation was necessary, the Court concluded, because persuading a person to withhold documents may not be malign in some circumstances (as with a document retention policy). The jury charge erroneously failed to convey the required knowledge of corruption, stating that the jury could convict Andersen without a showing of dishonesty for conduct that merely impeded the Government's factfinding ability. In addition, the charge was infirm because it failed to require a nexus between persuasion to destroy documents and at least a foreseeable official proceeding.

DISCRIMINATION

***Miller-El v. Dretke*, 125 S.Ct. 2317 (2005).**

In this opinion, the Supreme Court reversed the Fifth Circuit for a second time, granting habeas corpus relief to Miller-El based on racial discrimination against black jurors by Dallas County prosecutors. During *voir dire* for Miller-El's capital murder trial, prosecutors used peremptory strikes against 10 of 11 qualified black venire members. Miller-El objected, but the trial court found the prosecutors' race-neutral reasons for the strikes credible and concluded that there had been no purposeful discrimination. Miller-El was convicted and sentenced to death. He then filed a federal habeas petition based on *Batson v. Kentucky*, 476 U.S. 79 (1986), arguing that the prosecutors' strikes violated the Equal Protection Clause. The district court denied relief and the Fifth Circuit denied a certificate of appealability. The Supreme Court granted certiorari and reversed, concluding that a certificate should have issued because Miller-El's *Batson* claim was at least debatable among

reasonable jurists. On remand, the Fifth Circuit denied Miller-El's *Batson* claim on the merits.

In an opinion by Justice Souter, the Court again reversed, ordering that Miller-El be granted habeas relief. Because the state court determined that the prosecutors' race-neutral explanations were true as a factual matter, Miller-El had to show that this determination was unreasonable in light of the evidence presented. The Court concluded that several pieces of evidence supported the case for discrimination. The prosecutors used their peremptory challenges to strike 91% of black jurors—a disparity unlikely to be produced by happenstance. In addition, the Court noted that the prosecutors' proffered reasons for striking certain black panelists applied just as well to white panelists allowed to serve. Looking to more general practices, the prosecutors shuffled the jury when black panel members were near the front and offered no race-neutral explanation for doing so. The prosecutors also posed different questions to black and non-black panel members and worked for an office that had a policy of systematically excluding blacks from juries. Cumulatively, this evidence showed that the state court's conclusion that the prosecutors' strikes were not racially determined was wrong to a clear and convincing degree.

Justice Breyer concurred, observing that *Batson* had not eliminated the problem of discriminatory peremptory challenges and expressing a desire to reconsider the peremptory challenge system. Justice Thomas (joined by Chief Justice Rehnquist and Justice Scalia) dissented, arguing that the evidence did not clearly and convincingly show discrimination against potential jurors, especially when evidence never presented to the state court was excluded.

***Spector v. Norwegian Cruise Line Ltd.*, 125 S.Ct. 2169 (2005).**

In a fractured opinion, the Court considered the application of Title III of the Americans with Disabilities Act to foreign-flag cruise ships. Disabled passengers who embarked in Houston sued Norwegian Cruise Line for (1) failing to remove architectural and structural barriers when readily achievable, and (2) failing to make reasonable modifications to procedures in order to accommodate disabled individuals. The district court held that Title III applies to foreign-flag cruise ships in United States territorial waters, but that federal agencies had not promulgated any relevant architectural and structural guidelines. The Fifth Circuit reversed in part, holding that general statutes do not apply to foreign-flag ships absent a clear indication of congressional intent.

The Supreme Court reversed and remanded. Speaking for a majority, Justice Kennedy rejected the Fifth Circuit's conclusion that a broad clear statement rule applies to every facet of ships' operations. In a plurality portion of his opinion joined by Justices Stevens and Souter, Justice Kennedy concluded that general statutes ordinarily apply to foreign-flag ships when the interests of the United States or its citizens are at stake. Absent a clear statement of congressional intent, however, general statutes that regulate matters involving only the ships' internal affairs do not apply to foreign-flag ships. In this case, he observed, modifying the challenged ship procedures would not interfere with internal affairs, but requiring permanent and significant structural modifications would likely do so. He noted that Title III could well be interpreted to avoid such interference, however. For example, structural requirements that conflict with international legal obligations or that threaten the safety of non-disabled passengers are not "readily achievable." Finally, Justice Kennedy stated that application-by-application use of the internal affairs clear statement rule is proper because the rule is an implied limit on general and unambiguous statutes, not a uniform rule for interpreting ambiguous statutes.

Justice Ginsburg (joined by Justice Breyer) concurred in part and concurred in the judgment. She agreed that foreign-flag ships can resist Title III requirements that conflict with international legal obligations, but rejected a broader exception for requirements that interfere with ships' internal affairs. Justice Thomas concurred in part,

dissented in part, and concurred in the judgment. He agreed with Justice Scalia's dissenting views regarding structural modifications, but also agreed with Justice Kennedy that applications of Title III not involving internal affairs apply to foreign-flag ships.

Justice Scalia (joined by Chief Justice Rehnquist and Justice O'Connor) dissented. He argued that because some of Title III's general provisions affect a ship's internal affairs and there is no clear indication that Congress intended to cover foreign-flag ships, it must be presumed that none of Title III applies to such ships. Regarding the structural modification requirements of Title III, he found that they plainly would affect a ship's internal affairs regardless of whether they violated international law.

DUE PROCESS

***Castle Rock v. Gonzales*, 125 S.Ct. 2796 (2005).**

Jessica Gonzales sued the town of Castle Rock, Colorado for violation of her due process rights after Castle Rock police officers ignored her repeated reports that her estranged husband had taken the couple's three children in violation of her restraining order against him. The husband murdered all three children while they were in his custody. Gonzales claimed that Colorado's laws regarding domestic violence restraining orders created a property right in the enforcement of the restraining order, and argued that the town's tolerance of not enforcing restraining orders had deprived her of that right. The District Court dismissed the suit, but the Tenth Circuit reversed, holding that Gonzales did have a protected property right.

The Court, in an opinion by Justice Scalia, held that Colorado had not created a property right in the enforcement of restraining orders. Although the statute at issue stated that "A peace officer shall use every reasonable means to enforce a restraining order" and that "A peace office shall arrest" or seek an arrest warrant against a violator of a restraint order, this statute did not eliminate traditional police discretion regarding making arrests. Therefore, Gonzales did not have a property right in enforcement of the order.

Justice Souter, joined by Justice Breyer, concurred, stating that Gonzales' claimed right was in a state-mandated process. To recognize such a right, he argued, would be at odds with the rule that process is not an end in itself.

Justice Stevens, joined by Justice Ginsburg, dissented, contending that the majority opinion gave too little weight to the history of "mandatory arrest" statutes in the domestic violence context, failed to take seriously the fact that the Colorado statute was enacted for the benefit of persons who obtain restraining orders, and erred in asserting that a citizen's interest in the government's commitment to provide police enforcement in certain circumstances does not resemble any "traditional conception of property."

***Wilkinson v. Austin*, 125 S.Ct. 2384 (2005).**

In an opinion by Justice Kennedy, a unanimous Court held that Ohio's procedures for classifying prisoners for placement at its "Supermax" prison facility comply with due process requirements. The Court concluded that inmates have a protected liberty interest in avoiding assignment to the Supermax facility. The touchstone of this inquiry is not the language of regulations regarding those conditions but the nature of the conditions themselves in relation to the ordinary incidents of prison life. In this case, there would be not only extreme isolation, but the placement would be for extended duration would disqualify an otherwise eligible inmate for parole consideration.

The Court held that the procedures set out in Ohio's current policy for Supermax placement were sufficient to satisfy the Constitution's requirements. The procedural protections to which prisoners are entitled are more limited than in cases where the right at stake is the right to be free from confinement at all. In addition, the procedures here—which include multiple levels of review and two opportunities for an inmate to objection to his placement—provided for notice and a fair opportunity for rebuttal, as well as

sufficient review. Also, the State's interest is a dominant consideration when the issue is prison management; the State's first obligation must be to ensure the safety of guards and prison personnel, the public, and the prisoners themselves.

EQUAL PROTECTION

***Johnson v. California*, 125 S.Ct. 1141 (2005).**

When prisoners first enter a correctional facility in California, the California Department of Corrections (CDC) assigns them to two-person cells, for up to 60 days, based predominantly on race. The State's asserted rationale is that the policy prevents gang violence. An African-American inmate sued, claiming this policy violated his equal protection rights under the Fourteenth Amendment. The district court granted summary judgment in favor of defendants on qualified immunity grounds and the Ninth Circuit affirmed, finding the policy constitutional under the deferential standard of *Turner v. Safley*, 482 U.S. 78 (1987), which asks whether a regulation burdening prisoners' fundamental rights is reasonably related to legitimate penological interests.

In an opinion by Justice O'Connor, the Supreme Court reversed and remanded, holding that strict scrutiny was the correct standard of review. The Court followed precedent requiring strict scrutiny review of all racial classifications imposed by the government, including a prior case that involved racial segregation in prisons. *See Lee v. Washington,* 390 U.S. 333 (1968) (*per curiam*). The Court rejected the argument that, because the State's policy was confined to prisons, *Turner*'s deferential standard of review should apply. Instead, the Court held that *Turner* had only been applied to rights that are "inconsistent with proper incarceration," and that the right to be free from racial discrimination is not such a right. The Court also found *Turner* too lenient to prevent invidious uses of race, as it would let officials use race-based policies even where race-neutral solutions exist and even where a race-based policy does not actually advance the government's stated goal.

The Court rejected the argument that, because all inmates were subject to segregation, the CDC's policy was race neutral. Rather, precedent dictated that racial classifications must always be closely scrutinized, even if they benefit or burden races equally. Further, as held in *Brown v. Board of Education*, 347 U.S. 483 (1954), "separate" is never equal or "neutral." To prevail on remand, the Court held that CDC would have to prove that its policy was narrowly tailored to serve a compelling state interest as to new inmates as well as transferees.

Justice Ginsburg (joined by Justices Souter and Breyer) concurred to express the separate view that strict scrutiny should not apply to *all* official race classifications. Specifically, she argued that actions taken to "hasten the day when entrenched discrimination and its aftereffects have been extirpated" should not be reviewed in the same manner as actions designed to burden groups subject to historical discrimination.

Justice Stevens dissented from the Court's refusal to decide whether the CDC's policy was unconstitutional. He agreed that a remand to resolve the qualified immunity issue was appropriate, but he would have held the CDC's policy unconstitutional given the lack of record evidence justifying its use under even a minimal level of scrutiny.

Justice Thomas (joined by Justice Scalia) dissented and would have applied *Turner* because the "Constitution has always demanded less within the prison walls." Under that test, he found the State's policy constitutional. Given the pervasive problem of racial gang violence, the CDC's policy was reasonably related to a legitimate penological interest, there were alternative means of exercising the restricted equal protection rights, the integration of double cells could harm both inmates and staff, and there were no other obvious solutions to the problem. Justice Thomas characterized the Court's "inconsistent with proper incarceration" test as

begging the underlying question, and he also found it unfair that even though discovery was closed, California would have to meet a higher evidentiary standard on remand than it previously had reason to anticipate.

FIRST AMENDMENT

***Cutter v. Wilkinson*, 125 S.Ct. 2113 (2005).**

This case addressed whether the federal Religious Land Use and Institutionalized Persons Act (RLUIPA) violates the Establishment Clause by prohibiting governments from imposing a "substantial burden" on the religious exercise of an institutionalized person unless that burden furthers a "compelling governmental interest" by "the least restrictive means." Ohio inmates sued the state under RLUIPA, alleging that prison officials violated the law by failing to accommodate their non-mainstream religions. Ohio moved to dismiss, arguing that the law facially violates the Establishment Clause because it improperly advances religion. The district court rejected Ohio's argument but the Sixth Circuit reversed on interlocutory appeal, holding that RLUIPA impermissibly gave greater protection to religious rights than to other constitutional rights.

In a unanimous opinion by Justice Ginsburg, the Supreme Court reversed and remanded. The Court held that RLUIPA is a facially constitutional accommodation because it alleviates exceptional government-created burdens on private religious exercise. It observed that RLUIPA protects institutionalized persons who are not free to attend to their own religious needs and therefore depend on the government to accommodate their religious exercise. In applying RLUIPA, however, courts must also take into account: the urgency of discipline and safety in penal institutions; whether requests for accommodation are excessive or impose unjustified burdens on other institutionalized persons; and whether the government is administering the law neutrally among people of different faiths. The Court rejected the Sixth Circuit's rationale, holding that a law does not impermissibly advance religion simply by giving greater protection to religious rights than to other constitutional rights. Justice Thomas concurred, arguing that RLUIPA did not violate the Establishment Clause because that clause was intended to protect state establishments of religion from federal interference.

***McCreary County v. ACLU of Kentucky*, 125 S.Ct. 2722 (2005).**

Two Kentucky counties erected displays in their courthouses that included the text of the Ten Commandments. The first displays consisted only of an abridged text of the King James version of the Commandments. When the ACLU sued, the counties changed the displays to include eight other documents (including parts of the Declaration of Independence, the Mayflower Compact, the National Motto, and others) in smaller frames, each having a religious theme or excerpted to highlight a religious element. When the district court entered an injunction ordering the displays be removed, the counties erected a third display, consisting of nine documents of equal size—including the Ten Commandments, the Magna Carta, the Declaration of Independence, and others—and a statement about the historical and legal significance of each document. The district court again ordered that the displays be removed, and the Sixth Circuit affirmed.

Writing for the Court, Justice Souter noted that "[w]hen the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality." The Court held that a government action must have a secular purpose that is not merely secondary to a religious objective and that such a purpose must be inferred from all relevant actions, not merely the government's latest action.

In this case, the Court held, the reasonable observer could only think that the counties meant to emphasize and celebrate the Ten Commandments' religious message. This intent was made particularly clear in the second display, with its focus on religious messages. The

statements of purpose regarding the third display were "presented only as a litigating position," not having been included in any county resolution (as the second display had been). No reasonable observer "could swallow the claim that the Counties had cast off the objective so unmistakable in the earlier displays."

Justice Souter went on to state that neutrality is the proper rule for assessing Establishment Clause claims, arguing that the dissent's reliance on original intent to allow government statements in support of religion is misplaced because (1) the original intent was not clear, and (2) many of the founders believed that the Establishment Clause would prevent only discrimination among Christian sects.

Justice O'Connor concurred, stating that the purpose behind the counties' display is relevant because it conveys an unmistakable message of endorsement to the reasonable observer.

Justice Scalia, joined by Chief Justice Rehnquist and Justices Kennedy and Thomas, dissented. He argued that the United States is not, and has never been, a "secular republic." The First Amendment does not mandate governmental neutrality between religion and nonreligion. In addition, posting of the Ten Commandments does not violate the principle that the government cannot favor one religion over another, which applies in a limited sense to public acknowledgement of the Creator. The Establishment Clause permits the disregard of polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists.

Justice Scalia also argued that the Court had gone beyond the *Lemon* test by justifying inquiry into legislative purpose not as an end in itself, but as a means to ascertain the appearance of the government action to an "objective observer," and by demanding not only that the government have a secular purpose, but that the secular purpose "predominate" over any purpose to advance religion. Justice Scalia also argued that, in the context of the third display, the Ten Commandments were included to show their unique contribution to the development of the legal system, and that the Court's conclusion about the counties' purpose in erecting the display was doubtful.

***Tory v. Cochran*, 125 S.Ct. 2108 (2005).**

The state trial court determined that Ulysses Tory had engaged in unlawful defamatory activity and issued a permanent injunction prohibiting Tory from picketing, displaying signs or placards, and orally uttering statements about Johnnie Cochran and about his law firm in any public forum. The California Court of Appeals affirmed the injunction. After the Supreme Court granted certiorari and held oral argument, Johnnie Cochran died.

Justice Breyer, writing for the Court, stated that the case was not moot, because the injunction remained in effect. However, Cochran's death made it unnecessary to explore Tory's basic claims because the injunction, as written, had lost its underlying rationale and thus amounted to an overly broad prior restraint on speech. Therefore, the Court vacated the California judgment.

Justice Thomas, joined by Justice Scalia, dissented, arguing that the Court should have dismissed the writ of certiorari as improvidently granted.

***Van Orden v. Perry*, 125 S.Ct. 2854 (2005).**

On the Texas Capitol grounds, there is a granite monument with the text of the Ten Commandments inscribed on it, along with a note that the monument was presented by the Fraternal Order of Eagles. Forty years after the monument was erected, Thomas Van Orden—a former lawyer who frequently visits the Supreme Court law library—sued, seeking the removal of the monument on the basis that it violated the Establishment Clause. The district court rejected Van Orden's claims and the Fifth Circuit affirmed.

The Supreme Court affirmed, with Chief Justice Rehnquist announcing the judgment and authoring a plurality opinion. The Chief Justice

wrote that the Court must "neither abdicate our responsibility to maintain a division between church and state nor evince a hostility to religion by disabling the government from in some ways recognizing our religious heritage." He then stated that the *Lemon* test did not apply to "the sort of passive monument that Texas has erected on its Capitol grounds," and that the Court would instead look to the nature of the monument and our Nation's history.

The Chief Justice noted that "[t]here is an unbroken history of official acknowledgement by all three branches of government of the role of religion in American life from at least 1789." In addition, acknowledgements of the role played by the Ten Commandments in our Nation's heritage are common throughout America, including in the Supreme Court building itself. These acknowledgements have an undeniable historical meaning, and having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause.

The Chief Justice distinguished the holding in *Stone v. Graham*, 449 U.S. 39 (1980), which held unconstitutional a statute requiring the posting of the Ten Commandments in every public schoolroom. The result in *Graham*, he reasoned, was explained by the Court's particular vigilance in monitoring compliance with the Establishment Clause in elementary and secondary schools.

Justice Scalia concurred, emphasizing that "there is nothing unconstitutional in a State's favoring religion generally, honoring God through public prayer and acknowledgement, or, in a nonproselytizing manner, venerating the Ten Commandments."

Justice Thomas also filed a concurring opinion, arguing that the Court should consider only "actual legal coercion" as violative of the Establishment Clause.

Justice Breyer concurred in the judgment, stating that the Establishment Clause does not compel the government to purge from the public sphere all that partakes of the religious in any way. Such absolutism is inconsistent with our historical traditions and would tend to promote the kind of social conflict the Establishment Clause seeks to avoid. The context of the display at issue here, including the physical setting, communicates a secular as well as religious message. In addition, the forty years that passed without any challenge to the monument suggest that "few individuals, whatever their system of beliefs, are likely to have understood the monument as amounting, in any significantly detrimental way, to a government effort to favor a particular religious sect, primarily to promote religion over nonreligion, to 'engage in' any 'religious practic[e],' to 'compel' any 'religious practic[e],' or to 'work deterrence' of any 'religious belief.'"

Justice Stevens, joined by Justice Ginsburg, dissented, arguing that the Establishment Clause has created a strong presumption against the display of religious symbols on public property. In addition, the Establishment Clause requires the same respect for the atheist as it does for the adherent of a Christian faith. He contended that although Texas may genuinely wish to combat juvenile delinquency, and may want to honor the Eagles for their efforts, it cannot effectuate these admirable purposes through an explicitly religious medium.

Justice O'Connor filed a brief dissent, stating that she dissented for the reasons given in Justice Souter's dissent and in her concurrence in *McCreary County v. ACLU of Kentucky*.

Justice Souter, joined by Justice Stevens and Justice Ginsburg, also dissented, stating that Texas's "17 monuments with no common appearance, history, or esthetic role scattered over 22 acres is not a museum, and anyone strolling around the lawn would surely take each memorial on its own terms without any dawning sense that some purpose held the miscellany together more coherently than fortuity and the edge of the grass." Thus, he found "nothing to blunt the religious message and manifestly religious purpose behind" the Ten Commandments monument.

HABEAS CORPUS

***Bell v. Thompson*, 125 S.Ct. 2825 (2005).**

Gregory Thompson was sentenced to death after a sentencing phase in which his attorneys attempted to persuade the jury that Thompson's positive qualities and capacity to adjust to prison life provided good reasons for not imposing the death penalty. In his state postconviction petition, which was denied, Thompson claimed his trial counsel had been ineffective for failing to conduct an adequate investigation into his mental health.

Thompson renewed his ineffective assistance of counsel claim on federal habeas. While Thompson's appeal from the dismissal of his petition was pending, he filed a Rule 60(b) motion requesting that the district court supplement the record with the expert report and deposition of Sultan, the psychologist who had been hired to assist with his habeas petition—materials that had been left out of the summary judgment evidence. The district court denied the motion as untimely. The court of appeals affirmed the denial of habeas relief, but stayed the mandate pending the disposal of Thompson's petition for certiorari. The Supreme Court denied certiorari and rehearing, but the court of appeals did not issue the mandate. Five months later, however, the Sixth Circuit issued an amended opinion, vacating the district court's judgment denying relief in Thompson's initial federal habeas case.

The Supreme Court found that the court of appeals abused its discretion in issuing its amended opinion after five months in which it did not notify the parties that it was reconsidering its earlier opinion—despite the fact that its stay order only authorized a stay until the Supreme Court disposed of the case. Thompson's petition for rehearing in the court of appeals pressed the same arguments that eventually were adopted by the court of appeals in its amended opinion. After the request for rehearing was denied, the State could have assumed with good reason that the court of appeals was not impressed by these arguments.

In addition to the improper delay, the Court stated that there were ample grounds to conclude that the evidence was unlikely to have altered the district court's resolution of Thompson's ineffective assistance of counsel claim. Moreover, although the state's reliance interest is not as strong here as in cases in which the court had actually issued a mandate prior to withdrawing its opinion, similar finality and comity concerns are implicated.

Justice Breyer, joined by Justices Stevens, Souter, and Ginsburg, dissented. The court of appeals acted, after spending hundreds of hours reviewing the record in the case, to avoid what it believed to be a miscarriage of justice. The Sultan evidence was important and was not sufficiently raised by the petition for rehearing in the court of appeals.

***Gonzalez v. Crosby*, 125 S.Ct. 2641 (2005).**

This case addressed when a Rule 60(b) motion will be treated as a second or successive habeas petition. After the district court dismissed Gonzalez's habeas petition as time-barred, the Supreme Court ruled that a state post-conviction petition later dismissed as procedurally barred can still toll the statute of limitations. Based on the new ruling, Gonzalez filed a Fed. R. Civ. P. 60(b)(6) motion for relief from judgment, which the district court denied. On appeal, the Eleventh Circuit treated the motion as a second or successive habeas petition that could not be filed without precertification by the court of appeals.

The Supreme Court affirmed in an opinion by Justice Scalia. It rejected the Eleventh Circuit's treatment of Gonzalez's motion as the equivalent of another habeas petition, holding that a motion amounts to a successive petition only when it presents one or more new claims for relief from a state court conviction. Thus, motions that seek to add a new claim, that offer newly-discovered evidence to support a claim, or that argue the substantive law governing the merits of a claim has changed will be treated as successive petitions. But when a motion attacks a defect in the integrity of the federal proceedings—such as by asserting that a previous ruling that precluded a merits determination was in error—it will not be

treated as an additional petition. Here, the motion attacked a limitations ruling; it did not substantively address federal grounds for setting aside the state conviction and thus was not the equivalent of a successive habeas petition. The Court then considered and rejected Gonzalez's tolling argument, holding that a change in the interpretation of a limitations statute was not an "extraordinary circumstance" justifying relief under Rule 60(b)(6).

Justice Stevens (joined by Justice Souter) dissented, contending that the merits of the Rule 60(b)(6) motion should have been remanded for the district court to decide. He also argued that some changes in procedural law can constitute extraordinary circumstances, and that Rule 60(b)(6) relief was warranted because the State had no interest in the finality of a dismissal on a clearly defective procedural ground.

***Bradshaw v. Stumpf*, 125 S.Ct. 2398 (2005).**

John Stumpf admitted to shooting Mr. Stout (who survived), but claimed that he did not fatally shoot Mrs. Stout. At his sentencing hearing, Stumpf argued that he had participated in the crime only at the urging and under the influence of his co-defendant Clyde Wesley and that it was Wesley who fired the fatal shots at Mrs. Stout. The state argued that Stumpf had shot Mrs. Stout, but also noted that Ohio law did not restrict the death penalty to those who commit murder by their own hands, as long as the defendant acted with the specific intent to cause death. The three-judge panel specifically found that Stumpf was the principal offender in Mrs. Stout's murder and sentenced him to death.

After Stumpf was sentenced, Wesley was tried before a jury. At the trial, the prosecutor presented evidence that Wesley had admitted to firing the shots that killed Mrs. Stout. After this trial, Stumpf moved to withdraw his guilty plea or vacate his death sentence. The Ohio Court of Common Pleas denied the motion without explanation.

After his request for state post-conviction relief was denied, Stumpf filed a federal habeas petition. On appeal, the Sixth Circuit determined that habeas relief was warranted because, first, Stumpf's guilty plea was invalid because he had pleaded without understanding that specific intent to cause death was a necessary element of the charge under Ohio law and, second, Stumpf's due process rights were violated by the state's deliberate action in securing convictions of both Stumpf and Wesley for the same crime using inconsistent theories.

A unanimous Court (per Justice O'Connor) rejected the conclusion that Stumpf had not been properly informed before pleading guilty. Stumpf's attorneys represented on the record that they had explained the elements of the aggravated murder charge and Stumpf confirmed that this representation was true. The Court also rejected the Court of Appeals' holding that prosecutorial inconsistencies between the Stumpf and Wesley cases required voiding Stumpf's guilty plea. The prosecutor's use of allegedly inconsistent theories could have a more direct effect on Stumpf's sentence, however, because the sentencing panel's conclusion about Stumpf's principal role in the offense may have been material to its sentencing determination. Because it was not clear whether the Court of Appeals would have concluded that Stumpf was entitled to resentencing if it had not also considered the conviction invalid, the Court remanded the case for consideration of this issue.

Justice Souter, joined by Justice Ginsburg, concurred, noting that Stumpf's remanded claim was that a death sentence may not be allowed to stand when it is imposed in response to a factual claim that the State necessarily contradicted in subsequently arguing for a death sentence in the case of a codefendant.

Justice Thomas, joined by Justice Scalia, also concurred, noting that the State had not yet argued that Stumpf's claim was barred by *Teague v. Lane*, 489 U.S. 288 (1989), or that Stumpf procedurally defaulted the due process claim by failing to present the argument to the Ohio courts.

IMMUNITY

***Orff v. United States*, 125 S.Ct. 2606 (2005).**

In this case, the Court narrowly construed a statutory waiver of sovereign immunity to exclude a direct suit against the Government. Petitioners bought water from a district, which in turn had a contract with the U.S. Bureau of Reclamation. When the district sued the Bureau for reducing its water supply, petitioners intervened. All parties agreed to settle except petitioners, who pressed forward with a claim that the Bureau breached the contract and damaged them as third-party beneficiaries. The lower courts dismissed based on sovereign immunity, and the Supreme Court affirmed in a unanimous opinion by Justice Thomas.

The Court observed that the relevant statute only granted consent to join the Government as a necessary party defendant in any suit to adjudicate certain rights under a reclamation contract. Construing the waiver strictly in favor of the sovereign, the Court held that it only applied to actions between other parties when construction of a reclamation contract is required and joinder of the Government is necessary. It did not apply to petitioners' suit against the Government alone.

INTELLECTUAL PROPERTY

***Merck KGaA v. Integra Lifesciences I, Ltd.*, 125 S.Ct. 2372 (2005).**

A federal statute provides that using a patented invention solely for uses reasonably related to developing and submitting information under federal drug laws is not patent infringement. In this case, Integra argued that Merck willfully infringed its patents on a certain peptide by supplying that peptide to other defendants for use in preclinical research. The jury found infringement and the Federal Circuit affirmed.

In a unanimous opinion by Justice Scalia, the Supreme Court vacated and remanded. It held that the use of patented compounds in preclinical drug studies falls within the statutory safe harbor as long as the compound could be the subject of a submission to the FDA and the experiments will produce the type of information relevant to an investigational new drug application. It rejected Integra's argument that relevant preclinical data is limited to a drug's safety in humans, observing that the FDA also requires information on the drug's effectiveness so that it can conduct its own risk-benefit analysis. It also rejected the court of appeals' holding that the safe harbor categorically excludes experiments on drugs not ultimately submitted to the FDA or the use of patented compounds in experiments not ultimately submitted, concluding that the broad statutory text supported neither exception. The Court remanded to allow the court of appeals to apply this interpretation of the safe harbor to the evidence.

***Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 125 S.Ct. 2764 (2005).**

Respondents Grokster and StreamCast Networks distribute free "peer-to-peer" software products. This software allows users to access files from the computers of other users. There is no central point through which the substance of the communications passes in either direction. A large percentage—about 90%—of the files available through the network consist of copyrighted works. The record included evidence that Respondents clearly voiced the objective that recipients of their free software use it to download copyrighted works and that they took active steps to encourage infringement.

A group of copyright holders sued Respondents for their users' copyright infringements, alleging that they knowingly and intentionally distributed their software to enable users to reproduce and distribute copyrighted works in violation of the Copyright Act. The district court granted summary judgment to Respondents and the Ninth Circuit affirmed, holding that Respondents were not liable because the software was capable of substantial noninfringing uses and Respondents had no actual knowledge of specific instances of infringement.

The Supreme Court reversed in an opinion by Justice Souter, holding that one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties. The Court reconciled this decision with its opinion in *Sony Corp. v. Universal City Studios, Inc*., 464 U.S. 417 (1984), by stating that nothing in *Sony* was meant to foreclose fault-based liability based on evidence of intent, such as is present in this case.

Justice Ginsburg, joined by the Chief Justice and Justice Kennedy, concurred. Unlike in *Sony*, there had been no finding in this case of any fair use by users of the software and little beyond anecdotal evidence of noninfringing uses. Therefore, there was a genuine issue of material fact concerning Respondents' liability for both actively inducing infringement (as the Court's opinion held) and contributory infringement based on their distribution of the software.

Justice Breyer, joined by Justice Stevens and Justice O'Connor, also concurred, disagreeing with Justice Ginsburg's argument that the noninfringing use in this case failed to meet the *Sony* standard.

JURISDICTION

***Exxon Mobil Corp. v. Allapattah Servs., Inc*., 125 S.Ct. 2611 (2005).**

In two consolidated cases, the Court considered whether a federal court in a diversity action may exercise supplemental jurisdiction over additional plaintiffs whose claims do not satisfy the minimum amount-in-controversy required, provided the claims are part of the same case or controversy as the claims of plaintiffs who do allege a sufficient amount in controversy. In one case, the Eleventh Circuit had held that the district court had jurisdiction over all class members in a class action in which the named plaintiff had alleged the jurisdictional amount, but other class members would not meet the amount-in-controversy requirement. In the other case, the First Circuit had held that the district court would not have jurisdiction over the related claims of family members who did not allege the required amount-in-controversy, even though their injured daughter had alleged the jurisdictional amount.

The Supreme Court (per Justice Kennedy) held that the supplemental jurisdiction statute, 28 U.S.C. §1367, authorizes jurisdiction over the claims of other plaintiffs in the same Article III case or controversy, even if those claims are for less than the jurisdictional amount specified in the statute setting forth the requirements for diversity jurisdiction.

Prior to the enactment of §1367, supplemental jurisdiction did not extend to claims by plaintiffs who did not allege the jurisdictional amount or to claims against additional defendants that fell outside the district courts' original jurisdiction. §1367(a) provides, with certain exceptions, that "in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." The section continues: "Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties."

The Court stated that, when the well-pleaded complaint contains at least one claim that satisfies the amount-in-controversy requirement and there are no other relevant jurisdictional defects, the district court has original jurisdiction over that claim. If the court has jurisdiction over one claim in the complaint, it has original jurisdiction over a "civil action" within the meaning of §1367(a). In the special context of the complete diversity requirement, the presence of a claim against a non-diverse defendant will "contaminate" the complaint so that the court does not have jurisdiction over any part of the civil action, but the same is not true when the action includes a claim that does not meet the amount-in-controversy requirement. Therefore, §1367 extends jurisdiction to additional plaintiffs.

The Court declined to look to the legislative history of §1367 to illuminate its meaning because the language of the statute is not ambiguous. In addition, it called this legislative history "murky." The Court noted that the Class Action Fairness Act, enacted this year, had no bearing on its analysis of these cases.

Justice Stevens, joined by Justice Breyer, dissented, arguing that the Court should look to legislative history even if the language of a statute is not ambiguous. The history in this case indicated that §1367 was intended only to overturn the Court's decision in *Finley v. United States*, 490 U.S. 545 (1989), which held that, in a case based on federal question jurisdiction, a district court would not have supplemental jurisdiction over related claims against additional defendants over whom it did not have original jurisdiction.

Justice Ginsburg, joined by Justice Stevens, Justice O'Connor, and Justice Breyer, dissented, arguing that §1367 only overturned *Finley*. While the Court's reading of §1367 was plausible, she argued that the other plausible reading would be less disruptive of the Court's jurisprudence regarding supplemental jurisdiction. In her view, the clause "civil action of which the district courts have original jurisdiction" is sensibly read to incorporate the rules on joinder and aggregation tightly tied to the diversity jurisdiction statute at the time of §1367's enactment.

***Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg*., 125 S.Ct. 2363 (2005).**

In 1994, the IRS seized real property belonging to Grable & Sons to satisfy a tax delinquency and sold the property to Darue Engineering. Five years later, Grable brought a quiet title action in state court, claiming that Darue's title was invalid because—despite the fact that Grable had received notice of the seizure—the IRS had failed to notify Grable of the seizure in the exact manner required by the applicable statute. Darue removed the case to federal district court as presenting a federal question because the claim of title depended on the interpretation of the notice statute in the federal tax law. The district court refused to remand the case and the Sixth Circuit affirmed.

In an opinion by Justice Souter, a unanimous Supreme Court affirmed. In certain cases, federal question jurisdiction will lie over state-law claims that implicate significant federal issues. The federal issue will qualify for a federal forum only if federal jurisdiction is consistent with congressional judgment about the sound division of labor between state and federal courts. This case clearly met the requirement. The meaning of the federal statute was the only legal or factual issue contested in the case, and it is an important issue of federal law that sensibly belongs in federal court. In addition, because it will be the rare state title case that raises a contested matter of federal law, federal jurisdiction to resolve genuine disagreement over federal tax title provisions will portend only a microscopic effect on the federal-state division of labor.

Justice Thomas concurred, noting that no party had asked the Court to adopt a rule limiting federal question jurisdiction to cases in which federal law creates the cause of action pleaded on the face of the plaintiff's complaint. In an appropriate case, he indicated, he would be willing to consider that course.

LIMITATIONS

***Dodd v. United States*, 125 S.Ct. 2478 (2005).**

More than three years after Michael Dodd's conviction for knowingly and intentionally engaging in a continuing criminal enterprise became final, he filed a habeas corpus motion under 28 U.S.C. §2255, seeking to set aside his conviction based on the Court's decision in *Richardson v. United States*, 526 U.S. 813 (1999), which held that a jury must agree unanimously that a defendant is guilty of each of the specific violations that together constitute the continuing criminal enterprise. The district court dismissed the motion as time-barred under subparagraph (3) of §2255, which provides that the one-year period of limitation begins to run on "the date on which the right asserted was initially recognized by the

Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." Dodd appealed, arguing that the limitation period did not begin to run until the Eleventh Circuit held that the right recognized in *Richardson* applies retroactively to cases on collateral review. The Eleventh Circuit rejected this argument and affirmed the dismissal of Dodd's motion.

The Supreme Court affirmed in an opinion by Justice O'Connor, holding that the period in subparagraph (3) of §2255 begins to run on the date that the Supreme Court initially recognizes the right. The text unequivocally identifies this as the only date from which the limitation period is measured. Because the Supreme Court rarely announces within a year that a newly-recognized right will apply retroactively, this will result in most claims based on new rights being time barred, but the Court may not rewrite the statute that Congress has enacted.

Justice Stevens, joined in part by Justices Souter, Ginsburg, and Breyer, dissented. He argued that another reading of the text was plausible, and whenever possible the court should prefer the construction that starts the time limit running when the cause of action accrues. Congress surely intended to allow habeas petitioners to take advantage of new rights that the Court deems retroactive; otherwise, there would be no reason to include that section in the statute.

Justice Ginsburg, joined by Justice Breyer, filed a short dissent stating that applying Justice Stevens's rule that a limitations period should be read to commence when a cause of action accrues was proper in this case, because it prevented claim deprivation, but not proper in *Graham County* (below) because it was likely to cause claim deprivation in that case.

***Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 125 S.Ct. 2444 (2005).**

Karen Wilson brought an action for retaliation under the False Claims Act against Graham County Soil & Water Conservation District. Her claim was dismissed as untimely, however, when the district court held that the FCA's six-year statute of limitations did not apply to FCA retaliation claims and borrowed North Carolina's 3-year statute of limitations for retaliatory discharge action. The Fourth Circuit reversed, holding that the six-year period did apply and therefore her claim was timely.

The Supreme Court reversed in an opinion by Justice Thomas. The FCA, in 31 U.S.C. §3730, provides three enforcement mechanisms: an action by the United States, a *qui tam* action, and a private cause of action for an individual retaliated against by his employer for assisting an FCA investigation or proceeding. The FCA statute of limitations provides that "a civil action under section 3730" may not be brought "more than 6 years after the date on which" the false claim was made. The Court found that this section was ambiguous about whether a §3730(h) retaliation action is a "civil action under section 3730." A retaliation claim need not allege that a false claim was ever made, which means that the FCA limitations period would be left without a starting point for retaliation actions. In the presence of this ambiguity, the Court stated that two considerations led it to conclude that the better reading is that the FCA statute of limitations does not cover retaliation claims. First, the next subsection of the statute also uses the phrase "action brought under section 3730" to refer only to the government and *qui tam* actions. Second, reading the FCA statute of limitations only to cover these two types of actions is in keeping with the default rule that Congress generally drafts statutes of limitations to begin when the cause of action accrues. This default rule makes sense because it prevents situation like the one that could arise if the FCA statute of limitations applied to retaliation actions, in which

the limitations period could run (because it started when a false claim was made) before the cause of action even accrued (which would not happen until the employer retaliates).

Justice Stevens filed a statement that he concurred in the judgment for the reasons given in his dissenting opinion in *Dodd v. United States*.

Justice Breyer, joined by Justice Ginsburg, dissented, stating that the language of the FCA statute of limitations clearly included any action brought under §3730. In addition, Congress could have deviated from its general rule that statutes of limitations commence when an action accrues for a particular *qui tam*-related purpose: to provide a lengthy limitations period, but to put an end to all litigation at the end of that period.

***Mayle v. Felix*, 125 S.Ct. 2562 (2005).**

In this case, the Court considered whether an untimely amendment of a federal habeas petition related back to the original timely-filed petition under Fed. R. Civ. P. 15(c)(2). Within the one-year statute of limitations, Felix filed a habeas petition challenging the admission of videotaped witness testimony at his state criminal trial. Five months after the statute ran, he amended the petition to add a Fifth Amendment challenge to the admission of his statements during pretrial interrogation. Felix argued that the Fifth Amendment claim related back to the original petition because both arose out of the same "conduct, transaction, or occurrence" for Rule 15 purposes. The district court disagreed and dismissed the Fifth Amendment claim as time barred. The Ninth Circuit reversed, reasoning that both claims concerned the same "transaction"—the state court trial.

In an opinion by Justice Ginsburg, the Supreme Court reversed and remanded. It observed that the Ninth Circuit's broad definition of transaction would allow any habeas claim to relate back. Instead, relation back is proper in a civil proceeding only when the claims added by amendment arise from the same core of operative facts as the timely claims, not when the added claims depend on events separate in both time and type. The Court distinguished a case in which a plaintiff amended to add a new legal theory and set of facts concerning the defendant's failure to provide her husband a safe workplace, reasoning that both theories focused on the same "occurrence"—the husband's accidental death. Here, however, the videotaped witness testimony and Felix's pretrial interrogation were different episodes.

Justice Souter (joined by Justice Stevens) dissented, arguing that neither text nor policy supported the Court's narrow reading of "conduct, transaction, or occurrence." He also noted that the Court's rule unfairly burdened *pro se* petitioners for whom counsel is appointed only after the statute has run.

PREEMPTION

***Mid-Con Freight Sys., Inc. v. Michigan Pub. Serv. Comm'n*, 125 S.Ct. 2427 (2005).**

The federal system for regulating interstate trucking allows a company to register a truck's federal permit in every state by filling out a single set of forms in a base state. The base state can demand proof of the permit and of insurance, the name of an agent for service, and the registration fee, charged by each state but it cannot impose any "State registration requirement." Trucking companies argued that this last provision preempted Michigan's $100 fee for trucks with Michigan plates operating in interstate commerce. The Michigan courts rejected this argument, and the Supreme Court affirmed in an opinion by Justice Breyer.

Looking to text, historical context, and purpose, the Court concluded that the statute was only intended to preempt State requirements for determining compliance with the federal scheme. It does not preempt state filing or fee requirements that might affect interstate carriers or be imposed based on the carrier's operation in interstate commerce. Here, Michigan's fee system did not refer to the federal scheme or collect information for it. Nor was there any showing that Michigan prevented any truck that failed to comply with its requirements from

complying with the federal scheme. Accordingly, Michigan's fee was not preempted. Justice Kennedy (joined by Chief Justice Rehnquist and Justice O'Connor) dissented, arguing that state registration requirements targeting interstate truckers are preempted unless the federal scheme authorizes them.

RIGHT TO COUNSEL

***Halbert v. Michigan*, 125 S.Ct. 2582 (2005).**

Antonio Halbert was convicted on a plea of *nolo contendere*. Under Michigan law, a defendant convicted under such a plea must file an application for leave to appeal his conviction with the Michigan Court of Appeals (the intermediate appellate court), which has discretion to deny leave. Halbert sought the appointment of counsel to assist him with this application, but his request was denied. Under a Michigan statute, he would only have been entitled to counsel if his appeal was based on certain alleged sentencing errors.

In an opinion by Justice Ginsburg, the Supreme Court held that the Due Process and Equal Protection Clauses require the appointment of counsel for defendants who seek access to first-tier review in the Michigan Court of Appeals. Halbert argued that he was entitled to counsel under *Douglas v. California*, 372 U.S. 353 (1963), which required that counsel be appointed in a first-tier appellate proceeding. The State argued that the application for leave to appeal was for a discretionary appeal and, therefore, no appointed counsel was required under *Ross v. Moffitt*, 417 U.S. 600 (1974). The Court noted that the Michigan Court of Appeals, unlike the Michigan Supreme Court, sits as an error-correction instance. In addition, a first-tier review applicant, forced to act pro se, will face a record unreviewed by appellate counsel, and will not be equipped with an attorney's brief prepared for, or a reasoned opinion by, a court of review. Defendants need attorneys when appealing a conviction based on a plea as well a conviction following a trial, because the former kind of appeals may still involve myriad and often complicated substantive issues.

The Court rejected Michigan's argument that even if Halbert had a constitutionally guaranteed right to appointed counsel for first-level appellate review, he waived that right by entering his plea of *nolo contendere*. The trial court did not tell Halbert simply and directly that he would not have access to appointed counsel. In addition, when he entered his plea, Halbert had no recognized right to counsel he could elect to forgo.

Justice Thomas, joined by Justice Scalia and in part by the Chief Justice, dissented, arguing that the Court failed to ground its analysis in any particular provision of the Constitution or the Court's precedents and that, even if the right found by the Court existed, Halbert had waived that right in his plea.

***Rompilla v. Beard*, 125 S.Ct. 2456 (2005).**

Rompilla was convicted of murder in Pennsylvania state court. During the penalty phase, his counsel put on a mitigation case that consisted of arguments for residual doubt and pleas for mercy by Rompilla's family. Counsel did not discover significant mitigating evidence about his mental capacity and health, childhood, and alcoholism that was contained in a file regarding a prior conviction. The jury sentenced Rompilla to death. On state post-conviction review, he argued that trial counsel provided ineffective assistance by failing to present this evidence. The state courts rejected his argument. The federal district court granted Rompilla habeas corpus relief from his sentence, but the Third Circuit reversed.

The Supreme Court reversed and granted relief in an opinion by Justice Souter. The Court held that counsel's failure to review the file was objectively unreasonable because they knew the prosecution planned to use the prior conviction as aggravating evidence. It rejected the state court's conclusion that counsel's efforts to find mitigating evidence by other means were enough, observing that no reasonable lawyer would forgo examination of the file in favor of interviewing the defendant and family members about what they recalled.

Finally, because the state courts had not considered whether any ineffective assistance was prejudicial, the Court examined that question *de novo*. It held that the significant mitigating evidence in the file—which bore no relation to the pleas for mercy actually presented to the jury—might well have influenced the jury's appraisal of Rompilla's culpability at sentencing.

Justice O'Connor concurred, noting that the majority opinion did not impose a rigid requirement to review all documents in a prior conviction file. Here, such a review was required because Rompilla's counsel knew the prior conviction would be at the heart of the prosecution's case, the prosecution's use of the conviction would eviscerate their mitigation argument of residual doubt, and their decision not to obtain the file was not an informed tactical decision on how to best spend their time. Justice Kennedy (joined by Chief Justice Rehnquist and Justices Scalia and Thomas) dissented, arguing that a rule requiring counsel to review the entire court file regarding prior convictions used by the prosecution as aggravating evidence was a radical departure from the Court's traditional reluctance to impose rigid requirements on defense counsel. He also contended that no prejudice existed because it was unlikely counsel would have read the document containing the mitigation leads when reviewing the prior conviction file.

TAKINGS

***Kelo v. City of New London*, 125 S.Ct. 2655 (2005).**

This case concerns whether the Takings Clause allows private property to be condemned so that a private party may redevelop it as part of a city revitalization plan. Certain property owners sought to enjoin the condemnation, arguing that the Constitution only allows private property to be taken for "public use." The state district court enjoined the taking of some property, but the Connecticut Supreme Court upheld all of the takings.

In an opinion by Justice Stevens, the Supreme Court affirmed. The Court observed that a government cannot take private property when its actual purpose is to benefit a particular class of identifiable individuals. Here, however, the takings were part of a carefully considered development plan. Although the plan would not open the property for use by the general public, the Court held that it did serve a "public purpose" as precedent has broadly defined that concept. Reviewing its cases in this area, the Court concluded that they give governments broad latitude in determining what public needs justify the use of the takings power. Considering the challenges of individual owners in light of the entire plan, the Court deferred to the city's determination that economic rejuvenation was necessary. It also held that the goal of promoting economic development is a valid public purpose even when pursuit of that goal benefits private parties.

Justice Kennedy concurred, cautioning that property transfers are unconstitutional if they are intended to benefit particular private entities and yield only incidental or pretextual public benefits.

In dissent, Justice O'Connor (joined by Chief Justice Rehnquist and Justices Scalia and Thomas) argued that the Court's holding makes all private property vulnerable to being transferred to a new private owner who will use it in ways that government deems more beneficial to the public. In her view, equating "public use" with incidental public benefits resulting from the new owner's ordinary use of private property effectively removes those words from the Constitution. She argued that the Court departed from its precedent, which had only authorized condemnation that achieved direct public benefits by eliminating harmful property uses. Justice Thomas also dissented, contending that the original understanding of "public use" concerned whether property is used by the public or the government, not whether the purpose of the taking is legitimately public.

***San Remo Hotel, L.P. v. City & County of San Francisco*, 125 S.Ct. 2491 (2005).**

In California state court, hotel owners challenged a city zoning designation requiring them to pay $567,000 to convert residential rooms to tourist rooms. Later, they sued the city in federal court, pleading facial and as-applied claims to the city's zoning ordinance under the Takings and Due Process Clauses. The Ninth Circuit concluded that the as-applied challenge was unripe because the city had not yet denied a claim for compensation, and it abstained from deciding the facial challenge because the state court's decision regarding whether the zoning designation was proper could moot the owners' federal claims. Back in state court, the owners purported to reserve their right to return to federal court to litigate their federal claims if necessary. Yet they also asserted a takings claim under the state constitution and relied on federal takings decisions to support their arguments. After losing their state court suit, the owners returned to federal court to litigate their federal constitutional claims. The district court held that those claims were barred by issue preclusion, reasoning that state takings law had been interpreted coextensively with federal law and that the state judgment was entitled to full faith and credit. The Ninth Circuit affirmed.

In an opinion by Justice Stevens, the Supreme Court affirmed. The owners argued that unless takings claims are excluded from the requirement that federal courts give state judgments full faith and credit, plaintiffs will be forced to request compensation and assert their takings claims in state court without any realistic possibility of federal review. The Court rejected this argument, holding that courts may not create exceptions to the full faith and credit statute unless a later statute contains an express or implied partial repeal, which was not the case here. The owners could have insulated their facial challenge from preclusive effect by reserving it in state court and litigating only antecedent state-law issues that could moot the federal claims. Instead, they advanced facial and as-applied takings challenges, effectively asking the state court to decide the same issues they had previously asked it to reserve. Thus, the owners were not entitled to relitigate their claims in federal court.

Chief Justice Rehnquist (joined by Justices O'Connor, Kennedy, and Thomas) concurred in the judgment. He agreed with the Court's decision but wrote separately to argue that a previous decision may have been incorrect in requiring a claimant to seek compensation in state court before bringing a federal takings claim in federal court.

I have not failed. I've just found 10,000 ways that won't work.

Thomas Alva Edison
(1847 - 1931)

Al Durrell, Powers & Frost, L.L.P., Houston
Dylan O. Drummond, Attorney-at-Law, Austin

BREACH OF FIDUCIARY DUTY & RATIFICATION OF FRAUD

***Meyer v. Cathey*, 167 S.W.3d 327 (Tex. 2005) (per curiam) (cause no. 03-0938).**

In this breach of fiduciary duty and fraudulent inducement case, the Texas Supreme Court reversed the judgment of the Waco Court of Appeals and rendered judgment that Cathey take nothing.

Larry Meyer employed John Cathey to seek out real estate development projects and refinancing opportunities on extant projects. The two often differed over the exact compensation Meyer owed Cathey for his work, eventually resulting in Cathey suing Meyer for breach of fiduciary duty and fraudulent inducement. After a lengthy jury trial, the jury found that, while Meyer did induce Cathey to participate in each of the real estate projects in question, Cathey later ratified and waived each incident of inducement. The jury further found that, again, while Meyer did breach the fiduciary duty he owed Cathey, Cathey did not pursue his claims within the applicable statute of limitations. The court of appeals disagreed with the jury's findings, and reversed, holding that Cathey was entitled to recover on his fraud and breach of fiduciary duty claims on all but one of the projects.

Meyer challenged the legal sufficiency of the jury's finding of breach of fiduciary duty to the supreme court, which reversed. The court reviewed the litany of its previous opinions describing under what circumstances a fiduciary duty arises, and ultimately concluded that no legally sufficient evidence of a "'special relationship of trust and confidence . . . [existed] prior to, and apart from, the agreement made the basis of the suit.'" *Meyer*, 167 S.W.3d at 331 (quoting *Associated Indem. Corp. v. CAT Contracting, Inc.*, 964 S.W.2d 276, 288 (Tex. 1998)). The court explained that the projects entered into between the parties were, by and large, "arms-length transactions entered into for the parties' mutual benefit, and thus do not establish a basis for a fiduciary relationship." *Meyer*, 167 S.W.3d at 331. The court also held there was legally sufficient evidence to uphold the jury's finding of Cathey's ratification.

COLLATERAL ATTACK OF BANKRUPTCY JUDGMENTS

***Browning v. Prostok*, 165 S.W.3d 336 (Tex. 2005) (cause no. 03-0784).**

Writing for a unanimous court, Justice Wainwright held that Jeff Prostok and other senior bondholders' suit against Peter Browning and other junior bondholders was an impermissible collateral attack on a bankruptcy court's confirmation order. Accordingly, the court reversed the judgment of the Dallas Court of Appeals in part, and rendered judgment that Prostok take nothing.

The legal proceedings forming the basis of this petition originated almost fifteen years ago when two companies, one the holding company of the other, filed for Chapter 11 bankruptcy protection in federal court. The order confirming the reorganization plan became effective on July 1, 1993. Interested parties were permitted to contest the confirmation order within one hundred and eighty days of its entry, the expiration of which fell on September 9, 1993. No one did so.

Prostok filed this suit in 1995 against Browning, former officers and directors of one of the original Chapter 11 companies, and their financial advisor asserting, *inter alia*, that they collectively and intentionally undervalued the assets of the company during the bankruptcy proceeding. The suit was removed to the bankruptcy court, but was later remanded back to state court for lack of

jurisdiction, and summary judgment was granted in Browning's favor. The court of appeals eventually reversed the summary judgment against Prostok, and Browning petitioned for review.

The supreme court's analysis of the petition hinged on whether or not Prostok's suit constituted an impermissible collateral attack on the confirmation order of the bankruptcy court. The court held that it did, based on a three-pronged analysis. First, the court reasoned that the only basis of Prostok's alleged damages was alleged evidence of fraud "*during the bankruptcy proceedings*," which the court was persuaded to disallow under the First Circuit Court of Appeals' decision in *In re Public Service Co.*, 43 F.3d 763 (1st Cir. 1995). In that case, the court held that only "*new* evidence of fraud" could permit a reviewing court to allow the re-litigation of issues disposed of in the confirmation order. Second, the court addressed Prostok's alternative argument that the bankruptcy judge expressly rejected the contention that Prostok's suit was a collateral attack on the confirmation order. The court dismissed this argument because the bankruptcy court also held that it lacked subject matter jurisdiction to rule on the substantive issues in the case, one of which was Browning's collateral attack defense. Third, the court of appeals relied heavily on two federal cases for the proposition that "'bankruptcy courts agree that [the U.S. Code] does not bar fraud claims, unless those claims require revocation of a confirmed plan.'" *See Browning*, 165 S.W.3d at 350 (quoting *Prostok v. Browning*, 112 S.W.3d 876, 903 (Tex. App.—Dallas 2003)). The court distinguished both federal cases because the alleged fraudulent conduct examined in both was not asserted in the underlying bankruptcy proceedings, as it was in the case under review.

CONTRACT CONSTRUCTION

***Frost Nat'l Bank v. L&F Distribs., Ltd.*, 165 S.W.3d 310 (Tex. 2005) (per curiam) (cause no. 04-0074).**

After holding that the contract at issue only allowed the lessee to purchase the leased vehicles at the expiration of the lease, the Texas Supreme Court reversed the judgment of the Corpus Christi Court of Appeals at Edinburg, and remanded the cause back to the trial court.

Frost National Bank purchased fourteen new delivery vehicles, which it then leased to Williams Distributors, Inc., a beer distributor, for a sixty-month term. The lease agreement contained a purchase option, referred to in the agreement as a "terminal rental adjustment clause," which gave Williams the right to purchase the vehicles by giving Frost ninety days' written notice and provided for payment to be made "'on the last day of the [the lease's] Expiration [in] an amount in cash equal to the then[-]Fair Market Value . . . of such Equipment,'" (quoting the lease agreement). After a year, Williams received permission from Frost to assign the lease to another beer distributor, L&F Distributors, Inc., which, shortly after receiving the lease assignment, sought to exercise the purchase option by sending a payment in the amount required by the lease agreement to Frost. Frost rejected and returned the payment, refusing to sell the vehicles until the last day of the lease.

The trial court agreed with L&F, partially granted its summary judgment motion, and declared that Frost breached the lease agreement in refusing to sell the vehicles when L&F tendered payment. The court of appeals affirmed, holding the lease agreement is unambiguous, and allowed L&F to purchase the vehicles with proper notice at any time on or before the end of the lease term.

The supreme court also determined that the lease was unambiguous, but found that the court of appeals' interpretation was "'unreasonable, inequitable, and oppressive'" in causing Frost to forgo eighty percent of the rental value of the almost-new vehicles. *See Frost*, 165 S.W.3d at 313 (quoting *Reilly v. Rangers Mgmt., Inc.*, 727 S.W.2d 527, 530 (Tex. 1987)). Accordingly, the court reversed and remanded the cause back to the trial court.

***SAS Inst., Inc. v. Breitenfeld*, __ S.W.3d __, 48 Tex. Sup. Ct. J. 949, 2005 WL 1538273 (Tex. July 1, 2005) (per curiam) (cause no. 04-1103).**

Holding that John Breitenfeld was unambiguously required to repay a bonus he received based on a sale that was later cancelled, the Texas Supreme Court reversed the judgment of the Dallas Court of Appeals.

While Breitenfeld was employed by SAS, a software company, he was credited with closing a million dollar sale to Methodist Healthcare System. The commission contract he signed as a condition of employment therefore guaranteed him a substantial bonus for the sale. Some three months later, Methodist cancelled its order, and Breitenfeld left the company approximately two months after that. SAS sought repayment of the bonus it paid Breitenfeld, but he refused to refund it.

SAS sued Breitenfeld, both parties filed summary judgment motions, and the trial court granted same for SAS. However, the court of appeals reversed and rendered judgment in favor of Breitenfeld, and SAS petitioned the supreme court for review.

In reinstating the trial court's judgment, the court found that the commission contract unambiguously stated that cancelled contracts would require a deduction or repayment of any bonuses originally paid. Accordingly, the court held that Breitenfeld was required to repay the bonus he received from SAS on the cancelled contract as a matter of law.

EXCESS INSURERS–THIRD-PARTY REIMBURSEMENT

***Excess Underwriters at Lloyd's, London v. Frank's Casing Crew & Rental Tools, Inc.*, __ S.W.3d __, 48 Tex. Sup. Ct. J. 735, 2005 WL 1252321 (Tex. May 27, 2005) (cause no. 02-0730).**

In this insurance dispute case, Justice Owen, writing for the majority, reversed the Fourteenth Court of Appeals judgment and remanded the cause to the trial court.

Frank's Casing Crew & Rental Tools, Inc. was hired by ARCO/Vastar to fabricate a drilling platform, which was later installed in the Gulf of Mexico where it collapsed some months later. ARCO sued Frank's.

Frank's had a primary liability insurance policy for $1 million, and had obtained excess coverage of up to $10 million from several excess underwriters, including Lloyd's, London. Frank's and its excess underwriters were at odds over how much coverage the excess underwriters would extend to Frank's, and Frank's eventually "*Stower*ized" the excess underwriters by demanding they accept the $7.5 million offer by ARCO. After initially granting summary judgment for the excess underwriters and an award in the amount of $7,013,612, the trial court instead issued a take-nothing judgment against the excess underwriters after the Texas Supreme Court issued its opinion in *Texas Association of Counties County Government Risk Management Pool v. Matagorda County*. *See* 52 S.W.3d 128 (Tex. 2000). In affirming the judgment of the trial court, the court of appeals noted that the result of the case was "somewhat disquieting" in that "Frank's was able to resolve the parties' coverage dispute in its own favor simply by sending a *Stowers* demand to the [excess u]nderwriters."

The supreme court began its examination of the case by recounting that the duty *G.A. Stowers Furniture Co. v. Am. Indemn. Co.* imposes is to

exercise "that degree of care and diligence which an ordinarily prudent person would exercise in the management of his own business." *See* 15 S.W.2d 544, 547 (Tex. Comm'n App. 1929, holdings approved).

The court broadened its holding from *Matagorda*, explaining that, while *Matagorda* may have "indicated that the *only* circumstance under which an insurer may obtain reimbursement from an insured for settlement payments when there is no coverage is when there is an express agreement that there is a right to seek reimbursement," the court now clarified "that there are additional circumstances that will give rise to a right of reimbursement," including the circumstances present in this case.

Justices Hecht, Justice O'Neill, and Justice Wainwright all filed concurring opinions on differing grounds. Justice Hecht concurred in the judgment of the court, but clarified that none of the distinctions that the majority drew between its decision in *Matagorda* and *Excess Underwriters* were material, and therefore *Excess Underwriters* effectively overruled *Matagorda* for all intents and purposes. Justice O'Neill differed with the final portion of the opinion, concluding instead that "the *Stowers* test *presumes* coverage and simply has no application in determining an insurer's reimbursement right when coverage is disputed. Finally, Justice Wainwright lamented the lack of certainty and predictability in this area of the law because of the court's insistence on basing its decisions on competing policy considerations instead of construing the agreements between the parties.

GENDER DISCRIMINATION—DEFINITION OF "SIMILARLY SITUATED"

***Ysleta Indep. Sch. Dist. v. Monarrez,* __ S.W.3d __, 48 Tex. Sup. Ct. J. 1014, 2005 WL 2044934 (Tex. Aug. 26, 2005) (per curiam) (cause no. 02-1185).**

In this gender discrimination suit, the Texas Supreme Court held that there was legally insufficient evidence that Ysleta Independent School District discriminated against Gustavo Monarrez and Jose Rodriguez on the basis of their gender.

After a night of revelry, Rodriguez asked Monarrez to clock-in for him the next day at the district, where they worked, in case Rodriguez was late getting in to work. The following morning, Monarrez did as he was asked, and even clocked Rodriguez out at the end of their shift after Rodriguez failed to appear at work at all that day. Both men later admitted their deception to a supervisor, and after review, both were terminated.

On petition to the court, Monarrez and Rodriguez's claims of gender discrimination centered upon their allegations that female district employees were only reprimanded for time card violations, instead of being terminated as were Monarrez and Rodriguez.

In reversing the judgment of the El Paso Court of Appeals, the supreme court noted that it had not previously considered what it precisely meant, in an employment discrimination context, to be "similarly situated." Using federal jurisprudence as its guide, the court explained that, in order to "prove discrimination based on disparate discipline, the disciplined and undisciplined employees' misconduct must be of 'comparable seriousness.'" *Ysleta*, 48 Tex. Sup. Ct. J. at 1015 (citations omitted). Because the instances of time card misconduct by female district employees did not involve a conspiracy to conceal an employee's absence from work, the court reasoned that the female employees' conduct was not comparably serious, and therefore, Monarrez and Rodriguez's evidence of gender discrimination could not be given legal effect.

It has been noted elsewhere that, with this decision, the court took the somewhat unusual step of addressing an issue of first impression—namely precisely what the legal definition of "similarly situated" is under the Texas Commission on Human Rights Acts—by way of a

per curiam opinion. *See* Mary Alice Robbins, *Peculiar Per Curiam*, 21 TEX. LAW. 1 (Sept. 5, 2005).

MANDAMUS – FINALITY OF JUDGMENT

***In re Burlington Coat Factory Warehouse of McAllen, Inc.*, 167 S.W.3d 827 (Tex. 2005) (orig. proceeding) (cause no. 02-1084).**

Chief Justice Jefferson, writing for the majority, conditionally granted Burlington Coat Factory Warehouse of McAllen, Inc.'s petition for writ of mandamus, and directed the trial court to vacate its orders permitting execution of its judgment.

Evangelina Garcia sued Burlington for injuries she sustained while shopping at its store in McAllen, seeking both actual and exemplary damages. Burlington did not answer her petition, and the trial court rendered a default judgment against Burlington that awarded Garcia $183,000 in damages and post-judgment interest, but the judgment was silent on Garcia's exemplary damages claim. Burlington filed a motion for new trial, which the trial court initially granted. However, after Garcia protested that order granting new trial was void for lack of jurisdiction because the default judgment was a final judgment, the trial court entered a docket notation indicating that the new trial was cancelled due to lack of jurisdiction, but it never issued a written order to that effect.

Garcia subsequently attempted to enforce the default judgment through execution, and Burlington responded by simultaneously depositing a check in the amount of $191,523.24 in the registry of the court and filing a motion to quash execution, asserting that the default judgment was interlocutory and not subject to execution. The trial court denied Burlington's motion to quash, and ordered that the monies in the court's registry be released to Garcia's attorney. Burlington sought mandamus relief from the supreme court.

The court agreed with Burlington that the default judgment was not presumed to be final, and the court clarified that its analysis of whether the judgment was interlocutory or not hinged on whether the "'intent to finally dispose of the case'" was "'unequivocally expressed in the words of the order itself.'" *In re Burlington*, 167 S.W.3d at 830 (quoting *Lehamann v. Har-Con Corp.*, 39 S.W.3d 191, 200 (Tex. 2001)). Because the default judgment's language did "not unequivocally express that it was intended to be final and because the judgment does not dispose of all claims," the court concluded that it is interlocutory.

The court next turned to the trial court's order directing the execution to issue, holding that because an interlocutory order may not be enforced by execution, the trial court abused its discretion by directing the court's registry to pay the Burlington monies to Garcia's attorney. The court further explained that at the time the trial court permitted the execution to proceed, there was not even an interlocutory judgment then in force, because the trial court's grant of Burlington's motion for new trial effectively vacated the earlier default judgment. The court was unmoved by arguments that the docket entry "canceling" the new trial could be accepted as a substitute for a written order to that effect. Lastly, the court found that Burlington had no adequate remedy by appeal for allowing execution to issue before a final judgment has been entered.

Justice O'Neill, joined by Justice Johnson, dissented from the grant of mandamus relief, adjudging that enough evidence of finality did exist in the record, and what lack of evidence there was should have been weighed against Burlington as such evidence might have provided more indicia of finality.

MANDAMUS—INTERSTATE CHILD CUSTODY JURISDICTION

***Powell v. Stover*, 165 S.W.3d 322 (Tex. 2005) (orig. proceeding) (cause no. 03-1154).**

Writing for a unanimous supreme court, Justice O'Neill conditionally granted Russell Powell's

petition for writ of mandamus, staying all Texas proceedings pending a Tennessee court's determination of the appropriate forum for the cause.

In 2001, Russell and his wife Sonia Powell moved with the couple's son, D.B.P., to Tennessee. D.B.P. resided in the state with both parents for over ten consecutive months, until Sonia moved back to Texas, taking D.B.P. with her, in April 2002. Two weeks after Sonia and D.B.P. left Tennessee, she filed for divorce from Russell in Texas, and he filed for divorce from her in Tennessee two weeks after that. The Tennessee court awarded custody of D.B.P. to Russell, and he filed a plea in abatement in the Texas proceedings. His plea that jurisdiction was proper in Tennessee was based on the Texas Family Code, which defines "home state" as "the state in which a child lived with a parent . . . for [a period of]at least six consecutive months immediately before the commencement of a child custody proceeding." TEX. FAM. CODE ANN. §152.102(7) (Vernon 2002). In addition, this section of the Family Code expressly includes "period[s] of temporary absence of a parent . . . [as] part of the period." *Id.*

The trial court denied Russell's plea, citing "a very close question of fact," and a divided Beaumont Court of Appeals denied his subsequent petition for writ of mandamus because there was "a fact issue on whether [Sonia's] time spent in Tennessee was a temporary absence."

Although Russell styled his action as a petition for review, the supreme court treated his action as a petition for writ of mandamus because Russell did not appeal the final order of the court of appeals.

The supreme court disagreed with the court of appeals' reasoning on three grounds. First, the court discounted Sonia's presumption that Tennessee could only gain jurisdiction through her and not through Russell. Second, the court pointed to the Legislature's use of the term "lived," instead of "resided," or "was domiciled," which are both terms requiring tests that involve inquires into a person's intent. Because construction of the term "lived" demands no inquiry into any person's subjective intent, whether it be the mother, father, or child, the court declined to create such a test from whole cloth. Third, the court refused to apply a jurisdictional test based on the totality of the circumstances because, like a subjective-intent test, such a mechanism would "promote flexibility at the expense of the jurisdictional certainty that the home-state provision was intended to provide."

Finally, the court concluded that the trial court abused its discretion in denying Russell's plea in abatement, because the Family Code clearly provides that "[i]f [a Texas trial] court determines that a child custody proceeding has been commended in a court in another state having jurisdiction substantially in accordance with this chapter, the court of this state shall stay its proceedings and communicate with the court of the other state." §152.206(b).

NEGLIGENCE—EXEMPLARY DAMAGES

***Qwest Int'l Commc'ns, Inc. v. AT&T Corp.*, 167 S.W.3d 324 (Tex. 2005) (per curiam) (cause no. 03-0825).**

In this per curiam decision, the Texas Supreme Court addressed whether there was legally sufficient evidence in the record to support the jury's finding of malice on behalf of Qwest International Communications, Inc. In reversing the portion of the Austin Court of Appeals' judgment affirming the award of exemplary damages based on the malice finding, the court held that the evidence was legally insufficient.

Qwest and AT&T Corp. are competitors in the fiber-optic communications industry, and this dispute arose out of cable laying activities that Qwest was involved in where AT&T's already-laid cable was cut. AT&T sued for negligence and the jury awarded exemplary damages on top of nominal damages for malicious conduct by the upper levels of Qwest's management, who the jury found "foster[ed] a corporate environment of

rapid cable-laying operations in the same rights-of-way and in close proximity to AT&T's cable."

The supreme court reviewed this case under the new, elevated legal sufficiency standard first announced in *Southwestern Bell Telephone Co. v. Garza,* 164 S.W.3d 607, 619 (Tex. 2004). Under this standard of review, if the burden of proof at trial was by clear and convincing evidence, as it was here, the level of legal sufficiency review is elevated from more than a mere scintilla to whether reasonable jurors could have formed a firm conviction or belief. The statute governing the burden of proof at trial expressly required the jury find that Qwest's conduct, "when viewed objectively from the standpoint of [Qwest] at the time of its occurrence involve[d] an extreme degree of risk, considering the probability and magnitude of the potential harm to others." *See* Act of April 20, 1995, 74th Leg., R.S., ch. 19, §1, 1995 Tex. Gen. Laws 108, 109 (amended 2003) (current version at TEX. CIV. PRAC. & REM. CODE ANN. §41.001(11)). When and if that burden was met, AT&T was also required to show that Qwest—as a corporation—was liable for exemplary damages, which AT&T could only show if Qwest: (1) authorized or ratified an agent's malice; (2) maliciously hired an unfit agent; or (3) acted with malice through a vice principal. AT&T relied on the first and third grounds in their petition to the court.

The evidence, the court explained, was legally insufficient to show that corporate officers of Qwest authorized or ratified the cuts in AT&T's cable, much less knew about the incidents prior to their occurrence. The court also rejected out of hand the contention by AT&T that a corporate policy encouraging quick and efficient work by its employees somehow constituted malice or fostered it.

PROCEDURAL DUE PROCESS ("DUE COURSE OF LAW")

***Nat'l Collegiate Athletic Assoc. v. Yeo*, __ S.W.3d __, 48 Tex. Sup. Ct. J. 1016, 2005 WL 2045820 (Tex. Aug. 26, 2005) (cause no. 03-0753).**

Joscelin Yeo, a student-athlete at the University of Texas at Austin, petitioned the Texas Supreme Court, asserting that her procedural due process rights under article I, section 19 of the Texas Constitution (interchangeably termed "due course" instead of "due process," as under Amendment XIV, Section 1 of the U.S. Constitution, *Yeo*, 48 Tex. Sup. Ct. J. at 1018 n.14.) were violated by UT-Austin. Justice Hecht—writing for a unanimous court—disagreed, dismissed her petition for review, and reversed the judgment of the Austin Court of Appeals.

After transferring to UT-Austin from the University of California at Berkeley, Yeo was ruled ineligible by the National Collegiate Athletic Association from participating in the national swimming and diving championship. Yeo later competed in the championship after obtaining injunctive relief.

Yeo's contention before the court was that "she was entitled to notice and a meaningful hearing before NCAA rules were applied to her because of her unique reputation and earning potential." Conceding that reputation is not a protected liberty or property interest, Yeo proposed that the degree of her interest, and not merely just its character, was the touchstone of constitutional protection allegedly denied her.

The Texas Supreme Court rejected Yeo's analysis, citing to U.S. Supreme Court authority directing lower courts to "look not to the 'weight' but to the nature of the interest at stake." *Yeo*, 48 Tex. Sup. Ct. J. at 1019 n.18 (citing *Bd. of Regents of St. Colls. v. Roth*, 408 U.S. 564, 570-71 (1972)). Explaining that the weight of an interest cannot determine its nature, the court

theorized that the loss of either a stellar or of a modest reputation is substantial to its former owner, and so therefore, the "*nature* of one's interest in a good reputation is the same no matter how good the reputation is."

The court additionally held that an interest in future financial opportunities is too speculative to come under the rubric of due process protection. The court also noted that there is no comparable interest in participation in intercollegiate athletics with participation in graduate education. Lastly, the court admonished the lower courts in Texas—as the Texas Supreme Court, the Fifth Circuit Court of Appeals, and the U.S. Supreme Court have repeatedly stated—"judicial intervention in [student athletic disputes] often does more harm than good."

OIL & GAS – MINERAL DEED CONSTRUCTION

***J. Hiram Moore, Ltd. v. Greer*, __ S.W.3d __, 48 Tex. Sup. Ct. J. 662, 2005 WL 1186334 (Tex. May 20, 2005) (cause no. 02-0455).**

In this opinion on rehearing, the only difference between the court's latter and former opinions, *see* 48 Tex. Sup. Ct. J. 247, appears to be a footnote clarifying that the majority did not address whether, via pooling, Greer may have owned some interest in the survey at issue. *See Moore*, 48 Tex. Sup. Ct. J. at 663 n.1.

OIL & GAS – STANDARD FORM OPERATING AGREEMENT CONSTRUCTION

***Valence Operating Co. v. Dorsett*, 164 S.W.3d 656 (Tex. 2005) (cause no. 03-0836).**

In reversing the judgment of the Texarkana Court of Appeals, the Texas Supreme Court held that a modified 1977 American Association of Petroleum Landmen 610 Model Form Operating Agreement's notice provision did not impose any temporal limitation on an operator's ability to commence work on proposed projects, and that the Model Agreement's non-consent penalty was not akin to a liquidated damages clause.

Elmagene Dorsett was a minority working interest owner in a natural gas unit and entered into the Model Agreement with the majority working interest owner, TXO Production Corp. Under the Model Agreement, TXO was designated as the "operator," and was responsible for "the management and control of drilling, development, and production activities." All other parties under the Model Agreement, including Dorsett, were designated "non-operators." Further, all parties to the Model Agreement have the option on each project undertaken whether or not to share in the operating costs and liabilities, and whether to own equipment used on the project. Those who elect to share in the costs, are termed "consenting parties," and are then entitled to have priority in sharing in production revenues proportionate to their respective ownership interests. Those parties who do not so elect, are termed "non-consenting parties," and by doing so subject themselves to a "non-consent penalty," which "operates as a temporary relinquishment of the interest owner's share of production revenue from the project to the consenting parties," instead giving priority on the payout of proportionate production revenue to consenting parties.

In 1981, TXO drilled an initial test well in Dorsett's unit, and Valence Operating Co. later acquired TXO's ownership interest in the well. Valence notified Dorsett of its intent to drill more wells, and Dorsett elected to be a nonconsenting party on each of the wells. When Valence attempted to impose the non-consent penalty, Dorsett objected, contending that the Model Agreement required Valence to allow her thirty days to elapse before commencing work of any kind of the proposed operations. Valence had begun some preparatory work—and even drilling—before this thirty-day period after notifying Dorsett had elapsed.

In 2000, Dorsett sued Valence, alleging that Valence's failure to wait the full thirty days before commencing drilling operations was a breach of contract, and thereby negated the enforcement of the non-consent penalty against her. She further argued that the non-consent

penalty itself was an impermissible liquidated damages provision as well. The trial court granted summary judgment against Dorsett on her breach of contract claims, and the court of appeals reversed and rendered judgment in favor of Dorsett.

On petition to the supreme court, Justice Wainwright—writing for a unanimous court—agreed with Valence's contention that the Model Agreement's language stating that the operator "'shall, within sixty (60) days after the expiration of the notice period of thirty (30) days . . . actually commence work on the proposed operation,'" described only Dorsett's right to receive notice, but did not restrict when Valence could commence drilling operations. *See Valence*, 164 S.W.3d at 662 (quoting A.A.P.L. Form 610-1977, art. VI,B.1-2. (1977)).

The court next turned its analysis to Dorsett's non-consent penalty argument, and dismissed her claim by explaining that she "received notice of each of the proposed subsequent operations [and] . . . [s]he acknowledges that she did not consent to any of the proposed operations within thirty days of receiving notice [and] . . . [s]he therefore is a non-consenting party under . . . the Model . . . Agreement, and the non-consent penalty applies to her." The court added to its reasoning on this point by noting that liquidated damages are usually only recoverable where there has been a breach of contract. Here, the court took its analysis from a New Mexico intermediate court of appeals decision which held that "a non-consent election cannot convincingly be characterized as a breach," but is instead a reward to consenting parties for assuming a defined risk. *Valence*, 164 S.W.3d at 664-65 (quoting *Nearburg v. Yates Petroleum Corp.*, 943 P.2d 560, 566-67 (N.M. Ct. App. 1997)).

Justice Brister wrote separately, concurring in the court's judgment, to explain further how a non-consent penalty could be construed to not be a penalty.

SECURITIES FRAUD

***Sterling Trust Co. v. Roderick Adderley*, __ S.W.3d __, 48 Tex. Sup. Ct. J. 887, 2005 WL 1413154 (Tex. June 17, 2005) (cause no. 03-1001).**

In clarifying the aider liability standard imposed by the Texas Securities Act, the Texas Supreme Court reversed the judgment of the Fort Worth Court of Appeals, and remanded the cause back to the trial court.

Beginning around the early 1990s, an investment advisor formed several corporate entities aimed, at least officially, at designing and building luxury homes. The investment banker solicited investments from many people, some of which chose to invest their entire retirement savings in the luxury home entities. To maintain the tax-exempt status of the investors' retirement accounts, the investment advisor recommended the investors use Sterling Trust Co. as the federally-mandated third-party trustee. After a Securities and Exchange Commission investigation exposed the luxury home entities as an elaborate pyramid scheme, the entire venture failed and forced Sterling into receivership.

After sustaining substantial financial losses, the investors sued several parties, including Sterling. After trial, the jury found that Sterling aided in securities violations and that Sterling breached its fiduciary duty to its account holders, and awarded the investors $6 million in actual damages and $250,000 in punitive damages.

Justice O'Neill, writing for a unanimous court, centered her analysis on the scope of the scienter requirement of the TSA. The court of appeals held that the TSA did not require that the aider be "generally aware of its role in the securities violation to be liable as an aider." 119 S.W.3d 312, 320 (Tex. App.—Ft. Worth 2003). The supreme court disagreed, and reasoned that "the TSA's 'reckless disregard for the truth or the law' standard means that an alleged aider can only be held liable if it rendered assistance 'in the face of

a perceived risk' that its assistance would facilitate untruthful or illegal activity by the primary violator." *See Adderley*, 48 Tex. Sup. Ct. J. at 891 (quoting TEX. REV. CIV. STAT. ANN. Art. 581-33F(2); *Kolstad v. Am. Dental Ass'n*, 527 U.S. 535, 536 (1999)). On a tangential issue, the court also found that jury's instruction on Sterling's breach of fiduciary duty was overly broad, and rendered the question defective.

SPECIFIC JURISDICTION–MINIMUM CONTACTS

***Michiana Easy Livin' Country, Inc. v. Holten*, __ S.W.3d __, 48 Tex. Sup. Ct. J. 789, 2005 WL 1252268 (Tex. May 27, 2005) (cause no. 04-0016).**

In writing for the majority, Justice Brister reversed the judgment of the First Court of Appeals, and held that specific jurisdiction cannot be established based on allegations of tortious contacts alone.

After contacting a recreational vehicle's manufacturer's factory in an attempt to secure the lowest price on a new RV, James Holten was referred to Michiana Easy Livin' County, Inc., a "factory outlet" in Indiana. The outlet was a separate legal entity from the manufacturer, had no employees or property in Texas, was not authorized to do business in Texas, and did not advertise in Texas or even on the Internet. The RV itself was constructed and equipped outside of Texas, paid for outside of Texas, and shipped to Texas entirely at Holten's request and expense.

The sole contact that both the trial and appellate courts found sufficient to satisfy the Texas Long-Arm Statute was a phone call Michiana placed in response to Holten, in which Michiana allegedly made tortuous misrepresentations.

In rejecting this view, the supreme court reasoned that the lower courts' holdings would shift a reviewing "court's focus from the 'relationship among the *defendant*, the forum, and the litigation' to the relationship among the "*plaintiff*, the forum . . . and the litigation." *Michiana*, 48 Tex. Sup. Ct. J. at 796 (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984) and *Rush v. Savchuk*, 444 U.S. 320, 322 (1980), respectively)). The Texas Supreme Court explained that so altering the appellate inquiry would run directly counter to the U.S. Supreme Court's mandate that minimum contacts analysis focus solely on the actions and reasonable expectations of the defendant. The court bolstered its holding that determining jurisdiction cannot be based on where a defendant "directed a tort," but must instead turn on the defendant's contacts, by explicating that, to do so, would confuse the respective roles of judge and jury "by equating the jurisdictional inquiry with the underlying merits."

Lastly, the court clarified that, in cases dealing with commerce, a plaintiff may either sue on the contract or in tort, but if "directing a tort at Texas is enough, then personal jurisdiction arises when plaintiffs allege a tort, but not when they allege breach of contract." To do so would, the court explained, cause the defendant's purposeful availment of the forum state to depend on the form of claim elected by the plaintiff. Accordingly, the court held that, because Michiana's only contact with Texas arose from Holten's choosing to place his RV order from here, the minimum contacts necessary to establish jurisdiction in Texas were not present in this case.

Justice Medina filed a dissenting opinion, in which Justice O'Neill joined, that countered the majority's reasoning by arguing that "it is not the quantity or duration of contacts that matters in the specific jurisdiction context but the nature of the contacts." They posited that any tortious conduct by defendant aimed at a forum should subject the defendant to that forum's jurisdiction.

STATUTE OF LIMITATIONS

***Lowenberg v. City of Dallas*, __ S.W.3d __, 48 Tex. Sup. Ct. J. 869, 2005 WL 1366508 (Tex. June 10, 2005) (per curiam) (cause no. 04-0671).**

The Texas Supreme Court reversed the judgment of the Eastland Court of Appeals, and remanded the cause for further consideration.

Jim Lowenberg owned a piece of commercial property located within the corporate limits of the City of Dallas during 1994, when the City passed an ordinance requiring all commercial property owners to pay an annual "fire registration fee." Although the City repealed the ordinance the following year, not coincidentally after a wave of unsurprising protests, the City continued to attempt to collect the fee for the year it was in place.

Such was the case with Lowenberg, who was informed by the City in 1995 and 1996 that he was required to pay the fee, which, for him, amounted to $80. In 1997, the City issued a $2000 citation to Lowenberg for nonpayment of the fee, and he then paid the $80 in return for the City's dismissal of the citation.

Shortly thereafter, Lowenberg filed a class action in state court challenging the constitutionality of the fee, and the district court granted the class's motion for summary judgment, finding the fee was an illegal occupation tax. The court was unmoved by the City's limitations defense, as the court measured the accrual date of the class's claims from when Lowenberg paid the fee—some seventeen months before his state suit. After the City appealed, the court of appeals reversed and rendered a take-nothing judgment against the class, setting the accrual date when the City originally passed the fee ordinance.

The supreme court rejected the court of appeals' reasoning on several grounds. First, the court referred to its earlier decision in *Lubbock County v. Trammel's Lubbock Bail Bonds*, in which it held that the applicable statute of limitations was two years, and that the "'cause of action accrues when payment to the [entity] is made because that is when the injury occurs.'" *See Lowenberg*, 48 Tex. Sup. Ct. J. at 870 (quoting 80 S.W.3d 580, 584-85 (Tex. 2000)). While the court of appeals applied the two-year limitations period mandated by *Trammel's*, it refused to date the accrual of Lowenberg's claim from his payment of the fee, also required under the holding from *Trammel's*, because court of appeals held the *Trammel's* decision had "no application here."

In reaching this seemingly nonsensical conclusion, the court of appeals relied upon two federal cases, both of which the supreme court distinguished as regulatory takings cases. Following the direction of the U.S. Supreme Court, the Texas Supreme Court declined to treat cases involving regulatory takings as controlling precedents for physical takings cases. Additionally, the court explained, the injury giving rise to a claim in a regulatory takings case occurs when the ordinance causing diminution of property value is passed, while the injury in a physical takings case occurs when the property itself is taken, as was the case here.

The court summarized that Lowenberg never made any claim that his property was devalued by the passage of the ordinance, only that he was injured when he paid the fee—which he did within two years of his fee payment—and so his action was not barred by limitations.

TAXATION – AD VALOREM

***Matagorda County Appraisal Dist. v. Coastal Liquids Partners, L.P.*, 165 S.W.3d 329 (Tex. 2005) (cause no. 03-1200).**

In this factually unique case, the Texas Supreme Court reversed the judgment of the Corpus Christi Court of Appeals and remanded the cause back to the appellate court for further consideration.

Coastal Liquid Partners, L.P. leased several vast, underground, manmade salt dome caverns for the storage of approximately six million barrels of liquid hydrocarbons from the Texas Brine

Corporation. Matagorda County's appraisal district assessed the value of two of these caverns at $2 million for the tax years 1996-99.

Both Coastal and Texas Brine appealed the valuation to the local appraisal board, and the board entered an order upholding the district's assessment in Coastal's appeal. Coastal then sought review of the board's decision in the trial court in a de novo proceeding, but the trial court granted judgment for the district. Following Coastal's appeal from that judgment, the court of appeals reversed, holding that the caverns could not be separately appraised from the surface above them.

Justice Brister, writing for a unanimous court, rejected Coastal's assertion that the caverns at issue could only be taxed as "land" under the Tax Code. In support of its argument, Coastal cited to the court's decision in *Gifford-Hill & Co. v. Wise County Appraisal District*, wherein the court held that, in some circumstances, subterranean limestone could not be appraised separately from the land overlying it. *See* 827 S.W.2d 811, 814, 817 (Tex. 1991). Justice Brister distinguished the 1991 decision however on the grounds that the court's holding was not that "subterranean resources could *never* be appraised separately from the surface," but that such resources could only be separately appraised if the resource was not currently in production—as was the case with the limestone at issue in *Gifford-Hill*.

Here, it was undisputed that the salt dome caverns were very much in use, costing Coastal $500,000 annually to lease, and $1 million to create initially. Because the Tax Code defines an "improvement" to include "a . . . structure, [or] fixture . . . erected on or affixed to land," *see* TEX. TAX CODE ANN. §1.04(3)(A) (Vernon 2002 & Supp. 2004-05), the court reasoned the caverns could, in fact, be separately appraised from the overlying land. To bolster this holding, the court analogized the underground caverns to "huge storage facilit[ies] constructed aboveground to hold millions of barrels of hydrocarbons," which would undisputedly be taxable as improvements.

DEFAMATION

***Freedom Newspapers of Tex. v. Cantu*, __ S.W.3d __, 48 Tex. Sup. Ct. J. 916, 2005 WL 1489924 (Tex. June 24, 2005) (cause no. 04-0115).**

In this case, the supreme court addressed the issue of whether or not comments in a newspaper about a public figure constituted defamation. Conrado Cantu was running for sheriff in Cameron County and participated in a debate with several of his opponents, including Terry Vinson on October 4, 2000. During that debate, Cantu made comments about cultural and language differences between himself and Vinson. Reporter Brad Pierce from *The Brownsville Herald* was at the debate and took notes, but did not record the speeches. The next morning, an article appeared on the front page of the *Herald* under the following headline, added by a copy editor:

Cantu: No Anglo can be sheriff of Cameron County/Election 2000: Dem candidate stresses Hispanic Heritage at debate.

Pierce recounted the speech, using quotation marks repeatedly to indicate statements made by Cantu and Vinson. The following day, the paper ran a second article after Cantu contacted them objecting to the use of the word "Anglo" in the headline. In that article, Cantu was quoted as stating, "I did not say that an Anglo could not be Sheriff." Cantu went on to win the election, but later filed suit against the *Herald*, alleging that the original article's headline constituted defamation.

The trial court denied the *Herald's* summary judgment motion and they filed an interlocutory appeal, which the court of appeals affirmed. The supreme court granted the *Herald's* petition for review to decide whether the original article published by the paper constituted actual malice, which is required when a defamation claim is made against a public figure, such as Cantu.

The supreme court ruled that the paper's reporter thought he was reporting "the gist" of what Cantu said, and that any errors in the articles constituted—at most—negligence, not actual malice. In reviewing the lower court's decision, the court utilized the reasonable person standard to deduce what was intended by the articles. In doing so, the court listened to actual tape recordings of the debate. They noted that all direct quotes in the original article were in quotation marks. They also pointed to the fact that the articles, when taken as a whole, would lead a reasonable person to the conclusion that the writer was not attempting to quote Cantu directly in the headline. The judgment of the court of appeals was reversed.

CRIMINAL/CIVIL CONTEMPT

In re Gawerc, **165 S.W.3d 314 (Tex. 2005) (orig. proceeding) (per curiam) (cause no. 04-1044).**

This was an original habeas corpus petition in which petitioner Jim Gawerc asserted that his imprisonment for civil contempt was illegal because he did not have the monetary resources to comply with a requirement that he post a $50,000.00 bond as a condition for his release.

The trial court held Gawerc in both civil and criminal contempt for failure to comply with a child support modification order requiring him to pay $750.00 in child support and post the $50,000.00 bond. The court ordered that Gawerc pay $2,400.00 in attorney fees and suspended the sentence. When Gawerc failed to comply with the commitment suspension order, he was ordered to jail. Gawerc served the criminal sentence and paid the child support and attorney fees. The only condition that remained for his release on the civil contempt sentence was the $50,000.00 bond. Gawerc was eventually released on bond pending consideration of his habeas corpus motion.

Texas law is clear that a petitioner may not be confined for civil contempt unless he or she has the ability but refuses to perform the conditions for release. *Ex parte Rojo*, 925. S.W.2d 654, 655 (Tex. 1996) (orig. proceeding) (per curiam). Because Gawerc was able to conclusively prove that he was not able to purge himself of civil contempt by posting the bond, the supreme court granted Gawerc's petition for writ of habeas corpus and ordered him discharged from custody.

DEFAULT JUDGMENTS

***Mathis v. Lockwood*, 166 S.W.3d 743 (Tex. 2005) (per curiam) (cause no. 04-0516).**

In this case, the supreme court addressed whether or not a post-answer default judgment should be set aside where a party claimed to have not received notice of the trial setting. Mary Mathis appeared pro se to appeal the decision of the trial court after it denied her request to set aside a default judgment against her. The court of appeals affirmed the trial court's decision, finding that Mathis had failed to overcome the presumption that she had received notice.

Mathis was sued by Joseph Lockwood, a man whom she had lived with for some time before the suit. Lockwood sought a declaration that they were not common law spouses, and also sought the return of property he claimed Mathis had stolen. Mathis is believed to have filed an answer, but it is not in the record. The case was set for trial on December 13, 2002 in front of a visiting judge, and Mathis did not appear. A post-answer default judgment was granted in Lockwood's favor. Lockwood's counsel contends that they sent notice of the trial setting to her last known residence, as well as to her former counsel. There was no proof that Mathis had received the notice, either in the form of a certified mail receipt, a certificate of service from the notice, or otherwise, and since Mathis was no longer represented by counsel, service on that counsel could not constitute service on Mathis.

A post-answer default can be set aside if the defendant can prove the three elements laid out in *Cliff v. Huggins*, 724 S.W.2d 778, 779 (Tex. 1987) (citing *Craddock v. Sunshine Bus. Lines*, 133 S.W.2d 124, 126 (Tex. 1939)). The

Craddock test elements are: (1) nonappearance was not intentional or the result of conscious indifference; (2) a meritorious defense; and (3) a new trial would cause neither delay nor undue prejudice. When the first element is met, the second two elements are dispensed with for constitutional reasons. Thus, the supreme court only addresses the first element. The court determined that Lockwood could not produce evidence other than oral assurances of counsel that notice had been served, and thus there was no presumption that proper notice was given under Texas Rule of Civil Procedure 21a. Therefore, Mathis satisfied the *Craddock* test and the trial court abused its discretion in refusing to set aside the default judgment.

ARBITRATION

***In re Nexion Health at Humble, Inc.*, __ S.W.3d __, 48 Tex. Sup. Ct. J. 805, 2005 WL 1252271 (Tex. May 27, 2005) (orig. proceeding) (per curiam) (cause no. 04-0360).**

The supreme court determines in this case that Medicare funds crossing state lines constitutes interstate commerce, thereby bringing a contract within the Federal Arbitration Act and allowing arbitration in the case.

In April 2003, John Lyman was admitted to the Humble Healthcare Center, and his wife signed an arbitration agreement with HHC as part of the intake process. Lyman later died, and his wife filed a petition in trial court asserting claims under the Texas Wrongful Death Act and the Texas Survival Statute against HCC. The trial court denied HHC's motion to compel arbitration under the Texas Arbitration Act, and HHC filed a motion to reconsider, and requested that the trial court compel arbitration pursuant to the FAA. The trial court denied this motion to reconsider, and HHC filed a petition for writ of mandamus in the Fourteenth Court of Appeals, which was denied. HHC then filed an interlocutory appeal in the First Court of Appeals pursuant to the TAA, and also a petition for writ of mandamus with the supreme court pursuant to the FAA.

Lyman's wife argued that HCC had waived its right to compel arbitration under the FAA because it did not raise the issue in its original motion to compel arbitration under the TAA. The Texas Supreme Court ruled that the filing of that motion did not waive HCC's right to later seek arbitration under the FAA.

The Texas Supreme Court also held that the FAA preempts the TAA, that Medicare payments constituted interstate commerce, and provisionally granted the writ of mandamus, directing the trial court to order all claims proceed to arbitration under the FAA. HCC argued that because the FAA preempts the TAA, its interlocutory appeal to the First Court of Appeals was immaterial, and the Texas Supreme Court agreed.

***In re* McKinney, 167 S.W.3d 833 (Tex. 2005) (orig. proceeding) (per curiam) (cause no. 04-0651).**

In this per curiam decision, the Texas Supreme Court addressed whether or not a "pre-dispute arbitration clause" in a contract for financial services was enforceable, despite assurances from a party that he had not agreed to arbitrate.

Keith Rohlack received a cash settlement at a young age following the death of his father. The money was held in a custodial account with Edward Jones and the money was invested. After turning eighteen, Rohlack converted the account from a custodial account to one in his own name, and signed a contract that contained a "pre-dispute arbitration clause," which provided for arbitration and a waiver of a right to a jury trial. For three years after signing the contract, Rohlack used the funds to pay for college and living expenses. During that same time, the account suffered losses from investments in technology stocks. Rohlack sued Edward Jones, alleging fraud, breach of contract, and breach of fiduciary duty, among other claims.

Edward Jones filed a plea in abatement and a motion to compel arbitration, urging the trial court to apply the Federal Arbitration Act to the

agreement. The trial court denied the motion, finding that Rohlack had not agreed to arbitration, despite his signature on the agreement. Edward Jones sought mandamus relief in the court of appeals. The court of appeals concluded that it could not intervene because the issue of whether or not the parties had agreed to arbitrate was a fact issue beyond the scope of mandamus relief.

The supreme court disagreed, finding that a party is bound by the terms of a contract he or she signs absent fraud, misrepresentation, or deceit, regardless of whether he or she read it or thought it had different terms. The arbitration clause in the contract was unambiguous and clearly stated "THIS IS A BINDING CONTACT. I HAVE READ IT CAREFULLY BEFORE SIGNING." Therefore, the supreme court found that the trial court erred in denying Edward Jones' motion to compel arbitration.

***In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732 (Tex. 2005) (orig. proceeding) (cause no. 03-1129).**

The question in this original proceeding was whether Kellogg Brown & Root, Inc., as a non-signatory to a contract containing an arbitration clause, must arbitrate its claims against Unidynamics, Inc. and MacGREGOR (FIN) Oy—the signatories to the contract.

MacGregor contracted with Ingall's Shipbuilding, Inc. to construct elevator trunks for a cruise ship. MacGregor subcontracted with Unidynamics to fabricate and install those trunks. Unidynamics then further subcontracted with KBR perform the fabrication. The contract between Unidynamics and MacGregor contained an arbitration clause but the subcontract between Unidynamics and KBR did not.

Ingalls Shipbuilding filed bankruptcy, and KBR was asked to stop work, which it did. KBR billed Unidyamics for fabrication work already performed, but was not paid and asserted liens on the trunks and other materials. A dispute arose between MacGregor and Unidynamics as to who owed KBR for the unpaid fabrication work, and they entered into arbitration to settle that dispute. While the arbitration was being conducted, MacGregor and Unidynamics requested that KBR release the collateral, but KBR refused and filed suit for breach of contract against Unidynamics, seeking *quantum meruit* damages against both parties.

The trial court denied a motion by MacGregor to compel KBR and its claims into an ongoing arbitration between MacGregor and Unidynamics. The court of appeals conditionally granted mandamus relief and held that the trial court abused its discretion. It ordered the trial court to vacate its order denying MacGregor's motion and "issue an order compelling KBR to arbitrate its claims." KBR sought mandamus relief with the Texas Supreme Court, and two months later the arbitration between MacGregor and Unidynamics ended, however the issue was not yet moot, because the wording of the order purported to force KBR into arbitration for all claims, whether or not it was to be included in the ongoing arbitration or not.

The supreme court held that a non-signatory to a contract should not be compelled to arbitrate a claim only if it seeks, through the claim, to derive a benefit from the contract containing the contract provision. The court conditionally granted mandamus relief and ordered the court of appeals to vacate its order compelling KBR to "arbitrate all claims."

NEGLIGENCE

***Romero v. KPH Consolidation, Inc.*, 166 S.W.3d 212 (Tex. 2005) (cause no. 03-0497).**

This was a case involving a suit by the family of Ricardo Romero against Columbia Kingwood Medical Center, an orthopedic surgeon—Dr. Merrimon Baker, and an anesthesiologist—Dr. William Huie, among others, for negligence in delaying a blood transfusion to Romero while he was in surgery, and for malicious credentialing of

Baker. All parties settled the case except Columbia.

On July 15, 1998, Baker and Huie performed elective back surgery on Romero. During the surgery, Romero lost a significant amount of blood before anyone noticed, and in the forty-five minutes it took to prepare a blood transfusion, Romero lost almost all of the blood in his body and went into cardiac arrest, suffering severe brain damage and leaving him unable to care for himself.

Baker had a long history of allegations of drug abuse and malpractice claims against him. Romero's family alleged that, in light of these issues with Baker, Columbia acted with malice in credentialing him and allowing him to perform the operation. Columbia has a peer review committee which was responsible for reviewing Baker's record and credentialing him. Texas Law provides that, with certain exceptions, the proceedings and records of a peer review committee are confidential and communications to it are privileged from disclosure. TEX. OCC. CODE ANN. §160.007(c) (Vernon 2004). Columbia claimed the privilege in this case, and thus the record was silent on what the committee did or did not know about Baker when making its decision to credential him.

The trial court rendered judgment on a verdict in favor of the Romero family. Two issues were brought on appeal by Columbia before the Fourteenth Court of Appeals were: (1) whether there was any clear and convincing evidence that the hospital acted with malice in credentialing Baker (by statute, hospitals are not liable in Texas for improper credentialing absent malice, which is defined in the statute); and (2) if there was no evidence of malice, whether the trial court committed error in allowing a jury charge that allowed the jury to consider malice in apportionment of responsibility among the various defendants to the case.

The apportionment question was submitted to the jury in broad form, as required by Texas Rule of Civil Procedudre 277, but broad form submission cannot be utilized to put issues before the jury that have no basis in law or in the evidence. In the charge, the jury was instructed that if they found negligence by Columbia, Baker, and Huie, and by Columbia's malicious credentialing, they should apportion liability accordingly. They did so, finding Columbia forty percent responsible, Baker forty percent responsible, and Huie twenty percent responsible.

The court of appeals found that because the record was silent on what the peer review committee knew about Baker, there was no clear and convincing evidence that Columbia acted with malice, whether through actual knowledge or indifference. They also found that it was likely that the apportionment would most likely have been different had the jury not considered malice in their decision. Therefore, it found that allowing the jury to consider malice in apportionment of liability was error, and remanded the case for a new trial on negligence. The Romero plaintiffs filed a petition for review, and the supreme court affirmed.

Justice O'Neill filed a concurring opinion, in which Justice Medina joined, in which they agreed with the reasoning of the court, but commented further on their displeasure with the privilege Columbia asserted to protect the communications of their peer review committee. Justice O'Neill points out that the Romero family was forced to proceed without knowing what actions Columbia did or did not take in credentialing Baker. Justice O'Neill also noted that the intent of the legislature, which was to insure that health care institutions are vigilant and proactive in their peer review processes, is thwarted when hospitals fail to engage in the free exchange of information the privilege was designed to promote.

INSURANCE

***Progressive Cty. Mut. Ins. Co. v. Boyd*, __ S.W.3d __, 48 Tex. Sup. Ct. J. 1020, 2005 WL 2045816 (Tex. Aug. 26, 2005) (per curiam) (cause no. 04-0055).**

Barry Boyd filed suit against Progressive County Mutual Insurance Company following an automobile accident. Boyd had filed claims under the uninsured motorist coverage in his Progressive policy, alleging that he had been struck from behind by a hit and run driver, causing the accident. Following an investigation, Progressive denied his claim on the policy, and he filed his lawsuit, alleging breach of contract, bad faith, and extra-contractual claims.

The trial court severed the bad faith and extra-contractual claims and granted a summary judgment motion filed by Progressive on those claims. The breach of contract claim went to trial, and a jury found in favor of Progressive. The court of appeals affirmed this judgment on the breach of contract claim, but reversed the trial court's summary judgment on the bad faith and extra-contractual claims.

Progressive filed a petition for review from the court of appeal's judgment on the breach of contract claim. The supreme court reversed the decision of the court of appeals on the bad faith and extra-contractual claims, holding that the judgment for Progressive on the breach of contract claim negated coverage of the entire occurrence. The jury found no coverage for the occurrence. Thus, even if the trial court erred in granting summary judgment on the bad faith and extra-contractual claims, the court adjudged the error to be harmless because of the jury's finding of no coverage.

DUE PROCESS

***In re Commitment of Fisher*, 164 S.W.3d 637 (Tex. 2005) (cause 04-0112).**

The supreme court addressed the issue of whether or not the Civil Commitment of Sexually Violent Predators Act was punitive or civil. A jury determined that Michael James Fisher suffered from a behavioral abnormality that made him likely to engage in a predatory act of sexual violence, and the trial court ordered Fisher committed subject to the SVA. The court of appeals reversed this decision, holding that the commitment proceeding provided for under that SVA was punitive, rather than civil, and that Fisher was denied his due process rights under the Texas and United States Constitutions.

The SVA defines a sexually violent predator as a "repeat sexually violent offender" who "suffers from a behavioral abnormality that makes the person likely to engage in a predatory act of sexual violence." TEX. HEALTH & SAFETY CODE ANN.§841.001 (Vernon 2003 & Supp. 2004-05). The SVA goes on to create a multidisciplinary team to review the records of sexually violent predator candidates. The Texas Department of Criminal Justice or the Texas Department of Mental Health and Mental Retardation must notify the multidisciplinary team about the anticipated release of any person who may be a repeat sexually violent offender.

Within sixty days of this notice, the multidisciplinary team must: (1) determine whether the person is a repeat sexually violent offender and if they are likely to commit another such offense after release; (2) give notice of that determination; and (3) recommend the assessment of the person for a behavioral abnormality. Within sixty days of the team's recommendation, the TDCJ or TDMHMR must engage an expert to determine whether the person suffers from a behavioral abnormality, and if they do so conclude, they must give notice and documentation to an attorney employed by the

prison prosecution unit not less than sixty days after receiving the team's notification.

Within ninety days after notice to the state's attorney, the attorney may file a petition alleging the person is a sexually violent predator. Within two hundred and seventy days after such a filing, the judge must conduct a trial to make this determination. The alleged sexually violent predator is afforded counsel, and is allowed to present evidence and cross-examine witnesses. The judge or jury then determines whether, beyond a reasonable doubt, the person is a sexually violent predator. Any jury decision must be unanimous. Upon being adjudged a sexually violent predator, the judge must commit the person pursuant to the Act and provide restrictions to ensure compliance with the terms of commitment. Texas is the only state with such an act that provides for outpatient commitment with tracking devices, as opposed to restraint to a mental or correctional facility.

After going through this entire process, a jury found Fisher to be a sexually violent predator, and conditions were set for his commitment. Fisher moved for a new trial, asserting that his due process rights were violated because the trial court had denied his request to have a jury determine his competency to stand trial. The trial court denied his request, and he appealed, arguing that because the SVA was punitive, rather than civil, his substantive and due process rights were denied because he was incompetent. The court of appeals agreed with Fisher. The State petitioned with the supreme court to address the constitutional aspects of the SVA.

The supreme court followed the lead of the United States Supreme Court in *Kansas v. Hendricks*, 521 U.S. 346 (1997). In that case, the High Court addressed the constitutionality of a similar act in Kansas, and found a statute providing for inpatient civil commitment of sexually violent predators to be constitutional. Following this ruling, the supreme court examined in depth: (1) the legislative intent of the SVA, (2) the effects and purposes of the SVA, (3) affirmative disability versus physical restraint, (3) the historical view that civil commitment has not been considered punishment, (4) retribution, deterrence and scienter, (5) the fact that the SVA applies both to convicted offenders and those convicted but adjudged not guilty by reason of insanity, (6) a rational connection to a non-punitive purpose—community safety, and (7) lack of excessiveness. Taking all of these factors into consideration, they found that the SVA is civil, not punitive, in nature, and due process did not require Fisher be competent to stand trial. The court reversed the judgment of the court of appeals and rendered judgment committing Fisher to supervision and treatment according to the trial court's outlined final judgment and order of commitment.

EMPLOYMENT LAW

***Van Indep. Sch. Dist. v. McCarty*, 165 S.W.3d 351 (Tex. 2005) (cause 03-1123).**

Generally, the supreme court does not have jurisdiction to consider a petition from an interlocutory appeal, however, an exception to this rule is found where there is a conflict between the holding of a court of appeals and a holding of the supreme court, and that is what happened in this case.

Scott McCarty filed suit against the Van Independent School District for having been terminated after filing a workers' compensation claim, contending the termination was retaliatory. McCarty and the district agreed that he was required to file a notice of appeal to the District's Board of Trustees within seven days of his termination. McCarty missed that deadline, and did not file the appeal until two weeks later. Two months after filing the late appeal, McCarty filed another more detailed request asking the board to allow him a hearing to discuss the facts surrounding his termination and the reasons for his late filing of the appeal. The district allowed the hearing, but ultimately denied McCarty's grievance after hearing evidence because of the untimely initial filing of the notice of appeal.

After McCarty initiated this suit, the district filed a plea to the jurisdiction of the trial court, claiming that McCarty had not exhausted his administrative remedies, which the parties do not dispute is a prerequisite to the trial court acquiring jurisdiction. The trial court denied the plea. The district filed an interlocutory appeal, and the court of appeals affirmed the decision, concluding that the District had waived the exhaustion of administrative remedies requirement by allowing the hearing where it denied McCarty's grievance.

This decision conflicts with a previous decision of the court, *Wilmer-Hutchins Independent. School District. v. Sullivan*, 51 S.W.3d 293 (Tex. 2001), which was another case where a school employee filed suit after termination following a workers' compensation claim. In *Wilmer-Hutchins*, the court held that subject matter jurisdiction could not be conferred by estoppel, and that it could not be conferred by waiver either. To correct the conflict between this case and *Wilmer-Hutchins*, the supreme court reversed the judgment of the court of appeals and dismissed McCarty's case for want of jurisdiction.

Justice O'Neill filed a dissent, arguing that the district court would have maintained jurisdiction over McCarty's retaliatory discharge claims because McCarty satisfied the exhaustion requirement by requesting the board (1) hold a hearing on his grievance and (2) waive the non-statutory deadline for filing the request.

HEALTH CARE

***Murphy v. Russell*, 167 S.W.3d 835 (Tex. 2005) (cause no. 02-1101).**

Johnette Russell went to Zale Liphsy Hospital in Dallas for a biopsy in 1998. Prior to the procedure, she told the nurse inserting her intravenous line that she did not want to be sedated or to lose consciousness. She asked the nurse to communicate her wishes to the anesthesiologist, Dr. Mark Murphy. Murphy assured Russell that he would only use local anesthetic, but wanted the IV line inserted to ensure the delivery of antibiotics and saline. Ultimately Dr. Murphy did sedate Russell, who later filed suit for battery, breach of contract, and violations of the DTPA.

Russell did not file an expert report within one hundred and eighty days after filing suit, and Murphy moved to dismiss her lawsuit, arguing that the claims were "health care liability claims" subject to the requirements of former article 4590i (former TEX. REV. CIV. STAT. ANN. art. 4590i, §1.03.(a)(4)), since repealed. The trial court granted the motion and dismissed the case. On appeal by Murphy, the court of appeals reversed, finding that Russell had not alleged and did not need to prove that Murphy had deviated from any standard of medical care, health care, or safety. Thus, it found, no medical report was necessary under 4590i.

Murphy appealed to the supreme court, which examined the definition of "health care liability claim" in the former article 4590i, and found that Russell's claims fell squarely within the definition, including her DTPA claims. The supreme court reversed the judgment of the court of appeals and dismissed Russell's suit.

PROCEDURE/LEGISLATIVE CONTINUANCE

***In re Ford Motor Co*., 165 S.W.3d 315 (Tex. 2005) (orig. proceeding) (per curiam) (cause no. 05-0374).**

In this case, the supreme court was called upon to determine whether or not an exception to the legislative continuance provided for in section 30.003 of the Civil Practice and Remedies Code was appropriate in a particular set of circumstances. The Fuentes family was involved in an automobile accident where Robin Fuentes was rendered a quadriplegic. The family sued Ford Motor Co. because of an alleged tire defect that caused the Fuentes' truck to roll over. Ford filed a motion for legislative continuance (which allows for a continuance if an attorney representing a party is a member of the legislature and will be participating in a legislative session),

and the trial court denied the motion. Ford filed a petition for writ of mandamus with the court of appeals, which was denied. Ford then petitioned the supreme court to decide the matter.

The supreme court granted the writ of mandamus and directed the trial court to grant the motion for legislative continuance. The Fuentes family had argued that the continuance would cause Robin to be denied her existing right to rehabilitation and medical care, which would be delayed by a continuance. However, the court found that the Fuentes family had only an existing right to a *trial* against Ford, not an existing right to medical care against Ford, as such a right would not exist until after a trial on the merits.

OIL & GAS

***Tittizer v. Union Gas Corp*., __ S.W.3d __, 48 Tex. Sup. Ct. J. 1023, 2005 WL 2044931 (Tex. Aug. 26, 2005) (per curiam) (cause no. 04-0100).**

The supreme court was called upon to decide two issues in this case. First, they examined when royalties began to accrue under an oil and gas lease—from the time of first production or from the time a Designation of Pooled Unit was filed—under the terms of an oil and gas lease. Second, they examined whether or not Union Gas Corp. had preserved for appeal the issue of attorney fees.

Union Gas entered into multiple gas leases with members of the Gisler family who owned adjoining properties, and various other adjoining landowners, including Evelyn Tittizer. All of the leases contained pooling clauses, allowing Union Gas to pool the acreage for the production of natural gas. A well on the Gisler property began production on March 27, 2000. Union Gas, however, did not file a Designation of Pooled Unit until August 7, 2000. Language in the terms of the Designation purported to make it retroactive.

The Gislers filed a breach of contract claim against Union Gas, seeking one hundred percent of the royalties between March and August. Union Gas joined Tittizer as one of several third-party defendants, and requested a declaration of rights between all parties, which included a request that the effective date of the pooled unit be the first date of production for all pooled royalty owners.
Tittizer filed a counterclaim, also seeking a declaration that the effective date was from the first date of production, and seeking to recover her share of the royalties from production to the date of judgment. Union Gas then amended its third-party action to add a claim for interpleader, because the competing claims of the royalty owners put them in the position of "potential double liability" for the March to August time period. Union Gas tendered $1.3 million dollars to the court, representing the amount from the time of first production in March until the Declaration was filed in August.

The Gislers, Tittizer, and the other landowners all filed partial motions for summary judgment, which the trial court granted. The Gislers were awarded $1.3 million in royalties, plus attorney fees, representing the March to August royalties. The other landowners, including Tittizer, were awarded their pro-rata share of the royalties between March and the time of production. In doing so, the trial court rejected Union Gas's interpleader claim.

On appeal, Union Gas complained of the double liability, and the appeals court reversed, in part, the trial court's judgments in favor of the non-drillsite landowners, including Tittizer. The appeals court also found that Union Gas had not brought before them the issue of attorney fees, and thus did not consider the reasonableness of the $150,000 award.

Tittizer and Union Gas petitioned the supreme court for review, and the court reviewed the trial court's summary judgment de novo. The supreme court held that the language of the lease agreements was unambiguous in stating that

pooling begins on the date of the recording of a Designation of Pooling, and that the court of appeals was correct in concluding that Tittizer was not entitled to royalties for production between March 27, 2000 and August 7, 2000. It also found that Union Gas had preserved the issue of attorney fees in a motion to the court of appeals in which it provided the following point of error: "The trial court erred in granting final judgments which awarded attorneys fees to the Gislers because the amounts awarded were excessive . . . ." Thus, the supreme court affirmed in part and reversed in part the judgment of the court of appeals, and remanded the case to the appeals court to consider Union Gas's challenge to the reasonableness of the award of attorney fees.

NEGLIGENCE/SUFFICIENCY OF EVIDENCE

***Diamond Shamrock Ref. Co. v. Hall*, 168 S.W.3d 164 (Tex. 2005) (cause no. 02-0566).**

The central issue in this case was whether or not Diamond Shamrock was grossly negligent. Specifically, the supreme court needed to decide whether the evidence was sufficient to show Diamond Shamrock was actually, subjectively aware of risk to Hall, an employee who died following a refinery explosion, and was consciously indifferent to his welfare.

A plant explosion in which a compressor in the Feed Prep Unit ruptured resulted in the death of Charles Hall. His wife filed suit against Diamond Shamrock, alleging gross negligence and seeking exemplary damages. The trial court rendered judgment on a portion of a jury verdict in favor of the plaintiff, and both parties appealed. A divided court of appeals reversed and remanded the case for a new trial. Both parties petitioned the supreme court for review, which the court granted. The court applied the standard of evidentiary review adopted in *Southwestern Bell Telephone Co. v. Garza*, 48 Tex. Sup. Ct. J. 226 (Tex. Dec. 31, 2004), and found that there was no clear and convincing evidence of gross negligence on the part of Diamond Shamrock, and it therefore reversed and rendered judgment in their favor.

The court methodically reviewed the very technical evidence of the chain of events leading up to this explosion, and ultimately concluded that, despite previous explosions, remedial measures taken, and possible negligent design of the overall system, there was not legally sufficient evidence that Diamond Shamrock knew about the potential risk to Hall and did not care. This is the difference between ordinary negligence and gross negligence; for gross negligence to be found, it must be shown that a party did not care about the consequences of its act or omission.

STATUTORY INTERPRETATION/ARRANGER LIABILITY UNDER THE TEXAS SOLID WASTE DISPOSAL ACT

***R.R. Street & Co. v. Pilgrim Enters., Inc.*, 166 S.W.3d 232 (Tex. 2005) (cause no. 02-0758).**

This is a case of statutory interpretation, in which the supreme court was called upon to determine "arranger liability" under the Texas Solid Waste Disposal Act.

Pilgrim Enterprises, the operator of numerous dry-cleaning facilities, had a long term relationship with R.R. Street, which supplied Pilgrim with equipment and chemicals, including percholoroethylene. Street also provided advice and services over a number of years as to the equipment. Street advised Pilgrim to dispose of wastewater by pouring it down drains in their facilities. Also, a Street representative conducted regular chemical tests in Pilgrim facilities, and himself poured vials containing PCE down drains. There was some evidence, which was disputed, that there were leaks in the sewage pipes at some facilities which accounted for PCE contamination.

When Pilgrim was trying to sell assets in 1994, they underwent a mandatory environmental assessment and found that 16 of its 20 facilities had PCE contamination. Following this discovery, Pilgrim entered into a voluntary

remediation program with the Texas Natural Resources Conservation Commission, estimated to cost over $7 million.

Pilgrim filed suit against Street under the SWDA, which imposes responsibility for solid waste clean up costs on persons who "arranged" for disposal of solid waste. The trial court awarded $1.5 million to Pilgrim as Street's portion of the remediation cost. The trial court decided the issue of arranger liability in Pilgrim's favor, and refused to submit that issue to the jury. Street appealed to the First District Court of Appeals, which affirmed in part, and reversed in part. It affirmed the trial court's decision in regards to the jury instruction, finding that there was no error because Pilgrim had proven Street's liability under the SWDA as a matter of law. It reversed the portion of the case regarding damages, and remanded the case for the jury to reassess the damage award.

The Texas Supreme Court reversed. The court found under a "totality of the circumstances" review of the facts of the case showed that Street was not an "arranger" under the SWDA because Street lacked authority or control over decisions regarding the disposal of the waste. It also found that there was a fact question as to whether the PCE poured down Pilgrim drains by the Street employee constituted "solid waste" under the SWDA. It also found there remained a fact issue as to whether or not the pipes in the facilities had leaked. The court also held that the "domestic sewage exclusion" under the SWDA, which exempts materials in domestic sewage from the Act's coverage, did not apply to the test fluids to the extent it had leaked from the pipes onto Pilgrim's properties. The case was remanded to the trial court for further proceedings on liability and damages.

NEGLIGENCE/HEALTH CARE/DAMAGES

***Battaglia v. Alexander*, __ S.W.3d __, 48 Tex. Sup. Ct. J. 720, 2005 WL 1252326 (Tex. May 27, 2005) (cause no. 02-0701).**

The supreme court was called upon in this case to decide: (1) whether two physicians' professional associations can be held liable for their own direct negligence when the physicians who owned the facilities, themselves, were not negligent; (2) whether the professional associations were jointly and severally liable; and (3) how prejudgment interest should be calculated when all other parties have settled.

Carl Battaglia and Tommy Polk were both anesthesiologists who formed their own professional associations. The associations contracted with TOPS Surgical Specialty Hospital to operate and provide staffing for the hospital's anesthesia service.

Mark Alexander underwent outpatient arthroscopic surgery on his shoulder at TOPS. The attending anesthesiologist was Dr. LaVerta Crowder, and the nurse anesthetist was Constance Cernosek, who attended in the place of Battaglia and Polk. During the surgery, Cernosek discovered that Alexander was not getting any oxygen to his right lung. Crowder stopped the surgery and resuscitation began. Alexander had gone into cardiac arrest. His heart was restarted, but he remained comatose and died fourteen days later. Battaglia and Polk were not present during the incident, but Polk did assist with the resuscitation. Alexander's widow filed suit against Battaglia and Polk individually, against their associations, and against TOPS, Crowder and Cernosek. Cernosek and TOPS settled before trial.

The trial court gave a directed verdict that Polk was not individually liable, and the jury found that Battaglia was not individually liable. The jury also found that the associations, Crowder, and Cernosek were each responsible for Alexander's injuries, and apportioned liability to each. The jury further found that the professional associations were engaged in a joint venture, that Crowder was an agent of the associations, and that Cernocek was an employee. The trial court held the professional associations jointly and severally liable for the entire amount of the judgment. The Fourteenth Court of Appeals affirmed the trial court's judgment.

The supreme court affirmed the verdict as it related to apportionment of liability, but reversed as it pertained to prejudgment interest. Under section 16.02 of former article 4590i (Medical Liability and Insurance Improvement Act), prejudgment interest should not be calculated based on damages that a claimant does not actually recover under the trial court's judgment. Here, the settlements of the Hospital and Cernocek needed to be applied as credits. Prejudgment interest accrues only on the amount awarded in the judgment. The trial court's judgment included both past and future damages, so the settlements should be applied first to the past damages, and then to future damages.

Justice Brister was joined by Justice O'Neill and Chief Justice Jefferson in an opinion which affirmed in part, and dissented in part. They agreed with the upholding of liability allocation, but found that section 16.02 of former article 4590i unambiguously requires prejudgment interest be applied *before* applying settlement credits. Part (a) of former 16.02 says prejudgment interest "may not be charged" on claims settled within 180 days of notice of claim; part (b) says that in all other cases "the judgment must include prejudgment interest on past damages found by the trier of fact." The settlement here occurred after the 180 day window, so part (b) governed.

LEGAL SUFFICIENCY OF EVIDENCE

***City of Keller v. Wilson*, __ S.W.3d __, 48 Tex. Sup. Ct. J. 848, 2005 WL 1366509 (Tex. June 10, 2005) (cause no. 02-1012).**

The supreme court explains the appropriate scope of no-evidence review in this condemnation proceeding. In 1991, the City of Keller adopted a Master Drainage Plan which provided for drainage easements across property owned by Z.T. Sebastian and the Wilson family, allowing for drainage into Little Bear Creek. City codes require developers to comply with this Master Plan. The City later approved drainage plans for a new development, which included a drainage ditch across the Sebastian property, but which ended at the Wilson's property line. Prior to construction, water generally flowed across the Sebastian property, through the Wilson property, and into the creek. The Wilsons allege that ending the drainage ditch at their property line caused flooding of their property, and thus constituted an inverse condemnation of the property.

Along with evidence of the Master Plan and code requirements, the Wilsons presented expert testimony to the trial court that the plan the City of Keller approved was substantially certain to cause flooding on their property. The City countered with testimony that the same engineers who approved the Master Plan informed the City that the proposal from the developers would not cause flooding.

The jury awarded the Wilsons $300,000 in damages, and the City appealed. The City contended that it had no reason to be substantially certain that flooding would occur, and the evidence presented by the Wilsons to that effect was insufficient. The court of appeals rejected the City's argument in a divided opinion. The appeals court did not consider the various engineers' certifications because "we are to consider only the evidence and inferences that tend to support the finding and disregard all evidence and inferences to the contrary."

The Texas Supreme Court held that the City was not liable for inverse condemnation and reversed the judgment of the court of appeals. It held that the standard of review in examining legal sufficiency was improperly applied by the court of appeals, because proper review has never required appellate courts to disregard all evidence that does not support the verdict. Instead, the proper scope of review is for appellate courts to "view the evidence in the light favorable to the verdict, crediting favorable evidence if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not."

Applying this standard to the facts of the case, the Texas Supreme Court came to the conclusion that there was legally insufficient evidence to show the City knew the approved plan of the developers was substantially certain to flood the Wilson's property.

Justice O'Neill and Justice Medina concurred, agreeing with the court's analysis of the proper scope of review, however they would have found the jury had a reasonable basis upon which to disregard the City's reliance upon the advice of the engineers who (a) prepared the Master Plan and (b) told them the developer's plan would not flood the Wilson's property. The concurring opinion reflected O'Neill's belief that the City could not be liable for a taking in this case because "a city's mere act of approving a private development plan cannot constitute a taking for public use."

Never mistake motion for action.

Ernest Hemingway
(1899 - 1961)

O. Rey Rodriguez, Fulbright & Jaworski, L.L.P., Dallas
Kendyl Hanks Darby, Haynes and Boone, LLP, Dallas

ANTITRUST—"FILED RATE" DOCTRINE

***Texas Commercial Energy v. TXU Energy, Inc.*, 413 F.3d 503 (5th Cir. 2005).**

This case is an appeal from the dismissal of TCE's antitrust claims against TXU and others related to alleged manipulation of short-term energy prices. The district court held that, even if the defendants had engaged in market manipulation, the filed rate doctrine precluded TCE from recovering for its alleged losses under federal and state antitrust laws. The Panel agreed and noted that, "[t]he filed rate doctrine bars judicial recourse against a regulated entity based upon allegations that the entity's 'filed rate' is too high, unfair or unlawful." The Panel observed that the filed rated doctrine "has been consistently applied as a defense to antitrust actions by various circuits and by the Supreme Court for decades." The Panel held that applying this doctrine to the Texas Public Utility Regulatory Act "along with other common-law defenses that are normally part of the federal antitrust landscape, gives effect to the legislature's intent to have PURA 'complement other state and federal antitrust provisions.'" Likewise, the filed rate doctrine was held to apply with equal force to TCE's state antitrust claims.

In response to TCE's argument that the PURA does not require filing of rates in the particular energy market at issue, the Panel followed the approach of other circuits in holding that extensive government oversight of the subject energy market was sufficient to conclude that the applicable "energy rates are 'filed' within the meaning of the filed rate doctrine."

Relative to TCE's argument that the filed rate doctrine should not be applied under the "competitor exception," the Panel stated that such an exception has never been recognized in the Fifth Circuit or by the Supreme Court. Under this exception, "an anticompetitive practice embodied in a [filed] tariff may [still] violate the antitrust laws if it . . . impacts upon competitors as opposed to customers." Assuming, without deciding, that such an exception to the filed rate doctrine existed, the Panel concluded that TCE (a retailer) was not a competitor of TXU (an energy generator) under the facts presented.

TCE's remaining arguments—that the filed rate doctrine could not be applied because there was no substitute mechanism for the recovery of damages, that the "implication doctrine" warranted reversal and that application of the filed rate doctrine violated the state constitution—were held waived as a consequence of TCE's failure to raise them in the district court.

APPELLATE JURISDICTION—MOOTNESS

***Brazos Valley Coalition for Life, Inc. v. City of Bryan*, __ F.3d__, No. 04-20201, 2005 WL 1940100 (5th Cir. 2005).**

This is a summary judgment case involving challenges to city sign codes. After the plaintiffs moved for summary judgment (but before the city filed its own summary judgment motion), the city enacted a new, highly-detailed sign ordinance that attempted to address the lion's share of the plaintiffs' complaints. Ultimately, the district court denied summary judgment to the plaintiffs and granted the city's motion for summary judgment largely on the ground that the new ordinance mooted the lawsuit which was based on predecessor statutes.

On appeal, the plaintiffs/appellants contended that their claims were not mooted because the city could simply reenact the allegedly offending ordinances once the litigation was concluded. The Panel rejected this argument and held that the

case did not fall within the mootness exception set out in *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283 (1982). In that case, the challenged ordinance was repealed while the case was pending on appeal after an adverse final judgment, mootness was raised for the first time in the Supreme Court, and the City of Mesquite openly conceded at oral argument that it intended to reenact the disputed ordinance as soon as the Supreme Court vacated the judgment for mootness.

The Panel also rejected appellants' challenge to the district court's decision to stay discovery pending resolution of the cross-motions for summary judgment. The Panel noted that appellants failed to show why the extensive discovery they obtained over the course of a year left them unable to respond meaningfully to the city's motion for summary judgment, and appellants also failed to explain what relevant evidence they thought further discovery likely would have revealed. The Panel observed that any information on appellants' damages "would necessarily be within their own knowledge" and that their prospective claims raised pure questions of law such that additional discovery was unnecessary. The Panel affirmed the judgment of the district court.

APPELLATE JURISDICTION—RIPENESS

***Texas Independent Producers and Royalty Owners Ass'n. v. EPA*, 413 F.3d 479 (5th Cir. 2005).**

This case involves a petition for pre-enforcement review of an EPA rule potentially impacting a wide range of oil and gas activities. The Panel stated that "[i]n determining whether EPA's decision is 'ripe' for review we must weigh both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." Citing the Supreme Court's decision in *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726 (1998), the Panel noted that, "[a] court, in determining whether a case is ripe for review, must evaluate the following factors: (1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented."

Applying these factors, the Panel concluded that the case was not yet ripe for review. First, the new EPA rule would have no practical impact for at least another year and plaintiffs' activities and planning would not be impacted under this timetable. Second, the EPA had specifically stated its intent to examine interpretation and application of the new rule during an express deferral period such that judicial intervention would "necessarily prematurely cut off EPA's interpretive process." Finally, the Panel concluded that it needed further factual development to understand the practical impact and scope of the rule if implemented—without a more final and specific pronouncement from the EPA, the Panel "would only be able to address the issue by attempting to hypothesize possible situations in which the rule might apply and determine what is or is not an oil and gas operation."

ARBITRATION—SCOPE OF AGREEMENT IN INTEGRATED TRANSACTIONS

***Safer v. Nelson Fin. Group, Inc.*, __ F.3d__, No. 04-31092, 2005 WL 1993867 (5th Cir. Aug. 18, 2005).**

This is an arbitration case. After investors sued their financial consulting firm and others relative to securities purchases and losses made on the firm's advice, the defendants moved to compel arbitration based on the language of new account information forms signed by the plaintiff investors. In denying the motion to compel arbitration, the district court held that the dispute was more properly within the ambit of an investment advisory agreement (signed the same day) between the parties which did not contain any arbitration clause.

On appeal, the Panel first noted that the denial of a motion to compel arbitration is reviewed *de novo* and that the threshold inquiry is whether the parties agreed to arbitrate the dispute in question. In order to make this determination, the reviewing court must decide "(1) whether there is a valid agreement to arbitrate between the parties; and (2) whether the dispute in question falls within the scope of the arbitration agreement." Noting the strong policy favoring arbitration, the Panel referred to Fifth Circuit decisions holding that arbitration should not be denied "unless it can be said with positive assurance that [the] arbitration clause is not susceptible of an interpretation which would cover the dispute at issue."

In holding that the district court should have granted the defendants' motion to compel arbitration, the Panel pointed to the broad language of the arbitration clause in the account forms each of the plaintiffs had signed. The arbitration provision covered all disputes concerning "the continuation, performance or breach of this or any other agreement between us, whether entered into before, on, or after the date this account is opened." The Panel also observed that the advisory agreement (which had no arbitration clause) had terminated by its own terms before the lion's share of events giving rise to the lawsuit had even occurred. Further, the Panel concluded that the various agreements "were offered hand-in-hand as part of a single transaction designed to empower Nelson to manage the Safer's money" and "were contemporaneously executed as part and parcel of a single transaction" such that plaintiffs' allegations all fell within the scope of the arbitration clause.

COPYRIGHT—CLOTHING DESIGNS

***Galiano v. Harrah's Operating Co., Inc.*, 416 F.3d 411 (5th Cir. 2005).**

In this copyright case, a garment designer sued for alleged infringement on its casino-worker uniform designs. After the parties' underlying agreement for supply of these uniforms expired by its own terms, and after the designer obtained copyright protection on a series of drawings and sketches depicting its uniforms, the garment designer sued for, *inter alia*, copyright violations predicated on the casino's continued purchase of the uniforms from suppliers. In affirming the summary judgment against the garment designer, the Panel agreed with the district court's rationale that "[b]ecause copyright law does not allow one to copyright 'clothing designs' in which the artistic and utilitarian qualities are indivisible . . . [the designer's] copyright could not extend to the designs for the wearing apparel depicted in the illustrations referenced in [the] Certificate of Copyright."

The Panel noted that the core dispute turned on the copyrightability of "pictorial, graphic, and sculptural works"—under 17 U.S.C. §101, such articles "may be two or three dimensional and include works such as maps, fine or graphic art, diagrams, models and technical drawings." If, however, the item qualifies as a "useful article" under the Copyright Act, then it is entitled to copyright protection "only to the extent that its artwork or creative design is separable from the utilitarian aspects of the work." To apply this standard and thereby sever, where possible, the creative elements from industrial design features of an item, the Panel analyzed but declined to adopt the "elegant" and highly complex approach set out in *Pivot Point Int'l, Inc. v. Charlene Prods., Inc.*, 372 F.3d 913, 920-21 (7th Cir. 2004) in favor of the methodology proffered in the "leading treatise in the field"—NIMMER ON COPYRIGHT.

The Panel focused on one particular standard described in NIMMER as follows: "[I]t may be concluded that conceptual separability exists where there is substantial likelihood that even if the article had no utilitarian use it would still be marketable to some significant segment of the community simply because of its aesthetic qualities." The Panel expressly adopted the likelihood-of-marketability standard "for garment design only" and affirmed the summary judgment for the casino noting that the designer made "no

showing that its designs are marketable independently of their utilitarian function as casino uniforms."

While both sides briefed the district court's denial of the designer's summary judgment motion as to the casino's counterclaim for fraud on the Copyright Office, the Panel noted that it had no jurisdiction to consider the denial because, unlike other issues on appeal, no 28 U.S.C. §1292(b) designation had been made of this issue. In dismissing the appeal on the fraud counterclaim, the Panel stated, "[w]e may exercise only proper appellate jurisdiction, even if doing so requires us to consider the jurisdictional question *sua sponte*."

Finally, the Panel vacated and remanded the district court's order granting the casino attorneys fees under copyright law. The district court had failed to consider and apply the four attorneys fees factors set out in *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994): "(1) frivolousness, (2) motivation, (3) objective unreasonableness and (4) the need in particular circumstances to advance the considerations of compensation and deterrence." The Panel noted that the district court had given no reason for the fee award and, during the pertinent hearing, assumed that the appellate court would simply correct any error. In remanding for further treatment of the fees issue, the Panel observed, "[w]e cannot review a district court's decision for abuse of discretion where that court effectively delegates the underlying issue to us without making a substantive ruling of its own."

COPYRIGHT—SIGNED-WRITING REQUIREMENT FOR TRANSFERS

***Lyrick Studios, Inc. v. Big Idea Prods., Inc.*, __ F.3d__, No. 03-10837, 2005 WL 1845176 (5th Cir. 2005).**

In this copyright case, Lyrick successfully sued Big Idea for alleged breach of an exclusive license to distribute children's cartoon programs (including VeggieTales). On appeal from the jury's verdict and the trial court's judgment, Appellant Big Idea prevailed on its argument that Lyrick could not satisfy the requirement that all transfers of copyright must be in writing and signed by the transferor as required by 17 U.S.C. §204(a). The Panel noted that several draft agreements were sent back and forth over the years, but none were ever signed even though the parties proceeded to do business together (and earn significant profits from their relationship). While Lyrick pointed to an internal memorandum of Big Idea stating that "[w]e agreed over the phone to his contract . . . I would say that we have an agreement in force," the Panel noted that this document had never been intended to be communicated to Lyrick or to serve as a memorialization of an actual transfer. Discussing key Ninth Circuit decisions involving similar situations, the Panel held that the writing requirement was simply not satisfied in this case and reversed and rendered on these claims.

The Panel also vacated the district court's order permitting Lyrick to collect on the preliminary injunction bond Big Idea had posted and directed the district court to enter an order for restitution of the bond. Noting the streamlined rules governing the posting of bonds in the preliminary injunction context, the Court summarily rejected Lyrick's contention that only the surety had standing to obtain refund of the bond and that the surety had to assert such rights via separate action.

IMMUNITY—DERIVATIVE SOVEREIGN IMMUNITY

***GLF Constr. Corp. v. LAN/STV*, 414 F.3d 553 (5th Cir. 2005).**

This is a derivative sovereign immunity case. LAN/STV entered into an engineering contract with the Dallas Area Rapid Transit ("DART"). Under the engineering contract, LAN/STV prepared plans, drawings and specifications for construction on the light rail system in Dallas. DART, in turn, provided these plans to its general contractor GLF. When the construction project went awry, GLF filed tort claims against

LAN/STV (in apparent recognition of the lack of privity between these private parties). LAN/STV moved for, and obtained, summary judgment on the basis of derivative sovereign immunity. Noting Texas statutes governing DART's status as a governmental entity and the extension of immunity to independent contractors performing DART's functions, the Panel observed that because LAN/STV was performing a function of DART in preparing plans, drawings and specifications, it could be liable in damages to GLF "only to the extent" that DART would be liable if it had prepared those items itself. Because DART could not be held liable on the general contractor's tort claims under the limited waiver of immunity in the Texas Tort Claims Act, the Panel held that the trial court correctly granted summary judgment to LAN/STV.

INSURANCE—"ACCIDENT" VS. "DISEASE"

***Riverwood Int'l Corp. v. Employers Ins. of Wausau*, __ F.3d__, No. 04-30608, 2005 WL 1840057 (5th Cir. 2005).**

This case concerns whether an asbestos-related disease is a "bodily injury by accident" as that phrase is construed under various workers' compensation and employer liability insurance policies governed by Louisiana law. In affirming the trial court's summary determination that the subject policies were subject to only one reasonable interpretation—that an asbestos-related injury is not a "bodily injury by accident" under the policies—the Panel referred to Louisiana workers' compensation statutes, case law and federal authorities. As the Panel noted, if slow progression diseases related to repeated exposures to toxic substances were treated as bodily injuries "by accident," insurance policy provisions dealing with "bodily injury by disease" would be rendered essentially superfluous.

INSURANCE—"ERRORS AND OMISSIONS" CLAUSES

***Wentwood Woodside I, LP v. GMAC Commercial Mortgage Corp.*, __ F.3d__, No. 04 20819, 2005 WL 1714366 (5th Cir. 2005).**

In this summary judgment case, an insured apartment owner, Wentwood, sued its excess insurer and mortgage servicer to recover for flood damage. In affirming the summary judgment for the defendants, the Panel noted that the subject insurance policy effectively excluded the damaged apartments from any flood coverage.

The Panel also rejected the contention that the "errors and omissions" clause in the primary policy could operate to create insurance coverage that had neither been bargained, contracted or paid for. The Panel characterized Wentwood's lawsuit as "an attempt to retroactively purchase excess insurance for a loss that has already been realized." The Panel also rejected Wentwood's challenge to the trial court's decision to deny its request for leave to file an amended complaint to assert vicarious liability theories against the excess insurer (after that insurer had been granted summary judgment on Wentwood's claims). The Panel observed that the deadline for amending pleadings had long passed before Wentwood sought leave to file its second amended complaint and that Wentwood could have, but did not, timely plead its vicarious liability claim in the alternative. Accordingly, the Panel held that the district court did not abuse its discretion in denying Westwood a post-summary judgment opportunity to present new claims against the excess insurer.

The Panel also affirmed the summary judgment for Wentwood's mortgage servicer—GMAC. Relative to the claim that GMAC assumed a duty to notify Wentwood of revisions to FEMA's flood maps which placed the apartments within a flood zone, the Panel noted that GMAC had indeed communicated these changes to affiliated Wentwood entities but not to Wentwood itself.

Thus, no undertaking to perform services to Wentwood ever existed. Finally, the Panel rejected the contention that the National Flood Insurance Program, 42 U.S.C. §4011 *et seq*., created a duty upon which Wentwood could assert a negligence *per se* action. The Panel held that §4012a, in the first instance, did not apply because a regulated lending institution was not at issue. The Panel further concluded that the Texas Supreme Court "would construe 42 U.S.C. §4012a in a manner consistent with the unanimous conclusion of the federal judiciary" and thus "would not treat mortgagors as the protected class [under this section]"—thus, the Panel made the "Erie guess" that the Texas Supreme Court would hold that this section does not give rise to a private right of action under Texas law for negligence *per se*. The judgment of the district court was affirmed.

INSURANCE—LATE NOTICE OF DAMAGE OR LOSS

***Ridglea Estate Condo. Ass'n v. Lexington Ins. Co.*, __ F.3d__, No. 04-10447, 2005 WL 1899375 (5th Cir. 2005).**

This is a summary judgment case involving hail claims on a property insurance policy. Some six years after a severe hail storm struck its property, the Ridglea Estate Condominium Association discovered significant hail damage to the condominium roofs. In the coverage litigation, the insurance company moved for summary judgment asserting that the hail claims were barred as a matter of law by the insurance policy's notice requirement. That provision required "prompt notice of the loss or damage" to covered property.

Noting that the hail damage to the property was extensive and visible not only on the condominium roofs but also on shutters and windows, the Panel held that the notice period ran from on or about the date the hail damage occurred in 1995. The Panel wrote, "[w]e need not determine precisely where, under Texas law, the boundaries of 'prompt notice' or 'reasonableness' lay. Instead, we simply affirm the district court's holding that to delay an inspection for six years is unreasonable as a matter of law."

The Panel also held that because actual notice of damage was given after the period for prompt notice had already expired, the insurer's subsequent general denial of liability likewise came after the time limit for giving notice and thus did not constitute a waiver of the defense of late notice. The Panel ultimately reversed and remanded the summary judgment noting that, in its view of the governing authorities, the Texas Supreme Court would require a showing of prejudice from delay in reporting loss in order for the insurer to raise breach of the policy's prompt notice provision as a defense. On remand the district court was to determine "whether Ridglea has raised questions of material fact as to whether Lexington was prejudiced by its breach of the policy's prompt notice provision."

PRIVILEGE—ATTORNEY/CLIENT DISPUTES

***Willy v. Admin. Rev. Bd.*, DOL, __ F.3d__, No. 04-60347, 2005 WL 2038543 (5th Cir. Aug. 24, 2005).**

This case involves an attorney's ability to make use of his former employer's privileged materials where relevant to his own whistleblower suit against that employer. The Appellant, Mr. Willy, had served as an in-house environmental attorney for a petroleum company. After a series of events—including his preparation and dissemination of a highly-critical environmental audit report—Mr. Willy was terminated. As part of his whistleblower claims, Mr. Willy sought to obtain and make use of the final version of his environmental report which he asserted precipitated his termination. The company asserted attorney-client privilege.

In analyzing the privilege question, the Panel quickly determined that federal privilege law would apply—"[a]s Willy's claims arise under federal law—and are before us on federal

question jurisdiction under 28 U.S.C. §1331—the federal common law of attorney-client privilege governs our analysis." The Panel concluded that the "breach of duty" exception to the attorney-client privilege applied such that the report should have been admitted. The Panel cited to Supreme Court Standard 503(d) stating that no attorney-client privilege exists "[a]s to a communication relevant to an issue of breach of duty by the lawyer to his client or by the client to the lawyer . . . ." The Panel also relied on similar provisions in the Model Rules of Professional Conduct and Model Code of Professional Responsibilities.

In reviewing a number of federal decisions, the Panel rejected the contention that an attorney may use privileged documents only as a defense against charges brought against him by his client. The Panel wrote, "[t]he case law amply demonstrates the narrower proposition that the attorney-client privilege only prohibits a party from simultaneously using confidential information as both a shield and a sword. Stated differently, the 'shield and sword' analogy is conjunctive: it does not stand broadly for the proposition that an attorney may never use confidential information offensively." In the concluding segments of its opinion, the Panel somewhat confined the span of its holdings—"[t]oday, we merely hold that no rule or case law imposes a *per se* ban on the offensive use of documents subject to the attorney-client privilege in an in-house counsel's retaliatory discharge claim against his former employer under the federal whistleblower statutes when the action is before an ALJ."

PRIVILEGE—CRIME-FRAUD EXCEPTION

***In re Grand Jury Subpoena,* __ F.3d__, No. 04-30508, 2005 WL 1745307 (5th Cir. July 26, 2005).**

This case involves application of the crime-fraud exception to the attorney-client privilege. A grand jury subpoena was issued to secure documents from a criminal defendant's attorney after the government concluded that the criminal defendant and his girlfriend had conspired to commit perjury and had consulted with the attorney toward that end. The criminal defendant, a convicted felon, was originally arrested and charged with weapons and drug violations after a police search of the home he shared with his girlfriend turned up a pistol and drugs. While the girlfriend originally told police, and testified to a grand jury, that the gun and drugs did not belong to her and that she was unaware of their presence in the home, several months later the girlfriend signed an affidavit stating that she had originally lied when she stated that the pistol was not hers.

As part of the investigation into the suspected conspiracy to commit perjury, the government issued a grand jury subpoena to the criminal defendant's former counsel (who had withdrawn during the time the criminal defendant and his girlfriend began with the new explanation of gun ownership). The subpoena sought the attorney's testimony and "[a]ll written statements of [the criminal defendant and his girlfriend] and all notes, records, and recordings of interviews of [them]." Shortly after a grand jury investigation was initiated on the girlfriend's new-explanation affidavit, she informed the government that she had lied in that affidavit in furtherance of her agreement with the criminal defendant and that she had conferred with the criminal defendant's attorney about the ramifications of changing her story and the potential penalty for perjury.

The government moved to compel former counsel to comply with the grand jury subpoena and relied on the crime-fraud exception to pierce the attorney-client privilege and work product exemption. The government supported its motion with its own affidavit proof, the girlfriend's testimony, statements and her various affidavits. The district court examined these materials and conducted an *in camera* examination with former counsel after which the Court ordered compliance with the subpoena.

On appeal from the district court's denial of the criminal defendant's motion to quash, the Panel noted that privilege and exemption from

discovery can be overcome where communication or work product is intended to further continuing or future criminal or fraudulent activity. The Panel noted that the government bore the burden of establishing a *prima facie* case that the attorney-client relationship was intended to further criminal or fraudulent activity and that a trial court's finding that the crime-fraud exception applies is reviewed only for clear error. Citing the Supreme Court's decision in *United States v. Zolin*, 491 U.S. 554 (1989), the Panel stated that, "[b]efore a district court engages in an *in camera* examination to determine the applicability of the crime-fraud exception, the court 'should require a showing of a factual basis adequate to support a good faith belief by a reasonable person.'" Relative to the clear error standard, the Panel observed that "[a] finding is not clearly erroneous if it is plausible in light of the record as a whole." The Panel easily concluded that the *prima facie* showing had been met on the extensive record before it.

However, as to the sweeping scope of the subpoena—calling for disclosure of "all" communications between the attorney and his client and between the attorney and a third party—the Panel held that the subpoena could not be sustained. The Panel wrote, "[t]he [trial] court's application of the crime-fraud exception was overly broad because it lacked the requisite specificity to reach only communications and documents no longer protected by the attorney-client and work product privileges." The Panel observed that "this case does not present a situation where Appellant's entire criminal representation by Former Counsel was based upon or sought for the sole purpose of perpetrating a crime or fraud." In reversing and remanding on the overbreadth issue, the Panel rejected the contention that any showing of the crime-fraud exception automatically vitiates all privilege *ab initio*. The Panel concluded that "the proper scope of the crime-fraud exception must necessarily be limited to those attorney-client communications and work products reasonably related to the furtherance of the ongoing or future crime or fraud at issue. Otherwise, to put it simply, the crime-fraud exception swallows the privilege rule."

SUMMARY JUDGMENT—CIRCUMSTANTIAL EVIDENCE

***DIRECTV, Inc. v. Robson*, __ F.3d__, No. 04-30861, 2005 WL 1870775 (5th Cir. Aug. 9, 2005).**

This is a summary judgment case relative to alleged violations of federal statutes prohibiting the pirating of satellite television broadcasts. Defendant moved for, and obtained, summary judgment on all plaintiff DTV's claims. One group of those claims was for alleged illegal interception of DTV's satellite transmissions per 47 U.S.C. §605(a) and 18 U.S.C. §2511(1)(a). On appeal, DTV argued that the defendant's possession of certain pirating devices and his published intent to pirate DTV signals on a "pirate" website/message board raised a genuine issue of material fact as to whether the defendant had illegally intercepted transmissions. In holding that DTV failed to raise a fact issue through this circumstantial evidence, the Panel noted that there was no direct evidence of illegal interception or that the defendant had all equipment necessary for interception. Requiring additional circumstantial evidence beyond mere purchase and possession of some pirating equipment was necessary in the Panel's view lest the courts create a *de facto* civil action for mere possession or purchase.

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

***United States v. Scott*, __ F.3d __, 2005 WL 2174413 (9th Cir. 2005).**

As a case of first impression, a divided three judge panel held that a urine drug test and subsequent search of the home of a defendant awaiting trial after being release on his own recognizance violated the Fourth Amendment because it was unsupported by probable cause. The defendant was released on his own recognizance following his arrest for drug possession. As part of his pretrial release, he agreed to submit to warrantless random drug testing at anytime, as well as warrantless searches of his home at anytime. Based on the tip of an informer, police went to Scott's home to adminsiter a drug test. Scott tested positive for methamphetamine, so the police searched his home, at which point they found a shotgun. Following his indictment for possessing an unregistered firearm, the trial court granted Scott's motion to suppress the shotgun and statements he made during the search. The government filed an interlocutory appeal. The majority panel reasoned that the defendant did not waive all his Fourth Amendment rights under the terms of the pretrial condition and stated that the defendant's consent to any search was only valid if the search in dispute was reasonable under the Fourth Amendment, which included consideration of his consent to the pretrial condition. The panel concluded that the conditional warrantless drug testing of the pretrial defendant did not support any special needs beyond that of normal law enforcement, so probable cause was required. Focusing on the status of the defendant as a mere pretrial releasee as well his privacy interests in his home—regardless if the interest in privacy was reduced by his consent to the drug testing condition, the court rejected the government's purported special needs and also rejected the argument that these suspicionless searches were reasonable under a totality of the circumstances analysis under Forth Amendment jurisprudence. The dissenting judge argued that the majority was creating a per se rule against warrantless searches of pretrial releasees or their homes that would throw state and federal pretrial procedures into chaos.

***Willy v. Administrative Review Bd.*, __ F.3d __, 2005 WL 2038543 (5th Cir. 2005).**

Former in-house counsel brought a retaliatory discharge claim against his former employer after he was terminated, arguing that the termination violated the protections he was afforded under federal environmental whistleblower laws. Willy appealed the dismissal of suit by the Department of Labor's Administrative Review Board ("ARB"), who ruled that the attorney-client privilege barred introduction of the company's documents that supported Willy's case. In a narrowly worded holding, the Fifth Circuit held that "no rule or case law imposes a *per se* ban on the offensive use of documents subject to the attorney-client privilege" in this case. In reaching its conclusion, the court rejected the ARB's general reasoning that an attorney may only use privileged information defensively.

***United States v. Councilman*, 418 F.3d 67 (1st Cir. 2005) (en banc).**

The First Circuit reversed and remanded the dismissal of the defendant's indictment, which was premised on the theory that intercepting an e-mail message while it is in temporary or transient electronic storage constitutes an offense under the Wiretap Act. The defendant ran a business selling rare books and allowed his customers to maintain an e-mail address for which his company acted as the e-mail provider. The defendant then intercepted and copied customers' e-mails coming from a competitor before the mail had reached them. The First Circuit held that this activity came within the meaning of the term "intercept" under the Act and that transient electronic storage constitutes "electronic communications" with the meaning of the statute.

Alan Curry, Harris County District Attorney's Office, Houston

"LAW OF THE CASE" DOCTRINE

***Johnson v. State*, ___ S.W.3d ___, 2005 WL 1981251, No. 14-04-32-CR (Tex. App.—Houston [14th Dist.], Aug. 18, 2005) (not yet reported).**

The defendant was charged with possession of cocaine with the intent to deliver, and the defendant filed a motion to suppress evidence, which was subsequently overruled after a hearing. In a previous appeal, the defendant claimed that the trial court had erred in denying his motion to suppress, and the State claimed that the court of appeals had no jurisdiction to consider the defendant's previous appeal because he had filed a defective notice of appeal. In that previous appeal, the court of appeals rejected the State's argument, and held that the trial court had erred in denying the defendant's motion to suppress because officers did not have probable cause to conduct a search. However, the Texas Court of Criminal Appeals reversed the prior decision of the court of appeals, holding that the defendant's notice of appeal was in fact defective and that the defendant's appeal, therefore, should have been dismissed because of a lack of jurisdiction. The defendant was permitted to file an out-of-time notice of appeal after obtaining relief in an application for a post-conviction writ of habeas corpus. In this new appeal, the defendant again contended that the trial court had erred in denying the motion to suppress. The defendant claimed that the court of appeals need not revisit the propriety of the search because of the "law of the case" doctrine. However, the court of appeals held that its previous opinion was a nullity because the court lacked jurisdiction to consider the appeal. Consequently, the court of appeals was not bound by the law of the case doctrine. *Cf. Page v. State,* __ S.W.3d __, 2005 WL 1829736, No. 13-00-35-CR (Tex. App.—Corpus Christi, Aug. 4, 2005) (not yet reported) (case in which Court of Criminal Appeals reversed decision of court of appeals concerning admissibility of extraneous offenses, court of appeals then again held that extraneous offenses were not admissible, albeit on different grounds, and court of appeals then relied upon "law of the case" doctrine in order to avoid necessity of readdressing whether or not defendant was harmed).

PRESERVATION OF ERROR—MOTION TO SUPPRESS

In ***Johnson***, the court of appeals also noted that the defendant filed a generic motion to suppress that objected to "all evidence seized in the instant case because of the illegal detention, search, and arrest of the defendant and his home." Therefore, the State contended that the defendant had failed to preserve error with regard to his assertion on appeal that the arrest and search in the case were not supported by probable cause. The court of appeals noted that the State put on evidence that the search in the case was reasonable because it was supported by (1) probable cause and exigent circumstances and (2) written consent. The court held that, if the defendant had further complaints or objections regarding the admissibility of the evidence, he was obliged to make them clear to the trial court. However, the defendant did not make any further objection or complaint once the State offered evidence showing the search allegedly fell within several warrant exceptions. Nevertheless, the court of appeals noted that a defendant may always challenge the sufficiency of the evidence for the first time on appeal. The court of appeals held that the defendant had preserved error for the purposes of appeal because it had always been his contention that the State's evidence, even if true, failed to show the existence of probable cause.

PRESERVATION OF ERROR

***Reyna v. State,* 168 S.W.3d 173 (Tex. Crim. App. 2005).**

In the prosecution of him for committing the offense of indecency with a child, the defendant sought to introduce evidence of the victim's prior false allegation of sexual assault and her recantation of that allegation. The defendant argued to the trial judge that the evidence should be admitted for "credibility." However, he did not cite to any rules of evidence, cases, or constitutional provisions. Therefore, the State contended that the defendant had not preserved his claim on appeal that he was denied his constitutional right to confrontation and cross-examination. The Court of Criminal Appeals suggested that the defendant's reference to "credibility" could have been a reference to either the Rules of Evidence or the Confrontation Clause. However, because the defendant "did not clearly articulate" that the Confrontation Clause demanded admission of the evidence, the trial judge "never had the opportunity to rule upon" this rationale. As the losing party, the defendant must "suffer on appeal the consequences of his insufficiently specific offer." Therefore, the defendant did not preserve error concerning an alleged violation of the Confrontation Clause.

PRESERVATION OF ERROR—DOUBLE JEOPARDY

***Kelson v. State,* 167 S.W.3d 587 (Tex. App.—Beaumont 2005, no pet.).**

After the defendant's motion for a mistrial was granted in a previous prosecution for aggravated assault, the State again prosecuted the defendant for aggravated assault, and the defendant was convicted. Prior to commencement of the second trial, the defendant had filed a "Special Plea of Double Jeopardy," and a "Pre-Trial Application for Writ of Habeas Corpus Seeking Relief From Double Jeopardy." In both documents, the defendant had claimed that his right against double jeopardy prevented him from "twice being put to trial" for the offense of aggravated assault because the previous mistrial was based upon prosecutorial misconduct. After a hearing, the trial court had denied relief on both the special plea and the separate habeas corpus request, and the defendant was subsequently convicted. On appeal, the court of appeals noted that the defendant's "special plea" was cognizable only as to former jeopardy claims of "successive punishments," not "successive prosecutions." The court of appeals also noted that the defendant did not attempt an immediate appeal from the trial court's denial of relief on his application for a pre-trial writ of habeas corpus, but instead proceeded with a jury trial that resulted in his conviction.

TRIAL COURT'S POST-CONVICTION AUTHORITY TO MODIFY SENTENCE

***State v. Aguilera*, 165 S.W.3d 695 (Tex. Crim. App. 2005).**

The defendant was charged with three counts of aggravated sexual assault, and, without an agreed recommendation from the State as to punishment, the defendant entered pleas of guilty to the charged offenses. The trial court then found the defendant guilty and assessed the defendant's punishment at 25 years in prison. However, on the same day, the trial court held an in-chambers discussion with the attorneys regarding the court's reconsideration of the sentence. As a result of that discussion, and over the State's objection, the trial judge reassessed the defendant's sentence at 15 years in prison. The State then brought a State's appeal. The Court of Criminal Appeals held that a trial court retains plenary power to modify its sentence if the modification is made on the same day as the assessment of the initial sentence and before the court adjourns for the day. The re-sentencing must be done in the presence of the defendant, his attorney, and counsel for the State. *Cf. Williams v. State,* 170 S.W.2d 482 (Tex. Crim. App. 1943); *Powell v. State*, 63 S.W.2d 712 (Tex. Crim. App. 1933).

***Meineke v. State*, __ S.W.3d __, 2005 WL 1772259, No. 14-04-26-CR (Tex. App.—Houston [14th Dist.], July 28, 2005) (not yet reported).**

The defendant was charged with committing the offense of arson, and he was charged in two enhancement paragraphs with having previously been convicted of the offenses of murder and aggravated assault. Prior to trial, the defendant elected to have a jury determine guilt and assess punishment. However, after the jury had begun its deliberations, the defendant entered into an agreement with the State whereby, if the jury found him guilty, he would switch his punishment election to the court in exchange for the court assessing his punishment at 30 years' confinement. The jury returned a guilty verdict, and the trial court, therefore, orally pronounced the defendant's sentence at confinement for 30 years. The trial court subsequently realized that he had failed to make affirmative findings as to the defendant's prior convictions that were alleged in the two enhancement paragraphs. Without those affirmative findings, the defendant could not be sentenced to 30 years in prison. Therefore, on the following day, the defendant was brought back to court. After receiving the defendant's plea of "true" to the allegations in the two enhancement paragraphs, the trial court made affirmative findings as to those allegations and again assessed the defendant's punishment at 30 years in prison. The court of appeals held that this post-conviction procedure was appropriate because a trial court has plenary jurisdiction over a case for the first thirty days after sentencing and can correct an otherwise invalid sentence during that time. *See Mizell v. State*, 119 S.W.3d 804 (Tex. Crim. App. 2003). *Cf. McClinton v. State*, 121 S.W.3d 768 (Tex. Crim. App. 2003); *State v. Dickerson,* 864 S.W.2d 761 (Tex. App.—Houston [1st Dist.] 1993, no pet.); *Tooke v. State,* 642 S.W.2d 514 (Tex. App.—Houston [14th] 1982, no pet.). The court of appeals suggested that a different result might have been reached if the defendant had not entered a plea of "true" to the allegations in the two enhancement paragraphs because there would not have been sufficient evidence in support of the allegations otherwise. The defendant also contended that the trial court did not have jurisdiction to hold the post-conviction hearing because the defendant had already filed his notice of appeal. However, the court of appeals noted that, while filing a notice of appeal properly invokes the appellate court's jurisdiction, it does not automatically terminate the trial court's jurisdiction. The trial court did not lose jurisdiction until the record was filed with the court of appeals over a month after the post-conviction hearing had been held.

DEFENDANT'S NOTICE OF APPEAL—OUT-OF-TIME APPEAL GRANTED

***Mestas v. State,* 165 S.W.3d 917 (Tex. App.—Dallas 2005, no pet.).**

The defendant was convicted of committing the offenses of indecency with a child, evading arrest, and failure to stop and render aid. In a previous appeal, the defendant's appointed counsel on appeal filed *Anders* briefs, claiming that the appeals were without merit, and seeking permission to withdraw as counsel from the appeals. The court of appeals agreed that the previous appeals were frivolous, granted the motions to withdraw, and affirmed the trial court's judgments. However, the Court of Criminal Appeals subsequently granted the defendant's out-of-time appeals in the cases because he had not provided with access to the trial record and was not given the opportunity to file a pro se response to the *Anders* briefs. The Court of Criminal Appeals instructed the defendant that, should he desire to prosecute an appeal, he must file notices of appeal within 30 days after the mandates of the Court of Criminal Appeals had issued. Those mandates issued on February 18, 2004, and the defendant filed motions for new trial on February 16, 2004. However, the defendant did not file notices of appeal until April 1, 2004, well over 30 days after the mandates had issued. The court of appeals found that the defendant's motions for new trial did not extend the time for filing his notices of

appeal, and the court's holding was not changed, even though the previous opinion by the Court of Criminal Appeals had provided that "all time limits shall be calculated as if the conviction had been entered on the day that the mandate" issued.

APPEAL FROM TRIAL COURT'S DETERMINATION TO ADJUDICATE GUILT

***Bradford v. State,* __ S.W.3d __, 2005 WL 1475925, No. 2-04-414-CR (Tex. App.—Fort Worth, June 23, 2005) (not yet reported).**

The defendant was indicted for committing the offense of aggravated assault, and she was found by a jury to be incompetent to stand trial. Several months later, the trial court was notified that the defendant was competent to stand trial, and, after the defendant entered a plea of guilty to the offense, the trial court placed the defendant on "deferred adjudication" probation. Several months after that, the State moved to adjudicate the defendant's guilt, and the defendant's attorney filed a motion for a competency examination, which the trial court granted. Another jury found the defendant incompetent to stand trial. Several more months passed, and the trial judge was informed that the defendant had again regained her competency to stand trial. Therefore, the trial court held a hearing on the State's motion to adjudicate the defendant's guilt, adjudicated the defendant guilty, and sentenced her to five years in prison. On appeal, the defendant claimed that the trial judge was required to make a determination that the defendant had regained competency to stand trial, but the State contended that the defendant could not bring that claim in an appeal from the trial court's determination to adjudicate the defendant's guilt, pursuant to TEX. CODE CRIM. PROC. ANN. art. 42.12, §5(b) (Vernon Supp. 2004-05). *See Bearden v. State,* 147 S.W.3d 661, 662 (Tex. App.—Amarillo 2004, no pet.); *Davis v. State,* 141 S.W.3d 694, 696 (Tex. App.—Texarkana 2004, pet. ref'd); *Arista v. State,* 2 S.W.3d 444, 445-46 (Tex. App.—San Antonio 1999, no pet.). However, the court of appeals held that, since there was an existing judgment of mental incompetency on the part of the defendant, the defendant was presumed to be incompetent, and the burden was on the State to establish competency. Only after a judicial determination has been made that the defendant has regained competency can criminal proceedings against the defendant be resumed. Therefore, a defendant who has previously been found to be incompetent to stand trial should be permitted to appeal the trial court's failure to make a judicial determination that the defendant has regained competency to stand trial, even if that appeal is taken from the trial court's order adjudicating the defendant's guilt.

HARM ANALYSIS—IMPROPER COMMITMENT QUESTIONS

***Sanchez v. State,* 165 S.W.3d 707 (Tex. Crim. App. 2005).**

During jury selection in a prosecution for the offense of driving while intoxicated, the trial prosecutor, anticipating that the evidence at trial would show that the defendant suffered physical disabilities from polio, asked the prospective jurors, "Is there anyone here who thinks they may have a hard time reaching a verdict based on the fact that there may be evidence of a physical disability?" The trial prosecutor was also permitted, over objection, to ask other similar questions of the prospective jurors. On appeal, the court of appeals refused to decide whether the trial prosecutor's questions were improper commitment questions, instead holding that the defendant had not been harmed because he was unable to identify an objectionable person who sat on the jury on whom he would have exercised a peremptory challenge. Thus, the court of appeals applied the harm analysis set forth in *Anson v. State*, 959 S.W.2d 203 (Tex. Crim. App. 1997). The Court of Criminal Appeals held that that harm analysis was not appropriate in this situation. Rather, the court held that the proper test for harm is that set out in TEX. R. APP. P. 44.2(b), and that reviewing courts should use an appropriately tailored set of factors in order to determine whether the defendant's substantial rights have been affected. Under Rule 44.2(b),

reviewing courts should assess the potential harm of the State's improper commitment questioning by focusing upon whether a biased juror—one who had explicitly or implicitly promised to prejudge some aspect of the case because of the State's improper questioning—actually sat on the jury. The ultimate harm question is: was the defendant tried by an impartial jury, or, conversely, was the jury or any specific juror "poisoned" by the State's improper commitment questions on a legal issue or fact that was important to the determination of the verdict or sentence? The factors to consider in determining whether a trial court's error in permitting the State to ask improper commitment questions to an entire jury panel over the defendant's objection is harmful might include:

1) whether the questions were unambiguously improper and attempted to commit one or more veniremen to a specific verdict or course of action;

2) how many, if any, veniremen agreed to commit themselves to a specific verdict or course of action if the State produced certain evidence;

3) whether the veniremen who agreed to commit themselves actually served on the jury;

4) whether the defendant used peremptory challenges to eliminate any or all of those veniremen who had committed themselves;

5) whether the defendant exhausted all of his peremptory challenges upon those veniremen and requested additional peremptory challenges to compensate for their use on improperly committed veniremen;

6) whether the defendant timely asserted that a named objectionable venireman actually served on the jury because he had to waste strikes on the improperly committed jurors;

7) whether there is a reasonable likelihood that the jury's verdict or course of action in reaching a verdict or sentence was substantially affected by the State's improper commitment questioning during voir dire.

The Court of Criminal Appeals did not intend this to be an exhaustive or exclusive list of factors that reviewing courts might consider.

JUDICIAL NOTICE ON APPEAL

***Davis v. State*, __ S.W.3d __, 2005 WL 1979095, No. 12-04-157-CR (Tex. App.—Tyler, Aug. 17, 2005) (not yet reported).**

The defendant contended that the county attorney in the cases did not have the authority to prosecute the cases because he had failed to take the oaths required by Article 16, Section 1 of the Texas Constitution. There was no evidence in the record to support the defendant's contention, but he did present to the court of appeals photocopies of four documents from the Secretary of State's office that allegedly supported his contention. The defendant claimed that the court of appeals could take judicial notice of those documents. The court of appeals noted that the cases are not easily reconciled that discuss when judicial notice by an appellate court is appropriate when judicial notice was not requested in the trial court. The court of appeals concluded that judicial notice should not be mandatory on appeal, and the court also noted that traditional judicial philosophy indulges a wide range of presumptions in support of the trial court's judgment. Therefore, since the trial court had no opportunity to consider the documents upon which the defendant relied, the court of appeals declined to take judicial notice of them.

STATE'S APPEALS—MOTION TO DISMISS

***State v. Stanley*, __ S.W.3d __, 2005 WL 1788113, No. 10-05-101-CR (Tex. App.—Waco, July 27, 2005) (not yet reported).**

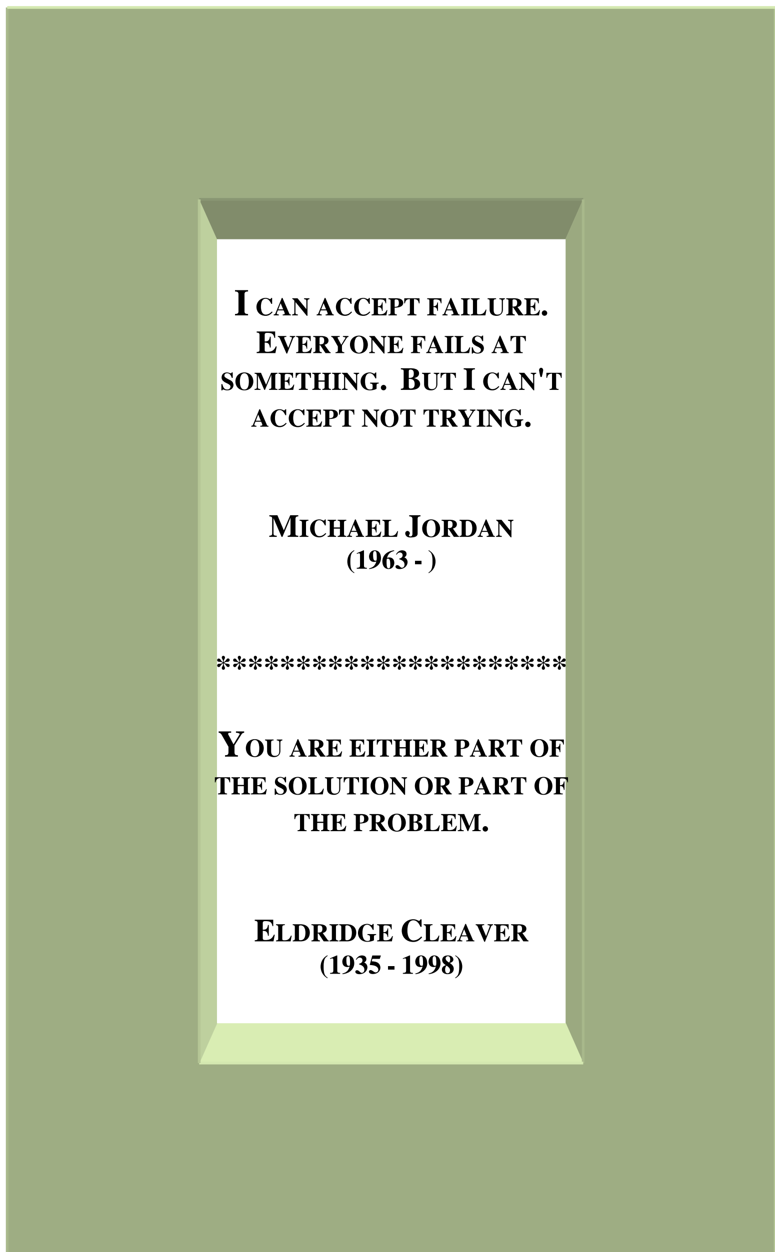
Following a bench trial, the trial court granted the defendant's motion to dismiss the charge against her on the grounds that the municipal ordinance

on which the charge was based is unconstitutional. The State brought an appeal under Article 44.01 of the Texas Code of Criminal Procedure. The defendant subsequently filed a motion to dismiss the State's appeal, contending that the State had the right to appeal only the pretrial dismissal of an indictment, information, or complaint. The court of appeals agreed with the defendant, holding that Article 44.01 permitted an appeal by the State from the pretrial dismissal of a charging instrument, but not from the dismissal of a charging instrument after a trial on the merits has commenced (and jeopardy has attached).

WRIT OF HABEAS CORPUS—PROBATION CASES

***Ex parte Cummins*, __ S.W.3d __, 2005 WL 1654765, No. 2-04-572-CR (Tex. App.—Fort Worth, July 14, 2005) (not yet reported).**

Pursuant to Article 11.072 of the Texas Code of Criminal Procedure, the defendant sought relief from the trial court's judgment, in which the defendant was placed on community supervision or probation. The defendant claimed that his guilty plea was involuntary because it was the result of the ineffective assistance of counsel. After the trial court denied relief, the defendant claimed on appeal that Article 11.072 did not authorize the trial court to consider the State's response, but instead required a hearing, unless the application was to be denied as frivolous. However, the court of appeals found that there was nothing in Article 11.072 *requiring* the trial court to conduct a hearing on an application for a writ of habeas corpus before rendering its decision on the relief sought. Furthermore, there was nothing in the statute that prohibited the trial court from considering evidence filed with the application or with the State's response.



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