

TEXAS SUPREME COURT UPDATE AND TRENDS

Presented By:

JAMES A. BAKER
Hughes & Luce, LLP
1717 Main Street, Suite 2800
Dallas, Texas 75201

State Bar of Texas
**17TH ANNUAL ADVANCED CIVIL APPELLATE
PRACTICE COURSE**
September 11-12, 2003
Austin, Texas

CHAPTER 11

Justice James A. Baker
Hughes & Luce, L.L.P.
1717 Main Street, Suite 2800
Dallas, TX 75201

214.939.5403 – TELEPHONE

bakerj@hughesluce.com – E-mail

214.939.6100 - FAX

Date and place of birth: March 30, 1931, Evansville, Indiana

Admitted to: Texas Bar - April 24, 1958

Federal Court, Northern District of Texas - August 4, 1958

5th Circuit Court of Appeals - November 24, 1961

11th Circuit Court of Appeals - October 1, 1981

United States Supreme Court - November 17, 1980

Judicial Service: Fifth District Court of Appeals, Dallas, TX. December 19, 1986 to October 3, 1995; Supreme Court of Texas, Austin, Texas. October 3, 1995 to August 31, 2002

Undergraduate education: Southern Methodist University (BBA 1953)

Law school and graduate education: Southern Methodist University School of Law (LLB 1958)

Employment history: Goldberg, Alexander and Baker (1958-1972)

Weber, Baker and Allums (1972-1979)

Law office of James A. Baker (1979-1986)

Professional activities: Member, State Bar of Texas; Member, Dallas Bar Association; Member, Travis County Bar Association; Member, American Bar Association; Fellow, Texas Bar Foundation; Fellow Dallas Bar Foundation; Member, College of the State Bar of Texas; Former Chair, Bankruptcy & Commercial Law Section, Dallas Bar Association (1974); Member, Texas Real Estate Broker/Lawyer Committee (1974-1995); Member, ABA Task Force on Appellate Delay Reduction (1991-92); Member, William Mac Taylor, Jr. Inn of Court (1993 -1995); Board of Directors, Dallas Bar Association (1995); Robert W. Calvert American Inn of Court (1998-); President, Robert W. Calvert American Inn of Court (2000-2001); American Law Institute (1998-); Supreme Court Liaison to Home Equity Loan Foreclosure Rules Task Force (1997); Supreme Court Liaison to Reverse Mortgage Loan Foreclosure Rules Task Force (1999); Supreme Court Liaison to Chapter 33-Parental Notification Rules Task Force (1999); Supreme Court Liaison to Texas Association for Court Administration (1996-2002); Adjunct Professor, University of Texas School of Law (1999-2002); Member, Supreme Court Gender Bias Reform Implementation Committee(2002-)

Publications : Contributing author, Texas Collection Manual; State Bar of Texas Pub., (1980)

Presentations : Lecturer, State Bar of Texas Professional Development Program; Guest Lecturer, SMU School of Law; Guest Lecturer, Dallas Bar Association; Presenter, University of Texas Law School, State and Federal Appeals Course.

Honors : American Board of Trial Advocates, Dallas Chapter - Outstanding Civil Jurist (1993); Board of Advocates, SMU School of Law - Award of Honorary Membership (1994). Highland Park High School, Distinguished Alumni Award (1998); S.M.U. Dedman School of Law, Distinguished Alumni Award for Judicial Service, 2000-2001; American Board of Trial Advocates, Texas Chapter - Judge of the Year (2001).

TABLE OF CONTENTS

I. SCOPE OF THE ARTICLE 1

II. INTRODUCTION..... 1

 A. Changes in Texas Law..... 1

 B. A Texas Supreme Court Trend. 1

III. THE RECENT CASES..... 1

 A. Texas’ Ripeness Doctrine..... 1

 B. Mandamus – State Boards and Commissions. 2

 C. Creative Statutory Interpretation. 2

 D. Peripatetic Sovereign Immunity. 2

 E. Mental Anguish Damages – Appellate Review..... 3

 F. Paying a Judgment Does Not Moot the Appeal. 3

 G. Juvenile Cases – Motion to Suppress – Standard of Review..... 4

 H. The TEXAS FAMILY CODE is “Federal Common Law”..... 4

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Buckley v. Valeo</i> , 424 U.S.1 (1976)	1
<i>Dakota County v. Glidden</i> , 113 U.S. 222 (1885)	3
<i>Egelhoff v. Egelhoff</i> , 532 U.S. 141 (2001)	4
<i>Ferrell v. Trailmobile, Inc.</i> , 223 F. 2d 697, 689 (5th Cir. 1955)	3
<i>Hunt v. Washington State Apple Advertising Comm'n</i> , 432 U.S. 333 (1977)	1
<i>Manning v. Hayes</i> , 212 F. 3d 866, (5th Cir. 2000)	5
<i>Miller v. Fenton</i> , 474 U.S. 104 (1985)	4

STATE CASES

<i>Akin v. Dahl</i> , 661 S.W.2d 917 (Tex. 1983)	3
<i>Barnett v. Barnett</i> , 67 S.W.3d 107 (Tex. 2001)	5
<i>Bentley v. Bunton</i> , 94 S.W.3d 561 (Tex. 2002)	3
<i>Betts v. Johnson</i> , 96 Tex. 360, 73 S.W. 4 (Tex. 1903)	2
<i>Dubai Petroleum Co. v. Kazi</i> , 12 S.W.3d 71 (Tex. 2002)	1
<i>Highland Church of Christ v. Powell</i> , 640 S.W.2d 235 (Tex. 1982)	3
<i>Keen v. Weaver</i> , 46 Tex. Sup. Ct. J. 804, 2003 LEXIS 82 (Tex. 2003)	4
<i>Mantas v. Fifth Court of Appeals</i> , 925 S.W.2d 656 (Tex. 1996)	2
<i>Maritime Overseas Corp. v. Ellis</i> , 971 S.W.2d 402 (Tex. 1998)	3
<i>Miga v. Jensen</i> , 96 S.W.3d 207 (Tex. 2002)	3
<i>Oles v. State</i> , 993 S.W.2d 103 (Tex. Crim. App. 1999)	4

Patterson v. Planned Parenthood,
971 S.W.2d 439 (Tex. 1998) 1

Perry v. Del Rio ,
66 S.W.3d 239 (Tex. 2001) 1

Pope v. Moore,
711 S.W.2d 622 (Tex. 1986) 3

In re R.J.H.,
79 S.W.3d 1 (Tex. 2002) 4

Riner v. Briargrove Park Prop. Owners, Inc.,
858 S.W.2d 370 (Tex. 1993) 3

Rocor Int'l Ins. Co. v. National Union Fire Ins. Co.,
77 S.W.3d 253 (Tex. 2002) 2

Rose v. Doctor's Hosp.,
801 S.W.2d 841 (Tex. 1990) 3

Texas A & M Univ. - Kingsville v. Lawson,
87 S.W.3d 518 (Tex. 2002) 2

Texas Ass'n of Business v. Texas Air Quality Control Board,
852 S.W.2d 440 (Tex. 1993) 1

Texas Indus.Traffic League v. Railroad Comm'n of Tex.,
633 S.W.2d 821 (Tex. 1983) 1

Texas Nat. Res. Conservation Comm'n v. IT-Davy,
74 S.W.3d 849 (Tex. 2002) 2

In re TXU Electric Co.,
67 S.W.3d 130 (Tex. 2001) 2

Waco Indep. Sch. Dist. v. Gibson,
22 S.W.3d 849 (Tex. 2000) 1

FEDERAL STATUTES

29 U.S.C. § 1144(a)..... 4

STATE STATUTES

TEX. CONST., art. V, § VI..... 3

TEXAS GOV'T. CODE § 22.225(a) 3

TEX. R. APP. P. 46 3

TEX. CIV. PRAC. & REM. CODE § 154.071(a)..... 2

TEXAS FAMILY CODE § 9.302(a)..... 4

MISCELLANEOUS

Theresa Gegen, note: Standing on Constitutional Grounds In Court: Affect of Texas Association of Business v. Texas Air Control Board,
47 Baylor L. Rev. 201, 221 (1995) 1

TEXAS SUPREME COURT UPDATE AND TRENDS

I. SCOPE OF THE ARTICLE

This article surveys cases that the Supreme Court of Texas decided from September 1, 2001 through July 3, 2003. The article also discusses cases that show the trend of the Texas Supreme Court to interpret Texas law in line with Federal law.

II. INTRODUCTION

A. Changes in Texas Law.

Between September 1, 2001 and July 3, 2003, the Supreme Court of Texas decided a number of cases which the Court made substantive changes in Texas law. These cases cut across a broad spectrum of practice areas. Both trial and appellate practitioners should be aware of these changes as they affect both the trial and appeal of lawsuits.

B. A Texas Supreme Court Trend.

In 2002, Professor L. Wayne Scott of the St. Mary's University School of Law in San Antonio, Texas, presented a paper entitled, "Trends In The Texas Supreme Court". Professor Scott, posited that whenever possible, the Court will interpret Texas procedure and jurisdictional concepts in line with Federal law. He states that in this area, the Court has attempted to bring the State Court and procedural system in line with the federal rules and court system. The problem with this attempt is that the federal system is a dependant court system and the State's system is independent. Federal Courts accept only those cases that come from the limited grant of powers Congress has given those courts. Texas courts must accept all cases their citizens bring, as well as those non-citizens who also seek entry to the Texas court system.

Professor Scott cites *Texas Ass'n of Business v. Texas Air Quality Control Board*, 852 S.W.2d 440 (Tex. 1993) as an example of this attempt. This case involves a Standing issue. Standing is a matter of subject matter jurisdiction, and as such, lack of standing (lack of subject matter jurisdiction) is a matter of fundamental error, and can be raised on appeal for the first time. *Texas Ass'n of Business* rejected prior state precedent that treated standing as a prudential and not a jurisdictional issue. See *Texas Indus. Traffic League v. Railroad Comm'n of Tex.*, 633 S.W.2d 821 (Tex. 1983). The *Texas Ass'n of Business* Court adopted the standard test announced in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977). The Texas Supreme Court did so without explaining how it affected the established and contradictory view of standing generally recognized in Texas. See Theresa Gegen, NOTE: *Standing on*

Constitutional Grounds In Court: Affect of Texas Association of Business v. Texas Air Control Board, 47 Baylor L. Rev. 201, 221 (1995). For an exception to this trend, see *Dubai Petroleum Co., v. Kazi*, 12 S.W.3d 71 (Tex. 2002).

The Court has continued on this path. There are several recent cases the court decided that apply federal law.

III. THE RECENT CASES

A. Texas' Ripeness Doctrine.

Perry v. DelRio, 66 S.W. 3d 239 (Tex. 2001).

This case involves three consolidated cases. The central issue, in two interlocutory appeals and one mandamus, is which district court, Harris County or Travis County, has dominant jurisdiction over four congressional re-districting cases filed in those counties. All four cases involved essentially the same issues, parties, lawyers, and witnesses.

Ripeness is a threshold issue that implicates subject matter jurisdiction. *Patterson v. Planned Parenthood*, 971 S.W.2d 439, 443 (Tex. 1998). The Ripeness Doctrine examines when claims may be brought. The Doctrine inquires: "whether, at the time a lawsuit is filed, the facts are sufficiently developed so that an injury has occurred or is likely to occur, rather than being contingent or remote." *Waco Indep. Sch. Dist. v. Gibson*, 22 S.W.3d 849, 851-52 (Tex. 2000); *Patterson*, 971 S.W.2d at 442.

In theory, the Court framed the Ripeness issue as whether a Court can have subject matter jurisdiction of a claim that was not ripe when the case was filed, but became ripe when the case was pending. After reviewing federal law, the Court concluded that the principles of federal law were consistent with Texas' Ripeness jurisdiction. The Court concluded that a trial court had subject matter jurisdiction of a claim that was not ripe when the case was filed but becomes ripe when the case is pending. The Court held that claim's lack of ripeness when filed is not a jurisdictional infirmity requiring dismissal if the case has matured. Despite its conclusion that federal law ripeness principles were consistent with Texas' Ripeness jurisdiction, federal law holds that Ripeness should be determined at the time the case is adjudicated. See *Buckley v. Valeo*, 424 U.S.1, 113-114 (1976).

In this case the Court observed that the threshold question was whether federal or state law determines the ripeness of federal constitutional claims made in these consolidated redistricting cases. The Court observed it was inclined to think that Ripeness, like Standing and other justiciability issues, should be determined by State law, but as the Ripeness Doctrine applies in these cases, the Court saw no difference between Texas and federal law.

As previously noted, Texas law held that Ripeness was determined at the time the lawsuit was filed.

Federal law is to the contrary, holding that Ripeness should be determined when the case is adjudicated. Despite this difference, the Court could not see it. Thus, the Court applied federal law and changed the Ripeness Doctrine in Texas.

B. Mandamus – State Boards and Commissions.

In re TXU Electric Co., 67 S.W.3d 130(Tex. 2001).

The Public Utility Commission entered an order requiring TXU to reverse its efforts to mitigate its estimated stranded costs as part of the transition to a deregulated competitive market for electricity sales in Texas. TXU sought Mandamus relief against the PUC from this order. TXU also joined each of the three commissioners individually. Six members of the Court voted to deny Mandamus relief, but for different reasons.

In 1903, the Texas Supreme Court held that it did not have jurisdiction against a Board of State officers, such as the Public Utility Commission. *See Betts v. Johnson*, 96 Tex. 360, 73 S.W.4, 5 (1903). But in TXU, 7 Judges agreed that the Court had jurisdiction, but only 1 Judge wrote on the jurisdiction issue. This Judge concluded that, although the Court had previously held Boards or Commissions were not subject to the Supreme Court's mandamus jurisdiction because TXU had joined the three individuals comprising the Commission, this was enough to allow mandamus to issue against the PUC.

Chief Justice Phillips concurred but voted not to grant mandamus because TXU did not establish that no adequate remedy was available. Justice Baker also concurred, stating he would deny relief because TXU sought relief only against the PUC as an agency, and the Court did not have original mandamus jurisdiction over the PUC under the *Betts* case.

C. Creative Statutory Interpretation.

Rocor Int'l Ins. Co. v. National Union Fire Ins. Co., 77 S.W.3d 253 (Tex. 2002).

Article 21.21, Section 4(10)(a)(ii) of the Insurance Code creates a cause of action for any person who has sustained actual damages if an insurer fails to attempt in good faith to effectuate a prompt, fair and equitable settlement of a claim with respect to which the insurer's liability has become reasonably clear. The Texas Supreme Court interpreted this statutory cause of action in *Rocor*. The Court asserted that it was necessary to define a statutory liability standard to the phrase "liability becomes reasonably clear". The Court noted it was necessary to interpret this phrase to determine when an insurer may be held liable for failing to reasonably and properly settle a third-party's claim against the insured.

The Court interpreted the phrase "when liability becomes reasonably clear" to mean: that an insurer's liability is not reasonably clear, and liability may not

be imposed under Article 21.21, Section 4(10)(a)(ii) unless the insured shows that: (1) the policy covers the claim; (2) the insured's liability is reasonably clear; (3) the claimant has made a proper settlement demand within policy limits; and (4) the demand's terms are such that an ordinarily prudent insurer did except it.

The Statute's plain language limits the statutory liability standard to the elements contained in the Statute. In contrast, the common law requires insurers to accept reasonable settlement demands within policy limits that an ordinarily prudent insurer would accept, considering the insurer's potential exposure to a judgment exceeding the policy limits. Here, the Court combined two distinct duties for insurers – one from the common law and the other from the Statute, to create a cause of action that exists neither in the common law nor in the Statute. The Court ignored the Statute's plain reading and grafted language into the Statute that does not exist and fails to give effect to the Legislature's intent.

D. Peripatetic Sovereign Immunity.

Texas A & M Univ. – Kingsville v. Lawson, 87 S.W.3d 518 (Tex. 2002).

In the initial litigation, Lawson sued the University for wrongful termination and included a claim under the Texas Whistleblower Act. Lawson and the University settled that suit. The University paid Lawson \$62,000 and further agreed that the University would respond to reference checks about Lawson to state only his salary and that he had been an assistant professor (instead of instructor, his rank when he was terminated). Lawson dismissed the suit, but later sued the University for breaching the settlement agreement. He claimed that the University told other schools that he was only an instructor at the University. In Lawson's second suit to enforce the settlement agreement, the trial court overruled the University's sovereign immunity claim and the Court of Appeals affirmed this order.

The principle issue in the Supreme Court was whether the University waived its Sovereign Immunity by its conduct when it accepted benefits under the Settlement Agreement.

Under both the Legislature's Mandate and this Court's holdings, a Settlement Agreement to resolve a dispute pending in court is a contract and is treated the same as any other written contract. *See TEX. CIV. PRAC. & REM. CODE § 154.071(a); Mantas v. Fifth Court of Appeals*, 925 S.W.2d 656, 658-59 (Tex. 1996) (a suit to enforce a Settlement Agreement is a separate breach-of-contract action). Additionally, the Court has repeatedly held that the State does not waive its immunity from suit simply by entering into a contract. *See Texas Nat. Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849 (Tex. 2002).

However, a plurality of the Court held that when a governmental entity is exposed to suit because immunity is waived, it cannot nullify that waiver by settling the claim with an agreement on which it cannot be sued. The Court recognized the University's argument that a suit for breach of a Settlement Agreement is separate and apart from the suit on the settled claim, enforcing a settlement of a liability, for which immunity is waived, but still held that the suit should not be barred by immunity.

E. Mental Anguish Damages – Appellate Review.

Bentley v. Bunton, 94 S.W.3d, 561 (Tex. 2002).

This is a libel case by a Texas District Judge in East Texas against two individuals who libeled the judge during local cable TV talk shows. The jury found that the two acted with actual malice and that they conspired to defame Judge Bentley. One of the several issues was whether the jury's \$7,000,000 award for mental anguish and \$150,000 award for damages to the Judge's reputation met legal standards.

In Texas, the standard for reviewing an excessive damages complaint is factual sufficiency of the evidence. See *Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 406 (Tex. 1998); *Rose v. Doctor's Hosp.*, 801 S.W.2d 841, 847-48 (Tex. 1990); *Pope v. Moore*, 711 S.W.2d 622, 624 (Tex. 1986). Additionally, the standard for reviewing whether a Trial Court should have ordered a remittitur is factual sufficiency. *Rose*, 801 S.W.2d at 847-48; *Larsen v. Cactus Util. Co.*, 730 S.W.2d 640, 641 (Tex. 1987). Because both the factual sufficiency standards are final in the Court of Appeals, the Texas Supreme Court lacks jurisdiction to review such findings, consider excessive damage complaints, and suggest remittiturs. See TEX. CONST., art. V, §. VI; TEXAS GOV'T. CODE §. 22.225(a); TEX. R. APP. P. 46; *Akin v. Dahl*, 661 S.W.2d 917, 921 (Tex. 1983).

A plurality of the Court held otherwise. Under the guise that federal constitutional law in defamation cases required such a review, the Court reviewed the factual sufficiency of the evidence to support Judge Bentley's mental anguish damages. After detailing all the evidence in the record that reflected the mental anguish the judge suffered, the plurality concluded that the evidence was *no evidence* that the plaintiff suffered mental anguish damages of \$7,000,000. The Court asserted "the amount is not merely excessive and unreasonable; it is far beyond any figure the amount can support." The plurality remanded the case to the Court of Appeals to consider the excessiveness of the mental anguish award in view of the plurality opinion. The plurality also concluded that the court of appeals was free to suggest a remittiture.

The plurality glossed over the fact that the court of appeals had already considered the defendant's excessive damage complaints. In fact, the court of

appeals concluded that there was nothing in the record to suggest that the jury was guided by anything other than a conscientious consideration of the evidence and the instructions of the trial court. Consequently, the court of appeals had concluded that the evidence was legally and factually sufficient to support the jury's total award of \$7,150,000.

F. Paying a Judgment Does Not Moot the Appeal.

Miga v. Jensen, 96 S.W.3d 207 (Tex. 2002).

There are two issues in this case: (1) whether Jensen lost his right to appeal by paying the judgment ostensibly to avoid interest charges; and (2) the measure of damages for a stock option – contract breach. Miga claimed Jensen refused to tender stock options Jensen promised Miga when Miga helped develop Jensen's long-distance telephone enterprises. The jury determined Jensen breached the stock option agreement and awarded Miga slightly more than 1 million dollars in contract damages and 17.7 million dollars in lost profits on stock options, apparently based on the stock price when the trial occurred. The jury also awarded Miga 17.7 million dollars on his fraud claim and 43 million dollars in punitive damages. The trial court refused to award Miga's fraud and punitive damages and entered judgment for the contract breach and lost profits. The court of appeals affirmed.

In Texas, if a judgment-debtor voluntarily paid and satisfied a judgment rendered against him, the cause becomes moot, as does an appeal. *Highland Church of Christ v. Powell*, 640 S.W.2d 235, 237 (Tex. 1982); See also *Riner v. Briargrove Park Prop. Owners, Inc.*, 858 S.W.2d 370, 371 (Tex. 1993). To demonstrate that a party involuntarily paid a judgment, so that the payment does not render the appeal moot, the record must show that the party paid the judgment under duress or to preclude execution. *Riner*, 858 S.W. 2d at 370-71; *Highland Church*, 640 S.W. 2d at 337.

On the other hand, federal courts hold that paying the judgment, of itself, does not cut off the payor's right of appeal. *Ferrell v. Trailmobile, Inc.*, 223 F. 2d 697, 689 (5th Cir. 1995)(citing *Dakota County v. Glidden*, 113 U.S. 222, 224-25 (1885)). The presumption that payment does not cut off the judgment-debtor's right of appeal does not apply when the payment is by way of compromise or shows an intention to abide by the judgment, when the payment is coupled with accepting of benefits under the judgment, or when compliance with the judgment renders appellate relief futile. See *Ferrell*, 223 Fed. 2d at 698.

Plus, under Texas law, the preliminary presumption is that payment of the judgment moots the appeal unless the record shows that the party paid the judgment under duress or to preclude execution. On the other hand, under federal law, the presumption is

that payment does not cut off the debtor's right of appeal except when the payment is by compromise, or shows an intent to abide by the judgment and the payment is coupled with accepting benefits under the judgment or appellate relief is futile.

In *Miga* however, the court held that the Texas Rule is not and never has been that any payment toward satisfying the judgment, including a voluntary one, moots the controversy. The court held that whenever a party wishes to avoid accruing post-judgment interest, particularly on a multi-million dollar judgment, is a question the parties should be able to decide without fear of the Hobson's choice – that is, that the party might presumptively waive its appellate prospects. The Court held that payment on a judgment will not moot an appeal of that judgment if the judgment-debtor clearly expresses an intent to exercise his right of appeal, and appellate relief is not futile.

Accordingly, the Court relied on federal law to change the Texas long-standing rule on payment and appeal. The Court's new rule does not require the record to show that the judgment-debtor paid the judgment under duress or to preclude execution; all that the court now requires is a clear expression of intent to appeal and that appellate relief is not futile.

This case is also important because the court changed the measure of damages that had previously applied the stock option breach of contract cases. Heretofore, the measure of damages had been the lost profits measured as of the option's highest market value between the date of the contract breach and the trial. Here in *Miga*, the Court held the proper measure of damages in such a cause of action is the "traditional one" that is, the difference between the price contracted to be paid [for the option] and the value of the option when it should [have been] delivered.

G. Juvenile Cases – Motion to Suppress – Standard of Review.

In re R.J.H., 79 S.W.3d 1 (Tex. 2002).

This case involved a juvenile and one of the issues raised was the standard of appellate review of a trial court's ruling on a Motion to Suppress. The Court observed that the Texas Court of Criminal Appeals, in an adult criminal case, has held that the standard of review of a trial court's ruling on a motion to suppress is abuse of discretion. *See Oles v. State*, 993 S.W.2d 103, 106 (Tex. Crim. App. 1999) The court also observed that the Court of Criminal Appeals has not said whether that standard of review is different from the federal law standard.

The court then discussed federal law. Under federal law, whether a confession is voluntary is a mixed question of fact and law. *See Miller v. Fenton*, 474 U.S. 104 (1985). The Court discussed in the *Miller* cases "definition of the standard of review to apply in the trial court's ruling in the federal system on

a Motion to Suppress. The Court then stated it was adopting a "abuse of discretion standard" but chose the language the U.S. Supreme Court used in *Miller*, rather than the traditional Texas language defining abuse of discretion.

H. The TEXAS FAMILY CODE is "Federal Common Law".

Keen v. Weaver, 46 Tex. Sup. Ct. J. 804, 2003 LEXIS 82 (Tex. 2003).

In this case, an ERISA pension plan participant designated his wife as the plan's primary beneficiary. The couple later divorced and, in an agreement incorporated in the decree, the former wife waived any interest in the plan, and agreed it would be her former husband's sole property. The ex-husband died 13 years later without changing his beneficiary designation. The former wife and the ex-husband alternate beneficiary lodged competing claims to the plan proceeds. The issue was whether ERISA precludes a pension plan beneficiary from waiving an interest in the plan.

After a bench trial, the trial court held that the ex-wife was entitled to the plan proceeds to the exclusion of the alternative beneficiary. The Court of Appeals reversed the trial court and held that the Texas "redesignation statute," [TEXAS FAMILY CODE § 9.302(a)] although preempted by ERISA, applied as federal common law to revoke the ex-wife's beneficiary designation after divorce and to re-designate the alternative beneficiary as the plan's beneficiary. The Tenth Court of Appeals holding agrees with the First Court of Appeals but conflicts with the Fourteenth District Court of Appeals. All the Courts of Appeal agreed that ERISA preempts the Texas re-designation statute, but all three disagreed on what happens given ERISA preemption. The Texas Supreme Court granted the petition for review to resolve the conflict.

The Court agreed with all the Courts of Appeals; that is, that ERISA preempts TEXAS FAMILY CODE § 9.302(a). The Court acknowledged that the ERISA's preemption section states that it shall supercede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan. 29 U.S.C. §1144(a). As recently as 2001, the U.S. Supreme Court held that ERISA expressly preempted a Washington State statute similar to the Texas redesignation statute. *See Egelhoff v. Egelhoff*, 532 U.S. 141, 143 (2001).

The majority then noted that despite the fact that ERISA preempts the Texas redesignation statute, there was still a harder question to answer. The Court then discussed the cases that have developed in the 5th, 7th, and 8th Circuit Courts of Appeals in the federal system. That is, whether Courts must resolve this type of issue from the text of the ERISA legislation itself, or

can the courts develop these issues as a matter of federal common law. *See Manning v. Hayes*, 212 F.3d 866, 870 (5th Cir. 2000, cert. denied). The 5th Circuit, along with the 7th and 8th Circuits have held that federal common law governs disputes between the designated former spouse beneficiary and the other claimants to ERISA plan proceeds. Only the 6th Circuit has taken a different view and has held that ERISA's express provisions preclude applying federal common law.

The Court then stated it did not believe that *Egelhoff* precluded applying federal common law to this dispute. The Court then applied the 5th, 7th and 8th Circuits' Rule and held that TEXAS FAMILY CODE § 9.302(a) was part of the "federal common law" and thus such federal common law recognizes a former spouse's waiver of ERISA plan benefits in a divorce decree dividing new marital estates as long as the waiver is specific, knowing and voluntary.

A strong dissent disagreed with the majority's rationale. The dissent agreed with the initial premise of the majority that ERISA preempts the re-designation statute, as recently held by the Supreme Court in *Engelhoff* and that this Court recognized in *Barnett v. Barnett*, 67 S.W.3d 107 (Tex. 2001). However, the dissent takes the majority to task for failing to apply the plain language construction of ERISA which the Court admitted is "simple and easy to apply" but went on to apply a construction that cannot be squared with ERISA's text or with *Engelhoff*. As the dissent states "this Court simply circumvents preemption by allowing State law to be reincarnated as federal common law.