

**JURY CHARGE:
TRENDS, ISSUES, AND UNCERTAINTIES**

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CHAPTER 2

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Creative Interpretations of State Farm v. Campbell, presented at the 15th Annual Conference on State and
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JURY CHARGE: TRENDS ISSUES, AND UNCERTAINTIES

The jury charge is a perennial source of confusion and frustration in all but the most simple single-issue, one “P” and one “D” cases. While the Supreme Court has frequently reaffirmed its preference for broad-form submission, crafting an error-free broad-form charge nevertheless continues to present challenges to practitioners. These challenges arise not only from case law, but also from legislative enactments imposing obligations that do not fit neatly within a generic broad-form submission model. This paper discusses some of the sources of tension between the broad-form goal and other influences encountered along the way when drafting a jury charge.

I. LEGISLATIVE ENACTMENTS AFFECTING THE JURY CHARGE

Several enactments of the Texas Legislature during the 2003 session implicate the submission of issues in the jury charge, some having a direct bearing on the broad-form submission of issues. The Legislature now requires that exemplary damages only be awarded on the unanimous finding of jurors, and requires findings of economic losses separate from non-economic losses and, when prejudgment interest is sought, present damages separate from future damages. Other changes require the jury to be instructed about the tax consequences of certain awards. The effect of these enactments on the submission of issues to the jury is addressed below.

A. Exemplary Damages: Unanimous Verdicts.

One of the more significant changes to jury charge practices that resulted from House Bill 4 involves the process by which juries now are to award exemplary damages. House Bill 4 amended Texas Civil Practice and Remedies Code sections 41.003(d) and (e) to require a unanimous verdict in connection with any award of exemplary damages. Those sections now provide:

- (d) Exemplary damages may be awarded only if the jury was unanimous in regard to finding liability for and the amount of exemplary damages.
- (e) In all cases where the issue of exemplary damages is submitted to the jury, the following instruction shall be included in the charge of the court:

“You are instructed that, in order for you to find exemplary damages, your answer to the question regarding the amount of such damages must be unanimous.”

TEX. CIV. PRAC. & REM. CODE § 41.003.

The implementation of the changes to chapter 41 raised its own set of questions, generating substantial debate. *See generally* Lisa Bowlin Hobbs, “Court Amends Standard Jury Instruction in Cases Involving Exemplary Damages,” *The Advocate*, State Bar Litigation Section Report, Summer 2005 at 15-18. Ultimately, the revision to chapter 41 resulted in amendments to Texas Rules of Civil Procedure 292 and 226a. In January 2005, the Supreme Court modified rule 292 to provide for unanimous findings in support of an exemplary damage award:

- (a) Except as provided in subsection (b), a verdict may be returned in any cause by the concurrence, as to each and all answers made, of the same ten or more members of an original jury of twelve or of the same five or more members of an original jury of six. . . .
- (b) A verdict may be rendered awarding exemplary damages only if the jury was unanimous in finding liability for and the amount of exemplary damages

TEX. R. CIV. P. 292.

As to how the jury charge itself should change, the Supreme Court promulgated Rule 226a and an accompanying order containing an instruction to be used in exemplary damage cases. Rule 226a simply provides “The court must give instructions to the jury panel and the jury as prescribed by the order of the Supreme Court under this rule.” TEX. R. CIV. P. 226a. The accompanying order provides in part:

If exemplary damages are sought against a defendant, the jury must unanimously find, with respect to that defendant, (i) liability on at least one claim for actual damages that will support an award of exemplary damages, (ii) any additional conduct, such as malice or gross negligence, required for an award of exemplary damages, and (iii) the amount of exemplary damages to be awarded. The jury's answers to questions regarding (ii) and (iii) must be conditioned on a unanimous finding regarding (i), except in an extraordinary circumstance when the conditioning instruction would be erroneous. The jury need not be unanimous in finding

the amount of actual damages. Thus, if questions regarding (ii) and (iii) are submitted to the jury regarding defendants D1 and D2, instructions in substantially the following form must immediately precede such questions:

Preceding question (ii):

Answer Question __ (ii) __ regarding D1 only if you unanimously answered "Yes" to Question[s] __ (i) __ regarding D1. Otherwise, do not answer Question __ (ii) __ regarding D1. [Repeat for D2.]

You are instructed that in order to answer "Yes" to [any part of] Question __ (ii) __, your answer must be unanimous. You may answer "No" to [any part of] Question __ (ii) __ only upon a vote of 10 or more jurors. Otherwise, you must not answer [that part of] Question __ (ii) __.

Preceding question (iii):

Answer Question __ (iii) __ regarding D1 only if you unanimously answered "Yes" to Question __ (ii) __ regarding D1. Otherwise, do not answer Question __ (iii) __ regarding D1. [Repeat for D2.]

You are instructed that you must unanimously agree on the amount of any award of exemplary damages.

[These examples are given by way of illustration.]

Misc. Docket No. 05-9022.¹

The Supreme Court's order also provides guidance as to the certification requirement. It provides:

If some of the jury's answers must be unanimous and others need not be, the court should obtain the required certificate in a clear and simple manner, which will depend on the nature of the charge. The court may consider using the following certificate at the end of the charge:

Certificate

We, the jury, have answered the above and foregoing questions as herein

indicated, and herewith return same into court as our verdict.

I certify that the jury was unanimous in answering the following questions:

Answer "All" or list answers: _____

Presiding Juror

Printed Name of Presiding Juror

(If the answers to some questions were not unanimous, the jurors who agreed to those answers must certify as follows:)

We agree to the answers to the following questions:

List answers: _____

Jurors' Signatures:

Jurors' Printed Names:

[Insert the appropriate number of lines - 11 or 5 - for signatures and for printed names.]

The court may also determine that a clearer way of obtaining the required certificate is to segregate the questions to which the jury's answers must be unanimous and request a certificate for each part of the charge.]

Id.

B. Legislative Changes Implicating Broad Form Submissions.

In addition to the unanimity and certification requirements, the 2003 Legislature adopted other statutory changes affecting the jury charge. These changes demonstrate the tension practitioners face in attempting, on the one hand, to draft a true broad-form submission, but ensuring, on the other hand, that all components of the verdict are properly supported by sufficient separate findings as may be required by statute or otherwise.

First, the addition of new Civil Practice and Remedies Code section 41.008(a) mandates the submission of economic damage questions separate from other compensatory damages. TEX. CIV. PRAC. & REM. CODE § 41.008(a) ("In an action in which a claimant seeks recovery of damages, the trier of fact shall determine the amount of economic damages separate from the amount of other compensatory

¹ www.supreme.courts.state.tx.us/rules/059022.pdf.

damages.”). “Compensatory damages” are defined as “economic and non-economic damages,” but not exemplary damages. *Id.* § 41.001(8). “Economic damages” are defined as “compensatory damages intended to compensate a claimant for actual or pecuniary loss” and exclude exemplary and non-economic damages. *Id.* § 41.001(4). Finally, “non-economic damages” are defined as “damages awarded for the purpose of compensating a plaintiff for physical pain and suffering, mental or emotional pain or anguish, loss of consortium, disfigurement, physical impairment, loss of companionship and society, inconvenience, loss of enjoyment of life, injury to reputation, and all other non-pecuniary losses of any kind other than exemplary damages.” *Id.* § 41.001(12). Under new section 41.008, those damages compensating a plaintiff for actual economic or pecuniary loss must be submitted by way of a question separate from any non-pecuniary losses.

Not only must the charge differentiate among types of damages (economic and non-economic), it must also differentiate as to when those damages were suffered. The 2003 inclusion of Texas Finance Code section 304.1045 requires the submission of claims for future damages separate from past damages. That section provides: “Prejudgment interest may not be assessed or recovered on an award of future damages.” TEX. FIN. CODE ANN. § 304.1045. A separate submission of past and future claims is thus necessary when prejudgment interest is sought to ensure that such interest is not awarded on any award for future injuries.

The impact these changes have on broad-form submission of damage questions can be illustrated by the fact pattern in *Harris County v. Smith*, 96 S.W.3d 230 (Tex. 2002). In *Harris County*, a husband and a wife injured in a car accident sued Harris County for damages. One damage question was submitted on behalf of each plaintiff, but with different instructions as to the elements that could be considered in making any award either to the husband or the wife. As to the husband, the jury was instructed it could consider physical pain and mental anguish, loss of earning capacity, physical impairment, and medical care. As to the wife, the jury was instructed that it could consider physical pain and mental anguish, physical impairment, and medical care.

Before the 2003 legislative enactments, nothing prevented the broad-form submission of the damage question – one question for each plaintiff based on multiple elements. Under the 2003 legislation, however, Mr. Smith’s economic injuries (loss of earning capacity) would have to be submitted separately from the other elements comprising his damage claim, thus adding another question to the charge. And to the extent the parties sought to recover prejudgment interest to the fullest extent allowed, the

2003 enactments would require the additional break-out of the past and future components of each set of the damages sought (Mr. Smith’s past loss of earning capacity, Mr. Smith’s future loss of earning capacity, Mr. Smith’s past non-economic damages, Mr. Smith’s future non-economic damages, Mrs. Smith’s past non-economic damages, and Mrs. Smith’s future non-economic damages). The 2003 legislation thus transformed the two damage questions into six.

These legislative changes notwithstanding, the Supreme Court’s decision in *Harris County* further alters how a damage question is to be submitted when based on more than one element. In *Harris County*, the Court addressed the proper method for submitting multiple elements when any doubt exists as to the validity of, or the sufficiency of the evidence offered in support of, any particular element for which damages are sought. The Court found error in the broad-form submission of a damage question that contained elements for which the Court found no evidentiary support.

As noted, in *Harris County*, the instructions accompanying the damage question for each of the Smiths identified different factors that could be considered in arriving at any award of damages. Harris County objected to the submission as to Mr. Smith, alleging there was no evidence of a loss of earning capacity, and as to Mrs. Smith, alleging there was no evidence of physical impairment. Harris County also asked that each damage element sought by the Smiths be submitted separately.

On appeal from an award of damages to each of the Smiths, Harris County alleged harmful error in the submission of broad form damage questions that included elements without evidentiary support. In evaluating that argument, the Supreme Court applied its earlier ruling in *Crown Life Insurance Co. v. Casteel*, 22 S.W.3d 378 (Tex. 2000). In *Casteel*, the Court held that harmful error arises when a single broad-form *liability* question commingles valid and invalid liability theories and when the appellate court cannot determine whether the jury based its verdict on the invalid theory. Viewing the *damage* submission as an extension of its earlier ruling in *Casteel*, the *Harris County* Court held that mixing valid and invalid *elements of damages* in a single broad-form submission also constitutes harmful error to the extent it prevents the appellate court from determining whether an award could have been based on an invalid element that should not have been submitted.

As to the effect the ruling would have on broad-form submission of damage questions, the Court reaffirmed its commitment in principle to the broad-form submission practice, and recognized that, historically, even the Pattern Jury Charge recommended that damage elements be submitted

separately in the presence of substantial doubt as to whether an element is supported by the evidence. “[I]n a case such as this one, asking the jury to record its verdict as to each element of damages when there is doubt as to the legal sufficiency of the evidence will permit the losing party to preserve error without complicating the charge or the jury’s deliberations.”

Harris County thus demonstrates the tension between submitting questionable elements separately while still remaining true to the spirit of broad-form submissions. If multiple elements were submitted by way of a single question, a successful appellate challenge to the sufficiency of evidence in support of any element could compromise the judgment in its entirety, as it did in *Harris County*. That result encourages the break-out of separate damage questions. The piecemeal submission of every element, however, could face resistance in light of the broad-form goal. On a hypothetical retrial of the Smiths’ case, for example, the two damage questions and their multiple elements would necessarily multiply into seven separate questions (assuming legally sufficient evidence supported each element): (1) Mr. Smith’s physical pain and mental anguish, (2) Mr. Smith’s loss of earning capacity, (3) Mr. Smith’s physical impairment, (4) Mr. Smith’s medical care, (5) Mrs. Smith’s physical pain and mental anguish, (6) Mrs. Smith’s physical impairment, and (7) Mrs. Smith’s medical care.

And those multiple submissions themselves multiply in light of the 2003 legislative amendments. The separate submission of the elements described above would satisfy the section 41.008 requirement that economic damages be submitted separately from non-economic damages sought. But the charge would also need additional questions to preserve the right to recover (and/or challenge) an award for prejudgment interest. Thus, assuming the evidence supported the submission of the seven different elements, a post-2003 amendment, post- *Harris County* charge could require fourteen different damage questions -- past and future variations on each of the various theories.

C. Jury Charge and Income Tax.

Adding to the potential need for additional instructions, the Texas Legislature also revised the Civil Practice and Remedies Code to add section 18.091. That section requires that the jury be instructed about the tax consequences of certain damages:

- (a) Notwithstanding any other law, if any claimant seeks recovery for loss of earnings, loss of earning capacity, loss of contributions of a pecuniary value, or loss of inheritance, evidence to prove the loss must be presented

in the form of a net loss after reduction for income tax payments or unpaid tax liability pursuant to any federal income tax law.

- (b) If any claimant seeks recovery for loss of earnings, loss of earning capacity, loss of contributions of a pecuniary value, or loss of inheritance, the court shall instruct the jury as to whether any recovery for compensatory damages sought by the claimant is subject to federal or state income taxes.

TEX. CIV. PRAC. & REM. CODE § 18.091.

To implement new section 18.091, an oversight committee of the State Bar Pattern Jury Charge Committees proposed the following pattern jury instruction:

You are instructed that any monetary recovery [*list each element of economic or noneconomic damages that is subject to taxation*], is subject to [*federal or state*] income taxes. Any recovery for [*list each element of economic or noneconomic damages that is not subject to taxation*], is not subject to [*federal or state*] income taxes.

The proposed instruction adopts an affirmative approach to informing the jury of tax implications, rather than the less informative instructions used by several other jurisdictions that merely instruct the jury not to consider the tax consequences, if any, of the award. For example, the comparable instruction in Indiana is: “In arriving at your verdict, you may not consider the tax consequences, if any, of the verdict.” 1-11 Indiana Pattern Jury Instructions -- Civil Instr. No. 11.08. Similarly, Ohio’s instruction is: “With reference to the amount of an award (if any), you are to follow the instructions already given. You may not consider federal (state or city) income taxes. In no event may you add to, or subtract from, an award because of such taxes.” 1 Ohio Jury Instr. 23.77.

A proposed federal instruction resembles the Texas instruction in cases where the award will not be subsequently taxed: “If you arrive at a verdict in favor of the plaintiff, you may not add any sum of money to the verdict for federal or state taxes, as the sum recovered by plaintiff is not subject to tax.” 4-77 Modern Federal Jury Instr. -- Civil P. 77.01. The Texas and federal instructions differ, however, in circumstances when the jury award *will* be subject to taxation. The underlying rationale for any instruction on taxability of damages is the assumption that the jury believes that any award will be taxed (and thus has a propensity to “gross up” the award). When the assumption is correct – *i.e.*, the award will be taxed --

it may not be necessary to instruct the jury. Recognizing the jury's customary assumption, the federal instruction is not given in cases in which the award will be taxed. In contrast, HB4 does not distinguish between a case in which the award is taxed and one in which it is not taxed. Instead, HB4 mandates that in all cases -- not just personal injury cases where the award will not be taxed -- a claimant must present evidence of "net loss for reduction of income tax payments" as a predicate for recovering the damage items listed in the statute.

In the typical non-personal injury case, however, an award for loss of earnings or earning capacity will be taxed. Nevertheless, in such non-personal injury cases, section 18.091 still requires that the claimant present evidence of net loss damages after taxes, although only an award of gross loss reflects full compensation. Thus, the likely result of section 18.091 is to create confusion that causes a double reduction in non-personal injury cases -- once by the jury and once by the taxing authority. See Claudia Wilson Frost & J. Brett Busby, *Charging the Jury in the Wake of HB 4*, 67 Tex. Bar. J. 276, 280 (Apr. 2004).

A more sensible application of section 18.091, although one that might require legislative action, is to apply the requirement for net loss evidence and the accompanying jury instruction only in personal injury cases. *Id.* In other cases in which the award is subject to taxation, the requirements of section 18.091 arguably should not apply because evidence of "net loss for reduction of income tax payments" is irrelevant and could prevent the jury from awarding an amount of damages that makes the injured party whole.

D. Applicability of Texas Legislative Enactments to Federal Jury Charges.

When a federal court has diversity jurisdiction over a state law cause of action, state substantive law and federal procedural law govern the action. *Hanna v. Plumer*, 380 U.S. 460, 465 (1965). Therefore, state rules that reflect substantive state policies will apply to state law claims brought in federal court, as long as those state rules do not conflict with clearly applicable federal rules. *Exxon Corp. v. Burglin*, 42 F.3d 948, 950 (5th Cir. 1995). State prescribed jury charges, however, do not necessarily apply in federal courts: "In a diversity case, the substance of the jury charge is governed by state law, but the form or manner of giving the instruction is controlled by federal law. The charge must accurately describe the state law, but the court has wide discretion in formulating the charge." *Broadcast Satellite Int'l v. Nat'l Digital Television Ctr.*, 323 F.3d 339, 347-348 (5th Cir. 2003) (citations omitted).

1. Designation of "Responsible Third-Parties."

Federal Rule of Civil Procedure 14 governs third-party practice in federal court. Therefore, to the extent HB4's amendment to third-party practice, including the ability to designate without joining other potentially responsible parties, conflicts with federal procedure, it may not apply in diversity actions. *Cf. Kelley v. Wal-Mart Stores, Inc.*, 224 F. Supp. 2d 1082, 1083-84 (E.D. Tex. 2002) (holding FED. R. CIV. P. 14, not then-existing TEX. CIV. PRAC. & REM. CODE § 33.004(d), governed timing/ procedure for joining third-party defendant in federal district court action).

This conclusion appears correct if the designation of a responsible third-party is viewed as a procedural method of *joining* additional parties into an action, as opposed to a substantive alteration in the foundations of proportionate responsibility. Although a federal court should apply the timing requirements of Rule 14, as in *Kelley v. Wal-Mart*, Rule 14 does not provide the underlying framework for proportionate responsibility that federal courts apply in diversity actions. For example, TEX. CIV. PRAC. & REM. CODE § 33.001 applies in federal court to prohibit a claimant from recovering when his percentage of responsibility is determined to be greater than 50 percent. Similarly, because the amendment to section 33.004 substantively affects the allocation of the percentage of responsibility among the parties, whether actually joined under Rule 14 or not, HB4 reflects a substantive alteration in proportionate responsibility under Texas law. Although Rule 14 dictates how third parties may be joined, Texas law governs the percentage of responsibility assigned to designated responsible third-parties, and should be binding on federal courts sitting in diversity. *Cf. Cities Serv. Oil Co. v. Dunlap*, 308 U.S. 208 (1939) (principles reaffirmed in *American Dredging Co. v. Miller*, 510 U.S. 433, 453 (1994)) (Texas law on who has burden of proving particular facts is substantive for *Erie* purposes).

2. Taxability of Damages.

As previously mentioned, HB4 (TEX. CIV. PRAC. & REM. CODE § 18.091) requires that a claimant seeking to recover loss of earnings or earning capacity, loss of contributions of a pecuniary value, or loss of inheritance must present evidence of such damages in the form of net less after reduction for income tax payments or unpaid tax liability pursuant to any federal income tax law. Additionally, the jury must be instructed as to whether any recovery sought is subject to federal or state income taxes.

A federal district court sitting in diversity must follow substantive state law, but is not bound by the state's jury charge practice. *Broadcast Satellite*, 323 F.3d at 347-48; *Turlington v. Phillips Petroleum Co.*, 795 F.2d 434, 441 (5th Cir. 1986) ("In diversity

actions, federal court jury instructions must accurately describe the applicable state substantive law,” but “a federal judge has discretion in how he decides to present the case to the jury.”). Therefore, the first requirement, that a claimant present evidence of net loss after reduction for taxes, should apply in federal courts because presentation of net loss evidence is a substantive requirement for recovery of pecuniary losses. A federal court, however, can choose not to use the prescribed jury instruction as long as the underlying law is applied.

The substantive policy reflected in the state law rule controls -- not the words of the instruction. The state policy adopted in section 18.091 is an attempt to limit a claimant’s recovery. There is no rule in federal law governing the introduction of evidence of after-tax damages. Therefore, the substantive state law does not conflict with any federal law, and should apply in diversity cases.

3. Exemplary Damages.

Federal courts sitting in diversity apply the Texas Civil Practice and Remedies Code requirements to state law claims for exemplary damages. *See United States Fire Ins. Co. v. Villegas*, 242 F.3d 279, 284 (5th Cir. 2001) (“Texas law permits recovery of exemplary or punitive damages upon a showing of fraud or malice.”); *Acosta v. Amoco Oil Co.*, 978 F. Supp. 703, 705 (E.D. Tex. 1997) (Texas law requires clear and convincing evidence of gross negligence before awarding exemplary damages). Does this mean that federal courts will also apply HB4’s amendment to Texas Civil Practice and Remedies Code § 41.003, requiring the jury to be instructed that it must be unanimous in answering the question regarding the amount of exemplary damages? If this amendment is viewed as a substantive predicate to awarding exemplary damages, analogous to a finding of malice or fraud by clear and convincing evidence, the requirement of unanimity will apply in federal court. Thus, although a federal court would not necessarily have to instruct the jury in the exact manner prescribed by section 41.003, it would have to apply the unanimity requirement before allowing an award of exemplary damages.

II. CASE DEVELOPMENTS IMPLICATING BROAD-FORM SUBMISSION

As noted earlier, the Supreme Court’s decision in *Casteel* involved the submission of a broad-form liability question that contained both proper and improper elements, while *Harris County* involved the submission of a broad-form damage question incorporating elements that were both supported and not supported by the evidence. The express lesson from *Harris County* is that, when there is doubt

whether an element of damages is supported by legally sufficient evidence, that element should be submitted separately.

The Supreme Court addressed another variation of the problem raised in *Casteel* and *Harris County* in *Romero v. KPH Consolidation, Inc.*, 2005 WL 1252748 (Tex. May 27, 2005). *Romero* extended *Casteel* and *Harris County* to the question of allocation of responsibility, addressing the consequences of an allocation finding when it is determined on appeal that an element considered by the jury lacks an evidentiary basis.

Romero involved claims by a patient and his family against a hospital and several doctors for damages resulting from a delayed transfusion. As to the hospital, the plaintiffs alleged the malicious credentialing of the surgeon, and as to all defendants (the doctors and the hospital), plaintiffs alleged negligence. Question 1 asked whether the hospital acted with malice in credentialing the doctor, and question 2 asked whether the negligence of the hospital and the surgical team proximately caused the occurrence in question. After answering “yes” to both, the jury answered question 3, which asked what percentage of conduct was attributable to each defendant, attributing 40% to the hospital.

On appeal, the Supreme Court concluded that the hospital was entitled to a reversal on the claim for malicious credentialing, noting the absence of evidence supporting the claim (either under a heightened clear and convincing standard or under the less stringent preponderance standard that governed the claim). The Court then addressed whether the allocation of responsibility to the hospital took into account an improper element (i.e., malicious credentialing) in support of which the Supreme Court found no evidence. The allocation question submitted to the jury asked:

What percentage of the conduct that caused the occurrence or injury do you find to be attributable to each of those found by you, in your answer to Questions No. 1 and/or 2 to have caused the occurrence of injury?

The Court interpreted this question as asking the jury to base its allocation of responsibility in light of, among other things, the jury’s finding of malicious credentialing. The Court held that “[s]ince there was no evidence of malicious credentialing, the jury should not have been allowed to consider that claim in setting Columbia’s percentage of responsibility.”

Because the question allowed that consideration, the Court held that it constituted harmful error, mindful that the jury could have reached the same allocation based exclusively on the negligence finding and

without considering the malicious credentialing finding. Relying on both *Casteel* and *Harris County*, the Court concluded: “Even if the jury *could* still have made the same apportionment of fault, the error in the question is nevertheless reversible because it effectively prevents Columbia from complaining on appeal that they *would not* have done so.” The Court explained:

We do not hold that the error of including a factually unsupportable claim in a broad form jury question is always reversible. Rule 44.1(a)(2) requires that the error, to be reversible, “probably prevented the appellant from properly presenting the case to the court of appeals.” But unless the appellate court is “reasonably certain that the jury was not significantly influenced by issues erroneously submitted to it,” the error is reversible. We have no such certainty here; on the contrary, we are reasonably certain that the jury *was* significantly influenced by the erroneous inclusion of the factually unsupported malicious credentialing claim in the apportionment question.

The Court then addressed the concern that an application of *Casteel* and *Harris County* to allocation issues would encourage, if not mandate, not only the separate submission of every liability theory, but also every combination of theories and every combination of defendants together with separate apportionment and damage questions for every theory, combination of theories, and combination of defendants. In this case, the plaintiff argued that the jury charge would have required 175 different issues to protect against all contingencies on appeal.

Rejecting those concerns, the Court noted that the charge in fact needed one *less* question (the malicious credentialing question, for which the Court found no evidence) rather than 172 more. It explained:

If at the close of evidence a party continues to assert a claim without knowing whether it is recognized at law or supported by the evidence, the party has three choices: he can request that the claim be included with others and run the risk of reversal and a new trial, request that the claim be submitted to the jury separately to avoid that risk, or abandon the claim altogether.

At first blush, it would appear that, in light of the *Harris County* case and its discussion of the separate submission of questionable damage elements, the Court intended to favor the use of separate submissions

when either the legal theory or the sufficiency of the evidence supporting a damage element was questionable. In the context of *allocation* of damages, however, the Court suggested the favored approach would be to forego the submission of a questionable theory outright. Continuing the passage quoted above, the Court explained:

The Romeros’ argument assumes that it is so commonplace to come to the end of a jury trial and have no idea what claims are still legally and factually valid that the only safe course to avoid retrial is to parse out every issue in a separate jury question. Nothing in our review of thousands of verdicts rendered by juries across the State suggests that there is any validity to the assumption.

Collectively, *Romero* and *Harris County* demonstrate the fine line that must be walked in deciding what issues to submit to the jury and how to do so. Because damages cannot be submitted by way of a single question relying upon both valid and invalid elements, the lesson from *Harris County* is that any doubt about the validity of an element favors the separate submission of the component elements. In contrast, when the issue of allocation may be tainted with a ruling that a liability theory should not have been submitted, *Romero* suggests that the parties should opt to *abandon* claims at the charge conference rather than seek the submission of questions addressing separate allocation contingencies.

III. SUBMISSION OF STATUTORY CLAIMS

Several recent Supreme Court decisions arising from charges submitted in connection with statutory claims demonstrate another fine line practitioners must walk in ensuring, on the one hand, that the charge adequately tracks the statutory language giving rise to the claim, but on the other, that it otherwise adequately instructs the jury as to all factors governing the claim and gives the jury a mechanism to make findings on all required elements.

The first case, *Southwestern Bell Telephone Company v. Garza*, 164 S.W.3d 607 (Tex. 2004), involved an action for a violation of the Anti-Retaliation Law. While garnering attention for its disposition of an award of punitive damages, *Garza* is also noteworthy for its discussion of charge error alleged on appeal.

Garza involved a judgment finding that that Southwestern Bell Telephone Company (“SWBT”) violated the Anti-Retaliation Law in connection with its termination of David Garza, and awarding actual and exemplary damages. In the Supreme Court, SWBT alleged error in the jury charge, and complained

of the legal sufficiency of the evidence of liability and supporting the award of exemplary damages.

As to the charge issue, SWBT complained that the question submitted to the jury deviated from the statutory claim being asserted. The Anti-Retaliation law provides: “A person may not discharge or in any other manner *discriminate* against an employee because the employee has . . . filed a workers’ compensation claim in good faith.” The charge submitted to the jury did not ask whether SWBT “discriminated” against Garza; instead, it asked whether SWBT “*disqualify[ied] or discharge[d]* Garza because he instituted or caused to be instituted a worker’s compensation claim in good faith.” SWBT complained that the substitution of “disqualify/discharge” for “discriminate” deprived it of the right to have the question of its statutory liability submitted in the words of the statute.

The Supreme Court rejected that argument, agreeing with Garza that the charge merely specified the nature of the alleged discrimination: discrimination by disqualifying or discharging him. The Supreme Court agreed that in this case, there was no difference between asking the jury whether Garza was disqualified for filing a compensation claim and asking whether he was discriminated against by being disqualified for filing a compensation claim. The Court concluded that Garza’s disqualification was disciplinary, and if it was imposed because he filed a compensation claim (as the jury found) and not for other reasons, then SWBT violated the Anti-Retaliation Law. The Court noted that the charge would have been more accurate had it tracked the statutory language, asking whether SWBT discriminated against Garza for filing a compensation claim by disqualifying him from his position. Nevertheless, the Court found it unreasonable to conclude that the jury was, in any important way, confused by the question as presented.

The Court also rejected SWBT’s argument that the charge was erroneous because Garza had only pleaded unlawful discharge and had not alleged discrimination. It noted that while Garza’s pleading did not use the “magic word” discrimination, it nevertheless gave fair notice of the facts on which Garza based his claim sufficient to allow SWBT to anticipate what evidence would be relevant and to prepare its defense.

A corollary charge issue arose in *Sterling Trust Company v. Adderly*, 2005 WL 1413154 (Tex. June 17, 2005). *Sterling Trust* involved a claim under the Texas Securities Act against Sterling Trust for secondary liability for losses suffered as a result of a Ponzi scheme. The Texas Securities Act provides for primary liability on a person who sells securities “by means of an untrue statement of a material fact or an omission to state a material fact,” and imposes

secondary liability on a person who “materially aids a seller, buyer, or issuer of a security” if the person acts “with intent to deceive or defraud or with reckless disregard for the truth or the law.” Liability in this case turned on the interpretation of the “reckless disregard for the truth or the law” component of the Act, and the appeal challenged the submission of that issue to the jury.

As to Sterling Trust, the jury charge asked whether it had aided one alleged with a primary violation by “directly or indirectly with intent to deceive or defraud or with reckless disregard for the truth or the law materially aid[ing] a seller of a security.” That question tracked the “magic words” of the statute, but Sterling Trust complained on appeal that the “reckless disregard for the truth or the law” component erroneously submitted the claim. It alleged that the charge failed to include an instruction that “reckless disregard” is not shown, and an aider and abettor cannot be held secondarily liable, unless the aider has a “general awareness” of its role in the primary violation.

The court of appeals rejected this argument. It declined to join other courts in imposing such a requirement as a predicate for secondary liability because the “language of the TSA does not explicitly impose such a requirement.”

On further appeal, the Supreme Court reversed the judgment. It observed that the statute’s history demonstrates that the Legislature intended the Texas Securities Act to be interpreted in harmony with federal securities law. When the Legislature added the aider-liability provision, most federal courts had held that aider liability could be imposed under the federal statute only when the aider was generally aware of its role in an improper scheme. The Court held that to establish “reckless disregard for the truth or the law” under the statute on a showing of general awareness “accords with the requirement that an aider must be aware of the primary violator’s improper activities before it may be held liable for assisting in the securities violation.” The Court held that the “reckless disregard for the truth or the law” standard means “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” and that “in order to perceive such a risk, the alleged aider must possess a “general awareness that his role was part of an overall activity that is improper.”

In the context of the charge, the Court concluded that the omission of an instruction relating to the subjective awareness requirement constituted harmful error. It concluded that the jury may have thought that reckless disregard was demonstrated based on

negligent handling of accounts even without actual knowledge of any improprieties by the principal.

Sterling Trust and *Garza* demonstrate the tension faced when drafting a charge in connection with a statutory-based claim. On the one hand, *Garza* demonstrates that so long as the charge does not confuse the jury about the requirements of a statutory claim, a question will not necessarily constitute error even if it does not track the precise language of the statute on which the claim is based. In contrast, *Sterling Trust* demonstrates that even when the statutory terms are used, the charge may still be deficient by omitting a necessary accompanying instruction interpreting those terms.

The opinion in *Diamond Offshore Management Co. v. Guidry*, 2005 WL 784265 (Tex. April 18, 2005), demonstrates that not only must the jury be adequately instructed about the operative terms of a statute on which a claim is based, the jury must also be given a mechanism to make decisions based upon the proper instructions.

Diamond Offshore Management Co. involved a Jones Act claim resulting from the death of a seaman after an on-shore accident. The charge instructed the jury as to the operation of the Jones Act, with the following instructions:

A seaman's employer is legally responsible for the negligence of one of his employees while that employee is acting within the course and scope of his employment

* * *

A seaman's employer may be liable under the Jones Act for injuries to the seaman only if the seaman was injured "in service of the vessel" or "in the course of his employment." Under the Jones Act "course and scope" of employment includes the whole period of service to the vessel by the seaman. A seaman on shore leave may or may not be acting in service of the vessel, or in the course of his employment, for purposes of application of the Jones Act.

This instruction informed the jury of the "course of employment" predicate for Jones Act liability.

The remainder of the charge, however, did not give the jury an opportunity to decide whether Guidry was in fact acting in the course of his employment at the time of the accident. Instead, it merely asked:

Did the negligence, if any, of those named below [Diamond Offshore and Guidry]

legally cause the injuries to Craig Guidry in question?

Diamond Offshore moved the trial court to submit a question asking the jury whether Guidry and his colleague were acting in the service of the vessel at the time of the accident, which the trial court refused.

The Supreme Court agreed that while the trial court properly instructed the jury on the "course of employment," it never asked the jury for a finding on the issue. The liability question asked the jury only to make findings on negligence and causation, and the jury was given no opportunity otherwise to make any findings on the course of employment question. Thus, the charge as submitted failed to ask the jury to resolve an element of the plaintiff's claim: whether the seaman was within the course of employment such that the employer would be liable under the Jones Act. Because the issue raised by Diamond Offshore focused on an element of plaintiff's claim, and did not seek to present a theory inconsistent with that claim, the Court observed that the requested question was not a mere inferential rebuttal question. And because the issues of negligence, causation, and course of employment could have been submitted in a single question with proper instructions, the Court concluded that Diamond Offshore's requested submission of an additional element would not offend the concept of broad-form submission.

IV. BROAD-FORM SUBMISSION AND OVERLAPPING INFERENTIAL REBUTTAL QUESTION.

The Supreme Court also decided a case addressing the use of inferential rebuttal questions and the extent to which a defendant may seek the multiple submission of overlapping theories. In *Dillard v. Texas Electrical Co-op*, 157 S.W.3d 429 (Tex. 2005), the Court declined to find error in a charge that submitted only one inferential rebuttal question when the submitted question subsumed the theory raised by the rejected theory.

The underlying facts involved a night-time highway collision between a truck and a cow. A second collision occurred shortly thereafter when an oncoming car came upon the accident and hit the cow. That second car then hit another, killing one person and injuring others (the Dillard's). The Dillard's sued the truck driver and his employer (TEC) for negligence. In response, TEC sought to raise two inferential rebuttal defenses: that the accident was unavoidable and that both accidents were the sole proximate cause of whomever allowed the cows onto the road.

As a part of its sole proximate cause instruction, TEC proposed the definition found in paragraph 3.2 of

the Texas Pattern Jury Charge (PJC). The court refused to include the instruction, but instructed the jury on “unavoidable accident,” with the accompanying definition of “proximate cause” derived from PJC 2.4:

‘Proximate cause’ means that cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a person using ordinary care would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event. An occurrence may be an ‘unavoidable accident,’ that is, an event not proximately caused by the negligence of any party to it.

On appeal, the court of appeals found error in the exclusion of the requested “sole proximate cause” instruction, observing that the jury could have reasonably inferred from the cows’ presence on the road that whoever owned them was a sole cause of both accidents.

The Supreme Court reversed the court of appeals. It noted that the Pattern Jury Charge provides five alternative theories that could be implicated when a defendant seeks to blame an occurrence on someone or something else other than a party. The purpose of those instructions is to advise jurors that they need not place blame on a party if the evidence shows that conditions beyond the parties’ control caused the accident or that the conduct of some person not a party to the litigation caused it.

TEC claimed entitlement to the submission of two separate inferential rebuttal questions because there was evidence that the accidents may have been caused by a condition beyond its control (the cattle on the roadway) or by someone not a party to the litigation (the owners of the cattle or Brown).

The Court rejected that argument in light of the “unavoidable accident” instruction that was in fact submitted. It observed that while the instruction ordinarily applies to matters such as fog, weather, or obstructed views, or in resolving cases involving very young children incapable of negligence, the instruction is not so limiting. The purpose of the instruction is to inform the jury that it may consider causes of the occurrence other than the negligence of the parties.

Under the “unavoidable accident” instruction submitted, TEC was free to argue that no one’s conduct (including the driver of the second car) caused the accident, a burden far easier than showing negligence on the part of others. While TEC alleged in

the alternative that the negligence of the driver whose car collided with the Dillard’s was the sole proximate cause of the accident, TEC did not contend at trial that the driver was to blame. Rather, its defense at trial focused exclusively on the presence of the cattle, implicating unknown owners of the cattle. The Supreme Court concluded, however, that whatever the conduct of the unknown owner may have been, it did not justify the submission of two separate inferential rebuttal questions on what was essentially one defense. The Court concluded that the instruction given was sufficient to capture all of TEC’s inferential rebuttal theories concerning the cattle.

The Court explained that while traditional instructions do not necessarily further the jury’s understanding of the defense or conform to broad-form practice, they do serve a legitimate purpose. The standard broad-form submission asks whether the negligence, if any, of particular persons caused an occurrence, creating an implication that an occurrence was in fact caused by *someone’s* negligence. It noted that an inferential rebuttal instruction can explain that no such implication is intended. It also noted, however, that giving multiple instructions on every possible rebuttal inference “has the potential to skew the jury’s analysis in the other direction.” Of the five inferential rebuttal questions, many overlap, creating redundancies that encourage parties to request several in order to emphasize the point that an occurrence may be no one’s fault. But the Court concluded that “[s]uch redundancy is contrary to the spirit of broad-form submission.”

Additionally, the Court noted that inferential rebuttal questions often draw distinctions among outside causes that are irrelevant to what the jury must decide. Under broad form submission rules, the jurors need not agree on every detail of what occurred so long as they agree on the legally relevant result. With respect to inferential rebuttal questions, jurors need not agree on what person or thing caused an occurrence so long as they agree it was not the defendant. Just as jurors may find against a defendant without agreeing on which precise acts were negligent, they should be able to find the opposite without agreeing on the precise reason, as the instruction presented to the jury allowed.

V. CAMPBELL’S EFFECT ON JURY INSTRUCTIONS REGARDING EXEMPLARY DAMAGES.

In *State Farm Mutual Ins. Co. v. Campbell*, 538 U.S. 408 (2003), the U.S. Supreme Court held that an award of \$145 million in exemplary damages, in a case involving \$1 million in actual damages, was unconstitutional. The majority opinion in *Campbell* did not remand the case to the Utah state trial court for

a new trial, nor did it contain any specific holding or statement that the Utah state trial court erred in submitting (or refusing to submit) any questions or instructions to the jury. The *Campbell* majority did, however, make a number of observations that may have a significant impact on how punitive damage cases are submitted to juries in Texas.

Specifically, the *Campbell* majority expressed three concerns that imprecise and indiscriminate common-law procedures for awarding punitive damage awards “have a devastating potential for harm.” First, “[a]lthough these awards serve the same purposes as criminal penalties, defendants subjected to punitive damages in civil cases have not been afforded the protections applicable in a criminal proceeding.” *Campbell*, 438 U.S. at 417. The Court thus observed that “[g]reat care must be taken to avoid use of the civil process to assess criminal penalties that can be imposed only after the heightened protections of a criminal trial have been observed, including, of course, its higher standard of proof.” *Id.* Whether this observation will have any impact on jury instructions in Texas is unclear. Although “clear and convincing” evidence is a higher burden of proof than the ordinary “preponderance” standard, it is a lower burden than the “beyond a reasonable doubt” standard required to protect the rights of criminal defendants in Texas state courts. Consequently, defense counsel may wish to request instructions -- or even separate questions and instructions -- inquiring whether the jury finds the conduct meriting exemplary damages “beyond a reasonable doubt” in order to avoid a retrial if an appellate court were to later determine that the higher evidentiary standard is constitutionally required. *Cf. Westgate, Ltd. v. State*, 843 S.W.2d 448, 455 n.6 (Tex. 1992) (submission of alternative liability standards might be appropriate when the governing law is unsettled). Of course, plaintiffs’ counsel can argue in response that the Texas legislature intentionally chose the “clear and convincing evidence” standard in 1995 and again in 2003, and that the United States Supreme Court has never held that any higher burden of proof is constitutionally required.

Second, the *Campbell* majority recognized that “[j]ury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant’s net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences.” *Campbell*, 438 U.S. at 417. The current statutory scheme in Texas implicates this very concern. Indeed, TEX. CIV. PRAC. & REM. CODE § 41.010 specifically provides that “the determination of whether to award exemplary damages and the amount of exemplary damages to be awarded is within the discretion of the trier of fact.” Although the

jury’s “discretion” is now limited by the statutory cap set forth in section 41.008, that cap is not revealed to the jury. Thus, it appears that the Texas legislature wants juries to have their say in cases involving exemplary damages, and then relies on the Texas courts to render a judgment in accordance with the statutory limitations. Accordingly, despite the concern of the *Campbell* majority, it does not appear likely that Texas courts will instruct juries that any considerations govern the amount of punitive damages other than the so-called *Kraus* factors currently set forth in TEX. CIV. PRAC. & REM. CODE § 41.011(a).

The third and final jury charge concern expressed by the *Campbell* majority was that “[v]ague instructions, or those that merely inform the jury to avoid ‘passion or prejudice,’ . . . do little to aid the decisionmaker in its task of assigning appropriate weight to evidence that is relevant and evidence that is tangential or only inflammatory.” *Campbell*, 438 U.S. at 418. Whether this concern will result in any change to the standard instruction that jurors should “not let bias, prejudice or sympathy play any part in [their] deliberations” remains to be seen. *See* TEX. R. CIV. P. 226a.

In addition to these concerns, the *Campbell* majority also mandated jury instructions forbidding the use of lawful out-of-state conduct for purposes of proving punitive damages. In *Campbell*, the plaintiffs had adduced evidence and largely based their claim for punitive damages on conduct that was unrelated to their claim and occurred in states other than Utah where the conduct was or may have been legal. The Supreme Court rejected this approach and concluded that “[a] jury must be instructed . . . that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred.” *Campbell*, 438 U.S. at 422.

Campbell did not, however, address procedures for determining what the law is in other states, nor did it determine who has the burden to plead and/or prove conduct is lawful, or unlawful, in other states. New commentary under the 2004 State Bar of Texas Pattern Jury Charge questions and instructions on exemplary damages addresses this issue as follows:

Out-of-state conduct. A defendant’s lawful out-of-state conduct may be probative on some issues in a punitive damage case in certain circumstances. . . . When such evidence is admitted, “[a] jury must be instructed . . . that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred. . . .” *Campbell* does not specify whether the requirement of an instruction means a limiting instruction at the

time the evidence is offered, an instruction in the jury charge, or both.

See, e.g., comment to PJC 80.6C.

The *Campbell* majority also criticized the Utah Supreme Court for awarding punitive damages to punish and deter conduct that bore no relation to the plaintiffs' harm. As the Court observed, "[a] defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as a basis for punitive damages. A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business." *Campbell*, 438 U.S. at 422. Despite this admonishment, there are instances in which such evidence may be admitted at trial over timely objection. *See* TEX. R. EVID. 404(b) (evidence of other wrongs or acts may be admissible to show proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident). In such circumstances, defense counsel might wish to tender an instruction based on the language in *Campbell*.

In the end, *Campbell* and its progeny will provide ample fodder for potential jury instructions on punitive damages. *See, e.g.*, *TVT Records v. Island Def Jam Music Group*, 279 F. Supp.2d 413, 422 (S.D. N.Y. 2003) (instructing the jury: "While there are not rigid benchmarks, the measure of punishment must be reasonable and proportionate to the amount of harm that plaintiffs have established and for which you decide to award damages, and must be based upon the facts of [the] particular circumstances associated with the severity of each defendant's conduct established by the evidence"); *see generally* John Gibeaut, *Punitive Precision*, 90 A.B.A.J. 44 (June 2004) (collecting arguments for and against the necessity for additional jury instructions in light of *Campbell*).