FINALITY OF JUDGMENTS

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I. OVERVIEW

The general rule is that a judgment must be final before it can be appealed. *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 195 (Tex. 2001). There are statutory exceptions permitting interlocutory appeals of certain types of orders. *See, e.g.*, Tex. Civ. Prac. & Rem. Code §51.014. Other exceptions allow immediate appeals of orders that resolve discrete issues in probate and receivership cases. *See Crowson v. Wakeham*, 897 S.W.2d 779, 783 (Tex. 1995); *Huston v. Federal Deposit Ins. Corp.*, 800 S.W.2d 845, 847 (Tex. 1990). Otherwise, finality is the key to appealability.

There can be only one final judgment in most cases (excepting situations such as the probate orders mentioned above). *See* Tex. R. Civ. P. 301. That does not mean there can be only one piece of paper. A series of orders that, when taken together, disposes of all parties and claims can constitute a single final judgment. *See, e.g., Mafrige v. Ross*, 860 S.W.2d 590 (Tex. 1993). Finality also can be achieved by severance, dismissal, or nonsuit of unresolved claims. *See, e.g., Park Place Hosp. v. Milo*, 909 S.W.2d 508 (Tex. 1995); *see also Perry v. Stanley*, ___ S.W.3d ___, 2002 WL 1430409 (Tex. App–Texarkana July 3, 2002, no pet. hist.) (court of appeals granted severance *sua sponte* and proceeded to address merits of severed claim on appeal); *compare Youngblood v. Judicial Watch*, 2002 WL 1899929 (Tex. App.–Houston [14th Dist.] August 15, 2002), (unpublished) (filing of supplemental petition abandoning unadjudicated claims did not make prior partial summary judgment final).

A judgment is final if it disposes of all parties and issues. *See North E. Indep. School Dist. v. Aldridge*, 400 S.W.2d 893, 895 (Tex. 1966). But determining ***whether*** and ***how*** a judgment disposes of all parties and issues can be difficult.

There is no particular form required for a final judgment. *Lehmann*, 39 S.W.3d at 195. "From the beginning . . . certainty in determining whether a judgment is final has proved elusive." *Id*. "What has vexed courts in this State and elsewhere is this: must a final judgment dispose of all parties and claims specifically, or may it do so by general language or even by inference?" *Id.*

In Texas the answer is, "It depends."

II. FINALITY AFTER A CONVENTIONAL TRIAL ON THE MERITS

Under *Aldridge*, if a judgment "not intrinsically interlocutory in character" is signed following a "conventional trial on the merits," and there is no order for separate trials, then the judgment is presumed to be final and dispose of all parties and all issues before the court. 400 S.W.2d at 897-98. This means claims that are not mentioned explicitly may be disposed of by implication. *See, e.g., Kaine v. Coomey*, 448 S.W.2d 223, 226 (Tex. Civ. App.–San Antonio 1969, no writ).

After noting that none of the many cases applying the *Aldridge* presumption has undertaken to define what "intrinsically interlocutory" means, the court did so in *Infonova Solutions, Inc v. Griggs*, ___ S.W.3d ___, 2002 WL 1058192 (Tex. App.–San Antonio May 29, 2002, no pet. hist.). "[A]n 'intrinsically interlocutory' order is one that does not inherently resolve the merits of a case."

In *Markowitz v. Allstate Ins. Co.*, 2002 WL 2027572 (Tex. App.–El Paso Sept. 5, 2002) (unpublished), the court applied the *Aldridge* presumption after the first portion of a trifurcated trial had been submitted to the jury, which ruled against the plaintiff.

III. FINALITY OF DISPOSITIONS THAT DO NOT RESULT FROM A CONVENTIONAL TRIAL ON THE MERITS

Different rules apply to summary judgments and other dispositions that are deemed to be something other than "a conventional trial on the merits." Those rules are set out in *Lehmann*.

In *Lehmann*, the supreme court returned once again to the oft-revisited issue of summary judgment finality and *Mafrige*'s endorsement of a Mother Hubbard clause reciting that "all relief not granted is denied."

Although the *Lehmann* majority opinion rejects the use of Mother Hubbard language endorsed by *Mafrige* to determine summary judgment finality, the court did not abandon the basic concept behind *Mafrige* or the search for sufficiently emphatic language that will notify litigants when a summary judgment really is final and appealable.

At the same time, *Lehmann* creates a substantial amount of wiggle room to allow appellate courts to avoid dismissals of arguably untimely appeals brought by litigants who did not appeal what they though were earlier interlocutory summary judgment orders.

A. Say Goodbye to Mother Hubbard

The *Lehmann* majority opinion — authored by Justice Hecht and joined by Chief Justice Phillips and Justices Owen, Abbott, and O'Neill — sets out its key holding as follows:

> . . . [I]n cases in which only one final appealable judgment can be rendered, a judgment issued without a conventional trial is final for purposes of appeal if and only if either

> it actually disposes of all claims and parties then before the court, regardless of its language, or it states with ***unmistakable clarity*** that it is a final judgment as to all claims and all parties.

39 S.W.3d at 192-93 (emphasis added). By addressing the issue in this manner, the Texas Supreme Court struck a balance between (1) providing a means of determining finality with some degree of certainty to reduce the confusion that existed before *Mafrige*; and (2) avoiding dismissals of appeals resulting from a failure to recognize the significance of Mother Hubbard language in an earlier interlocutory-flavored summary judgment order.

In striking this balance, the court erred on the side of avoiding inadvertent dismissals at the expense of certainty. Dismissals undoubtedly will decrease in light of the flexibility built into *Lehmann*'s restated finality standard.

The price of this policy choice will be paid by litigants who have to fight about summary judgment finality on appeal now that the bright-line standard for finality no longer is so bright.

B. Finality Through The Ages

On its way to addressing the fate of Mother Hubbard clauses, the *Lehmann* majority opinion surveys Texas finality case law dating back to 1881.

The survey reveals a gradual pendulum movement that starts with a bright-line-rule approach to determining finality; moves toward a "gestalt" approach aimed at discerning what the trial court really or "implicitly" intended to do based on all facts and circumstances; and then swings back towards the bright line approach. *See Lehmann*, 39 S.W.3d at 196-98. In *Lehmann* the pendulum now has come back to rest again on the look-at-all-the-circumstances side of the line.

In so doing, the majority opinion embraces the distinction between finality determinations following "a conventional trial on the merits" and finality determinations in the summary judgment context. *Id.* at 198 (citing *Aldridge*, 400 S.W.2d at 897-98). "The presumption that a judgment rendered after a conventional trial on the merits is final and appealable has proved fairly workable for nearly a century, but we have never thought that it could be applied in other circumstances . . . ." *Lehmann*, 39 S.W.3d at 199.

Dispositions that fall outside the realm of a "conventional trial on the merits" include non-suits, pleas to the jurisdiction, pleas in abatement, dismissals for want of prosecution, default judgments, and summary judgments. *Id.*; *see also Boyd v. West*, 2002 WL 285513 (Tex. App.–Houston [1st Dist.] Feb. 28, 2002) (unpublished) (applying *Lehmann* to determine finality of order granting plea to the jurisdiction); *Jones v. Gifford*, 2002 WL 342660 (Tex. App.–Amarillo March 4, 2002) (unpublished) (applying *Lehmann* to determine finality of order granting motion to dismiss suit as frivolous).

One of the interesting anomalies here is that *Aldridge* endorsed and applied a presumption of finality even though the judgment in that case was ***not*** the product of a "conventional trial on the merits" as later defined by the supreme court. *Aldridge* arose from a ***partial summary judgment*** and stipulated damages. *See Lehmann*, 39 S.W.3d at 198.

Aldridge nonetheless has become the citation of choice for the proposition that finality analysis should be divided into one category involving judgments following a "conventional trial on the merits," to which a presumption of finality applies, and a second category encompassing every disposition (including summary judgment) that is other than a "conventional trials on the merits," to which no presumption of finality applies.

The emergence of this distinction in the case law is described by the *Lehmann* majority's opinion, but the actual justification for relying on presumptive finality in certain circumstances or drawing distinctions is not developed.

The court's opinion states, "The reason for not applying a presumption [to summary judgments] . . . is that the ordinary expectation that supports the presumption that a judgment rendered after a conventional trial on the merits will comprehend all claims simply does not exist when some form of judgment is rendered without such a trial." *Id.* at 199-200. "On the contrary, it is quite possible, perhaps even probable these days in cases involving multiple parties and claims, that any judgment rendered prior to a full-blown trial is intended to dispose of only part of the case." *Id.* at 200.

This reasoning merely recharacterizes the court-created presumption as an "ordinary expectation." The presumption should be recognized because we have recognized a presumption and people have come to presume it.

The underlying questions are left unanswered. Why is a presumption of finality necessary or appropriate in any circumstance? If all facts and circumstances must be reviewed to gauge finality for some types of judgments, why should judgments following a "conventional trial on the merits" be treated differently?

The real answer to these questions probably is more practical than legal: If it ain't broke, don't fix it. *See Lehmann*, 39 S.W.3d at 199 ("the presumption that a judgment rendered after a conventional trial on the merits is final and appealable has proved fairly workable for nearly a century . . . ").

Regardless of the justification — or of any disconnect between the facts of *Aldridge* and the manner in which its holding has been applied by subsequent cases — it appears that the distinction between judgments following "a conventional trial on the merits" and other types of judgments is with us to stay.

Intermediate courts have responded to *Lehmann's* endorsement of this distinction by presuming the finality of judgments entered after a "full trial on the merits" in front of a jury or the trial court. *See Stephens v. Dallas Area Rapid Transit*, 50 S.W.3d 621 (Tex. App.–Dallas 2001, pet. denied) ("[W]e treat the judgment as final for purposes of appeal because the final judgment ostensibly was entered after a full trial before the court on the merits and contains a Mother Hubbard clause denying all relief not granted in the judgment"); *Mendoza v. City of Houston*, 2001 WL 520912 (Tex. App.–Houston [14th Dist.] May 17, 2001) (unpublished). ("[W]e decline to explicitly extend *Lehmann* to judgments following conventional trial on the merits"); *Barker v. Jumper*, 2001 WL 253853 (Tex. App.–Dallas March 15, 2001) (unpublished) ("We treat the judgment as final for purposes of appeal because the final judgment was entered after a full trial before the court and contains a Mother Hubbard clause . . .").

C. And The Winner Is . . . *Teer*

The *Lehmann* majority opinion goes on to address the conflict between *Schlipf v. Exxon Corp.*, 644 S.W.2d 453 (Tex. 1982) (per curiam), which endorsed the use of Mother Hubbard language in the summary judgment context to establish finality, and *Teer v. Duddlesten*, 664 S.W.2d 702 (Tex. 1984), which proclaimed that Mother Hubbard language has no place in the summary judgment context.

To its credit, *Lehmann* does not attempt to reconcile these decisions in some superficial way or pretend that *Teer* and *Schlipf* are anything other than diametrically opposed to one another. *See Lehmann*, 39 S.W.3d at 203 ("in sum, our opinions have not been entirely consistent on whether the inclusion or omission of a Mother Hubbard clause does or does not indicate that a summary judgment is final for purposes of appeal").

Instead, *Lehmann* has in essence declared *Teer* to be the winner of the finality wrestling match:

> Much confusion can be dispelled by holding, as we now do, that the inclusion of a Mother Hubbard clause — by which we mean the statement, "all relief not granted is denied," or essentially those words — does not indicate that a judgment rendered without a conventional trial is final for purposes of appeal. We overrule *Mafrige* to the extent is states otherwise.

39 S.W.3d at 203-04.

"If there has been a full trial on the merits either to the bench or before a jury, the language indicates the court's intention to finally dispose of the entire matter, assuming that a separate or bifurcated trial is not ordered." *Id.* at 204. The court continues, "But in an order on an interlocutory motion, such as motion for partial summary judgment, the language is ambiguous." *Id.* "It may mean only that the relief requested ***in the motion*** — not all the relief requested by anyone in the case — and not granted by the order is denied." *Id.* "The clause may also have no intended meaning at all, having been inserted for no other reason that it appears in the form book or resides on a word processor." *Id.*

The court then buries Mother Hubbard with these words: "For whatever reason, the standard Mother Hubbard clause is used in interlocutory orders so frequently that it cannot be taken as any indication of finality." *Id.* at 204.

D. The New Principles Governing Summary Judgment Finality

When the dust settles, the following principles for determining summary judgment finality emerge from *Lehmann*:

1. Neither a Mother Hubbard clause stating that "all relief not granted is denied" nor "take nothing" language indicates finality in a summary judgment order, although such language does so in a judgment signed following "a conventional trial on the merits." 39 S.W.3d at 203-04; *see also John v. Marshall Health Servs., Inc.,* 58 S.W.3d 738, 740 (Tex. 2001) (per curiam)("Whether the judgment was final should not depend on one party's testimony that he did or did not finalize a settlement with parties from whom he sought no relief at [a conventional trial on the merits] . . . . The *Aldridge* presumption fits just such circumstances"); *City of Glenn Heights v. Sheffield Dev. Co.*, 61 S.W.3d 634, 641 (Tex. App.–Waco 2001, pet. for review filed Jan. 11, 2002) (Mother Hubbard clause indicated final judgment following partial bench trial and partial jury trial on the merits).

2. To be final, a judgment rendered after a proceeding that is other than a "conventional trial on the merits" must

actually and explicitly dispose of all claims and parties, or must state "with unmistakable clarity that it is a final judgment as to all claims and all parties." 39 S.W.3d at 192-93.

3. The "unmistakable clarity" standard is satisfied by a statement that **"this judgment finally disposes of all parties and all claims and is appealable."** Id. at 206 (emphasis added); see also Kleven v. Texas Dept. of Criminal Justice, 2002 WL 221071 (Tex. App.–Texarkana Feb. 14, 2002) (unpublished) ("**This is a final judgment and disposes of all issues and parties in this case**"). Other statements of similar clarity also suffice. Richardson v. Prime Equip., Inc., 2002 WL 818833 (Tex. App.–Dallas May 1, 2002) (unpublished) ("**the Court severed the claims against Sue Richardson so that a final judgment against Jack Richardson could be entered**"); Alashmawi v. IBP, Inc., 65 S.W.3d 162 (Tex. App.–Amarillo 2001 pet. denied) (summary judgment order was final because it recited that trial court had **"reconsidered the first motion for summary judgment together with the second motion and 'is of the opinion that the Motions for Summary Judgment should be granted as to all claims asserted by Plaintiff'"**) (emphasis added); Murphy v. Gulf States Toyota, Inc., 2001 WL 619557 (Tex. App.–Houston [1st Dist.] June 7, 2001) (unpublished) (summary judgment order was final because it stated, **"Judgment on all claims is entered in favor of Defendant"**) (emphasis added); Capstead Mortgage Corp. v. Sun America Mortgage Corp., 45 S.W.3d 233 (Tex. App.–Amarillo 2001, no pet.) (summary judgment was final because it contained a handwritten provision stating that **"[a]s a result of the other orders signed on this date, this is a final judgment"**) (emphasis added).

4. Finality in the summary judgment context is determined by looking not only at the four corners of the order at issue, but also the appellate record as a whole to determine which claims were asserted; which claims were addressed; and which claims the trial court intended to address. 39 S.W.3d at 205-06; *see also Mendez v. San Benito/Cameron County Drainage Dist. No. 2*, 45 S.W.3d 746 (Tex. App.–Corpus Christi 2001, pet. denied); *Turner v. Polunsky*, 2001 WL 253444 at *3 (Tex. App.–Houston [1st Dist.] March 15, 2001) (unpublished).

5. In deciding summary judgment finality questions, courts are instructed to err on the side of preserving appeals by "ensur[ing] that the right to appeal is not lost by an overly technical application of the law." 39 S.W.3d at 205.

6. When in doubt about what the trial court intended to do, go to the source. "If the appellate court is uncertain about the intent of the order, it can abate the appeal to permit clarification by the trial court." *Id.*; *see also Lopez v. Sulak*, 2002 WL 449727 (Tex. App.–Corpus Christi March 21, 2002) (unpublished) (jurisdiction existed following abatement because trial court clarified its intent to enter a final summary judgment disposing of all claims); *Wellness Provider Mgmt. L.L.C. v. Kagan*, 2002 WL 287784 (Tex. App.–Houston [14th Dist.] Feb. 28, 2002) (unpublished) (dismissing appeal following abatement; pursuant to abatement, trial court made findings and conclusions stating that judgment was interlocutory); *Beach Exploration, Inc. v. Moore*, 2002 WL 261806 (Tex. App.–Amarillo Feb. 25, 2002) (unpublished) (abating appeal and remanding to allow trial court to cure jurisdictional defect); *Enercor, Inc. v. Pennzoil Gas Marketing Co.*, 2001 WL 754773 (Tex. App.–Houston [1st Dist.] July 5, 2001) (unpublished) (appeal abated to permit parties to cure jurisdictional defect by obtaining supplemental clerk's record containing signed order granting nonsuit); *Warren v. General Motors Corp.*, 2001 WL 665390 (Tex. App.–Houston [1st Dist.] June 14, 2001) (unpublished) (dismissing appeal after parties failed to cure jurisdictional defect during abatement period by failing to obtain signed order granting nonsuit); *compare Lucas v. Burleson Pub. Co., Inc.*, 39 S.W.3d 693, 696 n.1(Tex. App.–Waco 2001, no pet.) (declining to abate appeal and seek clarification from trial court because "the order is clearly a partial summary judgment"); *Benson v. Hutchinson County Hosp. Dist.*, 2001 WL 303686 at *3 (Tex. App.–Amarillo March 29, 2001) (unpublished) (same).

These principles leave litigants and courts somewhere on the kinder-and-gentler side of the

spectrum of approaches to summary judgment finality. At the same time the court still clings to the possibility that the English language contains words of sufficient clarity to communicate a trial court's unmistakable intent to dispose of all issues and parties before it — even if the phrase "all relief not granted is denied" does not do so.

Lehmann also recognizes that the practices of local clerks' offices affect this issue. The petitioners in *Lehmann* did not receive copies of the actual summary judgment orders at issue; instead, pursuant to local practice in Harris County, they received a vague postcard notice that an "interlocutory order" of some kind had been signed. 39 S.W.3d at 193-94. No degree of drafting precision will convey a summary judgment order's finality to the litigant who never reads it. And if litigants cannot reliably determine when a final judgment has been signed, why should the district clerks' offices be required to do so?

This recognition prompted the court to suggest consideration by the Supreme Court Advisory Committee of a rule amendment requiring all parties to be given copies of all orders signed in a case. *Id.* at 206. This is a sound idea that should be acted upon.

E. Justice Baker's Concurring Opinion

Justice Baker, joined by Justices Enoch and Hankinson, takes the *Lehmann* majority to task for doing "no more than replac[ing] . . . one set of magic language with another — while ignoring the reality that courts will likely face the same challenges deciding what language 'clearly and unequivocally states' that an order is final . . . ." 39 S.W.3d at 210.

According to Justice Baker, the majority's holding "represents but a minor departure from *Mafrige*." *Id.* Justice Baker opines that the court should address only the summary judgment situation, rather than all dispositions that are the result of something other than a "conventional trial on the merits;" overrule *Mafrige* in its entirety; and address the issues raised by summary judgment finality via the rulemaking process. *Id.* at 214, 216.

Justice Baker's recommended fix (which is where Justices Enoch and Hankinson apparently part company with him), is to amend Texas Rule of Civil Procedure 166a to require summary judgment orders to identify (1) the claims each party brings; (2) the grounds upon which each party seeks summary judgment; (3) each ground upon which the trial court granted summary judgment; and (4) each ground upon which the trial court denies summary judgment.

In addition, under Justice Baker's approach, the prevailing party would have to serve copies of a proposed order on all other parties at least ten days before the trial court is to sign and enter the order. *Id.* at 219. Clerks would be required to send copies of actual signed orders rather than just a postcard indicating that the court has signed an order. *Id.*; *compare City of Houston v. Houston Firemen's Relief and Retirement Fund*, 2002 WL 437253 (Tex. App.–Houston [1st Dist.] March 21, 2002) (unpublished) (summary judgment was interlocutory notwithstanding erroneous postcard order sent by district clerk's office calling it a "final" judgment).

Requiring detailed orders of this nature certainly would take some of the guesswork out of summary judgment finality questions. But certain practicalities need to be addressed before this proposal is pursued.

The most pressing question is this: Will busy state trial court judges, who lack law clerks for the most part, be able and willing to invest the extra time necessary to prepare detailed orders of the kind contemplated by Justice Baker's recommendation? Anyone who has attempted to negotiate and obtain a signature on a complex order can attest to the fact that getting this done can be a daunting process.

F. Is *Lehmann* Retroactive?

This question goes unmentioned by the majority and concurring opinions in *Lehmann*.

The general rule is this: "A decision of the Supreme Court operates retroactively ***unless*** this Court exercises its discretion to modify that application." *Bowen v. Aetna Casualty & Surety Co.*, 837 S.W.2d 99, 100 (Tex. 1992) (per curiam) (emphasis added). Nothing in *Lehmann* suggests that the court exercised discretion to make its new finality rule purely prospective. On the contrary, *Lehmann* was granted and decided to give immediate relief in response to pleas on behalf of litigants who were viewed as having been victimized by an overly technical application of the rules.

If *Lehmann*'s new finality rule operates retroactively, and if Mother Hubbard language no longer has any effect in the summary judgment context, then what does this mean for cases that were dismissed in courts of appeals in reliance on *Mafrige*?

This raises the prospect of litigation over the fate of resurrected appeals and newly un-final summary judgment orders existing in a purgatory located somewhere between the trial court and the court of appeals.

The retroactivity question was the subject of a motion for rehearing filed in the Fourteenth Court of Appeals in *Taub v. Dedman*, 56 S.W.3d 83 (Tex. App.–Houston [14th Dist.] June 14, 2001 pet. denied).

In *Taub*, the appellee obtained an order granting a plea to the jurisdiction based upon a 1994 summary judgment order that, under *Mafrige*, was deemed to be final because it contained a Mother Hubbard clause. In

an initial opinion issued December 21, 2000, the court of appeals agreed that the plea to the jurisdiction properly was granted because the prior summary judgment order was final. *See* 41 S.W.3d 164. After *Lehmann*, the court issued a substituted opinion in which it held that the prior summary judgment was not final. The appellee filed a motion for rehearing asking the court to hold that *Lehmann* applies only prospectively. The rehearing was denied, as was the subsequent petition for review.

G. Proposed Rule and Legislative Changes

The debate over *Mafrige* and summary judgment finality has spawned a number of proposals.

One proposal is to add subsection (j) to Rule 166a, which would require that an order granting summary judgment must state the grounds on which it was granted, and further provides that no judgment can be affirmed on other grounds stated in the motion unless they are asserted by the appellee in the appellate court as alternative grounds for affirmance.

This idea parallels a bill proposed during the 2001 legislative session — which ultimately died in committee before being voted upon— that would have required an order granting summary judgment to identify each specific ground on which summary judgment has been granted.

The problem with these two proposals is that they make it too easy for the finality determination to become a proxy for a larger issue — namely, the decades-long debate over whether summary judgments are granted too freely or too infrequently, and whether trial courts should be encouraged to grant more summary judgments or to set more jury trials.

The practical effect of imposing more onerous requirements for summary judgment orders will be to discourage the grant of summary judgments. That may be a good thing, or it may be a bad thing. But it is a thing that should be debated on its own merits, as it was when the supreme court added Rule 166a(i) authorizing no-evidence summary judgments. This larger issue should not be resolved indirectly in the guise of addressing finality problems.

Another proposal considered by the Supreme Court Advisory Committee would have established a new rule setting forth finality standards for all judgments — not just summary judgments.

Among other things, this rule would require a final judgment to state as follows: “This is a final, appealable judgment or order. All relief requested in this case that is not expressly granted in this judgment or by a subsisting prior order is denied.”

Yet another proposed rule change, known as the “death certificate,” would require a separate “Order of Appealability” in all cases containing (1) a Mother Hubbard clause; and (2) a statement that the date of the signing of the order is deemed to be the operative date for purposes of accrual of prejudgment and postjudgment interest, enforcement of orders and judgments, the time for filing postjudgment motions, and the time for perfecting an appeal.

These latter two proposals have virtues to recommend them. They stay away from presumptions for or against finality, and doctrinally suspect distinctions between a “conventional trial on the merits” and “other than a conventional trial on the merits” — two examples of common law gloss that tend to make this area of the law more confusing than it has to be. They also apply equally to summary judgments and other types of judgments, which would help to prevent finality standards from being used as a proxy for discouraging the granting of summary judgments.

Finally, and perhaps most importantly, rule changes such as these are the best mechanism to communicate a new, clearer finality standard to the largest number of practitioners and thereby reduce the possibility that appellate rights will be lost due to a failure to recognize language communicating a trial court’s intent to issue a final and appealable judgment. Other proposals are the subject of continuing discussion by the Supreme Court Advisory Committee.

H. Now What?

If an equitable resolution is defined as one that leaves both sides equally unhappy, then *Lehmann* has equitably resolved the fight over bright-line rules versus avoiding inadvertent loss of the right to appeal.

Advocates of the need for greater certainty in making finality determinations will declare that goal thwarted by *Lehmann’*s broad admonition to avoid “overly technical” applications of the rules, coupled with its approval of combing the entire appellate record for clues to the trial court’s true intent.

Critics of bright-line finality rules will bemoan *Lehmann’*s continued adherence to the idea that some combination of explicit words properly can be relied upon to alert reasonably attentive litigants that all claims and all issues have been resolved.

If any consensus emerges from the competing views illustrated in *Lehmann*, it is that the rulemaking process is better suited to strike a satisfactory balance of interests here than the case-by-case approach that has been relied upon for the last 20-plus years.

Mafrige has been criticized, and perhaps with some justification, as an unsuccessful attempt to achieve a quick fix for a complex problem. *Lehmann* now offers a complex fix for a complex problem.

The more fundamental point is that uncertainty breeds more uncertainty.

So long as summary judgment finality determinations depend primarily upon parsing scores of intermediate appellate decisions — which likely will apply the *Lehmann* standards with widely varying degrees of precision, just as they applied *Mafrige* with widely varying degrees of precision — this area of the law will remain muddled.

Implementing a uniform rule-based finality standard will not eliminate all uncertainty, but it likely will reduce the uncertainty to a tolerable level.

I. How Have The Courts Applied *Lehmann*?

1. Back to the Cupboard

Most of the summary judgment finality cases decided after *Lehmann* apply it straightforwardly to hold that a Mother Hubbard clause does not by itself dispose of unaddressed causes of action, claims, or parties. *See, e.g., Harris County Flood Control Dist. v. Adam*, 66 S.W.3d 265 (Tex. 2001) (per curiam denial of petition for review); *Nash v. Harris County*, 63 S.W.3d 415 (Tex. 2001) (per curiam); *Parking Co. v. Wilson*, 58 S.W.3d 742 (Tex. 2001) (per curiam); *Bobbitt v. Stran*, 52 S.W.3d 734 (Tex. 2001) (per curiam); *Guajardo v. Conwell*, 46 S.W.3d 862 (Tex. 2001) (per curiam); *Clark v. Pimienta*, 47 S.W.3d 485 (Tex. 2001) (per curiam).

The courts of appeals have followed the supreme court's lead for the most part, holding that Mother Hubbard or "take nothing" language alone does not establish the finality of an otherwise interlocutory summary judgment. *Yazdchi v. The Bennett Law Firm, P.C.*, 2002 WL 1163568 (Tex. App.–Houston [14th Dist.] May 30, 2002) (unpublished); *Sifuentes v. Dabbs Marketing, Inc.*, 2002 WL 511464 (Tex. App.–Amarillo April 3, 2002) (unpublished); *Sabre Oil & Gas Corp. v. Gibson*, 72 S.W.3d 812 (Tex. App.–Eastland 2002, pet. denied); *Hagerman v. Walburg State Bank*, 2002 WL 121938 (Tex. App.–Austin Jan. 31, 2002) (unpublished); *Braeswood Harbor Partners v. Harris County Appraisal Dist.*, 2002 WL 24430 (Tex. App.–Houston [1st Dist.] Jan. 10, 2002) (unpublished); *Chitsey v. Carter*, 2001 WL 1337591 (Tex. App.–Austin Nov. 1, 2001) (unpublished); *Mesa Operating Co. v. California Union Ins. Co.*, 2001 WL 1143316 (Tex. App.–Dallas Sept. 28, 2001) (unpublished); *Anderson v. Long*, 52 S.W.3d 385 (Tex. App.–Fort Worth 2001 no pet.); *Cooper v. Summit Photographix, Inc.*, 2001 WL 804516 at *4-*5 (Tex. App.–Dallas July 18, 2001) (unpublished); *Watson v. Hill*, 2001 WL 793223 at *1 (Tex. App.–Dallas July 16, 2001) (unpublished); *Anderson v. Long*, 52 S.W.3d 385 (Tex. App.–Fort Worth 2001, no pet.); *Youngblood & Assocs. v. Duhon*, 57 S.W.3d 63 (Tex. App.–Houston [14th Dist.] 2001, no pet.); *Automobile Ins. Co. v. Young*, 2001 WL 708505 at *2 (Tex. App.–Amarillo June 25, 2001) (unpublished); *Heister v. Western Shamrock Corp.*, 50 S.W.3d 643 (Tex. App.–Waco 2001, no pet.); *Hathcox v. Shinke*, 2001 WL 650609 at *1-*2 (Tex. App.–Texarkana June 13, 2001) (unpublished); *Danko v. Rodriguez*, 2001 WL 633756 at *2 (Tex. App.–El Paso June 7, 2001) (unpublished); *Laurel v. Gutierrez*, 2001 WL 487955 at *1 (Tex. App.–San Antonio May 9, 2001) (unpublished); *Scott v. Poindexter*, 53 S.W.3d 28 (Tex. App.–San Antonio 2001, pet. denied); *Henderson v. Duran*, 39 S.W.3d 392, 394 (Tex. App.–Waco 2001, no pet.); *Lucas*, 39 S.W.3d at 695-96; *Mission Petroleum Carriers, Inc. v. Solomon*, 37 S.W.3d 482 (Tex. App.–Beaumont 2001, pet. granted); *Walston v. Lockhart*, 36 S.W.3d 278 (Tex. App.–Waco 2001, no pet.).

Two cases have applied *Lehmann* to hold that default judgments that did not dispose of all parties and claims were not final despite the presence of a Mother Hubbard clause. *First Nat'l Bank in McAllen v. Villagomez*, 54 S.W.3d 345 (Tex. App.–Corpus Christi 2001, pet. denied); *GSI Security, Inc. v. Southwestern Bell Yellow Pages, Inc.*, 2001 WL 417310 at *1 (Tex. App.–San Antonio April 25, 2001) (unpublished).

Two other cases cite *Lehmann* for the proposition that an award of costs does not by itself indicate finality. *McNally v. Guerva*, 52 S.W.3d 195 (Tex. 2001) (per curiam); *Benson*, 2001 WL 303686 at *3.

Another case relies on *Lehmann* in holding that "take nothing" language in an order granting a bill of review and vacating a default judgment did not make that order final or constitute an adjudication of the underlying lawsuit. *Mills v. Corvettes of Houston, Inc.*, 44 S.W.3d 197 (Tex. App.–Houston [14th Dist.] 2001, no pet.).

Yet another case has looked at the issue from the opposite angle and properly concluded that inclusion of a Mother Hubbard clause does not make an otherwise final judgment interlocutory. *Federal Financial Co. v. Gober*, 2001 WL 699117 (Tex. App.–Houston [14th Dist.] June 21, 2001) (unpublished).

In *Little v. Thompson*, 2002 WL 1017847 (Tex. App.–Tyler May 14, 2002) (unpublished), the Court held that omission of a Mother Hubbard clause does not make an otherwise final judgment interlocutory. *See also Clark v. Bula*, 2002 WL 1371195 (Tex. App.–Dallas June 26, 2002) (unpublished) (same).

In *Al Ranyak v. Addison Airport of Texas, Inc.*, 2002 WL 1424531 (Tex. App.–Dallas July 2, 2002) (unpublished), the court relied on *Lehmann* in holding that an order granting summary judgment and requiring one party to pay rent on a hangar was interlocutory because "the trial court's order could not be carried into execution without determining facts not stated in the order itself . . . specifically, whether [the judgment creditor] . . . has collected" rent from a replacement tenant. *See also Miles v. Matthews*, 2002 WL 1470213

(Tex. App.–Dallas July 10, 2002) (unpublished) (judgment in partition suit was interlocutory because it failed to "finally determine the net equity of each party [or] . . . determine the final sum to which each party is entitled following offset").

However, cracks already have started to appear in *Lehmann*'s new finality facade. The cycle of combing through conflicting decisions to gauge finality is beginning anew.

2. Is That Your Final Answer?

Consider the decision issued about a month after *Lehmann* was decided in which a statement that plaintiffs ***"take nothing by their action"*** was determined to be "equivalent to the language *Lehman* [sic] uses to illustrate finality" and sufficient to establish finality even though claims against two additional defendants were not expressly disposed of in the summary judgment order. *Hodde v. Portanova*, 2001 WL 224940 at *1 (Tex. App.–Houston [14th Dist.] March 8, 2001) (unpublished).

This phrase sounds suspiciously like the "take nothing" language relied upon in *Mafrige* and treated as the equivalent of a Mother Hubbard clause to establish finality. *See* 866 S.W.2d at 590 n.1. *Hodde* arguably suggests in a footnote that any error arising from the order's failure to expressly dispose of the two additional defendants was waived because "no error has been assigned to this discrepancy in this appeal." *Id.* at 2. Any such suggestion would be erroneous because lack of finality is an unwaivable jurisdictional defect.

In another case, the court held that four separate summary judgment orders containing "take nothing" language and Mother Hubbard clauses constituted a final judgment even though the orders did not specifically address certain pending third-party claims. *Morales v. Craig*, 2001 WL 617187 at *1 (Tex. App.–Austin June 7, 2001) (unpublished). This conclusion is difficult to square with *Lehmann*'s rejection of the use of Mother Hubbard language to establish summary judgment finality and its requirement of an express determination of all claims or "unmistakably" clear language. The court nonetheless cites *Lehmann* and states, "A review of the district-court record reveals that the parties and the court intended the four judgments to constitute a final, appealable judgment, and no party has questioned either the finality of the district court's action or this Court's jurisdiction." *Id.* at n.7. *See also Hope's Financial Management v. Chase Mortgage Service, Inc.*, 2002 WL 1895268 n.2 (Tex. App.–Dallas August 19, 2002) (unpublished) ("take nothing" language was one indicator of finality); *Aguilar v. LVDVD, L.C.*, 2002 WL 1732520 (Tex. App.–El Paso July 25, 2002) (unpublished) (same).

Given the appellate court's independent obligation to examine its own jurisdiction, asking whether the parties have questioned the existence of appellate jurisdiction misses the point.

Another case points to the use of Mother Hubbard language in a summary judgment order as one of the circumstances that leave the Court "satisfied that the county court at law intended that the judgment be final as to all claims and all parties." *Brister v. Bank of America, N.A.*, 2001 WL 893456 at n.4 (Tex. App.–Austin Aug. 9, 2001) (unpublished).

3. Do What I Mean, Not What I Say

Confusion also has arisen in the context of summary judgment orders that grant more relief than the summary judgment movants requested.

Several decisions have found summary judgment orders to be interlocutory because they purported to grant relief on claims the movants did not include in their motions for summary judgment. *Liu v. Yang*, 69 S.W.3d 225 (Tex. App.–Corpus Christi 2001, no pet.); *Ortega v. City Nat'l Bank*, 2001 WL 1002161 (Tex. App.–Corpus Christi Aug. 31, 2001) (unpublished); *Scottsdale Ins. Co. v. Tipton*, 2001 WL 1136012 (Tex. App.–Corpus Christi March 15, 2001) (unpublished); *Espeche v. Ritzell*, 65 S.W.3d 226 (Tex. App.–Houston [14th Dist.] 2001), *rev'd*, ___ S.W.3d ___, 2002 WL 1338108 (Tex. June 20, 2002) (per curiam). The decision in *Scottsdale* prompted a published dissent from denial of a motion for rehearing en banc by Justice Dorsey. *Scottsdale Ins. Co. v. Tipton*, 55 S.W.3d 662 (Tex. App.–Corpus Christi 2001).

Other decisions hold that a summary judgment order granting more relief than the movant requested is erroneous and subject to reversal and remand, but it is not for that reason alone interlocutory and subject to dismissal. *Huang v. Board of Regents*, 2002 WL 534424 (Tex. App.–Austin April 11, 2002) (unpublished); *Schaefer v. American Mfrs. Mut. Ins. Co.*, 65 S.W.3d 806 (Tex. App.–Beaumont 2002, no pet. hist.); *Williams v. Denault*, 2001 WL 1249311 (Tex. App.–Houston [14th Dist.] October 18, 2001) (unpublished); *Reagan v. Marathon Oil Co.*, 50 S.W.3d 70, 75 n.4 (Tex. App.–Waco 2001, no pet.); *Swinehart v. Stubbeman, McRae, Sealy, Laughlin & Browder, Inc.*, 48 S.W.3d 865, 885-86 (Tex. App.–Houston [14th Dist.] 2001, pet. denied).

Justice Dorsey's dissenting opinion and the cases holding that finality exists reach the correct conclusion.

The logic behind cases holding that the summary judgment is interlocutory in these circumstances goes like this. (1) A trial court cannot grant summary judgment on grounds that are not addressed in the motion. (2) Therefore, the trial court did not grant summary judgment on grounds not addressed in the

motion regardless of what the order says. (3) Because the trial court did not grant summary judgment on all claims, the summary judgment is interlocutory.

This reasoning confuses error with finality. Courts sometimes do things they "cannot" or "should not" do, which then become the error complained of on appeal. If the error is significant, it is reversible error.

An error in granting relief on claims that were not included in the summary judgment motion does not make a summary judgment any less final; it makes the final summary judgment erroneous and subject to reversal. *See Espeche*, ___ S.W.3d ___, 2002 WL 1338108 at *2.

4. Got Intent?

In *Lehmann* the supreme court invited litigants to scour the appellate record in search of clues to the trial court's true intent in signing a disputed order. The invitation has been accepted. *Nabelek v. Bradford*, ___ S.W.3d ___, 2002 WL 1955833 (Tex. App.–Houston [14th Dist.] August 22, 2002 no pet. hist.) (looking at nature if allegations to conclude that arguments in city's motion for summary judgment also applied to claims asserted against police chief individually); *Walker v. City of Georgetown*, ___ S.W.3d ___, 2002 WL 1726912 (Tex. App.–Austin July 26, 2002 pet. filed) (looking at judicial admissions in answer as part of determining that summary judgment order was final); *Hodges v. Canyon Creek Ridge No. 1 Homeowners Ass'n, Inc.*, 2002 WL 418201 (Tex. App.–Dallas March 19, 2002) (unpublished) (summary judgment was final despite movant's failure to address newly added claim against another defendant because other defendant had not been served and had not filed an answer); *Smith v. Bristol Myers Squibb Co.*, 2002 WL 216118 (Tex. App.–Dallas Feb. 13, 2002) (unpublished) (language in order purporting to close case solely for administrative purposes indicated order was interlocutory); *Kintz v. Riley*, 2001 WL 1474868 (Tex. App.–Houston [1st Dist.] Nov. 21, 2001) (unpublished) (looking to court's and counsel's comments during hearing to discern intent that order was interlocutory); *In the Marriage of Norman James Riedmueller*, 2001 WL 1011661 (Tex. App.–Amarillo Sept. 5, 2001) (unpublished) (looking to docket entry for indication of trial court's intent in signing order); *Menefee v. McCaw Cellular Communications of Texas, Inc.*, 2001 WL 755636 (Tex. App.–Dallas July 6, 2001) (unpublished) (order was void, and therefore interlocutory, because it was signed by an objected-to visiting judge); *First Nat'l Bank,* 54 S.W.3d at 348 (trial court's subsequent grant of a new trial long after time for plenary power would have expired indicated intent that prior order was interlocutory).

5. Please Sign Here

One enterprising litigant obtained an affidavit from the trial judge stating that he intended only to sign a partial summary judgment. *Villareal v. Zukowsky*, 54 S.W.3d 926, 929 (Tex. App.–Corpus Christi 2001, no pet.). The appellate opinion does not state whether this affidavit was made a part of the trial court record, or instead was proffered to the court of appeals in the first instance after the appeal had been perfected. The court of appeals relied in part upon this affidavit in concluding that the summary judgment was interlocutory. *Compare* Tex. R. Evid. 605 ("The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point").

J. Two Handy Soundbites

Lehmann provides two citations that may have broader application beyond technical finality fights.

The first is this: "[W]e do not write rules by opinion." 39 S.W.3d at 205 (citing *State Dept. of Highways & Pub. Transp. v. Payne*, 838 S.W.2d 235, 241 (Tex. 1992), and *Alvarado v. Farah Mfg. Co.*, 830 S.W.2d 911, 915 (Tex. 1992)). This may come in handy if you are contending that a holding or argument stretches the plain terms of the rule that is being applied, or introduces new requirements that are not contained in the rule itself.

The second is the citation of unpublished opinions in Part I of the concurring opinion. 39 S.W.3d at 210 n. 2. The concurring opinion states that these unpublished decisions are cited "only as examples, not as precedent." *Id.*

Regardless of the outcome of the debate over unpublished opinions, this endorsement of citing unpublished opinions "as examples" should provide some comfort and cover for practitioners who feel compelled to bring an unpublished opinion to a court's attention.

K. The Yogi Berra Award for Precision in Legal Drafting

This year's prize goes to the scribe who bestowed upon us something called a "reverse Mother Hubbard clause." *See Brunson v. Woolsey*, 63 S.W.3d 583 (Tex. App.–Fort Worth 2001, no pet.).

The reverse Mother Hubbard clause states as follows: "***All relief requested and expressly granted is denied.***"

Any questions?